In recent decades, a growing number of scholars have proposed to apply the Thirteenth Amendment to a variety of present-day problems including workers’ rights, labor and sex trafficking, various forms of racial subjugation, immigrant rights, mass incarceration, the enslavement of children by their parents, and the subjection of women to involuntary servitude by their male partners. For the purposes of this paper, I will adopt Jamal Greene’s label for this scholarly trend (in which I am a proud participant): “Thirteenth Amendment optimism.” I also embrace his definition, namely that it “consists in arguing that the Amendment prohibits in its own terms, or should be read by Congress to prohibit, practices that one opposes but that do not in any obvious way constitute either chattel slavery or involuntary servitude as those terms are ordinarily understood.”\(^1\)

I do not, however, accept Greene’s suggestion that optimism “supplies to progressives what interpretivism has long supplied to conservatives: a language for arguing that the Constitution inspires, and perhaps even compels, their political objectives.”\(^2\) To the contrary, optimism seeks to apply standard methods of constitutional interpretation and construction to the Thirteenth Amendment. Thirteenth Amendment optimism is no more political than most constitutional scholarship. What Thirteenth Amendment optimists are optimistic about is rescuing the Amendment from what we see as its utterly unprincipled and downright bad faith

\(^2\) Greene, *supra* note 1, at 1737.
exclusion (the bad faith being exemplified by *Hodges v. United States*\(^3\)) from ordinary processes of constitutional interpretation and doctrinal development. “If the Thirteenth Amendment were taken as seriously as the Fourteenth has been taken,” observe Jack Balkin and Sanford Levinson, “one would expect considerable political and legal efforts to make sense of its underlying purposes and apply its terms (and purposes) to new situations. Just as the Establishment Clause has been read to ban more than state-sponsored churches or government-salaried ministers, and the Free Speech Clause to protect all manner of expression, one would have asked how best to make sense of the terms ‘slavery’ and ‘involuntary servitude’ in a modern world.”\(^4\) To Thirteenth Amendment optimists, changing that situation is objective number one.

For a long time, most optimistic articles sank without a ripple. Other scholars were happy to let us launch what they viewed as harmless fantasies.\(^5\) In recent years, however, we have been honored by some thoughtful and instructive critiques. My purpose in this paper is to engage the critics, both those who are present and some who are not, in the hope of moving our emerging debate forward. In particular, I will focus on the work of Jennifer Mason McAward, George Rutherglen, and Jamal Greene.

Before going any further, I want to emphasize that I have already learned tremendously from the critics, and I look forward to their future work. We could not have wished for better critics than McAward, Rutherglen, and Greene, whose scholarship is meticulously researched, deeply insightful, and unfailingly collegial in tone.

There’s just one problem. So far, our critics have tended to focus not on the merits of our arguments, which center mostly on the meaning of section 1, source of the Amendment’s distinctive substance. Instead, they have offered a wealth of reasons why section 1 should not even make it onto the agenda for serious consideration. The body of this article addresses some of these contentions. The first two do bear on the meaning of section 1, but they are offered as reasons for shifting attention to section 2 without reaching any conclusions on section 1. Part I

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\(^3\) *Hodges v. United States*, 203 U.S. 1 (1906) (discussed *infra* at notes __). The bad faith appellation is William Forbath’s. *See* Forbath, Caste, Class __.


addresses the claim that *United States v. Kozminski* reduces section 1 to a ban on physically or legally coerced labor, while Part II considers whether the Civil Rights Act of 1866 – heavily relied upon by optimists to support broad interpretations of section 1 – actually bears mainly on section 2. The next three Parts address the following questions:

**Part III:** Pragmatically, would we do better to focus on section 2 than on section 1?  
**Part IV:** Has Section 1 already accomplished its purpose?  
**Part V:** Is section 1 so precisely worded that it leaves little room for interpretation?  

The final three Parts address intertextual arguments that the Amendment should be read narrowly in order to avoid conflict with other provisions and constitutional values:

**Part VI:** Do the Commerce Clause and the Fourteenth Amendment shrink the Thirteenth?  
**Part VII:** Should the Amendment be read narrowly to avoid trenching on state autonomy?  
**Part VIII:** Should section 1 be read narrowly to avoid judicial overreaching?  

### I. Does *United States v. Kozminski* reduce section 1 to a ban on physically or legally coerced labor?  

Jennifer Mason McAward commences her insightful analysis of the badges and incidents doctrine by taking “as a given the prevailing judicial view that Section 1 bars only labor coerced by physical force or restraint.” She finds authority for that prevailing view in *United States v. Kozminski* (1989), which she reads as “holding that ‘involuntary servitude’ prohibited by the Thirteenth Amendment requires a showing of physical force or restraint in holding a laborer.” McAward is not the only distinguished scholar to read *Kozminski* this way. If her view is accurate, then *Kozminski* looms as a daunting obstacle to Thirteenth Amendment optimism.

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6 Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. Pa. J. Con. L. 561, 567 n.33 (2012); see also id. at 627 n.342 (characterizing *Kozminski* as “holding that psychological coercion is not enough to violate the rights guaranteed by Section 1 of the Thirteenth Amendment because that section should be narrowly construed to prohibit slavery and forced labor involving the use or threatened use of physical or legal coercion”).  
7 Other distinguished scholars have taken a similar view. *See, e.g.,__ Also by Vorenberg 241-42. (“the Court ruled that the Thirteenth Amendment did not assure laborers any rights beyond freedom from physical or legal coercion”). Andrew E. Taslitz, *Criminal Justice Successes and Failures of the Thirteenth Amendment*, in *The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment* 245, 261 (Alexander Tsesis ed. 2010) (charging that *Kozminski* “unwisely suggest[ed] in dicta that federal criminalizing of even the most
In Kozminski, several defendants were convicted of subjecting two mentally impaired men to “involuntary servitude” in violation of two federal statutes. Each statute incorporated the concept of involuntary servitude from the Thirteenth Amendment, one directly by including the term in the statute (§ 1584), the other by criminalizing conspiracies to violate rights “secured . . . by the Constitution or laws of the United States,” including the Amendment (§ 241). The jury had been instructed that the defendants could be convicted of imposing involuntary servitude on the basis of psychological coercion. The Court overturned the convictions, holding that the statutes prohibited only physical and legal coercion, not psychological coercion.

Does Kozminski hold, as McAward and others claim, that section 1 of the Amendment prohibits only the physical or legal coercion of labor? I have argued elsewhere that it says no such thing. However, judging from the impact of my argument to date (absolutely none), it couldn’t hurt to offer a (hopefully) improved version. To begin with, the Court said nothing to disturb its previous assertions that it had “left open” the question whether section 1, unaided by legislation, did anything more than prohibit slavery and involuntary servitude. That question had nothing to do with Kozminski, which hinged solely on the meaning of “involuntary servitude,” and not on whether the Amendment prohibited other things as well. Accordingly, the Kozminski Court mentioned the badges and incidents doctrine only once, to disclaim saying anything about it. After Kozminski, as before, it is the official position of the Supreme Court that the question remains open.

Second, and more fundamentally, neither the holding nor the reasoning of Kozminski purported to limit the scope of the Thirteenth Amendment itself. At first glance, that might seem impossible. Given that both statutes incorporated the concept of involuntary servitude from the Amendment, it would seem that a holding about the scope of the statute must also be, ipso facto, a holding about the scope of the Amendment. Indeed, the Court stated that Congress intended

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10 487 U.S. at 935-36.
11 Id. at 943-44, 953.
14 487 U.S. at 962 n.8.
the phrase “involuntary servitude” in section 1584 “to have the same meaning” as it did in the
Constitution.\textsuperscript{15} And most of the sources relied upon by the Court, including judicial opinions
and statutes enacted to enforce the Amendment, bear directly on the meaning of the Amendment
as well as that of the statute.

