The Thirteenth Amendment and Private Affirmative Action

Two affirmative action cases in the last two years have dominated legal and public debate on a matter of profound social concern, but an important constitutional issue has not been squarely addressed: does Congress have power under the Thirteenth Amendment to proscribe private affirmative action programs? Even though the Supreme


2. U.S. Const. amend. XIII, § 1: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Id. § 2: "Congress shall have power to enforce this article by appropriate legislation."

3. A determination that Congress is unable to proscribe private affirmative action under the Thirteenth Amendment is particularly important because Congress's ability to do so under other constitutional provisions is extremely problematic. In The Civil Rights Cases, 109 U.S. 3 (1883), the Court held that Congress's power to forbid discrimination under the Fourteenth Amendment does not reach action by private persons. Id. at 11-15. Although six justices adopted the contrary position in United States v. Guest, 383 U.S. 745 (1966), their statements were dicta since an allegation of state action was made that was sufficient to prevent dismissal of the indictment at issue. Id. at 754-57. More recently, reservations about the reach of congressional power under the Fourteenth Amendment caused the Court to sidestep the issue in Griffin v. Breckenridge, 403 U.S. 88, 107 (1971) (federal law providing relief from racially motivated torts reaches purely private action); see The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 100-01 (1971) (Griffin Court avoided Fourteenth Amendment issue by relying on Thirteenth Amendment); cf. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249-50 (1964) (Court skirted Fourteenth Amendment issue by finding that commerce clause supports legislation outlawing discrimination in public accommodations).

Congress also has power to reach private discrimination through the commerce clause, but only to the extent that such discrimination affects "commerce which concerns more States than one" and has a real and substantial relation to the national interest." Id. at 255. Not all private racial discrimination obstructs interstate commerce. See Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449, 465 (1974) (commerce power probably does not reach racial discrimination by private schools). Policies favoring blacks, in fact, may have a positive effect on the national economy. See Kaplan, Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment, 61 Nw. U. L. Rev. 365, 366 (1966) (making blacks economically equal to whites would sharply increase gross national product and ease drain on economy caused by welfare expenditures and crime). Congress, therefore, may altogether lack power under the commerce clause to ban private affirmative action. Such power to forbid affirmative action as Congress does have, moreover, may not reach purely local businesses. Cf. H.R. Rep. No. 914, 88th Cong., 1st Sess. 108 (1963) (separate views of Reps. Poff and Cramer) (Title VII is limited to employers with 25 or more employees because statute is grounded on commerce clause).
Court recently ruled in *United Steelworkers of America v. Weber*\(^4\) that Title VII,\(^5\) based on the commerce clause,\(^6\) does not forbid all affirmative action in private employment,\(^7\) a potential obstacle to “benign” discrimination in the private sector remains in 42 U.S.C. § 1981,\(^8\) which rests on the Thirteenth Amendment’s enforcement power.\(^9\)

The Thirteenth Amendment, after nearly a century of virtual desuetude, has been reinvigorated in the last decade.\(^10\) In *Jones v.*
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Alfred H. Mayer Co., the Supreme Court held that the amendment authorizes Congress to forbid private discrimination against blacks. The Court's expansive interpretation of both the Thirteenth Amendment and the Civil Rights Act of 1866, the source of section 1981, seemed to promise blacks greater opportunity in education and employment.

The promise of Jones was qualified, however, in McDonald v. Santa Fe Trail Transportation Co., which held that the Thirteenth Amend-
ment authorizes Congress to protect whites against discriminatory firing.\textsuperscript{18} The McDonald Court's ruling that section 1981 affords whites such protection is not above reproach.\textsuperscript{19} Assuming, however, that section 1981 was intended to forbid discriminatory firing of white employees, the more important question is whether Congress,\textsuperscript{20} in passing the statute, exceeded its authority under the Thirteenth Amendment to abolish the "badges and incidents" of slavery.\textsuperscript{21}

This Note examines the threat that the broad interpretation of section 1981 in McDonald poses for private affirmative action. The legislative history of the Thirteenth Amendment is explored to determine the nature and extent of the framers' objective to protect whites. This history demonstrates that congressional prohibition of benign discrimination is inconsistent with the framers' intent, which was to authorize protection of whites only to the extent necessary to aid blacks. Furthermore, the Note demonstrates that in this instance it would not be appropriate for courts to disregard the intent of the framers.

I. McDonald: A Cloud on Affirmative Action

The Supreme Court's decision in McDonald casts doubt on the validity of private sector affirmative action programs. McDonald arose when the white plaintiffs were fired for stealing from the defendant company, while a black co-employee involved in the theft was retained.\textsuperscript{22} The Court construed both Title VII of the Civil Rights Act of 1964 and section 1981 to forbid such discriminatory firing of

\textsuperscript{18} Id. at 287-88 & n.18.
\textsuperscript{19} See p. 418 & note 134 infra.
\textsuperscript{20} Section 1981 was enacted by the Thirty-Ninth Congress, more heavily Republican than the Thirty-Eighth Congress, which passed the Thirteenth Amendment. About half of the members of the Thirty-Ninth Congress had not participated in the Thirty-Eighth Congress. See C. Fairman, History of the Supreme Court of the United States 1160 (1971).
\textsuperscript{21} Although § 1981 was enacted pursuant to the Fourteenth Amendment as well as the Thirteenth, see note 9 supra, the Court has held that the statute reaches private conduct by virtue of the Thirteenth Amendment. See McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 287-88 & n.18 (1976). Formerly, the Court had held that, because § 1 of the Civil Rights Act of 1866 had been reenacted under the Fourteenth Amendment, a showing of state action was necessary to establish a violation. Hurd v. Hodge, 334 U.S. 24, 31-32 (1948).
\textsuperscript{22} McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 276 (1976). The plaintiffs initially filed a grievance with their union, but secured no relief. They therefore filed a charge with the Equal Employment Opportunity Commission, alleging that the company and the union had both discriminated against them in violation of Title VII. Agency proceedings proved equally unavailing, and plaintiffs finally brought suit against the company and the union under Title VII and § 1981. Id.
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whites. By permitting white plaintiffs to invoke section 1981 even though they had not been burdened because of any defense of blacks, the McDonald Court significantly expanded the reach of the statute.

