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New Textualism and the Thirteenth Amendment

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ESSAY

NEW TEXTUALISM AND THE THIRTEENTH AMENDMENT

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Michele Goodwin's piece raises important questions about whether troubling modern-day labor practices in jails and prisons are consistent with the Thirteenth Amendment.[1] In Goodwin's telling, the ratification of the Thirteenth Amendment formally ended the institution of slavery, but the Amendment allowed practices resembling slavery to continue, perhaps reflecting the extant stereotypes and racism that formally amending the Constitution cannot root out. Indeed, Goodwin excavates historical materials that suggest the people who drafted and ratified the Amendment understood and expected that it would allow the perpetuation of slavery in another form. As Goodwin explains, most historians have argued that the Thirteenth Amendment's punishment clause, which allows for involuntary servitude "as punishment for a crime,"[2] "was probably meant to preserve the existing system of prison labor."[3] But she persuasively demonstrates that these historians "overlook . . . [how] those systems were . . . racialized."[4] In other words, everyone understands that the Thirteenth Amendment was drafted to allow the continuation of prison labor. But while prison labor could—hypothetically—be a racially neutral system of uncompensated or undercompensated labor, contemporaries of the Thirteenth Amendment understood that it was not, in actuality, neutral. And they expected that it would not be neutral, and that undercompensated prison labor would be performed by

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1 Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899 (2019).

2 U.S. CONST. amend. XIII.

3 Goodwin, *supra* note 1, at 932–33.

4 *Id.*

primarily black and non-white immigrant populations caught in a dragnet web of interlocking state and private discrimination that would push them into the criminal justice system. Goodwin's narrative about the Thirteenth Amendment is a prime example of what Professor Reva Siegel has called "preservation-through-transformation"—how society and the legal system reject one form of racial discrimination while at the same time legitimating other forms of it.[5]

Goodwin's project thus pointedly asks what the Thirteenth Amendment means—was it understood and meant to permit, and does it permit, a racialized system of prison labor? Answering that question requires us to think about what the Thirteenth Amendment means, and Goodwin's thought-provoking article provides an occasion to revisit some of the ways people have interpreted the Thirteenth Amendment. As it so happens, the Thirteenth Amendment provides an abbreviated case study on some of the promises and limits of constitutional textualism, including the variant of "new textualism" that has recently emerged.[6] New textualism, in Jim Ryan's definition, is the promising new form of constitutional textualism whose "core principle . . . is that constitutional interpretation must start with a determination, based on evidence from the text, structure, and enactment history, of what the language in the Constitution actually means."[7] But unlike its predecessors, new textualism recognizes that the semantic meaning of texts can embody broad principles whose application to particular facts may change over time, and it welcomes the consideration of non-textual sources like structure or enactment history or historical context.[8]

The quest to interpret the Thirteenth Amendment illuminates how constitutional textualism, in practice, often involves the kinds of interpretive challenges that its proponents ascribe to purportedly textual methods of constitutional interpretation. These challenges include reconciling different genres of sources and selecting between different pieces of evidence based on intuitions about constitutional substance. Acknowledging that the end goal of

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5 Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1112 (1997).

6 *See* James E. Ryan, *Laying Claim to The Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1524 (2011).

7 *Id.*

8 *See id.* at 1538–56.

constitutional textualism is to determine "what the language in the Constitution actually means" does not change that;[9] nor does it necessarily provide the kind constraining, anchoring force that textualism is supposed to offer relative to other interpretive methodologies. This piece highlights how these dynamics have played out in the context of the Thirteenth Amendment with respect to two interpretive questions—what relevance the historical context behind the Amendment has, and whether other provisions in the Constitution shed some light on the meaning of the Thirteenth Amendment. It suggests that new textualism in many respects converges on other purportedly competing methodologies and that the promise of the new textualism also represents its shortcomings or at least the sacrifice of textualism's comparative advantages over other methodologies.

I
HISTORICAL CONTEXT

One question that comes up in interpreting the Thirteenth Amendment is what relevance does the historical context behind the Amendment have? The Thirteenth Amendment cases have grappled with how the historical context relates to, and sheds light on, the meaning of the constitutional text, as New Textualists maintain it does.[10] And it is helpful to survey different ways in which the law has inscorporated the historical context behind amendments, primarily with respect to the Thirteenth Amendment, but also with respect to the Fourteenth Amendment, as a point of comparison.

What the cases and the comparison among them reveal is that incorporating historical context can be done at different levels of generality.[11] The choice to define the historical context at a particular level of generality also involves a fair amount of interpretive latitude that makes constitutional textualism, including new textualism, less disciplined or constraining than its proponents occasionally maintain.[12] The cases also

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9 *Id.* at 1524.

10 *Id.* (arguing that enactment history is relevant to new textualism), 1526 (same, for historical context).

11 For a more extended discussion of how historical practices and context can be defined at different levels of generality, see Leah M. Litman, *Debunking Anti-Novelty*, 66 DUKE L.J. 1409, 1479–87 (2017). For an application of the same principle in another context, see also Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1088 (1990).

