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Roe and the Original Meaning of the Thirteenth Amendment

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ARTICLES

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INTRODUCTION

The current debate over *Roe v. Wade* as a substantive due process right has prompted scholars to investigate alternative sources for a constitutional right to abortion. One approach argues that the Thirteenth Amendment's prohibition on "slavery" and "involuntary servitude" prohibits the government from denying women the right to terminate a pregnancy.[1] Scholars making this argument concede that the right to abortion was not the expected application of the Thirteenth Amendment but insist that a forced continued pregnancy falls within the original meaning of the Amendment's terms.[2]

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1. U.S. CONST. amend. XIII, § 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.").

2. See, e.g., Andrew Koppelman, *Originalism, Abortion and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917 (2012); Sandy Levinson, *Fishkin on dissent: The Transcendent Importance of the*

This essay explores the history behind the adoption of the Thirteenth Amendment and conclude the pro-*Roe* reading of the Thirteenth Amendment is incorrect. The original meaning of the Thirteenth Amendment is defined by the text upon which it was based and defended: The 1787 Northwest Ordinance. The framers of the Amendment intentionally used this text precisely *because* it was well known and had a narrow historical meaning. As used in the Ordinance, the terms "slavery and involuntary servitude" referred to a specific and legally codified "private economical relation" between a "master" and a "servant." Under slavery—the most severe form of "involuntary servitude"—both the woman and the unborn child were considered property, equally subject to dismemberment or destruction. The Thirteenth Amendment applied the prohibitions of the Ordinance throughout the United States and forever abolished the idea that one could hold "property in man." However, nothing in the Amendment (or the Ordinance) affected laws restricting the termination of a pregnancy—laws that were common throughout antebellum America.

In Part I, I trace the Founding era understanding of "slavery" and "involuntary servitude" and the prohibition of both in the 1787 Northwest Ordinance. When paired, these terms referred to a legally codified relationship between a "master" and a "slave" or "servant." Next, I explore the role of the Northwest Ordinance in antebellum debates over slavery. The Ordinance's prohibition of "slavery []or involuntary servitude" played a key role in antebellum abolitionist arguments. The Ordinance established that the Founders opposed slavery and that they believed they had the power to ban slavery in the territories—contra the Supreme Court's opinion in *Dred Scott*. By the time of the Civil War, abolitionist political parties, including the Republican Party, publicly declared their fealty to the principles of the Northwest Ordinance and used the document to broaden public support for the abolition of slavery.

Part II of this essay explores the drafting and ratification of the Thirteenth Amendment. Having already used the language of the Northwest Ordinance in statutes banning slavery in the territories and in the District of Columbia, Congress then adopted the same language for the proposed Thirteenth Amendment. This allowed Republicans to claim that the Amendment was in furtherance of principles traceable to the Founding. Relying on the well-known language of the Ordinance also supported the Republican claims that the proposed amendment did nothing more than abolish the formal institution of chattel slavery and its counterpart, lifetime involuntary service of a servant to a master. During ratification, no one argued that the amendment went beyond the abolition of the formal institution of chattel slavery. The only major debate involved the potential scope of congressional power under Section Two of the amendment. After President Andrew Johnson publicly assured the southern states that Section Two could not be used to justify congressional regulation of state-level civil rights,

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Thirteenth Amendment, BALKINIZATION (May 13, 2022), https://balkin.blogspot.com/2022/05/ [https://perma.cc/BHV5-AQ8V].

southern states like South Carolina submitted their notice of ratification along with a statement regarding their narrow understanding of Section Two.

Soon after the Thirteenth Amendment's ratification, Radical Republicans in the Thirty-Ninth Congress attempted to use Section Two in support of the 1866 Civil Rights Act. Failing to convince a sufficient number of their colleagues to embrace such a broad reading of the Thirteenth Amendment, supporters of the Civil Rights Act then invoked a variety of alternative sources of congressional power, including the Republican Guarantee Clause, the Comity Clause, and the Due Process Clause of the Fifth Amendment. Although the Civil Rights Bill passed, the debates suggest that no more than a minority shared a broad reading of the Thirteenth Amendment. In particular, moderate Republicans like Ohio congressman John Bingham expressly denied Congress's power to pass the Civil Rights Act. According to Bingham, authority to protect rights beyond the formal institution of chattel slavery required the adoption of an additional, fourteenth, amendment.

Part III analyzes the relevance of this history to current efforts to ground the right to terminate a pregnancy in the language of the Thirteenth Amendment. The original meaning of the Thirteenth Amendment's terms "slavery" and "involuntary servitude" is co-extensive with the historically defined relationships forbidden by the Northwest Ordinance. The "servitude" covered by both terms is limited to a private economic relationship between a "master" and a "servant." This private economic relationship is neither created nor maintained by laws limiting the termination of a pregnancy. Nor are these historical forms of servitude simply the *expected application* of the Thirteenth Amendment; rather, they constitute the full original meaning of the text. Laws limiting the termination of a pregnancy thus fall outside the terms of the Amendment and any originalist construction of its terms. The abolition of slavery erased an institution that treated both the woman and the unborn child as property. Laws that restrict the termination of unborn life do not conflict with the Amendment's text or its original meaning. If anything, such laws further what historians now recognize as a growing antebellum movement to protect unborn life in the north and the south.

