Sleeping Giant?: Section Two of the Thirteenth Amendment, Hate Crimes Legislation, and Academia's Favorite New Vehicle for the Expansion of Federal Power

By Gail Heriot & Alison Schmauch Somin***

Note from the Editor:

This article examines the original meaning, purpose, and history of the Thirteenth Amendment and recent hate crimes legislation enacted by Congress using its Thirteenth Amendment power. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the authors. The Federalist Society seeks to foster further discussion and debate about the constitutional and policy issues involved with hate crimes and the Thirteenth Amendment. To this end, we offer links below to different perspectives on the issue, and we invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

- Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. Penn. J. Con. L. 1337 (2009): http://ecommons.luc.edu/cgi/viewcontent.cgi?article=1039&context=law_facpubs.
- The Matthew Shepard Hate Crimes Precention Act of 2009: Before the S. Comm. on the Judiciary, 111th Cong. 1 (2009) (statement of Eric W. Holder, Jr. Att'y Gen. of the United States): http://www.judiciary.senate.gov/pdf/06-25-09HolderTestimony.pdf
- The Matthew Shepard and James Byrd, Jr. Hate Crimes Precention Act of 2009: http://dpc.senate.gov/dpcdoc.cfm?doc_name=lb-111-1-97
- Prof. Dawinder S. Sidhu, *The Meaning and Viability of the Thirteenth Amendment*, The Hill's Congress Blog, Jan. 7, 2013: http://thehill.com/blogs/congress-blog/civil-rights/275887-the-meaning-and-viability-of-the-thirteenth-amendment

A brief look at the Thirteenth Amendment might suggest that it has rather limited application in today's world. The full text provides:

> 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.[1]

Indeed, when one of the authors of this essay told a friend that she was going to an all-day academic conference on contemporary applications of the Thirteenth Amendment, he expressed shock that there could be any need to discuss this subject and inquired if he had missed a campaign proposal by Newt Gingrich to revive chattel slavery.

He was joking—obviously. Hardly anyone is foolish enough to believe that chattel slavery is in danger of making an imminent or not-so-imminent comeback in America. Mr. Gingrich was being unfairly (though playfully) maligned. Nevertheless, there has been a growing movement in both academia and the halls of Congress to use the Thirteenth Amendment's Section 2 to address a variety of social ills thought to be in some way traceable back to slavery. This movement has had its greatest recent success with the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA). In passing that law, Congress relied solely on its Section 2 constitutional authority for its ban on crimes motivated by race and color.[2] (Congress relied on its Commerce Clause power for its ban on crimes motivated by gender, sexual orientation, gender identity and disability and therefore the statute requires proof of some interstate commerce nexus for a conviction on those bases. For crimes motivated by religion and national origin, Congress relied on both powers.)

In this essay, we discuss some issues presented by a broad conception of Section 2. We also survey the literature calling for legislation based on a broad conception of Section 2 and briefly note that conception's potential to be a double-edged sword.

I. Legislative History and Case Law Interpreting the Thirteenth Amendment

Section 1's straightforward text mostly speaks for itself. Modern scholars have sometimes quoted lofty rhetoric about its purpose and likely consequences,[3] but in the end its legal significance is unusually clear for a constitutional amendment: It bans slavery and involuntary servitude.[4] In the Supreme Court's words, it is "undoubtedly self-executing."[5] That self-executing character limits the extent to which it can or should be broadly or metaphorically construed.[6]

As for Section 2, there was relatively little discussion regarding its proper interpretation in the congressional

**Gail Heriot is a Professor of Law at the University of San Diego School of Law and a Member of the United States Commission on Civil Rights.*
***Alison Schmauch Somin is a special assistant and counsel at the U.S. Commission on Civil Rights.*

debates about the Thirteenth Amendment. Amendment co-author Senator Lyman Trumbull and supporter Representative Chilton White both said that Congress's enforcement powers resembled those that it had under the Necessary and Proper Clause.[7] Following *McCulloch v. Maryland*, Trumbull and White's comments suggest that they agreed with Chief Justice Marshall's well-known explication of that clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[8] Put differently, Trumbull and White's comments suggest that courts should review deferentially the means that Congress chooses to achieve a particular end, but that courts should not show such deference regarding the legitimacy of the ends of such legislation.[9] Under that view, Section 2 legislation may be somewhat prophylactic in nature, but it must have as its end the effectuation of Section 1 and not some other goal.[10]

The first Supreme Court cases interpreting Section 2 declined to read the section expansively. *United States v. Harris*, the first such case, concerned the Ku Klux Klan Act of 1871, which stated in part: "If two or more person in any state or territory conspire or go in disguise upon the highway . . . for the purpose of depriving . . . any person . . . of the equal protection of the laws … each of said persons shall be punished by a fine . . . or by imprisonment . . . ." The Court held that this was not a permissible exercise of Congress's Section 2 power because it covered conspiracies by white persons against a white person or by black persons against a black person who had never been enslaved.[11]

Ten months later, in the *Civil Rights Cases*, the Court again held a federal statute to be an improper exercise of Congress's Section 2 power—this time the Civil Rights Act of 1875, which had guaranteed "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement." The *Civil Rights Cases* first established that unlike the Fourteenth Amendment, which governs only state action, the Thirteenth Amendment governs private conduct and thus permits Congress to regulate such conduct directly.[12] The Court nevertheless held that Section 2 did not permit Congress to prohibit race discrimination in public accommodations. While Congress had the power to "pass all laws necessary and proper for abolishing all badges and incidents of slavery," being refused service at a hotel or restaurant on account of one's race was not such a badge or incident.[13]

The phrase "badges and incidents" of slavery has endured in Thirteenth Amendment case law into modern times and thus demands our attention. It was in widespread use before the Civil War. The "incidents" half of the phrase had a more determinate legal meaning. The 1857 edition of Bouvier's Law Dictionary defined an "incident" as a "thing depending upon, appertaining to, or following another, called the principal."[14] According to Professor Jennifer Mason McAward, a leading scholar of the Thirteenth Amendment, an "incident" of slavery was "an aspect of the law that was inherently tied to or that flowed directly from the institution of slavery—a legal restriction that applied to slaves qua slaves or a legal right that inhered in slave owners qua slave owners."[15] The clearest incident of slavery is, of course, compulsory service—since it is both necessary and arguably sufficient to create the slave-owner relationship. But the inability to marry, the inability to acquire property, and the deprivation of any status in a court of law, either as a litigant or a witness, could also be described as incidents of slavery as it was practiced in the American South. The term was indeed used in the congressional debates regarding the Thirteenth Amendment and the Civil Rights Act of 1866 in precisely this sense.[16]

"Badges," by contrast, was a more open-ended term that did not have a precise legal meaning but that was nonetheless used widely in antebellum abolitionist popular writing. Mid-nineteenth-century dictionary definitions are not terribly different from modern ones: one dictionary defines "badge" as "a mark or sign worn by some persons, or placed upon certain things for the purpose of designation."[17] Some "badges of slavery" were quite literal. In 18th and 19th-century Charleston, South Carolina, the city issued copper slave badges to all slaves-for-hire identifying the particular slave's trade (e.g. porter, mechanic, or fisher) and official number.[18] In addition, across the South, slaves were forbidden by law to travel without the permission of their owners. Consequently, travel passes had to be issued to those who had permission.[19] Sometimes these took the form of a letter from the owner, and sometimes they were tickets issued in the name of the particular plantation from which the slave came. A slave found to be travelling without such a pass by a slave patrol could be punished. The requirement that slaves have permission to travel was certainly an "incident of slavery"; the copper badges issued by Charleston were the clearest case of a "badge of slavery." But travel passes may also be one of the stronger cases of a "badge of slavery."