12 Josh Chafetz takes this argument a step further and argues that selecting between different historical narratives itself reflects a normative choice about

underscore that new textualism, in particular, is an eclectic methodology; that is, it relies on different *genres* of sources to ascertain the legally operative constitutional meaning. Designating the constitutional text as the primary or predominant consideration does not change that; a weighted balancing test that accords a different weight to different kinds of interpretive factors (such as text, historical context, structure, and precedent) still amounts to a balancing test that considers different kinds of evidence.[13] If that is not problematic—and I do not believe that it is—that goes a long way toward debunking some of the criticisms of purportedly non-originalist or non-textualist methods of interpretation.[14]

A. The Thirteenth Amendment

The Thirteenth Amendment provides that "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[15]

Two foundational cases on the Reconstruction Amendments, *Slaughter-House Cases* and the *Civil Rights Cases*, offer some examples of how historical context can be used to interpret the constitutional text.[16] *Slaughter-House*

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which histories to continue and depart from. Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96 (2017).

13 Ryan, *supra* note 6, at 1548 (endorsing an approach that is "holistic" and "relies on text, history, and the structure of the Constitution and the government it establishes to elucidate the best and truest meaning of the language contained in the document").

14 Robert Post & Reva Siegel, *How Liberals Need to Approach Constitutional Theory*, THE NEW REPUBLIC, Sept. 18, 2007, at 14 ("Americans routinely use many other forms of persuasion to convince one another about the Constitution's meaning. They appeal to text, precedent, history, structure, tradition, purpose, principle, prudence, and ethical ideas."); *see also* Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739, 1762–84 (2013) (explaining and rejecting noncombinability problem); Adam M. Samaha, *Looking Over A Crowd—Do More Interpretive Sources Mean More Discretion?*, 92 N.Y.U. L. REV. 554 (2017) (outlining experimental evidence that suggests adding sources of interpretation reduces interpretive discretion).

15 U.S. CONST. amend. XIII.

16 Here, although historical context might suggest the methodology is originalist, new textualists recognize that discerning the meaning of the text involves drawing from several different kinds of sources, including historical context. Ryan, *supra* note 6, at 1532–34. However, originalists like Larry Solum have argued that new textualism is not different than originalism. *See Bellin on Fourth Amendment Textualism*, Legal Theory Blog (Jan. 15, 2019), https://lsolum.typepad.com/legaltheory/2019/01/bellin-on-fourth-

Cases addressed the constitutionality of a Louisiana state law that required butchers in New Orleans to use a certain slaughter-house in slaughtering animals.[17] Among other claims, the butchers argued that the law created "an involuntary servitude" in violation of the Thirteenth Amendment.[18] And the *Civil Rights Cases* addressed the constitutionality of a federal law prohibiting private entities from racially discriminating; the Court examined whether Congress had the power to enact that law under its power to enforce the Thirteenth Amendment.[19]

In *Slaughter-House Cases*, the Court explained why the Louisiana law did not run afoul of the Thirteenth Amendment. The Court stated that even "[t]he most cursory glance" at the Amendment (along with the other Reconstruction Amendments) "discloses a unity of purpose, when taken in connection with the history of the times"[20]—destroying "[t]he institution of African slavery."[21] And, the Court continued, that purpose "cannot fail to have an important bearing on any question of doubt concerning their true meaning."[22]

But how might this historical context bear on the meaning of those Amendments? One way would be to interpret ambiguous terms in light of that purpose—that is, to rely on the historical context to resolve "question[s] of doubt" about the meaning of the text.[23] So, for example, the Court in *Slaughter-House Cases* was trying to figure out the meaning of the word "servitude." And, the Court explained,

> To withdraw the mind from the contemplation of this grand

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amendment-textualism.html [https://perma.cc/NL4S-3HC7]. The extent to which that is true may depend on whether one puts other non-textual or non-historical sources—such as structure or doctrine—in the construction bucket or the interpretation bucket. Loosely speaking, interpretation focuses on the core, unchangeable meaning of the text, whereas construction relates to how interpreters (including judges) implement it or construct its practical legally operative meaning. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 108 (2010); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 472 (2013) (explaining new originalists' understanding that construction is "essentially driven by normative concerns," whereas interpretation is not); Ryan, *supra* note 6, at 1544 ("Constitutional *adjudication* is thus distinct from constitutional *interpretation*.") (emphasis added).

17 Slaughter-House Cases, 83 U.S. 36, 58–59 (1872).

18 *Id.* at 66.

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

20 *Slaughter-House Cases*, 83 U.S. at 67.

21 *Id.* at 68.

22 *Id.* at 67.

23 *Id.*

> yet simple declaration . . .—a declaration designed to establish the freedom of four millions of slaves—and . . . find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it."[24]

In other words, the Court interpreted the terms of the Amendment in ways that would further the Amendment's purpose. Along these lines, the Court emphasized that the "spirit of these articles" must have "fair and just weight in any question of construction"; and that "in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy."[25]

But *Slaughter-House Cases* established some limits on what the historical context could and could not do. The Court continued:

> [W]hile negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent.[26]

Here, the text of the Amendments limits the amount of work that purpose can do—the text forbids slavery and servitudes of any kind, not just of particular races, even though the Court acknowledged that the purpose of the Amendments was the destruction of "[t]he institution of African slavery."[27]

There are other ways of considering historical context as well—such as consulting common or understood meanings of a phrase. The Court did some of that too and again anchored its analysis to an assessment of the Amendment's purpose. In

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24 *Id.* at 69; *see also id.* at 71 ("[N]o one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.").

