The Thirteenth Amendment "Exception" to the State Action Doctrine: An Originalist Reappraisal

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THE THIRTEENTH AMENDMENT “EXCEPTION” TO THE STATE ACTION DOCTRINE: AN ORIGINALIST REAPPRAISAL

Ryan D. Walters

There is an overwhelming consensus that the Thirteenth Amendment represents an exception to the general rule that the U.S. Constitution does not apply to private actors – the state action doctrine. There has never been an analysis of this assertion using reasonable-observer originalism. As a result, the consensus view on the Thirteenth Amendment threatens to undermine a key feature of the Constitution – that it provides rules of conduct solely for governmental actors.

This Essay uses reasonable-observer originalism to examine the text and context of the Thirteenth Amendment. This is the first analysis that finds that the Thirteenth Amendment is not the aberration that most have claimed; it is consistent with the state action doctrine and only applies to governmental actors. However, Section 2 of the Thirteenth Amendment allows Congress to act on private individuals when a state has refused to enforce its generally-applicable laws protecting bodily integrity and freedom from restraint. Both aspects of this analysis demonstrate how the case law that has arisen from the Thirteenth Amendment are in harmony with the revised view set forth in this Essay.

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I. INTRODUCTION

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.\(^2\)

The Thirteenth Amendment became part of the U.S. Constitution in 1865. Because slavery has long ceased to be a political issue, its continued relevance is doubted today. But the current way it is construed has the potential to undercut a core concept in American constitutionalism.

It is widely understood that, as a general matter, the U.S. Constitution applies only to governmental actors; it does not provide rules of conduct for private individuals.\(^3\) This is so even where particular constitutional provisions do not explicitly state that they apply only to governmental action. For example, the Eighth Amendment’s ban on cruel and unusual punishments\(^4\) makes no mention of state action or any governmental body (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”), yet no one thinks that it applies to regulate a bailment between a business and a customer, a mobile telephone carrier’s fines for late payment by its customers, a parent punishing his child, or to a sports league’s punishment of one of its players for drug use. Similarly, the Fourth Amendment\(^5\) doesn’t specifically state that it applies only to governmental searches or seizures (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”), but no one thinks a burglar has violated the Fourth Amendment when he prowls through someone’s house at night.\(^6\)

This widely held and time-honored insight – known as the state action doctrine – has been subject to withering attacks in the legal academy.\(^7\) Many academics are adamant that certain provisions should be interpreted to apply to private individuals, sometimes even in the

\(^2\) U.S. CONST. amend. XIII § 1.
\(^3\) See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) (“the conduct of private parties lies beyond the Constitution’s scope” unless they are acting on behalf of the government); Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. CHI. L. REV. 1043, 1055 (1988) (“although the Constitution empowers and limits government, it neither limits nor empowers the People themselves.”); Cass Sunstein, On the Tension between Sex Equality and Religious Freedom, in TOWARD A HUMANIST JUSTICE: THE POLITICAL PHILOSOPHY OF SUSAN MOLLER OKIN 130 n.4 (Debra Satz & Rob Reich eds., 2009) (“Of course, the American Constitution applies only to the state and not to private institutions”); Larry D. Kramer, The Supreme Court, 2000 Term – Foreword: We the Court, 115 HARV. L. REV. 4, 52 (2001) (“[T]he constitution was fundamental law (that is, law made by the people to regulate their rulers) and so not like ordinary law at all.”); id. at 31 (“Fundamental law was . . . law adopted by the people to regulate and restrain the government, as opposed to ordinary law, which is law enacted by the government to regulate and restrain the people. . . . When it comes to ordinary law, in other words, government regulates us.”).
\(^4\) U.S. CONST. amend. VIII.
\(^5\) U.S. CONST. amend. IV.
face of explicit language limiting the provision to governmental actors; some merely seek to accomplish the same result by defining governmental enforcement of private rights as governmental action itself.\(^8\) Although never seriously examined, it is also taken for granted that a couple of outlying provisions in the Constitution apply of their own force directly to private individuals – most importantly, the Thirteenth Amendment’s ban on slavery and involuntary servitude, but also restrictions on certain conduct relating to alcohol in the Eighteenth Amendment as well as the provision that repealed it, the Twenty-first Amendment.\(^9\)

The consensus view on the applicability of the Thirteenth Amendment to private conduct is without foundation in the text or history of that amendment. This Essay determines that the original meaning of the Thirteenth Amendment happens to be largely indistinguishable from the actual judicial doctrine that has been applied since its ratification in 1865; no court has ever directly applied the Thirteenth Amendment, as opposed to a statute enforcing that amendment, directly against a private individual.

The original meaning of the Thirteenth Amendment was a prohibition on the positive legal structures that created and enforced the legal institution of slavery. This institution was defined by the creation of the master-slave relationship and thereby designated by positive law two classes of human beings: freeman and slave. Most fundamentally, the state actions creating the legal institution of slavery consisted of discriminatory legal exemptions to generally-applicable laws such as assault, battery, kidnapping and false imprisonment. This understanding of the legal status of slavery was explicitly articulated from the eighteenth century all the way through the ratification of the Thirteenth Amendment in 1865.

Section 2 of the Thirteenth Amendment also empowered Congress to enforce Section 1’s ban on slavery against states, as well as to provide remedies against private actors whom states grant, either de jure or de facto, the legal right to own slaves either through positive law or discriminatory non-enforcement of the laws against battery, kidnapping and false imprisonment. Judicial rulings regarding the applicability of the Thirteenth Amendment – as opposed to judicial dicta – are consistent with the state action doctrine.

II. INTERPRETIVE METHODOLOGY: REASONABLE-PERSON ORIGINALISM

This Essay will determine constitutional meaning by interpreting textual provisions according to their original meaning through the standard of a hypothetical, objective reasonable-person standard.\(^10\) This is often called “reasonable-person originalism” or “textualist

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\(^10\) See Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 7 (2006) (defining “reasonable-person originalism” as a mode of interpretation based on the premise “that the Constitution means what a reasonable person in 1787 would have understood it to mean after considering all relevant evidence
originalism.”

This standard seeks to ascertain “[t]he meaning the words and phrases of the Constitution would have had, in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted – and not to determine either the framers’ or ratifiers’ subjective intention.” To elaborate:

and arguments. Under this approach, original meaning represents hypothetical mental states of a legally constructed reasonable person rather than actual mental states held by concrete historical persons.”

Professor Ramsey had described the nuance of this method:

modern textualist interpretation focuses on the objective meaning of the particular words and phrases appearing in the Constitution as they would have been understood at the time and in the context of its adoption. That entails, first, starting with the precise words of the text and attempting to give them the meaning that they would have had to an ordinary eighteenth-century reader. It further means looking at the surrounding context to see how the words of the text would have been understood as part of the Constitution as a whole. Finally, it acknowledges the relevance of the statements of Framers and other political leaders, the convention and ratification debates, and the post-ratification practice – but not as ends in themselves. The goal is not to construct an ideal (or intended) system of government from the general statements or intents of individual Framers and politicians, but rather to reconstruct what the words of the text meant in the context in which they were used.

Michael D. Ramsey, Textualism and War Powers, 69 U. CHI. L. REV. 1543, 1557 (2002). Professor Prakash has also articulated the text-focused nature of originalism:

. . . the intentions of the framers, simpliciter, are irrelevant in terms of understanding the law. The first inquiry must be what counts as law. If we say that only a particular set of words is part of the law, we necessarily exclude other sets of words. We also except from the ambit of law what people who wrote the law think that they wrote when there is no statutory basis for these understandings. Intentions without a basis in the text do not matter because we have made an antecedent decision that what counts as law is the text. When the text is law, the desires, fears, and floor statements of the legislators are not.

If all this is true, why do originalists extensively quote the founding fathers? An originalist who draws conclusions from such statements is not making claims about what all the framers or ratifiers thought. Rather, she seeks to make sense of the text by surveying how its words were used in common parlance. Indeed, the framers’ or ratifiers’ comments about a particular phrase or provision are often a fairly good reflection of what that phrase or provision commonly was understood to mean. Likewise, other writings and contemporaneous dictionaries furnish clues as to meanings. But remember: what was said contemporaneously matters only insofar as it sheds light on what the text might mean. A text has everyday meanings that exist apart from the sometimes unfounded expectations of its authors. The critique of collective intentions simply does not doom the project of making the best sense of language drafted and ratified by groups.


when interpreting the Constitution, the touchstone is not the specific thoughts in the heads of any particular historical people – whether drafters, ratifiers, or commentators, however distinguished and significant within the drafting and ratification process they may have been – but rather the hypothetical understandings of a reasonable person who is artificially constructed by lawyers. The thoughts of historical figures may be relevant to the ultimate inquiry, but the ultimate inquiry is legal.13

This methodology is justified because the text of the Constitution itself indicates that it is to be construed according to an objective, hypothetical meaning rather than by the subjective intentions or understandings of actual persons:

. . . when the Constitution declares that “We the People” “ordain and establish” the Constitution, it declares that “We the People” are the legal, even if not the physical, authors of the words contained in the document. According to the Constitution, “We the People” are trying to communicate, and the intentions of “We the People” are therefore the key to that communication.

“We the People of the United States,” however, is a hypothetical legal construct. The document was not, in literal fact, written, read, debated, or ratified by “We the People,” and everyone who ever actually wrote, read, debated, or ratified the document had to know this. The document was written, read, debated, and eventually ratified by a rather small subset of any plausible grouping of “We the People.” But if the document is to be taken on its own terms, the Constitution clearly identifies in whose name it purports to speak, and that is not the historically real authors or readers of the document.14

13 Gary Lawson & Guy Seidman, Originalism as a Legal Enterprise, 23 CONST. COMMENT. 47, 48 (2006). See also Michael Stokes Paulsen, Does the Constitution Provide Rules for Its Own Interpretation?, 103 NW. U. L. Rev. 857, 858 (2009) (methodology of originalism “is to read and apply the document’s written words and phrases, taken in context, as they would have been understood by reasonably informed readers of such a document at the time they were written. The search is for the objective, original meaning of the language, as informed by concrete evidence as to how it actually was understood at the time; but it is not a search for the subjective views of individuals or their specific expectations about how a provision would apply.”).

14 Lawson & Seidman, supra note 13, at 58-59. Professor Paulsen has also made this point:

The objective-observer-reasonable-man-hypothetical-person construct is actually supported by the text of the Constitution. Consider the famous first three words of the Enacting Clause: “WE THE PEOPLE.” Who is this “We the People” guy that enacted the Constitution? It is a collective, hypothetical construct – a fictitious legal personage. Here is our reasonable, objective speaker and reader of the words of the document, from whose perspective we should view the Constitution. To the salient insight that words in legal enactments presuppose the intention of a “lawmaker” to whom the words point, it may be
It is through this technique of constructing a hypothetical reasonable person aware of all evidence and arguments that this Essay will critique the consensus view that the Thirteenth Amendment is an exception to the state action doctrine and applies directly to private actors.

III. THE CONSENSUS VIEW: THE THIRTEENTH AMENDMENT AS ABERRATION

During Reconstruction, some judicial opinions began referring to the Thirteenth Amendment as directly prohibiting not just governmental action, but private acts intertwined with slavery as well. One early source of this contention is dicta in the Civil Rights Cases, where the Court declared that “the Amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.”15 This has been assumed to stand for the proposition that “[w]hen one person enslaves another – whether or not the slavery is backed by the state – the Thirteenth Amendment’s sweeping command that slavery ‘shall [not] exist’ is violated.”16

The Court in the Civil Rights Cases made its assertion with no citations or analysis of the meaning of the word “slavery”; it was a throw-away line made to bolster its argument that the Fourteenth Amendment only applied to state action rather than private persons. Although no court or scholar has ever engaged in serious textual or historical analysis of the direct

replied that the lawmaker of the Constitution is “We the People,” not the Framers or ratifiers or anyone else. “We the People” is the political community to which the Constitution is addressed. These words – which stand for much else as well – confirm an objective, reasonable-person stance to reading the words of the text.

They also would seem to confirm a public stance toward constitutional interpretation. Whoever “We the People” is/are, these words plainly describe a public persona. The Constitution’s meaning is not secret, the private province of some clandestine order, or accessible only to an elite class of high priests who serve as stewards of the document. The Constitution’s words’ meaning are their public meaning, not any hidden meaning. They are the publicly spoken words of the people.

Paulsen, supra note 13, at 874-75.

15 The Civil Rights Cases, 109 U.S. 3, 20 (1883). Even proponents of the view that the Thirteenth Amendment applies directly to private action recognize that this assertion was not part of the holding of the Court. See George Rutherglen, State Action, Private Action, and the Thirteenth Amendment, 94 VA. L. REV. 1367, 1387-88 (2008) (“The recognition of the Amendment’s coverage of private action might be dismissed as dictum, since it was unnecessary to the Court's ultimate decision, which depended entirely on the narrow interpretation of what constitutes a badge or incident of slavery.”).

16 Akhil Reed Amar & Daniel Widawsky, Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney, 105 HARV. L. REV. 1359, 1368 (1992) (second bracketing in original); see also id. (“unlike virtually every earlier provision of the Constitution, the Thirteenth Amendment contained no state action requirement.”); Gary Lawson, The Bill of Rights as an Exclamation Point, 33 U. RICH. L. REV. 511, 513 n.8 (1999) (“The Thirteenth Amendment is, of course, the exceptional provision that speaks to private as well as governmental conduct.”); Nathan B. Oman, Specific Performance and the Thirteenth Amendment, 93 MINN. L. REV. 2020, 2023 (2009) (“Unlike most constitutional provisions, the Thirteenth Amendment contains no state action requirement. Rather, it forbids a particular set of conditions – slavery and ‘involuntary servitude’ – declaring categorically that they shall not exist within the United States, regardless of how the conditions are brought about.”).
applicability of the Thirteenth Amendment to private action, from this acorn of early dicta has grown a forest of assertions that the Thirteenth Amendment has no state action requirement.

A facial comparison with the Fourteenth Amendment, passed shortly after the Thirteenth, is often used to justify the interpretation that the Thirteenth Amendment directly reaches private conduct. After all, the Fourteenth Amendment explicitly declares that its substantive provisions apply only to state action: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any 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.”

Contrast this with the lack of an explicit “No State shall” in the Thirteenth: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” Because of this omission, many assert that the Thirteenth Amendment must apply to private action. For example, the Supreme Court in 1905 explained that the Thirteenth Amendment

denounces a status or condition, irrespective of the manner or authority by which it is created. The prohibitions of the Fourteenth and Fifteenth Amendments are largely upon the acts of the states, but the Thirteenth Amendment names no party or authority, but simply forbids slavery and involuntary servitude and grants to Congress power to enforce this prohibition by appropriate legislation. The differences between the Thirteenth and subsequent amendments have been so fully considered by this Court that it is enough to refer to the decisions.

