LIBERATING THE THIRTEENTH AMENDMENT

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Introduction

In a constitutional arena dominated by the abstract principle of color-blindness, the Thirteenth Amendment¹ provides a powerful tool for combating racial inequality by requiring an analysis grounded in racial reality. By linking present racial discrimination to this nation's history of slavery and apartheid, a Thirteenth Amendment analysis uniquely addresses existing racial and economic injustice as modern relics and badges of slavery.² Moreover, the Thirteenth Amendment's promise of "universal civil and political freedom"³ applies to citizens from any race or class who have been branded with a badge of inferiority or involuntary servitude.

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*Professor of Law, Maryland School of Law. I dedicate this Article to Dwight Greene, who is dearly missed but whose spirit and sparkling intelligence inspire me daily. I thank my colleagues at Northeastern and Maryland law schools for providing encouragement when it was most needed. Maryland and Hofstra law schools deserve my appreciation for providing generous research resources that supported the writing of this Article. I also want to thank individual colleagues for enthusiastically responding with excellent suggestions at various stages: Arthur Kinoy, Dan Givelber, Aviam Soifer, Robin Lenhardt, Eric Freedman, and Cindy Feathers. I was extremely fortunate to have had the help of many dedicated law students, particularly my former students at Northeastern who provided the momentum to launch this idea, and Maryland law student Jean Cyril Walker, whose contributions were quite exceptional. Finally, I am forever grateful and fortunate to have had the constant support and encouragement of a true scholar, my life partner, Suzanne Sangree.

¹ "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII.

The Supreme Court has consistently held that the Thirteenth Amendment's prohibition against slavery includes Congress's "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (linking current forms of race discrimination to slavery) (quoting the Civil Rights Cases, 109 U.S. 3, 20 (1883)).

² Several national leaders have used images of slavery's legacy when addressing important human rights issues. See Robert Pear, Surgeon General Says Medicaid Enslaves Poor Pregnant Women, N.Y. TIMES, Feb. 26, 1994, at 8 (quoting former Surgeon General Joycelyn Elders' statement regarding the plight of young single women denied Medicaid benefits ("The Medicaid system must have been developed by a white male slaveowner . . . . It pays for you to be pregnant and have a baby but it won't pay for much family planning. . . . [T]his failure contributes to poverty, ignorance and enslavement."); Robert Pear, Conversations: Don Edwards; A Champion of Civil Liberties Lays Down His Lance, N.Y. TIMES, Apr. 3, 1994, at 7 (quoting retiring Congressman Don Edwards's analysis of the harsher punishment for African American defendants as evidence of "remnants left over from the slavery days . . . .")

³ The Civil Rights Cases, 109 U.S. at 20.
Unfortunately, the Thirteenth Amendment is largely ignored in the instruction of constitutional law. Authors of constitutional law textbooks usually limit references to abbreviated excerpts from the Supreme Court’s landmark 1968 decision, *Jones v. Alfred H. Mayer Company.* Most constitutional law professors view the Amendment as having historical meaning only and thus overlook the link between the abolition of slavery and current human rights issues. As a result, most law students are never exposed to serious discussion of the present day implications of the Thirteenth Amendment or its potential as a litigation tool.

The majority opinion in *Jones* resurrected the Thirteenth Amendment from a nearly century-old judicial burial and is, therefore, richly deserving of more than cursory treatment. In *Jones,* the Court revived a Reconstruction statute and held for the first time that a private developer’s refusal to sell a home to an African American family perpetuated one of slavery’s primary badges—the inability to own property. On this basis, the Court held that it was within Congress’s power to pass anti-discrimination legislation such as the Civil Rights Act of 1866 (“the 1866 Act”), which prohibited race discrimination in property transactions.

*Jones* provides a contemporary precedent for applying the Thirteenth Amendment’s prohibition against slavery to current racial injustices as well as other human rights issues. Decided during the 1960s civil rights movement’s struggle for racial equality and full economic opportunity,

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5 I use human rights in a broad sense to include scholars’ use of the Thirteenth Amendment in the context of race and race discrimination, as well as scholars’ reference to the Thirteenth Amendment analysis in non-race situations to describe, for example, the freedom rights of abused children and battered women, economic rights of working people, and a woman’s reproductive rights. See infra notes 16–21, 294–320 and accompanying text.

6 392 U.S. at 422–36.

7 Ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1982 (1988)).

8 *Jones* was decided on the last day of the Warren Court, a Court that breathed life into century-old civil rights statutes and made them viable remedies for citizens seeking
*Jones* revived the original purpose of the Thirteenth Amendment,9 and the Civil Rights Act of 1866,10 by declaring that they guarantee

at the very least . . . the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.11

Though some scholars have sharply criticized the *Jones* Court's interpretation of legislative intent,12 its liberty and anti-discrimination principles remain protected constitutional guarantees.13 *Jones* also reaffirmed Congress's Thirteenth Amendment power to enforce laws prohibiting race discrimination, a matter of controversy whenever Congress considers new civil rights legislation.14 Moreover, by reviving the debate over the con-


9 See *Jones*, 392 U.S. at 431–34 (quoting statements of Sen. Trumbull and Rep. Thayer). Senator Trumbull also indicated that the second section of the Thirteenth Amendment would allow Congress to pass additional laws that would be far more sweeping than the 1866 Act and the Freedmen's Bureau. *Id.* at 429–30.


13 In *Patterson v. McLean Credit Co.*., 491 U.S. 164 (1989), the Supreme Court unanimously affirmed the legislative history that had been the basis for the Court's decision in *Jones*.

14 Because the Supreme Court's decision in The Civil Rights Cases, 109 U.S. 3 (1883), substantially limited the reach of the Thirteenth and Fourteenth Amendments, see infra notes 128–155 and accompanying text, Congress relied on the Commerce Clause when passing the first major civil rights law since Reconstruction, the Civil Rights Act of 1964. See *Katzenbach v. Morgan*, 384 U.S. 541 (1966) (upholding congressional power under the Fourteenth Amendment to pass the Voting Rights Act of 1965); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (upholding Congress's power under the Commerce Clause, but not reaching the question of whether the Fourteenth or Thirteenth Amendments could have been a basis for passage). In passing other civil rights legislation since the 1964 Act, Congress has not relied on the Thirteenth Amendment, despite judicial and scholarly endorsement of it as a source of constitutional authority. See *Fullilove v. Klutznick*, 448 U.S. 448, 500 (1980) (Powell, J., concurring); *Williams v. City of New
constitutional meaning of freedom rights, the *Jones* opinion compels courts to consider whether existing racial injustices are traceable to slavery or segregation, an analysis quite distinct from the conventional state action and perpetrator models of Fourteenth Amendment doctrine.\textsuperscript{15}

In the wake of *Jones*, many scholars turned their attention to other forms of racial inequality.\textsuperscript{16} Most recently, a new group of scholars is exploring the Thirteenth Amendment’s present-day application to a broad range of subject areas, including First Amendment law,\textsuperscript{17} labor law,\textsuperscript{18} family law,\textsuperscript{19}

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Orleans, 729 F.2d 1554 (5th Cir. 1984) (Higginbotham, J., concurring). Professor Laurence Tribe recently testified before the U.S. Senate that the Thirteenth Amendment provides constitutional support for a proposed Racial Justice Act, which would have provided for race discrimination challenges to the imposition of the death penalty. 136 Cong. Rec. S6891 (daily ed. May 24, 1990) (statement of Laurence H. Tribe).

Justice Douglas’s concurring opinion, for example, identified numerous examples of existing badges and incidents of slavery. *Jones*, 392 U.S. at 447–49 (Douglas, J., concurring).


and reproductive freedom rights. The breadth of new scholarship demonstrates the Thirteenth Amendment's enormous potential as a catalyst in fighting for citizens' freedom and equality rights and in keeping alive the Amendment's promise of liberation.

In this Article, I argue that the Thirteenth Amendment has vast untapped potential as a teaching and litigation tool. In Part I, I recount the legislative debates that accompanied the Thirteenth Amendment and the 1866 Act, highlighting Professor Jacobus tenBroek's seminal 1951 scholarship on the topic. These debates reveal Congress's intent to define the Amendment's core values as freedom rights. During Reconstruction, legislators overwhelmingly approved a series of affirmative measures necessary to include African Americans as full members of civil society.

In Part II, I describe the Supreme Court's contorted judicial construction of the Thirteenth Amendment in cases decided between 1872 and 1883. These cases buried the Amendment and the 1866 Act for most of the following century. I also demonstrate the Court's revival of the Thirteenth Amendment during the last twenty-five years by analyzing Jones Immigrants, 102 Yale L.J. 1401, 1428–30 (1993); see infra notes 308–312 and accompanying text.


Professor Guyora Binder writes a compelling and moving account of African Americans' entitlements under the Thirteenth Amendment's freedom guarantees. Professor Binder describes the Amendment's potential for achieving racial justice and national redemption. Binder, supra note 21; see also Alexander Aleinikoff, A Case for Race Consciousness, 91 Colum. L. Rev. 1060, 1118–20 (1991) (advocating an "amendment shift" to the Thirteenth Amendment, thereby authorizing government action to combat the lingering effects of slavery and to achieve racial justice).

Jacobus tenBroek, Thirteenth Amendment to the Constitution of the United States, 39 Calif. L. Rev. 171 (1951)

See infra note 32. Even though the Thirteenth Amendment spoke about universal freedom rights, it did not originally apply to African American women or women generally. For a discussion of women who advocated for similar constitutional and equality rights, see, e.g., Ellen C. DuBois, Feminism and Suffrage: The Emergence of an Independent Women's Movement in America 1848–1869 (1978). In order to be consistent with current understandings of the rest of the Constitution, see, e.g., U.S. Const. amends. XIV & XIX, and to reflect changes in public values, the Thirteenth Amendment today would necessarily include women.
v. Mayer\textsuperscript{25} and Patterson v. McLean.\textsuperscript{26} These decisions revitalized the Thirteenth Amendment as a tool for combatting racial discrimination in all of its forms.

In Part III, I consider recent applications of the Thirteenth Amendment to current civil rights issues. I begin by analyzing Williams v. City of New Orleans,\textsuperscript{27} a Fifth Circuit decision upholding affirmative action measures to redress employment discrimination. Next, I consider the Thirteenth Amendment's application to racially discriminatory peremptory challenges and capital punishment sentencing practices.

Finally, I review the most recent scholarship that develops Thirteenth Amendment jurisprudence in new conceptual forms and presents useful litigation models for explaining the constitutionality of racial hate speech legislation, reproductive rights, and federal prosecution of racially motivated violence. This scholarship also provides new doctrinal models for describing situations faced by severely abused children, battered women, and women coerced into prostitution. I suggest that the Thirteenth Amendment's promise of universal freedom provides the opportunity to reach a variety of subject areas beyond those covered in the traditional constitutional law class. I conclude by calling upon more law professors to teach, and more public interest litigators to pursue, Thirteenth Amendment theories to bring this nation closer to realizing the ideals of freedom and equality.

I. Legislative Intent

The congressional debates accompanying the Thirteenth Amendment and the Civil Rights Act of 1866 reveal Congress's understanding of freedom and the constitutional guarantees that accompanied slavery's abolition. The South's violent response to the Thirteenth Amendment's ratification convinced legislators that the Amendment's promise of freedom would not be self-executing, but would require "practical effect, life, vigor and enforcement."\textsuperscript{28} Consequently, when the 39th Congress convened, virtually the same group of legislators who had debated and supported the Thirteenth Amendment enacted a civil rights bill that would give meaning to the Amendment's "declar[ation] that all persons in the United States should be free."\textsuperscript{29}

\textsuperscript{25}392 U.S. 409 (1968). See infra notes 184–199 and accompanying text.
\textsuperscript{26}491 U.S. 164 (1989). See infra notes 204–208 and accompanying text.
\textsuperscript{27}729 F.2d 1554, 1570–84 (5th Cir. 1984) (Wisdom, J., concurring and dissenting); see infra notes 218–237 and accompanying text.
\textsuperscript{28}CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (Statement of Rep. Thayer).
\textsuperscript{29}Id. at 474 (statement of Illinois Senator Lyman Trumbull, Chair of the Senate Judiciary Committee).
As discussed more fully in Part II, Supreme Court decisions, beginning in 1872, eviscerated the Amendment through a series of narrow interpretations that ignored historical context and overlooked legislators' identification of the core values underlying African Americans' newly won liberation. The Amendment fell into desuetude for nearly a century, and the legislative intent behind it was largely forgotten. Finally, in a path-breaking 1951 article, Professor Jacobus tenBroek began to unearth the Thirteenth Amendment's legislative history and revive its mandate. His review of the 1865-66 Reconstruction debates sheds light on the post-Civil War period, during which the nation grappled with the meaning of freedom for formerly enslaved African Americans and the meaning of liberty rights for all citizens.

A. Post-Civil War Reconstruction

The Reconstruction period was a rare time in this nation's history when national legislators seriously debated and enacted constitutional and federal protections to ensure for African Americans the full exercise of freedom and citizenship rights. Although this period was short-lived, lasting at most from 1863 to 1877, Congress succeeded in passing the Thirteenth, Fourteenth, and Fifteenth Amendments and seven major civil rights laws.

Between December 1863 and April 1866, the Thirteenth Amendment gained approval in the Senate and then met initial defeat in the House before eventually achieving the necessary two-thirds vote when resubmitted to the House in January 1865. Following the Amendment's ratification in December 1866, Congress passed the Civil Rights Act of 1866 and the second Freedmen's Bureau Act to define further the meaning of

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30 tenBroek, supra note 22.
31 Professor tenBroek's scholarship is quite amazing in that it represented a sharp break with the scholarly tradition of ignoring the Thirteenth Amendment. His work is an excellent example of the impact that law professors can have on the development of the law. Not only did it provide a solid foundation for the Supreme Court's subsequent analysis in Jones, but his scholarship and teaching also had a clear influence on his colleagues and students. Indeed, in a tribute to his legacy, many of tenBroek's former students recently gathered to celebrate the impact he has had on their professional lives. Krysten Crawford, People, Recorder, Oct. 16, 1992, at 5.
33 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.
34 Ch. 200, 14 Stat. 173 (1866). The First Freedmen's Bureau Act, ch. 90, 13 Stat. 507 (1865), provided for the establishment of a Bureau of Refugees, Freedmen and Abandoned
freedom and citizenship rights. The congressional debates preceding the Amendment’s ratification illuminate the legislators’ intent to extend broad liberty guarantees to all citizens, “high or low, rich or poor,” “black or white.”

B. The Thirteenth Amendment Debates

From the opening gavel, both sides in the legislative debates based their arguments on a common understanding that the Thirteenth Amendment would protect an expansive definition of freedom. Some opponents openly defended slavery, but most argued that the proposed Amendment offended traditional notions of federalism. States’ rights advocates knew that granting freedom meant much more than a simple exemption from personal servitude. They argued that freedom for African Americans would mean the right to participate in government and to enjoy the rights of citizenship. They fully appreciated that abolishing slavery would make African Americans their equals before the law. To constitutionalize freedom rights, opponents said, would violate the states’ rights compact agreed upon at the Union’s formation. They maintained that each indi-

Lands within the War Department. This Act was intended to provide refugees and freedmen with necessities and the opportunity to lease or buy up to 40 acres of abandoned land. Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753, 760 (1985). The second Freedmen’s Act was much broader and more controversial. It empowered the Bureau to provide educational opportunities for refugees and freedmen and included federal anti-discrimination provisions in criminal or civil law administration. Id. at 772.

35 See tenBroek, supra note 23 at 192 n.46, 196–97 (detailing legislators’ statements on the meaning of freedom and equality and the Thirteenth Amendment); see also CONG. GLOBE, 39th Cong., 1st Sess. 41 (1866) (statement of Sen. Sherman that it was “the duty of Congress to give to the freedmen of the southern States ample protection in all their natural rights”). Senator Stewart added that “[w]e have given [the African American man] freedom, and that implies that he shall have all the civil rights necessary to the enjoyment of that freedom.” tenBroek, supra note 23, at 298.


37 CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866) (statement of Sen. James Wilson) (“[B]y the equality of men . . . we mean that the poorest man, be he black or white . . . is as much entitled to the protection of the law as the richest and the proudest man.”).

38 See Colbert, supra note 21, at 27 n.167, 33 n.145. Professor tenBroek was convinced that the Amendment’s opponents understood that federal protection of African Americans’ rights represented a revolution in federalism and made it their primary argument. tenBroek, supra note 23, at 179.

39 Congressman William Holman recognized that such a “mere exemption . . . is a miserable idea of freedom.” CONG. GLOBE, 39th Cong., 1st Sess. 2962 (1866).

