SLAVERY AFTER EMANCIPATION:
CONTRACTS FOR SLAVES AND JUDICIAL
INTERPRETATION OF THE THIRTEENTH
AMENDMENT

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Abstract

The Thirteenth Amendment, long ignored as a source of constitutional law, is undergoing renewed scholarly interest. While the new Thirteenth Amendment scholarship has done much to develop possible substantive meanings, it has done little to address a major structural concern: the judiciary's role in making those meanings a practical reality. Commentators have assumed that Congress is the proper branch of government to define the Amendment's scope—indeed, some have suggested that the Amendment is inherently ill-suited for judicial interpretation. This Article argues that, to the contrary, courts may exercise interpretive authority over the Thirteenth Amendment and should do so in prescribed circumstances.

To this end, the Article first recovers a little-noticed episode in the Thirteenth Amendment’s history: a series of cases in which buyers of slaves on contract sought to void their debts after the Civil War. Though the Supreme Court ultimately held that slave contracts must be enforced—thus limiting the Thirteenth Amendment’s scope—the rulings of other judges suggest an alternative legal history. Slave contracts could have been considered unconstitutional badges of slavery—a point illustrated by a case in which the buyer was an African American purchasing his family’s freedom—and courts had the authority to declare them so. Indeed, it would have been appropriate to do so given contemporaneous Congressional policies that sought to advance freedmen’s rights.

With this history in mind, the Article then assesses the Thirteenth Amendment’s uses in modern constitutional law and develops a framework for the judiciary’s interpretive role. Concerns that the Amendment is a political provision are legitimate, and judges should defer to Congress when litigants effectively ask them to apply the Thirteenth Amendment in a vacuum. But in other circumstances there is less reason to be worried about activism of an unaccountable judiciary. To test this proposition, the Article examines several practices that the Thirteenth Amendment potentially prohibits. It concludes that courts may interpret the Thirteenth Amendment when the political branches have indicated that a practice being challenged is harmful to freedom.
INTRODUCTION

The Thirteenth Amendment positively guarantees freedom from “slavery and involuntary servitude.”¹ This unadorned language and the context in which it was ratified suggest that the Amendment’s force is limited to eradicating the historical institution of chattel slavery. That is surely the popular understanding today. But the Amendment’s authors did not intend that it be read so narrowly, nor do most contemporary scholars understand it that way. Indeed, the past few years have seen a renaissance of scholarship devoted to unearthing novel practices that might be covered under the rubric of “slavery and involuntary servitude.”²

These fertile explorations notwithstanding, the scholarship has largely neglected a topic that is typically of interest to constitutional lawyers: the role of judicial interpretation. Instead, commentators have focused on the Amendment as a political provision and have examined how Congress might use it to broaden civil rights legislation.³ Some have even suggested that the Amendment is uniquely unsuited to judicial construction.⁴ The judiciary is simply not of interest to most scholars of the Thirteenth Amendment.

Focus on the legislative branch is a product of the Amendment’s peculiar history at the Supreme Court. Most important

¹. The substantive portion of the Thirteenth Amendment reads, “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.” U.S. CONST. amend. XIII, § 1. The Amendment’s enforcement provision provides, “Congress shall have power to enforce this article by appropriate legislation.” Id. § 2.


³. See, e.g., George Rutherglen, The Thirteenth Amendment, the Power of Congress, and the Shifting Sources of Civil Rights Law, 112 COLUM. L. REV. 1551, 1579–80 (2012) (“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.”); Rebecca Zietlow, The Promise of Congressional Enforcement, in THE PROMISES OF LIBERTY, supra note 2, at 185 (“[S]ection 2 of the Thirteenth Amendment holds great promise for a Congress seeking to define and protect our rights of belonging.”).

⁴. See Jamal Greene, Thirteenth Amendment Optimism, 112 COLUM. L. REV. 1733, 1755 (2012) (“[The Thirteenth Amendment] may well be suited to constitutionalism of a sort, but it is not well suited to judicial practice because it turns limitation—the stuff of courts—into license—the stuff of legislatures.”).
is *Jones v. Alfred H. Mayer Co.*, a Warren Court case celebrated among those scholars who propose a robust reading of the Thirteenth Amendment. The opinion holds that the Amendment grants Congress the power to legislate against the “badges and incidents of slavery,” a term indicating those relics of slavery that do not amount to forced labor. While still good law, *Jones*’s contemporary relevance as judicial precedent is practically nil. That is because it speaks little of the Amendment’s self-executing force, leaving to the legislature plenary power to define the Amendment’s contours. Commensurate with *Jones*’s holding, the task of interpretation has been left almost entirely to Congress. But Congress has rarely gone to work in the garden of the Thirteenth Amendment.

This Article argues that the judiciary can be an appropriate forum in which to develop Thirteenth Amendment interpretations. Though there are abstract and theoretical reasons to oppose judicial action, the Thirteenth Amendment’s unique guarantee of positive freedom deserves the serious attention of courts. Academic commentators have written broadly on the Amendment’s meaning, and their work brings welcome illumination to an undeservedly abused and forgotten constitutional provision. However, for this scholarship to have any practical effect, litigants must argue from the Amendment where appropriate.

In contending that the judiciary may be a proper forum for Thirteenth Amendment interpretation, this Article recovers a lost debate in Reconstruction history—the argument over whether purchasers of slaves on contract remained obligated for their debt after the Civil War. In a series of cases, little noticed by scholars, many state courts and eventually the Supreme Court concluded that


6. The holding, upon which so much of today’s Thirteenth Amendment scholarship is founded, reads, “Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.” *Id.* at 440.

7. The phrase “badges and incidents of slavery” had a generally accepted colloquial meaning when the Thirteenth Amendment was ratified in 1865. An “incident” of slavery denoted a legal right or disability that accompanied the status of the slave, such as the prohibition on owning property. Where they continued after the Civil War, such prohibitions were considered incidents of slavery. The notion of a “badge” of slavery was used in a broader fashion to describe ways in which freedmen continued to be labeled as inferior. The term was used piecemeal in Congress at the time and entered into the judicial lexicon with the *Civil Rights Cases*, 109 U.S. 3 (1883). See Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. Pa. J. CONST. L. 561, 570–89 (2012) (discussing historical uses of the term).

8. See Greene, supra note 4, at 1762 (“*Jones* has virtually no significant doctrinal progeny and represents a missed opportunity to build upon the slow erosion of the Fourteenth Amendment state action doctrine that, by 1968, was nearly complete.”).
chattel slavery’s destruction did not also destroy the paper value of slaves traded on contract. Among the dissenters, however, we find judicial voices suggesting an active role for the Thirteenth Amendment in postwar legal interpretation. The most important of these, the lower court opinion in Osborn v. Nicholson, suggests that judicial neglect of the Thirteenth Amendment was not an inevitable outcome. Moreover, the conclusion that the Thirteenth Amendment did not require nullification of slave contracts is drawn into question by a case—completely unnoted by scholars—in which the purchaser was a freedman buying his family from slavery. Where such contracts were enforced, the result was actual re-enslavement.

In sum, this Article aims to contribute to the contemporary debate over the Thirteenth Amendment in two ways. One is historical: to shed light on a neglected aspect of our constitutional past and to suggest that the slave-contract cases posed implications for freedom just as dire as more notorious episodes such as the Slaughterhouse Cases, the Civil Rights Cases, and Plessy v. Ferguson. The second is theoretical: to suggest that courts may give the Thirteenth Amendment substantive force when doing so is consistent with legislative pronouncements. To achieve these aims, the Article proceeds in three parts. Part I discusses the history of the Thirteenth Amendment, specifically its history as a legal instrument. Part II examines the slave-contract cases and shows that, though the Supreme Court ultimately rejected the transformative implications of the Thirteenth Amendment and limited its scope, this result was not a foregone conclusion or universally accepted among judges. Analysis of these cases suggests historical support for a broader reading of the Amendment’s first section. Drawing on the first two Parts, Part III discusses how the Thirteenth Amendment might be used in courts today against practices that are not already captured by statutes (including the practices of non-state actors). In an effort to discern limitations on judicial enforcement, it examines a few specific practices that the Thirteenth Amendment potentially forbids. The Article concludes that while the Amendment’s political nature warrants judicial restraint in some circumstances, the judiciary’s enforcement authority will be strong where the political branches

10. 83 U.S. 36 (1873).
11. 109 U.S. 3 (1883).
12. 163 U.S. 537 (1896). Plessy, of course, is most notorious for constitutionalizing racial discrimination on the principle of separate-but-equal. But it also held it “too clear for argument” that separate-but-equal does not violate the Thirteenth Amendment. Id. at 542.
have established background principles from which courts may define the Amendment’s scope.

I. THE LEGAL CAREER OF THE THIRTEENTH AMENDMENT

Judges have frequently dismissed the Thirteenth Amendment as a feeble piece of verbiage. Perhaps the best-known instance came in the Civil Rights Cases, where Justice Joseph Bradley commented that it “would be running the slavery argument into the ground” to hold that the Thirteenth Amendment provided Congress the power to prohibit racial discrimination in public accommodations.13 Less frequently noted is Felix Frankfurter’s hostility to using the Amendment as the basis for a labor bill in the early 1930s: “The talk about the Thirteenth Amendment is too silly for any practical lawyer’s use.”14 These views are representative of the ridicule the Thirteenth Amendment has frequently suffered in the hands of its interpreters. This attitude is not entirely uniform, however, and the Amendment has seen some vindication in Congress and the courts.

This Part describes the doctrinal and legal history of the Thirteenth Amendment, an understanding of which is necessary to show the magnitude of the challenge for any “practical lawyer” who might wish to invoke the Amendment’s contemporary relevance.15 In reviewing this history, I intend to draw attention to two distinct questions in Thirteenth Amendment interpretation. The first relates to the Amendment’s substance—what does the phrase “slavery or involuntary servitude” encompass? The second deals with the division of power between Congress and the courts in defining and enforcing the Amendment. Since Jones v. Alfred H. Mayer Co.,16 Congress has been assumed to hold the principal role in defining the practices that the Thirteenth Amendment prohibits. However, that role is vulnerable given recent Supreme Court pronouncements on the limits of the Fourteenth Amendment’s enforcement clause.

15. I do not devote attention to the legislative history of the Thirteenth Amendment, a topic that has been covered in detail elsewhere. Two of the best sources are MICHAEL VORENBERG, FINAL FREEDOM (2001), which deals with the political history of the Amendment’s passage, and 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), which focuses on the legislative debates.
A. Early Interpretations

The Thirteenth Amendment is divided into two sections. Section One reads, “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 within their jurisdiction.” Section Two reads, “Congress shall have power to enforce this article by appropriate legislation.” Using its Section Two power, Congress passed the Civil Rights Act of 1866 immediately after the Amendment was ratified.\(^1\) The law, much of which is still in effect today,\(^2\) was a sweeping declaration of freedom. It granted citizenship to freedmen;\(^3\) prohibited discrimination on the basis of race in contracting, property transactions, and legal proceedings;\(^4\) granted to former slaves the “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens”;\(^5\) provided criminal penalties for interference with rights under “color of any law . . . or custom”;\(^6\) and gave federal courts exclusive jurisdiction to hear criminal cases under the Act.\(^7\) Congress, in passing the Civil Rights Act over President Andrew Johnson’s veto, most certainly believed that Section One of the Amendment also forbade the practices forbidden by the Act.\(^8\) By virtue of the Section Two power, the Act defined Section One’s content.\(^9\)

The judiciary did not take such an expansive view of the Thirteenth Amendment, however, and soon began chipping away at

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17. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.
20. Id.
21. Id.
22. Id. § 2, 14 Stat. at 27.
23. Id. § 3, 14 Stat. at 27.
25. Of course, there was some doubt, even among the Civil Rights Act’s supporters, that the Thirteenth Amendment was a sufficient foundation upon which to base the Act’s provisions, and the Fourteenth Amendment was meant to place the Act’s provisions beyond challenge. See id. at 200–02. Whether the Fourteenth Amendment thereby changed the meaning of the Thirteenth is a point of some debate. Compare Mark A. Graber, Subtraction by Addition? The Thirteenth and Fourteenth Amendments, 112 COLUM. L. REV. 1501, 1544 (2012) (“The Republicans who framed and ratified the Fourteenth Amendment protected fewer rights than the Republicans who framed and ratified the Thirteenth Amendment, because Republicans by the time the Fourteenth Amendment was ratified were less committed to racial equality and national protection for fundamental freedoms than they were when the Thirteenth Amendment was ratified.”) with tenBroek, supra note 15, at 202 (“The Fourteenth Amendment reenacted the Thirteenth and made the program of legislation designed to implement it constitutionally secure or a part of the Constitution.”).
the meanings the Civil Rights Act suggested. The slave-contract cases—the subject of Part II of this Article—were the first blow, but typically the *Slaughterhouse Cases*\(^{26}\) are nominated as the point at which the Thirteenth Amendment took a turn for the toothless.\(^{27}\) In that decision, more notable for its restrictive interpretation of the Fourteenth Amendment’s Privileges and Immunities Clause, the Supreme Court rejected the argument that the Thirteenth Amendment prohibited the State of Louisiana from forcing all New Orleans butchers to work in a circumscribed set of slaughterhouses.\(^{28}\)

The Thirteenth Amendment, the Court wrote, “seem[s] hardly to admit of construction”\(^{29}\)—the meaning of “slavery” was tied closely to that of “involuntary servitude.”\(^{30}\) The Court found it unambiguous that “Negro slavery alone was in the mind of the Congress which proposed the thirteenth article,” though it did grant that the Amendment would forbid enslavement of non-Africans, such as through “Mexican peonage” or “the Chinese coolie labor system.”\(^{31}\)

*Slaughterhouse* was a mixed result as far as the Thirteenth Amendment was concerned. If it did not adopt the broad reading that it might have, it did leave breathing space for practices that did not resemble chattel slavery exactly. The next major opinion to interpret the Amendment, the *Civil Rights Cases*,\(^{32}\) was similarly mixed. The opinion narrowed the Fourteenth Amendment by imposing a state-action requirement—the holding for which it is best known.\(^{33}\) As for

