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My “ticket” addresses several features of conventional scholarly wisdom about the Thirteenth Amendment. First, I consider a dimension of the legislative history of the Civil Rights Act of 1866 – Republican invocations of *Prigg v. Pennsylvania* – which scholars commonly see as evidence of a plenary enforcement theory of the Thirteenth Amendment. I trouble that interpretation by calling attention to the nineteenth century notion of *created rights* utilized in Prigg. Second, I explain how Justice Bradley (1874) used a distinction between *created* and *declared* rights to build a coordinated treatment of all three Reconstruction Amendments. My goal there is to show how the characteristics of the Thirteenth Amendment – its language and the type of right it protected – resisted theorization. I also show how Bradley “racialized” the Thirteenth Amendment. Finally, I call attention to *Hodges v. United States* (1906), an under-explored Thirteenth Amendment decision. My goals there are two-fold: (1) I suggest that the Waite Court did not gut the Thirteenth Amendment in the *Civil Rights Cases* (1883), as commonly presumed; rather, the Fuller Court gutted that Amendment and the Civil Rights Act of 1866 in *Hodges*. (2) I also suggest that *Hodges* simultaneously “expanded” the meaning of the Amendment to cover all forms of involuntary servitude, not just race-based servitudes, while contracting the meaning of the Amendment by limiting it to more formal master/servant relationships. I put on my “political science” hat at the end of the

ticket, where I identify Progressive era governmental concerns about peonage and the exploitation of *Italian* labor (considered white) as relevant to the analysis of *Hodges*. I conclude by calling for more attention to the relationship between *Hodges* and *Lochner v. New York*.

The *Prigg* Analogy: Congressional Power under the Thirteenth Amendment

Congress originally passed the Civil Rights Act of 1866 to enforce the Thirteenth Amendment. While the language of that amendment does not include a "no state" prohibition – it declares that "Neither slavery nor involuntary servitude…shall exist within the United States" – the absence of a state action limitation is not sufficient evidence that a theory of plenary enforcement attached to the act of 1866.[1] Introducing the 1866 bill, Sen. Lyman Trumbull stated, "It shall be understood that it is the policy of the Government that the rights of the colored men are to be protected by the States if they will but by the Federal Government if they will not."[2] Trumbull continued, "So long as the states did [not deny rights], the national government had no more power in the areas of traditional state jurisdiction than it had before the war."[3] The effort to remove doubt about the constitutionality of the act of 1866, moreover, produced the Fourteenth Amendment, which contains the "No state" limitation.[4] If the Fourteenth Amendment

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[1] The theory of plenary enforcement holds that the federal government has direct power to enforce rights. In other words: there is no "state action" limitation on federal enforcement power.

[2] Quoted in Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction," Journal of American History 61 (1974): 81.

[3] Quoted in ibid., 77.

[4] Rep. John A. Bingham raised questions about the constitutionality of this act and it is the consensus view of historians that Republicans passed the Fourteenth Amendment in part to remove all doubt about its constitutionality. Bingham's concern centered on the incorporation of the Bill of Rights contemplated/accomplished by the Civil Rights bill. See the sources cited in Kaczorowski 2004: notes 284 & 310.

introduced a state action predicate for federal enforcement that was not previously there, presumably congressmen would have said something. Nobody did. Moreover same congress passed the act of 1866 and the Fourteenth Amendment a mere three months apart. The seamlessness that characterizes the language used in debates on both matters[5] strongly suggests the consistent presumption of a state action predicate for federal rights enforcement.

Historians advancing the plenary enforcement theory attach considerable importance to the decision *Prigg v. Pennsylvania* (1842).[6] In this antebellum case, a unanimous Court held that Congress could enforce the constitutional right to the rendition of fugitive slaves and punish private individuals who interfered with this right. Rep. James Wilson of Iowa was the floor manager of the Civil Rights bill, and he pointed to *Prigg* as authority for the bill. Wilson was

> not willing that all of these precedents, legislative and judicial, which aided slavery so long, shall now be brushed into oblivion when freedom needs their assistance. Let them now work out a proper measure of retributive justice by making freedom as secure as they once made slavery hateful. I cannot yield up the weapons which slavery has placed in our hands now that they may be wielded in the holy cause of liberty and just government. We will turn the artillery of slavery upon itself.[7]

Rep. Wilson read from Justice Joseph Story's opinion in *Prigg*:

> [T]he fundamental principle applicable in all cases of this sort would seem to be that where the end is required the means are given; and where the duty is enjoined the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted…The [Fugitive Slave] clause is found in the national

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[5] See Brandwein, Reconstructing Reconstruction, 42-60.

