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State Action and the Thirteenth Amendment

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Abstract

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." Unlike its close cousin, the Fourteenth Amendment, the Thirteenth Amendment does not restrain only government actors. It also acts as a restraint on 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. The amendment's coverage of private action makes it virtually unique position among constitutional provisions.

This article begins by examining the status of this proposition in existing law, emphasizing its support in two otherwise inconsistent decisions, the Civil Rights Cases, decided after the end of Reconstruction, and Jones v. Alfred H. Mayer Co., decided during the Civil Rights Era. The analysis then examines to the historical conditions and events leading up to the adoption of the amendment: the role of private action in establishing antebellum slavery, the origins of the amendment's text in the Northwest Ordinance, and the legislative debates over the amendment. These sources contain all of the major arguments for the amendment's coverage of private action. The analysis then proceeds to the implications of these arguments for the separate question of what constitutes the "badges and incidents of slavery" that lie within the power of Congress to enforce the amendment. This article concludes by briefly considering the role of the Thirteenth Amendment in the jurisprudence of civil rights, now and in the future.

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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 does not restrain only government actors. It also acts as a restraint on 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. So much is accepted constitutional doctrine, established in 1883 in the *Civil Rights Cases*,[2] and not subject to any serious challenge since.

Precisely because this premise has become axiomatic, it has resisted serious 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, the answer is clear enough. Private action with respect to slavery is prohibited, including private forms of peonage established with–or without–the tacit support of the state.[3] Under section 2 of the amendment, however, the range of private action subject to regulation is far more indefinite and open-ended. Section 2 simply provides, in its entirety, that "Congress shall have the 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?

The answer to this question determines the practical effect and current significance of the Thirteenth Amendment. If the "badges and incidents of slavery" are broadly construed, then Congress has virtually plenary legislative authority to regulate anything connected to race relations or to slavery. Some decisions suggest as much, notably *Jones v. Alfred H. Mayer Co.*,[6] handed down at the very end of the Warren Court, but these decisions do not purport to make a comprehensive case for this conclusion. They also leave open the troubling question whether the Thirteenth Amendment is largely redundant, simply recapitulating the force and effect of other constitutional provisions. Insofar as it covers government 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; and 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. In contemporary constitutional law, the amendment appears to have lost whatever generative force it had.

This article examines the Thirteenth Amendment's coverage of private action, beginning with its status under existing law and its virtually unique position among constitutional provisions. The analysis then proceeds to the historical conditions and events leading up to the adoption of the Thirteenth Amendment: the role of private action in establishing antebellum slavery, the origins of the amendment's text in the Northwest Ordinance,[7] and the legislative debates over the amendment. These sources contain all of the major arguments for the

amendment's coverage of private action. The analysis then proceeds to the implications of these arguments for the separate question of what constitutes the "badges and incidents of slavery" subject to congressional power to enforce the amendment. This article concludes by briefly considering the role of the Thirteenth Amendment in the jurisprudence of civil rights, now and in the future.

I. Private Action in Existing Law

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 this instance of direct constitutional regulation of private conduct.[8] All the other provisions in the Constitution regulate the structure and function of government, and if they confer individual rights, they protect only against actions by the government. Most of these provisions concern the federal government, so that a "state action" interpretation of the Constitution is accurate only if it is taken to refer to government generally. In the same vein, a " private action" interpretation of the Thirteenth Amendment cannot be taken as a limitation upon its scope, since the amendment applies also to government action, both state and federal. Private action under the Thirteenth Amendment does not represent an exclusion from, but an expansion of, its coverage.

This proposition became established early in the decisions interpreting the amendment although, as the next section discusses, it was raised only inferentially in the legislative debates over the amendment. The canonical decision is the *Civil Rights Cases*, 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.[9] 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."[10] From this major premise, the Court went on to consider the minor premise whether discrimination in public accommodations was sufficiently related to slavery to fall within the "badges and incidents of slavery" that Congress could prohibit. The Court held that it was not, because such discrimination had been practiced against free blacks before emancipation. 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.