The discrimination challenged in McDonald was not part of an affirmative action plan, so the Court never had to define the full reach of section 1981 and congressional power under the Thirteenth Amendment. However, the Court’s unqualified ruling that section 1981 protects whites against racial discrimination in employment suggests the vulnerability of affirmative action in hiring and promotion. Courts have, in fact, seriously entertained section 1981 challenges to the validity of private, voluntary affirmative action programs.

In United Steelworkers of America v. Weber, decided last Term, the Court ruled that Title VII does not bar preferential treatment of blacks in private employment. Weber, however, did not involve any

23. The Court flatly declared that Title VII “prohibits all racial discrimination in employment.” Id. at 283. But see United Steelworkers of America v. Weber, 99 S. Ct. 2721 (1979) (Title VII does not forbid all affirmative action in private employment).

After a searching examination of the history of § 1981, the McDonald Court concluded that “the Act was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race.” 427 U.S. at 295.

24. In all previous cases under § 1981 and its companion § 1982, white plaintiffs had suffered injuries not on account of their race, but because of their support of blacks. See pp. 418-19 infra (discussing cases). Because the McDonald Court required no showing that such enmity caused the harm of which the white plaintiffs complained, future courts could read McDonald to permit whites to bring § 1981 actions any time blacks are treated preferentially. This Note argues that such a reading of McDonald cannot be supported under the Thirteenth Amendment.


26. Id. at 295-96.


30. The Court held that although Title VII would prohibit benign discrimination if construed literally, the statute must be read against its legislative history. Id. at 2725-27. The legislative history reveals a congressional purpose to remedy “the plight of the Negro in our economy.” Id. at 2727 (quoting 110 Cong. Rec. 6548 (1964) (remarks of
section 1981 claim. Moreover, Title VII and section 1981 are not in pari materia; the two statutes occasionally come into procedural and substantive conflict. Thus *Weber* did not defuse the section 1981 threat to affirmative action in private employment.

The expansive view of section 1981 implicit in *McDonald* jeopardizes benign discrimination not only in employment, but in other business situations as well. Private contracting with minority businesses on a preferential basis, for example, is arguably illegal under *McDonald*. *McDonald* even threatens affirmative action in private education. In *Runyon v. McCrary*, decided the same day as *McDonald*, the Court held that a private school's agreement to admit a student con-

Sen. Humphrey)). An interpretation of Title VII that forbade all affirmative action would "bring about an end completely at variance with the purpose of the statute' and must be rejected." *Id.*


34. *427 U.S. 160 (1976).*
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Instituted a contract subject to the strictures of section 1981. By applying section 1981 protection to whites, McDonald could permit whites to challenge successfully benign racial quotas in private school admissions.

While the legitimacy of private affirmative action programs under section 1981 has yet to be decided, lurking in the background is a more important constitutional question: does the Thirteenth Amendment authorize Congress to protect whites from benign discrimination at all? The Supreme Court intimated an affirmative answer in McDonald, stating that “Congress is authorized under the Enforcement Clause of the Thirteenth Amendment to legislate in regard to ‘every race and individual.’” But the amendment’s legislative history suggests that Congress, in exercising its power to erase the badges and incidents of slavery, can legitimately protect whites only against discrimination arising from hostility toward blacks.

II. The Thirteenth Amendment’s Original Purpose

Congressional debates over the Thirteenth Amendment contain general discussion of ensuring white citizens the privileges and immunities of the several states and equal protection of the law. These broad expressions of concern may suggest condemnation of discrimination against whites in favor of blacks. A careful reading of the debates, however, discloses that protection of whites was narrowly associated in the framers’ minds with achieving meaningful emancipation.

A. The General Purpose to Eradicate the “Badges and Incidents” of Slavery

The first clause of the Thirteenth Amendment, abolishing slavery and involuntary servitude, protects whites and blacks alike. The complainants were black parents who had unsuccessfully attempted to enroll their students in a private school. The school had advertised to the general public. Id. at 172.

McDonald’s potential adverse effect on affirmative action in education may be mitigated by Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), in which the Court narrowly upheld the use of race-conscious admission policies. Id. at 320 (Powell, J., announcing judgment of the Court).

