The Thirteenth Amendment and Pro-Equality Speech

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PANEL IV: CONTEMPORARY IMPLICATIONS

THE THIRTEENTH AMENDMENT AND PRO-EQUALITY SPEECH

William M. Carter, Jr.*

The Thirteenth Amendment’s Framers envisioned the Amendment as providing federal authority to eliminate the “badges and incidents of slavery.” The freemen and their descendants are the most likely to be burdened with the effects of stigma, stereotypes, and structural discrimination arising from the slave system. Because African Americans are therefore the most obvious beneficiaries of the Amendment’s promise to eliminate the legacy of slavery, it is often mistakenly assumed that federal power to eradicate the badges and incidents of slavery only permits remedies aimed at redressing the subordination of African Americans. While African Americans were the primary victims of slavery and are the most likely to feel the effects of its legacy, however, the debates leading to the Thirteenth Amendment’s ratification reveal that its architects understood the Slave Power to have inflicted grave harm upon the country itself by undermining the founding ideals in service of slavery. One incident of slavery felt keenly by non-blacks and of immediate interest to the Amendment’s Framers was the public and private suppression of abolitionists’ and Unionists’ freedom of speech. Prior to and following the Civil War, slaveowners and their allies routinely retaliated against the advocates of freedom with impunity. This Essay argues that contemporary antiretaliation law provides inadequate protection of those who engage in pro-equality speech, and that the Thirteenth Amendment authorizes Congress to expand such protection.

INTRODUCTION

Oppression is commonly thought of as solely concerning the oppressed. Subordinated groups and individuals, through protest, civil disobedience, moral persuasion, litigation, and political pressure, have always challenged their oppression and have often succeeded. From the abolition of slavery to contemporary struggles for civil rights, those who

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had a less immediate personal stake in the outcome have often joined subordinated groups in their quest for justice. Sometimes these individuals have been larger-than-life figures, such as William Lloyd Garrison (the abolitionist and founder of the American Anti-Slavery Society), John Brown (the insurrectionary abolitionist), Elijah Lovejoy (the clergyman and abolitionist who was murdered for publishing abolitionist newspapers), and Abraham Joshua Heschel (a rabbi who marched with and supported the civil rights movement). Sometimes, they have been ordinary individuals who paid an extraordinary price for working on behalf of racial equality, such as Andrew Goodman and Michael Schwerner, young white men who were murdered in Mississippi alongside James Chaney, a young African American man, for seeking to advance black human rights. And sometimes, they have been lesser-known individuals who have taken quieter but equally forceful stands. What they all shared, whether famous, fallen, or forgotten, was a willingness to take substantial risks on behalf of others in the pursuit of racial justice.

Scholars have contended that the Reconstruction Amendments provide a right to be free from speech promoting racial inequality. These scholars have argued that speech that is degrading or insulting on the basis of group identity, speech that promotes or reinforces white supremacy, and speech that incites identity-based violence are all antithetical to the values of our post-Civil War Constitution.¹ This Essay, by contrast, explores whether the Thirteenth Amendment can protect a positive right to speak in furtherance of racial equality. In abolishing slavery, the Amendment's framers also intended to eliminate the badges and incidents of slavery suffered by the freedmen as well as those circumstances that made slavery possible.² The legally sanctioned silencing of opposition to slavery and racial subordination was a central feature of the slave system that the Thirteenth Amendment's framers sought to dismantle.³ The Thirteenth Amendment, therefore, protects the freedom to speak for equality under the shelter of law.

The Thirteenth Amendment's text, context, and history make clear that the Amendment prohibits the literal enslavement of persons of any

¹. See, e.g., Alexander Tsesis, Dignity and Speech: The Regulation of Hate Speech in a Democracy, 44 Wake Forest L. Rev. 497, 499 (2009) (arguing "[h]ate speakers seek to intimidate targeted groups from participating in the deliberative process[,]" and "[d]iminished political participation because of safety concerns, in turn, stymies policy and legislative debates"); James Forman, Jr., Note, Driving Dixie Down: Removing the Confederate Flag from Southern State Capitals, 101 Yale L.J. 505, 515 (1991) (arguing "[t]he selection of an exclusionary symbol to fly above the state capitol is harmful in part because of the effect it may have on the desire and ability of the excluded to participate in the political and legal processes").

². See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (holding Thirteenth Amendment empowers Congress to "pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States" (emphasis added by Jones) (quoting The Civil Rights Cases, 109 U.S. 3, 20 (1883))).

³. See infra Part I (discussing legal and societal sanctioning of slavery).
race, and that it protects the descendants of slaves from the contemporary badges and incidents of slavery. Because of the distortions of perspective caused by historical distance, however, these self-evident facts make it all too easy for contemporary eyes to miss the Amendment’s broader remedial purposes. The framers of the Thirteenth Amendment well understood the dangers faced by the allies of racial justice and the importance of protecting them if the project of freedom was to succeed. One such incident of slavery was state-sponsored and private retaliation against abolitionists and other advocates for racial equality. Whites who dared to speak or act against slavery were often subject to brutal retaliation. For example, during the Thirteenth Amendment debates, Representative James Ashley of Ohio noted that “[slavery] has for many years defied the Government and trampled upon the national Constitution, by kidnapping, mobbing, and murdering white citizens of the United States guilty of no offense except protesting against its terrible crimes.” Therefore, protecting the friends of freedom from the “Slave Power” was understood to be essential to ending slavery and creating enduring freedom.

The need to protect the right to speak and act in favor of equality remains urgent, even in our putatively “post-racial” era. The old racism of state-sponsored segregation and avowedly bigoted private action has thankfully diminished. However, it has largely been supplanted by the

4. See Akhil Reed Amar & Daniel Widawsky, Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney, 105 Harv. L. Rev. 1359, 1384 n.106 (1992) (“Because of the Thirteenth Amendment’s special association with the liberation of blacks, mainstream constitutionalists may have overlooked it as a source of universal generative principles. The dominant subconscious sees the Amendment as black . . . .”). This Essay does not, of course, intend to minimize or disregard the fact that blacks were the primary victims of the slave system.


6. “The idea of a southern ‘Slave Power’ that dominated national politics . . . emerged in the 1830’s and became part of the nation’s political discourse in the years leading up to the Civil War.” Sandra L. Rierson, The Thirteenth Amendment as a Model for Revolution, 35 Vt. L. Rev. 765, 801 (2011). This Essay uses the term “Slave Power” in the sense in which the members of the Reconstruction Congresses understood it, that is, as connoting the entire system of slavery in all of its public and private incidents and manifestations. The legal institution of chattel slavery was the most profound manifestation of the Slave Power, of course, but not the only one.

7. See Sumi Cho, Post-Racialism, 94 Iowa L. Rev. 1589, 1594 (2009) (characterizing postracialism as “ideology that reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action").

8. To be clear, the fact that overt expressions of racism have diminished does not mean that racism has vanished. Indeed, a large body of literature suggests that rather than disappearing, racism has instead been sublimated: Racial bias continues to influence our actions, but it does so subconsciously. See, e.g., Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458, 460 (2001)
"new racism" of systemic inequality, unconscious bias, and more subtle forms of racial exclusion. In an era when it is generally seen as socially unacceptable to give voice to racist sentiments or to engage in explicitly discriminatory practices, the individuals most obviously motivated to oppose such practices—racial minorities—will often be unaware of them. Moreover, even when they are aware of such practices, social science research indicates that in-group members' (i.e., whites') condemnation is often more powerful than external critiques or the threat of legal sanctions.9

Current civil rights doctrines provide insufficient protection to individuals who oppose racial subordination and exclusion. As developed more fully in subsequent Parts of this Essay, the existing doctrines only provide protection against retaliation when the racially subordinating conduct that an individual opposes or questions is itself illegal under existing law. Moreover, justiciability doctrines have been applied in ways that reflect an unduly narrow understanding of the reasons for protecting such opposition. This Essay argues that the Thirteenth Amendment authorizes Congress to enact legislation that protects the right to oppose racial subordination, regardless of whether the practice opposed is illegal under current law. This Essay argues that Congress can provide a more robust set of protections pursuant to the Thirteenth Amendment.

