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# Threshold Liberty

Dawinder S. Sidhu

*University of New Mexico - Main Campus*

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## THRESHOLD LIBERTY

*Dawinder S. Sidhu*<sup>†</sup>

*The Supreme Court’s Thirteenth Amendment precedent is no longer sustainable. For starters, that precedent—which holds that the Amendment prohibits the “badges and incidents” of slavery, and that Congress has the power to “rationally” determine what constitutes a “badge or incident” of slavery—raises serious federalism and separation of powers concerns. To make matters worse, the Court itself has recently restricted the enforcement provisions of the Fourteenth Amendment (in *City of Boerne v. Flores*) and Fifteenth Amendment (in *Shelby County v. Holder*), rendering the generous bounds of the Thirteenth Amendment enforcement power an outlier among the Reconstruction Amendments.*

*To ensure that the Thirteenth Amendment has modern application in a manner consistent with these important constitutional considerations and these cases, the Amendment should no longer be interpreted to prohibit the “badges and incidents” of slavery, a non-textual category of harms that is virtually limitless in scope and is therefore virtually limitless as a source of congressional action. Instead, drawing from the Amendment’s textual prohibitions against “slavery” and “involuntary servitude,” direct or functional limitations on physical mobility should be the touchstone for the enforcement power moving forward.*

*To justify this proposal, this Article summarizes the Supreme Court’s Thirteenth Amendment jurisprudence, elaborates on the twin problems with this precedent, explores labor- and consent-based alternatives to the current model, and explains why a mobility-based approach enjoys more constitutional and historical support. To demonstrate the proposal’s workability, this Article shows how a mobility-centric model would apply to eight modern situations.*

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<sup>†</sup> Associate Professor of Law, University of New Mexico School of Law. My thanks to George Bach, William M. Carter, Jr., Charles Ogletree, Avi Soifer, Alexander Tsesis, Rebecca Zietlow, and participants at a workshop held at the Stanford Law School Center for Constitutional Law for helpful comments and suggestions; Elliot Barela, Jaymie Roybal, and Gary Lee for their research assistance; the members of the *Cardozo Law Review*, including Shirley Bi, Céalagh Fitzpatrick, Sarah Ganley, Joseph Goldstein, Jeremy Green, Emma Guido, Ira Handa, Rachel Karpoff, Alexa Kim, Sarah Kirschenheiter, Lauren Kobrick, Philip Langer, Adam Riff, and Bernard Tsepelman, for their efficiency and efforts in improving the quality of this Article; and my parents for their love and support. I take full responsibility for any errors.

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## INTRODUCTION

The liberty of individuals may be restricted to such a degree that physical mobility is absent for those individuals. Slavery exemplifies this situation, one in which limitations on liberty were the product of affirmative subjugation.

What if the liberty of individuals was limited not out of animus or direct action, but out of neglect and indifference? What if the individuals, released from any physical restraints, were nonetheless functionally restrained? What if the individuals possessed limited physical mobility, such that they were segregated from and unable to participate in mainstream society? What if these individuals were not localized in any one state, but existed throughout the nation? Would the federal government be powerless to step in, and thus be a bystander to the limited liberty of these Americans?

The political process would not correct this situation and restore the liberty of these individuals to a minimal level. This is because these individuals may contribute little to campaigns and thus cannot

effectively incentivize elected officials to divert attention to their circumstances.<sup>1</sup> The Spending Clause could allow Congress to attach relevant strings to federal monies, though this approach would hinge on the willingness of each of the implicated states to agree to a deal.<sup>2</sup> The Commerce Clause places in Congress's hands an instrument that may not be useful or reliable here, as the absence of liberty is not itself an economic activity,<sup>3</sup> and the instrument itself has been blunted by recent Supreme Court decisions.<sup>4</sup>

The existing individual rights paradigm is similarly unavailing. The Equal Protection Clause, which speaks to equal treatment, would not address this problem, which concerns not equality or relative wealth,

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<sup>1</sup> See Randall Kennedy, Professor, Harvard Law School, *America's Deepest Fault Line: Address at the Center for Social Cohesion Conference: Can the United States Remain United?* (June 13, 2011) ("Impoverishment means for many living apart from the so-called 'mainstream American society,' the sectors of a society to which politicians pay some heed."); see also Anmol Chaddha & William Julius Wilson, "Way Down in the Hole": *Systematic Urban Inequality and The Wire*, 38 *CRITICAL INQUIRY* 164, 178 (2011) ("[P]olitical institutions have not been vehicles for pursuing meaningful improvements in the conditions of the black urban poor, even when black officials have been elected to office."); David Cole, Foreword, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 *GEO. L.J.* 1059, 1062 (1999) ("Reliance on the political process . . . will simply ensure that minority interests within inner-city communities will be ignored.")

<sup>2</sup> See *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2602 (2012) ("The legitimacy of Congress's exercise of the spending power 'thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract."'") (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). The Supreme Court's opinion in *NFIB*, invalidating Congress's attempt to induce states, through additional funding, to expand their Medicaid coverage, suggests that greater scrutiny will be given to Spending Clause conditions more generally. See Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause after NFIB*, 101 *GEO. L.J.* 861, 864 (2013) ("The implications of that holding are potentially massive," as the decision "certainly revive[s] the challenges to . . . laws [enacted under the Spending Clause]," and could "seriously threaten the constitutionality of a broad swath of federal spending legislation."); see also Eloise Pasachoff, *Conditional Spending after NFIB v. Sebelius: The Example of Federal Education Law*, 62 *AM. U. L. REV.* 577, 662 (2013) (indicating that even if the courts are not inclined to strike down conditions, Congress and agencies should "take heed" of *NFIB* in proposing and overseeing spending actions).

<sup>3</sup> See *United States v. Morrison*, 529 U.S. 598 (2000) (holding that gender-motivated violence is not an economic activity and thus a federal statute giving victims of such violence a private right of action could not be sustained under the Commerce Clause); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that possession of a gun in a school zone is not an economic activity and thus the federal criminal prohibition of such possession could not be sustained under the Commerce Clause).

<sup>4</sup> Randy Barnett, who is credited with generating the challengers' legal arguments in *NFIB*, wrote after the decision that while the Supreme Court upheld the minimum coverage provision of the Affordable Care Act, the challengers "won" because the Court imposed limits on the Commerce Clause. Randy Barnett, Opinion, *We Lost on Health Care. But the Constitution Won*, *WASH. POST*, June 29, 2012, [https://www.washingtonpost.com/opinions/randy-barnett-we-lost-on-health-care-but-the-constitution-won/2012/06/29/gJQAzJjCW\\_story.html](https://www.washingtonpost.com/opinions/randy-barnett-we-lost-on-health-care-but-the-constitution-won/2012/06/29/gJQAzJjCW_story.html).

but a failure of individuals to occupy a certain baseline of liberty.<sup>5</sup> Nor would substantive due process be of any help, as courts do not recognize a fundamental right to a certain capacity to participate in society.<sup>6</sup>

This Article argues that Congress may address these severe limitations on physical liberty by way of the Thirteenth Amendment.<sup>7</sup> It posits that whereas Section One of the Thirteenth Amendment by itself prohibits actual limitations on physical mobility by way of enslavement and bondage of individuals, Section Two's enforcement power permits Congress to address the functional or effective deprivation of physical mobility.

This Article acknowledges, and seeks to resolve, the growing dispute in the courts and among legal scholars as to the proper meaning of the Thirteenth Amendment. There are significant concerns about the Supreme Court's Thirteenth Amendment precedent. First, the Supreme Court has broadened the scope of the Thirteenth Amendment beyond the text of the Amendment to include the "badges and incidents" of slavery,<sup>8</sup> a category of harms that is conceivably unlimited given the vast ways in which slaves were mistreated.<sup>9</sup> Second, the Supreme Court has left to Congress the task of determining what constitutes a "badge[]" or "incident[]" of slavery.<sup>10</sup> The virtually limitless scope of harms perpetrated against slaves and the allowance of Congress to define that scope raise two major problems: that Congress can use the Thirteenth Amendment to regulate aspects of individual conduct that are typically reserved for regulation by the States, and that Congress may effectively fix the meaning of the Amendment despite the fact that our constitutional system assigns that interpretive role to the courts.<sup>11</sup> The courts' ability to correct this dual overreaching is limited, because the Supreme Court has instructed that the Thirteenth Amendment enforcement power is subject only to a rationality review. In short, in the Thirteenth Amendment context, there is significant concern that

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<sup>5</sup> See generally *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike.").

<sup>6</sup> *Lavine v. Milne*, 424 U.S. 577, 584 n.9 (1976) (declaring in the context of holding that there is no fundamental right to welfare benefits for the poor, that "neither the State nor Federal Government is under any sort of constitutional obligation to guarantee minimum levels of support").

<sup>7</sup> U.S. CONST. amend. XIII.

<sup>8</sup> *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

<sup>9</sup> See *United States v. Hatch*, 722 F.3d 1193, 1204 (10th Cir. 2013) ("[N]early every hurtful thing one human could do to another and nearly every disadvantaged state of being might be analogized to slavery—and thereby labeled a badge or incident of slavery . . .").

<sup>10</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

<sup>11</sup> These concerns are addressed more fully in Part II, *infra*.

Congress may address a boundless universe of harms, squeezing state sovereignty and usurping judicial functions in the process.

Some entrepreneurial scholars are urging Congress to seize this opportunity to address a wide range of social problems.<sup>12</sup> Despite any social good that might arise from Congress's opportunistic use of the Amendment, such use may come at the cost of encroaching on proper responsibilities of the states as well as functions of the courts. If the status quo is not sustainable, neither should the Thirteenth Amendment, as others suggest, be reduced to a dead letter by confining its scope only to slavery proper.<sup>13</sup>

This Article seeks to respond to the federalism and separation of powers flaws in the current model, while at the same time ensuring that the Amendment has some modern applicability. Congress may use its Thirteenth Amendment power to address not only direct, but also functional, limitations on physical mobility. This Article addresses only the appropriate ends of Thirteenth Amendment legislation, leaving undisturbed the deferential rationality standard applied to the means chosen by Congress.

Taking this principled middle path would mean that every instance of discrimination would not be converted into a federally cognizable harm. But it would ensure that the Thirteenth Amendment enforcement power is not read completely out of the Constitution and that it has some defined meaning and continuing relevance. It would ensure also that the Thirteenth Amendment is available in limited circumstances to address only the deprivation of essential physical liberty: the liberty necessary for physical mobility, what I call "threshold liberty."

In order to make this case, Part I of this Article offers an overview of the origins, historical understanding, and current approach to the

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<sup>12</sup> See Gail Heriot & Alison Schmauch Somin, *Sleeping Giant?: Section Two of the Thirteenth Amendment, Hate Crimes Legislation, and Academia's Favorite New Vehicle for the Expansion of Federal Power*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 31, 35–36 (2012) (listing what "progressive" academics proposed as uses of the Section Two power). Scholars have been observing that the Thirteenth Amendment is underutilized and that Congress should strike when it can regulate the "badges and incidents" of slavery subject only to rationality review. See, e.g., Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1849 (2006) ("Despite the Court's recognition of broad congressional authority to define the incidents and badges of involuntary servitude, Congress has rarely exercised its enforcement power under the Thirteenth Amendment."); Jennifer R. Hagan, Comment, *Can We Lose the Battle and Still Win the War?: The Fight Against Domestic Violence After the Death of Title III of the Violence Against Women Act*, 50 DEPAUL L. REV. 919, 959 (2001) ("The Thirteenth Amendment represents a rarely used constitutional weapon, designed to provide Congress with the power to remedy occasions of involuntary servitude . . .").

<sup>13</sup> Heriot & Somin, *supra* note 12, at 34 (arguing that the Thirteenth Amendment should prohibit only "actual slavery and involuntary servitude," and that the stringent standard applicable to the Fourteenth Amendment enforcement power should apply to the Thirteenth Amendment enforcement power).

Thirteenth Amendment. Part II identifies the twin problems with that current framework. Part III suggests why the Thirteenth Amendment applies to situations in which threshold liberty is denied, and explains why alternative formulations predicated on consent or labor fall short. Part IV applies the mobility-centric standard to eight areas that scholars claim are fertile ground for Thirteenth Amendment legislation, showing which four would be proper for Congress to enter and which four would be off-limits. Part V concludes.

Circuit courts increasingly are knocking on the ceiling, asking for the Justices above to respond to their concerns about the current state of the Thirteenth Amendment.<sup>14</sup> In response to these calls for action, this Article advances a fresh perspective that bestows on the Amendment the limited, but critical, role of restoring basic liberty in areas where it has been depleted. This Article aims to be useful as judges and practitioners continue to grapple with the modern meaning of this post-Civil War provision, and as the Justices consider the growing demands for an updated, constitutionally sound understanding of the Thirteenth Amendment.

## I. THE THIRTEENTH AMENDMENT

This Part provides an overview of the Thirteenth Amendment. In particular, it addresses the historical context, purposes, and early interpretations of the Amendment; surveys the evolution of the Amendment's meaning over time; and summarizes the Supreme Court's current take on the scope of the Amendment.

### A. *Historical Background to the Thirteenth Amendment*

Traditionally, individuals inherit their sovereign. The Framers, once separated from England, were in the unique position of being able to create their own political community.<sup>15</sup> In the first *Federalist*, Alexander Hamilton warned that how the Framers responded to this opportunity would determine whether men were “really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on

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<sup>14</sup> See *infra* Part II (containing examples of decisions in which circuit courts have effectively encouraged the Supreme Court to revisit prevailing Thirteenth Amendment precedent).

<sup>15</sup> See JOSEPH J. ELLIS, *THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION, 1783–1789*, at xvi (2015) (suggesting that the first American revolution threw off British rule, and the second was the establishment of a republican form of government).

accident and force.”<sup>16</sup> In the words of Thomas Paine, the Framers had “it in our power to begin the world over again.”<sup>17</sup>

Recognizing this unique chance, the Framers created “one great, respectable, and flourishing empire,”<sup>18</sup> one that Thomas Jefferson termed an “[E]mpire of [L]iberty.”<sup>19</sup> The Framers appointed the people as the American sovereign, making government dependent upon the consent of the governed and thereby subordinating government to the people themselves.<sup>20</sup> They also enshrined certain rights in the Constitution, shielding individual liberty from governmental interference or intrusion, and the whims of the mob.<sup>21</sup> They also built a structure to check governmental overreaching and minimize encroachments on individual liberty.<sup>22</sup>

For all its virtues,<sup>23</sup> the Constitution was flawed. It was designed to primarily benefit white men and excluded people of color, particularly blacks, from its grand pronouncements of freedom and equality.<sup>24</sup> It failed to retrofit existing practices into the new order of the day, reducing the American vision of liberty and opportunity to one that was at best partial or incomplete.<sup>25</sup>

<sup>16</sup> THE FEDERALIST NO. 1 (Alexander Hamilton).

