THE PROBLEM OF CONFEDERATE SYMBOLS: A THIRTEENTH AMENDMENT APPROACH

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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

"We have been living at an immense rate, and have hardly had time to take breath and review the ground over which we have travelled [sic] Only aftergenerations will be able to contemplate intelligently the events of to-day, and appreciate their grand significance."

-Frederick Douglass**

There shall be neither slavery nor involuntary servitude in the said Territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted: provided, always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or services as aforesaid.

Ordinance of 1787, An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, art. VI, reprinted in THE CONSTITUTIONS OF OHIO 52 (Isaac F. Patterson ed., 1912). Drafted by Thomas Jefferson, the Northwest Ordinance illustrates his contradictory perspective on slavery. On the one hand he spoke out against its immorality, on the other he maintained a racist attitude that was reflected in his personal slave ownership. See ANTHONY F. C. WALLACE, JEFFERSON & THE INDIANS 78-79 (1999) (discussing Jefferson's contradictory statements about slavery and blacks).

++ Frederick Douglass, *The Final Test of Self-Government: An Address Delivered in Rochester, New York,* (Nov. 13, 1864), *in* 4 THE FREDERICK DOUGLASS PAPERS: SPEECHES, DEBATES, & INTERVIEWS 32-33 (John W. Blassingame et al. eds., Series No. 1 1991).

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⁺ The Senate Committee of the Judiciary, under the leadership of Lyman Trumbull, borrowed the first clause of the Thirteenth Amendment from the Northwest Ordinance of 1787. See HORACE WHITE, THE LIFE OF LYMAN TRUMBULL 224 (1913) (discussing history of the Amendment). Whatever good came from the Ordinance's prohibition of slavery, which applied to lands northwest of the Ohio River, was counterbalanced by an ominous fugitive slave clause:

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I. INTRODUCTION

The Thirteenth Amendment to the United States Constitution played an essential role in eliminating involuntary servitude. It anesthetized the slave supporting clauses of the Constitution¹ which had enabled the ante-bellum South to augment its power.² The South's peculiar institution was sheltered from the equalitarianism embraced in the Declaration of Independence.³ On the eve of the Civil War, Congressman Thomas Corwin, from the Seventh District of Ohio, proposed an amendment, the contents of which were antithetical to the current Thirteenth Amendment.⁴ He proffered it, on March 2, 1861, in a vain attempt to appease secessionist-minded congressmen, reading:

No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to

^{1.} In its original form the United States Constitution contained several provisions protecting slavery: U.S. CONST. art. I, § 2, cl. 3, partly repealed by U.S. CONST. XIV (reducing blacks to three-fifths value of whites for purposes of representation) ("Three-Fifths Clause"); U.S. CONST. art. IV, § 2, cl. 3, affected by U.S. CONST. amend. XIII (prohibiting non-slaveholding states from emancipating runaway slaves and requiring their return to slave owners) ("Fugitive Slave Clause"); and U.S. CONST. art I, § 9, cl. 1 (countenancing African slave trade in 1808) ("Slave Importation Clause"). See Paul Finkelman, The Color of Law, 87 Nw. U. L. REV. 937, 968 (1993) (reviewing ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992)) (providing overview of slave-supporting clauses to U.S. Constitution).

^{2.} See CONG. GLOBE, 38th Cong., 2d Sess. 265 (1865) (statements of Congressman Thaddeus Stevens) (stating slavery must be abolished regardless of its effect on different states).

^{3.} Id.; see THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (setting forth that "all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness").

^{4.} Michael J. Lynch, The Other Amendments: Constitutional Amendments that Failed, 93 L. LIBR. J. 303, 306-07 (2001); see Pamela J. Smith, Our Children's Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children, 42 How. L.J. 133, 156-57 (1999) (both discussing proposed amendments).

labor or service by the laws of said State.5

Racism was then so deeply entrenched in American culture that the proposal mustered the necessary two-thirds congressional super-majority needed to amend the Constitution.⁶ The vote in the House of Representatives was 133 for passage and 65 votes against it; 24 senators voted for it and 12 voted against.⁷ The infamy of having such an overtly racist constitutional provision was averted only by the commencement of the Civil War, by then three states had already ratified the proposed amendment.⁸ President James Buchanan affixed his signature to Corwin's amendment, showing his heartfelt support, even though he was not required to do so by the Constitution.⁹

The Thirteenth Amendment, as it is now worded, began on the road to success about two years later, shortly after the House of Representatives of the 38th Congress began legislating on December 14, 1863. Representative James M. Ashley of Ohio introduced the proposed amendment as one of the first bills of the session. He announced his intent to submit a national amendment to the states "prohibiting slavery, or involuntary servitude, in all of the States and Territories now owned or which may be hereafter acquired by the United States." John Henderson of Missouri introduced the Senate version (S. No. 16) on January 13, 1864. From then until January 1865, the movement Ashley helped initiate gained support in Congress and in the nation. In 1864, the Senate passed it, but the first time it was up for a vote in the House the proposed amendment failed to garner enough votes. However, after Lincoln was reelected in 1864, his backing for the Amendment helped sway the House, which adopted it on January 31, 1865. The debates leading up to ratification are

^{5.} Lynch, supra note 4, at 306 (quoting CONG. GLOBE, 36th Cong., 2d Sess. 1263 (1861)).

^{6.} Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561, 1563-64 (1998) (reviewing DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995 (1996)).

^{7.} Id.

^{8.} See Elai Katz, On Amending Constitutions: The Legality & Legitimacy of Constitutional Entrenchment, 29 Colum. J. L. & Soc. Probs. 251, 276 n.103 (1996) (listing Ohio, Maryland, and Illinois as ratifying states). One author argues that only Maryland's and Ohio's ratifications were valid since they were achieved by the state conventions, as Congress had required, while Illinois attempted to ratify it by a state constitutional convention. MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, & THE THIRTEENTH AMENDMENT 21 n.43 (2001). I believe Vorenberg is mistaken, however, since Article V of the United States Constitution allows for ratification either by state legislatures or conventions. See, e.g., U.S. CONST. art. V (setting forth procedures for amending Constitution).

^{9.} VORENBERG, supra note 8, at 21.

^{10.} Howard D. Hamilton, The Legislative & Judicial History of the Thirteenth Amendment, 9 NAT'L B.J. 26, 26 (1951).

^{11.} CONG. GLOBE, 38th Cong., 1st Sess. 19 (1863).

^{12.} Id.

^{13.} CONG. GLOBE, 38th Cong., 1st Sess. 145 (1863).

^{14.} Hamilton, supra note 10, at 38.

^{15.} Id.; JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 706 (1988).

^{16.} See VORENBERG, supra note 8, at 178 (discussing popular support of Amendment after 1864 election). Other abolitionists, including Frederick Douglass, supra note ++, also considered the

revealing, though sometimes unspecific, about the breadth of freedoms Congress intended emancipated people to enjoy.¹⁷ The North not only confronted a secessionist army, which fought under St. Andrew's, Cross (the Confederate battle flag), but Congressmen simultaneously fought polemical battles against supporters of the most inimical Southern institution, slavery.¹⁸

The first of the Reconstruction Era Amendments, represented the Union's deep seated commitment to end the "badges and incidents of servitude." It was an unadulterated call to abandon injustices that had made blacks outsiders in the country they helped build and whose economy they helped sustain. Thus, the overthrow of the Confederacy also vanquished hereditary slavery, which ruined countless lives. And, while little used today, the Thirteenth Amendment has tremendous potential continues to be a powerful battering ram

election victory to be a sign that "the Constitution of the United States shall be so changed that slavery can never again exist in any part of the United States."

17. See VORENBERG, supra note 8, at 179 (describing division in Congress over particular freedoms new freedmen should have).

18. See MCPHERSON, supra note 15, at 768-69 (discussing divide in North concerning abolition of slavery). After states ratified the Freedom Amendment in December 1865, the laws Congress passed illustrate the breadth of the Amendment's commitment to liberty. Some of the Amendment's framers were aware that physical bondage was not the only impediment to black freedom; it was also bridled by the white supremacism that permeated Confederate thought. The Civil Rights Act of 1866, which Congress passed pursuant to the Thirteenth Amendment, provided a legal avenue for freed people to receive redress for some of the injustices they continued to suffer even after ratification. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (Apr. 9, 1866). The Act is codified at 42 U.S.C. § 1981 (2001). Likewise, in July 1866, the Reconstruction Congress enacted, over President Andrew Johnson's veto, the second Freedmen's Bureau Act to provide freed blacks with economic and educational opportunities it understood to be complimentary to the Amendment's substance. Ch. 200, 14 Stat. 173 (1866). The fourteenth section of the second Freedmen's Bureau Act provides:

That in every State or district where the ordinary course of judicial proceedings has been interrupted by the rebellion, and until the same shall be fully restored, and in every State or district whose constitutional relations to the government have been practically discontinued by the rebellion, and until such State shall have been restored in such relations, and shall be duly represented in the Congress of the United States, the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color, or previous condition of slavery.

Id. at 176-77. Other major civil rights legislation that came out of the U.S. Civil War was codified at 42 U.S.C. §§ 1981, 1982, 1983, 1985(3), 1986, and 1988 (2001).

- 19. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 (1968) (reaffirming "badges and incidents of servitude" language of the *Civil Rights Cases*, 109 U.S. 3, 20-21 (1883)).
- 20. See VORENBERG, *supra* note 8, at 60 (discussing Senator Charles Sumner's view of Thirteenth Amendment at beginning of fight for black equality).
- 21. See generally PETER KOLCHIN, AMERICAN SLAVERY, 1619-1877 (1993) (providing overview of slavery in U.S.); LEON LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY (1979) (relying on black narratives to explain detrimental effect of slavery); Kenneth M. Stampp, The Peculiar Institution: Slavery in the Ante-Bellum South (1956) (discussing southern slavery).

against any persistent vestiges of servitude.²²

The Confederate battle flag is one of the remaining vestiges of the antebellum South.²³ It symbolizes a government whose ideology included the commitment to maintain a stratified society where only whites enjoyed freedom's bounties.²⁴ The Confederate flag is a badge of servitude, I argue more fully in Part IV, that Mississippi, Georgia, South Carolina, and other states continue to prominently display on their properties.²⁵ It is also the standard for groups like the Ku Klux Klan, skinheads, White Aryan Resistance, and other white supremacist organizations that gain ideological sustenance from Confederate dogma.²⁶ My thesis is that glorifying Confederate symbols on official state property should be prohibited pursuant to the Thirteenth Amendment to the U.S. Constitution.²⁷ The Thirteenth Amendment prohibits all relics of servitude, including state sponsored displays meant to laud a breakaway republic which idealized and waged war to perpetuate black slavery.²⁸

The Constitution of the Confederate States of America, unlike the United States Constitution, overtly protected "Negro slavery."²⁹ Moreover, the Confederate Constitution excluded persons of African descent from civil protections: "No bill of attainder, ex post facto law, or law denying or impairing the right to property in Negro slaves, shall be passed."³⁰ In spite of this legacy of human exploitation, some states are still proud of their Confederate heritage.³¹

^{22.} See infra Part III for a discussion of the Thirteenth Amendment's application.

^{23.} See, e.g., Chris Springer, The Troubled Resurgence of the Confederate Flag, 43 HISTORY TODAY 7, 9 (1993) (discussing symbolic nature of Confederate flag).

Id.

^{25.} See *infra* Part IV for a discussion of state governments' use of confederate symbols on public property.

^{26.} See, e.g., Ronald J. Rychlak, Civil Rights, Confederate Flags, & Political Correctness: Free Speech & Race Relations on Campus, 66 Tul. L. Rev. 1411, 1418 (1992); L. Darnell Weeden, How to Establish Flying the Confederate Flag with the State as Sponsor Violates the Equal Protection Clause, 34 AKRON L. Rev. 521 (2001); James Forman, Jr., Note, Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols, 101 YALE L.J. 505, 513-14 (1991); see also Carol Draeger, Police Arrest Eight in Melee After Klan Rally, S. BEND TRIB., May 6, 2001, at D4. Some of the organizations which rally around St. Andrew's cross have come to combine Confederate and Nazi heritages, using the symbols of both: See 4 Arrested at KKK Rally at Minnesota's Capitol, DESERET NEWS, Aug. 26, 2001, at A05.

^{27.} See *infra* Part IV for a discussion of how glorifying Confederate symbols on official state property should be prohibited pursuant to the Thirteenth Amendment.

^{28.} See *infra* Part III for a discussion of the full impact of the Thirteenth Amendment on badges of servitude.

^{29.} See, e.g., WILLIAM L. MILLER, ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS 21 (1996) (noting that Confederates used racial categories in their Constitution as opposed to the framers who avoided using words "slave" and "slavery"). The Confederate Constitution, which was adopted in 1861, is reprinted in EMORY M. THOMAS, THE CONFEDERATE NATION, 1861-1865, at 307-22 (1979).

^{30.} THOMAS, supra note 29, at 313 (quoting Confederate Constitution art. I, § 9, cl. 4) (emphasis added).

^{31.} See NCAA Sets Moratorium on Title Events in S.C., MILWAUKEE J. SENTINEL, Aug. 11, 2001, at 2C (stating that Mississippi maintains Confederate symbol as part of its state flag, and South Carolina continues to fly flag on state grounds).

They thereby extol the Confederacy and, by association, its ideals by incorporating Confederate symbolism into official logos and displaying them on government sites.³² I take issue, here, with governmental veneration of Confederate symbolism but do not oppose historical displays, regardless of whether they are located in public museums.³³

Part II discusses the role symbolism plays in socialization.³⁴ It addresses how communications can spread prejudices and derisive attitudes.³⁵ Symbols are not benign. They affect both groups with power and those which continue to suffer the social consequences of widespread negative racial and ethnic attitudes.³⁶ Part II also reflects on the socio-communicative implications of continued state-sponsored veneration of the Confederacy.³⁷

While the Civil War raged in the divided country, the more progressively-minded of the Thirteenth Amendment's framers argued for its desirability and reach.³⁸ The congressional debates, which are discussed in Part III.A, indicate that the Thirteenth Amendment's broad prohibition on vestiges of servitude extends to Confederate symbols on state property.³⁹ Radical Republicans were moved to action by the destructive effects that many of them, like Senator John B. Henderson of Missouri, blamed on slavery.⁴⁰ Slavery "curse[d] the country" and brought "untold miseries."⁴¹ Henderson argued that the "anguish and tears of the African in his long captivity" required both success on the battlefield and ratification of the Amendment.⁴²

The congressional debates leading up to the Amendment indicate that many of the Amendment's proponents were not only committed to setting blacks free, but also affording them rights that are intrinsic to civil freedom.⁴³ The freedom they secured through the Amendment is incompatible with the exclusionary message of states incorporating Confederate symbolism.⁴⁴ In fact, even those Congressmen who were opposed to its ratification understood that the Thirteenth Amendment could overturn many discriminatory practices, both private and public.⁴⁵ The hopes of making ex-slaves equals, and not mere

^{32.} See *infra* Part II for a discussion of how states laud Confederate ideals by utilizing Confederate symbolism.

^{33.} Id.

^{34.} Id.

^{35.} Id.

^{36.} *Id*.

^{37.} See infra Part II for a discussion of the socio-communicative consequences of continued state veneration of the Confederacy.

^{38.} See infra Part III.A for a discussion of the congressional debates.

^{39.} Id

^{40.} CONG. GLOBE, 38th Cong., 1st Sess. 1465 (1864).

^{41.} Id.

^{42.} Id.

^{43.} See infra Part III.A for a discussion of the congressional debates.

^{44.} Id.

^{45.} See *infra* Part III.A for a discussion of the different reasons presented for opposing the Thirteenth Amendment.

outsiders, were thwarted, as we will see, by the Supreme Court, which eviscerated the Thirteenth Amendment to a shell.⁴⁶ Freedpeople were then prevented from integrating into the mainstream United States by unequal, segregationist laws and behaviors.⁴⁷ Part III.B further analyzes the principle judicial decisions that first constricted the Thirteenth Amendment and finally reinstated it to its proper place in the bastion of civil rights.⁴⁸

Part IV, then, surveys the historical government use of Confederate symbols, along with the recent revival of this practice.⁴⁹ Finally, Part V argues that the Thirteenth Amendment empowers the federal government to prohibit states from retaining Confederate symbols on public property.⁵⁰ Congress should grant federal courts jurisdiction to issue injunctions against continued state inclusion of racist symbols on official flags and logos.⁵¹

II. SYMBOLIC POWER

The Confederate states' rallying symbol, the Confederate battle flag, carries a historical message, the tune of which is anti-American and heaps praise on a defunct regime, whose principal tenets included black racial and intellectual inferiority. This Part of the article discusses the use of symbols in the development of a social worldview by examining how symbols are defined and used to motivate others in society. It also highlights the communicative and ideological value of racist symbolism to better understand the message advanced by Confederate symbolism that is displayed on state properties.

Communication through symbols, like flags, is a primitive form of human interaction.⁵² Symbols relate information and are "a short cut from mind to mind."⁵³ Designs on flags are meant to draw citizens' attention to the referents' history, constitutional commitments, or ethnic or religious composition.⁵⁴ The flag, as the Supreme Court demonstrated in *Texas v. Johnson*,⁵⁵ is "a symbol of nationhood and national unity."⁵⁶

Symbols play a role in constructing a worldview.⁵⁷ They categorize objects

^{46.} See infra Part III.B for a discussion of the judicial interpretation of the Thirteenth Amendment.

^{47.} Id.

⁴⁸ Id

^{49.} See infra Part IV for a discussion of government use of Confederate symbols.

^{50.} See infra Part V for a discussion of what I believe is the Federal Government's responsibility.

^{51.} Id.

^{52.} Cf. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 632-34, 642 (1943) (holding that state requirement that children attending public schools salute American flag denied Jehovah Witnesses their rights to freedom of speech and freedom of worship). See *infra* Part V for a discussion of the First Amendment and government speech.

^{53.} Barnette, 319 U.S. at 632.

^{54.} See GEORGE SCHEDLER, RACIST SYMBOLS & REPARATIONS 9 (1998) (discussing use of designs and colors on national flags to elicit responses from citizens).

^{55. 491} U.S. 397, 406 (1989). (holding flag burning protected under First Amendment).

^{56.} Id. at 410.

^{57.} See PIERRE BOURDIEU, LANGUAGE & SYMBOLIC POWER 106 (Gino Raymond & Matthew

into "accepted types... current patterns... standard versions." This is especially true when governmental, political, or religious entities display identifying symbols. Information about events, persons, and objects are interpreted through linguistic filters, which are better known as "words," and designated signals, which are interpretive objects such as traffic lights. Words standardize the variegation of sense data (sensa) into types. Signals are understood culturally. A red light signals the permissible actions so that percipients can adjust their behaviors and not be hurt. Persons also infer from signals what is permissible for others. For instance, pedestrians seeing a red light pointing in a direction opposite of their travel realize that cars coming from that direction are forbidden from crossing a demarcated line. The pedestrians are then aware of the safe route(s) for crossing an intersection. Signals are thus intermediaries for associating sensa with comprehension.

Identifying nomenclature, used to describe people and groups, likewise brings to mind a set of cultural definitions.⁶⁶ "Physician" only applies to a certain set of people; not only does it refer to their abilities, it also brings to mind their ethical obligations (e.g. not to divulge confidential information), educational achievements (i.e. specialized medical training), and field of expertise.⁶⁷ Derogatory terms for particular people, especially those associated with racial and ethnic groups, carry with them culturally defined qualities (e.g. how many generations removed from progenitors with direct African ancestry), moral characteristics (i.e. claims of moral degeneracy), and intellectual abilities

Adamson Trans., 1991) (discussing use of symbols as "capital" to accumulate prestige, honor, or other emotional responses).

^{58.} WALTER LIPPMANN, PUBLIC OPINION 85 (16th prtg. 1957).

^{59.} See Schedler, supra note 54, at 8-9 (discussing general functions of flags as national or state symbols).

^{60.} Cf. RAYMOND W. FIRTH, SYMBOLS: PUBLIC & PRIVATE 140-44 (1973) (discussing Bronislaw Malinowski's theories that words are symbols which encapsulate the "whole body of experience and principle").

^{61.} BOURDIEU, supra note 57, at 13 (editor's introduction). For instance, although there are a variety of seats (e.g. pillows, logs, swings, benches, objects with four legs and a back, objects with three legs and no back, objects with spherical bases and arms but with no back, etc.) subjects can observe an object they have never seen before and identify it as a "seat." They do so by filtering the data through a set of known types to categorize it and be able to communicate it to others. Moreover, absent contextualization, it is indeterminate whether the word is a verb (i.e. to seat) or a noun (i.e. a seat). Therefore, a verbal signal has meaning when it is rubrical, having parameters of meaning, and contextual, reflecting a use appropriate to a given situation. Lawrence Lessig, The Regulations of Social Meaning, 62 U. CHI. L. R. 943, 952 (1995).

^{62.} LIPPMAN, supra note 58, at 85.

^{63.} See JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY 97 (1970) (discussing how symbols can "differentiate and sort out reality").

^{64.} Id. at 99.

^{65.} LIPPMAN, supra note 58, at 85.

^{66.} See BOURDIEU, supra note 57, at 105-06 (describing symbolic nature of titles or other identifiers).

^{67.} See LIPPMAN, supra note 58, at 89 (explaining how certain traits call up stereotypes defining a person).

(i.e. disparagements about cognitive abilities).⁶⁸ Once negative terms about outgroups gain widespread acceptance, they function to clump all individuals belonging to the disparaged groups into an undifferentiated pariah.⁶⁹ Symbols are then developed that calculatingly depict certain groups as base or savage and others as superior: for instance, anti-Semitic artists depict Jews as having sinister looks and big noses, negrophobic artists symbolize blacks as imbecilic and having big lips; on the other hand, images of Jesus tend to depict a white looking male often having Aryan features.⁷⁰

Yet symbols are not only definitional, they are also motivational. Language and cultural symbolism delimit people's parameters of thought and influence their attitudes, behaviors, and reactions.⁷¹ Some symbols, such as flags or insignia, have a propulsive effect, indicating common aspirations and serving as rallying cries.⁷² They reveal something about a person's self-definition and his or her regard for others.⁷³ Thus, wearing a pin depicting white and black hand shaking can promote cultural integration, while a broach with the image of a hooded figure is divisive.⁷⁴ That divisiveness arises because, in the United States, the hooded figures represent the Ku Klux Klan, a violent supremacist organization that lauds the Confederacy.⁷⁵ Even if the person wearing the pin said it referred to a social club⁷⁶ rather than a racist organization, s/he could not

^{68.} See, e.g., Lessig, supra note 61, at 958-61 (discussing dangers resulting from perception that adoption of "social meaning" is only "natural")

^{69.} See, e.g., id. at 960 n.46 (considering ways that idea or practice becomes uncontested).

^{70.} See generally T.W. Adorno, ET. Al., Authoritarian Personality (1950) (discussing use of characteristics to imply different races or religions are inferior). Religious stereotypes may reinforce and strengthen racism for centuries after their introduction. Religious doctrines, propounded by fallible people, are often unquestioningly believed because of their supposed divine origin. Blacks did not look like the stereotypical European image of Jesus who, although a Middle Eastern Jew, was depicted by artists as a white European. This was touted as the "Son of God's" appearance. People closer to the prototypical images of Jesus, which of course were figments of artists' imaginations, were considered closer to God's image and likeness. Those people were all white males. Misethnicity was part of a broad conceptual construct in which the full humanness of blacks was denied because they did not match the popular fancy of how the children of God looked. For an interesting discussion on the developments of colonial racism see B. VICKERS, NATIVE AMERICAN IDENTITIES 26-27 (1998).

^{71.} See Lessig, supra note 61, at 952 (writing about "social meaning").

^{72.} See SCHEDLER, supra note 54, at 8-9 (explaining positive feelings inculcated by flags).

^{73.} See, e.g., FIRTH, supra note 60, at 140-41 (discussing child's developmental use of language to relate to others).

^{74.} See LIPPMAN, supra note 58, at 85 (explaining how symbols reflect cultural meanings).

^{75.} There are a number of historical studies of the Ku Klux Klan. See, e.g., WILLIAM PIERCE RANDEL, THE KU KLUX KLAN: A CENTURY OF INFAMY (1965) (providing historical overview of Klan); ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY & SOUTHERN RECONSTRUCTION (Louisiana State Univ. Press 1995) (1971) (discussing development of Klan between 1866 and 1872); WYN C. WADE, THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA (Oxford Univ. Press 1998) (1987) (giving a critical account of Klan). Jack Nelson discusses the Ku Klux Klan's anti-Semitic campaign in JACK NELSON, TERROR IN THE NIGHT: THE KLAN'S CAMPAIGN AGAINST THE JEWS (1993).

^{76.} The Klan was founded in 1866 as a social club. Foner, A Short History of Reconstruction 146 (1990).

alter its underlying meaning.⁷⁷ An image of hooded figures is linked to the Klan's violent and exclusionary history which cannot be purged of its social reference.⁷⁸ Once the popular mind associates a symbol with destructive stereotypes, it can be manipulated for political ends.⁷⁹ Misethnic symbols are those that demean a racial or ethnic group and help bolster support for organizations or individuals supporting supremacist ideologies.⁸⁰

To comprehend the public meaning of a given symbol, it is important to consider what it represents.81 Such an evaluation must reflect on the object and the context within which it appears.⁸² Social history is part of the context of popular symbols and is used to jar perceivers' memories while interlinking them with collective experiences. Symbols can connect even disparate elements of experience filled with external cultural content and internal coping mechanisms.⁸³ National flags are not merely signals representing information,⁸⁴ they also symbolize ideas with value contents.85 The implication is that images such as cross burnings, swastikas, and Confederate flags have static definitions related to their historical backgrounds and personal meaning, neither of which can be wholly excluded.86 Threatening signs, such as swastikas and burning crosses, have historical connotations that draw upon and enhance the "badges" and "symbols" of servitude, discrimination, oppression, and persecution.87 Motivating persons through age-old images requires understanding their psychosocial needs and finding a symbol that is easily identifiable because of its cultural content.88 Using icons of past hate movements better inflames bigots to follow in their predecessors' footsteps. Misethnic symbols borrowed from

^{77.} See LIPPMAN, supra note 58, at 89 (explaining that symbols have stereotypical meaning).

^{78.} See, e.g., id. at 89-90 (relating how lack of intimate contact between people heightens labels given to people).

^{79.} See id. (commenting on symbols' stereotypical meanings).

^{80.} For a somewhat different, three-part definition of racist symbols see SCHEDLER, *supra* note 54 at 10

^{81.} See Robert J. Bein, Stained Flags: Public Symbols & Equal Protection, 28 SETON HALL L. REV. 897, 913 (1998) (stating that symbol's impact should be evaluated by what it means to "public body represented" by it).

^{82.} See Lessig, supra note 61, at 958 (explaining how social meaning is based on contextual associations of fact).

^{83.} See KOVEL, supra note 63, at 96-97 (discussing purpose of symbols).

