FROM STATUS TO AGENCY: ABOLISHING THE "VERY SPIRIT OF SLAVERY"

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In response to challenges that the disparate impact doctrine violates the Fourteenth Amendment's Equal Protection Clause, the Thirteenth Amendment provides a constitutional foundation that deflects the equal protection argument. Early interpreters of the Thirteenth Amendment envisioned the provision as a means to abolish chattel as well as civil slavery, which was the condition of subordinate status shared by all Black persons. Resurrecting this interpretation of the Thirteenth Amendment reveals that early efforts to transform the status of Black persons failed as they unduly focused upon freedom of contract, rather than measures to achieve effective, individual agency. Interpreting the Thirteenth Amendment as a means of transitioning free Black persons from status to agency demonstrates that the societal barriers prohibiting the transformation warranted programs and policies beyond the right to contract. Based upon the dimensions of status suffered by Black persons—perceived as stigma, station, and stratification—the disparate impact doctrine is an appropriate Thirteenth Amendment vehicle to aid in transforming the subordinate status of Black persons.

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I. INTRODUCTION

Observers praise *Griggs v. Duke Power Co.*,[1] which established the disparate impact claim as a viable doctrine,[2] as one of the Supreme Court's most important civil rights decisions.[3] But the dispute regarding the doctrine's constitutionality lingers after the Supreme Court's decision in *Ricci v. DeStefano*.[4] In *Ricci*, Justice Scalia argued in his concurring opinion that the disparate impact claim may violate the Equal Protection Clause because it requires an employer to engage in race-based, remedial conduct when its selection practices demonstrate a disproportionate impact upon a particular set of applicants; Scalia suggested that disparate impact laws are tantamount to Congress compelling employers to discriminate on the basis of race.[5]

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[1] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[2] *Griggs* interpreted provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a), (k), to establish the disparate impact doctrine. 401 U.S. at 430, 432. The disparate impact doctrine permits claims of discrimination without a showing that prejudice is a motivating factor for the discriminatory effects. 42 U.S.C. § 2000e–2(k) (2012).

[3] *See, e.g.*, ROBERT SAMUEL SMITH, RACE, LABOR, AND CIVIL RIGHTS: *GRIGGS VERSUS DUKE POWER* AND THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY 1 (2008) ("Judge Damon Keith of the Sixth Circuit, at the 75th annual convention of the NAACP, remarked that *Griggs*, "in [his] opinion even more than *Brown*, has proved most significant in combating racial discrimination. . . . Legal theorists have hailed the case as doing for employment what *Brown* did for education: breaking down the massive barriers to African Americans' full and equal participation. In fact, Keith accurately notes that *Griggs* is an even more seminal decision due to the case's role in delivering Blacks and other marginalized groups economic justice."); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 703 (2006) ("The *Griggs* decision has been universally hailed as the most important development in employment discrimination law."); Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 433 (2005) ("Aside from *Brown v. Board of Education*, the single most influential civil rights case during the past forty years that has profoundly shaped, and continues to shape, civil rights jurisprudence and the discourse on equality is *Griggs*...").

[4] Ricci v. DeStefano, 557 U.S. 557 (2009).

[5] *Id.* at 594–96.

In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,[6] the Supreme Court unexpectedly provided a justification for the disparate impact doctrine that assails Justice Scalia's argument: disparate impact claims counteract hidden discrimination and implicit bias. In upholding the viability of the Fair Housing Act's disparate impact claim, the Court proclaimed that disparate impact liability serves to attack practices born of "unconscious prejudices and disguised animus."[7] Therefore, disparate impact liability does not compel employers to racially discriminate on behalf of some employees; it actually ensures that selection practices do not inappropriately exclude protected groups from an institution's benefits based upon a criterion that is difficult to discern via disparate treatment standards.[8]

However, a question arises upon formulating the response to Justice Scalia's *Ricci* concurrence: what constitutional power underlies the rationale posited in *Texas Department of Housing*?[9] This Article submits that the

[6] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015).

[7] *Id.*

[8] *Id.*

[9] The Commerce Clause has traditionally underpinned the Civil Rights Act of 1964 in the past. U.S. CONST. art. I, § 8, cl. 3; Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 250 (1964); Katzenbach v. McClung, 379 U.S. 274, 298 (1964). This path proceeds on a shaky foundation, however, as the Court has curtailed the reach of the Commerce Clause in the years since Congress relied upon the provision to buttress civil rights legislation. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (holding that the Commerce Clause could not sustain the Patient Protection and Affordable Care Act's individual mandate to purchase health insurance); United States v. Morrison, 529 U.S. 598 (2000) (holding that the Commerce Clause could not sustain the civil remedy provision of the Violence Against Women Act); United States v. Lopez, 514 U.S. 549 (1995) (holding that the Gun–Free School Zones Act exceeded Congress' Commerce Clause power); *but see* Gonzales v. Raich, 545 U.S. 1 (2005) (holding that Congress may use the Commerce Clause power to apply Controlled Substances Act proscriptions against intrastate users of marijuana). Therefore, Congress' Commerce Clause regulatory power may not fare well against the

Thirteenth Amendment to the Constitution—section two of which gives Congress the power to enforce section one's prohibition against slavery and involuntary servitude[10]—undergirds the Court's 'unconscious prejudices and disguised animus' rationale for the disparate impact claim. "Unconscious prejudices and disguised animus" reveal the presence of diminished status, denoting the low esteem society accords to members of a particular group. Properly conceived, the Thirteenth Amendment exists to remedy the diminished status of individual members of the aggrieved group. Indeed, long-ignored interpreters of the Thirteenth Amendment provide that slavery in the United States encompassed a diminished status suffered by the enslaved population and free Black persons. As perceived by those interpreters, the Thirteenth Amendment exists to aggrieve the diminished status suffered by persons under the various forms of slavery prevalent in the United States during the antebellum era; those forms are principally characterized as chattel slavery, defined as the ownership of individuals as property, and civil slavery, the state of one group being subordinate to other groups in society.[11]

Specifically, defining slavery pursuant to nineteenth century conventions casts the Thirteenth Amendment as a vehicle to transition enslaved persons from the subordinated status of servitude to the liberated status of agency, which

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Constitution's requirement that Congress afford equal protection under the laws.

[10] The Thirteenth Amendment provides as follows:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

[11] LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN 91 (1999).

represents personal autonomy over individual actions and aspirations.[12] However, the nineteenth century efforts to transform status proved insufficient as they failed to account for the structural impediments in society that impeded former slaves from transitioning to individual agency. The Court's insight in *Texas Department of Housing* demonstrates that Congress may proscribe these structural features that inhibit individual agency—particularly via the disparate impact doctrine—and Congress' endeavor is sanctioned by the Thirteenth Amendment's aim to transition subjugated persons from status to effective agency.[13]

The ensuing parts of this Article will explore the meaning of slavery as status and the Thirteenth Amendment's focus to transition enslaved persons from status to agency. In Part I, after reviewing the inconclusive legislative history of the Thirteenth Amendment and the meaning of freedom attributed to it by freed Black persons, the Article will assess the dichotomy in interpretation among Supreme Court justices. The assessment will reveal that some Supreme Court justices adopted the sociological view that the status of free Black persons did not differ significantly from Black persons who suffered under chattel slavery. Most notable among these voices is Justice John Marshall Harlan's dissent in *The Civil Rights Cases*.[14]

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[12] *See* Mustafa Emirbayer & Ann Mische, *What is Agency?*, 103 AM. J. SOC. 962 (1998) (describing the interplay of the different dimensions of agency and defining agency as informed by the past but also oriented to the future and the present).

[13] Other articles discussing the Thirteenth Amendment as the constitutional foundation for disparate impact claims have not noted this linkage. *See* Darrell A.H. Miller, *The Thirteenth Amendment, Disparate Impact, and Empathy Deficits*, 39 SEATTLE U. L. REV. 847 (2016) (arguing that "modern systemic empathetic failures towards minorities, and those of African descent in particular, are legacies" of slavery that may be remedied by the disparate impact claim as a Thirteenth Amendment instrument); Marcia McCormack, *Disparate Impact and Equal Protection after* Ricci v. DeStefano, 27 WIS. J.L. GENDER & SOC'Y 100 (2012) (suggesting that the Thirteenth Amendment's anti–subordination goal may support the disparate impact claim).

[14] The Civil Rights Cases, 109 U.S. 3 (1883).

Harlan's *Civil Rights Cases* dissent deserves as much praise and allegiance as his *Plessy v. Ferguson*[15] dissent, which is viewed as a forerunner to *Brown v. Board of Education*.[16] His dissent classifies slavery as involving not just formal chattel slavery, but also the civil slavery encompassing free Black persons, a condition propagated explicitly by the *Dred Scott* case.[17] Other cases decided during the period also describe this phenomenon of civil slavery.[18] These opinions depict the status of Black persons as the "very spirit of slavery," and support the conclusion that Justice Harlan's *Civil Rights Cases* dissent should be installed as a judicial canon evoking the proper interpretation of the Thirteenth Amendment.

Part II examines the three dimensions of status underlying Harlan's conception of slavery—stigma, station, and stratification—so as to fully understand slavery and the concomitant scope of the Thirteenth Amendment. This analysis will depict stigma as the understanding that slaves were dehumanized and treated as animalized, inferior beings. Station refers to the doctrine used to justify slavery against the moral arguments of abolitionists. Slave owners and apologists developed an ideology of familial station; that is, slaves represented the lowest station in the families of slave owners—below spouses, children, and other servants—and slave owners assumed patriarchal control over the development of all these stations of individuals under their influence. The phenomenon of stratification portrays that slaves in the United States occupied the lowest rungs in the labor force and were relegated to performing menial work, unlike slaves in other slave systems.

In Part III, the Article establishes the Thirteenth Amendment as a measure to transition former enslaved persons from status to agency, from subordination to relatively liberated individuals. Two nineteenth century

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[15] Plessy v. Ferguson, 163 U.S. 537 (1896).
[16] Brown v. Bd. of Educ., 347 U.S. 483 (1954).
[17] Dred Scott v. Sandford, 60 U.S. 393 (1857).
[18] *See, e.g.*, Bryan v. Walton, 33 Ga. Supp. 11 (Ga. 1864).

sociological developments converge to shape the interpretation of the Thirteenth Amendment vis-à-vis the three aforementioned dimensions of slavery. Free labor ideology posited the belief that freeing all forms of labor to pursue their self-interest in advancement, principally through the right to contract, would transform the labor force into artisans and independent owners of production. Just as important, Sir Henry Thomas Maine declared in his seminal work *Ancient Law* that advanced societies evolved from establishing legal relationships on the basis of status to a legal order based upon individual contract.[19] Sociologist Amy Stanley elaborated upon this evolution, writing that the abolition of slavery represented a movement from the status of bondage to the freedom of contract.[20]

As Part III will reveal, nineteenth century interpreters of the Thirteenth Amendment failed to appreciate that the transition from the status of bondage could not rely merely upon the endeavor to give freed persons the right to contract. Rather, the right to contract symbolized the more foundational concept of agency, which denotes the freedom of individuals to determine the course of their lives and take action to effect that course. As later sociologists understood, the province of agency runs head-on into structural features of society that impede the best efforts of individuals to achieve effective action.

With this understanding, Part III crystallizes a primary impetus for the Thirteenth Amendment. The Amendment exists to transition freed persons and their descendants from the status of slavery—conceived as chattel, civil, and social subordination—to the state of individual agency, and this transition sanctions the use of legal tools to effect the evolution. One such legal tool has been the provision

[19] HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 165 (1864). The afore–cited edition refers to the first United States cited edition.

[20] AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 2 (1998).

of the right to contract and other rights (to acquire and sell property, etc.) free of discrimination, yet the Thirteenth Amendment also buttresses the use of the disparate impact doctrine as a tool to remove barriers to individual agency. As the Court stated in *Texas Department of Housing*, hidden discrimination and implicit bias exist in society as impediments to the exercise of rights.[21] The disparate impact doctrine serves to address such bias. The disparate impact claims also serve to end racial stigma and stratification, which represent different variations of implicit bias. Therefore, the disparate impact claim represents a proper exercise of Congress' enforcement power under the Thirteenth Amendment because it serves to address discriminatory barriers constituting badges and incidents of slavery.

Finally, Part IV provides that the disparate impact doctrine withstands any perceived violations of the Fourteenth Amendment's Equal Protection Clause because the Thirteenth Amendment compellingly justifies the doctrine's proscription of discriminatory status. More critically, nineteenth century Supreme Court authority reveals that the Thirteenth and Fourteenth Amendments work together to ensure that no class of persons should occupy a subordinate status to other groups. With this structural interpretation, a claim relying upon the Thirteenth Amendment for its constitutional foundation forestalls an argument that it violates the consonant provisions under the Fourteenth Amendment.

This Article examines the Thirteenth Amendment's meaning sociologically because other methods of interpretation have not captured this dynamic in the amendment's origin. Reviewing the historical record underlying the passage and ratification of the amendment provides contested findings. The members of Congress who passed the amendment appeared to have divergent understandings of the provision. Some thought it would only eradicate actual slavery and involuntary servitude, whereas

[21] 135 S. Ct. at 2522.

some believed it would also curtail discrimination in other facets of life. The states who ratified the amendment had their own interpretation as well, which traversed the gamut from mere prohibition of slavery to a broadly-defined conception of freedom. In addition, abolitionists had their own thoughts as to its meaning. All of these interpretations occurred against a backdrop where pervasive racial discrimination subjugated free Black people in the antebellum North and South, and such discrimination persisted after the Civil War.

Supreme Court case law also leaves questions in its wake. Notably, the 1883 majority decision in *The Civil Rights Cases* held that Congress may enact legislation to ameliorate the badges and incidents of slavery, which were perceived then as post-emancipation laws enacted by recalcitrant Southerners that re-imposed the legal restrictions concomitant with slavery.[22] The Court's interpretations of the amendment contracted and expanded for nearly a century until the Court decided *Jones v. A.H. Mayer Co.*, where it held that Congress possesses the authority to rationally specify the badges and incidents of slavery, and to pass legislation to address such problems.[23] *Jones*' formulation of the Thirteenth Amendment standard has spawned numerous articles about its meaning.

Some commenters limit the Thirteenth Amendment's enforcement clause to only prohibiting actual slavery and involuntary servitude.[24] Other scholars argue that the clause should be limited to addressing discriminatory violations that resemble chattel slavery or relegate people back to such

[22] 109 U.S. 3, 20 (1883).

[23] Jones v. A.H. Mayer Co., 392 U.S. 409 (1968).

[24] *See, e.g.,* Herman Belz, *The Civil War Amendments to the Constitution: The Relevance of Original Intent*, 5 CONST. COMMENT. 115, 139–40 (1988) (arguing that the Thirteenth Amendment "was not intended as comprehensive grant of civil rights," but chiefly to prohibit chattel slavery); HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 290 (1973).

slavery.[25] Still other scholars provide a broader interpretation of the amendment, positing that interpreters should heed the ideals of freedom embodied in the Declaration of Independence and trumpeted by some people before and during the Civil War. This conception provides an expansive interpretation of the amendment, ostensibly calling for the protection of autonomy and liberty for all people.[26] Many of the articles interpreting the scope of the Thirteenth Amendment reach conclusions comparable to those of the aforementioned scholars.[27]

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[25] For example, Jennifer Mason McAward argues that § 2 gives Congress broad discretion to pass legislation that prevents the *de facto* reemergence of slavery, i.e., the badges and incidents of slavery. *Defining the Badges and Incidents of Slavery*, 14 U. PENN. J. CONST. LAW 561, 624 (2012). Badges and incidents of slavery refer "to public or widespread private action, based on race, or the previous condition of servitude, that mimics the law of slavery and that has significant potential to lead to the *de facto* re-enslavement or legal subjugation of the targeted group." *Id.* at 630. Similarly, William M. Carter, Jr. argues that the badges and incidents of slavery should "be evaluated with reference to whether the identity of the victim and the nature of the injury demonstrate a concrete link to the system of chattel slavery." William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1320 (2007).

[26] The foremost expositor of this approach is Alexander Tsesis, who asserts that in a constitutional republic "each person has the right to pursue and fulfill his or her unobtrusive vision of the good life." ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM 5 (2004). "Emancipation is only meaningful where persons are left free to fulfill their potential, unfettered by the 'idiosyncratic judgments' of others." *Id.* at 5. "The Thirteenth Amendment grants the United States government power to secure the autonomy of emancipated, equal citizens." *Id.*; *see also* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438 (1989) ("Many members of Congress envisioned the Thirteenth Amendment as a charter for labor freedom ... For these members, free labor was not just the absence of slavery and its vestiges; it was the guarantee of an affirmative state of labor autonomy.").

[27] *See, e.g.*, George A. Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 171 (Alexander Tsesis, ed., 2010) (Congress has the power to remedy a broad array of incidents of servitude); Aviam Soifer, *Protecting Full and Equal Rights*, *in* THE PROMISES OF LIBERTY (extolling the broad purposes of the Civil Rights Act of 1866 under the Thirteenth Amendment); Jack M. Balkin & Sanford Levinson, *The*

Although the approaches by those scholars are laudable, a comprehensive interpretation of the Thirteenth Amendment requires an analysis beyond an exegesis on the meaning of freedom. It also demands a long-due examination of the meaning of the word "slavery" in the Thirteenth Amendment. In defining slavery, sociological, and in certain respects, legal sociological insights and developments present a different lens for interpreting the Thirteenth Amendment and its enforcement clause. Specifically, such studies define the particular meaning of slavery in the United States context, as well as the meaning of freedom attendant upon this understanding of slavery. This Article will examine these sociological insights to develop the principle claim set forth previously: the Thirteenth Amendment provides a constitutional foundation for laws that combat implicit bias and hidden discrimination because it serves to transform persons from a status of bondage to the relative freedom of individual agency.

II. RESURRECTING THE DEFINITION OF "SLAVERY" AS STATUS

Constitutional interpretation should begin with the text of the Thirteenth Amendment, yet that approach leaves us with the appraisal that slavery and involuntary servitude are not permitted in the United States. The question ensues whether the framers of the Thirteenth Amendment intended to limit the reach of the provision solely to the eradication of slavery and like conditions, or whether they envisioned some deeper purpose. The historical record underlying the passage and ratification of the Thirteenth Amendment does not

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Dangerous Thirteenth Amendment, 112 COLUM. L. REV. 1447, 1497 (2012) (arguing that slavery had a broader, anti-republican meaning that supports a more expansive interpretation of the amendment); Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1695 (2012) (describing an interpretation of the Thirteenth Amendment that provides for the protection of fundamental human rights); Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733 (2012) (the Thirteenth Amendment may be invoked to protect affirmative constitutional rights).

provide any clear answer to this question. However, certain Supreme Court jurists argued that slavery should be assessed in all its aspects, which encompasses chattel slavery as well as civil slavery, the subordinate status that linked free Black persons to the enslaved denizens of the United States.

A. The Thirteenth Amendment's Inconclusive Legislative and Ratification History

1. Divergent Interpretations by Lawmakers and the Citizenry

One of the definitive accounts of the ratification history is Michael Vorenberg's study in *Final Freedom*,[28] which reviews the debates and considerations expressed by the framers of the Thirteenth Amendment. Notwithstanding the Senate Judiciary Committee's efforts to avoid language similar to that in the French Declaration of Rights, Senator Charles Sumner of Massachusetts, a member of the Radical Republicans section of the Republican Party, submitted a major proposal phrasing the Thirteenth Amendment as affording "legal equality between the races."[29] Thus, Sumner's initial draft language for the amendment guaranteed all persons the same civil rights.[30] Nevertheless, heeding Pennsylvania Republican Senator Edward Cowan's argument that the amendment should only prohibit enslavement and not radically alter the laws of the states,[31] the Senate Judiciary Committee rejected the more egalitarian language of Sumner for that of the Northwest Ordinance.[32]

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[28] MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT (2001).

[29] *Id.* at 57. Sumner's language declared "all people equal before the law." *Id.* at 51.

[30] *Id.* at 55.

[31] *Id.* at 55–56; *see also* HOWARD DEVON HAMILTON, THE LEGISLATIVE AND JUDICIAL HISTORY OF THE THIRTEENTH AMENDMENT 56 (1996) (describing the views of some senators that the amendment freed people from slavery but did not give them citizenship).