A recent article by Professor Rutherglen describes the consensus view:

The Thirteenth Amendment speaks in terms that are universal: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” Unlike its close cousin, the Fourteenth Amendment, the Thirteenth Amendment restrains not only government actors, but also private individuals. Private forms of “involuntary servitude” violate the self-executing provisions of the Amendment, and private attempts to perpetuate the “badges and incidents of slavery” can be prohibited by Congress in legislation to enforce the

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17 See, e.g., Rutherglen, supra note 15, at 1371 (“[The Thirteenth Amendment] contains no reference to state action, unlike the Fourteenth Amendment, providing a negative inference in support of the private action interpretation.”).
18 U.S. CONST. amend. XIV, §1.
19 U.S. CONST. amend. XIII, §1.
Amendment. There is no need to prove state action to establish a violation of the Amendment or to support enforcing legislation – an accepted tenet of constitutional doctrine established in 1883 in the Civil Rights Cases and not seriously challenged since then.

Precisely because this interpretation of the Amendment has become axiomatic, it has resisted re-examination. Yet the range of private action covered by the Thirteenth Amendment remains both uncertain and controversial. Accepting the premise that the Amendment reaches private action, the question remains, “Private action with respect to what?” Under Section 1 of the Amendment, the answer is clear enough. Private action with respect to slavery is prohibited, whether accomplished with – or without – the tacit support of the state. Thus the Amendment has been interpreted to prohibit private contracts of peonage that forced an employee to continue to work for his master despite his decision to quit. 21

This Essay seeks to “seriously challenge” this “accepted tenet” and examines the Thirteenth Amendment on a clean slate, taking none of the judicial language at face value where analysis has not been by ascertaining the original meaning of the text of the provision.

IV. CRITIQUING THE CONSENSUS

Supporters of the consensus view have marshaled a variety of textual and historical arguments in favor of the interpretation that the Thirteenth Amendment represents an exception to the state action doctrine. On closer examination, however, these arguments cannot meet their burden of showing such a radical departure from the acknowledged constitutional baseline of the state action doctrine.

A. WHY THE LACK OF “NO STATE SHALL” LANGUAGE IN THE THIRTEENTH AMENDMENT DOES NOT DEMONSTRATE THAT IT APPLIES TO PRIVATE ACTORS

The “No State shall” language had earlier appeared in several provisions of the original Constitution, but its presence did not act to convert the other provisions lacking such language into rules applying to private individuals. 22 As seen with Chief Justice Marshall’s opinion in

21 Rutherglen, supra note 15, at 1367-68.
22 See, e.g., U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”); id. cl. 2 (“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controll of the Congress.”); id. cl. 3 (“No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”).
Barron v. Baltimore, the “No State shall” language instead distinguished whether the provision applied to the state governments rather than the national government.

1. WHY DID THE THIRTEENTH AMENDMENT LACK “NO STATE SHALL” LANGUAGE? LOOKING TO ANALOGOUS CONSTITUTIONAL PROVISIONS

One may ask why the Thirteenth Amendment did not include a variant of “No State shall” language – was it so that it would apply directly to private individual action? One would think that such an innovation to what was universally considered as the proper domain of a constitution would have been mentioned in the debates surrounding its adoption; it was not, and none of the proponents of such a theory have ever been able to find any contemporaneous articulation of such a belief.

The lack of “No State shall” language was likely for two reasons. First, it was essential that the Thirteenth Amendment apply not just to states but also to federal institutions. The Thirteenth Amendment was the first provision in the Constitution that limited both the federal government and the states within a single provision, creating a novel drafting requirement. By refusing to limit its applicability to state governments alone, the Thirteenth Amendment acted to nullify the then-existing portions of the U.S. Constitution supporting the legal institution of slavery, most notably the Three-Fifths Clause and the Fugitive Slave Clause.

The specific reference to banning slavery “any place subject to their jurisdiction” was a clear reference to slavery in the territories so prominent in the notorious Dred Scott case, which held that it was a violation of the federal Due Process Clause – the first use by the Supreme Court of the doctrine of “substantive due process” – for Congress to prohibit it there. Second, the legal institution of slavery created conceptual problems because it was created and enforced by the state but involved the legal relations between persons, akin to state-created legal institutions like marriage and the parent-child relationship. Later in this Essay, we will see how this affects the remedies that Congress was empowered to create to “enforce” the amendment compared to the similar power under the Fourteenth Amendment.

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24 A few provisions of the original Constitution (but no amendment prior to the Thirteenth) applied to both the federal government and the states, but always in separate provisions. See U.S. Const. art I, §9 (forbidding Congress from passing any “Bill of Attainder or ex post facto Law” and that “[n]o Title of Nobility shall be granted by the United States”); id. at §10 (“No State shall . . . pas any Bill of Attainder, ex post facto Law . . . or grant any Title of Nobility”).
26 U.S. CONST. art. IV, §2, cl. 3.
27 See DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888 at 271 (“[The Dred Scott ruling] was at least very possibly the first application of substantive due process in the Supreme Court, the original precedent for Lochner v. New York and Roe v. Wade.”); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 24 (“The first Supreme Court case to use [substantive due process] was, by the way, Dred Scott – not a desirable parentage.”).
28 See Slaughterhouse Cases, 83 U.S. 36, 68 (1873) (“In that struggle [of the Civil War], slavery, as a legalized social relation, perished.”).
29 See infra Section IX.
The Thirteenth Amendment was the provision of the Constitution to contain both a self-executing substantive prohibition on governmental action (in Section 1) and an empowerment of Congress to regulate both governmental and private conduct (in Section 2). Two examples of pre-Thirteenth Amendment Constitutional provisions that were treated in a similar manner are instructive.

a. The Commerce Clause

The Commerce Clause, which grants Congress the power to regulate “commerce among the several states,”\(^{30}\) was the subject of many cases in the Supreme Court prior to the Thirteenth Amendment. Undoubtedly, the Commerce Clause empowers Congress to regulate private individuals; indeed, the matter of controversy is whether Congress may regulate states at all under this clause.\(^{31}\)

But the Supreme Court has long declared that the Commerce Clause is also self-executing and has a legal effect even in the absence of congressional legislation (the doctrine of the “Dormant Commerce Clause”). However, even though Congress had the power to regulate private individuals under the Commerce Clause, the Supreme Court has never used the Dormant Commerce Clause to regulate private individuals; in the absence of legislation, only state laws have been nullified by Supreme Court rulings.

The Dormant Commerce Clause doctrine is based on the same text as the Commerce Clause,\(^{32}\) but the Court has always instinctively understood that it could not directly enforce a Constitutional provision against private individuals. The state action doctrine was a background understanding that needed no articulation.

b. The Fugitive Slave Clause

Similarly, the Fugitive Slave Clause was treated by the Supreme Court consistently with the state action doctrine. The Fugitive Slave Clause provided that

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.\(^{33}\)

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\(^{30}\) U.S. CONST. art. I, §8.

\(^{31}\) See National League of Cities v. Usery, 426 U.S. 833 (1976) (holding that Commerce Clause could not be used by Congress to apply the Fair Labor Standards Act to state governments, even though it could be applied to private actors) (overruled by Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)).

\(^{32}\) Indeed, there doesn’t appear to be any authority for the Supreme Court to enforce the Commerce Clause in the absence of congressional legislation against the states at all. The Commerce Clause is a “legislative power” vested in “Congress,” not the federal judiciary. See, e.g., Tyler Pipe Indus. v. Washington State Dep’t of Revenue, 483 U.S. 232, 261-263 (1987) (Scalia, J., concurring in part and dissenting in part). But that does not undercut the lesson from how the Court treated the two aspects of the Commerce Clause for purposes of on what type of actors the Court thought it could directly enforce the clause against.

\(^{33}\) U.S. CONST. art. IV, §2, cl. 3.
Congress passed legislation in 1793, the Fugitive Slave Act, to enforce the Fugitive Slave Clause. Among other things, it provided criminal penalties for private individuals interfering with a master attempting to recover his escaped slave.

As Professor Maltz explains:

While clearly establishing the proposition that free states could not emancipate fugitives by operation of law, the Fugitive Slave Clause left a number of critical questions unanswered. One of the most important of these questions was whether Congress possessed constitutional authority to enact enforcement legislation. Unlike the Full Faith and Credit Clause – also included in Article IV – the Fugitive Slave Clause does not explicitly grant Congress such authority, but instead provides only that the fugitive “shall be delivered up on Claim of the Party to whom . . . Service or Labour may be due.” Moreover, no power to enforce the Fugitive Slave Clause was included in Article I, Section 8, where the powers of Congress generally were listed.

Anti-slavery activists were correct when they asserted that Congress had no authority to enact legislation “enforcing” the Fugitive Slave Clause. Besides the obvious problem with similar prohibitory clauses containing specific clauses when Congress was intended to have power to legislate regarding them, the Necessary and Proper Clause could not be used to enforce it; that clause only empowers Congress to pass laws that “carry into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” The Fugitive Slave Clause does not vest any “power” in any federal governmental actor; it is merely a prohibition on the states.

The Fugitive Slave Clause, consistent with the notion that Constitutional prohibitions can only apply to governmental actors, also facially only prohibits state action, forbidding a “State” into which a slave has escaped from discharging the slave from service “in Consequence of any Law or Regulation therein.” “Law[s] or Regulation[s]” obviously cannot be promulgated by private individuals. So how did Congress get the authority to regulate private individuals who interfered with slave-catching? The correct answer is that Congress had no such power. But the Supreme Court nonetheless upheld the Fugitive Slave Act in a famous case in 1842.

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34 Act. of February 12, 1793, 1 Stat. 302, 305 (1793).
36 U.S. CONST. art. I, §8, cl. 18.
37 Cf. The Civil Rights Cases, 109 U.S. 3, 12 (1883) (stating that the Contracts Clause [U.S. CONST. art. I, §10: “No State shall . . . pass any . . . Law impairing the Obligation of Contracts”] gives Congress no legislative enforcement power); Employees v. Missouri Dep’t of Public Welfare, 411 U.S. 299, 319-20 n.7 (1973) (Brennan, J., dissenting) (“The Contract Clause . . . is not an enumerated power” and “it granted Congress no powers of enforcement by means of subjecting the States to suit or otherwise.”).
No federal court ever enforced the Fugitive Slave Clause – as opposed to legislation purporting to implement the clause – directly against private individuals. Such a move would have been textually ridiculous on the face of the clause.

What does the history of enforcement against private individuals under both the Commerce Clause and the Fugitive Slave Clause tell us about the understandings that federal courts had regarding the state action doctrine? Even though they never articulated it, courts acted consistently with the state action doctrine, just like courts always interpreted statutes and wrote their opinions in the English language even though they never articulated that obvious background assumption. Faced with textual provisions that were both applied directly by courts and were also read to empower Congress to legislate, courts applied the Constitution directly only to governmental actors, while only congressional legislation could reach private conduct.

The Thirteenth Amendment is in the same mold. Because anti-slavery activists had long argued that the lack of an enforcement clause prevented Congress from passing legislation to enforce the Fugitive Slave Clause, they made sure to include an enforcement clause in the Thirteenth Amendment. In the wake of Dred Scott, the Republican Party did not trust the courts

39 See Prakash, supra note 11, at 541. See also id. (“[S]ome rules are so self-evident that they need not be expressed. For instance, I need not designate a particular mode of interpretation for the benefit of readers. Nor need I declare that English should be used to understand this Review. The reader automatically knows how to read it. Construction of the law is no different.”); id. at 546 (“If Congress drafted our laws in German, we naturally would expect that judges would employ German in order to make sense of these statutes. Once a judge (or any interpreter) understood the law to be written in German, it would make a mockery of that law if the judge construed it as though it was in English or Sanskrit. Likewise, once a court knows that it is dealing with a 200-year-old document, it ought to adopt the language of 200 years ago to construe that document. To interpret the Constitution using modern English or using idiosyncratic definitions is to use the wrong language.”).

40 The past arguments of abolitionists against the power of Congress to enforce Constitutional prohibitions is why all three Reconstruction-era Constitutional Amendments had explicit language empowering Congress to enforce them:

[Prominent abolitionist and future Supreme Court Justice Salmon P.] Chase’s argument [against Congress having power to enforce the Fugitive Slave Clause due to the lack of an explicit grant of enforcement authority] shows how those abolitionists who objected to the power of Congress to enforce the Fugitive Slave Clause of Article IV were then led to deny that Congress had power to enforce the Privileges or Immunities Clause of Article IV. And this, in turn, at least partially accounts for why the Republicans in the Thirty-Ninth Congress would include the Privileges or Immunities Clause into Section One of the Fourteenth Amendment, which was then expressly made Congressionally enforceable by Section Five.


Indeed, developments in the law made the explicit addition of an enforcement clause even more imperative. In 1860, the Court seemed to back away from the logic of Prigg. Professor Prakash has pointed out that

Given Kentucky v. Dennison, 65 U.S. (24 How.) 66, 77-80 (1860) (admitting that Ohio governor had a constitutional responsibility to deliver up a fugitive who had helped a Kentucky slave escape but denying that the federal government could compel a state officer to perform this duty), overruled
of the day to enforce anti-slavery provisions; following President Lincoln, Republicans were firm believers in Departmentalism, the belief that each branch of government had the power to independently interpret the Constitution, and that no department could force its own views on another.\footnote{See Michael Stokes Paulsen, The Civil War as Constitutional Interpretation, 71 U. CHI. L. REV. 691, 692-93 (2004) (discussing Lincoln’s views).}

2. THE LACK OF “NO STATE SHALL” IN CONSTITUTIONAL CONTEXT

The context of the Constitution makes clear to which actors its injunctions apply. Does the Eight Amendment’s ban on cruel and unusual punishments – “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”\footnote{U.S. CONST. amend. VIII.} – apply to corporal punishment applied by a parent to a child? We know that it does not, even though the Eight Amendment does not specify that it is limited to governmental action.

We could also note the provision in Article I, Section 9, Clause 7 directing that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” Does this mean that a thief stealing money from the Treasury is violating the Constitution? Obviously not. But the language of these provisions is just as general as that of the Thirteenth Amendment and is similarly related temporally and spatially with provisions containing explicit “No State shall” language.

