

## Maryland Law Review

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Volume 71 | Issue 1


Article 4

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### Recommended Citation

Mark A. Graber, *Symposium - the Maryland Constitutional Law Schmooze - Foreword: Plus or Minus One: the Thirteenth and Fourteenth Amendments*, 71 Md. L. Rev. 12 (2011)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol71/iss1/4>

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# Symposium

## The Maryland Constitutional Law Schmooze

### FOREWORD: PLUS OR MINUS ONE: THE THIRTEENTH AND FOURTEENTH AMENDMENTS

MARK A. GRABER\*

Conventional wisdom maintains that ratification of the Fourteenth Amendment mooted a heated controversy over the scope of the Thirteenth Amendment. That controversy broke out during the debates over the Freedmen's Bureau Bill of 1866 and the Civil Rights Act of 1866. Most Republicans insisted those laws were appropriate means for enforcing the Thirteenth Amendment.<sup>1</sup> President Andrew Johnson, the Democrats in Congress, and a few Republicans insisted that the Congressional power under the Thirteenth Amendment was limited to legislation abolishing slavery and did not authorize the national legislature to pass laws protecting freed persons of color from discrimination short of enslavement.<sup>2</sup> Although the Civil Rights Act of 1866 passed over President Johnson's veto, Republicans recognized that the substantive rights of freed blacks needed firmer constitutional foundations. Hence, they framed and ratified the Fourteenth Amendment.

The ratification of the Fourteenth Amendment transformed constitutional debate in the United States. Subsequent controversies over the constitutional rights of African-Americans focused on the proper interpretation of Sections 1 and 5 of that Amendment. The Thirteenth Amendment was confined to a few isolated practices that could be analogized with slavery as it existed in the United States before the Civil War.<sup>3</sup> Legal historians continue to debate the proper interpreta-

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1. Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 189–94 (1951).

2. *Id.* at 189.

3. See *Bailey v. Alabama*, 219 U.S. 219, 241–42 (1911) (defining involuntary servitude and the practice of peonage).

tion of the Thirteenth Amendment. Jacobus tenBroek and others insisted that Republicans in 1866 correctly recognized the Thirteenth Amendment both abolished slavery and provided free blacks and others with the broad set of fundamental rights associated with free status. Nevertheless, at least according to conventional wisdom, ratification of the Fourteenth Amendment rendered inquiry into the original meaning of the slavery provisions largely historical. The Fourteenth Amendment, commentators agreed, at a minimum protected all the substantive rights that the original Thirteenth Amendment might have protected. The precise scope of those fundamental rights was contested. Scholars disputed, for example, whether the Fourteenth Amendment was originally intended to abolish segregated education.<sup>4</sup> The crucial point is that passage of the Fourteenth Amendment eliminated the practical need to adjudicate the 1866 debates between Radical Republicans and Andrew Johnson over the meaning of the Thirteenth Amendment. Constitutional law would be the same had Americans in 1865 just passed the original text of the Fourteenth Amendment. Jacobus tenBroek, the mid-twentieth century scholar who most forcefully advanced a substantial vision of the slavery provisions, admitted that the Fourteenth Amendment “re-nacted” the Thirteenth Amendment.<sup>5</sup>

This consensus that the Fourteenth Amendment incorporates the Thirteenth Amendment has come under sharp criticism in recent years. Several new works suggest that the Thirteenth Amendment, properly interpreted, protects some substantive rights not protected by the Fourteenth Amendment.<sup>6</sup> Some of this scholarship is undoubtedly motivated by an effort to avoid hostile Supreme Court precedents. Given how powerful the state action requirement of the Fourteenth Amendment has become in recent years, a good advocate might be well advised to switch claims to the Thirteenth Amendment, which does not have a state action requirement. Nevertheless, more seems to be going on than mere litigation strategy. Scholars are detecting different rights and regime principles in the Thirteenth

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4. See, e.g., Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995) (arguing that the original understanding of the Fourteenth Amendment did not condone the Court’s holding in *Brown*); Michael McConnell, *Originalism in the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (arguing that that the drafters of the Fourteenth Amendment would have supported the Court’s decision in *Brown*).

5. Jacobus tenBroek, *supra* note 1, at 203.

6. See, e.g., Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 41–42 (1995) (describing the different outcomes of challenging all-white jury selections under the Thirteenth and Fourteenth Amendments).

Amendment than they find in the Fourteenth Amendment.<sup>7</sup> At the very least, this scholarship suggests a constitution with the Thirteenth and Fourteenth Amendments is very different from a constitution with only the Fourteenth Amendment.

