THE THIRTEENTH AMENDMENT AND THE REGULATION OF CUSTOM

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Custom is an underdeveloped concept in Thirteenth Amendment jurisprudence. While a substantial body of work has explored the technical meaning of custom as it applies to § 1983 and, to a lesser extent, Congress's power to enforce the Fourteenth Amendment, few scholars have offered sustained treatment of custom as a way to understand the meaning and scope of the Thirteenth Amendment. This gap exists despite the fact that Congress specifically identified custom as a subject of regulation when it passed the Civil Rights Act of 1866 and despite the fact that the Thirteenth Amendment operates directly on the behavior of private parties. The fact that the Thirteenth Amendment can be applied to custom has important implications for how the Amendment should be construed. In particular, the concept of custom—especially as it relates to practices that upheld the slave system in the South—helps give shape and content to the other undefined terms the Thirteenth Amendment has generated: the "badges," "incidents," and "relics" of slavery. Ultimately, the concept of custom can help guide policymakers and judges who must consider the scope, the limitations, and the continuing relevance of the Thirteenth Amendment in the twenty-first century.

INTRODUCTION

Custom is an underdeveloped concept in Thirteenth Amendment jurisprudence. While a substantial body of work explores custom as a term of art in § 1983[1] and, to a lesser extent, Congress's power to enforce the Fourteenth Amendment,[2] few scholars have examined custom as a way to understand the meaning and scope of the Thirteenth

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1. E.g., Susan Bandes, *Monnell*, *Paratt, Daniels*, and *Davidson*: Distinguishing a Custom or Policy from a Random, Unauthorized Act, 72 Iowa L. Rev. 101, 104 (1986) (discussing distinction between random acts and government customs under § 1983); Myriam E. Gilles, Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability, 80 B.U. L. Rev. 17, 49–50 (2000) (discussing failure of contemporary jurisprudence to adequately take into account custom in civil rights enforcement under § 1983).

2. E.g., George Rutherglen, Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983, 89 Va. L. Rev. 925, 927 (2003) [hereinafter Rutherglen, Custom and Usage] (discussing role of custom in understanding 42 U.S.C. § 1983 and its relationship to Fourteenth Amendment).

Amendment. The Thirteenth Amendment power to regulate custom remains undertheorized despite the fact that Congress specifically identified custom as an object of regulation in the Civil Rights Act of 1866,[3] and despite the fact that the Thirteenth Amendment operates directly on the behavior of private parties, unmediated by the requirements of either state action or interstate commerce.[4]

Scholars frequently mention that the Thirteenth Amendment is designed to eradicate slavery's customs.[5] Their otherwise excellent articles have tended to treat the Thirteenth Amendment's effect on slavery's customs as self-evident and indisputable. Accordingly, the task of exploring what constitutes a custom of slavery, who gets to decide when a custom is related to slavery, what limits discretion in defining a custom of slavery, the relationship between custom and existing Thirteenth Amendment jurisprudence, and the legal basis for regulating custom at all, has largely been left to other authors.[6]

This Essay is an effort to reckon with these issues. Its goal is not to revisit custom as a term of art in the Reconstruction Acts. Instead, it seeks to assess more broadly what it means for the Thirteenth Amendment power to be informed by custom, and how the concept of custom helps frame difficult issues concerning judicial and congressional power to construe and to enforce the Thirteenth Amendment's prohibitions.

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3. Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (declaring anyone, who, through custom, deprives another of rights protected by Act is guilty of a misdemeanor); accord Jones v. Alfred H. Mayer Co., 392 U.S. 409, 423 (1968) ("To the Congress that passed the Civil Rights Act of 1866, it was clear that [the rights guaranteed under the Act] might be infringed not only by 'State or local law' but also by 'custom, or prejudice.'" (quoting Cong. Globe, 39th Cong., 1st Sess., 129, 209 (1866)) .

4. See United States v. Kozminski, 487 U.S. 931, 942 (1988) ("[T]he Thirteenth Amendment extends beyond state action . . . ."); The Civil Rights Cases, 109 U.S. 3, 20 (1883) (recognizing power under Amendment to act "direct and primary" upon acts of individuals); George Rutherglen, State Action, Private Action, and the Thirteenth Amendment, 94 Va. L. Rev. 1367, 1370 (2008) [hereinafter Rutherglen, State Action] (remarking on Thirteenth Amendment's unique applicability to private conduct).

5. See, e.g., Akhil Reed Amar & Daniel Widawsky, Child Abuse as Slavery: A Thirteenth Amendment Response to *DeShaney*, 105 Harv. L. Rev. 1359, 1368 (1992) ("[T]he Thirteenth Amendment broke sharply with custom insofar as custom condoned the condition of slavery."); Jack M. Balkin, The Reconstruction Power, 85 N.Y.U. L. Rev. 1801, 1817 (2010) ("To enforce the Thirteenth Amendment, Congress must disestablish all the institutions, practices, and customs associated with slavery and make sure they can never rise up again.").

6. One welcome exception in this regard is William Carter, who has discussed in more detail how custom interacts with the Thirteenth Amendment analysis. See William M. Carter, Jr., Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery, 40 U.C. Davis L. Rev. 1311, 1365–79 (2007) (discussing custom, race, and badges and incidents of slavery). This Essay attempts to fit his insights on custom into a larger structural and theoretical framework describing the regulation of custom in general, its historical provenance, and its potential in Thirteenth Amendment construction and enforcement.

This Essay concludes that custom—especially as it relates to practices that justified, maintained, and upheld the institution of slavery in America—can give shape and content to the other undefined terms that the Thirteenth Amendment has generated: the "badges," "incidents," and "relics" of slavery. This Essay posits that the Thirteenth Amendment not only eradicated slavery as an unspoken customary norm around which the Constitution was built; it also equipped Congress with the power to participate in norm entrepreneurialism with respect to these customs.[7] Through the Section 2 enforcement power, the Thirteenth Amendment gave Congress the authority to identify those behaviors that, individually or in the aggregate, have a colorable analog to either a historical practice or a historic disability of slavery, and to create legislation to prevent or inhibit those behaviors from ripening into a recognized norm.

The relationship between slavery, custom, and the Thirteenth Amendment has three key implications. First, it helps to rationalize terms like "badges," "incidents," and "relics" of slavery by linking them to a concept of custom and tradition that originated during the slave era. Second, it enables the public, through their elected representatives, to engage in a dialogue that the Reconstruction Congress began concerning the meaning of slavery and freedom. Third, custom defines a generous—but not unlimited—set of historical and conceptual parameters inside which Congress can act. The result is a Thirteenth Amendment that is neither a historical curio nor a font of utopian idealism, but something measured, historically contextualized, and fully part of our republican experiment.

This Essay progresses as follows. Part I offers a brief taxonomy of custom in Anglo-American culture and the relationship of custom to the institution of slavery: Part I.A discusses custom as a form of higher law, and explains how judges and slavery's apologists used this concept of custom to justify the legality, and occasionally the morality, of slavery; Part I.B discusses custom as particular law and explains how custom operated in a more granular way to regulate the social, economic, and political interactions between slaves, free blacks, and whites; Part I.C departs from custom as a term of art in law and discusses, more generally, how custom in the looser sense of social norms helped maintain the slave system in America, especially after emancipation; and Part I.D offers a brief summary and analysis of slavery and custom. Part II then turns to the Thirteenth Amendment and its effect on custom in these three forms. Part II also addresses the role that courts and Congress play in regulating

7. See, e.g., Robert C. Ellickson, The Evolution of Social Norms: A Perspective from the Legal Academy, *in* Social Norms 35, 44 (Michael Hechter & Karl-Dieter Opp eds., 2001) (discussing concept and role of norm entrepreneurs); Cass R. Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021, 2031–33 (1996) (discussing how law and private norm entrepreneurs work together to change behavior).

the customs of slavery identified in Part I, and justifies the difference between their two roles. Part III then briefly discusses the practical and theoretical implications of viewing the Thirteenth Amendment power through the lens of custom.

I. CUSTOM AS A SOCIO-LEGAL CONCEPT

Custom is "a Rorschach blot."[8] Custom can mean the basic or fundamental law of a nation. Eighteenth-century writers used terms like the "common law," the "common rights of Englishmen,"[9] or the "common custom of England"[10] to describe custom in this sense. Through the centuries, this type of custom has been associated with various kinds of authority: tradition, the wisdom of accumulated experience, the law of nations, and transcendental notions of reason, natural rights, and divine law.[11] Custom in this sense largely predates positivist accounts of law.[12] Today, it is reflected in decisions holding that the U.S. Constitution contains certain unexpressed but generally understood precepts of which the text is merely a reflection or confirmation. For example, a personal right to keep and bear arms,[13] the sovereign immunity of states from suits brought by their own citizens,[14] and a right to an abortion[15] have all been justified on the basis of customary higher law not necessarily specified in the text.[16]

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8. Morton J. Horwitz, The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy 123 (1992). Horwitz used this image to describe the fact that conservative legal thinkers of the late nineteenth century invoked custom to avoid the perils of "natural rights individualism" and unchecked majoritarian legislation. Id.

9. 1 Benjamin Franklin, William Temple Franklin & William Duane, Memoirs of Benjamin Franklin 214 (New York, Derby & Jackson 1859) (1818) (transcribing examination of Franklin before House of Commons in 1766).

10. E.g., John Hawles, The Englishman's Right: A Dialogue Between a Barrister at Law and a Juryman 9 (London, Free-School, Gower's Walk 1844) (1680).

11. See James Q. Whitman, Why Did the Revolutionary Lawyers Confuse Custom and Reason?, 58 U. Chi. L. Rev. 1321, 1323–27 (1991) (discussing muddled nature of how founding-era lawyers used word "custom"); see also infra Part I.A (examining custom as form of "higher law").

12. See Rutherglen, Custom and Usage, supra note 2, at 928 ("Custom was not always confined to such a derivative role. It used to be a source of law that public officials were required to recognize, which preexisted their official acts and survived afterward as well."). But see Curtis A. Bradley & Mitu Gulati, Withdrawing from International Custom, 120 Yale L.J. 202, 229 (2010) (identifying Chief Justice Marshall's opinion on legitimacy of slave trade in The Antelope, 23 (10 Wheat.) U.S. 66 (1825), as example of legal positivism).

13. See District of Columbia v. Heller, 554 U.S. 570, 591–92 (2008) (finding right to keep and bear arms for confrontation preexists constitutional text).

14. See Hans v. Louisiana, 134 U.S. 1, 15 (1890) (discussing common law tradition of sovereign immunity from suit reflected in Eleventh Amendment).

15. See Roe v. Wade, 410 U.S. 113, 152–53 (1973) (finding right to abortion is substantive due process right).

16. For a sustained discussion of this idea, see generally Suzanna Sherry, The Founders' Unwritten Constitution, 54 U. Chi. L. Rev. 1127, 1156 (1987) [hereinafter

Custom can also refer to the practice and usage of certain localities, trades, or classes. At one time, this type of custom was earthy and democratic; it relied upon testimony and was submitted to jurors, with review by the judiciary. This more populist conception of custom grew frail through the Middle Ages until by the eighteenth century, it had shrunk to a brittle exception to the more general common law pronounced by judges.[17] Nevertheless, custom in this particular sense still serves a residual function as a nontextual norm on which courts may rely to fill gaps or resolve ambiguities in the text of contracts, statutes, and other written instruments.[18]

Custom may also mean a set of cultural or behavioral norms that are followed, but are not necessarily recognized as "legal" in the sense of having acquired the formal imprimatur of government. Instead, these customs are enforced by social sanctions or rewarded with intangible benefits like esteem and prestige.[19] Custom in this sense may be internalized, so that it operates as a subliminal check, even without enforcement by third parties.[20]

The unifying feature of custom in all these senses is that it originates in praxis and exists outside text. Its unwrittenness distinguishes it from the pronouncements of legislatures or monarchs. Custom can be acknowledged in texts, such as Magna Carta or the Bill of Rights.[21] Custom can be recorded in the decisions of a judge or codified by legislation. But custom does not require text. Custom exists whether written or not.[22]

Sherry, Unwritten Constitution] (discussing Bill of Rights in particular as simply codifying certain fundamental natural law rights).

17. See Whitman, supra note 11, at 1331–41 (discussing decline of local custom).

18. See Riorden v. Clarke, 8 S.W.3d 182, 185 (Mo. Ct. App. 1999) (permitting lower court to use custom and practice to interpret ambiguous statutory term "travel time"); Omri Ben-Shahar, "Agreeing to Disagree": Filling Gaps in Deliberately Incomplete Contracts, 2004 Wis. L. Rev. 389, 394 (noting Uniform Commercial Code "gives broad permission for courts to fill gaps by incorporating practices and unwritten customs" (citing U.C.C. § 2-204(3) (1977))).

19. Ellickson, supra note 7, at 35–36. Offering a seat on a train to a pregnant or elderly person might be one such example of a cultural or behavioral norm.

20. Id. at 36 (discussing how internalized norms are self-enforcing); Richard M. McAdams, The Origin, Development, and Regulation of Norms, 96 Mich. L. Rev. 338, 340 (1997) [hereinafter McAdams, Regulation of Norms] (referring to norms as "informal social regulations that individuals feel obligated to follow because of an internalized sense of duty, . . . fear of external non-legal sanctions, or both").

21. See Frederic W. Maitland & Francis C. Montague, A Sketch of English Legal History 79 (James F. Colby ed., 1915) (observing Magna Carta's "own theory of itself . . . is that the old law, which a lawless king has set at naught, is to be restored, defined, covenanted, and written"); see also Hawles, supra note 10, at 8–9 (referring to customs as reified in Magna Carta).

22. Arthur R. Hogue, Origins of the Common Law 177 (1966) ("The [common law] principle can exist, without a writing, in the form of a generally accepted tradition."); see also Kunal M. Parker, Common Law, History, and Democracy in America, 1790–1900, at

Slavery as an American institution relied upon custom in all three of these senses: Slavery was an institution justified as a species of general law; slavery was an institution recognized through localized practice, and used to fill textual or conceptual gaps; and slavery was an institution maintained by informal normative forces. The history and theory of these concepts—general custom, particular custom, and customary norms—do not lend themselves to clear demarcations, and the charged history of slavery complicates the story. Further, courts, legal theorists, and historians disagree over the relative roles custom played in this peculiar institution. But the complexity of custom's role in the creation, maintenance, persistence, and abolition of slavery is not a good reason to abandon its exploration in favor of comfortable and uncritical positivism. Further, as this Essay will argue in Part III, no theory of the Thirteenth Amendment can be complete without engaging issues of slavery and custom at all three of these levels.[23]

A. *Custom as General or Higher Law*

Anglo-American law began as custom.[24] As Sir John Davies wrote in the seventeenth century, "the Common Law of England is nothing else but the Common Custome of the Realm."[25] Custom to these early thinkers required neither Parliament nor parchment; it was a "matter of fact" reflected in "use and practice."[26] If it could be said to be recorded any-

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38 (2011) (discussing distinction as expressed in Matthew Hale, History of the Common Law of England 2 (Lawbook Exchange 2000) (1713)).

