Maryland Law Review

Volume 71 | Issue 1 Article 13

Conclusion: The Political Thirteenth Amendment

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CONCLUSION: THE POLITICAL THIRTEENTH AMENDMENT

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I. INTRODUCTION

The United States Supreme Court has done little to develop the meaning of the Thirteenth Amendment. One could conclude from the Court's lack of development that the Amendment is irrelevant, unimportant, or even limited to remedying the historical circumstances surrounding its adoption by ending chattel slavery. It would, however, be a grave mistake to interpret the lack of judicial doctrine as a lack of constitutional meaning. Congress has played the principal role in determining the meaning of the Thirteenth Amendment's promise of freedom. Moreover, the framers of the Thirteenth Amendment never anticipated that the Court would define its meaning. Instead, they expected the political branches to enforce the Amendment responding to the influence of constitutional politics. As Michael Les Benedict explains, "From the era of the American Revolution at least through the era of Reconstruction, all politics were constitutional politics."[1] The political Thirteenth Amendment mandates that both its interpretation and its enforcement occur primarily through constitutional politics, not constitutional law.[2]

One of the underlying themes of this symposium is the relationship between politics and the Thirteenth Amendment. This Essay explores that theme and this symposium's contributions to our understanding of the political Thirteenth Amendment. It raises the issue of the relationship between constitutional politics and constitutional law. Participants in political movements engage in constitutional politics in an attempt to influence constitutional law. With respect to the

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1. Michael Les Benedict, *Constitutional Politics, Constitutional Law, and the Thirteenth Amendment*, 71 MD. L. REV. 163, 169 (2011).

2. For the purpose of this paper, "constitutional politics" refers to constitutional advocacy within the political realm, and "constitutional law" refers to the jurisprudence of the courts that interpret the Constitution.

Thirteenth Amendment, these activists have often succeeded. The result of their success is a series of sporadic but significant federal statutes protecting workers from involuntary servitude and racial minorities from the badges and incidents of slavery.[3] To understand the role the Thirteenth Amendment plays in our system of constitutional law, then, it is essential to understand the constitutional politics of that Amendment—to explore the political Thirteenth Amendment.

II. SEPARATION OF POWERS AND THE FRAMERS

As Michael Les Benedict reminds us, the framers of the Thirteenth Amendment simply did not believe that the Court had hegemony over constitutional meaning.[4] According to Benedict, the Reconstruction Era was a time "in which politics and political choices were predominantly articulated in constitutional terms."[5] Constitutional debates were conducted primarily not in the courts but in the halls of Congress.[6] Moreover, to put it mildly, the members of the Reconstruction Congress did not have a favorable impression of judicial review. Because of the *Dred Scott* decision,[7] members of the Reconstruction Congress saw the Supreme Court as an instrument to protect the institution of slavery.[8] After all, in *Dred Scott*, the Court held that slave owners had a *constitutional right* to own slaves.[9] The Thirteenth Amendment overruled that aspect of *Dred Scott* and transformed a pro-slavery constitution into one which promotes a broad vision of freedom.[10] It's not surprising that the framers of the Thirteenth Amendment did not expect the Court to play the leading role

3. These statutes include the Civil Rights Act of 1866, the Slave Kidnapping Statute, and the Anti-Peonage Act, all of which will be discussed *infra*. *See* Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 279–311 (2010) [hereinafter Zietlow, *Free at Last!*] (describing the congressional debates over statutes enforcing the Thirteenth Amendment).

4. Benedict, *supra* note 1, at 164.

5. *Id.*

6. *Id.* at 165.

7. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (overruled by the Thirteenth and Fourteenth Amendments).

8. REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 47–48 (2006) [hereinafter ZIETLOW, ENFORCING EQUALITY].

9. *See Dred Scott*, 60 U.S. at 452 ("[I]t is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind [a slave] in the territory of the United States . . . is not warranted by the Constitution . . . .").

