

Help Me to Find My Children: A Thirteenth Amendment Challenge to Family Separation*

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ABSTRACT

The Trump Administration’s forced separation of migrant families at the U.S.-Mexico border is an international fault line in the global human rights framework. The scope, severity, and urgency of the issue speak clearly to the need for a diversity of strategies to protect migrant groups. With that in mind, this Article draws attention to a thus-far overlooked source of protection for migrant families facing separation—namely, the Thirteenth Amendment to the U.S. Constitution. While it is familiar history that the Thirteenth Amendment was passed to eradicate the system of slavery and involuntary servitude, courts, scholars, and practitioners continue to underappreciate the extent to which the Amendment prohibits practices with a colorable referent to those that sustained the institution of slavery. Indeed, a central aspect of slavery was the denial of dignity and the fundamental human right to the sanctity of the family, and a central preoccupation of the Thirteenth Amendment’s architects was to prevent enslaved families from being ripped asunder. Highlighting parallels between the breaking up of Black families that reinforced the institution of slavery and the situation at the U.S.-Mexico border, this Article argues the involuntary separation of migrant families falls within the heartland of the Thirteenth Amendment’s protections and should be outlawed as an “incident of slavery” by Congress or the courts.

If one thing should be intuited from the current national reckoning with racism in the United States, it is that efforts to dismantle systems of oppression should proceed with due attention to the historical context from which the systems exist. A Thirteenth Amendment lens for evaluating the Trump Administration’s family separation practices achieves two goals: (1) it ties the violation to historical practices that impacted marginalized groups other than migrant families and accordingly may help to broaden the coalition of advocates fighting to shore up protections for migrant groups; and, (2) it makes the Congressional or judicial response more meaningful as a matter of public morality because it advances a narrative that centers the breaking up of migrant families as a failure by Congress and the courts to satisfy their constitutional duty to eliminate the kind of subjugation that was a hallmark of America’s original sin.

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I. INTRODUCTION

On the theory that the United States needed to deter nonwhite immigrants from entering the country, the Trump Administration rolled out a “zero tolerance” immigration policy in April 2018 that directed immigration officials to prosecute all adults who entered the Southwest United States, including asylum seekers who presented themselves for inspection.¹ The policy—as it was intended to do—resulted in the forced separation of migrant children from their parents.² By the time the policy captured public attention, 50-70 families, many fleeing violence and persecution

* The title of the Article is inspired by Heather Andrea Williams’ book *Help Me to Find My People: The African American Search for Family Lost in Slavery*. The phrase “help me to find my people” is a reference to the entreaty that formerly enslaved people who had been sold from their families during slavery cried out in their search for their separated family members.

¹ See Philip Bump, *Here Are the Administration Officials Who Have Said that Family Separation Is Meant as a Deterrent*, WASH. POST (June 19, 2018, 9:14 AM), <https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/> (noting top officials in the Trump Administration, including then-Attorney General Jeff Sessions, stated that the policy served to deter migrants fleeing violence in Central America); David Shepardson, *Trump Says Family Separations Deter Illegal Immigration*, REUTERS (Oct. 13, 2018, 5:44 PM), <https://www.reuters.com/article/us-usa-immigration-trump/trump-says-family-separations-deter-illegal-immigration-idUSKCN1MO00C> (reporting that deterrence was the basis for the Trump Administration’s zero-tolerance policy); Cora Currier, *Prosecuting Parents—and Separating Families—Was Meant to Deter Migration, Signed Memo Confirms*, THE INTERCEPT (Sept. 25, 2018, 6:00 AM), <https://theintercept.com/2018/09/25/family-separation-border-crossings-zero-tolerance/> (reporting that documents signed by top immigration officials, including then-Secretary of Homeland Security Kirstjen Nielsen, cite deterrence as the driving force behind the family separation policy); Liz Vinson, *Family Separation Continues Two Years After Trump Administration Claims It Ended*, S. POVERTY L. CTR (June 18, 2020), <https://www.splcenter.org/news/2020/06/18/family-separation-policy-continues-two-years-after-trump-administration-claims-it-ended>.

² Michael D. Shear, Katie Benner, and Michael D. Schmidt, *‘We Need to Take Away Children,’ No Matter How Young, Justice Dept. Officials Said*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html> (reporting that then-Attorney General Jeff Sessions and other top law enforcement officials “understood that ‘zero tolerance’ meant that migrant families would be separated and wanted that to happen because they believed it would deter future illegal immigration...”) [hereinafter Shear et al., *We Need to Take Away Children*].

in their home country, were being separated on a daily basis.³ The government had seized up to 2300 migrant children from their families, including at least 100 toddlers under the age of 4.⁴ It should come as no surprise that the policy drew outrage across the globe.⁵

As the incomprehensibly cruel and inhumane practice was unfolding, a frequently espoused belief was that the sundering of migrant families is incompatible with the nation's core values, or is "Un-American."⁶ But those who advanced this claim could only do so by ignoring the nation's history, which includes numerous historical instances of similar practices.⁷ Indeed, the

³ Complaint for Declaratory and Injunctive Relief at 3, *Washington v. United States*, No. 2:18-cv-00939 (W.D. Wash. filed June 26, 2018), ECF No. 1. This article uses the term migrant families to capture all families entering the Southwest border, including those seeking asylum, which is a right protected by international (G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10 1948), U.N. Doc. A/Res/217(III), art. XIV (Dec. 10, 1948)) and domestic law (the Refugee Act of 1980, Pub. Law 96-212, § 101, 94 Stat. 102, (1980)).

⁴ *Id.* at 46, 71.

⁵ The Trump Administration's policy of separating migrant children from their families struck a global nerve and is perhaps the most visible defect of the Administration's policy failures (although a similar assessment could be made of the Administration's ban of travelers from Muslim-majority countries to the United States). Yeganeh Torbati, Jeff Mason and Mica Rosenberg, *Chaos, anger as Trump order halts some Muslim immigrants*, REUTERS (Jan. 28, 2017 REUTERS (Oct. 13, 2018, 10:48 AM), <https://www.reuters.com/article/us-usa-trump-immigration-chaos/chaos-anger-as-trump-order-halts-some-muslim-immigrants-idUSKBN15C0LD>). Driving a wedge between the nation and its global allies, the policy conveyed to many observers that the United States is not committed to global human rights norms. See Resolution 2019/2733, of the European Parliament of July 18, 2019 on the Situation at the USA-Mexico Border, http://www.europarl.europa.eu/doceo/document/TA-9-2019-0005_EN.html?redirect (denouncing the family separation policy as a "cruel . . . and flagrant violation[] of both US asylum law and international law"); Ravina Shamdasani, *Press Briefing Note on Egypt, United States and Ethiopia*, U.N. OFF. OF THE HIGH COMM'R FOR HUMAN RIGHTS (June 5, 2018), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23174&LangID=E> (stating that the family separation policy is an "arbitrary and unlawful interference in family life, and . . . a serious violation of the rights of the child").

⁶ See, e.g., Kris Schneider, *Republican Senator Slams Proposal to Again Separate Families at Border: It 'Simply Is Un-American'*, ABC NEWS (Oct. 14, 2018, 12:16 PM), <https://abcnews.go.com/Politics/republican-senator-slams-idea-separating-families-border-simply/story?id=58479031>; Ian Schwartz, *Sen. Cory Booker: Obama-Holder Immigration Policy "Violation of Our Values"*, REALCLEARPOLITICS (June 21, 2018), https://www.realclearpolitics.com/video/2018/06/21/cory_booker_obama_holder_immigration_policy_violation_of_our_values.html; Sharon Nelson, *Sen. Nelson: Family Separations "Run Counter to Who We Are as Human Beings"*, WASH. STATE WIRE (June 20, 2018), <https://washingtonstatewire.com/sen-nelson-family-separations-run-counter-to-who-we-are-as-human-beings/>.

⁷ Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2325 (2019) (describing the long tradition of the dehumanization of nonwhite groups in America); K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1887-88 (2019).

law's functioning to forcibly separate nonwhite families has been a fixture in America since its founding.⁸ But this trajectory was not preordained.

Having suffered losses beyond accounting in the deadliest war on United States soil, the country was dragged into a deep morass when, despite the war's brutality and longevity, slaveholding states were committed to preserving an institution that was antithetical to the natural rights guarantees enshrined in the founding documents.⁹ With the soul of the nation at stake, the Thirteenth Amendment was framed and ratified by Congress in order to realize the Declaration's egalitarian ideals.¹⁰ Section 1 of the Amendment commands that "[n]either 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."¹¹ Section 2 empowers Congress to pass appropriate legislation to enforce the constitutional ban on slavery and its vestiges.¹²

⁸ The removal of Indigenous peoples from their land, the internment of Japanese Americans, and Black enslavement in the United States are all atrocities that illustrate this point. See, e.g., MARILYN IRVIN HOLT, *INDIAN ORPHANAGES* 8 (2001) ("Numerous pieces of federal and state legislation, as well as court decisions, spoke to the mechanism of jurisdiction that allowed non-Indian intervention into domestic life. Jurisdiction could ... involve actions under which Indian children became wards of the state, parents lost custody, or children were placed into non-Indian homes."); DONNA K. NAGATA, *Intergenerational Effects of the Japanese American Internment*, in *INTERNATIONAL HANDBOOK OF MULTIGENERATIONAL LEGACIES OF TRAUMA* 125, 125 (Yael Danieli ed., 1998) ("Japanese Americans underwent numerous traumata during their internment ... Many also experienced the destruction of social and family networks."); Justin Samard, *Citing Slavery*, 72 *STAN. L. REV.* 79, 91 (2020) (explaining that legal institutions "forcibly subjected the enslaved to appraisal, sale, and permanent separation from their family and friends") (citation omitted).

⁹ See, e.g., Alexander Tsesis, *Furthering American Freedom: Civil Rights & The Thirteenth Amendment*, 45 *B.C. L. REV.* 307, 325 (2004) [hereinafter Tsesis, *Furthering American Freedom*] (explaining that the Southern states' unwavering commitment to the institution of slavery became apparent to many observers including Abraham Lincoln during the Civil War); see also JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* 85 (5th ed. 1980) ("The implications of the Declaration, however vague, were so powerful that Southern slave owners found it desirable to deny the self-evident truths that it expounded and were willing to do battle with the abolitionists during the period of strain and stress over just what the Declaration meant with regard to society in nineteenth-century America.").

¹⁰ See Tsesis, *Furthering American Freedom*, *supra* note 9, at 322.

¹¹ U.S. CONST. amend. XIII, § 1.

¹² See U.S. CONST. amend. XIII, § 2; *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) ("[The Thirteenth Amendment] clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."); Jack M. Balkin, *The Reconstruction Power*, 85 *N.Y.U. L. REV.* 1801, 1817 (2010) [hereinafter Balkin, *The Reconstruction Power*] ("To enforce the Thirteenth Amendment, Congress must disestablish all the institutions, practices, and customs associated with slavery and make sure they can never rise up again.").

After the passage of the antislavery amendment, heady optimism was in the air about uprooting not merely the fact, but the vestiges, of slavery. Congressman M. Russell Thayer conveyed the exultation of his fellow abolitionists who had intended that ratifying the Amendment would give practical effect to the fundamental rights articulated in the Declaration of Independence: “We have wiped away the black spot from our bright shield and surely God will bless us for it.”¹³

The shadow of the abolitionists’ ambitions still hangs over contemporary discourse on the antislavery amendment, with scholars from Akhil Reed Amar to Catharine A. MacKinnon weighing in.¹⁴ It has been suggested that, through its Thirteenth Amendment Section 2 powers, Congress can pass laws addressing issues such as sexual harassment,¹⁵ hate speech,¹⁶ reproductive rights,¹⁷ racial profiling,¹⁸ violence against women,¹⁹ prostitution,²⁰ child abuse,²¹ capital

¹³ Michael Vorenberg, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 208 (2004) (quoting Thayer to Lieber, Jan. 31, 1865, Francis Lieber MSS, HEH); Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 568-69 (2002) [hereinafter Tsesis, *The Problem of Confederate Symbols*] (explaining congressional Republicans pressed to align the Thirteenth Amendment with the natural rights ideals embodied in the Declaration of Independence)

¹⁴ See Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 126, 155-56 (1992) [hereinafter Amar, *The Case of the Missing Amendments*]; Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 21-26 (1993).

¹⁵ Jennifer L. Conn, *Sexual Harassment: A Thirteenth Amendment Response*, 28 COLUM. J. L. & SOC. PROBS. 519, 556 (1995) (contending sexual harassment is a badge of slavery).

¹⁶ Amar, *The Case of the Missing Amendments*, *supra* note 14, at 126, 155-56 (arguing that hate speech “constitute[s] a badge[] of servitude that may be prohibited under the Thirteenth and Fourteenth Amendments”).

¹⁷ Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 484 (1990); Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment’s Role in the Struggle for Reproductive Rights*, 3 J. GENDER, RACE & JUST. 401, 403 (2000) (intimating that a Thirteenth Amendment framework can be utilized to attain equal reproductive rights for women across races).

¹⁸ William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 19 (2004).

¹⁹ *Violence Against Women: Victims of the System: Hearing on S. 15 Before the S. Comm. on the Judiciary*, 102nd Cong. 89 (1991) (statement of Burt Neuborne, Professor of Law, N.Y.U.) (contending Congress “should recognize that there are badges and incidents of the chattel slavery that women were subjected to and that under article II of the 13th amendment, if Congress wished, it could act”); Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097, 1098 (1998) (arguing the passage of the Violence Against Women Act was an appropriate exercise of Congress’s authority under Section 2 of the Thirteenth Amendment).

²⁰ MacKinnon, *supra* note 14, at 21-26.

²¹ Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1360 (1992) [hereinafter Amar & Widawsky, *Child Abuse as Slavery*].

sentencing of Black defendants,²² and felon disenfranchisement.²³ But despite its lofty promise the Amendment has done little progressive work since announcing that four million enslaved people were freed from their masters' control.²⁴ The minimal enforcement by Congress and the enduring vestiges of slavery offer a reminder of the Amendment's unfulfilled promises.²⁵

This Article seeks to give force to the Thirteenth Amendment as an instrument for protecting the fundamental rights that were the core concerns of the Amendment's architects. Highlighting underappreciated parallels between the forcible dislocation of migrant children from the adults accompanying them at the U.S.-Mexico border and the destruction of Black families during slavery, the Article suggests that the ongoing family separation crisis is properly understood as a matter of constitutional concern within the broad reach of the Thirteenth Amendment. This is because the involuntary splitting up of migrant families represents the denial of the fundamental sanctity of the family to a scorned, disfavored group and is thus a specific disability of the slave system, i.e., an "incident of slavery," that the Reconstruction Congress had set its sights on eradicating.²⁶ To that end, this Article argues that courts applying Section 1 of the Thirteenth

²² Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 47-49 (1995) (arguing the "disproportionate imposition of the death sentence on African Americans . . . is closely linked to the former system of slavery").

²³ DARRELL A.H. MILLER, *A Thirteenth Amendment Agenda for the Twenty-First Century: Of Promises, Power, and Precaution*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT, 291, 294 (Alexander Tsesis ed., 2010) (asserting that "[u]nder the Thirteenth Amendment Congress could use its enforcement authority to abrogate [laws disenfranchising people convicted of felonies] based on their disparate impact").

²⁴ ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 1, 170 (2019) [hereinafter FONER, THE SECOND FOUNDING] (explaining that the Supreme Court "has never gone on to define more broadly the 'badges and incidents' of bondage" and "[a]s a result, the Thirteenth Amendment remains essentially a 'dead letter' whose purpose was fulfilled when chattel slavery vanished").

²⁵ Taja-Nia Y. Henderson, *The Ironic Promise of the Thirteenth Amendment for Offender Anti-Discrimination Law*, 17 LEWIS & CLARK L. REV. 1141, 1189 (2013) (arguing that the Thirteenth "Amendment's remedial promise has yet to be fully realized"); see also Eric Foner, *The Lost Promise of Reconstruction*, N.Y. TIMES (Sept. 7, 2019), <https://www.nytimes.com/2019/09/07/opinion/sunday/reconstruction-trump.html> ("To this day, the 13th Amendment has almost never been invoked as a weapon against the racism that formed so powerful a bulwark of American slavery.").

²⁶ A variety of meanings have been ascribed to the term "incidents" of slavery. A common interpretation is that an "incident" of slavery is a technical term that captures the specific legal and political disabilities of slavery. See George A. Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the*

Amendment could and should eradicate the incidents of slavery and that legislation putting an end to the breaking up of migrant families falls comfortably within Congress's Section 2 enforcement power.

It is true that other legal instruments could attempt to more directly achieve the same result. The American Civil Liberties Union, for example, brought a Fifth Amendment substantive due process challenge against family separation in 2018, winning a preliminary injunction to stop the practice and reunite families separated.²⁷ Since migrant families continue to be torn apart and no meaningful progress has been made on the reunification front, a straightforward assessment is that additional protections are needed.²⁸ With that in mind, this Article suggests the Thirteenth Amendment should be included in the campaign to end family separation.

This Article has three parts. Part I provides a chronology of the Trump Administration's policy to separate migrant families at the Southwest U.S. border. Part II covers the doctrinal preliminaries of the Thirteenth Amendment. The starting point is a review of its adoption and the interlocking reasons why the Thirteenth Amendment has been relegated to virtual desuetude over

Thirteenth Amendment, in THE PROMISE OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 163, 177 (Alexander Tsesis ed., 2010); see also Darrell A.H. Miller, *The Thirteenth Amendment, Disparate Impact, and Empathy Deficits*, 39 SEATTLE U. L. REV. 847, 856 (2016) [hereinafter Miller, *Empathy Deficits*]; Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 564 (2012) [hereinafter McAward, *Defining the Badges and Incidents of Slavery*] (“The race- and color-based provisions of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act” provide an example, “given Congress’s finding that both ‘public and private . . . racially motivated violence’ is one of the badges and incidents of slavery.” (quoting National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 4702, 123 Stat. 2190, 2835-36 (2009)). The range of issues Congress’ authority under Section 2 has been interpreted to cover, e.g., abortion, felon disenfranchisement, capital punishment, and child abuse, indicates the meaning of the term “incidents” of slavery has eluded consensus. See *supra* notes 15-22; see, e.g., William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS. L. REV. 1311, 1335-36 (2007) [hereinafter Carter, *Defining the Badges and Incidents of Slavery*] (“While it has always been clear that the Amendment outlaws chattel slavery or classical peonage, courts and scholars have struggled with what other forms of physical domination or economic exploitation should be seen as modern equivalents of the ‘slavery or involuntary servitude’ to which the Amendment explicitly speaks.”).

