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A MEDITATION ON THE THIRTEENTH AMENDMENT AND CONSTITUTIONAL REDEMPTION

DARRELL A.H. MILLER*

[W]hen can they—when do they have to stop? . . . I mean, at some point it begins to look like . . . that this is going to go on forever.¹

There is never time in the future in which we will work out our salvation. The challenge is in the moment, the time is always now.²

The word “slavery” appears just once in the Constitution. Amendment Thirteen:

Section 1. 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 any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.³

So, there we have it. After generations of dissimulation and self-deceit, of euphemism and pregnant silence.⁴ And bloodshed. After all that, we have it there, finally, in the Constitution. Like Jesus and the demon of Gerasene,⁵ the evil is named only to be banished.

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* Melvin G. Shimm Professor of Law, Duke Law School. Thanks to Jeff Powell who reviewed an earlier version of this Essay. A disclosure: I wrote this piece over a decade ago, mostly for myself, and then put it in a drawer and didn’t pull it out until the 2023 Schmooze. Since then, time and age has made me more confident in some of my observations, less confident in others. But, as this piece is not a legal brief so much as a set of reflections once private, now public, I publish it, lightly updated, for you to consider as you will.

1. Question posed by Chief Justice John Roberts during oral argument in *Northwest Austin Municipal Utility District No. 1 v. Holder*, which considered eligibility for exemptions to the preclearance requirements of the Voting Rights Act of 1965. Transcript of Oral Argument at 32, *Nw. Austin Util. Dist. No. 1 v. Holder*, 577 U.S. 193 (2009) (No. 08-322).

2. JAMES BALDWIN, *NOBODY KNOWS MY NAME* 126 (First Vintage Int’l ed. 1993) (1961).

3. U.S. CONST. amend. XIII.

4. From 1789 until 1865 the Constitution smothered the “peculiar institution” in various euphemisms: “other Persons,” “Importation,” “Service or Labour.” U.S. CONST. art. I, §§ 2, 9; *id.* art. IV §2.

5. “And [Jesus] asked [the demoniac], What is thy name? And he answered, saying, My name is Legion: for we are many . . . And the unclean spirits went out, and entered into the swine: and

Section One of the Thirteenth Amendment states in terse, near-absolute terms, a promise.⁶ Slavery shall not exist in the United States. Section Two empowers Congress to keep this promise. Its tightly wound text is at once a form of national confession, a method of national penance, and an example of redemptive constitutionalism.

This Essay is a meditation on the Thirteenth Amendment as constitutional redemption. In the last decade, an interpretive movement, variously described as “democratic constitutionalism” or “redemptive constitutionalism”⁷ has developed as both complement and counterweight to certain forms of originalism.⁸

Redemptive constitutionalism originates in Robert Cover’s groundbreaking article, *Nomos and Narrative*.⁹ In that seminal piece, Cover explained how law and institutions are generated by, and in turn generate, narratives.¹⁰ As Cover observes, “[a]ll Americans share a national text in the first or thirteenth or fourteenth amendment, but we do not share an authoritative narrative regarding its significance.”¹¹ The process of giving the Thirteenth Amendment meaning is not just a matter of decoding its grammatical limits but requires a commitment to constructing an overall *narrative* of what those words mean. It is the narrative that gives its

the herd ran violently down a steep place . . . and were choked in the sea.” *Mark* 5:9–13 (King James); cf. *Matthew* 9:32–33 (New King James) (“As they went out, behold, they brought to Him a man, mute and demon-possessed. And when the demon was cast out, the mute spoke.”).

6. “At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.” *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968) (holding that Congress can use its Thirteenth Amendment enforcement power to prohibit racial discrimination in real estate transactions).

7. See, e.g., Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007).

8. Originalism is less a single theory than a “family of theories” that share a belief that the meaning or legal content of the Constitution is “fixed” by intentions, expectations, linguistic usage, or some combination at or around the time of enactment. See Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1427 (2013) (describing originalism as “a family of theories that hold that either constitutional meaning or the appropriate resolution of constitutional controversies does or should proceed from the way in which the text was originally understood or the way in which the drafters of some operative constitutional provision would have expected the controversy to be adjudicated”); see also John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1332 (2018); Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1266 (2019); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019) (explaining “original-law originalism”).

9. Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

10. *Id.* (“No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”).

11. *Id.* at 17.

declaration portent and vitality; it is the narrative that breathes normative power into its words.¹²

Key to the narrative of the Thirteenth Amendment, in particular, is a recognition that persons, institutions, and law exist in a fallen state.¹³ As Jack Balkin has observed, we must “recognize[] that a constitution always exists in a fallen condition, that it inevitably contains compromises with evil and injustice.”¹⁴ In the case of the 1789 Constitution, that defect was exemplified by the silent protection of slavery.¹⁵ But, though the Constitution is fallen, it is not irredeemably so. “[T]he constitution and constitutional tradition contain elements and resources that can assist in their eventual redemption.”¹⁶

Until recently, most discussions of redemptive constitutionalism have focused on the redemptive aspects of the Fourteenth Amendment and its broadly written Equal Protection and Due Process Clauses.¹⁷ This Essay is an attempt to fit within that discussion the Thirteenth Amendment, first among all the Reconstruction Amendments, both for its recognition of constitutional sin, and its power to wrestle with that sin.