25 *Id.* at 72.

26 *Id.*

27 *Id.* at 68.

Slaughter-House Cases, the Court reasoned that "[t]he word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery."[28] And in the *Civil Rights Cases*, the Court explained that "[u]nder the Thirteenth Amendment, it has only to do with slavery and its incidents."[29] It then proceeded to explain how decisionmakers should interpret those terms:

> The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities were the inseparable incidents of the institution.[30]

Finally, in both *Slaughter-House Cases* and the *Civil Rights Cases*, the Court tied its bottom-line conclusions to the historical context behind the Thirteenth Amendment. After reciting the Amendment's purpose, the Court in *Slaughter-House Cases* ended its analysis with this cursory statement: The Amendment's history was "all that we deem necessary to say on the application of that article to the statute of Louisiana, now under consideration."[31] In other words, the historical context behind the Amendment was enough to make clear why the Louisiana law did not violate the Amendment.

The *Civil Rights Cases* had a longer passage that yoked the Court's conclusion to the historical context behind the Amendment. The Court framed the "only question" in the case as "whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement . . . does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country."[32] And the Court answered that question in the negative:

> Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery. . . . What is called class

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28 *Id.* at 69.
29 The Civil Rights Cases, 109 U.S. 3, 23 (1883).
30 *Id.* at 22.
31 Slaughter-House Cases, 83 U.S. 36, 69 (1872).
32 *The Civil Rights Cases*, 109 U.S. at 23.

> legislation would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment, but would not necessarily be so to the Thirteenth, when not involving the idea of any subjection of one man to another.[33]

The *Civil Rights Cases* expanded on this analysis as follows: "[A]n act of refusal has nothing to do with slavery or involuntary servitude. . . . It would be running the slavery argument into the ground to make it apply to every act of discrimination."[34] And just to press the point further, the Court explained:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as white citizens; yet no one, at that time, thought that it was any invasion of their personal status as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery.[35]

These opinions all used historical context to shed light on the meaning of the constitutional text. But they used historical context in different ways—resolving ambiguities in the text in a way that would further the Amendments' purposes; consulting common or understood meanings of a phrase in light of contemporary events; and limiting the reach of the Amendments by relying on shared expectations or understandings about the Amendments' scope.[36]

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33 *Id.* at 23–24.

34 *Id.* at 24–25.

35 *Id.* at 25.

36 Ryan, *supra* note 6, at 1544 (approvingly describing a new textualism method where the "examination of history includes not simply the specific enactment history, but the broader historical context surrounding the enactment").

B. The Fourteenth Amendment

While Goodwin's piece focuses primarily on the Thirteenth Amendment, assessing the different textual moves that might be made with respect to the Thirteenth Amendment is easier with a point of comparison—the different textual moves that are made with respect to the Fourteenth Amendment's Equal Protection Clause.

Section 1 of the Fourteenth Amendment provides that: "[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."[37] The two foundational cases on the Thirteenth Amendment, *Slaughter-House Cases* (and the *Civil Rights Cases*) addressed Fourteenth Amendment claims in addition to Thirteenth Amendment claims.

The *Slaughter-House Cases* analysis is illuminating in what it says about the relationship between text and historical context.[38] *Slaughter-House Cases* quickly rejected the possibility that the Louisiana law on butchers might offend the Fourteenth Amendment. The Court explained:

> We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.[39]

Thus, because the purpose of the Fourteenth Amendment was so obviously to prohibit racial discrimination, it did not extend to other forms of discrimination.

Of course, *Slaughter-House Cases* was wrong about what the ultimate scope of the Equal Protection Clause would come to be. Today, the clause does protect against other kinds of discrimination in addition to discrimination based on race—such as discrimination based on sex,[40] discrimination based on sexual orientation,[41] or any animus-laden distinctions between persons.[42]

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37 U.S. CONST. amend. XIV.

38 The *Civil Rights Cases* is less illuminating because it focused primarily on the state action question. *See* The Civil Rights Cases, 109 U.S. 3, 15–16 (1883).

39 Slaughter-House Cases, 83 U.S. 36, 81 (1872).

40 *See* U.S. v. Virginia, 518 U.S. 515, 531–33 (1996).

41 Pavan v. Smith, 137 S. Ct. 2075, 2077–79 (2017); Sessions v. Morales-Santana, 137 S. Ct. 1678, 1690 (2017) (citing Obergefell v. Hodges, 135 S. Ct. 2587, 2603 (2015)).