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. This proposition has elicited nearly unanimous agreement. Only the minor premise of the *Civil Rights Cases* has provoked disagreement. The Court recognized the broad scope of the Thirteenth Amendment in one dimension of private action while it restricted it in another. Moreover, it restricted the Fourteenth Amendment in the very same dimension, limiting it to state action. The recognition of the contrasting scope of the Thirteenth Amendment might

be dismissed as dictum, since it was unnecessary to the Court's ultimate decision, but it was dictum that must have been well considered, since it stands in such sharp contrast to the Court's otherwise narrow interpretation of 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.[11]

The consensus on coverage of private action stretched back to the cases decided in the immediate aftermath of ratification of the Thirteenth Amendment 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,[12] 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*,[13] 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. 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, transforming the dictum in those cases about the scope of the amendment into a holding supporting the validity of the federal Anti-Peonage Act.[14] Peonage was 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 contract for service. In *Clyatt v. United States*,[15] 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. 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."[16]

By defining peonage without regard to race, the Court also implicitly endorsed the dictum in the *Slaughter-House Cases*[17] that the Thirteenth Amendment prohibited all forms of slavery, regardless of race, even though it was addressed principally to slavery based on race. This conclusion left intact the reasoning of the *Civil Rights Cases* (and *Plessy v. Ferguson*[18] as well) that the amendment did not prohibit racial discrimination independently of slavery. Slavery directed against any person, by any person, was the focus of the amendment. Racial discrimination was neither necessary nor sufficient to trigger the amendment's 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 took 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 it was used to invalidate prohibitions upon discrimination in public accommodations. In *Hodges v. United States*,[19] the Court invalidated an indictment for conspiracy to threaten and intimidate black workers for exercising their constitutional right to continue to work at a sawmill. 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 along the dimension of private action but narrowly along the dimension of the action that could be prohibited–persisted through the first two-thirds of the twentieth century. In *Jones v. Alfred H. Mayer Co.*,[20] all of this changed. The Supreme Court opened up the possibility that the amendment could be broadly interpreted along both dimensions, without questioning the amendment's application along the dimension of private action. The principal issue before the Court was whether the Civil Rights Act of 1866 applied to private discrimination, in this case, in the sale of housing. The Court held that it did and that the act, as so interpreted, was constitutional. The Court's statutory holding required an extended analysis of the act's legislative history, but 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 held, was at least as broad as the first act that Congress passed in the session immediately after the amendment was ratified. 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."[21]

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 about the continued validity of the *Civil Rights Cases*.[22] If they did, however, they also made its 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, specifically, the Civil Rights Act of 1968.[23] 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 didn't add to the power of Congress to pass the Civil Rights Act of 1875 under the Fourteenth Amendment–and it wasn't 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 the same limitation on federal power under the Thirteenth Amendment that the state action doctrine did under the Fourteenth. Conversely, in *Jones v. Mayer*, the broad power of Congress to regulate commerce made the endorsement of congressional power to eliminate the consequences of slavery largely redundant.

This comparison of these constitutional provisions raises questions about the independent scope and significance of the private action interpretation of the Thirteenth Amendment that only an examination of its sources can answer. Since these sources antedate the state action interpretation of the Fourteenth Amendment, they support, not surprisingly, a reassessment of what the framers of the Reconstruction amendments sought to achieve through abolition of slavery and redress for its consequences.

II. Private Action in Constitutional History

With the repeal of the Eighteenth Amendment, the Thirteenth Amendment stands alone among provisions of the Constitution that, of their own force, impose obligations on private individuals. 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 moralistic experiment that failed. 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. What led to the virtually entrenched and canonical status of the Thirteenth Amendment and its coverage of private action?

Section 1 of the amendment provides a partial answer to both questions. 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,[24] which had, at best, a temporary basis in the President's war powers and limited geographical application to the states then in rebellion,[25] 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. The text takes us to the threshold of the private action interpretation of the amendment. A look at the origins and history leading to ratification of the amendment supplies the arguments necessary to make this interpretation convincing.

A. Origins of the Text

The Thirteenth Amendment was debated and ratified in the shadow of the Emancipation Proclamation. Where 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. It did not apply in the border states or in 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 invoked to make the proclamation. The Thirteenth Amendment was designed to put abolition on a broader and more secure constitutional foundation. It could not just provide, as the proclamation did, "that all person held as slaves within said designated States, and parts of States, are, and henceforward shall be free."