40 CONG. GLOBE, 39th Cong., 1st Sess. 2962 (1866); see also infra notes 54–55.


42 Congressman Fernando Wood spoke for many who opposed the Thirteenth Amend-
vidual state should continue to determine "what it believes to be just and expedient in reference to its own people and its own institutions."\(^{43}\)

Opponents may have thought that their equality arguments would prevent the Thirteenth Amendment's passage. Many supporters of the Amendment, however, emboldened by the increasingly popular abolitionist sentiment during the war years, explicitly acknowledged that the constitutional right to freedom was intended to secure equal protection of the law and impartial justice for African Americans. Iowa Congressman James Wilson, for example, the Amendment's co-author and Chair of the House Judiciary Committee, opened the House debates by arguing that "slavery stands arrayed against every object for the attainment of which the people ordained and established the Constitution."\(^{44}\) Wilson declared that "[t]he establishment of justice would destroy slavery. . . . We must establish justice on the tomb of slavery, or have it not at all."\(^{45}\) Throughout the debates, members of the House echoed Wilson's equal justice theme.\(^{46}\)

Many proponents also recognized that the Thirteenth Amendment would require affirmative steps to establish equal rights for African Americans. The abolition of slavery meant the abolition of barriers erected to prevent equal access to the courts, equal freedom of speech and press, and equal property rights. Iowa Senator James Harlan stated that protecting such rights for African Americans was the specific goal of the Amendment.\(^{47}\)

Some proponents in the House presented a class-based analysis, in which they connected slavery's denial of rights to African Americans with its debilitating effect on free working people's labor rights.\(^{48}\) Massachu-

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\(^{45}\) Id. at 1201; see also id. at 1481 (statement of Sen. Sumner); id. at 2988–89 (statement of Rep. Arnold); id. at 2989–91 (statement of Rep. Ingersoll).

\(^{46}\) Congressman William D. Kelly stated that the proposed amendment was meant to cause the political and social elevation of African Americans so that they would enjoy all the rights of whites. Id. at 2985. Congressman Godlove Orth added that the Thirteenth Amendment would be a "practical application of that self-evident truth, that all men are created equal." CONG. GLOBE, 38th Cong., 2d Sess. 142 (1865).

\(^{47}\) CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864). Senator Harlan referred to other "necessary incidents of slavery," such as "abolishing the conjugal relationship . . . , the abolition practically of the parental relation . . . , robbing the offspring of the care and attention of his parents . . . , the right to testify . . . [and] the right to human sympathy . . . ." Id. at 1439–40.

\(^{48}\) Professor Lea VanderVelde's recent scholarship suggests the current relevance of a "labor vision" of the Thirteenth Amendment, which is based on legislators' extensive references linking the slave and the poor white worker. VanderVelde, Labor Vision, supra note 18, at 468–85 (detailing legislators' advocacy for the Thirteenth Amendment as a measure to protect working people's liberties); see also Hicks v. Brown Group, Inc., 902 F.2d 630, 643–48 (8th Cir. 1990).
setts Senator Henry Wilson emphasized the Amendment’s race- and class-based objectives:

[I]t will obliterate the last lingering vestiges of the slave system; [it will allow] the wronged victim of the slave system, [and] the poor white man . . . impoverished, debased, dishonored by the system that makes toil a badge of disgrace . . . [to] begin to run the race of improvement, progress, and elevation.49

Thus, the first debates revealed three purposes behind the Thirteenth Amendment. First, it was intended to strike “the shackle . . . from the limbs of the hapless bondman;” next, to extend liberty rights for African Americans, slave and free; and finally, to broaden constitutional rights for white citizens.50

House opponents of the Thirteenth Amendment succeeded in narrowly defeating the proposed Amendment in the spring of 1864.51 But after the Republicans’ successful showing in the November elections,52 supporters reintroduced the Amendment in January 1965. For eight consecutive days, supporters and opponents debated the consequences of granting freedom.

While proponents emphasized that slavery was a system at variance with equal justice,53 opponents denounced the call for freedom and equality. They renewed fears that abolishing slavery would entitle African

49 Cong. Globe, 38th Cong., 1st Sess. 1324 (1864). Many legislators emphasized that the Thirteenth Amendment would benefit white citizens as well as former slaves. In the House, the Amendment’s co-author, Congressman James Wilson, recognized that the Thirteenth Amendment’s freedom guarantees would ensure the rights of every citizen and have meaning for the “[millions of] free men in the free states [who] were practically reduced to the condition of semi-citizens of the United States.” Id. at 1202. Congressman E.C. Ingersoll similarly asserted that the Amendment’s guarantees would apply to the millions of poor white people in the slave states who had been deprived of the benefits of citizenship because slavery had kept them “in ignorance, in poverty, and in degradation.” Id. at 2990; see also Colbert, supra note 21, at 35 n.153.
51 The Senate passed the Thirteenth Amendment 38 to 6, Cong. Globe, 38th Cong., 1st Sess. 1490 (1865), but the House fell 13 votes short of the two-thirds needed to forward it to states for ratification. Id. at 2995.
52 The 1864 congressional election resulted in a Republican victory and a defeat for the Democratic Party, which generally opposed passage of the Thirteenth Amendment. James M. McPherson, Battle Cry of Freedom: The Civil War Era 838–39 (1988). Republicans like Congressman Orth seized upon these results and argued that the election had delivered a more definite expression of the public will. Cong. Globe, 38th Cong., 2d Sess. 142–44 (1865). California Congressman Higby added that between the last session of Congress and the present one, the Administration’s policy had been endorsed by a majority of 400,000. Id. at 155. Seeking to build a national consensus, President Lincoln convinced 14 defeated Democratic Representatives to join Republicans in voting to pass the Amendment. McPherson, supra, at 838–39.
Americans to citizenship rights, such as voting and jury service, which were the subject of great controversy.\textsuperscript{54} Congressman White best captured this sentiment when he argued that a constitutional ban on slavery would destroy the fundamental nature of government. He asked: "What will be the effect of turning loose this mass of people? . . . Do you propose to enfranchise them and make them 'before the law,' . . . the equals of the white man . . . ? Do you intend . . . to make this a mongrel Government, instead of a white man's Government?"\textsuperscript{55}

On January 28, 1865, the necessary two-thirds majority of House legislators voted for approval.\textsuperscript{56} Some thought that mere passage of the Amendment would institute freedom.\textsuperscript{57} Others who were more personally familiar with slavery's deeply entrenched roots, however, recognized that the Amendment's passage only laid the conceptual foundation for defining freedom and liberty. Frederick Douglass said that "the work does not end with the abolition of slavery, but only begins."\textsuperscript{58}

C. The Civil Rights Act of 1866

Douglass proved correct. Although the states ratified the Amendment in December 1865,\textsuperscript{59} a wave of brutal, racially motivated violence against African Americans swept the South the following year.\textsuperscript{60} Local law enforcement officials generally refused to prosecute offenders,\textsuperscript{61} and south-

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  \item \textsuperscript{54} See Colbert, supra note 21, at 37–38 n.168.
  \item \textsuperscript{55} CONG. GLOBE, 38th Cong., 2d Sess. 216 (1865) (statement of Rep. White).
  \item \textsuperscript{56} The Congressional Globe gave this description of the jubilation that followed the decision:
  \begin{quote}
  The announcement was received by the House and by the spectators with an outbreak of enthusiasm. The members on the Republican side of the House instantly sprung to their feet, and, regardless of parliamentary rules, applauded with cheers and clapping of hands. The example was followed by the male spectators in the galleries, which were crowded to excess, who waved their hats and cheered loud and long, while the ladies, hundreds of whom were present, rose in their seats and waved their handkerchiefs, participating in and adding to the general excitement and intense interest of the scene. This lasted for several minutes.
  \end{quote}
  \item \textsuperscript{57} Representative Kelley stated that passage of the Amendment was like "unfolding a new page in national life." Id. at 290.
  \item \textsuperscript{58} Eric Foner, Reconstruction: America's Unfinished Revolution 1863–1877 76 (1988).
  \item \textsuperscript{59} The 38th Congress, which introduced the Thirteenth Amendment, excluded Representatives from the 11 confederate states. Following the Civil War, each state then under military occupation was required to abolish slavery in its state constitution. Guyora Binder suggests that "[g]iven the Thirteenth Amendment's questionable formal pedigree . . . , the slaves have as good a claim to authorship of the Thirteenth Amendment as anyone." Binder, supra note 21, at 486.
  \item \textsuperscript{60} Foner, supra note 58, at 119.
  \item \textsuperscript{61} Colbert, supra note 21, at 40–43.
\end{itemize}
ern states enacted Black Code laws, which were intended to perpetuate African American slavery. The post-Civil War violence and state legislation reflected whites’ determined resistance to the establishment of freedom for African Americans.

Northern legislators had anticipated southern resistance to the Thirteenth Amendment. While some suggested providing economic reparations to accompany the constitutional guarantee, a strong consensus developed among moderates and conservatives favoring equal protection of the law for all men. The debates leading to passage of the 1866 Civil Rights Act reveal legislators’ broad and developing vision of what Thirteenth Amendment freedom rights meant, a view given little treatment in traditional coverage of the subject.

During the debates, legislators sought to delineate specific rights protected under the Thirteenth Amendment. Republican supporters of the

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62 DONALD NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN’S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865–68 98 (1979). The Black Codes represented a legalized form of slavery in which each southern state perpetuated the master-slave relationship by passing apprenticeship laws, labor contract laws, vagrancy laws and restrictive travel laws, and by denying African Americans civil rights and due process of law. The Supreme Court found that the Codes saddled African Americans with “onerous disabilities and burdens and curtailed their rights... to such an extent that their freedom was of little value.” Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1872).

63 FORER, supra note 58, at 120.

64 Congressman Howard spoke for many when he said that it was foreseeable “that in this case this scheme of emancipation is carried out in the rebel States it would encounter the most vehement resistance on the part of old slaveholders... [T]hey would resort to every means in their power to prevent... the loss of their property under this amendment.” CONG. GLOBE, 39th Cong., 1st Sess. 503 (1866).

65 Congressman Thaddeus Stevens proposed that if land were confiscated from the wealthiest 10% of confederate planters, each freedman would receive 40 acres. The remaining 90% of the land would be awarded to the highest bidders. Stevens’ amendment received only 37 votes. MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863–1869 149–50 (1974); FORER, supra note 58, at 235.

66 tenBroek, supra note 23, at 185. Illinois Senator Lyman Trumbull, chairman of the Senate Judiciary Committee, introduced the Civil Rights Bill by declaring that its “only object... [was] to secure equal rights to all the citizens of the country,” and that it “appl[ied] to white men as well as black men.” CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866). Senator Trumbull characterized a statute that did not treat everyone equally as a badge of servitude that was prohibited by the Constitution. Id. at 474.

67 Proponents and opponents of the Bill spoke about its protection of every citizen in the country. For proponents’ statements, see CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson); id. at 1263 (statement of Rep. Broomhall); id. at 3035 (statement of Sen. Henderson); for opponents, see id. at 504–05 (statement of Sen. Johnson); id. at 595 (statement of Sen. Davis); id. at 603 (statement of Sen. Cowan); id. at 1120–21 (statement of Rep. Rogers).

68 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. Section one of the 1866 Act provided that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous
Bill proposed to nationalize many rights that had been denied African Americans during slavery. After witnessing the South’s response to the Thirteenth Amendment, supporters realized that specific mandates were necessary for enforcing the Amendment.

The Bill’s first section guaranteed citizenship to all people, other than Native Americans, who were born in the United States. It specifically identified fundamental rights necessary to make all men equal before the law. These included contract and property rights, access to courts, and equality under the law. During the debates, proponents described the need for federal protection of such rights. Congressman Thayer stated: “[W]hen I voted for the amendment to abolish slavery . . . I did not suppose that I was offering [African Americans] a mere paper guarantee.”

Id. During the debates, many legislators described their sense of what freedom rights meant. CONG. GLOBE, 39th Cong., 1st Sess. 41 (1866) (statement of Sen. Sherman emphasizing access to court); id. at 298 (statement of Sen. Stewart emphasizing civil rights); id. at 602 (statement of Sen. Lone, referring to rights, privileges and immunities of freemen); id. at 1832 (statement of Sen. Lawrence declaring citizens’ freedom rights include life, liberty and property); see also tenBroek, supra note 23, at 184–200 (discussing the debates accompanying the Freedmen’s Bureau Act of 1866); VanderVelde, Labor Vision, supra note 18, at 479–85.

After passing the Act, proponents addressed concerns that a constitutional amendment was necessary to secure the Bill’s objective of guaranteeing a citizen’s “equal protection of life, liberty and property” and “privileges and immunities.” CONG. GLOBE, 39th Cong., 1st Sess. 1034, 1088 (1866) (statement of Rep. Bingham); id. at 2498 (statement of Rep. Broomall) (“It will do no harm . . . and [will] prevent a mere majority from repealing the law and thus thwarting the will of the loyal people.”). Shortly thereafter, Republican legislators proposed an additional constitutional amendment in order to guarantee the same citizenship and equal protection rights included in the 1866 Act. See, e.g., id. at 2459 (statement of Rep. Stevens); id. at 2498 (statement of Rep. Broomall).

Legislators identified rights denied African Americans through use of the Black Codes as the “inevitable incident[s] to liberty, without which liberty would be but a name.” Id. at 42 (statement of Sen. Sherman); see also supra note 47.

The 1866 Act’s citizenship clause overruled Dred Scott v. Sandford, 60 U.S. 393 (1857), which had denied African Americans citizenship rights provided to white people, including the right to sue in federal court. Senator Trumbull, chair of the Senate Judiciary Committee and author of the 1866 Civil Rights Act, declared that the Act’s guarantee included “those inherent, fundamental rights which belong to free citizens or free men in all countries.” CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866).

Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (current version at 42 U.S.C. § 1982 (1988)). Congressman Thayer spoke of the Thirteenth Amendment as intended to relieve slaves from all the oppressive incidents of slavery and to secure to them the fundamental rights of citizenship—life, liberty, and property—“which make all men equal before the law.” CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866).

Opponents of the Bill now argued that the Thirteenth Amendment should be narrowly construed and suggested that the Amendment was adopted only to liberate the slave from his master. Supporters referred to this construction as absurd and argued that the Amendment was intended to make the African American "a freeman . . . entitled to those rights which we concede to a man who is free."

Some opponents argued that by proposing to "bestow [equality] upon the whole free negro population," the Bill's expansion of the national government's enforcement power threatened the federal structure more than any other bill that was ever introduced. They renewed their previous federalism arguments by asserting that the Thirteenth Amendment "was not intended to overturn this Government and to revolutionize all the laws of the various states." Proponents of the 1866 Act responded that the Thirteenth Amendment had been passed explicitly to create such a dramatic transformation in the federal structure. Senator Morrill questioned: "[A]re we not in the midst of revolution . . . , a civil and political revolution which has changed the fundamental principles of our Government in some respects?"

Republicans voted overwhelmingly in favor of the 1866 Act and expected that President Johnson would sign the legislation. When Johnson vetoed the Bill, Congress instantly overrode the veto. Upon casting his vote to override, Senator Trumbull stated: "If the bill now before us, and which goes no further than to secure civil rights to the freedman, cannot be passed, then the constitutional amendment proclaiming freedom to all the inhabitants of the land is a cheat and a delusion."

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73 Id. at 499 (statement of Sen. Cowan); id. at 113, 477 (statement of Sen. Saulsbury); id. at 317 (statement of Sen. Hendricks); id. at 186 (statement of Sen. Davis). Opponents had previously voiced their fear of the Amendment's potential sweep. See supra notes 39-43 and accompanying text; see also VanderVelde supra note 18 at 453, 478.
75 Id. at 503-04 (statement of Sen. Howard).
76 Id. at 405. Congressman Garfield responded to similar arguments made in the House debate: "What is freedom? Is it the bare privilege of not being chained? . . . If this is all, then freedom is a bitter mockery, a cruel delusion." Foner, supra note 58, at 66 (quoting JAMES A. GARFIELD, THE WORKS OF JAMES ABRAM GARFIELD 1:86 (Burke A. Hinsdale ed., 1970) (1882-1883)).
78 Id. at 499 (statement of Sen. Cowan).
79 Id. at 570.
80 Both Houses of Congress provided substantial support for the civil rights statute: Senators voted 33 to 12 in favor (5 not voting), Representatives approved the measure by 111 to 38 (34 not voting). Id. at 607, 1367.
81 Andrew Johnson viewed the bill as representing "an absorption and assumption of power by the General Government which . . . must . . . destroy our federative system of limited powers." Id. at 1681. Johnson's veto message also questioned whether newly freed African Americans "possess[ed] the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States . . . ." Id. at 1679.
82 Id. at 1761.
By overriding the veto, supporters believed they had finally guaranteed to African Americans and other citizens federal protection of many fundamental rights. But judicial interpretation of the 1866 Act accorded with legislators' intent for only a brief period. Supreme Court decisions in the Civil Rights Cases, Plessy v. Ferguson, and Hodges v. United States virtually assured that the Thirteenth Amendment would become a mere "paper guarantee."

II. Judicial Interpretation

A. Upholding Legislative Intent 1866–1871

During the first years of post-Civil War Reconstruction, court rulings conformed with the Reconstruction Congress's legislative intent. Judicial decisions reflected "the fundamentally new assumptions [of] ... a new world [in which] [t]he character of the nation, the role of federal power and ... the appropriate role of Congress underwent significant alterations." These early court decisions upheld federal enforcement of civil rights based on a Thirteenth Amendment badges-of-slavery analysis.

The first test case arose only one month after the passage of the Civil Rights Act of 1866. In United States v. Rhodes, Supreme Court Justice Noah Swayne, sitting as the designated Circuit Court Justice in Kentucky, upheld a federal removal prosecution under the 1866 Act. In Rhodes, three white defendants were charged with burglary and conspiracy to commit burglary against an African American family in Kentucky. Like most pro-slavery states, Kentucky's testimonial rule disqualified African Americans from testifying against whites.

