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Essays

Did the Slaves Author the Thirteenth Amendment? An Essay in Redemptive History

Guyora Binder*

> If we shall suppose that American slavery is one of those offences which, in the providence of God, must needs come, but which, having continued through its appointed time, he now wills to remove, and that he gives to both North and South, this terrible war, as the woe due to those by whom the offence came, shall we discern therein any departure from those divine attributes which the believers in a Living God always ascribe to him? Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue, until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be

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paid by another drawn with the sword, as was said three thousand years ago, so still it must be said the judgments of the Lord, are true and righteous altogether.

Abraham Lincoln[1]

Lincoln got the praise for freeing us, but did he do it? He give us freedom without giving us any chance to live to ourselves, and we still had to depend on the Southern white man for work, food, and clothing, and he held us, through our necessity and want, in a state of servitude but little better than slavery.

Thomas Hall[2]

I. THE PROBLEM: WHO AUTHORED THE THIRTEENTH AMENDMENT?

No mere appendix to the Constitution, the Thirteenth Amendment reframed the nation.[3] But if the nation emerged from its crucible founded anew, who were its new founders? I will argue that it makes a moral difference to whom we credit our "new birth of freedom"[4] and that credit is due the slaves.

Recognizing the slaves as framers might change the implications we find in the Thirteenth Amendment, making it a more potent weapon in the arsenal of civil rights advocates. But my present purpose is neither to explicate the values of the slaves, nor to apply those values to Thirteenth Amendment issues, nor to calculate the benefits to anyone of so applying them.[5] The instrumental value to us of any interpretation of the Thirteenth Amendment depends on the prior question of how we define ourselves and our interests. My present argument goes to this prior question by urging contemporary Americans to define themselves as political descendants of the slaves.

As popular memory[6] has it, Northern whites gave—and Southern blacks received—freedom. Treating the Reconstruction Congressmen as

1. ABRAHAM LINCOLN, Second Inaugural Address, March 4, 1865, *in* SPEECHES AND WRITINGS 1859-1865, at 686-87 (1989).

2. Thomas Hall, Federal Writers' Project Interview, *in* BEFORE FREEDOM: 48 ORAL HISTORIES OF NORTH AND SOUTH CAROLINA SLAVES 44 (Belinda Hurmence ed., 1990).

3. *See infra* text accompanying note 64.

4. ABRAHAM LINCOLN, Gettysburg Address, *in* SPEECHES AND WRITINGS 1859-1865, *supra* note 1, at 536; GARY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1992).

5. For efforts to explicate the meaning of "freedom" to the slaves, making extensive use of slave narratives, letters, interviews, and spirituals, see Guyora Binder, *Mastery, Slavery and Emancipation*, 10 CARDOZO L. REV. 1435 (1989); Guyora Binder, *On Hegel, On Slavery, But Not On My Head!*, 11 CARDOZO L. REV. 563 (1990); Guyora Binder, Negating Slavery (1992) (unpublished manuscript, on file with the author).

6. There is an extensive literature on popular historical memory. *See, e.g.*, MAURICE HALBWACHS, THE COLLECTIVE MEMORY (1980); BERNARD LEWIS, HISTORY: REMEMBERED, RECOVERED, INVENTED (1975); Barry Schwartz, *The Social Context of Commemoration: A Study in Collective Memory*, 61 SOCIAL FORCES 374 (1982); DAVID LOWENTHAL, THE PAST IS A FOREIGN COUNTRY (1985); PAUL CONNERTON, HOW SOCIETIES REMEMBER (1989); MICHAEL

founders, constitutional interpreters wonder whether they were more motivated by the "Negrophobia" of their constituents or "by abolitionist ideology,"[7] or by the desire to leave abolition's "future effect . . . to future determination."[8] All three of these accounts recognize only Northern whites as members of the constituent power whose will was reflected in the new constitution. In a kind of gift-exchange, Northern whites receive status as constitutional authors in return for the freedom they supposedly conferred on Southern blacks.

Yet if black freedom is thus conditioned on recognizing white authority to define that freedom, the gift-exchange is a swindle. As Thomas Hall complained, whites won "praise" for conferring freedom, even as they perpetuated "a state of servitude but little better than slavery," slavery under another name. Along with interpretive authority, then, comes the power to recover the gift and retain moral credit for giving.

How much is such moral credit worth? According to Lincoln, the man who received most of the credit for emancipation, its worth could be measured in mountains and oceans. Slavery had left all whites liable for a mountain of debt "piled by the bond-man's two hundred and fifty years of unrequited toil," and, "drawn with the lash," an ocean of debt redder than any ink. For the nation conceived as a New Eden, the sin of slavery merited a fall, a flood, a curse on its first born sons, a Red Sea engulfing its mighty hosts. On the redemption of the slaves from bondage, then, hinged the redemption of the nation's soul.

That white Americans gained so much moral capital from the Thirteenth Amendment, while black Americans gained so little material capital, suggests that there is something deeply wrong with the popular account of emancipation as a gift from whites to blacks. In this essay I will argue that this received narrative symbolically dispossesses the slaves.

Characterizing the slaves' redemption as a gift from whites makes freedom a privilege that could be granted or withheld rather than an anterior right that slavery violated. In this way, popular memory perpetuates and participates in slavery's original dispossession of the slaves' dominion over themselves. In thus legitimizing the ex-slaves' prior status, this narrative dispossesses them also of "all the wealth piled by" their "two hundred and fifty years of unrequited toil." In treating freedom as a gift freely granted rather than a right defended, the dominant narrative also dispossesses the slaves of their historical agency, and the dignity Ameri-

KAMMEN, MYSTIC CHORDS OF MEMORY (1991); *Special Issue on Collective Memory and Countermemory*, 26 REPRESENTATIONS (1989).

7. RAOUL BERGER, GOVERNMENT BY JUDICIARY 10 (1977) (criticizing JACOBUS TENBROEK, EQUAL UNDER LAW (1951) (interpreting legislative history of the Thirteenth and Fourteenth Amendments as reflecting abolitionist influence)).

8. Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 64 (1955).

can culture has always conferred on the self-reliant. In the language of property law, denying the *adversity* of the slaves' self-possession diminishes their title to themselves. A further consequence of minimizing slave agency in precipitating emancipation is the exclusion of slaves from any role in reconstituting the nation. Denied their place among the framers not only at the original constitutional convention, but again at its Reconstruction, the slaves remain forever outside the constituent power. Thus, popular memory dispossesses the slaves not only of their agency, but also of their authorship of the post-Civil War Constitution.

One implication of effacing slave authorship of the Thirteenth Amendment is the extinction of what we might call the slaves' *copyright*: their claims to credit and consequent reward for their creative achievement. Thus, as argued above, the received narrative wrongly credits others for the substantial benefits of emancipation to the nation and its white citizens. "In giving freedom to the slave," Lincoln flattered Congress in 1862, "we assure freedom to the free."[9] In denying that the nation already owed the slaves a mounting debt, and in denying slave agency in limiting and partially forgiving that debt, popular memory dispossesses slaves of a claim on the nation's conscience.

A misattribution of the Thirteenth Amendment could deprive the slaves not only of their copyrights, but of whatever *moral rights* we think constitutional authors are owed. Whether constitutional authors should or even can retain authority over the interpretation of their products remains controversial. But as long as consultation of "framers' original intent" remains an important convention in constitutional interpretation, a misattribution of the Thirteenth Amendment dispossesses the slaves of their share of influence over the future meaning given emancipation.

In a variety of ways, then, the received account of emancipation perpetuates the dispossession that was slavery, violating the Thirteenth Amendment's command that "neither slavery nor involuntary servitude . . . shall exist." This essay urges interpreters of the Thirteenth Amendment to invert the transactional structure of this received account. It urges interpreters to read the Thirteenth Amendment as the slaves' gift to the nation, a gift that, like all gifts, cements a relationship and incurs a debt. If the slaves authored their own emancipation, they must also be credited with the nation's "new birth of freedom." In this sense, the slaves were redeemers of a "nation, conceived in liberty"[10] that had sold itself into moral bondage. As benevolent founders of the new nation emerging from the Civil War, the slaves have a claim to be recognized as authors—and authoritative interpreters—of its new Constitution. Indeed, fulfilling the Thirteenth Amendment's command that slavery be

9. ABRAHAM LINCOLN, Annual Message to Congress, December 1, 1862, *in* SPEECHES AND WRITINGS 1859-1865, *supra* note 1, at 413.
10. LINCOLN, *supra* note 4, at 536.

abolished entails interpreting that command from the viewpoint of the slaves.

Such a claim combines two uses of the past we typically see as distinct and even opposed. When we seek the original intent or understanding of legal language we treat the past as authoritative. On the other hand, when we identify past injustice, we seem to challenge the past's authority. There is an apparent tension in an argument that views the abolition of slavery as enacted law, while condemning the polity that enacted it as illegitimate because it excluded the slaves.

Yet this tension is apparent *only*. There is an important continuity between fidelity to, and revolt against, the past that illuminates how and why we confer authority upon the past at all. The continuity between pious and rebellious responses to the past is suggested by the fact that each implies a duty, alternatively to honor and perpetuate a past, or to repudiate and disestablish it. In treating a past as a source of either kind of duty, we accept that past as ours and take some measure of responsibility for it. But proprietorship of the past is a messy business—in claiming a past we inherit a going concern with assets, debts, investments, reputation, demanding customers, anxious shareholders, and acquisitive competitors. The duty of fidelity to our chosen ancestors is not neatly distinguishable from obligations to discharge their debts, correct their errors, and keep their concern going in a changing world. If we are to seek justification from the past, it seems, we must be prepared to justify the past, to fulfill its aspirations, to rectify its wrongs, to redeem it.

But why seek justification from a past so vulnerable to criticism? If the moral authority of the past depends on our power to judge and redeem, if as Steven Knapp has argued, "the lines of authority run from present to past and not the other way,"[11] what do we need a past for? Why are we bound by our horrific past in interpreting the Thirteenth Amendment's imperative that in the future such horrors "shall [not] exist within the United States"? Why not simply read our current hopes into the Thirteenth Amendment?[12]

The appeal of a prospective interpretation of the Thirteenth Amendment is strengthened by increasingly voiced doubts about the methodological possibility of keeping faith with the past. In constitutional theory, the jurisprudence of original intent has been all but abandoned. Constitutional scholars assure us that we can never identify authoritative

11. Steven Knapp, *Collective Memory and the Actual Past*, 26 REPRESENTATIONS 123, 130 (1989).

12. The leading champion of this appealing view that the Constitution should be read as if written today is Justice Brennan. *See* William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, *in* INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 13-24 (Sanford Levinson and Stephen Mailloux eds., 1988). In a sense, I am not challenging this conclusion, but adding the qualification that if we wrote the Constitution today we would and should be mindful of the nation's past.