The fact that these provisions are in a document labeled a “constitution,” and not in a section of a state legal code dealing with crime or family law, is all the context needed to show that they apply only to governmental actors. The Thirteenth Amendment was adopted through Article V of the Constitution, which provides that textual provisions successfully navigating the proposal and ratification process “shall be valid to all Intents and Purposes, as Part of this Constitution.”\footnote{U.S. CONST. art. V.} And the term “constitution” meant a set of rules creating, designating, empowering and limiting governmental institutions.\footnote{See Lawson & Seidman, supra note 13, at 52-53 (“The actual authors of the Constitution viewed it as an instruction manual for a form of government. The actual readers of the Constitution during the time of its creation viewed it as an instruction manual for a form of government. And the Constitution on its face presents itself to the world as an instruction manual for a form of government.”).}

Provisions adopted through the process of Article V are to be interpreted in pari materia with the rest of the Constitution of which it is a “Part.” It is uncontroversial that constitutional
amendments are to be interpreted in harmony with the rest of the Constitution – both the original document and prior amendments. For example, when Congress passes a law under its power to enforce the provisions of the Fourteenth Amendment\(^{45}\) to criminalize conduct of state actors violating the “equal protection of the laws,”\(^{46}\) those laws must certainly abide by the older constitutional provisions; for example, Congress could not name, adjudge and sentence to death a particular sheriff for allegedly violating the Equal Protection Clause,\(^{47}\) retroactively punish certain discriminatory acts as a crime,\(^{48}\) or provide for enforcement by punishing discriminatory sheriffs through the penalty of disembowelment.\(^{49}\) The only reason this can be the case is that constitutional provisions are not to be interpreted in isolation, but as part of the entire Constitution. The textual source of this rule of construction is the portion of Article V providing that successful amendments are to be treated “to all Intents and Purposes, as Part of this Constitution.”

The word “constitution” is often used today to mean a set of rules hierarchically superior to standard governmental acts (particularly legislative acts). This modern usage does not necessarily restrict the target of the rules to governmental actors, but may include a rule directly applying to private individuals. Such rules may be included in a constitutional document because a populace may want such a rule to be immune from standard governmental procedures that could otherwise change it. We see such rules today in state constitutions and in foreign constitutions.

The word “constitution” in Anglo-American history, however, did not always denote hierarchically superior rules.\(^{50}\) When “constitution” was used to refer to the English or British Constitution, it referred to the rules, customs and statutes that applied to the actions of the King, the House of Commons and the House of Lords.\(^{51}\) But the British Constitution was not

\(^{45}\) U.S. CONST. amend. XIV, § 5 (“The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”).

\(^{46}\) U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

\(^{47}\) See U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder . . . shall be passed.”).

\(^{48}\) See U.S. CONST. art. I, § 9, cl. 3 (“No . . . ex post facto Law shall be passed.”).

\(^{49}\) See U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

\(^{50}\) See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 119 (1897) (“The ‘flexibility’ of our constitution consists in the right of the Crown and the two Houses to modify or repeal any law whatever; they can alter the succession to the Crown or repeal the Acts of Union in the same manner in which they can pass an Act enabling a company to make a new railway from Oxford to London. With us, laws therefore are called constitutional, because they refer to subjects supposed to affect the fundamental institutions of the state, and not because they are legally more sacred or difficult to change than other laws.”)

\(^{51}\) Professor Hamburger explained the understanding of a “constitution” in the run up to the Framing, which was consistent with the state action doctrine:

[There were] at least two different conceptions of a constitution. From one perspective, a constitution was the arrangement and nature of government, which was embodied in practice or in custom and law. Americans, however, had also inherited a somewhat different and relatively new understanding of a constitution, according to which a constitution consisted of express restraints on government. Although the two conceptions occasionally merged, they also could be distinct.
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hierarchically superior to Parliament – it could be altered by Parliament at will.\textsuperscript{52} A prime reason for the American Revolution was the divergence in understanding relating to whether the British Constitution should also be hierarchically superior to Parliament.\textsuperscript{53} The Americans came to believe that it was, but this was contrary to the British concept of Parliamentary sovereignty. “By 1678, the colonies regarded constitutions as written codes of government apart from legislative enactment. The hallmark for distinguishing constitutional from legislative acts was the use of a specially designated body for generating constitutional law – the convention.”\textsuperscript{54} The feature of the U.S. Constitution making it hierarchically superior to acts of the legislature was an innovation of American thought, but it was not considered a necessary feature of a constitution as a definitional matter. But, importantly for our purposes, the British and the American understandings of the subject-matter jurisdiction of the British Constitution were never a point of dispute – it was universally understood as applying solely to governmental actors.

The word “constitution” at the time of the drafting and ratification of the Constitution had a meaning that excluded rules directly regulating private individuals. Modern commentators often use the word “constitution” and related words in the sense of it being a set of rules “constituting” governmental institutions.\textsuperscript{55} However, commentators sometimes also use the term to refer to documents which include hierarchically superior rules that directly regulate private individuals.

When it first became common in Anglo-American usage, “constitution” referred to local, hierarchically inferior legal rules as opposed to the superior rules of Parliament. In the decades leading up to the Framing, “constitution” in American usage came to exclusively mean hierarchically superior rules applying solely to governmental bodies. This is the relevant time frame for determining the meaning of the language in the Constitution. Subsequent evolution of

\textsuperscript{52} The British Constitution could be understood to be superior to the King, in a sense. The British Constitution included statutes passed by Parliament. Statutes regulating and binding the King were superior to him, but this was because of the general superiority of Parliament over the King. Additionally, since Magna Carta in 1215, the nature of an “executive” like the King was that he could not interfere with private persons domestically except pursuant to statutes regulating such persons – the “law of the land” or “due process of law.”


\textsuperscript{55} See, e.g., Akhil Reed Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1432 (1987) (“The excellence of the British Constitution lay in the way in which it constituted the King-in-Parliament; by blending all three classical forms of government – monarchy, aristocracy, and democracy – the British Constitution achieved an Aristotelian ‘mean of means’ that would avert the degeneration to which each pure ‘unmixed’ form of government was vulnerable.”) (emphasis in original); Gary Lawson & Christopher D. Moore, The Executive Power of Constitutional Interpretation, 81 IOWA L. REV. 1267, 1325 (1996) (describing “the Constitution” as “a legal document that seeks to allocate governmental power”).

language in the United States is apparently the source of modern confusion on the possibility of rules directly regulating private conduct in the Constitution. Well after the Framing, state constitutions, as well as foreign constitutions, began to also include rules directly regulating private conduct. But this subsequent meaning has no relevance to the original meaning as used in Article V in the 1780s.

“The idea of a ‘constitution’ was not new in 1787 or even 1776.” 56 At the time of the drafting and ratification of Article V during 1787-1789, the word “constitution” in the legal and political context meant a set of rules “constituting” – that is, creating, designating, empowering and limiting – political (i.e., governmental) institutions. The most widely-regarded dictionary at the time of the framing was Samuel Johnson’s A Dictionary of the English Language. In the 1785 edition, Johnson’s Dictionary defined “constitution” as “established form of government; system of laws and customs.” 57 Johnson defined “to constitute” as “1. to give formal existence; to make anything what it is; to produce. 2. To erect; to establish. 3. To depute; to appoint another to an office.” The definition of “constitution” points rather clearly toward the state action doctrine on the proper subject-matter jurisdiction of a constitution. But the Framers certainly were willing to innovate the political science of the past, so it can be helpful to look to other evidence of the meaning of the word “constitution.”

“[T]he legal term constitutio had existed and survived from Roman times,” 58 where it referred to imperial decrees in civil law and to fixed law or regulations in canon law. The term “constitution” referred to written laws or regulations, as distinguished from custom, in medieval England, often in the plural form to designate a related series of regulations. With the rise of the term “statute” to refer to written laws passed by Parliament, “constitution” morphed to meaning local written regulations lower in the hierarchy. 59

By the early seventeenth century, “constitutions” began to mean rules for the operation of government:

From the seventeenth century on, the term constitutio came to designate a written document and a set of explicit legal regulations instituted by human beings in opposition both to customs or conventions and to a transcendental natural law. . . .

The term constituere, to ‘constitute’, is a combination of the prefix con- and the verb statuere. The prefix con- has numerous grammatical meanings, one of which is ‘with’ or ‘together.’ The verb statuere on the other hand, comes directly from statuo, which means to cause to stand, to set up, to construct, to put, to place, to erect. The word constituere, therefore, literally denotes the act of founding together, founding in concert, or creating jointly. For this

56 Kramer, supra note 3, at 15.
57 1 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (1785) (unpaginated). The alternative definitions are not relevant to the way “constitution” is used here, as a legal constitution of government.
59 Id.
reason, it was also used in Latin to designate in the economic vocabulary of exchange relations an agreement with another on something, an accord among a plurality of actors.60

By the middle of the seventeenth century, English law often paired “constitutions” with the word “fundamental.”61 The famous work of 1640, Henry Parker’s *The Case of Shipmoney briefly discoursed*, stated that “by the true fundamental constitutions of England, the beame hangs even between the King and the Subject.”62 In 1649, Charles I was accused of subverting the “fundamental constitutions” of England. A “constitution” was something that a government official, such as a king, could be accused of violating, but there was never a usage accusing a private individual of such a violation – it was beyond the jurisdiction of a constitution to apply to anyone outside the government.

In British North America, “constitutions” in the early colonial period referred to written rules or regulations, as it did in England, but “fundamental constitutions” was eventually used in the modern sense, as rules for government.63

The international law scholar Emmerich de Vattel – who was widely influential with the Framers of the Constitution64 – wrote in 1758 that

> The fundamental law which determines the manner in which the public authority is to be exercised is what forms the constitution of the State. In this is seen the form in which the nation acts in quality of a body politic, how and by whom the people are to be governed, — and what are the rights and duties of the governors.65

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61 Stourzh, *supra* note 58, at 43-44.
62 Id. at 44.
63 Id. at 44.
65 EMMERICH DE VATTEL, LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE: APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS LIVRE I, ch. 3, § 27 (1916). “Body Politic” was synonymous with “government,” and developed from the distinction between the king’s natural body and his conceptual corporate body. See Guy I. Seidman, *The Origins Of Accountability: Everything I Know About The Sovereign’s Immunity, I Learned From King Henry III*, 49 ST. LOUIS L.J. 393, 454 (2005) (“the king ‘has in him two bodies.’ His natural body is mortal and subject to infirmities and old age; his ‘Body politic . . . cannot be seen or handled, consisting of Policy and Government, and constituted for the Direction of the People, and the Management of the public weal.’”); id. at 456 (“The constitutional convention that was established from that time on was that of the ‘King in Parliament’: The king – if only in his seal image – together with the Lords and Commons constitute the political body of the realm. Similarly, in 1649 when Parliament succeeded in having King Charles I (k.1625-1649) convicted of treason and executed, they clearly meant to execute the king’s natural body – ‘without affecting seriously or doing irreparable harm to the King's body politic.’”).
This work was an important event in the increasing significance of the word “constitution.” Before the English translation of Vattel in 1760, most prominent works of British political theory never used the term “constitution.” “Instrument of Government” was a common seventeenth-century term in written documents which would also be called “constitutions” in the eighteenth century.

The term “government” was widely used in the sixteenth and seventeenth centuries, and its meaning would become important in understanding the meaning of the later term “constitution.” “Government” at that time meant the ruling authority, of whatever type. The English language first began using the term “constitution” around the beginning of the seventeenth century, though the older synonyms – such as “forms” or “frames” of government – still remained in use long after “constitution” came into regular use. The term was first widely used in relation to corporate bodies in the early seventeenth century and completed its evolution during the time period leading up to the American Revolution.

It was common at the time to treat nature as an analogy for theoretical concepts such as politics. The human body’s constitution – what it consisted of and the natural processes that acted as rules for how it behaved – was the origin of the concept later used to determine what the legitimately-recognized government consisted of and what rules governed its actions.

In the 1640s the frequency of the term “constitution of government” had increased appreciably, particularly when discussing the conflict between the monarchy and the House of Commons. More and more regularly, the “of government” would be dispensed with because

66 Stourzh, supra note 58, at 35.
67 Id. at 36. Vattel spoke of “constitutions” solely as rules for governments, and distinguished them from laws regulating private persons. See VATTEL, supra note 65, at ch. 3, § 29 (1916) (“The laws are regulations established by public authority, to be observed in society. All these ought to relate to the welfare of the state and of the citizens. The laws made directly with a view to the public welfare are political laws; and in this class, those that concern the body itself and the being of the society, the form of government, the manner in which the public authority is to be exerted, — those, in a word, which together form the constitution of the state, are the fundamental laws. . . The civil laws are those that regulate the rights and conduct of the citizens among themselves.”); id at § 31 (“It is then manifest that a nation has an indisputable right to form, maintain, and perfect its constitution, to regulate at pleasure every thing relating to the government, and that no person can have a just right to hinder it.”); id. at § 34 (“Here, again, a very important question presents itself. It essentially belongs to the society to make laws both in relation to the manner in which it desires to be governed, and to the conduct of the citizens: this is called the legislative power. . . . The nation may intrust the exercise of it to the prince, or to an assembly and the prince jointly; who have then a right to make new laws and to repeal old. It is asked, whether their power extends to the fundamental laws — whether they may change the constitution of a state? The principals we have laid down lead us to decide with certainty, that the authority of those legislators does not extend so far, and that they ought to consider the fundamental laws as sacred, if the nation has not, in very express terms, given them power to change them. For the constitution of the state ought to possess stability: and since that was first established by the nation, which afterwards intrusted certain persons with the legislative power, the fundamental laws are expected from their commission.”).
68 Stourzh, supra note 58, at 37.
69 Id.
70 Id. at 38.
71 Id.
72 Id. at 40-41.
“everybody knew that ‘constitution’ referred to government.”

The first time that a document of fundamental law used the word “constitution” was during the Glorious Revolution of the late seventeenth century when a resolution of the convention announcing the abdication of James II and charged him with attempting “to subvert the constitution of the kingdom.” This inaugurated the age of reference to the “British Constitution.” The British Constitution: or, the Fundamental Form of Government in Britain was published in 1727 praising the British Constitution, and in 1733 Lord Bolingbroke explained the meaning of the term “constitution”:

By constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed. . . . We call this a good government, when . . . the whole administration of public affairs is wisely pursued, and with a strict conformity to the principles and objects of the constitution.

