

**ESSENTIALLY CONTESTED HISTORIES:
ON RECENT EFFORTS TO CABIN THE MEANINGS OF
SLAVERY AND DISESTABLISHMENT**

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Some of the Constitution's provisions decree that certain specific historical evils must not happen again. Such provisions generate a unique interpretive problem. The object of interpretation is not a word or a phrase but a repudiated cluster of practices. Any construction of such provisions must offer a description of what was wrong with the original evil so that the interpreter can decide whether the challenged action repeats that wrong.

The interpreter's moral judgment will inevitably shape the description. Every historical episode is susceptible to multiple interpretations, depending on which aspects the interpreter deems salient. One danger, which happened in the past and is happening again, is that an interpreter who is untroubled by some aspects of the historical evil may improperly narrow its scope by deeming those aspects outside the prohibition.

I illustrate this by focusing on two sections of the U.S. Constitution, the Thirteenth Amendment's prohibition of slavery and the First Amendment's prohibition of establishments of religion. The Supreme Court has subjected each to narrowing constructions, which focus on uncontroversial aspects of the historical wrong and then assert without further argument that they exhaust the text's coverage.

The most recent instance of this maneuver is Justice Gorsuch's reformulation of Establishment Clause law, cited with approval in his opinion for the Court in *Kennedy v. Bremerton*,¹ which would allow previously impermissible public endorsements of specific religious beliefs. His interpretive strategy is the same one that the Court used to restrict the scope of the Thirteenth Amendment in the *Civil Rights Cases*,² *Plessy v. Ferguson*,³ and *Hodges v. United States*.⁴ A description of what is undoubtedly included in the pertinent amendment's coverage does not, however, yield any information about the boundaries of coverage.

I. AVERSIVE CONSTITUTIONALISM

Kim Lane Scheppele, in an essay on comparative constitutional law, observes that some constitutions and constitutional provisions instantiate what she calls "aversive constitutionalism," which builds constitutional principles on negative models rather than positive aspirations. These negative models can be, in their own way, constitutive of national identity. "[C]onstitution builders often have a much stronger sense of what they *do not* want to adopt than what they do, a clearer vision of who and what they

1. 142 S. Ct. 2407 (2022).

2. 109 U.S. 3 (1883).

3. 163 U.S. 537 (1896).

4. 203 U.S. 1 (1906).

are *not* rather than of who and what they *are*.⁵ Aversive constitutionalism is not just a matter of alternatives rejected because there was something better. The rejected alternatives are at the core of constitutional meaning. “Constitution builders *guess* about the future and what will most successfully guide them through it. They *know* about the past and the present and what they want to avoid.”⁶ The rejection of the Communist past constitutes the post-Communist regimes of Eastern Europe. The rejection of racism constitutes the South African regime.⁷ “Aversive constitutionalism identifies a deeper sense of knowing who you are by knowing what you are not: it incorporates a nation-making sense of rejection of a particular constitutional possibility.”⁸

Jed Rubenfeld emphasizes the importance of paradigmatic cases that are objects of constitutional aversion. He observes that such cases frequently anchor constitutional argumentation, sometimes in a way that is only distantly related to the semantic meaning of the pertinent constitutional provision.⁹ They are “the core historical commitments memorialized by the act of constitution-writing in question.”¹⁰ For example, the language of the Fourteenth Amendment is broad and vague.¹¹ The Amendment had the specific, publicly understood purpose of invalidating the Black Codes.¹² Enacted by white-controlled legislatures after the Civil War, the Codes imposed specific legal disabilities on blacks, such as requiring them to be gainfully employed under contracts of long duration, excluding them from occupations other than manual labor, and disabling them from testifying against whites in court.¹³

The language of the Fourteenth Amendment’s text, however, standing alone, could support a judicial opinion upholding, say, a statute requiring all and only blacks to be employed as servants or laborers, by applying

5. Kim Lane Scheppele, *Aspirational and aversive constitutionalism: The case for studying cross-constitutional influence through negative models*, 1 I-CON 296, 298 (2003).

6. *Id.*

7. Scheppele quotes the preamble of the South African constitution, which begins: “We, the people of South Africa, Recognize the injustices of our past; Honour those who suffered for justice and freedom in our land . . .” *Id.* at 304 (quoting S. AFR. CONST. (1996)).

8. *Id.* at 300. Harry Frankfurt pertinently observes: “As the set of its essential characteristics specifies the limits of what a triangle can be, so does the set of actions that are unthinkable for a person specify the limits of what the person can will to do. It defines his essence as a volitional creature.” Harry Frankfurt, *Rationality and the Unthinkable*, in THE IMPORTANCE OF WHAT WE CARE ABOUT 188 (1988).

9. JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 184 (2001).

10. *Id.*

11. See U.S. CONST. amend. IV.

12. See THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH (1965).

13. See generally *id.*

rationality review. That would obviously be an interpretive travesty.¹⁴ The unconstitutionality of the Black Codes is so much a part of the amendment's meaning that to say that this is a settled interpretation is a misleading understatement. Rather, "[t]his piece of the Fourteenth Amendment's meaning *precedes* interpretation."¹⁵ This is because "[t]he struggle to abolish them was central to, motivating of, definitive of, the act of constitution-writing that eventuated in the Fourteenth Amendment."¹⁶ Any interpretation of the Amendment must be a chain of inferences from the core commitment represented by this paradigm case.¹⁷

This is similar with respect to other provisions as well. For example, the Fourth Amendment's ban on unreasonable searches and seizures repudiates the English government's general searches and writs of assistance before the American Revolution.¹⁸ The contract clause barred the debtor relief legislation of the 1780s.¹⁹ The Court must honor the core aversion in aversive constitutionalism in interpretation. A constitutional provision must be understood to address the very problem that it was designed to address.

That historical evil is not a rule, or even a standard, but rather the basis of a commitment not to repeat it. A commitment, Rubenfeld observes, is not necessarily exhausted by the specific intentions of the person who made it. I may find on reflection that my commitment constrains me in ways that I did not contemplate when I made it. Commitments have objective components: "through a commitment, we engage ourselves to something we think of as existing at least in part outside ourselves."²⁰ Thus, having committed myself to become a parent, I can discover that this demands more of my free time than I anticipated or intended. I am committed nonetheless.²¹

The meaning of paradigm cases resembles, but is importantly different from, Ronald Dworkin's account of the meaning of abstract constitutional provisions.²² Dworkin argues that the framers intended the abstract clauses of the Constitution to make interpreters focus on the moral concepts to

14. RUBENFELD, *supra* note 9, at 181.

15. *Id.* at 183.

16. *Id.* at 182.

