Supplementary Material

Chapter 7: The Republican Era—Equality/Race/Badges and Incidents of Slavery

---

Hodges v. U.S., 203 U.S. 1 (1906)

Berry Winn and a number of other African-Americans were employed in a lumber mill by a local manufacturing firm. Reuben Hodges and other members of a white supremacist group threatened Winn and the others with deadly force if they continued to fulfill their labor contracts. For these actions, Hodges and his confederates were indicted by a federal grand jury in Arkansas. They were charged with "knowingly, wilfully, and unlawfully conspir[ing] to oppress, threaten, and intimidate Berry Winn [and others] in the free exercise and enjoyment of rights and privileges secured to them and each of them by the Constitution and laws of the United States." The federal trial court rejected Hodges's assertion that the federal government had no power to charge him with a crime. He was tried, convicted, and sentenced to jail. Hodges appealed that verdict to the Supreme Court of the United States.

The Supreme Court of the United States declared that the Congress could not criminalize interfering with contractual relationships. Justice Brewer's majority opinion contended that Hodges had committed an ordinary crime and that ordinary crimes could be constitutionally punished only by the states. Both the Brewer majority opinion and the Harlan dissent relied on the Civil Rights Cases *(1883). Which opinion is more consistent with that precedent? Did* Hodges *merely confirm or expand past precedents insisting on state action? All the justices agreed that the Thirteenth Amendment does not have a state action component. How did the different justices interpret the "badges and incidents of slavery"?*

JUSTICE BREWER delivered the opinion of the court:

. . . That the 14th and 15th Amendments do not justify the legislation is . . . beyond dispute, for they, as repeatedly held, are restrictions upon state action, and no action on the part of the state is complained of. Unless, therefore, the 13th Amendment vests in the nation the jurisdiction claimed, the remedy must be sought through state action and in state tribunals, subject to the supervision of this court by writ of error in proper cases.

. . .

The meaning of [the Thirteenth Amendment] is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the nation. It is the denunciation of a condition, and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the nation, it commits every race and every individual thereof. Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon, are as much within its compass as slavery or involuntary servitude of the African. . . .

A reference to the definitions in the dictionaries of words whose meaning is so thoroughly understood by all seems an affectation, yet in Webster slavery is defined as "the state of entire subjection of one person to the will of another," and a slave is said to be "a person who is held in bondage to another." . . . .

It is said, however, that one of the disabilities of slavery, one of the *indicia* of its existence, was a lack of power to make or perform contracts, and that when these defendants, by intimidation and force, compelled the colored men named in the indictment to desist from performing their contract, they, to that extent, reduced those parties to a condition of slavery,—that is, of subjection to the will of defendants, and deprived them of a freeman's power to perform his contract. But every 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. A freeman has a right to be protected in his person from an assault and battery. He is entitled to hold his property safe from trespass or appropriation; but no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery. . . .

. . . [N]owhere 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. They took no more from the Amendment than any other citizens of the United States. But if, as we have seen, that denounces a condition possible for all races and all individuals, then a like wrong perpetrated by white men upon a Chinese, or by black men upon a white man, or by any men upon any man on account of his race, would come within the jurisdiction of Congress, and that protection of individual rights which, prior to the 13th Amendment, was unquestionably within the jurisdiction solely of the states, would, by virtue of that Amendment, be transferred to the nation, and subject to the legislation of Congress.

But that it was not the intent of the Amendment to denounce every act done to an individual which was wrong if done to a free man, and yet justified in a condition of slavery, and to give authority to Congress to enforce such denunciation, consider the legislation in respect to the Chinese. In slave times in the slave states not infrequently every free negro was required to carry with him a copy of a judicial decree or other evidence of his right to freedom or be subject to arrest. That was one of the incidents or badges of slavery. By the act of May 5, 1892, . . . Congress required all Chinese laborers within the limits of the United States to apply for a certificate, and any one who, after one year from the passage of the act, should be found within the jurisdiction of the United States without such certificate, might be arrested and deported. In *Fong Yue Ting v. United States* (1893), the validity of the Chinese deportation act was presented, elaborately argued, and fully considered by this court. While there was a division of opinion, yet at no time during the progress of the litigation, and by no individual, counsel, or court connected with it, was it suggested that the requiring of such a certificate was evidence of a condition of slavery, or prohibited by the 13th Amendment.