[32] HAMILTON, *supra* note 31, at 55. The Northwest Ordinance governed the territories acquired by the United States north and west of the

Unmistakably, a few members of the Senate Judiciary Committee believed that the rejection of Sumner's language indicated merely a difference in style, not substance, and thus the proposed amendment ostensibly guaranteed freedoms broader than manumission.[33] This view by some senators failed to acknowledge that the Senate Judiciary Committee rejected Sumner's proposal because of the association of such language with Sumner's Radical Republican views.[34] The Senate Judiciary Committee also considered the views and votes of the Northern Democrats, who would reject any amendment connected to Sumner or that similarly mentioned equality.[35] The rejection of Sumner's language maintained antislavery Democrats' commitment to a moderate amendment.[36] The language actually approved by the Senate Judiciary Committee, and ultimately by Congress and ratified as the amendment, did not suit Sumner. He believed that much more was needed beyond the adopted iteration of the amendment to secure freedom and equality.[37]

Ohio River, which presently comprise the states of Indiana, Illinois, Michigan, Ohio, Wisconsin, and part of the state of Minnesota. The law provided that "[t]here shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted." *Id.* at art. VI.

[33] VORENBERG, *supra* note 28, at 56; *but cf.* GEORGE H. HOEMANN, WHAT GOD HATH WROUGHT: THE EMBODIMENT OF FREEDOM IN THE THIRTEENTH AMENDMENT 159 (1987) ("Freedom was the plenitude of rights, and slavery the negation of rights. But freedom held precedence, so that it was incorrect to reverse the order and make liberty the mere negation of slavery. This was a lesson of the war abolitionists and radical [sic] proposed and fought for, and a key to understanding the scope of the Thirteenth Amendment.").

[34] VORENBURG, *supra* note 28, at 58.

[35] *Id.* at 58–59.

[36] *Id.* at 59.

[37] *Id.* at 60. Vorenberg estimates that this "[t]his short–term strategy for securing the amendment's adoption had an unanticipated, powerful long–term effect on civil rights law." *Id.* at 59. Although some senators may have believed the language of the Thirteenth Amendment accomplished Sumner's intent, their rejection of Sumner's original language "unwittingly placed an effective cudgel in the hands of later jurists and legislators who beat down any attempt to broaden the amendment into an extension of civil equality for African Americans." *Id.*

The ratification history of the amendment by the states reflects the same contested meaning, as there was no unity among politicians for the proposition that the amendment protected civil, political, and social rights.[38] President Andrew Johnson and Secretary of State William Henry Seward sought ratification in the Confederate states by assuring Southern lawmakers of the amendment's limited scope, including an interpretation restricting the amendment's enforcement clause.[39] Furthermore, congressional Republicans and Northern state-level Republicans differed on the rights accorded by the amendment. Although they agreed that the amendment would afford civil rights such as the right to contract, rent or own property, marry, sue in court, etc., some state-level Republicans believed the amendment affected Black persons in seceded states only, not loyal states.[40]

After the amendment's ratification, some senators asserted interpretations that were not voiced before ratification, such as the proposition that the amendment gave all persons the same civil rights.[41] Contrastingly, Kentucky Republicans attempted to attach legal disabilities to Black persons, and Indiana Republicans rejected the contention of their Democratic counterparts that the amendment would make Black persons first-class citizens.[42] As concluded by Vorenberg, "[t]he quest to determine which interpretation of the Thirteenth Amendment is most credible or most authoritative is endless and, to a certain extent, pointless, for the measure *never* had a single, fixed meaning."[43] The framers of the Thirteenth Amendment diverged in their

[38] VORENBERG, *supra* note 28, at 220.

[39] *Id*. at 229.

[40] *Id*. at 221.

[41] *Id*. at 236.

[42] *Id*. at 220, 221. The Black Codes were laws passed by Southern states in the immediate postwar period that were designed to control freed Black persons and force them to work against their will on former plantations. The laws included vagrancy prohibitions, draconian apprenticeship provisions, and broad police powers. *Id*. at 230.

[43] VORENBERG, *supra* note 28, at 237.

definitions of freedom and intentions for emancipation, some of which remained amorphous or obscure for political advantage.[44]

Vorenberg's analysis is shared by other historians,[45] including the assessment by preeminent Reconstruction historian Eric Foner in his article reviewing the meaning of freedom. After discussing the varied descriptions of freedom since the inception of the Republic, Foner found that abolitionists believed emancipation would ensure a measure of civil rights for freed persons.[46] Black abolitionists proceeded further and advocated for all civil, social, and political rights enjoyed by White citizens.[47] White Southerners believed that emancipation did not vanquish a state of dependency befitting freed persons,[48] whereas Northern Republicans initially could agree on nothing more than contractual and property rights for freed persons.[49] Although Northern Republicans eventually included political

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[44] *Id.*; *see also Id.* at 237–38 ("And even before the amendment had been approved by Congress and ratified by the states, congressmen, like all Americans, had begun to reevaluate the measure in new social, political, and legal contexts…Conservative Republicans preferred that the states rather than the federal government uphold civil rights. And Republicans as a whole ignored the amendment's potential impact on African Americans' legal status in the North."); Eric Foner, *Remarks at the Conference on the Second Founding November 14, 2008*, 11 U. PA. J. CONST. L. 1289, 1291 (2009) ("I do not think any historian would attribute a single, universally accepted original meaning to the Thirteenth Amendment."); *but see* HAMILTON, *supra* note 31, at 59 (The Amendment was designed to address more than what a private individual could accomplish with manumission.).

[45] Many different voices had conceptions about emancipation and the Thirteenth Amendment, from abolitionists (protection of rights), to Congressional representatives ("repealing the effects and concomitant attributes of slavery rather than positively secure rights for [B]lacks"), to unionists ("equal rights before the law"), and for Yale professor George P. Fisher, natural rights, including "justice, liberty, the fruit of labor, family, and education, among others." HOEMANN, *supra* note 33, at 28, 42, 46, 49, 52, 112.

[46] Eric Foner, *The Meaning of Freedom in the Age of Emancipation*, 81 J. AM. HIST. 435, 451 (1994).

[47] *Id.* at 452.

[48] *Id.* at 454–55.

[49] *Id.* at 455.

rights within the meaning of freedom, their meaning of civil freedom did not extend beyond the right to own property and form contractual relations.[50] Thus, the passage of the Thirteenth Amendment starkly raised the vexing issue of the meaning of freedom, whether it involved solely emancipation or more aspects of freedom, such as equality, citizenship, and protection of fundamental rights.[51] All manner of groups contested the meaning of freedom, and its interpretation changed considerably during the postbellum era.[52]

2. The Meaning Attributed by Former Enslaved Persons

As this recitation of the Thirteenth Amendment's ratification history demonstrates, the voices of the former enslaved persons were largely absent from those debates. However, other sources portray that they attached broader aspirations to the Thirteenth Amendment and the meaning of freedom both before and after its ratification. Frederick Douglass campaigned for the attendant benefits of emancipation, including eradication of discrimination, equality before the law, and suffrage.[53] When General Sherman queried Black Charleston leaders about the meaning of slavery, Garrison Frazier responded that it essentially means forced labor, and he thus defined freedom as the liberty to reap the rewards of labor, preferably by owning and tilling land.[54] Former slaves defined freedom as family cohesion, bodily integrity, and educational opportunity; and one minister stated that it represented the enjoyment of rights shared by all human beings.[55] Thus, the broader objectives of emancipation depicted the desire for

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[50] *Id.* at 457.

[51] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 66–68 (1988).

[52] *Id.* at 77.

[53] *Id.* at 27.

[54] *Id.* at 70–71.

[55] *Id.* at 78.

independence and autonomy on behalf of freed persons and their communities.[56]

Freed Black people considered slavery to be barbarous and oppressive, lamenting such practices as whippings, family separation, and other acts enforcing subjugation that permeated their experiences as slaves.[57] Thus, maintaining a stable family was a badge of freedom which contrasted the dehumanizing disruption of enslaved families.[58] Moreover, freed Black persons valued education as a central tenet of freedom, and this value reflected the desire for autonomy and self-improvement they believed to be so indicative of freedom.[59] Freedom of labor entailed receiving wages for work, controlling the conditions of work, and gaining autonomy from White control.[60]

B. The Supreme Court's Prevailing Interpretation of the Thirteenth Amendment Evaded the "Very Spirit of Slavery"

As the voices in larger society and among politicians contrasted on the meaning of freedom under the Thirteenth Amendment, members of the Supreme Court eventually engaged in a rhetorical contest on the amendment's interpretation until one perspective ultimately prevailed.[61] However, the Supreme Court's members diverged from viewing the rhetorical contest as a debate on the meaning of freedom. Rather, the Court's members endeavored to define the meaning of *slavery* conceptualized in the amendment. In this arena of debate, the Northern Democratic perspective prevailed in the Supreme Court's legal contest on the meaning of slavery.[62]

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[56] *Id.*

[57] FONER, *supra* note 51, 78–79.

[58] *Id.* at 88.

[59] *Id.* at 96.

[60] *Id.* at 103.

[61] PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 1 (1999).

[62] *Id.* at 41.

1. Background

Although there were some significant differences in their ideologies, both moderate and radical Republicans believed that emancipation compelled the protection of liberty against popular majorities, which resulted in an insistence upon the protection of certain civil rights.[63] In the main, Republicans believed that the post-Civil War era—that is, the postbellum era—still presented slavery's challenges,[64] and accordingly, they sought some civil rights for freed persons in an attempt to forestall efforts to legally maintain a racial caste system in the South.[65] The Northern Democrats viewed the Civil War primarily as a dispute over the right to secede from the union based upon the issue of slavery. After the war, they determined that ensuring freed persons self-ownership resolved all issues.[66]

The Supreme Court increasingly adopted the Northern Democrats' viewpoint over other perspectives in the debate, resulting in the stance that liberty ensued primarily in the protection of popular majorities against the government.[67] Prominent voices viewed the oppression of individuals by popular majorities as another threat to liberty. This perspective recognized that abolishing slavery compelled the protection of former slaves from unsympathetic majorities in the former Confederacy.[68] Eventually, the Northern Democrat's perspective prevailed as Northern legislators retreated from civil rights enforcement during Reconstruction and reached a truce to permit entrenchment of Jim Crow laws in the South.[69]

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[63] *Id*. at 30, 48.
[64] *Id* at 47.
[65] *Id*. at 54.
[66] *Id*. at 61–65.
[67] BRANDWEIN, *supra* note 61, 89–91.
[68] *Id*. at 89–91.
[69] *Id*. at 82–85.

2. The Civil Rights Cases

As stated previously, Supreme Court justices engaged in this rhetorical contest over the definition of slavery and the resultant interpretation of the Thirteenth Amendment. The preeminent case inciting this contest was *The Civil Rights Cases*. Although Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* is more widely acclaimed today, his dissent in the *Civil Rights Cases* was more widely celebrated at the time of the decision.[70] His dissent established a vision of the Thirteenth Amendment and the definition of slavery that should be viewed as the proper interpretation of the Amendment.

In the *Civil Rights Cases*, the Court had to review the constitutionality of the Civil Rights Act of 1875, which prohibited discrimination in the provision of public accommodations.[71] In his majority opinion, Justice Joseph P. Bradley ruled that Congress may enforce the Thirteenth Amendment by addressing the badges and incidents of slavery,[72] but he declared that such instances were limited to forced labor; restrictions upon movement; suppression of rights to acquire property, make contracts, and pursue court actions; and other similar burdens.[73] Justice Bradley also remarked that the Thirteenth Amendment did not give Congress the authority to "adjust" the social rights of the races occasioned by private conduct.[74] As such, he resolved that the amendment regulates distinctions based upon slavery, not race, color, or class.[75] Bradley concluded,

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[70] Many people praised Harlan for his dissent in the *Civil Rights Cases*. *Plessy* did not attract much attention because most White citizens believed the issue of segregation—whether by private rules or public law—had been settled by the time *Plessy* was decided. PRZYBYSZEWSKI, *supra* note 11, at 95.

[71] *Civil Rights Cases*, 109 U.S. at 4 (1883).

[72] *Id*. at 20.

[73] *Id*. at 22.

[74] *Id*.

[75] *Id*. at 24.

> There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as [W]hite citizens; yet no one, at that time, thought that it was any invasion of their personal *status* as freemen because they were not admitted to all the privileges enjoyed by [W]hite citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery.[76]

Bradley conceived chattel slavery as separate and apart from racial discrimination, and found antebellum free Black persons did not suffer the badges and incidents of slavery when they occupied a subordinate status and suffered discriminatory prohibitions.[77]

3. Justice Harlan's Dissent

In his dissent, Justice Harlan presented a contrasting voice on the definition of slavery, although his early stance on the institution would not have encouraged such a conclusion. As the Kentucky Attorney General, Harlan sought to circumvent the legal prescriptions of the Thirteenth

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[76] *Id.* at 25.

[77] Justice Bradley signaled in an opinion before the *Civil Rights Cases* that he may have countenanced a broader interpretation of the Thirteenth Amendment, but his majority opinion in the instant case belies that finding. *See Blyew v. United States*, 80 U.S. 581 (1872) (Bradley, J., dissenting) (stating the Framers designed Section Two of the Thirteenth Amendment to address the incidents and consequences of slavery, and instill civil liberty and equality for the freed persons); *cited in*, HAMILTON, *supra* note 31, at 61; *see also* BRANDWEIN, *supra* note 61 at 69–71. Bradley's conversion may have resulted from a desire for "national reconciliation" and stability during the late Reconstruction period. *Id.* at 71, 233.

Amendment and Reconstruction statutes.[78] As late as 1871, Harlan railed against social equality between the races, specifically by condemning a federal lawsuit that integrated streetcars in Louisville, Harlan's hometown.[79] As a politician in 1875, he believed that Blacks could be afforded civil rights without social equality; that is, White individuals could maintain their social prejudice against Black persons.[80] Indeed, Harlan definitely evolved in his thoughts about Black people, as at one point in 1864 he recounted a story to an audience about "'ze little [B]lack [n*****].'"[81] In 1871, he identified Black delegates to a convention as "three of the [B]lackest and ugliest darkies in the Commonwealth."[82] As a candidate for office, he actually opposed the Civil Rights Act of 1875, the statute that he later championed in his *Civil Rights Cases* dissent.[83]

As one biographer proclaims, Harlan's change in beliefs may have resulted from a sense of paternalism.[84] He and his family owned slaves, and while owning them apparently felt an obligation for their well-being, even though he believed the races were fundamentally different.[85] Justice Harlan accepted the changes wrought by the Civil War Amendments because of this racial paternalism.[86] Harlan chose between unlimited White power—which resulted in White supremacy and brutality—or his conception of paternalism, which placed boundaries on the conduct that White people could exhibit towards Black people.[87] By

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[78] PRZYBYSZEWSKI, *supra* note 11, at 38. Apparently, the racial violence during the post–Civil War period pushed Harlan to become a Republican. *Id.* at 39

[79] *Id.* at 83.

[80] *Id.* at 87.

[81] TINSLEY E. YARBROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN 139 (1995).

[82] *Id.*

[83] *Id.* at 84.

[84] PRZYBYSZEWSKI, *supra* note 11, at 34.

[85] *Id.* at 18, 42. His spouse, Malvina Harlan, claimed that "good slaveholders" "cherished" slaves as household members. *Id.* at 26.

[86] *Id.* at 34.

[87] *Id.* at 40.

choosing the latter, he adopted radical prescriptions for change.[88] Harlan designated his task as affording Christian redemption for Black persons, and this endeavor reflected his paternalistic and prejudiced notions that White individuals possessed a duty to protect the rights of other people and secure economic advancement for them.[89]

In his dissenting opinion in the *Civil Rights Cases*, Justice Harlan directly linked the "status" of free Black persons before the Civil War to those who were enslaved. Because Harlan was exhibiting writer's block in drafting the dissent, his spouse, Malvina Harlan, placed the inkstand of former Chief Justice Roger B. Taney [who authored *Dred Scott*] on his desk. Upon discovering it after church one Sunday morning, Harlan penned his dissent in short order, spurred by Taney's role in *Dred Scott*.[90] Indeed, *Dred Scott* played a pivotal role in Harlan's analysis.

Whereas Bradley defined slavery merely by the burdens and disabilities of chattel slavery, Harlan included the evils of both chattel and civil slavery in his conception.[91] Civil slavery comprised the experiences of "second-class citizenship," and many African American thinkers, including Frederick Douglass, lobbied against this form of slavery as much as chattel slavery.[92] Douglass stated that many free

[88] *Id.*; *see also id.* at 64–65 (Harlan deemed the Declaration of Independence to be the United States's "political bible," and it reflected the Framers' values of freedom more than the Constitution. The Civil War represented efforts to instill the values of the Declaration.).

[89] *Id.* at 86, 116. As evidence of his evolved egalitarianism, one biographer notes that Harlan associated with Frederick Douglass, even meeting him at his home on occasion, and Harlan attended Douglass' funeral. YARBROUGH, *supra* note 81, at 142.

[90] *See* LOREN P. BETH, JOHN MARSHALL HARLAN, THE LAST WHIG JUSTICE 229 (1992); PRZYBYSZEWSKI, *supra* note 11, at 93–94.

[91] Harlan Biographer Linda Przybyszewski expressly characterizes Harlan's arguments as an objection to "civil slavery." PRZYBYSZEWSKI, *supra* note 11, at 92–94, 114.

[92] *Id.* at 92–94; *see also* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 136 (1962):

Black persons during the antebellum period were "aliens" in the United States and essentially "slaves of the community."[93]

Harlan invoked these ideas in the interpretation of *Dred Scott* in his *Civil Rights Cases* dissent. *Dred Scott* held that Black persons in the United States—whether slaves or free persons—were not citizens of the United States. Rather, they were a "*subordinate and inferior class of beings*, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them."[94] Harlan argued that the Thirteenth Amendment operated to change this condition—this *status*, as coined by Justice Bradley—shared by all Black persons, whether enslaved or

> The emancipation of the slaves is submitted to only in so far 'chattel slavery in the old form could not be kept up. But although the freedman is no longer considered the property of the individual master, he is considered the slave of society, and all independent state legislation will share the tendency to make him such. The ordinances abolishing slavery passed by the conventions under the pressure of circumstances will not be looked upon as barring the establishment of a new form of servitude.

[93] *Id.*; *see also id*. at 136:

> Before the abolition of slavery, and before the war, it was the policy of slaveholders to make a free Negro as despicable a creature and as uncomfortable as possible. They did not want a free Negro about at all. They considered it an injury to the slave, as it undoubtedly was, creating discontent among the slaves. The consequences were that there was always an intense prejudice against the free Negro. Now, very suddenly, all have become free Negroes; and that was not calculated to allay that prejudice.

[94] *Dred Scott*, 60 U.S. at 404–05 (emphasis added), *cited in*, *Civil Rights Cases*, 109 U.S. at 32 (Harlan, J. dissent).

free.[95] The nation had categorized free Black persons as civil slaves—as described in *Dred Scott*—and the Thirteenth Amendment served to eradicate both chattel and civil slavery, and the badges and incidents thereof.[96] As a result, Harlan declared that Congress possessed authority under the Thirteenth Amendment to prohibit discrimination in public accommodations.[97]

Harlan's dissent in the *Civil Rights Cases* attracted praise from many quarters, including Black leaders, notable Republicans, and newspaper editors.[98] Numerous newspapers actually recommended him for the United States

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[95] *Id*. at 33. To be sure, Justice Harlan did not limit the Thirteenth Amendment to the protection of solely Black persons, but extended its purview to all races and ethnicities. *Id*.

[96] *See id*. ("These are the circumstances under which the Thirteenth Amendment was proposed for adoption. They are now recalled only that we may better understand what was in the minds of the people when that amendment was being considered, and what were the mischiefs to be remedied, and the grievances to be redressed.").

[97] *Id*. at 36. Harlan evolved on this question of civil rights, however, based upon the categorization of rights during that period. Nineteenth century thinkers divided rights into civil, political, and social. PRZYBYSZEWSKI, *supra* note 11, at 81–82. Civil rights represented "at a minimum personal liberty and the right to hold property, make contracts, and testify in court." *Id*. Political rights included voting rights, and rights to jury service and public office. *Id*. Social rights included the disabilities of prohibiting the mixing of races in school, marriage, social settings, etc. *Id*.; *c.f.* Du Bois, *supra* note 92, at 190 ("The Negro must have civil rights as a citizen; he must eventually have political rights like every other citizen of the United States. And while social rights could not be a matter of legislation, they, on the other hand, must not be denied through legislation, but remain a matter of free individual choice."). By the time of his dissent in the *Civil Rights Cases*, Harlan expanded the category of civil rights to include integration in public accommodations. PRZYBYSZEWSKI, *supra* note 11, at 84. According to this analysis, the personal liberty of Black and White persons to mix together on public accommodations was a matter of civil rights, not social rights. *Id*. at 97. Yet, this conception of rights also constrained Harlan. Harlan decided against school integration, thus reflecting a belief that interracial public education did not implicate civil rights, but social rights and equality. *Id*. at 99. In addition, Harlan agreed in *Pace v. Alabama*, 106 U.S. 583 (1883), that states may prohibit interracial, extramarital sex. PRZYBYSZEWSKI, *supra* note 11, at 110.