^{84.} Some flags are, in fact, informational. For instance, flags at a track meet might, by their colors, indicate where participants should start and finish a race. The colors used might change from one meet to another. So long as the participants are made aware of the alterations, the past signification of a flag of a certain color is rendered irrelevant. SCHEDLER, supra note 54, at 9.

^{85.} Id.

^{86.} See, e.g., KOVEL, supra note 63, at 96-97; Bein, supra note 81, at 914 (both relating that implications of symbol's historic representations cannot be erased).

^{87.} See Akhil R. Amar, The Case of the Missing Amendment: R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 157 (arguing that Thirteenth Amendment permits some regulation of racist speech).

^{88.} Cf. Lessig, supra note 61, at 957 (discussing various societal institutions' manipulation of social meanings).

previous social movements harken back to their fundamental ideals.89

Organizations and states choose particular banners because of their signification and power to move others to action.⁹⁰ Groups seeking to express a particular message can choose emblems that bring to mind the ideology of bygone eras.⁹¹ The purposeful reintroduction of previously used colors or shapes on a flag or official state seal are filled with meaning that encompasses pastpointing context.92 While present circumstances and motivations add to a symbol's meaning, and therefore modify its significance to later situations, the historical context cannot completely be eviscerated. 93 Propagandists can use those symbols to carry a traditional message into modern day context.⁹⁴ The interpretation of history is often the subject of dispute because historical memory "is always already a selective tradition . . . a present view of a past that best serves the purpose of ... justifying the status quo."95 By embracing symbols the historical sources of which are well known, the leaders of governments and political movements are more likely to attract followers.⁹⁶ Neophytes can later be convinced of novel ideas, but first they can best be drawn in by images that are easily identifiable with a romanticized past.⁹⁷ Reuse of traditional symbols, accompanied with a glamorized lore, can be tailored to fresh circumstances to identify with a larger constituency than the propaganda would otherwise reach.98 Tradition gives new movements an air of solemnity and gravity, even when the ideas they express are banal and irrational.⁹⁹ Such incorporation of past into present is most effective when its discontinuity can be obfuscated and any applicable past rituals can be integrated into present day circumstances. 100

^{89.} Id

^{90.} Hitler realized the unifying force of symbols and meticulously worked out the Nazi emblem. The swastika he took from ancient sources and the colors (red, black, and white) were the same as those of imperial Germany. See generally WILLIAM L. SHIRER, THE RISE & FALL OF THE THIRD REICH 43-44 (Simon and Schuster 1960) (describing selection and design of Nazi flag).

^{91.} See KOVEL, supra note 63, at 98-99 (discussing use of symbols to call upon repressed fantasy or memory).

^{92.} See FIRTH, supra note 60, at 142 (1973). Firth refutes the theory that symbols can have autonomous meaning from actual words. This theory was originally proposed by Bronislaw Malinowski, The Group & The Individual in Functional Analysis, 44 AMER. J. Soc. 958 (1939).

^{93.} See, e.g., Lessig, supra note 61, at 958-59 (considering historical implications that remain attached to symbols).

^{94.} See id. at 973-76 (writing how authorities, such as governments and schools, create fictionalized tradition).

^{95.} Andrew Lass, Romantic Documents and Political Monuments: The Meaning-Fulfillment of History in 19th-Century Czech Nationalism, 15 AM. ETHNOLOGIST 456, 457 (1988).

^{96.} Cf. Lessig, supra note 61, at 957 (noting destructive use of symbols to ostracize some groups in order to build up a sense of national identity).

^{97.} See id. (discussing government's use of symbols to create national identity to replace strong religious identities).

^{98.} See, e.g., Eric Hobsbawm, Inventing Traditions, in The Invention of Tradition 1-2 (Eric Hobsbawm & Terence Ranger eds., 1983).

^{99.} Id. at 2-3 (distinguishing between "custom" and "tradition").

^{100.} See Lessig, supra note 61, at 978 (relating how "invented tradition" is construct which is partly dependent on "apparent continuity").

Effective ideology incorporates familiar signals to help its proponents create a worldview about individuals, subgroups, and social obligations. ¹⁰¹ It standardizes public opinions, attitudes, and rationalizes behaviors. ¹⁰² A supremacist group wears recognizable labels to create a greater sense of identity with persons its members regard as having equal rights and to disassociate from those they consider unworthy of respect. ¹⁰³ Social reality and legitimization come to be defined through the lenses of doctrines that are based on degrading assumptions and often invoked for self-interested purposes. ¹⁰⁴

Authoritative bodies, whether they be governments or religious entities, have resources to spread their versions of the past through various communicative media (radio, television, schools, etc.), and therefore their mythologization is transmitted to a large audience. ¹⁰⁵ In their ambition to retain power, these entities often incorporate ideologies that selectively exclude whatever facts do not bode well for contemporary leaders and their desired retention of power. ¹⁰⁶ The preconceptions formed by authoritative repetition, say by states or clerics, become the deeply held convictions of ordinary people, unless they develop a sense of scepticism through independent education. ¹⁰⁷

Racist socialization involves an educational system that supports and promulgates disparaging images about subgroups which are vulnerable to widespread physical, verbal, and economic attacks. Schools, which pass on cultural significations through subjects like social studies and history, play an

^{101.} See Firth, supra note 60, at 130-31 (discussing signal groupings and interplay between symbols and society).

^{102.} See Adorno, supra note 70, at 2 (1950) (describing ideologies as independent of any single individual).

^{103.} Often an outgroup is forced to wear an identifying symbol, as Jews were in Medieval and Nazi occupied Europe. THE HOLOCAUST CHRONICLE 47, 256, 259 (2000).

^{104.} See RODERICK STACKELBERG, HITLER'S GERMANY 42 (1999) (stating that ideology rationalizes "dominant ideology" and "existing social relationships").

^{105.} See Lessig, supra note 61, at 979 (analyzing how an authority, such as a government or university, inculcates patterns of thought or action).

^{106.} Cf. id. at 979 (stating that powerful entities can selectively alter historical interpretation).

^{107.} LIPPMANN, supra note 58, at 90.

^{108.} David L. Hamilton & Tina K. Trolier, Stereotypes & Stereotyping: An Overview of the Cognitive Approach, in Prejudice, Discrimination & Racism 133 (1986). Propagandists use education to spread their doctrines. Aldous Huxley gives perhaps the best-fictionalized account of this in showing how teaching through repetition to somnolent children indoctrinates them to domineer some visibly different groups and grovel before others. Aldous Huxley, Brave New World 27 (Harper Perennial 1992) (1932). Former President Thomas Jefferson wrote in an 1814 letter to Edward Coles about how children who were "[n]ursed and educated in the daily habit of seeing the degraded condition [of blacks], both bodily and mentally, of those unfortunate beings, not reflecting that degradation was very much the work of themselves and their fathers, few minds have yet doubted but that they were as legitimate subjects of property as their horses and cattle." The Life and Writings of Thomas Jefferson 387 (S. E. Forman ed., 1900). Currently, Palestinian schools inflame a generation of youths through official textbooks which degrade Jews and contain exercises such as: "One must beware of the Jews for they are treacherous and disloyal. Write in your exercise book an event showing the fanaticism of Jews in Palestine against Islam and Christianity." Timothy J. Burger, Hill, Chuck Rip PLO Hate Books, Daily News, June 15, 2001, at 40.

instrumental role in imprinting socially appropriate behaviors and attitudes.¹⁰⁹ Educators pass on to children more than merely facts, data, and numbers.¹¹⁰ They can also perpetuate ethnic attitudes that reflect society's disposition toward diversity and its openness to interracial participation in powerful institutions.¹¹¹ When the official or unofficial lesson plan includes symbols on the ilk of the swastika or Confederate flag, which were used by the promoters of supremacist political systems, children learn to accept the ideology for which those symbols stand.¹¹² Supremacist ideas not only communicate a message of intolerance, facilitating the continued imposition of the "badges of servitude" on persecuted minorities, but also advocate active discrimination.¹¹³

Legitimization of autocratic regimes, as for example arguing that the Confederacy was fighting for state autonomy while omitting information about its commitment to withholding liberty from millions of individuals, impresses on children and adolescents a disdain for equal human freedom. From Confederate symbols in official places, like the cork boards of classrooms and state flags atop schools, children internalize that the Confederacy and what it represented was heroic, making prejudice part of their folkways. 114

Both positive social institutions, like tolerance, which allow for greater personal security and self-expression, and negative social institutions like racism, which perpetuates the incidents of servitude, are transmitted through communications in symbols, including state flags, political speeches, state seals and school mascots. Through daily training, cultural dispositions are inculcated in children. They learn from role models that Johnny Reb (as Confederate soldiers were called) fought on the good side and that "Them damn Yanks" tried to take Johnny's home and hurt his family. Children raised on this folklore begin to connect positively with the Confederacy, and this can occur even before they know that slavery was one of its bedrock institutions. Once this sort of orientation has been instilled, it is reinforced by oft-repeated cultural messages. These make it more likely that the durable effects of those ideologies which divide society into ingroups and outgroups will further

^{109.} Pierre Bourdieu, Systems of Education and Systems of Thought, in READINGS IN THE THEORY OF EDUCATIONAL SYSTEMS 162 (Earl Hopper ed., 1971).

^{110.} HOWARD J. EHRLICH, SOCIAL PSYCHOLOGY OF PREJUDICE 110 (1973).

^{111.} Id.

^{112.} Id.

^{113.} See *supra* text accompanying notes 1-5 for a discussion of the Thirteenth Amendment's prohibition against involuntary servitude.

^{114.} See GEORGE E. SIMPSON & J. MILTON YINGER, RACIAL & CULTURAL MINORITIES 64 (3d ed. 1972) (noting that children's cultural tendencies can only be understood in light of social and cultural situations in which they develop).

^{115.} John B. Thompson, *Introduction* to PIERRE BOURDIEU, LANGUAGE & SYMBOLIC POWER 12 (Gino Raymond & Matthew Adamson Trans., 1991).

^{116.} See Henri Tajfel, The Roots of Prejudice: Cognitive Aspects, in PSYCHOLOGY & RACE 86-87 (Peter Watson ed., 1973) (arguing that children develop preferences for particular ethnic groups before they understand categories of persons to which these preferences apply).

^{117.} See DAVID MILNER, CHILDREN AND RACE, 75-76 (1983) (discussing recursive reinforcement of racial animus).

intergroup rivalries.¹¹⁸

Moreover, the integration of latent, disparaging attitudes into personal psychodynamics soothes the conscience and therefore eases participation in prejudiced behaviors. Although children go through a period of doubt, wondering whether the other really is as different from themselves as they have been told, the full weight of cultural meaning weighs heavily on concept formation and commonly sweeps doubt away, hopefully to be revisited when they grow up. By assimilating their group identities through the matrix of misethnic social attitudes, children incorporate prejudgments into their worldview. Finally, they are ready to act within the context of what they learned.

Preconceptions influence interactions between social players. Prevalent symbols tend to reinforce moral philosophies, political orientations, and social outlooks. Paterotypes are particularly influential when they are displayed under governmental auspices. Paterotypes are particularly influential when they are displayed under governmental auspices. Paterotypes are particularly influential when they are displayed under governmental auspices. Paterotypes A banner is instrumental for marshaling various peoples with otherwise differing political orientations. Pake, for instance, the numerous festivities surrounding the display of flags at a time of war. Rather than concentrate on controversial issues that might cause disunion (like decreased civil liberties required to strengthen state security or the reduction in social spending to increase military budget), the government rallies people behind the national flag. The symbol has differing meanings for each person, but seemingly it forms a common bond among a nation, much of which is ready for action against a real or perceived enemy. The "expressive content" of flags is "pregnant" with meaning about a country's national inspirations and political principles, 128 be they communist, democratic, or something other. 129

^{118.} See Thompson, supra note 115, at 12-13 (noting that social dispositions become ingrained in people at early age and are not easily changed).

^{119.} See generally ABRAM KARDINER & LIONEL OVESEY, THE MARK OF OPPRESSION (1951) (writing of cycle of prejudice as it is perpetuated by system of slavery).

^{120.} See Eric J. Dingwall, Racial Pride and Prejudice 212-13 (1946) (discussing childhood development of group identity).

^{121.} See Phyllis A. Katz, Acquisition of Racial Attitudes in Children, in TOWARDS THE ELIMINATION OF RACISM 150 (Phyllis A. Katz ed., 1976) (explaining assimilation process by children of adult concepts).

^{122.} See id. (describing how children develop culturally condoned racial attitudes through multistaged process).

^{123.} See LIPPMANN, supra note 58, at 84 (discussing impact of preconceived stereotypes).

^{124.} *Id*.

^{125.} See LIPPMANN, supra note 58, at 83-84, 90 (noting importance of stereotypes); Cf. BOURDIEU, supra note 57, at 166-67 (discussing political functions of symbols).

^{126.} Cf. BOURDIEU, supra note 57, at 167 (explaining unifying effect of symbols).

^{127.} In highlighting the importance of a nation's flag to its people, Justice Stevens pointed out that, "In times of national crisis, [the flag] inspires and motivates the average citizen to make personal sacrifices in order to achieve societal goals of overriding importance; at all times, it serves as a reminder of the paramount importance of pursuing the ideals that characterize our society." United States v. Eichman, 496 U.S. 310, 319-20 (1990) (Stevens, J., dissenting).

^{128.} Texas v. Johnson, 491 U.S. 397, at 405 (1989).

An effective symbol, then, changes perspectives, thereby influencing personal attitudes.¹³⁰ Persons are thus mobilized, whether it be constructively or destructively, by socially legitimized symbolization.¹³¹ Influential speakers, especially those with impressive sounding governmental titles, can then use a recognized standard or emblem to motivate followers.¹³² The effect is almost as powerful as using force, but, since the symbol subtly elicits lasting mental images, it is far more convincing and enduring than simple coercion.¹³³ The drives associated with familiar rallying symbols, like flags or pictures of ideologues who catalyze political or religious movements, have an added power because they bring forth strong feelings through mental images of culturally or regionally significant events.¹³⁴ So, flags are not only ornamental, but also evoke strong emotions for national allegiance, political parties, and even etiquette.¹³⁵

The socially constructed meanings behind rallying symbols make it easier for popular leaders to manipulate their followers. ¹³⁶ Political symbols are not strictly decorative, but are instead designed to lead adherents to commit time and effort for the advancement of various causes. ¹³⁷ A government can manipulate this somnolent quality of language. ¹³⁸ For example, Germany in the 1930's and 40's exploited an image of the Jews as vermin, no better than rats, and justified murder as a form of sanitizing extermination. ¹³⁹ Associating Jews with vermin took a couple of decades of indoctrination, but once the image was taken for granted, depictions of Jews as rats were clearly linked with the provocative part of anti-Semitic ideology which advocated lashing out and attacking them. ¹⁴⁰

^{129.} Id.

^{130.} Id. (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

^{131.} See BOURDIEU, supra note 57, at 170 (describing generic power of symbols to mobilize people).

^{132.} Government, after all, participates in the construction of social meaning in many ways, one of the most powerful of which is education. Lessig, *supra* note 61, at 973.

^{133.} See BOURDIEU, supra note 57, at 170 (describing effects of symbols on people's memories and attitudes).

^{134.} LIPPMANN, supra note 58, at 13.

^{135.} See FIRTH, supra note 60, at 129 (discussing Franz Boas' theory of symbolic value of national flags).

^{136.} See id. (commenting on how Nazi symbols used to stratify German society to Nazi's advantage).

^{137.} Id.

^{138.} See id. (noting that symbols, such as swastika, arouse violent political passions).

^{139.} See generally ART SPIEGELMAN, MAUS II (Pantheon Books ed. 1991) (portraying graphically holocaust survivor's story based on Nazi propaganda imagery that depicts various races as animals, particularly Jews as mice).

^{140.} Paul de Lagarde was the first, in 1887, to liken Jews to bacilli: "Every Jew is proof of the enfeeblement of our national life and of the worthlessness of what we call Christian religion." PAUL DE LAGARDE, JUDENUND INDOGERMANEN, quoted in A. Bein, Modern Anti-Semitism and its Effect on the Jewish Question, 3 YAD VASHEM STUD. ON THE EUR. JEWISH CATASTROPHE AND RESISTANCE 7, 14 n.19 (1959). Lagarde considered Jews to be "usurious vermin" for whom there could be no compassion: "With trichinae and bacilli one does not negotiate, nor are trichinae and bacilli to be educated; they are exterminated as quickly and thoroughly as possible." Id. Statements of Nazi leaders, including Hitler, make clear how much these views influenced the masterminds of National

In the United States, Confederates waived their battle flag in pursuit of an incongruous brand of freedom.¹⁴¹ While this demagogy was enough to spur on a mass following, it disregarded millions of people living in bondage as being unworthy of self-governance.¹⁴² The highest echelons of society had convinced themselves that the Declaration of Independence granted fundamental rights only to whites and not blacks.¹⁴³ The Confederate flag was the symbol that rallied Southerners to defend their peculiar institution, slavery, and it was that exclusionary lifestyle which the Thirteenth Amendment intended to crush.¹⁴⁴

The civil rights victory that followed in the wake of the Reconstruction Amendments was greater than any that could have been won on the battlefield, but, alas, until the civil rights movement in the 1960s the fruits of victory were sparse. Some governmental entities continue to tacitly support Confederate ideals by their public veneration of Confederate symbols. The Confederate battle flag and the hero worship of Confederate leaders, through official displays of John Calhoun and Jefferson Davis statues, are signals indicating support for a plantation lifestyle, which only one race enjoyed. Confederate symbols express a nostalgic longing for the Old South. The message they embrace is very different than the one expressed by the Lincoln Memorial, which is a beacon of freedom. The message they embrace is very different than the one expressed by the Lincoln Memorial, which is a beacon of freedom.

Socialism. On one occasion, Hitler spoke of the development of his own thought, "I discovered the Jew as the bacillus and the ferment in social decomposition." Martin Broszat, *Genesis of the Final Solution*, 13 YAD VASHEM STUD. 73, 88 n.20 (1979) (quoting Adolf Hitler).

- 141. See SCHEDLER, supra note 54, at 26-29 (listing various rationales behind the Confederate flag).
 - 142. WILLIAM SUMNER JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH 244 (1935).
- 143. As Albert G. Brown of Mississippi put it on the floor of the Senate chambers during a debate on the Kansas and Nebraska Bill: "In the South all men are equal. I mean, of course, white men; Negroes are not men, within the meaning of the Declaration. If they were, Madison, and Jefferson, and Washington, all of whom lived and died slaveholders, never could have made it; for they never regarded Negroes as their equals, in any respect." CONG. GLOBE, 33d Cong., 1st Sess., app. 230 (1854).
- 144. See David P. Tedhams, The Reincarnation of 'Jim Crow': A Thirteenth Amendment Analysis of Colorado's Amendment 2, 4 TEMP. POL. & CIV. RTS L. REV. 133, 151 (1994) (referring to "badge of slavery" as any act "motivated by arbitrary class prejudice" and also noting that Thirteenth Amendment gave its Framers power to legislate slavery out of existence).
- 145. See Douglas L. Colbert, Liberating the Thirteenth Amendment, 30 HARV. C.R.-C.L. L. REV. 1, 2-3 (discussing how Supreme Court decision, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), decided during Civil Rights Movement of 1960s, revived Thirteenth Amendment but receives little notoriety or mention in academic circles).
- 146. See Mary J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 MICH. L. REV. 2320, 2378 (1989) (noting that full police protection given to Klu Klux Klan marches implies state's authorization of these marches and its promotion of their racist message).
- 147. See SCHEDLER, supra note 54, at 43 (citing one interpretation of KKK use of Confederate flag as remembering Old Southern culture).
 - 148. Social psychologist Howard J. Ehrlich has pointed out that:
 - The codability of a category can be determined by measuring the amount of information about an object that is required to assign it to a category....it can be seen that the greater the codability of a social object, the less information is needed to assign it to a social category.

Confederate symbols displayed on state property indicate support for a defunct government that protected slavery through its constitutional provisions. When Confederate symbols are placed on tax-supported property they reinvigorate the psychological incidents of servitude, comforting supremacists with the message that while overt racism is no longer tolerated, the nod and wink variety still is countenanced. The repetition of symbolism reflecting a veneration for a racist ethos expresses a disregard for the victims of endemic persecution and keeps blacks, as a group, distressed about their social standing. 151

The cost of nostalgia about Confederate heroes, who fought to maintain an inequitable culture, is black alienation.¹⁵² The message to victims is that the government does not consider the Confederacy wholly abominable; in fact, it regards it as having redeemable qualities.¹⁵³ This is somewhat like saying that even though the Nazi treatment of Jews was abhorrent, the swastika can be benignly affixed to official symbols because the Nazis also had some redeeming qualities; after all, they brought Germany out of a recession.¹⁵⁴ The victims of misethnicity cannot view these displays as benign, but only as signs of continued socialized supremacism.¹⁵⁵

Surrounded by symbols lauding the works of the Confederacy, children are prone to reflexively identify with its heroes. Whites are predominant in Confederate history; even though blacks served in the ranks of the Confederate Army, they were relegated to servile tasks rather than being treated like white soldiers. When the heroes are all white, black and white children tend to emulate them. Frantz Fanon, a psychoanalyst, discussed this pattern in the context of colonialization discourses:

I read white books and little by little I take into myself the prejudices,

EHRLICH, supra note 110, at 39.

^{149.} See infra notes 514, 528-43 and accompanying text for a discussion of the Confederate Constitution.

^{150.} See TEUN A. VAN DIJK, COMMUNICATING RACISM 23 (2d prtg. 1989) (stating that in reproducing shared stereotypes about outgroups, the majority spreads collective prejudices and stereotypes).

^{151.} See ABRAM KARDINER & LIONEL OVESEY, THE MARK OF OPPRESSION 379 (1951) (writing of cycle of prejudice as it is perpetuated by system of slavery).

^{152.} Gloria Johnson Powell, Self-Concept in White & Black Children, in RACISM & MENTAL HEALTH 300 (Charles V. Willie et al. eds., 2d ed. 1973) (noting that whites who act in socially acceptable negative ways can have deleterious impact on developing black children).

^{153.} Cf. id. at 301 (stating that ethnic personality is heavily influenced by given culture's perceptions of status and role).

^{154.} See SHIRER, supra note 90, at 258-62 (1960) (linking Nazi's early economic successes to Germany's rearmament program).

^{155.} See Matsuda, supra note 146, at 2378 (discussing how public racist displays incite and terrorize).

^{156.} See DAVID MILNER, CHILDREN AND RACE 76 (1983) (discussing how "good" and "bad" values impress children).

^{157.} See SCHEDLER, supra note 54, at 34-35 (noting that very few blacks were in Confederate Army).

the myths, the folklore that have come to me from Europe. But I will not accept them all, since certain prejudices do not apply in the Antilles.... Without turning to the idea of collective catharsis, it would be easy for me to show that, without thinking, the Negro selects himself as an object capable of carrying the burden of original sin. The white man chooses the black man for this function, and the black man who is white also chooses the black man. The black Antillean is the slave of this cultural imposition. After having been the slave of the white man he enslaves himself. The Negro is in every sense of the word a victim of white civilization. ¹⁵⁸

The continued depiction of slavers as heroes thus degrades black civil rights; it also reduces blacks' potential to live unmolested and uplifting lives devoid of the vestiges of servitude. 159

After regular exposure to Confederate images in courthouses, in the congressional rotunda, and on school buildings, even those persons who do not internalize the message may be frustrated by the government's continued endorsement of ideals they know arbitrarily target their race. Regardless of whether the restriction on personal autonomy is experienced by a majority or minority of blacks, official endorsement of Confederate symbols violates the Thirteenth Amendment, the central meaning of which I will discuss in Part III.

Governmental incorporation of Confederate symbols eases the socialization of prejudice. It encourages the uninhibited expression of racism through unfair hiring practices and hate crimes. While the use of symbols connoting white defiance does not always result in discriminatory actions, nor are all people who are fond of Confederate symbols prejudiced, the point of the matter is that displaying exclusionary symbols on state property violates the Thirteenth Amendment because it brands blacks as outsiders of the dominant narrative. The attitudes these symbols breed might lie dormant during times of political and social tranquility. Yet the danger of racism is that during times of unrest, it offers readily available scapegoats, images, and banners for venting unrelated

^{158.} Frantz Fanon, Black Skin, White Masks 191-92 (Grove Press, Inc. 1967) (1952).

^{159.} Id.

^{160.} See ANDREW KOPPELMAN, ANTI-DISCRIMINATION LAW & SOCIAL EQUALITY 62 (1996) (finding that even when targets of racism "do not internalize the message [they] suffer a different kind of injury, that of resentment, tension, and anger").

^{161.} See MILNER, supra note 156, at 75-76 (discussing how past prejudice reinforces contemporary social attitudes).

^{162.} It should be noted that systematic expressions of racist sentiments have often presaged destructive discrimination:

While many people would never move from antilocution to avoidance; or from avoidance to active discrimination, or higher on the scale, still it is true that activity on one level makes transition to a more intense level easier. It was Hitler's antilocution that led Germans to avoid their Jewish neighbors and erstwhile friends. This preparation made it easier to enact the Nürenberg laws of discrimination which, in turn, made the subsequent burning of synagogues and street attacks upon Jews seem natural.

GORDON W. ALLPORT, THE NATURE OF PREJUDICE 15 (3d ed. 1979) (1954).

^{163.} See MILNER, supra note 156, at 75 (noting residual tendency of past race relationships).

frustrations.164

Symbols can have a practical function; they are not merely aesthetic images. 165 They can be used for strategic social effect—for the easily recognized assertion of political messages. 166 The significance of a governmental symbol is connected to the state and its ethos. 167 One of the Confederacy's key beliefs, as its Constitution readily asserted, was the interminable white man's right to own black slaves. 168 The battle flag of the Confederacy, then, carries an exclusionary message that stigmatizes blacks as outsiders of the political community.¹⁶⁹ Official utilization of symbols extolling repressive regimes legitimizes the dogma of hate groups, like the KKK, which incorporate Confederate symbolism.¹⁷⁰ Portraying the supporters of slaveocracy, such as Jefferson Davis, 171 as liberators besmirches the memory of the thousands of blacks who died during the Middle Passage¹⁷² and contributed to the growth of this country by the uncompensated sweat of their brows.¹⁷³ The United States would do better to remove symbols of the Old South from its halls. I do not mean that images of slave owners like James Madison, James Monroe, George Washington, and Thomas Jefferson should be carted away from government property. These men realized and wrote about slavery as an evil, even as they hypocritically owned slaves during their lifetimes.¹⁷⁴ However, a statue glorifying an unflinching nullificationist like John Calhoun, who never abandoned the view "that it is a great and dangerous error to suppose that all people are equally entitled to liberty,"175 should find no place in the United States Capital's Great rotunda where it is now prominently

^{164.} See SIMPSON & YINGER, supra note 114, at 143 (arguing that traditional prejudices are often renewed during crises).

^{165.} See FIRTH, supra note 60, at 131(listing various practical uses of symbols).

^{166.} See BOURDIEU, supra note 57, at 220-21 (discussing political stratagem of using symbols).

