

NOTES

The Badges and Incidents of Slavery: A History and Modern-Day Crisis

Dalton C. Lahti^{1a}¹ Wilmington University School of Law

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This Note examines the constitutional evolution and modern-day relevance of the “badges and incidents of slavery” under the Thirteenth Amendment. By tracing the concept from its pre-Civil War origins to its twentieth-century judicial expansion and modern-day manifestations, this note argues that the amendment was intended to dismantle not just chattel slavery, but the entire social, economic, and cultural apparatus of the racial hierarchy. Through a comparative analysis with Brazil and post-apartheid South Africa, the note highlights the consequences of failing to proactively deconstruct structural and cultural subordination. Finally, it identifies modern manifestations of these badges in economic marginalization, educational inequities, and mass incarceration, concluding with a critique of immigration enforcement as the latest chapter in the history of the badges and incidents of slavery.

INTRODUCTION

Now, more than ever, the Supreme Court relies upon history as a guide to constitutional interpretation. It is thus an opportune time to reexamine an old concept: the scope of Congress’s power under the Thirteenth Amendment to remove the “badges and incidents” of slavery. The Civil Rights Cases decided in 1883 affirmed Congress’s power to abolish these structural remnants of slavery, yet the precise definition of those “badges” and “incidents” has remained a topic of legal and social discussion. What did the concept mean in 1865, what did it mean in 1883, and, most crucially, what does it mean today?

This note explores the historical trajectory and modern relevance of the badges and incidents of slavery to answer those questions. Part One examines the concept’s origins in early American jurisprudence. Part Two examines the Reconstruction era, highlighting how the thirty-eighth and thirty-ninth Congresses intended Section 2 of the Thirteenth Amendment to serve as a tool against the social, economic, and cultural systems that sustained racial hierarchy. Part Three traces the judicial expansion of the concept in the twentieth century.

^a 3L Wilmington University School of Law. I would like to thank Professor Patricia Wise, Hector Torres-Diaz, William Glover, Marisa Rauscher, and Professor Alisa Klein for their invaluable guidance, thoughtful feedback, and support throughout the development of this Article. Any errors are solely my own.

Part Four compares and contrasts the United States' failed Reconstruction with the abolitionist experiences of Brazil and post-apartheid South Africa. Part Five identifies and examines contemporary manifestations of the badges and incidents of slavery in the 20th and 21st centuries. Specifically, regarding economic marginalization stemming from discriminatory New Deal Policies, educational inequalities, and the "War on Drugs." Finally, Part Six analyzes modern immigration enforcement and the Supreme Court's decision in *Noem v. Vasquez Perdomo*. It argues that the weaponization of racial profiling in the name of immigration enforcement and the creation of a legally defenseless underclass represents the latest chapter in the history of the badges and incidents of slavery.

I. ORIGINS OF A CONSTITUTIONAL CONCEPT

In 1823 the Pennsylvania Supreme Court used the term "badge of slavery" in conjunction with the phrase "yoke of oppression" in *Lyle v. Richards*, marking one of the earliest uses of the phrase "badge of slavery" in American jurisprudence,¹ when Justice William Tilghman wrote for the majority:

That act likewise makes them void. There was the same law of entailment, the statute *de donis* in full force here, the same mode of destruction, by an instrument of the same name, with a declaration that whatever effect it should have in the mother country it should have here, whose common law was our common law, guaranteed to *William Penn*, and his followers, by the charter, insisted upon by the representatives of the people as their birthright; **not considered a badge of slavery or a yoke of oppression, but the palladium of their privileges and charter of their rights.** And this position judges must treasure up in their minds; because when called upon to decide questions of *meum* and *tuum*, it is their only sure guide. All lands in *Pennsylvania* are held in free and common socage, and thus socage tenure is still resorted to in the nomination of guardians²

The court's use of the phrase "badge of slavery" was less a literal use and more a metaphorical use to contrast the oppressive feudal land systems of England with the liberties Pennsylvania claimed. However, the use of the phrase as a metaphor for subjugation, dispossession and oppression allows us to understand how the authors of the Thirteenth Amendment may have viewed slavery and what they were creating in the Thirteenth Amendment. That a judge would equate oppressive property arrangements with slavery illustrated that even before abolition had reached its zenith, American legal

¹ *Lyle v. Richards*, 9 Serg. & Rawle 322, 357 (Pa. 1823).

² *Id.*

scholars were already recognizing slavery as going beyond simple formal ownership and bondage, as being a cultural system based on the exclusion of rights and a loss of agency similar to that of feudal Europe. Like feudal Europe, slavery brought with it reduced status enforced by law and custom.

In 1842 the U.S. Supreme Court used the term “badge of slavery” for the first time in *Williams v. Ash* when discussing “Colour” in relation to personal property. The Court found that in states where slavery was permitted, “Colour” was a badge of slavery, but in states where slavery was prohibited “Colour” was not a badge of slavery.³ The opinion reads in relevant part:

Shall we go to the laws of the several states? Our search would be equally vain here. The right which is held in a slave is so modified by statutory provisions, by local causes, by custom, by the common law, by the social condition, and by the local and political position of each state, that we can derive no important aid from them. It is emphatically a subject of peculiar regulation. But wherever we do find the right to manumit, we find this cardinal point, that suits for freedom are to be favored, pervading and controlling the judicial decisions.

The laws of personal property are not applicable.

Colour, in a slaveholding state, is a badge of slavery. It is not so where slavery does not exist. Accompanied by possession in the former state, it is evidence of title. An adverse possession of a slave for a period corresponding with the statute of limitations gives title in a slave.”⁴

Here, the Court distinguished that the legal meaning of “colour” rested largely on whether slavery existed in the jurisdiction. In slave states, “colour” was evidence of enslavement, while in free states it was not. The Court made clear that this discussion goes well beyond the law itself, but that slavery is socially constructed and maintained not just by local law but by local custom. Slavery could not exist without being maintained both in law and in culture. Ending the formal legal institution of slavery alone would not erase the slave states’ cultural association between “colour” and subjugation.

In 1856, the Supreme Court of Ohio, in *Anderson v. Poindexter*, Justice Bowen wrote for the majority:

No international law binds nations to sacrifice their own laws or policy to that of others. The rule on this subject cannot be thus evaded: “The state of slavery will not be recognized in any

³ *Williams v. Ash*, 42 U.S. 1, 14 (1842) (enslaved party).

⁴ *Id.*

country whose institution and policy prohibit slavery.” Story’s Conf. sec. 104. And what are the incidents of property in slaves, where none of the incidents of slavery will be recognized?

If slavery, as an institution, existed among all nations, the ruling class of all nations would probably find it in their interest to respect the domination of each other over the subjugated class, and call it property. Indeed, **property in slaves is but another name for the power of the master over the slave, armed by municipal law, to use him as the implement of his will; and the one cannot be acknowledged without the introduction of the other – it is slavery and the slave system masked under the mild name of property. The distinction is without a difference.**

The Constitution of the United States regards and acts upon slaves as persons and not as property. “Persons held to service;” “The migration or importation of such persons as any of the States now existing shall think proper to admit,” meaning by this circulation the slave trade; “Representatives and direct taxes shall be apportioned among the several States according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons” – meaning three-fifths of the slaves. There is nothing in the Constitution of the United States taking from the States, and delegating to the Federal Government, power over slaves as property.