. . .

JUSTICE BROWN concurs in the judgments.

JUSTICE HARLAN (with whom concurs JUSTICE DAY), dissenting:

. . .

. . . It is no longer open to question, in this court, that Congress may, by appropriate legislation, protect any right or privilege arising from, created or secured by, or dependent upon, the Constitution or laws of the United States. . . .

. . .

I come now to the main question,—whether a conspiracy or combination to forcibly prevent citizens of African descent, *solely because of their race and color*, from disposing of their labor by contract upon such terms as they deem proper, and from carrying out such contract, infringes or violates a right or privilege created by, derived from, or dependent upon, the Constitution of the United States.

. . . [The Thirteenth] Amendment destroyed slavery and all its incidents and badges, and established freedom. It also conferred upon every person within the jurisdiction of the United States (except those legally imprisoned for crime) the right, without discrimination against them on account of their race, to enjoy all the privileges that inhere in freedom. It went further, however, and by its 2d section, invested Congress with power, by appropriate legislation, to enforce its provisions. To that end, by direct, primary legislation, Congress may not only prevent the re-establishing of the institution of slavery, pure and simple, but may make it impossible that any of its incidents or badges should exist or

be enforced in any state or territory of the United States. It therefore became competent for Congress, under the 13th Amendment, to make the establishing of slavery, as well as all attempts, whether in the form of a conspiracy or otherwise, to subject anyone to the badges or incidents of slavery, *offenses against the United States*, punishable by fine or imprisonment or both. And legislation of that character would certainly be appropriate for the protection of whatever rights were given or created by the Amendment. So, legislation making it an offense against the United States to conspire to injure or intimidate a citizen in the free exercise of any right secured by the Constitution is broad enough to embrace a conspiracy of the kind charged in the present indictment. . . . The colored laborers against whom the conspiracy in question was directed owe their freedom as well as their exemption from the incidents and badges of slavery alone to the Constitution of the United States. Yet it is said that their right to enjoy freedom and to be protected against the badges and incidents of slavery is not secured by the Constitution or laws of the United States.

It may be also observed that the freedom created and established by the 13th Amendment was further protected against assault when the 14th Amendment became a part of the supreme law of the land; for that Amendment provided that no state shall deprive any person of life, liberty, or property without due process of law. To deprive any person of a privilege inhering in the freedom ordained and established by the 13th Amendment is to deprive him of a privilege inhering in the liberty recognized by the 14th Amendment. It is true that the present case is not one of the deprivation, by the Constitution or laws of the state, of the privilege of disposing of one's labor as he deems proper. But it is one of a combination and conspiracy by individuals acting in hostility to rights conferred by the Amendment that ordained and established freedom and conferred upon every person within the jurisdiction of the United States (not held lawfully in custody for crime) the privileges that are fundamental in a state of freedom, and which were violently taken from the laborers in question solely because of their race and color.

. . .

I participated in the decision of the *Civil Rights Cases* (1883), but was not able to concur with my brethren in holding the act there involved to be beyond the power of Congress. But I stood with the court in the declaration that the 13th Amendment not only established and decreed universal, civil and political freedom throughout this land, but abolished the incidents or badges of slavery, among which, as the court declared, was the disability, based merely on race discrimination, to hold property, to make contracts, to have a standing in court, and to be a witness against a white person.

One of the important aspects in the present discussion of the Civil Rights Cases is that the court there proceeded distinctly upon the ground that although the Constitution and statutes of a state may not be repugnant to the 13th Amendment, nevertheless, Congress, by legislation of a direct and primary character, may, in order to enforce the Amendment, reach and punish individuals whose acts are in hostility to rights and privileges derived from, or secured by, or dependent upon, that Amendment.

