

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

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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.¹

The Thirteenth Amendment became part of the U.S. Constitution in 1865.² Because slavery has long ceased to be a political issue, its continued relevance is doubted today. However, the proper interpretation of the Thirteenth Amendment itself remains in dispute; the current understanding has the potential to undercut a core concept in American constitutionalism.

It is widely understood that the U.S. Constitution applies only to governmental actors; it does not provide rules of conduct for private individuals.³ This holds true even where particular constitutional pro-

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¹ U.S. CONST. amend. XIII, § 1.

² Paul Finkelman, “*Let Justice be Done, Though the Heavens May Fall*”: *The Law of Freedom*, 70 CHI.-KENT L. REV. 325, 358 (1994) [hereinafter Finkelman, *Let Justice be Done*].

³ See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) (explaining that “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) (“[A]lthough 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* 129, 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, 53 (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.”).

visions do not explicitly state that they apply only to governmental action. For example, the Eighth Amendment's ban on cruel and unusual punishments makes no mention of state action or any governmental body, stating only that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁴ However, it is generally accepted that the Eighth Amendment would not apply 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.⁵

Similarly, the Fourth Amendment does not specifically state that it applies only to governmental searches or seizures, mentioning only that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"⁶ However, a burglar has not violated the Fourth Amendment when he prowls through someone's house at night.⁷

This widely held and time-honored insight—known as the state action doctrine—has been subject to withering attacks in legal scholarship.⁸ Many academics are adamant that certain provisions of the Constitution should be interpreted to apply to private individuals, sometimes even in the face of explicit language limiting the provision to governmental actors only.⁹ Others merely seek to accomplish the same result by defining governmental enforcement of private rights as governmental action itself.¹⁰ Although never seriously examined,

⁴ U.S. CONST. amend. VIII.

⁵ See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) ("Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the [Eighth] Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government. An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes.").

⁶ U.S. CONST. amend. IV.

⁷ See, e.g., *United States v. Jacobsen*, 466 U.S. 109, 113-15 (1984) (holding that the Fourth Amendment does not apply to searches and seizures by private individuals).

⁸ See generally Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767 (2010) (summarizing criticism of the state action doctrine).

⁹ E.g., Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 510-19, 550 (1985) (arguing that the Constitution only expressly protects against state action because, at its adoption, the common law provided necessary protection against private action and concluding that the Constitution should protect against private action where the common law no longer does).

¹⁰ See, e.g., LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 51-70 (1996); CASS R. SUNSTEIN, THE PARTIAL CONSTITU-

some of the provisions in the Constitution are assumed to apply of their own force directly to private individuals. The most important example is the Thirteenth Amendment's ban on slavery and involuntary servitude.¹¹

This Article seeks to derive the true constitutional meaning of the Thirteenth Amendment by interpreting textual provisions according to their original meaning through an objective reasonable-person standard.¹² This mode of analysis is often called "reasonable-person originalism" or "textualist originalism."¹³ It seeks to ascertain "the 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*."¹⁴ The meaning of any given provision cannot be examined in isolation, but must be considered in light of similarly worded provisions in the

TION 3-7 (1993); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470-72 (1923); Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149, 197-201 (1935); Cass R. Sunstein, *State Action is Always Present*, 3 CHI. J. INT'L. L. 465, 465-69 (2002).

¹¹ See *infra* Part I. Another example is the restrictions placed on certain conduct relating to alcohol in the Eighteenth Amendment, as well as the provision that repealed it, the Twenty-First Amendment. See Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217, 219-20 (1995) [hereinafter Tribe, *How to Violate the Constitution Without Really Trying*]; George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1370 (2008) ("The Eighteenth Amendment, imposing Prohibition, applied directly to private individuals . . .").

¹² "Reasonable-person originalism" is 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 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." Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 7 (2006) [hereinafter Lawson & Seidman, *The Jeffersonian Treaty Clause*].

¹³ See *id.*; Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1557, 1566 (2002); see also Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 536-37 (1998) (reviewing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996)) (arguing that the articulated intentions of the Framers by themselves are not dispositive to the meaning of a constitutional provision and that those intentions are relevant only to the extent they indicate what a phrase or provision was commonly understood to mean).

¹⁴ Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1118 (2003).

same document, and in harmony with the document's structural features.¹⁵

Through the lens of a hypothetical reasonable person, this Article will critique the consensus view that the Thirteenth Amendment is an exception to the state action doctrine and applies directly to private actors.¹⁶ The consensus view on the applicability of the Thirteenth Amendment to private conduct is without foundation in the text or history of the Thirteenth Amendment. This Article determines that the original meaning of the Thirteenth Amendment is largely indistinguishable from the actual judicial application of this amendment since its ratification in 1865; despite the consensus view, 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.¹⁷ This institution was defined by the creation of the master-slave relationship, thereby designating by positive law two classes of human beings: freeman and slave.¹⁸ 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.¹⁹ This understanding of the legal status of slavery was explicitly articulated from the eighteenth century until the ratification of the Thirteenth Amendment in 1865.²⁰

Section Two of the Thirteenth Amendment also empowered Congress to enforce Section One's ban on slavery against states. This section also allowed Congress to provide remedies against private actors whom states granted, either *de jure* or *de facto*, the legal right to own slaves through positive law or discriminatory non-enforcement of the laws against assault, battery, kidnapping and false imprisonment.²¹ Judicial rulings regarding the applicability of the Thirteenth Amend-

¹⁵ See Gary Lawson, *A Truism with Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME L. REV. 469, 478 (2008).

¹⁶ See *infra* Part I.

¹⁷ See *infra* Part III.

¹⁸ See *infra* Part III.

¹⁹ See *infra* Part III.

²⁰ See *infra* Part III.

²¹ See *infra* Part III.

ment—as opposed to judicial dicta—are consistent with the state action doctrine.²²

Part I of this Article describes the consensus view that the Thirteenth Amendment is an exception to the generally accepted maxim that the U.S. Constitution applies solely to governmental actors. Examining constitutional context and using the techniques of intratextualism, Part II explains the flaws in the reasoning advanced in support of the consensus view. Part III describes how the original meaning of the term “slavery” denoted a legal institution created and maintained by state action. Similarly, Part IV describes how the original meaning of “involuntary servitude” is consistent with a state-centered view of the institution. Part V analyzes how the relationship between the Civil Rights Act of 1866 and the Fourteenth Amendment reinforces the plausibility of the state-action interpretation of the Thirteenth Amendment. Part VI then describes how Section Two of the Thirteenth Amendment permits Congress to reach private conduct even though Section One only directly reaches state conduct, and how this interpretation makes sense of the existing case law regarding the scope of the Thirteenth Amendment.

I. THE CONSENSUS VIEW: THE THIRTEENTH AMENDMENT AS ABERRATION

One early source of the contention that the Thirteenth Amendment is an exception to the state action doctrine and directly prohibits private acts is dicta in the *Civil Rights Cases*.²³ There, the Court declared that “the [A]mendment 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.”²⁴ This statement has been assumed to stand for the

²² See *infra* Parts I, V.

²³ The *Civil Rights Cases*, 109 U.S. 3 (1883).

²⁴ *Id.* at 20. The Court also made other statements in that case that have bolstered the consensus view. See *id.* (“It is true that slavery cannot exist without law any more than property in lands and goods can exist without law, and therefore the [T]hirteenth [A]mendment may be regarded as nullifying all state laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States”); *id.* at 23 (“Under the [T]hirteenth [A]mendment the legislation . . . may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not; under the [F]ourteenth . . . it must necessarily be . . . corrective in its character, addressed to counteract and afford relief against state regulations or proceedings.”); *id.* at 35-36 (Harlan, J.,

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.”²⁵

The Court in the *Civil Rights Cases* made this assertion with no citations or analysis of the meaning of the word “slavery.”²⁶ Furthermore, this claim was made in reference to Congress’s enforcement power under Section Two of the Thirteenth Amendment, not the self-executing provision of Section One.²⁷ This is important, because there is a strong argument that Congress may pass enforcement legislation that directly affects private individuals even though the Thirteenth Amendment itself only applies to state action.²⁸

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.²⁹ 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

dissenting) (“[U]nder the [T]hirteenth [A]mendment Congress has to do with slavery and its incidents; and that legislation . . . may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not.”).

Even proponents of the view that the Thirteenth Amendment applies directly to private action recognize that these assertions were not part of the holding of the Court. *See, e.g.*, Rutherglen, *supra* note 11, at 1387-88 (“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.”).

²⁵ Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 HARV. L. REV. 1359, 1368 (1992) (second alteration in original) (quoting U.S. CONST. amend. XIII, § 1); *see also id.* (“[U]nlike 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.”).

²⁶ The Civil Rights Cases, 109 U.S. 3 *passim* (1883).

²⁷ *Id.* at 20.

²⁸ *See infra* Part VI.

²⁹ *See, e.g.*, Rutherglen, *supra* note 11, 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.”).

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.³⁰

Contrast the beginning of the Fourteenth Amendment, which explicitly includes “No State shall,” with the Thirteenth Amendment: “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.”³¹ Because of this omission, many assert that the Thirteenth Amendment must apply to private action.³² For example, the United States 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, 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 [C]ourt that it is enough to refer to the decisions.³³

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

³⁰ U.S. CONST. amend. XIV, § 1.

³¹ U.S. CONST. amend. XIII, § 1.

³² See, e.g., Rutherglen, *supra* note 11, at 1391 (“The only fixed point in decisions interpreting the Thirteenth Amendment, from its ratification to the present day, has been a refusal to limit its scope by importing a state action limit from the Fourteenth Amendment.”).

