

## SUBTRACTION BY ADDITION?: THE THIRTEENTH AND FOURTEENTH AMENDMENTS

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*The celebration of the Thirteenth Amendment in many Essays prepared for this Symposium may be premature. That the Thirteenth Amendment arguably protects a different and, perhaps, wider array of rights than the Fourteenth Amendment may be less important than the less controversial claim that the Fourteenth Amendment was ratified after the Thirteenth Amendment. If the Fourteenth Amendment covers similar ground as the Thirteenth Amendment, but protects a narrower set of rights than the Thirteenth Amendment, then the proper inference may be that the Fourteenth Amendment repealed or modified crucial rights originally protected by the Thirteenth Amendment. The broad interpretation of the Thirteenth Amendment, which is increasingly in vogue in certain progressive circles, may have been good constitutional law only between 1865 and 1868. For purposes of argument, this Essay assumes that the participants in this Symposium correctly interpret the original Thirteenth Amendment when they construe the constitutional ban on slavery broadly in order to protect a wide variety of fundamental rights. Rather than interpret the Fourteenth Amendment as adding to the Thirteenth, however, this Essay explores the textual and political evidence supporting claims that the Fourteenth Amendment diminished the rights protected by the Thirteenth Amendment or, more accurately, diminished the likelihood that any of the post-Civil War Amendments would be interpreted as protecting rights that might have been protected by a freestanding Thirteenth Amendment. Thirteen plus one, in this case, may be less than thirteen.*

### INTRODUCTION

Thaddeus Stevens complained bitterly about the final wording of the Fourteenth Amendment. He informed the House of Representatives that his vote to send the revised text to the states for ratification was reluctant. Stevens said,

In my youth, in my manhood, in my old age, I had fondly dreamed that . . . no distinction would be tolerated in this purified Republic but what arose from merit and conduct. This bright dream has vanished “like the baseless fabric of a vision.” I find that we shall be obliged to be content with patching up the worst portions of the ancient edifice, and leaving it, in many of

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its parts, to be swept through by the tempests, the frosts, and the storms of despotism.

Do you inquire why, holding these views and possessing some will of my own, I accept so imperfect a proposition? I answer, because I live among men and not among angels; among men as intelligent, as determined, and as independent as myself, who, not agreeing with me, do not choose to yield their opinions to mine. Mutual concession, therefore, is our only resort, or mutual hostilities.<sup>1</sup>

Many Radical Republicans shared Stevens's disappointment. The final text of the Fourteenth Amendment, in their opinion, substantially watered down vital constitutional protections for former slaves and other Americans. Wendell Phillips, a leading abolitionist, declared crucial provisions to be a "fatal and total surrender."<sup>2</sup> Senator James Grimes conceded, "It is not exactly what any of us wanted; but we were each compelled to surrender some of our individual preferences in order to secure anything . . ."<sup>3</sup> Michael Les Benedict captured this understanding when he entitled his seminal study of the politics that took place when the Fourteenth Amendment was drafted, *A Compromise of Principle*.<sup>4</sup>

Important recent works on the Thirteenth Amendment have more uplifting titles. Michael Vorenberg's study is entitled *Final Freedom*.<sup>5</sup> In 2004, Alexander Tsesis penned *The Thirteenth Amendment and American Freedom: A Legal History*.<sup>6</sup> Six years later, Tsesis published *The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment*.<sup>7</sup> Other titles include *Lincoln and Freedom: Slavery, Emancipation, and the Thirteenth Amendment*<sup>8</sup> and *The Quest for Freedom: A Legal History of the Thirteenth Amendment*.<sup>9</sup>

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1. Cong. Globe, 39th Cong., 1st Sess. 3148 (1866) (statement of Rep. Thaddeus Stevens).

2. Eric Foner, *Reconstruction: America's Unfinished Revolution 1863–1877*, at 255 (1988).

3. Letter from James Grimes to Mrs. Grimes (Apr. 30, 1866), in William Salter, *The Life of James W. Grimes: Governor of Iowa, 1854–1858; A Senator of the United States, 1859–1869*, at 292, 292 (1876).

4. Michael Les Benedict, *A Compromise of Principle: Congressional Republicans and Reconstruction 1863–1869*, at 14 (1974) (noting "[R]adical Republicans knew that their conservative allies were not as committed as they to the racially egalitarian principles of the Republican party, and they were continually frustrated in their attempts to win what they conceived to be true security for the Union").

5. Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (2001).

6. Alexander Tsesis, *The Thirteenth Amendment and American Freedom: A Legal History* (2004) [hereinafter Tsesis, *Legal History*].

7. *The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment* (Alexander Tsesis ed., 2010).

8. *Lincoln and Freedom: Slavery, Emancipation, and the Thirteenth Amendment 1, 5* (Harold Holzer & Sara Vaughn Gabbard eds., 2007) (collecting essays to "illuminate the

The celebratory titles of contemporary books on the Thirteenth Amendment match the celebratory rhetoric of antislavery advocates when the Thirteenth Amendment was framed and ratified. No Republican took to the floor to complain bitterly about compromises of principle when the Thirteenth Amendment was approved by the House and Senate. Martin Thayer spoke for his fellow antislavery advocates when he asserted, “We have wiped away the black spot from our bright shield and surely God will bless us for it.”<sup>10</sup> This is not to say that the final text of the Thirteenth Amendment was entirely consistent with Radical Republican preferences. Charles Sumner had previously proposed a constitutional amendment that stated, “Everywhere within the limits of the United States, and of each State or Territory thereof, all persons are equal before the law, so that no person can hold another as a slave.”<sup>11</sup> Still, Republicans in 1865 were far happier with the final text of the Thirteenth Amendment than more radical Republicans in 1868 were with the final text of the Fourteenth Amendment. Consider Vorenberg’s description of the reaction when Congress passed the Thirteenth Amendment on to the states:

For a moment there was only a disbelieving, hollow silence. Then the House exploded in cheers. Members threw their hats to the roof, caught them, and smashed them against their desks. . . . Blacks in the audience were equally moved, not only by the meaning of the event but by the reaction of the whites around them. . . .

For most Republican congressmen, it was the crowning moment of their careers.<sup>12</sup>

William Lloyd Garrison proclaimed that a Constitution he previously regarded as “a covenant with death” had been replaced by “a covenant with life.”<sup>13</sup>

This Symposium vindicates the Republican celebration of the Thirteenth Amendment. Such worthy descendants of Charles Sumner as Jack Balkin, William Carter, Jr., Andrew Koppelman, Sanford Levinson, Darrell Miller, Aviam Soifer, Alexander Tsesis, and Rebecca Zietlow have written exceptional Essays, which employ the Thirteenth Amendment to advance or support numerous progressive causes, from abortion rights to laws protecting employees who object to hate speech in their work-

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manner in which America’s greatest president dealt with the greatest challenge of his—and our nation’s—time”).

9. G. Sidney Buchanan et al., *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 13 *Hous. L. Rev.* 63 (1975).

10. Vorenberg, *supra* note 5, at 208.

11. *Cong. Globe*, 38th Cong., 1st Sess. 521 (1864) (statement of Sen. Charles Sumner).

12. Vorenberg, *supra* note 5, at 207–08.

13. Vorenberg, *supra* note 5, at 208 (quoting *The Liberator*, Feb. 10, 1865, at 2).

place.<sup>14</sup> The participants in a recent symposium at the University of Maryland reached similar conclusions about the potential progressive power of the constitutional ban on slavery.<sup>15</sup> Commentators suggested that the Thirteenth Amendment could be used for such diverse purposes as striking down bans on same-sex marriage and ending oppressive labor practices.<sup>16</sup> This cheering is bipartisan. Conservatives are also finding the Thirteenth Amendment a source of cherished rights.<sup>17</sup> Some maintain

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14. See generally Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 Colum. L. Rev. 1459 (2012) (arguing Amendment can be applied outside of chattel slavery); William M. Carter Jr., *The Thirteenth Amendment and Pro-Equality Speech*, 112 Colum. L. Rev. 1855 (2012) (arguing Amendment empowered Congress to prohibit retaliation against pro-equality speech); Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 Colum. L. Rev. 1917 (2012) (arguing Amendment supports abortion rights); Darrell A.H. Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 Colum. L. Rev. 1811 (2012) (arguing Amendment empowered Congress to identify and prohibit customs related to slavery); Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 Colum. L. Rev. 1607 (2012) (arguing Thirty-Ninth Congress asserted authority to ban voluntary peonage); Alexander Tsesis, *Gender Subordination and the Thirteenth Amendment*, 112 Colum. L. Rev. 1641 (2012) [hereinafter Tsesis, *Gender Subordination*] (arguing Amendment can be used against gender discrimination); Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 Colum. L. Rev. 1697 (2012) (discussing Amendment's potential for securing rights of belonging which encompass race, class, and gender). This is not to demean the other fine papers in this Symposium but merely to highlight those that interpret the Thirteenth Amendment broadly.

15. See, e.g., Linda C. McClain, *Involuntary Servitude, Public Accommodations Laws, and the Legacy of *Heart of Atlanta Motel, Inc. v. United States**, 71 Md. L. Rev. 83, 129 (2011) (arguing Thirteenth Amendment has broad aim of equal civil liberties); James Gray Pope, *What's Different About the Thirteenth Amendment, and Why Does It Matter?*, 71 Md. L. Rev. 189, 189–90 (2011) (discussing four unique features of Thirteenth Amendment that give rise to its broad interpretation); Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 Md. L. Rev. 40, 53–56 (2011) (arguing Thirteenth Amendment was intended by framers to have broad enforcement power). My essay in the Maryland Symposium alluded to the possibility that the Fourteenth Amendment might have narrowed the rights protected by the Thirteenth Amendment, but left that claim entirely undeveloped. See generally Mark A. Graber, *Foreword: Plus or Minus One: The Thirteenth and Fourteenth Amendments*, 71 Md. L. Rev. 12 (2011).

16. See Julie Novkov, *The Thirteenth Amendment and the Meaning of Familial Bonds*, 71 Md. L. Rev. 203, 226 (2011) (arguing “the denial of recognition for the marital and familial relationship is a contemporary badge of servitude or at least of deep inferiority”); Pope, *supra* note 15, at 193 (arguing “the Thirteenth Amendment affirmatively commands both Congress and the courts to ascertain what rights are necessary to ensure . . . the ongoing operation of a free labor system”).

17. See Ken I. Kersch, *Beyond Originalism: Conservative Declarationism and Constitutional Redemption*, 71 Md. L. Rev. 229, 229–30 (2011) (noting that many influential modern conservative theorists “recount the nation’s experience with slavery through . . . ‘Declarationism’ . . . [a] view that the Constitution can only be understood and interpreted in light of the principles enunciated in the opening words of the Declaration of Independence”).

that the individual mandate in the Affordable Health Care Act is analogous to the human bondage Americans outlawed in 1865.<sup>18</sup>

This renewed emphasis on the Thirteenth Amendment is inspired, in part, by a sense that the Fourteenth Amendment may be a weaker reed for protecting fundamental rights. The *Slaughter-House Cases* neutered the Privileges and Immunities Clause in Section 1.<sup>19</sup> A series of judicial precedents over the past forty years has limited judicial capacity to remedy what many progressives believe are severe violations of the Due Process and Equal Protection Clauses. *Jackson v. Metropolitan Edison Co.* and subsequent cases impose a strict state action requirement on equal protection and due process claims.<sup>20</sup> *Washington v. Davis* and subsequent cases impose a nearly impossible burden of proof on plaintiffs alleging race discrimination where there is no “smoking gun.”<sup>21</sup> The text of the Fourteenth Amendment augments these difficulties. The words “No State shall” in the Fourteenth Amendment provide the textual foundations for the state action requirement,<sup>22</sup> even if one believes *Jackson* interpreted that requirement too strictly.<sup>23</sup> Section 2 of the Fourteenth

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18. See Complaint at 3–4, *Indep. Am. Party v. Obama*, No. 2:10-cv-01477 (D. Nev. Aug. 31, 2010) (asserting Affordable Care Act violated eight different amendments, including Thirteenth Amendment’s prohibition of “involuntary servitude”).

19. See 83 U.S. 36, 76–78 (1873) (confining language to “those privileges and immunities which are *fundamental*” and denying provision created rights).

20. 419 U.S. 345, 358–59 (1974) (concluding state not sufficiently connected to public utility actions for purposes of making conduct state action under Fourteenth Amendment); accord *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 194 (1989) (rejecting argument that “failure of a state or local government entity or its agents to provide an individual with adequate protection services constitutes a violation” of Fourteenth Amendment Due Process Clause); *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982) (concluding nursing homes’ decisions regarding Medicaid patients did not constitute state action); *Rendell-Baker v. Kohn*, 457 U.S. 830, 843 (1982) (holding private school is not state actor under Fourteenth Amendment).

21. 426 U.S. 229, 248 (1976) (rejecting disparate impact standard for equal protection claims under Fourteenth Amendment); accord *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (explaining “to prevail under the Equal Protection Clause [plaintiff] must prove the decisionmakers in *his* case acted with discriminatory purpose” in imposing capital punishment); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977) (holding respondents “failed to carry their burden of proving that discriminatory purpose was a motivating factor” in zoning decision).

22. See U.S. Const. amend. XIV, § 1; see also *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982) (“This Court . . . [has] affirmed the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, ‘however discriminatory or wrongful,’ against which the Fourteenth Amendment offers no shield.” (quoting *Jackson*, 419 U.S. at 349)); *Ex parte Virginia*, 100 U.S. 339, 346–47 (1879) (noting that “the prohibitions of the Fourteenth Amendment are addressed to the States” and discussing what constitutes state action under Amendment).

23. See Kellen McClendon, *Do Hospitals in Pennsylvania Relieve the Government of Some of Its Burden?*, 67 *Temp. L. Rev.* 517, 556 (1994) (arguing Supreme Court’s decision in *Jackson* severely limited potential ground for finding state action in future cases).

Amendment provides plausible grounds for thinking that political rights are not protected by Section 1.<sup>24</sup> Conservatives can point to numerous statements made on the floor of Reconstruction Congress suggesting sharp limitations on the scope of the Fourteenth Amendment, most notably the speech by Thaddeus Stevens quoted in the first paragraph of this Essay. Significantly, while in 1866 the narrowest constructions of the Thirteenth Amendment were typically made by Democrats uninterested in any form of racial equality,<sup>25</sup> many of the most bitter complaints about the Fourteenth Amendment in 1866 were made by radical Reconstructionists who proposed more capacious amendments.<sup>26</sup> One consequence of the different reception the first two post-Civil War Amendments received among Radicals is that the same antislavery advocates who can be quoted in support of the broadest interpretation of the Thirteenth Amendment are often the leading authorities for the narrowest interpretation of the Fourteenth Amendment.<sup>27</sup>

This celebration of the Thirteenth Amendment may nevertheless be premature. That the Thirteenth Amendment arguably protects a different and, perhaps, wider array of rights than the Fourteenth Amendment may be less important than the less controversial claim that the Fourteenth Amendment was ratified after the Thirteenth Amendment. In constitutional law, first in time is last in line. If there is a conflict between two constitutional provisions, the later provision governs.<sup>28</sup> If, therefore, the Fourteenth Amendment covers similar ground as the Thirteenth Amendment, but protects a narrower set of rights than the Thirteenth Amendment, then the proper inference may be that the Fourteenth Amendment repealed or modified crucial rights originally protected by the Thirteenth Amendment. The broad interpretation of the Thirteenth Amendment, which is increasingly in vogue in certain progressive circles, may have been good constitutional law only between 1865 and 1868.

This Essay explores the relationship between the Thirteenth and Fourteenth Amendments. For purposes of argument, this Essay assumes that the participants in this Symposium correctly interpret the original Thirteenth Amendment when they construe the constitutional ban on

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24. See *infra* notes 118–127 and accompanying text (discussing historical conceptions of link between freedom from bondage and political rights).