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26. 83 U.S. 36 (1873).
27. One exception is found in the work of Alexander Tsesis, who has nominated *Bylew v. United States* as the first restrictive judicial reading of the Thirteenth Amendment. See *Bylew v. United States*, 80 U.S. (13 Wall.) 581 (1872), (restricting federal jurisdiction to hear state-law cases where state courts forbade black testimony); TSESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* 64–66 (2004).
28. As related in the United States Reports, the butchers argued, “Men are surely subjected to a servitude when, throughout three parishes, embracing 1200 square miles, every man and every woman in them is compelled to refrain from the use of their own land and exercise of their own industry and the improvement of their own property, in a way confessedly lawful necessary in itself, and made unlawful and unnecessary only because, at their cost, an exclusive privilege is granted to seventeen other persons to improve and exercise it for them.” The *Slaughterhouse Cases*, 83 U.S. at 50–51.
29. 83 U.S. at 69.
30. *Id.* (comparing “servitude” to an apprenticeship).
31. *Id.* at 72. Justice Field’s dissent offered a broader reading of the Thirteenth Amendment, though he ultimately rested his conclusion upon the Fourteenth. See *id.* at 90 (Field, J., dissenting) (“The abolition of slavery and involuntary servitude was intended to make every one born in this country a freeman, and as such to give him the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor.”).
32. 109 U.S. 3 (1883).
33. *Id.* at 18–19. Not all scholars have taken the *Civil Rights Cases* to be so disastrous in this regard. In particular, Pamela Brandwein has argued that the opinion preserved the concept
the Thirteenth Amendment, the Court said that “the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”

Moreover, the Court discerned no state-action requirement in the Thirteenth Amendment. Legislation under the Section Two could be “direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not.” However, a private party’s refusal of a public accommodation on the basis of race could not be said to be a badge or incident of slavery because “such an act of refusal has nothing to do with slavery or involuntary servitude.” The Civil Rights Cases thus resulted in a Thirteenth Amendment that could be used to regulate private acts. But an act was only “a badge or incident of slavery” if it was connected to traditional understandings of slavery or involuntary servitude. The test was whether a particular practice impeded “those fundamental rights which are the essence of civil freedom.”

What were those fundamental rights? Arguably they included the rights to own property, to contract freely, and to access courts—the sort of rights Congress sought to protect with the Civil Rights Act of 1866. The Supreme Court slammed the door on this idea in the 1906 case of Hodges v. United States, the nadir of Thirteenth Amendment jurisprudence. The case arose from an Arkansas incident in which the white intimidated black workers to abandon their labor contracts. The defendants were convicted under a statute that made it a crime to conspire against the exercise of civil rights. On appeal, they argued that the United States had no jurisdiction to bring the indictment because, in the absence of state action, the Thirteenth Amendment did not support the “right or privilege” claimed by the government—a federal freedom to contract without racial discrimination. The Court agreed, severely limiting the scope of the Thirteenth Amendment in the process. The Thirteenth Amendment was said to prohibit only “a condition of enforced compulsory service of one to another,” and “it was not the intent of the Amendment to denounce every act done to an individual which was wrong if done to a

of “state neglect” as a cognizable form of “state action.” See Pamela Brandwein, Rethinking the Judicial Settlement of Reconstruction 12–14 (2011).

34. 109 U.S. at 20.
35. Id. at 23.
36. Id. at 24.
37. Id. at 22.
38. 203 U.S. 1 (1906).
39. Id. at 16.
free man yet justified in a condition of slavery, and to give authority to Congress to enforce such denunciation.”

This language essentially erased the concept of “badges and incidents of slavery.” The Thirteenth Amendment forbade only labor bondage, and neither Congress nor the judiciary had the authority to read into it anything more.

Where the Court did perceive literal involuntary servitude, however, it did not hesitate to find a violation of the Thirteenth Amendment and statutes enforcing it. The most prominent such case was Bailey v. Alabama. Alabama law made it a crime, punishable by fine and hard labor, for an employee to break a service contract with intent to defraud his employer. The law provided a presumption of fraudulent intent where the party, having taken money for his services, refused to perform the service or refund the money. The effect was to transform a garden-variety contract breach—typically remedied by damages—into a criminal act remedied by forced labor.

Citing the Thirteenth Amendment and statutory prohibitions of peonage, the Court struck down Alabama’s law as an attempt to impose involuntary servitude for failure to repay a debt.

Taken together, these cases suggest a two-tracked interpretation of the Thirteenth Amendment. The first track regards forced labor, which is most obviously the subject of Section One. Even as it narrowed the Amendment in other regards, the Court continued to use this track to prohibit practices that amounted to involuntary servitude. The second track regards the more freewheeling notion of

40.  Id. at 19.
41.  219 U.S. 219 (1911).
42.  Id. at 227–28.
43.  See id. at 236 (“Was not the case the same in effect as if the statute had made it a criminal act to leave the service without just cause and without liquidating the debt?”).
45.  Bailey, 219 U.S. at 245.
46.  The Court consistently struck down laws like that at issue in Bailey. See Pollock v. Williams, 322 U.S. 4 (1944) (striking Florida statute substantially similar to Alabama’s in Bailey); Taylor v. Georgia, 315 U.S. 25 (1942) (striking Georgia statute substantially similar to Alabama’s in Bailey); United States v. Reynolds, 235 U.S. 133 (1914) (finding violation of Thirteenth Amendment where Alabama law permitted surety to pay criminal fines in exchange
“badges and incidents of slavery.” Because Hodges rendered this track a dead letter, the substance of the phrase and the question of whether the courts or Congress have power to define it long remained dormant in constitutional law.

B. Jones v. Alfred H. Mayer Co. and the Limits of Congressional Interpretation

The Thirteenth Amendment roared back in Jones v. Alfred H. Mayer Co.,47 a case decided in the Warren Court’s twilight. The plaintiffs, would-be black homeowners, claimed the defendants violated 42 U.S.C. § 198248—a statute derived from the Civil Rights Act of 1866—by refusing to sell on the basis of race. The Court held that the statute’s coverage was not limited to state action and that it was constitutionally applied to purely private action under the Thirteenth Amendment.49 In so holding, the Court announced a broad construction of Section Two: “Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”50 The result was to overrule Hodges and to establish a precedent that, in theory at least, remains valid to this day.51 So long as Congress has a rational basis for determining that a particular practice is a “relic of slavery,”52 it may legislate to eradicate that practice.

Jones left two major questions unanswered. The first is the one that has commanded the most scholarly attention: Which acts may Congress rationally determine to be the “badges and incidents of slavery?” The Supreme Court’s only other pronouncements on this issue have been limited to ratification of already-existing statutes as valid exercises of the Section Two power.53 And Congress has rarely

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47. 392 U.S. 409 (1968).
48. The statute reads, “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”
49. Jones, 392 U.S. at 413 (“We hold that § 1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.”).
50. Id. at 440.
51. See id. at 443 n.78.
52. Id. at 443.
53. For example, in Runyon v. McCrary, 427 U.S. 160 (1976), the Court addressed the scope of 42 U.S.C. § 1981, a statute derived from the Civil Rights Act of 1866 that gives all persons “the same . . . right to make and enforce contracts . . . as is enjoyed by white citizens.”
tested its power to prohibit the badges and incidents of slavery. Aside from the Civil Rights Act of 1991 and the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Congress has not premised recent statutes on its Thirteenth Amendment authority.

The dearth of legislation raises the second question: Does Section One, the self-executing portion of the Thirteenth Amendment, prohibit anything more than the existence of chattel slavery? Put another way, do courts as well as Congress have the power to prohibit the badges and incidents of slavery? This question has received little attention in either the academy or the judiciary. Several times in the first half of the twentieth century, the court struck down state-sanctioned peonage systems as contrary to Section One. Since these cases, however, the Court has declined to hold that the Thirteenth Amendment bans anything other than chattel slavery absent Congressional action.

The court interpreted § 1981 to apply to private conduct and held that it prohibited private schools from denying admission on the basis of race. Runyon, 427 U.S. at 172–73.


58. See supra notes 41–46 and accompanying text.
In its most forceful statement on the matter, the Court in *Palmer v. Thompson*\(^{59}\) refused to hold that the decision by Jackson, Mississippi, to close all public pools rather than integrate them was a badge or incident of slavery. “Establishing this Court’s authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country,” Justice Black wrote for the majority, “would grant it a lawmaking power far beyond the imagination of the amendment’s authors.”\(^{60}\) The meaning of these words is clear—the Thirteenth Amendment did not bestow upon the judiciary a general power to eliminate the vestiges of slavery.

*Palmer’s* authority might be called into question, however, as the Court only five years later undermined its core thesis that equal protection violations cannot be shown by improper motivation.\(^{61}\) And the Court did not put much stock in *Palmer’s* language when considering, in *City of Memphis v. Greene*,\(^{62}\) whether the closing of a road that separated white and black neighborhoods violated the Thirteenth Amendment. “The exercise of [legislative] authority [under Section Two],” the Court stated, “is not inconsistent with the view that the Amendment has self-executing force.”\(^{63}\) However, the Court refused to decide whether, as the first Justice Harlan wrote in his *Hodges* dissent, “by its own force, [the Thirteenth] Amendment destroyed slavery and all its incidents and badges, and established freedom.”\(^{64}\) It merely held that the road closure was not a badge or incident of slavery in any circumstance. The Court thereby avoided the structural question of the judiciary’s authority to define and enforce the Thirteenth Amendment.\(^{65}\)

\(^{59}\) 403 U.S. 226 (1971).

\(^{60}\) Id. at 226–27.

\(^{61}\) See *Washington v. Davis*, 426 U.S. 229, 242–43 (discussing *Palmer*). In holding that a discriminatory purpose is required to trigger strict scrutiny under the Equal Protection Clause, the Court in *Washington v. Davis* sought to read *Palmer* as holding that substantial evidence supported the finding that Jackson closed the pools for a legitimate purpose. Id. at 243. However, the Court appears to have understood that its holding contradicted the weight of *Palmer*. See id. at 244 n.11 (“To the extent that *Palmer* suggests a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases—as indicated in the text—are to the contrary . . . .”).

\(^{62}\) 451 U.S. 100 (1983).

\(^{63}\) Id. at 125.

\(^{64}\) Id. at 125–26 & n.40 (quoting *Hodges v. United States*, 203 U.S. 1, 27 (1906) (Harlan, J., dissenting)).

\(^{65}\) Courts of Appeals that have considered the question have been unsympathetic to the claim that the Thirteenth Amendment bars the badges and incidents of slavery by its own force. See *Channer v. Hall*, 112 F.3d 214, 217 n.5 (4th Cir. 1997) (stating that “suits attacking the ‘badges and incidents of slavery’ must be based on a statute enacted under § 2’’); *NAACP v. Hunt*, 891 F.2d 1555, 1564 (11th Cir. 1990) (“Standing alone, the Thirteenth Amendment does not forbid the badges and incidents of slavery.”).
That question has become more urgent since the Court decided City of Boerne v. Flores, which limited Congress’s power to pass enforcement legislation under Section Five of the Fourteenth Amendment. The case centered around the Religious Freedom Restoration Act of 1993, which prohibited a state from imposing laws with a “substantial effect” on religious practice unless it could show a “compelling reason” to do so. The Act was a direct response to Employment Division v. Smith, which held that neutral laws of general applicability do not violate the Free Exercise Clause. The Court concluded that the Act exceeded Congress’s Section Five power because, by overruling Smith’s understanding of the Free Exercise Clause, it had the effect of defining substantive constitutional protections. That was a job properly left to the judiciary. The Fourteenth Amendment permitted Congress to remediate violations of existing rights, not to create new ones. In order to ensure that Section Five legislation does not “become substantive in operation and effect,” the Court held that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”

Most Thirteenth Amendment scholarship has been premised on Jones’s holding that Congress has the power to define the badges and incidents of slavery under Section Two of the Thirteenth Amendment. Yet Section Two and the Fourteenth Amendment’s Section Five have functionally identical language. There may be good reasons to think that “congruence and proportionality” analysis is uniquely suited to the Fourteenth Amendment and would not apply to the Thirteenth. Still, there is also a strong argument that City of Boerne, along with other developments in constitutional law, portends an era of judicial exclusivism leaving little room for Congress to exercise its Thirteenth Amendment enforcement power. I do not endorse this argument,

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67. See id. at 515–16 (explaining Act).
69. City of Boerne, 521 U.S. at 519 (“Congress] has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”).
70. Id. at 520.
71. Compare U.S Const. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”) with U.S Const. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).
72. Alexander Tsesis has forcefully argued this position: “[T]he Thirteenth Amendment is a positive injunction requiring Congress to pass laws to [ensure freedom], while the Fourteenth Amendment is ‘responsive’ to ‘unconstitutional behavior.’” TSESIS, supra note 27, at 112 (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 86 (2000), and City of Boerne, 521 U.S. at 532).
73. See Carter, supra note 57, at 1349 (“If the [Thirteenth] Amendment itself solely prohibits literal enslavement, . . . Congressional action would amount to creating a new right to
and, as later portions of this Article show, I believe that the judiciary and Congress should share interpretive authority over the Thirteenth Amendment. But anyone who thinks the Amendment is a valid instrument of constitutional law must contend with City of Boerne's implications. This means considering the potential for real judicial enforcement.

If future development of the Thirteenth Amendment is to depend on judicial interpretation, then it is necessary to refute the idea, prevalent in constitutional law for over a century, that the Amendment "seem[s] hardly to admit of construction." To begin this project, I look to a historical moment where the Thirteenth Amendment was, at least briefly, the subject of judicial interpretation—the controversy over whether to enforce antebellum contracts for slaves.