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"intenders," or ascribe to them a single determinate preference. We would not know how to apply such preferences to the present, or whether doing so would fulfill the interpretive expectations of whomever held those preferences.[13] In cultural studies, critics of nationalism argue that nationalist movements invent the traditions to which they would adhere.[14] If the past we would perpetuate or repair is our own projection, why not dispense with the pretense and just enforce the normative conclusions we would have reached anyway? Why not simply enforce majority will?

One answer is that determining our own preferences, let alone those of a majority, is no simple matter. We do not arrive at normative judgments in a social and historical vacuum. We derive our values from roles and identities that are socially conferred. These social identities come equipped with collectively imagined histories—pasts we are constrained to accept not because they are "true," but because they are socially available. Thus normative decision-making involves narratively situating ourselves in relation to a tradition shared with others. As David Luban notes, even when we argue consequentially, "the consequences we seek are in large measure to be sought in the past. . . . We achieve happiness in the thought that we have resurrected the memory of our dead ancestors, rescued their history from the defamations of their enemies, and therefore given ourselves a past that makes us comprehensible."[15] Even utility—"happiness"—is a matter of fidelity to the interests our traditions confer upon us. In this sense, there is no "contemporary" normative perspective from which to judge tradition—instead, critiques of tradition must be rooted in a countertradition that stands some chance of mustering support. Traditions are indispensable for constituting politics, and are no less so for being "invented."

That traditions have no objective foundation or determinate implications hardly implies that fidelity to tradition is impossible *in general*. It is only the pervasive residue of slavery in our traditions that makes appeals to the past so problematic *in the particular context of the Civil War amendments*. But the solution to the deep cleavages of race cannot be to ignore our painful history and appeal to a contemporary normative consensus that is nowhere to be found. When a past is so manifestly unjust and a tradition so exclusive as to preclude their invocation in constitutional decision-making, *corrective* justice can also be *redemptive*. By

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13. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

14. *See generally* NATION AND NARRATION (Homi K. Bhaba ed., 1990); BENEDICT ANDERSON, IMAGINED COMMUNITIES (1983); THE INVENTION OF TRADITION (Eric Hobsbawm ed., 1983); ERNEST GELLNER, NATIONS AND NATIONALISM (1983).

15. David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2221-22 (1989) (discussing Walter Benjamin).

this I mean that rectification serves to make whole not only the victims, but also the constitutional tradition on which the citizenship of all depends. The project of redeeming a shared political identity offers all Americans, privileged as well as oppressed, a common interest in eradicating slavery's continuing legacy—a common interest that a purely prospective jurisprudence cannot provide. Interpreting the Thirteenth Amendment as if authored by the slaves would be such a redemptive use of history, enabling us to fashion a common identity out of an unjust past.

I will acknowledge that such a use of history is not without risks. What, in the end, can we know of these people? The sleepless souls of ten generations of slaves we bring back from the dead to adjudicate our constitutional controversies cannot but be spectral figures, more imagined than real. Never has any people been more ripped from the page of history. Nevertheless, I conclude, among the many lessons we can learn from them is the power of the imagination, against all odds, to weave together people displaced, orphaned, separated, and abandoned, into a common narrative of struggle. If they, in their harsh wilderness of anonymity, could forge a common identity, how much more easily, with their heroic example to urge us on, can we.

II. The Claim: The Slaves as Redeemers of the Constitution

In this section, I urge that we redeem our fallen past by incorporating the recorded struggles and aspirations of the slaves into our constitutional canon. My argument is made largely in the form of a story, an account of the origins of the Thirteenth Amendment.

Narrative argument often bridges the gap between an unjust past and a proposed future with the rhetoric of Whig history, pregnant with figures of growth, learning, or progress. Alternatively, the chasm may be more abruptly leaped with the messianic[16] imagery of redeeming or recuperating values that have been alienated or dishonored. The Lincoln of the debates dangerously interwove Whig and messianic history, implying that the horror of slavery was adequately compensated by its contribution to the formation of a union that would foster progress toward free labor. By his second inaugural, the apocalyptic course of history had swept him into a messianic narrative as he took the measure of the mountain of moral debt incurred by the sin of slavery, and offered a wistful prayer for a redeemer's grace.

In turning from Whig history to messianic history, Lincoln acknowledged not just the spatial but also the temporal gash that slavery had

16. *See* WALTER BENJAMIN, ILLUMINATIONS 263-64 (Hannah Arendt ed., 1968) (developing notion of "messianic time").

opened in the union. The nation had forsaken, or been forsaken by, its ancestry. It had to be redeemed—reborn with a new heritage.[17] Against the background of this imperative to redeem the past, the abolition of slavery becomes something more than a constitutional amendment—it becomes fundamentally reconstitutive.

To acknowledge that the reconstitution of the nation depends upon redeeming the nation's debt to the slaves is already to recompose the nation, to recognize African-Americans for the first time as parties to its social contract. But if the interpreter is to regard the resulting contract as binding on the slaves, she must recognize them not just as beneficiaries of the contract, but as authors, setting its terms. To redeem the debt owed the slaves, I am suggesting, this nation must finally come to terms with the slaves themselves; and to redeem a heritage stained by slavery, constitutional interpreters must earn the right to claim descent from the slaves. If we are to give a redemptive meaning to the Thirteenth Amendment, then, we must interpret it in light of the visions of freedom and the critiques of slavery enunciated by the slaves.[18]

A. The Claim Clarified

Before developing this claim, I should clarify its scope in three ways:

First, the argument I offer here is context-specific, as any redemption narrative must be. It ascribes no blanket privilege to all victims to dictate the terms of corrective justice.[19] Instead, it turns on the agency of

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17. *See* WILLS, *supra* note 4.

18. How *much* weight should interpreters of the Thirteenth Amendment accord the discernible values of antebellum African-Americans, relative to competing constitutive traditions? That will depend in part on what can be said on behalf of those traditions. I will be arguing in other work that the various strands of white antislavery thought were too circumscribed by their own racism to earn much contemporary credit, and that a commitment to racial subordination has continued to shape our constitutional development since the Civil War. Obviously, the power of slave experience to redeem our constitutional tradition depends in part on how fallen that tradition would be without it. Moreover, in weighing slave perspectives against the views of whites, we should take into account the possibility that enslaved African-Americans had already so adapted to white society that any further accommodation of the white majority would diminish any distinctively African contribution to our constitutional heritage to the vanishing point. All such questions of relative weight I leave to one side. I mean here only to develop the argument that incorporation of slave voices into the constitutional canon would offer redemption.

19. I offer no brief for redemptive narrative as a "method" or "technique" for objectively assessing normative claims. Redemption is a motif in much, if not all, narrative; and narrative form is not a criterion for distinguishing right from wrong normative arguments since it is a characteristic feature of all normative argument. It is useful to keep in mind the normative ambiguity of the rhetoric of redemption. Redemption may be either corrective or transactional, depending on background distributional assumptions. The redemption of a slave, for example, may be seen as the righting of a wrong, the restoration of an original equilibrium, necessitating compensation from or punishment of the master. Alternatively, redemption may be seen as an exchange, perpetuating a current equilibrium. In a variant of this transactional narrative, redemption may be figured as a benevolent gift or loan to a helpless supplicant, generating a new debt to the redeemer. Much of the dramatic power of redemption narratives is made possible by their capacity to suspend competing narrative interpretations. In particular, since any transaction can be recoded as an exchange of gifts, or as the reciprocal repayment of debts previously incurred, any exchange can be dramatized along the lines of O. Henry's *Gift of the Magi*: as a dispute transcended by mutual sacrifice, mutual forgiveness, mutual redemption. *See* David Kennedy, *The Turn to Interpretation*, 58 S. CAL. L.

slaves in extracting the promise of emancipation and on the particular centrality of that promise to the national identity cherished by many Americans. Still haunted by the restless shade of slavery,

> we yearn for the rite that will exorcise this most stubborn of our attendant demons, our old capricious cruelty now in its third century, the crime that bloodies our sacred arrows and puts around us that odor the Cheyenne smelt around the man who defiled the ultimate covenant by killing a tribal brother as our racism defiles our covenant with each other and the world.[20]

Another tedious quarter century has passed since Charles Black wrote these memorable words, and still slavery remains the breach in our covenant, the nation's original sin. This is what makes the eradication of slavery's lingering effects more even than a matter of justice: slavery's victims hold a note, not just for forty acres, but for the nation's soul.

Second, while it seems plausible to anticipate that realizing the slaves' conception of emancipation would alter the still subordinate status of African-Americans, it does not follow that it would benefit African-Americans only. Recent scholarship has offered the Thirteenth Amendment as a potential source of generally available labor rights,[21] reproductive rights,[22] and rights to state protection against private violence.[23] None of these applications would be foreclosed by the transfer of authority, say, from legislative debates in Congress to slave narratives—indeed I am confident they would be greatly strengthened.[24] Because the slaves had a rich and distinctive vision of freedom,[25] an interpretation of the Thirteenth Amendment rooted in the values of the slaves could have far-reaching applications for all Americans.

REV. 251 (1985). Thus, the figure of redemption denotes not so much a single stock narrative as a generative principle for narrative. In this sense, every effort to identify with a past can be read as a redemption narrative. *See* Steven L. Winter, *The Cognitive Dimension of the* Agon *between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2240-42 (1989) (describing complex narratives as assembled out of sequential or nested struggles to restore equilibrium).

20. Charles Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

21. *See* Lea Vander Velde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989); Lea Vander Velde, *The Gendered Origins of the* Lumley *Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775 (1992).

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

23. *See* Akhil R. Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359 (1992); Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude, and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207 (1992).

24. For an example of such a use of slave experience, see Amar & Widawsky, *supra* note 23, at 1370; *cf.* U.S. v. Kozminski, 487 U.S. 931, 944-51 (1988) (O'Connor, J.) (narrowing involuntary servitude to "physical or legal coercion" by viewing these as "necessary incident[s] of pre-civil war slavery"); *but see id.* at 965 (Brennan, J., concurring) (reading "slavelike condition of servitude" more expansively).