[98] YARBROUGH, *supra* note 81, at 147–48.

presidency based upon the dissent.[99] However, Justice Harlan was not the only jurist to depict this dual system of chattel and civil slavery.

In *United States v. Rhodes*,[100] Supreme Court Justice Noah Swayne, riding circuit on the occasion, ruled that the Civil Rights Act of 1866 was constitutional under the Thirteenth Amendment. In describing the "state of things" and "mischiefs" the Thirteenth Amendment was designed to remedy, Justice Swayne linked chattel slavery with civil slavery.[101] In particular, he depicted that slaves and free Black persons were treated similarly during the antebellum period:

> In Georgia, by an act of 1829, no person is permitted to teach a slave, a negro, or a free person of color to read or write. So in Virginia, by a statute of 1830, meetings of free negroes to learn reading or writing are unlawful, and subject them to corporal punishment; and it is unlawful for [W]hite persons to assemble with free negroes or slaves to teach them to read or write. The prohibitory act of the legislature of Alabama, passed at the session 1831-2, relative to the instruction to be given to the slaves or free colored population, or exhortation, or preaching to them, or any mischievous influence attempted to be exerted over them, is sufficiently penal. Laws of similar import are presumed to exist in other slaveholding states…[102]

Swayne declared that the "shadow" of slavery fell upon free Black persons as they suffered many of the same degradations as slaves, and their capacity for free existence was as hopeless

[99] *Id.*
[100] 27 F. Cas. 785 (C.C.D. KY (1867)) (No. 16,151).
[101] *Id.* at 794.
[102] *Id.*

as the slaves' because of the "*status*" the slave states had affixed upon them.[103]

Likewise, an antebellum jurist approvingly depicted this system of civil slavery. In *Bryan v. Walton*, the court reviewed whether a free Black person had the legal capacity to convey property.[104] The court ruled that slaves who had been manumitted in Georgia did not have such rights as well as other basic freedoms.[105] The reasoning of the court, excerpted at length, demonstrates the depth of civil slavery in the United States and the status of free Black persons:

> The [B]lack man in this State, may have the power of volition. He may go and come, without a domestic master to control his movements; but to be civilly and politically free, to be the peer and equal of the [W]hite man—to enjoy the offices, trusts and privileges our institutions confer on the [W]hite man, is not now, never has been, and never will be, the condition of this degraded race.
>
> The [B]lacks were introduced into [the state], as a race of Pagan slaves. The prejudice, if it can be called so, of caste, is unconquerable. It was so at the beginning. It has come down to our day. The suspicion of taint even, sinks the subject of it below the common level.... [An African] is not and cannot become a *citizen* under our Constitution and Laws. He resides among us, and yet is a stranger. A *native* even, and yet not a citizen. Though not a *slave*, yet is he not free. Protected by the law, yet enjoying none of the immunities of freedom. Though not a condition of chattelhood, yet constantly exposed to it.

[103] *Id*. (emphasis added).
[104] Bryan v. Walton, 14 Ga. 185 (Ga. 1853).
[105] *Id*. at 188–90, 205.

> He is associated with the slave in this State, in some of the humiliating incidents of his degradation…
>
> The fallacy of it is, its assumption that the manumission of the *negro*, which signifies nothing but exemption from involuntary service . . . imparts *ipso facto*, all the rights, privileges and immunities which are incident to freedom, among the free [W]hite inhabitants of this country. And in this distinction I find myself fully sustained by the Roman Law. Their freemen were subdivided into *freeborn* . . . and *freedmen* … So of the ancient villains among the Saxons. The lord might acquit his own title; but no man could be made free, in a *civil* sense, without the act and consent of the whole body.[106]

Given this belief about the status of freed and enslaved persons in the antebellum United States, it is not surprising that Harlan's interpretation of the Thirteenth Amendment frames the provision not only as a shield against forced labor, but also as a sword against subordinated status. Postbellum Republicans characterized the distinction between chattel and civil slavery as one between the "body of slavery" and the "spirit of slavery."[107] Abolishing chattel slavery did not eradicate the spirit of slavery, the "problem" Republicans identified as the sentiment that Black persons belonged in a servitude status.[108]

[106] *Id.* at 202–04; *c.f.* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 296 (1982) ("Enslavement, slavery, and manumission are not merely related events; they are one and the same process in different phases"). Racial attitudes could serve to infuse all aspects of this process. *Id.*

[107] BRANDWEIN, *supra* note 61, at 43–45.

[108] *Id.* at 43–45.

Black abolitionist Theodore Wright echoed the Republicans' linkage of chattel and civil slavery by similarly coining this shared status as the "very spirit of slavery":

> The prejudice which exists against the colored man, the freeman, is like the atmosphere everywhere felt by him." Though it was true, Wright acknowledged, that the 'free' colored men of the North were not whipped nor "liable to have their wives and infants torn from them[,] ... [s]ir, still we are slaves—everywhere we feel the chain galling us . . . . This spirit [of prejudice] is withering all our hopes, and oft times causes the colored parent as he looks upon his child, to wish he had never been born." . . . "[T]his influence cuts us off from every thing; it follows us up from childhood to manhood; it excludes us from all stations of profit, usefulness and honor; takes away from us all motive for pressing forward in enterprises, useful and important to the world and to ourselves.[109]

Notwithstanding these antebellum and postbellum voices calling for an interpretation of the Thirteenth Amendment that would abolish civil as well as chattel slavery, Bradley's opinion in *The Civil Rights Cases* denied recognition of them in Supreme Court doctrine. Furthermore, the Court missed a prime opportunity to resurrect these voices in the 1968 *Jones v. A.H. Mayer* case,[110] as the Court did not invoke the badges and incidents of civil slavery as described by Harlan in his *Civil Rights Cases* dissent. Unlike the Court's adoption of Justice Holmes' *Lochner*[111] dissent and Justice Harlan's *Plessy* dissent, the Court failed to adequately restore the vision that the Thirteenth Amendment serves to abolish civil slavery and its very animating spirit.

[109] DAVID BRION DAVIS, INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD 48–49 (2006).

[110] Jones v. A.H. Mayer, 392 U.S. 409 (1968).

[111] Lochner v. New York, 198 U.S. 45 (1905) (Holmes, J. dissenting).

4. Canonizing Justice Harlan's Civil Rights Cases Dissent

It is beyond cavil that the present-day Court may resurrect Harlan's interpretation of the Thirteenth Amendment. As the Court has stated, past cases may be overruled when facts in society are seen so differently that a prior rule no longer merits justification.[112] This analysis is particularly appropriate when prior decisions failed to perceive circumstances that would impose obligations on society to rectify wrongs, especially wrongs that rise to the level of national controversies.[113]

Clearly, Justice Bradley's majority opinion in *The Civil Rights Cases* constituted a decision that inaccurately perceived the facts upon which its foundation was laid. Contrary to Bradley's findings, free Black persons did not enjoy "all the essential rights of life, liberty, and property the same as [W]hite citizens," and their "personal status" suffered invasion because of those abridgments.[114] Likewise, systemic race and color discrimination constituted badges of slavery[115] because civil slavery and chattel slavery—the debasement of Black persons—caused the inferior status occupied by Black persons.

Moreover, the conditions warranting the launch of a dissent into the judicial canon coalesce to support such an enshrinement for Harlan's *Civil Rights Cases* dissent, as they did for the *Lochner* and *Plessy* dissents.[116] Although not completely agreed upon, those conditions warranting enshrinement include the esteem of the dissenting justice; the extent to which the judicial philosophy underlying the dissent

[112] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 855 (1992).

[113] *Id.* at 861–64.

[114] *Civil Rights Cases*, 109 U.S. at 25.

[115] *Id.*

[116] *Id.*

matches that of the successor generation; and the issue that the dissent contests, particularly when the issue pits a justice against society or a subjugated group against dominant forces.[117]

Observers champion Justice Harlan as one of the Supreme Court's preeminent jurists. Although his *Civil Rights Cases* dissent was widely acclaimed when it was rendered, his judicial philosophy reflects a late-twentieth century conception of racism and the horrors of slavery due to his description of the spirit of slavery and the linkage between chattel and civil slavery. Finally, Harlan's dissent definitively pitted him against a large swath of society, especially when Reconstruction ended and Jim Crow became the norm for society. His dissent also reflected the plight of free Black persons against societal forces that desired—and succeeded—in maintaining subordination.

Therefore, Harlan's observations that all Black persons suffered civil and chattel slavery warrants the interpretation that the Thirteenth Amendment should be construed to ameliorate this subordinate status. It is important to portray the different manifestations of this status as it existed in antebellum and postbellum sociological and historical analysis. Such a portrayal will lay a foundation for identifying the types of measures that could alter the subordinate status inherited from chattel and civil slavery.

III. STATUS: STIGMA, STATION, AND STRATIFICATION

As Justice Harlan described, Black persons in the United States before and after the Civil War, whether enslaved or "free," occupied an inferior status in society that may be transformed by reliance upon the Thirteenth Amendment.[118] Understanding the different facets of this status is important for comprehending the "slavery" and

[117] Richard Primus, *Canon, Anti–Canon, and Judicial Dissent*, 48 DUKE L. J. 243, 270–75 (1998).

[118] *Civil Rights Cases*, 109 U.S. at 32–33.

"involuntary servitude" that the amendment chiefly sought to remedy and transform.

Although one may posit several dimensions of the inferior status occupied by Black persons in the antebellum and postbellum periods, three notable dimensions predominate in well-considered studies of slavery and civil subordination during those periods. As this Part will demonstrate, the inferior status of Black persons in the nineteenth century manifested predominantly through the stigma against Black persons, the station of Black persons (within a paternalistic unit, rather than the general station in society at large), and the labor stratification forced upon enslaved and free Black persons. Sociological and historical studies provide ample evidence of these three dimensions underpinning the inferior status of Black persons in the nineteenth century.

A. Stigma Against Black Persons

Stigma is characterized as "a set of negative and often unfair beliefs that a society or group of people have about something."[119] In nineteenth century United States society, the stigma attached to Black persons may be fairly comprehended as beliefs that they were animals and subhumans. This dehumanization did not embody an exclusion of slaves from human identity; rather, it comprised the debasement of slaves such that society did not extend respect and dignity to Black persons.[120]

The stigma against slaves traverses world history.[121] Slaves were dishonored, which manifested in part as a psychological condition because they were subject to the complete power of their owners and did not have an

[119] *Stigma Definition*, MERRIAM–WEBSTER, http://www.merriam–webster.com/dictionary/stigma [https://perma.cc/4NNL-5ZEG].

[120] DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF EMANCIPATION 17 (2014).

[121] *See* PATTERSON, *supra* note 106.

independent social existence.[122] Indeed, some owners acquired slaves not for purposes of service or commodity production, such as slaves in the ancient Islamic world.[123] This phenomenon indicates the extent to which slavery exists to psychologically instill honor on slaveholders and dishonor on slaves.[124] In these respects, the United States southern slave society was in a class by itself because even freedom did not remove African American from the bottom social class.[125] They were essentially slaves without masters.[126]

Although Aristotle likened slaves to domestic animals and beasts, theorizing that slaves were inherently born to perform base labor for free persons,[127] there existed a spectrum of slave systems in world history. Some afforded slaves myriad forms of protections and rights, but those in the southern United States "were victims of one of the most oppressive slave systems ever known in terms of the rate of manumission, racial discrimination, and psychological oppression."[128] United States racial slavery widely distinguished Black slaves and their descendants as a depressed caste distinct from non-slave groups.[129] After 1815, United States slavery closed off pathways to manumission, further degrading and dehumanizing slaves and free Black persons.[130] By the nineteenth century, many Southerners believed that the slaves were descendants of Ham, who was

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[122] *Id.* at 10.

[123] *Id.* at 11.

[124] *Id.*

[125] *Id.* at 257–58.

[126] *Id.* Historian Ira Berlin popularly coined this phrase in his work detailing the subjugation of free Black persons in the South. *See* IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH (1974).

[127] DAVIS, *supra* note 109, at 32–34.

[128] *Id.* at 36; *see also* EUGENE D. GENOVESE, THE WORLD THE SLAVEHOLDERS MADE: TWO ESSAYS IN INTERPRETATION 6–7 (1988) (All systems of oppression produce psychological effects of inferiority in members of the lower caste.).

[129] DAVIS, *supra* note 109, at 3.

[130] *Id.*

condemned in the Bible to foster generations of "slaves of the slaves," that is, the lowest of slaves.[131]

The process of dehumanizing Black persons resulted from a systematic endeavor to animalize slaves.[132] Former slaves expressed how they were treated as brutes and domesticated animals such as horses and dogs, and interviews with former slaves consistently depicted the assessment that slave masters identified them as "four-legged chattel."[133] A study of slavery in 1829 likewise found that slaveholders did not regard slaves as humans but as "working animals," where the terms used for cattle, such as "stock," "breeders," and other like characterizations, revealed their similar treatment.[134] Freed Black persons testified that these animalistic characterizations continued into the Jim Crow era.[135] Importantly, the historical evidence generally finds that anti-Black racism emerged from the system of slavery, rather than preceding the institution.[136]

These concepts of animalization and dehumanization are chronicled in various ways. In one conception, the choice of designating Black persons rather than indentured White servants for entrenched, permanent slavery rested upon several factors, including the attitude that Africans were "innately inferior."[137] General society considered slaves to be indolent so as to lower their regard and preserve their labor for others who reaped the benefits.[138] During the Civil War,

[131] *Id.* at 64–68; *see also id.* at 62 (Although medieval Arabs and Persians enslaved White persons, they associated "the most degrading forms of labor with [B]lack slaves," especially those slaves from lower sub–Saharan Africa.).

[132] *Id.*; DAVIS, *supra* note 120, at 9.

[133] *Id.* at 9, 10 (citations omitted).

[134] *Id.* at 7–8 (citations omitted).

[135] *Id.* at 12.

[136] *Id.* at 28–35. Some historical figures expressed racial prejudice before the advent of the transatlantic slave system, but praise for Black persons existed in equal, if not greater, measure. *Id.* at 29–30.

[137] MARK M. SMITH, DEBATING SLAVERY: ECONOMY AND SOCIETY IN THE ANTEBELLUM AMERICAN SOUTH 3 (1998).

[138] *Id.* at 45.

it was common for Union soldiers to write home about their feelings of repulsion towards Black persons, variously referring to them as "vermin," "animals," and individuals who will never amount "to be anybody."[139]

As described previously, this stigma extended to free Black persons. Societal forces compelled educated, middle-class Black persons in the North to stay within their caste position.[140] In the nineteenth century, less wealthy White citizens viewed any labor performed by slaves or Black persons as work not fit for White people.[141] South Carolina politician John C. Calhoun admitted to John Quincy Adams: "[O]ne of the major benefits of racial slavery was its effect on lower-class Whites, who could now take pride in their skin color and feel equal to the wealthiest and most powerful [W]hites."[142] Thus, in Calhoun's eyes, slavery defused class conflict among White citizens because it was such an extreme instance of inequality, helping to make other relationships seem relatively equal.[143]

Of course, those who believed in the inferiority of Black persons did not hesitate to express their beliefs in writing. One nineteenth century author believed that Black persons, whether free or enslaved, were barbarians.[144] As already

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[139] LEON F. LITWACK, BEEN IN THE STORM SO LONG 128–32 (1979). Black soldiers did not escape the civil slavery lodged upon other Black persons. During the Civil War, Black soldiers did not obtain the same pay and benefits as White soldiers. *Id*. at 79–83. Free Black soldiers were subject to "badges of inferiority" and "civic subordination" that they had experienced in the antebellum United States, such as segregation, questionable combat status, denial of officer commissions, and lower pay than White soldiers. STEVEN HAHN, A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION 94–95 (2003).

[140] DAVIS, *supra* note 109, at 49.

[141] *Id*. at 177.

[142] *Id*.

[143] *Id*.

[144] THOMAS R. R. COBB, AN HISTORICAL SKETCH OF SLAVERY (1858), *reprinted in* THE LAW OF FREEDOM AND BONDAGE: A CASEBOOK 3 (Paul Finkelman, 1986). He continued his diatribe, stating that civilization requires a "laboring class," who farm and tend to other "menial" duties at

reviewed, the jurist in *Bryan v. Walton* believed that the act of manumission did not afford any rights for the freed slave.[145] The freedman occupied the same caste as the slave, and the freedman could not enjoy the freedom, rights, and privileges accorded to free White persons in the polity, as the nation's free persons were divided between "freeborn" and "freedmen."[146]

The scope of slavery's stigmatizing effects is portrayed by the differing generations of Black slaves that assumed servitude in the United States. Based upon the treatment of the second generation of slaves brought to the United States, the social distance between them and White servants grew.[147] Notwithstanding the low status of White servants, these servants could aspire to the status of hired labor, unlike Black slaves.[148] Furthermore, the emergence of the White overseer class led to diminishing rights for free Black persons because their very existence contrasted with the racist ideology underlying slavery.[149] The state lawmakers systematically branded free Black persons as inferior and excluded them from the privileges enjoyed by free White individuals.[150] Due to the advent of the cotton economy in the South, slavery was institutionalized to the extent that children of slaves remained enslaved, unlike other societies in which children of slaves had the opportunity to attain native-hood and other

the behest of the "wiser" class. The laboring class typically were slaves. *Id.* at 2.

[145] *Bryan,* 14 Ga. at 188–90.

[146] *Id.* *See also* Hoemann, *supra* note 33, at 90. ("Blacks might be free, but they were not yet part of America, the special status of 'freedmen' marking a subtle yet profound difference from average 'freemen.' To have meaning, freedom had to exist within a context, in connection with a place, society, and culture.").

[147] IRA BERLIN, GENERATIONS OF CAPTIVITY: A HISTORY OF AFRICAN–AMERICAN SLAVES 58–59 (2003).

[148] *Id.*

[149] *Id.* at 66.

[150] *Id.*

forms of favored dependency in their former masters' households.[151]

This paradigm of inferiority saddled upon Black persons was unassailably entrenched during this period of United States history. Black abolitionist Charles L. Reason predicted that emancipation would not erase the "brand" of slavery from Black persons, and Frederick Douglass stated that Black persons suffered a stigma of inferiority in the United States.[152] Both Northern and Southern societies deemed Black persons to be inferior and subordinate, and the "free" Northern states relegated them to menial labor, segregated transportation, and segregated schools.[153] Some politicians equated free Black persons with slaves, and deemed all Black people lazy and inferior to White people.[154] Others believed the natural place of Black persons was servitude, to be "'hewers of wood and drawers of water.'"[155] Because of their skin color and association with slavery, free Black workers were stigmatized and limited in their employment opportunities.[156]

Indeed, although it was expected that Southern slave society attached a stigma to labor and toil (thus affecting White laborers as well as slaves),[157] most Republicans in the Civil War era presumed that African Americans could not advance as free laborers due to the belief that they were "lazy, unenterprising, and lacking in the middle-class, Puritan

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[151] Joseph C. Miller, *Slaving as Historical Process: Examples from the Ancient Mediterranean and the Modern Atlantic*, *in* SLAVE SYSTEMS: ANCIENT AND MODERN 96–97 (Enrico Dal Lago & Constantina Katsari eds., 2008).

[152] FONER, *supra* note 51, at 75.

[153] ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF CIVIL WAR 77 (1980).

[154] *Id*. at 82–83, 90–91.

[155] *Id*. at 105.

[156] JACQUELINE JONES, AMERICAN WORK: FOUR CENTURIES OF BLACK AND WHITE LABOR 142 (1998).