The Thirteenth Amendment was adopted as a provision of a document labeled a “constitution” – indeed, the source of authority used to adopt it provides that textual provisions successfully navigating the amendment process “shall be valid to all Intents and Purposes, as Part of this Constitution.” This provides the necessary context for interpreting the text of the Thirteenth Amendment; when construed with the rest of the Constitution as a whole, the applicability of the state action doctrine is evident. There is thus a very heavy burden on the

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73 Id. at 42. The phrase “constitution of government” was still used during the Framing period. The 1777 constitution of Massachusetts declared itself a “mere constitution of civil government,” and that the people “do agree on, ordain, and establish the following declaration of rights, and frame of government, as the constitution of government.” (emphasis added). In his 1796 Farewell Address, George Washington observed that “[t]he basis of our political systems is the right of the people to make and to alter their constitutions of government.” George Washington, Farewell Address, (1796), reprinted in AN AMERICAN PRIMER 192, 199 (Daniel J. Boorstin ed., 1966). The resolution of the Confederation Congress in February 1787 authorized the Philadelphia convention to draft a plan “appearing to be the most probable mean of establishing in these States a firm national government” to “render the federal Constitution adequate to the exigencies of government and the preservation of the Union,” and the Annapolis meeting in September 1786 had earlier recommended the “appointment of commissioners to take into consideration the situation of the United States; to devise such further provisions as shall appear to them necessary to render the Constitution of the federal government adequate to the exigencies of the Union.” The Federalist No. 40 (emphasis added). We can see this equation of the short and long forms of the term in the drafting of the U.S. Constitution itself. On Monday, August 6, 1787, a printed copy of the draft of the Constitution, prepared by the Committee of Detail at the Convention, was delivered to each delegate. It stated that “We the people of the States . . . do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.” JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 385 (Gouverneur Morris) (emphasis added) (1984). The final version of this language became the preamble, which dropped the “for the Government” as superfluous – of course a “constitution” was for the “government.” U.S. Const. pmbl. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”).


76 U.S. CONST. art. V (emphasis added).
advocates of the consensus position to demonstrate that the language of the Thirteenth Amendment can plausibly elide the contextual limits of a document providing rules for governments, not private actors.

B. INTRATEXTUALISM: REFERENCES ELSEWHERE IN THE CONSTITUTION INDICATING THAT SLAVERY IS A GOVERNMENTAL INSTITUTION

The background understanding that rules in the Constitution apply only to government actors is still widespread today. As Professor Tribe has noted:

[T]he Fifth Amendment’s guarantee that “no person shall be . . . deprived of life, liberty, or property, without due process of law,” unlike its Fourteenth Amendment counterpart, nowhere specifies that it applies only to governmental, as opposed to entirely private action. It is the structure and history of the Bill of Rights as a whole that supplies the “state action” (or, more properly here, the federal action) requirement that the text itself often fails to express. 77

However, the textual case against the Thirteenth Amendment applying to private actors is even stronger. The Amendment prohibits “slavery” and “involuntary servitude.” We can use intratextualism78 to see where these terms are used elsewhere in the Constitution. The original Constitution did not include the words “slave” or “slavery.” But it did have provisions relating to that subject. So what words did the Constitution use as the equivalent? Look at the Fugitive Slave Clause:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.79

77 Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 HARV. L. REV. 1221, 1239 n.56 (1995) (citation omitted). See also Tribe, supra note 9, at 219 (referring to the general principle “that our Constitution’s provisions, even when they don’t say so expressly, limit only some appropriate level of government”) (footnote omitted).
78 See Akhil Amar, Intratextualism, 112 HARV. L. REV. 747 (1999). Intratextualism is a technique where “the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.” Id. at 748.
79 U.S. CONST. art. IV, §2, cl. 3. Even closer to time of the adoption of the Thirteenth Amendment, a proposed amendment intended to convince the South from seceding was endorsed by President Lincoln, passed by over two-thirds of each house of Congress, and ratified by two (possibly three) states before war broke out. Known as the Corwin Amendment, it provided that “No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.” It uses the same euphemism for slaves: “persons held to labor or service by the laws of [the] State.” See MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 20-22 (2001).
A “Person held to Service or labour in one State, under the Laws thereof” is a slave. The Fugitive Slave Clause did not require a state to turn an escaped kidnapping victim over to the kidnapper, because such a person is not held “under the Laws [of the State].” The victim in that case is held contrary to the laws of the State. A slave, however, is lawfully held in a slave state because the master-slave relationship has been exempted from the slave state’s generally applicable laws protecting persons’ bodily integrity and freedom from restraint.

We therefore have strong intratextual evidence that slavery is understood as being a state-created rule of positive law. To abolish slavery is to abolish those laws. It is widely understood that run-of-the-mill kidnapping or tortious false imprisonment does not rise to a violation of the Thirteenth Amendment. That is because those acts are in violation of the state’s laws and thus not subject to the prohibition of slavery and involuntary servitude.

V. THE ORIGINAL MEANING OF “SLAVERY”

The word “slavery” at the time of the drafting and ratification of the Thirteenth Amendment referred to a legal institution delineating the way the state would treat relations between persons deemed “master” and “slave.” This institution was created by positive law and could not exist without it. This was due to the fact that slavery required that the general tort and criminal laws against kidnapping, false imprisonment, assault and battery be exempted from applying to actions of the master toward the slave. The master-slave relationship was not necessarily about exploiting the labor of another; it was about the positive legal grant of the power to physically control and coerce the slave granted by the state to the master.

The error that proponents of the consensus view make is that they view statements of proponents of the Thirteenth Amendment and see the word “slavery” as referring to a private relationship between master and slave rather than a legal institution affirmatively created by discriminatory exemptions from state law. They therefore anachronistically see these statements as bolstering the consensus view.

Determining original public meaning is not about amassing actual subjective mental states as indicated by framers or ratifiers on one’s side; an actual mental state only indicates the “linguistic plausibility” of an interpretation. What ultimately counts for determining meaning are hypothetical mental states that take into account all of the relevant arguments, including “pointing out some feature of the document that one’s opponents have not seen, or have undervalued, or have refused to acknowledge for political or other reasons.”

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80 Free states adopted “anti-kidnapping” laws in response to slave catchers seizing fugitive slaves, or even free blacks, in their states. See, e.g., Prigg v. Pennsylvania, 41 U.S. 539 (1842).

81 See Amar & Widawsky, supra note 16, at 1369-70 (“[I]n Webster slavery is defined as ‘the state of entire subjection of one person to the will of another. . . .’ This definition rightly transcends mere economics; although forced labor for economic gain was one characteristic of slavery as practiced in the antebellum South, forced labor itself does not exhaust the meaning of slavery. Primarily, it does not capture the power relationship of the master over the slave – a system of dominance and degradation in which the master may treat the slave as a possession rather than as a person.”).


83 Id. at 91
Thus, a large number of actual mental states, evidenced by statements of framers or ratifiers, on a certain point is interesting, but insufficient; a hypothetical mental state, perhaps based on a small number of actual mental states (or not) and taking into account all of the relevant information, could just as easily be the best account of constitutional meaning.\(^84\) Professor Paulsen has explained that

Where the text, considered in context, and taking account of contemporaneous rules of grammar and style . . . does not yield a single clear meaning, consider the structure and logic of the provision in relation to other constitutional provisions, contemporaneous public sources that explicate the meaning of the provision at issue or the terms used, contemporaneous private sources that explicate the meaning of the provision at issue or the terms used, and early applications of the provision in concrete situations. Each of these sources has its limitations of reliability and pertinence, but in terms of ascertaining the original meaning of the Constitution’s language, each of these sources is at least a competent source of evidence that should be considered, and – usually – in roughly this order of priority.\(^85\)

The subjective statements of drafters or ratifiers during debates are more likely to reflect idiosyncratic understandings\(^86\) or be corrupted by the political considerations of a particular controversy.\(^87\) But they are evidence to be considered, nonetheless, because they at least demonstrate the “linguistic plausibility” of an interpretation, which may then be verified as the best meaning if structural concerns reinforce it.

There are many subjective statements by relevant actors supporting the applicability of the state-action doctrine to the Thirteenth Amendment, as well as uses of the term “slavery” that clearly reference is state-centered nature. As Representative Nathaniel Smithers, a Republican from Delaware, argued in support of the passage of the Thirteenth Amendment:

The operation of the amendment is upon the law, not upon the subject; its effect is to convert into a man that which the law declared was a chattel; but this effect only followed as the result of

\(^{84}\) *Id.* at 91-92. *See also id.* at 91 (“Imagine a complex text that a large number of actual readers (though less than the critical mass necessary to constitute an interpretive baseline) interprets to mean X. A smaller but non-zero number of actual readers interprets the same text to mean Y. No actual readers interpret the text to mean Z. Is it possible for Y or Z to be the correct original public meaning of the text? We think so, at least in the case of Y.”).\(^{85}\) Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 398-99 (2002).

\(^{86}\) Kesavan & Paulsen, *supra* note 12, at 1212.

\(^{87}\) *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002) (“Enactments of early Congresses are particularly suspect because members of Congress, even those who participated in the drafting and ratification of the Constitution, are not disinterested observers. They are political actors, responding to political as well as legal influences, who are eminently capable of making mistakes about the meaning of the Constitution. Their work product constitutes postenactment legislative history that ranks fairly low down on the hierarchy of reliable evidence concerning original meaning.”).
ousting the jurisdiction which enables the courts to take
cognizance of the claim of the master.  

Webster’s 1828 Dictionary was the authoritative English dictionary at the time of the
framing of the Thirteenth Amendment.  It defined “slavery” as

Bondage; the state of entire subjection of one person to the will of
another. Slavery is the obligation to labor for the benefit of the
master, without the contract of consent of the servant. Slavery may
proceed from crimes, from captivity or from debt. Slavery is also
voluntary or involuntary; voluntary, when a person sells or yields
his own person to the absolute command of another; involuntary,
when he is placed under the absolute power of another without his
own consent. 

Webster’s definition is consistent with the state action doctrine because “[w]ithout the
power to punish, which the state conferred upon the master, bondage could not have existed.”
In The Federalist No. 54, James Madison described slavery as a relation where the master has
power, created by the state, over the slave:

In being compelled to labor not for himself, but for a master; in
being vendible by one master to another master; and in being
subject at all times to be restrained in his liberty, and chastised in
his body, by the capricious will of another, the slave may appear to
be degraded from the human rank, and classed with those irrational
animals, which fall under the legal denomination of property.

Slavery was thus understood as a legalized power relation, involving the domination of
the master over the slave.  In 1842, Judge Turley of the Tennessee Supreme Court confirmed this
interpretation of slavery in Jacob v. State: “[T]he right to obedience and submission, in all lawful
things . . ., is perfect in the master. . . .”  Judge Ruffin of the North Carolina Supreme Court
described the master-slave relationship in similar terms: “Such obedience [of a slave to a master]
is the consequence only of uncontrolled authority over the body. . . . The power of the master
must be absolute, to render the submission of the slave perfect.”  A leading antebellum anti-
slavery tract had a similar characterization: “We have seen that ‘the legal relation’ of slave
ownership, being the relation of an owner to his property, invests him with unlimited power.”

Blackstone defined slavery as where “an absolute and unlimited power is given to the
master over the life and fortune of the slave.”  He further explained that “a slave or negro, the

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88  CONG. GLOBE, 38th Cong., 2d Sess. 217 (1865).
89  2 AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (emphasis added).
90  KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM
    SOUTH 171 (1956).
91  Jacob v. State, 3 Humph. 483, 521 (Tenn. 1842).
93  WILLIAM GOODELL, THE AMERICAN SLAVE CODE 155 (1853).
94  WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 411 (1765).
instant he lands in England, becomes a freeman; that is, the law will protect him in the enjoyment of his person, his liberty, and his property.” The difference between a slave and a freeman, then, was that a freeman is protected by law “in the enjoyment of his person, his liberty, and his property.” Slaves, however, were positively exempted from those general laws which protect one’s person, liberty, and property – exemplified by the tort and criminal laws of assault, battery, kidnapping and false imprisonment. Conversely, masters were exempted from the prohibitions created by those same laws.

Understanding that this is the key difference between a slave and a freeman clarifies why the blacks who alleged they were freemen wrongfully held as slaves filed suit for their freedom alleging a battery or similar tort:

With one exception, slaves could neither sue nor be sued in court. The one exception involved a suit for freedom. Slaves could, and did, sue for freedom. Such suits, however, always proceeded through the legal fiction that the plaintiff (slave) was already free. These suits were usually in the form of a claim for civil damages for assault, battery, or false imprisonment. The master then responded that the plaintiff was a slave. The court would then hear evidence on the defendant’s (master’s) claim. If the court ruled for the defendant master then the case was immediately dismissed; if the court ruled for the plaintiff slave, then the civil damage suit would go forward, with token damages awarded to the slave as proof of his or her freedom.

The most well-known cases involving slavery, including Dred Scott, were commenced in this manner. Courts would rule on whether the plaintiff was lawfully held by the purported master by ruling on the validity of his tort claim. If he won his suit for battery or another aspect of tort law protecting freedom from restraint or bodily integrity, the court had to have determined that he was a freeman who was protected in his person, liberty, and property; if he lost, the court

95 Id. at 412.
96 In an application for a writ of habeas corpus for a child held as a slave, the highest Massachusetts Court in 1836 also emphasized that merely applying general protective laws of bodily integrity and freedom from restraint act to free the slave:

That, as a general rule, all persons coming within the limits of a state, become subject to all its municipal laws, civil and criminal, and entitled to the privileges which those laws confer; that this rule applies as well to blacks as whites, except in the case of fugitives, to be afterwards considered; that if such persons have been slaves, they become free, not so much because any alteration is made in their status, or condition, as because there is no law which will warrant, but there are laws, if they choose to avail themselves of them, which prohibit, their forcible detention or forcible removal.

had just as obviously determined that he was a slave whom the master was legally entitled to use force against.

Somerset’s Case was a landmark case in which a master from the American colonies brought a slave to England. The slave escaped, but was recaptured and held on a ship bound for the British colony of Jamaica. A petition for a writ of habeas corpus to free Somerset was brought before the King’s Bench. The court held that while colonial laws established slavery, neither common law nor a statute by parliament recognized slavery in England. Lord Mansfield described slavery in his opinion, which was cited in debates by abolitionists up through the adoption of the Thirteenth Amendment:

The cause returned is, the slave absented himself, and departed from his master’s service, and refused to return and serve him during his stay in England; whereupon, by his master’s orders, he was put on board the ship by force, and there detained in secure custody . . . So high an act of dominion must derive its authority, if any such it has, from the law of the kingdom where executed. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and the time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law. . . . no master ever was allowed here to take a slave by force to be sold abroad because he had deserted his service, or for any other reason whatever.  

Because slavery existed only by positive law, an amendment abolishing it required only the nullification of those positive laws. Without the statutes creating and regulating slavery – which crafted exemptions from generally applicable protective laws in order to allow the master to control the slave – the master-slave relationship could not exist.

