ORIGINALISM, ABORTION, AND THE THIRTEENTH AMENDMENT

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Does an originalist reading of the Thirteenth Amendment support a right to abortion? Not long ago a negative answer seemed obvious enough to make the question silly. Since then, however, originalism has become more sophisticated. It is now understood that original meaning, not original intent, is the most appropriate originalist source of constitutional law. The original meaning of constitutional language sometimes focuses on paradigm cases: specific evils that the Constitution aims to keep from recurring. The Thirteenth Amendment's purpose is to end the specific institution of antebellum slavery. A ban on abortion would do to women what slavery did to the women who were enslaved: compel them to bear children against their will.

INTRODUCTION

Does an originalist reading of the Thirteenth Amendment support a right to abortion? Not long ago a negative answer seemed obvious enough to make the question silly. Since then, however, originalism has become more sophisticated.

I have argued in earlier writings that this constitutional provision is the strongest textual grounding for that right.[1] That argument, however, involved little engagement with methodological issues. It was a straightforward lawyer's argument, building on the authoritative precedents in the area, and offering inferences from them.

Since then, constitutional discourse has come to be dominated by questions of methodology, and in particular, on the role of original intent or meaning in constitutional interpretation. This gives rise to a new question. If an originalist approach to the Constitution is adopted, re-

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1. See generally Andrew Koppelman, Forced Labor: A Thirteenth Amendment Defense of Abortion, 84 Nw. U. L. Rev. 480 (1990) [hereinafter Koppelman, Forced Labor]; Andrew Koppelman, Forced Labor, Revisited: The Thirteenth Amendment and Abortion [hereinafter Koppelman, Forced Labor Revisited], *in* The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment 226 (Alexander Tsesis ed., 2010) [hereinafter Promises of Liberty].

maining as faithful to the original meaning of the document as possible,[2] what happens to the right to abortion?

The originalist argument offered here does not purport to resolve the abortion question. Even if restrictions on abortion turn out to raise constitutional concerns, it is possible that the state's interest in preserving fetal life is strong enough to overcome those concerns.[3] That question cannot be addressed here. It would be grotesque to try to resolve that question by reference to original meaning. But the originalist inquiry refutes Justice Scalia's claim that the Constitution says nothing at all about the abortion question.[4] Forced childbearing was an integral part of the system of slavery that the Thirteenth Amendment was specifically intended to abolish.

Part I of this Article clarifies the meaning of originalism and tries to explain its attractiveness. Part II considers the role of paradigmatic cases, such as the specific institution of antebellum slavery, in originalist constitutional interpretation. Part III considers the problem of how abstractly the Thirteenth Amendment should be read. Part IV argues that the Thirteenth Amendment prohibits a ban on abortion because such a ban would do to women what slavery did to the women who were enslaved: compel them to bear children against their will. Part V addresses the objection that, unlike slaves, women seeking abortions have voluntarily assumed the risk of pregnancy by consenting to sexual intercourse. This Article, in short, is primarily concerned with constitutional methodology. Readers who are interested only in the abortion issue may want to skip ahead to the last two parts.

I. ORIGINALISM: WHAT AND WHY

Originalists do not think that their field is in crisis. They should. They are now divided on multiple methodological questions. Is the ob-

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2. The definition of originalism will become clearer in the following discussion, but as a first cut, this discussion will follow Lawrence Solum's use of the term to refer to the family of constitutional theories that subscribe to the following claims: (1) that the meaning of each provision of the Constitution is fixed at the time of ratification, (2) sound interpretation requires recovery of original public meaning, (3) that meaning has the force of law, and (4) construction, supplementing the textual meaning, is necessary only when the text is abstract or vague. Lawrence Solum, We Are All Originalists Now, *in* Robert W. Bennett & Lawrence B. Solum, Constitutional Originalism: A Debate 1, 2–4 (2011). Note that claim (3) is vague as to whether the force of law trumps all other considerations, and so it is unclear whether every form of originalism that falls within Solum's definition is vulnerable to Mitchell Berman's devastating criticisms of those theories that give original meaning absolute and dispositive weight. See Mitchell N. Berman, Originalism Is Bunk, 84 N.Y.U. L. Rev. 1, 6 (2009). Note also that these claims are consistent with the view that "many of the most important questions of constitutional law are underdetermined by the linguistic meaning of the constitutional text." Solum, supra, at 22.

3. Koppelman, Forced Labor, supra note 1, at 515–18.

4. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

ject of inquiry the original intentions of the drafters of the Constitution, the original semantic meaning of the language, or its original public meaning? Is the meaning that matters that subjectively held at the time of enactment or the objective meaning of the language? Is it the actual understanding of those who lived at the time or that of a hypothetical reasonable interpreter? Can original meaning include standards and general principles, which may be understood at a high level of generality? Is the law appropriately based upon the entire set of original expectations about the application of constitutional principles, or some original meaning more narrowly construed? Is construction, the practice by which the interpreter exercises discretion to create specific applications of broad and vague terms, legitimate? Originalists are now on all sides of these debates.[5] As a consequence, originalism has fragmented into an enormous number of different theories.

In scholarship, fragmentation is not normally a problem at all. Most scholarly fields are fragmented. Diversity of opinion is a healthy sign of intellectual life.[6] In professional scholarship, the imperative of originality also doubtless plays a role. But one of the central stated purposes of originalism, and perhaps its chief selling point in the popular press, is to produce unique and indisputable answers to legal questions in order to eliminate the possibility of judicial discretion.[7] The proliferation of originalisms, and the certainty that none of them will vanquish its rivals, together with the concession in many of the sophisticated variants that interpretive discretion is unavoidable, make this enterprise a forlorn one. Multiple originalisms are problematic for the same reason that multiple popes are problematic. Some writers have concluded that there is no longer any practical difference between originalism and nonoriginalism.[8] Pamela Karlan analogizes originalism to a product whose name has come to refer to an entire category of products regardless of their source, like aspirin or cellophane. She argues that "it would be better if arguments over interpretive theory stopped trying to invoke this now-meaningless brand name."[9]

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5. See Thomas B. Colby, The Sacrifice of the New Originalism, 99 Geo. L.J. 713, 716–36 (2011) (surveying scholarly positions within originalism).

6. "Where there is much desire to learn, there of necessity will be much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making." John Milton, Areopagitica, *in* Complete Poems and Major Prose 743 (Merritt Y. Hughes ed., 1957).

7. Originalist writings making such claims are collected in Thomas B. Colby & Peter J. Smith, Living Originalism, 59 Duke L.J. 239, 288 n.225 (2008); Colby, supra note 5, at 716–17, 750–51, 769–76; and Berman, supra note 2, at 9–16.

8. Colby & Smith, supra note 7, at 273–92; Peter J. Smith, How Different Are Originalism and Non-Originalism?, 62 Hastings L.J. 707 (2011).

9. Pamela S. Karlan, Constitutional Law as Trademark, 43 U.C. Davis L. Rev. 385, 389 (2009) [hereinafter Karlan, Trademark].

Yet the appeal to originalism has continuing power. The proliferation of originalisms is testimony to that power: Everyone wants to get into the act.

The explanation is local. Originalism is a manifestation of American exceptionalism. Jamal Greene observes that in Canada and Australia, which have legal systems resembling that of the United States, originalism has had no rhetorical or legal traction; almost no one makes such arguments.[10] Many originalists claim that interpretation just *is* recovery of original meaning, that nothing else could count as interpretation.[11] They think that because they are Americans. Greene offers several possible explanations for this distinctive national tendency: America's tendency to lionize its founders, our Constitution's revolutionary origins, the originalists' desire to constrain the Warren Court, the public nature of Supreme Court confirmations, assimilationist tendencies in American identity, and the fundamentalist elements of American religion.[12] In a similar vein, Richard Primus argues that originalist arguments establish a speaker as an authoritative bearer of the American constitutional tradition.[13] Jack Balkin observes that faith in the Constitution involves a selective identification with the past: We take pride in our history because it is ours, because our forebears are part of the same political project that we are engaged in. Balkin notes that "originalist theories of interpretation may tend to piggyback on this identification."[14] Jed Rubenfeld observes that some degree of identification with the past is an indispensable part of national identity.[15]

It is the identification, and not any promise of judicial constraint, that is the real source of originalism's power. That is why the debate among originalisms can never end. There are many different ways of identifying with the past because there are so many different aspects of

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10. Jamal Greene, On the Origins of Originalism, 88 Tex. L. Rev. 1, 3 (2009) ("The notion that the meaning of a political constitution is, in any practical sense, fixed at some point in the past and authoritative in present cases is pooh-poohed by most leading jurists in Canada, South Africa, India, Israel, and throughout most of Europe.").

11. Those who think this nonetheless disagree about what it is that is obviously being recovered. Compare, e.g., Larry Alexander, Simple-Minded Originalism, *in* The Challenge of Originalism: Theories of Constitutional Interpretation 87 (Grant Huscroft & Bradley Miller eds., 2011) (arguing originalism is about recovering thoughts of writer of text), with Gary Lawson, On Reading Recipes . . . and Constitutions, 85 Geo. L.J. 1823 (1997) (arguing originalism is about recovering semantic meaning of text, without regard to what author may have been thinking).