³³ *Clyatt v. United States*, 197 U.S. 207, 216 (1905).

Congress in legislation to enforce the 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.³⁴

This Article seeks to challenge this consensus view by neutrally examining the Thirteenth Amendment by questioning the judicial language on the topic, where the courts made no attempt to ascertain the original meaning of the text of the provision in question.

II. CRITIQUING THE CONSENSUS

On close examination, the arguments in favor of the consensus view cannot meet their burden of showing that the Thirteenth Amendment was a radical departure from the constitutional baseline of the state action doctrine.

A. *The Lack of “No State Shall” in Constitutional Context*

The “No State shall” language appeared earlier in several provisions of the original Constitution,³⁵ but its presence did not act to convert the other provisions lacking such language into rules applying to private individuals.³⁶ Chief Justice Marshall’s opinion in *Barron v.*

³⁴ Rutherglen, *supra* note 11, at 1367 (citation omitted).

³⁵ 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.* at 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 its 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 Controul of the Congress.”); *id.* at 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.”).

³⁶ Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1239 (1995) (“A word frequently omitted from the federal Constitution but often understood to be silently there is the word ‘federal’ itself. Although the Sixth Amendment provides for a speedy jury trial, right to counsel, and other protections ‘in all criminal prosecutions,’ we know as a matter of structure and history that these Sixth Amendment protections applied only to federal criminal prosecutions (until the Fourteenth Amendment and incorporation doctrine came along) [hereinafter

*Baltimore*³⁷ demonstrates that the “No State shall” language operated instead to distinguish whether the provision applied to state governments rather than the national government.³⁸

It is often wondered why the Thirteenth Amendment did not include a variant of “No State shall” language. Was it so that the Thirteenth Amendment would apply directly to private individual action?³⁹ It seems that such an innovation to what was universally considered as the proper domain of the Constitution would have been mentioned in the debates surrounding its adoption; it was not, and none of the proponents of this theory have ever been able to find any explicit contemporaneous articulation of such a belief.⁴⁰

The lack of “No State shall” language was likely for two reasons. First, in order to ban slavery throughout the United States, it was essential that the Thirteenth Amendment apply not just to states but also to federal institutions.⁴¹ The Thirteenth Amendment was the first provision in the Constitution that limited both the federal government and the states in a single provision,⁴² creating a novel drafting requirement. By refusing to limit its applicability to state governments alone, the Thirteenth Amendment also acted to nullify the then-existing portions of the U.S. Constitution supporting the legal institution of slavery.⁴³ Most notably the Thirteenth Amendment abrogated the Three-Fifths Clause⁴⁴ and the Fugitive Slave Clause,⁴⁵ but it also overturned

Tribe, *Taking Text and Structure Seriously*]; *id.* (“Although a constitutional provision might not in words be limited to the federal government, one should not quickly assume that this opening in the text corresponds to open slots in the architecture of our government that may be filled in with entities besides the federal government, such as the states.”).

³⁷ *Barron v. Baltimore*, 32 U.S. 243, 247 (1833).

³⁸ *Id.* at 248-49.

³⁹ See *infra* Part II.

⁴⁰ In fact, there are many explicit statements indicating the opposite. See *infra* Part III.

⁴¹ This was because of Congress’s power to govern as a state in the territories, as enumerated in U.S. CONST. art. IV, § 3, cl. 2 and in the District of Columbia, as enumerated in U.S. CONST. art. I, § 8, cl. 17. Congress’s power over slavery in the territories was at issue in *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

⁴² See Rutherglen, *supra* note 11, at 1380. 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. Compare U.S. Const. art I, § 9, cl. 3, 8 (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 . . .”), with *id.* at § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder, ex post facto Law . . . or grant any Title of Nobility”).

⁴³ See *infra* notes 44-46 and accompanying text.

⁴⁴ U.S. CONST. art. I, § 2, cl. 3.

⁴⁵ U.S. CONST. art. IV, § 2, cl. 3.

the notorious *Dred Scott* ruling, which held that it was a violation of the *federal* Due Process Clause for Congress to prohibit slavery in the territories.⁴⁶

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-recognized legal institutions like marriage and the parent-child relationship.⁴⁷ This Article will demonstrate how the states' involvement affects the remedies that Congress was empowered to create to "enforce" the amendment compared to the similar power under the Fourteenth Amendment.⁴⁸

The context of the Constitution makes clear against whom its injunctions may be enforced, even if an injunction's applicability is not specifically articulated in a particular provision.⁴⁹ Does the Eighth Amendment's ban on cruel and unusual punishments—"excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"⁵⁰—apply to corporal punishment applied by a parent to a child? It does not, even though the Eighth Amendment does not specify that it is limited to governmental action.⁵¹

⁴⁶ *Dred Scott*, 60 U.S. at 449-50. This was the first use of the doctrine of substantive due process by the Supreme Court. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888* at 271 (1985) ("[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 (1997) ("The first Supreme Court case to use [substantive due process] was, by the way, *Dred Scott* – not a desirable parentage.").

⁴⁷ See *Slaughter-House Cases*, 83 U.S. 36, 68 (1872) ("In that struggle [of the Civil War.] slavery, as a legalized social relation, perished."); Amar & Widawsky, *supra* note 25, at 1366-67 (discussing the understanding of slavery as a state-created and state-defined legal relation among persons, similar to marriage and the parent-child relationship).

⁴⁸ See *infra* Part VI.

⁴⁹ Cf. Prakash, *supra* note 13, at 541 ("[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.").

⁵⁰ U.S. CONST. amend. VIII.

⁵¹ See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) ("Bail, fines, and punishment traditionally have been associated with the criminal process, and, by subjecting the three to parallel limitations, the text of the [Eighth] Amendment suggests an intention to limit the power of those entrusted with the criminal law function of government. An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes.").

The fact that a provision is in a document labeled a “constitution,” and not in a section of a state legal code dealing with crime or family law, is a strong indicator that it applies only to governmental actors.⁵² 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.”⁵³ The term “constitution” meant a set of rules creating, designating, empowering, and limiting governmental institutions.⁵⁴

Provisions adopted through the procedures in Article V are to be interpreted *in pari materia* with the rest of the Constitution of which it is a “Part.”⁵⁵ It is uncontroversial that constitutional amendments should be construed in harmony with the rest of the Constitution—both the original document and prior amendments.⁵⁶ For example, when Congress passes a law under its power to enforce the provisions of the Fourteenth Amendment⁵⁷ to criminalize conduct of state actors violating the “equal protection of the laws,”⁵⁸ the new laws must certainly abide by the pre-existing constitutional provisions.⁵⁹ Congress could not name, adjudge, and sentence to death a particular sheriff for allegedly violating the Equal Protection Clause,⁶⁰ retroactively punish certain discriminatory acts as a crime,⁶¹ or provide for enforcement by punishing discriminatory sheriffs through the penalty of disembowel-

⁵² See *infra* Part II.B.

⁵³ U.S. CONST. art. V.

⁵⁴ See Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT 47, 52-53 (2006) (“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.”).

⁵⁵ See Lawson & Seidman, *The Jeffersonian Treaty Clause*, *supra* note 12, at 54-55 (discussing that provisions of the Constitution “do not exist in a vacuum” and are interpreted with regard to the other provisions).

⁵⁶ See Lawson & Seidman, *The Jeffersonian Treaty Clause*, *supra* note 12, at 54-55.

⁵⁷ U.S. CONST. amend. XIV, § 5 (“The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”).

⁵⁸ U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

⁵⁹ See *generally* U.S. CONST. art. VI, cl. 2 (“This Constitution and the Laws of the United States which shall be made in the Pursuance thereof . . . shall be the supreme Law of the Land . . .”).

⁶⁰ See *generally* U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder . . . shall be passed.”).

⁶¹ See *generally* U.S. CONST. art. I, § 9, cl. 3 (“No . . . ex post facto Law shall be passed.”).

ment.⁶² This is the case only because constitutional provisions are not to be interpreted in isolation, but as part of the entire Constitution.⁶³

The word “constitution” in Anglo-American history did not always denote hierarchically superior rules.⁶⁴ 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.⁶⁵ But the British Constitution was not hierarchically superior to Parliament—it could be altered by Parliament at will.⁶⁶ A prime reason for the American Revolution was the divergence in understanding relating to whether the British Constitution should be hierarchically superior to Parliament.⁶⁷ The Americans came to believe that it was superior, but this was contrary to the British concept of Parliamentary sovereignty.⁶⁸

⁶² See generally U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

⁶³ Cf. *Branch v. Smith*, 538 U.S. 258, 273 (2003) (“We have repeatedly stated . . . that absent a clearly established congressional intention, repeals by implication are not favored. An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.”) (plurality opinion) (citations omitted) (internal quotation marks omitted).

⁶⁴ See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 122-23 (6th ed. 1902) (“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.”).

⁶⁵ During the seventeenth and eighteenth centuries, the predominate understanding of the term “constitution” shifted from “the arrangement and nature of government” to “express restraints on government.” Although these two definitions are not mutually exclusive, the latter definition prevailed in America because it derived from the development of the common and natural law in England. See Philip A. Hamburger, *The Constitution’s Accommodation of Social Change*, 88 MICH. L. REV. 239, 259 (1989).

⁶⁶ DICEY, *supra* note 64, at 37-38.

⁶⁷ See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 259-61 (1969) (contrasting “the Americans’ peculiar conception of a constitution” with the inability of eighteenth-century Englishmen to “conceive of the constitution as anything anterior and superior to government and ordinary law”).