25. See, e.g., *The Reconstruction Amendments' Debates* 107 (Alfred Avins ed., 1967) (speech of Sen. Thomas Hendricks).

26. See, e.g., Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860–1870*, 17 *Cardozo L. Rev.* 2153, 2195 (1996) (quoting Radical Republican James Ashley saying final version was “the best I could get”).

27. See, e.g., Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 204 (1997) (citing Thaddeus Stevens’s refutation of broad construction of Equal Protection Clause).

28. 16 *American Jurisprudence, Constitutional Law* § 67 (2d ed. 2009) (explaining that later provision governs because “it is the latest expression of the will of the people”).

slavery broadly in order to protect a wide variety of fundamental rights. The question in this Essay is whether all of those fundamental rights protected by the Thirteenth Amendment in 1865 survived the ratification of the Fourteenth Amendment in 1868. Rather than interpret the Fourteenth Amendment as adding to the Thirteenth, as is the common practice, or treat the post-Civil War Amendments as a coherent whole, this Essay explores the textual and political evidence supporting claims that the Fourteenth Amendment diminished the rights protected by the Thirteenth Amendment or, more accurately, diminished the likelihood that any of the post-Civil War Amendments would be interpreted as protecting rights that might have been protected by a freestanding Thirteenth Amendment. Thirteen plus one, in this case, may be less than thirteen.

Part I of the Essay makes the very unsurprising case for the proposition that the Fourteenth Amendment did not weaken or repeal any right protected by the Thirteenth Amendment. Both the *Slaughter-House Cases* and the constitutional text point to an ever-expanding series of constitutional rights.<sup>29</sup> Republicans during Reconstruction complained about the limited scope of the Fourteenth Amendment, but no antislavery advocate objected that Section 1 modified the constitutional ban on slavery.<sup>30</sup> The Fourteenth Amendment did arguably modify other constitutional rights, most notably certain antebellum constitutional rights of slaveholders (and possibly even a constitutional right to vote).<sup>31</sup> For this reason, Americans are wrong to insist that constitutional amendments never or never should modify or repeal existing constitutional rights.<sup>32</sup> Nevertheless, Part I's "lesson in the obvious" suggests that only an academic desperate to write a paper for a prestigious symposium might propose that the Fourteenth Amendment repealed the Thirteenth Amendment.

Part II, admittedly written by an academic desperate to write a paper for a prestigious symposium, discusses those elements of precedent, text, and history that support claims that the Fourteenth Amendment eliminated or weakened the foundations for rights originally protected by the Thirteenth Amendment. The conventional story of an ever-expanding series of constitutional rights relies heavily on the very narrow interpretation of the Thirteenth Amendment articulated in the *Slaughter-House*

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29. See *infra* notes 49–57 and accompanying text.

30. See *infra* notes 58–61 and accompanying text.

31. See *infra* notes 68–81 and accompanying text.

32. See, e.g., Hadley Arkes, *Beyond the Constitution* 80 (1990) (explaining “no man of prudence would urge us to repeal the Bill of Rights”). See generally Kathleen Sullivan, *What’s Wrong with Constitutional Amendments?*, in *New Federalist Papers: Essays in Defense of the Constitution* 61, 61–67 (Alan Brinkley, Nelson W. Polsby & Kathleen M. Sullivan eds., 1997) (arguing “unless the ordinary give-and-take of our politics proves incapable of solving something, the Constitution is not the place to fix it” and thus amending Constitution is and should be rare).

*Cases*.<sup>33</sup> If, however, the Thirteenth Amendment was originally understood as protecting the broad array of rights suggested by other papers for this Symposium,<sup>34</sup> then the real possibility exists that the ratification of the Fourteenth Amendment was part of the process by which the robust conception of freedom promised by the constitutional ban on involuntary servitude was transformed by the Supreme Court in the late nineteenth century into a much weaker guarantee of formal legal equality.<sup>35</sup> The text of the Thirteenth Amendment standing alone may protect more rights than the combination of the Thirteenth and Fourteenth Amendments. Constitutional framers are not paid by the word. On the plausible assumption that constitutional amendments do not merely reiterate preexisting rights and powers, the best reading of the first two post-Civil War Amendments may be that the Thirteenth Amendment is limited to emancipation while the Fourteenth Amendment elaborates the rights of newly freed slaves and others who might be similarly situated. This became the dominant interpretive theory in both Congress and the Supreme Court after 1868.<sup>36</sup> Republicans who in 1866 asserted that the Thirteenth Amendment guaranteed a robust set of freedoms relied almost exclusively on the Fourteenth Amendment when making similar rights claims in 1875.<sup>37</sup> At the very least, the Fourteenth Amendment seems to have clarified the rights protected by the Thirteenth Amendment. During that clarification process, some rights claims became easier to make, but many constitutional rights claims favored by Thirteenth Amendment revivalists became more difficult to assert.

Part III considers why and whether Thirteenth Amendment revivalists should consider this revisionist and pessimistic history. Part III argues they must do so because we cannot rediscover the progressive Thirteenth Amendment unless we understand why the robust understanding of constitutional freedom was lost. That robust understanding was lost because Americans after early 1866 increasingly lost the political will to imple-

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33. See *infra* notes 87–96 and accompanying text.

34. See, e.g., Carter, *supra* note 14, at 1857 (arguing Amendment should be used to protect right to pro-equality speech because framers “well understood the dangers faced by the allies of racial justice and the importance of protecting them if the project of freedom were to succeed”); Koppelman, *supra* note 14, at 1937–42 (mounting originalist argument that Amendment created right to abortion in light of contemporary awareness of forcible impregnation of slave women).

35. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 542, 550–51 (1896) (holding law providing for separate railway cars based on race did not violate Thirteenth or Fourteenth Amendment); *Civil Rights Cases*, 109 U.S. 3, 25 (1883) (noting Thirteenth Amendment “merely abolishes slavery”); *United States v. Cruikshank*, 92 U.S. 542, 554 (1875) (stating Fourteenth Amendment “adds nothing to the rights of one citizen as against another”).

36. See *infra* notes 172–184 and accompanying text (describing congressional statements and federal court opinions relying only on Congress’s power under Fourteenth Amendment to pass civil rights legislation).

37. See *Cong. Globe*, 42d Cong., 2d Sess. 381–84 (1872) (statement of Sen. Charles Sumner) (discussing proposal on what later became Civil Rights Act of 1875).



ment a progressive antislavery constitutional vision.<sup>38</sup> The ratification of the Fourteenth Amendment played a major role in the process that shrank the Thirteenth Amendment. The contemporary lessons to be learned are as much about constitutional politics as constitutional law.

This Essay challenges two conventional narratives of the post-Civil War Amendments. Justice Miller's opinion in the *Slaughter-House Cases* spun both stories.<sup>39</sup> His majority opinion told the tale of ever-increasing freedoms. The Thirteenth Amendment added to previous constitutional protections.<sup>40</sup> The Fourteenth Amendment protected rights not protected by the Thirteenth Amendment.<sup>41</sup> The Fifteenth Amendment protected rights not protected by either the Thirteenth or the Fourteenth Amendment.<sup>42</sup> *Slaughter-House* also proclaimed that all three constitutional amendments had "a unity of purpose."<sup>43</sup> This is the second conventional narrative. Bruce Ackerman's study of major constitutional transformations in American history expands on this second description of the post-Civil War Constitution.<sup>44</sup> Ackerman speaks of the epic triumph of a grand constitutional vision: Republicans gain control of the national government. They ratify the Thirteenth, Fourteenth, and Fifteenth Amendments, all three of which are united by common commitment to "nationalize[] the protection of individual rights against state abridgment."<sup>45</sup> This Essay offers a third view. A Republican Party whose commitment to racial equality was beginning to weaken passed a Fourteenth Amendment that both clarified and modified the rights protected by the Thirteenth Amendment.<sup>46</sup> When doing so, Republicans provided firmer foundations for a more robust set of freedoms than offered by the reigning Democratic Party account of the constitutional ban on slavery, while

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38. See *infra* notes 215–226 and accompanying text (tracing decline in political will to achieve racial equality after ratification of Thirteenth Amendment).

39. 83 U.S. (16 Wall.) 36 (1872); see also *infra* notes 49–59 and accompanying text (exploring Justice Miller's opinion).

40. See 83 U.S. (16 Wall.) at 68–69 (discussing Thirteenth Amendment).

41. See *id.* at 70 (explaining Fourteenth Amendment was passed because framers thought "more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much").

42. See *id.* at 71 (explaining Fifteenth Amendment gave former slaves, whom "the fourteenth amendment [had] . . . declared to be . . . citizen[s] of the United States" right to vote).

43. *Id.* at 67.

44. Bruce Ackerman, *We the People: Foundations* (1991).

45. *Id.* at 82.

46. See *infra* notes 219–222 and accompanying text (discussing Republican Party's weakening commitment to civil rights during period that Fourteenth Amendment was passed).

weakening the constitutional foundations for more radical Republican interpretations of the Thirteenth Amendment.<sup>47</sup>

The following pages are better designed to raise different questions about why the Thirteenth Amendment has failed to meet progressive aspirations than to refute broad progressive claims about the original meaning of the text. The Thirteenth Amendment had great promise in 1865.<sup>48</sup> That promise has not been realized for nearly 150 years. In a symposium devoted to the Thirteenth Amendment, we might spend some time thinking about why the Thirteenth Amendment has not achieved that promise, as well as revitalizing what that promise might mean. Thinking about whether the Fourteenth Amendment modified that promise might not only help us with some of the relevant constitutional law but, more importantly, some of the constitutional politics that have heretofore limited the progressive potential of the Thirteenth Amendment.

#### I. A LESSON IN THE OBVIOUS: THE THIRTEENTH AMENDMENT PLUS ONE

The *Slaughter-House Cases*, the text of the Fourteenth Amendment, and the history of the post-Civil War Amendments provide strong grounds for thinking that the persons who drafted and framed the Fourteenth Amendment augmented or at least confirmed the constitutional rights protected by the Thirteenth Amendment. *Slaughter-House* speaks of the post-Civil War Amendments as having “a unity of purpose.”<sup>49</sup> Section 1 of the Fourteenth Amendment details the rights of “[a]ll persons born in the United States,” including former slaves.<sup>50</sup> Sections 2, 3, and 4, by comparison, withhold rights from former slave-owners and states that discriminate against persons of color.<sup>51</sup> No proponent of the Fourteenth Amendment asserted that any provision in that text was intended to limit the Thirteenth Amendment.

#### A. Slaughter-House

Justice Miller’s opinion in the *Slaughter-House Cases* is the canonical statement of the conventional understanding that the Fourteenth Amendment augmented the constitutional ban on slavery. Miller told a Whig history of American freedom. The Thirteenth Amendment abol-

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47. See *infra* notes 175–182 and accompanying text (noting Republicans focused on Fourteenth Amendment at expense of Thirteenth Amendment when considering Civil Rights Act of 1875).

48. See *infra* notes 97–100 and accompanying text (quoting statements from congressional debates that Thirteenth Amendment broadly protects rights).

49. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 67 (1872).

50. U.S. Const. amend XIV, § 1.

51. See *id.* amend. XIV, §§ 2–4 (reducing political representation and constraining borrowing authority of former slaveowning states).

ished slavery.<sup>52</sup> Each subsequent amendment was ratified for the purpose of plugging up holes that history had revealed in the rights protected by previous amendments.<sup>53</sup> Americans from 1865 to 1870, Miller concluded, enjoyed an ever-expanding set of constitutional rights.

Miller's history of the Civil War Amendments began, appropriately, with the Thirteenth Amendment. The purpose of that Amendment, he maintained, was to entrench the result of the Civil War and Emancipation Proclamation. Miller stated that "those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on" the outcome of the war and the Emancipation Proclamation alone.<sup>54</sup> Instead they were "determined to place [the] main and most valuable result [of the war] in the Constitution of the restored Union as one of its fundamental articles."<sup>55</sup>

Time quickly revealed that the constitutional ban on slavery did not adequately protect the fundamental rights of newly freed slaves. The Black Codes in the South demonstrated that, "notwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before."<sup>56</sup> The Fourteenth Amendment was designed to remedy those identified weaknesses in the rights protected by the Thirteenth Amendment. "Circumstances" in the South, Miller asserted,

forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much.<sup>57</sup>

Time then quickly revealed flaws in the Fourteenth Amendment's constitutional scheme for protecting the rights of newly freed slaves. Miller's *Slaughter-House* opinion continued,

A few years' experience satisfied the thoughtful men who had been the authors of the other two amendments that, notwithstanding the restraints of those articles on the States, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon.<sup>58</sup>

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52. 83 U.S. (16 Wall.) at 69–70 (analyzing text of Thirteenth Amendment).

53. *Id.* at 80 (explaining Thirteenth, Fourteenth, and Fifteenth Amendments added to privileges and immunities of United States citizens).

54. *Id.* at 68.

55. *Id.*

56. *Id.* at 70.

57. *Id.*

58. *Id.* at 71.

These failings resulted in the Fifteenth Amendment, which Miller inaccurately stated made African Americans “voter[s] in every State of the Union.”<sup>59</sup>

Republican speeches during the framing and ratification of the Fourteenth Amendment buttress Justice Miller’s history of the post-Civil War Constitution. Radicals complained that Congress had not provided sufficient additional constitutional protections to newly freed slaves.<sup>60</sup> In the speech quoted in the first paragraph of this Essay, Thaddeus Stevens accused his fellow representatives of merely “patching up the worst portions of the ancient edifice.”<sup>61</sup> No Republican maintained that Congress in 1868 tore down protections constructed in 1865.

### B. *The Constitutional Text*

The constitutional text further supports Miller’s vision of an ever-expanding series of constitutional rights. Americans know how to write an amendment that repeals or modifies existing constitutional rights. The Twenty-First Amendment states that “[t]he eighteenth article of amendment to the Constitution of the United States is hereby repealed.”<sup>62</sup> No analogous language repealing or modifying the Thirteenth Amendment appears in either the Fourteenth or Fifteenth Amendment.

But looks can be deceiving. The Thirteenth Amendment also does not explicitly repeal any previous constitutional amendment. Nevertheless, Section 1 plainly abolished previously existing constitutional rights. The constitutional ban on slavery repealed the Fugitive Slave Clause in Article IV, Section 2. If *Dred Scott v. Sandford* correctly held that the Fifth Amendment protected the constitutional right of slaveholders to bring slaves into American territories,<sup>63</sup> then the Thirteenth Amendment altered the scope of the Due Process Clause. At the very least, the Thirteenth Amendment ended an extremely important strain in American constitutionalism that understood the Constitution as

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59. *Id.* The Fifteenth Amendment forbids the federal government and the states from discriminating on the ground of race when allocating voting rights. U.S. Const. amend. XV. No person is given the constitutional right to cast a ballot.

60. See Horace Edgar Flack, *The Adoption of the Fourteenth Amendment* 58–59 (1908) (observing Congressman John Bingham supported Fourteenth Amendment in order to empower Congress to enforce Bill of Rights against states); Kristian D. Whitten, *The Fourteenth Amendment: Justice Bradley’s Twentieth Century Legacy*, 29 *Cumb. L. Rev.* 143, 156 (1999) (arguing Congress intended to bind states to Bill of Rights through Fourteenth Amendment so as to secure additional rights for former slaves).

61. *Cong. Globe*, 39th Cong., 1st Sess. 3148 (1866) (statement of Sen. Thaddeus Stevens).

