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ARTICLES

FREEDOM TO INTEGRATE: A DESEGREGATIONIST PERSPECTIVE ON THE THIRTEENTH AMENDMENT

*Alexander Tsesis**

I. INTRODUCTION

THE ratification of the Thirteenth Amendment offered an opportunity to end all practices associated with racial subordination, including the desegregation of public places. While the Amendment explicitly grants Congress the power only to abolish the incidents and badges of slavery and involuntary servitude, its significance extends to a variety of federal civil rights initiatives.

Almost immediately after the Thirteenth Amendment was ratified, the Reconstruction Congress relied on it to secure the rights to contract, to purchase property, and to serve on juries. Shortly thereafter, congressional efforts began to abolish existing segregation because of its tendency to perpetuate the badges of slavery. The first opportunity to desegregate public places arose in the early 1870s when Charles Sumner introduced a bill that eventually became the Civil Rights Act of 1875.¹ Congress passed that statute pursuant to the Thirteenth and Fourteenth Amendments, but the anti-Reconstruction Supreme Court found it to be unconstitutional in 1883.² Scholars have thoroughly studied the significance of the Fourteenth Amendment to the 1875 statute,³ but they have given little notice to the Thirteenth Amendment's role in the nineteenth century struggle against segregation. While *Brown v. Board of Education*⁴ and its progeny broadened the reach of the Fourteenth Amendment, there has been little effort to recognize the Thirteenth Amendment's contemporary relevance.⁵

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1. Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335 (Mar. 1, 1875).

2. *The Civil Rights Cases*, 109 U.S. 3, 11, 26 (1883).

3. See, e.g., A.K. Sandoval-Strausz, *Travelers, Strangers, & Jim Crow: Law, Public Accommodations, & Civil Rights in America*, 23 LAW & HIST. REV. 53, 57-62 (2005).

4. 347 U.S. 483, 495 (1954).

5. But see several efforts to review the Thirteenth Amendment in a contemporary context: ALEXANDER TSESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* 137-60 (2004); Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1848 (2006); Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307,

Jim Crow had free reign until the 1950s when the Supreme Court began dismantling it; its legal demise came with the Civil Rights Act of 1964's provision prohibiting segregation. While the Thirteenth Amendment remains neglected in all but contractual cases, it is a viable means of congressional civil rights initiatives whose scope can be clarified by examining why the Reconstruction Congress relied on it for desegregation.

II. SEGREGATION IN ANTEBELLUM UNITED STATES

The Thirteenth Amendment was important not merely because it ended slavery, but also because it provided Congress with the power to prohibit any private or institutional conduct associated with slavery.⁶ Slavery ended, but its vestiges lingered because the institution had been intrinsic to southern culture, law, and labor relations. Slavery was the greatest segregating instrument, keeping blacks from enjoying the emoluments of citizenship. Even though the Civil War brought about the demise of slavery, the institution resisted defeat. As C. Vann Woodward identified, racism became the tool of repression until states codified laws to keep blacks and whites separated.⁷

There were some antebellum southern cities, such as Charleston, South Carolina and New Orleans, Louisiana, where black and white neighbors intermingled.⁸ That, however, was the rare exception; the norm was systematic exclusion of blacks from the life of ordinary citizens. Violence, terror, legal compulsion, and local custom perpetuated segregation. Many relied on racial supremacy to exclude persons from employment opportunities, equal social

358-59 (2004), reprinted in CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK (Steven Saltzman ed., 2004); Alexander Tsesis, *Regulating Intimidating Speech*, 41 HARV. J. ON LEGIS. 389, 400 (2004); Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 594 (2002); James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1, 119-20 (2002); Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 1007 (2002); Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 12 (1995); Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 HARV. L. REV. 1359, 1364 (1992); Akhil Reed Amar, *The Case of the Missing Amendment: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 157 (1992).

6. The Thirteenth Amendment contains two sections:

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.

7. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 13-95 (rev. ed. 1957). See also Roger A. Fischer, *Racial Segregation in Ante Bellum New Orleans*, 74 AM. HIST. REV. 926, 937 (1969) (concerning the post-Reconstruction use of Louisiana state segregation provisions somewhat similar to antebellum local segregation).

8. IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 254, 256 (1974).

interaction, and the privileges of citizenship. Only when slaves accompanied masters could they use white hotels and railcars.⁹ In other public situations, blacks and whites stayed strictly apart. A Richmond, Virginia ordinance forbade blacks from “driving, using, or riding in any hackney coach or other carriage for hire unless in the capacity of a servant.”¹⁰ Legislatures partly enacted laws against educating blacks to read and write to keep them from engaging whites in conversations about the religion, news, novels, or politics.¹¹ The intellectual degrading of blacks enabled whites to speak down to them as subordinates, unworthy of equal station and social intercourse.¹²

Where blacks and whites could come in contact, custom gave white patrons priority over black patrons. For example, on a steamboat headed from New Orleans into the Red River country, a critic of slavery wrote that black passengers slept on freight while white passengers slept in cabins or deck cots.¹³ This arrangement carried over to mealtimes when white passengers received service first, then white crew and officers, followed by free blacks, and finally slaves.¹⁴ A personal journal of Georgia plantation life told of slave laborers separated from whites both on the plantation and for hired-out labor.¹⁵ The law prohibited any free black laborer in Savannah from working as a “Carpenter, Mason, Bricklayer, Barber” or doing “any other Mechanical Art.”¹⁶ The Georgia General Assembly passed an 1818 misdemeanor law prohibiting “colored mechanics and masons, being slaves or free persons of color ... from making contracts for the erection of buildings, or for the repair of buildings, and ... the white person or persons [from] directly or indirectly contracting with or employing them.”¹⁷ The 1823 New Orleans City Council directed the mayor “to

9. See ROGER A. FISCHER, *THE SEGREGATION STRUGGLE IN LOUISIANA, 1862-77*, at 5 (1974).

10. Richard C. Wade, *Urban Segregation During Slavery*, in *THE ORIGINS OF SEGREGATION* 81, 81 (Joel Williamson ed., 1968) (quoting RICHARD C. WADE, *SLAVERY IN THE CITIES: THE SOUTH, 1820-1860*, at 266-77 (1964)).

