INTRODUCTION

In the Slaughter-House Cases, the Supreme Court identified “the one pervading purpose” of the Reconstruction Amendments as “[t]he freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.” 1 Although the Court was unwilling to say, given the Amendments’ sweeping language, “that no one else but the negro can share in this protection,” the Court thought that “any fair and just construction” of the Amendments had to rest on an understanding of the centrality of the condition of African Americans. 2

How ironic, then, that at the turn of the twentieth century, the Supreme Court advanced such a muscular and ahistorical construction of the Fourteenth Amendment’s Due Process Clause in Lochner v. New York, 3 just as it was

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1 83 U.S. (16 Wall.) 36, 71 (1873).
2 Id. at 72.
3 198 U.S. 45 (1905).
dismantling the Reconstruction Amendments’ protections of black Americans. For example, in Giles v. Harris, the Court refused to enforce the Fifteenth Amendment’s prohibition on racial discrimination in voting. And only a year after Lochner, in Hodges v. United States, the Court that had so recently extolled “the right of free contract” as an aspect of personal liberty refused to protect black workers’ ability to carry out their employment contracts as an aspect of the liberty that the Thirteenth Amendment protects.

What accounts for the different treatment of bakers in New York and lumbermen in Arkansas? This essay addresses that question. Part I describes how Hodges arrived at the Supreme Court, how the parties presented their claims, and what the Supreme Court decided. Part II considers a broader issue: how Hodges relates to two independent doctrinal issues – the purpose of the Civil War Amendments and the concept of freedom of contract. There, I argue that Justice Brewer’s opinions misread precedent in order to preserve a distinctive vision of the federal government. Far from misunderstanding the great cases that preceded Hodges, Justice Brewer comprehended them all too well.

It may seem jarring, in a symposium devoted to the centenary of Lochner, to include an essay in which Lochner remains largely offstage. But that incongruity is the very point of my argument. For all that Lochner celebrated “the right of the individual to liberty of person and freedom of contract” and located constitutional protection for that liberty in the central text of Reconstruction, the Lochner Court was unwilling to protect (or, more

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4 For example, the same Court that decided Lochner also decided Berea College v. Kentucky, 211 U.S. 45 (1908), which upheld a state prosecution of a private, racially integrated college for violating the state’s mandatory segregation law. The Court rejected the college’s argument that a law depriving a private institution of the ability to control its internal affairs and depriving individuals of the right to attend an educational institution of their own choice violated the Fourteenth Amendment’s Due Process Clause. Id. at 58; see also Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 23-24 (2004) (describing the tension between the Court’s opinions in Lochner, Berea College, and Plessy v. Ferguson, 163 U.S. 537 (1896)). For an extensive examination of the Court’s turn-of-the-century race cases, see Owen M. Fiss, History of the Supreme Court of the United States: The Troubled Beginnings of the Modern State, 1888-1910 (1993).

5 189 U.S. 475, 486-88 (1903) (denying plaintiff’s requested remedy on the grounds that the Court has no power to impose such equitable remedy). For the best recent scholarly discussion of Giles, see Richard H. Pildes, Democracy, Anti-Democracy, and the Canon, 17 CONST. COMMENT. 295 (2001).


7 See Hodges v. United States, 203 U.S. 1 (1906).

8 Lochner, 198 U.S. at 57.
precisely, to authorize the federal government to protect) liberty of person and freedom of contract when it came to black Americans in the South – the original intended beneficiaries of Reconstruction.

I. “A GENERAL GRIEVANCE IN THIS STATE AND SECTION”

Although the precise question that Hodges presented was one of federal power – whether the enforcement clause of the Thirteenth Amendment authorized federal prosecutions of racially motivated private impairments of the right to contract\(^9\) – the case did not stem from decisions made by a centralized sovereign, a Washington-based army of occupation in the states. The turn-of-the-century federal government really consisted of two loosely connected entities: the administration in Washington and federal officials in the states. The government’s position in Hodges reflected an interplay between the two entities’ concerns.

A. The Prosecution

On May 8, 1903, William G. Whipple, the United States Attorney for the Eastern District of Arkansas, wrote to Attorney General Philander C. Knox informing him that Whipple was “about to enter upon an important prosecution” involving “white-capping” in Cross County, Arkansas.\(^10\) Whipple stated that “[a]n inferior class of white men feeling themselves unable to compete with colored tenants combined to drive them out of the country. The movement is denounced by all the respectable white element irrespective of party.”\(^11\) Whipple asked the Justice Department to provide funds for a special prosecutor to handle the case.\(^12\)

A week later, the Attorney General authorized the expenditure, writing that “[f]ully alive to the aggressive attitude of such organized bands as those to which you refer, and determined to meet such emergencies with proper and decisive action, we shall appoint Mr. Houser [whom Whipple had


\(^10\) See Letter from William G. Whipple, U.S. Attorney for the Eastern District of Arkansas, to Philander C. Knox, Attorney General (May 8, 1903) (This letter, like the letters cited in notes 13, 23, 38, 41, and 150, were reviewed by the author some years ago, and were not available during the editing of this article. The Boston University Law Review did not check or verify any quotations from or statements related to these letters.). While the term “whitecapping” was often applied to generic acts of violence by whites against blacks (the phrase apparently coming from a colloquial term referring to members of the Ku Klux Klan), see Wayne R. Allen, Note, Klan, Cloth and Constitution: Anti-Mask Laws and the First Amendment, 25 GA. L. REV. 819, 823 n.32 (1991), its more precise meaning centers on the use of threats to intimidate a person “into an abandonment or change of home or employment.” See MISS. CODE ANN. § 97-3-87 (2004).

\(^11\) Letter from William G. Whipple to Philander C. Knox, supra note 10.

\(^12\) Id.
Houser proceeded with the investigation. Four months later, the U.S. Attorney’s office informed the Attorney General that two sets of indictments had been obtained. One set indicted eleven men who had intimidated a group of sharecroppers. The other set indicted fifteen men who had forced black workmen to leave work at a sawmill in Whitehall, a small town in Poinsett County, a mountainous region in northeastern Arkansas. This latter case, which was to reach the Supreme Court as Hodges v. United States, was originally captioned United States v. Maples. The indictment charged that on August 17, 1903, the defendants had appeared at the mill and had intimidated the black workmen “with the purpose of compelling them by violence and threats and otherwise to remove from said place of business, to stop said work and to cease the enjoyment of [the right and privilege of contracting for their labor],” in violation of sections 1977 and 5508 of the Revised Statutes.

Although the prosecutions claimed that the defendants had harassed the workers for race-related reasons, it would be a mistake to conclude that the government’s decision to bring the case was primarily to protect the rights of black workers. Rather, the prosecutions seem to have been undertaken at the instigation of prominent white citizens because the whitecappings interfered with their economic interests. Put bluntly, the race of the intimidated

14 Id.
15 United States v. Morris, 125 F. 322, 322 (E.D. Ark. 1903).
17 Transcript of Record at 4, Hodges v. United States, 203 U.S. 1 (1906) (No. 14 of Oct. 1905 term) [hereinafter Hodges Record].

[i]f two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession or District in the free exercise or enjoyment of any rights or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same . . . [t]hey shall be fined . . . and imprisoned . . .

18 U.S.C. § 241. Section 1981 provides in pertinent part that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . .” 42 U.S.C. § 1981.
19 See Hodges v. United States, 203 U.S. 1, 2 (1906) (outlining the basis of the charges against the defendants).
20 As David Bernstein points out, whitecapping served as a mechanism for distorting the labor market in the South. See David E. Bernstein, The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans, 76 Tex. L. Rev. 781, 789 n.42 (1998).
workers was simply a lever by which the “respectable white element” sought to invoke federal power in its battle with “an inferior class of white men.”