^{167.} See Bein, supra note 81, at 915 (analyzing how public symbols are intrinsic to public entities for which they stand).

^{168.} See supra text accompanying notes 29-32 for a discussion on Confederate ideals.

^{169.} See EVELYN KALLEN, LABEL ME HUMAN: MINORITY RIGHTS OF STIGMATIZED CANADIANS xxiv (1989) (discussing how stigmatization brands outgroups as "less-than-human").

^{170.} See Schedler, supra note 54, at 43 (discussing KKK's contemporary use of the Confederate flag).

^{171.} See infra text accompanying note 230 for a discussion of Jefferson Davis's view that slavery was responsible for equality among white men by providing a common ground of superiority.

^{172.} The Middle Passage was the harrowing transatlantic voyage by which enslaved Africans were taken to European countries and their colonies. See generally Gustavus Vassa, The Life of Olaudah Equiano, the African, in Great Documents in Black American History 47 (George Ducas, Charles Van Doren, eds., Praeger Publishers 1970) (1789) (describing the stifling and often deathly journey); Alexander Falconbridge, Black Voyage – Account of the Slave Trade on the Coast of Africa (1788), available at http://web-cr05.pbs.org/wgbh/aia/part1/1h281t.html (same).

^{173.} See generally SCHEDLER, supra note 54, at 93-119 (outlining various ways and explanations to compensate blacks).

^{174.} See generally ROGER WILKINS, JEFFERSON'S PILLOW (2001) (discussing founding fathers' ownership of slaves while they promoted United States as land of freedom).

^{175.} JOHN C. CALHOUN, CALHOUN: BASIC DOCUMENTS 63-64 (John M. Anderson ed., 1952).

displayed.176

Prejudice more readily spreads through a nation when government incorporates symbols which represent racist convictions.¹⁷⁷ The association between police power and bigotry intimidates a large segment of the population and inhibits their free access to social boons, such as freedom to decide where to live, thus infringing on their Thirteenth Amendment autonomy rights. Racist symbols, placed conspicuously in public places, have the effect of bolstering persons resolved to act on racist ideology. 178 Hate groups that have incorporated the same Confederate symbols into logos, such as the KKK and Aryan Nation, are keenly aware that they are joined by some state governments in lauding the Confederate cause and its heroes.¹⁷⁹ At the end of the day, the Confederate battle flag is still part of the Mississippi and Georgia flags, showing governmental support for secessionists who fought, in large part, to defend a racist institution. 180 Government symbols that extol racists, increase hate groups' persuasiveness. They make demeaning statements about blacks a more accepted part of everyday discourse. 181 Several states still display rebel symbols, expressing pride in their historical background, and undermining the Thirteenth Amendment ideal for a society where freedom has substantive value to persons of every race. 182

III. AFFIRMING FREEDOM

I think the pertinence of the Thirteenth Amendment to the controversy over state displays of Confederate symbols will become more apparent by an analysis of the Amendment's underlying aims. The Thirteenth Amendment is monumental because it overrode all constitutional provisions that protected and furthered the institution of slavery. When the Thirteenth Amendment was ratified, the United States committed itself to promoting freedom through federal laws. This was not merely a symbolic act, it created a constitutional mandate to preserve and further liberty rights. Its ratification, in 1865, drastically altered what this country stood for. The continued glorification of

^{176.} John E. Mulligan, A Tourist's Guide to D.C.–Memorials, Museums, More Govern a Visit To the Capital, THE PROVIDENCE J.-BULL., Apr. 9, 2000, at 18A.

^{177.} See MILNER, supra note 56, at 75-76 (discussing spread of prejudice by its integration into social structure).

^{178.} See Van Dijk, supra note 150, at 40 (noting that minorities are frequently shown by media in negative light or stereotypical roles).

^{179.} Face-Off with Hatred; KKK Visit Is Met By Police Presence, Thousands Praying for Peace, PITTSBURGH POST-GAZETTE, Apr. 6, 1997, at A-1; David Treadwell, Southern Communities Uniting against Klan, THE RECORD, May 4, 1986, at A45 (noting display of statue of Confederate soldier in town square of Gainesville, Georgia).

^{180.} See MCPHERSON, FOR CAUSE AND COMRADES 108-110 (1997) (finding that large contingent of Confederate soldiers explicitly regarded maintenance of slavery one of their war aims).

^{181.} See VAN DIJK, supra note 150, at 269 (discussing how prejudiced communications are both interpersonal and group based).

^{182.} See SCHELDER, supra note 54, at 44-47 (examining Southern states' use of Confederate flag). 183. U.S. Const. amend. XIII.

Confederate symbols in official venues around the country, and especially in the South, reflects an unwillingness to abide by the full scope of the Thirteenth Amendment, which bans all badges of servitude. The legislative history and contemporary judicial interpretation animate this intent.¹⁸⁴ The real goal of the Amendment is to make freedom lasting by prohibiting state and personal actions tending to efface people's ability to accomplish their reasonable aspirations.¹⁸⁵

Radical Republicans sought to make the Amendment's scope sweeping. They hoped it would not only eliminate all manner of inequality but also provide Congress with the federalist authority to enact national laws for black education and property ownership; the "forty acres and a mule" concept as Thaddeus Stevens called it. This meant nothing short of erasing all vestiges of the Confederacy. The modern display of Confederate symbols by state governments mocks the aspirations of the ratifiers. The Confederate battle flag stands for all those things that they hoped to eliminate. Its glorified place atop government buildings and on official state logos is a reminder that even though slavery is gone from American life, some of its vestiges linger in American culture. We must examine what the Thirteenth Amendment meant, both to those who ratified it and the generations that followed, because this will clarify why a federal law against state uses of Confederate symbols is constitutional.

Proponents of the Amendment knew well that President Abraham Lincoln's Emancipation Proclamation fell short both of liberating all blacks and of empowering them with civil rights. The Proclamation, which was issued on January 1, 1863, soon after the Union victory at Antietam, only emancipated those blacks who were then enslaved by states "in rebellion against the United States." The Proclamation also recognized African Americans' right to self-defense and allowed for their enlistment in the Union army. Most immediately, it affected slaves who were liberated by the Union Army and those who escaped into Union lines. It also untied the hands of Union officers from

189. Id.

^{184.} See Cong. GLOBE, 38th Cong., 1st Sess. 2985 (1864) (Representative William D. Kelley of Pennsylvania stated, "[1]et us not be content with crushing this rebellion. Let us not be content with producing all over the country loyalty to the flag. Let justice to all men be our aim. Let us establish freedom as a permanent institution, and make it universal").

^{185 77}

^{186.} See, e.g., CONG. GLOBE, 40th Cong., 1st Sess. 203 (containing Thaddeus Stevens' proposal); ERIC FONER, POLITICS & IDEOLOGY IN THE AGE OF THE CIVIL WAR 222, 235-36 (1980) (providing discussion of Stevens' Reconstruction aims).

^{187.} See Tedhams, supra note 144, at 137 (discussing effect of Emancipation Proclamation).

^{188.} PRESIDENT ABRAHAM LINCOLN, *THE EMANCIPATION PROCLAMATION*, THE UNIVERSAL ALMANAC 62 (John W. Wright ed., 2000). In pertinent part the proclamation states:

[[]A]II persons held as slaves within any State or designated part of a State the people whereof shall then be in rebellion against the United States shall be then, thenceforward, and forever free; and the executive government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom.

Id.

having to return freed people to their former masters and turned the conflict into a liberation campaign, not merely a war to save the Union.¹⁹⁰

Emancipationists would not, however, be satisfied with this partial victory only an unequivocal ban on slavery and its oppressive corollaries would do. Representative James F. Wilson of Iowa, Chairman of House Judiciary Committee, eloquently explained the aspirations of the champions of freedom, "this amendment will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading, and bloody codes; its dark, malignant barbarizing spirit; all it was, and is everything connected with it or pertaining to it, from the face of the nation it has scarred with moral desolation."191 Wilson also expounded on how slave-holders' desire to amass power and their "bitter scorn and contempt for the toiling masses" had "plunged the nation into the fire and blood and darkness of civil war." The human losses in the War exacted a heavy price for the exploitation "wrung from the sinews of the slave." ¹⁹³ Constitutional difficulties surrounding the Emancipation Proclamation could only be resolved by a fundamental change in the Constitution, through the first alteration to that document in sixty-one years. 194 Studying congressional debates about ratifying the Amendment can further contemporary understanding of the government's obligation to protect liberty rights against state use of racist symbols. 195

A. Congressional Debates

Congressional debates about the reach of the proposed amendment were extensive because the House of Representatives debated the issue twice. ¹⁹⁶ In 1864, the Senate passed the proposed language but it failed to receive the necessary votes in the House of Representatives. ¹⁹⁷ The House took up a second round of debates in 1865, expostulating further on the Amendment's meaning. ¹⁹⁸ Furthermore, congressional discussions about the second Freedmen's Bureau Act and the Civil Rights Act, which took place in the spring of 1865, also clarified that the Amendment's first clause guarantees the abolition of corporeal

^{190.} See Kenneth L. Karst, The Pursuit of Manhood & the Desegregation of the Armed Forces, 38 UCLA L. REV. 499, 512 (1991) (analyzing nature of Civil War).

^{191.} CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864).

^{192.} CONG. GLOBE, 38th Cong., 1st Sess. 1323, 1320 (1864).

^{193.} CONG. GLOBE, 38th Cong., 1st Sess. 1465 (1864) (statement of Senator John B. Henderson of Missouri).

^{194.} See J. G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 372-78, 390-91 (rev. ed. 1963) (discussing constitutional problems that arose with the issuance of the Emancipation Proclamation).

^{195.} See Douglas L. Colbert, Affirming the Thirteenth Amendment, 1995 ANN. SURV. AM. L. 403, 406 (1995) (discussing relevance of studying Thirteenth Amendment's history to better appreciate the Amendment's current significance).

^{196.} For a discussion about the adoption of the Fourteenth Amendment see Jacobus tenBroek, Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition And Key to the Fourteenth Amendment, 39 CAL. L. REV. 171, 173 (1951).

^{197.} Id.

^{198.} Id. at 173-74.

bondage and the second clause obligates Congress to rid United States society of all incidents associated with slavery. The Amendment was meant to empower Congress to eliminate all vestiges of state sponsored Confederate bigotry, whether they were legal or cultural. 200

The Amendment's proponents saw it as reaffirming the republican ideal of government envisioned by the general welfare provisions of the Preamble to the Constitution.²⁰¹ While opponents of the measure were committed to a racially stratified view that Southern protagonists had proclaimed since the days of constitutional ratification.²⁰² They also resorted to federalist arguments, claiming slavery was a domestic institution over which the federal government had no jurisdiction.²⁰³ Official acceptance of that point of view had enabled the South to augment its political power.²⁰⁴ Complicity between Northern and Southern states had secured the Three-Fifths Clause, which inflated southern representation in both the House of Representatives and the electoral college without providing blacks with any substantive representation in those bodies.²⁰⁵ Seeking to reduce future Southern political strength, upon the readmission of Confederate States into the Union,²⁰⁶ Representative William Higby of California challenged the Three-Fifths Clause as an anti-republican method used to keep power in the South.²⁰⁷ James Wilson, who was the coauthor of the Thirteenth Amendment, saw the entire institution of slavery as "an incessant, unrelenting, aggressive warfare upon the principles of the Government."208 While the number of congressmen representing the slave-holding states was increased by the number of slaves, they did not represent "all rights of the

^{199.} See id. at 186-200 (discussing Congressional debates on Freedmen's Bureau and Civil Rights bills).

^{200.} See id., at 200 (arguing that Thirteenth Amendment was intended to grant Congress' power to protect "natural, inalienable and civil rights" of all individuals).

^{201.} See, e.g., CONG. GLOBE, 38th Cong., 2d Sess. 222 (1865) (stating that Preamble is repository of moral and political truths which should guide formulation to any amendments).

^{202.} Several of the Amendment's opponents argued from a racist perspective. For instance, Democratic Senator Lazarus Powell believed the U.S. government "was made by white men and for white men." CONG. GLOBE, 38th Cong., 1st Sess. 1484 (1864). For congressmen of Powell's ilk, racial prejudice was a refrain for maintaining the racialist social order., This attack strategy against the proposed amendment sometimes took on a religious overtone such as when Delaware Senator Willard Saulsbury pronounced that God's "providence is inequality." CONG. GLOBE, 38th Cong., 1st Sess. 1442 (1864).

^{203.} See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 104 (1864) (statement of Senator Garrett Davis of Kentucky).

^{204.} See Paul Finkelman, Turning Losers Into Winners: What Can We Learn From The Antifederalists?, 79 TEXAS L. REV. 849, 869 (2001) (reviewing SAUL CORNELL, THE OTHER FOUNDERS (1999)) (arguing that federalism protected Southern political interests).

^{205.} U.S. Const. art. I, § 2, cl. 3; see Finkelman, supra note 204, at 869 (stating that U.S. Constitution in original form was proslavery and augmented Southern political power).

^{206.} See Robert C. Stelle, Note, Defining High Crimes & Misdemeanors: A Call for Stare Decisis, 15 J.L. & POL. 309, 360 (1999) (asserting that Reconstruction issues concerning admission of Southern Congressmen were driven by Republican party attempts to maintain political power).

^{207.} CONG. GLOBE, 38th Cong., 1st Sess. 2944 (1864).

^{208.} CONG. GLOBE, 38th Cong., 1st Sess. 1199 (1864).

people" because their political philosophy undercut black aspirations.²⁰⁹

Breaking the Confederacy required the destruction of one of its core institutions. Radical Congressional Republicans developed an egalitarian outlook: aware that their proposal would not only free slaves but also grant them an equal right to participate in democratic processes.²¹⁰ The increasing civil rights activism coincided with congressmen's recognition that black heroism during the Civil War deserved national gratitude.²¹¹ In April of 1864, Senator Charles Sumner tried to include language in the anti-slavery amendment that would have clarified its provisions for equality.²¹² His proposal stated "that all persons are equal before the law, so that no person can hold another as a slave; and the Congress may make all laws necessary and proper to carry this article into effect everywhere within the United States and the jurisdiction thereof."213 Some scholars have mistakenly suggested that the rejection of Sumner's proposal meant that congressmen were not yet ready to commit to the equality of rights.²¹⁴ In fact, many congressmen espoused Sumner's ideal of racial equality but believed the proposed Thirteenth Amendment to be sufficient for achieving that end and decided to exclude his explicit language in an effort not to alienate Democratic support for the proposed amendment.²¹⁵ For example, Senator Jacob Howard of Michigan, a committed Radical Republican, thought that "[i]n a legal and technical sense that language [of Sumner's proposal], is utterly insignificant and meaningless."216

Congressional debates, in fact, indicate that the Thirteenth Amendment was to have a dual purpose: to end racist practices and labor subjugation.²¹⁷ Passage of the Amendment, said Congressman Isaac Arnold of Illinois, Abraham Lincoln's close friend, was to recognize that "equality before the law is to be the

^{209.} Id.

^{210.} See VORENBERG, supra note 8, at 131 (2001) (discussing Congressional Representative's outlook on impact of Thirteenth Amendment).

^{211.} Id.

^{212.} Xi Wang, Black Suffrage & the Redefinition of American Freedom, 1860-1870, 17 CARDOZO L. REV. 2153, 2177 (1996).

^{213.} Id.

^{214.} See id. (concluding that rejection of Sumner's proposal was due to resistance to black equality by some congressman); see also VORENBERG, supra note 8, at 106-07 (2001) (discussing Republicans' decision not to adopt Sumner's proposed recommendations).

^{215.} See VORENBURG, supra note 8, at 106-07 (arguing that Republicans rejected Sumner's equal rights language to keep Democratic support for amendment).

^{216.} CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864).

^{217.} See, e.g., Andrew Koppelman, Forced Labor: A Thirteenth Amendment Defense of Abortion, 84 Nw. U. L. Rev. 480, 483-84 (1990) (arguing that liberty and equality guaranteed by Thirteenth Amendment are violated by forced pregnancies); Julie A. Nice, Welfare Servitude, 1 GEO. J. ON FIGHTING POVERTY 340, 344 (1994) (postulating that welfare servitude violates Thirteenth Amendment aims of liberty and equality); James G. Pope, Labor & the Constitution: From Abolition to Deinstitutionalization, 65 Tex. L. Rev. 1071, 1096-1104 (1984) (arguing that Thirteenth Amendment safeguards labor protests); Lea S. Vandervelde, The Labor Vision of the Thirteenth Amendment, 138 U. Pa. L. Rev. 437, 437 (1989) (using congressional debates to show Amendment's "free labor" ideals).

great cornerstone" in this country.²¹⁸ Many congressmen believed that the Amendment would give Congress the right to enact laws designed to ensure freed people equal access to United States' opportunities.²¹⁹ As we will see, this proved an elusive hope because the Amendment's ambiguous language allowed Supreme Court interpretation to undermine the Radical Republicans' wishes.²²⁰ The overt commitment to equality would have to wait until the passage of the Equal Protection of the Fourteenth Amendment.²²¹

Slavers' sense of superiority developed through a long trail of ideologues, who included some of the nation's leading politicians.²²² State governments that venerate Confederate symbols to this day lionize these Confederate heroes.²²³ Slavery's protagonists influenced many common Americans until a generation willingly took the battlefield to preserve the institution. Gradually, white superiority became part of many southerner's sense of identity.²²⁴ Senator John Calhoun, who continues to be a Confederate hero and whose statue now stands in the United States Capital rotunda, spoke of slavery as producing "an unvarying level among" whites.²²⁵ In Calhoun's mind slavery was an equalizer, placing all whites on the same social level. Calhoun's point of view was also popular with other Southern politicians.²²⁶ In 1842, Representative Campbell of South Carolina defended slavery against former President John Quincy Adams' sustained assault on the gag rule, which forbade Representatives from making speeches in the House opposing the legitimacy of slavery.²²⁷ Campbell believed the institution:

[P]roduces equality and nurtures a spirit of liberty among the citizen population of a country... Where domestic slavery does not exist, a

^{218.} CONG. GLOBE, 38th Cong., 1st Sess. 2989 (1864) (emphasis added).

^{219.} See James W. Fox Jr., Citizenship, Poverty, & Federalism: 1787-1882, 60 U. PITT. L. REV. 421, 493 (1999) (stating that many Congressmen thought Thirteenth Amendment enabled them to pass legislation providing peoples with equal citizenship rights).

^{220.} See *infra* Part III.B for a discussion of the Supreme Court's judicial interpretation of the Thirteenth Amendment.

^{221.} See Tanya Y. Murphy, An Argument for Diversity Based Affirmative Action in Higher Education, 1995 ANN. SURV. AM. L. 515, 516 (writing that "[t]he Equal Protection Clause of the Fourteenth Amendment [was] created to reinforce the Thirteenth Amendment's promise of freedom and equality to the emancipated slaves"); see also John Marquez Lundin, The Law of Equality Before Equality Was Law, 49 SYRACUSE L. REV. 1137, 1181 (1999) (arguing that Congress created first section of Fourteenth Amendment when it became evident that Thirteenth Amendment was not adequate enough to unequivocally direct states to grant blacks civil equality).

^{222.} See generally ALEXANDER TSESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS ch. 3 (2002) (discussing how racism gradually became popular in ante-bellum United States).

^{223.} See PETER KOLCHIN, AMERICAN SLAVERY 1619-1877, 169-99 (1993) (detailing centrality of slavery to Southern society prior to the Civil War).

^{224.} Id.

^{225.} Calhoun made this statement in 1820, responding to John Quincy Adams' attack against slaveocracy. 5 Memoirs of John Quincy Adams, Comprising Portions of His Diary From 1795 To 1848, at 10 (Charles F. Adams ed., 1875).

^{226.} See id. at 9 (noting Calhoun's influence on other Southern politicians).

^{227.} CONG. GLOBE, 27th Cong., 2nd Sess., Appendix, 337 (1842).

portion of the poor among the citizen population; and this degradation of a few affects the respectability of the entire class to which they belong... perform menial and domestic offices. The freeborn and laboring poor, although perhaps more virtuous than their rich neighbors, are treated as inferiors.... Equality among its citizens is the corner stone of a republic... an entire exemption from the performance of menial and degrading offices produces equality... ²²⁸

Likewise a highly influential Congressman from Virginia, Henry Wise, contended that "[t]he principle of slavery was a leveling principle; it was friendly to equality. Break down slavery, and you would with the same blow destroy the great Democratic principle of equality among men." 229

Jefferson Davis, the future Confederate President, also held to this dogma. In 1859, responding to the charge that Southern laborers were downtrodden, he argued that the degraded condition of blacks lifted whites to a state of equality:

I say that the lower race of human beings that constitute the substratum of what is termed the slave population of the South, elevates every white man in our community.... It is the presence of the lower caste, those lower by their mental and physical organization, controlled by the higher intellect of the white man, that gives this superiority to the white laborer. The white man does not perform menial services there.²³⁰

Sly politicians consciously exploited slavery to avoid conflict, funneling class tensions against the accepted pariahs. Proponents of the Thirteenth Amendment wanted to end that system of intolerance, and they saw Southern estrangement from the Union as the appropriate opportunity to accomplish it.²³¹ Those Southern states that continued, even after the Civil War, to officially use Confederate symbols, in effect, raised the standard for an ideology which the Thirteenth Amendment was meant to crush.²³²

After the states ratified the Amendment, opponents of black civil rights

^{228.} Id.

^{229.} CONG. GLOBE, 27th Cong., 2nd Sess. 173 (1842).

^{230.} JEFFERSON DAVIS, JEFFERSON DAVIS CONSTITUTIONALIST 49 (Dunbar Rowland ed., Miss. Dept. of Archives and Hist. 1923) (1859). Likewise, on April 29, 1861, Davis proclaimed that slavery raised blacks from "brutal savages' to useful laborers." 7 The Papers of Jefferson Davis 142 (1992). I do not share the view of a recent book whose author, although not espousing Jefferson Davis' supremacist views, sought to justify them by arguing that they were understandable since Davis was a product of racist times. William J. Cooper, Jr., Jefferson Davis, American xiv-xv, 656-58 (2000). To the contrary, United States abolitionists had, for several generations before Davis was elected to Congress, explicated the injustices of slavery. Benjamin Rush, Address to the Inhabitants of the British Settlements on the Slavery of the negroes in America 4, 19 (1775); S. Sewell, Selling of Joseph a Memorial, reprinted in G. H. Moore, Notes on the History of Slavery in Massachusetts, 83-87 (D. Appleton & Co. 1866) (1700). During Davis' political career and adult life, congressmen, like John Quincy Adams, and presidents, like Abraham Lincoln, spoke about slavery's evils, and Davis must have been aware of their views.

^{231.} These, for instance, were the sentiments of Missouri Senator John B. Henderson who argued that slavery was the cause of the Civil War. Cong. GLOBE, 38th Cong., 1st Sess. 1461 (1864). He called for adopting an amendment that would end proslavery agitation. *Id.* at 1465.

^{232.} See infra Part IV for a discussion of state uses of Confederate symbols.

contended that the freedom it envisioned went no further "than to cover the relation which existed between the master and his Negro African slave." The Amendment brought home the inequitable treatment of free blacks that then existed in the North. 234 Civil and political rights had to be granted to all persons of African descent, including those who never were slaves, otherwise the declaration of freedom would have little effect on blacks' rights. 235 This was a groundbreaking ideal because it implied that those Northern states which still denied blacks the rights to vote or use of public transportation would also be required to purge racist practices from their laws. 236

The advocates of civil justice welcomed this opportunity. Representative Thaddeus Stevens, for instance, realized the inherent injustice in setting "loose four million slaves without a hut to shelter them or a cent in their pockets."²³⁷ He believed the federal government's obligation did not stop with the emancipation of slaves, it also had to act against the racist system that had supported inequality through "infernal laws . . . [which] have prevented them from acquiring an education, understanding the commonest laws of contract, or of managing the ordinary business of life."²³⁸ In fact, he vigorously argued, the United States should make reparations to the former slaves by providing them with homesteads and creating laws to protect their property rights.²³⁹ The problem facing Congressmen in 1865 was how to protect the rights of people who owned no houses or professional tools and against whose advancement society established numerous legal and moral barriers.²⁴⁰

Primarily, the Thirteenth Amendment aimed to destroy supremacist elements in American civic life. James Harlan, an Iowa Senator, saw the

^{233.} CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866) (statement of Senator Edgar Cowan of Pennsylvania).

^{234.} See David F. Forte, Spiritual Equality, The Black Codes & the Americanization of the Freedmen, 43 LOY. L. REV. 569, 580 (1998) (discussing northern states' reluctance to grant civil rights to blacks).

^{235.} Id.

^{236.} See id. at 580 (discussing northern states' denial of civil rights to blacks). At the time of the Civil War blacks were only permitted to vote in six states (Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and New York), one of which had property and residency requirements on black voters. Oregon v. Mitchell, 400 U.S. 112, 156 (1942) (Harlah, J., concurring in part and dissenting in part); see also CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866) (statement of Senator Saulsbury) (relying on lack of rights afforded to blacks in Maryland and Delaware to support his view that Thirteenth Amendment was not intended to bring blacks equality but only freedom from slavery).

^{237.} CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865).

^{238.} Id.

^{239.} Id. Stevens's reparation recommendation was commonly referred to as "Forty Acres and a Mule." Lance S. Hamilton, Note, Ethnomiseducationalization: A Legal Challenge, 100 YALE L.J. 1815, 1820 n.19 (1991). Under President Andrew Johnson's Proclamation of Annesty, former slave owners reclaimed the plots of land that had been given to blacks by personnel from the Union Army and Freedmen's Bureau. Derrick Bell, Foreword: The Civil Rights Chronicles, 99 HARV. L. REV. 4, 9 n.20 (1985).

^{240.} See, e.g., Akhil Amar, Remember the Thirteenth; 10 CONST. COMMENT. 403, 407-08 (1993) (asserting that slaves' lack of property after emancipation restricted them from becoming "full and free citizens").

Amendment as a battle axe against the "incidents of slavery," which included interference with black family relationships, the prohibition against black participation on juries, and restrictions against black property ownership.²⁴¹ Senator Henry Wilson asserted that abolishing slavery would not only restore the victims to the "sacred rights of human nature," but also creating a federal mandate to "enlighten the darkened intellect of a race imbruted [sic] by long years of enforced ignorance."²⁴² This signaled the recognition that blacks had natural rights and that, without government sponsored education, emancipated blacks could not claw their way out of the abject state into which they were born.

Republican senators on the Judiciary Committee in 1864, which reviewed and reported the language of the Thirteenth Amendment to the full Senate, affirmed the broad intents it envisioned.²⁴³ One such senator was Jacob M. Howard of Michigan. He recalled that to the framers the meaning of freedom meant "respect to all civil rights... there is to be hereafter no distinction between the white race and the black race. It is to secure to these men whom we have made free the ordinary rights of a freeman and nothing else."244 Several bills were introduced to make this dream a reality. Senator Richard Yates, for instance, introduced a resolution that sought to make "null and void" all "constitutions, laws, or regulations of any State or Territory in aid of slavery, or growing out of the same."245 Yates' bill proposed that "all citizens of the United States, without distinction of race, color, and condition, shall be protected in the full and equal enjoyment of all their civil and political rights, including the right of suffrage."246 Even though the measure failed by a vote of 7 to 38, its language shows just how much some congressmen recognized the existence of nationwide bigotry and sought to eliminate it through powers intrinsic to the Thirteenth Amendment.247

Freedom was such a powerful principle in United States politics because of its centrality in the country's founding document, the Declaration of Independence. Republicans argued that slavery violated that fundamental statement of national aspirations.²⁴⁸ This line of attack was not new. In fact,

^{241.} CONG. GLOBE, 38th Cong., 1st Sess. 1439-40 (1864).

