

A Grievance Based Interpretation of the Thirteenth Amendment

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Lea VanderVelde

In some ways half of my published works have been about the Thirteenth Amendment.¹ In those writings directly on the Thirteenth Amendment, I have examined the Thirteenth Amendment from the framers' perspective.² I've focused on framers and aspirations, a relatively classic move in originalism.

The remarkable feature of the Originalism in the context of the Thirteenth Amendment is that the framers were the Radical Republicans, a group comprised of two separate strains of political thinkers who came together for a common end. The first group were the abolitionists, identified by senators like Charles Sumner, and speakers and writers like Wendell Phillips and Frederick Douglas. The second group were free labor adherents, including Senators Henry Wilson, Lyman Trumbull, and others. If ever there was a period in American constitutional history where the reformers were interested in protecting the least well off,³ specifically persons other than themselves, the Reconstruction Congress was that time. Thus, the originalism was liberal originalism.⁴

How does Originalism function in the Reconstruction era? While Originalism in the context of the original, some say, flawed, Constitution depended not only on debates, and the texts, but even on an expanded set of texts found in the exchange of letters called the "Federalist papers," there has not been a similarly well-developed set of supplemental texts to demonstrate meaning from a framers' intent approach. Some excellent new work is exploring that as scholars like Rebecca Zietlow go through the papers of *auteurs* like James Ashley.⁵

¹ Legal Ways of Seduction, 48 Stan. L. Rev 817 (1996); The Gendered Origins of the Lumley Doctrine, 101 Yale L. J. 775 (1992); Mrs. Dred Scott (the article) with Sandhya Subramanian, 106 Yale L. J. 1033 (1997); Mrs. Dred Scott (the book): A Life on Slavery's Frontier (Oxford University Press 2009); The Role of Captives in the Rule of Capture, 35 Envtl. L 649 (2005); The Moral Economy of the Purchase of Freedom, 17 Cardozo L. Rev. 1983 (1996); An Introduction to the American Tradition of Free Labor, in EMPLOYMENT LAW (1994)

² Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989). Lea VanderVelde, *The 13th Amendment of Our Aspirations*, 38 U. TOL. L. REV. 855, 875-76 (2007).

³ Henry Wilson, quoted in *The Labor Vision of the Thirteenth Amendment*.

⁴ Timothy Sandefur, LIBERAL ORIGINALISM: A PAST FOR THE FUTURE, 27 Harv. J.L. & Pub. Pol'y 489 (2004) "Liberal Originalism lay at the heart of the early Republican party."

⁵ Rebecca Zietlow,

Developing this corpus of understanding will be extremely useful for further generations of interpreters of the Reconstruction Amendments. Alexander Tsesis pulls in Charles Sumner and Jacob Howard.⁶ The concerted activity of multiple senators working on a series of constitutional reforms to reshape the nation as well as the constitution need not be individuated, as Jack Balkin wisely points out in his work, *The Reconstruction Power*.⁷ Balkin comes closest to the mark of realizing that in moving from the Thirteenth Amendment to the Fourteenth Amendment, some senators expressed the opinion, not of the Thirteenth's deficits, but that going further with the Fourteenth made the point even more clearly. The Fourteenth and Fifteenth amendments had not been mapped out with the passage of the Thirteenth. Overlapping powers, in Balkin's analysis, in the sense of congressional powers, was not a flaw, it was a feature.⁸ Overlapping intentions, similarly, is not Occam's razor -- no more than absolutely necessary as a limiting principle -- it was instead a series of thinkers building on each others' collective momentum for reform.

Who were the leaders in the Reconstruction Congress? Unlike the framers of the original Constitution, the movers and shakers were not established eastern landowners. Many of the "Framers" hailed from the west, hence, the Reconstruction amendments are more the Constitution of the West. Lyman Trumbull,⁹ James Ashley,¹⁰ and Jacob Howard of Michigan,¹¹ Thaddeus Stevens from western Pennsylvania. Still I continue to read Senator Henry Wilson of Massachusetts with awe. If anyone had a plan, and demonstrated a method of getting there by a series of well-placed political moves, it was Henry Wilson, the cobbler of congress.¹² Little by little, Henry Wilson expanded the likelihood and legitimacy of the ultimate abolition in the Thirteenth amendment to the Constitution, by liberating the bound laborers of the District of Columbia and bound slaves who joined Union forces, were married to Union soldiers, or fell behind Union lines, etc. These well-chosen moves meant that actions that had the breadth of

⁶ Alexander Tsesis, *Congressional Authority to Interpret the 13th Amendment*.