The circumstances surrounding another Arkansas case, Boyett v. United States, strengthens this hypothesis. Boyett involved the whitecapping of a group of railroad workers. There, Whipple had appointed Harry H. Myers as a special assistant to prosecute the case. In response to the Justice Department’s request that he complete an expense voucher sheet in order to be compensated for his work, Myers stated that:

[I] beg to say I do not expect and cannot accept any remuneration for assisting the District Attorney [sic] in these cases. The Railroad Co. who’s [sic] attorney I am, was interested in the prosecution for its own preservation only and asked you to appoint me special assistant U.S. attorney that I might assist, with no expectation that it should cost the Government any fee.

Thus, although the federal Constitution was invoked, it would be a mistake to view the Hodges prosecution as a sort of carpetbagging. All of the participants were local; all the interests to be served were similarly local.

Both the Morris and the Maples defendants filed demurrers to the indictments, challenging the constitutionality of § 1977 and stating that, taken together with § 5508, these laws constituted an “infringement on the rights of the several States and the people thereof.” The defendants’ demurrers were overruled in a substantial opinion by the federal district judge sitting in Helena,

21 David Bernstein has offered an analogous account of Lochner. In his account, New York’s maximum hours law was not primarily motivated by a desire to protect workers from their employers. See David E. Bernstein, Lochner v. New York: Barrier to the Regulatory State, in CONSTITUTIONAL LAW STORIES 325, 328-33 (2004). Rather, it reflected the efforts of unionized, largely native-born bakery workers to squelch competition from smaller, non-union, largely immigrant bakeries. Id.; see also David Bernstein, Note, The Supreme Court and “Civil Rights,” 1886-1908, 100 YALE L.J. 725, 735-36 (1990). Elsewhere, Bernstein has elaborated on his argument that freedom of contract doctrine might have provided black workers with greater civil rights during the early twentieth century by protecting them against a variety of discriminatory legislation. See generally DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001). As I shall suggest, however, the Court’s embrace of a strong state action requirement, combined with its hostility to federal intervention, meant that black workers were left largely unprotected from private interference with their ability to contract freely for the benefits of their labor.

22 207 U.S. 581 (1907) (per curiam). The lower court decisions in Boyett are unreported. The defendants’ convictions, however, were overturned in light of the Supreme Court’s decision in Hodges. See id. at 581.


24 Id.

25 Id. (emphasis added).

26 See Hodges Record, supra note 17, at 6.
Jacob Trieber.27 Trieber, a German immigrant, had an intellectual interest in the condition of blacks and the meaning of the Civil War Amendments. He later wrote an article for the Arkansas Historical Association, The Legal Status of the Negro in Arkansas Before the Civil War.28 Judge Trieber also had practical experience with the political position of blacks in Arkansas. In 1888, he had defeated a black Republican, J.A. Simmons, for his party’s nomination for convention temporary chairman.29 Thus, Judge Trieber clearly operated within the political universe of Arkansas, although his sympathetic views of civil rights were decidedly in the minority.

Judge Trieber’s opinion in Morris began by recognizing that, because the black workmen had been threatened by private citizens, the scope of the Thirteenth Amendment was the key to the government’s case,30 given that The Civil Rights Cases had restricted the scope of the Fourteenth Amendment to state action.31 Quoting Justice Swayne’s opinion in United States v. Rhodes,32 Judge Trieber wrote that the Thirteenth Amendment marked “a great extension of the powers of the national government.”33 If the freedom to work and to be

27 See United States v. Morris, 125 F. 322, 331 (E.D. Ark. 1903). Judge Trieber apparently filed the same opinion in both Morris and Maples. See id.; see also Hodges Record, supra note 17, at 7-17 (printing the Maples [Hodges] opinion). I cite the Morris version because it is reported.

28 Jacob Trieber, The Legal Status of the Negro in Arkansas Before the Civil War, 3 BULL. Ark. Hist. Soc’y (1911). Trieber was the first Jew to be named to a federal judgeship. See Aviam Soifer, Law and the Company We Keep 175 (1995). For an account of Judge Trieber’s career and his treatment of racial discrimination, see Gerald W. Heaney, Jacob Trieber: Lawyer, Politician, Judge, 8 U. Ark. Little Rock L.J. 421, 444-49 (1986).

29 See Tom Dillard, To the Back of the Elephant: Racial Conflict in the Arkansas Republican Party, 33 Ark. Hist. Q. 3, 6-7 (1974) (remarking that the race between Trieber and Simmons was not unusual in Arkansas at that time). Indeed, Judge Trieber was later to be, in some sense, a cause of black powerlessness. In January 1905, he upheld a poll tax which was used to disenfranchise Arkansas blacks. See John William Graves, Negro Disenfranchisement in Arkansas, 26 Ark. Hist. Q. 199, 219 (1967).

30 See Morris, 125 F. at 323-24 (addressing the scope of the Thirteenth Amendment and dismissing the potential application of the Fourteenth and Fifteenth Amendments to the case).

31 109 U.S. 3 (1883).

32 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151). There, Justice Swayne had described the Amendment in these terms:

It trenches directly upon the powers of the states and of the people of the states. It is the first and only instance of a change of this character in the organic law. It destroyed the most important relation between capital and labor in all the states where slavery existed. It affected deeply the fortunes of a large portion of their people. It struck out of existence millions of property. The measure was the consequence of a strife of opinions and a conflict of interests, real or imaginary, as old as the Constitution itself.

Id. at 788.

33 See Morris, 125 F. at 325 (remarking that the Thirteenth Amendment reaches every
compensated for that work – the laborers’ freedom to contract – was, as the indictment claimed, “a right and privileged conferred . . . by the thirteenth amendment,” then the federal government as well as the state could prosecute its infringement.

Judge Trieber found that the right to contract was a “fundamental or natural” right, “recognized among all free people.” In a slip which becomes almost prophetic in light of the Supreme Court’s later opinion, he then quoted the Declaration of Independence: “We hold these rights [sic] to be self-evident: That all men are created equal; that they are endowed with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.”

Judge Trieber asserted that the protection of this right could not be entrusted to the states. The states’ actions after the Civil War demonstrated their lack of commitment:

As is well known, in many of the States in which slavery had existed prior to the adoption of the thirteenth amendment, legislation was enacted in relation to the negroes, which practically established a system of peonage but little removed from that of slavery; and owing to the passions and prejudices aroused by the Civil War, and which at that time had not yet been allayed, irresponsible persons would prevent negroes from working of cultivating lands, and the courts of the states were powerless to protect them. It will serve no useful purpose to recite in this opinion of the state of affairs then existing . . . .

Certainly, Judge Trieber must have been aware that L.C. Going, one of the defense attorneys in both Morris and Maples, was also the state prosecutor. Because only federal enforcement could ensure the fundamental right to contract, it followed that the Thirteenth Amendment necessarily conferred upon the federal government the power to prosecute its infringement. Thus, Judge Trieber overruled the demurrers and ordered that both cases go forward.

Both cases were tried before juries. In Morris, Whipple requested funds from Washington to induce one of the defendants to turn state’s evidence, but

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34 See Hodges Record, supra note 17, at 4.
35 See Morris, 125 F. at 325-26 (finding that the right to “purchase, lease, and cultivate lands, or to perform honest labor for wages” did not require any written law for recognition).
36 See id.
37 Id. at 326-27.
38 See Letter from L.C. Going, Counsel for Plaintiffs in Error, to the Assistant Attorney General 1 (Feb. 7, 1906) (asking for rescheduling of oral argument in Hodges because “I am . . . a candidate for re-election to the office of prosecuting attorney of this district” and traveling to Washington would interfere with the primary campaign).
39 See Morris, 125 F. at 331.
40 See, e.g., Hodges v. United States, 203 U.S. 1, 23 (1906).
that request was denied. As a result, Whipple reported that “it was found impossible by any direct testimony or by satisfactory circumstantial evidence to establish a ground upon which to ask a verdict of the jury, though the jurors, as well as the Court, were convinced we had indicted the right men.”

