THE BADGES AND INCIDENTS OF CRIMINALITY

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> "Today, a criminal freed from prison has scarcely more rights, and arguably less respect, than a freed slave or a black person living 'free' in Mississippi at the height of Jim Crow."
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> –Michelle Alexander[1]

Abstract

The United States Constitution guarantees all citizens the same basic rights and privileges; however, citizens with criminal convictions are subject to a number of regulatory restrictions on fundamental rights (such as disenfranchisement, ineligibility for public housing and benefits, employment discrimination, etc.) regardless of the seriousness of the offense. These restrictions are called collateral consequences, and they effectively relegate citizens with criminal convictions to a state of second-class citizenship. The U.S. Supreme Court has published several opinions construing Section 2 of the Thirteenth Amendment, also known as the Enabling Clause, as not only abolishing slavery but also empowering Congress to eradicate all badges and incidents of slavery. However,

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1. Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 142 (Revised ed. 2012). In *The New Jim Crow*, Alexander compares mass incarceration in the United States to the racial caste system, Jim Crow. She explains how mass incarceration, focusing on the War on Drugs, has targeted African Americans and resulted in millions of African Americans being incarcerated and relegated to permanent second-class status. She also explains that mass incarceration has resulted in millions of African Americans being denied basic civil and human rights, which ultimately makes it legal to discriminate against African Americans as it once was during Jim Crow. *Id.*

the U.S. Supreme Court has provided little guidance on what constitutes the badges and incidents of slavery, and Congress has scarcely used its authority under the Enabling Clause. The countless collateral consequences that follow criminal convictions are many of the same "badges and incidents of slavery" imposed on slaves during the institution of slavery, and Congress has the authority to eradicate them via the Enabling Clause. This Comment urges Congress to eliminate all collateral consequences that follow criminal convictions and puts forth a three-part analysis to aid courts in identifying modern badges and incidents of slavery.

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Introduction

On March 9, 1965, Nelson Sibron was sitting in a restaurant enjoying a slice of pie and a cup of coffee when, suddenly, a Brooklyn police officer approached Sibron and asked him to exit the restaurant.[2] Once outside, the officer reached into Sibron's pocket and pulled out several envelopes containing heroin.[3] Subsequently, Sibron was arrested and sentenced to serve six months in jail.[4] After serving his sentence, Sibron appealed his conviction.[5]

On appeal, the Court inquired as to whether the case was moot since Sibron had already completed his sentence.[6] The Court considered an exception to the mootness doctrine that asks whether there are any further penalties or disabilities that could be imposed under state or federal law as a result of the conviction.[7] Justice Warren, writing for the majority, explained the "obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences."[8] Sibron's conviction may be used to impeach his character if it were at issue in any future criminal trial, and it must be considered in sentencing should he be convicted of another crime along with a plethora of other collateral consequences.[9] The effects of Sibron's conviction "survive[] the satisfaction of the sentence imposed on him."[10] Therefore, his case could not be considered moot.[11]

It is no secret that citizens with criminal convictions suffer substantial collateral consequences. A citizen with a criminal record may be legally subject to discrimination in employment, housing, education, public benefits, jury service, and even be denied the right to vote.[12] Even citizens with minor convictions who never step foot in a prison may become victims of these consequences.[13]

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2. Sibron v. New York, 392 U.S. 40, 45 (1968).
3. *Id.*
4. *Id.* at 50.
5. *Id.* at 48, 50 (Sibron appealed his conviction on the ground that the evidence was improperly obtained, thus rendering the heroin inadmissible).
6. *Id.* at 50.
7. *Id.* at 53.
8. *Id.* at 55.
9. *Id.* at 55–56.
10. *Id.* at 58 (quoting Fiswick v. United States, 329 U.S. 211, 222 (1946)).
11. *Sibron*, 392 U.S. at 58.
12. Alexander, *supra* note 1, at 141.
13. Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1316–17 (2012). Natapoff explains that misdemeanors are commonly not regarded in the same light as felonies despite misdemeanors comprising the vast majority of U.S. criminal convictions. Many prosecutors encourage criminal defendants to plead guilty to misdemeanors, rather than facing trial for more serious crimes that carry prison sentences, but misdemeanors carry the stigma of a criminal conviction and many

The Thirteenth Amendment to the United States Constitution was enacted to end the institution of chattel slavery and ensure that no class of citizens would be reduced to second-class citizenship. The Amendment is comprised of two sections. Section 1 states "neither slavery nor involuntary servitude, *except as punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction."[14] Section 2 states "Congress shall have power to enforce this article by appropriate legislation."[15] This Comment focuses on the exception in Section 1, known as the Punishment Clause, and the U.S. Congress's power under Section 2, known as the Enabling Clause.

The Thirteenth Amendment was intended to do more than simply abolish the institution of chattel slavery. The U.S. Supreme Court has consistently interpreted the Enabling Clause as also empowering Congress to enact legislation to abolish any burdens and restrictions on fundamental rights suffered by slaves or all *badges and incidents of slavery* (this concept will be explained further in Part II).[16] It is undisputed that Congress has the power to legislate regarding the badges and incidents of slavery under the Enabling Clause, but the Supreme Court has failed to provide a detailed explanation of what constitutes badges and incidents of slavery.[17]

This uncertainty has caused slavery's badges and incidents to be imposed on citizens with criminal convictions via the abundance of collateral consequences that follow a criminal conviction. These collateral consequences deprive citizens of basic privileges of civil society, reduce them to second-class citizens, and make it difficult for them to get acclimated to society or become productive citizens upon completion of their sentence.[18] The similarity between these collateral consequences and the restrictions imposed on slaves as well as the effects of these consequences qualify them for regulation pursuant to Congress's power under the Thirteenth Amendment.

Before proceeding, I must clarify that this Comment does *not* argue that citizens who commit crimes do not deserve any type of punishment. Citizens found guilty of committing crimes should receive a punishment proportionate to the crime committed and proper rehabilitation. However, their punishment must have an end. Individuals with criminal convictions are still *citizens* of the United States and entitled to the same

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of the same collateral consequences as felonies. She also explains how the misdemeanor process is the basis for many of the issues within the criminal justice system, including the racialization of crime. *Id.*

14. U.S. Const. amend. XIII, § 1.
15. *Id.* at § 2.
16. The Civil Rights Cases, 109 U.S. 3, 20 (1883); *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).
17. William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. Davis L. Rev. 1311, 1311 (2007).
18. Alexander, *supra* note 1, at 142–43.

basic rights and privileges outlined in the Constitution as those citizens who have no criminal history.

Nevertheless, the language of the Punishment Clause and the manner in which it is used indicates that incarcerated citizens are subject to involuntary servitude for financial gain, which, textually and theoretically, constitutes a state of de facto slavery. This Comment compares the restrictions imposed on slaves and free Black people during and after the institution of slavery with the restrictions suffered by citizens with criminal convictions to show that the latter is subject to the badges and incidents of slavery in violation of the Thirteenth Amendment.

Part I summarizes the Supreme Court's interpretations of the Thirteenth Amendment and how it empowers Congress to legislate regarding the badges and incidents of slavery. It also provides jurisprudence in which the Supreme Court has upheld Congressional legislation under the Enabling Clause. Part II provides an overview of the traditional use of the terms "badges" and "incidents" as they pertain to slavery. It also reviews other scholars' attempts to provide a modern definition of the badges and incidents of slavery and provides a modified analysis. Part III discusses how the Punishment Clause prompted the transition of involuntary servitude from plantations to prisons and how, along with this transition, collateral consequences to criminal convictions began to emerge.

Part IV elaborates on the collateral consequences suffered by citizens with criminal convictions. It shows the similarities between these collateral consequences and those restrictions imposed on slaves. It also explains how these consequences make citizens more likely to commit future crimes and become incarcerated and thereby returned to a condition of involuntary servitude. Finally, Part V discusses solutions to the problem, including removing all collateral consequences from citizens with criminal convictions and using the Fourteenth Amendment as a tool in identifying further badges and incidents.

I. Supreme Court Interpretations of Congress's Power to Eliminate the Badges and Incidents of Slavery

Contrary to popular belief, the Emancipation Proclamation did not end slavery in the United States. The Proclamation confirmed the idea that the Civil War was a war for freedom and allowed Black men to be accepted into the Union Army and Navy.[19] The Thirteenth Amendment, ratified immediately following the Civil War, officially ended slavery in the United States.[20] However, while the legal institution of slavery was no longer present in the United States, many Southern states began instituting a de facto slavery by enacting laws that excluded African Americans

19. Proclamation No. 95 (Emancipation Proclamation), Presidential Proclamations, 1791–1991, Record Group 11, General Records of the United States Government, National Archives (Jan. 1, 1863).
20. U.S. Const. amend. XIII, § 1.

from enjoying citizenship.[21] These efforts revealed a need to interpret the Thirteenth Amendment and expound upon the scope of its protections. The Supreme Court first considered the extent of the Thirteenth Amendment's protections seven years after its adoption.