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98 Somerset v. Stewart, 98 English Reports 499, 510 (King’s Bench 1772). See also Guyora Binder, The Slavery of Emancipation, 17 CARDOZO L. REV. 2063, 2077-78 (1996) (“Anglo-American jurisprudence . . . assumed that slavery violated natural law and could only be established by positive law.”); Kaimipono David Wenger, Slavery as a Takings Clause Violation, 53 AM. U.L. REV. 191, 219-220 (2003) (“The origin of slavery in the colonies began with legislation passed mostly in the seventeenth century. The adoption of slavery was an affirmative step taken by the colonies since slavery was virtually non-existent in England. The colonies passed statutes that created slavery as an institution and allowed for the children of female slaves to be born into slave status.”); William M. Wiecek, The Origins of the Law of Slavery in British North America, 17 Cardozo L. Rev. 1711, 1715-25 (1996) (discussing the lack of slavery in English tradition); William M. Wiecek, The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America, 34 WM. & MARY QUARTERLY 258, 258 (1977) (“as an anonymous Garrisonian abolitionist maintained in a retrospective survey of the statutory law of slavery in the British American mainland colonies, the legal origins of slavery are found in ‘the provincial legislative acts, which establish and sanction the custom [of slaveholding] and stamp it with the character of law.’”) (quoting “Constitutionality of Slavery,” Massachusetts Quarterly Review, IV (1848), 463-509, esp. 472.).

99 Lord Mansfield wondered “How many actions for any slight coercion by the master” would result from a decision in favor of Somerset. Somerset, 1 Lofft at 18, 98 Eng. Rep. at 509.
Thus, the Thirteenth Amendment nullified state statutes which exempted a class of human beings from the general laws protecting bodily integrity and freedom from restraint. The text of the Thirteenth Amendment in no way contradicts this interpretation. Notably, the only exception to the prohibition on slavery in that amendment is explicitly a state action: slavery may not be imposed “except as a punishment for crime whereof the party shall have been duly convicted.”

The famous case of *Lemmon v. People* exemplifies this understanding of slavery. Here is how the court described the issue in that case:

In November, 1852, a writ of *habeas corpus* on behalf of eight colored persons, was issued by a Justice of the Superior Court in the city of New York, to inquire into the cause of their detention. The appellant showed for cause that they were slaves of his wife in Virginia, of which State before that time he and his wife had been citizens and there domiciled, and that she held them as such in New York, in transit from Virginia through New York to Texas, where they intended to establish a new domicil. The return to the writ stated substantially that the route and mode of travel was by steamer from Norfolk, in Virginia, to the port of New York, and thence by a new voyage to Texas. In execution of this plan of travel, they and their slaves had reached the city of New York, and were awaiting the opportunity of a voyage to Texas, with no mention on their part that they or the eight colored persons should remain in New York for any other time, or for any other purpose, than until opportunity should present to take passage for all to Texas. The whole question, therefore, on these facts is, whether the cause shown was a legal one. If the relation of slave owner and slave which subsisted in Virginia between Mrs. Lemmon and these colored persons while there, by force of law attend upon them while commorant within this State in the course of travel from Virginia to Texas, and New York, though a sovereign State, be compelled to sanction and maintain the condition of slavery for any purpose, and cannot effect a universal proscription and prohibition of it within her territorial limits, then is legal cause of restraint shown: otherwise not.

Justice Denio’s majority opinion makes clear the nature of slavery as a state institution created by a state’s non-application of its general protective laws to the master-slave relation:

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100 U.S. CONST. amend. XIII, §1.
101 *Lemmon v. People*, 20 N.Y. 562 (1860). For its importance at the time, see Kurt T. Lash, The Origins of the Privileges or Immunities Clause, Part I: “Privileges and Immunities” as an Antebellum Term of Art, 98 GEO. L.J. 1241, 1279 n.173 (2010) (“There was considerable fear at the time that the New York court’s decision in *Lemmon* would be appealed to the United States Supreme Court, where its reversal would constitute the ‘second Dred Scott’ decision, which Lincoln and others had warned about, in which the Supreme Court would nationalize slavery.”).
102 *Lemmon*, 20 N.Y. at 615-16.
A number of the States had very little interest in continuing the institution of slavery, and were likely soon to abolish it within their limits. When they should do so, the principle of the laws of England as to personal rights and the remedies for illegal imprisonment, would immediately prevail in such States. The judgment in Somerset’s case and the principles announced by Lord Mansfield, were standing admonitions that even a temporary restraint of personal liberty by virtue of a title derived under the laws of slavery, could not be sustained where that institution did not exist by positive law, and where the remedy by *habeas corpus*, which was a cherished institution of this country as well as in England, was established.\(^{103}\)

Justice Wright’s concurring opinion in *Lemmon* also articulated this understanding.\(^{104}\)

Representative James Wilson of Iowa, the chairman of the Judiciary Committee in the 38th Congress, described the proposed Thirteenth Amendment as an equality provision regarding protective laws:

> [T]he people of the free States should insist on ample protection to their rights, privileges, and immunities, which are none other than those which the Constitution was designed to secure to all citizens alike, and see to it that the power which caused the war shall cease to exist. . . . An equal and exact observance of the constitutional rights of each and every citizen, in each and every State, is the end to which we should cause the lessons of this war to carry us. . . . What, then, shall we do? Abolish slavery. How? By amending our national constitution.\(^{105}\)

A ban on slavery was therefore promoted as extinguishing the state’s grant to the master of “the power which caused the war” by requiring that their protective laws apply “to all citizens alike.”

In 1864, Senator Charles Sumner from Massachusetts suggested his proposal to abolish slavery be substituted for what became the Thirteenth Amendment. It made clear that slavery only existed because of the discriminatory exemptions in state law denying slaves protection from restraint and force. It read: “All persons are equal before the law, so that no person can hold another as a slave.”\(^{106}\)

\(^{103}\) Id. at 605-06.

\(^{104}\) Id. at 610 (“No person can be restrained of his liberty within this State, unless legal cause be shown for such restraint. The *habeas corpus* act operates to remove the subject from private force into the public forum: and enlargement of liberty, unless some cause in law be shown to the contrary, flows from the writ by a legal necessity. The restraint cannot be continued for any moment of time, unless the authority to maintain it have the force of law within the State.”).

\(^{105}\) 38 Cong. 1st Sess. 1202-03 (March 1864).

\(^{106}\) CONG. GLOBE, 38th Cong., 1st Sess. 1482 (1864); id. at 521; see also id. at 523.
The understanding that the institution of slavery could only be created by a government’s positive law was also reflected in Thomas Jefferson’s proposed constitution for Virginia, which phrased a ban on slavery as a limitation on legislative power: “the general assembly . . . shall not have the power to permit the continuance of slavery beyond the generation which shall be living on the thirty-first of December one thousand eight hundred.”\(^\text{107}\)

The first state constitution to abolish slavery was adopted by Vermont in 1777. It made clear that slavery was understood as the legal institution created and enforced by state law:

> Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave or apprentice, after he arrives to the age of twenty-one years; nor female, in like manner, after she arrives to the age of eighteen years, unless they are bound by their own consent, after they arrive to such age, or bound by law, for the payment of debts, damages, fines, costs, or the like.\(^\text{108}\)

The 1780 Massachusetts Constitution declared that “All men are born free and equal, and have certain natural, essential, and inalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness.”\(^\text{109}\) This was interpreted by the high court of Massachusetts as forbidding slavery in \textit{Commonwealth v. Jennison} in 1783. Massachusetts authorities had prosecuted a slaveowner for beating his slave and forcing him to return to the master’s farm. The master claimed that he was defending his property rights in the slave, who had been his property since before 1780. The prosecution believed the “slave” had become free under the 1780 Constitution, and thus the “master’s” defense failed. The court agreed.

The nature of slavery as the state’s granting of discriminatory exemptions from its general protective laws could not be clearer than in \textit{Jennison}. Under slavery, those deemed “master” were granted by the state an immunity granted no one else – the right to violate the bodily integrity of and to restrain another human being. Reciprocally, those deemed “slaves” were discriminatorily unprotected by the state’s protective laws. Once the state discrimination ceased, slavery could not exist as a legal institution.

We can see how slavery operated by comparing similar legal relationships. The state and federal governments may coerce citizens through criminal sanctions to perform civic duties,\(^\text{110}\) and may create exceptions to general laws against physical coercion (such as assault, battery, false imprisonment and kidnapping) when creating certain legal relationships among persons. For example, the state creates the parent-child legal relationship, which provides exceptions from

\(^{108}\) VT. \textsc{const.} ch. I, art. 1 (1777) (emphasis added).
\(^{109}\) MASS. \textsc{const.} of 1780, pt. I, art. I (Declaration of Rights).
those general laws against physical coercion.  

When a father tells his son that he may not leave the house after nightfall, his ability to enforce that command is granted by the state through exemptions from those laws. Slavery is a similar state-created legal relationship.

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111 Amar and Widawsky have collected evidence which supports the understanding of slavery as a state-created and defined legal relation among persons similar to marriage and the parent-child relationship:

The history of the [Thirteenth] Amendment makes clear that slavery was understood as intimately connected with issues of family servitude. Critics of slavery in the mid-nineteenth century repeatedly linked the “peculiar institution” with polygamy. For example, the Republican Platform of 1856 declared that “it is both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barbarism – Polygamy, and Slavery.”

... During the debates over the passage of the Thirteenth Amendment, various Democratic defenders of slavery analogized the relationship between master and slave to that of parent and child. As one opponent of the Amendment recognized:

“The domestic institution of slavery is one of these [social and domestic] relations, and was recognized in the States of this Confederation as a species of proprietary interest. The Constitution describes slaves, and I suppose children and apprentices might come under the same class as persons bound to service.”

In the words of another supporter of slavery:

“The parent has the right to the service of his child; he has a property in the service of that child. A husband has a right of property in the service of his wife; he has the right to the management of his household affairs. The master has a right of property in the service of his apprentice. All these rights rest upon the same basis as a man’s right of property in the service of slaves.”

Similarly, Republican Congressman Samuel Shellabarger of Ohio noted in passing the analogy between “parents” and “masters.” In 1865, Democratic Congressman James Brown of Wisconsin proposed an alternative Thirteenth Amendment, which, among other things, would have created a sweeping exception to the ban on involuntary servitude for all “relations of parent and child, master and apprentice, guardian and ward.”

Amar & Widawsky, supra note 16, at 1366-67 (citations omitted); see also Oman, supra note 16, at 2052 (noting the widespread understanding that “the prohibition of ‘involuntary servitude’ as not reaching minor apprentices, regardless of where their indenture was contracted. This final proviso was consistent with the notion that the master of a minor apprentice was a kind of in loco parentis, whose authority derived not from a contract per se but rather was analogous to the authority of a father over his own children.”). Lea VanderVelde has explained how many members of Congress understood slavery as a state-created legal institution governing relations among persons similar to the family or apprenticeships. She concludes that “no congressmen claimed the term [‘involuntary servitude’] should apply to wives or children, relationships within the family which could be considered unequal and potentially abusive,” but that there was widespread agreement that it reached beyond the mere abolition of chattel slavery in the South. Lea S. VanderVelde, The Labor Vision of the Thirteenth Amendment, 138 U. PA. L. REV. 437, 457 (1989). She also notes that apprenticeship agreements, by which a minor was bound in service to a craftsman by his or her parent, were also not regarded as prohibited by the Amendment because “in essence, the apprenticeship relations was more an extension of the father’s dominion of the family than the master’s control of the workplace.” Id. at 458.
According to an 1819 report of the abolitionist Delaware Society, “[i]n the character of citizens of the United States, as members of the federal compact, slaves cannot be held. They can be held only by citizens of some particular States, deriving their power solely from the State government.”

Similarly, famed abolitionist lawyer (and future Supreme Court justice) Salmon P. Chase argued in 1847 to the Supreme Court of the United States that slavery was contrary to “natural right,” so laws establishing slavery as a legal institution “must necessarily be local and municipal.” When a slave entered a free jurisdiction, his slave status went away, not because a positive law freed him, but “because he continues to be a man and leaves behind him the law of force.” The laws of a free state protecting bodily integrity and freedom from restraint made no exceptions for “slaves” or “masters,” so a “master” had no legal right over a “slave” in such a jurisdiction.

In 1854, Wisconsin anti-slavery activist Byron Paine referenced the application of a state’s general protective laws as nullifying slavery: “The design [of the Fugitive Slave Clause] was to prevent the State from throwing over the slave the broad and impenetrable shield of its law, to protect him from the power of his master.”

Representative Frederick A. Pike, a Republican from Maine, arguing in 1865 in favor of banning slavery in the Constitution, characterized the law of slavery in the following terms:

No statute in any State has said that hereafter slavery shall exist here; but it has done what is equivalent. It has gone into the detail of management, sale, conveyance, and descent of property in slaves. It has made a body of laws which have been dependent upon slavery as the central fact. Abolish them, and you abolish slavery. I say, then, slavery is everywhere the creature of positive law.

This understanding of the nature of slavery did not change from the late eighteenth century up through the Civil War. Supreme Court justices in the Dred Scott case discussed...
Somerset’s Case and further described the state action nature of slavery. Both the justices in the majority and the dissenters had the same understanding, indicating a broad consensus on the nature of slavery in the most divisive and well-known case of the period leading up to the adoption of the Thirteenth Amendment.

Justice Daniel’s concurring opinion explained that Somerset’s Case had held “that within the realm of England there was no authority to justify the detention of an individual in private bondage.”120 Because the general laws protecting bodily integrity and freedom from restraint were not abrogated by statute, slavery could not exist in England, and never had. Justice Daniel also noted that cases subsequent to Somerset’s Case had only held that the master could not exert his power over the slave while in a free jurisdiction and subject to its laws; once the master and slave were back in a jurisdiction with different laws, those laws could apply again.121 This showed that slavery was not some metaphysical concept, but merely the creature of positive law.