[6] 41 U.S. 539 (1842).

[7] Cong. Globe, 39th Cong., 1st sess. at 1118. Wilson made similar remarks about a week later (ibid. at 1295).

> Constitution and not in that of any State. It does not point out any State functionaries or any State action to carry its provisions into effect.[8]

Wilson's reliance on *Prigg*, however, did not cohere with another dimension of his position on the Civil Rights bill: his view of the type of right the bill protected. Wilson explained that the type of right protected in the Civil Rights bill had its source in nature. Quoting Chancellor Kent, Wilson stated:

> 'The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and inalienable.' Now, sir, I reassert that the possession of these rights by the citizen raises by necessary implication the power in Congress to protect them.[9]

In the *Prigg* decision, Justice Story emphasized that the right to own slaves and hence the right to rendition was a *created* right, a creature of positive law. The right to property in slaves did not exist in nature.[10] The right to rendition was a right granted by the Constitution and because the right owed its "origin and establishment"[11] to the Constitution federal enforcement power was plenary, that is to say, direct. "It [is]…a new and positive right, independent of comity, confined to no territorial limits, and bounded by no state institutions or policy."[12] The theory of plenary enforcement in *Prigg*, therefore, was explicitly based on the type of right at issue: a right created by the Constitution. Because the rights protected by the Civil Rights bill, by contrast, had their

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[8] Cong. Globe, 39th Cong., 1st sess at 1294; Rep. Wilson quoting Prigg, 41 U.S. at 615.

[9] Ibid at 1118-19. Sen. Trumbull also quoted Blackstone and the same passage from Kent. See ibid. at 1757. On the Republican view that the Civil Rights bill protected rights that had their source in nature, see the sources cited in Kaczorowski, "A Moral Anomaly," 225-6 (footnote 311).

[10] Kaczorowski notes this (see 2004: 186, footnote 134) but does not identify the significance of the *created rights* category for Justice Story's theory of federal enforcement.

[11] Prigg, 41 U.S. at 623.

[12] Ibid. See also 41 U.S. at 612.

source in nature, as Rep. Wilson himself recognized, the *Prigg* analogy does not establish a plenary enforcement theory of the Civil Rights bill. In short, *Prigg* is not the foursquare analogy that some historians have presumed.

Prigg could still be used to defend the view that the federal government could *ultimately* protect constitutional rights in a corrective capacity if states defaulted in some way. Indeed, Sen. Trumbull referred to *Prigg* for the general proposition that the federal government could protect freedom: "Surely we have the authority to enact a law as efficient in the interest of freedom, now that freedom prevails throughout the country, as we had in the interest of slavery when it prevailed in a portion of the country."[13] Recall that it was Trumbull, manager of the Civil Rights bill in the Senate, who stated, "It shall be understood that it is the policy of the Government that the rights of the colored men are to be protected by the States if they will but by the Federal Government if they will not…So long as the states did [not deny rights], the national government had no more power in the areas of traditional state jurisdiction than it had before the war." *Prigg* is thus invoked as authority for a *corrective* model of federal power. It is true that in writing the Civil Rights Act of 1866, Republicans copied some of the machinery of the Fugitive Slave Act of 1850, legislation that embodied the plenary enforcement theory.[14] But they did not copy all of it. Most notably: Section 2 of the act of 1866 (the enforcement provision) had the key restriction that persons act "under color of law…or custom" – a state action limitation.

The Distinction Between "Created" and "Declared" Rights

[13] Cong. Globe, 39th Cong., 1st sess. 475
[14] See Kaczorowski 2004: 232-41.

In his circuit opinion in *United States v. Cruikshank* (1874), Justice Joseph Bradley attempted a coordinated treatment of all three Reconstruction amendments. The distinction between "created" and "declared" rights was central to that theorization. He began by pointing to *Prigg v. Pennsylvania*, the antebellum decision that invalidated the personal liberty laws of Pennsylvania, which required slave catchers to produce proof of identity for runaway slaves. The Court held that the Fugitive Slave Clause in the Constitution and the Fugitive Slave Law of 1793 created the right to the return of fugitive slaves. The personal liberty laws, the Court stated, interfered with this right. (The decision was not as pro-slavery as it appeared: states could pass laws that prohibited their officers from administering the rendition process. The federal government could provide for rendition but it would have to do so itself.)