⁶⁸ Gerald Stourzh, *Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century*, in CONCEPTUAL CHANGE AND THE CONSTITUTION 47 (Terence Ball & J.G.A. Pocock eds., Univ. Press of Kansas 1988). See also Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 AM. J. LEGAL HIST. 197, 198 (1994) (“By 1678, the colonies regarded constitutions as written codes of government separate 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.”) (citation omitted).

Making the U.S. Constitution 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.⁶⁹ But, most importantly, 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.⁷⁰

“The idea of a ‘constitution’ was not new in 1787 or even 1776.”⁷¹ At the time of the drafting and ratification of the Constitution, the meaning of the word “constitution” excluded rules directly regulating private individuals.⁷²

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.⁷³ In the 1785 edition, *Johnson’s Dictionary* defined “constitution” as “established form of government; system of laws and customs.”⁷⁴ Modern commentators often use the word “constitution” and related words to signal a set of rules “constituting” governmental institutions.⁷⁵ The definition of “constitution” points rather strongly toward the state action doctrine on the proper subject-matter jurisdiction of a constitution.⁷⁶ Because the Framers were certainly willing to revolutionize the political science of the past,⁷⁷ looking to other evidence of the meaning of the word “constitution” is instructive.

⁶⁹ Stourzh, *supra* note 68, at 47.

⁷⁰ See *supra* text accompanying note 3; see also *supra* text accompanying notes 64-65.

⁷¹ Kramer, *supra* note 3, at 1615.

⁷² See *supra* Part II.A.

⁷³ See *supra* text accompanying notes 53-56.

⁷⁴ 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.

⁷⁵ 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”).

⁷⁶ See *infra* text accompanying note 81.

⁷⁷ See generally Stourzh, *supra* note 68, at 47.

“[T]he legal term *constitutio* had existed and survived from Roman times,” where it referred to imperial decrees in civil law and to fixed law or regulations in canon law.⁷⁸ In medieval England, the term “constitution” referred to written laws or regulations, as distinguished from custom, often in the plural form to designate a related series of regulations.⁷⁹ With the rise of the term “statute” to refer to written laws passed by Parliament, “constitution” morphed to mean local written regulations lower in the hierarchy.⁸⁰

. . . 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 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.⁸¹

By the middle of the seventeenth century, English law often paired “constitutions” with the word “fundamental.”⁸² The famous 1640 work, Henry Parker’s *The Case of Shipmoney*, stated, “by the true fundamental constitutions of England, the beame hangs even between the King and the Subject.”⁸³ In 1649, Charles I was accused of having subverted the “fundamental constitutions” of England.⁸⁴ A “constitution” was something that a government official, such as a king, could be accused of violating, but it was never proper to accuse a

⁷⁸ Stourzh, *supra* note 68, at 43.

⁷⁹ Stourzh, *supra* note 68, at 43.

⁸⁰ Stourzh, *supra* note 68, at 43.

⁸¹ Andreas Kalyvas, *Popular Sovereignty, Democracy, and the Constituent Power*, 12 CONSTITUTIONS 223, 233, 235 (2005).

⁸² Stourzh, *supra* note 68, at 43-44.

⁸³ Stourzh, *supra* note 68, at 44.

⁸⁴ Stourzh, *supra* note 68, at 44.

private individual of a constitutional violation.⁸⁵ It was beyond the jurisdiction of a constitution to apply to anyone outside the government.⁸⁶

In British North America, “constitutions” in the early colonial period referred to written rules or regulations, as it did in England, but the phrase “fundamental constitutions” was eventually used in the modern sense, as rules for government.⁸⁷

The international legal scholar Emmerich de Vattel—who was widely influential with the Framers of the Constitution⁸⁸—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.⁸⁹

This work was an important factor in the increasing significance of the word “constitution.”⁹⁰ Before the English translation of Vattel in 1760, most prominent works of British political theory never used

⁸⁵ See *supra* Introduction.

⁸⁶ See *supra* Introduction.

⁸⁷ Stourzh, *supra* note 68, at 44.

⁸⁸ See Edwin D. Dickinson, *The Law of Nations As Part of the National Law of the United States*, I, 101 U. PA. L. REV. 26, 35 (1952) (“[T]he treatises of Grotius, Pufendorf, Burlamaqui, Vattel and others . . . were an essential and significant part of the minimal equipment of any lawyer of erudition in the eighteenth century.”); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 169 (1998) (noting that Vattel was “well-known and widely consulted by the constitutional generation in the United States”).

⁸⁹ 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 1, ch. 3, §§ 26-27 (1916) (English translation). “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) (“[T]he 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.’”) (citations omitted).

⁹⁰ Stourzh, *supra* note 68, at 35.

the term “constitution.”⁹¹ Instead, “Instrument of Government” was a common seventeenth-century term in written documents which would also be called “constitutions” in the eighteenth century.⁹²

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.”⁹³ “Government” at that time meant a ruling authority, of whatever type.⁹⁴ 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 long after “constitution” came into regular use.⁹⁵ The term “government” was first widely used in relation to corporate bodies in the early seventeenth century and attained its modern meaning during the time period leading up to the American Revolution.⁹⁶

In the 1640s, the frequency of the term “constitution of government” increased appreciably, particularly in relation to the conflict between the monarchy and the House of Commons.⁹⁷ More and more regularly, the “of government” part of the phrase would be dispensed with because “everybody knew that ‘constitution’ referred to government.”⁹⁸ The first time that a document of fundamental law used the

⁹¹ Stourzh, *supra* note 68, at 35-36. Vattel spoke of “constitutions” solely as rules for governments, and distinguished them from laws regulating private persons. See VATTEL, *supra* note 89, at ch. 3, § 29; VATTEL, *supra* note 89, at ch. 3, § 31.

⁹² See generally Stourzh, *supra* note 68, at 37.

⁹³ Stourzh, *supra* note 68, at 37.

⁹⁴ Stourzh, *supra* note 68, at 37.

⁹⁵ Stourzh, *supra* note 68, at 38.

⁹⁶ Stourzh, *supra* note 68, at 38.

⁹⁷ Stourzh, *supra* note 68, at 40-41.

⁹⁸ Stourzh, *supra* note 68, at 40-41. 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.*” JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 235 (Thomas McIntyre Cooley ed.) (1873) (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* (Richard B. Morris ed., 1966) 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

word “constitution” was during the Glorious Revolution of the late seventeenth century, in a resolution of the convention that announced the abdication of James II and charged him with attempting “to subvert the constitution of the kingdom.”⁹⁹ This inaugurated the age of reference to the “British Constitution.”¹⁰⁰

The Thirteenth Amendment was adopted as a provision of a document labeled a “constitution”—indeed, the source of authority used to adopt this amendment provides that textual provisions, which successfully navigate the amendment process, “shall be valid to all Intents and Purposes, as *Part of this Constitution*.”¹⁰¹ This specific designation 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.¹⁰²

The background understanding that rules in the Constitution apply only to government actors is still widespread today.¹⁰³ For example, although the text of the Fifth Amendment does not specify that it applies solely to state actors, the history and structure of the Bill of Rights provide the “state action” requirement, which is prop-

Constitution of the federal government adequate to the exigencies of the Union.” THE FEDERALIST NO. 40 (James Madison) (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 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. pmb. (“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.”).

⁹⁹ Stourzh, *supra* note 68, at 43 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *204).

¹⁰⁰ *Id.* (“From then on—that is, from the time of the Glorious Revolution—the golden age of the ‘British Constitution’ must be dated.”).

¹⁰¹ U.S. CONST. art. V (emphasis added).

¹⁰² See *infra* Parts II-III; Tribe, *Taking Text and Structure Seriously*, *supra* note 36, at 1278-79 (“The cases are legion in which constitutional text is not completely free of ambiguity. Yet it is often the case that, although there may be more than one linguistically possible interpretation of a constitutional provision, one of those possible interpretations may be the most plausible by a wide margin in light of structural considerations viewed against the backdrop of the history of the provision’s adoption.”).

¹⁰³ LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1688 (2d ed. 1988) (“Nearly all of the Constitution’s self-executing, and therefore judicially enforceable, guarantees of individual rights shield individuals only from government action.”).

erly read into the Fifth Amendment.¹⁰⁴ Thus, there is a very heavy burden on the advocates of the consensus position to demonstrate that the language of the Thirteenth Amendment can plausibly exceed the contextual limits of a document providing rules for governments, not private actors.¹⁰⁵

B. *Intratextualism: References Elsewhere in the Constitution Indicating That Slavery Is a Governmental Institution*

The textual case against the Thirteenth Amendment applying to private actors is strong. The Amendment prohibits “slavery” and “involuntary servitude.”¹⁰⁶ Intratextualism can be used to see where these terms are used elsewhere in the Constitution¹⁰⁷ The original Constitution did not include the words “slave” or “slavery.”¹⁰⁸ But it did have provisions relating to that subject.¹⁰⁹ The Constitution, in the Fugitive Slave Clause, uses the following words instead:

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

¹⁰⁴ Tribe, *Taking Text and Structure Seriously*, *supra* note 36, at 1239 n.56. See also Tribe, *How to Violate the Constitution Without Really Trying*, *supra* note 11, 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”) (citation omitted).

¹⁰⁵ John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and The Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327, 347 (1997) (“Arguments from structure are essential if we are to read a constitution as we should—holistically. A constitution is not designed to provide a laundry list of unrelated provisions, but to establish an integrated system. Thus, whenever a provision is ambiguous, we properly read it in light of the rest of the document. Sometimes other specific provisions shed light on a dispute over the meaning of a particular clause. . . . Sometimes inferences from the document as a whole, rather than from specific provisions, are relevant.”) (citation omitted).