Suppose the Legislature of Ohio should undertake to introduce slavery into Ohio in the mildest form, by enacting that the masters of slaves should have a right to bring their slaves here, temporarily, to work for their masters, or to do menial offices for them while the masters were *in itinere*, or on temporary visits, and that while so here, *some or any* coercive rights and domination over the slaves should be vested in the master by our law. If this would not be slavery existing within our limits, and sanctioned by our own law, what would it be? **It is slavery, modified, to be sure, as compared with that of slaveholding States, but, nevertheless, slavery.** Such a law would be a palpable violation of our own Constitution, and void. And this

court can not, on its own mere courtesy, suspend the operation of the Constitution, disregard its terms, and announce as law what the Legislature is forbidden to enact.⁵

While Justice Bowen in *Anderson* does not explicitly discuss what the badges and incidents may be, he does provide insight into a concept important to understanding them. Justice Bowen describes slavery as but another name for the power of the master over the slave, simply armed by legal authority and the law. As Justice Bowen discussed, if Ohio were to allow the masters of slaves from other states to bring slaves to Ohio even though they themselves have prohibited slavery, then it would still be slavery, nevertheless. The concept can be expanded to application of the Thirteenth Amendment. If the nation as a whole prohibited slavery but still permitted, through inaction, slaves from other countries to be brought to the United States as slaves, then the nation would still have slavery. Justice Bowen's hypothetical of Ohio introducing a mild form of slavery gives insight into how abolitionists of the time recognized that partial abolition was impossible; any recognition of the slave master's authority reproduced slavery in substance if not in name. This lends credence to the idea that the Thirteenth Amendment goes well beyond abolition in a legal sense and that Congress intended to remove all conditions allowing the former slave owners to exercise coercive control over the now freed people; otherwise slavery would persist under another guise.

In 1871 in the U.S. Supreme Court Case *Blyew v. United States*, Justice Bradley in his dissent explained that depriving a whole class of people the right to testify in court would brand them with a badge of slavery.⁶ It would, "expose them to wanton insults and fiendish assaults; it is to leave their lives their families and their property unprotected by law." The full passage reads:

To deprive a whole class of the community of this right, to refuse their evidence and their sworn complaints, is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families, and their property unprotected by law. It gives unrestricted license and impunity to vindictive outlaws and felons to rush upon these helpless people and kill and slay them at will, as was done in this case. To say that actions or prosecutions intended for the redress of such outrages are not "causes affecting the persons" who are victims of them, is to take, it seems to me, a view of the law too narrow, too technical, and too forgetful of the liberal objects it had in view. **If, in such a raid as I supposed, a colored person is**

⁵ *Anderson v. Poindexter*, 6 Ohio St. 622, 655-57 (1856) (enslaved party).

⁶ *Blyew v. United States*, 80 U.S. 581, 599 (1871) (Bradley, J., dissenting).

merely wounded or maimed, but is still capable of making complaint, and on appearing to do so, has the door of justice shut in his face on the ground that he is a colored person, and cannot testify against a white citizen, it seems to me almost a stultification of the law to say that the case is not within its scope.⁷

Justice Bradley's dissent shows that some legal minds of the time considered any form of legal exclusion constituting a badge of slavery to be an extension of slavery itself. By denying Black Americans the ability to testify in court, Kentucky relegated them to a position of vulnerability, unable to defend themselves, their families, or their property - the same vulnerability they were subject to as slaves. While this would not be slavery in the sense of forced labor, it resulted in second-class citizenship and legal invisibility all the same, denying them the full rights and protection afforded white citizens. In 1853, James H. Burch was arrested and tried in court for selling into slavery the abolitionist and free man, Solomon Northup. However, Burch escaped justice because Northup was not allowed to testify because he was black.⁸ Bradley's dissent foreshadowed the broader concepts of the "badges and incidents of slavery" adopted in future decisions; that civil, legal, and political rights are intertwined with freedom and equality. Without full legal standing, freed people remain second-class citizens subject to the whims of others without recourse, no different than slaves.

II. CONGRESSIONAL UNDERSTANDING OF THE THIRTEENTH AMENDMENT

An examination of the Thirteenth Amendment itself and what the thirty-eighth Congress intended in bringing it forth for ratification is paramount to understanding the meaning of the "badges and incidents of slavery" and the true extent of the Thirteenth Amendment. When Congress debated the Thirteenth Amendment in 1864 and 1865, legislators like Lyman Trumbull, John B. Henderson and James F. Wilson made clear that freedom required not just the formal end of slavery, but the full dismantling of the legal and social conditions that had marked African Americans as subordinate and inferior;⁹ that the Thirteenth Amendment was meant to "obliterate the last lingering vestiges of the slave system"¹⁰ and that the amendment was intended not to merely strike the physical shackles from the slave, but to secure to the formerly enslaved "the same rights of person and property as are enjoyed

⁷ *Id.*

⁸ SOLOMON NORTHUP, *TWELVE YEARS A SLAVE*, 315-16 (1853).

⁹ *See generally* ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019).

¹⁰ *See* Cong. Globe, 38th Cong., 1st Sess. 1324 (1864) (Statement of Sen. Henry Wilson: "It will, if it becomes the organic law of the land, obliterate the last lingering vestiges of the slave system; its very name will be erased from the statute-books.").

by white men.”¹¹ The thirty-eighth and thirty-ninth Congresses understood that unless it addressed the laws, customs, practices and social ideals that upheld racial hierarchy and the caste system, slavery would persist under new names. Congress’ intent would be further expressed by the passage of the Civil Rights Act of 1866 and the Enforcement Acts in the years preceding the ratification of the Thirteenth Amendment, as Congress to prevent the reimposition of slavery by opposing the Black Codes and the racial terrorism of the Ku Klux.¹² The Reconstruction-era Congresses clearly and deliberately drafted the Thirteenth Amendment to empower Congress to legislate against these broader “badges and incidents” of slavery, not just slavery itself.

In 1883, the same year the Civil Rights Cases were decided, Justin Harlan, in the dissent in *United States v. Stanley*, wrote:

My brethren say, that when a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected. **It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. The statute of 1875, now adjudged to be unconstitutional, is for the benefit of citizens of every race and color. What the nation through Congress, has sought to accomplish in reference to that race, is – what had already been done in every State of the Union for the white race – to secure and protect rights belonging to them as freemen and citizens; nothing more. It was not deemed enough “to help the feeble up, but to support him after.”** The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of the legal rights of the black race to take the rank of citizens, and to secure the enjoyment of the privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained. **At every step, in this direction, the nation has been confronted with class tyranny,** which a contemporary English historian says is, of all tyrannies, the most intolerable,

11 See Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (Statement of Sen. Lyman Trumbull: “The great fundamental rights set forth in this bill... are the same rights of person and property as are enjoyed by white men.”). Note: Trumbull was arguing that Section 2 of the 13th Amendment gave Congress the power to pass the Civil Rights Act of 1866 to achieve this

12 See Civil Rights Act of 1866 (1866); Enforcement Act of 1871 (1871). See also Cong. Globe, 42nd Cong., 1st Sess. 153–154 (1871) (Rep. Shellabarger, introducing the bill to combat the Ku-Klux-Klan). See also Eric Foner, *Reconstruction: America’s Unfinished Revolution, 1863-1877* (1988).