The 2011 Maryland Constitutional Law Schmooze<sup>8</sup> provided an opportunity for law professors, political scientists, and historians to discuss the proper place of the Thirteenth Amendment in the American constitutional universe. The merits of the revisionist literature on the relationship between the Thirteenth and Fourteenth Amendments were a central theme of conversation. Many participants saw the constitutional commitment to abolishing slavery as providing foundations for a new progressive constitutionalism. Some were more skeptical and defended more traditional interpretations of the post-Civil War Constitution. Others observed that sauce for the goose was sauce for the gander, that the Thirteenth Amendment might have as powerful a conservative as a progressive bite.

Several essays in this symposium provide a roadmap for how the Thirteenth Amendment might support rights presently unprotected by the Fourteenth Amendment. Julie Novkov's essay contrasts the central place of citizenship in the Fourteenth Amendment with the primacy of family in the Thirteenth Amendment. She notes how "the experiences and arguments over emancipation" call for "considering the legal recognition of family beyond conceptions of citizenship and civil membership."<sup>9</sup> Abolitionists, her paper details, more often condemned slavery's "effects on families," than the denial of citizenship rights. A Thirteenth Amendment jurisprudence that took this history into account might provide greater protection for immigrant families and gay couples. Novkov emphasizes that "the free capacity to marry and form a family unit is fundamentally incompatible with slavery."<sup>10</sup>

James Gray Pope's paper points to the unique features of the Thirteenth Amendment. He is particularly interested in that provision's distinctive treatment of constitutional labor relationships. Slavery, he notes, is a system of "labor control." Persons interpreting the constitutional command that slavery "shall [not] exist in the United States" must, therefore, determine "what rights are necessary to en-

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7. Julie Novkov, *The Thirteenth Amendment and the Meaning of Familial Bonds*, 71 MD. L. REV. 203 (2011) (finding protections for the rights of families in the Thirteenth Amendment); James Gray Pope, *What's Different About the Thirteenth Amendment, and Why Does It Matter?*, 71 MD. L. REV. 189 (2011) (finding a right to a free labor system in the Thirteenth Amendment).

8. Mark Tushnet is the founder of the contemporary Schmooze movement.

9. Novkov, *supra* note 7, at 213.

10. *Id.* at 225.

sure the permanent extinction of the slave labor system and the ongoing operation of a free labor system.”<sup>11</sup> This investigation will require that constitutional authorities commit themselves to attacking “relations of subjugation and exploitation”<sup>12</sup> whether they are found on the plantation or in the factory.

The lack of a state action requirement makes the Thirteenth Amendment particularly attractive as a foundation for progressive constitutional visions. Recent Supreme Court precedents have given a particularly restrictive reading to the phrase “No State shall” in Section 1 of the Fourteenth Amendment. The constitutional proclamation, “Neither slavery nor involuntary servitude . . . shall exist within the United States” contains no such limiting language. Alexander Tsesis’s essay relies heavily on this textual distinction when arguing for a more expansive reading of Congressional power under the Thirteenth Amendment than exists under the Fourteenth Amendment. His survey of the historical and jurisprudential background of the Thirteenth Amendment indicates that the congruent and proportional test the Supreme Court has employed when limiting federal power under the Fourteenth Amendment “is inapplicable to the judicial review of Thirteenth Amendment enforcement authority.”<sup>13</sup> Precedent, Tsesis insists, supports his reading of the post-Civil War Constitution. He reminds readers that, while the Supreme Court in *The Civil Rights Cases*<sup>14</sup> rejected both the Thirteenth and Fourteenth Amendments as foundations for a federal law prohibiting racial segregation in places of public accommodation, every Justice recognized the enforcement clauses of each amendment required a distinctive constitutional analysis. “The Court’s rationale for finding the law to be an unconstitutional use of the Thirteenth Amendment power was different than its analysis of the Fourteenth Amendment,” Tsesis points out, “even though its ultimate judgment about the statute’s unconstitutionality was the same.”<sup>15</sup> Given how precedent regards “the state action requirement of the Fourteenth Amendment to be an essential contrast between the two” amendments,<sup>16</sup> Tsesis concludes, “the recent line of cases that have narrowly interpreted the Fourteenth Amendment’s Enforcement Clause” do not “diminish the con-

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11. Pope, *supra* note 7, at 193.

12. *Id.* at 196.

13. Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 40, 42 (2011).

14. 109 U.S. 3 (1883).