17. *Id.* at 178–95. Rubenfeld's paradigm cases can include post-enactment decisions, *id.* at 180, 188, but here I focus only on those that motivated changes in the text of the Constitution.

18. See JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 32–33 (2005).

19. *Id.* at 67–68.

20. *Id.* at 106.

21. *Id.*; RUBENFELD, *supra* note 9, at 189.

22. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 136 (rev. ed. 1978).

which they refer.²³ “The clauses are vague only if we take them to be botched or incomplete or schematic attempts to lay down particular conceptions. If we take them as appeals to moral concepts they could not be made more precise by being more detailed.”²⁴

One should understand any such broadly worded clause, Dworkin thinks, to state a principle, a reason that must be given weight in deciding what the rule is in particular cases.²⁵ There is a sense in which a paradigm case is a principle, thus defined. But so far as I am aware, every example of a principle that Dworkin offers is capable of being stated in general propositional form, with recourse directly to that proposition when applying the principle to future cases.²⁶ It is a characteristic of paradigm cases that no such general proposition exhausts the law’s meaning because no such general proposition can completely capture the historical specificity of the paradigm.²⁷ In such cases, a constitutional provision will embody neither a moral concept nor a principle but rather the decision to reject a specific historical evil. It is a specific moral judgment about a particular case.²⁸

The core of that moral judgment will, however, be contestable. The contestability is deeper than that of “essentially contested concepts,” which W.B. Gallie famously described as “concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users.”²⁹ In such cases, there is agreement about the concept but disagreement about its application or the best realization of it. Dworkin illustrates the point when he observes that we can share a concept of fairness but disagree about how it should be applied in specific cases. After I offer a general injunction to treat others fairly, I may come to see that

23. *Id.*

24. *Id.*

25. *Id.* at 77–78.

26. *See, e.g.*, RONALD DWORKIN, *LAW’S EMPIRE* 435 n.7 (1986) (noting tension between the principles “that people should be free to do what they wish with their own property” and “that people should begin life on equal terms”).

27. *Id.*

28. Dworkin’s position, that the Constitution should be read to stand for specific moral principles, conflates two different claims. One is that the Constitution embodies moral judgments. The other is that those judgments take the form of principles. Dworkin’s conflation presupposes without argument that morality concerns the application of abstract principles to specific cases. I elaborate in Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 *COLUM. L. REV.* 1917, 1928–29 (2012). Here I repeat some of the claims I made in that article, but prescind from several issues I addressed there: whether moral judgments must take the form of principles; whether arguments based on paradigm cases count as a kind of originalism; and whether an originalist reading of the Thirteenth Amendment supports a constitutional right to abortion.

29. W.B. Gallie, *Essentially Contested Concepts*, 56 *PROC. ARISTOTELIAN SOC’Y* 167, 169 (1956).

“some particular act I had thought was fair when I spoke was in fact unfair.”³⁰

With an historical evil, however, there may be agreement about the facts but disagreement about what was evil about it. This will inevitably open the door for present-day conceptions of what was wrong with the paradigmatic case. Michael McConnell writes: “Rubinfeld is guided not by a historical understanding of the ‘principles and propositions that commit[ted] the nation in writing never again to permit certain evils,’ as his theory demands, but by present-day conceptions of those principles and those evils.”³¹ Aversive constitutionalism makes such a result impossible to avoid. The core is less specific than a concept. Its meaning is less fixed. We, interpreting the evil, have to make our own judgments of what was evil about it. When we do that, we may be guided in part by the framers’ judgments, but ultimately, we must decide the meaning of the wrong.

Any account of a historical evil will necessarily make salient the concerns of the historian and his time. Historical facts are not self-explanatory. As E.H. Carr observed, “from the ocean of facts the historian selects those which are significant for his purpose.”³² A historian can describe the sequence of events in a limitless number of ways. Rubinfeld notes: “Different judges will see the paradigm cases differently.”³³

The discernment of the salient aspects of a paradigm resembles, but is not identical to, the operation of the mischief rule in statutory interpretation. As Samuel Bray explains, the rule demands that the interpreter read a statute in light of “the problem that precedes the statute and the legal deficiency that allowed it; the mischief is what the statute responds to.”³⁴ It is an aid to interpretation, “logically anterior to the text, something the interpreter knew while reading the text itself.”³⁵ It is often “a rationale for choosing a narrower reading”³⁶ of a law. One excludes something from the literal meaning when the thing subtracted is no part of the mischief that concerns the statute. “No vehicles in the park” obviously

30. DWORKIN, *supra* note 22, at 134.

31. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1138 (1998).

32. EDWARD HALLETT CARR, *WHAT IS HISTORY?* 138 (1962).

33. RUBINFELD, *supra* note 18, at 17.

34. Samuel Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 973 (2021).

35. *Id.* at 991.

36. *Id.* at 1000.

does not apply to baby carriages.³⁷ On the other hand, the rule sometimes demands a broad reading. Bray quotes Justice Story:

But where the words are general and include various classes of persons, I know of no authority, which would justify the court in restricting them to one class or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them.³⁸

The mischief rule will sometimes leave a text's meaning unresolved, for example, if "there is a dispute about the mischief."³⁹ For this reason, simply looking to the mischief rule cannot resolve paradigm case issues. That kind of dispute arises in the cases I will now take up.

II. THE THIRTEENTH AMENDMENT

The Thirteenth Amendment's prohibition of slavery arises out of a specific historical wrong. From the beginning, there has been disagreement about what the wrong consisted of, and consequent disagreement about the amendment's scope. Justice O'Connor observed that the "primary purpose of the Amendment was to abolish the institution of African slavery as it had existed in the United States at the time of the Civil War."⁴⁰ But what was that institution? What does abolishing it entail?

A. *The Amendment Read Broadly*

The same Congress that approved the Thirteenth Amendment relied upon its authority to enact the Civil Rights Act of 1866, which declared that everyone born in the United States was a citizen and decreed that all persons born in the United States

shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties,

37. WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 15–16 (2016). The mischief rule can also expand the coverage of a statute, by making it apply to an activity that is not specifically named in the text but which is part of the evil that the statute aims to remedy. A "vehicle" is a conveyance moving on land, but if flying hovercraft that floated a foot above the ground started to be used in a way that endangered pedestrians in parks, they would probably be construed to be within the statute.

38. Bray, *supra* note 34, at 1000 (quoting *United States v. Winn*, 28 F. Cas. 733, 734 (C.C.D. Mass. 1838)).

39. *Id.* at 1013.