11. Janet Cornelius, *We Slipped & Learned to Read: Slave Accounts of the Literacy Process, 1830-1865*, 44 *PHYLON* 171, 174 (1983).

12. Senator Francis Gillette made a similar point, while making the case to the Senate for abolishing slavery in the District of Columbia in 1855:

Ignorant! Who has doomed them to ignorance? Debased! Who has sunken them to debasement? They, be it understood, who have brought all the sanctions of law and custom to crush them; who have snatched from them the key of knowledge, and closed every avenue to their elevation and advancement. Put out the eyes of men, and then tell them scornfully that they are blind. Extinguish the Promethean fire in their souls, and then tell them tauntingly that they are darkened and debased.

CONG. GLOBE, 33d Cong., 2d Sess. app. 230 (1855).

13. FISCHER, *supra* note 9, at 5 (discussing FREDERICK LAW OLMSTED’S *A JOURNEY THROUGH THE SEABOARD SLAVE STATES* (1856)).

14. *Id.*

15. FRANCIS A. KEMBLE, *JOURNAL OF A RESIDENCE ON A GEORGIAN PLANTATION IN 1838-1839*, at 123 (John A. Scott ed., 1961) (1863).

16. Wade, *supra* note 10, at 85.

17. THOMAS D. BOSTON, *AFFIRMATIVE ACTION AND BLACK ENTREPRENEURSHIP* 64 (1999).

hire white labor for the city works, in preference to negroes.”¹⁸ In the cities, governments perpetrated segregation in the name of culture or ordinance. In Savannah, an 1827 ordinance forbade “negroes, mulattoes, or other colored persons” from “the public promenade in South Broad [S]treet, or on that leading from thence to the Hospital.”¹⁹

Historian Isaiah Berlin documents locales where separate schools, libraries, railroads, business fairs, lunatic asylums, and penitentiaries kept blacks apart from whites.²⁰ An 1816 New Orleans city ordinance codified an exclusionary tradition in public places of accommodation. It forbade “any white person to occupy any of the places set apart for people of color; and the latter” were “likewise forbidden to occupy any of those reserved for white persons.”²¹ New Orleans likewise excluded free blacks from the public school system, which was established in the 1840s.²² Throughout the South, churches separated blacks and whites. Blacks typically sat in the back pews.²³ Churches regularly excluded black children from social events at Sunday schools.²⁴

Outside the South, Alexis de Tocqueville, traveling in the United States in 1831 at the age of twenty-five, discovered racial segregation in schools, theaters, hospitals, churches, and cemeteries. He realized that simple emancipation would not be enough to integrate them into democracy, “So the Negro is free” in the North, “but he cannot share the rights, pleasures, labors, griefs, or even the tomb of him whose equal he has been declared.”²⁵ Even a progressive state like Massachusetts administered segregated schools until 1845,²⁶ and Boston continued segregating black students until 1855.²⁷ Segregation only became uncommon on Massachusetts railroads in 1842.²⁸ On the Hudson River steamers, blacks could only find spots on deck, regardless of inclement weather, while whites could stay in cabins.²⁹

18. Wade, *supra* note 10, at 85.

19. *Id.* at 82.

20. BERLIN, *supra* note 8, at 322-23.

21. A WHOLE COUNTRY IN COMMOTION: THE LOUISIANA PURCHASE AND THE AMERICAN SOUTHWEST 115 (Patrick G. Williams et al. eds., 2005). See also CARYN COSSE BELL, REVOLUTION, ROMANTICISM, AND THE AFRO-CREOLE PROTEST TRADITION IN LOUISIANA, 1718-1868, at 77 (2004).

22. A WHOLE COUNTRY IN COMMOTION, *supra* note 21, at 115.

23. EDWIN G. BURROWS & MIKE WALLACE, GOTHAM: A HISTORY OF NEW YORK CITY TO 1898, at 548 (1998).

24. FISCHER, *supra* note 9, at 6.

25. James L. Crouthamel, *Tocqueville's South*, 2 J. EARLY REPUBLIC 381, 396 (1982). See also Richard W. Resh, *Alexis De Tocqueville and the Negro: Democracy in America Reconsidered*, 48 J. NEGRO HIST. 251, 256-57 (1963).

26. Carleton Mabee, *A Negro Boycott to Integrate Boston Schools*, 41 NEW ENG. Q. 341, 345 (1968).

27. *Id.* at 356; Leon F. Litwack, *The Abolitionist Dilemma: The Antislavery Movement & the Northern Negro*, 34 NEW ENG. Q. 50, 70-71 (1961).

28. LEON F. LITWACK, NORTH OF SLAVERY 106-08 (1961); Louis Ruchames, *Jim Crow Railroads in Massachusetts*, 8 AM. Q. 61, 61 (1956).

29. BURROWS & WALLACE, *supra* note 23, at 547.

Slavery was not the sole impediment to integration. Laws and culture prohibited free blacks from enjoying the benefits of a free and equal society. Business kept them out of the most desirable jobs and forced them to use second-class public facilities. The end of the culture of slavery meant much more than merely freeing bondsmen; from an abolitionist perspective, it meant putting the Declaration of Independence's promise of equality into practice.

III. THE THIRTEENTH AMENDMENT AND NATURAL RIGHTS

Abolitionists began agitating to integrate society decades before the Civil War. William Lloyd Garrison, who called for immediate abolition through his newspaper, *The Liberator*, considered any law prohibiting interracial couples from marrying to be "a disgraceful badge of servitude."³⁰ Abolitionists worked arduously to integrate northern schools, churches, and public transportation. Abolitionists like Theodore Weld believed that education was essential to social equality.³¹ As Theodore Tilton put it in a June 25, 1863 issue of his weekly *Independent*, mixed schools were essential "for social equality, for rights, for justice, for freedom."³²

Though they had long been outsiders in American politics, the rupture of the Civil War elevated abolitionists' status. For a brief period, radical abolitionists became chairmen of some of the most powerful congressional committees.³³ Even President Abraham Lincoln, although never a radical, abandoned gradualism by 1863, becoming instrumental in 1864 and 1865 in gaining enough votes for the Thirteenth Amendment.³⁴ He often relied on natural rights language, proclaiming that the Declaration of Independence guaranteed equality to whites and blacks.³⁵ Lincoln's ideas were never as immediatist as those of

30. Louis Ruchames, *Race, Marriage, & Abolition*, 40 J. NEGRO HIST. 250, 253 (1955) (quoting William Lloyd Garrison, *LIBERATOR*, June 11, 1831, at 93).

