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Furthering American Freedom: Civil Rights & the Thirteenth Amendment

Alexander Tsesis
Loyola University Chicago, School of Law, atsesis@luc.edu

FURTHERING AMERICAN FREEDOM: CIVIL RIGHTS & THE THIRTEENTH AMENDMENT

ALEXANDER TSESIS*

Abstract: This Article discusses why the Thirteenth Amendment's reach extends beyond the institution of slavery and has important implications for civil liberties. The Amendment—in providing a mechanism to protect fundamental rights articulated in the Declaration of Independence and Preamble to the Constitution—not only ended slavery, but also created a substantive assurance of freedom. This Article reviews Thirteenth Amendment jurisprudence and shows that, despite substantial narrowing after its adoption, the Amendment is a source of sweeping constitutional power for enacting federal civil rights legislation. The Article also distinguishes congressional power under the Thirteenth Amendment from that under the Fourteenth Amendment and the Commerce Clause, demonstrating that the Thirteenth Amendment is a viable, and at times preferable, alternative for civil rights reforms. Finally, the Article suggests that recent U.S. Supreme Court jurisprudence limiting congressional Commerce Clause and Fourteenth Amendment Section 5 powers has increased the importance of the Thirteenth Amendment as an alternative strategy for civil rights legislation and litigation.

* Visiting Assistant Professor, Chicago-Kent College of Law; Visiting Scholar, University of Wisconsin Law School, Institute for Legal Studies. The author is grateful to James G. Pope for his detailed comments on a complete draft of this Article and for helping to focus its analysis. G. Sidney Buchanan, Andrew Taslitz, Richard Warner, and William Wiecek also read, commented, and gave invaluable advice on large portions of previous drafts. Conversations about this subject with Akhil R. Amar, Robert J. Cottrol, Richard Delgado, Eric Foner, James McPherson, David Oshinsky, and Robert C. Post helped in clarifying ideas and structuring the argument. The comments of Howard Erlanger, Harold J. Krent, Stewart Macaulay, Sheldon H. Nahmod, Mark D. Rosen, Richard Ross, Margaret G. Stewart, and Mike Zimmer, who participated in faculty workshops at the University of Wisconsin Law School and the Chicago-Kent College of Law, helped to hone the discussion. Gloria Sanders's administrative assistance made the writing process more efficient.

INTRODUCTION

The Thirteenth Amendment's significance extends beyond the abolition of slavery.[1] It grants the federal government the authority to prevent any contemporary civil rights abuses associated with involuntary servitude. The South's peculiar institution interfered with far more than slaves' economic welfare. At a more specific level, owners prevented slaves from making independent parental decisions, choosing spouses, or freely traveling off plantations. The scope of the Thirteenth Amendment concerns these and other interferences against autonomy, and in many cases provides Congress with authority to prevent them. My contention is that the Thirteenth Amendment ended all aspects of slavery, which spread far outside the boundaries of plantation husbandry into interstate commerce, government fiscal policy, and private sales transactions.[2]

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[1] The Thirteenth Amendment provides:

> Section 1. 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.
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

[2] After the Civil War, Radical Republicans tied the end of slavery to increased protections of labor in general. Senator Henry Wilson of Massachusetts explained that slavery degraded white and black working people: "I tell you, sir, that the man who is the enemy of the black laboring man is the enemy of the white laboring man the world over. The same influences that go to keep down and crush down the rights of the poor black man bear down and oppress the poor white laboring man." CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866). Representative George Julian, who like Wilson was an unflinching abolitionist and

Radical Republicans, who were the driving force behind the Thirteenth Amendment, expected it to end all injustices related to involuntary servitude.[3] They planted the Amendment's roots in the Declaration of Independence and Preamble to the Constitution, which left the task of fleshing out the ideal of universal freedom to later generations. The Thirteenth Amendment's first section guarantees the freedom *from* arbitrary domination, and its second section empowers Congress *to enact* legislation protecting people's coequal liberty to establish meaningful lives. In this regard, the Thirteenth Amendment was both a new beginning for the nation and a constructive means for enforcing its foundational principles of liberty and general wellbeing. The Amendment made the United States' founding aspiration of equal liberty an enforceable right.[4]

The historical context of the Thirteenth Amendment is the abolitionist movement and the nation's decision to throw off its racist past. In the aftermath of the Civil War, both the federal government's recalcitrance to use the Amendment and Southern evasion of it necessitated the ratification of two additional Reconstruction Amendments.[5] Even then, reform was slow in coming.

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advocate of free labor, regarded corporate exploitation as a problem existing side by side with slavery. "The rights of men are sacred, whether trampled down by southern slave-drivers, the monopolists of the soil, the grinding power of corporate wealth, the legalized robbery of a protective tariff, or the power of concentrated capital in alliance with labor-saving machinery." GEORGE W. JULIAN, POLITICAL RECOLLECTIONS, 1840 TO 1872, at 322–23 (Negro University Press 1970) (1884).

[3] *See* Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45, 47–48 (1987) (explaining that congressional Republicans expected the Thirteenth Amendment to enable Congress to pass laws protecting natural rights); Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 564 (1989) (indicating that the Thirty-Ninth Congress intended the Thirteenth Amendment to end private as well as public discrimination); Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 174–75 (1951) (explaining how the Thirteenth Amendment extended the federal legislative powers into matters that had previously been left to the states); Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 560–76 (2002) (providing a detailed study of congressional debates preceding passage of the proposed Thirteenth Amendment); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 440 (1989) (stating that, "[i]n addition to purely labor-based concerns, the thirteenth amendment debates reflected themes such as racial equality, the importance of access to education, the integrity of families, and the natural rights of mankind").

[4] *See* James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1350–51 (1997) (discussing the importance of aspirational principles to constitutional fidelity).

[5] U.S. CONST. amends. XIV, XV.

After years of narrow judicial construction, which made the Thirteenth Amendment a dead letter in all but peonage cases, the United States Supreme Court revisited the Amendment's meaning during the heyday of the civil rights movement.[6] The landmark *Jones v. Alfred H. Mayer Co.* decision determined that the Thirteenth Amendment extends beyond uncompensated, forced labor. In fact, the Amendment's second section enables Congress to pass federal legislation that is rationally related to ending any remaining badges and incidents of servitude, such as present-day trafficking of foreign workers as sex slaves and coerced domestic servants.[7] The judiciary's role in evaluating such legislation is to determine whether Congress has overstepped its Section 2 enforcement authority. The judiciary's interpretation must be partially historical, because it cannot be made without reference to the United States' experience with slavery, and partially theoretical, because it must chart the course for civil liberties.

Even though the Thirteenth Amendment was ratified in 1865, its jurisprudence is relatively nascent. Rules should develop in this field as in other areas of common law. Issues will appear before judges whose holdings will be based on the extant precedents and on constitutional integrity. Further developments will test the reasoning of lower court decisions. The role of theory in this process is to scrutinize the current topography and articulate a sense of direction in this relatively uncharted territory.

Contemporary civil rights initiatives have predominantly relied on the Fourteenth Amendment and the Commerce Clause. Meanwhile, the Thirteenth Amendment has fallen into virtual disuse. Recent Supreme Court decisions, however, such as *United States v. Morrison* and *United States v. Lopez*, have eroded Fourteenth Amendment

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[6] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440–41 (1968); *see* Anti-Peonage Act, 14 Stat. 546 (1867). Justice David Brewer defined peonage "as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness." Clyatt v. United States, 197 U.S. 207, 215 (1905); *see* Pollock v. Williams, 322 U.S. 4, 17 (1944) ("[t]he undoubted aim of the Thirteenth Amendment as implemented by the Anti-peonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States"); United States v. Reynolds, 235 U.S. 133, 146, 148–50 (1914) ("[c]ompulsion of such service by the constant fear of imprisonment under the criminal laws" violates the Thirteenth Amendment); Bailey v. Alabama, 219 U.S. 219, 245 (1911) (finding a statute that compels labor to work off debt an unconstitutional form of peonage that violated the Thirteenth Amendment).

[7] *See Mayer*, 392 U.S. at 440–41.

and Commerce Clause precedents and spurred interest in Thirteenth Amendment jurisprudence.[8]

This Article examines what fundamental rights are protected by the Thirteenth Amendment. The Amendment is a potent constitutional provision that the Supreme Court has interpreted as a means for protecting fundamental rights. The Thirteenth Amendment is uniquely suited to confront civil rights violations that neither the Fourteenth Amendment nor the Commerce Clause can prevent. Unlike the Fourteenth Amendment, which only protects against state-sponsored discrimination, the Thirteenth Amendment prohibits private and public acts resulting in arbitrary deprivations of freedom.[9] This dual capacity makes the Thirteenth Amendment an essential complement for civil rights initiatives, even in circumstances not involving economic harms.[10]

In that respect, the Thirteenth Amendment also provides a more direct approach to preventing discrimination than does the Commerce Clause. It is directed against human rights abuses, whereas the Commerce Clause is primarily an economic provision that has been grafted ingeniously into the civil rights arena.[11] As a pragmatic matter,

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[8] *See Morrison*, 529 U.S. 598, 617–19 (2000); *Lopez*, 514 U.S. 549, 558–59 (1995) (discussing Congress's power under the Commerce Clause).

[9] *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883) ("[T]he [Thirteenth A]mendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."); Jack Balkin, *History Lesson*, LEGAL AFF., July-Aug. 2002, at 44, 49 (stating that the Thirteenth Amendment, like the Citizenship Clause, does not refer to state actions, and therefore applies to private conduct); Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 1007 (2002) (asserting that because the Thirteenth Amendment lacks a state action requirement, it places substantive restrictions on "private social and economic relationships"). The Fourteenth Amendment's state action requirement is not new. It can be traced to postbellum cases. *See, e.g.*, *Civil Rights Cases*, 109 U.S. at 11 (finding that the Civil Rights Act of 1875's prohibition against social discrimination on public accommodations violated the state action requirement); United States v. Harris, 106 U.S. 629, 639–40 (1882) (holding Congress exceeded its Fourteenth Amendment Section 5 power when it passed a section of the Ku Klux Klan Act, "[a]s . . . the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers, we are clear in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution"). Congress can prevent private party acts when individuals commit them in cooperation with the state. United States v. Price, 383 U.S. 787, 794, 798–99 (1966). More recently, the Court has reiterated the state action requirement in striking down the Violence Against Women Act of 1994. *Morrison*, 529 U.S. at 620–21.

[10] The Thirteenth Amendment can offer courts more guidance and provide legislators with added certainty.

[11] *See* ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT & AMERICAN FREEDOM: A LEGAL HISTORY, ch. 6 (forthcoming Sept. 2004) (distinguishing between the Thirteenth Amendment and Commerce Clause).

the Supreme Court's recently increased oversight of congressional Commerce Clause authority has made the Thirteenth Amendment even more important.[12]

This Article begins with a retrospective look at why the Thirteenth Amendment so drastically altered the Constitution by showing that before its ratification, civil liberty was limited by the basic right of possession.[13] As a result, even human lives were conceptualized in commodification terms. Protecting slave owners' interest in human chattel was even more important to the delegates of the Philadelphia Constitutional Convention than adopting the Bill of Rights. The Three-Fifths Clause, the Fugitive Slave Clause, and the twenty-year protection on slave importation held more practical importance in drafting an acceptable constitution than protecting speech, liberty, or life. In fact, the Thirteenth Amendment went even further than the Bill of Rights in securing the privileges and immunities of citizenship. The Article then explores the extent to which the Thirty-Eighth Congress, in 1864 and 1865, planned for the proposed Amendment to create protections for universal liberty.[14]

Next, the Article explains the Supreme Court's interpretation of the Thirteenth Amendment, beginning with its restrictive decisions issued in the aftermath of Reconstruction and continuing through the Court's most recent pronouncements involving the Amendment.[15] The Article then analyzes Court decisions limiting congressional Commerce Clause authority in passing civil rights reforms and explains why those limitations are inapplicable to the Thirteenth Amendment.[16] Correspondingly, the Article discusses holdings relying on federalism to limit the scope of Congress's power under Section 5 of the Fourteenth Amendment and distinguishes the statutory spheres

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[12] *See, e.g.*, *Morrison*, 529 U.S. at 617 ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."); *Lopez*, 514 U.S. at 558–59 (holding Congress may regulate three areas of commerce: "channels of interstate commerce"; "instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and "those activities having a substantial relation to interstate commerce").

[13] *See infra* Part I.

[14] *See infra* Part II.

[15] *See infra* Part III.

[16] *See infra* Part IV. The Court recently found Congress overstepped its Commerce Clause authority on several occasions. *Morrison*, 529 U.S. at 619 (discussing the Violence Against Women Act); *Lopez*, 514 U.S. at 567–68 (discussing the Gun Free School Zones Act).

of the Fourteenth and Thirteenth Amendments.[17] The Article concludes with a historical and theoretical analysis of how the Thirteenth Amendment fits with existing privacy and liberty rights case law.[18]

I. CONSTITUTION BEFORE THE THIRTEENTH AMENDMENT

Understanding how antithetical slavery was to United States ideals is a staring point to comprehending slavery's full effect on the Constitution. The revolutionary generation was engrossed with creating a free republic. The Sons of Liberty rallied colonists against taxation without representation; Liberty Polls were assembly places; Patrick Henry embodied the revolutionary project in his pithy statement "Give me liberty or give me death"; and Thomas Paine believed America to be "the place where the principle of universal freedom could take root."[19] Slavery was so incompatible with colonial aspirations that revolutionaries often declared they were under the British yoke of slavery.[20] Yet, revolutionaries turned a blind eye to the widespread enslavement of Africans and Native Americans.[21] The first U.S. Supreme Court Chief Justice, John Jay, later recalled that even among Northerners, "very few . . . doubted the propriety and rectitude of" slavery.[22]

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[17] Recent cases limiting Fourteenth Amendment Section 5 powers have dealt with a variety of subjects. *See, e.g.*, Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (holding that Congress was not authorized under Section 5 to require states to abide by the terms of the Americans with Disabilities Act because it infringed on state sovereign immunity); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 67 (2000) (stating that that the Age Discrimination in Employment Act contains "a clear statement of Congress' intent to abrogate the States' immunity, but that the abrogation exceeded Congress' [constitutional] authority"); City of Boerne v. Flores, 521 U.S. 507, 518–19, 535–36 (1997) (determining that "appropriate legislation" in Section 5 means that Congress can only pass remedial legislation that "deters or remedies constitutional violations," but does not allow Congress to create constitutional rights).

[18] *See infra* Part V.

[19] JAMES MACGREGOR BURNS, THE VINEYARD OF LIBERTY 23–25 (1982); FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 10 (1985); Eric Foner, *The Meaning of Freedom in the Age of Emancipation*, 81 J. AM. HIST. 435, 439 (1994) (stating Paine's position on creating a free republic).

[20] *See* BARRY ALAN SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT 289–91 (1994).

[21] *See* William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 21–22 (2002–2003) (discussing the enslavement of Native Americans in the colonies).

[22] William W. Freehling, *The Founding Fathers and Slavery*, 77 AM. HIST. REV. 81, 86 (1972) (quoting John Jay). Nevertheless, the revolution altered that dynamic in the North, partly because slavery was an economic liability and partly because of Northern politicians' realization that continued exploitation of slaves was hypocritical to the revolutionary project. *See id.*

The independence movement, particularly its New England contingent, began to recognize that the implication of its vision extended to blacks as well. Among its ranks were those who sought gradual emancipation, such as John Adams, the nation's second president, and those who demanded immediate liberation, such as Nathaniel Appleton, a member of the first Committee on Correspondence.[23] The 1774 Rhode Island law prohibiting slave importation proclaimed that, among rights and liberties, "personal freedom must be considered as the greatest."[24] Black leaders and some of their white counterparts, such as James Otis, recognized the opportunity to end slavery offered by the Revolution.[25] A group of black New Hampshire petitioners used natural rights terminology to make the point "[t]hat freedom is an inherent right of the human species . . . [and t]hat private or public tyranny and slavery are alike detestable."[26] Similarly, on April 20, 1773, black petitioners from Massachusetts expressed their expectation of "great things from men who have made such a noble stand against the designs of their *fellow-men* to enslave them."[27] That same year, blacks from Boston and other Massachusetts provinces petitioned for relief from the manifold burdens placed on them by New England slavery, decrying their lack of property, wives, children, city, and country.[28] Individuals of African descent helped shape such revolutionary rhetoric. Lemuel Haynes, a racially mixed minister, wrote

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[23] Lorenzo J. Greene, *Slave-Holding New England and Its Awakening*, 13 J. NEGRO HIST. 492, 524 (1928) (discussing John Adams's and Nathaniel Appleton's respective stances on slavery).

[24] WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812, at 291 (1968) (quoting the preamble to the Rhode Island law); *see* John M. Mecklin, *The Evolution of the Slave Status in American Democracy*, 2 J. NEGRO HIST. 105, 121 (1917) (mentioning the Rhode Island law). Rhode Island legislators, nevertheless, considered blacks to be the equals of Native Americans, but not of white colonists. F. Nwabueze Okoye, *Chattel Slavery as the Nightmare of the American Revolution*, 37 WM. & MARY Q. 3, 25 (1980).

[25] James Otis considered both blacks and whites free and equal colonists. *See* Rosalie Murphy Baum, *Early-American Literature: Reassessing the Black Contribution*, 27 EIGHTEENTH-CENTURY STUD. 533, 546–47 (1994); T.H. Breen, *Subjecthood and Citizenship: The Context of James Otis's Radical Critique of John Locke*, 71 NEW ENGL. Q. 378, 390 (1998) (comparing Otis's philosophical outlook with that of John Locke). The ownership of humans, Otis declared, "has a direct tendency to diminish the idea of the inestimable value of liberty." Louis Hartz, *Otis and Anti-Slavery Doctrine*, 12 NEW. ENGL. Q. 745, 746 (1939).

[26] JORDAN, *supra* note 24, at 291.

[27] Thomas J. Davis, *Emancipation Rhetoric, Natural Rights, and Revolutionary New England: A Note on Four Black Petitions in Massachusetts, 1773–1777*, 62 NEW ENG. Q. 248, 255 (1989).

[28] *Id.* at 252.

that "an *African*, or, in other terms, . . . *a Negro*, . . . *has an undeniable right to his Liberty.*"[29]

The ideal of universal freedom that many activists embraced relied on the philosophy of John Locke. Locke's natural rights theory made its way into the Declaration of Independence, but it did not end slavery.[30] The Declaration adopted Locke's statement of inalienable human rights, unbeholden to positive laws.[31] But the founding generation of American revolutionaries lived with the contradictory promises of civil freedom and property rights in human chattel. In Thomas Jefferson's original draft of the Declaration, his accusations against King George included a clause condemning the British monarch for acting "against human nature itself" by keeping open an international slave trade that violated the "rights of life and liberty in the persons of a distant people."[32] South Carolina, which repeatedly appeared as a leader in the antebellum proslavery camp, opposed the clause, and the language was not retained in the Declaration's final draft.[33]

In the decades between the ratification of the country's founding documents and the Thirteenth Amendment, the Declaration's universal guarantee of freedom posed a moral dilemma for politicians and citizens who tolerated and participated in an institution contrary to core national commitments. Even without Jefferson's proposed anti-importation passage, the Declaration of Independence established liberty as a primary national aspiration.[34] Its terms created the rhetorical

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[29] Ruth Bogin, *"Liberty Further Extended": A 1776 Antislavery Manuscript by Lemuel Haynes*, 40 WM. & MARY Q. 85, 92 (1983).

[30] *See* HERBERT FRIEDENWALD, THE DECLARATION OF INDEPENDENCE 201–03 (Da Capo Press 1974) (1904); JEROME HUYLER, LOCKE IN AMERICA: THE MORAL PHILOSOPHY OF THE FOUNDING ERA 209–11, 246–50 (1995); WILLARD STERNE RANDALL, THOMAS JEFFERSON: A LIFE 205 (1993); MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 61–78 (1978); Donald Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 65 (1985); Terry Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 307 (1990). *But see* GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 172–75 (1978) (arguing that Locke did not influence writing of Declaration of Independence).

[31] *See, e.g.*, 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 22 (Peter Laslett ed., Mentor Press 1997) (1689).

[32] Tania Tetlow, *The Founders & Slavery: A Crisis of Conscience*, 3 LOY. J. PUB. INT. L. 1, 11 (2001) (internal quotations omitted) (quoting Thomas Jefferson's original draft of the Declaration of Independence).

[33] WILLIAM W. FREEHLING, THE REINTEGRATION OF AMERICAN HISTORY: SLAVERY AND THE CIVIL WAR 26 (1994) (discussing South Carolina's opposition).

[34] *See* JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM 85 (5th ed. 1980) ("The implications of the Declaration, however vague, were so powerful that Southern slave owners found it desirable to deny the self-evident truths which it expounded and were willing to

dilemma of denying the otherwise universal right of freedom to persons of African descent.[35]

The wording of the Declaration was so general, without any accompanying philosophical or policy explanation, that it only gained a definitively antislavery significance during the Thirteenth Amendment's ratification process. Until then, there were two differing camps of thought. Shortly after the passage of the Thirteenth Amendment, Congressman Thaddeus Stevens, one of its leading protagonists, embraced a perspective claiming that the Founding Fathers postponed fully instituting the Declaration's principles until "a more propitious time."[36] Stevens echoed the view adopted by a variety of antislavery parties before the Civil War. For instance, the Liberty Party's 1844 platform asserted that the Declaration's principle that all men are endowed with inalienable rights, including liberty, was embodied in the Fifth Amendment's national protections of life, liberty, and property.[37] Because slavery deprived persons of all three without any due process of law, the Liberty Party's platform declared that the institution was "against natural rights."[38]

The Republican Party, of which Stevens was a leader, likewise understood the Fifth Amendment's commitment to natural rights as a guaranty for speaking out against the spread of slavery. The 1860 Republican platform asserted that freedom was the normal state of United States' territory.[39] Despite the Republican Party's 1856 platform that "all men are endowed with inalienable right[s]," it only committed itself to preventing the spread of slavery into the Western territories.[40] This stance fell short of the full implications of its political philosophy. Only in the midst of the Civil War did the Republican Party adopt the position that slavery must be eradicated throughout the nation.

Before ratification of the Thirteenth Amendment, however, proslavery forces manipulated the Fifth Amendment. Nineteenth cen-

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do battle with the abolitionists during the period of strain and stress over just what the Declaration meant with regard to society in nineteenth century America.").

[35] *See* ALEXANDER TSESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS 43–44 (2002) (discussing how ethnological rationalizations were used to support claims of black inferiority).

[36] CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

[37] *Liberty Party Platform of 1844, reprinted in* NATIONAL PARTY PLATFORMS, 1840–1960, at 5 (Kirk H. Porter & Donald B. Johnson eds., 2d ed. 1961).

[38] *See id.*

[39] *Republican Party Platform of 1860, reprinted in* NATIONAL PARTY PLATFORMS, *supra* note 37, at 32.

[40] *Republican Party Platform of 1856, reprinted in* NATIONAL PARTY PLATFORMS, *supra* note 37, at 27.

tury apologists for the expansion of slavery developed a political philosophy that placed property at the pinnacle of personal interests and regarded its protection as government's chief purpose. The Fifth Amendment's Just Compensation Clause provided an artificial bastion fortifying slavery against congressional action to limit its extension. Based on this property rights centered ideology, the U.S. Supreme Court in *Dred Scott v. Sandford* found that the Missouri Compromise unconstitutionally violated substantive due process.[41] Chief Justice Roger B. Taney wrote that

> an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.[42]

Taney further equated slaves with chattel, holding that nothing in the Constitution enabled Congress to give less protection to slave property than to any other form of property.[43]

It seems that Taney's decision was intended to undermine the universal applicability of the Declaration of Independence and Congress's power to prevent the spread of slavery into the West. He did not stand alone in his apparent wish to limit Congress's power to prevent the spread of slavery, and he sided with the prejudices of other prominent government officials. For example, during debates on the Kansas-Nebraska Bill, Senator Albert G. Brown declared, "negroes are not men, within the meaning of the Declaration. If they were, Madison, and Jefferson, and Washington, all of whom lived and died slaveholders, never could have made it, for they never regarded negroes as their equals, in any respect."[44]

The ability of both camps to harness the Fifth Amendment for opposite ends signals the importance of constitutional interpretation in the historic struggle over slavery.[45] Jacobus tenBroek, a historian of the Reconstruction period, wrote that "[o]nce the constitutional starting point on either side was accepted, almost all else followed auto-

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[41] 60 U.S. (19 How.) 393, 450 (1857).