The framers of the Thirteenth Amendment instead had to turn to more permanent forms of emancipation, looking back to a text from the Founding Era: the Northwest Ordinance passed by the Continental Congress in 1787 and then re-enacted 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."[26] 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.[27] The provision abolishing slavery, although not enacted, provided another connecting link to the Founding era, and through the attribution to Thomas Jefferson, to one of the Founders themselves.

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 with 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.[28] It also appeared in legislation enacted during the Civil War to abolish slavery in the District of Columbia and in the territories of the United States.[29] 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 complete abolition of slavery. The ordinance itself protected the rights of French inhabitants to property that they held, implicitly covering slaves held under French law, and the ordinance referred elsewhere to the rights of "free male citizens" to suffrage and representation, implying that some individuals were not "free citizens."[30] 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.[31] Such a gradual approach minimized the problems, much emphasized by opponents of emancipation, of expropriation of private property without just compensation. Prospective emancipation did not take away any property rights that slaveholders had in existing slaves. This 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 when those rights were eliminated.

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.[32] 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 the amendment "by appropriate legislation." Similar problems also plagued the implementation of the emancipation provisions in the confiscation acts passed during the Civil War, and as discussed in the next section, served as an object lesson in drafting the enforcement provisions of the amendment.

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.[33] 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.[34]

The model for the Thirteenth Amendment in general legislation made it a natural vehicle for addressing slavery as a domestic relationship 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 language proposed by the Senate 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 of the amendment read: "All persons are equal before the law, so that no person can hold another as a slave."[35] 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, 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," which sought to remove the disability of blacks to testify against whites in federal court.[36] "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 the latter said in the debate in the House, he believed that all men were created equal, "but not equality in all things–simply before the laws, nothing else."[37]

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.[38] 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 both public and private components, both in the amendment as ratified and in his proposed alternative. The legal form of property in human beings would be abolished and the private rights of slaveholders over their slaves would be abolished too. There was no need to distinguish one from the other. Quite the opposite: abolition was possible only by disregarding the distinction between government and private action.

"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.[39] 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.

B. Congressional Debates over the Thirteenth Amendment

The moral case for abolition dominated the arguments of supporters of the Thirteenth Amendment. It was met by federalist arguments for preserving states rights and against the expropriation of property rights under state law. These arguments of principle were augmented by consequentialist concerns over 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, paradoxically enough, did agree that the amendment would work great changes in American law: the supporters in applauding the declaration of universal freedom; the opponents in the lamenting the demise of state sovereignty and 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 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 the amendment received just enough votes to meet the constitutional threshold of a two-thirds

majority.[40] An examination of the minimum content of the amendment reveals a consensus on the need for the amendment to cover various forms of evasion–attempts to reinstate slavery by other means. This consensus stopped well short of full equality, but it did seek to assure the basic capacities of free individuals. 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, it 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 Constitution–making it strictly speaking unnecessary–to the inconsistency between slavery and natural law–making it necessary to purge the Constitution of its compact with slavery and bring it into conformity with the principle that "all men are created equal" in the Declaration of Independence.[41] 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: the need 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, were to be abolished in all their different forms.

The force and implication of these arguments were not lost on the legislators who debated the amendment. Senator Henry Wilson of Massachusetts, a prominent supporter of the amendment, claimed that "it 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."[42] 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."[43]

Those legislators who took a more pragmatic position argued that ending slavery was necessary to preserve the union in order to put controversies over slavery firmly in the past. Senator John Henderson 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."[44] Representative Godlove Orth of Indiana 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.[45]

Opponents of the amendment took exception to these optimistic predictions, forecasting continued sectional conflict over the fate of the newly freed slaves. 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." He went on to predict southern opposition to emancipation in what turned out to be a self-fulfilling 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."[46] Remarks such as these merged with general opposition to the amendment on grounds of federalism or of 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 of the amendment, among moderate Republicans and anti-slavery Democrats, presumed that the amendment would do enough finally to be put the issue of slavery to rest. Just how much that would require was the subject of the more general arguments offered in opposition to it.