See generally Buchanan, The Quest for Freedom: A Legal History of the Thirteenth Amendment, serialized throughout 12-13 Hous. L. Rev. (1974-75) (Thirteenth Amendment designed to protect rights of every individual); tenBroek, Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment, 39 Calif. L. Rev. 171 (1951) (Thirteenth Amendment intended to protect whites in wide range of natural and constitutional rights).

amendment's enabling or enforcement clause then gives Congress power to eradicate the badges and incidents of slavery.\textsuperscript{40} It is for Congress to determine what specific badges and incidents of slavery may exist.\textsuperscript{41} The amendment's framers, however, used the phrase "badges and incidents of slavery" generically to mean manifestations of racial hostility towards blacks. Both friends and foes of the amendment recognized that manumission alone would not guarantee blacks meaningful freedom.\textsuperscript{42} Disabilities customarily imposed on the freedmen would continue to preserve essential features of the slave system.\textsuperscript{43} For instance, slave and freedman alike were often barred by law or custom from education\textsuperscript{44} and travel,\textsuperscript{45} and local criminal codes treated blacks more harshly than whites.\textsuperscript{46} Similarly, blacks lacked status in court.\textsuperscript{47} In \textit{Dred Scott v.}

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\item Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439-40 (1968) (Congress has power under Thirteenth Amendment to determine incidents of slavery and to legislate them out of existence).
\item Id. at 440.
\item See, e.g., \textit{Cong. Globe, 38th Cong., 1st Sess.} 118 app. (1864) (remarks of Sen. Howe) (supporter) (government must also remove bars to education of freed blacks); id. at 1457 (remarks of Sen. Hendricks) (opponent) (northern prejudice will be "hard upon" freed blacks).
\item Blacks were kept in ignorance in order to preserve their docility. See p. 413 infra. Also, many whites equated the educational elevation of blacks with the degradation of whites. See K. Stampp, \textit{The Era of Reconstruction}, 1865-1877, at 78 (1965). In some southern states, therefore, it was a crime to teach blacks to read or write. See United States v. Rhodes, 27 F. Cas. 785, 793 (C.C.D. Ky. 1866) (No. 16,151) (describing laws of Georgia, Virginia, Alabama, and Louisiana). Other states depended on the pressure of public opinion, rather than on specific legislation, to prevent the education of blacks. See R. Nye, \textit{Fettered Freedom} 70-71 (1949).
\item Deep prejudice moved many Northern states to exclude free blacks entirely. See V. Voegeli, supra note 43, at 2 (listing exclusion laws of midwestern states). Southerners feared that blacks freely roaming the countryside would entice slaves to rebel. See K. Stampp, \textit{The Peculiar Institution} 215-16 (1956). After the war, southern blacks were restricted in their movement by oppressive labor contracts that tied them to the land. See K. Stampp, supra note 44, at 80.
\item See K. Stampp, supra note 45, at 210-11 (blacks punished more severely than whites for same crime); Hawes & Namorato, \textit{Race, Property Rights, and the Economic Consequences of Reconstruction: A Case Study}, 32 Vand. L. Rev. 305, 316-17 (1979) (blacks unable to pay criminal fines were hired out to work).
\item In many states, blacks were forbidden to serve as jurors. T. Cobb, supra note 43,
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_Sandford_, the Supreme Court ruled that blacks, whether slave or free, could not sue in federal court. Republicans in the Thirty-Eighth Congress angrily condemned the decision, and Senator James Harlan cited the deprivation of blacks' status in court as one of slavery's wicked incidents.

Fearing the perpetuation or growth of discriminatory laws and customs, draftsmen of the Thirteenth Amendment sought not only to emancipate the bondmen through the first clause, but to eradicate the incidents of slavery—those disabilities or badges of servitude fastened upon free blacks—through the second. Senator Henry Wilson proclaimed that the amendment would "obliterate the last lingering vestiges of the slave system; its chattelizing, degrading, and bloody codes; its dark, malignant, barbarizing spirit; all it was and is, everything connected with it or pertaining to it. . . ." Opponents of the amendment also recognized its expansive aim to complete the freedom of blacks. Representative Holman, a Democrat from Indiana, warned that the amendment "confers on Congress the power to invade any State to enforce the freedom of the African in war or peace. What is the meaning of all that? Is freedom the simple exemption from personal servitude? No sir; . . . Mere exemption from servitude is a miserable idea of freedom."

at cciv. In some states, the courtroom testimony of a single black had to be corroborated when blacks were the only parties. _Id._ at 230 n.7. Blacks were excluded from testifying altogether when any party was white. _Id._ at 230; see United States v. Rhodes, 27 F. Cas. 785, 787 (C.C.D. Ky. 1866) (No. 16,151) (construing section of Civil Rights Act of 1866 that finally guaranteed blacks right to testify even when whites were parties); K. STampp, supra note 45, at 222 ("neither slaves nor free Negroes could testify against whites").


49. The Court held that the black plaintiff, who had been taken as a slave to a free territory and later returned to Missouri, had not been emancipated upon reaching free soil, and therefore had no standing to sue. _Id._ at 452. Moreover, the Court said that even a free black was not a "citizen of the United States" entitled to maintain a diversity of jurisdiction suit in federal court. _Id._ at 404-05.


51. _Id._, 1st Sess. 1439 (1864).

52. See, e.g., _id._ at 1482 (remarks of Sen. Sumner) (statute books must be cleansed of "all existing supports of slavery"); _id._, 2d Sess. 523 (1865) (remarks of Rep. Coffroth) (same).

53. _Id._, 1st Sess. 324 (1864).

54. See, e.g., _id._ at 2988 (remarks of Rep. Edgerton) (charging that Republicans would not accept peace until blacks had been made equal to whites socially and politically); _id._, 2d Sess. 177 (1865) (remarks of Rep. Ward) (same).