Whipple apparently took comfort, however, in the fact that the defendants had “been in jail awaiting trial for one whole year, . . . and they have been subjected to great expense in the employment of attorneys to defend them” – an early version of the notion that the process is the punishment. He also reported that the defendants would be tried in state court for the murder of a detective who had been sent to investigate the incident. That the defendants would be prosecuted for the murder of a white man – the detective – but not for interfering with the black workers’ jobs, reinforces the truth of Judge Trieber’s view that state court enforcement of black men’s rights was unlikely.

Whipple had more success in the Maples prosecution. There, although twelve of the defendants were acquitted, three were convicted – William Clampit, Wash McKinney, and Reuben Hodges. The three convicted defendants appealed, and in March 1904, an order granting their writ of error brought the case to the Supreme Court. At this point, the Department of Justice took over the case, which shifted the prosecution’s perspective decisively. The focus of the case now lay entirely on the rights of blacks to contract for their labor; the rights of wealthy whites to use blacks to drive down labor costs disappeared from the picture.

B. Hodges Before the Supreme Court

The central issue before the Supreme Court, as both sides recognized, was not, given Lochner, whether a liberty or right of contract existed. Clearly it

42 Letter from William G. Whipple to Philander C. Knox (Mar. 22, 1904), supra note Error! Bookmark not defined., at 1.
43 Id.
44 Id. at 1-2.
45 Id. at 1. Whipple’s report displayed both considerable pride and over-optimism: It is believed that this is the first conviction of that offense in any Federal Court and that the effect of this conviction will be far reaching for good. It is probably that this will be the last attempt, in this State at least, to compel Negroes to abandon their work on account of their race.
46 See Hodges Record, supra note 17, at 22.
47 The decision in Hodges contains no discussion of the economic motivations behind whitecapping and focuses entirely on the constitutional issues.
48 See Hodges v. United States, 203 U.S. 1, 6 (1906) (admitting, on behalf of the defendants, that there is a right to contract).
did, and had the state of Arkansas prosecuted the defendants for interfering with the workers’ employment, the defendants would have had no constitutional defense.\textsuperscript{49} Rather, the central issue was whether the Thirteenth Amendment made the right to contract one guaranteed by the Constitution or laws of the United States and therefore one that the federal government had the power to protect.

The appellants argued that there was a distinction between rights \textit{declared or recognized} by the Constitution and rights \textit{granted} by it.\textsuperscript{50} They placed the right of contract within the former group, and argued that its protection was therefore left to the states.\textsuperscript{51} That such a result seem paradoxical to us – the more fundamental a right, the less the federal government has a stake in protecting it – is a reminder of how much has changed since \textit{Hodges}.

The appellants then analyzed the relation of the Thirteenth Amendment to this distinction of rights. That Amendment, they suggested, freed the slaves and made them equals before the law with white men.\textsuperscript{52} Once this was done – and Section 1 of the Amendment accomplished this through its own declaratory force – there was nothing more for the federal government to do.\textsuperscript{53} Since the right to contract had not been within the purview of the federal government before the passage of the Thirteenth Amendment, the Amendment did not create a federal interest in enforcing or protecting that right.\textsuperscript{54}

The brief for the United States painted the case in an entirely different light. The question, the United States argued, was not whether the federal government now had plenary power to enforce the right to contract, but whether the Thirteenth Amendment gave the government the power to protect

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\textsuperscript{49} As long ago as 1906, for example, Arkansas’ neighboring state, Mississippi, had a statute forbidding whitewapping, which made it a crime for a person to “by placards, or other writing, or verbally, attempt by threats, direct or implied, of injury to the person or property of another, to intimidate such other person into an abandonment or change of home or employment . . . .” \textit{See Miss. Code Ann. \textsection{} 97-3-87} (2004) (citing as the source for the current prohibition section 1398 of the 1906 Code). The Arkansas Supreme Court later upheld the constitutionality of a 1943 Arkansas statute that made it a crime “for any person by the use, or threat of the use, of force or violence to prevent or attempt to prevent any person from engaging in any lawful vocation within this state.” \textit{See Smith v. State}, 179 S.W.2d 185, 187 (Ark. 1944) (declaring the 1943 act constitutional); \textit{see also} 1943 Ark. Acts 193, \textsection{} 1 (codified as amended at Ark. Code Ann. \textsection{} 11-3-401 (2004)).

\textsuperscript{50} \textit{See Hodges}, 203 U.S. at 6 (arguing that “[t]he court below failed to recognize the distinction between rights declared and recognized, but not granted or secured by the Constitution”); \textit{see also} Michael G. Collins, “Economic Rights,” \textit{Implied Constitutional Actions, and the Scope of Section 1983}, 77 Geo. L.J. 1493 (1989) (discussing the distinction in the context of § 1983’s protection of rights “secured by” the Constitution).


\textsuperscript{52} \textit{See id.} at 8, 12.

\textsuperscript{53} \textit{Id.} at 8, 11-13.

\textsuperscript{54} \textit{Id.}
the ability to contract when the sole motive for the attempted deprivation was the race of a contracting party.\textsuperscript{55}

The Thirteenth Amendment, the government contended, had been intended to secure for blacks more than just the end of formal slavery; it was meant to grant “practical freedom.”\textsuperscript{56} As blacks had had no rights before the passage of the Reconstruction Amendments, it could therefore be said that the Constitution – through the Thirteenth and Fourteenth Amendments – was precisely the tool that had granted and secured these rights to them.\textsuperscript{57} One of the bedrocks of practical freedom was the right to contract and to receive compensation for the value of one’s labor. The absence of this right was one of the “badges and incidents” of slavery,\textsuperscript{58} and through Section 2 of the Thirteenth Amendment, Congress had the power to eliminate such badges and incidents, even by addressing the activities of private parties directly.\textsuperscript{59}

Finally, the Department of Justice, like Judge Triber, warned of the consequences of denying the federal government the power to protect black workers. The Court should not pretend, the government argued, that the states would protect this right: “It is idle to say that the laws of Arkansas leave the court open to him, for intimidation, like that alleged in this indictment, so effective that it causes the negro not only to abandon his contract, but to leave the place of its performance, utterly nullifies those laws.”\textsuperscript{60} The government’s position was clear: If there really were a right of contract, then only the force of the federal government could protect it adequately.

This assessment and the Court’s reaction to its implications were refined in the course of the Attorney General’s oral argument.\textsuperscript{61} The Attorney General had a delicate task. On the one hand, he sought to limit the claim of federal power solely to prosecuting racially motivated interference with contracts entered into by black workers, so as to avoid asserting a more general police power.\textsuperscript{62} On the other hand, he needed to persuade the Court of the pervasive urgency of permitting this limited exercise of federal power.\textsuperscript{63}

Much of the Court’s questioning centered on this first issue. Justice Brewer probed the scope of the government’s claim from two directions. First, he asked whether the black man’s right to contract differed from the white

\textsuperscript{55} Brief for the United States at 5, \textit{Hodges}.
\textsuperscript{56} \textit{See id.} at 11 (analyzing the legislative history of the Thirteenth Amendment to determine its scope).
\textsuperscript{57} \textit{Id.} at 36.
\textsuperscript{58} \textit{See id.} at 14. \textit{See generally} Forbath, \textit{supra} note 6 (discussing various meanings of “free labor”).
\textsuperscript{59} Brief for the United States at 11-13, \textit{Hodges}.
\textsuperscript{60} \textit{Id.} at 38.
\textsuperscript{61} \textit{See Oral Argument of the Attorney-General for the United States at 4, Hodges}.
\textsuperscript{62} \textit{See id.} at 15-17 (outlining the limits of the federal enforcement power).
\textsuperscript{63} \textit{See id.} at 40.
man’s. Second, he asked whether deprivations of black workers’ rights were always an offense against the Thirteenth Amendment.