25. *See generally* Binder, *Mastery, Slavery and Emancipation*, *supra* note 5; Binder, Negating Slavery, *supra* note 5.

Emancipation forced white Americans to define the "freedom" on which they had always prided themselves. The obligation to share their freedom with African-Americans confronted whites with a painful choice between defining their own freedom narrowly and defining the freedom of the former slaves broadly. They chose the first alternative, perpetuating a tradition of identifying freedom as individual independence. This meant that the newly freed slaves were forced to take their place in society as vulnerable individuals, and that the systematic violence and deprivation to which they were subject was defined as the product of a series of individual, discrete, private prejudices. Identifying freedom as independence also meant that whites would soon find their freedom vulnerable to an increasingly volatile labor market. Yet participants in Southern society understood the freedom enjoyed by the masters—and denied the slaves—to be a matter of social power and community membership. One of slavery's horrors was the powerlessness of slaves to protect their families against separation by sale. From the slaves' viewpoint, not only the current marginality of African-Americans but the contemporary isolation, commodification, and mutual indifference experienced by many Americans—their very independence—might look like legacies of slavery.[26]

Third, regardless of who would most benefit from a reinterpretation of the Thirteenth Amendment, my redemptive account of the hearing owed slave experience is concerned with doing justice to the slaves, not to living Americans. As Luban implies, the normative appeal of redemption is nonconsequentialist: redemptive arguments are premised on the belief that we can only define fairness and utility for people in the present in light of traditions that legitimately constitute their rights and interests. If we assess the values and aspirations of the slaves in terms of their consequences for any group of contemporary Americans, our judgment of what is owed those Americans remains uninformed and unauthorized by the voice of the slaves.

A danger in any consequentialist evaluation of the slave perspective is that we will see the slaves dimly through the ideological bars erected to insulate white Americans from responsibility, bars that have come to encage all Americans in a prison of independence to which the slaves alone may hold the key. As Alasdair MacIntyre argues, consequentialism has an individualist bias, and in the American context individualism has long had a racial meaning.

> From the standpoint of individualism I am what I myself choose to be. . . . Such individualism is expressed by those modern Americans who deny any responsibility for the effects of slavery upon black

26. *See* Binder, *Mastery, Slavery and Emancipation*, *supra* note 5; Binder, Negating Slavery, *supra* note 5.

Americans, saying "I never owned any slaves." It is more subtly the standpoint of those other modern Americans who accept a nicely calculated responsibility for such effects measured precisely by the benefits they themselves as individuals have indirectly received from slavery. In both cases, "being an American" is not itself taken to be part of the moral identity of the individual.[27]

Hazarding presumptuousness, I would argue that even contemporary African-Americans would become passive collaborators with slavery if they calculated their own interests independent of any responsibility to their enslaved ancestors. Frederick Douglass broke with the Garrisonian abolitionists over their impulse to avoid responsibility for slavery by seceding from the South.[28] Though formally free, Douglass regarded himself as still "bound in chains" with those enslaved in the South.[29] I do not doubt that many of those slaves' descendants calculate their interests today as African-Americans similarly, as a question of fidelity rather than utility.

Because redeeming the past is a precondition to evaluating our current responsibilities to one another, redemption should not be understood or defended as a tactic for realizing some other conception of justice. Accordingly, privileging the "voices" of slaves in constitutional interpretation is neither a substitute for, nor a surreptitious method of, privileging the "voices" of contemporary African-Americans *as such*. If aspects of what the slaves would have recognized as slavery persist in the present day, contemporary African-Americans may be considered additional *sources* of slave experience. However, to the extent that we view contemporary African-Americans as interpreters of—rather than participants in—slave tradition, I think it is wiser to make no *a priori* ascription of authority to them. African-Americans may identify with slave tradition more easily and interpret it more skillfully, but the redemptive power of slave experience depends upon its availability as part of the heritage of all Americans.

B. The Claim Developed

Attributing the Thirteenth Amendment to the slaves appropriately recognizes their privileged access to relevant knowledge, their embodiment of underrecognized and underrepresented cultural values, and their agency in precipitating constitutional change of benefit to contemporary interpreters at great risk to themselves.

27. ALASDAIR MACINTYRE, AFTER VIRTUE 205 (1981).

28. *See* FREDERICK DOUGLASS, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 467-80 (Philip Foner ed., 1950); VINCENT HARDING, THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA 137-38 (1983) (flaws of Garrisonian abolitionism); WILLIAM WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 251-52 (1977) (critique of Garrison offered by Douglass and others).

29. FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 441-45 (1969) (appendix).

1. Privileged Access to Relevant Knowledge

Slave testimony may be deployed to redeem the inaccuracy of our constitutive myths, on the view that slave status permits privileged access to normative or descriptive knowledge. This privileged access might result either from the special cognitive value of slave experience or the special cognitive costs associated with more privileged vantage points in American history.

The belief that slave status is a special source of *normative* insight has a venerable history. In Jewish scripture God's chosen are repeatedly tested and proven by suffering, and the movement from bondage to redemption provides the central narrative structure.[30] The assumption that suffering is a source of wisdom or moral privilege is basic to the Christian reinterpretation of this narrative pattern, and finds expression in the Hegelian argument that slavery is a path to self-consciousness and spiritual liberation.[31] In the American context, an African-American theology of redemption has influenced evangelical religion and thereby entered mainstream political discourse. And as Lincoln intuited, the rhetoric of redemption spoke with particular urgency to a nation that, in the wake of the Civil War, felt as if it had endured its own middle passage and seen its own bonds of kinship irreparably torn. Constrained to fashion a spiritual life in the deepest hell of captivity, slaves may be seen as experts in redemption. As such, their experience may resonate with all persons struggling to find value in a world of alien traditions.

The claim that slaves have privileged access to *descriptive* knowledge relevant to the interpretation of the Thirteenth Amendment is rather more straightforward. To the extent that we prohibit slavery because we regard it as harmful and oppressive, those people who experienced slavery are likely to be valuable sources of information, bearing witness to its harmful and oppressive effects.

Rather than privileging a slave perspective, we may be motivated to subordinate the perspectives on slavery of antebellum whites as tainted by racial animus or self-interest. Following Hegel's critique of the master's consciousness as uninformed by direct contact with the world, we may see the beneficiaries of slavery as systematically self-deceived. In other writings, I have argued that the paternalistic visions of emancipation entertained by many white Americans before the Civil War were complicit in the cultural assumptions of slavery.[32] As part of the very debt in need of redemption, such conceptions of emancipation are

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30. The centrality of the motif of enslavement and redemption in the Pentateuch is too self-evident to require authority. For a discussion of the recurrent theme of proving and purifying through exile in the wilderness, see DAVID DAMROSCH, THE NARRATIVE COVENANT: TRANSFORMATIONS OF GENRE IN THE GROWTH OF BIBLICAL LITERATURE 290-97 (1987).

31. G.W.F. HEGEL, PHENOMENOLOGY OF MIND 217-51 (J. Baillie trans., 1967) (1807).

32. *See* Binder, Negating Slavery, *supra* note 5.

unworthy of normative or descriptive "credit." By contrast, I have argued that the conception of freedom Southern whites fashioned for themselves is worthy of some attention because it was informed by its contrast with slavery, influenced by the values of the slaves, and underwritten by slave labor. From the perspective of the slaves, "freedom" may have meant something like the prosperity, power, and status that masters enjoyed at their expense.[33] If we view the slaves as exponents of Southern culture, the values of the slaves can be privileged as a synthesis of a characteristically Southern commitment to positive freedom and a characteristically Northern commitment to equal freedom—a reconciliation of the sectional crisis far more appealing than the common bond of racism that reunited Northern and Southern whites at the close of Reconstruction.

2. *Embodiment of Underrecognized and Underrepresented Cultural Values*

A second redemptive function of slave experience is the cultural diversification of our constitutive myths. Thus, we may give new credit to slave testimony not so much because of its privileged access to descriptive or normative truth, but simply to correct its previous suppression. African-Americans were, of course, excluded from the political process, voiceless before the law, and absent from the nation's constitutive myths. They were denied access to literacy and inscribed with a mythology that branded them ineducable, acquiescent, cowardly, contented, kinless, and incapable of making their own history. Slave narratives, generally structured by courageous struggles to escape and to achieve literacy—and almost invariably beginning with the heritage claim "I was born"—therefore served an intrinsically forensic function, apart from their depiction of the cruelties of slavery: they were constructed as refutations of the justificatory mythology of slavery. And by giving voice to African-Americans, and inscribing a counter-mythology (albeit one sluiced through the confining expectations of their white sponsors and audiences), slave narratives served to resist, to correct, to negate slavery.[34] We might conclude that unless we recover slave experience and knit it into the nation's constitutive heritage, we perpetuate an important aspect of slavery. Thus, if the Thirteenth Amendment is to abolish slavery and enfranchise African-Americans as citizens, perhaps it entails according the political vision of the slaves the kind of attention we pay to the views of the "framers."

33. *See* Binder, *Mastery, Slavery and Emancipation*, *supra* note 5.

34. *See* James Olney, *"I was born": Slave Narratives, Their Status as Autobiography and as Literature*, *in* THE SLAVE'S NARRATIVE 148-74 (Charles T. Davis & Henry Louis Gates, Jr. eds., 1985); Houston Baker, *Autobiographical Acts and the Voice of the Southern Slave*, *in* THE SLAVE'S NARRATIVE, *supra*, at 242-61.

3. *Recognizing Slave Agency in Precipitating Constitutional Change*

Thus, a third rationale for reading slave values into the Constitution would stress the causal role of slaves in the genesis of the Thirteenth Amendment in particular. Such an argument pays obeisance to the role that efficacy inevitably plays in the law's criteria of legitimacy,[35] while challenging the assumptions that slaves were incapable of historical agency and were too acquiescent to resist slavery. Depicting the slaves as the collective authors of their own liberation thereby negates the mythology of slavery.