62. U.S. Const. amend. XXI, § 1.

63. 60 U.S. (19 How.) 393 (1856); see Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* 58 (2006) (arguing “[o]nce one concedes, as antebellum Republicans did, that the Fifth Amendment to the Constitution protected the right to bring personal property into the territories, the historical case for *Dred Scott* becomes quite persuasive”).

providing substantial protections for rights to human property.<sup>64</sup> The constitutional declaration of rights in Section 1 of the Fourteenth Amendment nevertheless seems perfectly consistent with the declaration in the Thirteenth Amendment that slavery or involuntary servitude shall not exist in the United States or, for that matter, any prominent interpretation of the Thirteenth Amendment that broadly interprets the constitutional ban on human bondage. A fine analysis might provide grounds for thinking that the Republican effort to increase the constitutional rights of newly freed slaves diminished some constitutional rights previously enjoyed by other Americans. The constitutional right of birthright citizenship, for example, arguably abolished the putative right American citizens may have enjoyed before the Civil War to choose members of their polity.<sup>65</sup> The more important point is that nothing in the language of Section 1 of the Fourteenth Amendment supports claims that Republicans in 1868 sought to diminish whatever rights were granted to newly freed slaves in 1865.

The structure of the Fourteenth Amendment provides additional foundation for the claim that the persons responsible for that provision did not repeal any right granted when the Thirteenth Amendment was ratified. Section 1 of the Fourteenth Amendment is directed at the victims of slavery: former slaves, southern Unionists, and others who might be subjected to similar deprivations in the future. That provision speaks of the rights to be enjoyed by persons or citizens. “No State,” the text decrees,

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>66</sup>

Sections 2, 3, and 4 of the Fourteenth Amendment are directed at the persons who supported slavery and secession or states that might in the future seek to reestablish a racial caste system.<sup>67</sup> Those provisions speak of the rights these persons do not have or shall no longer enjoy. Many of those rights had some constitutional support before 1868.

Section 2 of the Fourteenth Amendment asserts that the United States will reduce the number of state representatives in Congress should states deny the ballot “except for participation in rebellion, or other

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64. See *Dred Scott*, 60 U.S. (19 How.) at 490 (Daniel, J., concurring) (noting that slavery was “the only private property which the Constitution has *specifically recognised*, and has imposed it as a direct obligation both on the States and the Federal Government to protect and *enforce*”).

65. See Peter H. Schuck & Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* 72–89 (1985) (attributing inclusiveness of birthright citizenship rule, in part, to efforts to overcome *Dred Scott*).

66. U.S. Const. amend. XIV, § 1.

67. *Id.* amend. XIV, §§ 2–4.

crime.”<sup>68</sup> This provision implies and has been interpreted as granting states the constitutional power to deny the ballot to persons previously convicted of felonies.<sup>69</sup> *Minor v. Happersett* pointed to Section 2 as supporting claims that American citizens had no constitutional right to vote.<sup>70</sup> Several state courts in the nineteenth century had reached a different conclusion, maintaining that American citizens who met reasonable standards had a constitutional right to vote.<sup>71</sup> If these state decisions correctly concluded that male citizens enjoyed a federal constitutional right to cast a ballot before the ratification of the Fourteenth Amendment, then Section 2 abolished preexisting constitutional rights.<sup>72</sup> At the very least, Section 2 strengthens constitutional claims that American citizens do not have the right to vote.

Section 3 of the Fourteenth Amendment declares that no former state or federal office holder who “engaged in insurrection or rebellion against [the United States]” or gave “aid or comfort to the enemies thereof” could hold state or federal office, unless a two-thirds majority in both Houses of Congress “remove[d] such disability.”<sup>73</sup> This provision arguably modified federal constitutional rights to run for federal office,<sup>74</sup> probably repealed some state constitutional rights to run for state and federal office,<sup>75</sup> and certainly added to the constitutional disabilities in Article I for being a federal or state officeholder.<sup>76</sup> When rejecting state power to add qualifications for candidates to federal office, Justice

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68. Id. amend. XIV, § 2.

69. See *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) (concluding “the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment”).

70. 88 U.S. (21 Wall.) 162, 174–75 (1874) (rejecting challenge to Missouri law granting only men right to vote and concluding in reference to Section 2 that “no such form of words would have been selected to express the idea . . . [that] suffrage was the absolute right of all citizens”).

71. See, e.g., *Green v. Shumway*, 39 N.Y. 418, 420 (1868) (invalidating state law requiring voters to take oath as contrary to United States and New York constitutions). *Minor* and *Green* are discussed at more length below. See *infra* notes 134, 137 and accompanying text.

72. William W. Van Alstyne, *The Fourteenth Amendment, the “Right” to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 Sup. Ct. Rev. 33, 39 (explaining Justice Harlan’s belief that Section 2 allowed states to deny certain voting rights).

73. U.S. Const. amend. XIV, § 3.

74. See *Bullock v. Carter*, 405 U.S. 134, 149 (1972) (noting state laws that in practice inhibit persons from running for office violate constitutional right of voters to support candidate of their choice).

75. Flack, *supra* note 60, at 132 (explaining Section 3 of Fourteenth Amendment had penal features which restricted most capable candidates in South from holding any office).

76. Article I, Section 2 states, “No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.” U.S. Const. art. I, § 2. Article I, Section 3 states, “No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.” Id. art. I, § 3.

Stevens's majority opinion in *U.S. Term Limits, Inc. v. Thornton*, "emphasized the egalitarian concept that the opportunity to be elected was [to be] open to all," and that "sovereignty confers on the people the right to choose freely their representatives to the National Government."<sup>77</sup> This language suggests that Article I grants all persons who meet the constitutional conditions the right to run for the national legislature ("the opportunity to be elected" is constitutionally "open to all") and that Americans have a constitutional right to choose for the national legislature any person who meets all Article I conditions ("the right to choose freely their representatives"). At the very least, Section 3 imposed a new constitutional disability, if that provision did not repeal a previously existing constitutional right.

Section 4 of the Fourteenth Amendment seems to abolish or repeal rights previously protected by the Takings Clause of the Fifth Amendment. That section asserts,

[N]either the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.<sup>78</sup>

Antebellum Democrats repeatedly insisted that laws emancipating slaves without compensation unconstitutionally took property.<sup>79</sup> During the Civil War, Representative Fernando Wood of New York stated that emancipation "appropriate[d] private property without due compensation or confiscate[d] it without the formality of trial and condemnation."<sup>80</sup> Many Republicans agreed, at least before Lincoln issued the Emancipation Proclamation. Rejecting uncompensated emancipation as a war policy, Sidney Fisher in 1862 asserted, "[W]e cannot permit property to be acquired under the law, and then take it away by law."<sup>81</sup>

The persons who drafted the Fourteenth Amendment knew how to add and how to subtract constitutional rights. Section 1 of the Fourteenth Amendment, the section that concerned the rights of formerly enslaved persons, plainly added constitutional rights. Sections 2, 3, and 4, the sections that concerned the rights of former slaveholders and

77. 514 U.S. 779, 793–94 (1995) (interpreting Court's holding in *Powell v. McCormack*, 395 U.S. 486 (1969)).

78. U.S. Const. amend. XIV, § 4.

79. James M. McPherson, *The Illustrated Battle Cry of Freedom: The Civil War Era* 140 (2003) (examining debate around slaves as property in wake of *Dred Scott* decision).

80. Cong. Globe, 38th Cong., 1st Sess. 2941 (1864) (statement of Rep. Fernando Wood); see also Cong. Globe, 38th Cong., 1st Sess., 1483 (1864) (statement of Sen. Lazarus Powell) (asserting uncompensated emancipation of slaves proposed by Thirteenth Amendment would "destroy property").

81. Sidney George Fisher, *The Trial of the Constitution* 306 (1862). See generally, Daniel W. Hamilton, *The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy During the Civil War* 41–56 (2007) (discussing property rights over slaves as part of larger discussion about Union confiscation of property in wartime).

their political allies, plainly subtracted constitutional rights or refuted possible Democratic interpretations of preexisting constitutional rights.<sup>82</sup> This structure provides additional confirmation of the already obvious claim that the Fourteenth Amendment in no way weakened or repealed the Thirteenth Amendment.

The analysis in this Part suggests that, contrary to common notions, Americans have amended the Constitution to eliminate constitutional rights. The Thirteenth Amendment abolished constitutional rights previously enjoyed by slaveholders. The Fourteenth Amendment abolished rights previously enjoyed by slaveholders and their supporters. These observations do not, however, touch the central thesis of this Essay. For all the above reasons and many more, Harold Hyman seemed on exceptionally safe ground when asserting, “[t]he Fourteenth Amendment repealed neither [the Thirteenth Amendment nor the Civil Rights Act of 1866], and both are still on the books.”<sup>83</sup>

## II. THE CONSTITUTION IN REVERSE GEAR: THE THIRTEENTH AMENDMENT MINUS ONE

The apparently obvious argument in *Slaughter-House* that the Fourteenth Amendment neither repealed nor modified the Thirteenth Amendment, on closer inspection, relies on premises that might justify the opposite conclusion. Justice Miller’s argument for an ever-expanding set of constitutional rights assumes a very narrow interpretation of the Thirteenth Amendment.<sup>84</sup> If you substitute the Thirteenth Amendment rights that revivalists believe the constitutional ban on slavery protects, then the *Slaughter-House* opinion suggests that constitutional protections diminished substantially between the ratification of the constitutional ban on slavery and the ratification of the Fifteenth Amendment. When the Bill of Rights was ratified, many Americans regarded the denial of political rights as a badge and incident of slavery.<sup>85</sup> If Section 2 of the Fourteenth Amendment provided constitutional foundations or support for claims that voting was not a privilege or immunity of citizenship, then the provision arguably eliminated one of the substantial rights entailed by the constitutional ban on slavery.<sup>86</sup> The very existence of the Fourteenth Amendment contributes to a narrowing of Thirteenth

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82. See Flack, *supra* note 60, at 97–136 (1908) (examining political process behind passage of Sections 2, 3, and 4 of Fourteenth Amendment).

83. Harold M. Hyman, Comment on Robert Kaczorowski’s Paper, *The Chase Court and Fundamental Rights*, 21 N. Ky. L. Rev. 193, 201 (1993).

84. See *supra* notes 52–58 and accompanying text (discussing Justice Miller’s view of Thirteenth Amendment’s impact on scope of constitutional rights).

85. See *infra* notes 121–124 and accompanying text (discussing historical American conceptions of link between slavery and denial of political rights).

86. See *infra* notes 118–120 and accompanying text (arguing Thirteenth Amendment’s elimination of badges and incidents of slavery did not endow slaves with voting rights).



Amendment rights when the Constitution is read as a whole. On the common assumption that no constitutional provision was designed to be “mere surplusage,”<sup>87</sup> the Constitution interpreted as a whole suggests that the Thirteenth Amendment prohibits slavery only, while the Fourteenth Amendment declares the rights of newly freed slaves. The Thirteenth Amendment standing alone, from this perspective, protects more rights than a Thirteenth Amendment in a constitution that also includes Section 1 of the Fourteenth Amendment.

#### A. Slaughter-House *Revisited*

The *Slaughter-House Cases* construed the Thirteenth Amendment narrowly. Justice Miller maintained that “slavery” consisted only of “personal servitude.”<sup>88</sup> While he admitted that the Thirteenth Amendment forbade more than slavery, Miller’s examples suggested that the only particular right essential to being a free man was a Hobbesian liberty of locomotion.<sup>89</sup> People are free if they are not in prison. “The exception of servitude as a punishment for crime,” Miller declared, “gives an idea of the class of servitude that is meant” by the Thirteenth Amendment.<sup>90</sup> Miller stated that the Thirteenth Amendment also forbade people from being reduced to “the condition of serfs attached to the plantation.”<sup>91</sup> Like prisoners, medieval serfs were not free to change their residence or employment.

Miller’s interpretation of the Thirteenth Amendment explains why his *Slaughter-House* opinion regarded the Black Codes as constitutional when enacted. Miller did not condemn on constitutional grounds laws that forbade African Americans “to appear in the towns in any other character than menial servants,” that “require[d] [them] to reside on and cultivate the soil without the right to purchase or own it,” and that “excluded” persons of color “from many occupations of gain, and [did not permit them] to give testimony in the courts in any case where a white man was a party.”<sup>92</sup> Miller invoked the Black Codes only to explain why the Fourteenth Amendment had to supplement the Thirteenth Amendment. “[T]he condition of the slave race would,” Miller wrote, “without further protection of the Federal government, be almost as bad as it was before.”<sup>93</sup>

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87. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

88. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 69 (1872).

89. See Quentin Skinner, *Hobbes and Republican Liberty* 211 (2008) (explaining Hobbes’ vision of freedom is “simply to be unhindered from moving in accordance with one’s natural powers”).

90. 83 U.S. (16 Wall.) at 69.

91. *Id.*

92. *Id.* at 70.

93. *Id.*

That Justice Miller almost certainly gave a crabbed reading of the Thirteenth Amendment has been well known to scholars since the classic works of Jacobus tenBroek and Harold Hyman and William Wiecek.<sup>94</sup> These scholars made the historical case that the persons responsible for the constitutional ban on involuntary servitude intended to protect a robust set of fundamental freedoms. TenBroek asserted,

The amendment was presented not as one step in a series of steps yet to come, not as an act of partial fulfillment, not as the opportunistic achievement of a limited objective. It was exultantly held up as “the final step,” “the crowning act,” “the capstone upon the sublime structure”; the joyous “consummation of abolitionism.” To the proponents of the amendment, though slavery was dead, the remote contingency of resurrection had to be provided against; the incidents of slavery had yet to be obliterated; the emancipated negro and his white friends had to be protected in the privileges and civil liberties of free men; and the federal power as the instrument for achieving these purposes had to be permanently assured.<sup>95</sup>

Contemporary Thirteenth Amendment revivalists endorse this vision of the Thirteenth Amendment as protecting the fundamental rights of citizens and the natural rights of persons. Alexander Tsesis states that the Radical Republicans responsible for the Thirteenth Amendment “intended that it provide Congress with the national authority to enact laws that would assure that freedom would not be a hollow word but a national commitment vested with substantive protections.”<sup>96</sup>

Thirteenth Amendment revivalism has substantial historical support. Republicans in Congress gave numerous speeches in which they broadly defined the freedoms entailed by a constitutional ban on involuntary servitude. Senator James Harlan of Iowa maintained that the Thirteenth Amendment would protect family, property, political, educational, and legal rights. He informed Congress,

[T]he prohibition of the conjugal relation is a necessary incident of slavery, and that slavery cannot or would not be maintained in the absence of such a regulation.

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94. See Harold M. Hyman & William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835–75*, at 477 (1982) (explaining after “constru[ing] the ‘pervading purpose’ of the Civil War amendments to be the freedom of black people, Miller relegated freedmen, for the effective protection of their new freedom, to precisely those governments . . . least likely to respect either their rights or their freedom”); 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, 189–94 (1951) (giving examples of narrow construction of Thirteenth Amendment); see also Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 *Harv. C.R.-C.L. L. Rev.*, 1, 20 (1995) (arguing “*Slaughter-House Cases* . . . constrained the application of the Thirteenth Amendment by narrowly defining involuntary servitude”).

95. TenBroek, *supra* note 94, at 176.

96. Tsesis, *Legal History*, *supra* note 6, at 38.

Another incident in the abolition practically of the parental relation, robbing the offspring of the care and attention of his parents, severing a relation which is universally cited as the emblem of the relation sustained by the Creator to the human family. . . . But again, it abolishes necessarily the relation of person to property. It declares the slave to be incapable of acquiring and holding property, and that this disability shall extend to his offspring from generation to generation throughout the coming ages. . . .

....

But it also necessarily, as an incident of its continuance, deprives all those held to be slaves of a status in court. Having no rights to maintain and no legal wrongs to redress, they are held to be incapable of bring a suit in the courts of the United States. . . .

....