40. *United States v. Kozminski*, 487 U.S. 931, 942 (1988).

and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.⁴¹

Senator Lyman Trumbull, the amendment's principal author, explained that the statute was necessary to invalidate the Black Codes, which instituted "the very restrictions which were imposed . . . in consequence of the existence of slavery,"⁴² even if they did "not make a man an absolute slave."⁴³ It was authorized by Congress's Section 2 power to enforce the Amendment: "of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slaveholding States laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?"⁴⁴ The Amendment's force was broad: "With the destruction of slavery necessarily follows the destruction of the incidents to slavery."⁴⁵ Congress has "authority to give practical effect to the great declaration that slavery shall not exist in the United States."⁴⁶

At the time, some doubted that Congress had the authority to do this.⁴⁷ They construed "slavery" more narrowly.⁴⁸ But they did not prevail. Congress passed the law and then overrode President Andrew Johnson's veto, which invoked constitutional objections.⁴⁹

Because the Amendment does not mention any specific right, James Gray Pope observes, "courts and Congress are left with the task of determining what rights are necessary to negate the prohibited conditions of slavery and involuntary servitude."⁵⁰ It demands that those rights be

41. Civil Rights Act of 1866, ch. 31, §1, 14 Stat. 27, 27. For a defense of the use of post-enactment legislative history as evidence of original meaning, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1107 (1995). That legislation enforcing the Reconstruction amendments implicitly interprets the meaning of those amendments is argued in *id.* at 1110–17.

42. Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Lyman Trumbull).

43. *Id.* at 475.

44. *Id.* at 474.

45. *Id.* at 322 (statement of Sen. Lyman Trumbull).

46. *Id.* at 474. Trumbull's argument was not idiosyncratic. Other Republicans made similar statements. Mark A. Graber, *Subtraction by Addition?: The Thirteenth and Fourteenth Amendments*, 112 COLUM. L. REV. 1501, 1518–20 (2012).

47. *Id.* at 1522–23.

48. *Id.*

49. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 243–51 (1988).

50. James G. Pope, *What's Different About the Thirteenth Amendment, and Why Does It Matter?*, 71 MD. L. REV. 189, 191 (2011).

developed in response to the dynamics of nongovernmental systems, here systems in which the wrong is actually occurring regardless of whether it has the sanction of the state.⁵¹ It “commits the government to root out the prohibited practice wherever it appears and to enact whatever measures might be necessary to prevent it from recurring.”⁵²

Justice Harlan argued in his dissent in the *Civil Rights Cases* that:

since slavery . . . was the moving or principal cause of the adoption of that amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races.⁵³

In *Plessy v. Ferguson*, Harlan’s dissent argued that racial segregation violated not only the Fourteenth but also the Thirteenth Amendment.⁵⁴ The latter provision “not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude.”⁵⁵ He quoted the *Dred Scott* case’s declaration that African Americans were, at the time of the framing, “considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them.”⁵⁶ Harlan declared that the Reconstruction Amendments “eradicated these principles from our institutions.”⁵⁷

Congressional power under the Thirteenth Amendment is today read quite broadly:⁵⁸ it “authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and

51. *Id.* at 192–94.

52. *Id.* at 195. All this is true even if one construes the amendment only to forbid the compulsion of a worker to serve a master. Congress has an obligation to prevent that from happening, and to do so by appropriate legislation.

53. *Civil Rights Cases*, 109 U.S. 3, 36 (1883) (Harlan, J., dissenting).

54. *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting).

55. *Id.*

56. *Id.* at 559–60 (quoting *Dred Scott v. Sandford*, 60 U.S. 393, 404–405 (1857)).

57. *Id.* at 560.

58. See generally Rebecca E. Zietlow, *The Promise of Congressional Enforcement, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 182* (Alexander Tsesis ed., 2010).

incidents of a society half slave and half free . . .”⁵⁹ On the basis of this interpretation, the Court in *Jones v. Alfred H. Mayer Co.* sustained Congress’s authority to outlaw private racial discrimination: “Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation.”⁶⁰ The decision to outlaw private housing discrimination, the Court held, is a reasonable exercise of this power. “[W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.”⁶¹

The Court has relied on the broad “badges and incidents” language to address such disparate evils as racial profiling and gender and sexual orientation discrimination.⁶² It has held Congress’s remedial powers extend to banning discrimination against Jews and persons of Arab ancestry.⁶³ On this basis, the Second Circuit upheld a law criminalizing hate crimes based not only on race, but also on religion and national origin.⁶⁴

In short, American law has a broad reading of the Amendment deeply embedded within it.

B. The Amendment Read Narrowly

Narrower readings have been proposed. In the 1866 Congress, even some supporters of the Civil Rights Act questioned Senator Trumbull's

59. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968) (quoting *Civil Rights Cases*, 109 U.S. at 22 (1883)).

60. *Jones*, 392 U.S. at 440.

61. *Id.* at 442–43.

62. See ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM* 137–60 (2004); Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U. L. REV. 77, 81 n.23 (2010).

63. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617–18 (1987); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

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

interpretation, leading to the enactment of the Fourteenth Amendment in part to dispel doubts about Congress's authority to enact it.⁶⁵

The *Civil Rights Cases* held that the amendment did not authorize federal antidiscrimination legislation: “The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery.”⁶⁶ Racism as such wasn’t covered: “[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination. . . .”⁶⁷ The Court asked rhetorically:

But is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theatre of its accommodations and privileges to an individual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? Whether it might not be a denial of a right which, if sanctioned by the state law, would be obnoxious to the prohibitions of the Fourteenth Amendment is another question. But what has it to do with the question of slavery?⁶⁸

People discriminated against Black people not because they were slaves, but because they were Black.

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 his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discrimination 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.⁶⁹

65. HERMAN BELZ, *EMANCIPATION AND EQUAL RIGHTS* 121–22 (1978).

66. *Civil Rights Cases*, 109 U.S. 3, 24 (1883).

67. *Id.* On the other hand, in private notes, the opinion’s author, Justice Bradley, understood slavery in more capacious terms: “To deprive white people of the right of choosing their own company would be to introduce another kind of slavery.” 7.2 CHARLES FAIRMAN, *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–1888* 564 (1987).

68. 109 U.S. at 21.

