

THE THIRTEENTH AMENDMENT AND CONSTITUTIONAL THEORY

The Thirteenth Amendment presents something of a paradox for students of constitutional law. In purely conceptual terms, the amendment was one of the most radical innovations in all of our constitutional history. It is the first provision in the Constitution that was designed to outlaw an institution that was (at the time) fundamental to the social structure of some of the states of the Union. Indeed, one might plausibly maintain that no other amendment—before or since—had a similar objective. To be sure, the Fourteenth Amendment, protects a wider variety of rights. But no state government would have claimed that the denial of equal protection, due process or privileges and immunities to its free inhabitants was fundamental to the basic structure of its society. Indeed, they no doubt would have proclaimed that their own governments were committed to protecting those same rights.

But at the same time, the Thirteenth Amendment has played almost no role in the development of modern constitutional doctrine by the Supreme Court. The execrable decision in *Jones v. Albert Mayer Co.* is probably the best-known example of a case in which the amendment was played an important role in a majority opinion. The amendment was also featured prominently in a series of early twentieth century cases dealing with peonage laws. However, I think that it is fair to say that the overall impact of the amendment on the development of the canon of constitutional law created by Supreme Court decisions has been minimal at best.

This reality is due in large measure to the success of the amendment in achieving the goals that animated its creation. By its terms, Thirteenth Amendment is designed to outlaw the institution of slavery—an institution that, until the passage of the amendment, was supported by an elaborate legal framework in a number of states. Once the amendment was ratified, that

framework performance collapsed. Relationships that may appropriately be described as slavery probably still exist on some scale in the United States. However, far from being protected by state or federal law, they generally run afoul of ordinary law and (when discovered) can be dealt with in those terms, without invoking the Constitution itself. Thus, in a very real sense, the Thirteenth Amendment has simply become irrelevant to modern life in America. The insignificance of the amendment to the development of constitutional jurisprudence is in large measure a reflection of this state of affairs.

Nonetheless, a small coterie of scholars has argued that the Thirteenth Amendment should play a much larger role in the overall development of constitutional law. Some, such as William Carter, Andrew Koppleman and Lea Vandervelde, contend that the prohibition on slavery by its terms should be interpreted broadly to outlaw actions beyond the maintenance of the master-slave relationship *simpliciter*. Others, including Alex Tsesis and James Gray Pope, focus on the scope of the enforcement authority granted by section two of the amendment and contend that the Court should rely on this authority to vindicate a wide range of congressional powers.

Given the principles first enunciated in *McCulloch v. Maryland*, the idea that the Court *could* rely on section two to vindicate a relatively wide variety of congressional legislation is theoretically unobjectionable. But despite the extravagant claims of its proponents, the recognition of the potential scope of section two would not have a major effect on the substantive content of congressional power. The same principles that support an expansive reading of section two apply with equal force to the Commerce Clause and the section five of the Fourteenth Amendment, and in those contexts have already been used to justify federal regulations of virtually any commercial activity and all racial discrimination that is practiced by

state and local government. All that is left is private racial discrimination that has no discernible connection with commercial activity. I suppose (First Amendment problems aside) that federal hate crimes legislation might be an example. But beyond that, it is hard to see how adding a new source of authority for federal legislation is going to have a significant impact on the real world powers of the federal government.

By contrast, an open-ended interpretation of the prohibitions of section one potentially has broader real world consequences. Some of those who focus on the scope of section one of the Thirteenth Amendment deal with the relationship between the amendment and specific issues such as restrictions on abortion or the marital rape exception. Such discussions are radically ahistorical, but given the current state of constitutional theory, who am I to say that they are implausible? Of more interest (to me, anyway) is the work of scholars such as William Carter and Lea Vandervelde, who seek to justify expansive judicial activism under section one by reference to the general policy goals that they see as view as having animated those who voted for the amendment. Carter, for example, argues that section one should be interpreted to outlaw practices and laws that are “proximately traceable to the system of slavery,” while Vandervelde seeks to derive Thirteenth Amendment protection for a wide variety of labor rights from the free labor ideology of the Republican party that was responsible for driving the amendment through Congress.

In making such arguments, these commentators in effect embrace the faux originalist theory that is currently perhaps most prominently associated with Jack Balkin. Balkin argues that in order to truly honor the original (fill in the blank), the courts should show fidelity to the “original meaning of the Constitution and *to the principles that underlie the text.*” This approach in turn implicitly rests on a particular conception of the nature of the Constitution-making

process—a conception that is, in my view, fundamentally unsound. The Thirteenth Amendment itself illustrates this point.

