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Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery

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The Supreme Court has held that the Thirteenth Amendment prohibits slavery or involuntary servitude and also empowers Congress to end any lingering badges and incidents of slavery. The Court, however, has failed to provide any guidance as to how courts should define the badges and incidents of slavery absent such congressional action. This has led the lower courts to conclude that the judiciary's role under the Thirteenth Amendment is limited to enforcing only the Amendment's prohibition of literal enslavement.

This Article has two primary objectives. First, it offers an interpretive framework for defining the badges and incidents of slavery that is true to

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both the Amendment's drafters' original purposes and that can also serve as a vibrant remedy for the legacies of slavery. The Thirteenth Amendment should neither be construed as a dead letter whose purpose was served with the removal of the freedmen's bonds nor as a limitless remedy for all forms of discrimination. Rather, the Amendment must be interpreted in an evolutionary manner, but with specific regard to the experience of the victims of human bondage in the United States (i.e., African Americans) and the destructive effects that the system of slavery had upon American society, laws, and customs.

Second, this Article explains that the judiciary has concurrent power with Congress to define and offer redress for the badges and incidents of slavery. Limiting the Amendment, in the absence of congressional action, to literal enslavement ignores the Amendment's framers' expressed original intent that the Amendment itself would eliminate all lingering vestiges of the slave system. Furthermore, such an interpretation violates separation of powers principles by imputing to Congress the ability to legislate under the Amendment's Enforcement Clause against conditions that purportedly do not violate the Amendment itself in any way. Even in the absence of congressional action, the judiciary should enforce the Thirteenth Amendment's promise to eliminate the badges and incidents of slavery.

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[I]t is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins . . . .[1]

INTRODUCTION

Despite its seemingly simple command that "[n]either slavery nor involuntary servitude . . . shall exist within the United States,"[2] the Thirteenth Amendment's scope remains ambiguous. In *Jones v. Alfred H. Mayer Co.*,[3] the Supreme Court construed the Amendment as not only abolishing African slavery, but also empowering Congress to "pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[4] In so holding, the Court resurrected the Thirteenth Amendment as a potentially significant source of civil rights protections after more than one hundred years during which the Amendment had largely been treated as obsolete. The Court, however, has never articulated or even suggested a consistent exegesis of the Amendment's meaning. Rather, the current jurisprudence rests wholly upon ad hoc determinations of whether a

[1] CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS 122 (Alfred Avins ed., 1967) [hereinafter THE RECONSTRUCTION AMENDMENTS' DEBATES] (statement of Sen. Trumbull in support of Civil Rights Act of 1866, passed pursuant to Thirteenth Amendment).

[2] U.S. CONST. amend. XIII, § 1.

[3] 392 U.S. 409 (1968).

[4] *Id.* at 439.

given statute or complaint falls within the Thirteenth Amendment.

Significant questions regarding the Amendment's scope and interpretation therefore remain unanswered. First, given "[t]he fact that southern slavery was, in the main, [African] slavery,"[5] can the Amendment's proscription of the badges of slavery be interpreted as extending to racial groups other than African Americans?[6] Second, even if the Thirteenth Amendment's prohibition of the badges of slavery does apply to all racial groups, does it apply to non-racial classes?[7] Third, what principles should guide judges, legislators, or potential litigants in determining whether a particular condition or form of discrimination constitutes a badge of slavery?

In addition to this lack of definition regarding the scope of the Amendment's prohibition of the badges and incidents of slavery, a significant separation of powers question also remains unresolved. In *Jones*, the Supreme Court held that the Thirteenth Amendment's Enforcement Clause empowers Congress to enact legislation it deems necessary to eliminate the badges and incidents of slavery.[8] Neither in *Jones* nor in subsequent cases, however, has the Court defined the Amendment's self-executing scope. The *Jones* Court specifically reserved the question of whether the Amendment, in the absence of

[5] *See, e.g.*, KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 193 (1961). Stampp posits that one reason for the ascendancy of African slavery was because "[i]f he ran away, the Negro slave with his distinctive skin color could not so easily escape detection as could a white indentured servant." *Id.*

[6] The Supreme Court has held that a variety of civil rights statutes passed pursuant to the Thirteenth Amendment do apply to persons who are not African American. *See, e.g.*, Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (holding that 42 U.S.C. § 1982 applies to discrimination against Jewish persons); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (noting that 42 U.S.C. § 1981 applies to discrimination in making or enforcement of contracts without regard to victim's race). The Court, however, has never directly addressed whether such persons can bring a direct cause of action under the Thirteenth Amendment itself (as opposed to under a statute implementing the Amendment) because the Court has also never definitively addressed whether such a direct cause of action exists. For a discussion of the dichotomy in the case law regarding the scope of Congress's Thirteenth Amendment Enforcement Clause power versus the scope of the Amendment in the absence of congressional action, see *infra* Part IV.B.

[7] *See* Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097, 1143 (1998) (criticizing this "settled interpretation" of Thirteenth Amendment: "[T]he promise of the Thirteenth Amendment for women is split down race lines. All women may claim the Amendment's protections against states of [actual] servitude . . . . Black women may invoke the civil rights statutes based on the Thirteenth Amendment for claims of racial discrimination.").

[8] *Jones*, 392 U.S. at 439.

implementing legislation, reaches the badges and incidents of slavery.[9] In the absence of a definitive statement from the Court, lower courts have uniformly held that the judicial power to enforce the Amendment is limited to conditions of literal slavery or involuntary servitude.[10] These courts have simultaneously affirmed that the Amendment empowers Congress to offer redress for the badges and incidents of slavery.[11]

[9] In *Jones*, the Court noted that "[w]hether or not the Amendment *itself* did any more than [abolish slavery]" was "a question not involved in this case." *See Jones*, 392 U.S. at 439. In *City of Memphis v. Greene*, 451 U.S. 100, 125 (1981), the Court subsequently stated that Congress's power to eliminate the badges and incidents of slavery "is not inconsistent with the view that the Amendment has self-executing force," but neither embraced nor rejected any particular view of the Amendment's scope.

[10] While the Court has never reached an actual holding on this issue, in *Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971), the Court indicated its skepticism toward construing the Amendment as providing a remedy for the badges of slavery in the absence of congressional legislation defining a condition as such. (*Palmer* is discussed in more detail in Part II.B, *infra*.) The Court's Thirteenth Amendment discussion in *Palmer*, although dicta, could be read as a strong signal that the badges of slavery power is relegated solely to congressional enforcement, were it not for the portion of *Greene* cited in note 9, *supra*, which was decided after *Palmer*.