<sup>17</sup> THOMAS PAINE, COMMON SENSE 120 (Isaac Kramnick ed., Penguin Books 1986) (1776).

<sup>18</sup> THE FEDERALIST NO. 14 (James Madison).

<sup>19</sup> See JOSEPH J. ELLIS, AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC 228 (2008).

<sup>20</sup> See *Munn v. Illinois*, 94 U.S. 113, 124–25 (1876) (summarizing the basic political theory of the country).

<sup>21</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”).

<sup>22</sup> *Boumediene v. Bush*, 553 U.S. 723, 742 (2008) (“The Framers’ inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty.”).

<sup>23</sup> Judge Learned Hand called the U.S. Constitution the “best political document ever made.” LEARNED HAND, *Morals in Public Life* (1951), reprinted in THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 225, 251–52 (Irving Dilliard ed., 1960).

<sup>24</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 388 (1978) (Marshall, J., concurring in part and dissenting in part) (“When the colonists determined to seek their independence from England, they drafted a unique document . . . proclaiming as ‘self-evident’ that ‘all men are created equal’ and are endowed ‘with certain unalienable Rights’ . . . . The self-evident truths and the unalienable rights were intended, however, to apply only to white men.”).

<sup>25</sup> See *id.* at 326 (Brennan, J., concurring in part and dissenting in part) (“Our Nation was founded on the principle that ‘all Men are created equal.’ Yet candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery.”).



The Framers did not ignore slavery; they knowingly perpetuated it.<sup>26</sup> For example, the Constitution insulated the slave trade from congressional regulation until 1808;<sup>27</sup> the Constitution also required that fugitive slaves be returned to their owners;<sup>28</sup> and the Constitution counted slaves as three-fifths of a person for purposes of computing proper representation in Congress.<sup>29</sup>

The mismatch between the sprawling principles of the Constitution and the continued subjugation of an entire race was not lost on the Framers. Jefferson, who penned the very tributes to liberty and equality in the Declaration of Independence, questioned whether he would suffer some divine consequence for the Framers' refusal to extend the sphere of liberty and equality to blacks in America.<sup>30</sup> Benjamin Rush, who signed the Declaration of Independence and was a member of the

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<sup>26</sup> This is not an uncontroversial topic. Compare Sean Wilentz, Opinion, *Constitutionally, Slavery Is No National Institution*, N.Y. TIMES, Sept. 16, 2015, at A27 (“The Constitutional Convention not only deliberately excluded the word ‘slavery,’ but it also quashed the proslavery effort to make slavery a national institution, and so prevented enshrining the racism that justified slavery.”), and David Post, *Puncturing the Slavery Myth*, WASH. POST: VOLOKH CONSPIRACY (Sept. 20, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/20/puncturing-the-slavery-myth> (referring to the Wilentz essay as “a good antidote to this myth that not only unfairly impugns the constitutional framers, but (more importantly) does serious damage to our sense of who and what we are as a nation”), with Lawrence Goldstone, *Constitutionally, Slavery Is Indeed a National Institution*, NEW REPUBLIC (Sept. 17, 2015), <http://www.newrepublic.com/article/122843/constitutionally-slavery-indeed-national-institution>, (arguing that slavery “dominate[d]” the “spirit” of the Constitution, and that “[b]y the time the Constitution was signed on September 17, 1787, slavery had indeed become a national institution”), and Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <http://www.theatlantic.com/features/archive/2014/06/the-case-for-reparations/361631> (stating that in slavery one finds “the roots of American wealth and democracy” and “America’s origin[.]”).

<sup>27</sup> U.S. CONST. art. I, § 9, cl. 1.

<sup>28</sup> *Id.* art. IV, § 2, cl. 3; see also *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 613 (1842) (“[W]e have not the slightest hesitation in holding, that under and in virtue of the [C]onstitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave . . .”).

<sup>29</sup> U.S. CONST. art. I, § 2, cl. 3.

<sup>30</sup> A. Leon Higginbotham, Jr. & Greer C. Bosworth, “*Rather than the Free*”: *Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 20–21 (1991). As Thomas Jefferson stated, “[i]ndeed I tremble for my country when I reflect that God is just; that his justice cannot keep sleep forever . . . ! The Almighty has no attribute which can take side with us in such a contest.” *Id.* (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 156 (1800)). Frederick Douglass similarly wrote that,

Every slaveholder in the land stands perjured in the sight of Heaven, when he swears his purpose to be, the establishment of justice—the providing for the general welfare, and the preservation of liberty to the people of this country; for every such slaveholder knows that his whole life gives an emphatic lie to his solemn vow.

Alexander Tsesis, *Furthering American Freedom: Civil Rights & The Thirteenth Amendment*, 45 B.C. L. REV. 307, 320 (2004) (quoting Frederick Douglass, NORTH STAR, Apr. 5, 1850, reprinted in VOICES FROM THE GATHERING STORM: THE COMING OF THE AMERICAN CIVIL WAR 40, 40–41 (Glenn M. Linden ed., 2001)).

Continental Congress, acknowledged that slavery is “a vice which degrades human nature, and [which] dissolves that universal tie” between men.<sup>31</sup> “The plant of liberty,” he added, “is of so tender a Nature, that it cannot thrive long in the neighbourhood of slavery.”<sup>32</sup>

The Framers threw off the most powerful government of the time, yet that failed to embolden them to correct this discrepancy in values and practice. The most they were able to muster was to punt the issue of slavery to a future generation of Americans.<sup>33</sup> Some Framers held the optimistic view that slavery would die a natural death with the passage of time. Chief Justice Oliver Ellsworth, for example, said: “As population increases, poor labourers will be so plenty as to render slaves useless. Slavery in time will not be a speck in our country.”<sup>34</sup> Others, however, “anticipated the possibility that the United States would split into two distinct political bodies, and that this disunion would occur specifically along northern and southern lines.”<sup>35</sup> “Should the people of America divide themselves,” Chief Justice John Jay wrote, “confidence and affection” would give way to “envy and jealousy,” and the “general interests of all America” would cede to the “partial interests of each confederacy.”<sup>36</sup>

Decades later, the prospect of the North-South division predicted by Chief Justice Jay was altogether real. In his March 4, 1861 inaugural address, Abraham Lincoln acknowledged that the common ties among the North and South were bending, but urged the people not to “break our bonds of affection.”<sup>37</sup> On April 12, 1861, the Confederates bombarded Fort Sumter, drawing the Union into a bloody conflict.<sup>38</sup>

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<sup>31</sup> BENJAMIN RUSH, *An Address to the Inhabitants of the British Settlements, on the Slavery of the Negroes in America* (1773), reprinted in *AN ADDRESS ON THE SLAVERY OF THE NEGROES IN AMERICA* 1, 26 (Arno Press, Inc. 1969).

<sup>32</sup> *Id.*

<sup>33</sup> An exception is worth noting. In 1839, John Quincy Adams proposed legislation outlawing slavery and forbidding the new admission of slave states into the Union. See MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 12 (2001). His efforts failed, and it was not until after the Civil War that antislavery legislation was seriously taken up again. See *id.*

<sup>34</sup> GORDON S. WOOD, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT* 28 (2006) (quoting J.J. Spengler, *Malthusianism in Late Eighteenth-Century America*, *AMER. ECON. REV.*, Dec. 1935, at 691, 705).

<sup>35</sup> Dawinder S. Sidhu, *Judicial Modesty in the Wartime Context*, *Roosevelt v. Meyer* (1863), 39 *J. SUP. CT. HIST.* 190, 190 (2014). Some of the language in this paragraph and the next paragraph is drawn from Sidhu, *supra*.

<sup>36</sup> *THE FEDERALIST NO. 5* (John Jay).

<sup>37</sup> President Abraham Lincoln, Inaugural Address (Mar. 4, 1861), [http://www.nytimes.com/interactive/2011/03/04/opinion/20110304\\_Lincoln\\_Inaugural\\_Speech.html](http://www.nytimes.com/interactive/2011/03/04/opinion/20110304_Lincoln_Inaugural_Speech.html).

<sup>38</sup> *Civil War Timeline*, NAT'L PARK SERV., <http://www.nps.gov/gett/learn/historyculture/civil-war-timeline.htm> (last visited Nov. 6, 2015).

The “one great” nation was at war with itself.<sup>39</sup> At the same time, whether man could govern himself, a question at the heart of the American experiment, was in serious doubt.<sup>40</sup>

B. *Need for and Legislative History of the Amendment*

The Union states triumphed over their Confederate brethren. In 1872, the Supreme Court in the *Slaughter-House Cases* explained that once the Union prevailed, “slavery, as a legalized social relation, perished.”<sup>41</sup> Indeed, President Lincoln’s Emancipation Proclamation “declared slavery abolished” in parts of the nation.<sup>42</sup>

But the outcome of the Civil War and the President’s declaration were not enough, on their own, to assure the Congress of a unified nation without slavery. “[T]hose who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive,”<sup>43</sup> the Court stated. Accordingly, “they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles.”<sup>44</sup> To further this interest, the Court recounted, “the [T]hirteenth [A]rticle of [A]mendment of that instrument” was deemed necessary.<sup>45</sup>

The Thirteenth Amendment sprang forth from legislative efforts that started as early as 1863, and that can be traced back to congressional leaders such as James Ashley of Ohio. Congressman Ashley proposed a bill that would amend the Constitution, “prohibiting slavery, or involuntary servitude, in all of the States and Territories now owned or which may be hereafter acquired by the United States.”<sup>46</sup> The proposed constitutional amendment lacked an enforcement clause, but

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<sup>39</sup> Slavery was the “foundation of the quarrel.” *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 68 (1872). The Civil War, the Court said, boiled down to a struggle between the “armies of freedom” and an “unlawful rebellion.” *Id.*

<sup>40</sup> The stakes of the Civil War for America and for mankind were well understood. See President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (“[The founding] fathers brought forth on this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation or any nation so conceived and so dedicated can long endure.”), <http://www.loc.gov/exhibits/gettysburg-address/ext/trans-nicolay-inscribed.html>.

<sup>41</sup> *The Slaughter-House Cases*, 83 U.S. at 68 (“[S]lavery was at an end wherever the Federal government succeeded in that purpose.”).

<sup>42</sup> See *id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Vorenberg, *supra* note 33, at 49–50 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 19 (1863) (statement of Rep. Ashley)).

Congressman Ashley proposed an accompanying statute that would have authorized Congress to enforce the amendment.<sup>47</sup> Senator John Henderson is credited with introducing the Senate version of this bill.<sup>48</sup> Congressman James F. Wilson offered a similar proposal to amend the Constitution, one that had two clauses: the first stated that, “[s]lavery, being incompatible with a free government, is forever prohibited in the United States, and involuntary servitude shall be permitted only as a punishment for crime,” and the second empowered Congress “to enforce the foregoing section of this article by proper legislation.”<sup>49</sup>

In 1864, the Senate Judiciary Committee, chaired by Senator Lyman Trumbull, drafted a constitutional amendment that also contained two clauses: “neither slavery nor involuntary servitude, except as a punishment for crime, whereof a party shall have been duly convicted, shall exist within the United States . . .; and also that Congress shall have power to enforce this article by proper legislation.”<sup>50</sup> The language of the first clause was drawn from Article 6 of the Northwest Ordinance of 1787, which was drafted by Thomas Jefferson,<sup>51</sup> and read: “There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted . . . .”<sup>52</sup>

The Senate Judiciary Committee introduced this bill to the Senate on February 10, 1864,<sup>53</sup> and on April 8, 1864, the Senate approved the bill by a 38-6 margin.<sup>54</sup> The bill, however, fell short of the two-thirds support needed in the House.<sup>55</sup> With President Lincoln encouraging House members to back the bill and with public opinion shifting in favor of the amendment, the House ultimately passed the bill by a 119-56 vote on January 31, 1865.<sup>56</sup> President Lincoln signed the bill on the same day. The Thirteenth Amendment was ratified on December 6, 1865.<sup>57</sup>

The text of the Amendment contains two sections. Section One of the Amendment provides: “Neither slavery nor involuntary servitude,

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<sup>47</sup> See *id.* at 51.

<sup>48</sup> See Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 541 (2002).

<sup>49</sup> Vorenberg, *supra* note 33, at 50 n.47 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 21 (1863)).

<sup>50</sup> *Id.* at 53 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 553 (1864)).

<sup>51</sup> See Tsesis, *supra* note 48, at 539 n.a2.

<sup>52</sup> Northwest Territory Ordinance of 1787, Art. VI, 1 Stat. 50, 53.

<sup>53</sup> See CONG. GLOBE, 38th Cong., 1st Sess. 553 (1864).

<sup>54</sup> See CONG. GLOBE, 38th Cong., 1st Sess. 1490 (1864).

<sup>55</sup> CONG. GLOBE, 38th Cong., 1st Sess. 2995 (1864).

<sup>56</sup> CONG. GLOBE, 38th Cong., 2d Sess. 531 (1865).

<sup>57</sup> *13th Amendment to the U.S. Constitution*, LIBRARY OF CONG., <http://www.loc.gov/rr/program/bib/ourdocs/13thamendment.html> (last visited Nov. 3, 2015).

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.”<sup>58</sup> Section Two provides: “Congress shall have power to enforce this article by appropriate legislation.”<sup>59</sup>

### C. *Early Supreme Court Interpretation of the Amendment*

The *Slaughter-House Cases* represented the Supreme Court’s first consideration of the contents of the Thirteenth Amendment. In these consolidated cases, Louisiana granted a monopoly to a slaughterhouse to operate within a defined space in New Orleans.<sup>60</sup> Other slaughterhouses had to close, and any butcher who wanted to continue working in the trade had to do so within the defined area for set wages.<sup>61</sup> A number of these butchers challenged the law under the Thirteenth Amendment.

The Court explained that the Amendment serves as a “grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government,” including “millions of slaves.”<sup>62</sup> Consistent with the view that the Amendment protects the human race, the Court noted that “while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter.”<sup>63</sup> That is, the Amendment’s reach is not limited to African-Americans: “[w]e do not say that no one else but the negro can share in this protection.”<sup>64</sup> The Court made clear that “[w]hile the thirteenth article of amendment was intended primarily to abolish

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<sup>58</sup> U.S. CONST. amend. XIII, § 1. The “punishment” exception to the Thirteenth Amendment is relatively rarely litigated. *See, e.g.*, *Pollock v. Williams*, 322 U.S. 4 (1944) (concerning punishment for obtaining money with intent to defraud); *Arver v. United States*, 245 U.S. 366, 390 (1918) (concerning punishment for refusal to perform military service); *Butler v. Perry*, 240 U.S. 328, 330 (1916) (concerning punishment for failure to work on roads and bridges); *Robertson v. Baldwin*, 165 U.S. 275, 288 (1897) (concerning punishment for desertion); *see also* *United States v. Ballek*, 170 F.3d 871, 875 (9th Cir. 1999) (concerning punishment for failure to meet child support obligations). Recent scholarship on this exception includes Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 610 (2008), and Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 397 (2009).