The government sought to allay the Court’s fears by sharply limiting the circumstances that justified federal interference. There was no difference, the government argued, between blacks’ and whites’ right to contract. Instead, the Thirteenth Amendment operated only to prevent anyone from interfering with blacks’ enjoyment of that right because of their color. Thus, interfering with a black individual’s right to contract because he was a member of a union, or because he was a Republican, would not be reachable by the federal government. That interference would not be an attempt to reimpose on him the badges or incidents of slavery that the Thirteenth Amendment was intended to prohibit.

At the same time, the government argued for a broad interpretation of the Thirteenth Amendment. Before its passage, “freedom was not secured to any of the people of the United States by the Constitution.” The Thirteenth Amendment, however, changed this state of affairs:

It took the whole subject of freedom out of the custody and control of the several States and placed it in the keeping of the nation. It gave to the nation the same power to guard, protect and defend the freedom of all the people of the United States, as, for instance, it had to guard, protect and defend commerce among the States. In both cases, the power is plenary.

The Thirteenth Amendment, in the government’s view, was thus both firmly grounded in the specific historical situation of emancipation and reflective of a more general expansion of the federal government’s proper concerns.

The Attorney General concluded his argument by once again asking the Justices to assess the scope of the Thirteenth Amendment in light of the dangers which leaving the protection of the right of contract in the hands of the states would create:

The war of races is no longer a sectional war; it is as bitter in the State of Chase and Giddings as it is in the State of Arkansas . . . . If the Negro who is in our midst can be denied the right to work and must live on the outskirts of civilization, he will become more dangerous than the wild

64 See id. at 4.
65 See id. at 16 (asking whether denial of labor rights is always akin to slavery).
66 See id. at 4.
67 Id. at 8.
68 Id. at 16-17.
69 Id. at 29 (arguing that denying rights due to ill will or a non-race-related crime does not fall within the purview of the Thirteenth Amendment because there is no “badge” of slavery).
70 Id. at 10.
71 Id. at 12.
beasts, because he has a higher intelligence than the most intelligent beast. He will become an outcast lurking about the borders and living by depredation.\textsuperscript{72}

Ultimately, the government’s argument rested on a complex claim about the constitutional meaning of the Civil War. Not only did Section 1 of the Thirteenth Amendment protect black Americans’ exercise of central aspects of free personhood, but the enforcement clause in Section 2 of the Thirteenth Amendment gave the federal government an expansive new power to protect blacks against not only state-sponsored discrimination but private animus as well. And this latter power was necessary precisely because the states remained unwilling or unable to guarantee the practical freedom of their black citizens.

\textbf{II. \textit{Hodges and the Wider World}}

By a 7-2 vote, the Supreme Court reversed Judge Trieber’s decision and ordered the \textit{Hodges} indictments dismissed.\textsuperscript{73} Justice Brewer’s opinion for the Court rested on the view that the Civil War had produced only a relatively circumscribed change in the federal government’s power to reach private conduct.\textsuperscript{74} The original Constitution had placed the entire domain of contract law “within the constitutional and legislative power of the States, and without that of the Federal Government,”\textsuperscript{75} and nothing about the Reconstruction Amendments fundamentally altered that allocation of power.\textsuperscript{76} To be sure, the Thirteenth Amendment abolished slavery and gave Congress the power to address the “incidents or badges of slavery.”\textsuperscript{77} Yet the Court seemed to confine those incidents and badges to legal disabilities,\textsuperscript{78} rather than taking a more expansive view that looked at freedmen’s practical ability to enjoy the benefits of economic activity. Thus, even after the Thirteenth Amendment, the responsibility for protecting blacks against private interference with their ability to benefit from contracts remained with the states:

At the close of the civil war, when the problem of the emancipated slaves was before the Nation, it might have . . . established them as wards of the Government like the Indian tribes, and thus retained for the Nation

\textsuperscript{72} \textit{Id.} at 40.

\textsuperscript{73} See \textit{Hodges v. United States}, 203 U.S. 1, 20 (1906). The first Justice Harlan, joined by Justice Day, dissented. \textit{Id.} at 20 (Harlan, J., dissenting). Oddly, although the Court announced its judgment on May 28, 1906, the opinion was apparently withheld until the dissent was filed nearly four months later, on October 24, 1906. \textit{Id.} at 1.

\textsuperscript{74} See \textit{id.} at 15, 18-19.

\textsuperscript{75} \textit{Id.} at 15.

\textsuperscript{76} \textit{Id.} at 18-19 (rejecting the idea that the Thirteenth Amendment now entitled the federal government to enforce deprivations of private rights between individual citizens).

\textsuperscript{77} \textit{Id.} at 19.

\textsuperscript{78} See \textit{id.} at 17.
jurisdiction over them, or it might, as it did, give them citizenship. It chose the latter. . . . Whether this was or was not the wiser way to deal with the great problem is not a matter for the courts to consider. It is for us to accept the decision, which declined to constitute them wards of the Nation . . . . but gave them citizenship, doubtless believing that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the States where they should make their homes.  

Ultimately, however, Justice Brewer’s opinion is striking as much for what it omits as for what it contains. This section explores the connections the Court left undrawn between Hodges and three central concerns of the turn-of-the-century Court: (1) the relationship of the Civil War Amendments to the status of black Americans; (2) the nature of the right of contract; and (3) the proper sphere of federal activity.

A. “As Clear As Language Can Make It”: The Meaning of the Civil War Amendments

Justice Brewer’s opinion in Hodges cites only one prior decision – the Slaughter-House Cases – in a substantive context. The crux of the Slaughter-House Cases had been the centrality of black slavery to the Reconstruction Amendments. In rejecting a constitutional challenge brought by a group of New Orleans butchers to a state-legislated slaughterhouse monopoly, Justice Miller’s opinion for the Court emphatically rejected the butchers’ attempt to put the commercial restriction laid upon them within the Thirteenth Amendment’s sphere of concern:

To withdraw the mind from the contemplation of this grand yet simple declaration of the person freedom of all the human race within the jurisdiction of this government – a declaration designed to establish the freedom of four millions of slaves – and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it. And that, concluded the Court, was “all that we deem necessary to say on the application of that article to the statute of Louisiana, now under consideration.”

79 Id. at 19-20.
80 83 U.S. (16 Wall.) 36 (1873).
81 See Hodges, 203 U.S. at 15.
82 See Slaughter-House Cases, 83 U.S. (16 Wall.) at 68-69, 71 (observing that slavery was the rationale behind the Thirteenth Amendment).
83 See id. at 69 (deriding the idea that the Thirteenth Amendment could be used to redress commercial monopoly concerns in the absence of racial implications).
84 Id.
The most striking aspect of Justice Brewer’s use of this passage from the *Slaughter-House Cases* is how he “edits” it. Gone is the reference to the Thirteenth Amendment’s being “a declaration designed to establish the freedom of four millions of slaves,” replaced by a set of ellipses.\(^85\) The omission is telling. In the *Slaughter-House Cases*, the Court decried the plaintiffs’ attempt to deflect the Thirteenth Amendment away from its central concern with “the institution of African slavery” and toward the merely semantically similar notion of “servitudes” attached to property.\(^86\) In *Hodges*, however, the Court treated the Thirteenth Amendment not essentially, nor even primarily, as a provision addressed to the emancipation of blacks, but rather as a “denunciation of a condition and not a declaration in favor of a particular people.”\(^87\)

The Court’s omission reflects a broader point: the Supreme Court of 1906 was no longer interested in the plight of black Americans. The *Slaughter-House Cases* were decided only a decade after the Emancipation Proclamation. By the time of *Hodges*, however, the Supreme Court had already participated in a wholesale retreat from Reconstruction.\(^88\) The Thirteenth Amendment, for the *Hodges* Court, had become like the previous twelve amendments were to the *Slaughter-House* Court, “historical and of another age.”\(^89\)

In addition, to the extent that the Thirteenth Amendment was intended to reach less overt forms of servitude, those other forms could be understood in 1873 to emanate directly from the still-robust afterlife of actual black slavery.

