

U.C.L.A. Law Review

Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery

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ABSTRACT

This Article presents the first comprehensive treatment of the basic and officially “open” question whether Section 1 of the Thirteenth Amendment directly bans the badges and incidents of slavery. Surprisingly, in light of present-day uncertainty, the historical record is relatively clear on this issue. Members of the Thirty-Ninth Congress generally agreed that Section 1 banned at least some of the badges and incidents; they parted company over which ones. The Democrats and their allies claimed that it outlawed only the core incidents of slavery, for example chattelization and physically or legally forced labor. But their Republican opponents maintained that it banned a far broader set including—at a minimum—denials of the rights enumerated in the Civil Rights Act of 1866, namely to enjoy the same rights to make contracts, own property, and participate in court as were enjoyed by white citizens. Until 1968, courts also assumed that the issue of badges and incidents hinged on Section 1. Contrary to the received wisdom, *Jones v. Alfred H. Mayer Co.*, decided in that year, announced for the first time that the identification of badges and incidents might be a task for Congress under the Section 2 power to enact “appropriate” enforcement legislation. Although the Court has maintained for nearly half a century that the question is “open,” the practical reality is that lower courts honor the narrow reading of Section 1 initially proposed by the unsuccessful Democratic opponents of both the Amendment and the 1866 Civil Rights Act, and later introduced to jurisprudence in the now-discredited Jim Crow decisions of *Plessy v. Ferguson* and *Hodges v. United States*. It is not too late to resolve the official uncertainty by embracing the Republican reading. This choice would restart the process, commenced by the Thirty-Ninth Congress but derailed in *Plessy* and *Hodges*, of determining what it means to ensure that neither slavery nor involuntary servitude “shall exist.” The Article concludes by exploring some of the basic interpretive issues and their implications for the constitutional law of racially disparate impact, race-based affirmative action, gender equality, and reproductive freedom.

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TABLE OF CONTENTS

INTRODUCTION.....	428
I. ORIGINAL UNDERSTANDINGS OF SECTION 1	433
A. Debates About the Proposal and Ratification of the Thirteenth Amendment.....	433
B. Section 1 of the Thirteenth Amendment and the Civil Rights Act of 1866	436
1. Focus on “Slavery” and “Involuntary Servitude”	440
2. Focus on “Freedom,” Antonym of “Slavery” and “Involuntary Servitude”	442
3. Focus on Congress’s Section 2 Power to Enact “Appropriate” Enforcement Legislation.....	445
C. The Significance of the 1866 Civil Rights Act for Constitutional Interpretation	448
II. SECTION 1 AND THE JURISPRUDENCE OF BADGES AND INCIDENTS, 1883 TO THE PRESENT	451
A. The Badges and Incidents Doctrine—Version 1: 1883–1896	452
B. The Doctrine Interred, 1896–1967.....	455
C. The Doctrine Resurrected, 1968–1971.....	457
D. The Badges and Incidents Doctrine—Version 2: 1971 to the Present	459
III. THE SECTION 1 DOCTRINE OF BADGES AND INCIDENTS: BASIC ISSUES	463
A. Does Section 1 Prohibit All or Only Some of the Badges and Incidents?.....	464
B. Does Section 1 Ban More Than the Core Incidents of Slavery?.....	465
C. Criteria for Identifying Badges and Incidents Under Section 1	466
IV. THE SECTION 1 BADGES AND INCIDENTS DOCTRINE: CASES	469
A. Anti-Subordination and Anti-Classification Approaches to Group Targeting: Can Whiteness Be a Badge of Slavery?	469
B. Unintentional Race Discrimination Under Section 1	473
C. Race-Conscious Affirmative Action on Behalf of African Americans	474
D. Gender Equality and Reproductive Freedom.....	477
CONCLUSION.....	485

Amendment XIII

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.

Although it does not appear in the Constitution, the phrase “badges and incidents of slavery” looms so large in Thirteenth Amendment discourse that a layperson might be forgiven for thinking otherwise. Judges and scholars generally treat the “badges and incidents” as something distinct from the “slavery” outlawed by Section 1 of the Amendment. According to the U.S. Supreme Court’s landmark decision in *Jones v. Alfred H. Mayer Company*, Section 1 abolished slavery while Section 2 empowered Congress to “do much more,” including “rationally to determine what are the badges and the incidents of slavery, and . . . to translate that determination into effective legislation.”¹ The Court maintains that it is an open question whether Section 1 “by its own terms did anything more than abolish slavery,” but lower courts have generally assumed that it does not, and most scholars have declined to object.² As historian James Oakes recently remarked, legal scholars have instead focused “almost exclusively” on Section 2, with some “hoping to find there a justification for federal activism on behalf of civil rights.”³

This Article seeks to resurrect a fundamentally different understanding of the badges and incidents, namely that they are *components* of the slavery and servitude outlawed by Section 1. The case for this understanding is especially clear with regard to the term “incidents,” which carried a relatively determinate meaning at the time of the Thirteenth Amendment’s enactment.⁴ Treatise

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1. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439–40 (1968).
 2. *City of Memphis v. Greene*, 451 U.S. 100, 125–26 (1981). For an illuminating exception to the general pattern of scholarly acquiescence, see William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1342–46 (2007).
 3. James Oakes, “The Only Effectual Way”: *The Congressional Origins of the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL’Y 115, 124 n.38 (2017).
 4. On the contemporary determinacy of the concept, see Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 571–72 (2012), and George

writers included a wide range of disabilities among the incidents of slavery, some of which were generally considered to be core, defining features of the status, for example the master's right to possess his slaves and to dispose of their labor.⁵ This usage followed that of antebellum courts, which included among the incidents such basic components as the property right of the master in his slave and in his female slave's offspring.⁶ When Justice Bradley introduced the phrase "badges and incidents of slavery" into the Supreme Court's lexicon, he included among the "inseparable" or "necessary incidents of slavery" both core features like the "[c]ompulsory service of the slave for the benefit of the master" and arguably more peripheral ones, for example the "disabilit[ies] to hold property [and] to have a standing in court."⁷

On this understanding, it was clear from the outset that Section 1 directly outlawed at least some incidents of slavery; the question was which ones and in what combinations. Nobody then or now, for example, would disagree that Section 1 banned such "incidents" of slavery as the master's rights to possess his slaves, dispose of their labor, and own the offspring of his female slaves.⁸ The question is whether it goes further, to encompass other components such as race-based (or perhaps even non-race-based) barriers to owning property,

A. Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, in *THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT* 163, 164–65 (Alexander Tsesis ed., 2010).

5. GEORGE M. STROUD, *A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA* 31–32 (2d ed. 1856) (listing, in a chapter entitled "Of the Incidents of Slavery," the disabilities reported in text); see also THEOPHILUS PARSONS, *THE LAW OF CONTRACTS* 326, 341, 346 (1857) (using the phrase "nature and incidents of slavery" interchangeably with slavery's "essential qualities, and the peculiar rules by which the questions to which it gives rise are to be determined," and discussing the slave's disabilities to contract, to marry, and to own property). There was nothing magical about the term "incidents." Like Parsons and Stroud, Thomas Cobb wrote of the disabilities of slaves, but without using the term "incidents." See I THOMAS R.R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA* 226, 235, 240, 242–43, 247, 260 (1858) (including among the "disabilities" or "incapacities" of slaves the denial of the rights to testify in court, to own and dispose of property, to contract, to marry, to bring suit, and to hold public office).
6. See, e.g., *In re Archy*, 9 Cal. 147, 162 (1858) ("[W]here slavery exists, the right of property of the master in the slave must follow as a necessary incident."); *Neal v. Farmer*, 9 Ga. 555, 567 (1851) (including among the "many . . . incidents of slavery" the slave's status as a "subject of property—saleable and transmissible" and her obligation to obey her master's commands or face "every species of chastisement"). For a concise and useful discussion of these and other cases, see McAward, *supra* note 4, at 571–72.
7. *Civil Rights Cases*, 109 U.S. 3, 22 (1883).
8. Even the narrowest readings of the Amendment allowed for the prohibition of these components. See, e.g., *Hodges v. United States*, 203 U.S. 1, 16 (1906) (stating that the Amendment covered "a condition of enforced compulsory service of one to another"); see also *infra* notes 38, 41–42 and accompanying text.

making and enforcing contracts, participating in court, marrying, raising one's children, and obtaining an education.

This question would be central to Thirteenth Amendment jurisprudence even if the Court had never developed a doctrine of badges and incidents. "Slavery is not unitary," as Darrell Miller explains, "it is a bundle of disabilities, bound together by conventions."⁹ Furthermore, as Andrew Koppelman points out: "Each one of those disabilities is part of slavery and so raises Thirteenth Amendment concerns."¹⁰ It is of secondary importance whether we call these disabilities badges, incidents, vestiges, relics, or rootlets;¹¹ each signifies a component or aspect of the "slavery" prohibited by Section 1. To comply with the command that slavery shall not "exist," we must determine which of them are so important to slavery and involuntary servitude that when they exist, it cannot be said that those conditions have been entirely eliminated.

It would be difficult to overstate the importance of this question for Thirteenth Amendment jurisprudence and constitutional politics today. Congress has prohibited a variety of badges and incidents including, most prominently, denials of the right of all citizens to enjoy the same rights of contract, property, and participation in court as are enjoyed by white citizens. If, as suggested here, those badges and incidents are directly prohibited by Section 1, then courts could enforce them directly and legislators could enact laws "appropriate" to remedy or prevent them, instead of having to justify legislation as appropriate to the prevention of physically forced labor or other core incidents of slavery. All Americans, here and now, could claim the constitutional right to be free from the badges and incidents of slavery, instead of a mere privilege to seek legislation from Congress identifying and banning them. And social movements could more persuasively invoke the Amendment in support of resistance to perceived badges and incidents of slavery, for

9. Darrell A.H. Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 COLUM. L. REV. 1811, 1848 (2012).

10. Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1943 (2012).

11. None of these terms appears in the Constitution, but all of them convey meaning relevant to the interpretive question of what it means to say that neither slavery nor involuntary servitude "shall exist." For a detailed and carefully documented discussion of these terms, see McAward, *supra* note 4, at 570–94. The phrase "badges and incidents of slavery" might best be thought of as an umbrella term covering the various possible ways of conceptualizing features of slavery or servitude.

example displays of Confederate battle flags and police killings of unarmed black men.¹²

This Article does not address the relative roles of courts, Congress, and We the People in identifying the badges and incidents of slavery. There is a tendency to assume that if Section 1 bans them directly, it follows that courts, not Congress, will necessarily make the determination. I do not share that view. It is true that Section 1 is self-enforcing, and that the judiciary is empowered to interpret and apply it. As William Carter points out, however, courts might defer to Congress for pragmatic reasons “that have nothing to do with the Amendment’s actual meaning and scope.”¹³ Some scholars have advised deference, for example, because of concerns about institutional competence and democratic constitutionalism.¹⁴ These scholars raise issues that lie beyond the scope of this Article; the point here is that one may accept that Section 1 outright bans the badges and incidents without holding that judges should monopolize their identification.

Not long ago, Congress put the Section 1 issue on track for a resolution. The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act makes it a federal crime to willfully injure a person not only on account of race and color (already held to be within the Amendment’s reach), but also on account of religion and national origin.¹⁵ When these protections reach the courts, judges will be called upon to determine whether they are “appropriate” to the enforcement of Section 1. If Section 1 prohibits only the physical and legal compulsion of labor, then the connection may be difficult, if not impossible, to establish.¹⁶ Although *Jones* requires only a rational basis for the connection, it is

12. See William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17 (2004); Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539 (2002).

13. Carter, *supra* note 2, at 1351–52; see also *id.* at 1319.

14. See Miller, *supra* note 9, at 1841–42 (“It is up to Congress, through enforcement, to tease out the customs of slavery from untainted customs, and for the people, through their representatives, to work out the meaning of slavery and freedom through that remedial process.”); Rebecca E. Zietlow, *Conclusion: The Political Thirteenth Amendment*, 71 MD. L. REV. 283, 283 (2011) (recounting that the framers of the Thirteenth Amendment expected its meaning to be determined not by courts but by Congress); see also RICHARD D. PARKER, “HERE, THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO (1994) (urging popular involvement in constitutional interpretation); MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (proposing that Congress play a central role in constitutional interpretation).

15. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2190, 2835–44 (codified as amended at 18 U.S.C. § 249 (2012)).

16. Courts have thus far avoided the Section 1 issue by drawing the line at race and according Congress wide deference under the rational basis test of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), quoted *supra* text accompanying note 1. See, e.g., *United States v. Hatch*,

hard to see how a general prohibition on hate crimes motivated by religion or national origin is rationally related to a ban on the physical or legal compulsion of labor. This problem will be compounded if, as seems entirely possible, the Supreme Court abandons the rational basis test of *Jones* in favor of the stricter congruent and proportional test of *City of Boerne v. Flores*.¹⁷

Part I of this Article examines contemporary debates over the proposal and ratification of the Thirteenth Amendment and the enactment, five months later, of the Civil Rights Act of 1866. It suggests that most proponents of the Amendment and the Act, including leading Moderate and Radical Republicans, held that Section 1 prohibited not only core components of slavery, like the disability to quit work, but also the disabilities to obtain and own property, to make contracts, and to testify in court. Nothing obligates us to accept their views today, but mainstream principles of constitutional interpretation at a minimum confirm their relevance and salience.

Part II considers the role of Section 1 in the jurisprudence of the badges and incidents of slavery. In the standard story, the doctrine of badges and incidents originated in the *Civil Rights Cases* (1883) and was expanded in *Jones v. Alfred H. Mayer Company* (1968). I propose, however, that the doctrine announced in the *Civil Rights Cases* differed fundamentally from the one set forth in *Jones*. Part II recounts the development of two, legally distinct doctrines of badges and incidents separated by a six-decade hiatus. The first, which lasted from 1883 until 1906, held that the phrase “badges and incidents of slavery” drew its meaning from Section 1 and served as a label for practices that were prohibited by Section 1. The second, which commenced in 1968 and endures today, holds that Congress enjoys the power “rationally” to identify

722 F.3d 1193, 1205 (10th Cir. 2013) (upholding the congressional determination that hate crimes motivated by race constitute badges or incidents of slavery); *United States v. Nelson*, 277 F.3d 164, 176–77 (2d Cir. 2002) (upholding prosecution for a hate crime motivated by religion where the religious group involved had been considered a “race” at the time of the Amendment’s adoption).

17. 521 U.S. 507, 520 (1997). Compare Jennifer Mason McAward, *Congressional Authority to Interpret the Thirteenth Amendment: A Response to Professor Tsesis*, 71 MD. L. REV. 60 (2011) (arguing that *City of Boerne* should apply to the Thirteenth Amendment), with William M. Carter, Jr., *Judicial Review of Thirteenth Amendment Legislation: “Congruence and Proportionality” or “Necessary and Proper”?*, 38 U. TOL. L. REV. 973 (2007) (urging retention of the *Jones* test), and Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 40 (2011) (suggesting additional reasons for retaining the *Jones* test). In an article that does not specifically address the standard of review, Mark Graber has presented evidence that Section 2 was understood to convey a broad grant of authority and to accord Congress wide discretion in the choice of means to enforce Section 1. See Mark A. Graber, *The Second Freedmen’s Bureau Bill’s Constitution*, 94 TEX. L. REV. 1361, 1383–85 (2016).

and eliminate the badges and incidents, some or all of which may or may not be directly prohibited by Section 1. While the first iteration of the doctrine was grounded firmly in Section 1, the second floats in a cloud of uncertainty that, as a practical matter, thwarts jurisprudential development.

Parts III and IV consider the present-day implications of the history and jurisprudence covered in Parts I and II. Part III discusses broad principles, while Part IV addresses the implications of a Section 1 badges and incidents doctrine in several specific contexts: discrimination against whites, disparate impact claims, race-conscious affirmative action, gender discrimination, and abortion rights.

I. ORIGINAL UNDERSTANDINGS OF SECTION 1

This Part discusses the significance of the Thirteenth Amendment's early history for present-day interpretation and construction of Section 1, focusing on: (A) the debates over the Amendment's proposal and ratification; (B) the far more revealing debates concerning the Civil Rights Act of 1866, enacted shortly after the Amendment's ratification; and (C) questions about the usefulness of the Civil Rights Act and its history as sources for interpreting the Amendment.

A. Debates About the Proposal and Ratification of the Thirteenth Amendment

Early on, the Amendment's proponents, nearly all of them Republicans, and opponents, mostly Democrats, debated its merits in a context distorted by role reversal. In order to drum up resistance, opponents portrayed it as a fearsomely sweeping measure that would topple traditional hierarchies not only of race, but also of sex. The Republicans intended nothing less, they claimed, than full equality for black men, including citizenship, the right to vote, and the right to marry white women.¹⁸ If the master's right to the services of his slave could be abrogated, some warned, then so could his right to the services of his wife, children, and apprentices.¹⁹ Representative William S. Holman accurately predicted not only that Republicans would claim authority

18. MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 130 (2001).

19. See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 1483 (1864) (statement of Sen. Powell) (warning that if the federal government could regulate slavery, then it could "on the same principle, make regulations concerning the relation of parent and child, husband and wife, and guardian and ward"); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 455–56 (1989).

from the Amendment to confer citizenship on former slaves, but also that the concept of freedom—as distinct from the absence of chattel slavery—would figure in the justification. “Mere exemption from servitude,” he observed, “is a miserable idea of freedom.”²⁰

Meanwhile, the Amendment’s most enthusiastic white proponents downplayed its effects in order to attract moderate and conservative votes.²¹ Most refrained from specifying what rights it would protect and, when they did mention specifics, it was usually to deny that the Amendment would accomplish some outcome feared by conservatives, for example conferring suffrage on black Americans or authorizing interracial marriage.²²

Nevertheless, all but the most conservative proponents avoided denying and sometimes affirmed that the Amendment guaranteed a set of “natural” or “civil” rights extending beyond freedom from the physical or legal coercion of labor.²³ Representative James Ashley, the Amendment’s floor leader in the House, proclaimed that it would provide “a constitutional guarantee of the government to protect the rights of all and secure the liberty and equality of its people.”²⁴ A few proponents framed the denial of fundamental rights as “incidents” or “vestiges” of slavery. Senator James Harlan of Iowa listed the “necessary incidents and peculiar characteristics of slavery,” a category in which he included the disabilities to marry, to raise children, to own property, and to testify in court, as well as the denial of education and the freedoms of speech and press.²⁵ Similarly, Senator Henry Wilson of Massachusetts promised that if the Amendment were enacted, “it will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading, and bloody codes; its dark, malignant, and barbarizing spirit; all it was and is, everything connected with it or pertaining to it,” including denials of “the sacred rights of

20. CONG. GLOBE, 38th Cong., 1st Sess. 2962 (statement of Rep. Holman).

21. See VORENBERG, *supra* note 18, at 190.

22. See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 1465 (statement of Sen. Henderson) (“So in passing this amendment we do not confer upon the negro the right to vote.”); VORENBERG, *supra* note 18, at 101–03, 190–91, 194–95.

23. Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 174–79 (1951); see also VORENBERG, *supra* note 18, at 190–91, 220–21. For further discussion, see HERMAN BELZ, *A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN’S RIGHTS, 1861–1866* 118, 160 (2000), and VanderVelde, *supra* note 19, at 473–74. On the views of conservative proponents, including President Andrew Johnson and the few Democrats who supported the Amendment, see VORENBERG, *supra* note 18, at 229–30.

24. REBECCA ZIETLOW, *THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION* (2018).

25. CONG. GLOBE, 38th Cong., 1st Sess. 1439 (statement of Sen. Harlan).

human nature, the hallowed family relations of husband and wife, parent and child.”²⁶ Such statements indicated that Section 1 would itself outlaw components of slavery other than forced labor and human property.²⁷

African American leaders, who spoke for a majority of the population in three southern states as well as substantial minorities in several others,²⁸ heartily concurred. They insisted that the abolition of slavery necessarily entailed not only outlawing the full-fledged conditions of slavery and servitude, but also eliminating each and every element of the slave system. A convention of the “colored citizens” of Norfolk, Virginia, for example, claimed that “all the State laws imposing disabilities upon colored people on the ground of color, ‘being but a creation of slavery, and passed for its maintenance and perpetuation, are part and parcel of the system and must follow its fate.’”²⁹ The Amendment’s guarantee of liberty would be nothing more than “a delusion, a mockery, and a snare,” warned Frederick Douglass, if black people could be deprived of such basic liberties as the rights to testify in court and to vote.³⁰

26. *Id.* at 1324 (statement of Sen. Wilson).

27. Wilson was explicit that the Amendment itself would “obliterate” the vestiges of slavery and, as George Rutherglen has observed, Harlan “made no reference to the power of Congress but implied that this, and other, incidents of slavery would be abolished by the amendment itself.” Rutherglen, *supra* note 4, at 168. For additional quotations from Harlan and Wilson, see Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1937 nn. 75–76 (1987).

28. U.S. CENSUS BUREAU, TABLE A-18. RACE FOR THE UNITED STATES, REGIONS, DIVISIONS, AND STATES: 1870 (2002), <http://perma.cc/N2UM-5WMU> (reporting black majorities in South Carolina, Mississippi, and Louisiana, and minorities of more than 40 percent in Alabama, Georgia, Florida, and Virginia).

29. Equal Suffrage: Address From the Colored Citizens of Norfolk, Va., to the People of the United States (June 5, 1865), *reprinted in* 1 PROCEEDINGS OF THE BLACK NATIONAL AND STATE CONVENTIONS, 1865–1900, at 83, 87 (Philip S. Foner & George E. Walker eds., 1986). On the roots of this view, see William M. Wiecek, *Emancipation and Civic Status: The American Experience, 1865–1915*, in THE PROMISES OF LIBERTY, *supra* note 4, at 80–83. Also see HENRY HIGHLAND GARNET, A MEMORIAL DISCOURSE DELIVERED IN THE HALL OF THE HOUSE OF REPRESENTATIVES, WASHINGTON, D.C. ON SABBATH, FEBRUARY 12, 1865, at 79, 85 (Joseph M. Wilson ed., 1865), which praised the assembled Representatives for their proposal of the Thirteenth Amendment and observing that it was time for the “gigantic monster” of slavery to perish and for the “shrine of Moloch” to sink, “leav[ing] no traces where it stood.” *Id.* at 79, 85 (internal quotation marks omitted).

30. FREDERICK DOUGLASS, *The Need for Continuing Anti-Slavery Work: Speech at Thirty-Second Annual Meeting of the Antislavery Society* (May 9, 1865), in 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: RECONSTRUCTION AND AFTER 166, 167 (Philip S. Foner ed., 1955). Douglass held that “[s]lavery is not abolished until the black man has the ballot,” but he had no confidence that the Amendment would be interpreted or enforced to accomplish that result. Accordingly, he argued that the work of abolitionists must continue and, in February 1866, he met with President Andrew Johnson as part of a delegation requesting that the Amendment be enforced by legislation extending the

After Lincoln's assassination on April 15, 1865, President Andrew Johnson urged his fellow white southerners to ratify the Amendment so that their representatives could return to Congress.³¹ Abandoning their dire predictions of the Amendment's broad reach, southern Democrats now moved to entrench a narrow reading on the ground. They accepted the obligation to abolish chattel slavery but treated any additional protection for the former slaves as a matter of legislative grace.³² Southern local and state legislatures enacted "Black Codes" providing the former slaves with a few basic rights, for example to own personal property and to marry (with other nonwhites), but prohibiting them from exercising many others including the right to bear arms, to serve on juries, to vote, to testify against whites in court, to quit their jobs while under contract, and to move about without proof of a labor contract with some employer.³³

By the time the Amendment was declared ratified on December 6, 1865, Republicans were already moving to enact their own, broader reading into law.

B. Section 1 of the Thirteenth Amendment and the Civil Rights Act of 1866

Barely five months after the Amendment's ratification, Congress passed the Civil Rights Act of 1866. It would be difficult to exaggerate the importance of this statute to present-day thinking about the Amendment. Under the Supreme Court's current approach to constitutional interpretation, congressional actions closely following the ratification of a constitutional provision can supply "weighty evidence" of the provision's meaning.³⁴ Even if the Justices were to change their minds about that canon of interpretation, the Act would loom large both because it spawned landmark judicial decisions about the Amendment's scope, and because the congressional debates over its

suffrage to African Americans. *Id.*; PROCEEDINGS OF THE BLACK NATIONAL AND STATE CONVENTIONS, *supra* note 29, at 214.

31. VORENBERG, *supra* note 18, at 227–29.

32. See W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 1860–1880, at 136 (1935); THEODORE B. WILSON, THE BLACK CODES OF THE SOUTH 62–63 (1965).

33. For example, around the time when the South Carolina legislature ratified the Amendment on November 13, 1865, it also adopted a series of four statutes designed to incorporate freed slaves into the legal order. WILSON, *supra* note 32, at 72–74. On the Black Codes of other states, see ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 199–201 (1988), and chapters 3 and 5 of WILSON, *supra* note 32, at 61–80, 96–115.

34. *Printz v. United States*, 521 U.S. 898, 905 (1997) (quoting *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986)).

enactment set the template for arguments about the badges and incidents of slavery down to the present day.

The Act went beyond the mere outlawing of full-fledged slavery and involuntary servitude to guarantee a modest but significant array of civil rights. To prove a violation of the Act, it was not necessary to show that anyone had been placed in a condition of chattel slavery or involuntary servitude. Instead, it was enough that the victim had been “depriv[ed] of *any* right secured or protected by this act.”³⁵ Moreover, the victim need not be entirely deprived of the right; it was enough that she was denied “the *same* right . . . as is enjoyed by white citizens” to make contracts, participate in court proceedings, own property, and enjoy the “full and equal benefit of all laws and proceedings for the security of person and property.”³⁶

During the congressional debates, Democrats and Conservative Republicans presented a cogent case that the Act (and the Second Freedmen’s Bureau Act, which contained a similar though temporary guarantee of civil rights) exceeded the scope of the Thirteenth Amendment.³⁷ Because present-day courts continue to implement their view of Section 1, it warrants careful attention. Again and again, they pointed to the text, which prohibited only slavery and involuntary servitude—not the denial of civil rights. “A man may be a free man and not possess the same civil rights as other men,” explained Senator Saulsbury. “If not, whose slave was he? Who could control his person or his actions? Who could appropriate to his own use the labor of such a one?”³⁸ Nobody cited dictionaries, but Saulsbury’s concept of slavery echoed

35. Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (emphasis added).

36. *Id.* § 1 (emphasis added).

37. For an account of the role of the Thirteenth Amendment in authorizing the Second Freedmen’s Bureau Act, see Graber, *supra* note 17. Graber presents a nuanced analysis of both the Republican and Democratic views on the Act’s constitutionality, stressing the combined scope of sections 1 and 2. See *id.* at 1373–90 (Republican); *id.* at 1390–96 (Democratic). His account, which goes beyond the Second Freedmen’s Bureau Act, sheds light on issues of federalism and congressional power not covered in the present article.

38. CONG. GLOBE, 39th Cong., 1st Sess. 477 (1866) (statement of Sen. Saulsbury). Senator Cowan explained:

The true meaning and intent of that amendment was simply to abolish negro slavery.

That was the whole of it. What did it give to the negro? It abolished his slavery.

Wherein did his slavery consist? It consisted in the restraint that another man had over his liberty, and the right that that other had to take the proceeds of his labor.

Id. at 1784 (statement of Sen. Cowan); see also *id.* at 1156 (statement of Rep. Thornton) (“The sole object of that amendment was to change the *status* of the slave to that of a freeman . . .”); *id.* at 1268 (statement of Rep. Kerr) (“But if these discriminations [prohibited by the Civil Rights bill] constitute slavery or involuntary servitude, which are the only things prohibited by the last constitutional amendment, then whose slaves are the persons so discriminated against?”).

contemporary editions, which defined slavery as involving the subjection of one person to another.³⁹ To the Senator and likeminded allies, Congress was cheating by enacting a civil rights law on the foundation of a constitutional provision that did nothing more than abolish slavery and involuntary servitude. “If you intended to bestow upon the freed slave all the rights of a free citizen, you ought to have gone further in your constitutional amendment, and provided that not only the *status* and condition of slavery should not exist, but that there should be no inequality in civil rights.”⁴⁰ The bill’s most vocal opponents held that the former slaves had gained only one right, the right to leave their employers (or, following Blackstone, the right of “locomotion”⁴¹), enforceable by obtaining a writ of *habeas corpus* if restrained by the employer. Anybody endowed with that one right could not, they insisted, be in a condition of slavery or servitude.⁴² A few opponents did accept that the Amendment protected additional rights, for example to contract and to collect wages, but they were in the minority.⁴³

39. See CONG. GLOBE, 39th Cong., 1st Sess. 113 (statement of Sen. Saulsbury) (“Slavery is a *status*, a condition; it is a state or situation where one man belongs to another and is subject to his absolute control.”); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1241 (Chauncey A. Goodrich & Noah Porter eds., 1865) (defining “slavery” as the “condition of a slave; the state of entire subjection of one person to the will of another”); JOSEPH E. WORCESTER, A DICTIONARY OF THE ENGLISH LANGUAGE 1352 (1860) (defining “slavery” as the “state of absolute subjection to the will of another; the condition of a slave”).

40. CONG. GLOBE, 39th Cong., 1st Sess. 477 (statement of Sen. Saulsbury).

41. 1 WILLIAM BLACKSTONE, COMMENTARIES *134 (stating that personal liberty “consists in the power of locomotion, of changing situation, or moving one’s person to whatsoever place one’s own inclination may direct, without imprisonment or restraint, unless by due course of law”).

42. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 499 (statement of Sen. Cowan) (claiming that the Amendment “was intended . . . to give to the negro the privilege of the *habeas corpus*; that is, if anybody persisted in the face of the constitutional amendment in holding him as a slave, that he should have an appropriate remedy to be delivered. That is all.”); *id.* at 623 (statement of Rep. Marshall) (asserting that “[i]f any man asserts the right to hold another in bondage as his slave, his chattel, and refuses to let him go free, Congress can [legislate]. But Congress has acquired not a particle of additional power other than this by virtue of this amendment.”); *cf. id.* at 318 (statement of Sen. Hendricks) (opposing the Freedman’s Bureau Bill on the ground that the Amendment “broke asunder this private relation between the master and his slave, and the slave then, so far as the right of the master was concerned, became free,” but “no new rights are conferred upon the freedman”); Wiecek, *supra* note 29, at 79 (observing that under the slave states’ “understanding of status, a former slave had only one right, locomotion, the ability to go where he or she wanted”).

43. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1156 (statement of Rep. Thornton) (conceding that “Congress has the power to punish any man who deprives a slave of the right of contract, or the right to control and recover his wages,” but rejecting any power to protect the right to testify in cases involving whites); *id.* at 600 (statement of Sen. Guthrie) (acknowledging that the Amendment required the states “to put these Africans upon the

To back up their legal arguments, opponents warned that if the Civil Rights Act were passed and upheld as constitutional, terrifying consequences would inevitably follow. “If, to protect the negroes in their freedom, you have the right to confer upon them all the civil rights and immunities contemplated by this bill,” declared one House Democrat, “you have the right to carry your legislation to any extent that the whim or caprice of gentlemen may dictate.”⁴⁴ Why was this so scary? Opponents conjured two sets of hypotheticals. The first fanned overtly racist fears that few constitutionalists would openly express today, for example that Congress could legalize interracial marriage, desegregate schools, authorize blacks to vote, and invite “all the inferior races of the earth to seek asylums and civil rights in America,” thereby causing the nation to “become substantially *Africanized, Mexicanized, or Coolyized*.”⁴⁵ The second, still very much a part of our public constitutional discourse, envisioned the federal government violating states’ rights. “If Congress can legislate in relation to [civil] rights in behalf of the black, why cannot they legislate in relation to the same rights in behalf of the white?,” demanded Democratic Senator Reverdy Johnson. “And if they can legislate in relation to both, the States are abolished.”⁴⁶

In order to establish the Act’s constitutionality, proponents needed to show only that it fell within Congress’s power to enforce the Amendment, conferred by Section 2. However, as Herman Belz has explained: “The scope of congressional power under section 2 depended fundamentally on the meaning assigned to slavery in section 1.”⁴⁷ Congress could—at a minimum—protect rights independently guaranteed by Section 1, adding “appropriate” enforcement mechanisms. The Act’s leading proponents accordingly claimed that the rights listed in the Act were already guaranteed by Section 1, offering

same footing that the whites are in relation to civil rights,” but arguing that legislation was unnecessary).

44. *Id.* at 1156 (statement of Rep. Thornton).

45. *Id.* at 500 (statement of Sen. Cowan) (desegregate schools); *id.* at 1121 (statement of Rep. Rogers) (authorize interracial marriage, desegregate schools, authorize blacks to vote); *id.* at 1268 (statement of Rep. Kerr) (“Africanized”).

46. *Id.* at 1777 (statement of Sen. Johnson); *see also id.* at 478 (statement of Sen. Saulsbury) (opposing the Civil Rights bill on the ground that “if you can regulate and govern in one particular, you can govern in reference to all the property and all the interests of the States”); *id.* at 1414 (statement of Rep. Davis) (“The principles involved in this bill, if they are legitimate and constitutional, would authorize Congress to pass a civil and criminal code for every State in the Union.”); *id.* at House app. at 158 (statement of Rep. Delano) (maintaining that if the Act were constitutional, then Congress could “manage and legislate with regard to all the personal rights of the citizen—rights of life, liberty, and property. You render this Government no longer a Government of limited powers”).

47. BELZ, *supra* note 23, at 125.

two theories in support. The first focused on the meaning of the terms “slavery” and “involuntary servitude,” while the second focused on their common antonym: “freedom.”

1. Focus on “Slavery” and “Involuntary Servitude”

According to Belz, “most Republicans viewed slavery as chattelism or as the master-slave relationship strictly conceived.”⁴⁸ Belz is undoubtedly right, and it could be said with equal accuracy that everyone from far right Democrats to the most Radical Republicans used the term “slavery” in that sense. It is also true, however, that most Republicans used the term in other senses as well. “Slavery” often signified the *system* of slavery, conceived as an interlocking set of components, raising the possibility that the eradication of slavery would entail eliminating not only chattelism and physically or legally coerced labor, but also other important components of the system.⁴⁹ “Slavery” could also serve as a synonym for “slave power,” a monstrous, antirepublican social order headed by the slave-owning aristocracy of the South.⁵⁰ “Slavery” did things; it suppressed public education, “reared an aristocracy,” “trampled down the masses,” repeatedly violated the Constitution (especially the Privileges and Immunities Clause of Article IV), and outright murdered women and children.⁵¹

The constitutional issue, however, hinged less on abstract definitions of “slavery” and “involuntary servitude,” than on what it took to satisfy the Amendment’s command that neither “shall exist.” As recounted above, the Democrats insisted that slavery ceased to exist as soon as its core incidents of

48. *Id.*

49. See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864) (statement of Sen. Wilson) (promising that the Amendment will “obliterate the last lingering vestiges of the slave system”); CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Trumbull) (“When slavery goes, all this system of legislation, devised in the interest of slavery and for the purpose of degrading the colored race . . . goes with it.”); see also *supra* note 29 and accompanying text.

50. Andrew E. Taslitz, *The Slave Power Undead: Criminal Justice Successes and Failures of the Thirteenth Amendment*, in *THE PROMISES OF LIBERTY*, *supra* note 4, at 248–49; see also Miller, *supra* note 9, at 1836–37.