<sup>59</sup> U.S. CONST. amend. XIII, § 2.

<sup>60</sup> *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 38–39 (1872).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 68–69.

<sup>63</sup> *Id.* at 72.

<sup>64</sup> *Id.*

African slavery, it equally forbids Mexican peonage or the Chinese coolie trade, when they amount to slavery or involuntary servitude.”<sup>65</sup>

As to the specific protections of the Thirteenth Amendment, the Court clarified that the Amendment spoke more to liberty than to equality. Following the Thirteenth Amendment, states enacted “laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value.”<sup>66</sup> These laws “forced upon the statesmen . . . the conviction that something more [than the Thirteenth Amendment] was necessary in the way of constitutional protection to the unfortunate race who had suffered so much.”<sup>67</sup> Accordingly, Congress passed the Fourteenth Amendment.<sup>68</sup>

With this context in mind, the Court summarized the purpose of the Reconstruction Amendments, including the Thirteenth Amendment: “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”<sup>69</sup>

By its own terms, the liberty protected by the Thirteenth Amendment meant protection from both “slavery” and “involuntary servitude,” and the Court indicated that the latter category includes a

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<sup>65</sup> *Id.* at 37; see also *Hodges v. United States*, 203 U.S. 1, 16–17 (1906) (“It is the denunciation of a condition, and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the nation, it commits every race and every individual thereof. Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon, are as much within its compass as slavery or involuntary servitude of the African.”), *overruled in part by Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968); *The Civil Rights Cases*, 109 U.S. 3, 33 (1883) (Harlan, J., dissenting) (“The terms of the Thirteenth Amendment are absolute and universal. They embrace every race which then was, or might thereafter be, within the United States.”); *United States v. Nelson*, 277 F.3d 164, 176 (2d Cir. 2002) (“There can . . . be no doubt that the Thirteenth Amendment’s prohibitions extend, at the least, to all race-based slavery or servitude.”). Whites may seek relief under the Amendment as well. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295–96 (1976) (“[Section 1981, passed pursuant to the Thirteenth Amendment,] was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race. Unlikely as it might have appeared in 1866 that white citizens would encounter substantial racial discrimination of the sort proscribed under [section 1981], . . . Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves.”).

<sup>66</sup> *The Slaughter-House Cases*, 83 U.S. at 70.

<sup>67</sup> *Id.* (“[W]ithout further protection of the Federal government,” the condition of the slave race would “be almost as bad as it was before.”).

<sup>68</sup> See *id.* For more details on the congressional lead-up to the Fourteenth Amendment, beyond what was summarized in the *Slaughter-House Cases*, see Aviam Soifer, Review Essay, *Protecting Civil Rights: A Critique of Raoul Berger’s History*, 54 N.Y.U. L. REV. 651, 670–77 (1979).

<sup>69</sup> *The Slaughter-House Cases*, 83 U.S. at 71.

broader set of harms than the former. In particular, the Court interpreted “involuntary servitude” to encompass “all shades and conditions of African slavery.”<sup>70</sup>

With this understanding of the Amendment, the Court held that the state law did not constitute involuntary servitude because the law did not require any butchers to work; it only set rules for those who voluntarily decided to engage in the slaughterhouse industry.<sup>71</sup>

The Supreme Court’s next substantive opinion on the Thirteenth Amendment, *United States v. Harris*,<sup>72</sup> issued in 1883, concerned the constitutionality of the Ku Klux Klan Act of 1871.<sup>73</sup> The Court stated that Section Two of the Thirteenth Amendment “gives power to [C]ongress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude,” and to protect “the enjoyment of that freedom which it was the object of the amendment to secure.”<sup>74</sup> But, the Court held, the Act in question went beyond Congress’s power under the Amendment, because the statute would apply to victims who were not slaves, including victims who were free white men.<sup>75</sup> This case indicates a particularly narrow view of the Section Two enforcement power, and seems to contradict the *Slaughter-House Cases*’ ruling that the Amendment protects all, irrespective of race.<sup>76</sup>

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<sup>70</sup> *Id.* at 69.

<sup>71</sup> Today, “involuntary servitude” is understood “to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results.” *United States v. Kozminski*, 487 U.S. 931, 942 (1988) (quoting *Butler v. Perry*, 240 U.S. 328, 332 (1916)). More specifically, the Supreme Court has defined “involuntary servitude” as “a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.” *Id.* at 952.

<sup>72</sup> *United States v. Harris*, 106 U.S. 629 (1883).

<sup>73</sup> Ch. 22, § 2, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1985). The relevant text of the statute made it unlawful to

conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws.

*Id.*

<sup>74</sup> *Harris*, 106 U.S. at 640.

<sup>75</sup> *See id.* at 640–41.

<sup>76</sup> This aspect of *Harris* has been roundly criticized by Thirteenth Amendment scholars. *See, e.g.,* Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 *FORDHAM L. REV.* 981, 1005 (2002) (pointing out that the *Harris* Court’s conclusion that “the Amendment does not and cannot concern the rights of whites [is] deeply at odds with the enactors’ broad libertarian and egalitarian conception of the Thirteenth Amendment”).

In the next key Thirteenth Amendment ruling, the *Civil Rights Cases*,<sup>77</sup> the Supreme Court faced the question of whether the Civil Rights Act of 1875,<sup>78</sup> which forbade discrimination on the basis of race or previous condition of servitude by places of public accommodations,<sup>79</sup> could be based on Congress's Thirteenth or Fourteenth Amendment enforcement power. The Court held that the former Amendment does not contain a state action requirement and thus its prohibitions can reach private actors, such as proprietors of public accommodations: "the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."<sup>80</sup> In other words, the Amendment's ban on "slavery" and "involuntary servitude" applies to both state agents and private actors.<sup>81</sup> Because of this, the Amendment possesses the distinction of being the only constitutional amendment that can directly prohibit private conduct.<sup>82</sup>

Critically, the *Civil Rights Cases* Court stated that the Thirteenth Amendment not only "nullif[ied]" slavery, but also "clothe[d] Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."<sup>83</sup> In other words,

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<sup>77</sup> 109 U.S. 3 (1883).

<sup>78</sup> Ch. 114, 18 Stat. 335.

<sup>79</sup> The relevant text of the act provides:

all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

*Id.* at 336.

<sup>80</sup> *The Civil Rights Cases*, 109 U.S. at 20; see also *id.* at 23 ("Under the Thirteenth Amendment the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not . . .").

<sup>81</sup> See *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439–40 (1973) (holding that a private swimming club was covered by 42 U.S.C. § 1982, which Congress created by way of its Thirteenth Amendment enforcement power); see also *United States v. Nelson*, 277 F.3d 164, 175 (2d Cir. 2002) ("[T]he Thirteenth Amendment eliminates slavery and involuntary servitude generally, and without any reference to the source of the imposition of slavery or servitude. Accordingly, . . . Congress's powers under the Thirteenth Amendment are not limited by any analogue to the State Action Doctrine . . . . The Thirteenth Amendment . . . reaches purely private conduct.").

<sup>82</sup> See George Rutherglen, Essay, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1370 (2008) ("The Thirteenth Amendment stands out in the Constitution as the only provision currently in effect that directly regulates private action.").

<sup>83</sup> *The Civil Rights Cases*, 109 U.S. at 20. A "badge" "refers to indicators, physical or otherwise, of African Americans' slave or subordinate status," while an "incident" is "any legal



the *Civil Rights Cases* Court held that the Amendment prohibits not only “slavery” and “involuntary servitude,” by its own terms, but also a third category of harms, namely the “badges and incidents” of slavery.<sup>84</sup>

Despite the addition of this third class of harms, the *Civil Rights Cases* Court narrowly construed “badges and incidents” of slavery to mean only “those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens.”<sup>85</sup> As examples, the Court identified “[c]ompulsory service” and “restraint of . . . movements,” as among the “the inseparable incidents of the institution” of slavery.<sup>86</sup>

Similar to the Court’s explanation in *The Slaughter-House Cases* that the Amendment dealt with liberty and not equality, the *Civil Rights Cases* Court stated that “the social rights of men and races in the community” were not the subject of the Amendment.<sup>87</sup> That is, the Amendment secured personal freedom, but it did not require equal civil rights nor social interaction among the races. Based on this parsing of the Amendment, the Court held that denial of admission to public accommodations related to social rights and thus were not cognizable “badges” or “incidents” of slavery within the meaning of the Thirteenth Amendment: “[i]t would be running the slavery argument into the ground to make [the Thirteenth Amendment] apply to every act of discrimination,” such as with whom a person wants to interact or do business.<sup>88</sup>

In 1906, the Court in *Hodges v. United States*<sup>89</sup> reviewed challenges to the Civil Rights Act of 1866,<sup>90</sup> which prohibited any knowing and willful conspiracy to oppress, threaten, or intimidate individuals in the exercise of constitutional rights, including the right to make and enforce contracts.<sup>91</sup> The Act was enacted pursuant to Congress’s Thirteenth

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right or restriction that necessarily accompanied the institution of slavery.” Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 575 (2012).

<sup>84</sup> See *The Civil Rights Cases*, 109 U.S. at 20.

<sup>85</sup> *Id.* at 35 (Harlan, J., dissenting).

<sup>86</sup> *Id.* at 22 (majority opinion).

<sup>87</sup> *Id.* at 22, 24.

<sup>88</sup> *Id.* at 24. For a discussion of intermediate cases, including *Robertson v. Baldwin*, 165 U.S. 275 (1897), and *United States v. Choctaw Nation*, 193 U.S. 115 (1904), see Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921*, 5 LAW & HIST. REV. 249, 264–68 (1987).

<sup>89</sup> 203 U.S. 1 (1906), *overruled in part by* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968).

<sup>90</sup> Ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1982, 1987–1988, 1991–1992).

<sup>91</sup> The relevant text of the Act is:

all persons born in the United States . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, . . . and to full and equal benefit of all laws and proceedings for the

Amendment enforcement power. Indeed, this statute was passed a few months after the ratification of the Thirteenth Amendment.<sup>92</sup> The Court held that the Act was an impermissible exercise of Congress's Section Two authority.<sup>93</sup> In contrast to prior cases in which the Court construed the Amendment to prohibit harms that did not amount to slavery, the *Hodges* Court took the strict view that the Amendment prohibits only actual slavery. To reach this conclusion, the Court turned to Webster's Dictionary for the definition of slavery, and therefore the scope of the Amendment: slavery, the Court wrote, prohibits only "the state of entire subjection of one person to the will of another," in which "a slave is said to be 'a person who is held in bondage to another.'"<sup>94</sup>

Justice Marshall Harlan dissented, as he was of the view that under Section Two, "Congress may not only prevent the re-establishing of the institution of slavery, pure and simple, but may make it impossible that any of its incidents or badges should exist or be enforced in any state or territory of the United States."<sup>95</sup> The Amendment, he argued, "not only established and decreed universal, civil and political freedom throughout this land, but abolished the incidents or badges of slavery,"<sup>96</sup> defining such badges and incidents, not unlike the *Civil Rights Cases*, as race-based abridgments "of the essential rights that appertain to American citizenship and to freedom."<sup>97</sup>

In 1916, the Court, doubling down on *Hodges*, stated that the Thirteenth Amendment "was intended to cover those forms of compulsory labor akin to African slavery which, in practical operation, would tend to produce like undesirable results."<sup>98</sup> The three categories of harms recognized in the *Civil Rights Cases* were effectively collapsed into one: slavery.

#### D. *Modern Supreme Court Interpretation of the Amendment*

In 1968, the Supreme Court overruled *Hodges* and gave birth to what federal courts understand to be the current approach to the

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security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

*Id.* § 1.

<sup>92</sup> See *United States v. Price*, 383 U.S. 787, 804 (1966).

<sup>93</sup> *Hodges*, 203 U.S. at 14–20.

<sup>94</sup> *Id.* at 17.

<sup>95</sup> *Id.* at 27 (Harlan, J., dissenting).

<sup>96</sup> *Id.* at 32.

<sup>97</sup> *Id.* at 37.

<sup>98</sup> *Butler v. Perry*, 240 U.S. 328, 332 (1916).

Thirteenth Amendment. In *Jones v. Alfred H. Mayer Co.*,<sup>99</sup> the Court addressed whether 42 U.S.C. § 1982, which guarantees “[a]ll citizens of the United States . . . 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,” was a valid exercise of Congress’s Thirteenth Amendment enforcement power.<sup>100</sup> The Court stated that *Hodges*, which trimmed the Thirteenth Amendment’s reach to slavery, was out of step with the *Civil Rights Cases*, which “clothed ‘Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.’”<sup>101</sup> The Court therefore restored the three categories of harms that are amenable to Thirteenth Amendment Section Two regulation.

Moreover, the Court in *Jones* held that it is within Congress’s authority “rationally to determine what are the badges and the incidents of slavery, and . . . to translate that determination into effective legislation.”<sup>102</sup> Applying this standard to section 1982, the Court held that the “badges and incidents of slavery” plainly “include[d] the power to eliminate all racial barriers to the acquisition of real and personal property.”<sup>103</sup>

In the 1970s, the Court affirmed and reaffirmed the *Jones* Court’s understanding of the Thirteenth Amendment. For example, the Court held that Congress may use its Section Two enforcement power to create civil remedies and criminal prohibitions for harms that “extend far beyond the actual imposition of slavery or involuntary servitude,”<sup>104</sup> such as discriminatory conspiracies to deprive another of protected rights, including the right of interstate travel<sup>105</sup> and the right to make and enforce contracts.<sup>106</sup> *Jones* therefore drew generous bounds around the scope of the Thirteenth Amendment and has been reliably followed to uphold varied congressional action taken under the Amendment. Indeed, since *Jones*, the Supreme Court has not invalidated any statutes passed by Congress under its Thirteenth Amendment enforcement power.<sup>107</sup>

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<sup>99</sup> 392 U.S. 409, 412–13 (1968).

<sup>100</sup> U.S. CONST. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”).

<sup>101</sup> *Jones*, 392 U.S. at 439 (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)).

<sup>102</sup> *Id.* at 440.

<sup>103</sup> *Id.* at 439–40.

<sup>104</sup> *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971).

<sup>105</sup> *See id.* at 105–06.

<sup>106</sup> *See Runyon v. McCrary*, 427 U.S. 160, 179 (1976).