I. THE THIRTEENTH AMENDMENT’S FRAMERS’ UNDERSTANDING OF THE PERILS OF ABOLITIONISM AND PRO-EQUALITY SPEECH

The Reconstruction Amendments “create[d] a new substantive [constitutional] value of ‘nonslavery’ and antisuordination to replace the old values of slavery and white supremacy.”10 Thus, to understand what the Thirteenth Amendment wrought and what relevance it may have for contemporary issues of racial inequality, it is important to first understand the full nature of the Slave Power.

First, the system of American chattel slavery depended on a complex interaction between several interlocking features. The legal system supported the institution of slavery, most notably by protecting the interests of slave owners in their “property.”11 In addition to laws and private custom treating blacks as property, the legal system further dehumanized

9. For further discussion of the role of in-group pressure in shaping racial attitudes, see infra Part IV.


blacks in a myriad of other ways, denying them the civil rights to which they would presumably have been entitled had they been considered full human beings and citizens of the United States. Such denial of legal rights and status to slaves and free blacks not only served the instrumental purpose of denying them such rights, but also served to dehumanize them as undeserving of rights more generally.

Second, the system of slavery depended not only upon the coercive power to deny freedom and equality to blacks but also to a significant degree upon the expressive power of law and custom to deny the validity of the idea of black freedom and equality. Both sides in the slavery debate well understood the centrality of expression and ideas to the maintenance of slavery. The slavers and their allies knew that legal and physical coercion had to be supplemented by the suppression of ideas regarding liberty and equality. Thus, legislation prohibiting the secular education of slaves (and, in some places, free blacks) sought to limit their exposure to ideas having a “dangerous tendency,” that is, ideas of freedom and justice. Denial of education also served to keep the slaves in a state whereby their lack of formal education would be perceived as proof of their mental inferiority. Their presumed mental inferiority was then used to justify their continued enslavement by reinforcing stereotypes about their inherent dangerousness, and by providing a basis for paternalistic arguments that slavery was a social good for the enslaved, who lacked the

12. For example, slaves (and free blacks in most states) were denied “the rights to enforce contracts, sue, give evidence in court, inherit, and purchase, lease, hold, and convey real property.” Alexander Tsesis, The Thirteenth Amendment and American Freedom: A Legal History 45 (2004) (citing Cong. Globe, 39th Cong., 1st Sess. 1151 (1866) (statement of Rep. Martin Thayer)). They were also denied parental and familial rights, deprived of personal liberty, and denied the ability to receive an education. See William M. Carter, Jr., Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery, 40 U.C. Davis L. Rev. 1311, 1324 nn.33-34 and accompanying text (2007) [hereinafter Carter, Race].

13. Thus, “any judicial protection of the slave would trigger further challenges to the legitimacy of the dehumanized status of blacks and slaves” because viewing slaves as rights-holders would erode the view that they were less than full human beings. A. Leon Higginbotham, Jr., In the Matter of Color: Race and the American Legal Process: The Colonial Period 8 (1978).

14. See, e.g., William Goodell, The American Slave Code in Theory and Practice: Its Distinctive Features Shown by Its Statutes, Judicial Decisions, and Illustrative Facts 319–23 (1853) (discussing penalties for violating antebellum prohibitions against educating slaves); Russel B. Nye, Fettered Freedom: Civil Liberties and the Slavery Controversy 1830–1860, at 70–71 (1949) (noting by 1850s and 1840s, most Southern states had laws prohibiting education of all blacks, while others “depended [instead] upon the pressure of public opinion” to effectively forbid it, and “[t]o most Southerners, a slave who could read was potentially dangerous,” since they “would have placed in their hands [materials] inculcating insubordination and rebellion” (quoting S. Presbyterian, Ought Our Slaves Be Taught To Read?, 18 De Bow’s Rev. 52, 52 (1855))).
capacity to provide for themselves.\textsuperscript{15}

The dehumanization of blacks served to reconcile the Enlightenment ideals upon which the country was founded with the reality that the new country was being built on the backs of slaves. A system that permitted the ownership of human beings stood in clear contradiction to ideals of individual liberty, equality, and natural rights.\textsuperscript{16} This social dissonance was lessened by the dehumanization of the enslaved. If slaves (and, as a corollary, all blacks) were presumed to be less than fully human, then they were not entitled to the freedom and natural rights that all human beings were presumed to possess.\textsuperscript{17}

Abolitionists and antislavery Republicans were well aware that the battle against racial subjugation would be in large part a war of ideas (even though it was ultimately force of arms that proved decisive in bringing about the immediate end of slavery). Prominent abolitionists argued that “one of the greatest evils of slavery was the denial in the South of freedom of speech and opinion in regard to it.”\textsuperscript{18} For example, the American Anti-Slavery Society’s “Declaration of Sentiments and Constitution of 1835” painstakingly “reprinted all Federal and state constitutional guarantees of free speech and press” and stated that “[w]e believe that American citizens have the right to express and publish their opinions of the constitutions, laws, and institutions of any and every State and nation under heaven; and we mean never to surrender the liberty of speech, of the press, and of conscience . . . .”\textsuperscript{19}

Third, state officials and private actors severely punished those who

\textsuperscript{15} See, e.g., Nye, supra note 14, at 19 (stating proslavery forces argued that slavery provided “the best and safest way of life for the childlike and irresponsible Negro [because it provided for him greater protection than any other system”).

\textsuperscript{16} See David Brion Davis, The Rocky Road to Freedom: Crucial Barriers to Abolition in the Antebellum Years, Foreword to The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment, at xvi (Alexander Tsesis ed., 2010) (noting cruel irony that “a nation conceived in liberty and dedicated to equal rights happened also to be the nation, by the mid-nineteenth century, with the largest number of slaves in the Western Hemisphere”).

\textsuperscript{17} White women, of course, were also denied the full range of rights that Enlightenment philosophy would presumably entitle them to, yet they were not treated as “less than human” in the same sense that African slaves were. See, e.g., Joyce E. McConnell, Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment, 4 Yale J.L. & Feminism 207, 207–08 (1992) (“The metaphor ‘women are slaves’ . . . suggested that white women shared . . . a similar legal and social status of non-identity and disability [with African Americans]. . . . [However,] even though there were significant . . . restraints on white women, they did not as a class suffer in the way that African Americans did under slavery.”).

\textsuperscript{18} Nye, supra note 14, at 100.

\textsuperscript{19} Id. at 99; see also David Brion Davis, Should You Have Been an Abolitionist?, N.Y. Rev. Books, June 21, 2012, at 56–57 (noting “the defenders of slavery . . . led countless mobs attacking and stoning the abolitionists, burning their literature, and destroying their printing presses . . . . [and] as a result, antebellum abolitionists . . . were able to link their aims with freedom of speech, the press, association, and petitioning”).
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had the temerity to challenge the system of slavery. As is well known, slaves and free blacks who acted in ways perceived to challenge white domination put their lives at risk.\textsuperscript{20} Less well known is that those who worked to preserve and expand the system of slavery also sought to intimidate and silence white abolitionists. The use of violence and intimidation to silence abolitionists was widespread prior to the Civil War, particularly after the intensification of abolitionist sentiment beginning in the 1830s.\textsuperscript{21} As Michael Kent Curtis has noted:

Slavery not only undermined liberty for Americans of African descent, but also undermined liberty for whites. In the South, state laws banned expression that would tend to make free blacks or slaves "discontent." The ban applied to virtually all anti-slavery expression addressed to white voters. It was enforced by searches and seizures for anti-slavery books and pamphlets and cruel punishments.\textsuperscript{22}

Indeed, the movement to silence abolitionist sentiment even reached the halls of Congress by virtue of the "gag rule," which prohibited discussion of abolition or the consideration of antislavery petitions in the House of Representatives.\textsuperscript{23}

\textsuperscript{20} One well-known and particularly brutal example is the Colfax Massacre, in which armed white men slaughtered dozens of blacks in the wake of a disputed election in Grant Parish, Louisiana in 1873. See Josh Blackman, The Supreme Court’s New Battlefield, 90 Tex. L. Rev. 1207, 1221 (2012) (book review). When a group of armed black men refused demands to disarm and evacuate the courthouse, "over 300 whites armed with rifles . . . brought out a cannon, raided the building, and set it afire, resulting in the death of 150 blacks." Id. (quoting Adam Winkler, Gunfight: The Battle over the Right to Bear Arms in America 143–44 (2011)). It has been well documented that private and state violence were used as tools for dominating the enslaved. See, e.g., Orlando Patterson, Slavery and Social Death: A Comparative Study 1–14 (1982) (defining slavery as "the permanent, violent domination of natally alienated and generally dishonored persons").