51. CONG. GLOBE, 38th Cong., 1st Sess. 1369 (statement of Sen. Clark); see also *id.* at 1322 (statement of Sen. Wilson) (“Slavery demanded the right to enter and range over the Territories It] bade the legislators of New Mexico enact a barbarous slave code, and also a degrading code for the oppression of white laboring men”); *id.* at 2984 (statement of Rep. Kelley) (“The offspring of robbery, its life one continued crime, its only support despotic power, slavery has impaired the national regard for the rights of the individual.”); JAMES D. SCHMIDT, *FREE TO WORK: LABOR LAW, EMANCIPATION, AND RECONSTRUCTION, 1815–1880*, at 113–14 (1998).

chattelism and forced labor had been abolished.⁵² But the Act's Republican proponents took a more demanding view. According to Representative Martin Russell Thayer, a centrist Republican⁵³ leader from Pennsylvania, the Amendment declared "not only that that feature of slavery shall be abolished which permitted the purchase and sale of men, of women and of little children as slaves, but that all features of slavery which are oppressive in their character, which extinguish the rights of free citizens, and which unlawfully control their liberty, shall be abolished and destroyed forever." Any other construction would leave the freed people "in a condition of modified slavery."⁵⁴ Senator Lyman Trumbull of Illinois, the Act's principal author, similarly asserted that "[w]ith the destruction of slavery necessarily follows the destruction of the incidents to slavery," a category in which he placed "laws that prevented the colored man going from home, that did not allow him to buy or to sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated."⁵⁵ According to Representative Ignatius Donnelly, a Radical Republican from Minnesota, even a partial deprivation of a single natural right could transform a free person into a slave:

"[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; he may be held down by unjust laws to a degraded and defenseless condition as fully as though his wrists were manacled; he may be oppressed by a convocation of masters called a Legislature as fully as by a single master."⁵⁶

Such statements harked back to pre-ratification assertions that the Amendment would eliminate the "incidents" and "vestiges" of slavery.⁵⁷

52. See *supra* text accompanying notes 41–42; see also *infra* text accompanying note 65.

53. In this Article, all identifications as to political tendency—for example, "Radical Republican" or "Conservative Republican"—are taken from the session-by-session typology in MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863–1869*, at 339–77 (1974).

54. CONG. GLOBE, 39th Cong., 1st Sess. 1152 (statement of Rep. Thayer).

55. *Id.* at 322–23 (Sen. Trumbull) (defending the constitutionality of the Second Freedmen's Bureau Act, which contained a prohibition on discrimination similar to that of the 1866 Civil Rights Act). For additional discussion and documentation on this point, see Carter, *supra* note 2, at 1342–46.

56. CONG. GLOBE, 39th Cong., 1st Sess. 588 (statement of Rep. Donnelly).

57. See *supra* notes 25–27.

2. Focus on “Freedom,” Antonym of “Slavery” and “Involuntary Servitude”

Second, the scope of the Amendment’s prohibitions on “slavery” and “involuntary servitude” might depend importantly on the meaning of the antonym shared by those terms, namely freedom (or liberty). In this view, the Amendment might protect a given right not only if its denial were a necessary incident to slavery, but also if its protection were a “necessary incident of freedom.”⁵⁸ From all indications, the members of the Thirty-Ninth Congress saw no middle ground between freedom, on the one hand, and slavery and servitude on the other.⁵⁹ It followed that the constitutional terms “slavery” and “involuntary servitude” could be defined as the absence of freedom. Trumbull, for example, acknowledged that the Black Codes “do not make a man an absolute slave,” but argued that they nevertheless pushed him across the line from freedom to slavery. “[I]t is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins, but a law that does not allow a colored person to go from one county to another is certainly a law in derogation of the rights of a freeman,” as were laws prohibiting colored persons from holding property, teaching, or preaching and—indeed—“any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens.”⁶⁰ According to Senator Jacob Howard of Michigan, a respected Radical, the Amendment was “intend[ed] to make [the negro] the opposite of a slave, to make him a freeman. And what are the attributes of a freeman according to the universal understanding of the American people?” At a minimum, “the right of acquiring property, of the right of having a family, a wife, children, home.”⁶¹ Senator William M. Stewart, Conservative Republican

58. CONG. GLOBE, 39th Cong., 1st Sess. House app. at 158 (statement of Rep. Delano) (opposing the bill on the ground that “the right to testify as a witness” is not “a necessary incident to freedom”); Robert J. Kaczorowski, *Epilogue: The Enduring Legacy of the Thirteenth Amendment*, in *THE PROMISES OF LIBERTY*, *supra* note 4, at 306–07 (recounting the Republican view that the Amendment not only abolished slavery, but also guaranteed freedom).

59. Here, the members of the Thirty-Ninth Congress echoed the law of slavery. See PARSONS, *supra* note 5, at 327 (“A slave cannot become partially free. The law recognizes only freedom on the one side and slavery on the other; and there is no intermediate *status*.”).

60. CONG. GLOBE, 39th Cong., 1st Sess. 474–75 (statement of Sen. Trumbull) (“A law that does not allow a colored person to hold property, does not allow him to teach, does not allow him to preach, is certainly a law in violation of the rights of a freeman, and being so may properly be declared void.”).

61. *Id.* at 504 (statement of Sen. Howard); see also *id.* at 41 (statement of Sen. Sherman) (“[U]nless 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

from Nevada, similarly contended that the Amendment conferred “freedom [on the negro], and that implies that he shall have all the civil rights necessary to the enjoyment of that freedom.”⁶² To Representatives Donnelly and Thayer, cited above for their views on the meaning of “slavery,” freedom provided a touchstone for defining that term. As Donnelly put it, “he who is not entirely free is necessarily a slave.”⁶³ Donnelly and Thayer agreed that the freedom guaranteed by the Amendment necessarily encompassed the “great natural rights,” a formulation that echoed pre-ratification statements by some Republicans.⁶⁴

Interestingly, the bill’s opponents did not dispute that the Amendment guaranteed freedom or that there was no middle ground between freedom, on the one hand, and slavery or servitude on the other. Instead of defining slavery as the absence of freedom, however, they defined freedom as the absence of slavery, narrowly conceived. “Slavery was a domestic relation [that] gave a right to the master to require involuntary service from his slave,” argued Representative Michael Kerr, a Democrat from Indiana. And because that relation had been “severed,” it followed that the “personal freedom of the slave is established, and no power can take it from him.”⁶⁵ Representative Anthony Thornton, Democrat of Illinois, accepted the Republican formulation of the constitutional question as whether “all the civil rights and immunities sought to be secured by this bill are necessary to constitute a man a freeman?” Thornton answered no on the ground that during the era of slavery free blacks had been denied rights protected by the bill, “yet they have been regarded as freemen.”⁶⁶

has the power, by the express terms of this amendment, to secure all these rights.”); *id.* at 1124 (statement of Rep. Cook) (“[W]hen those rights which are enumerated in this bill are denied to any class of men on account of race or color . . . they are not secured in the rights of freedom.”); *id.* at 1152 (statement of Rep. Thayer) (asserting that the rights guaranteed in the bill “constitute the essence of freedom”).

62. *Id.* at 298 (statement of Sen. Stewart); *see also id.* at 654 (statement of Rep. McKee) (“As freedmen they must have the civil rights of freemen.”).

63. *Id.* at 588 (statement of Rep. Donnelly).

64. *Id.* at 1152 (statement of Rep. Thayer); *see also id.* at 588 (statement of Rep. Donnelly); VORENBERG, *supra* note 18, at 190–91, 220–21; tenBroek, *supra* note 23, at 174–79.

65. CONG. GLOBE, 39th Cong., 1st Sess. 1268 (statement of Rep. Kerr); *see also id.* at 934 (statement of Sen. Davis) (“Slavery is the state of entire legal subjection of one person to the will of another, and freedom is the total absence of such subjection from a person.”); *id.* at 1784 (statement of Sen. Cowan) (asserting that the Amendment conferred upon the negro “the right of personal liberty,” which amounted simply to the “right to go wherever one pleases without restraint or hindrance on the part of any other person”).

66. *Id.* at 1156 (statement of Rep. Thornton); *see also id.* House app. at 158 (statement of Rep. Delano) (arguing that neither the right to testify nor the right to convey property was “a necessary incident to freedom” because “discriminations in inheritance, as well as in the right to testify, have been made by State legislation, and no one thought it an interference

This theory—that the Amendment protected only rights enjoyed by free blacks before emancipation—would later be embraced by the Supreme Court in the *Civil Rights Cases* (1883).⁶⁷

The Act’s proponents, however, rejected that notion on the face of their statute. Citizens “of every race and color” would henceforth “have the same right” to make contracts and to own property as were “enjoyed by white citizens”—not the same rights as were enjoyed by free blacks during the period of slavery.⁶⁸ This elevated the standard of freedom far above what it took to transform a slave to a “free negro” prior to liberation, especially in the South, which was home to the majority of free blacks. As described by the Georgia Supreme Court in 1853, for example, free black Georgians were “associated still with the slave in this State, in some of the most humiliating incidents of his degradation,” among them prohibitions on testifying against white citizens, bearing fire-arms, preaching without a license, teaching any other “free negro” to read or write, and practicing any trade “requiring a knowledge of reading or writing.” They were also subjected to the criminal code and punishments applicable to slaves, including whipping.⁶⁹

To generalize, Democrats argued that the Amendment conferred only formal freedom, while Republicans insisted upon actual freedom. The Georgia court pithily captured the clash. Even as it spoke of the “free person of color,” it acknowledged that “[t]hough not a *slave*, yet is he not *free*.”⁷⁰ Like the Democrats, the Georgia court classified unowned persons of color as formally “free,” but at the same time—like the Republicans—it recognized that they were not actually “free.” For the Act’s Republican proponents, the formal status of freedom was not enough; echoing African Americans, they insisted upon actual or practical freedom.⁷¹ The Thirteenth Amendment “declared that all persons in the

with the liberty of the citizen”); *id.* at 638 (statement of Rep. Shanklin) (maintaining that the Amendment empowered Congress only “to carry out and secure to the negro his personal freedom, such as all the free negroes then enjoyed”).

67. See *infra* text accompanying note 111 and accompanying text.

68. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

69. *Bryan v. Walton*, 14 Ga. 185, 202–03 (1853); see also GEORGE RUTHERGLEN, *CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866*, at 45 (2013) (observing that, as the Civil War approached, Southern courts “extended the incapacities of slaves to free blacks”). Herman Johnson describes this status as “civil slavery” (as opposed to formal, or chattel slavery), and traces it to the U.S. Supreme Court’s decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. See Herman N. Johnson Jr., *From Status to Agency: Abolishing the “Very Spirit of Slavery”*, 7 COLUM. J. RACE & L. 245, 251 (2017).

70. *Bryan*, 14 Ga. at 202 (third emphasis added).

71. On the views of African Americans, see *supra* text accompanying notes 29–30.

United States should be free,” instructed Senator Trumbull, and the Civil Rights Act was “intended to give effect to that declaration and secure to all persons within the United States practical freedom.”⁷² Under laws like the Black Codes, observed Senator Howard, a former slave could find himself, though “not being a slave,” deprived of the rights of a “free man”—a condition not permitted by the Amendment.⁷³ “The practical question now to be decided is whether they shall be in fact freemen,” commented Thayer. “It is whether they shall have the benefit of this great charter of liberty given to them by the American people.”⁷⁴

3. Focus on Congress’s Section 2 Power to Enact “Appropriate” Enforcement Legislation

Today, much attention focuses on a third constitutional justification for the Civil Rights Act. Even if Section 1 of the Amendment did not outlaw the Black Codes or guarantee the rights listed in the Act, perhaps Congress could accomplish those objectives under its Section 2 power to enforce Section 1 with “appropriate” legislation. Jennifer Mason McAward maintains that “supporters saw the Act not as an articulation of the rights guaranteed directly by Section 1, but rather as a clear example of necessary and proper legislation to secure the freedom conveyed by Section 1.”⁷⁵ She presents ample evidence from the legislative history tending to show that proponents of the Act located Congress’s power to enact the law in Section 2, and that they took a broad view of Congress’s discretion to choose means to enforce section 1.⁷⁶ Only one of the quoted statements, however, appears to indicate that the rights themselves—as opposed to the various provisions of the Act that provided for their enforcement—arose from Section 2 and not from Section 1. According to Representative Burton C. Cook of Illinois:

The first section would have prohibited forever the mere fact of chattel slavery as it existed. When Congress was clothed with power to enforce that provision by appropriate legislation, it meant two things. It meant, first, that Congress shall have power to secure the rights of freemen to those men who had been slaves. It meant,

72. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull); see also *id.* at 476 (stating that the bill would secure “freedom in fact”).

73. *Id.* at 504 (statement of Sen. Howard).

74. *Id.* at 1151 (statement of Rep. Thayer).

75. Jennifer Mason McAward, *The Scope of Congress’s Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U. L. REV. 77, 109 (2010).

76. *Id.* at 111–12; Jennifer Mason McAward, McCulloch and the Thirteenth Amendment, 112 COLUM. L. REV. 1769, 1789–90 (2012).

secondly, that Congress should be the judge of what is necessary for the purpose of securing to them those rights.⁷⁷

It seems unlikely, however, that Cook meant to advance a narrow interpretation of Section 1. The quoted passage was part of a lengthy constitutional argument, in the course of which Cook asserted that the Black Codes would “virtually reenslave” the freed people, reduce them to the “condition of slavery,” leave them in a “system of slavery,” and perpetuate “a system of involuntary servitude.”⁷⁸ If Cook, a Radical, believed that Section 1 permitted such results, then his views were anomalous even among centrist Republicans, much less among his fellow Radicals.⁷⁹ Although McAward’s reading is plausible, it seems more likely that Cook was concerned about the practical necessity for strong enforcement legislation, not about the theoretical scope of Section 1.

In any case, most Republicans who spoke on the issue relied on Section 1, not Section 2, as the source of civil rights protection. Trumbull was especially clear on this point. In response to Saulsbury’s claim that Congress lacked the constitutional power to pass the Act, he offered a justification that allotted distinct roles to Sections 1 and 2:

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 power to secure them, the second section of the amendment was added.⁸⁰

On another occasion, Trumbull declared “that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens . . . is, in fact, a badge of servitude which, *by the Constitution*, is prohibited.”⁸¹ Representative Thayer made it clear that, in his view, the

77. CONG. GLOBE, 39th Cong., 1st Sess. 1124 (statement of Rep. Cook); McAward, *supra* note 75, at 111–12.

78. CONG. GLOBE, 39th Cong., 1st Sess. 1124 (statement of Rep. Cook).

79. On Cook’s radical allegiance, see BENEDICT, *supra* note 53, at 351. On the views of other Republicans regarding the constitutionality of the Black Codes under section 1, see *supra* notes 54–56, 60–64 and accompanying text.

80. CONG. GLOBE, 39th Cong., 1st Sess. 43 (statement of Sen. Trumbull).

81. *Id.* at 474 (statement of Sen. Trumbull) (emphasis added); see also *id.* at 504 (statement of Sen. Howard) (stating that “[t]he once slave is no longer a slave; he has become, by means of emancipation, a free man” and querying “[i]f such be the case, then in all common sense is he not entitled to those rights which we concede to a man who is free?”); *id.* at 322

Amendment itself nullified the Black Codes: “The amendment to the Constitution gave liberty to all; and in giving liberty it gave also a complete exemption from the tyrannical acts, the tyrannical restrictions, and the tyrannical laws which belong to the condition of slavery, and which it is the object of this bill forever to remove.”⁸² As noted above, Senator Jacob Howard and others likewise derived protection for civil rights directly from the Amendment, maintaining that it was intended to make the former slave into “a freeman,” a status entailing protection not only for the rights listed in the Act, but also “the right of having a family, a wife, children, home.”⁸³

But there is even stronger evidence on the issue, for this is one of those rare instances where our historical protagonists came very close to addressing the precise issue that concerns us today. Senator James Guthrie of Kentucky opposed the Act on the ground that it was unneeded because the Amendment, by itself, nullified the Black Codes and required the states “to put these Africans upon the same footing that the whites are in relation to civil rights.”⁸⁴ In response, Senator Henry Lane of Indiana agreed “that all these slave laws [Black Codes] have fallen with the emancipation of the slave,” but explained that the Act was nevertheless necessary “because we fear the execution of these laws if left to the State courts.”⁸⁵ Senator Trumbull echoed Lane, agreeing with Guthrie that “all slave codes fall with slavery, that it is the duty of the States to wipe out all those laws which discriminate against persons who have been slaves,” but asking “yet if they will not do it, and Congress has authority to do it under the constitutional amendment, is it not incumbent on us to carry out that provision of the Constitution?”⁸⁶ Accordingly, then, the rights protected by the Act were guaranteed directly by the Amendment; legislation was required not to establish their status as legal rights, but to make their enforcement effective.⁸⁷

It might be objected that, as McAward shows, Section 2 played a significant role in the debates. If Section 1 directly guaranteed the rights listed in the Act, then what was all the fuss about Section 2? In a word, both sides had every reason to believe that, without the enforcement mechanisms provided by

(statement of Sen. Trumbull) (“With the destruction of slavery necessarily follows the destruction of the incidents to slavery.”).

82. *Id.* at 1152 (statement of Rep. Thayer); *see also id.* (“It was the purpose of that amendment to relieve those who were slaves from all the oppressive incidents of slavery.”).

83. *Id.* at 504 (statement of Sen. Howard); *see also, e.g., id.* at 1124 (statement of Rep. Cook); *id.* at 1152 (statement of Rep. Thayer); *id.* at 1160 (statement of Rep. Windom).

84. *Id.* at 600 (statement of Sen. Guthrie).

85. *Id.* at 602 (statement of Sen. Lane).

86. *Id.* at 605 (statement of Sen. Trumbull).