[42] *Id.*

[43] *Id.* at 452.

[44] CONG. GLOBE, 33d Cong., 1st Sess., app. 230 (1854).

[45] JACOBUS TENBROEK, EQUAL UNDER THE LAW 56 (Collier Books 1965) (1951).

matically."[46] If slaves were merely property, then the Fifth Amendment protected owners' property rights. Proslavery rhetoric, which the Taney Court accepted, relied on the natural or vested property rights view that the federal government could not trump state control over private economic interests.[47] If slaves were humans, and the proslavery argument a self-interested excuse for tyrannical exploitation, then the Just Compensation Clause was inapplicable and the Due Process Clause protected African American liberty.[48] The antislavery position relied on the Fifth Amendment to expound a natural rights theory against exploitation of persons and the misappropriation of fundamental interests in life and liberty.[49]

Ironically, the Framers' compromise on slavery, which they had made to secure the Union, was almost its undoing. A number of outspoken supporters of abolition were among the men who drafted the Constitution in Philadelphia. Benjamin Franklin was well known for his antislavery views and was elected in 1787 as the president of the Pennsylvania Society for Promoting the Abolition of Slavery, the Relief of Negroes Unlawfully Held in Bondage.[50] At the Constitutional Convention the same year, George Mason and Gouverneur Morris argued against continuing the slave trade.[51] Some powerful Southerners sided with Thomas Jefferson who wanted compensated, gradual manumission.[52]

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[46] *Id.*

[47] Proponents of the proslavery position used substantive due process analysis to claim that slave owners had a natural right to possess human chattel. *See* Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305, 318–19 (1988).

[48] *Id.*

[49] *Id.*

[50] *See* OSCAR REISS, BLACKS IN COLONIAL AMERICA 176 (1997) (quoting a speech Benjamin Franklin delivered as the president of the Pennsylvania Society for Promoting the Abolition of Slavery); Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms, 1787–1823*, 7 WM. & MARY BILL RTS. J. 347, 357 (1999).

[51] Paul Finkelman, *Intentionalism, the Founders, and Constitutional Interpretation*, 75 TEX. L. REV. 435, 465–66 (1996) (reviewing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996) (explaining Morris's and Mason's opposition to slavery during the Constitutional Convention's debate over Congress's future power over commerce)).

[52] Thomas Jefferson, Letter to Jared Sparks (Feb. 4, 1824), *in* 12 THE WORKS OF THOMAS JEFFERSON 334, 334–36 (Paul Leicester Ford ed., 1905); *see* 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 473–79 (1919) (discussing Marshall's support for gradual, compensated emancipation and African colonization). James Madison believed in gradual emancipation, compensated from national funds because the benefits of liberation would be national. ALLAN NEVINS, ORDEAL OF THE UNION, SELECTED CHAPTERS 19 (1973).

Economic interests, however, proved more powerful than ethical ones. By the mid-eighteenth century, slavery was entrenched in both the North and South. Northern shippers and merchants participated in slave importation from the years preceding the Constitutional Convention until 1808, when the slave trade legally ended.[53] Northern industrialists shipped Africans into the colonies and assured Southern return on human capital by purchasing Southern goods. The North's willingness to ship Africans provided the South with enough laborers to turn a profit on what otherwise would have been fallow farmland.

The proslavery camp used its leverage at the 1787 Constitutional Convention by demanding protections for slavery in exchange for ratifying the Constitution. The willingness to sacrifice human lives for the sake of gaining the consent of South Carolinian and Georgian representatives led the country away from the universal values of the Declaration of Independence toward factional dogma, which often split on the question of slavery.[54] Those Northern and Upper Southern delegates who had sought an immediate cessation of the trade gave in to the Deep South's demands.

To their credit, the Founders provided avenues for formal political change, including a method for proposing and amending the Constitution with Article V, which Radical Republicans later used to nullify the proslavery sections. However, the Founders did little to alter oligarchical social relations that existed in their own time. They granted a disproportionate amount of power to slave owners, rather than immediately producing the representative democracy that the Declaration heralded.[55]

The Framers' lack of concern for the human rights of slaves was reflected in numerous constitutional clauses. The constitutional concessions to slavocracy were so extensive that the Thirteenth Amendment profoundly altered United States laws and society.[56] The original

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[53] Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J.L. & Human. 413, 418 (2001) (explaining how South Carolina, North Carolina, and Georgia reopened the slave trade and imported tens of thousands of slaves after the Revolution and prior to the Constitutional Convention); Wolff, *supra* note 9, at 1011 (discussing how Northern merchants and shippers played a key role in the importation of slaves between 1778 and 1808).

[54] HENRY H. SIMMS, A DECADE OF SECTIONAL CONTROVERSY, 1851–1861, at 33–34 (1942) (discussing Georgia's and South Carolina's objection to giving Congress power over slave commerce).

[55] FREEHLING, *supra* note 33, at 14, 16–18 (claiming that the American Revolutionists intended a political but not a social revolution).

[56] Historian Jack Rakove recently questioned whether the constitutional concessions to South Carolina and Georgia were more extensive than was necessary to bring them into

Constitution was marked by a glaring contradiction with its protection of both liberty and slavery. In an article first published in 1850, Frederick Douglass, who escaped from slavery in his youth and became a renowned civil rights leader, brought out this contradiction:

> If we adopt the preamble, with Liberty and Justice, we must repudiate the enacting clauses, with Kidnapping and Slaveholding. . . . Every slaveholder in the land stands perjured in the sight of Heaven, when he swears his purpose to be, the establishment of justice—the providing for the general welfare, and the preservation of liberty to the people of this country; for every such slaveholder knows that his whole life gives an emphatic lie to his solemn vow.[57]

Even though the Constitution did not use the terms "slave" or "slavery," it contained numerous protections for the South's peculiar institution. Instead, the clauses that legalized slavery used euphemisms to refer to bondsmen—"person held to Service or Labour," "such persons," and "other persons"—which made constitutional passage less contentious and alteration easier. Douglass, writing in his *The North Star* newspaper, listed the Importation Clause among those constitutional provisions that furthered slaveholding.[58] The Importation Clause prohibited Congress from abolishing the international slave trade for twenty years after state ratification of the Constitution.[59] During that period, the Importation Clause limited Congress's authority to levying a ten-dollar head tax for each imported slave. Even though Congress passed laws in 1818 and 1820 that severely punished participants of the slave trade, calls for reopening the trade continued until the Civil War. Supporters of the slave trade, particularly those from South Carolina and Louisiana, sought to depress the prices of slaves by flooding the market with them, thereby decreasing labor costs.[60]

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the Union, because those states had a significant interest in joining it. *See* RAKOVE, *supra* note 51, at 58, 73–74, 93.

[57] Frederick Douglass, NORTH STAR, Apr. 5, 1850, *reprinted in* VOICES FROM THE GATHERING STORM: THE COMING OF THE AMERICAN CIVIL WAR 40, 40–41 (Glenn M. Linden ed., 2001) [hereinafter NORTH STAR]; *see also* Frederick Douglass, *The Constitution and Slavery*, NORTH STAR, Mar. 16, 1849, *reprinted in* 1 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 361 (Philip S. Foner ed., 1950) [hereinafter DOUGLASS WRITINGS]; FREDERICK DOUGLASS, The Revolution of 1848, Speech at West India Emancipation Celebration (Aug. 1, 1848), *in* DOUGLASS WRITINGS, *supra*, at 321.

[58] NORTH STAR, *supra* note 57, at 40–41.

[59] U.S. CONST. art. I, § 9, cl. 1.

[60] Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 Nw. U. L. REV. 477, 556–57 (1998) (discussing provisions of the 1818

Further, the Three-Fifths Clause[61] enabled the South to obtain a "domineering representation" in the House of Representatives.[62] This provided Southern congressmen with the power to proffer proslavery laws and the numbers to pass them. Another author recently pointed out that the Three-Fifths Clause also had a direct effect on presidential elections.[63] Article II, Section 1, Clause 2 granted each state presidential electors whose number was equal to the state's combined number of senators and representatives.[64] The electors, who comprise the body that votes for the president, played a consequential role in placing slaveholders into the executive office instead of principled antislavery advocates, as occurred in 1800 when Thomas Jefferson defeated John Adams for the presidency and in seating Northerners willing to placate the slave South, as was the case with James Buchanan's victory in 1856.

Other constitutional provisions guarded slave owners against recalcitrant slaves and required federal involvement in maintaining the peculiar institution. The Insurrection Clause gave Congress power to call up the militia to suppress revolts, including slave rebellions such as the Nat Turner Rebellion.[65] The Fugitive Slave Clause, which passed without any dissenting votes at the Constitutional Convention, required fugitives to be returned "on demand" and prohibited free states from

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and 1820 statutes); *see also* P.L. Rainwater, *Economic Benefits of Secession: Opinions in Mississippi in the 1850s*, 1 J. S. HIST. 459, 467 (1935) (discussing Jefferson Davis's desire to modify the law of 1819 and repeal the 1820 piracy act because of the adverse affect on slave importation); Harvey Wish, *The Revival of the African Slave Trade in the United States, 1856–1860*, 27 MISS. VALLEY HIST. REV. 569, 569, 572 (1941) (discussing how in the years immediately preceding the Civil War powerful forces, particularly in Louisiana and South Carolina, were on the verge of reopening the slave trade to gain more laborers).

[61] The Three-Fifths Clause provided that slaves were to be counted as three-fifths of a person for the purpose of determining how many representatives a state was to have in Congress. *See* U.S. CONST. art. I, § 2, cl. 3.

[62] *See* Michael Kent Curtis, *A Story for All Seasons: Akhil Reed Amar on the Bill of Rights*, 8 WM. & MARY BILL RTS. J. 437, 453 (2000) (book review) (explaining that the Three-Fifths Clause gave the South a disproportionate representation in the House of Representatives); John Rockwell Snowden et al., *American Indian Sovereignty and Naturalization: It's a Race Thing*, 80 NEB. L. REV. 171, 195 (2001) (pointing out that Section 2 of the Fourteenth Amendment also excluded untaxed Indians from the numeration); *cf.* Ruth Colker, *The Supreme Court's Historical Errors in* City of Boerne v. Flores, 43 B.C. L. REV. 783, 795 (2002) (explaining that the Thirteenth Amendment's repeal of the Three-Fifths Clause and arguable grant of citizenship to slaves further increased the South's representation in Congress).

[63] Paul Finkelman, *The Color of Law*, 87 NW. U. L. REV. 937, 971 (1993) (reviewing ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992)).

[64] *Cf. id.* (explaining that the Constitution provided for the indirect election of the president through an electoral college).

[65] U.S. CONST. art. I, § 8, cl. 15 (giving Congress the power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions").

liberating them.[66] Frederick Douglass denounced the provision for making "the whole land one vast hunting ground for men," making felons out of persons who broke the fetters of slavery.[67]

This superabundance of slaveholding compromises made the Thirteenth Amendment critical, not only to ending the physical bondage of slaves, but also to liberating the entire Constitution. The amendment provision in Article V requires two-thirds of both congressional houses to propose an amendment and three-fourths of state legislatures or conventions to ratify it. This made the passage of an antislavery amendment wholly impossible in the United States before the Civil War, because, in 1860, slavery was legal in fifteen of the thirty-three states then in the Union.[68] The Thirteenth Amendment rendered all clauses directly dealing with slavery null and altered the meaning of other clauses that originally had been designed to protect the institution of slavery, such as the Insurrection Clause, to exclude their original design.

The Thirteenth Amendment further reinterpreted the Declaration of Independence to apply the universal declaration of human rights to blacks, whites, and any other citizens. Until its ratification, abolitionists like Charles Sumner, who argued that Fifth Amendment

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[66] *Id.* art. IV, § 2, cl. 3 (providing that "[n]o Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due"); *see* DON E. FEHRENBACHER, SLAVERY, LAW & POLITICS: THE *DRED SCOTT* CASE IN HISTORICAL PERSPECTIVE 20–21 (1981) (disputing that the Fugitive Slave Clause was indispensable to the success of the Constitutional Convention); Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93, 121 (1989) (asserting that the Fugitive Slave Clause did not arouse much debate at the Constitutional Convention because it was not a significant issue); Paul Finkelman, *Sorting Out* Prigg v. Pennsylvania, 24 RUTGERS L.J. 605, 613 (1993) (asserting that although the "initial response" to South Carolina's proposed fugitive slave provision "was hostile," the Constitutional Convention "with neither debate nor formal vote, adopted the fugitive slave provision as a separate article of the draft constitution"); *see also* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 625–26 (1842) (overturning Edward Prigg's conviction under state law for kidnapping a black mother and her children in order to return them to a Maryland owner).

[67] Frederick Douglass, *Farewell Speech to the British People* (Mar. 30, 1847), *in* DOUGLASS WRITINGS, *supra* note 57, at 209.

[68] In 1860, there were fifteen slave states and eighteen free states. Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009, 1024 (1993); Robert R. Russel, *The General Effects of Slavery upon Southern Economic Progress*, 4 J. S. HIST. 34, 40 (1938); *see* Samuel Marcosson, *Colorizing the Constitution of Originalism: Clarence Thomas at the Rubicon*, 16 L. & INEQ. 429, 469 (1998) (arguing that Article V can be viewed as "the Framers' insurance policy against the possibility that then-excluded groups, including women, slaves and free blacks, could one day change the power structure the Founders had erected without regard to the needs, views, or priorities of the members of those groups").

guarantees applied to blacks and whites, held this view in the face of explicit constitutional provisions to the contrary.[69] Antebellum efforts to restrict slavery were ingenious but limited in scope. In 1850, Congress used its Article I, Section 8, Clause 17 authority over the nation's capital to prohibit slave trading, but not slavery, in Washington, D.C.;[70] legislators, however, could not do the same in the bordering states.

Antislavery advocates faced the dogma that states had the exclusive right to determine matters about slavery. The proslavery camp typically grounded its assertion on the Tenth Amendment's reservation of powers to the state or Article IV's guarantee of a republican form of government. Senator John Calhoun, the leading nineteenth-century states' rights advocate, refined this proslavery concept into the doctrine of concurrent majorities. He argued that the national government lacked the authority to regulate slavery because it was unable to gain support from each state to do so.[71]

The abolitionist movement responded to this proslavery ideology with a natural rights perspective that was grounded in the Declaration of Independence and the Preamble to the Constitution. Abolitionists aimed to dismantle the Constitution's tolerance for slavery, and their political agenda gradually led to ratification of the Thirteenth Amendment.

II. Abolition and Natural Rights

Before turning to judicial interpretation of the Thirteenth Amendment, I begin with a retrospective look at the Amendment's foundational aims. This background is necessary for my later dichotomization between the Thirteenth and Fourteenth Amendments and between the Thirteenth Amendment and Commerce Clause.

Radical Republicans based the Thirteenth Amendment on the natural rights principles that guided the abolitionist movement from its founding in 1833.[72] The movement was founded upon ideology opposing both the proslavery and gradualist antislavery camps. Uni-

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[69] *See* TENBROEK, *supra* note 45, at 56; MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 106–07 (2001).

[70] Compromise of 1850, ch. 63, 9 Stat. 467.

[71] MARK E. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE 54 (1998).

[72] The American Anti-Slavery Society's 1833 Declaration of Sentiments, *at* http://www.etsu.edu/cas/history/docs/antislavery.htm (last visited Feb. 6, 2004), was an early example. *Cf.* John P. Diggins, *Slavery, Race, and Equality: Jefferson and the Pathos of Enlightenment*, 28 AM. Q. 206, 222 (1976) (explaining that abolitionists found the natural rights theory problematic because it did not separate human rights from property rights, and it lacked a social responsibilities component).

tarian leader William Ellery Channing explained, in 1835, that the abolitionists' argument rested on the Declaration of Independence's assertion of "the indestructible rights of every human being."[73] Each person was "born to be free," and the desire for wealth, especially in human capital, could never trump individual rights.[74] Slavery was inimical because it stripped "man of the fundamental right to inquire into, consult, and seek his own happiness."[75]

The oratory and research skill of Theodore D. Weld likewise promoted the movement's broad-ranging aspirations for national liberation. Through his influential book, *American Slavery As It Is*, Weld passed on to Radical Republicans the view that slaveholders plundered slaves of their "bodies and minds, their time and liberty and earnings, their free speech and rights of conscience, their right to acquire knowledge, and property, and reputation."[76] The National Anti-Slavery Convention relied on the "self-evident truths of the Declaration of Independence . . . and in the Golden Rule of the Gospel—nothing more, nothing less."[77] The abolitionists in Congress echoed the same sentiments.

Senator Charles Sumner's arguments during the debates on the Kansas-Nebraska Bill were representative of the ideas he also espoused during the Senate debates on the Thirteenth Amendment. "Slavery," he stated in one speech, "is an infraction of the immutable law of nature, and, as such, cannot be considered a natural incident to any sovereignty, especially in a country which has solemnly declared, in its Declaration of Independence, the inalienable right of all men to life, *liberty*, and the pursuit of happiness."[78]

The Thirteenth Amendment's grant of power to Congress over matters resembling the incidents of servitude signaled a break from moderate antislavery leanings and a preference for radical abolitionist principles.[79] Moderates wanted states gradually and separately to end slavery. With the outbreak of the Civil War, however, a radical form of

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[73] WILLIAM E. CHANNING, SLAVERY 47–48 (Arno Press 1969) (3d ed. 1835).

[74] *Id.* at 48.

[75] *Id.* at 51.

[76] THEODORE D. WELD, AMERICAN SLAVERY AS IT IS 7–8 (Arno Press 1968) (1839).

[77] The National Anti-Slavery Standard, February 21, 1857, *quoted in* William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 536 (1974).

[78] CONG. GLOBE, 33d Cong., 1st Sess., app. 268 (1854).

[79] *See* DAVID A.J. RICHARDS, CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS 97–99 (1993).

abolitionism came to dominate Congress.[80] Even Abraham Lincoln, who also thought slavery was "a total violation" of the Declaration of Independence, initially maintained a gradualist, state-by-state approach. His views changed only during the War when he realized that Southern states would not be appeased into abandoning their expansionist ambitions.[81]

The Declaration takes for granted that the possession of natural rights is "self-evident."[82] Implicitly, this means people are intuitively empathetic and can recognize that others are endowed with the same rights. An advocate of the Thirteenth Amendment detailed a similar view during the House debate on the proposed Amendment:

> What vested rights so high or so sacred as a man's right to himself, to his wife and children, to his liberty, and to the fruits of his own industry? Did not our fathers declare that those rights were inalienable? And if a man cannot himself alienate those rights, how can another man alienate them without being himself a robber of the vested rights of his brotherman?[83]

Slavery was an anomaly in a country formed in opposition to British violation of American civil liberties. Within this national context, the Thirteenth Amendment brought the Constitution, which originally protected the institution of slavery, into harmony with the Declaration

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[80] On the House side, Thaddeus Stevens was the leader of the Committee on the Ways and Means during the debates on the Thirteenth Amendment, and, then, the Committee on Appropriations during the debates on the Civil Rights Act of 1866. *See* James A. Woodburn, *The Attitude of Thaddeus Stevens Toward the Conduct of the Civil War*, 12 AM. HIST. REV. 567, 567 (1907); Biographical Directory of the United States Congress, *at* http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000887 (last visited Feb. 6, 2004). Charles Sumner was the Chairman of the Senate Committee on Foreign Relations in 1861. Mark M. Krug, *The Republican Party and the Emancipation Proclamation*, 48 J. NEGRO HIST. 98, 103 (1963). Henry Wilson was Chairman of the Senate Committee on Military Services and the Militia. *Id.* Even more moderate leaders in the Republican Party, like Senator Lyman Trumbull, Chairman of the Committee on the Judiciary, rejected gradual abolitionism. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (arguing the Thirteenth Amendment abolished slavery in all states and destroyed all incidents to slavery).

[81] Abraham Lincoln, *Speech at Peoria, Illinois, in Reply to Senator Douglas, in* THE WORKS OF ABRAHAM LINCOLN 209 (Arthur B. Lapsley ed., 1905) (1854).

[82] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Declaration recognizes the existence of three natural rights: life, liberty, and the pursuit of happiness. ALLEN C. GUELZO, ABRAHAM LINCOLN: REDEEMER PRESIDENT 224 (1999).

[83] CONG. GLOBE, 38th Cong., 2d Sess. 200 (1865) (quoting Representative John F. Farnsworth).

of Independence.[84] Charles Black has pointed out that Thirteenth Amendment principles were dormant in the Declaration of Independence.[85] Abolitionists changed legal culture to accord with ideals that existed since 1776.

Radical congressmen used the amendment process under Article V of the Constitution to alter the Constitution's initially inimical provisions. The Thirteenth Amendment provides an enforceable right for the protection of those civil liberties that were valued in the Declaration of Independence but not implemented by the Constitution. The Amendment allows Congress to secure liberty, life, and the pursuit of happiness through positive laws.[86]

Behind its enforceable provisions lies the national commitment to secure personal liberties integral to civil welfare. Progressive advocates of the first reconstruction amendment made an earnest effort to remove impediments standing in the way of civil rights. They regarded the Thirteenth Amendment as a means of restoring the natural rights long denied to both blacks and wage earners. According to Radical Republicans, former slaves were not only freed from bondage; they also had gained the right to make fundamental choices about their jobs and families. Congressman M. Russell Thayer of Pennsylvania expressed the same point in general, rhetorical terms:

> [W]hat kind of freedom is that which is given by the amendment of the Constitution, if it is confined simply to the exemption of the freedom from sale and barter? Do you give freedom to a man when you allow him to be deprived of those great natural rights to which every man is entitled by nature?[87]

The Thirty-Ninth Congress opened in 1865 with a statement by Schuyler Colfax, the incoming Speaker of the House of Representatives. Given shortly after Congress passed the proposed Thirteenth Amendment and before the introduction of the proposed Fourteenth Amendment, the statement was indicative of how Congress planned to use the Thirteenth Amendment for Reconstruction. Colfax told the House:

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[84] W.R. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION 1865–1867, at 266–69 (1963); *cf.* STAUGHTON LYND, CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION 185–213 (1967) (discussing the question of slavery and the Constitutional Convention).

[85] Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1103 (1986).

[86] *See* CONG. GLOBE, 38th Cong., 2d Sess. 142 (1864) (quoting Godlove S. Orth, who argued for a practical application of natural rights principles via the Thirteenth Amendment).

[87] CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866).