Recalling how such rules had permitted "[c]rimes of the deepest dye [to be] committed by white men with impunity," Justice Swayne ruled that federal prosecution was necessary to achieve the 1866 Act's principle objective of providing just treatment for African American victims of crime. Justice Swayne believed that Congress's power to pass the 1866 Act emanated from the Thirteenth Amendment's guarantee of freedom. This guarantee, Justice Swayne reasoned, included all citizenship rights

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83 109 U.S. 3 (1883).
84 163 U.S. 537 (1896).
85 203 U.S. 1 (1906).
86 See infra note 92.
87 Soifer, Protecting Civil Rights, supra note 16, at 686.
88 27 F. Cas. 785 (C.C.D. Ky. 1866).
89 Section three of the 1866 Act provided for federal removal "of all cases ... affecting persons who are denied or cannot enforce in the [state] courts ... any of the rights secured to them by the first section of this act [guaranteeing enumerated rights]." Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.
90 Rhodes, 27 F. Cas. at 787.
such as the right to testify. Given whites’ continued opposition to granting African Americans equality under the law, Swayne believed that without the 1866 Act, the Amendment’s “simple abolition [of slavery] . . . would have been a phantom of delusion . . . . [S]lavery would have been in effect restored.” \(^{91}\) Justice Swayne’s decision in *Rhodes* upheld Congress’s constitutional authority to give full effect to the abolition of slavery under the Thirteenth Amendment. \(^{92}\)

The following year, Chief Justice Chase, sitting as a Circuit Court Judge in Maryland, also upheld the 1866 Act’s constitutionality. In *In re Turner*, \(^{93}\) the Chief Justice struck down an apprenticeship contract requiring the African American petitioner to work for her former master until age eighteen. \(^{94}\) He found that the alleged apprenticeship constituted involuntary servitude and violated the Thirteenth Amendment. \(^{95}\) He also ruled that the contract violated equal protection rights under section one of the 1866 Act because it did not contain the same financial and educational benefits to which white apprentices were entitled under the Maryland indenture statute. \(^{96}\)

Between 1866 and 1872, other federal and state court rulings \(^{97}\) reaffirmed Congress’s legislative power under the Thirteenth Amendment as well as the 1866 Act’s objective of eliminating the badges and incidents

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\(^{91}\) *Id.* at 794.

\(^{92}\) *Id.* at 793. Justice Swayne’s opinion captured “the spirit in which the amendment is to be interpreted.” *Id.* at 792. He stated that legislators were driven by “a strong sense of justice to an unoffending and long-suffering people.” *Id.* at 788. He reminded readers that at the close of the rebellion, 200,000 African Americans had become Union soldiers and that they had fought for more than an empty promise. *Id.* at 794.

\(^{93}\) 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247).

\(^{94}\) While Maryland prohibited slavery and involuntary servitude in its 1864 constitution, its state law still allowed for indentured apprenticeships. However, the terms of apprenticeships for African Americans, like Ms. Turner, were substantially different from those for whites: Ms. Turner’s contract did not require the master to educate her; it allowed her master to transfer her at will; and she was regarded as his property. For a more complete discussion of Chief Justice Chase’s decision in *In re Turner*, see Robert J. Kaczorowski, *The Chase Court and Fundamental Rights: A Watershed in American Constitutionalism*, 21 N. Ky. L. Rev. 151 (1993).

\(^{95}\) *In re Turner*, 24 F. Cas. at 339.

\(^{96}\) *Id.*

of slavery. This brief period represents the high water mark for achieving the central objective of the Thirteenth Amendment and Reconstruction legislation—empowering the federal government to abolish slavery’s vestiges and to protect freedom and citizenship rights.

B. Judicial Undermining of the Thirteenth Amendment

Supreme Court decisions between 1872 and 1876 laid the foundation for the Court’s “counterrevolution” against Reconstruction federalism. This counterrevolution culminated in 1883 in the Civil Rights Cases, in which the Court’s view of the Thirteenth Amendment shifted back to a pre-Reconstruction concept of federalism, requiring the national government to defer to local governments’ enforcement of civil rights laws. Thirteen years later in Plessy v. Ferguson, the Court delivered another devastating blow to the Thirteenth Amendment, rendering it obsolete except in situations involving compulsory exploitation of labor and peonage.

1. Supreme Court Decisions 1872–1876

The evolution of Thirteenth Amendment jurisprudence, from the badges-of-slavery analysis to the narrow interpretations that defeated the Amendment’s original purpose and confined it for the next 100 years, began with Blyew v. United States. Even though the Court’s decision upheld the 1866 Act’s constitutionality, it reversed the defendants’ federal convictions and undermined federal civil rights removal jurisdiction. Despite the Blyew Court’s remarkably tortured reasoning, the decision endured to restrict severely the use of federal removal prosecutions in instances when states failed to protect African American victims of racially motivated violence.

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98 Robert Goldstein, Blyew: Variations on a Jurisdictional Theme, 41 STAN. L. REV. 469, 474–75 (1989). Professor Goldstein agrees with Professor Kaczorowski’s conclusion that Blyew represents the beginning of Supreme Court decisions that limited the federal government’s responsibilities in civil rights enforcement. KACZOROWSKI, supra note 97, at 140.

99 109 U.S. 3 (1883).

100 163 U.S. 537 (1896).

101 80 U.S. (13 Wall.) 581 (1872). Most scholars have overlooked the significance of Blyew. Professors Goldstein and Kaczorowski represent the exception and provide an in-depth analysis of the decision. See supra note 98. Virtually no constitutional law text includes the Blyew decision. But see Theodore Eisenberg, Civil Rights Legislation (3d ed. 1991).

102 Federal removal remained unavailable for state criminal defendants until 1966 when the Court reexamined the narrow interpretation it had given to federal statute 28 U.S.C. § 1443 (1966). See Georgia v. Rachel, 384 U.S. 780 (1966) (permitting removal after defendants showed that state criminal prosecutions denied their federal right to use
In *Blyew*, two white defendants were convicted for murdering an African American married couple, their son, and his grandmother. Kentucky’s anti-testimonial rule disqualified the two surviving family witnesses from testifying against the white defendants. As in *Rhodes*, federal prosecutors invoked the 1866 Act’s removal remedy and obtained convictions in federal court. On appeal, the defendants attacked the federal court’s jurisdiction. They argued that the federal removal statute could not be invoked in every case where a state’s evidentiary rules barred African Americans from testifying against a white person, but could only be triggered by an “affected” party of record, i.e., either the government or the accused, not African Americans generally.

United States Solicitor General Bristow, the prosecutor who first used the removal remedy in *Rhodes*, argued that the obvious intent behind the Thirteenth Amendment and the 1866 Act was to empower Congress to remove an existing evil; namely, state laws prohibiting African Americans from testifying against white litigants. Solicitor Bristow reminded the *Blyew* Court that legislators had included the right to testify in the 1866 Act because that right is among those essential to the enjoyment of freedom.

The Supreme Court majority rejected the Solicitor General’s position and reversed the defendants’ convictions. Although the Court acknowledged that Congress passed the 1866 Act to overcome slavery’s legacy of denying African Americans due process protections, the majority decision ignored legislators’ judgment that federal removal was necessary to vindicate the rights of African American crime victims. Instead, the Court developed an extremely narrow and technical statutory interpretation. Distinguishing Justice Swayne’s ruling in *Rhodes*, which had concluded that removal was necessary to give full effect to the national will in abolishing slavery, the *Blyew* majority found that the removal remedy applied only

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104 See supra notes 88–92 and accompanying text.
105 *Blyew*, 80 U.S. at 588.
107 *Id.* “So long as he is denied the right to testify against those who violate his person or his property he has no protection, and is denied the power to defend his own freedom.” *Blyew*, 80 U.S. at 589 (reciting arguments of Solicitor General).
to "persons in existence,"109 not to the dead victims who, in any case, would not benefit from the remedy.110 In addition, witnesses had no standing to challenge the rule prohibiting testimony from African Americans.111 The Court majority ignored the obvious consequences of its decision: White Kentuckians could continue to kill African Americans with impunity as long as the only witnesses were also African American.

Dissenting Justices Swayne and Bradley characterized the majority's "view of the law [as] too narrow, too technical and too forgetful of the liberal objects it had in view."112 The dissent explained that Congress's main objective in proposing the Thirteenth Amendment and the 1866 Act was to provide African Americans with the same rights and privileges as other citizens.113 Reconstruction legislators had intended that the Amendment's broad freedom guarantee would remove the badges and incidents of slavery, not merely strike off "the fetters of the slave."114 The dissenters believed that the state's failure or inability to punish those responsible for murdering an African American affected the entire African American community. They concluded that depriving a whole community of the right to testify "brand[ed] [African Americans] with a badge of slavery . . . and [left] their lives, their families and their property unprotected by law."115

The Blyew decision illustrates how the Supreme Court defeated Congress's attempt to eliminate one of slavery's primary badges by narrowly interpreting the 1866 Act's removal provision. Blyew initiated the judicial retreat from the Reconstruction goal of liberating African Americans from slavery and inferior citizenship status.

The Supreme Court continued this retreat in United States v. Cruikshank.116 In Cruikshank,117 the Supreme Court upheld the reversal of conspir-
acy convictions against three Ku Klux Klan defendants in “[t]he bloodiest single instance of racial carnage in the Reconstruction era.” In dismissing the indictment on grounds of vagueness, the Court excluded any mention of the Thirteenth Amendment. It ignored Justice Bradley’s lower court opinion, in which he reasoned that the Thirteenth Amendment provided constitutional authority for federal prosecution of racially motivated violence against African Americans. The Court also failed to comment on Justice Bradley’s distinction between ordinary crimes, which he saw as within the state’s exclusive jurisdiction, and crimes of race, which he regarded as within the Thirteenth Amendment’s guarantee of equality before the law.

While Blyew and Cruikshank eviserated the Amendment’s grant of federal authority over race-related prosecutions, the Slaughter-House Cases further constrained the application of the Thirteenth Amendment by narrowly defining involuntary servitude. In the Slaughter-House Cases, white butchers sought to invalidate a Louisiana law that granted monopoly rights to a slaughterhouse corporation and denied the butchers the use of their own land and property to pursue an occupation. They argued that it violated the Thirteenth Amendment’s prohibition against involuntary servitude.

Minimizing the Thirteenth Amendment’s “grand yet simple declaration of the personal freedom of all the human race,” the Court’s 5-4

118 Foner, supra note 58, at 437. Following a disputed governor’s election in Louisiana, white supremacists attacked and overwhelmed the Black Republican militia in an effort to install the Democratic nominee. When the outnumbered troops finally surrendered, the white supremacists mutilated and killed 60 soldiers. A federal grand jury indicted 97 individuals, charging each with murder and conspiracy. Of the nine persons who were actually tried, however, only three were convicted of conspiracy. Kaczorowski, supra note 97, at 175-78.

119 United States v. Cruikshank, 25 F. Cas. 707 (C.C.D. La. 1874) (No. 14,897), aff’d, 92 U.S. 542 (1875). Justice Bradley argued that the Thirteenth Amendment’s guarantee of freedom authorized criminal prosecutions of those who violated citizens’ rights and privileges, in order to eliminate the badge of servitude and to guarantee equality before the law. Id. at 711.

120 Id. at 711. Justice Bradley believed that crimes directed against a victim because of race were federally protected because the perpetrators sought to deprive African Americans’ enjoyment of citizenship rights and of equal protection of the laws. Id. at 712. Justice Bradley described whites’ racially motivated violence as within federal jurisdiction to prosecute: “The war on race, whether it assumes the dimensions of civil strife or domestic violence, whether carried on in a guerilla or predatory form, or by private combinations, or even by private outrage or intimidation, . . . may be punished by the laws and in the courts of the United States.” Id. at 714.

121 86 U.S. (16 Wall.) 36 (1873).

122 The plaintiffs argued that the monopoly arrangement provided the corporation with special privileges, denied the butchers their right to labor and to compete freely, and forced them “to pursue only one trade or calling, and only in one locality of the country.” Slaughter-House, 83 U.S. at 90.

123 Id. at 69. The Court acknowledged the “one pervading purpose” of all the Reconstruction Amendments: “the freedom of the slave race, the security and firm establishment of
decision rejected the idea that granting a monopoly license to a corporation implicated liberty. The Court found that using "a microscopic search [to] endeavor to find [in the Thirteenth Amendment] a reference to servitudes, which may have been attached to property . . . requires an effort." The decision's sweeping language limited the Amendment's prohibition against involuntary servitude to the abolishment of chattel slavery.

Each of these three decisions evidenced the Court's narrowing of the Thirteenth Amendment. Several years after Reconstruction's formal ending, the Court further curtailed the power of the Thirteenth Amendment in the Civil Rights Cases. By declaring that Congress did not have the authority to eliminate slavery's badges and incidents, the Court rendered the Amendment moribund.

that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him." Id. at 71. In dissent, Supreme Court Justice Field stated that the Thirteenth Amendment "was intended to make everyone born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life without other restraint than such as affects all others . . . ." Id. at 90. Justice Field declared that "to labor even for his own benefit only in one direction . . . would be almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude." Id. at 90–91. In the lower court decision, the Slaughter-House Cases, 15 F. Cas. 649 (C.C.D. La. 1870), Supreme Court Justice Joseph Bradley and Circuit Court Judge Woods struck down the state law as violating a citizen's right under the 1866 Act to pursue an occupation and under the Fourteenth Amendment's privileges and immunities clause. Id. at 655.

Slaughter-House, 83 U.S. at 69.

Criminal prosecutions of persons holding others in conditions of involuntary servitude has been the most frequent application of the Thirteenth Amendment's protection. See Judy Rakowsky, Quincy Man Sentenced for Enslavement, BOSTON GLOBE, June 1, 1994, at 26; Shapiro, Involuntary Servitude: The Need for a More Flexible Approach, 19 RUTGERS L. REV. 65 (1964); Note, United States v. Kozminski: Involuntary Servitude—A Standard at Last, 20 U. TOL. L. REV. 1023 (1989). The Supreme Court's Slaughter-House decision suggested that the prohibition should apply only when the condition was analogous to African slavery. 83 U.S. at 69. Consequently, subsequent Court decisions relied on Slaughter-House to heighten the evidentiary standard for determining whether individuals were being held in involuntary servitude. See Butler v. Perry, 240 U.S. 328, 332 (1916) ("involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results."); Bailey v. Alabama, 219 U.S. 219, 241 (1911) ("control by which the personal service of one man is disposed of or coerced for another's benefit . . . is the essence of involuntary servitude."); Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989, 1000 (3d Cir. 1993) ("confining the Thirteenth Amendment to those situations that are truly 'akin to African slavery'"). The Supreme Court recently established a stringent standard for prosecuting involuntary servitude cases: evidence of use, or threatened use, of physical or legal coercion must be proven. United States v. Kozminski, 821 F.2d 1186, 1192 (6th Cir. 1987), aff'd, 487 U.S. 931 (1988).

127 109 U.S. 3 (1883). Though constitutional law texts include the Court's decision in the Civil Rights Cases, they rarely discuss the opinion's Thirteenth Amendment analysis. See supra note 4.
2. The Civil Rights Cases

The Reconstruction Congress's final piece of legislation, the Civil Rights Act of 1875 ("the 1875 Act"), prohibited race discrimination in the use and enjoyment of public accommodations\(^{128}\) and in jury selection.\(^{129}\) The Supreme Court's decision in the **Civil Rights Cases** declared the 1875 Act unconstitutional,\(^{130}\) thus finalizing the "juridical rationale for the abdication of national responsibility"\(^{131}\) for civil rights enforcement. The eight-Justice majority's narrowing of Congress's Thirteenth Amendment authority undermined Reconstruction's central premise: that federal power was necessary to ensure citizens' ability to exercise their constitutional rights in the face of discriminatory state laws and social custom. As a result, the Thirteenth Amendment lay dormant until 1968, when the Supreme Court decided **Jones v. Alfred H. Mayer Co.**\(^{132}\)

In the **Civil Rights Cases**, Chief Justice Bradley,\(^{133}\) writing for the majority, and Justice Harlan, writing in dissent, agreed that the Amendment's prohibition against slavery extended beyond removing slaves' shackles. They both recognized that the Amendment "establish[ed] and decreed universal civil and political freedom,"\(^{134}\) and was intended to "vindicate those fundamental rights which appertain to the essence of citizenship . . . ."\(^{135}\) They also affirmed that the Thirteenth Amendment

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\(^{128}\) Civil Rights Act of 1875, ch. 114, §§ 1–2, 18 Stat. 335 (declared unconstitutional by the Civil Rights Cases, 109 U.S. 3 (1883)).

\(^{129}\) Section four of the 1875 Act criminalized the disqualification of citizens from jury duty "on account of race, color or previous condition of servitude." Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336–37. Supreme Court decisions in **Ex parte Virginia**, 100 U.S. 339 (1879), and **Strader v. West Virginia**, 100 U.S. 303 (1879), upheld the Act's constitutionality. But the Supreme Court's decision in **Virginia v. Rives**, 100 U.S. 313, 320 (1879), virtually eliminated the use of federal removal whenever jury exclusion resulted from a state official's practices, rather than from a state's law or "legislative impediments." See **Colbert**, supra note 21, at 65–70.

\(^{130}\) The **Civil Rights Cases** involved the consolidation of four federal civil prosecutions and one federal criminal prosecution brought under the first two sections of the 1875 Act outlawing discrimination in the use and enjoyment of public accommodations. 109 U.S. at 4–5.