⁷ Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801 (2010);

⁸ *Id.* at .

⁹ Horace White, *The Life Of Lyman Trumbull* 224 (1913).

¹⁰ Rebecca E. Zietlow, *James Ashley and the Thirteenth Amendment* .

¹¹ Earl Maltz, *THE 13TH A AND CONSTITUTIONAL THEORY*. (however a rejection of Sumner and Howard is not a rejection of a broad reading. The broad reading is based on Henry Wilson rather than Sumner.

¹² Henry Wilson sprang into action immediately after the Dred Scott case, by attempting to get a passport for a Free Black resident of Boston. In 1860 he introduced a bill for more effective suppression of the slave trade; In 1861 he introduced a bill to provide for the release from D.C. Jails of those arrested as fugitives from labor; In 1862, he introduced a bill for the release of persons held to service or labor in the District of Columbia, and a joint resolution to grant aid to Maryland and Delaware to emancipate slaves just to name a few.

the Emancipation Proclamation, that he urged on President Lincoln, and the Thirteenth Amendment to the Constitution came within reach.

In this paper, I would like to explore a more adventurous reading, not to supplant the work and intentions of men like Henry Wilson, but to supplement it. The grievance-based approach asks what was wrong with the original constitution that the Reconstruction Amendments and particularly, the Thirteenth Amendment was designed to fix.¹³

The language of the Amendment borrowed from the language of the Northwest Ordinance is definitive in its negation of slavery and any slave-like existence, but less expansive in elaborating what slavery is. The Congress refused to quibble with wording in adopting the Thirteenth Amendment. As Senator Trumbull who performed the role of floor manager in the Senate on behalf of the Radical Republicans suggested that "if every member of the Senate is to select the precise words in which a law shall be clothed, and will be satisfied with none other, we shall have very little legislation."¹⁴ Haste was of importance in this post war setting. The Radical Republicans pushed for more and faster-- rather than less-- legislation and constitutional amendment.

Little attention has been focused on what I will call "grievance-based interpretation" until very, very recently¹⁵, and then, ironically, by a political movement. The Tea Party movement took its name from a grievance said to have been part of the trigger of the American revolution and its Constitution: "No taxation without representation." Several of the Constitutions' more specific provisions are said to stem from specific grievances that the

¹³ Scott Shapiro, *Legality* (Cambridge: Harvard Univ. Press, 2010) examining Planning Theory of interpretation in jurisprudence. "[L]awyers tacitly accept the idea that legal activity is, at bottom, a practice of social planning..." While Shapiro points out that since the point of planning is to achieve certain ends, texts that set out plans should always be interpreted solely in the light of those ends. Otherwise, the interpreter would be acting counterproductively and irrationally. Shapiro further points out that "The flaw in this analysis is that allowing someone to interpret [a plan] in accordance with its end would defeat the point of having a plan." This objection is less well made in the circumstance of interpreting the Thirteenth Amendment however. The law and the end-state are one in the same: Slavery and involuntary servitude (except in certain circumstances) shall not exist.

¹⁴ *Id.* at 1488.

¹⁵ Michael Dorf, *The Aspirational Constitution*, 77 *GWLR* 1631 (2009) Despite the Supreme Court's statement in the *Slaughter-House Cases* that the Reconstruction Amendments were principally addressed to the grievances of African Americans, and despite occasional invocations of the Fourteenth Amendment by the Supreme Court in response to those grievances, for most of the next six and a half decades, the principal role assigned by the Court to the Fourteenth Amendment was that of guarantor of private property and the liberty of contract. (footnotes omitted.)