I. ANTEBELLUM LAW

A. Slavery and Involuntary Servitude

Section One of the Thirteenth Amendment declares: "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."[3] When used as paired terms, antebellum Americans understood "slavery" and "involuntary servitude" as references to particular and related relationships, both regulated by codes of law. The former involved a master and slave, the latter involved a master and servant. Though distinguishable

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

(more on this below), the terms "slavery" and "servitude" were closely related—so much so that one can find the term "slavery" used interchangeably with "servitude for life."[4] Slavery, in fact, was understood as simply another form of indentured service. A constitutional example of this understanding is found in Article IV, which declares that "[n]o person held to service or labour in one State, under the laws thereof, escaping into another, shall . . . be discharged from such service."[5]

Slavery was a particularly brutal form of servitude. At the time of the Founding and throughout the antebellum period, being a slave meant being treated as a species of property.[6] The enslaved person could be bought and sold, abused, maimed, dismembered, or completely destroyed without having any legal recourse.[7] Slavery as "property in man" included ownership of any slave's unborn child who also could be bought and sold (or dismembered, maimed or destroyed) without the mother or child having recourse to the protections of law.[8] In the American states, local laws *might* regulate the treatment of the enslaved as laws might regulate the treatment of livestock, but the enslaved themselves held no legally assertable legal rights.[9]

Both slavery and servitude were regulated under legal codes.[10] In fact, according to Lord Mansfield's opinion in *Sommersett*, slavery was unenforceable absent the support of positive law. Wrote Mansfield, "[t]he state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law . . . . It is so odious, that nothing can be suffered to support it, but positive law."[11] In the American colonies, British "positive law" permitted slavery until the time of the American Revolution. Following the

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4. *See, e.g.*, Pennsylvania, An Act for the Gradual Abolition of Slavery, March 1, 1780, *reprinted in* 1 RECONSTRUCTION AMENDMENTS: ESSENTIAL DOCUMENTS 165 (Kurt T. Lash ed., 2021) ("That all persons, as well Negroes and Mulattoes as others, who shall be born within this state from and after the passing of this act, shall not be deemed and considered as servants for life, or slaves; and that all servitude for life, or slavery of children, in consequence of the slavery of their mothers, in the case of all children born within this state, from and after the passing of this act as aforesaid, shall be, and hereby is utterly taken away, extinguished and forever abolished.").

5. U.S. CONST. art. IV, § 2.

6. SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING 22 (2018).

7. *See, e.g.*, Virginia, An Act concerning Servants and Slaves (1705), *reprinted in* 1 RECONSTRUCTION AMENDMENTS *supra* note 4, at 160; *see also*, State v. Mann, 13 N.C. 263 (1829), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 200 (determining that the enslaved have no right to invoke the protection of courts of law).

8. *See* Virginia Slave Code, XXXVI (1705), *available at* https://blog.umd.edu/slaverylawandpower/the-virginia-slave-code-of-1705/ [https://perma.cc/VNN3-SRQT] ("And also it is hereby enacted and declared, That baptism of slaves doth not exempt them from bondage; and that all children shall be bond or free, according to the condition of their mothers, and the particular direction of this act.").

9. State v. Mann, 13 N.C. 263 (1829), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 200.

10. *See, e.g.*, Virginia, An Act concerning Servants and Slaves (1705), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 160.

11. Sommersett's Case, 20 Howell's State Trials 1 (K.B. 1772), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 164.

Revolution, southern states maintained their colonial slave codes,[12] while northern states either abolished slavery or moved towards emancipation.[13]

The condition of personal servitude[14] had a long history at common law, with the details of the master-servant relationship occupying hundreds of pages in Founding Era law books.[15] Servitude could be voluntary or involuntary, for a number of years or for life. In all cases, servitude involved a legally cognizable relationship between a "master" and a "servant." Involuntary servitude included forced labor as punishment for a crime.[16] It did not include required service as an aspect of one's duty as a citizen (jury or militia service) or parental obligations to care for one's children.[17]

In sum, at the time of the Founding, both slavery and servitude involved a relationship recognized by law and described in detail in legal codes. In all cases, this relationship involved a master and a servant, with the servant bound to provide service for the master. In the American states, slavery involved the most severe form of master-servant relationship, with the enslaved viewed as property utterly lacking in legal rights. Apart from their imposition as punishment for a crime, "involuntary servitude,"[18] "compulsory servitude,"[19] and "servitude for life" were viewed as relationships analogous to slavery. Accordingly, prohibitions on slavery generally included prohibitions on involuntary servitude.[20]

B. The Northwest Ordinance, and the Original Constitution

Adopted the same year as the federal Constitution, the 1787 Northwest Ordinance banned slavery in the territories that ultimately became the states of

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12. *See* Virginia Slave Code, *supra*, note 8.

