INTERPRETING THE THIRTEENTH AMENDMENT

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I. INTRODUCTION

Emerging from the Civil War in 1865, the Reconstruction Congress proposed numerous reform statutes pursuant to its power under the newly ratified Thirteenth Amendment.[1] The Enforcement Clause, found in the second section of the Amendment, granted legislators unprecedented power to pass nationally-binding civil rights legislation.[2]

As complicated as ending slavery had been, an even more daunting task loomed of ending all its incidental tyrannies. Not only was slavery a form of labor exploitation, it also infringed on individuals' rights to choose spouses, travel, and make parental decisions.[3] These and other forms of subordination were not merely local. The institution had spread through the channels of interstate commerce, private

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1 *See, e.g.*, CONG. GLOBE, 38th Cong., 2d Sess. 589 (1865) (documenting Congress's discussion of African American citizens petitioning Congress for the right to vote); S. 427, 38th Cong. (1865), *available at* http://lcweb2.loc.gov/cgi-bin/ampage?collId=llsb&fileName=038/llsb038.db&recNum=1719 (prohibiting the exclusion of persons from travel upon any railroad or navigable water in the United States on the basis of race, implicitly relying on the Thirteenth Amendment power).

2 U.S. CONST. amend. XIII, §§ 1–2("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. . . . Congress shall have power to enforce this article by appropriate legislation.").

3 Following the Civil War, leading advocates of the Thirteenth Amendment explained how slavery degraded the white and black laborers:

> I tell you, sir, that the man who is the enemy of the black laboring man is the enemy of the white laboring man the world over. The same influences that go to keep down and crush down the rights of the poor black man bear down and oppress the poor white laboring man.

CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866). Representative George Julian, another advocate of free labor and abolition, compared business exploitation with enslavement: "The rights of men are sacred, whether trampled down by Southern slave-drivers, the monopolists of the soil, the grinding power of corporate wealth, the legalized robbery of a protective tariff, or the power of concentrated capital in alliance with labor-saving machinery." GEORGE W. JULIAN, POLITICAL RECOLLECTIONS: 1840 TO 1872, 322–23 (Negro Univ. Press 1970) (1884).

transactions, and sectional compromises. The Thirteenth Amendment's First Section obliged States and individuals to immediately free slaves. The Second Section, with its grant of legislative authority, had long-term implications for the use of federal power.

Despite these great expectations, narrow judicial interpretations during the nineteenth century, in decisions like the *Slaughter-House Cases*[4] and the *Civil Rights Cases*,[5] undercut the Amendment's effectiveness. Only at the tail end of the 1960s did the Supreme Court revise its interpretation. *Jones v. Alfred H. Mayer*, the most expositive Supreme Court case on the Amendment, determined that the Amendment authorized Congress to act against a broad range of injustices that are rationally related to the badges and incidents of involuntary servitude.[6] The Thirteenth Amendment nevertheless remained primarily relegated to the annals of history, with few legislative uses to expand its reach.

Most civil rights statutes, from the passage of the Civil Rights Act of 1964 to the Violence Against Women Act of 1994, have relied on the Fourteenth Amendment or the Commerce Clause. Recent Supreme Court decisions, however, have limited Congress's ability to rely on those two sources for authority,[7] increasing a need to analyze the extent to which the Thirteenth Amendment provides a viable alternative for pursuing civil rights strategies.

This essay first examines how Gilded Age Supreme Court cases hamstrung legislative initiatives. It then turns to the Warren and Burger Courts' understanding of the Amendment. Relying on those precedents, I analyze the Thirteenth Amendment's contemporary significance.

I. SUPREME COURT REACTION

Early Supreme Court interpretations of the Thirteenth Amendment narrowed its scope. In a series of opinions, the Court rendered the Amendment virtually unrecognizable to the participants of the congressional debates that preceded its ratification.

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4 83 U.S. (16 Wall.) 36 (1872).

5 109 U.S. 3 (1883).

6 392 U.S. 409, 440–41 (1968) ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say that the determination Congress has made is an irrational one.").

7 *See, e.g.*, United States v. Morrison, 529 U.S. 598, 617–19 (2000) (diminishing Congress's ability to rely on Section 5 of the Fourteenth Amendment); U.S. v. Lopez, 514 U.S. 549, 558–59 (1995) (reducing Congress's Commerce Clause power).

During those debates, many congressmen described the Thirteenth Amendment's potential for ending any forms of oppression associated with slavery, not merely the exploitation of forced labor. Radical Republicans' statements on the subject were the most visionary, but moderates also indicated that they concurred about the Amendment's potential to alter antebellum federalism.

Representative John F. Farnsworth of Illinois agued that one facet of liberty was familial autonomy. He asserted that a "man's right to himself, to his wife and children" was inalienable.[8] With the end of slavery, individuals' right to choose a spouse and to raise and educate their children had to be secured against state and private interference.[9]

Illinois Representative Ebon C. Ingersoll also held an expansive view of the Thirteenth Amendment's potential uses. He asserted that living in a state of freedom meant profiting from one's labor and enjoying marital happiness without the fear of being sold away from family members.[10] Senator James Harlan of Iowa expressed an even wider-reaching definition of liberty. He believed the Amendment would end the "incidents of slavery," which included interference with family life, discriminatory jury selection, and barriers to property ownership.[11]

Shortly after ratification of the Thirteenth Amendment, Speaker of the Thirty-Ninth Congress, Schuyler Colfax, stressed Congress's newfound powers:

> [I]t is yours to mature and enact legislation which . . . shall establish [state governments] anew on such a basis of enduring justice as will guaranty all necessary safeguards to the people, and afford, what our Magna Charta, the Declaration of Independence, proclaims is the chief object of government—protection to all men in their inalienable rights.[12]

The notion that the Thirteenth Amendment meant to do no more than free slaves was a revisionist concept spread by opponents of reconstruction. Shortly after the Amendment's ratification, as Congress debated the Civil Rights Act of 1866, Representative M. Russell

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8 CONG. GLOBE, 38th Cong., 2d Sess. 200 (1865).

9 While no one, from either house of Congress, advocated to legalize intermarriage, the seed of that reform had been sown through abolitionist-minded congressmen. *See* Hamilton, *The Marriage Bill*, LIBERATOR, June 11, 1831, at 1 (discussing the potential effects of repealing a Massachusetts law forbidding intermarriage).

10 CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864) (describing each man's inalienable right to live in a state of freedom, till the soil, enjoy the rewards of his own labor, and enjoy his family without fear of infringement).

11 CONG. GLOBE, 38th Cong., 1st Sess. 1439–40 (1864).

12 CONG. GLOBE, 39th Cong., 1st Sess. 5 (1865).

Thayer mocked the notion that the Amendment had merely secured "the freedom from sale or barter." To the contrary, constitutional abolition would allow freed persons to enjoy "those great natural rights to which every man is entitled by nature."[13]

Ingersoll also expected that the Amendment would provide leverage not only to improve the status of blacks but "poor white people" as well.[14] The Republican Party had been founded, and during Reconstruction continued to press, for free labor rights.[15]

The Supreme Court soon restrained Congress from passing legislation that might have achieved these and other progressive goals. The pattern was set early in the *Slaughter-House Cases*.[16] The case involved a challenge to a state-created monopoly, which the Court held to be a constitutional public health regulation. The decision is best known for its spurious distinguishment between the privileges and immunities of state and United States citizenship.[17] An often overlooked portion of the decision also diminished the scope of the Thirteenth Amendment.