II. THE SLAVE-CONTRACT CASES

The eradication of chattel slavery hardly eradicated its conditions. The most famous proof of this point is the postwar emergence of the Black Codes, laws meant to confine African Americans' ability to rent, travel, and live as free humans would expect to. Still, one might think that, however horrible the Black Codes, freedman had at least ceased to be the subject of commerce. That thought would be wrong. To the contrary, freedman retained their former character as commodities via the continued existence of contracts for slaves. In most cases—qualification is necessary for reasons discussed in Part II.C—freedman themselves were unaffected by these contracts. Nevertheless, slavery remained lucrative business even after emancipation.

The typical form of slave paper was a run-of-the-mill promissory note—the buyer's guarantee to pay the seller sometime in

be free of the badges and incidents of slavery, which would be unconstitutional under Boerne.


74. See infra Part III.C.4.

75. The Slaughterhouse Cases, 83 U.S. 36, 69 (1873).

the future, often secured by the purchased slaves themselves. There was nothing extraordinary about such agreements in the slaveholding states, but they caused a unique problem when sellers sought to enforce them after the Civil War. The Thirteenth Amendment banned slavery, and the Fourteenth Amendment voided all claims “for the los
of . . . any slave.” Yet appeals to the courts for payment on a slave contract appeared both to vindicate slavery and to compensate a former slave owner. How were courts to reconcile the Reconstruction Amendments with what had previously been a common commercial transaction?

From one perspective, courts asked to enforce slave contracts faced a practical policy choice: Which party was to bear the loss? One way or the other, someone had to eat the value of the slave property embodied in the paper. Emancipation had caused the buyer to forfeit his slave. Should he forfeit the purchase price to boot? Or should the loss be split between buyer and seller by refusing to permit the seller the money owed to him? The quantity of these contracts made the loss-spreading question even more vexing. Although the value of slaves in the form of postwar slave contracts is not certain, slave contracts were common. Courts in every former Confederate state, and even in some Union ones, faced remorseful buyers who sought to be relieved of their slave debt. Especially given the enormous value of slaves—one historian has estimated it to be eighty percent of the gross national product in 1860, equivalent to $9.75 trillion in today’s dollars—we can be fairly certain that this legal battle threatened the ruin of either sellers or buyers as a class. Courts adjudicating slave-contract disputes were thus the final decisionmakers in a scuffle over the scraps of antebellum wealth.

Quite outside of this practical quandary, slave contracts posed a great moral problem: Did the decision to order payment for slaves not sanction the law of slavery? Private agreements for slaves were clearly valid at the time of their making, yet emancipation had wrecked the foundation on which they were based. How could courts reconcile these contract claims with a brand new Constitution—one

77. U.S. CONST. amend. XIV, § 4 (“[N]either the United States or any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.”).

78. David Brion Davis, Crucial Barriers to Abolition in the Antebellum Years, in THE PROMISES OF LIBERTY, supra note 2, at xvi.

79. Contemporary courts understood the gravity of the question in the same way. As the South Carolina Supreme Court put it in a case involving the descendants of John C. Calhoun, “The case before us is of interest to the community, from the large amount of debt which will be affected by the decision.” Calhoun v. Calhoun, 2 S.C. 283, 291 (1870).
that finally recognized the freedom of the nation’s black men and women?

The answers to these questions, for most jurists, were determined by neither practical considerations nor moral reasoning. They were determined by the forms of the law. Courts consistently applied conventional concepts in commercial law to find that the slave seller was entitled to have his payment. Startlingly, most courts failed to consider that the Thirteenth Amendment might have something to say about how the issue should be handled. Even some judges who declined to enforce the contracts limited their reliance on the Thirteenth Amendment, instead reaching their conclusions though typical legal arguments and forms. The overall result was a lost opportunity to secure the rights of freedmen. Yet some courts did find the contracts to perpetuate slavery. Their opinions offer an alternative history, one whereby the Thirteenth Amendment provides a substantive guarantee of freedom.

This Part addresses the calculus courts used to decide slave-contract cases and discusses the legal stakes of their decisions. After discussing the most conventional forms of argument, I turn to Osborn v. Nicholson,80 not only the most cogent of the slave-contract cases, but also the one that finally settled the issue in the Supreme Court. Though the Court enforced the contract, the opinion in the court below exhibited a vision of the Thirteenth Amendment that could have been. Finally, I examine a type of slave-contract case that has gone entirely ignored in the scholarship—one in which the buyer was an African American purchasing his family’s freedom. This circumstance clarifies why the decision to enforce slave contracts was contrary to the Thirteenth Amendment and why slave contracts should have been considered badges and incidents of slavery. Upholding a claim against a former slave disproved the notion, endorsed by the Supreme Court in Osborn, that “[n]either the rights nor the interests of those held lately in bondage [were] affected” by the decision to enforce.81 Far from being purely “private” agreements, these instruments had a deep influence on the world beyond the parties.

This Part amounts to a missing chapter in Thirteenth Amendment history, one that helps explain why the Amendment is one of the more wilted provisions of constitutional law. When the opportunity for interpreting the Thirteenth Amendment arose, few Reconstruction-era courts seized it. Yet, as Part III will show, those


81. Osborn, 80 U.S. at 663.
courts that did apply the Thirteenth Amendment to slave contracts established several important principles for a modern revival of judicial enforcement.

A. Legal Bases for Enforcing Slave Contracts

As the Alabama Supreme Court set about deciding whether to enforce slave contracts, it noted the novelty of the issue: “It is in vain to look for authorities in such cases as this, as there never was before the occurrence of such an event as the recent emancipation of the slaves in this country.” The decisions of high courts throughout the South belied the hollowness of this rhetoric. Courts had ample precedent to follow. Principles of antebellum constitutional, common, and commercial law—not the Reconstruction Amendments—supplied the legal grounds for deciding most slave-contract cases. By relying on these older authorities, courts almost universally upheld existing debts for slaves.

In the essential article on slave-contract jurisprudence, published nearly years ago, Andrew Kull condoned this result. Professor Kull contended that it was right to apply pure commercial law to the cases and that they were correctly decided on that basis. To void slave contracts through the Thirteenth Amendment, he argued, would have disturbed settled legal rules and imposed a brand of retroactive justice that the political forces of the time could not achieve. This Part seeks to support the other side of the argument by showing that the Thirteenth Amendment bore substantive force that

82. 44 Ala. 171, 175 (1870).
84. See Kull, supra note 83, at 531 (“[T]o decide the case in favor of the buyer of slaves, whatever the grounds on which the court denied the seller’s suit, was, as a matter of commercial law, to decide it wrong.”); id. at 532 (“[T]o give [nullification arguments] practical effect would have involved the nation in a political revolution that Reconstruction did not envision.”).
85. Id. at 532 (“A retroactive revision of property relations is easily within the province of political justice, forming the basis for all confiscation and reallocation problems, but no such revision was attempted by the Thirteenth Amendment.”).
by itself could have prevented enforcement of slave contracts. Nevertheless, Kull's piece is a nuanced and enlightening treatment that explains why it was not self-evident to Reconstruction actors that nullifying slave contracts was the correct move. I will have occasion to refer to Kull’s historical analysis as I consider two distinct circumstances in which the question of enforcement came before judges. In the first, state legislatures attempted to strip courts of jurisdiction to hear suits brought by sellers asking for enforcement. In the second, buyers argued that slave contracts were unenforceable by their very nature.

1. Avoidance Through Legislative Means

As a condition of readmission to the Union, Congress required former Confederate states to hold conventions for the passage of a new constitution. Only after Congress approved the resulting document would the state be permitted representation at the federal level. When the conventions convened, one of the key items on the agenda was debt forgiveness—including forgiveness for debts owed on slave contracts. Six states produced, and Congress subsequently approved, constitutions prohibiting judicial enforcement of slave contracts.

What were the motives of the men who passed these provisions? Some certainly objected to the idea that the courts of a free state should be available to provide a remedy to former slaveowners. Others, however, sensed in the elimination of slave debt the opportunity to provide compensation that the Fourteenth Amendment otherwise prohibited. Indeed, nullification of the contracts might be the worse outcome from a moral standpoint. The buyers had bet on slavery in its final hours, and forgiving their debt could serve as nod to those who held fast to the South. Perhaps nowhere is the ambiguity of the situation made clearer than in a correspondence between Gideon Pillow, a Confederate general and one of the largest slaveholders in Arkansas and Tennessee, and Senator Charles Sumner, the Radical Republican stalwart. Sumner had just proposed a bill stripping federal courts of jurisdiction to hear suits seeking enforcement of contracts for slaves. Pillow sent his thanks,

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86. For general background on the conventions, see Foner, supra note 76, at 316–32.
87. The six states were Alabama, Arkansas, Florida, Georgia, Louisiana, and South Carolina (with the caveat that Alabama's provision was an ordinance rather than an amendment to the state constitution). For the text of these provisions, as well as proposed provisions that failed, see Kull, supra note 83, at 533–38.
88. See id. at 522–23.
89. See id. at 523–24.
given that he was being sued for a $109,000 slave debt. As Pillow’s enthusiasm indicates, the question of whether to enforce may have been a moral wash.

When it came time to test the nullification measures in courts, judges had little to do with these real-world ambiguities. Their reasoning was almost purely legal, and it was based not on express policy considerations but rather on a technical question of constitutional law: Did any state in the Confederacy actually secede? Clearly, sellers argued in seeking enforcement, the nullification measures abrogated slave contracts and violated the Contracts Clause of the Constitution. Buyers responded, however, that the abrogation was permissible for two reasons. First, the states were outside the Union when they devised the ban on slave-contract enforcement—in other words, they were not actually “states” subject to the prohibition of the Contracts Clause. Second, because Congress approved the state constitutions—or “dictated” their terms, as one court put it—and because the Federal Constitution did not prevent Congress from impairing the obligation of contracts, there was no wrongdoing on the part of the states.

This rather clever argument succeeded only in Georgia, abetted by Congress’s decision to strike a number of debt-forgiveness provisions from the state’s proposed constitution while leaving its slave-contract prohibition intact. The United States Supreme Court deflated it once and for all in White v. Hart. The Court held that the state constitution, far from being dictated by Congress, was “voluntary,” and even had it not been, Congress had no authority to approve a state measure that violated the Federal Constitution. To the notion that the state had seceded from the Union, the Court held

90. See id. at 506. The correspondence is more fully related in CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–88, PART ONE 860 n.289 (1971).
91. See Kull, supra note 83, at 530 (“Depending on the viewpoint of the observer, the nullification of slave debts was thus either the last tribute due to loyalty, or the last exaction of a Bourbon class, advanced in the name of its final representatives. Inevitably it was both at once, besides being (in the eyes of others still) the final vindication of longstanding doctrine on the illegality of slavery by natural law.”).
92. U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .”). Some jurists sought a way around this conclusion by drawing a distinction between a state’s authority to regulate its courts’ jurisdiction and its authority to impair contracts. See Jacoway v. Denton, 25 Ark. 625, 660 (1869) (McClure, J., dissenting). However, the prevailing view was that to strip individuals of a judicial forum to enforce their contracts was to impair the obligations of the contracts themselves.
94. Id. at 305; White v. Hart, 39 Ga. 306, 307 (1869).
95. 80 U.S. (13 Wall.) 646.
96. Id. at 649.
that for the duration of the war the states’ “rights under the Constitution were suspended, but not destroyed.” Thus perished the theory that nullification of slave contracts fell outside the Contracts Clause.

The real flaw of *White v. Hart* was not so much its take on whether a state could never leave the Union—a serious and nuanced question in the jurisprudence of the time—but rather that it entirely ignored the Thirteenth Amendment. The Court failed to distinguish contracts involving subject matter such as bonds—another context in which the legality of secession arose—from those involving human bondage. Even had a state no ability to leave the Union, the question remained whether the state constitutional provisions were an appropriate means of enforcing the Thirteenth Amendment’s prohibition of slavery. Chief Justice Salmon Chase, at least, believed that they were. Few, however, stopped to consider how the Reconstruction Amendments might have altered the original Constitution’s Contracts Clause. Even those judges who believed the state provisions to be constitutional appeared more concerned with fairness toward the contracting parties than with the postwar status of the freedmen. By relying upon the Contracts Clause to require

97. *Id.* at 651.
98. The Court’s rationales in *White v. Hart* might be questioned. It seems absurd to claim that States taking up arms against the federal government remained part of the Union during conflict—a point that several contemporary jurists acknowledged. See, e.g., *Texas v. White*, 74 U.S. (7 Wall.) 700, 737 (1869) (Grier, J., dissenting) (“This is to be decided as a political fact, not as a legal fiction. This court is bound to know and notice the public history of the nation. If I regard the truth of history for the last eight years, I cannot discover the State of Texas as one of these United States.”). In the face of this reality, *White v. Hart* had to rely on a semantic distinction between territories, which Congress would “admit to the Union” as new States, and the reconstructed antebellum states, which under the Reconstruction Acts would not be “readmitted to the union” but instead would be “entitled” or “admitted to” representation in Congress. *White v. Hart*, 80 U.S. at 652. The language of the Reconstruction Acts apparently proved that the States of the Confederacy never left. Nevertheless, the result was consistent with the Court’s precedents on postwar problems such as the validity of confederate bond debt. See *Texas v. White*, 74 U.S. at 726 (holding that Texas continued as part of the Union even after secession); *Hyman & Wieck*, *Equal Justice Under Law* 460–63 (discussing importance of holdings in *Texas v. White* and *White v. Hart* to the Radical Republicans’ program).
100. Osborn v. Nicholson, 80 U.S. (13 Wall.) 654, 664 (1872) (Chase, C.J., dissenting) (“[C]lause in State constitutions, acts of State legislatures, and decisions of State courts, warranted by the thirteenth and fourteenth amendments, cannot be held void as in violation of the original Constitution, which forbids the States to pass any law violating the obligation of contracts.”).
101. See McElvain v. Mudd, 44 Ala. 48, 81 (1870) (Peters., J., dissenting) (“The seeming injustice of [enforcing the contract], appears from the fact, that the appellant will be made to pay quite eight thousand dollars, in legal funds, to the appellee, for property in persons, now citizens
enforcement, the cases ending in White obscured the conflict between old and new constitutional orders that was inherent in the slave contract cases.\textsuperscript{102}

2. Avoidance Through Judicial Means

The conflict between old and new was more clearly at issue in a series of cases squarely arguing that the destruction of slavery also destroyed antebellum contracts for slaves. In these cases, the question was not a state’s power to nullify contracts, but rather whether the very nature of the contracts rendered them unenforceable. The argument came in three forms, each based in commercial law: First, that the end of slavery violated warranties that sellers had given as to the quality of their slaves. Second, that the end of slavery caused a “failure of consideration” that relieved buyers of their obligations under the contract. And third, that the end of slavery rendered slave contracts void as against public policy.