42 U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (invalidating food

But the judicial implementation of the Equal Protection Clause continues to distinguish between discriminations based on different kinds of characteristics. The doctrine maintains that classifications based on certain characteristics, such as race, are subject to the highest degree of scrutiny,[43] and that classifications based on other characteristics, such as sex and perhaps sexual orientation, are subject to intermediate scrutiny.[44] It also maintains that other kinds of classifications, while they might be unconstitutional, are subject only to the weakest kind of judicial scrutiny—rational basis review.[45]

With respect to the Fourteenth Amendment, unlike the Thirteenth Amendment, *Slaughter-House Cases* appeared to rely on historical context only as a way to limit the reach of the Amendment by consulting shared expectations or understandings about the scope of the Amendments. And existing doctrine has continued to reflect that distinction, albeit in the doctrine that judicially implements the Amendments, rather than in construing the Amendment's meaning or scope.

C. (New) Constitutional Textualism and the Reconstruction Amendments

The use of historical context to interpret the constitutional text raises some interesting issues about the theory and practice of constitutional textualism. These issues include: (1) the relationship between the text and the context in which it was enacted; (2) the interpretive choices that are baked into textual interpretation (including new textualism) that cannot be boiled down to simple, mechanical formulas; and (3) the blurry lines between historical context and some ostensibly

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stamp restriction because it was designed to discriminate against hippies); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (invalidating refusal to grant housing permit for home for the intellectually disabled).

43 Fisher v. Univ. of Texas at Austin, 136 S. Ct. 2198, 2207–08 (2016); Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720–21 (2007); *id.* at 837 (Breyer, J., dissenting) ("Nonetheless, in light of *Grutter* and other precedents, I shall adopt the first alternative. I shall apply the version of strict scrutiny that those cases embody.").

44 *Virginia*, 518 U.S. at 531–33; *Morales-Santana*, 137 S. Ct. at 1690.

45 Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309–10 (2016) (explaining differences in the standard of review); *see also* Leah M. Litman, *Unduly Burdening Women's Health*, 116 MICH. L. REV. ONLINE 50, 55–58 (2017) (elaborating on this distinction); Leah M. Litman, *Getting to No on Roe*, TAKE CARE (July 5, 2018), https://takecareblog.com/blog/getting-to-no-on-roe [https://perma.cc/D5BC-5ZXU] (same).

forbidden considerations in constitutional interpretation (at least according to certain theories of interpretation, and in particular textualism). All of these issues point toward the "sacrifice" that the new textualism might make—it foregoes some of the differences (and purported advantages over) other methods of interpretation by recognizing that different sources, particularly historical context, can shed light on the meaning of the text.[46]

The use of historical context in constitutional textualism raises questions about how to reconcile text and historical context. When can the historical context broaden the text, or narrow it? Most people tend to think that historical context cannot change the meaning of the text, and that view is reflected in the cases on the Thirteenth Amendment.[47] But texts are susceptible to different interpretations, and historical context offers a way of selecting between them. And different aspects of the text can do the same thing—that is, different facets of the text can pull in different directions just as historical context can.

This, then, raises the possibility of weighing different kinds of evidence—"pure" text on the one hand and historical context on the other—against one another. Consider, for example, an argument that the *Slaughter-House Cases* acknowledged that cuts against its interpretation of the Thirteenth or Fourteenth Amendment:[48] Whereas the Fifteenth Amendment specifically prohibits abridging a person's right to vote "on account of race, color, or previous condition of servitude,"[49] the Thirteenth Amendment prohibits any form of "slavery []or involuntary servitude,"[50] and the Fourteenth Amendment prohibits states from denying "any person . . . the equal protection of the laws," on any basis.[51] Thus, the Thirteenth and Fourteenth Amendment's omission of any specific mention of race suggests the protections of those Amendments extend beyond racial discrimination or involuntary servitudes or slavery of particular racial groups. That cuts in the opposite direction as

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46 This phrase borrows from Thomas Colby's article of the same title, which is explained infra. *See* Thomas B. Colby, *The Sacrifice of The New Originalism*, 99 GEO. L. J. 713 (2011).

47 *See supra* text accompanying notes 25–27.

48 Slaughter-House Cases, 83 U.S. 36, 71–72 (1872) ("It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles were addressed to the grievances of that race, and designed to remedy them as the fifteenth.").

49 U.S. CONST. amend. XV.

50 U.S. CONST. amend. XII.

51 U.S. CONST. amend. XIV.

the historical context of the Amendments—the textual point suggests the Amendments reach more than just discrimination based on race, whereas the historical context suggests they are uniquely concerned with racial discrimination.

These are competing pieces of evidence, and they are also different kinds or genres of competing evidence. Yet the possibility that both pieces of evidence would enter into the constitutional analysis does not seem to raise the kind of incommensurability problems that are sometimes associated with critiques of multi-faceted forms of constitutional interpretation that do not exclusively focus on one kind of source, such as the text, or on the original meaning of the text. These critiques maintain that it is not possible to weigh different kinds of constitutional authority—text, precedent, original meaning, practice, or implications—against one another.[52] Other scholars have explained at length why the incommensurability problem is not a particularly significant issue for eclectic forms of constitutional interpretation.[53] And Thirteenth Amendment textualism supports those explanations and defenses of eclectic methods of interpretation in as much as it shows how different modes of constitutional argument can be sensibly weighed against one another, with an eye toward answering the ultimate question in constitutional cases—discerning the legally operative constitutional meaning.[54]

But if Thirteenth Amendment interpretation suggests that some interpretive challenges are less challenging than they might appear, it also suggests that other interpretive challenges may be more challenging. Specifically, using historical context to interpret the text involves several interpretive choices that cannot readily be boiled down to a simple formula. And in that sense, the constraint that textualism offers is more analogous to the kind of constraint that most theories of interpretation offer. All theories of interpretation constrain judges, and the cases that sought to

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52 *See, e.g.*, Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and The Combinability Problem*, 91 TEX. L. REV. 1739, 1762–84 (2013) (summarizing objection before rejecting it).