> [I]t is yours to mature and enact legislation which, . . . shall establish [state governments] anew on such a basis of enduring justice as will guarantee all necessary safeguards to the people, and afford what our Magna Charta, the Declaration of Independence, proclaims is the chief object of government—protection of all men in their inalienable rights.[88]

Radical Republicans relied on the Declaration of Independence to elucidate the proposed amendment. Representative Godlove S. Orth from Indiana expected the Amendment to "be a practical application of that self-evident truth," of the Declaration "'that [all men] are endowed by their creator with certain unalienable rights; that among these, are life, liberty, and the pursuit of happiness.'"[89] Its more progressive advocates made an earnest effort to remove impediments standing in the way of human rights.[90] Representative Francis W. Kellogg of Michigan traced the sources of the proposed amendment to the Declaration and to the Preamble of the Constitution's requirement that government promote the general welfare and secure liberty.[91]

Illinois Representative Ebon C. Ingersoll, who was elected to the Thirty-Eighth Congress to fill the vacancy created by the death of legendary abolitionist Owen Lovejoy, voiced the desire to secure slaves natural and inalienable rights because blacks have a right to "live in a state of freedom."[92] He asserted that they have a right to profit from their labors and to enjoy conjugal happiness without fear of forced separations at the behest of uncompassionate masters.[93] Moreover, Ingersoll viewed the proposed amendment to apply to "the seven millions of poor white people who live in the slave States but who have ever been deprived of the blessings of manhood by reason of . . . slavery. Slavery has kept them in ignorance, in poverty and in degradation."[94] Senator Henry Wilson likewise said the Thirteenth Amendment would provide "sacred rights" to whites and blacks.[95]

Representative Thomas T. Davis of New York expounded on civil liberty on January 7, 1865: "Liberty, that civil and religious liberty which was so clearly beautifully defined in the Declaration of Inde-

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[88] CONG. GLOBE, 39th Cong., 1st Sess. 5 (1865).
[89] CONG. GLOBE, 38th Cong., 2d Sess. 142 (1865).
[90] CONG. GLOBE, 38th Cong., 1st Sess. 1199 (1864).
[91] *Id.* at 2954–55.
[92] *Id.* at 2990.
[93] *Id.*
[94] *Id.*
[95] CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864).

pendence . . . . African slavery, was regarded as temporary in its character . . . . Our fathers predicted that the time would soon come when the interests of the country would demand that slavery should pass away."[96] Representative John F. Farnsworth of Illinois thought the "old fathers who made the Constitution . . . believed that slavery was at war with the rights of *human nature*."[97]

Republicans like Representative Ignatius Donnelly of Minnesota recognized that

> slavery is not confined to any precise condition. . . . Slavery consists in a deprivation of natural rights. A man may be a slave for a term of years as fully as though he were held for life; he may be a slave when deprived of a portion of the wages of his labor as fully as if deprived of all.[98]

Senator John Sherman of Ohio regarded the Amendment's second clause to be the grant of congressional power to actively secure freedpeople their liberty rights "to sue and be sued . . . [and] to testify in a court of justice."[99]

The Thirty-Eighth Congress wanted the Thirteenth Amendment to help achieve the liberty they extolled during the debates of 1864 and 1865. The Amendment's second section made enforceable the right to liberty. It placed the power to protect civil rights in the hands of federal legislators, shifting the balance of power from the states. Yet Supreme Court decisions that followed Reconstruction made the Amendment virtually ineffectual, and it was only at the end of the twentieth century that the Court corrected itself.

III. JUDICIAL INTERPRETATION

The Framers of the Thirteenth Amendment were driven by the conviction that slavery was an evil requiring permanent eradication.[100]

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[96] CONG. GLOBE, 38th Cong., 2d Sess. 154 (1864). Likewise, during the Senate debate, Reverdy Johnson, who had represented one of Dred Scott's owners, argued that if the Framers had known how much sectional strife would result from slavery, they would have opposed it. *The Anti-Slavery Amendment to the Constitution. Eloquent Speech of Reverdy Johnson. He Takes Strong Ground for Immediate Emancipation*, N.Y. TIMES, Apr. 6, 1864, at 1.

[97] CONG. GLOBE, 38th Cong., 1st Sess. 2978 (1864). Representative William D. Kelley of Pennsylvania, however, thought the errors of the Founding Fathers for compromising with wrongs were being expiated by blood, agony, and death. *Id.* at 2983.

[98] CONG. GLOBE, 39th Cong., 1st Sess. 588 (1866).

[99] CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865).

[100] There have been a number of in-depth studies on the congressional debates. TENBROEK, *supra* note 45, at chs. 9 & 10; TSESIS, *supra* note 11, at ch. 2; VORENBERG, *supra* note

In the years following Reconstruction, the U.S. Supreme Court undermined the Radical ideals of universal freedom and, eventually, interpreted the Amendment so narrowly that its holdings came to resemble the reasoning of congressmen who had voted against the Amendment.[101] In the years following the Compromise of 1877, the Supreme Court stripped the Amendment of its countermajoritarian potential.[102] Only during the 1960s' civil rights movement did the Court recognize its mistake.

A. *Judicial Overview*

A Kentucky federal court's 1866 decision in *United States v. Rhodes* was the first federal decision on the constitutionality of the Civil Rights Act of 1866, which Congress passed pursuant to its Thirteenth Amendment enforcement authority.[103] Congress passed the Civil Rights

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69, at ch. 4; G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1, 7–14 (1974); Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 6–11 (1995).

[101] Pamela Brandwein, *Slavery As an Interpretive Issue in the Reconstruction Congress*, 34 LAW & SOC'Y REV. 315, 316, 354–55 (2000) (analyzing the Northern Democratic view, expressed during the 1864 and 1865 debates, for a limited reading of the Thirteenth Amendment and linking it to later Supreme Court opinions).

[102] President Rutherford B. Hayes entered the Compromise of 1877. It was an agreement between Democrats and Republicans giving Hayes, rather than Samuel J. Tilden, the presidential election of 1876, in exchange for Hayes's agreement to withdraw federal troops from the South, thereby effectively ending what remained of Reconstruction. *See* GEORGE H. HOEMANN, WHAT GOD HATH WROUGHT: THE EMBODIMENT OF FREEDOM IN THE THIRTEENTH AMENDMENT 160 (1987) (discussing the regressive effect of the Compromise on civil rights efforts). G. Sidney Buchanan, a legal historian, examined the effects of the Compromise of 1877 on judicial decisions, finding that they extended further than the immediate congressional abandonment of Reconstruction legislation. Buchanan, *supra* note 100, at 367. The Supreme Court, too, having sent the key member to the election committee, began determining opinions in line with the Compromise of 1877. *See id.* at 367–68. Subsequent Court decisions became more averse to federal civil rights jurisdiction, until the Thirteenth Amendment was a hollow guarantee, remaining practically unenforceable. *See id.* at 367.

[103] 27 F. Cas. 785 (C.C.D. Ky. 1866). Shortly after the States ratified the Thirteenth Amendment, and before ratification of the Fourteenth Amendment, Congress passed four statutes to enforce it. Peonage Act of 1867, ch. 187, 14 Stat. 546 (1867); Act of February 5, 1867, ch. 27, 14 Stat. 385 (expanding the scope of habeas corpus statutes); Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866); Slave Kidnapping Act, ch. 86, 14 Stat. 50 (1866). These laws were radical departures from antebellum legal thought and speak loudest against the revisionist claim that the Thirteenth Amendment meant no more "for the Negro than exemption from slavery." *See* JAMES Z. GEORGE, THE POLITICAL HISTORY OF SLAVERY IN THE UNITED STATES 114 (Negro University Press 1969) (1915) (claiming a limited scope for the Thirteenth Amendment).

Act over President Andrew Johnson's veto.[104] The provisions of the Civil Rights Act were indicative of the Radical Republican Reconstruction plans. Senator Lyman Trumbull reported the Bill, on January 12, 1866.[105] In its initial form, the Bill conferred citizenship on all persons, except untaxed Indians, who inhabited the states or territories and made it a crime to discriminate against their civil rights and immunities.[106] The initial Bill essentially guaranteed equal enjoyment of the privileges and immunities of citizenship, but this language was removed from the Bill's final draft. Nevertheless, in its enacted form the Act recognized the civil rights to

> make and enforce contracts, to sue, be parties, 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, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[107]

The Act granted federal courts jurisdiction to hear cases of any alleged violations.[108] Moreover, anyone who was denied the right to enforce his or her rights under the Act in a state court was permitted to transfer the case to a federal court. State officials who violated the Act under color of law or pursuant to custom were also subject to criminal

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[104] Johnson vetoed the measure despite the urging of leading moderate Republicans. *See* Letter from Ohio Governor Jacob D. Cox to Andrew Johnson (Mar. 22, 1866), *in* 10 THE PAPERS OF ANDREW JOHNSON 287 (Paul H. Bergeron et al. eds., 1992). A note to the same effect from Secretary of State William Seward is filed under the date of March 27, 1866 in ANDREW JOHNSON PAPERS Reel 21 and housed at the Library of Congress. Congress overrode Johnson's veto by a vote of 33 Senators for and 15 against, and the House overrode his veto by a vote of 122 for and 41 against. CONG. GLOBE, 39th Cong., 1st Sess. 1809 (1866) (Senate vote); *id.* at 1861 (House vote). For Johnson's explanation of the reasoning behind his veto, see 8 COMPILATION OF THE MESSAGES & PAPERS OF THE PRESIDENTS 3603 (James D. Richardson ed., 1897). The Civil Rights Act's reach was national, unlike the Freedman's Bureau Act, a Reconstruction statute and a temporary wartime measure with no application outside the rebel states. *See* Freedman's Bureau Act of July 16, 1866, ch. 200, § 14, 14 Stat. 176 (1866).

[105] CONG. GLOBE, 39th Cong., 1st Sess. 211–12 (1866).

[106] *Id.*

[107] Civil Rights Act of 1866, 14 Stat. 27.

[108] *Id.* § 3.

prosecution.[109] Violators were subject to imprisonment for up to one year and a fine of no more than $1000.[110]

Supreme Court Justice Noah Swayne, sitting as a designated circuit court justice in 1866, rendered the opinion in *Rhodes*.[111] The case arose after white defendants were charged with committing burglary against Nancy Talbot, an African American.[112] Justice Swayne found that the Thirteenth Amendment granted Congress the power to pass the Civil Rights Act and federal courts the power to hear civil rights matters.[113] This was necessary to secure equal access to judicial redress for newly freed blacks in both criminal and civil cases.[114] Justice Swayne's decision was seeped with "the spirit in which the Amendment is to be interpreted."[115] Without congressional enforcement power, Justice Swayne wrote in dictum, "simple abolition . . . would have been a phantom of delusion."[116]

In 1872, while Justice Swayne was still an associate justice, the U.S. Supreme Court ruled very differently on a procedural matter in *Blyew v. United States*.[117] Just as *Rhodes*, *Blyew* was a federal removal case. Kentucky law, in 1868, when the *Blyew* defendants were indicted, still forbade black witnesses from testifying against white defendants.[118] *Blyew* was the first blow to the use of the Thirteenth Amendment for ending centuries of racial intolerance. There was both oral and physical evidence at trial showing that on one night John Blyew and George

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[109] *Id.*

[110] *Id.* §§ 5, 6.

[111] 27 F. Cas. 785. Justice Swayne heard this matter in federal court because Kentucky law forbade blacks from testifying against whites in state courts. *Id.* at 785–86. He was an established abolitionist even before the Civil War, and at one time he freed slaves he and his wife had received by marriage. JOSEPH FLETCHER BRENNAN, 1 THE (OHIO) BIOGRAPHICAL CYCLOPEDIA AND PORTRAIT GALLERY 101 (1880). As an attorney, Swayne had even represented several fugitive slaves. William Gillette, *Noah H. Swayne, in* 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1978: THEIR LIVES & MAJOR OPINIONS 990 (Leon Friedman & Fred L. Israel eds. 1980). His most famous representation came in the Oberlin rescue cases, involving the Fugitive Slave Law. *See generally* Bushnell v. Langston, 9 Ohio St. 77 (1859); Bushnell v. Langston, 8 Ohio St. 599 (1858).

[112] *Rhodes*, 27 F. Cas. at 785–86.

[113] *Id.* at 786–87.

[114] *Id.*

[115] *See id.* at 792.

[116] *Id.* at 794.

[117] 80 U.S. (13 Wall.) 581, 590–95 (1872).

[118] *Id.* at 581 (citing 1860 Ky. Acts, § 1, ch. 104, vol. 2, at 470). The law only permitted blacks and Native Americans to act as "competent witnesses" in civil suits to which the only parties were blacks or Native Americans. *Id.*

Kennard had murdered three generations of a black family.[119] The only witnesses to the crime were black. The United States Solicitor General argued that the right to testify protected persons and property, and was part and parcel of the freedom Congress assured all citizens regardless of race.[120] The Supreme Court, however, was convinced by the defendants' procedural argument against federal court jurisdiction and reversed the convictions.[121] The Court held that only living persons could request removal, making conviction impossible.[122] No one had standing to remove the case because the victims were dead and the defendants had not affected any of the black witnesses.[123]

The dissenting opinion, written by Justice Joseph Bradley, criticized both the majority's narrow reading of the Civil Rights Act and its disregard for the liberal ideals surrounding the statute's passage.[124] Bradley concluded that Congress broadly intended to prevent wanton, racist conduct from being committed against the black community.[125] The Amendment attempted to "do away with the incidents and consequences of slavery" and to replace them with civil liberty and equality.[126] Justice Bradley further wrote that the chief aim of the Abolition Amendment was to instate blacks to the full enjoyment of civil rights.[127] He also recognized that the majority opinion legitimized Kentucky's practice of prohibiting blacks from testifying against whites and thereby branded all blacks "with a badge of slavery."[128]

Southern government officials and hoodlums alike used *Blyew* to circumvent civil rights legislation. The case significantly diminished the potential for a successful reconstruction. It branded blacks as easy prey for individuals and groups who continued extolling the Confederacy and sought to reinvigorate its institutions. If the Ku Klux Klan (the "KKK") and other violent supremacist groups had been at all leery of being tried in federal courts, *Blyew* relieved them of that worry. The federal government could no longer provide a judicial fo-

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[119] *Murder: Particulars of the Late Tragedy in Lewis County*, LOUISVILLE (KY.) DAILY J., Sept. 9, 1868, at 3.

[120] *Blyew*, 80 U.S. at 589.

[121] *Id.* at 593–95.

[122] *See id.*

[123] *Id.* at 581, 594.

[124] *See id.* at 598–99 (Bradley, J., dissenting).

[125] *See Blyew*, 80 U.S. at 595–96 (Bradley, J., dissenting).

[126] *See id.* at 601 (Bradley, J., dissenting).

[127] *See id.* (Bradley, J., dissenting).

[128] *See id.* at 599 (Bradley, J., dissenting).

rum in cases where state laws prohibited blacks from testifying against whites and the black victims of a crime were unavailable.

The period of substantive decline for Thirteenth Amendment jurisprudence began in 1883 with the *Civil Rights Cases*.[129] Bradley, who was by then Chief Justice of the Supreme Court, drafted the majority opinion. He qualified his earlier dissent in *Blyew* and significantly contributed to the reversal of Radical Reconstruction. His ruling has implications for the contemporary distinction between the Thirteenth and Fourteenth Amendments.[130]

The constitutionality of the first two sections of the Civil Rights Act of 1875 was the subject of litigation in the Civil Rights Cases.[131] The Act was the last legislation passed by the Reconstruction Congress.[132] By the time the case came before the Supreme Court, Reconstruction had come to a grinding halt, even though many racialist institutions resembling slavery remained. These institutions included adhesion contracts for sharecropping, segregation, peonage, and the convict lease system.[133]

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[129] *See generally* 109 U.S. 3 (1883).

[130] Part V analyzes why this distinction makes the Thirteenth Amendment an important component for innovative civil rights activism. *See infra* notes 310–321 and accompanying text.

[131] The full name of the Civil Rights Act of 1875 was "An act to protect all citizens in their civil and legal rights." 18 Stat. 335.

[132] *See* Colbert, *supra* note 100, at 22 (discussing debate over Reconstruction that arose in passing Civil Rights Act of 1875); *see also* WILLIAM B. HESSELTINE, ULYSSES S. GRANT, POLITICIAN 368–71 (1935) (discussing President Ulysses Grant's role in the controversy); JAMES M. MCPHERSON, THE ABOLITIONIST LEGACY: FROM RECONSTRUCTION TO THE NAACP 16–19 (2d ed. 1995) (discussing Charles Sumner's heroic effort to secure passage of the Act). Even on his death bed, Sumner did not forget that abolition, *via* the Thirteenth Amendment, meant more than merely setting free millions of people who were denied an education by Southern slave codes and were still excluded from numerous public places. As he lay on his death bed, Sumner was not remiss to remind a visitor: "You must take care of the civil-rights bill, . . . don't let it fail." ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 226 (1990). Sumner died in March 1874 and did not live to see the enactment of the Civil Rights Act of 1875. *Id.* Benjamin Butler, who managed the Bill in the House, committed himself to defending "the rights of these men who have given their blood for me and my country." *Id.*

[133] One author recently found that in Alabama, Mississippi, and Georgia, as many as one-third of all sharecropping farmers "were being held against their will in 1900." *See* JACQUELINE JONES, THE DISPOSSESSED 107 (1992). Other authors have focused specifically on the convict lease system. *See generally* ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH (1996); DAVID M. OSHINSKY, WORSE THAN SLAVERY (1996); KARIN A. SHAPIRO, A NEW SOUTH REBELLION: THE BATTLE AGAINST CONVICT LABOR IN THE TENNESSEE COAL FIELDS, 1871–1896 (1998).

The *Civil Rights Cases* involved five joint cases from various parts of the country.[134] The first four cases were reviews of criminal prosecutions.[135] Two of the defendants were charged for denying blacks access to an inn or hotel, a third for prohibiting a black individual from access to the dress circle of a theater in San Francisco, and a fourth for refusing access to a New York opera house.[136] The fifth case was a civil action from Tennessee against a railroad company whose conductor prevented a black woman from riding in the ladies' car.[137] Attorneys for four of the five defendants did not even bother appearing to argue the cases before the Court.[138] The favorable ruling the defendants received was a clear signal for the national consensus to draw away from abolitionist principles.

The limits on Congress's Fourteenth Amendment powers announced in the *Civil Rights Cases* continue to be binding, and the Rehnquist Court recently further extended Chief Justice Bradley's ruling.[139] The *Civil Rights Cases* held that the Fourteenth Amendment protects citizens against state interference with individual rights, but not against individual invasion of individual rights.[140] Thus, Bradley decided that the Fourteenth Amendment did not give Congress authority to prevent social discrimination, such as exclusion from public places of amusement and segregation on public carriers. The Court, therefore, found that the first two sections of the Civil Rights Act of 1875 were unconstitutional under the Fourteenth Amendment.[141]

Justice John Marshall Harlan, the lone dissenter in the *Civil Rights Cases*, argued that congressional enforcement power, under Section 5 of the Fourteenth Amendment, was more realistic and analogous to Radical Republican ideals of Reconstruction. The fifth section of the Amendment, Justice Harlan wrote, enabled Congress to enact

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[134] 109 U.S. at 4–5.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] LOREN MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO 137–38 (1966).

[139] *See infra* text accompanying notes 313–316.

[140] 109 U.S. at 11, 19 ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. . . . This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces State legislation on the same subject, or only allows it permissive force.").

[141] *Id.* at 24–25.

"appropriate legislation . . . and such legislation may be of a direct and primary character, operating upon states, their officers and agents, and also upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the state."[142]

I critique the Fourteenth Amendment's state interference requirement in relationship to the Thirteenth Amendment in Part V.[143] Suffice it to say here that, in the unreconstructed South, the idea that states would regulate private discriminations was farfetched. Chief Justice Bradley made an artificial dichotomy, although one that was common in post-Reconstruction United States, between civil rights and social rights. In the *Civil Rights Cases*, he held that the Fourteenth Amendment covered civil rights, which included making contracts and leasing land, but not social rights, which pertained to using public accommodations.[144] Thus, as Angela P. Harris pointed out in a recent article, the Court limited Congress's ability to protect citizens pursuant to its federalist vision.[145] The Court continues to follow the *Civil Rights Cases* ruling on the state action requirement of the Fourteenth Amendment.[146] The ruling has so crippled the legislative branch's enforcement power under the Fourteenth Amendment that Congress was forced to rely on the Commerce Clause to pass major civil rights legislation, like the 1964 Civil Rights Act, in the twentieth century.[147]

The Court in the *Civil Rights Cases* also considered whether the Civil Rights Act of 1875 was constitutional under the Thirteenth Amendment. Indeed, the *Civil Rights Cases* provided the Supreme Court with its first opportunity to directly interpret the Thirteenth Amendment's substance. The Court recognized that the Amendment went further than simply releasing slaves from their masters' control.[148] In fact, Chief Justice Bradley reiterated his conviction that the

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[142] *Id.* at 36 (Harlan, J., dissenting).

[143] *See infra* notes 310–321 and accompanying text.

[144] *See* James W. Fox, Jr., *Re-Readings and Misreadings:* Slaughter-House, *Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67, 160–61 (2002–2003) (explaining the distinction made during the mid-nineteenth century between social, civil, and political rights).

[145] Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1961 (2000).

[146] *See* Aviam Soifer, *Disabling the ADA: Essences, Better Angels, and Unprincipled Neutrality Claims*, 44 WM. & MARY L. REV. 1285, 1333–34 (2003) (stating that the current Court continues to follow the *Civil Rights Cases* holding on the restraints of Congress's Fourteenth Amendment enforcement power).

[147] *See generally* Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[148] *See Civil Rights Cases*, 109 U.S. at 20.

Thirteenth Amendment granted Congress the power to pass all laws "necessary and proper for the obliteration and prevention of slavery, with all its badges and incidents."[149] He even conceded that the Thirteenth Amendment prohibited state and private violations.[150]

Nevertheless, the Court held that denying admission to public accommodations was not a vestige of slavery.[151] The Court reasoned that "the social rights of men and races in the community" differ from "fundamental rights which appertain to the essence of citizenship."[152] Just as with the Fourteenth Amendment, the Court determined that the Thirteenth Amendment only applies to civil and political rights. The *Civil Rights Cases* limited the term "necessary incidents" of slavery to a set of legal institutions, such as prohibitions against blacks testifying in court and owning property.[153] Thus, the Court determined that Congress overreached when it sought to extend legislative authority against social discriminations.[154]

Chief Justice Bradley's conclusion was in no way obvious. He stuck to an artificial dichotomy rather than recognizing that social discriminations perpetrated in public detrimentally affect both the victim and his or her group. In these cases, social discriminations limited the plaintiffs' ability to travel by rail, attend an opera, reserve a room at an inn, or see a play with friends. Such infringements on the plaintiffs' basic rights branded them unworthy of the same privilege to make personal choices enjoyed by whites and perpetuated the supremacist mentality of Southern slavocracy. The Court's holding showed callousness to the way public accommodation discrimination hindered blacks from enjoying their freedom. Chief Justice Bradley's dismissive opinion in

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[149] *Id.* at 20–21.

[150] *See id.* at 20.

[151] *Id.* at 25.

[152] *See id.* at 22. Bradley went on to say that the Thirteenth Amendment "simply abolished slavery" whereas the Fourteenth Amendment "prohibited the states from abridging the privileges or immunities of citizens of the United States." *See id.* at 23. His conclusions deviate from his dissent to *Blyew*, in which he recognized Congress's power to pass the Civil Rights Act of 1866. Provisions of the Civil Rights Act of 1866 indicate that congressmen regarded the Thirteenth Amendment as a conduit for equal rights legislation. *See supra* notes 124–128 and accompanying text; *see also* George A. Schell, Note, *Open Housing:* Jones v. Alfred H. Mayer Co. *&* *Title VIII of the Civil Rights Act of 1968*, 18 AM. U. L. REV. 553, 556 (1969) (discussing the Court's differentiation between social and civil rights).

[153] *See* 109 U.S. at 22.

