The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment

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Abstract

The Civil Rights Cases, decided in the aftermath of Reconstruction, declared the Civil Rights Act of 1875 unconstitutional, holding that its prohibitions against private discrimination exceeded the powers of Congress under both the Thirteenth and the Fourteen Amendments. Eighty-five years later, Jones v. Alfred H. Mayer Co., reached nearly the opposite conclusion, interpreting the Civil Rights Act of 1866 to prohibit private discrimination and upholding the act as so interpreted under the Thirteenth Amendment. These decisions agreed in their common use of the phrase “badges and incidents of slavery” to determine the scope of congressional power under the Thirteenth Amendment, but they did not agree on what this phrase meant or on how it was to be applied. The Civil Rights Cases drastically limited congressional power to prohibit private discrimination under the Thirteenth Amendment, while Jones v. Mayer greatly expanded it. How could one phrase bear such different meanings and justify such inconsistent conclusions? This essay offers an answer to this question by analyzing the literal and figurative senses that were given to the "badges and incidents of slavery” in political and legal discourse. Part I traces the origins of this phrase and how it would have been understood by the framers of the Thirteenth Amendment. Part II examines how it entered into the canon of constitutional interpretation despite its absence from the text of the Thirteenth Amendment and, almost entirely, from its legislative history. Part III considers the appearance of the phrase in judicial opinions and how it was transformed from a restrictive to an expansive test of congressional power. The inherent ambiguity of the "badges and incidents of slavery” is the key to understanding its role, initially in political thought and then in constitutional interpretation.
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The Supreme Court has rarely considered the scope of the Thirteenth Amendment, perhaps because of nearly unanimous agreement on two basic propositions: first, that the amendment reaches private action because, unlike the Fourteenth Amendment, it has no “state action” restriction on its coverage; and second, that Congress has the power under section 2 of the amendment to eliminate the “badges and incidents of slavery.” It follows from the first proposition that the only limit on congressional power to enforce the amendment depends upon the elusive meaning of the second proposition, and in particular, the phrase “badges and incidents of slavery.” This phrase does not appear in the amendment itself, which simply gives Congress the “power to enforce this article by appropriate legislation,” and it has received diametrically opposed interpretations in the leading decisions on the Thirteenth Amendment. The Civil Rights Cases,1 decided in the aftermath of Reconstruction, declared the Civil Rights Act of 1875 unconstitutional, holding that its prohibitions against private discrimination exceeded the powers of Congress under both the Thirteenth and the Fourteen Amendments. Eighty-five years later, Jones v. Alfred H. Mayer Co.,2 reached nearly the opposite conclusion, interpreting the Civil Rights Act of 1866 to prohibit private discrimination and upholding the act as so interpreted under the Thirteenth Amendment.

These decisions agreed in their common use of the phrase “badges and incidents of slavery,” but not on what it meant or how it was to be applied. The Civil Rights Cases drastically limited congressional power to prohibit private discrimination under the Thirteenth Amendment, while Jones v. Mayer greatly expanded it. How could one phrase bear such different meanings and be invoked to justify such inconsistent conclusions? This essay offers an answer to this question by analyzing the literal and figurative senses that were given to the “badges and incidents of slavery” in political and legal discourse. Part I traces the origins of this phrase and how it would have been understood by the framers of the Thirteenth Amendment. Part II examines how it entered into the canon of constitutional interpretation despite the fact that it appears neither in the text of the Thirteenth Amendment nor, to any appreciable extent, in its legislative history. Part III considers the appearance of the phrase in judicial opinions and how it was transformed from a restrictive to an expansive test of congressional power. The inherent ambiguity of the “badges and incidents of slavery” is the key to understanding its role, initially in political thought and then in constitutional interpretation.

I. Origins and Antebellum Meaning

1 109 U.S. 3 (1883).

Of the two attributes of slavery identified as “badges and incidents,” the “incidents” of slavery had a far more definite and accepted legal sense than the “badges.” The “incidents of slavery” could be taken literally as accepted legal usage, just like the incidents of ownership of property or the incidents of office, while the “badges of slavery” took on a sense that was at least partially figurative.

As the Oxford English Dictionary defines the term, “incident” means “Attaching itself, as a privilege, burden, or custom, to an office, position, etc.” It also cites English legal sources from the fifteenth through the nineteenth century that used the term to refer to the legal consequences of a status or position. In 1828, Noah Webster defined the term in much the same sense in his *American Dictionary of the English Language*: “Appertaining to or following the chief or principal. A court baron is incident to a manor.”

Within a few decades, “incidents of slavery” acquired its own specialized meaning. George M. Stroud used the phrase as the title of a chapter in his abolitionist treatise, recounting the various disabilities imposed upon slaves in different southern states. Theophilus Parson, a professor of law at Harvard, also offered a survey of the institution of slavery in his treatise on contracts, beginning with the observation that attempts to “ascertain the nature and incidents of slavery, as it exists in this country” by reference to feudal or civil law had proved to be largely unsuccessful. This usage of the word “incident,” as indicated by the definition given earlier, just invoked the literal meaning of the term.

