ESSAYS

STATE ACTION, PRIVATE ACTION, AND THE THIRTEENTH AMENDMENT

George Rutherglen[*]

INTRODUCTION

THE Thirteenth Amendment speaks in terms that are universal: "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."[1] Unlike its close cousin, the Fourteenth Amendment, the Thirteenth Amendment restrains not only government actors, but also private individuals. Private forms of "involuntary servitude" violate the self-executing provisions of the Amendment, and private attempts to perpetuate the "badges and incidents of slavery" can be prohibited by Congress in legislation to enforce the Amendment. There is no need to prove state action to establish a violation of the Amendment or to support enforcing legislation—an accepted tenet of constitutional doctrine established in 1883 in the *Civil Rights Cases*[2] and not seriously challenged since then.

Precisely because this interpretation of the Amendment has become axiomatic, it has resisted re-examination. Yet the range of private action covered by the Thirteenth Amendment remains both uncertain and controversial. Accepting the premise that the Amendment reaches private action, the question remains, "Private action with respect to what?" Under Section 1 of the Amendment,

[*] John Barbee Minor Distinguished Professor and Edward F. Howrey Research Professor, University of Virginia. I would like to thank my colleagues Michael Collins, Barry Cushman, Brandon Garrett, Risa Goluboff, John Harrison, Mike Klarman, Caleb Nelson, and Ann Woolhandler for discussions of this topic, and Derek Neilson and Dan Walter for their help as research assistants.

[1] U.S. Const. amend. XIII, § 1.

[2] 109 U.S. 3, 20 (1883).

the answer is clear enough. Private action with respect to slavery is prohibited, whether accomplished with—or without—the tacit support of the state. Thus the Amendment has been interpreted to prohibit private contracts of peonage that forced an employee to continue to work for his master despite his decision to quit.[3] Under Section 2 of the Amendment, the range of private action subject to regulation was extended even further and more indefinitely. Section 2 simply provides, in its entirety, that "Congress shall have power to enforce this article by appropriate legislation."[4] In even more delphic terms, this provision has been interpreted to authorize federal legislation to eliminate "the badges and incidents of slavery."[5] What constitutes private action preserving the badges and incidents of slavery?

In another article, I have examined the historical meaning of this phrase, finding that it was used most frequently before the adoption of the Thirteenth Amendment to refer to the symbolic manifestation of political and social inferiority that was analogous, but hardly identical, to the specific legal attributes of slavery.[6] The Supreme Court nevertheless used the phrase in the latter, narrower, sense in the *Civil Rights Cases*, limiting it to the specific disabilities of slavery, such as the lack of capacity to hold property, to enter into contracts, or to testify against a white person in court.[7] At the end of the Warren Court, however, the Supreme Court took a very different view of "the badges and incidents of slavery." In *Jones v. Alfred H. Mayer Co.*,[8] the Court left it to Congress to rationally determine what this phrase meant and therefore to determine how broadly to exercise its power to enforce the Thirteenth Amendment.[9] This decision has raised the disturbing possibility that Congress has virtually unlimited power to apply the Amendment to

[3] For an account of the cases prohibiting peonage, see Benno C. Schmidt, Jr., Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The *Peonage Cases*, 82 Colum. L. Rev. 646 (1982).

[4] U.S. Const. amend. XIII, § 2.

[5] *Civil Rights Cases*, 109 U.S. at 20–21.

[6] George Rutherglen, The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment, *in* Promises of Liberty: Thirteenth Amendment Abolitionism and Its Contemporary Vitality (Alexander Tsesis ed., forthcoming 2009).

[7] 109 U.S. at 22.

[8] 392 U.S. 409 (1968).

[9] Id. at 440.

private activity because of the absence of any state action requirement and any effective limit on what constitutes "the badges and incidents of slavery."

Yet the opposite has proved to be more nearly the case: under-enforcement, not over-enforcement, has been the persistent obstacle to making the Thirteenth Amendment effective. Where Congress has legislated in the exercise of its power under Section 2 of the Amendment, it has done so in limited instances that were directly related to slavery or racial discrimination. The scarcity of such legislation reveals a more troubling question about the Thirteenth Amendment: whether it has been effectively rendered obsolete by subsequent amendments and jurisprudence. Insofar as it covers state action, the Amendment prohibits the same loss of liberty and the same forms of racial discrimination prohibited by the Due Process and Equal Protection Clauses; insofar as it authorizes federal legislation against private forms of slavery and racial discrimination, it duplicates the authority granted to Congress under the Commerce Clause. Thus, most of the modern legislation against private racial discrimination, such as the Civil Rights Act of 1964, was originally enacted under the Commerce Clause, although it more naturally finds support under the Thirteenth Amendment. The force and authority of the Amendment has seemingly been displaced to other constitutional provisions.

This Essay will argue that the private action interpretation of the Thirteenth Amendment is both well-founded in its history and crucial to the modern project of prohibiting private discrimination. Part I will examine the historical conditions and events leading up to the Amendment's adoption: the role of private action in establishing antebellum slavery, the origins of the Amendment's text in the Northwest Ordinance,[10] and the legislative debates over the Amendment; these sources contain all of the major arguments for the Amendment's coverage of private action. Part II will proceed to discuss the Amendment's coverage of private action as it has developed in judicial decisions. Part III will then analyze the implications of these arguments for the separate question of what constitutes the "badges and incidents of slavery" within the power of Congress to enforce the Amendment. This Part and the Essay will

[10] Act of July 13, 1787, art. VI, reenacted by Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51.

conclude by briefly considering the role of the Thirteenth Amendment in the jurisprudence of civil rights, now and in the future.

I. PRIVATE ACTION IN CONSTITUTIONAL HISTORY

The Thirteenth Amendment stands out in the Constitution as the only provision currently in effect that directly regulates private action. The Eighteenth Amendment, imposing Prohibition, applied directly to private individuals, but its repeal by the Twenty-First Amendment eliminated that instance of direct constitutional regulation of private conduct.[11] All the other provisions of the Constitution regulate the structure and function of government, and if they confer individual rights, they protect only against "state action," in the broad sense of action by the federal government as well as by the states. In the same vein, a "private action" interpretation of the Thirteenth Amendment cannot be viewed as a limitation upon its scope, since the Amendment applies to both state and private action. Thus, including private action under the Thirteenth Amendment does not represent a reduction, but rather an expansion, of its coverage.

With the repeal of the Eighteenth Amendment, the Thirteenth Amendment stands alone among provisions of the Constitution in having such expansive coverage. Although it is hardly unique in authorizing Congress to regulate private action, it necessarily carries Congress further into what the Amendment's framers termed regulation of "domestic relations" than any other constitutional provision. The Eighteenth Amendment did so, too, but has come to be regarded as a failed moralistic experiment.[12] The Thirteenth Amendment has even stronger roots in the moral principles of abolitionism and, like all efforts to eliminate racial inequality, cannot be regarded as an unequivocal success. Yet repeal of the Thirteenth Amendment is unthinkable, and its application to private action has remained unquestioned. How is the virtually entrenched

[11] U.S. Const. amend. XVIII, § 1, amend. XXI, § 1. Section 2 of the Twenty-First Amendment does impose direct federal regulation by making it unlawful under federal law to violate any state law that prohibits the delivery or use of alcoholic beverages, but this provision depends for its entire effect on state law directly regulating private conduct. Id. § 2.

[12] David E. Kyvig, Repealing National Prohibition 201–02 (2d ed., Kent State Univ. Press 2000) (1979).

and canonical status of the Thirteenth Amendment related to its coverage of private action?

Section 1 of the Amendment provides a partial answer. It declares that slavery and involuntary servitude "shall not exist" within the United States, eliminating an evil which, to that point, had been a defining feature of American civilization. Unlike the Emancipation Proclamation,[13] which had, at best, a temporary basis in the President's war powers and in the limited geographical application to the states then in rebellion,[14] the Thirteenth Amendment was intended to eliminate a great evil for all time throughout the entire country. It was meant to be permanent and unlimited. It therefore contains no reference to state action, unlike the Fourteenth Amendment, providing a negative inference in support of the private action interpretation. A look into the origins and history leading to ratification of the Thirteenth Amendment supplies the arguments that make this interpretation convincing.

A. Origins of the Text

The Thirteenth Amendment was debated and ratified in the shadow of the Emancipation Proclamation. While the proclamation had freed the slaves in Confederate territory and had become effective with the advance of the Union armies, it had been less than universal in its coverage. The proclamation did not apply in border states or parts of the Confederacy then under Union control; it did not prevent the reintroduction of slavery in the areas where it applied; and it went no further than the war powers that President Lincoln had invoked to make the proclamation. The Thirteenth Amendment sought to remedy these shortcomings by putting abolition on a broader and more secure constitutional foundation. It could not just provide, as the proclamation did, "that all persons held as slaves within said designated states and parts of states are, and henceforward shall be, free."[15]

The framers of the Thirteenth Amendment instead had to turn to more permanent forms of emancipation, looking back to a text

[13] Proclamation No. 17, 12 Stat. 1268 (Jan. 1, 1863).

[14] See Michael Vorenberg, Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment 31–34 (2001).