[154] *See id.* at 24–25. Bradley put this point in the form of a *reductio ad absurdum*: "It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business." *Id.*

the *Civil Rights Cases* furthered the social tensions and misery that the Radical Republicans hoped to eliminate with the Thirteenth Amendment. Homegrown militias, such as the KKK, and private business owners who refused to provide blacks with goods and services were now protected by state indifference or outright support for discriminatory practices.[155]

Justice Harlan, in his dissent in the *Civil Rights Cases*, understood that the majority's decision precluded the national government from ending state-sponsored or -countenanced abridgements of freedoms.[156] He found the majority's opinion to be "narrow and artificial" and inimical to the "substance and spirit" of the Thirteenth Amendment.[157] Harlan understood that because the dogma of black inferiority was integral to maintaining slavery, the Thirteenth Amendment's guarantee of "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."[158] For Justice Harlan, this principle carried a practical implication:

> Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, *on account of their race*, of any civil rights enjoyed by other freemen in the same state; and such legislation may be of a direct and primary character, operating upon states, their officers and agents, and also upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the state.[159]

Although Justice Harlan agreed with Chief Justice Bradley that Congress lacked the power to regulate social interaction, he proclaimed that the Civil Rights Act of 1875 in fact did protect civil

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[155] *See id.* Bradley explicitly argued that equal access to public amenities is unconnected to the enjoyment of fundamental rights: "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 he was 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." *Id.* at 25.

[156] *See id.* at 54 (Harlan, J., dissenting).

[157] *Id.* at 26 (Harlan, J., dissenting).

[158] *Civil Rights Cases*, 109 U.S. at 36 (Harlan, J., dissenting).

[159] *Id.* (Harlan, J., dissenting).

rights.[160] He argued that state laws and private practices denying blacks the use of public accommodations excluded them from participation in an essential aspect of civic life.[161]

After the *Civil Rights Cases*, the Thirteenth Amendment was relegated to virtual disuse. The Court continued to chip away at federalism and Congress's ability to prevent private or state discrimination. The Court maintained the distinction between social and civil rights in *Plessy v. Ferguson*, where the Court did not regard the facilitation of social equality to be part of judicial function.[162] In concluding that separate accommodations on railcars did not violate the Thirteenth Amendment, the Court quoted the *Civil Rights Cases* for the proposition that the end of slavery did not require anyone to deal with other races in matters of intercourse or business.[163] Justice Henry Brown, writing for the *Plessy* majority, took a literalist approach to slavery, attacking the assumption that the enforced separation of the two races stamped African Americans with a badge of inferiority.[164]

Just as he had in the *Civil Rights Cases*, Justice Harlan wrote the dissenting opinion in *Plessy*. He regarded the right of persons to share railroad cars as inherent in the concept of freedom.[165] Harlan was prescient in foreseeing that the separate but equal doctrine would not be limited to rail travel, but would continue to infect many other aspects of civil society.[166]

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[160] *Id.* at 59 (Harlan, J., dissenting).

[161] *See id.* at 55–56 (Harlan, J., dissenting).

[162] *See* 163 U.S. 537, 551–52 (1896) (stating that "[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane").

[163] *Id.* at 543 ("'It would be running the slavery argument into the ground,' said Mr. Justice Bradley, 'to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will . . . deal with in other matters of intercourse or business.'" (quoting *Civil Rights Cases*, 109 U.S. at 24–25)).

[164] *Id.* at 551. Only in 1954 did the Supreme Court find the "separate but equal" doctrine unconstitutional. Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).

[165] *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting). On the importance of Harlan's dissent in *Plessy* to principled legal discourse, see BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 146 (1991) and T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1076 (1991).

[166] Justice Harlan reflected on the extensive implications of the majority's holding: "If a state can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street, and black citizens to keep on the other?" *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting).

The escape from the morass into which the Court had helped drag this country came in 1968, in *Jones v. Alfred H. Mayer Co.*[167] That case overruled the *Civil Rights Cases* limited construction of the Thirteenth Amendment's second section.[168] The *Jones* Court ruled that Congress passed the Civil Rights Act of 1866 as a "necessary and proper" means of prohibiting private and public discrimination in real estate transactions.[169] However, Justice Potter Stewart, writing for the Court, expressly avoided reaching the issue of whether the Thirteenth Amendment granted Congress authority to prevent discrimination in places of public accommodation, concluding that the Civil Rights Act of 1964 had made that issue moot.[170] Nevertheless, *Jones* gave Congress wide latitude to pass legislation against civil rights violations. The majority wrote that "[s]urely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."[171]

A logical extension of *Jones* is that Congress has the power to legislate against state or private infringements that arbitrarily interfere with individuals' right to live freely. Although Congress's determination of arbitrariness is subject to a rationality requirement, the standard is a low one that the federal legislature can meet by examining

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[167] 392 U.S. 409, 438–44 (1968) (upholding Congress's power to prevent private housing discrimination under 42 U.S.C. § 1982).

[168] *Id.*

[169] *Id.* (quoting *Civil Rights Cases*, 109 U.S. 3, 20). The Enabling Clause "clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*'" *Id.* The Court read § 1 of the Civil Rights Act of 1866 (42 U.S.C. § 1982 (2002)) to prohibit private actors from discriminating against real property purchasers: "[T]he fact that § 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem. If Congress has power under the Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals." *Id.* at 438–39. For a survey of civil rights cases arising under nineteenth century statutes, the Civil Rights Act of 1964, and the Civil Rights Act of 1968 see Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 466–505 (1974).

[170] *Jones*, 392 U.S. at 440–41, 441 n.78 ("[t]he Court did conclude in the *Civil Rights Cases* that 'the act of . . . the owner of the inn, the public conveyance or place of amusement, refusing . . . accommodation' cannot be 'justly regarded as imposing any badge of slavery or servitude upon the applicant' . . . . [w]hatever the present validity of the position taken by the majority on that issue—a question rendered largely academic by Title II of the Civil Rights Act of 1964" (quoting *Civil Rights Cases*, 109 U.S. at 24)).

[171] *Id.* at 440.

the historical landmarks of slavery, evaluating what existing practices perpetuate the incidents of involuntary servitude, and promulgating laws to end them. Congress, then, has the power to end any existing coercive and arbitrary injustices analogous to involuntary servitude.

Jones also recognized that the United States is responsible for protecting its citizens against arbitrary infringement of fundamental rights.[172] National civil rights laws, therefore, can confront civil rights violations directly and need not operate behind a veil of congressional power over interstate commerce.[173] Moreover, *Jones* required courts to analyze human rights violations in a way significantly different from the state action analysis under the Fourteenth Amendment. Finally, the decision raised intriguing questions about whether, even without congressional action, persons can bring suit both against states and individuals for violating the first section of the Thirteenth Amendment.[174] This is because, whereas the second section authorizes Congress to pass federal laws rationally tailored to end the badges and incidents of servitude, the first section is a self-executing, judicially enforceable prohibition against any remaining incidents of involuntary servitude, and that institution's injustices far exceeded forced labor.

In the Supreme Court cases that followed *Jones*, the Court continued holding that Congress could prohibit private racial discrimination pursuant to its Section 2 Thirteenth Amendment power. In *Runyon v. McCrary* the Court addressed the narrow issue of whether § 1981 prohibited private schools from refusing to enroll students based on their race.[175] Its holding had broad social ramifications on the integration of private schools. The relevant part of the statute provided that, "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens."[176] Justice Stewart based

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[172] *Id.* at 440–41.

[173] *See infra* text accompanying notes 274–281.

[174] *See Jones*, 392 U.S. at 439 ("'By its own unaided force and effect,' the Thirteenth Amendment 'abolished slavery, and established universal freedom.'" (quoting *Civil Rights Cases*, 109 U.S. at 20)). In a later case, the Court noted the outstanding issue of "whether § 1 of the Amendment by its own terms did anything more than abolish slavery." City of Memphis v. Greene, 451 U.S. 100, 125–26 (1981). This means that "the Court neither agreed nor disagreed with the first Justice Harlan's statement in dissent in *Hodges* that 'by its own force, that Amendment destroyed slavery and all its incidents and badges, and established freedom.'" *Id.* at 126 n.40 (Harlan, J., dissenting) (quoting Hodges v. United States, 203 U.S. 1, 27 (1906), *overruled by Jones*, 392 U.S. 409).

[175] 427 U.S. 160, 163 (1976).

[176] *Id.* at 160 (quoting 42 U.S.C. § 1981(a)).

his decision on § 1981's prohibition against contract discrimination.[177] The school violated the law because it refused to enter into a contract with the parents of potential students who happened to be black.[178] The Court found that the free association and privacy rights of parents wanting to keep the school segregated did not trump the rights of parents wanting to enroll their children.[179] Parental desire to send their children to a private, segregated school also did not override the government's reasonable prohibition against the school's discriminatory contracting practices.[180]

The Court could have sent an even stronger message about the nation's commitment to freedom had it used a more historical, rather than contractual, analysis. The Court's holding could have been based on the right to parental autonomy, which had been denied both through Slave Codes and by individual slave masters.[181] Schools that refuse to admit students because of their race violate the parents'

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[177] *Id.* at 168–73.

[178] *Id.* at 172–73 ("It is apparent that the racial exclusion practiced by the Fairfax-Brewster School and Bobbe's Private School amounts to a classic violation of § 1981. The parents . . . sought to enter into contractual relationships . . . for educational services. . . . Under those contractual relationships, the schools would have received payments for services rendered, and the prospective students would have received instruction in return for those payments. . . . But neither school offered services on equal basis to white and nonwhite students."). Justice Byron White, writing for the dissent, argued that § 1981 could not be used to force people to enter into contracts, no matter what their motives were for refusing to do so. *Id.* at 194–95 (White, J., dissenting).

[179] *Id.* at 175–77.

[180] *Runyon*, 427 U.S. at 175–77.

[181] Mary Beth Norton et al., *The Afro-American Family in the Age of Revolution*, *in* SLAVERY AND FREEDOM IN THE AGE OF THE AMERICAN REVOLUTION 186–87 (Ira Berlin & Ronald Hoffman eds., 1983) (explaining that slavery compromised family integrity because masters could sell their slaves for economic, subduing, or whimsical reasons); *see* HERBERT G. GUTMAN, BLACK FAMILY IN SLAVERY & FREEDOM, 1750–1925, at 207–11 (1976) (concluding that despite the risk of being forcefully separated by sale, slaves were able to develop cohesive family structures); Peter Kolchin, *Reevaluating the Antebellum Slave Community: A Comparative Perspective*, 71 J. AM. HIST. 579, 584 (1983) (discussing the difficulties faced by slaves who married the slaves of other owners). For more regional information about the slave family that developed since the 1980s, see generally LARRY E. HUDSON, JR., TO HAVE AND TO HOLD: SLAVE WORK & FAMILY LIFE IN ANTEBELLUM SOUTH CAROLINA (1997); ANN PATTON MALONE, SWEET CHARIOT: SLAVE FAMILY AND HOUSEHOLD STRUCTURE IN NINETEENTH-CENTURY LOUISIANA (1992). After 1865, in an effort to retain slavery through legal ruse, several states instituted child apprenticeship laws. These statutes required children to serve for a term of indenture away from parents, so long as a white judge determined that such service was in the children's best interests. PETER KOLCHIN, AMERICAN SLAVERY, 1619–1877, at 220–21 (1993). These child apprenticeships, as Leon Litwack pointed out, amounted to legalized kidnapping and de facto slavery. LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 191, 237–38 (1979).

Thirteenth Amendment right to make rational decisions about where to educate their children, not merely the parents' contractual right.

The Court's 1973 decision in *Tillman v. Wheaton-Haven Recreation Ass'n* provided even stronger ammunition in the civil rights arsenal.[182] The litigation involved a private swimming club that discriminated against blacks in its membership and guest policies.[183] Three African Americans, to whom the Association denied access, sought damages and an injunction against the practice pursuant to the racist leasing and rental practice prohibitions under §§ 1981 and 1982.[184] Justice Harry Blackmun, for the majority, reasoned that because the Association's membership was tied to a narrow geographic location, persons who lived and purchased property valuated their real estate partly on the expectation that they could join the recreation center.[185] The decision was thus again rooted in contract law rather than in a fundamental right to enjoy public accommodations. The Court limited itself to examining the discrimination on the basis of the existing statutes instead of the Thirteenth Amendment's underlying principles.

In a 1975 case, *Johnson v. Railway Express Agency, Inc.*, the Court further extended the applicability of § 1981, finding that it allowed recovery for the discriminatory conduct of a private employer.[186] The case provides a rich distinction between employment discrimination claims under § 1981 and Title VII, the latter being the traditional avenue for relief in employment discrimination cases.[187] The Court's holding makes clear why plaintiffs often fair better in employment discrimination claims filed under § 1981 instead of Title VII. For instance, Title VII's relatively short statute of limitations is not applicable to § 1981 claims.[188] Instead, § 1981 claims, à la *Johnson*, apply the pertinent personal injury statute of limitations from the plaintiff's state.

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[182] *See* 410 U.S. 431, 435–40 (1973).

[183] *Id.* at 432–33.

[184] *Id.* at 433–34. The Court found no need to examine whether §§ 1981 and 1982 applied to private discrimination, determining that it was sufficient that the "operative language" of both was "traceable" to section 1 of the 1866 Civil Rights Act. *Id.* at 439–40.

[185] *Id.* at 437.

[186] 421 U.S. 454, 459–61 (1975).

[187] *See id.* at 457–67.

[188] Title VII ordinarily requires an aggrieved party to file a charge with the U.S. Equal Employment Opportunity Commission ("EEOC") within 180 days of the alleged unlawful employment practice, or 300 days after the unlawful practice if the aggrieved party files a discrimination complaint in a state or local agency. 42 U.S.C. § 2000e-5(e) (2003). Filing a Title VII action with the EEOC does not toll the statute of limitations on § 1981 claims. *Johnson*, 421 U.S. at 465–66.

In *Johnson*, the Court applied Tennessee's one-year limitation period,[189] which was significantly longer than Title VII's 180-day requirement to file the employment claim with the EEOC or 300 days to file with a state office. Other courts commonly apply two- or three-year state personal injury statutes of limitations to § 1981 cases.[190] Further advantages to the Thirteenth Amendment-based employment discrimination claims are that § 1981 does not exempt employers who are improper parties under Title VII and § 1981 does not require the exhaustion of administrative remedies.[191] *Johnson* offers a meaningful alternative to persons seeking creative litigation strategies to obtain equitable and pecuniary relief for employment discrimination.[192]

In a 1989 case, *Patterson v. McLean Credit Union*, the Supreme Court ruled that § 1981 applies to racial discrimination perpetrated during the contract formation process, but not to post-formation discrimination.[193] Congress superceded the Court's ruling by passing the Civil Rights Act of 1991, codified as 42 U.S.C. § 1981(b).[194] The section provides that "the term 'make and enforce contracts' includes the making,

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[189] 421 U.S. at 462.

[190] *See, e.g.*, Rogers v. Barkin, No. 00-16025, 2001 WL 1218413, at *1 (9th Cir. May 31, 2001) (deciding that Nevada's two-year personal injury statute of limitations applied to § 1981 claims); Alexander v. Fulton County, 207 F.3d 1303, 1346 (11th Cir. 2000) (applying a two-year personal injury statute of limitations to both § 1981 and § 1983 claims); Thomas v. Denny's, Inc., 111 F.3d 1506, 1514 (7th Cir. 1997) (recognizing that damages awarded for a § 1981 claim were limited by the state's two-year personal injury statute). Some courts have also applied three-year personal injury statutes of limitations. *See, e.g.*, King v. Am. Airlines, Inc., 284 F.3d 352, 356 (2d Cir. 2002); Carney v. Am. Univ., 151 F.3d 1090, 1096 (D.C. Cir. 1998). The Eleventh Circuit even found that a four-year statute of limitations applied to a § 1981 claim. Baker v. Gulf & Western Indus., Inc., 850 F.2d 1480, 1481 (11th Cir. 1988).

[191] *Johnson*, 421 U.S. at 460–61 (asserting that "[s]ection 1981 is not coextensive in its coverage with Title VII. The latter is made inapplicable to certain employers. 42 U.S.C. § 2000e(b)"). The Supreme Court stated this matter more positively in a footnote to a 1994 case. *See* Rivers v. Roadway Express, Inc., 511 U.S. 298, 304 n.3 (1994) ("Even in the employment context, § 1981's coverage is broader than Title VII's, for Title VII applies only to employers with 15 or more employees, see 42 U.S.C. § 2000e(b), whereas § 1981 has no such limitation."). Likewise, in a concurring and dissenting opinion to *Patterson v. McLean Credit Union*, Justice William Brennan wrote that "§ 1981 is not limited in scope to employment discrimination by businesses with 15 or more employees, cf. 42 U.S.C. § 2000e(b), and hence may reach the nearly 15% of the workforce not covered by Title VII." 491 U.S. 164, 211 (1989) (Brennan, J., concurring in part and dissenting in part). But then, Title VII also has advantages: it provides certain remedies, such as the recovery of attorneys' fees, which § 1981 does not. *Johnson*, 421 U.S. at 460.

[192] Plaintiffs may sue to recover damages under both Title VII and § 1981. *Johnson*, 421 U.S. at 459.

[193] 491 U.S. at 171.

[194] Section 101 of the Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981(b) (2003)).

performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[195] Furthermore, the amended version of § 1981 explicitly covers private and state violators.[196]

The cases decided since the 1968 landmark decision in *Jones* show just how broadly the Thirteenth Amendment reaches, even when litigants rely on civil rights statutes like §§ 1981 and 1982.[197] Congress can go much farther and pass new statutes pursuant to its Section 2 authority, particularly in light of the sensibility against discrimination that has burgeoned in the United States since the 1960s. Certainly discrimination in real estate transactions and private schools is not literally slavery or involuntary servitude. The Court, however, interpreted the Thirteenth Amendment as granting Congress discretionary power to determine what forms of discrimination are rationally related to the incidents and badges of servitude. The Court's analyses in *Jones*, *Runyon*, and *Johnson* indicate that Congress can pass effective laws rationally designed to end any remaining incidents and badges of servitude. I return to the subject of how to differentiate which liberties the Thirteenth Amendment covers below, where I show how the Amendment fits into traditional civil rights law.[198]

B. *Section One Authority*

The Supreme Court has never determined whether a private party can bring a cause of action under the first section of the Thirteenth Amendment. The Court's current stance on this issue is somewhat ambiguous. Generally, lower court decisions proscribe independent judicial use of Section 1 to determine which discriminations are rationally related to the incidents and badges of servitude.[199]

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[195] 42 U.S.C. § 1981(b) (2003).

[196] *Id.* ("The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.").

[197] Both statutes are modeled after the Civil Rights Act of 1866.

[198] *See infra* Part V.B.

[199] Other courts have required plaintiffs to confine themselves to statutes passed pursuant to Congress's Section 2 power. *See, e.g.*, Crenshaw v. City of Defuniak Springs, 891 F. Supp. 1548, 1556–57 (N.D. Fla. 1995) (noting, however, that "neither the Supreme Court of the United States or the Courts of Appeal have decided the extent to which a direct cause of action exists under the Thirteenth Amendment"). On this point, the Fifth Circuit noted in 1997 that, "[w]hile it is true that suits attacking the 'badges and incidents of slavery' must be based on a statute enacted under § 2, suits attacking compulsory labor arise directly under prohibition of § 1, which is 'undoubtedly self-executing without any ancillary legislation.'" Channer v. Hall, 112 F.3d 214, 217 n.5 (5th Cir. 1997) (quoting *Civil Rights Cases*, 109 U.S. at 20). Likewise, the Fourth Circuit stated that "[w]hile Congress may

There is, however, a faint glimmer of hope in Supreme Court dicta that suggests a more progressive position.

Palmer v. Thompson, decided in 1971, addressed the Section 1 issue but left it unresolved.[200] In 1962, Jackson, Mississippi closed four segregated swimming pools and surrendered the lease of a fifth segregated pool.[201] Whites had exclusively used four pools and only blacks used the fifth.[202] The city council claimed that its decision was based on findings that continuing to operate the pools would be too costly and that closing them was necessary for preserving public order.[203] The petitioners sought an injunction to reopen the pools on a desegregated basis. They claimed that Jackson closed the facilities "because of ideological opposition to racial integration in swimming pools" and that the city thereby violated the Thirteenth and Fourteenth Amendments.[204] Justice Hugo Black, writing for the majority, refused to second-guess the legislators' motives.[205] The Court determined that the

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arguably have some discretion in determining what kind of protective legislation to enact pursuant to the thirteenth amendment, it appears that the amendment's independent scope is limited to the eradication of the incidents or badges of slavery and does not reach other acts of discrimination." Washington v. Finlay, 664 F.2d 913, 927 (4th Cir. 1981).

The general trend among lower courts has been to reject an independent cause of action under the Thirteenth Amendment. This is particularly true with employment discrimination claims. *See, e.g.*, Rash v. Minority Intermodal Specialists, Inc., 2001 WL 1654710, at *5 (N.D. Ill. Dec. 20, 2001) (stating that "[p]laintiff cannot bring a private right of action directly under the Thirteenth Amendment for employment discrimination"); Horton v. Norfolk S. Corp., 102 F. Supp. 2d 330, 335 (M.D.N.C. 1999) (stating the Thirteenth Amendment does not provide "an independent action for employment discrimination"); Mitchell v. Carrier Corp., 954 F. Supp. 1568, 1575 (M.D. Ga. 1995) (finding that the Thirteenth Amendment does not provide an independent cause of action in employment cases); Baker v. McDonald's Corp., 686 F. Supp. 1474, 1480 n.12 (S.D. Fla. 1987) (stating that, although unequal treatment of black persons may violate the Thirteenth Amendment, "plaintiff may not maintain a cause of action directly under the Thirteenth Amendment for employment discrimination. Rather, the plaintiff must base his claims on one of the implementing statutes, e.g., 42 U.S.C. § 1985(3) or § 1981").

These outcomes are not the Thirteenth Amendment's necessary effect. Section 1 of the Amendment could allow courts to be just as expansive in determining that a particular discrimination is rationally related to the incidents and badges of servitude as Congress's broad power to do so under Section 2. For a discussion of why lower court decisions limiting the use of Section 1 diverge from Supreme Court precedents, see Larry J. Pittman, *Physician Assisted Suicide in the Dark Ward: The Intersection of the Thirteenth Amendment and Health Care Treatments Having Disproportionate Impacts on Disfavored Groups*, 28 SETON HALL L. REV. 774, 851–71 (1998).

[200] *See generally* 403 U.S. 217 (1971).

[201] *Id.* at 218–19.

[202] *Id.*

[203] *Id.* at 225.

[204] *Id.* at 224–25.

[205] *Palmer*, 403 U.S. at 224–25.

stated legislative purposes were beyond the scope of judicial review and affirmed the district court's denial of injunctive relief.[206]

The petitioners had argued that "the city's closing of the pools to keep the two races from swimming together violates the Thirteenth Amendment."[207] Justice Black determined that, absent a federal law requiring the Court to open swimming pools, the Court could not "legislate new laws to control the operation of swimming pools throughout the length and breadth of this Nation."[208] The Court implicitly recognized Congress's second section authority to pass a law prohibiting governmental entities from purposefully refusing to desegregate.[209] The Court, however, refused to use any "authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country" because that "would grant it a law-making power far beyond the imagination of the amendment's authors."[210] Instead, the Court declared that, "[t]he last sentence of the Amendment reads: 'Congress shall have power to enforce this article by appropriate legislation.' But Congress has passed no law under this power to regulate a city's opening or closing of swimming pools or other recreational facilities."[211]

Even though the Court decided not to require that the city reopen the pools, the dictum in *Palmer* was the closest the Court has come to recognizing that it might sua sponte use Section 1 authority to find a discriminatory law unconstitutional. The Court stated that "[s]hould citizens of Jackson or any other city be able to establish in court that public, tax-supported swimming pools are being denied to one group

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[206] *Id.* at 225–27. After accepting the lower court's finding that the city council closed the pools for legitimate safety and economic reasons, the Court explained why it refused to second-guess the proffered motives:

> [T]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.

Id. at 225. The Court has repeatedly refused to strike down constitutional legislative actions for alleged illicit motives. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 292 (2000) (stating that the Court would uphold a statute based on an allegedly "illicit motive" if otherwise constitutional); United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.").

[207] *Palmer*, 403 U.S. at 226–27.