12. *Id.* at 46 (“The range of meaning that may be given to every norm . . . is defined . . . both by a legal text . . . and by the multiplicity of implicit and explicit commitments that go with it. . . . The narratives that any particular group associates with the law bespeak the range of the group’s commitments.”).

13. *Id.* at 9; *see also id.* at 34 (describing redemptive constitutionalism as arising from three postulates: “(1) the unredeemed character of reality as we know it, (2) the fundamentally different reality that should take its place, and (3) the replacement of the one with the other”).

14. Balkin, *supra* note 7, at 464.

15. *See supra* note 4 (describing manner in which original Constitution compromised with slavery).

16. Balkin, *supra* note 7, at 464.

17. For an assessment of these arguments and where they go wrong from a classical liberal perspective, see Richard A. Epstein, *The Classical Liberal Alternative to Progressive and Conservative Constitutionalism*, 77 U. CHI. L. REV. 887, 904–19 (2010). For other explorations of the Thirteenth Amendment and constitutional redemption, see, for example, Ken I. Kersch, *Beyond Originalism: Conservative Declarationism and Constitutional Redemption*, 71 MD. L. REV. 229 (2011); Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733 (2012). For recent work on the Thirteenth Amendment, see, e.g., Randy E. Barnett, *The Continuing Relevance of the Original Meaning of the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL’Y 1 (2017); Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899 (2019); Leah M. Litman, *New Textualism and the Thirteenth Amendment*, 104 CORNELL L. REV. ONLINE 138 (2019); James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426 (2018); Sandra L. Rierson, *Tracing the Roots of the Thirteenth Amendment*, 91 UMKC L. REV. 57 (2022); Christopher W. Schmidt, *Thirteenth Amendment Echoes in Fourteenth Amendment Doctrine*, 73 HASTINGS L.J. 723, 725 (2022); Rebecca E. Zietlow, *James Ashley, the Great Strategist of the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL’Y 265 (2017).

The mode of this Essay is that of a meditation.¹⁸ The structure loosely tracks the Sacrament of Penance, also known as The Sacrament of Reconciliation. And so, Parts I, II, III, correspond to the sacramental elements of Confession, Contrition, and Penance. The piece concludes with a note on Reconciliation. Each part will sketch how the Thirteenth Amendment in form, text, ambition, interpretation, history or understanding conforms to these elements of the sacrament. But, while this meditation is built roughly upon Catholic doctrine, its source material is eclectic and ecumenical, with citations from Protestantism, history, political philosophy, theology, and law.

This Essay is not a legal argument in the conventional sense. Its structure is not intended to follow the formal trappings of a legal brief.¹⁹ It is not written with an aim to generate doctrine, or to contrive tests, or to be cited by law clerks or judges. This Essay is, instead, a scholarly rumination on a politically powerful, but under-theorized constitutional moment,²⁰ written in a vernacular that abolitionists in the nineteenth century would have understood, and which modern Christians and constitutional fundamentalists will recognize, if not endorse.²¹

The object is twofold: First, by approaching this Amendment in the rhetorical style of a meditation, this Essay may help to slowly resurrect an under-theorized Amendment from the habituated, technical, legalistic manner in which it has been shrouded and interred,²² so that we may better

18. One purpose of a meditation is for reflection on “existential conditions of sin and salvation.” Eileen Sweeney, *Literary Forms of Medieval Philosophy*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 2.7 (2019), <http://plato.stanford.edu/entries/medieval-literary/#MedSol>.

19. For a discussion of how law creates its own aesthetics, with its own conventions, see Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1088 (2002) (discussing the “well-entrenched form of the law review article—the outline format, the rhetoric of advocacy, the bold print, the visually imposing piles of supporting authority, the acute hierarchy of signals, the monistic reductivism of the ubiquitous explanatory parenthetical”).

20. For a discussion of how the Constitution changes through “constitutional moments,” see Bruce A. Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2300–11 (1999); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L. J. 1013, 1022 (1983). On the Thirteenth Amendment as essential to the “Second Founding” of the United States, see ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019).

21. For more on reading constitutional text like biblical text, see Henry L. Chambers, Jr., *Biblical Interpretation, Constitutional Interpretation, and Ignoring Text*, 69 MD. L. REV. 92 (2009) (suggesting that the post-Civil War constitutional text can influence readings of the pre-Civil War text in much the same way as the Old Testament is read in light of the New Testament among Christians); Peter J. Smith & Robert W. Tuttle, *Biblical Literalism and Constitutional Originalism*, 86 NOTRE DAME L. REV. 693 (2011). For more general discussions of using Christian doctrine and thought as an approach to law, see ADRIAN VERMEULE, *COMMON GOD CONSTITUTIONALISM* (2022); William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707 (2003).

22. See, e.g., ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* 92 (2004) (“[T]he Thirteenth Amendment remains a sparsely used and little-defined part of the Constitution.”); Mark A. Graber, *Korematsu’s Ancestors*, 74 ARK. L. REV. 425, 475 (2021) (“The Thirteenth Amendment remained largely moribund as an alternate textual hook

understand what it meant—and what it could mean.²³ Second, by situating the Thirteenth Amendment within a framework of redemption, we can better appreciate the correspondences between this interpretive movement—redemptive constitutionalism—and its first constitutional exemplar.