But the terms "badge" and "badge of slavery" were also being used metaphorically at the time.[20] "Badge of slavery" was commonly used to refer to dark skin, but it also had other meanings. Some abolitionists referred, for example, to physically grueling labor as a "badge of slavery."[21] It is fair to say, however, that "badge" was ordinarily used to describe a characteristic that was distinctively associated with slave status and not one that could be commonly associated with both slave and non-slave status.

After the Civil War, however, the distinction between incidents and badges appears to have been lost. The phrase "badge of slavery" was used only twice during the debates over the Civil Rights Act of 1866. There, Senator Lyman Trumbull appears to use it essentially as a synonym for "incidents," as did the Supreme Court in the *Civil Rights Cases*.[22]

Congress's Section 2 power fell out of use following the *Civil Rights Cases*. It is not clear whether this was because the Court's decision limited that power or (more likely, in our opinion) because Congress felt that it had already erected the statutory framework needed to fulfill Section 1's promise. For about a century, most of the Thirteenth Amendment action involved the enforcement of the Peonage Abolition Act of 1867, which had outlawed peonage:

> The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited . . . and all acts, laws, resolutions, orders, regulations or usages . . . of any territory or state, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any person . . . in liquidation of any debt . . . are declared null and void.

Between the turn of the twentieth century and about 1945, the federal government prosecuted more than 100 peonage cases. In the years since emancipation, sharecroppers and agricultural laborers had come to be ensnared in a cycle of debt that sometimes obliged them to remain on the plantations. A complex web of laws—criminal laws for breach of contract and for vagrancy, etc.—supported a system that roughly approximated many of the attributes of antebellum slavery.[23] In order to abolish peonage, these laws had to be dismantled one by one—a task that involved multiple trips to the Supreme Court by both the United States and private litigants.[24] It is fair to call such laws "incidents of peonage."

The most notable thing about the struggle to abolish peonage is that it is near the core of what one would expect the Thirteenth Amendment to cover. These cases were not about an extension of Section 1's prohibition to some direct or indirect consequence of a system of slavery that had been abolished a century before. As far as Congress was concerned in 1867 and most Americans today, peonage *was* a form of slavery.

Things became a lot more creative in the 1960s. It was then that the Supreme Court issued an extraordinarily expansive "badges and incidents" decision—*Jones v. Alfred H. Mayer & Co*. *Jones* concerned a suburban St. Louis real-estate developer's policy of not selling homes to African-Americans.[25] Joseph Lee Jones and his wife Barbara Jo, an interracial couple, brought suit. Their problem, however, was that the Fair Housing Act was not passed until the week *after* their case had been argued in the U.S. Supreme Court. Instead, they had brought suit under a then-obscure section of the Civil Rights Act of 1866. It read: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase lease, sell, hold, and convey real and personal property." Much of *Jones*'s analysis deals with a question of statutory interpretation—whether these words amounted to a ban on race discrimination by private sellers in real estate transactions. The Court held that they did. This was a decision that we believe was not just a mistake, but an egregious misreading of history—for reasons discussed by Professor Gerhard Casper in his classic article, Jones v. Mayer*: Clio, Bemused and Confused Muse*.[26] Briefly stated, prior to emancipation, slaves did not have the legal capacity to own, purchase, or sell property. No transaction they might enter into could be enforced in court either by them or against them (and therefore few would be willing to transact with them). The legal capacity to purchase property is not, however, the same thing as the right to insist that others agree to sell. To view the question otherwise would be akin to saying that a "right to marriage" encompasses the right to marry someone who doesn't wish to marry you.

The *Jones* decision went on to address whether Congress was authorized by Section 2 of the Thirteenth Amendment to pass such a law in 1866. In analyzing this question, the Court once again used the "badges and incidents" terminology to describe the appropriate objects of Congress's power under Section 2.[27] But the Court was more explicitly deferential to Congress than it had been before by holding that Congress's determination that particular conduct is a "badge" or "incident" of slavery is subject only to rational-basis review.[28] The willingness of sellers to discriminate on the basis of race was held to be a badge or incident of slavery.

Note the Court's peculiar reasoning. First, the Court misinterpreted the statute by finding that the statute prohibits race discrimination by private parties engaged in the sale or lease of property—when it is overwhelmingly likely that Congress intended no such thing. Then it deferred to Congress's judgment on the question of whether Section 2 accords Congress the authority to prohibit such race discrimination—when Congress made no such judgment.

Jones was clearly inconsistent with the *Civil Rights Cases*. If Congress did not have the authority under Section 2 to prohibit race discrimination in public accommodations in the *Civil Rights Cases*, it is difficult to see how it could have the authority under Section 2 to prohibit race discrimination in the purchase and sale of real estate. It seems unlikely that race discrimination in the sale or lease of homes is either a badge or incident of slavery or a way of getting at a badge or incident of slavery but that race discrimination in public accommodations is not.[29]

Jones was decided in the midst of a tumultuous few months in American history. Among other things, the Rev. Martin Luther King, Jr. was assassinated just two days after oral argument wrapped up.[30] The Court had reason at the time for desiring to construe both the law and the Constitution broadly. But the constitutional issue in the *Jones* decision itself can be construed narrowly. Note that the Court was construing a statute that was passed in 1866, a time when the nation was still in the process of dismantling the actual institution of slavery, not in sorting out its long-term effects on the course of history. Under the circumstances, giving Congress considerable discretion in identifying the badges and incidents of slavery is best viewed as deferring to Congress on the means of ridding the nation of slavery, not as deferring to Congress on what constitutes slavery or involuntary servitude. A 21st-century statute outlawing private discrimination in housing (or the HCPA) would not be due the same deference, since dismantling slavery itself is no longer the problem. What is left is simply deciding what to do with its historical vestiges.

The only problem with this narrow interpretation of *Jones* is that the opinion itself contains casual language that suggests the Court was thinking more broadly. In a footnote, the Court suggests that Congress could take aim not just at slavery, but at the last "vestiges of slavery."[31] In another part of the opinion, it appears to suggest that wiping out "the relic[s] of slavery" is authorized.[32] Equating the "badges and incidents of slavery"

with the "relic[s]" and "vestiges of slavery" is dictum, of course, since it was unnecessary to the opinion. But dictum extending the power of the federal government has a funny way of being taken seriously.[33]

In future Thirteenth Amendment cases, however, it seems quite likely that the Supreme Court will reject the "vestiges" and "relics" language or perhaps even explicitly overrule *Jones*' Thirteenth Amendment holding.[34] *Jones* was part of a trio of cases from that period that have been interpreted to require considerable deference to Congress when it exercises its powers under the Reconstruction Amendments.[35] Later decisions have reasserted *McCulloch v. Maryland*'s notion that deference is to the means by which Congress carries out the goals of the Fourteenth Amendment, not the goals themselves. In *City of Boerne v. Flores*, the Court held that it is the job of the Court to determine what constitutes a substantive violation of the Fourteenth Amendment. While Congress has the power under the Fourteenth Amendment's Section 5 to promulgate prophylactic rules aimed at dealing with those substantive violations, there must be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[36]

Subsequent cases have added that the reviewing court must confirm that a subject is an appropriate target for prophylactic legislation by "identifying the constitutional right that Congress sought to enforce" and ensuring, through legislative history and findings, an identified "history and pattern of constitutional violations by the states" with respect to that right. If there is such a legislative record, the Court must then "determine whether the challenged legislation is an appropriate response to the history and pattern by asking whether the rights and remedies created by the statute are congruent and proportional to the constitutional right being enforced."[37] In other words, Fourteenth Amendment legislation receives much more detailed scrutiny than the bare-bones rational-basis review required by *Jones*.

Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment are textually nearly identical, containing all the same words but with the key clauses arranged in a slightly different order. Section 2 reads, "Congress shall have power to enforce this article by appropriate legislation," and Section 5 of the Fourteenth Amendment reads "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[38] Given these similarities, there is no apparent reason why "appropriate" should have a different meaning in each section. Instead, it seems overwhelmingly likely that the Court would apply *City of Boerne* and its progeny to the Thirteenth Amendment's Section 2.

If *City of Boerne* applies to Section 2 cases, it underlines that Section 1 prohibits actual slavery and involuntary servitude—as those terms are defined by the Court. It does not prohibit things that bear some causal relationship with slavery. While Congress may enact prophylactic rules to effectuate that end (and hence may ban certain "incidents" and "badges" of slavery), those rules must be congruent and proportional to the problem. Since almost no one is expecting slavery to be making a comeback, that limitation on Congress's Section 2 power is a very serious one.

The alternative is to take *Jones*' reference to "relic[s]" and "vestiges" as authority for Congress to obliterate anything with any kind of connection to slavery. But that construction would provide Congress with something very close to a general police power—something that was not intended by the Thirteenth Amendment's ratifiers and is certainly not to be wished for by anyone who values limited government.[39] The problem with equating the "badges and incidents" of slavery with the "relic[s]" and "vestiges" of slavery is that nearly everything has some historic connection with slavery. For example, if not for slavery, few African-Americans would have come to this country in the 17th, 18th and 19th centuries. It is likely that few would live here now. And African-Americans are not the only ones who would not be here. Nobody living today would be here, since it is unlikely that anyone's ancestors would have immigrated and/or paired off quite the way they did and produced quite the same descendants if slavery, the abolition movement, the Civil War, the Reconstruction Era, the period of Jim Crow, and the Civil Rights Movement had not happened. Everything, large and small, good and bad, would be different in ways we can barely imagine. There are relics and vestiges of slavery everywhere, just as there are relics and vestiges of the struggle to end it and of every other significant chapter in history.

II. The Thirteenth Amendment and Hate Crimes

Thirteenth Amendment bulls have already had one major legislative victory with the passage of the Mathew Shepard Hate Crimes Prevention Act (HCPA) of 2009. It provides in relevant part:

> (1) OFFENSES INVOLVING ACTUAL OR PERCEIVED RACE, COLOR, RELIGION, OR NATIONAL ORIGIN—Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person—
>
> (A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and
> (B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—
> (i) death results from the offense; or
> (ii) the offense includes kidnapping . . . aggravated sexual abuse . . . or an attempt to kill.[40]

Congress asserted that the Thirteenth Amendment gave it power to pass this legislation with the following finding:

> For generations, the institutions of slavery and involuntary servitude were defined by the race, color and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because

> of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.[41]

A very similar provision follows setting forth prohibitions on hate crimes on the basis of actual or perceived religion, national origin, gender, sexual orientation, gender identity, and disability. But the government may only prosecute such crimes if an adequate link between the circumstances of the criminal conduct and interstate commerce exists.[42] Potentially, the Thirteenth Amendment would thus permit Congress to prohibit some hate crimes that the Commerce Clause does not, although commentators have alleged that nearly all hate crimes can be shown to have some connection to interstate commerce.

Such a use of the Thirteenth Amendment seems to us to be more than a stretch. Congress may surely ban slavery and involuntary servitude. But it does not need to, since Section 1's ban is self-executing. Under Section 2, Congress may also punish those who engage in slavery and involuntary servitude. Less obviously, but grounded in the legislative history and established in the case law, it may ban the badges and incidents of slavery as a means of banning slavery itself. Indeed, it may do so even when this will cause it to "overshoot" its target of banning slavery and involuntary servitude, since doing so is often an appropriate way to ensure that slavery and involuntary servitude are indeed banned. In some sense, of course, slavery is simply the sum of its legal incidents; the only way to abolish it is to abolish the legal incidents that make it possible. Section 2 is flexible in allowing Congress the means by which to abolish and forever ban slavery and involuntary servitude.

But hardly anyone would claim that Congress's goal in passing the HCPA was to prohibit slavery or to prevent its return. Section 7(a)(1) is a ban on violent crime that occurs "because of" somebody's race, color, religion, or national origin. It appears to be intended to, well, ban violent crime that occurs "because of" somebody's race, color, religion, or national origin—although less charitable interpretations of congressional motivations are surely possible, too.[43]

The HCPA does not target an incident of slavery. It does not remove a legal disability imposed on slaves or a legal right accorded to slave owners. Indeed, it is not even one step removed from an incident of slavery in the sense that it does not attempt to remove a legal disability imposed on former slaves or slave descendants or a legal right accorded to the descendant of former slave owners or their descendants. It does not alter anyone's legal status. It simply adds federal penalties for conduct that was already illegal.

Nor does it target a badge of slavery. As Professor George Rutherglen has explained, the term "badge" is meant to refer to a "characteristic indicative of slave status." That is, a badge of slavery should be something that is distinctively associated with slavery. It should not refer to characteristics that can be commonly associated either with being a slave or not being a slave. It is not just that being the victim of bias crime is not such a badge.[44] It is not even a badge of former enslavement or of having been descended from slaves. No one is immune from bias crimes. Just like the statute held unconstitutional in *United States v. Harris*, the HCPA applies to everyone, regardless of race.[45] One need only read the newspapers to know members of all races are the victims of crimes motivated by race. [46] While one could argue that crimes against whites may have reflected anger or resentment influenced by slavery's history, other bias crimes, like those aimed at Asian-Americans, cannot be connected to slavery so easily.

If bias crimes had anything other than the mildest association with the nation's history of slavery, one might expect to see evidence in the HCPA's congressional record that there were more such crimes in the former slave states of the Deep South than in New England. Yet the statistics cited in the record show just the opposite.[47] Moreover, these statistics further show—and the HCPA reflects—that bias crimes are often based on things that are completely unrelated to race—like religion, sex, sexual orientation, disability, etc. Domestically, slightly less than half of the bias crimes reported to the FBI in 2010 (the most recent year for which data was available as of this writing) were based on racial bias and instead were based on other biases.[48] Moreover, in countries that have never had legal institutions resembling American antebellum slavery, such as France and Germany, bias crimes have been reported in the media to be a problem.[49] American antebellum slavery may have exacerbated or prolonged certain forms of racial bias, but the general problem of bias and crimes based on it is unfortunately hardly a distinctive characteristic of slave societies.

Under the circumstances, it seems unlikely that Congress's assertion of jurisdiction over hate crimes will be seen as congruent and proportional to the problem of slavery and involuntary servitude.