69. *Id.* at 25; see also David R. Upham, *The Understanding of Neither Slavery Nor Involuntary Servitude Shall Exist before the Thirteenth Amendment*, 15 *GEO. J.L. & PUB.*

In *Plessy*, the Court similarly held that state-mandated racial segregation did not violate the amendment:

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

On the contrary, the Amendment prohibited only “the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services.”⁷¹ The Civil War Amendments “in the nature of things . . . could not have been intended to abolish distinctions based upon color or to enforce social, as distinguished from political, equality.”⁷² Compulsory racial segregation, the Court concluded, was “reasonable, and . . . enacted in good faith for the promotion for the public good.”⁷³ Racism is part of the natural order: “Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”⁷⁴

POL’Y 137, 170 (2017) (documenting unchallenged, pervasive racial discrimination before the Civil War in jurisdictions that prohibited slavery). A similar argument has been offered to defeat the claim that a prohibition on abortion violates the Thirteenth Amendment: although it is true that compulsory childbearing was an especially cruel element of slavery for a large part of the slave population, abortion was not permissible for anyone. Kurt Lash, *Roe and the Original Meaning of the Thirteenth Amendment*, 20 GEO. J. L. & PUB. POL’Y 131 (2023); James J. Heaney, *There’s No 13th Amendment Right to Abortion: A(n overdue) reply to Andrew Koppelman*, DE CIVITATE (Jan. 10, 2023), <https://decivitate.substack.com/p/theres-no-13th-amendment-right-to> [https://perma.cc/RUD2-6QQ7]. Enslaved women were subjected to this burden, in other words, not because they were slaves, but because they were women. (Query whether a legislative attempt to restore the common law status of married women would violate the amendment. Under that regime, a husband held a legal privilege to rape and beat his wife, confiscate her earnings, and deny her any access to her children. A wife was incompetent to own property or enter into contracts without her husband’s consent. She could never escape this status so long as he refrained from adultery.)

70. *Plessy v. Ferguson*, 163 U.S. 537, 543 (1896).

71. *Id.* at 542.

72. *Id.* at 544.

73. *Id.* at 550.

74. *Id.* at 551–52.

*Hodges v. United States*⁷⁵ held that Congress had no power to pass the Civil Rights Act of 1866. (*Jones v. Mayer* overruled it.) Several white men had used violence and threats to force African American workers to leave their jobs at a sawmill.⁷⁶ The Court held that the federal statute, which criminalized interference with workers' right to make contracts without regard to race, was unconstitutional: "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery."⁷⁷ This was because slavery meant only "a condition of enforced compulsory service of one to another."⁷⁸ These victims indeed lost their freedom to perform their contracts. "But every wrong done to an individual by another, acting singly or in concert with others, operates *pro tanto* to abridge some of the freedom to which the individual is entitled."⁷⁹

Some modern scholars agree. Most prominently, Kurt Lash claims that the terms "slavery" and involuntary servitude" in the Amendment are legal terms of art, which "referred to a specific and legally codified 'private economical relation' between a 'master' and a 'servant.'"⁸⁰

75. 203 U.S. 1 (1906).

76. *Id.* at 20.

77. *Id.* at 18.

78. *Id.* at 16.

79. *Id.* at 17.

80. Kurt Lash, *Roe and the Original Meaning of the Thirteenth Amendment*, 20 *GEO. J.L. & PUB. POL'Y* 131 (2023). The same argument is embraced by Heaney, *supra* note 69. Query whether this narrow reading of the amendment can support the result in *Bailey v. Alabama*, 219 U.S. 219 (1911). That decision invalidated a criminal statute that in effect demanded specific performance of labor contracts. *Bailey*, 219 U.S. at 245. After the Civil War, the Southern states used such devices to reproduce many of the substantive abuses of antebellum slavery without the legal institution that specifically codified it. *See generally* DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008). If only the legal category was prohibited, then it is not clear that even the Court's inadequate efforts were legitimate. *Id.* Other scholars have offered less narrow readings that might still considerably constrict present law. David Upham understands the prohibition as

encompassing chiefly the "legal existence" of slavery and involuntary servitude, and perhaps also the nonlegal, actual existence of these evils, so their stipulated non-existence imposed on government not only a duty to refrain from recognizing slavery but also a duty to act to eradicate actual slavery by providing effective remedies.

David R. Upham, *The Understanding of Neither Slavery Nor Involuntary Servitude Shall Exist before the Thirteenth Amendment*, 15 *GEO. J.L. & PUB. POL'Y* 137, 141 (2017). Jennifer Mason McAward argues that the outer limit of the prohibition is "public or widespread private action, based on race or the previous condition of servitude, that mimics the law of slavery and that has significant potential to lead to the de facto reenslavement or legal subjugation of the targeted group." Jennifer M. McAward, *Defining the Badges and Incidents of Slavery*, 14 *U. PA. J. CONST. L.* 561, 569 (2012).

The implicit claim is that an injury must be unique to slavery, perhaps even judicially recognized as such, to be part of the slavery that the Thirteenth Amendment outlaws.

The narrow reading has plenty of historical support. Many Americans at the time thought that slavery was wrong but that African Americans were inherently inferior to whites and that their emancipation did not entail any right to equal treatment.⁸¹ For example, President Andrew Johnson pressed Southern states to ratify the Thirteenth Amendment and then spent the rest of his career fighting against racial equality.⁸²

C. Accounting for the Dispute

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

Although "slavery" as an abstract form does not encompass mere discrimination in the sale of housing, the attention of the congressmen in 1864 and 1865 was not directed simply at an abstract model of slavery, but at a particular instance of that evil which existed in the South. Having flourished for over a century, southern slavery had built up strong interests among those who depended upon it and ingrained habits and attitudes in men of both races. It involved a complex of social and economic as well as legal relationships. . . .

. . . [The Thirteenth Amendment] appears to have been designed as a full response to the evil perceived. As modern perceptions of that evil grow, the response may take on increasingly broader scope.⁸³

The problem of aversive constitutionalism is that, while constitution builders may indeed have "a clearer vision of who and what they are *not* rather than of who and what they *are*,"⁸⁴ that vision will still be contestable at its boundaries, and that contestability will change over time. Slavery is

81. See generally RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977).

82. See ERIC MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* (1960).

83. Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1301-02 (1969). The soundness of *Jones* depends on this kind of argument, since (as the dissent emphasized) it is doubtful that the framers of the Thirteenth Amendment, with their broad attachment to freedom of contract, would have interpreted slavery this way.

