

REMARKS AT THE CONFERENCE ON THE SECOND FOUNDING
NOVEMBER 14, 2008

*Eric Foner**

Historians like myself are often puzzled by what seems to be a focus by legal scholars on the question of the “original intent” of various parts of the Constitution and how legal scholars go about trying to ascertain it. Of course, historians are always trying to figure out what historical actors meant or intended by their words and deeds—what motivated them, what ideas inspired the actions they took. We find that the way many legal scholars and jurists do this is somewhat limited. They focus on the statements of members of Congress and on the moment when a part of the Constitution was debated and ratified. “[W]ar,” observed Congressman John A. Creswell, a Maryland Unionist who voted for the Thirteenth Amendment in January 1865, “is as subversive of theories as it is of mere physical obstacles.”¹ In an era of immense change in American institutions and in ideas about slavery, abolition, race relations, and citizenship—change that did not end with the ratification of the Thirteenth Amendment—the Amendment’s meaning cannot be frozen at a particular moment in time.

In an age of semiotics and deconstruction, not to mention intense debate among historians about the prevailing ideas of the Civil War era, there is something refreshingly naive, almost quaint, in the idea that any text, including the Constitution, possesses a single, easily ascertainable, objective meaning. Of course, whether the Supreme Court *should* be bound by the “original intent” of the Constitutional text is a political question, not a historical one. Quite frankly, while as a citizen it is very important to me how the nine members of the Supreme Court understand the original intent of the Thirteenth Amendment or any other part of the Constitution, as a historian, I have no interest in their judgment. The Justices have no special expertise in examining historical questions. Indeed, if you look at recent decisions relating to racial inequality, you must conclude that the majority of the Justices have no real understanding of the history

* DeWitt Clinton Professor of History, Columbia University.

1 CONG. GLOBE, 38th Cong., 1st Sess. 122 (1865).

of racism in America. They view racism as a matter of individual prejudice, not a long-established, structural feature of American society.

The questions historians ask are not the same questions that lawyers or judges ask. For example, the end of slavery came about because of the actions of innumerable people in Civil War America, not just members of Congress. There were no African Americans in the Congress that approved the Thirteenth Amendment or in any of the legislatures that ratified it. Nonetheless, the slaves themselves helped to catalyze the process of abolition by running away to Union lines from the very beginning of the war, forcing a reluctant Lincoln administration to begin establishing policies regarding slavery. Blacks put forward their own vision of what abolition meant and what kind of society should emerge from the ashes of slavery, but these visions were expressed in churches, black political gatherings, and on plantations, not in Congress. For example, black newspapers in 1864 began to include a constitutional amendment in their demands, but primarily, their attention increasingly focused on the fate of the freed people, equality before the law, economic independence, and the right to vote. A constitutional amendment abolishing slavery, they feared, would not settle these questions. The black Abolitionist James McCune Smith warned, "The word *slavery* will, of course, be wiped from the statute book, but the 'ancient relation' can be just as well maintained by cunningly devised laws."² One challenge facing historians is to find ways to get the voice of African Americans into discussions of the Amendment's original meaning, scope, and limitations.

One Washington newspaper described the Civil War Congress as "the Congress of the Revolution,"³ and it is easy to forget the radicalism of the Thirteenth Amendment in the context of Civil War emancipation. The Amendment was immediate, nationwide, offered no compensation to slave owners, made no distinction between loyal and disloyal owners, made no provision for "apprenticing" the freed people, and said nothing about "colonizing" the freed people outside the United States. Ideas of gradual, compensated emancipation of the slaves of rebels, linked to apprenticeship and colonization, had circulated widely in the first two years of the war. Even after the Emancipation Proclamation, which like the Amendment was immediate and offered no compensation or provision for colonization, Lincoln continued to think about a transitional period of apprenticeship, the

² MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 83 (2001) (citation omitted).

³ WASH. DAILY MORNING CHRON., Dec. 8, 1862.

transportation of at least some freed people outside the country, and paying owners for their loss of property in slaves. When the Amendment passed the Senate in April 1864, the *New York Herald* declared that it stood as a rebuke to the President, a statement by Congress “that his petty tinkering devices of emancipation will not answer.”⁴ In January 1865, the administration worked very hard to secure passage in the House. Yet a month later, Lincoln proposed another plan for compensation to slave owners.