87. For additional discussion and documentation, see Carter, *supra* note 2, at 1342–46.

Section 2, Section 1 would be a nullity. Republican members of the Thirty-Ninth Congress could recall what they considered to be crystal-clear constitutional violations by southern states before the war, particularly of the Article IV Privileges and Immunities Clause.⁸⁸ Senator Sherman, for example, cited the notorious case of Samuel Hoar, who had been sent by the Governor of Massachusetts to challenge southern state laws that prohibited free black seamen, citizens of Massachusetts, from setting foot in port. Hoar had been driven out of South Carolina “although he went there to exercise a plain constitutional right.” The Clause “was in effect a dead letter to him [because] there was no provision in the Constitution by which Congress could enforce this right.” Accordingly, “[t]o avoid this very difficulty, that of a guarantee without a power to enforce it, this second section of the [Thirteenth] amendment was adopted.”⁸⁹ Reflecting this imperative, nine of the 1866 Act’s ten sections concerned methods of enforcement that would not have been available without legislation.⁹⁰ In response, the Democrats dug in and insisted that judicial enforcement would suffice.⁹¹

C. The Significance of the 1866 Civil Rights Act for Constitutional Interpretation

How much weight should we give the Act and its history in interpreting and applying the Amendment? “If it were not for doubts about its own constitutionality under the Thirteenth Amendment,” suggests George Rutherglen, “the Civil Rights Act of 1866 would give us the best evidence of what Congress thought the ‘badges and incidents of slavery’ were at the time.”⁹² Rutherglen is not the only scholar to cite constitutional uncertainty as a reason

88. U.S. CONST. art. IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”); see BELZ, *supra* note 23, at 119–20.

89. CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865) (statement of Sen. Sherman); see also CONG. GLOBE, 38th Cong., 1st Sess. 2984 (1864) (statement of Rep. Kelley) (expressing outrage about the Hoar case); BELZ, *supra* note 23, at 119–20 (recounting Republican arguments that the southern states had nullified the privileges and immunities clause, and that the Thirteenth Amendment would provide a remedy).

90. Section 2 made it a crime for any person acting under color of law or “custom” to violate the rights enumerated in Section 1. Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (current version at 42 U.S.C. §§ 1981–82 (2012)). Sections 3–10 specified methods of enforcing the criminal prohibition set forth in Section 2. *Id.* §§ 3–10, 14 Stat. 27–29. Some of these enforcement mechanisms sparked sharp controversy. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 105–07 (1988).

91. Graber, *supra* note 17, at 1394–95.

92. Rutherglen, *supra* note 4, at 171.

for downplaying the Act's significance, and it is not disputed that at least a few members of Congress did entertain doubts. Representative John Bingham of Ohio, a respected Republican who favored the policy of the Act, voted against it on constitutional grounds.⁹³ Senator Luke Poland, a Conservative Republican who voted for the Act, and Representative Henry Raymond, a pro-Johnson Unionist who voted against, claimed that some who voted in favor nevertheless doubted its constitutionality.⁹⁴ The same Congress that passed the Act proceeded to propose the Fourteenth Amendment partly as a means of bolstering its constitutionality, and—four years later—another Congress reenacted the statute under authority of the Fourteenth.⁹⁵ Put these facts together, and it might appear that Congress was uncertain about the Act's validity under the Thirteenth Amendment.

On the other hand, there are reasons to believe that the Act should carry at least as much, if not more, interpretive weight than most congressional enactments. At a time when the Fourteenth Amendment had yet to be proposed, much less ratified, the question of constitutionality dominated the debates. Both sides presented their views in detail, and opponents—including at least two Republicans—reminded their colleagues of their oath to uphold the Constitution.⁹⁶ With the constitutional issues thus sharpened and spotlighted, the bill passed by overwhelming majorities in both House and Senate.⁹⁷ President Johnson tested the commitment of supporters by vetoing the bill on constitutional grounds, embracing and expanding upon the arguments made by congressional opponents including Bingham.⁹⁸ Never before in the nation's history had Congress overridden a president's veto of major legislation. But in early April, 1866, the Senate and House did so by margins of 33–15 (with 1 abstention) and 122–41 (with 21 abstentions).⁹⁹ In the face of these decisive roll-call votes, during which each member of Congress publically registered his stand, the unsupported claims of two members as to constitutional doubts on

93. CONG. GLOBE, 39th Cong., 1st Sess. 1089–91 (statement of Rep. Bingham).

94. McAward, *supra* note 75, at 115; BENEDICT, *supra* note 53, at 349, 352.

95. McAward, *supra* note 75, at 116. The Act was reenacted under the title “An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes.” Civil Rights Act of 1870, ch. 114, § 18, 16 Stat. 140, 144.

96. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1266 (statement of Rep. Raymond); *id.* at 1292 (statement of Rep. Bingham).

97. *Id.* at 1367, 1413.

98. 6 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897 405–16 (1897).

99. CONG. GLOBE, 39th Cong., 1st Sess. 1809, 1861; Aviam Soifer, *Protecting Full and Equal Rights: The Floor and More*, in THE PROMISES OF LIBERTY, *supra* note 4, at 204; BENEDICT, *supra* note 53, at 165.

the part of unspecified proponents ring hollow.¹⁰⁰ The point here is not that the constitutional views of Congress were crystal clear or that we are obligated to accept them today; it is only to affirm that, reminded of their oath to uphold the Constitution, thumping majorities of both houses voted to pass the Act and to overturn the President's veto—a powerful assertion of constitutionality.

There remains the broader question whether post-ratification history has any bearing on original meaning and, if so, how much. Jack Balkin suggests that it is irrelevant except to the extent that it “shed[s] light on adoption history.”¹⁰¹ The 1866 Civil Rights Act appears to meet that criterion, as it represents the culmination of a process that began well before ratification. During the spring and summer of 1865, the enactment of local southern Black Codes and other oppressive measures forced northern Republicans to begin specifying exactly what rights the Amendment protected. “By the time of the northern state ratification debates,” recounts historian Michael Vorenberg, “[a]t the very least, Republicans thought that the measure empowered the federal government to ensure that blacks in the former seceded states receive some civil rights, most importantly the right to make contracts and to sue in state and federal courts.”¹⁰² During the debates over the Civil Rights Act, as we have seen, leading Republicans found in Section 1 a nationwide guarantee of a

100. In this context, it is important to distinguish the constitutional views of senators and representatives from strategic concerns about constitutional politics. While there is scant evidence that proponents of the Act themselves doubted the Act's constitutionality, it does seem likely that they were concerned that the planters and their allies would challenge it on constitutional grounds, a problem that could be avoided by the proposed Fourteenth Amendment. Johnson and his followers, for example, continued to impugn the Act as unconstitutional. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 362 (2005). And Johnson had successfully vetoed the Second Freedmen's Bureau Bill and forced a veto override on the Civil Rights Act, both times on constitutional grounds. At the time that Congress voted to propose the Fourteenth Amendment, Johnson had yet to be weakened by impeachment or rejected for the 1868 Democratic nomination. For an analysis of vote counts suggesting that all but a few members of Congress who voted to propose the Fourteenth Amendment were already satisfied that the Civil Rights Act was constitutional under the Thirteenth, see Robert M. Black, *Redundant Amendments: What the Constitution Says When It Repeats Itself*, 94 U. DET. MERCY L. REV. 195, 211 (2017). Also see Mark A. Graber, *Constructing Constitutional Politics: Thaddeus Stevens, John Bingham, and the Forgotten Fourteenth Amendment* 10 (University of Maryland Francis King Carey School of Law, Paper No. 2014-37), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2483355, which concludes that, “John Bingham aside, very few members of Congress thought Section 1 contributed much more than a restatement of existing constitutional commitments.”

101. Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 656 (2013). For discussion of several instances in which the Supreme Court has considered post-enactment federal legislation as evidence of original meaning, see McAward, *supra* note 75, at 116–17.

102. VORENBERG, *supra* note 18, at 221–22.

broader set of rights including the right to the “full and equal benefit of all laws and proceedings for the security of person and property.”¹⁰³ Five months after the Amendment’s ratification, Congress’s override of Johnson’s constitutional veto appeared to confirm that view. Reasonable people could disagree about the precise significance of these developments, but if any post-ratification history bears on adoption history, the Civil Rights Act of 1866 would seem to qualify.

* * *

The Civil Rights Act of 1866 set the Thirteenth Amendment on a course of broad and purposive construction. While protecting only a modest list of basic rights, Congress decisively rejected the narrowing principles advanced by the Act’s opponents, namely that the Amendment *prohibited* nothing more than chattel slavery and nonconsensual coerced labor, and *guaranteed* a version of freedom consisting of nothing more than the right of locomotion. Moreover, leading proponents of the statute stressed “practical freedom” over formal definitions or concepts in reading and applying the Amendment’s text. As George Rutherf Glen points out, the Act was “necessarily experimental,” merely a first attempt “to articulate the rights that followed from emancipation”—not an exhaustive list.¹⁰⁴ To accept the Republican reading of the Amendment’s first section would be to embark on the project of identifying rights and adjudicating claimed violations in the same way that courts, with assistance from legislators, elected officials, and social movements, have developed jurisprudence not only on core violations of the First and Fourteenth Amendments (such as prior restraints and race discrimination) but also on less obvious violations (such as place and manner restrictions and gender discrimination).

II. SECTION 1 AND THE JURISPRUDENCE OF BADGES AND INCIDENTS, 1883 TO THE PRESENT

The Supreme Court has issued only a few rulings on the badges and incidents of slavery. Although scholars have written illuminating accounts of those cases, none focus on the distinct role of Section 1. This Part seeks to fill that gap. The account proceeds chronologically, because the jurisprudence of

103. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27; see *supra* text accompanying notes 53–74.

104. RUTHERGLEN, *supra* note 69, at 162.

badges and incidents is a pentimento of holdings and doctrines whose gaps and ambiguities cannot be understood apart from their origins.

A. The Badges and Incidents Doctrine—Version 1: 1883–1896

The Supreme Court first addressed the merits of a Thirteenth Amendment issue involving race in the *Civil Rights Cases* (1883). Writing for a majority of eight, Justice Bradley introduced the phrase “badges and incidents of slavery” into the Court’s lexicon, but in a doctrinal form markedly different from the present-day version. At issue was the constitutionality of the Civil Rights Act of 1875, which outlawed private race discrimination in transportation and other public accommodations.¹⁰⁵ Where today the Court holds that “Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery,”¹⁰⁶ Bradley treated the problem as one for the Court, centered on the meaning of the Section 1 terms “slavery” and “servitude” along with their common opposite, freedom.

Bradley began by granting that the Amendment “clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”¹⁰⁷ By itself, this statement leaves open the possibility that the Amendment itself does not ban the badges and incidents.¹⁰⁸ But Bradley then proceeded to identify the badges and incidents based on the meaning of the Section 1 terms “slavery” and “servitude,” along with their antonym: freedom. The “only question” with regard to the Thirteenth Amendment was:

[W]hether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any State law or regulation, does inflict upon such persons any manner of *servitude*, or form of *slavery*, as those terms are understood in this country?¹⁰⁹

105. Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

106. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

107. *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

108. Given that Section 2 empowers Congress to enforce Section 1, however, the more natural reading is that Section 2 empowers Congress to pass laws “necessary and proper” to enforce Section 1’s prohibition on the badges and incidents of slavery.

109. *Civil Rights Cases*, 109 U.S. at 23 (emphasis added). Justice Bradley was looking for the “necessary incidents” of slavery or the “inseparable incidents of the institution.” *Id.* at 22. Earlier, Bradley had written: “The power to enforce the amendment by appropriate legislation must be a power to do away with the incidents and consequences of slavery, and

Like the senators and representatives who debated the 1866 Civil Rights Act, Bradley divided the world of possibilities into two domains: freedom, on the one hand, and slavery or servitude on the other. A race-based exclusion could not constitute a badge or incident of slavery unless it had been “part of the servitude itself” under slavery, or unless it violated one of those “fundamental rights, . . . the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.”¹¹⁰ He then proceeded to follow the 1866 Act’s Democratic opponents in holding that the Amendment protected only those rights that had distinguished “free” blacks from slaves: “There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement.”¹¹¹ Hence, the 1875 Act could not be sustained under the Thirteenth Amendment.

Although it was not involved in the case, Bradley cited the 1866 Civil Rights Act as a counterexample to the 1875 Act, one that actually did prohibit “necessary incidents of slavery, constituting its substance and visible form.”¹¹² This statement is more than a little puzzling given Bradley’s embrace of the Democrats’ theory that the Amendment guaranteed only rights that distinguished free blacks from slaves during the period of slavery. As we have seen, the 1866 Act protected citizens of all colors against numerous race-based disabilities that had been imposed on free blacks, a fact exploited by its opponents during the debates.¹¹³ Perhaps Bradley mistakenly believed that free blacks had actually enjoyed the rights guaranteed by the 1866 Act on the same basis as whites. Or perhaps this was one of those occasions bearing out Pamela

to instate the freedmen in the full enjoyment of that civil liberty and equality *which the abolition of slavery meant.*” *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 601 (1871) (Bradley, J., dissenting) (emphasis added).

110. *Civil Rights Cases*, 109 U.S. at 22.

111. *Id.* at 25. On the views of Democratic members of Congress, see *supra* note 66 and accompanying text.

112. *Civil Rights Cases*, 109 U.S. at 22.

113. See COBB, *supra* note 5, at 314 (observing that free blacks in the slave states were denied numerous rights including the rights to contract and to bear arms, that they were subject to the authority of the slave patrol, and that such restrictions placed “the free negro but little above the slave as to civil privileges”). Free blacks were prohibited from testifying against whites even in some northern states, including Justice Bradley’s home state of New Jersey. *Id.* at cciv (listing five states); see also *supra* note 69 and accompanying text.

Brandwein's observation that "instability is a feature of Bradley's jurisprudence."¹¹⁴ Either way, these two assertions—that the 1866 Act prohibited necessary incidents of slavery and that the disabilities suffered by free blacks during the era of slavery could not constitute incidents of slavery—directly conflict. Bradley did offer an alternative basis for distinguishing the two Acts, namely that the 1875 Act protected "social rights."¹¹⁵ Before the ratification of the Thirteenth Amendment, leading Republicans had not hesitated to affirm that social rights, exemplified by the right of black men to marry white women, were excluded from its scope.¹¹⁶ Bradley did not, however, explain why the rights to ride in public conveyances and attend public amusements should be considered "social" and not civil or "legal," as argued by Justice Harlan in dissent.¹¹⁷ A hint may be found in Bradley's unpublished notes, where he suggested that legislation granting "colored people admission to every place of gathering and amusement" would impose "another kind of slavery" on white people. "Surely a white lady cannot be forced by Congressional enactment to admit colored persons to her ball or assembly or dinner party."¹¹⁸

In short, Bradley offered no hint that Congress might enjoy a degree of discretion to identify badges and incidents of slavery. He treated the problem as a straightforward matter of interpreting the Section 1 terms "slavery" and "servitude." The disabilities outlawed by the 1866 Act could be classified as "necessary incidents of slavery" because they "constitut[ed] its substance and visible form."¹¹⁹ Conversely, the practices outlawed by the 1875 Act did not amount to incidents because they did not impose "any manner of *servitude*, or form of *slavery*, as those terms are understood in this country."¹²⁰ Only one

114. PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 102 (2011).

115. *Civil Rights Cases*, 109 U.S. at 22.

116. VORENBERG, *supra* note 18, at 101–03, 194–95.

117. *Civil Rights Cases*, 109 U.S. at 59–60 (Harlan, J., dissenting).

118. 7 CHARLES FAIRMAN, *THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–88, PART TWO* 564 (Paul A. Freund & Stanley N. Katz eds., 1987) (quoting Letter from J. Bradley to J. Woods (Oct. 30, 1876)).

119. *Civil Rights Cases*, 109 U.S. at 22.

120. *Id.* at 23 (emphasis added). Justice Bradley was looking for the "necessary incidents" of slavery or the "inseparable incidents of the institution." *Id.* at 22. Earlier, Bradley had written that "[t]he power to enforce the amendment by appropriate legislation must be a power to do away with the incidents and consequences of slavery, and to instate the freedmen in the full enjoyment of that civil liberty and equality *which the abolition of slavery meant*." *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 601 (1871) (Bradley, J., dissenting) (emphasis added).

reported decision upheld a claim under Bradley's doctrine of badges and incidents, and it also relied on Section 1. District Judge Jacob Trieber, an able legal scholar, upheld the 1866 Civil Rights Act on the ground that the denial of a right protected by the Act "is an *element of servitude* within the meaning of [the thirteenth] amendment."¹²¹

B. The Doctrine Interred, 1896–1967

Justice Bradley's doctrine proved to be short-lived. In *Plessy v. Ferguson* (1896), a majority of eight Justices firmly embraced the Democratic reading of Section 1. Homer Plessy claimed that Louisiana's Separate Car Act, which required the segregation of railroad passengers by race, amounted to an incident of slavery. To Justice Henry Billings Brown, who wrote for the majority, it was "too clear for argument" that the Louisiana statute did not conflict with the Thirteenth Amendment. "Slavery implies involuntary servitude," he declared, "a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services."¹²² Brown cited the *Civil Rights Cases* for the proposition that the owner of a public conveyance who excluded people of color imposed no "badge of slavery or servitude."¹²³ In dissent, Harlan asserted the Republican position that "[t]he Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom," that 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."¹²⁴

Finally, in what has been aptly labeled "the nadir of Thirteenth Amendment jurisprudence," the Court reaffirmed the Democrats' reading of Section 1 and terminated Bradley's doctrine of badges and incidents.¹²⁵ In *Hodges v. United States* (1906), a group of whites took up arms and drove eight black laborers away from the Arkansas sawmill that employed them.¹²⁶ A jury

121. *United States v. Morris*, 125 F. 322, 330 (E.D. Ark. 1903) (emphasis added) (upholding indictment of whites for conspiring to prevent blacks from leasing land). For an illuminating discussion of Trieber and his ruling, see Pamela S. Karlan, *Contracting the Thirteenth Amendment: Hodges v. United States*, 85 B.U. L. REV. 783, 786–90 (2005).

122. *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896).

123. *Id.* at 542.

124. *Id.* at 555 (Harlan, J., dissenting).