Writing for the majority, Justice Samuel F. Miller discounted the petitioners' argument that monopolistic practices violated their right to choose a vocation.[18] He regarded the Thirteenth Amendment in the context of forced labor, which was not strictly confined to black slavery. *Slaughter-House* dictum indicated that the Amendment also applies to "Mexican peonage and the Chinese coolie labor system."[19] Justice Field, one of the four dissenting justices, agreed that "involuntary servitude" referred to forms of vassalage like peonage. But the abolition of slavery, he wrote, also secured the "right to pursue the ordinary avocations of life," which a state monopoly impeded.[20]

The Court's retrenchment away from national anti-discrimination standards into parochial racial norms appeared in the 1883 *Civil Rights Cases*.[21] The decision auspiciously found that the Thirteenth

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13 CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866).

14 CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864).

15 ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 38–41 (1st ed. 1970).

16 The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 66–83 (1872).

17 *Id.* at 78–79 ("Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge . . . .").

18 *Id.* at 66–74.

19 *Id.* at 72.

20 *Id.* at 90 (Field, J., dissenting).

21 109 U.S. 3 (1883).

Amendment did not grant Congress authority to prohibit discrimination in public places of accommodation. That outcome heralded judicial countenance of Jim Crow laws that persisted until 1954.[22]

The *Civil Rights Cases* struck down the Civil Rights Act of 1875 on the basis of both the Fourteenth and Thirteenth Amendments. The majority's analytic distinction between the two has important consequences to contemporary cases, such as *United States v. Morrison*, which continue to rely on the *Civil Rights Cases*.[23]

Writing for the majority, Justice Joseph P. Bradley announced that the Fourteenth Amendment had a state action component.[24] While Bradley ruled that the Civil Rights Act of 1875 was an overextension of legislative authority, he created precedent for future expansion of federal power. Section 2 of the Thirteenth Amendment, the Court concluded, granted Congress authority to pass all laws "necessary and proper . . . for the obliteration and prevention of slavery with all its badges and incidents."[25] Among the "necessary incidents" of slavery and involuntary servitude Bradley included prohibitions against black court testimony and property ownership.[26]

Despite this recognition, the Court rejected the claim that under the Thirteenth Amendment Congress could penalize segregated businesses, even ones that provided public services.[27] Bradley went beyond the narrow issues in the case, asserting that the Thirteenth Amendment "simply abolished slavery" while the Fourteenth Amendment "prohibited the states from abridging the privileges or immunities of citizens of the United States."[28] The majority of eight did not regard discrimination perpetrated by opera houses and inns to be incidental to slavery. This conclusion allowed for the un-

22 Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that segregation of children in public schools based solely on race denies equal protection of the laws guaranteed under the Fourteenth Amendment).

23 United States v. Morrison, 529 U.S. 598, 602, 621, 624 (2000) (striking down 42 U.S.C. § 13981 because the statute's civil remedy exceeded Congress's constitutional authority).

24 *The Civil Rights Cases*, 109 U.S. at 11, 19 ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. . . . This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces State legislation on the same subject, or only allows it permissive force.").

25 *Id.* at 20–21.

26 *Id.* at 22.

27 *Id.* at 24.

28 *Id.* at 23.

checked development of public Jim Crow facilities during the late 1880s and early 1890s.[29]

Only the first Justice Harlan dissented in the case. He found the majority's interpretation of the incidents of slavery to be "narrow and artificial" and contrary to the "substance and spirit" of the Thirteenth Amendment.[30] Segregation, he argued, perpetuated a system of black subservience, while the Thirteenth Amendment secured the complete "freedom [that] necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races."[31] According to him, then, abolition was only the beginning of complete emancipation from supremacist institutions. The Amendment's practical effect was to provide Congress with the "express power to enforce that amendment, by appropriate legislation." Anti-discrimination laws were needed,

> to protect that people against the deprivation, *because of their race*, of any civil rights granted to other freemen in the same State; and such legislation may be of a direct and primary character, operating upon States, their officers and agents, and, also, upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the State.[32]

Harlan thought the majority to be mistaken that public accommodations were places of private, social interaction; to the contrary, their use was essential to participation in civic life.

The Supreme Court did not end its assault on the Thirteenth Amendment's substance in the *Civil Rights Cases*. *Plessy v. Ferguson*, another odious case, also regarded segregation to be a social rather than public matter.[33] The Court rejected the claim that forced racial separation on railcars marked African Americans with a badge of inferiority.[34] The first Justice Harlan's dissent, on the other hand, recognized that sharing public rail was an aspect of civic freedom.[35] He foresaw that the holding of the case would legitimize other forms of segregation.[36]

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29 C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 13–95 (rev. ed. 1957).

30 *Civil Rights Cases*, 109 U.S. at 26 (Harlan, J., dissenting).

31 *Id.* at 36.

32 *Id.*

33 163 U.S. 537, 551–52 (1896) (supporting the notion of "separate but equal").

34 *Id.* at 551.

35 *Id.* at 557 (Harlan, J., dissenting) (arguing that a statute segregating railroad cars on the basis of race interferes with personal freedom).

36 *Id.* ("If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the

After Reconstruction, the Thirteenth Amendment remained effective only for ending peonage.[37] Only in 1968, at the very end of the Civil Rights Era, did the Court expand the Thirteenth Amendment's reach. In *Jones v. Alfred H. Mayer Co.*, the Court found that a private law suit, brought under 42 U.S.C. § 1982 seeking to prevent housing discrimination, could be brought pursuant to a statute predicated on Congress's Thirteenth Amendment authority.[38] The Court also formulated a general rule for civil rights enforcement: "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."[39]

The Burger Court went a step further. It upheld Congress's authority to prevent private school segregation, pursuant to Section 2 of the Thirteenth Amendment.[40] In *Runyon v. McCrary*, the Court reasoned that civil remedies were available to secure for "[a]ll persons within the jurisdiction of the United States" the same rights "to make and enforce contracts."[41] Interestingly, plaintiff parents' contractual right to be free from the incidents of involuntary servitude trumped the free association right of those parents who wanted schools to remain segregated.[42]

Another decision from the 1970s, *Tillman v. Wheaton-Haven Recreation Association*, provided further insight into individual liberties covered under the Amendment. Parties brought the case against a local swimming club's racially-exclusionary membership. And the Court found that racially discriminatory policies violated §§ 1981 and 1982 liberty protections.[43]

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streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other?").

