

ESSAY

THE THIRTEENTH AMENDMENT IN LEGAL
THEORY

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INTRODUCTION

Unique among constitutional amendments, the Thirteenth Amendment has been eclipsed by its own success. It gave rise directly to the Civil Rights Act of 1866,¹ which was enacted under Section 2 of the Amendment; and the rights conferred by the 1866 Act, in turn, served as the model for Section 1 of the Fourteenth Amendment. Constitutional decisions have paid far more attention to the Due Process and Equal Protection Clauses of the Fourteenth Amendment than to the Thirteenth Amendment, leading some scholars to conclude that it has been unjustly neglected.² Judged by citation count, that conclusion cannot be doubted, but this metric for assessing the significance of a constitutional provision has little to be said for it. By that measure, the provisions that have proved to be most effective—because least disputed, like the allocation of two senators to every state—would have very little significance.

The Thirteenth Amendment presents a number of paradoxes in assessing its effects. Ratified just after the Civil War ended, it signaled the beginning of Reconstruction, what Eric Foner has aptly characterized as “America’s Unfinished Revolution.”³ In addition to serving as the direct doctrinal antecedent to the Fourteenth Amendment, the Thirteenth Amendment raised the fundamental question that has animated civil rights law ever since: once abolition took hold, what was the legal status of the newly freed slaves? The 1866

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¹ Act of April 9, 1866, § 1, 14 Stat. 27 (1866).

² Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1460 (2012).

³ ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–77 (1988).

Act answered that question in favor of citizenship, of “all persons born in the United States and not subject to any foreign power,” who had the same rights as are “enjoyed by white citizens.”⁴ These provisions were then incorporated in Section 1 of the Fourteenth Amendment.⁵ In our own time, the question of citizenship has become one of guaranteeing to previously disfavored groups all the rights in the public sphere, whether involving government action or private action, that dominant groups have long enjoyed, including equal rights to housing, employment, and government benefits.

The Thirteenth Amendment has played an important role in filling out the dimensions of full citizenship since its ratification. Yet its reception in legal theory has been episodic and muted.⁶ This Essay examines the presuppositions behind the Amendment’s indifferent reception from three related perspectives: first, that the abolitionist principles embodied in the Amendment are too obvious; second, that the implications of these principles are too narrow; and third, that these features of the Amendment, as it has been interpreted, have resulted in scholarship that is too reactive—too dependent on sporadic innovations under the Amendment. The lesson from all three perspectives is the sobering one that legal theory has followed rather than led interpretation of the Thirteenth Amendment and that its contributions have been mainly to rationalize existing law rather than to change it.

I

TOO OBVIOUS

Emancipation became an axiom of the American legal order, but not a moment before its acceptance was settled by ratification of the Thirteenth Amendment. At that point, and probably earlier by operation of the Emancipation Proclamations and the liberation of slaves by the Union Army,⁷ emancipation became an irreversible reality. The Thirteenth Amendment took *de facto* emancipation and made it *de jure* part of the Constitution. It codified what the outcome of the Civil War had made apparent: that slavery was dead and could not be revived. Attempts at revival after Reconstruction—or “redemption” as conservative southern politicians would later

⁴ Act of April 9, 1866, § 1, 14 Stat. 27 (1866).

⁵ See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1410–51 (1992).

⁶ Balkin & Levinson, *supra* note 2, at 1460.

⁷ MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 31–34 (2001).

term it—had to stop short of a formal return to slavery. Reconstruction secured physical liberty for all even as it could not secure genuine equality for African Americans. To say that the abolition of slavery is now axiomatic when it was formerly a matter of intense and deadly controversy captures its two-faced role in American history. It is fundamental to the current constitutional order even as it nearly destroyed the prior constitutional order, requiring it to be rebuilt on an abolitionist foundation.