Justice Campbell’s opinion concurring in the judgment noted that “[t]he Constitution of Missouri recognises slavery as a legal condition, extends guaranties to the masters of slaves, and invites immigrants to introduce them, as property, by a promise of protection. The laws of the State charge the master with the custody of the slave, and provide for the maintenance and security of their relation.”122 This shows that slavery was a status created by state law, granting powers to masters, and governing the legal relations between two classes of persons whose status was created by the state. Campbell then described the issue in Somerset’s Case, quoting Lord Mansfield’s opinion, which reinforces this understanding:

‘Here, the person of the slave himself,’ he says, ‘is the immediate subject of inquiry, Can any dominion, authority, or coercion, be exercised in this country, according to the American laws?’ He answers: ‘The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme, and yet many of those consequences are absolutely contrary to the municipal law of England.’ . . . That there is a difference in the systems of States, which recognise and which do not recognise the institution of slavery, cannot be disguised.123

The dissenting opinions in Dred Scott, which inspired anti-slavery activists, were in full agreement on this issue. Justice Curtis noted that

. . . where the municipal law of a country not recognising slavery, it is the will of the State to refuse the master all aid to exercise any control over his slave, and if he attempt to do so, in a manner justifiable only by that relation, to prevent the exercise of that

120 Scott v. Sandford, 60 U.S. 393, 486 (Daniel, J., concurring).
121 Id. at 486-87.
122 Id. at 493-94.
123 Id. at 497-98 (Campbell, J., concurring).
control. But no law exists designed to operate directly on the relation of master and slave, and put an end to that relation.\textsuperscript{124} . . .

Slavery, being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but is inferable from the Constitution and has been explicitly declared by this court. The Constitution refers to slaves as “persons held to service in one State, under the laws thereof.”

Nothing can more clearly describe a status created by municipal law. In Prigg v. Pennsylvania, 10 Pet. 611, this court said: “The state of slavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws.”\textsuperscript{125}

Justice Curtis argued that this reliance on positive law necessarily made untenable the argument that slavery was protected in the territories, because there was no positive law regulating the master-slave relation there.

And not only must the status of slavery be created and measured by municipal law, but the rights, powers, and obligations which grow out of that status must be defined, protected, and enforced by such laws. . . .

Is it conceivable that the Constitution has conferred the right on every citizen to become a resident on the territory of the United States with his slaves, and there to hold them as such, but has neither made nor provided for any municipal regulations which are essential to the existence of slavery?

Is it not more rational to conclude that they who framed and adopted the constitution were aware that persons held to service under the laws of a State are property only to the extent and under the conditions fixed by those laws that they must cease to be available as property, when their owners voluntarily place them permanently within another jurisdiction, where no municipal laws on the subject of slavery exist, and that, being aware of these principles, and having said nothing to interfere with or displace them, or to compel Congress to legislate in any particular manner on the subject, and having empowered Congress to make all needful rules and regulations respecting the territory of the United States, it was their intention to leave to the discretion of Congress . . .

\textsuperscript{124} Id. at 591 (Curtis, J., dissenting).

\textsuperscript{125} Id. at 624 (Curtis, J., dissenting).
what regulations, if any, should be made concerning slavery therein? 126

The other dissenter in Dred Scott also articulated the necessary relationship between slavery and positive law. Justice McLean first noted that the facts of the case illustrated that the crux of the dispute was whether the parties had been exempted from general laws protecting bodily integrity and freedom from restraint: “An action of trespass was brought, which charges the defendant with an assault and imprisonment of the plaintiff, and also of Harriet Scott, his wife, Eliza and Lizzie, his two children, on the ground that they were his slaves, which was without right on his part, and against law.”127 McLean then described the positive law nature of slavery:

The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognised in Somersett’s Case, Lafft’s Rep. 1, 20 Howell’s State Trials, 79, which was decided before the American Revolution.

There was some contrariety of opinion among the judges on certain points ruled in Prigg’s Case, but there was none in regard to the great principle that slavery is limited to the range of the laws under which it is sanctioned.

No case in England appears to have been more thoroughly examined than that of Somersett. The judgment pronounced by Lord Mansfield was the judgment of the Court of King’s Bench.

. . . The Case of the Slave Grace, decided by Lord Stowell in 1827, does not, as has been supposed, overrule the judgment of Lord Mansfield. Lord Stowell held that, during the residence of the slave in England, “No dominion, authority, or coercion, can be exercised over him.”

There is no slave State where the institution is not recognised and protected by statutory enactments and judicial decisions. . . . 128

The opinions in Dred Scott show that the understanding of slavery as a legal institution created and maintained by positive state laws was a background understanding by both supporters and opponents of the Court’s ruling.

Far from contradicting the applicability of the state action doctrine to the Thirteenth Amendment, the historical evidence demonstrates frequent use of the state-centered

126 Id. at 625 (Curtis, J., dissenting).
127 Id. at 529 (McLean, J., dissenting).
128 Id. at 534-35 (McLean, J., dissenting).
understanding of the term “slavery,” and therefore points toward its harmony with the abolition of slavery.

VI. THE ORIGINAL MEANING OF “INVOLUNTARY SERVITUDE”

Besides prohibiting slavery, Section 1 also prohibits “involuntary servitude.” How are these legal statuses different? Slavery and involuntary servitude were both state-enforced legal institutions that relied on exemptions from laws protecting bodily integrity and freedom from restraint; the same analysis for slavery described above applies no differently to involuntary servitude.

However, they differed in two ways. First, slavery was a lifetime condition, whereas servitude lasted for a term of years.\textsuperscript{129} Second, under servitude, the state only enforced the relation between the master and the servant, whereas in slavery the state also enforced rules for how other members of the public interacted with slaves and had a separate criminal code to govern the behavior of slaves.\textsuperscript{130}

\textsuperscript{129} See Wiecek, supra note 98, at 262 (“the statutes [of the colonies at the time of the Revolution] defined slavery as a lifetime condition, distinguishing it from servitude and other forms of unfree status, which lasted only for a term of years.”). The Ohio Supreme Court in 1856 also distinguished the two terms in this way:

\begin{quote}
The prohibition [in the Ohio constitution] is against slavery and involuntary servitude as a state and condition of man in Ohio. The slavery prohibited consists in the right of one person to hold another person and his posterity in perpetual bondage to labor in Ohio, without compensation, save the reciprocal obligation of the master to support his slave. And the involuntary servitude inhibited is the same thing, with the exception, that the bondage may not be for the entire life of the servant, nor involve his posterity.
\end{quote}

Anderson v. Poindexter, 6 Ohio St. 622, 690-91 (1856) (emphasis omitted) (internal quotation marks omitted).

\textsuperscript{130} Professor Wenger has explained this distinction:

Indentured servants obligated themselves to serve a particular master for a specific length of time. The master’s rights, defined and controlled by the indenture and enforceable only by the master, were in personam. While slavery granted some in personam rights to slave owners, unlike indenture, it had a significant in rem component. Specifically, slavery created numerous in rem rules – rights that the community possessed against slaves. Depending on the jurisdiction, slaves were subject to legal prohibitions on owning property, making contracts, inheriting property, marrying, voting, or obtaining an education. Such restrictions were in rem because they could be enforced by the community, and not just by specific individual rightholders.

Peonage is similarly distinct from slavery. As one commentator notes, peonage “approximated slavery in substance, if not in legal form.” Peons, like indentured servants (and unlike slaves) were subject to specific contractual obligations to a certain employer, who was defined through a relationship of debt. The rights granted were in personam with respect to that employer, not in rem rights enforceable by other members of the community.

Wenger, supra note 98, at 212.
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Professor Oman found that the term “involuntary servitude” had a well-developed meaning at the time of the adoption of the Thirteenth Amendment.131 Professor Oman also claims that “in every instance in which the [Supreme] Court has actually found ‘involuntary servitude,’” the same four factors were present.132

The majority opinion in the modern case of United States v. Kozminski began with the rote assertion that the Thirteenth Amendment “extends beyond state action,” explaining what is prohibited by the Amendment:

[O]ur precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion. . . . [The amendment encompasses servitudes enforced] by the use of threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.133

This is consistent with the interpretation of the Thirteenth Amendment advanced in this Essay. The references to legal coercion and legal process clearly require an affirmative act by the state to enforce the master-slave relationship, and the references to physical coercion, physical restraint and physical injury refer to a discriminatory exemption or non-enforcement of the general tort and criminal laws protecting those interests. If a person holds someone against his will, it violates every state’s general laws against false imprisonment. If the state does not enforce those laws, it is violating the Thirteenth Amendment.

The Kozminski Court noted that, by 1948, “all of the Court’s decisions identifying conditions of involuntary servitude had involved compulsion of services through the use or threatened use of physical or legal coercion.” 134 The Court further discussed the original Slave Trade statute passed in 1818,135 noting that it “nothing in the history of the Slave Trade statute

131 Oman, supra note 16, at 2024; see also id. at 2038-72 (examining historical usage of the term).
132 Id. at 2072-91. The “four factors” mentioned are:

First, did the promisor enter the contract while in a state of “perfect freedom,” or did the promisee have some overarching power over the promisor? Second, was the promisee compensated for her services with a “bona fide consideration,” or did the relationship constitute “unrequited toil?” Third, were there temporal limits on the contract? Agreements extending over extremely long periods of time were suspect while more limited engagements were not. Finally, did the promisee – the master – physically dominate and degrade the promisee – the servant – with abuse and claim a right to personally capture her and return her to service if she tried to quit?

134 Id. at 945.
135 Act of Apr. 20, 1818, ch. 91, § 6, 3 Stat. 452 (authorizing punishment of persons who “hold, sell, or otherwise dispose of any . . . negro, mulatto, or person of colour, so brought [into the United States] as a slave, or to be held to service or labour.”).
suggests that it was intended to extend to conditions of servitude beyond those applied to slaves, *i.e.*, physical or legal coercion.”

The Court then explained that

> [a]bsent change by Congress, we hold that, for purposes of criminal prosecution under § 241 or § 1584, the term “involuntary servitude” necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process. This definition encompasses those cases in which the defendant holds the victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion.

Similarly, in *United States v. Reynolds*, the Court held that “[c]ompulsion of . . . service by the constant fear of imprisonment under the criminal laws” violated “rights intended to be secured by the Thirteenth Amendment.” In that case, the Court struck down a criminal surety system under which a person fined for a misdemeanor offense could contract to work for a surety who would, in turn, pay the convict’s fine to the state. The critical feature of the system was that the breach of the labor contract by the convict was a crime. The convict was thus forced to work by threat of criminal sanction by the state.

The Court has also invalidated state laws subjecting debtors to prosecution and criminal punishment for failing to perform labor after receiving an advance payment. The laws at issue in these cases made failure to perform services for which money had been obtained prima facie evidence of intent to defraud. The Court reasoned that “the State could not avail itself of the sanction of the criminal law to supply the compulsion [to enforce labor] any more than [the State] could *use or authorize the use of physical force.*”

In *Bailey v. Alabama*, the Court examined an Alabama statute that created a presumption of fraud whenever a laborer quit work while indebted to his employer, providing criminal penalties. The Court held that “involuntary servitude” existed whenever there was “compulsory service.”

In 1821, the Indiana Supreme Court decided the case of *In re Mary Clark*. In 1816, Clark “voluntarily bound herself to serve” a man named Johnson for twenty years. She later applied for a writ of habeas corpus, requesting that her service be abrogated. “[A] covenant for service,” wrote the court, “might, as in the case before us, require a number of years. Such a performance, if enforced by law, would produce a state of servitude as degrading and

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136 Kozinski, 487 U.S. at 946-47.  
139 *Bailey*, 219 U.S. at 244 (emphasis added).  
140 *Id.*
demoralizing in its consequences, as a state of absolute slavery . . . ”141 Furthermore, the court noted that Johnson was not actually asking for a court order forcing Clark to serve under the indenture agreement. Rather, having no way of obtaining such an order, Johnson was personally forcing Clark to work under the contract. The court wrote:

Deplorable indeed would be the state of society, if the obligee in every contract had a right to seize the person of the obligor, and force him to comply with his undertaking. . . . We may, therefore, unhesitatingly conclude, that when the law will not directly coerce a specific performance, it will not leave a party to exercise the law of the strong, and coerce it in his own behalf. A state of servitude thus produced, either by direct or permissive coercion, would not be considered voluntary either in fact or in law.

The court distinguished Clark’s relationship with Johnson from that of an ordinary worker with her employer by the fact that Johnson claimed the right to personally force Clark to perform, without any state intervention:

If a man, contracting to labor for another a day, a month, a year, or a series of years, were liable to be taken by his adversary, and compelled to perform the labor, it would either put a stop to all such contracts, or produce in their performance a state of domination in the one party, and abject humiliation in the other.142

This is consistent with the understanding that a ban on slavery and involuntary servitude requires that a state’s laws protecting bodily integrity and freedom from restraint must be applied equally. The master could not be exempted from the laws against battery, for example. As Professor Oman explains the ruling:

In such a case it was apparently not the fact that a worker was compelled to work under the contract that produced “involuntary servitude.” Rather, it was that the master had a personal right to physically dominate the servant. In re Clark, however, looks not simply at the length of the relationship, but also the extent to which it involves one party’s exercise of complete dominion over the other party. In the case of Clark, the master’s claimed right to physically prevent her departure and personally force her to work was sufficient evidence of such domination.143

In 1814, a slave named Phoebe was taken to Illinois by her master, Joseph Jay, where she signed an indenture to serve him for forty years. Over a decade later, after ratification of the state constitution, she brought “an action of trespass, assault, battery, wounding, and false imprisonment” against Jay, arguing that the enforcement of her indenture agreement constituted

141 In re Clark, 1 Blackf. 122 (Ind. 1821).
142 Id. at 125.
143 Oman, supra note 16, at 2044.
forbidden “involuntary servitude” under the Illinois constitution. Jay admitted to “a little force and beating” of Phoebe. The court held that this did constitute involuntary servitude, but that it was legal under a clause grandfathering indentures pre-dating the Illinois constitution.\footnote{Phoebe v. Jay, 1 Ill. (Breese) 268, 268 (1828).}

Professor Oman has noted that “the jurisprudence in Ohio, Indiana, and Illinois shows a fairly unified approach to the question of ‘involuntary servitude,’” including that they always “involved complete domination by the master of the servant, including the right to use violence to coerce the servant.”\footnote{Oman, \textit{supra} note 16, at 2048. They all also involved contracts for labor “not entered into ‘in a state of perfect freedom,’ . . . lack[ing] compensation or ‘bona fide consideration,’ [and] extend[ing] over a long period of time that exceeded at least a year but could be less than the entire life of the servant.” \textit{Id.} All of these factors are best understood as evidence of the involuntary nature of the agreement, and thus normally covered by a state’s general protective laws. The fact that the state did not act against it shows discriminatory exemptions from its general laws.}

\section*{VII. THE MISUNDERSTOOD CASE OF \textit{IN RE TURNER}}

One case frequently cited for the proposition that the Thirteenth Amendment applies to private conduct of its own force involved the enforcement of a contract of personal service in the 1867 circuit case of \textit{In re Turner};\footnote{\textit{In re Turner}, 24 F. Cas. 337 (1867). Professor Rutherglen makes a typical statement that \textit{In Re Turner} directly applied the Thirteenth Amendment to private conduct: \textit{The consensus regarding the Thirteenth Amendment’s coverage of private action stretches back to cases decided immediately after its ratification and forward to cases decided in the modern civil rights era. Much of this litigation, early and late, arose under the Civil Rights Act of 1866, the first statute passed by Congress to enforce the Thirteenth Amendment. The earliest such case applying the Amendment to a private defendant was In re Turner, a habeas corpus action brought by a former slave indentured to her former master. Chief Justice Chase, sitting on circuit, held that the contract violated the Thirteenth Amendment as a form of involuntary servitude. The contract also denied the former slave the “full and equal benefit of all laws and proceedings” guaranteed by the 1866 Act.}} it does no such thing, however. Rather, it struck down a state apprenticeship law under the Thirteenth Amendment, which had been a defense under the state’s general laws protecting bodily integrity and freedom from restraint.