Bradley cited *Prigg* for the contention that "congress has power to enforce, by appropriate legislation, every right and privilege given or guarantied by the constitution."[15] Note the distinction between *given* and *guaranteed* rights. The distinction might easily slip by modern readers who regard the words as synonymous. But in fact they designated two types of rights.

During the nineteenth century, the Constitution was conceived as a hybrid document. However alien to our own understanding, it was taken for granted that the Constitution protected both natural rights secured by the document and positive rights created by it. A handful of terms designated each type of right. Natural rights were secured, recognized, or declared by the Constitution. Positive rights were created, granted, conferred, or given by the document. Justice Bradley worked this legal

[15] 25 F. Cas. 710.

distinction to build a coordinated view of the Reconstruction amendments. He tried to generate rules for congressional enforcement, first, from the type of right protected and, second, from the wording of the amendment.[16] The nature of the three amendments however resisted theorization.

Bradley explained that when natural rights were declared or secured through prohibitory language, Congress could provide only corrective remedies. Federal remedies were contingent on state rights denials:

> With regard to those acknowledged rights and privileges of the citizen, which form part of his political inheritance derived from the mother country, and which were challenged and vindicated by centuries of stubborn resistance to arbitrary power, they belong to him as his birthright, and tit is the duty of the particular state of which he is a citizen to protect and enforce them…When any of these rights and privileges are secured in the constitution of the United States only by a declaration that the state or the United States shall not violate or abridge them, it is at once understood that they are not created or conferred by the constitution, but that the constitution only guaranties that they shall not be impaired by the state, or the United States. 25 F. Cas. at 710.

Here is state action doctrine theorized: the state action rule pertained to congressional enforcement of natural rights secured or declared by the Constitution. The Fifteenth Amendment had prohibitory language but created a new right: the right to exemption from racial interference in voting. This put Bradley in a bind, as the amendment's prohibitory text and its creation of a new right pointed to different rules for federal enforcement. Finding the amendment's creation of a new right dispositive, Bradley exempted congressional enforcement of the Fifteenth Amendment from state action rules.[17] Later courts cited Bradley for the Fifteenth Amendment exemption.[18]

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[16] 25 F. Cas. 710.

[17] On the Fifteenth Amendment exemption, See Brandwein, Rethinking the Judicial Settlement of Reconstruction (Cambridge University Press, 2011).

Justice Bradley also elaborated a rule for federal enforcement of the Thirteenth Amendment. He worked a distinction between "ordinary crimes" and race-based interferences in "liberty," which would later be central in his construction of the equal protection clause of the Fourteenth Amendment. The Thirteenth Amendment declares that "Neither slavery nor involuntary servitude…shall exist in the United States" and so it was incumbent upon Bradley to supply a legal definition of freedom. For this he turned to the Civil Rights Act of 1866. Under the Thirteenth Amendment, he explained, Congress "acquired the power not only to legislate for the eradication of slavery, but the power to give full effect to this bestowment of liberty on these millions of people. All this it essayed to do by the civil rights bill, passed April 9, 1866."[19] The act of 1866 provided in part for the equal protection of *civil rights*, that core group of rights that centrist and radical Republicans agreed were necessary for freedom. The federal government could thus punish race-based interferences in *civil rights* under the Thirteenth Amendment. Later in the *Civil Rights Cases*, Bradley was noncommittal about whether the act of 1866 was authorized under the Thirteenth Amendment. He explicitly identified the act of 1866 as "clearly corrective" legislation under the Fourteenth Amendment.[20]

But Congress was not authorized under the Thirteenth Amendment "to pass laws for the punishment of ordinary crimes…against persons of the colored race or any other race. That belongs to the state government alone."[21] By "ordinary felonious or criminal intent" (at 714) Bradley meant "malice, revenge, hatred, or gain," without any design to

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[18] United States v. Lackey, 99 F. 952, 962 (District Court, KY 1900). United States v. Miller, 107 F. 913, 915 (District Court, IN 1901). See also United States v. Butler, 25 F. Cas. 213 (C.C. D. S.C. 1877), where C.J. Waite clearly endorses the Fifteenth Amendment exemption.