23. As Professor Palmer writes, "[C]ustoms form part of the cultural-legal history of slavery and their study can provide insights into the theoretical relationship between law and extralegal norms and the nature of legal change." Vernon Valentine Palmer, The Customs of Slavery: The War Without Arms, 48 Am. J. Legal Hist. 177, 178 (2006).

24. See Charles Howard McIlwain, The High Court of Parliament and Its Supremacy 42 (1910) ("Laws in feudal times are in the main declarations of existing custom; they are . . . 'not enactments but records.'" (quoting Edward Jenks, Law and Politics in the Middle Ages 61 (London, John Murray 1897))); James R. Stoner, Jr., The Idiom of Common Law in the Formation of Judicial Power, *in* The Supreme Court and American Constitutionalism 47, 50 (Bradford P. Wilson & Ken Masugi eds., 1998) ("Common law was, in the first place, the immemorial customary law of England . . . ."); see also R.H. Helmholz, Christopher St. German and the Law of Custom, 70 U. Chi. L. Rev. 129, 132 (2003) ("Custom [in medieval England] was not simply a 'background norm.' For many purposes it was treated as binding law."). For criticism of this account, see J.W. Tubbs, The Common Law Mind: Medieval and Early Modern Conceptions 1–2 (2000) (arguing medieval evidence "is too mixed to establish custom as the only or even the primary way of conceptualizing the common law").

25. John Davies, Preface Dedicatory to Les Reports des Cases & Matters en Ley, Resolves & Adjudges en les Courts del Roy en Ireland (John Davies ed.) (London, E. Flesher, J. Streater, & H. Twyford 1674) (emphasis omitted); see also Parker, supra note 22, at 33–34 (drawing upon Davies and discussing law as "self-given," as opposed to hierarchically imposed and inherited by all people).

26. Davies, supra note 25.

where, it was recorded only "in the memory of the people."[27] For these reasons, early Western legal traditions treated custom as fundamental and foundational.[28] Custom, to paraphrase James Whitman, constituted "the basic norm," the bedrock, the anchor of all "legal reality."[29] Custom *was* justice.[30]

Custom as raw aboriginal justice gradually become more formalized.[31] Juries replaced compurgators,[32] and individual justice became systematized in the localities.[33] But, as Professor Whitman has documented, determining custom suffered a "crisis of proof"[34] as political and judicial authority became more centralized, the work of criminal and civil adjudication migrated from the localities to the King's ministers, and legislatures began to produce edicts that appeared more than mere summaries of the practices of the realm.[35]

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27. Id.

28. Whitman, supra note 11, at 1330 ("Custom formed the 'basic norm,' the fundamental source of legitimacy upon which 'legal reality' . . . was founded." (footnote omitted)).

29. Id. (using similar terms to describe Western European notions of custom).

30. Id. (stating that to medieval jurists, "[w]hat was not customary, was not right"); cf. Burnham v. Superior Court, 495 U.S. 604, 621 (1990) (Scalia, J., plurality decision) (noting that due process limitations of Fourteenth Amendment are determined by "traditional notions of fair play and substantial justice" and looking to "pedigree" to determine what is just).

31. See S.F.C. Milsom, Historical Foundations of the Common Law 1 (2d ed. 1981) (describing early courts as "essentially community meetings"); see also Whitman, supra note 11, at 1330 (noting that customs could only be determined by consensus arrived at during community gatherings).

32. Compurgators, also known as an "oath-helpers," were persons who would swear to the soundness of the litigant's oath. If a sufficient number of compurgators swore, the party won. See F.W. Maitland, The Forms of Action at Common Law 12 (A.H. Chaytor & W.J. Whittaker eds., 1979) (1910). Some scholars trace the English jury to this custom. See Laurie L. Levenson, Courtroom Demeanor: The Theater of the Courtroom, 92 Minn. L. Rev. 573, 615 (2008) ("When jury trials first began, jurors served as compurgators—individuals who were selected to sit as jurors because they knew the defendant and could, as witnesses, offer opinions regarding the defendant's credibility and law-abiding nature."). Others disagree. See William Forsyth, History of Trial by Jury 69–70 (London, John W. Parker and Son 1852) (arguing that compurgators were distinct from juries).

33. See Whitman, supra note 11, at 1353 ("[T]he initial English practice was to determine custom through the consultation of local witnesses—especially as organized into juries."); see also Lysander Spooner, An Essay on the Trial by Jury 25 (Da Capo Press 1971) (1852) (discussing Magna Carta as recognizing that juries had authority to determine justice of law); cf. Hogue, supra note 22, at 187–88 (suggesting 1164 compilation of Constitutions of Clarendon was comparable to work of special "jury" of experts summoned to offer "something like the juror's verdict" on general customs of realm).

34. Whitman, supra note 11, at 1360.

35. See id. at 1329–31, 1352–53 (describing these forces in both England and continental Europe).

These pressures caused custom to split. Treatise writers began to speak of two categories of custom: general and particular.[36] General custom was the common law broadly conceived.[37] The common law was judicially noticeable. It did not need to be proven; its evidence was in the recorded decisions of other judges, which developed into the concept of precedent.[38]

Custom in the sense of general or higher law became entangled with notions of popular sovereignty, reason, natural law, the law of nations, and even divine revelation.[39] Henry St. John Bolingbroke, for instance, called the constitution of England an "Assemblage of Laws, Institutions, and Customs, derived from certain fix'd Principles of Reason."[40] The law of nations was the product of "'[c]ertain maxims and *customs*, consecrated by long use, and observed by nations in their mutual intercourse with each other.'"[41] According to commentators, these customs were simply natural law as applied to nations.[42] The law of nations in this sense was part of the general common law of England.[43] As such, the law of nations, like general custom, was judicially noticeable. It could form the

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36. E.g., 1 William Blackstone, Commentaries *67; Christopher St. Germain, Doctor and Student 17, 34 (William Muchall ed., Cincinnati, Robert Clarke & Co. 1886) (1518). Blackstone also identified an additional type of particular custom: that associated with the civil and canon law and operative only in particular courts or jurisdictions. 1 Blackstone, supra, at *79.

37. See Edward Jenks, English Civil Law, 30 Harv. L. Rev. 1, 15 (1916) (noting "'custom of the realm,'" referred to in Blackstone, "is the result of the efforts of the King's judges, mainly in the thirteenth and fourteenth centuries, to build up, out of the varying customs of the different parts of England[,]" a body of law for unified commonwealth (quoting 1 Blackstone, supra note 36, at *69)).

38. See Whitman, supra note 11, at 1357, 1360–61 (discussing switch from local witness testimony about custom to judicial reliance on other judges' statements about what custom is).

39. See Peter Goodrich, Satirical Legal Studies: From the Legists to the Lizard, 103 Mich. L. Rev. 397, 481 (2004) (citing fifteenth-century writer Fortescue's proposition that "[t]he ultimate source of reason . . . was custom and practice so immemorial as to be part of the law of nature" and concluding "even custom was attributed to a divine rather than human inspiration"); Mark D. Walters, The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law, 51 U. Toronto L.J. 91, 108 (2001) (noting connection in Fortescue, who found common law to be "a divine, rational, ancient, and perfect embodiment of the *ius naturale*"); Whitman, supra note 11, at 1361 (discussing way in which these concepts were blended).

40. Henry St. John Bolingbroke, A Dissertation upon Parties 108 (3d ed. London, H. Haines 1735).

41. Stewart Jay, The Status of the Law of Nations in Early American Law, 42 Vand. L. Rev. 819, 823 (1989) (alteration in original) (quoting E. de Vattel, The Law of Nations, at lvi (J. Chitty ed., Philadelphia, T & J.W. Johnson 1863)).

42. Id. at 822.

43. Id. at 824 (quoting 4 Blackstone, supra note 36, at *66–*67); see also id. at 822 ("In the eighteenth century a consensus existed that the law of nations rested in large measure on natural law.").

basis of adjudication, outside or even in contravention of the affirmative pronouncements of legislatures.[44]

Legal writers also associated general custom with popular will or consent; Blackstone explained that "one of the characteristic marks of English liberty [is] that our common law depends upon custom . . . probably . . . introduced by the voluntary consent of the people."[45] The common customs of England were those institutions "according to which the Community hath agreed to be governed."[46] By the time the Framers began to hammer out the original Constitution, they were working with a legacy in which these terms: custom, common law, natural law, reason, and popular will had lost whatever precision they once might have had.[47]

Custom in this sense of general, judicially noticeable, extratextual law helped to legitimate slavery in the United States. Before there was a law of slavery, there was a custom of slavery.[48] A May 1652 enactment by the "Commissioners of Providence and Warwicke" attempted to regulate the "common course practised amongst English men to buy negers, to that end they may have them for service or slaves forever."[49] It failed in its declared goal.[50] A 1767 bill in Massachusetts aimed "to prevent the un-

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44. See generally, e.g., Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (using public law and public international law to decide whether Oregon could compel California citizen to defend himself in Oregon's courts); Bonham's Case, (1610) 77 Eng. Rep. 646 (K.B.) 652; 8 Co. Rep. 113b, 118a (suggesting that common law could void an act of Parliament, "when an Act of Parliament is against common right and reason"); Jonathan F. Mitchell, Stare Decisis and Constitutional Text, 110 Mich. L. Rev. 1, 21 (2011) (arguing that Bonham "suggested that established common-law customs could trump a later-enacted act of Parliament").

45. 1 Blackstone, supra note 36, at *75.

46. Bolingbroke, supra note 40, at 108.

47. See Whitman, supra note 11, at 1365 (observing that eighteenth-century legal scholars "faced a tradition that mixed terminology about 'reason' and 'custom,' none of which had clear meaning"); see also Stoner, supra note 24, at 49 (discussing how Framers wrote Constitution in "idiom of the common law" which saw natural rights as complementary).

48. Lawrence M. Friedman, A History of American Law 46 (3d ed. 2005) ("Clearly, there was a kind of custom of enslaving blacks, before law explicitly recognized the status of the slave."); Alexander Johnston, Slavery (in U.S. History), *in* 3 Cyclopædia of Political Science, Political Economy, and of the Political History of the United States 725 (John J. Lalor ed., New York, Charles E. Merrill & Co. 1890) ("[N]egro slavery in the colonies never existed or was originally established by law, but that it rested wholly on custom.").

49. 1 John Russell Bartlett, Records of the Colony of Rhode Island and Providence Plantations in New England 243 (Providence, A. Crawford Greene & Brother 1856).

50. See William M. Wiecek, The Origins of the Law of Slavery in British North America, 17 Cardozo L. Rev. 1711, 1746 (1996) [hereinafter Wiecek, Origins] (noting failure of this statute).

natural and unwarrantable custom of enslaving mankind."[51] It too failed.[52]

To the Arkansas Supreme Court, slavery was congenital to the American republic: "[Slavery] was entailed upon our nation at her birth; it grew up as she grew; . . . it was regulated and sustained by State statutes, but not so created; it was sanctioned by the people, and by their common consent it was made law."[53] To the Connecticut Supreme Court, it was an infection: "[Slavery] probably crept in silently, until it became sanctioned, by custom or usage."[54]

Both courts and slaveholders recognized that slavery had to have a pedigree. To find otherwise would confirm the abolitionists' charge that slavery was nothing more than despotism,[55] a betrayal of everything the Founders had said they stood for.[56] Custom provided that pedigree. Judges and legal scholars used the vocabulary of custom to acknowledge slavery as part of a long—and, if not venerable, at least tolerable—tradition.

Justice Marshall, like many others, traced slavery's origin to the law of conquest: "Slavery . . . has its origin in force; but as the world has agreed that it is a legitimate result of force, the state of things which is thus produced by general consent, cannot be pronounced unlawful."[57] Other sources spoke of the customary rights of Christians to dominate "heathen" or "infidels."[58] Courts and apologists also referred to slavery as

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51. Robert Walsh, An Appeal from the Judgments of Great Britain Respecting the United States of America 312 (1819) (emphasis omitted) (internal quotation marks omitted).

52. Id.

53. Jacoway v. Denton, 25 Ark. 625, 636 (1869) (holding Federal Constitution's Contracts Clause prevented state constitutional provision abrogating contract for slaves).

54. Jackson v. Bulloch, 12 Conn. 38, 42 (1837).

55. See Richard Hildreth, Despotism in America: An Inquiry into the Nature and Results of the Slave-Holding System in the United States 8 (Boston, Whipple and Damrell 1840) ("[B]ut whether one or a thousand [slaves], of those he does own, the laws create him . . . the absolute master, lord and despot.").

56. For a discussion of the antislavery rhetoric surrounding American independence, see A. Leon Higginbotham, In the Matter of Color: Race and the American Legal Process 371–76 (1978).

57. The Antelope, 23 U.S. (10 Wheat.) 66, 121 (1825); see also Tindal v. Hudson, 2 Del. (2 Harr.) 441, 441 (Del. Super. Ct. 1838) ("The origin of slavery will always be traced to conquest . . . ."). Compare with the United States Supreme Court's discussion of the rights to real property in America and its relationship to conquest in Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588 (1823) ("Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.").

58. See, e.g., Fable v. Brown, 11 S.C. Eq. (2 Hill Eq.) 378, 391–92 (1835) ("I think that the true state of the slave must be ascertained by reference to the disabilities of an alien enemy, in which light the heathen were anciently regarded."); Anonymous, Personal Slavery Established by the Suffrages of Custom and Right Reason 11 (Philadelphia, John

part of the customary law of nations.[59] St. George Tucker (an advocate of gradualist abolition) and James Kent analogized slavery to the abandoned English practice of serfdom, known as villenage,[60] although this analogy did not persuade all jurists.[61] Writers also cited slavery in Mosaic tradition or in ancient Greek and Roman republics.[62] This was an anguish of parentage: American jurists used these sources "to show that slavery bore a lineage that included the noble ancient republics and perhaps even England itself."[63]

On the eve of the American Civil War, Thomas Cobb wrote an entire treatise defending slavery as grounded in custom and natural law. He began his work with a sweeping assertion: "[N]o organized government has been so barbarous as not to introduce [slavery] amongst its customs. It has been more universal than marriage, and more permanent than liberty."[64] Cobb went on to exhaustively categorize the African people, and concluded that enslavement of black Africans "develops and perfects" their nature, and hence could not be contrary to natural law.[65]

Judicial acquiescence of slavery as unwritten custom occurred over many years, and was far from uniform, but its influence on constitutional thinking is reflected in two well-known Supreme Court cases: *Prigg v. Pennsylvania*[66] and *Scott v. Sandford*.[67] In *Prigg*, Justice Story observed that property owners retained a common law right to retrieve property

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Dunlap 1773) (arguing "liberty of enslaving the Africans and the Heathen round about us" comes from Mosaic law).

59. *The Antelope*, 23 U.S. (10 Wheat.) at 120–21 (referring to law of nations for legitimacy of slavery); Neal v. Farmer, 9 Ga. 555, 568–69 (1851) (tracing slavery to "law of nations"); Williams v. Johnson, 30 Md. 500, 505 (1869) (finding public history shows slavery was "sanctioned and protected by all of the enlightened commercial nations of Europe").

60. Ellen Holmes Pearson, Remaking Custom: Law and Identity in the Early American Republic 116–18 (2011) (citing 2 James Kent, Commentaries on American Law 250 (New York, O. Halsted 1827); St. George Tucker, On the State of Slavery in Virginia (c. 1790), *in* St. George Tucker, Ten Notebooks of Law Lectures, bk. 9, at 18) (commenting on these analogies).