84. Scheppele, *supra* note 5, at 298.

wrong, but at different times we will have different accounts of what is wrong with it. McConnell is right that present-day conceptions of the evil of slavery will inevitably color our interpretation of the Thirteenth Amendment.⁸⁵ Otherwise, we might have to doubt *Jones*'s assumption that racist discrimination is part of what the amendment prohibits since racism was so pervasive at the time of the framing.⁸⁶

The narrow reading has other surprising entailments. Congress relied on the commerce clause rather than the Reconstruction amendments when it enacted the Civil Rights Act of 1964 because the *Civil Rights Cases* had cast doubt on its power under the Thirteenth and Fourteenth Amendments to remedy discrimination by private actors.⁸⁷ This was obviously incongruous. Prof. Gerald Gunther objected that “the construction of an artificial commercial façade” was “demeaning.”⁸⁸ But its authority under the more appropriate source, the Thirteenth Amendment, was clarified too late: *Jones* was not decided until 1968. If, however, the narrow reading is correct, the commerce power will turn out to be the only possible source of Congressional power to enact this law. Justice Thomas and many originalist scholars have contended that the commerce power has been read too broadly.⁸⁹ He would return to the old pre-New Deal categories, proposing that “commerce” be understood to include only “selling, buying, and bartering, as well as transporting for these purposes.”⁹⁰ The broad commerce power as now understood—which happens to have been relied on in 1964—is “but an innovation of the 20th century.”⁹¹ If this is correct, and those scholars also read the Thirteenth Amendment narrowly, it will follow that the 1964 Act is unconstitutional, authorized neither by the Amendment nor by the commerce power.⁹²

The *Civil Rights Cases*, *Plessy*, and *Hodges* neglected to explain why the line ought to be drawn where the Court drew it. Why should the amendment deem only some of the burdens and humiliations attendant

85. McConnell, *supra* note 31.

86. The pervasiveness of the racism is documented in RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

87. SANFORD LEVINSON ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 637–40 (8th ed. 2022).

88. *Id.* at 638.

89. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (criticizing the commerce clause as “Congress appropriating state police powers.”).

90. *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring).

91. *Id.* at 596. To similar effect, see, e.g., Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce,"* 2012 U. ILL. L. REV. 623 (2012).

92. This is only one of many areas in which originalism promises to randomly blow up familiar areas of American law. See Andrew Koppelman, *Why do (Some) Originalists Hate America?*, 63 ARIZ. L. REV. 1033 (2021).

upon slavery—burdens recognized as such at the time of the framing—to be prohibited when the amendment purported to abolish it?

The Court's response was a bald description of the historical wrong in narrow terms that omitted the contested area. It is as though I were to ask you whether Ann Arbor is in Michigan, and you were to respond by telling me that it is not because Detroit is in Michigan.

What actually did the work, evidently, was the background assumption that racism was natural and that the legislature was not unreasonable in legislating on that basis.⁹³ The Court presumed that, because racial equality was obviously false, interpretive charity demanded that one not attribute such silly ideas to the Constitution.⁹⁴

Here's the unavoidable indeterminacy that arises out of paradigms: they do not interpret themselves. Interpretive charity is inevitable, but it tends to import the interpreter's values into the text. Given ambiguity, why interpret a provision in a manifestly unreasonable way? These decisions are uncontroversially wrong today, not because they are logically unsound inferences from the text but because people now generally agree the values they rely on are repugnant.⁹⁵

III. THE ESTABLISHMENT CLAUSE

The Establishment Clause is a similarly apt candidate for paradigm case interpretation. The core historical wrong it is intended to bar—an establishment of religion of the kind that existed in England—is specifically named in the text.⁹⁶ Justice William Brennan, concurring in the decision to ban school prayers, wrote in 1963 that the Court should ask whether challenged practices “threaten those consequences which the

93. *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896).

94. *Id.*

95. Interpretive charity continues to cabin the reach of the amendment. Balkin and Levinson observe that, for many observers, the Thirteenth Amendment's “project of ending domination in social life, and securing self-rule and self-sufficiency . . . puts too many features of society into question, ranging from the way markets and government actually work to the way that family life is structured.” Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1470 (2012). A reading of the amendment that is more faithful to its commitments enables a defense of abortion such as I have developed in previous writings, but it also opens the door to the opposite claim, that the amendment protects the fetus and so categorically prohibits abortion. See George S. Swan, *The Thirteenth Amendment Dimensions of Roe v. Wade*, 4 J. JUV. L. 1 (1980).

96. Rubenfeld briefly discusses the interpretation of the Establishment Clause in RUBENFELD, *supra* note 18, at 29–30. Some have argued that the clause merely protects state establishments from federal interference and so cannot be a constraint on the states, but because Justice Gorsuch, whose work I am examining here, does not take up that argument, I ignore it here as irrelevant to this article's claims. Thanks to Rick Garnett for pressing me on this point.

Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent.”⁹⁷ The question is what are “those substantive evils the fear of which called forth the Establishment Clause of the First Amendment.”⁹⁸ Answering that requires an historical inquiry much like that raised by the Thirteenth Amendment. When the authors of the First Amendment condemned establishment, Thomas Curry notes, “they had in their minds an image of tyranny, not a definition of a system.”⁹⁹

A. *The Clause Read Broadly*

There is—or was, until recently—of course a well-developed body of Establishment Clause law. The aspect of it that is salient here is the requirement that the government take no position on live religious questions. Disestablishment of religion meant that the government was incompetent to adjudicate theological controversies. As recently as 2013, I was able to offer the following description of that law:

First Amendment doctrine treats religion as a good thing. It insists, however. . . that religion’s goodness be understood at a high enough level of abstraction that the state takes no position on any live religious dispute. It holds that we best honor religion’s value by prohibiting the state from trying to answer religious questions. Over time, American religious neutrality has become more vague as America has become more religiously diverse, so that today (with the exception of a few grandfathered practices) the state may not even affirm the existence of God. This is not the kind of neutrality toward all conceptions of the good that many liberal political theorists have advocated, but it is the best response to the enormous variety of religious views in modern America. It is faithful to the belief held by the leading framers of the First Amendment that state support can corrupt religion.¹⁰⁰

The grandfathered practices, “In God We Trust” on the currency and the like,

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

98. *Id.* at 241.

99. THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 211 (1986). The Court has similarly observed that the purpose of the Framers of the First Amendment “was to state an objective, not to write a statute.” *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970).

100. ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 2 (2013).

represented a common-ground strategy—an effort, in its own time, to understand “religion” in an ecumenical and nonsectarian way. At the time that these elements of civil religion were put in place . . . the existence of God appeared to be the one aspect of religion that was common to the various religious factions then dominant in American life. The continuation of this old settlement is not an effort by an incumbent administration to manipulate religion or a triumphalist effort to exclude outsiders.¹⁰¹

Several Supreme Court decisions vindicated that analysis, indicating that old religious monuments were permissible, but new ones would be invalid.¹⁰²

B. The Clause Read Narrowly

But the Supreme Court recently announced that it was abandoning the principal judicial test for the clause that was laid down in *Lemon v. Kurtzman*.¹⁰³ *Kennedy v. Bremerton*¹⁰⁴ declared that “the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’”¹⁰⁵ It demanded an “analysis focused on original meaning and history.”¹⁰⁶ The law must “accord with history and faithfully reflect the understanding of the Founding Fathers.”¹⁰⁷ None of this gives any lower court any guidance as to how to decide anything, but the result in that case, vindicating a public school football coach who insisted on praying on the 50-yard line after games and putting his players in a position where they would feel pressured to join him, indicates that much state action that would previously have been invalid will now be upheld.¹⁰⁸

Justice Gorsuch, writing for the Court, cited with approval Professor Michael McConnell’s scholarship that identifies multiple important

101. *Id.* at 74.

102. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2082 (2019) (declaring “a presumption of constitutionality for longstanding monuments, symbols, and practices”); *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005).

103. 403 U.S. 602 (1971).

104. 142 S.Ct. 2407 (2022).

105. *Id.* at 2428 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

106. *Id.*

107. *Id.* The same majority, in other contexts, is however willing to misrepresent original meaning in order to reach results it finds congenial. Andrew Koppelman, *Justice Alito, Originalism, and the Aztecs*, 54 LOY. U. CHI. L.J. 455 (2023).

108. On the pressure, see Andrew Koppelman, *The Emerging First Amendment Right to Mistreat Students*, 73 CASE W. RESV. L. REV. 1209 (2023).

“historical hallmarks of an established religion.”¹⁰⁹ He also cited his own concurring opinion from the same term, which noted “some helpful hallmarks that localities and lower courts can rely on.”¹¹⁰ There, he wrote:

Beyond a formal declaration that a religious denomination was in fact the established church, it seems that founding-era religious establishments often bore certain other telling traits. First, the government exerted control over the doctrine and personnel of the established church. Second, the government mandated attendance in the established church and punished people for failing to participate. Third, the government punished dissenting churches and individuals for their religious exercise. Fourth, the government restricted political participation by dissenters. Fifth, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And sixth, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function.¹¹¹

Note that, unlike those who read the Thirteenth Amendment narrowly, Gorsuch is not claiming that “establishment” was a term of art with an understood, lawyerly meaning at the time of the framing. Instead, both he and McConnell are contemplating the history retrospectively and singling out what they take to be the salient aspects.

Gorsuch noted several establishment clause precedents and argued that “[t]he thread running through these cases derives directly from the historical hallmarks of an establishment of religion—government control over religion offends the Constitution, but treating a church on par with secular entities and other churches does not.”¹¹²

But then he claimed that when the state singles out and endorses certain religious doctrines by displaying its symbols on public property the clause is not violated:

As a close look at these hallmarks and our history reveals, “[n]o one at the time of the founding is recorded as arguing that the use

109. *Kennedy v. Bremerton*, 142 S. Ct. 2407, 2429 n.5 (2022) (citing Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2144–46 (2003)).

110. *Id.* (citing *Shurtleff v. City of Bos.*, 142 S. Ct. 1583, 1605–06 (2022) (Gorsuch, J., concurring)).

111. *Shurtleff*, 142 S. Ct. at 1609 (Gorsuch, J., concurring) (citations omitted).

112. *Id.*

of religious symbols in public contexts was a form of religious establishment.” For most of its existence, this country had an “unbroken history of official acknowledgment by all three branches of government of the role of religion in American life.” In fact and as we have seen, it appears that, until *Lemon*, this Court had never held the display of a religious symbol to constitute an establishment of religion. The simple truth is that no historically sensitive understanding of the Establishment Clause can be reconciled with a rule requiring governments to “roa[m] the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine.” Our Constitution was not designed to erase religion from American life; it was designed to ensure “respect and tolerance.”¹¹³

His claim appears to be that because the public display of religious symbols is not among the “hallmarks” that McConnell enumerates, it cannot violate the establishment clause. The distinction between old and new displays is unmentioned.¹¹⁴ Any public endorsement of any specific religion is permissible. Anyone objecting to such an endorsement needs to learn respect and tolerance.

C. Accounting for the Dispute

Gorsuch’s narrowing strategy is the same one that the Court deployed in the *Civil Rights Cases* and *Plessy*: point to the most obvious violations of the constitutional provisions and then declare that the challenged law is not among those violations and so is permissible.¹¹⁵

113. *Id.* (citations omitted).

114. It might, perhaps, be thought to be implicit in the reference to “tearing down monuments,” which can only be done if the monuments already exist. But a few sentences earlier there is a blanket endorsement of “the use of religious symbols in public contexts.” *Id.* And of course a court might order the tearing down of a monument that was erected last week.

115. The *Civil Rights Cases* offered its own similarly narrow list of the hallmarks of slavery:

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. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offences.

Civil Rights Cases, 109 U.S. 3, 22 (1883).

McConnell's hallmarks can be mapped directly onto all the modern controversies with even modest efforts to adapt to changed social conditions.¹¹⁶ Douglas Laycock observes: "The only universal element of every establishment was government endorsement of one or more religions."¹¹⁷ But if anything is clear from Gorsuch's formulation, it is that he thinks endorsement as such raises no constitutional issues.

McConnell writes, with respect to the first of his hallmarks, that the "principal means of government control over the church were laws governing doctrine and the power to appoint prelates and clergy."¹¹⁸ These means originally involved coercion: only worship that conformed with official articles of faith was permitted. Gorsuch writes in *Kennedy* that religious coercion "was among the foremost hallmarks of religious establishments the framers sought to prohibit."¹¹⁹ Perhaps he thinks the noncoercive character of public displays is what distinguishes them from forbidden establishment. But McConnell also counts within this category the South Carolina Constitution of 1778, which allowed only churches that conformed to certain articles of faith to be "incorporated and esteemed as a church of the established religion of this State,"¹²⁰ but also

provided that "[n]o person shall, by law, be obliged to pay towards the maintenance and support of a religious worship that he does not freely join in, or has not voluntarily engaged to support." In South Carolina, therefore, there was an established church with state-specified articles of faith, but no financial support. This was a unique and unprecedented arrangement.¹²¹

Despite the noncoercive character of this establishment, McConnell still counts it as an exercise of "the power to control articles of faith."¹²² If that is correct, then some official displays assert the same power.¹²³ One

116. See Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1798–01 (2006).

117. Douglas Laycock, "Noncoercive" Support for Religion: Another False Claim About the Establishment Clause, 26 VAL. U. L. REV. 37, 42 (1991).

118. McConnell, *supra* note 109, at 2132.

119. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2429 (2022).

120. McConnell, *supra* note 109, at 2135 (quoting S.C. CONST. of 1778 art. XXXVIII).

121. *Id.* at 2157.

122. *Id.* at 2135.