A. *Slaughter-House Cases*

In 1872, the Supreme Court interpreted the Thirteenth Amendment for the first time. In the *Slaughter-House Cases*, the state of Louisiana enacted a statute that created a monopoly over the butchering industry in New Orleans and required all independently owned and operated slaughterhouses to close.[22] The statute permitted butchers to slaughter and prepare their own meat; however, they were required to do so in designated slaughterhouses and pay reasonable compensation for use of the facility.[23]

One of the grounds upon which the statute was challenged was that it created a condition of involuntary servitude in violation of the Thirteenth Amendment.[24] In response to this argument, the Court noted that the Thirteenth Amendment followed a civil war fought over whether to maintain or eliminate the institution of slavery.[25] The history of African slavery in the United States and its conditions are unquestionable, and a monopoly over the slaughterhouse industry was not a form of involuntary servitude embodied by the institution.[26] Thus, the Court rejected the butchers' Thirteenth Amendment argument and upheld the Louisiana statute.[27]

In its analysis of the Thirteenth Amendment, the Court explained that the word "servitude" as used in the Thirteenth Amendment has a broader meaning than the institution of slavery itself, and its purpose was to prohibit all lingering effects of African slavery.[28] The purpose of the Thirteenth Amendment could have been eluded if only the word "slavery" had been used rather than including "servitude" as well.[29] The Court also explained that African Americans are not the only class of people to whom the protections of the Thirteenth Amendment apply.[30] Although African Americans were the only group enslaved in the United States and Congress had them in mind when drafting the Thirteenth

21. *See* Alexander Tsesis, The Thirteenth Amendment and American Freedom (2004). Tsesis describes how deeply slavery was rooted in antebellum America and how it was the motivation for the adoption of the Thirteenth Amendment. Tsesis gives a brief legislative history of the Thirteenth Amendment and how its adoption was the first step in assuring freedom for all American citizens. *Id.*
22. Slaughter-House Cases, 83 U.S. 36, 59–60 (1872).
23. *Id.* at 61.
24. *Id.* at 66.
25. *Id.* at 68.
26. *Id.* at 77–78.
27. *Id.* at 83.
28. *Id.* at 69.
29. *Id.*
30. *Id.* at 72.

Amendment, the Amendment's protections spread to all groups.[31] The Court encouraged future interpreters of the Amendment to look to its purpose, the evil it was designed to remedy, and the Amendments that follow for guidance.[32]

Ultimately, the Court concluded that a monopoly over the slaughterhouse industry was not the harm the Thirteenth Amendment sought to prevent; rather, the Amendment was designed to prevent those conditions of African slavery and the institution's lingering effects.[33] Here, the issue involved state action, and the Court did not address whether the protections of the Amendment reach private actions by citizens. The Supreme Court discussed this issue and elaborated further on the protections of the Amendment a decade later.

B. *The Civil Rights Cases*

In 1883, the Supreme Court interpreted the Thirteenth Amendment in review of Congress's authority to adopt the Civil Rights Act of 1875.[34] *The Civil Rights Cases* were a combination of five suits brought under the Civil Rights Act of 1875 in which two persons of color were denied the accommodations and privileges of a hotel, two were denied the privileges and accommodations of a theater, and one was denied the privilege of riding in a railcar.[35] Each alleged that the denial was a violation of the Civil Rights Act of 1875, which Congress enacted pursuant to its power under the Enabling Clause of the Thirteenth Amendment.[36]

The Act asserted that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances . . . and other places of public amusement."[37] Essentially, it guaranteed that the enjoyment of these facilities shall not be subject to any conditions applicable only to citizens of a particular race, color, or previous condition of servitude.[38]

Congress's power to enact direct and primary legislation pertaining to fundamental rights comes from the Thirteenth Amendment.[39] Section 1 of the Amendment abolished slavery and established universal freedom, and Section 2 recognized that legislation may be necessary to remedy all who were affected by slavery and prevent any future violations of Section 1 in letter or spirit.[40] Therefore, Section 2 "clothes congress with power to pass all laws necessary and proper for abolishing all badges and incidents

31. *Id.*
32. *Id.*
33. *Id.* at 69, 83.
34. *See* The Civil Rights Cases, 109 U.S. 3 (1883).
35. *Id.* at 4.
36. *Id.*
37. *Id.* at 9.
38. *Id.* at 9–10.
39. *Id.* at 20.
40. *Id.*

of slavery in the United States," and such legislation may be directed towards State and private action.[41]

Regarding the constitutionality of the act, Justice Bradley, writing for the majority, considered whether the denial of any person's admission to the accommodations and privileges of the facilities outlined in the Act constituted a badge or incident of slavery.[42] His main inquiry was "what does it have to do with the question of slavery."[43] Congress was not empowered to adjust the social rights of all races, but it was enabled to ensure the fundamental rights that constitute the essence of citizenship and comprise the fundamental distinction between freedom and slavery.[44] To clarify these fundamental rights, Justice Bradley explained that slavery and its necessary incidents include "disability to hold property, to make contracts, to have a standing in court, to be a witness against a White person, and such like burdens and capacities" and "severer punishments for crimes were imposed on the slave than on free persons guilty of the same offense."[45]

According to the Court, the primary concern of the Thirteenth Amendment is slavery and its lingering effects, and discriminations on the basis of race are not considered badges of slavery.[46] The Court explains that there were many free people of color in this country prior to the abolition of slavery, and none of them thought it was an invasion of their status as freemen because they were subject to discrimination at facilities on the basis of race.[47] Thus, the Court concluded that the acts of refusal in question have nothing to do with slavery or involuntary servitude, and the Civil Rights Act of 1875 was found unconstitutional.[48]

Ultimately, in *The Civil Rights Cases*, the Court introduced the phrase "badges and incidents of slavery," but gave minimal insight into what exactly the phrase entails. The Court also added that Congress's power under Section 2 applies to State and private conduct. Nevertheless, the Supreme Court interpreted the Thirteenth Amendment again two decades later, which resulted in a deviation from the established precedent of Congress's authority under the Thirteenth Amendment.

C. *Hodges v. United States*

In 1906, the Supreme Court overruled *The Civil Rights Cases* in *Hodges v. United States* and decided that Congress's power under the Enabling Clause of the Thirteenth Amendment did not extend beyond the institution of slavery itself.[49] In *Hodges*, eight Black workers were hired

41. *Id.* at 20, 23.
42. *Id.* at 20–21.
43. *Id.* at 21.
44. *Id.* at 23.
45. *Id.* at 22.
46. *Id.* at 23–24.
47. *Id.* at 24–25.
48. *Id.* at 25–26.
49. Hodges v. United States, 203 U.S. 1, 20 (1906), *overruled by* Jones v. Alfred H.

at a lumber mill and contracted to receive compensation in exchange for their labor.[50] One day, a group of White men came to the mill and threatened them with deadly weapons in an effort to coerce them to abandon their contracts or stop receiving pay for their work.[51] Ultimately, the workers were compelled to quit their jobs.[52]

The workers argued that the Thirteenth Amendment guaranteed them the right to receive compensation for their labor.[53] They asserted that the White men violated their rights under the Amendment by coercing them to rescind their contracts.[54] Justice Brewer, writing for the majority, applied a strict textualist view of the Thirteenth Amendment and explained that the framers used the words which most clearly expressed the ideas they intended to convey.[55] The Court opined that the prohibitions under the Thirteenth Amendment are slavery and involuntary servitude, and these terms have a clear understanding of being compulsory service of one to another.[56] According to the Court, the Amendment prohibited a condition, but did not give favor to any particular group of people.[57]

The workers argued that the lack of power to perform contracts is an indicium of slavery's existence, and when they were compelled to repudiate their contracts by force, they were deprived of a free man's right to perform contracts.[58] Justice Brewer responded by suggesting that the purpose of the Thirteenth Amendment was not to give Congress the authority to erase every feature of slavery, but to forbid the institution of slavery and involuntary servitude itself.[59]

Essentially, the Court decided that this action did not constitute a violation of the Thirteenth Amendment, and that the Supreme Court had no jurisdiction to hear the case.[60] This was an interesting interpretation of the limits of the Thirteenth Amendment given the established precedent that the protections of the Thirteenth Amendment extend beyond slavery itself. The Court referred to the badges or incidents of slavery only once, discussing laws requiring free Black people to carry a copy of their freedom documents or be subject to arrest, but declined to determine that Congress was empowered to regulate them.[61]

In addition to Supreme Court precedent that contrasted with the Court's opinion in *Hodges*, Alexander Tsesis explained that there was

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Mayer Co., 392 U.S. 409 (1968).

50. *Id.* at 2–3.
51. *Id.* at 3–4.
52. *Id.*
53. *Id.* at 2–3.
54. *Id.* at 3–4.
55. *Id.* at 16.
56. *Id.*
57. *Id.* at 16–17.
58. *Id.* at 17.
59. *Id.* at 19.
60. *Id.* at 20.
61. *Id.* at 19.

essentially a universal belief in Congress that the Amendment would extend far beyond simply abolishing the institution of chattel slavery.[62] It was widely understood that the Amendment would empower Congress to legislate regarding any incidents of servitude.[63] The Thirteenth Amendment was intended to cover "every proposition relating to slavery."[64] In fact, this power was the reason many opponents of the Amendment, mostly Southern states, opposed its passage.[65] For example, a delegate from Mississippi expressed concern that "[t]he second section confers extraordinary power upon Congress. That section gives to Congress broad, and almost, I may say, unlimited power . . . which may be destructive to the welfare of the South."[66] The primary objection by opponents of the Amendment was that it empowered Congress to eradicate all lingering effects of slavery, which would be harmful to the economies of those states that once depended on slave labor.