55. _Id._, 1st Sess. 2962 (1864). Other Democrats echoed Representative Holman's fear that the amendment would trench upon the states' right to regulate their internal affairs. See, e.g., _id._ at 2616 (remarks of Rep. Herrick); _id._ at 2950 (remarks of Rep. Marcy). Even Senator Henderson, the Missouri Democrat who offered Senate Joint Resolution 16 (which eventually became the Thirteenth Amendment), was wary of a centralization of
Shortly after ratification of the Thirteenth Amendment, the feared course of state and local oppression of blacks began. The "Black Codes" essentially reenacted many of the old slave codes, and thereby "placed the Negro in a kind of twilight zone between slavery and freedom." It was largely to defeat these discriminatory laws that the Thirty-Ninth Congress, under authority of the Thirteenth Amendment, enacted the Civil Rights Act of 1866.

B. Discrimination Against Whites as an Incident of Slavery

Congressional debates on the Thirteenth Amendment reveal an intention to give increased constitutional protection to whites. In particular, supporters wished to safeguard whites who had been reduced almost to "semicitizens" because of their antislavery views. This persecution was plainly a manifestation of hostility toward blacks, and thus an incident of slavery.

Of the thirty-eight Senators who supported the Thirteenth Amendment, nine contributed significantly to the debates. All but one of the nine acknowledged the amendment's purpose to guarantee civil liberties to whites. Their statements, however, were narrowly ad-

power inimical to the interests of the states. See id. at 1462; cf. United Steelworkers of America v. Weber, 99 S. Ct. 2721, 2729 (1979) (history of congressional fear of undue federal regulation bolsters conclusion Title VII not meant to forbid all voluntary affirmative action in private employment).

56. See United States v. Rhodes, 27 F. Cas. 785, 794 (C.C.D. Ky. 1866) (No. 16,151) (upon adoption of Thirteenth Amendment, enactment of discriminatory laws increased). See generally K. STAMP, supra note 44, at 80 (describing post-amendment Black Codes); Haws & Namorato, supra note 46, at 311-14 (Black Codes of Mississippi).

57. K. STAMP, supra note 44, at 80; see Willey, The Case for Preferential Admissions, 21 HOW. L.J. 175, 175 (1978) (Black Codes threatened to restore de facto slavery).

58. See C. FAIRMAN, supra note 20, at 1169-1206 (examining congressional debates on Civil Rights Act of 1866); J. McPHERSON, THE STRUGGLE FOR EQUALITY 341-42 (1964) (Act of 1866 passed in response to Black Codes of South). The Act was passed by a two-thirds vote of Congress over President Johnson's veto. Id. at 350.


60. Abolitionists both North and South were robbed of their civil liberties by law and custom. With the exception of Kentucky, every Southern state passed laws curtailing freedom to discuss the merits of slavery. R. NYE, supra note 44, at 140. Since these laws were vague and difficult to enforce, mobs or "vigilance committees" were organized to block the dissemination of antislavery thought. Id. at 141. Mob violence against abolitionists "reached its climax during the period 1833-1840, receding in the North after 1845 and continuing with undiminished force in the South until the Civil War and after." Id.; see D. DUMOND, ANTISLAVERY ORIGINS OF THE CIVIL WAR IN THE UNITED STATES 51-66 (1939) (recounting mobbings of Northern abolitionists and denial of civil rights generally).

61. See C. FAIRMAN, supra note 20, at 1138-39. Seven were Republicans and the remaining two, Reverdy Johnson of Maryland and John Henderson of Missouri, were Democrats.

62. While Senator Reverdy Johnson of Maryland did not address the plight of white abolitionists in the South, he did discuss the amendment's purpose to "elevate" and enlighten blacks. See pp. 412-13 infra.
dressed to the plight of whites who had been persecuted for defending the rights of blacks.

Senator Henry Wilson of Massachusetts, a Radical Republican, spoke at length of slavery’s disregard for the “equal protection” and “privileges and immunities” of white citizens. Antislavery activists North and South, he complained, were prevented from publicly denouncing the “peculiar institution.” Abolitionist presses were “padlocked.” Freedom of religious opinion, to the extent incompatible with slavery, was suppressed. The right to assemble peaceably and to petition the government for redress of grievances was similarly suspended. Even free elections, Wilson maintained, had been trammeled by proponents of slavery.

Senator Lyman Trumbull of Illinois also charged that slavery had been responsible for denying freedom of speech and press to white citizens. Senator Daniel Clark of New Hampshire elaborated. Spea-
ing anthropomorphically of slavery's treatment of whites sympathetic to blacks, he observed that, "She has assaulted them, imprisoned them, lynched them, expatriated them, murdered them, for no crime, but because they testified against her." 70

Senator Harlan, enumerating the incidents of slavery, specified suppression of radical speech and press. 71 "Slavery cannot exist," he explained, "where its merits can be freely discussed; hence in the slave States it becomes a crime to discuss its claims for protection or the wisdom of its continuance." 72 Senator Hale, in a few brief remarks, warmly approved Harlan's words. 73

Senators Henderson, Howe, and Sumner also alluded to the nationwide mistreatment of antislavery individuals. Henderson, a Missouri Democrat and author of the resolution that eventually became the Thirteenth Amendment, recognized that slavery would not permit "doubts of the sacredness of the institution" to be expressed. 74 Senator Howe resented the way that proslavery forces attempted to "crush out" antislavery opinion 75 "by bluster, by threat, by menace." 76 Finally, Charles Sumner of Massachusetts, a Radical who had been caned in the Senate chamber for espousing antislavery views, 77 called slavery "the perpetual spoiler of human rights and disturber of the public peace..." 78