[Past precedents] proceeded upon the ground that, although the Constitution and laws of the state might be in perfect harmony with the 13th Amendment, yet the compulsory holding of one individual by another individual for the purpose of compelling the former, by personal service, to discharge his indebtedness to the latter, created a condition of involuntary servitude or peonage, was in derogation of the freedom established by that Amendment, and, therefore, could be reached and punished by the nation. Is it consistent with the principle upon which that case rests to say that an organized body of individuals who forcibly prevent free citizens, solely because of their race, from making a living in a legitimate way, do not infringe any right secured by the national Constitution, and may not be reached or punished by the nation? One who is shut up by superior or overpowering force, constantly present and threatening, from earning his living in a lawful way of his own choosing, is as much in a condition of involuntary servitude as if he were forcibly held in a condition of peonage. In each case his will is enslaved, because illegally subjected, by a combination that he cannot resist, to the will of others in respect of matters which a freeman is entitled to control in such way as to him seems best. It would seem impossible, under former decisions, to sustain the view that a combination or conspiracy of individuals, albeit acting without the sanction of the state, may not be reached and punished by the United States, if the combination and conspiracy has for its object, by force, to prevent or burden the free

exercise or enjoyment of a right or privilege created or secured by the Constitution or laws of the United States.

. . . [T]his court has held that the 13th Amendment, by its own force, without the aid of legislation, not only conferred freedom upon every person (not legally held in custody for crime) within the jurisdiction of the United States, but the right and privilege of being free from the badges or incidents of slavery. And it has declared that one of the insuperable incidents of slavery, as it existed at the time of the adoption of the 13th Amendment, was the disability of those in slavery to make contracts. It has also adjudged—no member of this court holding to the contrary—that any attempt to subject citizens to the incidents or badges of slavery could be made an offense against the United States. If the 13th Amendment established freedom, and conferred, without the aid of legislation, the right to be free from the badges and incidents of slavery, and if the disability to make or enforce contracts for one's personal services was a badge of slavery, as it existed when the 13th Amendment was adopted, how is it possible to say that the combination or conspiracy charged in the present indictment, and conclusively established by the verdict and judgment, was not in hostility to rights secured by the Constitution?

I have already said that the liberty protected by the 14th Amendment against state action inconsistent with due process of law is neither more nor less than the freedom established by the 13th Amendment. This, I think, cannot be doubted. In *Allgeyer v. Louisiana* (1895) we said that such liberty "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment *of all his faculties; to be free to use them in all lawful ways; to live and work when he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned*." All these rights, as this court adjudged in the Allgeyer Case, are embraced in the liberty which the 14th Amendment protects against hostile state action, when such state action is wanting in due process of law. They are rights essential in the freedom conferred by the 13th Amendment. If, for instance, a person is prevented, because of his race, from living and working where and for whom he will, or from earning his livelihood by any lawful calling that he may elect to pursue, then he is hindered in the exercise of rights and privileges secured to freemen by the Constitution of the United States. . . .

. . . Such is the import and practical effect of the present decision, although the court has heretofore unanimously held that the right to earn one's living in all legal ways, and to make lawful contracts in reference thereto, is a vital part of the freedom *established by the Constitution*, and although it has been held, time and again, that Congress may, by appropriate legislation, grant, protect, and enforce *any* right, derived from, secured or created by, or dependent upon, that instrument. These general principles, it is to be regretted, are now modified, so as to deny to millions of citizen-laborers of African descent, deriving their freedom from the nation, the right to appeal for national protection against lawless combinations of individuals who seek, by force, and solely because of the race of such laborers, to deprive them of the freedom established by the Constitution of the United States, so far as that freedom involves the right of such citizens, without discrimination against them because of their race, to earn a living in all lawful ways, and to dispose of their labor by contract. I cannot assent to an interpretation of the Constitution which denies national protection to vast numbers of our people in respect of rights derived by them from the nation. . . .