By contrast, the phrase “badges of slavery” could be given no such straightforward literal sense. Taken literally, it means a “distinctive device, emblem, or mark . . . worn as a sign of office,” such as a sheriff’s badge. Figuratively, it is a “distinguishing sign, emblem, token, or symbol of any kind,” as in *The Red Badge of Courage*, the famous novel about the Civil War. Eliminating the literal badges of slavery makes no sense in a system in which slaves did not wear badges. The obvious analogue to literal badges in American slavery, of course, was dark skin and the other physical characteristics of African-American slaves. Yet this analogy cannot yield a literal sense of “badges of slavery,” since Congress is powerless to eliminate the physical characteristics of race. What it can act upon, of course, are the social consequences of race, but these are badges of slavery only in a figurative sense.

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5 George M. Stroud, A Sketch of the Laws Relating to Slavery in the Several States of the United States of America (2d ed. 1856).


7 I Oxford English Dictionary at 876.
How far to take this figurative sense has been the central question under section 2 of the Thirteenth Amendment: Which consequences of slavery can Congress prohibit? In the *Civil Rights Cases*, the Supreme Court took a narrow view of these consequences, essentially limiting them to the "necessary incidents" of slavery, defined by comparison of the status of slaves with the status of free blacks before emancipation. Although the Court assumed that Congress also had the power to eliminate the "badges of slavery," the Court failed to give any independent significance to this term. Either it meant the same as "incidents of slavery" or it added only metaphorical connotations that had no operative legal effect. The reference to "badges," at most, amounted only to a more colorful way of referring to the legal consequences of slavery.

"Badges of slavery" certainly could be used in this narrow sense, as it was by William Lloyd Garrison when he referred to the prohibition against the marriage of interracial couples as "a disgraceful badge of servitude." The denial of the capacity to marry was among the disabilities imposed upon slaves. Garrison's remark was controversial, not in drawing attention to this incident of slavery, but in drawing the analogy between denial of the capacity to marry and denial of the capacity to marry someone of a different race. The first was an inference from slave status in a literal sense, while the second was an inference to slave status in a figurative sense. Laws against miscegenation, insofar as they applied to whites and free blacks, did not draw out a consequence of actual slavery, but were an indication of symbolic slavery.

This figurative sense derived from the literal meaning of "badge" as a sign deliberately worn to indicate position or status. From certain external features, an individual's social position could be inferred. Thus, in an argument before the Supreme Court in 1843, a lawyer for a slave seeking freedom through a conditional manumission offered the following observation about American slavery: "Colour in a slaveholding state is a badge of slavery. It is not so where slavery does not exist." Being black was evidence of being a slave.

This sense of "badges" rarely appeared in the law of slavery, which relied far more frequently on "incidents" to denote the consequences of being a slave. "Badges," when it was

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8 Id. at 20-25.

9 Id. at 20 ("it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States").

10 The Liberator (June 11, 1831), quoted in Louis Ruchames, Race, Marriage and Abolition, 40 J. Negro Hist. 250, 253 (1955). I am grateful to Alix Tsesis for this reference.

11 Stroud, supra note __, at 99.

12 Williams v. Ash, 42 U.S. 1, 8 (1843) (argument for defendant in error).

13 For some additional examples, see Thomas D. Morris, Southern Slavery and the Law, 1619-1860 35 (1996); Jacob v. State, 22 Tenn. 493, ___ (1842) ("It is certainly true that many of
used in legal discourse, appeared in an entirely different field, as "badges of fraud": evidence that a transaction was designed to put a debtor's assets beyond the reach of existing creditors. This terminology was well established in the law of bankruptcy and creditors' rights by the middle of the nineteenth century. As one treatise defined the term and its synonyms, they all "simply denote an act which has a fraudulent aspect," confirming the sense of "badges" as evidence permitting an inference from external appearances to legal status. A transaction with the badges of fraud, such as a secret transfer of the debtor's assets, supports the inference that it is a fraudulent conveyance.

This shift in focus from the consequences of legal status to evidence for that status underlies the most common sense in which "badges of slavery" was used before the Civil War: as evidence of political subjugation. In The Wealth of Nations, Adam Smith used the phrase in a famous passage denouncing British mistreatment of the American colonies. Restrictions on trade and manufacture in the colonies, he wrote, "are only the impertinent badges of slavery imposed upon them without any sufficient reason, by the groundless jealousy of the merchants and manufacturers of the Mother Country." This passage was well known in the nineteenth century, as evidenced by its appearance in Bancroft's History of the United States, and Smith's writings generally were familiar to leading Americans. Wholly apart from Smith's use of the term, it appears in the writings of leading political figures such as George Washington, John Adams, and Edmund Burke. The use of the phrase can be traced in English political discourse at least as far back as the disabilities incident to slavery are inconsistent with the common law.