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\(^{85}\) Here is how the passage from the *Slaughter-House Cases* appears in the *Hodges* opinion: “To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this Government . . . requires an effort, to say the least of it.” *Hodges*, 203 U.S. at 17 (omission in original).

\(^{86}\) See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 68 (arguing that the Thirteenth Amendment was intended to provide freedom to slaves, not to expand the liberties of white men).

\(^{87}\) See *Hodges*, 203 U.S. at 16. Ironically, even when the early twentieth century Supreme Court did adopt an expansive interpretation of the Thirteenth Amendment, it did so by deliberately ignoring the Amendment’s roots in African slavery. *See Bailey v. Alabama*, 219 U.S. 219, 231 (1911). In striking down an Alabama statute as a violation of the anti-peonage principle, the Court stated that 

\[w]e at once dismiss from consideration the fact that the plaintiff in error is a black man . . . . The statute, on its face, makes no racial discrimination, and the record fails to show its existence in fact. No question of a sectional character is presented, and we may view the legislation in the same manner as if it had been enacted in New York or in Idaho. Opportunities for coercion and oppression, in varying circumstances, exist in all parts of the Union, and the citizens of all the States are interested in the maintenance of the constitutional guarantees, the consideration of which is here involved.

*Id.*

\(^{88}\) For some particularly striking examples of the Supreme Court’s active participation in the dismantling of Reconstruction, see generally RICHARD M. VALLELY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT (2004).

\(^{89}\) See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 67.
Several decades later, however, those same oppressions were less overtly tied to the formal legal disabilities of pre-Civil War slavery, at last in the minds of the Hodges Court. As C. Vann Woodward points out, a prevalent sociological view of the early 1900s was William Graham Sumner’s distinction between “stateways” and “folkways.”\footnote{See C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 103-04 (2d ed. 1966) (discussing Sumner’s theory that “stateways” (legislation) cannot change “folkways” (habits of certain groups) because “folkways” are inherent in the specified group).} This distinction implied, as the Court had pointed out in \textit{Plessy v. Ferguson},\footnote{163 U.S. 537, 542-44 (1896) (arguing that social distinctions between races were based on certain immutable physical characteristics and not the former condition of slavery).} that not every distinction between blacks and whites could be ascribed to the effects of slavery. Some distinctions instead stemmed from what the Court and the white public saw as blacks’ immutably servile nature.\footnote{For an extremely thorough treatment of white attitudes toward blacks at the turn of the century, see GEORGE M. FREDICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914, at 256-58 (1971), explaining that many academics and other prominent figures at the turn of the century argued that African Americans were by nature inferior to other races.}

In a sense, then, Justice Brewer correctly characterized the government’s position as withdrawing the mind from the grand yet simple meaning of the Amendment. The prosecution in Hodges addressed both a more mundane and more complex problem than the problem the Amendment’s framers had faced. It is one thing for a federal government of limited and enumerated powers to abolish slavery; it is quite another for it actually to be responsible for securing personal freedom to particular individuals. The government was, of course, arguing that only by taking this latter step could the Amendment be given continuing content. The Court’s rejection of this argument, however, was not solely an attempt to stick its collective head in the sand. Rather, the Court’s position reflects the recognition that to attack the problem as the prosecution did in Hodges would require a tremendous change in both the behavior of the federal government and in the practical scope of the Amendment.

In contrast to Justice Brewer’s heavy reliance on the \textit{Slaughter-House Cases}’ discussion of the historical bases of the Civil War Amendments,\footnote{This reliance, we shall see, rested on Justice Miller’s discussion in the \textit{Slaughter-House Cases} of the Privileges and Immunities Clause of the Fourteenth Amendment. \textit{See infra} text accompanying notes 115-117.} Justice Brewer never mentions the parallel discussion of the two Amendments by Justice Bradley in the \textit{Civil Rights Cases}.\footnote{See Hodges v. United States, 203 U.S. 1 (1906).} In that decision, the Supreme Court struck down the Civil Rights Act of 1875, which had prohibited the denial of equal access to public accommodations on the basis of race, color, or previous servitude.\footnote{See \textit{Civil Rights Cases}, 109 U.S. 3, 11-24 (1883) (evaluating Congress’ power to enact the Civil Rights Act of 1875).} The constitutional infirmity, the Court explained, was...
that the Fourteenth Amendment was “prohibitory upon the States”; “[i]ndividual invasion of individual rights is not the subject matter of the amendment.”

Having disposed of the Fourteenth Amendment as a constitutional warrant for the 1875 Act, Justice Bradley then considered the scope of the Thirteenth Amendment. The government had argued that the denial of equal access to accommodations was “in itself, a subjection to a species of servitude within the meaning of the amendment.”

Unlike the Fourteenth Amendment, which dealt with treatment within an existing framework of laws, the Thirteenth Amendment involved the creation of a new right:

By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances . . . . And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws . . . but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

The Thirteenth Amendment’s declaration, in this formulation, was affirmative rather than prohibitory. It created a positive right in each individual to be free from slavery or involuntary servitude. The Fourteenth Amendment, by contrast, was negative in that it denied a right (the right to discriminate) to a particular entity (the state).

In order to give effect to this positive declaration, the Thirteenth Amendment undeniably gave Congress the power to legislate. Since the right conferred by the Thirteenth Amendment inhered in the individual, Congress could act against any entity – governmental or private – that obstructed this right.

Thus, the dispositive Thirteenth Amendment question in the Civil Rights Cases was whether the specific behavior against which Congress had legislated was a badge or incident of slavery. To answer this question, Justice Bradley appealed explicitly to history: “The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents.” Most of the incidents to which the Justice pointed involved the denial of rights which the law otherwise would have vested in an individual. Among these were the lack of standing in the courts and the inability to make contracts.
On the other hand, Justice Bradley found that the refusal of lodgings or other public accommodations was not a denial that affixed a badge of slavery to its victim. Once again, he appealed to his audience’s historical understanding of slavery:

There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations. Mere discriminations on account of race or color were not regarded as badges of slavery.

The fact that discrimination against blacks in this arena had been permissible when there had been a clear line of demarcation between freemen and slave meant that such discrimination was not necessarily connected with freedom or the lack thereof. Rather, this type of discrimination was connected with private racial sentiments – sentiments which did not lie within the scope of the Thirteenth Amendment.

For the Civil Rights Cases Court, the Thirteenth Amendment was designed to put blacks in the same position as whites, and not to give them special protection. Once the black man had been emancipated, “there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws.”

Thus, a free black man must look to the same sovereign for the protection of his rights as the white man: the state.

The Hodges Court, twenty-three years later, took its cue from this latter appeal to history. Although the intimidation alleged in Hodges unquestionably interfered with the black workers’ exercise of a right that other citizens were exercising without restriction, the Court drew a distinction between the denial of freedom and the imposition of slavery: “[E]very wrong done to an individual by another, acting singly or in concert with others, operates pro tanto to abridge some of the freedom to which the individual is entitled. . . . [N]o mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery.”

will, disability to hold property, [and] to make contracts.” Id. Bradley described The Civil Rights Act of 1866 – the original version of Rev. Stat. § 1977 (1874) – as an effort “to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form.” See id.