Americans suffered at the expense of the British. The proscription against the quartering of troops in time of peace is one example.¹⁶ Others have suggested the right to bear arms was included in the Constitution in response to grievances against the crown.¹⁷

The idea behind grievance-based interpretation is that law is enacted in response to a grievance with the previous set of circumstances. In Scott Shapiro's language, "[L]aws are plans, or planlike norms." Similarly, constitutional amendments are planlike norms, especially when they proclaim an endstate, that something "shall not exist."

As the focus on framers necessitates the question who should speak for them, so too the grievance-based approach requires the question: Who should speak for the grievants? Guyora Binder hints that the grievance was the slaves' after all, the people who were "the least well-off," in Henry Wilson's formulation. These individuals were unlikely to have been framers in the hall of Congress as the Reconstruction amendments were debated. This grievance based approach must necessarily introduce a supplementary group to the Framers, who were in a position to enact the law, and certainly not the least well-off group. (At one point, I toyed with the notion that those slaves who stood outside the chambers of congress, cheering and at other times verbally reacting, like should be considered part of the dynamic by which the Thirteenth Amendment was enacted.¹⁸ There is considerable historical support for the notion that popular sentiment loudly expressed in public places was considered an acceptable form of influence of legal matters, and the Congressional Globe records outbursts and attempts to quiet the chamber.¹⁹) I subsequently have concluded that grievance-based interpretation is a sounder method of supplementation.

In his probative essay, Guyora Binder asks the probing question, "Did the Slaves Author the Thirteenth Amendment?"²⁰ Professor Binder has no particular slave or set of slaves in mind. The focus on grievance leaves us open to projecting a set of actual or fictional slaves onto the language. Harriet Beecher Stowe's sensational success with "Uncle Tom's Cabin" opens the door to a popular meaning as a constitutional method of interpreting the Thirteenth Amendment from the perspective of the fictional characters, Uncle Tom, Eliza, and

¹⁶ [U.S. CONST. amend. III.](#)

¹⁷ Patrick J. Charles, "ARMS FOR THEIR DEFENCE"?: AN HISTORICAL, LEGAL, AND TEXTUAL ANALYSIS OF THE ENGLISH RIGHT TO HAVE ARMS AND WHETHER THE SECOND AMENDMENT SHOULD BE INCORPORATED IN MCDONALD V. CITY OF CHICAGO, 57 Clev. St. L. Rev. 351(2009).

¹⁸ Lea VanderVelde "A Presence in the Galleries, (mapping the series of outbursts offside that prompted the call to order of the assembly.

¹⁹ Allen Steinberg, *The Transformation of Criminal Justice: Philadelphia 1800-1880.*

²⁰ Guyora Binder, "Did the Slaves Author the Thirteenth Amendment?" *An Essay in Redemptive History, Yale J. L. & the Humanities* 5 (1992): 473.

George Harris. After all, in terms of popular meaning, the lives of Uncle Tom, Eliza and George, were more familiar to many northerners than the circumstances of real slaves.

I prefer to stick to what can be known about the experiences and circumstances of millions of Americans before the act of emancipation and Constitutional amendment. After all, what could be considered more clearly a grievance than enslavement! Several former slaves are good informants on the issue of what the Thirteenth Amendment meant from a grievance-based approach. One could turn to the writings of Frederick Douglas, William Wells Brown,²¹ or any number of slave narratives written during the era.²² One could even turn to a broader set of actors who took up arms against slavery like Nat Turner and even John Brown, who collected support for his famous raids in Kansas in states like Massachusetts.

Ideally positioned to raise the perspective of enslavement as a grievance is another couple whose legal actions demonstrated the flaws in the unamended Constitution: Dred Scott and his wife, Harriet Robinson Scott. Before we approach the more challenging parts of this analytic argument, let us dispense with the easy ones. There is no doubt that Dred Scott v. Sanford is recognized as one of the legal impetuses for Constitutional revision.²³ The litigation is a grievance on at least two distinct levels: 1) the level of holdings in the Taney opinion, and 2) the original grievance of enslavement experienced by the Scott family.