The Court's decision in *Hodges* overruled *The Civil Rights Cases* and limited Congress's power under the Thirteenth Amendment to the institution of slavery itself. This remained the prevailing view for over sixty years until the Supreme Court interpreted the Thirteenth Amendment again at the peak of the Civil Rights Movement.

D. *Jones v. Alfred H. Mayer Co.*

Hodges was overruled in 1968. In *Jones v. Alfred H. Mayer Co.*, the Supreme Court reviewed the constitutionality of 42 U.S.C. § 1982 after an African American citizen filed suit under the act because a real estate company refused to sell him a home solely because he was Black.[67] The Act provided that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[68] In short, it prohibited housing discrimination on the basis of race.

The Act was part of the Civil Rights Act of 1866, which was passed pursuant to Congress's authority under the Thirteenth Amendment. Therefore, the Court considered whether the act was a proper exercise of Congress's authority under the Thirteenth Amendment.[69] Justice Stewart, delivering the majority opinion, explained that Section 1 of the Thirteenth Amendment simply abolished slavery and involuntary servitude, and Section 2 "clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*'" and applies to state and private action.[70]

62. Tsesis, *supra* note 21, at 38.
63. *Id.* at 45.
64. *Id.* at 39.
65. *Id.* at 48.
66. *Id.*
67. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 412 (1968).
68. *Id.*
69. *Id.* at 422; 437–38.
70. *Id*. at 438–39 (quoting The Civil Rights Cases, 109 U.S. 3, 20 (1883)).

Specifically, the Court inquired whether Congress's authority to enforce the Thirteenth Amendment includes the power to prohibit racial discrimination in the sale of real and personal property.[71] According to the Court, "the answer to that question is plainly yes."[72] The Court reasoned that the Thirteenth Amendment is essentially useless if Congress does not have the power to ensure equality among citizens regarding the fundamental rights of a free society.[73] Furthermore, the Court explained that the Thirteenth Amendment empowers Congress to rationally determine the badges and incidents of slavery and translate that determination into effective legislation.[74] Regarding the act in question, the Court concluded that Congress appropriately achieved this objective.[75] The Court noted that the badges and incidents of slavery, or its "burdens and disabilities," include restraints upon the fundamental rights that are essential to civil freedom, including the right to purchase, lease, sell, and convey property.[76] Ultimately, the Court upheld the constitutionality of the Act.[77]

Accordingly, *Jones* overruled *Hodges* and reaffirmed the idea that the Thirteenth Amendment empowers Congress to pass legislation to remove all badges and incidents of slavery. The *Jones* Court also gave an interesting interpretation of Congress's power under the Enabling Clause. In a footnote, the Court explained that the Thirteenth Amendment eradicates the last *vestiges* and incidents of slavery.[78] The term "vestiges" was not previously used by the Court in *The Civil Rights Cases*, but is defined as "a trace, mark, or visible sign left by something (such as an ancient city or a condition or practice) vanished or lost."[79] Recognizing Congress's power as eradicating the vestiges of slavery potentially broadens Congress's power to include any products of the institution as well.[80] Tsesis also used similar language. He explained that the result of the Thirteenth Amendment debates was a commitment to end the vestiges of slavery.[81]

The *Jones* Court identified one badge or incident of slavery that Congress is authorized to prohibit under the Enabling Clause: racial discrimination in the purchase, sale, lease, or conveyance of property. The Supreme Court has also identified a few other badges or incidents of slavery in upholding Congressional legislation pursuant to the Enabling Clause.

71. *Id.* at 439.
72. *Id.*
73. *Id.* at 443.
74. *Id.* at 440.
75. *Id.* at 440–41.
76. *Id.* at 441.
77. *Id.*
78. *Id.*
79. *Vestige*, Merriam-Webster, https://www.merriam-webster.com/dictionary/vestige [https://perma.cc/KCR7-EKJZ].
80. Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. Pa. J. Const. L. 561, 592 (2012).
81. Tsesis, *supra* note 21, at 344.

E. *Judicial Approval of Legislation Under the Enabling Clause*

In 1971, Congress's authority under the Thirteenth Amendment was presented again before the Supreme Court. In *Griffin v. Breckenridge*, two White citizens drove their car in the path of a vehicle occupied by Black citizens and blocked them from further travel on a public road.[82] Mistaking them for Civil Rights activists, the White citizens forced the Black citizens out of their car and severely beat them while pointing guns at them and threatening to kill them if they tried to escape.[83] The victims filed suit under 42 U.S.C. § 1985(3), which prohibited two or more people from conspiring to interfere with a citizen's right to travel public highways.[84]

The Court's main inquiry was whether Congress had the authority to prohibit the type of private conspiracy outlined in the Act.[85] Justice Stewart, writing for the majority, explained that the Enabling Clause empowers Congress to impose liability on private action.[86] The Thirteenth Amendment marked a commitment by the nation that former slaves and their descendants will forever be free.[87] In order to keep that promise, the Court reasoned, the Thirteenth Amendment empowers Congress to rationally determine what the badges and incidents of slavery entail and legislate accordingly.[88]

According to the Court, the "right to pass freely from state to state" has long been recognized as one of the rights and privileges of national citizenship.[89] Therefore, that right, along with other rights of national citizenship, is within Congress's authority to protect by appropriate legislation.[90] Ultimately, the Court upheld 42 U.S.C. § 1985(3) as a valid exercise of Congress's authority.[91]

In 1976, the Supreme Court considered whether Congress had the authority to prohibit private schools from denying qualified Black children admission solely because of their race.[92] In *Runyon v. McCrary*, two Black children were denied acceptance to a private school pursuant to the school's policy of denying admission to Black students.[93] The children alleged that their rejection solely because of their race was a violation of 42 U.S.C. § 1981, which prohibits racial discrimination in the making and enforcement of private contracts.[94]

82. Griffin v. Breckenridge, 403 U.S. 88, 90 (1971).
83. *Id.* at 91.
84. *Id.* at 92.
85. *Id.* at 104.
86. *Id.* at 105.
87. *Id.*
88. *Id.*
89. *Id.* at 106.
90. *Id.*
91. *Id.* at 107.
92. Runyon v. McCrary, 427 U.S. 160, 163 (1976).
93. *Id.* at 164.
94. *Id.* at 164, 168.

Justice Stewart, writing for the majority, explained that the private schools' exclusion of Black students was a violation of 42 U.S.C. § 1981, which was adopted pursuant to Congress's authority under the Enabling Clause.[95] The educational services of the schools were advertised to the general public, and the students sought to enter into contractual relationships with the schools in exchange for such services.[96] It was evident that the students were denied access solely because of their race; therefore, the Court held, their exclusion was a violation of 42 U.S.C. § 1981.[97]

Ultimately, the Supreme Court has recognized racial discrimination in the purchase, lease, sale, or conveyance of property; interference with the right of interstate travel; and the private denial of education as badges or incidents of slavery subject to Congress's Thirteenth Amendment power. While these are a few badges or incidents that have been identified by Congress and the Supreme Court, there are other similar burdens that have yet to be addressed.

II. What are the Badges and Incidents of Slavery and Who Can Be Affected by Them?

As previously discussed, the phrase "badges and incidents of slavery" was first used in *The Civil Rights Cases* in 1883,[98] and Justice Bradley identified them as "disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities."[99] The phrase "and such like burdens and incapacities" suggests that the badges and incidents of slavery extend beyond the few he identified. But what are the other burdens and incapacities?