<sup>107</sup> *See* Jennifer Mason McAward, *The Scope of Congress’s Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U. L. REV. 77, 97 (2010); *see also id.* at 97 n.109 (listing cases in which federal courts upheld Thirteenth Amendment legislation).

While the Supreme Court has broadly blessed Congress's use of the Thirteenth Amendment enforcement power, the Court has been reluctant to find violations of the Thirteenth Amendment in the absence of congressional legislation.<sup>108</sup> The Supreme Court, for example, refused to hold that "[t]he denial of the right of Negroes to swim in pools with white people is . . . a 'badge or incident' of slavery," because the judiciary's particular "authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a law-making power far beyond the imagination of the amendment's authors," adding that the Amendment only empowers Congress "to outlaw" a "badge[] of slavery."<sup>109</sup> Similarly, the Court declined to hold that the closure of a street to allegedly cut off blacks was a "badge or incident" of slavery, as the closure amounted to an "inconvenience [which] cannot be equated to an actual restraint on the liberty of black citizens that is in any sense comparable to the odious practice the Thirteenth Amendment was designed to eradicate."<sup>110</sup>

What is the current state of the Thirteenth Amendment? *Jones* and its progeny suggest that the self-executing force of Section One of the Amendment prohibits only actual slavery and involuntary servitude.<sup>111</sup> Section Two, however, "empower[s] Congress to do much more."<sup>112</sup> In particular, the Court has enabled Congress to also regulate the "badges and incidents" of slavery and has subjected such regulations to a deferential rationality review.<sup>113</sup> A useful summary of the Amendment

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<sup>108</sup> See *Alma Soc'y Inc. v. Mellon*, 601 F.2d 1225, 1237 (2d Cir. 1979) ("The [Supreme] Court has never held that the Amendment itself, unaided by legislation as it is here, reaches the 'badges and incidents' of slavery as well as the actual conditions of slavery and involuntary servitude."); see also Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1219 n.21 (1978) (lamenting the fact that "the [C]ourt has confined its enforcement of the [Thirteenth A]mendment to a set of core conditions of slavery, but that the [A]mendment itself reaches much further; in other words, the [T]hirteenth [A]mendment is judicially underenforced").

<sup>109</sup> *Palmer v. Thompson*, 403 U.S. 217, 226–27 (1971).

<sup>110</sup> *City of Memphis v. Greene*, 451 U.S. 100, 126–28 (1981).

<sup>111</sup> See *id.* at 125–26 ("[T]he Court left open the question whether [Section One] of the Amendment by its own terms did anything more than abolish slavery."); *United States v. Nelson*, 277 F.3d 164, 184 (2d Cir. 2002) (noting the Court's "unwillingness . . . to apply Section One of the Thirteenth Amendment where Congress had not acted under Section Two," and a "willingness . . . to affirm Congress's choices when it had acted under the latter section"); see also *Channer v. Hall*, 112 F.3d 214, 217 n.5 (5th Cir. 1997).

<sup>112</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968); see also *Nelson*, 277 F.3d at 184–85 (noting the Court's decisions that "serve[] to underscore the extent to which Congress's powers under Section Two of the Thirteenth Amendment extend beyond the prohibition on actual slavery and servitude expressed in Section One"); *id.* at 185 ("Congress, through its enforcement power under Section Two of the Thirteenth Amendment is empowered, to control conduct that does not come close to violating Section One directly.").

<sup>113</sup> See *Alma Soc'y*, 601 F.2d at 1237 ("Abolition of the badges and incidents the [Supreme] Court has left to Congress."); see also Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1822 (2010) ("The framers of the Thirteenth Amendment assumed that Congress

comes from Laurence Tribe, who observes that “Congress possesses an almost unlimited power to protect individual rights under the Thirteenth Amendment,” and is virtually “free, within the broad limits of reason, to recognize whatever rights it wishes, define the infringement of those rights . . . and proscribe such infringement as a violation of the Thirteenth Amendment.”<sup>114</sup>

## II. PROBLEMS WITH THE CURRENT JURISPRUDENCE

This Part enumerates federalism and separation of powers concerns, expressed by courts and scholars, with the Supreme Court’s expansive interpretation of the scope of the Thirteenth Amendment enforcement power.<sup>115</sup> It also notes that the Thirteenth Amendment enforcement power is in tension with *City of Boerne v. Flores*<sup>116</sup> and *Shelby County v. Holder*,<sup>117</sup> relatively recent cases in which the Supreme Court announced rather constrictive interpretations of the enforcement provisions of the Fourteenth Amendment and Fifteenth Amendment, respectively. As the language of all three Reconstruction Amendment enforcement provisions are almost identical,<sup>118</sup> as all three had a

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would define the badges and incidents of slavery and decide what legislation was appropriate to eliminate them, and that the courts would defer to any reasonable construction.”); Tsesis, *supra* note 48, at 590 (“[Jones] established a low rationality threshold for determining whether Congress had overstepped its authority in enacting laws” pursuant to the Amendment’s enabling clause.).

<sup>114</sup> 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 926–27 (3d ed. 2000). Congress’s Section Two authority is not completely unbounded. The Supreme Court has instructed that the Amendment may not be used to “repeal other provisions of the Constitution,” “strip the States of their power to govern themselves,” “convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation,” “undercut the [other] amendments’ guarantees of personal equality and freedom from discrimination,” or “undermine those protections of the Bill of Rights” that are “applicable to the States” pursuant to the Fourteenth Amendment. *Oregon v. Mitchell*, 400 U.S. 112, 128–29 (1970).

<sup>115</sup> These concerns necessarily intertwine. For example, the ability of Congress to define the scope of its authority, a core separation of powers issue, could translate into Congress enacting a broad swath of laws that impinge on State police powers, a federalism issue. For ease of discussion, however, the concerns have been broken down into two.

<sup>116</sup> 521 U.S. 507 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (2012), *as recognized in* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>117</sup> 133 S. Ct. 2612 (2013).

<sup>118</sup> 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.”), and U.S. CONST. amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”).

common historical origin in the wake of the Civil War,<sup>119</sup> and as all three were enacted shortly after one another,<sup>120</sup> recent opinions on the Fourteenth and Fifteenth Amendment enforcement powers may bear on the current meaning of the Thirteenth Amendment enforcement power.

#### A. *Federalism*

Concerns that the Thirteenth Amendment would bring about federal interference with the traditional functions of the States have been around as long as the Amendment itself. In debates on the Amendment, proponents of the Amendment openly sought to catalyze “a revolution in federalism,” and this change was “virtually the sole basis of the[] opposition to the Amendment.”<sup>121</sup> Even after the ratification of the Amendment, federalism issues remained. In 1866, for example, Senator Edgar Cowan of Pennsylvania questioned whether the Amendment would upset “the whole frame and structure of the laws,” urged that the Amendment “never was intended to overturn this government and revolutionize all the laws of the states everywhere,” and suggested that the Amendment could be wielded so as to “overturn the states themselves completely.”<sup>122</sup>

These concerns were shared in the federal courts. In the first federal court case construing the Thirteenth Amendment, the very first sentence about the Amendment, written by Justice Noah Swayne sitting as Circuit Justice, is: “The [T]hirteenth [A]mendment . . . trenches directly upon the power of the states and of the people of the states.”<sup>123</sup> In 1874, Justice Joseph Bradley, sitting as Circuit Justice, took pains to contrast the operation of the Amendment with states’ police powers. He explained that the Amendment “does not authorize congress to pass laws for the punishment of ordinary crimes and offenses against persons of the colored race or any other race,” which, he noted, “belongs to the

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<sup>119</sup> See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872) (“[T]he one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”).

<sup>120</sup> The Thirteenth Amendment was ratified on December 6, 1865, the Fourteenth on July 9, 1868, and the Fifteenth on February 3, 1870. See *Constitution of the United States: Amendments 11–27*, NAT’L ARCHIVES, [http://www.archives.gov/exhibits/charters/constitution\\_amendments\\_11-27.html](http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html) (last visited Aug. 20, 2015).

<sup>121</sup> Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 179 (1951).

<sup>122</sup> *Id.* at 190 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866) (statement of Sen. Cowan)).

<sup>123</sup> *United States v. Rhodes*, 27 F. Cas. 785, 788 (C.C.D. Ky. 1866) (No. 16,151).

state government alone.”<sup>124</sup> That said, Justice Bradley indicated that the Thirteenth Amendment does permit Congress to withdraw from the States the ability to deprive African-Americans of the “rights and privileges enjoyed by white citizens,” such as the opportunity to give evidence in criminal cases.<sup>125</sup>

Similarly, and more recently, the Supreme Court in 1971 upheld 42 U.S.C. § 1985(3), which prohibits conspiracies to interfere with the constitutional rights of others, but in the same breath cautioned that the statute does not “apply to all tortious, conspiratorial interferences with the rights of others.”<sup>126</sup> “The constitutional shoals that would lie in the path of interpreting [section] 1985(3) as a general federal tort law can be avoided by” requiring evidence of discriminatory intent, the Court stressed.<sup>127</sup>

These federalism concerns have taken on new life following the enactment of federal hate crimes legislation. In 2009, Congress passed 18 U.S.C. § 249(a)(1), the Matthew Shepard and James Byrd Jr., Hate Crimes Prevention Act (Hate Crimes Prevention Act), pursuant to its Thirteenth Amendment enforcement power.<sup>128</sup> This provision makes it unlawful for anyone to “willfully cause[] bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person.”<sup>129</sup> Defendants prosecuted under this provision have challenged its constitutionality, and these challenges have made their way to the federal appeals courts. Those courts have faithfully applied *Jones*, a binding precedent, and based on that application have upheld the constitutionality of the provision. At the same time, they have also expressed serious federalism concerns about *Jones* and its progeny.

In *United States v. Hatch*, the U.S. Court of Appeals for the Tenth Circuit heard, and rejected, a constitutional challenge to section 249(a)(1).<sup>130</sup> In this case, a few individuals with varying ties to white

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<sup>124</sup> *United States v. Cruikshank*, 25 F. Cas. 707, 711 (C.C.D. La. 1874) (No. 14,897).

<sup>125</sup> *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 596–97 (1871) (Bradley, J., dissenting).

<sup>126</sup> *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971).

<sup>127</sup> *Id.* at 102.

<sup>128</sup> See *The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/crt/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention-act-2009-0> (last updated Aug. 6, 2015).

<sup>129</sup> 18 U.S.C. § 249(a)(1) (2012). This provision should be contrasted with 18 U.S.C. § 249(a)(2), which was enacted under Congress’s Commerce Clause power and contains a jurisdictional hook. See *id.* at (a)(2)(B) (providing that the conduct must be “(I) across a State line or national border; or (II) us[e] a channel, facility, or instrumentality of interstate or foreign commerce”).

<sup>130</sup> *United States v. Hatch*, 722 F.3d 1193 (10th Cir. 2013). By way of disclosure, I co-authored and organized an amicus brief in support of the United States government in *Hatch*. While the amicus brief asserted that Congress’s use of the Thirteenth Amendment enforcement

supremacy had, for five hours, harassed a developmentally disabled Native-American man by, among other things, branding a swastika into his arm.<sup>131</sup> The defendants were prosecuted under section 249(a)(1), and contested the provision's constitutionality.<sup>132</sup> The U.S. District Court for the District of New Mexico found the provision valid, dismissing federalism objections on the ground that Congress does not infringe upon powers reserved for the states if Congress acts pursuant to a delegated power.<sup>133</sup>

On appeal, the Tenth Circuit seemed persuaded by the appellant's contentions that the Thirteenth Amendment, as construed by *Jones*, could not be squared with *City of Boerne v. Flores*,<sup>134</sup> *United States v. Lopez*,<sup>135</sup> and *United States v. Morrison*.<sup>136</sup> In *City of Boerne*, the Court struck down the Religious Freedom Restoration Act—which was passed pursuant to Congress' Fourteenth Amendment enforcement power and which was designed to require States to provide greater religious exercise protections—insofar as the Act applied to States.<sup>137</sup> In *Lopez* and *Morrison*, the Supreme Court invalidated Congress's attempts under the Commerce Clause to regulate gun possession and gender-motivated violence, respectively, warning that to permit these federal regulations would be tantamount to endorsing a federal police power.<sup>138</sup>

The appellant argued that, while *City of Boerne*, *Lopez*, and *Morrison* all sought to protect states' rights, "*Jones* creates a constitutional loophole through which Congress can enact all sorts of otherwise impermissible police power legislation,"<sup>139</sup> such as regulations on "racial profiling, racial bias of jurors, and race discrimination in imposition of the death penalty," as well as "education and family life."<sup>140</sup> The Tenth Circuit admitted that these

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power as applied in that case was consistent with *Jones*, this Article argues that *Jones* is no longer sustainable. That is, the brief may be characterized as descriptive, whereas this Article is normative.

<sup>131</sup> See *United States v. Beebe*, 807 F. Supp. 2d 1045, 1047 (D.N.M. 2011), *aff'd sub nom. Hatch*, 722 F.3d 1193.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 1057–58.

<sup>134</sup> 521 U.S. 507 (1997), *superseded by statute*, RLUIPA, 42 U.S.C. §§ 2000cc to 2000cc-5 (2012). Congress responded to *City of Boerne* by enacting RLUIPA under different constitutional powers, though *City of Boerne* still provides the standard for assessing the constitutionality of legislative action grounded in the Fourteenth Amendment enforcement power.

<sup>135</sup> 514 U.S. 549 (1995).

<sup>136</sup> 529 U.S. 598 (2000).

<sup>137</sup> See *City of Boerne*, 521 U.S. at 511, 516, 531–33.

<sup>138</sup> See *United States v. Hatch*, 722 F.3d 1193, 1203 (10th Cir. 2013) (citing *Lopez*, 514 U.S. at 551, 564, and *Morrison*, 529 U.S. at 605–06, 617–18).

<sup>139</sup> *Id.* at 1203–04.

<sup>140</sup> *Id.* at 1204 (quoting Brief for Appellant at 29).



arguments “raise important federalism questions”<sup>141</sup> that “we share.”<sup>142</sup> In doing so, the Tenth Circuit seemed to suggest that section 249(a)(1) also may operate as an impermissible federal police power.<sup>143</sup>

As it was troubled by federalism considerations, the Tenth Circuit acknowledged that it could “not blaze a new constitutional trail.”<sup>144</sup> “[I]t will be up to the Supreme Court to choose whether to extend its more recent federalism cases to the Thirteenth Amendment,”<sup>145</sup> and “we must leave it to the Supreme Court to bring Thirteenth Amendment jurisprudence in line with the[se] structural concerns.”<sup>146</sup>

Duty-bound to follow *Jones* yet still moved by the federalism arguments put forth by the defendant, the Tenth Circuit identified three limiting principles that apparently calmed its federalism concerns and allowed it to uphold the application of section 249(a)(1) as to the defendant’s conduct. First, the victim was selected on the basis of race; second, the injury was committed intentionally; and third, the racially motivated physical attack could rationally be determined a “badge or incident” of slavery.<sup>147</sup>

While the Tenth Circuit invoked these limiting principles, it would be a mistake to believe that these limiting principles define the outer bounds of the Section Two enforcement power—it stretches much further. First, under section 249(a), a victim must be targeted “because of” race or another covered characteristic. In a rather infamous case under section 249(a)(2)(A), in which the beards of Amish men were cut by members of another Amish community, the Sixth Circuit held that the “because of” provision requires proof of “but-for causation.”<sup>148</sup> This suggests, similar to the Tenth Circuit’s analysis, that the victim must be selected because of faith-based animus.