There is good, solid information that Reconstruction Congress considered the *Dred Scott* case as one of the Constitutional results they sought to reverse. The Congressional Globe carries repeated references deploring the result in the *Dred Scott* case, as the problem that the unamended constitution brought about. Quite poignantly, just days after the decision, Massachusetts senator Henry Wilson, who would become a major architect of the Thirteenth Amendment, attempted to aid one of his free black friends, and Massachusetts constituents in publicly applying for an American passport, to test the theory of whether free Americans of African descent could receive a passport as an American citizen. The state department refused to issue the passport since the free Black Boston resident was now deemed not to have American citizenship.²⁴ Clearly, the decision's holding that Dred Scott was not a citizen of a state entitled to invoke jurisdiction of the federal courts must be

²¹ "My Southern Home," reprinted in *Brown, William Wells, From Fugitive Slave to Free Man: The Autobiographies of William Wells Brown*, ed. William Andrews. Columbia: University of Missouri Press, 2003.

²² See, e.g., Jacobs, Harriet A. *Incidents in the Life of a Slave Girl: Written by Herself*. New York: Cambridge University Press, 1987. Reprint, New York: Dover, 2001.

²³ Unless one is only focusing on congressional power, almost everyone in this symposium references Dred Scott together with the Thirteenth Amendment.

²⁴ Lea VanderVelde, Mrs. Dred Scott, at p. 330 citing Missouri Republican, April 19, 1858.

considered as one of the major grievances that the Amendment sought to redress. Section 2 of the Amendment also falls into place with a grievance-based analysis. The other two holdings were that the Northwest Ordinance and the Missouri Compromise were unconstitutional as beyond congressional power. What better fix than to grant Congress power in a way that Taney's interpretation of the old Constitution had previously proscribed. No Supreme Court decision could ever again hold that Congress did not hold the power over this matter.

This level of analysis locates the grievance in the Taney opinion in *Dred Scott v Sanford*. A more redemptive reading would shift analysis to the litigants' grievance.

What was Dred Scott's grievance? One loses the focus by reading the pleadings and by the popular account in Harriet Beecher Stowe's fiction. Generations of scholars of the Dred Scott case have wondered what his grievance was since reporters interviewing him considered that he was "practically free" even before the law suit.²⁵ As the front man for the family's law suit, Dred appears to have engaged in some protective shucking when he found himself the most famous Black in America. He was quoted, and re-quoted as declaring the lawsuit "a heap of trouble" when it was over.²⁶ Contrary to the necessary formalism of pleading the case, Dred Scott had no actual claim that he had been chained, confined, or beaten as the image of enslavement usually conjures up.

More illuminating is the fact that the lawsuit was not simply the suit of a lone man seeking freedom, it was a family's lawsuit.²⁷ In only recently revealed evidence, letters of the opposing counsel, Lyman Norris reveal that Norris offered to buy Dred "and his family," (emphasis added), if Dred would bargain with him, rather than pursue the suit.²⁸ In fact, as the family's grievance, the circumstances of Mrs. Dred Scott, the co-litigant, seem

²⁵ Statement of Mrs. Emerson in refusing to allow Dred to buy his freedom. Mrs. Dred Scott, 228. *Springfield Republican*. Feb 12, 1903. Letter of Norris to his mother, I told Dred Scott . . . that I should buy him and his family for 400\$ of his master— . . . and then Dred must make an agreement to pay me 100\$ a year and take care of my room etc. . . . until it was paid and then he would be free—but he was certain of winning . . . and now he is a slave for life. Quoted in Mrs. Dred Scott,

²⁶ *Frank Leslie's Illustrated Newspaper* 4, no. 82 (June 27, 1857) McGinty, Brian. "Dred Scott's Fight for Freedom Brought Him a Heap O' Trouble." *American Illustrated* 16 (May 1981): 34–39.

²⁷ Mrs. Dred Scott, with Subramanian, (the article) and Mrs. Dred Scott (the book.)

²⁸ Letter of Norris to his mother, I told Dred Scott . . . that I should buy him and his family for 400\$ of his master— . . . and then Dred must make an agreement to pay me 100\$ a year and take care of my room etc. . . . until it was paid and then he would be free—but he was certain of winning . . . and now he is a slave for life. Quoted in Mrs. Dred Scott,(the book).

more centrally representative. Harriet supported and kept the family together through the eleven years of litigation, and under the principle of matrilinearity, the fates of three members of the family of four depended upon her status. Their daughters would be deemed free and could not be sold away from them, if the court determined that Harriet was a free woman. Dred's status was irrelevant to their daughters' future lives as free persons.