\textsuperscript{21} See Nye, supra note 14, at 139 (noting "[i]t was imperative, after the beginnings of the aggressive phase of abolition [in the early 1830s], for the dominant slaveholding group to prevent the dissemination of abolition doctrines").


\textsuperscript{23} See Nye, supra note 14, at 35–36 (describing debates leading to adoption of gag rule); Michael Kent Curtis, The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens, 44 UCLA L. Rev. 1109, 1122–23 (1997) [hereinafter Curtis, Killing] ("[I]n response to anti-slavery petitions[,] the House of Representatives passed the resolution known as the gag rule . . . [which was designed] to suppress discussion of slavery in the House"). Indeed, official and private coercion, retaliation, and violence were not always even separable. A member of the House employed moblike measures to silence abolitionist sentiment in the Senate when he beat Senator Charles Sumner into unconsciousness in response to Sumner’s "Crime Against Kansas" speech, in which Sumner argued against the expansion of slavery. See generally William James Hull Hoffer, The Caning of Charles Sumner: Honor, Idealism, and the Origins of the Civil War 1–4 (2010) (describing Sumner’s speech and attack). Sumner’s speech also personally impugned individual congressmen
In addition to formal legal measures, private individuals used mob violence and other retaliatory measures to silence the critics of slavery. Concerted private action often made it unnecessary to resort to formal legal measures to suppress antislavery views. Indeed, private coercion often proved more effective at silencing antislavery sentiment than government suppression because "legal processes were often slow and unsatisfactory[,] [and] loopholes could be found in the statutes. To remedy these defects and to provide swifter and more effective punishment, the South turned to the device of the citizen-mob ...." To this end, private individuals routinely silenced critics of slavery through physical violence, by driving them from their homes and jobs, and by otherwise retaliating against them for their antislavery speech. One of the more dramatic examples involved the murder of Elijah Lovejoy, an abolitionist minister and newspaper editor, who was killed in a mob attack on his printing presses.

The Thirteenth Amendment's framers, who were heavily influenced by the history recounted above, repeatedly identified the private suppression of abolitionist speech as one of the evils of the slave system. In the congressional debates leading up to the Thirteenth Amendment, Representative James Wilson of Iowa condemned the suppression of speech advocating abolition and racial equality:

[Who] could stand up in the presence of the despotism [of slavery] ... with any assurance that his life would not be exacted as the price of his temerity? ... The press has been padlocked, and men's lips have been sealed. ... Submission and silence were inexorably exacted. Such ... is the free discussion which slavery tolerates.

If non-slaveholding whites became alarmed at the bold announcement that "slavery is the natural and normal condition of the laboring man, whether white or black," seeing therein the commencement of an effort intended to result in the enslavement of [all] labor instead of the mere enslavement of the African race, they were not privileged [to discuss it] ... and to arouse the people in opposition to it.

24. As Representative James Wilson noted in the early congressional debates in 1864 that led to the Thirteenth Amendment, "[l]egislatures, courts, [e]xecutives, almost every person holding political or social power and position in the southern States[ ] were all arrayed on the side of slavery, and what they could not accomplish was turned over to the mob, which, without law ... did its work with fearful accuracy and terrible exactness." Cong. Globe, 38th Cong., 1st Sess. 1202 (1864) (statement of Rep. James F. Wilson) (emphasis added).
25. Nye, supra note 14, at 141.
26. See Curtis, Klan, supra note 22, at 1385–86 (describing these tactics).
[Free speech] could be enjoyed only when debased to the
uses of slavery. Slaveholders and their supporters alone were
free to think and print, to do and say what seemed to them
best... 28

Representative John Bingham expressed similar sentiments as the
sectional conflict was coming to a head, accusing Virginia of having “os-
tracized the friends of emancipation” because slaveholders in the South
understood that “if free speech is tolerated and free labor protected by
law, free labor might attain in their midst to such dignity and importance
as would bring into disrepute the system of slave labor...” 29 Discussing
some of the incidents of the slave system, Senator James Harlan of Iowa
likewise noted that “another incident of [slavery] is the suppression of
the freedom of speech and of the press, not only among those down-
trodden people themselves but among the white race. Slavery cannot ex-
ist when its merits can be freely discussed...” 30

Private retaliation against those who advocated for racial equality
continued after the end of the Civil War. “Unpunished harassments of
federal officials in the South [during Reconstruction] renewed painful
memories of prewar years when physical violence marred proceedings in
the federal Senate and when mobs attacked critics of slavery.” 31 The rise
of armed bands of white Southerners, such as the Ku Klux Klan, led to
the routine intimidation, coercion, and murder of proponents of equal-
ity. Republican leaders saw these activities as a “conspiracy to drive loyal
men out of the South” by which “[t]he lives of state and local officials... were threatened.” 32

In summary, one of the key aspects of the Slave Power was the use of
violence and intimidation to retaliate against persons who advocated
ideas of liberty and equality. Slaveholders and their allies, with the aid or
acquiescence of state officials, retaliated against the friends of freedom
who spoke out against slavery. 33 The Thirteenth Amendment’s framers,

Wilson).
Bingham). Bingham noted in the same speech that “Southern mobs punished those who
attended Republican national conventions and dispersed a Republican meeting in
Virginia.” Curtis, Klan, supra note 22, at 1385.
Development 1835-1875, at 393 (1982).
32. George C. Rable, But There Was No Peace: The Role of Violence in the Politics
33. See sources cited supra notes 20-23 (discussing retaliatory measures by both state
officials and private actors).
having lived through this history, viewed the suppression of pro-equality speech via private retaliation as a badge or incident of slavery.\(^\text{34}\)

II. THE LIMITS OF CURRENT DOCTRINE IN PROTECTING OPPOSITIONAL SPEECH AND CONDUCT

Current civil rights laws do offer protection against retaliation for opposing racially exclusionary practices in certain circumstances. However, those protections are limited in important ways. First, current statutes and doctrines only apply when the underlying conduct opposed by the complaining individual is itself illegal under the statute in question.\(^\text{35}\)

Although this approach may seem sensible, this Essay argues that the Thirteenth Amendment authorizes Congress to enact legislation that sweeps more broadly—that is, legislation that protects the right to oppose racial subordination, regardless of whether the practice opposed is illegal under current law. Second, justiciability doctrines have been applied in ways that reflect an incomplete understanding of the harms that retaliation for pro-equality speech causes. Many courts have reasoned that plaintiffs in such cases only have standing to sue if they suffered injury by virtue of being personally deprived of the benefits of interracial association, as when discrimination results in a racially homogenous environment.\(^\text{36}\)

However, since the framers considered the suppression of pro-equality speech to be a badge or incident of slavery in and of itself, a Thirteenth Amendment approach would not so limit legal protections for those who oppose racial subordination. In sum, this Essay argues that current antiretaliation doctrine falls short of the liberty envisioned by the Thirteenth Amendment’s framers—an individual, personal right to advocate for racial justice and to be protected from private retaliation in response to such advocacy.