^{242.} CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864); see also Fox Jr., supra note 219, at 487 (discussing how many Southern states made it educating blacks criminal offense).

^{243.} See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (statements of Senator Howard).

^{244.} Id.

^{245.} CONG. GLOBE, 39th Cong., 1st Sess. 472 (1866).

^{246.} Id.

^{247.} Only Radical Republicans, including Charles Sumner, voted for the Bill. Melissa L. Saunders, Equal Protection, Class Legislation, and Colorblindness, 96 MICH. L. REV. 245, 276 n.135 (1997).

^{248.} See Colbert, supra note 145, at 8-15 (finding natural rights foundations in Thirteenth Amendment and Civil Rights Act of 1866); Lisa Tudisco Evren, Note, When Is a Race Not a Race?: Contemporary Issues Under the Civil Rights Act of 1866, 61 N.Y.U. L. Rev. 976, 985 (1986) (explaining that congressional Republicans intended Thirteenth Amendment to secure natural rights asserted in Declaration of Independence); see also DAVID COOPER, A SERIOUS ADDRESS TO THE RULERS OF AMERICA, ON THE INCONSISTENCY OF THEIR CONDUCT RESPECTING SLAVERY (1783) (arguing blacks have an equal share in natural rights).

opposition to slavery existed from the early days of the republic. Late eighteenth century theorists recognized the contradiction between natural rights philosophy, which holds that all persons have inalienable rights, and the institution of slavery.²⁴⁹

The Three-Fifths Clause was part of an ethical compromise that undermined the Declaration's commitment to equality for the sake of colonial unity. The intrinsic discrepancy of a political philosophy that advocated "liberty and justice for all" and yet prohibited a large group of its denizens from making the most basic types of free choices would have been self-evident but for a plantation mentality which denied blacks were on an intellectual and biological par with whites. This popular viewpoint, which influenced attitudes and behaviors, contained two kernels of thought. One was that since blacks were not part of the Continental Congress at the signing of the Declaration, its provisions did not cover them, and the other was that slaveholders did not intend to despoil themselves of their property by entering into a social contract. The Declaration of Independence played a prominent role in speeches of the proposed Amendment's advocates like Godlove S. Orth of Indiana.

Thaddeus Stevens addressed the institution's supremacist rapaciousness in a

^{249.} Id.

^{250.} See Anthony E. Cook, King and the Beloved Community: A Communitarian Defense of Black Reparations, 68 GEO. WASH. L. REV. 959, 990 (2000) (arguing that Three-Fifths Clause is reflection of Fouding Fathers' struggle to reconcile idea of free society with fact of slavery). The Declaration formed the basis of free government by the people's representatives and the Bill of Rights was designed to protect personal liberties. Founding fathers, such as Patrick Henry, Thomas Jefferson, and George Washington recognized that slavery was inherently wrong. See Raymond T. Diamond, No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution, 42 VAND. L. REV. 93, 104 n.64 (1989). However, political expediency and interest in existing white dominance over blacks led them to vote for provisions protecting slavery and continuing the slave trade. See Mark A. Graber, Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory, 14 CONST. COMMENT. 271, 312 (1997) (stating that although some Founding Fathers believed slavery inconsistent with ideals of Declaration of Independence, emancipation proposals were frequently linked to slaves' deportation).

^{251.} There are numerous examples of this line of thought in the words of Southern politicians. For instance, Representative Campbell of South Carolina made this argument in 1842 against, John Quincy Adams, that gadfly in the ointment of slavery:

That the expressions used in the Declaration of Independence, that 'all men are by nature equal,' were intended to have no reference whatever to our slave population, is evident from the fact that slavery existed in this country at the time that declaration was made; and also from the fact, that those who adopted it were themselves slaveholders.

CONG. GLOBE, 27th Cong., 2nd Sess., Appendix, 337 (1842). Likewise, Senator Albert G. Brown of Mississippi stated, during a debate on the Nebraska and Kansas Bill, "Negroes are not men, within the meaning of the Declaration. If they were, Madison, and Jefferson, and Washington, all of whom lived and died slaveholders, never could have made it, for they never regarded Negroes as their equals." CONG. GLOBE, 33rd Cong., 1st Sess., Appendix 230 (1854).

^{252.} See Paul Finkelman, The Centrality of the Peculiar Institution in American Legal Development, CHI.-KENT L. REV. 1009, 1011 (1993) (arguing that Declaration of Independence's proclamation of natural rights applied only to whites).

^{253.} CONG. GLOBE, 38th Cong., 1st Sess. 142 (1864).

speech he gave on December 18, 1865, several months after ratification.²⁵⁴ The proponents of laws that limited black freedom strictly to emancipation from slavery thought the United States should remain a "'white man's Government."255 In their worldview "one race of men are to have the exclusive right forever to rule this nation, and to exercise all acts of sovereignty, while all other races and nations and colors are to be their subjects."256 This, Stevens 'argued, contradicted "all distinctive principles of the Declaration of Independence."257 In his egalitarian view, "[a]ccidental circumstances, natural and acquired endowment and ability, will vary their fortunes. But equal rights to all the privileges of the Government is innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits."258 Another Congressman believed that the founders accepted slavery as a necessary evil "regarded as temporary in its character and as tolerable only by reason of the exigencies of the hour But, sir, as years rolled on, slavery, once regarded as a crime and a curse, became to the South a profitable institution."259 The Confederate flag, especially when it is displayed by governmental entities, cannot be divorced from entrenched Confederate racism.

At the philosophical foundation of the Declaration of Independence lies the principle that the possession of natural rights is "self-evident." The Thirteenth

^{254.} CONG. GLOBE, 38th Cong., 1st Sess. 72-75 (1864).

^{255.} CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865).

^{256.} Id.

^{257.} Id.

^{258.} Id.

^{259.} CONG. GLOBE, 38th Cong., 2nd Sess. 154 (1865) (statement of Mr. Thomas T. Davis of New York). Historian James M. McPherson presents a contemporary discussion on the economics of slavery. MCPHERSON, supra note 15, at 96-102. Early scholarship by Cassius M. Clay, Hilton Helper, Frederick Olmsted, and John Cairnes indicated that slavery brought on depredation of Southern economy. James C. Morgan, Slavery in the United States: Four Views 98-101 (1985). Economists have arrived at divergent opinions on the economic rationality of slavery. Ulrich Bonnell Phillips argued that "slave labor proved to be a type of labor peculiarly unprofitable to its employers in a multitude of cases" because it limited economic diversification. ULRICH B. PHILLIPS, The Economics of Slave Labor in the South, in THE SLAVE ECONOMY OF THE OLD SOUTH 137 (1968). Phillips calculated the costs of the business aspects of slavery and concluded that slavery was more of a way of life than a realistic way of making a profit. ULRICH B. PHILLIPS, AMERICAN NEGRO SLAVERY 359-401 (1966). Likewise Eugene D. Genovese argued that the "economic backwardness" of slavery reduced Southern productivity and ultimately caused its defeat in the Civil War. EUGENE D. GENOVESE, THE POLITICAL ECONOMY OF SLAVERY: STUDIES IN THE ECONOMY AND SOCIETY OF THE SLAVE SOUTH 43 (1965). Nevertheless, several authors have come to the opposite conclusion. For instance, Kenneth M. Stampp concluded that slave labor was cheaper than free labor and provided a profit for slave owners. See generally STAMPP, supra note 21 (discussing Southern slavery). See also ROGER L. RANSON, CONFLICT & COMPROMISE: THE POLITICAL ECONOMY OF SLAVERY, EMANCIPATION, & THE AMERICAN CIVIL WAR 42-53 (1989) (arguing that slavery was lucrative for slave owners but may have stymied Southern agriculture).

^{260.} THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Declaration recognizes the existence of at least three natural rights: life, liberty, and the pursuit of happiness. BERNARD BAILYN ET AL., THE GREAT REPUBLIC: A HISTORY OF THE AMERICAN PEOPLE 576-77 (4th ed. 1992); ALLEN C. GUELZO, ABRAHAM LINCOLN: REDEEMER PRESIDENT 224 (1999). This list is based on Lockean philosophy. HERBERT FRIEDENWALD, THE DECLARATION OF INDEPENDENCE: AN INTERPRETATION

Amendment proclaimed that in the United States life, liberty, and the pursuit of happiness were the rights of all people regardless of their race. The Amendment's more progressive advocates made an "earnest effort" to remove impediments standing in the way of human rights. Representative E. C. Ingersoll of Illinois voiced the desire to see blacks "live in a state of freedom." He asserted that they had a right to profit from their labors and to enjoy conjugal happiness without fear of forced separations at the behest of uncompassionate masters. 264

Not only were the natural rights of slaves implicated by the Thirteenth Amendment, but so were their political and citizenship rights.²⁶⁵ These rights were the embodiments of the "great" charter of liberty given to them by the American people," which was due to blacks as well as whites.²⁶⁶ The Amendment offered the hope that the privileges and immunities afforded to all United States citizens would no longer be denied to persons who paid taxes and gave their lives to save the Union.²⁶⁷ The black citizens who heard of the Amendment's passage from the House galleries, to which they had been admitted just a short time before, hoped that this was the first step to their integration into society.²⁶⁸

Curiously, congressmen who opposed passing the proposed amendment inadvertently leant credence to a broad reading of the rights it was meant to affect. Numerous opposition speakers realized that the Radical Republicans

AND AN ANALYSIS 201 (1974); JEROME HUYLER, LOCKE IN AMERICA: THE MORAL PHILOSOPHY OF THE FOUNDING ERA 251-53 (1995); WILLARD S. RANDALL, THOMAS JEFFERSON: A LIFE 205 (1993); Donald L. Doernberg, "We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action, 73 CAL. L. REV. 52, 65 (1985); Terry S. Kogan, A Neo-Federalist Tale of Personal Jurisdiction, 63 S. CAL. L. REV. 257, 307 (1990). But see Garry Wills, Inventing America: Jefferson's Declaration of Independence 172-75 (1978) (arguing that Locke did not influence drafting of Declaration of Independence). See generally Morton White, The Philosophy of the American Revolution (1978) (discussing early American philosophy and the Declaration of Independence). The inclusion of "property" among the natural rights is questionable. The right to property only arises when persons become part of a social entity, whence they begin to have better claims than others to some material objects. Therefore, property rights are derivative from the existence of interrelations but they are not fundamental (i.e. existing prior to and independent of social entities). But see John Locke, Two Treatises of Government 2: § 87 (Peter Laslett ed., 1988) (asserting that right to property is natural right).

261. See CONG. GLOBE, 38th Cong., 2nd Sess. 142-43 (1864) (statement of Mr. Godlove S. Orth of Indiana) (arguing for practical application via Thirteenth Amendment of natural rights principles).

262. CONG. GLOBE, 38th Cong., 1st Sess. 1199 (1864) (statement of Mr. James Wilson of Iowa).

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

264. Id.

265. See Cong. Globe, 39th Cong., 1st Sess. 69 (1865) (Statement of Mr. Benjamin F. Loan of Missouri) (providing text of resolution for inquiry on legislation granting political and civil rights to blacks from rebellious state).

266. CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (state ment of Representative Russell M. Thayer of Pennsylvania).

267. Id.; CONG. GLOBE, 39th Cong., 1st Sess. 46 (1865).

268. See VORENBERG, supra note 8, at 207-08 (describing celebrations after final passage by House of proposed amendment).

conceived the scope of the proposed Amendment to go well beyond outlawing hereditary, physical bondage.²⁶⁹ Republican leaders sought to alter United States culture from one where white race was the *sine qua non* of acquiring and retaining power, to one where blacks and whites enjoyed personal liberties.²⁷⁰ This social redirection was brought out during an 1865 exchange between Pennsylvania Representative, William D. Kelley, who was a staunch advocate of African American rights.²⁷¹ and John D. Stiles of Virginia:

MR. STILES: In the event of the passage of the amendment to the Constitution proposed, is my colleague in favor of equality between the races? And will he regard Negroes as equal to the white man?

MR. KELLEY: I could not possibly regulate the equality of men. I cannot make my colleague so moral or intelligent as a man of darker complexion who is more moral and more intelligent; nor could I degrade my colleague to the level, in morals and intelligence, of the colored man who is less moral or less intelligent than he. My colleague does not, according to his theory, vote by reason of his intelligence, but simply by reason of his color. I might be willing to exclude from the privilege of voting an immoral or a voluntarily ignorant man; but I want no senseless rule that allows a fool or a scoundrel to vote if he be white, and excludes a wise and an honest man if he be black.

MR. STILES: ... The right of Negroes to become voters, jurors, and in all respects equal with the white man, is the favorite theory of the times and of the party in power. The day will come when the men who avow such principles will be condemned by the popular voice everywhere.²⁷²

In the debates following the second and successful vote on the Amendment in the House, Elijah Ward, Democrat of New York, like Stiles, exclaimed that it was absurd "to sanction a joint resolution to amend the Constitution so that all persons shall be equal under the law, without regard to color, and so that no person shall hereafter be held in bondage."²⁷³

Opponents of the proposal realized that it would commit the United States to having a racially mixed government.²⁷⁴ "Do you propose to enfranchise them, and make them 'before the law,'... the equals of the white man; give them the right to suffrage; the right to hold office; the right to sit on juries? Do you intend... to make this a mongrel Government, instead of a white man's Government?"²⁷⁵ Democrats understood that the Amendment would make

^{269.} tenBroek, supra note 196, at 175-76 (explaining that some viewed Radical Republicans' readings of Amendments as broad and "revolutionary").

^{270.} Id. at 176-78 (noting that amendment would allow both white and black men to enjoy life, liberty, and the pursuit of happiness).

^{271.} See VORENBERG, supra note 8, at 133 (discussing Kelley's political views on equality and legislation).

^{272.} CONG. GLOBE, 38th Cong., 2nd Sess. 291 (1865).

^{273.} CONG. GLOBE, 38th Cong., 2nd Sess. 177 (1865).

^{274.} CONG. GLOBE, 38th Cong., 2nd Sess. 216 (1865).

^{275.} Id. .

blacks "American citizens" whose interests would be represented in Congress. Robert Mallory, an outspoken opponent to the Amendment, thought it interconnected the ideals of freedom and equality. The Amendment's "main purpose," was "the enfranchisement of a people." The Amendment's "main purpose," was "the enfranchisement of a people."

Thus, some framers hoped, and the Amendment's antagonists feared, that it would grant Congress the power to enforce racial tolerance and political equality.²⁷⁹ As the congressional debates on the proposed Amendment show, the Union considered its mission not only to destroy Southern battlefield resistance, but also its slavery and associated discriminations. In fact, they believed the military conflict was interlinked with the moral corruption of slavery since the Confederacy raised St. Andrew's Cross, its battle flag, to rally its supporters around "slavery, the cornerstone of the rebellion,"²⁸⁰ Northern forces were fighting a military and social battle. A principal advocate of the Thirteenth Amendment, Representative James Wilson, rightly or wrongly,²⁸¹ believed: "[S]lavery is the conspirator that conceived and organized this mighty conspiracy against the unity and existence of the Republic. Slavery is the traitor that madly plunged the nation into the fire and blood and darkness of civil war."²⁸² On the other hand, those Democrats who opposed secession while

^{276.} CONG. GLOBE, 38th Cong., 1st Sess. 2982 (1864).

^{277.} CONG. GLOBE, 38th Cong., 2nd Sess. 179 (1865).

^{278.} CONG. GLOBE, 38th Cong., 1st Sess. 2962 (1864).

^{279.} Although there were few proponents of immediate black enfranchisement, their number was significant enough to cause consternation to the opposition. tenBroek, *supra* note 196, at 181.

^{280.} CONG. GLOBE, 38th Cong., 1st Sess. 2618 (1864).

^{281.} In recent years, scholars have devoted much time on assessing to what extent emancipation drove Northern purposes in pursuing the Civil War. While President Abraham Lincoln abhorred slavery, his initial war aims were unificationist; however, as the war ground on and slaves fled to Union lines, the North embraced moderate, albeit unwavering, abolitionist ideals. James M. McPherson, Drawn with the Sword: Reflections on the American Civil War 62-63, 71-72, 100-01 (1996). Once Lincoln issued the Emancipation Proclamation and threw in his support for the Thirteenth Amendment, victory over the South could not come without Southern renunciation of slavery. Ranson, supra note 259, at 211. Not only politicians, but soldiers from the slave holding South showed a deep sense of loyalty to the peculiar institution. Soldiers from slaveholding families, comprising about 47% of the Confederate forces, wrote from the battlefields advising their families to invest in slaves in the days following the Emancipation Proclamation. James M. McPherson, For Cause And Comrades 114 (1997). They fought in part for the self-contradictory liberty of owning slaves. Id. at 108-110. Many non-slaveholding Confederate soldiers also felt an interest in maintaining the institution because it elevated their social status above millions of people. Id.

^{282.} CONG. GLOBE, 38th Cong., 1st Sess. 1320, 1323 (1864). On March 21, 1861, Alexander Stephens, who was vice-president of the Confederate States, voiced his opinion that the Republican commitment against slavery was "the immediate cause of the late rupture and the present revolution." JAMES M. MCPHERSON, WHAT THEY FOUGHT FOR, 1861-1865 47 (1994). He went on to say that the Confederacy's "cornerstone rests[] upon the great truth that the Negro is not equal to the white man; that slavery, subordination to the superior race, is his natural and normal condition. This, our new government, is the first, in the history of the world, based on this great physical, philosophical, and moral truth." *Id.* at 47-48. After the end of the Civil War, Alexander H. Stephens tried to sing a different tune, arguing that the struggle for slavery was but an aspect of the Confederacy's raison dêtre. ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES: IT'S CAUSES, CHARACTER, CONDUCT AND RESULTS 9-12 (1868). In contrast to this view, Henry

remaining true to slavery regarded the only legitimate war aim to be reunification, and insisted that pursuing the abolition of slavery would only prolong the war.²⁸³

States that romanticize Confederate heroes, placing their statues in prominent public places,²⁸⁴ display a nostalgia for southern aristocracy which Radical Republicans hoped to asphyxiate.²⁸⁵ Idealists in the abolitionist movement hoped that after ratification of the Amendment blacks would "benefit [from the] great charter of liberty given to them by the American people."286 Senator Charles Sumner proposed a bill declaring "that all laws or customs in such States establishing any oligarchical privileges and any distinction of rights on account of color or race are hereby annulled, and all persons in such States are recognized as equal before the law."287 The effect on national life was a broad based abandonment of the ideology that the Supreme Court had developed in *Dred Scott v. Sandford*. 288 In that case, the Court relegated African Americans to "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations."289 The Court regarded this as adequate reason to subordinate black rights to the will of whites.²⁹⁰ In 1883, even as it was constricting the Amendment's application, the Court interpreted the Amendment to be a decree of "universal civil and political freedom throughout the United States."291 If "freedom" meant nothing more than

Wilson, a Radical Republican Senator during the War, believed it was the Southern slaveholders who catapulted the nation into Civil War. HENRY WILSON, THE HISTORY OF THE RISE AND FALL OF SLAVEPOWER IN AMERICA 127-38 (1877).

283. See, e.g., CONG. GLOBE, 38th Cong., 2nd Sess. 176 (1865) (comments of Mr. Elijah Ward of New York) (stating that his primary goal was to "bring back the seceded states").

284. Cf. Sanford Levinson, They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society, 70 CHI.-KENT L. REV. 1079, 1084 (1995) (discussing statues memorializing Confederate leaders which stand in prominent public place in Richmond, Virginia).

285. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440-41 (1968) (holding that Thirteenth Amendment eliminated all "badges and incidents" of slavery).

286. CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (remarks of Representative Russell M. Thayer of Pennsylvania).

287. CONG. GLOBE, 39th Cong., 1st Sess. 91 (1865). This proposal was not adopted. Instead, Congress passed the Civil Rights Act of 1866. See tenBroek, supra note 196, at 184-85.

288. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

289. Id. at 407.

290. See id. (stating that for more than a century, white men were not bound to respect rights of blacks).

291. The Civil Rights Cases, 109 U.S. 3, 20 (1883). While the majority in the *Civil Rights Cases* weakened the Amendment's applicability, Justice Harlan, who wrote the dissent, recognized its revolutionary guarantee of universal freedom. *Id.* at 34-36 (Harlan, J., dissenting). Justice Harlan wrote:

Congress... under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, because of their race, of any civil rights granted by 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:

liberation from shackles; then it was "a bitter mockery" and "a cruel delusion." ²⁹²

During the summer and autumn of 1865, President Andrew Johnson appointed provisional governors in secessionist states.²⁹³ They promulgated regulations for convening state constitutional conventions.²⁹⁴ "It was understood that at these conventions the states would abrogate their secessionist ordinances, adopt new constitutions, repudiate their war debts, and ratify the Thirteenth Amendment."²⁹⁵ Most of the Southern opposition to ratification focused on Congress' broad ranging powers.²⁹⁶ A delegate in the Mississippi constitutional convention explained Southern concerns:

The second section confers extraordinary power upon Congress. That section gives to Congress broad, and almost, I may say, unlimited power.... I fear excessively that there is hidden away in that section, something which may be destructive to the welfare of the South. I am not willing to trust to men who know nothing of slavery the power to frame a code for the freedmen of the State of Mississippi.²⁹⁷.

The provisional governor of South Carolina found the same leeriness in that state: "They have no objection to adopting the first section of the amendment proposed; but they fear that the second section may be construed to give Congress power of local legislation over the Negroes, and white men, too, after the abolishment of slavery." Southern premonitions were in fact accurate. Radical Republicans envisioned the second clause as the source of congressional power against slaveocracy. It is the source of power, I argue in Part V, for the federal government to forbid governmental veneration of Confederate symbols on state and federal properties. 299

The framers intended to rely on the second clause of the Thirteenth. Amendment to pass a series of civil rights legislation.³⁰⁰ Senator Lyman

Id. at 36 (Harlan, J., dissenting).

^{292.} Congressman James A. Garfield, *Oration Delivered At Ravenna, Ohio July 4, 1865, in* THE WORKS OF JAMES ABRAM GARFIELD 86 (Burke A. Hinsdale ed., 1882).

^{293.} See Robert L. Kohl, The Civil Rights Act of 1866, Its Hour Come Round At Last: Jones v. Alfred H. Mayer Co., 55 VA. L. REV. 272, 276 (1969) (synopsizing early reconstruction efforts).

^{294.} *Id.* at 276-77. Executive Proclamation Appointing William W. Holden Provisional Governor of North Carolina, May 29, 1865, *in* EDWARD MCPHERSON, POLITICAL MANUAL FOR 1866 & 1867 at 11 (1867). Similar proclamations were made for other southern states. *Id.* at 12.

^{295.} Kohl, *supra* note 293, at 276 (citing C. Wood, A Complete History of the United States 344 (1941)).

^{296.} See Journal of the Mississippi Constitutional Convention of 1865 137-38, quoted in Hamilton, supra note 10, at 45-46 (noting that fear of section 2, which could give broad power to Congress in enforcement, was "principal basis" for opposition of amendment).

^{297,} Id. at 45.

^{298.} Hamilton, *supra* note 10, at 45 (reproducing in part, 39th Cong., 1st Sess., *Ex. Doc. No. 26*, p. 254 (1866)).

^{299.} See infra Part IV for a discussion of governmental reverence of Confederate symbols.

^{300.} Soon after ratifying the Thirteenth Amendment, Congress passed a number of laws such as the Civil Rights Act of 1866. The civil rights recognized by those laws indicate that Radical Republicans planned to initiate a social revolution that could have alleviated racism in the United

Trumbull, who would be instrumental in passing the Civil Rights Act of 1866 and the Freedmen's Bureau legislation, argued that the Amendment not only superseded all state and local laws favorable to slavery, but also destroyed all "incidents to slavery." In his view, "badges" of slavery were privations of rights which included laws against black property ownership, contract enforcement, and freedom of movement. So long as such degrading laws were enforced, African Americans were not truly free people. The second clause of the Amendment offered a solution:

I have no doubt that under this provision of the Constitution we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery.³⁰⁴

The Thirteenth Amendment, Trumbull believed, conferred on Congress the power to nullify state laws it deemed detrimental to civil rights.³⁰⁵

Likewise, Senator John Sherman of Ohio saw in the second clause the grant of congressional power to actively secure freed people their liberty rights "to sue and be sued... [and] to testify in a court of justice." "Liberty" meant nothing less to Sherman than interstate recognition of black citizenship. Treedom's advocates considered it a natural right which subsumed "those fundamental rights which are the essence of civil freedom." Their aspiration was to create a world in which the fundamental rights of all people were respected—this went well beyond simply freeing slaves and extends to any lingering government effects supporting the Old South.

The essentialness of the Amendment to the Radical Republicans' agenda became evident in the years immediately following the War.³¹⁰ Even after states ratified the Amendment in December 1865, violence swept through the South.³¹¹

States. See Blyew v. United States, 80 U.S. (13 Wall.) 581, 588 (1871).

^{301.} CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866).

^{302.} Id.

^{303.} Id.

^{304.} Id.

^{305.} *Id.* Trumbull was a product of his times. Even though in many ways he was a progressive thinker, he nevertheless considered it equitable to forbid blacks from marrying whites so long as whites were likewise prohibited from marrying blacks. *Id.*

^{306.} CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865).

^{307.} Id. The Comity Clause states that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1. It guarantees every citizen the right to move freely throughout the country without interference from any state. Kunal M. Parker, State, Citizenship, & Territory: The Legal Construction of Immigrants in Antebellum Massachusetts, 19 LAW & HIST. REV. 583, 609 n.67 (2001).

^{308.} Jones, 392 U.S. at 441 (citing The Civil Rights Cases, 109 U.S. at 22).

^{309.} See Parts II and IV for a discussion of contemporary symbolic support of the Old South.

^{310.} See tenBroek, supra note 196, at 175-76 (outlining certain Republicans' views of the Amendment).