²⁷ Ms. L. v. U.S. Immigr. & Customs Enf’t, 310 F. Supp. 3d 1133, 1142, 1149 (S.D. Cal. 2018) (order granting plaintiffs’ motion for class-wide preliminary injunction).

²⁸ See Liz Vinson, *Family Separation Continues Two Years After Trump Administration Claims It Ended*, S. POVERTY L. CTR. (June 18, 2020), <https://www.splcenter.org/news/2020/06/18/family-separation-policy-continues-two-years-after-trump-administration-claims-it-ended>.

the more than a century and a half of its existence. In particular, Part II explains that in the aftermath of the Civil War, the United States Supreme Court began to adopt a narrow reading of the Amendment, particularly Section 1, flattening its meaning into little more than a resolution to eradicate slavery. As a consequence of this narrowing, civil rights litigants rarely relied on the Amendment in future cases.²⁹ Unsurprisingly, the few attempts to bring claims under the Amendment were unsuccessful.³⁰ The Court did not recognize its error until the heyday of the civil rights revolution when *Jones v. Alfred H. Mayer Co.* was decided in 1968.³¹ Even though the Supreme Court had attempted to revitalize the Amendment in *Jones*, Thirteenth Amendment doctrine has created few future opportunities for doctrinal development.³²

Part III is the heart of the paper, considering the relevance of the Thirteenth Amendment for the Trump Administration's family separation policy. Drawing on the work of historians Thomas D. Russell and Heather Andrea Williams, it begins by examining incidences of individual slave sales in the antebellum South, an expression of the law's endorsement of the destruction of enslaved families. Part III then explains that these slave sales demonstrated that the separation of enslaved families was a core concern of the abolitionists who were the primary architects of the Thirteenth Amendment. The drafters of the Thirteenth Amendment, fully aware that breaking up

²⁹ Akhil Reed Amar, *Remember the Thirteenth*, 10 CONSTITUTIONAL COMMENTARY 403, 403 (1993) [hereinafter Amar, *Remember the Thirteenth*] (lamenting that the Thirteenth Amendment is underutilized as a constitutional aid to champion progressive causes).

³⁰ See, e.g., *Palmer v. Thompson*, 403 U.S. 217 (1971) (rejecting a challenge by Black citizens in the city of Jackson, Mississippi that the city's decision to shutter four public pools rather than operate on a desegregated basis amounted to a "badge or incident of slavery" under the Thirteenth Amendment); *City of Memphis v. Greene*, 451 U.S. 100, 129 (1981) (rejecting the argument that the closing of a public street in the city of Memphis, Tennessee which resulted in a disparate impact on the city's Black residents violated Section 1 of the Thirteenth Amendment); see generally Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1735, 1768 (2012) (arguing Thirteenth Amendment claims are slow in permeating judicial doctrine).

³¹ See, e.g., Tsesis, *Furthering American Freedom*, *supra* note 9, at 329 ("The escape from the morass into which the Court had helped drag this country came in 1968, in *Jones v. Alfred H. Mayer Co.* That case overruled the *Civil Rights Cases* limited construction of the Thirteenth Amendment's second section").

³² 392 U.S. 409, 443-44 (1968); see Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1463 (2012) [hereinafter Balkin & Levinson, *The Dangerous Thirteenth Amendment*] (asserting "the history of the Thirteenth Amendment . . . has been decidedly jurispathic").

enslaved families was central to the maintenance of the slave system, had intended that passing the Amendment would end “the sharp cry of the agonizing hearts of severed families”³³

Having situated the separation of enslaved families as an incident of slavery the framers sought to eradicate,³⁴ Part III laments that legal challenges to the separation of migrant families have largely played out without attending to the historical structures of subjugation in the United States on which the practice rests. If one thing should be intuited from the current national reckoning with racism in the United States, it is that efforts to dismantle systems of oppression should have in mind the historical context in which those systems arose and in which they exist.

In light of that reality, Part III makes the case that movement actors could profitably deploy the Thirteenth Amendment to put an end to family separation. Since the nation is reckoning with the pernicious legacy of slavery, the Thirteenth Amendment’s true potential is that it refocuses attention on the practice and gives it greater salience. More specifically, a Thirteenth Amendment lens accomplishes two things. *First*, it elevates a new understanding of the family separation crisis as a civil rights issue that is tied to historical practices that impacted vulnerable classes in ways that parallel the effect on migrant families at the Southwest U.S. border and may accordingly broaden the coalition of advocates fighting to shore up protections for migrant families. *Second*, a Thirteenth Amendment lens makes the Congressional or judicial response more meaningful as a matter of public morality because it advances a narrative that centers the breaking up of migrant families as a failure by Congress and the courts to satisfy their constitutional duty to eliminate the kind of subjugation that was a hallmark of America’s original sin.³⁵

³³ See CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864).

³⁴ Amar & Widawsky, *Child Abuse as Slavery*, *supra* note 21, at 1373 (arguing that the architects of the Thirteenth Amendment were motivated in part by the desire to stop the destruction of Black families, a practice that was necessary to sustain the slave system).

³⁵ The ratification of the Thirteenth Amendment was an expression of the framers’ intent to live up to the ideals of the Declaration of Independence. Tsesis, *Furthering American Freedom*, *supra* note 9, at 387 (“The Enforcement Clause of the Thirteenth Amendment provides lawmakers with the power to craft laws tied to the

I. FAMILY SEPARATION

In her book *Help Me to Find My People*, the historian Heather Andrea Williams provides a magisterial account of the forced separation of Black families during slavery and their efforts to reunite, a perspective largely missing in the conventional understanding of slavery as an institution.³⁶ Williams plumbs countless historical documents and slave narratives, transporting the reader to the auction blocks and market places where Black families experienced unbounded grief.³⁷ “It was where many [B]lack people parted from place, from family, and from the lives they had known,” writes Williams.³⁸ Among those who engaged in the separation of Black families was the third president of the United States.

To the consternation of contemporary observers, Thomas Jefferson—an infamous buyer and seller of enslaved people—famously wrote that Black people are “inferior to the whites in the endowments both of body and mind” and belong to the “catalogue of our indigenous animals.”³⁹ This perverse but common belief enabled the founding generation and their successors to accept

Declaration of Independence’s ideal of a free and equal citizenry. The Framers of the Thirteenth Amendment refined that idea to include persons of all races.”).

³⁶ See HEATHER ANDREA WILLIAMS, *HELP ME TO FIND MY PEOPLE: THE AFRICAN AMERICAN SEARCH FOR FAMILY LOST IN SLAVERY* 13-14 (2012) [hereinafter WILLIAMS, *HELP ME TO FIND MY PEOPLE*]; *Families Torn Apart by Slavery Desperately Sought Reunion After Emancipation*, EQUAL JUSTICE INITIATIVE (Feb. 24, 2017), <https://eji.org/news/families-torn-apart-by-slavery-sought-reunion/>.

³⁷ See WILLIAMS, *HELP ME TO FIND MY PEOPLE* at 28-29 (recounting a formerly enslaved man’s heart-wrenching recollection of when, as a child, he had been sold from his mother); see also Imani Perry, *Human Bonds*, N.Y. TIMES (June 29, 2012), <https://www.nytimes.com/2012/07/01/books/review/help-me-to-find-my-people-by-heather-andrea-williams.html> (reviewing Williams’ book).

³⁸ WILLIAMS, *HELP ME TO FIND MY PEOPLE*, *supra* note 36, at 101.

³⁹ THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 78, 149-55 (J.W. Randolph ed., 1853) (1785). The 1781 writings by Thomas Jefferson were focused on his observations relating to the physical terrain of Virginia, but the revelation of his deeply held prejudices about Black people have now come to capture the ethos of the writings. David K. Shipler, *Jefferson is America – And America is Jefferson*, N.Y. Times (April 12, 1993), <https://www.nytimes.com/1993/04/12/opinion/jefferson-is-america-and-america-is-jefferson.html> (editorializing that “[r]acism is still the most corrosive problem in America, and its major elements can be seen clearly in what Jefferson wrote,” including “[i]n his only book, ‘Notes on the State of Virginia.’” To this Shipler adds that “Jefferson observe[d] his slaves and endorse[d] virtually every stereotype—positive but largely negative—that today characterizes the system of prejudices about black people physically, mentally, sexually, emotionally.” Worse still, “[s]uch ugly suspicions, also tempered with diffidence, lie in mainstream white America today.” Although writing in 1993, Shipler’s observations continue to resonate today.).

family separation and the institution of slavery as a norm.⁴⁰ The dehumanization of Black people to justify their subjugation in antebellum times was a bellwether for oppressive practices that continue today.⁴¹ With only modest tweaks to the language, Jefferson’s sentiments that Black people are lesser than whites and akin to animals is essentially the same as those expressed by President Donald Trump to justify the wanton destruction of migrant families: “You wouldn’t believe how bad these people are. These aren’t people, these are animals”⁴² As will be related in the section that follows, family separation continues under the banner of practices rooted in the slave system.

A. *The Family Separation Apparatus*

The designs for the family separation policy were set in motion when Trump launched his bid for U.S. president. In a June 2015 speech announcing his candidacy, Trump offered a blistering attack on Mexico and Mexican immigrants, foretelling an Administration that would count exclusion and white nationalism among its core principles. “When Mexico sends its people, they’re not sending their best,” he assessed.⁴³ “They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re

⁴⁰ WILLIAMS, HELP ME TO FIND MY PEOPLE, *supra* note 36, at 98 (“Part of the justification for enslaving Africans and their descendants lay in this assertion that blacks lacked the sensitivity and the capacity to feel emotional pain as white people did.”).

⁴¹ I note here that the institution of slavery was not limited to a dehumanization campaign against Black people. Indigenous people were also enslaved. Gregory Ablavsky, *Making Indians “White”: The Judicial Abolition of Native Slavery in Revolutionary Virginia and its Racial Legacy*, 159 PENN. L. REV. 1457, 1459 (2011) (explaining that “despite present-day conceptions that all slaves were Africans, Indian slavery was ubiquitous. Indian slaves could be found in all thirteen mainland British colonies in 1772, as well as in the French and Spanish colonies of North America. In Virginia alone, thousands of descendants of enslaved Indians toiled alongside African slaves on plantations.”).

⁴² Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants ‘Animals’ in Rant*, N. Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html>.

⁴³ Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <https://time.com/4473972/donald-trump-/>.

rapists.”⁴⁴ As if to pacify some observers, he added the caveat that “some . . . are good people.”⁴⁵ During campaign stops, Trump boasted he would build a wall financed by Mexico along the U.S.-Mexico border to deter immigration from Central America.⁴⁶ He rode this white nationalist, anti-immigrant sentiment to the White House.⁴⁷

The formal process of rolling back protections for both lawful and unauthorized immigrants commenced days after Trump assumed office.⁴⁸ On January 25, 2017, Trump issued two executive orders. Executive Order 13767 directed Administration officials to begin constructing a wall along the Southwest U.S. border, to restrict access to asylum, and to increase immigration law enforcement, among other things.⁴⁹ Executive Order 13768, which regulated interior enforcement, called for the refusal of federal funds to so-called sanctuary cities and the addition of 10,000 Immigration and Customs Enforcement agents to intensify the policing of immigrant communities.⁵⁰ By a memorandum dated February 20, 2017, then-Secretary of Homeland Security (DHS) John Kelly issued implementation guidelines for the executive orders on border security and interior enforcement.⁵¹ The message to senior DHS officials was that immigration agents had *carte blanche* to deport unauthorized immigrants.⁵² The practical effect

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See Nick Corasaniti, *A Look at Trump's Immigration Plan, Then and Now*, N.Y. TIMES (Aug. 31, 2016), <https://www.nytimes.com/interactive/2016/08/31/us/politics/donald-trump-immigration-changes.html>.

⁴⁷ See Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 197, 200 (Mar. 2019).

⁴⁸ See, e.g., Chas Danner, *The Long-Term Damage of Trump's War on Immigrants*, THE INTELLIGENCER (Apr. 7, 2019), <https://nymag.com/intelligencer/2019/04/the-long-term-damage-of-trumps-war-on-immigrants.html> (explaining the societal impact of Trump's attack on migrant groups).

⁴⁹ Exec. Order No. 13767, 82 Fed. Reg. 8,793, 8,793, 8,795 (Jan. 25, 2017).

⁵⁰ Exec. Order No. 13768, 82 Fed. Reg. 8,799, 8,799, 8,800 (Jan. 25, 2017).

⁵¹ Memorandum from Sec'y John Kelly to Senior Dep't of Homeland Sec. Officials (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

⁵² The policy provided that DHS “personnel should prioritize removable aliens who: (1) have been convicted of any criminal offense; (2) have been charged with any criminal offense that has not been resolved; (3) have committed acts which constitute a chargeable criminal offense; (4) have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency; (5) have abused any program related to receipt of public benefits; (6) are subject to a final order of removal but have not complied with their legal obligation to depart

was that immigrant communities languished in fear that they could be arrested and deported at any moment.⁵³

The Administration’s immigration policy eventually offered an even more categorical directive in Spring 2018 when Trump’s then-Attorney General Jeff Sessions—the most anti-immigrant U.S. Senator at the time of his appointment⁵⁴—announced the Department of Justice would pursue criminal prosecution of all immigrants who entered the country through the Southwest border.⁵⁵ “I have put in place a ‘zero tolerance’ policy for illegal entry on our Southwest border. If you cross this border unlawfully,” Sessions warned, “then we will prosecute you. It’s that simple. If you smuggle illegal aliens across our border, then we will prosecute you.”⁵⁶ His statement bluntly announced the Administration’s intent to use the zero-tolerance policy—including family separation—as a means to deter *all immigration* from the Southwest U.S., although by warning families not to “come here illegally”, unlawful immigration was singled out.⁵⁷ A draft report from the Justice Department’s inspector general obtained by the *New York Times* exposed the fallacy of the national security pretext used to justify the separation of migrant families. According to the report, Sessions reportedly told top government officials that “[w]e need to take

the United States; or (7) *in the judgment of an immigration officer, otherwise pose a risk to public safety or national security.*” *Id.* at 2 (emphasis added).

⁵³ Olivia Sanchez, *Endless Fear: Undocumented Immigrants Grapple with Anxiety, Depression Under Trump*, USA TODAY (Aug. 25, 2019), <https://www.usatoday.com/story/news/nation/2019/08/25/undocumented-immigrants-struggle-mental-health-survival-mode/1816672001/>.

⁵⁴ Thomas M. McDonnell & Vanessa H. Merton, *Enter at Your Own Risk: Criminalizing Asylum-Seekers* 51.1 COLUM. HUM. RTS. L. REV. 1, 9 (2019) [hereinafter McDonnell & Merton, *Criminalizing Asylum-Seekers*].

⁵⁵ Carrie F. Cordero et al., *The Law Against Family Separation*, 51.2 COLUM. HUM. RTS. L. REV. 432, 439-41 (2020) (explaining the chronological development of the family separation policy); *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry*, U.S. DEP’T OF JUSTICE (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> (reporting that the “zero tolerance” policy called for law enforcement officials to prosecute all undocumented entrants into the Southwest U.S. border).

⁵⁶ Att’y Gen. Jeff Sessions, Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>.

⁵⁷ *Id.* (emphasis added); Shear et al., *We Need to Take Away Children* (reporting the zero tolerance policy was intended to “prosecute all undocumented immigrants even if it meant separating children from their parents” because “they believed it would deter future illegal immigration”).

away children”—a move top law enforcement officials recognized as intended to deter the influx of families into the U.S. Trump had campaigned against preventing.⁵⁸

Prior to the “zero tolerance” regime, DHS’s border apprehension policy was governed by a 1997 court-ordered settlement agreement stemming from the case of *Flores v. Reno*.⁵⁹ The *Flores* settlement mandated that children could not be detained in immigration facilities for more than 20 days.⁶⁰ As a result of *Flores*, families suspected of entering the United States illegally were released into the U.S. interior within 20 days and allowed to remain in the U.S. while their immigration status was adjudicated, a practice pejoratively known as “catch and release.”⁶¹ Notably, under prior administrations, first-time entrants were typically placed in *civil* detention, where children could be held with their parents in the first instance.⁶² By contrast, the Trump

⁵⁸ Nicole Narea, *The Trump Administration Knew Exactly What It Was Doing With Family Separation*, VOX (Oct. 7, 2020), <https://www.vox.com/2020/10/7/21506059/trump-family-separations-sessions-rosenstein> (reporting that then-Attorney General Jeff Sessions and his deputy Rod Rosenstein deliberately engineered the immigration policy to break up migrant families).

⁵⁹ Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997); Veronica Stracqualursi, Geneva Sands, Elizabeth Elkin and Veronica Rocha, *What is the Flores settlement that the Trump administration has moved to end?*, CNN (August 23, 2019), <https://www.cnn.com/2019/08/21/politics/what-is-flores-settlement/index.html> (reporting the Trump administration has made repeated attempts to change the *Flores* settlement, arguing that it hinders the government from deterring undocumented immigrants from entering the country”) [hereinafter Stracqualursi et. al, *Flores settlement explained*].

⁶⁰ Stracqualursi et. Al, *Flores settlement explained* (noting the “decades-old settlement agreement ... had set a 20-day limit for holding children” accompanied by adults suspected of crossing the U.S. border unlawfully).

⁶¹ Michael D. Shear, Zolan Kanno-Youngs and Maggie Haberman, *Trump Signals Even Fiercer Immigration Agenda, With a Possible Return of Family Separations*, N.Y. TIMES (April 8, 2019), <https://www.nytimes.com/2019/04/08/us/politics/trump-asylum-seekers-federal-judge.html> (reporting that built into President Trump’s immigration agenda was a desire to undo the “so-called catch and release policies in which asylum seekers [and other migrants] are temporarily released into the United States while they wait for their court hearings”).

⁶² Although migrant parents were separated from their children under prior administrations, those instances were not the norm. Zolan Kanno-Youngs, *Trump Tried to Blur Responsibility for His Family Separation Policy in Final Debate*, N.Y. Times (Oct. 23, 2020), <https://www.nytimes.com/2020/10/23/us/politics/trump-child-separation.html> (“The Obama administration separated children from adults at the border only in cases when there was a doubt about the familial relationship between a child and an accompanying adult or if the adult had a serious criminal record.”). Under the Trump Administration, the breaking up of migrant families hardened into a rule. See Linda Qiu, *Fact-Checking Trump’s Family Separation Claim About Obama’s Policy*, N.Y. TIMES (Apr. 9, 2019), <https://www.nytimes.com/2019/04/09/us/politics/fact-check-family-separation-obama.html> (reporting on the false claim that the family separation practice originated under President Barack Obama’s Administration); William Cummings, *Trump Defends Conditions for Detained Migrant Kids, Blames Obama for Family Separations; Fact Checkers Call Foul*, USA TODAY (June 24, 2019), <https://www.usatoday.com/story/news/politics/2019/06/23/trump-falsely-says-obama-started-family-separation/1540733001/> (same).