I. CONFESSION

“America was born in sin,” and its name was slavery.²⁴ The fall is typically dated somewhere around 1619, when an unknown Dutch “man-o’-war” sold twenty “Negars” to the Jamestown Colony in Virginia.²⁵ From there it quickly insinuated itself into the American project.²⁶

It was a sin the founding generation could not reconcile, could not face, could not even speak.²⁷ Heedless, the nation luxuriated in its sin for three quarters of a century. The sin erected a capital,²⁸ raised marble colonnades,²⁹

for the constitutional law of racial equality.”); Note, *The “New” Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1319 (1969) (referring to the Thirteenth Amendment as an “unserviceable constitutional antique”).

23. See Darrell A. H. Miller, *State DOMAs, Neutral Principles, and the Mobius of State Action*, 81 TEMPLE L. REV. 967, 969 (2008) (citing Russian formalist method of *ostranenie* to “make strange” what is familiar in order to better understand its nature); Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989) (using trope of theoretical physics to understand constitutional doctrine).

24. Kermit Roosevelt, *Reconstruction and Resistance*, 91 TEX. L. REV. 121, 143 (2012). As William Lloyd Garrison famously decried, this nation had been founded on “a covenant with death, and an agreement with hell.” WALTER M. MERRILL, *AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON* 205 (1963).

25. See e.g., IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 29 (1998); Nikole Hannah-Jones, *The 1619 Project: Our Democracy’s Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES MAG. (Aug. 14, 2019) <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html> (“In August 1619, just 12 years after the English settled Jamestown, Va., one year before the Puritans landed at Plymouth Rock and some 157 years before the English colonists even decided they wanted to form their own country, the Jamestown colonists bought 20 to 30 enslaved Africans from English pirates.”).

26. See, e.g., BERLIN, *supra* note 25; EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 385–86 (1975) (arguing that slavery, and its concomitant racism, made early it possible for early leaders of America to fully embrace ideals of liberty, equality, and republicanism).

27. In his chapter entitled, “The Silence,” the historian Joseph Ellis calls slavery “the tragic and perhaps intractable problem that even the revolutionary generation, with all its extraordinary talent, could neither solve nor face.” JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 119 (2000).

28. On the slave labor used to build Washington, D.C., see WILLIAM C. ALLEN, *OFF. OF THE ARCHITECT OF THE CAPITOL, HISTORY OF SLAVE LABORERS IN THE CONSTRUCTION OF THE UNITED STATES CAPITOL* (2005); S. Con. Res. 24, 111th Cong. (2009) (creating a memorial to slaves who worked on Capitol building).

29. S. Con. Res. 24 § 1(5).

and heaped earth upon which to set the shining American beacon.³⁰ Through this sin, the colonies first became a nation³¹ and then became a world power.

Slavery was brutal. Millions of human beings, crammed like cord wood, died in the stinking bowels of the slave ships. Millions more, herded into pens and placed upon auction blocks, were sold away from mothers, fathers, country and kin.

Slavery was subtle.³² For more than a century it existed in America without the text of the Constitution.³³ It operated by euphemism, by habit, by malign neglect.³⁴ It was *lex*³⁵ without *lexis*,³⁶ *nomos*³⁷ without *logos*.³⁸ It was an evil spirit, insinuated into the body politic.³⁹

It took four generations and a war before America could acknowledge its sin. In 1865, with the Thirteenth Amendment, the people finally acknowledged that our national legal and cultural structure, upon which the

30. Cf. MICHAEL REAGAN, *THE CITY ON THE HILL: FULFILLING RONALD REAGAN'S VISION FOR AMERICA* (1997).

31. See Balkin, *supra* note 7, at 469 (discussing the dire economic and political circumstances of the 1780s that compelled the compromises over slavery).

32. "Now the serpent was more subtil than any beast of the field which the LORD God had made." *Genesis* 3:1 (King James).

33. See Darrell A.H. Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 COLUM. L. REV. 1811 (2012) [hereinafter Miller, *Regulation of Custom*]. Some abolitionists argued that, as the Constitution never mentioned slavery expressly, its existence was not guaranteed by the Constitution. See Kurt Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 343 (2011) ("Finally, abolitionists like Lysander Spooner, Alvan Stewart, and William Goodell argued that the Constitution prohibited slavery or, at the very least, empowered Congress to restrict its expansion.").

34. See *supra* note 4.

35. "Law." *Lex*, AMERICAN HERITAGE DICTIONARY (5th ed. 2022), <https://ahdictionary.com/word/search.html?q=lex>.

36. "The total set of words in a language as distinct from morphology; vocabulary." *Lexis*, AMERICAN HERITAGE DICTIONARY (5th ed. 2022), <https://ahdictionary.com/word/search.html?q=lexis>.

37. See Cover, *supra* note 9, at 4 (defining *nomos* as a "normative universe").

38. Greek for "word." CARROLL N. BROWN, *ENGLISH-GREEK GREEK-ENGLISH DICTIONARY* 667 (7th ed. 1924).

39. For the manner in which slavery was an unacknowledged norm in America, see generally Miller, *Regulation of Custom*, *supra* note 33. As William Wiecek has noted, the Constitution is filled with provisions that have historical roots direct, or oblique, in the protection of slavery. For a discussion of the specific provisions of the Constitution that were drawn with the protection of slavery in mind, see WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* at 62-63 (1977).

original Constitution was founded, was shot through with rot.⁴⁰ The Thirteenth Amendment brought the corruption to the surface and named it.⁴¹