10. *See* Benedict, *supra* note 1, at 181 ("In place of a constitutional order that exalted the property rights of slaveowners, the Amendment would re-establish a constitutional order dedicated to freedom.").

in defining its meaning. The members of the Reconstruction Congress played that role themselves, and empowered members of future Congresses to do the same with Section 2 of that Amendment.[11]

Immediately after the Thirteenth Amendment was ratified, members of Congress began the debate over the first piece of legislation enforcing the Amendment—what became the 1866 Civil Rights Act.[12] Introduced by the well-respected lawyer Lyman Trumbull, the Act provided that all persons born within the United States were citizens, and would enjoy the same right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."[13] This broad language reflects the prevailing view in the Reconstruction Congress that freedom itself entitled a person to the protection of fundamental human rights.[14] Other statutes, including the 1866 Slave Kidnapping Act[15] and the 1867 Anti-Peonage Act,[16] protected workers from being subjected to undue coercion. The most far-reaching Reconstruction Era statute, the 1871 Enforcement Act,[17] which imposed civil and criminal penalties on state actors who violated the federal rights of any person,[18] and on private actors who engaged in conspiracies to prevent a person from exercising "any right or privilege of a citizen of the United States,"[19] was based in part on Congress's power under Section 2.[20]

11. Section 2 reads: "Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII.

12. *See* Zietlow, *Free at Last!*, *supra* note 3, at 277–79 (describing the theory of the Thirteenth Amendment which the Reconstruction Congress adopted in drafting the Civil Rights Act of 1866).

13. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2006)).

14. *See* Zietlow, *Free at Last!*, *supra* note 3, at 279.

15. Slave Kidnapping Statute, ch. 86, 14 Stat. 50 (1866) (codified as amended at 18 U.S.C. § 443 (2006)). This statute overruled the Fugitive Slave Laws.

16. Anti-Peonage Act, ch. 187, 14 Stat. 546 (1867) (codified as amended at 18 U.S.C. § 1581 and 42 U.S.C. § 1994 (2006)). The Anti-Peonage Act abolished the "slavery-like" practice of peonage.

17. Enforcement Act of 1871, 17 Stat. 13, 13–15 (codified as amended in scattered sections of 18 U.S.C.A. and 42 U.S.C. (2006)).

18. *See* 42 U.S.C. § 1983 (stating that any person who deprives a citizen of the United States of "any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .").

19. 42 U.S.C. § 1985(3).

20. Some members of Congress also argued that it also fell within their authority to enforce the Fourteenth Amendment. *See* Zietlow, *Free at Last!*, *supra* note 3, at 287 (quoting Reconstruction Era congressmen defending the constitutionality of the 1871 Enforce-

Legislative activism in the Reconstruction Congress reveals that these congressmen believed that they had far-reaching authority to both define rights protected by the Amendment and to enact legislation enforcing those rights. Some feared that the Court might overrule their efforts, especially after the Court's narrow reading of the Privileges or Immunities Clause of the Fourteenth Amendment in the *Slaughter-House Cases*.[21] However, the congressional debates reveal that those members of Congress saw the Court as a threat to their autonomy, not as the proper authority to determine the meaning of the Reconstruction Amendments.[22]

By and large, the United States Supreme Court recognizes that Congress has a great amount of autonomy to enforce the political Thirteenth Amendment. The Court has virtually never ruled on the meaning of the Thirteenth Amendment itself. Instead, it has indirectly interpreted the meaning of the Thirteenth Amendment by interpreting statutes protecting rights based in that Amendment.[23] The Court has taken pains to make it clear that these cases are merely matters of statutory, not constitutional, interpretation.[24] Congress has amended statutes based on the Thirteenth Amendment several times to correct what members of Congress believe to be unduly cramped Supreme Court interpretations.[25] The Court has deferred to Con-

ment Act). The Court upheld § 1985 as a valid use of the Section 2 power in *United States v. Guest*, 383 U.S. 745 (1966).

21. Slaughter-House Cases, 83 U.S. 36 (1873). *See* James W. Fox, Jr., *Re-readings and Misreadings: Slaughter-House, Privileges or Immunities, and Section Five Enforcement Power*, 91 KY. L.J. 67, 155 (2002) (noting that the ruling in the *Slaughter-House Cases* eliminated discussion of the "fundamental privileges of national citizenship" from congressional debates).