53 *See id.*; *see also* Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CALIF. L. REV. 593, 607–08 (1999); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1187 (1987) (considering how to weigh structure and doctrine when they point in different directions).

54 Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1290 (2015).

interpret the text of the Thirteenth Amendment underscore that all of the different interpretive methodologies (including textualism) also involve balancing different considerations at one point or another in their analysis.

The use of historical context, in particular, involves another series of choices about how to read the relevant history. It is no secret that history is often messy and complicated, or that historical narratives can be described at different levels of generality.[55] And the historical context behind the Thirteenth Amendment is no exception. At various points, the cases discussing the historical context of the Thirteenth Amendment describe that context as the institution of African slavery[56] (or, slightly differently, the destruction of the institution of slavery[57]); at a slightly higher level of generality, the "subjection of one man to another";[58] on another formulation, "discrimination against the negroes as a class, or on account of their race"[59]; or (in modern cases) discrimination "on the basis of race."[60] All of these descriptions are rough cut but fair descriptions of the historical context behind the Thirteenth Amendment. And selecting between them—at their varying levels of specificity or generality—may result in different interpretations of the Amendment, and different applications of it.

That is all fine and good; interpretation inevitably involves some degree of discretion and some amount of choice. But recognizing that this kind of discretion and choice is a part of textualism (or at least a part of textualism that is attentive to historical context) should reduce the extent to which proponents of textualism can insist that their theory avoids the kind of interpretive choices that they sometimes implicitly or explicitly represent are uniquely part of other theories of interpretation. Linguists have already pointed out some of the ways in which that is not the case: Textualism, like all kinds of interpretation, involves a significant amount of interpretive choice, including through the phenomena of

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55 Litman, *Anti-Novelty*, *supra* note 11, at 1479–87 Novelty; Chafetz, *supra* note 12.

56 The Civil Rights Cases, 109 U.S. 3, 9 (1883).

57 Slaughter-House Cases, 83 U.S. 36, 72 (1873).

58 *The Civil Rights Cases*, 109 U.S. at 23–24.

59 *Slaughter-House Cases*, 83 U.S. at 81.

60 Fisher v. Univ. of Texas at Austin, 136 S. Ct. 2198, 2207–08 (2016); Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720–21 (2007).

"entextualization," which occurs when interpreters pick the relevant "chunk" of text to focus on.[61] The case study of Thirteenth Amendment textualism supplements that scholarship by highlighting other choices that are also part of textualism, or at least some variants of it.

Finally, the use of historical context to interpret the Thirteenth Amendment illustrates some of the ways textualism can smuggle in some ostensibly forbidden considerations, or at least considerations that the theory of textualism, according to its proponents, was meant to shift away from. In particular, historical context sometimes blurs together with purpose, and textualism is often described or pitched as an alternative to purposivism, which is defined as a focus on the official, objective purpose(s) of a law.[62] All of the discussion of the historical context behind the Thirteenth Amendment focused on the animating goal(s) of the Amendment. "[W]hen taken in connection with the history of the times," the Court declared, "a unity of purpose" became clear.[63] The Court described its understanding of the historical context as a "design[] to establish the freedom of four millions of slaves."[64] Both of these references to history are about the purpose that contemporaries would have attributed to the Thirteenth Amendment. That is striking insofar as proponents of textualism often trumpet it as an alternative to purposivism, which its critics sometimes dismissively depict as an unconstrained and largely free-wheeling judicial inquiry.[65]

The use of historical context in the cases on the Reconstruction Amendments also illustrates some of the fuzzy boundaries between the original public meaning of a text and its expected applications. The distinction between the two is relevant insofar as modern versions of originalism tend to

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61 Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent*, 55 B.C. L. REV. 1613, 1651 (2014); Anya Bernstein, *Before Interpretation*, 84 U. CHI. L. REV. 567 (2017).

62 Richard Re has made a similar point about some of the Court's recent statutory interpretation cases. *See* Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2d 407 (2015).

63 *Slaughter-House Cases*, 83 U.S. at 67.

64 *Id.* at 69; *see also id.* at 71 ("[N]o one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.").

65 *See* William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1532–33 (1998) (summarizing critique before challenging it).

focus more on the former, rather than the latter, for a variety of reasons.[66] But the distinction between the two is not always clear, nor is it particularly stable. In part for that reason, Michael Dorf warned of what he deemed the originalism two-step—interpreters' ability to shift back and forth between a text's public meaning and its expected applications depending on the context.[67] For example, some originalists interpreted the text at a high level of generality when analyzing the constitutionality of laws restricting marriage to heterosexual couples: In that instance, interpreters read the Equal Protection Clause as forbidding laws that subordinate one group to another, particularly with respect to a societally important institution.[68] But when analyzing other issues, originalists interpret the text at a much more specific level of generality.[69] For example, to determine whether laws restricting women's access to medical procedures terminating a pregnancy, interpreters maintain that the text could not forbid laws that were common at one point in history.[70] But the same could be said for laws restricting marriage to heterosexual couples.