A. *Traditional Understanding of "Badges" and "Incidents" of Slavery*

Black's Law Dictionary recognizes the concept "badge of slavery" and defines it as "a legal disability suffered by a slave, such as the inability to vote or to own property."[100] While it recognizes the concept, this definition is fairly vague. Historically, badges of slavery referred to any physical or other indicator of a slave's inferior status.[101] Prior to the Civil War, the term was mostly used to signify the dark color of a Black slave's skin.[102] As a result, many of the same legal restrictions that applied to slaves also applied to free Black people because they also wore the "badge of slavery."[103] Some authors believed that slavery had undermined the dignity of labor and referred to labor as the badge of slavery,

95. *Id.* at 170, 172.
96. *Id.* at 172.
97. *Id.* at 173.
98. McAward, *supra* note 80, at 570.
99. The Civil Rights Cases, 109 U.S. 3 at 22.
100. *Badge of Slavery*, Black's Law Dictionary, (11th ed. 2019).
101. McAward, *supra* note 80, at 575.
102. *Id.* at 576.
103. *Id.*

and others referred to the psychological scars suffered by slaves as the badge of slavery.[104] However, it was most commonly used to refer to the color of a Black slave's skin.[105]

Immediately after the Civil War, use of the term dwindled, but it was sometimes used to refer to the efforts of southern governments and Whites' attempts to restrict the rights of Black citizens and subject them to inferior status.[106] The term became more common as a legal term in 1866 after Justices Swayne, Harlan, and Woods used the term to refer to the political, civil, and legal disabilities imposed on slaves, former slaves, and free Black people.[107]

Black's Law Dictionary does not define "incident of slavery" as a concept, but defines an "incident" as "[a] dependent, subordinate, or consequential part (of something else)."[108] Prior to the Civil War, courts generally understood the incidents of slavery to be the legal restrictions and burdens imposed on slaves due to their slave status.[109] According to Senator James Harlan, some of the incidents of slavery included prohibition of the conjugal relationship, revocation of parental rights, inability to hold property, loss of standing in court, lack of ability to testify in court, suppression of the freedom of speech and press, and lack of access to education.[110] Many of the incidents of slavery also applied to free Black people; however, this does not undermine the fact that the restrictions were necessarily applicable to slaves.[111]

Incidents of slavery have also been identified as "barriers to freedom in their work, family life, child rearing, career pursuits, mobility, and entertainment."[112] Ultimately, the incidents of slavery are the legal restrictions that necessarily accompanied the institution of slavery as well as any civil disabilities imposed on slaves based on their status as slaves.[113]

The traditional use of the terms "badges" and "incidents" of slavery provides a glimpse of what they encompass, and there is evidence that the terms may be synonymous. Slavery was critical to the social and class structures of the United States, and many of its badges and incidents have survived the elimination of the institution. During slavery and in the years shortly after its abolition, its products were fairly easy to identify. However, slavery has not existed in modern society for over a century, and, today, many of its products are implicit and difficult to

104. *Id.* at 577.
105. *Id.*
106. *Id.* at 577–78.
107. *Id.* at 578–79.
108. *Incident*, Black's Law Dictionary, (11th ed. 2019).
109. McAward, *supra* note 80, at 571.
110. Cong. Globe, 38th Cong., 1st Sess. 1439 (1864).
111. McAward, *supra* note 80, at 572.
112. Ryan S. Marion, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 Wm. & Mary Bill Rts. J. 213, 221 (2009).
113. McAward, *supra* note 80, at 575.

identify. Therefore, in order for Congress to effectively enact legislation to eliminate any remaining products of slavery, there must be a method of identifying slavery's badges and incidents in modern society.

B. *Modern Interpretations of the Badges and Incidents of Slavery*

There has never been a clear definition fully encompassing all of the badges and incidents of slavery. In the absence of congressional or judicial guidance on how to define the concept, legal scholars have made efforts to provide an interpretation.

Jennifer Mason McAward explains that legislation under the Enabling Clause targeting the badges and incidents of slavery is "prophylactic" in nature in that it allows Congress to be proactive in enacting laws aimed at conduct that does not explicitly violate Section 1 in order to deter future violations.[114] Her prophylactic view has limits which require a concrete definition.[115] Thus, she defines the badges and incidents of slavery as:

> Public or widespread private conduct that targets a group on the basis of race or previous condition of servitude, that mimics the law of slavery, and that poses a substantial risk that the members of the targeted population will be returned to de facto slavery or otherwise denied the ability to participate in the basic transactions of civil society.[116]

Her definition includes conduct that targets groups based on race generally as well as people or groups who have previously been held in slavery or involuntary servitude and continue to suffer the badges or incidents of their former status.[117] The latter entails Black people and other minority groups that have historically suffered conditions of involuntary servitude, but not Whites.[118] Regarding whose conduct Congress may target, McAward believes Congress may target all state actors but only those private actors so widespread or influential that their conduct poses the risk of returning the group or persons to de facto slavery or involuntary servitude.[119] Lastly, the conduct must have a historical link to slavery and have a profound likelihood of leading to future violations of Section 1.[120]

William M. Carter, Jr. proposes a slightly different approach to defining the badges and incidents of slavery. Carter proposes a two-prong approach that analyzes the connection between the plaintiff's class and the institution of chattel slavery and the connection between the alleged injury and the institution of chattel slavery.[121] He believes the examination must take into account the systemic effect of slavery on the descendants

114. *Id.* at 605.
115. *Id.* at 606.
116. *Id.*
117. *Id.* at 610–11.
118. *Id.* at 611.
119. *Id.* at 614.
120. *Id.* at 624.
121. Carter, *supra* note 17, at 1366.

of those enslaved and how the system shaped society; Congress's power may extend beyond African Americans in certain circumstances.[122] African Americans making claims such as housing discrimination, inequality in the administration of justice, and systematic denial of education opportunities satisfy his approach; however non-African American plaintiffs, given the weak correlation or lack of correlation between the class and the institution of slavery, have a more difficult burden to prove.[123] Under Carter's approach, a non-African American plaintiff has a heavy burden of proving that the injury or discrimination is closely tied to the system of slavery.[124]

C. *A New Approach to Defining the Badges and Incidents of Slavery*

I do not believe a concrete definition is necessary to outline Congress's power to govern the badges and incidents of slavery. As with any other concrete rule or law, a concrete definition will only be subject to more scrutiny and open for more interpretation. Based on my research of different scholars' attempts to define the badges and incidents of slavery, I propose a three-step analysis that provides guidance in determining what constitutes badges and incidents of slavery. This three-step analysis considers (1) the connection between the plaintiff's class and enslavement in the United States; (2) the relationship between the plaintiff's alleged injury and the legal restrictions imposed on slaves; and (3) the magnitude of the effect that the injury has on the plaintiff.

1. Connection Between the Plaintiff's Class and Enslavement

Although African Americans were the group Congress had in mind when drafting the Thirteenth Amendment, the Amendment's protections spread to all groups, and Justice Miller encouraged interpreters of the Amendment to look to the evil it was designed to remedy for guidance.[125] Therefore, an inquiry into the connection between the plaintiff's class and enslavement is necessary to encompass the evil the Amendment was designed to remedy while also providing protections to all groups.

Generally, as the connection between the plaintiff's class and enslavement becomes weaker, the burden of proving the connection between the injury and institution of slavery becomes heavier. This distinction may seem questionable considering *The Civil Rights Cases* explanation that the Thirteenth Amendment is not concerned with race, class, or color.[126] However, it would be inappropriate to ignore the historical connection between race and the institution of slavery as well as its lingering effects.

122. *Id.* at 1365–66.
123. *Id.* at 1367–69.
124. *Id.* at 1369.
125. Slaughter-House Cases, 83 U.S. 36, 72 (1872).
126. The Civil Rights Cases, 109 U.S. 3, 24 (1883).

2. Relationship Between the Plaintiff's Injury and the Legal Restrictions Imposed on Slaves

The key inquiry of the Court in *The Civil Rights Cases* when analyzing the constitutionality of the prohibitions of the Civil Rights Act of 1875 was, "what does it have to do with the question of slavery?"[127] In order to address this consideration, an inquiry into the connection between the plaintiff's injury and the institution of slavery is essential to the analysis. The Supreme Court explained that mere discriminations on the basis of race are not considered badges of slavery.[128] Therefore, this inquiry also serves to distinguish between racial discrimination and remnants of slavery.

Generally, a plaintiff whose injury resembles those suffered by slaves may have a plausible claim for the injury constituting a badge or incident of slavery. However, this inquiry requires a reference back to the plaintiff's class. Because African Americans, as a class, have a close connection to enslavement in the United States, as opposed to many other groups, it is more likely that African Americans suffering injuries similar to those suffered by slaves are actually remnants of slavery. Thus, an African American plaintiff must show that their harm or injury has *some* connection to the institution of slavery. However, a plaintiff whose class does not have a historical connection to enslavement in this country must show that their harm or injury has a *substantial* connection to the institution of slavery. This burden requires more than a showing that an injury is simply similar to one suffered by slaves, but that the injury is closely related to those suffered by slaves.

Slavery, as an institution, depended on the social and class distinctions between the enslaved and the free. According to the Supreme Court in *Dred Scott v. Sanford*, Negroes were not in the minds of the framers of the Constitution when outlining the privileges and immunities guaranteed to citizens.[129] Rather, they were considered property at the behest of their master.[130] This distinction was essential to the preservation of slavery. Therefore, the plaintiff's access to those fundamental rights and privileges guaranteed to citizens should be considered to determine the connection between the alleged injury and the institution of slavery.

3. Magnitude of the Effect of the Injury on the Plaintiff

The Court in *The Civil Rights Cases* stressed the idea that the Thirteenth Amendment does not empower Congress to adjust the social rights of all races, but to ensure the fundamental rights that constitute the essence of citizenship and comprise the fundamental distinction between freedom and slavery.[131] An inquiry into the manner in which the injury

127. *Id.* at 21.
128. *Id.* at 23–24.
129. Dred Scott v. Sandford, 60 U.S. 393, 411–12 (1857).
130. *Id*. at 411.
131. The Civil Rights Cases, 109 U.S. 3, 22 (1883).

affects the plaintiff captures this contrast. The purpose of slave codes was to deprive slaves of fundamental rights of citizenship in order to create and maintain a basic distinction between slaves and citizens.[132] Therefore, the alleged harm must deprive the plaintiff of some fundamental right guaranteed to all citizens and present a risk that the plaintiff will be reduced to second-class citizenship or subject to de facto slavery.