This is the first requirement of redemption: confession.⁴²

II. CONTRITION

But confession assumes knowledge and apprehension of the nature of the sin.⁴³ Not every exclamation of “slavery” really meant slavery. The founding generation was prodigal with the term. Patrick Henry barked “slavery” three times to goad his fellow colonists in his “Give Me Liberty or Give Me Death!” speech.⁴⁴ Thomas Jefferson’s early drafts of the Declaration of Independence counseled taking up arms rather than submitting to “voluntary Slavery.”⁴⁵ The Founders decried Parliament as seeking to reduce the colonies to “Slavery and Ruin.”⁴⁶ The Association of the Sons of Liberty claimed their compact was designed to “prevent a calamity which, of all others, is the most to be dreaded—slavery and its terrible concomitants.”⁴⁷

Did these writers truly believe that they would be put out to toil with the Black field hands if they did not rise up in rebellion? What does this mean to the slave? What does it mean for the Constitution? Their words are vanity,

40. The Reconstruction era’s recognition that the Constitution and culture was contaminated by slavery contrasts with Justice Scalia’s belief that Constitutions are written down because of a risk that societies will, in his words, “rot.” See Antonin Scalia, *Common Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 41 (Amy Gutman ed., 1998). As Professor Balkin notes, “[i]mplicit in Scalia’s theory of constitutions as preventing rot is a narrative of decline.” Balkin, *supra* note 7 at 458 (citing Scalia). My point is that the Thirteenth Amendment, as well as subsequent Reconstruction Amendments, acknowledge that the Constitutional order was *already* fallen.

41. *The South and Slavery*, N.Y. TIMES, Sept 11, 1865 (“[Southerners] have always regarded [slavery] as an incubus upon their industry and prosperity, but one of which they could not rid themselves.”); see also *supra* note 5.

42. See Balkin, *supra* note 7, at 441 (constitutional interpretation “starts with the assumption that the Constitution exists, and always has existed, in a fallen condition”).

43. *Id.*, at 442 (“There can be no redemption without the recognition of sin.”).

44. Patrick Henry, *Give Me Liberty or Give Me Death*, YALE L. SCH.: AVALON PROJECT (Mar. 23, 1775), https://avalon.law.yale.edu/18th_century/patrick.asp.

45. *Declaration on Taking up Arms*, in 2 JOURNALS OF THE CONTINENTAL CONGRESS 128, 153 (Libr. of Cong. 1905) (1775). Jefferson was more equivocal when it came to actual slaves taking up arms, as they did in Haiti. See William G. Merkel, *Jefferson’s Failed Anti-Slavery Proviso of 1784 and the Nascence of Free Soil Constitutionalism*, 38 SETON HALL L. REV. 555, 602 (2008) (noting that the violence of the Haitian Revolution sapped Jefferson of some of his pro-freedom, anti-slavery impulses).

46. *Address to the Inhabitants of Great Britain*, in 2 THE JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 45, at 163, 164; see also, JOSEPH J. ELLIS, *HIS EXCELLENCY: GEORGE WASHINGTON* (2004) (quoting repeated uses of George Washington comparing colonists’ treatment under British rule as similar to “slavery”).

47. *Association of the Sons of Liberty in New York*, YALE L. SCH.: AVALON PROJECT (Dec. 15, 1773), https://avalon.law.yale.edu/18th_century/assoc_sons_ny_1773.asp.

impudence, bombast, hypocrisy, impiety.⁴⁸ “Slavery” cannot mean everything the Framers’ imagined in their rhetorical flights.⁴⁹ To accord their hyperbole equal standing with that of the enslaved, to count their yelps as equal in constitutive meaning, is to indulge in the grossest form of debasement.⁵⁰

No. Redemption requires contrition, and contrition requires recognition of what one it is sorry for. “Slavery” is a term of art. It means a specific sin. It means chattel slavery in the United States, specifically as applied to imported African labor.⁵¹ It means the lash, the shackle, the “can to can’t.”⁵² In this, universal emancipation has a “reflex character,” aimed at “any form

48. See Frederick Douglass, *What to the Slave is the Fourth of July?: An Address* (July 5, 1852), in *FREDERICK DOUGLASS: SPEECHES & WRITINGS* 166, 178 (David W. Blight ed. 2022). Douglass famously observed:

What, to the American slave, is your 4th of July? I answer: a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim. To him, your celebration is a sham; your boasted liberty, an unholy license; your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; your denunciations of tyrants, brass fronted impudence; your shouts of liberty and equality, hollow mockery; your prayers and hymns, your sermons and thanksgivings, with all your religious parade, and solemnity, are, to him, mere bombast, fraud, deception, impiety, and hypocrisy—a thin veil to cover up crimes which would disgrace a nation of savages.

Id. Consider also Samuel Johnson’s sneer, “How is it that we hear the loudest yelps for liberty among the drivers of negroes?” 2 *JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON* 734 (Roger Ingpen ed., Pittman & Sons 1907) (1791).

49. See Miller, *Regulation of Custom*, *supra* note 33, at 1836.

50. See Guyora Binder, *Did the Slaves Author the Thirteenth Amendment? An Essay in Redemptive History*, 5 *YALE J.L. & HUMAN.* 471, 474–75 (1993) (“[F]ulfilling the Thirteenth Amendment’s command that slavery be abolished entails interpreting that command from the viewpoint of the slaves.”). Binder goes on to argue that the slaves themselves must be considered as part of the authorship and constitutive force of the Reconstruction Amendments. *See id.* at 474. For a similar position, see, for example, FONER, *supra* note 20 at 51–52; James W. Fox, Jr., *Originalism and the Exclusionary Critique: Counterpublic Originalism*, 67 *ALA. L. REV.* 675 (2016).