[208] *Id.* at 227.

[209] *See id.*

[210] *Id.* at 226–27.

[211] *Id.* at 227.

because of color and supplied to another, they will be entitled to relief."[212] This statement leaves open the possibility that litigants can obtain an injunction, absent statutory authority, if they petition to desegregate an open public facility rather than praying to reopen closed ones. The dictum is particularly intriguing because it comes at the very end of the opinion, almost inviting a citizen lawsuit to rely on Section 1 to petition for an injunction. The likelihood that the Court would issue such an injunction, however, is small given the absence of any decisive precedent on the matter.[213]

One of *Palmer*'s greatest weaknesses lies in the Court's failure to analyze the extent to which the category "badges and incidents of servitude" extends to social discrimination, such as swimming pool segregation. Nowhere in the decision did the Court analyze whether racism and its coercive practices developed through forced, public racial segregation. If the Court concluded that segregation in public places stamped blacks with a badge of inferiority that limited autonomy rights and helped maintain a divisive society, granting an injunction would not have amounted to making new law. Instead, the Court would have acknowledged that slavery extends beyond the plantation system and continues to plague the United States. Such a finding also would not have required the Court to micromanage "thousands of towns and cities."[214] Instead, it would have granted victims standing to file claims pursuant to Section 1. Litigation, then, would have focused on ripe issues.

The Court's decided avoidance of a timely issue was question-begging. The Court in *Palmer* could have relied on Justice Harlan's dissent in *Hodges*, where he asserted that Section 1 did much more than free slaves: "by its own force, that Amendment destroyed slavery and all its incidents and badges, and established freedom."[215]

Ten years after *Palmer*, the Court again considered whether the first section of the Thirteenth Amendment went any farther than simply abolishing slavery.[216] In *City of Memphis v. Greene*, black citizens ob-

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[212] *Palmer*, 403 U.S. at 227.

[213] Larry Pittman, however, has argued extensively that in *Palmer* the Supreme Court recognized that claims can be brought directly pursuant to the Thirteenth Amendment. *See* Pittman, *supra* note 199, at 860 (stating that *Palmer* and *Greene* indicate the Supreme Court removed "uncertainty regarding one's ability to bring a direct claim under the Thirteenth Amendment").

[214] *Palmer*, 403 U.S. at 227.

[215] *Hodges*, 203 U.S. at 27 (Harlan, J., dissenting) (dissenting from an opinion that found the Thirteenth Amendment only abolished slavery in the literal sense).

[216] *Greene*, 451 U.S. at 102, 124.

jected to the closing of a street running between a predominantly black area and a white residential community. The plaintiffs claimed that the closing constituted a badge of servitude because it affected black citizens' ability to enjoy their property.[217] The Court held that the City's motives were to protect children's safety and preserve residential quietude, not to discriminate.[218] The street closing constituted a "routine burden of citizenship" and was not, therefore, a badge of servitude.[219]

The Court in *Greene* did, however, emphasize the Thirteenth Amendment's self-executing first section.[220] The decision further indicated that, under the right circumstances, the Court might allow a claim directly under Section 1, even absent congressional action.[221] Memphis had based its argument on *Palmer*, claiming that absent direct congressional enabling legislation the Court could not hold for the plaintiffs.[222] The Court rejected Memphis's argument and stated that "[p]ursuant to the authority created by § 2 of the Thirteenth Amendment, Congress has enacted legislation to abolish both the conditions of involuntary servitude and the 'badges and incidents of slavery.'"[223] This "exercise of that authority" the Court went on "is not inconsistent with the view that the Amendment has self-executing force."[224]

Interestingly, the majority emphasized the possibility that courts have the power to find that Section 1 extends beyond the abolition of slavery:

> In *Jones*, the Court left open the question whether § 1 of the Amendment by its own terms did anything more than abolish slavery. It is also appropriate today to leave that question open because a review of the justification for the official action challenged in this case demonstrates that its disparate impact on black citizens could not, in any event, be fairly characterized as a badge or incident of slavery.[225]

Presumably, if the Court did decide that Section 1 extended beyond mere abolition, it could enable the judiciary to use a methodological analysis of discriminatory actions similar to the one *Jones* established

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[217] *Id.*
[218] *Id.* at 126–28.
[219] *Id.* at 129.
[220] *See id.* at 124–29.
[221] *Greene*, 451 U.S. at 124–29.
[222] *Id.* at 124.
[223] *Id.* at 124–25.
[224] *Id.*
[225] *Id.* at 125.

for the legislature.[226] This dictum in *Greene* indicates that, given a justiciable controversy, the judiciary could decide whether a cause of action amounts to a badge or incident of servitude.

The Supreme Court has not subsequently returned to clarify this important point. This leaves open the question of whether a private claim is available under Section 1 absent an ancillary statute and, if such a cause of action is available, whether it may be filed against public and private actors.

C. *Summing up*

Thirteenth Amendment jurisprudence has emerged from the narrow Court holding in the *Civil Rights Cases.* This case precluded petitioners from seeking to end discriminatory practices in public accommodations. Had the Court come to the opposite conclusion, a civil rights movement could have bourgeoned immediately after the Civil War, and the Thirteenth Amendment could have helped end many stigmatizing practices, such as racial segregation, which continued into the 1960s. By the 1896 *Plessy* decision, the Supreme Court virtually nullified the Amendment's effectiveness, having become complicit in legitimizing separate but equal practices. Finally, with the 1906 *Hodges* decision, the Supreme Court undermined Congress's ability to prevent the perpetuation of any badges and incidents of servitude, except those directly associated with peonage and chattel slavery. Only in 1968, with the ruling in *Jones*, did the Court recognize its earlier mistake. *Jones* returned the Thirteenth Amendment to its bastion among other cornerstones of federal civil rights.

Even today, the Thirteenth Amendment remains a sparsely used and little-defined part of the Constitution. The Amendment has recently become ever more relevant because the Supreme Court has narrowly construed legislative power under the Commerce Clause and Section 5 of the Fourteenth Amendment.[227] Supreme Court deci-

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[226] *See* 392 U.S. at 440 ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.").

[227] William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2322–23 (2002) (arguing that recent cases are ahistorical in their approaches and that "[i]t is now unclear how much authority Congress has to implement the politics of remediation for women, lesbigay people, the disabled"); Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541, 1577 (2002) (commenting that "the Court intended, by placing such stringent requirements on the effects test in [*United States v.*] *Lopez* and *Morrison*, to police the limits of Congress's Commerce Clause authority, regardless of whether Congress itself finds that the

sions, such as *Kimel v. Florida Board of Regents*, *United States v. Morrison*, and *City of Boerne v. Flores*, have restricted Congress's ability to enact antidiscrimination laws.[228] At the same time, the Supreme Court has not similarly limited *Jones* and the subsequent cases addressing Congress's Thirteenth Amendment power. Federalism developments in the areas of Commerce Clause and Fourteenth Amendment common law demand a creative approach, which can be found in a new commitment to Thirteenth Amendment civil rights activism.

IV. The Commerce Clause and Thirteenth Amendment

The next issue to analyze is whether the Thirteenth Amendment alternative can bolster civil rights cases that have traditionally relied on the Commerce Clause for their authority. This analysis requires a preliminary explanation of the case law regarding the regulation of interstate commerce and then a critical comparison to Thirteenth Amendment authority and its potentials. The Thirteenth Amendment is not susceptible to the economic interpretation that the Court has recently given the Commerce Clause.

Commerce Clause jurisprudence developed during the New Deal and established the federal government's authority to regulate activities integral to the national economy.[229] The U.S. Supreme Court even extended the national government's power over interstate commerce to the regulation of private farms growing crops for the farmer's consumption.[230] The New Deal Court learned from *Lochner v. New York* what

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activity affects commerce or places the 'affecting commerce' language in a statute and leaves that finding to a jury"); Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 Harv. L. Rev. 4, 14–15 (2001) (asserting that the Court's recent cases indicate a willingness to cast aside long-established precedent, "especially those limiting Congress's power under Section 5 of the Fourteenth Amendment"). *But see* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 103–04, 146 (2001) (writing in favor of an economic, restricted application of the Commerce Clause); Diane McGimsey, *The Commerce Clause and Federalism After* Lopez *and* Morrison: *The Case for Closing the Jurisdictional-Element Loophole*, 90 Cal. L. Rev. 1675, 1682–85, 1730–37 (2002) (explaining that *Lopez* and *Morrison* constrict Congress's power to regulate activities that substantially affect interstate commerce and proposing a further limitation of Commerce Clause powers, using a nexus test).

[228] *See infra* notes 297-307 and accompanying text.

[229] James G. Pope recently wrote a fascinating article on the labor movement's decision to base labor rights activism on the Commerce Clause instead of the Thirteenth Amendment. *See generally* James G. Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 Colum. L. Rev. 1 (2002). Pope's emphasis on labor's constitutional freedoms is beyond the scope of this Article. *See id.* at 15.

[230] Wickard v. Filburn, 317 U.S. 111, 118–29 (1942) (upholding the Agricultural Adjustment Act of 1938 because family farm consumption had a cumulative effect on the

seemed, for many years, to be a sustained lesson not to meddle in rational federal laws regulating interstate commerce.[231] The Court's deference on matters of commerce carried over into the civil rights arena.

By the 1960s, constitutional lawyers regularly resorted to the Commerce Clause in litigation. Part of their aim was to adopt strategies to circumvent the eighty-year-old state action restrictions in *United States v. Harris* and the *Civil Rights Cases*.[232] Civil rights leaders, too, recognized that private acts of discrimination violated the individual right of self-determination and wanted the federal government to provide a remedy against private actors.[233]

To that end, Congress passed numerous 1960s civil rights statutes relying, in large part, on its Commerce Clause authority. The success of presidents John F. Kennedy and Lyndon B. Johnson in spurring a civil rights agenda culminated in the Civil Rights Act of 1964.[234] That statute continues today to provide remedies against a variety of discriminations, including those perpetrated in public accommodations, employment, and housing. The Supreme Court, under the leadership of Chief Justice Earl Warren, used the Commerce Clause instead of post-Reconstruction jurisprudence on Congress's Fourteenth Amendment powers to justify Congress's enactment of laws against private discrimination.[235]

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national wheat market). *United States v. Lopez* did not overrule Wickard, but called it "the most far reaching example of Commerce Clause authority over intrastate activity." 514 U.S. 549, 560 (1995).

[231] 198 U.S. 45 (1905); *see, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) ("Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.").

[232] The Civil Rights Cases, 109 U.S. 3, 11–12 (1883) (holding that Congress's Fourteenth Amendment Section 5 enforcement powers are limited to state action); United States v. Harris, 106 U.S. 629, 644 (1883) (invalidating the 1871 Ku Klux Klan Act, ch. 22, § 2, 17 Stat. 13, which punished private conspiracies).

[233] Even though many, including the Attorney General, Robert F. Kennedy, and constitutional scholars, like Gerald Gunther, counseled to use the Fourteenth Amendment, the Solicitor General, Archibald Cox, understood that without overruling the *Civil Rights Cases* such a suggestion was a nonstarter. Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1312 (2000). Because stare decisis indicated that the likelihood of overruling the 1883 decision was small, Cox convinced the President to follow the Commerce Clause strategy. *See id.* at 1310–13.

[234] Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.).

[235] *See* Jim Chen, *Come Back to the Nickle and Five: Tracing the Warren Court's Pursuit of Equal Justice Under the Law*, 59 WASH. & LEE L. REV. 1203, 1231–32 (2002); *see* 42 U.S.C. § 2000a(b) (2003) (prohibiting public place discrimination and segregation "affecting

In a 1964 watershed case, *Heart of Atlanta Motel Inc. v. United States*, the Supreme Court determined that Congress could use its power to regulate interstate commerce to prevent a private motel from discriminating on the basis of race, color, religion, or national origin. The Motel refused to rent rooms to African Americans while advertising nationally and serving clientele from interstate highways.[236] The Court held that the Motel's refusals caused blacks to be "subject of discrimination in transient accommodations," forcing them to travel greater distances to find another motel or stay with friends.[237] Oddly, it was the Motel that raised the Thirteenth Amendment claim, arguing that requiring it to provide accommodations to unwanted customers would subject the business to involuntary servitude.[238] The Court rejected the Motel's reasoning and held that the Thirteenth Amendment granted Congress authority to pass rationally designed antidiscrimination laws for bettering the general welfare. Nevertheless, the Court refused to reverse the *Civil Rights Cases* Fourteenth Amendment bar against federal laws prohibiting public accommodation discrimination.[239]

That same year, the Court decided, in *Katzenbach v. McClung*, that the Civil Rights Act of 1964 constitutionally prohibits a family-owned restaurant from discriminating against potential patrons.[240] In the district court, the plaintiffs relied on a Thirteenth Amendment argument. The trial court found the Amendment irrelevant to the issue because it neither permitted nor denied Congress power to pass laws against discrimination.[241] The trial court also found there was no "close and substantial relation" between the restaurant and interstate commerce.[242] The Supreme Court did not follow the "close and substantial relation" test. Instead, it determined that Congress had a "rational basis" for adopting the Act's regulatory scheme based on evidence that segregated restaurants hindered business, inhibited travel,

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interstate commerce or supported in their activities by State action as places of public accommodation"). The Court noted in *Heart of Atlanta Motel, Inc. v. United States* that "the history of the Act indicates that Congress based the Act on § 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, § 8, cl. 3, of the Constitution." 379 U.S. 241, 249 (1964).

[236] *Heart of Atlanta Motel*, 379 U.S. at 243.

[237] *Id.* at 252–53.

[238] *Id.* at 244.

[239] *Id.* at 278; *Civil Rights Cases*, 109 U.S. at 25.

[240] 379 U.S. 294, 304–05 (1964).

[241] *Id.* at 297.

[242] *Id.*

and therefore detrimentally affected interstate commerce.[243] The Court refused, however, to reach the Thirteenth Amendment issue.

For decades, *Heart of Atlanta Motel* and *McClung* stood for the deferential principle that Congress could pass any necessary laws rationally connected to interstate commerce. The Court did not second-guess congressional factfinding when it met this minimum threshold.[244] So long as the legislature did not pass a law based on arbitrary and concocted findings, the Court time and again found statutes constitutional. Prior to 1997, as Harold J. Krent pointed out, the Court also did not categorically require that all legislation with constitutional implications be supported by legislative findings.[245] Such a requirement "unquestionably would fundamentally alter the relationship between the judiciary and the legislature."[246]

Although use of Commerce Clause authority was a well-established civil rights strategy by the 1990s, recent Court decisions put the continued viability of this strategy into doubt. For example, the Rehnquist majority reduced Congress's effectiveness in enacting legislation pursuant to its Commerce Clause power in *United States v. Morrison*, where the Court struck down a national law prohibiting gender-motivated violence, and *United States v. Lopez*, where it found unconstitutional a federal statute against the possession of firearms near a school.[247] In the name of federalism, the Court's rulings both diminished Congress's power to act on rational findings that something affects interstate commerce and increased judicial oversight authority.[248] These decisions make the Thirteenth Amendment ever more relevant.

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[243] *Id.* at 303–05.

[244] United States v. Morrison, 529 U.S. 598, 666 (2000) (Breyer, J., dissenting) ("This Court has not previously held that Congress must document the existence of a problem in every State prior to proposing a national solution.").

[245] Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 732–33 (1996). For an earlier rendition of the same point, see Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 105 (1966) ("The Court does not review the sufficiency of the evidence in the record to support congressional action.... No case has ever held that a record is constitutionally required.").

[246] Krent, *supra* note 245, at 732–33.

[247] *Morrison*, 529 U.S. at 619; *Lopez*, 514 U.S. at 551–52, 561. Chief Justice William Rehnquist and Justices Antonin Scalia, Anthony Kennedy, Sandra Day O'Connor, and Clarence Thomas have joined in recent opinions reducing Congress's Commerce Clause power. In similar fashion, the Court encroached on Congress's Section 5 Fourteenth Amendment authority both in *Morrison* and *Kimel v. Florida Board of Regents*, 528 U.S. 62, 67 (2000).

[248] The Court's recent trend of striking laws because of an inadequate congressional record is highly questionable on precedential, constitutional, and practical grounds. A.

The Court first narrowly construed congressional Commerce Clause power in *Lopez*.[249] The case dealt with the Gun-Free School Zones Act of 1990, which provided criminal penalties for persons who knowingly possessed firearms in a school zone.[250] Chief Justice William Rehnquist, writing for the majority, found the Act unconstitutional.[251] The ruling in *Lopez* was the first time in sixty years the Court found a federal statute exceeded Congress's power to regulate interstate commerce.[252] Chief Justice Rehnquist's opinion weakened Congress's Commerce Clause power by forgoing the rational basis test inquiry and, instead, examining whether the law had a "substantial effect" on interstate commerce.[253] The Court then found no congressional showing that guns carried in a school zone had a substantial effect on interstate commerce.[254] Rehnquist's language also indicated that the Commerce Clause would henceforth only apply to cases involving "economic enterprise."[255]

Justice Stephen Breyer, writing in dissent, found no basis for deviating from the rational basis test. He argued that Congress can regulate any activity "significantly (or substantially)" affecting national commerce.[256] Justice Breyer pointed out that, contrary to the majority's holding, Commerce Clause cases have not consistently used the "substantial effects" label: "I use the word 'significant' because the word 'substantial' implies a somewhat narrower power than recent precedent suggests. But to speak of 'substantial effect' rather than 'significant effect' would make no difference in this case."[257]

Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 389 (2001).

[249] 514 U.S. at 558–68.

[250] 18 U.S.C. § 922(q)(2)(A) (2000) (forbidding individuals from possessing "a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone").

[251] *Lopez*, 514 U.S. at 561.

[252] In 1935, the Court had struck a law that regulated the wages and hours of an intrastate business. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550–51 (1935).

[253] *Lopez*, 514 U.S. at 561–63.

[254] *Id.* at 561–65.

[255] *Id.* at 558–61.

[256] *Id.* at 618 (Breyer, J., dissenting).

[257] *Id.* at 616 (Breyer, J., dissenting) (citations omitted). At the other end of the spectrum from Breyer was Justice Clarence Thomas, who regarded the substantial effects test to be an excessive grant of congressional power: "[W]e must . . . respect a constitutional line that does not grant Congress power over all that substantially affects interstate commerce." *Id.* at 593 (Thomas, J., concurring). He believed the substantial effects test would give Congress practically limitless power: "Under our jurisprudence, if Congress passed an omnibus 'substantially affects interstate commerce' statute, purporting to regulate every aspect of human existence, the Act apparently would be constitutional." *Id.* at 600 (Thomas, J., concurring).

If the Court had relied on Justice Breyer's reasoning, it likely would have determined Congress did not exceed its authority. Guns in schools significantly undermine national education and thus adversely affect interstate and foreign commerce. In addition, Congress could have legitimately found that, on a national level, guns have a substantial effect on children's education. The majority's reliance on the substantial effect test allowed it to second-guess the adequacy of the congressional record and conclude that possessing guns close to schools was not a commercial activity.[258] The Court, ultimately, refused to rely on the government's claim of expertise.

The decision in *Lopez* apparently also was based on an unreflective concern about congressional overreaching. One of "the implications of the Government's arguments" is that "under the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example."[259] These same concerns equally apply to other federal statutes directly impacting family life such as the Uniform Interstate Family Support Act and the Parental Kidnapping Prevention Act.[260] Similarly, traditional federal civil rights claims, such as those under 42 U.S.C. §§ 1983 and 1985(3), often function concurrently with state remedies for racial or gender discrimination.[261] In *Lopez*, the Court usurped congressional Commerce Clause powers by granting itself oversight in an area of decision making that the Constitution granted to the people's representatives.[262]

Five years later, the Court in *Morrison* relied on *Lopez* to find unconstitutional the Violence Against Women Act ("VAWA"), a federal statute that provided a private remedy for gender-motivated violence.[263] The Chief Justice again wrote for the majority, further embedding into jurisprudence his views on the centrality of economics to Congress's

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[258] *See Lopez*, 514 U.S. at 563.

[259] *Id.* at 564.

[260] Uniform Interstate Family Support Act, 42 U.S.C. § 666 (2003) (easing interstate child support); Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (2003) (providing full faith and credit for child custody decisions).

[261] Julie Goldscheid, United States v. Morrison *and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 134–35 (2000).

[262] *See* Kramer, *supra* note 227, at 138–41.

[263] 42 U.S.C. § 13981 (1994); *Morrison*, 529 U.S. at 601–02, 619, 627.

Commerce Clause power.[264] Unlike the congressional record on the Gun-Free School Zones Act, Congress had provided abundant information about the interstate effects of gender violence. Nevertheless, the Court did not find sufficient evidence to prove that violence against women substantially affected interstate commerce. Even on its face, without any fact gathering, the connection between the inability of women to reach their potential when confronted by gender bias appears obvious. But, instead of relying on presupposition, Congress bolstered the factual record with a "mountain of data," including information from no less than nine congressional hearings and from gender bias task forces in twenty-one states, which was amassed over four years.[265] The Court's rejection of Congress's inductions from the evidence went beyond *Lopez* and granted the judiciary even more control in determining whether congressional findings adequately justify civil rights laws passed pursuant to the Commerce Clause.

The Court disregarded the compiled data on the grounds that violent gender-motivated crimes "are not, in any sense of the phrase, economic activity."[266] This reasoning seems to be a return to judicial scrutiny reminiscent of *Lochner*-era due process review.[267] To further curtail congressional overreaching, the Court concluded that Congress could not enact law "based solely on that conduct's aggregate effect on interstate commerce."[268] The aggregation doctrine, the Court held, was inapplicable in cases of gender-motivated violence that is "not directed at the instrumentalities, channels, or goods involved in interstate commerce."[269]

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[264] Chief Justice Rehnquist had made his concerns known years before *Morrison*, in a concurring opinion to *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, where he espoused the view that the congressional regulation of commerce should have a "substantial effect" on interstate commerce. 452 U.S. 264, 312 (1981) (Rehnquist, J., concurring). Otherwise, he stated, "one could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress." *Id.* at 308 (Rehnquist, J., concurring).

[265] *Morrison*, 529 U.S. at 628–31 (Souter, J., dissenting).

[266] *Id.* at 613.

[267] *See id.* at 644 (Souter, J., dissenting) ("[I]n the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism."); Alden v. Maine, 527 U.S. 706, 814 (1999) (Souter, J., dissenting) ("The resemblance of today's state sovereign immunity to the *Lochner* era's industrial due process is striking."); Seminole Tribe v. Florida, 517 U.S. 44, 165–69 (1996) (Souter, J., dissenting) (comparing recent Supreme Court federalist approaches to *Lochner*).

[268] *Morrison*, 529 U.S. at 599.

[269] *Id.* at 617–18.

The dissents in *Morrison*, written by Justices David Souter and Stephen Breyer, sought to restore the rational basis test.[270] Justice Souter regarded the congressional record on the VAWA as more convincing than those in *Heart of Atlanta Motel* and *McClung*.[271] Although the majority did not overrule those two earlier cases, it cast doubt on their vitality because *Heart of Atlanta Motel* and *McClung*, just as *Morrison*, involved civil rights protections created on the basis of Congress's Commerce Clause authority. The Court in *Heart of Atlanta Motel* determined that racial discrimination had a "disruptive effect . . . on commercial intercourse."[272] The Court in *McClung* found there was replete testimony that discrimination at restaurants had a "highly restrictive effect upon interstate travel by Negroes."[273] Similarly, Congress documented that gender-based violence often forced victims to quit jobs and reduced "the mobility of employees and their production and consumption of goods shipped in interstate commerce."[274]

Given the Court's recent propensity to bevel away at Congress's Commerce Clause authority, the Thirteenth Amendment remains an important alternative for civil rights litigation. A Commerce Clause approach is unduly susceptible to economic arguments that an intolerant act is not substantially connected to interstate commerce. Although the Court found that violence against women is not an economically directed activity, that finding is irrelevant in deciding whether the Thirteenth Amendment grants Congress the power to prevent violence against women. The Thirteenth Amendment perspective allows congressmen to review the connection of gender-motivated violence to slavery. Such violence was regularly perpetrated against slaves on plantations, and women, as Andrew Koppelman has pointed out, were particularly vulnerable to sexual brutality by masters and others who exploited their strengths and positions of power.[275]

Federal laws relying on the Thirteenth Amendment need only be rationally related to the vestiges of slavocracy. The Court has never

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[270] *Id.* at 637–38, 647–52 (Souter, J., dissenting) (referring to congressional evidence that violence against women affects interstate commerce); *id.* at 663 (Breyer, J., dissenting) ("I continue to agree with Justice Souter that the Court's traditional 'rational basis' approach is sufficient.").