Justice O’Connor’s opinion for the Court, however, repeatedly and carefully
distinguished the enterprise of interpreting a constitutional provision that is incorporated in a
criminal statute from the enterprise of interpreting that same constitutional provision directly.
She left no doubt that the holding of \textit{Kozminski} goes to the meaning of the constitutional terms as
they are incorporated in the statutes, and does not limit their meaning in the Constitution itself:
“By construing § 241 and § 1584 to prohibit only compulsion of services through physical or
legal coercion, we adhere to the time-honored interpretive guideline that uncertainty concerning
the ambit of criminal statutes should be resolved in favor of lenity.”\textsuperscript{16} She further specified how
the interpretive constraints on criminal statutes opened a gap between the statutory and
constitutional meanings:

Because, as a criminal statute, § 1584 must be interpreted to conform with special
doctrines concerning notice, vagueness, and the rule of lenity, the issue here focuses on what \textit{central}
evil the words "involuntary servitude" unambiguously encompass in a way that can be defined with specificity. The interpretation of "involuntary servitude" here is thus necessarily narrower than it would be if the issue were what enforceable civil rights
the Thirteenth Amendment provides of its own force.\textsuperscript{17}

To ensure compliance with the doctrines of notice, vagueness, and lenity, the Court held
that Congress intended section 1584 to criminalize only forms of labor control that, as of the
statute’s enactment in 1948, had already been adjudicated by the Court. "At that time,” observed
O’Connor, “all of the Court's decisions identifying conditions of involuntary servitude had
involved compulsion of services through the use or threatened use of physical or legal coercion." Accordingly, "by employing the constitutional language, Congress apparently was focusing on
the prohibition of comparable conditions.” Thus, the scope of the statutory phrase, but not the
constitutional one, was frozen in time to “the scope of that constitutional provision at the time §
1584 was enacted.”\textsuperscript{18} Further, in ascertaining the Amendment’s scope at that time, the statutory
phrase, but not the constitutional one, was limited to the “\textit{central} evil the words ‘involuntary

\begin{itemize}
\item \textsuperscript{15} \textit{Id.} at 945.
\item \textsuperscript{16} \textit{Id.} at 952.
\item \textsuperscript{17} \textit{Id.} at 962 n.8 (italics in original).
\item \textsuperscript{18} \textit{Id.} at 948.
\end{itemize}
servitude’ unambiguously encompass.” In effect, the statute pickled the Court’s narrow holdings as of 1948, but not its broader statements of principle.

Section 241 posed a more tricky problem, but O’Connor solved it in a way that likewise distinguished sharply between the statutory and constitutional meanings. She found her solution in two previous decisions, United States v. Guest (1966) and United States v. Price (1966). Because section 241 referred to the Amendment generally (as opposed to lifting a particular phrase, as did section 1584), the Court in those cases had determined that

Congress intended the statute to incorporate by reference a large body of potentially evolving federal law. This Court recognized, however, that a statute prescribing criminal punishment must be interpreted in a manner that provides a definite standard of guilt. The Court resolved the tension between these two propositions by construing § 241 to prohibit only intentional interference with rights made specific either by the express terms of the Federal Constitution or laws or by decisions interpreting them.19

O’Connor then reviewed the Court’s decisions up to 1988, when Kozinski was decided. She looked solely to holdings and not to judicial language: “Looking behind the broad statements of purpose to the actual holdings, we find that in every case in which this Court has found a condition of involuntary servitude, the victim had no available choice but to work or be subject to legal sanction.”20 That historical fact, however, limited the scope of "involuntary servitude" only in the context of a criminal statute: “We draw no conclusions from this historical survey about the potential scope of the Thirteenth Amendment.” Only “through the narrow window that is appropriate in applying § 241,” was it “clear that the Government cannot prove a conspiracy to violate rights secured by the Thirteenth Amendment without proving that the conspiracy involved the use or threatened use of physical or legal coercion.”21

In short, Kozinski applied interpretive methods tailored to its criminal statutory context. When the constitutional terms were incorporated into criminal statutes, they entered an world far from that of ordinary constitutional interpretation. In order to ensure clear notice of criminal liability, the Court viewed the statutes through a “narrow window” with an eye toward finding the kind of unambiguous meaning that could arise only from previous Supreme Court holdings and not from “broad statements of purpose” or “amorphous definitions.”22 The Court’s survey of those holdings should not, instructed Justice O’Connor, be read to limit “the potential scope of

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19 Id. at 941..
20 Id. at 942-43.
21 Id. at 944.
22 Id. at 951.
the Thirteenth Amendment” as distinct from the statutes. She specified that the meaning of “involuntary servitude” in Kozminski was “necessarily narrower than it would be if the issue were what enforceable civil rights the Thirteenth Amendment provides of its own force,” the question that concerns us here.

It might be objected that, given the current composition and direction of the Supreme Court, all of this is whistling in the wind. Besides, even if the Court never held that section 1 reaches only physically and legally coerced labor, the fact remains that it has never applied section 1 to anything else during the 150 years since the Amendment’s ratification. Nevertheless, I believe that there is a big practical difference between an on-point Supreme Court holding and a void of decisions. As some of our critics have stressed, forward motion on the Thirteenth Amendment is far more likely to come from social movements and legislation than from transformative judicial decisions. Congress has already broken the barrier of physical and legal coercion by amending the Trafficking Victims Protection Act to reach psychological and financial coercion. If there is no holding to the contrary, then the Court might take leadership from Congress on the meaning of section 1 as applied to those forms of coercion just as it did with regard to the inalienable right to quit during the twentieth century. One need only read Kathleen Kim’s pathbreaking scholarship to understand that the question of coercion hinges far more on the section 1 concepts of slavery and involuntary servitude than on the meaning of “appropriate” in section 2. But if Kozminski limited section 1 to physical and legal coercion, then the TVPA’s ban on other forms of coercion could be supported only as legislation “appropriate” to the prevention of physical and legal coercion. Congress would be effectively blocked from contributing to the interpretation of section 1 until and unless the Court were ready to overrule Kozminski. Subsequent legislation could be defended only with reference to the fixed baseline of physical and legal coercion. And social movements would have to consider the obstacle posed by Kozminski each time they assessed the relative merits of the Amendment as compared to other possible foundations for a rights claim. All of these obstacles could be

24 See discussion infra at notes ___.
reduced or eliminated simply by jettisoning the notion that Kozminski limits the scope of the Amendment as opposed to criminal statutes incorporating its concepts.

II. Does the Civil Rights Act of 1866 support a broad reading of section 1 or only of section 2?

Under the Supreme Court’s current approach to constitutional interpretation, congressional actions closely following the ratification of a constitutional provision can supply “contemporaneous and weighty evidence” of the provision’s meaning.\(^{26}\) Four months after the ratification of the Thirteenth Amendment, Congress passed the Civil Rights Act of 1866. The Act went far beyond the mere outlawing of slavery and involuntary servitude to guarantee a broad array of “civil” (as opposed to social or political) rights. To prove a violation of the Act, it was not necessary to show that anyone had been placed in a condition of slavery or involuntary servitude. Instead, it was enough that the victim had been “depriv[ed] of any right secured or protected by this act,” a category that included the right of citizens “of every race and color” to “have the same right . . . as is enjoyed by white citizens” to make contracts, participate in court proceedings, own property, and enjoy the “full and equal benefit of all laws and proceedings for the security of person and property.”\(^{27}\)

Thirteenth Amendment optimists have relied heavily on the Act to support their view that section 1 of the Amendment prohibits far more than slavery and involuntary servitude, narrowly defined. McAward has objected, however, that “supporters saw the Act not as an articulation of the rights guaranteed directly by Section 1, but rather as a clear example of necessary and proper legislation to secure the freedom conveyed by Section 1.”\(^{28}\) She presents ample evidence from the legislative history tending to show that proponents of the Act located Congress’s power to enact the law in section 2, and that they took a broad view of Congress’s discretion to choose means to enforce section 1.\(^{29}\) As far as I can tell, however, only one of the quoted statements appears to indicate that the rights themselves – as opposed to the various provisions of the Act


\(^{27}\) Civil Rights Act of 1866, ch. 31, §§ 1, 2, 14 Stat. 27.


\(^{29}\) McAward, *Scope*, supra note 29, at 111-12; Jennifer Mason McAward, McCulloch and the Thirteenth Amendment, 112 COLUM. L. REV. 1769, 1789-90 (2012).
that provided for their enforcement – arose from section 2 and not from section 1. According to Representative Burton C. Cook of Illinois:

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

William Carter defends the contrary view. The congressional proponents of the Act held, he argues, that section 1 directly supported the Act. He quotes statements by several prominent Senators indicating that Congress would have enjoyed the power to enact the bill even without section 2. Moreover, most proponents who spoke on the issue indicated that the rights enumerated in the Act arose directly from the Constitution. “I take it that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens,” explained Senator Trumbull, “is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited.” Senator Jacob Howard and others likewise derived protection for civil rights directly from the Amendment, maintaining that it was intended to make the former slave into “the opposite of a slave, to make him a freeman,” a condition necessarily entailing “the right of acquiring property [and] the right of having a family, a wife, children, a home.” Both before and after ratification, prominent Republicans indicated that the Amendment itself would outlaw the incidents and vestiges of slavery.