The case arose out of an indenture agreement between a young girl who had been a slave, Elizabeth Turner, her mother, and their former master, Philemon T. Hambleton. In 1864, Maryland had adopted a new constitution that outlawed slavery. It also adopted an apprenticeship act that outlawed slavery. It also adopted an apprenticeship act that had differing rules for black and white apprentices.

Professor Oman sums up the relevant facts from the case:

Turner sued for a writ of habeas corpus in federal court, claiming that her detention under the contract constituted “involuntary
servitude.” In an extremely terse decision, Chief Justice Chase, sitting as a circuit justice, held that the indenture agreement constituted “involuntary servitude” under the Amendment and that Maryland’s differing rules for African-American and white apprentices violated the newly passed Civil Rights Act. The court ordered Turner released, and Hambleton did not appeal. The opinion contains no arguments for its conclusions. The factual recitation, however, focuses on all of the elements considered by antebellum courts in the Northwest, a body of law with which Chief Justice Chase, a long-time anti-slavery lawyer from Ohio, was no doubt familiar. . . . while the record does not contain any explicit mention of direct physical coercion by Hambleton, Turner’s action was styled as a petition for a writ of habeas corpus directed at Hambleton, which implied his ability to control Turner’s movements, and in his reply he all but admitted direct coercion of her person, stating “I herewith produce the body of Elizabeth Turner showing the cause of her capture and detention.”

_In re Turner_ is thus consistent with the state action doctrine; the Thirteenth Amendment was used only to nullify the state apprenticeship law, and without that law, Hambleton had no argument that he was lawfully holding Turner against her will. The general Maryland tort laws thus applied, and Chase used his power under the Habeas Corpus Act of 1867 in the same way Lord Mansfield had used such a writ to free James Somerset in 1772.

**VIII. THE RELATIONSHIP AMONG THE THIRTEENTH AND FOURTEENTH AMENDMENTS AND THE CIVIL RIGHTS ACT OF 1866**

One must understand the highly symbiotic relationship among three provisions coming out of the 38th and 39th Congresses from 1865 through 1868 – the Thirteenth Amendment, the Civil Rights Act of 1866, and the Fourteenth Amendment. The reactions by the former states of the Confederacy to evade the first provision led to passage of the latter two to further rein them in.

The Thirteenth Amendment was passed by the Senate on April 8, 1864, by the House on January 31, 1865, and adopted by the requisite number of state legislatures on December 6, 1865. As described above, it is properly understood as an anti-discrimination provision, forbidding states from creating classes of master and slave, de jure or de facto, by either facially exempting a group of persons from the strictures of its general tort and criminal laws protecting bodily integrity and freedom from restraint (and conversely, exempting a separate group from the protections of those same laws in relation to the favored group), or by failing to enforce a facially neutral protective law. It does not specify the content of any state’s protective laws, or require

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147 Oman, *supra* note 16, at 2075-76.
that a state have any such laws at all, but only requires the prevention of a caste-based discriminatory system of exemptions from any such laws.

In reaction to the Thirteenth Amendment, the states of the former Confederacy passed Black Codes, which limited the rights of freed slaves. The Black Codes replaced the now-nullified Slave Codes which had granted the master power over the slave, provided a separate criminal code to govern slaves, and had regulated the working conditions and care of slaves as well as the public restrictions how persons outside the master-slave relationship interacted with slaves.

In response to these attempts by the former slave states to work around the strictures of the Thirteenth Amendment, Senator Lyman Trumbull introduced a bill on January 5, 1866, which was later to be known as the Civil Rights Act of 1866. The initial draft of the bill provided that:

[A]ll persons of African descent born in the United States are hereby declared to be citizens of the United States, and there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.\footnote{149 CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).}

Senator Trumbull articulated the purpose of the bill as to use Congress’s power to enforce the Thirteenth Amendment to nullify discriminatory state laws like the Black Codes:

Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very
restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the constitutional amendment.150

The main sponsor of the bill in the House, Rep. James Wilson, articulated the same purpose: “It will be observed that the entire structure of this bill rests on the discrimination relative to civil rights and immunities made by the States on ‘account of race, color, or previous condition of slavery.”151 “The claim that Congress had such power provoked heated controversy. The Civil Rights Bill, whatever its primary object may have been, was not limited to protecting freed slaves and was not even limited to the states in which slavery had formerly existed.”152 Furthermore, claiming the Thirteenth Amendment’s abolition of slavery made all blacks citizens or authorized Congress to make them so, was doubtful; Dred Scott had ruled that even free blacks who had never been slaves could not be U.S. citizens. In addition, Section 1’s ban on slavery required states to apply their general laws protecting bodily integrity and freedom from restraint evenly, but this general notion had always applied even to aliens (that is, foreigners within the United States are protected from battery, kidnapping, murder, etc.), so citizenship was not the issue. Furthermore, many states which had never had slavery also had restricted free blacks’ right to contract and own property, among other things.153

This created grave doubts as to whether the Thirteenth Amendment gave Congress the authority to pass the bill. Even strong anti-slavery members of Congress who supported the goals of the bill strongly doubted the power of Congress to pass it.154 An earlier proposal by Senator Henry Wilson had been limited to the former slave states of the Confederacy.155

Despite the serious doubts by President Johnson and numerous members of Congress, Congress passed the bill into law as the Civil Rights Act of 1866 by overriding President Johnson’s veto. The version passed into law provided that

150 Id.
151 Id. at 1118.
154 See Harrison, supra note 152, at 1404 (“One Republican who shared the doubts about the adequacy of Congress’ constitutional power was Representative John Bingham of Ohio, a member of the Joint Committee and the principal drafter of Section 1 of the Fourteenth Amendment. Bingham, a firm abolitionist, favored the policy of the Civil Rights Bill but thought that Congress lacked the power to enact it. These doubts may have been shared by President Johnson, who said that he vetoed the bill on the grounds that it exceeded Congress’ power.”); id. at 1403 n.58 (“Columbus Delano, a Republican Representative from Ohio, said that the bill declared ‘in effect that Congress has authority to go into the States and manage and legislate with regard to all the personal rights of the citizen – rights of life, liberty, and property. You render this Government no longer a Government of limited powers . . . .’”) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 39, 158 app (1865)).
155 Wilson’s proposal would have nullified all “laws, statutes, acts, ordinances, rules, and regulations” in those states that provided for “inequality of civil rights and immunities” on the basis of race, color, descent, or previous condition of slavery. CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865). Toward the end of the debate on Senator Wilson’s proposal, Trumbull explained that he would propose similar legislation as soon as the Thirteenth Amendment was ratified. Id. at 43.
All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding. 156

The continuing doubts about Congress’s power under the Thirteenth Amendment 157 to enact the Civil Rights Act led to the drafting of an additional proposed amendment to the

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156 Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27. Professor Harrison has explained how the final version enacted into law differed from the earlier proposal:

The Act as finally adopted differed from Senator Trumbull’s initial proposal in two important respects. It protected only citizens, not inhabitants, and it did not open with a general ban on discrimination in civil rights or immunities. The first change probably responded to the concern that otherwise the bill would extend all the rights of citizens to aliens, and in particular that it would permit aliens to hold real property on the same terms as citizens. See CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866) (Sen. Johnson). The second responded to concerns over the general phrase “civil rights and immunities,” particularly the fear that it would be found to include the right to vote -- something the Republicans hesitated to do. When he discussed the phrase’s deletion shortly before the House voted on the bill, Representative James Wilson of Iowa, chairman of the House Judiciary Committee, explained that he did not think the change made a difference, but that it was done to accommodate those who feared that “it might be held by the courts that the right of suffrage was included” in the general phrase. Id. at 1366-67. The rest of the Act consists of enforcement provisions that are extremely important for a complete understanding of the Act itself, but do not affect most questions regarding § 1.

Harrison, supra note 152, at 1405 n.64.

157 Sen. Trumbull was a rare example of a member of Congress who took the Constitution’s limitations on his power seriously, even where it limited his preferred policy outcomes. Before the decision to abolish slavery through Constitutional amendment, some wanted to ban slavery by statute. Sen. Trumbull would have none of it:

Some . . . say that we may pass an act of Congress to abolish slavery altogether . . . I am as anxious to get rid of slavery as any person, but has Congress authority to abolish slavery everywhere? . . . It is a convenience [for prosecution of the war] some will say. Sir, it is not because a measure would be convenient that Congress has authority to adopt it. The measure must be appropriate or needful to carry into effect some granted power, or we have no authority to adopt it.
Constitution that had two purposes: to authorize, without doubt, Congress’s authority to pass the Civil Rights Act of 1866, and further, to prevent its repeal by a future Congress by embedding its terms into the Constitution itself. This proposal became the Fourteenth Amendment.\footnote{CONG. GLOBE, 38th Cong., 1st Sess., 1314 (1864). Congress did have authority under the Commerce Clause to ban the importation of foreign slaves (which Congress did overwhelmingly in 1808) or exportation of slaves to other countries and ban interstate slave trade through the Commerce Clause, and the Territories Clause is properly understood (despite \textit{Dred Scott}) to enable Congress to ban slavery in the territories (a similar clause in Article I, Section 8 empowers Congress to ban slavery in the District of Columbia). But none of these powers can affect slavery within a state. Lincoln did use his executive power to wage war to free the slaves in enemy territory through the Emancipation Proclamation, but this is incident to the warmaking power’s ability to confiscate enemy resources that may be used to further their war effort – no different than seizing a cache of weapons, bombing factories, burning crops, or detaining enemy soldiers until the end of hostilities. \textit{See} Michael Stokes Paulsen, \textit{The Emancipation Proclamation and the Commander in Chief Power}, 40 GA. L. REV. 807 (2006).}

Section 1 of the Fourteenth Amendment was the provision that effectively embedded the Civil Rights Act of 1866 into the Constitution. It provided that

\begin{quote}
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any 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.\footnote{An earlier draft of the soon-to-be Fourteenth Amendment by Rep. Bingham read “The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.” \textit{See} CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866). Bingham explained this his proposal would go beyond the limitation of the Thirteenth Amendment to slavery, and apply even in states where slavery had never existed:}
\end{quote}

In response to [Rep.] Hale’s claim that the amendment would operate only in the seceding states, Bingham said that it would apply to other states “that have in their constitutions and laws to-day provisions in direct violation of every principle of our Constitution.” CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866). When Bingham said that, Representative Rogers interjected, asking “I suppose the gentlemen refers to the State of Indiana?” \textit{Id.} Bingham replied, “I do not know; it may be so. It applies unquestionably to the State of Oregon.” \textit{Id.} Bingham was referring to race discrimination. Rogers mentioned Indiana because the previous day he had pointed out that the amendment would nullify Indiana’s ban on immigration and property ownership by blacks. \textit{Id.} at 134 app. Bingham in 1859 had opposed the admission of Oregon, whose proposed constitution forbade immigration by blacks. CONG. GLOBE, 35th Cong., 2d Sess. 982-85 (1859). In his second speech on the proposed amendment Bingham again alluded to that debate, saying that the Constitution had been disregarded in Oregon and the insurrectionary states. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866). His objections to Oregon’s admission in 1859 were based on Article IV. CONG. GLOBE, 35th Cong., 2d Sess. 982-85 (1859).}

\footnote{Harrison, \textit{supra} note 152, at 1406 n.70.}
Specifically, the Privileges or Immunities Clause – “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” – acted to incorporate the Civil Rights Act of 1866 into the Constitution. “Privileges or Immunities” referred to common law rights to make contracts, own property as had been delineated in the Civil Rights Act: “the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property.”

The Privileges or Immunities Clause is an anti-discrimination provision, not a substantive one. That is, it does not require any state to have any particular law regarding contracts, property ownership, etc. It merely requires that any such rights the state provides not be abridged for any group of citizens compared to another. It was, not coincidentally, worded like the Comity Clause of Article IV of the original Constitution, which was an anti-discrimination provision requiring that a state grant citizens of another state the same privileges and immunities granted its own citizens. The Fourteenth Amendment shifted the scope of the anti-discrimination norm to apply within a state to its own citizens.

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160 See Michael W. McConnell, Originalism and the Desegregation Decisions, 81 VA. L. REV. 947, 1027 (1995) (“It is useful to begin with the areas of agreement and move toward the areas of controversy. At a minimum, we may be confident that the category of civil rights comprised the rights protected by the Civil Rights Act of 1866: the rights to make and enforce contracts; to buy, lease, inherit, hold and convey property; to sue and be sued and to give evidence in court; to legal protections for the security of person and property; and to equal treatment under the criminal law. These were roughly the same rights that were protected under the Privileges and Immunities Clause of Article IV, which applied to citizens of other states.”).