A. Existing Protections for Opposition to Discrimination

Most federal civil rights statutes prohibit retaliation against those who oppose practices that violate such statutes. The Americans with Disabilities Act (“ADA”),\(^\text{37}\) the Age Discrimination in Employment Act (“ADEA”),\(^\text{38}\) and the Family and Medical Leave Act (“FMLA”)\(^\text{39}\) all con-
tain provisions similar to those in Title VII (described below), prohibiting retaliation against those who oppose practices that violate those statutes. Section 1981, which prohibits, inter alia, racial discrimination in the making and enforcement of contracts, does not textually prohibit retaliation, but the Supreme Court has construed the statute as doing so. The Fair Housing Act ("FHA") also contains provisions prohibiting retaliation, and § 1982, which also prohibits housing discrimination but lacks such textual provisions prohibiting retaliation, has been interpreted as doing so. Title II of the Civil Rights Act of 1964, which prohibits discrimination in places of public accommodation, and the Voting Rights Act of 1965 also contain provisions that prohibit at least certain forms of

39. Id. § 2615(a)(2) ("It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.").

40. See 42 U.S.C. § 1981(a) (providing "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other"). Section 1981 does apply to employment contracts and therefore to employment discrimination. Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459-60 (1975) ("Although this Court has not specifically so held, it is well settled among the federal Courts of Appeals—and we now join them—that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." (citations omitted)). But since it applies beyond that context, it is discussed here rather than in Part II.B, infra, which deals with protections against retaliation in the employment context.

41. See CBOCS W., Inc. v. Humphries, 553 U.S. 442, 446-52 (2008) (holding § 1981 encompasses retaliation claims, because it had long been interpreted similarly to § 1982, which provides for such claims).

42. The FHA provides that "[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of [rights secured by the FHA] or . . . on account of his having aided or encouraged any other person in the exercise or enjoyment of [rights secured by the FHA]." 42 U.S.C. § 3617. However, the scope of that protection and the situations in which it applies remain unclear. For example, the FHA has been construed as prohibiting retaliation against real estate agents or apartment managers who refused to follow their superiors' orders to engage in discrimination in violation of the FHA. See Robert G. Schwemm, Neighbor-on-Neighbor Harassment: Does the Fair Housing Act Make a Federal Case out of It?, 61 Case W. Res. L. Rev. 865, 897-99 (2011) (discussing cases and Department of Housing and Urban Development regulation which construe FHA to prohibit "'adverse employment actions' against employees and agents for assisting others in obtaining housing free from discrimination"). It is unclear, however, whether a neighbor who was not himself the victim of discrimination, but who opposed his neighbors' discrimination against others and consequently suffered retaliation, would have a claim under the FHA. See id. at 901-05 (describing split in cases involving this scenario).

43. See Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969) (stating § 1982 prohibits retaliation because allowing white man to be "punished for trying to vindicate the rights of minorities protected by § 1982 . . . would give impetus to the perpetuation of racial restrictions on property").
retaliation. Finally, although Title IX does not textually prohibit retaliation, it has been interpreted as doing so, at least under certain circumstances.

Title VII of the Civil Rights Act of 1964 has the most developed case law regarding retaliation. Title VII prohibits covered employers from engaging in discrimination on the grounds of race, gender, religion, or national origin. In addition to prohibiting discrimination, Title VII also prohibits two kinds of retaliation. First, Title VII prohibits retaliation against an employee after he has filed a complaint or otherwise sought to enforce Title VII's provisions in response to discrimination against him (the "participation clause"). More directly pertinent to the subject of this Essay, Title VII also prohibits retaliation against an employee because he has "opposed any practice made an unlawful employment practice by [Title VII]," even if the complaining employee himself was not the victim of prohibited discrimination (the "opposition clause"). Thus, for example, Title VII's opposition clause would prohibit an employer from retaliating against a male employee who opposed his employer's discrimination against women.

At a conceptual level, the opposition clauses of Title VII and other antidiscrimination statutes embrace the normative premise of this Essay—namely, that rooting out racial inequality requires the willingness of persons who are not the subjects of discrimination to take stands in opposition to discrimination against others. At an operational level, however, Title VII's approach falls short of the full scope of protection against private retaliation that this Essay advocates and is also unlikely to prove fully effective in addressing more subtle forms of contemporary discrimination.

44. Title II provides that "[n]o person shall ... intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by [Title II]." 42 U.S.C. § 2000a-2(b). The Voting Rights Act similarly provides that "[n]o person ... shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote ...." 42 U.S.C. § 1973i(b). Neither provision has well-developed case law, but both are textually more akin to provisions of other statutes that prohibit retaliating against an individual who seeks to exercise his own rights to be free from discrimination than to provisions that prohibit retaliating against one who advocates for the rights of others to be free from discrimination.

45. See Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005) ("Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action.").

46. 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate ... because of such individual's race, color, religion, sex, or national origin ... ").

47. Id. § 2000e-3(a).

48. Id.
B. Disaggregating the Illegality of the Underlying Conduct from Protections for Opposition to Racial Subordination

Current Title VII doctrine provides protection against retaliation for oppositional conduct only when an employee opposes a practice that is actually unlawful under the statute at issue or a practice that the employee would objectively reasonably believe to be unlawful under the statute. This standard proves problematic in a variety of ways when compared to the full scope of the pro-equality speech that Congress can protect pursuant to its Thirteenth Amendment power. As a preliminary matter, with regard to protection against retaliation for opposing unlawful practices, one point emerges that is self-evident but important: Slavery was legal in the places where those who opposed it had the most to fear. The Thirteenth Amendment’s framers were concerned not only with protecting advocacy aimed at enforcing the existing positive law of freedom where it existed, but also with protecting advocacy aimed at changing the existing laws and the social norms that supported slavery.

Three examples may help to illustrate the limits of current retaliation doctrine in this respect. Assume that a white employee routinely overhears her coworkers using racial epithets regarding other employees who are racial minorities but outside of those other employees’ hearing. The white employee objects to the use of such epithets because they create a racially poisonous environment, and she is consequently passed over for a promotion because she is not a “team player.” Title VII’s opposition clause would provide no redress in this situation. Title VII does prohibit race-based discrimination in employment, including racially hostile work environments. However, a racially hostile work environment is only legally cognizable under Title VII if it rises to a sufficient level of severity and pervasiveness. The use of such racial epithets may be indicative of a workplace that is infused with racial bias, but if such bias is

49. See, e.g., id. (stating Title VII’s opposition clause prohibits retaliation against employee who “has opposed any practice made an unlawful employment practice by this subchapter”).

50. See, e.g., Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 271 (2001) (rejecting employee’s retaliation claim because “[n]o reasonable person could have believed” there was Title VII violation); Wilkerson v. New Media Tech. Charter Sch. Inc., 522 F.3d 315, 322 (3d Cir. 2008) (“The employee must have an ‘objectively reasonable’ belief that the activity s/he opposes constitutes unlawful discrimination under Title VII. . . . [I]f no reasonable person could have believed that the underlying incident complained about constituted unlawful discrimination, then the complaint is not protected.” (citing Moore v. City of Philadelphia, 461 F.3d 331, 341 (3d Cir. 2006))).

51. See supra Part I (explaining nature of Slave Power and framers’ view of suppression of abolitionist speech as evil of slave system).

52. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (holding that for sexual harassment to be actionable under Title VII, “it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982))).
not directed at racial minorities, it is unlikely to be deemed to have created a work environment that is racially hostile toward them. The non-minority employee's objection thereto would therefore not be in opposition to an "unlawful employment practice," and thus would not be protected by the opposition clause. Nor would the objecting employee fare better if she had a good faith, but mistaken, belief that the routine and explicit expression of racial animus in the workplace violated Title VII. Courts have generally held that the opposition clause applies only when the practice the objecting employee opposes is one that a reasonable employee would objectively perceive to violate Title VII. Under current case law, the occasional use of even virulent racist epithets outside of the presence of employees who are racial minorities is unlikely to be deemed conduct that a reasonable employee would objectively believe to be a substantive Title VII violation.