22. *See* ZIETLOW, ENFORCING EQUALITY, *supra* note 8, at 60 (explaining that the *Slaughter-House* holding "rejected the broadest, natural rights theory of the privileges and immunities of citizenship held by some Framers of the Fourteenth Amendment.").

23. *See, e.g.*, Patterson v. McClean, 491 U.S. 164, 171 (1989) (interpreting 42 U.S.C. § 1981); United States v. Kozminski, 487 U.S. 931 (1988) (same); Runyon v. McCrary, 427 U.S. 160 (1976) (same); Pollock v. Williams, 322 U.S. 4 (1943) (interpreting the Anti-Peonage Act).

24. *See, e.g.*, *Kozminski*, 487 U.S. at 944.

25. For example, Congress amended the Anti-Peonage Act in 1948 to broaden the meaning of involuntary servitude in response to Supreme Court and lower court rulings narrowly interpreting the meaning of the anti-peonage statute. *See* Zietlow, *Free at Last!*, *supra* note 3, at 300 (noting that Congress intended the 1948 amendments to make it "a crime to hold someone in a condition of involuntary servitude regardless of the existence of any debt."). Congress enacted the 1991 Civil Rights Act in part to correct the Court's narrow reading of § 1981 in *Patterson v. McClean*. *Id.* at 277. The Court acknowledged as much and upheld the amendment in *CBOCS W. Inc. v. Humphries*, 553 U.S. 442, 446–48 (2008). A provision of the 2000 Trafficking Victims Protection Act was intended to overrule the Court's narrow interpretation of involuntariness in *Kozminski*. Zietlow, *Free at Last!*, *supra* note 3, at 301.

gress's authority to do so.[26] The Court's approach to interpreting the Thirteenth Amendment is thus highly deferential, reserving to Congress the power to define the Amendment's meaning.

Finally, the Court has adopted a highly deferential approach when evaluating the scope of Congress's power to enforce the Thirteenth Amendment. In *Jones v. Alfred H. Mayer Co.*, the Court held that Congress's Section 2 power extends to eliminating the badges and incidents of slavery, adopting language reminiscent of the congressional debates over the Thirteenth Amendment enforcement power.[27] Thus, the Court adopted a "hands off" rational basis review of Congress's authority to enforce the Thirteenth Amendment. In subsequent cases, the Court has retained that deferential approach.[28] This is the proper approach for the Court to take toward the political Thirteenth Amendment.

III. DEBATE OVER THE BREADTH OF THE ENFORCEMENT POWER

Since the Court largely cedes enforcement authority to Congress, the extent of the congressional enforcement power under Section 2 of the Thirteenth Amendment is particularly significant. Two articles in this symposium address the scope of the enforcement power.[29] As Alex Tsesis points out, most scholars who have addressed the issue argue that Congress has broad authority to enforce the Amendment, and that courts should defer to that authority.[30] Recently, however, Jennifer Mason McAward has called for the Court to adopt a more re-

26. *See, e.g.*, *CBOCS W. Inc.*, 553 U.S. at 446–48 (finding that a provision of the 1991 Civil Rights Act was intended to overrule its interpretation of § 1981 in *Patterson v. McClean* and upholding that provision).

27. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968). The Court held that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." *Id.*

28. *See, e.g.*, *CBOCS W. Inc.*, 553 U.S. at 446–50 (describing the purpose of legislative amendments to §§ 1981–1982 and judicial interpretations of those amendments).

29. *Compare* Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 40 (2011) [hereinafter Tsesis, *Congressional Authority*] (arguing that courts should defer to the enforcement power) *with* Jennifer Mason McAward, *Congressional Authority to Interpret the Thirteenth Amendment: A Response to Professor Tsesis*, 71 MD. L. REV. 60 (2011) [hereinafter McAward, *A Response*] (arguing that courts should impose limits on the enforcement power).