[157] ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 58–59 (1970).

qualities of character so essential for economic success."[158] Although most Black leaders adopted the belief that economic dependence degraded workers, and hence economic independence upon manumission would begat respect,[159] other supporters of freedom ultimately believed that African Americans would always be socially inferior and poor as a race.[160]

Black North Carolinian A.D. Lewis dramatically recorded the postbellum aspects of this stigma when he reported an incident to the state's governor in 1869:

> Please allow me to call your kine attention to a transaction which occured to day between me and Dr. A. H. Jones…I was in my field at my own work and this Jones came by me and drove up to a man's gate that live close by . . . and ordered my child to come there and open that gate for him ... while there was children in the yard at the same time not more than twenty yards from him and jest because they were [W]hite and mine [B]lack he wood not call them to open the gate .... I spoke gently to him that [the White children] would open the gate .... He got out of his buggy ... and walked nearly hundred yards rite into my field where I was at my own work and double his fist and strick me in the face three times and ... cursed me [as] a dum old Radical. ... Now governor I wants you to please rite to me how to bring this man to jestus.[161]

Lewis' letter reflects fortitude, courage, and dignity in demanding that his children be treated the same as White children,[162] yet it also reflects the regard in which freed Black

[158] *Id.* at 297.
[159] *Id.* at 299.
[160] *Id.* at 299–300.
[161] FONER, *supra* note 51, at 122–23.
[162] *Id.* at 123.

persons were held by former slave owners and other White persons in society at that time. The stigma of dehumanization, animalization, and inferiority led those in the "superior" position to believe that even freed Black persons were still subject to their personal control and violent reprobation.

B. Station of Enslaved Persons

Although the foregoing evidence demonstrates the extent of Black slaves and free persons stigmatization and dehumanization, some slavery apologists desired to rebut the abolitionist argument that Black persons were treated in an inhumane and degrading manner. In part, slave owners and their apologists rebutted abolitionists by acknowledging the humanity of slaves and Black persons, but holding nonetheless that they occupied a subordinate station within paternalistic slave owner households. Thus, slave owners argued that slaves' station merited their subjugation and enslavement—that is, in a grand effort to parry the arguments of abolitionists, slaveholders invoked the doctrine of paternalism, whereby they considered slaves as members of their extended family and as overage juveniles.[163] Under this doctrine, slave masters systematically intervened into all aspects of the slaves' existence, not just labor performance.[164] Slaveholders believed in their role of paternalistically mastering enslaved Black persons.[165]

[163] BERLIN, *supra* note 147, at 204–05; *see also* PRZYBYSZEWSKI, *supra* note 11, at 18 (noting that some southern legal codes grouped master and slaves under domestic relations law, where spousal and parent child law were located.).

[164] BERLIN, *supra* note 147, at 204–05.

[165] DAVIS, *supra* note 109, at 106–07; s*ee also* JONES, *supra* note 156, at 83 (Southern slaveholders viewed themselves as patriarchs over households of dependents, including Blacks and Whites, of all ages and sexes.); Enrico Dal Lago & Constantian Katsari, *The Study of Ancient and Modern Slave Systems: Setting an Agenda for Comparison*, *in* SLAVE SYSTEMS, *supra* note 151, at 24 (Slaveholders justified slavery on the grounds of patriarchal paternalism.).

To be sure, Southern slaveholder paternalism existed alongside a cruel and disdainful system that maintained the productivity of slaves and rationalized the system to critics.[166] Nevertheless, in the face of increasing criticism from abolitionists, slaveholders deployed the paternalism ideology to argue that slaves were humans in need of guidance and compulsion for their own benefit and salvation.[167] To facilitate this "guidance," slaveholders considered slaves to be members of their family.[168] This paternalistic and patriarchal ethos thrived in the southern plantation system, whose culture dictated that plantation masters rule over extended "households" that relegated slaves to the lower rungs.[169] Thus, slaveholders conceived the Southern slave household as a paternalistic family with participants bound by responsibilities, including the slave "members" of the family.[170] This ideology assisted in rendering slaves natally alienated, and thus socially dead.[171] They could not claim any formal or cultural relationship with their parents, forebearers, ancestors, lineage, etc.[172]

Elaborating upon this framework, Southern planters viewed slavery as a God-ordained hierarchy of unequals, in which society benefitted from the White control of Black persons.[173] The slaveholders' ideological system maintained that individuals must temper their instincts and passions for the greater good of society, and thus they believed certain

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[166] EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVEHOLDERS MADE 4–5 (1976).

[167] *Id.* at 73.

[168] *Id.*

[169] *Id.* at 96, 100–01, 199.

[170] JEFFREY ROBERT YOUNG, DOMESTICATING SLAVERY: THE MASTER CLASS IN GEORGIA AND SOUTH CAROLINA, *1670–1837* 6 (1999). Although scholars contrasted such arrangements with the nuclear family purportedly prevailing in the North, other scholars reject this characterization by depicting the presence of a bourgeois domesticity in the South. *Id.*

[171] PATTERSON, *supra* note 106, at 5.

[172] *Id.* at 5. In Africa and other pre–modern societies, the contrast of being a slave was membership in an ethnic group or familial clan, not freedom. DAVIS, *supra* note 109, at 28.

[173] YOUNG, *supra* note 170, at 2–3.

categories of individuals (slaves) succumbed more naturally to ignorance, lust, and passion.[174] Therefore, slaveholders subordinated slaves due to a concern for the slaves' "personal welfare and potential for moral growth."[175] The "Baptist luminary Richard Furman, for example, insisted that 'a master may, in an important sense, be the guardian and even the father of his slaves.'"[176] Therefore, slaveholders viewed their paternalistic role as critical for the individual development of slaves, and they believed this devaluing of individual freedom was critical to society and more appropriate than the abolitionists' radical egalitarianism.[177] As revealed, the slaveholders desired to plant their paternalistic ideology firmly in the bourgeois individualist and domesticity ethics of that historical period.[178]

Sociologist Amy Dru Stanley situated this ideology in John Locke, who wrote that the "'master of a family' . . . was a man 'with all these subordinate relations of wife, children, servants and slaves' gathered under his domestic rule."[179] Pre-modern wage and marriage contracts gave the patriarch of a household dominion over its inhabitants, and the common law subsequently classified the wage contract as a domestic relation.[180] United States southerners domesticated slavery by equating master/slave relations to other household relations.[181]

[174] *Id.* at 10.

[175] *Id.*

[176] *Id.* at 8.

[177] *Id.* at 9.

[178] *Id.* at 10.

[179] STANLEY, *supra* note 20, at 8 (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 46 (1980)).

[180] *Id.* at 10.

[181] *Id.* at 24. It is important to stress that "tracing the evolution of a southern proslavery culture and that culture's influence on sectional relations in the antebellum United States" does not suggest "that the benevolent self–image held by owners led to improved conditions on their plantations. To the contrary, the slaveowners' world view acted to blind White southerners to the hideous circumstances of plantation slavery." YOUNG, *supra* note 170, at 15.

To be sure, not all observers characterize United States slavery as evincing a paternalistic slave owner ideology. Among slave historians, there developed two paradigms about slaveholder interests.[182] Some historians harp on the slaveholder ideology of paternalism, the notion that slaveholders incorporated slavery to protect Black persons from their supposed instincts and habits.[183] Initially, historians argued that slave owners were pre-capitalist, and thus slavery was economically inefficient.[184] As an elaboration upon the slave owner paternalism ideology, early historians maintained that slave owners engaged in slavery because of the cultural badge of honor they received.[185]

Other historians argued that slaveholders operated primarily as capitalists, maximizing the profits from their investments in slaves.[186] Therefore, they maintain that slavery was highly profitable and economically efficient.[187] By demonstrating that slavery was profitable, they undermined other historians' argument that slavery was predominantly about slaveholders' commitment to paternalism and patriarchy.[188]

This debate resulted in a convergence in recent scholarship. Southern slave ideology coalesced around the argument that slaveholder households contained the same predilections as Northern households, and a concern for the individual growth of slaves in the Southern "family" reflects the contribution of paternalism to this ideology.[189] Nevertheless, paternalism does not contradict a profit-making ethos, as some forms of paternalism are profitable and result

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[182] *Id.* at 4–5.
[183] *Id.* at 4–5.
[184] SMITH, *supra* note 137, at 16–17.
[185] *Id.* at 16–17.
[186] YOUNG, *supra* note 170, at 4–5.
[187] SMITH, *supra* note 137, at 24–25.
[188] ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY 71 (1974).
[189] YOUNG, *supra* note 170 at 8.

in good business.[190] Indeed, while slaveholders practiced profit-maximization techniques in controlling their plantations, the dual, Southern legal system—in which laws existed on the books but states gave the slaveholders control of their plantations and slaves—may account for the paternalistic/pre-bourgeois ethos of the plantation that existed alongside the capitalist features of the system.[191] Thus, the slave owners' paternalistic ideology did not bar profit maximization, and it actually reflected the slave owners' appreciation of "efficiency and productivity."[192]

Therefore, slavery supporters created this ideology of paternalism, treating slaves as inferior members of their households so as to excuse their subjection of Black persons to slavery. This paternalistic ideology afforded this lower station to Black persons within plantation households, but it did not obviate the parallel phenomenon of stigmatizing Black persons as subhuman and animals. That other inferior members of the slave owner paternalistic household (spouses and children) were not dehumanized and animalized reveals the insincerity of the paternalistic ideology. The conceptions of stigma and paternalistic station existed side-by-side, and their juxtaposition demonstrates the extent to which the paternalistic ideology was a farce. However, the third dimension of societal status regarding slaves and Black persons—labor stratification—was all pervading, supported by all sides, and had far-reaching effects before, during, and after slavery.

[190] FOGEL & ENGERMAN, *supra* note 188, at 73.

[191] *Id*. at 128–29.

[192] SMITH, *supra* note 137, at 24–25; *see also* DAVIS, *supra* note 109, at 6 (Slavery was economically efficient in its organization and structure, basically resembling "factories in the field."); *id*. at 180–81 (The United States southern slave system was economically efficient and productive, even to the extent that some freed slaves developed businesses and employed large numbers of slaves.).

C. Stratification of Black Persons' Labor

1. Background

As discussed in previous sections, chattel and civil slavery generated sentiments of scorn that reflected the regard in which Black persons were held. This dimension of status worked with other factors to stratify Black persons in the lowest rungs of the labor hierarchy.[193] This stratification served to distinctly mark Black people as inferior to other races and ethnicities.[194] As several observers have concluded:

> Jobs are never just jobs; they are social markers of great real and symbolic value. The abolitionist Frederick Douglass recognized that work matters when he warned his fellow free people of color in 1853: 'Men are not valued in this country, or in any country, for what they are; they are valued for what they can do.' . . . At stake was not work alone—slaves for example never lacked for jobs—but the legal and social status of workers. The work that people did, and the terms and conditions under

[193] *C.f.,* BERLIN, *supra* note 147, at 3 ("Plantation slavery did not have its origins in a conspiracy to dishonor, shame, brutalize, or otherwise reduce [B]lack people's standing on some perverse scale of humanity—although it did all of those at one time or another. Slavery's moral stench cannot mask the design of American captivity: to commandeer the labor of the many to make a few rich and powerful."). Therefore, slavery incites class as much as it did race, the effort of a few to exploit the labor of others through violence so as to obtain a hierarchical position. *Id*.

[194] *See also* David F. Schwartz, The Thirteenth Amendment as a Basis for Judicial Protection of Individual Rights 203 (March 25, 1975) (unpublished Ph.D. dissertation, Pennsylvania State University) (on file with Davis Library, Samford University) (Gainful work represents a fundamental factor in the development of human potential such that any deprivation of work renders a person a second–class citizen.)

> which they did it, revealed both their place and their possibilities within American society.[195]

Labor systems define United States civic life by reserving certain jobs for certain races and ethnicities.[196] As Jones notes, "[a]s a society; we are what we do at work, and we remain the sum of our radically divergent workplaces."[197]

Slave work was more arduous in some sectors and form of cultivation versus others.[198] For example, mining was more burdensome than farming, farming more than manufacturing, manufacturing more than domestic service, cultivating sugar crops more than coffee and rice crops, coffee and rice more than cotton, etc.[199] Significant differences existed between urban and rural slaves, field and artisan slaves, domestic and agricultural slaves.[200] As slave societies developed into a crucial component of the Atlantic commercial

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[195] JONES, *supra* note 156, at 13; *see also* DAVIS, *supra* note 109, at 37 (Although all slave systems displayed the rights of masters to dispose of their slaves at whim—whether by selling, physically abusing, or killing—"the central quality of a given kind of slavery was usually defined by the nature of the work required…"); Ira Berlin & Phillip D. Morgan, *Labor and the Shaping of Slave Life in the Americas*, *in* CULTIVATION & CULTURE: LABOR AND THE SHAPING OF SLAVE LIFE IN THE AMERICAS 1–3 (Ira Berlin & Philip D. Morgan eds., 1993) (Historical scholarship has taken it for granted, but slavery was centrally about work, as it occupied most of the slaves' time… "The conflict between master and slave took many forms, involving the organization of labor, the pace of work, the division of labor, and the composition of the labor force…The legacy of slavery cannot be understood without a full appreciation of the way in which slaves worked."); FONER, *supra* note 51, at 50 (Slavery was first and foremost a system of labor.); *c.f.*, Genovese, *supra* note 166, at 6 ("As the Brazilian sociologist and historian of slavery Fernando Henrique Cardoso observes: 'Freedom in slave society is defined by slavery. Therefore, everyone aspired to have slaves, and having them, not to work.' . . . This [aristocratic] ideal affected every other class in society, including the slaves.'").

[196] JONES, *supra* note 156, at 20.

[197] *Id.*

[198] Berlin & Morgan, *supra* note 195, at 4.

[199] *Id.* at 4.

[200] DAVIS, *supra* note 109, at 6–7.

trading system, slaveholders increasingly separated themselves from slaves by burgeoning levels of supervision.[201]

As an initial matter, the United States' labor stratification system did not inexorably derive from slavery alone, as slave systems or societies throughout history afforded slaves positions of privilege and esteem in their hierarchical labor regime.[202] In this regard, United States slavery remains remarkably distinguished from other slave systems in history.[203]

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[201] Berlin & Morgan, *supra* note 195, at 4.

[202] *See* PAUL E. LOVEJOY, TRANSFORMATIONS IN SLAVERY: A HISTORY OF SLAVERY IN AFRICA 8 (2012):

> [T]he American system of slavery was unique in two respects: the manipulation of race as a means of controlling the slave population, and the extent of the system's economic rationalization. In the Americas, the primary purpose of slave labor was the production of staple commodities – sugar, coffee, tobacco, rice, cotton, gold, and silver – for sale on world markets. Furthermore, many features that were common in other slave systems were absent or relatively unimportant in the Americas. These included the use of slaves in government, the existence of eunuchs, and the sacrifice of slaves at funerals and other occasions (but not the use of slaves and the descendants of slaves in the military). The similarities and differences are identified to counteract a tendency to perceive slavery as a peculiarly American institution. Individual slave systems had their own characteristics.

[203] Slave systems denote geographic regions that relied upon a pervasive mode of economic production and labor centered on slavery. Slave systems encompassed regions that were slave societies, that is, where the dominant form of economic and social life was based upon slavery, which is distinguished from societies with slaves. Dal Lago, *supra* note 165, at 4–5. In societies with slaves, slaves were marginal to the dominant process of production. BERLIN, *supra* note 147, at 8. In slave societies, slaves were central to the production of a good or commodity, and the growth in international trade of particular goods or commodities transformed regions periodically into slave societies. *Id.*

Recent historical scholarship has focused upon the slave societies of the Atlantic ocean as one integrated whole.[204] Whereas the Atlantic slave system employed slaves in the "entirely novel context" of commercialized activity for the purpose of producing agricultural commodities, most ancient slave systems incorporated slaves into hierarchical households to aggrandize owner status within certain locales.[205] Most slaves in the Atlantic slave system were bonded to a mercantilist, capitalist, transnational economy.[206] Increasingly, Atlantic slavery shifted from domestic artisanry to field hand labor.[207]

Furthermore, in many early historical settings, slaves were often females, employed in domestic servitude, or both.[208] As time passed, Greek and Roman slave systems portray slave owners using slaves in many sectors.[209] In ancient Greece, owners employed slaves in skilled jobs due to the shortage of free persons willing to do the work.[210]

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[204] Dal Lago, *supra* note 165, at 6; *see also* DAVIS, *supra* note 109, at 141 (United States slavery was part of a larger Atlantic slave system.).

[205] Miller, *supra* note 151, at 14, 74–79, 81–82, 85–87, 99. Caribbean and South/Central American slave societies focused on the markets for sugar, molasses, syrup, and rum, and the extent of those operations entailed 95 percent of African slaves transported during the Transatlantic Slave Trade ending up in those regions. DAVIS, *supra* note 109, at 103–04. Slaves employed in sugar cultivation and production, particularly those outside of the United States, developed into highly–skilled and semi–skilled labor. *Id*. at 108.

[206] DAVIS, *supra* note 109, at 3.

[207] Dal Lago, *supra* note 165, at 6. This phenomenon did not hold for all parts of the Atlantic slave system. "The absence of competitors, [W]hite or [B]lack, allowed slaves in the Caribbean opportunities that hardly existed on the mainland. In Antigua, some slaves served as physicians to [W]hite and [B]lack alike." Berlin & Morgan, *supra* note 195, at 19.

[208] Walter Scheidel, *The Comparative Economics of Slavery in the Greco-Roman World*, in SLAVE SYSTEMS, *supra* note 151, at 106–07.

[209] *Id*. at 106–07. However, note that the data on the use of slaves in agriculture is controversial. *Id*. at 106–07.

[210] Tracy Rihll, *Slavery and Technology in Pre–Industrial Contexts*, *in* SLAVE SYSTEMS, *supra* note 151, at 130–31, 133; *see also* DAVIS, *supra* note 109, at 51 (In world history, elites have always distinguished

Furthermore, slaves in the Greek empire worked in agriculture because free citizens disdained manual labor.[211] In addition, Greek slaves worked as nurses, prostitutes, urban artisans, domestic servants, and miners.[212] As a result, slaves employed in this work had homes that were indistinguishable from those of free persons, typically worked in manufacturing rather than agriculture, lived separately from their masters, were paid in cash, had to accumulate their own food, and had to pay for their own housing.[213]

In his seminal work on slavery, sociologist Orlando Patterson detailed these patterns in slave systems around the world. Slaves in the Near East, Greco-Roman economies, Islamic societies, and medieval Europe engaged in all manner of economic activity, and sometimes economically outperformed free persons.[214] Slaves earned fortunes as bankers and agents, and were skilled artisans.[215] Slaves exercised authority in military, administrative, executive and

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themselves from the darkened field workers, and the upper classes in Western society deemed physical labor "as a chore best left to slaves.").

[211] DAVIS, *supra* note 109, at 41–42. This resulted from the ancient Greeks' general outlook on manual labor:

> [I]n the classical Greek tradition, the slavish person would be ideally suited to perform all the menial, unpleasant, and degrading labor that made the civilized state possible, providing 'citizens' with the freedom and leisure needed for the so–called good life…The Bible also repeatedly links the lowliest forms of labor with the 'curse' of slavery.

DAVIS, *supra* note 109, at 56.

[212] *Id.* at 41–42.

[213] Rihll, *supra* note 210, at 130–31, 133. Both the Mediterranean and the United States Southern slave systems exhibited a paternalistic type of slave management, which was tied to the slave owners' structure of their families. Dal Lago, *supra* note 165, at 23. However, the South tied paternalism to the maximization of production and the racial exploitation of their slaves, unlike their Mediterranean counterparts. *Id.* at 23.

[214] PATTERSON, *supra* note 106, at 184.

[215] *Id.* Indeed, some slaves owned other slaves amassed through their fortune.

even political roles in several empires throughout history.[216] For example, in certain Islamic empires, slaves exerted tremendous cultural influence and were important in the realms of administration, religion, artwork, music, poetry, grammar, and education.[217]

This phenomenon existed in other slave systems. Madanu-bel-usur, a Babylonian slave over 2,500 years ago, was a privileged slave who owned real and personal property, conducted lending operations, and won a lawsuit against an insolvent debtor.[218] Other privileged slaves exist in history, such as the Egyptian Mamluk elite military slaves, and the Chinese and Byzantine chief eunuchs.[219] There were also prince-like slaves in Roman emperor households and Palatine eunuch slaves in China as well.[220] Although Mesopotamian civilizations employed slaves in heavy manual labor and New Kingdom Egyptians used slaves in heavy labor work, slaves in the Babylonian period worked as artisans, agents, tenant farmers, merchants, bankers, and domestic servants.[221] Brazilian slaves worked in many skilled occupations, assumed the status of their owners, either wealthy or poor, and some even owned their own slaves and property.[222]

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[216] *Id*. at 299.