15. Tsesis, *supra* note 13, at 55–56.

16. *Id.* at 55.

tinued vibrancy of legislative efforts to combat existing incidents and badges of involuntary servitude.”<sup>17</sup>

Jennifer Mason McAward maintains Tsesis is mistaken. She claims he is “wrong to assign to Congress the substantive power to define the badges and incidents of slavery on its own, subject only to bare bones rationality review.”<sup>18</sup> McAward uses both history and text to support her conclusion. Her paper details how “[t]he historical record contains no evidence to support placing such a substantive power in Congress’s hands.”<sup>19</sup> Moreover, she argues, similarly worded texts should receive the same interpretation. McAward notes, “the enforcement provisions of the Thirteenth and Fourteenth Amendments are virtually identical.”<sup>20</sup>

Michael Les Benedict suggests that Tsesis and the other legal participants in the debate over the enforcement provisions of the post-Civil War Amendments are ahistorical. Much of his analysis supports the Tsesis thesis. Benedict points out that nineteenth century constitutional politics assigned to elected officials the primary authority for elucidating the meaning of constitutional provisions protecting fundamental rights. His essay details how, when the post-Civil War amendments were framed and ratified, “the responsibility for protecting rights lay with the people themselves as expressed through the political system.”<sup>21</sup> Both Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment were understood in light of the conventional practices that saw judicial supremacy as a threat to constitutional democracy. Benedict departs from Tsesis in his analysis of the contemporary constitutional regime. The problem with interpreting the enforcement provisions in the post-Civil War Constitution as giving Congress in 2011 the authority to elucidate the meaning of constitutional provisions, Benedict declares, is that we no longer live in the constitutional universe inhabited by the persons responsible for the Thirteenth and Fourteenth Amendments. He states, “[T]he logical outcome of the present system of constitutional politics, which recognizes judicial priority in construing the Constitution . . . [is] the Court alone has the authority to define what constitutional provisions

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17. *Id.* at 59.

18. Jennifer Mason McAward, *Congressional Authority to Interpret the Thirteenth Amendment: A Response to Professor Tsesis*, 71 MD. L. REV. 60, 63 (2011).

19. *Id.*

20. *Id.* at 62.

21. Michael Les Benedict, *Constitutional Politics, Constitutional Law, and the Thirteenth Amendment*, 71 MD. L. REV. 163, 174 (2011).

mean and the political branches must acquiesce in those determinations.”<sup>22</sup>

Tsesis’s argument about congressional power to enforce the Thirteenth Amendment may not provide progressive balm in a conservative age even if his premises are both historically correct and not anachronistic. To the extent that the Thirteenth Amendment left the definition of freedom in the hand of elected officials, that decision places the responsibility for eradicating both the practice and legacy of slavery in hands of the white elite. Quoting Derrick Bell, William Carter’s essay concludes that the practical effect of the Thirteenth Amendment is that “the interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”<sup>23</sup> These facts of political life do not leave African-Americans without any recourse. Carter suggests that the Thirteenth Amendment might be “interpreted to extend protection to whites in situations where their opposition to racial justice or exclusion . . . puts them at physical or economic risk.”<sup>24</sup> Nevertheless, the overall tone of his essay puts a damper on the hope that the Thirteenth Amendment may be the tonic for all that afflicts constitutional progressives. “Thirteenth Amendment scholarship and advocacy,” Carter concludes, “could benefit from a heavy dose of legal realism regarding its opportunities for success.”<sup>25</sup>

The recent history of incorporation suggests how interest convergence theory might lead the Thirteenth Amendment on a different developmental path than that proposed by constitutional progressives. For much of the twentieth century, liberals favored and conservatives opposed claims that the Due Process Clause of the Fourteenth Amendment required state government to honor all or the vast majority of provisions in the Bill of Rights.<sup>26</sup> As late as 1985, President Ronald Reagan’s attorney general, Edwin Meese, gave a major address opposing incorporation.<sup>27</sup> Twenty-five years later in *McDonald*

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22. *Id.* at 187.

23. William M. Carter, Jr., *The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery*, 71 MD. L. REV. 21, 23 (2011) (quoting Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980)).

24. *Id.* at 37.

25. *Id.* at 39.

26. *See, e.g.*, *Adamson v. California*, 332 U.S. 46, 53–54 (1947) (holding that the Fourteenth Amendment did not incorporate the Fifth Amendment); *Id.* at 68–72 (Black, J., dissenting) (arguing that the Fourteenth Amendment fully incorporated the Bill of Rights).

27. Edwin Meese III, Address Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), *available at* <http://www.fed-soc.org/resources/page/the-great-debate-attorney-general-ed-meese-iii-november-15-1985>.

*v. Chicago*<sup>28</sup> every conservative member of the Supreme Court enthusiastically defended some version of incorporation. Strict legalists might conclude that after nearly half a century such cases as *Duncan v. Louisiana*<sup>29</sup> and *Robinson v. California*<sup>30</sup> are cast in *stare decisis* stone. Still, given ongoing conservative efforts to overrule *Roe v. Wade*<sup>31</sup> and *Miranda v. Arizona*,<sup>32</sup> time seems an insufficient explanation for incorporation's recent favorable reception. The conservative enthusiasm for incorporation in *McDonald* seems at least partly a consequence of the issue before the Court: whether states were obliged to respect the individual right to bear arms that the Justices had declared in *District of Columbia v. Heller*<sup>33</sup> was protected by the Second Amendment. More generally, over the past twenty-five years, the incorporation doctrine has provided precedential support for federal decisions limiting state power to restrict hate speech, regulate commercial advertising, limit campaign contributions, protect environmental laws, and adopt land use restrictions. In short, conservative interests in 2011 support a far broader incorporation doctrine than in 1961, when most incorporation issues concerned the rights of poor persons and persons of color accused of criminal offenses.