[19] 25 F. Cas. 711

[20] 109 U.S., 3, 16. "Whether the [act of 1866] was fully authorized by the Thirteenth Amendment alone, without the support which it afterward received from the Fourteenth Amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire." 109 U.S. at 22.

[21] 25 F. Cas. at 712.

interfere with the rights of citizenship or the equal protection of the law on a racial basis. (at 712) “All ordinary murders, robberies, assaults, thefts, and offenses whatsoever are cognizable only in the state courts, unless, indeed, the state should deny to the class of persons referred to the equal protection of the laws.” (at 711-12] Charges drawn up under the Thirteenth Amendment, therefore, had to specify a racial motive:

> “To constitute an offense, therefore, of which congress and the courts of the United States have a right to take cognizance under this amendment, there must be a design to injure a person, or deprive him of his equal right of enjoying the protection of the laws, by reason of his race, color, or previous condition of servitude. Otherwise it is a case exclusively within the jurisdiction of the state and its courts.” (Ibid)

Justice Bradley thus racialized the Thirteenth Amendment. He imposed a racial limitation that was not present in the text.

A commitment to protecting the civil freedom of blacks is evident in Bradley’s conclusion where he declares that the national government was permitted to intervene in the “war of race.” His language was forceful:

> The “war of race, whether carried on in a guerrilla or predatory form, or by private combinations, or even by private outrage or intimidation, is subject to the jurisdiction of the government of the United States; and when any atrocity is committed which may be assigned to this cause it may be punished by the laws and in the courts of the United States.” (at 714).

In generating a rule for federal enforcement of the Thirteenth Amendment, Bradley was confronted with the opposite version of the problem generated by the Fifteenth Amendment, though he did not walk through this problem in similar fashion. The Thirteenth Amendment’s text and the type of right it protected could not be reconciled but here it was the text that supported the broader view of federal authority. The Thirteenth Amendment had no prohibitory language, suggesting that no state

action/neglect rule applied. The amendment "is not merely a prohibition against the passage or enforcement of any law inflicting or establishing slavery or involuntary servitude, but it is a positive declaration that slavery shall not exist. It prohibits the thing." (at 711). But it did not create a right. It was the consensus position that natural law protected freedom (the right to enslave was a created right) and so the Amendment's recognition of the natural right suggested that state infringement was a necessary predicate for federal intervention.

In presenting the "war of race" rule, Bradley appeared to prioritize the language of the Thirteenth Amendment (even as he ignored the absence of a racial limitation). The federal government had jurisdiction of the "war of race" under the Thirteenth Amendment regardless of state behavior. In the *Civil Rights Cases*, Bradley explicitly treats the Civil Rights Act of 1866 as Fourteenth Amendment legislation, insisting on a state action/neglect predicate for the federal enforcement of the act of 1866. This appears to reflect a prioritization of the type-of-right, though Bradley does not say so explicitly. This instability is a feature of Bradley's jurisprudence.

Both prioritizations, however, bespeak a commitment to black civil freedom and to federalism. As Justice Bradley explained in *Cruikshank* when he distinguished between "ordinary" and race-based crimes and when he identified state neglect as a form of state action: unless both moves are made, "we are driven to one of two extremes -- either that congress can never interfere where the state laws are unobjectionable, *however remiss the state authorities may be in executing them*, and however much a proscribed race may be oppressed; or that congress may pass an entire body of municipal law for the protection of person and property within the states, to operate concurrently with the state

laws, for the protection and benefit of a particular class of the community." (25 F. Cas. 711). Together the two moves protected blacks' civil freedom and preserved federalism.

A side note: There are scholars today who have taken note of Bradley's "war of race" language and have concluded from it that he abandoned the view in 1883 when he ruled that race-based exclusion from public accommodations was not a violation of the Thirteenth Amendment. John Anthony Scott, for example, sees a contradiction between Bradley's 1874 statement that private, race-based intimidation and outrages were part of the "war of race," which could be punished by the federal government under the Thirteenth Amendment, and Bradley's 1883 view that private, race-based exclusions from public accommodations were not part of the "war of race," and so could not be punished. Scott concludes that Bradley's 1883 rejection of the Civil Rights Act of 1875 was a reversal of his support in 1874 for the Civil Rights Act of 1866.[22]

But there was no contradiction or reversal. Scott misses the critical significance of the civil/social distinction used by Justice Bradley. For Bradley, the "war of race" pertained to the *civil rights* category, which now included voting. Centrist Republicans put public accommodation rights into the *social rights* category.[23] The recovery and translation of the civil/social distinction in centrist Republican thought is thus essential for understanding the scope of Bradley's "war of race" language. It never encompassed race-based exclusions from public accommodations.