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104 Id. at 25.
105 Id. (emphasis added).
106 Of course, the Court ignored the likelihood that race and condition were linked so closely before the Civil War that even a nominally free black man was still viewed as part of a slave class because of his race.
107 Civil Rights Cases, 109 U.S. at 25.
108 Hodges v. United States, 203 U.S. 1, 17-18 (1906).
The government had conceded in its brief that slavery was more than simply the denial of freedom. Nevertheless, the government argued that the federal government could reach the defendants’ actions because of an “additional element, to wit, the infliction of an injury upon one individual citizen by another, solely on account of his color.” In a sense, the government’s position in Hodges was the obverse of the Court’s position in the Civil Rights Cases. The government’s brief in Hodges linked the current treatment of blacks to their historical experience of slavery and argued that because of this connection, what would be a simple denial of freedom in the mine run of cases became an attempt to reimpose slavery when perpetuated against blacks.

Justice Brewer emphatically rejected this argument:

The logic [of the government’s position] points irresistibly to the contention that the Thirteenth Amendment operates only to protect the African race. This is evident from the fact that nowhere in the record does it appear that the parties charged to have been wronged by the defendants had ever been themselves slaves, or were the descendants of slaves.

If the Thirteenth Amendment was a grand yet simple declaration of freedom, it could not have a broader meaning when applied to one group and a narrower meaning when applied to every other group. Essentially, the Court’s disingenuous statement about the record in Hodges rests on its refusal to presume that all animus against blacks stemmed from their past condition of slavery. In an age when society disliked immigrants for being different and bandied about ideas of inherent racial superiority, such a dissociation has a certain logic. Hodges and his compatriots might dislike blacks and wish to prevent them from exercising their right to contract without any thought to those black workers’ previous condition of enslavement. For the Thirteenth Amendment to come into play, some proof or intent to enslave or impose the badges or incidents of slavery had to be proved.

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109 Brief for the United States at 7, Hodges.
110 Id.
111 Hodges, 203 U.S. at 18.
112 The Supreme Court has repeatedly used an intent requirement in constitutional law to narrow the sweep of constitutional provisions. See, e.g., Washington v. Davis, 426 U.S. 229, 238-39 (1976) (rejecting disparate impact theory for an Equal Protection claim against an applicant entry exam for police officers); see also Pamela S. Karlan, Note, Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent, 93 YALE L.J. 111, 112 (1983) (discussing how the Supreme Court has imposed intent requirements to validate facially neutral statutes); Note, Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law, 92 YALE L.J. 328, 331 (1982) (acknowledging that the Supreme Court’s holding in Davis imposed a new intent requirement on Equal Protection litigants).
B. “Inseparable Incidents”: Freedom of Contract and the Paradox of Fundamental Rights

Because the Thirteenth Amendment did not bring every facet of the condition of blacks within the federal government’s jurisdiction, the critical question became whether interference with the right to contract and receive compensation for one’s labor was one of the “inseparable incidents of the institution”\textsuperscript{113} of slavery that the Amendment could reach. Here, a second striking omission in the Hodges opinion comes into play. Despite the fact that the case involved the freedom to contract, the Court never mentioned \textit{Lochner}, which had held only one year before that the Fourteenth Amendment did fundamentally alter the scope of the states’ police power.\textsuperscript{114} How could it be that freedom of contract was so fundamental a liberty that it was protected against state infringement by the Fourteenth Amendment but was not a right of free persons that could be protected against private impairment by the Thirteenth?\textsuperscript{115}

Understanding this paradox requires returning to the \textit{Slaughter-House Cases}. The double-barreled argument made by the butchers had created an ambiguity about the nature of rights.\textsuperscript{116} The Court held that whatever the proper relationship between state power and individual liberty, the resolution of this problem was generally no concern of the federal government.\textsuperscript{117} The right to acquire and possess property was a privilege and immunity of the citizens of the several states; it was not a privilege and immunity of citizens of the United States.\textsuperscript{118} The Fourteenth Amendment’s prohibition on state abridgement of the rights of United States citizens therefore did not prevent Louisiana from creating a new slaughterhouse monopoly.\textsuperscript{119} Although the immediate result of the \textit{Slaughter-House} decision favored the state’s sphere of autonomy over the individual’s absolute freedom of contract, the Court’s construction also seemed to recognize the right’s fundamentality. Unlike the right to be free, which the Thirteenth Amendment had only recently established, the right of free men to control their economic destinies antedated the Civil War and the expansion of the federal government’s powers.\textsuperscript{120}

Dicta in the \textit{Civil Rights Cases}, however, suggested that freedom of contract was so fundamental that its “enjoyment or deprivation . . . constitute[d] [an]

\begin{itemize}
  \item \textsuperscript{113} See \textit{Civil Rights Cases}, 109 U.S. 3, 22 (1883) (stating that the Thirteenth Amendment could reach incidents of private conduct that were closely related to the institution of slavery itself).
  \item \textsuperscript{115} See \textit{Slaughter-House Cases}, 83 U.S. (16 Wall.) 36 (1873).
  \item \textsuperscript{116} See \textit{id.} at 78-82.
  \item \textsuperscript{117} \textit{id.} at 76.
  \item \textsuperscript{118} \textit{id.} at 74 (explaining that the Fourteenth Amendment did not prohibit the states from violating their own privileges and immunities).
  \item \textsuperscript{119} See \textit{Forbath}, \textit{supra} note 6, at 779-82 (discussing how the idea of a man being in control of contracting for his own labor dates back to at least the eighteenth century).
\end{itemize}
essential distinction between freedom and slavery.”120 There, Justice Bradley stated that:

[The] disability . . . to make contracts . . . and such like burdens and incapacities, were the inseparable incidents of the institution [of slavery]. . . . Congress . . . undertook to wipe out these burdens and disabilities . . . and to secure to all citizens of every race and color . . . those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts . . . .

The Civil Rights Cases thus magnified a tension implicit in the Slaughter-House Cases. On the one hand, there was a distinction between freedom and slavery, and the Thirteenth Amendment empowered the federal government to intervene to protect freedom. On the other hand, there was a distinction between rights inherent in all free men, whose protection was properly the province of the states, and rights inherent in America’s particular form of republicanism – such as the right to travel – whose protection lay within the power of the federal government.

As I have suggested, the question presented by Hodges was further clouded by the Court’s decision in Lochner. In striking down a New York statute fixing the maximum hours for bakery employees on Fourteenth Amendment grounds, Justice Peckham’s opinion for the Court adopted the perspective of the eager worker.122 From this viewpoint, the law interfered with a worker’s ability to “‘contract or agree to work,’ more than ten hours per day.”123 Such interference implicated a “part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.”124 The Lochner Court rejected the possibility that “the statute was intended to meet a case of involuntary labor in any form.”125

For the Lochner Court, the right to contract was not simply a fundamental right protected by the Fourteenth Amendment; it was a metaphor for the nature of civilization. Each man possessed certain rights that he bartered and employed in the marketplace of society. The state’s obligation was to facilitate this transacting by making sure that citizens were neither robbed on their way to the market nor short-weighted when they arrived. That individuals might not be equally endowed with commodities to trade or that no one would buy their wares at a price which provided them with the reward they sought was not the state’s concern.

The fundamentality of contract for the Lochner Court stemmed not so much

120 109 U.S. 3, 22 (arguing that freedom of contract was the fundamental right that the former slaves had been robbed of during slavery).
121 Id.
123 See id. at 52 (stating that the New York law unnecessarily infringed on two parties’ ability to sit down and contract their employment relationship).
124 Id. at 53.
125 See id. at 52.
from the circumstances surrounding the adoption of the Civil War Amendments as from the necessity of contractual behavior to any political society. In contrast to Hodges’ explicit statement that the federal government would clearly have been powerless before the Civil War Amendments to intervene in Arkansas,126 Lochner is pointedly silent about the possibility that New York might have been free to interfere with liberty of contract before the adoption of the Fourteenth Amendment. Lochnerian contract, like its Lockeian ancestor, thus seems to have been present at the creation.