12. Greene, supra note 10, at 62–81.

13. Richard Primus, The Functions of Ethical Originalism, 88 Tex. L. Rev. See Also 79, 86–88 (2010).

14. Jack M. Balkin, Constitutional Redemption: Political Faith in an Unjust World 52 (2011). Balkin's account of the appeal of originalism resembles Greene's. See Jack M. Balkin, Living Originalism 84 (2011) [hereinafter Balkin, Living Originalism].

15. Jed Rubenfeld, Freedom and Time: A Theory of Constitutional Self-Government 145–59 (2001) [hereinafter Rubenfeld, Freedom and Time]. Balkin has a similar view. See Balkin, Living Originalism, supra note 14, at 57–58, 63–64.

the past with which one can identify. Original intention (to the extent that it can persuasively be shown), original public contextual meaning, and original semantic meaning each has a plausible claim to constitute a link to the revered framers. Similar points could be made about each of the other factional divisions within originalism. Each of these approaches therefore can do useful rhetorical work, and will be conscripted when that is likely to help with a constitutional argument. There is no way to stop constitutional interpreters from using all the tools they find in the kit, and so none of these can be permanently elevated to exclusive authority.[16] Originalism is fundamentally about a narrative of rhetorical self-identification with the achievements of a founding historical moment. That is the real basis of its power. An originalist argument will succeed to the extent that it can persuade its audience that it can keep faith with that identification.[17]

Originalist argument is a kind of constitutional rhetoric, connecting us with the past, constructing a narrative of national identity. Persuasive advocacy is an honorable undertaking. It can never be illegitimate to call an audience's attention to something that they care about, or ought to care about, such as saying "your father would have been appalled by what you are proposing to do."

Originalist argument can be an argument from authority, citing texts that lay down legal rules or from which such rules can be inferred, or it can describe commitments, laid down at the time of the framing, that are still attractive today. If the latter, then originalist argument must offer a story about the pertinent commitment. Where the commitment is a decision to *break* with the past in some way—and, as argued below, many constitutional commitments take this form—then a story must be told about what was wrong with that past. Then the argument must contend that the same kind of wrong is present in the instant case.

Understanding originalism in this way can explain some persistent puzzles. For example, originalists are committed to certain substantive results: Almost every living originalist thinks that originalism, properly

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16. This conclusion reinforces Jack Balkin's argument that the United States has multiple Constitutions, rooted in the ideals of its multiple interpreters. See Andrew Koppelman, Respect and Contempt in Constitutional Law, or, Is Jack Balkin Heartbreaking?, 71 Md. L. Rev. 1126 (2012).

17. Originalists, Berman notes, tend to root their argument either in transcendent linguistic necessity or in some form of rule-consequentialism. See Berman, supra note 2, at 82–86. He is addressing their arguments on the merits. This Essay claims that such arguments are not the source of whatever persuasive power originalism has. That claim is supported by Berman's demonstration that they are very bad arguments. It follows that the claim to an authority that overrides all other considerations, which Berman takes to be definitive of originalism, see Berman, supra note 2, at 18–22, is something of a distraction from the real source of that power. Filial piety does not necessarily entail despising every other possible object of affection. See Cordelia's response to Regan and Goneril in William Shakespeare, King Lear act 1, sc.1.

understood, supports the result in *Brown v. Board of Education*.[18] On the other hand, Balkin is a heretic among originalists (and I am, too) because he thinks originalism supports *Roe v. Wade*.[19] Originalism began as a movement to turn back the liberal decisions of the Warren and Burger Courts. Yet Keith Whittington is obviously correct when he writes that "interpretive results are separate from interpretive methods."[20] Whittington notes with regret the "tendency to push originalists to meet some judicial litmus test and to evaluate interpretive approaches by their ability to reach desired results in designated cases."[21] It is a matter of pull as well as push. Michael McConnell writes: "Such is the moral authority of [*Brown v. Board of Education*] that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited."[22] Robert Bork thinks that the need to account for the rightness of *Brown* is "a matter of psychological fact, if not logical necessity."[23] But the psychological fact might as well be a logical necessity. It is that inescapable. Thus, originalists struggle with the problem whether the general purpose of the Fourteenth Amendment, to mandate the legal equality of blacks, should trump the specific intention of many (at least) of the framers to permit school segregation and miscegenation laws.[24]

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18. The only exception of whom I am aware is Earl Maltz. See generally Earl Maltz, Originalism and the Desegregation Decisions—A Response to Professor McConnell, 13 Const. Comm. 223 (1996). Originalists on the Court now claim fidelity, not to what the Equal Protection Clause meant in 1868, but to what the Court, or perhaps even the plaintiffs' attorneys, meant in 1954. See Karlan, Trademark, supra note 9, at 401–05.

19. See Andrew Koppelman, Why Jack Balkin Is Disgusting, 27 Const. Comm. 177 (2010).

20. Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review, at xii (1999).

21. Id.

22. Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 952 (1995) [hereinafter McConnell, Originalism]. Other originalists have conceded the same point. See Colby & Smith, supra note 7, at 299.

23. Robert Bork, The Tempting of America 77 (1990).

24. For arguments that courts should follow the framers' specific intentions, see Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 117–33, 161–63 (1977); Alfred Avins, Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent, 52 Va. L. Rev. 1224 (1966). The most impressive attempt to respond to this challenge from within an originalist-intentionalist framework is McConnell, Originalism, supra note 22, at 953–54 (arguing *Brown* is consistent with originalist understanding of Fourteenth Amendment). But see Michael J. Klarman, Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell, 81 Va. L. Rev. 1881, 1883 (1995) (arguing McConnell's claims for originalist support of desegregation are unpersuasive); Maltz, supra note 18, at 223 (same). The task is easier for forms of originalism that make intention irrelevant. See Steven G. Calabresi & Andrea Matthews, Originalism and *Loving v. Virginia*, BYU L. Rev. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2020371 (on file with the *Columbia Law Review*) (defending Court's invalidation of miscegenation laws on this basis).

The attachment to these specific outcomes shows that originalism's apparently consequence-insensitive methodology is embedded within a larger set of commitments that originalism must be trimmed and modified to fit. Theoretical tidiness will not do unless the theory as a whole is capable of inducing rhetorical uptake. The ultimate enterprise is not theoretical but rhetorical.

One may object that this understanding of originalism as a rhetorical strategy misrepresents originalism, which is in fact a distinctive set of theoretical claims, entirely unrelated to rhetorical considerations. But the question of definition is connected to the question of function. A "chair" can be described as an assembly of arms and legs, but the word can also be defined functionally, as an artifact designed for a person to sit on. That is why a beanbag chair is a chair. Originalist argument is an artifact designed to recall the Constitution's origin and connect what we are doing now with that origin.

Once this functional definition of originalism is understood, it follows that the range of possible original arguments is quite broad. It is not, however, infinite. Karlan is right that originalism has now become a generic name for a number of different products,[25] but that does not mean that the name is meaningless. If I ask you for some cellophane, please do not hand me an acetylsalicylic acid tablet (that is, an aspirin). Originalism is a distinct modality of constitutional argument. It is not precedent. It is not prudence. It is not even constitutional structure. It is a useful name for a specific kind of argument with a specific kind of function.[26]

II. ORIGINALISM AND PARADIGM CASES

Here in particular, I want to emphasize the importance of negative origins: constitutional provisions that are understood to stand for a rejected past that the nation has determined to move away from. Kim Lane Scheppele, in an essay on comparative constitutional law, observes that some constitutions and constitutional provisions are instances of what she calls "aversive constitutionalism," which builds constitutional principles on negative models rather than positive aspirations.[27] Those negative models can be, in their own way, constitutive of national identity. "[C]onstitution builders often have a much stronger sense of what they

25. See Karlan, Trademark, supra note 9.

26. It is also not infinitely manipulable, because the aspiration to connect with the framing generation is subject to the norms of historical accuracy and so cannot support an argument that misrepresents its sources or conceals pertinent evidence. See generally Andrew Koppelman, Phony Originalism and the Establishment Clause, 103 Nw. U. L. Rev. 727 (2009) [hereinafter Koppelman, Phony Originalism].

27. Kim Lane Scheppele, Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models, 1 Int'l J. Const. L. 296, 298 (2003).

do not want to adopt than what they do, a clearer vision of who and what they are *not* rather than of who and what they *are*."[28] Aversive constitutionalism is not just a matter of alternatives rejected because there was something better. The rejected alternatives are at the core of constitutional meaning. "Constitution builders *guess* about the future and what will most successfully guide them through it. They *know* about the past and the present and what they want to avoid."[29] The post-Communist regimes of Eastern Europe are constituted by their rejection of the Communist past. The South African regime is constituted by its rejection of racism.[30] "Aversive constitutionalism identifies a deeper sense of knowing who you are by knowing what you are not: it incorporates *a nation-making sense of rejection of a particular constitutional possibility*."[31]

The role of paradigm cases in constitutional law has been emphasized by Jed Rubenfeld.[32] He observes that such cases frequently anchor constitutional argumentation, sometimes in a way that is only distantly related to the semantic meaning of the pertinent constitutional provision. For example, the language of the Fourteenth Amendment is broad and vague. The Amendment was enacted with the specific purpose of invalidating the Black Codes. Passed by white-controlled legislatures after the Civil War, the Codes imposed specific legal disabilities on blacks, such as requiring them to be gainfully employed under contracts of long duration, excluding them from occupations other than manual labor, and disabling them from testifying against whites in court.[33] However, the language of the Fourteenth Amendment's text, standing alone, could support a judicial opinion upholding, say, a statute requiring all and only blacks to be employed as servants or laborers, by applying rationality review.[34] That would obviously be an interpretive travesty.[35] The unconstitu-

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28. Id.