^{311.} There is no indication that even after freeing their slaves most Southerners considered

Whippings and lynchings were spurred on by white supremacists.³¹² They denied freed people's humanity, incensed that blacks initiated conversations with whites, refused to call whites "masters," resisted whippings, and protected family members.³¹³ Some common folk zealously wrote their congressmen informing them of the brutality perpetrated against blacks and other abolitionists.³¹⁴ Many Southern state officials either participated in the mayhem, encouraged it, or did nothing to prevent it.³¹⁵ Those assailants who were prosecuted could rest secure in a skewed white-only jury system.³¹⁶ Lily-white juries acquitted all 500 of the whites charged with murdering blacks in Texas between 1865 and 1866. ³¹⁷

Confederate soldiers returning from the War, still dolled-up in their Confederate greys, terrorized blacks, stealing from them and forcing them to sign binding labor contracts. It is their commitment to white supremacy that Confederate symbols, which are still popular in some states today, call to mind. Some former Confederates joined a secret society called the Ku Klux Klan, the aim of which was the perpetuation of Southern ideology, which included a social commitment to white supremacy. The United States Freedmen's Bureau provided some measure of protection against these injustices, but could not stop all the beatings, whippings, lynchings, and criminal assaults. The efforts of persons, such as Tennessee Governor William G. Brownlow and Arkansas Governor Powell Clayton, who were committed to ending repression and stamping out the Klan, were not enough to diffuse the racism which had entrenched itself through generations of indoctrination.

slavery to be unethical. To the contrary there were continued oral and written defenses of slavery as a divinely ordained institution that uplifted blacks above Africans and improved them religiously. LITWACK, *supra* note 21, at 189.

- 312. Id.
- 313. ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 52-53 (1990).
- 314. Congressmen disseminated their constituents' testimonials. For example, a woman in New Orleans wrote her congressman about persons who shot at her because they opposed her educating black children. CONG. GLOBE, 39th Cong., 1st Sess. 95 (1865). A "loyal Texan" wrote that any abolitionists who traveled to the South ran the risk of being shot and that juries were unlikely to convict violent perpetrators. *Id.*
- 315. Douglas L. Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges, 76 CORNELL L. REV. 1, 40-43 (1990). In New Orleans, a mob, which was primarily composed of Confederate militants, attacked and disrupted a meeting of black and white abolitionists who were hoping to enfranchise freedmen. HERBERT SHAPIRO, WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY 5 (1988). In Memphis, riot police arrested black servicemen. Black resistance inflamed a white mob which attacked a black neighborhood. In its destructive wake, the attack left forty-six blacks and two whites dead, and at least five black women were raped. Id. at 6-8.
 - 316. Colbert, supra note 315, at 40-41.
 - 317. Id.
- 318. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 203 (1988) (discussing post civil war terror perpetrated by former confederate soldiers).
 - 319. Id
 - 320. SHAPIRO, supra note 315, at 5.
 - 321. Id
 - 322. FONER, supra note 313, at 189-90.

Militant support reestablished old social and racial hierarchies that condemned blacks to a life of virtually unrequited toil and poor whites to a lower rung of the social ladder than their plantation-owning brethren.³²³ Douglas L. Colbert, a leading legal scholar on the Thirteenth Amendment, summed up the post-War Southern resistance to civil rights as a "determined resistance to the establishment of freedom for African Americans."³²⁴

Radical Republican leaders sought to assure newly-freed-slaves with substantive and procedural justice; the elimination of racially based employment barriers; freedom of movement; right to education; legal protections against arbitrary arrests; and the equitable application of common law.³²⁵ They passed federal civil rights legislation to nullify the inimical black codes.³²⁶ During this brief flurry of benevolent activity, immediately after the Civil War, Senator Sumner introduced a bill "to enforce the amendment to the constitution by securing the elective franchise to colored citizens" and offered "a joint resolution that prohibited any denial of civil or political rights, on the ground that such denial would violate the Amendment and the constitutional guarantee of the republican form of government."³²⁷ Ultimately, four statutes emerged to enforce the Amendment: the Civil Rights Act of 1866, the Slave Kidnapping Act of 1866, the Peonage Act of 1867, and the 1867 amendment to the Judiciary Act.³²⁸ Among these four, courts found the Civil Rights Act of 1866 the most fertile for interpretations impacting the legislative uses of the Thirteenth Amendment.

B. Judicial Interpretation

The Civil Rights Act of 1866³²⁹ was monumental in its scope.³³⁰ It rejected race-based restrictions and recognized African American citizenship, including the concomitant rights to "enforce contracts, to sue, be parties and give evidence,

^{323.} Id.

^{324.} Colbert, supra note 145, at 12.

^{325.} See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 111 (1865) (arguing for congressional intervention to insure blacks obtained a constitutional right to freedom).

^{326.} See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (highlighting Senator Trumbull's attack on black codes which he expressed in effort to pass legislation which eventually became Civil Rights Act of 1866); DAVID A. J. RICHARDS, CONSCIENCE AND THE CONSTITUTION 127 (1993) (describing Civil Rights Act of 1866 as effort to strike down black codes). See generally Kohl, supra note 293, at 283-84 (discussing how purpose of Civil Rights Act of 1866 was to eliminate black codes).

^{327.} See Hamilton, supra note 10, at 59 (quoting Senate Bill No. 345, Senate Joint Resolution No. 28).

^{328.} See Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (currently codified as amended at 42 U.S.C. §§ 1981-82 (1994)) (requiring all people born in U.S. to have some rights in property, contracts and personal security); Slave Kidnapping Act, ch. 86, 14 Stat. 50 (1866) (holding as criminal anyone who kidnaps or induces any person to board a vessel or go any place for purpose of making him or her a slave); Peonage Act of 1867, Act of February 5, 1867, ch. 27, 14 Stat. 385 (1867) (expanding scope of habeas corpus statutes).

^{329.} Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (currently codified as amended at 42 U.S.C. §§ 1981-1982 (1994)).

^{330.} See infra notes 350-83 and accompanying text for a discussion of the Civil Rights Act of 1866.

to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens."³³¹ The Act did in practical form what the Thirteenth Amendment achieved in principle: it overturned the 1857 *Dred Scott* decision, which denied that blacks had recognizable legal rights and privileges of citizens.³³²

In developing a diverse political coalition, which included a few Democrats, to pass the Thirteenth Amendment, Republicans found it necessary to resort to ambiguous language.³³³ Nowhere did the text identify the multifaceted meaning of "freedom" that emerged during the course of congressional debates.³³⁴ The key to extensive social and legal reform was in the Amendment's second clause, which allowed for passage of "appropriate legislation" to breathe life into the Amendment.³³⁵ Initial judicial interpretations of federal civil rights statutes emaciated the Amendment's potential uses for human rights reform.³³⁶ When faced with issues surrounding the treatment of minorities, the judiciary made short shrift of the Amendment's substance by deferring to state laws.³³⁷

Supreme Court decisions in the Civil Rights Cases, 338 Plessy v. Ferguson, 339 and Hodges v. United States 40 construed the Thirteenth Amendment literally, limiting its reach to a small set of cases involving forced labor. 341

331. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (currently codified as amended at 42 U.S.C. §§ 1981-1982 (1994)). The first section of the Civil Rights Act of 1866, provides:

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 condition of slavery... shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Id.

- 332. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 416 (1857).
- 333. See VORENBERG, supra note 8, at 191 (discussing compromises made to ensure the passage of the Thirteenth Amendment).
- 334. See id. at 189-91 (discussing Republicans' efforts to prevent narrow interpretation of Amendment).
 - 335. See id. at 190. (explaining Republicans' desire to keep broad language of second clause).
 - 336. Id. at 240.
 - 337. Id.
 - 338. 109 U.S. 3 (1883).
 - 339. 163 U.S. 537 (1896).
 - 340. 203 U.S. 1 (1906).
- 341. See infra, Part III.B.1 for a discussion concerning the holdings in Hodges, Plessy, and the Civil Rights Cases.

1: Early Treatment of the Thirteenth Amendment

The first decision on the Civil Rights Act of 1866, United States v. Rhodes, 342 offered short-lived hope to the newly freed slaves and their advocates.343 That decision was based on "the spirit in which the amendment is to be interpreted."344 The court acknowledged the injustice of laws prohibiting blacks from testifying in court against whites.³⁴⁵ Rhodes, the white defendant, was charged with committing burglary against Nancy Talbot, "a citizen of the United States of the African race."346 The laws of Kentucky disqualified her from testifying against the white defendants.347 Hearing the case as a designated Circuit Court Justice, Supreme Court Justice Noah Swayne348 found that removal of such cases to federal courts was necessary to afford blacks equal access to courts, both in civil and criminal cases.349 Justice Swayne held that the second clause of the Thirteenth Amendment granted Congress the authority to enact legislation enabling blacks to have the same right to testify as any white citizen. He upheld the constitutionality of the Civil Rights Act and its federal removal provisions, thus securing Talbot's right to legal redress.350 The Civil Rights Act of 1866 gave force to the Thirteenth Amendment; without it "simple abolition would have been a phantom of delusion."351 Without federal intervention, Kentucky would have permitted whites to commit crimes against blacks with impunity.352

In the immediate aftermath of *Rhodes*, lower court decisions differed on the extent of Congress' power under the Thirteenth Amendment.³⁵³ Those rulings focused on the effect of the Civil Rights Act of 1866 on state sovereignty.³⁵⁴ While some courts found that the Act granted people the right to testify in court regardless of their race or ethnicity,³⁵⁵ others held that Congress had

^{342. 27} F. Cas. 785 (C.C.D. Ky. 1866).

^{343.} See Rhodes, 27 F. Cas. at 786 (upholding Civil Rights Act of 1866).

^{344.} Id. at 792.

^{345.} Id. at 786.

^{346.} Id.

^{347.} Id. at 785.

^{348.} Richard L. Aynes, Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, & the Slaughterhouse Cases, 70 CHL-KENT L. REV. 627, 674 (1994). Justice Swayne was committed to abolitionism both in his judicial opinions and personal life. Id. When he received slaves through marriage, he and his wife freed them. Id.

^{349.} Rhodes, 27 F. Cas. at 787.

^{350.} Id. at 787, 794.

^{351.} Id. at 793.

^{352.} Id.

^{353.} See *infra* notes 385-449 and accompanying text for a discussion of the extent of Congress' power under the Thirteenth Amendment.

^{354.} See *infra* notes 350-483 and accompanying text for a discussion of the Civil Rights Act of 1866 and state sovereignty.

^{355.} See, e.g., People v. Washington, 36 Cal. 658, 669-71 (1869) (affirming federal government's authority to enforce rights of various ethnic groups to give evidence and finding Civil Rights Act affirmed peoples equality before laws); see also Kelley v. State, 25 Ark. 392, 403 (1869) (finding

overstepped its constitutional authority by granting blacks the right to testify against whites.³⁵⁶

The Supreme Court's first blow to the Thirteenth Amendment's potentiality to end centuries of racial intolerance in the United States, occurred in Blyew v. United States.³⁵⁷ The Court found the Civil Rights Act of 1866 inapplicable in this case which, like *Rhodes*, dealt with federal court removal.³⁵⁸ The case arose after two white defendants, who were moved by racial animus, murdered a black woman.³⁵⁹ A Kentucky law forbade black witnesses from testifying against the white defendants.³⁶⁰ The United States Solicitor General argued that the right to testify protected persons and property and was part and parcel of the freedom Congress assured all citizens regardless of their race.³⁶¹ Persuaded by the defendants' procedural argument against federal court jurisdiction, the Supreme Court reversed the convictions:³⁶² Making conviction impossible, the Court construed that only living persons could request removal. Since the victims were dead, no black witnesses were "affected" by the defendants and thus they had no standing to remove the case.³⁶³ Blyew wiped out the holding in Rhodes, which had found that the Thirteenth Amendment provided Congress with the power to grant federal removal.³⁶⁴ Moreover, the majority limited the Act's reach only to those rights Congress had enumerated, finding that the law did not explicitly acknowledge African Americans' right to testify in courts.³⁶⁵

Justice Swayne continued to maintain his views from *Rhodes*, joining Justice Bradley in the dissent to *Blyew*.³⁶⁶ As their dissent pointed out, enacting the Civil Rights Act put former slaves specifically, and all blacks generally, on an

Arkansas law forbidding blacks to testify against white persons unconstitutional); Ex parte Warren, 31 Tex. 143 (1868) (finding that Civil Rights Act of 1866 gave blacks equal right to testify in judicial proceedings)..

^{356.} See, e.g., Bowlin v. Commonwealth, 65 Ky. 5, 10 (1867) (holding that Civil Rights Act of 1866 violated state sovereignty and therefore rejecting Congress' authority to strike state law that forbade blacks from testifying against whites).

^{357. 80} U.S. 581 (1871).

^{358.} Blyew, 80 U.S. at 582-83, 593. The third section of the Act provided removal authority. Id. at 582. Blyew had a long-term effect on American jurisprudence. The Court only returned to the issue of federal removal in 1966. See Georgia v. Rachel, 384 U.S. 780, 793, 805-06 (1966) (finding that removal to federal district court was proper where state courts immunized defendants who refused services at place of public accommodation (e.g., restaurants), for racial reasons because such discrimination was illegal under Civil Rights Act of 1964).

^{359.} Blyew, 80 U.S. at 583.

^{360.} Id. at 581 (citing 1860 Ky. Acts, § 1, ch. 104, vol. 2, at 470). The law only permitted blacks and Native Americans to act as "competent witnesses" in civil suits to which the only parties were blacks or Native Americans. Id.

^{361.} Id. 80 U.S. at 589.

^{362.} Id. at 595.

^{363.} *Id.* at 581, 594

^{364.} See Rhodes, 27 F. Cas. at 786 (validating Civil Rights Act of 1866 based on Thirteenth Amendment).

^{365.} Blyew, 80 U.S. at 581, 590-93.

^{366.} Id. at 595.

equal legal footing with other United States citizens.³⁶⁷ The Majority misconstrued the Act, giving it an artificially "narrow" reading, discounting the liberal ideals surrounding its passage.³⁶⁸ Swayne and Bradley interpreted the congressional intent to have been the prevention of wanton, racist conduct directed at the black community.³⁶⁹ Congress had attempted to "do away with the incidents and consequences of slavery" and to replace them with "civil liberty and equality."³⁷⁰ Instating blacks to the "full enjoyment" of civil rights was a chief aim of abolishing slavery.³⁷¹ Congress enacted the Act because "merely striking off the fetters of the slaver" would have been an inadequate solution for the years of black repression.³⁷² The dissent warned that the majority opinion and Kentucky's refusal to provide blacks with the right to testify against whites branded all blacks with a badge of slavery.³⁷³ "Slavery," Justices Bradley and Swayne seemed to indicate, was not only involuntary servitude, but it also encompassed the social institutions that bolstered it.³⁷⁴

Blyew played a role similar to the black codes, it was a means of skirting civil rights legislation and, even more so, the Thirteenth Amendment.³⁷⁵ It dimmed the hopes of persons aspiring to live freely and branded blacks as easy prey for individuals and groups who continued to extol the Confederacy and sought to reinvigorate its institutions even after Lee signed the surrender at Appomattox.³⁷⁶ If the Klan and other supremacist groups were all leery before Blyew that violence would be avenged by punishment, after the decision there was no longer any doubt that so long as states like Kentucky immunized them from suits by black litigants, the federal government could provide no forum to victims seeking redress.

The period of significant decline in Thirteenth Amendment jurisprudence began with the *Civil Rights Cases*,³⁷⁷ which involved the protections of the Civil Rights Act of 1875. The passage of the Act was due, in large part, to Charles Sumner's heroic efforts.³⁷⁸ Even on his deathbed this champion of liberty and equality did not forget that abolition meant more than merely setting free millions of people who had been denied an education by Southern slave codes

^{367.} Id. at 595 (Bradley, J., dissenting).

^{368.} Id.

^{369.} Id. at 595 (Bradley, J. dissenting).

^{370.} Blyew, 80 U.S. at 601.

^{371.} Id.

^{372.} Id.

^{373.} Id. at 599.

^{374.} Id. at 595-96 (Bradley, J. dissenting).

^{375.} See generally Colbert, supra note 145, at 17 (discussing Blyew as limiting ability of African Americans to seek federal court protection when states fail to protect them from racially based violence).

^{376.} See id. at 19 (concluding that Blyew "initiated judicial retreat from Reconstruction goal of liberating African Americans from slavery and inferior citizenship status").

^{377. 109} U.S. 3 (1883).

^{378.} The full name of the Act was "An act to protect all citizens in their civil and legal rights." 18 Stat. 335 (1875).

and possessed scarcely more than the clothes on their backs. In March 1874, before the Bill was passed in the Senate, as he lay dying. Sumner reminded a visitor, "[y]ou must take care of the civil-rights bill,... don't let it fail." Benjamin Butler, who managed the Bill in the House, committed himself to defending "the rights of these men who have given their blood for me and my country." ²⁸⁰

There was some popular support for the Civil Rights Bill as well. For instance, George Curtis, the editor of *Harper's Weekly*, wrote in favor of its passage. When "hotels and restaurants may turn respectable guests away because they are of the colored race," Curtis unequivocally stated, "and theaters and cars, all doing business by legal license, may refuse them entrance for the same reason, it is plain that the law fosters the prejudice." However, when "the law enables the colored guest to call the offending host to account... the prejudice will begin to wane."

The Civil Rights Act of 1875 was the last legislation passed by the Reconstruction Congress. The Civil Rights Cases involved the constitutionality of the first two sections of the Act. Those sections provided equal access to many forms of public accommodations including inns, theaters, and public transportation. In the Civil Rights Cases, Tourise Bradley drastically qualified his earlier dissent in Blyew and further diminished the scope of federal civil rights protections.

Bradley, who was by then Chief Justice of the Supreme Court, acknowledged that Thirteenth Amendment provisions did not stop with simply releasing slaves from their masters' control.³⁸⁹ Bradley distinguished "the social

^{379.} ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 1863-1877 226 (1990). Summer died on March 11, 1874 and did not live to see the enactment of the Civil Rights Act of 1875. *Id.*

³⁸⁰ Id

^{381.} JAMES M. MCPHERSON, THE ABOLITIONIST LEGACY 18 (1975).

^{382.} Id. at 18-19.

^{383.} See Colbert, Liberating the Thirteenth Amendment, supra note 149, at 22 (discussing debate about Reconstruction that arose in passing Civil Rights Act of 1875).

^{384.} See The Civil Rights Cases, 109 U.S. at 25 (finding that the Civil Rights Act of 1875 as went beyond the scope of Thirteenth Amendment); see also the Civil Rights Act of 1875, ch. 114, §§ 1-2, 18 Stat. 335 (1875) (creating private cause of action and making it misdemeanor to deny any U.S. citizen "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement").

^{385.} See The Civil Rights Cases, 109 U.S. at 25 (holding equal access to accommodation was social right not covered by Thirteenth Amendment).

^{386.} See The Civil Rights Cases, 109 U.S. at 25 (discussing the Civil Rights Act of 1875 as going beyond the scope of Thirteenth Amendment); see also the Civil Rights Act of 1875, ch. 114, §§ 1-2, 18 Stat. 335 (1875) (creating private cause of action and making it misdemeanor to deny any U.S. citizen "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement").

^{387.} See The Civil Rights Cases, 109 U.S. at 21 (indicating Bradley's altered conclusions).

^{388.} See Arthur Kinoy, The Constitutional Right of Negro Freedom, 21 RUTGERS L. REv. 387, 396-98 (1967) (arguing Justice Bradley's opinion assumed protection of civil rights was the responsibility of individual states).

^{389.} Id. at 20.

rights of men and races in the community," which he thought the Thirteenth Amendment did not cover, from "fundamental rights which appertain to the essence of citizenship." While Justice Bradley reiterated his conviction that under the Thirteenth Amendment Congress had the power to pass all laws necessary and proper to the "obliteration and prevention of slavery, with all its badges and incidents," he held that denying persons admission to public accommodations was not a vestige of slavery. The conclusion Bradley drew was that the discriminatory practices prohibited by the Civil Rights Act of 1875 were "social rights" rather than the civil or political ones covered by the Thirteenth Amendment. 392

In effect, the majority gave states and private entities a free pass segregationist and exclusionary laws, finding that Congress lacked the power to prohibit them.³⁹³ Bradley showed his limited understanding on how deeply entrenched was white supremacy in American society, and particularly in Southern culture.³⁹⁴ He conceived of the "necessary incidents" of slavery as limited to a set of legal institutions, such as prohibitions against black testimony, prohibitions against owning property, and the unlimited power over black lives by slave masters.³⁹⁵ By denying the particular hardships that long-held prejudices wreaked on black lives and offering blacks only the bare-bone legal protections of a "mere citizen," the Bradley majority left their safety to the whim of Southern states, which continued enforcing black codes.³⁹⁶ Homegrown militias, such as the KKK, and private business owners, who refused to provide blacks with goods and services, were also strengthened by the decision.³⁹⁷ Blacks

^{390.} Id. at 22. Bradley went on to say 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." Id. at 23. His conclusions deviate from his dissent to Blyew v. United States, see supra notes 364-94 and accompanying text, where he recognized Congress' power to pass the Civil Rights Act of 1866. Provisions of the Civil Rights Act of 1866 indicate that congressmen regarded the Thirteenth Amendment as a conduit of equal rights legislation. See George A. Schell, Note, Open Housing: Jones v. Alfred H. Mayer Co. & Title VIII of the Civil Rights Act of 1968 556 (1969) (discussing courts distinguishment between social and civil rights).

^{391.} The Civil Rights Cases, 109 U.S. at 20-21, 25. Even so, Bradley conceded that the Thirteenth Amendment prohibited state and private badges of servitude. *Id.* at 20.

^{392.} Id. at 22-23. As Justice Bradley put it, "It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business." Id. at 24-25.

³⁰³ Id at 18

^{394.} See The Civil Rights Cases, 109 U.S. at 21-22 (discussing black codes as distinct from the institution of slavery).

^{395.} Id. at 22.

^{396.} See generally this Part for a discussion of the black codes.

^{397.} Bradley explicitly argued that equal access to public amenities is unconnected to the enjoyment of fundamental rights: "There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as freemen because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and

faced a series of obstructionist state laws designed to keep them in a degraded state, excluding them from any privileges of citizenship.³⁹⁸ States like South Carolina and Mississippi passed black codes which effected black lives in much the same way as the pre-Civil War Slave Codes.³⁹⁹ The provisions of these statutes suppressed African American aspirations by restricting their freedom of movement, privacy, and property rights.⁴⁰⁰ Lawmakers obfuscated these statutes' inequitable aims under the ruse of racially neutral provisions.⁴⁰¹ Even though many of the laws were facially nondiscriminatory, their burden fell primarily upon the backs of agricultural laborers, most of whom were black.⁴⁰² The black codes riddled now-freed people's lives with "onerous disabilities and burdens and curtailed their rights... to such an extent that their freedom was of little value."⁴⁰³

The majority opinion was "narrow and artificial" and undermined the "substance and spirit" of the Thirteenth Amendment. 404 Justice Harlan, the lone dissenting voice in the Civil Rights Cases understood that the majority's decision precluded the national government from ending state sponsored or countenance abridgements of freedoms. 405 He believed the dogma of black inferiority was instrumental to the sustenance of slavery; therefore, the Amendment's guarantee of freedom must have "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."406 Congress, Harlan insisted, had the power to enact legislation against behaviors committed in furtherance of schemes designed to degrade blacks.⁴⁰⁷ The second section of the Amendment made clear the framers' desire to promulgate civil rights legislation rather than leaving civil reform in the hands of the very states that opposed the abolition of slavery. 408 While Justice Harlan agreed with Justice Bradley that Congress could not tamper with regulating social rights, he proclaimed that the rights protected by the Civil Rights Act of 1875 were civil because state laws denying blacks the right to use public accommodations

places of amusement." The Civil Rights Cases, 109 U.S. at 25.

^{398.} Id. at 43 (Harlan, J., dissenting).

^{399.} Andrew E. Taslitz, Slaves No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings, 15 GA. St. U. L. Rev. 709, 746 (1999).

^{400.} Id. at 747.

^{401.} See, e.g., Donald G. Nieman, To Set the Law in Motion: The Freedmen's Bureau & the Legal Rights of Blacks, 1865-68 98 (1979) (discussing states' attempts to give black codes appearance of neutrality); John H. Franklin, Reconstruction After the Civil War 50 (1961) (analyzing Mississippi's discriminatory legislation).

^{402.} NIEMAN, *supra* note 401, at 98. In some cases, the laws overtly targeted blacks. *See* RANDALL KENNEDY, RACE, CRIME, & THE LAW 84-85 (1997) (writing that black codes contained criminal provisions which more stringently regulated black conduct than it did white behavior).

^{403.} The Civil Rights Cases, 109 U.S. 3, 37 (1872).

^{404.} Id. at 26 (Harlan, J., dissenting).

^{405.} Id. at 54.

^{406.} Id. at 36.

^{407.} Id.

^{408.} The Civil Rights Cases, 109 U.S at 34-35 (Harlan, J., dissenting).

refused them essential equal legal protections.⁴⁰⁹ Harlan stood alone in his acute understanding that the vestiges of slavery could only be eliminated by broad-based legal reforms.⁴¹⁰

The Supreme Court's holding in the Civil Rights Cases, coupled with a Republican reevaluation of the party's priorities, and a presidential policy of appeasing the South following the Compromise of 1877, put a halt to reconstructionist attempts to end systemic discrimination. While the institution was swept away, in many ways, the underlying attitudes toward blacks remained the same. They took a particularly dark tone in the South where a plethora of laws served to keep blacks from enjoying the full contentment of United States freedoms.⁴¹¹

Such miscarriage of justice was apparent in South Carolina, the first state to secede, which created a separate criminal court system for blacks. Since the Thirteenth Amendment did not bar involuntary servitude as a form of criminal punishment, capricious prosecution and conviction for autonomous acts construed as crimes constituted another means of refusing freed persons the full benefit of their emancipation. Throughout the South, blacks who left plantations to find work were often subject to being whipped. In the years immediately following ratification, blacks remained in a state of penal servitude since they could not leave their place of employment without criminal repercussions. Black codes flew in the face of the constitutional changes the Thirteenth Amendment wrought. The Civil Rights Cases were a missed

^{409.} Id. at 56.

^{410.} Id.

^{411.} See CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865) (discussing state laws repressing freedom of African Americans). These laws were diametrically opposed to the assurance of liberty which the Thirteenth Amendment emblazoned into the Constitution. Georgia passed a statute requiring that any master/servant relationship lasting more than a month be entered into in writing. Any contractually bound employee leaving his employment before the expiration of the contract forfeited his wages. See id. (Senator Henry Wilson of Massachusetts discussing bill he learned of by telegraph). Such a person could also be imprisoned for four months or fined \$500. On the other hand, employers could fire servants for such subjective reasons as "disobedience . . . immorality, and want of respect." Id. Likewise, in Mississippi, any person leaving an employer before the termination of a labor contract was subject to arrest and subject to forfeiture of up to a year's worth of wages. See id. (providing some of law's language); FRANKLIN, supra note 401, at 48-49 (describing arrest provision). Persons who refused to sign such contracts ordinarily were unable to find any work and could be arrested for vagrancy. Id. at 48-49. Meanwhile blacks were unable to start up their own farms because a Mississippi law prohibited them from buying or leasing lands outside cities. See CONG. GLOBE, 39th Cong., 1st Sess. 111 (1865) (statement of Senator William Stewart) (identifying discrimination in many southern laws). In Louisiana, freed people were placed in virtually impossible circumstances by a law requiring them to obtain a home within twenty days from a certain date, yet forbidding anyone from selling or leasing lands to them. See id. (arguing that state laws fostering inequality needed to be annulled).