Hodges drew a distinction between the formal and practical freedoms of contract. This distinction was implicit in the economic contractarian perspective of Lochner, where the formal freedom of contract was divorced from the social context in which contracts between factory owners and bakers occurred. The way in which Justice Bradley’s opinion in the Civil Rights Cases had discussed the “disability . . . to make contracts” as one of the “inseparable incidents of the institution” of slavery further supported this distinction.127 In listing the right to contract along with such rights as access to the courts, Justice Bradley expressed his concern with the public aspect of the contracting process. It was not so much that the slave could not contract that was an inseparable part of his enslavement, but rather that he did not have the legal right to contract (or to enforce contracts). The theoretical, and not the actual, limitation on the slave’s ability to contract was the essential restriction.

In Hodges, Justice Brewer’s assertion that the Thirteenth Amendment had by its own force brought the black man to freedom128 implied that the formal strictures placed on blacks had been lifted, and that blacks therefore stood in the same position as free men before Emancipation. As blacks and whites were now on a theoretically equal footing, interference with the contracting process motivated by racism was no more a concern of the federal government than interference motivated by any other private purpose.129

If the absence of the formal legal right to contract (rather than a practical ability to engage in contracting activity) was the inseparable incident of slavery, then the proper role of the federal government would be protector against state interference with an individual’s legal entitlement to enter into contracts and not protector against private citizens’ interference with an individual’s ability to carry out contracts he had made. The task of protecting the legal right to contract was most appropriately performed by the federal courts, exercising their power of judicial review, rather than by individual federal prosecutors seeking to punish private interference with the execution of particular contracts. Under this view, Lochner, and not the Civil Rights Cases or the Hodges prosecutions, was an appropriate use of federal power. If the

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126 See Hodges v. United States, 203 U.S. 1, 14 (1906).
128 Hodges, 203 U.S. at 19.
129 Indeed, as we shall see, racism might even provide less of a justification for federal intervention than more economically motivated interference. See infra Part II.C.
federal government was to remain a government of limited powers, then its protections of rights was better confined to the wholesale activity of judicial review of state laws interfering with constitutional rights rather than the retail activity of actually vindicating individuals’ interests. Protecting the right rather than its exercise comports better with a conception of the federal government’s primary relationship being with the states rather than with individuals.

Thus, both Hodges and Lochner affirmed an ideal of the autonomous individual in the face of the political branches’ determination that such a view no longer conformed to reality. Parallel passages in the two opinions highlight this vision. In Lochner, Justice Peckham dismissed the possibility that the New York statute was simply a labor law. According to Peckham, bakers were as intelligent as every other class; they were just as capable of looking after their interests as everyone else; and “[t]hey [we]re in no sense wards of the State.” This idea resonates in Justice Brewer’s statement in Hodges that the nation, in enacting the Thirteenth Amendment, chose not to “establish[] [the freedmen] as wards of the Government.” That bakery employees might not be in an equal position with their employers and that blacks were unable to resist white oppression by themselves were facts the Court was slow to recognize.


Justice Brewer wrote the Supreme Court’s opinions in both Hodges and In re Debs. None of the participants in Hodges, as far as I can tell, ever mentioned Debs, yet no case raised such similar questions and answered them so differently.

Debs concerned the validity of an injunction issued against Eugene V. Debs and other leaders of a railroad strike that paralyzed the United States rail system. Debs and the other defendants challenged the power of the federal

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130 See Lochner, 198 U.S. at 57.
131 See id.
132 Hodges, 203 U.S. at 19.
133 The Court’s more capacious reading of the Thirteenth Amendment in the peonage cases illustrates that this understanding was hardly inevitable. Risa Goluboff points out that in these cases, in sustaining federal prosecutions of individuals who forced blacks into involuntary servitude to pay off their debts, the Court rejected the claim that individuals forced into peonage were “capable contractors.” See Risa L. Goluboff, The Thirteenth Amendment and the Lost Origins of Civil Rights, 50 DUKE L.J. 1609, 1650 (2001); see also KLARMAN, supra note 4, at 73-74 (arguing that the Court’s turn of the century peonage cases reflected a “minimalist” interpretation of the Thirteenth Amendment and that to have done less would have effectively permitted Southern nullification of the Amendment).
134 See Hodges, 203 U.S. at 14; In re Debs, 158 U.S. 564, 577 (1895).
135 See In re Debs, 158 U.S. at 566-67 (discussing how Debs and others used the strike to
government to issue an injunction, as well as the contempt convictions that resulted from their disobedience of the district court’s order.136

Justice Brewer’s opinion began by considering the nature of the federal government’s power under the Commerce Clause to intervene in the railroad strike, describing these powers expansively:

[W]ithin the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the State.

....

“No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it.”137

Given this plenary power, the wishes of the states were irrelevant. In fact, Illinois Governor Altgeld had been markedly reluctant to put down the strike.138 That “prosecutions for such offenses had in such a community would be doomed in advance to failure” – that is, that the federal government could not rely on a state to vindicate its interests – was all the more reason why the federal government was justified in intervening directly.139 Justice Brewer completed his syllogism with a rhetorical question: “[I]f a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?”140 The answer, clearly, was no. Neither the state nor the individual could interfere with the federal government’s guarantee of those rights that lay within its control.

At an abstract level, Hodges presented nearly the same issue. The Contracts Clause prohibits states from passing laws “impairing the Obligation of Contracts.”141 Decisions from the Civil Rights Cases to Lochner had held that the right to contract freely for the use of one’s labor was a fundamental right that the states could not invade.142 But do private individuals who band

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136 See id. at 575-77. For an extensive treatment of the Debs case, see Fiss, supra note 7, at 53-74, arguing that Brewer’s decision in Debs stemmed from his opinion that labor strikes effected a conversion of the employer’s private property.

137 In re Debs, 158 U.S. at 578 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 424 (1819)).

138 See William E. Forbath, The Shaping of the American Labor Movement, 102 HARV. L. REV. 1109, 1161 n.223 (1989) (noting that Governor Altgeld believed that the labor movement was less dangerous than the corporations that opposed it).

139 In re Debs, 158 U.S. at 582.

140 Id. at 581.

141 See U.S. CONST. art. I, § 10, cl. 1.

142 See supra Part II.B.
together as a mob interfere with this right any less? Unconsciously strengthening this parallel, the Attorney General had argued in his brief that the unwillingness of the Arkansas courts to guarantee the right to contract had “utterly nullified” whatever laws Arkansas had guaranteeing such right, just as the unwillingness of a state’s inhabitants to convict obstructers of the mails nullified the federal government’s ability to protect interstate commerce in the Debs case.\textsuperscript{143}

The Solicitor General seemed to be suggesting that when the state had failed as guarantor of fundamental rights it was necessary for the nation to step in to guarantee them. To be sure, in the Civil Rights Cases, the Court had held that the Fourteenth Amendment did not confer the authority to enact civil rights statutes governing private conduct, but part of its analysis rested on the fact that the law at issue applied even to “[s]tates which have the justest laws . . . whose authorities are ever ready to enforce such laws.”\textsuperscript{144} But that surely was not the case with respect to the workers in Hodges. Arkansas could hardly be characterized as a state with the justest laws that it was ever ready to enforce.

What accounts, then, for the diametrically opposite positions Justice Brewer and the Court took in Hodges and Debs? Precisely speaking, of course, the cases were not identical. The nature of the federal government’s power vis-à-vis the states was not quite the same. The Constitution granted Congress affirmative power over commerce and the mails.\textsuperscript{145} It denied the states affirmative power over contract,\textsuperscript{146} but it gave Congress no affirmative power over the process of contracting. Therefore, what the federal government sought to do in Hodges was not to further an enumerated interest of the federal government, as was the case in Debs, but rather to cure a state’s dereliction of duty. If the state’s police power to regulate contract was to mean anything, the state must have the right to decide to what extent it would involve itself. Part of the police power is the power not to police. In essence, just as the Dormant Commerce Clause prevented the states from stepping in where Congress had chosen not to tread, a “dormant contract clause” prevented the nation from stepping in when a state had chosen to abstain.