[15] Proclamation No. 17, 12 Stat. 1268, 1269 (Jan. 1, 1863).

from the Founding Era: the Northwest Ordinance, which was passed by the Continental Congress in 1787 and then reenacted by the First Congress in 1789. The Northwest Ordinance provided that "[t]here shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted."[16] This language was derived, in turn, from a draft of the Ordinance of 1784, a predecessor of the Northwest Ordinance. The draft is attributed to Thomas Jefferson, who served on the committee that prepared it and who wrote it out in longhand,[17] providing another connecting link to the Founding Era. Debate over the precise terms of the Amendment was therefore framed in terms of adopting the "Jeffersonian ordinance" as part of the Constitution.[18]

The analogous provision in the Northwest Ordinance was enacted and was effective in preventing the spread of slavery into the area north of the Ohio River, in what is now Ohio, Indiana, Illinois, Michigan, Wisconsin, and parts of Minnesota. The ordinance also provided for the return of fugitive slaves, a provision not necessary in the Thirteenth Amendment because of its geographic extension to "the United States, or any place subject to their jurisdiction." Apart from this difference, the language of Section 1 closely tracks the language of the Northwest Ordinance. The same language was also used in the Missouri Compromise, abolishing slavery in the northern part of the Louisiana Purchase.[19] It also appeared in legislation enacted during the Civil War to abolish slavery in the District of Columbia[20] and in the territories of the

[16] Act of July 13, 1787, art. VI, reenacted by Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51.

[17] See 1 Henry S. Randall, The Life of Thomas Jefferson 397–98 (New York, Derby & Jackson 1858). That proposal read: "That after the year 1800 of the Christian era there shall be neither slavery nor involuntary servitude in any of the said States, otherwise than in punishment of crimes, whereof the party shall have been duly convicted to have been personally guilty." Id.

[18] Senator Sumner, who argued against the existing language in the amendment, said, "I understand that it starts with the idea of reproducing the Jeffersonian ordinance." Cong. Globe, 38th Cong., 1st Sess. 1488 (1864).

[19] Act of March 6, 1820, ch. 22, § 8, 3 Stat. 545, 548. Within this area, "slavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby, forever prohibited." This compromise came undone with the Kansas-Nebraska Act, Act of May 30, 1854, ch. 59, § 14, 10 Stat. 277, 283.

[20] Act of April 16, 1862, ch. 54, § 1, 12 Stat. 376.

United States.[21] By the time the Thirteenth Amendment was proposed, the Northwest Ordinance had become the template for federal legislation abolishing slavery.

As interpreted and applied, however, the Ordinance effected less than a complete abolition of slavery. The ordinance itself protected the rights of French inhabitants to their property, which implicitly covered slaves held under French law, and referred elsewhere to the rights of "free male inhabitants" or "free inhabitants" to suffrage and representation, which implied that some individuals were not free.[22] The ordinance also attempted only a gradual abolition of slavery by applying prospectively, limiting the introduction of slaves into the territory and emancipating the children of existing slaves. The northern states that abolished slavery did so in much the same manner.[23] Such a gradual approach minimized the problems, much emphasized by opponents of emancipation, created by taking private property without just compensation. Prospective emancipation did not take away any property rights that slaveholders had in existing slaves. The expropriation problem, like the treatment of fugitive slaves, was pretermitted by the Thirteenth Amendment, which superseded any claim to property rights in slaves or any claim for just compensation by invalidating those rights as a matter of constitutional law.

The one issue in implementing the Northwest Ordinance that could not be avoided in drafting the Thirteenth Amendment was its uneven enforcement. The ordinance was subverted, particularly in Indiana, by substituting long-term contracts of indenture for outright involuntary servitude.[24] The ordinance effectively prohibited only official recognition of slavery, not its evasion by legal devices with nearly identical consequences. Recognizing such problems of enforcement, the drafters of the Thirteenth Amendment provided that Congress could enforce it "by appropriate legisla-

[21] Act of June 19, 1862, ch. 111, 12 Stat. 432.

[22] Act of July 13, 1787, §§ 2, 9, art. V, reenacted by Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51.

[23] Arthur Zilversmit, The First Emancipation: The Abolition of Slavery in the North 137–38, 199–200 (1967). When Congress abolished slavery in the District of Columbia, it did so with compensation to slaveowners loyal to the Union. See Act of April 16, 1862, ch. 54, §§ 2, 3, 12 Stat. 376.

[24] The Northwest Ordinance 1787: A Bicentennial Handbook 74–76, 100 (Robert M. Taylor, Jr., ed. 1987).

tion." Similar problems also plagued attempts to implement the emancipation provisions found in the Confiscation Acts passed during the Civil War and, as discussed in Part III, these problems served as an object lesson in drafting the enforcement provisions of the Amendment.[25]

The Northwest Ordinance did not require any such authorization of congressional authority because it fell within the plenary power of Congress to "make all needful Rules and Regulations respecting the Territory" of the United States.[26] In the exercise of this power, Congress could have provided for effective enforcement of the prohibition against slavery in the Northwest Territory. It failed to do so in large part because of the regional divisions that soon emerged over slavery in the states to be added to the union. The Northwest Ordinance operated directly upon private individuals on matters usually reserved to the states because it was meant to be a temporary substitute for state law. Thus the ordinance dealt with such issues as property and inheritance that were normally handled by the states.[27]

Modeling the Thirteenth Amendment after general legislation made it a natural vehicle for addressing slavery as a domestic relationship, even though that was considered at the time to be wholly subject to state law. The framers of the Amendment would not have thought of it as regulating only state action when they based its wording on an ordinance that applied as municipal law within federal territory. This issue and the threat that it posed to state sovereignty were raised by opponents of the Amendment and extensively debated, as were the issues of expropriation and congressional enforcement power, also taken up in the next Section.

What was not extensively discussed were alternatives to the language that was adopted. Only Senator Charles Sumner from Massachusetts took issue with the language proposed by the Senate

[25] See infra text accompanying notes 89–90.

[26] U.S. Const. art. IV, § 3. The plenary power of Congress over the Northwest Territory was recognized in cases that otherwise limited federal power to regulate slavery, notoriously *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 432–42 (1857). The dissenters in that case would have recognized plenary congressional power over other territories as well. Id. at 539–40 (McLean, J., dissenting); id. at 605–07 (Curtis, J., dissenting). The dissenters' position was later adopted by the Supreme Court. See, e.g., Downes v. Bidwell, 182 U.S. 244, 285 (1901).

[27] Act of July 13, 1787, § 2, reenacted by Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51.

committee that drafted the Thirteenth Amendment. He would have taken the Amendment in a direction at once broader and narrower than the language we now have; his version read: "All persons are equal before the law, so that no person can hold another as a slave."[28] The reference to "equal before the law" anticipates the Equal Protection Clause of the Fourteenth Amendment and goes beyond emancipation to impose a general, but indefinite, requirement of equal treatment. At the same time, however, this reference suggests some version of the state action requirement by limiting its focus to legal treatment of all free individuals. Senator Sumner had used the same phrase in legislation introduced earlier in the same Congress "to secure equality before the law in the courts of the United States," seeking to prohibit the legal disability of blacks from testifying against whites in federal court.[29] "Equality before the law" was for Senator Sumner, as it was for his fellow Republican, Representative Thaddeus Stevens, an ideal of equal treatment that stopped short of full equality. As Representative Stevens said during a later debate in the House, he believed in equality, "but not equality in all things—simply before the laws, nothing else."[30]

This version of the Amendment had only isolated support, as Senator Sumner recognized in withdrawing it after a brief debate with Senator Lyman Trumbull, the chairman of the Senate committee that drafted the Amendment.[31] His effort to constitutionalize general principles of equality would have to await the Fourteenth Amendment. The rejection of his proposal does not tell us much about private action, mainly because the legislators who debated the Thirteenth Amendment did not think in terms of the state action doctrine as we have come to know it. Abolition had public and private aspects, represented both in the Amendment as ratified and in Senator Sumner's proposed alternative. The public legal form of holding property in human beings would be abolished, as would the private rights of slaveholders over their slaves. There was no need to distinguish one aspect from the other. Quite

[28] Cong. Globe, 38th Cong., 1st Sess. 1482 (1864); id. at 521; see also id. at 523.

[29] S. Rep. No. 38-25, at 1 (1864).

[30] Cong. Globe, 38th Cong., 2d Sess. 125 (1865); see Vorenberg, supra note 14, at 189–90.

[31] Cong. Globe, 38th Cong., 1st Sess. 1489 (1864); see also id. at 553.

the opposite, abolition was possible only by disregarding the distinction between private action and state action. Slavery could no more be maintained through the private exercise of common law rights of property and contract—which constitute the paradigm of private individual action—than through the efforts of the government itself.

"State action" did enter into the debates over the Thirteenth Amendment, but in a sense that confirms how anachronistic it would be to read our understanding of the doctrine into the congressional debates. Representative George Yeaman, a reluctant supporter of the Amendment from Kentucky, delivered a long speech in which he considered "state action" as an alternative to amending the Constitution to achieve emancipation.[32] It was state action to end slavery, not state action insofar as it perpetuated slavery, that came up in the debates in Congress. If the states would end slavery by themselves, there would be no need for the federal government to intervene. This issue, in many different forms, permeated the debate over the Thirteenth Amendment, much more so than any explicit consideration of whether it applied to private action. There was no occasion to debate whether the Amendment was directed to the slaveholding states alone since it contained no reference to the "State," unlike the Due Process and Equal Protection Clauses of the Fourteenth Amendment. By declaring that neither slavery nor involuntary servitude "shall exist," the Amendment applied equally to the slaveholders and the slaveholding states. The Thirteenth Amendment did not distinguish between the private individuals who benefited from slavery and the states that conferred those benefits upon them. Both were held responsible for slavery and both would feel the direct consequences of abolition, as the congressional debates made clear.