And then another incident of this institution is the suppression of the freedom of speech and of the press, not only among those down-trodden people themselves but among the white race. Slavery cannot exist when its merits can be freely discussed. . . . Its continuance also requires perpetuity of the ignorance of its victims. It is therefore made a felony to teach slaves to read and write.<sup>97</sup>

Representative C.J. Ingersoll declared that the Thirteenth Amendment would protect both political and natural rights. He asserted,

Sir, I am in favor in the fullest sense of personal liberty. I am in favor of the freedom of speech. . . . I am in favor of the adoption of this amendment because it will secure to the oppressed slave his natural and God-given rights. I believe that the black man has certain inalienable rights, which are as sacred in the sight of Heaven as those of any other race. I believe he has a right to live, and live in a state of freedom. He has a right to breathe the free air and enjoy God's free sunshine. He has a right to till the soil, to earn his bread by the sweat of his brow, and enjoy the rewards of his own labor. He has a right to the endearments and enjoyment of family ties; and no white man has any right to rob him or infringe on any of these blessings.<sup>98</sup>

Similar quotations litter the Congressional Globe during the debates on the Thirteenth Amendment, the debates on the Freedman's Bureau, and the debates on the Civil Rights Act of 1866. Senator Lyman Trumbull, during the debates over the Civil Rights Act of 1866, detailed the broad congressional powers necessary to implement the constitutional ban on slavery:

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97. Cong. Globe, 38th Cong., 1st Sess. 1439 (1864) (statement of Sen. James Harlan).

98. Id. at 2990 (statement of Rep. Charles Jared Ingersoll); see tenBroek, *supra* note 94, at 176–81 (giving examples of supporters' statements in "the congressional debates in the spring of 1864 and January 1865 [that] explode the traditionally accepted beliefs about the scope and meaning of the Thirteenth Amendment").

I hold that we have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States. The various State laws to which I have referred—and there are many others—although they do not make a man an absolute slave, yet deprive him of the rights of a freeman; and it is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins, but a law that does not allow a colored person to go from one county to another is certainly a law in derogation of the rights of a freeman. A law that does not allow a colored person to hold property, does not allow him to teach, does not allow him to preach, is certainly a law in violation of the rights of a freeman, and being so may properly be declared void.<sup>99</sup>

When elaborating the rights protected by the Thirteenth Amendment, Representative William Lawrence asserted,

Every citizen . . . has the absolute right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property. These are rights of citizenship. As necessary incidents of these absolute rights, there are others, as the right to make and enforce contracts, to purchase, hold, and enjoy property, and to share the benefit of laws for the security of person and property.<sup>100</sup>

Substituting the Thirteenth Amendment as understood by James Harlan, Lyman Trumbull, and Jacobus tenBroek for Justice Miller's analysis of that constitutional provision in *Slaughter-House* plays havoc with the conventional belief that Reconstruction witnessed an ongoing expansion of constitutional rights or three amendments with a single purpose. Thirteenth Amendment revivalists maintain that the Constitution of 1865 protected the fundamental rights of citizens and the natural rights of persons.<sup>101</sup> Miller maintained that the Constitution of 1873 protected neither the fundamental rights of citizens nor the natural rights of persons.<sup>102</sup> If both are right, some event or process must have taken place between 1865 and 1873 that repealed Thirteenth Amendment protec-

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99. Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (statement of Sen. Lyman Trumbull).

100. *Id.* at 1833 (statement of Rep. William Lawrence); see tenBroek, *supra* note 94, at 190–96 (giving examples of statements in third debate over Thirteenth Amendment).

101. See Pope, *supra* note 15, at 190–92 (noting Thirteenth Amendment guarantees certain fundamental rights, yet text does not mention any such rights); see also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 (1968) (explaining Thirteenth Amendment allows Congress to outlaw slavery and secure “the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens”).

102. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 82 (1872) (arguing “[t]he adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power”).

tions for fundamental freedoms and natural rights. The most obvious candidate is the framing and ratification of the Fourteenth Amendment.

Thirteenth Amendment revivalists avoid this potential dilemma by pointing to common assertions that Justice Miller misconstrued the post-Civil War Amendments.<sup>103</sup> In particular, numerous Justices and commentators insist that the *Slaughter-House* majority misconstrued the Fourteenth Amendment, most notably, the Privileges and Immunities Clause. Justices Field and Bradley reached that conclusion when dissenting in *Slaughter-House*.<sup>104</sup> In 2010, Justice Thomas rejected Justice Miller's interpretation of the Privileges and Immunities Clause in *McDonald v. City of Chicago*.<sup>105</sup> Thirteenth Amendment revivalists think Justice Miller's *Slaughter-House* opinion, in addition to offering a crabbed reading of the Fourteenth Amendment, also too narrowly construed the Thirteenth Amendment. "[N]arrow judicial interpretations during the nineteenth century," Tsesis writes, "undercut the [Thirteenth] Amendment's effectiveness."<sup>106</sup> Tsesis and others insist that the Constitution protected the same liberties in 1873 as it did in 1865.<sup>107</sup> Justice Miller offered too narrow a conception of the rights protected in 1873, in this view, only because he had too narrow a conception of the rights protected in 1865.

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103. Louis Lusky, *By What Right?: A Commentary on the Supreme Court's Power To Revise the Constitution* 201 (1975) (arguing Justice Miller's opinion ignored intent of framers); see also Leonard W. Levy, *The Fourteenth Amendment and the Bill of Rights, in* *Judgments: Essays on American Constitutional History* 64, 69 (1972) (describing Miller's majority opinion as "one of the most tragically wrong opinions ever given by the Court"); Thomas B. McAfee, *Constitutional Interpretation—The Uses and Limitations of Original Intent*, 12 *U. Dayton L. Rev.* 275, 282 (1986) (noting agreement among modern commentators that Justice Miller's opinion was "clearly wrong").

104. See 83 U.S. (16 Wall.) at 97 (Field J., dissenting) (finding "[t]he privileges and immunities designated are those *which of right belong to the citizens of all free governments*"); *id.* at 119 (Bradley, J., dissenting) (arguing "[i]t was not necessary to say in words that the citizens of the United States should have and exercise all the privileges of citizens . . . . Their very citizenship conferred these privileges, if they did not possess them before.").

105. 130 S. Ct. 3020, 3085 (2010) (Thomas, J., dissenting) (arguing "[t]here was no reason for the [*Slaughter-House* majority] to interpret the Privileges or Immunities Clause as putting the Court to the extreme choice of interpreting the 'privileges and immunities' of federal citizenship to mean either all . . . rights . . . or no rights at all").

106. Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 *U. Pa. J. Const. L.* 1337, 1338 (2009).

107. See Douglas L. Colbert, *Affirming the Thirteenth Amendment*, 1995 *N.Y. Ann. Surv. Am. L.* 403, 403 (discussing versatile use of Thirteenth Amendment to protect freedoms and liberties, even more so than that of Fourteenth Amendment); see also *Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting) (explaining Thirteenth Amendment suffered from excessively narrow judicial interpretation); tenBroek, *supra* note 94, at 172 (arguing prohibition of Thirteenth Amendment is absolute, not restricted like in Fourteenth Amendment, but freedom protected by latter is more comprehensive than Thirteenth Amendment).

Tsesis and others take a position that might be described as the “Leviathan”<sup>108</sup> conception of the Thirteenth Amendment. On this reading, the Thirteenth Amendment fully guaranteed the fundamental rights of citizens and the natural rights of persons. If interpreted correctly, no other constitutional rights amendment would be necessary. At best, the Fourteenth Amendment merely reiterates the rights protected by the Thirteenth Amendment. TenBroek declared that, in 1866, Republicans attempted “to do the same job all over again by another amendment.”<sup>109</sup> “The Fourteenth Amendment,” he concluded, merely “reenacted the Thirteenth Amendment and made the program of legislation designed to implement it constitutionally secure.”<sup>110</sup> At worst, the Fourteenth Amendment protected only a subset of the rights protected by the Thirteenth Amendment. Nevertheless, that the Fourteenth Amendment protects fewer rights hardly entails that it repealed any part of the Thirteenth Amendment.

The Leviathan conception of the Thirteenth Amendment is true to the common view that the Fourteenth Amendment was designed to provide more secure foundations for legislation implementing Reconstruction. Democrats and Republicans offered different interpretations of the constitutional ban on involuntary servitude during the congressional debates over the Civil Rights Act and Freedmen’s Bureau Act. Republicans insisted that the Thirteenth Amendment both emancipated slaves and guaranteed former slaves certain fundamental freedoms and natural rights.<sup>111</sup> Lyman Trumbull declared that Americans in 1865 had secured “to all persons within the United States practical freedom.”<sup>112</sup> Democrats and a few Republicans responded that the Thirteenth Amendment did little more than emancipate slaves.<sup>113</sup> Senator Thomas Hendricks of Indiana argued,

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108. Hobbes described the “Leviathan” as containing those elements that “gav[e] life and motion to the whole body.” Thomas Hobbes, *Leviathan: Parts I and II* 1 (A.P. Martinich & Brian Battiste eds., Broadview Press rev. ed. 2011) (1651). So the Leviathan conception of the Thirteenth Amendment encompasses the entire domain of rights and liberties.

109. TenBroek, *supra* note 94, at 201.

110. *Id.* at 203.

111. Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 *Fordham L. Rev.* 981, 1010–12 (explaining Republicans hoped Thirteenth Amendment would guarantee fundamental rights for slaves and formerly freed slaves, and quoting James Garfield as remarking, “What is freedom? . . . Is it the bare privilege of not being chained?” and “If this is all, then freedom is a bitter mockery, a cruel delusion”).

112. *Cong. Globe*, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Lyman Trumbull).

113. Azmy, *supra* note 111, at 1022 (explaining that opponents of Thirteenth Amendment believed it was “absurd promise of equality for freedmen”); see also Andrew Johnson, *Veto Message*, Mar. 27, 1866, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=71978&st=veto&st1=> (on file with the *Columbia Law Review*) (justifying veto of civil rights bill because “[s]lavery has been abolished, and at present nowhere exists

It is claimed that under this second section Congress may do anything necessary, in its judgment, not only to secure the freedom of the negro, but to secure to him all civil rights that are secured to white people. I deny that construction, and it will be a very dangerous construction to adopt. The first section abolishes slavery. The second section provides that Congress may enforce the abolition of slavery "by appropriate legislation." What is slavery? It is not a relation between the slave and the State; it is not a public relation; it is a relation between two persons whereby the conduct of the one is placed under the will of the other. It is purely and entirely a domestic relation, and is so classed by all law writers; the law regulates that relation as it regulates other domestic relations. This constitutional amendment broke asunder this private relation between the master and his slave, and the slave then, so far as the right of the master was concerned, became free; but did the slave, under that amendment, acquire any other right than to be free from the control of his master? The law of the State which authorized this relation is abrogated and annulled by this provision of the Federal Constitution, but no new rights are conferred upon the freedman.<sup>114</sup>

The Fourteenth Amendment settled this debate. After 1868, no doubt existed that the Constitution both emancipated slaves and guaranteed newly freed slaves and others certain substantive rights. The "one point upon which historians of the Fourteenth Amendment all agree . . . , which the evidence places beyond cavil," tenBroek states, "is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and Civil Rights Bills . . . beyond doubt."<sup>115</sup>

The problem with the Leviathan conception of the Thirteenth Amendment is that Republicans, when clarifying that the Constitution both freed slaves and protected the fundamental freedoms of newly freed slaves, may have undermined some rights originally protected by the Thirteenth Amendment and thus buttressed the Democratic claim that

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within the jurisdiction of the United States; nor has there been . . . any attempt to revive it by the people or the States").

114. Cong. Globe, 39th Cong., 1st Sess. 318 (1866) (statement of Sen. Thomas Hendricks).

115. TenBroek, *supra* note 94, at 200; see also William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 48 (1988) (describing how proponents of Civil Rights Act of 1866 justified its constitutionality by relying on Thirteenth Amendment and how Democrats and President Johnson were skeptical of this theory). Whether Republicans intended to do much more than provide more secure constitutional foundations for the Civil Rights Act of 1866 is the main matter on which students of the Fourteenth Amendment disagree. Compare Berger, *supra* note 27 (arguing supporters in Congress thought Section 1 proposed relatively modest changes), with Walter F. Murphy, *Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?*, 87 *Yale L.J.* 1752 (1978) (concluding Berger's interpretation of Congress's narrow understanding of "privileges and immunities" is flawed).

the Thirteenth Amendment was limited to emancipation. As previously noted, Section 2 of the Fourteenth Amendment weakens the constitutional connection between citizenship and voting rights.<sup>116</sup> By doing so, that provision also weakened the constitutional argument made by many framers and some Republicans that laws limiting the male voting rights were a form of enslavement.<sup>117</sup> The very existence of the Fourteenth Amendment may have changed the meaning of the Thirteenth Amendment. When the Constitution was read as a whole after 1868, Americans could easily conclude that the Thirteenth Amendment contained the provision that emancipated slaves, while the Fourteenth Amendment contained the provisions that protected the rights of newly freed slaves. By making the Fourteenth Amendment carry the burden of protecting rights, Republicans in 1869 both enfeebled the Thirteenth Amendment and probably limited the fundamental constitutional freedoms of emancipated slaves and all Americans.

#### B. *The Fourteenth Amendment Revisited*

Section 2 of the Fourteenth Amendment undermines claims that the Thirteenth Amendment protects political rights. When the Constitution was ratified, Americans believed that the lack of political rights was a defining characteristic of human bondage.<sup>118</sup> Charles Sumner and other Republican Radicals relied on this understanding of servitude when proposing voting rights legislation as a means for implementing the constitutional ban on involuntary servitude.<sup>119</sup> Other Republicans disputed this historical connection between citizenship and access to the ballot.<sup>120</sup> By declaring that states could deny voting rights to male citizens, the Fourteenth Amendment put a strong thumb on one side of this debate,

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116. See *supra* text accompanying notes 84–99; see also Van Alstyne, *supra* note 72, at 38–60 (explaining different arguments relating to Section 2 of Fourteenth Amendment’s power over suffrage).

117. See generally *The Reconstruction Amendments’ Debates*, *supra* note 25, at 108 (anthologizing debates around Freedmen’s Bureau Bill); see also *Cong. Globe*, 39th Cong., 1st Sess. app. 219 (1866) (statement of Sen. Timothy Howe) (stating that Black Codes, which included denying Blacks right to vote, deny “the plainest and most necessary rights of citizenship”); *id.* at 1151 (statement of Rep. Martin Thayer) (arguing that Black Codes are being used to “reduce this class of people to the condition of bondmen”).

118. See *infra* notes 125–128 and accompanying text (discussing emphasis placed on voting rights).

119. See, e.g., *Cong. Globe*, 39th Cong., 1st Sess. 1124 (1866) (statement of Rep. Burton Cook) (arguing that Black Codes “practically reduce these men to the condition of slavery”); *id.* at 603 (statement of Sen. Henry Wilson) (arguing that Black Codes “make slaves of men whom we have made free”).

120. Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 *Mich. L. Rev.* 245, 270 n.105 (1997) (explaining that moderate Republicans in Congress believed in granting Blacks “civil rights” but few believed Blacks should have been granted “political rights” such as voting).



substantially weakening preexisting claims that being denied political rights was a badge or incident of slavery.