13. *See, e.g.*, Pennsylvania, An Act for the Gradual Abolition of Slavery, March 1, 1870, *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 165.

14. Here I distinguish personal servitude from "servitude" in property law which refers to a device tying rights and obligations to a piece of land.

15. *See, e.g.*, ST. GEORGE TUCKER, 2 BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE, Chapter 14: Of Master and Servant (1803) (hereinafter "Tucker's Blackstone").

16. *See* The Northwest Ordinance (July 13, 1787), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 10 ("There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted.").

17. *See* David Upham, *The Understanding of "Neither Slavery nor Involuntary Servitude Shall Exist" Before the Thirteenth Amendment*, 15 GEO. J. L. & PUB. POL'Y 137, 155–56 (2017).

18. *See, e.g.*, U.S. Congress, Debate on the Tallmadge Amendment, February 15 and March 2, 1819, *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 198 (Remarks of Mr. Livermore) (using "involuntary servitude" as a reference to slavery).

19. *See, e.g.*, St. George Tucker, A Dissertation on Slavery, May 20, 1796, *reprinted in* 1 RECONSTRUCTION AMENDMENTS *supra* note 4, at 194 (using term "compulsory servitude" as a reference to slavery).

20. In addition to the Northwest Ordinance discussed below, see also, District of Columbia, Compensated Emancipation Act, 12 Stat. 376, April 16, 1862, *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 359 ("neither slavery nor involuntary servitude, except for crime, whereof the party shall be duly convicted, shall hereafter exist in said District.").

Ohio, Indiana, Michigan, Illinois, Wisconsin, and Minnesota. In language traditionally attributed to Thomas Jefferson,[21] Article IV of the Ordinance declared:

> There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted.[22]

If the "odious" institution of slavery could only be maintained by way of positive law, then the prohibition of slavery in the Northwest Territory and in the northern states might render free any enslaved person who managed to escape to free soil. Both the Ordinance and the Constitution responded to this concern by enacting in positive law the right of an "owner" to reclaim their "property."[23] Despite this and other concessions to the slave holding states, the framers of the Constitution avoided adding the term "slavery" to its text because, according to James Madison, it would be "wrong to admit in the Constitution the idea that there could be property in men."[24]

Whether the Constitution itself was a pro-slavery or anti-slavery document became a matter of substantial debate—a debate not fully concluded until the adoption of the Thirteenth Amendment itself. Pro-slavery advocates pointed to provisions like the "Three-Fifths Clause" and the "Fugitive Slave Clause" as evidence that the Constitution embraced and promoted slavery.[25] Abolitionists, on the other hand, noted that the Founders intentionally omitted the term slavery from the Constitution in order to avoid legitimizing the idea that one might hold "property in man."[26]

Whether intentional or not, the federalist structure of the original Constitution not only preserved the right of southern states to maintain the legal institution of chattel slavery, it also guaranteed the right of northern states to abolish slavery and embrace anti-slavery policies. Northern abolitionists and anti-slavery political parties expressly invoked the language of the Northwest Ordinance as proof that the Founders opposed any further extension of slavery beyond the southern states. As the Free Soil Party Platform of 1848 declared:

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21. *See, e.g.*, Free Soil Party Platform of 1848, *infra* note 27; *see also* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (3d. ed. 2014) (describing the drafting process and the multiple players).

22. The Northwest Ordinance (July 13, 1787), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 10.

23. *See id.*; U.S. CONST. art. IV, § 2.

24. 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 184.

25. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393 (1857), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 266 (arguing that the inclusion of these provisions proved the pro-slavery nature of the Founding and the Constitution).

26. *See* Debates over the Framing of the Constitution (Aug. 25, 1787), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 184 (remarks of James Madison).

> *Resolved*, That the proviso of Jefferson, to prohibit the existence of slavery after 1800 in all the territories of the United States . . . ; the actual exclusion of slavery from the Northwestern Territory, by the Ordinance of 1787, unanimously adopted by the states in Congress, and the entire history of that period, clearly show that it was the settled policy of the nation not to extend, nationalize, or encourage, but to limit, localize, and discourage slavery.[27]

To abolitionist Republicans, Jefferson's words in the Northwest Ordinance had two-fold importance. First, they refuted the pro-slavery argument that the nation's Founders were committed to the continuance of chattel slavery. Secondly, the Ordinance proved that the Founders believed they had power to ban slavery in the territories. As then-candidate Abraham Lincoln explained in his famous speech at the Cooper Institute, "[i]n 1789, by the first Congress which sat under the Constitution, an act was passed to enforce the Ordinance of '87, including the prohibition of slavery in the Northwestern Territory. . . . This shows that, in their understanding, no line dividing local from federal authority, nor anything in the Constitution, properly forbade Congress to prohibit slavery in the federal territory."[28]

Lincoln and the Republican Party rejected Chief Justice Taney's reasoning in *Dred Scott* that Congress lacked power to pass the Missouri Compromise and they utterly rejected Taney's claim that historically Black Americans "had no rights which the white man was bound to respect." The Northwest Ordinance proved otherwise. As the Republican Party Platform of 1860 declared, "the normal condition of all the territory of the United States is that of freedom . . . our Republican fathers, when they had abolished slavery in all our national territory, ordained that 'no persons should be deprived of life, liberty or property without due process of law.'"[29]

In sum, by the time of the Civil War, the abolition language of the Northwest Ordinance was well-known and it played a high-profile role in the national debate over slavery. Jefferson's language was legal language in a legal document that had a legal effect. To the extent the language had additional rhetorical value, it stood as specific historical evidence that the nation's Founders opposed chattel slavery and its mirror-image, involuntary servitude.