But the Thirteenth Amendment is not so confined. The Supreme Court has stated that the Thirteenth Amendment “denounces a status or condition, irrespective of the manner or authority by which it is created.”<sup>149</sup> This condition, the Second Circuit explained, “remains the same regardless of whether a person is subjugated on grounds of race or

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<sup>141</sup> *Id.* at 1201.

<sup>142</sup> *Id.* at 1204.

<sup>143</sup> *Id.* at 1203–04.

<sup>144</sup> *Id.* at 1204.

<sup>145</sup> *Id.* at 1201.

<sup>146</sup> *Id.* at 1205.

<sup>147</sup> *Id.* at 1205–06.

<sup>148</sup> *United States v. Miller*, 767 F.3d 585, 590–92 (6th Cir. 2014).

<sup>149</sup> *Clyatt v. United States*, 197 U.S. 207, 216 (1905); *see also* *Hodges v. United States*, 203 U.S. 1, 16–17 (1906) (“[The Amendment] is the denunciation of a condition, and not a declaration in favor of a particular people.”), *overruled in part by* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968).

for some other reason.”<sup>150</sup> Accordingly, for Thirteenth Amendment purposes, a victim need not be targeted because of a protected trait. The Tenth and Sixth Circuits’ interpretation of section 249(a), as requiring targeting “because of” a protected trait, cannot be fairly said to represent the limits of the Thirteenth Amendment.<sup>151</sup> The Amendment reaches objective conditions without regard to the subjective mindset of the perpetrator.

Second, the Tenth Circuit’s federalism concerns were also allayed because section 249(a) has an intent requirement.<sup>152</sup> But as the Thirteenth Amendment regulates certain conditions,<sup>153</sup> it does not matter whether those conditions were created intentionally or knowingly. Leading scholars on the Amendment agree that the Amendment covers harms regardless of whether the harms are intentionally imposed.<sup>154</sup> Intent requirements thus may not serve as a categorical limitation on the reach of Thirteenth Amendment legislation.

Third, the Tenth Circuit determined that a racially motivated attack is sufficiently rationally related to the harms to which slaves were subjected.<sup>155</sup> But the Thirteenth Amendment is not limited to physically attacking someone on account of race. As the court itself noted, slavery involved harms so expansive that virtually any harm could be encompassed within the Thirteenth Amendment enforcement power: “nearly every hurtful thing one human could do to another and nearly

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<sup>150</sup> *United States v. Nelson*, 277 F.3d 164, 179–80 (2d Cir. 2002). *But see* *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1348 (11th Cir. 1999) (Tjoflat, J., concurring in part and dissenting in part) (“Congress’ authority under the Thirteenth Amendment is limited . . . to the prevention of discrimination on the basis of race.”); *United States v. Cruikshank*, 25 F. Cas. 707, 711–12 (C.C.D. La. 1874) (No. 14,897) (arguing that what distinguishes a federal law properly enacted by Congress pursuant to its Thirteenth Amendment authority from an “ordinary” state crime is that the former involves the “interference with that person’s exercise of his equal rights as a citizen because of his race”).

<sup>151</sup> *See Miller*, 767 F.3d at 603 (Sargus, J., dissenting) (objecting to the Sixth Circuit’s holding on the grounds that the majority “read[] into the statute an extra, non-textual element,” and had “[s]pecifically . . . added to the hate crimes statute proof of faith-based animus”); *Hatch*, 722 F.3d at 1205–06.

<sup>152</sup> *See Hatch*, 722 F.3d at 1205–06.

<sup>153</sup> *See Clyatt*, 197 U.S. at 216; *Hodges*, 203 U.S. at 16–17.

<sup>154</sup> *See* William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 87 (2004) (“The Thirteenth Amendment’s Framers did not intend to eliminate slavery and its lingering effects only where they are intentionally inflicted.”); Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 311 (2010) (“Congress could use [its enforcement power under the Thirteenth Amendment] to outlaw practices that have a discriminatory impact on racial minorities, regardless of evidence of discriminatory intent.”).

<sup>155</sup> *See Hatch*, 722 F.3d at 1205.

every disadvantaged state of being might be analogized to slavery—and thereby labeled a badge or incident of slavery . . . .”<sup>156</sup>

This is all to suggest that the concerns that animated the Tenth Circuit’s decision are even more salient in light of the fact that the Thirteenth Amendment enforcement power is more expansive than the limiting principles of *Hatch* would indicate.<sup>157</sup>

These federalism considerations are heightened in view of recent Supreme Court decisions. In *Shelby County*, the Court held that the formula used by Congress under its Fifteenth Amendment enforcement power to determine which jurisdictions are subject to Voting Rights Act pre-clearance requirements was outdated; as such, the federal government could not justify the existing imposition of such requirements on jurisdictions covered by that stale criteria.<sup>158</sup> *Shelby County* indicated that the Fifteenth Amendment enforcement power must be exercised according to current circumstances, not past realities.<sup>159</sup>

This would throw into doubt the practice of ascertaining what constitutes a badge or incident of slavery with reference to whether the prohibited conduct has a sufficient “historical association with slavery and its cognate institutions.”<sup>160</sup> That is, the backward-looking analysis contemplated by *Jones*—in which harm addressed by current legislation is matched against the harms visited upon slaves<sup>161</sup>—may no longer be appropriate in light of *Shelby County*. As the Fifteenth Amendment is another Reconstruction Amendment,<sup>162</sup> and as its enforcement power contains identical language to the enforcement power of the Thirteenth

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<sup>156</sup> *Id.* at 1204.

<sup>157</sup> To be sure, the Tenth Circuit itself disclaimed any attempt to define the “outer limits” of *Jones*. *Id.* at 1201. The point here is to explain that the Tenth Circuit was comfortable upholding the conviction, despite its federalism concerns, because of three limiting principles; but those limiting principles do not set the outer limits of *Jones* and thus federalism concerns may be more pressing outside of the context of this particular statutory provision.

<sup>158</sup> See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2630–31 (2013).

<sup>159</sup> *Id.* at 2626–27.

<sup>160</sup> *United States v. Nelson*, 277 F.3d 164, 189 (2d Cir. 2002); see also Carter, *supra* note 154, at 65–67 (applying this “historical nexus” test to the racial profiling context); Larry J. Pittman, *Physician-Assisted Suicide in the Dark Ward: The Intersection of the Thirteenth Amendment and Health Care Treatments Having Disproportionate Impacts on Disfavored Groups*, 28 SETON HALL L. REV. 774, 856–57 (1998) (endorsing this “historical nexus” test).

<sup>161</sup> This was the precise question in *Hatch*, where the defendants physically attacked and branded a victim on account of race. See *United States v. Beebe*, 807 F. Supp. 2d 1045, 1052 (D.N.M. 2011) (“Racially charged violence, perpetuated by white men against black slaves, was a routine and accepted part of the American slave culture.”), *aff’d sub nom. Hatch*, 722 F.3d 1193.

<sup>162</sup> See *Shelby Cty.*, 133 S. Ct. at 2619 (“The Fifteenth Amendment was ratified in 1870, in the wake of the Civil War.”).

Amendment, *Shelby County* may foreshadow a more restrictive approach to the Thirteenth Amendment by the Supreme Court.<sup>163</sup>

Two other recent Supreme Court opinions are necessary to mention in the context of federalism concerns with the Thirteenth Amendment. First, in *NFIB v. Sebelius*, the Court emphasized that the police power belongs to, and must be exercised by, the States: “[b]ecause the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens’ daily lives are normally administered by smaller governments closer to the governed.”<sup>164</sup> In *Bond v. United States*, the Court explained that leaving the police power in the hands of the government bodies nearest the people not only makes sense as a practical matter, but also is designed to check governmental overreaching as a constitutional matter.<sup>165</sup> Even if the Court does not construe *Shelby County* as applying to the Thirteenth Amendment, these two cases point to the current Court’s more generalized interest in recognizing and preserving state authority, while also guarding against federal encroachments on that authority and on the liberty of the people.<sup>166</sup>

### B. Separation of Powers

While federalism concerns with the enforcement provision of the Thirteenth Amendment stretch back to Reconstruction, the separation of powers concerns are tied to *Jones* and thus have less historical

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<sup>163</sup> See, e.g., Will Baude, *The Uncertain Future of the Matthew Shepard Hate Crimes Prevention Act*, VOLOKH CONSPIRACY (July 16, 2013, 3:05 PM), <http://volokh.com/2013/07/16/the-uncertain-future-of-the-matthew-shepard-hate-crimes-prevention-act>. But see Supplemental Brief for the United States as Appellee at 4–7, *United States v. Cannon*, 750 F.3d 492 (5th Cir. 2014) (No. 12-20514) (arguing that *Shelby County* is inapplicable to constitutional challenges to 18 U.S.C. § 249(a)(1) because: the Voting Rights Act’s pre-clearance requirement governs states or parts of states and as such presents federalism issues not in section 249(a)(1); Congress premised section 249(a)(1) on findings of recent bias-motivated conduct; *Shelby County* said nothing about section 249(a)(1) or the Thirteenth Amendment broadly; and the binding precedent remains *Jones*); Georgina C. Yeomans, Comment, *The Constitutionality of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act in Light of Shelby County v. Holder*, 114 COLUM. L. REV. SIDEBAR 107, 117–18 (2014) (reinforcing the first and last of these points as to the constitutionality of Section 249(a)(1) even after *Shelby County*).

<sup>164</sup> *NFIB v. Sebelius*, 132 S. Ct. 2566, 2578 (2012).

<sup>165</sup> *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (“By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.”).

<sup>166</sup> See Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 583 (2015) (noting, after a discussion of *Bond* and *NFIB*, that “[t]he Roberts Court is heeding to a theory of federalism, limiting Congress’s power as much as possible and elevating the states’ role in regulating various aspects of our democratic system”).

pedigree. The separation of powers concerns are still significant, even if recent in vintage.

In *Hatch*, the Tenth Circuit understood that *Jones* gave Congress not only “the power to enforce the [A]mendment, but also to a certain extent to define its meaning.”<sup>167</sup> Indeed, the court noted quite simply that “[b]adges and incidents of slavery” consist of “conduct [that] Congress seeks to prohibit.”<sup>168</sup> Because of the vast universe of harms that were imposed on slaves, Congress may label virtually anything a badge or incident of slavery under *Jones*.<sup>169</sup> “In effect,” the court recognized, “this interpretation gives Congress the power to define the meaning of the Constitution—a rare power indeed.”<sup>170</sup>

The Tenth Circuit suggested that, *Jones*, on its own, raises serious separation of powers problems. Placed up against other cases, those problems become amplified. In particular, the Tenth Circuit strongly signaled that *Jones* may be tough to square with *City of Boerne*, which, as noted above, prohibits Congress from using its Fourteenth Amendment enforcement power to create substantive rights.<sup>171</sup> In order to gauge whether Congress is enforcing the Fourteenth Amendment (permissible) or whether it was creating substantive rights (impermissible), *City of Boerne* asks whether Fourteenth Amendment enforcement legislation exhibits “congruence and proportionality” to the social harm.<sup>172</sup> The Tenth Circuit seemed to indicate that 18 U.S.C. § 249(a)(1) takes from the courts the function of defining the scope of the Thirteenth Amendment. Despite this tension, the court ultimately did not strike down section 249(a)(1) for separation of powers reasons, pointing to the fact that *City of Boerne* did not mention the Thirteenth Amendment or *Jones*.<sup>173</sup>

Similarly, in *United States v. Cannon*, the United States Court of Appeals for the Fifth Circuit heard the case of three defendants who were convicted by a jury of violating section 249(a)(1).<sup>174</sup> The defendants, all white supremacists, physically attacked an African-

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<sup>167</sup> *United States v. Hatch*, 722 F.3d 1193, 1200 (10th Cir. 2013) (emphasis omitted).

<sup>168</sup> *Id.* at 1204.

<sup>169</sup> *Id.* While to disagree with Akhil Amar is almost to be presumptively wrong, the Tenth Circuit’s statement, which portrays a wide-ranging Thirteenth Amendment, seems to suggest that Professor Amar cannot be right that the Amendment has a “rather specific and bounded domain” and therefore is closer to the Fifteenth (which he says shares this same attribute) as compared to the Fourteenth (which he says has “far more sweeping application across the waterfront of imaginable policy space”). Akhil Reed Amar, Essay, *The Lawfulness of Section 5—and Thus of Section 5*, 126 HARV. L. REV. F. 109, 120 n.30 (2013).

<sup>170</sup> *Hatch*, 722 F.3d at 1204.

<sup>171</sup> *See id.* at 1202 (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

<sup>172</sup> *See City of Boerne*, 521 U.S. at 520.

<sup>173</sup> *Hatch*, 722 F.3d at 1203.

<sup>174</sup> *United States v. Cannon*, 750 F.3d 492 (5th Cir. 2014).

American man who was waiting at a bus stop, and repeatedly used a racial epithet in the course of the encounter.<sup>175</sup> The court acknowledged that the *Jones* Court “held that Congress has the authority to enact legislation necessary to abolish the ‘badges’ and ‘incidents’ of slavery, as well as the power to rationally determine what those ‘badges’ and ‘incidents’ are.”<sup>176</sup> The defendants argued that *Jones* had been undermined by *City of Boerne* and by *Shelby County*—the latter a case handed down just days after *Hatch*. The defendants also claimed that, under the seminal case of *McCulloch v. Maryland*,<sup>177</sup> the courts may defer only to “the means that Congress uses to achieve a particular end, but not to Congress’s determination that the end itself is legitimate.”<sup>178</sup>

The Sixth Circuit admitted that the defendants’ contentions were “not frivolous,”<sup>179</sup> but, as with the Tenth Circuit, conceded that it could not overturn *Jones*. “[A]bsent a clear directive from the Supreme Court,” the court explained, “we are bound by prior precedents.”<sup>180</sup> Also, and for the same reason, the defendants’ *McCulloch* contention was “foreclosed.”<sup>181</sup> In any case, the court added, “*Shelby County* never mentioned the Thirteenth Amendment or *Jones*.”<sup>182</sup> As with the Tenth Circuit, the Sixth Circuit adhered to, seemingly reluctantly, “the Supreme Court’s binding precedent in *Jones*.”<sup>183</sup>

These circuit court decisions suggest that following *Jones* comes at the cost of the powers of the states and the proper duties of the courts. Furthermore, these decisions have diagnosed inconsistencies between *Jones*—a 1968 opinion—and subsequent Supreme Court pronouncements on the enforcement provisions of the Fourteenth and Fifteenth Amendments. *Jones* is in need of repair. Specifically, the Thirteenth Amendment must be read in a manner that does not run afoul of federalism or separation of powers problems, or of recent interpretations of the Reconstruction Amendments. The next Part offers a new way forward.