29. Id.

30. Scheppele quotes the preamble of the 1996 South African constitution, which begins:

> We, the people of South Africa,
>
> Recognize the injustices of our past;
>
> Honour those who suffered for justice and freedom in our land . . . .

Id. at 304 (quoting S. Afr. Const., 1996, pmbl.).

31. Id. at 300. Harry Frankfurt pertinently observes: "As the set of its essential characteristics specifies the limits of what a triangle can be, so does the set of actions that are unthinkable for a person specify the limits of what the person can will to do. It defines his essence as a volitional creature." Harry Frankfurt, Rationality and the Unthinkable, *in* The Importance of What We Care About 177, 188 (1988).

32. Rubenfeld, Freedom and Time, supra note 15, at 178–95.

33. See generally Theodore Brantner Wilson, The Black Codes of the South (1965).

34. One may consider this a reductio ad absurdum of semantic originalism. Lawrence Solum argues that "the linguistic meaning of a legal text like the Constitution is a function of (1) the conventional semantic meanings of the words and phrases that make up the text and (2) the rules of syntax and grammar that combine the words and phrases." Solum, supra note 2, at 10. The question is not what the interpreters at the time meant. Rather, it

tionality of the Black Codes is so much a part of the Amendment's meaning that to say that this is a settled interpretation is a misleading understatement. Rather, "[t]his piece of the Fourteenth Amendment's meaning *precedes* interpretation."[36] Any interpretation of the Amendment must be a chain of inferences from the core commitment represented by this paradigm case.[37] Similarly with other provisions. The Fourth Amendment's ban on unreasonable searches and seizures should be read in light of the controversies over general searches and writs of assistance before the American Revolution.[38] The contract clause should be read as a response to debtor relief legislation in the 1780s.[39] The core aversion—that is, what the original drafters intended to avoid—in aversive constitutionalism must be honored in interpretation. A constitutional provision must be understood to address the very problem that it was designed to address. Constitutional arguments, Rubenfeld thinks, are likely to turn on different views about the principle that the paradigm case is taken to stand for.[40]

This Essay's claim that paradigm case reasoning is originalist is controversial. Rubenfeld thinks that reliance on paradigm cases "is not originalist . . . [but] commitmentarian."[41] But this supposes that "originalism defers (or is supposed to defer) to all the intentions or purposes that make up the original 'understanding' or 'will.'"[42] As we have

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is, as Gary Lawson and Guy Seidman emphasize, "*hypothetical* and *counterfactual*: What would a fully informed public audience at the relevant point in time, in possession of all relevant information about the Constitution and the world around it, have understood the Constitution to mean?" Gary Lawson & Guy Seidman, The Constitution of Empire: Territorial Expansion and American Legal History 9 (2004). The semantic approach implies that, in interpreting the meaning of "equal protection of the laws" in the Fourteenth Amendment, one would look up each of the words to discern its meaning in 1868, but one would not be allowed to notice that those words had anything to do with the mistreatment of the former slaves, since that is not part of their dictionary meaning.

Elsewhere Solum writes that "we can resort to those aspects of the framing and ratification of a given constitutional provision that would have been available to the general public." Solum, supra note 2, at 25. So perhaps context matters after all (and perhaps this is what Lawson and Seidman are saying). But then semantic originalism is a misnomer, because we are now looking beyond the semantic meaning of the constitutional text.

35. Rubenfeld, Freedom and Time, supra note 15, at 181.

36. Id. at 183.

37. Id. at 178–95. In this sense, the meanings of constitutional provisions are indeed fixed at the time of the framing. Thus paradigm case interpretation fits Solum's definition of originalism. See Solum, supra note 2. That fixed meaning is not a rule, but Solum concedes that the fixed meanings may not be rules.

38. See Jed Rubenfeld, Revolution by Judiciary: The Structure of American Constitutional Law 32–33 (2005) [hereinafter Rubenfeld, Revolution] (describing historical context of Fourth Amendment limitations).

39. Id. at 67–68.

40. Rubenfeld, Freedom and Time, supra note 15, at 194–95.

41. Id. at 184.

42. Id. Rubenfeld elsewhere elaborates on this critique of originalism. Id. at 62–65, 87–88.

seen, however, this is only one strand of originalism. Original commitment is another variety of originalism, as entitled to the label as any of the others. Jack Balkin agrees with Rubenfeld that paradigm case reasoning is not originalist. Balkin thinks that originalist argument is, strictly speaking, a method of text, rule, standard, and principle.[43] This, he argues, excludes Rubenfeld's claim that the paradigm cases that motivated the framing of certain provisions have constitutional status.[44] If, however, originalist argument is argument that relies on the origins of the constitutional provisions to delimit their meaning, then paradigm case reasoning is indeed a species of originalism.[45] It takes its force from its capacity to imaginatively connect us to a commitment that the nation made at the time of the framing, but, like other originalisms, it leaves a great deal of room for interpretive discretion. Balkin evidently thinks that paradigm cases are excessively constraining,[46] but any constraint comes from background cultural rules, and these shift over time. Rubenfeld observes that paradigm cases only rule some interpretations out; they don't rule any in.[47] McConnell observes: "In choosing and analyzing paradigm cases, Rubenfeld is guided not by a historical understanding of the 'principles and propositions that commit[ted] the nation in writing never again to permit certain evils,' as his theory demands, but by present-day conceptions of those principles and those evils."[48]

Rubenfeld writes of "the paradigm-case method,"[49] but there is really no method here, just a source of law that must somehow be accounted for. A paradigm is like a precedent: you are bound by it, but you can have lots of fun construing and recharacterizing it. Perhaps this gives interpreters too much discretion, but Rubenfeld's discussion of the role of paradigm cases in constitutional law is descriptive as well as normative. This is how Americans do constitutional law.

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43. Balkin, Living Originalism, supra note 14, at 6.

44. Id. at 345 n.23.

45. Berman so identifies it. See Berman, supra note 2, at 28 n.70. In Balkin's terminology, paradigm cases are "a different linguistic technology of regulation and constraint." Balkin, Living Originalism, supra note 14, at 43. Put in terms of his taxonomy, it is a standard, not a principle.

46. Commitments, he writes, "always exist against a background of assumptions about how society is organized, what is technologically feasible, and how the world works. Social, economic, and technological changes might undermine these background assumptions." Balkin, Living Originalism, supra note 14, at 346. Changes in these assumptions may very well change the way in which a paradigm case is interpreted—for example, what one thinks is wrong about slavery—but that is different from abandoning the paradigm case altogether.

47. Rubenfeld, Freedom and Time, supra note 15, at 194.

48. Michael W. McConnell, Textualism and the Dead Hand of the Past, 66 Geo. Wash. L. Rev. 1127, 1138 (1998).

49. See generally Jed Rubenfeld, The Paradigm-Case Method, 115 Yale L.J. 1977 (2006).

Rubenfeld doesn't say much about what one does with a paradigm case.[50] This is not a criticism. In fact, there is not a lot to say. But something can be said about why there is not a lot to say.

What is at the core of our aversive constitutionalism is not a rule, or even a standard, but rather commitments rooted in paradigm cases. A commitment, Rubenfeld rightly observes, is not necessarily exhausted by the specific intentions of the person who made it.[51] She may find on reflection that her commitment constrains her in ways that she did not contemplate when she made it. But by what process of reasoning could that happen?

The meaning of paradigm cases resembles, but is importantly different from, Ronald Dworkin's account of the meaning of abstract constitutional provisions. Dworkin argues that the abstract clauses of the Constitution were intended to make interpreters focus on the moral concepts to which they refer: "The clauses are vague only if we take them to be botched or incomplete or schematic attempts to lay down particular conceptions. If we take them as appeals to moral concepts they could not be made more precise by being more detailed."[52] Any such broadly worded clause, Dworkin thinks, should be understood to state a principle, a reason that must be given weight in deciding what the rule is in particular cases.[53]

The core of the Thirteenth Amendment, however, is neither a moral concept nor a principle. It is the decision to reject a specific historical evil. It is a specific moral judgment about a particular case.

Dworkin's position, that the Constitution should be read to stand for specific moral principles, conflates two different claims. One is that the Constitution embodies moral judgments. The other is that those judgments take the form of principles. Dworkin's conflation presupposes without argument that morality concerns the application of abstract principles to specific cases.