American Revolutionaries equated the possession of political rights with freedom.<sup>121</sup> To be a citizen was to have political rights. The opposite of citizen was slave (if one was not an alien—or virtually represented as was thought to be the case with women and children). When the Framers declared, “We are slaves,” they were referring to the denial of political rights. Consider the following collection of assertions colonists made when opposing the Townshend Revenue Act of 1767:

“For what slavery can be more compleat,” rhetorically asked a Philadelphia Grand Jury, “more miserable, more disgraceful, than that lot of a people” that was governed by laws not of their own making. John Dickinson, who became a central figure in the Continental Congress, wrote in a similar fashion that persons who were taxed without their consent were in “a state of the most abject slavery.” The same year, Silas Downer, the corresponding secretary of the Sons of Liberty for Rhode Island, denounced taxation without Americans’ consent to be the “the lowest bottom of slavery.” The Tea Act, through which Parliament imposed the tax on tea that spurred the Boston Tea Party in December 1773, was viewed as the “[e]nsign of their arbitrary Dominion and your Slavery.” In dramatic fashion, Josiah Quincy proclaimed that “We are slaves!” of the British oppressors. The implication, as another pamphleteer remarked, was that persons who were not treated as “subjects”—or “citizens,” in modern terminology—were slaves.<sup>122</sup>

The “slavery” reference in each comment refers to an absence of political rights. Thomas Jefferson made the same connection between freedom and political rights when in 1774 he asked, “does his majesty seriously wish . . . that his subjects should give up the glorious right of representation, with all the benefits derived from that, and submit themselves the absolute slaves of his sovereign will?”<sup>123</sup> Further, some framers in-

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121. See Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 *U.C. Davis L. Rev.* 1773, 1799 (2006) (explaining abolitionist theory that “slavery was the worst of all robberies” in part because it denied slaves political rights).

122. *Id.* at 1782–83 (alteration in original) (quoting Order of Philadelphia Grand Jury (Sept. 24, 1770), *in* *Bos. Evening-Post*, Nov. 5, 1770; John Dickinson, *Letters from a Farmer in Pennsylvania, to the Inhabitants of the British Colonies* 93 (1774); Silas Downer, *A Discourse, Delivered in Providence, in the Colony of Rhode-Island, upon the 25th Day of July 1768, at the Dedication of the Tree of Liberty, from the Summer House in the Tree* 10 (Providence, John Waterman 1768); Hampden, *The Alarm* (No. III) 1 (1773); Josiah Quincy, Jun’r., *Observations on the Act of Parliament Commonly Called the Boston Port-Bill* 69 (Boston, Edes and Gill 1774); David Parker, *An Argument in Defence of the Exclusive Right Claimed by the Colonies to Tax Themselves* 92 (London, Brotherton and Sewell 1774)).

123. Thomas Jefferson, *A Summary View of the Rights of British America*, *in* 1 *The Writings of Thomas Jefferson* 429, 441 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1892).

sisted that a form of enslavement took place when slaveholders were deprived of their slaves without their political consent.<sup>124</sup>

Prominent Republicans after the Civil War sought to maintain this eighteenth-century connection between freedom and political rights. Charles Sumner, during the debates over the Freedmen's Bureau Act of 1866, vigorously championed the notion that Congress could protect the right to vote when implementing the Thirteenth Amendment. He asserted,

The ballot is a *protector*. Perhaps, at the present moment, this is its highest function. Slavery has ceased in name; but this is all. The old masters still assert an inhuman power, and now by positive statutes seek to bind the freedman in new chains. . . . To save the freedman from this tyranny, with all its accumulated outrage, is your solemn duty. For this we are now devising guarantees; but, believe me, the only sufficient guarantee is the ballot. Let the freedman vote, and he will have in himself under the law a constant, ever-present, self-protecting power. The armor of citizenship will be his best security. The ballot will be to him sword and buckler—a sword with which to pierce his enemies, and a buckler on which to receive their assault. Its possession alone will be a terror and a defense. The law, which is the highest reason, boasts that every man's house is his castle; but the freedman can have no castle without the ballot. When the master knows that he may be voted down, he will know that he must be just, and everything is contained in justice. . . . To him who has the ballot all other things shall be given—protection, opportunity, education, a homestead.<sup>125</sup>

Almost immediately after the Thirteenth Amendment was ratified, the most antislavery wing of the Republican Party launched “a campaign to convince Northern public opinion that suffrage was ‘the logical sequence of negro emancipation.’”<sup>126</sup> “[A]ll Radicals,” Eric Foner states, “could unite on the principle that without black suffrage there could be no Reconstruction.”<sup>127</sup>

Many Republicans contested the connections Radicals drew between freedom and political rights.<sup>128</sup> Abraham Lincoln identified slavery strictly with the denial of economic rights. In his first debate with Stephen Douglas, Lincoln asserted,

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124. See Peter Kolchin, *American Slavery: 1619–1877*, at 91 (1993) (explaining many Southerners thought “infringing on their right to own slaves was a violation of their liberty”).

125. Cong. Globe, 39th Cong., 1st Sess. 685 (1866) (statement of Sen. Charles Sumner).

126. Foner, *supra* note 2, at 221 (1988).

127. *Id.*

128. See Saunders, *supra* note 120, at 270 (explaining few moderate Republicans believed in granting Blacks same “political” rights, and even fewer wanted to grant Blacks full “social” equality).

I have no purpose to introduce political and social equality between the white and the black races. . . . [B]ut I hold that notwithstanding all this, there is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence, the right to life, liberty and the pursuit of happiness. I hold that he is as much entitled to these as the white man. I agree with Judge Douglas he is not my equal in many respects. . . . But in the right to eat the bread, without leave of anybody else, which his own hand earns, *he is my equal and the equal of Judge Douglas, and the equal of every living man.*<sup>129</sup>

In other debates with Douglas, Lincoln asserted that he had never “complained especially of the Dred Scott decision because it declared . . . that a negro could not be a citizen” and that he opposed making Blacks citizens of Illinois.<sup>130</sup> Conservative and moderate Republicans during the debates over the Fourteenth Amendment agreed that being denied political rights was not a badge or incident of slavery. Republican Representative John R. McBride of Oregon “den[ie]d the conclusion” that “if we emancipate we must enfranchise also.” He stated, “a recognition of natural rights is one thing, a grant of political franchises is quite another.”<sup>131</sup>

The relationship between freedom and political rights was sharply contested in state constitutional law during the years between the ratification of the Thirteenth and Fourteenth Amendments. During and immediately after the Civil War, many states passed laws requiring voters to swear that they had always been loyal to the Union.<sup>132</sup> Some state courts declared these laws unconstitutional. Others sustained those measures.<sup>133</sup> The crucial issue in these cases was the constitutional connection between citizenship and voting. The state judges that declared these loyalty oaths unconstitutional insisted that voting was one of the most important privileges of (male) citizenship. In *Green v. Shumway*, the New York Court of Appeals described voting as one of the “most inestimable and invaluable privileges of a free government.”<sup>134</sup> State courts that sustained loyalty oaths rejected claims that freedom or citizenship entailed voting rights.

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129. Abraham Lincoln, First Debate with Stephen A. Douglas at Ottawa, Illinois, in 3 *The Collected Works of Abraham Lincoln* 16 (Roy P. Basler ed., 1953).

130. Abraham Lincoln, Seventh and Last Debate with Stephen A. Douglas at Alton, Illinois, in *The Collected Works of Abraham Lincoln*, supra note 129, at 299.

131. Cong. Globe, 38th Cong., 2d Sess. 202 (1865) (statement of Rep. John McBride); see also Nelson, supra note 115, at 125–32 (detailing Republican positions on suffrage).

132. See Michael A. Ross, Loyalty Oaths, in 3 *Encyclopedia of the American Civil War: A Political, Social, and Military History 1230, 1230* (David S. Heidler & Jeanne T. Heidler eds., 2000) (describing loyalty oaths during Civil War).

133. *Id.* (listing Missouri, Tennessee, Maryland, and Louisiana as all having rigorous loyalty laws to restrict voting and describing court challenges).

134. 39 N.Y. 418, 421 (1868); see also *Rison v. Farr*, 24 Ark. 161, 171 (1865) (“The right of suffrage in this state . . . is at least a constitutional right, and . . . any law infringing upon that right as vested by the constitution is null and void.”).

In *Anderson v. Baker*, the Court of Appeals of Maryland ruled, “[c]itizenship and suffrage are by no means inseparable; the latter is not one of the universal inalienable rights with which men are endowed by their Creator, but is altogether conventional.”<sup>135</sup> The Supreme Court, without written opinions, divided four-to-four on the constitutionality of requiring voters to take these loyalty oaths.<sup>136</sup>

The Fourteenth Amendment strengthened the case against treating the denial of political rights as a badge or incident of slavery. After the Fourteenth Amendment was ratified, opponents of universal suffrage could and did point to Section 2 as providing foundations for their restrictive policies. Most notably, Chief Justice Waite in *Minor v. Happersett* relied heavily on the language of Section 2 when rejecting assertions that the post-Civil War Amendments enfranchised women. After quoting the text, he stated, “no such form of words would have been selected . . . if suffrage was the absolute right of all citizens.”<sup>137</sup> Section 2 does not absolutely bar constitutional protection for voting rights. The Warren Court held that voting was a fundamental interest under the Equal Protection Clause of the Fourteenth Amendment.<sup>138</sup> Nevertheless, at the very least, ratification of the Fourteenth Amendment considerably weakened the constitutional case for using the Thirteenth Amendment to make the framing link between freedom and political rights.

### C. *The Constitution as a Whole*

The persons responsible for the Constitution intended the Thirteenth and Fourteenth Amendments to be read as a whole, not as two discrete provisions that might be found in two distinct documents. The Fourteenth Amendment was ratified in large part because of political and legal developments that were inhibiting congressional implementation of the Thirteenth Amendment. Thus, in order to understand what the Fourteenth Amendment means, we must understand the different understandings of the Thirteenth Amendment that were championed

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135. 23 Md. 531, 619 (1865); see also *Blair v. Ridgely*, 41 Mo. 63, 175 (1867) (“[N]o person either has or can exercise the elective franchise as a natural right, and he only receives it upon entering the social compact, subject to such qualifications as may be prescribed.”).

136. See Harold Melvin Hyman, *Era of the Oath: Northern Loyalty Tests During the Civil War and Reconstruction* 117 (1954) (explaining “[i]n 1865 the Court of Appeals sustained the provision, deciding that suffrage is not a property right and is controllable by the state”).

137. 88 U.S. (21 Wall.) 162, 174–75 (1874) (explaining language of Section 2 does not grant universal suffrage).

138. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668–70 (1966) (declining to qualify principle that voting is fundamental interest by sustaining state poll tax); see also *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969) (explaining decisions concerning which resident citizens may participate in election of public officials “must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections”).

during early Reconstruction. The Fourteenth Amendment was grounded in some of those different understandings, but not others. Thus, in order to understand what the Thirteenth Amendment came to mean after 1868, we need to understand which conceptions of the constitutional ban on involuntary servitude survived and which were discarded when the Fourteenth Amendment was ratified.

That the Fourteenth Amendment modified the Thirteenth should not be surprising. Constitutional amendments, often by their very existence, change the rights protected and the powers granted by preexisting constitutional provisions. New constitutional provisions introduce, buttress, or undermine those broader regime principles that had structured the proper interpretation of previously adopted constitutional provisions. The adoption of the Twelfth Amendment, which declared that the President and Vice President would run on a common ticket, weakened the anti-party commitments of the Constitution of 1789.<sup>139</sup> Constitutional amendments are commonly based on assumptions about how other constitutional provisions are best interpreted. The framers in 1869 declared, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws” because they believed the national government was already constitutionally committed to equality.<sup>140</sup>

Constitutional commentators have detailed how new constitutional amendments adjust the rights protected by preexisting constitutional provisions, even when recently ratified provisions do not explicitly repeal or augment past rights’ guarantees. Critical race and feminist theories maintain that the Fourteenth Amendment withdrew First Amendment protection from hate speech. Proponents of reverse incorporation argue that the Fourteenth Amendment increased First Amendment protection for antislavery speech and analogous forms of political dissent. By understanding how the Fourteenth Amendment altered the rights protected by the First Amendment, we may better understand how the Fourteenth Amendment altered the rights protected by the Thirteenth Amendment.

Prominent critical and feminist theories assert that the post-Civil War Amendments provided the national government with the power to ban certain forms of racist invective that were constitutionally protected in 1791. Catherine MacKinnon sharply criticizes the view that “the upheaval that produced the Reconstruction Amendments did not move the ground under the expressive freedom, setting new limits and mandating

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139. See U.S. Const. amend. XII (providing that Electors “shall name in their ballots the person voted for as President, and in the distinct ballots the person voted for as Vice President”).

140. See Mark A. Graber, *A Constitutional Conspiracy Unmasked: Why “No State” Does Not Mean “No State,”* 10 *Const. Comment.* 87, 90 (1993) (arguing “[l]eading participants in the debate over the Fourteenth Amendment treated as common knowledge the proposition that the pre-Civil War Constitution already prohibited federal laws inconsistent with equal protection”).

new extensions.”<sup>141</sup> She excoriates those who believe that “Fourteenth Amendment equality . . . can be achieved while the First Amendment protects the speech of inequality.”<sup>142</sup> MacKinnon thinks that once Americans reinterpret the First Amendment in light of the Fourteenth, they will easily be able to distinguish constitutional restrictions on hate speech from unconstitutional restrictions on the advocacy of progressive reform. “The piously evenhanded treatment of the Klan and NAACP boycotters,” in her view, ignores the fact that “the Klan was promoting inequality and the civil rights leaders were resisting it, in a country that is supposedly not constitutionally neutral on the subject.”<sup>143</sup>

Other critical race theorists maintain that the Fourteenth Amendment established a new compelling interest for restricting otherwise constitutionally protected speech. Charles Lawrence asserts that Americans became constitutionally committed to racial equality in 1868.<sup>144</sup> This constitutional commitment, he maintains, justified both *Brown v. Board of Education* and bans on hate speech. Lawrence interprets *Brown* as holding “that segregated schools were unconstitutional primarily because of the message segregation conveys—the message that black children are an untouchable caste, unfit to be educated with white children.”<sup>145</sup> In his view, if the Constitution as amended in 1868 forbids government from delivering certain messages, then that same Constitution “commit[s] us to some regulation of racist speech” that could not be constitutionally proscribed before the Civil War.<sup>146</sup>

One need not endorse the strongest version of the critical race and feminist defense of restrictions on hate speech to acknowledge the possibility that the Fourteenth Amendment permitted government to regulate some speech that was previously protected by the First Amendment. The post-Civil War Amendments make promoting racial equality a legitimate government purpose. To the extent that one takes a nineteenth-century view of individual rights, which regards government regulations as constitutional whenever the regulation clearly serves a public purpose,<sup>147</sup> then bans on hate speech passed after 1868 pass constitutional muster. Even if

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141. Catherine A. MacKinnon, *Only Words* 71 (1994).

142. *Id.* at 72.

143. *Id.* at 86.

144. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* 53, 59 (1993) (arguing “equal citizenship” is “a principle central to any substantive understanding of the equal protection clause, the foundation on which all anti-discrimination law rests”).

145. *Id.*

146. *Id.* at 58–59.

147. See Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* 7–9 (1993) (exploring “evidence of the late-nineteenth century legal community’s obsession with drawing distinctions between legitimate promotions of the public interest and illegitimate efforts to impose special burdens and benefits”).

one takes the more modern view that bans on speech must be narrowly tailored to serve compelling government interests,<sup>148</sup> the post-Civil War Amendments suggest that restrictions designed to curtail white supremacy serve compelling government ends. A good deal of dispute may take place over whether particular restrictions on racist invective are necessary or narrowly tailored,<sup>149</sup> but the constitutional commitment to racial equality announced by the Fourteenth Amendment obviates debate over whether such measures satisfy the government interest prong of modern constitutional balancing tests. In short, the Fourteenth Amendment at the very least substantially weakened the constitutional foundations for claims that the First Amendment protects racist and sexist expression.

