

NOTE TO SCHMOOZE PARTICIPANTS:

I have omitted all citations from this draft. I have lots of them – mostly from me and other people at this wonderful event – but have left them out as I have in years past. This draft should be read in the spirit in which it is offered. It is a collection of ever-developing but unvetted ideas that have been spawned from prior research and publications.

**WHY ORIGINALISM IS OF SO LITTLE USE IN INTERPRETING THE
THIRTEENTH AMENDMENT**

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ABSTRACT

The 13th Amendment affords two very different visions. One vision limits the 13th Amendment's scope to ending slavery and involuntary servitude without more. The second expands the 13th Amendment's scope to include an anti-subordination principle. Proponents of both visions rely on originalism to support their visions. Unfortunately, originalism does not help us reach a clearly correct conclusion regarding the scope of the 13th Amendment.

That is fine, because the core question regarding the interpretation of the 13th Amendment ought to be whether the amendment is constitutionally transformative. That is, does the 13th Amendment announce a constitutional principle that requires that the constitutional meaning of other text not explicitly changed by the amendment be re-interpreted. Determining that requires that the Constitution be read as it existed just before the 13th Amendment was adopted and as it existed just after the 13th Amendment was adopted. This is arguably originalist in orientation with its focus on the effect of the 13th Amendment at the time it was adopted. However, this method's results may not be originalist at all.

The interpretive method suggested makes the current scope of the 13th Amendment depends not on its original meaning or original intent, but on amendments passed after it. To be clear, the amendments adopted after the 13th Amendment would not change the amendment through implication. They would merely require that the amendment's interpretation change.

INTRODUCTION

The 13th Amendment of the Constitution may be the most consequential amendment in the country's history. By its explicit terms, it ended slavery and began the process of reconstructing the nation on an equalitarian basis. However, it is unclear just how equalitarian the United States could be based solely on the 13th Amendment. Much of the 13th Amendment's

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equalitarian power appears to have been blunted by the 14th and 15th Amendments. The 14th Amendment's Equal Protection Clause has become the font of much of the equality that Americans enjoy and the 15th Amendment's limitation on providing the right to vote based on race facially provides equal political rights. However, given how the reach of the 14th and 15th Amendments has been limited, divining the scope of substantive equality that the 13th Amendment does or can provide on its own remains worthwhile.

The 13th Amendment may be a simple prohibition on slavery and involuntary servitude. Its terms are reasonably clear and easy to understand. It addressed a core issue in the Civil War and cemented the victory that the Union won. The 13th Amendment empowers Congress to guarantee that slavery and involuntary servitude, other than pursuant to criminal conviction, does not exist in the United States. If interpreted narrowly, it could be interpreted to have done nothing more than raise former slaves up to the level of free blacks with respect to substantive rights of freedom in the post-*Dred Scott* era. It may have been a mere first step toward providing full admission for free blacks and former slaves into the American polity.

On the other hand, the 13th Amendment may be an anti-subordination amendment. The amendment ends slavery and involuntary servitude, but arguably does much more. It fully resolved a central issue of inequality that plagued the nation from its founding. Rather than providing a mere first step toward freedom and equality, the first section of the 13th Amendment alone may provide substantive equality with §2 – its enforcement clause – giving Congress the power to guarantee full equality to all people. In giving Congress the power and responsibility to enforce the prohibition on slavery, the 13th Amendment may urge Congress to ensure that free blacks and former slaves are made full and equal citizens in the American polity. If the 13th

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Amendment is to be treated as a broad grant of authority to Congress to provide substantive equality to all, the 13th Amendment may be more important than the 14th and 15th Amendments.

If the interpretation of the 13th Amendment at the time it was passed is relevant to its interpretation today, resort to an originalist interpretation of the amendment may seem appropriate. Indeed, proponents of each vision mentioned above claim that originalism supports their interpretation. However, a resort to originalism is problematic. There is an internal conflict between two branches of originalism: original intent and original meaning. Original intent tends to focus on framers, a narrow group within a much larger group whose assent was necessary to adopt the text. Original meaning focuses on determining the scope of the words in a text by investigating the text. That conflict is particularly important in analyzing the reach of the 13th Amendment given that there is originalist support for both sides of the issue. The issue is likely intractable. However, it ought to be secondary.