The ambivalence of law towards slavery dates back to classical times, when Roman jurists recognized it as the point of departure of natural law from the law of nations.⁸ According to the Institutes of Justinian, “[s]lavery is an institution of the law of nations (*ius gentium*) by which, contrary to nature, a person is subjected to the dominion of another.”⁹ It was widely regarded as necessary for civilization in the ancient world, and so supported a complicated body of Roman law, but it was admitted to be fundamentally unjustifiable.¹⁰ The gap between the ubiquity of slavery and its horrifying inequity led to rationalizations based on the inherently defective nature of slaves, and even of the original sin of both slaves and masters.¹¹

This combination of ambivalence and rationalization carried over into the New World, augmented by persistent and virulent racism. Even the common law, which celebrated the freedom conferred upon slaves who set foot in England, could be adapted by way of the law of property to become part of the law of slavery in the antebellum United States.¹² The various and disparate sources drawn on to justify the American law of slavery look today less like a persuasive justification rather than a convoluted rationalization from a miscellany of available sources. The Thirteenth Amendment swept aside all these efforts to defend the indefensible, leaving to legal theory the simpler task of justifying abolition as a long overdue step that had to be reconciled with the original Constitution.

The legal and constitutional theory of the time certainly regarded it as a *fait accompli* and little more. Thomas Cooley’s post-war edition of Joseph Story’s Commentaries on the

⁸ BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 55 (1962).

⁹ ALAN WATSON, ROMAN SLAVE LAW 7 (1987).

¹⁰ DAVID BRION DAVIS, INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD 41–44 (2006).

¹¹ *Id.* at 44, 55–56.

¹² THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 56–57 (1996).

Constitution devoted three pages to the Amendment.¹³ His discussion concluded on a decidedly optimistic note:

The mark of degradation which slavery stamped upon the colored race, and which had been found alike prejudicial to those who imposed and to those who suffered it, has thus been removed, and the disturbance and danger to the body politic occasioned by its existence has ceased.¹⁴

Cooley did little to remark upon the violent opposition to Reconstruction in the South, beyond recounting the terms of the Civil Rights Act of 1866, and he did not anticipate the reaction that would set in throughout the South when Reconstruction ended. James Bradley Thayer's famous article on judicial review did not mention the Thirteenth Amendment at all and was focused more upon what the Constitution did not require than what it did. On his view, only clear violations of the Constitution, "outside [the] border of reasonable legislative action," were subject to judicial review.¹⁵

The neglect of the Thirteenth Amendment in legal theory would persist until Jacobus tenBroek revived interest in the Reconstruction Amendments after World War II.¹⁶ His article, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*,¹⁷ took a broad view of the Amendment that pushed its meaning, and the power of Congress to enforce it, well beyond the abolition of slavery as a legal institution.¹⁸ He took full account of the intense debates over the Amendment, even in the Republican-dominated Congress in the final year of the Civil War, and he contrasted the broad and then narrow view of the Amendment taken by its opponents: in arguing against approval of the Amendment, they contended that it would radically alter political and social relations; but after ratification, they argued against enforcement legislation on the ground that the Amendment only granted physical liberty to the newly freed slaves.¹⁹ By the time tenBroek wrote, however,

¹³ JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 672-75 (Melville M. Bigelow, ed., 5th ed. 1891).

¹⁴ *Id.* at 673.

¹⁵ James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 148 (1893).

¹⁶ JACOBUS TENBROEK, *THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951).

¹⁷ Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171 (1951).

¹⁸ *Id.* at 200.

¹⁹ *Id.* at 189.

the Thirteenth Amendment had been part of the Constitution for over 80 years and the Civil Rights Era was well under way.