Administration's "zero tolerance" policy made immigration an exclusively criminal matter.⁶³ And because, under the *Flores* settlement, migrant children could not be held long-term in criminal detention, they were separated from their parents once the criminal prosecutions commenced.⁶⁴

As of January 2020, U.S. officials estimated that 4,368 children had been separated from their families under the Trump Administration.⁶⁵ Among them were Juan and Sofia, then-7 and 11-years-old, respectively, who were separated from their father Adolfo.⁶⁶ Facing imminent death at the hands of El Salvador's notorious gangs, the family fled their native land to seek asylum in the U.S.⁶⁷ U.S. Border Patrol agents charged that Adolfo himself was a gang member and a danger to the community, even though no evidence existed to support their allegations.⁶⁸ Nevertheless, the family was broken up without having an opportunity to press their claims before an asylum judge.⁶⁹ The treatment of migrant families like Adolfo's form the backdrop for the opposition to the policy, where the American Civil Liberties Union has played a prominent role.

⁶³ ACLU, *The Trump administration's "Zero Tolerance" and "Operation Streamline" policies are creating a legal and humanitarian disaster in our border communities*, <https://www.aclusandiego.org/operationstreamline/> ("On April 6, 2018, Attorney General Jeff Sessions ordered federal prosecutors to abandon professional judgment in favor of a 'Zero Tolerance' policy, *requiring criminal charges against every person apprehended entering the United States without documentation*. Prosecutors may no longer employ common sense to determine the best use of court and government resources, for instance by prioritizing serious felonies over misdemeanor cases.") (emphasis added).

⁶⁴ See *Family Separation and Detention*, AM. BAR ASS'N, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/immigration/familyseparation/ (last visited Oct. 27, 2020) ("Since children cannot be held in criminal detention, the children are designated as 'unaccompanied alien children' and placed in the custody of the Department of Health and Human Services' Office of Refugee Resettlement (ORR). ORR places the children in shelters until they are released . . ."); see also Seung Min Kim, *7 Questions About the Family-Separation Policy, Answered*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/politics/q-and-a-understanding-the-controversy-over-separating-families-at-the-border/2018/06/19/8a61664a-73fb-11e8-be2f-d40578877b7b_story.html.

⁶⁵ Kristina Davis, *U.S. Officials Say They Are Highly Confident to Have Reached Tally on Separated Children: 4,368*, L.A. TIMES (Jan. 18, 2020), <https://www.latimes.com/world-nation/story/2020-01-18/u-s-officials-say-they-are-highly-confident-to-have-reached-tally-on-separated-children-4-368>.

⁶⁶ Manuel Bojorquez, *Immigrant Father Accused of Being in a Gang Reunites with Children After 184 Days*, CBS NEWS (May 30, 2019), <https://www.cbsnews.com/news/immigrant-father-accused-of-being-in-a-gang-reunites-with-children-2019-05-30/>.

⁶⁷ *Id.*

⁶⁸ See *id.*

⁶⁹ See *id.*

B. *Challenges to Family Separation*

In June 2018, the ACLU sued the Trump Administration in the Southern District of California, winning a court order on behalf of a class of migrant parents who had been separated “from their minor children while [the parents] were held in immigration detention and without a showing that they were unfit to parent or otherwise presented a danger to their children.”⁷⁰ The decision was handed down days after Trump issued Executive Order 13841, which directed the DHS Secretary to “maintain custody of alien families during the pendency of any criminal improper entry or immigration proceedings” except where doing so would endanger the child.⁷¹

Plaintiffs alleged that “the Government’s practice of separating [migrant parents] from their children, and failing to reunite those parents who have been separated” violated their “substantive due process rights to family integrity under the Fifth Amendment.”⁷² Substantive due process prohibits “certain [arbitrary wrongful] government actions regardless of the fairness of the procedures used to implement them.”⁷³ To prevail, a plaintiff must show that the practice complained of “shocks the conscience.”⁷⁴ Federal district judge Dana Sabraw was particularly troubled by the reality that the “practice of separating these families was implemented without any effective system or procedure for (1) tracking the children after they were separated from their parents, (2) enabling communication between the parents and their children after separation, and (3) reuniting the parents and children.”⁷⁵ Lamenting that the government did not account for migrant children with the “same efficiency and accuracy as property,” since the government

⁷⁰ See *Ms. L. v. U.S. Immigr. & Customs Enf’t*, 310 F. Supp. 3d 1133, 1137 (S.D. Cal. 2018) (order granting plaintiffs’ motion for class-wide preliminary injunction).

⁷¹ Exec. Order No. 13841, 83 Fed. Reg. 29,435, 29,435 (June 20, 2018).

⁷² *Ms. L.*, 310 F. Supp. 3d at 1142.

⁷³ *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

⁷⁴ See *Ms. L.*, 310 F. Supp. 3d at 1142 (order granting plaintiffs’ motion for class-wide preliminary injunction).

⁷⁵ *Id.* at 1144.

routinely keeps track of “[m]oney, important documents, and automobiles,” the court concluded the government had jeopardized the “class members’ constitutional rights to family association and integrity.”⁷⁶

Despite the favorable judgment directing the government to halt the practice and commence the reunification of families separated, the government had separated “nearly 1,000 migrant families at the border” within a year of Judge Sabraw’s preliminary injunction.⁷⁷ As of December 2019, more than 5,500 children had been reportedly separated involuntarily from their parents by the Trump Administration.⁷⁸ Making matters worse, in January 2020, Judge Sabraw refused to issue new reunification guidelines, instead granting DHS discretion to decide whether families should be separated.⁷⁹ As a consequence of this decision, the same Administration that categorically criminalizes migrants can continue to separate families “based on any criminal history” of the parent.⁸⁰ Granting such discretion to immigration authorities in the Trump Administration comes close to proclaiming that the “zero-tolerance” policy is effectively reinstated. In light of these developments, there is no reliable indication of when the sundering will be at an end or how long it will take for separated families to be reunited.⁸¹

Since families continue to be separated under the nose of the American public despite its illegality under traditional Fifth Amendment substantive due process principles, an inference to be drawn is that current protections are inadequate. Taking a cue from Professor Akhil Amar, I

⁷⁶ *Id.* at 1144, 1148.

⁷⁷ *Ms. L. v. U.S. Immigr. & Customs EnFt*, 415 F. Supp 3d 980, 983 (S.D. Cal. 2020).

⁷⁸ John Washington, *Family Separations at the Border Constitute Torture, New Report Claims*, THE INTERCEPT (Feb. 25, 2020), <https://theintercept.com/2020/02/25/family-separations-border-torture-report/>.

⁷⁹ *Ms. L.*, 415 F. Supp 3d at 996-98 (order granting in part and denying in part plaintiff’s motion to enforce preliminary injunction.).

⁸⁰ *Id.* at 992.

⁸¹ The government conceded in court filings that no efforts had been made to document the whereabouts of children or their parents before April 2018, making reunification a seemingly Herculean task. See Julia Jacobs, *U.S. Says It Could Take Two Years to Identify up to Thousands of Separated Immigrant Families*, N.Y. TIMES (Apr. 6, 2019), <https://www.nytimes.com/2019/04/06/us/family-separation-trump-administration.html>.

suggest that part of the reason this inadequacy exists is because substantive due process challenges do not highlight the constitutional values at stake and the inhumane treatment of migrant families in a way that everyday Americans can wrap their arms around.⁸² “‘Due process’ sounds (at least at first blush) more in process than substance, and seems more focused on protecting what one already has than on guaranteeing what one needs,” writes Amar.⁸³

A challenge predicated on the Fifth Amendment’s Equal Protection Clause would suffer from similar “welfare rights conceptualization[]” issues.⁸⁴ In *Washington v. United States*, 18 state Attorneys General filed a joint lawsuit alleging that the family separation policy subjected migrants arriving at the Southwestern U.S. border to discriminatory treatment “consistent with the demonstrated anti-Latina/o bias repeatedly shown by President Trump.”⁸⁵ Thus, it was a denial of the equal protection of the laws because the government’s Northern Border Strategy for regulating immigration did not “demand prosecution and family separation for all unauthorized entrants.”⁸⁶ While the case is ongoing, even if the challenge succeeds, the problem with an equal protection framing is that it “seems to conjure up a right to equal property shares, rather than a minimal grubstake.”⁸⁷ What is needed is a framework that could “usefully focus some of the constitutional values at stake.”⁸⁸

Naming family separation as a violation of basic human rights—rights embodied in the nation’s founding documents—is more likely to help Americans “walk in the shoes of immigrant families . . . to comprehend the misery endured by people whose only crime is to seek a better

⁸² Amar, *Remember the Thirteenth*, *supra* note 29, at 408.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Complaint for Declaratory and Injunctive Relief at ¶¶ 1, 137, *Washington v. United States*, No. 2:18-cv-00939 (W.D. Wash. June 26, 2018), ECF No. 1.

⁸⁶ *Id.* at ¶ 136.

⁸⁷ Amar, *Remember the Thirteenth*, *supra* note 29, at 408.

⁸⁸ *Id.*

life.”⁸⁹ The Thirteenth Amendment speaks to the ugliness of family separation in the language of basic human rights and, thus, increases the probability that public pressure will be applied to ensure the demise of practice.⁹⁰

II. THE THIRTEENTH AMENDMENT

The Thirteenth Amendment was the first of the Reconstruction Amendments, which were intended to at long last operationalize the ideals of universal freedom embodied in the nation’s founding documents.⁹¹ Adopted by the Thirty-Eighth Congress and soon thereafter ratified by the states, Section 1 of the Amendment commands that “[n]either 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.”⁹² Under Section 2, “Congress shall have power to enforce [Section 1] by appropriate legislation.”⁹³

This Part begins in II.A with a review of the Supreme Court’s early marginalization of the Thirteenth Amendment. The Radical Republican framers who led the charge for its enactment had anticipated that the Amendment would root out all injustices connected to involuntary servitude,

⁸⁹ JOHN LEWIS, *A VISION FOR CHANGE AND THE FUTURE OF AMERICA* 129 (2017) [hereinafter LEWIS, *ACROSS THAT BRIDGE*]. It is important to note that the Administration’s executive order purportedly ending the “zero-tolerance” policy was a result of public outrage at the depravity of the practice. See Lauren Gambino & Oliver Laughland, *Donald Trump Signs Executive Order to End Family Separations*, THE GUARDIAN (June 20, 2018, 3:29 PM), <https://www.theguardian.com/us-news/2018/jun/20/donald-trump-pledges-to-end-family-separations-by-executive-order>; see also Kris Schneider, *Republican Senator Slams Proposal to Again Separate Families at Border: It ‘Simply is Un-American’*, ABC NEWS (Oct. 14, 2018, 12:16 PM), <https://abcnews.go.com/Politics/republican-senator-slams-idea-separating-families-border-simply/story?id=58479031>.

⁹⁰ The intuition underlying this assumption is that people are more likely to rally around a cause that they can wrap their arms around. It keeps them more invested. And, because of this investment, they are more likely to hold public officials accountable. See, e.g., J. Courtney Sullivan, *How Regular Americans Can Help Reunite Migrant Families*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/opinion/border-family-separation.html> (“If you feel outraged now, stay outraged until every last child is reunited with his or her parents and family separation is abolished. We have the power to make this country what it ought to be: to welcome and aid the most vulnerable, to vote out those who would do them harm.”).

⁹¹ Tsesis, *Furthering American Freedom*, *supra* note 9, at 315.

⁹² U.S. CONST. amend. XIII, § 1.

⁹³ U.S. CONST. amend. XIII, § 2.

including the breaking up of enslaved families.⁹⁴ But, in the *Slaughter-House Cases* and the *Civil Rights Cases*, the Supreme Court’s interpretation of the entitlements in the antislavery amendment squeezed the Thirteenth into virtual disuse when the ink was barely dry. It was not until the heyday of the civil rights movement when the Supreme Court in *Jones v. Alfred H. Mayer* corrected its mistake, as discussed in Part II.B. Unfortunately, *Jones* has not had a meaningful impact.

A. *Empty Promises: The Supreme Court’s Early Construction of the Thirteenth Amendment*

The Republicans in the Thirty-Eighth Congress had grand ambitions for the Thirteenth Amendment. They had expected the Amendment to achieve far more than render slavery illegal. Congressman Martin Thayer of Pennsylvania, for example, thought “the Amendment guaranteed African Americans, as full citizens, certain fundamental rights including ‘the rights to enforce contracts, sue, give evidence in court, inherit, and purchase, lease, hold, and convey real property.’”⁹⁵ Underscoring the broad reach of the Amendment’s power, Senator Charles Sumner of Massachusetts contended that it “abolishes slavery entirely . . . it abolishes it root and branch. It abolishes it in general and the particular. It abolishes it in length and breadth and then in every detail. . . . Any other interpretation belittles the great amendment and allows slavery still to linger among us in some of its insufferable pretensions.”⁹⁶ Although the Radical Republicans’ high aspirations for the Amendment were unambiguous, the dramatic marginalization of the Thirteenth Amendment commenced soon after it was ratified.

1. *The Slaughter-House Cases*

⁹⁴ See, e.g., Tsesis, *Furthering American Freedom*, *supra* note 9, at 309, 326; Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War*, 92 AM. HIST. REV. 45, 47-48 (1987) (noting that the Republican framers thought that the Thirteenth Amendment would allow Congress to enact legislation to safeguard natural rights).

⁹⁵ Carter, *Defining the Badges and Incidents of Slavery*, *supra* note 26, at 1324-25, 1325 n.34 (quoting ALEXANDER TSEISIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* 45 (2004)).

⁹⁶ CONG. GLOBE, 42nd Cong., 2d Sess. 728 (1872) (statement of Senator Sumner).

The United States Supreme Court first interpreted the rights embodied in the Thirteenth Amendment in the *Slaughter-House Cases*.⁹⁷ A Louisiana law that granted monopoly power to slaughterhouses conducting business in several parishes in the state was the subject of the litigation, with various butchers alleging that the statute violated the Thirteenth Amendment's ban on "involuntary servitude" because it mandated that they could only utilize their skills to work for the state-created monopoly slaughterhouses.⁹⁸ Writing for the majority, Justice Samuel Miller brusquely dismissed plaintiffs' argument as a "microscopic search" that overlooked the Amendment's "obvious purpose" of "forbid[ding] all shades and conditions of African slavery."⁹⁹ Whatever might be said of the full scope of the Amendment's coverage, Justice Miller's interpretation fell short.

The political episodes of the day exerted considerable influence on the Court's judgment. Miller began the opinion by relating a distorted account of the Civil War that was at the time supposedly "fresh within the memory of us all."¹⁰⁰ The message was the oft-repeated (and accepted)¹⁰¹ myth that the warring sides were clashing primarily over the right of slave states "to separate from the Federal government, and to resist its authority."¹⁰²

Millers' failure to appreciate the extent to which the Civil War and reconstruction were about the broader project of achieving robust forms of equality and freedom cannot simply be

⁹⁷ 83 U.S. (16 Wall.) 36 (1873). Although the Court first analyzed the substantive coverage of the Thirteenth Amendment in the *Slaughter-House Cases*, it was presented with an opportunity two years prior in *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1872), but declined substantive review. *See* 80 U.S. at 594-95.

⁹⁸ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 49-50. The petitioners also brought claims under the Fourteenth Amendment's Equal Protection and Privileges and Immunities Clauses. *Id.* at 50-59.

⁹⁹ *Id.* at 68-69.

¹⁰⁰ *Id.* at 68.

¹⁰¹ This account of the Civil War is still accepted by many. A recent Pew Research study concluded that a 48% plurality of Americans believe the Civil War was fought over states' rights. Russell Heimlich, *What Caused the Civil War?*, PEW RESEARCH CENTER (May 18, 2011), <https://www.pewresearch.org/fact-tank/2011/05/18/what-caused-the-civil-war/>. Only 38% say the war was primarily about slavery. *Id.*

¹⁰² *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 68.

summed up as the product of a lack of contrarian thinking at the time.¹⁰³ By 1865 when the Thirteenth Amendment was adopted, the increasing centrality of the Civil War as a contest to eradicate the institution of slavery and *all* its accoutrements was not lost on observers. “[P]roponents of [the Thirteenth Amendment] incorporated the trauma of war and experiences with Southern recalcitrance after the Northern victory into far more complex narratives about the slave system they sought to destroy.”¹⁰⁴

Miller’s account thus upended much of what the Radical Republican framers had recognized as the impetus for the Thirteenth’s adoption.¹⁰⁵ With the reductionist narrative in place, Justice Miller continued with the business of mythologizing the politics of the day to validate an interpretation of the Amendment that was not historically demonstrable. Only seeing one angle, he maintained that the sole purpose of the “grand” yet “simple” antislavery amendment was to memorialize the illegality of slavery and “establish the freedom of four millions of slaves.”¹⁰⁶ He did not appreciate that the amendment was intended to, as Republican Senator Henry Wilson put it, “obliterate . . . everything connected with [slavery] or pertaining to it.”¹⁰⁷ According to Miller, “those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest” solely on the outcome of the war and the Emancipation Proclamation.¹⁰⁸ Recognizing that “both . . . might have been questioned in after

¹⁰³ FONER, *THE SECOND FOUNDING*, *supra* note 24, at 64-65 (explaining that “[m]ost Republicans[,] moderates as well as Radicals[,] believed that the Thirteenth Amendment” went beyond abolition and “empowered Congress and the federal courts to protect” a broad range of entitlements).

¹⁰⁴ Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 *FORDHAM L. REV.* 981, 1003 (2002).

¹⁰⁵ *Id.*

¹⁰⁶ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 69.

¹⁰⁷ FONER, *THE SECOND FOUNDING*, *supra* note 24, at 40.

¹⁰⁸ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 68.

times . . . they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles.”¹⁰⁹

Thus, Miller concluded the narrow construction in the *Slaughter-House Cases* was justified because the sum of the Reconstruction-era Amendments adequately protected the rights of formerly enslaved people. This point requires amplification. Miller spoke of the Reconstruction Amendments as having “a unity of purpose”—amendments deliberately drafted to provide ever-expanding constitutional freedoms.¹¹⁰ According to Miller, the Thirteenth Amendment’s framers intentionally limited the Amendment’s coverage because they planned to furnish protection for Black people in piecemeal fashion.¹¹¹ From 1865 to 1870, the Reconstruction Congress adopted and ratified three new amendments.¹¹² With the ratification of the Fourteenth and Fifteenth Amendments in 1868 and 1870, respectively, the gaps left unplugged in the Thirteenth would be addressed.¹¹³ Professor Mark A. Graber has commented succinctly on the point Justice Miller was trying to assert: “The Thirteenth Amendment added to previous constitutional protections. The Fourteenth Amendment protected rights not protected by the Thirteenth Amendment. The Fifteenth Amendment protected rights not protected by either the Thirteenth or the Fourteenth Amendment.”¹¹⁴

¹⁰⁹ *Id.*

¹¹⁰ *See id.* at 67.