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. 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.[47]

As a rhetorical flourish emphasizing the fundamental changes made by the Thirteenth Amendment, this argument had more to be said for it. Unlike any preceding amendment, it 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 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 preserve of the states were now subject to federal regulation that could, under the Supremacy Clause, displace state law.

Slavery was one of those subjects. It was obviously a sectional prerogative of the

southern and border states which had not chosen, on their own, to abolish slavery. It was also thought to be a "domestic relationship," 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."[48] 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."[49]

Supporters of the amendment responded to such charges of undue federal interference by claiming that it made only the least change 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 Federal Government."[50] For him, the South had brought on the prospect of federal interference 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 more overtly moral terms, "slavery is a *wrong*; so recognized by the whole civilized world; and cannot claim immunity as a *right*."[51] 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. We 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 to us than their prominence in debates over the Thirteenth Amendment and their common presumption that the amendment would necessarily affect private rights. Opponents 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 human. Both 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.[52] Slavery did not come to the colonies with a legal structure that could readily regularize and legitimize its practice. It instead arrived instead with the first blacks who were brought to the colonies as laborers and the law of slavery only developed 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 entered into the Federal compact they did not submit that institution, or their other domestic institutions, to the control of the Federal Government."[53] At most, emancipation could abolish pre-existing property rights only with just compensation.[54]

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 made it immune from revision or abolition. The most overt appeals to natural law invoked biblical sources, which had the added of advantages of refuting defenses of slavery based on Jewish law. Representative Farnsworth, a Republican from Illinois, argued:

> "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.[55]

Other supporters of the amendment pointed out that the states themselves could abolish slavery, an admission tacitly made by opponents who argued that slavery was exclusively a matter of state law.[56] If it 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, several legislators argued that slavery depended upon enactments of positive law and hence could be repealed by the same or superior sources of law. Representative Frederick A. Pike, a Republican from Maine, characterized the law of slavery in the following terms:

> No statute of 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.[57]

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."[58]

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 effectively excluded any compromise to protect their interests at the end of a bloody civil war. Interpreting the amendment only to abolish the law of slavery, without any 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. As the Thirteenth Amendment was soon interpreted, it also restricted common law rights in contract. First, contracts of peonage were prohibited by federal law: contracts under which a laborer was forced, under threat of criminal punishment, to work until a debt incurred from the employer was paid off.[59] Second, remedies for breach of contract were restricted, preventing the issuance of injunctions to force an employee who had quit to return to work.[60] 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 resort to government assistance. Otherwise the central abolitionist aim could not have been accomplished: to abolish slavery in all forms.

This is not to say that 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,[61] and it still persists in isolated instances among rural and migrant laborers.[62] 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.

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."[63] This "reflex character" appears to be 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*,[64] or a defense to an action for specific performance of a contract for services, 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 decide to quit. The "reflex 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 that these wrongs were systematically remedied. As noted earlier, slavery remained widespread under a variety of guises until the middle of the twentieth century. 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 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 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,[65] 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, however, this phrase does not invite any version of the distinction between government and private action.

This conclusion accords with the reasons offered in the congressional debates over section 1 of the Thirteenth Amendment. The moral imperative to eliminate all forms of slavery and its vestiges applies equally to the actions of private citizens as to those of public officials. The recognition that slavery was a domestic relationship carried federal regulation far into conduct previously reserved to the states. And the denial of property rights to slaveholders required federal interference with the private exercise of common law rights. The limiting principle that controls the scope of the Thirteenth Amendment must be found elsewhere than in slavery solely as an institution of state law.

The debates over section 2, although much more limited than those over section 1, confirm this conclusion. 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.[66] These acts freed the slaves used in the Confederate war effort, assimilating emancipation to 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 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 were offered of their freedom.[67]

Section 2 sought to remedy this defect by give 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 that under the Necessary and Proper Clause. Senator Sumner offered several alternative versions of the amendment, some of which used the phrase "necessary and proper" to describe the scope of congressional power.[68] 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.[69] 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*.[70] 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."[71]