¹⁰⁶ U.S. CONST. amend. XIII, § 1.

¹⁰⁷ 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.” See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

¹⁰⁸ See DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 27 (1978) (“One returns finally to the striking fact that in the three clauses [in the Constitution prior to the Thirteenth Amendment] dealing with slavery, the word itself was deliberately avoided.”).

¹⁰⁹ See *id.* at 19-27 (discussing various provisions in the Constitution relating to slavery).

shall be delivered up on Claim of the Party to whom such Service or Labour may be due.¹¹⁰

It is clear that a “Person held to Service or labour in one State, *under the Laws thereof*” is a slave.¹¹¹ 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].”¹¹² The victim in that case is held *contrary* to—not *under*—the laws of the State.¹¹³ A slave, however, could be lawfully held in a slave state, because the master-slave relationship was exempted from the slave state’s generally applicable laws protecting persons’ bodily integrity and freedom from restraint.¹¹⁴

Therefore, there is strong intratextual evidence that slavery is properly understood as being a state-created rule of positive law. To abolish slavery is to abolish those laws.¹¹⁵ It is widely understood that ordinary kidnapping or tortious false imprisonment does not rise to a

¹¹⁰ 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); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty Seventh Amendment*, 103 YALE L.J. 677, 699 (1993) (quoting J. Res. 13, 36th Cong., 2d Sess., 12 Stat. 251 (1861)).

¹¹¹ See *Dred Scott v. Sandford*, 60 U.S. 393, 624 (1857) (Curtis, J., dissenting) (emphasis added).

¹¹² U.S. CONST. art. IV, § 2, cl. 3.

¹¹³ See, e.g., MODEL PENAL CODE, § 212.1 (2001):

A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes: (a) to hold for ransom or reward, or as a shield or hostage; or (b) to facilitate commission of any felony or flight thereafter; or (c) to inflict bodily injury on or to terrorize the victim or another; or (d) to interfere with the performance of any governmental or political function.

¹¹⁴ See *infra* Part III.

¹¹⁵ See, e.g., CONG. GLOBE, 38th Cong., 2d Sess. 488 (1865):

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.

(statement of Rep. Frederick A. Pike).

violation of the Thirteenth Amendment.¹¹⁶ Those acts violate state laws¹¹⁷ and thus are not subject to the prohibition of slavery and involuntary servitude under the Thirteenth Amendment.

III. THE ORIGINAL MEANING OF “SLAVERY”

When a word has developed a particular meaning and becomes a term of art, the selection of that word by the drafters gives rise to the presumption that the concepts associated with that term of art are included within the meaning.¹¹⁸ At the time of the drafting and ratification of the Thirteenth Amendment, the word “slavery” referred to a legal institution defining the way a state would treat relations between persons deemed “master” and “slave.”¹¹⁹ The institution of slavery was created by positive law and could not exist without it. 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.¹²⁰ The master-slave relationship was not necessarily about exploiting the labor of another; it was

¹¹⁶ See LAWRENCE A. ALEXANDER & PAUL HORTON, *WHOM DOES THE CONSTITUTION COMMAND?: A CONCEPTUAL ANALYSIS WITH PRACTICAL IMPLICATIONS* 86 (1988) (noting “extreme implications” of an interpretation that “garden variety kidnapping and false imprisonment” violated the Thirteenth Amendment “even if the [kidnapper’s] act violates the laws of the state”).

¹¹⁷ See 36 C.J.S. *Federal Courts* § 225 (West 2012) (explaining that state laws apply for actions for false imprisonment).

¹¹⁸ See *Evans v. United States*, 504 U.S. 255, 259-60 (1992) (“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken”) (quoting *Morisette v. United States*, 342 U.S. 246, 263 (1952)); *Ex parte Wells*, 59 U.S. 307, 311 (1855) (“We must then give the word [‘Pardon’ in U.S. CONST. art. II, § 2] the same meaning as prevailed here and in England at the time it found a place in the constitution.”); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) (“[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”).

¹¹⁹ See CONG. GLOBE, 37th Cong., 2d Sess. 1495 (1862) (statement of Sen. John Sherman) (“We must not be driven to interfere with the relation of master and slave, or with any other local institution of any State, one step further than the Constitution gives us the just authority and power to do.”).

¹²⁰ See, e.g., *Prigg v. Pennsylvania*, 41 U.S. 539, 550 (1842) (regarding Pennsylvania’s adoption of “anti-kidnapping” laws in response to slave catchers seizing fugitive slaves, or even free blacks, in their state).

about the positive legal grant of the power, from the state to the master, to physically control and coerce the slave.¹²¹

The error that proponents of the consensus view make is that they 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.¹²² Therefore, they anachronistically believe that contemporaneous statements referencing slavery bolster the consensus view of the application of the Thirteenth Amendment.¹²³

Determining original public meaning is not about amassing actual or subjective mental states as indicated by the framers or ratifiers supporting a particular position; an actual mental state only indicates the “linguistic plausibility” of an interpretation.¹²⁴ What ultimately counts for determining meaning is 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.”¹²⁵

Thus, a large number of actual mental states, evidenced by statements of framers or ratifiers, on a certain point are interesting, but insufficient to demonstrate meaning. A hypothetical mental state, perhaps based on a small number of actual mental states, which takes into account all of the relevant information provides the best basis on which to form constitutional meaning.¹²⁶

The subjective statements of the drafters and ratifiers during the constitutional debates are more likely to reflect idiosyncratic understandings¹²⁷ or be corrupted by the political considerations of a particular controversy.¹²⁸ However, these statements should still be

¹²¹ See Amar & Widawsky, *supra* note 25, 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 . . . , forced labor itself does not exhaust the meaning of slavery.”) (citations omitted).

¹²² See, e.g., *id.* at 1368.

¹²³ See *supra* Part I.

¹²⁴ Gary Lawson & Guy Seidman, *The First “Establishment” Clause: Article VII and the Post-Constitutional Confederation*, 78 NOTRE DAME L. REV. 83, 92 (2002) [hereinafter Lawson & Seidman, *The First “Establishment” Clause*].

¹²⁵ *Id.* at 91.

¹²⁶ *Id.* at 91-92.

¹²⁷ Kesavan & Paulsen, *supra* note 14, at 1212.

¹²⁸ 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 . . . ,

considered as evidence because they demonstrate the “linguistic plausibility” of an interpretation, which may then be verified as the best meaning, if structural concerns reinforce it.¹²⁹

Relevant actors have made many significant statements supporting the applicability of the state action doctrine to the Thirteenth Amendment and on the state-centered nature of the term “slavery.”¹³⁰ 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 ousting the jurisdiction which enables the courts to take cognizance of the claim of the master.¹³¹

Webster’s 1828 Dictionary 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.¹³²

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.”¹³³ 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

are political actors, responding to political as well as legal influences, who are eminently capable of making mistakes about the meaning of the Constitution.”).

¹²⁹ See Lawson & Seidman, *supra* note 124, at 92.

¹³⁰ See generally Earl M. Maltz, *Slavery, Federalism, and the Structure of the Constitution*, 36 AM. J. LEGAL HIST. 466, 477 (1992).

¹³¹ CONG. GLOBE, 38th Cong., 2d Sess. 217 (1865).

¹³² AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (emphasis added).

¹³³ KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* 171 (1956).

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.¹³⁴

Slavery was thus understood as a legalized power relation, involving the master's domination of the slave.¹³⁵ In 1842, the Tennessee Supreme Court described “the right to obedience and submission, in all lawful things . . . is perfect in the master” and essential to slavery.¹³⁶ The North Carolina Supreme Court similarly described slavery: “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.”¹³⁷ A prominent 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*.”¹³⁸

Blackstone defined slavery as a relationship where “an absolute and unlimited power is given to the master over the life and fortune of the slave.”¹³⁹ He further explained that “a slave or negro, the 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.”¹⁴⁰ The difference between a slave and a freeman, then, was that the law protected a freeman “in the enjoyment of his person, his liberty, and his property.”¹⁴¹ Slaves, however, were positively exempted from those general laws which protect one's person and liberty—exemplified by the tort and criminal laws of assault, battery, kidnapping, and

¹³⁴ THE FEDERALIST NO. 54, at 334 (James Madison) (Clinton Rossiter ed., 2003).

¹³⁵ Amar & Widawsky, *supra* note 25, at 1370; *see supra* text accompanying note 132.

¹³⁶ Amar & Widawsky, *supra* note 25, at 1370 (quoting *Jacob v. State*, 3 Humph. 483, 521 (Tenn. 1842)).

¹³⁷ *Id.* (quoting *State v. Mann*, 13 N.C. 263, 266 (N.C. 1830)).

¹³⁸ *Id.* (emphasis in original) (quoting WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, 140 (1853)).

¹³⁹ WILLIAM BLACKSTONE, COMMENTARIES *411.

¹⁴⁰ *Id.* at 412 (emphasis added).