Several studies of incorporation provide reasons for thinking that the Fourteenth Amendment also expanded the rights protected by the First Amendment. Proponents of incorporation claim that the persons responsible for the Privileges and Immunities Clause (or the Due Process Clause) of the Fourteenth Amendment intended to prohibit state governments from violating the liberties in the first eight amendments to the Constitution.<sup>150</sup> Champions of incorporation also argue that the Fourteenth Amendment intended that state and federal authorities be bound by the same constitutional standards when regulating speech, religion, and other matters enumerated in the Bill of Rights.<sup>151</sup> If the First Amendment prohibited the federal government from banning flag burning, then the Fourteenth Amendment prohibited states from banning flag burning. If, after 1868, the Court ruled that the Fourteenth Amendment protected the right to stage a protest near a funeral for a fallen soldier, then the Justices as a matter of *stare decisis* were obligated to rule that the same speech was protected by the First Amendment.<sup>152</sup> These constitutional commitments to incorporation and uniformity,

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148. See, e.g., *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011) (applying strict scrutiny to government-imposed restrictions on campaign expenditures).

149. See, e.g., *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863–64 (E.D. Mich. 1989) (finding university policy prohibiting discriminatory speech was not narrowly tailored to survive strict scrutiny).

150. See *Adamson v. California*, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting) (explaining “that the provisions of the Amendment’s first section . . . were intended to . . . make the Bill of Rights, applicable to the states”); Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 165 (1986) (noting “[t]he privileges or immunities clause was the primary vehicle through which [Republicans] intended to force the states to obey the commands of the Bill of Rights”).

151. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 (2010) (explaining “incorporated Bill of Rights protections ‘are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment’” (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1964))).

152. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (finding First Amendment offers special protection for speech in public places on matters of public concern).

when combined, entail that Americans, by ratifying the Fourteenth Amendment, changed the rights protected by the First Amendment.

The persons responsible for the Fourteenth Amendment wished to provide constitutional protection for specific utterances that the First Amendment in 1791 may not have covered. Republicans were particularly concerned with preventing states from punishing antislavery speech or, the post-Civil War equivalent, pro-Reconstruction speech. The Republican Party in 1856 adopted the slogan, “Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Frémont.”<sup>153</sup> Party members reiterated that commitment to expression rights during the debates over the Fourteenth Amendment and Reconstruction measures. Proponents of the Fourteenth Amendment condemned antebellum Southern laws that “proscribed democratic literature as incendiary” and “nullified constitutional guarantees of freedom and free speech and a free press.”<sup>154</sup> Whether the First Amendment originally protected antislavery speech is, however, contested. Leonard Levy maintains that the persons responsible for the Bill of Rights provided constitutional protection only against prior restraint.<sup>155</sup> Michael Kent Curtis’s study of antebellum free speech debates demonstrates that Americans in 1868 had a more expansive understanding of free speech than Americans had in 1791.<sup>156</sup> Virtually all constitutional decisionmakers in slave states and many in the North had no problem finding restrictions on antislavery speech consistent with constitutional guarantees for speech rights. Governor Marcy of New York in 1836 responded to Southern demands that abolitionists be legally muzzled by proposing legislation that provided criminal sanctions for persons whose speech was “calculated and intended to excite insurrection and rebellion in a sister State.”<sup>157</sup>

Republicans achieved their goal of providing a uniform national standard of free-speech protection that encompassed protection for antislavery dissent by a process sometimes called reverse incorporation. Reverse incorporation, Akhil Amar writes, occurs when “the federal government is obligated to abide by the same constitutional duty . . . that is

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153. Richard H. Sewell, *Ballots for Freedom: Antislavery Politics in the United States, 1837–1860*, at 284 (1976).

154. Michael Kent Curtis, “Free Speech, The People’s Darling Privilege”: Struggles for Freedom of Expression in American History 364 (2000) [hereinafter Curtis, *Free Speech*] (quoting 2 *The Bill of Rights: A Documentary History* 1031 (Bernard Schwartz ed., 1971)); see also *id.* at 216–372 (discussing free speech during post-Reconstruction era).

155. Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 234–48 (1985) [hereinafter Levy, *Legacy*].

156. Curtis, *Free Speech*, *supra* note 154, at 52–116.

157. *Id.* at 185; see also *State v. Worth*, 52 N.C. (7 Jones) 488, 493 (1860) (upholding state law that prohibited publication and circulation of book with intent to “disturb the happiness and repose of the country”); Curtis, *Free Speech*, *supra* note 154, at 182–205 (describing North’s demand for legal action against Southern abolitionists).



imposed upon the states.”<sup>158</sup> *Bolling v. Sharpe* is the best known instance of this process.<sup>159</sup> In *Bolling*, the Supreme Court held that the federal government had the same obligation to desegregate public schools under the Due Process Clause of the Fifth Amendment as states did under the Equal Protection Clause of the Fourteenth Amendment.<sup>160</sup> “In view of our decision [in *Brown v. Board of Education*] that the Constitution prohibits the states from maintaining racially segregated public schools,” Chief Justice Warren asserted, “it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”<sup>161</sup> One crucial feature of reverse incorporation is that new constitutional amendments limiting state power alter the rights protected by preexisting constitutional provisions limiting federal power. The *Bolling* Court ruled that ratification of the Fourteenth Amendment added a right not to be a victim of federal racial discrimination to the Fifth Amendment.<sup>162</sup> Republicans during Reconstruction similarly employed reverse incorporation when their ratification of a constitutional amendment protecting antislavery dissent against state regulation added antislavery advocacy to the utterances protected by the First Amendment.<sup>163</sup>

Distinguished constitutional scholars champion reverse incorporation. Laurence Tribe suggests that persons “comfortable with . . . ‘time travel’ . . . [might] treat[] the history of the late 1860s as somehow changing the meaning of a constitutional provision ratified in 1789.”<sup>164</sup> Akhil Amar agrees that ratification of the Fourteenth Amendment changed the rights protected by the First Amendment: He thinks “the Fourteenth Amendment has a doctrinal ‘feedback effect’ against the federal government, despite the amendment’s clear textual limitation to state action.”<sup>165</sup> Amar concludes that “the parallel language between the First Amendment and the Fourteenth, should strongly incline us toward a unitary theory of freedom of speech against both state and federal governments.”<sup>166</sup>

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158. Akhil Reed Amar, *Constitutional Rights in a Federal System: Rethinking Incorporation and Reverse Incorporation*, in *Benchmarks: Great Controversies in the Supreme Court* 71, 79 (Terry Eastland ed., 1983).

159. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

160. *Id.* at 500 (“[R]acial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment.”).

161. *Id.* (referring to *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

162. *Id.* at 499 (explaining even though Fifth Amendment does not contain equal protection clause like Fourteenth Amendment, “the concepts of equal protection and due process . . . are not mutually exclusive”).

163. See generally Mark A. Graber, *Antebellum Perspectives on Free Speech*, 10 *Wm. & Mary Bill Rts. J.* 779, 802–05 (2002) (explaining that “Republicans could, without contradiction, nationalize free speech protections” by “treating the Reconstruction amendments as incorporating previous constitutional settlements outside of courts”).

164. 1 Laurence H. Tribe, *American Constitutional Law* 902 n.221 (3d ed. 2000).

165. Akhil Reed Amar, *The Bill of Rights* 243 (1998).

166. *Id.* at 244.

These scholars recognize that reverse incorporation is one manifestation of the broader principle that constitutional amendments inevitably revise preexisting constitutional rights and powers by introducing, buttressing, or undermining more fundamental understandings about the nature of the constitutional regime. The constitutional amendments passed in the Progressive Era that provided for the direct election of senators and gave women the right to vote were also part of the process by which Americans began to understand their regime as a constitutional democracy rather than a constitutional republic.<sup>167</sup> These alterations in the foundations of American constitutionalism often compel constitutional decisionmakers to rethink the rights protected by constitutional provisions superficially untouched by the new constitutional amendment. Constitutional decisionmakers must, therefore, recognize previous understandings of the constitutional rights Americans enjoy in light of the impact of new amendments on basic regime principles. Tribe writes,

A revision to avoid conflicts with new constitutional text occurs when a constitutional amendment so alters the rest of the Constitution that, upon referring back to the constitutional provision in question, we are bound—unless we are satisfied with a Constitution that merely collects contradictions—to recognize a revision in that constitutional provision even if the amendment did not in so many words decree a change in that provision’s words.<sup>168</sup>

Stephen Feldman details how constitutional thinkers toughened constitutional standards for government regulation of political dissent after Americans became more committed to pluralist notions of constitutional democracy.<sup>169</sup>

Bruce Ackerman plays a variation on this theme when he emphasizes the “problem of multigeneration synthesis.”<sup>170</sup> Constitutional decisionmakers after a constitutional moment, he maintains, must first “identify which aspects of the earlier Constitution had survived,” and then “synthesize them into a new doctrinal whole that g[ives] expression to the new ideals” ratified by the American people.<sup>171</sup> Constitutional amendments often require the same process writ small. Once constitutional decisionmakers have determined that a new amendment entails a constitutional commitment to racial equality or to uniform standards of rights protections, they must adjust all their understandings of the rights provided by preexisting rights provisions so that they reflect newly

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167. See Thomas M. Keck, Symposium on *America’s Constitution: A Biography*, 59 *Syracuse L. Rev.* 31, 60 (2008) (arguing “constitutional amendment[s] during the progressive era . . . deepen[ed] the Constitution’s commitment to democracy”).

168. Tribe, *supra* note 164, at 67.

169. Stephen M. Feldman, *Free Expression and Democracy in America: A History* 291–419 (2008).

170. Ackerman, *supra* note 44, at 88.

171. *Id.* at 88–89.

adopted or strengthened constitutional principles. For example, even though the matter remained unstated in Justice Douglas's majority opinion in *Harper v. Virginia Board of Elections*, that state poll taxes were declared unconstitutional almost immediately after Americans ratified a constitutional amendment prohibiting poll taxes in federal elections does not seem a coincidence.<sup>172</sup>

Immediately after the Civil War, Americans found a related path for having a constitutional amendment alter the rights protected by a preexisting constitutional provision. The Fourteenth Amendment was a consequence of a debate over the Thirteenth Amendment. Republicans maintained the Thirteenth Amendment banned slavery and guaranteed certain substantive freedoms.<sup>173</sup> Democrats and some Republicans insisted that the Thirteenth Amendment only banned slavery.<sup>174</sup> The Fourteenth Amendment settled this controversy. After 1868, general agreement existed that the Constitution of the United States banned slavery and protected certain substantive freedoms. Both the constitutional text and history suggest, however, that this debate was settled by transferring from the Thirteenth to the Fourteenth Amendment most of the substantive rights Republicans in 1865 maintained were guaranteed by the Thirteenth Amendment. Several good reasons exist for thinking that Republicans secured these fundamental freedoms through a process that stripped the Thirteenth Amendment of previous rights guarantees.

The most natural reading of the Constitution after 1868 is that the Thirteenth Amendment frees slaves and the Fourteenth Amendment sets out the rights of newly freed slaves and persons who are or may be similarly situated. If interpreters adopt even a fairly weak presumption that constitutional provisions are not redundant, the Democratic interpretation of the Thirteenth Amendment seems to best fit the contemporary Constitution as a whole. No language in Section 1 of the Fourteenth Amendment gives the reader any clue that the text is merely clarifying rights already protected by the Thirteenth Amendment. Republicans did not ratify a text that declared, for example, "The freedom granted by the Thirteenth Amendment entailed the following rights and privileges." The Thirteenth Amendment, standing alone, by comparison seems more susceptible to the original Republican interpretation of the constitutional ban on involuntary servitude. Without the Fourteenth Amendment, constitutional interpreters must derive the badges and incidents of slavery or the fundamental freedoms of free persons from the

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172. See 383 U.S. 663, 665 (1966) (finding state poll tax unconstitutional because "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause").

173. See *supra* note 126 and accompanying text (discussing Republican Party members' views on impact of Thirteenth Amendment).

174. See *supra* text accompanying notes 113–114 (discussing Democrat party members' view of Thirteenth Amendment).

simple announcement that slavery will no longer exist in the United States.

Constitutional debate immediately before and immediately after the ratification of the Fourteenth Amendment provides more evidence that the Thirteenth Amendment was largely stripped of substantive content when the Fourteenth Amendment was ratified. During the debates over the Civil Rights Act of 1866, most Republicans insisted that the constitutional ban on involuntary servitude entailed a robust set of fundamental freedoms.<sup>175</sup> One of the most important of these freedoms was a right not to be the victim of discrimination. Senator Trumbull declared, “[A]ny statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited.”<sup>176</sup> After 1868, congressional debate focused almost entirely on the meaning of the Fourteenth Amendment. Charles Sumner aside,<sup>177</sup> the Republicans who favored the proposed ban on discrimination in schools and places of public accommodations in the Civil Rights Act of 1875 focused almost entirely on the congressional power under the Fourteenth Amendment. Senator Matthew Carpenter of Wisconsin had “no doubt of the power of this Government under the fourteenth amendment . . . to say that a colored man shall have his right in the common school.”<sup>178</sup> Representative William Lawrence, who in 1866 had waxed eloquent on the broad scope of the Thirteenth Amendment,<sup>179</sup> in 1875 limited his analysis to the Fourteenth Amendment. Forgetting his own Thirteenth Amendment defense of the Civil Rights Act of 1866, Lawrence informed Congress that all the civil rights acts the national legislature had passed “proceed upon the idea that if a State omits or neglects to secure the enforcement of equal rights, that it ‘denies’ the equal protection of the laws within the meaning of the fourteenth amendment.”<sup>180</sup> The 102 pages that Michael McConnell devoted to the Civil Rights Act of 1875 in his monumental study of congressional attitudes toward the constitutionality of segregation made an average of almost one citation per page to congressional references to the

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175. See 1 Howard Gillman, Mark A. Graber & Keith E. Whittington, *American Constitutionalism: Structures of Government* 273–75 (2012) (quoting statements from Senators Trumbull and Sumner to illustrate Republican belief that Thirteenth Amendment “guarantee[d] a robust set of rights”).

176. Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Lyman Trumbull).

177. Cong. Globe, 42d Cong., 2d Sess. 728 (1872) (statement of Sen. Charles Sumner) (arguing that Congress’s authority to pass Civil Rights Act of 1875 was “founded on the thirteenth amendment”).

178. *Id.* at 763 (statement of Sen. Matthew Carpenter).

179. Cong. Globe, 39th Cong., 1st Sess. 1832 (1866) (statement of Rep. William Lawrence).

180. 2 Cong. Rec. 414 (1874) (statement of Rep. William Lawrence).

Fourteenth Amendment.<sup>181</sup> The same pages contain only one reference to a congressional speech discussing the Thirteenth Amendment.<sup>182</sup>

Federal court opinions suggest a similar tendency for judges to examine issues that had previously been thought to raise Thirteenth Amendment concerns under the Fourteenth Amendment. Chief Justice Salmon Chase suggested the Thirteenth Amendment might protect a robust set of rights when riding circuit in *In re Turner*.<sup>183</sup> That decision struck down a Maryland law requiring masters to teach only their white indentured servants to read on the ground that the law “does not contain important provisions for the security and benefit of the apprentice which are required by the laws of Maryland in indenture of white apprentices.”<sup>184</sup> After the Fourteenth Amendment was ratified, Justices focused their attention almost entirely on the Fourteenth Amendment when similar rights claims were made. All three dissents in the *Slaughter-House Cases*, for example, focused their energy on the majority opinion’s narrow interpretation of the Fourteenth Amendment. Justice Swayne bluntly stated, “The first section of the fourteenth amendment is alone involved in the consideration of these cases.”<sup>185</sup> Justice Field’s was the only dissent that raised the possibility that the majority’s interpretation of the Thirteenth Amendment might be too narrow.<sup>186</sup> *Strauder v. West Virginia*, which declared that persons of color enjoyed a constitutional “right to exemption from unfriendly legislation against them distinctively as colored,” was decided entirely under the Fourteenth Amendment.<sup>187</sup>

Justice Harlan played the role of Charles Sumner when the Supreme Court, by an eight-to-one vote, in the *Civil Rights Cases* declared unconstitutional the Civil Rights Act of 1875. Harlan alone insisted that the Thirteenth Amendment protected a robust set of rights, including the right not to be a victim of racial discrimination.<sup>188</sup> His brethren accused

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181. Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 984–1086 (1995).