“for it is ubiquitous in its operation, and weighs, perhaps, most heavily on those whose obscurity or distance would withdraw them from them the notice of single despot.” **To-day, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be that some other race will fall under the ban of race discrimination.** If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against freeman and citizens because of their race, color, or previous condition of servitude. To that decree – for the due enforcement of which, by appropriate legislation, Congress has been invested with express power – everyone must bow, whatever may have been, or whatever now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect.¹³

It was not deemed enough to help the feeble up, but to support him after. Justice Harlan insisted that Congress’ enforcement power under the Thirteenth Amendment extended to eliminating racial discrimination in public accommodations, as such exclusions perpetuated the subjugated status of the formerly enslaved people.¹³ While the court did not formally recognize that the “badges and incidents” are social and cultural practices that sustain racial hierarchy, regardless of state action, Harlan laid the groundwork for future courts to do so. Harlan’s dissent was ahead of its time; it anticipated the Court’s eventual recognition in *Jones v. Alfred H. Mayer Co.* that private discrimination could constitute slavery.¹⁴ Harlan’s dissent serves as a bridge between the ideas of the Reconstruction-era abolitionist ideals and the beginning of the civil rights movement.

In 1886 Judge Swayne in *United States v. Rhodes*, wrote for the Circuit Court of Kentucky:

Slaves were imperfectly, if at all, protected from the grossest outrages by the whites. Justice was not for them. The charities and rights of the domestic relations had no legal existence among them. The shadow of the evil fell upon the free blacks.

¹³ Stanley, 109 U.S. 3 at 61-62 (Harlan, J., dissenting).

¹⁴ Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440-43 (1968).

They had but few civil and no political rights in the slave states. **Many of the badges of the bondman's degradation were fastened upon them.** Their conditions, like his, though not so bad, was helpless and hopeless. This is borne out by the passages we have given from Kent's Commentaries. Further research would darken the picture. The states had always claimed and exercised the exclusive right to fix the statutes of all persons living within their jurisdiction.

On January 1, 1863, President Lincoln issued his proclamation of emancipation. Missouri and Maryland abolished slavery by their own voluntary action. Throughout the war the African race had evinced entire sympathy with the Union cause. At the close of the Rebellion two hundred thousand had become soldiers in the Union armies. The race had strong claims upon the justice and generosity of the nation. Weighty considerations of policy, humanity, and right were superadded. **Slavery, in fact, still subsisted in thirteen states. Its simple abolition, leaving these laws and this exclusive power of the states over the emancipated in force, would have been a phantom of delusion.** The hostility of the dominant class would have been animated with new ardor. Legislative oppression would have been increased in severity. Under the guise of police and other regulations slavery would have been in effect restored, perhaps in a worse form, and the gift of freedom would have been a curse instead of a blessing to those intended to be benefited. They would have had no longer the protection which the instinct of property leads its possessor to give in whatever form the property may exist. It was to guard against such evils that the second section of the amendment was framed. It was intended to give expressly to congress the requisite authority, and to leave no room for doubt or cavil upon the subject. The results have shown the wisdom of the forecast. Almost simultaneously with the adoption of the amendment this course of legislative oppression was begun. Hence, doubtless, the passage of the act under consideration. In the presence of these facts, who will say it is not an "appropriate" means of carrying out the object of the first section of the amendment, and a necessary and proper execution of the power conferred by the second? **Blot out this act and deny the constitutional power to pass it, and the worst effects of slavery might speedily follow. It would be a virtual abrogation of the amendment.**

It would be a remarkable anomaly if the national government, without this amendment, could confer citizenship on aliens of every race or color, and citizenship, with civil and political rights, on the “inhabitants” of Louisiana and Florida, without reference to race or color, and **can not, with the help of amendment, confer on those of the African race, who have been born and always lived within the United States, all that this law seeks to give them.**¹⁵

Justice Swayne explicitly warned that without federal intervention, former slave states would reimpose slavery in all but name. That emancipation alone, without congressional enforcement, would be a “phantom of delusion.”¹⁶ If the Thirteenth Amendment meant emancipation alone and did not provide for wide-reaching congressional enforcement, then the authors of the Thirteenth Amendment would be providing virtue without strength. This reflects the political maxim that virtue without terror “is powerless.”¹⁷ Swayne articulated the clearest rationale for Section 2 of the Thirteenth Amendment, because arming Congress without the power to legislate against subtler forms of subjection and enslavement would leave Congress powerless to enforce the promise of the Thirteenth Amendment; the promised emancipation would be nothing more than empty words.

III. EXPANSION IN THE TWENTIETH CENTURY

Justice Stewart wrote for the majority in *Jones*:

[T]his Court recognized long ago that, **whatever else may have encompassed, the badges and incidents of slavery – its “burden and disabilities” – included 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. Just as the Black Codes, enacted after the Civil War to restrict free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And **when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.**

¹⁵ United States v. Rhodes, 27 F. Cas. 785, 793-94 (C.C.D. Ky. 1866) (No. 16,151).

¹⁶ *Id.* at 793.

¹⁷ Maximilien Robespierre, On the Principles of Political Morality That Should Guide the National Convention in the Domestic Administration of the Republic (February 5, 1794) at M-5.

Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom – freedom to “go and come at pleasure” and to “buy and sell when they please”⁸⁰ – would be left with “a mere paper guarantee” if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. **At the very least, the freedom that Congress empower to secure under the 13th Amendment includes the freedom to buy whatever a white man can buy, the right to live where a white man can live. If Congress cannot say that being a free man means at least this much, then the 13th Amendment made a promise the Nation cannot keep.**¹⁸

Justice Stewart summarized what the legal minds before him were leading to—that the badges and incidents of slavery are more than just the remnants of the legal institution of chattel slavery itself; rather they encompass the systemic economic, legal, and social structures that perpetuate racial subordination. The badges and incidents of slavery thus encompass not only legal restrictions but also private practices by individuals that maintain racial hierarchy and continue slavery’s economic and cultural legacy.

Justice Douglas, concurring in *Jones*, wrote:

Enabling a Negro to buy and sell real and personal property is a removal of one of many badges of slavery.

Slaves were not considered men . . . They could own nothing; they could make no contracts; they could hold no property, nor traffic in property; they could not hire out; they could not legally marry nor constitute families; they could not control their children; they could not appeal from their master; they could be punished at will.

The true curse of slavery is not what it did to the black man, but what it has done to the white man. For the existence of the institution produced the notion that the white man was of superior character, intelligence, and morality. The blacks were little more than livestock – to be fed and fattened for the economic benefits they could bestow through their labors, and to be subjected to authority, often with cruelty, to make clear who was master and who slave.