II TOO NARROW

As tenBroek aptly summarized the prior decisions under the Thirteenth Amendment, “it denounces slavery and involuntary servitude” understood to “refer to a condition of enforced compulsory service of one to another;”²⁰ but it did not extend to “the badges and incidents” of slavery understood in the broad sense of the racist practices and prejudices that accompanied and were reinforced by slavery.²¹ If the first, narrow view prevails, the Thirteenth Amendment accomplished its main purpose when slavery ceased to be a recognized institution in American law. Whether effective substitutes for slavery persisted, without the formal domination of one person by another, was a question beyond the scope of the Amendment. Its mission was accomplished as soon as slavery was disestablished. On the second, broader view, however, much remained to be done, as legislation to enforce the Amendment revealed. Both legislation to create the Freedmen’s Bureau and to protect civil rights responded to the compelling need to give the newly freed slaves the status of free citizens.²²

Legal theory remained almost entirely silent on this choice until tenBroek wrote his article. The narrow view made the Thirteenth Amendment’s meaning too obvious to warrant discussion, while the broad view made its meaning too difficult to discern. If the Amendment settled the bitter controversy over slavery by abolishing slavery as an institution, legal theory did not need to elaborate on the consequences of that momentous step. In the words of one reluctant supporter of the Amendment, “in passing this amendment we do not confer upon the negro the right to vote. We give him no right except his freedom, and leave the rest to the States.”²³ As this remark implies, however, a broad view of the amendment raises a host of questions about the consequences of abolition: Would it extend to equal civil and political rights? How would those rights be defined and enforced? Would private racial

²⁰ *Id.* at 172.

²¹ *Id.* at 172–73.

²² See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 763 (1985).

²³ Cong. Globe, 38th Cong., 1st Sess. 1465 (1864) (remarks of Sen. Henderson).

discrimination fall within the scope of enforcement legislation? Would state refusal to protect the newly freed slaves from violence and discrimination violate federal law?

The resources of Legal Realism, with its emphasis upon the social effects of legal rules and judicial decisions, would be needed to give an informed answer to these questions, but its advent was decades after Reconstruction and the establishment of Jim Crow. And when Legal Realism eventually arrived, its focus would be elsewhere, on a general theoretical critique of legal formalism as a closed system of legal reasoning. The realists targeted formalism as it pervaded private law subjects such as contracts and torts rather than public law subjects like civil rights. As noted earlier, when progressive legal theorists like Thayer discussed constitutional law, they were concerned to limit judicial review, not to expand it, let alone for the benefit of racial minorities. As Justice Holmes wrote, in his celebrated dissent in *Lochner v. New York*:

I think that the word 'liberty' in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.²⁴

This limitation on judicial review allowed the courts to invalidate only the most blatant attempts to evade the Thirteenth Amendment, as tenBroek recounted in his article.²⁵ The nuanced approach to legal rules and their consequences advocated by the Legal Realists tended to increase doubts about the wisdom of striking down legislation rather than encouraging vigorous enforcement of the Constitution. Following Thayer and Holmes, those doubts were then resolved in favor of allowing legislation and other forms of state action to stand. With only rare exceptions, the traditional patterns of racial segregation and hierarchy that accompanied slavery received the benefit of the doubt in the late nineteenth and early twentieth century.

Both innovative and established approaches to constitutional law at that time had little capacity to address the material conditions of Jim Crow, and in particular, how the cumulative effects of discrimination could amount to the effective equivalent of slavery. In the law developed under the

²⁴ 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

²⁵ tenBroek, *supra* note 17, at 171-72.

Thirteenth Amendment, assessment of those effects fell under the question whether they amounted to “badges and incidents” of slavery subject to the power of Congress to enforce the Amendment. On a broad view of the term, practices that did not involve all the features of involuntary servitude prohibited by Section 1 of the Amendment could still be prohibited by Congress as a “badge” or “incident” of slavery under Section 2. Voluntary servitude, prohibited by the Anti-Peonage Act of 1867,²⁶ fell under this heading. Yet after Reconstruction ended, Congress did not take a broad view of “badges and incidents” of slavery and it failed to enact any new civil rights legislation that could extend the effective scope of the Thirteenth Amendment. Both judicial interpretation of the Amendment and the absence of enforcement legislation effectively confined its scope, giving legal theory no innovations in legal doctrine that required innovations in legal reasoning. All this changed with the advent of the Civil Rights Era, which eventually resulted in expanded interpretation of the Amendment and which forced legal theory belatedly to confront its implications.