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50. Rubenfeld comes close to acknowledging his silence on this point:

> The task of building up doctrine from paradigm cases is of course an open-ended one—quite familiar to judges in a common law system—that necessarily involves normative judgment. That is why I refer to the effort to 'do justice' to a constitutional provision in light of its paradigm cases.

Id. at 198.

51. Rubenfeld, Freedom and Time, supra note 15, at 186.

52. Ronald Dworkin, Taking Rights Seriously 136 (rev. ed. 1978).

53. See id. at 77–78. There is a sense in which a paradigm case is a principle, thus defined, but, so far as I am aware, every example of a principle that Dworkin offers is capable of being stated in general propositional form, with recourse directly to that proposition when applying the principle to future cases. See, e.g., Ronald Dworkin, Law's Empire 435 n.7 (1986) (noting tension between principles "that people should be free to do what they wish with their own property" and "that people should begin life on equal terms"). It is characteristic of paradigm cases that no such general proposition exhausts the law's meaning, because no such general proposition can completely capture the historical specificity of the paradigm.

Albert Jonsen and Stephen Toulmin observe that, in contemporary philosophy, there is a deep conflict between "two very different accounts of ethics and morality: one that seeks eternal, invariable principles, the practical implications of which can be free of exceptions or qualifications, and another, which pays closest attention to the specific details of particular moral cases and circumstances."[54] Jonsen and Toulmin are proponents of the latter approach, which they find in the medieval tradition of casuistry. There is, they think, no "ethical algorithm" that can provide definitive answers to moral questions.[55] Rather, the locus of moral certitude, to the extent that certitude is available, lies in a "shared perception" of what is "*specifically* at stake in particular kinds of human situations."[56] Persuasive moral argument is less likely to be a deduction from inescapable premises than a rich description of the specific situation at hand.

The "particularist" school in contemporary moral philosophy attempts to rigorously work out the consequences of the perspective that Jonsen and Toulmin offer.[57] Its central claim is that moral principles are not necessary to correct moral judgment and can in fact lead to moral error. Moral reasons may vary in their reason-giving force: it is usually good to be considerate, but it is not good to wipe the torturer's brow, even though that is a considerate thing to do.[58] Principles may be helpful, but "no suggested principles are anything like flexible enough to cover the ground and do the job we require of them."[59] Ethics is rather about the appropriate perception of specific situations, and "the situations we encounter differ from each other in subtle ways that no panoply of principles could ever manage to capture. Principles deal in samenesses, and there just aren't enough samenesses to go round."[60]

Particularism allows for reasoning by analogy. But no analogy is conclusive:

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54. Albert R. Jonsen & Stephen Toulmin, The Abuse of Casuistry: A History of Moral Reasoning 2 (1988).

55. Id. at 7.

56. Id. at 18.

57. The particularists' claims are controversial. See generally the essays, by both particularists and their critics, collected in Moral Particularism (Brad Hooker & Margaret Olivia Little eds., 2000). Their position is, however, a possible account of morality, and so it is worth thinking about what constitutional reasoning would look like if that account were correct. That inquiry calls attention to the possibility (which the Thirteenth Amendment illustrates) that what the Constitution enacts, at least in some provisions, is a particular moral judgment, not a rule or a principle.

58. The example is drawn from Jonathan Dancy, Moral Particularism, Stanford Encyclopedia of Philosophy (Jan. 14, 2009), http://plato.stanford.edu/entries/moral-particularism/ [hereinafter Dancy, Moral Particularism] (on file with the *Columbia Law Review*).

59. Jonathan Dancy, Ethics Without Principles 2 (2004).

60. Id.

> A particularist can perfectly well point to how things are in another perhaps simpler case, and suggest that this reveals something about how they are in the present more difficult one. There need be no generalist suggestion that since this feature made a certain difference there, it must make the same difference here. But our judgement can be informed, and indeed defended, by seeing the way in which a feature functions in situations that resemble the present one in various ways. What we learn is not how things *must* be here, but how they might very well be.[61]

The Thirteenth Amendment may be taken as an illustration of the particularists' argument: Particularists emphasize the specific details of a particular moral situation rather than its relation to any overarching principle. The Thirteenth Amendment was enacted to right a specific moral wrong: slavery. The moral judgment it embodies is, therefore, not a rule or a standard or a principle. Instead, consistent with particularist theory, it is a judgment about this particular case.

III. THE THIRTEENTH AMENDMENT AND ABSTRACTION

Particularism in ethics thus entails no determinate decision procedure. Practice at moral discernment begets better discernment. As in medicine, experience with the various pathologies can produce a judgment that this case should be treated like one encountered before, but that judgment is not necessarily reducible to rules.

The Thirteenth Amendment already involves categorization, because antebellum slavery is not a particular act, but an institution that lasted for centuries. It is a pattern of activities, maintained through a pattern of ideas and assumptions. The particular judgment codified in the Thirteenth Amendment is a generalization across the parts of the pattern, a judgment that this pattern is wrong and is not to be repeated.

One can, however, read the judgment narrowly or broadly, depending on one's understanding of the salient aspects of the evil. One might require an exceedingly close resemblance between any challenged practice and antebellum slavery in order to bring the Amendment into play. That is a danger of paradigm case reasoning as a source of constitutional law: The provision may be read to bar only the specific practices that impelled its enactment.[62] Rubenfeld thinks that paradigm case reasoning proceeds by "extrapolating general principles from the foundational paradigm cases and applying those principles to the controversy at hand."[63] Like Dworkin, Rubenfeld thinks that principles must mediate between the paradigm case and the resolution of new controversies. But

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61. Dancy, Moral Particularism, supra note 58.

62. This objection is raised against Rubenfeld in Michael J. Gerhardt, The End of Theory, 96 Nw. U. L. Rev. 283, 324 (2001).

63. See Rubenfeld, Freedom and Time, supra note 15, at 191.

a paradigm case can be confined to its facts, or to circumstances that very closely approximate those facts. If what is salient about the paradigm is a wrong that is rare or unlikely to be repeated, then its analogical force will be weak.[64]

This happened to the Thirteenth Amendment in *Hodges v. United States*, which held that Congress had no power to pass the Civil Rights Act of 1866.[65] In *Hodges*, several white men had used violence and threats to force African American workers to leave their jobs at a sawmill. The Court held that the federal statute, which criminalized interference with workers' right to make contracts without regard to race, was unconstitutional: "[N]o mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery."[66] This was because slavery had a very narrow definition. It was "a condition of enforced compulsory service of one to another."[67] It was true that these victims were deprived of their freedom to perform their contracts. "But every wrong done to an individual by another, acting singly or in concert with others, operates pro tanto to abridge some of the freedom to which the individual is entitled."[68]

Similarly narrowing moves had appeared in earlier cases. The Thirteenth Amendment did not authorize federal antidiscrimination legislation, because "[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination."[69] Nor did it bar state-mandated racial segregation:

> A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.[70]

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64. The Third Amendment is an example. Quartering of troops in citizens' homes in peacetime is a very specific paradigm case, but hardly any analogous evils have been presented. This can be seen in the paucity of case law on the Third Amendment, which has only five different cases noted in the U.S.C.A. See Notes of Decisions, Third Amendment, *in* Amendment 1 (End) to Amendment 4, United States Code Annotated: Constitution of the United States Annotated 208, 209 (2004).

65. 203 U.S. 1, 2–3 (1906), overruled by Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

66. Id. at 18.

67. Id. at 16.

68. Id. at 17. This point is not as devastating as the Court hopes, because it may just mean that the Amendment gives Congress enormous power to bring about human liberty by any means necessary. See Jack Balkin & Sanford Levinson, The Dangerous Thirteenth Amendment, 112 Colum. L. Rev. 1459, 1470–77 (2012).

69. The Civil Rights Cases, 109 U.S. 3, 24 (1883).

70. Plessy v. Ferguson, 163 U.S. 537, 543 (1896), overruled by Brown v. Bd. of Educ., 347 U.S. 483 (1954).

It is, however, consistent with particularism in morality to say that there are *some* samenesses across moral situations, and that situation *B* is morally analogous to situation *A*. Particularism, as noted above, permits reasoning by analogy. Thus, a paradigm case can legitimately generate new law.[71] William Brennan, concurring in the decision to ban school prayers, implicitly relied on paradigm case reasoning when he wrote in 1963 that the Court should ask whether challenged practices "threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent."[72] The question is what are "those substantive evils the fear of which called forth the Establishment Clause of the First Amendment"?[73] These can be described very specifically or very abstractly. There is no clear answer to the old levels-of-abstraction problem in constitutional law.[74]

The levels-of-abstraction problem also presents itself when we try even to describe the paradigm case. *Hodges* itself construed slavery very narrowly, as involving only the deprivation of the formal legal right to contract, not the practical ability to engage in contracting activity.[75] Because there was no formal deprivation of the right, there was no constitutional violation to justify the exercise of congressional power. Karlan observes that the *Hodges* Court—in 1906!—"viewed the problems of blacks as already solved."[76]

Today, of course, congressional power under the Thirteenth Amendment is read quite broadly.[77] This provision, the Court has held, "authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and incidents of a society half slave and half free."[78] On the basis of this interpretation, the

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71. "Can," not "must." Consider again the sterile jurisgenerative history of the Third Amendment. See supra note 64.

72. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 236 (1963) (Brennan, J., concurring).

73. Id. at 241. A defense of present Establishment Clause law that is originalist in this sense, building on Brennan's insight, is Andrew Koppelman, Defending American Religious Neutrality (forthcoming Jan. 2013).

74. For a good introduction to that problem, see Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution (1991). Because even an abstract understanding of the original meaning is nonetheless grounded in a paradigm case, what is offered here is not the "I Have No Idea Originalism" of Justice Antonin Scalia, which I have previously criticized. See Koppelman, Phony Originalism, supra note 26, at 735.

75. Hodges v. United States, 203 U.S. 1, 17–19 (1906) ("[O]ne of the disabilities of slavery . . . was a lack of power to make or perform contracts . . . [but] it was not the intent of the [Thirteenth] Amendment to denounce every act done to an individual which was wrong if done to a free man").

76. Pamela S. Karlan, Contracting the Thirteenth Amendment: *Hodges v. United States*, 85 B.U. L. Rev. 783, 807 (2005).

77. See Rebecca E. Zietlow, The Promise of Congressional Enforcement, *in* Promises of Liberty, supra note 1, at 182, 186–91 (discussing cases).

78. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 n.78 (1968).

Court in *Jones v. Alfred H. Mayer Co.* overruled *Hodges* and sustained Congress's authority to outlaw private racial discrimination: "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation."[79] The decision to outlaw private housing discrimination, the Court held, is a reasonable exercise of this power. "[W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery."[80]

Badges, incidents, vestiges, relics: the Amendment reaches all of these because they are associated in some way with slavery.[81] When the Court overruled *Hodges*, it clearly was persuaded that injuries that were not themselves antebellum slavery were nonetheless analogous or connected enough with that evil to be the legitimate objects of congressional concern. This leaves a pretty big area of contestation. The broad "badges and incidents" language has been relied on to address such disparate evils as racial profiling and gender and sexual orientation discrimination.[82] The Second Circuit upheld on this basis a law criminalizing hate crimes based not only on race, but also on religion and national origin.[83]

The breadth of *Jones*, Aviam Soifer observes, "clearly has irritated many justices ever since it was handed down in 1968."[84] Jennifer Mason McAward argues that "*Jones* is arguably a remnant of the past"[85] after *City of Boerne v. Flores*, which signaled aggressive judicial review of congressional exercises of the Reconstruction powers.[86] *Jones*'s broad

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79. Id. at 440.

80. Id. at 442–43.

81. See George A. Rutherglen, The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment, *in* Promises of Liberty, supra note 1, at 163.

82. Examples of arguments that rely on this language are collected in Jennifer Mason McAward, The Scope of Congress's Thirteenth Amendment Enforcement Power After *City of Boerne v. Flores*, 88 Wash. U. L. Rev. 77, 81 n.23 (2010), and Alexander Tsesis, The Thirteenth Amendment and American Freedom 137–60 (2004).

83. See United States v. Nelson, 277 F.3d 164, 190 (2d Cir. 2002). The Supreme Court suggested in *Griffin v. Breckenridge* that the Thirteenth Amendment is not confined to injuries to blacks, or even to those based on race, and held that the Ku Klux Klan Act, outlawing private conspiracies to deprive any class of persons of their constitutional rights, was a valid exercise of Congress's Thirteenth Amendment powers. 403 U.S. 88, 96 (1971). In order to avoid creating a general federal tort law, the Court held that the mental element required for a violation of the statute was "some racial, *or perhaps otherwise class-based*, invidiously discriminatory animus." Id. at 102 (emphasis added). In a footnote, the Court added that "[w]e need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable." Id. at 102 n.9.

84. Aviam Soifer, Protecting Full and Equal Rights: The Floor and More, *in* Promises of Liberty, supra note 1, at 199.

85. McAward, supra note 82, at 81.

86. See City of Boerne v. Flores, 521 U.S. 507, 519 (1997) ("Congress' power under

deference to Congress "would create serious separation-of-powers issues if taken to its logical limit."[87] Congress cannot be the judge of its own powers. McAward advocates that the scope of the Amendment be limited to "the eradication, prevention, and remedy of slavery and coerced labor."[88]

An answer to McAward appropriately begins with Lawrence Sager's underenforcement thesis, which has particularly impressive explanatory power in this context. Sager argues that some constitutional provisions are judicially underenforced because of the Court's concern about its own limitations, concern which does not apply when Congress acts. Thus

> [o]ne explanation of the great disparty [sic] between the scope of § 1 and § 2 of the thirteenth amendment is that the court has confined its enforcement of the amendment to a set of core conditions of slavery, but that the amendment itself reaches much further; in other words, the thirteenth amendment is judicially underenforced.[89]

Sager's underenforcement thesis must be true of the Thirteenth Amendment. Consider the federal antipeonage statute, which imposes criminal penalties on whoever "knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person."[90] Justice Brennan observed that "as a criminal statute," this provision "must be interpreted to conform with special doctrines concerning notice, vagueness, and the rule of lenity."[91] It follows that the meaning of involuntary servitude in the statute is "necessarily narrower than it would be if the issue were what enforceable civil rights the Thirteenth Amendment provides of its own force or if the issue here concerned the scope of Congress's Thirteenth Amendment authority to pass laws for abolishing all badges or incidents of slavery or servitude."[92] The requirements Brennan cites point in a different direction as well. The same requirements of notice, vagueness, and lenity mean that, absent a statute, no court could impose criminal penalties on private actors who enslave others. The self-executing provision of the Amendment cannot fully be given effect without congressional enforcement.

McAward rejects Sager's claim in this context. Congress, she argues, only has a choice of means; it cannot decide the substantive scope of the

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§ 5, however, extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment. . . . Congress does not enforce a constitutional right by changing what the right is.").

87. McAward, supra note 82, at 130.

88. Id. at 144.

89. Lawrence Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1219 n.21 (1978).

90. 18 U.S.C. § 1584 (2006).

91. United States v. Kozminski, 487 U.S. 931, 961 n.8 (1988) (Brennan, J., concurring in the judgment).

92. Id.

Amendment, because that is a judicial function.[93] But the importance of the paradigm case complicates the question of the Amendment's meaning, and shows the limits of judicial competence in this area.

A contemporaneous defense of *Jones*'s expansive reading of the Thirteenth Amendment notes the indispensable role of judgment in discerning the Amendment's scope:

> Although "slavery" as an abstract form does not encompass mere discrimination in the sale of housing, the attention of the congressmen in 1864 and 1865 was not directed simply at an abstract model of slavery, but at a particular instance of that evil which existed in the South. Having flourished for over a century, southern slavery had built up strong interests among those who depended upon it and ingrained habits and attitudes in men of both races. It involved a complex of social and economic as well as legal interrelationships. . . .
>
> . . . [The Thirteenth Amendment] appears to have been designed as a full response to the evil perceived. As modern perceptions of that evil grow, the response may take on increasingly broader scope.[94]

The problem of aversive constitutionalism is that, while constitution builders may indeed have "a clearer vision of who and what they are *not* rather than of who and what they *are*,"[95] that vision will still be contestable at its boundaries, and that contestability will change over time. Slavery is wrong, but at different times we will have different accounts of what is wrong with it, and so we will have different accounts of what it is.[96] *Pace* McConnell, present-day conceptions of the evil of slavery will inevitably color our interpretation of the Thirteenth Amendment. Otherwise we might have to doubt *Jones*'s assumption that racist discrimination is part of what the Amendment prohibits, since racism was so pervasive at the time of the framing.[97]

Jones's claim that racial discrimination is barred by the Thirteenth Amendment is contestable. It is also originalist. Aversive constitutional-

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93. McAward, supra note 82, at 140. She also writes that the Amendment "arguably is not underenforced at all"; perhaps it only abolishes slavery. Id. But she does not seem to really believe this, because she does not call for the complete overruling of *Jones*.

94. Note, The "New" Thirteenth Amendment: A Preliminary Analysis, 82 Harv. L. Rev. 1294, 1301–02 (1969). The soundness of *Jones* depends on this kind of argument, since it is doubtful that the framers of the Thirteenth Amendment, with their broad attachment to freedom of contract, would have interpreted slavery this way. Justice Harlan emphasized this point in his dissent. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 476 (Harlan, J., dissenting).

95. Scheppele, supra note 27, at 298.

96. This problem is inevitably true of any account of any historical evil, which will make salient the concerns of the historian and his time. See generally E.H. Carr, What is History? 1–25 (2d ed. 2001).