¹¹¹ *The Slaughter-House Cases*, 83 U.S. (16 Wall) at 68-71 (discussing the supposed rationale for the framers’ adoption of the Reconstruction Amendments over a five-year span).

¹¹² Balkin, *The Reconstruction Power*, *supra* note 12, at 1808 (“Between 1865 and 1870, Congress passed three new amendments, each with an enforcement clause: Section 2 of the Thirteenth Amendment, Section 5 of the Fourteenth Amendment, and Section 2 of the Fifteenth Amendment”).

¹¹³ FONER, *THE SECOND FOUNDING*, *supra* note 24 at 80 (explaining Reconstruction Amendments bolstered the privileges and immunities of U.S. citizens); Mark A. Graber, *Subtraction by Addition? The Thirteenth and Fourteenth Amendments*, 112 COLUM. L. REV. 1501, 1510-11 (2012) (“Miller told a Whig history of American Freedom. The Thirteenth Amendment abolished slavery. Each subsequent amendment was ratified for the purpose of plugging up holes that history had revealed in the rights protected by previous amendments.”) (footnotes omitted); Azmy, *supra* note 104, at 1004 (explaining that Miller thought the Amendment was the “first, intentionally incomplete step toward achieving equality for blacks, a process that had to be completed through the adoption of the Fourteenth and Fifteenth Amendments”) (footnotes omitted).

¹¹⁴ Graber, *supra* note 113, at 1509 (footnotes omitted).

Although Miller claims the existence of the Fourteenth and Fifteenth Amendments shows that the Radical Republicans never understood or anticipated that the Thirteenth Amendment would have robust, rights-conferring effects, the more accurate view is that the Republicans passed the Amendments out of concerns that *other people* would fail to appreciate the broad and ambitious vision that the Thirteenth itself embraced. For example, many Republicans originally understood the Civil Rights Act of 1866 to be clearly authorized by Section 2 of the Thirteenth Amendment,¹¹⁵ but they later enacted the Fourteenth Amendment to placate any lingering concerns about the statute's legitimacy.¹¹⁶ In other words, far from evidencing a narrow understanding of the Thirteenth Amendment, the other Reconstruction Amendments evince a continued commitment to protecting the broad visions and goals that were always associated with the Thirteenth Amendment.

Indeed, from the viewpoint of the people responsible for framing and ratifying the antislavery amendment, Miller's reading is unjustifiable. In his classic examination of the Thirteenth Amendment, Jacobus tenBroek put the point this way: "The amendment was presented not as one step in a series of steps yet to come, not as an act of partial fulfillment, not as the opportunistic achievement of a limited objective."¹¹⁷ Rather, "[i]t was exultantly held up as 'the

¹¹⁵ Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 YALE L.J. 565, 567-68 (1989) ("Congressional proponents of the Civil Rights Act of 1866 found constitutional authorization to enforce civil rights in the Thirteenth Amendment. The Thirteenth Amendment abolished slavery. . . . [T]he framers insisted that this Amendment delegated to Congress as much authority to secure the freedom established by its abolition of slavery as Congress previously had possessed to secure the property right of slaveholders in their slaves. The framers specifically relied on the United States Supreme Court's interpretation of the constitutional provision that secured the personal property right of slaveholders in their slaves as authority for their view of Congress' plenary power to secure the personal rights of the slaves emancipated by the Thirteenth Amendment.").

¹¹⁶ See *id.* at 570 n.24. During the Thirty-Ninth Congress Senate Judiciary Chairman John Trumbull proposed a Civil Rights Bill that became the Civil Rights Act of 1866. Republicans like Congressman Bingham "understood the Civil Rights Bill as a guarantee of the Bill of Rights." *Id.* Because there were doubts about the national government's authority to enforce the Bill, the Fourteenth Amendment was passed "to arm Congress with" enforcement authority. *Id.*

¹¹⁷ Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 176 (1951).

final step,’ ‘the crowning act,’ ‘the capstone upon the sublime structure’; the joyous ‘consummation of abolitionism.’¹¹⁸

Like tenBroek, Justice Stephen Field recognized the majority’s mistake. Dissenting, he criticized the majority for adopting a watered-down account of the Thirteenth Amendment’s purpose.¹¹⁹ According to Field, the Amendment did more than announce a constitutional ban on slavery.¹²⁰ It was also intended to guarantee a wide variety of fundamental rights and “to secure to all persons in the United States practical freedom.”¹²¹

2. The *Civil Rights Cases*

The Supreme Court’s contraction of the Thirteenth Amendment continued in 1883 with the *Civil Rights Cases*.¹²² Five joint lawsuits from around the country comprised the *Civil Rights Cases*.¹²³ At issue was the constitutionality of Sections 1 and 2 of the Civil Rights Act of 1875, passed by Congress under its Thirteenth and Fourteenth Amendment authority.¹²⁴ The Act, banning racial discrimination in public accommodations,¹²⁵ was the last bill passed by Congress during Reconstruction.¹²⁶ The political and social environment in which the case was decided is worth noting. Following a brief period during which formerly enslaved people enjoyed expansions

¹¹⁸ *Id.*

¹¹⁹ Azmy, *supra* note 104, at 1004 (“Justice Field, dissenting, agreed with the central Thirteenth Amendment ruling, that ‘involuntary servitude’ can only apply to humans, not property. However, Field took issue with the majority for ignoring the Thirteenth Amendment’s complexity, correctly arguing that the Amendment was meant to guarantee a broad conception of liberty for all persons, and full equality in the enjoyment of fundamental rights.”) (footnotes omitted).

¹²⁰ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 91-92.

¹²¹ *Id.*

¹²² *The Civil Rights Cases*, 109 U.S. 3 (1883).

¹²³ *Id.* at 4-5.

¹²⁴ Congress was also authorized under the Fourteenth Amendment to pass the Act. *See* U.S. CONST. amend. XIV, § 2.

¹²⁵ Act of March, 1875, ch. 114, §§ 1-2, 18 Stat. 335-36. The full name of the Civil Rights Act of 1875 was “An act to protect all citizens in their civil and legal rights.” *Id.*

¹²⁶ Tsesis, *Furthering American Freedom*, *supra* note 9, at 333 (discussing how the *Civil Rights Cases* contributed to the substantive decline of the Thirteenth Amendment).

in legal protections, Congressional Reconstruction came to a halt with the Compromise of 1877.¹²⁷ The Compromise, reached to settle the contested U.S. presidential election of 1876, gave the presidency to the Republican candidate Rutherford B. Hayes.¹²⁸ In exchange, Republicans agreed to withdraw federal troops from the South and allow Southern states to conduct their affairs unimpeded.¹²⁹ The practical effect was that civil rights laws were unenforced and white supremacy regained its stronghold.¹³⁰ To be clear, many of the systems resembling slavery that the Thirteenth Amendment was supposed to eradicate had persisted before the bargain in 1877 was consummated. Examples include the convict lease system, contracts for sharecropping, and peonage.¹³¹ But the withdrawal of federal troops from the South certainly rendered these and other practices all the more prevalent by the time the *Civil Rights Cases* came before the Court.¹³²

¹²⁷See Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONSTITUTIONAL COMMENTARY 115, 129 (1994) (“Historians debate the extent to which the Compromise of 1877 was the product of a specific backroom political deal and extent to which it was the culmination of a gradual shift in public opinion and the priorities of the Republican Party. But no one disputes that a vast and dramatic change occurred between 1874 and 1877, or that the effect was to nullify the rights won by black Americans through the Fourteenth and Fifteenth Amendments.”) [hereinafter McConnell, *The Forgotten Constitutional Moment*]; C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 1951 (explaining the Compromise of 1877 “wrote an end to Reconstruction and recognized a new regime in the South”).

¹²⁸ FONER, THE SECOND FOUNDING, *supra* note 24 at 126 (“The ‘bargain of 1877’ between leaders of the two major parties, which resolved the disputed election of 1876, had elevated Republican Rutherford B. Hayes to the presidency while acknowledging Democratic control of all the southern states.”).

¹²⁹ See *Id.*

¹³⁰ See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877, 574-87 (1988).

¹³¹ Tsesis, *Furthering American Freedom*, *supra* note 9, at 333.

¹³² The demise of slavery did not automatically mean formerly enslaved people were free. After the end of the Civil War, many of the entitlements formerly enslaved people had secured were obliterated with the enactment of the Black Codes and the reign of violence carried out by terrorist groups like the Ku Klux Klan. Balkin, *The Reconstruction Power*, *supra* note 122, at 1847 (explaining Black Codes were “draconian laws passed after the abolition of slavery that stripped blacks of basic civil rights”); *Id.* at 1846 (“After the Civil War, southern whites terrorized blacks and white unionists, and local governments were either unable or unwilling to stop the violence.”); FONER, THE SECOND FOUNDING, *supra* note 24 at 116 (“In many parts of the South, the freedpeople’s newly won rights, and the governments that sought to implement and protect them, came under sustained assault. The main perpetrator of the cascade of violence in the late 1860s and early 1870s was the Ku Klux Klan, which spread throughout the region after being founded in Tennessee soon after the end of the Civil War.”). In an unprecedented expansion of federal power, Republican governments were installed throughout the South to quell the intransigence of the defeated Confederate states. See FONER, THE SECOND FOUNDING, *supra* note 24 at 117 (explaining that “outrage over what more than one southern Republican called the Klan’s ‘reign of terror’ resulted in laws that ... dramatically expanded the power of the federal government to protect citizens against acts of violence that deprived them of constitutionally guaranteed rights”); *Id.* at 119 (explaining that the expansion of federal power in response to Southern intransigence approached the “outer limits of the constitutional revolution”). Federal troops had been successful in quelling the Klan’s campaign of terror. *Id.* at 121 (describing efforts by federal government actors between 1871 and

Consistent with the views of the Thirteenth Amendment’s framers, the Court in the *Civil Rights Cases* did acknowledge that the Amendment was intended to do more than give four million slaves their freedom. It was also “an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.”¹³³ The Court also recognized that Congress could validly exercise its Section 2 enforcement power to pass all laws “necessary and proper . . . for the obliteration and prevention of slavery, with all its badges and incidents.”¹³⁴ But having conceded that the Amendment was meant to reach even state and private violations,¹³⁵ the majority opinion took a jarring turn: The Court questioned whether “denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theater, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery?”¹³⁶

This inquiry was the product of an artificial dichotomy drawn up by the Court between civil rights and social rights. “[T]he social rights of men and races in the community,” Chief Justice Bradley wrote curtly, are different from those “fundamental rights which appertain to the essence of citizenship.”¹³⁷ By an eight-to-one vote, the Court determined Congress exceeded the scope of its Section 2 authority in adopting the Civil Rights Act of 1875 because racial discrimination in public accommodations was not a vestige of slavery but merely an infringement of a “social right.”¹³⁸ By contrast, the Court held, the Thirteenth Amendment applied only to civil and political rights, not “what may be called the social rights of men and races in the community.”¹³⁹ Holding

1873, including the arrest and prosecution of Klansmen, that “broke the Klan’s back”). But the withdrawal of federal troops from the South restored local affairs to local control and sounded the death knell for Reconstruction. *Id.* at 148 (“Rutherford B. Hayes’s letter accepting the Republican nomination in 1876 promised a return to ‘local self-government’ in the South, a phrase everyone understood to mean white control.”).

¹³³ The Civil Rights Cases, 109 U.S. 3, 20 (1883).

¹³⁴ *Id.* at 20-21.

¹³⁵ *Id.* at 20.

¹³⁶ *Id.* at 21.

¹³⁷ *Id.* at 22.

¹³⁸ *Id.* at 22, 25.

¹³⁹ *Id.* at 59 (Harlan, J., dissenting).

to the contrary, reasoned the Court, would “run[] the slavery argument into the ground.”¹⁴⁰ We thus see in the *Civil Rights Cases* a conception of the phrase “incidents of slavery” that confines its application to “a set of legal institutions, such as prohibitions against blacks testifying in court and owning property.”¹⁴¹

Justice John Harlan found fault with the majority’s holding. Alone in dissent, he criticized the “narrow and artificial” holding as irreconcilable with the “substance and spirit” of the Thirteenth Amendment.¹⁴² He maintained the Thirteenth Amendment protected a robust set of rights for Black people, which “necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races.”¹⁴³ As such, Congress’s authority under the Thirteenth Amendment was far-reaching:

Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, because of their race, of any civil rights granted to other freemen in the same State; and such legislation may be of a direct and primary character, operating upon States, their officers and agents, and, also, upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the State.¹⁴⁴

The *Civil Rights Cases* ushered in a new constitutional reality barely resembling the ideals contemplated by the Republican framers of the Thirteenth Amendment. Instead of eradicating the institutions, practices, and customs that reinforced slavery, the majority’s decision had the opposite effect. It eviscerated one of the crown legislative achievements of the Reconstruction Congress

¹⁴⁰ *Id.* at 24.

¹⁴¹ Tsesis, *Furthering American Freedom*, *supra* note 9, at 336.

¹⁴² *The Civil Rights Cases*, 109 U.S. at 26 (Harlan, J., dissenting).

¹⁴³ *Id.* at 36 (Harlan, J., dissenting).

¹⁴⁴ *Id.* (Harlan, J., dissenting) (emphasis omitted).

and entrenched the subjugation of Black people.¹⁴⁵ After the Court's judgment, the Thirteenth Amendment was effectively rendered a dead letter. Subsequent Supreme Court decisions continued to impede Congress's power to stop private or state discrimination, taking their cues from the social-civil rights distinction precedent Justice Bradley established in the *Civil Rights Cases*.¹⁴⁶

B. *The Civil Rights Movement Attempts to Revitalize the Thirteenth Amendment*

The Thirteenth Amendment lay dormant until 1968, when the Supreme Court decided the landmark case *Jones v. Alfred H. Mayer*.¹⁴⁷ A private developer Alfred H. Mayer Corporation refused to sell a house to a Black couple, Mr. and Mrs. Jones, because of the color of their skin.¹⁴⁸ The question concerned whether 42 U.S.C. § 1982, which bans racial discrimination in the transfer of property, was a legitimate exercise of Congress's power under the Thirteenth Amendment.¹⁴⁹ The Court answered yes, repudiating the narrow construction of Congress's Section 2 enforcement power announced in the *Civil Rights Cases*.¹⁵⁰

¹⁴⁵By neglecting to provide robust protections to newly freed Blacks in the *Civil Rights Cases*, the Supreme Court turned its back on the promises of Reconstruction. As Michael W. McConnell put it, "(l)egal propriety aside, the practical effect of the *Civil Rights Cases* ... was to erase one of the principal legislative achievements of the Reconstruction period." McConnell, *The Forgotten Constitutional Moment*, *supra* note 127 at 138.

¹⁴⁶Notably, in finding that race-based accommodations on railroad cars were constitutional, *Plessy v. Ferguson* cited with approval the reasoning in the *Civil Rights Cases* that the Constitution did not require the Court to facilitate social relations. *See* 163 U.S. 537, 551-52 (1896) (noting that "[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane").

¹⁴⁷*Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

¹⁴⁸*Id.* at 412.

¹⁴⁹*Id.* at 409.

¹⁵⁰*Id.* at 437-43. In *Jones*, the Court announced a version of Congress's Section 2 power consistent with the preferences of the Amendment's architects. Those responsible for framing the antislavery amendment expected that Congress would determine what legislation was appropriate to abolish slavery and that the judiciary would defer to this judgment. *See* CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (statement of Sen. Trumbull) ("[W]e have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States."). While the *Civil Rights Cases* read Congress's power narrowly, *Jones* conferred on Congress the power to rationally determine what constitutes an incident of slavery and pass federal legislation to remedy those vestiges of slavery. *Jones*, 392 U.S. at 440-41.

With the federal government backing the struggle for Black liberation under the administrations of presidents John F. Kennedy and Lyndon B. Johnson, little wonder that the Thirteenth Amendment was rescued from a netherworld during the civil rights revolution.¹⁵¹ “[A] constitutional ruling against the Joneses would have called into serious question the constitutionality of the Fair Housing Act, which was enacted just days after oral argument in *Jones* and whose passage was urged by President Johnson amid the riots following the assassination of Martin Luther King, Jr.”¹⁵² But the Court’s doctrinal expansion was nonetheless surprising because the Court nonetheless chose to embrace a Thirteenth Amendment-based theory when it could easily have relied on other legal sources instead.¹⁵³ Mr. and Mrs. Jones brought claims under the Fifth, Thirteenth, and Fourteenth Amendments, and 42 U.S.C. §§ 1981-1983.¹⁵⁴ Their briefing and oral arguments before the Court relied exclusively on Fourteenth Amendment and statutory theories.¹⁵⁵ Settling on Thirteenth Amendment principles, the Court held that 42 U.S.C. § 1982 was a “necessary and proper” legislation to outlaw private and public discrimination in renting and purchasing property.¹⁵⁶

¹⁵¹ See Greene, *supra* note 30, at 1757.

¹⁵² *Id.* at 1758 (footnote omitted).

¹⁵³ *Id.* (explaining that *Jones*’ holding deviated from expectations in view of the other constitutional or statutory theories available that were more suitable for the result).

¹⁵⁴ *Jones v. Alfred H. Mayer Co.*, 379 F.2d 33, 36 (8th Cir. 1967).

¹⁵⁵ Greene, *supra* note 30, at 1758-59.

¹⁵⁶ *Jones*, 392 U.S. at 438-44. A widely shared belief is that the *Jones* majority interpreted the term “appropriate” under Section 2 as permitting any “necessary and proper” legislation in view of Justice Marshall’s opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See Jennifer Mason McAward, *McCulloch and the Thirteenth Amendment*, 112 COLUM. L. REV. 1769, 1770 (2012). This belief obtained its force as early as the 1880s, when members of the Supreme Court began to recognize *McCulloch* as showing “the spirit in which the [Thirteenth] [A]mendment is to be interpreted, and develop[ing] fully the principles to be applied.” *United States v. Rhodes*, 27 F. Cas. 785, 792 (Swayne, Circuit Justice, C.C.D. Ky. 1866) (No. 16,151). We see in *McCulloch* that the Radical Republican framers intended “appropriate legislation” to cover “all means which are appropriate, which are plainly adapted to [a valid] end, which are not prohibited, but consist with the letter and spirit of the constitution.” See 17 U.S. (4 Wheat.) 316, 421 (1819).