123. McConnell elsewhere argues that the Establishment Clause should be understood to prohibit "government action that has the purpose and effect of coercing or altering religious belief or action." Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 940 (1986). He understands coercion

of the principal concerns of the framers was the idea that religion can be distorted and corrupted by state involvement, an idea shared by John Milton, John Locke, Elisha Williams, Isaac Backus, John Leland, Thomas Jefferson, and the principal author of the First Amendment, James Madison.¹²⁴

People have taken the *Kennedy* decision to license much previously impermissible state embrace of specific religious doctrines. For example, Texas state Senators cited it as authorizing their bill, passed in April 2023, requiring the posting of the Ten Commandments in every public school classroom,¹²⁵ a practice that the Supreme Court held impermissible in 1980.¹²⁶ The bill died because, although it passed a House committee, it was not brought to a vote before the end-of-session deadline.¹²⁷ It was reintroduced in June 2023.¹²⁸

Justice Stevens noted in 2005 that “[t]here are many distinctive versions of the Decalogue, ascribed to by different religions and even different denominations within a particular faith; to a pious and learned

broadly, declaring that he agrees with the Court’s statement that “When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.” *Id.* at 935 (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)). He suggests that religious displays should be permissible if they could reasonably be construed to reflect pluralism rather than religious triumphalism.

Judicial scrutiny should be reserved for cases in which a particular religious position is given such public prominence that the overall message becomes one of conformity rather than pluralism. Certainly they should not allow official acts that declare one religion, or group of religions, superior to the rest, or give official sponsorship to symbols or ceremonies that are inherently exclusionary. Particular care should be taken where impressionable children are involved.

Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 193–94 (1992) (citations omitted). Gorsuch offers no indication that he would draw the line there.

124. Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1841–42 (2009).

125. The link does not support this assertion, authority is needed to support the Texas state senators citing the *Kennedy* decision.

126. *Stone v. Graham*, 449 U.S. 39 (1980).

127. Robert Downen, *Bill requiring Ten Commandments in Texas classrooms fails in House after missing crucial deadline*, TEX. TRIB. (May 25, 2023), https://kdhnews.com/news/local/bill-requiring-ten-commandments-in-texas-classrooms-fails-in-house-after-missing-crucial-deadline/article_c7370a90-fb30-11ed-94d2-6363329888ab.html [<https://perma.cc/RJP5-Q9TS>].

128. See King, *Bill Analysis*, S.B. 9, SENATE RSCH. CTR. (June 6, 2003), <https://capitol.texas.gov/tlodocs/881/analysis/html/SB00009I.htm> [<https://perma.cc/Y6JK-DD6A>].

observer, these differences may be of enormous religious significance.”¹²⁹ The Texas bill tries to avoid denominational favoritism by requiring the version drafted in the 1950s by a judge who thought its display could reduce juvenile delinquency and who consulted a priest, a minister, and a rabbi. This version was then placed on monuments erected all over the United States by the Fraternal Order of Eagles.¹³⁰ That language is, however, rejected by some adherents of each of these denominations, and of course, growing numbers of Americans are neither Christians nor Jews. The state of Texas is now deeply involved in this theological controversy.

Prayer, which evidently the Court specifically licensed in *Kennedy*, presents even more intractable issues. In *Marsh v. Chambers* (1983), the Court upheld legislative prayers, using the same tradition-based reasoning that Gorsuch offers.¹³¹ By sanctioning official deism, Gorsuch suggests the Court will extend the logic of that decision beyond legislative prayer.

Doubtless, the *Marsh* Court thought that, by upholding legislative prayers, it was avoiding divisive controversy. Yet, this relaxation of the neutrality requirement is different from other forms of ceremonial deism, such as “In God We Trust” on the currency,¹³² in a crucial respect: as Christopher Lund observes, it requires “a continual set of discretionary religious choices.”¹³³ The prayer issue now divides municipalities all across the country in a zero-sum battle in which the state is required to decide disputed points of theology.¹³⁴ The state faces a dilemma: either it must censor prayers in order to ensure that they are inoffensive, or it must allow outright proselytizing.¹³⁵ In the years following *Marsh*, some jurisdictions have rejected proposed prayers precisely on the basis of their nonmajoritarian religious content: one clerk systematically eliminated Muslims, Jehovah’s Witnesses, Jews, and Mormons from the list of

129. *Van Orden v. Perry*, 545 U.S. 677, 717–18 (2005) (Stevens, J., dissenting) (citing Steven Lubet, *The Ten Commandments in Alabama*, 15 CONST. COMMENT. 471, 474–476 (Fall 1998)); As this article was going to press, Louisiana appeared to be about to enact a similar law, with similar problems. See Steven Lubet, *Louisiana wants the Ten Commandments in schools but which version?*, THE HILL (May 27, 2024) <https://thehill.com/opinion/civil-rights/4684714-louisiana-wants-the-ten-commandments-in-schools-but-which-version/>.

130. Jess Bravin, *Monoliths Erected to Promote Epic Film May Be in Violation of the Constitution*, WALL ST. J. (Apr. 18, 2001), <https://www.wsj.com/articles/SB987543322785247205>. The monuments were distributed with the encouragement of Hollywood director Cecil B. DeMille, who was promoting his film, *The Ten Commandments*. *Id.*

131. *Marsh v. Chambers*, 463 U.S. 783 (1983).

132. Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 1050 n.51 (2010).

133. *Id.* at 978.

134. *Id.* at 974.

135. *Id.* at 976–77.

invited participants, while another rejected Wicca as “neo-pagan.”¹³⁶ Elections have sometimes been fought over whether official prayers should be overtly Christian.¹³⁷ There has sometimes been violence.¹³⁸ Members of the clergy have tailored their prayers to make them more likely to be acceptable to authorities.¹³⁹

When the Court reaffirmed *Marsh* in *Town of Greece v. Galloway*,¹⁴⁰ it restated that there were limits to what was permissible, though those limits were specified even more vaguely than in *Marsh*. Lund writes:

Marsh . . . had said that legislative prayers could not “proselytize or advance any one, or to disparage any other, faith or belief.” Notice the differences between that and [*Town of Greece*]: “[T]he course and practice over time [must show] that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion.” Notice the subtle changes there — the addition of the phrases “course and practice” and “over time,” the use of words like “denigration” rather than “disparagement,” “damnation” in place of “advancement,” “preaching conversion” instead of “proselytizing.”¹⁴¹

Even these limits are hard to associate with Gorsuch’s hallmarks,¹⁴² and after *Kennedy*, it is uncertain whether they are still good law.¹⁴³

As with the Thirteenth Amendment, interpretive charity does a lot of work here. Gorsuch, and the Court majority for which he speaks “appear to be in the grip of a narrative in which militant secularists in government are [constantly] trying to persecute religious conservatives, who have only the Court to protect them.”¹⁴⁴ This narrative has produced a remarkable hypertrophy of successful claims of discrimination¹⁴⁵ and

136. *Id.* at 1025–28.