Debate was more prolonged in the House, where the proposed amendment was defeated at the first session. 79 Upon reconsideration, over fifty congressmen volunteered remarks—most of little significance in interpreting the amendment. 80 Many supporters, however, echoed

70. Id. at 1369.
71. Id. at 1439. Harlan deemed suppression of radical speech an incident of slavery because it denied blacks the elemental "right to receive the common sympathies of the human race." Id.
72. Id. Every slave state made it a felony to say or write anything that might lead to discontent or rebellion among slaves. See K. STAMPE, supra note 45, at 211.
73. CONG. GLOBE, 38th Cong., 1st Sess. 1443 (1864).
74. Id. at 1460. Henderson was himself a slaveholder. See Hamilton, The Legislative and Judicial History of the Thirteenth Amendment, 9 NAT'L B.J. 26, 29 (1951).
75. CONG. GLOBE, 38th Cong., 1st Sess. 116 app. (1864).
76. Id. at 117 app.
78. CONG. GLOBE, 38th Cong., 1st Sess. 1481 (1864).
79. The first vote in the House on the Joint Resolution to amend the Constitution, taken on June 15, 1864, counted 99 for, 65 against, and 29 not voting. Id. at 2995.
80. Most congressmen focused on the expediency of manumitting the slaves, neglecting to discuss congressional power to enforce the freedom of blacks under the proposed amendment. Democrats generally warned that manumission would prolong the war and
the Senate's aim to protect white abolitionists' civil rights.81
Representative James Ashley of Ohio, manager of the amendment in
the House, claimed that slavery muted white critics by "kidnapping,
imprisoning, mobbing, and murdering" them.82 Moreover, slavery
"silenced every free pulpit within its control. . . ."83 Representative
Scofield bemoaned that slavery:

demanded exemption from . . . criticism . . ., and we granted the
immunity. . . . [W]e submitted to a censorship of the mails, and
authorized the burning of all offensive papers and letters. . . . [I]t
demanded silence in this House and in the Senate, and we adopted
the "Atherton gag." . . . [I]t demanded silence in the North, and
every city raised its pro-slavery mob to demolish presses and murder
editors and lecturers.84

Other representatives followed in condemning slavery's abuse of
abolitionists.85 Representative King, for example, asked colleagues to
reflect on the "spell-bound terror forbidding debate" with which
proslavery forces "sought to surround that subject upon all occasions,
great and small."86 Thaddeus Stevens remembered that his own
speeches against slavery had been delivered "amid the pelting and
hooting of mobs. . . ."87 Representative Kasson illustrated how aboli-
tionists were denied access to courts in the South."88 And Representative
Smith of Kentucky concluded that the denial of equal privileges to
Northerners in the South "had more to do with the destruction of
slavery than all things else put together."89
Persecution of abolitionists loomed large as an incident of slavery because it reinforced all other invidious incidents. While suppression of radical speech was an evil in itself, it also helped to preserve slavery as an institution and to prevent the elevation of free blacks to the social status of whites. Thus liberty could not be achieved for blacks until freedom from discrimination had been secured to abolitionist whites.

C. McDonald: Expanding Congressional Power Contrary to the Amendment’s Remedial Purpose

The legislative history thus shows that the enforcement clause of the Thirteenth Amendment was intended to protect whites against certain forms of malign, not benign, discrimination. Further analysis reveals that the Thirty-Eighth Congress sought the educational and economic uplift of blacks to the status of whites. Thus, supporters of the amendment not only lacked an express intent to expose private affirmative action to congressional assault, but embraced a positive, remedial purpose similar to the one underlying contemporary affirmative action programs.

It would be paradoxical for courts to build into the Thirteenth Amendment congressional power to hamper the social and economic progress of the very group the amendment was designed to aid. The Thirty-Eighth Congress anticipated that passage of the amendment would result in economic and educational improvement for blacks. In particular, congressmen contemplated that blacks would acquire education and land.

Many congressmen expected free schools to proliferate in territories where slavery had discouraged education. Reverdy Johnson, Demo-

90. See p. 410 supra; D. Dumond, supra note 60, at 59-60.
92. See generally Thirteenth Amendment and Education, supra note 16, at 423-26 (Congress sought elevation of blacks).
93. See pp. 413-14 infra. Land ownership and education were commonly considered essential to the “good life.” See Meier, Negroes in the First and Second Reconstructions of the South, in BEYOND THE CIVIL WAR SYNTHESIS: POLITICAL ESSAYS OF THE CIVIL WAR ERA 275, 279 (R. Swierenga ed. 1975) (black leaders stressed pursuit of education and acquisition of property).
94. See, e.g., Conc. GLOBE, 38th Cong., 1st Sess. 1439 (1864) (remarks of Sen. Harlan) (slavery has prevented schooling of blacks); id. at 1479 (remarks of Sen. Sumner) (ignorance of blacks an incident of slavery). Senator Howe of Wisconsin was perhaps the most outspoken advocate of education for newly liberated blacks. He insisted that “when the American people command that these persons shall be free, they should command that they be educated, or at least that there be no laws enacted in any State to prevent their education.” Id. at 118 app.
ocratic Senator from Maryland and a former foe of emancipation,95 observed that slaves were kept in utter ignorance in order to preserve their docility.96 He rejoiced that the Thirteenth Amendment would result in the education of blacks.97 Senator Wilson concurred, exclaiming that "when this amendment . . . shall be consummated, . . . the schoolhouse will rise to enlighten the darkened intellect of a race imbruted by long years of enforced ignorance."98 Similar views were sounded in the House of Representatives.99 Representative Morris of New York observed that "[a]n entire race has been deprived of all social rank, barred our schools, shut out from the gospel, and then held to be inferior for not rising in spite of their hinderances to an equality with the Saxons in the enjoyment of each of these privileges."100