A second example that is a variation of the one above may be further illustrative. Assume that racial epithets are routinely used in the workplace, but in this example, a racial epithet is directed personally at a minority employee. A nonminority coworker overhears the remark, complains to his supervisors, and is passed over for promotion because he is not seen as a "team player." Current doctrine would still provide no relief, because it would not be "reasonable for [the complaining employee] to believe that one blatantly racist remark created a legally recognizable hostile environment under Title VII." 53

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53. Professor Lawrence D. Rosenthal explained that, although the Supreme Court in Breeden declined to resolve the issue, lower federal courts "have come to require a showing that the plaintiff's belief that he was opposing an unlawful employment practice was objectively reasonable. A plaintiff's good-faith, but unreasonable, belief of an unlawful employment practice is no longer protected, as it had been in some jurisdictions prior to Breeden." Lawrence D. Rosenthal, Reading Too Much into What the Court Doesn't Write: How Some Federal Courts Have Limited Title VII's Participation Clause's Protections After Clark County School District v. Breeden, 83 Wash. L. Rev. 345, 349 (2008) (footnotes omitted).

54. See, e.g., Harris v. Forklift Sys. Inc., 510 U.S. 17, 21, 114 (1993) ("[M]ere utterance of an... epithet which engenders offensive feelings in an employee' does not sufficiently affect the conditions of employment to implicate Title VII." (citation omitted) (quoting Meritor Sav. Bank, 477 U.S. at 67)).

55. Deborah Brake, The Limits of Title VII as a Rights-Claiming System, Pitt L. Mag. (Spring 2007), available at http://www.law.pitt.edu/magazine/spring-2007/the-limits-of-title-vii-as-a-rights-claiming-system (on file with the Columbia Law Review). Professor Brake's example involved Jordan v. Alternative Resource Co., 458 F.3d 392 (4th Cir. 2006), a case in which the complaining employee was an African American who complained about a racially offensive remark made in his presence and was subsequently fired. Id. at 396. The court held that it was unreasonable for him to believe that an isolated offensive remark created a racially hostile work environment, and therefore concluded that his complaints received no protection against retaliation. Id. at 341. Presumably, courts following similar reasoning would similarly find no protection under the opposition clause for a nonminority employee who complained about such a remark in similar circumstances.
Some may object to the preceding examples as representing nothing more than the reluctance of courts to impose workplace speech codes under the guise of protecting oppositional conduct. Consider, therefore, a third example of discrimination and retaliation with more tangible consequences that would still fall outside of current doctrine. Assume that racial minorities refrain from even applying for positions with a given employer because the general racial hostility of the workplace is well known. Or assume that current minority employees refrain from applying for promotions within the company because they are aware that no minority employee has been promoted in the past, and they believe this is due to racial discrimination. A current employee raises this issue with her supervisors, believing it to be unjust that racial minorities are being implicitly discouraged from applying to or seeking advancement within the company. The complaining employee might have a good faith belief that such scenarios violate Title VII, but she would be wrong: No minority applicant or employee has suffered a tangible “adverse employment action” if none have applied for a position or a promotion. Accordingly, Title VII would not protect the complaining employee’s oppositional speech. Or assume that the complaining employee recognizes that Title VII does not prohibit a racially hostile workplace unless it leads to a tangible adverse employment action, but believes that such practices should be illegal or, at the least, are objectionable. Her opposition to practices that she believes should be (but are not) illegal certainly would not be protected by the opposition clause. Regardless of the merits of whether Title VII should prohibit the maintenance of work environments that are so racially hostile that they effectively prevent minority candidates from applying for positions or promotions, the thesis of this Essay is that the complaining employee in these scenarios should be protected against retaliation.

What current doctrine fails to acknowledge is that the question of whether the underlying conduct is illegal is an analytically distinct question from that of whether an individual should be protected from retaliation for opposing conduct that she believes should be illegal under current law. Abolitionists knew, of course, that slavery was legal as a matter of then-existing positive law, but they argued that it was nonetheless unjust. The Thirteenth Amendment’s framers believed that retaliation against those who advocated for the end of human bondage was a badge


57. See Ahern v. Shinseki, 629 F.3d 49, 54–55 (1st Cir. 2010) (holding that, although female plaintiffs alleged their employer “engaged in a pro-male pattern of discriminatory hiring,” they could not establish prima facie gender discrimination claim because “[n]one of them applied—let alone applied unsuccessfully—for any open position [and therefore], none of them can maintain a failure-to-hire claim”).
or incident of slavery, despite the legality of slavery as a matter of positive law. 58

C. Misunderstanding the Nature of Standing in Opposition Cases

Justiciability requirements impose a separate limitation on the scope of current antiretaliation doctrine. Most courts that have considered the issue have applied prudential standing doctrines in ways that generally operate to exclude an altruistic opponent of racial subordination from the protection of antiretaliation doctrine. Courts taking this narrower view have expressed slippery slope concerns that they believe inhere in construing protections for oppositional conduct and speech too broadly. In the words of the Seventh Circuit:

If [mere] unease on observing wrongs perpetrated against others were enough to support litigation, all doctrines of standing and justiciability would be out the window . . . . No employer can purge the workplace of all comments that are offensive—or even of all comments that imply substantive violations of Title VII. 59

Other courts, however, have taken a broader, though still limited, approach and found standing under Title VII, at least "where plaintiffs have claimed that discrimination against third parties caused them to lose the benefits of interracial association." 60

Because the relevant cases do not always carefully distinguish between standing under Title VII's opposition clause and standing under Title VII's substantive provisions, important questions regarding standing remain unanswered. If a person were retaliated against for objecting to discrimination against others, would he have standing because he has suffered a personal injury under the opposition clause? Or would the complaining employee have standing not because he is asserting his own

58. See supra Part I (discussing Thirteenth Amendment's framers' views regarding suppression of antislavery speech).

59. Bermudez v. TRC Holdings, Inc., 138 F.3d 1176, 1180–81 (7th Cir. 1998); see also Childress v. City of Richmond, 134 F.3d 1205, 1209 (4th Cir. 1998) (Luttig, J., concurring) (stating "because the white male plaintiffs in the present case assert only the rights of third-parties to be free from race or sex-based discrimination in the workplace, they have not stated a cause of action under Title VII"); Patee v. Pac. Nw. Bell Tel. Co., 803 F.2d 476, 478 (9th Cir. 1986) ("The male workers do not claim that they have been discriminated against because they are men. . . . [T]he male workers cannot assert the right of their female co-workers to be free from discrimination based on their sex.").

60. Leibovitz v. N.Y.C. Transit Auth., 252 F.3d 179, 186 n.5 (2d Cir. 2001) (citing Clayton v. White Hall Sch. Dist., 875 F.2d 676, 679–80 (8th Cir. 1989) (finding white plaintiff had standing to pursue Title VII claim based upon discrimination against black coworker due to "lost benefits of associating with persons of other racial groups" and protectable "interest in a work environment free of racial discrimination"); EEOC v. Miss. Coll., 626 F.2d 477, 483 (5th Cir. 1980) (holding white woman "may charge a [Title VII] violation of her own personal right to work in an environment unaffected by racial discrimination"); Waters v. Heublein, Inc., 547 F.2d 466, 469 (9th Cir. 1976).
rights but because he is asserting the legal rights of others to be free from discrimination? Or would the complaining employee have standing because he has a substantive personal right under Title VII to work in an environment free from racial discrimination?