\(^{131}\) **Kinoy, Constitutional Right, supra** note 16, at 397. A minority of scholars view the **Civil Rights Cases** majority opinion more benignly. They criticize colleagues for "overstating" the claim that the Court's decision undermined the legislative intent to restructure antebellum federalism. See, e.g., **Earl Maltz, The Civil Rights Act and the Civil Rights Cases: Congress, Court, and Constitution**, 44 U. FLA. L. REV. 605, 606, 635 (1992).

\(^{132}\) 392 U.S. 409 (1968); see infra notes 184–199 and accompanying text.

\(^{133}\) Historians have described Chief Justice Bradley's role in casting the decisive vote in the disputed 1876 Presidential election as a member of the Electoral Commission. The results led to federal troops' removal from the South and political power returned to states' rights forces. For a detailed account of the "Compromise" of 1877, see **C. Vann Woodward, Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction** 188–96 (1956).

\(^{134}\) The **Civil Rights Cases**, 109 U.S. at 20.

\(^{135}\) Id. at 22.
empowered Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."\textsuperscript{136}

Beyond this, however, the majority’s analysis had little in common with that of the dissent. The Bradley majority\textsuperscript{137} viewed slavery’s main underpinning as the status of bondage and completely ignored the Supreme Court’s 1857 decision in \textit{Dred Scott v Sandford}.\textsuperscript{138} \textit{Dred Scott} had provided a sweeping rationale for denying African Americans’ citizenship rights and for legitimizing slaveowners’ property rights.\textsuperscript{139} The \textit{Dred Scott} opinion presented extensive historical proof that slavery’s foundation had been fortified by racially discriminatory laws and treatment.\textsuperscript{140} It also maintained that racial distinctions stigmatized free African Americans and justified denying them citizenship rights.\textsuperscript{141} The opinion had joined free and enslaved African Americans together in arguing that the “stigma, of the deepest degradation, was fixed upon the whole race.”\textsuperscript{142} This historical account of legal recognition that slavery entailed much more than a status of bondage was completely ignored by the majority.

In the \textit{Civil Rights Cases}, the Bradley majority offered a revised version of antebellum history. Justice Bradley wrote that before the abolition of slavery, “thousands of free colored people . . . enjoy[ed] all the essential rights of life, liberty and property the same as white citizens.”\textsuperscript{143} Without any supporting references, Bradley’s historical account asserted that “no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges

\textsuperscript{136}\textit{Id.} at 20. While declaring that legislation would likely be necessary to enforce the Amendment’s guarantee, the Court avoided deciding the nature of the “self-executing” rights included in the Amendment’s first section, which prohibits slavery and involuntary servitude. \textit{See id.} at 35 (Harlan, J., dissenting).

\textsuperscript{137}For an account of Justice Bradley’s transformation from his authorship of an expansive Thirteenth Amendment interpretation in prior judicial opinions to the narrow view he assumed in the \textit{Civil Rights Cases}, see John A. Scott, \textit{Justice Bradley’s Evolving Concept of the Fourteenth Amendment From the Slaughter-House Cases to the Civil Rights Cases}, 25 Rutgers L. Rev. 552 (1971).

\textsuperscript{138}60 U.S. (19 How.) 393 (1857).

\textsuperscript{139}In \textit{Dred Scott}, the Supreme Court denied an African American litigant the right to sue in federal court by finding that Congress did not have the constitutional power to grant citizenship rights to African Americans who were residing north of the 36° 30’ line. The Court summarized the nation’s prevailing sentiment toward African Americans: They had no rights that whites were “bound to respect.” 60 U.S. at 407.

\textsuperscript{140}In \textit{Dred Scott}, the Court used numerous examples of racially discriminatory colonial and post-revolutionary laws as proof that African Americans had been regarded as inferior and unfit to associate with whites. \textit{See, e.g., id.} at 408-16.

\textsuperscript{141}In \textit{Dred Scott}, Chief Justice Taney’s majority opinion pointed to discriminatory laws and practices as proof of the “enduring marks of inferiority and degradation” against the entire African race. \textit{Id.} at 416.

\textsuperscript{142}\textit{Id.} at 409. For a review of state laws and customs that made few distinctions between the rights afforded free and enslaved African Americans, see Colbert, \textit{supra} note 21, at 20–24, 29–31.

\textsuperscript{143}The \textit{Civil Rights Cases}, 109 U.S. 3 (1883).
enjoyed by white citizens." Justice Bradley's reasoning contradicted the huge body of evidence marshalled in *Dred Scott* to demonstrate that free African Americans were regarded as a subordinate class with no rights or privileges, except those that the government might choose to grant them. Because the Bradley majority did not believe that race discrimination affected the exercise of legal rights by free African Americans during slavery, they concluded that mere discriminatory acts were not badges of slavery. Slavery's "necessary incidents" were limited to the specific rights enumerated in the 1866 Act and to "[c]ompulsory service of the slave for the benefit of the master." Consequently, Justice Bradley found that the Thirteenth Amendment did not grant Congress the power to pass anti-discrimination laws such as the 1875 Act and that Congress had improperly determined that race discrimination was a badge or incident of slavery. He concluded that "[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination ...," such as refusing to allow African Americans the enjoyment and use of public accommodations.

Dissenting, Justice Harlan characterized the majority's decision as "narrow and artificial." He sharply criticized the majority for circumventing the Thirteenth Amendment's "substance and spirit." Justice Harlan argued that eliminating race discrimination in the use and enjoyment of public accommodations was a proper exercise of Congress's Thirteenth Amendment power to "uproot the institution of slavery wherever it existed ..." He further contended that the 1875 Act fell within Congress's power to remove "burdens and disabilities which constitute badges of slavery and servitude."

Justice Harlan explained that the discriminatory treatment of African Americans during slavery was rooted in the inferiority attached to their race. He understood that state laws or customs that discriminated on the basis of race, by denying African Americans free use and enjoyment of hotels, inns, theaters, and railroad trains, reinforced racial inferiority. For Justice Harlan, the Thirteenth Amendment's promise of universal

144 Id.
145 Id. at 404–05.
146 The Civil Rights Cases, 109 U.S. at 25.
147 Id. at 22.
148 Id.
149 Id. at 24. The Court also noted that "[w]hen a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws. . . ." Id. at 25.
150 Id. at 26 (Harlan, J., dissenting).
151 Id.
152 Id. at 34.
153 Id. at 35.
154 Id. at 36.
freedom necessarily involved protection against all race discrimination.\textsuperscript{155} But he stood alone in asserting that the Thirteenth Amendment prohibited race discrimination as a bedrock of slavery.

The \textit{Civil Rights Cases} provided the conceptual framework for eviscerating the Thirteenth Amendment and for denying its use as a source of congressional power for protecting fundamental citizenship rights. Subsequent Court decisions in \textit{Plessy v. Ferguson} \textsuperscript{156} and \textit{Hodges v. United States} \textsuperscript{157} completely gutted the Amendment’s substance and spirit, limiting its application to a dictionary definition of slavery.

3. \textit{Plessy v. Ferguson} and \textit{Hodges v. United States}

In the \textit{Civil Rights Cases}, the Supreme Court still unanimously agreed that the Thirteenth Amendment guaranteed universal civil and political freedom and the obliteration of slavery with all its badges and incidents.\textsuperscript{158} The majority specifically held that the Thirteenth Amendment nullified all state laws that establish or uphold slavery.\textsuperscript{159} Yet only a decade later, in \textit{Plessy v. Ferguson}, eight Justices could “not understand”\textsuperscript{160} why the plaintiff relied upon that Amendment to challenge Louisiana’s criminal law mandating the segregation of African Americans from white railway passengers.

The \textit{Plessy} Court declared that mandated segregation did not violate the Thirteenth Amendment because it did not “stamp[ ] the colored race with a badge of inferiority.”\textsuperscript{161} If African Americans felt otherwise, the majority proclaimed, it was “not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”\textsuperscript{162} Appearing oblivious to congressional intent and to segregation’s underpinning in slavery, the majority proclaimed that the drafters of the Thirteenth Amendment never intended that the abolition of slavery would require the prohibition of racially discriminatory state laws.\textsuperscript{163} The \textit{Plessy}

\textsuperscript{155} \textit{Id.} at 35–36.
\textsuperscript{156} 163 U.S. 537 (1896). Like the \textit{Civil Rights Cases}, virtually all constitutional law texts analyze \textit{Plessy v. Ferguson} as a Fourteenth Amendment case. See supra note 4. A WESTLAW search reveals that Justice Harlan’s dissent, urging a broad reading of the Thirteenth Amendment, was rarely cited prior to Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).
\textsuperscript{157} 203 U.S. 1 (1906).
\textsuperscript{158} 109 U.S. at 20.
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} 163 U.S. at 543.
\textsuperscript{161} \textit{Id.} at 551.
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} “[A] legal distinction . . . founded in the color of the two races . . . must always exist . . . [and] has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.” \textit{Id.} at 543.
Court concluded that the Thirteenth Amendment only applied to the compulsory exploitation of labor and peonage.164

Again Justice Harlan was the lone dissenting voice. He sought to revive the Thirteenth Amendment’s purpose of eliminating all burdens and disadvantages that persisted as remnants of slavery or servitude.165 Because the Louisiana statute compelled African Americans to sit separately from white passengers, Harlan understood that it was intended to reinforce their racial inferiority.166 Justice Harlan found that the Amendment prohibited “the deprivation of any right necessarily inhering in freedom”167 and concluded that the arbitrary separation of citizens on the basis of race was wholly inconsistent with the Amendment’s guarantee of freedom and equality before the law.168

It would be more than seventy years before Justice Harlan’s view was resurrected and accepted by a Supreme Court majority. His warning that Plessy would “in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case”169 proved to be remarkably prescient. In the period immediately following Plessy, thousands of whites joined lynch mobs against African Americans and received virtual immunity from criminal prosecution.170

The Court’s 1906 decision in Hodges v. United States171 reinforced official tolerance of such lawlessness by overturning the federal conviction of several white defendants who had used violence and threats to force African American workers to surrender their jobs.172 The seven-Jus-

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164 Justice Brown’s majority opinion restricted the Thirteenth Amendment’s reach considerably further than the Supreme Court’s decision in the Civil Rights Cases, 109 U.S. at 16–17. In Plessy, the Court declared that “[s]lavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services.” 163 U.S. at 542.

165 163 U.S. at 555 (Harlan, J., dissenting).

166 Harlan explained that “[e]very one knows that the statute in question had its origin in the purpose . . . to exclude colored people from coaches occupied by or assigned to white persons.” Id. at 557. He further observed that “the real meaning of such legislation” is “that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens . . . .” Id. at 560.

167 Id. at 555.

168 Id. at 562.

169 Id. at 559.

170 White mobs lynched more than 400 African Americans in the four-year period immediately following the Plessy decision; between 1900 and 1935, white mobs murdered over 2000 African Americans. See Robert L. Zangrando, The NAACP Crusade Against Lynching 1909–1950 6–7 (1980). Less than one percent of the thousands of white people who participated in these homicides were ever successfully prosecuted. James H. Chadbourn, Lynching and the Law 13 (1933); see also Colbert, supra note 21, at 78–79.

171 203 U.S. 1 (1906).

172 The federal prosecutors indicted the defendants under what is now 18 U.S.C. § 241 (1994):
tice majority held that the Thirteenth Amendment did not authorize such criminal prosecutions.

Justice Brewer’s majority opinion ignored the legislative history behind the Thirteenth Amendment and the 1866 Act and instead referred to Webster’s dictionary. The Court adopted a plain language rule that prohibited only the compulsory service of one person to another.\textsuperscript{173} With this definition, the Court rejected its prior view as well as Reconstruction legislators’ determination that federal legislation was necessary to eliminate slavery’s badges and incidents.\textsuperscript{174}

The Court’s interpretation was fueled by the general movement in favor of states’ rights. The Brewer opinion scoffed at the Thirteenth Amendment’s national protections and refused to consider whether the defendants’ actions were intended to maintain white supremacy or to reinforce African Americans’ racial inferiority and subjugation.\textsuperscript{175} Instead, the Court concluded that “no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery.”\textsuperscript{176}

Writing in dissent, Justices Harlan and Day referred extensively to prior Thirteenth Amendment decisions in which the Court had found that the Amendment guaranteed universal freedom and abolished the perpetuation of slavery’s badges and incidents.\textsuperscript{177} Both dissenting Justices con-

\begin{quote}
If two or more persons conspire to injure, oppress, threaten or intimidate any inhabitant of a State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than ten thousand dollars or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.
\end{quote}

\textit{Id.} In urging the Supreme Court to affirm the convictions, the prosecutors argued that the Thirteenth Amendment authorized such criminal prosecutions. "If the Nation has not the power at the very threshold to say to those who declare against this or other races, that as a race it shall not have one of the most essential rights of a free man, it is powerless indeed. The Government submits that it has that power. It was given to the Nation by the Thirteenth Amendment . . . ." 203 U.S. at 14.

\textsuperscript{173} 203 U.S. at 16.

\textsuperscript{174} See supra notes 134–136 and accompanying text.

\textsuperscript{175} The Court recognized that "one of the disabilities of slavery . . . was a lack of power to make or perform contracts, and that when these defendants . . . compelled the colored men . . . to desist from performing their contract they to that extent reduced those parties to a condition of slavery." 203 U.S. at 17. The majority held, however, that it was not the intent of the Thirteenth Amendment to denounce every act that was wrong if done to a free man but was justified as a condition of slavery.

\textsuperscript{176} Id. at 18.

\textsuperscript{177} The dissent quoted extensively from The Civil Rights Cases, 109 U.S. 3 (1883); see supra notes 150–155 and accompanying text; United States v. Cruikshank, 25 F.Cas. 707 (C.C.D. La. 1874), aff’d, 92 U.S. 542 (1875); Clyatt v. United States, 197 U.S. 207 (1905); as well as from the rights included in the 1866 Act.
sidered the defendants’ actions as falling squarely within the Amendment’s prohibitions.\textsuperscript{178} They recognized that liberty rights are implicated whenever citizens are denied employment opportunities because of their race. They further observed that one of the incidents of slavery at the time of the adoption of the Thirteenth Amendment was the prohibition against slaves entering into contracts.\textsuperscript{179} Justices Harlan and Day found that the majority’s holding paralyzed the federal government from prosecuting individuals who violently prevented citizens of color from earning a living. They concluded that their brethren’s interpretation was hostile to the freedom established by the supreme law of the land, and that it neutralized many of the declarations made by the Thirteenth Amendment.\textsuperscript{180}

The Supreme Court’s analysis in the \textit{Civil Rights Cases, Plessy,} and \textit{Hodges} limited the Amendment’s application to situations involving compulsory labor or violations of anti-peonage laws. Consistent with the Court’s restricted interpretation of the Thirteenth Amendment, legal scholars also paid scant attention to the Amendment’s intended reach. For most of the Amendment’s first century, scholars did not dispute the Supreme Court’s doctrine and dogmatically advanced two themes: first, the Amendment’s prohibitions applied only to situations involving enforced compulsory service; and second, the Amendment did not contain affirmative rights protections.\textsuperscript{181} In 1947, one commentator observed that “a refusal of the courts to give the Amendment its historical meaning has resulted in its retaining only a marginal importance today,” adding that the “restricted definition is now so well-settled that this Amendment offers no basis for Congressional anti-racial discrimination legislation.”\textsuperscript{182} Then, on the last day of the Warren Court, the Supreme Court decided \textit{Jones v. Alfred H. Mayer Company}\textsuperscript{183} and resurrected the Amendment’s nearly forgotten objectives.

\textsuperscript{178} "One who is shut up by superior or overpowering force, constantly present and threatening, [and prevented] from earning his living in a lawful way of his own choosing, is as much in a condition of involuntary servitude as if he were forcibly held in a condition of peonage." 203 U.S. at 34.
\textsuperscript{179} \textit{Id.} at 35.
\textsuperscript{180} \textit{Id.} at 37.
\textsuperscript{181} \textit{tenBrock, supra} note 23, at 172.
\textsuperscript{182} Note, \textit{The Reach of the Thirteenth Amendment}, 47 Col. L. Rev. 299, 300–01 (1947). “The relative rarity of litigation involving the Thirteenth Amendment should not be construed to indicate that it is unimportant, but rather that the social principle it embodies has been universally accepted.” \textit{Id.} at 306.
\textsuperscript{183} 392 U.S. 409 (1968).
C. The Thirteenth Amendment’s Revival—Jones v. Alfred H. Mayer
Company: The Thirteenth Amendment and Housing Discrimination

Jones v. Mayer was decided at the peak of the 1960s civil rights
movement, a movement inspired in part by the Supreme Court’s promise
of racial equality in Brown v. Board of Education\(^\text{184}\) and by southerners’
violent resistance against compliance. Similar to Reconstruction, this brief
period was one of the rare times when the national conscience seemed to
demand that African Americans be freed according to the original expan-
sive terms of the Thirteenth Amendment.\(^\text{185}\)

In Jones, a private developer had refused to sell a home to the Jones
family solely because they were African American.\(^\text{186}\) Based on the Court’s
prior decisions in the Civil Rights Cases, Plessy, and Hodges, such dis-
tribution appeared well beyond the reach of the Thirteenth Amendment.
Jones marked a startling departure from the Supreme Court’s limited
application of the Thirteenth Amendment to situations of compulsory
labor. For most of the Amendment’s life, the Court had disregarded Re-
construction legislators’ expressed intention that it was meant to guarantee
citizens’ universal freedom and equality.\(^\text{187}\) In Jones, however, the seven-
Justice majority revived the broad purpose of the Amendment articulated
during the century-old legislative debates. The Court repeatedly referred
to Reconstruction legislators’ passionate call for an expansive meaning of
freedom.