Some badges of slavery remain today. **While the institution has been outlawed, it has remained in the minds and hearts of many** white men. Cases which have come to this Court

¹⁸ *Jones*, 392 U.S. 409 at 441-443.

depict a spectacle of slavery unwilling to die. We have seen contrivances by States designed to thwart Negro voting. Negroes have been excluded over and over again from juries solely on account of their race, or have been forced to sit in segregated seats in courtrooms. They have been made to attend segregated and inferior schools or been denied entrance to colleges or graduate schools because of their color. Negroes have been prosecuted for marrying whites. They have been forced to live segregated residential districts and residents of white neighborhoods have denied them entrance. Negroes have been forced to use segregated facilities in going about their daily lives, having been excluded from railway coaches, public parks, restaurants, public beaches, municipal golf courses, amusement parks, buses, public libraries.

Today the black is protected by a host of civil rights laws. But the forces of discrimination are still strong.¹⁹

Justice Douglas went further than Stewart by discussing the cultural stains of slavery which still existed in the hearts and minds of men. Douglas illustrated how forms of segregation at the time, in schools, housing, juries, and public facilities, created a caste system which perpetuated both the material and symbolic legacies of slavery and subjugation. Douglas' concurrence makes clear that the badges of slavery extend beyond mere economic exclusion and include the systemic social and cultural stigma in the country.

Justice Stewart, in his majority opinion, also quoted words written nearly a century before him, by Fredrick Douglass, who wrote:

They are Negroes – and that is enough, in the eye of this unreasoning prejudice, to justify indignity and violence. In nearly every department of American life they are confronted by this insidious influence. It fills the air. It meets them at the workshop and factory, when they apply for work. It meets them at church, at hotel, at the ballot-box, and worst of all, it meets them in the jury-box. Without crime or offense against law or gospel, the colored man is the Jean Valjean of American society. He has escaped from the galleys, and hence all presumptions are against him. The workshop denies him work, and the inn denies him shelter; the ballot-box a fair vote, and the jury-box a fair trial. **He has ceased to be the slave of an individual, but has in some sense become the slave of society.** He may not now be bought and sold like a beat in the market, but

¹⁹ Jones, 392 U.S. 409 at 444-47 (Douglas, J. concurring).

he is the trammled victim of a prejudice, well calculated to repress his manly ambition, paralyze his energies, and make him a dejected and spiritless man, if not a sullen enemy to society, fit to prey upon life and property and to make trouble generally.²⁰

It is telling that Justice Stewart decided to quote Douglass, as his words illustrate how everyday discrimination serves as a continuation of slavery's subjugation and horrors, and how that social prejudice itself can function as a badge of slavery even after legal emancipation. Douglass recognized that systemic exclusion from economic opportunity, civic participation, and legal protection transformed the freed person from a slave into an individual who, as he put it, is a "slave of society."²¹ Stewart's decision to invoke Douglass emphasized that the work of the Thirteenth Amendment is not finished when merely the physical chains of bondage are broken, but only when the informal forces that perpetuate subjugation, caste, and hierarchy are broken.

In *Griffin v. Breckenridge*, Justice Stewart wrote for the majority:

[S]urely there has never been any doubt of the power of Congress to impose liability on private persons under § 2 of that amendment, "for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Civil Rights Cases*, 109 U.S. 3, 20. See also *id.*, at 23; *Clyatt v. United States*, 197 U.S. 207, 216, 218; *Jones v. Alfred H. Mayer Co.*, 392 U.S., at 437-440. **Not only may Congress impose such liability, but the varieties of private conduct that it may make criminally punishable or civilly remediable extend far beyond the actual imposition of slavery or involuntary servitude. By the Thirteenth Amendment, we committed ourselves as a Nation to the proposition that the former slaves and their descendants should be forever free.** To keep that promise, "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." *Jones v. Alfred H. Mayer Co.*, *supra*, at 440. **We can only conclude that Congress was wholly within its powers under § 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of**

²⁰ *Jones*, 392 U.S. 409, 446-47 (quoting Excerpt from Frederick Douglass, *The Color Line*, *The North American Review*, June 1881, 4 *The Life and Writings of Frederick Douglass* 343-344 (1955)).

²¹ *Id.* at 447.

conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men.²²

IV. COMPARATIVE EXPERIENCES & AMERICA'S FAILED RECONSTRUCTION

To fully grasp the scope and meaning of the Thirteenth Amendment and the “badges and incidents of slavery,” it is helpful to look beyond U.S. case law and history, examining how other societies confronted with slavery have viewed and dealt with its end. These comparative experiences highlight the universal principle that legal abolition without structural and cultural transformation leaves intact the conditions of subordination, caste, hierarchy and inequality. Brazil was the last country in the Western Hemisphere to formally abolish slavery, doing so in 1888. It provides a cautionary example of how formal emancipation alone cannot uproot the stains of slavery.²³ Brazil officially abolished slavery with the passage of the Lei Aurea, yet it implemented no legislation to integrate formerly enslaved peoples into society. There were no grants of land, no educational initiatives, and no efforts to dismantle the hierarchical order.²⁴ The Brazilian experience with abolition demonstrates that, without affirmative efforts to address the social and economic badges and incidents of slavery, emancipation remains a hollow promise.

A similar and more modern-day comparison is South Africa's dismantling of apartheid in the 1990s. While apartheid was not officially slavery, it produced a system predicated on racial domination and hierarchy akin to slavery's social and legal structure. It was slavery in all but name. The 1996 South African Constitution sought not merely to end apartheid's legal framework but to dismantle its enduring effects. It guarantees equality, human dignity, housing, health care, education, and social security, and rights explicitly designed to address historical subordination.²⁵ South Africa's courts have repeatedly recognized that apartheid's legacy required the proactive intervention of the state. Their court understood that systematic subjugation must be actively dismantled, and that social and economic rights are integral to freedom and equality,²⁶ a principle that echoes the debate over the extent and reach of the badges and incidents of slavery.

²² Griffin v. Breckenridge, 403 U.S. 88, 105 (1971).

²³ See ROBERT CONRAD, THE DESTRUCTION OF BRAZILIAN SLAVERY, 1850-1888 (1993).

²⁴ See GEORGE REID ANDREWS, BLACK AND WHITE IN SAO PAULO, BRAZIL, 1888-1988 (1991); see also EMILIA VIOTTI DA COSTA, THE BRAZILIAN EMPIRE: MYTHS AND HISTORIES (rev. ed. 2000).

²⁵ CONST. OF THE REPUBLIC OF S. AFR., ch. 2, §§ 26-27.

²⁶ Government of the Republic of South Africa v. Grootboom 2001 (1) SA 45 (S. Afr.).

These are but some of countless similar experiences of nations around the world. Common among them is the understanding that abolition is not self-executing. A legal decree ending institutionalized slavery, without deliberate policies to dismantle its social, economic, and cultural legacies, ensures its effects will endure. While Brazil provides a cautionary tale of what happens with state inaction, the American experience demonstrates a more tragic path: a brief, radical vision for change that was actively sabotaged and reversed.