The primary issue in interpreting the 13th Amendment ought to be whether the amendment constitutes transformative constitutional text. Constitutional interpretation allows an interpreter to determine meaning so that the relevant text can be applied to a particular piece of legislation or course of action to determine if it is constitutional. When constitutional text acts as a rule, its adoption merely overlays a prior constitutional rule or fills the space where no rule had existed before. When constitutional text acts as a principle, it can be transformative. It can act as an overlay of the entire Constitution, changing the practical meaning of many sections of the document without explicitly changing them.

Originalism is arguably a worthwhile method to interpret constitutional text when that text is merely a rule that reflects what we do, i.e., how the country is to be governed. However, determining whether constitutional text is transformative may not be a good job for originalism.

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Original intent polls a small number of people relevant to a text's adoption. Original meaning's focus on evidence regarding the meaning of the words of the constitutional text at the time the text was ratified may be too narrow. With respect to a statement of principle, it may make little sense to interpret the text merely with an eye toward determining how it fits with pre-existing text and precedent.

However, even if originalism were a reasonable way to determine whether the 13th Amendment was transformative, it may not be useful in determining the amendment's current scope. The very notion of transformative constitutional text assumes that the meaning of constitutional text can change without being explicitly amended. If the addition of the 13th Amendment could have changed the meaning of prior constitutional text, the addition of later amendments could have changed the meaning of the 13th Amendment. If that is so, it is entirely possible that neither the original intent nor original meaning of the 13th Amendment matters much to the current scope of the 13th Amendment.

These issues are briefly explored below.

I. THE THIRTEENTH AMENDMENT

The 13th Amendment's first section abolishes slavery and involuntary servitude, except as criminal punishment, in the United States. Its second clause allows Congress to enforce the ban through legislation. The ban is very similar to the slavery ban from the Northwest Ordinance. However, the enforcement provision was new. It marked the first time enforcement language had been written into a constitutional provision of this type. Arguably, §1 is self-executing and §2 was not necessary. For example, the fugitive slave clause of the Constitution had been deemed self-executing by the Supreme Court. Indeed, Congress debated whether the enforcement clause was necessary. Nonetheless, it was included.

At a minimum, the 13th Amendment amended the Constitution and overwrote the portion of *Dred Scott* that invalidated the Missouri Compromise and deemed Congress impotent to ban slavery in certain parts of the country. Its ban on slavery literally made slaves free. However, arguably, freed slaves were merely free blacks. *Dred Scott* had deemed free blacks incapable of becoming U.S. citizens, though capable of becoming state citizens. Consequently, if *Dred Scott* remained applicable law and the 13th Amendment were construed narrowly, without more, free blacks could continue to occupy a space below citizens of the state in which they resided and definitely would continue to occupy a space below citizens of the United States. The 13th Amendment allows and arguably encourages Congress to pass legislation to guarantee that former slaves and free blacks were not treated essentially as slaves or required to render involuntary labor. However, section 2 might only allow Congress to legislate directly on issues that might risk practical enslavement or the actual re-enslavement of some inhabitants of the United States.

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If interpreted more broadly, the 13th Amendment could be thought to have created a single class of citizens to which all rights of citizenship were to be given. In an antebellum society that tolerated both freedom and slavery, it is somewhat sensible for there to be a continuum between those two conditions, with former slaves or descendants of slaves occupying Chief Justice Taney's middle ground between slavery and true freedom. However, given that the abolition of slavery guarantees freedom and that the Constitution suggests no distinctions among inhabitants of the United States (except as to aliens), a single class of equal citizens could have been thought to have been created by the ratification of the 13th Amendment. Section 2 of the amendment could be viewed as a strong enforcement mechanism for a clear command of equality.

The 13th Amendment's interpretation could be thought to depend on whether the amendment was primarily supposed to be a direct response to a portion of *Dred Scott* or was also to be a blow to the entire structure of subordination of free blacks and others in the United States. If it is the former, the 13th Amendment creates a *Dred Scott* Constitution with a no-slavery overlay. If it is the latter, the 13th Amendment creates a United States without a racial or status citizenship criterion. Given that proponents of both views claim that originalism supports their views, whether originalism can help resolve the issues is important.

II. ORIGINALISM

Originalism suggests that text generally retains its meaning over time and generally ought to be interpreted the same today as when it was adopted. In looking backward, originalism arguably seeks to identify the agreement that was made when the text was accepted or ratified. Many originalists would argue that if the text is to bear a different meaning than the original

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meaning, the text needs to be amended, not reinterpreted. Putting aside meaning, whether the text ought to be applied in the same way it would have been applied when passed is a somewhat more complicated issue.