Several essays in this symposium provide paths by which the Thirteenth Amendment might drift from a vehicle for progressive constitutional ambitions to a source for more conservative constitutional law.<sup>34</sup> Benedict's discussion of the "free labor" principles underlying Republican opposition to slavery<sup>35</sup> could easily serve as a foundation for reinvigorating the freedom of contract.<sup>36</sup> Linda McClain's essay points out that during the debates over the Civil Rights Act of 1964, the Thirteenth Amendment was as often cited by southern propo-

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28. 561 U.S. 3025 (2010).

29. 391 U.S. 145 (1968) (incorporating the Sixth Amendment right to trial by jury).

30. 370 U.S. 660 (1962) (incorporating the cruel and unusual punishment clause of the Eighth Amendment).

31. 410 U.S. 113 (1973). See *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Thomas, J., dissenting) ("[T]he Court's abortion jurisprudence . . . has no basis in the Constitution.").

32. 384 U.S. 436 (1966). See *Dickerson v. United States*, 530 U.S. 428, 448 (2000) (Scalia, J., dissenting) ("*Miranda* was objectionable for innumerable reasons . . .").

33. 554 U.S. 570 (2008).

34. See generally, J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869 (1993).

35. Benedict, *supra* note 21, at 182.

36. See *Lochner v. New York*, 198 U.S. 45, 54 (1905) (discussing "the right of the individual to labor for such time as he may choose"); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 110 (1872) (Field, J., dissenting) (describing "the right of free labor" as "one of the most sacred and imprescriptible rights of man").



nents of racial segregation as by liberals committed to racial equality. “[S]ome lawmakers,” McClain details, “argued that the Thirteenth Amendment posed an ‘insurmountable constitutional barrier’ to a federal public accommodations law because it compelled service.”<sup>37</sup> Champions of white supremacy insisted that “however compelling the need may seem that individuals serve others in particular circumstances, such a requirement flies in the face of the strong and clear policy of the 13th Amendment.”<sup>38</sup>

Ken Kersch’s essay details how the Thirteenth Amendment might provide broad foundations for a constitutional vision favored by some of the most conservative participants in American politics. He details the rise of “Declarationism” among right-wing constitutionalists. Adherents maintain “the Constitution can only be understood and interpreted in light of the principles enunciated in the opening words of the Declaration of Independence.”<sup>39</sup> Declarationists celebrate the Thirteenth Amendment and Lincoln’s attack on slavery. They believe the Constitution is grounded in natural rights theory, interpret Lincoln’s attack on slavery during the Lincoln-Douglas debates as reaffirming the natural rights foundations of fundamental rights, and insist the Thirteenth Amendment is a reaffirmation of that core commitment of American constitutionalism. A liberal natural rights advocate might regard this history as supporting constitutional protection for such natural rights as the right to marry the person of one’s choice or the right to work in nonexploitative conditions. Conservative natural rights theorists draw very different conclusions from the antislavery commitments they believe motivated Lincoln and the Thirteenth Amendment. In their view, a proper understanding of the natural rights foundations for the constitutional ban on slavery should turn Americans away from “abortion, euthanasia, and gay marriage,” as well as away from “Obamacare, the celebration of sodomy, and government funding for Planned Parenthood.”<sup>40</sup>

Readers might conclude from these essays that, contrary to popular understanding, the Fourteenth Amendment weakened, rather than expanded or confirmed, Thirteenth Amendment protections for fundamental rights. The judicial emphasis on the Fourteenth

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37. Linda C. McClain, *Involuntary Servitude, Public Accommodations Laws, and the Legacy of Heart of Atlanta Motel, Inc. v. United States*, 71 MD. L. REV. 83, 83 (2011) (quoting Strom Thurmond).

38. *Id.* at 141 (quoting Alfred Avins).

39. Ken I. Kersch, *Beyond Originalism: Conservative Declarationism and Constitutional Redemption*, 71 MD. L. REV. 229, 229–30 (2011).

40. *Id.* at 280.

Amendment cabined the potential of the post-Civil War Constitution. Instead of developing broad understandings of both slavery and the legacy of human bondage in the United States, constitutional decisions and commentary too often focuses on the particular rights Reconstruction Republicans sought to guarantee in the late 1860s. By turning the spotlight back on the constitutional visions of antislavery Americans before the Fourteenth Amendment, the participants in the Schmooze have opened new possibilities for freedom in the twenty-first century.