III

TOO REACTIVE

Over a decade after constitutional theory faced the task of justifying the radical re-interpretation of the Fourteenth Amendment in *Brown v. Board of Education*,²⁷ it was faced with a similar need to justify an expanded interpretation of the Thirteenth Amendment. The decision in question, *Jones v. Alfred H. Mayer Co.*,²⁸ offered a broad interpretation of the power of Congress to enforce the amendment and a broad interpretation of the first statute, the Civil Rights Act of 1866, enacted under the Amendment. The opinions in that case emphasized the legislative history of the Act, neglecting textual references in the statute itself to “custom.”²⁹ In the first article to analyze the decision, Gerhard Casper would have shifted the focus of the analysis to that term, which presupposes that pervasive private discrimination can become the equivalent of state action.³⁰ On this interpretation, the Act was continuous

²⁶ Act of Mar. 2, 1867, 14 Stat. 546 (codified as amended at 19 U.S.C. § 1581).

²⁷ 347 U.S. 483 (1954).

²⁸ 392 U.S. 409, 413, 420–41 (1968).

²⁹ *Id.* at 422–26.

³⁰ Gerhard Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89, 106–09, 117–19 (1969).

with the prohibition against public discrimination established in *Brown* but went further to reach private action.

There followed a chorus of criticism and endorsement of *Jones v. Mayer*. Charles Fairman took the lead in denouncing the decision as unprincipled judicial activism in his volume on the history of the Supreme Court during Reconstruction.³¹ Others rose to its defense, particularly as the Supreme Court began to have doubts about the breadth of an interpretation of the 1866 Act that reached all forms of private discrimination in contracting and property.³² That debate eventually was settled by Congress in the Civil Rights Act of 1991, which amended the statute to protect explicitly “against impairment by nongovernmental discrimination.”³³ That amendment to the statute, like *Jones v. Mayer* itself, clearly signaled that the path for effective enforcement of the Thirteenth Amendment went through Congress.

Subsequent scholarship, however, has not taken this hint. Instead of looking at the breadth of the enforcement power under Section 2 of the Amendment, it has concentrated on Section 1, with consequences that have been, at best, hit or miss. The Amendment has been held up as a basis for protecting rights as disparate as those concerned with abortion and with animal cruelty.³⁴ This scholarship takes as its model the course of decisions under Section 1 of the Fourteenth Amendment, resulting in the large body of doctrine developed under the Equal Protection and Due Process Clauses. Suggestions like the analogy between forced carriage of a pregnancy through birth and involuntary servitude might have some force, but they carry the Thirteenth Amendment very far from its historical origins. It would be better to see how these analogies might be pursued in the political sphere and whether they could generate effective legislation, based on enforcement of the Amendment or the exercise of some other congressional power, to make progress towards equality. The aim is not to maximize the visibility of the Thirteenth Amendment, let alone simply its self-enforcing provisions in Section 1, but to fulfill the program of freedom and equality that it stands for.

³¹ CHARLES FAIRMAN, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, PART ONE 1172–1204 (1971).

³² Robert Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 YALE L.J. 565, 565–67 (1989).

³³ Pub. L. No. 102-166, 105 Stat. 1071 (1991), codified at 42 U.S.C. § 1981(c).

³⁴ Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1733–34 (2012).

Reacting to continuing problems makes good sense. Reacting to purely doctrinal issues does not.

Several such continuing problems are apparent: the continued existence of slavery, particularly in the form of sex trafficking; the misuse of the criminal justice system against African Americans; and the mistreatment of migratory workers, particularly undocumented aliens. The Thirteenth Amendment serves as a timeless reminder of the incomplete project of achieving equal citizenship and it provides the means, mainly through its prohibition on private discrimination, of making progress towards that goal. It offers a distinctive contribution to the persistent problems at the intersection of freedom, race, and labor. It is worth identifying what the different features of that contribution are, now as much as in the aftermath of the Civil War.