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14 Orlando Bump, A Treatise upon Conveyances Made by Debtors to Defraud Creditors 29 (3d ed., James Gray, ed. 1896). For antebellum cases using the term, see, e.g., Warner v. Norton, 61 U.S. 448, 459 (1857); 200 Chests of Tea, 22 U.S. 430, 443 (1824); Sexton v. Wheaton, 21 U.S. 229, 250 (1823). The standard provision on this subject today, although not one using the term, is the Uniform Fraudulent Transfer Act § 4(b).

15 Adam Smith, An Inquiry in the Nature and Causes of the Wealth of Nations 582 (R.H. Campbell, A.S. Skinner, W.B. Todd eds. 1981) Bk. IV, ch. 7 (1776). He also notes, but dissent from, the opinion "that poll-taxes of all kinds have often been represented as a badges of slavery." Id. at 857.

16 VIII George Bancroft, History of the United States from the Discovery of the American Continent 174 (1868).

17 Samuel Flieshacker, Adam Smith's Reception Among the American Founders, 1776-1790, 59 Wm. & Mary Q. 897 (2002).

18 VI The Writings of George Washington 486 (Jared Sparks, ed. 1834) (remarking during the Revolution that Britain's ability to raise troops were frustrated by the Irish "who feel the importance of a critical moment to shake off those badges of slavery, which they have worn
back as the English Civil War and much further back through the analogous Latin term, “imaginem servitii,” which appears in Tacitus. According to one nineteenth century history of English law, the phrase refers to “those badges of slavery which are imposed upon a conquered people.”

Unlike its legal use, the political use of this phrase was common in the antebellum era. As Bernard Bailyn famously pointed out: “Slavery’ was a central concept in eighteenth-century political discourse. As the absolute political evil, it appears in every statement of political principle, in every discussion of constitutionalism or legal rights, in every exhortation to resistance.” The Revolution resulted in political independence, even if it left chattel slavery in place, in order to free the colonies from the “badges and incidents” of slavery that Adam Smith had previously identified. The inconsistency inherent in this position became only more apparent after independence, causing abolitionists to insist that chattel slavery could not be reconciled with the principle that “all men are created equal.” The decades leading to the Civil War only intensified the rhetorical connection between slavery and political power, ironically one invoked as frequently in the South as in the North. Southerners saw the rise of the Republican Party and the election of Lincoln as the prelude to their political enslavement. Northerners saw the spread of slavery to new states and territories in the same terms. Political slavery was inextricably intertwined with chattel slavery in political discourse that connected both the figurative and the literal in debates over slavery. It was against this background that “badges of slavery” entered into legal debates over the meaning of the Thirteenth Amendment.

so long”); IV The Works of John Adams 206 (Charles Francis Adams, ed. 1851) (arguing that the legislature should choose a governor and “divest him of most of those badges of slavery called prerogatives”) (emphasis in original); V The Works and Correspondence of Edmund Burke 393 (1852) (the principle of voluntary contributions during the French Revolution led the populace “to throw off the regular methodical payments to the state as so many badges of slavery”).

19 John Bristol, A Discourse Shewing the Great Happinesse, that hath, and may still accrue to His Majesties Kingdomes of England and Scotland, by Re-uniting them into one Great Britain 197 (1641) (“[W]e will weare the Badge of slavery on our sleeve, to brag to the world, that we are not ashamed to be conquered.”)

20 Tacitus, Annals Bk. 15 [31]. He recounts an incident in which a Roman general was asked to treat a conquered Parthian king so that he “might not have to endure any badge of slavery.”


II. “Badges and Incidents of Slavery” in Congress

It was not until after the Thirteenth Amendment was ratified that “badges and incidents of slavery” became the touchstone for determining the scope of congressional power under section 2. In Congress, the “badges of slavery” were not mentioned at all and the “incidents of slavery” only once (at least so far I can determine). Section 2 was itself rarely discussed, and mainly by opponents of the amendment who saw a threat of federal encroachment on the power of the states. What the opponents lacked in precision, they made up for in the extremism of their rhetoric, indulging in the conceit that the amendment itself was unconstitutional and predicting the demise of state government if the amendment were adopted. Supporters, on the other hand, remained largely silent on the scope of congressional power conferred by the amendment, hoping to win over the votes to secure the necessary two-thirds majority in Congress and subsequent ratification by three quarters of the states. Neither side addressed this question in terms of the “badges and incidents of slavery,” or indeed, to acknowledge any specific test for the scope of congressional power to enforce the amendment. This phrase entered into debates over congressional power only when Congress considered the Civil Rights Act of 1866, but even this appearance of the phrase was not without irony, since it was doubts about the constitutionality of the act which led to adoption of the Fourteenth Amendment.