The weakest of these arguments posited that emancipation voided the seller’s warranty that the slave would be a “slave for life.” Such warranties were boilerplate—default language included in almost all slave contracts. On a common-sense reading, they meant simply that the slave at the heart of the contract was not in actuality free or physically damaged at the time of sale. These warranties did not guarantee that the slave would remain enslaved for the duration of his life or that slavery would never come to an end.

Postwar courts had no problem so holding. The Florida Supreme Court, for example, rested its decision on the distinction between insurance against loss, which the parties could have agreed to separately, and a basic warranty as to the nature of the slave at sale. Had the parties wished to warrant against the end of slavery, the Court stated,

\begin{quote}
they would doubtless have been more explicit in making known that intention than by adopting a stereotyped formula, which had been in use under an entirely different condition of things for more than two hundred
\end{quote}

of the State, who had been declared enfranchised by the nation, and whose emancipation the nation was most solemnly pledged to make good; and yet, get comparatively nothing of value for his money.”); Shorter v. Cobb, 39 Ga. 285, 304 (1869) (“It would be alike rigorous and unjust to hold that creditors were the only class whose property was insured against the contingencies and losses incident to the war; that a bond, note, or mortgage was the only property too sacred to be touched, and too secure to be affected during the general wreck of fortunes, and ruin of families.”).

\textsuperscript{102} See Jacoway v. Denton, 25 Ark. 625, 645 (1869) (“A change of constitution can not [sic] release a State from a contract made under a Constitution which permits it to be made.”).
years. Such an intention, clearly manifested by the terms used, would have imparted to the instrument rather the character of a 'policy of insurance' than of an ordinary warranty of title and continuous possession.\textsuperscript{103}

Courts considered agreements for slaves made at such a late date to be “risking contracts,”\textsuperscript{104} gambles that slaves would still have value at the end of the Civil War. As a matter of commercial law, the doctrine of eminent domain was sufficient to resolve the warranty issue in favor of the seller. Time and again, courts reasoned analogically that, just as a seller of land does not guarantee against future government confiscation, so too did the buyer bear the risk that the government would end the institution of slavery.\textsuperscript{105}

A separate theory, closely related to the warranty claim, argued that the end of slavery caused the contracts to suffer from “failure of consideration.” This argument depended in large part on the date of slavery’s end: at what point did it become illegal to contract for slaves? The \textit{Emancipation Proclamation Cases},\textsuperscript{106} a Texas decision, was exemplary of the way courts treated this question. In this particular case, the contracts had been made after the Emancipation Proclamation but before the end of hostilities between the North and South. The majority’s opinion was dedicated to a refutation of the Emancipation Proclamation’s legal force. A mere war measure, it was no authority for freedom of its own accord. In the court’s view, only a decisive cessation of hostilities could confirm slavery’s end, and only slavery’s end could make a contract for slaves illegal: “Until slavery was abolished, no feature of it was destroyed. Owners of slaves had all the rights of property therein, and the one not least in importance is its vendible quality.”\textsuperscript{107} For the Texas Supreme Court and for other courts that reasoned in a similar fashion, the Emancipation Proclamation was about timing, not about the broader meaning of freedom.

The dissent to the \textit{Emancipation Proclamation Cases}, penned by Andrew Jackson Hamilton, relied less on exegesis of the Proclamation’s legal power and more on the realities that it represented for slave owners. Even if the Proclamation could not free the slaves instantaneously, its effect was to declare decisively that slavery was contrary to the policy of the legitimate government. How,

\begin{itemize}
\item \textsuperscript{103} Walker \textit{v. Gatlin}, 12 Fla. 9, 14–15 (1868).
\item \textsuperscript{104} \textit{McElvain}, 44 Ala. at 55.
\item \textsuperscript{105} See, e.g., Calhoun \textit{v. Calhoun}, 2 S.C. 283, 303 (1870); \textit{Walker}, 12 Fla. at 15–17; \textit{Scott \textit{v. Scott}}, 59 Va. 150, 176–77 (1868) (Moncure, J., concurring).
\item \textsuperscript{106} 31 Tex. 504 (1868).
\item \textsuperscript{107} \textit{Id.} at 526.
\end{itemize}
then, could a court now support a contract that ran against that policy? “The question here,” wrote Hamilton,

is not as to the moment in time when the former slaves in Texas actually obtained their freedom by events in the war; but it is whether now the courts will aid in carrying out and enforcing contracts against the public policy of the government, pronounced in the most solemn form as both sovereign and belligerent in a great civil war.\(^{108}\)

Hamilton’s dissent was a species of the final major theory against enforcement: that slave contracts were void for public policy. But whereas Hamilton had tried to ground the public-policy argument on the foundation of the Emancipation Proclamation—and indeed, he would have upheld slave contracts made prior to its issuance\(^{109}\)—other judges adopted a public-policy argument of broader sweep. In Louisiana, the only state whose courts consistently nullified slave contracts, judges mixed castigation of slavery’s morality with somewhat more legalistic analysis in the vein of Hamilton’s opinion. For instance, in \textit{Wainwright v. Bridges}, Louisiana’s foundational slave-contract case, the court opined that slavery was a relic of “barbarous ages.”\(^{110}\) It had persisted in American culture as a matter of expediency, but “the moral conscience of men no longer permitted them to sustain slavery as a thing of right.”\(^{111}\) This broader point made, the court went on to hold that slave contracts were abolished along with slavery itself: “The fiat of the sovereign is potent to release the contracting parties, as well as potent to set the bondman free. Its sweep is general, and its wisdom does justice to all.”\(^{112}\)

These passages indicate that judges who refused to enforce slave contracts relied primarily on freewheeling application of principles of justice. In their opinions there was little exegesis of common law, statute, or the Constitution. Most courts, however, were eager to combat a mode of thought that did not rely on pure legal reasoning. As the Tennessee Supreme Court succinctly put it, “With the morality of slavery we have nothing to do, but simply announce the laws of property as we find them in reference to contracts of this

\(^{108}\) \textit{Id.} at 553 (Hamilton, J., dissenting).
\(^{109}\) \textit{Id.} at 552–53 (“As to the executed contracts of this sort, however reprehensible they may be, it is a matter of no concern to the courts of the country or to the laws of the land, provided the persons who were bought and sold have in fact attained their freedom.”).
\(^{111}\) \textit{Id.}
\(^{112}\) \textit{Id.} at 240.
In sum, the strategy of courts that enforced slave contracts was to adhere to established common-law precedents. The principles of commercial law that demanded enforcement were deeply rooted in Anglo-American legal thought—so firmly rooted, in fact, that judges could cite seventeenth-century English cases to support the proposition that a buyer bears the risk that the government will take property.114

Ancient authority did not precisely parallel the problem of slave contracts, of course. Slavery had always posed special legal puzzles of its own, given the dual nature of the slave as both property and human being, and questions that defied conventional analysis continued to arise in the slave-contract cases. For example, to enforce the contracts, courts were required to draw a conceptual distinction between the slave as tangible property—a sort of property that was now illegal—and the monetary value of the slave memorialized on paper. A decision against enforcement also posed a unique problem of judicial administration. Was there any limitation on these suits? If slave contracts were invalid only because slavery was immoral, a party who bought a slave on contract in 1830 had just as valid claim that his bargain was null as the buyer who completed his contract in 1863.115 Blatant sympathy for slavery played a role in the judicial calculus as well. In their most candid moments, judges excoriated the non-enforcement theory as a regrettable attack on the Southern past.116
Regardless of these nuances, the established forms of the common law provided an easy answer to pleas for relief, and postwar courts clung to these forms when faced with slave contracts. Had they inquired into the meaning of the new Constitution and the Thirteenth Amendment—and few state judges did—they would have found the issue vastly more complicated.

B. Osborn v. Nicholson and the Thirteenth Amendment
Counterargument

To gain a different view of how to treat slave contracts, we must depart the state courts for the federal circuit court for the Eastern District of Arkansas. In that forum arose Osborn v. Nicholson, which would eventually put a decisive end to the slave-contract controversy. Osborn involved a $1,300 debt for a twenty-three-year-old slave named Albert, contracted on the eve of Fort Sumter in March 1861. These facts did little to distinguish it from the numerous other slave-contract cases of the era. Yet Osborn is remarkable for two reasons. First, Judge Henry Clay Caldwell’s circuit court decision is the most clearly realized opinion to argue against enforcement, not to mention one of the few to justify that outcome based on the Thirteenth Amendment. Second, the Supreme Court’s opinion reversing Caldwell and enforcing the contract announced a starkly different view of freedom and personal rights—and provided an early example of the postwar Court’s tendency to favor established interests over freedmen and other exploited people. Read together, these two writings illustrate alternative visions of the Reconstruction Constitution and the Thirteenth Amendment’s place within it.

A biographical sketch portrays Henry Clay Caldwell as a man who “saw the law as an instrument of substantive justice.” This characterization certainly finds support in his Osborn opinion, a jeremiad against the slave states’ rejection of natural liberty and a prophecy for freedom under the Reconstruction Constitution.

118. Caldwell’s opinion is most certainly flawed. It is a rather baggy document that relies excessively on analogy to other cases. But it is difficult to express how effective the opinion is when it breaks free of legalistic form, particularly in the final five pages.
opinion’s decisional basis is something entirely different that what we see in the state cases, including those that forgave the debt. Caldwell’s refusal to enforce was not founded on “failure of consideration” or on a technical parsing of the state’s power to abrogate slave contracts under the Contracts Clause. And while the opinion as a whole might be accurately characterized as a public-policy argument, Caldwell’s position, unlike other public-policy arguments, was fully informed by the substantive implications of the Thirteenth Amendment.

Caldwell made two major points in the course of his opinion. He began by drawing a distinction between “natural” law and “municipal” or “positive” law. He reasoned that slavery was a violation of natural law and supported only by the positive law of the states. Abolition of positive slave law destroyed not only the property right in slaves but also the remedy by which that right could be enforced:

It was only by virtue of the slave code of the state, that the plaintiff ever could have maintained an action in any court on this contract. The common law would afford him no remedy, and the statute giving the remedy, having been repealed by article 13 of the amendments, of the constitution of the United States, he is without remedy.\(^\text{120}\)

In this vision—very much rooted in the antislavery thought of the antebellum era—the Thirteenth Amendment serves the remedial purpose of restoring the law to its natural state. Because the common law did not respect the right of the slaveowner, its forms could not justify the enforcement of slave contracts once positive law had been swept away.\(^\text{121}\)

Caldwell might have rested his opinion entirely on this interaction between natural and municipal law. But his second point went further—he analyzed the Thirteenth Amendment as a provision with a substantive force of its own. To be sure, the Thirteenth Amendment contained notions of natural law that Caldwell relied on

\(^{120}\) Osborn, 18 F. Cas. at 850.

\(^{121}\) Caldwell used similar reasoning to uphold Arkansas’s constitutional prohibition on enforcement. Because it was completely within the power of the states to abolish slavery under the old Constitution, slaveholding states could sanction abolition without violating the Contracts Clause. See id. at 852 (“Now if slave property was excepted from the operation of [the commerce] power, on the ground that the power over that subject was exclusively with the several states, upon which principle of logic or rule of construction can it be claimed that the constitution of the United States throws its protecting shield over the slave dealer, and the contracts growing out of that traffic?”). Caldwell pointed out that the state’s authority over slavery was so great that was justified to destroy the marriage contract between Dred Scott and his wife once Scott was taken from freedom and brought back to slavery in Missouri. If the state power over slavery could be used to destroy a marriage contract, then certainly it could be used to destroy a contract for slaves. Id. at 851.
in elsewhere in his opinion. The Amendment, he wrote, was passed “for the purpose of restoring the slaves to their natural rights, and conforming the institutions and laws of the republic and of the several states to the immutable law of eternal justice, and making the fact conform to the theory upon which our form of government is based.”

But when viewed alongside the Fourteenth Amendment, the Thirteenth Amendment not only restored natural law, but also established its own positive law of freedom:

The effect of these amendments cannot be limited to the mere severance of the legal relation of master and slave. They are farreaching in their results. Under them the former slave is now a citizen, possessing and enjoying all the rights of other citizens of the republic. Can any one doubt that it was the object and purpose of these amendments to strike down slavery and all its incidents, and all rights of action based upon it?

By focusing on citizenship and the incidents of slavery, Caldwell suggested that the Thirteenth Amendment was a substantive embodiment of liberty with which slave contracts could not be reconciled.

In the most evocative part of his opinion—indeed, the most vivid passage to appear in any of the slave-contract cases—Caldwell provides his interpretation of the Thirteenth Amendment even more tangible form:

With this passage, Caldwell turned the warranty argument, so easily dismissed by other courts, on its head. On this view, the warranty in a slave contract was more than boilerplate. It provided a license to inspect a freedman in exactly the same fashion as if he had been a

122. Id. at 854–55.
123. Id. at 855 (emphasis added).
124. Id. (emphasis added).
slave. Fanciful though Caldwell’s scenario may have been, it provided a powerful argument that slave contracts were incidents of slavery barred by force of the Thirteenth Amendment. By contrasting slavery’s incidents to citizenship rights, Caldwell provided a more concrete basis for decision than the fuzzier notions of natural law and public policy. A citizen could never be the subject of contract. How then could a freedman?