First, abolition in fact has to be distinguished from abolition in law. Slavery has been pushed out of the mainstream of economic life in this country, but it still hangs on at the margins. Isolated farming, forestry, and mining operations can be used to hide workers in indentured servitude from enforcement efforts and from the possibility of rescue or escape. Slavery also hides in plain sight among domestic workers, often undocumented aliens who fear disclosure of their situation to law enforcement agencies. In foreign countries, slavery has proven to be more durable and open, as harsh economic conditions force individuals and their families into servitude. These practices overseas carry forward into this country through various forms of trafficking, of which sex trafficking is the most virulent and resistant to elimination.³⁵

The reach of the Thirteenth Amendment makes it the most likely source of federal law addressed to these residual forms of slavery. The Fourteenth Amendment prohibits only state action in violation of individual rights and the Commerce Clause still retains some limits, however haphazard, requiring an effect on economic activity.³⁶ The Thirteenth Amendment extends to all forms of involuntary servitude, in Section 1, and by legislation under Section 2, to any form of racial discrimination that constitutes one of the “badges and incidents of slavery.”³⁷ Hence, Congress has enacted legislation like the Victims of Trafficking and Violence

³⁵ KEVIN BALES, *ENDING SLAVERY: HOW WE FREE TODAY'S SLAVES* 5–20 (2007).

³⁶ *See, e.g.,* *United States v. Morrison*, 529 U.S. 598, 619–27 (2000) (invalidating the Violence Against Women Act).

³⁷ *Jones v. Mayer Co.*, 392 U.S. 362, 441 (1968).

Protection Act of 2000.³⁸

Of course, enacting prohibitions only constitutes the first step towards effective enforcement. But here, too, the lessons from the Thirteenth Amendment reveal a variety of means, from criminal prosecutions, to private civil actions, to broad remedial programs like those undertaken by the Freedmen's Bureau. The lesson is not that one size fits all, but the opposite: that needed remedies can be tailored to existing wrongs. Working to assist the victims of modern servitude and trafficking presents challenges of its own, as these individuals usually are in no position to assert their own rights. Deploying the resources to discover their plight and to alleviate it requires the same affirmative efforts that were necessary in Reconstruction and all too frequently were lacking. The lessons of the early years after abolition still have value today.

The same could be said of the second issue of salience today: the prevalence of police violence against African Americans. It resembles, even if on a smaller scale, the campaign of intimidation and terrorism against the newly freed slaves and their supporters during and after Reconstruction. So far, the principal remedy against police violence, from the beating of Rodney King to the present day, has been the nearly ubiquitous presence of video cameras. Filmed police violence constitutes compelling evidence to support criminal prosecutions and civil lawsuits, but it does not, of course, guarantee conviction or a judgment for damages. Litigation has offered, at best, sporadic remedies. It has called attention to the problem but not provided any consistent solution, either by way of compensation for past wrongs or deterrence of future misconduct.

Some of the blame can be assigned to lenient standards applied in excessive force cases, allowing police to use any degree of force assessed "in favor of deference to the judgment of reasonable officers on the scene,"³⁹ and additionally allowing immunity to officers "for reasonable mistakes as to the legality of their actions."⁴⁰ The same network of lenient substantive standards and broad immunity applies to actions against government officials under the Civil Rights Act of 1866.⁴¹ Yet the potential for legislation under Section 2 of the Thirteenth Amendment to address racial discrimination in policing offers

³⁸ Pub. L. No. 106-386, 114 Stat. 1464 (with amending and reauthorizing legislation in 2003, 2005, 2008, 2013).

³⁹ *Saucier v. Katz*, 533 U.S. 194, 204 (2001).

⁴⁰ *Id.* at 206.

⁴¹ *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731 (1989).

the opportunity for a fresh start in examining the existing regime of liability and immunity for civil rights violations. A steady stream of recent scholarship criticizes the scope and justification of qualified immunity in civil rights actions⁴² and the immunity has never been recognized in lawsuits against private defendants under the Civil Rights Act of 1866. The stark contrast between suits against public and private defendants, respectively with and without immunity, provides a reason to re-examine the existing hurdles to recovery from public officials for civil rights violations.