31. Betty Fladeland, *Who Were the Abolitionists?*, 49 J. NEGRO HIST. 99, 102 (1964).

32. HERBERT APTHEKER, *ANTI-RACISM IN U.S. HISTORY: THE FIRST TWO HUNDRED YEARS* 188 (1993).

33. Radicals dominated the Senate during debates on the Thirteenth Amendment and the Civil Rights Act of 1866. The Amendment was the Radicals' one chance to bring about revolutionary change to race relations. Sumner chaired the coveted Committee on Foreign Relations throughout Radical Reconstruction. Senator Benjamin Wade chaired both the Joint Committee on the Conduct of the War and the Senate Committee on Territories. Wade also later became the President Pro Tempore of the Senate. William Fessenden chaired the Senate Committee of Finance and later became President Lincoln's Secretary of the Treasury. Senator Henry Wilson, a lifelong abolitionist, chaired the Military Affairs Committee from 1863 to 1872. James Harlan chaired the Senate Public Land Committee until 1865, and conceived the Thirteenth Amendment as dealing with a breadth of freedoms including conjugal rights. See *passim* 2 COMMITTEES IN THE U.S. CONGRESS, 1789-1946 (David T. Canon et al. eds., 2002). For a useful listing of congressional Radicals and conservatives, see MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS & RECONSTRUCTION, 1863-1869*, at 339-77 (1974).

34. MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 113-17, 123, 125-27 (2001); TESIS, *supra* note 5, at 46-47.

35. Lincoln's earliest recorded indictment of slavery came during a speech about mobocracy on January 27, 1838, before the Young Men's Lyceum of Springfield, Illinois. ABRAHAM LINCOLN, *SPEECHES AND WRITINGS 1832-1858: SPEECHES, LETTERS, AND MISCELLANEOUS WRITINGS: THE*

Garrisonian abolitionists, but both groups agreed on the country's fundamental commitment to civil equality. To Radicals, this meant that the federal government had the obligation to its citizens that transcended state boundaries.

The antebellum Constitution vested power over civil rights almost exclusively in the states. That enabled states to follow their own local mores and customs about inter-citizen relations in public places. States could choose which classes of individuals to treat as equals and which classes to treat as outsiders. The Constitution needed an amendment to prevent states from infringing what Radicals perceived to be core American values. The Supreme Court's pro-slavery decisions in *Prigg v. Pennsylvania*, *Ableman v. Booth*, and *Dred Scott v. Sanford* made them leery of that institution.³⁶ The notion that one of the Court's functions is to protect insular minorities was unknown to the Reconstruction Congress,³⁷ which shifted power over civil rights to the Legislative Branch.

The Thirteenth Amendment's enforcement clause granted Congress the authority to pass laws for ending the last vestiges of involuntary servitude. Merely unshackling slaves was not enough; instead, rigorous statutes granting federal courts jurisdiction to hear civil rights cases would be crucial for avoiding local jury nullification. In 1865, soon after states ratified the Thirteenth Amendment, Speaker of the House Schuyler Colfax invoked the breadth of congressional power to

mature and enact legislation [that would renew state governments] 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.³⁸

This perspective of federalism dominated congressional debates on the Thirteenth Amendment.

Soon after Ohio Representative James M. Ashley introduced the proposed Thirteenth Amendment in Congress,³⁹ Lincoln articulated the competing meanings of liberty at an April 18, 1864 speech in Baltimore:

LINCOLN-DOUGLAS DEBATES 28-36 (Don E. Fehrenbacher ed., 1989). See also *Letter from Abraham Lincoln to James N. Brown (Oct. 18, 1858)*, in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 327-28 (Roy P. Basler et al. ed., 1953); *Speech at New Haven, Conn.*, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra*, at 16-17.

36. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) (finding the Pennsylvania Personal Liberty Law unconstitutional and upholding the constitutionality of the Fugitive Slave Law of 1793); *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858) (upholding the Fugitive Slave Act of 1850); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (holding that blacks were not citizens of the United States).

37. Strict scrutiny development was planted in footnote 4 of *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

38. CONG. GLOBE, 39th Cong., 1st Sess. 5 (1865).

39. Ashley introduced the proposal on December 14, 1863, during the 38th Congress, announcing his intent to submit an amendment "prohibiting slavery, or involuntary servitude, in all

We all declare for liberty; but in using the same word we do not all mean the same thing. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor.⁴⁰

The congressional debates on the proposed Thirteenth Amendment sought to dispel this paradoxical vagueness about liberty in order to promote the principle of equality.

The "self-evident truth that all men are created equal" influenced those congressmen who played a vital role in the advancement of freedom. They believed slavery was inimical to a wide range of freedoms. One representative, advocating passage of the Amendment, reminded Congress that the framers made inalienable the rights of a person "to himself, to his wife and children, to his liberty, and to the fruits of his own industry."⁴¹ Another Republican understood that the founders had acceded to the demands of slavery, but thought they considered the institution to be a tolerable evil that was "temporary in its character."⁴² Representative Godlove Orth of Indiana regarded the Amendment as a congressional grant of power to pass laws for the protection of life, liberty, and the pursuit of happiness. While, the Declaration of Independence did not end slavery because it spoke of the American government in aspirational terms, the Thirteenth Amendment made sure Congress could make those aspirations national guarantees.⁴³ The Thirteenth Amendment gave Congress the authority to safeguard those natural rights and to make the Constitution uniform with the Declaration of Independence. In this sense, as Charles Black pointed out, the Thirteenth Amendment lay dormant in the Declaration.⁴⁴

Congress intended the passage of the Thirteenth Amendment to break down the discrepancy belying the nation's commitments and its practices. Without the added power of the Amendment, as Thaddeus Stevens pointed out, the federal government had no authority to regulate any of the abuses of slavery.⁴⁵ To Orth and other Radicals in Congress, the proposed Thirteenth Amendment would provide Congress with the authority to give "practical application of that self-evident truth" of the Declaration of Independence.⁴⁶ In their minds, those truths were also linked to the Preamble's charge to the national government that it

of the States and Territories now owned or which may be hereafter acquired by the United States." CONG. GLOBE, 38th Cong., 1st Sess. 19 (1863). In the Senate, John Henderson of Missouri introduced the proposal on January 13, 1864. CONG. GLOBE, 38th Cong., 1st Sess. 145 (1864).