30 CONG. GLOBE, 39th Cong., 1st Sess. 1124 (1866) (Rep. Cook); McAward, Scope, supra note 29, at 111-12.
32 Id. at 1342-43.
33 CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (Sen. Trumbull) (italics added); see also id. at 475 (“The once slave is no longer a slave; he has become, by means of emancipation, a free man. If such be the case, then in all common sense is he not entitled to those rights which we concede to a man who is free?”) Earlier, during a discussion of the Freedmen’s Bureau Act, Trumbull had made this point at greater length: “With the destruction of slavery necessarily follows the destruction of the incidents to slavery. When slavery was abolished, slave codes in its support were abolished also. Those laws that prevented the colored man going from home, that did not allow him to buy or to sell, or to make contracts; that did not allow him to won property; that did not allow him to enforce rights; that did not allow him to be educated, were all badges of servitude made in the interest of slavery and as part of slavery. They never would have been thought of or enacted anywhere but for slavery, and when slavery falls they fall also.” Id. at 322 (Sen. Trumbull); see also Carter, Badges, supra note 31 at 1345 [ck. __]
35 CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (Rep. Thayer) (“It was the purpose of that amendment to relieve those who were slaves from all the oppressive incidents of slavery.”) Prior to ratification, Senator James Harlan offered a long list of the incidents of slavery. CONG. GLOBE, 38th Cong. 1st Sess. 1439 (1864). In this speech, he
But there is stronger evidence on the issue, for this is one of those rare instances where our historical protagonists came very close to addressing the precise issue that concerns us today. Senator James Guthrie of Kentucky opposed the Act on the ground that it was unneeded because the Amendment, by itself, nullified the Black Codes and required the states “to put these Africans upon the same footing that the whites are in relation to civil rights.” In response, Senator Henry Lane of Indiana agreed “that all these slave laws [Black Codes] have fallen with the emancipation of the slave,” but explained that the Act was nevertheless necessary “because we fear the execution of these laws if left to the State courts.” Senator Trumbull echoed Lane, agreeing with Guthrie that “all slave codes fall with slavery, that it is the duty of the States to wipe out all those laws which discriminate against persons who have been slaves,” but asking “yet if they will not do it, and Congress has authority to do it under the constitutional amendment, is it not incumbent on us to carry out that provision of the Constitution?”

Apparently, then, the rights protected by the Act were guaranteed directly by the Amendment; legislation was required not to establish their status as legal rights, but to make their enforcement effective.

This brings us back to Representative Cook’s apparently contrary statement, quoted above. Although McAward’s reading of Cook is entirely plausible, there is an alternative possibility. Like Senators Lane and Trumbull, Cook might have believed that – as a practical matter – it would require legislation to protect the rights of freemen, not that section 1 without section 2 did not guarantee those rights in theory. Shortly before the passage quoted by McAward, Cook stated his point consistently with that view: “Suppose [section 2] had never been adopted, no court could hold that any man in any State had a right to hold another as his slave in the sense in which slaves had been held before; but it is apparent that under other names

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“made no reference to the power of Congress but implied that this, and other, incidents of slavery would be abolished by the amendment itself.” George Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, in *The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment* 163, 168 (Alexander Tsesis ed. 2010). Similarly, Senator Wilson promised that the Amendment, if enacted, would “obliterate the last lingering vestiges of the slave system; its chattelizing, degrading, and bloody codes; its dark, malignant, and barbarizing spirit; all it was and is, everything connected with it or pertaining to it . . . .” *Cong. Globe*, 38th Cong., 1st Sess. 1324 (1864).

36 *Cong. Globe*, 39th Cong., 1st Sess. 600 (1866) (Sen. Guthrie). “I do not see what benefit can arise from repealing them by this bill,” added Guthrie, “because if they are not repealed by the Constitution as amended, this bill could not repeal them.” *Id.*


38 *Cong. Globe*, 39th Cong., 1st Sess. 604 (1866) (Sen. Trumbull); *see also* quotations *supra* note __ [search “necessarily follows”].
and in other forms a system of involuntary servitude might be perpetuated over this unfortunate race. They might be denied the right of freemen unless there was vested a power in the Congress of the United States to enforce by appropriate legislation their right to freedom. . . .”

From this, it appears that Cook was concerned about the practical – not theoretical – limitations of section 1. It would alert courts that they could not enforce relations of chattel slavery, but – by itself – would provide no shield against more subtle attacks on the right to freedom, which might not depend on enforcement through the courts. On this view, the right of freedom springs from section 1, but it – unlike the ban on chattel slavery – requires enforcement legislation as a practical matter. Accordingly, Cook claimed congressional authority only to judge “what is necessary for the purpose of securing to them those rights,” not to identify the rights themselves.

In the final analysis (and unfortunately for clarity), the members of the Thirty-Ninth Congress were not enacting a coherent constitutional theory. Proponents of the Act all agreed that it was constitutional, but they did not express any unified view on the rationale. Some, for example, relied not only on the Thirteenth Amendment but also on other provisions of the Constitution, for example the privileges and immunities clause of Article IV and the general welfare clause of Article I. If they had been told that those theories were off the table (as they are today), would they then have shifted to sole reliance on section 1? On section 2? Or would they have conceded that the Act was unconstitutional? We don’t know. And how many proponents of the Act would, if asked, have endorsed each of the theories? Again, we don’t know. However, if they lined up in proportion to those who spoke on the question, then we would have clear evidence for a view of section 1 extending far beyond the dictionary definitions of slavery and involuntary servitude as conditions or statuses, and for a range of rights protections extending far beyond the rights to be free from slavery and involuntary servitude to

39 CONG. GLOBE, 39th Cong., 1st Sess. 1124 (1866) (Rep. Cook); McAward, Scope, supra note 29, at at 111-12.
41 Some members apparently believed that section 1 of the Amendment by itself merely removed the disability of slavery, but that the removal of that disability entitled the former slaves to enjoy the rights of citizens. Those rights, in turn, were bestowed upon them – as on all citizens – not by the Amendment itself but by other provisions of the Constitution, for example the privileges and immunities clause of Article IV. Proponents of this theory embraced a broad concept of substantive constitutional rights that conflicted with pre-Civil War court decisions and with the present-day view of the Article IV privileges and immunities clause. See CONG. GLOBE, 39th Cong., 1st Sess. 1056 (1866) (Rep. Higby); Amar, Bill of Rights __. On the general welfare clause, see CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866) (Rep. Broomall) (suggesting that the Act was supported by the general welfare clause and the inherent power of government to protect its citizens).
include at least the rights enumerated in the 1866 Act. Given that many of the speakers were influential leaders, it does not seem unreasonable to give their statements considerable weight.

III. Pragmatically, would we do better to focus on section 2 than on section 1?

Thus far, we have approached the meaning of section 1 as an issue of constitutional principle. Some of our leading Thirteenth Amendment scholars, however, have suggested that—regardless of the constitutional merits—it might be a waste of time for scholars and lawyers to challenge the status quo on section 1. McAward maintains that taking the status quo as given “acknowledges the political reality that the Court is unlikely to alter prevailing Section 1 doctrine any time soon.”42 Similarly, Rutherglen declines to express an opinion on the reach of section 1 (he acknowledges that it would take a “thorough analysis of the historical record” to refute arguments that it extends beyond physical and legal coercion) but because “the current Supreme Court has shown little sympathy for the progressive uses of constitutional law, especially to protect employees, and if anything has shown the reverse.”43 He stresses that, in the century and a half since the Amendment’s ratification, “[n]either the right nor the left, nor anyone in between, has been successful in expanding the prohibition against involuntary servitude based solely on Section 1 of the Amendment.”44 Section 2, on the other hand, has supported important civil rights legislation. Accordingly, those who wish to revive the Amendment should emphasize section 2, not section 1: “The history of the Thirteenth Amendment reveals no examples of judges adopting and extending analogies to slavery without congressional approval. If the Amendment’s scope expands, it will be under Section 2 rather than Section 1.”45 Jamal Greene concurs, and observes that arguments for expanding “the self-executing scope of Section 1 may in some cases have significant epistemic or historical value, but such arguments have no other contemporary relevance and make little strategic sense.”46

In my view, these scholars are both right and wrong—right about the bleak prospects for judicial leadership in the expansion of section 1 and wrong about the relative importance of sections 1 and 2. Few would quibble with McAward’s prediction that change is unlikely to come

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42 McAward, supra note 6, at 567-68.
45 Rutherglen, Thirteenth Amendment, supra note 45, at 1579-80.
46 Greene, supra note 1, at 1736-37.
from the Court “any time soon,” and Rutherglen and Greene provide ample historical evidence of the Court’s longstanding practice of rejecting section 1 claims. They argue persuasively that if the Thirteenth Amendment is to be revived, the impetus will come primarily from political activity not lawsuits. 47 But all three of these scholars additionally assume that if the courts are unlikely to change the law of section 1, the focus of scholars should be on section 2. In my view, this is a nonsequitur. Section 1 is the heart and soul of the Amendment; it contains all of the Amendment’s substantive content; section 2 merely grants Congress enforcement power – and in terms virtually identical to the enforcement clauses of the Fourteenth, Fifteenth, Nineteenth, Twenty-Third, Twenty-Fourth and Twenty-Sixth Amendments. Regardless of whether courts, Congress, or We the People take the lead, the fate of the Thirteenth Amendment hinges first and foremost on section 1.