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 or fathers resisted the British empire. Mere exemption from servitude is a miserable idea of freedom."[72] 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."[73] These complaints simply echoed the arguments, discussed earlier, that the amendment exceeded the scope of the amending process. Shorn of their exaggerated rhetoric, we 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, that "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."[74] 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 limit provided by "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, such as peonage, and purely instrumental measures to achieve these goals, like the Anti-Peonage Act. The badges and incidents of slavery are intermediate in both a conceptual and an instrumental sense. Conceptually, they are the components of slavery, and 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.[75] 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."[76] 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 commerce," "goods and persons in commerce," and "activities substantially affecting commerce" under the Commerce Clause.[77] 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, because the Commerce Clause does not identify any goal apart from regulation itself, while the Thirteenth Amendment does. Nevertheless, both provisions specify what federal legislation must be directed towards and then, through the Necessary and Proper Clause and section 2, authorize Congress to choose the appropriate means to this end.

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

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

In a previous article,[78] 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 under the amendment. 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?

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 invested in slaveowners over their slaves.[79] 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 wrong, Congress was given the power in section 2 to abolish the many indignities and inequalities associated with it. Almost all of these 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 decisions to discipline and punish.[80] They 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 was 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 most obviously meant the denial of physical freedom, allowing the master to control the slave's movement and travel and resulting in denial of access to any 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 federal 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 effectively the same as slavery. 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. 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 resort 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 total as the institution of slavery itself, the 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.[81] Even the *Civil Rights Cases* did not impose such restrictions upon congressional power.

It is essentially a legislative judgment whether to address all of a problem or only part of it, as we know from constitutional decisions in other fields.[82] 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.[83] Close questions, of course, can arise about the existence of any connection at all between a 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, concerning the general connection between the disputed practice and slavery itself. Government 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. Yet 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. Government action is not necessary to sustain the inference that a particular practice constitutes a badge of incident of slavery, but it offers support for this conclusion when it is present. The role of government action remains a matter of evidence, not a matter of 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 other of its enumerated powers. It 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 racial analogue to the Violence Against Women Act, struck down in *United States v. Morrison*,[84] should easily be upheld under the Thirteenth Amendment.[85] Race has always been associated with American slavery and violence has been the means by which it was coerced. Government action legitimatized private violence to create and maintain slavery, and after Reconstruction, to prolong its legacy, but it was not necessary. It is only evidence, not an essential component, of the badges and incidents of slavery.

The evidentiary role of government action should dispense with any felt necessity to preserve some 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 need not be credited to conclude that the amendment expanded the power of the federal government into areas previously reserved to the states. It follows that the absence of constraints on federal power in one dimension–regulation of private action in addition to government action–should not induce increased constraints in 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.

These limits require a connection to slavery as an historical institution, as recent attempts to expand the scope of the amendment 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.[86] These proposals raise the right question, although perhaps under the wrong section of the amendment.[87] 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 and regulation and to reflect the political support necessary to curtail or eliminate them. By contrast, under section 1, the judiciary can only go so far to find that otherwise justifiable institutions, such as parental control over children, can take pathological forms that make them the equivalent of 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 from 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 the *Civil Rights Cases*, disapproved–of legislation enacted under section 2. The dearth of enforcement activity could be attributed to the decline of slavery, if it had been eliminated as quickly as anticipated. On the contrary, the adoption of the amendment immediately solved the problems of slavery in form only, allowing them to persist in practice in the preservation of labor relations that were scarcely different from peonage and in continued pervasive discrimination.

The alternative explanation for the comparative neglect of the Thirteenth Amendment locates the source of constitutional principles of equality in the Fourteenth Amendment, which was adopted to remedy perceived limitations on the power of Congress to pass the Civil Rights Act of 1866.[88] Even if 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 their scope of operation. The denial of due process or equal protection by the states could then be addressed 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*[89] did not make the Thirteenth Amendment superfluous.