161 Harrison, supra note 152, at 1398 (“Two features of the [Comity] Clause as usually understood deserve attention. First, its protections extend only to citizens of American states who are temporarily in other states, but who have retained citizenship in their home state. It has no effect, either substantive or equality-based, on the treatment a state gives its own citizens. Second, the Comity Clause does not impose a complete ban on unfavorable treatment of visiting Americans. Rather, it applies only to the privileges and immunities of citizens, whatever those privileges and immunities may be.”); id. at 1454-55 (“the Comity Clause suggests that we can approach the Fourteenth Amendment by asking whether a right is one as to which a state could discriminate against out-of-state Americans. . . . the core categories of the privileges and immunities of state citizenship are the private law and public protection rights covered by Section 1 of the Civil Rights Act of 1866. Tax laws are also subject to the clause, because any feature that reduces a citizens’ tax is an immunity. Similarly, criminal liability and punishment must be equal because any legal rule that prevents conviction or reduces punishment is an immunity. Protections against government – constitutional rights as we use the term today – are immunities. . . . privileges or immunities as understood in 1866 probably did not include political rights. The most difficult question outside of the historical core involves government benefits.”); id. at 1416 (“The natural interpretation of the text is that the privileges and immunities of citizens of the United States include the privileges and immunities of both of the citizenships that the Constitution confers. But what are the privileges and immunities of state citizenship, and what can it possibly mean to say that a state may not abridge a right defined by its own laws? The privileges and immunities of state citizenship are rights like, and probably consist mainly of, those listed in the Civil Rights Act of 1866. Those are private law rights of property ownership, contractual capacity, and personal security, and access to governmental mechanisms that protect those primary rights.”); see also McConnell, supra note 160, at 1024-25 (“It was generally understood that the nondiscrimination requirement of the Fourteenth Amendment applied only to ‘civil rights,’ Political and social rights, it was agreed, were not civil rights and were not protected. . . . This taxonomy of rights is rooted in the relationship of the Privileges or Immunities Clause of the Fourteenth Amendment to the Privileges and Immunities Clause of Article IV. The most fundamental conception of the Fourteenth Amendment was that it would extend to the citizens of each state, without regard to race or color, the same legal rights (privileges and immunities) that would have been available to citizens of other states under Article IV. This included such civil rights as the right to contract, own property, and sue, but not political rights such as the right to vote, hold office, or serve on a
The Equal Protection Clause – “No State shall deny to any person within its jurisdiction the equal protection of the laws” – was largely duplicative of the Thirteenth Amendment’s ban on slavery and involuntary servitude.\(^\text{163}\) It was probably broader by the fact that it applied even in states where slavery did not exist; but it was also narrower because the Equal Protection Clause only applied to states, not the federal government, whereas the Thirteenth applied to the territories, the District of Columbia, and other actions of the federal government.\(^\text{164}\)

Unlike the Privileges or Immunities Clause, which only protects citizens, the Equal Protection Clause protects all “persons,” including aliens. But it only applies to “protective” laws, not laws in general. The term had a particular meaning at the time of the adoption of the Fourteenth Amendment: “‘protection of the laws’ referred to the mechanisms through which the government secured individuals and their rights against invasion by others.”\(^\text{165}\) The Civil Rights Act itself referred to this principle when it gave all citizens “full and equal benefit of all laws and proceedings for the security of person and property.”\(^\text{166}\) Professor Harrison argues that there is substantial overlap between the two clauses, but describes evidence of the difference between the Privileges or Immunities Clause and the Equal Protection Clause:

Republican Representative George Hoar of Massachusetts said that Congress was flooded with complaints “that large numbers of our fellow-citizens are deprived of the enjoyment of the fundamental rights of citizens. That their lives are not secure; that their property does not receive the equal protection of the law; that their homes are not safe. . . .” Hoar apparently thought that equality in the content of the laws was required by the Privileges or Immunities Clause, while the Equal Protection Clause was concerned with legal remedies and administration. He said that if the 14th Amendment was designed merely to prevent “formal exercise of power by the State in derogation of civil rights, that last clause...
would have been unnecessary, because the preceding part had provided that ‘no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.’” Similarly, Representative Samuel Shellabarger said that “[t]he laws must be, first, equal, in not abridging rights; and second, the States shall equally protect, under equal laws, all persons in them.”

Professor Harrison describes the prototypical example of a denial of equal protection of the laws:

The idea of denial has an easily identifiable core: a purposeful decision by a state not to provide protection for a reason that violates the requirement of equality. The classic case occurs when the Ku Klux Klan lynch black and the government does nothing because government policy favors the Klan. If the clause governs the content of laws as well as their execution, then any law that unequally provides or withdraws protection also violates the clause. Difficult questions certainly would arise. For example, it might be hard to decide how deliberate a failure to protect must be in order to qualify as a denial.

Slavery was a state of affairs where persons declared “slaves” were denied the same protections by the state that “masters” and “freeman” were granted. The Thirteenth Amendment is an equality provision that prevents this discriminatory state action.

IX. MAY CONGRESS REACH PRIVATE CONDUCT THROUGH EXERCISE OF THE ENFORCEMENT POWER OF SECTION 2 OF THE THIRTEENTH AMENDMENT?

We have seen that the original meaning of Section 1 of the Thirteenth Amendment directly operated on the national and state governments to nullify discriminatory exceptions to generally-applicable laws, such as assault, battery, false imprisonment, and kidnapping, which protected a person’s bodily integrity and freedom from the restraint of others. Section 1 also nullified the discriminatory exemption of slaves from generally-applicable common-law defenses to crimes and torts, such as self-defense and defense of others. It did not directly operate on private persons alleged to have engaged in slavery or involuntary servitude.

The next issue is to what extent the Enforcement Clause in Section 2, which provides that “Congress shall have power to enforce this article by appropriate legislation,” allows Congress to reach private persons directly through legislation who were complicit in slavery and involuntary servitude either directly authorized by discriminatory state law or by way of discriminatory lack of state enforcement of its facially neutral protective laws.

Section 2 of the Thirteenth Amendment allows Congress to enact enforcement legislation against private individuals under certain circumstances; this is because of the nature of the

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167 Harrison, supra note 152, at 1437 n.215 (citations omitted).
168 Id. at 1449.
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substantive prohibition of Section 1, which prohibits states from discriminatorily refusing to enforce their general tort and criminal laws protecting bodily integrity (assault, battery) or freedom from restraint (kidnapping, false imprisonment). Congress may “enforce” that prohibition by not only nullifying state laws, and holding criminally or civilly liable state officials, but by directly enforcing the state’s laws which have failed to be enforced. It may act against an alleged enslaver criminally, authorize civil causes of action against a private individual benefiting from a state’s discriminatory non-enforcement, or authorize the issuance of a writ of habeas corpus to free a person being falsely imprisoned or kidnapped, even if the custodian is a private person.169

During the debate over the 1866 Civil Rights Act, members of the Reconstruction Congress discussed the scope of the Section 2 enforcement power. Senator Trumbull explained in an earlier debate, “The second clause of that amendment was inserted for . . . the purpose . . . of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free.”170

Representative John Bingham argued during debate over the 1871 Enforcement Act that the Thirteenth Amendment prohibited states from allowing slavery, and authorized Congress to “make it a felony punishable by death to reduce any man . . . endowed with immortal life, into a thing of trade, an article of merchandise.”171 Bingham continued, “In such a case the nation would inflict the penalty for this crime upon individuals, not upon States.”172

To see why this is true, we must remember that the Thirteenth Amendment is an equality provision. It does not require states to have any particular laws protecting bodily integrity or freedom from restraint; it only forbids states from exempting a group of persons from that category of laws, as the legal recognition of the master-slave relationship did by definition. Calabresi and Stabile have pointed out that this is the proper understanding of Congress’s ability to enforce the Equal Protection Clause of the Fourteenth Amendment, which largely overlaps with the substantive provision of the Thirteenth Amendment. Although agreeing that the Fourteenth Amendment itself only applies to state actions, they argue that Congress is empowered to remedy state denials of the equal protection of the laws by acting directly on private individuals – by directly enforcing the laws which the state has refused to apply.173

169 Section 1 does not mandate any particular state laws protecting bodily integrity or freedom from restraint, but only discriminatory non-application of those laws. It is an interesting question whether this means that Congress’s enforcement power is limited when punishing private enslavers to the penalties under the particular state’s laws, a question beyond the scope of this Essay.
171 CONG. GLOBE, 42d Cong., Spec. Sess. 81, 85 (1871).
172 Id.
173 Steven G. Calabresi & Nicholas P. Stabile, On Section 5 of the Fourteenth Amendment, 11 U. PA. J. CONST. L. 1431, 1446-49 (2009). See also id. at 1447:

The Equal Protection Clause is a clause that is about “the Protection” of the laws and not the making of them. It says in essence that the States must not discriminate in “the Protection” of the laws by enforcing facially adequate and neutral laws in a discriminatory way. It is inadequate to have laws that ban violence against African Americans or women on the books if those laws go
However, there must first be an actual state denial before such action may be taken; Congress has no power to reach private conduct per se.

Professor Harrison has also pointed to evidence that state violations of the Equal Protection Clause could be understood to permit Congress to reach private individuals benefitting from that violation:

Senator Daniel Pratt, a Republican from Indiana, said to states that objected to federal punishment of “riots, arsons, robberies, and murders”: “You have brought this necessity upon yourselves by refusing to obey a plain constitutional duty not to withhold any one the equal protection of your laws.” This argument has two steps: (1) the Equal Protection Clause obliges the states equally to protect people’s rights against other private persons, and (2) where the state has failed in its obligation, Congress can enforce that obligation by creating a substitute federal remedy.\(^{174}\)

Professor McConnell also points out how the actual reasoning of the Supreme Court in the *Civil Rights Cases* has been misunderstood regarding the ability of Congress to reach private individuals when enforcing the Equal Protection Clause (which we have seen is similar to the Thirteenth Amendment):

In an opinion by Justice Joseph P. Bradley, the Court held the Civil Rights Act of 1875 unconstitutional. The Fourteenth Amendment, according to the Court, does not apply directly to the discriminatory acts of private persons; the Constitution is not “violated until the denial of the right has some State sanction or authority.” This does not mean – as is often thought – that Congress lacks the power under the Fourteenth Amendment to protect against discrimination at the hands of private parties. It means, rather, that Congress lacks the power to protect against unenforced. It is quite clear . . . that the framers of the Equal Protection Clause saw it as protecting African Americans and white Republicans from private violence like lynchings and assaults that were going unpunished by the Southern States even though the law on the books forbade them. Congress could and did create supplementary federal remedies to deal with situations like that.

\(^{174}\) *Harrison,* supra note 152, at 1437 n.214 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 506 (1871)). *See also id.* at 1471 n. 329 (The debates on the Ku Klux Act and the Civil Rights Act of 1875 focused on the question whether Congress could ever act directly on private persons. It is entirely possible to say that such direct legislation is sometimes authorized while denying that Congress can simply replace the states. Then-Representative Garfield, during the Ku Klux Act debate, said that Congress could provide direct protection against private outrages when, but only when, the states had failed to do so. He explained that the problem of the Klan arose because ‘by a systematic maladministration of [the laws], or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe the last clause of the first section empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection.’ CONG. GLOBE, 42nd Cong., 1st Sess. 153 app. (1871); *see also Laurent B. Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts,* 73 YALE L.J. 1353, 1359 (1964) (describing theory of congressional power where states have defaulted on enforcement).
discrimination at the hands of private parties if the laws of the state provide equal protection for all persons without regard to race.

Thus, the vice of the 1875 Act, according to the Court, was that it was overbroad: “It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment.” If the law had been confined to those cases in which state law did not provide redress, it would have been constitutional. “Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them,” the Court noted, in an exposition of the common law not dissimilar to that of Charles Sumner. “If the laws themselves make any unjust discrimination,” the Court continued, “Congress has full power to afford a remedy under [the Fourteenth] amendment . . . .” But if states do their duty, the Court held, the federal government has no power under the Fourteenth Amendment to interfere.

The problem with the Civil Rights Act of 1875, according to the Court, was that it exceeded federal power as applied to states with just and equal laws, though it would be constitutional as applied in states that fail to provide equal protection to black citizens with respect to the common law right of common carriage in covered institutions.175

Many prominent cases throughout history had involved courts issuing writs of habeas corpus to free those held in slavery. Prominent abolitionist intellectuals had long claimed that slaves could be freed through writs of habeas corpus because they were unlawfully restrained.176

Section 2 of the Thirteenth Amendment empowered Congress to provide remedies for persons wrongly being held by others when states failed to do. Because every state has general common law protections for a person’s bodily integrity and freedom from restraint, persons holding someone against his will necessarily finds that any former defense they had to do so has been nullified by the Thirteenth Amendment. Therefore, whenever someone has a claim to a remedy from a state’s protective laws which is not being validated by state enforcement, Congress may provide a remedy.

A.V. Dicey described the writ of habeas corpus, including its applicability to free persons unlawfully detained by private persons:

175 McConnell, supra note 160, at 1090-91.

A person, again, who is detained in confinement but not on a charge of crime needs for his protection the means of readily obtaining a legal decision on the lawfulness of his confinement, and also of getting an immediate release if he has by law a right to his liberty. This is exactly what the writ of *habeas corpus* affords. Whenever any Englishman or foreigner is alleged to be wrongfully deprived of liberty, the Court will issue the writ, have the person aggrieved brought before the Court, and if he has a right to liberty set him free. Thus if a child is forcibly kept apart from his parents, if a man is wrongfully kept in confinement as a lunatic, if a nun is alleged to be prevented from leaving her convent, — if, in short, any man, woman, or child is, or is asserted on apparently good grounds to be, deprived of liberty, the Court will always issue a writ of *habeas corpus* to any one who has the aggrieved person in his custody to have such person brought before the Court, and if he is suffering restraint without lawful cause, set him free.\(^{177}\)

Section 2 empowered Congress to provide the same remedies to disadvantaged groups as to the advantaged groups. *Habeas corpus*, even against private individuals holding someone against their will, was one such remedy:

A former slave received not only the right to personal liberty and bodily security enjoyed by a free person, but also the remedies protecting that right. Personal liberty is vindicated by the most celebrated public law remedy of all, the writ of *habeas corpus*, by which unlawful detention can be challenged. In the Habeas Corpus Act of 1867, Congress made sure that freed slaves would be able to bring *habeas* actions in federal as well as state court if they were restrained of liberty contrary to the Thirteenth Amendment.\(^{178}\)

The Thirteenth Amendment did not of its own force reach private individuals, but it did empower Congress to do so in order to enforce discriminatory state treatment of persons, whether through authorizing the issuance of writs of *habeas corpus* or other remedies. It is through recognition of this power of Congress that harmonizes existing case law with the applicability of the state action doctrine with the Thirteenth Amendment.

**X. CONCLUSION**

The consensus view that the Thirteenth Amendment is an exception from the state action doctrine has its roots in dicta in early Supreme Court cases, but there is no convincing evidence that that view is consistent when examined with the standard tools of textual and historical analysis. Such a view also represents such a constitutional anomaly that convincing evidence should be required to demonstrate that it is correct. Those who think that the original meaning

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\(^{178}\) Harrison, *supra* note 148, at 397.
should be dispositive in determining constitutional meaning – or at least a substantial element of the interpretive baseline – should not accept the consensus at face value.

Using the most highly-developed articulation of originalist methodology – that we are looking not for subjective intentions of concrete historical persons, but a legally constructed hypothetical reasonable person familiar in the law – leads to the conclusion that the consensus is wrong and that the state action doctrine applies to Section 1 of the Thirteenth Amendment to the same extent it applies to the rest of the U.S. Constitution, but that Congress’s exercise of its powers under Section 2 explain how no existing case law contradicts the understanding advanced in this Essay.