[11] *See* Crenshaw v. City of Defuniak Springs, 891 F. Supp. 1548, 1556 (N.D. Fla. 1995) ("While neither the Supreme Court . . . or the Courts of Appeal have decided the extent to which a direct cause of action exists under the Thirteenth Amendment, district courts have uniformly held that the amendment does not reach forms of discrimination other than slavery or involuntary servitude."); Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 213 (1992) ("[T]he Thirteenth Amendment is generally, albeit implicitly, interpreted by the courts [solely] as a prohibition against coerced wage labor in the market economy . . . . If one accepts this limited perspective, the Thirteenth Amendment guarantees workers nothing more than the freedom to contract their labor."); *see also* Larry J. Pittman, *Physician-Assisted Suicide in the Dark Ward: The Intersection of the Thirteenth Amendment and Health Care Treatments Having Disproportionate Impacts on Disfavored Groups*, 28 SETON HALL L. REV. 774, 860-71 (1998) (surveying lower courts' Thirteenth Amendment cases). The conclusion that the Amendment empowers Congress to legislate against the badges of slavery, but that the Amendment itself only reaches literal enslavement, is far from compelled by the Amendment's history or Supreme Court cases. In fact, it runs directly counter to the Amendment's legislative history and context. It also raises serious constitutional concerns by imputing to Congress a power under the Amendment's Enforcement Clause that is completely separate from what these courts believe the Amendment itself prohibits. *See infra* Part IV.B. This structure may make sense as a practical matter, if one believes that courts are ill-suited to determine what modern day conditions constitute lingering effects of slavery. But the lower courts have cast their narrow interpretations of the judiciary's power under the Amendment as constitutional decisions regarding the Amendment's meaning or original intent, not as matters of prudential abstention.

This lack of clarity since the Court's decision in *Jones* has resulted in a growing divide between Thirteenth Amendment case law and Thirteenth Amendment scholarship. The lower courts have consistently found that the Amendment itself prohibits only literal slavery, involuntary servitude, or other forms of coerced labor.[12] Concurrent with this judicial narrowing of the Amendment's potential, scholars and litigants have advocated for an expansive interpretation of the Amendment as applying to various forms of social injustice.[13]

[12] *See* discussion *supra* note 11. One court has even gone so far as to suggest that asserting the Thirteenth Amendment as a direct cause of action for the badges or incidents of slavery was so improper as to be sanctionable under Federal Rule of Civil Procedure 11. *See* Sanders v. A.J. Canfield, 635 F. Supp. 85, 87 (N.D. Ill. 1986).

[13] *See, e.g.*, ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY (2004) [hereinafter TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM] (arguing that scope of Thirteenth Amendment reaches beyond actual enslavement and has important implications for civil liberties); Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENTARY 403 (1993) (arguing that Thirteenth Amendment's "significance is underappreciated in a wide range of contexts where issues of state action and private power have been problematic"); Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1992) (positing Thirteenth Amendment as constitutional basis for federal laws restricting hate speech); Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 401 (2000) [hereinafter Bridgewater, *Reproductive Freedom as Civil Freedom*] (noting that infringement of women's reproductive rights is both remnant of institution of slavery and modern manifestation of slavery); Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 11 (2001) (arguing that Thirteenth Amendment protects against sexual exploitation as both badge of slavery and as instance of involuntary servitude); William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17 (2004) (explaining that racial profiling is badge or incident of slavery in violation of Thirteenth Amendment); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1 (1990) [hereinafter Colbert, *Challenging the Challenge*] (arguing that race-based peremptory jury challenges violate Thirteenth Amendment); Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1 (1995) [hereinafter Colbert, *Liberating the Thirteenth Amendment*] (discussing that racial disparities in capital punishment and race-based peremptory jury challenges violate Thirteenth Amendment); Marco Masoni, *The Green Badge of Slavery*, 2 GEO. J. ON FIGHTING POVERTY 97 (1994) (arguing that environmental degradation of black communities is remnant of slavery); Petal Nevella Modeste, *Race Hate Speech: The Pervasive Badge of Slavery that Mocks the Thirteenth Amendment*, 44 HOW. L.J. 311 (2001) (arguing that Thirteenth Amendment provides grounds to prohibit racial hate speech); Larry J. Pittman, *A Thirteenth Amendment Challenge to Both Racial Disparities in Medical Treatments and Improper Physicians' Informed Consent Disclosures*, 48 ST. LOUIS U. L.J. 131 (2003) (arguing that racial disparities in medical treatments and

At the extremes, the current approaches to construing the Thirteenth Amendment's self-executing prohibition of the badges and incidents of slavery are misguided. Those courts that dismiss "badges and incidents of slavery" claims out of hand without seriously considering such claims can do so only by disregarding Supreme Court precedent, the Amendment's legislative history, its historical context, and its framers' intent. Scholars and litigants who view the Thirteenth Amendment as providing a generalized constitutional remedy for all forms of discrimination without analyzing whether the practice or condition at issue has a real connection to the institution of chattel slavery ignore enslavement itself and the consequent injuries thereof that motivated the Amendment's adoption. In so doing, they weaken the Amendment's potential as an effective legal remedy for the claims that it does encompass.

African Americans are the most obvious beneficiaries of the Thirteenth Amendment. I ultimately conclude, however, that persons who are not African American can also suffer a badge or incident of slavery when the injury at issue is proximately traceable to the system

improper physicians' informed consent disclosures violate Thirteenth Amendment); Pittman, *supra* note 11, at 774 (stating that racial discrimination in healthcare industry violates Thirteenth Amendment as badge or incident of slavery); Vernellia R. Randall, *Slavery, Segregation and Racism: Trusting the Health Care System Ain't Always Easy! An African American Perspective on Bioethics*, 15 ST. LOUIS U. PUB. L. REV. 191 (1996) (noting that racial discrimination against African Americans by physicians and other medical providers violates Thirteenth Amendment); David P. Tedhams, *The Reincarnation of "Jim Crow": A Thirteenth Amendment Analysis of Colorado's Amendment 2*, 4 TEMP. POL. & CIV. RTS. L. REV. 133, 142 (1994) (explaining that Colorado referendum prohibiting state from offering protection from discrimination on basis of sexual orientation was badge or incident of slavery because any legislation depriving "an individual, or class, of their civil rights . . . devalue[s] the subject class by relegating it to a subordinate status, [and therefore] violate[s] the mandate of equality implicit in the Thirteenth Amendment"); Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 308 (2004) [hereinafter Tsesis, *Furthering American Freedom*] (furthering argument that scope of Thirteenth Amendment reaches beyond actual enslavement and has important implications for civil liberties); Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539 (2002) (arguing that confederate symbols are badges of slavery violating Thirteenth Amendment); Victor Williams & Alison M. Macdonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 230 (1994) (observing that current constitutional structures governing presidential elections were adopted as "constitutional appeasements to southern slaveholding interests" and, as such, "must be philosophically and politically scrutinized as structural badges and incidents of slavery") (internal quotation marks omitted); Hearn, *supra* note 7 (writing that violence against women violates Thirteenth Amendment).

of slavery. Defining the badges and incidents of slavery requires an examination of the nexus between group history and the nature and genesis of the complained of injury or condition. In other words, as the group's link to slavery grows more attenuated, the nature of the injury must be more strongly connected to the system of slavery to be rationally considered a badge or incident thereof. Conversely, where the harm suffered is less directly traceable to the system of slavery, the injured party must be able to show that her group's current status, history, and societal perception are sufficiently similar to those actually enslaved such that inequality arising out of or based upon that status is an outgrowth or legacy of slavery.