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66 Litman, *Anti-Novelty*, *supra* note 11, at 1450; Dorf, *Undead Constitution*, *infra* note 69, at 2020.

67 *See also* Ryan, *supra* note 6, at 1533 ("Although the shift to original meaning was significant as a matter of theory, it often changed little in practice. Conservatives were often unwilling to follow this refined version of originalism when it would lead to liberal outcomes by courts.").

68 *See* Ilya Somin, *Originalism is Broad Enough to Include Arguments for a Constitutional Right to Same-Sex Marriage*, THE VOLOKH CONSPIRACY (Jan. 28, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/28/originalism-is-broad-enough-to-include-arguments-for-a-constitutional-right-to-same-sex-marriage/?utm_term=.01bc85ac3b1c [https://perma.cc/Z5P6-VVJL]; *see also* Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 1, 23–48 (2017). Dorf also gives as an example of academic arguments that seek to justify the claim that discrimination on the basis of sex is unconstitutional. Dorf, *Undead Constitution*, *infra* note 69 at 2031–34 (citing Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011)).

69 *See* Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2032–34 (2012) (book review) (citing Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 695–98 (2009)).

70 Jim Ryan generalized: "Conservatives, however, continued to rely on what the framers and ratifiers said about the Constitution. This is not in itself controversial, because the statements and understandings of the founding generations constitute some evidence of what the language meant when adopted. What was (and remains) controversial is that conservatives often relied exclusively on what the ratifiers and framers believed the Constitution required in certain contexts in order to establish the meaning of the text. Put differently, they relied on the expectations of the framers and ratifiers rather than the actual language in the document." Ryan, *supra* note 6, at 1534–35.

The same back-and-forth between public meaning and expected applications is evident in the Thirteenth Amendment cases too. The *Slaughter-House Cases*' and the *Civil Rights Cases*' discussion of the historical context behind the Thirteenth Amendment ranged from the very general ("[t]he institution of African slavery"[71]) to the very specific ("the refusal to any persons of the accommodations of an inn"[72]). And importantly, the Court seamlessly switched back and forth between discussing the historical context as a background principle to the Amendment (which comes closer to approximating original public meaning) and discussing the historical context as a way of testing whether contemporaries would understand the text to mean that a particular law is unconstitutional (which starts to look like the expected application of the text).[73]

The back-and-forth between public meaning and expected applications has some particularly problematic consequences in the context of these cases. Specifically, the *Civil Rights Cases* used contemporaries' expected applications about the Thirteenth Amendment as a basis to legitimate private forms of discrimination.[74] It also used contemporaries' shared understandings about the Thirteenth Amendment to mistakenly put some conceptual space between slavery and racism, as well as to suggest that the institution of slavery was separate from race and racism.[75]

Of course, this is but one limited case study in how textualism has worked. But it points in the direction of some limitations to the "new textualism" that mirror some of the limitations to the "new originalism." In his article, *The Sacrifice of The New Originalism*, Thomas Colby explained the trade-off that newer forms of originalism make.[76] Colby argues that more modern forms of originalism came to focus on original public meaning, rather than original intentions, to avoid many of the criticisms with relying on original intent.[77] These

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71 Slaughter-House Cases, 83 U.S. 36, 68 (1873).

72 The Civil Rights Cases, 109 U.S. 3, 23–24 (1883).

73 *See supra* text accompanying notes 33–36.

74 *See The Civil Rights Cases*, 109 U.S. at 25.

75 *See id.*; Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680, 1723 (2006) ("The argument here was straightforward. Race and slavery were legally independent.").

76 Colby, *supra* note 46.

77 Colby, *supra* note 46, at 736–44; *see also* Ryan, *supra* note 6, at 1532 ("For conservatives, the shift to original meaning provided a stronger theoretical base for originalism. Everyone could agree that the text of the Constitution, at least when clear, counted as law.").

criticisms include the claim that intentions, rather than enacted text, do not amount to law, and the concern that relying on the framers' intentions or expectations would produce some rather intolerable results (such as the unconstitutionality of paper money, and the continued inequality and disenfranchisement of women and African-Americans, among other things). But focusing on original public meaning—and particularly in accepting that the original public meaning was potentially capacious enough to mean that laws prohibiting same-sex marriage are unconstitutional, or that laws prohibiting abortion are unconstitutional, or that laws segregating public schools are unconstitutional—sacrificed one of the main benefits that originalism purportedly offered: constraining judges, and reducing their ability to make freewheeling, policy-laden determinations.[78]

Something similar could be said about the new textualism. Specifically, the new textualism's acknowledgment that the constitutional text can adopt and reflect general principles, and that the meaning of the constitutional text can be discerned by examining many different kinds of sources (such as historical context, or purpose, or structure, or other texts) both more accurately reflects how interpretation works, and also improves on some of the shortcomings of more wooden forms of textualism. But in the process, it may sacrifice some of the constraints that textualism was supposed to offer, or at least complicate some of the arguments for why textualism is superior to other interpretive methodologies, including the constraint it imposes on judges. And that has had significant consequences for the legal doctrine that governs Congress' ability to enact legislation to carry out the promises of the Thirteenth (and Fourteenth) Amendments.