B. Congressional Debates over the Thirteenth Amendment

The moral case for abolition was the most prominent argument offered in support of the Thirteenth Amendment. It was countered by federalist arguments in favor of preserving states' rights and against the expropriation of property rights under state law. These federalist arguments of principle were augmented by consequen-

[32] Cong. Globe, 38th Cong., 2d Sess. 171 (1865).

tialist concerns about the beneficial or harmful effects of abolition, but such effects remained peripheral and conjectural as legislators could only guess what would happen upon ratification of the Amendment. Supporters and opponents of the Amendment did agree, however, that it would work great changes in American law: the supporters in applauding it as a declaration of universal freedom; the opponents in lamenting the demise of state sovereignty and the expropriation of property rights. For that reason, statements from both camps can be marshaled in support of a broad interpretation of the Amendment, including its coverage of private action.

A more reliable guide to the Amendment than conjectures over its possible effects rests on legislative statements about what it would necessarily accomplish. These consequences had to be accepted by even the most reluctant supporters of the Amendment, particularly those in the House of Representatives, where it received just enough votes to meet the constitutional threshold of a two-thirds majority.[33] An examination of the minimum content of the Amendment reveals a consensus on the need for it to cover various forms of evasion—attempts to reinstate slavery by other means. For example, with respect to the self-executing provisions of Section 1, the consensus extended the Amendment from slavery and involuntary servitude to contracts of peonage. With respect to enforcement under Section 2, the consensus went further to authorize Congress to prohibit actions by private individuals that reinstated the systematic incapacities typical of slavery. Under both Sections 1 and 2, regulation of private action was as necessary as regulation of state action.

1. Moral Foundations

Any analysis of the scope and content of the Thirteenth Amendment must begin from its moral foundations in abolitionist thought. The supporters of the Amendment invoked the entire array of abolitionist arguments, from the claim that the Amendment only declared principles already implicit in the original Constitu-

[33] U.S. Const. art. V. The vote in the House of Representatives was 119 in favor, 56 opposed, and 8 not voting. Cong. Globe, 38th Cong. 2d Sess. 531 (1865). If three votes had switched from "in favor" to "opposed," the amendment would have failed.

tion—making it, strictly speaking, unnecessary—to the argument that slavery was inconsistent with natural law—making it necessary to bring the Constitution into conformity with the principle that "all men are created equal" in the Declaration of Independence.[34] Others argued, more pragmatically, that only abolition could finally put an end to sectional conflict over slavery, achieving lasting peace after a bloody civil war. All of these arguments led to the same conclusion: it was necessary to abolish slavery forever and everywhere within the nation. It was only a short step from this conclusion, apparent in the text of the Amendment, to the further conclusion that slavery and involuntary servitude, except as punishment for crime, should be abolished in all their different forms.

The force and implication of all these abolitionist arguments were not lost on the legislators who debated the Amendment. Senator Henry Wilson of Massachusetts, a prominent supporter of the Amendment, claimed:

> [The Amendment] will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading, and bloody codes; its dark, malignant, barbarizing spirit; all it was and is, everything connected with it or pertaining to it, from the face of the nation it has scarred with moral desolation, from the bosom of the country it has reddened with the blood and strewn with the graves of patriotism.[35]

In less colorful language, other supporters of the Amendment also endorsed its comprehensive effect. Representative Thomas Davis of New York agreed with Senator Sumner in seeking "equality before the law" and argued that this could be achieved "only by removing every vestige of African slavery from the American Republic."[36]

Those legislators who took a more pragmatic position argued that ending slavery was necessary to preserve the union and to put controversies over slavery firmly in the past. Senator John Hender-

[34] The Declaration of Independence para. 2 (U.S. 1776).

[35] Cong. Globe, 38th Cong., 1st Sess. 1324 (1864).

[36] Cong. Globe, 38th Cong., 2d Sess. 155 (1865); see also Cong. Globe, 38th Cong., 1st Sess. 2618 (1864) (remarks of Rep. Kellogg) (explaining that slavery must be destroyed "to make sure and certain that the cause of the rebellion being dead and buried may have no future resurrection").

son of Missouri expressed the hope that the Amendment would "bring about the speedy reunion of a dissevered and bleeding country; that it may lay the foundations of a lasting peace, upon which national freedom may be built in national strength."[37] Representative Glenni Scofield of Pennsylvania combined these pragmatic concerns with the moral condemnation of slavery:

> Slavery in the end must die. It has cost the country too much suffering and too much patriotic blood, and is in theory an institution too monstrous, to be permitted to live. The only question is, shall it die now, by a constitutional amendment—a single stroke of the ax—or shall it linger in party warfare through a quarter or half a century of acrimonious debate, patchwork legislation, and conflicting adjudication?[38]

Slavery would be abolished by the single act of amending the Constitution.

Opponents of the Amendment took exception to such optimistic predictions, forecasting continued sectional conflict over the fate of the newly freed slaves. Their objections were made all the more vivid by the bloody toll that the Civil War continued to exact in 1864 and 1865 as Congress debated the Thirteenth Amendment. Representative Chilton White, a Democrat from Ohio, found the Amendment to be "not so much a provision to free the slaves as it is a provision to obstruct and prevent the return of the seceded States to the Union."[39] He went on to predict southern opposition to emancipation in what turned out to be an accurate prophecy:

> If you liberate the negro by the bayonet, the tenure by which he will hold his liberty will be only that by which you have given it to him; he will be free just as long as the soldier sets his bayonet between the slave and the master, and no longer.[40]

[37] Cong. Globe, 38th Cong., 1st Sess. 1465 (1864); see also Cong. Globe, 38th Cong., 2d Sess. 171, 172 (1865) (remarks of Rep. Yeaman) (arguing for deciding the question of slavery alone to prevent consideration of "the other dangerous schemes" associated with it).

[38] Cong. Globe, 38th Cong., 2d Sess. 144 (1865); see also id. at 263 (remarks of Rep. Rollins) (referring to slavery as a "Gordian knot" that must be cut and disposed of once and for all).

[39] Cong. Globe, 38th Cong., 2d Sess. 216 (1865).

[40] Id.

Remarks such as these merged with general opposition to the Amendment on grounds of federalism and protecting private property. All these sources of opposition shared a common tendency to exaggerate the immediate legal effect of the Amendment, ironically giving it a construction better suited to its strongest abolitionist supporters. Yet even the marginal supporters, moderate Republicans and anti-slavery Democrats, presumed that the Amendment would do enough finally to put the issue of slavery to rest. The extent of federal intervention necessary to effectively abolish slavery was the subject of the more general arguments offered in opposition to the Amendment.

2. Federalism

The federalist arguments against the Thirteenth Amendment took the surprising form that the Amendment itself was unconstitutional. Taken literally, as an argument for limitations on the amending power under Article V, this argument had no basis in the Constitution itself. The entrenched protection of the slave trade in that Article had long since lapsed, leaving only the entrenched protection of each state's representation in the Senate.[41] The negative inference from the constitutional text was that slavery enjoyed no immunity—or no longer had any immunity—from the ordinary process of constitutional amendment.[42]

As a rhetorical flourish emphasizing the fundamental changes made by the Thirteenth Amendment, the argument of the Amendment's unconstitutionality had more to say. Unlike any preceding amendment, the Thirteenth Amendment expanded the power of the federal government, instead of constraining it to protect individual rights, as in the first nine amendments, or to preserve state power, as in the Tenth and Eleventh Amendments. The transformative effect of the Thirteenth Amendment in altering the balance of power between the federal government and the states became more apparent with the ratification of the Fourteenth and Fifteenth Amendments. All of the Reconstruction amendments

[41] U.S. Const. art. V (prohibiting repeal before 1808 of the restriction on congressional power to prohibit the slave trade).

[42] See generally Vorenberg, supra note 14, at 107–12 (discussing the constitutionality of the amendment).

limited what the states could do and expanded what the federal government could do, both in widening the scope of judicial review and granting new enforcement authority to Congress. Matters that previously had been the exclusive domain of the states were now subject to federal regulation that could, under the Supremacy Clause, displace state law.

Slavery was one of those matters. It was a sectional prerogative of the southern and border states that had chosen, on their own, not to abolish slavery. It was also thought to be a "domestic relationship," like those within a household or among family members. Representative Fernando Wood, a Democrat from New York, opposed the Amendment on this ground: "The control over slavery, and the domestic and social relations of the people of the respective States, was not and never was intended to be delegated to the United States, and cannot now be delegated except by the consent of all the States."[43] A similar position was taken by Senator Thomas Hendricks, a Democrat from Indiana: "I am not satisfied that this proposed amendment is one that can be made to the Constitution. The institution of slavery is a domestic institution."[44]

Supporters of the Amendment responded to such charges of undue federal interference by claiming that it made only changes absolutely necessary to bring slavery to an end. Representative Rollins of Missouri expressed this position well: "I want to see no intrenchment further than is absolutely necessary to preserve the whole machine, either by the General Government upon the rightful, constitutional powers of the States, or upon the part of the States on the rightful points of constitutional power to the General Government."[45] For him, the South had brought the prospect of federal interference on itself by rebelling against the union and would continue to do so until it acquiesced in the abolition of slavery. Federalism conferred no immunity upon slavery from the amending process. As Representative Justin S. Morrill of Vermont put this point, in overtly moral terms, "slavery is a *wrong*; so recognized by the whole civilized world; and cannot claim immunity as

[43] Cong. Globe, 38th Cong., 1st Sess. 2941 (1864); see also id. at 2940 (remarks of Rep. Pruyn) (arguing against the use of federal power to interfere with domestic institutions regulated by state law).