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<sup>175</sup> *Id.* at 495–96.

<sup>176</sup> *Id.* at 499.

<sup>177</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>178</sup> *Cannon*, 750 F.3d at 504; see Jennifer Mason McAward, *McCulloch and the Thirteenth Amendment*, 112 COLUM. L. REV. 1769 (2012) (arguing that *McCulloch* permitted broad deference to the means chosen by Congress to effectuate an enumerated power, but did not support Congress’s ability to define the ends of its legislation); see also Heriot & Somin, *supra* note 12, at 32 (same).

<sup>179</sup> *Cannon*, 750 F.3d at 502.

<sup>180</sup> *Id.* at 505.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

## III. AN ALTERNATIVE MODEL

This Part considers and proposes a new paradigm for the Thirteenth Amendment, one that would allow the Amendment to retain modern application but still stays within the bounds of appropriate federalism and separation of powers considerations, as well as one that is in sync with the enforcement provisions of the two other Reconstruction Amendments.

This model suggests that sustained limitations on physical mobility should be the touchstone for a problem remediable by the Thirteenth Amendment. Put in affirmative terms, the Thirteenth Amendment may be used by Congress to ensure that individuals possess “threshold liberty,” that is the liberty necessary to exercise physical mobility. More specifically, this model posits that Section One of the Amendment, by its own terms, prohibits “slavery” (direct and indirect limitations on physical mobility) and “involuntary servitude” (debt-based limitations on physical mobility). Section Two enables Congress to enact legislation remedying these types of harms and to address functional or effective limitations on physical mobility. This alternative approach does not contemplate authority for Congress to address the “badges and incidents” of slavery, a category not found in the text of the Amendment and that serves as an invitation to wide-ranging encroachments by the national legislature. This Part offers support for this new vision of the Amendment.

A. *Possible General Approaches to the Thirteenth Amendment Enforcement Power*

In general, the scope of Section Two of the Thirteenth Amendment may be construed in three different ways: first, that Congress may use Section Two only to “enforce” the specific contents of Section One, as those contents have been defined by the courts; second, that Congress may use Section Two, as it can and does now, to define and regulate the “badges and incidents” of slavery; and third, that Congress may use Section Two to do something in between pure enforcement and the status quo. The first and second options are untenable; therefore, the category that is most supported, and where the future of Section Two lies, is the third.

First, the extent to which Congress may invoke its Section Two power is not limited by the specific harms of Section One as understood by the courts. This is for at least two reasons. First, an enforcement provision would be superfluous. There would be no need for Congress to do anything if courts could identify violations of Section One and set

forth remedies for those violations. Second, the courts, in the context of the Fourteenth and Fifteenth Amendments, have rejected the notion that the enforcement clause is confined by the judicially recognized contents of the substantive clauses. The argument that substantive harms are for the courts to enumerate and for Congress to then address was made by Justice John Marshall Harlan II in his famous dissent to a Fourteenth Amendment enforcement power case, in which Congress had prohibited literacy tests in voting, even though the Supreme Court previously had found such tests consistent with the Fourteenth Amendment.<sup>184</sup> How could Congress prohibit under the Fourteenth Amendment what the highest Court in the land said was consistent under that Amendment, he asked. Would Congress not be subverting both the courts, which have issued constitutional decisions to the contrary, and the states, which may be subject to such congressional action, he added. The Court answered, in the Fourteenth Amendment context, by making it clear that enforcement powers are a “positive grant of legislative power”<sup>185</sup> that Congress may utilize to “deter[] or remed[y] constitutional violations . . . even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’”<sup>186</sup> Similarly, in the Fifteenth Amendment enforcement power context, the Court has said that, “[b]y adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in [the substantive clause].”<sup>187</sup>

Accordingly, any suggestion that Congress’s Thirteenth Amendment Section Two power must be predicated upon judicial understandings of “slavery” or “involuntary servitude” fails to comport with well-established decisions on the enforcement powers of Fourteenth and Fifteenth Amendments. If Congress can do more, the question becomes, how much?

The second possible approach to the Thirteenth Amendment is *Jones*, the current Supreme Court precedent, which says that Congress can define and prohibit the “badges and incidents” of slavery. The problems with this approach are several.

First, the Supreme Court has given Congress the power to address the “badges and incidents” of slavery, but this category of harms is

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<sup>184</sup> See *Katzenbach v. Morgan*, 384 U.S. 641, 665–71 (1966) (Harlan, J., dissenting).

<sup>185</sup> *Id.* at 651 (majority opinion).

<sup>186</sup> *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

<sup>187</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 325–26 (1966), *abrogated by* *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).



found nowhere in the text of Section One.<sup>188</sup> Where the text of a constitutional provision is clear, the interpretive matter should be over.<sup>189</sup>

Second, the text of the Amendment already included “slavery” and “involuntary servitude” as identifiable categories of harms, which begs the question why “badges and incidents” were not listed as well.<sup>190</sup> The enumeration itself implies sufficiency, particularly because there are no words, such as “including,” indicating that the enumeration is merely representative or otherwise non-exhaustive.

Third, to endorse the “badges and incidents” formulation is to admit a virtually boundless Thirteenth Amendment. To be sure, there is ample evidence that the Framers of the Thirteenth Amendment sought not only to release freed slaves from bondage, but also to remove race-based barriers to the enjoyment of that new freedom.<sup>191</sup> As an example, within months of the ratification of the Thirteenth Amendment, Congress used its Section Two power to prohibit conspiracies to interfere with certain protected rights.<sup>192</sup> But, even accepting this original understanding of the Thirteenth Amendment, the “badges and incidents” of slavery can reach an almost infinite universe of harms because of the comprehensiveness of the evils visited upon slaves.<sup>193</sup> Simply put, “the badges and incidents” of slavery is anything but a reliable limitation on the scope of Congress’s power under the Amendment.

Fourth, the current approach to the Thirteenth Amendment is in tension with the federalism and the separation of powers concerns expressed by circuit courts and seemingly heightened by the Supreme

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<sup>188</sup> See Ilya Somin, *The Scope of Federal Power Under the Thirteenth Amendment*, VOLOKH CONSPIRACY (Feb. 14, 2013, 10:55 AM), <http://volokh.com/2013/02/14/the-scope-of-federal-power-under-the-thirteenth-amendment>.

<sup>189</sup> See ROBERT A. KATZMANN, *JUDGING STATUTES* 56 (2014); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 16 (1997); *cf.* *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015) (departing from “the most natural reading of the pertinent statutory phrase” where that plain meaning is “untenable in light of the statute as a whole” (alteration omitted) (quoting *Dep’t of Revenue of Or. v. ACF Indus.*, 510 U.S. 332, 343 (1994))).

<sup>190</sup> See Somin, *supra* note 188.

<sup>191</sup> See, e.g., *United States v. Harris*, 106 U.S. 629, 640 (1883).

<sup>192</sup> Civil Rights Act of 1866, Ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1982, 1987–1988, 1991–1992).

<sup>193</sup> The original understanding of the Amendment appears broad. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872) (stating that the Reconstruction Amendments forbade “oppressions” on the former “slave race”); see also Alexander Tsesis, *Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1657 n.69 (2012) (noting that Justice Bushrod Washington’s flowing natural rights rhetoric in *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230), inspired sponsors of the Thirteenth Amendment). But that original understanding is tough to square with current conceptions of federalism and separation of powers. See *United States v. Hatch*, 722 F.3d 1193, 1204 (10th Cir. 2013).

Court in *NFIB* and *Bond*.<sup>194</sup> The courts have attempted to establish limiting principles that may mitigate these considerations, but as noted above, the full reach of the Amendment is far greater than these limiting principles would admit; therefore, the federalism and separation of powers problems with the Amendment are greater as well.<sup>195</sup>

As a result, the two ends of the spectrum—reducing the Thirteenth Amendment to Section One or leaving the Amendment as is—should be taken off the table. Accordingly, Section Two of the Thirteenth Amendment must rest somewhere between these extremes.

### B. *The Thirteenth Amendment and Mobility*

Some candidates for the middle path may be the limiting principles articulated by the Tenth Circuit in *Hatch*. The Tenth Circuit confined the application of section 249(a) to circumstances in which there was targeting because of race, which was intentional, and which was of a type that has a historical nexus.<sup>196</sup> None of these characteristics delineate the outer bounds of the Section Two power. Nor should any serve as the basis, either alone or in any combination, for the middle path.

As to racial motivation and intent, the Thirteenth Amendment is concerned with a “condition,” or an objective situation.<sup>197</sup> That condition may exist regardless of the subjective motivation, if any, for the creation of that condition. In other words, slavery should be prohibited because of the nature of the restriction on the liberty of the individual, and that prohibition should not depend on why that restriction may have occurred. The condition inhabited by the victim would qualify as slavery regardless of the intent of anyone else. A remedy for slavery should hinge on the circumstances of the victim, and not on the mindset of any perpetrator.

As to historical nexus, this factor is an intuitive and attractive guidepost, but is one that does not hold up on inspection. For starters, because the Amendment is designed to address certain conditions, the relationship of the conditions to the past may not be dispositive as to the

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<sup>194</sup> See *supra* notes 164–65 and accompanying text.

<sup>195</sup> Any claim that the Thirteenth Amendment reworked federalism in the United States would be difficult to reconcile with current understandings of federalism. To the extent that the Thirteenth Amendment can be read to have adjusted federalism, that modification could be construed as a temporary, wartime necessity. As that exigency is no longer present and as the nation has not divided along the northern and southern lines, the justification for a perpetual change in federalism considerations loses force.

<sup>196</sup> See *Hatch*, 722 F.3d at 1205.

<sup>197</sup> See *Hodges v. United States*, 203 U.S. 1, 16–17 (1906), *overruled in part by Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968); *Clyatt v. United States*, 197 U.S. 207, 216 (1905); *United States v. Nelson*, 277 F.3d 164, 179–80 (2d Cir. 2002).

problematic nature of the current conditions. Moreover, the historical harms are so vast that history offers little refinement to the scope of the Thirteenth Amendment. And, in any event, *Shelby County* places a premium on current realities rather than historical ties. The Tenth Circuit's limiting efforts in *Hatch* were thus useful for purposes of reconciling the Hate Crimes Prevention Act with other concerns, but cannot be enlisted to establish the basis for a refined Thirteenth Amendment approach more broadly.

Nor should labor or consent serve as that guidepost, despite their appeal. One may point out that slavery and involuntary servitude generally required the slave or the peon to engage in labor.<sup>198</sup> A labor-centric vision of the Thirteenth Amendment is too narrow because slavery and involuntary servitude were not limited to labor. Instead, they were more appropriately marked by limitations on physical liberty due to ownership or debt obligations; labor was a byproduct of the condition, rather than the essence of the condition itself. Moreover, consent does not represent a necessary aspect of a Thirteenth Amendment violation, as counterintuitive as this may seem. Aviam Soifer uncovered a statute—enacted by the 39th Congress, which immediately followed the Congress that enacted the Thirteenth Amendment—that prohibited *voluntary* peonage.<sup>199</sup> This prohibition is not all surprising when one considers that the Thirteenth Amendment bans certain conditions. With an understanding that consent does not undergird the Thirteenth Amendment, a two-way street emerges: Congress may address certain conditions regardless of the *perpetrator's* motivation or intent, and regardless of the *victim's* consent. Put differently, neither the perpetrator's mindset nor the victim's mindset can cure the unconstitutional conditions that are at the heart of the Thirteenth Amendment.

The enterprise of ascertaining a single guiding principle for the application of the Thirteenth Amendment seems difficult given the extent of the subjugation of slaves and debt-based servants. This may help explain the Court's willingness to leave to Congress the definitional function. Given the problems with the current model, however, some attempt must be made as to line-drawing, complexities aside.

There is ample support for enlisting physical mobility as that guidepost. For starters, the sheer diversity of harms included within the ambit of slavery, as well as the attendant hazards of separating out those

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<sup>198</sup> See Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989) (arguing that Reconstruction was animated by an interest in recognizing the dignity of labor and enhancing the status and rights of the working man).

<sup>199</sup> See Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607, 1609–10 (2012).

harms, were understood by the Framers of and chief advocates for the Thirteenth Amendment. Thaddeus Stevens, a leader of Reconstruction in Congress, acknowledged that “there are many degrees in the miseries of slavery,” likening the institution to Danté’s “nine circles” of hell.<sup>200</sup> Conceding these degrees, Congressman Stevens nonetheless identified laws restricting slave mobility as the paradigmatic problem with slavery.<sup>201</sup> As an example, Congressman Stevens highlighted an 1808 Virginia statute that prohibited a slave from “going abroad in the night, or running away and lying out,” and that permitted a slave owner to redress such acts by way of dismembering the victim or imposing any other punishment short of death.<sup>202</sup>

Mobility has long been a quintessential feature of slavery. The earliest slave codes in the colonies regulated, as an issue of first order importance, slaves’ physical movements. For example, a 1680 Virginia statute, a “model” for other colonies,<sup>203</sup> provided that, “no Negro or slave may . . . go from his owner’s plantation without a certificate and then only on necessary occasions,” also establishing as “the punishment twenty lashes on the bare back, well laid on.”<sup>204</sup> The absence of a certificate, former Third Circuit judge A. Leon Higginbotham noted, “destroyed” the mobility of slaves.<sup>205</sup> A 1712 South Carolina statute required slaves to carry passes upon travel, *obligating* a white person to whip a slave found without a ticket.<sup>206</sup> The mobility of slaves was heavily circumscribed because mobility itself was seen as a threat to the order established by whites.<sup>207</sup>

The Supreme Court in 1883 characterized slavery by the “[c]ompulsory service of the slave for the benefit of the master, restraint of his movements except by the master’s will, disability to hold property, to make contracts, to have a standing in court, [and] to be a witness against a white person.”<sup>208</sup> “Among the many different forms of oppression imposed by slavery,” Elise Boddie writes, “the inability of slaves to choose any manner of space was fundamental.”<sup>209</sup> That spatial

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<sup>200</sup> Rep. Thaddeus Stevens, The California Question (June 10, 1850), in 1 THE SELECTED PAPERS OF THADDEUS STEVENS, JANUARY 1814–MARCH 1865 at 120 (Beverly Wilson Palmer & Holly Byers Ochoa eds., 1997).