30. *See, e.g.*, Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801 (2010) (arguing that the Reconstruction Amendments were drafted with the intention of granting Congress broad enforcement powers); Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. PA. J. CONST. L. 1337 (2009) (explaining how later Supreme Court interpretations limited the broad congressional enforcement power of Section 2 of the Thirteenth Amendment); Zietlow, *Free at Last!*, *supra* note 3 (same).

strictive approach to legislation enacted under Section 2.[31] McAward argues that the Court should apply the same restrictive "congruence and proportionality" test that it adopted toward Congress's power to enforce the Fourteenth Amendment in *City of Boerne v. Flores*.[32] In their symposium pieces, Tsesis and McAward debate whether either the original meaning of the Thirteenth Amendment or principles of federalism and separation of powers justify such a restrictive approach toward Section 2. At stake is whether the political branches will retain control over their power to enforce that Amendment.

Tsesis argues that the framers of the Thirteenth Amendment intended the enforcement power to be broad, and that structural limitations on congressional power do not justify judicial restrictions on that power. Tsesis begins with the premise "that statements made in the immediate aftermath of the Thirteenth Amendment are best indicative of the scope of the legislative power provided Congress under Section 2."[33] Most of these statements were made during the debate over the 1866 Civil Rights Act, which, as noted above, protects a broad spectrum of fundamental rights. This history supports Tsesis's claim that members of the Reconstruction Congress believed that their power to enforce the Thirteenth Amendment was extremely broad.[34] Moreover, the debates reveal that member of the Reconstruction Congress saw themselves, and not the courts, as the primary enforcers of the Amendment.[35]

However, the intent of the framers by itself is not determinative of the meaning of the Thirteenth Amendment. Principles of federalism or separation of powers might justify restrictions on Section 2. Citing *Boerne*, McAward argues that principles of separation of powers counsel against Congress having the power to define the substantive meaning of the Thirteenth Amendment.[36] She claims that the

31. Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After* City of Boerne v. Flores, 88 WASH. U. L. REV. 77, 130 (2010) [hereinafter McAward, *Enforcement Power After* City of Boerne] (arguing that Congress's Section 2 power "is best understood as a prophylactic power, and the concept of the 'badges and incidents of slavery' is best understood as referring to a defined set of practices associated with slavery and postemancipation attempts at de facto reenslavement").

32. 521 U.S. 507 (1997). McAward, *Enforcement Power After* City of Boerne, *supra* note 31, at 136–41.

33. Tsesis, *Congressional Authority*, *supra* note 29, at 41.

34. *See id.* at 43–47 (describing the statements of congressmen during the Thirteenth Amendment debates).

35. *See* Zietlow, *Free at Last!*, *supra* note 3, at 275–77 (describing Senator Trumbull's beliefs that in spite of the *Dred Scott* ruling Congress still maintained broad enforcement power under the Reconstruction Amendments).

36. McAward, *A Response*, *supra* note 29, at 75.

Court's deferential approach in *Jones v. Alfred H. Mayer Co.* poses the danger that Section 2 could become a general police power in the unfettered hands of Congress.[37] According to McAward, the Court should intervene to protect states from the resulting intrusion on their sovereignty.[38] Tsesis discounts those concerns, and points out that the Reconstruction Amendments altered our structure of federalism to create a federal source of individual rights.[39]

As Tsesis points out, the Court has shown no indication that it intends to restrict the Section 2 enforcement power.[40] Indeed, in its rulings evaluating Congress's power to enforce the Thirteenth Amendment since *Boerne*, the Court has remained highly deferential to that power.[41] There also appears to be no need for the Court to change its approach. To some extent, McAward's thesis is a solution in search of a problem. While it is true that some scholars have made far-reaching claims about the scope of the Thirteenth Amendment, Congress has shown no inclination to follow that lead. In fact, Congress has rarely used the Section 2 enforcement power, and when it has done so, it has used the power to remedy conduct that clearly falls within the definition of slavery, involuntary servitude, or the badges and incidents of slavery.[42] The political limits on Congress's power to enforce the Thirteenth Amendment seem to be working quite well, perhaps too well.