[44] Id. at 1458.

[45] Cong. Globe, 38th Cong., 2d Sess. 262 (1865).

a *right*."[46] The principles of federalism had to yield to the moral demands of abolition.

3. Property

The moral conflict between the rights of slaveowners and the rights of slaves—between property and freedom—played an even more prominent role in the debates over the Amendment. One might see this conflict as entirely one-sided, but it was taken seriously at the time. First, it concerned rights directly opposed to one another: what the slaveowners lost in property rights, the slaves gained in freedom. Second, partisans on each side could make their argument in legal terms: slaveowners under the Takings Clause of the Fifth Amendment and abolitionists under the Declaration of Independence. And third, emancipation with just compensation, assuming the government could afford it, provided a way to compromise these competing claims of rights: it was, for instance, one device used to achieve abolition in some of the northern states before the Civil War.

The nuances of these competing claims matter less today than their prominence in the debates over the Thirteenth Amendment and their common presumption that it would necessarily affect private rights. Opponents of the Amendment argued that these rights were constitutionally protected from expropriation by the federal government. Supporters argued that natural law forbade the creation of property rights in humans. Both sides agreed that private rights necessarily were at stake, an agreement that later became apparent in the judicial decisions interpreting the Amendment.

The leading modern study of the law of slavery, by Thomas D. Morris, finds that property provided the only unifying legal framework for the disparate provisions of the law that grew up to regulate American slavery.[47] Slavery did not come to the colonies with a legal structure that could readily systematize and legitimize its practice. It arrived instead with the first blacks who were brought to the colonies as laborers, and the law of slavery only developed

[46] Id. at 173.

[47] Thomas D. Morris, Southern Slavery and the Law, 1619–1860, at 42 (1996) ("'[J]uristically' the idea of 'property' is the key to the definition of slavery."); see also id. at 61–80.

later as judicial decisions and statutes formalized practices that grew up after black laborers had arrived. From its inception, the American law of slavery had to catch up with an institution that did not fit comfortably into any of the categories of the common law that defined the status of individuals. The law of property provided the structure that defined the central problem of slavery: the inherent contradiction in treating an individual as an object of ownership. This contradiction carried over into the debates over the Thirteenth Amendment.

Opponents of the Amendment rationalized the rights of slaveholders as natural rights predating the Constitution that could not be changed by constitutional amendment. For Senator Thomas A. Hendricks, a Democrat from Indiana, slavery was an institution that "came with the colonies into their state of independence and separate sovereignty; and when the colonies came into the Federal compact they did not submit that institution, or their other domestic institutions, to the control of the Federal Government."[48] And even if a constitutional amendment were possible, it could accomplish emancipation only by offering just compensation for preexisting property rights.[49]

Supporters of the Amendment met these objections by denying that rights existed in this form of property, as a matter either of natural law or common law, that would have made the slaveholders' rights immune from revision or abolition. The most overt appeals to natural law invoked biblical sources, such as the following speech by Representative Farnsworth, a Republican from Illinois: "'Property!' What is property? That is property which the Almighty made property. When at the creation He gave man dominion over things animate and inanimate, He established property. Nowhere do you read that He gave man dominion over another man."[50] Other supporters of the Amendment pointed out that the states themselves could abolish slavery, an admission tacitly made

[48] Cong. Globe, 38th Cong., 1st Sess. 1458 (1864); see also id. at 2952 (remarks of Rep. Coffroth) (arguing that abolition would be taking property).

[49] Id. at 1489 (remarks of Sen. Davis); id. at 2941 (remarks of Rep. Wood); id. at 2987 (remarks of Rep. Edgerton); Cong. Globe, 38th Cong., 2d Sess. 181 (1865) (remarks of Rep. Clay).

[50] Cong. Globe, 38th Cong., 2d Sess. 200 (1865); see also Cong. Globe, 38th Cong., 1st Sess. 1437–38 (1864) (remarks of Sen. Harlan) (criticizing classical forms of slavery); id. at 1481 (remarks of Sen. Sumner) (condemning slavery as "execrable").

by opponents who argued that slavery was exclusively a matter of state law.[51] If slavery was a wholly domestic institution subject to state law, then it could be abolished by state law regardless of its effects on property rights (in the era before ratification of the Fourteenth Amendment).

A similar argument went even further into the sources of slavery in state law. Following the position of Stephen Douglas in the Lincoln-Douglas debates,[52] several legislators argued that slavery depended upon enactments of positive law and hence could be repealed by positive law. Representative Frederick A. Pike, a Republican from Maine, characterized the law of slavery in the following terms:

> No statute in any State has said that hereafter slavery shall exist here; but it has done what is equivalent. It has gone into the detail of management, sale, conveyance, and descent of property in slaves. It has made a body of laws which have been dependent upon slavery as the central fact. Abolish them, and you abolish slavery. I say, then, slavery is everywhere the creature of positive law.[53]

It followed that abolition was sufficient if it operated upon the laws that permitted slavery. As Representative Nathaniel Smithers, a Republican from Delaware, argued:

> The operation of the amendment is upon the law, not upon the subject; its effect is to convert into a man that which the law declared was a chattel; but this effect only followed as the result of ousting the jurisdiction which enables the courts to take cognizance of the claim of the master.[54]

The direct effect of the Amendment—abolishing a legal form of property—had the necessary consequences of both freeing the slaves and taking property from their owners.

---

[51] Cong. Globe, 38th Cong., 2d Sess. 243–44 (1865) (remarks of Rep. Woodbridge).

[52] Political Debates Between Abraham Lincoln and Stephen A. Douglas 116 (Cleveland, Burrows Bros. Co. 1894) (arguing slavery's existence within a state depends on the acts of the legislature).

[53] Cong. Globe, 38th Cong., 2d Sess. 488 (1865); see also id. at 190–91 (remarks of Rep. Kasson) (arguing for constitutional power to abolish slavery as a relation rather than as property).

[54] Id. at 217.

Supporters of the Amendment took this position only in order to avoid the need to compensate the slaveholders for the loss of their property, an option that was neither politically feasible nor morally defensible. Having brought on the war in defense of a discredited institution, and, by a large majority, having taken sides against the Union, slaveholders had no realistic claim for compensation. The moral case for abolition and the political consequences of a bloody civil war precluded any compromise to protect the interests of slaveholders in the value of their slaves. Interpreting the Amendment only to abolish the law of slavery, without effecting an expropriation of private property, rationalized a foregone conclusion.

Even on its own terms, however, this interpretation could not deny the effect of the Amendment on property rights. After abolition, slaveholders had no claim upon their slaves as property. Their common law property rights to that extent were extinguished. It followed that any exercise of those rights was forbidden by federal law, a paradigm of private action directly restricted by federal law. Although common law rights are defined and enforced by state law, state enforcement does not transform the private exercise of common law rights into state action. If it did, the scope of the Fourteenth Amendment, not the Thirteenth, would be virtually limitless. The Due Process and Equal Protection Clauses would extend to any right exercised by private individuals that was recognized by state law. All forms of private discrimination would be equivalent to discrimination by the government.

Yet it was only the Thirteenth Amendment that was interpreted to reach the private exercise of common law rights. First, federal law prohibited contracts of peonage: contracts under which a laborer was forced, under threat of criminal punishment, to work until a debt incurred from the employer was paid off.[55] Second, remedies for breach of contract were restricted, preventing the issuance of injunctions to force an employee who had quit to return to work.[56] And third, it followed that any attempt to coerce an employee to return to work without legal authority, solely by the use of physical force, had to be prohibited. The Amendment barred any attempt to reinstate the rights of slaveholders—with or without

[55] Schmidt, supra note 3, at 653–54, 656–57.
[56] Arthur v. Oakes, 63 F. 310, 318 (Harlan, Circuit Justice, 7th Cir. 1894).

resort to government assistance. Otherwise, the central abolitionist aim could not have been accomplished: to abolish slavery in all its forms.

This is not to say that the Amendment was immediately effective. Far from it, as many of the deficiencies of inadequate enforcement, implicitly foreseen by the addition of Section 2 to the Amendment, became a reality. In the decades after Reconstruction, peonage thrived in a variety of different forms, with greater or lesser support from state law. It was only after World War II, with the coming of the Civil Rights Movement, that widespread peonage was effectively abolished,[57] and it still persists in isolated instances among rural and migrant laborers.[58] Yet even at the height of resistance to the Thirteenth Amendment, it was interpreted to reach private action. The Amendment was not aimed at either state action or private action separately, but at both together, merging them into a single object of regulation and prohibition. Slavery as a form of property law was abolished, and with it, the claims of slaveowners upon their slaves. The one aim could not be accomplished without the other, and before the advent of the state action doctrine, few problems were perceived in pursuing both together. The framers of the Thirteenth Amendment did not repudiate the state action doctrine in anticipation of the Fourteenth Amendment so much as they simply failed to anticipate it. This difference in viewpoint between our world and theirs raises few questions under Section 1 of the Amendment, which abolishes slavery of its own force, but it raises continuing questions about the scope of congressional power to enforce the Amendment under Section 2.