As noted in the previous section, “incidents of slavery” has a far more definite meaning than “badges of slavery.” Further evidence for this conclusion appears early in the debates over the Thirteenth Amendment, where Senator James Harlan of Iowa gave a long list of the “incidents of slavery,” like the antebellum treatises cited earlier. The enumerated incidents of slavery were offered as defining features of the institution, as the senator said with respect to the inability of slaves to marry: “If you continue slavery you must continue this necessary incident of its existence.”24 He made no reference to the power of Congress, but implied that this, and other, incidents of slavery would be abolished by the amendment itself. Other supporters of the amendment were anxious to limit its effect, denying, for instance, that it affected the right to vote. Even the prominent Radical Republican, Representative Thaddeus Stevens, took this position, saying that he did not believe in “equality in all things—simply before the laws, nothing else.”25 He also offered a specific criticism of section 2 of the amendment, but only in the formal terms that it should have been consolidated with the provisions of section 1, by analogy to the Full Faith and Credit Clause in Article IV.26 In fact, section 2 derived from a proposal by

24 Cong. Globe, 38th Cong., 1st Sess. 1439 (1864). For a discussion of this passage, see Alexander Tsesis, The Thirteenth Amendment and American Freedom: A Legal History 121 (2004); Senator Wilson made a similar point in enumerating the “privileges and immunities” denied to slaves. Id. at 1202.


Representative Wilson to cure problems with prior legislation that had freed the slaves in occupied confederate territory, but had made no provisions for enforcement.27

The scope of congressional power, and questions of federalism generally, figured far more prominently in the arguments advanced against the Thirteenth Amendment. Opponents of the amendment argued that, if ratified, it would fundamentally alter the balance of power between the states and the Federal Government, so much so that the amendment itself was unconstitutional. Although this argument might strike the modern reader as bizarre, it did point to a defining feature of the Thirteenth Amendment: Unlike any previous amendment, it would expand federal power at the expense of the states, injecting the federal government into the regulation of “domestic relationships” like that between master and slave.28 This argument carried over directly to section 2 of the amendment, since that would expand federal power even further by authorizing federal legislation without any of the checks imposed by the amendment process.29

These arguments were echoed in the ratification debates in the state legislatures, but with a sharper focus on section 2. In some northern states, such as Indiana and Illinois, intense debates over the expansion of federal power preceded the eventual vote to ratify the amendment.30 The border state of Kentucky, however, refused to ratify for this reason, and among southern states, Mississippi took the same course. South Carolina tried to find a middle course, reluctantly voting to ratify with a resolution approving of section 1 of the amendment, but not section 2.31 Secretary of State Seward nevertheless counted South Carolina as ratifying the entire amendment and declared the amendment ratified when Georgia supplied the final resolution in its support. If the marginal states most reluctant to ratify determined the meaning of the amendment, then it would have granted Congress hardly any enforcement powers at all. Supporters of the amendment met these concerns by addressing the weakest of the opponents' arguments, based on the unconstitutionality of the amendment itself. This argument failed almost on its terms. Article V does contain limitations on the amending power, but these only confirm how broad the amending power otherwise is. The limited exceptions with respect to slavery—preventing repeal of the limitation on congressional power to prohibit importation of slaves before 1808—had long since lapsed. On the more immediate issue of the expansion of congressional power, the supporters of the amendment responded with studied ambiguity. Like Thaddeus Stevens, they conceded only that the amendment conferred something less than full

27 Vorenberg, supra note __, at 50.
28 See Vorenberg, supra note __, at 107-10, 194-97.
29 See id. at 132-33, 190-91.
30 See id. at 219-21.
31 See id. at 216-18, 228-33.
equality on the newly freed slaves, without ever specifying quite what that was. They argued that it conferred “equality before the law,” or “civil rights,” or “natural rights,” but not “political rights,” or “social equality,” or “full citizenship.” By implication, the enforcement power conferred by section 2 must have been subject to the same limits, but the supporters of the amendment did not say what those limits were.

Some of the supporters’ strongest disclaimers simply forced a reconciliation between the amendment’s abolitionist aims and its limited effect. As Representative Thomas T. Davis, a Republican from New York, framed the issue, the only way to secure equality before the law was “by removing every vestige of African slavery from the American Republic.” Others conceded the limited effect of the amendment. Senator John B. Henderson, a Republican from Missouri, who participated in the process of drafting the amendment, offered a candid but ambivalent account of its consequences. In denying that the amendment conferred citizenship on the freedmen, he said: “So in passing this amendment we do not confer upon the negro the right to vote. We give him no right except his freedom, and leave the rest to the States.” He then went on to deny that amendment would result in miscegenation: “I will not be deterred from doing an act of simple justice from fear of the consequences. It is impossible that great evil should spring from such acts of justice. We may not be able now to solve the many problems that universal emancipation may present.” Senator Henderson was content to leave these problems to the future and to be addressed, at least in the first instance, by the states. A more extreme version of this position was taken by some reluctant Democratic supporters of the amendment, whose votes were nevertheless necessary for it to pass the House. One of them, Representative George Yeaman, from Kentucky, thought that the amendment would preempt the need for further abolitionist legislation: “In passing this amendment we do make sure the final extinction of slavery, but so far from indorsing the radical abolition party, we rob them of their power.” Just as in the legislatures of the ratifying states, the marginal votes necessary to obtain the two-thirds majorities necessary in Congress, were based on a severely limited view of congressional power to enforce the amendment.