Consider the relative roles of rights definition and enforcement authority in our historical experience. Most of the constitutional rights that we celebrate today amounted to nothing more than paper guarantees until social movements campaigned to make them real. Some movements relied heavily on specific provisions of the Constitution, for example the Free Speech Clause of the First Amendment and the rights-granting clause of the Second Amendment. Others framed their claims with reference to highly abstract guarantees like the Due Process Clause and the Equal Protection Clause. 48 Some sought relief from Congress while others relied heavily on the courts. Whatever the textual foundation or institutional target, however, the struggle centered on the merits of the rights claim and not on the scope of congressional power. Social movements advanced rights claims to foster commitment, broaden public support, and justify the defiance of laws and private rules that they held to be unconstitutional. 49 For example, former slaves exercised a wide variety of rights – including those of free speech, free exercise of religion, assembly, and bearing arms – under the banners of the Thirteenth and Fourteenth Amendments. 50 Women suffragists cited the Fourteenth Amendment as justification for voting in defiance of male-only voting laws. Socialist and Wobbly soap box speakers proclaimed their right to free

47 Rutherglen, Thirteenth Amendment, supra note 45, at 1583 (“change will most likely come, if at all, from incremental advances in the interpretation of existing enforcement legislation or from the enactment of new legislation”); Greene, supra note 1, at __.
49 Nancy Fraser etc. from LCF.
50 Black Conventions __; Foner on struggle over meaning of freedom __ [pages from CRCL].
speech as officers hauled them off to jail. \(^{51}\) Workers defied anti-picketing and anti-strike injunctions citing the First and Thirteenth Amendments. Civil rights activists flouted segregation laws and sat in at private lunch counters under the aegis of the [Thirteenth and] Fourteenth Amendment. Gun rights proponents brought the Second Amendment to life through political activism. These struggles are, consistently with Rutherglen’s and Greene’s analysis, imminently political. But they also inevitably focus on the merits of the rights claim (the section 1 issue in the case of the Thirteenth Amendment), on which popular political support depends.

To be sure, questions of congressional power can take center stage when courts and legislative bodies respond to social movement claims. Courts sometimes dodge the issue, leaving enforcement to Congress as in *Palmer v. Thompson*. And Congress may accept the justice of a social movement claim, but choose to ground enforcement legislation on a different power as in the case of the Child Labor Act of 1916, advocated by the American Federation of Labor as a measure to enforce the Thirteenth Amendment, but passed by Congress under authority of the Commerce Clause. \(^{52}\) This does not, however, give reason to doubt the centrality of the underlying rights claim. Consider, for example, the labor and civil rights movements of the twentieth century. In each case, the movement won broad political support for rights claims (the rights of workers to organize and strike in the case of the labor movement, and rights of racial equality in the case of the civil rights movement) through advocacy and direct action. In each case, the movement scored some litigation victories – far more numerous and important in civil rights, but enough to establish a foothold in labor as well. \(^{53}\) In each case, Congress enacted landmark statutes to protect the claimed rights. But also in each case, Congress ultimately chose to ground key statutory protections on the Commerce Clause instead of the provisions stressed by the social movements (the Thirteenth Amendment in the case of labor, and the Fourteenth in the case of civil rights). Only at that late moment did the question of congressional power – as distinct from the merits of the rights claim – emerge to the forefront. Rutherglen Columbia

\(^{51}\) Rabban IWW; Wertheimer dissertation; *see* Michael Kent Curtis, *The People’s Darling__


\(^{53}\) The labor movement won many First Amendment cases including landmark decisions in *Hague v. CIO*, *Thornhill v. Alabama*, and *Thomas v. Collins*. Kairys on 1A in Kairys ed., *Critical Legal Studies*. Concerning the Thirteenth Amendment, advances were temporary and limited to lower courts and occasional observations in Supreme Court dissents. *See, e.g.*, *AFL v. Am. Sash & Door Co.*, 335 U.S. 538, 559 (1949) (Rutledge, J., joined by Murphy, J., concurring in *Lincoln Fed. Labor Union No. 19129 v. Nw. Iron & Metal Co.*, 335 U.S. 525 (1949)) (describing as “momentous” the question of a Thirteenth Amendment right to strike); Pope, 13A versus Commerce Clause __.
1561: Kennedy administration initially relied on 13A but “In an era still dominated by the
Dunning School of history, which emphasized the regional resentment created by Reconstruction
rather than its achievements, an appeal to the Thirteenth Amendment would have alienated
legislators whose support was crucial to passage of the Act.”

As a practical matter, then, the Amendment will rarely beckon to courts, Congress, or
We the People as long as the ex-Confederate view of section 1 remains dominant. Each time an
opportunity arises, other provisions are likely to appear more attractive.\textsuperscript{54} To put the scope of
section 1 to one side, as McAward, Rutherglen, and Greene urge, would be to surrender without
a fight. In my view, these scholars could advance our understanding of the Amendment even
more effectively than they already have if they were to focus their formidable talents on section 1
instead of directing us toward section 2.

\textbf{IV. Has the Thirteenth Amendment already accomplished its purpose?}

Rutherglen suggests that “the Amendment has been neglected, not out of desuetude, but
because it has become a victim of its own success.” He finds evidence of this success in the
demise of chattel slavery and the relegation of peonage “to the margins of American life.”\textsuperscript{55} To
McAward, there is little need for enforcement legislation because, “[a]t this point in our nation’s
history, it is mercifully difficult to envision any racist act—alone or in combination—that
abridges such fundamental liberties that one could reasonably fear the return of an entire race (or
even a single individual of that race) to slavery or legally subordinate status.”\textsuperscript{56}

We could argue about the extent of the Thirteenth Amendment’s success at eliminating
slavery and marginalizing peonage, or about how mercifully difficult it is to imagine the
enslavement of a single member of a racially defined group. What about human trafficking and

\textsuperscript{54} Goldfarb 536: “Despite the many parallels between violence against women and slavery, neither Congress nor
the petitioners in Morrison claimed the Thirteenth Amendment as a constitutional basis for the civil rights provision
of the Violence Against Women Act. The decision not to invoke the Thirteenth Amendment was no doubt made for
strategic reasons, in light of the apparent strength of the Commerce Clause and section 5 arguments and the relative
novelty of a Thirteenth Amendment claim.”

\textsuperscript{55} Rutherglen, Thirteenth Amendment, supra note 45, at 1576.

\textsuperscript{56} McAward, supra note 6, at 626. McAward would limit congressional power to the prohibition of conduct that
“would have the cumulative effect of subordinating an entire race to the point that it would render it unable to
participate in and enjoy the benefits of civil society. The prophylactic nature of the Section 2 power demands no
less.” Id. at 629.
the “new slavery”? What about the “caste” of undocumented immigrant workers “laboring beneath the floor for free labor”? What about forced labor in the burgeoning prison-industrial complex, where incarceration may be less for the “punishment of crime” (which is exempted from the Amendment’s prohibition) than for the production of profit and the preservation of white supremacy?

But there is a more basic issue at stake here. The Amendment can be adjudged successful only if section 1’s prohibition has been effectively implemented. If section 1 prohibits more than slavery, peonage, and race-based “legally subordinate status,” then the elimination or marginalization of those evils alone cannot suffice to indicate success. And if those evils are defined broadly to include, for example, economic coercion and denials of rights essential to participation in a free labor system, violations might be widespread. Once again, the issue hinges on the meaning of section 1.

V. Is section 1 so precisely worded that it leaves little room for interpretation?

The Supreme Court once opined that “the words of the Thirteenth Amendment ‘seem hardly to admit of construction, so vigorous is their expression.’” McAward similarly suggests that the “language of Section 1 does not, on its face, invite broad-ranging interpretation.” To the contrary, “[i]ts proscription of slavery and involuntary servitude is precise, not ‘vague and elastic,’ as Justice Frankfurter once described the Constitution’s ‘great concepts’ that were ‘purposefully left to gather meaning from experience.’”