40. William L. Westermann, *Between Slavery & Freedom*, 50 AM. HIST. REV. 213, 213 (1945).

41. CONG. GLOBE, 38th Cong., 2d Sess. 200 (1865) (statement of Rep. Farnsworth).

42. *Id.* at 154.

43. *Id.* at 142.

44. *Id.* at 200; Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1103 (1986).

45. CONG. GLOBE, 38th Cong., 2d Sess. 265 (1865).

46. *Id.* at 142.

promote the general welfare and secure equal liberty.⁴⁷ Pennsylvania Congressman M. Russell Thayer was incredulous at the suggestion that constitutionally granted freedom could be “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?”⁴⁸ Representative James A. Garfield pointed out in 1865 that liberty must be more than merely the loosening of shackles; otherwise, it would be no more than “a bitter mockery” and “a cruel delusion.”⁴⁹ Without natural rights guarantees, said Congressman Thayer, abolition would remain chimerical.⁵⁰

Representative Isaac N. Arnold, who was President Lincoln’s confidant, asserted that the Thirteenth Amendment would establish “*equality before the law* ... to be the great cornerstone” of the U.S. government.⁵¹ Though his statement lacked specificity, at its core was a commitment to federal protections for inalienable rights of persons of all classes and races. Whether they were on the radical or moderate side of the political spectrum, congressmen realized that they could only achieve such a civil transformation if the national government had constitutional power to pass laws necessary for a meaningful freedom.

Section 2 enforcement grew out of Radicals’ commitment to individual liberties and overall welfare. Freedom could only be universal where federal, rather than state citizenship, predicated civil rights.⁵² Ohio Senator John Sherman, who had his hand on the pulse of federal power, later becoming Secretary of the Treasury and then Secretary of State, asserted that the enforcement provision was “an express grant of power to Congress to secure ... liberty by appropriate legislation.”⁵³ He regarded the congressional grant of authority to be necessary for interstate comity, maintaining that friction between states was avoidable only where national government determined citizenship rights.⁵⁴

Ending the incidents of servitude required more than abolishing *de jure* slavery. Congress needed the power to prohibit private discrimination, which

47. CONG. GLOBE, 38th Cong., 1st Sess. 2955 (1864) (Francis W. Kellogg’s connection of the proposed Thirteenth Amendment to the Preamble).

48. CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866).

49. James A. Garfield, *Oration Delivered at Ravenna, Ohio July 4, 1865*, in 1 THE WORKS OF JAMES ABRAM GARFIELD 85, 86 (Burke A. Hinsdale ed., 1882).

50. CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866).

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

52. Cf. CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865):

Now unless a man may be free without the right to sue and be sued, to plead and be impleaded, to acquire and hold property, and to testify in a court of justice, then Congress has the power by the express terms of this amendment, to secure all these rights. To say that a man is a freeman and yet is not able to assert and maintain his right, in a court of justice, is a negation of terms.

Id.

53. *Id.*

54. *Id.*

was often the product of gentlemen's agreements or vigilante violence. Discrimination prevented blacks and, to a lesser degree, white laborers from engaging in business, contracting, and gaining an education.⁵⁵ The three debates surrounding passage of the Thirteenth Amendment, one in the Senate and two in the House, reacted to both these private violations and to legally sanctioned discrimination. The debates indicate that both supporters and opponents of the Amendment expected the constitutional change to provide sweeping power to protect civil rights. As the Congressmen understood it and the Supreme Court later interpreted it,⁵⁶ section 2 provided the authority to end all manner of subjugation, not only chattel slavery. In the course of a contentious debate, a consensus developed that the Thirteenth Amendment would empower Congress to end arbitrary practices connected with the incidents of involuntary servitude.

Iowa Senator James Harlan provided one of the clearest expositions of the manifold practices the Amendment would cover. He seems to have been the first to coin the term "incidents of servitude." The Supreme Court later adopted his terminology.⁵⁷ According to Harlan, slavery corrupted the privileges of citizenship. The Amendment would enable the federal government to prevent violations of civil rights that were analogous to slavery, such as interference with marriage, intrusion of parental decision-making, prohibition against property ownership and alienation, restriction against participation in equitable trials, penalty for teaching or learning how to read and write, and similar degradations.⁵⁸ Senator Jacob M. Howard, a member of the Senate Judiciary Committee that reported the language of the Thirteenth Amendment, remembered that its purpose was to secure "the ordinary rights of a freeman."⁵⁹ Essential to the Radicals' aims was providing necessary protections for free persons who desired to be educated and raise their families.⁶⁰

Opponents of the proposed Amendment understood the profound change Radicals hoped to initiate. The opposition understood that the plan was to do much more than end forced labor. Several Democratic representatives, like Chilton A. White, warned colleagues that the Amendment would enable Congress to fashion a government of equals where blacks would be treated the

55. See, e.g., *id.* at 74.

56. *Runyon v. McCrary*, 427 U.S. 160, 168-75 (1976) (prohibiting a private school from discriminating against parents who wanted to enroll their children); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-40 (1968) (affirming the *Civil Rights Cases*'s finding that the Thirteenth Amendment bans all "badges and incidents of [servitude]"); *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (finding that the Thirteenth Amendment prohibited state and private badges of servitude).

57. CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864); *Jones v. Alfred H. Mayer*, 392 U.S. 409 (1968) ("[T]his Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its 'burdens and disabilities'—included restraints [sic] upon 'those fundamental rights which are the essence of civil freedom, namely, the same right ... to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.'") (quoting *Civil Rights Cases*, 109 U.S. at 22).

58. CONG. GLOBE, 38th Cong., 1st Sess. 1439-40 (1864).

59. CONG. GLOBE, 39th Cong., 1st Sess. 503-04 (1866).

60. CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864). Numerous antebellum southern states made it a criminal offense to educate blacks. James W. Fox, Jr., *Citizenship, Poverty, and Federalism: 1787-1882*, 60 U. PITT. L. REV. 421, 487 (1999).

same as other citizens in voting, holding political office, and serving on juries.⁶¹ A debate between two Pennsylvania Congressmen, William D. Kelley and John D. Stiles, raised the Thirteenth Amendment's potential role for achieving equal citizenship. To the latter's inquiry of whether the Amendment's supporters meant to achieve racial equality, Kelley replied that racist views should not prevent blacks from equal political participation.⁶² Given their concerns, opponents of the Amendment regarded it as an impermissible assertion of federal power since the Amendment would materially alter governmental powers.⁶³

The opponents' fears were born out in the next Congress. When the Thirty-Ninth Congress returned to do the bulk of its business in 1866, Senator Trumbull, head of the Senate Judiciary Committee, endorsed the power of Congress, pursuant to the section 2 enforcement clause, to pass any laws needed for achieving liberty.⁶⁴

One of the greater shortcomings of these debates was the presumption that after the Civil War, slavery would be so clear an injustice that future Congresses would have no difficulty in discovering which natural rights to protect pursuant to the Thirteenth Amendment. The decision to couch their commitment to protected fundamental freedoms in negative terms that abhorred slavery gave little guidance to the Amendment's positive character. For the immediate future, at least while the Radicals were in power, there was a sure commitment to alter civil and political racial dynamics. It was what would happen after Radicals were removed from power that was inadequately discussed during congressional debates on the Thirteenth Amendment. Congress scarcely fathomed that a moderate reconstruction would ensue and that southern redemption would take precedence over civil rights. Hence, the Amendment's language was too ambiguous to prevent white supremacists from creating *de facto* slavery in place of the *de jure* variety.

IV. AGITATING FOR CHANGE

Garrisonian abolitionists enjoyed some successes in desegregating railcars and schools; their efforts also led to a repeal of Massachusetts's ban on intermarriage.⁶⁵ Abolitionist achievements in the North produced a nonsegregated transportation system, except in New York, Philadelphia, Cincinnati, and San Francisco, and racial separation came to an end in these

61. CONG. GLOBE, 38th Cong., 2d Sess. 216 (1865).

62. *Id.* at 291.

63. CONG. GLOBE, 38th Cong., 1st Sess. 186 (1864) ("The change you propose is a fundamental change of your Government never before contemplated by its founders."); *id.* at 2940 ("It will be, if adopted, a change in the fundamental law—a material alteration in the Constitution of the United States as formed by the founders of the Government.").

64. CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866). Trumbull's view, however, can in no way be characterized as equalitarian since, on the same page, this moderate Republican proclaimed that laws prohibiting intermarriage were equitable and constitutional. *See id.*

65. Litwack, *supra* note 27, at 72.

cities between 1863 and 1867.⁶⁶ By 1865, throughout New England public schools enrolled black and white children.⁶⁷ Likewise, Michigan (1867 and 1871), Illinois (1872), and New Jersey (1866 and 1881) desegregated their schools.⁶⁸ Connecticut, Iowa, Minnesota, and Kansas did the same between 1867 and 1873. School segregation, nevertheless, persisted in southern cities and states, which had the largest share of the black population.⁶⁹ The differing state mores, especially the South's zeal for white supremacy, redoubled the effort of abolitionist congressmen to create a national standard against segregation.

Even before the ratification of the Thirteenth Amendment, still in the throws of civil war, Congress initiated civil rights legislation pursuant to its Article I, section 8, clause 17 authority over the District of Columbia. In 1864 and 1865, legislators twice prohibited segregation on Washington, D.C. streetcars.⁷⁰ The Supreme Court later determined that Congress had, in the use of "the colored and white race," decided both groups should be "placed on an equality."⁷¹ This legislative effort evinced a will to use congressional authority against segregation. Both the Fourteenth and Thirteenth Amendments' enforcement clauses provided additional power to stymie segregation on a national scale.

Senator Charles Sumner believed that a federal desegregation act would be the crowning jewel of his indefatigable effort to abolish everything associated with the institution of slavery. On May 13, 1870, he referred a bill to the Judiciary Committee. It proposed "to prohibit discrimination by railroads, steamboats, public conveyances, hotels, restaurants, licensed theaters, public schools, [institutions of learning authorized by law,] juries, church institutions, or cemetery associations 'incorporated by national or State authority.'"⁷² However, the Judiciary Committee merely proposed indefinite postponement on the bill.⁷³ Year in and year out, for the remainder of his life, Sumner toiled to make his vision a reality. Abolitionist journalists, like Frederick Douglass and Theodore Tilton, catalyzed popular support for the measure.⁷⁴ At a convention of abolitionists, a participant expressed by common sense that the duty to emancipated slaves was incomplete "until they enjoy the same social rights and privileges which are accorded to ourselves."⁷⁵

66. JAMES M. MCPHERSON, *THE STRUGGLE FOR EQUALITY* 224 (1964); James M. McPherson, *Abolitionists and the Civil Rights Act of 1875*, 52 J. AM. HIST. 493, 495 (1965); LITWACK, *supra* note 28, at 111-12.

67. MCPHERSON, *supra* note 66, at 228-29.

68. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 968-69 (1995).

69. McPherson, *supra* note 66, at 498-99.

70. Act of July 1, 1864, 13 Stat. 326, 329 (regulating the D.C. Railroad Company); Act of Mar. 3, 1865, 13 Stat. 536, 537 (regulating the D.C. Railroad Company).