III. Potential Future Directions in Section Two Legislation

The HCPA is not the only effort to make use of Section 2 in light of the breadth of the *Jones* decision. Scholarly articles argue that Section 2 authorizes hate-speech regulation;[50] bans on housing discrimination based on sexual orientation;[51] federal civil remedies for victims of domestic violence;[52] federal child labor bans;[53] bans on racial profiling;[54] minimum-wage laws like the Fair Labor Standards Act;[55] federal regulation of the mail-order bride industry;[56] bans on race-based jury peremptory challenges;[57] regulation of racial disparities in capital punishment;[58] regulation of environmental problems in African-American communities;[59] state laws like Colorado's Amendment 2 that prohibit states and localities from passing bans on sexual orientation discrimination;[60] regulation of the use of the Confederate battle flag;[61] laws that aim to protect employees' privacy and autonomy;[62] federally funded job-training programs for the urban underclass;[63] federal guarantees of public education;[64] a federal ban on rape;[65] anti-sexual harassment laws;[66] legislation protecting "reproductive freedom"; [67] bans on payday lending;[68] and even changes to our nation's "malapportioned, undemocratic presidential election system" because of its adoption on the alleged basis of

"appeasement to southern slaveholding interests."[69]

Predicating these proposals on the Thirteenth Amendment may seem fanciful now. But, for good or ill, today's fanciful academic ideas sometimes become tomorrow's legislation. Few would have predicted a generation before it happened the growth of the Commerce Clause power that occurred in the 20th century.[70] Who, for example, would have predicted *Wickard v. Filburn*?[71] The HPCA proves that academic proposals to employ Section 2 have not been wholly ignored.

Most of the academic calls for expansive readings of Section 2 have come in support of policy proposals that are typically more popular with the political left than the right. Three Supreme Court Commerce Clause decisions of the last twenty years—*United States v. Lopez*,[72] *United States v. Morrison*,[73] and *National Federation of Independent Business v. Sebelius*[74]—have clarified the scope of the Commerce Clause power. They have suggested that this power is more limited than many lawyers and academics previously understood it to be (although vastly more expansive than the framers may have expected it to be). The holding of *City of Boerne v. Flores* similarly suggested that this grant of power under Section 5 of the Fourteenth Amendment was also more limited than some had previously thought. Political liberals and progressives have since been searching for alternative constitutional groundings for general economic or civil rights legislation that they favor, and the breadth of *Jones* has made Section 2 seem like one such attractive constitutional foundation for such legislation. Some liberal and progressive academics more or less explicitly acknowledge that they find broad readings of Section 2 attractive for this reason.[75] Despite the low likelihood that the arguments of these Thirteenth Amendment optimists will prove successful in court, one legal scholar notes that the broader movement may still have value in mobilizing political progressives to work on behalf of favored causes: "The most productive use of Thirteenth Amendment optimism lies not in encouraging appellate lawyers and judges to incorporate Thirteenth Amendment arguments into briefing and judicial decisions but rather in stimulating a political movement to broaden its imagination and understand its ends in Thirteenth Amendment terms."[76]

Perhaps, but at this point we note only that the lone bill proposed during this session of the 112th Congress that explicitly cites Section 2 as Congress's constitutional authority for passing it—the Pregnancy Nondiscrimination Act (PRENDA)—was proposed by Republicans, on behalf of a cause ordinarily classified as politically conservative. PRENDA would ban the performance of a sex-selection or race-selection abortion, coercion to undergo either, the acceptance or solicitation of funds for either, and the transportation of a woman into the United States or across state lines to obtain either.[77] The Committee Report cites the *Jones* decision for the proposition that "the Thirteenth Amendment prohibits slavery, and the opposite of slavery is liberty. Therefore any unwarranted restrictions on liberty that are race based, may be considered 'incidents' of slavery, and section 2 of the Thirteenth Amendment empowers Congress to protect citizens from unjust restrictions on liberty."[78]

As far as we are aware, there is no historical evidence showing that race-selective abortion was a distinctive feature or badge of chattel slavery. (Indeed, there is some evidence that female slaves were often coerced into bearing more children than they might have wished because of the economic benefits that additional slave children provided to their masters.[79]) Therefore, we are inclined to conclude that the Thirteenth Amendment does not give Congress the power to enact PRENDA, although other constitutional provisions might.[80]

It is unclear to us whether PRENDA is a sign that the academic commentators are wrong about the likely political valence of broad readings of Section 2.[81] What is clearer to us is that politicians of all stripes like broad grants of power, and that they are therefore likely to use broadly granted powers in ways that those advocating for the grant of power often could not have at first readily imagined. That is why broad grants of power to politicians are undesirable. Perhaps the best way to prevent legislators from so going beyond the limits of their constitutionally granted powers is for courts to pay close attention to the text and original meaning of the relevant constitutional provisions and vigorously enforce appropriate limits on such powers.

Endnotes

1 U.S. Const. amend. XIII.

2 18 U.S.C. § 249 (2011).

3 Jennifer Mason McAward, *Congressional Authority to Interpret the Thirteenth Amendment: A Response to Professor Tsesis*, 71 Md. L. Rev. 60, 64–65 (2011) (responding to Alexander Tsesis's citations to the Congressional Globe in the service of supporting broad readings of Section 2); Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 Md. L. Rev. 40 (2011). For a more complete exposition of the congressional debates and subsequent case law relating to the Thirteenth Amendment than we can provide in this short essay, see Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment After* City of Boerne v. Flores, 88 Wash. U. L. Rev. 77 (2010) [hereinafter McAward, *Scope*]; Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. Pa. J. Const. L. 561 (2012) [hereinafter McAward, *Defining the Badges*].

4 Just about everyone agrees that the primary evil at which Section 1 was targeted was chattel slavery of African-Americans as it existed before the Civil War in the American South. There is less agreement over whether Section 1's ban on slavery and involuntary servitude extends to modern and historic forms of forced labor that in some ways resemble antebellum slavery but in other ways are quite different—*e.g.*, traditional apprenticeship; indentured servitudes of short duration; the military draft; mandatory community service requirements for high-school students; proposals for six months or a year of mandatory national service for teenagers that are sometimes likened to a universal civilian draft; and even the confinement of zoo or circus animals that perform for crowds without compensation. In this article, we need not take a position on whether any of these practices, all of which in some sense involve "involuntary servitude," fall within the scope of the Section 2 (other than the last one, which we are happy to label as just plain silly). Instead, our primary concern is that the courts and many in Congress have embraced too broad a conception of Congress's enforcement power to ban activities that are not in any sense "slavery" or "involuntary servitude" under Section 2. Likewise, our occasional comments about Thirteenth Amendment bulls, bears, optimists, pessimists, etc. refer to different views on Section 2 and should not be taken as a commentary on how broadly the self-executing Section 1 ought to be read.

5 *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883). Section 1's text was modeled after the Northwest Ordinance, and there was already a history of case law interpreting that language at the time of its adoption. *See* Butler v. Perry, 240 U.S. 328 (1916).