At first blush, the slaves' claim to authorship of the Thirteenth Amendment may seem paradoxical. Few slaves participated in the Amendment's framing or ratification. Yet the procedural illegitimacy of the Thirteenth Amendment precludes anyone from claiming *formal* responsibility for enacting it. Recall that the Congress that proposed the Amendment excluded the Southern States, while the Executive and most of Congress insisted that these states had never left the Union. Such an exclusion of states is no small matter, given that equal representation of the states in the Senate was the one remaining feature of the Constitution that could not be amended pursuant to Article V.[36] The Thirteenth Amendment could not have passed without the support of at least two of these excluded Southern states, and actually relied on passage by eight. Not only were these ratifying states excluded from representation during the Amendment's framing, they were under federal military occupation at the time of their ratification. Even if they had been free of military pressure, the Reconstruction governments of these states would not have represented their citizens, in as much as they were organized with the consent of just ten percent of the electorate. In any case, Congress conditioned the recognition of these governments on the ratification of state constitutions abolishing slavery, in probable violation of the amendment procedures designated by existing constitutions. Confirming the illegitimacy of these state governments, the Thirty-ninth Congress still refused to seat representatives of the Southern states even after they had ratified the Thirteenth Amendment.[37]

Given these serious procedural irregularities, it is fair to say that the Thirteenth Amendment was not a duly enacted amendment at all. It was the culmination of a revolutionary struggle; it was the extralegal founda-

35. Examples of the positivist principle that rights depend on their effective defense include the doctrine of adverse possession in property; the principle of international law that recognition depends primarily on effective control of territory; and the principle found in any system of customary law that rights violated with impunity are lost.

36. "[N]o Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any manner affect them . . . [slave trade clause and a related clause preventing *inter alia* a head tax on slaves]; and . . . no State, without its consent, shall be deprived of its equal suffrage in the Senate." U.S. CONST. art. V.

37. *See* Bruce Ackerman, 2 Discovering the Constitution (1989) (unpublished manuscript, on file with the author).

tion of a new constitutional order; it was a self-legitimating decree akin to the Declaration of Independence. Accordingly, identifying the Amendment's author is a matter of assigning causal responsibility for a revolution, not of determining competence to enact a law.

Seen in this light, slaves may be said to have "authored" the Thirteenth Amendment in at least seven ways.

First, it should be recalled that the language of the Thirteenth Amendment was drawn from the Northwest Ordinance, arguably a crucial part of the original constitutional compromise on slavery.[38] That compromise reflected a short-lived surge of abolitionist sentiment fueled by black participation in evangelical Christianity and perhaps by black participation in the revolution as well.

Second, African-American litigants gave meaning to the Northwest Ordinance and similar language in state constitutions. For example, a "woman of color" named Mary Clark helped establish the meaning of free labor by persuading the Indiana Supreme Court that indentured servitude too closely resembled slavery to be called "voluntary."[39]

Third, slaves arguably helped precipitate the Civil War by running away, even in small numbers. The legislation, litigation, and pamphleteering that resulted from Southern anxiety over the Northern response to runaways contributed to the secession crisis.[40]

Fourth, runaways and freedpersons played an important role in the abolitionist movement, especially, as noted above, by communicating their experiences and thus demonstrating their refusal to acquiesce to slavery. They not only hastened the crisis by fanning Southern fears of abolitionism and of free blacks, they helped prepare the Northern public for an abolitionist resolution.

Fifth, once the war occurred, slaves all but forced the Emancipation Proclamation by fleeing *en masse* toward the Union lines. While Lincoln no doubt perceived the military benefits of African-American allegiance to the Union cause, he must have been equally impressed with the cost of siphoning off Union troops to secure the rebels' unruly property. By continuing to run away after the Proclamation took "effect," slaves gave it the only enforcement possible.[41]

Sixth, two hundred thousand African-American troops banished the myth of black cowardice. Along with countless spies, saboteurs, runaways, and shirkers, the black regiments did benefit the Union war effort, making Northern victory more likely. Perhaps even more importantly,

38. *See* DANIEL FARBER AND SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 147-74 (1990).

39. The Case of Mary Clark, Woman of Color, 1 Blackf. 122 (Ind. 1821). *See* ROBERT STEINFELD, THE INVENTION OF FREE LABOR IN THE UNITED STATES 144-49 (1991) (discussion of case). *See also* Phoebe, a Woman of Color v. Jay, 1 Ill. (Breese) 268 (1828).

40. *See* JAMES OAKES, SLAVERY AND FREEDOM 167-74 (1990).

41. *Id.* at 182-93.

as I note below, by demonstrating their military utility to the American public, black soldiers provided Lincoln with both a constitutional and a political justification for the Emancipation Proclamation, which enabled the Republicans to stay in office and prosecute the war to victory.[42] With the Proclamation in force and the war won, universal manumission, at least, was a practical fact.

Seventh, once the war was won, the presence of a large number of blacks under arms continued to exert pressure on federal policy. Black soldiers were willing to remain mobilized longer than whites and hence played a greater role in maintaining the military occupation of the South after the Civil War. By constituting a substantial portion—in many areas the bulk—of the occupation army, blacks were suddenly in a position to influence the terms of the peace. This was a situation that Northern and Southern whites alike found acutely uncomfortable, impelling efforts to speed the demobilization of black troops: "In addition to charges of incompetence and insubordination, Union generals charged that black troops were hostile and insulting to Southern whites, threatening to white women, and encouraged militancy and insolence among civilian blacks."[43] Mary Frances Berry has argued that the quickest way literally to pacify these armed guardians of black liberty was to constitutionalize emancipation by passing the Thirteenth Amendment.[44]

Given the Thirteenth Amendment's questionable formal pedigree, it may be said to have been debated and ratified on the battlefields of the Civil War. Given the agency of the slaves in precipitating, defining, and resolving that war, the slaves have as good a claim to authorship of the Thirteenth Amendment as anyone.

The image of an occupying army of slaves laying down their weapons and disbanding on the promise of emancipation suggests two distinct contractarian rationales for consulting the expectations of the slaves in defining emancipation. Such a contract, like *The Gift of the Magi*, may be mapped as a double redemption, the simultaneous redemption of the slaves from bondage and of the nation from its moral debt. In determining what the slaves could have fairly expected from such a contract, we may ask how much the slaves gave up and how much the nation received.

4. *Recognizing the Slaves' Sacrifice*

Consider first what the slaves *gave up* in accepting citizenship in a nation that had authorized and enforced their enslavement. As Southern

42. *See* JAMES MACPHERSON, BATTLE-CRY OF FREEDOM 686-87 (1989).
43. DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 31 (1980).
44. MARY FRANCES BERRY, TOWARD FREEDOM AND CIVIL RIGHTS FOR THE FREEDMEN: MILITARY POLICY ORIGINS OF THE THIRTEENTH AMENDMENT AND THE CIVIL RIGHTS ACT OF 1866, at 7-19 (1975).

judges insisted, slavery presumed that Africans were a "subjugated" race,[45] with "no rights that a white man was bound to respect."[46] The corollary, Judge Edmund Ruffin acknowledged, was that whites had no rights that Africans were bound to respect:

> The end [of slavery] is the profit of the master, his security and the public safety; the subject, one doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make anything his own, and to toil that another may reap the fruits. What moral considerations shall be addressed to such a being, to convince him what, it is impossible but that the most stupid must feel and know can never be true—that he is thus to labor upon a principle of natural duty. . . . Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect.[47]

If, prior to abolition, African-Americans were bound only by force—rather than duty—to obey American law, the Thirteenth Amendment can only be construed as an *offer* of citizenship, imposing no obligation on the slaves until accepted. Accordingly, the question facing interpreters of the Thirteenth Amendment becomes: what conditions could African-Americans, theretofore excluded from the People, have fairly set for subjecting themselves to American law? Under what conditions and with what limitations could they accept the legitimacy of a potentially hostile majority will?

Such a contractarian analysis of the Thirteenth Amendment has some warrant in constitutional theory of the Civil War era. Treatises on the Law of Nations read in the nineteenth century, influenced by the contractarian political theories of the previous century, reasoned that nations owed their citizens an obligation of protection in return for allegiance.[48] Abolitionist constitutional theory had given this obligation of affirmative governmental protection a broad, if somewhat indeterminate, compass.[49] Congressional supporters of the Civil Rights Act of 1866 explained its constitutionality by arguing that the citizenship implicitly conferred by the Thirteenth Amendment encompassed such a broad right to protection.[50] And in the seldom-cited case upholding the Act's constitutionality under the Thirteenth Amendment, Justice Swayne echoed this argument. Swayne added that the amendment must be inter-

45. Mitchell v. Wells, 37 Miss. 235, 252 (1859) (Harris, J.).

46. Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857) (Taney, C.J.).

47. State v. Mann, 2 Devereaux Law Rep. 263 (N.C. 1829), *in* PAUL FINKELMAN, THE LAW OF FREEDOM AND BONDAGE: A CASEBOOK 218-19 (1986).

48. *See, e.g.*, EMMERICH VATTEL, LAW OF NATIONS, Book I, Ch. 2, Sec. 17; Book II, Ch. 6, Sec. 71 (Joseph Chitty trans., 1834) (1776). *See also* Luria v. U.S., 231 U.S. 9, 22 (1913).

49. *See generally* JACOBUS TENBROEK, EQUAL UNDER LAW (1962); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111 (1991).

50. FARBER & SHERRY, *supra* note 38, at 302-05 (collecting numerous examples from the Congressional debates).

preted on the assumption that its framers "felt that much was due the African race for the part it had borne during the war." He added that "they were also impelled by a sense of right and by a strong sense of justice to an unoffending and long-suffering people," and by the dangers that people had risked as a result of "evincing entire sympathy with the Union cause."[51] Where Swayne's interpretive approach falls short of that suggested here is in treating the grant of citizenship as an act of "grace,"[52] rather than the price extracted by the slaves for their allegiance in an unworthy nation's struggle for its life. Viewing freedom and citizenship as the slaves' just price rather than the nation's charitable gift, an interpreter will more likely consult the expectations of the slaves.