Nowhere is this principle more starkly illustrated than in the failure of the United States to secure a meaningful Reconstruction. The promise of the era was profound. General William T. Sherman's Special Field Order No. 15 allocated confiscated Confederate land for settlement by formerly enslaved families, giving rise to the phrase "40 acres and a mule."²⁷ Similarly, Congress established the Freedmen's Bureau to provide assistance and protect the rights of the newly freed.²⁸ These efforts represented a tangible effort at economic justice, an attempt to undo slavery's economic legacy. These promises would prove hollow, however, because after Lincoln's assassination, President Andrew Johnson largely abandoned Reconstruction, ordered the land returned to the Confederate leaders he had pardoned, and displaced thousands of freed families.²⁹ This initial failure set the tone for the era. Reconstruction was officially abandoned with the Compromise of 1877, which saw the withdrawal of the last federal troops from the South.³⁰ Without federal protection, the project of building an interracial democracy collapsed. In place of land ownership, freed people were trapped in systems of sharecropping and debt peonage, binding them to the land they had worked as slaves in a cycle of debt that was nearly impossible to escape.³¹

Where the American failure becomes distinct is in its contrast with that of post-apartheid South Africa. While South Africa's 1996 constitution affirmatively guaranteed social and economic rights like housing and education to proactively dismantle the structures of apartheid, the United States did the opposite. Following the abandonment of Reconstruction, Southern states meticulously reconstructed a racial caste system through the law. The Black Codes, and later Jim Crow laws, were not mere social customs; they were state-sanctioned systems designed to rigidly control Black labor, criminalize Black Americans existence, and deny them civic participation through poll taxes and literacy tests.³² Where the law was insufficient, organized racial terrorism by groups like the Ku Klux Klan enforced the racial order through lynchings, arson, and intimidation. These failures ensured that

²⁷ Headquarters, Mil. Div. of the Mississippi, Special Field Ord. No. 15 (Jan. 16, 1865).

²⁸ The Freedmen's Bureau Act of 1865 (1865).

²⁹ See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*; see also C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (commemorative ed. 2002).

the badges and incidents of slavery remained deeply embedded in American law and society, shaping everything from the racial wealth gap to segregated housing, inequitable education, and a biased criminal justice system that continues to echo the logic of convict leasing. The United States chose not to dismantle slavery's structures, but rather to allow them to evolve into new forms of subordination.

This is not to say that other countries have removed the stains of slavery or achieved complete racial equality. Yet these comparative experiences underscore a critical idea that the authors of the Thirteenth Amendment and subsequent legal minds understood: true emancipation requires more than the abolition of slavery itself; it requires the dismantling of the conditions that sustain its legacy.

V. CONTEMPORARY MANIFESTATIONS OF THE BADGES AND INCIDENTS OF SLAVERY

Even prior to the passage of the Thirteenth Amendment, at every level of the judicial system it was understood that slavery extended beyond merely municipal laws. Slavery was not simply a legal category but a social and economic condition of domination, reinforced through custom, violence and systemic exclusion. As a concept, it was understood that ending slavery as a formal institution would not be enough to make those formerly enslaved peoples, full and equal citizens of the United States.

Justice Stewart framed it best in *Jones* when he pointed out that if the Thirteenth Amendment merely ends the formal institution of slavery, then it “made a promise the Nation cannot keep.”³³ If the badges and incidents of slavery were to be truly defined, the best definition lies in the idea that anything which would contribute to de facto slavery would be considered a badge and incident of slavery; anything that would prevent any group of people from exercising the same fundamental unalienable rights awarded to their fellow citizens; anything that diminishes the ability of members of that group to live the lives of their fellow citizens; anything that contributes to the prospect that any person of the United States is less than another from birth; anything that would result in second-class citizenship status; anything that would deny them “Life, Liberty and the pursuit of Happiness,”³⁴ be it government or private action.

A. Economic Subordination After Emancipation

From the moment slavery ended, Black workers were systematically excluded from labor protections afforded to white workers and taken advantage of. The Fair Labor Standards Act of 1938 established minimum

³³ See *Jones*, 392 U.S. 409 at 443

³⁴ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

wages and collective bargaining rights.³⁵ However agricultural and domestic workers were excluded from these labor protections, sectors in which a majority of Black workers at the time were employed.³⁶ Southern legislators seeking to preserve the echoes of slavery insisted that labor protections should not undermine the racial hierarchy.³⁷ The exclusion of Black workers from New Deal protections limited their ability to organize, bargain collectively and secure stable wages, further cementing their economic marginalization. It is perhaps President Franklin Delanor Roosevelt's greatest failure. While this exclusion was gradually reduced with time, the damage had already been done and Black workers remained overrepresented in low-wage occupations and underrepresented in management and professional employment.

The Servicemen's Readjustment Act of 1944, more commonly known as the GI Bill, was signed into law by President Franklin Delanor Roosevelt on June 22, 1944.³⁸ It was designed to provide returning World War II veterans with educational benefits, unemployment insurance, and guaranteed home loans. Sixteen million Americans served during World War II, more than two million of whom were African American.³⁹ Black veterans had answered the call to service in every branch of the armed forces, fighting for country and freedom abroad, all while being denied full citizenship and freedom at home. Essential to the passage and creation of the GI Bill was Mississippi Congressman John Rankin, chair of the House Veterans' Affairs Committee, who ensured that the Bill would be administered at the state level rather than directly by the federal government.⁴⁰

That decision empowered local officials in Southern states to discriminate against African Americans in the distribution of these benefits. Black veterans found themselves systematically excluded. In higher education, traditionally white institutions often denied them admission while traditional Black institutions were underfunded and lacked the capacity to absorb returning soldiers.⁴¹ In housing, Black veterans were routinely denied mortgages, especially in the suburbs where restrictive covenants and redlining practices

35 Fair Labor Standards Act of 1938 (1938) (revised 2011).

36 See Ira Katznelson, *When Affirmative Action Was White*, POVERTY & RACE, March/April 2006; See also Ira Katznelson & Sean Farhang, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, STUDIES IN AMERICAN POLITICAL DEVELOPMENT, 19 (Spring 2005); See also Michael J. Klarman, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY, (2007).

37 See Ira Katznelson, *When Affirmative Action Was White*, POVERTY & RACE, March/April 2006; See also Ira Katznelson & Sean Farhang, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, STUDIES IN AMERICAN POLITICAL DEVELOPMENT, 19 (Spring 2005); See also Michael J. Klarman, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY, (2007).

38 Servicemen's Readjustment Act of 1944 (1944)

39 See VA HISTORY SUMMARY - DEPARTMENT OF VETERANS AFFAIRS, <https://department.va.gov/history/history-overview/>.

40 See also, Sarah Turner & John Bound, *The G.I. Bill, World War II, and the Education of Black Americans* (2002); See also Beryl Satter, *FAMILY PROPERTIES: RACE, REAL ESTATE AND THE EXPLOITATION OF BLACK URBAN AMERICA* (2009); See also Richard Rothstein, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); See also Glenn Altschuler & Stuart Blumin, *THE GI BILL: A NEW DEAL FOR VETERANS* (2009).