The rhetoric of “badges and incidents of slavery” perfectly captured this contrast between the revolutionary aims and limited effects of the amendment. It set a conquered race free from the badges of their subservience, but it immediately abolished only the necessary incidents of slavery. “Badges and incidents” was a phrase adequate to encompass the deep-seated conflicts over the meaning of the amendment, but not to resolve all the contradictory impulses behind its adoption. These emerged as soon as Congress sought to exercise its newly conferred powers under section 2.

33 Id. at 1465.
34 Cong. Globe, 38th Cong., 2d Sess. 171 (1865)
Senator Trumbull first invoked the phrase in support of the Freedman's Bureau Bill and the Civil Rights Act of 1866. After several southern states had enacted “black codes,” restricting the rights of the newly freed slaves, Trumbull denounced such laws for reinstating the badges and incidents of slavery: “With the destruction of slavery necessarily follows the destruction of the incidents to slavery.” And, “With the abolition of slavery should go all the badges of servitude which have been enacted for its maintenance and support.”35 In his opinion, these extended to any statute that denied civil rights to some citizens but not others, thereby imposing “a badge of servitude which, by the Constitution, is prohibited.”36 When the power of Congress to enact legislation to invalidate the Black Codes was questioned, Trumbull interpreted the amendment to grant Congress nearly sole discretion to decide what measures were “appropriate legislation” under section 2.37 He admitted, however, that he had not expressed this opinion in the debates over the Thirteenth Amendment, offering the explanation that it was not necessary to do.38 In fact, continuing in the same vein, he explained that some members of Congress did not think that section 2 was needed at all, because the Constitution already authorized all legislation “necessary and proper” to put its provisions into effect.39 On this view, section 2 simply clarified what the existing powers of Congress already were.

Other legislators took a different view, among them Senator John Sherman of Ohio, who argued that section 2 was added to the amendment to avoid problems that had arisen in enforcing the Privileges and Immunities Clause of Article IV. This clause had no corresponding enforcement provision, leading to doubts about the power of Congress to assure equal privileges and immunities of citizens in states different from their own.40 These concerns echoed those that led Representative Wilson to introduce the provision that eventually became section 2. His interpretation of “appropriate legislation” rested squarely on the famous passage in *McCulloch v. Maryland* broadly interpreting the power of Congress under the Necessary and Proper Clause: “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.”41

35 Cong. Globe, 39th Cong., 1st Sess. 322, 323 (1866). Representative Thayer used the language of “incidents” in a similar sense. Id. at 1151.

36 Id. at 474.

37 Id. at 43, 475.

38 Id. at 43.

39 Id. at 43.

40 Id. at 41.

41 Id. at 1118. See also id. app. at 157. Senator Trumbull eventually took a similar position, arguing that section 2 “authorizes us to do whatever is necessary to protect the freedman
This appeal to precedent, however, did little to reduce the controversy over congressional power under section 2. When President Johnson vetoed the Civil Rights Act of 1866, he invoked the same language of “necessary and proper,” but limited it only to the end of abolishing slavery, which he thought had already been accomplished.\(^{42}\) Although his veto of the Civil Rights Act of 1866 was overridden, his veto of the Freedman’s Bureau Bill on similar grounds was not, and a more moderate Freedman’s Bureau Act was proposed again, and again vetoed, but eventually enacted into law.\(^{43}\) Doubts about the constitutionality of the Civil Rights Act of 1866 also persisted beyond its enactment, leading directly to congressional consideration of the Fourteenth Amendment as one way to put those doubts to rest. And, indeed, after ratification of that amendment, Congress moved quickly to re-enact the Civil Rights Act of 1866.\(^{44}\)

If it were not for doubts about its own constitutionality under the Thirteenth Amendment, the Civil Rights Act of 1866 would give us the best evidence of what Congress thought the “badges and incidents of slavery” were at the time. The act lists a variety of rights guaranteed to the newly freed slaves, from specific rights that were denied to slaves, such as the “right to make and enforce contracts” to the general right to the “full and equal benefit of all laws and proceedings for the security of person and property.” As it progressed from specific to general, the act gave less and less determinate content to what constituted the badges and incidents of slavery. The act also purported to confer citizenship on the newly freed slaves and eventually was incorporated in the Fourteenth Amendment. Likewise, the “full and equal benefits” clause in the statute was the model for the Equal Protection Clause in the amendment. The presence of these two provisions in the Civil Rights Act of 1866 reproduced the full range of ambiguity about the nature and degree of freedom created by the Thirteenth Amendment. Questions about the meaning of the amendment were not answered—or perhaps even fully appreciated—before it was ratified and they were resolved afterwards only by the simple expedient of making them questions about the meaning of the Fourteenth Amendment.