61. See *Fable*, 11 S.C. Eq. (2 Hill Eq.) at 390 ("The status, the entire civil and political condition of the villein, was, in almost every particular, different from that of our slave."); Commonwealth v. Turner, 26 Va. (5 Rand.) 678, 684–86 (1827) (discussing distinctions between slavery and villenage).

62. See *Turner*, 26 Va. (5 Rand.) at 685 (looking to laws of ancient Jews, Greeks, and Romans for sources of American slave law).

63. Pearson, supra note 60, at 121 (stating that writers used these sources to "deflect" rather than "absolve" themselves of guilt).

64. 1 Thomas R.R. Cobb, An Inquiry into the Law of Negro Slavery, at xxxv (Philadelphia, T. & J.W. Johnson & Co. 1858). For a discussion of the ways writers used natural law to support or condemn slavery, see Parker, supra note 22, at 182–87.

65. Cobb, supra note 64, at 51.

66. 41 U.S. (16 Pet.) 539 (1842).

67. 60 U.S. (19 How.) 393 (1857).

wrongfully taken.[68] This common law right of "recaption" was reflected in the Fugitive Slave Clause: "The owner must . . . have the right to seize and repossess the slave, which the local laws of his own state . . . confer on him as property."[69] The "right of seizure and recaption" according to Justice Story, "is no more than a mere affirmance of the principles of the common law applicable to [slave property]."[70] To Story, the Fugitive Slave Clause was an expression of a common law right directed towards slave property, and could not be frustrated by "the consequence of any state law or regulation" to the contrary.[71] The result of this decision was that, to the extent any one state gave an individual a property right in a person, all states had to recognize that individual's right to seize the person.[72] Persons could be seized by private force because the Constitution guaranteed certain customary remedies for reclamation of slave property that were no different from immemorial customs for reclamation of any other type of property.[73]

In *Scott*, Chief Justice Taney referred to the "public history of every European nation" to show that any emancipation since the Founding resulted from mere positive enactment, and not from "any change of opinion in relation to this race."[74] Taney elaborated: "No one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise."[75] Even those emancipated "were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free."[76] As Kunal Parker has written, Taney's inscription of African slavery in the custom and practices of the Founders, and thus the unspoken assump-

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68. *Prigg*, 41 U.S. (16 Pet.) at 613; see Black's Law Dictionary 1382 (9th ed. 2009) (defining "recaption" as "[p]eaceful retaking, without legal process, of one's own property that has been wrongfully taken").

69. *Prigg*, 41 U.S. (16 Pet.) at 613. There is much disagreement about *Prigg*, its holding, and its place in the jurisprudence of slavery and freedom. For an unpacking of the *Prigg* opinions, see generally Paul Finkelman, Sorting Out *Prigg v. Pennsylvania*, 24 Rutgers L.J. 605 (1993) [hereinafter Finkelman, Sorting Out *Prigg*]. For an account that suggests *Prigg* is less proslavery than it has been described, see Leslie Friedman Goldstein, A "Triumph of Freedom" After All?: *Prigg v. Pennsylvania* Re-Examined, 29 Law & Hist. Rev. 763 (2011).

70. *Prigg*, 41 U.S. (16 Pet.) at 613 (citing 3 Blackstone, supra note 36, at *4).

71. Id. at 612.

72. See Finkelman, Sorting Out *Prigg*, supra note 69, at 636 (arguing that Story's opinion "nationalized" slavery).

73. See Robert J. Kaczorowski, Fidelity Through History *and* to It: An Impossible Dream?, 65 Fordham L. Rev. 1663, 1674–75 (1997) (noting Fugitive Slave Clause "expanded . . . and elevated [recaption] into a new constitutional right that authorized slaveholders to pursue and recover their slave property even when their slaves escaped to a state that did not recognize slavery"). See also Finkelman, Sorting Out *Prigg*, supra note 69, at 636 (coming to similar conclusion).

74. Scott v. Sandford, 60 U.S. (19 How.) 393, 407, 412 (1857).

75. Id. at 411.

76. Id.

tions of the Constitution, enabled slavery's apologists to write that slavery, not freedom, was "'originally universal, founded upon immemorial custom and universal principles of international law.'"[77] To them, slavery was the norm, freedom the aberration.[78]

As Professors Pearson and Parker have noted, custom thus provided a sense of continuity with the past that Americans needed to accept slavery.[79] It appealed to the sense that, despite its odiousness, slavery reflected the national, and indeed international, consensus. This does not mean that all Americans or all states recognized slavery as fundamental law. Instead, at a minimum, slavery represented a privilege of certain states and localities, reflected in the federal structure of government and its traditions, but only implicit in the constitutional text.[80] Such a custom could not be eradicated through judicial fiat.[81] As numerous antebellum courts concluded, slavery might be immoral, but it was not illegal; and it was not illegal, because it was customary.[82]

B. *Custom as Particular Law*

Custom also operates on a particular level. Blackstone identified this type of custom as the customary practices of specific localities or trades. These customs, unlike the general customs of England, initially resembled jury issues. The very *existence* of a particular custom had to be proven to "a jury of twelve men, and not [to] the judges," unless the custom had been proven and recorded previously in the same court.[83] In this sense,

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77. Parker, supra note 22, at 186 (quoting George S. Sawyer, Southern Institutes 143 (Philadelphia, J.B. Lippincott 1858)).

78. See John Craig Hammond, Slavery, Freedom, and Expansion in the Early American West 172 (2007) (calling "slaveholders' vision" one where "slavery was . . . the national norm, freedom the exception"); Parker, supra note 22, at 186 (describing argument that "freedom was the exception to the underlying universal law of slavery").

79. Parker, supra note 22, at 185 (stating that for proslavery thinkers "[s]lavery derived its legitimacy precisely from custom"); Pearson, supra note 60, at 114 (remarking on American legists' use of Blackstone to both condemn and justify existence of slavery in America).

80. Dinesh D'Souza summarized the position this way: "[The American Founders] produce[d] a Constitution in which the concept of slavery [was] tolerated, in deference to [popular] consent, but nowhere given any moral approval, in recognition of the slave's natural rights." Dinesh D'Souza, The End of Racism: Principles for a Multiracial Society 109 (1995).

81. Suzanna Sherry, Natural Law in the States, 61 U. Cin. L. Rev. 171, 183 n.64 (1992) ("It is well-established that neither the Supreme Court nor most state courts used principles of natural justice to abolish slavery.").

82. Id. Compare with England's *Somerset* decision, which was cited for the proposition that slavery could arise only from positive law. Somerset v. Stewart, (1772) 98 Eng. Rep. 499 (K.B.) 510; Lofft. 1, 17–18 (opinion of Lord Mansfield, C.J.). But see William M. Wiecek, *Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World, 42 U. Chi. L. Rev. 86, 105–09 (1974) [hereinafter Wiecek, *Somerset*] (discussing some ambiguities of decision that make it less than ringing endorsement for abolition).

83. 1 Blackstone, supra note 36, at *76.

these particular customs were democratic and parochial. They represented the normative sense, not of an entire people, but of a segment of a polity.

Particular customs, however, had to clear a second hurdle of judicial scrutiny. According to Blackstone, courts could ignore particular customs if they did not meet a set of essential criteria: The customs had to be immemorial, continuous, peaceable (that is, acquiesced to), reasonable, certain, compulsory, and consistent.[84] If they failed these requirements, they had no legal effect.

The "reasonableness" requirement for particular customs allowed English judges to ignore the custom when it deviated from legislative enactments or the general common law, when the local custom's "effect was 'to the general prejudice, for the advantage of any particular person'"[85] or "where the effects of a custom fell unevenly on a class of people."[86] Further, local or particular customs—even if proven to exist—had to be "construed strictly" if the particular custom stood "in derogation of the common law."[87]

Besides these Blackstonian traditions, particular custom also resolves gaps or ambiguities in interpreting contracts, legislation, or property entitlements.[88] It forms baselines—for example, whether an easement is a taking of private property for a public purpose, or whether the easement is, and always has been, public property.[89]

Slavery's defenders used particular custom both normatively and pragmatically. First, they used the concept of particular custom to legitimize the institution of slavery against contrary theories of law. Courts occasionally acknowledged that slavery did not meet the strict Blackstonian requirements of "good custom" because slavery was not immemorial, or because it was against right reason or natural law, or because it conflicted with the general common law of England.[90] But many other provisions of

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84. Id. at *76–*78.

85. David J. Bederman, The Curious Resurrection of Custom: Beach Access and Judicial Takings, 96 Colum. L. Rev. 1375, 1394 (1996) (quoting Le Case de Tanistry, (1608) 80 Eng. Rep. 516 (K.B.) 524; Dav. 28b, 36 (unofficial translation from Law French)).

86. Id. at 1394–95 (citing Haspurt v. Willis, (1670) 86 Eng. Rep. 50 (K.B.); 1 Vent. 71; Barker v. Cocker, (1621) 80 Eng. Rep. 471 (K.B.); Hob. 329).

87. 1 Blackstone, supra note 36, at *78.

88. See Lon L. Fuller, The Morality of Law 234 (rev. ed. 1969) ("[C]ustomary law . . . plays an important, though usually silent role, not only in the interpretation of written law, but in helping to supply the gaps that will always be perceived in any body of enacted law.").

89. See Bederman, supra note 85, at 1438–44 (gathering cases and discussing this phenomenon in context of property disputes); Henry E. Smith, Community and Custom in Property, 10 Theoretical Inquiries L. 5, 36–41 (2009) (discussing role of custom in establishing baselines in regulatory takings jurisprudence).

90. See Wiecek, *Somerset*, supra note 82, 118–27 (discussing tensions between custom, English common law, natural law, and existence of slavery in England and America).

American law also failed these requirements.[91] So, despite slavery's tense relationship with Blackstone's schema,[92] courts routinely considered slavery to be legal.

For instance, a Delaware court in 1791, deciding an unrelated property matter, used slavery as an example of a lawful institution that defied strict Blackstonian conventions of "immemoriality," stating, "[s]o there is no law for slavery in this state, yet it is legal."[93] Similarly, the Connecticut Supreme Court speculated that if slavery rested "entirely upon custom or usage," it was possible that such a custom was "so utterly repugnant to the great principles of liberty, justice and natural right" as to be unreasonable and void.[94] But as slavery had been regulated by the legislature, it had received some "implied sanction," and therefore could not be judicially abolished (although legislative intervention was another matter).[95] Other courts identified slavery as originating not in the general common law of England or from statute only, but as a particular custom of the colonies.[96]

Custom also helped maintain the institution of slavery on a more granular level. Customary practice helped to generate the legal, social, and civil disabilities of the enslaved, from prohibitions on marriage to the inabilities to acquire property, possess weapons, or testify in court.[97] Custom also formed the basis for more exotic disabilities, such as special punishments for assaulting whites. It also provided a basis to extend these disabilities beyond slaves to all African Americans. Sometimes this granular custom hardened into specific legislation, sometimes legislation responded to custom that was too permissive, sometimes custom established baselines for social management, and sometimes custom supplied

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91. David Bederman identifies a Virginia court which opined that no local or particular custom could develop in the state "'because it lacks the essential ingredient of good custom—it is not immemorial.'" Bederman, supra note 85, at 1400 (quoting Harris v. Carson, 34 Va. (7 Leigh) 632, 638–39 (1836)).

92. Blackstone himself appears to have reconsidered the relationship between slavery and the common law, softening the strong abolitionist language of his first edition of the *Commentaries*. See Wiecek, *Somerset*, supra note 82, at 98–99 (discussing Blackstone's modification of his initial position).

93. Wright's Lessee v. Cannon, 1 Del. Cas. 227, 228 (1796) (citation omitted) (citing Pirate v. Dalby, 1 Dall. 167, 169 (Pa. 1786)).

94. Jackson v. Bulloch, 12 Conn. 38, 42 (1837).

95. Id.; see also Wiecek, *Somerset*, supra note 82, at 123 (discussing the *Bulloch* decision).

96. See Williams v. Johnson, 30 Md. 500, 506 (1869) (stating slavery was established by "local law only" and was "entirely distinct in its origin and authority, and in its territorial and personal extent from the common law" (internal quotation marks omitted) (citation omitted)); see also Miller v. McQuerry, 17 F. Cas. 335, 336 (C.C.D. Ohio 1853) (No. 9583) (suggesting that Southern customs had made slavery legal, notwithstanding lack of express legislative authorization, and contrary English common law traditions).

97. Jonathan A. Bush, Free to Enslave: The Foundations of Colonial American Slave Law, 5 Yale J.L. & Human. 417, 426 (1993) (noting that slave norms "occurred outside legal forms" including "private rule-making" by slave owners).

gap-filling norms where the existing common law or legislation was unclear.[98]

Slave law developed, as Professor Palmer notes, through an iterative process among slaves, owners, courts, and legislators, with custom essential "both to [the] origins of slavery itself and to the continuing development of its substantive rules and institutions."[99] Slavery as an institution was patched together from scraps of customary practice, common law analogs, and positive enactments. Custom helped American slave societies resolve the core paradox of treating human beings as both persons and property.[100] Specific regulations differed in their details, but shared common ideological and instrumental features: white supremacy, racial (and in particular black) subordination, the social and economic dependency of slaves, political powerlessness, and the perpetuation and protection of a racial caste system.[101]

The doctrine of *partus sequitur ventrem* represents one example. Who could be a slave when one parent was free? *Partus sequitur ventrem* specified that status passed from the mother, rather than the father, as it did in English villenage. The courts looked to local custom to justify this rule. In the 1786 case of *Pirate v. Dalby,* the Supreme Court of Pennsylvania confronted a person who claimed to be free. There, the court observed that "[s]lavery is of a very ancient origin. By the sacred books of Liviticus [sic] and Deuteronomy, it appears to have existed in the first ages of the world; and we know it was established among the Greeks, the Romans, and the Germans."[102] The court acknowledged that English practice was to trace villenage through father, but because "*contrary practice* [*partus sequitur ventrem*] *has . . . been universal in America*; and our practice is so strongly authorized by the civil law, from which this sort of domestic slavery is derived, and is in itself so consistent with the precepts of nature, that we must now consider it as the law of the land."[103]

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98. See infra text accompanying notes 100–130 (discussing use of custom by courts and legislatures in context of slavery).

99. Palmer, supra note 23, at 177–78.

100. Rutherglen, Custom and Usage, supra note 2, at 938 (noting this paradox as challenge to coherent slave law); see also Bush, supra note 97, at 420 ("In the end, colonists awkwardly and often implicitly fitted the issues raised by their slaveholding into the traditional categories of the common law.").

101. See, e.g., Orlando Patterson, Slavery and Social Death 95–96 (1982) (identifying degradation and dependence as features of Southern slave society).

102. Pirate v. Dalby, 1 Dall. 167, 168 (Pa. 1786).

103. Id. at 169 (emphasis added); accord United States v. Sanders, 27 F. Cas. 950, 951 (C.C.D. Ark. 1847) (No. 16,220) (identifying doctrine as common law borrowing from civil law); Wilks's Adm'r v. Greer, 14 Ala. 437, 444–46 (1848) (identifying doctrine as common law custom); Wiecek, Origins, supra note 50, at 1756 (discussing emergence of this civil law "legal exotic" into America's otherwise common law system).