¹⁴¹ *Id.*

false imprisonment.¹⁴² Conversely, masters were exempted from the prohibitions created by those same laws.¹⁴³

This key distinction between a slave and a freeman clarifies why blacks alleging they were freemen wrongfully held as slaves had sought their freedom by filing suit 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.¹⁴⁴

The most well-known cases involving slavery, including *Dred Scott*, were commenced in this manner.¹⁴⁵

Somerset's Case was a landmark case in which a master from the American colonies brought one of his slaves with him to England.¹⁴⁶ The slave escaped, but was recaptured and held on a ship bound for the British colony of Jamaica.¹⁴⁷ A petition for a writ of habeas corpus to free the slave was brought before the King's Bench.¹⁴⁸ The court held that while colonial laws established slavery, neither common law nor a statute of parliament recognized slavery in England.¹⁴⁹ Lord

¹⁴² 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. *Commw. v. Aves*, 35 Mass. 193 (1836).

¹⁴³ See THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW 1619-1860* at 182-85 (1996) (describing how laws in slave states permitted masters' use of violence against slaves that would otherwise be considered criminal).

¹⁴⁴ Finkelman, *Let Justice be Done*, *supra* note 2, at 332.

¹⁴⁵ FEHRENBACHER, *supra* note 108, at 250-51.

¹⁴⁶ *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.) 499.

¹⁴⁷ See FEHRENBACHER, *supra* note 108, at 53.

¹⁴⁸ See FEHRENBACHER, *supra* note 108, at 53.

¹⁴⁹ See FEHRENBACHER, *supra* note 108, at 53.

Mansfield described slavery as a condition only capable of existing through positive law.¹⁵⁰

Because slavery existed only by positive law, an amendment abolishing it required only the nullification of those positive laws. Without statutes creating and regulating slavery—which crafted exemptions from generally applicable protective laws to allow the master to control the slave—the master-slave relationship could not exist.¹⁵¹

Indeed, the Thirteenth Amendment invalidated state statutes that exempted a class of human beings from the general laws protecting bodily integrity and freedom from restraint.¹⁵² The text of the Thirteenth Amendment in no way contradicts this interpretation; notably, the Thirteenth Amendment’s only exception to the prohibition on slavery refers explicitly to a state action: slavery may not be imposed “except as a punishment for crime whereof the party shall have been duly convicted.”¹⁵³

The famous case of *Lemmon v. People* exemplifies this understanding of slavery.¹⁵⁴ In *Lemmon*, the highest court in New York evaluated the merits of a habeas petition brought by eight slaves who

¹⁵⁰ *Somerset*, 98 Eng. Rep. at 510. 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.”) (citations omitted); 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 Q. 258, 258 (1977) (“[A]s 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*, 4 MASS. Q. REV. 463, 472 (Sept. 1848)).

¹⁵¹ See generally William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711 (1996). Lord Mansfield wondered “how many actions for any slight coercion by the master” would result from a decision in favor of *Somerset*. *Somerset*, 98 Eng. Rep. at 509.

¹⁵² See *supra* text accompanying notes 141-142.

¹⁵³ U.S. CONST. amend. XIII, § 1.

¹⁵⁴ *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,

travelled through New York, a non-slave state, with their Virginia owners on their course from Virginia to Texas. The issue, then, was whether New York law forbidding slavery prevailed over the master's rights recognized in Virginia over the slaves.¹⁵⁵

Justice Denio's majority opinion clearly identified 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:

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.¹⁵⁶

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

which Lincoln and others had warned about, in which the Supreme Court would nationalize slavery.”).

¹⁵⁵ *Lemmon*, 20 N.Y. at 615-16.

¹⁵⁶ *Id.* at 605-06; *see also id.* at 610 (Wright, J., concurring) (“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.”) (citations omitted).

we do? Abolish slavery. How? By amending our national constitution.¹⁵⁷

A ban on slavery was therefore promoted to extinguish the state's grant to the master of "the power which caused the war" through the requirement that state protective laws apply "to all citizens alike."¹⁵⁸

In 1864, Senator Charles Sumner of Massachusetts proposed the abolition of slavery as a substitute for what became the Thirteenth Amendment.¹⁵⁹ His proposal emphasized that slavery only existed because of the discriminatory exemptions in state law denying slaves protection from restraint and force.¹⁶⁰ It read: "All persons are equal before the law, so that no person can hold another as a slave."¹⁶¹

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: "[t]he [g]eneral assembly . . . shall not have the power to permit the continuance of slavery beyond the generation which shall be living on the [thirty-first] day of December [one thousand eight hundred]"¹⁶²

In 1777, Vermont became the first state to adopt a constitution to abolish slavery.¹⁶³ The Vermont Constitution demonstrates that slavery was understood as a 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.¹⁶⁴

¹⁵⁷ CONG. GLOBE, 38 Cong. 1st Sess. 1203 (March 1864).

¹⁵⁸ *Id.*

¹⁵⁹ Rutherglen, *supra* note 11, at 1374-75.

¹⁶⁰ Rutherglen, *supra* note 11, at 1374-75.

¹⁶¹ CONG. GLOBE, 38th Cong., 1st Sess. 521 (1864).

¹⁶² 6 THE PAPERS OF THOMAS JEFFERSON, 298 (Julian P. Boyd et al. eds., 1952).

¹⁶³ Finkelman, *Let Justice be Done*, *supra* note 2, at 327 & n.14.

¹⁶⁴ VT. CONST. ch. I, art. 1 (1777) (emphasis added).

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.”¹⁶⁵ In 1783, the high court of Massachusetts interpreted this language as forbidding slavery in *Commonwealth v. Jennison*.¹⁶⁶ Massachusetts authorities had prosecuted a master for beating his slave and forcing him to return to the master’s farm.¹⁶⁷ The master claimed that he was defending his property rights in the slave, who had been his property since before 1780.¹⁶⁸ The prosecution argued that the “slave” had become free under the 1780 Massachusetts Constitution, and thus the “master’s” defense to the charges failed, and the court agreed.¹⁶⁹

The nature of slavery as the state’s granting of discriminatory exemptions from its general protective laws could not be more pronounced than in *Jennison*.¹⁷⁰ Under slavery, those individuals deemed as “masters” were granted by the state an immunity from the generally applicable laws—the right to violate the bodily integrity of and to restrain another human being.¹⁷¹ Reciprocally, those deemed as “slaves” were discriminatorily unprotected by the state’s protective laws.¹⁷² Once the state discrimination ceased, slavery could not exist as a legal institution.¹⁷³

By comparing similar legal relationships, the operation of slavery becomes clear. The state and federal governments may coerce citizens through criminal sanctions to perform civic duties.¹⁷⁴ These entities

¹⁶⁵ MASS. CONST. of 1780, pt. I, art. I (Declaration of Rights).

¹⁶⁶ See PAUL FINKELMAN, *THE LAW OF FREEDOM AND BONDAGE: A CASEBOOK* (1985). See 36-37 (unreported case reprinted) [hereinafter FINKELMAN, *THE LAW OF FREEDOM AND BONDAGE*].

¹⁶⁷ Finkelman, *Let Justice be Done*, *supra* note 2, at 334.

¹⁶⁸ Finkelman, *Let Justice be Done*, *supra* note 2, at 334.

¹⁶⁹ Finkelman, *Let Justice be Done*, *supra* note 2, at 335.

¹⁷⁰ See FINKELMAN, *THE LAW OF FREEDOM AND BONDAGE*, at 36-37 (unreported case reprinted).

¹⁷¹ Amar & Widawsky, *supra* note 25, at 1369-70.

¹⁷² Amar & Widawsky, *supra* note 25, at 1369-70.

¹⁷³ See *supra* text accompanying note 156; Rutherglen, *supra* note 11, at 1375.

¹⁷⁴ See *Hurtado v. United States*, 410 U.S. 578, 589 & n.11 (1973) (recognizing that jury service is compelled of all citizens summoned without violating the Thirteenth Amendment); *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918) (recognizing that military service is compelled of all citizens drafted without violating the Thirteenth Amendment); *Butler v. Perry*, 240

may also make exceptions to general laws against physical coercion, such as assault, battery, false imprisonment, and kidnapping, when creating certain legal relationships among persons.¹⁷⁵ For example, the state creates the parent-child legal relationship, which provides exceptions from those general laws against physical coercion.¹⁷⁶ 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 these general laws.¹⁷⁷ Similarly, slavery is a state-created legal relationship.¹⁷⁸

This relationship of slavery to the government was recognized by those opposing slavery. 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.”¹⁷⁹

U.S. 326, 328 (1916) (recognizing that participation in local roadwork is compelled of all citizens summoned without violating the Thirteenth Amendment).

¹⁷⁵ See, e.g., *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897) (explaining that the Thirteenth Amendment was not intended to prohibit “the right of parents and guardians to the custody of their minor children or wards”).

¹⁷⁶ Amar & Widawsky, *supra* note 25, at 1366-67 (discussing the understanding of slavery as a state-created and state-defined legal relation among persons, similar to marriage and the parent-child relationship); see also Oman, *supra* note 25, 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.”). Professor 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 “[n]o 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.

¹⁷⁷ See *supra* text accompanying note 174; *Robertson v. Baldwin*, 165 U.S. 275, 287 (explaining that the Thirteenth Amendment does not prohibit laws forbidding sailors who contract to work on vessels from deserting them).

¹⁷⁸ Amar & Widawsky, *supra* note 25, at 1366-67.

¹⁷⁹ Report of a Committee of the Delaware Society (Sept. 29, 1819), in *Minutes of the Sixteenth American Convention for Promoting the Abolition of Slavery, and Improving the Condition of the African Race*, 25 (Phila., Fry 1819) (Early Am. Imprints, Series 2, no. 46985).