71. *Railroad Co. v. Brown*, 84 U.S. 445, 453 (1873).

72. McPherson, *supra* note 66, at 500 (quoting CONG. GLOBE, 41st Cong., 2d Sess. 3434 (1870)).

73. CONG. GLOBE, 41st Cong., 2d Sess. 5314 (1870).

74. McPherson, *supra* note 66, at 501.

75. *The Abolitionists*, CHI. TRIB., June 12, 1874, at 3.

In the post-bellum world, segregation was a blight in educational institutions. Since government had so long denied southern blacks the right to be literate, developments in black education were met with a fierce demand for separate schools. The 1870 Tennessee Constitution provided for separation of races in education. Kentucky opted for statutory restrictions on student racial mixing. All blacks, Sumner said, “resent the imputation that [they are] seeking to intrude ... socially anywhere.” Separate but equal public facilities, he continued, “are the artificial substitutes for Equality.”⁷⁶ To argue there was “no denial of Equal Rights when this separation [was] enforced” was in “vain.”⁷⁷

To bolster his advocacy for desegregation law, Sumner read petitions from ordinary folk such as black delegates representing five southern states. Petitioners who dealt daily with discrimination laid bare the unfairness of segregation. J.F. Quarles of Georgia, who was a delegate to a Columbia, South Carolina convention, understood that “legislative enactments alone cannot remedy these social evils” and demanded that “odious discriminations cease.”⁷⁸ Even emancipation had disparagingly been labeled a form of social equality, and some attached the same label to school desegregation. Douglass C. Griffing of Oberlin, Ohio also mocked the use of the “bugbear” of “social equality” to “frighten” whites and deny colored people “many public privileges accorded to other American citizens.”⁷⁹ A member of the North Carolina House of Representatives, F.A. Sykes, gave example of discrimination he had suffered after he bought a first class ticket on a steamship. The ship’s crew did not permit Sykes to use the first class accommodations; instead, they told him to remove himself “below into the dirty department set aside for [his] race.”⁸⁰ He also recounted the similar experiences of his wife and of another married couple’s. Such practices managed to exclude thousands of citizens from equal privileges and immunities.⁸¹

Provisions in the bill to desegregate schools and cemeteries became the greatest hurdles to passing the law. Out of conviction, Sumner refused to remove either of them to gain additional support. He worried that separate schools could “have a depressing effect on the mind of colored children, fostering the idea in them and others that they are not as good as other children.”⁸² Further, states with separate school systems maintained an unequal system, as Edmunds of Vermont demonstrated statistically. In Virginia, approximately forty percent of all students were black, but less than twenty-five percent of schools were set

76. CONG. GLOBE, 42d Cong., 2d Sess. 382 (1872).

77. Alfred H. Kelly, *The Congressional Controversy Over School Segregation, 1867-1875*, 64 AM. HIST. REV. 537, 552-56, 558, 563 n.143 (1959); CONG. GLOBE, 42d Cong., 2d Sess. 382-83 (1872).

78. CONG. GLOBE, 42d Cong., 2d Sess. 429 (1872).

79. *Id.* at 431.

80. *Id.*

81. CONG. GLOBE, 41st Cong., 2d Sess. 3434 (1870) (proposed bill); CONG. GLOBE, 42d Cong., 2d Sess. 244 (1871) (bill).

82. Bertram Wyatt-Brown, *The Civil Rights Act of 1875*, 18 W. POL. Q. 763, 763-64 (1965) (quoting Sumner, NEW NAT’L ERA, May 5, 1870).

aside for them. Of North Carolina's roughly 350,000 students, one-third were black, but they could attend only approximately twenty percent of the schools. The educational system in Georgia similarly favored white over black students.⁸³ As for southerners, Virginia Senator John W. Johnston claimed that the racial separation of students aided in their development.⁸⁴

While Sumner did not live to see the enactment of his heroic effort, even on his deathbed he maintained the commitment to the equality principle that had been the central tenet of his political career. In March 1874, near death, he urged a friend, Massachusetts Representative Rockwood R. Hoar, "You must take care of the civil-rights bill ... don't let it fail."⁸⁵ Passage of the bill was no easy matter, however, especially with Republicans reeling from the loss of an astounding ninety-six seats in the House during the 1874 election. Democrats won 182 seats while Republicans won 103, with eight other seats in the hands of various Independents. Republicans realized that if Sumner's brainchild were to become law, it would have to pass before the democratically controlled Congress came to power.⁸⁶

The lame-duck Congress enacted the Civil Rights Act in 1875, in a modified form, ending segregation in public accommodations, but it excluded any mention of cemeteries and schools. Thus, prejudice could apparently be taken from the classroom to the grave. Failure to include schools amounted to a sanction, and soon thereafter, North Carolina (1876) and Georgia (1877) adopted constitutional provisions mandating the racial separation of students.⁸⁷

Despite the Act's shortcomings, it was a giant leap forward. Its first section entitled "all persons within the jurisdiction of the United States [to] the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement."⁸⁸ The Act's second section set out the applicable criminal and civil penalties. Thus, the government could subject violators both to private causes of action and to criminal prosecutions. The third section gave federal courts exclusive jurisdiction over cases arising under the Act, and the fourth section prohibited state and federal jury selection based on racial grounds.⁸⁹ The Supreme Court later found the first two sections of the law to be unconstitutional, undermining its core purpose.⁹⁰

The Civil Rights Act of 1875 provided a window into how Congress, acting shortly after the states ratified the Thirteenth and Fourteenth Amendments, perceived the range of its power to end the badges of slavery while protecting the equal privileges and immunities of citizenship. Equality meant acting affirmatively to prevent discrimination in the public sphere. Without providing

83. CONG. REC., 43d Cong., 1st Sess. 4173 (1874) (Edmunds).

84. *Id.* at 4114 (Johnston).

85. DAVID DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 586 (1970).

86. Kelly, *supra* note 77, at 555-56.

87. *Id.* at 563 n.143 (on North Carolina and Georgia segregation).

88. Civil Rights Act of 1875, ch. 114, §§ 1-2, 18 Stat. 335, 336.

89. *Id.* §§ 3-4.