Legislatures codified some customs into statutes.[104] *Partus sequitur ventrem* is an obvious example,[105] but other, less obvious customs also came to be legislated. A writer observed in 1827 that the prohibition of both slaves and blacks in general from testifying as witnesses against whites "derive[d] its authority from custom" in some slave states.[106] In the North, this prohibition was, according to one decision, "a settled point at common law[;] . . . a slave could not be a witness" because the authority of the master over him was equivalent to duress.[107] The Fundamental Law of North Carolina specified that "[e]very freeman of Carolina shall have absolute power and authority over negro slaves of what opinion and religion soever."[108] North Carolina enacted this law, not because it was novel, but because "it fitted in with what was in the other colonies already good custom."[109]

Other times, legislatures regulated or inhibited customs. Baptism of slaves, for example, put Anglo-American slave owners in a bind. Because slavery depended in part on the justification that heathens could be held in thrall, once the enslaved became Christian, it jeopardized a customary justification for the new believer's continued subjugation. Courts and legislatures remedied this quandary by positive declarations. In England, two senior legal officials resolved the question against enslaved Christians over after-dinner drinks.[110] In colonial America, legislative bodies decided the question. The Maryland General Assembly, for example, declared that "no Negroe or Negroes by receiving the holy Sacrament of Baptism is hereby manumitted or set free nor hath any right or title to freedom or Manumission more then [sic] he or they had before any Law

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104. See Palmer, supra note 23, at 179 ("When legislators incorporated a custom into positive law, they both dignified and recognized it and highlighted the interplay of statute and custom.").

105. See La. Civ. Code Art. 183 (1824), reprinted in Documentary History of Slavery in North America 177 (Willie Lee Rose ed., 1976) (codifying that slave status follows mother); An Act Relating to Servents [sic] and Slaves (1715), reprinted in Archives of Maryland, Proceedings and Acts of the General Assembly of Maryland, April, 1715–August, 1716, at 289 (William Hand Browne ed., 1910) (providing that children of slaves would be slaves for their natural lives).

106. George M. Stroud, A Sketch of the Laws Relating to Slavery in the Several States of the United States of America 66 (1827).

107. Respublica v. Mulatto Bob, 4 U.S. 145, 145 n.1 (1795).

108. The Fundamental Constitutions of Carolina, Drawn Up by John Locke, March 1, 1669, reprinted in 1 Colonial Records of North Carolina 187, 204 (W.L. Saunders ed., 1886); see also John Spencer Bassett, Slavery and Servitude in the Colony of North Carolina 27 (Baltimore, Johns Hopkins Press 1896); Friedman, supra note 48, at 48.

109. Bassett, supra note 108, at 27; see also Friedman, supra note 48, at 48 (discussing customary roots of slave law and citing Bassett).

110. See Wiecek, *Somerset*, supra note 82, at 93 (discussing how Attorney General and Solicitor General of England decided baptism had no effect on slave status in "refectory in Lincoln's Inn" in 1729).

usage or *Custome* to the Contrary Notwithstanding."[111] Other colonies issued similar pronouncements.[112]

Hence, customs and common law principles that had operated without respect to African chattel slavery had to accommodate that institution, and became tainted by it.[113] Mark Tushnet notes that North Carolina judges, for example, had to modify the rules respecting provocation to deal with confrontations between slaves and free persons. "At common law," Tushnet writes, "the only issue . . . was whether the defendant was justified in his striking."[114] Slavery, however, introduced "other variables," including "the relation between the victim and the defendant[,]" "[h]ow serious was the blow[,]" and whether justification should "vary with the relationship or the severity of the provocation."[115] One court, for instance, appealed to custom in stating that any adjudication of interracial violence under a provocation theory must recognize the "habits" of servility "indispensible to [the slave's] own well-being" and "required by the inveterate usages of our people."[116]

In *Mitchell v. Wells*, the Mississippi Supreme Court denied a woman emancipated in Ohio the right to pursue a bequest in Mississippi.[117] Although in other contexts, the question would have been decided by generally applicable inheritance and choice of law principles, slavery transformed the case into a "vehicle[] for vitriolic denunciation and political retaliation."[118] To determine whether an emancipated woman could claim a bequest, the court asked itself a set of rhetorical questions about custom and habits in determining public policy.

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111. An Act Relating to Servents and Slaves, supra note 105, at 289 (emphasis added).

112. See An Act to Incourage [sic] the Baptizing of Negro, Indian and Mulatto Slaves, Oct. 21, 1706, as reprinted in 1 The Colonial Laws of New York from the Year 1664 to the Revolution 597–98 (Albany 1894) (declaring that baptism does not create reason for setting a slave free); An Act Declaring That Baptisme Doth Not Exempt Them from Bondage (Virginia 1667), as reprinted in Documentary History of Slavery in North America, supra note 105, at 19. For more on this point, see Paul Finkelman, The Crime of Color, 67 Tul. L. Rev. 2063, 2073–77 (1993) (discussing laws governing baptism and slave status).

113. Lawrence G. Sager, Congress's Authority to Enact the Violence Against Women Act: One More Pass at the Missing Argument, 121 Yale L.J. Online 629, 631 (2012) (noting that "elasticity" of common law allowed it to "accomodat[e]" slavery). For a discussion of the concept of "tainted law" see Michael C. Dorf, Tainted Law, 80 U. Cin. L. Rev. (forthcoming 2012).

114. Mark Tushnet, The American Law of Slavery, 1810–1860: A Study in the Persistence of Legal Autonomy, 10 Law & Soc'y Rev. 119, 138 (1975).

115. Id. at 139.

116. Id. at 143 (quoting State v. Jarrott, 23 N.C. (1 Ired.) 76, 86 (1840)) (internal quotation marks omitted).

117. Mitchell v. Wells, 37 Miss. 235 (1859).

118. Note, American Slavery and the Conflict of Laws, 71 Colum. L. Rev. 74, 97 (1971).

> Is it the subject of legislative declaration alone? To be prescribed by law, as a rule of action, and to be gathered alone from positive enactment? Or are we to be guided by the nature and character of our institutions; our Constitution and form of government; their nature, character, and whole history; the manners, customs, and habits of our people . . . as sources of evidence indicating public policy?[119]

Using custom as a gap-filling function, the Mississippi court concluded that the common consent of the people of Mississippi, if not of the United States, was to forbid the woman from suing on her bequest. Ohio had become "forgetful of [its] constitutional obligations to the whole race" by conferring citizenship upon "an inferior caste," a race situated by "the order of nature" in a position somewhere "between the irrational animal and the white man."[120] Citing the choice of law principle that no state could be forced to accept laws repugnant to its own public policy, the court dismissed the suit.[121]

Similarly, the Louisiana Supreme Court stated that a general incorporation statute would be read to deny free blacks the ability to found a church.[122] The legislature had passed a law clarifying that the statute would not be construed to permit such incorporation out of fear of "assemblages of colored persons, free and slave."[123] The court suggested that *even if Louisiana had passed no specific language on the issue of black incorporation*, the Court would still have read such an exception into the statute.[124] "The African race are strangers to our Constitution," the majority stated, "and are the subjects of special and exceptional legislation."[125]

An exceptional feature of America's custom of slavery was its expressly racial dimension.[126] Slaves came in all colors in Greece and

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119. *Wells*, 37 Miss. at 251 (emphasis omitted).

120. Id. at 262–63.

121. See id. at 264 ("Ohio, by . . . conferring rights of citizenship there, contrary to the known policy of Mississippi, can [not] confer freedom on a Mississippi slave . . . ." (emphasis omitted)).

122. See African Methodist Episcopal Church v. City of New Orleans, 15 La. Ann. 441 (1860).

123. Id. at 442.

124. See id. at 443 ("Had the question been submitted to this court, in the absence of [the Act], whether the Legislature intended to sanction . . . the formation of corporations composed entirely of colored persons . . . we would have been bound to rule the negative.").

125. Id.

126. See Edmund S. Morgan, American Slavery, American Freedom: The Ordeal of Colonial Virginia 315 (reissued ed. 2003) (noting linkage between race and slavery as Virginia adopted slave economy); Alan Watson, Slave Law in the Americas 128 (1989) (noting racism was part of English slave law from beginning and gradually became harsher to both enslaved and free blacks "in exactly the same way").

Rome.[127] In America, however, the period of color-blind slavery was short-lived. By the nineteenth century, only Africans or their descendants could be slaves in America.[128] This principle served a gap-filling function in understanding laws about who could and could not be a slave. A Delaware court summarized this characteristic of American slavery:

> [W]e observe one general and pervading feature, *that the black is the slave to the white man*; this feature has always characterized it here. The origin of slavery will always be traced to conquest: the two races are marked by very striking differences; and, as the one has subjected the other, so will it alone hold that race in subjection by the strong arm of force. Were the negro race the stronger it would subjugate the white; and the master now, would in his turn become the slave. Such being the fact, and slaves being fully recognized by our law as *property*, we shall continue so to consider them until the legislature alters the law.[129]

All persons of African descent were thus presumed to be slaves, and interactions with them were conditioned upon this presumption.[130]

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127. See Watson, supra note 126, at 127 (noting lack of race determinate in Roman slavery); Wiecek, Origins, supra note 50, at 1727–28 ("The ancients [Egyptians, Greeks, Romans] did not equate slave status with race.").

128. Paul Finkelman, Introduction: The Centrality of Slavery in American Legal Development, *in* Slavery and the Law 3, 6 (Paul Finkelman ed., 1997) [Finkelman, Centrality of Slavery] ("Only blacks could be slaves [in the United States]; no one else, however great their misfortune could end up enslaved."); Wiecek, Origins, supra note 50, at 1720 (noting that during eighteenth century, "[s]lavery became a condition reserved exclusively for Africans and, in dwindling numbers, the indigenous peoples"). A contemporary dictionary of American English usage defined a "slave state" as "a State in which *negro* slavery exists." John Russell Bartlett, Dictionary of Americanisms: A Glossary of Words and Phrases Usually Regarded as Peculiar to the United States 605 (4th ed. 1877) (emphasis added). For a discussion of the gradual extinction of Indian slavery, see generally Gregory Ablavsky, Comment, Making Indians "White": The Judicial Abolition of Native Slavery in Revolutionary Virginia and Its Racial Legacy, 159 U. Pa. L. Rev. 1457 (2011).

129. Tindal v. Hudson, 2 Del. (2 Harr.) 441, 441–42 (Super. Ct. 1838); see also Phillis v. Lewis, 1 Del. Cas. 417, 418 (Ct. Com. Pl. 1796) (explaining "[s]lavery in this state does not extend, nor has it ever been held to extend, to other persons than Negroes and mulattoes descended from a female Negro" and "[t]here is no law which recognizes slaves of any other description, nor any custom which has allowed others to be held in slavery" and freeing slave because her mother was Asian rather than African).

130. See Mandeville v. Cookenderfer, 16 F. Cas. 580, 582 (C.C.D.C. 1827) (No. 9009) ("Every negro is . . . prima facie to be considered as a slave, and the property of somebody; and he, who acts in regard to him as if he were a free man, acts at his peril . . . ."); Stringfield v. State, 25 Ga. 474, 476 (1858) ("In this State every negro is presumed to be a slave and to have an owner . . . ."); State v. Dorsey, 6 Gill 388, 390 (Md. 1848) ("[T]he law has gone so far as to presume every negro a slave to some one . . . ."); State v. Heddon, 1 N.J.L. 377, 381 (1795) (Chetwood, J., dissenting) (stating blacks must prove themselves to be free when claimed by another person); see also Finkelman, Centrality of Slavery, supra note 128, at 6 (making similar observation). The relationship between this presumption and discrimination against even free blacks in the law of common carriers, for example, is explored in David S. Bogen, From Racial Discrimination to Separate But Equal: The

Custom in the particular sense thus contributed to the maintenance of slavery by helping insulate it from challenges of general or higher law, by generating regulations concerning the interactions of both slaves and free men, and by establishing a set of racially determined norms to resolve problems where ordinary principles of the common law or statutory construction were unclear.

C. *Custom as Social Norms*

Custom can also mean a social norm, not necessarily recognized by the law, but enforceable by third party sanction or by internal behavioral controls. This type of custom is as important (some behavioral scientists might say more important) than other types of norms in controlling human behavior. As Richard Epstein has observed, "[i]t is scarcely possible to imagine how any of us could organize the daily task of living . . . without extensive—and perhaps unconscious—reliance on myriad customs."[131] Many, including H.L.A. Hart, are skeptical that this concept of custom can be called "law" at all, at least unaided by some rule that recognizes it as such.[132] And yet, this kind of custom exists and, as the legal realists explained, custom in this sense can be as coercive as any positive law promulgated by government agents.[133]

Custom in this sense operates outside the positive declarations of governments. Indeed, it may operate despite such declarations. For example, economic cartels and guilds, although they violate the Sherman Antitrust Act, can maintain cohesion through bonds of "tradition," "pride," "loyalty," or through fear of "shunning" punishments imposed by other members of the cartel.[134] Scholars such as Ellickson and McAdams identify customary norms in informal dispute resolution procedures among landowners, extrajudicial contract enforcement among diamond merchants, and the rise and fall of dueling as a Southern cul-

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Common Law Impact of the Thirteenth Amendment, 38 Ohio N.U. L. Rev. 117, 126 (2011). Professor Bogen asserts that "[p]rior to the Civil War, African-Americans could be refused passage on common carriers in the South on the grounds that the captain feared that they might be slaves trying to escape . . ." Id. at 126.

131. Richard A. Epstein, The Path to *The T.J. Hooper*: The Theory and History of Custom in the Law of Tort, 21 J. Legal Stud. 1, 6–7 (1992).

132. See H.L.A. Hart, The Concept of Law 9–10, 44 (1961) (distinguishing "mere convergent habitual behavior" from law); Smith, supra note 89, at 10–11 (describing positivist claims "that law gets its force from a rule of recognition, which leaves little room for custom to operate as law on its own").

133. See Horwitz, supra note 8, at 140 (noting Oliver Wendell Holmes's abandonment of idea of custom as "buffer between consent and coercion").

134. See, e.g., Christopher R. Leslie, Trust, Distrust, and Antitrust, 82 Tex. L. Rev. 515, 585–90 (2004) (discussing role of "social norms of mutual trust and cooperation" in industry cartels); Richard A. Posner, The Material Basis of Jurisprudence, 69 Ind. L.J. 1, 10 (1993) (noting weavers' guild "sought . . . to encourage social cohesiveness among its members" to restrict competition).

tural phenomenon.[135] As David Bederman puts it, custom in this non-positivist sense is an "idea that communities can make law through the practice and usage of their constituents" that can be "as normative and as binding as any act of a legislative sovereign or any decision of a common law judge."[136]

Informal customs helped to organize and maintain the institution of African chattel slavery in America. The majority of Americans were not slaveholders. Hence, slavery depended on a set of norms that ensured that slaves would remain servile, that free blacks would not cause agitation, and that whites would maintain racial solidarity with the slaveholding class.[137]

As Richard McAdams has written, this type of norm explains the persistence of racial discrimination against slaves and other African Americans both before and after emancipation.[138] Whites and others who aspired to join their group could receive the superior status benefits by enforcing norms that depressed the status of others and of black people in particular.[139] Further, the norms that ensured the slave system's vitality tended to insinuate themselves into other types of interactions. According to Ira Berlin, the essential difference between "societies with slaves" and "slave societies" is that "[i]n slave societies . . . the master-slave relationship provide[s] the model for all social relations: husband and wife, parent and child, employer and employee, teacher and student."[140] In this poisoned atmosphere, no one is immune.[141]

Private norms deployed to replicate the slave system appear in the immediate post-emancipation period, and they support the notion of an institution reliant on informal social custom as well as law. Minnesota

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135. See McAdams, Regulation of Norms, supra note 20, at 340–41 (examining literature that uses norms to explain "variety of positive and normative issues").