Similarly, famed abolitionist lawyer—and future Supreme Court Justice—Salmon P. Chase argued in 1847 to the Supreme Court¹⁸⁰ that slavery was contrary to “natural right,”¹⁸¹ and therefore laws establishing slavery as a legal institution “must necessarily, be local and municipal.”¹⁸² When a slave entered a free jurisdiction, his status as a slave terminated, not because a positive law freed him, but “because he continues to be a man and leaves behind him the law of force.”¹⁸³ 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.¹⁸⁴

In 1854, Wisconsin anti-slavery activist Byron Paine referenced the application of a state’s general protective law 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.”¹⁸⁵

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.¹⁸⁶

¹⁸⁰ *Jones v. Van Zandt*, 46 U.S. 215, 223 (1847).

¹⁸¹ Brief for John Van Zandt at 83, *Jones v. Van Zandt*, 46 U.S. 215 (1847).

¹⁸² *Id.*

¹⁸³ *Id.* at 84 (emphasis omitted).

¹⁸⁴ See BLACKSTONE, *supra* note 149, at 412 (explaining that “a slave or negro, the 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.”) (emphasis added).

¹⁸⁵ *Unconstitutionality of the Fugitive Slave Act: Argument of Byron Paine, Esq. and Opinion of Hon. A. D. Smith, Associate Justice of the Supreme Court of the State of Wisconsin* 11 (1854).

¹⁸⁶ CONG. GLOBE, 38th Cong., 2d Sess. 488 (1865); see also *id.* at 190-91 (remarks of Rep. Kasson) (arguing for constitutional power to abolish slavery as a relation rather than as property).

This understanding of the nature of slavery did not change from the late eighteenth century through the Civil War.¹⁸⁷ Supreme Court justices in the *Dred Scott* case¹⁸⁸ discussed *Somerset's Case* and further described the state action nature of slavery.¹⁸⁹ Though dividing on the issue presented in that case, the justices in the majority and in the dissents held similar views on the nature of slavery. This indicates a broad consensus on this issue even in the most divisive and well-known case of the time period leading up to the adoption of the Thirteenth Amendment.

Justice Daniel's concurring opinion in *Dred Scott* explained that *Somerset's Case* held "that within the realm of England there was no authority to justify the detention of an individual in private bondage."¹⁹⁰ Because the general laws protecting bodily integrity and freedom from restraint were not abrogated by statute, slavery could not exist in England, and indeed it never had.¹⁹¹ Justice Daniel also noted that cases subsequent to *Somerset's Case* 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, that jurisdiction's laws would apply again.¹⁹² Therefore, slavery was not some metaphysical concept, but merely the creature of positive law.¹⁹³

Justice Campbell's opinion concurring in the judgment noted that Missouri law:

recognizes 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.¹⁹⁴

¹⁸⁷ *Dred Scott v. Sandford*, 60 U.S. 393 (1857); See also Anthony V. Baker, "The Authors of All Our Troubles": The Press, the Supreme Court, and the Civil War, 8 J. S. LEGAL HIST. 29, 45-47 (2000).

¹⁸⁸ *Scott*, 60 U.S. at 393.

¹⁸⁹ See *id.* at 486 (Daniel, J., concurring); *id.* at 497-98 (Campbell, J., concurring).

¹⁹⁰ *Id.* at 486 (Daniel, J., concurring) (emphasis omitted).

¹⁹¹ *Id.*

¹⁹² See generally *id.* at 486-87.

¹⁹³ See *supra* text accompanying notes 189-192.

¹⁹⁴ *Dred Scott v. Sandford*, 60 U.S. 393, 493-94 (1857).

This explained that slavery was a status created by state law, granting powers to masters, and governing the legal relations between the 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 recognize and which do not recognize the institution of slavery, cannot be disguised.¹⁹⁵

The dissenting opinions in *Dred Scott* fully agreed on this issue.¹⁹⁶ Justice Curtis argued in his dissenting opinion that the reliance on positive law necessarily made untenable the argument that slavery was protected in the territories, because the territories lacked positive law regulating the master-slave relation.¹⁹⁷

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

¹⁹⁵ *Id.* at 497-98 (Campbell, J., concurring).

¹⁹⁶ *See id.* at 624 (Curtis, J., dissenting) ("Slavery, being contrary to natural right, is created only by municipal law.")

¹⁹⁷ *Id.* at 625 (Curtis, J., dissenting).

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 what regulations, if any, should be made concerning slavery therein?¹⁹⁸

The other dissenter in *Dred Scott* also articulated the necessary relationship between slavery and positive law.¹⁹⁹ Justice McLean wrote that

. . . 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 *Somerset'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 *Somerset*. The judgment pronounced by Lord Mansfield was the judgment of the Court of King's Bench. . . .

. . . .

. . . The [C]ase of the [S]lave 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 recognized and protected by statutory enactments and judicial decisions.²⁰⁰

The opinions embodied in *Dred Scott* demonstrate that the understanding of slavery as a legal institution created and maintained by positive state laws was a basic understanding by both supporters and opponents of the Court's ruling.²⁰¹

¹⁹⁸ *Id.* (Curtis, J., dissenting).

¹⁹⁹ *Id.* at 531-39 (McLean, J., dissenting).

²⁰⁰ *Id.* at 534-35 (McLean, J., dissenting) (citation omitted).

²⁰¹ *See supra* text accompanying notes 190-200.

Instead of contradicting the applicability of the state action doctrine to the Thirteenth Amendment, the historical evidence demonstrates frequent use of the state-centered understanding of the term “slavery,” and points toward its harmony with the abolition of slavery.²⁰²

IV. THE ORIGINAL MEANING OF “INVOLUNTARY SERVITUDE”

Besides prohibiting slavery, Section One of the Thirteenth Amendment also prohibits “involuntary servitude.” There are some key distinctions and similarities between these two legal statuses. 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 in the same manner to involuntary servitude.²⁰³

However, the statuses differed in two ways. First, slavery was a lifetime condition, whereas servitude lasted for a term of years.²⁰⁴ Second, under servitude, the state only enforced the relation between the master and the servant, whereas with 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. Professor Oman finds that the term “involuntary servitude” had a well-developed meaning at the time of the adoption of the Thirteenth Amendment.²⁰⁵ He also claims that “in every instance in which the [Supreme] Court has actually found ‘involuntary servitude,’” the same four factors were present: (1) unequal bargaining power,

²⁰² See *supra* note 130.

²⁰³ See *Anderson v. Poindexter*, 6 Ohio St. 622, 691 (1856) (“[I]nvoluntary servitude . . . is the same thing [as slavery], with the exception, that the bondage may not be for the entire life of the servant, nor involve his posterity.”) (emphasis omitted) (internal quotation marks omitted).

²⁰⁴ Wiecek, *supra* note 150, at 262 (“[T]he 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:

The prohibition [in the Ohio constitution] is against slavery or 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.

Anderson, 6 Ohio St. at 690-91 (emphasis omitted) (internal quotation marks omitted).

²⁰⁵ Oman, *supra* note 25 (examining historical usage of the term ‘involuntary servitude’).

(2) inadequate consideration, (3) unreasonable temporal limits to the term of the servitude, and (4) physical abuse or coercion.²⁰⁶

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.²⁰⁷

This viewpoint is consistent with the interpretation of the Thirteenth Amendment advanced in this Article. The references to legal coercion and legal process most clearly require an affirmative act by the state to enforce the master-slave relationship.²⁰⁸ The statements regarding 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.²⁰⁹ If a person holds individuals against their will, he violates every state’s general laws against false imprisonment.²¹⁰ If the state does not enforce those laws, it is violating the Thirteenth Amendment.²¹¹

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

²⁰⁶ Oman, *supra* note 25, at 24-25. Although Professor Oman sees some of these factors as independent of state action, the more reasonable interpretation is that they are all evidence of involuntariness, and therefore are evidence demonstrating that a state is exempting a relationship from its laws protecting bodily integrity and freedom from restraint. Oman, *supra* note 25, at 2083-84.

²⁰⁷ *United States v. Kozminski*, 487 U.S. 931, 944-52 (1988) (emphases added).

²⁰⁸ See *infra* text accompanying note 271.

²⁰⁹ See *infra* text accompanying note 271.

²¹⁰ See, e.g., MODEL PENAL CODE, § 212.3 (2001) (“A person commits a misdemeanor if he knowingly restrains another unlawfully so as to interfere substantially with his liberty.”).

²¹¹ Cf. CURRIE, *supra* note 46, at 397 (arguing that the Equal Protection Clause of the Fourteenth Amendment “seems to impose upon the states a unique duty to take affirmative action to protect black persons from private attack”). See *infra* Part V for a description of the similarities among the Thirteenth Amendment, the Civil Rights Act of 1866, and the Fourteenth Amendment.

or legal coercion.”²¹² The Court further discussed the original Slave Trade statute passed in 1818,²¹³ noting that “nothing in the history of the Slave Trade statute suggests that it was intended to extend to conditions of servitude beyond those applied to slaves, *i.e.*, physical or legal coercion.”²¹⁴

The Court then explained that:

Absent 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.²¹⁵

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.”²¹⁶ 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.²¹⁷ The critical feature of the system was that the convict’s breach of the labor contract was a crime.²¹⁸ The convict was thus forced to work by threat of criminal sanction by the state.²¹⁹

The Court has also invalidated state laws subjecting debtors to prosecution and criminal punishment for failing to perform labor after receiving an advance payment.²²⁰ The laws at issue in these types of cases made failure to perform services under those circumstances

²¹² *Kozminski*, 487 U.S. at 945.