37 Anti-Peonage Act, ch. 187, 14 Stat. 546, 546 (1867) (codified as amended at 42 U.S.C. § 1994 (2000)). A landmark case defined peonage "as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness." Clyatt v. United States, 197 U.S. 207, 215 (1905); *see also* Pollock v. Williams, 322 U.S. 4, 17 (1944) ("The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor . . . ."); United States v. Reynolds, 235 U.S. 133, 146, 148–50 (1914) (distinguishing between free and voluntary labor); Bailey v. Alabama, 219 U.S. 219, 245 (1911) (striking down state law to the extent it made refusal to work evidence of a crime).

38 392 U.S. 409, 438–39 (1968).

39 *Id.* at 440.

40 Runyon v. McCrary, 427 U.S. 160, 168–75 (1976).

41 *Id.* at 164 n.1 (quoting 42 U.S.C. § 1981).

42 *Id.* at 175–77.

43 410 U.S. 431, 435–40 (1973).

The Court has also determined that an employee can bring a § 1981 claim against a private employer. *Johnson v. Railway Express Agency* pointed out that sometimes a § 1981 complaint has advantages over a Title VII charge filed through the Equal Employment Opportunity Commission ("EEOC").[44] Section 1981 provides a longer time frame for filing a claim than Title VII.[45] Further, § 1981 does not require litigants to exhaust the administrative process, as does Title VII, and § 1981 applies to a more inclusive group of employer-defendants.[46] Section 1981 applies to discrimination at the time of the employment contract formation and, as the Court pointed out in a 2008 case, to employers' retaliatory acts perpetrated thereafter.[47]

Since 1968, all Supreme Court cases dealing with §§ 1981 and 1982 have deferred to Congress's civil rights authority under Section 2 of the Thirteenth Amendment. Meanwhile, Congress has rarely tried to invoke that power to pass laws with a broader applicability than contract and property rights. Even in the context of only those two interests, the Court has recognized that the Thirteenth Amendment enables Congress to prevent housing discrimination and private school segregation, neither of which is directly tied to slavery as a form of labor exploitation. The scope of the Amendment, therefore, encompasses liberty interests far beyond receiving reasonable compensation for work.

The expansion of Thirteenth Amendment jurisprudence began in a liberal court and continued through a moderately conservative one. The implication of this line of cases is that Congress can go still fur-

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44 421 U.S. 454, 459–61 (1975).

45 Title VII ordinarily requires an aggrieved party to file a charge with the EEOC within 180 days of the alleged unlawful employment practice, or 300 days after the unlawful practice if the aggrieved party files a discrimination complaint in a state or local agency. 42 U.S.C. § 2000e–5(e) (2000). Filing a Title VII action with the EEOC does not toll the statute of limitations on § 1981 claims. *Johnson*, 421 U.S. at 465–66. For a discussion of the applicable statutes of limitation for § 1981 complaints, see Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 371, 380–83 (2004); Goodman v. Lukens Steel Co., 482 U.S. 656, 660 (1987).

46 Rivers v. Roadway Express, Inc., 511 U.S. 298, 304 n.3 (1994) ("Even in the employment context, § 1981's coverage is broader than Title VII's, for Title VII applies only to employers with 15 or more employees, see 42 U.S.C. § 2000e(b), whereas § 1981 has no such limitation."). Justice Brennan, in a concurring and dissenting opinion to *Patterson v. McLean Credit Union* (*Patterson II*), wrote that "§ 1981 is not limited in scope to employment discrimination by businesses with 15 or more employees, cf. 42 U.S.C. § 2000e(b), and hence may reach the nearly 15% of the workforce not covered by Title VII." 491 U.S. 164, 211 (1989) (Brennan, J., concurring in part and dissenting in part). A disadvantage of § 1981 is that, unlike Title VII, it does not provide for attorneys' fees. *Johnson*, 421 U.S. at 460.

47 CBOCS W., Inc. v. Humphries, 128 S. Ct. 1951, 1956–58 (2008).

ther in protecting fundamental rights by passing laws pursuant to its Section 2 power. Courts can review the constitutionality of such laws by assessing whether they are legitimate means for ending discrimination that Congress found to be rationally related to the incidents of involuntary servitude. That formula is analogous to the rational basis standard of review which the Court until recently relied on to evaluate Commerce Clause cases.[48]

II. THE THIRTEENTH AMENDMENT TODAY

Congress has traditionally relied on its Commerce Clause authority to pass statutes affecting individual rights. The Fourteenth Amendment has likewise provided a foundation for protecting the general welfare, especially through judicial identification of fundamental rights. The Supreme Court has recently diminished the ability of the federal government to use these two constitutional provisions to pass civil rights legislation. Given this regressive development, legislators searching for an alternative source of authority should explore the reach of Section 2 of the Thirteenth Amendment.

A. The Evolving Commerce Clause

In several cases upholding the constitutionality of the Civil Rights Act of 1964, the Court recognized Congress's power to end various forms of discrimination pursuant to the Commerce Clause.[49] Title II of the Act penalized discrimination perpetrated at places of public accommodation, which the Supreme Court had previously found to be outside the scope of the Fourteenth and Thirteenth Amendments. Rather than overturning this nineteenth century decision, the Court upheld the 1964 law on the basis of Congress's Commerce Clause authority.

In *Heart of Atlanta Motel, Inc. v. United States*, the Supreme Court announced that Congress could use its power over interstate com-

48 *See* Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281, 285 (2000) (noting that the Court, until recently, broadly interpreted the scope of Congress's authority to regulate interstate commerce); Frank D'Angelo, Note, *Turf Wars: Street Gangs and the Outer Limits of RICO's "Affecting Commerce" Requirement*, 76 FORDHAM L. REV. 2075, 2087–89 (2008) (explaining the deferential approach of the Court's Commerce Clause jurisprudence prior to the late 1990s).

49 Pub. L. No. 88–352, 78 Stat. 241 (1964) (codified as amended in various sections of 28 U.S.C. and 42 U.S.C.).

merce to prevent a private business, a downtown motel in that case, from discriminating against clients on the basis of race, color, religion, or national origin.[50] While the motel operated in a single state, its advertisement efforts were national, and it let rooms out to interstate travelers.[51] The motel claimed that by forcing it to rent accommodations to racially undesired customers Congress had subjected it to involuntary servitude.[52] But the Court found this argument to be spurious, recognizing that the Thirteenth Amendment was not meant to further discrimination but to end it.[53]

In a companion case, *Katzenbach v. McClung*, the Court also found the Civil Rights Act of 1964 to be applicable to a local restaurant that purchased out-of-state products from an in-state supplier.[54] The owner's effort to enjoin prosecution, in part, by raising a Thirteenth Amendment defense was unsuccessful. On writ of certiorari, the Supreme Court refused to weigh in on the Thirteenth Amendment issue. Instead, the Court denied the request for an injunction because it found the restaurant's segregationist practices to interfere with interstate interests associated with business travel.[55]

Heart of Atlanta Motel and *McClung* established the principle that Congress can pass any necessary and proper law that is rationally related to interstate commerce. As long as Congress had engaged in a minimum threshold of factfinding, the Court did not second-guess legislative policies.[56] Despite this doctrine's long pedigree, which is based on New Deal jurisprudence, during the late 1990s the Court began to diminish congressional authority under the Commerce Clause. This new line of cases has elevated the Thirteenth Amendment's relevancy to civil rights litigation.