Given that slavery has been abolished for over a century, critics may argue that it is difficult to connect an injury and its effects today to an injury and its effects during the height of slavery. However, the factors of the analysis do not require a showing that an injury or effect is identical to those experienced by slaves. Rather, it allows for time changes and evolutions in social and legal standards and is intended to capture any similarities or byproducts of the institution. For example, Justice Bradley acknowledged suffering severer punishments than White persons for the same crimes as an incident of slavery.[133] A look at the recent demographics of the criminal justice system shows how the analysis can be satisfied today.

4. The Criminal Justice System's Disproportionate Effect on African Americans

I will now discuss my three-prong analysis as it applies to Black people impacted by the criminal justice system. The history of African slavery in the United States gives African Americans, as a class, a strong connection to enslavement in the United States. Therefore, the first prong of the analysis is satisfied. Next, an African American plaintiff's strong connection to enslavement requires them to show that their alleged injury has some connection to slavery. The connection between suffering severer punishments than free persons for the same crimes and the disproportionate effect of the criminal justice system on African Americans provides an example of such a connection. It also provides an example of a harm of great magnitude that deprives citizens of fundamental rights and reduced them to second-class citizens.

The criminal justice system has a significantly heavier impact on African Americans, and they suffer much harsher effects of a criminal record than other groups.[134] In 2010, 33 percent of African American

132. *See* Alan K. Lamm, *Slave Codes*, NCPedia (Jan. 1, 2006), https://www.ncpedia.org/slave-codes [https://perma.cc/XE83-DARU]. Lamm describes the origin of slave codes and how they made slavery a lifelong condition and prohibited slaves from voting, owning property, testifying in court against Whites, gathering in large numbers, traveling without permission, marrying Whites, and learning how to read and write. Lamm also explains that following the Civil War, slave codes were replaced by the Black Codes, which was a modified attempt to control the newly freed African American population. After the Black Codes were outlawed by the Fourteenth and Fifteenth Amendments, slave codes continued to live on through Jim Crow laws and other forms of discrimination. *Id*.

133. The Civil Rights Cases, 109 U.S. at 22.

134. Alexander, *supra* note 1, at 148.

men had a felony conviction.[135] In that same year, 2,207 per 100,000 African Americans were incarcerated while only 380 per 100,000 Caucasian Americans were incarcerated.[136] In 2016, almost 10 percent of voting-age African Americans were unable to vote, which is four times the rate of any other group.[137] In 2017, African Americans represented 12 percent of the total United States population but 33 percent of the prison population, while Caucasian Americans represented 64 percent of the total population but 30 percent of the prison population.[138] It is interesting that the total Caucasian American population is *more than five times* that of the total African American population, yet African Americans have a larger prison population. In fact, African American adults are six times more likely to be incarcerated than Caucasian Americans.[139]

Not only are African Americans incarcerated at almost six times the rate of Caucasian Americans, but in 2015, more than 25 percent of people arrested for drug crimes were African American despite rates of drug use among races being relatively similar.[140] In 2016, about half of those serving life sentences were African American.[141] In the same year, African American youth made up 35 percent of juvenile arrests, but 15 percent of all U.S. children.[142]

135. *Race & Justice News: One Third of Black Men Have Felony Convictions*, Sent'g Project (Oct. 10, 2017), https://www.sentencingproject.org/news/5593 [https://perma.cc/ZC2T-86VZ] (describing the significant increase in the number of Black men with felony convictions over the last thirty years).
136. Wendy Sawyer, *United States Incarceration Rates by Race and Ethnicity, 2010*, Prison Policy Initiative (2020), https://www.prisonpolicy.org/graphs/raceinc.html [https;//perma.cc/92WV-CV27] (showing the number of people incarcerated per 100,000 by race and ethnicity).
137. Christopher Uggen et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, Sent'g Project 3 (Oct. 6, 2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016 [https://perma.cc/3UX9-FHUV] (providing a statistical overview of felony disenfranchisement across the United States and a state-by-state breakdown of felony disenfranchisement laws).
138. John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison Is Shrinking*, Pew Research Center (Apr. 30, 2019), https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison [https://perma.cc/ZT6K-P62C] (explaining that although the racial and ethnic makeup of U.S. prisons are unrepresentative of the demographics of the country as a whole, over the last decade, the gap between the number of Black and White prisoners has decreased).
139. *Report of The Sentencing Project to the United Nations Special Rapporteur of Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance*, Sent'g Project 1 (Mar. 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities [https://perma.cc/G76H-7BZQ] (explaining the racial disparity in the United States criminal justice system, the largest in the world).
140. *Id.* at 3.
141. *Id.* at 7.
142. *Id.* at 2.

The disproportionate impact of the criminal justice system on African Americans reduces many African Americans to second-class citizens and poses a great risk that they will be subject to de facto slavery.[143] It does so by placing restrictions on citizens' access to fundamental rights, such as the right to vote, education, and jury service, and presenting a high likelihood of incarceration (this will be explored further in Part IV).[144] Once incarcerated, a citizen is commonly subject to involuntary servitude and suffers a number of collateral consequences upon release that ultimately presents a significant risk of being reincarcerated and subject or returned to a condition of involuntary servitude.

The disproportionate impact of the criminal justice system on African Americans is a byproduct of slavery. Slaves suffered severer punishments for the same crimes as White citizens, and now African Americans are incarcerated at much higher rates than White citizens with no evidence of higher crime rates. Hence, the disproportionate impact of the criminal justice system on African Americans has a connection to the institution of slavery and satisfies each factor of the analysis. The history of involuntary servitude in the penal system and its evolution provides a deeper understanding of its connection to the institution of slavery as well as its resulting badges and incidents.

III. The Transition from Plantation to Prison

Section 1 of the Thirteenth Amendment abolished slavery and involuntary servitude throughout the United States *except as punishment for crime whereof the party shall have been duly convicted*.[145] Thus, there is only one exception to the absolute ban of involuntary servitude in the United States: punishment for crime. This exception, come to be known as the Punishment Clause, has been used to subject incarcerated citizens to involuntary servitude, with little to no pay, for the benefit of private entities. Given the history of slavery in the United States, and punishment for a crime being the *only* exception to the absolute prohibition of slavery, it is no surprise that the United States currently has the highest incarceration rate in the world.[146] In fact, at the end of 2015, over 6.7 million individuals were under some form of correctional control, such as parole or probation, and at the end of 2018, there were over 2.1 million prisoners in the United States.[147] While prison numbers are high today, this was not the case in the pre-Civil War era.

143. Alexander, *supra* note 1, at 139.
144. *Id.* at 139; *see also* Mariel Alper et al., U.S. Dep't Just., NJC 250975, 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005–2014) 1 (2018) (examining the patterns of formerly incarcerated citizens and their involvement in criminal activity following their release from prison).
145. U.S. Const. amend. XIII, § 1.
146. Roy Walmsley, *World Prison Population List, World Prison Brief*, Inst. Crim. Pol'y Rsch. 2 (2018) (compiling statistics of the number of prisoners held in 223 different countries).
147. *Id.*; *See also* Sent'g Project, *supra* note 139, at 1.

During the Colonial period, confinement was generally not considered a form of criminal punishment.[148] Rather than imprisonment, citizens convicted of crimes were sentenced to various forms of corporal punishment including the stocks, pillory, whipping, branding, ducking-stool, and, for more serious crimes, death.[149] In the late seventeenth century, William Penn, founder of the Pennsylvania colony, introduced the idea of confinement as punishment and promoted the creation of "houses of correction."[150] His efforts resulted in the Great Law of 1682 requiring every county in Pennsylvania to have institutions of confinement and labor for citizens convicted of crimes.[151] In 1790, Pennsylvania established the first state-owned and operated "penitentiary" known as the Walnut Street Prison.[152] This new method of confinement received much admiration throughout the United States, and, eventually, a state penitentiary system was adopted in every state.[153]

The nation's first prison boom came immediately after the abolition of slavery and the passage of the Thirteenth Amendment.[154] Following the abolition of slavery, Southern states suffered from shattered economies.[155] In an effort to revitalize their economies, states introduced a new form of involuntary servitude, known as convict leasing, which allowed prisons to lease inmates out to plantation owners and other private entities for labor.[156] In order to ensure the success of the system, Southern states passed laws, infamously known as the Black Codes, that punished frivolous "crimes", such as homelessness and unemployment, and enforced them solely against African Americans.[157] For example, in 1865, Mississippi was the first state to enact such laws which criminalized "common night-walkers," "persons who neglect their calling or employment," and those who "do not provide for the support of themselves or their families," along with many other simple activities.[158]