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27. Free Soil Party Platform (1848), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 235; *see also* Liberty Party Platform, August 30, 1843, *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 225.

28. Abraham Lincoln, Address at the Cooper Institute (Feb. 27, 1860), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 314.

29. Republican Party Platform (1860), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 320.

II. THE THIRTEENTH AMENDMENT

A. Drafting the Thirteenth Amendment

Given its high-profile role in antebellum Republican abolitionist theory, it is not surprising that when Republicans framed an abolition amendment to the Constitution they used Jefferson's language from the Northwest Ordinance. That language specifically targeted the institution of chattel slavery and would be familiar to both the members of Congress and to the ratifying public. In fact, only the year before, congressional Republicans used Jefferson's language in the 1862 Act abolishing slavery in the territories[30] and in the 1862 Act abolishing slavery in the District of Columbia.[31]

On January 11, 1864, Missouri senator John Brooks Henderson introduced a proposed abolition amendment, which was submitted to the Senate Judiciary Committee.[32] On February 10, that committee reported its consideration of Henderson's proposal (now "S. No. 16") "to amend the Constitution of the United States so that neither slavery nor involuntary servitude, except as a punishment for crime, whereof a party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction; and also that Congress shall have power to enforce this article by proper legislation."[33] Finally, on March 28, 1864, the chair of the Senate Judiciary Committee, Lyman Trumbull, submitted the following "joint resolution, as originally introduced by Mr. Henderson":

> Sec. 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.
>
> Sec. 2. Congress shall have power to enforce this article by appropriate legislation.[34]

The committee based its draft on Jefferson's language in the Northwest Ordinance, which declared "[t]here shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the

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30. *See* An Act to secure Freedom to all Persons within the Territories of the United States, 12 Stat. 432 (1862) ("[T]here shall be neither slavery nor involuntary servitude in any of the Territories of the United States now existing, or which may at any time hereafter be formed or acquired by the United States, otherwise than in punishment of crimes whereof the party shall have been duly convicted."); *see also* AKHIL AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 359 (2005).

31. District of Columbia, Compensated Emancipation Act, 12 Stat. 376 (1862), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 359 ("neither slavery nor involuntary servitude, except for crime, whereof the party shall be duly convicted, shall hereafter exist in said District.").

32. 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 386.

33. 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 390.

34. 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 402.

party shall have been duly convicted."[35] The Amendment used the same language in a slightly restructured form.

In his speech introducing the Amendment, Trumbull noted that it was "generally admitted" that the institution of chattel slavery had triggered the current civil war.[36] "The only effectual way of ridding the country of slavery, and so that it cannot be resuscitated," Trumbull insisted, "is by an amendment of the Constitution forever prohibiting it within the jurisdiction of the United States. This amendment adopted, not only does slavery cease, but it can never be reestablished by State authority, or in any other way than by again amending the Constitution."[37]

Note Trumbull's emphatic statement that, with the adoption of the Amendment, "slavery cease[s]." The Amendment targeted chattel slavery and its adoption would permanently end that institution. As Trumbull declared when the country ratified the proposed amendment, "we are forever freed of this troublesome question . . . . We take this question entirely away from the politics of the country."[38] Henderson himself also saw the Amendment as targeting nothing other than the institution of chattel slavery. Although a Missouri slave owner himself, Henderson "confess[ed] I see no probability of restoring the Union with the institution of slavery remaining. I wish the Union restored, but I confess also I do not desire the perpetuation of slavery."[39] On the other hand, Henderson noted, his proposal would do nothing other than end chattel slavery: "Whether he shall be a citizen of any one of the States is a question for that State to determine . . . . We give him no right except his freedom, and leave the rest to the States."[40]

The narrow scope of the proposed amendment raised objections from Radical Republicans. Charles Sumner, for example, appreciated that the proposed draft was based on "the old Jeffersonian ordinance, sacred in our history."[41] Sumner, however, preferred a broader amendment that would go beyond the prohibition of chattel slavery and guarantee that "[a]ll persons are equal before the law, so that no person can hold another as a slave."[42]

Sumner's last-minute effort to rewrite the proposed amendment with his preferred language was quickly and successfully rebuffed. According to Lyman Trumbull, "although the Senator from Massachusetts may satisfy himself that the words he has suggested, copied from the French Revolution, are the best words

35. The Northwest Ordinance (July 13, 1787), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 10.

36. Speech of Lyman Trumbull Reporting Amended Version of Abolition Amendment (Mar. 28, 1864), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 402.