The Court's reinterpretation of congressional Commerce Clause authority began with *United States v. Lopez*.[57] In ruling that the Gun-

50 379 U.S. 241 (1964).

51 *Id.* at 243.

52 *Id.* at 244.

53 *Id.* at 244, 261.

54 379 U.S. 294, 296–97 (1964).

55 *Id.* at 303–05.

56 Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 105 (1966) ("The Court does not review the sufficiency of the evidence in the record to support congressional action. . . . No case has ever held that a record is constitutionally required."); Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 732–33 (1996) (stating that requiring all laws with constitutional implication to be supported by extensive legislative findings "unquestionably would fundamentally alter the relationship between the judiciary and the legislature").

57 514 U.S. 549 (1995).

Free School Zones Act was unconstitutional, the Court created a new evaluative approach. Rather than relying on the deferential rational basis test, as it had done since *Heart of Atlanta Motel*, Chief Justice William H. Rehnquist for the majority examined whether the statute concerned conduct with a "substantial effect" on interstate commerce.[58] The Court found that the legislative record did not contain enough information about guns near schools to meet that analytical standard.[59] What is more, the Court made clear that only statutes targeting an "economic enterprise" would fall within Commerce Clause authority.[60]

In dissent, Justice Breyer took the Court to task for deviating from the rational basis test. He emphasized that weapons carried near schools could have a cumulatively significant effect on interstate commerce.[61]

The Court's increasingly economic reading of the Commerce Clause also made its mark in *United States v. Morrison*. The case struck the private cause of action provision from the Violence Against Women Act ("VAWA").[62] That statute was a bipartisan effort that relied on findings that lawmakers amassed through nine congressional hearings and twenty-one state task forces. The consensus among Democrats and Republicans was that the "mountain of data" they had collected showed that gender violence had a substantial effect on interstate commerce.[63] By rejecting this massive evidence, the Court further diminished Congress's ability to pass civil rights legislation. The Court rejected conclusions drawn from the gathered data because gender motivated crimes "are not, in any sense of the phrase, economic activity."[64]

The dissent again opposed abandoning the rational basis of Commerce Clause review.[65] In his dissent, Justice Souter expressed his conviction that Congress's hearings about interstate impact that led to the enactment of VAWA were even more thorough than those

58 *Id.* at 561–63.

59 *Id.* at 561–65.

60 *Id.* at 558–61.

61 *Id.* at 616, 618 (Breyer, J., dissenting).

62 United States v. Morrison, 529 U.S. 598, 617 (2000).

63 *Id.* at 628–31 (Souter, J., dissenting).

64 *Id.* at 613 (majority opinion).

65 *Id.* at 637–38, 647–52 (Souter, J., dissenting); *see also id.* at 663 (Breyer, J., dissenting) ("I continue to agree with Justice Souter that the Court's traditional 'rational basis' approach is sufficient.").

on the Civil Rights Act of 1964.[66] As with the 1964 statute, which relied on testimony of the "highly restrictive effect" of discrimination "upon interstate travel,"[67] VAWA passed after Congress had documented that gender violence impeded "the mobility of employees and their production and consumption of goods shipped in interstate commerce."[68]

Unlike its Commerce Clause jurisprudence, the Supreme Court has never restricted the Thirteenth Amendment to economic matters. Neither is it likely to do so. Further, even one infringement on an individual's rights would be actionable; whereas, *Morrison* asserts that a single harm to the national economy would not be enough for Commerce Clause purposes.[69]

The recent Supreme Court decisions have made it clear that using the Commerce Clause to set civil rights policy is vulnerable to economic counterarguments. Judges with a states' rights leaning are likely to require a high burden of proof about the magnitude of interstate commerce involvement rather than relying on congressional findings. In the case of violence against women, years of documentation proved to be insufficiently persuasive. If a new version of VAWA were to rely on Thirteenth Amendment analysis, on the other hand, proving that violence against even one woman related to the subordination of involuntary servitude would suffice to secure a conviction.

Whether such physical harm is an incident of involuntary servitude is a question that, according to *Jones v. Alfred H. Mayer Co.*, only Congress can answer; and a judge can review under a rational basis standard.[70] Whether a woman suffered economic harm is irrelevant for Thirteenth Amendment assessment. What is pertinent is that violence was regularly perpetrated against women on plantations. Andrew Koppelman, among other scholars, has pointed out that sexual crimes were endemic to slavery.[71] Therefore, given congressional task forces who found that state courts do not provide adequate proce-

66 *Id.* at 635 (Souter, J., dissenting) (noting that sexual assault and domestic violence caused a loss of $3 billion in 1990 and $5 to $10 billion in 1993).

67 Katzenbach v. McClung, 379 U.S. 294, 300 (1964).

68 *Morrison*, 529 U.S. at 634, 636 (Souter, J., dissenting).

69 *See id.* at 617–18 (majority opinion) (rejecting "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce").

70 *See supra* note 39 and accompanying text.

71 Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 508–09 (1990).

dural protections for the victims of sexual abuse,[72] Congress can rely on its Thirteenth Amendment power to create a needed federal remedy.

Given the sparseness of Thirteenth Amendment precedents, broadening its reach is more likely to succeed through incremental policymaking. This step-by-step strategy is analogous to the NAACP's successful approach to litigation in the Fourteenth Amendment area.[73] A modest place to start is a statute tying forced labor to a relatively narrow group of domestic violence cases involving restraints on employment. An analogy to involuntary servitude can be drawn where a husband uses physical force or violence to keep his wife from working. Prosecutors could then show that a husband who used force to prevent his wife from obtaining work outside the home acted in a way that was reminiscent of slave-holders' treatment of human chattel. This narrow federal question cause of action would open additional opportunities for expanding the role of Thirteenth Amendment decision-making.

The Thirteenth Amendment approach to the problem is grounded in human rights purposes. It differs from the Commerce Clause strategy to civil rights policymaking, which can only clear the judicially set hurdle by showing that a statute regulates activity that has a substantial effect on the national economy. The Thirteenth Amendment was the first constitutional change of the Second Founding. It required the nation to live up to the ideals first announced in the Declaration of Independence and reiterated in the Preamble.[74] Unlike the Amendment, the Commerce Clause is a neutral device. Congress might have regulated the interstate flow of slaves after 1824 when the Court decided *Gibbons v. Ogden*,[75] but, until the ratification of the Thirteenth Amendment, national power over commerce was never used to stem the sale and transport of slaves.[76]

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72 S. REP. NO. 103-138, at 49–50 (1993) (noting that "State remedies have proven inadequate to protect women against violent crimes motivated by gender animus").

73 *See* Mark Tushnet, *The Rights Revolution in the Twentieth Century*, *in* 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 377, 381 (Michael Grossberg & Christopher Tomlins eds., 2008).

74 ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 108–09 (2004).