57 KeviN BAlEs & Ron SOOdALTER, THe SlaVe NeXt DOor: HuMaN TRAFFICKING And slaveRY In AmerIca TOdAy (2009); DenIse BRennAnaN, lIFe INtERRUPTeD: TRAFFICKING INTO FORCed LABOR IN THE UNErTED STAteS (2014).
58 MaRia OnTiveRos, lABOR UNIOn COalITION CHALLENGES TO GOVernMenTAL aCTION: DeFENDInG THE CIVIL RIGHTS OF low-WAge WORKeRS, 2009 U CHi LEGAL F 103, 134; see alsO MaRia l. OnTiveRos, IMMIGRANT WORKeRS’ RIGHTs IN A P ost-HoffMan WOrLD - ORGANIZING AROUnD THE thIrTeHNTH aMendMent, 18 Geo. IMMIGR. L.J. 651, 658 ___[cK.] (2005); Ruben J. Garcia, GhoST WORKeRS IN AN INTeRCONNeCTED WOrLD: GoINg BeYOND THE DIcToMAtIES OF DOMINICAN IMMIGRAtION AND LABOR LAWS, 36 U. MICh. J.L. REFORM 737, 754-55 (2003) (suggesting that the condition of undocumented immigrant workers can resemble that of slaves).
59 Ryan S. Marion, PrIsOneRs For SAle: making thIRteHNTH aMendMent CAse GaInSt STate PrIvate PrIsOn CoNTRActs, 18 WM. & MARY BiLL RTs. J. 213 (2009); Raja Raghunath, A P rIomise THE NATION CAnNOT KEEP: WHAT PRevents THE ApPLICAtION OF THE thIrteHNTH aMendMent IN PrIson?, 18 WM. & MARY BiLL RTs. J. 395 (2009); MICHelLe ALEXANDeR, thE NeW JIM CRow: Mass InCarCerAtION IN thE Age oF CoLorBRInDess (2010); RuTH WIlSOuN GILMOrE, GOLDeN GULAG: PrIsons, SuRPLUS, CrIsIS aNd oPpOnItION IN GlobAlIzINg CaLIfORNIA (2007). For a deep and illuminating analysis of the law of prison labor, see Zatz, __.
60 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69 (1873).
61 McAward, sCope, supra note 29, at 132.
Greene concurs. He suggests that the Amendment “refers to three specific practices—slavery, involuntary servitude, and punishment for crime—the scopes of which were well understood (indeed, too well understood) at the time of the Amendment’s adoption and which remain well understood today.”62 Within the professional culture of law, optimistic proposals seem not only wrong, but off the wall. “The proposition that private use of racial slurs or a state prohibition on abortion qualifies as slavery or may be regulated as such does not merely feel technically incorrect as a matter of current legal doctrine; it intuitively seems to misunderstand the English language and the terms of art used within it.”63

This is the one point on which I would say that our critics might have crossed the line to polemic. If the meaning of section 1 is so clear, then why not explain it? Does the purported clarity derive from the text? Normally, textual analysis starts from contemporary dictionary definitions, but none of the critics refer to the definitions of slavery or involuntary servitude which, as Akhil Amar, Daniel Widawsky, Jack Balkin, Sanford Levinson and others have pointed out, can be capacious in some dimensions.64 Worse, scholars (and judges) sometimes play fast and loose with the text in their enthusiasm for narrowing the Amendment. “Forced labor” crops up as a synonym for “involuntary servitude” despite the obviously distinct (though overlapping) meanings of those two phrases.65 And “chattel” has been known to slip in as a modifier to “slavery” despite the absence of any such modifier in the constitutional text.66 But perhaps the critics find their clarity in history. Nobody disputes that the Amendment’s immediate purpose was to eliminate chattel slavery. Nevertheless, as Lea Vandervelde, Rebecca Zietlow and others have shown, there is a wealth of contemporary evidence that the Amendment’s framers and ratifiers contemplated the achievement of much broader purposes than the elimination of chattel slavery or of physically or legally forced labor.67 Moreover, it is

62 Greene, supra note 1, at 1736.
63 Greene, supra note 1, at 1736.
64 Amar & Widawsky, supra note 5; Balkin & Levinson, supra note 4, at; McConnell Battering; Pope Contract Race.
65 McAward, supra note 6, at 627 n.342 (characterizing Kozminski as “holding that psychological coercion is not enough to violate the rights guaranteed by Section 1 of the Thirteenth Amendment because that section should be narrowly construed to prohibit slavery and forced labor involving the use or threatened use of physical or legal coercion”). On the distinct meaning of the phrases, see Pope Contract Race __.
66 Greene, supra note 1, at 1735 (classifying as “optimism,” in contrast with “interpretivism,” the practice of making arguments that the Amendment prohibits in its own terms, or should be read by Congress to prohibit, practices that one opposes but that do not in any obvious way constitute either chattel slavery or involuntary servitude as those terms are ordinarily understood.”) (Emphasis added).
67 Vandervelde Labor Vision; Zietlow Ashley; Tsesis book.
an interpretive choice to narrow a broad text to an immediate purpose. During the years closely following ratification, it might be “a kind of trickery” to seize upon the broad language of a provision and apply it outside its generally understood scope.\footnote{David A. Strauss, \textit{Common Law, Common Ground, and Jefferson’s Principle}, 112 YALE L.J. 1717, 1753 (2003).} As the historical context fades into the past, however, it seems appropriate that the framers’ and ratifiers’ expected applications give way to the enacted text.\footnote{\textit{Id.} at 1753-54.} This has been the Court’s practice with regard to other provisions including the Free Speech clause, eventually broadened far beyond its immediate purpose of protecting against prior restraints, and the Equal Protection Clause, now extended to cover discrimination based on sex, national origin, alienage, and illegitimacy as well as race.

VI. Do the Commerce Clause and the Fourteenth Amendment shrink the Thirteenth?

It has been argued that the Thirteenth Amendment should be read narrowly in order to avoid trenching on issues more appropriately dealt with under other provisions of the Constitution. Andrew Taslitz, for example, maintains that the Amendment’s potential scope should be limited to avoid rendering the Fourteenth Amendment “pointlessly repetitive.”\footnote{Taslitz chapter __ 258. Taslitz extends this point to the Fifteenth Amendment as well. \textit{Id.} This idea is reflected in some judicial decisions, where the Court has retrofitted Fourteenth Amendment doctrines to limit the scope of legislation enacted under the Thirteenth. \textit{See} Soifer Chapter 202 (\textit{citing} General Building Contractors Ass’n v. Pennsylvania, 458 U.S. 375, 389 (1982), where the Court asserted that it would be “incongruous to construe [the Civil Rights Act of 1866] in a manner markedly different from that of the Fourteenth Amendment itself.”). Soifer comments: “As modern justices undertake interpretation of the CR Act of 1866, they betray an awkward zeal to fit the broad terms of a hard-fought congressional initiative passed in the throes of the Civil War within an abstract, narrowing template developed by the Court itself years later.” 205.} Similarly, McAward warns that an expansive interpretation of the Thirteenth Amendment “would overlap in large part with—and even supplant—the Commerce Clause as the justification for some of the most far-reaching federal legislation.”\footnote{McAward, \textit{ supra} note 6, at 613.}

Neither Taslitz nor McAward explain why it would be bad for the Thirteenth Amendment to overlap the Fourteenth Amendment or the Commerce Clause. From a functional point of view, there is no redundancy. Where the Thirteenth overlaps with the Fourteenth and Fifteenth, it exceeds their practical reach because it applies to private as well as state actors. And where it overlaps the Commerce Clause, it similarly goes further because it is not limited to violations that are connected to interstate commerce. Nor does it appear harmful for the Thirteenth
Amendment to supplant the Commerce Clause as the foundation for civil rights legislation. Indeed, it seems more questionable to ground civil rights statutes on the Commerce Clause than on a civil rights guarantee like the Thirteenth Amendment; if either should get out of the way, it would seem to be the Commerce Clause.72

It could be argued that the Fourteenth and Fifteenth Amendments (but not the previously enacted Commerce Clause) would never have been proposed, much less ratified, if the Thirteenth already protected rights within their coverage. This idea traces back to the Slaughter-House Cases (1873), where the Supreme Court first addressed the merits of claims based on the Reconstruction Amendments. Justice Miller, writing for the Court, sought the meaning of the Amendments in the history of their enactment which, he claimed, was “fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.” In Miller’s account, the Thirteenth, Fourteenth, and Fifteenth Amendments were each enacted to solve a particular, discrete problem.73 First, the victors of the Civil War constitutionalized emancipation in the Thirteenth Amendment. Unfortunately, southerners responded by enacting the Black Codes, forcing “upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much.” Hence the Fourteenth Amendment. After a few years, however, “the thoughtful men who had been the authors of the other two amendments” realized “that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage. Hence the fifteenth amendment.”74