136. Bederman, supra note 85, at 1375. These types of norms can eventually harden into what one might consider positive law. As with international law, norms in this informal sense can "ripen" or "crystalize" into a binding law. Cf. Bradley & Gulati, supra note 12, at 211 (discussing this process); Ian Johnstone, Law-Making Through the Operational Activities of International Organizations, 40 Geo. Wash. Int'l L. Rev. 87, 88 (2008) (discussing process of "hardening" of norms in international law).

137. Patterson, supra note 101, at 36 (noting that for slavery to survive, "[t]hose who were not directly involved . . . had to come to accept it . . . as the normal order of things").

138. See Richard H. McAdams, Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination, 108 Harv. L. Rev. 1003, 1060 (1995) (describing method in which race discrimination produces status).

139. See id. at 1060 (applying "status-production model" to racial beliefs).

140. Ira Berlin, Many Thousands Gone: The First Two Centuries of Slavery in North America 8 (1998).

141. Id. ("From the most intimate connections between men and women to the most public ones between ruler and ruled, all relationships mimicked those of slavery."); Patterson, supra note 101, at 76 (noting that in South, single "symbolic code" came to define "all authority relations—not only . . . between master and slave but, among the masters between male and female, upper class and working class, parent and child").

Representative Ignatius Donnelly cited "combinations of white masters" who conspired to fix labor wages and conditions in order to return former slaves to thralldom.[142] Assistant Adjutant General Edward W. Smith recounted how Virginia employers held meetings to create "unjust and wrongful combinations . . . for the purpose of depressing the wages of the freedman."[143] Smith predicted these employer cartels, set against a backdrop of vagrancy laws that criminalized homelessness or joblessness, "[would] reduce the freedman to a condition . . . [of] slavery in all but its name."[144]

A letter from a Union colonel in Texas spoke of "'planters [who] have held meetings and have agreed not to hire freed people'" without "'written permission from [the freedman's] former master.'"[145] Donnelly quoted an unnamed Southerner who observed that "'[t]he blacks eat, sleep, move, live only by the tolerance of the whites, who hate them. . . . [T]heir former masters own everything, and will sell them nothing . . . .'"[146]

The compulsion for this type of discriminatory behavior need not be expressly legal. As Carl Schurz, who investigated the South in the immediate postwar period, summarized: "It requires only a simple understanding among the employers, and the negro is just as much bound to his employer 'for better and for worse' as he was when slavery existed in the old form."[147] To that end, whites with no stake in the slave system other than racial supremacy enlisted themselves in restoring the old order. Schurz remarked on the "singularly bitter and vindictive feeling" that non-slaveholding whites felt toward blacks, since "the negro has ceased to be property."[148] In this sense, the immediate postwar planter class, and the entire racial caste system, operated with informal norm generation

142. Cong. Globe, 39th Cong., 1st Sess. 589 (1866) (statement of Rep. Ignatius Donnelly).

143. Id. at 908 (statement of Rep. William Lawrence) (quoting Headquarters Dep't of Va., General Orders, No. 4 (1866)); see also id. (reporting prohibition of "[a]ll combinations or agreements which are intended to hinder, or may so operate as to hinder, the employment of labor" (quoting Headquarters Dep't S.C., General Orders, No. 1 (1866))).

144. Id. (quoting Headquarters Dep't of Va., General Orders, No. 4 (1866)).

145. Id. at 941 (statement of Sen. Lyman Trumbull) (quoting letter from De Gress, Colonel, Freedmen's Bureau, to Howard, Major Gen., Freedmen's Bureau (Dec. 15, 1865)).

146. Id. at 589 (statement of Rep. Ignatius Donnelly).

147. Carl Schurz, Report on the Condition of the South (1865) [hereinafter Schurz, Report], reprinted in 1 Speeches, Correspondence and Political Papers of Carl Schurz 279, 325 (Frederic Bancroft ed., 1913); see also Darrell A.H. Miller, White Cartels, the Civil Rights Act of 1866, and the History of *Jones v. Alfred H. Mayer Co.*, 77 Fordham L. Rev. 999, 1030 (2008) [hereinafter Miller, White Cartels] (discussing how "private restraints often worked in concert with facially neutral law").

148. Miller, White Cartels, supra note 147, at 1028 (quoting Schurz, Report, supra note 147, at 311) (internal quotation marks omitted)).

and enforcement mechanisms like those seen in modern economic cartels.[149]

D. *An Interim Summary and Analysis*

The customary nature of slavery—embedded in higher law, particular law, and informal norms—had three effects on American legal culture: First, it legitimized an institution that many Americans considered morally repugnant by linking it with the prestige of the past.[150] Second, it supplied a set of instrumental rules and gap-fillers, created by the people themselves, to deal with questions of how to treat human beings as property. Third, custom formed a normative and behavioral taproot that resisted positive enactments designed to dislodge slavery as an institution.[151]

Because slavery and custom became so entangled in American society, as Professor Binder put it, "the condemnation of slavery [by the Thirteenth Amendment] challenge[s] the legitimacy of the very traditions and customs" necessary to understand the Amendment itself.[152] If slavery insinuated itself into all aspects of American society, how does one distinguish those customs contaminated by slavery from those left untouched? Which customs—whether general, particular, or informal—were meant to survive intact after abolition?

While the questions are difficult, a close parsing of the text, structure, and history of the Thirteenth Amendment, in light of familiar common law modes of reasoning, can provide some answers to the difficult questions surrounding custom—or at least can provide analytical structures to arrive at some answers. Blackstone described Parliament's enactments as having one of two effects on the common law: declaratory or remedial.[153] Declaratory statutes were necessary "where the old custom of the kingdom [was] almost fallen into disuse, or become disputable."[154] Such statutes simply "declare what the common law is and ever hath

149. For more on the connections between economic and race-based cartels, see Darrell A.H. Miller, Racial Cartels and the Thirteenth Amendment Enforcement Power, 100 Ky. L.J. 23, 28–34 (2012) (arguing that racial discrimination can be understood as cartel behavior from economic, historical, and behavioral perspectives); Daria Roithmayr, Racial Cartels, 16 Mich. J. Race & L. 45, 50–65 (2010) (describing mechanisms by which race-based cartels "derive significant economic, social, and political benefits" from racial exclusion).

150. See, e.g., Parker, supra note 22 (noting custom provided sense of continuity with past that Americans needed to legitimize slavery).

151. See supra text accompanying notes 131–149 (discussing post-emancipation norms designed to preserve slavery's features).

152. Guyora Binder, The Slavery of Emancipation, 17 Cardozo L. Rev. 2063, 2066 (1996).

153. 1 Blackstone, supra note 36, at *86.

154. Id.

been."[155] Remedial statutes, by contrast, repair "defects" in the common law. They do this by either "enlarging" the coverage of a legal norm where the common law was "too narrow and circumscribed," or by "restraining" the common law where "it was too lax and luxuriant."[156]

The Thirteenth Amendment reflects a Blackstonian attempt to be both declaratory and remedial. Section 1 is declaratory. It empowers judges to identify that which is now no longer custom and to enforce that norm through common law reasoning. Section 2 is remedial. It empowers Congress to remedy deficiencies created by the courts' limited institutional capacities to enforce the norm against slavery in this common law manner. The following Part explains this construction in more detail.

II. CUSTOM AND THE THIRTEENTH AMENDMENT

Section 1 of the Thirteenth Amendment states that "[n]either 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."[157] Section 2 states that "Congress shall have power to enforce this article by appropriate legislation."[158] It is the first time the word "slavery" appears in the Constitution. It is also the first time the text expressly grants Congress the "power to enforce" a specific constitutional provision. As this Part explains, the Thirteenth Amendment's textual, structural, and historical features rely upon, but also challenge, methodologies that look to custom as an interpretive resource.[159] This Essay ultimately agrees with the sentiments of Dean Carter and Professor Rutherglen that Section 1 power under the Thirteenth Amendment should be construed narrowly; it is judicially enforceable only when the challenged conduct exhibits most of the historically agreed-upon features of slavery or involuntary servitude. Section 2 power, by comparison, is broad. It permits Congress to target any individual act or disability, alone or in the aggregate, that can be tied to or threatens to recreate a customary aspect of slavery in America.[160]

The Thirteenth Amendment cannot be understood through text alone. First, the Amendment refers to both "slavery" and "involuntary

155. Id.

156. Id. at *86–*87.

157. U.S. Const. amend. XIII, § 1.

158. Id. § 2.

159. See Binder, supra note 152, at 2067 (arguing that slavery's use of custom makes its use in legal interpretation problematic).

160. For more on these themes, see Carter, supra note 6, at 1349–55 (arguing that both Congress and courts share responsibility for enforcing Thirteenth Amendment against badges and incidents of slavery, but that there are prudential and institutional reasons why Congress is better suited to do so); Rutherglen, State Action, supra note 4, at 1399–1403 (describing relationship between Section 1 and Section 2 enforcement power as difference between disabilities that "display all the wrongs of slavery" as opposed to just a single wrong).

servitude." The two separate terms suggest that the Amendment contemplates some prohibition beyond private compelled labor.[161] Second, the prohibitions of the text are not cabined by reference to state action or interstate commerce. In fact, Section 1 is not directed to any entity at all. In Nicholas Rosenkranz's terms, it is an Amendment that appears to have neither an "object" nor a "subject."[162] Instead, Section 1 contemplates an "end-state."[163] It is teleological. It is a declaration of both what America is and what it ever shall be—a nation without slavery. Third, because the Amendment has no subject or object, it operates in ways "primary and direct" upon individuals,[164] and its specific prohibitions and limits must be gleaned from other sources.

Linguistic conventions alone fail to capture the Thirteenth Amendment's meaning. "Slavery," as that word is commonly used, is at once too narrow and too broad. A strict dictionary reading of the word "slavery" reduces it to a near-synonym of "involuntary servitude." In *Hodges v. United States*, the Court used this narrow view to state that slavery was but "bondage" and the "state of entire subjection of one person to the will of another."[165] But this dictionary usage does not capture all the ways slavery was more than a simple labor system, a conception that

161. Winthrop D. Jordan, The White Man's Burden: Historical Origins of Racism in the United States 36 (1974) (noting, in English colonies, "[s]ervitude, no matter how long, brutal, and involuntary, was not the same thing as perpetual slavery"). But see United States v. Shackney, 333 F.2d 475, 486 (2d Cir. 1964) (Friendly, J.) (concluding original meaning of "involuntary servitude" was "something 'akin to African slavery,' although without some of the latter's incidents" (quoting Butler v. Perry, 240 U.S. 328, 332 (1916))). A further reason for this reading is the textual caveat: "except for punishment for a crime whereof the party shall have been duly convicted." If slavery and involuntary servitude meant the same thing, it would suggest that one can be duly convicted and condemned to chattel slavery, a conclusion that one writer has called a "legal absurdity." Andrea C. Armstrong, Slavery Revisited in Penal Plantation Labor, 35 Seattle U. L. Rev. 869, 873 (2012) (conducting textual analysis of Thirteenth Amendment).

162. See Nicholas Quinn Rosenkranz, The Objects of the Constitution, 63 Stan. L. Rev. 1005, 1009 n.12 (2011) (discussing application of the Thirteenth Amendment to both private and public action); Nicholas Quinn Rosenkranz, The Subjects of the Constitution, 62 Stan. L. Rev. 1209, 1214 n.11 (2010) (acknowledging that Thirteenth Amendment could be violated by both private and public actors).

163. Lea VanderVelde, The Thirteenth Amendment of Our Aspirations, 38 U. Tol. L. Rev. 855, 857 (2007); see also The Civil Rights Cases, 109 U.S. 3, 20 (1883) (stating Thirteenth Amendment is "an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States").

164. *The Civil Rights Cases*, 109 U.S. at 20 (recognizing power of Amendment to reach badges and incidents).

165. 203 U.S. 1, 17 (1906) (quoting Webster's Dictionary definition of "slavery").

contemporary references to the "slave power" acknowledge,[166] and that the Supreme Court itself recognized in the *Civil Rights Cases*.[167]

At the same time, "slavery" is a word debased by hyperbole. Jack Balkin and Sanford Levinson have catalogued how "slavery" was a "well-established rhetorical convention[] within British thought" going back to the seventeenth century.[168] In the American colonies, taxation without representation was slavery,[169] as was going into personal debt.[170] In the nineteenth century, Southern ideologues suggested that abolition was itself a form of slavery.[171] In modern times everything from public accommodation laws,[172] to healthcare reform,[173] to Social Security,[174] has been described as slavery. The term becomes even more unmoored if we consider slavery's antonyms—freedom or liberty: words of such notorious

166. See, e.g., Eric Foner, Free Soil, Free Labor, Free Men 88–89 (1970) (discussing concept of "slave power" as totalizing slave regime and its political development and deployment in the North); see also Berlin, supra note 140, at 8 (noting totalizing aspect of slavery in "slave societies").

167. 109 U.S. at 20 (commenting on Thirteenth Amendment's "reflex character [of] establishing and decreeing universal civil and political freedom throughout the United States; and . . . cloth[ing] Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States").

168. Jack M. Balkin & Sanford Levinson, The Dangerous Thirteenth Amendment, 112 Colum. L. Rev. 1459, 1482 (2012); see also George A. Rutherglen, The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment, *in* The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment 163, 164–67 (Alexander Tsesis ed., 2010) (describing rhetorical use of slavery during eighteenth and nineteenth centuries.)

169. Balkin & Levinson, supra note 168, at 1483 (quoting letter written by John Dickinson in 1768).

170. See 1 Thomas Jefferson, Memoirs, Correspondence, and Private Papers 404 (Thomas Jefferson Randolph ed., London, Henry Colburn and Richard Bentley 1829) (describing economic practices of English merchants as ensnaring Virginia planters with debt so that "debts had become hereditary from father to son, for many generations, so that the planters were a species of property, annexed to certain mercantile houses in London"). Oddly enough, until the Thirteenth Amendment, slavery was not slavery—it was "importation," it was "other persons," it was "service or labour." See U.S. Const. arts. I, IV.

171. See James M. McPherson, Drawn with the Sword: Reflections on the American Civil War 50 (1996) (compiling examples of allusions to slavery used by politicians and in newspapers).

172. See Jurisdictional Statement and Brief at 55, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (No. 515) (presenting hotel's argument that requirement to serve African Americans in public hotels is tantamount to "legalized thraldom").