90. The Civil Rights Cases, 109 U.S. 3, 26 (1883).

all people, irrespective of race, the opportunity to use public places on an equal footing, constitutional abolition was incomplete.

V. THE CIVIL RIGHTS CASES

The *Civil Rights Cases* reviewed the constitutionality of the first two sections of the Civil Right Act of 1875. The decision consolidated five separate causes of action, four criminal and one civil. The four criminal actions involved denying blacks access to an inn or hotel, the dress circle at a San Francisco theater, and a New York opera house. The civil action, which arose in Tennessee, involved a railroad company whose conductor refused to allow a black woman to “ride in the ladies’ car.” Attorneys for four of the five defendants did not even bother coming to the Supreme Court to argue on behalf of their clients; given the anti-Reconstruction climate of the country, they nevertheless secured over-whelming victories for their clients. Their success was indicative of the national decision to draw away from abolitionism.⁹¹

The plaintiffs relied on two alternative theories. First, they relied on the Fourteenth Amendment’s grant of legislative authority to enact laws that were necessary and proper to counteract state provisions infringing the privileges of national citizens. Their second theory reflected Congress’s Thirteenth Amendment power to enact appropriate statutes against the incidents of involuntary servitude and slavery.

Eight justices were in the majority, and only Justice John Marshall Harlan dissented. Regarding the Fourteenth Amendment, the Court found Congress had overstepped its authority. All five cases involved private facilities, while the Amendment only permitted the regulation of state actions. “Individual invasion of individual rights is not the subject matter of the [A]mendment.”⁹² In the unreconstructed South, what amounted to a Court sanction of private discrimination provided white supremacists with a means of maintaining the status antebellum.

The dissenting opinion was much closer to the views of congressmen who had passed the Fourteenth Amendment onto the states for ratification.⁹³ Harlan argued that the Fourteenth Amendment’s section 5 enabled Congress to enact 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.”⁹⁴

As for the Thirteenth Amendment, the majority simply found that the discrimination in public places of accommodation was not a vestige of involuntary servitude. Just as Taney and the *Dred Scott* majority had forgotten that blacks had been citizens from revolutionary times, so too Justice Bradley,

91. *Id.*

92. *Id.* at 11.

93. Robert J. Kaczorowski, *Congress’s Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 229 (2005).

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

writing for the *Civil Rights Cases*'s majority, seemed to have forgotten that slavery excluded blacks from public comforts, like first class trains and public inns, which were open to their fellow Americans. The Court conceded that the Thirteenth Amendment did more than merely nullify state laws protecting slavery and releasing slaves from their masters' control. It also "decree[d] universal civil and political freedom throughout the United States."⁹⁵ Further, it granted Congress the "power to pass all necessary and proper laws abolishing the "badges and incidents of slavery in the United States."⁹⁶ The majority refused to find segregation on common carriers to be one of the badges and incidents of slavery meant to hinder black citizens from enjoying their freedom. Instead, the Court declared that the five cases involved "the social rights of men and races in the community," which the Thirteenth Amendment did not cover.⁹⁷

Harlan accused the majority of holding to a "narrow and artificial" interpretation⁹⁸ that undermined the "substance and spirit" of the Thirteenth Amendment. The Court had construed "constitutional provisions adopted in the interest of liberty" in such a way as to "defeat the ends the people desired to accomplish."⁹⁹ The federal government was granted the enforcement authority to pass legislation like the Civil Rights Act of 1875 to remove remaining impediments to universal freedom. "I am of the opinion," he wrote in dissent,

that such discrimination practiced by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude, the imposition of which Congress may prevent under its power. By appropriate legislation, to enforce the Thirteenth Amendment; and consequently, without reference to its enlarged power under the Fourteenth Amendment, the act of March 1, 1875, is not, in my judgment, repugnant to the Constitution.¹⁰⁰

Harlan continued that the Thirteenth Amendment was a direct response against *Dred Scott*'s holding that blacks never were citizens of the United States and, therefore, shared none of the inherent privileges and benefits of its laws and protections. *Dred Scott* further denied that the Framers meant for the Declaration of Independence to apply to anyone imported as a slave into the United States or to any of their descendants. After constitutional abolition, persons of all races became national citizens, which is a status unassailable by state machinations. To support his finding, Harlan quoted the Civil Rights Act of 1866, "[A]ll persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."¹⁰¹ That was a valid use of enforcement authority. Because the dogma of black inferiority was instrumental to sustaining slavery, the Thirteenth

95. *Id.* at 20.

96. *Id.*

97. *Id.* at 22.

98. *Id.* at 26 (Harlan, J., dissenting).

99. *Id.*

100. The Civil Rights Cases, 109 U.S. 3, 42 (1883) (Harlan, J., dissenting).

101. *Id.* at 32 (Harlan, J., dissenting) (quoting the Civil Rights Act of April 9, 1866, 14 Stat. 27).

Amendment meant “to establish universal freedom” that “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.”¹⁰²

The ability to use public highways unimpaired by racial discrimination is “so far fundamental as to be deemed the essence of civil freedom.” The “right of locomotion” is “essential and ... supreme” to personal liberty. The Civil Rights Act of 1875 removed “burdens which lay at the very foundation of the institution of slavery.”¹⁰³ Businesses serving clientele that were engaged in “a *quasi* public employment” could not deny their services to persons because of their race or color. Similarly, places of amusement, like opera houses, were “established and maintained under direct license of the law.”¹⁰⁴ The Thirteenth Amendment “obliterated the race line” that impeded rights fundamental to freedom.¹⁰⁵

Justice Harlan did agree with Justice Bradley that Congress lacks the power to intrude into social relations; that is, Congress may not demand blacks and whites be personal associates. The rights protected by the 1875 Act, however, were not social but legal. Public transportation, entertainment, and accommodations were no more social in nature than public streets or markets. Race-based exclusions were inconsistent with “the freedom established by the fundamental law.”¹⁰⁶ However, Harlan stood alone in his indictment of the persistent badges of slavery meant to humiliate blacks and keep them from enjoying the full range of freedoms enjoyed by persons of other races.