6 Self-executing constitutional prohibitions are poor candidates for broad interpretation, since such an interpretation would create the potential for overreach by the judiciary. For example, as noted in *supra* note 4, some advocates have argued in federal court that Section 1 prohibits the confinement of zoo or circus animals that perform for crowds. *See* Michael Winter, *Judge Dismisses PETA "Slavery" Suit Over SeaWorld Orcas*, USA Today, Feb. 8, 2012; *supra* note 4. If the federal courts were to adopt this or any other extremely aggressive view, Congress would have no power to reject that result. Only a constitutional amendment could do that. The comments of one of the Thirteenth Amendment's co-authors, Senator Lyman Trumbull, that the effect of the Amendment was only to "rid the country of slavery" suggested that his conception of the Amendment's reach was quite narrow. Cong. Globe, 38th Cong., 1st Sess. 1314 (1864). Indeed, in this respect his reading was arguably narrower than the text, which banned both slavery and involuntary servitude. His comment suggests that "involuntary servitude" was included simply to reduce the chance that "slavery" would be given an unduly narrow construction and not to augment the prohibition.

An interesting debate developed almost immediately about the Thirteenth Amendment's reach. Senator John Brooks Henderson, one of the Amendment's co-authors, argued that it conferred or could confer only freedom upon the freed slave. *See* Cong. Globe, 38th Cong., 1st Sess. 1465 (1864). According the Senator James Harlan, it conferred rights such as "the right to acquir[e] and hol[d] property," the deprivation of which was a "necessary incident" to slavery. Cong. Globe, 38th Cong., 1st Sess. 1439–40 (1864). This issue became highly significant in the debates over the Civil Rights Act of 1866, which purported to confer those rights on all citizens regardless of race. *See* McAward, *Scope*, *supra* note 3, at 109–114.

President Andrew Johnson vetoed that legislation in part on the ground that the Thirteenth Amendment did not authorize Congress to require states to confer upon freedmen the legal capacity to buy, sell, or own property and that this was therefore a matter for the States. Congress overrode his veto. Just to be sure of its authority, however, Congress re-enacted these provisions as the Civil Rights Act of 1870 after the ratification of the Fourteenth Amendment, which among other things requires states to accord all persons the equal protection of the laws.

This shows where the battle lines were then drawn in the debate over the Thirteenth Amendment's interpretation. There is no doubt that the legal incapacity to purchase, own, and convey property was a hugely important incident of a slave's status and that slavery was still in the process of being dismantled at the time. Yet it was controversial whether Congress had the power under Section 2 to confer that legal capacity. Note that the re-enactment in 1870 has significant bearing on the later controversy over *Jones v. Alfred H. Mayer & Co.*, 392 U.S. 409 (1968). *See infra* notes 26–35 and accompanying text. If, as the *Jones* decision concluded, a statute conferring the right to own, purchase, and convey property should be interpreted as a prohibition on race discrimination in the purchase and sale of property by private parties, then re-enactment under the Fourteenth Amendment, which clearly applies only to state action, did not address President Johnson's constitutional objections. The overwhelmingly likely explanation is that *Jones* misinterpreted the Act and it was never intended to cover anything but the legal capacity to own, purchase, and convey.

7 Cong. Globe, 38th Cong., 1st Sess. 553 (1864) (statement of Sen. Trumbull); *id.* at 1313; Cong. Globe, 38th Cong., 2d Sess. 214 (1865) (statement of Rep. White).

8 McCulloch v. Maryland, 17 U.S. 216 (1819).

9 *See* McAward, *Scope*, *supra* note 3.

10 More expansive views of the potential of Section 2 could be found in speeches made by the Amendment's opponents in both Congress and in the state-level ratification debates. But the speakers on those occasions were not arguing that an expansive view was desirable. They were arguing that the Amendment should be rejected. *See, e.g.*, *id.* at 106–08 (summarizing comments made during ratification debates); *see also* George Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, *in* Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment 163 (Alexander Tsesis ed., 2010).

11 United States v. Harris, 106 U.S. 629 (1883).

12 The Civil Rights Cases, 109 U.S. 3, 11 (1883).

13 *Id.* at 20.

14 McAward, *Defining the Badges*, *supra* note 3, at 570 (citing Bouvier's Law Dictionary 617 (7th ed. 1857)).

15 McAward, *Defining the Badges*, *supra* note 3, at 572. McAward's article also gives additional examples of the ways in which antebellum courts used "incident" in precisely this legal sense. *See also* Rutherglen, *supra* note 10.

16 McAward, *Scope*, *supra* note 3, at 126.

17 McAward, *Defining the Badges*, *supra* note 3, at 575 (citing Bouvier's Law Dictionary 151 (7th ed. 1857)); Webster's Encyclopedic Dictionary of the English Language 93 (Fallows ed., 1900) (reprinting definitions from 1864 ed.) (defining "badge" as "[a] mark, sign, token, or thing, by which a person is distinguished, in a particular place or employment, and designating his relation to a person or to a particular occupation; as, the badge of authority")).

18 *See* Harlan Greene, Harry S. Hutchins, Jr. & Brian E. Hutchins, Slave Badges and The Slave-Hire System in Charleston, South Carolina 1783–1865 (2008). These slave badges are considered collectible today. Several are available on Ebay and apparently sell for well over a thousand dollars each.

19 Charles Joyner, Down By The Riverside: A South Carolina Slave Community 132 (1985); Kenneth M. Stampp, The Peculiar Institution: Slavery in the Ante-Bellum South (Vintage Books ed. 1989).

20 For example, the phrase "badge of fraud" occasionally appears in antebellum cases to refer to sham transactions made to shield a debtors' assets from creditors. Rutherglen, *supra* note 10, at 166.

21 McAward, *Defining The Badges*, *supra* note 3, at 576–78.

22 109 U.S. 3 (1883).

23 Benno Schmidt, Jr., *Peonage*, *in* The Oxford Companion to The Supreme Court of The United States 729 (Kermit Hall, James W. Ely & Joel B. Grossman eds., 2005).

24 Pollock v. Williams, 322 U.S. 4 (1944); United States v. Gaskins, 320 U.S. 527 (1944); Taylor v. Georgia, 315 U.S. 25 (1942); United States v. Reynolds, 235 U.S. 133 (1914); Bailey v. Alabama, 219 U.S. 219 (1911); Clyatt v. United States, 197 U.S. 207 (1905).

25 392 U.S. 409 (1968).

26 *See* Gerhard Casper, Jones v. Mayer*: Clio, Bemused and Confused Muse*, 1968 Sup. Ct. Rev. 89 (1968) (explaining the error of *Jones*' interpretation of the Civil Rights Act of 1866); *see also* George Rutherglen, *The Improbable Story of Section 1981: Clio Still Bemused and Confused*, 2003 Sup. Ct. Rev. 303 (2003) (a retrospective look at *Jones* and its progeny); Louis Henkin, *Foreword: On Drawing Lines*, *in The Supreme Court 1967 Term*, 82 Harv. L. Rev. 63, 82–87 (1968) (placing the error of *Jones* in the context of the Court's 1968 Term). A similar issue was addressed a generation earlier in connection with the capacity of married women to own property. The New York Married Women's Property Act ensured that married women would have the same right to own and control property as single women. 1848 N.Y. Laws 307, ch. 200. No one has interpreted this law to prohibit a seller from choosing not to do business with a woman because she is married.

Interestingly, the statute in the *Jones* decision applies to both the purchase and sale of property. Presumably, then, not only can Mr. and Mrs. Jones bring a lawsuit for the refusal of Alfred H. Mayer & Co. to sell them a house on account of Mr. Jones' race, but Alfred H. Mayer & Co. could have sued the Joneses for refusing to buy from a seller whose race did not suit them. It also applies to inheritance: A minority member who could convince a court that the deceased would have left him all her estate if only the deceased had not been inclined toward racism would presumably be entitled to damages.