Gutting the Thirteenth Amendment in *Hodges v. United States* (1906)

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[22] John A. Scott, "Justice Bradley's Evolving Concept of the Fourteenth Amendment," 25 Rutgers Law Review 552, 564 (1971.

[23] Brandwein, Rethinking the Judicial Settlement of Reconstruction, 60-86.

The judicial abandonment of blacks reached the Thirteenth Amendment and contract rights – the core of the nineteenth century *civil rights* category – in Hodges v. United States.[24] The case remains under-explored because conventional wisdom among constitutional lawyers and legal historians holds that the *Civil Rights Cases* (1883) had already done the relevant damage to the Thirteenth Amendment. But the Court's 1883 refusal to see a denial of public accommodation rights as a badge of servitude did not gut the Thirteenth Amendment. As I explore elsewhere, centrist Republicans distinguished between "civil" and "social" rights: they rejected public accommodation rights as civil rights but held a genuine, principled commitment to the Civil Rights Act of 1866, which protected "civil rights."

The *Hodges* case was doctrinally significant because it was here that the (Fuller) Court gutted the Civil Rights Act of 1866 and the Thirteenth Amendment. The case stemmed from an incident in Arkansas, and it involved the civil rights enumerated in the Civil Rights Act of 1866. An armed white mob threatened Berry Winn and seven other black men with violence if they did not stop work and leave their place of employment, a sawmill. As put in the indictment, Winn and the others were to "cease the free enjoyment of all advantages under [their work] contracts. The indictment charged that such threats were made "because they were colored men and citizens of African descent." The case looks like a textbook violation under Waite Court rules.

The indictment was drawn in part under Section 1977, which guaranteed to all persons the same right to make and enforce contracts "as in enjoyed by white persons." Section 1977 derived from Section 1 of the Civil Rights Act of 1866. The indictment was also drawn under Section 5508, which made it a crime to conspire to deprive any citizen

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[24] 203 U.S. 1 (1906).

of any right secured by the Constitution or laws of the United States. The Waite Court (1874-1888) had repeatedly approved the statute.[25]

Writing for the Court, Justice Brewer recognized that Section 1977 reached private individuals. However, he took this to mean that only the Thirteenth Amendment could authorize the law. "That the Fourteenth and Fifteenth Amendments do not justify the legislation is…beyond dispute." A recent district court decision had said the same this. But in the *Civil Rights Cases*, Justice Bradley had explicitly named Section 1977 and other sections deriving from the act of 1866 as valid Fourteenth Amendment legislation. Bradley housed the concept of state neglect (state neglect as a form of state action) in the phrase, "under color of law…or custom," which appears in the enforcement provision of the act of 1866. In asserting that only the Thirteenth Amendment could justify Section 1977, Justice Brewer erased this critical dimension of the *Civil Rights Cases* and obscured Bradley's construction of "color of law…or custom."

Hodges shifted direction in a second way. Recall that Waite Court justices required indictments drawn under the Thirteenth Amendment to specify a racial motive. Without addressing the old body of case law, Justice Brewer announced that the Thirteenth Amendment could not be limited to race. "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."[26] The Thirteenth Amendment, therefore, could not be limited to race-based servitudes.

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[25] Cruikshank (1876), Butler (1877), Yarbrough (1884), In re Neagle (1890), Logan (1892)

[26] 203 U.S. at 17. The government agreed. In oral argument before the Court, the attorney general stated, "I can easily rest this case upon the fact that the persons injured were of the colored race, and therefore peculiarly within the protection of the thirteenth amendment. But I have not been able to satisfy my mind that this amendment makes a permanent distinction between negroes and persons of other races. Its benefits extend to all persons of all races." Quoted in Bernstein, "Thoughts on Hodges," 814.