In both formulations, the point of reference remains where I believe it must: either on the group formerly enslaved (African Americans) and those classes sufficiently similar to them in terms of history and societal standing, or upon the system of slavery and the specific damage it caused to American society. In this way, the constitutional command to eliminate the badges and incidents of slavery remains tethered to the actual historical facts of American slavery and its particular victims.[14] In short, because the institution of slavery was about the interaction of race,[15] power, and group status, the Thirteenth Amendment should be expressly construed in terms of race, power, and group status.

I have argued elsewhere that viewing the Amendment as vesting Congress alone with the power to address the badges of slavery is inconsistent with the Amendment's legislative history and the Supreme Court's recent precedents regarding congressional power to enforce the Reconstruction Amendments.[16] This Article expands upon those themes and also addresses the separation of powers concerns

[14] *See* Tsesis, *Furthering American Freedom*, *supra* note 13, at 310 ("The judiciary's interpretation [of the Thirteenth Amendment] must be partially historical, because it cannot be made without reference to the United States' experience with slavery, and partially theoretical, because it must chart the course for civil liberties.").

[15] "Race," of course, is a controversial concept. *See* Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093 (2004). By saying that the Thirteenth Amendment is about "race" I do not mean that discrimination or inequality based upon factors other than biology or skin color is always beyond the Amendment's scope. As will be demonstrated below, the Thirteenth Amendment's framers conceived their mission as remedying the permanent disabilities that the institution of slavery inflicted in perpetuity upon an identifiable and stigmatized group, where those injuries were inflicted in furtherance of maintaining slavery and subordination. Therefore, a more accurate characterization of the Amendment's goals is that it was designed to eliminate the permanent caste system slavery created and to ensure that such castes would not exist in the future.

[16] *See* Carter, *supra* note 13, at 82-86.

from a pragmatic perspective. While Congress may, in some cases and for pragmatic reasons, be the *better* branch of government to define what conditions amount to badges of slavery, it is not the *only* branch practically equipped or constitutionally empowered to do so. Thus, while courts should accord substantial deference to congressional determinations that particular injuries or conditions are lingering effects of slavery, they should also, in the absence of applicable federal legislation, exercise their independent constitutional authority to say "what the law is" regarding the Thirteenth Amendment. [17]

This Article has two primary objectives. First, it offers an interpretive framework for defining "badges and incidents of slavery" that is true to the Amendment's drafters' original purposes and that can also serve as a vibrant remedy for the legacies of slavery. Second, it explains that the judiciary has concurrent power with Congress to define and offer redress for the badges and incidents of slavery. These two objectives are related because the courts, regardless of their formal power to enforce constitutional rights, are unlikely to do so where the proposed interpretation is so indeterminate as to raise concerns about judicial policymaking. I believe that courts have been unwilling to extend the Amendment to its full scope at least in part because the badges and incidents of slavery prohibited by the Thirteenth Amendment remain so undefined.[18]

Part I of this Article briefly reviews the existing Thirteenth Amendment literature, the Amendment's legislative history, and Supreme Court jurisprudence to discern generally accepted principles and remaining areas of ambiguity. Part II proposes principles of constitutional interpretation to guide us in defining the badges and incidents of slavery, and concludes that an understanding of the Amendment's framers' purposes supports interpreting the Amendment

[17] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[18] Arguably, the current ambiguity regarding what exactly constitutes a badge or incident of slavery should make courts *more* willing to extend the Thirteenth Amendment to a variety of injustices. *See, e.g.*, G. SIDNEY BUCHANAN, THE QUEST FOR FREEDOM: A LEGAL HISTORY OF THE THIRTEENTH AMENDMENT 176 (1976) (stating that Thirteenth Amendment "creates inviting conceptual vistas for scholastic exploration"); Bridgewater, *Reproductive Freedom as Civil Freedom*, *supra* note 13, at 424 ("[T]he precise scope of the Thirteenth Amendment remains undefined. This creates an opportunity for creative litigators and legal scholars to attempt to persuade courts that a particular practice or condition violates the Thirteenth Amendment."). The fact that no court has yet accepted that the Thirteenth Amendment reaches the badges and incidents of slavery (absent congressional authorization), despite the many cogent arguments for so doing, suggests that clearer theoretical justification is necessary.

as reaching substantially beyond literal slavery or involuntary servitude. Part III reviews the current approaches to Thirteenth Amendment interpretation and concludes that none of the prevailing approaches is tenable. In Part IV, I synthesize the foregoing principles and propose that the badges and incidents of slavery be evaluated with reference to whether the identity of the victim and the nature of the injury demonstrate a concrete link to the system of chattel slavery. I also provide examples of how the framework I propose would be applied in practice. Finally, in Part IV, I briefly respond to the potential criticism that grounding the badges and incidents of slavery analysis in the specifics of chattel slavery and the experiences of African Americans under that institution would unduly minimize the unique experiences of other racial and ethnic minorities. I conclude by arguing that the Thirteenth Amendment's promise to rid America of the lingering vestiges of slavery remains a vibrant option for the furtherance of substantive equality.

I. THE THIRTEENTH AMENDMENT: BACKGROUND, LEGISLATIVE HISTORY, AND SUPREME COURT INTERPRETATION

The Thirteenth Amendment has given rise to two distinct interpretations. The first is that the Amendment prohibits only chattel slavery, involuntary labor, or other conditions amounting to actual compelled service. Courts and commentators have analyzed, for example, whether the Thirteenth Amendment provides a remedy for coercive labor practices,[19] physical confinement,[20] child abuse,[21]

[19] *See e.g.*, United States v. Kozminski, 487 U.S. 931 (1988) (holding that "involuntary servitude" means that victim was forced to labor under threat of physical force or restraint); Sterier v. Bethlehem Area Sch. Dist., 987 F.2d 989 (3d Cir. 1993) (holding that Thirteenth Amendment does not prohibit mandatory community service programs); Bahar Azmy, *Unshackling the Thirteenth: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981 (2002) (discussing possible application of Thirteenth Amendment to modern labor trafficking); Samantha C. Halem, *Slaves to Fashion: A Thirteenth Amendment Litigation Strategy to Abolish Sweatshops in the Garment Industry*, 36 SAN DIEGO L. REV. 397 (1999) (arguing that exploitation of immigrant garment workers violates Thirteenth Amendment); Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-*Hoffman *World — Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651 (2004) (arguing that Thirteenth Amendment should apply to undocumented workers); Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989) ("[T]he thirteenth amendment can be interpreted to stand for a much broader idea of employee autonomy and independence."); Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973 (2002) (arguing that Thirteenth Amendment applies to involvement of U.S. firms in forced labor abroad); Donald C. Hancock, Comment, *The Thirteenth Amendment and the Juvenile Justice*

prostitution,[22] or other forms of compelled service or physical domination.[23] This interpretation of the Amendment does not posit race or a link to the institution of chattel slavery as an essential element of the exercise of Thirteenth Amendment power. The Thirteenth Amendment is an absolute declaration that neither slavery nor involuntary servitude shall exist in the United States.[24] Therefore, just as any person of any race can be enslaved, so too can any person be abused, exploited, or physically dominated in a manner equivalent to enslavement.[25]

System, 83 J. CRIM. L. & CRIMINOLOGY 614 (1992) (arguing that Thirteenth Amendment prohibits state practice of compelling juvenile delinquents to perform involuntary labor).