37. *Id*.

38. *Id*. at 406.

39. Speech of Senator Henderson (Apr. 7, 1864), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 433.

40. *Id*. at 433–34.

41. Speech of Charles Sumner (Apr. 8, 1864), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 437.

42. *Id*.

for us to adopt, I am not at all sure of it. I think there is nothing historical about them, nothing in the source from whence they come to commend them particularly to us."[43] Senator Jacob Howard was equally dismissive of Sumner's proposal. The Committee's draft, Howard explained, used "language employed by our fathers in the ordinance of 1787, an expression which has been adjudicated upon repeatedly, which is perfectly well understood both by the public and by judicial tribunals."[44] According to Howard, this historical language "is well understood, well comprehended by the people of the United States, and that no court of justice, no magistrate, no person, old or young, can misapprehend the meaning and effect of that clear, brief and comprehensive clause."[45]

The Senate passed the Henderson draft on April 8, 1864.[46] Although the House initially failed to secure enough votes for passage, a second vote taken after Lincoln's re-election succeeded. On January 31, 1865, the House passed the amendment on a vote of 121–24 and sent the proposal to the states for ratification.[47]

B. Ratifying the Thirteenth Amendment

Despite Radical Republican insistence that the rebel states had committed suicide, Congress had the proposed amendment sent to every state in the Union for potential ratification. Lincoln supported the decision to send the proposal to the southern states. Without committing himself to requiring their votes, Lincoln noted that counting only the votes of the northern states "would be questionable, and sure to be persistently questioned; while a ratification by three-fourths of all the States would be unquestioned and unquestionable."[48]

Sadly, Lincoln did not live to see the constitutional abolition of slavery. Assassinated on April 15, 1865, it fell to Lincoln's Vice President, Andrew Johnson, to secure the ratification of the Thirteenth Amendment. Johnson strongly supported the abolition of slavery. In his speech as Vice-President elect at the Tennessee State Constitutional Convention, Johnson celebrated the end of chattel slavery and the fact that the "nefarious, diabolical slave aristocracy has been tumbled to the ground."[49] Beyond the specific issue of formal abolition, however, Johnson was more circumspect. "I shall say nothing of the future condition of the negro," demurred Johnson, "[f]irst, reorganize; time and experience will regulate the rest. Let us first get rid of slavery; let there be no bickering or conflict till we get that out of the way. This being done, we will take up other

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43. U.S. Senate, Debate and Passage of Abolition Amendment (April 8, 1864), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 441.

44. *Id*. at 442.

45. *Id*.

46. 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 434.

47. *Id*. at 495.

48. Abraham Lincoln, Speech on the Status of Louisiana (Lincoln's Last Public Address) (Apr. 11, 1865), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 536.

49. Vice President Elect Andrew Johnson, Speech at the Tennessee State Constitutional Convention (Feb. 15, 1865), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 525.

questions, and dispose of them as they arise."[50] Once he became President, Johnson immediately went to work setting up provisional southern state governments and encouraging their assemblies to ratify the proposed amendment.[51]

As far as the end of chattel slavery was concerned, there was little to debate. The re-election of Lincoln and broad gains of the Republican Party signaled a nation ready to end the peculiar institution. Nor was there anything unclear about the Amendment doing so. In a letter published in both the *New York Tribune* and the *New York Times*, Francis Leiber described the proposed Thirteenth Amendment as employing "simple and straightforward words, allowing no equivocation" which would "cure our system of this poisonous malady" which had caused "a wide a bitter civil war."[52] I have not discovered a single example of anyone during the ratification debates describing Section One as having even a *possible* application outside of the formal legal categories covered by the Northwest Ordinance.

The narrow scope of the Amendment, in fact, was a matter of grave concern to Black southern freedmen. For example, in an "Address to the People of the United States," a committee of "colored citizens of Norfolk, Virginia" demanded the "full enjoyment" of the "privileges of full citizenship," including the rights of suffrage.[53] Although slavery would soon be abolished, this would not be enough to secure substantive rights. According to the Address:

> [T]he late constitutional amendment, if duly ratified, can go no further; neither touch, nor can touch, the slave codes of the various southern States, and the laws respecting free people of color consequent therefrom, which, having been passed before the act of secession, are presumed to have lost none of their vitality, but exist, as a convenient engine for our oppression.[54]

Although the text of Section One narrowly targeted the historical categories of slavery and involuntary servitude, some southern states feared Republicans might try to stretch the scope of their powers under Section Two. In a letter to Secretary of State William Seward, for example, Provisional South Carolina Governor Benjamin Perry noted that the South Carolina legislature "ha[d] no objection to adopting the first section of the amendment proposed but they fear that the second section may be construed to give congress power of local legislation over the

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50. *Id.*

51. *See, e.g.*, Andrew Johnson to Provisional Mississippi Governor William L. Sharkey (Aug. 15, 1865), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 543.

52. Dr. Lieber's Letter to Senator E. D. Morgan on the Amendment of the Constitution Extinguishing Slavery, N.Y. TRIBUNE, Feb. 4, 1865, *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 511.