137. *Id.* at 1045–46.

138. *Id.* at 974–75.

139. *Id.* at 1044.

140. 572 U.S. 565, 578–81 (2014).

141. Christopher Lund, *Symposium: Town of Greece v. Galloway going forward*, SCOTUSblog (May 6, 2014, 5:05 PM), [https://www.scotusblog.com/2014/05/symposium-town-of-greece-v-galloway-going-forward/\[https://perma.cc/EHF3-4EEY\]](https://www.scotusblog.com/2014/05/symposium-town-of-greece-v-galloway-going-forward/[https://perma.cc/EHF3-4EEY]).

142. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 537 (2022). *Id.* at 537, n.5 (citing *McConnell*, *supra* note 109, at 2144–46). *Shurtleff v. City of Bos., Massachusetts*, 596 U.S. 243, 286 (2022) (Gorsuch, J., concurring).

143. *Kennedy v. Bremerton* would allow for public endorsements of specific religious beliefs. *Id.* at 546–47 (Sotomayor, J., dissenting).

144. Andrew Koppelman, *The Increasingly Dangerous Variants of the “Most-Favored-Nation” Theory of Religious Liberty*, 108 IOWA L. REV. 2237, 2286 (2023).

145. *Id.* at 2287–89.

neglected procedural niceties that normally distinguish judges from autocrats.¹⁴⁶ If you perceive the world that way, you are likely predisposed to construe an ambiguous constitutional provision in a way that does not produce what you take to be substantial injustice. One would feel more confidence in Gorsuch's judgment here if he gave any evidence that he appreciated the concern about the corruption of religion that the framers regarded as one of the core evils of establishment.

IV. CONCLUSION

The fundamental problem with both narrow readings, those of the Thirteenth Amendment and of the Establishment Clause, is that they cite what is undoubtedly *included* in the pertinent amendment's coverage as though it yielded information about the *boundaries* of coverage. Justice Gorsuch appears to be under the impression that McConnell's hallmarks can help him resolve the boundary question, which McConnell does not purport to do. Lawrence Solum observes: "Justice Scalia sometimes made arguments that moved directly from original expected applications to the legal content of constitutional doctrine without consideration of the actual meaning of the constitutional text."¹⁴⁷ Gorsuch has now duplicated this error. It is what I have called *I Have No Idea Originalism*: the interpreter declares, "I have no idea what this provision means. But whatever it means, it can't prohibit this, because the framers approved of it."¹⁴⁸

The move is more excusable in the context of constitutional provisions that refer to paradigm cases because the meaning of those texts is never reducible to a set of propositions. History hangs over any effort to interpret them. Interpretive charity will influence the way judges interpret that history. But Gorsuch did not even offer a judicial construction that clearly delineates what the provisions prohibit. In that respect, the comparison is to the advantage of the *Plessy* Court, which at least stated a rule.

The interpretive question of how to interpret a constitutional provision based on the condemnation of a paradigm case will, in practice, arise when someone complains that the prohibition encompasses some challenged practice. This complaint must logically include some argument about the

146. Andrew Koppelman, *Religious Liberty as a Judicial Autoimmune Disorder: The Supreme Court Repudiates Its Own Authority in Kennedy v. Bremerton*, 74 HASTINGS L.J. 1751, 1753–54 (2023).

147. Lawrence Solum, *Original Expected Applications Redux*, BALKINIZATION BLOG (Jan. 27, 2023) <https://balkin.blogspot.com/2023/01/original-expected-applications-redux.html> [<https://perma.cc/W99P-XC2Y>].

148. Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 737 (2009).

scope of the wrong, which aims to persuade its audience that the practice in question is within the scope of the wrong.

The appropriate way to rebut such an argument is to address it directly by offering an alternative description of the wrong, which entails that the practice in question is not in fact part of that wrong. Thus, for example, Robert Nozick's argument that redistributive taxation is a form of slavery can be shown to depend on indefensible assertions about the moral significance of pretax income.¹⁴⁹ The interpretation of the Thirteenth Amendment offered by the *Plessy* Court depends on the Court's dubious claim that certain kinds of race-based mistreatment were not integral to the wrong of antebellum slavery. The contestation will be resolved by which argument (in the opinion of the adjudicator) better captures the moral question of why the wrong in question is wrong.

What will not suffice as a response to an alleged violation is to point to other, uncontroversial violations and summarily declare that they exhaust the scope of the provision.¹⁵⁰

There is no way to settle the scope of the commitment embodied in the paradigmatic case that the pertinent provision rejects. The original beliefs of the framers can't settle it. Rubinfeld is right: commitments can have surprising entailments. "[E]very commitment, personal or political, raises the possibility that we may be obliged to give up practices that seemed perfectly reasonable to us, perfectly natural, at the time we embarked on the commitment."¹⁵¹

Property is familiarly regarded as a bundle of rights. Each historical episode that is the basis of aversive constitutionalism is a bundle of wrongs. With property, you can pull a stick out of the bundle and there will still be property, albeit of a somewhat different description. When, however, a legal interpreter decides that an element of a bundle of wrongs is not so wrong after all and is not affected by the constitutional

149. See ANDREW KOPPELMAN, *BURNING DOWN THE HOUSE: HOW LIBERTARIAN PHILOSOPHY WAS CORRUPTED BY DELUSION AND GREED* 91–92 (2022).

150. The quasi-Dworkinian view I'm offering, which makes moral reasoning a part of Constitutional law, familiarly gives rise to the countermajoritarian difficulty. The difficulty is real but irrelevant to the task of discerning the meaning of the Constitution's prohibitions. The difficulty isn't about meaning at all; it concerns the institutional limitations of the judiciary. It is possible that those limitations are a reason for the judiciary to underenforce the Constitution: to the extent that the Constitution incorporates contestable moral judgments, one might legitimately be troubled by the delegation of such judgments to unelected judges. Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212–17 (1978). However, the democracy-based objection to judicial review implies a substantive view about what is appropriately the object of democratic decision making, and this view would itself need to be defended in the face of the pertinent constitutional provisions. See *id.* at 1234.

151. RUBENFELD, *supra* note 9, at 194.

commitment that it not be repeated, one must wonder whether, as Justice Harlan put it, “the substance and spirit . . . have been sacrificed by a subtle and ingenious verbal criticism.”¹⁵²

In each of the cases that we examined here, the interpreter reduced the prohibition’s scope without any reasoning at all. When that happens, one is entitled to suspect that the provision is an obstacle to the kind of world that the interpreter wants to live in. When that happens, one is entitled to suspect that the provision is an obstacle to the kind of world that the interpreter wants to live in, and that the interpreter seeks to preserve the very evil that the constitutional provision aims to abolish.

152. Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).