The legislative debates concerning the enactment of the Civil Rights Act of 1866 were helpful to the Court’s analysis.¹⁵⁷ Justice Stewart, writing for a majority of seven in *Jones*, recognized the Thirteenth Amendment had broader application than freeing four million slaves from physical bondage.¹⁵⁸ Section 2 gave Congress wide latitude to pass legislation championing natural rights consistent with the ideals of abolitionists.¹⁵⁹ In upholding the constitutionality of the Act, *Jones* affirmed Congress’s power “rationally to determine what are the badges and the incidents of slavery,” and also “to translate that determination into effective legislation.”¹⁶⁰

C. *Thirteenth Amendment Coverage*

While *Jones v. Alfred H. Mayer Co.* interpreted Section 2 as vesting Congress with power “under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation,”¹⁶¹ significant questions regarding the Amendment’s coverage remain. What constitutes a badge or incident of slavery? Does the Amendment protect non-racial classes? What about Congress’s power under the Amendment’s enforcement clause? Does it reach only remedies for past violations or can Section 2 legislation be enacted to prevent future ones? The civil rights bills passed by Congress under its Section 2 authority to ban discrimination in areas ranging from contract formation¹⁶² to real estate

¹⁵⁷ See *Jones*, 392 U.S. at 424-27 (citing several Congressional debates).

¹⁵⁸ *Id.* at 433-35 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866)) (“It thus appears that, when the House passed the Civil Rights Act on March 13, 1866, it did so on the same assumption that had prevailed in the Senate: It too believed that it was approving a comprehensive statute forbidding *all* racial discrimination affecting the basic civil rights enumerated in the Act.”).

¹⁵⁹ Tsesis, *The Problem of Confederate Symbols*, *supra* note 13, at 590 (“Justice Stewart, writing for the *Jones* majority, found that the second clause to the Thirteenth Amendment empowered Congress to pass legislation specifically designed to promote personal autonomy and to eliminate the ‘badges and incidents’ of servitude.”).

¹⁶⁰ *Jones*, 392 U.S. at 440.

¹⁶¹ *Jones*, 392 U.S. at 440.

¹⁶² See, e.g., Civil Rights Act of 1866, 42 U.S.C. § 1981a (2018) (establishing that citizens of all races have equal contract rights).

transactions¹⁶³ offer clues to the Amendment’s reach. Still, its precise scope has eluded consensus.¹⁶⁴

During antebellum times, “incident of slavery” was generally understood as encompassing the legal rights or restrictions attendant to the slave system.¹⁶⁵ Antebellum courts used the term to refer to legal constraints and conditions imposed on enslaved people.¹⁶⁶ Evidence of the meaning ascribed to the term can be found in books such as George Stroud’s 1856 *Sketch of the Laws Relating to Slavery*.¹⁶⁷ Chapter 2 of Stroud’s book, entitled “Of the Incidents of Slavery—the Relation of Master and Slave,” examines the laws regulating the slave and slave master relationship, such as the enslaved person’s standing as property, the master’s authority to lord over the slave’s daily life, and the restrictions placed on slaves including being barred from entering into contracts.¹⁶⁸

Stroud’s conception of the term “incident of slavery”—legal rights or restrictions affixed to the slave system—resembles that adopted by the Thirteenth Amendment’s framers. At the ratifying debates, Senator James Harlan of Iowa contended the Amendment was intended to obliterate slavery and all its “necessary incidents.”¹⁶⁹ To Harlan and other abolitionists, the incidents of slavery encompassed civil and social disabilities inflicted on enslaved people because of their legal status as property, including prohibitions against testifying in court, acquiring and holding property, and attaining an education.¹⁷⁰

¹⁶³ See, e.g., Fair Housing Act, 42 U.S.C. §§ 3601-19 (2018) (banning discrimination in real estate transactions).

¹⁶⁴ See, e.g., McAward, *Defining the Badges and Incidents of Slavery*, *supra* note 26, at 564 (explaining that “there is no generally accepted understanding as to the meaning of this often-invoked but under-theorized concept”).

¹⁶⁵ *Id.* at 575.

¹⁶⁶ *Id.* at 571.

¹⁶⁷ GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 9-43 (Negro Univ. Press 1968) (1856).

¹⁶⁸ *Id.*

¹⁶⁹ CONG. GLOBE, 38th Cong., 1st Sess. 1439-40 (1864) (statement of Senator Harlan).

¹⁷⁰ See *id.*

Contemporary scholars interpret “incidents of slavery” as encompassing issues from hate speech¹⁷¹ and reproductive rights¹⁷² to violence against women¹⁷³ and child abuse.¹⁷⁴ Speaking to the interpretation of this broad spectrum, the term “incidents” of slavery is conceptualized in two ways. One is that the term refers to the types of harms that reinforced the institution of slavery (e.g., violence against women or child abuse) or are the direct outgrowth of the legacy of slavery, what I call the “legacy view.”¹⁷⁵ The other interpretation, or “slavery-adjacent view,” is that the term contemplates injuries suffered that are not directly traceable to the institution of slavery or its legacy, but for which the victim is a member of a vulnerable group.¹⁷⁶

The separation of migrant families at the U.S.-Mexico border is compatible with both formulations. The “legacy view” offers the most linear path—and the one I will develop in Part III—to making out a claim that the courts and Congress have a concurrent obligation to obliterate the practices.¹⁷⁷ A core component of the slave system was the devastation of Black families by ripping them apart.¹⁷⁸ With this understanding, the Thirteenth Amendment framers hoped the Amendment would keep Black families together and put Black family units on a more secure

¹⁷¹ Amar, *The Case of the Missing Amendments*, *supra* note 14, at 126, 155-56 (arguing that hate speech “constitute[s a] badge[] of servitude that may be prohibited under the Thirteenth and Fourteenth Amendments”).

¹⁷² Koppelman, *supra* note 17, at 483-84; Bridgewater, *supra* note 17, at 403 (intimating that a Thirteenth Amendment framework can be utilized to attain equal reproductive rights for women across races).

¹⁷³ *Violence Against Women: Victims of the System*, *supra* note 19 (contending Congress “should recognize that there are badges and incidents of the chattel slavery that women were subjected to and that under article II of the 13th amendment, if Congress wished, it could act”); Hearn, *supra* note 19, at 1098 (arguing the passage of the Violence Against Women Act was an appropriate exercise of Congress’s authority under Section 2 of the Thirteenth Amendment).

¹⁷⁴ Amar & Widawsky, *Child Abuse as Slavery*, *supra* note 21, at 1360.

¹⁷⁵ McAward, *Defining the Badges and Incidents of Slavery*, *supra* note 26, at 566 (arguing an alternate interpretation would “suggest that Section 2 of the Thirteenth Amendment confers on Congress a broad power to legislate against discrimination . . . and tends to devalue the immediate aftermath of the slave system, in which governments and individuals alike sought to achieve de facto reenslavement of four million African Americans”).

¹⁷⁶ Carter, *Defining the Badges and Incidents of Slavery*, *supra* note 26, at 1318.

¹⁷⁷ See *infra* Part III.

¹⁷⁸ WILLIAMS, HELP ME TO FIND MY PEOPLE, *supra* note 36, at 27.

foundation.¹⁷⁹ But, even if one chooses to disregard this history, the practice of family separation can be recast as a slavery-adjacent “incident”.

Slavery, at its heart, was an institution built on subordination in which white slave masters treated Black people as property, and not as people. The framers of the Thirteenth Amendment were concerned with remedying the disabilities imposed by the system of slavery upon a group that was subjugated on the basis of their race.¹⁸⁰ Trump’s record as a whole clearly establishes that his Administration’s immigration policies are premised on a conception of nonwhite immigrants as inferior. To be sure, it is not immigration as a whole Trump opposes, it is immigration from so-called “shithole countries”— the President’s shorthand for African and Latin American nations.¹⁸¹ Just as the dehumanization of Blacks was used to justify slavery, Trump has peddled the same dehumanizing rhetoric to separate migrant children from their mothers and fathers.

III. APPLYING THE THIRTEENTH AMENDMENT TO FAMILY SEPARATION

A. *Family Separation, an Incident of Slavery*

When I have suggested the family separation crisis at the U.S.-Mexico border is deeply relevant to the institution of slavery that existed in antebellum times, “alarm” is the one word summing up the general reaction. Jack M. Balkin and Sanford Levenson’s essay *The Dangerous Thirteenth Amendment* may help clarify why this response should not come as a surprise. According to Balkin and Levenson, common wisdom has it that drawing parallels to slavery is

¹⁷⁹ See, e.g., Amar & Widawsky, *Child Abuse as Slavery*, *supra* note 21, at 1373.

¹⁸⁰ See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438, 441 (1968) (determining “Congress has power under the Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their *race* or color” because those conditions are “badges and incidents of slavery” (emphasis added)).

¹⁸¹ See Ibram X. Kendi, *The Day Shithole Entered the Presidential Lexicon*, ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054/>. In the same discussion with U.S. Senators where President Trump railed against protecting immigrants from countries such as Haiti, El Salvador and Nigeria, he lamented that the U.S. was not taking in more people from European countries such as Norway. *Id.*

“thought to be ‘off the wall’ or a grievous insult to the ‘real slaves’—generations of African Americans—on whose backs these rhetorical claims rest.”¹⁸²

The intuition seemingly underlying the skepticism is that the lingering effects of slavery are outmoded.¹⁸³ And unlike Africans who were enslaved in the United States, migrant families are not being put to work against their will. It is true that the treatment of migrant families varies from the treatment of African slaves in a number of respects, including the fact that migrant families are not forced into labor. But limiting the conception of chattel slavery to conditions of forced labor provides only a partial view and ignores other fundamental aspects of the institution. Images of all-Black chain gangs—men, women, and children laboring in Southern plantation fields—form a familiar backdrop for the received wisdoms about slavery. But slavery was not limited to Africans being forced to work in plantation fields. The destruction of Black families by buying and selling slaves was a fundamental aspect of the antebellum slave system and its “most cold and stark element.”¹⁸⁴

In this connection, the reader will likely remember that the third President of the United States was an ignominious trader of human beings.¹⁸⁵ At the time Thomas Jefferson authored the Declaration of Independence, declaring the equality of all men to be a “self-evident” truth, he

¹⁸² Balkin & Levinson, *The Dangerous Thirteenth Amendment*, *supra* note 32, at 1496.

¹⁸³ Carter, *Defining the Badges and Incidents of Slavery*, *supra* note 26, at 1352-53 (stating that slavery “is seen as having little contemporary relevance because discourse about slavery’s lingering contemporary effects raises uncomfortable questions about the congenital distribution of material, social, and psychological benefits between the descendants of the enslaved, the descendants of the slave master, and those who fall on either side of this divide by association”).

¹⁸⁴ WILLIAMS, HELP ME TO FIND MY PEOPLE, *supra* note 36, at 27.

¹⁸⁵ While there has been a tendency to mystify the combination of Jefferson’s slave ownership and his writings on liberty as revealing a deeply complex man, the cognitive contortions needed to justify this position obscure an ugly truth: Jefferson was a racist hypocrite. Stephen E. Ambrose, *Founding Fathers and Slaveholders*, SMITHSONIAN MAG. (Nov. 2002), <https://www.smithsonianmag.com/history/founding-fathers-and-slaveholders-72262393/>.

owned approximately 175 slaves.¹⁸⁶ A particularly cruel master, he punished slaves by selling them individually to distant places away from their families—a treatment he intended to replicate death.¹⁸⁷ Although the buying and selling of individual slaves was pervasive, its inexplicable cruelty of separating families was not lost on observers at the time. As Professor Heather Andrea Williams has explained, “[s]ome whites boasted of never selling slaves or separating families precisely because they realized the horror and pain slaves felt at losing their families.”¹⁸⁸

The study of individual slave sales in the United States is relatively nascent and underdeveloped, but a thorough account is given in Thomas D. Russell’s *Articles Sell Best Singly: The Disruption of Slave Families at Court Sales*.¹⁸⁹ Russell points out that with the exception of Alabama, Georgia, and Louisiana, states through their legal systems did not try to preserve any familial relationships in slave transactions.¹⁹⁰ To the contrary, the law’s general preference was to sell family members individually.¹⁹¹ And even the limited protections that enslaved families were afforded came in the form of statutes directing that very young children only be sold with their mothers.¹⁹²

¹⁸⁶ Paul Finkelman, *The Monster of Monticello*, N.Y. TIMES (Nov. 30, 2012), <https://www.nytimes.com/2012/12/01/opinion/the-real-thomas-jefferson.htm> (recounting Thomas Jefferson’s deeply held prejudices against Black people).

¹⁸⁷ On one occasion, Jefferson wanted to punish Cary, a slave who was accused of assaulting another slave. THOMAS JEFFERSON’S FARM BOOK: WITH COMMENTARY AND RELEVANT EXTRACTS FROM OTHER WRITINGS 19 (Edwin Morris Betts, ed., 1953). Jefferson calculated that if Cary “could be sold in any other quarter so distant as never more to be heard of among us, it would to the others be as if he were put out of the way by death.” *Id.*

¹⁸⁸ WILLIAMS, HELP ME TO FIND MY PEOPLE, *supra* note 36, at 97.

¹⁸⁹ Thomas D. Russell, *Articles Sell Best Singly: The Disruption of Slave Families at Court Sales* 1996 UTAH L. REV. 1161 (1996) [hereinafter Russell, *The Disruption of Slave Families at Court Sales*].

¹⁹⁰ *Id.* at 1171.

¹⁹¹ Economist Laurence Kotlikoff estimates the average price of individual slaves was higher than the average price of slaves sold in groups, suggesting slave masters may have been motivated by financial incentives to separate Black families. See Laurence J. Kotlikoff, *The Structure of Slave Prices in New Orleans, 1804 to 1862*, 17 ECON. INQUIRY 496, 512-18 (1979).

¹⁹² For example, a Georgia law barred the sale of children “not exceeding five years” without their mothers. An Act to Regulate the Sale and Division of Slaves, in Certain Cases Therein Named, No. 90, § 1, 1854 Ga. Stat. 103, 103, *repealed by* GA. CONST. OF 1868, art. IV, *reprinted in* COMPILATION OF THE GENERAL AND PUBLIC STATUTES OF THE STATE OF GEORGIA WITH THE FORMS AND PRECEDENTS NECESSARY TO THEIR PRACTICAL USE 636-37 (Howell Cobb ed., 1859). An Alabama Code contained a limitation similar to the one in the Florida and Louisiana statutes,

The risk of family separation was a specific disability of the institution of slavery, i.e., an incident of slavery, which troubled the Thirteenth Amendment’s architects.¹⁹³ Reviewing 1,134 slave bills of sales¹⁹⁴ involving 4,492¹⁹⁵ slaves sold in South Carolina,¹⁹⁶ Russell concludes that “a majority (fifty-two percent) of slaves sold at South Carolina’s court sales experienced individual sale.”¹⁹⁷ For local, commercial sales, that number was nineteen percent.¹⁹⁸ Thus, “the risk of family separation due to individual sale appears to have been between two and three times higher at court sales than at commercial sales.”¹⁹⁹ A few caveats warrant consideration. In instances where the individual slave had no living kin or had previously been sold away from relatives, individual slave sales would overrepresent family separations.²⁰⁰ Where a buyer acquired an entire family unit through individual sales, the same would be true.²⁰¹ The number of individual slave sales, however, would underrepresent actual family separation in situations where family members were sold in groups, i.e., mothers with children, but where the entire family unit was not included

requiring enslaved mothers to be sold along with their children under ten. See Ala. Code. § 2056 (1852), reprinted in A DOCUMENTARY HISTORY OF SLAVERY IN NORTH AMERICA 189 (Willie Lee Rose ed., 1976).

¹⁹³ See CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864).

¹⁹⁴ Russell, *The Disruption of Slave Families at Court Sales*, supra note 189, at 1186-89 (explaining bills of sales were documents used by buyers to record when property was acquired: “Although a bill of sale might be recorded for any type of property, in South Carolina, nearly all (96.5%) of the bills filed with the state were for slave sales. The most important reason for a buyer to file a bill of sale was to provide certain evidence of title. A certain record of title benefited a buyer if a question ever arose regarding the ownership of property. In this way, bills of sale were like the systems that states and counties today used to record real estate or automobile sales.” (footnotes omitted)).

¹⁹⁵ *Id.* at 1186 n.142.

¹⁹⁶ According to Thomas Russell, three types of slave sales were common in antebellum times: commercial sales (16%), court sales (50%), and interregional sales (34%). See *id.* at 1188.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*; see also Thomas D. Russell, *South Carolina's Largest Slave Auctioneering Firm*, 68 CHI.-KENT L. REV. 1241, 1241, 1266 (1993) (emphasizing that in South Carolina, 50% of slave sales took place by operation of law in the form of sheriffs’, probate, and equity court sales, contrasting the often referenced commercial sales conducted by merchants.).

²⁰⁰ Russell, *The Disruption of Slave Families at Court Sales*, supra note 189, at 1170 (explaining we should be careful in our interpretation of individual slave sales).

²⁰¹ For the most part, details about the familial ties of the enslaved person were not of concern to buyers and sellers because slaves were strictly commodities—“goods that brought a price and profit.” WILLIAMS, HELP ME TO FIND MY PEOPLE, supra note 36, at 110. “[S]uch people may have only been known to these owners and traders as ‘likely’ or ‘prime’ or an experienced cook, a good seamstress, or a field hand.” *Id.* at 151. The tenuous records on the movement of enslaved people and their kinship connections did not bode well for reunification. *Id.* at 159.

in the sale.²⁰² The bills of sale do not capture these gradations. But the essential point is that individual sales happened frequently and always presented the risk of family separation.²⁰³

In the throes of the realization that his family could be broken up at any moment, Thomas H. Jones, a former slave, told horror stories of his experience being wrenched from his mother as a child. “I was very much afraid, and began to cry, holding on to my mother’s clothes, and begging her to protect me, and not let the man take me away,” Jones recalled.²⁰⁴ “Mother wept bitterly, and in the midst of her loud sobbings, cried out in broken words, ‘I can’t save you Tommy; master has sold you, you must go.’”²⁰⁵

Not surprisingly, the breaking up of enslaved families worried abolitionists.²⁰⁶ Republican Congressman Henry Wilson of Massachusetts was among the Thirteenth Amendment’s framers hoping that

[W]hen this amendment to the Constitution shall be consummated . . . the sharp cry of the agonizing hearts of severed families will cease to vex the weary ear of the nation . . . Then the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law which make sacred alike the proud homes and lowly cabins of freedom.²⁰⁷

Recognizing the devastating impact of slavery on Black families, Senator Harlan of Iowa similarly captured the point at the Thirteenth Amendment ratifying debate:

Another incident [of slavery] is the abolition practically of the parental relation, robbing the offspring of the care and attention of his parents, severing a relation which is universally cited as the emblem of the relation sustained by the Creator to the human family. And yet, according to the matured judgment of these slave States,

²⁰² Russell, *The Disruption of Slave Families at Court Sales*, *supra* note 189, at 1170.