The Supreme Court, with only Chief Justice Chase dissenting, refuted every aspect of Caldwell’s reasoning. It rejected the notion that slavery was law only in jurisdictions where supported by statute: “Being valid when and where it was made, [the contract] was so everywhere.” In the Court’s view, slaves had long been “covered by the same protection of other property.” Eradication of the positive law of slavery did not eradicate the common law of contract. Given that slaves were a legal form of property when the contract was made, the question of enforceability was governed by the principles of contract law. The most relevant analogy was to eminent domain. Just as the buyer of real property bore the risk that the government would convert it to public use, so too the buyer of a slave bore the risk that the government would eliminate slavery as a valid form of property.

In short, much of the language upon which the Court based its opinion could have been lifted from one of the many state decisions on the issue.

Had the Court stopped there, the opinion would have been notable mainly for its unique facts. It did not stop there, however. Instead, it explained why the case implicated due process—that of former slaveholders. By the time of the Thirteenth Amendment, the Court explained, the right of the seller to his payment had become “legally and completely vested.” The real danger of Caldwell’s ruling was that refusal to enforce a vested contract right would “take away one man’s property and give it to another. . . . [T]he deprivation would be without due process of law. This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the States and the Nation.” In short, the Court went beyond the proper application of common law rules to announce a philosophy of natural liberty and substantive justice—one

125. In fact, after the Civil War juries did sometimes decide whether certain slaves had been “defective” under a warranty. See Trimble v. Isbell, 51 Ala. 356 (1874).
127. Id. at 661.
128. Id. at 659.
129. Id. at 662.
130. Id. (internal quotation marks omitted).
completely at odds with Caldwell’s.\textsuperscript{131} Indeed, this is the very sort of substantive-due-process argument that the Court would use to protect economic rights well into the twentieth century.\textsuperscript{132}

The \textit{Osborn} case is important not simply for ending the slave-contract dispute, but for presenting two opposing visions of the postwar constitutional order. In the Court’s view, the Reconstruction Amendments did little to alter the relationship between the individual property owner and the state. For sure, it forbade slavery and compensation for the loss of slaves. But where these specific prohibitions did not speak, the individual retained the extent of his property interest. Natural law was relevant only insofar as it required protection of a private, vested right—even if that right found its roots in slavery.

For Caldwell, the issue was more complex. The Reconstruction Amendments did not merely abolish slavery—they altered the entirety of the constitutional structure. Though the antebellum Constitution would have given the seller a remedy, the new Constitution demanded a different result.\textsuperscript{133} Most fundamentally, the Thirteenth Amendment ensured that individual property interests would no longer take precedence over the liberty rights of freedmen as a class. Caldwell saw his role as to decide whether “the good of the community at large is taken to be of more importance than the claim of the individual.”\textsuperscript{134} That decision was not based on Caldwell’s own predilections. Rather, it was moored to the Thirteenth Amendment, which showed that “slavery is condemned in all its features.”\textsuperscript{135} Indeed, Caldwell appears to be the first judge to have read the Thirteenth Amendment as an affirmative prohibition on the relics of slavery.

But Caldwell’s broader view was not to be the law. Under the Court’s interpretation of the new Constitution, the decisive question—answered as soon it was asked—was whether enforcement carried freedmen back into literal slavery. As the Court saw it, “[n]either the

\begin{itemize}
  \item \textsuperscript{131} See \textit{id}. at 663 (“Whatever we think of the institution of slavery viewed in the light of religion, morals, humanity, or a sound political economy—as the obligation here in question was valid when executed, \textit{setting as a court of justice}, we have no choice but to give it effect.” (emphasis added)).
  \item \textsuperscript{132} See \textit{Risa Goluboff, The Lost Promise of Civil Rights} 17–25 (2007) (tracing development of the concept of civil rights from Reconstruction to the New Deal).
  \item \textsuperscript{133} \textit{Osborn v. Nicholson}, 18 F. Cas. 846 (C.C.E.D. Ark. 1870) (“These amendments are the work of the sovereign people of the United States. There are no technical rules to obstruct or prevent their full operation presently on all persons, matters, and things within their scope. Obligation of contracts and vested rights, based on slavery, cannot be set up to impede or restrain their operation. And no one can escape from their operation by the cry of the ‘constitution as it was.’”).
  \item \textsuperscript{134} \textit{id}. at 855.
  \item \textsuperscript{135} \textit{id}.
\end{itemize}
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rights nor the interests of those held lately in bondage [were] affected” by enforcement of a slave contract. 136

C. Contracts for Slaves by Slaves: Enforcement as a Badge and Incident of Slavery

To the trained legal mind, the Supreme Court’s reasoning in Osborn has a satisfying logic. In the field of law, there is nothing especially problematic about separating the right to a thing from the possession of the thing itself. The slave had her freedom—the use of her own body—and that was as it should be. But why should that freedom affect in the least a disembodied right to the slave’s labor? As Professor Kull has argued, there was a certain dissonance in making the seller bear the loss of the slave. Refusal to enforce made emancipation retroactive to sellers, who by a temporal trick lost the value of their property even where it had remained valid in law. 137 Morally satisfying as voiding the contract may have been, it could not make emancipation retroactive to the slaves themselves, who of course remained in bondage until the end of the war.

This reasoning is complicated, however, if we consider a particular type of contract that has eluded the attention of scholars: one where the buying party was himself a former slave purchasing freedom for his family. In such cases, enforcement of the contract had an opposite temporal effect than it did when the parties were exclusively white. Rather than simply vindicating the white seller by refusing to make emancipation of his slave retroactive, enforcement carried forward the shackles of slavery well beyond the institution’s expiration date. In a very real sense, a freedman forced to make good on his antebellum agreements was still chained to his master. And this realization forces us to reconsider the easy assumption that freedmen were unaffected by being the subject of an antebellum contract between whites.

Consider Andrews v. Page. 138 In December 1857, Henry Page, a free man of color and owner of 321 acres of land, 139 made an

136. Osborn, 80 U.S. at 663.
137. See Kull, supra note 83, at 494 (“Nullification . . . pushed back the effective date of emancipation as between these buyers and sellers, denying to the seller the fruit of his favorable bargain and relieving the buyer from the consequences of his unfavorable one.”).
139. Page possessed equitable title to all but thirteen acres of the land. Record of Prior Proceedings, Andrews v. Page, 50 Tenn. (3 Heisk.) 653 (1871) (on file at Tennessee State Library and Archives, Manuscript Section, box 2404). An equitable titleholder enjoys use and possession of land but does not have actual ownership. BLACK’S LAW DICTIONARY 1214 (9th ed. 2009) (defining “beneficial owner”).
agreement with William B. Andrews, a Tennessee slaveowner. In exchange for a $3,200 bill of sale, Page received three slaves: Page’s wife, Dilly, and Page’s children, Bill and Britt. When the note came due in January 1861, Page was nowhere to be found. Andrews placed an attachment on Page’s property, but the intervention of the Civil War prevented him from carrying it out. During the war, Page died working on a sawmill, leaving his family to live on the land. Though the war freed Page’s family, it had not freed Page of his obligation to Andrews. Andrews thus sought to take the Page property in satisfaction of the note.

The resulting opinion of the Tennessee Supreme Court is a remarkable document of how the vestiges of slavery continued to loom over freedmen after the Civil War. The court expressly declined to decide the case on the basis of the Thirteenth Amendment, or to inquire whether Page freed his family when he purchased them.\textsuperscript{140} It did not address whether the contract was valid or whether the Civil Rights Act of 1866 prohibited attachment.\textsuperscript{141} Instead, it decided the case under the law of slave marriages. Because that law recognized that Page and Dilly had entered into a valid marriage while enslaved, and because a postwar statute ratified that law, Dilly was entitled to a dower interest in the property.\textsuperscript{142}

That a freedwoman could take her former owner to court and win a judgment in her favor may seem a startling result. But, at least in Dilly Page’s case, success was deceptive. The court never considered the possibility that the contract might have been invalid because made for slaves—or that the purchaser was not a coequal white slaveowner, but rather a husband and father purchasing his wife and children.\textsuperscript{143} Through dower, Dilly would be able to keep part of her

\begin{footnotes}
\item[140] Andrews, 50 Tenn. at 658 (“The rights of the parties cannot now be determined upon the constitution and laws as they now exist, but are to be ascertained under the constitution and laws as they existed at the death of Henry Page, in 1864.”). Cf. Osborn, 18 F. Cas. at 854 (“It must not be forgotten that this question must be determined under the constitution of the United States, as it stands now.”).
\item[141] Andrews, 50 Tenn. at 656.
\item[142] Id. at 670–71.
\item[143] See id. at 658 (“Dilly presented a petition for rehearing, in which she alleged that Harry had not purchased her for the purpose of making her his slave, but as a wife, and to make her a free woman.”). The case does not indicate whether Page himself had once been Andrews’s slave, or whether he had always been free. My research has shown that he was born around 1788 in Virginia. Smith County, Tennessee, Census of 1850 p. 164 (Thomas E. Partlow, ed.) (on file at Tennessee State Library and Archives). One explanation for Page’s move—perhaps the best explanation, considering that the natural path of migration for a free black prior to the Civil War was northward rather than southward—is that a master or slave trader transported him to Tennessee.
\end{footnotes}
land.\textsuperscript{144} But it would only be part—from the other part, Andrews was entitled to satisfy the debt Page contracted for her freedom.\textsuperscript{145} Furthermore, the Page children were unprotected, because the court awarded Andrews a remainder in the property that was subject to dower.\textsuperscript{146} Unless the debt could be repaid, no future generation of Pages would enjoy this land.

The Thirteenth Amendment emancipated Dilly Page and forbade that she ever again be treated as property. But it did not prevent her former owner from continuing to extract value from her. In one sense, Henry Page’s contract was no different than numerous others for slaves—Andrews acquired the contract right when slave property was legal, and abolition of a slave’s status as property did not also abolish the right. Yet Page’s contract also had a key difference—it permitted Dilly’s former master to take land that would rightfully be hers but for her prior status as a slave. Enforcement meant that Dilly was not truly free from her obligations to her master. This was most certainly not, as the Supreme Court wrote in \textit{Osborn}, a situation where “[n]either the rights nor the interests of those lately in bondage [were] affected.”\textsuperscript{147}

By showing the freedman not as abstract “consideration” for money, but instead as a live human being, \textit{Andrews v. Page} forces us to reassess enforcement’s broader implications for emancipation. It is true that very few slave-contract cases placed upon freedmen the sort of real burden that enforcement caused Dilly Page. There is no evidence that courts were awash in claims by whites against their former slaves. But this single agreement alone brings the entirety of the slave-contract edifice into sharp relief. Enforcement of every one of these contracts hinged on an assumption that former slaves were less than fully free. If slave contracts could be enforced, freedmen retained something of their character of property—even if expressed as “vested rights” instead of tangible ownership. This was not a harmless attitude in an era where a major aspiration of the moneyed Southern class was to retain the labor relations that prevailed during slavery.\textsuperscript{148}

\begin{itemize}
\item \textsuperscript{144} My estimation is that she would get to keep 107 acres. Dower typically protected one-third of the husband’s real property, and \textit{Andrews} explicitly held that the property over which Henry Page held equitable title would be included. \textit{Andrews}, 50 Tenn. at 670–71. Of course, this seems like a rather large chunk of land. But the amount of land is not really relevant to my argument—the point remains that Dilly’s former owner could strip her of over two hundred acres of land because her slave status was enshrined in a contract.
\item \textsuperscript{145} \textit{Id.} at 671.
\item \textsuperscript{146} \textit{Id.}
\item \textsuperscript{147} \textit{Osborn v. Nicholson}, 80 U.S. (13 Wall.) 654, 663 (1872).
\item \textsuperscript{148} See \textit{Foner}, supra note 76, at 428 (“Equally important among the aims of violence was the restoration of labor discipline on white-owned farms and plantations. In a sense, the Klan
From a legal standpoint, *Andrews v. Page* supports an argument that slave contracts were an outcropping of slavery that should have been barred under the Thirteenth Amendment. For freed slaves such as Dilly Page, who still owed money on the purchase price of their freedom, the authority of the master and his entitlement to take their property represented a direct return to the law of slavery. Put another way, these contracts re-imposed the legal incidents of slave status. And for those freedmen who were the subject of contracts between whites, the very existence of the contract symbolized the freedman’s continued subordination as a form of salable property. This symbolic effect rendered contracts between whites badges of slavery.

As Judge Caldwell’s opinion suggests, these interpretations were available to Reconstruction-era courts. Their failure to prevail offers a powerful explanation for the nonexistence of a Thirteenth Amendment jurisprudence well into the twentieth century. But these interpretations also offer a starting point for examining how the Thirteenth Amendment might be revived as a functional tool in constitutional law.