<sup>201</sup> See *id.* (noting that these laws were created by “the slave’s worst enemies,” reflected by slaveholders’ “increas[ing] their burdens, and tighten[ing] their chains,” and were “more cruel laws” compared to others).

<sup>202</sup> *Id.* at 121.

<sup>203</sup> A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 39 (1978).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 171.

<sup>207</sup> DAVID DELANEY, RACE, PLACE & THE LAW, 1836–1948, at 51 (1998).

<sup>208</sup> The Civil Rights Cases, 109 U.S. 3, 22 (1883).

<sup>209</sup> Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 426 (2010).

control was comprehensive, encompassing rules on where a slave slept, where a slave worked, and whether the slave could travel beyond the territory of the plantation and, if so, on what terms.<sup>210</sup> To the extent that a slave traveled away from the plantation, such movements were possible only with the permission of the master and even then were closely regulated.<sup>211</sup>

This control of physical mobility was possible because of the “assignment of a particular sort of meaning to lines and spaces” for purposes of control—what David Delaney coins “territoriality” in his careful study of the geography of slavery.<sup>212</sup> Slavery existed, he writes, as a “geography of discipline and confinement and, for most slaves, extremely limited mobility.”<sup>213</sup> Indeed, if a slave escaped from those established bounds, the Constitution, through the fugitive slave clause, codified the right of the owner to have that slave returned to her designated space.<sup>214</sup> Spatial control was thus codified in the Constitution itself.

These lines were patrolled by physical, or direct, and by effective, or indirect, means. Masters controlled the movements of their slaves through “shackles, beatings, and threats of violence.”<sup>215</sup> That is, a slave’s movements were constrained not only by actual legal constraints, but also by functional constraints, such as violence and threats. Including functional constraints is consistent with *United States v. Kozminski*,<sup>216</sup> where the Court made clear that involuntary servitude is a condition generated not only by physical restraint or physical injury, but also by psychological threat or coercion.

Mobility is the proper focus of the Thirteenth Amendment because of its centrality not only to slavery, but also to the other enumerated category in Section One: involuntary servitude. The touchstone of the Thirteenth Amendment must be integral to slavery and to the only other express practice listed in and prohibited by Section One. It is for this reason that other harms, such as restrictions on property

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<sup>210</sup> See *id.*; DELANEY, *supra* note 207, at 35.

<sup>211</sup> See Carter, *supra* note 154, at 63.

<sup>212</sup> DELANEY, *supra* note 207, at 6; see also *id.* at 35 (“The overwhelming feature of the spatiality of slavery was that it was designed by whites in order to control blacks.”); see generally EDWARD W. SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY 79–80 (1989) (“Space in itself may be primordially given, but the organization, and meaning of space is a product of social translation, transformation, and experience.”).

<sup>213</sup> DELANEY, *supra* note 207, at 35.

<sup>214</sup> See U.S. CONST. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).

<sup>215</sup> Carter, *supra* note 154, at 63.

<sup>216</sup> 487 U.S. 931, 942–43 (1988).

ownership, contract formation and enforcement, and serving as a witness,<sup>217</sup> are not viable candidates. As one federal court explained, “the peon, although practically a slave as long as he was indebted to his master or employer, without the privilege of changing his vocation or leaving his master, no matter how small the debt, . . . possessed all the rights of citizenship, including the right of franchise.”<sup>218</sup>

Involuntary servitude, Judge Henry Friendly recounted, meant “conditional servitude” due to a “previously existing debt or obligation.”<sup>219</sup> The Northwest Ordinance of 1787,<sup>220</sup> on which the Thirteenth Amendment was based, replaced a 1784 draft.<sup>221</sup> The 1787 update, Judge Friendly noted, contained an important additional provision: “[for] any person escaping [involuntary servitude,] such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.”<sup>222</sup> This added provision indicates that, as with slavery, the mobility of the peon undermined the operation of peonage and, as with slavery, fugitive peons were to be returned to those with a claim over the peon’s services.

Not all limitations on physical mobility will do. Both slavery and involuntary servitude were marked by sustained, indefinite limitations on physical mobility. The slave was a slave effectively for life, except for manumission or escape.<sup>223</sup> Slavery was inherited, and may have been passed down for as many as ten generations.<sup>224</sup> A peon was under the service of the creditor until the debt was discharged. Unlike slavery, peonage was not a generational phenomenon, but a peon’s service nonetheless could last for years.<sup>225</sup> This suggests that fleeting or temporary limitations on physical mobility are not of the same nature as that which characterized the slavery or involuntary servitude.

The final point to address is how this formulation creates greater harmony between the Thirteenth Amendment and the other two

<sup>217</sup> See *The Civil Rights Cases*, 109 U.S. 3, 22 (1883).

<sup>218</sup> *The Peonage Cases*, 136 F. 707, 708 (E.D. Ark. 1905).

<sup>219</sup> *United States v. Shackney*, 333 F.2d 475, 483 (2d Cir. 1964).

<sup>220</sup> 1 Stat. 50.

<sup>221</sup> *Shackney*, 333 F.2d at 483–84.

<sup>222</sup> *Id.* at 484 (quoting Northwest Territory Ordinance of 1787, Art. VI, 1 Stat. 50, 53).

<sup>223</sup> See CHRISTOPHER TOMLINS, *FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865*, at 508 (2010) (noting that slavery involved “[c]ontrol of entry, control of life within, control of exit, whether by manumission or death”).

<sup>224</sup> See Wendy B. Scott, *Panel Commentary Twenty-Five Years: The Future of Affirmative Action*, 78 TUL. L. REV. 2053, 2055 (2004).

<sup>225</sup> See, e.g., Mary Louise Fellows, *The Law of Legitimacy: An Instrument of Procreative Power*, 3 COLUM. J. GENDER & L. 495, 505 (1993) (quoting a peon’s narrative, in which he recounts that he was a peon “for nearly three years,” though this term of service was cut short only because of the efforts of his wife (quoting *The Life Story of a Negro Peon*, in BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 151, 153–55 (Gerda Lerner ed., 1973))).

Reconstruction Amendments. First, as to the Fourteenth Amendment, while this Article does not address the rationality standard of review, it does substantially shrink the universe of what Congress can regulate and is therefore subject to that standard of review,<sup>226</sup> thus making it less likely, though admittedly not foolproof, that Congress would be establishing substantive rights in violation of *City of Boerne*.<sup>227</sup> Second, as to the Fifteenth Amendment, this model does not ask whether a current harm sufficiently relates to a harm that was part of slavery, which may offend *Shelby County*,<sup>228</sup> but instead asks whether Congress is addressing extant conditions that impair individuals' ability to exercise physical mobility.

In light of the foregoing, sustained limitations on mobility should be the proper end of Thirteenth Amendment legislation. An essential aspect of "slavery" and "involuntary servitude," the two enumerated harms listed in Section One of the Thirteenth Amendment,<sup>229</sup> are such extended limitations on physical mobility. For slavery, those limitations are owed to physical and effective restraints. For involuntary servitude, those limitations are due usually to debt. A slave's moments are controlled by an owner; a peon's by a creditor.

#### IV. APPLICATION

This Article contemplates a Thirteenth Amendment that prohibits sustained limitations on physical mobility, either imposed directly or experienced due to functional limitations. The Thirteenth Amendment, in other words, is best understood as guaranteeing "threshold liberty," the basic freedom necessary to possess physical mobility. That mobility is an essential prerequisite to obtaining access to other critical rights and opportunities in this country.

To give practitioners and judges a sense of how this model would work in actuality, this Part addresses how a mobility-centric approach may apply to eight contexts that scholars have claimed are legitimate subjects of Thirteenth Amendment legislation. It identifies four contexts that would surpass this revised, more constitutionally sound, Thirteenth Amendment standard, and four that would fall short.

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<sup>226</sup> See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968).

<sup>227</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

<sup>228</sup> See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2626–27 (2013).

<sup>229</sup> U.S. CONST. amend. XIII, § 1.

A. *Harms Congress Can Regulate Under this Alternative Approach*

Under this Article's proposed model, Congress should be able to regulate the following four issues by way of its Section Two enforcement power.<sup>230</sup>

Sex trafficking involves the transportation of individuals for the purpose of engaging those individuals in the sex trade.<sup>231</sup> Inherent in such trafficking is the actual physical movement of individuals for this purpose, as well as the strict regulation of the individuals' movements once transported. This control is possible due to physical violence, coercion, and threats of violence. And such control is indefinite in nature. These core elements bring sex trafficking within the bounds of Congress's Section Two power, as envisioned in this Article.<sup>232</sup>

Domestic violence entails not only physical and psychological abuse, but also effective control over the victim's movements as a result of such abuse. That is, with domestic violence, the perpetrator may physically enforce the limits of the victim's whereabouts, and may instill such fear into the victim that the victim does not feel safe to leave due to the specter of future abuse.<sup>233</sup> To make matters worse, the victim may lack the resources to escape her situation.<sup>234</sup> Congress may be able to

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<sup>230</sup> U.S. CONST. amend. XIII, § 2.

<sup>231</sup> See 22 U.S.C. § 7102(10) (defining "sex trafficking" as "the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act").

<sup>232</sup> Indeed, a plausible case can be made that such actions are violative of Section One of the Thirteenth Amendment because of their close relationship to slavery and involuntary servitude. See Neal Kumar Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 812 (1993) ("[P]imps control prostitutes through (1) physical abuse; (2) physical control of prostitutes' children, with threats to keep the children as hostages if prostitutes leave; (3) serious threats of physical harm, including murder; (4) keeping prostitutes in continuous states of poverty and indebtedness; and (5) ensuring that [they] have no freedom to move outside unaccompanied." (second alteration in original) (quoting Nancy Erbe, *Prostitutes: Victims of Men's Exploitation and Abuse*, 2 LAW & INEQ. 609, 612-13 (1984))).

<sup>233</sup> See *State v. Kelly*, 478 A.2d 365, 370 (N.J. 1984) (countering the "stereotypes and myths concerning the characteristics of battered women and their reasons for staying in battering relationships," which is "most critically, . . . that women who remain in battering relationships are free to leave their abusers at any time"). Some women, for example,

become so demoralized and degraded by the fact that they cannot predict or control the violence that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation. There is a tendency in battered women to believe in the omnipotence or strength of their battering husbands and thus to feel that any attempt to resist them is hopeless.

*Id.* at 372.

<sup>234</sup> *Id.* ("[E]xternal social and economic factors often make it difficult for some women to extricate themselves from battering relationships. A woman without independent financial resources who wishes to leave her husband often finds it difficult to do so because of a lack of material and social resources.").



address an individual's direct or functional restriction on the physical mobility of a domestic partner.

Child labor is also susceptible to Thirteenth Amendment regulation. Under this practice, a child is required, by a parent or other, to work in service. Inherent in the practice is direction and control over the child's movements. Where child labor is the product of parental decisionmaking, special considerations exist. The upbringing of a child traditionally is left squarely with the child's parents.<sup>235</sup> Parents can exercise such authority because the child lacks the requisite mental maturity to appraise or appreciate what is in her best interests.<sup>236</sup> Therefore, a child necessarily exhibits some degree of dependency on her parents. These factors cut against any finding that child labor is a Thirteenth Amendment problem. But the extent to which a child is held in service may bring the situation from one within the proper bounds of parental decisionmaking to one in which the government has an interest.<sup>237</sup> The parents may cede at least some of their natural and constitutional authority, by way of holding a child in labor, to the government. Where the movements of the child are restricted in service to that extent, Congress may take up the matter using its Thirteenth Amendment power.<sup>238</sup> The case is much easier to make where the person or persons in control of the child are not parents or guardians, and therefore lack constitutionally protected authority over the upbringing of the child.

Extreme concentrated poverty is the last of the four issues addressed in this Article that can be regulated by Congress's Section Two power. Pockets exist in the United States where the inhabitants possess so few resources that they are unable to leave their modest economic circumstances. Consider that "more than 70% of black children who are raised in the poorest quarter of American neighborhoods will continue to live in the poorest quarter of neighborhoods as adults."<sup>239</sup> In the south side of Chicago, for example, individuals in concentrated urban poverty have never left their surroundings as youths and have made it downtown only as adults.<sup>240</sup>

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<sup>235</sup> See generally *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>236</sup> See Dina Mishra, *Child Labor as Involuntary Servitude: The Failure of Congress to Legislate Against Child Labor Pursuant to the Thirteenth Amendment in the Early Twentieth Century*, 63 RUTGERS L. REV. 59, 67–68 (2010).

<sup>237</sup> See generally Akhil Reed Amar & Daniel Widawsky, Commentary, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 HARV. L. REV. 1359, 1364 (1992).

<sup>238</sup> See Mishra, *supra* note 236, at 66–67.

<sup>239</sup> Patrick Sharkey, *The Intergenerational Transmission of Context*, 113 AM. J. SOC. 931, 933 (2008).

<sup>240</sup> See Dawinder S. Sidhu, *The Unconstitutionality of Urban Poverty*, 62 DEPAUL L. REV. 1, 24–25 (2012).

As another example, some of the poorest were unable to leave New Orleans prior to Hurricane Katrina, and were thus exposed to the natural disaster wrought by the storm.<sup>241</sup> Because those experiencing extreme poverty are trapped in their physical environments due to their lack of resources, Congress can remedy this absence of physical mobility by way of the Thirteenth Amendment.

One may claim that extreme concentrated poverty should be beyond the purview of Congress because poverty is not caused, in whole or in part, by violence, coercion, or threats of violence. In contrast, one may say, sex trafficking, domestic violence, and child labor all may involve such physical or psychological control, or dependence. As support, one may point specifically to the Court's opinion in *Kozminski*, in which involuntary servitude was defined as a condition that encompasses physical and psychological components.<sup>242</sup>

It would be a mistake, however, to require evidence of physical or psychological domination as a necessary element to support Congress's Thirteenth Amendment enforcement power.<sup>243</sup> This is because the proper end of Thirteenth Amendment legislation is a condition.<sup>244</sup> To mandate a specific manner in which that condition has to occur would be to graft an extraneous requirement onto the Thirteenth Amendment. In the same way that the condition need not be race-based,<sup>245</sup> the condition need not be brought about in a particular fashion. Moreover, the importance of the psychological element in *Kozminski* is that Congress may address a relevant condition, even where the condition arises out of non-physical and non-direct situations; put differently, a condition that is the subject of the Thirteenth Amendment legislation may exist due to functional limitations. The condition that unites slavery and involuntary servitude, and any other focus of Thirteenth Amendment congressional action, is sustained restrictions on physical mobility.