II. PRIVATE ACTION IN CONSTITUTIONAL INTERPRETATION

The Thirteenth Amendment's coverage of private action was, as we have seen, only implicitly raised in the congressional debates over the Amendment, yet it quickly became an established feature of judicial interpretation. The canonical decision is the *Civil Rights*

[57] See Risa L. Goluboff, The Lost Promise of Civil Rights 51–80 (2007).

[58] See Alexander Tsesis, The Thirteenth Amendment and American Freedom: A Legal History 157–60 (2004).

Cases,[59] in which the Supreme Court considered the constitutionality of the prohibition against racial discrimination in public accommodations found in the Civil Rights Act of 1875.[60] The Court began from the premise that legislation to enforce the Thirteenth Amendment could apply to private action: "And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."[61] After establishing this major premise, the Court went on to find that discrimination in public accommodations was not sufficiently related to slavery to fall within the "badges and incidents of slavery" that Congress could prohibit because such discrimination had been practiced against free blacks before emancipation.[62] The Court also held that the Act was beyond the power of Congress under the Fourteenth Amendment because discrimination by the private operators of public accommodations did not meet the state action requirement of that amendment.[63]

These holdings have been, to say the least, controversial, and it is remarkable that they stand in such proximity to the Court's declaration that the Thirteenth Amendment applies to private action. The Amendment's coverage of private action has, in the words of the Supreme Court, "never been doubted."[64] Only the minor premise of the *Civil Rights Cases*, narrowly construing the "badges and incidents of slavery," has provoked disagreement. The Court recognized the broad scope of the Thirteenth Amendment in one dimension—involving private action—while it restricted it in another—involving the badges and incidents of slavery. The recognition of the Amendment's coverage of private action might be dismissed as dictum, since it was unnecessary to the Court's ul-

[59] Civil Rights Cases, 109 U.S. 3 (1883).
[60] Ch. 114, 18 Stat. 335.
[61] *Civil Rights Cases*, 109 U.S. at 20.
[62] Id. at 21–22.
[63] Id. at 18–19.
[64] "It has never been doubted, therefore, 'that the power vested in Congress to enforce the [Thirteenth Amendment] by appropriate legislation,' includes the power to enact laws 'direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not.'" Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438 (1968) (quoting *Civil Rights Cases*, 109 U.S. 3, 20, 23 (1883) (citations omitted)).

timate decision, which depended entirely on the narrow interpretation of what constitutes a badge or incident of slavery. Nevertheless, it was dictum that must have been well considered, since it stands in such sharp contrast to the Court's otherwise narrow interpretation of both the Thirteenth and Fourteenth Amendments. Moreover, it was dictum on which the Court was unanimous. Justice Harlan, in his dissenting opinion, disagreed only with how broadly "the badges and incidents of slavery" should be construed, not with whether they could be perpetuated by private action.[65]

The consensus regarding the Thirteenth Amendment's coverage of private action stretches back to cases decided immediately after its ratification and forward to cases decided in the modern civil rights era. Much of this litigation, early and late, arose under the Civil Rights Act of 1866,[66] the first statute passed by Congress to enforce the Thirteenth Amendment. The earliest such case applying the Amendment to a private defendant was *In re Turner*,[67] a habeas corpus action brought by a former slave indentured to her former master. Chief Justice Chase, sitting on circuit, held that the contract violated the Thirteenth Amendment as a form of involuntary servitude. The contract also denied the former slave the "full and equal benefit of all laws and proceedings" guaranteed by the 1866 Act.[68] Whether the Act itself applies to private action has since become a vexed question, but the application of the Amendment itself was simply presumed by this decision.

After the *Civil Rights Cases*, the Supreme Court as a whole reached the same conclusion as the single Justice in *Turner*, transforming the dictum about private action in the *Civil Rights Cases* into a holding in favor of the validity of the federal Anti-Peonage Act.[69] Peonage was generally defined as a form of compulsory service for debt, which could be ended only by payment of the debt in full; quitting was not an option as it would be in an ordinary con-

[65] *Civil Rights Cases*, 109 U.S. at 34, 37 (Harlan, J., dissenting).

[66] Ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)).

[67] 24 F. Cas. 337 (Chase, Circuit Justice, C.C.D. Md. 1867) (No. 14,247).

[68] Id. at 339 (quoting Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000))).

[69] Act of March 2, 1867, ch. 187, 14 Stat. 546 (codified as amended at 18 U.S.C. § 1581 (2000)).

tract for service.[70] In *Clyatt v. United States*,[71] the Court upheld an indictment under this Act, although it found the evidence in the record insufficient to support a conviction and remanded the case for retrial.[72] The Court quoted extensively from the *Civil Rights Cases* to support the prevailing understanding of the Thirteenth Amendment: "It is not open to doubt that Congress may enforce the Thirteenth Amendment by direct legislation, punishing the holding of a person in slavery or in involuntary servitude except as a punishment for crime."[73]

By defining peonage without regard to race, the Court in *Clyatt* also implicitly endorsed the dictum in the *Slaughter-House Cases* that the Thirteenth Amendment prohibited all forms of slavery, regardless of race, even though it was addressed principally to slavery based on race.[74] This conclusion left intact the reasoning of the *Civil Rights Cases* (and *Plessy v. Ferguson*[75] as well) that the Thirteenth Amendment did not prohibit racial discrimination unrelated to slavery. Slavery directed against any person, by any person, was the focus of the Amendment. Racial discrimination by itself was neither necessary nor sufficient to trigger its coverage. As a description of the Amendment's self-executing provisions in Section 1, this conclusion was—and still is—hardly open to dispute. It has proved to be far less certain with respect to congressional power under Section 2.

At first, the Supreme Court interpreted this limitation on Section 1 to apply with full force to Section 2. The doctrinal vehicle for achieving this result was the narrow interpretation of the "badges and incidents of slavery" that the Court adopted in the *Civil Rights Cases*. There, the Court held that racial discrimination in public accommodations was not a badge or incident of slavery that Congress could prohibit under Section 2.[76] In *Hodges v. United States*, the Court invalidated an indictment for conspiracy to threaten and intimidate black workers for exercising their supposed constitutional

[70] See, e.g., Bailey v. Alabama, 219 U.S. 219, 242 (1911) (the essence of peonage is "compulsory service in payment of a debt").
[71] 197 U.S. 207 (1905).
[72] Id. at 222.
[73] Id. at 216–18.
[74] 83 U.S. (16 Wall.) 36, 71–72 (1873).
[75] 163 U.S. 537, 542–43 (1896) (citing the *Civil Rights Cases*).
[76] Civil Rights Cases, 109 U.S. 3, 20–25 (1883).

right to continue to work at a sawmill.[77] Although the indictment alleged a racially based conspiracy, it did not allege any necessary incident of slavery. The victims were not forced to keep their jobs, but to leave them, and the federal statute in question could not criminalize this form of coercion. Congress could only prohibit wrongful acts that were unique to slavery. These acts could include those of private individuals—a premise that the Court tacitly accepted—but these acts had to fall within the narrow definition of what could constitute a badge or incident of slavery.

This equilibrium in interpretation of the Thirteenth Amendment—broadly allowing application against private action but narrowly construing the action that could be prohibited—persisted through the first two-thirds of the twentieth century. In 1968, however, in *Jones v. Alfred H. Mayer Co.*,[78] all of this changed. The Supreme Court opened up the possibility that the Amendment could be broadly interpreted regarding the type of action that could be prohibited, without questioning its application to private action. The Court held that the Civil Rights Act of 1866 applied to private discrimination—in this case, in the sale of housing—and that the Act as so interpreted was constitutional.[79] Although the Court's statutory holding required an extended analysis of the Act's legislative history, its constitutional holding was limited to a brief discussion of what could be classified as a badge or incident of slavery. Congressional power under Section 2 of the Amendment, the Court reasoned, was at least as broad as the first act that Congress passed in the session immediately after it was ratified.[80] All the Court had to say about private action, apart from quoting the *Civil Rights Cases*, was this: "Thus, the fact that [the Act] operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem."[81]

More telling was the Court's reference to the modern constitutional decisions upholding the power of Congress to prohibit private discrimination under the Commerce Clause. The Court found that these decisions rendered "largely academic" any question

[77] 203 U.S. 1 (1906).
[78] 392 U.S. 409 (1968).
[79] Id. at 413.
[80] Id. at 439–40.
[81] Id. at 438.

about the continued validity of the *Civil Rights Cases*,[82] but if that was true, then those decisions also made the Court's own decision "largely academic" as well. The broad construction of the Civil Rights Act of 1866 upheld in *Jones v. Mayer* resulted, in the end, only in augmenting the coverage and remedies available to victims of housing discrimination under modern civil rights legislation. In particular, the Civil Rights Act of 1968,[83] which prohibited the same discrimination alleged in *Jones v. Mayer* itself, was passed while that decision was under consideration by the Supreme Court. That Act, like other modern civil rights legislation, was made possible by the vast expansion of federal power under the Commerce Clause accomplished during the New Deal. As a practical matter, *Jones v. Mayer* added little to existing civil rights law, and as a theoretical matter, it simply invoked the existing understanding of congressional power already established under the Commerce Clause. This understanding was radically different from that presupposed by the *Civil Rights Cases*.