I do not think any historian would attribute a single, universally accepted original meaning to the Thirteenth Amendment. A few Democrats voted for the Amendment in the hope of reviving the fortunes of their party by eliminating once and for all the question of slavery from national politics. George H. Yeaman, a Kentucky Unionist, said he voted for it so that conservatives like himself could then confront the “radical abolition party” on the issues of land confiscation, black citizenship, and black suffrage, which he claimed were too often confused with the question of abolition.⁵ Yeaman seemed to assume that the abolition of slavery carried with it almost no rights at all. John Henderson, another border Unionist, insisted, “We give him no right except his freedom, and leave the rest to the States.”⁶

On the other hand, Republicans believed that slavery violated all sorts of rights, including those of the nation itself. “[T]he defiant pretensions of the master,” said Charles Sumner, “claiming the control of his slave, are in direct conflict with the paramount rights of the national Government.”⁷ Sumner was also the most insistent proponent of the idea that abolition carried with it “equality before the law”—a concept that had recently emerged in political discussions, and whose precise meaning was still quite unclear. He even proposed a substitute amendment embodying the phrase “equal before the law,” borrowed from the French Declaration of Rights of 1791, but the Senate Judiciary Committee rejected his language in favor of simply adopting the wording of the Northwest Ordinance of 1787.⁸ Nonetheless, many other Republicans seemed to assume that freedom carried with it at least partial legal equality. Isaac Arnold, a moderate Republican from Illinois, told the House that the Amendment would establish equality before the law as “the great corner-

4 VORENBERG, *supra* note 2, at 116 (citing James Gordon Bennett, N.Y. HERALD, Apr. 9, 1864, at 4).

5 CONG. GLOBE, 38th Cong., 2d Sess. 170–71 (1865).

6 CONG. GLOBE, 38th Cong., 1st Sess. 1465 (1864).

7 *Id.* at 523.

8 *See* VORENBERG, *supra* note 2, at 51, 55.

stone” of the reconstructed Republic.⁹ There was a long tradition of alternative constitutionalism that envisioned a unified nation-state with a single national citizenship and all citizens enjoying the same rights regardless of race. This vision had been pioneered by the Abolitionists and had gained more and more adherents during the Civil War. Central to the outlook of the Republicans who voted to approve the Amendment was what I have called the free labor ideology. To them, the end of slavery, at a minimum, meant establishing a just system of labor relations—the right to receive wages for one’s work, to sign contracts, to compete on an equal basis in the labor market, to enjoy stable family life, and to educate one’s children. In a campaign speech in Philadelphia in October 1864, Congressman William D. Kelley explained the war as a clash between “two conflicting systems of civilization.”¹⁰ The end of slavery would bring to the South the civilization of freedom, which meant “giving every man his rights—wages for his labor, the right to defend his wife and daughter, and the right to seat his children in a school.”¹¹

At the outset of the war, Lincoln had explained the conflict in terms of the familiar free labor ideology:

“On the side of the Union, it is a struggle for maintaining in the world, that form, and substance of government, whose leading object is, to elevate the condition of men—to lift artificial weights from all shoulders—to clear the paths of laudable pursuit for all—to afford all, an unfettered start, and a fair chance, in the race of life.”¹²

In his second inaugural, he referred pointedly to the slaves’ “two hundred and fifty years of unrequited toil.”¹³ To Lincoln, as to many other Republicans, slavery was above all a theft of labor. Perhaps the most repeated phrase in the Thirteenth Amendment debates was about the laborer’s “right to the fruits of his labor.”¹⁴ As early as 1862, Senator James Harlan of Iowa had insisted that, while abolition would not mean social or political equality, it would mean that

[former slaves] shall be equal with the white race in their right to themselves and the enjoyment of the proceeds of their own labor; they shall from that time forward be in a position to fulfill the conditions of the original curse that man should earn his bread by the sweat of his own face;

9 CONG. GLOBE, 38th Cong., 1st Sess. 2989 (1864).

10 WILLIAM D. KELLEY, SPEECHES OF HON. WILLIAM D. KELLEY 52 (Philadelphia, Collins 1864).

11 *Id.* at 55.

12 4 ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 438 (Roy P. Basler ed., 1953).

13 8 *id.* at 332–33.