[217] *Id*. at 180. Lest one argues otherwise, slavery also existed in Africa. In the early stages of slavery in Africa, it was primarily a social institution designed to enhance the status of slaveholders. LOVEJOY, *supra* note 202, at 12–13. When people were enslaved during Muslim invasions, slaveholders predominantly used slaves for domestic, government, and military purposes, although some were used in production. *Id*. at 16–17, 20. Based upon the Atlantic slave trade with Europeans and Americans, slavery in Africa transformed into an agricultural based system. *Id*. at 20–21. Indeed, Africans enslaved Africans of other ethnic groups to sell to Transatlantic slave traders for hard work and toil in the new world. DAVIS, *supra* note 109, at 12–13.

[218] *Id*. at 27.

[219] *Id*. at 29.

[220] PATTERSON, *supra* note 106, at 51.

[221] *Id*. at 38–40.

[222] *Id*. at 118–19. Unlike other slave societies, the nineteenth century United States South did not permit slaves to marry, own property, or testify in court. *Id*. at 194.

2. Stratification in the Early United States Slave System

Slavery in the United States focused upon employing slaves in agricultural labor, with minimal deployment in manufacturing.[223] In the Americas, Patterson discerned that owners used slaves primarily as agricultural labor.[224] In mining and plantation slave systems, which comprised most of the slave societies in the Americas, slaves were primarily units of production.[225] In the United States Southern slave society, the most low-paying, semi-skilled work was known as "n***** work," and White workers occupied higher-skilled work.[226] Owners employed most slaves as field hands in this system, and this affected the status of all Black persons.[227]

[223] Scheidel, *supra* note 208, at 106–07. One does not mean to suggest that slaves in the Greco–Roman world were employed in a variety of occupations whereas slaves in the Atlantic system were employed only in forced, agricultural labor. Scores of slaves were employed in agriculture in both systems, and slaves in the Atlantic were employed in some industrial occupations. Dal Lago, *supra* note 165, at 15–16. Nevertheless, because ancient free persons disdained manual labor, the Mediterranean slave system extensively used slaves in manufacturing labor, and slaves lived in a semi–free status. This condition existed in few antebellum industries in the United States South. Rihll, *supra* note 210, at 18, 130–31.

[224] PATTERSON, *supra* note 106, at 159.

[225] *Id.* at 198–99. To be sure, owners put slaves to many uses, whether for "prestige, political, administrative, ritual, sexual, marital, or economic reasons." *Id.* at 173. Nevertheless, the condition of slaves on plantations, which contained the vast majority of slaves, differed from those of slaves who labored as tenant farmers or with small family farmers. *Id.* at 174. In some American slave societies, slaves used as tenant farmers achieved a significant degree of social and economic independence. *Id.* at 199. Nevertheless, although slaves manufactured goods for their own use, the marketing of such goods to other slaves and persons was more limited in North America than the Caribbean. Berlin & Morgan, *supra* note 195, at 32–33. In North America, non–slave persons controlled the markets for such goods. *Id.*

[226] PATTERSON, *supra* note 106, at 257–59, 260.

[227] *Id.* Although slaveholders created reward structures that permitted slaves to rise in the hierarchy of slave life, slave societies constrained them from attaining the highest opportunities, such as leaders of great businesses, or faculty in universities. FOGEL & ENGERMAN, *supra* note 188, at 148–49, 152–53.

Unlike other slave societies, slavery in the Americas thrived in a closed system—where the rates of manumission were low and freed slaves remained a separate group even after manumission—and thus, the conditions for effort-intensive/pain-incentivized slavery existed, that is, slavery in agricultural labor rather than more care-intensive work.[228] Indeed, forced labor was not typically used in highly-skilled/high-care work due to the risk of substantial loss from sabotage.[229]

Initially, there was no racial division of work in the colonies as Black and White workers worked side-by-side in the hard toil of forming new colonies.[230] Eventually, however, White English colonists determined that the toil of New World manual work was degrading and thus unsuitable for Englishman.[231] Therefore, the colonists invoked the institution of Black slavery as a humanitarian cause to free Englishman from the toil of manual labor.[232] As the colonies developed, the British agricultural economies in the United States became labor-intensive systems, and White workers in the colonies hoped to "outgrow" this manual labor.[233] The harshness of cultivating land in the early colonies led the more prominent planters to employ and exploit workers for this

[228] Scheidel, *supra* note 208, at 107–15. Due to the advent of the cotton economy in the South, slavery was institutionalized to the extent that children of slaves remained slaves, unlike other societies in which children of slaves had the opportunity to attain native–hood and other forms of dependency in their masters' households. Miller, *supra* note 151, at 96–97. When we discard the idea that slaves have to be bought or sold, then we realize that the thetes within the ancient Greek system, who were landless, low–class inhabitants, and African–Americans during the Jim Crow era, were also slaves, particularly "semi–manumitted slaves, no longer always under the direct control of a master but very much at the mercy of most genuinely free persons in the society." Orlando Patterson, *Slavery, Gender, and Work in the Pre–Modern World and Early Greece: A Cross–Cultural Analysis*, *in* SLAVE SYSTEMS, *supra* note 151, at 63–64.

[229] Rihll, *supra* note 210, at 128.

[230] JONES, *supra* note 156, at 68–71, 76–77.

[231] *Id.* at 78. Becoming an Englishman was a status to which all White colonists could attain.

[232] *Id.* at 78.

[233] *Id.* at 24–25.

labor.[234] The distinction of escaping from such toil transformed into a status for those settlers who enjoyed that position.[235]

Therefore, Black workers occupied a vulnerable status in the seventeenth century; by that time, they could not even oversee White indentured servants.[236] The other colonists viewed them as strangers in the New World, and whereas other bonded labor could hope to escape that status and become "English," Black workers, because of their skin color, could not achieve that distinction.[237] White, indentured servants in Virginia and Maryland eventually compelled planters to refrain from assigning them tasks in the field.[238] White servants could eventually enjoy the status of "Englishness"—a status associated with "[W]hite skin and a European lineage"—but Black workers long-retained their "strangeness."[239]

3. Stratification in the Plantation Slave System

As the second generation of slaves were brought to the United States, which corresponded with the advent of plantation agriculture,[240] slaveholders assigned them the most burdensome tasks and largely denied them experience in more skilled work.[241] This second generation of slaves trafficked from Africa derived from the interior of the

[234] *Id*. at 30–31.
[235] *Id*. at 30–31.
[236] JONES, *supra* note 156, at 38–39.
[237] *Id*. at 38–39.
[238] *Id*. at 42–43.
[239] *Id*. at 53.
[240] The prototype for American plantations slavery was the southern Italian and Sicilian latifundia, who were slaves that worked in large–scale agriculture at the height of the Roman Empire. DAVIS, *supra* note 109, at 44. Nevertheless, "[n]othing in the Roman works was really like the racial slavery that came to pervade[] the Western Hemisphere. Romans imported . . . highly educated and professional slaves from Greece and northern Africa." *Id*. at 46.
[241] BERLIN, *supra* note 147, at 58.

continent.[242] They were not as skilled and diverse as the coastal Africans who were conversant with the Atlantic economy, as the second generation were primarily farmers.[243] Furthermore, this second generation of plantation slaves did not benefit from the decline in White servants.[244]

Plantation labor systems operated under a more complex hierarchical regime, where the owners relied upon overseers and supervisors to manage the slave force.[245] The managerial hierarchies permitted some slaves to occupy low-level supervisory positions, such as drivers and foremen, and artisan positions.[246] Primarily, however, the slaves worked longer hours, for more days of the week and months of the year, under closer supervision by overseers, and with less food and rations than English workers and White servants.[247] Slaveholders developed their paternalistic ideology during this period in the eighteenth century with the rise of plantation economies, and the combination of this ideology with the plantation economy resulted in more work for the slaves and a greater distance between the owners and slaves as they hired overseers and stewards to manage the slave force.[248]

This dichotomy increasingly manifested in the Southern slave societies, as the presence of a Black slave force elevated all White owners, supervisors, and laborers.[249] This dichotomy between Black and White labor had completely taken hold by the late eighteenth century:

> By the time of the Revolution, [W]hite elites—and especially the great planters of Virginia—had developed a theory of [B]lack inferiority that

[242] *Id*. at 60.
[243] *Id*. at 60.
[244] *Id*. at 61–62.
[245] Berlin & Morgan, *supra* note 195, at 16–17.
[246] *Id*. at 16–17.
[247] BERLIN, *supra* note 147, at 61–62.
[248] *Id*. at 63.
[249] JONES, *supra* note 156, at 79.

> sought to justify the relegation of Africans and their descendants to lifelong menial toil. In large measure this theory grew out of the fact that slaves were forced to perform amounts and kinds of labor from which [W]hite men and women were increasingly exempt. Because slaves were forced to work at a grueling pace, often under dangerous conditions, [W]hites concluded that, in the words of one Virginia planter, [B]lack people in general 'are by nature cut out for hard labour and fatigue….' In the parlance of slaveowners, [B]lack men and women resembled animals ("poor creatures"); they were devoid of "reason," vulnerable to the arbitrary whims and wish of their masters, and condemned (along with their children) to perpetual bondage.[250]

At this point, the wholesale division of labor between Black and White labor increasingly crystallized. White people developed a social ideology that certain types of tasks were suitable for Black slaves, such as tapping pine trees for pitch and tar, irrigating rice fields, and planting and harvesting rice, cotton, and indigo.[251] Although Southern planters did not limit field cultivation to slaves, White laborers did not perform certain tasks associated with what was termed "n***** crops," and they had the ability to escape the cultivation of such crops altogether.[252] To be sure, while plantation slaves worked as field hands, domestic servants, and artisans, some urban slaves occupied positions in manufacturing and other skilled

[250] *Id.* at 82–83. James Henry Hammond, the governor of South Carolina in 1858, stated in his infamous "Cotton is King" speech that Black slaves were created to serve as menial laborers for the higher White caste, who were created to lead societal progress. DAVIS, *supra* note 109, at 189.

[251] JONES, *supra* note 156, at 89. The rice cultivation and indigo production performed by slaves from North Carolina to Florida was tedious, backbreaking work that one commenter remarked was "'only fit for slaves.'" BERLIN, *supra* note 147, at 70–71. Nevertheless, due to the absence of owners from the large rice and indigo plantations in the Carolinas, Georgia, and Florida, some slaves rose to influential driver or foremen positions on the plantations. *Id.* at 76–77.

[252] JONES, *supra* note 156, at 208.

jobs.[253] The latter phenomenon undermined the racial ideology that Black individuals were inferior in intelligence and skills, but eventually pressures resulted in increasing relegation of skilled jobs to poor White workers.[254]

This division of labor was not limited to the southern United States or to slaves. In the North, slave labor initially competed with free laborers for artisan positions in urban areas.[255] Northern states never became complete slave societies. Until their acts of manumission, they were societies with slaves.[256] Thus, they never developed the large plantation system of slave labor prominent in the South, and slave labor in the North never achieved centrality in the production system as it had in the South.[257] Nevertheless, because of their skin color and association with slavery, free Black workers were stigmatized and limited in their employment opportunities.[258] In addition, the fear of civil disorder from Black workers committed Northern and Southern Whites to keeping Black workers in menial jobs.[259]

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[253] *Id.* at 218. In eighteenth century Louisiana, slaves enjoyed a measure of independence, including the ability to possess property and produce goods and commodities. BERLIN, *supra* note 147, at 42–43. Indeed, before the antebellum period, creole slaves could marry, acquire property, eventually own slaves themselves, and possess some independence. *Id.* at 33, 41.

[254] JONES, *supra* note 156, at 218. Of course, economic conditions would prevent such relegation from occurring entirely to the detriment of Black workers. "[W]ithin the realm of manual and skilled work, there was no single southern notion of '[B]lack man's work' or '[B]lack woman's work,' but rather a fluid definition of the appropriate work for certain groups, depending on the relative supply of [B]lack and [W]hite, slave and free, skilled and unskilled workers in any particular time and place." *Id.* at 212; *see also* Berlin & Morgan, *supra* note 195, at 3 (Slave labor manifested in many forms, depending upon the type of crops farmed, the crafts needed by the owner, the locale of the plantation, the free workforce in the locale, etc.).

[255] BERLIN, *supra* note 147, at 82.

[256] *Id.* at 87–88. For the distinction between slave societies and societies with slaves, *see* LOVEJOY, *supra* note 202.

[257] BERLIN, *supra* note 147, at 87–88.

[258] JONES, *supra* note 156, at 142.

[259] *Id.* at 140.

For example, free Black workers in shipyards did not have labor mobility and thus occupied lower-paying positions.[260]

4. The Effect of Cotton on Stratification

The stratification of labor sharpened during the cotton era in the southern United States.[261] Plantation slavery expanded exponentially in the United States southern interior during the antebellum period due to the Atlantic economy's thirst for the commodity.[262] The Second Middle Passage denotes the epoch when large numbers of slaves were transferred to the interior, Lower South to work on cotton plantations or produce sugar on Louisiana plantations.[263] Yet, it was the dominance of cotton production in the Lower South that transformed the region into a slave society.[264] Due to the explosive increase in the cotton economy, more than 835,000 slaves shifted from the northeastern parts of the South to the central and southwestern states from 1790 to 1860.[265] The

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[260] *Id.* at 167.

[261] The United States slave system in the nineteenth century rested largely upon the global economic system of cotton, which spurred cultivation in the South and manufacture and sale in the rest of the world. DAVIS, *supra* note 109, at 184.

[262] BERLIN, *supra* note 147, at 17.

[263] *Id.* at 17, 162. United States slavery was divided into four distinct societies: the North; the Chesapeake Bay and Virginia piedmont; the Carolina and Georgia lowcountry; and Spanish Florida and French Louisiana. DAVIS, *supra* note 109, at 125–26.

[264] BERLIN, *supra* note 147, at 166. Sugar cultivation in the Louisiana slave society generated a complex mix of labor skills among the slaves due to the complexity of producing the staple. *Id.* at 184–85. Eventually, the destruction of the staple crop economy in Louisiana transformed it from a slave society into a society with slaves, with slaves gaining increasing autonomy to produce goods and commodities for their own exploitation and migrating into more skilled trades such as blacksmithing, masonry, coopery, roofing, etc. *Id.* at 88–90, 95. As a result, New Orleans produced middle and upper class Black persons. Du Bois, *supra* note 92, at 154–55. Nevertheless, the sugar industry was a minor crop in the United States, utilizing no more than ten percent of the United States slave force. Therefore, it did not have a large effect on the development of United States slavery, unlike other colonies and nations in the Western Hemisphere. FOGEL & ENGERMAN, *supra* note 188, at 20–21.

[265] PATTERSON, *supra* note 106, at 165.

explosive increase of staple-producing plantations transformed the Lower South into slave societies, the seaboard South into societies with slaves, and the North into free societies.[266]

The "overall percentage of slaves engaged in skilled labor declined during the period 1790 to 1860, a development that reflected the expansion of cotton cultivation."[267] The states in the lower South attracted slave labor from the Upper South, where skill levels were high, and placed the slaves in field tasks on cotton plantations.[268] Cotton farming engendered extremely hard, tedious work for slaves on the Lower South plantations, as owners drove slaves hard year round to cultivate cotton.[269] Cotton plantations utilized few skilled abilities because it involved simple processing operations.[270]

Cotton plantations employed the slaves in gang labor managed by White overseers rather than Black drivers or foreman, which increased the brutality exercised upon slaves.[271] This arrangement also pushed Black persons further down the labor hierarchy:

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[266] BERLIN, *supra* note 147, at 17. Initially, the North was a society with slaves rather than a slave society, as its economy never depended upon slave labor. DAVIS, *supra* note 109, at 128–29. As a result, slaves were more integrated in Northern society and frequently worked alongside their owners, unlike the planter/owner slave societies in the United States South. *Id*. at 128–29. Virginia maintained a slave hierarchy, with more privileged native–born slaves employed in skilled work. *Id*. at 133. Slaves in urban Charleston mastered many skills and trades, exercised *de facto* independence in some instances, and even served as soldiers early in the history of the colony. *Id*. at 136–37.

[267] JONES, *supra* note 156, at 195–96. Although certain rice estates in the South Carolina and Georgia low country employed specialized tasks for slaves, this was the exception.

[268] *Id*. at 195–96.

[269] BERLIN, *supra* note 147, at 176–78.

[270] Berlin & Morgan, *supra* note 195, at 18. Indeed, Freedmen in South Carolina did not want to cultivate the "slave crop," cotton. FONER, *supra* note 51, at 51.

[271] BERLIN, *supra* note 147, at 176–78. Slave owners generally arranged their plantations by the task system, where slaves accomplished

> The removal of [B]lack men—and occasionally women—from the managerial ranks in the cotton South reduced opportunities for slaves to rise within the plantation hierarchy. The occupational ladder was further truncated with the elimination of many of the skills that slaves had once practiced on the tobacco and rice plantations of the seaboard, for cotton cultivation demanded little artisanal labor. Field work required equipment no more sophisticated than a hoe or a simple plow. Once ginned and baled, cotton had only to be covered with a tarpaulin to protect it from the weather. Unlike tobacco, it required no barrels, hence no coopers; no barns and storage sheds, hence no carpenters and sawyers; no drays or wagons, hence no wagoners and carriage makers. Unlike rice, cotton required none of the complex hydraulic systems, fans, or mills, hence no engineers, machinists, and millers. The spread of cotton culture devastated the ranks of the slave artisanry, reducing many tradesmen and women to field hands and depriving them of the opportunity to pass their skills on to their children. For slave artisans, whose identity was in their work, the march south was doubly destructive.[272]

certain tasks, or the gang system, where slaves worked in defined groups under close supervision by overseers. Berlin & Morgan, *supra*, note 195, at 14–15. The gang system occasioned little room for individual initiatives by the slaves, as it demanded labor during all working hours. *Id.* at 14–15. The type of commodity produced by slaves generally determined the type of organization—gang or task—employed by the slave owner. *Id.* However, even slaveholders who deployed the task system in the Carolinas extended the task to encompass day–long work that prevented slaves from producing their own goods or commodities. BERLIN, *supra* note 147, at 311.

[272] BERLIN, *supra* note 147 at 178; *but see* DAVIS, *supra* note 109, at 139 (Because of the task system employed on the lowcountry rice and indigo plantations in South Carolina and Georgia, slaves were able to complete their slave work early in a day and tend to growing their own gardens or

Increasingly, domestic labor on cotton plantations decreased, as slaveholders deployed more male slaves to the field to maximize cultivation of the staple crop.[273] The trend towards non-specialization and deterioration of skill levels resulted in ninety-five to ninety-seven percent engagement of slaves in field cultivation by 1860.[274]

The hierarchies occasioned by cotton work influenced all levels of work throughout United States society. Although southern manufacturers were initially receptive to exploiting Black labor in the antebellum period,[275] from the outset northern manufacturers during this period did not employ Black laborers.[276] In the antebellum period, northern societies excluded Black workers from vocational education and job-training and limited them to service and manual labor jobs.[277] Northern public officials enacted policies that restricted

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other projects. This freedom enabled slaves to accumulate property, although it was untitled).

[273] BERLIN, *supra* note 147, at 6, 179. As the lower South slave society matured, some slaves assumed domestic positions in plantation houses. *Id*. at 200. These positions became hereditary, as did the field positions, and thus there existed a division of labor with the Southern slave society. *Id*. Nonetheless, the slave on the average nineteenth century plantation worked in field labor. DAVIS, *supra* note 109, at 198–99.

[274] JONES, *supra* note 156, at 195–96. In certain respects, larger plantations occasioned the use of slaves in more skilled activities. Berlin & Morgan, *supra*, note 195, at 19.

[275] Although southern slaves occupied some skilled and lower managerial positions during the antebellum era, the vast majority were deployed in low level, laboring positions as compared to free White laborers. FOGEL & ENGERMAN, *supra* note 188, at 38–39. More than seventy percent of slaves worked as laborers on plantations or in other settings, while less than ten percent of any given workforce worked in managerial, artisan, or semiskilled positions. *Id*. at 38–39.

[276] JONES, *supra* note 156, at 224; *see also* DAVIS, *supra* note 109, at 153–54 (In the antebellum North, states barred free Black persons from most occupations and professions, and Northern rural slaves lacked the skills to work in but the most menial labor.).