A majority of the Thirty-Eighth Congress also hoped that the freedmen would become economically self-sufficient.101 Republicans in both Houses pressed measures to give the freedmen land.102 One month after passage of the Thirteenth Amendment, Congress created the Freedmen's Bureau to help blacks adjust to liberty by providing them with medical care, education, and the opportunity to acquire land.103 Some Southern plantations were in fact partitioned and distributed to

97. Id.
98. Id. at 1324.
100. Id., 1st Sess. 2615 (1864).
101. See K. STAMPP, supra note 44, at 123 (Radicals thought blacks' economic helpless-ness would allow white landholders to reestablish bondage in another guise); J. McPherson, supra note 58, at 246-47 (same). Many Radical Republicans favored federal economic assistance for freedmen. See, e.g., Cong. Globe, 38th Cong., 1st Sess. 2799 (1864) (remarks of Sen. Sumner). Other Republicans thought federal aid unnecessary. Goaded perhaps by the Democratic litany that blacks were not fit for freedom, they insisted that the freedmen could fend for themselves. See, e.g., id. at 2985 (remarks of Rep. Kelley); id., 2d Sess. 190 (1865) (remarks of Rep. Grinnell). Democrats straddled both sides: while urging that blacks be kept in bondage lest they die of privation, the minority party opposed special aid to the freedmen on the ground that blacks could take care of themselves. See id. at 987-88 (remarks of Sen. Morrill) (observing the contradiction).
102. See J. McPherson, supra note 58, at 246-59 (history of confiscation and homestead measures for freedmen introduced in Congress).
103. See Cong. Globe, 38th Cong., 2d Sess. 1307 (1865) (text of Freedmen's Bureau Bill). The bill was vetoed by President Johnson and repassed by a two-thirds majority of Congress in 1866. See J. McPherson, supra note 58, at 409. Although white war refugees received some aid under the bill, blacks were conceived to be, and were in fact, the primary beneficiaries. See Elden, "Forty Acres and a Mule," With Interest: The Constitutionality of Black Capitalism, Benign School Quotas, and Other Statutory Racial Classifications, 47 J. Urb. L. 591, 600 (1969-70).
freedmen. Although legislative efforts to achieve land reform ultimately failed, they did reflect a substantial interest in the social and economic advancement of blacks.

Congress thus intended the Thirteenth Amendment to raze, not erect, barriers to the social and economic progress of blacks. Prohibiting benign discrimination would run counter to this remedial purpose. Section 1981, therefore, to the extent it does invalidate private affirmative action, frustrates the purpose of the Thirteenth Amendment.

III. Significance of the Framers' Intent

The framers' intent, even when clear, does not automatically control constitutional decisionmaking. Constitutional provisions are susceptible to reinterpretation over time as changing circumstances dictate. Because of the static nature of a written constitution and the difficulty of the amending process, phrases such as "equal protection" and "due process" must be redefined periodically to comport with evolving public values. Indeed, the very vagueness of such constitutional

104. See J. McPherson, supra note 58, at 259 ("Freedmen ... were being settled with 'possessory titles' on thousands of acres in South Carolina, Georgia, and Florida."); K. Stampp, supra note 44, at 125-26 (40,000 blacks relocated on land in South Carolina and Georgia sea islands).

105. Lack of financial resources hampered efforts to distribute land to blacks. See Elden, supra note 103, at 601. Moreover, most parcels of land that had been confiscated from Southern whites and given to blacks were eventually returned to their former owners. See Meier, supra note 93, at 284 (politicians had too great a sense of property rights to permit permanent confiscation of rebels' estates).

106. See J. McPherson, supra note 58, at 247; K. Stampp, supra note 44, at 134-35. Congressional drives for land reform were not, however, prompted solely by solicitude for the economic welfare of blacks. Congress also wanted to "promote democracy in the South by destroying the economic basis of the 'landed aristocracy.'" J. McPherson, supra note 58, at 247. And, undoubtedly, some northern congressmen wanted to give freedmen land as an inducement to stay in the South. See V. Voegeli, supra note 43, at 177.


109. See Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966) (Court not confined to historic notions of equality); cf. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) (Eighth Amendment draws meaning from evolving standards of decency); Weems v. United States, 217 U.S. 349, 378 (1910) (cruel and unusual punishment clause "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened
provisions may indicate that they were purposely left to gather meaning from common experience.\textsuperscript{110}

The words of the Thirteenth Amendment, however, are not nearly as elastic as those of its complement, the Fourteenth Amendment.\textsuperscript{111} Nor were they intended to be. While the framers of the Fourteenth Amendment deliberately chose language capable of growth,\textsuperscript{112} Thirteenth Amendment draftsmen, treating the narrow but burning issue of emancipation, perceived no need for flexible phraseology.\textsuperscript{113} Still, inflexible language should not necessarily prevent expansion of the Thirteenth Amendment's meaning. Whenever the amendment is expanded beyond the literal meaning of the text and the framers' intent, however, congruence with contemporary social norms is essential.\textsuperscript{114} by a humane justice"). The Fourteenth Amendment, in particular, has been subject to changing interpretations. Compare Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1872) (prevailing purpose of Fourteenth Amendment is to protect blacks) with Dunn v. Blumstein, 405 U.S. 330 (1972) (durational residency requirement for voters struck down under Fourteenth Amendment). See generally T. Taylor, Two Studies in Constitutional Interpretation 14 (1969) (original understanding must be "leavened" by "considered consensus"); Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972) (contrasting substantive concerns and decisionmaking techniques of Warren and Burger Courts).