[271] *Id.* at 635 (Souter, J., dissenting) (noting that sexual assault and domestic violence caused a loss of $3 billion in 1990 and $5 to $10 billion in 1993).

[272] 379 U.S. at 257.

[273] 379 U.S. at 300.

[274] *Morrison*, 529 U.S. at 634, 636 (Souter, J., dissenting).

[275] Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Analysis*, 84 NW. U. L. REV. 480, 508–09 (1990).

overturned the *Jones* rational basis test. Had Congress at least partly relied on it, the Court might have deferred to Congress, given legislative findings that gender-motivated violence is rationally related to the incidents of servitude and that the VAWA was a necessary and proper means of dealing with such acts. The only question left for the Court would then have been whether the VAWA was "reasonably adapted to the end permitted by the Constitution."[276]

The Commerce Clause does little, if anything, to invoke the legacy of slavery or to look at its remaining manifestations, making it susceptible to a purely economic interpretation like the one the Rehnquist majority has adopted. Instead, the Commerce Clause bodes back to what we may call Lockean social religion, which elevates property above the Preamble's guarantee to safeguard citizens' life and liberty for the general welfare.[277] After all, Congress has had the power to regulate all manner of commerce between states at least since 1824, pursuant to *Gibbons v. Ogden*, when slavery flourished in the United States.[278] In fact, one author has argued that the Commerce Clause was an important part of the Founders' compromise with slavocracy at the Constitutional Convention.[279] Even though the Clause granted Congress the power to regulate the slave trade between states, the national government tolerated the practice, and some antebellum congressmen even owned slaves.[280]

By its very terms, the Thirteenth Amendment is not given to a neutral reading; indeed, it gives the federal legislature the power to enforce the liberty guarantees of the Declaration of Independence and Preamble to the Constitution in the context of both private and state-sponsored discrimination. Further, the Thirteenth Amendment extends to interstate and intrastate activities, regardless of the impact

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[276] *Heart of Atlanta Motel*, 379 U.S. at 262 (explaining, in the context of the Commerce Clause, the use of the rational basis test).

[277] U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.").

[278] *See generally* 22 U.S. (9 Wheat.) 1 (1824).

[279] PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 24 (1981).

[280] *See* Charles H. Cosgrove, *The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis*, 32 U. RICH. L. REV. 107, 123 (1997) (stating that Congress had power under the Commerce Clause to regulate "incoming slave trade" and failure to do so "owed more to the bad faith of the American people than to any inherent constitutional restraints"); Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 Nw. U. L. REV. 695, 702 n.54 (2002) (stating that even if Congress could not regulate intrastate slave trade it certainly could have done so on an interstate level).

on commerce. The Amendment thereby recognizes that the arbitrary restriction of freedom is not merely an economic harm, but one that affects society in a more profound way. This does not mean that a Thirteenth Amendment civil rights approach should displace Commerce Clause efforts under the Civil Rights Act of 1964. Rather, I mean to stress the continued vitality of *Jones* in establishing Congress's broad interpretive power at a time when the Court in *Lopez* and *Morrison* has made the passage of new civil rights legislation increasingly difficult to justify on Commerce Clause grounds.

The role of the Thirteenth Amendment in employment discrimination cases is illustrative of its importance. The link between employment discrimination and slavery is obvious, as slavery directly restricted blacks from choosing professions. Nationally, discriminatory practices barred blacks from competitive jobs. Congress can, therefore, rationally determine that exclusion of a group from equal participation in the workplace is related to forced subservience and an impediment to commerce. Based on this finding, Congress can pass legislation prohibiting employment discrimination currently not covered under the scope of federal laws. For instance, Title VII of the Civil Rights Act of 1964, which Congress passed on the basis of its Commerce Clause powers, is more restrictive than the Thirteenth Amendment. Title VII permits the federal government to regulate employers with at least fifteen employees.[281] Employment claims based on the Thirteenth Amendment need not be so restrictive.

The limited congressional action taken in the employment arena is promising. Modern day peonage cases were successfully prosecuted under the Anti-Peonage Act, which Congress passed pursuant to its Thirteenth Amendment Section 2 authority.[282] Even absent new legislation, the Supreme Court has already found that § 1981, a Reconstruction-era statute based on Congress's Thirteenth Amendment authority, provides a private remedy to persons working for employers with fewer than fifteen people.[283] In dictum the Court stated in 1994

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[281] 42 U.S.C. § 2000e(b) (2003).

[282] *See* Pollock v. Williams, 322 U.S. 4, 17 (1944) ("The undoubted aim of the Thirteenth Amendment as implemented by the Anti-peonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States."); Fox, *supra* note 144, at 122–23 (noting Congress's interpretive use of its Thirteenth Amendment enforcement power in passing the Anti-Peonage Act).

[283] *See* Theodore Eisenberg & Stewart Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 601–03 (1988) (discussing the relationship of employment race discrimination claims brought under § 1981 and Title VII). The Court has found that the

that "[e]ven in the employment context, § 1981's coverage is broader than Title VII's, for Title VII applies only to employers with 15 or more employees, whereas § 1981 has no such limitation."[284]

At times, the Thirteenth Amendment strategy is also preferable to the Commerce Clause alternative because of the Amendment's unique communicative value.[285] Tying discrimination to the economy is not enough to alter racist views that have, in some circles, been culturally condoned since the country's founding. A legal framework designed to protect liberty and improve the general welfare conveys a powerful message about this country's underlying commitments. Legal norms can influence a people's desires and interests. They create entitlements society must honor.[286] Laws protecting human rights on the basis of the Thirteenth Amendment effectively communicate a federal commitment to prosecuting demagogic conduct resembling the badges of involuntary servitude. Such legal remedies "express recognition of injury and reaffirmation of the underlying normative principles for how the relevant [social] relationships are to be constituted."[287]

The Thirteenth Amendment is a more obvious source for civil rights protections than the Commerce Clause. The former protects individual autonomy against state and private interference, and recent Supreme Court decisions indicate the latter principally concerns regulation of interstate economic transactions. The Thirteenth Amendment was ratified to increase the federal government's ability to assure universal freedom and general welfare, and the Commerce Clause was included to provide a central authority for regulating commercial interactions across state borders. There is no doubt after *McClung* and *Heart of Atlanta Motel* that the Commerce Clause is also relevant to ending racist practices—even *Lopez* and *Morrison* did not overrule those cases. With the Court's trend away from its earlier deference to congressional

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remedies under Title VII and § 1981 are "separate, distinct, and independent." Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975).

[284] Rivers v. Roadway Express, Inc., 511 U.S. 298, 304 n.3 (1994) (discussing § 101 of Civil Rights Act of 1991).

[285] *See* Pope, *supra* note 229, at 119–20 (describing how words and legal text can facilitate "social movement mobilization, dispense symbolic incentives, undermine the legitimacy of established social norms, and produce numerous other effects"); Tsesis, *supra* note 3, at 545–58 (discussing the centrality of symbolism for unifying social movements).

[286] *See* Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of Law in the Political System*, 77 AM. POL. SCI. REV. 690, 697 (1983) (explaining how legal norms influence perceptions of desires, wants, and interests).

[287] *See* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1529 (2000).

Commerce Clause authority, however, the Thirteenth Amendment's centrality has become manifest.

V. The Thirteenth and Fourteenth Amendments

The substantive provisions of the Thirteenth and Fourteenth Amendments emerged from the United States' historic commitment to freedom. The country's primary statements of national purpose, the Declaration of Independence and the Preamble to the Constitution, made liberty a foremost guarantee of federal government, but neither manifesto had an explicit enforcement provision. The makers of the Constitution, as Justice Louis Brandeis explained in a dissenting opinion, set out "to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone."[288]

The Thirteenth Amendment disengages the principle of freedom from the original Constitution's favoritism for property-owning whites. The Amendment makes the liberty to live an uncoerced, self-directed life a universal right. Adopted in the immediate aftermath of the Civil War, the Amendment was designed both to abolished slavery and to protect people's right to act independent of arbitrary coercion. Its grant of enforcement authority bestows Congress with the power to protect the right of individuals to make and pursue meaningful life decisions.

The Fourteenth Amendment too secures normative values essential to living a good life, although the state action requirement sets a limit on its effectiveness that the Thirteenth Amendment does not impose.[289] The U.S. Supreme Court has only recently limited the civil rights potential of the Commerce Clause; on the other hand, Fourteenth Amendment jurisprudence was narrowly interpreted at least as early as the holdings in the *Slaughter-House Cases* and the *Civil Rights Cases*.[290] The Court's current state-oriented federalism has brought

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[288] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[289] *See* Robin West, *Universalism, Liberal Theory, and the Problem of Gay Marriage*, 25 Fla. St. U. L. Rev. 705, 706 (1998) (writing about the rationalist conception of human nature, considered to be characteristic of the liberty secured under the Fourteenth Amendment); Maureen B. Cavanaugh, Note, *Towards a New Equal Protection: Two Kinds of Equality*, 12 Law & Ineq. 381, 422 (1994) (writing that the Equal Protection Clause of the Fourteenth Amendment stands for the promise of a good life).

[290] *Civil Rights Cases*, 109 U.S. 3, 18 (1883); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 60–63 (1872).

into sharper relief a comparison between the Thirteenth and Fourteenth Amendments.

A. *Thirteenth and Fourteenth Amendment Freedoms*

Both the Thirteenth and Fourteenth Amendments protect pluralistic freedom; nonetheless, each has a unique role in the constitutional scheme. Although this Article is not the appropriate place for a detailed analysis of the Fourteenth Amendment, some examination about its relative place to the Thirteenth Amendment will help demonstrate better how these amendments can be integrated. The normative principles on which they are both established require the federal government to use its limited power to improve the common good by protecting individual liberties.[291]

To begin, I regard the Thirteenth Amendment to be a more specific and unequivocal guarantee of civil liberties than the Fourteenth Amendment. This Part demonstrates that the Thirteenth Amendment remains the principal constitutional source requiring the federal government to protect individual liberties against arbitrary private and public infringements that resemble the incidents of involuntary servitude. I believe the Thirteenth Amendment's two sections take a three-part approach to freedom: its first section guarantees freedom *from* arbitrary domination; and its second section authorizes Congress *to* enact federal laws protecting people's coequal liberties to establish meaning *for* their lives.

The Thirteenth Amendment is an even more unambiguous federal mandate than the Fourteenth Amendment. The prohibition against involuntary servitude is absolute, thus any incidents or badges of it are ineluctably proscribed. The Thirteenth Amendment vests Congress with the power to protect the unobtrusive exercise of freedom against arbitrary infringement. In at least some cases, such as those involving specific instances of slavery, not even a compelling state interest can justify a state or private infringement of autonomy.

In contrast, the state may infringe on the personal liberties otherwise secured under the Fourteenth Amendment where there is an overriding public interest. The U.S. Supreme Court, in *City of Cleburne v.*

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[291] I have more fully explained my ethical point of view in TSESIS, *supra* note 35, at ch. 10. Essentially my view is that the Preamble to the Constitution requires the federal government to protect individual liberties in order to achieve the common good. *See id.*; *see also* Alexander Tsesis, *Eliminating the Destitution of America's Homeless: A Fair, Federal Approach*, 10 TEMP. POL. & CIV. RTS. L. REV. 103, 121–23 (2000).

Cleburne Living Center, carved out this exception to the Fourteenth Amendment's proscription of race, alienage, and national origin classifications.[292] Such laws "are subjected to strict scrutiny" analysis and will only be found constitutional if they "serve a compelling state interest."[293] The Court later clarified that governmental restraints on fundamental freedoms must be "specifically and narrowly framed to accomplish" the compelling purpose.[294] Such a restrictive law cannot be "merely rationally related, to the accomplishment of a permissible state policy."[295] In the context of the Fourteenth Amendment, a legislature can abridge fundamental liberty interests for compelling public reasons.[296]

The Court's most recent decisions on the Fourteenth Amendment adopt a "responsive," rather than a proactive, reading of Congress's Section 5 powers. In *City of Boerne v. Flores*, the Court invalidated the Religious Freedom Restoration Act, in part because the statute was "so out of proportion to a supposed remedial or preventative object that it *cannot be understood as responsive to*, or designed to prevent, unconstitutional behavior."[297] The case limited Congress's Section 5 powers to passing congruent laws for remedying state violations of Fourteenth Amendment guarantees:[298] "The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause." The Court's rationale was based on statements made during congressional debates over the proposed Fourteenth Amendment to the effect that "[t]he proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure."[299] In a recent article, Ruth Colker maintained that the Court misleadingly resorted to the record of the debates that preceded passage of the proposed Fourteenth Amendment.[300] The Court relied on the statements of four congressmen to bolster the *Boerne* rationale without ever mentioning that only one of them voted for the proposed

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[292] 473 U.S. 432, 440 (1985).

[293] *Id.*

[294] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986); *see also* Shaw v. Hunt, 517 U.S. 899, 908 (1996).

[295] McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

[296] *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[297] 521 U.S. 507, 532 (1997) (emphasis added). The Court reiterated this "responsive" language in *Kimel v. Florida Board of Regents*, 528 U.S. 62, 86 (2000); *see infra* notes 302–303 and accompanying text.

[298] *Boerne*, 521 U.S. at 520.

[299] *Id.* at 520–21.

[300] *See* Colker, *supra* note 62, at 797–817.

Fourteenth Amendment.[301] Relying on the understanding of the ratification opponents is a dubious method of judicial interpretation.

The Court maintained the remedial interpretation of Congress's Section 5 power in *Kimel v. Florida Board of Regents*, finding that Congress overstepped its enforcement authority when it extended the Age Discrimination in Employment Act's ("ADEA") applicability to states and local governments.[302] The Court in *Kimel* held that Congress's decision to apply the ADEA to states was "out of proportion to its supposed remedial or preventive objectives."[303] Other recent cases dealing with Section 5 have applied the responsive "proportionality and congruency" test to the Patent Remedy Act,[304] the VAWA,[305] the Americans with Disabilities Act,[306] and the Family and Medical Leave Act (the "FMLA").[307]

In addition to authorizing laws that responsively remedy specific acts of past discrimination, the Thirteenth Amendment also grants Congress the power to pass laws that are substantive guarantees.[308] Pursuant to the Amendment, the standard for passing "effective legislation" is that it be "rationally" related to "the badges and the incidents of servitude." Under the Thirteenth Amendment, the federal legislature may, and indeed should, pass laws that help liberty thrive. Congress may use its Section 2 power to pass laws that protect the non-intrusive use of personal freedom and punish its abridgment.

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[301] *See id.* Specifically, in *Boerne* the Court quoted Representatives Hale, Hotchkiss, and Rogers, and Senator Stewart. 521 U.S. at 520–21. "Of the Representatives quoted by the Court, only Representative Hotchkiss voted for ratification of the Amendment. Representative Hale abstained and Representative Rogers voted against the measure." Colker, *supra* note 62, at 792.

[302] 528 U.S. at 86.

[303] *Id.* at 82.

[304] Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647 (1999) ("The Patent Remedy Act . . . is particularly incongruous in light of the scant support for the predicate unconstitutional conduct . . . .").

[305] United States v. Morrison, 529 U.S 598, 625–26 (2000) ("[A]s we have phrased it in more recent cases, prophylactic legislation under § 5 must have a 'congruence or proportionality between the injury to be prevented or remedied and the means adopted to that end.'") (quoting *Florida Prepaid*, 527 U.S. at 639; *Boerne*, 521 U.S. at 526).

[306] Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) ("Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation.").

[307] Nevada Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 1982 (2003) ("We believe that Congress' chosen remedy, the family-care leave provision of the FMLA, is 'congruent and proportional to the targeted violation . . . .'") (quoting *Garrett*, 531 U.S. at 374).

[308] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968).

Moreover, Congress may pass civil legislation, more sensitive to human rights concerns than §§ 1981 and 1982, allowing for private compensation. Congress's enforcement power under the Thirteenth Amendment not only aims proportionately and congruently to prevent interference with fundamental rights, which is the extent of Congress's authority under the Fourteenth Amendment, but also enables the federal government to substantiate the promises of freedom found in the Declaration of Independence and the Preamble.[309]

The Thirteenth Amendment's lack of a state action requirement is another reason for sometimes preferring the Thirteenth to the Fourteenth Amendment. The Supreme Court created this dichotomy as early as 1883, in the *Civil Rights Cases*, and has never strayed from it. The Court then found that the Fourteenth Amendment enforcement power is limited to state actions:

> It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must necessarily be predicated upon

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[309] U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). The Court first connected governmental interference with the Privileges and Immunities Clause in the *Slaughter-House Cases*, finding that it only protected citizens from state interference with the privileges and immunities of national, but not state, citizenship. *See* 83 U.S. at 60–63. Likewise, the Equal Protection Clause prevents interference with the exercise of fundamental rights "unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 388 (1978). "The Fourteenth Amendment's Due Process Clause has a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests' . . . ." Troxel v. Granville, 530 U.S. 57, 57 (2000) (quoting *Glucksberg*, 521 U.S. at 720).

> such supposed State laws or State proceedings, and be directed to the correction of their operation and effect.[310]

The *Civil Rights Cases* accorded with post-Reconstruction political decisions, such as the Compromise of 1877, which favored Northern and Southern reconciliation at the expense of meaningful improvements for blacks.[311]

Boerne took the state action requirement for granted, and further straight-jacketed Congress by finding that Section 5 allows it "to enforce" but not "to determine what constitutes a constitutional violation."[312] The Supreme Court also embraced the state action requirement in *United States v. Morrison*.[313] Chief Justice Rehnquist, writing for the majority, explained that the Court would not deviate from "the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action."[314] *Morrison* asserted that it was based on the doctrine of stare decisis and the "insight attributable to the Members of the Court at that time," because they had "intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment."[315] The Court's historical analysis again failed to account for the events immediately preceding the *Civil Rights Cases*. Chief Justice Bradley wrote the decision in the *Civil Rights Cases* shortly after he cast the deciding vote on the electoral commission that gave Rutherford B. Hayes the presidency and secured the Compromise of 1877.[316] Bradley and the other members of the electoral commission abandoned blacks to the injustices of segregation.

The Rehnquist majority drew on precedent filled with racist undertones instead of advancing progressive arguments born from the abolitionist movement. The Court, in *Morrison*, also quoted from another 1883 case, *United States v. Harris*, for the principle that Section 5 refers to "[s]tate action exclusively, and not to any action of private

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[310] *Civil Rights Cases*, 109 U.S. at 11–12.

[311] *See supra* note 102.

[312] 521 U.S. at 533.

[313] 529 U.S. 598, 621 (2000). Both *Boerne* and *Morrison* failed to evaluate the Court's interpretation of "enforce" in Thirteenth Amendment cases, relying instead on the *Civil Rights Cases* "niggardly" interpretation of that term. Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1154–56 (2002).

[314] *Morrison*, 529 U.S. at 621.

[315] *Id.* at 622.

[316] Fox, *supra* note 144, at 159. From that year, the Court began using the Constitution to avoid the enforcement of antidiscrimination laws. *See, e.g.*, Hall v. DeCuir, 95 U.S. 485, 488–89 (1877) (finding Louisiana violated the Commerce Clause by requiring the desegregation of public conveyance).

individuals."[317] *Harris* struck section 2 of the Ku Klux Klan Act, which had made it criminal for two or more people to conspire to deprive anyone from enjoying the equal protection of the law or the privileges and immunities of national citizenship.[318] The Court's continued reliance on these two decisions, both of which moved the country in the direction of *Plessy v. Ferguson* (1896), indicates the present-day difficulty of using a Fourteenth Amendment strategy to end injustices like violence against women or hate crimes generally.

Ever since it decided the *Slaughter-House Cases*, *Civil Rights Cases*, and *Harris*, the Court has severely handicapped national power in the area of the Fourteenth Amendment. But beginning with *Jones*, the Court expanded federal authority to prevent interference with civil liberties.

The schema proposed herein authorizes Congress to pass laws preserving the right to freely pursue goals that do not arbitrarily interfere with others' legitimate interests. This schema provides both a positive grant of power, in so far as it recognizes that the Thirteenth Amendment provides Congress the power to expand opportunities, and a negative grant of freedom, because it prohibits the government and individuals from intrusively abusing others' autonomy. Such a perspective makes more evident Congress's authority to decide rationally that a law, such as the VAWA, is necessary for protecting women's freedom of movement against misogynistic intrusions into their lives. A law against other hate crimes would likewise use federal power to punish and prevent the types of interference with liberty that the Reconstruction Congress sought to end.

Thus, the Thirteenth Amendment provides a substantive alternative for passing civil rights laws. This interpretation of the Amendment is based on Supreme Court precedent. The Supreme Court has consistently found that the Thirteenth Amendment does not contain any equivalent to the Fourteenth Amendment's state action requirement. Congress has great latitude, pursuant to its Thirteenth Amendment Section 2 power, to end any remaining vestiges of servitude and their concomitant forms of subordination. The judiciary, I argued above, should use Section 1 even absent congressional action.[319] The practices to which both sections of the Thirteenth Amendment apply are usually not overtly tied to forced labor; they

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[317] *Morrison*, 529 U.S. at 621 (quoting *Harris*, 106 U.S. 629, 639 (1883)) (internal quotations omitted).

[318] 106 U.S. at 644.

[319] *See supra* Part III.B.

may be masked in institutional discrimination and private behavior that arbitrarily denies victims the opportunity to live meaningful lives.

B. *Pertinent Rights*

The Supreme Court has done little to examine what civil liberties Congress may protect pursuant to the Thirteenth Amendment. Instead, the Court has used various constitutional provisions to establish its decisions concerning privacy and liberty rights. For example, the Court has held repeatedly that liberty rights are imbedded in the Due Process Clause of the Fourteenth Amendment, which gives the Court little guidance about which liberties it protects.[320] Typically, the Court simply asserts that a human decision, such as choosing whether to travel, is a historically fundamental liberty that is immune from state infringement absent a compelling state interest.[321] This kind of unspecific historical reasoning exposes holdings to the originalist detraction that courts are engaging in judicial lawmaking.[322] Critics of opinions such as *Roe v. Wade* have called the Court's reflective method "unprincipled," "illegitimate," and lacking "connection with any value

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[320] *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 498–500 (1977) (determining that the right of family members to live together was a family liberty protected by the Due Process Clause); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974) (stating that "[t]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment"); Roe v. Wade, 410 U.S. 113, 152 (1973) (finding that certain privacy rights are not explicitly mentioned in the Constitution but "implicit in the concept of ordered liberty"); Whalen v. Roe, 429 U.S. 589, 603–04 (1971) (holding that patient identification requirements of a substance abuse act did not violate "any right or liberty protected by the Fourteenth Amendment").

[321] *See* Zobel v. Williams, 457 U.S. 55, 66–67 (1982) (Brennan, J., concurring) ("In light of the unquestioned historic recognition of the principle of free interstate migration, and of its role in the development of the Nation, we need not feel impelled to 'ascribe the source of this right to travel interstate to a particular constitutional provision.'" (quoting Shapiro v. Thompson, 394 U.S. 618, 630 (1969))); Dunn v. Blumstein, 405 U.S. 330, 335, 360 (1972) (finding the right to travel a fundamental right that the state cannot withhold absent a substantial and compelling reason); Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972) (finding that loafing and strolling are "historically part of the amenities of life as we have known them").