[277] JONES, *supra* note 156, at 258–59; *see also* FONER, *supra* note 153, at 77 (Both Northern and Southern societies deemed Black persons to be inferior and subordinate, and the "free" Northern states relegated them to menial labor, segregated transportation, and segregated schools.).

factory machine operative jobs to White laborers.[278] Even free, affluent Black families saw the erosion of job opportunities during the antebellum period.[279] By the Civil War, Black persons represented only two percent of the northern population.[280] During the antebellum period, the northern White elite constituted wealthy merchants, speculators, physicians, lawyers, and manufacturers.[281] Contrastingly, the northern Black elite constituted "barbers, preachers, skilled tradesmen, petty proprietors, teachers, and waiters."[282]

Because the cotton boom increasingly engaged all slave labor to the exclusion of non-agricultural work, Southern manufacturers eventually mirrored their Northern counterparts and trended toward all-White factories.[283] White manufacturers saw a political advantage in hiring White workers over slaves or free Black workers, even to their economic detriment.[284] That is, the prospects of idle White citizens, and skilled, knowledgeable Black slaves or workers, resulted in the relegation of Black individuals to lower-skilled work.[285] In the antebellum North and South, politicians prevented Black workers from occupying artisan and trade positions in response to their White laborer constituents' demands.[286] The stance of the White population resulted from a belief that Black workers should not have particular types of jobs, rather than the belief that Black workers were mentally incapable of performing them.[287] In addition, due to

[278] JONES, *supra* note 156, at 258–59.
[279] *Id.* at 213.
[280] *Id.* at 248.
[281] *Id.* at 257.
[282] *Id.*
[283] *Id.* at 232.
[284] JONES, *supra* note 156, at 220–21.
[285] *Id.*
[286] *Id.* at 271–72.
[287] *Id.* at 272; *cf. Bryan*, 14 Ga. at 189–203 (The freed Black person cannot testify against a White person, cannot vote, cannot possess firearms, cannot preach without a special license, cannot be employed as a compounder of drugs, cannot teach other Black persons to read or write, and

the fear of an increasingly free Black population, upper South societies in the nineteenth century treated free Black persons as "slaves without masters," basically by limiting their work opportunities and subjecting them to other dehumanizing conditions.[288]

5. Stratification After the Civil War

The postbellum period did not see any drastic improvement in labor stratification.[289] Upon emancipation, freed persons held high aspirations for themselves and their families, and possessed new conceptions about working and living as independent persons.[290] However, most Southern Whites remained beholden to an ideology of Black inferiority and racial solidarity, summed up by the *Cincinnati Enquirer*'s claim that "'[s]lavery is dead, the negro is not, there is the misfortune.'"[291] Southerners adopted a strategy implemented by northerners seventy-five years prior: disavow any notion that Black workers possess artisanal skill so as to eliminate freed Black workers as competitors with White artisans and factory workers, and relegate Black workers to agricultural and domestic work.[292] This new ideology and mythology emerged as the Jim Crow stance that Black workers could not mentally handle skilled jobs.[293]

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cannot work to set a printing press or in "any other labor requiring a knowledge of reading or writing.").

[288] DAVIS, *supra* note 109, at 204; *see also* FOGEL & ENGERMAN, *supra* note 188, at 36–37 (Whereas the northern United States and other colonies engaged in gradual emancipation that prevented the most deleterious consequences of abolition, the United States South hardened during the antebellum years. Southern states placed limits on voluntary manumission and prevented freedmen from possessing firearms, traveling freely, owning land, and publicly assembling.).

[289] During the war, most military officials believed that emancipated slaves should remain in agricultural labor, and they enacted policies to ensure this development. FONER, *supra* note 51, at 58–59.

[290] Litwack, *supra* note 139, at 222–23.

[291] *Id.*

[292] JONES, *supra* note 156, at 221–22.

[293] *Id.* at 222.

Thus, Southern planter paternalism during the postbellum period manifested in the sentiment that freed persons could never hold esteemed positions such as legislators, judges, or teachers, and should thus be confined to work as farmers, handymen, or domestic servants for their own "protection."[294] To accomplish this objective, Southerners instituted the laws and regulations known as the Black Codes, which defined freed persons as agricultural laborers, criminalized their failure to work in a job, and prohibited them from working in any alternative occupation.[295] These codes had a most pernicious effect:

> Rather than expedite the slave's transition to freedom or help him to realize his aspirations, the Black Codes embodied in law the widely held assumption that he existed largely for the purpose of raising crops for a [W]hite employer. Although the ex-slave ceased to be the property of a master, he could not aspire to become his own master. No law stated the proposition quite that bluntly but the provisions breathed that spirit in ways that could hardly be misunderstood. If a freedman decided that agricultural labor was not his special calling, the law often left him with no practical alternative. To discourage those who aspired to be artisans, mechanics, or shopkeepers, or who already held such positions, the South Carolina code, for example, prohibited a [B]lack person from entering any employment except agricultural labor or domestic service unless he obtained a special license and a certification from a local judge of his 'skill and fitness' and 'good moral character.' This provision, of course, threatened to undermine the

[294] Litwack, *supra* note 139, at 366; *see also* Du Bois, *supra* note 92, at 166–67 (After the Civil War, Southern White citizens largely believe that the natural condition of Black persons was slavery, and the South sought to enforce this doctrine by establishing the Black Codes.).

[295] Litwack, *supra* note 139, at 366.

> position of the old free Negro class which had once nearly dominated the skilled trades in places like Charleston. With unconcealed intent, the Mississippi law simply required special licenses of any [B]lack wishing to engage in 'irregular or job work.'
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> . . .
>
> By adopting harsh vagrancy laws and restricting non-agricultural employment, the [W]hite South clearly intended to stem the much-feared drift of freedmen toward the cities and to underscore their status as landless agricultural laborers.[296]

Although the Civil Rights Act of 1866 and other federal laws proscribed the Black Codes, Southern states enforced the codes where Freedmen's Bureau officials declined to enforce their authority.[297] In any event, the promulgation of the Black Codes revealed that the Southern ruling class desired to keep lack workers in agricultural and domestic work, and it largely achieved this end through economic coercion and contract enforcement.[298] The Union Army and, eventually, the Freedmen's Bureau adopted the belief that freed persons were best used as agricultural laborers, and these officials

[296] *Id*. at 367–68; *see also* Du Bois, *supra* note 92, at 167–68 (The Black Codes severely limited the efforts of Black persons to work, as evidenced by the South Carolina law requiring Black persons to pay for a special license to work in an occupation other than agriculture and domestic service.); HAMILTON, *supra* note 31, at 53–54 (The postbellum Black Codes in the South were used to keep freed African–Americans in agricultural labor, and required them to obtain licenses for non–farm occupations.).

[297] Litwack, *supra* note 139, at 370–71.

[298] *Id*. A Florida legislature committee reported in 1865 that the emancipated slave occupied no higher strata than free Black persons before the war. Du Bois, *supra* note 92, at 139. Therefore, the legislature could discriminate against the emancipated freedmen in the same manner as that afforded previously–free Black persons. *Id*.

endeavored to keep freed slaves on their former plantations as contract laborers.[299]

While slaveholders employed some Black workers in a diversity of occupations before the Civil War, the systematic efforts to maintain labor stratification resulted in freed slaves and their descendants occupying "largely menial agricultural" work after the war.[300] "Urban skilled [B]lacks (descended from antebellum free men of color) gradually disappeared from southern cities."[301] "During the last decade of the nineteenth century, in the Cotton South fewer than fifteen out of every hundred [B]lack persons worked at something other than farming (most of them were sharecroppers), unskilled labor, or domestic service."[302]

These three dimensions of the status occasioned by civil slavery—stigma, station, and stratification—exhibit the extent to which civil slavery differed little from chattel slavery. All Black persons merited protection under the Thirteenth Amendment, and this understanding should have indicated the policies and programs that would be necessary to abolish the spirit of slavery. Indeed, Congress undertook some early efforts pursuant to the Thirteenth Amendment's enforcement clause to address the status of Black persons, but those policies and programs proved ineffective against entrenched societal forces. The failure of these programs reveals that decision makers misunderstood the nature of the status burdening Black persons.

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[299] Litwack, *supra* note 139, at 376–77, 379–81, 386; *cf.* Du Bois, *supra* note 92, at 188 (The Thirteenth Amendment did not abolish slavery because most of the freed Black persons worked on the same plantations doing the same work after ratification.).

[300] JONES, *supra* note 156, at 242; *cf.* FONER, *supra* note 157, at 299 (Frederick Douglass "deplored [the former slaves'] tendency to remain in menial occupations.").

[301] JONES, *supra* note 156, at 242.

[302] *Id.*

IV. TRANSFORMING STATUS INTO AGENCY

The focus upon entrenched dimensions of status reveals the challenges that postbellum lawmakers, lawyers, and other stakeholders faced. Supreme Court doctrine eventually rejected a Thirteenth Amendment interpretation that would have encompassed civil as well as chattel slavery, and by extension the three dimensions of status suffered by Black persons. Nevertheless, early postbellum decision makers attempted to address the legacy of civil slavery by promulgating measures to alter the status of Black persons.

As reflected in Justice Bradley's majority opinion in the *Civil Rights Cases*,[303] the device most decision makers championed as the tool to transform the status of freed persons pursuant to § 2 of the Thirteenth Amendment was the right to contract. Reliance upon the right to contract to transform the status of Black persons emanated from two sociological concepts that were prevalent during that historical period: free labor ideology and the legal sociological theory that modern society represented a movement from status to contract. Proponents of these concepts considered the right to contract as a sufficient means to alter the status of freed persons. Later developments demonstrate that contract rights served as a mere component of agency, and a proper focus on agency would have revealed the shortcomings in relying only upon the right to contract as the measure to achieve transformation under the Thirteenth Amendment. With this proper focus, decisionmakers could have discerned the barriers preventing the transformation, including the institutional discrimination factors that can be remedied by the disparate impact claim.

[303] 109 U.S. 3 (1883).

A. The Right to Contract as the Hallmark of Free Labor

In the antebellum period, progenitors of the Republican Party and eventually members of the party itself championed free labor ideology as the primary challenge to the South's slave economy. Free labor ideology permeated all factions of the Republican Party before the Civil War, and it encapsulated the idea that laborers, artisans, and farmers could progressively work their way up to entrepreneurship and economic independence.[304] The Republican free labor ideology celebrated the dignity of work and its capacity to provide for advancement of the working individual.[305] This concept of free labor extended to all manner of workers, including businessmen, craftsmen, mechanics, etc.[306] The goal animating free labor ideology was economic independence, or the state of moving from the wage-earning ranks to independent autonomy.[307] The ideology conceived that lifelong dependence on wage labor rendered an individual "as unfree as the southern slave."[308]

Free labor ideology enjoyed a "strong cultural authenticity" in the North, as its citizens believed that committed individuals could economically advance to become business owners.[309] The ideology's proponents believed that the failure to advance out of the wage-earning ranks or to

[304] FONER, *supra* note 153, at 100–01, 104; *see also* Randall M. Miller, *The Freedmen's Bureau and Reconstruction: An Overview*, *in* THE FREEDMEN'S BUREAU AND RECONSTRUCTION: RECONSIDERATIONS xix (Paul A. Cimbala & Randall M. Miller, eds. 1999) ("Republicans generally subscribed to a free–labor ideology rooted in the belief that economic mobility ensured social and republican order. By their reckoning, personal habits of industry, frugality, integrity, and self–discipline would lead to independence and prosperity for both individuals and society. The key was unfettered access to opportunity, which in an agricultural and artisanal world meant land and tools.").

[305] FONER, *supra* note 157, at 12–14.

[306] *Id.* at 15.

[307] *Id.* at 16–17.

[308] *Id.* at 17.

[309] *Id.* at 33.

escape poverty reflected a moral failing in the individual caught in those conditions.[310] Under free labor ideology, "the interests of labor and capital were identical, because equality of opportunity in American society generated a social mobility which assured that today's laborer would be tomorrow's capitalist."[311] Although free labor ideology increasingly justified the privileges of the business class in the late nineteenth century, antebellum Republicans championed it as the proper framework to achieve economic advancement for laborers.[312]

Critically, free labor ideology buttressed the Republican Party's primary argument against the South's slave system. The Republicans contrasted free labor with slave labor, as free labor provided the opportunity for laborers to rise to entrepreneurship and artisanship, and slavery represented stagnation.[313] Because of their adherence to free labor ideology, Northern Republicans viewed the South's slave society as "alien" due to its lack of prospects for economic advancement.[314] The Republicans despised the labor situation in the South, as it was characterized by unmotivated slaves and poor, degraded, socially immobile White laborers.[315] As a result, the North deemed the South economically and ethically deficient,[316] as the "moral qualities

[310] FONER, *supra* note 157, at 23–24. Some Republicans believed that social factors marred the advancement of some individuals, but they heeded free labor ideology. *Id*. at 25–26.

[311] *Id*. at 20.

[312] *Id*. at 38; *cf*. John C. Rodrigue, *The Freedmen's Bureau and Wage Labor in the Louisiana Sugar Region*, *in* FREEDMEN'S BUREAU, *supra* note 304, at 199 ("The triumph of wage labor both coincided with and reflected the transformation of northern free–labor ideology—from a doctrine that championed the ownership of productive property as the bedrock of economic independence to one that celebrated the freedom of the laborer to sell his or her labor for the best possible terms on a free and open market.").

[313] FONER, *supra* note 51, at 28–29.

[314] FONER, *supra* note 157, at 40.

[315] *Id*. at 50; *see also* DAVIS, *supra* note 109, at 131 (Northern White workers believed that slavery degraded most forms of labor.).

[316] FONER, *supra* note 157, at 50.

of free labor, hard work, frugality, and interest in economic advancement seemed absent in the South."[317]

As expected, the North's victory in the Civil War sustained the advance of free labor ideology in the postbellum era, especially as it pertained to formerly enslaved persons. According to one commentator, slavery depressed inclinations for individual initiative and degraded labor, resulting in immoral habits and unwarranted wealth disparities.[318] In the immediate postbellum era, free labor proponents endeavored to transform the South into a free-labor economy.[319] Free labor adherents argued that free Black individuals had the right to compete in society and deserved protection of rights attendant to such competition, such as the right to own property and the right to access the courts.[320] Essentially, free labor proponents desired economic advancement for Black persons.[321] The desired policies reflected a goal to establish free labor ideology as the economic and social standard in the South, and to give freed persons the same opportunities to

[317] *Id.*; *see also* DAVIS, *supra* note 109, at 56 ("[I]t was not until writers in the Enlightenment and early nineteenth century began to ennoble free labor . . . that it became possible to launch a popular attack on slavery as a backward and inhuman institution that stigmatized and dishonored the very essence of labor. It was precisely such free labor, as the nineteenth and twentieth centuries progressed, that became the idealized and supposedly voluntary route—as an alternative to aristocratic birth—to both individual success and respected identity").

[318] Miller, *supra* note 304, at xix.

[319] *Id.*

[320] FONER, *supra* note 157, at 296; *see also* Du Bois, *supra* note 92, at 189 ("The abolition of slavery meant not simply abolition of legal ownership of the slave; it meant the uplift of slaves and their eventual incorporation into the body civil, politic, and social, of the United States.").

[321] FONER, *supra* note 157, at 296; *cf.* Berlin & Morgan, *supra* note 195, at 45 ("With emancipation, freed people throughout the Americas made it clear that they wanted, above all, access to land and other material resources that they could work in family and communal groups. They wanted no part in gang labor or in any system that limited their control over what they could grow, what they could rear, and what they could sell. They understood these rights—the rights to work on their own and to control their own resources—as coincident with their independence. In short, they desired most to build upon the independent economic activity in which they had engaged as slaves.").

progress and obtain equality with those in the higher classes of society.[322] Even some moderate Republicans supported civil equality for freed persons due to the violation of the free labor ideology in the South.[323] In any event, free labor ideology suffused societal imagination as the proper paradigm for economic advancement.

Justice John Marshall Harlan, whose importance to the interpretation of the Thirteenth Amendment was discussed previously, was a staunch adherent to free labor ideology and applied its precepts to Black persons, arguing that the Thirteenth Amendment frees every person to work freely for themselves and their race.[324] As a member of the Presbyterian Church in the U.S.A.'s Standing Committee on Freedmen, Harlan issued a report preaching free labor principles for the freed Black citizens: "Educate him, not for a *civil slave*, but to give him an equal chance with every other man—laborer with laborer, artisan with artisan, doctor with doctor, teacher with teacher, preacher with preacher, and leader with leader."[325]

As the historical record provides, the primary tool used to advance free labor for freed persons was the right to contract. Notwithstanding the contested aspects of the amendment reflected in the congressional record before its ratification, after ratification Congress passed the Civil Rights Act of 1866 and the Freedmen's Bureau Act to demonstrate that the amendment protected the civil rights of African Americans.[326] The Civil Rights Act of 1866 constituted Congress' first attempt to give meaning to the Thirteenth Amendment.[327] Radical Republicans had an expansive view of the fundamental rights promised by the amendment and encompassed in the bill, and moderate

[322] FONER, *supra* note 51, at 234–35.

[323] *Id.* at 242.

[324] PRZYBYSZEWSKI, *supra* note 11, at 68–70.

[325] *Id.* at 103 (emphasis added). Notably, however, Harlan's report supported the social separation of the races.

[326] VORENBERG, *supra* note 28, at 233–34.

[327] FONER, *supra* note 51, at 244.

Republicans at least believed that fundamental rights included the right to contract and own property.[328] Therefore, the debates leading to the passage of the Civil Rights Act of 1866—which relied on the Thirteenth Amendment for authority—enumerated the right to contract as a fundamental freedom that directly contrasted with slavery.[329] As discerned, the Civil Rights Act of 1866 constituted an attempt to enshrine free labor principles by establishing labor contract freedom as a tool engendering a rise into the yeoman/artisan class.

The evidence that free labor ideology morphed into freedom of contract is even more pronounced when examining the policies of the Freedmen's Bureau after the Civil War. During the war itself, the Union army established a new order in the South that linked freedom to the right to contract.[330] As time progressed after the war, Freedmen's Bureau agents abandoned the idea of free labor as land ownership by freed African Americans and imparted the policy of contract rights as the embodiment of free labor and the "foundation of civilization," which was reflected in the establishment of labor contracts between freed persons and their former slave owners.[331] As a result, the Freedmen's Bureau officers equated freedom with contract, instilling in freed persons the mutual duties and freedom inherent in contractual relations.[332]

Free labor ideology underpinned the Freedmen's Bureau's activities as its agents attempted to balance freed persons' aspirations with the needs of plantation farmers.[333]

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[328] *Id.*

[329] STANLEY, *supra* note 20, at 55–56.

[330] *Id.* at 35.

[331] FONER, *supra* note 51, at 164.

[332] STANLEY, *supra* note 20, at 36.

[333] James D. Schmidt, *"A Full–fledged Government of Men": Freedmen's Bureau Labor Policy in South Carolina, 1865–1868*, *in* FREEDMEN'S BUREAU, *supra* note 304, at 219. As many ideologies go, however, its meaning was not clear:

The agents were stark proponents of the ideology as a reflection of the "natural order," and viewed a consensus of interests between Black workers and former slave owners as something that would inure to their mutual benefit.[334]

However, as a foreshadowing of the shortcomings underlying sole reliance upon the free labor and freedom of contract ideology, the Bureau encountered substantial problems with implementing freedom of contract principles.[335] The Bureau's agents immediately realized that slavery's legacy cast a pall over relations between Black workers and former slave owners.[336] Freedmen and planters were mired in

> By the time of the Civil War . . . those assumptions had come to mean many things for many different groups of people. For some, free labor implied the ownership of productive property, either in the form of land or in the form of a small shop or other petty proprietorship. For others, it meant simple self–ownership, which implied freedom from the will of another and the ability to sell one's labor power freely in the marketplace. For still others, as historians of labor law have uncovered in recent years, free labor implied a set of legal relationships that regulated both the marketplace and the shop floor.

Id.

[334] Rodrigue, *supra* note 312, at 200. The lead Bureau official in Virginia viewed transforming freedmen into free laborers as his most important duty, and this transformation revolved around establishing free contracts between freed persons and former slave owners. *See* Mary J. Farmer, *Because They Are Women": Gender and the Virginia Freedmen's Bureau's "War on Dependency"*, *in* FREEDMEN'S BUREAU, *supra* note 304, at 164–65.

[335] The Slave Codes initiated the backlash by eradicating slaves' self–ownership, whereby they could not consent to form a contract. STANLEY, *supra* note 20, at 18.