Bermudez v. TRC Holdings, Inc. and Clayton v. White Hall School District are illustrative cases. In Bermudez, the plaintiff alleged that the defendant, TRC Holdings (a job placement firm), encouraged racial discrimination and created a racially hostile work environment. Plaintiff Schlichting, a white woman, recounted instances in which fellow employees were rewarded by TRC for facilitating their clients' racial prejudices, such as by recommending only those potential employees with "white sounding names" to such clients. Other plaintiffs recounted similar instances of fellow employees catering to clients' racial prejudices and of racial discrimination against the firm's minority employees.

Plaintiff Schlichting sued TRC under Title VII, alleging hostile work environment discrimination. Although her claims were not premised on Title VII's antiretaliation provisions, the court's reasoning in rejecting her claim is instructive. The court reasoned that plaintiff's claim "is not that white women were harassed on account of their race or sex, but that persons of any race or sex who were opposed to discrimination felt uncomfortable." Since "[w]hite women were welcome at TRC and fared well there," plaintiff could not herself make a case of discrimination due to her race or gender. Furthermore, even if defendant TRC's conduct violated the rights of applicants for job placement or of minority employees, the court stated that plaintiff was "not entitled to enforce their rights and does not claim that she was retaliated against for sticking up for the rights of black co-workers or clients."

Importantly, however, the court reasoned that even if she had been making such a retaliation claim, it would have been reluctant to find in her favor, stating that "[a]n adverse reaction to observing someone else's injury" should not provide standing. Rather, in the court's view, the preferable approach would be to limit standing in such cases to circumstances where the complaining employee can prove that the employer's discrimination against others caused the plaintiff to suffer a direct per-
sonal "loss of important benefits from interracial associations."71 Under this approach, principled opposition to racially exclusionary practices is by itself insufficient to confer standing to make a retaliation claim. Rather, the complaining employee must prove that the discrimination against others harmed her by depriving her of specific benefits she would have received by virtue of associating with persons of other races.

*Clayton* represents a somewhat broader view of antiretaliation doctrine. *Clayton* involved a Title VII suit by a public school employee against the school district.72 The school district's policy required that children attending the district's schools reside in the district. The plaintiff, a white woman, had moved outside of the school district, but the district had permitted her to keep her child enrolled at the school for several years thereafter. Another school district employee, a black man, attempted to enroll his child at the school, but was denied because he lived outside of the school district. The school district subsequently enforced its residence policy against the plaintiff, barring her child from attending the school.73 Her theory under Title VII was that the school discriminated against the black employee on the basis of his race by refusing to allow his child to attend school in the district, while permitting the child of a similarly situated white employee (herself) to attend. Further, she alleged, "such discrimination ha[d] resulted in deprivation of a previously established benefit of her employment,"74 that is, the ability of her child to attend the district's schools, thereby satisfying the injury-in-fact requirement for purposes of standing. She also alleged injury caused by the district "creat[ing] a hostile working environment permeated by racial discrimination" via its discrimination against the black employee.75

The court concluded that the plaintiff had standing to pursue her claim. The court found that the plaintiff, in claiming that she suffered emotional and psychological distress from the maintenance of a "hostile working environment permeated by racial discrimination," sufficiently alleged a cognizable injury for purposes of standing.76 Citing the Supreme Court's decision in *Trafficante v. Metropolitan Life Insurance Co.*,77 the court found that the plaintiff's interest "in a work environment free of racial discrimination [was] clearly within the zone of interest protected by Title VII," and reasoned that finding standing in such cases

71. Id. (quoting Stewart v. Hannon, 675 F.2d 846, 850 (7th Cir. 1982)).
73. Id.
74. Id. at 679 (emphasis added).
75. Id. at 678.
76. Id.
77. 409 U.S. 205 (1972).
would further Title VII’s purpose of “[r]oot[ing] out discrimination in employment.”78

To be sure, the Bermudez court was correct in stating that the loss of the benefits of interracial association is an injury caused by discrimination in the workplace, housing, and other spheres of life. From a Thirteenth Amendment perspective, however, it is not the sole injury; indeed, it may not even be the central injury. The theory of this Essay is that retaliation against those who speak and act in furtherance of racial equality is a badge or incident of slavery in itself. Although most persons who speak out against perceived inequality and discrimination will be aggrieved in part by the effects of such discrimination in constructing racially homogenous environments, it is the denial of the right to speak in favor of equality without fear of retaliation that would be the gravamen of the Thirteenth Amendment claim. This Essay argues that the Thirteenth Amendment protects a personal right to be free from such retaliation, the denial of which is sufficient injury in fact to confer standing.

A straightforward analogy to the First Amendment will help to clarify the nature of the injury in cases of retaliation for pro-equality speech and demonstrate why the “denial of the benefits of interracial association” theory does not fully capture the nature of the injury.79 Assume that an individual who works at a private company joins a protest in support of affirmative action measures at government workplaces. Since the individual does not work for the government, he will not personally lose (or gain) the benefits of interracial association, regardless of the outcome of the controversy. Yet if the government were to sanction him in response to his speech, he has suffered a First Amendment injury: the denial of the personal right to speak out on the controversy. In short, the injury in cases of retaliation in response to pro-equality speech has a dignitary aspect. The dignitary injury still exists regardless of the consequences of the underlying discrimination for the speaker.

This is not to suggest that the consequences of the underlying discrimination are irrelevant. Indeed, as discussed in Part IV of this Essay, protecting pro-equality speech serves the purpose of rooting out discrimination by protecting those in-group members who oppose or reveal it and are in a position to influence discriminatory norms. For purposes of standing, however, this Essay contends that the nature of the injury in

78. Clayton, 875 F.2d at 680 (quoting EEOC v. Shell Oil Co., 466 U.S. 54, 77 (1984)). There are two important caveats regarding Clayton. First, Clayton was decided prior to the Supreme Court’s decisions beginning with Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), in which the Court narrowed standing doctrine. Second, although the Clayton court did find that the plaintiff had standing to pursue her claims, it ruled against her on the merits, holding that the single incident of discrimination was insufficient as a matter of law to establish a hostile work environment claim. Clayton, 875 F.2d at 680.

79. See supra notes 59–60 and accompanying text (discussing standing under Title VII for claim of denial of “benefits of interracial association”).
cases of retaliation for pro-equality speech is a dignitary injury to the speaker, as well as a separate potential injury resulting from the loss of the benefits of interracial association.

Fortunately, Congress clearly has the power to fix this standing issue. Although an individual may only assert "his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties," Congress can establish substantive legal rights. The Supreme Court has held that the requisite injury in fact for Article III purposes "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . ." Moreover, "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." Thus, a statute enacted pursuant to Congress's Thirteenth Amendment Enforcement Clause power that creates a clear substantive right to be free from retaliation in response to pro-equality speech and that creates an express private cause of action for violations of this right would presumably satisfy Article III as well as prudential standing concerns.

III. CONGRESS'S POWER UNDER SECTION 2 OF THE THIRTEENTH AMENDMENT TO PROTECT PRO-EQUALITY SPEECH

The constitutionality of Thirteenth Amendment legislation extending more robust protection to pro-equality speech depends upon two separate analyses: first, whether Congress would have the power to enact such legislation as a matter of its enumerated or implied powers and, second, whether such legislation would violate another provision of the Constitution. This Essay argues that Congress possesses the power to adopt such legislation under Section 2 of the Thirteenth Amendment, and that such legislation could be crafted in ways consistent with the First Amendment.