[322] *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 24–25, 47 (Amy Gutmann ed., 1997) (arguing for an originalist constitutional interpretation). For an originalist denial of liberty rights, see *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (stating that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution"), *overruled by* Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003).

of the Constitution."[323] A Thirteenth Amendment approach sidesteps these criticisms because, instead of an intuitive assertion, it requires a finding that an abridgement of liberty is significantly connected to the incidents or badges of servitude.[324]

The legality of protecting liberties through the Thirteenth Amendment is difficult to gainsay because interpreting the Amendment begins with the historical injustice it ended. My approach is analogous to the Supreme Court's two-tiered analytic method in substantive due process cases:

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty" .... Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking" .... This approach tends to rein in the subjective elements that are necessarily present in due process judicial review.[325]

Similarly, courts adjudicating matters under the Thirteenth Amendment must compare contemporary harms to past practices. Once the plaintiff establishes a prima facie case of involuntary servitude, the burden shifts to the defendant to prove that the limitation on individual liberty is no more restrictive than is necessary to protect the public's ability to live freely.

Protecting essential freedoms means ending coercive practices and enabling people to make reasonable choices. Using the Thirteenth Amendment for that end would be a legitimate use of governmental power to provide for the common good. Only civic requirements, such as jury duty, public highway work, or military service

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[323] John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 949 (1973); *see* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7–12 (1971) (making similar observations regarding *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

[324] Along similarly historical grounds, Andrew Koppelman has argued that the Thirteenth Amendment secures a woman's right to abort pregnancy. Koppelman, *supra* note 275, at 483.

[325] *Glucksberg*, 521 U.S. at 720–22 (internal citations omitted).

during just war, are legitimate reasons for requiring people to act against their will.[326]

Every generation must develop an understanding of fundamental freedoms by critically examining the nation's past, its core documents, and its moral standing as a constitutional democracy. This mode of collective self-reflection aims at achieving empathic decision making that avoids past injustices. Freedom is a progressive civic condition that best expands through an affective comprehension of moral obligations and social limitations. I take it as a given that persons are relational animals who innately empathize and therefore can understand fellow citizens' desire to achieve goals without coercion or arbitrary domination. Constitutional development should never come at the cost of human autonomy and social welfare; otherwise, it would interfere with the reasonable goals of individuals' living in a community of equals. Nevertheless, some limits on freedom are necessary in organized societies where people often have conflicting goals. Normative principles are critical to constructing laws for a pluralistic society. To avoid religious or philosophical absolutism, the Thirteenth Amendment requires a historical basis for asserting that an interest falls under the Amendment's purview.

Legislation against acts of domination, whether they are perpetrated during employment or in other settings, is essential in a country devoted to civil liberties. Laurence H. Tribe has pointed out that based on existing case law

> Congress possesses an almost unlimited power to protect individual rights under the Thirteenth Amendment. Seemingly, Congress is free within the broad limits of reason, to recognize whatever rights it wishes, define the infringement of those rights as a form of domination or subordination and thus an aspect of slavery, and proscribe such infringement as a violation of the Thirteenth Amendment.[327]

Likewise, the Supreme Court should adjudicate cases implicating personal liberties through the lens of the Thirteenth Amendment. In order to provide consistency and predictability to citizens and litigants,

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[326] *See, e.g.*, Hurtado v. United States, 410 U.S. 578, 589 n.11 (1973) (asserting that a compensation of $1 a day for jury duty does not amount to involuntary servitude); Selective Draft Law Cases, 245 U.S. 366, 390 (1918) (discussing a military draft).

[327] 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-15, at 926–27 (3d ed. 2000).

both the legislature and judiciary should use a normative historical analysis.

The Thirteenth Amendment approach can sharpen judicial decisions concerning the extent to which persons may enjoy fundamental rights, particularly when the exercise of those rights conflicts with the interests of other members of a pluralistic community. The basis of such an analysis need not be ad hoc; instead, it should be based on the recognition that slavery and involuntary servitude were inimical to fundamental, human liberties. The woefully incomplete post-Civil War American project involves ending racist practices. Twentieth-century Court decisions on constitutionally protected liberty and privacy rights reflect this trend. Those rights, however, are not absolute. To the contrary, the Thirteenth Amendment bars certain uses of freedom, particularly those used for domination. After all, in 1857, the Court favored Dred Scott's master's interest in free interstate travel with slave property to Dred Scott's interest in freedom from slavery.[328] The Thirteenth Amendment made the exploitative use of power an unconstitutional abuse of freedom.

Liberty rights are well established in United States jurisprudence. The Court has often invoked the Due Process Clause and Equal Protection Clause in privacy rights cases; the Court, however, has not always provided even this degree of specificity.[329] Its frequent resort to tradition provides little explanation for the protection of fundamental rights.[330] The Thirteenth Amendment is a more explicit guarantee of freedom than other constitutional provisions on which the Court has relied. For instance, *Roe*, upholding a woman's right to choose an abortion, relied on the Fourteenth Amendment's liberty provision and endorsed the district court's view that the source of that right is the Ninth Amendment.[331] Although the Court in *Roe* did provide an expansive historical analysis to justify its conclusion, its reliance on tradition was a two-edged sword because the dissent also resorted to tradition to derive the opposite point of view on the right to abortion.[332]

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[328] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450–52 (1857). The Court concentrated both on the master's liberty and property interest. *See supra* text accompanying note 42.

[329] For instance, in *Shapiro* the Court ascribed the right to travel to "a particular constitutional provision." 394 U.S. at 630.

[330] Cass R. Sunstein, *Is There a Constitutional Right to Clone?*, 53 HASTINGS L.J. 987, 990 (2002).

[331] 410 U.S. at 153.

[332] *Id.* at 174–77 (Rehnquist, J., dissenting) (reviewing state statutes limiting abortion which were in place in 1868, when the Fourteenth Amendment was adopted); *see* Adam B.

Without a specific nexus on which a court must ground references to tradition, privacy rights cases rely on the predispositions of judges, and when racists like Chief Justice Taney sit on the Supreme Court, decisions like *Dred Scott* are the product. To prevent the hijacking of tradition, the Thirteenth Amendment requires a very clear judicial analysis: Is the act an incident or badge of servitude? Or, in the case of legislation, did Congress rationally determine that the statute was a necessary and proper means to end an incident of servitude? The rather obvious shortcoming of this method is that the antagonist of a particular law or judgment can argue that it is unrelated to involuntary servitude. Such criticism does little, however, to limit the virtually plenary power that the Supreme Court found Section 2 of the Thirteenth Amendment grants to Congress.[333] Moreover, in spite of the Amendment's specific focus, it allows for a broad reading.

Familial liberties are principal examples of how Thirteenth Amendment analysis works outside the context of contract and property rights cases, where the Amendment has most commonly been applied.[334] Indeed, the first use of the term "incidents of servitude," which Senator James Harlan of Iowa coined during the 1864 Senate debate on the Amendment, came within the context of slavery's detriments to marriage: "[T]he prohibition of the conjugal relation is a necessary incident of servitude."[335] If Harlan was correct, then the federal guarantee to marry the partner of one's choice is linked to the rights of free people. Traditionally, however, the Court has located the right "to marry, establish a home and bring up children" in the Due Process Clause.[336]

Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101, 131 (2002) ("While the majority opinion in *Roe* never explicitly stated that it was relying on tradition to find the fundamental right to an abortion, its nearly twenty-page discussion of the history of abortion precedes its finding that there is such a fundamental right."). Andrew Koppelman has argued that "[w]hen women are compelled to carry and bear children, they are subjected to 'involuntary servitude' in violation of the thirteenth amendment." Koppleman, *supra* note 275, at 484. The Court also stated that proscriptions against consensual homosexual conduct are constitutional, in part because they "have ancient roots." *Bowers*, 478 U.S. at 192–94. In *Lawrence*, the Court found this historical assertion to have been invalid. 123 S. Ct. at 2478–79.

[333] *See supra* text accompanying notes 167–180.

[334] *See generally, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976); *Jones*, 392 U.S. at 409.

[335] CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864).

[336] Poe v. Ullman, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting). In *Poe*, the Court considered a challenge to a Connecticut law against the use of contraceptives and dismissed for lack of standing. *Id.* at 507–08.

Choice of a marriage partner is fundamental because it reflects so many aspects of an individual's character traits. Family rights issues provide further insight into why the Thirteenth Amendment is as relevant to protecting civil liberties as the Due Process Clause. Both involve a continuum of interests not subject to any "substantial arbitrary impositions and purposeless restraints."[337] Denying adults the right to family autonomy signifies a lack of respect for the individuals' decisions, passions, hopes, and sense of self. Moreover, in this country arbitrary deprivation of family freedoms is linked to slavery.

In both the antebellum and postbellum South, slaves were degraded to a social rung below whites. Intermarriage was forbidden to them, and even marriages between free blacks and slaves were only permitted at the slave owners' behests.[338] A typical argument against abolition was that it would lead to miscegenation.[339] A back-country farmer's attitude was typical:

> [H]ow'd you like to hev a nigger steppin' up to your darter? Of course you wouldn't; and that's the reason I wouldn't like to hev 'em free; but I tell you, I don't think it's right to hev 'em slaves so; that's the fac—taant right to keep 'em as they is.[340]

The Supreme Court held that antimiscegenation laws violated the Due Process and Equal Protection Clauses in the 1967 case of *Loving v. Virginia*.[341] The Court recognized the right to marry "as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[342] Prohibitions against intermarriage are also related to slavery and subservience. Any arbitrary burdens placed on marriage formation implicate the Thirteenth Amendment.

The abolition of slavery further rejected the racist stereotype that made black families subject to personal and legislative whims. Any

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[337] *Id.* at 542–43 (Harlan, J., dissenting).

[338] Arnold A. Sio, *Interpretations of Slavery: The Slave Status in the Americas*, 7 COMP. STUD. SOC'Y & HIST. 289, 297 (1965); *see* William L. Imes, *The Legal Status of Free Negroes and Slaves in Tennessee*, 4 J. NEGRO HIST. 254, 262 (1919); *see also* JOHN H. RUSSELL, THE FREE NEGRO IN VIRGINIA, 1619–1865, at 126 (Negro University Press 1969) (1913) (stating that even after emancipation, blacks were distanced from whites by their lack of interaction and intermarriage).

[339] *See* Sidney Kaplan, *The Miscegenation Issue in the Election of 1864*, 34 J. NEGRO HIST. 274, 282–83 (1949) (explaining how miscegenation became an issue against Republicans during the 1864 national election).

[340] CARL N. DEGLER, OUT OF OUR PAST: THE FORCES THAT SHAPED MODERN AMERICA 167 (1959).

[341] 388 U.S. 1, 11–12 (1967).

[342] *Id.* at 12.

contemporary burdens on familial living arrangements that resemble the hardships faced by slave families are unconstitutional. Black families in the antebellum South faced great obstacles to maintaining stable family relationships. Limits on slave families severely hampered personal choices and caused enormous misery.[343] Many masters considered slave marriages only temporary and subject to forced termination.[344] Because all southern states forbade blacks from entering into formal marriage contracts, masters had an absolute right to sell one or both spouses. When slaves married persons on other plantations or free blacks, they were limited in how often they could visit their spouses. Spouses who lived on different plantations were even more likely to be sold apart than those with a common owner, and even when they remained on nearby plantations, their new masters sometimes prevented them from contacting spouses.[345]

The dominant stereotype claiming that blacks were indifferent to family life proved groundless.[346] During and after the Civil War, many freedpersons wandered far off plantations in search of loved ones. Ben Dodson, a sixty-five-year-old plantation preacher, cried out in joy when he was reunited with his wife after years of estrangement resulting from their master's decision to sell them separately: "Glory! glory! hallalujah! Dis is my Betty, shuah," he said, glancing again at her face to reassure himself. "I foun' you at las'. I's hunted an' hunted till I track you up here. I's boun' to hunt till I fin' you if you's alive."[347] After emancipation, parents were reunited with children, often not rec-

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[343] *See* E. Franklin Frazier, *The Negro Slave Family*, 15 J. NEGRO HIST. 198, 246 (1930) (discussing the inability of slaves to attain any civil effects of marriage).

[344] *See* Jo Ann Manfra & Robert R. Dykstra, *Serial Marriage and the Origins of the Black Stepfamily: The Rowanty Evidence*, 72 J. AM. HIST. 18, 34–35 (1985) (providing statistics indicating that force accounted for the termination of about one-third of slave marriages, and that of those marriages that were dissolved forcefully, about one-third were unions of five or more years, and about half produced offspring); *see also* JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH 91 (1972) (providing similar statistics and concluding that of 2888 slave families, 32.4% were separated forcefully within six years of their marriage).

[345] Steven E. Brown, *Sexuality and the Slave Community*, 42 PHYLON 1, 6 (1981).

[346] This dehumanizing attitude is found repeatedly in apologetics for slave trading. A typical view was that "[w]ith regard to the separation of husbands and wives, parents and children, ... [n]egroes are themselves both perverse and comparatively indifferent about this matter." James H. Hammond, *Letter to an English Abolitionist*, *in* THE IDEOLOGY OF SLAVERY 191–92 (Drew G. Faust ed., 1981).

[347] LAURA S. HAVILAND, A WOMAN'S LIFE-WORK 463 (Mnemosyne Publishing Co. 1969) (1881).

ognizing each other but for a scar or some other unusual feature.[348] Sometimes they discovered their newly found loved ones had been brutalized during the years of slavery that separated them. One woman located her eighteen-year-old daughter, who had been sold from her, to have been cut "[f]rom her head to her feet . . . just as . . . her face."[349]

The variety of chores on big plantations also often resulted in family separation, especially among extended family members. If one family member worked in the plantation house, he could not live with those members of his family who worked in the fields. The most devastating form of family disruption came from sales, which had even less regard for extended family relationships than for parental or spousal relationships.[350]

The Thirteenth Amendment prohibits such disruptions to family structure. The Amendment complements due process jurisprudence and expands the scope of prohibited conduct. In *Moore v. City of East Cleveland*, the Supreme Court found the Due Process Clause grants extended families the right to live together.[351] The Court recognized that "the institution of family is deeply rooted in this Nation's history and tradition."[352] The Thirteenth Amendment yields added protection of this fundamental right. Pursuant to Section 2 of the Thirteenth Amendment, Congress can prohibit private and state interference with family living arrangements.[353]

In another relevant context, the Court in *Griswold v. Connecticut* further guaranteed the protection of family rights.[354] Marriage, the Court observed, "promotes a way of life . . . a harmony of living . . . bilateral loyalty."[355] The Court based its decision on "several constitutional guarantees" of liberties that contain "penumbras, formed by emanations from those guarantees that help give them life and sub-

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[348] THE AMERICAN SLAVE: A COMPOSITE AUTOBIOGRAPHY 274 (George P. Rawick ed., 1975).

[349] Letter from Lucy Chase to Miss Lowell (Nov. 29, 1863), *in* DEAR ONES AT HOME 99 (Henry L. Swint ed., 1966).

[350] *See* KOLCHIN, *supra* note 181, at 125–26.

[351] 431 U.S. at 499.

[352] *Id.* at 503–04.

[353] The Supreme Court has never addressed the question of whether § 1982 applies to housing exempt from the Fair Housing Act of 1968. Several lower courts have held that housing is covered by § 1982. *See* Morris v. Cizek, 503 F.2d 1303, 1304 (7th Cir. 1974); Johnson v. Zaremba, 381 F. Supp. 165, 167–68 (N.D. Ill. 1973).

[354] 381 U.S. at 484–86.

[355] *Id.* at 485–86.

stance."[356] In particular, the Court found a right to marital liberty in the Due Process Clause.[357] The Connecticut anti-contraception law was an affront to the marital relationship because it enabled the state to interfere with the intimate rights of spouses.[358]

Justice William Douglas's majority opinion in *Griswold* has been the subject of a variety of criticisms that would not apply to a Thirteenth Amendment approach. One critic of the decision was Justice Hugo Black, who wrote in a dissenting opinion that the majority based its decision on the ambiguities of procedural due process. Justice Black rejected the decision because he could "find in the Constitution no language which either specifically or implicitly grants to all individuals a constitutional 'right to privacy.'"[359] Similarly, Robert H. Bork criticized the *Griswold* reasoning for failing "every test of neutrality . . . . *Griswold* . . . is an unprincipled decision, both in the way in which it derives a new constitutional right and the way it defines that right, or rather fails to define it."[360]

Griswold's critics, however, fail to realize that finding substantive guarantees to family privacy does not require novel legal reasoning. Substantive guarantees, like the First Amendment's guarantee of religious liberty and the Fifth Amendment Just Compensation Clause's guarantee of property rights, are strewn about the Bill of Rights.[361] The Thirteenth Amendment's substantive guarantee of marital freedom is another reason critics are mistaken. The liberty to choose a spouse is grounded in its historic setting and the organic nature of constitutional interpretation. The Thirteenth Amendment facilitates Justice Felix Frankfurter's vision of the Constitution as a "stream of history," which the Supreme Court directs within "a living framework" for growth.[362] Likewise, the Amendment is compatible with Justice Ruth Bader Ginsburg's view that "[a] prime part of the history of our

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[356] *Id.* at 484.

[357] *See id.* at 481–83.

[358] *Id.* at 480, 485–86.

[359] HUGO L. BLACK, A CONSTITUTIONAL FAITH 9 (1968). Thus, he thought, the states could invade privacy rights "unless prohibited by some specific constitutional provision." *Id.*

[360] Bork, *supra* note 323, at 7–11.

[361] *See* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065 (1980) (arguing that there is a "stubbornly substantive character of so many of the Constitution's most crucial commitments: commitments defining the values that we as a society, acting politically, must respect. Plainly, the First Amendment's guarantee of religious liberty and its prohibition of religious establishment are substantive in this sense. So, too, is the Thirteenth Amendment, in its abolition of slavery . . . .").

[362] Reid v. Covert, 354 U.S. 1, 43 (1957) (Frankfurter, J., concurring); FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 2 (1937).

Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored and excluded."[363]

The Thirteenth Amendment could have further bolstered Justice Arthur Goldberg's concurring opinion in *Griswold*, which convincingly argued that the Ninth Amendment's sweeping protection of unenumerated rights includes marital privacy rights.[364] The Amendment unequivocally condemns laws and practices that intrude on marital autonomy because such restrictions resemble the coercion of involuntary servitude. The Thirteenth Amendment's first section provides the judiciary with the power to hear cases against individuals, officials, or governmental entities who use arbitrary characteristics, such as race, to intrude on conjugal rights.[365]

The Thirteenth Amendment is relevant in other family autonomy contexts as well. Its applicability is clear, for example, in the area of parental autonomy over children's education. Theodore Weld, in 1839, exclaimed that enslaved parents had "as little control over [their children] as have domestic animals over the disposal of their young."[366] Slave parents were particularly restrained from educating their children. Indeed, many states forbade slaves from receiving any form of education.[367] Parents held in bondage were altogether prohibited from teaching their children to read and write. Such a practice prohibited parents from helping offspring achieve their potential for private and public accomplishments.

As we saw earlier, the Supreme Court in *Runyon v. McCrary* recognized the Thirteenth Amendment's applicability to parental deci-

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[363] United States v. Virginia, 518 U.S. 515, 557 (1996) (citing RICHARD MORRIS, THE FORGING OF THE UNION, 1781–1789, at 193 (1987)).

[364] *See* 381 U.S. at 486–87 (Goldberg, J., concurring).

[365] FRANKFURTER, *supra* note 362, at 2; Felix Frankfurter, *Taft and the Supreme Court*, *in* FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 49, 61 (Philip B. Kurland ed., 1970).

[366] WELD, *supra* note 76, at 56.

[367] Some African Americans did learn clandestinely, many of them with the help of sympathetic or self-interested whites. African Americans often demonstrated resourcefulness in using linguistic skills to elevate themselves from slavery and cultural prejudices. *See* Kimberly Rae Connor, *To Disembark: The Slave Narrative Tradition*, 30 AFR.-AM. REV. 35, 36 (1996); Joyce E. Williams & Ron Ladd, *On the Relevance of Education for Black Liberation*, 47 J. NEGRO ED. 266, 266 (1978). In the South, general education for blacks began only in 1861 in Fortress Monroe, Virginia. Ellis O. Knox, *A Historical Sketch of Secondary Education for Negroes*, 9 J. NEGRO ED. 440, 445 (1940). Masters would sometimes amputate the digits of slaves whom they caught learning to read. Janet Cornelius, *"We Slipped and Learned to Read": Slave Accounts of the Literacy Process, 1830–1865*, 44 PHYLON 171, 174 (1983). Whites usually helped blacks, like Charity Jones, who learned to read and write. *Id.* at 176. These "teachers" were typically the adolescent playmates of blacks. *Id.*

sions over their children's education.[368] The plaintiffs were parents who wanted to contract for education with a private school. The Court held that the Civil Rights Act of 1866 prohibited the school from refusing to enroll the children on racial grounds.[369] The Court concluded that parents have the liberty right to enter contractual agreements with the school of their choosing.

The Court could have refined its reasoning with a discussion of the disadvantages that slaves faced and the Act's liberating purposes. Rather than basing its decision on contract rights, the Court should have defined the universal human right to educate one's children. After all, parents' rights go well beyond the right to contract for their children's education and include a privacy interest in improving their children's lives.

Indeed, a whole series of parental autonomy cases fit the Thirteenth Amendment's criteria so well as to make it plausible that courts could find unconstitutional arbitrary restrictions on parental autonomy, even absent congressional action. This would require the Court to recognize that Section 1 grants the judiciary deliberative powers, which, in turn, could have significant ramifications on litigants' ability to sue under the Amendment, especially in those circumstances where Congress has failed to address educational discrimination.

Other parental autonomy cases regarding educational issues do rely on broad historical reasoning that the Thirteenth Amendment can buttress. In *Meyer v. Nebraska*, the Court struck down a state law that forbade teaching students a language other than English before they finished the eighth grade.[370] The Court relied on the liberty protection of the Due Process Clause and decided the law violated the parents' right to decide how to educate their children.[371] The decision is somewhat ambiguous because the majority did not attempt "to define with exactness the liberty thus guaranteed."[372] The Court provided a more useful criterion in *Wisconsin v. Yoder*, where the Court invalidated a state law requiring children to attend school until the age of sixteen.[373] The Court held that the law violated Amish parents'

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[368] 427 U.S. at 175–77; *see supra* notes 175–180 and accompanying text.

[369] *Runyon*, 427 U.S. at 168, 172–73 (stating that the Thirteenth Amendment granted Congress the authority to pass § 1981, which "prohibits racial discrimination in the making and enforcement of private contracts").

[370] 262 U.S. 390, 396–97, 403 (1923).

[371] *Id.* at 399–400, 403.

[372] *Id.* at 399.

[373] 406 U.S. 205, 207, 213–15 (1972).

rights to exercise parental control and religious authority.[374] The Court stated that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children."[375] Using similar reasoning in *Santosky v. Kramer*, the Court noted "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child."[376] And it reiterated the "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."[377]

The Court clothed these cases in the historical recognition that the government must not interfere with parental decisions absent a compelling state interest. Thirteenth Amendment analysis could better link that aspect of American legal history to specific constitutional landmarks. Such an analysis would reflect on the institutional denial of parental autonomy in the antebellum United States and consider critically whether barring parents from particular educational or custody decisions resembles the conditions of involuntary servitude. The liberation from slavery extended to all parents the freedom to make critical decisions about their children's education. The Thirteenth Amendment approach, then, may be even better grounded in U.S. history than the one based on the Fourteenth Amendment. The Thirteenth Amendment sifts through specifics rather than generalities and has the further advantage of providing a cause of action against public and private schools.