### III. Judicial Interpretation of the Thirteenth Amendment

As scholarly interest in the Thirteenth Amendment has grown, a debate has arisen about the role of the judiciary in its interpretation. Some have suggested that the Thirteenth Amendment, while perhaps not impervious to construction, is better used as a tool of constitutional politics than a tool of constitutional law. Based on the notion that the judiciary is ill-suited to identify the badges and incidents of slavery, these arguments call for incremental interpretation exclusively through Congress.\(^{149}\) Structural constitutional concerns such as federalism and separation of powers may also counsel against novel judicial applications of undeveloped constitutional principles. Yet, as some scholars have recognized, the historical record provides good reason to believe that Reconstruction’s

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\(^{149}\) See Greene, *supra* note 4, at 1754 (“[D]evoting resources to manipulation of judicial doctrine distracts the mind from the project of altering the political conditions that will ultimately be needed for the doctrine to be adopted and to crystallize into lasting precedent.”); Rutherglen, *supra* note 3, at 1584 (suggesting that the best approach counsels “only incremental changes in the Thirteenth Amendment—in the power of Congress to enforce it, rather than judicial review under it”).
framers did not intend for courts to refrain from interpreting the Amendment.\textsuperscript{150} Perhaps neither side of this debate is entirely correct. The better path may be to acknowledge that development of the Thirteenth Amendment requires a dialogue between the judiciary and the political branches.\textsuperscript{151} For this dialogue to occur, scholars, judges, and practitioners must take seriously the potential for judicial interpretation of the Thirteenth Amendment as well as its prudential limits. This Part develops a framework to address both concerns. As an initial matter, neither scholars, nor Congress, nor the judiciary have developed a complete procedural apparatus by which litigants might present courts with Thirteenth Amendment claims.\textsuperscript{152} I therefore begin by discussing potential procedural mechanisms for bringing Thirteenth Amendment claims. Though some avenues for judicial action already exist—a point that the slave-contract cases illustrate—private conduct remains outside the traditional structure for enforcing civil rights law. This raises the possibility, advanced recently by some scholars, that the Thirteenth Amendment reaches only limited private conduct. Using the slave-contract cases as a foundation, I reject this possibility in favor of broad reading of the Amendment’s coverage of non-state action. However, acknowledging that this reading raises concerns about unfettered judicial power, I seek to define the boundaries of justiciability by identifying situations in which judicial enforcement is warranted and those in which it is not. This analysis suggests that judicial interpretation of the Thirteenth Amendment is most proper when supported by congressional background principles. It also provides grounds for further scholarship on the substantive definition of the badges and incidents of slavery.

A. Procedural Enforcement Mechanisms

Assuming that a particular practice qualifies as a badge or incident of slavery, does a person injured by that practice have a

\textsuperscript{150} See Carter, supra note 58, at 1342–47. Professor Carter’s piece is one of the most detailed and nuanced to argue, like this Article, that it is proper for the judiciary to interpret the Thirteenth Amendment.

\textsuperscript{151} See McAward, supra note 73, at 142 (suggesting that there is room in Thirteenth Amendment interpretation for a “productive constitutional dialectic between coequal and coordinate federal branches”).

\textsuperscript{152} Carter, supra note 58, at 1344 n.124 (noting the “important and under-developed distinction between whether the Thirteenth Amendment itself creates a right to be free of the badges and incidents of slavery, and, if so, how that right can be enforced.”).
judicial remedy? As the law currently stands, the answer depends on whether the Thirteenth Amendment is to be used as a sword or a shield in litigation.

The slave-contract cases present a clear situation in which the Thirteenth Amendment provides a remedy: When a defendant faces a civil claim or criminal charge that, if successful, would perpetuate a practice barred by the Amendment. If, as argued above, enforcement of slave contracts violated the Thirteenth Amendment, then the Thirteenth Amendment could have served as a defense to enforcement. Likewise, the Supreme Court struck down peonage practices that violated Section One in Bailey v. Alabama, a case where a criminal defendant successfully raised a Thirteenth Amendment defense. Now as then, courts routinely block enforcement of laws that violate defendants’ constitutional rights. As a matter purely of judicial procedure, there is no reason why courts should not permit defendants similarly to use the Thirteenth Amendment as a shield.

What about situations where a plaintiff wishes to use the Thirteenth Amendment as a sword? Can a person bring a lawsuit asking a court to block a practice that imposes a badge or incident of slavery? Such suits might claim that a particular labor practice amounts to involuntary servitude or might seek to prospectively block enforcement of a state law that creates a badge or incident of slavery. They might even ask for damages. This is much trickier procedural territory. To bring suit for a violation of Constitutional rights, a plaintiff typically must locate a cause of action in a federal statute. But no cause of action unique to the Thirteenth Amendment currently exists in federal law. Underdevelopment of the Amendment’s

153. See supra Part II.C.
154. 219 U.S. 219 (1911).
155. See supra notes 41–45 and accompanying text. Another case in which the defendants might have used the Thirteenth Amendment as a shield is Shelley v. Kraemer, 344 U.S. 1 (1948). In Shelley, the defendants were African Americans who bought a home encumbered by a racially restrictive covenant. The plaintiff sought judicial enforcement of the covenant, but the Supreme Court held that judicial enforcement was state action that violated the Equal Protection clause of the Fourteenth Amendment. Id. at 19. As Mark Rosen has argued, the Court might have more directly struck down the covenant by holding that it violated the Thirteenth Amendment or the portions of the Civil Rights Act of 1866 that enforced it. See Mark D. Rosen, Was Shelley v. Kraemer Incorrectly Decided? Some New Answers, 95 CALIF. L. REV. 451, 483–91 (2007).
157. However, as I discuss in Part III.C, there may be nonprocedural reasons to limit judicial authority to block enforcement of laws on Thirteenth Amendment grounds.
substance has led to underdevelopment of the procedural mechanisms to enforce it.

Of course, federal law does provide several causes of action for plaintiffs to enforce the civil rights laws, and these may be used to enforce the Thirteenth Amendment as well as traditionally recognized constitutional rights. The Supreme Court has already ratified 42 U.S.C. §§ 1981 and 1982, which prohibit racial discrimination in contracting and property holding respectively, as valid exercises of Congress’s Thirteenth Amendment authority.\textsuperscript{158} And 42 U.S.C. § 1983, the most commonly invoked civil rights statute, permits suits against state actors for violations of federal rights.\textsuperscript{159} So long as a practice violates the Thirteenth Amendment and is the product of state action, an injured party may sue to prevent it.\textsuperscript{160} Other statutes, less frequently invoked, are available to prevent Thirteenth Amendment violations. 42 U.S.C. § 241, for example, criminalizes private conspiracies to deprive individuals of federal rights.\textsuperscript{161} And other civil rights laws, such as Title VII of the Civil Rights Act of 1964, were passed under the authority of the Commerce Clause but protect substantive rights that may be covered by the Thirteenth Amendment.\textsuperscript{162}

These laws aside, there is not an adequate statutory scheme to permit judicial enforcement of the Thirteenth Amendment to the full extent of its prohibitions. State action is plainly covered, but there is


\textsuperscript{159} The statute reads, “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .” Its criminal-law counterpart is found at 42 U.S.C. § 242.

\textsuperscript{160} A recent example in which a plaintiff used § 1983 to enforce the Thirteenth Amendment is McGarry v. Pallito, 687 F.3d 505 (2d Cir. 2012). The case held that the plaintiff stated a claim under the Thirteenth Amendment where he alleged that prison officials made him work at hard labor during pretrial detention. Because he had not been “duly convicted,” the crime exception to the Thirteenth Amendment did not come into play.

\textsuperscript{161} The statute makes it a crime for two or more persons to “conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory or District in the free exercise of any right or privilege secured to him by the Constitution or laws of the United States, or because of his exercise of the same” or to “go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured.” Its civil counterpart, 42 U.S.C. § 1985(3), speaks more narrowly of conspiracies to deprive “any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.”

no civil cause of action against private persons not acting under color of law. 163 Though § 241 allows criminal prosecutions of private conspiracies to violate Thirteenth Amendment rights, private parties may only bring civil actions insofar as a private conspiracy deprives an individual of “equal protection of the laws.” 164 Moreover, the Supreme Court has narrowed the government’s use of § 241 to those situations where conspirators use physical or legal coercion to impose servitude. 165 And the statutes do not speak at all of a remedy against individual natural persons or corporations—that is, those not conspiring with others—when they impose the badges or incidents of slavery. In sum, the current procedural scheme for judicial enforcement of the Thirteenth Amendment is a piece of Swiss cheese: Full coverage for violations by state actors, slight coverage for private conspiracies, and no coverage for individual actors.

The simplest way to correct this problem is to read a direct cause of action into the Thirteenth Amendment itself. Though this approach has been called a Bivens remedy, 166 that is something of a misnomer. Bivens permits damages suits against federal officers for violations of Fourth Amendment rights by federal officers, even

163. See Carter, supra note 57, at 1344 (“It is possible that the Amendment, even in the absence of congressional action, creates a constitutional right to be free of the badges and incidents of slavery but that an individual does not have a private cause of action to enforce that right.”).

164. 42 U.S.C. § 1985(3). See supra note 161. Of course, it might be argued that a practice that amounts to a badge or incident of slavery also deprives a person of the equal protection of the laws (though, except in Dilly Page’s situation, that proposition would not have been true in the slave-contract cases). It is a matter of some debate whether the Thirteenth Amendment contains an equal protection component. See, e.g., TenBroek, supra note 15, at 200. However, the principle of badges and incidents of slavery is qualitatively different, and perhaps broader, than the principle of equal protection.

165. United States v. Kozinski, 487 U.S. 936, 941–44 (1988). The defendants in the case forced two mentally handicapped men to work on their dairy farm without pay. The government did not seek to establish that the defendants physically forced the men to work, but rather that they had kept them as “psychological hostages” and “brainwashed” them. Id. at 935. The Court held such proof of psychological compulsion inadequate to establish “involuntary servitude” for the purpose of § 241. Some authors have suggested that Kozinski is especially problematic for advocates of judicial enforcement of the Thirteenth Amendment. Section 241 contains no substantive rights; to reach its conclusion, the Court had to interpret the term “involuntary servitude” as it is used in Section One of the Thirteenth Amendment. The narrow reading that the Court established may foreclose judicial enforcement of any violation other than physically compelled labor. See Greene, supra note 4, at 1761–62. However, the Court in Kozinski emphasized that it was not defining the scope of the Thirteenth Amendment, but rather viewing it “through the narrow window that is § 241.” Kozinski, 487 U.S. at 944. That meant following the interpretive policy of the rule of lenity, as appropriate in a criminal context. Id. at 952. Kozinski does not prohibit a broader judicial reading of the Thirteenth Amendment when it is not the basis of prosecution.

166. See Azmy, supra note 57, at 1049–60 (discussing direct actions under the Thirteenth Amendment). The reference, of course, is to Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).
though Congress has not provided a cause of action for such suits. It does not cover private parties; indeed, the Court later held that private parties could not be sued pursuant to *Bivens*. In the context of the Thirteenth Amendment, a direct cause of action implies something larger than *Bivens*, something that would permit suit against state as well as private actors for injunctive relief as well as for damages. However, the general rationale by which *Bivens* justified a direct cause of action for damages against federal officers—that it is necessary to vindicate the Fourth Amendment—is equally applicable to the Thirteenth Amendment. To enforce the right, a remedy must be implied.

What are some potential objections to a *Bivens* approach? One was evident in *Bivens* itself: separation-of-powers principles mandate that the legislature rather than the judiciary provide private causes of action. But this concern did not prevent the *Bivens* Court from providing a constitutional remedy where no alternative enforcement existed—as it does not where the unique considerations of the Thirteenth Amendment are concerned. Even though the current

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168. An even more innovative approach to judicial enforcement of the Thirteenth Amendment is suggested by Mark Rosen’s concept of “constitutional preemption.” In a fascinating article, Professor Rosen argues that the Thirteenth Amendment was a better basis than the Equal Protection Clause for deciding *Shelley v. Kraemer*, 344 U.S. 1 (1948). See Rosen, *supra* note 155, at 498–510. Under the procedure he proposes, private parties would be preempted from enforcing racially restrictive covenants because the federal government could have banned them under the Thirteenth Amendment in the first place. *See id.* at 491–98. On this view, the Thirteenth Amendment has a “dormant” aspect much like the Commerce Clause. Just as states are preempted from regulating interstate commerce despite Congressional inaction, individuals are preempted from imposing badges and incidents of slavery despite Congressional inaction. Ingenious though the proposal is, there are problems with extending its approach beyond situations, as in *Shelley* and the slave-contract cases, where a person seeks to use the Thirteenth Amendment as a shield. First, some cause of action would have to be found to permit a person to bring the preemption theory before a federal court. It might be implied by the Supremacy Clause, though a recent Supreme Court case has brought into doubt whether the Supremacy Clause alone provides a direct cause of action. *See Douglas v. Indep. Living Ctr. of S. Cal, Inc.*, 132 S. Ct. 1204, 1211 (2012) (remanding without answering the question); *id.* at 1213 (Roberts, J., dissenting) (stating on behalf of four justices that “to say that there is a federal statutory right enforceable under the Supremacy Clause, when there is no such right under the pertinent statute itself, would effect a complete end-run around this Court’s implied right of action and 42 U.S.C. § 1983 jurisprudence.”). Second, assuming a cause of action were found, the problems of separation of powers and federalism discussed *infra* would still arise, because “constitutional preemption” still requires a court to interpret the substance of the Thirteenth Amendment. Given that the *Bivens*-like remedy is a more direct procedural path, it is preferable to “constitutional preemption.”

169. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 411–12 (1971) (Burger, J., dissenting) (“We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power.”).
Supreme Court does not go out of its way to extend *Bivens*, its rule remains good law. Thus, it would seem that courts could provide a Thirteenth Amendment cause of action akin to *Bivens* absent some “special factor counselling hesitation.”

One such factor might arise from the unsettled nature of Thirteenth Amendment rights, or at least some of them. Awarding damages against employers who impose literal wage slavery does not seem to be a particularly controversial proposition. The Amendment was meant to outlaw involuntary servitude, so why should courts not give that pronouncement effect? But when we start talking about novel interpretations of the Amendment—those that would ban anti-abortion laws or sexual harassment, for example—issues of separation of powers and federalism begin to bubble to the surface. Remedies against the badges and incidents of slavery are likely to affect practices that have typically been left to the political processes or that are within the purview of the states.

However, these considerations need not enter into an analysis of whether there is a procedural mechanism for bringing a Thirteenth Amendment suit. As I explain below, once a plaintiff presents a court with a claim, a set of prudential rules accounting for these concerns may guide judges on whether to enforce the Thirteenth Amendment in a given circumstance. The proper path is to permit the remedy at the threshold and then to allow courts to apply these rules of constitutional deference where apt.