14 Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 473 (1989).

that he shall earn it for himself and those immediately dependent on him, and not be compelled to earn it for another. They will be equal with white men in their right to justice and the protection of the laws; they shall have an equal right to the free use of their own bodies, their own intellects, their own moral affections, and the right to apply the proceeds of their own labor to the promotion of their own welfare and the welfare of their dependent families.¹⁵

In the Emancipation Proclamation, Lincoln enjoined the former slaves to “labor faithfully for reasonable wages.”¹⁶ One could make the argument that the denial of “reasonable wages” to blacks for many decades after the end of the Civil War violated the intentions of the Thirteenth Amendment.

It is indeed ironic that by the 1880s and for decades thereafter, the courts consistently viewed state regulation of business enterprise—especially interventions in contractual labor relations such as laws establishing maximum hours of work and safe working conditions—as a paternalistic insult to free labor, a throwback to the thinking characteristic of slavery. “Free labor, declared the West Virginia Supreme Court in 1889, meant not only freedom from servitude . . . but the right . . . to pursue any lawful trade or avocation,” which no state law could restrict.¹⁷ The memory of slavery and abolition played a large role in the era’s judicial discourse. Yet the courts seemed to understand slavery not as a complex system of economic, political, social, and racial power, but as little more than the denial of the laborer’s right to choose his livelihood and bargain for compensation. It was the era’s labor movement that sought to keep alive the memory of the Thirteenth Amendment “as a ‘glorious labor amendment’ that enshrined the dignity of labor in the Constitution and whose prohibition of involuntary servitude was violated by court injunctions undermining the right to strike.”¹⁸ “Reaching back across the divide of the Civil War, labor defined employers as a new ‘slave power,’ called for the ‘emancipation and enfranchisement of all who labor,’ and spoke of an ‘irrepressible conflict between the wage system of labor and the republican system of government.’”¹⁹

If this episode in the Thirteenth Amendment’s history proves anything, it is that definitions of freedom are never fixed. It is essential to remember that for many of its supporters, the Thirteenth Amendment was a resting place, not a final solution to the question

15 CONG. GLOBE, 37th Cong., 2d Sess. app. 322 (1862).

16 6 LINCOLN, *supra* note 12, at 30.

17 ERIC FONER, THE STORY OF AMERICAN FREEDOM 123 (1998).

18 *Id.* at 124.

19 *Id.* at 124–25.

of abolition and its consequences. These supporters expected Congress to act further, and so did many outside its halls. No one in Congress argued that abolition logically required giving blacks the right to vote. But when William Lloyd Garrison declared that his “vocation, as an Abolitionist” had ended with the Amendment’s passage, Frederick Douglass responded, “Slavery is not abolished until the black man has the ballot.”²⁰ Wendell Phillips insisted that further measures were necessary to protect the freed people against the denial of their rights by the states—otherwise they would be “ground to powder by the power of State sovereignty.”²¹ “[T]o my mind,” he added, “an American abolitionist, when he asks freedom for the Negro, means effectual freedom.”²² When Congress approved the Amendment in early 1865, no one knew what exactly that effectual freedom would look like.

At the very outset of the war, a northern pamphleteer, Leonard Marsh, shrewdly observed that the question “what shall be done with the negroes” was about whites as much as blacks. It really meant “how will their freedom affect us?”²³ The Civil War unleashed a dynamic debate, which continues today, over the nature and rights of American citizenship and over the very meaning of freedom in American society. As long as that debate continues, we can expect new meaning to be infused into the Thirteenth Amendment.

20 J. M. W. Yerrinton, *Thirty-Second Anniversary of the American Anti-Slavery Society, Speech of William Lloyd Garrison*, NAT'L ANTI-SLAVERY STANDARD, May 20, 1865, at 1.

21 Wendell Phillips, Esq., Speech at the Massachusetts Anti-Slavery Society (Jan. 26, 1865), *in* LIBERATOR (Boston), Feb. 17, 1865, at 1.

22 Wendell Phillips, Esq., Speech at the Massachusetts Anti-Slavery Society (Jan. 26, 1865), *in* LIBERATOR (Boston), Feb. 10, 1865, at 1.

23 LEONARD MARSH, ON THE RELATIONS OF SLAVERY TO THE WAR, AND ON THE TREATMENT OF IT NECESSARY TO PERMANENT PEACE: A FEW SUGGESTIONS FOR THOUGHTFUL AND PATRIOTIC MEN, at 6 n.P. (1861).