I am not advocating abandoning the generalities of the Fourteenth Amendment where they are applicable. The point, rather, is that many parental autonomy cases that typically are analyzed under the Fourteenth Amendment could be made less vulnerable to criticism by bringing the Thirteenth Amendment's self-executing first section into the judgment or, preferably, by enacting federal family protections pursuant to the second section.[378]

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[374] *Id.* at 232–33.

[375] *Id.* at 232.

[376] 455 U.S. 745, 753 (1982).

[377] *Id.*

[378] Federal family protection passed under the Thirteenth Amendment should focus on private acts. The Court recently held that sovereign immunity does not shield a state from complying with the FMLA. *Hibbs*, 123 S. Ct. at 1974. The Court determined that Congress's use of its Fourteenth Amendment Section 5 power in order to prevent gender discrimination under the FMLA was congruent or proportional to the injury the Act forbids and the means adopted to that end. *Id.* The Court stated:

> Unlike the statutes at issue in *City of Boerne*, *Kimel*, and *Garrett*, which applied broadly to every aspect of state employers' operations, the FMLA is narrowly

Although greater methodological certainty makes the Thirteenth Amendment an attractive alternative for civil rights strategists, it is not the best alternative for all cases related to family life and reproduction. Some cases do not fall under the Amendment's ambit, even though at first they seem to fit it. For example, in *Skinner v. Oklahoma*, the Court appropriately resorted to the Equal Protection Clause of the Fourteenth Amendment to find an Oklahoma law requiring "habitual criminals" to undergo sterilization violated their fundamental right to procreate.[379] "We are dealing here" the majority wrote, "with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[380] The decision remains open to critics like Bork, who criticized the Court for failing adequately to ground the right to procreate, thereby enabling judges to exploit "substantive equal protection" to "embed their notions of public policy in the Constitution."[381] Bork's criticism would be entirely inapplicable to a Thirteenth Amendment prohibition against the arbitrary infringement of liberty rights. His textualist argument, which rests on the premise that there is no constitutional guarantee to procreate, comes undone at the infusion of Thirteenth Amendment analysis. Masters interfered with many aspects of their slaves' procreation. They castrated slaves with relative equanimity because it was generally considered a medical procedure that masters could perform on chattel.[382] Further, some states permitted castration

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> targeted at the fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship. Also significant are the many other limitations that Congress placed on the FMLA's scope.

Id. at 1975. The FMLA, the Court continued,

> applies only to employees who have worked for the employer for at least one year and provided 1,250 hours of service within the last 12 months, § 2611(2)(A); and does not apply to employees in high-ranking or sensitive positions, including state elected officials, their staffs, and appointed policymakers, §§ 2611(2)(B)(i) and (3), 203(e)(2)(C)).

Id. No such restriction is applicable to the Thirteenth Amendment because it prohibits all incidents and badges of servitude, regardless of the employer's characteristics or the time for which a victim was exploited.

[379] 316 U.S. 535, 541–43 (1942).

[380] *Id.* at 541.

381 ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 63–64 (1990).

[382] Barbara L. Bernier, *Class, Race, and Poverty: Medical Technologies and Socio-Political Choices*, 11 HARV. BLACKLETTER L.J. 115, 121 (1994).

as part of the punishment for black rape of white women.[383] Thus, impediments to procreation interfere with a free life.

In spite of this seeming fit, the problem of using the Thirteenth Amendment in cases like *Skinner* or *Turner v. Safley*, which found that prisoners retain the right to marry under the Fourteenth Amendment, is that they both dealt with prisoners' rights.[384] Even where limiting marriage and procreation rights has some resemblance to the incidents of servitude, the first section of the Thirteenth Amendment does not protect persons who have been duly convicted of crimes.[385] This is a disturbing conclusion for human rights activism, making the Fourteenth Amendment the best means for convicted criminals to proclaim their limited right to exercise fundamental freedoms. Further, it presents a dilemma that can be rectified only by amending the Thirteenth Amendment's exception for the use of involuntary servitude "as a punishment for crime whereof the party shall have been duly convicted."[386]

A historically based interpretation of the Thirteenth Amendment also protects liberty rights other than those linked to family relations. Right-to-travel cases further indicate that the Thirteenth Amendment is a substantive guarantee of freedom. Justice William Douglas found the right to travel abroad and within the United States was "a part of our heritage" that the Due Process Clause of the Fifth Amendment protects.[387] In *Kent v. Dulles*, he explained the subtle nature of that right: "Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values."[388] Justice Douglas did not, however, provide a reason for finding that right in the Bill of Rights.[389] Indeed, slaves' in-

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[383] JORDAN, *supra* note 24, at 154, 156, 473.

[384] *See Turner*, 482 U.S. 78, 91 (1987).

[385] "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." U.S. CONST. amend. XIII, § 1.

[386] The Senate Committee of the Judiciary, under the leadership of Lyman Trumbull, borrowed the first clause of the Thirteenth Amendment from the Northwest Ordinance of 1787. *See* HORACE WHITE, THE LIFE OF LYMAN TRUMBULL 224 (1913).

[387] *See* Kent v. Dulles, 357 U.S. 116, 126–27 (1958). Justice Douglas had a long-standing commitment to civil rights. Drew S. Days III, *William O. Douglas and Civil Rights*, *in* "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 109–17 (Stephen L. Wasby ed., 1990) (documenting Justice Douglas's civil rights opinions and the Court's responses).

[388] 357 U.S. at 126.

[389] *See id.* at 126–27.

ability to freely travel without their masters' permission indicates that the Fifth Amendment did not adequately protect that right.

Slaves were restricted from relocating. Even those slaves who worked for their masters outside the homestead or plantation only traveled at the masters' sufferance.[390] After liberation, many blacks wandered in the country and settled in cities away from their plantations. The newly freed people desired freedom from manacles and the ability to live and work where they wished. Often they were financially strapped, but preferred freedom to the security of their old homes.

This was the situation Sidney Andrews found during his travels in 1866, while reporting on the defeated South.[391] Throughout Georgia he found many freedpeople who were living in destitution after leaving their former homes.[392] "Who shall have the heart to blame them?" Andrews asked rhetorically.[393] "For they were in search of nothing less noble and glorious than freedom. They were in rags and wretchedness, but the unquenchable longing of the soul for liberty was being satisfied."[394] Andrews asked one elderly woman why she had left a mistress who "would have given you a good home as long as you live."[395] To the freewoman the response seemed obvious, "What fur? *'Joy my freedom.*"[396] In another place, he found eleven people living in a hut with rags for bedding.[397] To Andrews's inquiry about whether he had a kind master, an elderly inhabitant responded, "I's had a berry good master, mass'r, but ye see I's wanted to be free man."[398]

Another narrative tells of an elderly slave, named Si, who left a plantation one night with his wife.[399] In the morning, the master came across Si bending down in a nearby forest by his deceased wife, who

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[390] Slaves who left their masters' homesteads or plantations were required to carry passes or wear badges. Christopher Morris, *The Articulation of Two Worlds: The Master-Slave Relationship Reconsidered*, 85 J. AM. HIST. 982, 1000 (1998); Robert Starobin, *Disciplining Industrial Slaves in the Old South*, 53 J. NEGRO HIST. 111, 114 (1968). Literate slaves wrote passes for themselves and others, always subject to severe disciplinary measures if they were discovered. *See* David Waldstreicher, *Reading the Runaways: Self-Fashioning, Print Culture, and Confidence in Slavery in the Eighteenth-Century Mid-Atlantic*, 56 WM. & MARY Q. 243, 263 (1999).

[391] SIDNEY ANDREWS, THE SOUTH SINCE THE WAR 350–53 (Houghton Mifflin Co. 1971) (1866).

[392] *Id.* at 350–51.

[393] *Id.*

[394] *Id.* at 351–53.

[395] *Id.*

[396] ANDREWS, *supra* note 391, at 350–51.

[397] *Id.*

[398] *Id.*

[399] OCTAVIA V. ROGERS ALBERT, HOUSE OF BONDAGE 134–35 (Oxford Univ. Press 1988) (1890).

had died of exposure.[400] "'Uncle Si, why on earth did you so cruelly bring Aunt Cindy here for, through all of such hardship, thereby causing her death?' Lifting up his eyes and looking his master full in the face, he answered, 'I couldn't help it, marster; but then, you see, she died free.'"[401]

After the ratification of the Thirteenth Amendment in 1865, states could no longer arbitrarily deny citizenship or access into their borders. Senator Trumbull explained during an 1866 congressional debate that the Thirteenth Amendment's enforcement power allowed Congress to pass laws that would, in effect, prevent racist isolationism in both the North and South:

> It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights. These are rights which the first clause of the constitutional amendment meant to secure to all; and to prevent the very cavil which the Senator from Delaware suggests today, that Congress would not have the power to secure them, the second section of the amendment was added.[402]

Even after the Thirteenth Amendment's ratification, states clandestinely evaded the Amendment's grant of freedom and placed legal barriers limiting freedpeople's movement.[403]

In 1865 and 1866, all former Confederate States, except Tennessee and Arkansas, passed sweeping vagrancy laws.[404] These made any poor man who did not have a labor contract subject to discretionary arrest.[405] Vagrancy laws disproportionately targeted unemployed blacks and were designed to keep them from leaving their former masters' plantations.[406] Some Southern cities enacted similar ordinances designed to thwart black movement. The mayor of Mobile, Alabama warned vagrants that if they did not find employment or leave that city, they would be arrested and forced to work on public streets.[407] Other towns had similar punishments to prevent blacks from staying in urban areas. Nashville, Tennessee and New Orleans, Louisiana sent black "va-

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[400] *Id.*

[401] *Id.*

[402] CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865).

[403] William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J. S. HIST. 31, 47 (1976).

[404] *Id.*

[405] *Id.*

[406] *Id.* at 33–34.

[407] LITWACK, *supra* note 181, at 318–19.

grants" to workhouses.[408] San Antonio, Texas and Montgomery, Alabama required that they work on the streets to pay for the expense of keeping them in jails.[409] In a move reminiscent of the antebellum system of passes, without which slaves could not leave their masters' property, some cities arrested any blacks who stayed out on the streets after curfew without their employer's permission.[410] This scheme was meant as much to inhibit blacks from intrastate and interstate travel as it was to perpetuate a system of involuntary servitude.[411]

The Court has recognized that the right to travel is "firmly established and repeatedly recognized."[412] Similar to the family privacy cases, the Court has found support for protecting the right to travel in a variety of constitutional provisions, including the Privileges and Immunities Clause, the Due Process Clause, the Equal Protection Clause, and the Commerce Clause.[413]

Shapiro v. Thompson involved a state welfare-eligibility provision that imposed a one-year residency requirement.[414] The Court ruled that absent a compelling interest, state interference with the fundamental right to travel violated the Equal Protection Clause.[415] In another case, *Saenz v. Roe*, dealing with the availability of welfare benefits to persons who recently moved to a new state, the Court ruled that prohibitions on the right to travel violated the constitutionally guaranteed privileges and immunities of newly arrived citizens.[416] The Court majority in *United States v. Guest* found that the constitutional right to travel "and necessarily to use the highways and other instrumentalities of interstate

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[408] *Id.* at 319.

[409] *Id.*

[410] *Id.*

[411] *See* Amy Dru Stanley, *Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America*, 78 J. AM. HIST. 1265, 1293 (1992) ("Under the vagrancy laws, the state enforced the sale of labor—through an involuntary exchange—wherever beggars contrived to avoid the natural sanctions of hunger and cold.").

[412] United States v. Guest, 383 U.S. 745, 757 (1966).

[413] Saenz v. Roe, 526 U.S. 489, 501 (1999) (concluding the right to travel derives from the Privileges and Immunities Clause of Article IV, section 2); *Guest*, 383 U.S. at 758–59 (concluding the right to travel exists in the Commerce Clause's protection of free movement); Zemel v. Rusk, 381 U.S. 1, 14 (1965) (indicating the right to travel exists in the Fifth Amendment); Twining v. New Jersey, 211 U.S. 78, 96–97 (1908) (concluding the right to travel derives from the Fourteenth Amendment); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869) (concluding the right to travel derives from the Privileges and Immunities Clause of Article IV, section 2).

[414] 394 U.S. at 629–31.

[415] *Id.* at 638; *see also id.* at 657 (Harlan, J., dissenting) (stating that "the Court basically relies upon the equal protection ground").

[416] 526 U.S. at 502–03, 509–11.

commerce in doing so, occupies a position fundamental to the concept of our Federal Union."[417] The majority linked the right to travel to the Commerce Clause because it regarded "the constitutional right of interstate travel [as] a right secured against interference from any source whatever, whether governmental or private. . . . that is quite independent of the Fourteenth Amendment."[418] The Court's preference for the Commerce Clause as the source of the right to travel again artificially linked a fundamental right to an economic power rather than to a human interest existing independently of governmental powers.

Of course, it is accurate that limits on travel can be both detrimental to commerce and violate citizens' privileges and immunities, but, to date, the Supreme Court has inadequately examined the connection between slavery and restraints on movement. A Thirteenth Amendment approach on the right to free travel adds a needed reflection on whether impediments to free movement resemble the burdens of involuntary servitude. This approach recognizes that some extreme burdens on the right to move about freely can resemble the constraints of enslavement.

In *Griffin v. Breckenridge*, the Court nearly acknowledged the connection between the Thirteenth Amendment and right to travel, but failed to make the logical connection between them.[419] The case dealt with a racially motivated assault perpetrated on a public highway.[420] In his opinion, Justice Potter Stewart referred to several right-to-travel cases, including *Shapiro*, and found that "[o]ur cases have firmly established that the right of interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference."[421] Furthermore, Justice Stewart determined that Congress had the power to create a cause of action against private, racially motivated conspiracies under § 1985(3), the Ku Klux Klan Act.[422]

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[417] 383 U.S. at 757. Justice John Harlan, who concurred in part and dissented in part to the *Guest* opinion, found there was a right to travel in two constitutional provisions: "It is accordingly apparent that the right to unimpeded interstate travel [is] regarded as a privilege and immunity of national citizenship. . . . A second possible constitutional basis for the right to move among the States without interference is the Commerce Clause." *Id.* at 767 (Harlan, J., concurring in part and dissenting in part).

[418] *Id.* at 759 n.17.

[419] *See generally* 403 U.S. 88 (1971).

[420] *Id.* at 89–92.

[421] *Id.* at 102, 105–06.

[422] *See id.* at 104.

In later years, the Court explained that "the conspiracy at issue [in *Griffin*] was actionable because it was aimed at depriving the plaintiffs of rights protected by the Thirteenth Amendment and the right to travel guaranteed by the Federal Constitution."[423] The clear indication in *Griffin* is that the right to travel and the Thirteenth Amendment granted Congress the authority to pass the Ku Klux Klan Act, thereby providing redress against individual conspiracies that interfere with movement—even absent a state action, negative effects on commerce, or interference with the privileges and immunities of national citizenship. The case is unclear, however, as to why the right to travel should be separated from core Thirteenth Amendment interests. This dichotomy is particularly obscure because Congress passed the Ku Klux Klan Act, in part, pursuant to the Thirteenth Amendment.[424] The Amendment, therefore, was a logical place for the Court to find congressional power to prohibit conspirators from interfering with citizens' right to travel.

The Court has located the right to travel in so many constitutional provisions because, like family autonomy, it is a fundamental interest that the state must protect. The right to live free of arbitrary impediments that prevent the enjoyment of such interests sometimes implicates the protection of the Thirteenth Amendment. Securing "the blessings of liberty" is a national aspiration to which the Preamble to the Constitution commits the federal government. The Amendment made that national aspiration enforceable against state and private infringements. The Amendment enhances, clarifies, and enforces contemporary civil rights decisions.

Conclusion

The Thirteenth Amendment continues to be a source of sweeping constitutional power for enacting federal civil rights legislation. This Article suggests a progressive Thirteenth Amendment theory that relies on existing precedents and abolitionist aspirations. The Amendment drastically altered the Constitution and became the legal causeway from slavery to freedom.[425] Its first section eliminated, or

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[423] United Bhd. of Carpenters v. Scott, 463 U.S. 825, 832–33 (1983).

[424] *Griffin* established at least two constitutional bases for the Ku Klux Klan Act. Those are the Thirteenth Amendment and the Commerce Clause. *Griffin*, 403 U.S. at 105–07.

[425] Sanford Levinson, Constitutional Faith 139 (1988) ("The conflict of 1861, among other things, divides our constitutional history, and some historians refer to the 'first' and 'second' Constitutions. The first Constitution—that of 1787—was predicated, among other things, on federalism and recognition of slavery; the second Constitution, on an enhanced national government and individual liberty.").

more euphemistically amended, all the federalist provisions of the 1787 Constitution that protected slavery. The Amendment's second section provided the U.S. Congress with the power to protect individual rights and thereby better the nation. Accordingly, the Thirteenth Amendment secured two fundamental principles, which both emanated from the Preamble. The first principle protects the right to unobtrusive autonomy in carrying out deliberative decisions. The second principle limits autonomy whenever it arbitrarily interferes with other citizens' sense of purpose. The guarantee of freedom protects individual choices as long as they do not infringe on the coequal liberty rights of others. This approach balances autonomy with welfare to achieve a liberating sense of mutual purpose for civil society.

The Thirteenth Amendment, thus, not only ended slavery but also created a substantive assurance of freedom. It prohibits all the vestiges of involuntary slavery, whether imposed by public or private actors, and grants Congress the right to enact laws, making "universal liberty" a matter of national concern, not merely of state prerogative. The Thirteenth Amendment not only secures delineated civil freedoms, such as those specifically enumerated in the Bill of Rights, but also secures freedom from all forms of arbitrary domination. In this regard, legislative initiatives must balance individual liberties against the national interests of a diverse but equally free people. The Enforcement Clause of the Thirteenth Amendment provides lawmakers with the power to craft laws tied to the Declaration of Independence's ideal of a free and equal citizenry. The Framers of the Thirteenth Amendment refined that idea to include persons of all races.[426]

The Thirteenth Amendment's liberty guarantee is expansive enough for each generation to abolish continued coercive practices, not just those the Thirty-Eighth Congress recognized when it debated the Thirteenth Amendment. Indeed, the range of liberty rights the Thirteenth Amendment secures is just as broad as those the Due Process Clause guarantees. Accordingly, Justice Harlan's description of a broad concept of freedom in the context of the Due Process Clause bears striking resemblance to the description of freedom his grandfa-

[426] The Republican Party's decision after the Civil War to use the language of the patriarchal family structure helped maintain some of the unequal civil structure that existed in antebellum U.S. *See* LAURA F. EDWARDS, GENDER STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION 184–85 (1997). On the decision of the women's rights movements to move from joining race and gender issues to an insistence of specific gender rights, see generally Ellen C. DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820–1878*, 74 J. AM. HIST. 846 (1987).

ther expounded in the dissents to the *Civil Rights Cases*, *Plessy v. Ferguson*, and *Hodges v. United States*. Our nation, Harlan wrote in dissent to *Poe v. Ullman*, balances

> respect for the liberty of the individual . . . and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. . . . [T]he imperative character of Constitutional provisions . . . must be discerned from a particular provision's larger context. . . . '[L]iberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .[427]

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[427] 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting). Compare Justice Harlan's statement from *Poe* with his grandfather's arguments in other dissents. For example, in the *Civil Rights Cases*, his grandfather stated:

> [T]he power conferred by the thirteenth amendment does not rest upon implication or inference. Those who framed it were not ignorant of the discussion, covering many years of the country's history, as to the constitutional power of congress to enact the fugitive slave laws of 1793 and 1850. When, therefore, it was determined, by a change in the fundamental law, to uproot the institution of slavery wherever it existed in this land, and to establish *universal freedom*, there was a fixed purpose to place the power of congress in the premises beyond the possibility of doubt.

109 U.S. 3, 33–34 (1883) (emphasis added) (Harlan, J., dissenting). In his dissent in *Plessy*, he wrote:

> The thirteenth amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It 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. It decreed universal civil freedom in this country. . . . The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race.

The constitutional right to freedom, then, is linked to this country's struggle to break with racial enslavement and to its moral growth through the Reconstruction Amendments.

The Thirteenth Amendment prohibits all repressive conduct rationally related to the impediments of freedom, not simply racist labor practices.[428] The Amendment's protections apply to anyone who is subject to arbitrary restraints against the enjoyment of freedom. Congress must only find that those restraints resemble the badges and incidents of involuntary servitude. Laws passed pursuant to the Thirteenth Amendment should protect free and equal persons' conceptions of, and quests for, qualitatively good lives. Masters had suppressed slaves' life aspirations, prohibiting them from entering into marital contracts, from choosing professions, and from making a host of other important life decisions. Slavery devalued the commitment of our pluralistic society to respect the individual and collective right to live free of arbitrary intrusion on freedom. Consequently, laws passed under Section 2 against any badges of involuntary servitude must make it easier for people to express their individuality and prevent arbitrarily domineering private and state actions.

The Thirteenth Amendment's legislative process must reflect on the nation's history to evaluate whether the U.S. has cleansed itself of all vestiges of involuntary servitude. With those vestiges that remain,

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163 U.S. 537, 555, 560 (1896) (Harlan, J., dissenting). And in *Hodges*, he said that the Thirteenth Amendment

> conferred upon every person within the jurisdiction of the United States (except those legally imprisoned for crime) the right, without discrimination against them on account of their race, to enjoy all the privileges that inhere in freedom. It went further, however, and by its second section, invested Congress with power, by appropriate legislation, to enforce its provisions. . . . It may be also observed that the freedom created and established by the Thirteenth Amendment was further protected against assault when the Fourteenth Amendment became a part of the supreme law of the land; for that Amendment provided that no state shall deprive any person of life, liberty or property, without due process of law. To deprive any person of a privilege inhering in the freedom ordained and established by the Thirteenth Amendment is to deprive him of a privilege inhering in the liberty recognized by the Fourteenth Amendment.

203 U.S. 1, 27–28 (1906).

[428] The Abolition Amendment freed slaves from much more than their obligation to engage in unrequited labor. It ended all incidents of servitude such as the forced limitations on slaves' right to practice religion, hire out their labor, and leave their plantations without permission. *Cf.* KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 208 (1956).

expiation must come from enacting, and then enforcing, laws rationally designed to end the oppressions.

An evolving understanding of how best to protect fundamental rights and improve social harmony should inform congressional and judicial interpretation of the Thirteenth Amendment. Such an aim comports with the Preamble's assertion that the national government's purpose is to secure the blessing of liberty and to promote the general welfare. Civil rights laws should be passed and judged pursuant to this dual purpose of national government.

Congress thus far has done little to fulfill its role under the Thirteenth Amendment, and only a handful of cases interpret it. With only a smattering of meaningful laws passed to effectuate the Amendment, its potency remains minimal but its potential is great. In spite of more than a century of virtual neglect, the Amendment has a deep-reaching effect on the constitutional significance of liberty.

At a time of judicial activism, which has resulted in narrowly construed congressional Commerce Clause and Fourteenth Amendment Section 5 powers, *Jones v. Alfred H. Mayer Co.* and the handful of cases it engendered remain wholly intact. *Jones*'s ruling that the Thirteenth Amendment grants Congress broad power to pass necessary and proper laws rationally related to the incidents of servitude is still virtually untapped. The Thirteenth Amendment is uniquely suited for combating contemporary infringements against civil liberties, some of which I discuss elsewhere.[429] It reaches private acts of discrimination, which the Rehnquist Court asserted Congress cannot regulate under Section 5 of the Fourteenth Amendment, and it is not subject to the "economic enterprise" interpretation that the U.S. Supreme Court has recently associated with the Commerce Clause.

[429] Federal prohibitions against hate crimes, state use of confederate symbols, and the enslavement of migrant farmers are some of the proposals I make in TSESIS, *supra* note 11, at ch. 7. *See also* Tsesis, *supra* note 3, at 545–58.