173. Andy Barr, Ad: Health Care is "Slavery," Politico (June 29, 2010, 4:28 PM), http://www.politico.com/news/stories/0610/39154.html (on file with the *Columbia Law Review*) (reporting Alabama Republican candidate's description of President Obama's health care reform).

174. Matt Pitchford, Allen West: Social Security Disability is Modern Slavery, Daily Caller (Aug. 9, 2012, 1:06 PM), http://dailycaller.com/2012/07/09/allen-west-social-security-disability-is-modern-slavery/ (on file with the *Columbia Law Review*) (reporting remarks of Allen West, U.S. Representative from Florida).

imprecision that the *Richmond Enquirer* once declared, "Freedom is not possible without Slavery."[175] Slavery cannot have such a broad sweep of meaning to function as law. "Slavery" must be an idiomatic term, shaped by the historical and cultural context in which it is used.

Recognizing both the teleological nature of the Amendment and, perhaps, the limits of textualism, the Court has stated that the Thirteenth Amendment extends to the "badges," "incidents," and "relics" of slavery.[176] In the *Civil Rights Cases* the Court struck down a suite of public accommodation regulations contained in the Civil Rights Act of 1875. Notwithstanding, Justice Joseph Bradley, writing for the majority, penned broad dicta that has buoyed Thirteenth Amendment doctrine (such as it is) ever since. The Thirteenth Amendment is "self executing" and by "its own unaided force . . . established universal freedom."[177] It authorizes legislation that is "necessary and proper" for effectuating its object, including legislation "primary and direct" in nature.[178] Indeed, nearly a century after the Amendment's ratification, the waning Warren Court capitalized on Justice Bradley's dicta in *Jones v. Alfred H. Mayer Co.*, holding that a single instance of private discrimination in real estate sales is a badge or incident of slavery that Congress may legitimately prohibit through its Thirteenth Amendment Section 2 power.[179]

The Thirteenth Amendment text and its subsequent interpretation by the Court recognize that slavery is an institution. Institution is a freighted concept. To call something an institution entails a set of normative conventions—some historical, some legal, some behavioral, some collective, and some individualistic.[180] As an institution, slavery requires reference to meaning outside the text, to the customs that formed and maintained this institution, in order to define it.

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175. McPherson, supra note 171, at 51 (noting "Orwellian" nature of remark); see also Cong. Globe, 27th Cong., 2d Sess. 173 (1842) (statement of Rep. Henry Wise) ("[W]herever black slavery existed, there was found at least an equality among the white population; but where it had no place, such equality was never to be found.").

176. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441, 443 (1968) (noting Congress's freedom under Thirteenth Amendment to determine badges, incidents, and relics of slavery).

177. The Civil Rights Cases, 109 U.S. 3, 20 (1883).

178. Id.

179. See *Jones*, 392 U.S. at 440–43 (highlighting example of private discrimination that can be prohibited through Thirteenth Amendment).

180. See, e.g., Tobias Barrington Wolff, The Thirteenth Amendment and Slavery in the Global Economy, 102 Colum. L. Rev. 973, 1008 (2002) (noting "syntax [of an institution] aims at capturing the elaborate body of ritual and praxis that surrounded the systematic exploitation of involuntary labor in America"); see also Frederick Schauer, Institutions as Legal and Constitutional Categories, 54 UCLA L. Rev. 1747, 1752 (2007) (observing institutions exist "by virtue of a . . . multifaceted set of rules and relationships" and explaining that one's "considerate or empathetic treatment of another human being is an act, but etiquette is an institution").

This is not to suggest that custom as an interpretive resource is unproblematic. At a basic level, one must decide what customs survived abolition and what customs did not. For example, the Court has held that forcing a seaman to perform his service is not involuntary servitude, even though the text of the Amendment and the "immemorial" custom of mariner service are in tension.[181] Similarly, selective service has routinely been upheld against Thirteenth Amendment challenges.[182] By contrast, the Court has stated, in cases like *Jones* and *Runyon v. McCrary*, that private racial discrimination in housing or private education is a "badge" of slavery, tied to the custom of slavery, and that legislation on the issue is within congressional Thirteenth Amendment power, despite endemic racial discrimination in the North at the time of ratification.[183]

One can pose an endless set of rhetorical questions about slavery's legacy in American laws, rights, and institutions.[184] Is it possible, for instance, to construct modern doctrines pertaining to the right to bear arms without reference to the fact that slaves were denied arms at one point in history? Is it possible to understand the militia clauses without acknowledging that the militias that were formed to protect the freed populace were sometimes the very organizations that oppressed them? Can public policing or vagrancy laws be understood without acknowledging the custom of private slave patrols or the private enforcement of vagrancy statutes?[185] Can the right of association be disentangled from a history in which that right was used to keep slaves and their descendants from the levers of political power[186] and educational opportunity?[187] Or,

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181. See Robertson v. Baldwin, 165 U.S. 275, 281 (1897) ("[E]ven if the contract of a seaman could be considered within the letter of the Thirteenth Amendment, it is not, within its spirit, a case of involuntary servitude.").

182. See, e.g., United States v. Holmes, 387 F.2d 781, 784 (7th Cir. 1967) (affirming constitutionality of selective service).

183. Compare Runyon v. McCrary, 427 U.S. 160, 172–76 (1976) (holding Congress may prohibit racial discrimination at private school despite freedom of association claims), and *Jones*, 392 U.S. at 412–13 (deciding prohibition on racial discrimination in real estate is legitimate exercise of Thirteenth Amendment power), with *Jones*, 392 U.S. at 473–74 (Harlan, J., dissenting) (identifying instances of public and private discrimination in North).

184. Orlando Patterson, reviewing the works of others, has identified excessive honor, militarism, idealization of women, and regional nationalism as essential components of Southern slave society. Patterson, supra note 101, at 95.

185. See Higginbotham, supra note 56, at 171 (noting South Carolina's eighteenth-century slave laws obliged whites to whip slaves found abroad without pass and unaccompanied by white person); Schurz, Report, supra note 147, at 326 (discussing southern laws "investing every white man with the power . . . of a police officer as against every black man"); Carl T. Bogus, The Hidden History of the Second Amendment, 31 U.C. Davis L. Rev. 309, 335–36 (1998) (discussing overlap between slave patrols and militias).

186. Cf. Terry v. Adams, 345 U.S. 461, 465–67 (1953) (plurality opinion) (concluding private associations connected to political campaign are not insulated from constitutional scrutiny).

contrarily, from instances when that right was denied to slaves and their descendants who could not meet voluntarily as congregations or abolitionist organizations?[188] These questions confirm Professor Binder's observation that if all American legal, social, and economic institutions were founded upon customs, and if slavery insinuated itself into all American customs, then "abolition of the custom of slavery threaten[s] the legitimacy of custom itself."[189]

Professor Binder's essay challenges all who investigate the meaning of the Thirteenth Amendment with respect to custom. Nevertheless, custom as a sociolegal concept can help us understand the Amendment, once we accept that slavery is a word shaped and formed by historical context. It is an idiom and an institution: more capacious than bondage, but more limited than simple coercion.[190] Understanding slavery as custom can clarify the scope and establish limits for what Professors Balkin and Levinson call, quite rightly, a "dangerous" Amendment.[191]

Custom as a sociolegal concept has two primary effects with respect to the Thirteenth Amendment. First, custom cabins the range of private or government practices that a court may, on its own, declare a violation of the Amendment's textual prohibitions. That is, "slavery" as used in the Thirteenth Amendment is a historically contextualized term and should be read fairly narrowly when the question is one of judicial enforcement. Slavery implies a set of power dynamics particularly concerning labor between private parties and primarily, but not exclusively, concerning African Americans.[192] The concept of custom, in this way, is a limiting principle. The Court can take judicial cognizance of a behavior when it falls within the center of a consensus view of what slavery actually entails. As Professor David Strauss might say, the word "slavery" serves as a "focal point" around which agreements on common law judicial enforcement may coalesce.[193] Accordingly, judicial enforcement must ordinarily reflect

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187. *Runyon*, 427 U.S. at 170 (holding Congress may prohibit discrimination in private schooling through Thirteenth Amendment enforcement power).

188. William E. Nelson, The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America, 87 Harv. L. Rev. 513, 533 (1974) (commenting on restrictions on abolitionist speech and organization in antebellum period).

189. Binder, supra note 152, at 2067.

190. See United States v. Kozminski, 487 U.S. 931, 943 (1988) ("[N]ot all situations in which labor is compelled by physical coercion or force of law violate the Thirteenth Amendment.").

191. See Balkin & Levinson, supra note 168, at 1471.

192. See, e.g., The Slaugher-House Cases, 83 U.S. 36, 72 (1872) ("[W]hile negro slavery alone was in the mind of . . . Congress . . . [the Thirteenth Amendment] forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop [into] slavery . . . this amendment . . . [will] make it void.").

193. David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 910–16 (1996) (discussing manner in which text can serve as focus of agreement in common law constitutional interpretation).

a consensus view of what that word "slavery" means, and that consensus is likely to be rather narrow. In this sense, Section 1 of the Thirteenth Amendment text also performs the Blackstonian function of resolving disputes about what the general customs of the nation are. Section 1 simply "declar[es] . . . the common law . . . ."[194] The customs of the people and the fundamental law are forever against chattel slavery, and no court can appeal to a pre- or extratextual custom to say otherwise.

But this textual restriction should not apply the same way to congressional power under Section 2. The very fact that the Thirteenth Amendment contains an enforcement provision is a structural feature that betrays a distrust of the judiciary's capacity to recognize the myriad ways that slavery operated or could operate in the nation by way of custom. Otherwise, Congress would simply have made the Amendment declaratory and permitted state and federal courts to eradicate "slavery" in a familiar case-by-case, common law manner.[195] Furthermore, Section 2 diminishes the need for the word "slavery" to serve as a common law-like focal point for agreement (and hence, legitimacy), because the text presumes that representative democracy will supply that agreement and legitimacy.[196]

The fact the Amendment includes an enforcement provision is also pertinent to the relationship between the Amendment's declaration of freedom and its implementation. It seems to presuppose that Section 1 will be underenforced and specifies who should step in to fill the gap. In the well-known framework of Professor Sager, Section 1 contains more normative content than courts have the time or capacity to disentangle in adjudication.[197] It is up to Congress, through enforcement, to tease out the customs of slavery from untainted customs, and for the people, through their representatives, to work out the meaning of slavery and

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194. 1 Blackstone, supra note 36, at *86.

195. Cf. McElvain v. Mudd, 44 Ala. 48, 80 (1870) (Peters, J., dissenting) (suggesting it is for states to determine effects of emancipation). An alternative interpretation is that Congress would have possessed power to enforce the Amendment, but only by implication, and only by relying on reasoning in the despised *Prigg v. Pennsylvania* decision. See Rebecca E. Zietlow, The Ideological Origins of the Thirteenth Amendment, 49 Hous. L. Rev. 393, 407 (2012) (discussing early version of Thirteenth Amendment that omitted separate congressional enforcement provision as unnecessary).

196. Michael Vorenberg, Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment 67 (2001) (observing that concepts of freedom and slavery were to occur through enforcement of Amendment).

197. For more on the concept of underenforced constitutional norms, see Lawrence G. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1219 n.21, 1234–35 (1978) [hereinafter Sager, Fair Measure] (describing thesis as presuming "that there exist constitutional norms which are not enforced to their full conceptual limits . . . and that such underenforced constitutional norms are legally valid to their conceptual limits" and speculating about thesis in light of Thirteenth Amendment); see also Lawrence G. Sager, Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law, 88 Nw. U. L. Rev. 410, 433 (1993) ("[I]n the Thirteenth Amendment in particular, the underenforcement premise is very near the surface.").

freedom through that remedial process. In this way, Section 2 also performs a second, familiar Blackstonian function: It authorizes a remedy where judicial efforts may be "too narrow and circumscribed."[198] The following section explains these points in more detail.

A. *Custom and Judicial Enforcement of the Thirteenth Amendment*

The Thirteenth Amendment is a written repudiation of slavery. The importance of its being written is hard to overstate. Writing the word "slavery" into the Constitution resolved a debate between those who understood slavery as an evil that the Constitution accepted, but did not name, and those who understood slavery to be so profoundly immoral that it that could be recognized *only* when written.[199] In effect, it settled the dispute between the radical abolitionists who thought the Constitution was a "covenant with death,"[200] in the words of William Lloyd Garrison, and those who believed slavery could be eliminated through some subconstitutional effort.[201] The Thirteenth Amendment settled the matter by invoking the evil only to exorcise it.[202]

Section 1 of the Thirteenth Amendment directs the judiciary to no longer recognize this institution as having any force in adjudication. For those judges who felt constrained by judicial modesty from abolishing slavery on bare moral grounds, the Thirteenth Amendment provided a textual hook.[203] Slavery could no longer be justified as part of a long and ancient history because the people, in reifying abolition through the Thirteenth Amendment, repudiated what custom had enabled.

The history of opposition to the Thirteenth Amendment reinforces this custom-clarifying interpretation. As Michael Vorenberg has written, Thirteenth Amendment opponents balked at the abolition amendment because they understood slavery as interwoven into the deepest customs,

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198. 1 Blackstone, supra note 36, at *86. It is possible, as stated earlier, that the textual word "slavery" combined with an enforcement provision actually *contemplates* that judicial enforcement was going to be "too narrow and circumscribed." Rutherglen, State Action, supra note 4, at 1369 (noting that Thirteenth Amendment has always been underenforced rather than overenforced).

199. See, e.g., Parker, supra note 22, at 181–86 (discussing ideological differences between Lysander Spooner and George Sawyer as to whether slavery or freedom was universal).

200. William Lloyd Garrison famously denounced the Constitution with these words from the Book of Isaiah. See Sanford Levinson, Constitutional Faith 66 (1988).

201. See Wiecek, *Somerset*, supra note 82, at 118–19 (discussing various approaches of abolitionist thinking with respect to slavery, the Constitution, and custom).

202. See Paul Finkelman, Slavery and the Founders: Race and Liberty in the Age of Jefferson 6 (2d ed. 2001) (observing slavery appears first in the Thirteenth Amendment, and then, only to abolish it).

203. Cf. Sherry, Unwritten Constitution, supra note 16, at 1158 (1987) (noting Ex Post Facto Clause was defended as offering textual hook for otherwise natural law theory).

traditions, and structure of the nation from its founding.[204] Opponents of the "unconstitutional constitutional amendment" appealed to the Founding Fathers' original intent, inalienable rights to property, and federalism to argue that slavery was a superconstitutional norm—an institution—that even the text of the Constitution could not destroy.[205] The Amendment's opponents lost these arguments.

But they lost more than that. They lost an approach to constitutional interpretation that reposes sole authority in the judicial branch to identify and address the unwritten customs of the people with respect to slavery.[206] The Court's reputation was at its nadir during Reconstruction.[207] By creating a specific enforcement provision, the Thirteenth Amendment clarified the postwar view that questions of slavery's customary existence and remedial necessity was not a solely judicial matter, but one shared with the political branches.[208] This must be the case, for, as Vorenberg writes, the Thirteenth Amendment "*never* had a single, fixed meaning"; its drafters and ratifiers "had diverse, competing motivations as well as disparate notions of freedom."[209] Consequently, the judiciary

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204. Vorenberg, supra note 196, at 108 (noting opponents said "the Declaration of Independence was intended for whites, not blacks, and that the framers obviously approved of slavery wholeheartedly").