51. For a discussion of the historical contextualization of the meaning of the words “slavery” see Darrell A. H. Miller, *A Thirteenth Amendment Agenda for the Twenty-First Century: Of Promises, Power, and Precaution*, in *THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT* 291 (Alexander Tsesis, ed. 2010); Darrell A. H. Miller, *White Cartels, the Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer, Co.*, 77 *FORDHAM L. REV.* 999 (2008) [hereinafter Miller, *White Cartels*]; William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 *U.C. DAVIS L. REV.* 1311, 1358 (2007).

52. The enslaved were required to work from “can see” (sunrise) to “can’t see” (after sundown), hence the expression “work[ing] from can to can’t.” *See* Interview with Henry Cheatam, *reprinted in VOICES FROM SLAVERY: ONE HUNDRED AUTHENTIC SLAVE NARRATIVES* 55, 56 (Norman R. Yetman, ed. 2000) (using this expression).

of coerced labor, regardless of its source.”⁵³ It authorizes direct judicial enforcement, irrespective of congressional action.⁵⁴

But it means more. African slavery in America was more than compelled labor. The Thirteenth Amendment distinguishes the two, forbidding both slavery *and* involuntary servitude.⁵⁵ Slavery was a system. Slavery was an institution. Slavery was a power.⁵⁶ Slavery in the United States depended on customs, norms, values, as well as law, in order to persist.⁵⁷ It is this institutional aspect of slavery that the Thirteenth Amendment text also contains.⁵⁸

Carl Schurz, surveying the South immediately after the wreckage of the Civil War, knew that mere liberation was not enough.⁵⁹ The dismantling of the labor system in the South could not alone destroy the slave power. Faith

53. George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1392 (2008) (citing and quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)).

54. *Id.* (discussing mechanisms, including *habeas corpus* and common law to liberate persons under physical compulsion).

55. Miller, *Regulation of Custom*, *supra* note 33, at 1836 (making similar observation). It also provides for an exception for involuntary servitude as punishment for crime. U.S. CONST. amend. XIII, § 2. Few have suggested that a person may be permanently enslaved as a punishment for crime. See Miller, *Regulation of Custom*, *supra* note 33, at 1836.

56. See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 96–98 (1970) (noting that the concept of a “Slave Power” was fear of a totalizing system in which slavery as a system would dictate national policy, or otherwise break the union); see also IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 8 (1998) (suggesting the totalizing aspect of a “slave society”).

57. See *The Civil Rights Cases*, 109 U.S. at 37 (Harlan, J., dissenting) (“[T]he power of Congress under the Thirteenth Amendment is not necessarily restricted to legislation against slavery as an institution upheld by positive law, but may be exerted to the extent, at least, of protecting the liberated race against discrimination, in respect of legal rights belonging to freemen, where such discrimination is based upon race.”); see also *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 445 (1968) (Douglas, J. concurring) (“Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die.”); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1817 (2010) (“Slavery was not just legal ownership of people; it was an entire system of conventions, understandings, practices, and institutions that conferred power and social status and maintained economic and social dependency.”).

58. Miller, *Regulation of Custom*, *supra* note 33, at 1816 (“Slavery was an institution justified as a species of general law; slavery was an institution recognized through localized practice, and used to fill textual or conceptual gaps; and slavery was an institution maintained by informal normative forces.”). The Supreme Court, in the *Civil Rights Cases* recognized the institutional and cultural aspects of slavery, conceding that it had generated its own “incidents” and “badges.” 109 U.S. at 21–22. But the Court was blind to the manner in which these incidents and badges persisted, not only in the South, but in the North as well. *Id.* at 24–25.

59. See CARL SCHURZ, *REPORT ON THE CONDITION OF THE SOUTH* (1865), *reprinted in* 1 *SPEECHES, CORRESPONDENCE, AND POLITICAL PAPERS OF CARL SCHURZ* 279, 355 (Frederic Bancroft ed., Knickerbocker Press 1913) (remarking that “the whole organism of Southern society . . . must be reconstructed”).

in the invisible hand of the market would not destroy the slave power either.⁶⁰ Instead, the entire structure of society needed to be remade.⁶¹

Slavery was a system of private coercion, yes; but it was also a system of silent acquiescence, or rather, indifference. As Andrew Tsaliz identified it, slavery persisted because of an agreement, a “contract[] of mutual indifference” to the plight of the not-us.⁶² The inability to empathize, the desire for the African to simply “go away” once emancipated,⁶³ these too are the wages of slavery.

We must recognize all the ways in which we as a People have transgressed through this sin of slavery.⁶⁴ For what we have said, and what we have left unsaid; for what we have done, and what we have left undone,⁶⁵ for all this we must be sorry.

This is the second requirement of redemption: contrition.

III. PENANCE

But, to paraphrase Peter De Vreis, confession without penance is as a tweed coat is to dandruff—palliative not remedial.⁶⁶ It is salvation without effort, absolution without atonement. It is “cheap grace.”⁶⁷

60. Andrew Johnson vetoed the Civil Rights Act of 1866 in part because of a belief that market forces would lead to a “harmonious” adjustment between the enslaved and their former masters. See Miller, *White Cartels*, *supra* note 51, at 1035–36. Neither Congress nor the former slaves were convinced. See *id.* at 1036 (noting that Congress overrode Johnson’s Veto of the Civil Rights Act of 1866); see also MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 83 (2001) (noting African-American skepticism of purely market-based solutions to Reconstruction).