**B. Judicial Competence to Enforce the Thirteenth Amendment Against Private Parties**

Besides the question of available causes of action to enforce the Thirteenth Amendment against private parties, there is the more basic question of whether the Amendment applies to private parties at all. It has rarely been necessary to defend the proposition that the Thirteenth Amendment applies to all forms of private action. By its terms, the Amendment contains no state-action limitation, and

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170. See Minneci v. Pollard, 132 S. Ct. 617, 620 (2012) (declining to provide a *Bivens* remedy for Eighth Amendment violation at private federal prison because remedy was available in state tort law).
171. *Bivens*, 403 U.S. at 396.
172. Professor Azmy’s article focuses specifically on these most blatant sorts of Thirteenth Amendment violations. See Azmy, supra note 57, at 1049–60. It does not discuss whether a direct cause of action is necessary or wise to enforce against the badges and incidents of slavery.
173. See supra Part III.C.
longstanding authority establishes that Section Two permits Congress to pass laws “operating upon the acts of individuals, whether sanctioned by State legislation or not.”\textsuperscript{174} However, as scholars have recently sought to revive Congress’s legislative power under the Thirteenth Amendment, some have proposed that the concept of “badges and incidents of slavery” cannot be employed against all private acts. In particular, Jennifer McAward, one of the most thorough contemporary writers on the Thirteenth Amendment, suggests that a practice cannot be a badge or incident of slavery unless it is a “public or widespread private action.”\textsuperscript{175} “One off” occasions of discrimination do not count.\textsuperscript{176} This claim is well worth considering, particularly in the context of judicial enforcement.

As an initial matter, there is little reason to think that this claim is correct as applied to Congress’s Section Two authority. It confuses the substance of the Thirteenth Amendment—what counts as a badge or incident of slavery?—with the more fundamental issue of whom the amendment may reach.\textsuperscript{177} The substance of the Amendment is up for genuine debate, but its extension to private parties is not. The Supreme Court has time and again considered legislation passed under Section Two, and time and again it has stated, without limiting language, that such legislation applies to private conduct.\textsuperscript{178} Indeed, few would argue that a private individual who literally enslaves someone for a day—a “one off” event—has not violated the Thirteenth Amendment. It follows that if a practice is properly considered a badge or incident of slavery, then it is prohibited to a single individual as much as to the largest government entity.

\textsuperscript{174}. The Civil Rights Cases, 109 U.S. 3, 23 (1883).
\textsuperscript{175}. Jennifer Mason McAward, supra note 7, at 630.
\textsuperscript{176}. Id. at 614.
\textsuperscript{177}. I believe that Professor McAward’s error stems in large part from an incorrect reading of the Civil Rights Cases, particularly Justice Bradley’s maxim that to find a Thirteenth Amendment violation under the circumstances would be “running the slavery argument into the ground.” The Civil Rights Cases, 109 U.S. at 24. Professor McAward takes that statement to mean that “the concept of the badges and incidents of slavery referred only to state action.” McAward, supra note 7, at 615. However, Justice Bradley meant only that it would be wrong to conclude that discrimination in public accommodation was a badge of slavery. He did not say that private action in general cannot be a badge of slavery. Only Hodges v. United States stands for the proposition that private action cannot be a badge or incident of slavery—but Jones v. Alfred H. Mayer Co. expressly overruled Hodges. See supra note 51.
On its face, this proposition would appear to be true regardless of whether the judicial branch or the legislative branch is interpreting the Amendment. However, special questions of judicial competence might arise when the Thirteenth Amendment is interpreted to cover private actions that have previously been free of judicial scrutiny. As applied to plain instances of involuntary servitude, the Amendment provides courts with a clear mandate to act. But new definitions of badges and incidents of slavery could engender clashes with other constitutional rights. For example, any finding that hate speech violated the Thirteenth Amendment would necessarily conflict with First Amendment freedoms. There is a good argument, at least, that Congress rather than the Court is best situated to sort out such clashes.

To elaborate, consider that the rights protected by the Thirteenth Amendment and those protected by most other constitutional provisions are qualitatively different. Many of our constitutional amendments protect individual autonomy. The First Amendment guarantees of free speech and free exercise, the Fourth Amendment guarantee of privacy, the Fifth Amendment Takings Clause—each of these advances self-sufficiency. The Thirteenth Amendment shares this quality—indeed, freedom from enslavement is perhaps the most basic of autonomy rights. Yet unlike many of the constitution’s rights provisions, the Thirteenth Amendment finds its impetus in the protection of classes as well of individuals. It was designed to remedy a class-based wrong, and it continues to have a class-based component. What’s more, the classes protected by the amendment can change over time.

179. See Akhil Reed Amar, *The Case of the Missing Amendments*: R.A.V. v. City of St. Paul, 106 H.A.R.V. L. REV. 124, 126 (1992) (arguing that “the most difficult question hiding behind R.A.V.” was “whether, and under what circumstances, . . . symbols such as burning crosses cease to be part of the freedom of speech protected by the First and Fourteenth Amendments, and instead constitute badges of servitude that may be prohibited under the Thirteenth and Fourteenth Amendments”).

180. See Rosen, *supra* 155, at 507–08 (“[T]he considerations of institutional competence and basic democratic commitments together strongly suggest that the more political legislative and executive branches properly play a central, if not the dominant, role in the deeply subjective and value-laden decision-making process of prioritizing among competing constitutional commitments.”).

181. Most obviously, the Thirteenth Amendment was meant to protect African Americans freed from slavery. But its class-based implications have gone beyond that. For example, Risa Goluboff has written of how the Justice Department’s Civil Rights Section pursued Thirteenth Amendment theories on behalf of free labor during the New Deal. *See Goluboff, supra* note 132, at 158–59.

182. The *Slaughterhouse Cases* stated as much when it said that the Amendment might someday apply to coolie labor or Mexican peonage. 83 U.S. 36, 72 (1873).
entail social facts, and the question of how to act upon such facts is more properly within the province of the legislature.\footnote{183} The slave-contract cases illustrate both the collective nature of Thirteenth Amendment rights and the potential difficulty that arises from having judges adjudicate those rights. As established above,\footnote{184} slave contracts were properly considered badges and incidents of slavery. This is because enforcement of the contracts, when taken in the aggregate, pinned a badge of servitude upon all freedmen—a distinct class—by suggesting that they could still be treated as property. But for a judge to so hold, he would have to determine that this collective Thirteenth Amendment interest outweighed the property interest of individual sellers on contract. Of course, constitutional law routinely requires judges to balance rights against each other. But the amorphous nature of the right to be free from “badges and incidents of slavery” warrants input from the political branches.

Input, however, does not imply exclusivity. Ultimately, it was within judicial competence to determine that the Thirteenth Amendment trumped individual property rights because the Reconstruction Congress had given the judiciary a clear background principle against which to work. That principle, established in the passage of the Thirteenth Amendment as well as in the Civil Rights Act of 1866, was a clear repudiation of property rights in favor of freedom. The Reconstruction Congress unambiguously stated its preference to revolutionize federal-state relations and to wipe out the vestiges of slavery. Given that context, it would have been appropriate for the judiciary to vindicate individual and collective freedom under the Thirteenth Amendment by refusing enforcement of slave contracts. As discussed in the next Section, a similar approach is warranted where the judiciary undertakes contemporary interpretations of the badges and incidents of slavery.

\footnote{183.\ Rosen, supra note 155, at 508 ("Congress's institutional superiority is only deepened insofar as the meaning of badges and incidents subject to change as there are changes of various facts on the ground (such as various ethnic groups’ socioeconomic status and other more general cultural sensibilities); Congress is better suited to updating the meaning of badges and incidents because it does not have the inherent conservatism and backward looking-quality that characterizes the judiciary . . . ."); Carter, supra note 57, at 1354 ("In some circumstances, the question of whether a particular condition or form of discrimination constitutes a badge or incident of slavery could be so highly fact-specific that answering the question would require tools that courts do not readily possess.").}

\footnote{184. \ See supra Part II.C.}
C. Testing Justiciability

Assuming there exists a cause of action to enforce the Thirteenth Amendment against private parties, there remains a problem of a higher order: it may be that the Amendment is not justiciable. Some scholars have argued that the Thirteenth Amendment is an inherently political provision. Like the Guarantee Clause or the Ninth Amendment, its very nature may defy judicial interpretation. This Part has already identified several reasons for taking this claim seriously. Structural features such as federalism and separation of powers may counsel judicial restraint in interpretation of the Thirteenth Amendment. So too might the need to balance individual rights or to account for the superior fact-finding capacity of the legislature where the Amendment is to be applied on a class-wide basis.

This Part assesses the validity of these concerns by considering whether it is appropriate for the judiciary to use the Thirteenth Amendment to regulate three separate practices: the death penalty, discriminatory sentencing for crimes involving crack cocaine, and displays of the Confederate flag. The point is not to establish that the identified practices violate the Thirteenth Amendment, but rather to assess judicial competence to make that determination in light of the considerations identified above. However, as it has not been argued that the death penalty or disparities in crack sentences violate the Thirteenth Amendment, I begin those sections by sketching the potential claim should scholars wish to develop the idea.

1. The Death Penalty

It is well established that the death penalty is applied in a racially discriminatory manner. Most famously, David Baldus’s study of the Georgia system concluded that capital punishment is more likely to be applied when the victim is white and most likely to be applied when a black defendant murders a white victim. The study

185. See Greene, supra note 4, at 1755.
186. U.S. CONST. art. IV (“The United States shall guarantee to every State in this Union a Republican Form of Government . . . .”).
187. Id. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).
188. See supra Part III.A.
189. See supra Part III.B.
was the centerpiece of *McCleskey v. Kemp*, in which the defendant argued, based on the study’s data, that Georgia’s death-penalty scheme violated the Equal Protection Clause. The Court rejected the claim, holding that the Baldus study was insufficient to show that either the individuals who tried the defendant or the state as a whole harbored discriminatory intent.\textsuperscript{191}

*McCleskey* narrowed the role of statistical evidence in Equal Protection jurisprudence. The Baldus study exhibited that Georgia’s death penalty had a discriminatory effect. Though discriminatory effect alone does not make out an Equal Protection violation, previous cases had suggested that objective effects could be used to prove the necessary element of discriminatory motive.\textsuperscript{192} At least in the context of the death penalty, *McCleskey* rejected that suggestion and held that a defendant is required to prove that the state maintains its death penalty because it specifically intends to discriminate against blacks.\textsuperscript{193}

Regardless of *McCleskey*, an argument could be made, based on the Baldus study, that the death penalty violates the Thirteenth Amendment. Unlike the Equal Protection Clause, the Thirteenth Amendment has no intent requirement—badges and incidents of slavery either exist or they do not.\textsuperscript{194} As scholars have explained, the death penalty is an extension of lynching,\textsuperscript{195} which is itself rooted in

\textsuperscript{191}. *McCleskey*, 481 U.S. at 291–99.

\textsuperscript{192}. See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“[D]iscriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.”); *Yick Wo v. Hopkins*, 118 U.S. 356, 374–75 (1886) (“Though the law itself be fair on its face and impartial in its appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.”).

\textsuperscript{193}. *McCleskey*, 481 U.S. at 298.

\textsuperscript{194}. In *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982), the Court held that a plaintiff must prove discriminatory intent to make out a claim under 42 U.S.C. § 1981. However, this holding was based on a rather contorted reading of the statute’s origins in the Fourteenth Amendment rather than the Thirteenth, as its provenance had been typically understood. See *id.* at 384–90. The Court explicitly refrained from determining whether the Thirteenth Amendment has an intent requirement. See *id.* at 390 n.17. Reading such a requirement into the Thirteenth Amendment would make little sense, as the Amendment was passed to eliminate a status regardless of intent to maintain it.

\textsuperscript{195}. See David C. Baldus, et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 *CORNELL L. REV.* 1638, 1643 n.4 (“A highly discretionary death penalty was an effective substitute for lynching, a practice that tarnished the image of many states, both northern and southern, well into this century. A jury’s (usually all white) ‘lawful’ conviction and sentencing of a black, followed by a swift execution, substituted for the more unseemly lynching, with the same practical effect. Lawful ‘executions’ also reduced pressure on Congress to enact federal antilynching legislation in the 1920s.”).
the racial oppression of the slave regime. Given these historical links and the continued racial discrimination shown by the Baldus study, it is not implausible to argue that the death penalty is a badge of slavery that may be regulated or even banned under the Thirteenth Amendment.

Assuming the validity of this analysis, would it be proper for the judiciary to strike down the death penalty under the Thirteenth Amendment? Principles of federalism might suggest that it would not be. Constitutional law currently regulates the death penalty through the Eighth Amendment’s prohibition on cruel or unusual punishment. Judges determine whether a punishment is cruel or unusual by assessing “evolving standards of decency,” an analysis that looks to public opinion, state practice, and even international law.\(^{196}\) A criticism of this approach is that the judiciary should not interfere with the criminal justice systems of the states, which are best left to state legislatures and juries.\(^{197}\) A similar critique might be leveled at attempts to regulate the death penalty under the Thirteenth Amendment. Congress is the proper institution to regulate the death penalty through the Thirteenth Amendment, the critique would run, because each state can represent its own interests there.

Ultimately, however, federalism is an insufficient reason to prevent judicial application of the Thirteenth Amendment to the death penalty. This is for at least two reasons. First, the notion of “badges and incidents of slavery” is a more tethered standard than that of “evolving standards of decency.” A practice is most likely to be found a prohibited badge or incident when it is closely tied to the practice of chattel slavery.\(^{198}\) Though historical interpretation is frequently the subject of disagreement, it is less susceptible to dispute than the notion of “evolving standards of decency,” a concept heavily dependent on moral values over which there tend to be no consensus. If the judiciary can assess evolving standards of decency, then surely it can assess the badges of slavery prohibited by the Thirteenth Amendment.