75 22 U.S. (9 Wheat.) 1, 75 (1824) (holding that the Commerce Clause authorizes Congress to regulate interstate navigation).

76 *See* Charles H. Cosgrove, *The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis*, 32 U. RICH. L. REV. 107, 123 (1998) ("[T]he non-use of these powers . . . owed more to the bad faith of the American people than to any inherent constitutional restraints."); Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695, 702 n.54 (2002) (describing

Turning to the Thirteenth Amendment for a fresh legislative strategy is not, however, meant to displace the Commerce Clause. Many laws passed pursuant to this grant of power, including the Civil Rights Act of 1964 and various provisions of the Americans with Disabilities Act, need no buttressing. But in the area of gender motivated violence or other forms of hate crimes, the Thirteenth Amendment offers a new lawmaking strategy to avoid running afoul of *United States v. Morrison*.[77]

Senator Edward Kennedy recently introduced the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007.[78] He rooted the congressional authority for that hate crime bill in Section 2 of the Thirteenth Amendment. While he eventually withdrew the bill, it provided a look at the Amendment's continued relevance to contemporary policy. The proposal related that:

> For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.[79]

During the same session of Congress, Representative John Conyers also introduced a hate crimes prevention act but based it on Congress's power over interstate commerce.[80]

Given the Court's new Commerce Clause jurisprudence, which emerged in *United States v. Lopez*, it is more likely that Kennedy's, rather than Conyers's, version of the bill would survive judicial scrutiny. An approach that is even more likely to withstand appellate review should include both Thirteenth Amendment and Commerce Clause

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Professor Barnett's contention that Congress could enact regulations concerning foreign commerce such as slave importation).

77 529 U.S. 598 (2000).

78 Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. (2007). In the interest of full disclosure, it is important to mention that I advised Senator Kennedy's judicial committee staff on the drafting of this bill. For a compassionate description of Shepard's murder, see Shannon Gilreath, *"Tell Your Faggot Friend He Owes Me $500 for My Broken Hand": Thoughts on Substantive Equality Theory of Free Speech*, 44 WAKE FOREST L. REV. (forthcoming) (Wake Forest Univ. Legal Studies Paper No. 1332040), *available at* http://ssrn.com/abstracts=1332040.

79 Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. (2007).

80 Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. (2007).

justifications for a nationally enforceable hate crimes law. An added severability clause would enable the law to survive even if a court declared one of those two grounds to be an invalid use of congressional power.

Beyond simply pragmatic reasons for relying on the Amendment to pass new civil rights legislation, it would add a communicative dimension to such law that the Commerce Clause does not provide. At the time of its ratification, the Thirteenth Amendment revealed a break from antebellum constitutionalism. It put federal muscle behind abolishing slavery. Within a year, Congress relied on it to pass the Civil Rights Act of 1866.[81] This demonstrated a commitment to battle the incidents of involuntary servitude rather than remaining complacent with liberating slaves. Yet the ambitious plans of reapportioning Confederate leaders' lands to newly freed slaves failed to get enough support.[82]

Today, despite the enormous progress that made it possible for an African American to become president, much remains undone. Human trafficking exploits labor in a way that transcends simple economic and racial rubrics. Likewise, abuses against migrant farmers, foreign workers, child apprentices, and domestic laborers all involve economic harms, but they each require redress that is based on the nation's commitment to civil rights rather than solely the regulation of the channels of the interstate exchange.[83]

Tying anti-discrimination legislation to a civil rights amendment relays an important message about the value of individual liberty. A

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81 Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27–30 (1866) (codified as amended at 18 U.S.C. § 242 (2006) and 42 U.S.C. §§ 1981, 1982 (2000)).

82 Thaddeus Stevens proposed to give freed persons "forty acres and a mule." William A. Russ, Jr., *The Negro and White Disfranchisement During Radical Reconstruction*, 19 J. OF NEGRO HIST. 171, 184 (1934). Another radical Congressman, George W. Julian, also proposed a land reapportionment scheme of reparation. WILLIAM RICHTER, AMERICAN RECONSTRUCTION, 1862–1877, at 240–41 (1996).

83 For a variety of cases dealing with the exploitation of labor rising to the level of involuntary servitude, see Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1294 (N.D. Okla. 2006); Chellen v. John Pickle Co., 344 F. Supp. 2d 1278, 1290 (N.D. Okla. 2004); Weidenfeller v. Kidulis, 380 F. Supp. 445, 449–51 (E.D. Wis. 1974). The purposes of criminalizing human trafficking are explained in the Trafficking Victims Protection Act, 22 U.S.C. § 7101(b)(12) (2000) (describing the impact of trafficking for such purposes as "involuntary servitude, peonage, and other forms of forced labor"). *See also* Neal Kumar Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 806–09 (1993) ("Pimps deprive prostitutes of their free will and their free labor in the same way that Southern slave masters deprived slaves in the 1800's.") On the use of the Thirteenth Amendment to punish the forceful use of migrant farm labor, see United States v. Warren, 772 F.2d 827, 833 (11th Cir. 1985); United States. v. Booker, 655 F.2d 562 (4th Cir. 1981). On the forceful use of child labor, see United States v. King, 840 F.2d 1276 (6th Cir. 1988).

law that directly targets the vestiges of subordination sends a signal about the nation's values. Stressing the federal government's commitment to protect individuals against the continued incidents of involuntary servitude is more likely to alter classist, racist, and sexist hierarchies than laws grounded on utility maximization.

The Thirteenth Amendment is a more logical source of federal civil rights authority than the Commerce Clause. It can help fill the gap of federal authority that the Supreme Court created in *United States v. Lopez* and *United States v. Morrison*. The Amendment empowers government to prohibit private and public breaches against personal autonomy, even when violators do not substantially impact the national economy. On the other hand, recent Supreme Court decisions increasingly interlink the Commerce Clause to large-scale economic transactions. Reliance on the Thirteenth Amendment's Enforcement Clause has become of further import because of the Court's new interpretation of the Fourteenth Amendment.

B. The Thirteenth and Fourteenth Amendments

The Fourteenth Amendment, just as the Thirteenth Amendment, demonstrates the country's commitment to individual rights. The latter was the first constitutional break from the slave-protecting provisions of the original Constitution. Besides abolishing slavery, it provided Congress with the necessary authority to pass laws preventing state or private infringement against universal liberties. Shortly thereafter, the Fourteenth Amendment incorporated due process and equal protection into the constitutional ethos. It, too, augmented legislative power, which the Court restricted in the *Civil Rights Cases* to the regulation of state actions. In the past decade, the Court has added new restraints on Fourteenth Amendment authority.