The Justices placed substantial reliance upon the Reconstruction leg-
islators’ awareness that the 1866 Act was necessary “to giv[e] real content
to the freedom guarantee of the Thirteenth Amendment.”\(^\text{188}\) They upheld
the federal statute’s guarantee of property rights that had been denied
African Americans during slavery and applied the 1866 Act to the Jones
family’s bid to purchase a home. In making this historical connection, the

\(^{184}\) 347 U.S. 483 (1954).

\(^{185}\) For a bibliography on the period often referred to as “America’s second Re-

\(^{186}\) In June 1965 Joseph Lee Jones and his wife attempted to purchase a new house in
a subdivision called Paddock Woods that was being developed by the Alfred H. Mayer
Corporation. Jones v. Mayer, 379 F.2d 33, 35 (8th Cir. 1967). The defendants, through
their agents, refused to consider the Jones’ application, because it was defendants’ general
policy not to sell homes to African Americans. The Joneses filed suit, alleging violation
accommodations); and the Thirteenth and Fourteenth Amendments. The defense countered
by stating that the plaintiffs did not meet the Fourteenth Amendment state action require-
ment and that the Thirteenth Amendment and federal statutes did not apply because of the
Supreme Court’s ruling in Hudr v. Hodge, 334 U.S. 24 (1948).

\(^{187}\) See supra part I.B. Legislators supporting the Thirteenth Amendment did not
explain the full extent of “universal freedom” rights. They passed the 1866 Act to delineate
rights that they considered fundamental to the meaning of freedom and citizenship. See
supra notes 71–76 and accompanying text.

\(^{188}\) Jones, 392 U.S. at 433.
Court recognized that private, as well as public, discriminatory acts reinforce African Americans' presumed racial inferiority.

In deciding Jones on Thirteenth rather than Fourteenth Amendment grounds, the Court emphasized a citizen's fundamental right to purchase a home\(^ {189} \) rather than the seller’s right to dispose of property as he chooses. Under the Fourteenth Amendment, relief would have required proof of state action—a difficult burden to sustain.\(^ {190} \) Instead, the Jones Court considered whether private acts of housing discrimination were connected to past segregation laws and customs that limited where African Americans could live and whether they could own property. The Justices viewed the private race discrimination that blocked many African Americans from moving to all-white communities as badges of slavery that were linked to slavery's denial of property rights.\(^ {191} \) They also viewed housing segregation patterns that resulted in ghettoizing African Americans as "relic[s] of slavery."\(^ {192} \) Following Jones, housing discrimination law incorporated an understanding of racism in the nation’s history.\(^ {193} \)

The constitutional analysis in Jones also confirmed that Justice Harlan’s Thirteenth Amendment analysis had been correct and that Congress had the power to pass legislation to enforce fully the Amendment’s prohibition.\(^ {194} \) Jones’s repeated references to the original debates reminded the nation that continued vigilance and legislative action are necessary "to prevent [the Thirteenth Amendment] from remaining a dead letter upon the constitutional pages of this country."\(^ {195} \)

\(^ {189} \) 392 U.S. at 441.
\(^ {191} \) "Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes." Jones, 392 U.S. at 441–42.
\(^ {192} \) Id. at 443.
\(^ {193} \) See, e.g., United States v. Hayward, 6 F.3d 1241 (7th Cir. 1993), cert. denied, 114 S. Ct. 1369, reh'g denied, 114 S. Ct. 1872 (1994) (criminalization of cross burning is a proper exercise of the government’s power under the Thirteenth Amendment to eradicate all incidents and badges of slavery and does not violate defendants’ free speech rights); Barrick Realty, Inc. v. City of Gary, 491 F.2d 161 (7th Cir. 1974) (holding the right to open housing means more than the right to move from an old ghetto to a new ghetto); United States v. Hunter, 459 F.2d 205 (4th Cir. 1972) (holding 42 U.S.C. §§ 3601–3604 was designed to provide fair housing throughout the nation and is valid exercise of congressional power under this Amendment to eliminate badges and incidents of slavery).
\(^ {194} \) See supra notes 150–153 and accompanying text.

Jones explicitly overruled the Supreme Court’s decision in Hodges v. United States, 203 U.S. 1 (1906). In a footnote, the Jones Court stated: "The conclusion of the majority in Hodges rested on a concept of congressional power under the Thirteenth Amendment . . . incompatible with the history and purpose of the Amendment itself." Jones, 392 U.S. at 441 n.78.

The *Jones* decision provided scholars with immediate intellectual grist for urging that the Amendment itself, without any ancillary legislation, could be used to challenge racial inequality. Some speculated that the Court's constitutional analysis would also apply to other relics of slavery. While these scholars envisioned *Jones*'s construction of the Thirteenth Amendment as a powerful weapon for fighting racial discrimination, other commentators criticized the Court for overreaching and breaching its proper constitutional role.

After *Jones*, a newly constituted Supreme Court upheld anti-discrimination claims against private defendants. However, the Court declined to develop further the badges of slavery analysis and to apply it to other forms of race discrimination. In *Runyon v. McCrory*, the Court followed *Jones*’ legislative history and applied the 1866 Act’s contract rights guarantee to void a private school’s racially discriminatory admissions policy. Yet Justice White reiterated in dissent that the Act was meant to apply only to state action and not to an individual’s discriminatory conduct.

Thirteen years later, in *Patterson v. McLean Credit Union*, the Court decided to reconsider whether *Runyon*’s (and *Jones*'s) interpretation of the 1866 Act’s legislative history had been mistaken. A month after the oral argument in the case, the Court asked for briefing and argument about whether *Runyon* should be overruled. By 1989, due to changes in its composition, the Court viewed civil rights issues with hostility.

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196 The Court’s decision focused on the Amendment’s second clause, which empowered Congress to pass laws necessary for abolishing slavery’s badges and incidents. It left unanswered the meaning of freedom rights contained in the Amendment’s self-executing first clause. 392 U.S. at 439 (“[W]hether or not the Amendment itself did any more than that [is] . . . a question not involved in this case.”) (citing The Civil Rights Cases, 109 U. S. 3, 20 (1883)).

197 See supra note 16.

198 See *Kinoy, Historic Step*, supra note 16, at 479.

199 See supra note 12.

200 The Court upheld claims that African American plaintiffs were discriminated against on the basis of race when they asserted property claims, see Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), and contract rights. Tillman v. Wheaton-Haven Recreation Ass’n, Inc., 410 U.S. 431 (1973).

201 427 U.S. 169 (1976). In *Runyon*, a private school that did not receive public funding denied admission to an African American and a Latino child. School officials informed the parents that their children were denied admission because of their race.

202 The Court stated that the petitioner's view that section 1981 did not reach private acts of racial discrimination was "wholly inconsistent with *Jones* interpretation of the legislative history of section one of the Civil Rights Act of 1866." *Id.* at 173.

203 Justice White expressed a view, first stated when he joined Justice Harlan’s dissent in *Jones*, 392 U.S. at 449–50, that the legislative debates accompanying the 1866 Act do not establish a congressional intent to apply the Thirteenth Amendment to purely private action. *Runyon*, 427 U.S. at 192.


206 Supreme Court decisions in six cases decided between May and June 1989...
Historians, elected officials, and civil rights law enforcement offices rushed to defend the Court’s rulings and interpretation of legislative history in Runyon and Jones. They eventually persuaded the Justices to reject unanimously Justice White’s prior concern and to affirm that the Thirteenth Amendment empowers Congress to legislate against private acts of racial discrimination that perpetuate slavery’s badges and incidents.

III. The Thirteenth Amendment’s Current Relevance

Since the Patterson decision, scholars have begun exploring the Thirteenth Amendment’s potential for addressing slavery’s remaining badges and incidents and for applying the Amendment’s prohibition against slavery and involuntary servitude to modern conditions. This section presents an analysis of how the Thirteenth Amendment can be applied to three new areas: employment discrimination and affirmative action, jury selection and peremptory challenges, and capital crimes and the death penalty. Finally, this section reviews additional Thirteenth Amendment scholarship and explains the importance of meaningful discussion of the Thirteenth Amendment in legal education.

A. Williams v. City of New Orleans: Employment Discrimination and Affirmative Action

The Supreme Court recognizes the constitutionality of some forms of affirmative action, but it has long been a controversial issue, sharply dividing the Justices. Decisions concerning employment discrimination usually overlook the Thirteenth Amendment and instead rely almost


207 Sixty United States Senators, 47 state attorneys general, the American Bar Association, prominent historians, and over 100 civil rights, religious, and civic groups filed amicus briefs and urged the Court not to overrule Runyon. Stuart Taylor Jr., High Court Getting Unusual Pleas Not to Reverse Key Rights Ruling, N.Y. TIMES, June 24, 1988, at 1. Historians also submitted a brief, arguing that the Thirteenth Amendment empowered Congress to abolish private discrimination. Amicus Curiae Brief of Eric Foner, John H. Franklin, Louis R. Harland, Stanley N. Katz, Leon F. Litwack, C. Vann Woodward, and Mary Frances Berry for Appellant, Runyon v. McCrory, 427 U.S. 160 (1976).

208 The Court’s opinion read, “Runyon is entirely consistent with our society’s deep commitment to the eradication of discrimination based on a person’s race or the color of his or her skin.” Patterson, 491 U.S. at 174. See supra note 13, 26–27.

209 While Court decisions have not developed a Thirteenth Amendment analysis, some Justices have referred to the Amendment as a source of constitutional authority for federal legislation or have made references that would support a Thirteenth Amendment analysis. See Fullilove v. Kluczniak, 448 U.S. 448, 463 (1980) (Burger, C.J.) (“The legislative objectives of the MBE provision must be considered against the background of the . . . century-old promise of equality of economic opportunity.”); id. at 500 (Powell, J.,
exclusively upon the Fourteenth Amendment equal protection clause and Title VII statutory considerations.

Under an equal protection approach, the Court has eviscerated the potential of the Fourteenth Amendment and Title VII remedies to secure substantive equality for African Americans by turning its back on this nation’s history of racial oppression and focusing solely on abstract principles. First, the Court focuses on the principle of “color-blindness,” rather than racial equality, as the goal of equal protection. The principle of color-blindness for some justices has become more important than achieving racial equality:

The difficulty of overcoming the effects of past discrimination is nothing compared with the difficulty of eradicating from our

concurring) (Congress has the power to enforce the Thirteenth Amendment through legislation such as the federal “set-aside” law); United Steel Workers of America v. Weber, 443 U.S. 193, 204 (1979) (Brennan, Stewart, White, Marshall, Blackmun, JJ.) (“Congress designed Title VII...to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history ...”); University of California Regents v. Bakke, 438 U.S. 265, 400-02 (1978) (Marshall, J., concurring) (providing an historic context for understanding the exclusion of African Americans from positions of influence).

200 An equal protection analysis would first consider the standard of review to be applied to a racial classification, strict or intermediate scrutiny. At the time Williams v. City of New Orleans, 729 F.2d 1554 (5th Cir. 1984), was decided, a majority of Supreme Court Justices did not support either standard. Cf. Fullilove, 448 U.S. at 448 (Burger, Powell, and White, JJ.) (holding that any racial classification “must necessarily receive a most searching examination”); Bakke, 438 U.S. at 357 (Brennan, White, Marshall, and Blackmun, JJ.) (holding that strict scrutiny only applies to groups that have been historically subject to unequal treatment by the majority). Today, a majority of Justices follow a strict scrutiny standard for considering a state’s or municipality’s race-based affirmative action plan. See City of Richmond v. J.A. Croson, 488 U.S. 469 (1989) (finding a state set-aside plan unconstitutional under equal protection analysis). Consequently, a city’s affirmative action plan will be carefully scrutinized to determine that it meets a “compelling” governmental interest and is “narrowly tailored” toward meeting this objective. Adarand Constructors, Inc., v. Federico Pena, 16 F.3d 1527; 1994 U.S. App. LEXIS 2832 (holding that the Congressionally mandated Small Business Act met constitutional requirements under the Fullilove standard); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (holding that Congressionally mandated measures are constitutionally permissible if they satisfy an intermediate scrutiny standard). Fullilove, 448 U.S. at 448.

211 The Civil Rights Act of 1964, Title VII, section 42 U.S.C. § 2000e (1994). In reviewing Title VII affirmative action agreements, courts consider the efficacy of alternate remedies, the planned duration of the remedy, the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or workforce, and the availability of waiver provisions. Local 28, Sheet Metal Workers’ Int’l Ass’n v. Equal Employment Opportunity Comm’n, 478 U.S. 421 (1986).

212 See Croson, 488 U.S. 495 (O’Connor, J.) (“the ultimate goal of the equal protection clause is to eliminate entirely from government decision-making such irrelevant factors as a human being’s race.”) (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986)).

213 A color-blind equal protection approach considers race irrelevant and opts for racial neutrality in government decision-making. See id. at 519 (Kennedy, J., concurring). The approach will usually oppose any racial classification, id. at 520-521, and favors treating
society the source of these effects, which is the tendency—fatal to a nation such as ours—to classify and judge men and women on the basis of the... color of their skin (emphasis added).^{214}

Second, by ignoring this nation’s history of racism, the justices reframe the Reconstruction Amendments’ specific purpose of ending whites’ oppression of African Americans into a generalized prohibition of “race discrimination.”^{215} This abstracted conception of discrimination led the justices to oppose affirmative action on the grounds that it “discriminates” against innocent third parties^{216} predominantly white males who have benefited from this nation’s exclusionary employment policies. Current equal protection interpretation thereby rejects the historical justification for affirmative action remedies: a response to centuries of excluding people of color from educational opportunities and better-paying professional and skilled jobs.^{217}

In Williams v. City of New Orleans,^{218} six judges of the Fifth Circuit^{219} provided the constitutional and statutory blueprint for educators interested

each person on his or her individual merit rather than on the basis of group membership. *Id.* at 493.

^{214} *Id.* at 520 (Scalia, J., concurring).


The perpetrator perspective denies historical reality—in particular, the fact that we would never have fashioned antidiscrimination law had it not been for the specific historical oppression of particular races. Denial leads all too quickly to the startling claim of “ethnic fungibility”—the notion that each of us bears an “ethnicity” with an equivalent legal significance, and with an identical claim to protection against “discrimination,” despite the grossly disproportionate experience that generated the legal intervention in the first place. Thus, discrimination on the basis of “whiteness” gains the same disreputable status as discrimination against blacks, and efforts to improve conditions for historic victims of discrimination are struck down on grounds of “principle.”

*Id.* at 125.

^{216} Justice Powell’s opinion in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986), best describes this protective posture:

No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

*Id.* (emphasis in original).

^{217} Professor Aleinikoff describes “[m]odern antidiscrimination law—at least at the constitutional level—[as] largely becom[ing] a Fourteenth Amendment story about drastically curtailing the use of racial classifications.” Aleinikoff, supra note 22, at 1113.

^{218} 729 F.2d 1554 (5th Cir. 1984).

^{219} Authoried by Judge Minor Wisdom, the six-judge opinion contained both a concurring and dissenting ruling. It joined the plurality’s 9-4 majority opinion, which rejected the government’s narrow Title VII statutory interpretation. See infra note 222 and accom-
in demonstrating the stark difference between a Thirteenth Amendment approach and a more conventional equal protection approach. Williams involved a class action by African American police officers charging that racially discriminatory practices prevented African Americans from being hired and promoted as police officers within the New Orleans police department, as well as a consent decree calling for promotion of African American and white officers at an equal rate.\textsuperscript{220} The federal government intervened and argued that the proposed consent decree was impermissible under the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964.\textsuperscript{221} The Fifth Circuit's 9-4 plurality opinion\textsuperscript{222} avoided answering the constitutional challenge directly, but rejected the government's argument to limit Title VII relief to actual victims of discrimination, not an entire racial group. The plurality ruled, however, that the trial court did not abuse its discretion when it rejected the consent decree's proposed one-to-one promotional plan.

The plurality's 7-6 decision does not mention African Americans' historic exclusion from the New Orleans police force, a critical factor that convinced the City to enter the consent decree specifying the affirmative hiring and promotion plan. Judge Williams considered the Title VII consent decree from the perspective of individuals who were affected by the decree, but not represented in negotiations.\textsuperscript{223} In upholding the trial court's

\footnotesize{panying text. It also voiced a dissenting view from the plurality's 7-6 decision, which sustained the trial court's rejection of the consent decree's one-to-one promotion plan. See infra note 229 and accompanying text.}

\footnotesize{In 1973, the plaintiffs filed a class action suit. Just prior to trial in 1981, the parties entered a consent decree, which contained numerous affirmative provisions in the recruitment, hiring, and promotion process, including the creation of 44 supervisory positions to be filled by African American officers only. The Justice Department raised no objections to any of these provisions, targeting only the future promotion policy under which African Americans would be promoted at a rate equal to that of white officers whenever a supervisory position became available. Williams, 729 F.2d at 1554.}

\footnotesize{The government intervenors maintained that the Fourteenth Amendment limits Title VII relief to what is necessary to make whole the actual, identifiable victims of unlawful discrimination. It challenged the one-to-one promotion plan on this basis and on grounds that the one-to-one ratio did not serve a compelling interest. The Government also argued that section 706(g) of Title VII prohibited such "quotas" and was intended to provide relief only to an individual who could establish that she had been the victim of racial discrimination. Id.}

\footnotesize{The Fifth Circuit en banc plurality decision consisted of several opinions and a shifting consensus that was determined by the issue. Judge Williams, joined by two other judges, formed a bloc that carried the swing votes. Together with Judge Wisdom and the six judges who supported his opinion, this bloc formed a 9-4 plurality rejecting the government's narrow Title VII interpretation. When supported by four other judges who wrote two separate opinions opposing affirmative action relief, these three judges furnished the 7-6 majority necessary to uphold the trial court's rejection of the one-to-one promotion plan. Id.}

\footnotesize{Williams, 729 F.2d at 1560. Judge William's opinion emphasized that the trial court "bears full responsibility" for reviewing a consent decree to protect the interests of non-represented groups, such as whites, women, and Hispanics. Id. The opinion focused on the agreement's "discriminatory impact on third parties," id. at 1564, and it applied a "cautious, methodical approach to the use of percentage goals." Id. at 1561.}
discretion to reject the one-for-one promotion plan, the Williams opinion shared that court’s concern that the twelve-year plan would seriously jeopardize the career interests of non-African American “officers [who] . . . had never benefitted from the effect of past discrimination.”