Jim Pope claims that "the Thirteenth Amendment directly commands the government to undertake a project of social transformation."[43] As early as *The Civil Rights Cases*, the Supreme Court agreed,

37. *Id.* at 77–78 ("*Jones* put its imprimatur on a power of near-plenary proportions that could permit Congress to attack any form of discrimination against any group.").

38. *Id.* at 78 ("This conception of the Section 2 power carries substantial federalism costs.").

39. *See* Tsesis, *Congressional Authority*, *supra* note 29, at 46 ("The breadth of power Congress defined for itself through the Civil Rights Act of 1866 unequivocally signaled the creation of congressional supremacy power over matters involving the protection of human rights.").

40. *Id.* at 53.

41. *See* CBOCS W. Inc. v. Humphries, 553 U.S. 442, 446–48 (2008) (discussing prior interpretations of the Civil Rights Act of 1991); United States v. Marcus, 487 F. Supp. 2d 289, 313 (E.D.N.Y. 2007) (discussing congressional authority to enact the Trafficking Victims Protection Act), *vacated on ex post facto grounds*, 538 F.3d 97 (2d Cir. 2008), *rev'd and remanded on other grounds,* 130 S. Ct. 2159 (2010); United States v. Bradley, 390 F.3d 145, 152–54 (1st Cir. 2004) (same), *vacated on other grounds*, 545 U.S. 1101 (2005) (per curiam).

42. McAward acknowledges as much in her other work. McAward, *Enforcement Power After* City of Boerne, *supra* note 30, at 89.

43. *See* James Gray Pope, *What's Different About the Thirteenth Amendment, and Why Does it Matter?*, 71 MD. L. REV. 189, 194 (2011) (explaining how explicitly banning slavery and involuntary servitude transformed society).

pointing out that the Thirteenth Amendment has an affirmative nature that includes a promise of substantive freedom for people within Congress's jurisdiction.[44] After a flurry of Reconstruction Era civil rights legislation, Congress waited a century to enact the only other civil rights act based on the Thirteenth Amendment, portions of the 1968 Fair Housing Act.[45] Thus, Congress has rarely used its Section 2 power to address the badges and incidents of slavery. Congress has been even more reluctant to use the Section 2 power to protect the rights of workers under the slavery and involuntary servitude clauses. The Court has suggested that ending involuntary servitude would entail "maintain[ing] a system of completely free and voluntary labor throughout the United States."[46] Yet Congress has done remarkably little to protect low wage workers who lack the "power below" to work in a truly free workplace,[47] even though real wages have declined dramatically concomitantly with the decline in the right of workers to organize and bargain collectively.[48]

Given Congress's failure to truly enforce the Thirteenth Amendment, Court-based restrictions on the Section 2 power would arguably be superfluous. The real problem is congressional reluctance to use that power to protect the rights of workers and racial minorities. Addressing that reluctance is not a matter of constitutional law, but of constitutional politics.

IV. THIRTEENTH AMENDMENT IN POLITICS

In their articles, Linda McClain and Ken Kersch talk about the role that the Thirteenth Amendment has played in politics. Their pieces reveal that the constitutional politics of the Thirteenth Amendment is more complex than one might first expect. Activists

44. *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883) ("[T]he Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. . . . [I]t is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery . . . .").

45. Fair Housing Act, Pub. L. No. 90-284, Title VIII, April 11, 1968, 82 Stat. 81 (codified at 42 U.S.C. §§ 3601 et seq.). The Hate Crimes Act and the Anti-Blockbusting portions of the Act were based in the Thirteenth Amendment.