^{412.} RANDALL KENNEDY, RACE, CRIME, & THE LAW 85 (1997).

⁴¹³ *Id*

^{414.} W. E. B. DU BOIS, BLACK RECONSTRUCTION 167 (Kraus-Thomson Org. Ltd. 1973) (1935).

⁴¹⁵ Id

^{416.} See Douglas L. Colbert, supra note 145, at 11-12 n.62 (discussing effective enslavement of

opportunity to further the racially tolerant vision of the Thirteenth Amendment that Justice Harlan spelled out.⁴¹⁷ The nation had to wait until 1964 to end discrimination in public accommodations.⁴¹⁸ Until then, the country was in the degrading grip of forces opposed to congressional authority in cases of state racial discrimination. States that continue to honor the Confederacy by proudly displaying their insignia continue to laud the legacy of segregation, black codes, and supremacism.⁴¹⁹

The cases that followed on the heels of the *Civil Rights Cases* further curtailed the significance of the Thirteenth Amendment. *Plessy v. Ferguson*⁴²⁰ discarded the ideals of post-Civil War Reconstruction.⁴²¹ As with the former case, only Justice Harlan voiced a dissent.⁴²²

Justice Henry B. Brown, who penned the infamous majority opinion, found that a Louisiana Act excluding blacks from white railroad cars did not violate the Thirteenth Amendment. The Court took a literalist approach to the term "slavery," defining it as "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." This definition included involuntary servitude and peonage. Thereby, *Plessy* discarded the Amendment's potential to herald a renaissance of freedom and equality. That decision made the Union's victory over the Confederacy less than complete because it allowed the continued spoliation of black civil rights. Justice Brown was remiss in addressing the cultural baggage that continued to haunt black lives. He devalued black American frustrations, angers, and fears:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by

emancipated southern blacks by Black Codes).

^{417.} See id. at 25 (stating that after the Civil Rights Cases, Thirteenth Amendment could no longer be used "as a source of congressional power for protecting fundamental citizenship rights").

^{418.} See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250-51 (1964); Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) (both cases upholding Congress' authority, under Commerce Clause, to enact the Civil Rights Act of 1964 that prohibited racial, religious, or national origin discrimination in public places of accommodation providing services to out-of-state travelers and operating with out-of-state materials). If not for Justice Bradley's decision in the Civil Rights Cases, the basis for prohibiting public place discrimination could have been based on the full freedom envisioned by the Thirteenth Amendment. Public desegregation had to wait 100 years because of Bradley's holding.

^{419.} See infra Part IV for a detailed discussion on this point.

^{420. 163} U.S. 537 (1896).

^{421.} See Colbert, Liberating the Thirteenth Amendment, supra note 145, at 2, 25 n.4, 156 (noting that while Plessy is usually discussed as Fourteenth Amendment case, it also had important Thirteenth Amendment consequences).

^{422.} Plessy, 163 U.S. at 552 (Harlan, J., dissenting).

^{423.} Id. at 542.

^{424.} Id.

^{425.} Id.

^{426.} See supra Part III.A for a discussion of freedom and equality.

reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.⁴²⁷

The majority's lack of understanding of why the plaintiff considered "a legal distinction between the white and colored races" to be a badge of servitude was disheartening. Showing an insensitivity and ignorance about black conditions and the outgroup sense of helplessness in the face of widespread prejudices, Justice Brown speculated that if blacks were in the majority and whites in the minority, whites would not demand racial integration.

In his *Plessy* dissent, Justice Harlan once again manifested his commitment to the fundamental rights of United States citizens.⁴³¹ Disavowing the majority's disregard for the hardships blacks faced, Harlan's dissent drew on "the humanitarianism of the earlier era."⁴³² The right of persons of various races to share railroad cars was only a sub-part of the rights "inhering" in Harlan's notion of "freedom."⁴³³ The Louisiana law against racial integration in rail cars was primarily aimed at restricting black personal liberties by prohibiting them from sitting in rail cars with whites.⁴³⁴ Justice Harlan realized the majority's opinion would have long-term ramifications, and in fact, for years after the holding it affected many facets of Southern culture including government, sanctioned separate drinking fountains and schools.⁴³⁵

The Louisiana law at issue in *Plessy* not only limited the free movement of individuals; its effects were far broader. The divide between whites and blacks, Harlan realized, created tension between the races making interracial harmony impossible. Justice Harlan found disingenuous the notion that separate accommodations for blacks and whites made both races equals before the law: The thin disguise of equal accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.

^{427.} Plessy, 163 U.S. at 551.

^{428.} Id. at 543.

^{429.} See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 78-84 (1980) (concerning requirement that republican government protect minorities against majoritarian power).

^{430.} Plessy, 163 U.S. at 551.

^{431.} See id. at 555 (stating that Thirteenth and Fourteenth Amendments, if properly enforced, "will protect all civil rights that pertain to freedom and citizenship") (Harlan, J., dissenting).

^{432.} Hamilton, supra note 10, at 75.

^{433.} Plessy, 163 U.S. at 555 (Harlan, J., dissenting).

^{434.} Id. at 557.

^{435.} Id. at 557-59. Harlan reflected on the extensive implications of the majority's holding: 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 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?

Id. at 557.

^{436.} See *infra* notes 470-77 and accompanying text for the effects of other discriminatory state laws.

^{437.} Plessy, 162 U.S. at 560-61.

^{438.} Id. at 562 (Harlan, J., dissenting).

Separation of the races, to the contrary, was a continued mark of slavery which denied them the full enjoyments of "civil freedom and the equality before the law established by the constitution."

If the health of a society can be measured by the extent to which the government respects the fundamental rights of all its citizens and benefits social welfare, the prognosis for the United States after *Plessy* was for a malignant disregard for oppressed and weak minorities. Justice Harlan predicted, quite accurately, that *Plessy* would "prove to be quite as pernicious as the decision made by the tribunal in the *Dred Scott* Case." Generational acceptance of purported black inferiority, coupled with legally: countenanced inequality, legitimized social avoidance and even violence.

It would take decades for the country to recover from the Supreme Court's constriction of the human rights protections that valiant idealists, like Charles Sumner and Thaddeus Stephens, had fought to include in the Constitution. In 1903, a district court judge, sitting in Arkansas, sought to reverse the trend. In 1903, a district court judge, sitting in Arkansas, sought to reverse the trend. In 1903, a district court judge, sitting in Arkansas, sought to reverse the trend. In 1903, and Interest the trend. In 1903, and Inte

The Supreme Court, however, soon snuffed this brief flicker of hope. Hodges v. United States⁴⁴⁹ arose in 1903, when several white men conspired to violently drive eight black American citizens from their employment at a lumber mill.⁴⁵⁰ The Court viewed the Thirteenth Amendment prohibition against slavery in its "natural sense," meaning that it relied on Webster's Dictionary definition of the term rather than considering the debates surrounding the Amendment's passage or the social circumstances leading up to its ratification. Construing organized racist aggression as no different than any other crime, the

^{439.} Id.

^{440.} Id. at 559.

^{441.} See id. at 560-61 (stating that state laws restricting civil rights on basis of race reduced value of victory in civil war) (Harlan, J. dissenting).

^{442.} See *supra* notes 210-21 and accompanying text for a discussion of the construction of anti-slavery legislation.

^{443.} See United States v. Morris, 125 F. 322 (E.D. Ark. 1903) (holding that right to lease lands and accept employment are fundamental rights that cannot be denied based on race).

^{444. 125} F. 322 (E.D. Ark. 1903).

^{445.} Morris, 125 F. at 322.

^{446.} Id. at 326.

^{447.} Id. at 331.

^{448.} See id. at 325 (quoting U.S. Constitution and Declaration of Independence).

^{449. 203} U.S. 1 (1906).

^{450.} Hodges, 203 U.S. at 2-4.

^{451.} Id. at 16.

^{452.} See id. at 17 (using Webster's dictionary to arrive at definition of slavery).

Court held that "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery."⁴⁵³

Justices Harlan and Day, joining in the dissent, asserted that the Thirteenth Amendment prohibited racists from impeding law-abiding persons from pursuing their desired employment. To the dissent, then, personal freedom necessarily implied the right to express one's will without arbitrary infringements, motivated by irrational hatred and artificially imposed superiority. Hodges abandoned blacks to the whims of racists who no longer had to fear federal prosecution for belligerent acts. Until 1968, the underlying ideals of the Thirteenth Amendment, freedom with dignity and self-governance, were buried in the avalanche of Supreme Court equivocations. Since the Supreme Court cut off the federal avenue of redress, hundreds of thousands of people suffered from legally sanctioned racism, through tyrannical state legislation and private discriminatory acts.

Hodges dealt what seemed to be a deathblow to Thirteenth Amendment activism. The court's decision limited the Amendment's reach to cases of unrequited, forced labor and peonage. Labor activists' attempts in the 1930's to assert their right to organize and bargain collectively on the Thirteenth Amendment were eventually abandoned. Instead, of this Thirteenth Amendment civil rights approach, the commerce clause increasingly became the Constitutional vehicle for civil rights legislation. It was not until 1968 that the Supreme Court again recognized the Amendment's protection against discrimination historically tied to slavery.

It is for us to accept the decision, which declined to constitute them wards of the Nation or leave them in a condition of alienage where they would be subject to the jurisdiction of Congress, but gave them citizenship, doubtless believing that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the States where they should make their homes.

^{453.} Id. at 18.

^{454.} Id. at 35-36 (Harlan, J., dissenting).

^{455.} See Hodges, 203 U.S. at 36-37 (Harlan, J. dissenting). The majority was explicit in its abandonment of African Americans to the whim of the several states, and couched its argument in benevolent terms:

Id. at 20.

^{456.} See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 445-46 (1968) (Douglas, J., concurring) (citing multiple examples of legally sanctioned racism).

^{457.} See id. (Douglas, J., concurring) (listing examples of state mandated racism and institutionalized discrimination).

^{458.} See Part III.B for a discussion of Thirteenth Amendment jurisprudence.

^{459.} Hodges, 203 U.S. at 19 (stating that purpose of Thirteenth Amendment was to eradicate slavery).

^{460.} James G. Pope, The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957, 102 COLUM, L. REV. 1, 3-4 (2002).

^{461.} Id.

^{462.} See Jones, 392 U.S. at 443 (stating that Thirteenth Amendment empowers Congress to protect against racial discrimination).

2. A Ray of Hope: Jones v. Alfred H. Mayer Co.

After a long period of dormancy, the Thirteenth Amendment emerged from the narrow confines to which the late Nineteenth and early Twentieth Century Supreme Court had relegated it. *Jones v. Alfred H. Mayer Co.* interpreted the Amendment as a broad protection of civil liberties.⁴⁶³ The case gave civil rights advocates new opportunities to further the aims of abolition.⁴⁶⁴ The Supreme Court rendered its decision during a period of great civil rights reform that was initiated by the administrations of Presidents John F. Kennedy and Lyndon B. Johnson.

Mr. and Mrs. Jones, who were black, wanted to purchase a new house from the Alfred H. Mayer Corporation, a private developer. The defendant, on racial grounds, refused their offer. The Supreme Court had a number of legal grounds, including the Fourteenth Amendment, it could have relied on to prohibit such discrimination. It settled on the Civil Rights Act of 1866, which was founded on Thirteenth Amendment principles, to uphold the Jones' private cause. The *Jones* holding signaled the Courts commitment to ending state-sponsored and private practices that left blacks in little better circumstances than their enslaved ancestors.

The Court overturned the narrow construction of the Amendment it had adopted in *Hodges* and *Plessy*.⁴⁷⁰ Its reasoning relied on the views expressed by radical republicans who had not expected the Amendment to become a "paper guarantee."⁴⁷¹ The Court also considered the legislative debates surrounding passage of the Civil Rights Act of 1866.⁴⁷² Following the reasoning of Justice

^{463. 392} U.S. 409, 443 (1968).

^{464.} See Jones, 392 U.S. at 439 (stating that Thirteenth Amendment not only abolished slavery but through enabling clause "empowered Congress to do much more").

^{465.} Jones v. Alfred H. Mayer Co., 379 F.2d 33, 35 (8th Cir. 1967).

^{466.} Jones, 392 U.S. at 412.

^{467.} Id. The Joneses sued under the Fifth, Thirteenth, and Fourteenth Amendments, and 42 U.S.C. §§ 1981-1983. Jones, 379 F.2d at 36.

^{468.} Jones, 392 U.S. at 427-48, 433, 436-37. In dicta, the Court also found that private litigants could sue discriminatory public entities. *Id.* at 421. The Court arrived at that conclusion by evaluating the legislative intent, plain meaning, and judicial history of the Civil Rights Act of 1866. Note, *Jones v. Mayer: The Thirteenth Amendment & The Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1019, 1021-22 (1969).

^{469.} Jones, 392 U.S. at 421. The Thirteenth Amendment, by its very terms, prevents private state vestiges of servitude. See Tobias B. Wolff, The Thirteenth Amendment and Slavery in the Global Economy, 102 COLUM. L. REV. 973, 1040 (2002) (stating that since Thirteenth Amendment "contains no state action requirement, the Amendment both restrains the actions of the State and regulates the activities of private individuals").

^{470.} See Jones, 392 U.S. at 439 (holding that Congress' power to enforce Thirteenth Amendment includes power to terminate racial obstacles to the acquisition of property).

^{471.} *Id.* at 433-34, (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (statement of Representative Thayer of Pennsylvania)).

^{472.} See Jones, 392 U.S. at 424-27 (citing multiple Congressional debates). The Court determined that since the Civil Rights Act of 1866 was enacted by many of the same Congressmen who about two years before debated and then passed the proposed Thirteenth Amendment, the Act's provisions

Harlan's earlier dissents, Justice Stewart, writing for the *Jones* majority, found that the second clause to the Thirteenth Amendment empowered Congress to pass legislation specifically designed to promote personal autonomy and to eliminate the "badges and incidents" of servitude. 473 Stewart recognized that the framers anticipated that the liberation of slaves would not eliminate prevailing discriminatory attitudes towards blacks. 474 The Amendment's framers affixed the second clause to the Amendment as a legislative tool for battling local prejudices and giving practical effect to abolitionist ideals. 475 The Amendment was not meant merely to set people free and then abandon them to the whims of militias and unscrupulous governmental entities. 476 Congress was granted power to effectuate the cause of freedom through all "necessary and proper" laws. 477

In *Jones*, the Supreme Court found that the Thirteenth Amendment had broader applications than merely trumping the Confederacy's discriminatory laws. 478 It also gave Congress power to prevent racially based infringements on the natural rights of United States citizens. 479 *Jones* expanded civil rights jurisprudence after carefully examining the debates surrounding the Amendment's passage through Congress. 480 The Court established a low rationality threshold for determining whether Congress had overstepped its authority in enacting laws against measures designed to thwart the equal enjoyment of personal autonomy. 481

Jones functions on two levels. On the one hand, it stands for the narrow prohibition against housing discrimination. On the other, it has a far reaching socially-altering implication, which has not been fully realized. The Court found that the Thirteenth Amendment was an affirmation of civil liberties. It iterated Congress' obligation to enact legislation for protecting minorities against majority forces bent on arbitrarily restricting outgroup freedoms.

represented the types of protections that the framers had intended to provide. Id. at 439-40.

^{473.} Id. at 440-41.

^{474.} See id. at 442-43 (recognizing that Black Codes served as "substitutes for the slave system").

^{475.} Id. at 433-34 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866)) (statement of Representative Thayer of Pennsylvania).

^{476.} After the Civil War, former Confederate leaders were permitted to join governmental bodies even though many of the continued to maintain racist attitudes. See FONER, A SHORT HISTORY OF Reconstruction, supra note 379, at 213, 248 (discussing how at end of Reconstruction Southern governments emerged committed to black subordination).

^{477.} Jones, 392 U.S. at 439 (quoting The Civil Rights Cases, 109 U.S. 3, 20 (1883)). See text accompanying notes 300-09 for a discussion of the "necessary and proper" effects of the Thirteenth Amendment.

^{478.} See Jones, 392 U.S. at 437-39 (quoting the Civil Rights Cases for proposition that Thirteenth Amendment endows broad powers to Congress to eliminate racial obstacles).

^{479.} Id.

^{480.} See Colbert, supra note 145, at 2-3 (stating that Jones revived the "original purpose of the Thirteenth Amendment, and the Civil Rights Act of 1866").

^{481.} Jones, 392 U.S. at 440.

C. Concluding Reflections on the Freedom Amendment

While the language of the Thirteenth Amendment was ambiguous enough to give rise to segregationist decisions like Plessy v. Ferguson, its strength lies in its breadth of meaning. 482 The Amendment received disparate treatment over the years, in part, because during the Congressional debates on its ratification, proponents tended to focus on the institution of slavery and general policy principles on the fundamentals of republican government, but little on what civil protections freed people would have after liberation. 483 Laws, such as the Civil Rights Act of 1866⁴⁸⁴ and the Freedmen's Bureau Acts, 485 which passed soon after the ratification of the Amendment, gave content to the liberties the framers hoped to make a reality. 486 These laws evinced that freedom from slavery meant the ability to live the fulfilling lives of citizens and the right to obtain judicial redress.⁴⁸⁷ The statutes' provisions made federal authorities responsible for preventing public and private injustices in the areas of property transaction, contract enforcement, and litigation.⁴⁸⁸ Radical Republicans, who were the driving force behind the Thirteenth Amendment, envisioned a sweeping reconstruction which would cover discrimination in the North and South.⁴⁸⁹ However, in 1865, when the Civil War ended, only Massachusetts had a "comprehensive" law against public discrimination, much work still lay ahead. 490

As we have seen, the key to passing civil rights legislation was the Amendment's second clause, the Enforcement Clause. The first clause was a self-executing declaration that freed slaves. The long-term substance of the Amendment lay in the next clause which empowered Congress to pass positive

^{482.} See infra Part III.B.2 for a discussion of the expansive interpretation of the Thirteenth Amendment in Jones v. Alfred H. Mayer Co.

^{483.} See VORENBERG, supra note 8, at 90-92 (discussing Congressional debates on the Amendment).

^{484.} Ch. 31, 14 Stat. 27 (1866)

^{485.} An Act to Establish a Bureau for the Relief of Freedmen and Refugees, ch. 90, 13 Stat. 507 (1865); An Act to Continue in Force and To Amend "An Act to Establish a Bureau for the Relief of Freedmen and Refugees, and for other purposes" ch. 200, 14 Stat. 173 (1866).

^{486.} See VORENBERG, supra note 8, at 234 (stating that the Acts offered "unprecedented legal protection to African Americans).

^{487.} Cf. id. (discussing new rights secured by Amendment).

^{488.} Id.

^{489.} While slavery was outlawed throughout the North, many persons and entities located there continued abridging black rights. See LEON F. LITWACK, NORTH OF SLAVERY 64-187 (1961) (discussing political, educational, and economic repressions in North). Abolitionists did make significant inroads against discriminatory practices in the North. By 1861, New England had numerous desegregated public schools, but many private schools continued to be segregated. JAMES MCPHERSON, STRUGGLE FOR EQUALITY 223, 227-28 (1964). Thanks to Charles Sumner and Sojourner Truth, the public transportation system in Washington, D.C. was desegregated in 1865. Id. at 230. There was even a move toward black suffrage in states like Rhode Island where a state constitutional provision that only allowed for only white manhood suffrage was revoked. Id. at 223. And by 1860 blacks throughout New England, except Connecticut, enjoyed equal political rights. Id. at 223.

^{490.} McPHERSON, supra note 489, at 236-37.

laws to protect all citizens' fundamental right to live unobtrusive, autonomous lives. 491 By including the additional clause, Congressmen determined to end generations of legal disabilities. 492 Without that power the aspirations of Reconstruction would have rung hollow, something that radicals like Charles Sumner and Thaddeus Stevens staved off.

The Supreme Court in *Jones v. Alfred H. Mayer Co.* recognized that under the Thirteenth Amendment Congress could pass any laws "necessary and proper" for ending any remaining badges of slavery.⁴⁹³ That language is reminiscent of the extensive powers under the Commerce Clause which grants Congress the right to enact "necessary and proper" legislation to carry out federal government functions.⁴⁹⁴ Moreover, Chief Justice Marshall's opinion in *McCulloch v. Maryland* indicates that "necessary and proper" is constitutionally synonymous, or at least analogous, to "appropriate," which was used in the Enforcement Clause.⁴⁹⁵ Taking the Thirteenth Amendment contextually, it grants Congress the same breadth of power, in light of the important interests involved, as it has to further the aims of the Fourteenth and Fifteenth Amendments.⁴⁹⁶ In determining whether a law is needed to safeguard the cause of freedom, Congress can use any "rational means" to "determine what are the badges and the incidents of slavery, and the authority to translate that

^{491.} See Aviam Soifer, Status, Contract, and Promises Unkept, 96 YALE L.J. 1916, 1938 (1987) (concluding that Thirteenth Amendment granted Congress power "to protect fundamental rights throughout the nation").

^{492.} Hamilton, supra note 10, at 80.

^{493.} Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).

^{494.} U.S. CONST., art. I, § 8, cl. 18 ("The Congress shall have Power... [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"). It has been argued that the clause means that Congress is empowered to enact necessary and proper laws on how the powers of the United States government will be exercised. Lawrence Lessig and Cass R. Sunstein, *The President & the Administration*, 94 COLUM. L. REV. 1, 67-68 (1994). Congressional power can be exercised by statutory regulation, provisions for judicial enforcement, enforcement by regulatory agencies having few discretionary powers, or broad delegation to regulatory agencies. John D. Livingstone, Comment, *Uniformity of Patent Law Following Florida Prepaid: Should the Eleventh Amendment put Patent Owners Back In the Middle Again?*, 50 EMORY L.J. 323, 359 (2001).

^{495.} McCulloch v. Maryland, 17 U.S. 316, 356 (1819). See, e.g., Steven A. Engel, Note, The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5, 109 YALE L.J. 115, 131 (1999) (discussing debate on why Congress chose "appropriate" instead of "necessary and proper").

^{496.} See Akhil Reed Amar, Intratextualism, 112 HARV. L. REV. 747, 822-23 (1999) (arguing that Thirteenth and Fourteenth Amendments grant breadth of powers). Section 5 of the Fourteenth Amendment confers on Congress the "power to enforce" the equal protection and due process provisions "by appropriate legislation." Interpreting the term "appropriate" in the Fourteenth Amendment to have the same connotation as "necessary and proper," follows the tradition of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 355 (1819). Catharine A. MacKinnon, Disputing Male Sovereignty: On United States v. Morrison, 114 HARV. L. REV. 135, 161 (2000). In 1980, the Supreme Court applied the same liberal interpretation to the Fifteenth Amendment. See City of Rome v. United States, 446 U.S. 156, 175 (1980) (stating "Congress' authority under § 2 of the Fifteenth Amendment, we held, was no less broad than its authority under the Necessary and Proper Clause").

determination into effective legislation."497

While the abolition of slavery was the Amendment's foremost concern, the protection of civil liberties was also a preeminent goal. The United States, which had been committed to an often contradictory version of the natural rights theory since the earliest days of the republic, 498 finally came to grips with the implications of that philosophy: All people have the same essential rights. 499

The question of whether laws or actions violate the Thirteenth Amendment should be determined by evaluating whether they violate fundamental rights. The analysis must transcend questions that merely focus on disabilities existing contemporaneously with the passage of the Amendment and the federal laws that followed on its boot heels. The broader question is whether indicia of servitude continue to interfere with U.S. denizens enjoyment of their lives, liberties, and sense of well-being. Federal law should be brought to bear against any remaining vestiges of servitude.

The Thirteenth Amendment assures persons of the basic right to live free

^{497.} Jones, 392 U.S. at 440. The rational discretionary standard has also been applied to the right to vote, which, like liberty, was a reconstructionist ideal: "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) (regarding validity of Voting Rights Act of 1965).

^{498.} John Locke, one of the natural rights theory's chief proponents, drafted a constitution for the South Carolina colony, in 1669. Jonathan A. Bush, Free to Enslave: The Foundations of Colonial American Slave Law, 5 Yale J.L. & Human. 417, 421 (1993). The provisions of that constitution indicate that even Locke viewed natural rights in a light that excluded blacks from their enjoyment. Id. His South Carolina constitution contains provisions against interference with black slavery. Id.; see also Paul Finkelman, The Crime of Color, 67 Tul. L. Rev. 2063, 2075-76 (1993) (discussing development of South Carolina's slave laws from Locke's constitution to later emendations).

^{499.} Senator Francis Gillette poignantly described the hypocrisy of denigrating blacks for the abjectness which racist laws and institutions imposed on them:

Ignorant! Who has doomed them to ignorance? Debased! Who has sunken them in debasement? They, be it understood, who have brought all the sanctions of law and custom to crush them; who have snatched from them the key of knowledge, and closed every avenue to their elevation and advancement. Put out the eyes of men, and then tell them scornfully that they are blind. Extinguish the Promethean fire in their souls, and then tell them tauntingly that they are darkened and debased.

CONG. GLOBE, 33rd Cong., 2nd Sess., App. 230 (1855).

^{500.} Larry J. Pittman, Physician Assisted Suicide in the Dark Ward: The Intersection of The Thirteenth Amendment & Health Care Treatments Having Disproportionate Impacts on Disfavored Groups, 28 SETON HALL L. REV. 774, 858 (1998). See ALEXANDER TSESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS ch. 10 (2002), for a discussion on fundamental rights. Fundamental rights are those that persons have before joining political societies. Id. Amongst them is the liberty of movement and expression. Id. Persons give up some of these natural or essential rights when they form a state to increase social welfare; however, civil laws must be consistent with natural rights principles. Id.; see also Philip A. Hamburger, Natural Rights, Natural Law, and the American Constitutions, 102 YALE L.J. 907, 908-09 (1993) (defining fundamental rights and how government affects them).

^{501.} See Pittman, supra note 509, at 858-59 (stating that key question is whether racist acts affect African Americans' rights to life, liberty, and happiness in ways that do not affect whites).

from impediments that are reminiscent of slaveocracy.⁵⁰² It aims not only to eradicate forced labor but also the remaining "spectacle of slavery" which continues to be "unwilling to die."⁵⁰³ Current exclusionary practices and denigrations against outgroups, including government symbols extolling the Confederacy, must be eliminated to invigorate the constitutional assurance of personal autonomy.⁵⁰⁴

The Thirteenth Amendment assures persons of all races striving to attain their aspirations that they will not be subject to impediments, which are designed to maintain indiscriminate power. The Freedom Amendment positively empowers legislators to pass any laws necessary to assure all citizens of their rights to self-determination, accomplishment of reasonable aspirations, and freedom from harassment tending to diminish their ability to achieve their potentials. 506

The next Part argues that the broad reading of the Thirteenth Amendment presented thus far indicates that Confederate symbols on public property are vestiges of a racist regime whose dregs the Thirteenth Amendment empowers Congress to eliminate. The use of Confederate symbolism on official state logos is historically associated with the insignia of the Confederacy. States that continue to use Confederate symbolism identify themselves through the badge of servitude, which, pursuant to the interpretation of *Jones v. Alfred H. Mayer Co.* violates the Thirteenth Amendment.