A further contrast has to do with the very existence of actions against private defendants in legislation under the Thirteenth Amendment. From the very beginning, it has been accepted, virtually alone among constitutional provisions, as a restriction on private conduct.⁴³ It prohibits both private servitude and legally authorized slavery. So, too, legislation under Section 2 of the Amendment can also reach private action. Legislation with this scope dispenses with the need for the plaintiff to prove “state action,” with immediate implications for cases, like the killing of Trayvon Martin, involving private security guards. This extension to private action might seem minor, given the pervasive presence of state police in modern society, but the use of public intimidation and violence regularly depends upon private support. The experience in Reconstruction again underlines this point from an historical perspective. Rampant private violence tolerated by the public authorities effectively put an end to efforts to reconstruct southern state governments.⁴⁴

The third issue of pressing current concern represents an ironic variation on the experience of American slavery. Migrants come to this country willingly, often at great personal risk, in search of employment and other economic opportunities. Slaves came here as the coerced cargo of the slave trade. Yet both current migrants and historical slaves share the experience of working under coercion: many of the former under threat of deportation, and all of the latter under violent control by their masters. Moreover, many undocumented immigrants share ethnic, racial, and religious identification as minorities, as the constitutional challenges to

⁴² See John C. Jeffries, Jr., *What’s Wrong With Qualified Immunity?*, 62 FLA. L. REV. 851, 854–66 (2010); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55–60, 63–69, 72–77 (2018).

⁴³ *The Civil Rights Cases*, 109 U.S. 3, 20, 23 (1883).

⁴⁴ W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 549–65 (1934).

President Trump's travel ban made clear.⁴⁵

A longstanding difficulty in immigration law involves reconciliation of controls over access to employment—the possession of a “green card”—and employer intimidation of undocumented aliens who work illegally but then, in turn, are subject to illegal conditions of employment.⁴⁶ The economics of such arrangement strongly favor employer attempts to employ a cheap and easily controlled work force. Deterrence through enforcement of legal prohibitions depends upon individuals willing to come forward to complain and testify, which is exactly what aggressive enforcement of the immigration laws discourage. The end result bears a disturbing similarity to the criminal suretyship laws that were used to enforce labor contracts in the early twentieth century. Upon conviction, workers could then be subject to involuntary servitude under the exception for convict labor in the Thirteenth Amendment. The Supreme Court struck down these laws as a transparent evasion of the free labor regime established by the Amendment.⁴⁷

Labor under threat of deportation has all the essential features of private peonage, which has long been defined as “compulsory service to secure the payment of a debt.”⁴⁸ An employer seeks to enforce a contract for labor, often under illegal terms and conditions of employment, by threatening to invoke the immigration laws against the employee. To see the problem in this light greatly strengthens the case for sanctions against the employer. A Thirteenth Amendment approach yields new support for reform through legislation and litigation.

CONCLUSION

Appealing to the Thirteenth Amendment offers no panacea for current or future problems of race, labor, and coercion. In the terms of the Amendment itself, the judicially enforceable provisions of Section 1 can only go so far without legislative support by enactments under Section 2. And even then, enforcement efforts must be deployed through public and private litigation, usually on behalf of individuals who are poorly situated to protect themselves. The effort nevertheless must be made. Over 150 years ago, the Thirteenth

⁴⁵ *Trump v. Hawaii*, 138 S. Ct. 2392, 2415–16 (2018).

⁴⁶ T. ALEXANDER ALENIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 1122–33 (8th ed. 2016).

⁴⁷ *Bailey v. Alabama*, 219 U.S. 219, 227–28 (1911).

⁴⁸ *Clyatt v. United States*, 197 U.S. 207, 216 (1905).

Amendment raised the question of what constitutes equality among citizens and, in the words of the current version of the Civil Rights Act of 1866, what constitutes equality among “all persons within the jurisdiction of the United States.”⁴⁹ It has yet to receive a satisfactory answer.

⁴⁹ 42 U.S.C. § 1981(a).