205. Id. at 107–12 ("[O]pponents [of the amendment] were steadfast in their claim that, by overthrowing slavery, an institution accepted by the framers, the amendment was inherently unconstitutional.").

206. Cf. Mitchell N. Berman, Constitutional Decision Rules, 90 Va. L. Rev. 1, 97 (2004) (noting "common law practice" at framing was for courts to "create . . . standard adjudicatory devices . . . when administering statutes" and discussing in light of constitutional implementation).

207. In speaking of the drafting of the Fourteenth Amendment, Michael McConnell has observed that the Republicans of the Thirty-Ninth Congress could hardly have been warm to arguments that the institution that gave the nation *Scott v. Sandford* still retained "primary authority" to construe the Constitution. Michael W. McConnell, Comment, Institutions and Interpretation: A Critique of *City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 182 (1997); see also Nelson, supra note 188, at 549–50 (discussing low confidence in Court after Civil War).

208. Michael Les Benedict has concluded that neither the ratifying legislatures nor Congress expected courts to be the primary enforcement mechanism for the Thirteenth Amendment. Instead "[t]hey expected it to be enforced through the political process," of which the judicial process would simply be a part. See Michael Les Benedict, Constitutional Politics, Constitutional Law, and the Thirteenth Amendment, 71 Md. L. Rev. 163, 176 (2011).

209. Vorenberg, supra note 196, at 237. Consider, for example, the reaction of the editors of the *Anglo-African* to ratification of the Amendment. They wrote,

> [O]ne thing which makes this triumph the richer . . . is the [second] Section of the Amendment . . . . This gives to the Congress the power for ever to legislate in reference to the rights of the freedmen—power to see that they are not subject to impartial and oppressive law—power to protect them in all the rights of freemen.

Thanks to God for Victory, Anglo-African, Dec. 23, 1865, available at http://research.udmercy.edu/find/special_collections/digital/baa/item.php?record_id=2547&collectionCode=baa (on file with the *Columbia Law Review*).

can enforce the Thirteenth Amendment directly, but should do so only in those situations where consensus is fairly clear. Where consensus is lacking, the political process necessary to enforce the Amendment *forms* that consensus.[210]

B. *Custom and Congressional Enforcement of the Thirteenth Amendment*

Section 2 of the Thirteenth Amendment, by granting Congress the power to enforce its terms, specifically enabled Congress to identify the customs that had maintained slavery, and to abolish them. More importantly, it gives Congress the power to abrogate the customs of slavery not only at the point they become law as recognized by a judge, but also before they have crystallized into a publicly acknowledged norm. In the Civil Rights Act of 1866, Congress specifically identified "custom" as a target of Thirteenth Amendment enforcement power. Through this enactment, Congress recognized that slavery was more than an "institution upheld by positive law."[211] Congress had a host of reports from Freedmens' Bureau agents, from military officials, and from congressional investigators like Carl Schurz that Southern culture was turning to other types of extralegal norms to reestablish the slave system.[212] As Schurz wrote, whites in the South had come to regard "blacks [as] their property by natural right."[213] Whites used informal agreements and traditional community policing to maintain a system in which they could vindicate their "ingrained feeling that the blacks at large belong to the whites at large," and to deal with blacks "just as their profit, caprice or passion may dictate."[214] Schurz conjectured that reconstruction required not only a legal but a sociological project of changing the "whole organism of Southern society."[215] The fact that the Reconstruction Congress felt compelled to regulate "custom" is evidence that it understood that it had the power to accomplish the type of reconstruction that Schurz mentioned in his report.[216]

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210. See Vorenberg, supra note 196, at 67 (observing this represented middle course, allowing enumeration of rights to occur through enforcement legislation). Professor Araiza has articulated an approach that shares some of these same features in an article on Fourteenth Amendment enforcement power. See William D. Araiza, New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause, 37 Fla. St. U. L. Rev. 451, 506, 516, 529, 537 (2010) (discussing role of consensus in evaluating constitutionality of Fourteenth Amendment enforcement legislation).

211. The Civil Rights Cases, 109 U.S. 3, 37 (1883) (Harlan, J., dissenting).

212. See Miller, White Cartels, supra note 147, at 1026–31 (discussing reports).

213. Schurz, Report, supra note 147, at 319–20 (quoting letter to Schurz from assistant commissioner of Freedman's Bureau in Mississippi).

214. Id.

215. Id. at 355.

216. Professor Rutherglen has concluded that Congress used custom as a term of art in 1866 to mean something akin to state action. See Rutherglen, Custom and Usage, supra note 2, at 941–50. Whether that is true with respect to construing the 1866 Act, this Essay contends that Congress clearly understood that its Thirteenth Amendment power ex-

Twentieth century cases interpreting the Thirteenth Amendment accord with this model. Beginning with *Jones* and continuing through the Burger and Rehnquist Courts, the Justices have tended to follow a restrained approach to the self-executing nature of Section 1, but to defer to Congress when it exercises its Section 2 enforcement power.[217] Traditionally, this deference is couched in the terms of Congress's ability "rationally" to target the "badges," "incidents," or "relics" of slavery.[218]

There is a growing literature that has attempted to pin down what exactly qualifies as a badge, incident, or relic of slavery.[219] Some scholars take an extremely broad approach, suggesting any form of subordination or prejudice qualifies;[220] other scholars take a more restrictive approach, arguing that only some types of activity can constitute a badge, incident, or relic of slavery, or that only some groups of individuals can suffer a badge, incident, or relic of slavery.[221]

This writer tends to agree with those scholars who seek some historical markers for what qualifies as a badge, incident, or relic of slavery.

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tended beyond state action, and permitted regulation of privately generated norms far less positive and definitive than enactments or even government policy.

217. Compare City of Memphis v. Greene, 451 U.S. 100, 125–26 (1981) (deciding closing road not violative of Section 1 of Thirteenth Amendment), and Palmer v. Thompson, 403 U.S. 217, 226 (1971) (holding no Thirteenth Amendment violation when city closed public pools rather than desegregate them), with Runyon v. McCrary, 427 U.S. 160, 170–73 (1976) (holding that prohibitions on discrimination in private schooling are rational application of Section 2 enforcement power), and Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440–43 (1968) (holding that congressional prohibitions on discrimination in housing rational application of Section 2 enforcement power). For a discussion of the courts' restrained view of judicial enforcement of the Thirteenth Amendment, see Sager, Fair Measure, supra note 197, 1219 n.21.

218. See *Runyon*, 427 U.S. at 170; *Jones*, 392 U.S. at 440–43.

219. This literature can be plotted along a spectrum of increasingly narrow distinctions. In recent years, Professor Currie has stated that the Thirteenth Amendment has nothing to do with civil rights and that *Jones v. Alfred H. Mayer Co.* and its ilk are wrong. See David P. Currie, The Reconstruction Congress, 75 U. Chi. L. Rev. 383, 396 (2008) ("To equate emancipation with freedom and freedom with the enjoyment of civil rights was nothing but a play on words."). Professor McAward has suggested a somewhat broader test: that Congress may legislate against badges and incidents of slavery, but only if the badge or incident "is sufficiently virulent or prevalent as to threaten the reemergence of slavery or involuntary servitude." Jennifer Mason McAward, Defining the Badges and Incidents of Slavery, 14 U. Pa. J. Const. L. 561, 624 (2012). And Professor Tsesis has suggested that the badges and incidents rationale applies to many forms of "arbitrary domination." Alex Tsesis, Furthering American Freedom: Civil Rights & The Thirteenth Amendment, 45 B.C. L. Rev. 307, 309 (2004). Other theories fall somewhere along this spectrum.

220. See, e.g., G. Sidney Buchanan, The Quest for Freedom: A Legal History of the Thirteenth Amendment 186–89 (1976) (suggesting that any "arbitrary prejudice" based on race, color, religion, sex or national origin can fall within Section 2 power, and speculating it may extend to other classifications as well).

221. See Carter, supra note 6, at 1368–79 (proposing that "the badges and incidents of slavery be evaluated with specific reference to the damaging effects of the institution of slavery itself and the experience of African Americans under that system and thereafter").

Custom, as this Essay has urged, forms the glue that holds these concepts together. The badges, incidents, and relics of slavery are manifestations of slavery's structural imprint on the nation's laws, institutions, and collective American consciousness. Americans recognize something as a badge, incident, or relic of slavery because of its similarity to a social or legal phenomenon of slavery.[222] And, because Congress is the institution charged with managing contested disputes over our slave history, Congress deserves significant latitude when identifying and attempting to regulate a custom related to that legacy.

C. *Custom, Institutional Competence, and Limits*

Yet, the Thirteenth Amendment's power to prohibit slavery, if read broadly, is a frightening grant of authority. The power does not depend on even minimal connections with interstate commerce, has no state action requirement, and can be enforced in ways "primary and direct" upon persons.[223] What keeps the government from turning a tool of emancipation into a tool of oppression? This is a serious concern. Congress rarely asserts its Thirteenth Amendment enforcement power, perhaps because of the Amendment's unsteady theoretical foundation, or perhaps because it is unnecessary given Congress's broad commerce authority.[224] But that could be changing, especially in areas where Congress's commerce power is questionable,[225] or where Congress's authority is countered by other constitutional values.[226] All questions of power raise questions of limits.[227]

One approach is simply to read the Thirteenth Amendment as narrowly as possible, as proscribing only compelled personal servitude.

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222. See Rutherglen, State Action, supra note 4, at 1393–1400 (noting that badges and incidents of slavery referred to unified or disaggregated subjects that were characteristic of slavery). This writer will not expand further on Professor Rutherglen other than to note that the concept of a "badge" of slavery connotes a signification to a polity—a concept fully consistent with the idea of custom in this Essay.

223. See The Civil Rights Cases, 109 U.S. 3, 20 (1883).

224. See Rutherglen, State Action, supra note 4, at 1369 (noting that Thirteenth Amendment enforcement and Commerce Clause enforcement of civil rights tend to overlap).

225. See, e.g., Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, div. E, § 4702, 123 Stat. 2835, 2836 (2009) (to be codified at 18 U.S.C. § 249) (citing Thirteenth, Fourteenth, and Fifteenth Amendments for authority and necessity of passing hate crimes legislation); cf. United States v. Lopez, 514 U.S. 549, 561 (1995) (holding aggregated effects of crime are not sufficient nexus to interstate commerce to support congressional action).

226. See Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011, H.R. 3541, 112th Cong. § 2(b)(2) (2011) (proscribing elective abortions where motivation is race or sex selection and identifying Section 2 of Thirteenth Amendment as authority); cf. Roe v. Wade, 410 U.S. 113, 164–65 (1973) (upholding substantive due process right to abortion).

227. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579–80 (2012) (upholding 2010 Patient Protection and Affordable Care Act).

Congress would then only have power to draft legislation that remedies instances of compelled personal service.[228] But, as discussed above, this saps the word "slavery" of any special institutional or idiomatic meaning, renders the Amendment's enforcement provision nearly superfluous, and seems to run counter to the text, history, and structure of the Amendment itself.[229] Further, even Justice Scalia, who has shown little tolerance for prophylactic rules in constitutional law, grants that race is somehow different.[230]

Another approach is to impose a proportionality and congruence test onto Section 2, in the same way that the Court has imposed such a requirement on Congress's Fourteenth Amendment Section 5 power. In *City of Boerne v. Flores*, the Supreme Court held that Congress may only pass legislation under Section 5 of the Fourteenth Amendment that is "congruen[t]" and "proportional[]" to a constitutional injury to be "prevented or remedied."[231] But the Court's Section 5 jurisprudence is unsatisfactory. It has led to a bewildering set of outcomes in which legislation designed to remedy age and disability discrimination in state employment fails congruence and proportionality,[232] but legislation designed to remedy sex discrimination in family caregiving or disability discrimination in courthouse access is congruent and proportional.[233] It has also opened the Court to accusations of imposing its own policy preferences in the area of constitutional law and failing to accord appropriate respect for a coordinate branch of government.[234] Mapping the

228. See Tennessee v. Lane, 541 U.S. 509, 560 (2004) (Scalia, J., dissenting) ("[W]hat § 5 does *not* authorize is so-called 'prophylactic' measures, prohibiting primary conduct that is itself not forbidden by the Fourteenth Amendment.").

229. Consider *Bailey v. Alabama*, in which the Court upheld the federal Anti-Peonage Act of 1867, 42 U.S.C. § 1994 (2006), as a valid exercise of Thirteenth Amendment enforcement power, even though the Act sweeps in by its own terms allegedly "voluntary" compelled service in liquidation of a debt. 219 U.S. 219, 241–43 (1911).

230. See Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1338–39 (2012) (Scalia, J., concurring in judgment) (suggesting that prophylactic rules with respect to race discrimination are valid, perhaps under strong form of stare decisis); *Lane*, 541 U.S. at 563–65 (Scalia, J., dissenting) (same).

231. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

232. See Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (holding federal statute permitting suits for money damages against states for violation of Americans with Disabilities Act not valid exercise of Section 5 power); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (reaching similar result with respect to Age Discrimination in Employment Act). But cf. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 73 n.16 (1996) (acknowledging some suits for injunctive relief against state officials for violation of federal law are permitted under *Ex Parte Young* fiction).

233. *Lane*, 541 U.S. at 533–34 (holding that Title II of ADA as applied to access to courts is congruent and proportional legislation under Section 5); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 735 (2003) (upholding family care provision of Family and Medical Leave Act (FMLA) as constitutional exercise of Section 5 Power). But see *Coleman*, 132 S. Ct. at 1338 (holding self-care provision of FMLA not congruent and proportional).

234. See *Coleman*, 132 S. Ct. at 1338 (Scalia, J., concurring in the judgment) (questioning soundness of proportionality and congruence test); *Lane*, 541 U.S. at 557–58

Fourteenth Amendment Section 5 jurisprudence jot for jot onto Section 2 of the Thirteenth Amendment has the merit of consistency, but little else.

A third way to address congressional limits is to try to harmonize the Court's concept of congruence and proportionality with a notion of congressional regulation of custom. To accomplish this harmonization, a unitary understanding of slavery must be abandoned. Slavery is not unitary; it is a bundle of disabilities, bound together by conventions.[235] Or, as Andrew Koppelman has put it, slavery is "a pattern of activities, maintained through a pattern of ideas and assumptions."[236] This proposition suggests that Congress has the power to regulate anything in this pattern when there is some colorable analogical relationship to this pattern.[237] The Court frequently engages in a similar process of analogical reasoning to determine whether something is a "search" or "seizure," "speech," or an "arm" when construing the Fourth, First, and Second Amendments. The Thirteenth Amendment enforcement power similarly enables *Congress* to engage in this analogical enterprise. Congress is permitted to legislate against modern behaviors that descend from, resemble, or threaten, individually or in the aggregate, one of the historical practices, or historical disabilities, of slavery. It can then regulate that behavior before it ripens into a custom.[238]

Custom, then, does the work that is sometimes understood in Fourteenth Amendment doctrine as "congruence." Congruence does not mean simply that which the Court has already declared to be a constitutional violation.[239] Congruence is a way of showing that the targeted social phenomenon is analogous to, and therefore congruent to, a custom

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(Scalia, J., dissenting) (describing congruence and proportionality test as "flabby," invitation to "judicial arbitrariness," and one designed to "bring [the Court] into constant conflict with a coequal branch of Government").