148. Marion, *supra* note 112, at 215–16.
149. Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 J. Am. Inst. Crim. L. & Criminology 35, 39 (May 1921 to February 1922). Barnes explains the origin of the prison system in America and the methods of criminal punishment used prior to the adoption of confinement as punishment. Barnes also discusses the emergence of the first prison in America and how it evolved into the labor efficient system that is currently used. *Id.*
150. Marion, *supra* note 112, at 216–17.
151. *Id.*
152. *Id.* at 217.
153. *Id.* at 217–18.
154. Ruth Delaney et al., *American History, Race, and Prison*, Vera Inst. (Sept. 2018), https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison [https://perma.cc/3XCT-BSJ3].
155. Marion, *supra* note 112, at 224.
156. *Id.* at 224–25.
157. *Id.* at 225.
158. *Mississippi Black Codes (1865)*, http://web.mit.edu/21h.102/www/Primary%20source%20collections/Reconstruction/Black%20codes.htm [https://perma.cc/3YKB-5KJZ] (showing a few Mississippi statutes, known as the Black Codes, which were specifically directed towards African Americans and limited their

Convict leasing and Black Codes resulted in a drastic increase in the prison population and a substantial number of African Americans being criminalized, leased out to White landowners, and subjected to a condition similar to what they suffered under slavery.[159] Eventually, the Black Codes were outlawed by the passage of the Civil Rights Act of 1866, which prohibited states from enforcing laws discriminating on the basis of race.[160] Although the Civil Rights Act of 1866 invalidated and prohibited discriminatory laws, it had no effect on the convict leasing system.[161]

Along with the wave of prisoners following the abolition of slavery came a new wave of laws restricting the rights of citizens with criminal convictions. During the institution of slavery, most states adopted laws that significantly diminished the rights of slaves in order to ease the growing fear of rebellion among slaveholders.[162] These laws, known as slave codes, imposed various restrictions on slaves that removed their right to own property and sit on a jury, imposed extremely harsh punishments for crimes against White persons, and made it illegal for them to receive an education.[163] However, only a few states—mostly Southern states—enacted laws restricting the civil rights of citizens convicted of crimes.[164] Of the states that had laws restricting the rights of citizens convicted of crimes, these laws generally only applied to citizens convicted crimes of "infamy," which referred to the infamy of the punishment rather than the infamy of the crime.[165] After the Civil War, nearly every state adopted disenfranchisement laws that applied to a wide variety of crimes, including less serious crimes such as petty theft and misdemeanor larceny.[166]

In 1871, the Virginia Supreme Court went as far as characterizing an incarcerated citizen as the "slave of the state."[167] In *Ruffin v. Commonwealth*, a group of prisoners were leased out to work on the Chesapeake and Ohio Railroad.[168] One of the prisoners, while working in Bath County, attempted to escape and ultimately killed one of the supervising

civil rights, imposed apprentice laws, vagrant laws, and other penal laws).

159. Marion, *supra* note 112, at 225.

160. *Black Codes: Cross References*, Law Library - American Law and Legal Information, https://law.jrank.org/pages/4769/Black-Codes.html [https://perma.cc/3AUZ-ZSTE].

161. *See* Marion, *supra* note 112, at 228.

162. *6f. "Slave Codes"*, U.S. History: Pre-Columbian to the New Millennium, https://www.ushistory.org/us/6f.asp [https://perma.cc/KD6B-XHBW].

163. *Id.*

164. Pippa Holloway, *A History of Stolen Citizenship*, 12 Origins: Current Events in Hist. Persp. (June 2019), https://origins.osu.edu/article/voting-crime-and-race-history-stolen-citizenship-disenfranchisement-felony [https://perma.cc/KD6B-XHBW].

165. *Id.*

166. *Id.*

167. Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

168. *Id.* at 791–92.

guards.[169] The prisoner was tried and convicted in Richmond, Virginia—an independent city not located in Bath County—by a jury also selected from Richmond.[170] The prisoner alleged that the Court erred by trying him in Richmond and that he should have been tried in Bath County or, at least, the jury should have been selected from Bath County.[171] In support of his argument, he explained that the Bill of Rights guaranteed him the right to a speedy trial by an impartial jury in the State and district where the crime was committed; thus, Virginia's law giving the city of Richmond jurisdiction over offenses committed by prisoners was repugnant to the Sixth Amendment.[172]

The Court responded to his argument by saying that while a citizen is incarcerated, he is a slave of the State and, therefore, "civilly dead."[173] Thus, as a consequence for the crime committed, a prisoner has forfeited his liberty as well as all personal rights except those granted by state law.[174] The Court in *Ruffin* explained that the Bill of Rights only applies to freemen; not prisoners and those civilly dead.[175] These "slaves" were only subject to the laws prescribed by the state to govern them; therefore, Virginia's law requiring all prisoners be tried in Richmond, rather than in the district where the crime was committed, was upheld.[176] This remained the prevailing view for decades.

In the early twentieth century, amid concern from White paid laborers that they were losing employment opportunities to the cheap labor provided by mostly African American inmates, the convict leasing system began to erode.[177] By the early 1940s, there was virtually no private involvement in the state prison industry.[178] In the late 1950s, Southern governors and law enforcement officials began promoting opposition to the Civil Rights Movement by encouraging the restoration of "law and order."[179] In the 1968 presidential election, Richard Nixon made "law and order" the central theme of his campaign.[180] During his administration, President Nixon introduced the idea of a "war on drugs," and in 1982, President Ronald Reagan made the "War on Drugs" official.[181] This "war" resulted in a second prison boom, causing a 115 percent increase in the prison population by the end of the decade, the majority of whom were African American or Latino.[182]

169. *Id.* at 792.
170. *Id.*
171. *Id.*
172. *Id.* at 792–93, *see also* U.S. CONST. amend. VI.
173. Ruffin, 62 Va. at 796.
174. *Id.*
175. *Id.*
176. *Id.* at 798–99.
177. Marion, *supra* note 112, at 229.
178. *Id.*
179. *See* Alexander, *supra* note 1, at 40.
180. *Id.* at 46.
181. *Id.* at 47, 49.
182. Marion, *supra* note 112, at 232; *See also* Alexander, *supra* note 1, at 59.

This drastic increase in the prison population led to the rebirth of private prison labor. In 1983, two Tennessee politicians founded the Corrections Corporation of America, which grew the private prison market into a billion-dollar industry.[183] At the same time, the number and scope of laws restricting the rights of citizens with criminal convictions grew substantially to include bans from public and government housing, employment discrimination, and ineligibility for public benefits.[184] By this time, incarcerated citizens were no longer considered civilly dead, but were only permitted to "retain those constitutional rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[185] Although no longer considered civilly dead, citizens with criminal convictions were still assigned a status inferior to that of other citizens and suffered major restrictions on basic civil rights.

Ultimately, the abolition of slavery and the Punishment Clause of the Thirteenth Amendment prompted the transition of involuntary servitude from plantations to prisons. The Punishment Clause has been used to grow prison labor into an industry just as lucrative as chattel slavery. The same restrictions that were used to keep slaves from having basic rights of citizenship were also shifted to citizens convicted of crimes after emancipation. These collateral consequences are some of the badges and incidents of slavery that deny citizens basic privileges and immunities of civil society and pose a substantial risk of being returned to involuntary servitude.

IV. Congressional Authorization of Slavery's Badges and Incidents on Citizens With Criminal Convictions

Today, citizens released from prison suffer a number of restrictions that reduce them to second-class citizenship and inhibit their reintroduction to society.[186] Citizens can be denied public housing and welfare benefits.[187] States are permitted to allow public housing agencies to deny housing to individuals with criminal convictions.[188] Citizens can also be

183. Marion, *supra* note 112, at 232.

184. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. Rev. 457, 489–90 (2010).

185. Turner v. Safley, 482 U.S. 78, 95 (1987), *superseded by statute*, Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-1 (2021).

186. *See* Jeremy Travis, Invisible Punishment: The Collateral Consequences of Mass Imprisonment 15–16 (Marc Mauer & Meda Chesney-Lind eds., 2002). Travis discusses the collateral consequences of a criminal conviction, including the revocation of the rights and privileges of citizenship and legal residency in the United States. *Id.* Travis explains that these consequences are "invisible" because they are imposed outside of the judicial system and are not considered by sentencing judges. *Id.* at 16. This has led to minimal discussion and debate regarding their imposition. *Id.*; *See also* Alexander, *supra* note 1, at 141–42.

187. Travis, *supra* note 186, at 18.

188. *Id.* at 23–24.

denied the ability to obtain professional licenses.[189] Currently, thirty-two states allow licensing agencies to deny applicants based on an arrest that did not lead to a criminal conviction, and sixteen states allow agencies to deny licenses without considering whether the applicant has been rehabilitated.[190] In many jurisdictions, people with prior criminal convictions receive harsher punishments for subsequent convictions.[191] Other restrictions include loss of parental rights and the ability to obtain an education, and immigrants face the risk of deportation.[192] Even citizens with minor criminal convictions that do not get sentenced to prison suffer many of these same consequences.[193] The Supreme Court has long held that the Enabling Clause of the Thirteenth Amendment empowers Congress to prohibit all badges and incidents of slavery; however, they have not used this power to do so.