²⁰³ *Id.*

²⁰⁴ THE EXPERIENCE OF THOMAS H. JONES, WHO WAS A SLAVE FOR FORTY-THREE YEARS 6-8 (1857).

²⁰⁵ *Id.*

²⁰⁶ See Amar & Widawsky, *Child Abuse as Slavery*, *supra* note 21, at 1373.

²⁰⁷ See CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864).

this guardianship of the parent over his own children must be abrogated to secure the perpetuity of slavery.²⁰⁸

Illinois Representative Ebon Ingersoll had hoped that eradicating slavery would permit formerly enslaved people to live “without the fear of being sold away from family members.”²⁰⁹ If you take them at their word, it is clear the separation of enslaved families was an incident of slavery the Thirteenth Amendment’s framers sought to obliterate.

B. Thirteenth Amendment Litigation as a Tool to Challenge Family Separation

1. Judicial Recognition of Thirteenth Amendment Claims

Assuming I have defended successfully my claim that family separation qualifies as one of the “incidents of slavery” contemplated by the Thirteenth Amendment’s framers, it remains unclear such a theory can be put in service of migrant groups. Can Thirteenth Amendment litigation score victories for migrant families? I argue in this Section that a Thirteenth Amendment suit challenging family separation is doctrinally plausible. But I do not intend to suggest such claims are ripe for doctrinal expansion or that courts are prepared to address the pernicious legacy of slavery by finding in favor of migrant families on the basis of the Thirteenth Amendment. Rather, this Section challenges the widely held belief that judicial power under the Thirteenth is constrained to the elimination of literal enslavement or involuntary servitude and does not extend to the eradication of the incidents of slavery.²¹⁰

Those who limit courts’ power under the Thirteenth to the eradication of literal enslavement or involuntary servitude often cite as dispositive the fact that the Supreme Court has never said courts are authorized to remedy the vestiges of slavery in the absence of Congressional

²⁰⁸ *Id.* at 1439.

²⁰⁹ Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11.5 U. PA. J. CONST. L. 1337, 1339 (2009). (citations omitted).

²¹⁰ Carter, *Defining the Badges and Incidents of Slavery*, *supra* note 26, at 1340.

action.²¹¹ Consider, for example, *Alma Society v. Mellon*, a Second Circuit Court of Appeals case involving the constitutionality of state adoption laws.²¹² The plaintiffs there maintained that a statute requiring the permanent sealing of adoption records destroyed family ties in ways that resonate with the lived experiences of enslaved children.²¹³ But the court rejected this Thirteenth Amendment theory, stating that it “simply does not conform to the Supreme Court’s interpretations of the Thirteenth Amendment” and emphasizing that “[t]he Court has never held that the Amendment itself, unaided by legislation as it is here, reaches the ‘badges and incidents’ of slavery as well as the actual conditions of slavery and involuntary servitude.”²¹⁴ Rooting out the badges and incidents of slavery, the court concluded, is a power constitutionally vested in Congress alone.²¹⁵

In another case, a Black woman had alleged she had been subjected to employment discrimination on the basis of her race and gender and that the treatment constituted a Thirteenth Amendment violation.²¹⁶ Observing that she did not assert that she was literally enslaved or subjected to involuntary servitude, a federal district court dismissed her claims on the grounds that “the Amendment *itself* [does not] reach[] forms of discrimination other than slavery and involuntary servitude.”²¹⁷

What these lower courts get wrong is that the Supreme Court has never ruled out judicial review of claims alleging conduct constituting badges or incidents of slavery in the absence of

²¹¹ *Id.* at 1340-41.

²¹² 601 F.2d 1225, 1227 (2d Cir. 1979).

²¹³ *Id.* at 1227-29.

²¹⁴ *Id.* at 1237.

²¹⁵ *Id.*

²¹⁶ *Atta v. Sun Co.*, 596 F. Supp. 103 (E.D. Pa. 1984).

²¹⁷ *Id.* at 105; *see also* Carter, *Defining the Badges and Incidents of Slavery*, *supra* note 26, at 1340 (“[T]he Amendment’s empowerment of Congress to act against the badges and incidents of slavery is presumed to create the negative implication that the power of judicial review under the Amendment is limited to conditions of actual enslavement.”).

Congressional legislation. Indeed, cases such as *Memphis v. Greene* offer a reminder that judicial intervention may be proper in such situations.²¹⁸ In *Greene*, the Supreme Court concluded the Thirteenth Amendment may have self-executing force, meaning Section 2 of the Amendment does not necessarily vest Congress with power untethered to the Amendment itself; the judiciary may have concurrent power to eradicate the badges and incidents of slavery as well.²¹⁹

Indeed, a review of the Amendment's history reveals a constitutional design consistent with *Greene*'s insights. At the ratifying debates, Senator Wilson of Massachusetts, for example, declared that the Amendment "obliterat[ed] 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."²²⁰ This demonstrates the architects of the Amendment understood the Amendment itself to vanish slavery and all its badges and incidents. It did not merely provide a separate power vested to Congress under the Amendment's Enforcement Clause. As Professor William M. Carter Jr. has argued, abolitionists "would have seen no need for a specific authorization for the judiciary" to implement the Amendment's objectives because they "assumed that such judicial power existed under commonly understood principles of judicial review."²²¹ Thus, the more likely reading of the Amendment's legislative history is that the framers had intended for the courts and Congress to have a concurrent obligation to liberate enslaved people from their servile condition.²²²

²¹⁸ 451 U.S. 100 (1981).

²¹⁹ *Id.* at 125 (noting that Congress's Section 2 authority "is not inconsistent with the view that the Amendment has self-executing force").

²²⁰ CONG. GLOBE, 38th Cong., 1st Sess. 1199, 1319, 1321, 1324 (1864) (statements of Sen. Wilson).

²²¹ Carter, *Defining the Badges and Incidents of Slavery*, *supra* note 26, at 1346.

²²² See Carter, *Defining the Badges and Incidents of Slavery*, *supra* note 26, at 1347 ("Barring . . . conclusive evidence [to the contrary], we should not lightly assume that the Thirteenth Amendment, unlike all other constitutional protections of individual rights, requires deviation from the settled principles of judicial review under which both the courts and Congress have concurrent power to enforce the Constitution."); Larry J. Pittman, *Physician-Assisted Suicide in the Dark Ward: The Intersection of the Thirteenth Amendment and Health Care Treatments Having Disproportionate Impacts on Disfavored Groups*, 28 SETON HALL L. REV. 774, 832 (1998) ("Neither the legislative

Proponents of the Congress-only view also argue an inference one should draw from the explicit authority granted to Congress under the Amendment's Enforcement Clause, as well as its silence on the judiciary's role, is that courts should stay out of the business of abolishing the badges and incidents of slavery absent Congressional action.²²³ For support they point to the interpretive principle of *expressio unius est exclusio alterius*, or "the negative implication rule."²²⁴ Under the logic that flows from this principle, if a text explicitly grants an institution the power to do something, the power does not extend to any institution not specified in the text.²²⁵ The problem with the negative implication principle as applied here is that there is no textual basis for the claim asserted.²²⁶ Congress's power to eliminate the badges and incidents of slavery comes from the Supreme Court's reading of the legislative history of the Amendment.²²⁷ The Amendment's text itself does not mention the words "badges" or "incidents". Reasonable observers can differ as to the proper scope of judicially enforceable Thirteenth Amendment rights. But those who see the Amendment as limiting the judiciary's role to eradicating literal slavery or involuntary servitude do so only by ignoring the Thirteenth Amendment's legislative history.

2. *Nicholson v. Williams* and the Viability of Badges and Incidents Suits

Indeed, where there is a tight connection between the alleged violation and a practice directly traceable to slavery, as here, the Thirteenth Amendment could be utilized to the benefit of

history of the amendment itself nor the debates over the use of Section 2 to adopt the Civil Rights Act of 1866 conclusively show that Congress intended the [courts] to have no role in the enforcement of the Thirteenth Amendment." (footnote omitted)).

²²³ Carter, *Defining the Badges and Incidents of Slavery*, *supra* note 26, at 1340 ("[T]he Amendment's empowerment of Congress to act against the badges and incidents of slavery is presumed to create the negative implication that the power of judicial review under the Amendment is limited to conditions of actual enslavement.").

²²⁴ *Id.* at 1341.

²²⁵ See generally Clifton Williams, *Expressio Unius Est Exclusio Alterius*, 15 MARQ. L. REV. 191 (1931).

²²⁶ Carter, *Defining the Badges and Incidents of Slavery*, *supra* note 26, at 1341-42.

²²⁷ Writing for the majority in the *Civil Rights Cases*, Justice Bradley acknowledged that the Thirteenth Amendment authorized Congress to pass legislation rooting out the "badges and incidents of slavery." The *Civil Rights Cases*, 109 U.S. at 20.

advocates. This was the insight articulated by Judge Jack B. Weinstein in the landmark²²⁸ ruling in *Nicholson v. Williams*, a case involving abused mothers whose children had been seized by the state without due process.²²⁹ The *Nicholson* decision set the stage for recasting abusive state actions towards a vulnerable parent-class as a matter of constitutional concern under the Thirteenth Amendment. Bleeding from her head after being assaulted by her partner, Sharwline Nicholson, a thirty-two year old single mother of two, was rushed to the hospital.²³⁰ As she had done in the past when circumstances required it, Ms. Nicholson asked her neighbor, a baby sitter, to look after her children.²³¹ On the evening of the assault New York’s Administration for Child Services (ACS) seized Ms. Nicholson’s children and placed them in a foster home without legal authorization.²³² ACS was required to file a petition of neglect in Family Court against Ms. Nicholson within a day of her children being seized by the agency but did not do so until five days later.²³³ Without distinguishing her as a victim rather than a batterer, ACS alleged Ms. Nicholson “fail[ed] to cooperate with offered services designed to insure the safety of the children” and was unfit to parent because she “engage[d] in acts of domestic violence in the presence of [her] child.”²³⁴

Representing a plaintiff class of similarly situated mothers—women whose children had been temporarily seized by ACS because their partners had abused them—Ms. Nicholson sued ACS alleging due process violations under the Fourteenth Amendment.²³⁵ She testified at trial that ACS refused to tell her where her children had been taken, which left her “very upset . . . [and]

²²⁸ See, e.g., Chris Lombardi, *Justice for Battered Women*, THE NATION (June 27, 2002), <https://www.thenation.com/article/archive/justice-battered-women/> (observing that the *Nicholson* decision was a landmark decision “that could change child welfare as we know it”).

²²⁹ *Nicholson*, 203 F. Supp. 2d at 168-69.

²³⁰ *Id.* at 169.

²³¹ *Id.*

²³² *Id.* at 169-70.

²³³ *Id.* at 171-72.

²³⁴ *Id.* at 209.

²³⁵ *Id.* at 233.

devastated.”²³⁶ ACS’s policy of separating children from their mothers “solely because the mother[s] ha[d] been abused” abridged the mothers’ procedural and substantive due process rights, Judge Weinstein ruled in an 87-page opinion.²³⁷ ACS did not investigate the mothers’ fitness to care for their children, whether alternatives short of removal existed, or whether the children were even in any objective danger, the court found.²³⁸

Judge Weinstein also found *sua sponte* that ACS’s conduct violated the Thirteenth Amendment, reasoning that “[t]he exact language of the Thirteenth Amendment could be construed to cover children forcibly and unnecessarily removed without due process.”²³⁹ The Amendment “bears on the interpretation of the law insofar as it attempts to protect the right of mothers and children not to be forcefully separated without being ‘convicted’—here adjudicated properly as neglectful and neglected.”²⁴⁰

The deep resonance of the analogy Judge Weinstein invites to the breaking up of families at the U.S.-Mexico border is unmistakable and layered with significance. A group of medical and human rights experts recently evaluated asylum-seeking parents who had been separated from their children between 60 and 69 days for psychological harms, concluding that the practice of family separation was equivalent to torture.²⁴¹ At the heart of the evaluations were two questions:

- 1) What traumatic experiences did these asylum seekers report in their home countries, during their journey to the United States, and during and after their apprehension at the border?; and 2) What were the psychological effects associated with the forced separation

²³⁶ *Id.* at 169.

²³⁷ *Id.* at 250.

²³⁸ *Id.* (“ACS [did] not conduct ‘sufficient investigation’ before removing children . . . fail[ed] to determine what [could be] done . . . without forced removal . . . [and failed to] adequately investigate what the mother [did] to try to protect herself and her children.”).

²³⁹ *Id.* at 164-65, 248.

²⁴⁰ *Id.* at 247.

²⁴¹ Hajar Habbach et al., “*You Will Never See Your Child Again*”: *The Persistent Psychological Effects of Family Separation*, PHYSICIANS FOR HUM. RTS. (Feb. 25, 2020), <https://phr.org/our-work/resources/you-will-never-see-your-child-again-the-persistent-psychological-effects-of-family-separation/>.

of children from their parents and other family members after entry into the United States?²⁴²

All parents reported already having suffered trauma and fled their home country “fear[ing] that their child would be harmed or killed if they stayed.”²⁴³ They sought asylum in the U.S. “confident that the journey to the United States would result in protection for their children.”²⁴⁴ Rather than finding refuge, new abusers and abuses greeted them when they arrived on U.S. soil. “[P]arents reported that immigration authorities forcibly removed children from their parents’ arms, removed parents while their children slept, or simply ‘disappeared’ the children while their parents were in court rooms or receiving medical care.”²⁴⁵ Compounding the trauma was that the parents were goaded and mocked by immigration officials when they asked about their children’s whereabouts.²⁴⁶ A mother whose child was seized was reportedly told she should “learn to deal with it.”²⁴⁷ Another migrant mother whose daughter was seized by immigration authorities was reportedly told her daughter “was going to be adopted by an American family and that [she] would be deported and that she would never see her daughter again.”²⁴⁸ Words do not do justice to the anguish manifest in these stories. That migrant children were often taken from their parents’ care to languish in decrepit detention facilities and mistreated in foster arrangements deepened the problem.²⁴⁹

Important parallels between the abused mothers in *Nicholson* and the plight of migrant families can be drawn from these narratives. Like the women in *Nicholson*, migrant mothers whose children are summarily taken into state custody have not had their rights adjudicated as having

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* (alteration in original).

²⁴⁹ *See id.*

acted in any way justifying disruption of their families.²⁵⁰ Like the women in *Nicholson*, migrant mothers are often the victims of violence; they flee their home country and come to our borders *because* they are deeply concerned with their children’s welfare, and not the other way around.²⁵¹ Like the women in *Nicholson*, the migrant mothers are nonwhite.²⁵² When the state seizes their children, it does so on the basis of assumptions and prejudices about their fitness to parent. In *Nicholson*, the state assumes “from the fact that a woman has been beaten and humiliated that she permitted or encouraged her own mistreatment . . . and [thus] is not capable of raising her children in a safe and appropriate manner because of actions which are not her own.”²⁵³ The state assumes migrant mothers are “invade[rs],”²⁵⁴ “criminals,”²⁵⁵ and bestial,²⁵⁶ undeserving of the fundamental right to family relations. These are assumptions the *Nicholson* court described as “unnecessary cruelty”²⁵⁷ that “harm rather than help the interests of the child.”²⁵⁸ These are assumptions that

²⁵⁰ See *Ms. L. v. U.S. Immigr. & Customs Enf’t*, 310 F. Supp. 3d 1133, 1145 (S.D. Cal. 2018) (order granting plaintiffs’ motion for class-wide preliminary injunction) (noting the government had not shown that parents separated from their children were “unfit to parent or present[ed] a danger to” their children).

²⁵¹ Rosa Flores & Angela Barajas, *Mom and 4 Children Forced to Separate After Seeking Asylum in US*, CNN (June 5, 2018), <https://www.cnn.com/2018/06/05/us/guatemalan-immigrant-family-separated/index.html> (reporting the story of 40-year old Maria, a migrant parent who had fled Venezuela to protect her four children from deadly violence).

²⁵² Beth A. Mandel, *The White Fist of the Child Welfare System: Racism, Patriarchy, and the Presumptive Removal of Children from Victims of Domestic Violence in Nicholson v. Williams*, 73 U. CIN. L. REV. 1131, 1132 (2005) (arguing the fact that the majority of plaintiffs in *Nicholson* are Black women is relevant to the injury alleged).

²⁵³ *Nicholson v. Williams*, 203 F. Supp. 2d 153, 252 (E.D.N.Y. 2002).

²⁵⁴ Thomas Kaplan, *How the Trump Campaign Used Facebook Ads to Amplify His ‘Invasion’ Claim*, N. Y. TIMES (Aug. 5, 2019), <https://www.nytimes.com/2019/08/05/us/politics/trump-campaign-facebook-ads-invasion.html>.

²⁵⁵ Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <https://time.com/4473972/donald-trump-/>.

²⁵⁶ *Trump is Lying About Immigrant Crime – and the Research Proves It*, S. POVERTY L. CTR. (May 17, 2019), <https://www.splcenter.org/news/2019/05/17/trump-lying-about-immigrant-crime-and-research-proves-it>.

²⁵⁷ *Nicholson*, 203 F. Supp. 2d at 163, 255.

²⁵⁸ *Id.* at 255.

have much in common with those that facilitated the breaking up of Black families in the antebellum South.²⁵⁹

3. Limits of Thirteenth Amendment Litigation

In the foregoing I have attempted to demonstrate that challenging the parting of migrant children from their families as an incident of slavery is plausible as a matter of judicial acceptance, as the court recognized in *Nicholson*. However, there are limits to bringing “badges and incidents” claims in court. Professor Jamal Greene has written about this topic.²⁶⁰ He argues that even the most sanguine formulation of the Thirteenth Amendment’s corrective power is unlikely to yield a winning argument in court.²⁶¹ “[Thirteenth Amendment claims] are almost uniformly unlikely to persuade a court or anyone who supports the challenged practice, and they are gravy to those who already oppose the practice,” writes Greene.²⁶² The problem with “Thirteenth Amendment optimism,” as Greene terms it, is that “[w]hatever original meaning originalism means in theory, it does not easily justify an interpretation of the Thirteenth Amendment that is inconsistent with how everyone at the time, and indeed the vast majority of people today, would have expected it to apply.”²⁶³ Greene argues that reputational costs further dampen the prospects of Thirteenth Amendment doctrinal expansion because lawyers bringing Thirteenth Amendment arguments before a judge assume the risk of compromising their credibility with claims likely to be perceived as fanciful.²⁶⁴

²⁵⁹ See WILLIAMS, HELP ME TO FIND MY PEOPLE, *supra* note 36, at 98 (“Part of the justification for enslaving Africans and their descendants lay in this assertion that blacks lacked the sensitivity and the capacity to feel emotional pain as white people did.”).