One great difference between the amendments persists, however. The Fourteenth Amendment applies only to state action. The Thirteenth Amendment reaches private action. This question dominated interpretation of the Civil Rights Act of 1866 towards the end of the twentieth century, but it has indirectly figured in interpretation of the Thirteenth Amendment from the beginning. If state action does not operate as a restriction on this amendment, then what does? All that remains is the inherently ambiguous phrase, “badges and incidents of slavery,” which soon became canonical in interpreting the amendment. The decisions that reached this

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\(^{42}\) Id. at 1681.

\(^{43}\) Act of July 16, 1866, 14 Stat. 173.

\(^{44}\) Act of May 31, 1870, 16 Stat. 140.
conclusion are the subject of the next part of this essay.

III. “Badges and Incidents of Slavery” in the Supreme Court

From its origins in the scattered statements of a single senator, “badges and incidents of slavery” quickly became the Supreme Court’s standard gloss upon the powers of Congress under the Thirteenth Amendment. The trajectory of its rise to prominence was from Senator Trumbull to Justice Bradley, who first referred to “a badge of slavery” in his dissent in Blyew v. United States and then to “badges and incidents of slavery” in his majority opinion in the Civil Rights Cases. From there, it found its way into almost every subsequent decision of the Supreme Court on the Thirteenth Amendment. At the moment that this phrase became authoritative, it also lost its expansive implications, when the Supreme Court struck down the provisions on public accommodations in the Civil Rights Act of 1875. According to Justice Bradley, to hold that such discrimination was a badge or incident of slavery “would be running the slavery argument into the ground.” This argument by reductio ad absurdum, however, would not prove to be the last word on section 2, but only the beginning of a long, and ultimately, contradictory line of opinions.

The significance of this entire line of opinions depends upon another distinction introduced by the Civil Rights Cases: between the regulation of private action under the Thirteenth Amendment and the regulation of state action under the Fourteenth Amendment, which applies only to state action. In addition to holding the Civil Rights Act of 1875 unconstitutional under the Thirteenth Amendment, the Court also held it unconstitutional under the Fourteenth. Congress lacked the power to regulate public accommodations under the Fourteenth Amendment because the private operators of those facilities did not engage in sufficient state action to be subject to the amendment. According to Justice Bradley, the Fourteenth Amendment authorized no “primary and direct” legislation that operated on individuals and private firms, while the Thirteenth Amendment did.

The Court's dictum on the amendment's coverage of private action came closer to a holding in Clyatt v. United States, a case involving a prosecution of private individuals under

45 80 U.S. 581, 599 (1872) (Bradley, J., dissenting).
46 109 U.S. 3, 20, 21 (1883).
47 Id. at 24.
48 Id. at 18-19.
49 109 U.S. at 19, 20.
50 197 U.S. 207 (1905).
the Peonage Act of 1867. The Court found the indictment sufficient, despite the absence of any allegation that the defendants engaged in state action (although they had commenced state proceedings against the individuals taken into peonage). The indictment also failed to allege any element of racial discrimination, following the principle of the Civil Rights Cases that “[t]he Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery.”

The crucial issue in a prosecution for peonage is reducing an individual to the condition of “involuntary servitude,” not discrimination on the basis of race. Peonage, according to the Court, “may be defined as a status or condition of compulsory service, based upon indebtedness of the peon to the master.”

The race of the peon did not matter, a conclusion foreshadowed by the Slaughterhouse Cases. Although the Court there emphasized protection of African-Americans as the animating purpose of the Reconstruction amendments, it also acknowledged that the literal terms of the Thirteenth Amendment prohibited all forms of servitude, regardless of race.

The scope of this prohibition was the crucial issue in the Civil Rights Cases, and in all subsequent cases under the Thirteenth Amendment. Only the limited subject-matter of the amendment prevented it from authorizing federal regulation of all kinds of private activity previously reserved to the states. Denial of public accommodations did not fall within the scope of the amendment. “Mere discriminations on account of race or color were not regarded as badges of slavery.”

Only the rights that free blacks had, and the slaves did not, constituted the necessary incidents of slavery that could be remedied under the Thirteenth Amendment. Since free blacks were subject to pervasive discrimination before emancipation, the same would also be true of the newly freed slaves.

This narrow construction of the “badges and incidents of slavery” survived well into the twentieth century, providing one of the pillars in the legal foundation for the segregationist regime of Jim Crow. Along with the state action doctrine and “separate but equal”—what Charles

51 Id. at 215-18. The Court also held, however, that the evidence was insufficient to prove a “return . . . to a condition of peonage” as alleged in the indictment. Id. at 219-20. Other decisions of the period also pointed out that the Thirteenth Amendment covered private activity. Robertson v. Baldwin, 165 U.S. 275, 282 (1897); Bailey v. Alabama, 219 U.S. 219, 241 (1911).

52 109 U.S. at 24.


54 83 U.S. 36 (1873).