The fact remains, however, that the Constitution prevents some forms of interference with the right to contract. Thus, although Hodges can be distinguished from Debs, the real difference lies in the facts, and not in the formal constitutional provisions at issue.

From the Debs Court’s perspective, the railroad strike of 1894 was an


\textsuperscript{144} 109 U.S. 3, 14 (1883).

\textsuperscript{145} See U.S. Const. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce); U.S. Const. art. I, § 8, cl. 7 (granting Congress the power to establish post offices).

\textsuperscript{146} See U.S. Const. art I., § 10, cl. 1 (forbidding states from passing any law impairing the obligation of contracts).
emergency. It paralyzed the nation’s most important switchyard. If the strike were not stopped, there was no telling what its effects would be.

Regardless of Governor Altgeld’s reluctance to intervene, there was no reason to believe that Illinois alone could control the problem. The strike was quintessentially a national problem, not simply because interstate commerce or the mail was affected, but because a national issue was at stake.

By contrast, the outcome in Hodges reflected the Court’s view that the problems of eight black men were not as significant or compelling as those surrounding eighty thousand strikers. Hence, the Court was reluctant to allow the federal government to intervene. In rejecting the picture the Attorney General had painted at the end of his oral argument of the black man as a potentially dangerous outcast lurking at the outskirts of society, the Court decided that no matter how catastrophic the events in Whitehall had been for the victims, they did not threaten the foundations of the nation itself.

This perspective resulted from a number of subsidiary assumptions, none of which the Court made explicit. First, white harassment and brutality against blacks were almost inseparable incidents of Jim Crow. As we have seen, the Whitehall incident was not all that unusual. Indeed, a number of U.S. Attorneys in other districts wrote to the Department of Justice asking for information about the progress of the case because they wished to bring similar prosecutions in their districts.

To muster the entire power of the federal government to deal with the Whitehall situation would mean deciding that federal power was to be used in the ordinary course of events. This would be a drastic expansion of the federal government’s role, and would quite possibly undercut the Hodges Court’s view of federalism. Action against a catastrophic strike would not invoke so constant a federal presence.

Second, the Court viewed the problems of blacks as already solved. The Civil War and the three Civil War Amendments had solved whatever problem had existed, at least insofar as that problem was a matter of national concern. Indicative of this assumption is Hodges’ directive that blacks should “take[e] their chances” in the states where they lived. In 1928, Charles Warren was to characterize the Court’s behavior at the turn of the century in these terms:

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147 See In re Debs, 158 U.S. 564, 592 (1895).
148 Id. (describing the Court’s view that the case involved a critical question of national welfare).
149 See Hodges v. United States, 203 U.S. 1, 14 (1906).
151 For a brief discussion of the relationship between the Civil War and the Court’s decision in Debs, see Eben Moglen, Holmes’s Legacy and the New Constitutional History, 108 HARV. L. REV. 2027, 2043-44 (1995) (book review), arguing that the Civil War made an intense personal impression on all of the Justices who decided the Debs case.
152 See Hodges, 203 U.S. at 20.
Viewed in historical perspective now, however, there can be no question that the decisions in [the cases which restricted the scope of the civil War Amendments] were most fortunate. They largely eliminated from national politics the negro question which had so long embittered congressional debates; they relegated the burden and the duty of protecting the negro to the States, to whom they properly belonged; and they served to restore confidence in the National Court in the Southern States.\footnote{2 Charles Warren, The Supreme Court in United States History, 1836-1918, at 608 (2d ed. 1928).}

Although we know that the Court was tragically wrong in viewing the debased status of blacks as a local problem of little significance to the nation as a whole, it was correct in recognizing that to address that problem the federal government would have to radically transform its role.\footnote{For a discussion of that transformation, focusing on the role of the Thirteenth Amendment, see Goluboff, supra note 133, at 1640-44, describing how government attorneys used the Thirteenth Amendment to broaden the Department of Justice's civil rights practice in the 1940s.}

The Debs opinion contains a section whose contradiction of Hodges goes to this point. In explaining how the commerce power has come to include regulation of the railroads as well as the roads and navigable waters, Justice Brewer wrote that “[c]onstitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation.”\footnote{See In re Debs, 158 U.S. 564, 591 (1895).} The Debs opinion exhibits an understanding of the public interest as evolutionary and responsive to economic and social change. Hodges, however, rejected this approach to the Thirteenth Amendment. The Thirteenth Amendment “is as clear as language can make it.”\footnote{See Hodges, 203 U.S. at 17.} “The things denounced are slavery and involuntary servitude,” as they were understood in 1895, and, despite Justice Brewster’s resort to Webster’s Dictionary, not as they were being partially reinstated in Jim Crow Arkansas.\footnote{Id.}

The Court refused to acknowledge that by the beginning of the twentieth century, the South had developed more sophisticated means for imposing involuntary servitude on blacks.\footnote{Indeed, even in one of the few cases where the Court did intervene to protect blacks from peonage, the Court insisted in an extraordinarily disingenuous fashion that the case had nothing to do with race or the South’s history of black slavery. See Bailey v. Alabama, 219 U.S. 219, 231 (1911).} If the promise of the Thirteenth Amendment were to be fulfilled, then the federal government had to have the power to attack the subjugation of those whom the Amendment had been intended to protect, regardless of the guise in which that oppression appeared.
The Court’s rejection of an evolutionary perspective on the scope of the Thirteenth Amendment is all the more troubling and unjustifiable in light of the transformation which it wreaked on the Fourteenth Amendment in \textit{Lochner}. The interference with state autonomy engendered by \textit{Lochner’s} expansion of the Fourteenth Amendment was no less radical than that which expansion of the Thirteenth Amendment would have brought.

\textbf{CONCLUSION}

In the end, \textit{Hodges} confronted the Supreme Court with a choice between commitment to the grand yet simple principle of personal freedom contained in the Thirteenth Amendment and the central constitutional principle of a federal government of limited powers. In order to proclaim adherence to both these goals, the Court had to deny that there was any conflict between them. Justice Brewer’s opinion thus ignored and distorted both past jurisprudential and historical realities. He never mentioned the \textit{Civil Rights Cases}, \textit{Lochner}, or \textit{Debs}, which all bore directly on the meaning of the right to contract and the proper role of the federal government. He misquoted the \textit{Slaughter-House Cases}. He pretended that the long history of black slavery in Arkansas had no relationship to the plight of the eight black workers forced from their jobs. He suggested that the black workers could look to an at best indifferent state sovereign to protect their rights. Because the Court was unwilling to align the law with the world in which it operated, the Court remade the world so as to align it with an abstract notion of what the law should do.

Sixty-two years later, in \textit{Jones v. Alfred H. Mayer Co.}, the Supreme Court finally overruled \textit{Hodges} in a footnote.\footnote{392 U.S. 409, 441 n.78 (1968).} But it took a second Reconstruction to overcome the view established in 1906 that the federal government should not enforce racial justice.

I doubt that next year will see the kind of centennial retrospectives on \textit{Hodges} that \textit{Lochner} has prompted this year. As Jack Balkin’s contribution to this symposium explains, the question of which cases become part of the canon, which become part of the anti-canon, and which become simply part of the non-canon is a complex one.\footnote{See Jack M. Balkin, “Wrong the Day it Was Decided”: \textit{Lochner} and Constitutional Historicism, 85 B.U. L. REV. 677 (2005).} But the questions \textit{Hodges} raised – about congressional power under the Reconstruction Amendments – remain extraordinarily important today. And in a time when several key pieces of the Second Reconstruction\footnote{Not to mention some key provisions of the \textit{Lochner}-repudiating New Deal, such as Social Security.} face renewed attack, it is worth remembering how the Court contributed to the demise of the First.