A. Congress's Power Under Section 2 of the Thirteenth Amendment

The Thirteenth Amendment contains two sections: a substantive provision (Section 1) and an enforcement clause (Section 2). The enforcement clause empowers Congress to enforce the Amendment's substantive guarantees. The proper construction of these provisions for purposes of Congress's ability to protect pro-equality speech turns upon

81. Id. at 500 (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)) (citing Sierra Club v. Morton, 405 U.S. 727, 732 (1972)).
82. Id. at 501.
83. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").
84. U.S. Const. amend. XIII.
two questions. First, is the self-executing scope of Section 1 limited to the
prohibition of literal enslavement and involuntary servitude, or does it
also encompass the badges and incidents of slavery? Second, is
Congress's power under Section 2 limited to enforcing the literal prohi-
bition of slavery and involuntary servitude, or may Congress also reach
the lingering vestiges of the slave system, even if the existence of such
vestiges poses no risk of the recurrence of literal slavery? For the reasons
discussed below, this Essay argues that protection of the right to engage
in pro-equality speech should fall to Congress in the first instance. This
Essay, therefore, does not seek to fully engage the first question above. 85

As to the second issue, the Supreme Court's decision in Jones v. Alfred H.
Mayer Co. directly holds that Section 2 empowers Congress to legislate
against conditions it rationally defines as badges and incidents of slavery. 86
The Court in Jones concluded that Congress's power extends be-
yond the enactment of prophylactic measures designed to prevent the
reestablishment of chattel slavery. 87

Jones would therefore seem to settle the matter, except for subse-
quent Supreme Court decisions such as City of Boerne v. Flores arguably
calling Jones's rationale into question, or at least unsettling its doctrinal
premises. 88 Fuller discussion of this issue appears elsewhere in this
Issue. For purposes of this Essay, it is sufficient to note that the
Thirteenth Amendment does empower Congress to identify private re-
taliations against persons who advocate for racial equality as a badge or
incident of slavery and to adopt measures rationally aimed at remedying
the injuries brought about by such retaliation. In identifying the suppress-
sion of such speech as one of the incidents of the Slave Power, 89 the
Thirteenth Amendment's framers spoke broadly about freedom of ex-

85. This author has argued elsewhere, however, that Section 1 of the Thirteenth
Amendment does indeed authorize a judicial cause of action to remedy the badges
and incidents of slavery, even in the absence of legislation enacted pursuant to Section 2. See,
e.g., Carter, Race, supra note 12; William M. Carter, Jr., A Thirteenth Amendment
ther Carter, Racial Profiling].

86. 392 U.S. 409, 439 (1968) (stating Section 2 authorizes Congress to "pass all laws
necessary and proper for abolishing all badges and incidents of slavery in the United States." (quot-
ing The Civil Rights Cases, 109 U.S. 3, 20 (1883))).

87. Id.

88. 521 U.S. 507, 520 (1997) (adopting narrow "congruence and proportionality" test
for assessing validity of Congress's exercise of its power to enforce Fourteenth
Amendment, in contrast with broader "rationality review" applied by Jones).

89. See Jennifer Mason McAward, McCulloch and the Thirteenth Amendment, 112
Colum. L. Rev. 1769, 1796 (2012) (discussing Court's assertion of "interpretive suprem-
cy" in Boerne); Alexander Tsesis, Gender Discrimination and the Thirteenth Amendment,
112 Colum. L. Rev. 1641, 1693-94 (2012) (discussing impact of Fourteenth Amendment
cases on Thirteenth Amendment).

90. See supra note 6 (defining "Slave Power").
pression. To be sure, by withholding the protection of law from antislavery speech, states enabled private actors to suppress such speech and thereby perpetuate chattel slavery. But the Thirteenth Amendment's framers saw the suppression of such speech, and the failure of law to protect Unionists and abolitionists, as a moral and political affront to the rights of citizens to speak in furtherance of their ideals, quite apart from the instrumental effects of such suppression. In sum, the framers of the Thirteenth Amendment viewed the suppression of such speech via state and private retaliation as an incident of the Slave Power in and of itself. The elimination of such a vestige of slavery, then, is squarely within the Thirteenth Amendment's grant of power to Congress and is therefore rationally related (or "congruent and proportional") to the power being exercised.

B. First Amendment Concerns

A separate potential objection to legislation aimed at remedying private retaliation against those who engage in pro-equality speech is that such legislation would violate the First Amendment rights of the individual who engages in the retaliatory conduct. Some potential First Amendment objections are as follows:

(1) Freedom of Speech. If the retaliation takes the form of literal expression (i.e., verbal or written harassment) or expressive activity, then legislation prohibiting such retaliation arguably infringes upon the harasser's free speech rights.

(2) Freedom of Association. If the retaliatory action arises from the private party's desire to associate only with persons sharing racially subordinating opinions (e.g., a private employer who wishes to maintain a workplace from which persons holding racially egalitarian viewpoints are excluded), then legislation prohibiting adverse action against employees who engage in pro-equality speech arguably limits the employer's freedom of association.

91. See supra notes 28-30 and accompanying text (discussing framers' views that suppression of such speech was badge or incident of slavery).
92. See supra Part I (discussing history of suppression of abolitionist speech before Civil War and suppression of pro-equality and Unionist speech even thereafter).
93. See supra notes 28-30 and accompanying text (discussing framers' views).
94. See generally William M. Carter, Jr., Judicial Review of Thirteenth Amendment Legislation: "Congruence and Proportionality" or "Necessary and Proper"?, 38 U. Tol. L. Rev. 973 (2007) (arguing Boerne's congruence and proportionality test is wrong even in Fourteenth Amendment context where it developed, and that, for a variety of reasons, it should not be extended to Thirteenth Amendment). This Essay therefore operates on the assumption that the rationality review standard of Katzenbach v. Morgan, 384 U.S. 641 (1966), provides the appropriate standard for assessing Thirteenth Amendment legislation. Even if Boerne applies to Thirteenth Amendment legislation, however, the author believes that legislative remedies for the private suppression of pro-equality speech would fall well within the scope of the Thirteenth Amendment and would satisfy the congruence and proportionality standard.
(3) Viewpoint Discrimination. Under this Essay's proposal, only private retaliation against persons who express pro-equality views would be prohibited; retaliation against those who express anti-equality views would not be covered by this proposal. This arguably amounts to viewpoint discrimination.

A full examination of these and other First Amendment concerns is beyond the scope of this Essay. However, there are at least three reasons why these concerns can be reconciled with the premise of this Essay.

First, as a matter of constitutional structure, the First Amendment, like any provision of the Constitution, should not be considered in isolation. Thus, we should consider not only whether putative First Amendment rights to retaliate against those who engage in pro-equality speech limits the reach of the Thirteenth Amendment, but also whether the Thirteenth Amendment limits the putative First Amendment rights to engage in retaliation. In sum, the Thirteenth Amendment, like the First, is part of the Constitution; we therefore should not lightly or automatically assume the primacy of the First Amendment over the Thirteenth Amendment.95

Second, the structural point above is supported by the historical evidence regarding the Thirteenth Amendment's framers' views on the balance between the "right" to engage in retaliatory conduct and the right to be free from such conduct.96 Those framers, quite frankly, expressed little sympathy for the argument that "free speech" rights to engage in retaliating against the proponents of freedom would be violated by protecting abolitionists and Unionists from such retaliation.97 This may well be viewpoint discrimination, but it is viewpoint discrimination allowed by the Thirteenth Amendment.

Third, this Essay questions whether the kinds of retaliatory conduct discussed here (and with which the Thirteenth Amendment's framers were concerned) should be considered "speech" for First Amendment purposes at all. To be sure, there is an expressive component in firing an employee or harassing a neighbor in retaliation for their racially egalitarian expressive activities. But the First Amendment does not protect all conduct having an expressive component.98 Indeed, laws whose opera-

95. Cf. Shannon Gilreath, "Tell Your Faggot Friend He Owes Me $500 For My Broken Hand": Thoughts on a Substantive Equality Theory of Free Speech, 44 Wake Forest L. Rev. 557, 570-71 (2009) ("The Fourteenth Amendment marked a seismic shift in the ground on which First Amendment tradition rests.... [B]oth the right to speak... and the negative right to be free from speech that dehumanizes you [promote equality].").