The only fixed point in decisions interpreting the Thirteenth Amendment, from its ratification to the present day, has been a refusal to limit its scope by importing a state action limit from the Fourteenth Amendment. That refusal has had very different consequences, as evidenced by the vicissitudes of these decisions, depending on coordinate elements of constitutional doctrine defining the scope of congressional power under either Section 2 of the Amendment itself, Section 5 of the Fourteenth Amendment, or the Commerce Clause. It is only a slight exaggeration to conclude that the Thirteenth Amendment did not matter in the *Civil Rights Cases*—because it did not add to the power of Congress to pass the Civil Rights Act of 1875 under the Fourteenth Amendment—and it was not necessary in *Jones v. Mayer*—because Congress already had the power to pass fair housing legislation under the Commerce Clause. The principles that defined federal power over private action under these constitutional provisions also operated under the Thirteenth Amendment. Thus, in the *Civil Rights Cases*, the narrow interpretation of "badges and incidents of slavery" effected a

[82] Id. at 441 n.78.

[83] Pub. L. No. 90–284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601–3619 (2000)).

limitation on federal power under the Thirteenth Amendment analogous to the state action doctrine under the Fourteenth. Conversely, in *Jones v. Mayer*, the broad power of Congress to regulate commerce made the Court's endorsement of congressional power to eliminate the consequences of slavery largely redundant.

This comparison of these constitutional provisions raises questions about the independent significance of the private action interpretation of the Thirteenth Amendment insofar as it affects congressional power to enforce the Amendment. The inquiry requires an assessment of the relationship between judicial enforcement under Section 1 of the Amendment and legislative enforcement under Section 2; and more generally, what the framers of the Amendment sought to achieve, first, through abolition of slavery, and second, by providing for legislation to redress its consequences.

III. FROM SECTION 1 TO SECTION 2: FROM JUDICIAL ENFORCEMENT TO LEGISLATION

A. Self-Execution, Legislation, and Private Action

In an otherwise puzzling aside, the *Civil Rights Cases* refer to the "reflex character" of the Thirteenth Amendment: it "may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States."[84] This "reflex character" appears to have an effect on private action, creating a right in the newly freed slaves to be free of any form of coerced labor, regardless of its source. Hence they could assert whatever remedies were available to them at common law to protect their freedom. These included a writ of habeas corpus against a private individual, as in *In re Turner*,[85] or a defense to an action for specific performance of a contract for services,[86] a doctrine that is now a familiar part of contract law. Plaintiffs can recover damages in such actions, or orders returning individuals to work if they have not quit, but they cannot obtain an injunction forcing them to continue to work if they do decide to quit. The "re-

[84] 109 U.S. 3, 20 (1883).
[85] 24 F. Cas. 337, 377 (C.C.D. Md. 1867) (No. 14,247).
[86] Arthur v. Oakes, 63 F. 310, 318 (Harlan, Circuit Justice, 7th Cir. 1894).

flex character" of the Amendment made it both self-executing and applicable against private parties. The right to freedom was judicially enforceable against anyone who infringed upon it.

This right was conferred by Section 1 of the Amendment and was limited by its terms. Only relationships that amounted to slavery or involuntary servitude gave rise to self-executing remedies. Detention and compulsory labor exhausted the category of wrongs that, in and of themselves, violated Section 1. This is not to say, however, that these wrongs were systematically remedied. As noted earlier, slavery remained widespread under a variety of guises until the middle of the twentieth century.[87] Making good on the promise of Section 1 has always presupposed effective enforcement under Section 2.

Section 2 gives Congress the power to enforce the Amendment by "appropriate legislation," raising questions about what legislation is appropriate and to what end. Peonage and other contractual relationships that denied laborers the freedom to quit could be closely analogized to slavery and were accordingly prohibited by the Anti-Peonage Act. The difficult questions under Section 2 have concerned legislation against practices associated with slavery but not identical to it, chiefly involving discrimination on the basis of race and national origin. By themselves, these forms of discrimination have never been thought to violate Section 1, raising the question whether Congress can prohibit them under Section 2. How far can Congress go in prohibiting practices that are related, but not identical, to slavery?

The accepted answer to this question is that Congress can prohibit the "badges and incidents of slavery." This phrase, as I have argued elsewhere,[88] can bear a variety of different meanings, from the specific disabilities imposed upon slaves to define their inferior status to any form of systematic mistreatment that could be construed as a sign of social or political subordination. The inherent ambiguity in this phrase admits a corresponding spectrum of conclusions about the range of congressional power, from narrowly addressing only the essential components of slavery to broadly regulating every practice associated with it. For all its ambiguity,

[87] See infra text accompanying notes 57–58.
[88] Rutherglen, supra note 6.

however, this phrase does not reintroduce the distinction between government and private action as a limitation upon the Amendment.

This distinction was hardly mentioned in the congressional debates over Section 1. The moral imperative to eliminate all forms of slavery was taken to apply equally to private citizens and to public officials. Even when opponents of the Amendment argued that slavery was a domestic relationship previously immune from federal regulation, they reinforced the Amendment's application to private conduct. So, too, their emphasis on the property rights of slaveholders, although it referred to rights created by state law, necessarily required federal interference with what was previously a right to private property. The limiting principle that controls the scope of the Thirteenth Amendment must be found elsewhere than in slavery solely as an institution created by the states. The obvious place to look is Section 2, which controls the development of the Amendment's continuing consequences through legislation.

The debates over Section 2, however, are much more fragmentary and much less informative than those over Section 1. Representative James F. Wilson, a Republican from Iowa, added Section 2 to the draft of the Amendment soon after the absence of enforcement provisions in the emancipation provisions of various confiscation acts became a matter for concern.[89] These acts freed the slaves used in the Confederate war effort and later any slaves held by Confederate supporters, assimilating emancipation into the forfeiture of other forms of property used in the rebellion. These acts thus shared the flawed moral premise of slavery itself: that human beings could be treated as property. Divisions within Congress over this fundamental question whether slaves could be equated with property prevented the enactment of effective enforcement provisions. The slaves were freed only when they came under the protection of the Union Army, either by their own efforts or in the course of the war, and no further guarantees of their freedom were offered.[90]

[89] Vorenberg, supra note 14, at 49–50, 53.

[90] Silvana R. Siddali, From Property to Person: Slavery and the Confiscation Acts, 1861–1862, at 227–50 (2005).

Section 2 sought to remedy this defect in prior attempts at emancipation by giving Congress the authority to devise solutions to the unprecedented problems of emancipation, not previously encountered on the scale created by the Amendment. Congressional power to enact "appropriate legislation" was equated with congressional authority under the Necessary and Proper Clause. Senator Sumner offered several alternative versions of the section, some of which used the phrase "necessary and proper" to describe the scope of congressional power.[91] No one remarked on the difference between this language and the language that was eventually adopted in Section 2. The debate, instead, focused entirely on differences in the wording of Section 1.[92] Later, in debates over the Civil Rights Act of 1866, Representative Wilson explicitly equated the power of Congress to enact "appropriate legislation" under Section 2 with the Necessary and Proper Clause as it had been interpreted in *McCulloch v. Maryland*.[93] He invoked the famous passage in that opinion recognizing the power of Congress to pursue any legitimate end by "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution."[94]

During debates over the Amendment, this invocation of established constitutional doctrine was greeted with dire predictions by its opponents that it would lead to the demise of state government. Representative William Holman, from Indiana, charged that the Amendment revealed the real, abolitionist basis for the Union cause and then added:

> But, sir, the amendment goes further. It confers on Congress the power to invade any State to enforce the freedom of the African in war or peace. What is the meaning of all that? Is freedom the simple exemption from personal servitude? No, sir; in the language of America it means the right to participate in government, the freedom for which our fathers resisted the British em-

[91] Cong. Globe, 38th Cong., 1st Sess. 1482–83 (1864).
[92] Id. at 1487–89 (remarks of Sen. Trumbull).
[93] 17 U.S. (4 Wheat.) 316 (1819); Cong. Globe, 39th Cong., 1st Sess. 1118 (1866).
[94] *McCulloch*, 17 U.S. (4 Wheat.) at 421.

> pire. Mere exemption from servitude is a miserable idea of freedom.[95]

Another opponent of the Amendment, Representative Robert Mallory from Kentucky, found it to be "not only a step toward the conversion of the Government from a federative to a consolidated one, but it will be the accomplishment of that purpose."[96] These complaints simply echoed the arguments, discussed earlier, that the Amendment exceeded the scope of the amending process. Shorn of their exaggerated rhetoric, one can now see in these remarks, with the benefit of hindsight, some appreciation of how the Amendment would transform relations between the states and the federal government.

The supporters of the Amendment responded by returning to its focus solely upon slavery, an idea voiced most forcefully by Senator John Henderson, a Republican from Missouri: "in passing this amendment we do not confer upon the negro the right to vote. We give him no right except his freedom, and leave the rest to the States."[97] As opponents of the Amendment recognized, this defense left open exactly what the content of freedom would be. Was freedom necessarily equal freedom with white citizens? Did it embrace civil, political, or social rights in addition to the right to physical liberty? We can be certain now, for instance, that freedom under the Thirteenth Amendment did not include the right to vote subsequently protected by the Fifteenth Amendment, but we cannot be as certain of the rights included in the constitutional grant of freedom. This question becomes all the more urgent in the absence of a state action limitation on congressional power.