[20] *See, e.g.*, United States v. Alzanki, 54 F.3d 994 (1st Cir. 1995) (affirming convictions for holding household worker in involuntary servitude); United States v. King, 840 F.2d 1276 (6th Cir. 1988) (holding that religious cult held children in involuntary servitude in violation of federal law and Thirteenth Amendment); United States v. Warren, 772 F.2d 827 (11th Cir. 1985) (affirming convictions for holding migrant workers in involuntary servitude).

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

[22] *See, e.g.*, Neal Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791 (1993) (arguing that forced prostitution and governmental failure to enforce laws against pimping violate Thirteenth Amendment); *cf*. Vanessa B.M. Vergara, Comment, *Abusive Mail-Order Bride Marriage and the Thirteenth Amendment*, 94 NW. U. L. REV. 1547 (2000) (arguing that mail-order bride industry violates Thirteenth Amendment).

[23] *See, e.g.*, Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV 480 (1990) (arguing that certain abortion restrictions violate Thirteenth Amendment); McConnell, *supra* note 11 (arguing that violence against women creates conditions of involuntary servitude in violation of Thirteenth Amendment); Sean Charles Vinck, *Does the Thirteenth Amendment Provide a Jurisdictional Basis for a Federal Ban on Cloning?*, 30 J. LEGIS. 183 (2003) (arguing that Thirteenth Amendment is source of constitutional authority for ban on human cloning); Hearn, *supra* note 7 (arguing that Thirteenth Amendment provides basis for federal legislation covering violence against women).

[24] *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883) ("[T]he [Thirteenth] 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.").

[25] *See* Hodges v. United States, 203 U.S. 1, 16-17 (1906) ("Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo Saxon, are as much within [the Thirteenth Amendment's] compass as slavery or involuntary servitude of the African."); The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 72 (1872) ("[N]egro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter."); United States v. Nelson, 277 F.3d 164, 176 (2d Cir. 2002) ("[T]he Thirteenth Amendment's prohibitions extend, at the least, to all race-based slavery or servitude.").

In contrast, the badges and incidents of slavery interpretation of the Amendment requires an examination of whether a modern condition or form of discrimination is a lingering effect of the system of African slavery. In *Jones*, for example, the Supreme Court held that a private individual's refusal to sell a home to an African American buyer was a relic of slavery that reinforced segregation.[26] In so holding, the Court did not examine whether a black person's inability to purchase real property from a white seller amounted to actual enslavement. Rather, the Court's focus was on the dehumanizing vestiges and stigmas arising out of slavery that African Americans still suffered.[27]

Given the relative lack of jurisprudence regarding the badges and incidents of slavery, particularly with regard to the Amendment's reach in the absence of congressional legislation, it remains an open question as to how courts presented with Thirteenth Amendment claims should determine what constitutes a badge or incident of slavery. In the following discussion, I first examine settled Thirteenth Amendment principles by analyzing the Amendment's framers' intentions and Supreme Court case law. I then turn to the myriad of unsettled questions regarding the Amendment's scope and applicability.

A. The Thirteenth Amendment Debates

By the time of the Civil War, the gradualist approach to abolition that had previously prevailed among congressional Republicans had been replaced by a rejection of incrementalism and general acceptance that the time had come to end both slavery and its concomitant disabilities immediately.[28] The Thirteenth Amendment was designed

[26] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441-43 (1968).

[27] One court, while purporting to recognize that the Thirteenth Amendment does provide a direct, individual cause of action for the badges and incidents of slavery, reached the odd conclusion that such a cause of action only encompasses conditions of forced labor. *See* Rogers v. American Airlines, 527 F. Supp. 229, 231 (S.D.N.Y. 1981) (dismissing African American woman's Thirteenth Amendment claim for employment discrimination because of her "Afro-centric" braided hairstyle and stating that Thirteenth Amendment "prohibits practices that constitute a badge of slavery and, unless a plaintiff alleges she *does not have the option of leaving her job*, does not support claims of racial discrimination in employment") (emphasis added and internal quotation marks omitted). The court's misunderstanding of the difference between the Thirteenth Amendment's prohibition of compelled labor and its prohibition of the badges and incidents of slavery illustrates the confusion surrounding the Thirteenth Amendment.

[28] *See* TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM, *supra* note 13, at 102 ("The Thirteenth Amendment . . . signaled a break from moderate anti-slavery

to do so. For a variety of reasons, the Thirteenth Amendment debates focused little on whether the time had come for the economic institution of chattel slavery to end. It was apparent that the legal institution of slavery would end with the North's imminent military victory in the Civil War.[29] Even conservative Democrats in the House and Senate realized that slavery was inexorably moving toward its end. By the time of the Thirteenth Amendment debates, it was no longer considered politically acceptable for Northern conservatives to argue in favor of maintaining human enslavement on its own merits.[30] The Thirteenth Amendment debates, therefore, did not focus on the wisdom of ending slavery itself, but on what effect the Amendment would have beyond manumission.

Specifically, the debates reveal concern among conservative Democrats that the Amendment would provide the federal government with the power to interfere in matters they argued were solely of state concern; namely, the civil rights of persons in each state.[31] Given the stated goals of the Reconstruction Republicans, these concerns were well-founded. As such, the Amendment's drafters did intend to provide the federal government with the express constitutional power to protect the freedmen from continued state and private discrimination and subjugation after the formal end of slavery.[32]

leanings. Moderates wanted states gradually and separately to end slavery."); RONALD G. WALTERS, AMERICAN REFORMERS: 1815-1860, at 80 (1997) (noting that antislavery doctrine, from 1830s onward, rejected what William Lloyd Garrison called "pernicious doctrine of gradual abolition").

[29] *See* Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 174 (1951) ("With the victory of Northern arms, slavery as a legal institution was at an end, save in a few border states where it could not hope long to survive surrounded by a free nation.").

[30] With the South's exit from Congress, the arguments regarding slavery changed. In the debates leading to the Amendment, there was a notable absence of earlier assertions that slavery was a positive good that had a "civilizing" or "Christianizing" effect. *See id.* at 174.

[31] *See, e.g.*, *id.* (noting that Amendment's opponents were fighting "a last-ditch stand against the second of the two revolutions which had been in progress: The revolution in federalism"); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 866-67 (1986) (arguing that "[t]he most important question for the framers [of the Reconstruction Amendments] was whether the national or the state governments possessed primary authority to determine and secure the status and rights of American citizens").