41 See also, Sarah Turner & John Bound, *The G.I. Bill, World War II, and the Education of Black Americans* (2002); See also, Beryl Satter, *FAMILY PROPERTIES: RACE, REAL ESTATE AND THE EXPLOITATION OF BLACK URBAN AMERICA* (2009); See also Richard Rothstein, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); See also Glenn Altschuler & Stuart Blumin, *THE GI BILL: A NEW DEAL FOR VETERANS* (2009).

excluded African Americans.⁴² While white veterans leveraged the GI Bill to secure homes, pursue higher education and build middle-class lives, Black veterans were denied those same rights.

The original GI Bill expired in 1956. By that time, nearly eight million veterans had received education or training and over four million home loans worth more than thirty billion dollars had been issued.⁴³ However, the benefits were not distributed evenly. Property ownership, which is arguably the single greatest mechanism for building wealth in America, was disproportionately denied to Black veterans. White veterans used the Bill to solidify their position in the growing American middle class, passing along advantage to children and grandchildren. Black veterans, by contrast, were locked out of these opportunities, left instead to confront overcrowded neighborhoods, predatory lending and declining property values. In this sense, the GI bill became yet another badge and incident of slavery. Congress had promised equality, yet functionally perpetuated racial discrimination.

The promise of freedom in the Thirteenth Amendment remains a subject of debate today. Some argue that the fight for civil rights has been won—that Black Americans now have equal opportunity and that policies such as affirmative action and diversity, equity, and inclusion initiatives have tipped the scales in favor of racial minorities. Great progress has been made, and relatively speaking under the law equality has been achieved. However, such arguments overlook the systemic barriers that have persisted since emancipation. Equality can feel like oppression to those accustomed to privilege.⁴⁴

Since the passage of the Thirteenth Amendment, Black Americans have continuously struggled for equal access to the rights guaranteed to them under the Constitution. After the abolition of slavery, Black Codes restricted their economic and social mobility, followed by Jim Crow laws that enforced segregation. The fight for equality has been long and hard, often coming one small step at a time, one small victory at a time. The right to marry had to be earned, as did the right to own property, the right to receive an education, and to access public ⁴⁵ [redacted]. While Black Americans fought to secure these rights, white Americans continued to benefit from a system that had long favored them, leaving Black communities economically and socially disadvantaged.

B. Segregated Opportunities in Education and Wealth

Today, school funding is tied largely to local property taxes, which only reproduces racial disparities by ensuring that predominantly Black school districts receive less investment. Majority white school districts receive over

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Anonymous

⁴⁵ *See*, *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Civil Rights Act of 1964 (1964).

twenty-three billion dollars more in funding each year than majority nonwhite school districts, despite serving a similar number of students.⁴⁶ This serves to deny Black children equal access to experienced teachers, advanced placement courses, modern technology, and the extracurricular opportunities that are essential for developing critical skills and competing for admission to higher education. Education, like property ownership, is a pathway to autonomy and economic mobility. By limiting access to the primary mechanism for economic and social advancement, these funding disparities effectively confine entire communities to a state of perpetual disadvantage, reinforcing the very racial hierarchies the Thirteenth Amendment was intended to dismantle.

We've seen this cycle play out with every minority group in American History. When Irish Americans first immigrated here, they faced intense discrimination, were often seen as racially inferior, and were relegated to low-wage jobs and segregated into urban slums.⁴⁷ When Italian Americans first immigrated here, they endured similar xenophobia, being stereotyped as criminals and facing violent prejudice and systematic exclusion.⁴⁸ When Chinese Americans first immigrated here, they were met with violent racism, seen as racially inferior and incapable of assimilation, culminating in the Chinese Exclusion Act of 1882, which explicitly suspended immigration for Chinese immigrants and would remain the law for nearly sixty years.⁴⁹ Later Japanese Americans faced similar discrimination during World War II when, following the attack on Pearl Harbor, President Roosevelt issued Executive Order 9066.⁵⁰ Under the guise of national security, Japanese Americans were forcibly removed and relocated to incarceration camps. American citizens were stripped of their property, business and freedom for no crime other than being of Japanese descent.⁵¹ Consistently, minority groups have been denied equal access to education, capital, and political power. It is not until they are freely brought into the social and economic mainstream that the generational cycle of disadvantage begins to break. While Irish and Italian minorities were eventually accepted into the mainstream social and economic circles, Black Americans have statistically remained on the outside looking in.⁵²

⁴⁶ *23 Billion*, EdBuild, 4 (2019)

⁴⁷ See generally Noel Ignatiev, *HOW THE IRISH BECAME WHITE* (1995); see also LIBRARY OF CONGRESS, RACIAL TENSIONS, IMMIGRATION AND RELOCATION IN U.S. HISTORY, CLASSROOM MATERIALS AT THE LIBRARY OF CONGRESS, <https://www.loc.gov/classroom-materials/immigration/irish/racial-tensions>.

⁴⁸ LIBRARY OF CONGRESS, RACIAL TENSIONS, IMMIGRATION AND RELOCATION IN U.S. HISTORY, CLASSROOM MATERIALS AT THE LIBRARY OF CONGRESS, [HTTPS://WWW.LOC.GOV/CLASSROOM-MATERIALS/IMMIGRATION/ITALIAN/UNDER-ATTACK/](https://www.loc.gov/classroom-materials/immigration/italian/under-attack/)

⁴⁹ LIBRARY OF CONGRESS, RACIAL TENSIONS, IMMIGRATION AND RELOCATION IN U.S. HISTORY, CLASSROOM MATERIALS AT THE LIBRARY OF CONGRESS, <https://www.loc.gov/classroom-materials/immigration/chinese/intolerance/>.

⁵⁰ LIBRARY OF CONGRESS, RACIAL TENSIONS, IMMIGRATION AND RELOCATION IN U.S. HISTORY, CLASSROOM MATERIALS AT THE LIBRARY OF CONGRESS, <https://www.loc.gov/classroom-materials/immigration/japanese/behind-the-wire/>

⁵¹ *Id.*

⁵² Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FED. RESRV. (September 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.html>.