In a 1966 case, the Court interpreted Section 5 of the Fourteenth Amendment to be an affirmative grant of power authorizing Congress "to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[84] More recently, however, the Court indicated that it has a sole discretion to interpret the Constitution, turning back a congressional effort to safeguard free exercise rights beyond those that the justices had previously identified.[85]

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84 Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

85 City of Boerne v. Flores, 521 U.S. 507, 519 (1997) ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.").

City of Boerne v. Flores began a trend of increased judicial intrusion into legislative policymaking. That case found that the Religious Freedom Restoration Act to be unconstitutional because it was "so out of proportion to a supposed remedial or preventive object that it [could not] be understood as responsive to, or designed to prevent, unconstitutional behavior."[86] The Court unquestioningly retained the state action requirement from the *Civil Rights Cases*, finding that the Fourteenth Amendment only allowed Congress to prevent state infringements but not to define what rights are constitutionally cognizable.[87] Congress, the Court asserted, lacks the mandate "to decree the substance of the Fourteenth Amendment's restrictions on the States."[88]

United States v. Morrison further diminished legislative authority to identify fundamental rights and to pass laws protecting them. As with the Commerce Clause portion of that opinion,[89] the Court held that the VAWA provision creating a private cause of action was beyond the pale of Congress's Section 5 authority.[90] *Morrison* also endorsed the state action requirement, providing further proof of the doctrine's resilience.[91]

The Thirteenth Amendment has no state action requirement, providing Congress with the power to enact legislation against private discrimination that is currently outside the scope of the Fourteenth Amendment.[92] The most effective Thirteenth Amendment statutes currently available primarily regulate incidents and badges of involuntary servitude that violate contractual and property ownership interests.[93] But much more can be done. Congress has not nearly exhausted its authority to pass "effective legislation" that is rationally related to the Amendment's purposes.[94] The Thirteenth Amendment

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86 *Id.* at 532.

87 *Id.* at 524–25, 536.

88 *Id.* at 519.

89 *See supra* 62–66 and accompanying notes.

90 United States v. Morrison, 529 U.S. 598, 627 (2000).

91 *Id.* at 621–23. The majority asserted that it would continue to follow "the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action." *Id.* at 621.

92 *See* U.S. v. Kozminski, 487 U.S. 931, 942 (1988) ("[T]he Thirteenth Amendment extends beyond state action . . . .").

93 42 U.S.C. §§ 1981–1982 (2000) (discussing enforcement of contracts and security of property).

94 *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) ("Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.").

was not merely ratified for slaves to leave plantations but to allow persons to meaningfully enjoy their liberties. As Representative James Garfield put it the year the Amendment was ratified, if freedom meant no more than being unchained, it was but "a bitter mockery" and "a cruel delusion."[95]

Identifying what rights the Thirteenth Amendment protects begins, as it does with substantive due process, with an assessment of what liberties are deeply rooted in the American tradition.[96] But unlike the Court's new Fourteenth Amendment doctrine, the text of the Thirteenth Amendment leaves it to the legislature, not the judiciary, to make this initial finding. Working through their representatives, the electorate can play a central role in assessing what forms of persistent subordination are logically tied to the incidents of involuntary servitude. Congress can then find the best means of dealing with those abridgements of liberty on a federal level, creating a unified scheme that would be binding on individuals and the States.[97]

The current Thirteenth Amendment case law has remained a broad grant of congressional power at a time when the Court has diminished Fourteenth Amendment Section 5 authority. Laurence H. Tribe has understood the current precedents to recognize that:

> Congress possesses an almost unlimited power to protect individual rights under the Thirteenth Amendment. Seemingly, Congress is free, within the broad limits of reason, to recognize whatever rights it wishes, define the infringement of those rights as a form of domination or subordination and thus an aspect of slavery, and proscribe such infringement as a violation of the Thirteenth Amendment.[98]

Tribe's understanding is profound, but it needs some qualification to prevent the legislature from overreaching Section 2's grant of authority. Courts can assess whether a particular statute fits within the Thirteenth Amendment framework by evaluating whether legislators came to a reasonable decision after making a normative and historical evaluation.

The use of historical antecedents to legislative power can help prevent ad hoc lawmaking. What's more, a Thirteenth Amendment

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95 James A. Garfield, Oration Delivered at Ravenna, Ohio (July 4, 1865), *in* 1 THE WORKS OF JAMES ABRAM GARFIELD 86 (Burke A. Hinsdale ed., 1882).

96 *See* Washington v. Glucksberg, 521 U.S. 702, 720–22 (1997).

97 The Supreme Court has found that some forms of public service, such as mandatory jury duty or obligatory military service, do not resemble involuntary servitude when they are done for the common good. *See* Hurtado v. United States, 410 U.S. 578, 589–90 n.11 (1973) (asserting that compensation of "$1-a-day" for jury duty does not amount to involuntary servitude); Selective Draft Law Cases, 245 U.S. 366, 390 (1918) (discussing a military draft).

98 1 LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5–15, at 926–27 (3d ed. 2000).

approach can explain some of the ambiguities of Fourteenth Amendment jurisprudence. While the Thirteenth Amendment can fill some gaps in constitutional interpretation, relying on it alone can have its own shortcomings.

One of the greatest challenges in the years to come will be to determine the extent that the Thirteenth Amendment applies to classifications other than race. Current case law on Section 2 authority deals with racial discrimination.[99] The temptation, in keeping with Tribe's suggestion, is to claim that Congress should be left unimpeded in its evaluation of the Thirteenth Amendment's scope. After all, the narrowing parameters of congressional power that *Boerne* and *Morrison* established for Section 5 of the Fourteenth Amendment are inapplicable to the Thirteenth Amendment. This approach is appealing because, if successful, it might prevent judicial intrusion into legislative policymaking. But it is too great a leap. A better strategy for expanding the Amendment's reach is to proceed incrementally. Moving gradually is more likely to meet with success than seeking immediate judicial interpretation of the full scope of Section 2 authority.

Initial lobbying efforts should focus on statutory formulation that is clearly linked to overt incidents of involuntary servitude. Existing laws provide a sense of what is possible. Section 1981 covers violations of employment contracts, but it does so from a transactional angle.[100] The law is applicable if a civil rights violation is linked to some form of transactional violation. For instance, it provides a private cause of action against labor exploitation. A person who is lured to the United States by an employer promising a position at a restaurant but is then forced into sexual slavery can sue under § 1981. If the victim could not pursue a contractual claim, she might sue under the Victims of Trafficking and Violence Protection Act of 2000 ("TVPA"), another statute grounded in Thirteenth Amendment enforcement authority.[101] There is no comparable private cause of action under the Fourteenth Amendment.

If the lawsuit were only seeking redress for gender violence in the workplace, with no involvement of coerced labor, neither § 1981 nor

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99 *See, e.g.*, *Jones*, 392 U.S. at 442–43 ("And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery."); *see also* Runyon v. McCrary, 427 U.S. 160 (1976) (discussing schools' racially-discriminatory admissions policies).

100 42 U.S.C. § 1981 (2000).

101 22 U.S.C. §§ 7101–7110 (2006) ("Trafficking Victims Protection"); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (2000); *see also* 18 U.S.C. §§ 1589–1594 (2006) (dealing with forced labor).

the TVPA would be implicated. To fill this gap, Congress could create a private cause of action for gender motivated violence that is perpetrated during the course of employment. That type of statute would begin to fill the private cause of action gap left open when the Supreme Court found the Violence Against Women Act to be unconstitutional. It would carry the Thirteenth Amendment a step beyond the racial context but still retain its readily recognizable connection to civil rights violations that occur in the workplace.