Conclusion

The absence of any form a government action as a prerequisite for applying the Thirteenth Amendment creates a stark contrast with the rest of the Constitution. It might, as opponents of the amendment argued, license unlimited federal power. Yet the course of decisions, legislation, and interpretation of the amendment has been far more restrained. The amendment might lead to unrestricted federal power, but it hasn't. Judicial decisions have not readily invoked analogies to slavery, 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 the state action doctrine 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. We 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 of 1866, have been interpreted to reach private racial discrimination, and other provisions of the Constitution have been enlisted to support enactment of modern civil rights 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 more naturally seem to follow from enforcement of the Reconstruction amendments. The displaced authority of the Thirteenth Amendment offers tacit support for this conclusion, even if it is seldom acknowledged as a matter of explicit legal doctrine. Just like the consequences of slavery itself, the lessons of the Thirteenth Amendment

[1] U.S. Const. amend. XIII § 1.

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

[3] For an account of these cases, 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] 109 U.S. at 20-21.

[6] 392 U.S. 409 (1968).

[7] Act of July 13, 1787, art. VI, reenacted by Act of Aug. 7, 1789, 1 Stat. 51 (1789).

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

[9] 18 Stat. 335 (1875).

[10] 109 U.S. at 20.

[11] Id. at 34, 37 (Harlan, J., dissenting).

[12] 14 Stat. 27, codified as amended as 42 U.S.C. §§ 1981-82 (2000).

[13] 24 Fed. Cas. 337 (1867).

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

[15] 197 U.S. 207 (1905).

[16] Id. at 218. For the quotations from the *Civil Rights Cases*, see id. at 216-17.

[17] 83 U.S. 36, 71-72 (1873).

[18] 163 U.S. 537, 542 (1896).

[19] 203 U.S. 1 (1906).

[20] 392 U.S. 409 (1968).

[21] Id. at 438.

[22] Id. at 441 n.78.

[23] Pub. L. No. 90-284, 82 Stat. 73, codified as amended as 42 U.S.C. §§ 3601-19 (2000).

[24] Proclamation No. 17, 12 Stat. 1268 (January 1, 1863).

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

[26] Act of July 13, 1787, art. VI, reenacted by Act of Aug. 7, 1789, 1 Stat. 51 (1789).

[27] See 1 Henry S. Randall, The Life of Thomas Jefferson 397-98 (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 duly convicted to have been personally guilty."

[28] Act of March 6, 1820, § 8, 3 Stat. 547. 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.

[29] Act of April 16, 1862, § 1, 12 Stat. 376; Act of June 19, 1862, 12 Stat. 432.

[30] Act of July 13, 1787, §§ 2, 9.

[31] Arthur Zilversmit, The First Emancipation: The Abolition of Slavery in the North 137-38, 199-200 (1967).

[32] The Northwest Ordinance 1787: A Bicentennial Handbook 72-76, 100 (Robert M. Taylor, Jr., ed. 1987).

[33] U.S. Const. art. IV § 3.

[34] Act of July 13, 1787, § 2.

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

[36] 38th Cong., 1st Sess. S. Rep. No. 25 (1864).

[37] Cong. Globe, 38th Cong., 2d Sess. 125 (1865). See Vorenberg, supra note __, at 189-90.

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

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

[40] U.S. Const. art. V.

[41] The Declaration of Independence ¶ 2.

[42] Cong. Globe, 38th Cong., 1st Sess. 1489 (1864).

[43] Cong. Globe, 38th Cong., 2d Sess. 155 (1865). See also id. at 2618 (remarks of Rep. Kellogg).

[44] Cong. Globe, 38th Cong., 1st Sess 1465 (1864). See also Cong. Globe, 38th Cong., 2d Sess. 171, 172 (1865) (remarks of Rep. Yeaman).

[45] Cong. Globe, 38th Cong., 2d Sess. 144 (1865). See also id. at 263 (remarks of Rep. Rollins).

[46] Cong. Globe, 38th Cong., 2d Sess. 216 (1864).

[47] See Vorenberg, supra note __, at 107-12.

[48] Cong. Globe, 38th Cong., 1st Sess. 2941 (1864); see also id. at 2940 (remarks of Rep. Pruyn).

[49] Id. at 1458.

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

[51] Id. at 173 (remarks of Rep. Morrill) (emphasis in original).

[52] Thomas D. Morris, Southern Slavery and the Law 1619-1860 56-80 (1996).

[53] Cong. Globe, 38th Cong., 1st Sess. 1458 (1864). See also id. at 2952 (remarks of Rep. Coffroth).

[54] 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).