Originalism would seem a sensible method to interpret text that provides or protects legal rights, such as a contract. However, whether originalism is an appropriate way to interpret constitutional text is contestable. The Constitution is not just a legal document that defines and provides legal rights. It arguably tells us who we are as a people. As importantly, its interpretation requires determining what text means and how it applies to various situations over an extended period of time. Nonetheless, originalism has been taken to be a legitimate method to interpret the Constitution, in some circumstances, even though it may not be executed well in all instances.

Originalism's two most common variants are original intent and original meaning. Original intent focuses on what the drafters of a document intended it to mean. If one is to determine the terms of an agreement, one might want to look at what the parties, or at least one party, to the agreement intended the agreement to be. As promulgators, the drafters arguably have the best idea what the text was supposed to mean. However, determining the original intent of constitutional text can be more complicated. The framers of constitutional text are not parties to the agreement in the same way that contracting parties are parties to their agreement. In addition, the various drafters and framers may have had various opinions and inputs on the meaning of text. As importantly, the ratifiers of constitutional text have the final word on whether the text is adopted. As such, their belief regarding what the text means should be considered important, if not more important than the framers.

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It is unclear what the original intent of the 13th Amendment is. Certainly, some of the framers of the 13th Amendment believed it was generally an anti-subordination measure. Indeed, the principal drafters of the amendment arguably thought so. One problem is that it is somewhat unclear who the framers are – the drafters, the congressmen who voted for the measure or all of the congressmen who commented on the measure before it passed. Each group likely believed a bit differently about the 13th Amendment and its scope. The 13th Amendment was a response to *Dred Scott* and to the Civil War. The responses to both were varied. Any assertion of the authentic original intent of the 13th Amendment rests somewhat uncomfortably on a definition of what group is chosen as the amendment's framers.

Original meaning focuses on the text itself to determine what the text means. The text is the law. Understandings not expressed in the text arguably are not part of the law. However, the ultimate goal of interpretation is to determine how the text is going to apply. Multiple interpretations can attach to most texts, leading to various possibly applications of those texts. Rather than relying on original intent, original meaning relies on the reasonable or ordinary person. The original meaning of a text is the meaning that an ordinary person would attach to the text at the time the text was adopted. Of course, when an interpreter must choose between two plausible interpretations of text, resort to the intent of the drafters can be helpful. However, to the proponent of original meaning, the intent of the framers does not displace original meaning. The intent of the framers is only relevant to determine original meaning. Other contemporaneous writings regarding the text in question would be relevant as well.

Original meaning of the 13th Amendment focuses on what a reasonable person have thought the amendment meant when passed. However, a problem arises. What the reasonable person would have thought about the implications of the 13th Amendment is unclear. That is,

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even if the average person thought about the 13th Amendment's meaning, it is unclear the person would have thought about how the 13th Amendment was to apply to particular situations. For example, a reasonable person clearly would have deemed the 13th Amendment to have ended slavery. However, whether that meant that freed slaves were to be treated merely as free blacks with limited rights consistent with the language of *Dred Scott* or instead would be treated the same as other free people arguably able to embrace the equality language of the Constitution is unclear. Given the relatively clear language of the amendment, looking more deeply at the text is unlikely to provide a clearer answer.

Neither original meaning nor original intent provides a certain answer regarding the 13th Amendment's interpretation. This is neither a surprise nor a problem. The core consideration ought not be what the amendment says or means (in a fairly simplistic manner), it ought to be how the amendment is to be applied. The issue is less about how to interpret the text itself and more about what how the text does or does not alter the Constitution as a whole. That issue is worthy of discussion.

III. TRANSFORMATIVE CONSTITUTIONAL TEXT

A. Constitutional Rules and Constitutional Principles

Interpreting constitutional text requires determining if it is transformative. Constitutional text that is not transformative tends to present as a constitutional rule. Constitutional rules reflect how we want to live, but do not reflect the essence of who we are. Whatever core command the rule provides will be enforced, but nothing else. Constitutional rules can be readily incorporated into the Constitution. They overlay prior rules covering the specific subject they concern and are applied accordingly. For example, a change to the age a person must attain to qualify to be

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president would be a constitutional rule that can be applied easily. Constitutional rules may be relevant to issues other than those they explicitly govern. However, they are not the basis for the reinterpretation of other constitutional text.