Two separate opinions supported Judge Williams’ conclusion, while lending strong endorsement to the Justice Department’s opposition to affirmative action. Judges Gee and Garwood’s brief opinion argued that the Constitution does not authorize prospective, race-conscious remedies. Judge Higginbotham, joined by Judges Jolly and Garwood, expressed parallel views, arguing that equal protection principles prohibited “deal[ing] with entire races as though they were unified groups.” Judge Higginbotham insisted that such relief is limited to individual members who were themselves actual victims of discrimination and that equal protection principles did not extend constitutional relief to “the black race” for past discrimination.

Judge Wisdom wrote his dissent from a “race-conscious” perspective and contended that the one-for-one promotion plan should have survived the equal protection grounds, even if strict scrutiny were applied. What made the six-judge opinion exceptional, however, was its

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224 Id. at 1564. Judge William’s opinion affirmed the trial court’s finding that the 50% promotion target was not supported by sufficient evidence. 225 Williams was decided at a time when President Reagan’s Justice Department was mounting an aggressive challenge to undermine state and municipal affirmative action plans and consent agreements. Assistant Attorney General Bradford Reynolds, head of the Civil Rights Division, sent a letter to 50 cities, counties, and states seeking a modification of affirmative action consent decrees and court orders in employment discrimination cases, following the Supreme Court’s decision in Firefighters Local Union 1784 v. Stotts, 467 U.S. 561 (1984). States, Cities Urged to Alter Quota Decrees, L.A. TIMES, Mar. 2, 1985, at A1, A26. 226 Williams, 729 F.2d at 1565 (“Such quotas are desperate measures, [and] inherently invidious”). 227 Id. at 1568. 228 Id. at 1567. Judge Higginbotham said that Title VII’s legislative history does not support a duty to proportionally employ African American victims of discrimination in order to reach a specific quota. Id. 229 In developing a Thirteenth and Fourteenth Amendment argument, Judge Wisdom viewed the Constitution from a perspective in which the Thirteenth Amendment “contemplates, and the equal protection clause of the Fourteenth Amendment does not prohibit,” affirmative relief in the “appropriate case.” Id. at 1572–73. An appropriate case, in equal protection terms, is one in which “discrimination in a state governmental unit is systemwide, institutional, and the product of a long history of discrimination against blacks as a group to continue what amounts to a caste system.” Id. at 1573. 230 Judge Wisdom would have applied an intermediate standard of review, since the group claiming harm, predominantly white males, lacked the “traditional indicia of suspectness.” Id. at 1574 (citing University of California Regents v. Bakke, 438 U.S. 265, 356 (1978) (Brennan, J., dissenting)). However, he argued that the plan also met a strict scrutiny review: by curing past discrimination in the workplace and by improving law enforcement’s effectiveness, it served a compelling government interest. Moreover, the promotion plan was “closely tailored” to achieving these objectives. Id. at 1575. Wisdom wrote: “When the vice is in the system or the institution, the system or institution must
Thirteenth Amendment response to the Justice Department’s vigorous attack on affirmative action.

The Wisdom opinion argued that affirmative action was a necessary remedy in response to the Thirteenth Amendment’s prohibition against badges and incidents of slavery. The Wisdom opinion sought to “restore [it] to its rightful place in the constitutional scheme.”231 Building on the Supreme Court’s analysis in Jones v. Mayer, Judge Wisdom recognized that early judicial interpretation artificially limited the reach of the amendment.232 Through a Thirteenth Amendment lens, Congress clearly possesses the power to outlaw “practices that continue to burden blacks with badges of inferiority and to hinder the achievement of universal freedom.”233 From this perspective, Title VII’s anti-discrimination provision is a legislative effort to eliminate African Americans’ second-class and inferior status in the employment arena.

In using the Thirteenth Amendment to evaluate the one-for-one promotion plan, Wisdom used an analysis grounded in the nation’s history of racial oppression. The historical analysis demonstrated that a “cornerstone of slavery was the race-based denial of equal economic opportunities, especially in governmental jobs requiring the exercise of authority.”234 Wisdom then traced the post-Thirteenth Amendment period to the present in order to demonstrate the close link between slavery, the Black Codes and Jim Crowism and current discrimination against African Americans in the New Orleans Police Department.235 Judge Wisdom concluded that African Americans were “relegated to the bottom of the caste system, especially in terms of serving as police officers in the City of New Orleans.”236 Wisdom explained that by blocking African Americans from

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231 Id. at 1578.
232 Id. at 1578. The Wisdom opinion soundly rejected Chief Justice Bradley’s reasoning in the Civil Rights Cases, see supra notes 149–167, and adopted Justice Harlan’s view that the Thirteenth Amendment is not confined to the elimination of the “auction bloc,” but also extends to the badges and incidents of a slavery system. Williams, 729 F.2d at 1578.
233 Id.
234 Id. at 1579.
235 The Wisdom opinion detailed the history of African Americans serving as law enforcement officers in New Orleans between 1862 and 1877, and the dramatic changes that disqualified African Americans from becoming police officers for the 75 years following Reconstruction. Id. at 1579.
236 Id. at 1580.
exercising official authority over white people, these exclusionary practices perpetuated slavery's legacy of racial inequality.

Judge Wisdom's Thirteenth Amendment analysis provides a critical tool for understanding the persistence of racism in our society and for developing legal strategies to eliminate it. The Wisdom opinion concluded that:

[W]hen a present discriminatory practice upon blacks as a class can be linked with a discriminatory practice against blacks as a race under the slavery system, the present effect may be eradicated under the auspices of the thirteenth amendment.\textsuperscript{237}

Unlike the Supreme Court's current Fourteenth Amendment equal protection analysis, the Thirteenth Amendment analysis is race and class conscious; it focuses on the rights of a people and provides some hope that future generations of African Americans will be liberated from the badges of slavery.

\begin{center}
\textbf{B. Jury Selection and Peremptory Challenges}
\end{center}

Except for a brief period following the Thirteenth Amendment's ratification and the 1866 Act's passage, the all-white or predominantly white trial jury has been the prototype of American justice.\textsuperscript{238} During the past three centuries, lawyers have employed various methods to exclude African American jurors; from slavery's outright disqualification, to post-Reconstruction's disenfranchisement laws and racially discriminatory selection criteria. From 1935 to the present, the prosecutor's peremptory challenge replaced these exclusionary procedures and became the primary weapon for striking prospective African American jurors.\textsuperscript{239} Each of these methods has achieved the same result: denying African Americans the opportunity to serve as trial jurors and correspondingly denying litigants the opportunity to be judged by a mixed-race jury. States' exclusion of African

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\textsuperscript{237} Id. at 1577.

\textsuperscript{238} I describe the institution of the all-white jury more fully in an earlier article. See Colbert, \textit{supra} note 21, at 75--101. The multi-racial jury appeared in the southern trial courtroom beginning in 1867, and from 1870 to 1873, African American jurors played an important role in the Justice Department's successful prosecution of Ku Klux Klan defendants, \textit{Id.} at 53--56. By 1900, however, the all-white trial jury returned and dominated northern and southern courtrooms during most of this century, particularly in interracial cases. \textit{Id.} at 75--80.

\textsuperscript{239} Williams v. Mississippi, 170 U.S. 213 (1898) (upholding laws that could be used to discriminate); Colbert, \textit{supra} note 21, at 85--86. More recently, defendants in racially sensitive cases have used peremptory challenges to achieve a predominantly white jury. \textit{Id.} at 126--27 n.608; cf. McCollum v. Georgia, 112 S. Ct. 2348 (1992) (applying Batson equal protection standard to defendant's use of peremptory challenges); \textit{infra} notes 250, 251 and accompanying text.
American jurors from the jury box relied upon a rationale similar to one previously used to deny them citizenship rights: they were presumed intellectually and morally inferior to render judgments against whites.

Supreme Court decisions since 1935 have reversed convictions rendered by juries from which African Americans were excluded on Fourteenth Amendment grounds. However, the Court has usually overlooked the Thirteenth Amendment implications of such exclusion. An important exception was the Supreme Court's first decision on racially discriminatory jury selection procedures, *Strauder v. West Virginia*.

In *Strauder*, the Court reversed the defendant's conviction by ruling unconstitutional a West Virginia statute that systematically excluded African American jurors. Though explicitly decided on Fourteenth Amendment equal protection grounds, the *Strauder* Court addressed how jury exclusion on racial grounds perpetuated a badge and incident of slavery. The Court viewed African Americans' automatic disqualification from

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240 *In Dred Scott v. Sandford*, the Supreme Court unabashedly stated that "for more than a century before [they had] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . ." 60 U.S. 393, 404–05 (1857).

241 *Norris v. Alabama*, 294 U.S. 587 (1935) (the Court reversed convictions because of two Alabama counties' systematic practice of disqualifying African Americans from serving on juries over a 50-year period). *Norris* was the first time the Court had intervened in state jury selection since deciding *Neal v. Delaware*, 103 U.S. 370 (1881). In *Neal*, the Court intervened and rejected the "violent presumption" behind the total exclusion of blacks from jury service. *Id.* at 397. In the following decades, however, the Court's revised equal protection analysis resulted in reversals in other cases where African Americans had been automatically excluded from jury service. *See Colbert, supra* note 21, at 83–85. But the Court's Fourteenth Amendment analysis only required that states include token African American representation. In addition, the Court avoided addressing the consequences of the all-white jury system judging African American litigants. *Id.* at 84.

242 100 U.S. 303 (1880).

243 The defendant sought to remove his trial from state to federal court. *Id.* at 310–11. The contested West Virginia law stated that "[a]ll white male persons, who are twenty-one years of age, and not over sixty, and who are citizens of this state, shall be liable to serve as jurors, except as hereinafter provided." 1872–1873 W. Va. Acts, ch. 47, 102. *Strauder* contended that the disqualification of African American jurors violated the anti-discrimination jury selection provisions of the Civil Rights Act of 1875, which had been passed pursuant to the Fourteenth Amendment. These provisions subjected public officials to misdemeanor charges for disqualifying any citizen from serving as a juror because of his race. *Strauder* also relied on the statutory language in the Civil Rights Act of 1866, subsequently reenacted in sections 1977 and 1978 of the Enforcement Act of 1870, when he argued that the all-white state jury denied him the "full and equal benefit of all laws and proceedings . . . for the security of his person." 100 U.S. at 304, 311.

244 The Court held that, by excluding all persons of *Strauder*'s race, the West Virginia statute violated African American citizens' Fourteenth Amendment equal protection right to "exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." *Id.* at 308.
"participat[ing] in the administration of the law . . . [as] an assertion of their inferiority . . . ."245

From this perspective, African Americans’ systematic exclusion from serving as jurors violated the Thirteenth Amendment because it perpetuated the view that African Americans’ inferiority precluded them from sitting in judgment of other people and from being judged impartially as litigants. Strauder thus represents the rare occasion when a Supreme Court majority identified racial exclusion, in Thirteenth Amendment terms, as a badge of racial inferiority.

Since Strauder was decided, Supreme Court jury exclusion opinions have avoided reference to the Thirteenth Amendment, and consider racial exclusion a Fourteenth Amendment equal protection issue. For more than 100 years following the Supreme Court’s decision in Neal v. Delaware, the Fourteenth Amendment’s focus on explicit proof of discriminatory intent rather than the history and consequences of racial exclusion made constitutional challenges to racially discriminatory jury selection practices all but futile.246

Even when the Court modestly reformed its constitutional standard, state prosecutors found it relatively easy to maintain the all-white jury.247 For example, in Swain v. Alabama,248 the Court denied the defendant’s equal protection claim and upheld prosecutors’ reliance on the peremptory challenge to strike the only African American jurors in the trial venire. This result was contrary to the overwhelming evidence showing that the challenge had been responsible for maintaining the racially segregated trial jury.249

245 Id.
246 The Court’s analysis established a virtually insurmountable evidentiary burden for establishing an equal protection violation. Following the Supreme Court’s denial of federal removal relief in Virginia v. Rives, 100 U.S. 313 (1880), southern state courts consistently denied defendants’ equal protection challenges to the jury venire, unless officials admitted that African Americans were excluded from jury duty because of their race. Gilbert Thomas Stephenson, Race Distinctions in American Law 250 (1910).

The Court’s federalism concerns led it to defer to states’ systematic disqualification of African American jurors through racially discriminatory practices of state officials. See Rives, 100 U.S. at 321; see also Williams v. Mississippi, 170 U.S. 213 (1898); Smith v. Mississippi, 162 U.S. 593 (1896); Gibson v. Mississippi, 162 U.S. 565 (1896). Consequently, states reinstitutionalized the all-white jury during the remaining years of the 19th century. See Colbert, supra note 21, at 75–78.

247 For example, when the Supreme Court provided for equal protection challenges against the systematic exclusion of African American jurors in Norris v. Alabama, 294 U.S. 587 (1935), prosecutors responded by simply including a token African American in the trial venire and by using a peremptory challenge to strike the prospective juror. During the 50 years following Norris, the Court also refused to interfere with prosecutors’ racially discriminatory use of the peremptory challenge, despite being quite familiar with the ways in which the all-white trial jury had denied African American litigants impartial justice. See, e.g., Swain v. Alabama, 380 U.S. 202 (1965).

249 In affirming Swain’s conviction, Alabama’s highest court recognized the peremp-
During the next twenty years, defense lawyers were unable to meet Swain's "crippling burden of proof."250 Though the Court's 1986 reform in Batson v. Kentucky251 permits courts to scrutinize prosecutors' use of challenges to determine whether there was a race-neutral basis for striking a juror,252 the Court's equal protection remedy remains largely ineffective: it still permits prosecutors "to discriminate who are of a mind to discrimi-

The Court's Fourteenth Amendment analysis, which hinges on discerning whether there is explicit evidence of discriminatory intent, has blurred the importance of including African Americans on trial juries, particularly in interracial cases involving an African American criminal defendant or victim of racially motivated violence. In such cases, the all-white jury has demonstrated an inability to render a verdict based on the evidence presented, rather than on the litigant's race.254 Further, the Fourteenth Amendment analysis has obscured the underlying historical context essential for evaluating the all-but-certain outcome of an all-white or predominantly white jury determination.255 Such juries regularly con-

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250 Batson v. Kentucky, 476 U.S. 79, 92 (1986). The evidentiary rule under Swain required defendants to "show when, how often, and under what circumstances the prosecutor alone has been responsible for striking those Negroes who have appeared on petit jury panels in Talladega County." Swain v. Alabama, 380 U.S. at 224. For a listing of cases in which defendants failed to meet the burden under Swain, see, Batson, 476 U.S. at 85 n.17; Colbert, supra note 21, at 94 n.459.


252 A defendant must show that the prosecutor's peremptory challenge targeted members of the defendant's racial group. Once this is shown, the court may infer that the potential jurors were struck because of their race, and the evidentiary burden shifts to the prosecution to set forth a race-neutral explanation. Id. at 96–97.

253 Avery v. Georgia, 345 U.S. 559, 562 (1953); Batson, 476 U.S. at 106 (warning that "any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons."). Since Batson was decided, trial courts have sanctioned a broad array of prosecutorial explanations for peremptorily eliminating African American jurors. See Colbert, supra note 21, at 96–101. For an analysis of Batson's ineffectiveness, see Jeffrey S. Brand, The Supreme Court, Equal Protection and Jury Selection: Denying that Race Still Matters, 1994 Wis. L. Rev. 511, 596–613; Colbert, supra note 21, at 96–99.

254 In addition to historical evidence of the all-white jury's predictable results in interracial crimes, social scientists' studies indicate the importance of the multiracial jury. In close cases where the proof of guilt is less than certain, the multiracial jury reaches a different decision than the all-white jury by giving the benefit of the doubt to an accused African American. For an excellent analysis of the results of these studies, see Sheri Lynn Johnson, Black Innocence and the White Jury, 83 Mich. L. Rev. 1611, 1617–51, 1698 (1985).