²¹³ *Id.* at 946 (“[S]tatute authorized 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.”) (citing Act of Apr. 20, 1818, ch. 91, § 6, 3 Stat. 450, 452).

²¹⁴ *Id.* at 946-47.

²¹⁵ *Id.* at 952.

²¹⁶ *United States v. Reynolds*, 235 U.S. 133, 146, 150 (1914).

²¹⁷ *Id.* at 146.

²¹⁸ *Id.*

²¹⁹ *Id.* at 150.

²²⁰ *E.g.*, *Pollock v. Williams*, 322 U.S. 4, 6, 25 (1944); *Taylor v. Georgia*, 315 U.S. 25, 29 (1942); *Bailey v. Alabama*, 219 U.S. 219, 244 (1911).

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*.”²²¹ For example, 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, resulting in criminal penalties.²²² The Court held that “involuntary servitude” existed whenever there was “compulsory service.”²²³

The 1821 case of *In re Mary Clark*²²⁴ involved a woman who had “voluntarily bound herself to serve” Johnson for twenty years.²²⁵ She applied for a writ of habeas corpus, requesting that her service be abrogated.²²⁶ The court noted that “a covenant for service might, . . . as in the case before us, require a number of years. Performance of this type of contract, if enforced by law, would produce a state of servitude as degrading and demoralizing in its consequences, as a state of absolute slavery. . . .”²²⁷ The court also recognized that Johnson was not actually requesting an order forcing Clark to serve pursuant to the indenture agreement, but was personally coercing Clark to work under the agreement’s terms.²²⁸ The court distinguished Clark’s relationship with Johnson from that of an employment relationship based upon Johnson’s alleged right to personally use force against Clark in order to make her to perform the terms of the agreement.²²⁹

This holding 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.²³⁰ The master could not be exempted from the laws against battery, for example.²³¹ Professor Oman explains the ruling as demonstrating that

²²¹ *Bailey*, 219 U.S. at 244 (emphasis added).

²²² *Id.* at 227-28.

²²³ *See id.* at 242.

²²⁴ *In re Clark*, 1 Blackf. 122 (Ind. 1821).

²²⁵ *Id.* at 122-23.

²²⁶ *Id.*

²²⁷ *Id.* at 124.

²²⁸ *Id.* at 125.

²²⁹ *Id.* at 124-25.

²³⁰ *See supra* Part III.

²³¹ *See supra* Part III.

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.²³²

In an 1828 Illinois case, a slave named Phoebe signed an indenture to serve her master, Jay, for forty years.²³³ Phoebe subsequently brought “an action of trespass, assault, battery, wounding, and false imprisonment” against Jay, arguing that enforcement of the agreement was forbidden “involuntary servitude” under the new Illinois constitution.²³⁴ Jay answered that he administered “a little force and beating” of Phoebe.²³⁵ The court held that these circumstances constituted involuntary servitude, but nonetheless that the agreement was legal under a clause grandfathering indentures pre-dating the Illinois constitution.²³⁶

Professor Oman noted that “the jurisprudence in Ohio, Indiana, and Illinois shows a fairly unified approach to the question of ‘involuntary servitude,’” including that it always “involved complete domination by the master of the servant, including the right to use violence to coerce the servant.”²³⁷

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 for personal service in the 1867 circuit case

²³² Oman, *supra* note 25, at 2044 (citations omitted).

²³³ *Phoebe v. Jay*, 1 Ill. (Breese) 268, 268 (1828).

²³⁴ *Id.* at 268, 270.

²³⁵ *Id.* at 269-70.

²³⁶ *Id.* at 270-72.

²³⁷ Oman, *supra* note 25, 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.” *Id.* (citations omitted). 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.

of *In re Turner*.²³⁸ However, this is a misguided conception of *In re Turner*.²³⁹ This case involved an indenture agreement between a young former slave, Elizabeth Turner, her mother, and their former master, Hambleton.²⁴⁰

Turner filed for a writ of habeas corpus against Hambleton, contending that she was being kept in a state of involuntary servitude.²⁴¹ In a very brief decision ordering Hambleton to release Turner, the court held that the agreement was a forbidden involuntary servitude and that the Civil Rights Act of 1866 forbade Maryland's different rules for black and white apprentices.²⁴² Turner's petition "implied [Hambleton's] 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.'"²⁴³

This case used the Thirteenth Amendment to strike down the state's apprenticeship law, which had been a defense to the state's general laws protecting bodily integrity and freedom from restraint.²⁴⁴ *In re Turner* is thus consistent with the state action doctrine; the Thirteenth Amendment was only used to nullify the state apprenticeship law, and without that law, Hambleton had no argument that he was lawfully holding Turner against her will.²⁴⁵ As a result, the general Maryland tort laws applied, and Chief Justice Chase used his power

²³⁸ *In re Turner*, 24 F. Cas. 337 (1867). Professor Rutherglen makes a typical statement that *Turner* directly applied the Thirteenth Amendment to private conduct:

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.

Rutherglen, *supra* note 11, at 1388 (citations omitted).

²³⁹ Rutherglen, *supra* note 11, at 1388.

²⁴⁰ Oman, *supra* note 25, at 2074.

²⁴¹ *Turner*, 24 F. Cas at 337-38.

²⁴² *Id.* at 339.

²⁴³ Oman, *supra* note 25, at 2075-76 (citations omitted).

²⁴⁴ *Turner*, 24 F. Cas. at 339-40.

²⁴⁵ *See supra* Part III.

under the Habeas Corpus Act of 1867 in the same manner Lord Mansfield previously used a writ to free James Somerset in 1772.²⁴⁶

V. THE RELATIONSHIP AMONG THE THIRTEENTH AND
FOURTEENTH AMENDMENTS AND THE CIVIL RIGHTS ACTS
OF 1866

To see how the Thirteenth Amendment makes sense even when limited to state action, one must understand the highly symbiotic relationship among three provisions promulgated by the 38th and 39th Congresses from 1865 through 1868—the Thirteenth Amendment, the Civil Rights Act of 1866, and the Fourteenth Amendment. The actions of the former states of the Confederacy to evade the Thirteenth Amendment led to passage of the latter two, to further rein in those states.²⁴⁷

The Thirteenth Amendment was ratified in late 1865.²⁴⁸ 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.²⁴⁹

In reaction to the Thirteenth Amendment, the states of the former Confederacy passed Black Codes to limit the rights of freed slaves.²⁵⁰ The Black Codes replaced the Slave Codes, which had granted the master power over the slave, provided for a separate criminal code to govern slaves, and regulated the working conditions and care of slaves as well as the public restrictions on how persons outside the master-slave relationship interacted with slaves.²⁵¹

²⁴⁶ See *supra* text accompanying notes 146-151.

²⁴⁷ See Finkelman, *Let Justice be Done*, *supra* note 2, at 357-59.

²⁴⁸ See Finkelman, *Let Justice be Done*, *supra* note 2, at 358.

²⁴⁹ See John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 SUP. CT. REV. 353, 396 (2006) (The Thirteenth Amendment remedied the fact that slaves lacked right to “bodily integrity and liberty,” because “their masters may physically confine them and compel them to work and thus may take actions with respect to their slaves that would be torts if done to free people.”) (citations omitted) [hereinafter Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*].

²⁵⁰ See Finkelman, *Let Justice be Done*, *supra* note 2, at 354-57.

²⁵¹ See Finkelman, *Let Justice be Done*, *supra* note 2, at 354-57.

In response, Congress passed the Civil Rights Act of 1866.²⁵² Even strong anti-slavery members of Congress, who supported the goals of the bill, seriously doubted the power of Congress to pass it.²⁵³

The version passed into law provided that:

[A]ll 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.²⁵⁴

The continuing doubts about Congress's power under the Thirteenth Amendment²⁵⁵ to enact the Civil Rights Act led to the drafting of Fourteenth Amendment to the 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.²⁵⁶

²⁵² See GEORGE RUTHERGLEN, *CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866* at 46-49 (2013).

²⁵³ John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *YALE L.J.* 1385, 1404 (1992) [hereinafter Harrison, *Reconstructing the Privileges or Immunities Clause*].

²⁵⁴ *CONG. GLOBE*, 39th Cong., 1st Sess. 211, 573 (1866).

²⁵⁵ Sen. Trumbull articulated the doubts:

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 . . . ?

. . . .

. . . [I]t 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.

CONG. GLOBE, 38th Cong., 1st Sess., 1314 (1864).

²⁵⁶ See EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS* 93 (1990) [hereinafter MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS*].

Section One of the Fourteenth Amendment was the provision that effectively rooted the Civil Rights Act of 1866 into the Constitution.²⁵⁷ It provided that:

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.²⁵⁸

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”²⁵⁹—acted to incorporate the Civil Rights Act of 1866 into the Constitution.²⁶⁰ “Privileges or Immunities” referred to, for example, common law rights to make contracts and own property, which had been delineated in the Civil Rights Act.²⁶¹

The Privileges or Immunities Clause is an anti-discrimination provision, not a substantive one, as it merely requires that any right the state provides may not be abridged for any group of citizens as compared to another.²⁶² It was, not coincidentally, worded like the Comity Clause of Article IV of the original Constitution,²⁶³ which was an anti-discrimination provision requiring that a state grant citizens of another state the same privileges and immunities granted to its own

²⁵⁷ Harrison, *Reconstructing the Privileges or Immunities Clause*, *supra* note 253, at 1416.

²⁵⁸ U.S. CONST. amend. XIV, § 1.

²⁵⁹ U.S. CONST. amend. XIV, § 1.