C. Convict Leasing to Mass Incarceration

Wealth and education are not the only areas where the badges and incidents of slavery are present today. The weaponization of the criminal justice system and deliberately unequal application of the law has long served as a badge and incident of slavery. Just as convict leasing and discriminatory laws served to extend the legacy of slavery, the mass incarceration of African Americans in the late 20th century and now 21st century represents yet another continuation of slavery's legacy. Following the passage of the Controlled Substances Act in 1970 and Nixon's "War on Drugs," federal and state policies disproportionately criminalized Black communities.⁵³ Mandatory minimum sentencing laws, "three strikes provisions", and disparate penalties for various drugs, ensured that Black men in particular were incarcerated at staggering rates relative to their white counterparts.⁵⁴ The War on Drugs became the new Jim Crow, replacing explicit racial segregation with a system of legal and cultural control that stigmatized Black Americans as criminals and "legally" stripped them of their civil rights.⁵⁵

Such parallels to chattel slavery prior to the civil war are telling. The use of forced labor through prison industries, exclusion from housing and employment post release, and enduring stigmatization resulted in second-class citizenship, including the permanent denial of voting rights. Black Americans are approximately thirteen percent of the U.S. population but make up approximately thirty eight of the incarcerated population.⁵⁶ Black men are six times more likely to be incarcerated as white men. Black men receive sentences nearly twenty percent longer than those of white men for similar offenses.⁵⁷ These disparities cannot be explained by a difference in drug use or in criminal behavior, as black and white Americans use marijuana at similar rates, yet Black Americans are approximately three times more likely to be arrested for marijuana offenses.⁵⁸ Mass incarceration under the guise of a "War

53 See Comprehensive Drug Abuse Prevention and Control Act of 1970 (1970); See Anti-Drug Abuse Act of 1986 (1986); See also Violent Crime Control and Law Enforcement Act of 1994 (1994); See also David Farber, *THE WAR ON DRUGS: A HISTORY* (2021); See also The Color of Justice, The Sentencing Project; See also Aaron Morrison, *50-Year War on Drugs Imprisoned Millions of Black Americans*, AP NEWS, (July 23, 2021), <https://apnews.com/article/war-on-drugs-75e61c224de3a394235df80de7d70b70>.

54 See Comprehensive Drug Abuse Prevention and Control Act of 1970 (1970); See Anti-Drug Abuse Act of 1986 (1986); See also Violent Crime Control and Law Enforcement Act of 1994 (1994); See also David Farber, *THE WAR ON DRUGS: A HISTORY* (2021); See also The Color of Justice, The Sentencing Project; See also Aaron Morrison, *50-Year War on Drugs Imprisoned Millions of Black Americans*, AP NEWS, (July 23, 2021), <https://apnews.com/article/war-on-drugs-75e61c224de3a394235df80de7d70b70>.

55 See generally Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010)

56 See Federal Bureau of Prisons, *Inmate Statistics* (2025); See also Leah Wang, *Incarceration stats by race, ethnicity, and gender for all 50 states and D.C.*, PRISON POLICY INITIATIVE (September 27, 2023), https://www.prisonpolicy.org/blog/2023/09/27/updated_race_data/. See also United States Sentencing Commission. (2017). *Demographic differences in sentencing: An update to the 2012 Booker report*. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf

57 United States Sentencing Commission. (2017). *Demographic differences in sentencing: An update to the 2012 Booker report*. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf. See also The Color of Justice, The Sentencing Project; See also ASHLEY NELLIS, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* (2021); See also UNITED STATES SENTENCING COMMISSION, *DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING* (November 2023).

58 See American Civil Liberties Union, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* (2020); See also Substance Abuse and Mental Health Services Administration, *Results from the 2023 National Survey on Drug Use and Health* (2024)

on Drugs” stripped millions of Black Americans of voting rights, economic opportunity and social mobility, just as slavery did prior to the American Civil War and the passage of the Thirteenth Amendment. It created a system in which Black Americans exist as Americans in name only, while their subordination remains firmly entrenched in law, culture, and practice.

VI. DEFINING THE BADGES AND INCIDENTS OF SLAVERY TODAY: IMMIGRATION ENFORCEMENT AS A MODERN BADGE AND INCIDENTS OF SLAVERY

When analyzing the persistent racial disparities in American society today, one must confront one simple question: Are these disparities the result of inherent differences in ability based on race, or are they the product of systemic disadvantage? The former contradict reason, science, logic, and morality – leaving the latter as the only rational explanation. If reason alone is not enough, the Preamble to the Declaration of Independence should be:

We hold these truths to be self-evident, **that all men are created equal**, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.⁵⁹

This one simple truth leaves only one definition for the badges and incidents of slavery today, and the limit on the government’s power to enforce the Thirteenth Amendment. The badges and incidents of slavery are anything that would seek to relegate a class of people to second-class citizenship status and deny them the ability to live equal lives to their fellow citizens. As it relates to the government’s power to enforce the Thirteenth Amendment, there is no limit beyond the Constitution’s general structural limits on the government’s power. Justice Stewart said it best, “[w]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.”⁶⁰

While often forgotten, the Thirteenth Amendment does not simply protect Black Americans; it protects all Americans equally, regardless of race, from the badges and incidents of slavery. However, on September 8, 2025, the U.S. Supreme Court betrayed the promise of the Thirteenth Amendment in *Noem v. Vasquez Perdomo*, where the court decided to stay a district court order preventing federal immigration officers from relying on any combination of four factors: (1) apparent race or ethnicity, (2) speaking in Spanish or accented English, (3) presence at a location where undocumented immigrants are known to gather, and (4) working specific jobs such as landscaping and construction, to justify conducting detective stops.⁶¹ The

⁵⁹ The Declaration of Independence, para. 2 (U.S. 1776).

⁶⁰ Jones, 392 U.S. 409 at 442-43.

⁶¹ *Noem v. Vasquez Perdomo*, application for stay, 25A169 (Sept. 8, 2025) p. 2-3.

Court was not alone in this betrayal, however, the Trump administration has been relentless in its violation of Americans' due process rights in the enforcement of mass deportation and national security, expanding the use of expedited removal proceedings which deny individuals a formal hearing before an immigration judge.⁶² Even those who attempt to comply with the law find themselves ensnared in these mass deportation efforts. There have been countless reports of immigrants attending their scheduled immigration hearings, only to be detained by federal agents in the courthouse and immediately processed for deportation.⁶³ Justice Frankfurter in 1947 wrote, "There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what law is, every man can. That means first chaos, then tyranny."⁶⁴

Armed and masked agents of the United States government, acting under the umbrella of national security have raided car washes, tow yards, farms, and parks and seized individuals on sight, without question, based simply on the fact that they appeared to be Latino, spoke Spanish, had an accent, and/or worked a type of job associated with immigrants.⁶⁵ The system's reliance on racial profiling and asking questions later has led to the wrongful detention and deportation of those here legally and of United States citizens.⁶⁶ In something akin to the novel *1984*, American citizens have been asked to prove their citizenship status on the spot or face detention. Some have been swept up in raids and in some cases removed from the only country they have ever known, their constitutional rights dissolving in the face of suspicion, based solely on the color of their skin or the way they speak.

These actions and criteria are no different from those of southern slave catchers and U.S. Marshals before the Civil War, who captured Black Americans, whether freedmen or slaves, to deliver them into slavery based solely on the color of their skin.⁶⁷ Such a system creates a permanent

⁶² See Exec. Order No. 14159, 90 Fed. Reg. 8700 (Jan. 21, 2025); See also Cong. Research Serv., Expedited Removal of Aliens: Legal Framework (R45314) (Oct. 30, 2018); See also Am. Immigr. Council, A Primer on Expedited Removal (Feb. 25, 2021); See also 8 U.S.C. §§ 1225, 1228 (2018); See also *CHIRLA v. Noem*, Coalition for Humane Immigrant Rights v. Noem, 1:25-cv-00872 (D.D.C. Apr. 2025).