27 *Jones*, 392 U.S. at 439. It did not define those terms, nor did the Court indicate why it had so chosen to include them. Unlike "badge" and "incident," these terms were not in widespread use in the Reconstruction era. See McAward, *Defining the Badges*, *supra* note 3, at 196, for historical analysis on this point.

28 *Jones*, 392 U.S. at 440.

29 If anything, the case for congressional power over public accommodations should be stronger, given the common-law tradition of treating common carriers and innkeepers as quasi-public institutions. Joseph Henry Beale, Jr., The Law of Innkeepers And Hotels 42–50 (1906). The statute at issue in the *Civil Rights Cases* was enacted in 1875. The Civil Rights Act of 1835, 18 Stat. 335 (1875). It seems strange that Congress would pass a statute with the far-more modest goal of ensuring non-discrimination in public accommodations if the Civil Rights Act of 1866 had already outlawed private discrimination in inheritance as well as in the purchase, lease, or conveyance of real and personal property (according to the *Jones* decision's interpretation of Section 1982) and in contracting of any kind (according to *Runyon v. McCrary*, 427 U.S. 160 (1976), which followed *Jones* in interpreting the parallel Section 1981). Yet that is what *Jones* and *Runyon* require readers to believe.

30 Contemporary news events are not always a useful explanation for the actions of courts. In the case of *Jones*, however, we would be remiss if we did not at least mention the dramatic events that unfolded while it was pending before the Supreme Court. Five weeks before oral argument the Report of the National Advisory Commission on Civil Disorders (known as the "Kerner Commission Report") was published. The Commission had been formed to investigate the extensive civil unrest of the summer of 1967. In its controversial report, the Commission concluded that white racism was largely to blame and warned that without reform things would get worse.

Whether on account of the lack of reform or something else, things did get worse. *Jones* was argued on April 1–2, 1968. Two days later, the Reverend Martin Luther King, Jr. was assassinated in Memphis, Tennessee. The tragedy of that loss was quickly multiplied as dozens of cities became engulfed in riots. In Washington, D.C. alone, over the course of the next several days, twelve people were killed (mostly in burning homes), over 1000 were injured, and over 6000 arrests were made. Government offices—including those on Capitol Hill, where the Supreme Court is located—were evacuated. It took more than 13,000 federal troops and five days to quell the riots, which at one point came within a few blocks of the White House. When the smoke cleared, about 1200 buildings had been burned, many of them in middle-class black neighborhoods that did not begin to recover economically until the 1990s. *See* Ben W. Gilbert et al., Ten Blocks from the White House: Anatomy of the Washington Riots of 1968 (1968). But as Washington calmed, riots continued in Baltimore and erupted for the first time in Kansas City.

On the first full day of violence, President Lyndon Baines Johnson wrote a letter to the Speaker of the House of Representatives urgently requesting that the Fair Housing Act, which had been stalled for some time, be given immediate priority. *See* Letter from Lyndon Baines Johnson to Speaker John W. McCormick (Apr. 5, 1968) ("When the Nation so urgently needs the healing balm of unity, a brutal wound on our conscience forces upon us all this question: What more can I do to achieve brotherhood and equality among all Americans?"). McCormick delivered, and Johnson signed the bill into law on April 11, 1968. While this did not moot the *Jones* case, it greatly reduced the legal consequences of the decision. Race discrimination in the sale and lease of housing would be illegal no matter how the case came out.

Sporadic riots continued through the month of May. The opinion in *Jones* was announced on June 17, 1968—just eleven days after the assassination of Senator Robert F. Kennedy, an event that no doubt added to the sense of turmoil that pervaded those months.

It is entirely possible, of course, that none of this had any effect upon the thinking of any of the Court's members. It is possible they would have rendered an opinion that misunderstood the historical context as well as the text of the Civil Rights Act of 1866 even in the absence of these events. It is also possible that their expansive reading of Section 2 of the Thirteenth Amendment giving Congress broad powers to tackle the civil-rights issues was unrelated in any way to the tragedies they had witnessed. But it would be unwise to deny the possibility.

31 *Jones,* 392 U.S. at 441 n.78.

32 *Id.* at 443. The Court did not define those terms, nor did it indicate why it had so chosen to include them. Unlike "badge" and "incident," these terms were not in widespread use in the Reconstruction era. For more historical analysis on this point, see McAward, *Defining the Badges*, *supra* note 3, at 196.

33 Such a power would, of course, be quite sweeping. In Afghanistan, the Taliban saw it as its mission to remove the relics of Buddhism from that country—even though Buddhism had been eliminated as a religion in that country almost a thousand years ago. *See* Ahmed Rashid, *After 1,700 Years, Buddhas Fall to Taliban Dynamite*, The Telegraph, Mar. 12, 2001. Presumably the authority to outlaw the relics and vestiges of slavery—rather than just slavery itself or slavery along with the supports that make it possible—would empower Congress not just to ensure that slavery does not return, but to wipe out any sign it ever existed. That could include everything from Southern plantation houses to the use of gumbo in Southern recipes. This hardly seems like a plausible reading of either the Thirteenth Amendment or the intent of those who adopted it. That amendment is about prohibiting slavery, not wiping away history.

34 As of this writing, one federal court of appeals has upheld the HCPA in a Thirteenth Amendment constitutional challenge. United States v. Maybee, No. 11-3254 (8th Cir. 2012). The court of appeals appears not to have considered some of the arguments raised in this article.

35 Katzenbach v. Morgan, 384 U.S. 641 (1966) (interpreting the Fourteenth Amendment); South Carolina v. Katzenbach, 383 U.S. 301(1966) (interpreting the Fifteenth Amendment).

36 521 U.S. 507, 519 (1997).

37 Tennessee v. Lane, 541 U.S. 509 (2004).

38 Section 2 of the Fifteenth Amendment is identical to Section 2 of the Thirteenth Amendment. *See* U.S. Const. amend. XV, § 2. *City of Boerne* has been cited as authority in Fifteenth Amendment cases. *See* Shelby County v. Holder, No. 1:10-cv-00651 15-20 (D.C. Cir. May 18, 2012).

39 Deeply rooted federalist doctrines regarding the importance of protecting individuals from the long reach of a powerful central government also counsel for reading Section 2 at least as narrowly as Section 5. Section 5 gives Congress remedial power to act only when the states have violated the Fourteenth Amendment's substantive provisions, and the doctrine elucidating limits on the scope of this power has grown up with the goal of preventing legislation that intrudes on legislative spheres of autonomy generally reserved to the states. *See* Fitzpatrick v. Bitzer, 427 U. S. 445, 455 (1976). But preserving the legislative spheres of autonomy of the states is not traditionally viewed as an end in and of itself. Rather, as Supreme Court Justice Anthony Kennedy once put it: "States are not the sole intended beneficiaries of federalism . . . ." An individual has a direct interest in objecting to laws that upset the constitutional balance between the national government and the states." Bond v. United States, 564 U.S. __ (2011). *City of Boerne* thus protects individual rights indirectly by protecting the states' traditional spheres of autonomy from federal intrusion. But the potential threat to individual liberty in the Thirteenth Amendment context is perhaps much greater than in the Fourteenth Amendment context because Section 2 permits Congress to reach individual conduct directly. *Cf.* McAward, *Scope*, *supra* note 3, at 141("However, legislation that controls private conduct raises a separate federalism concern, namely, that Congress could attempt to exercise such a high degree of control over private citizens that it will transform the Thirteenth Amendment enforcement power into a general police power . . . ."). In other words, current doctrine requires the Supreme Court to aggressively protect the legislative autonomy of the states so as to protect individual autonomy indirectly, but requires the Court to be hands-off in reviewing Section 2 legislation that may directly infringe on individual autonomy. This seems to us to be an odd result and perhaps even precisely backwards.