Scholars have already pointed to a similar dynamic—sacrifices entailed in efforts to improve—when it comes to statutory textualism.[79] Both John Manning and Richard Re have argued that professed textualists occasionally broaden their purported textualist inquiries to include consideration of

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78 Colby, *supra* note 46, at 744–64. New Originalism distinguishes between constitutional interpretation and constitutional construction; construction involves the "process of fashioning constitutional doctrine and applying it to [a] particular issue[]," whereas interpretation involves determining the actual, semantic meaning of the words of the Constitution. *Id.* at 766–67.

79 This may also reflect the dynamic Jeremy Kessler and David Pozen identified in Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819 (2016).

other sources, such as context and structure, or legislative object or purpose.[80] And, in doing so, these scholars have suggested that these purported textualist methods may sacrifice or compromise on several of the advantages of textualism.

Perhaps it is possible to perform an analysis of the text that always manages to focus on original public meaning rather than expected applications, or an analysis of the text that is not bound up with normative choices about how to read history or structure. But if the theory of constitutional textualism—or at least the strain of it tied to original public meaning—is perfectible, its practice is far from it.[81]

II
INTERTEXTUALISM

The Thirteenth Amendment also provides an occasion to think about another occasional move in textualism, particularly new textualism—intertextualism, which is the effort to interpret similar words or phrases in the Constitution to mean similar things and to read different wording choices as a significant indicator of constitutional meaning.[82] At least when applied to the Thirteenth Amendment, intertextualism might not have the kinds of interpretive payoffs it is supposed to have; intertextualism, rather, reveals how the text can often cut in different directions, just like other kinds of sources can.

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80 John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113; Re, *supra* note 62.

81 *Cf.* Colby, *supra* note 46, at 769 ("When its apparent methodological compatibility with the New Originalism is recognized, *Blaisdell* might serve as an illustration of the inability of the New Originalism to constrain judges or obviate outcomes despised by many champions of originalism.").

82 A recent example of intertextualism is the Chief Justice's dissent in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2687 (2015) (Roberts, C.J., dissenting) ("The unambiguous meaning of 'the Legislature' in the Elections Clause as a representative body is confirmed by other provisions of the Constitution that use the same term in the same way." He then goes on to survey other uses of the term within the Constitution: regarding section 2 of Article I, "This reference to a 'Branch of the State Legislature' can only be referring to an institutional body. . ."; regarding Article IV, "The references to 'the Recess of the Legislature of any State' and 'the next Meeting of the Legislature' are only consistent with an institutional legislature"; regarding Article IV, "but the *only* natural reading of the Clause is that 'the Executive' may submit a federal application when 'the Legislature' as a representative body cannot be convened"; and regarding Article VI, "this provision can only refer to the 'several State Legislatures' in their institutional capacity." (emphasis added)).

A. Thirteenth and Eighth Amendments

The Thirteenth Amendment provides that slavery and involuntary servitude shall not exist "except as a punishment for crime whereof the party shall have been duly convicted."[83] Goodwin's piece focuses on labor practices in modern jails. Are those practices immune from constitutional scrutiny because they amount to "punishment for crime[s]"?

One reason to think not is that the labor practices Goodwin writes of are not *themselves* necessarily imposed "*as a punishment* for crime,"[84] which is what the Thirteenth Amendment exempts from the constitutional prohibition. Rather, the persons engaged in labor in jails were sentenced to jail time; and in jail, they were contracted out as laborers.[85] But the labor—or involuntary servitude, if it rises to that level—was not what the judge ordered or imposed on the defendant at the time of sentencing.

One way of testing that intuition would be to look elsewhere in the Constitution for when the word "punishment" is used. It shows up in the Eighth Amendment, which provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[86] Would an interpretation of the Thirteenth Amendment that maintained labor practices in jails are not constitutionally permissible "punishments" also mean that labor practices in jails (or any treatment of inmates in jails) are not subject to scrutiny under the Eighth Amendment, because they are not "punishments"?

Perhaps. But the word "punishment" is used in slightly different ways in both Amendments. The Thirteenth Amendment prohibits involuntary servitude "*except as a* punishment," whereas the Eighth Amendment prohibits "cruel and unusual punishments" from being "inflicted." The former refers to the act of the imposition of punishment, whereas the latter focuses more on punishment at the moment it is experienced by the individual subject to it—hence the verb "inflicted"—without any reference to the person or entity inflicting it. Thus, perhaps the former's focus on the imposition of punishment, rather than the experience of it, means that labor practices in jails could not constitute "a

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83 U.S. CONST. amend. XIII.

84 U.S. CONST. amend. XIII (emphasis added).

85 Some labor practices may be imposed as punishment, either at sentencing or in prison.

86 U.S. CONST. amend. VIII.

punishment" for purposes of the Thirteenth Amendment, but could still constitute punishments for purposes of the Eighth.