Viewing the Thirteenth Amendment from Harriet Robinson Scott's perspective of grievance, Taney's interpretation of the unamended Constitution thwarted her avenue of redress, as did Missouri law, the institution of slavery and the racist interpretation presuming enslavement for persons of color.²⁹ Not only was she not a citizen of the state, nor a person whose rights had to be respected by white persons, the laws and practices of enslavement rendered her and her children slaves for life. As slaves for life she was prevented from saving herself or her children from indignity and further involuntary servitude, her husband from being stolen away, or realizing the fruits of her labor by being able to retain the wages that her laboring under the court's decree for several years had withheld from her. That was Harriet Scott's grievance. To right the wrong of the *Dred Scott* case, to determine that slavery shall not exist, American families need to be allowed and enabled to determine their futures by taking care of themselves. The modern-day Harriet Robinson Scott is a lower class mother working one or two jobs in the service sector to provide for her family and seeing a future that offers her children little better. From a grievance-based perspective, the Thirteenth Amendment's promise is that she is not pressed into poverty or the need to sacrifice her children in order to make ends meet. The freedom that the Thirteenth Amendment should assure is that hardworking adults can find decent work that supports them and their children. A slave mother's Thirteenth Amendment is that her children and her reproductive function are not harnessed to another person's volition and possible exploitation.

What does this interpretation yield us? "Slavery and Involuntary Servitude shall not exist" guarantees a space of family privacy and integrity as a very basic and personal right. It links that right as part and parcel of the opportunity to find decent work to support one's family and the next generation. This grievance-based interpretation suggests an understanding of enslavement as far broader than the markers of brutal violence and physical force. There is no evidence that Dred or Harriet Scott were subject to beatings or confinement. Enslavement can exist by circumstances of coercion that prevent individuals and families from having some role in choosing their own futures³⁰ and remaining together in the common quest for survival.

Slaves had no realm of privacy, at the very least abolishing slavery, declaring that it could not exist, returned to Harriet and her daughters the privacy that enslavement had denied

²⁹ Utilizing Ken Kersch's terminology, I want to bring Harriet Robinson Scott into the triptych.

³⁰ But see *U.S. v. Kozminski*.

them. Slaves had no right to marry and have the bond of marriage recognized by law. Slaves had no right to freedom from interference by third parties.

One additional argument exists for utilizing a grievance-based interpretation of the Thirteenth Amendment from the perspective of Harriet Robinson Scott. I invoke that argument by responding to a criticism of the use of Harriet as the focal grievant. The criticism could be made that the Thirteenth Amendment did not incorporate Harriet fully into the polity. Even with the Fifteenth Amendment, Harriet did not have the right to vote. Enslaved African American women were left out.

There are three responses to this argument. First, the Congressional globe debates make frequent references to the manifest injustice of selling children away from their mothers, or in the more dramatic language of the nineteenth century debates, ripping babies from their mother's breasts. This mother-child separation, involuntarily on the part of the mother, is one of the evils that the Congressional speakers articulate.

Second, although African American women, like Harriet, did not get the right to vote under the Fifteenth Amendment, their statuses were profoundly altered by the declaration "slavery shall not exist." In many ways, African American women were the least well-off, even in comparison to their father's, brothers, or sons. If the Thirteenth Amendment was directed at improving the status of the least well-off, they are the appropriate grievants to consider.

Third, finally, and most importantly, a constitutional amendment like constitutional formation alters the polity by creating a new social contract. This new social contract was intended to improve the lot of the least well-off. That suggests that their perspectives should be referenced in its interpretation. This speaks to taking the grievance-based interpretation into account rather than the perspective of bestowing some limited, grudgingly bestowed privilege upon the newly included group. From a legal process perspective, it requires attention to the interests of the newly included group. Neither Harriet nor Dred sought the right to vote in their litigation. Their needs were more basic, more fundamental, and more material.

The Thirteenth Amendment was the first step of the Reconstruction impetus; it exemplified a spirit of redressing the grievance of slavery; but it wasn't the last.