235. See Walter Johnson, Resetting the Legal History of Slavery: Divination, Torture, Poisoning, Murder, Revolution, Emancipation, and Re-enslavement, 29 Law & Hist. Rev. 1089, 1093 (2011) (describing slavery as bundle of rights exercised by one person over another); see also United States v. Beebe, 807 F. Supp. 2d 1045, 1051 (D.N.M. 2011) ("'[S]lavery,' banned by Section 1 of the Thirteenth Amendment, [is] a system made of various component parts.").

236. Andrew Koppelman, Originalism, Abortion, and the Thirteenth Amendment, 112 Colum. L. Rev. 1917, 1929 (2012).

237. See Rutherglen, State Action, supra note 4, at 1399–1400 (suggesting that distinction between congressional enforcement and judicial enforcement is that congressional enforcement may target practices that display only *some* of wrongs of slavery, such as private racial discrimination in contracting).

238. See Carter, supra note 6, 1366–69 (articulating model of Thirteenth Amendment enforcement that takes into account both racial nature of persons injured, and relationship between injury and historical custom or practice of slavery).

239. But see *Coleman*, 132 S. Ct. at 1338–39 (Scalia, J., concurring in the judgment) (suggesting in Fourteenth Amendment cases—other than those dealing with race—congressional power to enforce means only power to proscribe what Court has already identified as constitutional violation).

of slavery. The idea is that the Constitution confers upon Congress latitude to demonstrate that a certain societal phenomenon, left unaddressed, has or may lead to disabilities that replicate the social, economic, or political disabilities of African Americans during slavery.[240]

Custom also helps to interpret what the Court means by "proportionality." Proportionality does not mean that the Court is empowered to, as Justice Scalia says, grade the homework of Congress.[241] That is, proportionality is not an open invitation for the Justices to second-guess Congress's judgment as to the necessity or wisdom of the legislation in the abstract. Instead, proportionality means that Congress's Thirteenth Amendment regulation cannot crowd out other textually indicated or deeply held constitutional values.[242] In Fourteenth Amendment jurisprudence, the primary constitutional value in tension with congressional enforcement is sovereign immunity. In the Thirteenth Amendment context, because the Amendment operates not only on government entities but also on private parties, other constitutional values must be considered—free speech, freedom of religion, and due process. However, because the Amendment gives Congress the power to regulate the customs of slavery—including customs related to education, racial discrimination, mob violence, contracting, common carriers and the like—courts should accord these enforcement measures more deference than if Congress had simply used its more general power to regulate commerce or spending.[243] As the Civil War and the resulting Fourteenth Amendment altered the relationship between Congress and the states, so did the Civil War and the Thirteenth Amendment alter the relationship of Congress to the individual. Notions of rights of association, of property, of purely domestic matters, and of purely private agreements were altered by the

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240. See Miller, White Cartels, supra note 147, at 1045 ("Congress can use its Thirteenth Amendment enforcement power to prevent individual and isolated instances of racial discrimination . . . [that,] if aggregated over a broad spectrum of persons, would have the effect of locking out African Americans from valuable social, economic, or political opportunities.").

241. *Coleman*, 132 S. Ct. at 1338 (Scalia, J., concurring) ("This grading of Congress's homework is a task we are ill suited to perform and ill advised to undertake.").

242. See Charles Fried, The June Surprises: Balls, Strikes, and the Fog of War, SCOTUSblog (Aug. 2, 2012, 12:19 PM), http://www.scotusblog.com/2012/08/the-june-surprises-balls-strikes-and-the-fog-of-war/ ("The *propriety* of the reach [of congressional power] has been thought to be a question of whether the claim bumps against an explicit or implicit constitutional barrier.") (on file with the *Columbia Law Review*). This Essay advocates a different approach from Professor McAward's approach, which argues that Congress's assessment of "causation" should be presumptively valid unless there is some other constitutional value that would temper that presumption. See McAward, supra note 219, at 626–29 (discussing causation requirement).

243. Cf. Runyon v. McCrary, 427 U.S. 160, 172–76 (1976) (finding no freedom of association defense to congressional legislation integrating private school); Rutherglen, State Action, supra note 4, at 1370 (observing that Thirteenth Amendment's applicability to private action allows regulation of what would otherwise be purely "domestic relations").

Thirteenth Amendment's abolition of slavery, and the Court has and should continue to respect that recalibration.[244]

III. IMPLICATIONS

A Thirteenth Amendment doctrine understood within a broader framework of the identification and regulation of custom gives us a better appreciation for the Amendment's jurisgenerative potential, the manner in which courts may evaluate novel uses of the Amendment's enforcement power, as well as the Amendment's place within a larger conversation about constitutional methodology. First, a more completely theorized Thirteenth Amendment reinforces the constitutional grounding of existing civil rights legislation, especially given the cracks that have begun to form in Commerce Clause jurisprudence.[245] Second, it offers some intellectual grist for new types of legislation that Congress may see fit to enact, grist that is largely indiscriminate to policy or party. After all, the same Thirteenth Amendment enforcement power that produced the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009[246] has propelled the Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Bill.[247]

Indeed, an analysis very roughly along the lines of this Essay has played out in a recent District of New Mexico case and demonstrates how a more fully realized Thirteenth Amendment doctrine might operate. In *United States v. Beebe*,[248] a group of white supremacists moved to dismiss a federal indictment charging them with violation of 18 U.S.C. § 249, the federal hate crimes statute. The defendants allegedly branded a mentally disabled Navajo man with a swastika and drew sexually degrading pictures on his skin.[249] The defendants argued that the hate crimes statute

244. Pamela Brandwein, Slavery as an Interpretive Issue in the Reconstruction Congresses, 34 Law & Soc'y Rev. 315, 324 (2000) (observing that process of defining slavery also defined boundaries between federal and state, public and private).

245. Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2585–92 (2012) (opinion of Roberts, C.J.) (holding Patient Protection and Affordable Care Act's individual mandate is not valid exercise of Congress's Commerce Clause power); id. at 2644–50 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (same); Seven-Sky v. Holder, 661 F.3d 1, 20 (D.C. Cir. 2011) (acknowledging that public accommodation laws are "encroachment on individual liberty" but confirming that they are permissible encroachment under Commerce Clause) (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258–59 (1964)), abrogated by *Sebelius*, 132 S. Ct. 2566.

246. Pub. L. No. 111-84, 123 Stat. 2190, 2836 (to be codified at 18 U.S.C. § 249) (citing Thirteenth, Fourteenth, and Fifteenth Amendments for authority and necessity of passing hate crimes legislation).

247. H.R. 3541, 112th Cong. (2011) (proscribing elective abortions where motivation is race or sex selection and identifying Section 2 of Thirteenth Amendment as authority).

248. 807 F. Supp. 2d 1045, 1047 (D.N.M. 2011).

249. Id.

exceeded congressional Thirteenth Amendment power.[250] The court held the Act constitutional.[251]

Attempting to "harmonize" *Boerne*'s congruence and proportionality test with *Jones*'s more deferential, rational basis test, the district court first observed that slavery is "a system made up of various component parts."[252] Targeting a badge or incident of slavery, according to the court, is targeting "in part, the institution of slavery itself."[253] According to the court, if Congress's identification of a badge or incident of slavery is rational, then only rational basis review of the legislation is warranted. If, however, the identification is irrational, something like congruence and proportionality is required. The court then looked to see whether Congress could have rationally determined that racially motivated violence was a badge or incident of slavery, and whether the fact that the statute facially applied to persons other than African Americans made the Act overbroad.[254] The court rejected both propositions. First, racially motivated violence was "a routine and accepted part of the American slave culture."[255] Consequently, Congress's decision to target racially motivated violence "could not possibly [be] irrational . . . . Rather, the history indicates that such a conclusion is ineluctable."[256] Second, whatever the claim for overbreadth, the legislation fell upon a Navajo man, whom history demonstrated was "a member of a class that suffered slavery before the passage of the Thirteenth Amendment."[257] Moreover, slavery, according to the court's dicta, was an institution that did not make distinctions among its victims, so it could extend beyond African Americans and Navajos. Because Congress rationally identified racially motivated violence as a badge or incident of slavery, the court used simple rational basis review to uphold the Act.[258]

The *Beebe* court certainly made some errors with respect to its analysis. Imposing a color-blindness component on the Thirteenth Amendment seems peculiar. As this Essay has tried to show, slavery as an American institution was far from color-blind, and some form of race-consciousness seems part of the very meaning of the word "slavery," at least as it existed in the United States. Further, the "double deference" review process the Court created appears somewhat labored, although

250. Id. at 1048

251. Id. at 1056.

252. Id. at 1051.

253. Id.

254. Id. at 1052–53 (providing historical overview of racially motivated violence in institution of slavery).

255. Id. at 1052.

256. Id.

257. Id. at 1055.

258. Id. at 1055–56 (applying rational basis review per McCulloch v. Maryland, 17 U.S. 316 (1819)).

such double deference is not unheard of.[259] However *Beebe* may fare on appeal, its approach to the Thirteenth Amendment enforcement power seems correct insofar as it concluded that slavery must be understood within American customary conventions, that slavery is an institution, and that some connection between a historical phenomenon of slavery and a modern analog is necessary to maintain the Amendment's integrity and its relevance.

Finally, as a matter of constitutional theory, understanding the Thirteenth Amendment's relationship to custom speaks to various schools of constitutional interpretation, in particular, "new originalism," "new textualism," "new doctrinalism," and "common law constitutionalism."[260] To be clear, this Essay does not purport to, nor can it, offer a comprehensive theory synthesizing these various schools. Instead, this Essay merely aims to inject a relatively undertheorized, but historically pivotal, Amendment, into a broader conversation about the relationship between text, institutions, common law, and history in constitutional construction. With that disclaimer, for the new originalists,[261] understanding the Thirteenth Amendment as a method of regulating custom frees the Amendment from the narrow, older, original expected applications approach (which reduces the Amendment to little more than a constitutional punctuation mark) and brings it closer to the resources this school has used to construe other amendments, as, for example, the protections and scope of the Second Amendment.[262] For the new textualists,[263] this approach agrees that the word "slavery" is more open-textured than has heretofore been recognized. And yet, this Essay suggests that the word "slavery" in the Thirteenth Amendment—perhaps more so than the word "equal" in the Fourteenth, for example—must be contextualized by history, and must be understood as an institution

259. See Harrington v. Richter, 131 S. Ct. 770, 778 (2011) (noting double deference owed to state courts under ineffective assistance of counsel test and Antiterrorism and Effective Death Penalty Act).

260. This writer uses all these terms guardedly, aware that there is significant disagreement both between and among these different schools of constitutional theory, and disagreement even as to the boundaries between one school of theory and another.

261. See Thomas B. Colby, The Sacrifice of the New Originalism, 99 Geo. L.J. 713, 716–36 (2011) (laying out description of new originalism).

262. District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (identifying "longstanding prohibitions" and common law sources as potential limitations on scope of the Second Amendment). For more on this, see Darrell A.H. Miller, Historical Tests, (Mostly) Unbalanced Rights, and What the Seventh Amendment Can Teach Us About the Second, 122 Yale L.J. (forthcoming 2012) (discussing role of extratextual history and custom in construing unclear text).

263. See James E. Ryan, Laying Claim to the Constitution: The Promise of New Textualism, 97 Va. L. Rev. 1523, 1539–55 (2011) (offering one description of new textualism and its use by various scholars).

shaped by that history, to maintain its integrity as law.[264] For the new doctrinalists,[265] understanding the Thirteenth Amendment as operating on and through custom speaks to both the manner and the limits by which courts and Congress are empowered to create "decision rules" for enforcing a norm that, by its very language and structure, seems to contemplate underenforcement. And finally, for the common law constitutionalists,[266] this Essay provides an example of how methods of common law reasoning could apply in those areas of the Constitution where the text and structure appear to contemplate a role for both the judiciary and Congress in constitutional development.

CONCLUSION

The process of construing our Constitution is, in the words of Justice Harlan, a process of determining "the traditions from which it developed as well as the traditions from which it broke."[267] Slavery still haunts the dark recesses of America's legal and cultural institutions.[268] It is a spirit far more palpable and proximate today than that of George III and the Tory Parliament.[269]

In construing the Thirteenth Amendment, it is incumbent upon courts to recognize that they are no longer the sole determiners of America's traditions with respect to this signal event in American history.

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264. See Carter, supra note 6, at 1366 ("Determining whether a particular injury or form of contemporary inequality constitutes a badge or incident of slavery requires a discourse about the historical facts of chattel slavery.").

265. See Brannon P. Denning, The New Doctrinalism in Constitutional Scholarship and *District of Columbia v. Heller*, 75 Tenn. L. Rev. 789, 797 (2008) (identifying and discussing concept of new doctrinalism and decision rules).

266. See generally Strauss, supra note 193, at 877–90 (setting out concept of common law constitutionalism).

267. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (discussing scope of Due Process Clause).

268. Consider, for instance, this selection from the abolitionist newspaper, *Elevator*, speaking on the way slave culture influenced northern rules on enfranchisement: "Thus we see [in the Northern states] how the influence of slavery has changed the organic law, and how the oligarchy of the petty State of South Carolina has ruled and governed—not only the other slave States, but those which have been called by way of distinction, free States." Citizenship and Suffrage, Elevator, Dec. 22, 1865, available at http://research.udmercy.edu/find/special_collections/digital/baa/item.php?record_id=726&collectionCode=baa (on file with the *Columbia Law Review*).

269. One must consider what American popular constitutional discourse would sound like if Americans intoned the names Frederick Douglass, William Lloyd Garrison, John Bingham, and Charles Sumner with the same reverence as Thomas Jefferson, James Madison, Patrick Henry, and George Washington. For discussion of what Akhil Amar has called America's "curiously selective ancestor worship," see Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 293 (1998); Tom Donnelly, Our Forgotten Founders: Reconstruction, Public Education, and Constitutional Heroism, 58 Clev. St. L. Rev. 115, 117 (2010) (discussing treatment of Reconstruction versus Founding Era historical figures in popular culture and textbooks).

The enforcement provision of Section 2 is a textual command that the question of what has been, what is, and what shall be a custom associated with our history of slavery is a question shared with Congress.

Understanding slavery within this well-developed methodology of addressing custom is one response to what Ariela Gross has identified as the central conservative narrative: that "slavery has no permanent legacies, unless they are cultural legacies, which cannot be remedied by law."[270] Slavery has a permanent legacy: It is embedded in our laws and our constitution, in our attitudes and our aspirations. Slavery was a custom in America: Its history, laws, custom, and culture are as much a part of the American experiment as the English Declaration of Right, the Mayflower Compact, the Boston Massacre, and Paul Revere's ride. Accordingly, the impact of the Thirteenth Amendment should be treated as no less revolutionary and no less influential to our constitutional understanding.

270. Ariela Gross, When Is the Time of Slavery?: The History of Slavery in Contemporary Legal and Political Argument, 96 Calif. L. Rev. 283, 287 (2008).