⁶³ See Reuters, ICE Arrests Migrants at Courthouse, Opens Door to Fast-Track Deportations (May 23, 2025); See also AP, Trump Administration Sues New York Over Law Barring Warrantless Immigration Arrests at Courthouses (June 15, 2025); See also U.S. Immigr. & Customs Enf't, Civil Immigration Enforcement Actions in or Near Courthouses (Apr. 27, 2021).

⁶⁴ *United States v. United Mine Workers*, 330 U.S. 258, 312 (1947) (Frankfurter, J., concurring)

⁶⁵ See AP, U.S. Citizen Detained by ICE Agents at Work in Portland, Oregon (October 10, 2025); See also ACLU, Federal Court Rules in Favor of U.S. Citizen Illegally Detained for Deportation by Florida Sheriff (May 2025); See also Institute for Justice, U.S. Citizen and Army Veteran Submits Claims for Unconstitutional Immigrant Detention (July 2025); See Reuters, Chicago TV producer detained by border patrol agents (October 10, 2025); See also *Brown v. Ramsay*, 785 F. Supp. 3d 1214 (S.D. Fla. 2025); See also *Flores v. Noem*, No. 5:25-cv-02490-AB-AJR, 2025 U.S. Dist. LEXIS 194312 (C.D. Cal. Sep. 29, 2025); See also *Noem v. Vasquez Perdomo*, application for stay, 25A169 (Sept. 8, 2025).

⁶⁶ See AP, U.S. Citizen Detained by ICE Agents at Work in Portland, Oregon (October 10, 2025); See also ACLU, Federal Court Rules in Favor of U.S. Citizen Illegally Detained for Deportation by Florida Sheriff (May 2025); See also Institute for Justice, U.S. Citizen and Army Veteran Submits Claims for Unconstitutional Immigrant Detention (July 2025); See Reuters, Chicago TV producer detained by border patrol agents (October 10, 2025); See also *Brown v. Ramsay*, 785 F. Supp. 3d 1214 (S.D. Fla. 2025); See also *Flores v. Noem*, No. 5:25-cv-02490-AB-AJR, 2025 U.S. Dist. LEXIS 194312 (C.D. Cal. Sep. 29, 2025); See also *Noem v. Vasquez Perdomo*, application for stay, 25A169 (Sept. 8, 2025).

⁶⁷ See Fugitive Slave Act of 1850; See also U.S. Const. art. IV, 2, cl. 3; See also H. Robertt Baker, *The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War* (2006); See also *Freeman v. Robinson*, 7 Ind. 255 (1855).

underclass, stripped of basic legal protections and subject to arbitrary seizure at any moment.⁶⁸ As a result of the decisions of the Supreme Court and actions of the Trump Administration, along with Congressional inaction, Latin Americans, whether immigrants or citizens, have been relegated to second-class citizenship based on their race and national origin. They are forced to live in a state of constant fear, unable to trust the rule of law to protect them and unwilling to appear in Court for fear of detention, a condition fitting of the definition of a badge and incident of slavery. The Nation has done more than fail to uphold the promise of the Thirteenth Amendment; it now again actively enables the badges and incidents of slavery. The following quote best highlights the striking similarities between how those fearing immigration enforcement today and Black American's prior to the passage of the thirteenth amendment:

The motto which I adopted when I started from slavery was this—"Trust no man!" I saw in every white man an enemy, and in almost every colored man cause for distrust. It was a most painful situation; and, to understand it, one must needs to experience it, or imagine himself in similar circumstances. Let him be a fugitive slave in a strange land—a land given up to be the hunting-ground for slaveholders—whose inhabitants are legalized kidnappers—where he is every moment subjected to the terrible liability of being seized upon by his fellowmen, as the hideous crocodile seizes upon his prey!—I say, let him place himself in my situation—without home or friends—without money or credit—wanting shelter, and no one to give it—wanting bread, and no money to buy it,—and at the same time let him feel that he is pursued by merciless men-hunters, and in total darkness as to what to do, where to go, or where to stay,—perfectly helpless both as to the 109 means of defense and means of escape,—in the midst of plenty, yet suffering the terrible gnawing of hunger,—in the midst of houses, yet having no home,—among fellow-men, yet feeling as if in the midst of wild beasts, whose greediness to swallow up the trembling and half-famished fugitive is only equaled by that with which the monsters of the deep swallow up the helpless fish upon which they subsist,—I say, let him be placed in this most trying situation,—the situation in which I was placed,—then, and not till then, will he fully appreciate the hardships of, and know how to sympathize with, the toil-worn and whip-scarred fugitive slave.⁶⁹

⁶⁸ *Id.*

⁶⁹ Frederick Douglass, *Narrative of the Life of Frederick Douglass, an American Slave* (1845) Chapter XI.

VII. CONCLUSION

Usage and development of the phrase, “badges and incidents of slavery” throughout the history of American jurisprudence reveals more than a simple history of legal interpretation; it charts the nation’s halting, often contradictory, struggle with the very meaning of freedom and the ideals this nation was founded on. Dating back to its origins as a metaphor for systemic oppression, the concept of “badges and incidents of slavery” was intended by the framers of the Thirteenth Amendment to be a potent grant of power. It was intended to be an instrument not merely to break the physical chains of chattel slavery, but to eradicate the entire racial caste system that sustained it. The betrayal of Reconstruction and the subsequent rise of Jim Crow stalled this vision, but through the efforts of everyday Americans and civil rights activists legal change was made. As the failures in post-abolition Brazil and the attempted proactive constitutionalism of post-apartheid South Africa illustrate, true emancipation is not a self-executing decree; it requires a sustained, affirmative commitment to dismantling inherited structures of subordination.

Today, those structures persist in new and insidious forms. They are found in the generational economic disparities cemented by discriminatory New Deal policies, in the inequitable funding of our schools, and in a system of mass incarceration that functions as a modern-day apparatus of racial control. The current weaponization of immigration enforcement, which subjects individuals to arbitrary seizure based on their ethnicity and creates a legally defenseless underclass, is not a separate issue but the latest chapter in this long history of the badges and incidents of slavery. It is the creation of a new “slave of society,” against which the Thirteenth Amendment is supposed to stand as our most direct constitutional barrier. The promise of 1865 was not simply that the government would no longer enforce slavery, but that the nation would be forever free from its substantive conditions.

To confine the Thirteenth Amendment to the museum of the nineteenth century is to willfully ignore its enduring mandate. While it took time, the courts came to recognize this, gradually expanding the scope of the Thirteenth Amendment and the “badges and incidents of slavery.” However, as long as systems exist that relegate any group to a state of fear, powerlessness, and second-class citizenship, the amendment’s work is not done and its promise unfulfilled. So, we fight. We fight for a world we cannot see. For a future that is not ours. We fight for those we will never meet. “Human progress is neither automatic nor inevitable. . . . Every step toward the goal of justice requires sacrifice, suffering, and struggle the tireless exertions and passionate concern of dedicated individuals.”⁷⁰

⁷⁰ Martin Luther King Jr., Address at the Thirty-fourth Annual Convention of the National Bar Association 2 (August 20, 1959).



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