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196. See Roper v. Simmons, 543 U.S. 551, 564–78 (2005) (assessing national consensus, state laws, and international norms to determine that the death penalty for juveniles violates the Eighth Amendment).
197. See Atkins v. Virginia, 536 U.S. 304, 324 (2002) (Rehnquist, J., dissenting) (“[T]he democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.”).
198. See Darrell A.H. Miller, A Thirteenth Amendment Agenda for the Twenty-First Century: Of Promises, Power, and Precaution, in The Promises of Liberty, supra note 2, at 294 fig. 16.1 (proposing chart to determine the strength of a Thirteenth Amendment claim in a given situation).
Second, and more generally, the Thirteenth Amendment represents the judgment of its Framers that the principles of federalism must sometimes succumb to the value of freedom. It fundamentally altered the federal-state balance and guaranteed the federal government a role in eradicating slavery and its vestiges. If the judiciary is otherwise capable of identifying a forbidden practice under the Thirteenth Amendment, the Amendment’s purpose does not suggest that passivity is warranted because of special solicitude for the states.

2. Crack Cocaine Sentencing

A more serious question is whether the judiciary should defer to Congress on Thirteenth Amendment questions because of separation-of-powers principles. To test this concern, I examine a problem that has attracted a large amount of attention in recent years: the disparity in federal sentencing between crimes involving crack cocaine and powder cocaine.

In 1986, Congress imposed new mandatory-minimum sentences for possession with intent to distribute crack cocaine. If the defendant possessed fifty grams or more, he was required to serve at least ten years in federal prison; there was a mandatory minimum of five years for possession of five grams or more. To incur the same mandatory minimums for possession of powder cocaine, a person needed to possess one hundred times more powder than crack: five kilograms to incur the ten-year minimum or five hundred grams to incur the five-year minimum. To reflect the statute, the United States Sentencing Commission implemented sentencing guidelines prescribing sentencing ranges for crack offenders. The effect of this scheme was to sweep blacks into the prison system at a disproportionate rate. In 2009, for example, about eighty percent of defendants sentenced under the guidelines were black.
The crack-powder disparity and its impact on blacks came in for harsh criticism. Congress responded in 2010 by passing the Fair Sentencing Act, which reduced the amount of crack needed to incur a mandatory-minimum sentence and changed the crack-powder ratio from 100:1 to 18:1. The Sentencing Commission amended its guidelines to reflect the statutory change. A major question remains, however: Should the reductions be made retroactive to prisoners who were sentenced under the previous regime?

So far, the answer to that question has been equivocal. The Supreme Court recently held that Congress intended its mandatory minimums to apply to defendants who committed their crimes before the Act’s effective date but who were sentenced afterward. As the law currently stands, a defendant who was sentenced the day before the Act went into effect is subject to the old mandatory minimum. Moreover, though the Commission explicitly made its crack amendments retroactive, not every crack offender is able to take advantage of that retroactivity. Federal law permits a prisoner to move for a sentence reduction only if his original sentence was “based upon” a sentencing range lowered by the Commission and if such a reduction would not otherwise violate the Sentencing Commission's policy statements. A current guidelines policy statement prohibits a reduction where a crack offender was also sentenced under some other guideline. For example, a separate guideline imposes additional punishment on defendants who are “career offenders,” those who have committed three drug crimes or three violent felonies. The predominant view is that retroactively reducing a career offender’s crack sentence would violate the guidelines’ policy statement, which the Supreme Court has held to be mandatory. In sum, Congress has enacted legislation acknowledging the deep unfairness of the crack sentencing regime, but that legislation has been ineffective to correct crack sentences in many cases.

Might the Thirteenth Amendment have something to say about this problem? It could be argued that the continued persistence of

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204. See, e.g., Kenneth B. Nunn, Race, Crime, and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks”, 6 J. GENDER RACE & JUST. 381, 396–400 (2002).
206. UNITED STATES SENTENCING GUIDELINES MANUAL amend. 750.
208. UNITED STATES SENTENCING GUIDELINES MANUAL amend. 750.
210. UNITED STATES SENTENCING GUIDELINES MANUAL § 1B1.10 cmt. 1(A) (2012).
211. See id. § 4B1.1.
The racially discriminatory sentencing policy is a badge of slavery, one that is linked to slavery’s systematic domination of blacks. The Thirteenth Amendment was intended not simply to end forced labor but to grant positive freedom. Continuing to imprison blacks for crimes that have since been eliminated from the books violates this intention. Though the Thirteenth Amendment carves out an exception for the commission of crimes, it does not permit continued deprivations of freedom for noncriminal behavior. Because its policy of freedom is absolute and cannot be applied selectively, the Amendment should work to give the Fair Sentencing Act a retroactive effect.

Assuming this argument is correct, is the judiciary the proper institution to enforce the Thirteenth Amendment against discriminatory crack-cocaine sentences? Typically separation-of-powers concerns might counsel judicial restraint from using the Thirteenth Amendment to alter application of federal criminal laws. Short of imposing cruel and unusual punishments, Congress has free rein to define substantive crimes so long as those crimes have a substantial effect on interstate commerce. If the Thirteenth Amendment is to be used to alter criminal sentencing, it may be

213. The Thirteenth Amendment forbids slavery and involuntary servitude “except as a punishment for a crime whereof the party shall have been duly convicted.” U.S. Const. art. XIII, § 1. Much work remains to be done on the relationship between the criminal justice system and Thirteenth Amendment freedom. Scholars have shown how convict labor systems permitted actual slavery to persist well past emancipation. See, e.g., Douglas A. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II; David Oshinsky, Convict Labor in the Post–Civil War South: Involuntary Servitude after the Thirteenth Amendment, in The Promises of Liberty, supra note 2. However, it is an open question whether the Thirteenth Amendment places any limits on the sort of “crime” that the government may impose to revoke freedom or impose servitude. While constitutional limits on the definition of crimes and the imposition of punishment are typically handled under the Cruel and Unusual Punishment Clause of the Eighth Amendment, see, e.g., Trop v. Dulles, 356 U.S. 86 (1958), the Thirteenth Amendment might have a role to play where criminal enforcement discriminates against minorities. Bailey v. Alabama, discussed supra notes 41–45, is an important precedent in this regard. The theory of that case is that a state cannot use its police powers to bind a person to an agreed-to term of service. See Bailey v. Alabama, 219 U.S. 219, 243–44 (1914) (“The Thirteenth Amendment prohibits voluntary servitude except as punishment for crime. But the exception, allowing full latitude for the enforcement of penal laws, does not destroy the prohibition. It does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other. The State may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.”). It would seem to follow that the government cannot use its police powers to revoke freedom if doing so does not serve a legitimate penological purpose. Such a theory might be used to attack a racially discriminatory criminal law regardless of whether Congress has shown leniency, as with the Fair Sentencing Act, to some offenders punished under the law.

preferable for the politically accountable branches to make that determination.

This concern is considerably less compelling in the context of crack cocaine, however. This is because Congress already has, through the Fair Sentencing Act, made a policy determination that the current sentencing regime is unjust. Notably, the Supreme Court recently implied that it would not grant reductions to crack offenders who were sentenced before enactment of the Fair Sentencing Act. However, this reticence was based on the general rule of construction that the Court will not apply sentencing changes retroactively unless Congress clearly intended that effect. If, on the other hand, a court were to specifically identify the crack-sentencing disparities as a badge of slavery, the “clear intention” rule need not control. The issue, rather, is whether it is within judicial competence to free prisoners when they are being held in violation to the Thirteenth Amendment. The answer is most clearly “yes” when Congress has established a broader policy supporting that decision. In such a situation, the judiciary’s location of a Thirteenth Amendment violation is not rogue judicial activism—it is authorized by a political background principle. Just as the Civil Rights Act of 1866 favored freedom over individual property rights and would have justified judicial nullification of slave contracts, so too does the Fair Sentencing Act imply a judicial mandate to release offenders if their continued incarceration violates the Thirteenth Amendment.

3. The Confederate Flag

Now consider a situation where the mandate to enforce the Thirteenth Amendment does not seem so clear. Alexander Tsesis has argued that the Amendment should be read to prohibit displays of the Confederate flag. However, his argument is couched in the context of congressional authority to determine, as permitted in Jones, that there is a rational basis to link harms caused by the Confederate flag

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217. Id. (“We also recognize that application of the new minimums to pre-Act offenders sentenced after August 3 will create a new set of disparities. But those disparities, reflecting a line-drawing effort, will exist whenever Congress enacts a new law changing sentences (unless Congress intends reopening sentencing proceedings concluded prior to a new law’s effective date).”).
218. Tsesis, supra note 27, at 137–49.
to slavery.\textsuperscript{219} Quite apart from the merits of this argument, would it be prudent, absent congressional action, for courts to forbid the display of the confederate flag as a Thirteenth Amendment violation?

The basic concern here is neither federalism nor separation of powers, but rather whether Congress or the judiciary is better equipped to sort out a novel conflict between constitutional values. Display of a flag, of course, implicates the free speech right of the First Amendment—one of the strongest of rights in the Constitution.\textsuperscript{220}

Though courts routinely balance rights against one another, typically the meaning and extent of these rights has been well developed over time. Using the Thirteenth Amendment to trump other long established rights would have a problematic bolt-out-of-the-blue quality.

This is particularly so because of the political nature of the Thirteenth Amendment. Whether a particular practice is a badge or incident of slavery is open to democratic debate. The Confederate flag, while odious to many, conveys multiple meanings that have shifted over time. Moreover, it involves continuing political disputes between different regions of the country—disputes that are best resolved in the political process. And Congress has provided courts with no background context—such as the Civil Rights Act with regard to slave contracts—that would signal a court to act of its own accord. These problems counsel judicial restraint in declaring displays of the Confederate flag to be a Thirteenth Amendment violation.

One might contrast other incidents of racially insensitive symbolism that are less divisive than the Confederate flag. Imagine a plaintiff’s claim that a defendant imposed a badge of servitude upon her by burning a cross near her home. Assuming that the merits of this claim could be established, there is less reason for judicial restraint in enforcing this interpretation of the Thirteenth Amendment. Cross-burning has a static meaning, it is almost universally reviled, and determining whether it is a badge or incident of slavery requires no assessment of any real political or social policy. Moreover, the executive branch regularly prosecutes cross-burners under federal statutes.\textsuperscript{221} Given the more settled meaning of the practice and the opprobrium with which it is already viewed by the

\textsuperscript{219} Id. at 149 (“Congress has an interest in prohibiting state uses of confederate symbols because they play a role in retaining the regressive social stratification that was essential to preserving slavery.”).

\textsuperscript{220} See, e.g., City of Ladue v. Gilleo, 512 U.S. 43, 58–59 (striking down city’s ban on residential lawn signs); Texas v. Johnson, 491 U.S. 397, 399 (overturning state conviction for burning an American flag).

democratic branches of government, courts would be on firmer ground in declaring cross-burning to be an unconstitutional badge of slavery than in declaring displays of the Confederate flag to be so.

4. General Principles

The analysis in this Section suggests some general principles to help determine the appropriate level of judicial restraint in interpretation of the Thirteenth Amendment. First, the judiciary’s power to interpret the Amendment is strongest when the practice before it amounts to forced labor or obvious “involuntary servitude.” The plain language of Section One sanctions courts to act in this situation. Judicial authority is less certain when the issue is whether a particular practice is not squarely within the prohibition on involuntary servitude. Courts should play a role in defining the badges and incidents of slavery, but one that recognizes the political nature of the question and its traditional location within the purview of Congress. Though federalism is not a principle that should restrain judicial interpretation of the Amendment, separation of powers should. So too should the concern that new meanings of the Thirteenth Amendment will truncate other well-established constitutional rights.

To reflect these considerations, the judiciary may legitimately interpret Section One to prohibit a badge or incident of slavery where the political branches have established background principles to suggest that they would agree with the interpretation. Where Congress has passed a law like the Fair Sentencing Act, for example, courts may apply the policy implications of that law to its reading of the Thirteenth Amendment. But where litigants attempt to extend the Thirteenth Amendment to novel realms—by claiming that it protects the right to an abortion or prohibits the flying of the Confederate flag, for instance—judicial restraint is warranted. Congress is well equipped to define the badges and incidents of slavery, and courts should await its input before crystallizing the Amendment’s meaning.

In short, the judiciary and Congress each have a role to play in defining the badges and incidents of slavery and enforcing the Thirteenth Amendment against them. Though novel readings of the Amendment should not be foreclosed, Congress is the proper branch of government to turn those readings into law. Still, fidelity to the Amendment’s primary purpose—to ensure substantive liberty—requires locating protection in the judicial as well as the legislative
branch. Where the acts of Congress indicate political support for freedom, courts should not hesitate to read that support into its interpretations of the badges and incidents of slavery forbidden by the Thirteenth Amendment.

CONCLUSION

The Thirteenth Amendment should not be considered a dead letter. While recent scholarship has done much to prove that point, it has assumed that the Amendment’s force rests almost entirely within Section Two and has done little to explain how constitutional lawyers might make practical use of the Amendment without its further definition through legislation. Examination of the slave-contract cases, heretofore considered a blip in the constitutional radar, suggests an alternative path in which the judiciary plays a meaningful role in enforcing the Thirteenth Amendment. Slave contracts should have been considered badges and incidents of slavery—as the case of Dilly Page shows—and judges like Henry Clay Caldwell could have exercised judicial authority to implement that interpretation. While this Article has not been concerned with defining other practices that might be considered contrary to the Thirteenth Amendment, it has sought to establish a principle that would allow courts to legitimately interpret Section One. Development of the Thirteenth Amendment should occur through dialogue between coequal branches of government. Some interpretations of the Amendment are beyond the realm of political possibility, and thus should not be imposed by the judiciary. But where Congress suggests a policy in support of a particular iteration of freedom—as, for example, the Civil Rights Act did in connection with slave contracts—judges are on firm ground in reading that freedom into the Thirteenth Amendment and ruling accordingly.

The Thirteenth Amendment is not a civil rights panacea. Legitimate concerns caution against its untethered application by courts. But its unique guarantee of freedom should not be ignored. By defining for the judiciary an appropriate role in the Thirteenth Amendment’s interpretation, we can begin to more fully realize its promise.