Chief Justice Miller’s tale is nothing if not coherent and conceptually neat. At each stage, the heroes of reunification acted as a body, rectifying gaps in the prior law. The Thirteenth clarified and constitutionalized the abolition of slavery; the Fourteenth did away with the Black Codes; and the Fifteenth secured practical equality under the legal regime thus

72 From the outset, a variety of legal thinkers, including Justices Oliver Wendell Holmes, William O. Douglas, and Gerald Gunther have questioned the honesty and integrity of framing civil rights statutes as exercises of the commerce power. See Pope Colum. at 4 n.5 (citing sources).
74 83 U.S. at 68, 70, 71.
established. Whatever this narrative’s strengths, however, it bore little relation to reality. Somehow, Miller’s “fresh” memories did not include the inconvenient fact that the Black Codes had been nullified not by the Fourteenth Amendment, but by the Thirteenth Amendment and the Civil Rights Act of 1866, enacted under its authority. Nor did his tale of events “free from doubt” include the momentous struggle between Congress and President Andrew Johnson over the constitutionality of the Act, including Johnson’s veto and Congress’s first-ever override of a Presidential veto. As we have seen, most of the Senators and Representatives who spoke in favor of the Fourteenth Amendment did so not because they doubted whether the Thirteenth authorized the Act, but because they did not want to face future fights with the President and other naysayers every time Congress passed a civil rights bill.

Nevertheless, there is a logic of sorts behind Miller’s approach. “On the common assumption that no constitutional provision was designed to be ‘mere surplusage,’” observes Mark Graber, “the Constitution interpreted as a whole suggests that the Thirteenth Amendment prohibits slavery only, while the Fourteenth Amendment declares the rights of newly freed slaves.” George Rutherglen similarly suggests that the contrast between court decisions interpreting the first sections of the Thirteenth Amendment (“few and restrictive”) and the Fourteenth (“many and expansive”) “reveals the narrow focus of the Thirteenth Amendment on the immediate aim of abolishing slavery, leaving the consequences of slavery to be addressed by further legislation.” In this view, the enactment of the Fourteenth Amendment effectively narrowed the Thirteenth. Although the Thirteenth could have been interpreted and applied to its full extent had the Fourteenth never been enacted, the arrival of the Fourteenth – combined with the principle of no “surplusage” – had the effect of shrinking the Thirteenth to make room for the

75 For early presentations of this point, see Jacobus tenBroek, Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment, 39 CALIF. L. REV. 171 (1951); Harold M. Hyman & William M. Wiecek, Equal Justice Under Law” Constitutional Development, 1835-75 (1982) [No particular reason to think they’ve got this, but worth checking.].
76 See supra notes ___ & accompanying text.
77 See supra notes ___ & accompanying text.
79 Rutherglen, Thirteenth Amendment, supra note 45, at 1558. As is apparent from the quotation, Rutherglen limits the Fourteenth Amendment’s narrowing effect to section 1 of the Thirteenth; he accommodates the broad view of Congress’s enforcement power expressed in Jones, 392 U.S. at 440, by allowing for overlap between section 2 of the Thirteenth and section 5 of the Fourteenth. Cf. McAward, McCulloch, supra note 30, at 1774 (suggesting that interpreting the Amendment to permit only legislation “directly tied to slavery and involuntary servitude” or to “a limited subset of discriminatory conduct that threatens the reinvigoration of slavery or involuntary servitude” avoids “redundancy”).
new Amendment to perform a distinctive, nonoverlapping role. Hence Miller’s retroactive narrowing of the Thirteenth to create an ahistorical but conceptually neat gap for the Fourteenth to fill. Graber calls this process “subtraction by addition.”

It is not clear, however, that the presumption against surplusage operates with full force where one provision follows another in time. The term “mere surplusage” comes from *Marbury v. Madison*, where the Court was considering phrases enacted simultaneously. In that context, it is not unreasonable to presume that each phrase was meant to convey at least some distinctive meaning; otherwise there would be a clear redundancy. With regard to a sequence of provisions over time, however, the presumption weakens. Instead of crafting a single text, proposers and ratifiers respond to a changing series of real-world problems. They might enact new, more specific language to clarify matters that they believed had been resolved in previous provisions. As we have seen, that appears to have been the impetus behind section 1 of the Fourteenth Amendment. After further research, Graber himself has come to that conclusion: “John Bingham aside, very few members of Congress thought Section 1 contributed much more than a restatement of existing constitutional commitments.” He makes a strong case that the original contribution of the Fourteenth Amendment lay mainly in sections 2 and 3, which deal with suffrage, representation in Congress, and the eligibility of ex-Confederates for state and federal office. On this view, the Thirteenth and Fourteenth Amendments do overlap, with the Fourteenth restating in specific language some of the rights protections already contained in the general language of the Thirteenth, but also adding important new meaning in sections 2 and 3. Considering President Johnson’s vetos of the Civil Rights Act and the Freedmen’s Bureau Act, it is understandable why Congress would consider it advisable to restate and clarify protections already contained in the Thirteenth Amendment.

In short, traditional methods of interpretation might yield an interpretation of the Thirteenth Amendment that extends into areas also covered by the Fourteenth Amendment and the Commerce Clause. However, it does not appear that the resulting overlaps pose any particular problem or threaten any identifiable harm that would warrant judicially repealing part

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80 Graf, *Subtraction*, supra note 78, at 1535-36.
82 See supra text accompanying notes __.
83 Mark A. Graber, *Constructing Constitutional Politics: Thaddeus Stevens, John Bingham, and the Forgotten Fourteenth Amendment* (unpublished manuscript), at 10.
of the Amendment.\(^{84}\) Justice Miller’s tale of non-overlapping successive Amendments in *Slaughter-House*, though conceptually neat, departs so drastically from the actual events that it is hard to see why we should accept it today.

**VII. Should the Amendment be read narrowly to avoid trenching on state autonomy?**

From the outset, the narrow reading of section 1 has been justified as necessary to prevent undue intrusions on state autonomy. Opponents of the 1866 Civil Rights Act argued that if Congress could protect black civil rights, then there would be nothing to stop it from legislating about all personal rights of all citizens thereby effectively abolishing the states.\(^{85}\) Congress overrode this argument twice by thumping majorities, but Justice Brewer’s opinion for the Court in *Hodges* v. *United States* (1906) rehabilitated it. In *Hodges*, a group of whites took up arms and drove eight black laborers away from the Arkansas saw mill that employed them.\(^{86}\) A jury convicted the attackers of conspiring to prevent the laborers from exercising their right “to make and enforce contracts” on the same basis as whites, protected by the Civil Rights Act of 1866. The Court held that the Act exceeded the scope of Congress’s Thirteenth Amendment enforcement power. Justice Brewer, writing for a majority of seven, focused solely on section 1 of the Amendment. He quoted Webster’s definition of "slavery" as "the state of entire subjection of one person to the will of another," and “servitude” as "the state of voluntary or compulsory subjection to a master." Because the black laborers had no master, they could not be in a

\(^{84}\) Amar suggests that “doctrinal rules implementing the Fourteenth Amendment’s basic principles must be sensitively crafted in light of Thirteenth Amendment principles. Neither Amendment ‘trumps’ the other; rather they must be synthesized into a coherent doctrinal whole.” Amar, Missing Amendments 157 n.180.

\(^{85}\) CONG. GLOBE, 39th Cong., 1st Sess. 1775 (1866) (Sen. Johnson) (“If Congress can legislate in relation to [civil] rights in behalf of the black, why cannot they legislate in relation to the same rights in behalf of the white? And if they can legislate in relation to both, the States are abolished.”); *id.* at 477 (Sen. Saulsbury) (opposing the Civil Rights bill on the ground that “if you can regulate and govern in one particular, you can govern in reference to all the property and all the interests of the States.”); *id.* at 1414 (1866) (Rep. Davis) (“The principles involved in this bill, if they are legitimate and constitutional, would authorize Congress to pass a civil and criminal code for every State in the Union.”); *id.*, House Appendix 158 (Rep. Delano) (maintaining that if the Act were constitutional, then Congress could “manage and legislate with regard to all the personal rights of the citizen—rights of life, liberty, and property. You render this Government no longer a Government of limited powers.”).

condition of slavery or involuntary servitude.\(^{87}\) Therefore, the whites had not violated the Amendment and Congress could not reach their activity.\(^{88}\) Although *Hodges* involved violent and intentional interference with black labor freedom, the Amendment’s core concern, Brewer chose to worry instead about the possibility that the national government might seize on the Thirteenth Amendment as authority to displace the states’ authority over all personal rights. He claimed – here echoing congressional opponents of the 1866 Act – that if the Amendment reached racially motivated interferences with the right to make contracts, then it must reach “every wrong done by an individual to another,” thereby transferring to the national government “that protection of individual rights which prior to the Thirteenth Amendment was unquestionably within the jurisdiction solely of the States.”\(^{89}\) For the next six decades, spanning the constitutional revolution of the 1930s and the rise of the civil rights movement in the 1950s and 1960s, *Hodges* gutted the badges and incidents doctrine and blocked the development of a Thirteenth Amendment jurisprudence of race. Today, even though *Hodges* has been overruled as to congressional power, the courts have yet to reject or go beyond its narrow interpretation of section 1.