Rather, Congress has done the opposite and enacted numerous laws that deny citizens with criminal convictions basic fundamental rights. Congress enacted two statutes that significantly increased the number crimes that would subject an immigrant to deportation.[194] The Immigration Reform and Control Act of 1986 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 resulted in deportations of immigrants with criminal convictions rising from 7,338 in 1989 to 56,011 in 1998.[195] In 2020, over 170,000 immigrants with criminal convictions or pending criminal charges were deported.[196]

In 1996, Congress enacted the Welfare Reform Law that allows states to permanently ban citizens with drug-related felony convictions from receiving federally funded public assistance and food stamps.[197] The Adoption and Safe Families Act of 1997 revokes the right of citizens with certain criminal convictions to adopt children.[198] The Higher Education Act of 1998 prohibits citizens convicted of drug-related offenses from receiving student loans.[199] Citizens convicted of crimes may even lose their right to vote, serve on a jury, or hold office.[200] Alabama lists

189. Nick Sibilla, *Barred From Working: A Nationwide Study of Occupational Licensing Barriers for Ex-Offenders*, Inst. for Just. (2020), https://ij.org/report/barred-from-working [https://perma.cc/E5TM-87DG].
190. *See Id*.
191. Natapoff, *supra* note 13, at 1316–17.
192. Travis, *supra* note 186, at 18.
193. Natapoff, *supra* note 13, at 1316.
194. Travis, *supra* note 186, at 23.
195. *Id.*
196. *ICE Statistics*, U.S. Immigr. and Customs Enf't (Jan. 11, 2021), https://www.ice.gov/remove/statistics [https://perma.cc/946T-8RLH].
197. Travis, *supra* note 186, at 23.
198. *Id.* at 24.
199. *Id.*
200. Gabriel J. Chin, *Collateral Consequences of Criminal Conviction*, 18 U.C. Davis J. Criminology, Crim. Just., L. & Soc'y 1, 2 (2017). Chin explains that the collateral consequences of a criminal conviction present a harm just as significant as imprisonment itself. Chin also explains that some of the collateral consequences of a criminal conviction include loss of civil rights, public benefits, and ineligibility

dozens of felony convictions that permanently bar citizens from voting,[201] and Arkansas requires that all felony convictions be pardoned or discharged before voting rights may be restored.[202] The federal government and twenty-seven states permanently ban convicted felons from jury service.[203]

Not only are these collateral consequences imposed by the state, but they extend to the private sector as well. Most states permit public and private employers as well as licensing agencies to reject applicants based on a criminal record or simply an arrest with no conviction.[204] Most job applications ask whether applicants have been convicted of a crime, and almost every state permits private employers to discriminate based on criminal history and even arrests that do not result in conviction.[205] At least 80 percent of private employers perform background checks on applicants, and an applicant who refuses to submit to a background check may have their application rejected.[206] Many employers are prohibited by the state from hiring applicants with criminal convictions, even if the offense is unrelated to the job.[207]

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for employment, licenses and permits, and all fifty states impose collateral consequences based on convictions from any jurisdiction. *Id.*

201. Ala. Code § 17-3-30.1 (1975) (providing a list of felonies that disqualify citizens from voting. Among the list are crimes such as assault, endangering the water supply, bigamy, incest, burglary, theft, robbery, and more).

202. *Voter Registration Information*, Ark. Sec'y State, http://www.sos.arkansas.gov/elections/Pages/voterRegistration.aspx [https://perma.cc/YY8Z-8M6B].

203. James M. Binnall, *The Exclusion of Convicted Felons from Jury Service: What Do We Know?*, 31 Ct. Manager 26, https://www.ncsc-jurystudies.org/__data/assets/pdf_file/0023/6836/jurynews31-1_convictedfelons.pdf [https://perma.cc/3QJR-E33K]. Binnall discusses the exclusion of convicted felons from jury service. Binnall describes two types of exclusion statutes: lifetime bans and temporal bans. Binnall provides two rationales for jury-exclusion statutes. The first, known as the character rationale assumes that convicted felons do not have the moral capacity to serve on a jury. The second, known as the inherent-bias rationale, assumes that convicted felons will harbor biases toward those on trial as a result of their experiences with the criminal justice system. Binnall characterizes jury exclusion as a vestige of the notion of civil death. *Id.*

204. Colorado Commission on Criminal & Juvenile Justice, *Standards for Hiring People with Criminal Records*, https://cdpsdocs.state.co.us/ccjj/Meetings/2008/2008-07-11_LACStandardsForHiring.pdf [https://perma.cc/83KQ-Z8WY] (discussing the obstacles citizens with criminal convictions face in obtaining employment, and that many employers are permitted to provide broad exclusions of applicants with criminal convictions, resulting in many qualified and rehabilitated citizens not being able achieve employment).

205. Alexander, *supra* note 1, at 149.

206. Judy Whiting & Anita Marton, *Legal Rights of People with Criminal Conviction Histories*, Legal Action Ctr. 1, 16–17 (2009), http://www.recoverytexas.org/wp-content/uploads/2013/12/Know-your-rights-Legal-rights-of-people-with-criminal-conviction-histories.pdf [https://perma.cc/4GXE-3954]; *see also Background Checks: What Job Applicants and Employees Should Know*, U.S. Equal Emp't Opp'y Comm'n (Mar. 11, 2020), https://www.eeoc.gov/eeoc/publications/background_checks_employees.cfm [https://perma.cc/TYG4-9SBU].

207. Alexander, *supra* note 1, at 149.

The Supreme Court has acknowledged the fact that even minor criminal convictions come with substantial collateral consequences. In *Lawrence v. Texas*, the Supreme Court considered the constitutionality of a Texas law that made same-sex sexual intercourse a minor misdemeanor.[208] The petitioners were convicted under the statute and fined $200 along with court costs.[209] Justice Kennedy, writing for the majority, explained that although a misdemeanor is minor, the stigma that follows is not.[210] Those convicted will have a criminal history that carries other collateral consequences that inevitably follow a criminal conviction, such as employment discrimination.[211] After considering many additional factors, the Court declared the law unconstitutional.[212]

The criminal justice system essentially operates in a cycle that results in those that fall victim to the system returning back. After an individual is arrested and indicted, prosecutors commonly engage in a process known as plea bargaining, which allows defendants to plead guilty to lesser offenses in exchange for the prosecutor recommending a more lenient sentence.[213] This incentivizes defendants to plead guilty rather than go to trial and, if convicted, face the possibility of a much longer sentence. According to the Supreme Court, plea bargaining "is an essential component of the administration of justice" and should be encouraged because it allows prosecutors—frequently having heavy caseloads—to get through cases quicker and easier by settling before going to trial.[214] As a result, 90 percent of federal criminal defendants plead guilty and only about 2 percent go to trial.[215] These deals are often presented in an irresistible manner, and defendants are often not informed of the extent of the collateral consequences that come with a criminal record.[216]

Upon returning to society, citizens with criminal convictions often struggle to find jobs, end up homeless, or become forced to return to the same environment in which they lived prior to being incarcerated but with fewer rights and privileges.[217] This results in extremely high

208. Lawrence v. Texas, 539 U.S. 558, 562 (2003).
209. *Id.* at 563.
210. *Id.* at 575.
211. *Id.* at 575–76.
212. *Id.* at 578–79.
213. *How Courts Work*, Am. Bar Ass'n, (Sep. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining [https://perma.cc/H2BX-A4HX].
214. Santobello v. New York, 404 U.S. 257, 260 (1971).
215. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, Pew Rsch. Ctr. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty [https://perma.cc/2RT6-RJDW]. It is extremely rare for criminal cases to go to trial. While 90 percent of federal criminal cases plead guilty and 2 percent go to trial, the remaining 8 percent are dismissed. It is difficult to find statistics about trial rates in state courts, but trial rates in state court are generally low as well. *Id.*
216. Alexander, *supra* note 1, at 142.
217. *Id.* at 144–51.

recidivism rates and creates a strong likelihood of returning to prison. In fact, 83 percent of prisoners released in 2005 across thirty states were arrested at least once within nine years after their release.[218]

Ultimately, citizens with criminal convictions suffer a number of collateral consequences that make it difficult for them to become productive members of society. Many consequences, including losing the right to sit on a jury, losing the right to housing benefits, being denied student loans, and receiving harsher penalties for subsequent offenses are very similar to those restrictions imposed by the slave codes. These restrictions on basic fundamental rights relegate citizens with criminal convictions to second-class citizenship and pose a substantial risk of re-offending or returning to a condition of involuntary servitude.

V. Solutions

A. *Enact Legislation to Remove All Collateral Consequences of Criminal Convictions*

Generally, collateral consequences of a criminal conviction are not considered criminal sanctions by the courts.[219] Rather, they are considered regulatory.[220] This characterization has resulted in little judicial discussion on the subject and the constant introduction of new consequences.[221] The U.S. Supreme Court briefly discussed collateral consequences in the context of deportation in *Padilla v. Kentucky*.[222] Justice Stevens, writing for the majority, stated that although the "drastic measure" of deportation is not necessarily a criminal sanction, it is virtually inevitable for a substantial number of immigrants convicted of crimes.[223] Regulatory restrictions imposed on citizens with criminal convictions resembles the purpose of the burdens imposed on slaves. It not only ostracizes citizens from society but perpetuates the idea that citizens with criminal convictions are inferior and need to be regulated by those who are superior. Citizens with criminal convictions should not suffer any restrictions based on their criminal history. An individual convicted of a crime is still a citizen of the United States and entitled to the same privileges and immunities as those citizens with no criminal history. Imposing further restrictions on these citizens imposes a stigma upon them and makes it more likely for them to commit future crimes.