Given the close relation of workplace violence to slavery and involuntary servitude, a court would likely find the statute to be a constitutionally legitimate use of Section 2 authority. To further bolster such a statute, Congress should pass it pursuant to both its Thirteenth Amendment and Commerce Clause power. A severability provision, allowing the statute to survive even if one of those bases of power were to be found unconstitutional, would further bolster it against constitutional challenges.

Outside the gender context, incremental steps can also be taken to protect groups who are not members of a suspect class. An even more cautious approach is warranted here since it is an additional step beyond the currently race-focused interpretation of the Thirteenth Amendment.

Most members of Congress already support efforts to rely on the Thirteenth Amendment to add sexual orientation among the characteristics protected by national hate crime laws.[102] Sexual orientation discrimination is the third most common form of hate crime.[103] The number of such crimes is only exceeded by racially and religiously motivated hate crimes.[104] Yet, the current federal hate crime law does not penalize offenses motivated by sexual orientation bias.[105] The most recent attempt at preventing harms to the safety of gays, lesbians, and other at-risk groups, the Matthew Shepard Bill, relied on Section 2 of the Thirteenth Amendment.[106] When the bill failed to get adequate congressional support, Senator Edward Kennedy who sponsored the effort, withdrew it from consideration.

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102 My characterization of the congressional level of support for the hate crime bill is based on conversations with a congressional staffer on Senator Richard Durbin's staff on the Senate Judiciary Committee.

103 Federal Bureau of Investigation, 2006 Hate Crime Statistics, http://www.fbi.gov/ucr/hc2006/victims.html (last visited May 8, 2009).

104 *Id.*

105 18 U.S.C. § 245(b)(2) (2006) (providing for criminal penalties for violence motivated by race, color, religion, or national origin).

106 *See supra* note 78–79 and accompanying text.

Kennedy's proposed bill would have made it a criminal offense to commit violent acts "motivated by prejudice based on the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim, or is a violation of the State, local, or Tribal hate crime laws."[107] Adding protections for vulnerable peoples not covered under current law would allow Congress to combat subordinating behavior analogous to the incidents of involuntary servitude. Hence, Kennedy invoked Thirteenth Amendment Section 2 authority. The bill would have been less vulnerable to opposition had it been approached more pragmatically, although the down side of this approach is a diminished sense of idealism.

A more incremental approach to a hate crime statute that adds a sexual orientation component would prevent subordinating violence in the workplace.[108] If this narrow act were to pass judicial scrutiny, then Congress could seek to broaden the reach of its Section 2 authority to areas unconnected to labor.

Take, for example, the right to privacy, which the court has found to be a protected substantive due process interest. Under the current state action doctrine, Congress cannot use its Section 5 power to promulgate a statute prohibiting individuals from infringing on individuals' privacy interests. The Court is limited by institutional constraints to adjudicating ripe claims about allegedly offending state regulations. Where no state regulation of constitutionally protected private conduct, like homosexual intimacy,[109] is involved, litigants cannot obtain legal redress. Consequently, gay Boy Scout leaders who seek an injunction or damages against that organization have no recourse under the Fourteenth Amendment.[110]

From a historic perspective, being excluded from organizations was a feature of slavery. Before the Civil War, blacks were commonly prohibited from congregating to pray, play at cards, roll dice, attend cultural activities, and participate in fraternal orders.[111] Likewise, most trade associations from the eighteenth to the early twentieth

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107 Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. § 4(a)(1)(C) (2007).

108 One of the bill's weaknesses was the failure to clearly link sexual orientation-motivated crimes to the incidents of involuntary servitude.

109 Lawrence v. Texas, 539 U.S. 558, 564–79 (2003).

110 *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 643–44 (2000) (holding that a New Jersey anti-discrimination statute was inapplicable to an organization that had the associational right to include persons based on sexual orientation).

111 DOUGLAS R. EGERTON, GABRIEL'S REBELLION: THE VIRGINIA SLAVE CONSPIRACIES OF 1800 AND 1802, at 30 (1993); WHITTINGTON B. JOHNSON, BLACK SAVANNAH 1788–1864, at 23 (1996).

centuries often prohibited women from joining.[112] Contemporary cases of slavery perpetrated by sweatshops also infringe on workers' right to associate in trade unions.[113] Exclusion from organizations has been intrinsic to slavery and involuntary servitude from the colonial period to the present. Legislators could, therefore, rationally conclude that Section 2 allows Congress to prohibit exclusion from associations, at least in cases where some labor is involved, as with Boy Scout leaders. Just as segregated school associational rights do not trump those of parents wishing to enroll their children,[114] the associational rights of a discriminatory organization cannot trump the interest of unobtrusive individuals seeking to participate in them.

The ability of qualified persons to join organizations of their choice, without being subject to arbitrary character tests, also enables them to exercise other rights. For example, the Supreme Court has repeatedly recognized that the "firmly established"[115] "freedom of travel is a constitutional liberty closely related to rights of free speech and association."[116] Decisions dealing with that right to move about have, to date, relied on the Privileges and Immunities Clause, the Due Process Clause, the Equal Protection Clause, and the Commerce Clause.[117]

Justice Douglas asserted that the right to travel internationally is "a part of our heritage," which is protected by the Due Process Clause of the Fifth Amendment.[118] In *Kent v. Dulles*, he explained how it was connected to other human functions: "Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values."[119] In fact, in antebellum United States the Due Process Clause of the Fifth Amendment applied to travel into territories and the Dis-

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112 *See, e.g.*, ELIZABETH BLACKMAR, MANHATTAN FOR RENT, 1785–1850, at 54 (1989).

113 *See* ROBERT J. S. ROSS, SLAVES TO FASHION: POVERTY AND ABUSE IN THE NEW SWEATSHOPS 268–69 (2004).

114 Runyon v, McCrary, 427 U.S. 160, 176–77 (1976).

115 United States v. Guest, 383 U.S. 745, 757 (1966).

116 Aptheker v. Sec'y of State, 378 U.S. 500, 517 (1964).

117 Saenz v. Roe, 526 U.S. 489, 501 (1999) (finding that the right to travel comes from the Privileges and Immunities Clause of Article IV , Section 2); *Guest*, 383 U.S. at 758–59 (deciding that the right to travel is part of the Commerce Clause's protection on free movement); Zemel v. Rusk, 381 U.S. 1, 14 (1965) (indicating the right to travel is found in the Fifth Amendment); Twining v. New Jersey, 211 U.S. 78, 96–97 (1908) (holding the right to travel is linked to the Fourteenth Amendment).

118 Kent v. Dulles, 357 U.S. 116, 126–27 (1958).

119 *Id.* at 126.

trict of Columbia.[120] But slaves and even free blacks were routinely prohibited from exercising that liberty by States or slaveholders.[121] The Fourteenth Amendment incorporated due process rights against state barriers but not against private interference with travel.