255 For example, in Swain v. Alabama, the majority opinion declined to acknowledge the undisputed evidence that suggested "that no Negro ha[d] ever served on a jury in the history of the county." 380 U.S. 202, 235 (1965) (Goldberg, J., dissenting). Such evidence would have been central for establishing an ongoing badge of slavery and a Thirteenth
vict the accused if he is African American and acquit if he is a white person accused of committing a crime against an African American.256 Consequently, the Court's current emphasis on the prospective African American juror's equal protection right to serve is incomplete.257 The Fourteenth Amendment jury selection decisions obfuscate a basic truth: in race-sensitive cases, impartial justice requires that the trial jury include a significant representation of African American jurors.258

A Thirteenth Amendment analysis of jury selection cases would focus on the historic context to determine whether the exclusion of African American jurors violates the constitutional prohibition against maintaining a badge and incident of slavery. Under a Thirteenth Amendment analysis, inclusion of African American trial jurors would be viewed as essential for ensuring impartial jury verdicts in interracial cases, because of all-white juries' historic failure to protect African Americans' lives and freedom rights. White juries' inability to judge accused African Americans fairly or to vindicate them when injured reinforces the stigma of inferiority dating to slavery; namely, that African Americans are not entitled to legal redress when wronged, nor to due process of law when accused. Further, under this analysis, the elimination of African American jurors stigmatizes all African Americans by inferring that only white jurors are qualified to sit in judgment of others. Application of the Thirteenth Amendment would bar the prosecutor's and defendant's peremptory challenge,259 and would limit a party to challenge prospective jurors "for cause" only.

The differences between a Fourteenth and Thirteenth Amendment analysis of peremptory challenges are striking. The Fourteenth Amendment analysis relies on the prosecution's race-neutral explanation to vali-
date a predominantly white or all-white jury; a Thirteenth Amendment analysis focuses on the all-white jury itself. The Fourteenth Amendment minimizes the history of African Americans’ exclusion from jury duty; the Thirteenth Amendment identifies such disqualification as an underpinning of the chattel slave system. The Fourteenth Amendment analysis examines the peremptory striking of an individual juror to determine if it may be sustained; a Thirteenth Amendment approach abolishes the racially discriminatory peremptory challenge and the all-white jury, because they are considered badges of slavery.

In the following section, a similar Thirteenth Amendment analysis is applied to understand and challenge the racially imbalanced imposition of the death penalty.

C. Capital Crimes and the Death Penalty

You know how I felt when I saw the jury? I said, “I’m dead.”

The all-white jury has played a critical role in convicting accused African Americans charged with crimes against white people. Its prominence is even more sharply highlighted in capital cases. Since the 1930s, it has replaced the lynch mob as the primary method for imposing death sentences on African Americans in interracial cases involving white victims. The Thirteenth Amendment is equally applicable to this form of racial injustice.

The race of the accused and the victim has always been an important, if not critical, factor in determining whether a criminal defendant will receive a death sentence. Throughout this nation’s history, interracial crimes involving an African American defendant and a white victim were regarded as the most egregious and thus received the harshest punishment. During slavery, black-on-white crimes were usually classified as

261 Leo Edwards surely spoke for many African American defendants facing capital murder charges before an all-white jury when uttering these words prior to his trial.

Parchman, Man Who Calls His Trial Unjust is Executed for Mississippi Killing, N.Y. Times, June 22, 1989, at A14 (Mr. Edwards, who was convicted and sentenced to death by the jury, maintained his innocence until his execution).

262 See infra notes 268–269 and accompanying text.

263 During the colonial period, Georgia law justified a white person killing a slave who “grievously wound[ed], main[ed], or bruise[ed] any white person,” who was convicted for the second time of striking a white person, or who attempted escape from slavery. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 256–57, 262 (1978). Other colonies had similar laws that permitted whites to kill slaves who struck and injured a white person. See, e.g., id. at 195 (citing South Carolina’s 1722 and 1740 laws); id. at 117–24 (citing Virginia’s model laws in 1669 and 1680 and New York’s law, which required a jury to impose the death penalty for a variety of offenses, including an assault of a white person by a slave). For further discussion of the pre–Civil War period, see, LORENZO J. GREENE, THE NEGRO IN COLONIAL NEW ENGLAND (1974); WINTHROP D. JORDAN, WHITE OVER
capital offenses, although the same act, when committed by a white person against a black, was either not criminalized at all or was a crime of lesser consequences.

During the century following the Civil War, African Americans continued to face summary executions, extralegal killings by white lynch mobs and terrorist groups, and death sentences imposed by an all-white judicial and jury system. At the same time, the legal system provided whites with virtual immunity from criminal prosecution for crimes committed against African Americans.


The rape of white women by African American men has consistently been regarded as a crime justifying a death sentence. Between 1930 and 1977, for example, Georgia executed 62 men, 58 of whom were African American, for rape of white women. McCleskey v. Kemp, 481 U.S. 279, 332 (1987) (Brennan, J., dissenting); see also BELL HOOKS, Ain’t I A WOMAN? (1981); GERDA LERNER, BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY (1972); Judith Schacter, The Long Arm of the Law, 60 Tul. L. Rev. 1247, 1262 (1986); Jennifer Wriggins, Rape, Racism, and the Law, 6 HARV. WOMEN’S L.J. 103 (1983). African Americans convicted today for killing a white person are still the most likely to receive a death sentence. See infra notes 272, 273 and accompanying text.


264 For example, the rape of an African American woman, free or slave, was not considered a crime for most of this nation’s history. See GREENE, supra note 263; JORDAN, supra note 263, at 141. The first successful prosecution of a white man for raping a black woman did not occur until the middle of the 20th century. See HOOKS, supra note 263; LERNER, supra note 263; Schacter, supra note 263, at 1262; Wriggins, supra note 263. In addition, throughout this nation’s history, white offenders of racially motivated violence against African Americans have received virtual immunity. See infra note 269.

265 The archives at Tuskegee Institute maintain statistics on lynchings that occurred between 1882 and 1968. The Institute recorded 4743 victims of lynching; more than 80% were African American. ZANGRANDO, supra note 170, at 4, 6–7.

266 Although death sentences were rare prior to 1890, they increased sharply thereafter. During the 1920s, all-white juries under state authority sentenced 1038 people to death, two-thirds of whom were African American. In the 1930s, all-white juries convicted and sentenced more people to death than in any other decade in United States history; a total of 1523 people were executed. During both decades, a disproportionate number of those executed were African American. WILLIAM J. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA 54, 59 (1984). After 1935, the all-white jury replaced the lynch mob as the primary method for imposing death sentences on African Americans. Between 1935 and 1968, 64 people were victims of lynch mobs; all but seven were African Americans, ZANGRANDO, supra note 170, at 6–7.

267 During the post-Reconstruction period, when southern states regained control of
Prior to its 1986 decision in *McCleskey v. Kemp*, the Supreme Court had declined to directly address the importance of race in capital sentencing decisions for interracial crimes. In *McCleskey*, the Supreme Court accepted the findings of the Baldus Study, which concluded that the defendant's and victim's race were determining factors in a prosecutor's decision to seek, and in a jury's decision to impose, the death penalty in black-on-white capital crimes committed in Georgia. The study showed that defendants charged with killing white people were more than four times as likely to be sentenced to die as defendants charged with killing African Americans. It also revealed the influence of race in prosecutors' decisions to seek the death penalty. Prosecutors asked for death sentences in seventy percent of the cases involving an accused African American defendant and a white victim, substantially more than any other racial combination. Despite the persuasive statistical data, the Court denied the defendant's Fourteenth and Eighth Amendment challenge to Georgia's capital sentencing system.

Justice Powell's majority opinion revealed the Court's reluctance to use a Fourteenth Amendment equal protection analysis to target the impermissible use of race in death penalty cases, and refusal to consider the historical context for the attending disparity. The Court's equal protection evidentiary standard was the same "mission impossible" requirement

the criminal process, white people participated in lynchings without fear that state law enforcement would successfully prosecute them. Lynching were spectacles conducted with "great fanfare and public acclaim." *Id.* at 3. Of the tens of thousands of whites who participated, "more than ninety-nine percent . . . escaped arrest, prosecution, conviction, and punishment." *Id.* at 8. Between 1882 and 1940, 5150 lynchings resulted in only 40 prosecutions. Michael R. Belknap, *Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post-Brown South* 9 (1987); see also Chadbourne, *supra* note 170, at 13 (only eight-tenths of one percent of all lynchings between 1900 and 1930 were followed by a conviction).


*271* *Id.* at 286–87. Professors David C. Baldus, Charles Pulaski, and George Woodworth's statistical study (The Baldus Study) examined over 2000 murder cases in Georgia in the 1970s. The Baldus Study focused on the defendants' and victims' race in capital cases to determine the degree to which race influenced the sentencing outcome. *Id.* at 286.

*272* *Id.* at 287. The raw numbers indicated that defendants charged with killing white people received the death penalty in 11% of the cases; only one percent of those charged with killing African Americans were sentenced to death. The Baldus Study subjected this data to 230 variables that could have explained the disparities on nonracial grounds. Based on this analysis, defendants who killed white people were 4.3 times more likely to receive the death penalty than when the victim was African American. Perhaps most compelling was the study's finding that "six out of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black." *Id.* at 321 (Brennan, J., dissenting).

*273* Prosecutors asked a jury to impose the death penalty in only 19% of the cases involving white defendants and black victims, in 15% of the cases involving black defendants and black victims, and in 32% of the cases involving white defendants and white victims. *Id.* at 287.

*274* In McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), the Second Circuit referred
that had been used to perpetuate racial discrimination in jury selection. Defendants were required to produce actual proof that a decision-maker acted with a racially discriminatory purpose in imposing a particular death sentence. Absent the unusual circumstance when a decision-maker declares or documents that race entered into the sentencing decision, defendants have always fallen short of meeting this evidentiary standard.

By placing the burden on the defendant to prove purposeful discrimination by an identifiable wrongdoer, the McCleskey Court avoided examining the systematic influence that race has assumed in death penalty decisions. Justice Powell's majority opinion made no mention of the historic context in evaluating whether the defendant's and victim's race had been a substantial factor in imposing death sentences in Georgia.275

Moreover, in rejecting the Baldus Study's statistical data to prove an equal protection claim in capital sentencing cases, the majority adopted a race-neutral and formalistic understanding of the jury's role in imposing the death penalty, rather than an historical, contextual one.276 It described each trial jury as "unique in its composition," a result of jurors having been "selected from a properly constituted venire"277 that was "to a great degree, objectively verifiable."278 The majority's analysis of the "properly constituted venire" overlooked how these selection methods—along with widespread disenfranchisement laws—traditionally resulted in the system-

to the likelihood that a defendant would meet the Supreme Court's equal protection standard in Swain v. Alabama, as a "mission impossible." See supra note 250 and accompanying text. Justice Blackmun believed that the Baldus Study would have satisfied even the evidentiary burden in Swain. McCleskey, 481 U.S. at 364 (Blackmun, J., dissenting).

275 Though acknowledging that "the history of racial discrimination in this country was undeniable," 481 U.S. at 298, Justice Powell's equal protection analysis failed to connect Georgia's dual system of crime and punishment, which had long permitted the killing of African American defendants for crimes against whites, to its current decision to execute Warren McCleskey. Id. at 329 (Brennan, J., dissenting). In his dissent, Justice Brennan argued that race created a substantial risk of arbitrariness in imposing the death penalty and violated the Eighth Amendment. The Brennan dissent contained an historical account of the severe and disparate sentences that African American defendants received in Georgia during slavery's 200-year history and during the most recent 40-year period preceding the Court's decision. Id. at 329–33. Justice Blackmun, who joined the Brennan dissent and wrote separately on equal protection grounds, also endorsed using historical references as an "evidentiary source" for establishing Fourteenth and Eighth Amendment claims. Id. at 298.

276 To justify its refusal to admit statistical evidence to analyze the imposition of the death penalty where it admits such evidence to scrutinize the racial composition of juries, the McCleskey Court argued that there exists a "fundamental difference from the corresponding elements in venire selection" and capital sentencing cases. Id. at 295.

277 Id. at 294.

278 Id. at 295 n.14. The majority relied on its belief that juror eligibility is limited by statutory requirements that each juror be intelligent, upright, or of sound mind and good moral character: considerations that are objectively verifiable. Id. (citing Castaneda v. Partida, 430 U.S. 482 (1977) (sound mind and good moral character); Turner v. Fouche, 396 U.S. 346 (1970) (upright and intelligent)).
atic disqualification of African Americans from jury venires.\textsuperscript{279} The majority also failed to acknowledge that prosecutors’ use of the racially discriminatory challenge excluded any African American jurors who were actually called to the trial jury panel.\textsuperscript{280} The majority ignored jurors’ most commonly shared characteristic: their uniform whiteness.\textsuperscript{281}

From this idealized perspective, the Court did not see race as improperly influencing the jury’s death penalty decision. Instead, said the Court, capital sentencing “rest[s] on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense.”\textsuperscript{282} The majority argued that the objective standards for jury selection justified discounting statistical evidence of race discrimination in juries imposing death sentences. Had the Court’s equal protection analysis allowed consideration of the systemic racial impact of capital sentences,\textsuperscript{283} it would have been difficult to obscure the importance of race in capital sentencing determinations.

A Thirteenth Amendment analysis of capital sentencing would look quite different. The focus would be on the historical imposition of the death penalty in black-on-white crimes by all-white juries. This analysis could mirror Judge Wisdom’s opinion in \textit{City of New Orleans v. Williams.}\textsuperscript{284} In determining Congress’s Thirteenth Amendment power to leg-

\textsuperscript{279}GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 250 (1910) (citing comprehensive study showing that disenfranchisement laws resulted in few African Americans remaining eligible to serve as jurors in the South by the first decade of the 20th century). For a discussion of African Americans’ exclusion from jury selection in the North, see, Colbert, \textit{supra} note 21, at 88–93.

\textsuperscript{280}Colbert, \textit{supra} note 21, at 85–86. “As commentators predicted, prosecutors relied on the unfettered exercise of peremptory challenges as the ultimate trump card for attaining all-white juries.” \textit{Id.} at 93.

\textsuperscript{281}The all-white jury assumed a significant role in imposing the death penalty on African American defendants, particularly from 1935 to 1967. \textit{See supra} note 268.

\textsuperscript{282}McCleskey, 481 U.S. at 294.

\textsuperscript{283}The majority opinion avoided a race-conscious approach in examining prosecutors’ decision to seek the death penalty. In overlooking prosecutorial “consistency” in seeking the death penalty in black-on-white crime, the Court expressed a concern with “requiring prosecutors to defend their decisions to seek death penalties, often years after they were made.” \textit{Id.} at 296 (citing \textit{Batson v. Kentucky}, 476 U.S. 79 (1986)). Such a concern is unpersuasive. As Justice Blackmun wrote, “[p]rosecutors’ . . . need . . . for discretion to fulfill their responsibilities . . . does not place them beyond the constraints imposed on state action under the Fourteenth Amendment.” \textit{Id.} at 363 (Blackmun, J., dissenting). The dissenters would have applied a \textit{Batson} equal protection standard in considering the prosecutor’s role in seeking the death penalty and proceeding to the death penalty phase. Finding that McCleskey’s evidence “[gave] rise to an inference of discriminatory purpose,” \textit{Id.} at 359, the dissenters concluded that the State’s response was insufficient to rebut the presumption that McCleskey’s death sentence was due to racial factors. Justice Powell, who cast the deciding vote in \textit{McCleskey}, recently indicated that he would have reversed his vote in \textit{McCleskey} and held the imposition of the death penalty unconstitutional because of its haphazard and time-consuming enforcement. JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 451–52 (1994).

\textsuperscript{284}\textit{729 P.2d} 1554 (5th Cir. 1984). For a full discussion of Judge Wisdom’s opinion in \textit{Williams}, see, \textit{supra} notes 224–232 and accompanying text.
isolate against racially discriminatory capital sentencing.\textsuperscript{285} An opinion using a Thirteenth Amendment analysis would have likely invoked Justice Harlan's declaration that Congress's power to enforce the Amendment could be exerted by legislation designed to eradicate the badges and incidents of slavery.\textsuperscript{286}

In determining congressional intent, the opinion would emphasize that Congress passed the 1866 Act to eliminate practices that continued to burden African Americans with badges of inferiority and to hinder the attainment of universal freedom.\textsuperscript{287} Few could dispute that one of the cornerstones of slavery that the 1866 Act sought to rectify was imposition of harsh and unequal punishments, including death sentences, upon African Americans charged with crimes committed against whites.

A Thirteenth Amendment analysis would consider the all-white jury's sentencing of McCleskey for the crime of killing a white police officer within the context of Georgia's prior sentencing practices in capital cases involving black-on-white crimes. For example, the analysis would review the clear evidence that during slavery, Georgia punished African American defendants more severely for crimes committed against whites than for the same crimes committed by white defendants.\textsuperscript{288} It would then examine the post-Civil War period to determine whether there existed a close link between slavery, the Black Codes and Jim Crowism and modern discrimination against African American defendants currently charged with crimes against whites in Georgia.\textsuperscript{289} The opinion would probably observe that the Georgia constitution disenfranchised African American and that they received little protection from Georgia law enforcement authorities against the white mob's attacks at the turn of the century,\textsuperscript{290} and just after the second World War.\textsuperscript{291}

\textsuperscript{285} Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 ("citizens . . . shall be subject to like punishment, pain and penalties and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.").

\textsuperscript{286} \textit{Williams}, 729 F.2d at 1577.

\textsuperscript{287} See id.

\textsuperscript{288} See \textit{Higginothman}, supra note 263, at 256–57, 262; \textit{Strood}, supra note 263, at 20–28. Justice Blackmun referred extensively to the legislative record accompanying the Fourteenth Amendment, which detailed states' failure to prosecute whites' violence against African Americans after the War. \textit{McCleskey}, 481 U.S. at 346 n.2 (Blackmun, J., dissenting). Congress had considered the same evidence when passing the 1866 Act one month earlier and guaranteeing citizens "the full and equal benefit of all law . . . for the security of person and property." See supra note 68.