112. See Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955) (framers of Fourteenth Amendment used expansible language so scope of amendment could adjust to later needs and concerns).

113. Senator Sumner of Massachusetts offered his own abolition amendment, cast in terms resembling those of the Fourteenth Amendment, as a substitute for Senate Joint Resolution 16, the proposal that was eventually adopted. Sumner's proposal read: "Everywhere within the limits of the United States, and of each State or Territory thereof, all persons are equal before the law, so that no person can hold another as a slave." Comp. Globe, 38th Cong., 1st Sess. 921 (1864). Sumner's version was rejected by the Senate Judiciary Committee, and subsequent attempts to introduce the proposal during debate on S.J. Res. 16 were opposed. Senator Trumbull, chairman of the Senate Judiciary Committee, could not understand "why the Senator from Massachusetts should be so pertinacious about particular words. The words that we have adopted will accomplish the object." Id. at 1488. Senator Howard of Michigan, another member of the Judiciary Committee, also preferred S.J. Res. 16, for "no court of justice, no magistrate, no person, old or young, can misapprehend the meaning and effect of that clear, brief, and comprehensive clause." Id. at 1489. In the face of these objections, Sumner withdrew his proposal. Id.

114. See L. Hand, The Spirit of Liberty 15-16 (L. Dillard ed. 1952) (law must lag behind new judicial ideas unbacked by general acceptance); Lupu, Untangling the Strands
otherwise, reinterpretation of the amendment will merely reflect judges' personal preferences.\textsuperscript{115} Thus, decisions such as Jones that arguably build upon the sentiments of the Thirty-Eighth Congress are supportable because they accord fully with the prevailing sense of justice.\textsuperscript{116}

There is, however, no consensus opposed to affirmative action that might justify a departure from the original understanding of the Thirteenth Amendment. Indeed, as indicated by recent Supreme Court decisions, few subjects generate greater differences of opinion today. When faced with an early challenge to affirmative action in 1974, the Supreme Court awkwardly sidestepped the issue.\textsuperscript{117} And the Court's two recent brushes with affirmative action in Regents of the University of California v. Bakke\textsuperscript{118} and United Steelworkers of America v. Weber\textsuperscript{119} sharply divided the justices.\textsuperscript{120}

Furthermore, powerful sociological arguments can be marshalled for and against benign discrimination. On the negative side, such discrimination may frustrate efforts to mitigate race consciousness generally.\textsuperscript{121} Racial quotas that exclude whites may stir resentment and against the Fourteenth Amendment, 77 Mich. L. Rev. 981, 1047 (1979) ("consensus is a necessary component of any theory of constitutional adjudication in support of unenumerated values"); cf. Oregon v. Mitchell, 400 U.S. 112, 203 (1970) (Harlan, J., concurring in part and dissenting in part) (Court cannot establish norms for society by deviating from framers' intent).

115. The three basic sources that inform constitutional interpretations are the text, extrinsic evidence of the framers' intent, and current social norms. See generally P. Brest, supra note 110, at 139-71. When the text is ambiguous, public values are unsettled, and the framers' intent is ignored, little is left to guide a judge in deciding except personal preference.


120. Each judgment was reached by a bare majority of the Court. In Bakke, four Justices, Brennan, Marshall, White, and Blackmun, approved a public school's racial admissions quota, 438 U.S. at 324-78, while four other Justices, Burger, Rehnquist, Stevens, and Stewart, found the quota statutorily impermissible, 438 U.S. at 408-21. Justice Powell concluded that the school could not constitutionally establish strict racial quotas, but could make race a factor in admissions decisions, 438 U.S. at 320. In Weber, Justice Brennan delivered the opinion of the Court, in which Stewart, White, Marshall, and Blackmun, JJ., joined. 99 S. Ct. at 2724-30. Justice Rehnquist and Chief Justice Burger dissented. Id. at 2734-55 (Burger, C.J., dissenting); id. at 2736-53 (Rehnquist, J., dissenting). Justices Powell and Stevens did not participate. See R. Berger, supra note 107, at 323 (five-to-four split evidences deep disagreement about socially desirable result).

121. The Court may lose potency as an educative force if it relaxes or qualifies the principle that color is irrelevant to hiring and admissions decisions. See Kaplan, supra note 3, at 379 ("any legal classification by race weakens the government as an educative force"); O'Neil, Racial Preference and Higher Education: The Larger Context, 60 Va. L. Rev. 925, 933-34 (1974) (same).
hostility toward blacks. Such quotas also may reinforce stereotypes of racial inferiority. There is, moreover, an inherent unfairness in forcing innocent persons to bear the burden of redressing grievances not of their own making.

On the other hand, notions of distributive as well as retributive justice support demands for affirmative action. Aiding the educationally and economically disadvantaged is widely recognized as an important and legitimate social goal. Race-conscious affirmative action seems a sensible way to attain the goals of distributive justice: race is a rough proxy for socioeconomic status since discrimination has disadvantaged some minority groups pervasively. Affirmative action also may benefit society more directly. Giving minority individuals preferences in education and employment may help stabilize minority communities and promote contact between the races.


123. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (Powell, J., announcing judgment of the Court) (preferential treatment reinforces beliefs that minorities cannot achieve success without special aid); see Kaplan, supra note 3, at 378 (preferences may damage blacks’ self-image).


125. See Kaplan, supra note 3, at 365 (distributive justice would put blacks on equal economic footing with whites); Nickel, Remedial Uses of Race: A Moral Dilemma, 21 How. L.J. 513, 514 (1978) (racial preferences are way of dealing with inequalities of income).


127. See 14 WEEKLY COMP. OF PRES. DOC. 98, 103-07 (Jan. 19, 1978) (President Carter’s State of Union Address); Kaplan, supra note 3, at 365 (true equality achieved by treating people according to need).


130. See O’Neill, The Case for Preferential Admissions, in REVERSE DISCRIMINATION, supra note 124, at 69-69 (statistics on minority representation in professions); Sandalow, supra note 122, at 698 (increased number of minority professionals should encourage aspirations of minority children). But see DeFunis v. Odegaard, 416 U.S. 312, 342 (1974) (Douglas, J., dissenting) (purpose of university cannot be to produce black lawyers for blacks).

The legal and social debate over affirmative action has failed to yield broad consensus or dominant values. In deciding whether Congress may proscribe private affirmative action as an incident of slavery, therefore, neither public norms nor practical considerations furnish a clear guide. Accordingly, the framers' intent must govern interpretation of the Thirteenth Amendment.\textsuperscript{132}

The foregoing legislative history shows that the framers intended to do no more than protect those whites who were penalized for aiding blacks. This narrow view of the framers' understanding of the Thirteenth Amendment contrasts sharply with the view implicit in the \textit{McDonald} Court's version of the legislative history of the Civil Rights Act of 1866.\textsuperscript{133} The \textit{McDonald} Court's showing that the Thirty-Ninth Congress felt authorized to protect whites and blacks equally, however, misconstrued the legislative history of section 1981. What little discussion there was in the Thirty-Ninth Congress of protecting whites again concerned only whites persecuted on account of their abolitionist beliefs, not their color.\textsuperscript{134}

\textsuperscript{132} Cf. Ely, \textit{The Constitutionalitity of Reverse Racial Discrimination}, 41 U. Chi. L. Rev. 723, 728 (1974) (Fourteenth Amendment should not be applied, without sense of its historical function, to prohibit benign discrimination).

\textsuperscript{133} The Court conceded that a mechanical reading of the statute, assuring all persons the same right to contract "as is enjoyed by white citizens," would lead to the conclusion that whites are not protected. The legislative history of \textsection 1981 was reviewed, however, to show that the phrase "as is enjoyed by white citizens" was intended merely to emphasize "'the racial character of the rights being protected.'" 427 U.S. at 287 (quoting \textit{Georgia v. Rachel}, 384 U.S. 780, 791 (1966)).

\textsuperscript{134} The Court pointed to only one proponent who explicitly stated that the statute would protect whites—Senator Trumbull of Illinois. \textit{Id.} at 290. Trumbull's remarks were provoked by charges by Senator Davis and others that the bill provided extraordinary federal pro-
Precise historical analysis thus indicates that discrimination against whites, when motivated by a hostility towards blacks, is a proper object of congressional attack under the enforcement clause of the Thirteenth Amendment. Pre-McDonald cases conform to this understanding. For instance, in *Sullivan v. Little Hunting Park, Inc.*, the Supreme Court ruled that the Civil Rights Act of 1866 affords whites relief when they have been “punished for trying to vindicate the rights of minorities.” The white plaintiff in that case was permitted to challenge his expulsion from a privately operated, racially restricted park for trying to have a black admitted.

The rationale of *Sullivan* also has been applied to employment controversies. Thus, a white employee has standing to sue his employer under section 1981 if discharged in retaliation for efforts to end discrimination against nonwhite coworkers. Courts have recognized that denying white employees standing to sue in this situation would encourage discriminatory conduct to continue.

The *Sullivan* Court’s interpretation of the Civil Rights Act of 1866
comports with the legislative history of the Thirteenth Amendment. Discrimination against whites prompted by racial animus towards blacks, such as appeared in *Sullivan*, was considered an incident of slavery by the drafters. However, the implication of *McDonald*, that Congress could properly exercise its Thirteenth Amendment power to ban racial discrimination against whites in favor of blacks pursuant to bona fide affirmative action plans, draws no support from the legislative history. Only the limited reading of section 1981, accepted by courts before *McDonald*, properly confines the authority granted Congress by the Thirteenth Amendment.

140. The white plaintiff was punished not on account of his race, but because of his "advocacy" of a black man's cause—precisely the type of discrimination against whites decried by the framers. See pp. 408-12 supra.

141. The view that the Thirteenth Amendment does not protect whites generally was consistently maintained in cases arising immediately after ratification. For instance, Justice Swayne wrote that the amendment's sole aim was to remove from the states the power to fix the status of blacks. *United States v. Rhodes*, 27 F. Cas. 785, 794 (C.C.D. Ky. 1866) (No. 16,151) ("The whites needed no relief or protection, and they are practically unaffected by the amendment.") (dictum). Subsequently, the Supreme Court invalidated a federal statute on the ground that it protected whites as well as blacks. *United States v. Harris*, 106 U.S. 629 (1883). Congress, in 1871, had enacted a statute intended to combat the terrorism of the Ku Klux Klan. The Court reasoned that the statute was broader than the Thirteenth Amendment authorized because it literally applied to a conspiracy of two blacks against a white or a conspiracy of two whites against a third white. *Id.* at 641.