[32] The Reconstruction Amendments' primary purpose of establishing a national power to protect civil rights is unduly minimized by the Supreme Court's recent jurisprudence regarding "states rights" and congressional enforcement power under

The debates also reveal disagreement between Republicans and Democrats, and among Republicans themselves, over exactly how far the Amendment would go in protecting the freedmen's rights. The Republican coalition's conservatives and moderates agreed with progressive Republicans that the federal government should protect the civil rights of African Americans, but disagreed as to whether this included rights to full political participation or "social" equality.[33] Many of the Amendment's advocates identified particular incidents of slavery that would be abolished by the Amendment.[34] More often,

the Fourteenth Amendment. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (holding that Congress did not have power under Section Five of Fourteenth Amendment to enact civil remedy provision of Violence Against Women Act); City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that Religious Freedom Restoration Act of 1993 exceeded Congress's powers under Section Five of Fourteenth Amendment). The history of the Reconstruction Amendments shows that, under our Reconstructed Constitution, states have no right to be free from federal "interference" when they violate the civil rights of U.S. citizens. Taking a more moderate position, Professor Michael Les Benedict has argued that the historical record shows that Republicans wanted to take a "conservative" approach to Reconstruction: "Republicans agonized over the choices they had to make between preserving federalism and protecting black rights. Faced with the choice, they opted to protect rights, but they did so in such a way as to preserve as much as possible of the traditional, state-centered system." Michael Les Benedict, *Constitutional History and Constitutional Theory: Reflections on Ackerman, Reconstruction, and the Transformation of the American Constitution*, 108 YALE L.J. 2011, 2030 (1999). Benedict, however, acknowledges that even conservative Republicans recognized that if a state "systematically violate[s] [the rights of the freedmen], those who violate them will be themselves responsible for all the necessary interference of the central government." *Id.* at 2030-31 (internal quotations omitted). Accordingly, while I would not go as far as some who have argued that "[t]he Thirteenth Amendment deflates federalism concerns because, by its very enactment, it superceded federalism," I do believe that the Thirteenth Amendment creates plenary power for the federal government to override state action or remedy state inaction that results in violations of the rights of national citizenship. *See* Hearn, *supra* note 7, at 1140.

[33] More conservative Republicans believed that the Thirteenth Amendment should only grant limited, "civil" rights, including the right to make and enforce contracts, property rights, and the right to be full parties and witnesses in court proceedings, but "they considered the rights to vote, to hold office, and to serve on juries to be 'political' rights." Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 270 n.105 (1997); *cf.* Plessy v. Ferguson, 163 U.S. 537, 551-52 (1896) ("If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane."). The hesitancy concerning political rights was, of course, not universally shared among Reconstruction Republicans; after all, many of the same men later voted in favor of the Fifteenth Amendment (guaranteeing the right to vote), which was ratified in 1870.

[34] Senator James Harlan of Iowa, elaborating upon the Amendment's purposes, indicated that the incidents of slavery that the Amendment would abolish included the

however, the Amendment's proponents spoke of the Amendment's purposes using broad, natural rights language indicating that they intended it to be flexible enough to eliminate the vestiges of slavery in whatever form they might be found.[35]

B. Supreme Court Interpretation of the Badges and Incidents of Slavery

The Supreme Court's cases clearly establish that the Thirteenth Amendment was intended to abolish both the institution of chattel slavery and the badges and incidents of that institution. As early as 1883, the Court stated in the *Civil Rights Cases*[36] that the Amendment empowered Congress to "pass all laws necessary and proper for abolishing all badges and incidents of slavery."[37] This statement, however, was a departure from its other cases decided during and shortly after Reconstruction, wherein the Court limited its reading of the Amendment to situations involving actual, forced labor.[38]

lack of respect for familial bonds, inability to hold property, denial of equal status before the justice system, suppression of freedom of speech, and prohibition on blacks' ability to seek education. *See* tenBroek, *supra* note 29, at 177-78 (citing CONG. GLOBE, 38th Cong., 1st Sess. 1439, 1440 (1864)). Representative Martin Thayer of Pennsylvania believed that the Amendment guaranteed African Americans, as full citizens, certain fundamental rights including "the rights to enforce contracts, sue, give evidence in court, inherit and purchase, lease, hold, and convey real property." TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM, *supra* note 13, at 45 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866)). Representative John Kasson of Iowa believed that the Amendment guaranteed the freedmen "the right to conjugal relations, parental rights, and 'the right of a man to the personal liberty.'" *Id.* at 46 (citing CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864); CONG. GLOBE, 38th Cong., 2d Sess. 154 (1865)).

[35] For a discussion of the Thirteenth Amendment's drafters' view of the Amendment as enshrining natural rights principles, see *infra* Part III.

[36] 109 U.S. 3 (1883).

[37] *Id.* at 20. The Court, however, held that the Civil Rights Act of 1875 exceeded Congress's Thirteenth Amendment authority by prohibiting segregation in places of public accommodation. The Court believed that congressional power under the Amendment was limited to enforcing equality of "civil freedoms," such as the right to make contracts or engage in judicial proceedings, but did not extend to "adjust[ing] what may be called the social rights of men and races in the community," such as the integration of privately operated facilities. *Id.* at 22. In the *Civil Rights Cases* the Court therefore recognized that the Thirteenth Amendment was "undoubtedly self-executing without any ancillary legislation [and] . . . [b]y its own unaided force and effect it abolished slavery, and established universal freedom" and that both the self-executing core of the Amendment and legislation passed pursuant to Section 2 encompassed the badges of slavery. *Id.* at 20. Where the Court disagreed with Congress in that case was regarding whether the particular subjects legislated against were in fact badges or incidents of slavery.

[38] *See, e.g.*, Corrigan v. Buckley, 271 U.S. 323, 330 (1926) (holding that

The Supreme Court revived the badges of slavery interpretation of the Thirteenth Amendment in *Jones*.[39] In *Jones*, the plaintiffs, an interracial couple, alleged that the defendant's refusal to sell property to them because the husband was African American violated 42 U.S.C. § 1982, which prohibits racial discrimination in the sale or rental of property.[40] The question presented in *Jones* was whether, as a matter of statutory construction, § 1982 reached purely private discrimination and, if so, whether § 1982 was a constitutional exercise of congressional power. After concluding that § 1982 does apply to purely private discrimination,[41] the Court further held that the Thirteenth Amendment provided Congress with the power to enact such a statute because it gave Congress the authority "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States,"[42] regardless of whether they are imposed by state action or private conduct. The Court reasoned that private refusal to sell property to African Americans because of their race was a badge or incident of slavery.

> Just as the Black Codes, enacted after the Civil War to restrict the free exercise of [the freedmen's] rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes

Thirteenth Amendment did not provide jurisdiction to hear challenge to enforcement of racially restrictive covenant, because Amendment only reaches "condition[s] of enforced compulsory service of one to another [and] does not in other matters protect the individual rights of persons of the negro race"); Hodges v. United States, 203 U.S. 1, 17 (1906) (holding that Amendment empowered Congress to outlaw only those private acts that amounted to actual physical enslavement, meaning "the state of entire subjection of one person to the will of another"); Plessy v. Ferguson, 163 U.S. 537, 542 (1896) (stating, in deciding that Thirteenth Amendment did not invalidate "separate but equal" doctrine, that "[s]lavery implies involuntary servitude — a state of bondage; the ownership of mankind as chattel, or at least the control of the labor and services of one man for the benefit of another"); United States v. Harris, 106 U.S. 629, 641 (1883) (holding that federal statute criminalizing conspiracies to interfere with federal civil rights "clearly cannot be authorized by the [Thirteenth] amendment which simply prohibits slavery and involuntary servitude").