53. Equal Suffrage: Address from the Colored Citizens of Norfolk, Va., to the People of the United States (Jun. 26, 1865), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 543.

54. *Id.* at 544.

Negroes and white men, too, after the abolishment of slavery. In good faith South Carolina has abolished slavery and never will wish to restore it again."[55]

Secretary of State Seward's reply, published in the *New York Times* and elsewhere, was short and curt: "The objection which you mention to the last clause of the constitutional amendment is regarded as querulous and unreasonable, because that clause is really restraining in its effect, instead of enlarging the powers of Congress."[56] Satisfied, the South Carolina legislature proceeded to ratify the amendment, but added an accompanying resolution declaring "[t]hat any attempt by Congress towards legislating upon the political status of former slaves, or their civil relations, would be contrary to the Constitution of the United States, as it now is, or as it would be altered by the proposed amendment."[57]

The *New York Times* both published Secretary Seward's assurance about the "restraining" effect of Section Two and congratulated the South Carolina assembly for having accepted the President's assurance and ratifying the Thirteenth Amendment. According to the *Times* editors:

> The sentiment of South Carolina on the adoption of the amendment was natural and proper. It is not strange that she should hesitate about giving her sanction to a provision of the constitution which might authorize Congress to take the negroes under its exclusive legislative control. But the explanations made at Washington removed all difficulty on this score, and her action was then prompt and satisfactory.[58]

Similarly, the editors of the *Daily Eastern Argus* (Portland, Maine), praised South Carolina's acceptance of Seward's interpretation of Section Two:

> The construction put upon the amendment by President Johnson is the only fair one. That claimed by the radicals is absurd. The language cannot be tortured into such a meaning. The second section confines the action of Congress simply to the enforcement of the prohibition contained in the 1st section and gives no color to interference with negroes after they are free. With this official construction of the amendment it is probable that all the Southern States will adopt it.[59]

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55. Provisional South Carolina Governor Benjamin F. Perry to Secretary of State William Seward (Nov. 1, 1865), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 545–46.

56. Secretary of State William Seward to Provisional South Carolina Governor Benjamin F. Perry (Nov. 6, 1865), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 546.

57. South Carolina, Ratification and Accompanying Resolution (Nov. 13, 1865), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 546.

58. *South Carolina*, N.Y. TIMES, Nov. 16, 1865, p. 4, *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 547.

59. *The Amendment to the Federal Constitution*, DAILY EASTERN ARGUS, Nov. 17, 1865, p. 2, *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 548–49.

C. The Civil Rights Bill and the Fourteenth Amendment

Although never saying so publicly, some Radical Republicans hoped to use Section Two of the Thirteenth Amendment as a basis for invalidating the newly enacted southern Black Codes.[60] Not long after the new Congress was gaveled into session, the Senate Judiciary Committee submitted a proposed Civil Rights Act which would prohibit racial discrimination in matters relating to life, liberty and property.[61] The Radical Republican drafters of the Civil Rights Act originally justified its passage as an enforcement of the Thirteenth Amendment.[62] According to Lyman Trumbull, for example, the Civil Rights Act was necessary lest "the trumpet of freedom that we have been blowing throughout the land has given an 'uncertain sound,' and the promised freedom is a delusion."[63]

The more moderate members of Congress were not convinced.[64] In the face of concerns voiced by both Republicans and Democrats, the bill's supporters began searching for alternative sources of power, including the Republican Guarantee Clause, the Comity Clause of Article IV, and the unenumerated power to enforce the rights of life, liberty, and property declared in the Due Process Clause of the Fifth Amendment.[65] Although a sufficient number of members eventually voted in favor of the Civil Rights Act, continued doubts about congressional power helped fuel the effort to adopt an additional amendment.

One particularly important doubter was Ohio Representative John Bingham. A respected moderate and a member of the Joint Committee on Reconstruction, Bingham rejected Trumbull's broad understanding of the Thirteenth Amendment. Although Bingham fully supported the goal of invalidating the Black Codes, he did not believe those codes had anything to do with subjects covered by the Thirteenth Amendment. According to Bingham, issues relating to the equal protection of life, liberty and property were matters relating to the provisions in the Bill of Rights, especially the Due Process Clause of the Fifth Amendment.[66] Enforcing the Bill of Rights against the states, however, first required passing a

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60. *See* Letter from General Benjamin Butler to Henry Wilson (Nov. 20, 1865), *in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 556.

61. *See* CONG. GLOBE, 39th Cong., 1st Sess. 474–76 (Jan. 29, 1866), *reprinted in* 2 RECONSTRUCTION AMENDMENTS: ESSENTIAL DOCUMENTS 67 (Kurt T. Lash ed., 2021) (opening debates on a proposed Civil Rights Bill). For a discussion of proposed bill and its relationship to the protection of the rights of life, liberty and property, see Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389 (2018).