One may also contend that extreme concentrated poverty is outside of Congress's grasp for another reason, namely that poverty does not involve service. But, as noted above, labor is not the essence of slavery or

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<sup>241</sup> See *id.* at 25.

<sup>242</sup> See *United States v. Kozminski*, 487 U.S. 931, 942–43 (1988).

<sup>243</sup> See Amar & Widawski, *supra* note 237, at 1381 (stating that, under the Thirteenth Amendment, “certain *private* action is banned, but also that certain state *inaction* is prohibited”); Note, *The “New” Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1307 (1969) (“Freed of all such restrictions, one may fulfill his aspirations within the limits of his inner resources. Yet if those resources have not been fully developed . . . he may still not be a ‘free man.’”).

<sup>244</sup> See *Hodges v. United States*, 203 U.S. 1, 16–17 (1906), *overruled in part by Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968); see also *Clyatt v. United States*, 197 U.S. 207, 216 (1905).

<sup>245</sup> See *United States v. Nelson*, 277 F.3d 164, 175–76 (2d Cir. 2002).

involuntary servitude; instead, it is a byproduct of the control over the slave or peon.

To be sure, bringing extreme concentrated poverty within Congress's power would still put it at the edge of that power. But the fact that the condition arose because of neglect, and the fact that individuals need not be required to do anything within that condition, do not alter the fact of the individuals' absence of physical mobility or remove the issue from Congress's domain.

While this analysis puts emphasis on physical mobility, its connection to social mobility cannot be dismissed. Indeed, physical mobility may be made possible by way of social mobility. A battered woman, for example, may have greater capacity to escape her circumstances if she possesses increased resources.<sup>246</sup> The poor who are hemmed in ghettos and are relegated to the shadows of our communities stand a higher chance of occupying zip codes that are safer and that have better opportunities if they have increased resources. The link between physical mobility and social mobility means that this Article is not inconsistent with calls for the Thirteenth Amendment to guarantee some minimal economic independence to all Americans.<sup>247</sup> Indeed, to suggest that Congress can use its Section Two power to ensure that individuals can exercise physical liberty is to suggest that the Thirteenth Amendment is not only about substituting a condition of fixed mobility with a condition of freedom, but that it also aims to make that freedom meaningful.<sup>248</sup> Were the entire work of the Thirteenth Amendment to be limited to freedom from bondage, the Amendment, as then-Representative James Garfield noted, would be "a bitter mockery" and "a cruel delusion."<sup>249</sup>

Relatedly, it must be stressed that an argument for Congress's authority to affect these four harms is not an argument for entitlements, or directly giving individuals more resources and therefore more prospects for physical mobility. Rather, it is an authorization for

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<sup>246</sup> See *State v. Kelly*, 478 A.2d 365, 372 (N.J. 1984).

<sup>247</sup> See Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J. L. & PUB. POL'Y 37, 38 (1990) ("[F]or one truly to be a citizen in a democracy and to participate in the democratic process, one needs a minimum amount of independence."); *id.* at 40 ("Otherwise . . . [the government has] really failed to set the slaves free—free from economic dependence."); Azmy, *supra* note 76, at 1031 (connecting labor, mobility, and independence).

<sup>248</sup> Dr. Martin Luther King, Jr. also once remarked, "What good is it to be allowed to eat in a restaurant if you can't afford a hamburger?" WILLIAM J. WILSON, POWER, RACISM, AND PRIVILEGE: RACE RELATIONS IN THEORETICAL AND SOCIOHISTORICAL PERSPECTIVES 154 n.38 (paperback ed. 1976).

<sup>249</sup> Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. PA. J. CONST. L. 1337, 1354 (2009) (quoting Rep. James A. Garfield, Oration Delivered at Ravenna, Ohio (July 4, 1865), in 1 THE WORKS OF JAMES ABRAM GARFIELD 85, 86 (Burke A. Hinsdale ed., 1882)).

Congress to alter the conditions that exist for these individuals. Take extreme concentrated poverty for example. This Article's thesis supports a congressional power to enhance the conditions of the extreme poor by, for instance, greater infrastructure, skills-development programs, and substance abuse treatment.

With a discussion of those four contexts that Congress can affect by way of a recalibrated Section Two power, this Article now turns to those areas that lie on the other end of the spectrum.

#### B. *Harms Congress Cannot Regulate Under this Alternative Approach*

This subpart identifies four contexts that generally would not be appropriate ends of Thirteenth Amendment legislation under the revised model advanced in Part IV. To do so, this Article breaks down these harms into three categories: first, those harms that do not relate to physical mobility; second, those harms that have an indirect relationship to physical mobility; and third, those harms that involve limitations on physical mobility, but are transient or temporary in nature. This subpart gives one example in each category. It also reveals how the Hate Crimes Prevention Act—the federal statute at the heart of modern discussions of the Thirteenth Amendment—would fare under this revised standard, placing it within the last category. This subpart includes an important caveat: that Congress may regulate these harms if they are severe and pervasive enough to cause sustained limitations on physical mobility.

First, some harms proposed by scholars as proper subjects of the Thirteenth Amendment do not relate to physical mobility, and therefore would fall outside of the model advanced in this Article. Hate speech generally means utterances that denigrate another individual because of that individual's race, color, religion, national origin, gender, gender identity, or sexual orientation.<sup>250</sup> Bans on hate speech, aside from being problematic under a First Amendment analysis,<sup>251</sup> are words that generally do not disable others from moving. The domestic violence context, by contrast, is one in which the victim may be physically or functionally confined to a particular space and, because of the actions of another, may be effectively unable to leave.<sup>252</sup> Hate speech lacks those spatial considerations.<sup>253</sup>

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<sup>250</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992) (quoting a local hate crimes ordinance).

<sup>251</sup> See *id.* at 391 (holding that said ordinance violates the First Amendment).

<sup>252</sup> See *supra* notes 233–34 and accompanying text.

<sup>253</sup> This same analysis would apply to the use of confederate symbols, which are said to constitute “one of the remaining vestiges of the ante-bellum South” and a “badge of servitude,” which “symbolizes a government whose ideology included the commitment to maintain a

Second, some harms relate to physical mobility, but the connection is too distant. Housing discrimination clearly implicates physical mobility, as an individual who is denied a rental property or the ability to purchase a home is thereby denied the ability to change physical locations. On its own, the discriminatory behavior of a particular landlord, seller, or real estate agent may deprive the individual of one option for physical mobility. But the individual may still be able to exercise physical mobility, and retains the capacity for physical mobility, through the procurement of alternative housing, despite the fact that a specific housing option may be cut off. That said, this analysis leaves open the possibility that housing discrimination may be so significant that the ability of the individual to traverse is meaningless, as it has been foreclosed completely by others. A poor individual who is discriminated against in housing in an area where better jobs are located may have no choice but to return to her modest setting.<sup>254</sup> In such circumstances, the absence of physical mobility is implicated and Congress may intervene through the Thirteenth Amendment.<sup>255</sup>

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stratified society where only whites enjoyed freedom's bounties." Tesis, *supra* note 48, at 543. Race-based peremptory challenges suffer a similar fate. These challenges, already prohibited by law, see *Batson v. Kentucky*, 476 U.S. 79 (1986), are ones in which an attorney will strike a prospective juror on the basis of the juror's race. Such challenges are done, for example, because of the stereotypical belief that an individual of the same race as the defendant will be more sympathetic to that defendant, and conversely that an individual of a different race than the defendant will be less forgiving, see *id.* at 89 ("[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."). Inability to serve on a jury and perform that vital civic function, and a defendant's right to have a properly selected jury, however important, do not relate to physical mobility. In contrast, a consequence of extreme poverty is being exposed to environmental harms without having the requisite ability to move to better areas not presenting those environmental hazards. See Marco Masoni, Student Research, *The Green Badge of Slavery*, 2 GEO. J. ON FIGHTING POVERTY 97 (1994). These environmental problems themselves impose no restriction on individuals' physical mobility. They are another byproduct of living in such depressed areas, but are not themselves responsible for poor individuals' inability to reach other, more environmentally friendly areas. As a result, this harm on its own, however noxious, does not seem to be a proper area for Congress to affect by way of the Thirteenth Amendment.

<sup>254</sup> The qualitative and quantitative effects of such discrimination may have a substantial, sustaining impact on physical mobility. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253 (1964) (referring to evidence that racial discrimination in hotels and motels "had the effect of discouraging travel on the part of a substantial portion of the Negro community").

<sup>255</sup> Education also would fall within this second category. Education itself is not a direct limitation on physical mobility, but modest educational opportunities can facilitate and perpetuate extreme poverty. See Sidhu, *supra* note 240, at 20–22. It is a contributing cause and symptom of extreme poverty, and thereby of limited physical and social mobility. Accordingly, where the absence of physical mobility is severe enough—that is, where the students are unable to meaningfully leave their circumstances—the federal government may inject resources and support to boost the educational opportunities through its Thirteenth Amendment enforcement power. See Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 53–54 (1995). Using that power would send a strong signal that the federal

Third, some harms may relate directly to physical mobility, but the limitation on that mobility is not sustained enough to give rise to valid Thirteenth Amendment regulation. Racial profiling is a key example of this last category. Racial profiling generally concerns the pretextual stopping of a car or individual by law enforcement because of the individual's actual or perceived race or national origin.<sup>256</sup> There is no doubt that racial profiling, by definition, entails restrictions on physical mobility. A car stop, or stopping an individual on a street, both require the driver or individual, respectively, to be at rest at the direction of law enforcement. But the stops themselves, also by definition, are temporary detentions.<sup>257</sup> Accordingly, they are of a different nature than slavery, involuntary servitude, sex trafficking, domestic violence, child abuse, and extreme poverty, which all involve indefinite limitations on physical mobility.

The Hate Crimes Prevention Act, while upheld by each federal court that has assessed its constitutionality,<sup>258</sup> would, for similar reasons, be invalidated under the approach advanced in this Article. Hate crimes can involve attacks on a person that result in restrictions in movement. The victim in *Beebe*, for example, was harassed for five hours before he was released by his captors.<sup>259</sup> This is not an insignificant deprivation of an individual's liberty, one that well exceeds typical temporary detentions of a stop-and-frisk or traffic stop. That said, the victim's detention by the three individuals was still temporary in nature,<sup>260</sup> and did not translate into a sustained limitation. The victim regained his physical mobility, venturing into a convenience store,<sup>261</sup> whereas the appropriate subjects of Thirteenth Amendment legislation are those whose physical liberty is indefinitely absent, where such absence cannot be cured in a matter of minutes or hours.

It should be noted that, for each of the harms that lie outside of Congress's Thirteenth Amendment enforcement power, there may be a state law that would prohibit the wrongful conduct in question.<sup>262</sup> State

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supplementary aid is the result of significant limitations on students' actual liberty—not premised on test scores, teacher quality, and the like.

<sup>256</sup> See Angela J. Davis, Essay, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 431–32 (1997).

<sup>257</sup> Such stops are temporary detentions and qualify as seizures governed by the Fourth Amendment. See *Terry v. Ohio*, 392 U.S. 1, 20–22 (1968).

<sup>258</sup> See, e.g., *United States v. Hatch*, 722 F.3d 1193 (10th Cir. 2013).

<sup>259</sup> See *United States v. Beebe*, 807 F. Supp. 2d 1047, 1047 (D.N.M. 2011).

<sup>260</sup> See *id.*

<sup>261</sup> See United States Response to Sentencing Memorandum at 2, *Beebe*, 807 F. Supp. 2d 1047 (No. 10-3104 BB), 2012 WL 1494134.

<sup>262</sup> For example, in the case of Dylann Roof, who killed several members of the historic Emanuel AME Church in Charleston, South Carolina, some are arguing that federal hate crimes charges are not needed because Roof already faces capital charges at the state level. See, e.g., Jacob Sullum, *What's the Point of Charging Dylann Roof with Hate Crimes?*, REASON.COM

prohibitions against bias-motivated crimes, false imprisonment, and assault, for example, could all be deployed against the perpetrators in *Beebe*. This is to say that the defendants in these contexts would not be free from civil or criminal liability; the point is more modest, that the federal government cannot pursue such liability, insofar as Section Two is concerned. This respect for the limits of federal power and for state laws in local matters, as demonstrated by the hate crimes example, helps reinforce the propriety of this alternative approach to the Thirteenth Amendment.

## V. CONCLUSION

Thomas Jefferson referred to the United States as an “[E]mpire of [L]iberty.”<sup>263</sup> Should that liberty “at any time degenerate” in the country, he wrote, the nation must draw upon “new sources of renovation” of those principles.<sup>264</sup> This Article suggests that the Thirteenth Amendment is a fountain of liberty, one that secured the freedom of slaves in the wake of the Civil War, and that applies to current circumstances where basic liberty has fallen below a basic minimum. That threshold is to be assessed on the basis of whether the individual can exercise meaningful physical liberty. Physical or direct limitations on that liberty, as well as functional or effective limitations on that liberty, may be addressed by Congress pursuant to its Section Two enforcement power.

This Article has sought thereby to infuse the Thirteenth Amendment with some contemporary meaning, and to do so in a way that respects the significant and growing federalism and separation of powers concerns articulated by circuit courts in Thirteenth Amendment cases, and by the Supreme Court in the Reconstruction context. It appreciates the shakiness of the status quo, as well as the existence of contrary proposals that would read the Thirteenth Amendment out of the Constitution and reduce it to a historic relic.<sup>265</sup> It anticipates Supreme Court review of the Thirteenth Amendment and offers a principled compromise that will hopefully guide future arguments and decisions in this precarious doctrinal area.

At bottom, this Article is a substantive response to practical realities—there are individuals who, by affirmative conduct or by

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(Jun. 25, 2015, 7:07 AM), <https://reason.com/blog/2015/06/25/whats-the-point-of-charging-dylann-roof> (“Since Roof already faces nine murder charges in state court, where he will be subject to the death penalty if convicted, an additional federal prosecution seems gratuitous.”).

<sup>263</sup> ELLIS, *supra* note 19, at 207.

<sup>264</sup> *Id.* at 228.

<sup>265</sup> See Heriot & Somin, *supra* note 12, at 34.

neglect, do not have the fundamental ability to move, a fundamental liberty that is the predicate to, and provides a lifeline to, other rights and opportunities.<sup>266</sup> The “Empire of Liberty” cannot deserve that name if there are Americans who lack this essential capability. This Article seeks to restore their liberty to a certain threshold, and turns to the Thirteenth Amendment for that critical rejuvenation.

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<sup>266</sup> President Johnson once remarked, “[i]t is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.” President Lyndon B. Johnson, Commencement Address at Howard University: “To Fulfill These Rights” (June 4, 1965), <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>. Today, literally, that ability is not a possibility for some Americans.