Neither Brewer nor the opponents of the 1866 Civil Rights Act contended that state autonomy was unduly threatened by federal protection for the rights actually listed in the final version of the Act. So they framed their federalism claims as slippery slope arguments, positing inevitable slides down to future federal protection for all personal rights, where the threat to state autonomy appeared more compelling. Eugene Volokh offers a useful framework for analyzing and assessing this type of argument. Suppose that there are two or more possible outcomes in a case, and that one of them (call it “A”) is under consideration. A slippery slope argument consists in the claim that although A by itself might be an acceptable choice, it should nevertheless be rejected because there is an unacceptable risk that it might lead legislators, voters, or judges to choose future outcome B, which would clearly be a mistake.\(^{90}\) Volokh suggests that the validity of any particular slippery slope argument depends upon (1) the value of

\(^{87}\) Id. at 17.

\(^{88}\) *Hodges*, 203 U.S. at __ [precedes opinion, which begins on 14.] Unlike the *Jones* Court, the *Hodges* Court did not accord Congress any leeway to go beyond the Court’s narrow interpretation of section 1.

\(^{89}\) *Hodges*, 203 U.S. at 17-18. Hence, the case posed the question whether it was “the intent of the Amendment to denounce every act done to an individual which was wrong if done to a free man and yet justified in a condition of slavery, and to give authority to Congress to enforce such denunciation,” to which the answer was, in Brewer’s view, clearly no. *Id.* at 19.

A, (2) the harmfulness of B, and (3) the likelihood that A will lead to B. Concerning the third, it is important to note that the mere availability of a theoretical slippery slope stopper is not enough to counter the argument. It is possible that the implementation of A might set in motion a variety of real world dynamics that could lead legislators, voters, or judges to breach the stopper and go all the way to B. Volokh illustrates the point with a First Amendment example. Suppose that outcome A is a ban on Nazi advocacy, and outcome B is a ban on all “offensive” advocacy. Logical slippery slope stoppers are available, for example the instantaneous emotional harm inflicted by Nazi advocacy on victims of the Holocaust and their descendants. Nevertheless, many people who supported protection for all advocacy might now feel that there is an injustice because the type of advocacy that they find exceptionally offensive, for example communist advocacy or atheist advocacy, is not also banned. As a result, they might now join a coalition favoring B.

Applying Volokh’s framework to Hodges, “A” is federal protection for the right of all citizens to make contracts on the same basis as white citizens, while “B” is federal protection for all personal rights that had been denied to slaves and guaranteed to free people. Justice Brewer said nothing about the value of A, suggesting that he did not regard its sacrifice as a cost. On the harmfulness of B, he warned that state autonomy would be diminished far beyond “the intent of the Amendment” if it were read to transfer from state to national authority every right that was denied to slaves and enjoyed by free people – a category that included virtually every personal right. On the likelihood that A would lead to B, Brewer maintained that there was no acceptable stopping point between them. The government had proposed one, namely that the Amendment reached only racially motivated interferences with civil rights. To Brewer, however, the racial motivation stopper kicked in too far down the slope, as it would transfer to the national government jurisdiction over every wrong committed “by any men upon any man on account of his race” without regard to prior enslavement – matters that “prior to the Thirteenth Amendment [were] unquestionably within the jurisdiction solely of the States.”

In dissent, Justice Harlan wrote that to reject A would be to “deny to millions of citizen-laborers of African descent, deserving their freedom from the Nation, the right to appeal for

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91 Id. at 1031.
92 Id. at 1033-35.
93 See id. at 1060-61.
94 solely on account of his color
95 Id. at 18.
National protection against lawless combinations of individuals who seek, by force, and solely because of the race of such laborers, to deprive them of the freedom established by the Constitution of the United States.”96 Having valued A so highly, Harlan did not find it necessary to refute the contention that its sacrifice could be justified by the mere possibility of some future intrusion on state autonomy (B).

The contentions advanced by the opponents of the 1866 Act and by Brewer provide cautionary tales about the perils of slippery slope arguments. Each served to divert attention from the actual issue at stake (namely “A,” the right of citizens of all colors to enjoy the same core civil rights as white citizens) to a distant hypothetical outcome (namely “B,” federal jurisdiction over all personal rights). Neither paid any attention to the value of A, an essential element of any principled slippery slope argument.97 Likewise, neither provided any explanation why A would lead to B, apparently relying instead on unreasoning fear to carry the day.98 In both cases, subsequent experience confirmed the error of the argument. Congress overrode the first, and nothing remotely resembling B transpired, as the Supreme Court simultaneously announced and sharply delimited the badges and incidents doctrine in the Civil Rights Cases (1883). The second succeeded in Hodges, and the cost of sacrificing A proved devastating, as African Americans were — for six decades — stripped of protection against private, racially motivated discrimination and violence.99

Despite this experience, federalism slippery slopes persist in Thirteenth Amendment scholarship today. McAward argues that the Amendment threatens federalism values so seriously as to warrant strict limits on the combined scope of sections 1 and 2 — limits “sufficiently narrow that Congress’s Thirteenth Amendment enforcement power may well have limited applicability today.”100 Without such limits, section 2 might be transformed “into a general police power (or at least a general civil rights power) that would give Congress

96 Id. at 36-37 (Harlan, J., dissenting).
97 As Frederick Schauer points out, “[b]y focusing on the consequences for future cases, we implicitly concede that this instance is itself innocuous, or perhaps even desirable. If we felt otherwise, then we would not employ the slippery slope argument, but would rather claim much more simply that this case, in itself, is impermissible.”
99 She does suggest, however, that the Thirteenth Amendment might lack a requirement of intentional discrimination so that disparate impact claims could be brought under its authority. Id. 617
100 McAward, Badges, supra note 6, at 569.
jurisdiction over issues generally thought to be the proper subject of state regulation.”101 It is a long way down the slope from McAward’s strict limits to a general police power, but she does not find it necessary to explain why the slope is so slippery that limits could not be placed far enough down to allow a meaningful role for the Amendment. Not only McAward, but Balkin and Levinson, who are not hostile to Thirteenth Amendment optimism, give credence to the slippery slope. They warn that “once it is acknowledged that ‘slavery’ need not be identical to or closely resemble African chattel slavery, the attack on slavery might threaten not only modern capitalism and the modern state, but also any number of traditional social formations and traditional status relations.”102 I agree, but I doubt that Balkin and Levinson mean to imply that there is a truly slippery slope running even a substantial part of the way from a typical, optimistic Thirteenth Amendment claim to the abolition of capitalism or of the modern state.

Slippery slope arguments have been dismissed by some critics as vehicles for irrational fear.103 Volokh wrote his tour de force in part to rescue the type from such criticisms. As his analysis makes clear, however, a sound slippery slope argument requires straightforward value judgments (assessing the benefits of A and costs of B) as well as what may well be the most difficult type of social-scientific inquiry, namely predicting the future consequences of a decision made today (gauging the probability that A will lead to B). We might wonder whether, absent unusual clarity, such contingent, contestable and difficult judgments should be given much weight in resolving disputed constitutional questions. At a minimum, it would seem that a slippery slope argument should be rejected unless it meets all of Volokh’s requirements. As of now, I have yet to see one that makes any attempt whatever to implement his third step (gauging the probability that A will lead to B) and even the first (assessing the benefits of A) is usually ignored. Instead, Thirteenth Amendment slippery slopes appear to be nothing more than vehicles for the transmission of unexplained and unreasoned fears.