That slave resistance helped precipitate Emancipation may appear to cut against, rather than for, the authority of slave interpretations of the Thirteenth Amendment. We have already noted that one strong argument for including slave values in our constitutive traditions is to correct their previous exclusion. We may feel that the *more* influence on history slaves have had, the less responsibility we now have to conform the outcome of that history to the subjective desires of the slaves. In contract law, after all, we assume that, absent severe deficits of bargaining power, the parties got the agreement that they wanted. But where the contract is drafted by one party and offered on a take-it-or-leave-it basis, the courts read it *against* the author.[53] Where one party to a contract is judged to have lacked meaningful choice in making the contract, courts will replace terms deemed substantively unfair.[54]

Nevertheless, there are limits to this principle of interpreting or applying a contract in favor of the more passive party, and we hit those limits at the point at which one ceases to be a party at all. The conventional description of the role of the slaves in the Civil War is as passive bystanders, at best third party beneficiaries of the contract between the victorious Union and the chastened Southern states. Under modern contract law, such passive beneficiaries have rights, but only to the extent intended by the active contracting parties.[55] So while the slaves' constrained choice in joining the social contract is one reason to read it in their favor, it is their agency in joining the contract that establishes their contractual rights in the first place.[56]

51. U.S. v. Rhodes, 27 F. Cas. 785, 794 (C.C.D. Ky. 1866) (No. 16,151).

52. *Id.*

53. *See, e.g.*, Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599 (2d Cir. 1947), *cert. denied*, 331 U.S. 849 (1947); Ransom v. Penn. Mut. Life Ins. Co., 43 Cal. 2d 420, 274 P.2d 633 (1954) (en banc).

54. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); *see* U.C.C. § 2-302; *see generally* ALAN WERTHEIMER, COERCION 31-38 (1987) (exploring various possible meanings of lacking "choice").

55. *See* RESTATEMENT (SECOND) OF CONTRACTS, §§ 302-04 (1981).

56. If the slaves' lack of options in joining the social contract is one reason for supplying fair terms, the indeterminacy of those terms is another. The laconic text of the Thirteenth

5. *Recognizing the Slaves' Contribution to the Nation*

The justice of the slaves' expectations turns not only on what they gave up, but on what the nation *gained* from the transaction. And here it seems to me that the nation owed and owes the slaves something more even than its survival. For to the extent that slaves precipitated their own emancipation, it was the slaves who gave the Thirteenth Amendment to the nation and to them that the nation owes its own redemption.

Both the appeal and the dangers of figuring the slaves as redeemers are illustrated by the controversial film *Glory* which, for all its flaws, exposed the American public to the bravery of the Civil War's first all-black regiment, successfully struggling for the right to die in combat.[57] After the massacre of the Massachusetts Fifty-fourth at Fort Wagner in July of 1863, the *Atlantic Monthly* wrote that "[t]hrough the cannon-smoke of that dark night, the manhood of the colored race shines for many eyes that would not see."[58] Lincoln, his unpopular Emancipation Proclamation vindicated, wrote that "when this war is won, there will be some black men who can remember that with silent tongue, and clenched teeth, and steady eye, and well-poised bayonet, they have helped mankind on to this great consummation."[59] And many white men had not forgotten by November, 1863, when the Republicans won stunning victories at the polls.[60] The Emancipation Proclamation was thus secured.

No doubt the film perpetuated an injustice by focusing on the white abolitionist who commanded the regiment and recorded the story. As George Frederickson writes:

> *Noblesse oblige* was the characteristic note struck in New England's glorification of white 'aristocrats' who officered black regiments . . . , men like Robert Gould Shaw. Hence it was possible to advocate the use of Negro troops and glorify their achievements without giving up the cherished stereotype of black submissiveness and docility in the presence of "superior" whites.[61]

Forewarned, steeled in skepticism, I nevertheless left the theater soaked in sentiment.

I saw the movie with an attorney who represents battered women in domestic "controversies." Seeing the unromantic consequences of male

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Amendment—proclaiming the abolition of a pervasive and fundamental feature of American society that implicated and implicates the self-image of almost every American—gives interpreters no guidance. While contract doctrine directs interpreters to resolve ambiguities by recourse to custom and usage, it is precisely the scope of abolition's inevitable disentrenchment of tradition that is at issue. Thus we are driven back to a substantive analysis of the fairness of the bargain, in its historical context. We may wish to correct, not merely continue, that history.

57. GLORY (Columbia TriStar 1990).

58. *Quoted in* MACPHERSON, *supra* note 42, at 686.

59. *Quoted in* GEORGE FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND 168 (1987).

60. MACPHERSON, *supra* note 42, at 688.

61. FREDERICKSON, *supra* note 59, at 171.

violence on a daily basis, she greeted the black soldiers' hunger for battle somewhat more coolly than I did. Although moved by the portrayals of the black soldiers, she found it hard to identify with their aspiration to gain recognition for their manhood by fighting in a white man's war. Their need to redeem themselves from what Western culture has always viewed as the slaves' "cowardly contract," by offering themselves up as cannon fodder, struck her as an index of their continuing lack of freedom. She didn't hold them responsible for a culture that associates freedom with violence, but she saw their struggle to redeem their freedom on these terms as more tragic than heroic, more depressing than inspiring.

But to me the story had a different significance, revealing these brave men as the authors not only of their own freedom, but of all of ours. Despite the centrality of slavery in the genesis of the Civil War, it was constitutionally defined as a white man's war—an exercise of power that could be justified only by pragmatism rather than principle, permitted for the preservation of a union with slavery, not its abolition. But Northern whites could not, or at least did not, preserve their union with Southern whites without the military support of African America. It was the military utility of the slaves in a time of national peril that enabled the North to expropriate the South without violating the constitutional compact between them.

Thus, the Northern decision to condition abolition on military necessity was aimed at perpetuating the constitutional compromise aptly characterized by William Lloyd Garrison as a "covenant with death" and an "agreement with hell."[62] It preserved the nation at the peril of its soul, a peril avoided and a sin purged, as Lincoln intimated at his second inaugural, only because the prolonged, fierce, and bloody resistance of the South necessitated the arming of the slaves. It was for this reason that Lincoln urged mercy towards the South—no more responsible than the North for the blot of slavery, no less responsible for its abolition. While the conditioning of abolition on military need was *morally* indefensible, it made it *legally* and *politically* possible for the North to dictate the terms of a new compact with the South, to bind the South legally to freedom.

The nation's constitutional commitment to slavery was a white man's problem for which African-Americans, of course, bore no responsibility. But because white America held the keys to their shackles, the contradictions that rent the soul of white America established the historical conditions within which African-Americans were constrained to pursue their own freedom. By dying in battle, the men of the Massachusetts Fifty-fourth did far more than show that they were not the "sissies" slaves were said to be. They demonstrated the military utility of abolition to

62. *See* PHILIP S. PALUDAN, A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA 3 (1975) (quoting speech by William Lloyd Garrison as reported in *The Liberator*, July 7, 1854).

the Union cause and thereby—as much as any mortals have—they turned the tumblers of history and set their people "free."[63]

As I watched the major motion picture Hollywood had projected onto these events, I will admit I was moved by more than the sacrifice these men made for their brothers and sisters still enslaved. It was, to paraphrase the Passover service, what they "did for *me* in the land of Egypt" that brought me out of my seat and raised me up. For, costly as the Civil War was to this country, no amount of blood spent on a morally indifferent cause could have redeemed this nation's crime or made it worthy of our allegiance. I do not know if the intervention of black arms on the Union side won the Civil War. I do know that they made it a war worth winning, transforming a jurisdictional dispute into the cause of freedom.

I do not pretend that such men laid down their lives for me, or that my fine sentiments redeem their deaths. But, because of their sacrifice, I can view this country as something more than a relationship of convenience, devoted to whatever selfish interest a majority can temporarily agree upon. I can pretend instead that by accepting citizenship in this nation we have committed ourselves to a righteous cause, that we are a community dedicated to a proposition as yet unrealized. Describing the day the Thirteenth Amendment passed the House, one Republican representative wrote that "[m]embers joined in the [gallery's] shouting and kept it up for some minutes. Some embraced one another, others wept like children. I have felt, ever since the vote, as if I were in a new country."[64]

And so whether they willed it or no, the glory of the Fifty-fourth was not theirs alone. By taking up the mud-stained standard of a nation that did not deserve their sacrifice, they raised it high. As one black soldier exhorted his fellows,

> Our masters, they have lived under the flag, they got their wealth under it, and everything beautiful for their children. Under it they have grind us up, and put us in their pocket for money. But the first minute they think that old flag mean freedom for we colored people, they pull it right down and run up the rag of their own. But we'll never desert the old flag, boys, never![65]

During the Civil War, Lucy McKim Garrison thrilled to the song of "thousands of Negroes on the fourth of July last, when they marched in procession under the Stars and Stripes, cheering them for the first time as 'the flag of *our* country.' "[66] And so I thought, filing reverently out past the popcorn stand, it is only because slaves amended the meaning of the

63. MACPHERSON, *supra* note 42, at 686-88.

64. *Quoted in id.* at 840.

65. *Quoted in* EUGENE GENOVESE, FROM REBELLION TO REVOLUTION 137 (1981) (spelling converted from dialect).

66. *Quoted in id.* at 136.

republic, for which it stands, that I can today cheer it as the flag of *my* country.

III. Skeptical Objections to the Authority of the Past

My account of the origins of the Thirteenth Amendment makes for a nice story. But why should it have any authority in constitutional interpretation? After all, it is largely an account of one man's *viewing* of a glitzy Hollywood *movie* based on a *diary* recording *other* men's struggles in an obscure theater of the Civil War. It seems at once too personal, or *subjective*; and too vicarious, too mediated, too *inauthentic*, to carry much weight. In this section, I will consider why any account of the past has normative authority by confronting two forms of skepticism about the authority of the past: the skeptical critique of original intent in constitutional theory, and the skeptical critique of tradition in cultural studies. Each of these critiques imposes an impossible burden of proof on accounts of the past. For constitutional theory, accounts of original intent must prove objective; for cultural studies, traditions must prove authentic. While normative argument cannot avoid invoking the past, its authority does not depend on the objectivity or authenticity of its accounts of the past. Normative argument seeks to commit listeners to identify with certain accounts of the past, not to prove their truth.

A. Original History and the Objectivity Problem

Why, in light of constitutional theory's skepticism about original history, should we care about the reasons for the Thirteenth Amendment's adoption? Recognizing the good reasons to look back requires forgetting the bad reasons constitutional theory debunks.

Constitutional theory's skeptical critique of original history is situated within a larger critique of the courts as institutionally incompetent to countermand the will of legislative majorities. Constitutional theory therefore understands history as one of many forms of knowledge courts claim in their efforts to qualify themselves as technically expert.[67] Because the real target of constitutional theory's skeptical critique of history is the claim of courts to objectivity, that critique says little about the relevance of history to constitutional decisionmaking as such. Somebody must make constitutional decisions, subjective and political though those decisions may be; and they will find it is hard to avoid consulting history in making constitutional decisions.