^{502.} See, e.g., Griffin v. Breckenridge, 403 U.S. 88, 105 (1971) (finding Ku Klux Klan Act prohibition against racist conspiracies constitutional under Thirteenth Amendment's overall aim to prevent persons from depriving blacks of "basic rights that the law secures to all free men"); G. Sidney Buchanan, The Quest for Freedom: A Legal History of the Thirteenth Amendment, 12 Hous. L. Rev. 1, 7-9 (1974) (discussing Thirteenth Amendment's equality under law implications); Petal Nevella Modeste, Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment, 44 How. L.J. 311, 346 (2001) (arguing that congressional failure to understand that hate speech is badge of involuntary servitude disregards mandate for equality).

^{503.} See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 445 (1968) (Douglas, J., concurring) (stating that while slavery has been abolished as an institution, "badges of slavery" are still prevalent).

^{504.} See id. at 440 (discussing statement of Senator Trumbull that Thirteenth Amendment was meant to give blacks basic civil rights guaranteed by U.S. Constitution); see also Modeste, supra note 501, at 331 (noting that one of rationales behind First Amendment is to promote personal autonomy).

^{505.} See Colbert, supra note 195, at 403-04 (arguing that Thirteenth Amendment should be interpreted broadly to include more than abolition of slavery).

^{506.} See Jones, 392 U.S. at 443 (stating that "Congress is empowered to secure under the Thirteenth Amendment" the freedom of blacks "to buy whatever a white man can buy, the right to live wherever a white man can live").

^{507.} See infra Part IV for my personal analysis.

^{508.} See *infra* Part IV.B and accompanying text for a discussion of state adoption of Confederate symbols.

^{509.} See supra Parts II.B.1&2 for a discussion of Jones v. Alfred H. Mayer Co.

IV. GOVERNMENT USE OF CONFEDERATE SYMBOLS

A. Confederate Symbols' Historical Links

States that officially adopt Confederate icons stoke an entrenched social system of norms and values that denies blacks an equal share of personal autonomy.⁵¹⁰ In evaluating the expressive role of symbols, the source from which they are derived must be taken into consideration.⁵¹¹ Their impact on human lives, particularly the lives of groups, which have historically been more susceptible to discrimination, is significant.⁵¹² Objects, like flags, which harken back to racist ideologies promoting interracial frictions.⁵¹³

The Confederate flag refers to a political entity which had a Constitution that protected black slavery.⁵¹⁴ Its provisions were unlike those of the United States Constitution which, while countenancing the institution, did not specifically mention the white supremacy practiced there.⁵¹⁵ As historian, William Lee Miller has explained:

The use of elaborate euphemisms and circumlocutory verbal devices to avoid the words "slave" and "slavery," at considerable cost at least to brevity and possibly to clarity, had an important purpose. It was explicitly designed to keep the Constitution from recognizing, as James Madison put it, that there could be "property in men." 516

Likewise, a social historian, while not justifying the compromise to permit slavery in the Union, writes: "It is true that the Framers recognized slavery in the Constitution, as the price for the 'Great Compromise' that created the Union, but they did not intend that the federal government must protect slavery and allow its expansion across the continent." Neither did the Declaration of Independence limit its assertion of inalienable rights to white Americans, seen though there were many in Congress who would have wanted it to be so restrictively interpreted. Founders like James Madison, Thomas Jefferson,

^{510.} See Colbert, supra note 196, at 403-04 (stating that Thirteenth Amendment could be interpreted so that government has duty to former slaves to aid them in realizing their newly found freedom).

^{511.} See Bein, supra note 81, at 917 (arguing that effect symbol has on individuals should not be separated from intent of symbol's creator).

^{512.} See id. (noting that if symbol such as flag portrays discriminating message then effect of symbol is discriminating).

^{513.} SCHEDLER, supra note 54, at 9.

⁵¹⁴. See infra notes 528-39 and accompanying text for a discussion of the Confederate Constitution.

⁵¹⁵. See supra note 1 for a discussion of the provisions in the Constitution, where slavery is specifically mentioned.

^{516.} WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY 20-21 (Alfred A. Knopf, ed., 1996).

^{517.} PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 183-84 (1999).

^{518.} See David Barton, "A Death-Struggle Between Two Civilizations," 13 REGENT U. L. REV. 297, 317 n.91 (2000-2001) (arguing that demise of slavery was initiated by Declaration of Independence).

^{519.} Some argued that the Declaration of Independence only applied to men, and blacks were

and John Marshall were conscious of the hypocrisy that they committed by fighting against "no taxation without representation" and the tyranny of the British Empire, while slavery was freely practiced throughout America, including on their own plantations.⁵²⁰

The Reconstruction Amendments were part of the United States' emphatic recognition that blacks are endowed with the same human rights as whites.⁵²¹ They were part of the expiation process for having inflicted so much woe on generations of slaves.⁵²² Those amendments gave a principled reading to the concepts already embodied in the country's guiding documents, the Constitution, with its Amendments, and the Declaration of Independence.⁵²³ Thus, the Freedom Amendment propelled the country into a rights-based tradition of constitutionalism.⁵²⁴ Many of the founders were aware that slavery was profoundly unjust and left the constitutional language broad enough that future amendments could sweep that institution aside.⁵²⁵ The Thirteenth Amendment corrected inconsistencies between the Bill of Rights and inequitable constitutional clauses.⁵²⁶ After the ratification of the Reconstruction

excluded from it, being regarded as a subspecies of humans without the same legal protections. See CONG. GLOBE, 27th Cong., 2nd Sess., App. 337-38 (1842) (statement by Representative Campbell arguing that since slavery existed at time of signing, document did not extend protections to slave race).

520. James Madison, a slave owner himself, nevertheless, called slavery the "original sin." Letter from James Madison to General Lafayette (Nov. 25, 1820) in 3 Letters and Other Writings of James Madison 190 (J.B.. Lippincott & Co. 1867); see also Wallace, supra note +, at 78-79 (discussing Jefferson's contradictory statements about blacks and slavery). Although Thomas Jefferson intellectually realized that slavery was unjust, he nevertheless, during the course of his life, augmented the number of slaves he owned. Notes on Virginia (1785), in Complete Jefferson 665 (S. K. Padover ed., Tudor Pub. 1943). In part, Jefferson did not emancipate them because he believed blacks were "inferior to whites in the endowments both of body and mind ... This unfortunate difference of color, and perhaps.of faculty is a powerful obstacle to the emancipation of these people." Id. Chief Justice John Marshall also held a negative attitude toward slavery, but owned some and used them as house servants. Samuel R. Olken, Chief Justice John Marshall in Historical Perspective, 31 J. Marshall L. Rev. 137, 160 (1997); Irons, supra note 517, at 138. As a further indication of the Founders two mindedness about slavery, several of them who owned slaves were members of societies for ending the institution, however their plans were based on racial separation through colonization. Barton, supra note 518, at 318 n.91. That group included James Monroe, James Madison, and John Marshall. Id.

- 521. See Kogan, supra note 260, at 325 (stating that Reconstruction Amendments embodied Lockean natural rights tradition).
- 522. See Modeste, supra note 502, at 339 (noting that Thirteenth Amendment helped grant personal liberties to blacks).
- 523. See generally AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998) (regarding incorporation doctrine).
- 524. See David A.J. Richards, Abolitionist Feminism, Moral Slavery, and the Constitution: "On the Same Platform of Human Rights," 18 CARDOZO L. REV. 767, 813 (1996) (discussing how Reconstruction Amendments returned U.S. to revolutionary principles of human rights).
- 525. See David A.J. Richards, Comparative Revolutionary Constitutionalism: A Research Agenda For Comparative Law, 26 N.Y.U. J. INT'L L. & POL. 1, 15-16 (1993) (stating that although original Constitution was rarely amended, when it was, it was done to address serious problems in document).
- 526. See Edward J. Erler, Equal Protection and Personal Rights: The Regime of the "Discrete and Insular Minority," 16 GA. L. REV. 407, 408 (1982) (stating that Reconstruction Amendments

Amendments, the symbolism of the United States flag came to represent the drive for universal civil liberties, formulated to protect individual rights and increase social welfare.⁵²⁷

The Confederate Constitution, on the other hand, was blatantly racist.⁵²⁸ It forbade the enactment of any law "denying or impairing the right of property in Negro slaves."⁵²⁹ The Confederate Constitution assured its citizens "privileges and immunities," including the right to transport their slaves to other Confederate states without fear that those slaves would be liberated there.⁵³⁰ Escaped slaves had to be returned to slave owners upon demand.⁵³¹ Any new states entering the Confederacy would be granted the right to practice "the institution of Negro slavery."⁵³² The Confederate Vice President, Alexander Stephens, explained that the "cornerstone" of his government rested "upon the great truth that the Negro is not equal to the white man; that slavery, subordination to the superior race, is his natural and normal condition."⁵³³

Unlike the United States, the Confederacy never passed any amendments to abolish slavery.⁵³⁴ In fact, the language used in the Confederate Constitution leaves in doubt whether any rectifying amendment was even permissible.⁵³⁵

embodied central injunction of Declaration of Independence); David A.J. Richards, *A Theory of Free Speech*, 34 UCLA L. REV. 1837, 1855 (1987) (writing that Founders of Thirteenth Amendment altered defect in constitution's original design).

- 527. See Guyora Binder, Did the Slaves Author the Thirteenth Amendment? An Essay in Redemptive History, 5 YALE J.L. & HUMAN. 471, 491-92 (1993) (writing how slaves efforts during Civil War were instrumental in altering meaning of U.S. flag and republic which it symbolizes).
- 528. See *infra* notes 534-39 and accompanying text for a discussion of the Confederacy's policies and laws.
 - 529. CONFEDERATE CONST. art. I, § 9, cl. 4.
 - 530. CONFEDERATE CONST. art. IV, § 2, cl. 1.
- 531. CONFEDERATE CONST. art. IV, § 2, cl. 3. This clause functioned like the ante-bellum fugitive slave laws which required that runaway slaves be returned to their masters. See Lea VanderVelde & Sandhya Subramanian, Mrs. Dred Scott, 106 YALE L.J. 1033, 1078-79 n.195 (1997) (discussing methods slaves used for escaping to North and how fugitive slave laws impeded their hopes); see also Edward McGlynn Gaffney, Jr., Politics Without Brackets on Religious Convictions: Michael Perry and Bruce Ackerman on Neutrality, 64 Tul. L. Rev. 1143, 1162 (1990) (discussing how some people continued to help blacks escape bondage even though they risked prosecution for violating fugitive slave laws).
 - 532. CONFEDERATE CONST. art. IV, § 3, cl. 3.
 - 533. McPherson, *supra* note 489, at 47-48.
 - 534. See generally THE CONFEDERATE CONSTITUTION.
- 535. In this regard, consider also United States Constitution's Article V, which prohibited any restrictions on slave importation until 1808. U.S. Const. art. V. That provision proscribed the passage of any constitutional amendments on the slave trade until that year. See Paul Finkelman, The Founders and Slavery: Little Ventured, Little Gained, 13 YALE J.L. & HUMAN. 413, 416 (2001) (stating that this clause unnecessary to keep nation together); see also Paul Finkelman, Affirmative Action for the Master Class: The Creation of the Proslavery Constitution, 32 AKRON L. REV. 423, 429 (1999). (stating that this clause gave south "special treatment"). The Confederate Constitution's prohibition against any laws abridging property in the Negro slave seems to have likewise precluded any amendment to the Confederate Constitution abolishing slavery. CONFEDERATE CONST. art 1, § 9, cl. 4.

Even if the Confederacy legally could have abolished slavery, it never did.⁵³⁶ The Confederacy's support for slavery is static: since the country no longer exists, there is no way to alter its Constitution's repressive clauses.⁵³⁷ Whether they would have been changed had the secessionists succeeded is speculative.⁵³⁸ Therefore, Confederate symbols are interconnected to the repressive institution for which secessionists fought.⁵³⁹

While support of slavery was not the exclusive motivator of the rebellion, preservation of the institution was one of its foremost commitments. Confederate soldiers fought not only to protect their homes and maintain Southern state rights; they were the products of a culture that considered slavery to be an equalizer for the white race.⁵⁴⁰ Revisionism, which claims the South's primary raison dêtre was the preservation of states' constitutional rights, does not take into account that the Confederacy's own Constitution reflected its supremacist foundation.⁵⁴¹ The zeal to preserve slavery led South Carolina to secede and other states to follow suit.⁵⁴² Any state or municipality adopting symbolism lauding the Confederacy associates itself with attitudes and deeds of the Old South.⁵⁴³

Proud displays of the Confederate battle flag, statues dedicated to the Confederacy's chief ideologues, and other such memorabilia support not only that entity's governmental reality but also its entrenched separatism between races. The Confederate flag is a nostalgic symbol for the days when legal institutions reflected an unquestioning commitment to black subordination. The Thirteenth Amendment was then circumvented through narrow judicial construction tolerant of black codes and segregation.⁵⁴⁴ A movement, which incorporated Confederate symbols, sprung up after the Civil War, and its reference to the rebel states, was clear. At the turn of the twentieth century, Confederate flags were often unfurled during the proud marches of the United

^{536.} See generally Confederate Const. art 1, § 9 (maintaining, rather than prohibiting slavery).

^{537.} See generally MARSHALL L. DEROSA, THE CONFEDERATE CONSTITUTION OF 1861 1-5 (1991) (summarizing creation and extirpation of Confederate Constitution).

^{538.} Id.

^{539.} See infra notes 23-28 and accompanying text for a discussion of this proposition.

^{540.} See SCHEDLER, supra note 54, at 26 (discussing what motivated South to fight).

^{541.} See Martin D. Carcieri, The South Carolina Secession Statement of 1860 and the One Florida Initiative: The Limits of a Historical Analogy and the Possibility of Racial Reconciliation, 13 St. Thomas L. Rev. 577, 584 (2001) (noting that South Carolina Secession Statement describes state's rights as primary reason for leaving Union); see also Confederate Const. art. I, § 9, cl. 4 (forbidding any law that would outlaw institution of slavery).

^{542.} Weeden, *supra* note 26, at 528. When Lincoln was elected in 1860, South Carolina secessionists decided to bolt from the Union because they viewed him as "hostile to slavery." Carcieri, *supra* note 540, at 583.

^{543.} See Weeden, supra note 26, at 528 (stating that state's sponsorship of Confederate flag communicates a "disgraceful justification for enslaving a entire race").

^{544.} See Kohl, supra note 293, at 280-81 (showing how courts in South suppressed rights of freed slaves through Black Codes); SCHEDLER, supra note 54, at 24 (discussing judicial interpretation of Black Codes).

Confederate Veterans.545

Confederate symbols are more than merely fashionable insignia. They are laden with combustible social and political messages which "like long-buried ammunition, can go off without warning."⁵⁴⁶ The Confederate battle flag called Southerners to arms. It swelled the breasts of those who believed plantation life, with its concomitant racist features, was worth dying for.⁵⁴⁷ The Old South not only kept blacks in a state of bondage, it denied them the right to gain an education, speak their minds, and marry whom they would, and the Thirteenth Amendment was meant to eradicate those restrictions.⁵⁴⁸ Contemporary governments, which use the Confederate battle flag in their official logos, stamp blacks with a badge of inferiority.⁵⁴⁹ Any state that extols its Confederate heritage communicates its high regard for a government that abridged freedoms by prohibiting blacks from voting, traveling outside areas their masters permitted them to frequent, denied blacks the right to enter into contracts, including marriage.⁵⁵⁰ Modern day statues of leading traitors like Jefferson Davis, ⁵⁵¹ erected on publicly owned lands, signal solidarity with Confederate goals.⁵⁵²

Enacting legislation that codifies the display of monuments to these supporters of the South's peculiar institution, as slavery was euphemistically called, and allocating money to pay for them sends an exclusionary social message to black Americans, particularly those living in the communities that adopt confederate symbols.⁵⁵³ It has much the same exclusionary effect as Germany erecting a statue to Adolf Hitler or Heinrich Himmler would have on Jews, especially those living in Germany.⁵⁵⁴ Likewise, state flags which either

^{545.} See GAINES M. FOSTER, GHOSTS OF THE CONFEDERACY: DEFEAT, THE LOST CAUSE, & THE EMERGENCE OF THE NEW SOUTH 1865-1913 139 (1987) (discussing how parades and flags brought back memories of war and helped establish social unity).

^{546.} Springer, supra note 23, at 7.

^{547.} See Forman, supra note 26, at 513 (stating that first design of Confederate Flag was used to rally troops together for battle).

^{548.} See Akhil R. Amar & Daniel Widawsky, Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney, 105 HARV. L. REV. 1359, 1369-70 (1992) (asserting that Thirteenth Amendment ended "a system of dominance and degradation" whose power reached beyond economic exploitation).

^{549.} See Forman, supra note 26, at 505 (noting that South Carolina added Confederate symbol to its flag in 1957 as part of their "Segregation Forever" campaign).

^{550.} See id., at 513 (arguing that analysis of Confederate flag's significance should take into account its sociohistorical context).

^{551.} Officially President Jimmy Carter pardoned Jefferson Davis as part of a national reconciliation. Robert Meister, Sojourners and Survivors: Two Logics of Constitutional Protection, 3 U. CHI, L. SCH. ROUNDTABLE 121, 155 (1996).

^{552.} Richmond, Virginia, in fact, has lined its city blocks with statutes to Confederate leaders. See Sanford Levinson, They Whisper: Reflections on Flags Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society, 70 CHI.-KENT L. REV. 1079, 1084 (1995) (cautioning against legal invalidation of Confederate flag).

^{553.} See Lessig, supra note 61, at 954 (discussing exclusionary message of flying Confederate flag over state's seat of government).

^{554.} See id. (giving, as example, exclusion of German Jews when Germans celebrate birthday of Goebbels).

incorporate Confederate symbols into their flag designs, as do Mississippi and Georgia, or those states that honor the Confederacy by flying its flag on state grounds, as South Carolina does,⁵⁵⁵ create an exclusionary environment that stigmatizes blacks and countenances discriminatory attitudes toward them.⁵⁵⁶ Active state promotion of such a message violates the Thirteenth Amendment because it creates a divisive political environment, which is detrimental to civic respect for human rights. Those symbols refer to a heritage in which the white race benefited from an artificially created racial hierarchy that undermined the liberty for which the American Revolution was fought.⁵⁵⁷ The only freedom they represent is the "freedom of the white Southern plantation owners to bask in economic prosperity at expense of the liberty and freedom of African Americans."⁵⁵⁸

Harkening back to the statements of Thirteenth Amendment framers, there was a resonant understanding that its ratification would require Confederate states to tear down St. Andrew's Cross and replace it with Old Glory. In 1864, Mr. Kellogg of New York looked forward to the day when the Union flag would be raised above the rebellious states "and the promise of freedom then be fulfilled."559 Senator Henry Wilson powerfully prophesied "when the war drums throb no longer and the battle-flags are furled, our absent sons, with the laurels of victory on their brows, will come back to gladden our households Then the star of the United America ... will reappear ... to illume the pathway ... of struggling humanity."⁵⁶⁰ Another congressman contended that the Confederates were "defenders of slavery in arms" and those who defected to the Union lines were coming "to rally around the old flag." 561 New York Representative Elijah Ward, on January 9, 1865, spoke about the ratification of the proposed Amendment in terms of winning "back the seceded States under the glorious flag of that Union."562 Immediately following the Civil War, loyalty to confederate symbols was so great that it was not unheard of for an angry mob to murder a person raising the Stars and Bars.⁵⁶³

To the dismay of abolitionists, the end of the Civil War was not immediately

^{555.} See infra notes 569-608 and accompanying text for a discussion on the flags of these southern states.

^{556.} See Forman, *supra* note 26, at 514-15 (noting that flying flag over state capital would have effect of excluding many people from feeling like citizens).

^{557.} See Martin D. Carcieri, Democracy and Education in the Thought of Jefferson and Madison, 26 J.L. & EDUC. 1, 6 (1997) (asserting that "[w]hile liberty is the end we seek, democratic institutions and practices have long been thought to be the means to securing liberty").

^{558.} Cynthia Vaughn, Editorial, *Theory Comparing Flag to Cross Misses the Mark*, Greensboro News & Record, Jan. 29, 2000.

^{559.} CONG. GLOBE, 38th Cong., 1st Sess. 2618 (1864).

^{560.} CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864).

^{561.} CONG. GLOBE, 38th Cong., 1st Sess. 2984-85 (1864).

^{562.} CONG. GLOBE, 38th Cong., 2nd Sess. 176 (1865).

^{563.} CONG. GLOBE, 39th Cong., 1st Sess. 503 (1865) (discussing statement of Senator Jacob M. Howard of Michigan describing murder of man in Texas for raising Union flag).

followed by the dissipation of racism.⁵⁶⁴ In fact, the vestiges of slavery continue today. In the realm of an historical interpretation, some states have sided with organizations who regard the Confederacy as an heroic cause for liberty, forgetting that it denied fundamental rights to millions of humans and helped imprint a supremacist ideology on future generations.

B. Revival of Confederate Symbolism

The revival of interest in Confederate symbolism during the 1950's occurred contemporaneously with a vocal defense for segregationism. As part of the move opposing civil rights legislation, some Southern leaders, amongst whom Governor Fielding Wright of Mississippi took the lead, organized the States' Rights Democratic Party, better known as the Dixiecrats.⁵⁶⁵ The Dixiecrats purposefully associated the Confederate flag with aggressive white supremacism.⁵⁶⁶ They proudly displayed St. Andrew's Cross as a statement of defiance against laws requiring public school desegregation.⁵⁶⁷ The flag was meant as much to intimidate and galvanize hate groups, as it was to voice opposition to social policy.⁵⁶⁸

Several states continue to conspicuously promenade Confederate symbols on their properties. For instance, the Confederate battle flag covers one-third the surface of the Mississippi flag.⁵⁶⁹ Mississippi first adopted this design during an era when it enacted laws purposefully drafted to limit black political autonomy.⁵⁷⁰ Mississippi emphasizes the public lesson value of its flag, requiring that it be displayed on public buildings,⁵⁷¹ including schools.⁵⁷² The history

564. A leading scholar of the Thirteenth Amendment, Arthur Kinoy, explained the civil rights situation in 1968:

But this central historical fact—that the social system of slavery was never fully uprooted, and that its badges and indicia continued to brand the black man with the hallmark of slavery, the stamp of an "inferior race" — has been buried deep in our national consciousness. It is an unpleasant fact, an upsetting fact, one which is easier submerged than recognized, easier ignored than acknowledged. For almost a century, in every area of national thinking—political, social, cultural, and even the historical sciences—we have chosen to act blandly as if the abrasive truth were nonexistent.

Arthur Kinoy, The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Alfred H. Mayer Company, 22 RUTGERS L. REV. 537, 541-42 (1968).

565. Springer, supra note 23, at 8.

566. Id.

567. Id. at 9.

568. Id.

569. 1894 Miss. Laws 154.

570. See EDWARD L. AYERS, THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION 146-49 (1972) (discussing how Mississippi instituted poll taxes and educational level voting requirements, knowing that in other states those measures had appreciably reduced black voting roles); 2 A HISTORY OF MISSISSIPPI 13-14 (Richard A. McLemore ed., 1973) (discussing push by Mississippi Legislature to add literacy and property ownership conditions to right to vote).

571. Miss. Code Ann. § 3-3-15 (2001).

572. Id. § 37-13-5.

behind the flag's design must be taught in public schools.⁵⁷³ A lifelong indoctrination is transmitted to students whose curriculum includes studying the pledge of allegiance to the state flag. The pledge instructs them to take "pride in her history and achievements," which, based on the image that it proudly displays, must include the infamous history of slavery.⁵⁷⁴ The educational value of the Confederate design promulgates a message that is favorable to the continued racial stratification that the framers to the Thirteenth Amendment had hoped to uproot.

In 2001, Mississippi voters reaffirmed their commitment to secessionist heritage by voting to retain the Confederate symbol on their flag by a 65% popular majority.⁵⁷⁵ The Mississippi Supreme Court considers it constitutional for the state to display the Confederate battle flag in public⁵⁷⁶ and has found that having the battle flag on a portion of the state flag does not violate the United States Constitution.⁵⁷⁷ In its decisions on this subject, the State Supreme Court failed to reflect on whether the Confederate battle flag's exclusionary message violates the Thirteenth Amendment.⁵⁷⁸

The widespread commitment to a symbol pregnant with racist meaning indicates a disregard for the impediments continued racism places on blacks who, like other citizens, seek to live meaningful, unfettered lives. The Mississippi flag is a continued badge of servitude that has a detrimental effect on state and national life because it disregards the dignity rights of a large portion of the state's population. It places a wedge between Mississippi whites and blacks by recalling a social vision that was favorable only to whites.

Until recently, two-thirds of Georgia's state flag was covered with St. Andrew's Cross.⁵⁷⁹ Unlike Mississippi, Georgian law had no qualms in asserting

573. Id. § 37-13-5 (1), (3). The full text of these sections of the statute reads:

The flag of the State of Mississippi and the flag of the United States shall be displayed in close proximity to the school building at all times during the hours of daylight when the school is in session when the weather will permit without damage to the flag. It shall be the duty of the board of trustees of the school district to provide for the flags and their display. In all public schools there shall be given a course of study concerning the flag of the United States and the flag of the State of Mississippi. The course of study shall include the history of each flag and what they represent and the proper respect therefore. There also shall be taught in the public schools the duties and obligations of citizenship, patriotism, Americanism and respect for and obedience to law.

Id.

574. See id. § 37-13-7(2) (quoting official pledge of State of Mississippi).

575. See Robert Tait, Mississippi's Racial Divide Widens With Vote to Keep Rebel Yell Flying, THE SCOTSMAN Apr. 19, 2001, at 11 (noting vote went strictly along racial lines).

576. See Daniels v. Harrison County Bd. of Sup'rs, 722 So. 2d 136, 138 (Miss. 1998) (upholding right to display state flag at amusement park).

577. Mississippi Div. of United Sons of Confederate Veterans v. Mississippi State, Conference of NAACP Branches, 774 So. 2d 388, 389 (Miss. 2000). The Court gave little weight to the constitutional argument, doing little more than approvingly citing to Alabama cases. *Id.* (citing, inter alia, NAACP v. Hunt, 891 F. 2d 1555 (11th Cir. 1990)).

578. See Mississippi Div. Of United Sons, 774 So. 2d. at 389 (failing to squarely address Thirteenth Amendment while upholding state use of portions of battle flag).

579. H.B. 16, Gen. Assem., Reg. Sess. (Ga. 2001) (amending Ga. Code Ann. § 50-3-1 (1994 &

that part of its state flag design was derived from markings on the "flag of the Confederate States." Georgia evinces the same public commitment as Mississippi to the symbolism of its flag by requiring its exhibition in public and private schools. Georgia statutorily proclaims that no one can prevent the "patriotic" display of the Confederate "flag, standard, color, shield, ensign, or other insignia." The state legislature makes clear its veneration of the Confederacy:

The flags of the Georgia troops who served in the army of the Confederate States, and which have been returned to the state by the United States government, shall be preserved for all time in the capitol as priceless mementos of the cause they represented and of the heroism and patriotism of the men who bore them.⁵⁸³

The racist implications of this pronouncement are associated with human rights abuses Confederate states perpetrated prior to the ratification of the Freedom Amendment and the supremacist practices Confederate states maintained following its ratification.