Another Warren Court case, which found a welfare residency requirement to be unconstitutional, held that absent a compelling state reason state interference with the right to travel was an equal protection violation.[122] Three decades later a Rehnquist Court welfare rights case determined that an excessive burden on out-of-state plaintiffs' right to travel violated their privileges and immunities as "Citizens in the several States."[123]

A decision that pursued a different analysis found that "the constitutional right of interstate travel" is secure against governmental and private interference.[124] The right to travel on highways "and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union."[125] The problem with this Commerce Clause tract is that standing alone, without an added Thirteenth Amendment rationale, it rests a fundamental right on the basis of substantial economic factors. On the other hand, the Fourteenth Amendment alone is useless against private conspiracies to interfere with travel, since the Court remains convinced that Amendment is only applicable to state infringements.

The Thirteenth Amendment, on the other hand, provides a historically supported reason to believe that arbitrary interference with the right to travel is an incident of involuntary servitude. Masters prevented their human chattel from leaving at will.[126] Upon gaining their freedom through the Amendment, many newly freed persons

120 *See* Dred Scott v. Sandford, 60 U.S. (1 How.) 393, 450 (1856). ("[A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law.")

121 *See* ALEXANDER TSESIS, WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW 50 (2008).

122 Shapiro v. Thompson 394 U.S. 618, 629–31 (1969).

123 Saenz v. Roe, 526 U.S. 489, 501–02, 509 (1999).

124 U.S. v. Guest, 383 U.S. 745, 759 n.17 (1966).

125 *Id.* at 757.

126 Christopher Morris, *The Articulation of Two Worlds: The Master-Slave Relationship Reconsidered*, 85 J. AM. HIST. 982, 1000 (1998); Robert Starobin, *Disciplining Industrial Slaves in the Old South*, 53 J. NEGRO HIST. 111, 114 (1968).

travelled to find work, seek long-displaced relatives, or take a vacation.[127]

In 1866, Senator Lyman Trumbull, who was chairman of the Senate Judiciary Committee that fashioned the text of the Thirteenth Amendment, explained the right to travel within the context of Section 2 enforcement authority:

> It is idle to say that a man is free who cannot go and come at pleasure . . . [and] who cannot enforce his rights. These are rights which the first clause of the constitutional amendment meant to secure to all; and . . . [so] that Congress would not have the power to secure them the second section of the amendment was added.[128]

One of the great failures of the Reconstruction Congresses was their inability to successfully prevent legal and private restrictions, through legal devices like vagrancy laws and plantation owners' pacts, on free-persons' travels.[129]

The Court's most explicit statement on the Thirteenth Amendment's applicability to free movement cases came in *Griffin v. Breckenridge*.[130] The case dealt with a portion of the Ku Klux Klan Act that criminalized private conspiracies that intended to deprive persons from using the interstate highway system.[131] The majority recognized that penalizing conspirators who use a public highway to deprive their victims of the "equal protection of the laws, or of equal privileges and immunities under the laws" invoked Fourteenth Amendment language.[132] The Thirteenth Amendment, on the other hand, explicitly did not include an equal protection clause.[133] To find a way around the state action requirement, without overturning the *Civil Rights Cases*, the Court asserted that "[o]ur cases have firmly established that the right of interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference."[134] The

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127 *See* OCTAVIA V. ROGERS ALBERT, HOUSE OF BONDAGE 134–35 (Oxford Univ. Press 1988) (1890); SIDNEY ANDREWS, THE SOUTH SINCE THE WAR 350–53 (Arno Press and the N.Y. Times 1969) (1866).

128 CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865).

129 LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 191, 318–19 (1979); William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J. S. HIST. 31, 47 (1976); Amy Dru Stanley, *Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America*, 78 J. AM. HIST. 1265, 1293 (1992).

130 403 U.S. 88, 104–05 (1971).

131 42 U.S.C. § 1985(3) (2000).

132 *Griffin*, 403 U.S. at 96–97.

133 Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 562–63 (2002).

134 *Griffin*, 403 U.S. at 105.

Thirteenth Amendment offered the necessary resolution since it provided Congress with the power to prevent "racially discriminatory private action."[135] In later years, the Court explained that "the conspiracy at issue [in *Griffin*] was actionable because it was aimed at depriving the plaintiffs of rights protected by the Thirteenth Amendment and the right to travel guaranteed by the Federal Constitution."[136]

Griffin has broad implications. First, Congress can reasonably determine what restrictions on travel, whether private or public, are the badges and incidents of involuntary servitude. Then it can provide penalties to prevent them. Arbitrary barriers to choosing a home, for instance, significantly hinder movement. This means that a federal housing law might be advanced through the Thirteenth Amendment. Such a statute might prohibit discrimination on the basis of sexual orientation, which the current law does not cover.[137] Such a fair housing law could also be even more far reaching than the current model, which only applies to dwellings that benefit from federal funding.[138] The Thirteenth Amendment, I believe, provides the authority to enact a civil rights statute, even when the offending residence receives no governmental spending.

Legislative developments in this constitutional niche might also offer federal protections against criminal profiling, hate crimes, and U.S. company exploitation of foreign workers. While these achievements will take time, they may be feasible in the future: criminal profiling—which is usually based on race, national origin, and ethnicity—prevents targeted persons from travelling freely through neighborhoods. Hate crimes similarly intimidate persons from exercising their right of free movement. And domestic companies that exploit overseas sweatshop labor operate from the United States to perpetuate slavery.

III. CONCLUSION

The Thirteenth Amendment not only ended slavery, through its First Section, but also allowed Congress to secure liberties against continued forms of arbitrary subordination through Section 2. The

135 *Id.*

136 United Bhd. of Carpenters v. Scott, 463 U.S. 825, 832–33 (1983).

137 Fair Housing Act, 42 U.S.C. § 3604(a) (2000). Twelve states have laws prohibiting housing discrimination based on sexual orientation; *see also* Philip C. Aka, *Technology Use and the Gay Movement for Equality in America*, 35 CAP. U. L. REV. 665, 674–75 (2007).

138 42 U.S.C. § 3603 (2000).

Amendment's broad language enables each generation, through their elected representatives, to abolish coercive practices. Its focus, unlike the Commerce Clause, does not trigger economic concerns, and, unlike the Fourteenth Amendment, lacks wording that can be mistaken for a state action requirement.

The Rehnquist Court placed new restraints on congressional Commerce Clause and Fourteenth Amendment authority, but it left intact broad legislative power to identify and regulate the badges and incidents of involuntary servitude. Congress may pass necessary and proper laws that it reasonably expects will end any subordinating infringements against individual rights. Legislation should be passed with enough circumspection to provide protections for fundamental interests like associational liberties and free movement. Success is more likely if the efforts are incremental, focusing initial legislative proposals on ending civil rights discrimination related to work environments and infringements on core interests, like free movement. This approach can best avoid eliciting judicial decisions that undermine the sort of deference shown in *Jones v. Alfred H. Mayer*.

If this initial effort succeeds, Congress can eventually become more expansive in its policies. The Thirteenth Amendment's ultimate commitment is to ending any arbitrary impediments on fundamental liberties.