125. McAward, *supra* note 4, at 589; see also McAward, *supra* note 75, at 124.

126. *Hodges v. United States*, 203 U.S. 1, 2–4 (1906); *id.* at 20 (Harlan, J., dissenting). On *Hodges*, see Karlan, *supra* note 121, at 785–87, and Martha R. Mahoney, *What's Left of*

convicted the attackers of conspiring to prevent the laborers from exercising their right “to make and enforce contracts” on the same basis as whites, protected by the Civil Rights Act of 1866. The Court held that the Amendment could not support the prosecutions. Justice Brewer, writing for a majority of seven, focused solely on Section 1 of the Amendment. “The meaning of this is as clear as language can make it,” he declared. “The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another.”¹²⁷ Brewer quoted Webster’s definition of “slavery” as “the state of entire subjection of one person to the will of another,” and “servitude” as “the state of voluntary or compulsory subjection to a master.” Because the black laborers had no master, they could not be in a condition of slavery or involuntary servitude.¹²⁸ Therefore, the whites had not violated the Amendment and Congress could not reach their activity.¹²⁹ Brewer left little doubt that he was doing away with the badges and incidents doctrine altogether. During slavery, he observed, free blacks had been required to carry proof of their freedom, and “[t]hat was one of the incidents or badges of slavery.”¹³⁰ Yet the Supreme Court had recently upheld a statute commanding that Chinese laborers carry a certificate establishing their right to be present in the United States, and no one had even mentioned the possibility of a Thirteenth Amendment violation.¹³¹ As in *Plessy*, Justice Harlan countered with the Republican view that the Amendment “destroyed slavery and all its incidents and badges” and conferred on all persons “the right, without discrimination against them on account of their race, to enjoy all the privileges that inhere in freedom.”¹³²

For the next six decades spanning the constitutional revolution of the 1930s and the resurgence of the civil rights movement that began during World War II and continued through the 1960s, *Hodges* erased the badges and incidents doctrine and blocked the development of a Thirteenth Amendment jurisprudence of race. Civil Rights activists often chose to frame their agenda in terms of freedom and slavery as opposed to equal protection, but *Plessy v. Ferguson*’s standard of “equal but separate” left an

Solidarity? Reflections on Law, Race, and Labor History, 57 BUFF. L. REV. 1515, 1528–37 (2009).

127. *Hodges*, 203 U.S. at 16.

128. *Id.* at 17.

129. *Id.* at 17–20.

130. *Id.* at 19.

131. *Id.* (citing *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)).

132. *Id.* at 27 (Harlan, J., dissenting).

opening for Fourteenth Amendment legal advocacy that was entirely missing under the Thirteenth Amendment as interpreted in *Hodges*.¹³³ Between *Hodges* in 1906 and *Jones* in 1968, only one Thirteenth Amendment race case reached the Supreme Court. In *Corrigan v. Buckley* (1926), the Court summarily rejected the claim that a racially restrictive real property covenant violated the Amendment, citing *Hodges* for the proposition that the prohibition on “slavery and involuntary servitude” reached nothing more than “a condition of enforced compulsory service of one to another,” and that the Amendment “does not in other matters protect the individual rights of persons of the negro race.”¹³⁴

C. The Doctrine Resurrected, 1968–1971

Six decades after *Hodges*, at the peak of the twentieth century civil rights movement, the Court resurrected the badges and incidents doctrine and held that Section 2 of the Amendment empowers Congress to go further than *Hodges* allowed. In *Jones v. Alfred H. Mayer Company* (1968), the Court upheld the Civil Rights Act of 1866 as applied to ban private racial discrimination in the sale and rental of housing.¹³⁵ The Court did not hold that such discrimination violates Section 1 of the Amendment. Nor did it disapprove *Hodges*’s dictionary definitions of slavery and involuntary servitude. Instead, Justice Potter Stewart’s opinion for the Court shifted the focus to Section 2:

“By its own unaided force and effect,” the Thirteenth Amendment “abolished slavery, and established universal freedom.” Whether or not the Amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed “Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*.”¹³⁶

133. Consider, for example, “Freedom Summer,” “Freedom Schools,” “Freedom Vote,” and the “Mississippi Freedom Democratic Party.” See generally DOUG MCADAM, *FREEDOM SUMMER* (1988); CHARLES M. PAYNE, *I’VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE* (1995). On the abandonment of early efforts to secure black labor rights through the Thirteenth Amendment, see RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007).

134. *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926) (citing *Hodges*, 203 U.S. at 16, 18).

135. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968); see 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 216–17 (2014) (placing *Jones* at the high point not only of the civil rights movement, but of the Second Reconstruction).

136. *Jones*, 392 U.S. at 439 (citation omitted) (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1883)).

Having thus cited Justice Bradley's opinion for the proposition that Section 2 conferred the power, Stewart then proceeded to ignore Bradley's discourse on the identification of badges and incidents—which focused solely on the meanings of the Section 1 terms “slavery” and “servitude.”¹³⁷ Instead he held that “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.” *Hodges* was expressly overruled, but only as to its “concept of congressional power.”¹³⁸

Despite the Court's failure to elucidate the meaning of “slavery,” *Jones* elevated the Thirteenth Amendment jurisprudence of slavery to its historic zenith. For the first time a majority of the Court embraced the Republican position on the constitutionality of the 1866 Act, albeit shifted to Section 2. Because *Jones* is one of only two post-*Hodges* cases to provide substantial reasoning on the identification of particular badges and incidents, it warrants quotation at length:

Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery. Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to “go and come at pleasure” and to “buy and sell when they please”—would be left with “a mere paper guarantee” if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live.¹³⁹

Although this reasoning was deployed to support the proposition that Congress had acted “rationally,” it lacked the language of deference. Stewart spoke directly for the Court, without interposing Congress. His opinion echoed the Republican proponents of the 1866 Act in its dual focus on actual oppression and practical freedom, as opposed to formal definitions. Stewart found in housing discrimination a functional “substitute” for the Black Codes which, in

137. See *supra* text accompanying notes 109–110.

138. *Jones*, 392 U.S. at 441 n.78.

139. *Id.* at 441–43 (footnotes omitted).

turn, constituted a “substitute” for the “slave system” itself, and he found in freedom from housing discrimination a right essential to practical freedom or, as he put it, to avoid reducing the Amendment to a “paper guarantee.”¹⁴⁰

D. The Badges and Incidents Doctrine—Version 2: 1971 to the Present

Commentators anticipated that *Jones* would soon spawn a holding that Section 1 directly prohibited the badges and incidents of slavery. “It strains credulity,” observed Richard Parker, “to rest an open housing law on authority to prevent the reestablishment of slavery. The evil named in section one must bear some realistic relation to the restrictions on freedom which may be attacked under section two.” Accordingly, at a minimum, *Jones* seemed to entail that Section 1 outlawed the badges and incidents.¹⁴¹ Today, however, nearly half a century after *Jones*, the question remains open, and Stewart’s failure to address the meaning of slavery continues to vex interpreters.¹⁴²

The Court has managed to exclude this basic question from its agenda by upholding enforcement legislation without any serious inquiry into its appropriateness as a means of enforcing Section 1 (which would hardly be possible without first deciding whether Section 1 itself bans the badges and incidents) while rejecting claims brought directly under Section 1 with slim reasoning and a nod to Congress’s power to go further. The Court has addressed two cases in each category. In *Griffin v. Breckenridge*, two white men attacked several black people under the mistaken impression that they were associated with a civil rights organization.¹⁴³ The victims sued the perpetrators under a provision of the Ku Klux Klan Act of 1871 that provides a federal tort

140. *Id.* at 434–42.

141. Richard Davies Parker, *The “New” Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1319–20 (1969). Sam Ervin explains:

Jones asserts, in substance, that the thirteenth amendment endows the Negro with various rights in addition to the one its words give him—the right to be free from enforced compulsory service to another; that among the additional rights the thirteenth amendment confers upon the Negro is: the right to have a dollar in his hand “purchase the same thing as a dollar in the hands of a white man;” the right “to buy whatever a white man can buy;” and “the right to live wherever a white man can live.”

Sam J. Ervin, Jr., *Jones v. Alfred H. Mayer Co.: Judicial Activism Run Riot*, 22 VAND. L. REV. 485, 501 (1969) (quoting *Jones*, 392 U.S. at 443); Louis Henkin, *The Supreme Court, 1967 Term, Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 88 n.82 (1968) (“Congress can legislate to eliminate private discrimination, it would appear, only on the theory that it is a ‘badge,’ a remnant, of slavery. But if so, why is it not one also for the courts?”).

142. Darrell A. H. Miller, *White Cartels, the Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co.*, 77 FORDHAM L. REV. 999, 1019 (2008).

143. *Griffin v. Breckenridge*, 403 U.S. 88, 90–91 (1971).

action against conspiracies to deprive a person of equal protection of the laws (now section 1985(3)). The Court held that the statute, as applied to the plaintiffs, fell within the power conferred by the Thirteenth Amendment.¹⁴⁴ Justice Stewart, author of *Jones*, again wrote for the Court. On the badges and incidents issue, he reasoned simply that, given the Nation's commitment "to the proposition that the former slaves and their descendants should be forever free," it was entirely rational for Congress to create "a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men."¹⁴⁵ Next, in *Runyon v. McCrary* (1976), the Court upheld the Civil Rights Act of 1866 as applied to prohibit racial discrimination in the making and enforcement of contracts for private education.¹⁴⁶ As in *Jones*, the Act had been utilized to ensure that "a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man."¹⁴⁷

While according Congress broad deference, however, the Court has rejected the only two Section 1 race claims to come before it since *Jones*. In *Palmer v. Thompson* (1971), the City of Jackson, Mississippi, had operated separate public pools for whites and non-whites until a federal court declared the policy of segregation unconstitutional.¹⁴⁸ Rather than open the pools to people of all colors, the City shut them down.¹⁴⁹ Some black residents challenged the closure, arguing that the City's refusal to operate integrated pools imposed a badge or incident of slavery in violation of the Thirteenth Amendment. This claim raised two issues: (1) whether Section 1, unaided by legislation, banned the badges and incidents, and (2) if so, whether the pool closing constituted a badge or incident. In his opinion for the Court, Justice Black rejected the challenge without specifying which of these issues he was addressing. To grant the plaintiffs' claim, he opined, "would severely stretch

144. *Id.* at 105. See generally Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (2012)).

145. *Griffin*, 403 U.S. at 105. In the process of reaching this conclusion, the Court overruled *United States v. Harris* (1883), which had invalidated the predecessor of 42 U.S.C. § 1985(3) on the ground that, as worded, it exceeded the Thirteenth Amendment enforcement authority because it could be applied not only to whites conspiring against blacks, but also to whites conspiring against whites or blacks conspiring against whites. *Harris*, 106 U.S. 629, 641 (1883). Stewart reasoned that the *Harris* Court had applied a severability rule that had since been rejected. *Griffin*, 403 U.S. at 104.

146. 427 U.S. 160, 179 (1976).

147. *Id.* (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968)).

148. 403 U.S. 217, 218–19 (1971).

149. *Id.* at 219.

[the Thirteenth Amendment's] short simple words and do violence to its history."¹⁵⁰ Apparently those words and that history were so clear that Black saw no need to explain how the words would be stretched or the history violated.

Finally, in *City of Memphis v. Greene* (1981), the City of Memphis blocked a road leading from a predominantly black neighborhood into an all-white neighborhood and rerouted the traffic around the white neighborhood.¹⁵¹ The road had provided the main route for residents of an adjacent, mostly black neighborhood, to reach downtown Memphis.¹⁵² Black residents claimed that the closure constituted a badge or incident of slavery because it was racially motivated and exerted a disparate impact on black motorists and black property values.¹⁵³ The Supreme Court upheld the District Court's findings that the city's action had not been racially motivated and did not affect black property values, but found that it had exerted a disparate impact on black motorists.¹⁵⁴ On this state of facts, the Court rejected the plaintiffs' Thirteenth Amendment claim.¹⁵⁵

In terms of jurisprudential development, Justice Stevens's opinion for the Court advanced far beyond *Palmer*.¹⁵⁶ Not only did Stevens clarify that two distinct questions were involved, but he also provided a clear answer to one of them. First, he acknowledged but dodged the basic question whether Section 1 directly prohibited the badges and incidents of slavery, choosing instead "to leave that question open."¹⁵⁷ Second, he announced the Court's first and only clear holding on the merits of a Section 1 badges-and-incidents claim since *Plessy v. Ferguson* in 1896. Even if Section 1 did directly ban badges and incidents, he concluded, the road closing did not impose any badge or incident of slavery. The "slight inconvenience" suffered by black motorists could not "be equated to an actual restraint on the liberty of black citizens that is in any sense comparable to the odious practice the Thirteenth Amendment was designed to

150. *Id.* at 226.

151. 451 U.S. 100, 100 (1981).

152. *Id.* at 103.

153. *Id.* at 107–09.

154. *Id.* at 126–28.

155. *Id.* at 119, 128–29.

156. Whether this development was in a positive direction is another question. For critical analyses, see Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401 (2010); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 357–58, 363–64 (1987); and Sheri Josephs, Comment, *City of Memphis v. Greene: A Giant Step Backwards in the Area of Civil Rights Enforcement*, 48 BROOK. L. REV. 621 (1982).

157. *Memphis*, 451 U.S. at 126.

eradicate.”¹⁵⁸ Accordingly, the plaintiffs’ claim “must . . . rest, not on the actual consequences of the closing, but rather on the symbolic significance of the fact that most of the drivers who will be inconvenienced by the action are black.” At this juncture, Stevens avoided assessing the symbolic impact of the particular street closing at issue, which sealed off an all-white neighborhood at its border with a predominantly black neighborhood, by conjuring a slippery slope: “Almost any traffic regulation—whether it be a temporary detour during construction, a speed limit, a one-way street, or a no-parking sign—may have a differential impact on residents of adjacent or nearby neighborhoods.” To hold that such “inevitable” effects inflicted a stigma “so severe as to violate the Thirteenth Amendment would trivialize the great purpose of that charter of freedom.”¹⁵⁹

The Supreme Court has not addressed the badges and incidents issue since *Greene*, decided more than three decades ago. Meanwhile, the lower courts have effectively left in place its most recent statement on the Section 1 question, namely *Hodges*’s dictionary definitions of slavery and servitude. For the past half century, no court has applied Section 1 directly to anything other than the coercion of labor.¹⁶⁰ Instead of citing *Hodges*, some point to the Supreme Court’s *practice* of declining to identify or remedy any Thirteenth Amendment violation other than the imposition of slavery or involuntary servitude, a practice that was mandated for six decades by *Hodges*.¹⁶¹ Others simply assert that Section 1 does not ban the badges and incidents.¹⁶²

In short, then, the courts have chosen to continue applying the narrow readings of “slavery” and “servitude” advanced by those who opposed the 1866 Civil Rights Act and the Amendment itself, following the pattern set under *Hodges*. Not only have they refrained from explaining this choice as a matter of

158. *Id.* at 119, 128.

159. *Id.* at 128. For a critique of this view, see Josephs, *supra* note 156.

160. George Rutherglen, *Constitutionalizing Employees’ Rights: Lessons From the History of the Thirteenth Amendment*, 27 WIS. J.L. GENDER & SOC’Y 162, 163 (2012); VanderVelde, *supra* note 19, at 503.

161. See, e.g., *Alma Soc’y Inc. v. Mellon*, 601 F.2d 1225, 1237 (2d Cir. 1979) (rejecting claim that the sealing of adult adoption records constituted a badge of slavery in violation of the 13th Amendment, explaining that “The Court has never held that the Amendment itself, unaided by legislation as it is here, reaches the ‘badges and incidents’ of slavery as well as the actual conditions of slavery and involuntary servitude”). For a critical review of lower court decisions as of 1998, 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, 860–71 (1998).

162. See, e.g., *NAACP v. Hunt*, 891 F.2d 1555, 1564 (11th Cir. 1990); *Wong v. Stripling*, 881 F.2d 200, 203 (5th Cir. 1989).

interpretation or construction, but—with the Supreme Court maintaining that the question is “open”—it appears that there is no choice to explain. We might envision *Hodges*’s reading of Section 1 as a kind of legal zombie, lumbering around blocking doctrinal development despite the extraction of its substance by *Jones*. As a result, we now have, and have had for more than four decades, a truly extraordinary situation in Thirteenth Amendment jurisprudence. According to the highest tribunal in the land, there is no official answer to one of the most basic and momentous questions of Thirteenth Amendment doctrine. And because there is no answer, there cannot be a principled official explanation for that (nonexistent) answer. Not since *Hodges* have the courts considered whether the outlawing of “slavery” and “involuntary servitude” in Section 1 might require eliminating each component, badge, or incident of slavery and not just the core features of human property and physical or legal coercion of labor. Nor have they applied (or expressly declined to apply) the interpretive canon giving evidentiary weight to contemporary congressional enactments,¹⁶³ in this case the Civil Rights Act of 1866. Never have they offered a principled reason for embracing the old Democratic reading or for rejecting the Republican reading. Nor have they considered whether *Hodges*’s conception of Section 1 should share the fate of its narrow holding. If, as the Supreme Court once asserted, “a decision without principled justification would be no judicial act at all,” then the continued enforcement of the purportedly neutralized *Hodges* reading of Section 1 would appear to be no judicial act at all.¹⁶⁴

III. THE SECTION 1 DOCTRINE OF BADGES AND INCIDENTS: BASIC ISSUES

Suppose that, as suggested in Parts I and II, Section 1 of the Amendment bans some or all of the badges and incidents of slavery. What are the implications going forward? This Part addresses three questions: (1) whether Section 1 bans all or only some of the badges and incidents of slavery; (2) whether Section 1 bans more than the core incidents of slavery; and (3) by what criteria the badges and incidents should be identified.

163. *Printz v. United States*, 521 U.S. 898, 905 (1997) (quoting *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986)).

164. *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992).