The alternative limitation provided by the "badges and incidents of slavery" seeks to identify the permissible aims of congressional regulation under Section 2. These aims are intermediate between the goal of eliminating slavery and all similar practices prohibited by Section 1, such as peonage, and purely instrumental measures to achieve those goals, like the Anti-Peonage Act. The badges and incidents of slavery are intermediate in both a conceptual and an instrumental sense. Conceptually, they constitute the components of

[95] Cong. Globe, 38th Cong., 1st Sess. 2962 (1864).
[96] Cong. Globe, 38th Cong., 2d Sess. 180 (1865).
[97] Cong. Globe, 38th Cong., 1st Sess. 1465 (1864).

slavery; instrumentally, eliminating them one-by-one serves the ultimate goal of eradicating slavery itself. Thus the Civil Rights Act of 1866 identified several badges and incidents of slavery recreated by the "Black Codes" passed by southern states to deny full legal capacity to the newly freed slaves.[98] These codes, passed in the wake of the Thirteenth Amendment, were not anticipated by the Congress that debated the Amendment, but the next Congress acted quickly to counteract them in the Civil Rights Act of 1866. The Act protected, among other rights, those "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property."[99] The denial of capacity in these respects was characteristic of slavery and therefore a proper subject of federal regulation.

To draw an analogy to federal regulation under the Commerce Clause, the practices identified as "badges and incidents of slavery" mark out the areas of presumptive congressional power, just like categories such as "instrumentalities of interstate commerce," "persons or things in interstate commerce," and "activities that substantially affect interstate commerce" under the Commerce Clause.[100] These subjects collectively define the scope of the commerce power. Under the Necessary and Proper Clause, Congress can also enact legislation as a means to the end of regulation in these areas. So, too, under Section 2 of the Thirteenth Amendment, Congress can pass legislation directed to the end of eliminating the badges and incidents of slavery. This analogy cannot be pressed too far, however, because the Commerce Clause identifies no goal apart from regulation itself, while the Thirteenth Amendment does. Nevertheless, each provision first specifies what federal legislation must be directed towards and then, through the Necessary and Proper Clause and Section 2, respectively, authorizes Congress to choose the appropriate means to that end.

The analogy between the two provisions is instructive for another reason as well: both authorize Congress to regulate private

[98] See Charles Fairman, Reconstruction and Reunion, 1864–88, Part One, *in* 6 The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States 1224–30 (Paul A. Freund ed., 1971).

[99] Ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)).

[100] United States v. Morrison, 529 U.S. 598, 608–09 (2000).

activity, either commerce or the "badges and incidents of slavery." Yet this latter phrase, despite its pedigree going back to the *Civil Rights Cases*, bears an uncertain and contested relationship to the presence or absence of state action. How can the separate decisions of private individuals be transformed into the collective symbols of inferiority? Doesn't this transformation require some degree of government participation? The next Section takes up the question how this relationship between individual and collective action should be framed.

B. The Private Dimension of the "Badges and Incidents of Slavery"

In another article,[101] I have suggested that the phrase "badges and incidents of slavery" conceals an inherent tension between the narrowly defined "incidents" that necessarily accompany slavery as a legal status and the indefinite range of symbolic "badges" that signify comparable forms of subordination. The absence of a state action restriction on the Thirteenth Amendment makes the tension inherent in this phrase both more consequential and more problematic. If nothing but this phrase stands in the way of unlimited congressional power, then reducing it to a definite limit becomes the crucial issue of federalism. But, how can the "badges and incidents of slavery" be defined apart from the various forms of state action that established and legitimated the institution of slavery in the first place?

Finding the way out of this impasse requires an examination of how public and private action combined to establish, maintain, and preserve the institution of slavery. The central element in the law of slavery, apart from all the paradoxes that it generated in treating people as if they were property, was the nearly absolute power that it vested in slaveowners over their slaves.[102] This degree of control of one person over another was not a badge or incident of slavery, but slavery itself. The self-executing provisions of Section 1 abolished this legal relationship. The enormity of this loss of freedom, however, should not blind us to the many lesser deprivations included in slavery as an institution: the laws, customs, and practices that supported and maintained it. To effectively abolish the larger

[101] See Rutherglen, supra note 6.
[102] Morris, supra note 47, at 161–62, 182–83.

wrong, Congress was given the power in Section 2 to abolish the many indignities and inequalities associated with slavery. Almost all of these vestiges had a private as well as a public dimension.

Thus the principal feature of the law of slavery was the "master's justice" over his slaves, who had virtually no legal protection from the master's decision to discipline and punish.[103] Slaves were subject to private action that resulted in private violence. Likewise, control over the slave's labor required denial of any other form of work or livelihood, resulting in lack of legal capacity to contract or to own property. The positive right of the master to force the slave to work entailed the negative right to deny the slave any alternative form of employment. The same was true of the domestic lives of slaves, which were also wholly under the master's control, precluding marriage, custody of children, and even the right of couples to live together. Any one member of the household could be removed at the discretion of the master. The denial of liberty entailed the denial of physical freedom, allowing the master to control the slave's presence and movement and denying the slave any right to travel or access to the means of doing so.

These consequences of slavery perhaps are obvious, as is the role of private action in giving effect to the legal relationship of slavery. Hence, no one today has any hesitation in finding congressional power to prohibit private forms of servitude. Doubts arise only when the many different forms of private conduct that constituted slavery are disaggregated into separate components, no one of which independently could be considered the same as slavery in its entirety. Thus, in the *Civil Rights Cases*, racial discrimination in public accommodations was dismissed as not essential to slavery because it was commonly practiced against free blacks in the antebellum era.[104] Yet the systematic denial of public accommodations on the basis of race accomplished much the same denial of physical freedom as the master's control over the movement and travel of his slaves. It prevented access to the most common means of getting from one place to another, restricting blacks to secondary and inferior accommodations and methods of travel. Although neither as absolute nor as controlling as the institution of slavery itself, the

[103] See id.

[104] See supra text accompanying note 62.

resulting discrimination was part and parcel of the entire institution.

The distinction between practices that display all the wrongs of slavery and those that display only some is not a distinction between a dominant strand and a subsidiary strand of analysis under Section 2 of the Thirteenth Amendment. Instead, it is the distinction between self-enforcement—or more precisely, judicial enforcement—under Section 1 and congressional enforcement under Section 2. The courts have exercised their power to declare forms of labor unconstitutional under the Thirteenth Amendment only rarely, when all of the incidents of slavery have been present and only the name has been absent.[105] Even the *Civil Rights Cases* did not require all incidents of slavery to be present for Congress to act.

It is essentially a legislative judgment whether to address all of a problem or only part of it at any one time, as we know from constitutional decisions in other fields.[106] Under the Thirteenth Amendment, Congress can choose to prohibit any practice connected with slavery as it was practiced in this country. The intermediate goal of prohibiting such practices furthers the ultimate goal of eliminating slavery and all its vestiges. The crucial question is how deeply such practices were implicated in slavery as an institution in this country. In the case of racial discrimination, the answer should be obvious, since American slavery has always involved subordination of particular racial groups, from Africans (and for a short period Indians) in antebellum slavery, to Mexicans in forms of peonage, and to Asians under the "coolie system" of forced labor.[107] Close ques-

[105] This was true, for instance, in the cases that struck down state statutes making failure to perform labor for an advance of money prima facie evidence of criminal fraud. See, e.g., Pollock v. Williams, 322 U.S. 4, 25 (1944); Taylor v. Georgia, 315 U.S. 25, 29 (1942); Bailey v. Alabama, 219 U.S. 219, 243–45 (1911). For a discussion of how these laws operated with the system of convict labor to recreate involuntary servitude, see Schmidt, supra note 3, at 650–60.

[106] This principle applies to both federal and state legislation. See, e.g., Califano v. Boles, 443 U.S. 282, 296 (1979); Dandridge v. Williams, 397 U.S. 471, 486–87 (1970).

[107] See, e.g., Moon-Ho Jung, Coolies and Cane: Race, Labor, and Sugar in the Age of Emancipation 36-38 (2006); Morris, supra note 47, at 17–36; Lawrence R. Murphy, Reconstruction in New Mexico, 43 N.M. Historical Rev. 99, 100–04 (1968). Peonage was occasionally practiced against white immigrants, see Schmidt, supra note 3, at 658–59, but the only comparable institution imposed systematically on non-Hispanic whites was indentured servitude. Unlike slavery, indentured servitude was always for

tions, of course, can arise about the existence of a connection between the disputed practice and slavery. In this respect, the limits of congressional power under the Thirteenth Amendment do not differ markedly from those under any other clause granting power to Congress.

Yet the nature of these limits, whatever they may be, intersects with the distinction between government and private action in only one respect: the general connection between the disputed practice and slavery itself. State action is more likely than private action to be general in its operation and effects, and therefore more likely to generate an inference that any disadvantages that it imposes are systematic indications of inferiority. The government can more easily impose "badges and incidents of slavery" than private individuals, who must engage in concerted action in order to do so. Thus, the backlash in the South against the Thirteenth Amendment began with the enactment of "Black Codes" that sought to deny the newly freed slaves the full capacities of citizenship. But even after these codes were invalidated by the Civil Rights Act of 1866, private individuals sought to achieve the same result through systematic violence, which persisted until well into the twentieth century. State action is not necessary to sustain the inference that a particular practice constitutes a badge or incident of slavery, but it offers support for this conclusion when it is present. The role of state action is a matter of evidence and experience, not doctrine and logic, under the Thirteenth Amendment.

