

IV. Badges and Incidents: The Meaning of the Thirteenth Amendment

In the 1883 Civil Rights Cases, the Court noted that Congress had the power to define the "badges and incidents of slavery" but defined that power narrowly, denying that racial discrimination in places of public accommodation was among those badges and incidents.

What does slavery under Section 1 of the 13th Amendment mean for us today, and what are the "badges and incidents" of slavery that Congress may address under section two? What is the relationship between the Fourteenth Amendment's guarantee of equal citizenship and the Thirteenth Amendment's abolition of slavery throughout the United States?

Is slavery a question of (1) systematic and overlapping forms of private power, (2) profound economic deprivation, (3) denial of self-ownership or control over one's own productive capacities, (4) a system of private coercion backed by contract and property rights, (5) a technique of racial subordination, or a combination of all of these? Is the prohibition on slavery necessarily an issue of race (a claim ironically denied by the Civil Rights Cases) or can it concern other forms of subordination and injustice?

Does the ban on slavery within the United States have special meaning for aliens within our borders? Does Congress have the power under Section 2 to address sex discrimination, or issues of economic injustice and deprivation? Could affirmative action programs be within Congress's powers to remedy the badges and incidents of slavery?

Finally, how important is the fact that the 13th Amendment contains no state action limitation? What can Congress do under its powers to enforce the 13th Amendment that it cannot do under the Commerce Power? Do the limitations of the 11th Amendment apply to laws passed under Congress's Section 2 powers?