40 18 U.S.C. § 249 (2011).

41 National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 4707 (2009). Congress also found that certain unspecified religions and national origins were considered to be races at the time and that in order to eliminate the badges and incidents of slavery, the HCPA should include those categories as well (at least to a limited degree).

42 18 U.S.C. § 249(a)(2)(A). Specifically, the criminal conduct must occur:

> during the course of, or as the result of, the travel of the defendant or the victim (I) across a State line or national border; or (II) using a channel, facility, or instrumentality of interstate or foreign commerce; (ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A); (iii) in connection with the conduct described in

subparagraph (A), the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce. *Id.* § 249(a)(2)(B).

Alternatively, the alleged criminal conduct must either interfere "with commercial or other economic activity in which the victim is engaged at the time of the conduct" or otherwise affect interstate or foreign commerce." 18 U.S.C. § 249(a)(2)(B).

It is not known to us why Congress did not write this section of the statute to permit prosecution of race- or color-motivated hate crimes if there is a sufficient connection between such hate crimes and the Thirteenth Amendment. Because the HPCA has a severability clause, if the section passed pursuant to Section 2 of the Thirteenth

Amendment is struck down, the rest of the HPCA will still stand. It may be that the drafters thought that, in the aftermath of *Lopez* and *Morrison*, the section passed pursuant to Section 2 was less vulnerable to court challenge than the section passed under the Thirteenth Amendment. The decision to include race and color only under the Thirteenth Amendment may have been an invitation to litigate the issue.

43 The dissenting view in the House Committee Report argued that there was a general lack of evidence in the record that state and local governments were falling down on the job at prosecuting the kind of crime covered by the Act. H.R. Rep. No. 111-86, pt 1. at 42 (2009). At the hearing, the question was asked, "Precisely how many cases is the Justice Department aware of that have gone unprosecuted at the state and local level?" Some hedging rhetoric was followed by a single account of a sexual orientation case that was prosecuted under South Carolina state law, but under which the defendant received a lenient sentence. Given this lack of evidence, it may be that members of Congress simply wished to please interest groups who in turn wished to ensure their members and donors that they were doing everything possible to eradicate that kind of crime. An army of organizations submitted testimony in support of the HCPA, from the American Music Therapy Association to the Gay, Lesbian, and Straight Education Network to the National Abortion Federation. Some of the organizations and governmental entities that weighed in in favor of the legislation may have been motivated in part by the subsidies that the legislation distributes in the fight against such crimes. To our knowledge, none of these organizations argued that the reason that conduct of this nature should be federally banned is that otherwise slavery could make a comeback. Nor was such an argument made by the thousands of individuals who marched around the Department of Justice headquarters demanding more federal hate crimes prosecutions. *See Thousands Protest Hate Crimes*, CNN Newsroom Transcript, Nov. 16, 2007, *available on* Lexis-Nexis. As far as we are aware, slavery made it into the discussion only in the perfunctory reference to it in Congress's findings in order to invoke Section 2 powers under the Thirteenth Amendment. *See supra* note 41 and accompanying text.

44 We hesitate to call the crimes covered by the HCPA "hate crimes," since hatred is not an element of the crime. It is sufficient if the crime occurs "because of" somebody's race, color, religion, sex, disability, etc. We are not keen even on the less dramatic term "bias crime," though we are willing to use it. The way the statute is written, however, it is sufficient if the perpetrator would not have committed the crime if the victim were of a different race. With rape, of course, it will be uncommon for the perpetrator to be indifferent to the sex of his victim. *See* Gail Heriot, *Lights! Camera! Legislation!: Grandstanding Congress Set to Adopt Hate Crimes Bill that May Put Double Jeopardy Protections in Jeopardy*, Engage, Feb. 2009, at 4.

45 If it did not, then it would be vulnerable to Fifth Amendment due-process objections. Similar state statutes would be vulnerable to Fourteenth Amendment equal-protection objections.

46 *See* Charisse Jones, *Death on the LIRR: The Suspect: In Notes and Past of the Accused, Portrait of Boiling Resentment*, N.Y. Times, Dec. 9, 1993 (providing biographical information on Colin Ferguson, an African-American who murdered six people and wounded nineteen others on the Long Island Rail Road in New York; papers were found on his person indicating that his killing spree was motivated by "'racism by Caucasians and Uncle Tom Negroes'"); *see also* James B. Jacobs & Kimberly Potter, Hate Crimes: Criminal Law and Identity Politics 143 (describing series of crimes committed by African-Americans against white, Hispanic, and South Asian victims in Brooklyn, New York in 1993 as retaliation for an alleged hate crime directed against African-American children).

47 Brian Levin, Director for the Center of Hate Crimes and Extremism, noted that there were more hate crimes reported to the FBI from the city of Boston in 2007 than from the Deep South states of Georgia, Alabama, Arkansas, Louisiana, and Mississippi combined. S. Rep. No. J-111-33, at 287 (2009). More recently, following the much-publicized Trayvon Martin case, there were several media reports of white crime victims who were targeted on the basis of their race in retaliation for Martin's death. *See, e.g.*, *Gainesville Man Beaten After Men Shout Trayvon*, Jacksonville News 4 Online, Apr. 10, 2012, *available at* http://www.news4jax.com/news/Gainesville-man-beaten-after-men-shout-Trayvon/-/475880/10396944/-/wk1c9z/-/v; *Police, Trayvon Protesters Ransack Store*, Local News 10 Online, Mar. 27, 2012, *available at* http://www.local10.com/news/Police-Trayvon-protesters-ransack-store/-/1717324/9719674/-/xctonpz/-/index.html; Michael Lansu, *Officials: Trayvon Case Cited in Racial Beating*, Chicago Sun-Times, May 22, 2012, *available at* http://www.suntimes.com/news/metro/12032142-460/prosecutors-trayvon-martin-case-led-to-racial-beating-in-oak-park.html.

48 *See* Fed. Bureau of Investigation, Hate Crimes Statistics: Incidents and Offenses (2010), *available at* http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-incidents-and-offenses (last accessed Sept. 18, 2012). In other words, a clear majority of bias crimes committed in the United States do not target the descendants of African-American slaves. African-Americans also have also committed widely publicized hate crimes. Data for the years preceding 2010 showed similar patterns.

49 *See, e.g.*, *Spate of Hate Crimes in Eastern German City*, Der Spiegel Online (International Edition), Dec. 13, 2007; *ADL Applauds New Italian Initiative to Combat Hate Crimes, Sarkozy Announces Crackdown on Internet Hate Sites*, Reuters, Paris, Mar. 22, 2012, *available at* http://www.reuters.com/article/2012/03/22/us-france-shooting-sarkozy-idUSBRE82L0MH20120322.

50 Alexander Tsesis, *Hate Speech and Hate Crime, Symposium Essay: Regulating Intimidating Speech*, 41 Harv. J. on Legis. 389 (2004.); *see also* Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. St. Paul, 106 Yale L. J. 124 (1992).