[39] Jones v. Alfred H. Mayer Co, 392 U.S. 409 (1968).

[40] Section 1982, originally enacted as part of the Civil Rights Act of 1866, provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (2006).

[41] *Jones*, 392 U.S. at 421-22.

[42] *Id.* at 439 (internal quotation marks omitted).

> their ability to buy property turn on the color of their skin, then it too is a relic of slavery.[43]

The Court therefore concluded that § 1982's application to private conduct imposing a badge or incident of slavery was well within Congress's Thirteenth Amendment power.

The Court has shown no signs of returning to a strict textualist interpretation of the Thirteenth Amendment in its post-*Jones* cases. It has also been unwilling, however, to extend *Jones* as far as its logic and the Amendment's history would permit. The Court has never reached the question of whether the Amendment itself reaches the badges and incidents of slavery absent congressional legislation, but has implied that prohibition of the badges of slavery is delegated solely to Congress. For example, in *Palmer v. Thompson*, the plaintiffs challenged a city's decision to close all public swimming pools rather than integrate them.[44] Plaintiffs alleged that the city's action violated, inter alia, the Thirteenth Amendment's prohibition of the badges and incidents of slavery because it amounted to an official expression that blacks were "so inferior that they [were] unfit to share with whites this particular type of public facility."[45] The Court rejected plaintiffs' Thirteenth Amendment claim because it believed that their claim "would severely stretch [the Amendment's] short simple words and do violence to its history."[46] Moreover, the Court indicated its skepticism that the courts were the proper venue to seek redress for the badges and incidents of slavery:

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[43] *Id.* at 441-43.

[44] 403 U.S. 217 (1971).

[45] *Id.* at 266 (White, J., dissenting). An illuminating aspect of *Palmer* is the fact that swimming pools were the only public facility that the city chose to close rather than desegregate. *Id.* at 219 (noting that city, in response to federal court order to desegregate public facilities, did desegregate its parks, auditoriums, zoo, and golf courses). The city and its white residents clearly believed that there was something different about mingling with blacks in this circumstance. It seems quite likely that ideas about "cleanliness" as well as the stereotype of African Americans as hypersexualized predators influenced the city's absolute refusal to integrate this one type of public facility. *See, e.g.*, GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914, at 252 (1987) (discussing this stereotype); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 41-47 (1978) (same); Martha A. Myers, *The New South's "New" Black Criminal: Rape and Punishment in Georgia, 1870-1940*, *in* ETHNICITY, RACE, AND CRIME: PERSPECTIVES ACROSS TIME AND PLACE 145, 146 (Darnell F. Hawkins ed., 1995) (same).

[46] *Palmer*, 403 U.S. at 226.

> [A]lthough the Thirteenth Amendment is a skimpy collection of words to allow this Court to legislate new laws to control the operation of swimming pools throughout the length and breadth of this Nation, the Amendment does contain other words that we held in [*Jones*] could empower *Congress* to outlaw "badges of slavery." The last sentence of the Amendment reads: "Congress shall have the power to enforce this article by appropriate legislation." But Congress has passed no law under this power to regulate a city's opening or closing of swimming pools or other recreational facilities.[47]

The Court thereby indicated its retreat from the broad view of the Amendment's potential that it had articulated in *Jones*.[48]

The Supreme Court's jurisprudence has also made clear that the Thirteenth Amendment differs from and is broader than the Fourteenth Amendment's Equal Protection Clause in two important respects. First, although the Court has long held that the Equal Protection Clause only applies where state action exists,[49] the Court has also held that the Thirteenth Amendment contains no such limitation and applies to purely private conduct imposing either slavery or a badge or incident of slavery.[50] Second, while the Equal Protection Clause is limited to instances of intentional or purposeful discrimination, the Court has not so limited the Thirteenth Amendment.[51] Thus, applying the Thirteenth Amendment to unintentional or "disparate impact" discrimination remains possible.[52]

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[47] *Id.* at 226-27 (emphasis added).

[48] *See also* City of Memphis v. Greene, 451 U.S. 100, 128 (1981) (holding, in rejecting Thirteenth Amendment challenge to city's decision to close street running through all-white area, which effectively segregated it from adjacent black area, that neither practical nor symbolic significance of closing could "be equated to an actual restraint on the liberty of black citizens that is in any sense comparable to the odious practice the Thirteenth Amendment was designed to eradicate").

[49] *See, e.g.*, The Civil Rights Cases, 109 U.S. 3 (1883).

[50] *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 421-22 (1968) (affirming constitutionality of 42 U.S.C. § 1982, which "encompass[es] every racially motivated refusal to sell or rent and [is not] confined to officially sanctioned segregation in housing"); *The Civil Rights Cases*, 109 U.S. at 20 ("[T]he [Thirteenth] 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.").

[51] *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (holding that Equal Protection Clause is only violated by intentional discrimination).

[52] *See* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390 n.17 (1982) (holding that 42 U.S.C. § 1981 only applies to intentional discrimination, but leaving open question of whether "the Thirteenth Amendment itself reaches practices

Several fundamental principles can be gleaned from the Amendment's legislative history and the Supreme Court's jurisprudence beyond the basic principle that the Amendment ended chattel slavery. First, the Amendment's Enforcement Clause empowers Congress to adopt legislation aimed at preventing or remedying conditions that it rationally determines are badges or incidents of slavery.[53] As a correlative to this power, the federal government can trump whatever "states' rights" might otherwise exist with regard to civil rights matters.[54] Second, the badges and incidents of slavery against which Congress can legislate include at a minimum those "inseparable incidents"[55] of slavery imposed upon African Americans during slavery, such as abridgement or denial of freedom of movement, the ability to own or dispose of property, the right to make and enforce contracts, and of other civil rights afforded to white citizens.[56] Third, in contrast to the Equal Protection Clause, the Court has clearly held that the Thirteenth Amendment applies to private conduct; the Court has left open the possibility that the Thirteenth Amendment applies not only to purposeful discrimination but also to systemic or "disparate impact" discrimination.[57] Finally, the Court's post-*Jones* cases have shown skepticism regarding whether the Thirteenth Amendment itself, in the absence of congressional legislation enacted pursuant to the Amendment's Enforcement Clause, reaches the badges and incidents of slavery.[58]

with a disproportionate effect as well as those motivated by a discriminatory purpose"); *Greene*, 451 U.S. at 128-29 ("To decide the narrow constitutional question presented by this record we need not speculate about the sort of impact on a racial group that might be prohibited by [the Thirteenth Amendment] itself. We merely hold that the impact [in this case] . . . does not reflect a violation of the Thirteenth Amendment.").

[53] *See Jones*, 329 U.S. at 440.

[54] *See supra* notes 31-32 and accompanying text.