[336] Rodrigue, *supra* note 312, at 200; *see also* STANLEY, *supra* note 20, at 39–41 (Some freed people equated emancipation with the right to contract and sell their labor for wages. However, Freedmen's Bureau officials also discovered that some freed persons loathed returning to work for their former masters; they desired the economic independence of owning their own land to employ their labor.).

conflict over the everyday meaning of free labor ideology, revealing "that both former slaveholders and freedmen possessed a more realistic understanding of the challenges they faced: namely, that quickly surmounting slavery's legacy was a hopeless task and that little common interest existed between former slaves and former slaveholders."[337] Ultimately, free labor's commitment to social advancement

[337] Rodrigue, *supra* note 312, at 200. One example presented the free persons' conception in the context of Louisiana sugar cultivation:

> Freedmen offered a contrasting vision of free labor and of the Freedmen's Bureau. Familiar with the dictates of sugar cultivation, they admitted the need for centralized plantation routine but envisioned a free–labor system that ensured them a degree of autonomy within the realm of sugar production. Freedmen willingly submitted to the discipline that sugar production required as long as they were paid for their labor, enjoyed access to the plantation's economic resources, and were not driven as slaves. Although freedmen had to continue working in gangs under [W]hite overseers, they demanded a voice in such matters as the conditions of labor and insisted that overseers accord them the respect due free people. In reinterpreting northern free–labor ideology to fit their own experiences and in building on the communitarian ethos that had provided them psychological and spiritual sustenance under slavery, freedmen did not see free labor and sugar production as incompatible. The two could, and must, coexist. Nor did freedmen view wage labor as a repressive form of social relations or as 'wage slavery.' Rather, they included it within their larger definition of freedom. In trying to realize their visions of free labor and of freedom itself, freedmen would continually look to the Freedmen's Bureau as an indispensable ally. Thus, a sort of quasi–free–labor system had existed in southern Louisiana for more than two years by the time the Civil War ended in the spring of 1865.

Id. at 198.

under civil equality did not prove sufficient to counter the history of slavery and subordinated status, thus negating equality of opportunity for Black persons.[338]

B. Transforming the Status of Dependence to the Freedom of Contract

The idea that freedom of contract represented the apotheosis of transforming status to freedom was central not only to free labor ideology, but also to another societal creed that commanded allegiance when the Thirteenth Amendment, the Civil Rights Act of 1866, and the Freedmen's Bureau Act were first construed by the Supreme Court. This societal framework arose in a seminal work first published in the United States in 1864 by legal sociologist Sir Henry Sumner Maine.[339]

Maine set out to trace the sociological history of law from the ancient period to his contemporary context. In doing so, Maine argued that pre-modern legal rules were established on the basis of one's status in a family controlled by a patriarchal head.[340] As described by Maine, the eldest male figure exercised supreme control over a household's inhabitants, including spouses, offspring, younger siblings' families, and even slaves; Maine posited that this patriarchal theory of control existed in all pre-modern societies.[341] Furthermore, because of this arrangement the units of legal authority and regulation were not individuals but rather families, and the supreme male authority in the household held ultimate legal power and responsibility for a family's members.[342]

As legal rules developed in different areas (such as contracts, property, and testamentary succession), Maine

[338] FONER, *supra* note 157, at 299–300.
[339] Maine, *supra* note 19.
[340] *Id.* at 118–33.
[341] *Id.* at 119, 158.
[342] *Id.* at 121–22, 129–30.

declared that the primary situs of legal regulation evolved from family dependency to individual obligation.[343] Hence, pre-modern law affixed rights and duties upon a person based on that person's status in a family, but "progressive societies" latched legal abilities upon the agreements individuals undertook to form relationships and assume obligations.[344] Therefore, Maine concluded in an oft-quoted phrase for which he is well-known, "the movement of the progressive societies has hitherto been a movement *from Status to Contract*."[345] Notably, several observers have detailed Maine's influence among United States lawmakers and legal scholars during the nineteenth century.[346]

Modern day sociologist Amy Dru Stanley elaborated upon this same concept and expressly applied it to slavery in the United States.[347] Citing sociologist William Graham Sumner (a contemporary of Maine's), Stanley argues that a

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[343] *Id.* at 162–63.

[344] *Id.* at 163.

[345] Maine, *supra* note 19, at 165.

[346] For example, scholar David M. Rabban remarked that United States legal scholars Henry Adams, William Gardiner Hammond, Melville Bigelow, and James Thayer expressly used Maine's work as the foundation for their scholarship, and other scholars recognized that Maine's thematic organization and foundation in *Ancient Law* framed Oliver Wendell Holmes Jr.'s work. *See* David M. Rabban, *American Legal Thought in Transatlantic Context, 1870–1914*, Clio Themis, no. 9, 2015, 8, 9, http://www.cliothemis.com/American–Legal–Thought–in [https://perma.cc/J2QN-MM7S]. Roscoe Pound argued that Maine's work increasingly influenced United States legal minds after 1870, when his historical method of legal sociology gained provenance among law students. *See* Lewis A. Grossman, *'From Savigny Through Sir Henry Maine': Roscoe Pound's Flawed Portrait Of James Coolidge Carter's Historical Jurisprudence* 22–3, American University, WCL Research Paper No. 2009–21, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1001&context=fac_works_papers [https://perma.cc/X9WA-VKUU]. Another scholar remarked that Maine had a transforming influence on nineteenth century intellectual life and *Ancient Law* was one of two works that had the most influence on English jurisprudence during that period. Alan Diamond, *Introduction*, THE VICTORIAN ACHIEVEMENT OF SIR HENRY MAINE: A CENTENNIAL APPRAISAL 10 (Alan Diamond, ed., 2006).

[347] STANLEY, *supra* note 20.

social structure based upon contractual relations conceivably eradicates dominion over individuals and dependence "based on status, law, or custom."[348] Based upon this understanding, societies naturally progressed from the status of bondage to a state of freedom embodied in contract.[349] As already discussed, in postbellum society the idea of contract symbolized individual rights and freedom.[350] Therefore, the right to contract married individual liberty and obligation, and "marked the difference between freedom and coercion."[351]

Observers in the nineteenth century possessed a detailed understanding of the supposed connection between freedom and contract. According to John Locke's formulation, the right to contract represented the freedom to consent, a bedrock value that contrasts with the strictures of enslavement.[352] The right to contract rests upon the value of self-ownership: only individuals with the freedom to transact possessed free will.[353] Thus, contracts embody the concepts of consent and self-ownership, and free laborers consented to an employer having a right to the employees' labor.[354]

Contrarily, the lack of consent and contract demarcated the slave system.[355] Legal scholars held that the freedom to contract set the "boundary between slavery and freedom."[356] Abolitionist sentiments long held that slavery violated the tenets of contract rights and autonomy.[357] In an

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[348] *Id.* at 1.

[349] *Id.* at 2.

[350] *Id.*

[351] *Id.*

[352] *Id.* at 6.

[353] STANLEY, *supra* note 20, at 3.

[354] *Id.* at 8–9.

[355] *Id.* at 9.

[356] *Id.* at 17. Educators even portrayed the link between freedom and contract via the crafting of stories emphasizing those themes. *Id.* at 38 (describing *John Freeman and His Family*, a story illustrating a man's "transition from bondage to freedom" via "three scenes of contract").

[357] *Id.* at 18; *cf.* Foner, *supra* note 153, at 64–65 (The abolitionists equated freedom with self–ownership, which was an individualistic definition of freedom that avoided the dictates of class relations that the

effort to distinguish free laborers from slaves, abolitionists separated wage labor from dominion and deemed it the essence of freedom due to its connection to self-ownership.[358] Furthermore, although Southerners domesticated slavery by equating master-slave relations to other household relations, abolitionists maintained that contract and free consent underlie true households of integrity.[359] Indeed, late nineteenth century legal and economic treatises described the wage contract in antislavery language.[360] A notable treatise stated that "'liberty of contract' was the 'badge of a freeman,'" and other treatises equated emancipation with freedom of contract.[361]

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labor movement employed in its definition). In countering abolitionist claims that slavery entailed domination over a slave's soul, slaveholders agreed with the sentiment that slavery merely manifested the absence of a contract. STANLEY, *supra* note 20, at 19. Yet, slave owners could not parry the abolitionists' argument that slavery represented total dominion over soul and body:

> The bodily images reflect how seriously abolitionists took the corporeal dimension of the formal right of self proprietorship, which they regarded as the only secure guarantee of personal autonomy. The obverse of the slave whose person was dismembered, through punishment and as a commodity, was the autonomous individual whose body was inviolate. Freedom, as Douglass curtly defined it, was 'appropriating my own body to my use.' . . . [B]y representing free individuals (in contrast to slaves) as unmistakably embodied bearers of rights, abolitionists rendered self ownership concrete while suggesting a new moral and ideological framework for thinking about the vicissitudes of human bodies. By their lights, soul and body were inseverable; spirit could not be emancipated where flesh was bound.

STANLEY, *supra* note 20, at 22–23.

[358] *Id.* at 20–21.

[359] *Id.* at 24.

[360] *Id.* at 74.

[361] *Id.*

Therefore, emancipation launched the nation's transition from a system of status reflecting dependence and dominion, in particular slave bondage, to a system of freedom based upon contract.[362] Emancipation resulted in the disavowal of the slaveholders' paternalistic ideology, replacing the dominion inherent in the paternalistic household that incorporated slavery with a market system in which contract and consent regarding the commodity of labor governed relations.[363] Labor relations no longer fell within a description of the domestic sphere.[364]

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[362] *Id.* at 4. As forcefully argued by Stanley:

> The overarching theme of the labor history written in this era was the transition from bondage to free contract. The ascendance of contract allegedly had transformed labor from a relation of personal dominion and dependence to a commodity exchange in which buyers and sellers were formally equal and free, yet also mutually dependent on one other. No longer was the laborer human property, a commodity possessed by a slave master; rather, the self–owning hireling brought labor—something abstracted from self—into the free market to sell as a commodity in exchange for a wage. By the late nineteenth century, the abolitionist view of wage labor, which constituted the official ideological framework of emancipation, had become a conceptual foundation for the social sciences as well as for the law.

Id. at 75.

[363] STANLEY, *supra* note 20, at 76–77.

[364] *Id.* Unfortunately, Stanley convincingly illustrates that this freedom from dominion and dependence in the household hierarchy did not extend to women in general, and freed women in particular. In an effort to forestall this development, freed women sought autonomy over their body and their labor, contrary to the Southern ethos that equated slavery with marriage relations. *Id.* at 52–54. Sojourner Truth trumpeted her desire that freed women obtain their freedom from Black men as they had from slaveholders, and Francis Ellen Watkins Harper engaged in the same advocacy. *Id.* Furthermore, a minority of abolitionists, particularly Black women such as Watkins Harper and Harriet Jacobs, portrayed abolition as the freeing of enslaved women's bodies and the right of free women to personal sovereignty and self–ownership over their bodies. *Id.* at 29–34.

However, as sociologists, historians, and other expert observers have discerned, freedom of contract avowal failed to engender the hoped-for eradication of domination and dependence. Although labor rights supporters acknowledged that antebellum notions considered slaves and laborers as members of a domestic household, the postbellum period's freedom of contract regime revealed the antagonisms between labor and owners of capital, and the resultant view of labor as a mere commodity input.[365] In the decades after the Civil War, the prospects for economic independence dimmed as industrialization advanced and the capacities of wage earners to become independent producers retreated.[366] Free labor principles ideally were well suited for small-scale capitalists, farmers, artisans, and small entrepreneurs.[367] The advent of large-scale industrialization and its tampering of economic advancement for the laboring classes eviscerated free labor

Therefore, "the theory of female self ownership was a vital aspect of abolitionism," and this recessive strain of abolitionism displayed a firmer commitment to contract freedom. *Id.* at 33–35, 54–55. Notwithstanding those efforts, abolitionists largely maintained that abolition would transfer dominion over enslaved women from the slaveholder to her husband. *Id.* at 29. "[U]nlike any other contract, the marriage contract ordained male proprietorship and absolute female dispossession, establishing self ownership as the fundamental right of men alone." *Id.* at 11. Although emancipation occasioned some revisions of the freed persons' marriage contracts and household relations, which engendered a freedom as important to the freed persons as wage contracts, freed men believed that emancipation gave them the right to exercise sovereignty over their wives, even violently. *Id.* at 44, 48. "The claim of slaveholders was that southern domestic relations were inseparable from slavery, and this legacy endured in the marriages of former slaves." *Id.* In addition, in an effort to reconcile the conflict between fundamental contract freedom and states' rights to control domestic relations, congressional members excised marriage rights from the Civil Rights Act of 1866 and only proscribed the incidents of slavery on the basis of race. *Id.* at 57–59.

[365] *Id.* at 78–80; *see also* FONER, *supra* note 51, at 164 (illustrating that transformation of the free labor concept into free contract ideology hid the economic power disparity between freed persons and their former owners).

[366] FONER, *supra* note 157, at 33.

[367] *Id.* at 316.

ideology.[368] Thus, the foundations for free labor ideology eroded as the economic system industrialized and created the permanent, wage labor paradigm.[369]

Justice Harlan recognized these developments during his tenure on the bench. Revisionist legal historians, demonstrating that the vilified liberty of contract principles originate in antebellum free labor ideology, acknowledge that Harlan's espousal of free labor appeared in several of his opinions and underlie his understanding of liberty of contract.[370] However, Harlan blamed corporate figures for the failure of free labor ideology, not the ideology itself.[371] He never abandoned free labor ideology in the face of corporate power, which he likened to a new form of slavery.[372]

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[368] *See Id.* These circumstances were not foreordained with respect to freed persons, because the linkage between free labor and freedom of contract was contested:

> If viewed from the perspectives of both free–labor ideology and free–labor law at least three positions emerged. A sizable group of 'conservatives' often supported coercive labor law with few restrictions and with little commitment to elements of free–labor ideology that promoted social mobility. Additionally, this group more consistently supported state action on the part of employers rather than workers. A small minority of 'liberals,' clinging to some version of the free–labor ethic, usually desired a labor system ultimately disciplined by market forces instead of the state. Often antagonistic to or unaware of free labor's legal system, these men more often supported state action on the part of workers than of employers. The 'moderate' majority tried to combine the two and saw state control of the labor market as one of the best ways to achieve the ultimate result of social mobility.

Schmidt, *supra* note 333, at 221–22.

[369] FONER, *supra* note 51, at 28–29.

[370] PRZYBYSZEWSKI, *supra* note 11, at 167–70.

[371] *Id.* at 175, 182, 184.

[372] *Id.*; *see also* BETH, *supra* note 90, at 194 (highlighting Harlan's "warning against 'the slavery that would result from aggregations of capital

Therefore, free labor and free contract principles transformed into the phenomenon of dependent, commodity production, which was not the social advancement path to independence envisioned by free labor ideology.[373] Late nineteenth century labor law recognized that the forum of labor transformed from a regime incorporated into a dominated domestic sphere into a regime incorporating wage contracts, which, while permitting the freedom to contract one's labor, evinced domination and control by management over labor.[374] The postbellum era failed to forestall an ambiguous emancipation pulled between self-ownership and control by impersonal forces.[375] As a result, freedom of contract did not reflect free labor ideology's union of labor and capital interests.[376]

in the hands of a few individuals and corporations controlling for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessities of life.").

[373] STANLEY, *supra* note 20, at 86.

[374] *Id.* at 83–84. Although social theory and empirical studies in the late nineteenth century demonstrated a contrast between free labor and free contract principles, postbellum scholarship equated wage labor with free contract paradigms. *Id.* at 73.

[375] *Id.* at 84.

[376] *Id.* at 97. Stanley reached a more pointedly devastating conclusion:

> The wage slave thus stood for the illusions of contract freedom. Labor spokesmen agreed with the axiom that the exchange between capitalists and workers was not paternalistic, but purely commercial. But, to their way of thinking, market relations and dependence were not mutually exclusive—if labor was for sale. They emphasized the difference between the domestic dependencies of slavery and subjugation under the wage system. In the households of the Old South 'the proprietor had absolute right over . . . his wife, his children, his slaves,' but in northern factories the master was the property owner who possessed authority over 'work, wages, and everything else' and 'at whose nod or beck the poor unrequited slave who labors must bow the head and bend the knee in humble suppliance.'

C. From Status Dependence to Effective Agency

That freedom of contract failed as the predominant measure advanced under the Thirteenth Amendment to afford self-ownership to freed persons does not disavow the objective of altering the regime of status relations. As explained previously, a legal regime based upon status—whether stigma, station, or stratification—constrains the freedom that persons in the lower strata have to advance in society. Nineteenth century legal subjects, however, failed to steer the movement from status into the proper conception of emancipation. Rather than construct the movement on the right to contract, building it on what freedom of contract supposedly embodied—the freedom of self-ownership, or rather, agency—provides the proper conception to accomplish the Thirteenth Amendment's command to transform status into freedom. Importantly, this conception provides space for responding to any barriers to individual agency.

The sociological concept of agency refers to the capacity of individuals to act pursuant to their will to shape the social interactions and environment in which they exist.[377] Attached to such philosophical luminaries as John Locke, Adam Smith, Jeremy Bentham, and John Stuart Mill, agency essentially represents a conception of action focused upon individual initiative that frames accounts of personal liberty and advancement.[378] Although it takes many guises—such as rational choice theory in the economics sphere[379] —agency as

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> The point was that there could be no such thing as a pure and simple bargain, a free contract, involving labor.

Id. at 87.

[377] Emirbayer & Mische, *supra* note 12, at 965. *See also* William H. Sewell, Jr. *A Theory of Structure: Duality, Agency, and Transformation*, 98 AM. J. SOC. 1, 18 (1992).

[378] Emirbayer & Mische, *supra* note 12, at 965.

[379] Vincent Colapietro, *A Revised Portrait of Human Agency: A Critical Engagement with Hans Joas' Creative Appropriation of the*

a distinct concept and theory in sociology and other social sciences encompasses considerations of individual free choice and autonomy in the pursuit of human action.

As conceived, agency seamlessly corresponds to the aspirations underlying the freedom of contract regime espoused by free labor proponents and expositors of the status-to-contract theory. The individualist conception underlying nineteenth century free labor theory and status-to-contract orientation posits capacity to contract as the epitome of autonomy and free will, the necessary condition for individuals to form legal relationships and seek advancement in society. As understood, lack of the capacity to contract constituted a barrier to individual choice and action, and a subjugation of individual initiative to the status one occupied in society.

Therefore, properly conceived, postbellum nineteenth century proponents of the Thirteenth Amendment sought to ensure that freed persons possessed the capacity to choose and shape their interactions in society so as to achieve better circumstances. However, the vehicle the proponents chose to encapsulate this free will and autonomy—the freedom to contract—proved to be insufficient for the objective, as explained in the previous section. That the right to contract did not measure up to the task is understandable given another central sociological concept underlying the theory of human action in society.

The concept of structure refers to complex social factors or parameters that influence and circumscribe individual human action.[380] The prominent sociologist Emile Durkheim posited one of the early conceptions of structure, when he

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Pragmatic Approach, 1 EUR. J. PRAGMATISM & AM. PHILO. 1, 6 (2009), http://lnx.journalofpragmatism.eu/wp–content/uploads/2009/12/definitivo2.pdf [https://perma.cc/3NAJ-NEB3] (describing a critique of rational choice theory).

[380] Jonathan H. Turner, *A New Approach for Theoretically Integrating Micro and Macro Analysis*, *in* THE SAGE HANDBOOK OF SOCIOLOGY 406 (Craig Calhoun et al. eds., 2005).

proposed that social facts exert an external coercion over individual action.[381] Modern theorists describe structure "as the constraining and enabling conditions of action,"[382] and such structures may exist as patterns of social relationships, inequalities of social stratification, and internalized values and beliefs.[383]

Not surprisingly, theorists engaged in a social scientific debate whether agency or structure provided the prime account of human action, yet more recent theorists have tended to merge the approaches. Scholars situate human action in a contextual realm where structure influences and enables agency, and agency correspondingly transforms structure.[384] The primary observation provides that human actors may influence and transform a particular structural factor such that agency is enhanced by the transformation.[385]

Therefore, the endeavor to construe the Thirteenth Amendment as providing the right to contract was incomplete. Freedom of contract was a necessary but insufficient tool to accomplish the objective symbolized by the right to contract in the nineteenth century, which is to give individuals appropriate agency to pursue their interests and advance in society. Conceiving the proper goal as the efforts to achieve agency reveals that the objective cannot be accomplished without addressing the structural factors that serve to inhibit individual agency. In the context of freed persons and their descendants, those structural factors emanate from the dimensions of the disadvantaged status borne by Black

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[381] EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 45 (George E. G. Catlin ed., Sara A. Solovay & John H. Mueller trans., Free Press 8th ed. 1964) (1938).

[382] Emirbayer & Mische, *supra* note 12, at 1003.