There are certain circumstances where it may be appropriate to take certain criminal convictions into consideration. For example, there are times when it may be relevant to consider certain criminal convictions in employment; however, this is only when the conviction is directly related to the occupation or privilege sought. An embezzlement conviction

218. Alper et al., *supra* note 144, at 1.
219. Chin, *supra* note 200, at 2.
220. *Id.*
221. *Id.*
222. *See* Padilla v. Kentucky, 559 U.S. 356 (2010).
223. *Id*. at 360, 365.

should probably be taken into consideration if a citizen is applying to work at a bank because this conviction directly speaks to the applicant's fitness for the particular position. However, discrimination based on criminal convictions generally should be prohibited.

Some Congressional legislation permits states to opt out of certain provisions or narrow the restrictions they impose. For example, the Welfare Reform Law of 1996 allows states to opt out of the federally sanctioned lifetime ban on federally-funded public assistance for citizens with felony drug convictions, and some states have elected to do so.[224] The problem, however, is that while states may opt out of this lifetime ban, it is still permitted at the federal level and many states have not elected to do so.[225] I propose that, rather than simply giving states the discretion to opt out of certain provisions, Congress should prohibit these sanctions at the federal level.

Another example is the Anti-Drug Abuse Act of 1988 that required public housing agencies and private landlords receiving federal funding to evict tenants if any member of the household engaged in criminal activity on or near the premises.[226] Despite discrimination in the purchase, lease, and conveyance of real property being identified by the U.S. Supreme Court as a badge or incident of slavery, Congress has been reluctant to prohibit this type of discrimination towards citizens with criminal convictions.[227] Rather, Congress passed the Second Chance Act of 2007 that allowed states to opt out of the requirement that public housing agencies and owners evict tenants after just one conviction.[228] Congress should utilize its authority under the Thirteenth Amendment to prohibit public housing agencies and private landlords from denying citizens with criminal convictions access to housing at the federal level rather than simply giving states the discretion to opt out.

There are a number of badges and incidents of slavery that have not yet been identified by Congress or the courts. The *Slaughterhouse* Court encouraged interpreters of the Thirteenth Amendment to look to

224. Travis, *supra* note 186, at 23; *See* Marc Mauer and Virginia McCalmont, *Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits*, Sent'g Project (November 14, 2013), https://www.sentencingproject.org/publications/a-lifetime-of-punishment-the-impact-of-the-felony-drug-ban-on-welfare-benefits [https://perma.cc/PFA2-5RV7] (as of 2016, only twelve states impose no ban on cash assistance for citizens with felony drug convictions, and sixteen states impose no ban on food stamps for citizens with felony drug convictions).

225. Mauer, *supra* note 224 (explaining that as of 2016, thirty-eight states impose at least some ban on cash assistance for citizens with felony drug convictions ranging from partial bans to full bans and, additionally, thirty-four states have at least some ban on food stamps for people with felony drug convictions ranging from partial bans to full bans).

226. *Public Housing Bans*, Nat'l Low Income Housing Coal. (Feb 26, 2020) https://nlihc.org/resource/public-housing-bans [https://perma.cc/5KBU-L8XK].

227. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

228. Nat'l Low Income Hous. Coal., *supra* note 226.

the amendments that follow for guidance.[229] The Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment can be a useful guide in determining whether a harm has a sufficient connection to slavery in order to qualify as one of its badges or incidents.

B. *Using the Fourteenth Amendment as a Tool*

Prior to the adoption of the Fourteenth Amendment, Black people were not considered citizens of the United States.[230] In *Dred Scott v. Sanford*, a slave and his family, residing in Missouri, filed an action to declare freedom after his owner took him to Illinois, a state in which slavery was prohibited pursuant to an act of Congress.[231] In support, Scott argued that the United States' system of federalism permits states to confer citizenship upon whomever it pleases within its own boundaries.[232] Therefore, he alleged that when his owner took him to Illinois, he was made free, and was no longer a slave upon his return to Missouri.[233]

Rather than considering whether Scott was entitled to freedom, the Court inquired whether a Black man was entitled to all the rights, privileges, and immunities guaranteed to citizens by the United States Constitution, particularly, the privilege of suing in court.[234] The Court explained that Black people were not "citizens" of the United States under the Constitution and, therefore, not entitled to the privileges and immunities guaranteed by it.[235] In fact, Black people were not even in the minds of the framers of the Constitution when outlining the privileges and immunities guaranteed to citizens; rather, they were considered property at the behest of their master.[236] Therefore, the Court had no jurisdiction to hear the case.[237]

When the Thirteenth Amendment was enacted, it not only abolished slavery but established universal freedom.[238] This universal freedom was intended to come with the privileges and immunities guaranteed by the Constitution, otherwise African Americans would simply be left with "a mere paper guarantee."[239] Nevertheless, immediately following the abolition of slavery, states began passing laws that imposed oppressive burdens and restrictions on African Americans and heavily restricted the freedom they recently attainted.[240] To remedy these burdens and ensure African Americans the basic rights that they were previously

229. Slaughter-House Cases, 83 U.S. 36, 72 (1872).
230. *See* Dred Scott v. Sandford, 60 U.S. 393 (1857).
231. *Id.* at 431–32.
232. *Id.* at 405.
233. *Id.* at 452.
234. *Id.* at 403.
235. *Id.* at 453.
236. *Id.* at 411–12.
237. *Id.* at 454.
238. The Civil Rights Cases, 109 U.S. 3, 28 (1883).
239. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968).
240. Slaughter-House Cases, 83 U.S. 36, 70 (1872).

denied, Congress passed the Fourteenth Amendment.[241] The Fourteenth Amendment overturned *Dred Scott*, gave African Americans citizenship, and prohibited states from making laws to interfere with the privileges and immunities of citizens of the United States or deny them equal protection of the laws.[242] Thus, considering whether an injury falls under those rights guaranteed by the Privileges and Immunities Clause or the Equal Protection Clause of the Fourteenth Amendment can be a useful guide in determining whether it constitutes a fundamental right.

It is important to stress the fact that while the Fourteenth Amendment can be a guide in determining the connection of the harm to the institution of slavery, it is not dispositive of whether a harm suffered constitutes a badge or incident of slavery. The Thirteenth and Fourteenth Amendments have a number of differences. For example, the Thirteenth Amendment abolishes slavery and its incidents, while the Fourteenth Amendment prohibits states from enacting laws that abridge the privileges and immunities of citizens as well as denying citizens the equal protection of the laws.[243] Furthermore, the Thirteenth Amendment applies to state and private activity, and legislation under the Amendment may be direct and primary.[244] In other words, the Thirteenth Amendment permits Congress to be proactive and enact legislation to prevent future violations of fundamental rights. On the other hand, the Fourteenth Amendment is reactive, only allowing Congress to serve as a remedy and invalidate state laws that violate fundamental rights.[245]

In consideration of these differences and the Congressional legislation that permits states to discriminate against citizens with criminal convictions, when using the Fourteenth Amendment as a tool the appropriate inquiry for legislation enacted by Congress should be: absent congressional legislation, whether such state action constitutes a violation of those rights guaranteed by the Fourteenth Amendment's Privileges and Immunities or Equal Protection Clauses. When considering private action, the proper inquiry is: if a state adopted such legislation, whether that state action would constitute a violation of those rights guaranteed by the Fourteenth Amendment's Privileges and Immunities or Equal Protection Clauses.

Conclusion

Citizens with criminal histories suffer many collateral consequences that are incidental to their convictions. Although the institution of slavery has long been abolished, involuntary servitude still remains due to the Punishment Clause. The modern criminal suffers similar restrictions upon release as those once imposed on slaves during the institution

241. *Id.*
242. U.S. Const. amend. XIV, § 1.
243. The Civil Rights Cases, 109 U.S. at 30.
244. *Id.*
245. *Id.*

of slavery. Regardless of whether a citizen has a felony or misdemeanor conviction or whether the citizen is incarcerated or serves some other form of punishment, these restrictions may be imposed. Congress is empowered to prohibit these restrictions under the Enabling Clause of the Thirteenth Amendment.

After a citizen pays his debt to society, his punishment must come to an end. Otherwise, rehabilitation and reintroduction into society as a productive citizen are meaningless. As Justice Warren explained:

> It is impossible for this Court to say at what point the number of convictions on a man's record renders his reputation irredeemable. And even if we believed that an individual had reached that point, it would be impossible for us to say that he had no interest in beginning the process of redemption with the particular case sought to be adjudicated.[246]

The stigma and restrictions attached to a criminal conviction encourage the idea that a citizen guilty of a crime is second-class and irredeemable. Congress must utilize its power under the Enabling Clause to eliminate these collateral consequences in order to ensure all citizens a second chance.

246. Sibron v. New York, 392 U.S. 40, 56 (1968).