61. See SCHURZ, *supra* note 59, at 355.

62. Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1286 (2000) (“Indifference, sometimes meaning an unwillingness to feel others’ pain, but always including an unwillingness to act to stop such pain, depends upon defining a ‘dangerous’ and ‘inferior’ out-group.”).

63. See Guyora Binder, *The Slavery of Emancipation*, 17 CARDOZO L. REV. 2063, 2067 (1996) (“The only way that the institution of slavery could disappear, leaving what the whites conceived as America unaffected, would be if African-Americans were to somehow disappear.”). An editor of the *Memphis Daily Argus*, responding to the Freedman in the city fumed: “Would to God, they (meaning the negroes) were back in Africa, hell, or some other sea-port town, *anywhere* but here.” E.B. WASHBURNE, *MEMPHIS RIOTS AND MASSACRES*, H.R. REP. NO. 39-101, at 328 (1866); see also Darrell A.H. Miller, *The Thirteenth Amendment, Disparate Impact, and Empathy Deficits*, 39 SEATTLE U. L. REV. 847, 854 (2016) (“Making the Black body disappear once its service was no longer required or compelled was a fantasy of antebellum politics—both North and South.”).

64. Binder, *supra* note 50, at 481 (“[T]he redemptive power of slave experience depends upon its availability as part of the heritage of all Americans.”).

65. See *A Penitential Order: Rite One*, in *THE BOOK OF COMMON PRAYER* 319, 320 (Chapel ed. 1979) (“Most merciful God, we confess we have sinned against thee . . . by what we have done, and what we have left undone.”).

66. See EVAN ESAR, *20,000 QUIPS AND QUOTES* 168 (1968) (supplying quip by Peter DeVreis).

67. In the words of Dietrich Bonhoeffer, “[c]heap grace is the preaching of forgiveness without . . . repentance . . . communion without confession.” It is “the grace we bestow upon

Penance requires action and vigilance. In the ancient tradition, it required suffering, sometimes public. St. Thomas Aquinas called it “[t]he payment of the temporal punishment due on account of the offence committed . . . by sin.”⁶⁸ Penance has two forms: the first is *poena vindicativa* or restitution of the sinner to grace; the second is *poena medicinalis*, the medicine that prevents further sin.⁶⁹

America suffered a convulsion, a visible scourging, from spring of 1861 to the spring of 1865. The Civil War was America’s chastisement for its sin. It was a war to vindicate and to restore the moral order.⁷⁰ President Abraham Lincoln recognized the nature of the conflict, stating in his Second Inaugural Address:

Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue, until all the wealth piled by the bondman’s two hundred and fifty years of unrequited toil shall be sunk, and until every drop drawn from the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said “the judgments of the Lord, are true and righteous altogether.”⁷¹

It is not ratification through Article V alone that makes the Thirteenth Amendment law.⁷² It is this scourging, and, more importantly, our acceptance as a Nation that we deserved this scourging, that gives the Thirteenth Amendment its authority.⁷³ To fail to acknowledge this fact, even by

ourselves.” DIETRICH BONHOFFER, *A TESTAMENT TO FREEDOM: THE ESSENTIAL WRITINGS OF DIETRICH BONHOFFER* 325 (Geoffrey B. Kelley & F. Burton Nelson eds., 1990).

68. *The Sacrament of Penance*, NEW ADVENT: CATHOLIC ENCYCLOPEDIA, <http://www.newadvent.org/cathen/11618c.htm> (last visited July 15, 2023) (quoting ST. THOMAS AQUINAS, *SUMMA THEOLOGICAE* SUPPLEMENT § 12.3 (Fathers of the English Dominican Province trans., 2d ed. 1920) (1485)).

69. See S.E.B., Book Review, *A General Survey of Events, Sources, Persons, and Movements in Continental Legal History*. By Various European Authors., 22 YALE L.J. 176, 177 (1912) (describing the *poena vindicativa* as “an evil inflicted by society, as the servant of God, in the name of God, to restore the supernatural order of things by enforced expiation”); see also *The Sacrament of Penance*, *supra* note 68 (describing the preventive nature of the *poena medicinalis*).

70. See S.E.B., *supra* note 69, at 177.

71. Abraham Lincoln, Second Inaugural Address, March 4, 1865, in GREAT SPEECHES: ABRAHAM LINCOLN 106, 107 (Stanley Appelbaum ed. 1991).

72. U.S. CONST. art. V (providing for mechanism to amend the Constitution). The Thirteenth Amendment was proposed by a Congress with no Confederate delegation, and ratified at the point of Union bayonets, as many have pointed out. See, e.g., Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 640 (1987).

73. Professor Binder notes that “[g]iven the Thirteenth Amendment’s questionable formal pedigree, it may be said to have been debated and ratified on the battlefields of the Civil War.” Binder, *supra* note 50, at 486. One scholar has gone so far as to say that this Amendment is a kind of super-amendment, one that would resist even Article V. See Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1839 (2005) (“Most obviously, Article V cannot be used to repeal the Thirteenth Amendment and re-establish slavery.”).

omission, is to backslide into the same error that besmirched the Founding era.⁷⁴ The Civil War was America's *poena vindicativa*.⁷⁵

But what of the *poena medicinalis*? What of the medicine for the “bettering [of] the wrongdoer”?⁷⁶ Section Two of the Thirteenth Amendment is the medicine, and powerful medicine at that.⁷⁷ It states that “Congress shall have power to enforce this article by appropriate legislation.”⁷⁸ It is the first time that the People expressly empowered Congress to enforce an amendment to the Constitution.