97. See Berger, supra note 24, at 131 (discussing Thirteenth Amendment framers' opposition to racial equality).

ism is a kind of originalism. It keeps faith with the founders' decision to break with an aspect of their own past. They committed themselves to never doing *that* again. We honor them by honoring that commitment. But the best interpretation of that commitment may turn out to bind us in ways that we did not anticipate when we made it.[98]

If slavery is a complex system, the description of which depends on thick sociological and empirical information, this is a challenge to the judiciary, not only at the remedy stage (as with criminal penalties for enslavement), but also at the interpretive one. That challenge supports the underenforcement account: Congress must play a large role because of the correspondingly large limits to judicial competence. This conclusion seems to be what the Supreme Court had in mind when it referred to "the inherently legislative task of defining 'involuntary servitude.'"[99] Second Circuit Judge Guido Calabresi inferred that "the task of defining 'badges and incidents' of servitude is by necessity even more inherently legislative."[100]

It is inherently legislative because the judiciary has no special advantage even in the core function of knowing a constitutional violation when it sees it. *Pace* McAward, the *Jones* framework imposes enforceable boundaries on congressional power.[101] But these boundaries are appropriately drawn in a very deferential fashion, applying rational basis review.[102] "Congress has the power under the Thirteenth Amendment *rationally* to determine what are the badges and incidents of slavery . . . ."[103]

IV. FORCED PREGNANCY AND SLAVERY

The argument thus far has focused on the scope of legislative power under the Amendment. It also has implications for the Amendment's judicially enforceable reach. Congress has the power to reach slavery's badges, incidents, vestiges, and relics, but reliance on the legislature may be inadequate when servitude is imposed upon individuals. If the Amendment gives Congress broad power, then it would be odd for the

98. See Rubenfeld, Revolution, supra note 38, at 104–07. Most pertinently, he observes that commitments have objective components: "[T]hrough a commitment, we engage ourselves to something we think of as existing at least in part outside ourselves." Id. at 106. Thus, having committed oneself to become a parent, one may discover that this demands more of one's free time than one anticipated, but one is committed nonetheless. Id. The analogy here is that, having committed ourselves to abolishing antebellum slavery, we may discover that there were components of antebellum slavery that we were hoping to preserve.

99. United States v. Kozminski, 487 U.S. 931, 951 (1988).

100. United States v. Nelson, 277 F.3d 164, 185 n.20 (2d Cir. 2002).

101. See supra text accompanying notes 85–88 (describing McAward's view).

102. Rational basis review is, of course, not infinitely deferential. Sometimes it is used to invalidate statutes. See, e.g., Romer v. Evans, 517 U.S. 620, 632 (1996).

103. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) (emphasis added).

Amendment's self-executing force to be as narrow as *Hodges* implies. Congress is, after all, enforcing the Amendment. If Congress's power is broad, then the Amendment itself cannot be too narrow.

When we consider the self-executing Thirteenth Amendment, we are still asking the same question: Is the practice complained of sufficiently analogous to the specific, paradigmatic evil that the Amendment prohibits? An argument from analogy depends on a detailed description of both the settled case and the problematic one, to see if the salient description of the first highlights properties that are relevant to the assessment of the other.

With these considerations in place, we can finally turn to the question this Essay proposes to answer: Does an originalist reading of the Thirteenth Amendment support a right to abortion?

I've argued in my earlier work that the settled case law on the Thirteenth Amendment supports such a right.[104] Here is a quick summary. One line of the case law is concerned with individual liberty. The Court has explained that "involuntary servitude" refers to "the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own *person*, property and *services*"[105] or "that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude."[106] Even *Hodges*, with its definition of slavery as "a condition of enforced compulsory service of one to another," is part of this line of decisions.[107] The germinal case construing the self-executing force of the Thirteenth Amendment is *Bailey v. Alabama*, which invalidated a law that, in effect, made it a crime to breach a labor contract after accepting an advance.[108] *Bailey* in effect constitutionalized the old common law rule against ordering specific performance of personal service contracts.[109] It follows that "involuntary servitude" includes coerced pregnancy. The pregnant woman may not serve at the fetus's *command*—it is the state that, by outlawing abortion, supplies the element of coercion[110]—but she is serving involuntarily for the fetus's *benefit*, and this is what the Court has said that the Amendment forbids.

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104. See supra note 1.

105. Plessy v. Ferguson, 163 U.S. 537, 542 (1896) (emphases added).

106. Bailey v. Alabama, 219 U.S. 219, 241 (1911).

107. Hodges v. United States, 203 U.S. 1, 16 (1906); see also supra notes 65–68 and accompanying text (describing narrow reading of slavery in *Hodges*).

108. 219 U.S. 219, 222 (1911) ("A breach of contract for personal service upon which advances have been received cannot be made prima facie evidence of a fraudulent intent in entering into the contract.").

109. See Restatement (Second) of Contracts § 367 (1981) ("A promise to render personal service will not be specifically enforced.").

110. The same is, of course, true of any system of slavery sanctioned by positive law, such as that of the antebellum South: The master did not need to resort to self-help to control his slaves but could rely on the authorities to come to his assistance if necessary.

A second line of case law, of which *Jones v. Alfred H. Mayer Co.* is the leading case, is concerned with equality. Here is where badges of inferiority matter. If indeed "[t]here can be no doubt that our Nation has had a long and unfortunate history of sex discrimination,"[111] this discrimination has involved the use of motherhood to define and limit women's social, economic, and political capacities. Because the subordination of women, like that of blacks, has traditionally been reinforced by a complex pattern of symbols and practices, the Amendment's prohibition extends to those symbols and practices.

Thus, the Thirteenth Amendment argument for abortion rights draws on both of these lines of case law. The Thirteenth Amendment is both libertarian and egalitarian, because the paradigmatic violation deprives its victims of *both* liberty and equality. It compels some private individuals to serve others, and it does so as part of a larger societal pattern of imposing such servitude on a particular caste of persons. If the libertarian and egalitarian rules of decision are both plausible readings of the Amendment, it is because each stresses one undeniable aspect of the paradigmatic case. The courts may invalidate laws that impose servitude only on individuals, as the Court said it was doing in *Bailey*, and Congress may outlaw practices that stigmatize, but do no more than stigmatize, traditionally subjugated groups, as in *Jones*. But if either of *these* cases were paradigmatic of the Amendment's prohibition, the other would be inexplicable. While the Amendment has been construed broadly to encompass both these injuries, each involves only one of the two main aspects of what the Amendment forbids. Compulsory pregnancy involves both. Since the Amendment reaches far enough to forbid either of these injuries standing alone, a fortiori it forbids laws that inflict both of them at once.[112]

The originalist objection is obvious: "[N]o reasonable person at the time would have thought that unwanted pregnancy was a form of involuntary servitude."[113] Here the importance of the paradigm case is crucial.

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111. Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion).

112. This thesis obviously elicits objections, which I have addressed in my earlier work. On the relevance of compelled jury service and the military draft, see Koppelman, Forced Labor, supra note 1, at 518–22. On the relevance of the obligations that law imposes on parents, see Koppelman, Forced Labor Revisited, supra note 1, at 236–37. The claim that the pregnancy is not involuntary if the woman is compelled to bring it to term after voluntarily engaging in sexual intercourse is addressed infra in the text accompanying note 153–160.

113. John O. McGinnis, Decentralizing Constitutional Provisions Versus Judicial Oligarchy: A Reply to Professor Koppelman, 20 Const. Comment. 39, 56 (2003). This objection is telling only if one follows one particular school of originalism. McGinnis and Michael Rappaport argue that "one should follow the principles of interpretation that a reasonable person at the time of the framing and ratification thought would be applied to the Constitution." John O. McGinnis & Michael Rappaport, Original Interpretive Principles as the Core of Originalism, 24 Const. Comment. 371, 372 (2007). They think that the original expected applications of otherwise vague provisions are powerful evi-

Forced pregnancy and childbearing are not merely *analogous* to the slavery that existed before the Civil War. In my earlier work, I briefly noted that here the relation to the paradigm case is one of identity, not analogy:

> [M]andatory motherhood and loss of control over one's reproductive capacities were partially *constitutive* of slavery for most black women of childbearing age, whose principal utility to the slaveholding class lay in their ability to reproduce the labor force. Unlike (unmarried) white women, they had no right even in theory to avoid pregnancy through abstinence; they were often raped with impunity, by their masters and others. Emancipation was intended to free them from such indignities. The effect of abortion prohibitions (whose impact, by the way, has been felt mainly by poor women who are disproportionately black) is thus to consign women to a kind of servitude from which the amendment was supposed to free them.[114]

For women, loss over their reproductive capacities, and compulsion to bear children whether they wished or no, was part of the experience of being a slave. "Every indignity that comes from the denial of reproductive autonomy," Dorothy Roberts observes, "can be found in slave women's lives—the harms of treating women's wombs as procreative vessels, of policies that pit a mother's welfare against that of her unborn child, and of government attempts to manipulate women's childbearing decisions through threats and bribes."[115] An ex-slave, Harriet Jacobs, wrote: "Slavery is terrible for men, but it is far more terrible for women."[116] Henry Louis Gates, Jr. observes that Jacobs's autobiography "charts in vivid detail precisely how the shape of her life and the choices she makes are defined by her reduction to a sexual object, an object to be raped, bred, or abused."[117]

The ban on importing slaves after 1808 produced a steady inflation in their price, which made enslaved women's childbearing even more valuable. Slave women's capacity to bear children was integral to their value and status from the earliest beginnings of the New World slave system,[118] but it became crucial after the slave trade was abolished in 1808.