A. Does Section 1 Prohibit All or Only Some of the Badges and Incidents?

If Section 1 bans at least some badges and incidents of slavery, then the question arises: Does it ban all of them? Justice John Marshall Harlan opined in his *Hodges* dissent that the Amendment “by its own force . . . destroyed slavery and all its incidents and badges, and established freedom.”¹⁶⁵ In its most recent statement on the issue, the Supreme Court noted that, although it has overruled *Hodges* on the scope of congressional power, it has “neither agreed nor disagreed” with Harlan on Section 1.¹⁶⁶ If accepted, Harlan’s position would hinge outcomes on the identification of “badges” and “incidents.” If a given practice constituted a badge or incident, then—*ipso facto*—it would be prohibited by Section 1. Others, however, have suggested that Section 1 bans only a subset of badges and incidents. According to Justice Bradley’s opinion for the Court in the *Civil Rights Cases*, for example, Section 1 bans only the “necessary” or “inseparable” incidents of slavery.¹⁶⁷

Whether Section 1 bans all of the badges and incidents or only a subset, the issue ultimately hinges on the criteria used to make the determination. Adding a qualifier like Bradley’s “necessary” would alter outcomes only if that factor were not already incorporated into the test for identifying badges and incidents. Recall *Memphis v. Greene*, for example, where the City of Memphis had erected a street barrier on the border between two neighborhoods, one all-white and the other mostly black.¹⁶⁸ The Supreme Court held that the barrier did not amount to a badge or incident of slavery because it inflicted only a “slight inconvenience” on black motorists and a non- “severe” stigma on residents of the mostly-black neighborhood.¹⁶⁹ The same result could have been reached if the closing did constitute a badge or incident, but one that was not inconvenient or severe enough to fall within Section 1’s prohibition. The *Greene* Court simply incorporated the element of severity into the definition of badges and incidents instead of adding it on as a qualifier. Either way, what matters is the test applied to determine what practices are prohibited by Section 1. The remainder of this Part addresses that question.

165. *Hodges v. United States*, 203 U.S. 1, 27 (1906) (Harlan, J., dissenting).

166. *City of Memphis v. Greene*, 451 U.S. 100, 126 n.40 (1981).

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

168. *Memphis*, 451 U.S. at 100, *discussed supra* text accompanying notes 151–156.

169. *Id.* at 119, 128–29; *see supra* text accompanying notes 158–159.

B. Does Section 1 Ban More Than the Core Incidents of Slavery?

As we have seen, it has been argued from the outset that Section 1 bans only the core incidents of slavery, for example the treatment of human beings as chattels and the physical or legal coercion of labor. Most of the Senators and Representatives who opposed the 1866 Civil Rights Act embraced that view, as did the Supreme Court between *Hodges* in 1906 and *Jones* in 1968.¹⁷⁰ Because the *Jones* Court refrained from repudiating *Hodges* on the point, the question is officially “open” today, and lower courts have continued to follow *Hodges* in practice.

From a historical point of view, however, it is hard to see why present-day Americans should adopt the interpretation favored by the Democratic allies of the former slave masters, who opposed both the Amendment and the Act, rather than that of the Republican allies of the Amendment’s intended beneficiaries. As recounted above, the Democrats lost. During the pre-ratification debates, they repeatedly and loudly warned that if the Amendment were enacted, not only would slavery be abolished, but a host of civil rights would be conferred upon the freed slaves.¹⁷¹ No voter or state legislator could have been unaware of the possibility. And, although proponents disavowed some far-reaching applications (most prominently the rights of freed people to vote and to marry whites), most held that the Amendment extended beyond the core incidents of slavery to protect a set of basic civil rights.¹⁷² By the time of ratification, the scope of Section 1 was already emerging as a crucial issue in the debates over what would soon become the 1866 Civil Rights Act. The Democrats now claimed that Section 1 did nothing more than guarantee the right of locomotion. Leading Republicans countered that Section 1 protected all civil rights necessary to practical freedom including those enumerated in the Act, and that Section 2 authorized them to enact effective enforcement mechanisms.¹⁷³ After passionate debates that centered on the constitutional issues, both houses of Congress voted for the Act by decisive margins, not once but twice, the second time overriding President Johnson’s constitutionally-based veto.¹⁷⁴

Supreme Court jurisprudence points in the same direction. When Justice Bradley launched the badges and incidents doctrine in the *Civil Rights Cases*, he

170. See *supra* text accompanying notes 41–42, 128–134.

171. See *supra* text accompanying notes 18–20.

172. See *supra* text accompanying notes 24–27.

173. See *supra* text accompanying notes 38–42, 53–64, 80–87.

174. See *supra* text accompanying notes 96–100.

based it on Section 1 and included among the “necessary incidents of slavery” not only core incidents like compulsory service, but also less distinctive incidents including denials of “those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.”¹⁷⁵ *Hodges* extinguished the doctrine altogether for more than six decades, but *Jones* overruled *Hodges* and revived the doctrine in 1968.¹⁷⁶ This time around, courts deferred to Congress on the identification of badges and incidents. In reviewing Congress’s determinations, however, the Court has focused on the Section 1 issue of what it means to eliminate slavery and establish freedom, and not on the pragmatic choice of “appropriate” means to enforce Section 1. In *Jones*, for example, the Court held that Congress had rationally identified racial discrimination in housing as a badge or incident of slavery because it was a “substitute for the Black Codes” which, in turn, had been “substitutes for the slave system.”¹⁷⁷ Conversely, “[a]t the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live.”¹⁷⁸ The Court thus deferred to Congress not on a choice of means to eliminate physically or legally forced labor, but on the identification of housing discrimination as, in Laurence Tribe’s phrase, “a form of domination and thus an aspect of slavery.”¹⁷⁹ As commentators noted at the time, it is difficult to see how a statutory ban on race discrimination in housing could be justified as “appropriate” legislation to enforce a constitutional provision that did nothing more than prohibit chattel slavery and physically or legally coerced labor.¹⁸⁰

C. Criteria for Identifying Badges and Incidents Under Section 1

Nobody claims that the Amendment protects or authorizes Congress to protect each and every right denied under slavery. If it did, it would authorize the federal government to guarantee virtually all rights, effectively eliminating

175. Civil Rights Cases, 109 U.S. 3, 22 (1883). For further discussion, see *supra* text accompanying notes 109–112.

176. See *supra* text accompanying notes 134–135.

177. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 442 (1968). *Jones* was followed on this point in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 235–36 (1969), and *Runyon v. McCrary*, 427 U.S. 160, 179 (1976).

178. *Jones*, 392 U.S. at 443.

179. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 333 (2d ed. 1988).

180. See *supra* note 141; see also Koppelman, *supra* note 10, at 1936 (“If Congress’s power is broad, then the Amendment itself cannot be too narrow.”).

federalism. George Rutherglen explains the resulting interpretive problem: “The further that slavery is broken down into its component parts, the less distinctive each component becomes as an element of slavery itself and the more attenuated the connection becomes to slavery as it was practiced in this country.”¹⁸¹ Section 1 prohibits “slavery,” then, but does not specify exactly which components must be eliminated before we can say that it does not “exist.” Judges, legislators, and scholars have responded to this imprecision by reasoning outwards from the core historical cases of chattel slavery, the Black Codes, and—shifting the focus from slavery to freedom—the rights guaranteed by the 1866 Civil Rights Act.¹⁸² This methodology mirrors that used to develop the Fourteenth Amendment doctrine of suspect classifications, where the Court analogized classifications such as national origin and sex to the core case of race. Although much of Thirteenth Amendment jurisprudence and scholarship concerns the constitutionality of enforcement legislation, which hinges on the combined scope of Sections 1 and 2, the method of reasoning out from core cases appears no less applicable to Section 1. It seems clear, for example, that Section 1 by itself prohibits such core “incidents” of slavery as the master’s rights to possess laborers, to transfer them, and to compel their service, as well as the laborer’s disabilities to quit work and to marry. And, if we choose to follow contemporary understandings, it appears that the disabilities to make contracts, to own property, and to participate in court on the same basis as whites would also be prohibited.¹⁸³ The distinctive Section 2 issue, namely what constitutes “appropriate” legislation, would seem to involve the choice of means to ensure that no component of slavery that is prohibited by Section 1 “shall exist.”¹⁸⁴

181. George Rutherglen, *The Thirteenth Amendment, the Power of Congress, and the Shifting Sources of Civil Rights Law*, 112 COLUM. L. REV. 1551, 1579 (2012).

182. See, e.g., *Jones*, 392 U.S. at 442–43 (1968), discussed *supra* text accompanying notes 135–140; Carter, *supra* note 2, at 1368; see also McAward, *supra* note 4, at 569; Darrell A.H. Miller, *A Thirteenth Amendment Agenda for the Twenty-First Century: Of Promises, Power, and Precaution*, in *THE PROMISES OF LIBERTY*, *supra* note 4, at 293–94; Taslitz, *supra* note 50, at 258.

183. See *supra* text accompanying notes 23–27, 53–64, 80–87.

184. The term “appropriate” was drawn from Chief Justice Marshall’s opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819), which stated: “Let the end be legitimate, let it be within the scope of the constitution, and all the means which are appropriate, which are plainly adapted to the end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.” *Accord* *United States v. Rhodes*, 27 F. Cas. 785, 791 (C.C.D. Ky. 1866) (No. 16,151); see also REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* 54 (2006); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1810–11 (2010). Representative Wilson, floor manager of the 1866 Civil Rights Act in the House, quoted

To determine whether a particular practice amounts to a badge or incident, judges, legislators, and scholars generally focus on two elements: (1) group targeting, with African ancestry and previous condition of servitude being the core cases, and (2) some causal, genealogical, analogical, or functional connection between the particular injury (for example, a denial of the right to testify or a violent infliction of physical harm) and the law, practice, or experience either of chattel slavery itself or of the post-slavery resubjugation of African Americans.¹⁸⁵ Some say that both elements are required, while others maintain that group targeting alone should suffice.¹⁸⁶ It also seems that, in some cases, a nexus with slavery or involuntary servitude by itself suffices; no group targeting is necessary. In the peonage cases, for example, the Supreme Court held that Section 1 of the Amendment established the right to quit even a relation of consensual peonage and thereby abolished the disability to quit work. Although the Court did not rely on the badges and incidents doctrine (which had been temporarily interred by *Hodges*), the disability to quit work was certainly an “incident” of slavery.¹⁸⁷

McCulloch on this point and continued: “The end is legitimate because it is defined by the Constitution itself. The end is the maintenance of freedom.” CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866). Trumbull similarly declared: “I hold that we have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States.” *Id.* at 475.

185. See, e.g., *Jones*, 392 U.S. at 443 (finding in racial housing discrimination a functional substitute for the Black Codes, which served as a substitute for the “slave system,” and concluding that “[a]t the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live”), discussed *supra* text accompanying notes 135–140; Carter, *supra* note 2, at 1366 (suggesting that the badges and incidents of slavery “be defined with reference to two primary issues: (1) the connection between the class to which the plaintiff belongs and to the institution of chattel slavery, and (2) the connection the complained-of injury has to that institution”); McAward, *supra* note 4, at 608 (observing that “[p]ostbellum, every judicial discussion of “the badges and incidents of slavery” has referred specifically to the legal and social treatment of African-Americans”); Miller, *supra* note 182, at 293–94 (endorsing and elaborating upon Carter’s theory).
186. See, e.g., G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment: Chapter IV*, 12 HOUS. L. REV. 592, 595 (1975) (stating that group targeting alone suffices); Carter, *supra* note 2, at 1366 (stating that both are required); McAward, *supra* note 4, at 608, 620–21 (stating that both are required).
187. As noted above, the master’s right to compel the slave’s labor was considered a core incident of slavery. See *supra* text accompanying notes 5–7. The Supreme Court relied directly on the involuntary servitude clause rather than the badges and incidents doctrine. See, e.g., *Pollock v. Williams*, 322 U.S. 4, 17–18 (1944) (striking down Florida peonage law); *Bailey v. Alabama*, 219 U.S. 219, 241 (1911) (striking down Alabama peonage law). Interestingly, Maria Ontiveros has combined the involuntary servitude line of cases with the badges-and-incidents line to propose that the treatment of undocumented immigrant workers violates the Amendment. See Maria L. Ontiveros, *Immigrant Workers’ Rights in a*

If, as suggested here, Section 1 prohibits more than the core incidents of slavery, then the nature of the group targeting and required connections to slavery will assume a position of importance on the agenda for constitutional interpretation. Rather than discuss those issues in the abstract, I will focus on a few particular problems.

IV. THE SECTION 1 BADGES AND INCIDENTS DOCTRINE: CASES

This Part considers some possible implications of a Section 1 badges and incidents doctrine in four different contexts: (A) discrimination against whites; (B) unintentional discrimination against African Americans; (C) race-conscious affirmative action on behalf of African Americans; and (D) cases involving gender equality and reproductive freedom.

A. Anti-Subordination and Anti-Classification Approaches to Group Targeting: Can Whiteness Be a Badge of Slavery?

Courts and scholars have applied two conflicting approaches to the element of group targeting, one centering on group subordination, the other on classification.¹⁸⁸ In *Jones*, race-based exclusion from the housing market constituted a badge or incident of slavery not merely because it involved a racial classification, but because it—like African slavery and the Black Codes—functioned to subjugate a racially-defined group (“herd[ing] men into ghettos”) and to defeat the Amendment’s promise of guaranteeing freedom to African Americans (“freedom to buy whatever a white man can buy, the right to live wherever a white man can live”).¹⁸⁹ In this view the Amendment condemns not classifications in the abstract, but classifications that target a group for subjugation and exploitation. When we say that the Amendment is “about ‘race,’” explains Carter, we mean not that it seeks to erase all classifications grounded in skin color or biology, but “to eliminate the permanent caste system slavery created and to ensure that such castes would not exist in the future.”¹⁹⁰

Post-Hoffman World—Organizing Around the Thirteenth Amendment, 18 GEO. IMMIGR. L.J. 651, 672–73 (2005).

188. On the origins of this clash in Fourteenth Amendment jurisprudence and scholarship, see Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003), and Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004).

189. *Jones*, 392 U.S. at 442–43.

190. Carter, *supra* note 2, at 1318 n.15.

On the other hand, the Supreme Court has since ruled that the statutory language at issue in *Jones* prohibits racial discrimination against whites, and that the Amendment authorized Congress to enact that prohibition.¹⁹¹ Consistently with “[t]he prevailing view in the Congress as to the reach of its powers under the enforcement section of the Thirteenth Amendment,” reasoned the Court, the original draft of the 1866 Civil Rights Act provided that “there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race.”¹⁹² *MacDonald* has been read to support the proposition that race-conscious action generally—in favor of a dominant or subordinate group—constitutes a badge or incident of slavery.¹⁹³ In this view, the race classification itself, not racial subjugation, constitutes the badge or incident of slavery. “Slavery brutalized human dignity,” suggests Sidney Buchanan, and “[i]n modern America, acts motivated by arbitrary prejudice continue to inflict the wounds that were institutionalized under slavery.”¹⁹⁴ Under this approach, the concern with subordination drops out; “arbitrary class prejudice” itself infringes the Thirteenth Amendment.¹⁹⁵ Scholars have floated both far-reaching and strictly constrained versions of this approach. Buchanan, for example, suggests that it extends to “non-racial classes” including women,¹⁹⁶ while—at the other end of the spectrum—McAward would limit it to race and the previous condition of slavery.¹⁹⁷

The anti-classification approach originated in Fourteenth Amendment cases applying the guarantee of “equal protection of the laws.”¹⁹⁸ By contrast, Section 1 of the Thirteenth prohibits “slavery” and “involuntary servitude,” both of which center on domination and exploitation. Contemporary

191. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287–88 (1976); Carter, *supra* note 2, at 1358; McAward, *supra* note 4, at 608–09.

192. *McDonald*, 427 U.S. at 287–88.

193. McAward, *supra* note 4, at 608–10 (suggesting that the doctrine reaches discrimination against all races and that this approach “recognizes that the eradication of race discrimination of any kind is a national priority”).

194. G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment: Chapter VIII*, 12 HOUS. L. REV. 1069, 1073 (1975).

195. *Id.* at 1072. Buchanan repeatedly specifies that the evil is “class” prejudice, and does not mention the concept of caste. See *id.* at 1072–76.

196. *Id.* at 1076.

197. McAward, *supra* note 4, at 569. McAward would also require that, to constitute a badge or incident of slavery, private action must have “significant potential to lead to the de facto reenslavement or legal subjugation of the targeted group.” *Id.* She does not explain how that criterion could be met in the case of whites in the present-day United States.

198. See Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 34 (1995).

dictionaries defined slavery as “the state of entire subjection of one person to the will of another”¹⁹⁹ and servitude as “the state of voluntary or involuntary subjection to a master.”²⁰⁰ Proponents of the 1866 Civil Rights Act argued that the rights enumerated in the Act were necessary not to establish equality in the abstract, but to negate slavery (or “modified slavery”) and to establish its opposite, freedom (or “practical freedom”).²⁰¹ The Black Codes came under Thirteenth Amendment scrutiny not because race classifications were considered to be “irrelevant” as a matter of principle, a staple of modern Fourteenth Amendment doctrine, but because of their role in elevating a master caste over a servant caste.²⁰² Thirteenth Amendment legislation targets racial “discrimination” not as a means of establishing some kind of “meritocracy” (which might or might not assist in eliminating slavery and involuntary servitude), but as a means of preventing the subjugation prohibited by Section 1.²⁰³

As McAward points out, the original badge of American chattel slavery was blackness itself.²⁰⁴ Whiteness did function as a badge, but of freedom and masterhood—not slavery. Indeed, the legal identifier “white” first emerged as a label for people, previously termed “Christians” or “English,” who could not be enslaved.²⁰⁵ Even non-slave-owning whites enjoyed rights and privileges to

199. See *supra* note 39.

200. WEBSTER, *supra* note 39, at 1207; see also WORCESTER, *supra* note 39, at 1314 (defining “servitude” as the “state or condition of a servant, or more commonly of a slave”). On the antistatutory thrust of Thirteenth Amendment jurisprudence and legislation generally, see Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403, 405 (1993), and Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U.L. REV. 255 (2010).