182. *Id.* at 997 (referring to Senator Sumner’s comments, discussed *supra* at note 177).

183. 24 F. Cas. 337, 339 (Chase, Circuit Justice, C.C.D. Md. 1867) (No. 14,247) (“The first clause of the thirteenth amendment to the constitution of the United States interdicts slavery and involuntary servitude, except as a punishment for crime, and establishes freedom as the constitutional right of all persons in the United States.”).

184. *Id.*

185. 83 U.S. (16 Wall.) 36, 126 (1872) (Swayne, J., dissenting); see also *id.* at 93 (Field, J., dissenting) (explaining “[t]he provisions of the fourteenth amendment, which is properly a supplement to the thirteenth, cover, in my judgment, the case before us”); *id.* at 122–24 (Bradley, J., dissenting) (analyzing Privileges and Immunities Clause of Fourteenth Amendment).

186. *Id.* at 89–91 (Field, J., dissenting) (arguing it is “clear that [the words ‘involuntary servitude’] include something more than slavery in the strict sense of the term”).

187. 100 U.S. 303, 308 (1879).

188. *The Civil Rights Cases*, 109 U.S. 3, 35 (1883) (Harlan, J., dissenting) (arguing when Congress passed Thirteenth Amendment it “undertook to remove certain burdens

those who thought that the Thirteenth Amendment protected a right against private discrimination of “running the slavery argument into the ground.”<sup>189</sup> Justice Bradley’s majority opinion emphasized the Fourteenth Amendment’s declaration, “No State shall”—words that do not appear in the Thirteenth Amendment—when denying congressional power under the Fourteenth Amendment to ban what he claimed to be private race discrimination.<sup>190</sup>

The career of Senator Lyman Trumbull, one of the most important framers of the post-Civil War Constitution, provides evidence that the diminished place of the Thirteenth Amendment in the American constitutional universe weakened the rights protected by the Constitution as a whole. Shortly after the Thirteenth Amendment was ratified, Trumbull led the fight for the Civil Rights Act of 1866 and the Freedmen’s Bureau Act. His speeches, quoted above, insisted that the constitutional ban on slavery justified a broad array of individual freedoms.<sup>191</sup> Shortly after the Fourteenth Amendment was ratified, Trumbull began to oppose Reconstruction measures on constitutional grounds. Trumbull’s speeches discussed only the proper interpretation of the Fourteenth Amendment, and he interpreted that Amendment as protecting a far narrower set of constitutional rights than he had claimed were protected by the Thirteenth Amendment in 1866. When arguing against the Enforcement Act of 1871, Trumbull asserted,

[T]he Government of the United States was formed for national and general purposes, and not for the protection of the individual in his personal rights of person and property. The rights of individuals were left, when the Constitution was formed, to the protection of the States. It was thought by the men who made the Government that personal liberty could be more safely left to the protection of the local authorities of the States than be conferred upon the General Government. . . .  
 . . . The fourteenth amendment has not extended the rights and privileges of citizenship one iota.<sup>192</sup>

When championing the Freedmen’s Bureau Act in 1866, Trumbull declared, “Those laws that . . . did not allow [the colored man] . . . to be educated, were all badges of servitude made in the interest of slavery.”<sup>193</sup>

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and disabilities, the necessary incidents of slavery, and to secure all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom”).

189. *Id.* at 24 (majority opinion).

190. *Id.* at 10–11 (explaining “[i]ndividual invasion of individual rights is not the subject matter of the [Fourteenth] amendment”).

191. See *supra* notes 99, 176 and accompanying text (recounting Senator Trumbull’s statements in various congressional debates).

192. Cong. Globe, 42d Cong., 1st Sess. 575–76 (1871) (statement of Sen. Lyman Trumbull).

193. Cong. Globe, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Lyman Trumbull).

When opposing the Civil Rights Act of 1875, Trumbull bluntly stated, “The right to go to school is not a civil right and never was.”<sup>194</sup> Trumbull became far more conservative on racial matters during the later stages of Reconstruction.<sup>195</sup> Nevertheless, given the crucial role he played in both passing legislation implementing the Thirteenth Amendment and framing the Fourteenth Amendment, his speeches before and after 1868 support claims that the Fourteenth Amendment changed the meaning of the Thirteenth Amendment. After 1868, Trumbull clearly regarded the Fourteenth Amendment as the main depository of fundamental rights and he interpreted those rights far less capaciously than he had previously interpreted the substantive rights protected by the Thirteenth Amendment.<sup>196</sup>

The Thirteenth Amendment would have certainly enjoyed a far more exalted status had Republicans reacted differently to President Andrew Johnson’s veto of the Civil Rights Act of 1866, a veto that declared that the Thirteenth Amendment did little more than free slaves.<sup>197</sup> In this constitutional universe, instead of ratifying the Fourteenth Amendment in order to provide clear foundations for early Reconstruction measures, Republicans stick to their guns on the meaning of the Thirteenth Amendment and win. They repass both the Freedman’s Bureau Act and the Civil Rights Act of 1866 over Johnson’s opposition. Faced with impeachment, President Johnson backs down and agrees to accept the Republican interpretation of the Thirteenth Amendment. Future generations look to the speeches Republicans gave during the debates over the Freedman’s Bureau Act and the Civil Rights Act of 1866 as the canonical assertions on the meaning of the Thirteenth Amendment. No one thinks the Thirteenth Amendment was passed solely for the purpose of providing constitutional support for the Civil Rights Act of 1866. In this world where the Thirteenth Amendment stands alone, the Constitution may protect more rights than the actual world in which the Thirteenth Amendment is paired with the Fourteenth Amendment.

Both the constitutional text and the historical record suggest that Americans in 1868 transferred constitutional protections for fundamental freedoms from the Thirteenth Amendment to the Fourteenth Amendment. This transfer did not necessarily transform the fundamen-

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194. Cong. Globe, 42d Cong., 2d Sess. 3189 (1872) (statement of Sen. Lyman Trumbull).

195. See Mark M. Krug, *Lyman Trumbull: Conservative Radical* 228–54 (1965) (charting Trumbull’s “gradual change from support for Johnson’s reconstruction scheme to serious doubts about its workability”); Horace White, *The Life of Lyman Trumbull* 296–300 (1913) (describing Trumbull’s conservative votes during end of Reconstruction).

196. See *supra* text accompanying note 192 (quoting Sen. Trumbull’s conception of Fourteenth Amendment).

197. See Johnson, *supra* note 113 (presenting President Johnson’s construction of Thirteenth Amendment in his veto message).

tal freedoms protected by the Constitution as a whole. The past 150 years have demonstrated that anything that could be said under the Thirteenth Amendment can and has been said under the Fourteenth Amendment. Nevertheless, something may be lost in translation. Taylor Strauder's claim to be tried by a jury in which persons of color were not excluded by law proved easier to state using the language of the Fourteenth Amendment than the language of the Thirteenth Amendment.<sup>198</sup> The petitioners in the *Civil Rights Cases* learned that their claimed right against race discrimination in places of public accommodation was far more difficult to state using the language of the Fourteenth Amendment than the language of the Thirteenth Amendment.<sup>199</sup> Their experience, and that of numerous other Americans with claims of fundamental freedoms, highlights how ratification of the Fourteenth Amendment left neither the Thirteenth Amendment nor the Constitution as a whole unchanged.

### III. CONSTITUTIONAL POLITICS AND THE THIRTEENTH AMENDMENT REVIVAL

Political scientists and historians are frequently frustrated by what law professors write, and vice versa. Political scientists and historians regularly accuse law professors of engaging in law office history, writing narratives that are more designed to persuade judges about present truths than to provide accurate information about the American past. Martin Flaherty notes how "constitutional discourse is replete with historical assertions that are at best deeply problematic and at worst, howlers."<sup>200</sup> Law professors respond by accusing political scientists and historians of, at best, irrelevance or, at worst, justifying injustice when the latter spin narratives that focus on the least attractive side of the American constitutional heritage. When Gregory Magarian criticizes *Transforming Free Speech* by asserting, "Graber never fully develops the connection he appears to want to draw between the conservative libertarian tradition and his own quite egalitarian vision of expression rights,"<sup>201</sup> he assumes the only point of "useable" history is to provide historical foundations for contemporary policy positions.<sup>202</sup> Justice Black could not understand how Leonard Levy, who believed that "the concept of seditious libel and freedom of

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198. See *Strauder v. West Virginia*, 100 U.S. 303, 310–12 (1879) (holding for Strauder on Fourteenth Amendment grounds).

199. See *supra* notes 188–190 and accompanying text (discussing Court's consideration of Thirteenth and Fourteenth Amendments in *Civil Rights Cases*).

200. Martin S. Flaherty, History "Lite" in Modern American Constitutionalism, 95 Colum. L. Rev. 523, 525 (1995).

201. Gregory P. Magarian, Book Review, 90 Mich. L. Rev. 1425, 1428 (1992).

202. See generally, Cass R. Sunstein, The Idea of a Useable Past, 95 Colum. L. Rev. 601, 603 (1995) (explaining useable past "points to the goal of finding elements in history that can be brought fruitfully to bear on current problems").



the press are incompatible,”<sup>203</sup> could nevertheless publish a book in which he claimed that the persons responsible for the First Amendment did not intend to prohibit the criminalization of seditious libel.<sup>204</sup> Black declared that *Legacy of Suppression* “is probably one of the most devastating blows that has been delivered against civil liberty in America for a long time.”<sup>205</sup>

This Essay may frustrate contemporary progressives in much the same way that Leonard Levy frustrated Hugo Black. Very good constitutional and political reasons justify constitutional decisions adopting virtually all the proposals made by the authors in this Symposium. The only reservation a progressive might have with judicial decisions promoting progressive conceptions of gender equality<sup>206</sup> or labor rights<sup>207</sup> is a mild Rosenbergian concern with judicial efficacy and backlash,<sup>208</sup> not a Bickelian concern with the countermajoritarian difficulty.<sup>209</sup> Indeed, in sharp contrast to Levy, who thought the Framers of the First Amendment had an unduly crabbed theory of free speech, good reasons exist for thinking the framers of the Thirteenth Amendment provided the foundations for quite progressive notions of racial equality and fundamental freedoms.<sup>210</sup> Each of the progressive lawyers in this Symposium has advocated a perfectly plausible interpretation of the Thirteenth Amendment. If, therefore, the policy is just and the history is plausible, surely the desire to publish a paper in the *Columbia Law Review* is hardly a sufficient motive to question the constitutional foundations for a more progressive Thirteenth Amendment.

This Essay quarrels with the constitutional politics of the Thirteenth Amendment revival, not with more progressive interpretations of that text. Americans during Reconstruction were well aware of the liberating potential of the constitutional ban on slavery. Many Republicans made such arguments during the debates over the framing of the Thirteenth

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203. Leonard W. Levy, *Emergence of a Free Press*, at xvii (1985) [hereinafter Levy, *Emergence*].

204. See Levy, *Legacy*, supra note 155, at 236–37 (1960) (discussing Framers’ intent with respect to First Amendment and seditious libel).

205. Levy, *Emergence*, supra note 203, at xviii.

206. E.g., Alexander Tsesis, *Gender Subordination*, supra note 14.

207. E.g., Zietlow, supra note 14.

208. See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 339 (2d ed. 2008) (explaining “litigation steer[s] activists to an institution that is constrained from helping them [and] also . . . siphons off crucial resources and talent, and runs the risk of weakening political efforts”).

209. See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16–17 (2d ed. 1986) (discussing concept of countermajoritarian difficulty).

210. Although I also think the history of the Thirteenth Amendment provides grist for perfectly coherent constitutional arguments for regressive interpretations of racial equality and fundamental freedoms.

Amendment,<sup>211</sup> the Civil Rights Act of 1866,<sup>212</sup> and the Freedman's Bureau Act of 1866.<sup>213</sup> Such arguments largely disappeared from both Congress and the *Supreme Court Reports* after the Fourteenth Amendment was ratified, and were replaced by somewhat narrower constructions of the privileges and immunities of American citizens, equal protection, and due process.<sup>214</sup> Theories of constitutional interpretation do not fully explain why such Republicans as Lyman Trumbull abandoned progressive interpretations of the Thirteenth Amendment as early as the late 1860s. Politics also mattered.

Political histories of Reconstruction tell a very different narrative than the conventional legal lore about trends in American support for racial equality and fundamental freedoms. The standard constitutional narratives, discussed above, tell of ever-increasing commitment to fundamental rights and the rights of former slaves or of a consistent commitment to those freedoms and rights from the framing of the Thirteenth Amendment to the ratification of the Fifteenth Amendment. Such scholars as Michael Les Benedict, Eric Foner, and Philip Klinkner and Rogers Smith, by comparison, detail a steady decline during this same time period in public support for providing robust constitutional protections to former slaves.<sup>215</sup> American support for racial equality, their histories suggest, peaked during the debates over the Civil Rights Act of 1866 and the Freedmen's Bureau Act of 1866.<sup>216</sup> In 1865 and the first

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211. See Cong. Globe, 38th Cong., 1st Sess. 1437–40 (1864) (statement of Sen. James Harlan) (explaining Thirteenth Amendment could cover suppression of freedom of speech, education, and other things); *id.* at 1479–83 (statement of Sen. Charles Sumner) (explaining Thirteenth Amendment would expand liberty for all people).

212. See Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Lyman Trumbull) (“I take it that any statute which is not equal to all, and which deprives any citizens of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited.”); *id.* at 684 (statement of Sen. Charles Sumner) (arguing abolition of Black Code appropriate to enforce abolition of slavery).

213. See Cong. Globe, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Lyman Trumbull) (explaining “[t]he [Thirteenth] amendment abolishes just as absolutely all provisions of State or local law which make a man a slave as it takes away the power of his former master to control him”).

214. See *supra* notes 84–87 and accompanying text (discussing narrowing of rights previously secured under Thirteenth Amendment after ratification of Fourteenth Amendment).

215. See Benedict, *supra* note 4, at 272–74 (describing public dissatisfaction with “unqualified suffrage” and Republican response); Foner, *supra* note 2, at 525 (noting “the erosion of the free labor ideology [that accompanied the Depression] made possible a resurgence of overt racism that undermined support for Reconstruction”); Philip A. Klinkner & Rogers M. Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America* 74 (1999) (explaining “[t]o preserve long-familiar privileges in a changing world, to oppose what were perceived as excessive transformational goals of the racial ‘radicals,’ many white Americans underwent the ‘great change’”).