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dence of the original meaning of those provisions. Id. In other accounts of originalism—paradigm case reasoning is one example, see supra note 37 and accompanying text—it matters less what the people of the time may have thought or have been likely to think.

114. Koppelman, Forced Labor, supra note 1, at 508–09 (footnotes omitted).

115. Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty 23 (1997).

116. Id. at 29 (quoting Harriet Jacobs, Incidents in the Life of a Slave Girl 64 (Nellie Y. McKay & Frances Smith Foster eds., W.W. Norton & Co. 2001) (1861)).

117. Id. at 23 (quoting Henry Louis Gates, Jr., To Be Raped, Bred or Abused, N.Y. Times Book Rev., Nov. 22, 1987, at 12).

118. See generally Jennifer L. Morgan, Laboring Women: Reproduction and Gender in New World Slavery (2004).

The American slave system depended on maintaining itself through reproduction.[119]

Slave women faced constant, coercive inducements to bear children. Some masters calculated that natural increase was the basis of at least five to six percent of their profit.[120] Thomas Jefferson instructed his plantation manager in 1820, "I consider a woman who brings a child every two years as more profitable than the best man on the farm."[121] Pregnant women usually did less work and received greater rations, and additional clothing and food were offered as inducements to have larger families.[122] Sometimes women were promised freedom if they bore an unusually large number of children.[123] "On plantations where the work load was exhausting and back breaking, a lighter work assignment could easily have proved incentive to get pregnant as often as possible . . . ."[124]

On the other hand, "a barren woman was separated from her husband and usually sold."[125] By bearing children, women reduced their danger of being separated from their loved ones.[126] One North Carolina planter threatened to flog a group of women slaves to death, and when they asked what they had done, explained: "Damn you I will let you know what you have done; you don't breed, I have not had a young one from you for several months."[127] If a couple were separated by sale or death, each was expected to quickly find a new spouse.[128] One ex-slave remembered: "A slave girl was expected to have children as soon as she became a woman. Some of them had children at the age of twelve and thirteen."[129]

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119. See Roberts, supra note 115, at 24.

120. Deborah Gray White, Ar'n't I a Woman? Female Slaves in the Plantation South 98 (rev. ed. 1999).

121. Roberts, supra note 115, at 25 (quoting Thomas Jefferson, Letter to John W. Eppes (June 30, 1820), *in* Thomas Jefferson's Farm Book: With Commentary and Relevant Extracts from Other Writings 45, 46 (Edwin Morris Betts ed., 1953)). Roberts quotes another planter's calculations: "I own a woman who cost me $400, when a girl, in 1827. . . She now has three children, worth over $3000 . . . I would not this night touch $700 for her. Her oldest boy is worth $1250 cash, and I can get it." Id. at 24 (quoting Herbert G. Gutman, The Black Family, *in* Slavery and Freedom, 1750–1925, at 77, 78 (1976)).

122. Id. at 25.

123. Id. at 26.

124. White, supra note 120, at 100.

125. Id. at 101 (quoting Interview with Berry Clay (May 8, 1937), *in* Slave Narratives: A Folk History of Slavery in the United States from Interviews with Former Slaves 189, 191 (Works Projects Admin. ed., 1941)).

126. Roberts, supra note 115, at 26.

127. Id.

128. White, supra note 120, at 103.

129. Peggy Cooper Davis, Neglected Stories: The Constitution and Family Values 178 (1997).

Sale of a slave woman was voidable if the seller certified that she was fit to bear children and it could be demonstrated that this was false.[130] The future children of a slave were devisable in a will, just like the future rents of a piece of real estate.[131]

Sometimes masters resorted to forced sex. Rose Williams, interviewed when she was ninety years old by the Federal Writers' Project in 1930, reported that when she was sixteen, her master moved her to the cabin of a male slave named Rufus. When Rufus came into her bunk, she fended off his advances with a poker.

> De nex' day de massa call me and tell me, "Woman, I's pay big money for you and I's done dat for de cause I wants yous to raise me chillens. I's put yous to live with Rufus for dat purpose. Now, if you doesn't want whippin' at de stake, yous do what I wants."
>
> I thinks 'bout massa buyin' me offen de block and savin' me from bein' sep'rated from my folks and 'bout bein whipped at de stake. Dere it am. What am I's to do? So I 'cides to do as de massa wish and so I yields.[132]

Forced mating of the kind described by Williams was unusual but not unknown. One ex-slave recalled that "massa pick out a p'otly man and a p'otly gal and just put 'em together. What he want am the stock."[133] Some ex-slave men recalled being used or rented as studs.[134] An extensive review of slave narratives found that five percent of the women and ten percent of the men mentioned deliberate slave-breeding.[135]

Finally, masters could sometimes profit by raping their female slaves. About ten percent of the slave population in 1860 was classified as "mulatto."[136] Most mixed-race children were the product of sex between white men and slave women. One historian notes that "when it came to sexual relationships between masters and slaves, even if rape in its conventional understanding was not an issue, the line between coercion and consent could often be a blurry one."[137] Formerly enslaved men repeatedly recounted the frustration of watching their families be victimized by

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130. White, supra note 120, at 100–01.

131. Roberts, supra note 115, at 33–34.

132. Women and Slavery in America: A Documentary History 109 (Catherine M. Lewis & J. Richard Lewis eds., 2011). "I never marries, 'cause one 'sperience am 'nough for dis nigger. After what I does for de massa, I's never want no truck with any man. De Lawd forgive dis cullud woman, but he have to 'scuse me and look for some others for to 'plenish de earth." Id. Other narratives by ex-slave women are collected in Patrick Minges, Far More Terrible for Women: Personal Accounts of Women in Slavery (2006).

133. Roberts, supra note 115, at 28.

134. Id.

135. Id. at 27. For additional examples, see Davis, supra note 129, at 176–79.

136. Roberts, supra note 115, at 29.

137. Joshua D. Rothman, Notorious in the Neighborhood: Sex and Families Across the Color Line in Virginia, 1787–1861, at 19–20 (2003).

whites.[138] In one sensational Virginia case, a white slaveowner was murdered by his own enslaved daughter after he attempted to rape her.[139]

There is also some evidence that some slave women practiced birth control and abortion: suspicious comments by owners, and stories of women who were deemed barren but who had children after emancipation.[140] Of course, if the slave women were able to induce abortions, they would have concealed that fact from their owners.

Paradigm case arguments in constitutional law, we saw earlier, tend to rely on present-day conceptions of what is wrong with the paradigmatic case.[141] Their originalist credentials are, however, strengthened by evidence that the framing generation had a similar understanding of that wrong. The habitual abuse of slave women was a persistent theme of abolitionist literature. Antislavery activist Stephen S. Foster declared that the slaveholder's "very position makes him the minister of unbridled lust" and leaves the slave woman to be "used by her claimant as his avarice or lust may dictate."[142] Harriet Martineau wrote in 1837 that "every man who resides on his plantation may have his harem, and has every inducement of custom, and of pecuniary gain, to tempt him to the common practice."[143] Fanny Kemble declared it "notorious, that almost every Southern planter has a family more or less numerous of illegitimate colored children."[144] One British visitor, after conversations with enslaved mothers of interracial children, concluded that the practice of interracial sex and selling one's own offspring, "instead of being very rare, is unhappily very general!"[145]

In light of this history, is compulsory pregnancy, the state-enforced creation of the very indignity that enslaved women suffered, a violation of the Thirteenth Amendment? Paradigm cases are indeterminate: They can be construed broadly or narrowly, depending on the interpreter's description of the underlying wrong. So here is a description of the underlying wrong. Under slavery, women's reproductive capacities were used to positively take over the entire course of their lives. Their bodily

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138. Id. at 138.

139. Id. at 149–63. The daughter and her two co-conspirators had their death sentences commuted and were sold and shipped to parts unknown. Id. at 163.

140. Roberts, supra note 115, at 46–49 (describing various abortion techniques said to be practiced by slaves and noting that some slave women practiced infanticide to prevent their children from living as chattel); White, supra note 120, at 84–86 ("Some Southern whites were certain that slave women knew how to avoid pregnancy as well as how to deliberately abort a pregnancy . . . . [A]n 1869 South Carolina court case revealed that a slave woman sold as 'unsound' and barren in 1857 had three children after emancipation.").

141. See supra note 37 and accompanying text (discussing concept of paradigm case).

142. Davis, supra note 129, at 175.

143. Rothman, supra note 137, at 133.

144. Id.

145. Id.

powers were seized, in the intrusive and degrading way that is unique to unwanted pregnancy, and directed to the end of producing children. No other prohibition in our entire legal system, with the possible exception of the bans on contraception that the Court invalidated in 1965, so entirely dominates the life of the person who is thus regulated.[146] Compulsory pregnancy is a badge of slavery, a practice that signifies the inferiority of the victim, and an incident, a legal consequence of the status of being a slave. This Essay has not said anything about the status of the fetus; perhaps there is a compelling interest that justifies this mistreatment of women.[147] But mistreatment is still mistreatment. When abortion is prohibited, the state is doing what it was doing when it enslaved women before the Civil War.