201. See *supra* text accompanying notes 53–71.

202. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866) (statement of Rep. Thayer) (defending 1866 Civil Rights Act as necessary to prevent “modified slavery”); Colbert, *supra* note 198, at 34 (contrasting the historically-based Thirteenth Amendment badges-and-incidents doctrine with Fourteenth Amendment jurisprudence, which “reframe[s] the Reconstruction Amendments’ specific purpose of ending whites’ oppression of African Americans into a generalized prohibition of ‘race discrimination’”); see also *supra* text accompanying notes 47–51.

203. As the Supreme Court once put it, the badges and incidents doctrine originated as a means of realizing “the proposition that the former slaves and their descendants should be forever free.” *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) (emphasis added). There is no inherent inconsistency between slavery and meritocracy. Indeed, the Amendment’s exception for “punishment” can plausibly be read to authorize the enslavement of a class of people lacking in merit, namely those duly convicted of a crime.

204. McAward, *supra* note 4, at 576. Blackness is by no means the only possible “badge” of slavery. Cropped hair was said to serve that function in Burgundy, and bare feet in Brazil. See COBB, *supra* note 5, at civ, 183 n.1.

205. KATHLEEN M. BROWN, *GOOD WIVES, NASTY WENCHES, AND ANXIOUS PATRIARCHS: GENDER, RACE AND POWER IN COLONIAL VIRGINIA* 198 (1996).

dominate nonwhites, including the right and duty to accost blacks in public spaces and demand proof of lawful presence, to abuse blacks physically knowing that their victims were legally prohibited from raising a hand in self defense, and to testify against blacks in court without fear of rebuttal by black witnesses.²⁰⁶ Beginning in the 1600s, whiteness was treated as a valuable property interest and protected by law against allegations of nonwhiteness.²⁰⁷ Not surprisingly given the legal context, immigrants struggled for acceptance into the white race.²⁰⁸ In the midst of all this, the Thirteenth Amendment's framers, ratifiers, and early enforcers could not have imagined that whiteness *generally* could be a badge or incident of slavery. This helps to explain how they could enact a law—the Civil Rights Act of 1866—guaranteeing to citizens of all races and colors the same basic civil rights as were “enjoyed by *white* citizens” while simultaneously maintaining that the law protected whites. At first glance, this seems nonsensical. If a state (say South Carolina, which was about sixty per cent black at the time) were to enact a “White Code” parallel to the Black Codes nullified by the Act, how could a white citizen claim to have been denied rights enjoyed by white citizens? Not at all if the term “white” is read to signify members of a pale-skinned race,²⁰⁹ but easily if it signifies the dominant, racially-defined group in a racial hierarchy. Just as blackness served as the badge of slavery, whiteness signified freedom. In this view, there is nothing inconsistent between the truism that the Amendment protects people of all races and colors,²¹⁰ and the claim that—for race-based group targeting to

206. EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 329–33 (1975).

207. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 548–49 (1896) (containing dictum suggesting that Louisiana's segregation statute would be unconstitutional if it deprived whites of a remedy against carriers for misidentifying them as colored). For detailed treatments of the property interest in whiteness, see Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767, 768 (1988), and Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1752–53 (1993).

208. See generally KAREN BRODKIN, *HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA* (1998); NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995); DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE: THE STRANGE JOURNEY FROM ELLIS ISLAND TO THE SUBURBS* (2005).

209. See Richard A. Posner, *The Bakke Case and the Future of “Affirmative Action”*, 67 CALIF. L. REV. 171, 186 (1979) (observing that the Act “explicitly stat[es] that white persons are the standard and not the protected class”); *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880) (recounting that the Fourteenth Amendment was “[O]ne of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy.”).

210. See, e.g., *Bailey v. Alabama*, 219 U.S. 219, 241 (1911) (proclaiming that the Amendment is “a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag”).

constitute a badge or incident of slavery—it must have the purpose or effect of subjugating that racially defined group or, to come at it from the other direction, to deprive its members of practical freedom.

It might be objected that constitutional rights are enjoyed by individuals, not groups. Accepting that formulation for purposes of discussion (and keeping in mind that it might not apply to the Thirteenth Amendment, which abolishes the systems as well as the individual conditions of slavery and involuntary servitude), the question centers on defining the individual right. Is it a right not to have one's race considered in decisions? If so, then members of dominant groups are constitutionally protected against race-conscious measures designed to eliminate racial subjugation, the current rule under the Fourteenth Amendment.²¹¹ As discussed above, however, the Thirteenth Amendment guarantees a different individual right, namely the right not to be branded with a badge of group subordination or otherwise subjugated based on race.²¹²

B. Unintentional Race Discrimination Under Section 1

In *Memphis v. Greene*, the Supreme Court held out the possibility that some sort of racially disparate impact might violate Section 1: “To decide the narrow constitutional question presented by this record we need not speculate about the sort of impact on a racial group that might be prohibited by the Amendment itself.”²¹³ According to two, highly regarded empirical studies, black job applicants face pervasive and severe race-based, but not provably intentional, discrimination. Those with a clean criminal record encounter

211. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224–25 (1995) (stating that when political judgments “touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest” (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (opinion of Powell, J.))).

212. See *supra* notes 189–190, 199–203 and accompanying text.

213. *Memphis v. Greene*, 451 U.S. 100, 128–29 (1981). Darrell Miller has taken up this invitation. See Darrell A.H. Miller, *The Thirteenth Amendment, Disparate Impact, and Empathy Deficits*, 39 SEATTLE U. L. REV. 847, 848 (2016) (suggesting that racially disparate impacts typically reflect “systemic empathy deficits towards minorities,” and that those deficits constitute badges of slavery); see also Boddie, *supra* note 156, at 416–19 (proposing a theory of racial territoriality that goes beyond intentional discrimination, and applying that theory to *Greene*); McAward, *supra* note 4, at 616–17 (suggesting that the Thirteenth Amendment might lack a requirement of intentional discrimination so that disparate impact claims could be brought under its authority); Pittman, *supra* note 161, at 777 (contending that the racially disparate impact of health care policy in the U.S. violates the Amendment).

about the same rate of success as whites with a drug felony conviction.²¹⁴ From the viewpoint of a black job applicant, then, being born with a black skin is roughly equivalent to being born with a felony conviction.²¹⁵ Even if the disadvantage were less extreme than a false felony conviction, there would be a straightforward case that the racially disparate treatment of black job applicants constitutes a badge or incident of slavery prohibited by Section 1 of the Thirteenth Amendment. In sharp contrast to the “inconvenience” and non-severe stigma suffered by black motorists and residents in *Greene*, exclusion from job opportunities directly and severely affects the labor freedom of African Americans—a central, if not *the* central, concern of the Amendment.²¹⁶ It would appear to be exactly “the sort of impact on a racial group that might be prohibited by the Amendment itself.”²¹⁷ Regardless of whether the disparity results from concealed conscious bias, unconscious bias, or unnoticed institutional tilts, it carries forward slavery’s exclusion of African Americans from the system of free labor.²¹⁸

C. Race-Conscious Affirmative Action on Behalf of African Americans

Judge John Minor Wisdom and several Thirteenth Amendment scholars have suggested that the Amendment could also support race-conscious affirmative action.²¹⁹ This claim is particularly compelling in the case of

214. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 955–62 (2003). To isolate the effect of a criminal record on the job search, Pager sent pairs of young, well-groomed, well-spoken college men with identical resumes to apply for 350 advertised entry-level jobs in Milwaukee. One member of each pair reported that he had served an 18-month prison sentence for cocaine possession, while the other did not. One pair was black while the other pair was white. Pager totaled up the number of call-backs obtained by each tester. For her black testers, the callback rate was 5 percent if they had a criminal record and 14 percent if they did not. For whites, it was 17 percent with a criminal record and 34 percent without. *Id.*; see also Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 785–86 (2009) (reporting results of an experimental study in New York City replicating the Milwaukee study’s finding of a rough equivalence between the impact of a felony conviction and that of black skin).

215. Pager et al., *supra* note 214, at 780.

216. On the central importance of labor freedom, see VanderVelde, *supra* note 19, and Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 SEATTLE U. L. REV. 859 (2016).

217. *Greene*, 451 U.S. at 128–29.

218. See Johnson, *supra* note 69, at 329, 332 (describing mechanisms of racial discrimination that cannot be proven intentional, with citations to the literature); Miller, *supra* note 213, at 850–52 (same, but with additional analysis and documentation); see also Elise C. Boddie, *Adaptive Discrimination*, 94 N. C. L. REV. 1235 (2016) (recounting the evolution of discrimination to avoid legal strictures).

219. See *Williams v. City of New Orleans*, 729 F.2d 1554, 1578–79 (5th Cir. 1984) (Wisdom, J., concurring in part and dissenting in part) (relying on the Thirteenth Amendment in

African Americans. Nobody doubts that the Amendment was enacted first and foremost to secure freedom for the former slaves, their descendants, and others branded with the original badge of American chattel slavery: blackness.²²⁰ Within two years of the Amendment's ratification, the Thirty-Ninth Congress had passed several race-conscious statutes providing targeted relief for African Americans.²²¹

To date, the Supreme Court has not considered the possible relevance of the Thirteenth Amendment to affirmative action. During the crucial years from *Bakke* in 1978 to *Adarand* in 1995, the Thirteenth Amendment remained largely out of the picture. Instead, litigants and judges relied on the robust body of Fourteenth Amendment jurisprudence developed during the rise and heyday of the Civil Rights Movement, from the 1940s through the 1960s. During that period, the Thirteenth Amendment had been relegated to obscurity by *Hodges*, which terminated the badges and incidents doctrine in 1906.²²² *Jones* resurrected the doctrine in 1968, but without resolving the crucial question whether the Amendment itself banned the badges and incidents of slavery.²²³ As a result, the Thirteenth Amendment offered little to

finding that a District Court abused its discretion by disapproving a settlement agreement's provision for promoting white and African American officers on a one-to-one basis as a remedy for past discrimination); Colbert, *supra* note 198, at 32–38 (noting the “stark difference” between Thirteenth Amendment and Fourteenth Amendment approaches, and arguing that the Thirteenth Amendment provides a source of authority for race-conscious affirmative action); McAward, *supra* note 4, at 610 n.253 (noting the possibility of “certain federal affirmative action programs finding justification under the Thirteenth Amendment rather than the Fourteenth,” for example federal legislation protecting African Americans in particular); Miller, *supra* note 182, at 295 (suggesting that the Thirteenth Amendment could authorize race-conscious affirmative action plans implemented by public school districts to remedy the effects of “private preferences in municipal residency”).

220. “By the Thirteenth Amendment,” as the Supreme Court later observed, “we committed ourselves as a Nation to the proposition that the former slaves and their descendants should be forever free,” and it is “[t]o keep that promise” that Congress enjoys the power to eliminate badges and incidents of slavery. *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971).

221. See Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430–32 (1997) (citing enactments providing relief to “destitute colored women and children” and to destitute “colored” persons in the District of Columbia); Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 560–62 (1998) (citing enactments providing benefits and protection to “colored” soldiers, sailors, marines, and “heads of families of the African race”); *id.* at 559–60 (citing the Freedmen's Bureau Act and other legislation providing benefits based on “previous condition of servitude,” a phrase that was “fully interchangeable” with the black race in contemporary discourse). For a concise discussion of the literature on this point, including counterarguments, see PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 1114–17 (5th ed. 2006).

222. See *supra* text accompanying notes 132–134.

223. See *supra* text accompanying notes 138, 142.

the proponents of affirmative action. On the rare occasions when parties or amici advanced Thirteenth Amendment arguments, they were ignored by the majority and dissenting justices alike.²²⁴

If, as suggested above, Section 1 of the Amendment itself prohibits badges and incidents of slavery, then Section 2 might authorize race-conscious affirmative action as a means of eliminating particular badges and incidents. Though distant from the objective of preventing full-fledged chattel slavery, race-conscious affirmative action could well be the most direct and effective means of freeing African Americans from, for example, the equivalent of a criminal birthmark in the labor market.²²⁵ If such unequal treatment does violate Section 1, then enforcement legislation would seem to be an “appropriate” means of eliminating it. Given that more than half a century of antidiscrimination legislation has failed utterly to provide equal opportunity, Congress might reasonably conclude that nothing short of race-conscious affirmative action would do the job. Congressional findings to that effect would likely survive judicial scrutiny under the rational basis test of *Jones* and, depending on the particulars of the program, under the “congruent and proportionate” test of *City of Boerne*.²²⁶

The contrary position—that the Constitution insulates unintentional discrimination against race-conscious remedies—confers upon whites a constitutional right to enjoy the benefits of racial discrimination that is not provably intentional. Although individual white job applicants might be entirely innocent of race discrimination themselves, it is difficult to see why that innocence should endow them with a constitutional right to profit from invidious racial discrimination directed against equally innocent black applicants.

224. Compare Brief of the Board of Governors of Rutgers, the State University of New Jersey et al. *Amici Curiae* at 8, 17–18, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 189514, at *8, *17–18 (arguing that the “gross exclusion of blacks and similar racial minorities from the medical profession” constituted a badge or incident of slavery, and that the affirmative action plan involved in *Bakke* was a constitutional means of eliminating it), and Brief for the Respondents at 37, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (No. 93-1841), 1994 WL 694992, at *37 (“Congress’s remedial powers under the Thirteenth Amendment . . . require deference to its identification of private discrimination and its choice of remedy.”), with *Bakke*, 438 U.S. 265 (striking down the plan without considering the Thirteenth Amendment), and *Adarand Constructors*, 515 U.S. 200 (containing no mention of Thirteenth Amendment in the opinion holding that strict scrutiny applies to race-based affirmative action by the federal government).

225. Concerning the claim that African Americans suffer from the equivalent of a criminal birthmark in the labor market, see *supra* text accompanying notes 214–217.

226. As noted above, it is possible that the Court will extend the *Boerne* test to cover the Thirteenth Amendment. See *supra* note 17, and accompanying text.

Even if the Thirteenth Amendment could support affirmative action on behalf of African Americans, however, there remains the problem of accommodation with Fourteenth Amendment jurisprudence, which currently requires strict scrutiny of all race-conscious affirmative action.²²⁷ “Neither Amendment ‘trumps’ the other,” observes Akhil Amar; “rather they must be synthesized into a coherent doctrinal whole.”²²⁸ If courts were to restore the Republican understanding that Section 1 of the Thirteenth Amendment itself bans more than the core incidents of slavery, then that synthesis would proceed from a starting point very different from that of the Fourteenth Amendment affirmative action cases. It is hard to imagine, for example, that a Court imbued with that understanding would arrive at a synthesized principle entitling members of a dominant race, endowed with the historic badge of mastery—whiteness—to block government action designed to eliminate the continuing significance of blackness as a badge of subordination and exclusion. After all, the Fourteenth Amendment was enacted not to cut back on the Thirteenth, but to strengthen the effort to ensure that citizens of all colors would enjoy the “same right[s]” as were “enjoyed by white citizens.”²²⁹ In light of the Thirteenth Amendment’s concern with “practical freedom,” it would strain credulity to argue that a black person enjoys the same right to make contracts as whites when she enters the job market and is treated as if she were born with a felony conviction.

D. Gender Equality and Reproductive Freedom

Fourteenth Amendment jurisprudence detaches sex equality issues, cognizable under the equal protection clause, from reproductive freedom claims, treated under the due process clause.²³⁰ Before her appointment to the Supreme Court, Ruth Bader Ginsburg urged the Justices to reject this

227. *Adarand Constructors*, 515 U.S. at 227.

228. Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 157 n.180 (1992).

229. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (current version at 42 U.S.C. §§ 1981–1982 (2012)), *quoted in* Amar, *supra* note 228, at 157 n.179); *see also* Graber, *supra* note 100, at 8 (providing evidence for the proposition that the “primary purpose of the Fourteenth Amendment was to construct the constitutional politics that guaranteed the fruits of the northern victory and ensured meaningful implementation of the Thirteenth Amendment”).

230. *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that discrimination based on pregnancy does not constitute sex discrimination); Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 783 (2010).

compartmentalization, to “take abortion, pregnancy, out-of-wedlock birth, and explicit gender-based differentials out of the separate cubbyholes in which they now rest, acknowledge the practical interrelationships, and treat these matters as part and parcel of a single, large, sex equality issue.”²³¹ As Neil and Reva Siegel point out, Ginsburg’s critique reflected an anti-subordination (as opposed to anti-classification) view of the Fourteenth Amendment.²³² Ginsburg objected not to sex classifications *per se*, but to any laws—whether framed as classifications or as restrictions on reproductive freedom—that reinforced “the subordinate position of women in our society and the second-class status our institutions historically have imposed upon them.”²³³

Taken seriously, Section 1 of the Thirteenth Amendment provides a more hospitable home for this kind of claim. As noted above, its text and history leave no doubt that it is concerned with subordination, not classifications in the abstract.²³⁴ In sharp contrast to Fourteenth Amendment jurisprudence, it treats both classifications and restraints on liberty as elements of the same constitutional issue.²³⁵ Scholars have documented historical, analogical, and functional connections between slavery, on the one hand, and sex discrimination and restraints on reproductive freedom, on the other. “We often envision the hallmark of slavery’s inhumanity as the slave picking cotton under the overseer’s lash,” comments Dorothy Roberts. “[But a]s much as slaves’ forced labor, whites’ control of slave women’s wombs perpetrated many of slavery’s greatest atrocities.”²³⁶ As Roberts and others have recounted, these atrocities concerned not only the wombs of enslaved women, but also their entire persons as vehicles for breeding and white pleasure.²³⁷ Antislavery

231. Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 462 (1978).

232. Siegel & Siegel, *supra* note 230, at 783–84.

233. Brief for the Petitioner at 27, *Struck v. Sec’y of Def.*, 409 U.S. 1071 (1972) (No. 72-178), 1972 WL 135840, at *27.