[55] Cong. Globe, 38th Cong., 2d Sess. 200 (1865). See also Cong. Globe, 38th Cong., 1st Sess. 1437-38 (remarks of Sen. Harlan) (criticizing classical forms of slavery); id. at 1481 (remarks of Sen. Sumner).

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

[57] Id. at 488. See also id. at 190-91 (remarks of Rep. Kasson).

[58] Id. at 217.

[59] Schmidt, supra note __, at 656-57.

[60] Arthur v. Oakes, 63 F. 310 (7th Cir. 1894) (Harlan, J., on circuit).

[61] Risa L. Goluboff, The Lost Promise of Civil Rights 51-80 (2007).

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

[63] 109 U.S. at 20.

[64] 24 Fed. Cas. 337 (1867).

[65] George Rutherglen, The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment, in The Promises of Liberty: Thirteenth Amendment Abolitionism and Its Contemporary Vitality (Alexander Tsesis, ed. forthcoming 2008).

[66] Vorenberg, supra note __, at 49-50, 53.

[67] Silvana R. Siddali, From Property to Person: Slavery and the Confiscation Acts, 1861-62 227-50 (2005).

[68] Cong. Globe, 38th Cong., 1st Sess. 1482-83 (1864).

[69] Id. at 1487-89 (remarks of Sen. Trumbull).

[70] Cong. Globe, 39th Cong., 1st Sess. 1118 (1866).

[71] 17 U.S. 316, 420 (1819).

[72] Cong. Globe, 38th Cong., 1st Sess. 2962 (1864).

[73] Cong. Globe, 38th Cong., 2d Sess. 180 (1865).

[74] Cong. Globe, 38th Cong., 1st Sess. 1465 (1864).

[75] Charles Fairman, 6 History of the Supreme Court of the United States: Reconstruction and Reunion, Part One 1226-27 (1971).

[76] 14 Stat. 27 (1866), codified as amended as 42 U.S.C. §§ 1981-82 (2000).

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

[78] See Rutherglen, supra note __, at ___-___.

[79] Morris, supra note __ at 161-62, 182-83.

[80] See id.

[81] 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. Pollock v. Williams, 322 U.S. 4 (1943); Taylor v. Georgia, 315 U.S. 25 (1941); Bailey v. Alabama, 219 U.S. 219 (1911). For a

discussion of how these laws operated with the system of convict labor to recreate involuntary servitude, see Schmidt, supra note __, at 650-59.

82 Dandridge v. Williams, 397 U.S. 471, 486-87 (1970) (equal protection); Califano v. Boles, 443 U.S. 282 (1979) (due process).

83 Morris, supra note __, at 18-36; see Lawrence R. Murphy, Reconstruction in New Mexico, 43 N.M. Hist. Rev. 99, 100-04 (1968). Peonage was occasionally practiced against white immigrants, see Schmidt, supra note __, at 658-59, but the only comparable institution imposed upon systematically on non-Hispanic whites was indentured servitude. Unlike slavery, indentured servitude was always for 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).

84 529 U.S. 598 (2000).

85 Federal legislation against hate crimes on the basis of race and national origin, among other grounds, is currently pending before Congress. S. 1105, 110th Cong., 1st Sess. § 6 (2007); H.R. 1592, 110th Cong., 1st Sess. § 7 (2007). For the argument for extending the Thirteenth Amendment to the related issue of racially motivated hate speech, see Akhil Reed Amar, The Case of the Missing Amendments: *R.A.V. v. City of St. Paul*, 106 Harv. L. Rev. 124 (1992).

86 E.g., Akhil Reed Amar & Daniel Widawsky, Child Abuse as Slavery: A Thirteenth Amendment Response to *DeShaney*, 105 Harv. L. Rev. 1359 (1992); Andrew Koppelman, Forced Labor: A Thirteenth Amendment Defense of Abortion, 84 Nw. U. L. Rev 480 (1990).

87 For an argument expanding judicial power to eliminate the badges and incidents of slavery, see William M. Carter, Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery, 40 U.C. Davis L. Rev. 1311 (2007).

88 See Fairman, supra note __, at 1270-83.

89 347 U.S. 483 (1954).