55 Id. at 72.

56 109 U.S. at 24, 25.
Black called “the Medusan caryatids of racial injustice”\textsuperscript{57}—a narrow construction of the Thirteenth Amendment provided crucial support for the preservation of segregation. Indeed, this construction figured in a subsidiary holding in \textit{Plessy v. Ferguson}, which found a state law requiring “separate but equal” facilities in public accommodations to be constitutional under both the Thirteenth and Fourteenth Amendments. Segregation, the Court said, “has no tendency to destroy the legal equality of the races, or reestablish a state of involuntary servitude.”\textsuperscript{58}

The Court imposed a similarly narrow interpretation of the powers of Congress in several decisions in the early twentieth century and consequently limiting the scope and significance of the Thirteenth Amendment. Thus in \textit{Hodges v. United States},\textsuperscript{59} the Supreme Court held that the amendment did not cover the right to keep a job free from private violence. In that case, a federal indictment alleged that black laborers were forcibly expelled from their jobs at a sawmill by the white defendants, in violation of their right to engage in free labor under the Thirteenth Amendment. The Court, however, found no badge or incident of slavery in the denial of the right to work, even if it was based on race. Wrongful action on the basis of race was not enough because “it was not the intent of the Amendment to denounce every act done to an individual which was wrong if done to a free man and yet justified in a condition of slavery.” The denial of the right to work was not unique to slavery because, the Court reasoned, the same right could be denied to immigrants. The badges and incidents of slavery were narrowed to the essential distinguishing features of slavery as an institution, with a corresponding limit on the power of Congress to enforce the amendment.

This entire restrictive approach persisted for more than a century after ratification of the Thirteenth Amendment, only to be suddenly overthrown by the Warren Court. In \textit{Jones v. Alfred H. Mayer Co.}, the Court held that the Civil Rights Act of 1866, the first legislation enacted under the amendment, prohibited private discrimination in addition to discrimination by government and that the act as so interpreted was constitutional. The Court required only a rational basis for the exercise of congressional power: “Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”\textsuperscript{60} Among the badges and incidents of slavery, according to the Court, were private racial discrimination in housing because it denied blacks “the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.”\textsuperscript{61}

\textsuperscript{57} Charles L. Black, Jr., Foreword: “State Action,” Equal Protection, and California’s Proposition 14, 81 Harv. L. Rev. 69, 70 (1967).

\textsuperscript{58} 163 U.S. 537, 543 (1896).

\textsuperscript{59} 203 U.S. 1, 17-19 (1906).

\textsuperscript{60} \textit{Jones v. Mayer}, 392 U.S. at 440.

\textsuperscript{61} \textit{Civil Rights Act of 1866} § 1, 42 U.S.C. § 1982, quoted in the \textit{Civil Rights Cases}, 109
Jones v. Mayer took a broad view of “badges and incidents” where the Civil Rights Cases had taken a narrow view, greatly expanding the ends for which Congress could legislate under the Thirteenth Amendment. In the terms used in McCulloch v. Maryland, the legitimate ends under the amendment expanded from abolition of slavery to eliminating the consequences of slavery, with a concomitant increase in the appropriate means that Congress could choose to reach those ends. This reasoning closely follows the modern decisions under the Commerce Clause expanding the scope of congressional regulation to any activities that “substantially affect interstate commerce.” These decisions conferred doctrinal legitimacy on Jones v. Mayer at the same time as they minimized its immediate consequences, which were only to augment the coverage and remedies available to victims of housing discrimination under the Civil Rights Act of 1968.

That act, like other modern civil rights legislation, had been enacted under the Commerce Clause, avoiding the limitations on congressional power imposed by the Civil Rights Cases. The vast expansion of federal power on this ground had been solidified in the New Deal and changed the background against which Jones v. Mayer was decided. As a practical matter, the decision added little to existing civil rights law and as a theoretical matter, it invoked an understanding of congressional power under a combination of the Commerce Clause and the Necessary and Proper Clause. A broad interpretation of the latter clause carried over directly to the Thirteenth Amendment by way of the phrase “appropriate legislation” in section 2. As we have seen, that phrase was viewed by the framers of the amendment as an implicit reference to McCulloch v. Maryland. An expansion of what was necessary and proper to the regulation of commerce led, with seeming ease and inexorability, to a corresponding expansion of the power to enforce the Thirteenth Amendment.

Subsequent decisions have not given Congress nearly so much discretion to enforce the Reconstruction amendments. In particular, legislation to enforce the Fourteenth Amendment must exhibit “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” The phrase “appropriate legislation” again provides the connecting link between interpretation of the Fourteenth Amendment and interpretation of the Thirteenth, since all the Reconstruction amendments use this phrase in their enforcement provisions. The standard of “congruence and proportionality” would be markedly more stringent

U.S. at 22.