51 Alexander Tsesis, *The Second Founding: Interpreting the Thirteenth Amendment*, 11 U. Pa. J. Const. L. 1337 (2009).

52 Marcellene Elizabeth Hearn, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. Pa. L. Rev. 1097 (1998).

53 Dina Mishra, *Child Labor as Involuntary Servitude: The Failure of Congress to Legislate Against Child Labor Pursuant to the Thirteenth Amendment in the Early Twentieth Century*, 63 Rutgers L. Rev. 59 (Fall 2010).

54 William Carter, *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 Harv. C.R.-C.L. L. Rev. 17, 57 (2004); William Carter, *Toward a Thirteenth Amendment Exclusionary Rule as a Remedy for Racial Profiling*, Temple University Legal Studies Research Paper No. 2008-57 (Mar. 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1108247.

55 James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law*, 102 Colum. L. Rev. 1 (2002).

56 Suzanne S. Jackson, *Marriages of Convenience: International Marriage Brokers, "Mail-Order Brides," and Domestic Servitude*, 38 U. Tol. L. Rev. 895 (2007).

57 Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1 (1990).

58 Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 Harv. C.R.-C.L. L. Rev. 1 (1995).

59 Marco Masoni, *The Green Badge of Slavery*, 2 Geo. J. on Fighting Poverty 97 (1994) (arguing that environmental degradation of black communities is remnant of slavery).

60 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, 142 (1994) (explaining that the Colorado referendum prohibiting state from offering protection

from discrimination on basis of sexual orientation was a badge or incident of slavery because any legislation depriving "an individual, or class, of their civil rights . . . devalue[s] the subject class by relegating it to a subordinate status, [and therefore] violate[s] the mandate of equality implicit in the Thirteenth Amendment").

61 Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 Temp. L. Rev. 539 (2002) (arguing that confederate symbols are badges of slavery violating Thirteenth Amendment).

62 Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. Pa. L. Rev. 437 (1989).

63 Dawinder S. Sidhu, *A Constitutional Remedy for Urban Poverty*, DePaul L. Rev. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1872184.

64 Rodic B. Schoen, *Nationalization of Public Education: The Constitutional Question*, 4 Tex. Tech L. Rev. 63, 115 (1972).

65 Jane Kim, *Taking Rape Seriously: Rape as Slavery*, 35 Harv. J.L. & Gender 264 (2011).

66 Jennifer L. Conn, *Sexual Harassment: A Thirteenth Amendment Response*, 28 Colum. J.L. & Soc. Probs. 519 (1995).

67 Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. Gender Race & Just. 401 (2000).

68 Zoe Elizabeth Lees, *Payday Peonage: Thirteenth Amendment Implications in Payday Lending*, St. Mary's L. Rev. on Minority Issues (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009022.

69 Victor Williams & Alison M. Macdonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 Marq. L. Rev. 201, 230 (1994) (observing that current constitutional structures governing presidential elections were adopted as "constitutional appeasements to southern slaveholding interests" and, as such, "must be philosophically and politically scrutinized as structural badges and incidents of slavery") (internal quotation marks omitted).

70 As one of our colleagues once colorfully put it: "American law schools are the origin of some very bad ideas, in something like the same way bats are said to be the reservoir of certain nasty viruses in Africa; the germs of pernicious concepts incubate there in relative obscurity between epidemics, erupting occasionally to spread destruction and misery." Thomas A. Smith, *The Liberal Paper Chase*, Yale Alumni Mag., May/June 2011, *available at* http://www.yalealumnimagazine.com/issues/2011_05/arts_law_schools.html; *see also* Walter Olson, Schools for Misrule (2011) (describing how once-seemingly exotic ideas nursed in the legal academy eventually become part of our law).

71 317 U.S. 111 (1942).

72 514 U.S. 549 (1995).

73 529 U.S. 598. (2000).

74 No. 11-393 (June 28, 2012).

75 *See, e.g.*, Rebecca Zietlow, *The Promise of Congressional Enforcement*, *in* The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment 182 (Alexander Tsesis ed., 2010) ("These cases [*Lopez* and *Morrison*]present a challenge for members of Congress wishing to expand rights of belonging, those rights that provide an inclusive vision of who belongs to the national community . . . and that facilitate equal membership in that community. However, Section Two of the Thirteenth Amendment has considerable potential to resolve this dilemma."); *see also* Mark Graber, *Plus or Minus One: The Thirteenth and Fourteenth Amendments*, 71 Md. L. Rev. 12 (2011) ("Many participants [at a Maryland Law symposium] saw the constitutional commitment for abolishing slavery as foundation for a new progressive constitutionalism."). In the same piece, Graber also notes that "[t]he lack of a state action requirement also makes the Thirteenth Amendment particularly attractive as a foundation for progressive constitutional visions."

See also Sidhu, *supra* note 63 ("Moreover, as a practical matter, the Supreme Court has never struck down a congressional act made pursuant to the Thirteenth Amendment's enforcement power, whereas the Commerce Clause does not have this track record.").

See generally Lea VanderVelde, *The Thirteenth Amendment of Our Aspirations*, U Iowa Legal Studies Research Paper No. 07-20, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014417&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014417 ("sketch[ing] a much broader interpretation of the Thirteenth Amendment, an interpretation of our aspirations of freedom in a carefully delimited, but expansive, rather than a restrictive, fashion").

76 Jamal Greene, *Thirteenth Amendment Optimism*, Colum. L. Rev., (forthcoming 2012) (symposium issue).

77 *See* Prenatal Nondiscrimination Act (PRENDA) of 2012, H.R. 3541, 112th Congress (2012).

78 First, this sentence is not a direct quote from *Jones*; broad as that case's language is, it makes no such sweeping claim. *Jones* does not provide a comprehensive definition of badge or incident, but, quoting the Civil Rights Act of 1866, states only that the badges and incidents of slavery includes "restraints upon those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." *Jones v. Alfred H. Mayer & Co.*, 392 U.S. 409, 441. The relevant section of the Committee Report also notes: "The Supreme Court's abortion jurisprudence does not require a different result. The Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* recognized the essential holding of the Court in *Roe v. Wade*—that women possess the right to obtain an abortion without undue interference from the state before viability. That holding, *Casey* clarified, was based on the Court's perception that the state's interests were not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure at that stage. The Supreme Court has made clear, however, that the government has a compelling interest in eliminating discrimination against women and minorities, and this compelling interest could prove sufficient to hold that such an abortion restriction is constitutional.

79 *See generally* Pamela D. Bridgewater, *Un/Re/Discovering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 Wash. & Lee J. Civ. Rts & Soc. Just. 11 (2001) (suggesting that "while forced labor is the commonly thought of and protected against aspect of slavery, the institution also consisted of reproductive exploitation via forced sex and forced reproduction and the doctrine designed to protect against slavery should be broadened to recognize such conditions").

80 We have not closely studied the alternative claims made by PRENDA's sponsors that the Commerce Clause or Section 5 of the Fourteenth Amendment give Congress the authority to pass it and therefore express no opinion on these claims here.

81 *See also* Graber, *supra* note 75, at 18 ("Several essays in this Symposium also provide paths by which the Thirteenth Amendment might drift for a vehicle for progressive constitutional ambitions to a vehicle to a source for more conservative constitutional law.").