

section 1 of the Amendment against private parties.⁹ In 1968, however, the Court overturned almost century-old precedent and held that Congress may regulate private activity in exercise of its section 2 power to enforce section 1 of the Amendment.

Certain early cases suggested broad congressional powers,¹⁰ but the *Civil Rights Cases*¹¹ of 1883 began a process, culminating in *Hodges v. United States*,¹² that substantially curtailed these powers. In the former decision, the Court held unconstitutional an 1875 law¹³ guaranteeing equality of access to public accommodations. Referring to the Thirteenth Amendment, the Court conceded that “legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.” Appropriate legislation under the Amendment, the Court continued, could go beyond nullifying state laws establishing or upholding slavery, because the Amendment “has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States,” and thereby empowering Congress “to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”¹⁴

These badges and incidents as perceived by the Court, however, were those that Congress in its 1866 legislation¹⁵ had sought “to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, pur-

⁹ In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968), the Court left open the question whether the Amendment itself, unaided by legislation, would reach the “badges and incidents” of slavery not directly associated with involuntary servitude, and it continued to reserve the question in *City of Memphis v. Greene*, 451 U.S. 100, 125–26 (1981). See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Justice Harlan dissenting). The Court drew back from the possibility in *Palmer v. Thompson*, 403 U.S. 217, 226–27 (1971).

¹⁰ *United States v. Rhodes*, 27 F. Cas. 785 (No. 16,151) (C.C. Ky. 1866) (Justice Swayne on circuit); *United States v. Cruikshank*, 25 Fed. Cas. 707, (No. 14,897) (C.C.D. La. 1874) (Justice Bradley on circuit), aff’d on other grounds, 92 U.S. 542 (1876); *United States v. Harris*, 106 U.S. 629, 640 (1883); *Blyew v. United States*, 80 U.S. 581, 601 (1871) (dissenting opinion, majority not addressing the issue).

¹¹ 109 U.S. 3 (1883).

¹² 203 U.S. 1 (1906). See also *Plessy v. Ferguson*, 163 U.S. 537, 542–43 (1896); *Corrigan v. Buckley*, 271 U.S. 323, 331 (1926); *Hurd v. Hodge*, 334 U.S. 24, 31 (1948).

¹³ Ch. 114, 18 Stat. 335.

¹⁴ *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

¹⁵ Ch. 31, 14 Stat. 27 (1866), now 42 U.S.C. §§ 1981–82.