216. See Klinkner & Smith, *supra* note 215, at 85 (noting, by 1874, common sentiment was that “the negro [had] got as much as he ought to have”).

months of 1866, a united Republican Party first ratified the Thirteenth Amendment and then asserted that the congressional power to enforce the constitutional ban on slavery justified national legislation providing African Americans and others with a wide array of substantive freedoms.<sup>217</sup> Republican solidarity weakened in mid-1866 during the debates over framing the Fourteenth Amendment.<sup>218</sup> Conservative Republicans consistently rejected proposals by such Radicals as Thaddeus Stevens and Charles Sumner that provided powerful guarantees of economic and political equality to African Americans.<sup>219</sup> The American commitment to racial equality further weakened during the time period when states were ratifying the Fourteenth Amendment.<sup>220</sup> Some states tried, unsuccessfully, to rescind their ratification of the Fourteenth Amendment after the elections of 1867 dramatically increased the power of Northern Democrats in state legislatures. Several prominent Republicans interpreted the election returns as mandating a retreat from their party's previous support for civil rights.<sup>221</sup> The Grant Administration and Congress during the 1870s provided support for persons of color only in short bursts.<sup>222</sup> Republicans passed laws empowering the president to protect the rights of freed slaves but rarely provided the government with the funds necessary to enforce those laws.<sup>223</sup> The Grant Administration repeatedly wavered in its commitment to implementing federal law in the South.<sup>224</sup> In 1874, Republicans lost their majority in the House of Representatives.<sup>225</sup> In 1876, Republicans retained the White House only by agreeing to remove federal troops from the South.<sup>226</sup>

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217. See Foner, *supra* note 2, at 66–76 (discussing passage of Thirteenth Amendment and debates about appropriate legislation under Amendment).

218. See *id.* at 251–61 (discussing Fourteenth Amendment debates and impact of upcoming elections on Republican support).

219. See *id.* at 240 (noting proposals like those of Sumner's "to overturn the Johnson governments and commit Congress to black suffrage fell on deaf ears").

220. See *id.* at 268–69 (noting "white public opinion . . . was very unanimous against adopting the Amendment"); see also Klinkner & Smith, *supra* note 215, at 79–80 (noting during ratification campaign for Fourteenth Amendment "[m]ore conservative Republicans feared . . . that the party was going too far").

221. See Benedict, *supra* note 4, at 272–74 (describing key Republican defeats in elections of 1867 and noting senators at time blamed the "suffrage question").

222. See Foner, *supra* note 2, at 446 (describing passage of Fifteenth Amendment); see also Klinkner & Smith, *supra* note 215, at 80–83 (providing overview of Congress during Grant's presidency).

223. See Klinkner & Smith, *supra* note 215, at 81 (noting Republicans' "enforcement acts . . . were far weaker than they appeared" and citing lack of money as reason).

224. See Foner, *supra* note 2, at 458 (noting Grant's implementation of enforcement acts to arrest those committing racially motivated violence represented "dramatic departure" and administration had previously "launched few initiatives in Southern policy").

225. See *id.* at 549–50 (explaining "[t]he 1874 Southern elections proved as disastrous for Republicans as those in the North").

226. See Klinkner & Smith, *supra* note 215, at 89 (describing withdrawal of troops from South).

The constitutional story told in Part II is consistent with this political history. The Republicans who framed and ratified the Fourteenth Amendment protected fewer rights than the Republicans who framed and ratified the Thirteenth Amendment, because Republicans by the time the Fourteenth Amendment was ratified were less committed to racial equality and national protection for fundamental freedoms than they were when the Thirteenth Amendment was ratified.<sup>227</sup> The Republicans in 1870 and afterwards who discussed the constitutional rights of persons of color preferred the Fourteenth Amendment to the Thirteenth Amendment because the former better reflected their increasing racial conservatism. Justice John Harlan's dissents demonstrate that late-nineteenth-century Americans had the interpretive tools necessary to use the Thirteenth Amendment and other constitutional provisions to protect a wide array of rights.<sup>228</sup> What they lacked was the political will or, in the case of the decreasing number of committed racial egalitarians, the political power.<sup>229</sup>

During the third quarter of the twentieth century, Americans temporarily regained the political will and, as a result, an increased number of racial egalitarians gained the political power necessary to provide greater protections for progressive conceptions of racial equality and fundamental freedoms. The Warren Court declared that separate but equal had no place in American constitutionalism<sup>230</sup> and that racial distinctions as well as racial discriminations had to satisfy a demanding strict scrutiny test.<sup>231</sup> Vinson and Warren Court majorities consistently found state action in circumstances where nineteenth-century justices

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227. See *supra* notes 215–219 and accompanying text (discussing decline in Republican solidarity on civil rights issues after 1866).

228. See *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting) (arguing that Thirteenth and Fourteenth Amendments, “if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship”); *The Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting) (expressing disappointment that “the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted”).

229. See *supra* notes 215–226 and accompanying text (discussing erosion of Republican commitment to, and power to achieve, civil rights aims after 1866).

230. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (concluding “in the field of public education, the doctrine of ‘separate but equal’ has no place”).

231. See *Loving v. Virginia*, 388 U.S. 1, 10 (1967) (explaining “[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination” in holding unconstitutional state scheme to prevent marriages between people based on race); *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (holding same and explaining “courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose—in this case, whether there is an arbitrary or invidious discrimination between those classes covered by [the] cohabitation law and those excluded”).

saw only private racial discrimination.<sup>232</sup> Congress, when passing the Civil Rights Act of 1964 and the Voting Rights Act of 1965, relied on the Commerce Clause of Article I, the Fourteenth Amendment, and the Fifteenth Amendment to expand dramatically protections to persons of color and other fundamental rights.<sup>233</sup> The Supreme Court used the Due Process Clause to incorporate almost all the provisions in the Bill of Rights<sup>234</sup> and to protect other fundamental rights that were not explicitly enumerated in those provisions.<sup>235</sup> Several Supreme Court opinions held that the Equal Protection Clause required that gender and other nonracial discriminations satisfy a heightened standard of judicial scrutiny.<sup>236</sup>

Both constitutional law and politics contributed to the process that brought the rights revolution of the 1960s to a halt. Elizabeth Bussiere details how the text of the Fourteenth Amendment and inherited judicial doctrine handicapped litigation movements aimed at having the Supreme Court declare that the Constitution protected certain positive rights.<sup>237</sup> The state action doctrine helps explain why some justices who in *Heart of Atlanta Motel, Inc. v. United States*<sup>238</sup> enthusiastically supported congressional power to ban private discrimination under the Commerce Clause recoiled in *Moose Lodge No. 107 v. Irvis*<sup>239</sup> from exercising judicial power under the Fourteenth Amendment to bar private discrimination. Perhaps a rights revolution based on the Thirteenth Amendment would

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232. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961) (concluding “fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action” prohibited by Fourteenth Amendment); *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) (finding judicial enforcement of racial covenants to be state action under Fourteenth Amendment).

233. See S. Rep. No. 89-162, at 32 (1965) (“[T]he Congress of the United States has made a clear mandate under the Fourteenth and Fifteenth amendments to the Constitution to enforce these provisions . . . .”); S. Rep. No. 88-872, at 12–14 (1964) (neglecting to discuss Fourteenth Amendment because “the instant measure is based on the commerce clause”).

234. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding “the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which . . . would come within the Sixth Amendment’s guarantee”).

235. *Roe v. Wade*, 410 U.S. 113, 164 (1973) (invalidating state criminal abortion statute as violative of Due Process Clause of Fourteenth Amendment); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (finding right of privacy in “penumbras” of Bill of Rights).

236. See *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (arguing, while strict scrutiny did not apply, “the scrutiny ‘is not a toothless one’” (quoting *Matthews v. Lucas*, 427 U.S. 495, 509 (1976))); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives”).

237. Elizabeth Bussiere, *Disentitling the Poor: The Warren Court, Welfare Rights, and the American Political Tradition* 6 (1997).

238. 379 U.S. 241 (1964).

239. 407 U.S. 163, 164 (1972). The majority opinion in *Moose Lodge* included Justices Stewart and White, who were also a part of the majority in *Heart of Atlanta Motel*.

have progressed further than a rights revolution based on the Fourteenth Amendment. Nevertheless, for every constitutional claim Thirteenth Amendment revivalists make, there is a perfectly respectable law review article or judicial opinion claiming that some provision of the Fourteenth Amendment protects the same right or gives Congress the power to protect the same right. Frank Michelman in a series of articles published in the late 1960s and early 1970s made a powerful argument for interpreting the Fourteenth Amendment as guaranteeing all persons rights to basic necessities.<sup>240</sup> Justice Douglas in *Heart of Atlanta Motel* would have largely scuttled the state action doctrine.<sup>241</sup> Justice Brennan's dissent in *Moose Lodge* provided reasons for thinking the state action requirement does not serve to substantially inhibit judicial power under the Fourteenth Amendment to bar private racial discrimination.<sup>242</sup> The rights revolution stalled in the 1970s in large part for the same reasons the rights revolution stalled in the late 1860s.<sup>243</sup> As Americans lost the will to provide greater protections for racial equality and fundamental freedoms, the declining number of advocates for more robust racial equality and fundamental freedoms lost the political power necessary to make their constitutional vision the official constitutional law of the land. Richard Nixon, Nixon's judicial appointments, and the political coalitions that brought Nixon to and maintained him in power had at least as much to do with constitutional decisions in the 1970s that limited positive rights<sup>244</sup> and racial integration<sup>245</sup> as any inherent weaknesses in the

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240. See Frank I. Michelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7, 9 (1969) (arguing Court's "'egalitarian' interventions . . . could be . . . understood as vindication of a state's duty to protect against certain hazards which are endemic in an unequal society" (emphasis omitted)); Frank I. Michelman, In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice, 121 U. Pa. L. Rev. 962, 966 (1973) (examining support in Rawlsian theory for "specific welfare guaranties in a constitution or determinations by the judiciary that some such guaranties are already present in the spacious locutions of, say, section one of the fourteenth amendment").

241. 379 U.S. at 241 (Douglas, J., concurring) (explaining under his construction of Fourteenth Amendment, right to be free of discrimination in public accommodations and that state enforcement of trespass laws would be state action).

242. See 407 U.S. at 190 (Brennan, J., dissenting) (explaining "the mere existence of efforts by the State, through legislation or otherwise, to authorize, encourage, or otherwise support racial discrimination in a particular facet of life constitutes illegal state involvement" (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 202 (1970))).

243. See Klinkner & Smith, *supra* note 215, at 294-95 (comparing shift in sentiments between 1865 and 1908 to "the pattern [of] what ha[d] happened in the United States after each of the other two periods of major racial reforms, the Revolutionary era and the modern World War II-Cold War decades").

244. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (finding education is not fundamental right); *Dandridge v. Williams*, 397 U.S. 471, 483 (1970) (holding welfare assistance is not fundamental right).

245. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 751 (1974) (finding multidistrict remedy for de jure school segregation inappropriate).

Fourteenth Amendment as a source for a progressive constitutional vision.<sup>246</sup>

### CONCLUSION

Contemporary American politics places greater obstacles in the path of a revived Thirteenth Amendment than contemporary constitutional law. The constitutional law is available. This Symposium highlights the plausible Thirteenth Amendment grounds on which constitutional decisionmakers might justify progressive conceptions of racial equality and fundamental freedoms. As the above paragraph suggests, the law reviews and judicial dissents provide plausible Fourteenth Amendment grounds for reaching similar, if not identical, progressive constitutional decisions. All that is missing is the political will necessary to staff crucial government institutions with constitutional decisionmakers interested in relying on those strands of American constitutionalism that support a more robust conception of racial equality and more progressive notions of political freedom. The United States at present seems to be in a long period of racial stagnation, in which opponents of racial hierarchies must spend far more energy preserving past gains that advanced toward a more egalitarian society. As Philip Klinkner and Rogers Smith noted in 1999, “the forces that pressed for racial equality so powerfully for so long in modern America have again receded.”<sup>247</sup> The next decade did not bring about any renaissance.<sup>248</sup>

Whether Thirteenth Amendment revivalism has the potential to end that stagnation is doubtful. Political movements do not hang on textual clauses. Abraham Lincoln and Martin Luther King rallied their supporters by invoking the broad principles in the Declaration of Independence. Lincoln in his debates with Douglas spoke of a general constitutional commitment to place slavery on “the course of ultimate extinction”<sup>249</sup> and in the Gettysburg Address promised “a new birth of freedom” to a nation “dedicated to the proposition that all men are created equal.”<sup>250</sup> Martin Luther King’s “I Have a Dream” speech reminded Americans of

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246. See generally Kevin J. McMahon, *Nixon’s Court: His Challenge to Judicial Liberalism and Its Political Consequences* 8 (2011) (arguing “the Nixon-shaped Burger Court largely adopted the general approach—if not the specific positions—[Nixon’s] administration advanced on law and order and school desegregation”).

247. Klinkner & Smith, *supra* note 215, at 5.

248. See generally Desmond S. King & Rogers M. Smith, *Still a House Divided: Race and Politics in Obama’s America* 13 (2011) (arguing “[i]n the early twenty-first century, the stark reality is that the United States remains a house divided, on race and by race”).

249. Abraham Lincoln, *Mr. Lincoln’s Reply: First Debate with Stephen A. Douglas at Ottawa, Illinois* (Aug. 21, 1858), *in* 3 *The Collected Works of Abraham Lincoln*, *supra* note 129, at 1, 18.

250. Abraham Lincoln, *Address Delivered at the Dedication of the Cemetery at Gettysburg: Final Text*, *in* 7 *The Collected Works of Abraham Lincoln*, *supra* note 129, at 23, 23.

the “promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness,” and asked Americans to “live out the true meaning of its creed—‘we hold these truths to be self-evident, that all men are created equal.’”<sup>251</sup> Neither Lincoln nor King in public or in private expressed any interest in whether one constitutional provision provided a better hook than another for movement goals.

Political consultants are far better able than constitutional lawyers to determine precisely what appeals might mobilize a revitalized progressive coalition. Although Thirteenth Amendment revivalism is unlikely to mobilize such a coalition, such a perspective on American constitutionalism might prove quite useful once that progressive coalition is empowered, even if equally plausible Fourteenth Amendment arguments exist for progressive conceptions of racial equality and fundamental freedoms. Sympathetic constitutional decisionmakers often prefer “jumping the tracks” to overruling past decisions. They declare past rulings rejecting claims that one constitutional provision protected some right left open the possibility that some other constitutional provision protected that right. Gordon Silverstein discussed this practice at some length when he asked readers “to imagine two parallel sets of train tracks, each representing a pre-existing set of lineal precedents. A lateral move might occur when a judge jumps from one track to another.”<sup>252</sup> Rather than abandon the precedents establishing the state action requirement of the Fourteenth Amendment, the constitutional decisionmakers responsible for the Civil Rights Act of 1964 relied heavily on the Commerce Clause as the vehicle for justifying congressional power to regulate private economic discrimination.<sup>253</sup> Rather than overrule the *Slaughter-House Cases*, the Supreme Court for more than 100 years used the Due Process Clause as the vehicle for incorporating various provisions of the Bill of Rights and protecting fundamental freedoms.<sup>254</sup> The Essays in this Symposium and others interpreted the constitutional ban on slavery to provide foun-

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251. Martin Luther King, Jr., *I Have a Dream*, Speech Delivered at the Lincoln Memorial (Aug. 28, 1963), in *I Have a Dream: Writings and Speeches that Changed the World* 102, 104 (James Melvin Washington ed., 1992) (quoting *The Declaration of Independence* para. 2 (U.S. 1776)).

252. Gordon Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* 68 (2009).

253. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (finding “ample power” for Congress to pass Title II under Commerce Clause and therefore “not consider[ing] the other grounds relied upon”).

254. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3030–31 (2010) (“For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of [the Fourteenth] Amendment and not under the Privileges and Immunities Clause.”); see also *Baker v. Carr*, 369 U.S. 186, 237 (1962) (ruling malapportionment presented justiciable Equal Protection claims rather than, as previous precedents had held, nonjusticiable Guarantee Clause claims).



dations for Supreme Court opinions that might similarly promote progressive causes by “jumping the tracks.” Justices favoring greater protection for gender rights or rights to basic necessities might accelerate the process necessary for realizing those goods by citing Professor Tsesis, Dean Soifer, and the other distinguished Thirteenth Amendment revivalists when writing future opinions that may assert “past cases limiting rights under the Fourteenth Amendment left open whether the Thirteenth Amendment might provide more robust protection.”