Any analogy can be rebutted by arguments that distinguish the settled case from the instant case. Here one might respond that forced pregnancy was not imposed on the enslaved women because they were *slaves*, but rather because they were *women*. Free women faced pressure to become mothers that, if not as intense as that brought to bear on slaves, was nonetheless enough to produce that result much of the time. Some of them were even impregnated by rape and forced to bear the children. Here one could deploy Justice Rehnquist's point, in his *Roe v. Wade* dissent, that abortion was illegal in most states at the time of the Fourteenth Amendment's framing.[148]

This response is familiar. The Court in the *Civil Rights Cases* denied that discrimination in public accommodations was a badge of slavery, because free blacks were subject to discrimination too.[149] The *Hodges* Court declared that "it was not the intent of the Amendment to denounce every act done to an individual which was wrong if done to a free man and yet justified in a condition of slavery."[150] It noted that under slavery, "not infrequently every free negro was required to carry with him a copy of a judicial decree or other evidence of his right to freedom or be subject to arrest. That was one of the incidents or badges of slavery."[151]

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146. Rubenfeld observes this fact but does not note its relevance in the context of the Thirteenth Amendment. See Rubenfeld, Freedom and Time, supra note 15, at 225 ("It is impossible to name a single prohibitory law in our legal system with greater affirmative, conscriptive, life-occupying effects than those imposed by a law forcing a woman to bear a child against her will."). He does, however, note that a much less severe imposition, "a law requiring blacks to shine white people's shoes," would be obviously unconstitutional, though even here he cites the Fourteenth rather than the Thirteenth Amendment. Id. at 205.

147. See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) ("[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.").

148. Roe v. Wade, 410 U.S. 113, 175–77 (1973) (Rehnquist, J., dissenting).

149. The Civil Rights Cases, 109 U.S. 3, 25 (1883).

150. Hodges v. United States, 203 U.S. 1, 19 (1906), overruled by Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

151. Id.

Yet no one had raised a Thirteenth Amendment objection to the 1892 act requiring Chinese laborers to secure and carry a certificate of eligibility to be in the United States, on pain of deportation.[152]

Slavery is a complex system. Property is familiarly regarded as a bundle of rights. Slavery is a bundle of disabilities. Each one of those disabilities is part of slavery and so raises Thirteenth Amendment concerns. The *Hodges* opinion assumes that, in light of the conceded power before the Civil War to impose specific legal burdens on certain races, the imposition of racist burdens could not be part of slavery. The Court's reasoning implies that a state could impose on free blacks something like the old documentation requirement, and Congress would have no power to prevent this. The documentation requirement was part of the bundle. So was loss of control over one's reproductive capacities, and being treated as a mere instrument of reproduction. So it will not do to respond that forced pregnancy is only part of the bundle and not the whole, especially when this particular part of the bundle was so integral a part of the wrong of slavery. If it is acceptable to force people to bear children, then what could be so bad about the considerably lighter burden of forcing them to pick cotton?

V. THE ASSUMPTION OF RISK OBJECTION

Another objection may be decisive for many readers: that abortion prohibitions are nothing like slavery because unless a pregnancy is a result of rape, a woman seeking an abortion has voluntarily assumed the risk of pregnancy. Even if she conscientiously used contraception, she should have known that no contraceptive method is entirely reliable.[153]

There are several things to be said about this response. The first is to notice how much it concedes. The standard objection to a constitutional right to abortion is that the Constitution is silent about it.[154] If, however, a woman's deliberate assumption of risk is necessary to break the resemblance to antebellum slavery, then that resemblance persists in cases of rape. And then the distinction between those pregnancies and others will need to be explained. Given the notorious difficulties of proving rape in court,[155] the set of nonconsensual sex acts is considerably larger than the

152. Id.

153. See, e.g., Office of Women's Health, Fed. Drug Admin., Birth Control Guide (August 2012), http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf (on file with the *Columbia Law Review*) (discussing reliability of various contraception methods).

154. See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting) (reasoning that woman's liberty to have abortion is not protected because "the Constitution says absolutely nothing about it").

155. See Susan Estrich, Real Rape: How the Legal System Victimizes Women Who Say No 28 (1987) ("[S]imple rape . . . cases are difficult if not virtually impossible to prove.").

set of deeds that produce criminal convictions.[156] A state will have a constitutional obligation to permit abortion with respect to any pregnancy that was generated by a sex act that is within the larger set. It is not clear how that can be done consistently with a general criminal prohibition of abortion. The case-by-case inquiries would be intrusive and their results unreliable.

The moral significance of rape as a marker of the involuntariness of pregnancy would also have to be clarified. Its distinguishing feature cannot be the mere fact that the woman who has *not* been raped could have conducted her life in a way that avoided the risk of pregnancy. As Judith Jarvis Thomson observes, "by the same token anyone can avoid a pregnancy due to rape by having a hysterectomy, or anyway by never leaving home without a (reliable!) army."[157] These are, of course, unreasonable constraints to impose on anyone. But then, why is it reasonable to demand celibacy of women who do not wish to run the risk of bearing children?

Most of the forced childbearing under slavery was the result, not of rape, but of subtler pressures.[158] There is a voluntary aspect to any slavery: The slave deliberately moves her muscles as commanded for fear of something worse. What makes the situation coercive is an alternative that a reasonable person would deem unacceptable.[159] Those who resist the analogy should consider whether lifelong abstinence from sexual intercourse is something they would find unacceptable for themselves. (And, of course, if abortion is criminalized, the element of outright physical coercion to bear children is also present.)

The strongest rejoinder would begin with the assumption that a fetus is in fact a person, a being with rights that others are bound to respect. If this is the case, then once a fetus has been conceived, there is a

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156. This objection also places great rhetorical weight on the injury of rape while treating the burdens of unwanted pregnancy as something a reasonable woman should be willing to endure. This ranking of burdens is inconsistent with respect to the disruption of the victim's life, the duration of the harm, and even the permanence of the bodily injury.

157. Judith Jarvis Thomson, A Defense of Abortion, 1 Phil. & Pub. Aff. 47, 59 (1971).

158. See supra text accompanying notes 115, 118–136.

159. This argument is elaborated in Koppelman, Forced Labor, supra note 1, at 501. That piece also addresses the general notion that women's consent legitimates unwanted pregnancy. See id. at 491–93, 495–509. There are other issues as well. The most pertinent developments since that article was written are the growing unavailability of contraception to low-income women and the spread of abstinence-focused sex education, which increases the likelihood that a girl will not even know how to use contraception when she has her first sexual experience. See John Santelli et al., Abstinence and Abstinence-Only Education: A Review of U.S. Policies and Programs, 38 J. Adolescent Health 72, 77 (2006) (describing effects of abstinence-only education on students' understanding of contraception); Jennifer J. Frost et al., Improving Contraceptive Use in the United States, Guttmacher Institute: In Brief, 2–3 (2008), available at http://www.guttmacher.org/pubs/2008/05/09/ImprovingContraceptiveUse.pdf (on file with the *Columbia Law Review*) (describing barriers to accessing contraception).

moral obligation not to kill it. It follows that a reasonable person *is* in fact celibate unless willing to assume the risk of begetting children.[160] We are in fact objectively constrained. Many people happen to be in fact unreasonable, but that is not the law's fault.

I will frankly report that the reason I am unmoved by this rejoinder is that I don't concede its major premise—that a fetus is a rights-bearer even at the earliest stages of pregnancy. But then, you may respond that the Thirteenth Amendment argument, in non-rape cases (whatever they may be), may be parasitic on denying the premise that a fetus is a person—at least, on deeming that premise not proven. If the argument is dependent on a controversial position with respect to the very matter in controversy, what good is it?

The Thirteenth Amendment argument makes its constitutional case without any direct reliance on the position that a fetus is not a person.[161] Its foundation is the undeniable fact that forcing women to bear children was a part of slavery. Even if forcing contemporary women to do the same thing is justifiable, such compulsion, the argument shows, is constitutionally fraught. This is related to another attraction of the argument: it provides a textual basis for denying the claim of Justices Rehnquist, White, and Scalia that the Constitution says nothing about abortion. When I began work on this issue, I was a law student who felt sheepish about the absence of any textual basis for a right to abortion. I haven't felt sheepish in years.

CONCLUSION

The Thirteenth Amendment, properly read, declares that one cannot do to human beings the precise things that were done to slaves under antebellum slavery. Those things include compulsory childbearing. By refusing to do again what we once wrongly did, we keep faith with the commitments of the past—commitments that help to constitute us as a nation. Keeping faith with those commitments is what originalism is about. An originalist reading of the Amendment focuses on the wrongs that the Amendment sought to break from and forbids their reenactment. The original meaning of the Thirteenth Amendment supports a constitutional right to abortion.

160. It may also follow that, given the danger of rape, a reasonable woman who does not wish to bear children will get a hysterectomy at the earliest opportunity, or at a minimum regularly use chemical contraception even if she is not heterosexually active.

161. See Koppelman, Forced Labor, supra note 1, at 511 n.136.