62 Gonzales v. Raich, 545 U.S. 1, 15-17 (2005); Wickard v. Filburn, 317 U.S. 11, 121-25 (1942).

63 Jones v. Mayer, 392 U.S. at 441 n. 78.

than that applied to legislation under the Commerce Clause, which allows Congress to regulate virtually all economic activity without regard to the proportionality between the means it has chosen and the resulting effect on commerce. Under existing law, there is a gap between what is “necessary and proper” to enforce the Commerce Clause and what is “appropriate” to enforce the Fourteenth Amendment.

*Jones v. Mayer* falls nearer to the Commerce Clause side of this gap, even though the terminology of “badges and incidents of slavery” has few associations with commerce. What it does have is the same capacity to embrace the consequences of an activity that Congress undeniably can regulate. On a broad construction, it would give Congress the power to eliminate the residual effects of slavery, just as Congress can regulate the activity with substantial effects on commerce. *Jones v. Mayer* exploited the potential breadth of the “badges and incidents of slavery” to expand the ends that could be achieved under the Thirteenth Amendment, moving from abolition of the narrowly defined incidents of slavery to prohibiting the badges of continued racial discrimination.

Moreover, the Court accomplished this result without departing from the terms used in the *Civil Rights Cases*, although it gave them a very different sense and spirit. The Court grudgingly recognized that the *Civil Rights Case* could not really be reconciled with the validity of modern civil rights legislation under the Commerce Clause, but because Congress enacted the Civil Rights Act of 1866 only under the Thirteenth Amendment, the Court had to give the “badges and incidents of slavery” a much broader interpretation than they had received in the *Civil Rights Cases*. In general, Congress had the power “to eradicate the last vestiges and incidents of a society half slave and half free,” and in particular, it could act to prohibit private discrimination with respect to any of the rights enumerated in the 1866 Act.

This holding has since co-existed uneasily with the *Civil Rights Cases*. Both decisions serve as defining instances of appropriate legislation under the Reconstruction amendments, but both have been doubted and limited as precedents. The statutory holding in *Jones v. Mayer* soon came under attack as an unjustified judicial extension of the Civil Rights Act of 1866 to private discrimination and the decision was soon limited in some respects, although not on constitutional grounds. Ultimately, however, the full force of the decision was reinstated by Congress in the Civil Rights Act of 1991. This legislation could not reinforce the constitutional holding that Congress had the powers that it purported to exercise in reaffirming *Jones v. Mayer*. Yet the concurrence of Congress in support of the decision inevitably contributed political support to its interpretation of the Thirteenth Amendment.

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65 *Jones v. Mayer*, 392 U.S. at 441 n.78. Only *Hodges v. United States* had to be overruled. See id.


A similar process of indirect ratification resulted from the Supreme Court's reliance on the *Civil Rights Cases* in decisions invalidating legislation attempting to enforce the Fourteenth Amendment. These decisions did not mention the Thirteenth Amendment holding in the *Civil Rights Cases* which had been called into question by *Jones v. Mayer*. Yet the endorsement of the *Civil Rights Cases* in one respect might well carry over to its force as a precedent in another since, as noted earlier, Congress can enforce both amendments only by "appropriate legislation." The crucial difference between the two amendments—with the Thirteenth Amendment extending to private action and Fourteenth Amendment limited to state action—might mitigate any such effect by altering the permissible ends that Congress could seek to achieve. "Appropriate legislation" might have the same meaning under each amendment, but with very different implications as applied to legislation aimed at different ends. Such uncertainties contribute to the continued coexistence of *Jones v. Mayer* with the *Civil Rights Cases*, minimizing the likelihood of any direct conflict between the decisions and any need to resolve the obvious tensions between them. The ambiguity inherent in the Thirteenth Amendment may be more durable than any attempt to resolve it.

Conclusion

Some may find the "badges and incidents of slavery" to be a constitutional standard of dubious provenance, uncertain meaning, and unprincipled application.68 Others may see it as the constitutional foundation of racial equality and federal civil rights legislation.69 The historical record contains enough ambiguity to support both views, and many in between. To the extent that a single phrase can capture all the contradictory aspirations and limitations of the Thirteenth Amendment, "badges and incidents of slavery" does so: "badges" because of its breadth and resonance with ideals of political independence and "incidents" because of its narrow reference to the immediate legal implications of slavery. This essay on the origins of this phrase and its introduction into constitutional discourse cannot reconcile all the disparate and conflicting arguments that have surrounded the Thirteenth Amendment since it was proposed. All this exegesis of this standard can do is to indicate how these different strands of interpretation could credibly be brought together under a single heading—how a single fragment of constitutional doctrine could do justice both to the moral imperatives of emancipation and to the political limitations on its realization. These issues, like the consequences of slavery itself, remain as alive for us as they were for the framers of the Thirteenth Amendment.

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68 For David Currie, it represents "a triumph of the Trojan Horse theory of constitutional adjudication." David P. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789-1888 401 (1985).

69 Mark deWolfe Howe, Federalism and Civil Rights, in Civil Rights, the Constitution, and the Courts 30, 48-51 (1967).