²⁶⁰ Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733 (2012).

²⁶¹ *Id.* at 1733-35.

²⁶² *Id.* at 1737.

²⁶³ *Id.* at 1768.

²⁶⁴ *Id.* at 1737; see also Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 979 (2004) (Most . . . commentators . . . not to mention lawyers, judges, and politicians, dismiss [Thirteenth Amendment] musings as academic flights of fancy—the kinds of things only law professors, unconnected to reality, would think worth pursuing.”).

Indeed, it seems plausible that in many cases a “badges and incidents” claim will not go very far because it does not conform to how people at the time would have understood the Thirteenth Amendment to apply. However, breaking up migrant families because of their race is an injury that mirrors the harms that troubled the Thirteenth Amendment’s architects.²⁶⁵ The Amendment’s framers had expected that the Amendment would put an end to the separation of enslaved families and prevent families of *all races* from being *unnecessarily* ripped apart.²⁶⁶ Here, federal immigration law does not *require* the Trump Administration to break up migrant families; the cruelty is the point.²⁶⁷

Nevertheless, it would be a mistake to assume the *Nicholson* court’s capacity is indicative of the judiciary’s.²⁶⁸ Questions about whether the injury alleged rises to the level of being an incident of slavery are deeply fact-intensive and usually require judges to evaluate difficult historical issues that may cause some judges to sit on their hands.²⁶⁹ Although the prospects of a successful Thirteenth Amendment suit challenging family separation are not strong if history is

²⁶⁵ See *supra* notes 207 and 208 and accompanying texts.

²⁶⁶ Tsesis, *Furthering American Freedom*, *supra* note 9, at 384 (“The Enforcement Clause of the Thirteenth Amendment provides lawmakers with the power to craft laws tied to the Declaration of Independence’s ideal of a free and equal citizenry. The Framers of the Thirteenth Amendment refined that idea to include persons of all races.”); FONER, *THE SECOND FOUNDING*, *supra* note 24 at 40 (explaining Congressional Republicans including Senator Henry Wilson had intended that the Thirteenth Amendment would eradicate everything connected to the slave system. From this observation flows the assertion that the antislavery amendment was intended to bring to an end the sundering of Black Americans condemned to servitude, since family separation was a fixture of the slave system).

²⁶⁷ A well-regarded article by *The Atlantic*’s Adam Serwer argues persuasively that cruelty underwrites many of the Trump Administration’s policies targeted towards migrant groups and others they hate and fear. See Adam Serwer, *The Cruelty is the Point*, *ATLANTIC* (Oct. 3, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104/>.

²⁶⁸ See, e.g., Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 *COLUM. L. REV.* 1971, 2007 (1997) (arguing Judge Weinstein is unique in his creativity from the bench).

²⁶⁹ See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971) (rejecting plaintiffs’ badges and incidents of slavery claim on the theory that “[e]stablishing this Court’s authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a law-making power far beyond the imagination of the amendment’s authors”); Carter, *Defining the Badges and Incidents of Slavery*, *supra* note 26, at 1352 (“The judiciary’s near-total abdication of its role as an enforcer of the right to be free of the badges and incidents of slavery is at least partially explainable by reference to judicial reluctance to delve into the history of slavery and concerns about the potential reach of the Amendment were it fully enforced.”).

any indication, this limitation has other implications. “A defeat in court provides a unique opportunity for a movement to present to the public a narrative that generates sympathy in ways that assist the underlying cause.”²⁷⁰ And, Congress’s enumerated powers under Section 2 offer another vehicle for furnishing protections to migrant families being ripped apart.²⁷¹

C. *Thirteenth Amendment Section 2 Legislation as a Tool to Challenge Family Separation*

1. *Legislating Against Family Separation Falls Comfortably Within Congress’ Power Under the Thirteenth Amendment*

While the idea that courts are authorized to eradicate the badges and incidents of slavery is contested, Congress’s authority to legislate against the incidents of slavery is firmly established. The Enforcement Clause of the Thirteenth Amendment explicitly empowered Congress to root out practices rationally related to the institution of slavery.²⁷² And the Supreme Court in the *Civil Rights Cases* affirmed this authority.²⁷³ Seen in this light, the Thirteenth Amendment’s true potential to provide relief to migrant families at U.S.-Mexico border is best realized through Congressional legislation. The explanation lies in part on the institutional differences between the judiciary and Congress that make Congress more adept than the courts at undertaking the sort of fact-finding required to determine whether a particular claim amounts to an incident of slavery.²⁷⁴ Legislators are democratically elected to promulgate legislation that reveals the values held by a

²⁷⁰ On the benefits of bringing unfavorable litigation, see Ben Depoorter, *The Upside of Losing*, 113 COLUM. L. REV. 817, 854 (2013) (arguing that bringing claims likely to fail is can be beneficial because “[t]he resulting public and political awareness about the underlying cause may ultimately slow down legislative trends or, sometimes, even prompt legislative initiatives that reverse the unfavorable judicial decision or improve the general legal framework.”).

²⁷¹ See Greene, *supra* note 30, at 1756 (explaining that “Section 2 has been said to empower Congress to eradicate . . . badges and incidents [of slavery] almost from the beginning of Thirteenth Amendment interpretation”).

²⁷² *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

²⁷³ *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (“[The Thirteenth Amendment] [c]lothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”).

²⁷⁴ Carter, *Defining the Badges and Incidents of Slavery*, *supra* note 26, at 1354, 1354 n.152 (“Congress possesses factfinding and policymaking powers that courts do not.”). Getting to the merits of a Thirteenth Amendment litigation may require nationwide evidentiary hearings involving persons who are not the direct stakeholders or witnesses in the action.

society.²⁷⁵ On the other hand, the federal judiciary—thought to be undemocratic in its makeup since members of the federal bench are appointed and not elected—is not equipped to create social change in its lawmaking.²⁷⁶ “Because Congress has democratic authority, it can apply constitutional norms flexibly—drawing lines that courts cannot or will not—and take political responsibility for the results.”²⁷⁷ By contrast, the judiciary is not a politically accountable actor, so it may refuse to remedy some conditions in deference to democratic authority.²⁷⁸

Yet it would be a strained argument to elevate Congress’s capacity to help the cause of migrant families while ignoring Congress’s long tradition of passing legislation against the interests of immigrant groups (particularly those that are nonwhite).²⁷⁹ Some would pause here to counsel for prudence in pursuing Congressional action to remedy the situation at the U.S.-Mexico border, pointing out that Congress’s history raises a cloud of doubt as to the likelihood that Congress would take up the cause of migrant families by passing Section 2 legislation. That

²⁷⁵ *But see* Geoffrey C. Hazard, Jr., *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 2 (1978) (arguing the Court is also legislature and thus the judiciary should “formulate general rules that primarily reflect the notions of utility and value held by its members”).

²⁷⁶ *See* Emily Zacklin, *Popular Constitutionalism’s Hard when You’re Not Very Popular: Why the ACLU Turned to the Courts*, 42 Law & Soc’y Rev. 367, 371 (2001) (explaining prominent scholars like Mark Tushnet and Larry Kramer question whether courts can play a productive role in social change and advocate “for constitutional politics to be conducted not only outside courts, but largely without courts”). Among the first scholars to examine the social impact of change-oriented litigation was Gerald Rosenberg. In his famous book *The Hollow Hope*, Rosenberg argues that “court decisions are neither necessary nor sufficient for producing significant social reform.” GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 35 (2d ed. 2008).

²⁷⁷ Balkin, *The Reconstruction Power*, *supra* note 12, at 1807-08.

²⁷⁸ *Id.*

²⁷⁹ America’s anti-immigration posture dates back to the founding generation, notwithstanding the fact that the U.S. itself is a nation of immigrants. Worried that unscrupulous ideas from France would be introduced to the United States, Congress passed a series of anti-immigrant measures in the late-eighteenth century to screen out non-citizens, what are commonly known as the “Alien Acts.” *See* An Act to Establish a Uniform Rule of Naturalization [Naturalization Act], ch. 54, 1 Stat. 566 (1798) (repealed 1802); An Act Concerning Aliens [Alien Friends Act], ch. 58, 1 Stat. 570 (1798) (expired 1800); and An Act Respecting Alien Enemies [Alien Enemy Act], ch. 66, 1 Stat. 577 (1798) (codified as amended in 50 U.S.C.A. § 21 et seq.). More recently, several contemporary Congressional acts related to immigrants—both lawful and unauthorized—have been injurious to immigrant groups. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (expanding removal grounds for lawful permanent residents); CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (providing coronavirus cash payments to working-class American citizens, but excluding those married to unauthorized immigrants).

argument is conceded. As the Supreme Court has observed, “Congress regularly makes rules [for non-citizens] that would be unacceptable if applied to citizens.”²⁸⁰ From the so-called “Alien Acts”²⁸¹ to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,²⁸² anti-immigrant legislation has been a fixture of Congressional lawmaking. Therefore, if a course of action can be intuited from Congress during an Administration that has leaned into the nation’s anti-immigrant history with particular fervor, it is that federal legislation benefitting migrant groups will be difficult to achieve.²⁸³ But still there is something to be gained from pursuing Congressional legislation to remedy the situation at the U.S.-Mexico border.

2. Pursuing Thirteenth Amendment Section 2 Legislation to Challenge Family Separation May Help to Broaden the Coalition of Advocates

Recasting family separation as Thirteenth Amendment violation that Congress is constitutionally obligated to root out provides a normative framework to refocus public attention on the crisis. As I have already noted, the Due Process Clause of the Fifth Amendment secured a modest victory for groups fighting to shore up protections for migrant families.²⁸⁴ Meanwhile, families continue to be separated.²⁸⁵ And given all that has transpired since news broke of zero

²⁸⁰ *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976).

²⁸¹ See *supra* note 281 (discussing the series of anti-immigrant laws passed in the late-eighteenth century known as the “Alien Acts”).

²⁸² Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (expanding removal grounds for lawful permanent residents).

²⁸³ For an insightful discussion of the politics of immigration in the United States, see Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 197 (2019).

²⁸⁴ *Ms. L.*, 310 F. Supp. 3d at 1149 (concluding that the Trump Administration’s treatment of migrant families at the U.S. Mexico border built a firewall between those families and their constitutional protections under the Due Process Clause of the Fifth Amendment).

²⁸⁵ Leila Rafei, *Family Separation, Two Years After Ms. L.*, ACLU (Feb. 26, 2020), <https://www.aclu.org/news/immigrants-rights/family-separation-two-years-after-ms-l/> (“The ACLU has managed to reunited over 2,000 families since the injunction in 2018. But the fight to stop separations and reunite families continues. The administration is using loopholes to continue separating some families with excuses including dirty diapers, expired driver’s licenses, and other minor offenses that would never justify separation under any U.S. child welfare laws.”).

tolerance policy, the general public is no longer as attentive to the realities of the situation.²⁸⁶ Thus I suggest the Thirteenth Amendment can be utilized to win recruits to the cause to end family separation by appealing to broader societal values such as family stability. In turn, the increase in public pressure might serve as a check to ensure the demise of the practice.

There is authority for the idea that the normative frame a group uses to define its cause is crucial to its ability to win allies.²⁸⁷ Narratives that speak to the dominant societal value of family stability—one of the values that gave rise to the adoption of the Thirteenth Amendment and that is implicated in the involuntary separation of migrant families—have a track record of advancing progressive agendas.²⁸⁸ The evidentiary basis for this conclusion will be familiar to scholars of cause lawyering.²⁸⁹

To take just one example, consider how the fight to legalize same sex marriage in the United States was won in *Obergefell v. Hodges*.²⁹⁰ Cause lawyers in the struggle for marriage equality triumphed by depicting marriage as a gateway to family stability that produces the best

²⁸⁶ Viewed through the prism of the raging coronavirus pandemic, it is reasonable to conclude that the breaking up of migrant families has taken on lesser salience in the court of public opinion.

²⁸⁷ See, e.g., WILLIAM A. GAMSON, TALKING POLITICS 84-86 (1992) (relating why cause-framing is important for generating momentum for collective action); Doug McAdam, *Culture and Social Movements*, in NEW SOCIAL MOVEMENTS: FROM IDEOLOGY TO IDENTITY 36, 42 (Enrique Laraña et al. eds., 1994) (explaining that “successful framing efforts are almost certain to inspire other groups to reinterpret their situation”).

²⁸⁸ Scholars like Ron Eyerman and Andrew Jamison have contended that sympathetic narratives that resonate with mainstream society can win recruits for social causes. See RON EYERMAN & ANDREW JAMISON, SOCIAL MOVEMENTS: A COGNITIVE APPROACH 56, 138-39 (1991). Others like Donatella della Porta and Mario Diani assert the success of social movements will hinge on framing the cause “in the most efficient manner to the specific orientations of the sectors of public opinion which they wish to mobilize.” DONATELLA DELLA PORTA & MARIO DIANI, SOCIAL MOVEMENTS: AN INTRODUCTION 68 (1999).

²⁸⁹ An effective definition of the term “cause lawyering” comes Professor John O. Calmore. Broadly defined, Calmore observes, “cause lawyering encompasses various law-related activities . . . that relies on law-related means to achieve social justice for individuals and subordinated or disadvantaged groups.” John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927, 1928 (1999). “Cause lawyering” has been the subject of many thought-provoking articles. See, e.g., David Luban, *The Moral Complexity of Cause Lawyers Within the State*, 81 FORDHAM L. REV. 705 (2012); Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 MARQ. L. REV. 263 (2010).

²⁹⁰ In *Obergefell v. Hodges*, the United States Supreme Court overturned bans on same-sex marriage nationwide. 576 U.S. 644 (2015).

outcomes for the children of same-sex parents.²⁹¹ By reframing gay marriage as a matter of creating the best environment for bringing up children, cause lawyers adopted a framework that connects to larger societal values like family stability that have traditionally carried weight with socially conservative Americans. Emphasizing the importance of framing to the rights secured in *Obergefell*, Congressman John Lewis put the point this way: “The movement to legalize gay marriage is an excellent example of action that successfully used a directed, strategic approach to the reach human heart . . . Once people began to realize that gay marriage affected their sons and daughters . . . they embraced the need to make a more compassionate choice in our society.”²⁹²

Here, since a primary goal of the Thirteenth Amendment’s architects was to strengthen the family bonds of all races, naming the separation of migrant families as a Thirteenth Amendment violation elevates a new understanding of the crisis as a civil rights issue that is tied to historical practices that impacted a vulnerable class other than migrant families.²⁹³ This lens may help to broaden the coalition of advocates fighting to shore up protections for migrant groups by sweeping in advocacy groups that have so far been on the outside looking in.

The tide of public sentiment has mainly treated the separation of migrant families as an immigrants’ rights and human rights issue.²⁹⁴ With the exception of the American Civil Liberties

²⁹¹ Michael S. Wald, *Obergefell: A Victory for Children*, SLS BLOGS (last updated June 26, 2015), <https://law.stanford.edu/2015/06/26/obergefell-a-victory-for-children/> (explaining that “[t]hroughout most of the movement to recognize same sex couple marriage, the major justification used by opponents of marriage was that being raised by same sex parents is harmful to children.” However, “many opponents of marriage [now concede] that children in same sex couple households would benefit if their parents could marry.” It is in this environment that Justice Anthony Kennedy, writing for the majority in *Obergefell*, cited the welfare of children as a major reason to recognize the legal union of same sex couples. “The total switch in the understanding of the interests of children is a major factor in the dramatic shift in the judicial treatment of same sex couple relationships”).

²⁹² LEWIS, ACROSS THAT BRIDGE, *supra* note 89 at 124-25.

²⁹³ Azmy, *supra* note 104, at 1031 (“[B]y correctly describing the Thirteenth Amendment as a ‘charter of universal civil freedom’ that applies equally to all races and classes, the Court recognized that the Amendment was enacted to end the many degradations the slave system perpetrated against all Americans—slaves, free blacks and whites.” (quoting *Bailey v. Alabama*, 219 U.S. 219, 241 (1911) (footnotes omitted)).

²⁹⁴ See, e.g., Nick Cumming-Bruce, *Taking Migrant Children from Parents Is Illegal, U.N. Tells U.S.*, N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/world/americas/us-un-migrant-children-families.html>; Veronica Rocha et al., *Immigration Crisis at the US Border*, CNN POLITICS (July 2, 2019, 10:51 AM),

Union, Southern Poverty Law Center, and NAACP Legal Defense and Educational Fund, organizations advocating for migrant families have primarily been immigration-centered or human rights organizations.²⁹⁵ While human rights and immigrants' rights expertise is important to remedying the situation at the U.S.-Mexico border, a coalition consisting of racial justice organizations—e.g., Color of Change²⁹⁶ and UltraViolet Action²⁹⁷—would provide a more comprehensive platform to address violations that are largely motivated by racial animus.²⁹⁸

Having said all this, it is also true that defining family separation as an incident of slavery implicating the Thirteenth Amendment may also focus negative attention on the issue and be a disadvantage to the cause. To echo an earlier point, some might complain that treating the separation of migrant families as a Thirteenth Amendment violation is an insult to slavery.²⁹⁹ It should go without saying that this interpretation of the issue is unlikely to register momentum for remedying the treatment of migrant families at the Southwest U.S. border; or worse, put-off would-be allies. Another kind of criticism might be leveled by those who prefer to ignore the legacy of

https://www.cnn.com/politics/live-news/immigration-crisis-us-border-july-2019/h_20d596ae16e9d5a8b78a3b991b5eeb7a.

²⁹⁵ See, e.g., ASYLUM SEEKER ADVOCACY PROJECT, <https://asylumadvocacy.org/> (last visited Sept. 28, 2020); IMMIGRATION JUSTICE CAMPAIGN, <https://immigrationjustice.us/> (last visited Sept. 28, 2020); KIDS IN NEED OF DEFENSE, <https://supportkind.org/> (last visited Sept. 28, 2020); SAFE PASSAGE PROJECT, <https://www.safepassageproject.org/> (last visited Sept. 28, 2020).

²⁹⁶ Color of Change is the nation's largest online racial justice organization that seeks to create a more human and less hostile world for Black people in America. COLOR OF CHANGE, <https://colorofchange.org/about/> (last visited Sept. 28, 2020).

²⁹⁷ UltraViolet Action is a 501(c)(4) organization that demonstrates the demand and creates political pathways for policies centering on women, especially women of color, Indigenous women, immigrants, and LGBTQ people. ULTRAVIOLET ACTION, <https://weareultraviolet.org/> (last visited Sept. 28, 2020). See also THE NATIONAL BLACK WOMEN'S JUSTICE INSTITUTE, <https://www.nbwji.org/> (last visited Sept. 28, 2020) (NBWJI works to reduce racial and gender disparities across the justice continuum affecting Black women and girls).