> "If, as we have seen, [the Thirteenth Amendment] denounces a condition possible for all races and all individuals, then a like wrong perpetrated by white men upon a Chinese, or by black men upon a white man, or by any men upon any man on account of this race, would come within the jurisdiction of Congress, and that protection of individual rights which prior to the Thirteenth Amendment was unquestionably within the jurisdiction of the States, would by virtue of that Amendment be transferred to the Nation, and subject to the legislation of Congress." (203 U.S. 18).

Justice Brewer was of course right about the language of the Thirteenth Amendment. It was not limited to race. But his move raised a federalism problem: Section 1977 identified interference in contract rights as an imposition of involuntary servitude, and so once the Court opened the coverage of the Thirteenth Amendment (to include involuntary servitude of any sort), what followed was a national police power over contract rights. And the Fuller Court was not prepared to grant the federal government this general police power. The Court escaped the problem by defining slavery and involuntary servitude in more formal master/servant terms. Slavery was "the state of entire subjection of one person to the will of another."[27] This definition severely restricted the reach of the Thirteenth Amendment.

And so much of what the Court appeared to give (by attending to the language of the amendment) the Court took back by defining involuntary servitude in formal terms. The white mob's interference in Berry Winn's contract rights would not be recognized as a "badge of slavery" because it was not "entire subjection" within the meaning of the Thirteenth Amendment. The Civil Rights Act of 1866 emerged from the case severely compromised regarding its capacity to vindicate those black rights deemed fundamental during Reconstruction.

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[27] 203 U.S. at 17.

The Fuller Court thus expanded the breadth of the Thirteenth Amendment (it would now reach an Alabama peonage law, which did meet the formal requirement), but the cost was the depth of the amendment: private, race-based interference in property, contract, and other rights protected by the Civil Rights Act of 1866 could no longer be reached. The Waite Court had constructed the opposite breadth/depth mix: narrow (i.e., limited to race-based interferences) but deep (covering all the rights listed in the act of 1866).

The under-explored *Hodges* case requires more attention, as does the relationship between Hodges and *Lochner*. [28] In thinking about Fuller Court's shift (and these were a new generation of Republican justices), it seems relevant that the Government was involved at the time in peonage cases in the South involving Italian immigrants. [29] Under Waite Court rules, it would have been impossible to prosecute the peonage cases under the Thirteenth Amendment. Indicting and convicting the mob leader Rueben Hodges, however, would have been utterly conventional.

Justice Harlan's dissenting opinion in *Hodges* offers an important lens on the decision. Harlan pointed backward to the *Civil Rights Cases*, identifying his disagreement with the majority on the constitutionality of the public accommodation provisions. But Harlan also identified a point of consensus: approval for the Civil Rights Act of 1866:

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[28] Thus far, only a handful of scholars have paid attention to the *Hodges* decision. See Pamela Karlan, "Contracting the Thirteenth Amendment: Hodges v. United States," 85 Boston University Law Review 783 (2005) and David Bernstein, "Thoughts on Hodges v. United States," 85 Boston University Law Review 811 (2005). Bernstein notes that the majority may have been concerned that ruling for the government might have involved the courts in supervising the membership of labor unions (at 817).

[29] In Bailey v. Alabama, 219 U.S. 219, 241 (1911), the Court invalidated an Alabama peonage statute under the Thirteenth Amendment, repeating the statement in Hodges that the Thirteenth Amendment was a charter of civil freedom for "all persons of whatever race, color, or estate." Bailey, notably, involved a state law, not private individuals.

> I participated in the decision in the Civil Rights Cases, but was not able to concur with my brethren in holding the act there involved to be beyond the power of Congress. But I stood with the court in the declaration that the Thirteenth Amendment not only established and decreed universal civil and political freedom throughout this land, but abolished the incidents or badges of slavery, among which, as the court declared, was the disability, based merely on race discrimination, to hold property, to make contracts, to have standing in court, and to be witness against a white person.

In listing the rights enumerated in the Civil Rights Act of 1866, Harlan's point was that consensus in the Civil Rights Cases pointed to the *opposite* conclusion in Hodges. Centrist and radical Republicans had long agreed that the enumerated rights were "essential for freedom," but the Court in *Hodges* shifted away from that understanding. Harlan's opinion thus sheds light on the *Civil Rights Cases*, as well as *Hodges*. Again, we see the intermingling of historical and doctrinal issues pertaining to the Thirteenth and Fourteenth Amendments: a challenge to conventional wisdom on one of the Amendments entails a challenge to conventional wisdom on the other.