Federalism slippery slopes have not stopped the Court from applying traditional methods of interpretation to the Free Speech Clause of the First Amendment or the Equal Protection or Due Process Clauses of the Fourteenth. Yet, those clauses are of similar or greater potential breadth than the prohibitory clause of the Thirteenth. An immense range of human activity

101 McAward, Badges, supra note 6, at 607, 613.  See also id at 622 (expressing concern that section 2 might “devolve into an undifferentiated police power”) [ck__].
102 Balkin & Levinson, supra note 4, at 1475.
103 Volokh __.
involves speech; virtually every law and government policy treats some people differently (and thus arguably unequally) from others, and the notion of “liberty” in the due process clause has been invoked by the Supreme Court to protect rights ranging from abortion and same-sex sex, at one end of the spectrum, to yellow dog contracts at the other. Instead of shying away from this difficulty, the Court has plunged in and decided hundreds of cases under those clauses, erecting elaborate doctrinal structures in the process. The disparity with Thirteenth Amendment jurisprudence is so great that it is no exaggeration to describe the Court’s treatment of the Amendment as “jurispathic,” or law-killing.\(^\text{104}\)

It has been argued, however, that the Thirteenth Amendment is distinctively dangerous because it is the sole constitutional rights guarantee that lacks a state action limitation. Granted that the Amendment is unique in that respect, it does not necessarily follow that it is more dangerous overall. For starters, the absence of an all-or-nothing state action requirement does not necessarily mean that the Amendment reaches any and all private action. One can accept that the core prohibition of the Amendment applies even to a single individual acting alone, while simultaneously placing limits on the kind of private action that can be reached under more expansive theories. Darrell Miller has proposed, for example, that the badges and incidents doctrine should apply only to private action that amounts to “custom,” while McAward would limit it more narrowly to private action that is “so widespread or influential” as to threaten the defacto reestablishment of slavery or involuntary servitude.\(^\text{105}\) Both of these scholars would, however, extend the Amendment to cover even an isolated individual in some circumstances (in Miller’s view, when the person engages in action that “exhibits most of the historically agreed-upon features of slavery or involuntary servitude”; in McAward’s view, when the person “has such influence or capacity to shape public opinion that her actions are likely to generate (or already reflect) a trend of wider subjugation of [a] targeted class”).\(^\text{106}\) Whatever one might say about the merits of these proposals, their sliding scale approach (of tightening limits based on the seriousness of the conduct or the influence exerted by the individual) offers a potentially workable alternative to an all-or-nothing approach to state action.\(^\text{107}\)

\(^{104}\) Balkin & Levinson, supra note 4, at 1463.

\(^{105}\) Darrell A.H. Miller, The Thirteenth Amendment and the Regulation of Custom, 112 COLUM. L. REV. 1811 (2012); McAward, supra note 6, at 614.

\(^{106}\) Miller Custom, supra note 105, at 1835; McAward, supra note 6, at 620.

\(^{107}\) It might be objected that because Miller and McAward advanced their proposals as limits on section 2, I misusing their work. However, if the Court can stand up to Congress, one would think that it could limit itself. ___
More fundamentally, state action is only one of many possible slippery slope stoppers. Though broader in the particular dimension of state action, the Thirteenth Amendment appears narrower in other dimensions. As of now, for example, the case law extends the combined scope of sections 1 and 2 only to prohibit practices that either infringe labor freedom or inflict injury based on “race” (as understood in the 1860s). Scholars have proposed numerous additional or alternative limits, some based on historical connections to the institution of African chattel slavery; others on analogies to slavery or principles extrapolated from the underlying evils of that institution. For now, the point is that there is nothing about Thirteenth Amendment slippery slopes that appears to warrant the uniquely stunted state of its jurisprudence.

VIII. Should section 1 be read narrowly to avoid judicial overreaching?

In addition to federalism, concerns about judicial overreaching have been advanced to justify narrowing section 1. Consider, for example, the Supreme Court’s decision in Palmer v. Thompson (1971). The City of Jackson, Mississippi, had operated separate public pools for whites and non-whites until a federal court declared the policy of segregation unconstitutional. Rather than open the pools to people of all colors, the City shut them down. Some black residents challenged the closure, arguing that the City’s refusal to operate integrated pools imposed a badge or incident of slavery in violation of the Thirteenth Amendment. In his opinion for the Court, Justice Black rejected the challenge, reasoning that “the Thirteenth Amendment is a skimpy collection of words to allow this Court to legislate new laws to control the operation of swimming pools throughout the length and breadth of this Nation.” Black acknowledged that “other words,” meaning section 2, might authorize Congress to outlaw badges and incidents of slavery, but Congress had not acted with regard to swimming pools. In short, it was for the legislative branch, not the judicial branch, to “legislate new laws.”

Black’s opinion assumes that courts enforce section 1, while section 2 authorizes Congress to go beyond section 1. As noted above, however, the ban on badges and incidents of slavery appears to spring directly from section 1. If so, then the Palmer Court was underenforcing section 1 while acknowledging Congress’s power to finish the job. Darrell

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108 See, e.g., Carter, Badges, supra note 31 at ___; McAward, supra note 6, at ___; Taslitz ___; Tsesis __.
110 Id. at 227.
111 Id.
112 See supra __.
Miller and William Carter read the case law in this manner, suggesting that the Court has refrained from enforcing section 1 up to its full extent while permitting Congress to do so.\(^{113}\) Courts often underenforce constitutional provisions because of institutional concerns, including the danger of engaging in judicial legislation.\(^{114}\) Lawrence Sager, who authored the classic analysis of this phenomenon, suggested that “[o]ne explanation of the great disparity between the scope of § 1 and § 2 of the thirteenth amendment is that the court has confined its enforcement of the amendment to a set of core conditions of slavery, but that the amendment itself reaches much further; in other words, the thirteenth amendment is judicially underenforced.”\(^{115}\)

Carter and Miller have done a great service in disengaging the meaning of section 1 from the scope of direct judicial enforcement. If the two expand or shrink in lockstep, then the only way for a court to reduce its institutional role is to declare a narrower meaning. But section 1 is directed not only to courts, but to all Americans.\(^{116}\) If the Court tailors the official meaning to its own institutional capacities and limitations, then it severs the official meaning from the wider societal understanding, which is unconstrained by any particular institutional role. To the extent that the Court inevitably participates in shaping the Amendment’s meaning not only for itself, but also for everyone, the choice to narrow section 1 out of institutional concerns amounts to dishonesty and distortion.

Suppose, for example, that – apart from concerns about judicial overreaching – section 1 is best read not only to abolish the condition of slavery, but also to outlaw the system of slavery along with all of its badges and incidents. Then every American can claim the constitutional right to be free from the badges and incidents of slavery, demand protection for that right, and resist each and every badge or incident of slavery under claim of constitutional right. In practice, this is how many of our most treasured constitutional rights gained official recognition from courts and Congress.\(^{117}\) But suppose also that the identification of badges and incidents would involve the Court in too many judgments of a legislative character.\(^{118}\) If the Court responds to that institutional problem by declaring that section 1 does nothing more than abolish the condition of slavery, then it declares an official meaning narrower than the meaning that is most

\(^{113}\) Miller Custom, supra note 105, at 1841-42, 1845; Carter, Badges, supra note 31 at 1351-52.
\(^{115}\) Id. at 1219 n.21.
\(^{116}\) Kramer __; Parker __; Tushnet __.
\(^{117}\) Michael Kent Curtis __ (free speech); Kluger Simple Justice? __ (equal protection) ; Republican Moments __
\(^{118}\) See, e.g., Miller Custom, supra note 105, at 1841-42.
appropriate for our ultimate sovereign, We the People. The right to be free from the badges and incidents of slavery now springs from a provision that does nothing more than grant power to Congress. From the viewpoint of the people, it must be won through ordinary politics before it can be exercised as a matter of right.

Many considerations go into the division of labor among courts, Congress, and We the People. This article is concerned mainly with the meaning of the Amendment, and not with allocating responsibility for its interpretation and enforcement. However, for those who reject Carter’s and Miller’s separation of those two issues, it should be noted that concerns about judicial overreaching have not stopped the courts from applying the usual methods of interpretation to the Free Speech Clause of the First Amendment or the Equal Protection or Due Process Clauses of the Fourteenth.119

IX. Conclusion

The increasing volume and quality of criticism directed at Thirteenth Amendment optimism suggests that this scholarly movement may have moved beyond its infancy. However, the critics have yet to engage optimism on its home ground – the meaning of section 1. Instead, they have deployed a diverse set of arguments to divert attention onto section 2 or, in some cases, away from the Amendment altogether. This article has urged the critics to reconsider, and to join us in exploring the meaning of the Amendment’s distinctive provision.

119 Granted, the Thirteenth Amendment, unlike the First and Fourteenth, does lack a state action requirement. As suggested above, however, there are reasons to believe that that factor may not justify the courts’ failure to apply the standard methods of interpretation. See supra text accompanying notes __.