[55] Hodges v. United States, 203 U.S. 1, 31 (1906) (Harlan, J., dissenting) ("Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution.").

[56] *See Jones*, 392 U.S. at 432 (citing CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (statement of Sen. Trumbull)).

[57] *See supra* note 52 and accompanying text.

[58] *See, e.g.*, Memphis v. Greene, 451 U.S. 100 (1981); Palmer v. Thompson, 403 U.S. 217 (1971).

II. GUIDING INTERPRETIVE PRINCIPLES: THE THIRTEENTH AMENDMENT'S FRAMERS' VISION AND PHILOSOPHY

A common argument in our contemporary constitutional discourse is that "originalism"[59] is the province of conservatives who seek only to faithfully interpret the Constitution according to neutral principles,[60] while "living constitutionalism"[61] is the province of liberals intent on detaching the Constitution from its original meaning in the interest of unprincipled social engineering.[62] It is often asserted

[59] In its simplest sense, the idea of originalism has been expressed as follows: "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when adopted it means now." Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 208 n.21 (1980) (citing South Carolina v. United States, 199 U.S. 437, 448 (1895) (Brewer, J.)). One form of originalism is strict textualism, under which the objective is not necessarily to understand the subjective "intent" behind a text, but rather its "objective" linguistic meaning. Most "textualist originalists," however, are not "literalists," in the sense that they would be willing to go beyond the dictionary definition of words, particularly when dealing with constitutional provisions, in seeking the meaning of those words. Even Justice Scalia, who has great disdain for the use of legislative history as a tool of statutory interpretation, does not advocate literalism in constitutional interpretation. *See, e.g.*, Bank One Chicago v. Midwest Bank & Trust Co., 516 U.S. 264, 279 (1996) (Scalia, J., concurring). Justice Scalia has written that:

> In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation — though not an interpretation that the language will not bear. . . . I will consult the writings of some men who happened to be delegates to the Constitutional Convention . . . . I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.

Antonin Scalia, *Common-Law Courts in a Civil-Law System*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 37-38 (Amy Gutmann ed., 1997). Thus, Justice Scalia, while still refusing to consider the subjective intent or non-textual purposes of the drafters of a constitutional provision, does consider their views in attempting to place a constitutional provision's text in context to divine the text's meaning. His approach seeks to find the meaning the text itself would have had at the time it was drafted, rather than the meaning that particular drafters of that text may have intended to give it.

[60] *See*, *e.g.*, Cass R. Sunstein, *Fighting for the Supreme Court: How Right-Wing Judges Are Transforming the Constitution*, HARPER'S MAG., Sept. 2005, at 36 (arguing that judicial conservatives who advocate originalism "insist[] that their approach is neutral while other approaches are simply a matter of 'politics'").

[61] William J. Brennan Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 437-38 (1986).

[62] "Today, originalism, as a theory of constitutional interpretation, is generally

that following the framers' "original intent" will tend to yield narrow interpretations of constitutional rights.[63]

Most originalists, however, are not literalists when it comes to constitutional interpretation. Rather, they will to some extent consult sources beyond the written text of a constitutional provision in attempting to discern that text's meaning, primarily, the intentions of the text's drafters.[64] With regard to the Thirteenth Amendment, an originalist should recognize that it must be interpreted as extending substantially beyond ending chattel slavery and involuntary labor.[65] Whatever the intent of the Constitution's original framers, the Reconstruction Republicans intended the Thirteenth Amendment to have an evolving and dynamic interpretation. To the Thirteenth Amendment's drafters, "[f]reedom was much more than the absence of slavery. It was, like slavery, an evolving, enlarging matrix of both

invoked by constitutional and political conservatives to limit the constitutional powers of the federal government, and to restrict the scope of constitutionally protected rights." Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153, 176 n.89 (2004) (citing as examples United States v. Morrison, 529 U.S. 598 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997); United States v. Lopez, 514 U.S. 549 (1995)); *see also* Lynette Clemetson, *Meese's Influence Looms in Today's Judicial Wars*, N.Y. TIMES, Aug. 17, 2005, at A1 (quoting Professor Laurence Tribe's view, regarding former U.S. Attorney General Edwin Meese's role in shaping contemporary debate regarding constitutional interpretation, that "Meese was successful in making it look like he and his disciples were carrying out the intentions of the great founders, where the liberals were making it up as they went along").

[63] This is, of course, not always true. Justices Scalia and Thomas, for example, while generally considered conservative, have written or joined opinions asserting a robust interpretation of the Sixth Amendment right to jury trial based upon what they believe to be the original intent of that Amendment. *See, e.g.*, Blakely v. Washington, 542 U.S. 296 (2004); Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000).

[64] *See* Ruth Colker, *The Supreme Court's Historical Errors in* City of Boerne v. Flores, 43 B.C. L. REV. 783, 787 (2002) ("Although the conservatives on the Rehnquist Court, led by Justice Scalia, have disavowed the use of legislative history to interpret ambiguous statutes, no member of the Court has disavowed the importance of history in assessing the meaning of the Constitution.").

[65] Of course, it is true that at this point "most committed originalists remain persuaded by the traditional account" of the Thirteenth Amendment, under which the Amendment itself is limited to "condition[s] of enforced compulsory service." Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 569, 568 (1998) (internal quotation marks omitted). Originalism, however, exists on a spectrum and any form of originalism that takes account of the Amendment's framers' expressed intentions or the surrounding historical context should recognize that the badges and incidents of slavery interpretation of the Amendment is supported by this evidence.

formal and customary relationships rather than a static catalog."[66] In short, the Amendment's framers wished not only to end slavery itself but also "to act so as to obliterate the last vestiges of slavery in America."[67] Thus, while I do not believe that defining the badges of slavery need be solely or even principally an originalist project, truly examining the Amendment's drafters' original intent supports a robust interpretation of its intended scope.[68]

The Reconstruction Amendments' primary architects were strongly influenced by abolitionist philosophy on the nature of a just society.[69] Accordingly, consideration of abolitionist ideology is important in constructing a Thirteenth Amendment jurisprudence that is both faithful to the Amendment's drafters' intent and stands as a vibrant legal basis for federal protection and promotion of substantive equality.[70] Abolitionists believed that the social contract obligated the

[66] HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875, at 391-92 (1982) (describing influence of abolitionist and natural rights philosophies on Thirteenth Amendment's drafters).

[67] Tedhams, *supra* note 13, at 137 (citing CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864) (statement of Sen. Wilson of Massachusetts)).

[68] There are also pragmatic concerns that counsel in favor of an inquiry into the original intent (broadly defined) of the Amendment's drafters, at least as the starting point for interpretation. As Senator Trumbull noted during the debates over the Civil Rights Act of 1866, "There is very little importance in the general declaration of abstract . . . principles unless they can be carried into effect." Kaczorowski, *supra* note 31, at 896 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866)). As a practical matter, it must be recognized that avowedly non-originalist constitutional interpretation is unlikely to gain credence in the current jurisprudential climate. *See, e.g.*, Morris B. Hoffman, Op-Ed, *Ruling from the Head, Not the Heart*, N.Y. TIMES, Oct. 21, 2005, at A25 (stating, in discussing nomination of Harriet Miers to Supreme Court, that "[w]e need more judges, at all levels, who are not frustrated policymakers, who won't strain to find ambiguity in unambiguous words because they want to 'do good'").