62. *See* Declaration of Sentiments, Women's Rights Convention, Seneca Falls, July 19, 1848, *reprinted in* 2 RECONSTRUCTION AMENDMENTS, *supra* note 61, at 40. Though Trumbull at this point was discussing the Freedmen's Bureau Bill, he had introduced this and the Civil Rights Bill at the same time, with the same equal rights language. *See id.* at 35.

63. *Id.* at 41.

64. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866) (statement of Rep. Delano), *reprinted in* 2 RECONSTRUCTION AMENDMENTS, *supra* note 61, at 132.

65. For a general discussion of these arguments, *see* Lash, *Enforcing the Rights of Due Process*, *supra* note 61, at 1414–1446.

66. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (statement of Rep. Bingham), *reprinted in* 2 RECONSTRUCTION AMENDMENTS, *supra* note 61, at 136.

new constitutional amendment. As Bingham explained in his speech opposing the Civil Rights Act, "I am with [Mr. Wilson] in an earnest desire to have the bill of rights in your Constitution enforced everywhere. But I ask that it be enforced in accordance with the Constitution of my country."[67]

Weeks later, Bingham and the Joint Committee proposed a Fourteenth Amendment that prohibited states from depriving any person of life, liberty or property without due process of law or denying any person the equal protection of the laws, and an additional clause empowering Congress to enforce the same.[68] When the Fourteenth Amendment was passed and ratified, Bingham joined his colleagues in voting to repass the 1866 Civil Rights Act.[69]

III. PROHIBITIONS ON ABORTION AND THE THIRTEENTH AMENDMENT

The public that ratified the Thirteenth Amendment understood that its language and scope was no different than the language and scope of the Northwest Ordinance. The Ordinance was not an *example* of what the Amendment prohibited; the Ordinance *defined* what was prohibited. This one-to-one correspondence was critically important to the Amendment's supporters as it allowed them to rely on the well-known historically rooted Ordinance and that document's long-standing prominence in the abolitionist rhetoric of the Republican Party.[70]

The historical categories covered by the Northwest Ordinance were legal terms defined in codes of law. In particular, the term "slavery" *as used in the Ordinance* referred to the legal category of "chattel slavery." Apart from the Ordinance, the general term "slavery" played a role in a variety of social and political movements, including the rhetoric of the Revolution and the antebellum women's rights movement.[71] As used in the Thirteenth Amendment, however, the term referred specifically to the same institution addressed by the Northwest Ordinance: the legal institution of chattel slavery. The same is true for the term "involuntary servitude." Servitude as used in the Ordinance was a legal category involving "a private economical relation" between a "master" and a "servant."[72] It did not involve the relationship of the individual to the state or to the public at large.[73]

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67. *Id.*

68. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2458–69 (1866) (statement of Rep. Stevens), *reprinted in* 2 RECONSTRUCTION AMENDMENTS, *supra* note 61, at 158.

69. *Id.* at 605.

70. This distinguishes the Ordinance from other documents like the Declaration of Independence, which abolitionists and others also relied upon at a high level of generality.

71. *See, e.g.*, Declaration of Sentiments, Women's Rights Convention, Seneca Falls, July 19, 1848, *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 135 (using a modified form of the language of the Declaration to establish women's rights of suffrage).

72. *See* Tucker's Blackstone, *supra* note 15, at 422.

73. *Id.* This essay does not address the original meaning of the Exceptions Clause ("except as a punishment for crime whereof the party shall have been duly convicted"). For a discussion of the history behind that clause and its relationship to the due process of law, see Christopher Green, *Duly Convicted: The Thirteenth Amendment as Procedural Due Process*, 15 GEO. J. L. & PUB. POL'Y 73 (2017).

Having determined the original meaning of the terms "slavery" and "involuntary servitude" as used in the Thirteenth Amendment, it is clear that laws restricting the termination of a pregnancy fall outside the scope of the Amendment. Although such regulations create a legal obligation between the individual and the public at large, they do not create or maintain a private economical relationship between a master and servant.

We also know that laws regulating the termination of pregnancies and the treatment of the unborn were common both at the time of the Founding and at the time of the Civil War.[74] This was true both in free states and in states that allowed chattel slavery. Nothing about being enslaved affected a woman's right to terminate a pregnancy because no such right then existed anywhere in the United States.[75] What chattel slavery *did* do was render the unborn child an article of property, one subject to being bought and sold, maimed or dismembered like the enslaved woman herself.[76]

Some scholars argue that just because the public in 1865 *expected* the Thirteenth Amendment to apply to nothing more than chattel slavery, these "expected applications" do not affect the original meaning of the Amendment itself. Andrew Koppelman, for example, argues that the term "involuntary servitude" has a meaning capacious enough to include "coerced pregnancy" whereby the coercion of the state forces a woman to "serve at the fetus's command."[77] To Koppelman, coerced pregnancy was "not merely analogous to the slavery that existed before the Civil War," the "loss of control over one's reproductive capacities were partially *constitutive* of slavery for most black women of childbearing age."[78] Thus, even if the people of 1865 did not envision an application of the Thirteenth Amendment to laws regulating abortion, such laws nevertheless are a "paradigmatic" example of what the terms prohibit.[79]

Enslaved women were in fact subject to horrific forms of control and coercion, including rape and loss of control over their children, born and unborn.[80] Slaveowners expected their enslaved women to bear children, children who were born enslaved and treated as a species of property. The institution that treated both women and children as property was forbidden by the Northwest Ordinance and by the Thirteenth Amendment. Laws protective of developing life which were common at the time of the Thirteenth Amendment, however, were not

74. *See* John M. Finnis & Robert P. George, Indictability of Early Abortion c. 1868, at 4 (Oct. 11, 2021) (unpublished manuscript).