Intertextualism, in other words, can identify different interpretive moves. It at least raises a concern about interpreting the Thirteenth Amendment in a way that would suggest any labor ordered by prison administrators could never amount to "punishments" under the Eighth Amendment, even if it does not resolve it. It is less clear, however, that intertextualism can definitively resolve these questions.

B. Thirteenth and Fourteenth Amendments

What might a comparison between the Fourteenth and Thirteenth Amendments tell us about the Thirteenth Amendment? The Fourteenth Amendment provides that "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws,"[87] whereas the Thirteenth Amendment provides that "neither slavery nor involuntary servitude . . . shall exist" except for certain exceptions?[88]

One possible inference concerns whether the Amendments only prohibit intentional harms based on how the two Amendments focus on subjects versus objects.[89] The Thirteenth Amendment focuses on a prohibited result, or state of affairs—"slavery [and] involuntary servitude . . . shall [not] exist," whatever their sources.[90] By contrast, the Fourteenth Amendment focuses on the actions of the state; the Fourteenth Amendment specifically prohibits the state from denying equal protection—"Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."[91] That clause of the Fourteenth Amendment ("Nor shall any state") is the source of the "state action" doctrine of the Fourteenth

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87 U.S. CONST. amend XIV.

88 U.S. CONST. amend. XIII. This is in addition to the textual similarity between the two, relative to the Fifteenth Amendment. *See supra* text accompanying notes 48.

89 *Cf.* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1210 (2010) ("The Constitution prohibits not objects but actions. Judicial review is the review of such actions. And actions require actors: verbs require subjects. So before judicial review focuses on verbs, let alone objects, it should begin at the beginning, with subjects. Every constitutional inquiry should begin with a basic question that has been almost universally overlooked. The fundamental question, from which all else follows, is the who question: who has violated the Constitution?"); Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005 (2011).

90 U.S. CONST. amend XIII.

91 U.S. CONST. amend XIV.

Amendment.[92]

But that feature of the Fourteenth Amendment may do some other work too. In particular, the Court has interpreted the Fourteenth Amendment to prohibit only *intentional* discrimination. That is, the Court has said that policies do not violate the Fourteenth Amendment merely because they produce racially disparate effects; policies are unconstitutional only if they intentionally produce disparate racial burdens.[93] And the Fourteenth Amendment's text, which focuses on the subject of the forbidden action—rather than the objects, or parties burdened by it—might be a point in favor of that interpretation.

But the reverse is true in the case of the Thirteenth Amendment. That Amendment does not focus on the source of the forbidden action; it focuses on the result (slavery or involuntary servitude). In the case of the Fourteenth Amendment, the text singles out the subject—the entity doing the forbidden action. In the case of the Thirteenth Amendment, the focus is different. Viewed in that light, intertextualism might suggest that the Thirteenth Amendment is not merely concerned with intentional wrongs or government purposes. It is instead concerned with the results of government or private policies.

With that in mind, the labor practices that Goodwin writes of take on a different light—and a more troubling one at that. For if the Thirteenth Amendment, as *Slaughter-House Cases* reminded us, was uniquely concerned with servitudes inflicted on African Americans, modern-day labor practices in jails disproportionately burden communities of color, as they are disproportionately subject to criminal sanctions. Those differential burdens might trigger some concerns under the Thirteenth Amendment. And unlike in the case of the Fourteenth Amendment, the text of the Thirteenth Amendment might suggest that it does not matter whether those disparate burdens were imposed intentionally or not.

On closer inspection, however, that comparison might not yield quite so significant an interpretive payoff. The Thirteenth Amendment forbids slavery and involuntary servitudes "except as a punishment for crime whereof the party shall have been

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92 The Civil Rights Cases, 109 U.S. 3, 11–15 (1883).

93 Pers. Adm'r v. Feeney, 442 U.S. 256, 259 (1979). For a paper critiquing this framework by excavating a contrary framework in federal courts designed to suss out state discrimination against federal rights, see Leah M. Litman, *State Discrimination Against Federal Rights* (manuscript, on file with author).

duly convicted."[94] That exception arguably isolates the reason why an involuntary servitude has been imposed, which suggests the Thirteenth Amendment is more like the judicial implementation of the Fourteenth Amendment, which focuses on government purposes, and the reasons for the government's actions. Here, too, intertextualism raises some interesting points of comparison and possible inferences, but it is less clear that it definitively resolves them.

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The point of this Essay is not to suggest that textualism and textualist decisions are all made up, or that textualism does not constrain judicial decision-making and can generate any result.[95] Far from it. The point is, instead, to suggest that constitutional textualism, as evidenced by a case study on the Thirteenth Amendment, works the way that all other theories of constitutional interpretation do. It grapples with having to reconcile different kinds of sources; it deals with competing evidence that pulls interpreters in different directions; and it involves relatively unguided decisions that call on interpreters' intuitions about constitutional substance, or the purpose or animating principles behind a constitutional provision. Textualism is not unique in that respect—it is just not obviously worse or better.

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94 U.S. CONST. amend. XIII.

95 *Cf.* Ryan, *supra* note 6, at 1560 (arguing that some critics of textualism and new textualism "suggest that constitutional interpretation has little or no attractive force independent of the results it produces").