234. See *supra* text accompanying notes 189–190, 199–203.

235. See *supra* text accompanying notes 178–183.

236. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 45 (1997).

237. *Id.* at 25–45; see also PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 216–36 (1991); Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 11, 12–29 (2001); Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 217 n.52 (1992); Judith K. Schafer, *Sexual Cruelty to Slaves: The Unreported Case of Humphreys v. Utz*, 68 CHI.-KENT L. REV. 1313 (1993) (suggesting that the true extent of sexual abuse was deliberately hidden by courts); Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097, 1145–46 (1998).

advocates ranked these abuses among the worst of slavery's evils.²³⁸ In light of this history, scholars have proposed that the Thirteenth Amendment reaches sexual exploitation and reproductive oppression either as badges and incidents of slavery or as instances of "involuntary servitude."²³⁹ Mary Ann Case and Alexander Tsesis further suggest that, as feminist abolitionists asserted at the time and the Supreme Court later affirmed, "throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes."²⁴⁰ In particular, women were denied basic rights guaranteed by the Civil Rights Act of 1866—rights that leading Republicans and the Supreme Court considered to be constitutive of the freedom guaranteed by the Amendment.²⁴¹ Moreover, the subordinate status of women was justified on grounds that were also said to support the enslavement of Africans, namely that they were suited by nature to the domestic sphere of natural subordination and paternalistic authority.²⁴² "One need not accept this argument categorically and argue," observes Case, "that all marital and filial relations are called into question by the Thirteenth Amendment to make the case that some are."²⁴³

On the other hand, counterarguments are available. The proponents of both the Amendment and the Act emphatically denied that it would apply to sex discrimination or to the relationship of husband and wife.²⁴⁴ The domestic

238. Bridgewater, *supra* note 237, at 31–39; see also Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1697, 1711 (2012) (recounting abolitionist women's critique of slavery's impact on women).

239. Bridgewater, *supra* note 237, at 40; see also McConnell, *supra* note 237, at 218–20 (relying on similar evidence to support the proposition that the term "involuntary servitude" outlaws physical coercion of services generally—whether sexual, reproductive, or productive—in intimate relationships).

240. *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (plurality opinion), *quoted in* Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 442 (2014); see also Alexander Tsesis, *Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1661–62 (2012).

241. Examples include the married women's property acts, denial of married women's right to sue in court, occupational exclusions that applied to single as well as married women, and vulnerability to domestic abuse. Case, *supra* note 240, at 442–43; Tsesis, *supra* note 240, at 1661–68; see also Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2125–26 (1996).

242. Anita Bernstein, *What's Wrong With Stereotyping?*, 55 ARIZ. L. REV. 655, 660 (2013) (suggesting that certain types of gender stereotyping violate the Thirteenth Amendment, namely stereotypes that "keep alive the Aristotelian slaves-by-nature construct by characterizing particular groups of persons as unruly and in need of authoritative constraint"); Siegel, *supra* note 241, at 2175–84.

243. Case, *supra* note 240, at 443.

244. AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 57 (1998); VORENBERG, *supra* note 18, at

sphere of reproduction and home labor loomed large in their thinking, but “freedom” in that sphere consisted mainly in the freedman’s right to create and rule a family.²⁴⁵ Furthermore, although the Supreme Court has refrained from foreclosing the possibility that the Amendment might authorize Congress to address sex discrimination, affirmative precedent is lacking.²⁴⁶

It seems, then, that we are confronted with a fairly standard choice between broad and narrow readings. We can choose to honor the specific expectations of the men who proposed and ratified the Amendment, particularly their view of women’s proper role in the domestic sphere, or we can apply their broadly worded text in light of present-day facts and understandings. Consider, for example, Andrew Koppelman’s argument that abortion bans should trigger strict scrutiny under the Thirteenth Amendment.²⁴⁷ As urged by Ginsburg, Koppelman combines claims of reproductive freedom and sex equality into a single coherent constitutional claim. Abortion bans, he suggests, place pregnant women in a condition of “involuntary servitude” and thereby relegate them to a “servant caste.”²⁴⁸ Although the argument might seem counterintuitive to some, it is firmly grounded in traditional legal reasoning. The Supreme Court has held that Section 1 of the Thirteenth Amendment prohibits the legal or physical compulsion of service, even where the laborer has voluntarily undertaken to provide the service.²⁴⁹ Koppelman acknowledges that the services rendered by a pregnant woman differ in some respects from the kind of services typically provided in the labor market, but points out that they are nevertheless, “according to medical experts, arduous, tiring, and obstructive of other work.”²⁵⁰ In particular, the contractions of childbirth literally constitute labor,

100–01, 131, 194–95; see also VanderVelde, *supra* note 19, at 457 (“No congressmen claimed the term should apply to wives or children, relationships within the family which could be considered unequal and potentially abusive.”).

245. STANLEY, *supra* note 244, at 45–50, 57.

246. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 268–69 (1993); Tsesis, *supra* note 240, at 1641.

247. Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 Nw. U. L. REV. 480, 511 (1990).

248. *Id.* at 484; see also Andrew Koppelman, *Forced Labor Revisited: The Thirteenth Amendment and Abortion*, in THE PROMISES OF LIBERTY, *supra* note 4, at 231–33.

249. Koppelman, *supra* note 247, at 484 (citing *Bailey v. Alabama*, 219 U.S. 219, 241 (1911)); see also Koppelman, *supra* note 248, at 228–31. For a nuanced discussion of the argument that pregnant women voluntarily assumed the risk, see Koppelman, *supra* note 10, at 1943–45.

250. Motion for Leave to File Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case, and Brief Amici Curiae at 23, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18) 1972 WL 126045, at *23 [hereinafter *Roe Amicus*].

“the most strenuous work of which the human body is capable.”²⁵¹ Koppelman suggests that a failure to recognize forced childbirth as forced labor might reflect a gender-based failure of empathy: “[W]hat would we call any activity that demanded that a man, in order to produce a tangible result, endure constant exhaustion, loss of appetite, vomiting, sleeplessness, bloatedness, soreness, swelling, uncontrollable mood swings, and, ultimately, hours of agony, often followed by deep depression?”²⁵² Furthermore, it could be said that abortion bans impose a badge of servitude on women because “forcing women to be mothers makes them into a servant caste, a group which, by virtue of a status of birth, is held subject to a special duty to serve others and not themselves.”²⁵³ The notion that women can, by virtue of their natural capacity to give birth, be forced to provide that service bears an unmistakable resemblance to one of the pillars of pro-slavery ideology—that Africans could, because of their purportedly natural suitability for strenuous manual labor, be forced to supply it.

Koppelman does not contend that the Thirteenth Amendment provides an easy solution to the abortion issue; given that infanticide is acknowledged by all to be murder, and that a late-term fetus can survive outside the womb, there can be no easy line-drawing. “What can be shown here,” however, “is that prohibitions of abortion implicate a constitutional right of great weight, one for which many lives have been sacrificed in the past.”²⁵⁴ Although this showing does not compel recognition of the abortion right, it certainly provides a more solid textual foundation than the right’s current grounding in the abstract concept of “liberty” and the oxymoronic doctrine of “substantive due process.”

Counterarguments are again available. It is certainly true that, at the time of the Amendment’s ratification, “no reasonable person . . . would have thought that unwanted pregnancy was a form of involuntary servitude.”²⁵⁵ But, as Koppelman points out, numerous present-day constitutional doctrines would fall if the scope of constitutional provisions were limited to applications expected at the time.²⁵⁶ The framers of the Fourteenth Amendment, for

251. *Id.* at 24.

252. Koppelman, *supra* note 248, at 230.

253. Koppelman, *supra* note 247, at 484.

254. Koppelman, *supra* note 248, at 236.

255. John O. McGinnis, *Decentralizing Constitutional Provisions Versus Judicial Oligarchy: A Reply to Professor Koppelman*, 20 CONST. COMMENT. 39, 56 (2003); see also Steven D. Smith, *Idolatry in Constitutional Interpretation*, 79 VA. L. REV. 583, 620 n.130 (1993) (dismissing Koppelman’s argument as a “hatrabbitt operation” designed to extend the Amendment “beyond what its authors could have contemplated”).

256. Koppelman, *supra* note 247, at 488 n.40; Koppelman, *supra* note 248, at 235.

example, did not contemplate that their creation would be applied to overturn antimitiscegenation laws, sex classifications, or restrictions on contraception.

Jamal Greene contends, however, that the Fourteenth Amendment can be distinguished from the Thirteenth because the broadly worded Equal Protection Clause, unlike Section 1 of the Thirteenth Amendment, “does not lend itself to specific-intent application.”²⁵⁷ In Greene’s view, the Thirteenth targets “three specific practices—slavery, involuntary servitude, and punishment for crime—the scopes of which were well understood (indeed, too well understood) at the time of the Amendment’s adoption and which remain well understood today.”²⁵⁸ He equates “slavery” with “chattel slavery” and involuntary servitude with physical or legal coercion.²⁵⁹ Greene challenges Koppelman “to show why slavery and involuntary servitude are more like the Equal Protection Clause and less like” the presidential oath requirement or the 25-year age minimum for Representatives—specific provisions that can appropriately be limited to expected applications.²⁶⁰

If we focus on the sources traditionally used in constitutional interpretation, however, then I would submit that Koppelman can meet this challenge. Section 1 of the Thirteenth Amendment might not be worded as broadly as the Equal Protection Clause, but it certainly leaves plenty of room to go beyond original expected applications. Contemporary and present-day dictionaries define “slavery” and “servitude” not with precise terminology like a number of years or a spelled-out oath, but in such abstractions as the “subjection” of one person to another.²⁶¹ The nature of slavery, servitude, and “involuntary” action have, like that of equal protection, sparked centuries of scholarly inquiry and disputation.²⁶² Around the time of the Amendment’s

257. Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1740 (2012).

258. *Id.* at 1736.

259. *Id.* at 1735, 1741, 1749, 1761.

260. *Id.* at 1741.

261. See WEBSTER, *supra* note 39, 1207 (defining “servitude” as the “state of voluntary or involuntary subjection to a master”); *id.* at 1241 (defining “slavery” as the “condition of a slave; the state of entire subjection of one person to the will of another”); WORCESTER, *supra* note 39, at 1352 (defining “slavery” as the “state of absolute subjection to the will of another”).

262. See, e.g., DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770–1823* (1975) (recounting different views concerning the evils of slavery among various antislavery constituencies in the United States and Great Britain); ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* (1982) (comparative analysis of slave systems, revealing a wide range of practices and identifying common elements); Scott Anderson, *Coercion*, STAN. ENCYCLOPEDIA PHIL. (Feb. 10, 2006), <https://plato.stanford.edu/entries/coercion/#HobLocKan> (recounting various theories of

framing, as we have seen, the terms “slavery” and “servitude” were deployed and understood in multiple senses at varying levels of abstraction, often by the same individuals.²⁶³ Moreover, those terms appear in a command that neither “shall exist,” a directive that could be—and has been—read to require the elimination not only of their core features, but also of more peripheral ones, like the disabilities to make contracts, own property, and participate in court.²⁶⁴ Furthermore, although the Supreme Court declared in *Hodges* that the meaning of the Thirteenth Amendment is “as clear as language can make it,”²⁶⁵ *Hodges* has since been overruled and the Court has retreated so far from the claim of determinacy that it now endorses no definition of slavery whatsoever and holds open the basic question whether Section 1 does more than abolish slavery.²⁶⁶

There are, of course, scholars who favor the method of original expected application even for broadly worded provisions. But in the particular cases of reproductive freedom and gender equality, there might be good reasons even for them to consider going beyond the framers’ expectations. For those who value original meaning because it reflects popular consent, there is the exclusion of women from the Congresses that proposed the Amendment, the state legislatures that ratified it, and the electorates that selected both.²⁶⁷ For those who value original meaning as a constraint on present-day judicial discretion, there is the difficulty that meaning is determined by context, and the context reflects prevailing power relations.²⁶⁸ If judges are in need of constraints not provided by the constitutional text, then perhaps we should find better ones than nineteenth century notions about women’s innate suitability to the

coercion beginning with the ancient Greek philosophers and continuing to the present era).

263. See *supra* text accompanying notes 48–51.

264. See *supra* text accompanying notes 53–64; see also Bridgewater, *supra* note 237, at 31–33; McConnell, *supra* note 237, at 219.

265. *Hodges v. United States*, 203 U.S. 1, 16 (1906).

266. *City of Memphis v. Greene*, 451 U.S. 100, 126 (1981); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968); Carter, *supra* note 2, at 1342.

267. Annaleigh E. Curtis, Note, *Why Originalism Needs Critical Theory: Democracy, Language, and Social Power*, 38 HARV. J.L. & GENDER 437, 444 (2015).

268. As Curtis explains, the contemporary meanings of legal terms were inevitably shaped by the same field of power that produced and was reflected in exclusions from political participation. *Id.* at 446. Thus, the “decision to enforce the original meaning of a text without critical insight is not a neutral decision. Rather, it will often be tantamount to endorsing an oppressive history masked in common language.” *Id.* at 459.

domestic sphere—notions contradicted by the subsequent enactment of the Nineteenth Amendment.²⁶⁹

In addition to original meaning, Greene cites tradition. In *Robertson v. Baldwin* (1897), the Supreme Court held that merchant seamen could be subjected to involuntary servitude because the Amendment “was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional, such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards.”²⁷⁰ Admittedly, forced child bearing originated in the distant past. As Koppelman points out, however, the Court erred in describing ancient practices as “exceptional”; there could be no exceptions to a ban on slavery and involuntary servitude until those practices were in fact banned.²⁷¹ Like the alleged exceptions listed by the Court, forced child bearing arose at a time when slavery and involuntary servitude were widely accepted practices. The question whether it fell within or outside a prohibition on such practices, then, could not be resolved merely by citing tradition; we need a determination whether forced child bearing falls within the class of evils prohibited by the Amendment.²⁷² The Court recognized this difficulty when it actually came time to explain the exception for military service. Instead of relying on *Robertson’s* tradition rationale, the Court considered whether compulsory military service embodied evils similar to those of slavery. Far from a badge of slavery, military service reflected the “noble duty” of the citizen to contribute to the defense of the nation.²⁷³ Indeed, the Court might have noted that *exclusion* from the armed forces is a badge of slavery, while military service has provided an avenue to freedom and equal rights.²⁷⁴ Far from the arbitrary command of a master, military service resulted

269. See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) (recounting the debates over women’s capabilities and role in society that accompanied the proposal and ratification of the Nineteenth Amendment).

270. *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897).

271. Koppelman, *supra* note 247, at 524–25.

272. See Akhil Reed Amar & Daniel Widawsky, Commentary, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1374 (1992) (observing that “custom alone cannot be the sole test of the Thirteenth Amendment’s meaning, because the Amendment was designed to challenge long-standing institutions and practices that violated its core values of personhood and dignity,” and suggesting that “[a]ny exception to the Amendment’s reach must be limited to those historic practices that are consistent with the Amendment’s central thrust”).

273. *Arver v. United States*, 245 U.S. 366, 390 (1918).

274. See, e.g., Second Militia Act of 1792, 1 Stat. 271 (1792) (providing for the enrollment of every “free, able-bodied, white, male citizen” in the militia); ERIC FONER, *THE STORY OF*

from a declaration of war issued “by the great representative body of the people.”²⁷⁵ And, far from the private profit of a master, military service benefitted the entire nation including the soldiers and their families.²⁷⁶ By contrast, the disability of women to control their reproductive capacity was a component of slavery, constitutive of the institution.²⁷⁷ Although some Americans today undoubtedly consider child bearing to be a noble duty of women, their view hinges not on any concept of civic duty, but on the belief that the individual interest of the fetus trumps the pregnant woman’s interest in reproductive freedom. This brings us back to the limited nature of Koppelman’s claim, namely that restrictions on abortion infringe the right to be free from slavery and involuntary servitude, thus triggering strict scrutiny. The question whether the preservation of fetal life is a sufficiently compelling interest to justify some restriction of the right lies beyond the scope of Koppelman’s argument and of this Article.

CONCLUSION

Today, more than a century and a half since the ratification of the Thirteenth Amendment, its meaning remains a mystery. The Supreme Court has no current position on some of the most important, first-level interpretive issues raised by the text: no position on what it means to say that “slavery” shall not “exist”; no position on whether Section 1, by itself, outlaws anything more than full-fledged slavery or physically or legally coerced labor; and no view on whether Section 1 bans some or all of the badges and incidents of slavery. In this environment of doctrinal uncertainty, lower courts have refrained from applying Section 1 to anything other than physically or legally coerced labor. Although the Court maintains that the question is “open,” the practical reality is that courts honor the narrow reading of Section 1 proposed by the unsuccessful Democratic opponents of both the Amendment and early enforcement legislation, and later introduced to jurisprudence in the now-

AMERICAN FREEDOM 17 (1998) (“[The] long-lasting tradition whereby service in the army enabled excluded groups to stake a claim to full citizenship.”); *id.* at 97 (recounting that the service of 200,000 black soldiers in the Union Army “placed black citizenship on the postwar agenda”).

275. *Arver*, 245 U.S. at 390.

276. *Id.*

277. Koppelman, *supra* note 247, at 508; *see also* Bridgewater, *supra* note 237, at 16–18, 20–22. Enslaved women resisted this control by methods including self-induced abortion. Bridgewater, *supra* note 237, at 27–28.

discredited Jim Crow decisions of *Plessy v. Ferguson* and *Hodges v. United States*.

In this Article, I have presented evidence from history and jurisprudence tending to support a broader reading of Section 1, namely that it prohibits not only core incidents of slavery, like chattelization and physically or legally forced labor, but also a set of others including—at a minimum—denials of the rights enumerated in the Civil Rights Act of 1866. To accept this reading would be to restart the process, commenced by the Thirty-Ninth Congress in 1865 but derailed in *Plessy* and *Hodges*, of identifying and protecting Thirteenth Amendment rights. Whether this process is led by judges, legislators, or social movements, it is long overdue.