²⁶⁰ Harrison, *Reconstructing the Privileges or Immunities Clause*, *supra* note 253, at 1416.

²⁶¹ See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1026-27 (1995) (arguing that civil rights protected by the Civil Rights Act of 1866 included “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,” which were basically the same rights protected by the Comity Clause).

²⁶² Harrison, *Reconstructing the Privileges or Immunities Clause*, *supra* note 253, at 1437, n.215 (citations omitted).

²⁶³ See U.S. CONST. art. IV, § 2, cl. 1.

citizens.²⁶⁴ However, the Fourteenth Amendment shifted the scope of the anti-discrimination norm to apply to a state's own citizens.²⁶⁵

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.²⁶⁶

However, unlike the Privileges or Immunities Clause, which only protects citizens, the Equal Protection Clause protects all "persons," including aliens.²⁶⁷ But it only applies to "protective" laws, not laws in general.²⁶⁸ This term had a particular meaning when the Fourteenth Amendment was adopted: "'Protection of the laws' referred to the mechanisms through which the government secured individuals and their rights against invasion by others."²⁶⁹ 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."²⁷⁰

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 lynches blacks 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.²⁷¹

²⁶⁴ Harrison, *Reconstructing the Privileges or Immunities Clause*, *supra* note 253, at 1398, 1454-55 (describing features of the Comity Clause and relation with the Fourteenth Amendment).

²⁶⁵ McConnell, *supra* note 261, at 999-1000.

²⁶⁶ See MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS*, *supra* note 256, at 96 ("The equal protection and due process clauses essentially restated the Thirteenth Amendment itself, guaranteeing all persons the legal incidents of freedom."); JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951) (arguing that Section One of the Fourteenth Amendment was basically a restatement of the Thirteenth Amendment).

²⁶⁷ See U.S. CONST. amend. XIV § 1.

²⁶⁸ Harrison, *Reconstructing the Privileges or Immunities Clause*, *supra* note 253, at 1436-37.

²⁶⁹ Harrison, *Reconstructing the Privileges or Immunities Clause*, *supra* note 253, at 1435.

²⁷⁰ CONG. GLOBE, 39th Cong., 1st Sess. 211, 573 (1866).

²⁷¹ Harrison, *Reconstructing the Privileges or Immunities Clause*, *supra* note 253, at 1449.

The Thirteenth Amendment's relationship to the Civil Rights Act of 1866 and the Fourteenth Amendment clarifies its nature as an anti-discrimination provision targeted at unequal laws protecting the bodily integrity and liberty of persons. Slavery was a state of affairs where persons declared "slaves" were denied the same protections by the state that "masters" and "freeman" were granted.²⁷² The Thirteenth Amendment is an equality provision that prevents this discriminatory state action.²⁷³

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

This Article has explained that the original meaning of Section One 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.²⁷⁴ Section One also invalidated the discriminatory exemption of slaves from generally-applicable, common-law defenses to crimes and torts, such as self-defense and defense of others.²⁷⁵ The Thirteenth Amendment did not directly apply to private persons alleged to have engaged in slavery or involuntary servitude.²⁷⁶

This Section addresses whether the Enforcement Clause in Section Two, which provides that "Congress shall have power to enforce this article by appropriate legislation," allows Congress to reach private persons directly through legislation. Specifically of concern are those individuals who were complicit in slavery and involuntary servitude, either by being directly authorized by discriminatory state law or by way of discriminatory lack of state enforcement of its facially neutral protective laws.

²⁷² See *supra* at Part III.

²⁷³ See Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, *supra* note 249, at 396.

²⁷⁴ See *supra* Parts III-IV.

²⁷⁵ See Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, *supra* note 249, at 396.

²⁷⁶ See *supra* Parts III- IV.

Section Two of the Thirteenth Amendment allows Congress to enact enforcement legislation against private individuals under certain circumstances. Congress was given this enforcement power, because of the substantive nature of prohibition contained in Section One, which forbids states from discriminatorily refusing to enforce their general tort and criminal laws protecting bodily integrity, such as assault or battery, or freedom from restraint, such as kidnapping or false imprisonment.²⁷⁷

During the debate over the 1866 Civil Rights Act, members of the Reconstruction Congress discussed the scope of Section Two's enforcement power.²⁷⁸ 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."²⁷⁹

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."²⁸⁰ Bingham continued, "[i]n such a case the nation would inflict the penalty for this crime upon individuals, not upon States."²⁸¹

To see why this is true, it must be remembered 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 did the legal recognition of the master-slave relationship.²⁸²

Calabresi and Stabile contend that this is the proper understanding of Congress's ability to enforce the Equal Protection Clause of the Fourteenth Amendment.²⁸³ Although agreeing that the Fourteenth

²⁷⁷ See *supra* Part III.

²⁷⁸ See MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, *supra* note 256, at 62-63.

²⁷⁹ CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865) (statement of Sen. Trumbull).

²⁸⁰ CONG. GLOBE, 42d Cong., Spec. Sess. 85 (1871).

²⁸¹ *Id.*

²⁸² See *supra* Part III.

²⁸³ Steven G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11. U. PA. J. CONST. L. 1431, 1447 (2009). The Enforcement Clause of Section Five of the Fourteenth Amendment is worded almost identically to that of Section Two of the Thirteenth Amendment. Compare U.S. CONST. amend. XIV, § 5 with U.S. CONST. amend. XIII, § 2.

Amendment itself only applies to state actions, they argue that Congress is empowered to remedy state denials of the equal protection of the laws.²⁸⁴ In order to enact a remedy, Congress may act directly on private individuals, by enforcing the laws that the state has refused to apply.²⁸⁵ 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*.²⁸⁶

Professor Harrison also provides evidence that state violations of the Equal Protection Clause can 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.²⁸⁷

Additionally, Professor McConnell maintains that the 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 has been shown to be similar to the Thirteenth Amendment. The *Civil Rights Cases* did not flatly hold that Congress could not reach private conduct through the enforcement power of the Fourteenth Amendment; rather, the statute at issue was deficient because it was not limited to circumstances where the state itself had violated the Constitution.²⁸⁸

Many prominent cases throughout history have involved courts issuing writs of habeas corpus to free those held in slavery.²⁸⁹ Prominent abolitionist intellectuals had long claimed that slaves could be

²⁸⁴ *Id.* at 1446-49.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 1447.

²⁸⁷ Harrison, *Reconstructing the Privileges or Immunities Clause*, *supra* note 253, at 1437 n.214 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 506 (1871)) (citations omitted). *See also id.* at 1471 n.329.

²⁸⁸ McConnell, *supra* note 261, at 1090-91 (citations omitted).

²⁸⁹ *See, e.g., Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.) 499.

freed through writs of habeas corpus because they were unlawfully restrained.²⁹⁰

Section Two of the Thirteenth Amendment empowered Congress to provide remedies for persons wrongly held by others when states failed to do.²⁹¹ Because every state has general common law protections for a person's bodily integrity and freedom from restraint, persons holding someone against his will are no longer protected by any defense they had to do so, as the Thirteenth Amendment nullified those defenses.²⁹² Therefore, whenever an individual 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.²⁹³

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

A person . . . 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.²⁹⁴

Section Two empowered Congress to provide the same remedies to disadvantaged groups and the advantaged groups.²⁹⁵ Habeas

²⁹⁰ See, e.g., BENJAMIN SHAW, *ILLEGALITY OF SLAVERY* 1 (1846); Lysander Spooner, *Unconstitutionality of Slavery in the District of Columbia*, 5 N.Y.U. J. OF L. & LIBERTY 30, 32 (2010) (reprinting article from *THE DAILY CHRONOTYPE*, May 12, 1848).

²⁹¹ See *supra* Part III.

²⁹² See *supra* Part III.

²⁹³ See *supra* Part III.

²⁹⁴ DICEY, *supra* note 64, at 132-33.

²⁹⁵ Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, *supra* note 249, at 397.

corpus, even against private individuals holding another 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.²⁹⁶

The Thirteenth Amendment did not of its own force reach private individuals, but it did empower Congress to do so to rectify discriminatory state treatment of persons, either by authorizing the issuance of writs of habeas corpus or other remedies acting directly on private individuals.²⁹⁷ 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; of its own force, the Thirteenth Amendment applies only to governmental actions, but Congress may enforce its provisions by acting on private individuals when a state has failed to equally apply its laws protecting bodily integrity and freedom from restraint.

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.²⁹⁸ However, there is no convincing evidence that that view is correct when examined with the standard tools of textual, structural and historical analysis.²⁹⁹ To support the validity of such a constitutionally anomalous view, convincing evidence is required. Those who think that the original meaning should be dispositive in constitutional interpretation—or at least a substantial ele-

²⁹⁶ Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, *supra* note 249, at 397.

²⁹⁷ Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, *supra* note 249, at 397.

²⁹⁸ *See supra* Part I.

²⁹⁹ *See supra* Parts II-III.

ment of the interpretive baseline—must not accept the consensus view at face value.

Using the most highly-developed articulation of originalist methodology—that looks 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 One of the Thirteenth Amendment to the same extent it applies to the rest of the U.S. Constitution.³⁰⁰ Recognizing this would not require overturning any cases because no holding has ever directly applied the Thirteenth Amendment to a private action; Congress's power to reach private actors through legislation explains how no existing case law contradicts the understanding advanced in this Article.³⁰¹ There is thus no overriding reason to refuse to reexamine the issue of whether the Thirteenth Amendment truly represents an exception to the state action doctrine.

³⁰⁰ *See supra* Part III.

³⁰¹ *See supra* Part VI.