Section Two of the Thirteenth Amendment is a means of performing penance. Slavery was to be torn out “root and branch.”⁷⁹ And Congress is given the power to ensure it never takes root again. The Constitution authorizes Congress to protect the body politic from the sin of slavery. It authorizes Congress to pass laws to prevent the nation from returning to its wicked ways, in all the overt and subtle forms in which the sin can and has manifested itself.

Thus, the Thirteenth Amendment permits legislation aimed directly against private parties who require service from others approximating African chattel slavery, even if such service is entered into “voluntarily.”⁸⁰ It permits legislation designed to destroy the ghetto, the spatial relic of slavery.⁸¹ It permits legislation aimed at private contracts.⁸² It permits Congress to delve deep into what before the Civil War might have been

74. The 112th Congress' failure to mention those passages that protected slavery during its ceremonial reading of the Constitution is one such instance, as is Virginia Governor Robert McDonnell's initial failure in 2010 to mention slavery in his proclamation commemorating “Confederate History Month.” See Michal C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1319 n.168 (2011) (discussing Governor McDonnell); David A. Fahrenthold, *Notable Passages of Constitution Left Out of Reading in the House*, WASH. POST (Jan. 6, 2011, 2:49 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010603759.html> (discussing passages dealing with slavery omitted from the reading of the Constitution).

75. Whether there was a second upheaval, in the middle of the twentieth century, I reserve judgment. See Roosevelt, *supra* note 24, at 143–44 (discussing the Second Reconstruction of the Civil Rights Movement).

76. S.E.B., *supra* note 69, at 177 (defining *poena medicinalis*).

77. See also Miller, *White Cartels*, *supra* note 51, at 1046 (referring to the enforcement power of the Thirteenth Amendment as “powerful medicine”).

78. U.S. CONST. amend. XIII § 2.

79. See George Washington Julian, *Indiana Politics: Delivered at Raysville (July 4, 1857)*, in GEORGE W. JULIAN, *SPEECHES ON POLITICAL QUESTIONS* 126, 146 (1872).

80. See *Bailey v. Alabama*, 219 U.S. 219, 241–43 (1911) (addressing peonage, service for debts incurred).

81. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968) (holding that the Civil Rights Act of 1866 forbids discrimination in private real estate sales).

82. *Runyon v. McCrary*, 427 U.S. 160, 161 (1976) (holding that the Civil Rights of 1866 forbids discrimination in formation of contracts).

regarded as exclusively state or personal affairs.⁸³ Crime motivated by racial hatred, for example,⁸⁴ or the decision to educate one's child apart in a private, racially segregated school.⁸⁵ Perhaps even some of the most intimate decisions about bearing children come within its purview.⁸⁶ Thus, this penitential Amendment authorizes Congress to do far, far more than simply implement the High Court's own pronouncements.⁸⁷ And it demands far more of us than passive acceptance of cheap absolution.⁸⁸

This is the third requirement of reconciliation: penance.

CONCLUSION: RECONCILIATION

So, when do we get to say enough is enough? When are we made whole? When do the waters recede and the labors end? When can we say we are delivered—reborn as a new People?

Likely, never. Every sinner knows that salvation is a process.⁸⁹ To paraphrase theologian James Dunn, the believer never arrives, is never perfect.⁹⁰ The believer "is always *in via*, in transit."⁹¹ The Constitution of the United States begins with an object: The People have enacted the document to "form *a more perfect Union*."⁹² It is a textual reflection of St. Paul's

83. See Rutherglen, *supra* note 53, at 1406 (explaining that the Thirteenth Amendment aimed at both public and private denials of equality).

84. See Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190, 2836 (codified at 18 U.S.C. § 249) (citing Thirteenth, Fourteenth, and Fifteenth Amendments as authority for legislation); Rutherglen, *supra* note 53, at 1401 (suggesting that "[a] single instance of private discrimination or racially based private violence can be prohibited by Congress, as part of a more general prohibition against the same kind of actions that have a systematic connection to slavery").

85. *Runyon*, 427 U.S. 160, 178–79 (explaining that associational rights, such as the right to choose a private school in which to educate one's children, do not trump congressional exercise of Thirteenth Amendment power).

86. See Dov Fox, *Thirteenth Amendment Reflections on Abortion, Surrogacy, and Race Selection*, 104 CORNELL L. REV. ONLINE 114, 115 (2019); Note, *Regulating Eugenics*, 121 HARV. L. REV. 1578, 1590 (2008).

87. *But cf.* *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 45 (2012) (Scalia, J., concurring in judgment) ("I would limit Congress's [Fourteenth Amendment] § 5 power to the regulation of conduct that *itself* violates the Fourteenth Amendment."); *Tennessee v. Lane*, 541 U.S. 509, 560 (2004) (Scalia, J., dissenting) ("[W]hat § 5 [of the Fourteenth Amendment] does *not* authorize is so-called 'prophylactic' measures, prohibiting primary conduct that is itself not forbidden by the Fourteenth Amendment.").

88. See *infra* notes 89-100 and accompanying text.

89. Well, perhaps not the Calvinist. See JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 610 (Henry Beveridge trans., Hendrickson Publ'g 2008) (1536) ("All are not created on equal terms, but some are preordained to eternal life, others to eternal damnation; and, accordingly, as each has been created for one or other of these ends, we say that he has been predestinated to life or to death.").