²⁹⁸ In *Department of Homeland Security v. Regents of University of California*, a 2020 Supreme Court case involving the rights of DACA recipients, Justice Sonia Sotomayor noted that President Trump's rhetoric against Mexicans is evidence of racial animus that can be used to mount a constitutional challenge against the Trump Administration. Sotomayor explained, "[t]aken together, 'the words of the President' help to 'create the strong perception' that the [decision to rescind DACA] was 'contaminated by impermissible discriminatory animus.'" No. 18–587, 591 U.S. (2020) (Sotomayor, J., concurring).

²⁹⁹ See *supra* note 182 and corresponding text.

slavery altogether.³⁰⁰ This group may point to the abolition of *de jure* slavery 155 years ago as watertight evidence that any existing injustices cannot possibly be traced to the slave system. Such arguments often surface when the subject of reparations for Black enslavement in the United States is visited.³⁰¹ Some Congressional lawmakers argue that so much has intervened since the institution of slavery was eradicated that slavery cannot continue to inflict disabilities on Black people.³⁰² Although ample evidence has been accumulating to the contrary,³⁰³ it should be conceded there are people who will assert that relating the core concerns of the antislavery amendment to the separation of migrant families is apocryphal, or what the *Civil Rights Cases* called “running the slavery argument into the ground.”³⁰⁴

³⁰⁰ Several theories have been offered to explain why people might choose to ignore the legacy of slavery. One widely-circulated theory is that reflecting on the legacy of slavery provides revelatory insights about existing societal injustices that can be directly traced to the slave system, e.g., the black-white wealth gap. See, e.g., Nikita Stewart, *We are committing educational malpractice: Why slavery is mistaught—and worse—in American schools*, N.Y. TIMES (Aug. 19, 2019), <https://www.nytimes.com/interactive/2019/08/19/magazine/slavery-american-schools.html> (explaining that K-12 education in American public schools obscures the truth about Black enslavement in the United States and the cloud that still hangs over the nation from this obfuscation. As a consequence, “students graduate with a poor understanding of how slavery shaped our country, and they are unable to recognize the powerful and lasting effects it has had.”). So those who choose to ignore the legacy of slavery do so to be shielded from the uncomfortable truth that American society was built on the exploitation of Black people, and that other groups continue to benefit from this plundering. Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> (explicating that the United States “stand[s] to discover much about” itself by carefully undertaking an honest effort to consider reparations for Black enslavement in America. “But the idea of reparations is frightening ... because it threatens ... America’s heritage, history, and standing in the world. The early American economy was built on slave labor. The Capitol and the White house were built by slaves ... An honest assessment of America’s relationship to the black family reveals the country to be not its nurturer but its destroyer ... Reparations ... is the price we must pay to see ourselves as equal”). In other words, it insulates against the acknowledgment of one’s privilege. On race-based privilege, see Cheryl L. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

³⁰¹ The Senate Majority Leader Mitch McConnell was recently asked whether the U.S. government should provide reparations to descendants of slavery in America. He answered no, embracing the argument that the passage of time renders reparation moot: “I don’t think reparations for something that happened 150 years ago, for whom none of us currently living are responsible, is a good idea.” Laurie Kellman, *McConnell on Reparations for Slavery: Not a ‘Good Idea’*, ASSOCIATED PRESS (June 18, 2019), <https://apnews.com/e79abc3b64e7400ea961f2fe99a73dc6>.

³⁰² See, e.g., *id.*

³⁰³ See, e.g., WILLIAMS, HELP ME TO FIND MY PEOPLE, *supra* note 36, at 11 (“[T]he racism that slavery produced and that, in turn, shored up slavery has persisted and has continued to reproduce itself from 1865, when slavery ended, to the present. Racism has spawned all sorts of discrimination and inequalities that have affected every aspect of African American life, including the family.”) The MacArthur Grant-winning author Ta-Nehisi Coates’ essay *The Case for Reparations* is a useful starting point for a survey of how the legacy of slavery continues to imperil Black communities. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

³⁰⁴ The Civil Rights Cases, 109 U.S. 3, 24 (1883).

Whatever force such arguments may have are softened by the current political and social arrangements in the United States. As I write, the United States is in a moment of national awakening. The state-sanctioned execution of George Floyd³⁰⁵ has generated a movement—unseen since the Civil Rights revolution—to hold the United States accountable for its failure to meaningfully address systemic racism and oppression.³⁰⁶ The calls to defund and abolish the police gaining traction nationwide reveal the limits of reform efforts that do not attend to the legacy of slavery.³⁰⁷ Whether the United States will provide a balm for the pain afflicting Black and brown Americans and their allies by passing federal civil rights legislation is uncertain. But the recent developments are instructive. They reveal that the public is warming to the idea that it is desirable (and perhaps necessary) to appraise current injustices in full historical context to achieve meaningful change.³⁰⁸

³⁰⁵ Colin Dwyer, *George Floyd's Death Stokes Calls for Minneapolis Officers to Be Charged*, NPR (May 27, 2020), <https://www.npr.org/2020/05/27/862956646/george-floyds-death-stokes-call-for-minneapolis-officers-to-be-charged-with-murd>.

³⁰⁶ See *id.*; Catie Edmondson, *George Floyd's Brother Pleads With Congress: 'Make it Stop'*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/10/us/politics/george-floyd-brother-congress-philonise.html> (“[Philonise Floyd’s] testimony added to the mounting sense of urgency on Capitol Hill to overhaul law enforcement practices and address systemic racism in policing.”); UN NEWS, *Independent Rights Experts Urge US to Address Systemic Racism and Racial Bias*, (June 5, 2020), <https://news.un.org/en/story/2020/06/1065722>; see also Rachel Pannett et al., *George Floyd's Death in U.S. Sparks Outcry Abroad*, W.S.J. (June 3, 2020), <https://www.wsj.com/articles/george-floyds-death-in-u-s-sparks-outcry-abroad-11591123234>; ALJAZEERA, *International Reaction to George Floyd Killing*, (June 2, 2020), <https://www.aljazeera.com/news/2020/06/international-reaction-george-floyd-killing-200602075231946.html>.

³⁰⁷ Scottie Andrew, *There's a Growing Call to Defund the Police. Here's What It Means*, CNN (June 17, 2020), <https://www.cnn.com/2020/06/06/us/what-is-defund-police-trnd/index.html> (reporting on the significance of calls to abolish police departments as a mechanism to address the legacy of slavery because “[I]aw enforcement in the South began as slave patrol, a team of vigilantes hired to recapture escaped slaves. Then, when slavery was abolished, police enforced Jim Crow laws -- even the most minor infractions . . . [t]hat history is engrained in our law enforcement.”); Malaika Jabali, *If You're Surprised by How the Police are Acting, You Don't Understand US History*, GUARDIAN (June 5, 2020), <https://www.theguardian.com/commentisfree/2020/jun/05/police-us-history-reform-violence-oppression> (explaining that “beyond the fiscal argument is an ethical one: policing in America cannot be reformed because it is designed for violence. The oppression is a feature, not a bug”); see also Wenei Philimon, *Not Just George Floyd: Police Departments Have 400-Year History of Racism*, USA TODAY (June 7, 2020), <https://www.usatoday.com/story/news/nation/2020/06/07/black-lives-matters-police-departments-have-long-history-racism/3128167001/> (“These past grievances, past harms by law enforcement, need to be addressed before even attempting to move forward.”).

³⁰⁸ See Wenei Philimon, *Not Just George Floyd: Police Departments Have 400-Year History of Racism*, USA TODAY (June 7, 2020), <https://www.usatoday.com/story/news/nation/2020/06/07/black-lives-matters-police-departments-have-long-history-racism/3128167001/>; see also Austin McCoy, *Defund the Police: Protest Slogans and*

3. Pursuing Thirteenth Amendment Section 2 Legislation to Challenge Family Separation Makes the Response More Meaningful as a Matter of Public Morality

We must also ask whether adopting a Thirteenth Amendment framing is necessary when one considers that Congress could, in theory, more straightforwardly put an end to family separation by exercising its Article I authority to regulate immigration. In theory, yes, Congress could rely on other powers to root out the practices. But training the focus of the American public on the Thirteenth Amendment makes the Congressional response more meaningful as a matter of public morality. From the very beginning, a defining feature of the Thirteenth Amendment was its potency as a tool for the nation to secure a higher moral ground. “In the decades between the ratification of the country’s founding documents and the Thirteenth Amendment, the Declaration’s universal guarantee of freedom posed a moral dilemma for politicians and citizens who tolerated and participated in an institution contrary to core national commitments.”³⁰⁹ This is why “Republicans condemned slavery not simply as violation of basic human rights but as an affront to the nation.”³¹⁰ The Thirteenth Amendment, the Reconstruction Congress had hoped, “would destroy the Slave Power that had so often shaped national policy.”³¹¹ Its expansive guarantees of essential entitlements were intended to obliterate the country’s entanglement with slavery and advance its moral growth.³¹²

Regrettably, as the late civil rights hero and Congressman John Lewis pointedly observed, “[t]his is a nation still scarred by the violence of slavery, including the forms of legalized

the Terms for Debate, AHA PERSPECTIVES ON HISTORY (June 12, 2020), <https://www.historians.org/publications-and-directories/perspectives-on-history/summer-2020/defund-the-police-protest-slogans-and-the-terms-for-debate> (discussing the rise of the slogan “Defund the Police”).

³⁰⁹ Tsesis, *Furthering American Freedom*, *supra* note 9, at 315.

³¹⁰ FONER, *THE SECOND FOUNDING*, *supra* note 24, at 31.

³¹¹ *Id.*

³¹² Tsesis, *Furthering American Freedom*, *supra* note 9, at 389.

segregation and racial discrimination we faced almost one hundred years after the end of the Civil War.”³¹³ Recasting family separation as a practice that is proximate to a core feature of the slave system highlights the immorality of the decision to tear migrant families apart in ways that other frameworks do not. Just as the perverse belief that enslaved people were subhuman and akin to animals was used to justify the destruction of Black families,³¹⁴ the Trump Administration has dehumanized migrants to justify their inhumane treatment.³¹⁵ By directly acknowledging the deep relevance of family separation to slavery, the Congressional or judicial response would evince a desire to erase the vestiges of slavery and at long last make good on the natural rights guarantees trumpeted in the founding documents and embraced by the Thirteenth Amendment’s architects. This moral framing is particularly meaningful because “[t]oday it seems there is no moral basis for anything we do as a society”³¹⁶ even though “[p]eople are crying out. They want to see the governments of the world’s nations humanize their policies and practices.”³¹⁷

Nevertheless, it is to be expected that a Thirteenth Amendment framing will still have its opponents. This raises the question of whether redefining the separation of migrant families as an artifact of America’s original sin overrides the backlash that would result when the analogy is negatively construed. There is good reason to believe that a Thirteenth Amendment framework would have more supporters than detractors. Since the murder of George Floyd, racial reconciliation in the United States is in the ascendancy. To borrow a phrase I first heard from Dr.

³¹³ LEWIS, *supra* note 89, at 119.

³¹⁴ WILLIAMS, HELP ME TO FIND MY PEOPLE, *supra* note 36, at 3, 44-45 (“Some white contemporaries of black slaves believed they felt more deeply than black people, that somehow, losing one’s child or mother or father hurt a white person more than it hurt a black person.”).

³¹⁵ See Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants ‘Animals’ in Rant*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html>.

³¹⁶ LEWIS, *supra* note 89, at 6.

³¹⁷ *Id.* at 13-14.

Cornell West, the nation is in a period of “escalating consciousness.”³¹⁸ The racial arrangements in society suggest it is reasonable to conclude that recasting the breaking up of migrant families as a Thirteenth Amendment violation is a framework that may have some utility. Given the scope, severity, and urgency of the family separation crisis, the Thirteenth Amendment could function as one among many instruments that movement actors deploy on behalf of the campaign to end the practice. So, even if a Thirteenth Amendment theory does not appeal to some people, others might find it useful, and that is reason enough to add it to the movement actor’s toolkit.

CONCLUSION

While the novel coronavirus (COVID-19) crisis rages at the time of this writing, President Trump has repeatedly said the United States is at war with an invisible enemy.³¹⁹ Trump’s attempt to recast himself as a wartime president will ring appropriate for migrant families that have been under siege since he entered the White House.³²⁰ Even as the global community wrestles with the weight of the COVID-19 pandemic, the Administration’s assault on migrant families continues to intensify. When the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)³²¹ was passed to soften the blow of the crisis and the U.S. government earmarked at least \$1,200 in

³¹⁸ Nina Turner (@ninaturner), TWITTER (June 26, 2020, 5:50 PM), <https://twitter.com/ninaturner/status/1276679371022045184>.

³¹⁹ Brian Bennett & Tessa Berenson, ‘Our Big War.’ *As Coronavirus Spreads, Trump Refashions Himself as a Wartime President*, TIME (Mar. 19, 2020), <https://time.com/5806657/donald-trump-coronavirus-war-china/>; *Trump Says Coronavirus Worse ‘Attack’ Than Pearl Harbor*, BBC NEWS (May 7, 2020), <https://www.bbc.com/news/world-us-canada-52568405>; Jeet Heer, *If This Pandemic Is a War, Trump Is a War Criminal*, NATION (May 6, 2020), <https://www.thenation.com/article/politics/trump-coronavirus-war-criminal/>.

³²⁰ See McDonnell & Merton, *Criminalizing Asylum-Seekers*, *supra* note 54, at 7 n.9 (“It is not hyperbole to state that from the moment of his inauguration, the Trump Administration has metaphorically gone to war against immigrants, both lawful and undocumented.”); Masha Gessen, *Trump’s New War on Immigrants*, NEW YORKER (Aug. 10, 2018), <https://www.newyorker.com/news/our-columnists/trumps-new-war-on-immigrants>; Matt Ford, *Trump’s War on the Rule of Law Is Reaching the Breaking Point*, NEW REPUBLIC (Apr. 9, 2019), <https://newrepublic.com/article/153536/trumps-war-rule-law-reaching-breaking-point>.

³²¹ Also known as the CARES Act, it was passed “[t]o provide emergency assistance and health care response for individuals, families, and businesses affected by the 2020 coronavirus pandemic.” See CARES Act, Pub. L. No. 116-136, 134 Stat. 281.

payments for working-class families,³²² an estimated 1.2 million American citizens were denied the beneficence of the Act solely because they are married to unauthorized immigrants.³²³ Trump pledged on Twitter to halt all immigration to the United States “to protect the jobs of our GREAT American Citizens” during the pandemic,³²⁴ in a move some have correctly recognized as a thinly veiled attack on immigrants.³²⁵ And although the stories no longer feature on the front pages of the press, migrant families continue to be separated.³²⁶

The Trump Administration’s unwavering attacks on nonwhite immigrants speak clearly to the need for a diversity of strategies to challenge the flagrant violations. This Article suggests elements of the separation of migrant families at the U.S.-Mexico border are proximate to the destruction of familial ties Black families experienced during slavery. The Thirteenth Amendment not only eradicated slavery and involuntary labor practices, it also sought to prevent vulnerable families of all races from being unnecessarily ripped apart.

³²² Eileen Sullivan, *5 Takeaways From the Coronavirus Economic Relief Package*, N.Y. TIMES (March 19, 2020), <https://www.nytimes.com/2020/03/19/us/politics/1200-dollar-stimulus-check-coronavirus.html> (reporting the details of Congress’ coronavirus economic relief plan, which had included sending “checks of up to \$1,200 to taxpayers who earn less than \$99,000 a year, loans for small businesses and large tax cuts for big corporations”). President Trump signed the CARES Act into law on March 27, 2020. *See Statement by the President*, WHITEHOUSE.GOV (Mar. 27, 2020) <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-38/>

³²³ *See* Caitlin Dickerson, *Married to an Undocumented Immigrant? You May Not Get a Stimulus Check*, N.Y. TIMES (Apr. 28, 2020), <https://www.nytimes.com/2020/04/28/us/coronavirus-undocumented-immigrants-stimulus.html> (explaining that the Coronavirus Aid, Relief, and Economic Security Act (CARES), deliberately leaves out families with undocumented immigrants from its protection). Another indication of the Trump Administration’s disdain for immigrants, the CARES Act included a prohibition barring cash relief to persons who file taxes jointly with anyone who uses an Individual Taxpayer Identification Number (ITPN). *Id.* Immigrants typically use ITPN’s without legal status as a substitute for a Social Security Number. *Id.* At a time of unprecedented distress, the result of the provision was that tax-paying American citizens did not receive federal benefits because of whom they love. Immigrants rights groups brought litigation challenging the bill as an unconstitutional violation of their due process and equal protection rights. *See* John Doe v. Trump, No. 1:20-cv-02531 (N.D. Ill. Filed Apr. 24, 2020), <https://www.classaction.org/media/doe-v-trump-et-al.pdf>.

³²⁴ Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 20, 2020, 7:06 PM), <https://twitter.com/realdonaldtrump/status/1252418369170501639>.

³²⁵ *See* Michael D. Shear et al., *Trump Halts New Green Cards, but Backs off Broader Immigration Ban*, N.Y. TIMES (Apr. 21, 2020), <https://www.nytimes.com/2020/04/21/us/politics/coronavirus-trump-immigration-ban.html?action=click&module=RelatedLinks&pgtype=Article>.

³²⁶ Liz Vinson, *Family Separation Policy Continues Two Years After Trump Administration Claims It Ended*, S. POVERTY L. CTR. (June 18, 2020), <https://www.splcenter.org/news/2020/06/18/family-separation-policy-continues-two-years-after-trump-administration-claims-it-ended>.

In this regard, the Thirteenth Amendment is a valuable constitutional aid for protecting migrant groups. Although the Amendment has largely laid dormant over its 155-year existence, its robust constitutional guarantees of fundamental rights should not be ignored. By refocusing attention on the breaking up of migrant families as a Thirteenth Amendment violation, it ties the deeply problematic treatment of migrant families to historical practices that impacted marginalized groups other than migrant families and may accordingly broaden the coalition of advocates fighting to shore up protections for migrant groups. Moreover, given the primacy of the antislavery amendment to social mores such as family integrity and stability, a Thirteenth Amendment lens makes the Congressional response more meaningful as a matter of public morality by Congress and the courts to satisfy their constitutional duty to eliminate the kind of subjugation that was a hallmark of slavery, America's original sin.³²⁷

³²⁷ See FONER, *THE SECOND FOUNDING*, *supra* note 24, at 45 (“[M]ost Republicans saw abolition not as reorienting traditional family relations but as restoring to blacks the natural right to family life so grievously undermined by slavery.”).