Constitutional text may also promulgate constitutional principle. The text likely will have a clear core that is to be enforced. However, it also will have a broader effective scope. The key is that a statement of principle will be transformative. It transforms because it is a statement around which some portion or the rest of the Constitution should be re-interpreted. Its adoption overwrites specific constitutional language touching the issue it addresses and alters the meaning of additional text. For example, the 14th Amendment is a statement of constitutional principle. It has a core to be enforced. However, it has also triggered the incorporation of much of the Bill of Rights which, rather than regulating what the federal government can do to its citizens, now regulates what any government in the United States can do to its citizens.

B. Rule or Principle?

Whether constitutional text is a statement of a constitutional rule or a statement of a constitutional principle arises in the context of interpreting the text for the purpose of applying it. A textual approach to the issue – like original meaning – may be problematic. Original meaning will tend to assume that constitutional text is a constitutional rule unless it is clear from the text or clearly discernible from the text that it is a statement of constitutional principle. However, when constitutional text is a statement of constitutional principle, its scope may not be readily apparent from its text.

An intentionalist approach – like original intent – tends to focus on a small group of framers who may not be an appropriate group to reference when deciding whether the relevant text is transformative. Original intent may be particularly ill suited to determine if constitutional text is

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transformative. Constitutional text is the fundamental law of the land and trumps all other law. Consequently, if its interpretation is not clear from the text, it arguably ought to mean what reasonable people and others probably thought it meant – the original meaning – rather than what the drafters thought it meant. This is particularly so when original intent suggests that the language is to be transformative. If it were clear when Congress passed the relevant amendment that the text should be deemed transformative or if the ratifiers made clear that they thought the language would be transformative, that might be reasonably sufficient to deem the text transformative. However, it is arguably not enough that a small group of framers believed the text to be transformative.

Distinguishing a constitutional rule from a statement of constitutional principle can be difficult. The same concept can have different meanings depending on the context. For example, a ban on slavery applied to territories appears to have different implications than a ban on slavery applied to the entire country. Timing can also be relevant. A ban on slavery coupled with a congressional enforcement provision adopted just after a civil war fought against citizens who were convinced that their states had the right to regulate slavery may appear to have different implications than the same provisions adopted at a different time in the country's history.

The issue with respect to the 13th Amendment is whether adding it to the Constitution fundamentally changed the Constitution. More specifically, interpreters ought to ask whether a fair reading of the Constitution just before the 13th Amendment was passed and a fair reading of the Constitution just after the 13th Amendment was passed would lead to the conclusion that some text that was not explicitly or clearly implicitly changed by the 13th Amendment ought to be reinterpreted in light of the 13th Amendment. For example, if the nature of freedom expressed

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by the pre-13th Amendment Constitution is simply different than that expressed by the post-13th Amendment Constitution such that the nature of some constitutional text ought to have different implications, the 13th Amendment is transformative. This is of particular moment because the Constitution is wildly contradictory on the essence of equality. The Constitution asserts the equality of all, but did so in the context of allowing, if not endorsing, slavery. Assertions of equality may mean something different or have different implications when slavery has been abolished and Congress is charged with making sure it is not practiced. If so, the 13th Amendment is transformative and should be interpreted as such.

Similarly, if the nature of federal power over the states is different post-13th Amendment than it was pre-13th Amendment, the amendment may be transformative. For example, if §2 of the amendment suggests that the country is more serious about stopping a disfavored practice and will use Congressional power to act directly on an issue that has historically been left to states, the 13th Amendment may be transformative. Conversely, if §2 was unnecessary because the §1 of the 13th Amendment is self-executing text that could have been enforced through longstanding governmental powers, the amendment likely is not transformative on that issue.

C. Implications

Constitutional text likely can be transformative. However, if the 13th Amendment can transform constitutional text that predates it, it may get re-interpreted over time by constitutional text that postdates it. This is not amendment by implication. The passing of the later constitutional text may have been thought to be unrelated to the 13th Amendment based on a reading of the later text in isolation. It is that the same words may be thought of differently after

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some subsequent principle is adopted that requires the rethinking or reinterpretation of a significant part of the Constitution. The issue is subtle and is likely controversial.

CONCLUSION

The 13th Amendment affords two very different interpretations. The proponents of both rely on originalism to support their claims. However, the key to the interpretation of the 13th Amendment is less about what the original intent or original meaning of the amendment is and more about what the amendment does or does not do to the rest of the Constitution. If the 13th Amendment transforms the interpretation of constitutional text, it is unclear that originalism has much to say about the scope of the 13th Amendment. As importantly, if constitutional text can transform the interpretation of significant pieces of the Constitution, originalism may have little to say about the scope of the 13th Amendment because the 13th Amendment's original intent or meaning may have changed through the transformative text of other amendments that postdate it.