Constitutional theory's concern with the relative competence of courts and legislatures invites dichotomies between legal interpretation and political will, and between tradition and innovation—yet these dichoto-

67. *See* Tushnet, *supra* note 13.

mies are false.[68]

Legal interpretation is not an alternative to majority will, but a means equally indispensable to enforcing majority will or resisting it. Because majority will is indeterminate at the point of application, no one—no executive, no citizen, and no court—can enforce it without interpreting it. More crucially, no one can enforce majority will without interpreting something prior to majority will: the rule of recognition that *constitutes* a sovereign majority. No matter how committed we may be to majority will in the abstract, we must decide in the concrete whose voices count, under what conditions, and how they will participate in which decisions. And we cannot decide such questions by majority will, because there is no majority will until we decide these questions.

No controversy in our history has so exposed the indeterminacy of popular sovereignty as the controversy over slavery. To Steven Douglas's claim that the legality of slavery should be determined by majority will, Lincoln responded that "when the white man governs himself that is self-government; but when he governs himself, and also governs *another* man, that is *more* than self-government—that is despotism."[69] Once it is admitted that the question of the power and status of African-Americans in American society is prior to and partially constitutive of popular sovereignty, the dependence of political choice on *constitutional* choice becomes evident. Whether or not we delegate such constitutional decisionmaking to courts, we cannot practice majoritarian democracy without setting and interpreting its ground rules.

The identification of past majority will is subjective, not because the past is harder to make sense of than the present, but because the identification of *any* majority will depends on the exercise of normative discretion. Certainly we cannot purge current majority will of contingency by deferring to the will of past decisionmakers. That appeals to the past cannot free constitutional decisionmaking from politics, however, does not mean that constitutional decisionmaking can dispense with appeals to the past.

The invocation of tradition is an almost indispensable component of

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68. The dichotomy between legal interpretation and political will is false for reasons beyond those addressed here. This dichotomy is one variant of the distinction between legal rules and social interests that enables functionalist legal history. Critical legal scholars have shown how law constructs the social interests we pursue in our politics. *See* Guyora Binder, *Beyond Criticism*, 55 U. CHI. L. REV. 888, 895-901 (1988) (critique of instrumentalist jurisprudence); Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 102-09 (1984) (critique of functionalist legal history); William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (client interests legally constituted); Ed Baker, *The Ideology of Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975) (economic preferences dependent upon legally protected property entitlements); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979) (similar point); Duncan Kennedy, *Cost Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) (similar point).

69. ABRAHAM LINCOLN, Reply to Douglas at Peoria, Oct. 16, 1854, *in* SPEECHES AND WRITINGS 1832-1858, at 328 (1989).

political argument and political judgment.[70] So fundamental is tradition to our normative deliberation that any effort to free ourselves from one tradition invokes another.[71] Thus while we wield scientific rationality against received beliefs, Edward Shils points out that "the patterns of reason and scientific method are not acquired by each possessor who works them out for himself. They are for the most part transmitted."[72] Similarly, revolutionary movements typically justify the overthrow of existing order by appeal to still more deeply rooted traditions betrayed.[73] Rejecting the Burkean opposition between tradition and reason, Alasdair MacIntyre concludes that "all reasoning takes place within the context of some traditional mode of thought," while every vital tradition is "constituted by a continuous argument."[74]

It might seem that the inherent traditionality of normative argument could also be deduced from the principle of formal justice that like cases be treated alike: normative argument typically motivates choice in part by urging its consistency with some other choice already made in the narrative, if not the actual past. But likeness between present and past is only part of the story told by normative argument—unless the listener can be committed to her past choice, its analogy to a present option may motivate the rejection of both.

Persuasive interpretations of past choice do motivate future action, however, because, as cognitive psychologists have demonstrated, people do tend to feel committed to past choices.[75] Moreover, this deference to past choice is rational: other things equal, consistency with past choice is a *good* reason for action. Just as democrats need to identify majority will before they can attempt to realize it, individual rational utility maximizers need to identify their own interests before they can pursue them; and rational utility maximizers often have good reason to make past choices constitutive of their present interests. The constant reevaluation of choices is costly, as is the exchange of information with others about one's intentions. Deference to shared expectations that people will con-

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70. *See generally* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983).

71. *See* EDWARD SHILS, TRADITION 21-32 (1981).

72. *Id.* at 21.

73. That the American Revolution was defended as the preservation of the traditional rights of Englishmen in the face of the threat of their corruption is now broadly accepted. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); Thomas Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978). On the traditionality of the French Revolution, see MICHAEL WALZER, REGICIDE AND REVOLUTION (1974); WILLIAM SEWELL, WORK AND REVOLUTION IN FRANCE (1980); PATRICE HIGGONET, SISTER REPUBLICS (1989); Mona Ozouf, *Regeneration*, *in* A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION 781 (Francis Furet & Mona Ozouf eds., 1989); Keith Baker, *Constitution*, *in* A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION, *supra*, at 479. Modern national liberation movements, like all nationalist movements, advocate the restoration of indigenous cultural traditions.

74. MACINTYRE, *supra* note 27, at 206.

75. *See* LEON FESTINGER, THE THEORY OF COGNITIVE DISSONANCE (1957).

form to customs and persist in habits facilitates cooperation. Commitment to choices therefore reflects a willingness to ascribe to ourselves the interests or preferences that others ascribe to us. Our past choices signal our future intentions to others, enabling them to cooperate with us if they wish.

We can think of tradition as a set of past choices, possibly fictional, that can be shared by individuals bent on cooperation. In other words, individuals indifferent as to all goals other than cooperation are well advised to pursue goals widely perceived as traditional or customary. Tradition is a cue that, like our habit of bearing to the right of oncoming pedestrians, coordinates behavior without explicit communication.[76] For action to communicate, it must relate to a narrative context of which the actor is not the sole author. Viewing all action as communicative, MacIntyre reasons that "I can only answer the question 'What am I to do?' if I can answer the prior question 'Of what story or stories do I find myself a part?' "[77] If traditionality is the source of action's social meaning, it both requires and enables cooperation.

One of the areas in which cooperation is essential is in the construction of identity. Personal identity depends upon social recognition. Even feelings of personal autonomy may depend on competence in socially-valued tasks, competence that can only be achieved with the sustained help of others.[78] The risk of investing a lifetime in the development of a self-definition that no one will recognize channels people into the reproduction of cultural traditions. The best assurance of an appreciative audience for one's achievements is to serve values traditionally endorsed by a particular culture or community. This explains as rational the seemingly irrational commitment many people show to tradition and thus explains the power of justificatory appeals to tradition. The claim that a proposed collective decision is entailed by, or at least compatible with, the past value choices of a culture provides reassurance that the decision will sustain cooperation rather than provoke disaffiliation. Par-

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76. *See* DONALD REGAN, UTILITARIANISM AND COOPERATION 191 (1980) (drawing on THOMAS SCHELLING, THE STRATEGY OF CONFLICT (1960)); David Gauthier, *Coordination*, 14 DIALOGUE 195-221 (1975).

77. MACINTYRE, *supra* note 27, at 201.

78. In an extraordinary reinterpretation of Hegel's dialectic of master and slave, the psychiatrist Jessica Benjamin has stressed the importance of recognition from several socially recognized others in the development and sustenance of personal identity. *See* Jessica Benjamin, *The Bonds of Love: Rational Violence and Erotic Domination*, 6 FEMINIST STUDIES 144 (1980). Marxian political theorist Jon Elster has also argued that recognition is a necessary condition for "self-realization," by which he means the feeling of autonomous development and self-definition that can arise from challenging, meaningful work, or participation in political deliberation. Because achievement and even innovation in any endeavor are culturally defined, argues Elster, self-realization generally requires training, encouragement, and continuing positive regard from competent others. Because the requisite competence for realizing oneself and conferring recognition on other self-realizers requires sustained effort to achieve, self-realization requires sustained cooperation. Jon Elster, *Self-realization and Work and Politics: The Marxist Conception of the Good Life*, 3 SOC. PHIL. & POL'Y 97 (1986).

ticipants in a culture may be willing to accept decisions that otherwise disadvantage them, or take risks to implement decisions from which they derive no other benefit, if persuaded that such decisions sustain the culture that secures their identities. So wagered the author of the Emancipation Proclamation and the Gettysburg Address in implying that emancipation—however costly—had become necessary to the maintenance of national identity.[79]

In sum, other things being equal, it is rational for individuals to commit themselves to their own past choices and to defer to shared traditions; it is rational for individuals to identify themselves with groups and for groups to defer to past choices. Accordingly, we tend to view traditionality as a persuasive reason for choice, we expect normative argument to invoke the past, we ascribe traditionality to choices appealing on other grounds, and we reinterpret the past to conform to current choice. By couching normative arguments in traditional terms, we offer our audience recognition as members of a normative community constituted by a common past.[80] Because we must supply or rely upon such "heritage tales" in urging any duty upon our interlocutors, we are implicitly interpreting history whenever we offer political arguments to one another.[81]

Subjective though it may be, political choice requires legal judgment and historical interpretation. Neither law nor history should therefore be seen as bulwarks of objectivity, holding in check a sea of subjectivity. It is the desire to engage in politics, not to flee it, that turns our attention to law and to history. Through the invocation of shared norms and shared traditions, we hope to persuade our fellow citizens, rather than simply coerce, outvote, or outspend them. Constitutional theory's skeptical critique of original history—provoked by the claims of courts to objectiv-

79. Understanding the cooperative nature of important value choices deepens our earlier intuition that the reevaluation of past choice is costly. Individual choice is more than the implementation of a presocial preference for a particular good: it is the choice—sometimes the mere acceptance—of a social role that in turn dictates preferences. Outside of any social identity there are no criteria by which to make individual choices, because there is no self. *See* MACINTYRE, *supra* note 27, at 204-05. In this sense, choice is often better described as judgment than as preference, because it involves the interpretation of preexisting obligations implicit in the chooser's identity. For a description of political choice as the exercise of judgment rather than will, see Arthur Jacobson, *The Private Use of Public Authority: Sovereignty and Associations in the Common Law*, 29 BUFF. L. REV. 599 (1980). Conceived as judgment, individual choice has an inherently narrative structure, basing any instrumental choice on previous constitutive choices. *See* Mark Kelman, *Choice and Utility*, 1979 WISC. L. REV. 769, 787; Richard Pildes & Elizabeth Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism and Democratic Politics*, 90 COLUM. L. REV. 2121, 2194-95 (1990). We can, and do, revise these constitutive choices. *See* Kelman, *supra*, at 787. But to reevaluate all of one's past decisions at once is to be without criteria for evaluating any. In this sense, unrestricted choice is more than costly: it is self-defeating. *See* Pildes & Anderson, *supra*, at 2193-94. To the extent that personal identity depends on group identity, group choice is similarly restricted—the instrumental rationality of social choice depends on sustaining the traditions that constitute the group and that, by means of cooperation, secure to its members durable identities.

80. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 293-94 (1990).

81. For an illustration of this point, see CELESTE CONDIT, DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE (1990).

ity—presumes a more exacting standard of justification than is warranted for political argument.

Thus far I have shown that there are better reasons for constitutional interpreters to look back than the ones that constitutional theory attacks. Constitutional decisionmaking is inherent in political decisionmaking and constitutional argument must engage the past not to avoid politics, but to join it. Yet, the fact that the "countermajoritarian difficulty" is a false problem for constitutional interpretation (as opposed to judicial authority) does not mean that constitutional interpretation poses no real problems. Just as there are better reasons for constitutional interpreters to invoke the past than the quixotic aspiration to objectivity, there is a better objection to the past's authority than its indeterminacy. The difficulty with invoking the past in American constitutional decisionmaking is that our *particular* past is horrific. America's history is what divides us as a nation, not what joins us together.

Impelled by a seemingly relentless drive toward philosophical abstraction, contemporary constitutional theory moves from particular controversies to the indeterminacy of constitutional language and history, to the inscrutability of language itself.[82] This penchant for waxing "philosophical" subjects constitutional theory to the ridicule of pragmatists who point out that far from providing an obstacle to interpretation, language is its enabling condition.[83] Interpretation is a conventional practice with conventional criteria of success and failure; we can never refute a particular interpretation by arguing that interpretation is universally incapable of meeting any criteria of success. The indeterminacy of language and the subjectivity of history are "difficulties" with no particular political implications,[84] difficulties that constitutional theory need not endeavor to solve.

Seeing politics as inherently "difficult" for law to assimilate, constitutional theory has ignored the particular difficulty within our politics posed by the absorption of slaves into the polity that enslaved them. By denying that the past could ever speak persuasively to the present, constitutional theory has succeeded in maintaining a discreet silence about the particularly sordid "original history" that makes our society's race relations record so singularly lacking in moral authority.

Thus, constitutional theory mischaracterizes as epistemological a

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82. The origin of this philosophical trend in constitutional theory was the extraordinary impact of Ronald Dworkin's *Hard Cases*, 88 HARV. L. REV. 1057 (1975). Among the best articles locating the sources of interpretive indeterminacy outside of any historical context are Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

83. *See* STANLEY FISH, DOING WHAT COMES NATURALLY (1990); Dennis Patterson, *Law's Pragmatism: Law as Practice and Narrative*, 76 VA. L. REV. 937 (1990).

84. *See* Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1466-67 (1990).

problem that is actually political; it mischaracterizes as universal a problem that is quite historically specific. Crises over the legitimacy of judicial review, like controversies about original history, do not spring up all over the Constitution's text. Instead, they obsessively revisit the scene of our greatest crime, returning so often to the Civil War amendments that they have worn a rut into which all constitutional theorizing seems to flow.[85] It is the indeterminacy of these constitutional texts in particular that has inspired the most despairing pronouncements on the impossibility of interpretation.[86] Thus the reason that the Civil War amendments have occasioned so much historiographic controversy is not that it is somehow theoretically impossible to maintain faith with the past. The real problem is that tradition cannot tell us how to negate a past that does not deserve our faith.

It is their implicit rejection of some of the most fundamental traditions of antebellum society that make the Civil War amendments so peculiarly indeterminate. It is the persistence into the present of some of the constitutive values of slave society that makes judicial enforcement of the Civil War amendments politically risky. And so it is this enduringly countercultural character of the Civil War amendments that occasions so much concern about the judiciary's countermajoritarian character.

In sum, the skeptical critique of original history is one expression of the continuing controversy over the legitimacy of any form of judicial interpretation of the Civil War amendments. The real problem, however, lies not in the judiciary but in the Civil War amendments themselves. Absent some unifying narrative context in which to interpret the Constitution, it remains, even after its reconstruction, a house divided by history. Far from demonstrating the irrelevance of history to contemporary normative disputes, the continuing inscrutability of the Civil War amendments testifies to the dependence of deliberative politics on a com-

85. Since World War II, historiographical controversies over the Civil War amendments have recurred with what Avi Soifer called "Locust"-like regularity. *See* Adamson v. California, 332 U.S. 46 (1947); Brown v. Bd. of Ed., 347 U.S. 483 (1954); Monroe v. Pape, 365 U.S. 167 (1961); Bell v. Maryland, 378 U.S. 226 (1964); Jones v. Mayer Co., 392 U.S. 409 (1968); Runyon v. McCrary, 427 U.S. 160 (1976); RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977); Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979). *See* George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1346-49 (1990) (constitutional theory underestimates the merits of textual formalism because it ignores such areas as criminal procedure); Stephen Carter, *Constitutional Interpretation and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821 (1985) (pointing out interpretability of most of the Constitution); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985) (same point).

86. I think it is fair to say that the Fourteenth Amendment is the context for the anguished and qualified conclusions of such liberal constitutional theorists as Ely and Perry that "interpretivism" is unworkable, and for the arguments of such critical legal scholars as Brest and Tushnet that their qualifications are insupportable. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS (1982); Brest, *supra* note 13; Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988).

mon past. Seen in its proper context then, the skeptical critique of original history reveals the urgency of redemptive history.

B. Tradition and the Paradox of Authenticity

If *Glory* illustrates the debt contemporary Americans owe the slaves as constitutional redeemers, it also illustrates the moral risks of thus conditioning the black voice in America's constitutive mythology on its power to redeem a mostly white citizenry. My self-mocking account of viewing the film is meant to convey something more than the ironic distance with which participants in postmodern culture are obliged to excuse, if not quite disguise, their own sentimentality. Surely there is something unconvincing in the identification of late-twentieth-century white audiences with the violence of black Civil War soldiers, safely channeled by white officers, or with the hopes and rages of slaves, neatly ordered by their white editors and amanuenses. Redemption seems too cheaply purchased at the price of a movie ticket, and identification across so great a distance in time, social status, and cultural perspective almost certainly requires flattening the multidimensional reality of the slaves. To my mind, however, these are risks—not refutations—confronting any constitutive use of history in normative argument. Awareness of these risks should inform, but need not invalidate, what I regard as an inevitable feature of constitutional interpretation.

Consider the danger that identification with slave founders will enable whites to purchase a clear conscience cheaply, at little gain to contemporary African-Americans. After all, generations of African-Americans have watched whites expropriate their cultural products and eschew their society. At the same time, they have had to watch whites enjoying ecstatic communion with fictional representations of blacks. From the days of the Great Awakening, when the presence of slaves served as a catalyst for the ritual release of emotion by white worshipers, through the slavery controversy, when affectionate "Sambos" vied with long-suffering "Uncle Toms" for the sympathies of the reading public, white Americans ascribed "redeeming virtues"[87] to their subject people.

The literary appreciation of these virtues may have afforded white readers a vicarious redemption, but it actually did little to redeem the slaves. As Henry Louis Gates sardonically notes,

> as late as 1829 . . . George Moses Horton's master at North Carolina collected his slave's poems, published them as a book, and then falsely advertised in Northern black and antislavery newspapers that all proceeds from the book's sales would be used to purchase Hor-

87. FREDERICKSON, *supra* note 59, at 101.

ton's freedom![88]

As if anxious to avoid a similar swindle, Thomas Hall told his interviewers from the federal writers' project:

> You are going around to get a story of slavery conditions and the persecution of Negroes before the Civil War, and the economic conditions concerning them since that war. You should have known before this late date all about that. Are you going to help us? No! You are only helping yourself. You say that my story may be put into a book. . . . Well, the Negro will not get anything out of it. . . . Harriet Beecher Stowe wrote *Uncle Tom's Cabin*. I didn't like her book, and I hate her. No matter where you are from, I don't want you to write my story . . .[89]

Hall implied that a nation built on slavery could not buy redemption merely by selling a stamp commemorating the cultural contributions of African-Americans, when what was needed was a deed to forty acres of ground.

Against the background of this tradition of cultural expropriation we might well wonder how subversive "multiculturalism" can be today, now that cultural diversity has become a consumer commodity, a little cilantro spicing the cuisine of the gentry, advertising their third-worldliness. Just when the culture of the oppressed is accepted into the canon it ceases to be the exclusive possession of the oppressed.[90] But if we cannot assume that predominantly white interpreters of America's slave heritage will interpret it against their own interests, neither can we treat those interests as independent of the process of interpretation, or assume that whites will be unambiguously benefitted by the subordination of blacks in all possible worlds.

It goes without saying that interpreters will only incorporate slaves into their heritage tales if they perceive that to be in their self-interest. But what they define as their self-interest depends on how they narratively constitute themselves. In maintaining the political and economic subordination of blacks in the wake of "abolition," whites have constituted themselves as independent free laborers; and so constituted, whites may have an interest in maintaining that subordination. But by recognizing slaves as their political ancestors, whites have the opportunity to

88. HENRY LOUIS GATES, JR., FIGURES IN BLACK: WORDS, SIGNS, AND THE "RACIAL" SELF 13 (1987).

89. Hall, *supra* note 2, at 45.

90. "[S]cholarly accentuations of group identity may be heard as suggestions that faculty candidates of color ought to be judged . . . by conformity to a cultural mode that *someone* constructs as, say, black. . . . [A]ny such constructions will come from the minds of (predominantly white) people in 'predominantly white' . . . social settings. . . . It seems that inviting *us* to say who is and who is not culturally 'of color,' as we go about (re)populating our institutions, should not routinely be considered a sure and safe path toward desubordination." Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1052 (1991).

inherit a richer freedom and so to reconstitute themselves as participants in a community of recognition. After abolition, whites can no longer monopolize the "power in fellowship" separately sought by antebellum Southerners, white and black;[91] and, because power and status in a community are inevitably underwritten by access to material resources, sharing power and status is never costless. But whites may rationally conclude that inheriting a richer freedom and a richer civic identity from slave ancestors is well worth the distributive costs of sharing that freedom and that identity with African-Americans. Doing so would involve learning what David Brion Davis regards as Hegel's most important lesson: that "true emancipation, whether physical or spiritual, must always depend on those who have endured or overcome some form of slavery."[92]

Nevertheless, the worry that whites bent on redemption will invent compliant and forgiving slave ancestors points to a deeper difficulty inherent in mobilizing tradition for normative argument: the likelihood that tradition will rely on distorted images of the past.