96. See supra Part I and note 58 (discussing framers' views on right to be free from retaliatory conduct).

97. See supra Part I and note 58 (discussing framers' concerns about suppression of abolitionist and Unionist speech).

98. See, e.g., Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) ("[The Court's] cases reject the view that an apparently limitless variety of conduct can be labeled "speech"
tion to some extent depends upon the expressive component of the regulated conduct (such as hate crime or sexual harassment laws) have been held to be consistent with the First Amendment under the "conduct, not speech" doctrine. Moreover, this Essay proposes that Congress should exercise its Thirteenth Amendment power to address retaliation against persons who engage in pro-equality speech where such retaliation has substantial and tangible effects upon the victim of the retaliation, such as ideologically motivated violence, adverse employment consequences, disruptions of home and family life, or interference with contractual relations. This Essay therefore does not suggest that the mere expression of opposition to or disagreement with such speech should be considered a badge or incident of slavery.

This Part has contended that Congress has the power under the Thirteenth Amendment to prohibit private retaliation for pro-equality speech, and, at least as a conceptual matter, can do so consistently with the First Amendment. The final Part of this Essay explains why such legislation would have substantial beneficial effects.

IV. WHAT CAN LAW DO? THE ROLE OF LAW IN SHAPING BEHAVIOR

This Essay has argued that Congress has the power to proscribe as badges or incidents of slavery instances of private retaliatory action against persons who engage in pro-equality speech. This final Part will discuss why such a law would be likely to make a difference.

This Part begins by acknowledging the limits of the law: No law can by itself convince persons who are virulently opposed to racial equality to reverse course and become advocates for racial justice. Conversely, some individuals are so committed to the cause of racial justice that no law protecting their advocacy is necessary to incentivize their behavior. Most people, however, at least most of the time, fall somewhere between these two extremes. Most people are neither unrepentant racists nor selfless idealists willing to take great risks on behalf of others even when they have nothing other than principle directly at stake. To be sure, altruism is an important force. As Professor Derrick Bell noted with regard to the struggles against slavery and segregation, there were, of course, "whites for whom recognition of the racial equality principle was [itself] suffi-

whenever the person engaging in the conduct intends thereby to express an idea." (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)).

99. See id. at 490 (holding state hate crimes law that enhanced penalty for aggravated battery when defendant intentionally selected victim because of victim's membership in protected class was consistent with First Amendment); Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (rejecting First Amendment challenge to Title VII of Civil Rights Act of 1964 and stating "[i]ndividuals may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections" (quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973))).
Robust protection of pro-equality speech would have both instrumental and expressive benefits. Instrumentally, a civil remedy for retaliation would entitle persons who take stands in favor of racial equality to receive compensation for any harms incurred thereby. It would also deter such retaliation from occurring by expressing a social norm that retaliation is unacceptable or deviant. As Professor Deborah Brake has noted, “When the expressive force of law and other government action shapes social meaning, this influence on social meaning may affect individual and collective behavior wholly apart from the sanctions of law enforcement.”

Quite apart from their direct coercive or compensatory effects, legal protections for pro-equality speech can also encourage private individuals to oppose racially discriminatory and exclusionary practices and to discourage such practices through private condemnation. Law can create an incentive for individuals to engage in pro-equality speech and thereby interrupt discriminatory norms through private “second order” sanctions, such as shaming, reporting, and providing arguments against discrimination. Social science research reveals that “[i]ndividuals are... more likely to view conduct as worthy of condemnation when they know that others condemn it. Indeed, studies suggest that the opinions of one’s peers more significantly influence one’s moral attitudes toward various forms of conduct than does the status of those forms of conduct under the law.”

This Essay’s proposal to deepen and broaden protections against retaliation for pro-equality speech seeks to empower individuals to act as “norm entrepreneurs” for ideas of equality. By protecting (and thereby

101. Id.
102. Deborah L. Brake, When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law, 46 Wm. & Mary L. Rev. 513, 579 (2004); cf. Dov Fox & Christopher L. Griffin, Jr., Disability-Selective Abortion and the Americans with Disabilities Act, 2009 Utah L. Rev. 845, 858 (finding “expressivist changes to social customs and attitudes can emerge without knowledge of a specific law but still because of the law’s existence”).
103. See Robert E. Scott, The Limits of Behavioral Theories of Law and Social Norms, 86 Va. L. Rev. 1603, 1603–04, 1616 (2000) (explaining that laws influence behavior both directly (by sanctioning or rewarding certain behavior) and indirectly, by establishing or reinforcing norms that empower other members of community to informally discourage undesirable behavior through shaming, reporting such behavior, or providing those seeking to enforce laws with arguments).
105. See, e.g., David E. Pozen, We Are All Entrepreneurs Now, 43 Wake Forest L.
encouraging) the expression of opposition to racial inequality, the law can act as a catalyst for intragroup, informal norm management. In Professor Sunstein’s formulation, norm entrepreneurs are most effective in provoking changes in norms by “(a) signalling their own commitment to change, (b) creating coalitions, (c) making defiance of the norms seem or be less costly, and (d) making compliance with new norms seem or be more beneficial.”

This Essay is most directly aimed at factors (a) and (c). The law can encourage the expression of opposition to discriminatory norms by protecting it (factor (a)). Then, the vocal egalitarian dissident who avails herself of that protection and is either not punished because others are aware that the law condemns and holds out sanctions for retaliation, or who is punished but has a legal remedy, expresses to others that such dissent is possible without having to risk extraordinary harm (factor (c)).

The Slave Power deprived those who wished to act and speak in ways counter to the prevailing norm of dehumanization of the protection of law. The Thirteenth Amendment was designed in part to provide the “capital” (to continue the entrepreneurship analogy) of legal protection to those who sought to promote norms of shared humanity and equality.

This Essay does not suggest that protecting oppositional speech and conduct by nonminorities is more important than protecting persons of color who themselves oppose racial discrimination. Undoubtedly, blacks under slavery (and thereafter) suffered more severely than their white allies for having the temerity to directly or symbolically challenge slavery. However, the nature and causes of discrimination and retaliation are such that protecting nonminority advocates of racial equality is an important part of challenging discriminatory norms and behavior. As Professor Brake has noted, “social science research shows that women and persons of color are perceived negatively and are disliked by majority group members when they step forward to challenge discrimination. By challenging discrimination and unjust social privilege, they are perceived as transgressing the social order, creating prime conditions for retaliation.” In other words, although the individuals who are themselves subject to discrimination have the most to gain by changing discriminatory norms, they are also likely to have the most to lose by challenging them.

This Essay is mindful that antidiscrimination law has been criticized for treating racial minorities only as “passive victims of an oppressive so-


107. See supra note 6 (defining “Slave Power”).

108. See supra Introduction and Part I (discussing Slave Power’s effects upon whites who engaged in pro-equality speech).

cial structure,” rather than as the agents of their own freedom. This author’s other work has accordingly articulated theories of the Thirteenth Amendment aimed at empowering subordinated groups to challenge forms of oppression arising from slavery. History shows that it would be a mistake for racial minorities to depend primarily upon the collective altruism of nonminorities to end racial subordination. That same history also shows, however, that successful challenges to racial subordination have often involved the contributions of nonminorities to the struggle for civil rights.

CONCLUSION

The Thirteenth Amendment embodies a promise that the Nation would eliminate the institution of slavery as well as the lingering vestiges of the Slave Power. Fulfillment of that promise requires that Congress, as the institution vested with primary authority to enforce the Thirteenth Amendment, address the badges and incidents of slavery wherever and whenever they are found. The Thirteenth Amendment’s framers viewed slavery as having damaged American society as a whole. Thus, while the direct consequences of the history of slavery most often and most directly fall upon the descendants of the enslaved and those who are similarly burdened by the legacy of racial slavery and subordination, the Thirteenth Amendment’s framers’ vision was broad enough to encompass the effects of the Slave Power upon those who advocated for freedom and equality. As this Essay demonstrates, Congress therefore has the power under the Thirteenth Amendment to prohibit private retaliation against persons who engage in pro-equality speech.

110. Id. at 22.