Georgia adopted its state flag in 1956 as a protest against federal decisions, like *Brown v. Board of Education*,⁵⁸⁴ which forced the South to desegregate.⁵⁸⁵ That same year, Governor Marvin Griffin expressed his state's activist opposition to civil rights, exclaiming that "there will be no mixing of the races in public schools," and announcing that "the rest of the nation is looking to Georgia for the lead in segregation."⁵⁸⁶ In a Court of Appeals case, *Coleman v. Miller*, evaluating the constitutionality of covering part of the Georgian flag with St. Andrew's Cross, the Eleventh Circuit recognized that the symbol was adopted as an expression of white supremacism.⁵⁸⁷ The appellant argued that displaying the Georgian flag with its Confederate symbolism violated the Equal Protection Clause of the Fourteenth Amendment.⁵⁸⁸ At trial he testified that the flag placed him in imminent threat of harm and that his friend pled guilty on a parking ticket violation after seeing the Confederate flag in the courtroom.⁵⁸⁹ This dearth of factual evidence was insufficient for the court to find that

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Supp. 1997)).
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^{580.} Id.

^{581.} Ga. Code Ann. § 50-3-3 (2000).

^{582.} Id. § 50-3-10.

^{583.} Id. § 50-3-5.

^{584. 347} U.S. 483 (1954).

^{585.} Eric Harrison, Georgia Flag's Rebel Emblem Assumes Olympian Proportions, L.A. TIMES, Feb. 11, 1993, at A5.

^{586.} Coleman v. Miller, 117 F.3d 527, 528 (11th Cir. 1997) (quoting Governor Marvin Griffin's 1956 state address).

^{587.} Coleman, 117 F.3d at 528-29.

^{588.} *Id.* at 529. The appellant also argued that the flag violated his First Amendment rights, but the Court turned that aside, finding nothing compelled appellant to affirm the ideals of the state flag by carrying or displaying it. *Id.* at 531.

^{589.} Id. at 529.

Georgia's flag had a disproportionate impact on blacks as a group.⁵⁹⁰

Coleman would have been better off arguing that his Thirteenth Amendment rights were violated, rather than posturing from the Equal Protection standpoint. The first section of the Thirteenth Amendment is amenable to a private cause of action arising from the state saddling persons with a badge of servitude and intimidating them from fully enjoying life in Georgia's civil society. From an Equal Protection standpoint, the *Coleman* court relied on the unnecessarily narrow construction of the Fourteenth Amendment adopted by the *Slaughterhouse Gases*. The *Coleman* court should have considered whether equal protection violations resulted from private injuries, in order to accurately evaluate whether Appellant's claims of private harm were actionable. Moreover, the discriminatory assertions surrounding the adoption of the Georgian state flag, which the court reviewed in its opinion, make clear that retaining a racial hierarchy favorable to whites, and thereby negatively impacting blacks as a group, was the intent of Georgia's legislators, in 1956. 595

^{590.} Id. at 530.

^{591.} See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438-39 (1968) (discussing that Thirteenth Amendment's reach includes private and state actions).

^{592.} The Court "never recovered from the narrow reading it received in Slaughterhouse and remains virtually a dead letter, although the modern Court's expansive reading of the equal protection and due process clauses has largely mooted the issue." GEOFFREY R. STONE, ET. AL., CONSTITUTIONAL LAW 448 (1986); see also Erwin Chemerinsky, Making the Right Case for A Constitutional Right to Minimum Entitlements, 44 MERCER L. REV. 525, 538 (1993) (explaining how "[i]n the Slaughterhouse Cases, the Court's very narrow construction of the equal protection clause as only protecting blacks and its restrictive view of the due process clause as not encompassing substantive rights have long been rejected"). Recently, a new school of thought has arisen arguing that the majority in the Slaughterhouse Cases adopted the incorporation doctrine, making the Bill of Rights applicable to the states through the Fourteenth Amendment. See generally Kevin Christopher Newsom, Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases, 109 YALE L.J. 643 (2000) (analyzing the Slaughterhouse Cases and incorporation); Bryan H. Wildenthal, The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment, 61 OHIO ST. L.J. 1051 (2000) (exploring current and historical trends towards Fourteenth Amendment's incorporation of Bill of Rights); Bryan H. Wildenthal, The Road to Twining: Reassessing the Disincorporation of the Bill of Rights, 61 OHIO ST. L.J. 1457 (2000) (discussing historical views of incorporation from 1880 to 1908).

^{593.} The Supreme Court has recognized that there are private interests in equal protection. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

^{594.} See Chemerinsky, supra note 592, at 538 (stating that Supreme Court has "repeatedly... used the Fourteenth Amendment to protect rights from state interference, and it is widely accepted that the Amendment does safeguard individual rights from state interference"). The traditional Supreme Court view, however, is that since the Fourteenth Amendment states "No state shall...", the implication is that the Amendment's provisions apply to state but not private actions. Consequently, as best stated by Paul Berman, "the state cannot constitutionally exclude African-Americans from a government housing facility, but the Constitution is silent with regard to an individual's choice to exclude African-Americans from his or her home." Paul Schiff Berman, Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation, 71 U. Colo. L. Rev. 1263, 1266 (2000).

^{595.} See, e.g., Coleman, 117 F.3d at 528 (citing one motivation for Georgia's flag to be legislature's recognition of peoples "renewed interest in their Confederate heritage").

After much public pressure, Georgia finally changed the design of its flag.⁵⁹⁶ The new state flag still retains the Confederate design, but it is now depicted by a small emblem—one amongst five banners previously flown in Georgia.⁵⁹⁷ The retention of the Confederate flag indicates a continued reverence for the Confederacy.⁵⁹⁸ The prevalence of this attitude became evident when several months after changing the face of Georgia's flag, the state's legislators passed a resolution encouraging people to fly Confederate flags during Confederate History and Heritage Month.⁵⁹⁹

The continued retention of St. Andrew's Cross on the Georgian flag, no matter how small, is analogous to modern Germany keeping a swastika in the design of its flag. After all, that symbol represents part of German history, just as the Confederate battle flag refers to Georgia's past. While the brutalities committed by the Nazi regime and the Confederacy were different, both were responsible for crimes against humanity. Flaunting symbols that inflame racist impulses should have no place in a democracy. Otherwise, the advances in civil liberties become attenuated, weakened by a social psyche that lauds a government the central tenets of which included a devotion to inhumanity.

South Carolina likewise tried to defuse boycotts against its state⁶⁰⁰ by removing the Confederate flag from the State Dome, where it flew between 1962 and 2000.⁶⁰¹ The South Carolina legislature voted to move that flag to the site of a monument for the state's Civil War dead, located on the front lawn of the state capital grounds.⁶⁰² Arkansas' flag has a star on its face expressly dedicated to the Confederacy.⁶⁰³ For its flag, Tennessee chose the colors of the Confederate States.⁶⁰⁴ Texas, too, expresses pride in its slaveholding heritage. Its official state

^{596.} Civil rights organizations threatened to boycott Georgian industries if the State flag's Confederate design remained unchanged. David Pendered, *Boycott by SCLC Threatened If Georgia Flag Not Changed*, COX NEWS SERVICE, Apr. 4, 2000.

^{597.} Georgia House Passes Bill To Reduce Confederate Emblem On State Flag, St. Louis Post-Dispatch, Jan. 25, 2001, at A2.

^{598.} E.g., SCHEDLER, supra note 54, at 43 (discussing how KKK shows nostalgia for Old South by using Confederate flag).

^{599.} Patricia M. LaHay, Senate Resolution Encourages Flying of Former Georgia Flags, ASSOCIATED PRESS STATE & LOCAL WIRE, Mar. 20, 2001.

^{600.} NAACP protests against the South Carolina tourist industry, directed at forcing legislators to take the Confederate flag off the State Dome, had a \$10 million dollar impact there. Rick Freeman, S. Carolina's Allegiance To the Flag; State Is a Sports Outcast Because of Confederate Link, WASH. POST, May 20, 2000, at D1.

^{601.} Jim Davenport, S.C. Legislature Approves Moving Confederate Flag From Statehouse Dome, ASSOCIATED PRESS STATE & LOCAL WIRE, May 18, 2000. As in Mississippi, two years after Brown, state congressmen showed their contempt for civil rights reform by embracing the Confederate flag. Following the lead of South Carolina Senator John D. Long, they raised the Confederate flag above the Senate chambers. Tim Smith, Banner Traced to One Man, Work of Single Racially Motivated Lawmaker Brought Rise of Confederate Flag to Chambers, Augusta Chron, Jan. 30, 2000, at B2.

^{602.} Freeman, supra note 600, at D1; Kevin Sack, Battle Lines Form Again on the Battle Flag, N.Y. TIMES, Aug. 4, 2001, at A12.

^{603.} SCHEDLER, supra note 54, at 4.

^{604.} Tennessee Flag, at http://www.ultimateflags.com/states/tennessee.htm (last visited Oct. 11, 2001).

seal, adopted in 1991, reflects Texas' nostalgia for all the flags that have flown above it including those of Confederate states and the Republic of Texas.⁶⁰⁵ Florida and Alabama have flags that incorporate symbols on their flags "reminiscent" of St. Andrew's Cross.⁶⁰⁶ Alabama flew the Confederate flag above the state capital until April 1993, when Governor Jim Folsom, ordered that it be taken down.⁶⁰⁷ The flag had originally been raised by Alabama Governor George Wallace during his "Segregation Forever" campaign.⁶⁰⁸

Confederate symbols have been linked with white supremacism, both before and after ratification of the Thirteenth Amendment.⁶⁰⁹ When governments sanction those symbols by placing them in visible public places, they give them an air of respectability and excuse persons who hold repressive attitudes. By maintaining and paying for the upkeep of Confederate symbols, states reinvigorate hurdles still facing blacks living in the United States.⁶¹⁰ It also sends a mixed message to children who hear of racial equality and at the same time see the icons of Confederacy lauded.

I was surprised during a 2001 visit to Washington, D.C., while on my first tour of the White House, to find a large sized painting of President John Tyler hanging in the Blue Room. The painting has been there since 1972.⁶¹¹ What so amazed me was that this same John Tyler had been elected to the Provisional Congress of the Confederacy, and in 1861 he was elected to the Confederate House of Representatives.⁶¹² He, in fact, was the only former president of the United States to formally participate in Confederate politics. And yet, an image honoring this devotee to the institution of slavery⁶¹³ hangs in one of the most prominent places in the United States, there to be viewed and praised by

^{605.} Charles A. Spain, Jr., The Flags & Seals of Texas, 33 S. Tex. L. Rev. 215, 252-53 (1992).

^{606.} SCHEDLER, supra note 54, at 4.

^{607.} Weeden, *supra* note 26, at 525 (2001). In a well-publicized and often cited case, NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990), the Eleventh Circuit Court of Appeals found that flying the Confederate flag above the Alabama capital building was neither a "badge of servitude," under the Thirteenth Amendment, nor a violation of the Equal Protection Clause. *Id.* at 1562. Some of the flaws of that case include the court's failure to investigate whether the flag is at all connected to slavery, and its history indicates that it is, and that the court's strict reading of the Equal Protection Clause is unlikely to withstand strict scrutiny. Weeden, *supra* note 26, at 535-36.

^{608.} Weeden, *supra* note 26, at 529-30. Governor George Wallace subsequently apologized for his racist remarks and segregationist views. Ronald J. Krotoszynski, Jr., *Equal Justice Under Law: The Jurisprudential Legacy of Judge Frank M. Johnson, Jr.*, 109 YALE L.J. 1237, 1240 n.14 (2000).

^{609.} See, e.g., Coleman, 117 F.3d at 528 (describing anti-desegregationists' use of Confederate flag); SCHEDLER, supra note 54, at 43 (discussing KKK's use of Confederate flag while preaching their supremacist views).

^{610.} See Weeden, supra note 26, at 534 (stating that state-sponsored feeling of either racial superiority or racial inferiority is created when state flies the Confederate flag over its public buildings).

^{611.} Telephone Interview with Barbara McMillan, Office of the White House Curator (Sept. 27, 2001).

^{612.} WILLIAM A. DEGREGORIO, THE COMPLETE BOOK OF U.S. PRESIDENTS 158 (5th ed. 1993 with1996 update by Connie Jo Dickerson).

^{613.} Tyler propelled the drive to annex Texas in order to spread slavery into Western territories. *Id.* at 157; GEORGE B. TINDALL, AMERICA: A NARRATIVE HISTORY 519-20 (1984).

common United States citizens and foreign dignitaries alike. That painting, coupled with John Calhoun's impressive statue in the United States Capital rotunda and the many statues devoted to Jefferson Davis around the country, evidence a continued callousness about the plight of blacks, throwing governmental support behind the vestiges of slaveocracy.

Confederate symbols are associated with an intolerant society, much the same way as are the swastika and hammer and sickle. The inclusion of any of these on modern day flags is troublesome. While displays about the Confederacy can teach historical lessons, when Confederate symbols are incorporated into government emblems they indicate a persistent social failure to come to terms with the South's violent defense of slavery.

Confederate symbols are divisive to a multiethnic society. Once a label has been attached to an outgroup, it becomes more difficult for persons raised with derogatory preconceptions to disassociate the stereotype from individuals. 614 State symbols refer not only to the individuals who fought bravely for a cause, but also to the ideology behind the cause. Their power can help forge a collective mentality that can be drawn upon for votes or actions. To commit racist injustices on a grand scale, an exclusionary mentality must be in place, conceptually placing some social groups outside the pale. Confederate flags may reaffirm heroism, but we must ask, heroism for what? The answer is: For the very social injustices that the Thirteenth Amendment sought to eradicate.

V. FEDERAL RESPONSIBILITY

The Enabling Clause of the Thirteenth Amendment requires Congress to pass laws that will eradicate all badges and incidents of servitude. G15 Jones v. Alfred H. Mayer Co. Stands for the principle that the federal government can pass civil rights legislation pursuant to the overarching aim of eliminating any barriers stemming from institutional slavery. Causes of action under the Thirteenth Amendment have the unique feature in so far as they arise from "racial injustices... traceable to slavery or segregation." This article has argued that government sponsored displays of Confederate symbols are badges of servitude because they tend to further the supremacist ideals for which the Confederate States fought. The elimination of Confederate symbols on state property, through federal legislation, therefore falls within the ambit of the Thirteenth Amendment.

The First Amendment is not a barrier against legislation restricting state use

^{614.} See BOURDIEU, supra note 57, at 121 (noting how persons can become trapped by the assignation of certain social definitions to them).

^{615.} See *supra* notes 1-9 and accompanying text for a summary of the Thirteenth Amendment's ban on servitude.

^{616. 392} U.S. 409 (1968).

^{617.} See supra Part II.B.2 and accompanying text for a discussion of this case.

^{618.} Colbert, supra note 144, at 4.

^{619.} The federal judiciary has original jurisdiction over claims arising from violation of the Constitution. 28 U.S.C. § 1331 (2000).

of racist symbols. Protection of political expression in a constitutional republic is meant to guard the speech of individuals who make controversial statements, especially those questioning governmental policies. The right to free speech is not a license for state sponsored hate speech. In the words of James Madison: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." The First Amendment does not protect the intentional, governmental promotion of racist speech. Symbolism harkening back to destructive social movements relegates minorities to the place of outsiders. It limits minorities' autonomy, diminishing their ability to participate in politics and governance. 621

While the First Amendment protects individuals against government interference, states have no analogous right to its protection. 622 In fact, the First Amendment's language indicates that it protects private actors against government interference. The Constitution makes no similar provisions for the government as speaker. 623 Traditionally, the Amendment has been viewed as a source of individual not state rights. 624 As Frederick Schauer put it, "[i]f... we view the first amendment as primarily or exclusively protecting individual self-expression, self-realization, self-fulfillment, or something of that sort, then it is hard to see how government speech could be a first amendment problem."625

Government speech extends to important public functions such as

^{620. 4} Annals of Cong. 934 (1794).

^{621.} See Jack A. Guggenheim, The Indians' Chief Problem: Chief Wahoo as State Sponsored Discrimination and a Disparaging Mark, 46 CLEV, St. L. REV. 211, 225 (1998) (positing that arguably offensive symbolic "Cleveland Indian" stigmatizes Native Americans and chills their ability to speak out).

^{622.} See CBS v. Democratic Nat'l Comm., 412 U.S. 94, 139 (1972) (Stewart, J., concurring) (stating that government is not precluded from restricting its own expressions). The Eleventh Circuit has reiterated this principle. See N.A.A.C.P. v. Hunt, 891 F.2d 1555, 1565 (11th Cir. 1990) (holding that while "the First Amendment protects citizens' speech only from government regulation; government speech itself is not protected by the First Amendment"); see also Estiverne v. Louisiana State Bar Ass'n, 863 F.2d 371, 379 (5th Cir. 1989) (also holding that government speech is not protected by First Amendment). Likewise, the Fifth Circuit Court of Appeals has found that it is "essentially right" that "the First Amendment extends only to private expression and not to governmental expression." Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1038 (5th Cir. 1982). Similarly, in a dissent, Supreme Court Justice Stevens distinguished between public and private broadcasting facilities. Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 686-87 (1998) (Stevens, J., dissenting). The Eleventh Circuit Court of Appeals also held that "[w]hen the competing speaker is the government, that speaker is not itself protected by the first amendment," but it can facilitate the market place of ideas. Warner Cable Commns., Inc. v. City of Niceville, 911 F.2d 634, 638 (11th Cir. 1990).

^{623.} Frederick Schauer, Is Government Speech a Problem?, 35 STAN. L. REV. 373, 383-86 (1983); cf. Marjorie Heins, Viewpoint Discrimination, 24 HASTINGS CONST. L.Q. 99, 150-59 (1996) (arguing that whether First Amendment principles should apply to government speech should be determined on case by case basis and be based on evaluations of messages' purposes and forum where they are uttered).

^{624.} Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1503-04 (2001) (discussing alternative First Amendment theories).

^{625.} Schauer, supra note 623, at 384.

formulating policies and disseminating information, about legislation. Individuals' constitutional rights cannot be abridged by a state asserting First Amendment privileges. The civil rights gained through the Reconstruction Amendments, beginning with the affirmation of freedom in the Thirteenth, trump government speech. There is a more compelling interest in protecting civil rights than in countenancing state displays of racist symbols. States exist not to perpetuate a hollow bureaucracy proud of its ignominious past, but rather to assure individual rights and to increase the benefits of social living. The incorporation of Confederate imagery into state symbolism is a Thirteenth Amendment problem, not one raising First Amendment issues. Placing racist symbols on government properties awakens the ghosts of slavery because it draws meaning from a history in which the Confederacy stifled the voices of blacks and abolitionists. 628

State resources, both the monetary means to design and purchase state symbols and the real property where they are placed, increase the reach of state messages far beyond what any private party could accomplish. The power of the state to be heard in the marketplace of ideas is overwhelming compared to the audibility of other voices. The state has no absolute right to use tax revenues for undermining its citizens' liberties. Confederate symbols in places of power send a message which fuses racist rhetoric with state legitimizing messages. They indicate the government's commitment to maintaining the Old South's culture even in the face of Civil War defeat. Those symbols perpetuate a tradition that is intrinsically associated with the badges of servitude. Thereby, wittingly or unwittingly, a government furthers not only prejudices but active discrimination, as well.

If Congress were to enact legislation, pursuant to the second clause of the Thirteenth Amendment, prohibiting the glorifying displays of Confederate symbols on state and federal property, private parties could seek legal redress for damages and injunctive relief in federal courts.⁶³⁰ Taken at its word, the

^{626.} See Bezanson & Buss, supra note 624, at 1502, 1508-09 (stating that "[t]he idea of government 'speech' under First Amendment is thus both illogical and inconsistent with the text").

^{627.} See Amar, supra note 87, at 155-61 (1992) (discussing how meaning of First Amendment was changed after states ratified Thirteenth and Fourteenth Amendments); Schauer, supra note 622, at 386 (arguing that abuses of governmental power, even those related to government communications, need not be framed in First Amendment terms); Andrew E. Taslitz, Hate Crimes, Free Speech, & the Contract of Mutual Indifference, 80 B.U. L. Rev. 1283, 1391 (2000) (regarding speech that elicits hate crimes as unprotected by First Amendment).

^{628.} See generally Michael Kent Curtis, The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, & the Privileges of American Citizens, 44 UCLA L. Rev. 1109 (1997) (discussing how pro-slavery forces in ante-bellum United States sought to silence Abolitionists).

^{629.} See Richard Delgado, The Language of The Arms Race: Should The People Limit Government Speech?, 64 B.U. L. REV. 961, 991-93 (1984) (discussing extensive reach of government legitimizing statements about nuclear arms).

^{630.} Patterson v. McLean Credit Union, 491 U.S. 190, 192-93 (1989) (Brennan, J., concurring and dissenting in part); Pittman, *supra* note 500, at 853 (analogizing private causes of action under Thirteenth Amendment to enslaved persons individually suing slave owners).

Supreme Court in *Jones* regarded Congress' power to protect civil rights, pursuant to the Thirteenth Amendment, to be as sweeping as its power to regulate interstate commerce. Accordingly, Congress has an interest in prohibiting state uses of Confederate symbols because they play a role in retaining the regressive social stratification that was essential to preserving slavery. Removing those symbols from public places would likely lessen racial tensions and make people more secure in this constitutional republic. If a federal cause of action were created, federal courts could issue injunctions forbidding states from displaying markers of social and political bigotry. Whether a particular object was in fact a badge of servitude would be a question of fact to be decided by the trier of fact, whether that be judge or jury. If a state symbol were found to further racial discrimination, the government would have to show a compelling state interest for maintaining it in the face of the harms it causes or to be enjoined from displaying it.632

Litigation of these cases may be costly because they will probably require the use of expert testimony. The United States Courts of Appeals in both Coleman v. Miller and NAACP v. Hunt, held that personal testimony of harms caused by Confederate symbols on flags was insufficient to prove that they violated Appellants' rights under the Equal Protection Clause. Therefore, besides testimony from private parties, the plaintiffs will have to prove their social and psychological effects on blacks in particular, and United States democracy as a whole. This may also require testimony from historians aware of the legislative debates surrounding the Thirteenth Amendment and how, through the years, it has been neglected as a source of civil rights reforms.

VI. CONCLUSION

The Thirteenth Amendment assures persons of all races that they will be secure in their right to enjoy the full range of civil freedoms associated with a liberal democracy. The Freedom Amendment's more radical Framers saw in it the opportunity to end not only hereditary servitude but all the badges and incidents associated with it.⁶³⁴ The veneration of Confederate symbols on governmental property makes the guarantee of liberty more tenuous. They glorify the memory of a government that zealously denied blacks the right to live free from the uncertainties of racial intolerance and perpetuated an exclusionary ideology. Such symbolic displays reduce the general welfare of U.S. society

^{631.} See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-13 (2d ed. 1988) (describing wide breadth of congressional power under Thirteenth Amendment).

⁶³². See Pittman, supra note 499, at 859-60 (discussing how strict scrutiny analysis should apply to discriminations which violate Thirteenth Amendment).

^{633.} In *Coleman*, appellant relied only on his own testimony "to demonstrate a disproportionate racial effect." *Coleman*, 117 F.3d at 530. The Appellant in *Hunt* also presented insufficient factual evidence to prove his claim. *Hunt*, 891 F. 2d at 1563.

^{634.} See CONG. GLOBE, 38th Cong., 1st Sess. 1439-40 (1864) (transcribing Senator James Harlan's stated Amendment was to alleviate "incidents of slavery"); see also CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (reporting Senator Lyman Trumbull's comments on "badges of slavery").

because they are harmful to its citizens' sense of security. Not only can Congress prohibit acts of arbitrary prejudice, but it can also do the same to state sponsored and financed logos that depict symbols of racial oppression. Any symbols that reduce a groups' ability to live freely according to the laws of a representative government are indicia of servitude. They make persons leery about public safety, thereby restricting their mobility.635 They also legitimize supremacist ideologies and increase the incidents of employment and habitation discrimination. 636 Prejudice augments in the public mind when it redoubles the efforts of its ideological precursors. That is, discrimination that builds on existing well-known, deprecatory ideations is most capable of influencing a large and diverse group of followers. This was the modus operandi of Nazism, which built a following by using traditional German anti-Semitism, 637 and of the proslavery movement, which developed along the lines of longstanding supremacism in the United States. 638 Federal prohibitions, enacted pursuant to the second clause of the Thirteenth Amendment, against state sponsored displays of Confederate symbols do not violate the First Amendment. 639 Confederate symbols impede personal autonomy because they place persons, in particular blacks, on notice that they are outsiders living freely only at the dominant group's behests. Those symbols laud the works of persons who sought to maintain a system of involuntary servitude, and therefore they are not heroes to the progeny of the slaves or others who strive for a fair society.⁶⁴⁰ By eliminating from government property signs that harken back to the United States' darkest hours, the federal government can better protect the freedoms of a historically persecuted minority.

While the Supreme Court, for a time, eviscerated the substance of the Thirteenth Amendment through its holdings in the Civil Rights Cases, Plessy v. Ferguson, and Hodges v. United States, it could not dampen the spirit of liberty which had been imprinted into the Constitution. In time, the Court returned to the broad reading suggested by the first Justice Harlan in his famous dissents. Jones v. Alfred H. Mayer Co. highlighted Congress' power to prevent arbitrary, racial abuses of citizens' individual rights. As long as Confederate symbols cast a

^{635.} john a. powell, As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society, 16 LAW & INEQ. J. 97, 109 (1998).

^{636.} See Part IV for a discussion of confederate symbolism.

^{637.} See JOHN WEISS, IDEOLOGY OF DEATH 98 (1996) (elaborating on some of ideological precursors of Nazi Germany); Alexander Tsesis, The Empirical Shortcomings of First Amendment Jurisprudence: An Historical Perspective on the Power of Hate Speech, 40 SANTA CLARA L. REV. 729, 740-47 (showing that Nazi anti-Semitic propaganda often was based on prior German prejudices).

^{638.} See Tsesis, supra note 637, at 751-55 (discussing development of Negrophobic propaganda in U.S.). See generally WILLIAM SUMNER JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH (Peter Smith ed. 1960) (explaining proslavery thought in ante-bellum South).

^{639.} See Amar, supra note 87, at 157 (arguing that prohibitions against hate speech are based on values of the Reconstruction Amendments and do not threaten core First Amendment principles).

^{640.} See Charles H. Jones, Jr., An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. § 241 and the Thirteenth Amendment, 21 HARV. C.R.-C.L. L. REV. 689, 735-36 (1986) (arguing that Thirteenth Amendment proscribes racially motivated violence because such violence impedes freedom).

tolerant aura on the Old South's racist past, some badges and incidents of servitude will remain.



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