75. *See* Roe v. Wade, 410 U.S. 113, 138–40 (1973) (noting the general regulation of abortion between the Founding and the Civil War).

76. *See* Dorothy E. Roberts, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 33–34 (1997).

77. Andrew Koppelman, *Originalism, Abortion and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1936 (2012).

78. *Id*. at 1938.

79. *Id*.

80. *See* Roberts, *supra* note 76.

"paradigmatic" forms of either slavery or involuntary servitude.[81] If anything, such laws were driven by the understanding that unborn children were persons, not "property."[82]

Consider, for example, the following passage from Harriet Beecher Stowe's, *The Key to Uncle Tom's Cabin*[83] Here, Stowe quotes a passage from an opinion by Judge Clarke in the 1820 case, *Mississippi v. Jones*:

> The taking away the life of a reasonable creature, under the King's peace, with malice aforethought, expressed or implied, is murder at common law. Is not a slave a reasonable creature—is he not a human being? And the meaning of this phrase, "reasonable creature," is a human being. For the killing a lunatic, an idiot, or even a child unborn, is murder, as much as the killing a philosopher; and has not the slave as much reason as a lunatic, an idiot, or an unborn child?[84]

Stowe's point was to prove that, even in Mississippi, enslaved Black Americans were understood to be "persons" every bit as much as unborn children. To Stowe, the obvious conclusion was that both "persons" deserved protection under law. Other scholars have further developed the history of antebellum laws regarding the treatment of the unborn.[85] The point here is simply to refute the idea that laws protecting the unborn are somehow a "paradigmatic" form of slavery or in any way "constitutive" of the terms "slavery" and "involuntary servitude" as those terms are used in the Thirteenth Amendment.

CONCLUSION

The original meaning of the Thirteenth Amendment is defined by the public's understanding of the text upon which it was based and defended: the 1787 Northwest Ordinance. This is not a case where a historical document provides an *example* of what is prohibited. In the case of the Thirteenth Amendment, the practices prohibited by the Northwest Ordinance *are* what is covered. The framers of the Amendment purposefully drew upon the Ordinance's role in the debates over slavery and the public's deep familiarity with its history and terms. Accordingly, the originally understood scope of the Amendment is co-extensive with prohibitions of the Ordinance.[86]

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81. For a discussion of antebellum laws regarding the unborn child, *see* Finnis & George, *supra* note 74.

82. Whether Congress could pass laws protecting the unborn under Section Two of the Thirteenth Amendment is beyond the scope of this article.

83. HARRIET BEECHER STOWE, THE KEY TO UNCLE TOM'S CABIN: PRESENTING THE ORIGINAL FACTS AND DOCUMENTS UPON WHICH THE STORY IS FOUNDED (1853).

84. *Id.* at 141.

85. Finnis & George, *supra* note 74.

86. The Supreme Court's interpretation of the Thirteenth Amendment in cases like *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), is beyond the scope of this article. There is, however, a robust scholarly debate regarding the court's jurisprudence of the "badges and incidents of slavery" and the

Laws restricting the termination of a pregnancy have nothing to do with the specific legally recognized relationships covered by the Northwest Ordinance. Servitude, with slavery being its most extreme form, involved "a private economical relation" between a "master" and a "servant." Under slavery, both the women and the unborn child were considered property, both equally subject to dismemberment or destruction. Abolishing slavery abolished the idea that one could hold "property in man." Nothing about abolition, however, affected laws restricting the termination of a pregnancy—laws that were common in antebellum America north and south.

Courts and scholars continue to debate the meaning of texts like the Fourteenth Amendment's Equal Protection Clause and the Privileges or Immunities Clause—clauses that in 1868 lacked any specific historical antecedent.[87] Such was not the case regarding the language of the Thirteenth Amendment. That language was embraced precisely because it had a well-established historical meaning. As Jacob Howard noted during the framing debates, the language of the Thirteenth Amendment "is well understood, well comprehended by the people of the United States, and that no court of justice, no magistrate, no person, old or young, can misapprehend the meaning and effect of that clear, brief and comprehensive clause."[88]

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original understanding of the Amendment. *Compare* Koppelman, *supra* note 77, *with* Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U. L. REV. 77 (2010).

87. *Compare* KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014), *with* ILAN WURMAN, THE SECOND FOUNDING (2020).

88. *See* CONG. GLOBE, 38th Cong., 1st Sess. 1489 (1864) (statement of Sen. Howard), *reprinted in* 1 RECONSTRUCTION AMENDMENTS, *supra* note 4, at 442.