\textsuperscript{289} See \textit{Williams}, 729 F.2d at 1579.

\textsuperscript{290} Eric Foner described whites' violence and murder of African Americans in Georgia during the immediate post-War period and the State's inability to successfully prosecute those responsible. \textit{Foner}, supra note 58, at 120, 137. In 1906 in Atlanta, white mobs attacked "every black person they saw," spreading to an Atlanta suburb where whites killed four "substantial" African American citizens and injured many others. Other incidents of violence are reported as well, along with Georgia law enforcement's failure to prosecute the perpetrators. \textit{Franklin}, supra note 185, at 440–41; \textit{Racial Violence in the United States} 44–46 (Alan D. Grimshaw ed., 1969).

\textsuperscript{291} In 1946 mob rule targeted and lynched two married couples in Walton County, and
The analysis would then refer to the all-white jury's consistent record of disproportionately imposing the death sentence upon African American defendants in interracial cases to the present day. These implications would reveal capital punishment as a continuing badge of inferiority linked to the legacy of slavery. Whether as slaves, as victims of lynch mobs, or as defendants in capital cases, African Americans have been sentenced to death consistently for crimes against whites—crimes that are rarely punished by death when committed by white defendants.

The continued disproportionate imposition of the death sentence on African Americans for their crimes against whites is closely linked to the former system of slavery and the reaction of whites unwilling to accept African Americans' freedom rights. The imposition of the death penalty is a badge of slavery, readily visible in the community, and attaches a stigma upon African Americans as a class. A Thirteenth Amendment approach to capital punishment laws will not provoke a majority of current Supreme Court Justices to invalidate the death penalty. But it should prove helpful to practitioners seeking to force the Court to confront race's historic importance and its relevance in making such decisions today.

D. The "New" Scholarship

Building on the earlier scholarship of Jacobus tenBroek, Arthur Kinoy and Avi Soifer, a growing number of legal academics and law students are acknowledging the Thirteenth Amendment's usefulness in addressing many of today's critical race and human rights issues. During the past few years, this attention has suggested many ways to tap the Amendment's potential for educating students and courts about a variety of race-sensitive and individual rights subjects.

Professor Akhil Amar, a prolific and influential scholar of Thirteenth Amendment jurisprudence, has argued that the Amendment's analysis sharpens the focus of the constitutional values at stake in a wide range of issues. For example, Amar strongly criticized the Supreme Court's analysis...
in *R.A.V. v. City of St. Paul*\(^{299}\) for ignoring the real constitutional issues in the case, the Reconstruction Amendments. In overruling the defendant’s conviction for cross-burning, the majority relied solely on First Amendment grounds. Amar urges, and presents, a compelling Thirteenth Amendment perspective for upholding the constitutionality of the city’s cross-burning statute.\(^{300}\)

He suggests that a Thirteenth Amendment analysis would have explained to the Court why, under First Amendment law, a burning cross\(^{301}\) and race-based fighting words directed at African Americans should be treated differently from other fighting words.\(^{302}\) Through a Thirteenth Amendment lens, Amar sees cross burning as “an obvious legacy of slavery” and views whites’ racial harassment of an African American family “as a badge of the slavery system.”\(^{303}\) A complete Thirteenth Amendment analysis would include specific links detailing white mobs’ historic violence against African American families moving into all-white communities\(^{304}\) and white supremacist’s use of the burning cross as a signal that violence would soon follow. This analysis is far more ominous than the majority opinion. While Amar acknowledges that a Thirteenth Amendment analysis might not have changed the Court’s outcome in *R.A.V.*, he believes that the analysis is useful because it would have provided “legitimacy [for] government regulation . . . to cleanse America of the badges and incidents of slavery, such as burning crosses in the yards of black families in the dead of night.”\(^{305}\)

\(^{299}\) 112 S. Ct. 2538 (1992). In *R.A.V.*, a cross was burned on the lawn of an African American family. The St. Paul Bias Motivated Crime Ordinance provided that “[w]hoever places public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.” MINN. LEGIS. CODE § 292.02 (1990).

\(^{300}\) Amar, *The Missing Amendments*, supra note 17, at 155–160; Justice Scalia’s five-Justice majority opinion found that the St. Paul statute was aimed at punishing speech and not conduct, and that the defendant’s cross-burning was protected speech. Though the Scalia opinion considered the act of cross-burning reprehensible, *id.* at 140, the Justices made no reference to the historic significance of whites setting ablaze a cross on the property of an African American family. The majority appeared to treat cross-burning as it would any other item that was set afire and awaken people in the mid-morning hour. \(^{301}\) *Id.* at 155.

\(^{302}\) *Id.* at 155–57. These speech-related acts, declared Amar, are badges of servitude, which the Constitution allows legislatures to treat differently from other kinds of speech. \(^{303}\) *Id.* at 159.

\(^{304}\) The Jones family was moving to East St. Louis, Ill. In the summer of 1917, East St. Louis was the scene of whites engaging in widespread violence against African Americans who had left the South as part of the Great Migration north. Over a two-week period, white rioters killed 40 African Americans and destroyed 312 homes. McCPherson, *supra* note 52, at 185. Historians would assist in locating other episodes of whites’ violence in East St. Louis, as well as examples showing the burning cross’s use. \(^{305}\) Amar, *The Missing Amendments*, supra note 17, at 160. Professor Amar provided
Scholars have explored the usefulness of the Thirteenth Amendment to analyze other race-sensitive areas. After reviewing the Amendment's legislative history, Professor Charles Jones concluded that the Civil Rights Act of 1866 contains statutory authority for federal prosecutions of racially motivated crimes when states fail to convict perpetrators. Professor Jones urges successful prosecution of white offenders to protect African Americans' liberty and to obliterate a badge of slavery, namely immunizing whites who commit crimes against them. Professor Fred Lawrence agrees, and concludes that Congress intended to protect African Americans' freedom through vigorous enforcement of rights included in the Thirteenth Amendment, the 1866 Act, and other civil rights laws.

Scholars have also examined the Amendment's applicability to family and labor law. Professor Peggy Davis encourages judges and legislators to consider the Thirteenth Amendment's freedom guarantees when making child custody and parental rights determinations. Similarly, Amar suggests that a Thirteenth Amendment analysis offers the best constitutional vehicle for providing relief to children who have been physically abused. In a different family law context, Professor Joyce McConnell's analysis of the Thirteenth Amendment's prohibition against involuntary servitude permits readers to consider whether extreme cases of domestic battery, including coerced sexual services, should be considered within its scope. Building upon scholarship documenting that coerced sexual services and corporal punishment were key aspects of the enslavement of African American women, McConnell depicts battering relationships as present vestiges of slavery.

several suggestions for drafting race hate speech legislation that would survive First Amendment scrutiny. First, he would explicitly state that the ordinance is designed to implement the Thirteenth Amendment by eliminating various badges and incidents of slavery and caste-based subordination. Amar also suggests defining badge of slavery narrowly to include only things such as words, pictures and symbols that are targeted at captive members of historic victims of racial discrimination and are designed to degrade and dehumanize them on the basis of their group membership. Id. at 38 n.87(l)(3). For an excellent analysis of the Thirteenth Amendment's redemptive potential, see Binder, supra note 21.

308 See Amar, supra note 17; Margaret A. Burnham, An Impossible Marriage: Slave Law and Family Law, 5 LAW & INEQ. J. 187 (1987); Davis, supra note 19; McConnell, supra note 19; Anderson, supra note 19.
309 Davis, supra note 19, at 1114–18. Davis revives the 38th and 39th Congresses' explicit concern for family integrity rights and suggests that an historical context would lead courts to view a state's removal of children to foster care or termination of parental rights within the context of American slavery.
310 Amar & Widawsky, supra note 16, at 1360.
311 McConnell, supra note 19, at 217.
312 See Burnham, supra note 308, at 355.
In a still different legal context, Professor Lea VanderVelde channels Thirteenth Amendment analysis into labor law.\textsuperscript{313} She exhorts colleagues to rescue the Amendment from the oblivion of narrowly circumscribed use\textsuperscript{314} and "to begin stripping away the vestiges of slavery and involuntary servitude that have remained in employment relations law and that continue to influence legal opinions and popular expectations."\textsuperscript{315} Professor VanderVelde's review of the Reconstruction debates shows that many legislators envisioned the Amendment as a charter for labor freedom.\textsuperscript{316}

Other Thirteenth Amendment scholars argue that the Amendment may provide a constitutional basis for guaranteeing women's reproductive freedom rights. Professor Andrew Koppelman details the physiological reality of pregnancy and childbirth. He persuasively argues that forcing a woman to endure pregnancy and childbirth constitutes involuntary servitude.\textsuperscript{317} Professor Dorothy Roberts\textsuperscript{318} and Margaret Burnham\textsuperscript{319} present compelling historical evidence of enslaved women's coerced childbearing. This history could be used to demonstrate that current denial of reproductive choice to women of color is a badge and incident of slavery and involuntary servitude.

In another situation concerning women's autonomy rights, Neil Katyal examines women who are coerced into prostitution\textsuperscript{320} and compares such a condition with women's historic abuse during slavery. Katyal concludes that the pimp-prostitute relationship is based on slavery's core values. Women are treated as property; their sexuality is regarded as a commodity; they are physically abused; and they are denied the exercise of free will. Katyal argues that consequently, coerced prostitution should be considered within the reach of the Thirteenth Amendment.

As the above scholarship suggests, scholars have begun to mine the Thirteenth Amendment's potential. There is yet a wealth of theory to be discovered.

\textsuperscript{313} See VanderVelde, Labor Vision, supra note 18.
\textsuperscript{314} Id. at 504.
\textsuperscript{315} Id. at 498.
\textsuperscript{316} Id. at 438.
\textsuperscript{317} Koppelman, supra note 20, at 484 ("When women are compelled to carry and bear children, they are subjected to 'involuntary servitude' in violation of the Thirteenth Amendment.").
\textsuperscript{318} Roberts, supra note 20, at 7-10. Professor Roberts demonstrates that slavery's foundation depended upon an "intimate intertwining" of race and gender: African Americans' dehumanization was based both on racial subjugation and on white slaveowners' control of African American women's sexuality and reproduction. Within this context, when African American women today are denied autonomy over reproduction and are forced to bear a child, whether by government denying Medicaid benefits for family planning or by an individual's violence or coercion, a Thirteenth Amendment analysis may consider this to be a perpetuation of one of slavery's badges. See supra note 2.
\textsuperscript{319} Burnham, supra note 308.
\textsuperscript{320} Katyal, supra note 21; see also N.R. Kleinfield, Five Charged With Holding Thai Women Captive for Prostitution, N.Y. TIMES, Jan. 5, 1995, at B1.
E. Legal Education

I close this section on the Amendment’s relevance with a brief discussion of the potential role of the Thirteenth Amendment in law schools today. Despite provocative Thirteenth Amendment scholarship and important judicial decisions in recent decades, the Thirteenth Amendment is not included in the law school syllabus in any meaningful way. If there is truth to the idea that we are influenced by our own experiences and tend to reproduce them, then it is understandable why most law professors do not teach the Amendment: few ever studied slavery, the Thirteenth Amendment or Jones v. Mayer in their constitutional law classes.

We should also not be surprised that most law students today know little of slavery’s 200-year history or of the century following in which people were legally segregated on the basis of race. The nation generally suffers from a sense of collective denial concerning this part of its past. Our failure to confront slavery’s past and to measure its lasting impact has remained a constant throughout this nation’s history.

Law professors have many responsibilities. They must teach doctrine, motivate students, instill professional responsibility, and foster the value of public service. A Thirteenth Amendment badge of slavery analysis facilitates each of these objectives. It is an excellent conceptual model for explaining racial and human rights issues; it has significant potential as a litigation strategy; and it serves to motivate law students to “become immersed in the burning issues of the day.”

Thirteenth Amendment jurisprudence provides students with an historical context that is likely to instill a more complex understanding of racial issues and a deeper sense of commitment when facing injustice. Thus, inclusion of Thirteenth Amendment material in law schools is criti-

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321 A recent study of law students revealed that only two out of five students could identify the importance of Selma, Alabama during the 1960s civil rights movement. Only one out of five white students, and three out of five African American students, knew the Supreme Court’s decision in Dred Scott v. Sandford, 60 U.S. 393 (1857). Richard P. Vance & Robert Pritchard, Measuring Cultural Knowledge of Law Students, 42 J. LEGAL EDUC. 233 (1992).

322 For example, consider the Constitution’s text, which includes many references to slavery’s existence but never once mentions the word slavery. See, e.g., U.S. CONST., Art. 1, § 2, cl. 3 (apportioning representatives among the states according to the whole number of free persons and three-fifths of “all other persons”); Art. 1, § 9, cl. 1 (prohibiting Congress from lifting the importation of persons until at least 1808); Art. 4, § 3 (return of escaped persons to their owner). Perhaps this discrepancy helps explain how the framers reconciled celebrating their post-revolutionary freedom with maintaining enslavement for nearly one-fifth of the population. See Thurgood Marshall, The Constitution’s Bicentennial: Commemorating the Wrong Document?, 40 VAND. L. REV. 1337 (1987); Juliet E.K. Walker, Whither Liberty, Equality or Legality? Slavery, Race Property and the 1787 American Constitution, 6 N.Y.L. SCH. J. HUM. RTS. 299 (1989).

323 Professor Arthur Kinoy, Speech at Northeastern Law School (paraphrasing Justice Oliver Wendell Holmes).
cal for students, who will be called upon during their careers to wrestle with many difficult issues. Discussions of the Amendment would require students to consider the institution of slavery, the promise of freedom, and the reality of race discrimination today.

For example, by linking African Americans’ exclusion from today’s desirable occupations first to slavery’s absolute disqualification, and then to segregation’s continuing color barrier, we can view affirmative hiring and promotion plans from the perspectives of the injured parties. Claims by African Americans that they are entitled to the employment and educational opportunities that were historically denied them can be considered within the Thirteenth Amendment’s mandate to eliminate one of slavery’s primary badges of inferiority: the denial of equal economic opportunity. Teaching employment discrimination from a Thirteenth Amendment perspective may thus allow future generations of law students to consider affirmative action relief in the light of an entire race’s continuing quest for economic justice.

It may also permit courts to consider affirmative action relief as necessary to fulfill this nation’s promises and commitments. Knowledge about the exclusion of African Americans from serving as jurors, particularly in race-sensitive cases, may lead courts to take affirmative measures to increase the likelihood of a multi-racial jury. Further, a Thirteenth Amendment analysis of capital punishment would help law students understand that a state’s sentencing system provides ample opportunity for racial bias to influence a prosecutor’s decision to bring charges or a jury’s decision in rendering a verdict. A Thirteenth Amendment discussion in today’s law schools would also encourage this generation of law students to consider what their professional roles will be in determining whether race’s influence in the criminal justice system will continue to lengthen the historical chain or whether the legacy shall be broken during their lifetime.

Conclusion

A Thirteenth Amendment analysis is useful for understanding the role of race in law today and for developing litigation strategies to address current legacies of slavery. Indeed, this overview of the 130-year history

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324 Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 Chi.-Kent L. Rev. 1087 (1993) (criticizing law professors for failing to include slavery in their constitutional law courses).

325 In his *McCleskey* dissent, Justice Brennan indicated his belief that “subtle and unconscious” factors may have entered into the prosecutor’s charging and sentencing decisions. In deciding that Georgia’s sentencing scheme violated *McCleskey’s* Eighth Amendment rights, Justice Brennan believed it important to consider “the influence of history.” *Id.* at 332.
of the Thirteenth Amendment is largely intended to encourage that Amendment's increased use as a teaching tool in law school and, ultimately, as a litigation tool in court. Recent decades have seen some encouraging developments in Thirteenth Amendment jurisprudence, following a long, discouraging period of desuetude. These developments include the decisions in Jones v. Mayer and Williams v. City of New Orleans and the recent, innovative scholarship exploring possible applications of the Amendment to a variety of issues. It is striking and disturbing, however, that the Thirteenth Amendment remains largely unexplored in contemporary legal curricula.

It takes little imagination to understand that a link exists between law schools' failure to provide a meaningful discussion of the Thirteenth Amendment and its rare use in courtrooms today. There can be no doubt that in identifying causes of action, litigants draw upon the lessons they learned in law school. Few practicing litigators can be expected to realize that the Thirteenth Amendment might be of use to their clients in employment discrimination, jury selection and other areas, when the Amendment's modern relevance was not even hinted at in law school.

Clearly, law professors cannot include everything in a syllabus. However, this Article explains the Thirteenth Amendment's significance as a primary source of constitutional rights and its potential for meaningful law reform. Law teachers should include discussion of the Amendment so that this generation, and future generations, of law students will be better informed about the meaning of freedom in our constitutional tradition and will be better equipped to influence judicial decision making. Litigators must also rise to the challenge of displaying the courage and creativity necessary to use the Thirteenth Amendment as the basis of many claims and the skills necessary to persuade courts that the Amendment's expansive interpretation encompasses many civil rights.

Otherwise, as we head into the twenty-first century, the Amendment's forgotten promise of ensuring freedom and full rights to all citizens will remain unfulfilled. By embracing the Amendment's original spirit and considering broad applications, courts today and tomorrow have the opportunity to effectively address critical issues of human rights and to honorably begin a new chapter in the history of the Thirteenth Amendment.