46. Pollock v. Williams, 322 U.S. 4, 17 (1944).

47. Pope, *supra* note 43, at 194.

48. *See generally* Nicole M. Fortin & Thomas Lemieux, *Institutional Changes and Rising Wage Inequality, Is There a Linkage?*, 11 J. ECON. PERSPECTIVES 75 (1997) (ascertaining a possible linkage between a decrease in unionization and a decrease in real wages).

on both sides of the political spectrum have claimed the Thirteenth Amendment as their own.[49]

Most accounts of the 1964 Civil Rights Act as constitutional politics discuss Congress's reliance on the Commerce Clause and the Fourteenth Amendment's Equal Protection Clause.[50] Title II of the 1964 Act outlawed race-based discrimination in places of public accommodation.[51] In her article, McClain points out that both sides of the debate over Title II cited the Thirteenth Amendment in support of their claim.[52] A few proponents of the Act claimed that it fell within the power of Congress to enforce the Thirteenth Amendment because race discrimination in places of public accommodation amounts to a badge or incident of slavery.[53] McClain reports that during his testimony before Congress, then-Attorney General Robert F. Kennedy opined that the Thirteenth Amendment would provide a foundation for Title II.[54] Kennedy argued that private discrimination was a badge or incident of slavery, and pointed out the advantage of the Thirteenth Amendment over the Fourteenth—that it lacked a state action requirement and could clearly be used to remedy private discrimination.[55]

Notwithstanding the urging of the Department of Justice, few members of Congress even acknowledged the argument that Title II could be justified under Congress's power to enforce the Thirteenth Amendment.[56] It would be interesting to know why that argument

49. For example, activists on both sides of the debate over the 1964 Civil Rights Act invoked the Thirteenth Amendment in support of their arguments. *See infra* note 52 (describing the arguments on both sides of Title II). More recently, right wing activists claim that the Thirteenth Amendment protects their libertarian positions. *See* text accompanying *infra* note 65 (describing libertarian views on the Thirteenth Amendment).

50. *See, e.g.*, Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945 (2005) [hereinafter Zietlow, *To Secure These Rights*] (describing the debates surrounding the Civil Rights Act of 1964).

51. Civil Rights Act of 1964, Pub. L. No. 88-352, July 2, 1964, 78 Stat. 241 (codified at 42 U.S.C. § 2000 et seq. (1994)).

52. *See* Linda C. McClain, *Involuntary Servitude, Public Accommodations Laws, and the Legacy of* Heart of Atlanta Motel, Inc. v. United States, 71 MD. L. REV. 83, 123–42 (2011) (describing the arguments of both proponents and opponents of Title II based on the Thirteenth Amendment).

53. *Id.* at 126.

54. *See id.* at 125–26 (citing Hearings Before the Senate Committee on S. 1732 A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce, 88th Cong., 1st Sess., July 1–3, 8–9, 12–18, 22, 1963, at 28 (statement of the Hon. Robert F. Kennedy, Attorney General of the United States)).

55. *Id.* Kennedy's assistant, Deputy Attorney General Burke Marshall, sounded the same theme in his testimony before the Senate. *Id.* at 127–28.

56. *Id.* at 130 (citing Individual Views of Senator Winston L. Prouty, S. Rep. No. 88-872, Part 2, at 1–4).

was not taken up by more supporters of the Act. After all, the 1866 Civil Rights Act, which also outlawed private race discrimination in the market, was based on Section 2.[57] Moreover, only four years after the passage of the 1964 Act, members of Congress invoked the Thirteenth Amendment to support the 1968 Fair Housing Act.[58] Nonetheless, in 1964, the Thirteenth Amendment's promise of substantive freedom was eclipsed by the Fourteenth Amendment's promise of equality, and the pragmatic call of the Commerce Clause.[59]

Ironically, by far the more salient Thirteenth Amendment-based arguments in the debate over the 1964 Civil Rights Act were those made not in support of, but in opposition to, the Act. Both Moreton Rolleston, the owner of the Heart of Atlanta Motel, and Senator Strom Thurmond, a chief congressional opponent of the Act, argued that the bill would impose involuntary servitude on property owners by requiring them to serve black customers.[60] Although McClain correctly characterizes this argument as one that would have confused even Alice in Wonderland,[61] it does highlight the libertarian potential of the Amendment's promise of freedom. After all, as Jim Pope points out, the Thirteenth Amendment is arguably the only constitutional provision that mandates "the official identification and enforcement of unenumerated rights."[62] Many of the framers of the Thirteenth Amendment believed in a wide range of natural rights, and believed that all free persons were entitled to those rights which include a certain level of individual autonomy.[63] As McClain points out, the argument that the protected autonomy includes the right to discriminate based on race strains credulity given that the primary purpose of the Amendment was to wipe out slavery and the deprivation of fundamental human rights that the institution entailed. Both

57. *See* Zietlow, *Free at Last!*, *supra* note 3, at 275–81 ("The Reconstruction Congress relied on the Thirteenth Amendment to enact legislation to end the subordination that resulted from the racially-based denial of fundamental rights and the brutal economic exploitation of slavery." *Id.* at 279).