Suppose the original Constitution had included a provision which stated that “Congress shall have the authority to regulate the institution of slavery in the United States,” but that Congress had not chosen to exercise that authority prior to 1860. Suppose further that this authority had lain dormant until after the Civil War, when Congress had passed a statute which stated that “Neither slavery nor involuntary servitude , except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or in any place subject to their jurisdiction.” (sound familiar?)

While a court might have some difficulties in determining whether, for example, peonage was prohibited by the statute, no one would seriously claim that such a statute should be interpreted to (for example) ban racial profiling by the police or to displace the doctrine of employment at will. Nor would citing statements from the Congressional Record to the effect that the statute was designed to “secure the freedom of African-Americans” or “protect the integrity of free labor” change this conclusion. A court would simply reply that, whatever considerations of general principle might be seen as having motivated the passage of the statute, racial profiling and the employment at will rule were simply outside the boundaries of the rule of law that was described by the statutory language.

However, the argument seems to be that constitutions are different from statutes in that the language is designed to be a repository for general principles rather than a simple description of a rule of law. Despite the widespread acceptance of this argument in academic circles, it rests on a profound misunderstanding of the constitution-making process. To be sure, constitutional provisions do differ from statutes in some important respects—they are more difficult to adopt and

change than statutes, and they rank above statutes in the hierarchy of legal authority. But in those aspects that are most important for purposes of interpretation—the process by which the language is chosen and the expectations of those responsible for choosing the language—constitutional provisions are indistinguishable from statutes.

The creation of the Thirteenth Amendment dramatically illustrates this point. By early 1864, Republicans generally agreed that the abolition of slavery was necessary for the good of the country. While some argued that abolition could be accomplished by statute, most believed that a constitutional amendment was necessary, and a number of different formulations were proposed. All were submitted to the relevant committees, just as conflicting versions of ordinary statutes would have been, and after considering their options, the committees settled on the language that is currently included in the Constitution. The committee proposal was then brought to the floor of both houses for debate and (again like a statute) the members vigorously debated the legal import of the language of the proposal.

The single most significant episode of the debate was the well-known exchange between Republican Sens. Charles Sumner of Massachusetts and Jacob Howard of Michigan. Sumner's speech was entirely consistent with his status as the leading candidate for the pompous blowhard award among Senate radicals (one equally radical member of the House of Representatives was described as "Sumner without the idiocy.") Rhapsodizing about the beauties of the constitution adopted in 1791 by France, Sumner moved to replace the committee language with a provision that began with the statement that "[a]ll men are equal before the law," asserting that this formulation "gives precision to that idea of human rights that is enunciated in our Declaration of Independence."

If Sumner's language had been adopted, one might have some plausible basis for the kind

of expansive reading of section one advocated by Carter and Vander Velde. However, Sumner's fellow Republicans were having none of it (indeed, in reading the Congressional Globe, one can easily visualize the rolling of eyes that must have accompanied Sumner's speech). Howard's response was particularly pointed. After first questioning Sumner's understanding of the import of the import chosen language under French law, Howard continued

I prefer to dismiss all references to French constitutions and French codes, and go back to the good old Anglo Saxon language employed by our father in the [Northwest Ordinance], an expression which has been adjudicated upon repeatedly, which is perfectly understood by both the public and judicial tribunals...I think it is well understood, well comprehended by the people of the United States, and that no court of justice, no magistrate...can misapprehend the meaning and effect of that clear, brief and comprehensive clause.

After Howard made his argument, Sumner withdrew his motion without even calling for a vote.

The message could hardly be clearer. Howard—like everyone who voted on the Thirteenth Amendment—understood that constitutional language was not to be chosen simply because it symbolizes some grand political vision for the country. Instead, he knew that the purpose of constitutional amendments (like the purpose of statutes) is to change or reinforce existing legal doctrine in more or less specific ways, and that the language of the amendments should be chosen accordingly. In the case of the Thirteenth Amendment, the parameters change in legal doctrine that would be wrought by the language was clear. Indeed, while differing in their more general political theories and motivations, *everyone* involved in the debate over the Thirteenth Amendment—opponents as well as proponents, ratifiers as well as drafters—knew what the language of the amendment connoted. It was designed to outlaw the institution of slavery—no

less, but no more.

The basic point is that if we truly wish to honor the judgments of the framers, we must base our analysis on the legal texts that they actually produced rather than on their abstract beliefs. The import of those texts in turn can only be understood by placing them in the context of the legal culture at the time that they were adopted. Of course, one might still adopt some theory of constitutional interpretation that admonishes judges to adopt an open-ended view of the concept of slavery. But no one can should maintain that such an approach vindicates the judgment of those responsible for the passage of the Thirteen Amendment in any meaningful sense.