The Supreme Court’s holding in the *Civil Rights Cases*, coupled with a Republican reevaluation of the party’s priorities, and the presidential policy of increasingly appeasing the South, culminating in President Rutherford B. Hayes’s decision to pull federal soldiers out of the South in 1877, put a halt to Reconstruction and any systematic attempt to end discrimination. The *Civil Rights Cases* were a missed opportunity to further the racially tolerant vision of the leading supporters of the Thirteenth Amendment. The majority struck down a law that relied on Radical Republicans’ aspirations for an integrated nation. Only in 1964 did Congress finally pass civil rights legislation that prohibited the use of public accommodations for discriminatory purposes.

VI. CONTEMPORARY DESEGREGATION

The Supreme Court so effectively put an end to federal desegregation efforts that the next attempt came eighty-one years later, after President John F. Kennedy’s assassination. His successor, President Lyndon Johnson pressed Congress to act against the continuing vestiges of servitude that intruded on citizens’ lives. In 1964, Congress passed an omnibus civil rights act that

102. *Id.* at 36 (Harlan, J., dissenting).

103. *Id.* at 39-40 (Harlan, J., dissenting).

104. *Id.* at 41 (Harlan, J., dissenting).

105. *Id.* at 40 (Harlan, J., dissenting).

106. *Id.* at 59 (Harlan, J., dissenting).

included Title II, prohibiting discrimination based on race, color, religion, and national origin in public places of accommodation, like hotels, restaurants, and places of entertainment. The statute made no reference to the Thirteenth Amendment; instead, it relied on the broad Commerce Clause reading predicated on New Deal jurisprudence, for the regulation of private conduct affecting the national economy and the Fourteenth Amendment to cover discriminatory public acts.¹⁰⁷ Yet, the failure to attack Bradley's *Civil Rights Cases* opinion directly placed civil rights in the realm of economic regulation instead of the more logical placement of responsibility in the context of abolition's incompatibility with public-place segregation.

When the Supreme Court had the chance to uphold the law in *Heart of Atlanta Motel v. United States*¹⁰⁸ and *Katzenbach v. McClung*,¹⁰⁹ it relied on the Commerce Clause rather than disturbing the *Civil Rights Cases*'s state action interpretation of the Fourteenth Amendment. In a concurrence to *Heart of Atlanta*, Justice Goldberg agreed that Congress had legitimately relied on Commerce Clause authority, but he wrote separately to emphasize that the "primary purpose of the Civil Rights Act of 1964 ... is the vindication of human dignity and not mere economics."¹¹⁰ In a separate concurrence, Justice Douglas was likewise reluctant to rest the opinion entirely on commerce authority since the "right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines."¹¹¹

There is no telling how the Court might have ruled if Congress had also relied on the Thirteenth Amendment for passing the statute; however, the majority might have been more willing to adopt the sort of rationale Goldberg and Douglas urged since doing so would have hardly disturbed the *Civil Rights Cases*. While there may have been no way around the eighty-one year old case's Fourteenth Amendment state action requirement, since both the *Heart of Atlanta Motel* and the family restaurant in *McClung* were privately owned, the Thirteenth Amendment approach might have allowed the Court to rely on legislative purpose. After all, the *Civil Rights Cases* recognized that private defendants were proper parties under the Thirteenth Amendment¹¹² All that was lacking, which the Civil Rights Act of 1964 might have supplied, was a clear legislative statement of segregation's debilitating effect on freedom. Segregation burdened blacks with a badge of inferiority that functioned to subordinate them to the same racial stratification that existed before the Civil War. Justice Douglas, in another

107. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1226 n.40 (2001).

108. 379 U.S. 241 (1964).

109. 379 U.S. 294 (1964).

110. *Heart of Atlanta Motel*, 379 U.S. at 291 (Goldberg, J., concurring).

111. *Id.* at 279 (Douglas, J., concurring) (internal citations and quotations omitted).

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

concurrence against lunch counter segregation, argued that the required separation of the races in public places was “a relic of slavery.”¹¹³

VII. CONCLUSION

Segregation was intrinsic to slavery. Free blacks in the antebellum South and in many northern cities were prohibited from enjoying the use of public facilities and services. The possibility of change appeared with the Thirteenth Amendment, which Congress intended not only to free slaves but also to allow it to provide blacks with the safeguards necessary to enjoy the same liberties as any other citizen. Even before the Redeemer South made segregation almost universally enforceable by state laws, congressmen recognized desegregation to be essential for meaningful abolition and equal citizenship. The Civil Rights Act of 1875 included provisions making desegregation enforceable in federal courts. Even though Congress watered down the statute by excluding schools and cemeteries from the requirement to desegregate public places, the law was a huge leap forward and indicated the Reconstruction Congress’s understanding of the fundamental freedom intrinsic to free citizens.

In the *Civil Rights Cases*, the Court rejected Congress’s resolve to integrate society for Americans of all races to participate in a full breadth of public opportunities. Justice Harlan’s dissent, on the other hand, relied on the abolitionist perspective that racial exclusion from public accommodations was a badge of slavery. That view did not curry favor with the majority. Given the Court’s intransigence with ending discrimination, the South increasingly made Jim Crow the norm for subrogating black rights to participate in everyday life. In the Civil Rights Era, the Court explicitly recognized congressional authority to prohibit segregation by all businesses involved in interstate commerce. That left for future cases to decide whether civil rights statutes can regulate activities even when they do not substantially and directly affect on the national economy. The Thirteenth Amendment remains a viable alternative for Congress to act against private discrimination it finds to be rationally analogous to the incidents of involuntary servitude. That constitutional authority avoids the pitfalls of placing substantive rights under the rubric of commerce.¹¹⁴

113. *Bell v. Maryland*, 378 U.S. 226, 260 (1964) (Douglas, J., concurring) (“Segregation of Negroes in the restaurants and lunch counters of parts of America is a relic of slavery. It is a badge of second-class citizenship.”).

114. Tsesis, *Furthering American Freedom*, *supra* note 5, at 350-61.