A single instance of private discrimination or racially based private violence can be prohibited by Congress, as part of a more general prohibition against the same kind of actions that have a systematic connection to slavery. Establishing this connection remains a prerequisite for the exercise of federal power, but it can go beyond conduct that Congress can reach under its other enumerated powers. The regulated conduct need not involve any state participation, as would be necessary under Section 5 of the Fourteenth Amendment, and it need not have a substantial effect on commerce, as the Commerce Clause would require. Consequently, a

a limited term of years and was not passed on to subsequent generations. Lawrence M. Friedman, A History of American Law 82–89 (2d ed. 1985).

racial analogue to the Violence Against Women Act, struck down in *United States v. Morrison*,[108] could easily be upheld under the Thirteenth Amendment.[109] Race has always been associated with American slavery, and violence has been the means by which it was established and maintained. State action legitimated private violence within the institution of slavery and, after Reconstruction, in efforts to reestablish slavery under the regime of Jim Crow. Sponsorship by the government was necessary to make slavery into a persistent feature of American life, but not to make individual acts of violence into a denial of liberty. State action remains only evidence, not an essential component, of either slavery or its badges and incidents.

The evidentiary role of state action should dispense with any perceived necessity to preserve an artificial balance of federalism as it existed before the Civil War. The opponents of the Thirteenth Amendment, in the face of a studied silence by most of its supporters, correctly foresaw that it effected a fundamental transformation in the relationship between the states and the federal government. The opponents' dire predictions of the demise of state government were greatly exaggerated, but they did correctly recognize that the Amendment expanded the power of the federal government into areas previously reserved to the states. This expansion of federal power along one dimension—regulation of private action in addition to state action—does not dictate that it should be constrained along another—what constitutes the "badges and incidents of slavery." Interpretation of the Thirteenth Amendment must instead rest upon the limits inherent in the Amendment itself and the principles of abolition that it embodies. The other Reconstruction amendments elaborated similar principles of racial equality, but in

[108] 529 U.S. 598 (2000).

[109] Federal law currently prohibits racial violence against anyone participating in a long list of federally protected activities, see 18 U.S.C. § 245 (2000), a prohibition which has been upheld under the Thirteenth Amendment. United States v. Allen, 341 F.3d 870, 879–83 (9th Cir. 2003). Congress is currently considering additional prohibitions against hate crimes on the basis of race, national origin, and other grounds. S. 1105, 110th Cong. § 7 (2007); H.R. 1592, 110th Cong. § 7 (2007). For the argument for extending the Thirteenth Amendment to the related issue of racially motivated hate speech, see Akhil Reed Amar, Comment, The Case of the Missing Amendments: *R.A.V. v. City of St. Paul*, 106 Harv. L. Rev. 124, 155–60 (1992).

different ways and with different limits that should not be read back into the Thirteenth Amendment.

The Amendment's inherent limits require a connection to slavery as a historical institution, as recent attempts to expand its scope reveal. Some have proposed that the Amendment provides a constitutional basis for the right to an abortion, or that it protects children from abuse by their parents.[110] These proposals raise the right question—whether the Thirteenth Amendment prohibits practices that do not closely resemble traditional forms of slavery—although perhaps under the wrong Section.[111] The self-enforcing provisions of Section 1, as noted earlier, have never received a very broad interpretation, while the enforcement power granted to Congress in Section 2 has. Congress, unlike the courts, has the capacity to select the elements associated with slavery for prohibition or regulation and to reflect the political support necessary to curtail or eliminate those elements of servitude. By contrast, under Section 1, the judiciary can only go so far in finding that otherwise justifiable relationships, such as that between parent and child, can be regulated when they take on pathological forms equivalent to involuntary servitude.

Congress could still go too far in asserting its powers under Section 2, although the areas in which it is likely to act—such as prohibiting racially motivated violence—do not pose a great risk of congressional overreaching. The opposite risk, of underenforcement, has proved to be far greater under the Thirteenth Amendment. After an initial burst of legislation during Reconstruction, Congress has rarely exercised its power to enforce the Amendment. The Supreme Court also has taken a limited role in enforcing Section 1, and it has either summarily approved—or in

[110] E.g., Akhil Reed Amar & Daniel Widawsky, Child Abuse as Slavery: A Thirteenth Amendment Response to *DeShaney*, 105 Harv. L. Rev. 1359, 1365–66 (1992) (arguing that the Thirteenth Amendment does not allow children to be treated "as chattel and subjected (legally or illegally) to domination and degradation by a parent"); Andrew Koppelman, Forced Labor: A Thirteenth Amendment Defense of Abortion, 84 Nw. U. L. Rev. 480, 484 (1990) ("When women are compelled to carry and bear children, they are subjected to 'involuntary servitude' in violation of the thirteenth amendment.").

[111] For an analysis of the issues raised by expanding judicial power to eliminate the badges and incidents of slavery, 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, 1355–65 (2007).

the *Civil Rights Cases*, disapproved—of legislation enacted under Section 2. If slavery had been eliminated as quickly as anticipated, the dearth of enforcement activity could be explained by the absence of any need to address a problem that had largely been solved. On the contrary, however, the adoption of the Amendment immediately solved the problem of slavery in form only, allowing slavery to persist in practice through labor relations, such as peonage, and pervasive racial discrimination. Any further efforts to enforce the Thirteenth Amendment would not have been a solution in search of a problem.

A more widely accepted explanation for the comparative neglect of the Thirteenth Amendment relies upon the superseding effect of the Fourteenth Amendment, which relocated the source of constitutional principles of equality and liberty to the Equal Protection and Due Process Clauses. The Fourteenth Amendment was adopted to remedy perceived limitations inherent in the Thirteenth Amendment, and in particular, limitations on the power of Congress to enact legislation such as the Civil Rights Act of 1866.[112] Although the additional powers granted to Congress under the Fourteenth Amendment did not explicitly curtail those already granted under the Thirteenth, they may have effectively limited the operation of the powers Congress already had. They allowed Congress to address denial of equal protection or due process by the states directly, without regard to any connection with slavery. Descriptively, this explanation has some appeal, but again only by ignoring the many decades in which neither the Fourteenth nor the Thirteenth Amendment was effectively enforced to protect civil rights. The revival of the Fourteenth Amendment in *Brown v. Board of Education*[113] did not make the Thirteenth Amendment superfluous.

Both as a matter of history and as a matter of logic, the Thirteenth Amendment formed the foundation for the Fourteenth. The grant of equal citizenship in the latter could not have been accomplished without the freedom from slavery created by the former. The Fourteenth Amendment developed directly out of debates over the Civil Rights Act of 1866, the first statute passed to enforce the Thirteenth Amendment, and Section 1 of the Fourteenth

[112] See Fairman, supra note 98, at 1270–90.
[113] 347 U.S. 483 (1954).

Amendment was, to a significant extent, modeled on the Act itself.[114] As a matter of logic, the guarantees of citizenship, equal protection, and due process in the Fourteenth Amendment would have had little determinate meaning without the prior abolition of slavery in the Thirteenth Amendment. In the modern era, the Thirteenth Amendment, with its focus on civil rights and its coverage of private action, provides a bridge between the Fourteenth Amendment, which is limited to state action, and the Commerce Clause, which expresses no specific concern for civil rights. The Thirteenth Amendment shares the advantages, but not the limitations, of these constitutional provisions as an alternative source for civil rights legislation against private discrimination. Modern statutes, such as the Civil Rights Act of 1964, are necessary to make fully effective the constitutional guarantees of equal citizenship. Such statutes might not be based explicitly on the Thirteenth Amendment, but they are inconceivable without it.

CONCLUSION

The absence of any form of state action as a prerequisite for applying the Thirteenth Amendment creates a stark contrast with the rest of the Constitution. It might lead to unrestricted federal power, but it has not. Judicial decisions have not readily invoked analogies to slavery to uphold federal legislation, let alone to expand judicial review to declare actions of any kind unconstitutional. Congress has only fitfully passed legislation to enforce the Amendment.

If the absence of a state action requirement has led to few changes in the law directly attributable to the Thirteenth Amendment, it has nevertheless exercised a subtle and indirect influence over the interpretation of other sources of law, statutory and constitutional alike. One might say that while the enactment force of the Thirteenth Amendment has been minimal, its gravitational force has been pervasive. Statutes enacted under the Thirteenth Amendment, such as the Civil Rights Act of 1866, have been interpreted to reach private racial discrimination, while other constitutional provisions have been enlisted to support modern civil rights

[114] See John Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L.J. 1385, 1410–51 (1992).

legislation to the same effect. After the *Civil Rights Cases*, the Commerce Clause became the unlikely vehicle for passing the Civil Rights Act of 1964, resulting in legislation upheld on economic grounds when it would have more naturally followed from enforcement of the Reconstruction amendments.

The displaced authority of the Thirteenth Amendment offers tacit, but crucial, support for modern civil rights legislation, even if it is seldom acknowledged as a matter of explicit legal doctrine. If the weight of modern civil rights legislation falls upon the Commerce Clause and the Equal Protection Clause, the precedent of the Thirteenth Amendment provides indispensable support for the construction that these constitutional provisions have received. The Amendment was the necessary first step in recognizing a right to racial equality and in providing for enforcement of this right against private individuals. The Amendment established that freedom, from both public and private racial oppression, is the foundation of equality.