58. *Id.* at 301–06.

59. *See* McClain, *supra* note 52, at 135–37; Zietlow, *To Secure These Rights*, *supra* note 50, at 977–78.

60. *See* McClain, *supra* note 52, at 137–38.

61. *Id.* at 93.

62. *See* Pope, *supra* note 43, at 190.

63. *See* ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 103 (2004) ("They [the framers] regarded the Thirteenth Amendment as a means of restoring the natural rights long denied to both blacks and wage earners."); *see generally* Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment* (unpublished manuscript on file with the author).

the members Congress and the courts who heard the argument agreed.[64]

Nonetheless, as Ken Kersch reminds us, the libertarian side of the Thirteenth Amendment continues to attract conservative ideologues in this country.[65] Kersch describes the contemporary conservative movement of Declarationism, which champions both the Declaration of Independence and the ideology of Abraham Lincoln and the Reconstruction Republicans in support of a conservative agenda.[66] Ironically, participants in the Declarationist movement rely upon the natural law ideology behind the Declaration and Reconstruction measures, including the Thirteenth Amendment, as a means of redeeming the South from the taint of slavery.[67]

Kersch reminds us that the political Thirteenth Amendment is open to a variety of interpretations depending on the political goals of those interpreting the Amendment. Thus, labor leaders in the late nineteenth and early twentieth century argued that the Thirteenth Amendment protected a fundamental right to organize and to strike.[68] Segregationists in the mid-twentieth century argued that antidiscrimination laws violated the Thirteenth Amendment by imposing involuntary servitude upon them. The validity of these interpretations depends in part on the extent to which they coincide with the original meaning of the Thirteenth Amendment. However, given the wide range of meaning that can be attributed to that Amendment, the extent to which the Thirteenth Amendment protects those rights depends ultimately upon constitutional politics—the extent to which the political movements championing those interpretations succeed in convincing courts and lawmakers to adopt their approach.

Of course, the political advocates will be more likely to succeed if their interpretation is consistent with the original meaning of the Thirteenth Amendment. Thus, labor's theory of the Thirteenth Amendment, while never embraced by the framers of that Amendment, is arguably consistent with the Amendment's original goal to create a free labor force in which workers were not subject to undue coercion. Labor advocates succeeded in convincing Congress to adopt the National Labor Relations Act, which protected their free-

64. *See* McClain, *supra* note 52, at 149.

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

66. *Id.* at 230–33.

67. *Id.* at 249–50.

68. James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 942, 959 (1997).

dom to organize and to strike.[69] By contrast, the argument that statutes prohibiting race discrimination impose involuntary servitude upon racists flies in the face of the framers' use of the Thirteenth Amendment enforcement power to end race discrimination in private contracts. Thus, the segregationists' invocation of the Thirteenth Amendment failed, and barely registered amongst the members of Congress and the Court to whom it was addressed. The success and failure of the two movements suggests that even in constitutional politics, original meaning is relevant. These two examples suggest that legal arguments are simply more persuasive when they have support in original meaning, even when they are made not in courtrooms but in the realm of constitutional politics.

V. CONCLUSION

The political Thirteenth Amendment reminds us about the importance of constitutional politics to the development of constitutional law. Although the Court has done little to develop the meaning of the Thirteenth Amendment, the Amendment has played an important role in constitutional politics at key moments during our history. The Thirteenth Amendment remains relevant because its promise of freedom and fundamental rights is so compelling. Therefore, the political Thirteenth Amendment will always remain within our national constitutional consciousness.

69. ZIETLOW, ENFORCING EQUALITY, *supra* note 8, at 85–86.