90. JAMES D.G. DUNN, *THE THEOLOGY OF PAUL THE APOSTLE* § 18.1, at 465 (2006).

91. *Id.*

92. U.S. CONST. pmb1. (emphasis added).

theology; a perfect union is not possible, but an effort to make the union more perfect is.⁹³

The Supreme Court of the last decade has been itching to pronounce the redemptive project of the Constitution complete. In a series of cases, it has edged ever closer to announcing by judicial decree that we are, all of us, saved.⁹⁴ This sentiment is not new. The desire to wash one's hands of the entire business of Reconstruction began almost as soon as the war ended.⁹⁵

It is a weariness understandable, but one that we must resist. Not when there is still so much left to be done. Not when African-Americans still cluster in the lowest economic stratum of our society and fill our prisons. Not when elected representatives can proudly trumpet the intent to suppress minority voting.⁹⁶ Not when a U.S. Senator can suggest that private property and rights to association should trump the opportunity to eat at any restaurant that you

93. See Charles J. Ogletree, Jr., *From Brown to Tulsa: Defining our Own Future*, 47 HOW. L.J. 499, 549 (2004) (“Our Union will never be perfect, only more perfect, and it is our daily task to see that it becomes so.”); see also SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 75 (1988) (“The point of American constitutional law . . . is presumably to attain the values summarized in the Preamble and otherwise found within the materials of the American political tradition.”).

94. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023); *Shelby County v. Holder*, 570 U.S. 529, 547 (2013) (“[T]hings have changed dramatically.”); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (giving twenty-five years to wind down affirmative action); Transcript of Oral Argument at 32, *Nw. Austin Util. Dist. No. 1 v. Holder*, 577 U.S. 193 (2009) (No. 08-322); cf. DERRICK BELL, *AND WE WERE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987).

95. While slavery was still living memory for many, the Court said this: “When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected.” *The Civil Rights Cases*, 109 U.S. 3, 25 (1883).

96. Harm Verhuizen, *Voting Groups Condemn Spindell Email About Lower 2022 Turnout Among Black, Hispanic Voters in Milwaukee*, PBS WISC. (Jan. 13, 2023), <https://pbswisconsin.org/news-item/voting-groups-condemn-spindell-email-about-lower-2022-turnout-among-black-hispanic-voters-in-milwaukee/> (reporting about a Republican political operative who sent a newsletter stating that Republicans “‘can be especially proud’ of lowered turnout in Milwaukee during the 2022 election, ‘with the major reduction happening in the overwhelming Black and Hispanic areas’”). In 2012, a party chairman from Franklin County, Ohio, remarked, “I guess I really actually feel we shouldn’t contort the voting process to accommodate the urban—read African-American—voter turnout machine.” Ray Rivera, *Racial Comment by Republican Official in Ohio Rekindles Battle Over Early Voting*, N.Y. TIMES (Aug. 22, 2012), <http://www.nytimes.com/2012/08/23/us/politics/ohio-early-voting-battle-flares-after-racial-comment-by-republican-official.html>.

choose.⁹⁷ Not when elected officials still have the temerity to claim that slavery was a blessing upon Black America.⁹⁸

And if absolution is to come at all, it cannot come from the Justices of the Supreme Court. Their pronouncement of reconciliation is an indulgence, one we should reject. For, as Professor Balkin has put it, “to be faithful to the Constitution, we must see ourselves as continuing a constitutional project that stretches back to the past and forward to the future.”⁹⁹ Contrary to what some Justices may think, the values of the Reconstruction Amendments have no sunset provision, no expiration date, any more than do the first ten amendments. And so we must continue on, working, reconciled to the knowledge that the Thirteenth Amendment is not a period in our collective narrative, but an ellipsis.¹⁰⁰

97. Then candidate, now Senator, Rand Paul expressed hesitation at the effect of the Civil Rights Act of 1964 on private businesses: “[I]f we want to harbor in on private businesses and their policies, then you have to have the discussion about: do you want to abridge the First Amendment as well.” Richard Adams, *Rand Paul vs. the Civil Rights Act*, GUARDIAN (May 20, 2010, 6:06 PM), <http://www.guardian.co.uk/world/richard-adams-blog/2010/may/20/rand-paul-civil-rights-act-rachel-maddow>.

98. Andrea Salcedo, *A Lawmaker Wanted to Ban ‘Divisive’ Teaching on Race. Then He Mentioned ‘The Good’ of Slavery*, WASH. POST (April 28, 2021, 7:11 AM), <https://www.washingtonpost.com/nation/2021/04/28/ra-garofalo-louisiana-good-slavery/>; John Celock, *Loy Mauch, Arkansas Lawmaker, Defended Slavery in Letters to the Editor*, HUFFINGTON POST (Oct. 8, 2012, 3:18 PM), http://www.huffingtonpost.com/2012/10/08/loy-mauch-arkansas-slavery_n_1948717.html (reporting on two Arkansas state representatives who suggested that slavery “may have been a blessing” and was not all that “God-awful”).

99. Balkin, *supra* note 7, 438–39 (2007).

100. See THOMAS G. LONG, PREACHING AND THE LITERARY FORMS OF THE BIBLE 134 (1989) (“Th[e] list of linkages between text and sermon ends not with a period, but an ellipsis.”).