[383] Jane D. McLeod & Kathryn J. Lively, *Social Structure and Personality*, *in* HANDBOOK OF SOCIAL PSYCHOLOGY 77, 77–78, 81 (John Delamater ed., 2003).

[384] Emirbayer & Mische, *supra* note 12, at 1004; Sewell, *supra* note 377, at 4.

[385] *See* McLeod & Lively, *supra* note 383, at 86 ("social actors are constrained by the structures in which they are embedded, but they also reproduce those structures through their actions").

persons in chattel and civil slavery, the stigma, station, and stratification suffered by the Black populace in the United States. In fair measure, those structural factors exist in the form of hidden discrimination, unconscious bias, and other aspects of institutional discrimination.

D. Unconscious Bias and Hidden Discrimination as Structural Factors

Unconscious bias represents a "set of often unconscious beliefs and associations" that members of one group may have about members of another group.[386] This type of prejudice results from the history of discrimination against certain groups, and manifests as attitudes and behaviors that result in disadvantage for the historically marginalized groups.[387] Even if persons possess commendable, antiracist intentions, unconscious bias produces "racially biased cognitive categories and associations" that "shape people's cognitive, affective, and behavioral responses."[388] These overt behaviors resulting from unconscious bias may take the form of indirect prejudice, where individuals blame members of the disadvantaged group for their predicament; automatic prejudice, where individuals make unconscious, split-second decisions based upon stereotypes, fear, anxiety, etc.; ambiguous prejudice, which research indicates is the main effect of unconscious bias and represents an individual's subtle favoring of a privileged group rather than a disfavoring of a disadvantaged group; and ambivalent prejudice, where individuals from disadvantaged groups may be "disrespected

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[386] REBECCA M. BLANK ET AL., NAT'L RES. COUNCIL, MEASURING RACIAL DISCRIMINATION 58–59 (2004).

[387] *Id.* at 58–60. *See* Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 192–93 (2008) (describing "strong negative racial associations" towards African Americans revealed in experiments testing for unconscious bias, "even among those who consciously repudiate prejudicial beliefs.").

[388] BLANK ET AL., *supra* note 386, at 59.

but liked in a condescending manner," or "respected but disliked."[389]

Hidden discrimination may manifest as prejudice or antipathy that is masked in some fashion, yet it also includes other facets. One such form is durable inequality in organizational contexts, in which organizations maintain group boundaries by distinguishing people categorically in an effort to facilitate varied organizational goals such as solidarity, resource-access, etc.[390] Although such boundary maintenance may not be intentionally sustained to create inequality, it does nonetheless.[391] Other studies of organizational context reveal that personnel practices are the cause of most discriminatory outcomes in organizations because they fail to constrain unconscious bias.[392]

Other forms of institutional processes manifest as hidden, structural discrimination in society. For example, in the housing context, the process by which housing advertising and selection are made (i.e., subtle steering and mortgage lending) perpetuate racial segregation even though the participants in such practices may not intend to continue illegal housing discrimination.[393] Likewise, another form of hidden discrimination is statistical discrimination. In this form, decisionmakers discriminate based upon "beliefs that reflect the actual distributions of characteristics of different groups," yet this discrimination is harmful because it reflects that decisions about an individual member of the group rest upon the characteristics of the group.[394] Although such decisions may be economically rational when decision makers possess scant information about individuals,[395] they violate the rights of individuals to receive individualized consideration for selections.

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[389] *Id*. at 59–60.
[390] Pager & Shepherd, *supra* note 387, at 193–94.
[391] *Id*. (citation omitted).
[392] *Id*. at 194 (citation omitted) (internal alteration omitted)
[393] BLANK ET AL., *supra* note 386, at 63–64.
[394] *Id*. at 61–62.
[395] *Id*. at 62.

As described, unconscious bias and hidden discrimination are features of structural discrimination in society that operate to constrain the individual agency of people of color. Furthermore, these structural discrimination factors emanate from the history of systemic discrimination and exclusion practiced against subordinated groups, including the salient status dimensions underlying chattel and civil slavery, stigma, station, and stratification. Therefore, the Thirteenth Amendment may be used to abolish these structural discrimination factors that inhibit the individual agency of Black persons. Postbellum lawmakers and Freedmen's Bureau officials erroneously deemed freedom of contract as a sufficient measure under the Thirteenth Amendment to transform freed persons from a status of bondage to contract freedom. Present day lawmakers and law interpreters may use the Thirteenth Amendment to fashion and recognize additional measures to afford the freedom of agency for descendants of freed persons still suffering from status designations related to chattel and civil slavery (the badges and incidents of slavery).

E. Disparate Impact Liability as a Measure to Combat Structural Discrimination

As argued previously, the disparate impact claim is designed to combat various forms of structural discrimination. In the employment sector, the disparate impact claim preserves a baseline conception of the modern workplace, primarily that the workplace should be organized to provide equal and fair treatment, and efficiently allocate awards and promotions. Any workplace practice or measure that distorts governance norms violates the baseline conception and should be exorcised from a particular site. Importantly, any practice that adversely impacts a racial category of individuals or other group, but does not efficiently measure the qualifications for a job, violates this baseline conception of procedural efficiency.

In particular, certain forms of procedural violations, such as stigmatizing processes, inferior status expectations, and statistical discrimination, countermand the workplace fairness governance norms. Stigmatizing processes refer to the phenomena of categorizing individuals pursuant to certain characteristics and ascribing stereotypes to those characteristics.[396] Selection practices that engender disparate impact against Black candidates reinforce stereotypes and further stigmatize the group in light of its historically disadvantaged status. The Thirteenth Amendment decries such enhancement of a disadvantaged status, and thus the disparate impact claim may be used to combat such stigmatization in the absence of a necessity for the selection practice at issue.

Status expectations theory and its sub-theory, status characteristics theory, posit that actors in a particular site (a workplace, housing transaction, etc.) imbue traditionally disadvantaged groups with inferior performance status characteristics, particularly the trait of competence, based upon stereotypes, stigmatization, or other experiences with the group.[397] The results of selection practices tend to confirm or deny the status characteristics lodged upon a traditionally disadvantaged group in a site, and thus a selection practice that causes an adverse impact against the group confirms the inferior status characteristic about the group, notwithstanding the possibility that the selection practice may not accurately measure ability.[398] The disparate impact claim exists to counteract such improper status expectations, and the Thirteenth Amendment also proscribes such status expectations that harm traditionally disadvantaged groups suffering inferior status based upon a history of subjugation.

[396] Pager & Shepherd, *supra* note 387, at 193.

[397] Shelley J. Correll & Cecilia L. Ridgeway, *Expectation States Theory*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 29, 31–34 (John Delamater ed., 2003); Cecilia Ridgeway, *The Social Construction of Status Value: Gender and Other Nominal Characteristics*, 70 SOC. FORCES. 367, 368–69 (1991).

[398] Joseph Berger et al., *Status Organizing Processes*, 6 ANN. REV. SOC. 479, 480–81 (1980); Correll & Ridgeway, *supra* note 397, at 38.

As described previously, statistical discrimination refers to those processes in which a decision maker in a setting generalizes about members of a particular group in the absence of individualized information.[399] Of course, the generalizations about a particular group may result from statistical observations underlying the group, but even such observations may be based upon inappropriate stigmatizing, stereotypes, and status expectations.[400] These causes of statistical discrimination violate the Thirteenth Amendment's aim to transition individuals from status to agency, and thus the disparate impact claim's efficacy in combating statistical discrimination by requiring valid selection practices aids in the Thirteenth Amendment's goal.

Therefore, based upon the foregoing analysis it is evident that the Thirteenth Amendment may serve as the constitutional foundation for the disparate impact claim. Both legal doctrines address the same aim: to ameliorate the inferior status of individuals who are members of historically disadvantaged groups, in particular groups who suffered the injustice of chattel and civil slavery. For any future challenge to the constitutionality of the disparate impact claim, the Thirteenth Amendment should be one of the provisions advanced to maintain its viability and appeal.

V. THE THIRTEENTH AMENDMENT'S PROHIBITION OF STATUS SERVES A COMMON PURPOSE WITH THE FOURTEENTH AMENDMENT'S CONCERN WITH RACIAL CLASSIFICATIONS

Finally, the remaining issue is whether this conception of the disparate impact claim protects it from Justice Scalia's Equal Protection Clause attack. To recap, Justice Scalia maintained in his *Ricci* concurrence that disparate impact liability violates the Equal Protection Clause because it

[399] *See* BLANK ET AL., *supra* note 386, at 61–62.
[400] *Id.*

compels entities to classify their employees (or other actors) according to race and make decisions based upon the classification (if a particular selection practice has a disproportionate impact upon one of the classified races). As this section of the Article demonstrates, not only is the disparate impact claim justified under the Equal Protection Clause's strict scrutiny rationale, its existence as a Thirteenth Amendment remedy reveals that it works in concert with the Fourteenth Amendment to achieve the common purpose of eradicating subordinate status.

In the first rejoinder to Justice Scalia's arguments, the Equal Protection Clause permits racial classifications if the appropriate justification is satisfied. Supreme Court jurisprudence maintains that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[401] The strict scrutiny standard governs racial classifications in equal protection jurisprudence, and it requires that such classifications be "narrowly tailored measures that further compelling governmental interests."[402]

The disparate impact doctrine readily satisfies the strict scrutiny standard as the Supreme Court has ruled that the elimination of racial discrimination constitutes a compelling governmental interest. In one notable case addressing this issue, *Bob Jones University v. United States*, the Internal Revenue Service denied the University tax-exempt status because of its racially discriminatory admissions policy.[403] The University retaliated by seeking a refund of federal unemployment tax payments it had made, and the IRS counterclaimed for unpaid taxes.[404]

After upholding the IRS's interpretations of pertinent statutes that justified its denial of tax-exempt status for

[401] Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).
[402] *Id.*
[403] Bob Jones Univ. v. United States, 461 U.S. 574, 579–81 (1983).
[404] *Id.* at 582.

discriminatory institutions, the Court addressed the University's argument that the IRS abridged its right to the free exercise of religion under the First Amendment.[405] Although the First Amendment's Free Exercise Clause mounts a formidable barrier protecting religious freedom, the Court established that religious liberty may be abridged when a governmental limitation satisfied an "overriding governmental interest,"[406] which is essentially the same framework for racial classification justifications under the Equal Protection Clause. In *Bob Jones*, the Court unequivocally held that "eradicating racial discrimination" is a compelling and "fundamental, overriding interest" that substantially outweighs the burdens placed on religious beliefs.[407]

In like manner, the Court's decision in *Runyon v. McCrary*[408] reached a similar result. In *Runyon*, parents sought to enroll their Black children in two private schools that maintained policies against admitting Black students.[409] Upon denial, they filed claims pursuant to 42 U.S.C. § 1981, the provision of the Civil Rights Act of 1866 that enforces the right to contract free of race and color bias. At the Supreme Court, a majority upheld the parents' rights under Section 1981 to enroll their children at the schools, and the Court maintained that this right was valid under the Thirteenth Amendment.[410] The schools maintained that the Court could not apply Section 1981—and, by extension, the Thirteenth Amendment—because they had a First Amendment right to freedom of association and recognized rights to privacy, parenting, and familial autonomy under the Constitution.[411]

The Court held that although the schools may continue to preach their doctrine of racial segregation, they could not

[405] *Id*. at 602–03.
[406] *Id*. at 603.
[407] *Id*. at 604.
[408] Runyon v. McCrary, 427 U.S. 160, 176 (1976).
[409] *Id*. at 163–65.
[410] *Id*. at 172, 179.
[411] *Id*. at 175–78.

maintain a policy of racial exclusion. As the Court declared, the "Constitution places no value on discrimination, and while invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment it has never been accorded affirmative constitutional protections."[412] Therefore, the Court dismissed the challenges by the schools.

Based upon the Court's decisions in *Bob Jones* and *Runyon*, the disparate impact claim should satisfy the Equal Protection Clause's strict scrutiny justification. Although the Equal Protection Clause may not serve as the constitutional basis for disparate impact claims,[413] it does not permit individuals and entities to ignore practices that cause adverse impact. The disparate impact claim's efforts to eradicate discrimination and transition historically disadvantaged individuals from diminished status to effective agency countermands any Equal Protection Clause argument that companies should be permitted to sustain discriminatory practices.

The disparate impact claim does not coerce employers to make discriminatory decisions. It requires employers to properly account for selection practices that slow the progression of persons from status to agency, i.e., practices that sustain discrimination. Left unfettered, ignoring the discriminatory effects a selection practice has upon a traditionally disadvantaged group violates the Thirteenth Amendment's goal to transform individuals from a status of subordination to effective agency for the pursuit of personal advancement. In this manner, the disparate impact claim serves the compelling governmental interest of eradicating discriminatory status burdens and thus does not violate the Equal Protection Clause.

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[412] *Id*. at 176 (citations and internal alterations omitted).

[413] *See* Washington v. Davis, 426 U.S. 229, 247–48 (1976) (holding that the Equal Protection Clause prohibits intentional discrimination, but not policies or practices merely having a discriminatory effect in the absence of a prejudicial motivation).

Notwithstanding this argument that the disparate impact claim does not contravene the Equal Protection Clause, more circumspect analysis reveals that there should be no conflict between a doctrine resting upon the Thirteenth Amendment and a provision of the Fourteenth Amendment.[414] Pursuant to the structural method of constitutional interpretation, observers should construe the Constitution's provisions holistically, with certain clauses clarifying and modifying other text within the document.[415] Indeed, we may return to Justice Harlan's *Civil Rights Cases* dissent to determine that the Reconstruction Amendments—in particular the Thirteenth and Fourteenth Amendments—should be read consonant with each other rather than in conflict.

[414] Although Congress, as an arm of the federal government, is subject to the Fifth Amendment's Equal Protection Clause rather than that of the Fourteenth Amendment, they are interpreted to provide virtually the same protections. *See Adarand,* 515 U.S. at 217 (1995).

[415] *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969) (arguing that the Court may interpret the Constitution by a "method of inference from the structures and relationships created by the constitution in all its parts or in some principal part."); James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1526 (2011) ("legal academics from the Right and the Left are looking increasingly to textual clues, the structure of the Constitution, historical context, and enactment history to provide as concrete a meaning as possible to these relatively abstract constitutional provisions"). Scholar Michael Dorf posits that Black's method of structural interpretation should be construed as a "method of constitutional interpretation in which the reader draws inferences from the relationship among the structures of government." Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L. J. 833, 833 (2004). Nevertheless, he acknowledges that an impressive array of scholars maintain that Black's structural method "principally address[es] . . . the structure of the Constitution and the relationship among its various provisions," *id.* at 835 n.10, including Justice Scalia. *Id.* at 835 n.6 (citing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37 (1997) ("In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit–picking detail . . . ."));

After addressing his interpretation of the Thirteenth Amendment in his dissent, Justice Harlan proceeded to demonstrate the propriety of the civil rights legislation under the Fourteenth Amendment. In doing so, he recounted several prior Supreme Court cases that elucidated a common purpose for the Thirteenth and Fourteenth Amendments. Thus, Justice Harlan reminded observers that in the *Slaughter-House Cases*,[416] the Court "declared that the one pervading purpose found in [the Reconstruction Amendments], lying at the foundation of each, and without which none of them would have been suggested—was 'the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him.'"[417] Later in his dissent, he trumpeted the Court's "emphatic language" in *Ex Parte Virginia*[418] that "one great purpose of [the Reconstruction Amendments] was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States."[419] Likewise, the Court stated in *Strauder v. West Virginia*[420] that the Reconstruction Amendments have "a common purpose, namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy."[421] Finally, Justice Harlan provided his own structural interpretation of the Amendments, declaring that:

> If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in

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[416] Slaughterhouse Cases, 83 U.S. (16 Wall) 36, 72 (1872).

[417] *Civil Rights Cases*, 109 U.S. at 44 (1883) (citation omitted).

[418] *Ex Parte* Virginia, 100 U.S. 339, 344–45 (1879).

[419] *Civil Rights Cases*, 109 U.S. at 49 (citing *Ex Parte Virginia* at 344–45).

[420] Strauder v. West Virginia, 100 U.S. 303, 306 (1880).

[421] *Civil Rights Cases*, 109 U.S. at 49 (citing *Strauder*, 100 U.S. at 306).

> 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 freemen and citizens because of their race, color, or previous condition of servitude.[422]

The foregoing structural interpretation of the Reconstruction Amendments—in particular the Thirteenth and Fourteenth Amendments—demonstrates that remedial legislation buttressed by one of the amendments cannot supervene another one of the amendments. The Thirteenth and Fourteenth Amendments exist to eradicate an underclass status borne by the institution of chattel and civil slavery. As described in this Article, the disparate impact doctrine serves this common purpose underlying both of the amendments as it aids in abolishing the status animating slavery. Correspondingly, a remedial vehicle that exists to eradicate racially subordinate status does not violate the Equal Protection Clause; indeed, it works in concert with the Equal Protection Clause to achieve the common purpose of eliminating any class of human beings from being in practical subjugation to another. Therefore, the disparate impact doctrine, properly conceived as resting upon the Thirteenth Amendment, does not violate the Equal Protection Clause.

With this understanding of the Thirteenth Amendment, the disparate impact doctrine returns to its origins of eradicating structural discrimination. Before Congress amended Title VII with the Civil Rights Act of 1991 and explicitly codified the disparate impact claim,[423] the doctrine rested upon the 1964 provisions of the Act prohibiting "artificial, arbitrary, and unnecessary barriers" that

[422] *Id.* at 62.
[423] 42 U.S.C. § 2000e–2(k).

"limit…or classify" aggrieved individuals "in any way which would deprive or tend to deprive any individual of employment opportunities."[424]

Of course, unconscious discrimination and hidden bias comprise particular forms of "artificial, arbitrary, and unnecessary barriers" that "limit" and "classify" members of historically disadvantaged groups that occupied a lower status in United States society. That the disparate impact doctrine serves as a remedial vehicle to circumvent these barriers makes it a preeminent means to advance the Thirteenth Amendment's legacy as our nation's best hope for finally transforming the vestiges of subordinated status into effective forms of agency.

VI. CONCLUSION

Notwithstanding the passage of 150 years since the ratification of the Thirteenth Amendment, the need still exists to focus the Thirteenth Amendment upon transforming members of aggrieved groups from a diminished status to effective, individual agency. Advancement in the protection of civil and human rights ensures that groups no longer suffer the ignobility of civil slavery, but the badges of the "very spirit of slavery"—the consequences of four centuries of diminished status—have not entirely abated. As established in the social scientific data reviewed in prior sections, it is still too common for descendants of freed persons to fall prey to conscious or

[424] *Id.* § 2000e–2(a)(2); *see also* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2517–18 (2015) (citing Griggs v. Duke Power Co., 401 U.S. at 426 n.1 (1971)); Smith v. City of Jackson, 544 U.S. 228, 235 (2005) (noting that the disparate impact claims of Title VII and the Age Discrimination in Employment Act (29 U.S.C. § 623(a)) rest upon the provisions of the respective statutes that proscribe practices that limit, segregate, or classify employees); Connecticut v. Teal, 457 U.S. 440, 448 (1982) (citing 42 U.S.C. § 2000–e(a)(2)) (the disparate impact claim reflects that part of Title VII prohibiting "discriminatory 'artificial, arbitrary, and unnecessary barriers to employment,' . . . that 'limit . . . or classify . . . applicants for employment . . . in any way which would deprive or tend to deprive any individual of employment opportunities.'").

unconscious notions of inferior competence and devalued expectations. Indeed, the prominence of the Black Lives Matter movement demonstrates that Black persons still suffer lower assessments of their relative worth. The badges of inferior status still exist, signaling the continued need for the Thirteenth Amendment and its programs for transformation, including a properly-conceived disparate impact doctrine.

Although the conception of agency incorporates a measure of autonomy, it is past time to proceed beyond the notion of freedom and invoke the concept of dignity as an integral component of the Thirteenth Amendment. Dignity is a prominent human rights value in modern legal orders, and it is beyond debate that slavery is a violation of human dignity. In the same manner, diminished status—as manifested via stigma, station, and stratification—transgresses human dignity, as it denies individuals the inherent worth and integrity accorded to all of humanity. Infusing the Thirteenth Amendment with the value of human dignity bolsters the charge that the amendment serves to eradicate diminished status and transform persons to a state of agency. The rationales for both the Thirteenth Amendment and the disparate impact doctrine both reflect a concern for individual self-worth and human dignity, and this realization should parry any attack upon the doctrine's constitutionality.