As I have suggested, argument from tradition persuades by facilitating cooperation; that is, by offering to connect its listeners to others via a shared identity rooted in fidelity to an authoritative past. Arguments from tradition, in other words, identify us with others both synchronically and diachronically. In thus connecting us to others, arguments from tradition must confront a problem that post-structuralists see as inherent in group identity: the paradox of authenticity.[93] This paradox derives from the assumption that to be authoritative, tradition must "authentically" represent past actors. But when we turn to the past for normative guidance about what to do, we inevitably construct a fictionalized representation devoid of ambivalence and contradiction. The paradox of authenticity implies that all modern exponents of slave experience who view it as a source of normative authority are likely to falsify the experience to which they would be true.

To be sure, interpreters of the Thirteenth Amendment cannot simply identify and apply the "authentic" values of the slaves, for reasons similar to those that complicate the jurisprudence of original intent.

First, those values did not remain static. They evolved over ten generations, and within each generation from the dependence of childhood through the soaring individuality of adolescence and the responsibility of adulthood, to the preoccupations with memory, mortality, and creature comfort characteristic of age. Of those ten generations, eight were reinforced by a gradually diminishing influx from Africa. Those born in

91. *See* BERTRAM WYATT-BROWN, SOUTHERN HONOR 331 (1982).
92. DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823, at 565 (1975).
93. For explanation and critique of this motif in post-structuralist thought, see Guyora Binder, *Representing Nazism*, 98 YALE L.J. 1321, 1367-83 (1989); Guyora Binder, *What's Left?*, 69 TEX. L. REV. 1985, 2035-40 (1991).

Africa could long for return to a remembered homeland; those born in America were expatriates without origin, aliens in a society partially of their own making, but not at all of their choosing. In the creation and reproduction of slave culture, no generation can be privileged; we can identify no origin or consummation that will define slave culture. Instead, slave acculturation was an unfolding historical process of the Americanization of Africans and the Africanization of America. In some respects, Africans became even more African in America, in the sense that the culture they developed was Pan-African rather than local and tribal. Like peasants of all cultures, they developed a national identity only on being uprooted,[94] while the particular experience of enslavement encouraged African-Americans to connect national identity with freedom, a normative synthesis that would have had no meaning in Africa. In short, the construction of African identity in America was conditioned on its "adulteration" by an American context that the slaves resisted, accommodated, and also shaped.

Second, slave culture was not only dynamic but also polyvocal. Like any collective author of legislation, slaves invested a variety of hopes in emancipation. In other writings, I have argued that African-American tradition generally favored collective over individual freedom, and material over formal freedom, and that in many contexts community and material welfare were mutually dependent.[95] Even if my claims are persuasive, however, the pursuit of community and of material welfare may have had divergent implications in many settings. Thus, it might be that a majority of the slave population was committed to each of these values at a given time, but a minority was committed to both.

Third, exponents of slave tradition must apply it today in a different society, with different valences of power, to problems then unforeseen. This involves coming to terms with an even more complex historical process which consisted of both the continued constitutional development of the nation, and the continued suppression, assimilation, reconstruction, and dissemination of African-American culture.[96] As to the continuing constitutional development of America, I will argue in future works that it has been largely along lines compatible with the constitutive commitments of slave society.[97]

94. *See* GELLNER, *supra* note 14; ANDERSON, *supra* note 14; DOV RONEN, THE QUEST FOR SELF-DETERMINATION (1979).

95. *See* Binder, *Mastery, Slavery and Emancipation*, *supra* note 5; Binder, *On Hegel, On Slavery, But Not On My Head!*, *supra* note 5; Binder, Negating Slavery, *supra* note 5.

96. For lucid and urgent exposition of the dynamics of this process and the political choices with which it confronts African-Americans, see CORNEL WEST, PROPHESY DELIVERANCE: AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY (1982).

97. The post-Reconstruction doctrinal history of the Thirteenth Amendment involved the progressive closing off of the doctrinal avenues suggested in U.S. v. Rhodes, *supra* note 51, and in Harlan's dissents in the Civil Rights Cases, 109 U.S. 3, 26 (1883), Plessy v. Ferguson, 163 U.S. 537, 552 (1896), and U.S. v. Hodges, 203 U.S. 1, 20 (1905), avenues that could have been reopened by the

Thus, while our temporal distance from the ratification of the Thirteenth Amendment makes the task of applying slave experience more complex, the subsequent failure to enforce the Thirteenth Amendment fully means that our task may not be fundamentally different from the task facing the nation in 1866. The experience of African-Americans prior to 1866 can help us distinguish slavery from freedom, and so can help us identify the persistence of slavery after passage of the Thirteenth Amendment. This will enable us to see some subsequent African-American experience as additional evidence of slave values. Kendall Thomas has argued, for example, that modern civil disobedience by African-Americans is the expression of a continuing refusal to accept the legitimacy of American law.[98] If so, citizens bent on redeeming America may have to come to terms not only with generations of the dead, but with living African-Americans as well; and the distance between 1866 and the present is just one leg of the larger distance between 1619 and the present, and between precolonial Africa and contemporary America.

The dynamism, pluralism, and temporal remoteness of slave experience suggest that phrases like "the authentic values of the slaves" simply have no referent. Certainly, to the extent that "authentic" values are only those derived entirely from within a tradition, with no trace of external influence, no value can be authentic to a tradition. But if no normative argument can accurately represent a set of values as authentic to a particular tradition, there is something wrong with the criterion of authenticity, rather than the normative arguments it is used to judge.

Just as the skeptical critique of originalism presumes originalism's address to the impossible task of expelling politics from adjudication, the paradox of authenticity depends upon mischaracterizing tradition as a purely descriptive concept. Yet the accuracy of any description of the past depends on the purposes for which we describe it. Commenting on one Native American community's quest for recognition as a tribe, despite its members' partly coerced assimilation into American society, James Clifford writes that "interpreting the direction or meaning of the historical 'record' always depends on present possibilities. When the future is open, so is the past. In a present context of serious revival, [tribal traditions and institutions merely] went underground [during the nineteenth century]." However, in a present context of assimilation, Clifford concludes, tribal traditions long ago "disappeared."[99] Being true

courts, by Congress, or the executive in the constitutional crisis of the 1930s and were not. On the racist restraints on the New Deal Congress's constitutional vision, see Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987).

98. Kendall Thomas, Remarks at the Columbia Race and the Law Workshop, Columbia Law School (Nov. 5, 1991).

99. JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH CENTURY ETHNOGRAPHY, LITERATURE AND ART 343 (1988).

to the past in the context of constitutive argument is a matter of fidelity, not accuracy: we choose a past to be true to. In constructing traditions, we cannot emulate those archaeologists so committed to preserving an unadulterated record of the past that they hesitate to break ground.

But if we are free to invent the past of our choice, what prevents our fellow citizens from choosing badly, even embracing the legacy of slavery?

Only our persuasive efforts. Collectively we can indeed choose whatever identities we wish—but we cannot choose our identities individually. Because identities are social choices that cannot be altered unilaterally, they situate and constrain our moral judgments. Thus, we embrace those views that are permitted by identities we wish to claim; and we interpret those identities in ways that encourage the present and future adherence of others. My argument—*like all normative argument*—is directed at those who have already restricted their choice of identities to a narrow range of options.

I am addressing only those who feel some attachment to an American identity, involving fidelity to a Constitution that—about as explicitly as possible—rules out embrace of our slaveholding past and includes former slaves and their descendants as citizens. The voluntary nature of identification with tradition is crucial to my argument, however, because it means that no one can compel the acquiescence of the slaves and their descendants in this identity—aspirants to American identity must win adherence from the living and deserve it from the dead. No one can retain an American identity of the sort described without the cooperation of the slaves and their descendants. Hence claimants to such an American identity have a stake in fashioning a version of it that the slaves could have accepted without humiliation and that, to the extent slavery and its effects persist, contemporary African-Americans will accept.

What we want to know about the slaves—what forms of freedom and citizenship they would have accepted and would now endorse—we cannot know. These questions are frankly hypothetical. What we want from the slaves—consent to our plans, identification with our redemptive aspirations—we can never finally get. "Many thousands" have gone and left us abandoned, orphaned, bereft. The daunting responsibility all of us face in interpreting the Thirteenth Amendment is therefore to act and speak for the slaves, to resurrect them in our imaginations, to invent them anew for their own purposes, not only ours. Can our imaginations do them justice? Yes, perhaps, with their help.

Natally alienated, radically displaced, repeatedly separated by sale or seizure for debt, African-American slaves may have been more acutely conscious than any people in human history that tradition is a fragile work of the imagination. From diverse cultural threads they were able to weave a resilient web of narrative tradition that connected them, one

to another, across the generations and across the sea—a web of fiction as important to their survival as the fictive kinship with which they reknit networks of affiliation routinely torn by sale. Drawing on African accounts of slavery as social death and ancestral abandonment; drawing on West African initiation rites depicting a death, followed by "seekin' in the wilderness"[100] and ultimate rebirth; drawing on the Exodus narrative, on Christ's Passion and Resurrection, and on the familiar rigors of escape, the slaves wove a mythic account of their ordeal in slavery as a collective sojourn in the wilderness, harsh and endless as death itself, but in which they could nevertheless retain, reproduce, and bequeath to those who would claim it the faith that they would one day reemerge alive, reborn, redeemed.

100. MARGARET WASHINGTON CREEL, "A PECULIAR PEOPLE:" SLAVE RELIGION AND COMMUNITY-CULTURE AMONG THE GULLAHS 58, 285-95, 309 (1988).