[69] *See* TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM, *supra* note 13, at 101 ("Radical Republicans established the Thirteenth Amendment on the natural rights principles that had guided the abolition movement from its founding in 1833."); Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 491-92 (2003) ("The radical abolitionists' ideology, which gave birth to the idea of reinterpreting the Constitution as a means of transforming America from a slave-holding nation to a humanity-upholding nation for the betterment of all, stands as the most authoritative point of reference in evaluating the civil rights law that has subsequently developed."); *see also* tenBroek, *supra* note 29, at 202 (arguing that history and context of Reconstruction Amendments requires that their meaning be discerned in relation to "the comprehensive goals of the abolitionist crusade").

[70] I realize the dangers of reading too much into abolitionist philosophy, because "factions that ranged from radically progressive to conservative characterized the abolitionist movement, and even the most progressive among them would be

federal government to "make just" the conditions of all persons within the reach of its power.[71] Thus, under abolitionist philosophy, not only was the federal government required to refrain from action that denied the humanity of those subject to its jurisdiction, it was also required to take positive action to prevent the states and private persons from doing the same.[72] Further, the idea of permanent castes of persons who were "denied the basic rights, privileges, and protections characteristic of membership in a civilized society" was abhorrent to abolitionists.[73]

The Thirteenth Amendment debates reflect this expansive view of liberty derived from abolitionist thought. The Civil War Republican ideology was one of "natural rights, individual liberty, and equal opportunity."[74] Senator Lyman Trumbull of Illinois, while recognizing that "[i]t is difficult, perhaps, to define accurately what slavery is and what liberty is,"[75] argued that the Thirteenth Amendment would enforce civil liberty: that is, "natural liberty, so far restrained by human laws and no further, as is necessary and expedient for the general advantage of the public."[76] Examination of the legislative history of the Civil Rights Act of 1866,[77] which was based upon the

considered anachronistic conservatives today." Andrews, *supra* note 69, at 493 n.26. For example, Senator Trumbull stated that he did not believe the Thirteenth Amendment required extending the right to vote to the freedmen: "I have never thought suffrage any more necessary to the liberty of a freedman than of a non-voting white, whether child or female." CONG. GLOBE, 39th Cong., 1st Sess. 1761 (1866), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 1, at 200. Senator Trumbull went on to argue, however, that the freedman was entitled to the liberty promised by the Thirteenth Amendment and was therefore entitled to "whatever is necessary to secure it to him . . . be it the ballot or the bayonet." *Id.* Thus, mid-nineteenth century, white abolitionists' views on the specifics of what constituted social justice were certainly narrower than what I would advocate is called for today. The abolitionists' broader purposes of reconceptualizing our Constitution to guarantee equality, however, must guide Thirteenth Amendment jurisprudence.

[71] *See* Andrews, *supra* note 69, at 493.

[72] *See* tenBroek, *supra* note 29, at 199 (arguing that Amendment's framers intended it to ensure freedmen "full enjoyment" of rights of freedom, which depended upon "(1) the absence of discriminatory state legislative or other official action and (2) the presence of adequate affirmative protection to prevent or cope with individual invasions").

[73] Andrews, *supra* note 69, at 494.

[74] Kaczorowski, *supra* note 31, at 879.

[75] CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 1, at 121.

[76] *Id.* (quoting Blackstone).

[77] Some may question the probative value of legislators' statements made subsequent to adoption of the Thirteenth Amendment. *See, e.g.*, Colker, *supra* note

Thirteenth Amendment, also reveals that Reconstruction Republicans recognized that both state action and private custom could create subjugation that, while not "mak[ing] a man an absolute slave" nonetheless "deprive[d] him of the rights of a freeman."[78] For example, Representative Myers of Pennsylvania, arguing in favor of the Civil Rights Act of 1866, stated:

> The great change of which I have spoken is that from slavery to freedom. Slavery gone, its laws, its prejudices, and consequences should be buried forever. We are legislating for

64, at 790 ("We should rarely look at statements made after the ratification of a Constitutional provision. The important temporal period is the moment (or the immediate moment before) the ratification of constitutional language."). However, the statements I cite from the debates over the Civil Rights Act of 1866 are directly relevant to Thirteenth Amendment interpretation. The Act was Congress's first major exercise of its Thirteenth Amendment power and, as such, the debates regarding the Act help illuminate legislators' views of the Amendment's scope. Because the statements in favor of and against the Act were made by many of the same legislators who had passed the Amendment one year earlier, their views regarding the Amendment's scope are particularly informative. In short, the debates regarding the Civil Rights Act of 1866 should be seen as a continuation and extension of the debates over the Thirteenth Amendment itself.

[78] CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 1, at 122 (statement of Sen. Trumbull); *see also id.* at 504, *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 1, at 127 ("The once slave is no longer a slave; he has become, by means of emancipation, a free man. If such be the case, then in all common sense is he not entitled to those rights which we concede to a man who is free?") (statement of Sen. Howard of Michigan during debates over Civil Rights Act of 1866); Carter, *supra* note 13 at 47-52 (arguing that legislative history reveals clear intent that Amendment would do more than end chattel slavery). *But see* CONG. GLOBE, 39th Cong., 1st Sess. 1784 (1866), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 1, at 203 (arguing that Thirteenth Amendment did not authorize Civil Rights Act of 1866 because Amendment was intended "simply to abolish negro slavery") (statement of Sen. Cowan). Senator Cowan added:

> Did anybody ever suppose that [the Amendment] had any operation whatever upon the *status* of the free negro, a negro who was born free or who had been emancipated ten years before it was passed? Certainly not. Nobody ever dreamed of such a thing. Its operation was wholly confined to the slave; it made the slave free; it did not affect anybody else except the master by depriving him of his slave.

Id. Senator Cowan's statements, however, do not obviate the fact that taken as a whole, "[t]he debates over the Amendment's ratification reveal disagreement over the Amendment's *wisdom*, not over its *purpose* of doing far more than emancipation and of granting substantial affirmative rights." Azmy, *supra* note 19, at 1008 (emphasis added); *see also id.* at 1008-22 (exploring congressional debates in detail); Carter, *supra* note 13, at 47-53 (same); tenBroek, *supra* note 29, at 174-81 (same).

> mankind. If there be wrong, now is the time to right it; if there be defects, this is the forum in which to remedy them; if doubts remain, the present is the hour to solve them. The craven may shift the responsibility, but civilization will hold us accountable for the performance of our whole duty.[79]

Thus, an understanding of the abolitionist and natural rights roots of the Thirteenth Amendment's framers' political philosophy leaves little room for an interpretation of the Amendment as limited to literal enslavement.

III. CURRENT APPROACHES TO DEFINING THE BADGES AND INCIDENTS OF SLAVERY

A. Thirteenth Amendment Literalism

"Strict textualism,"[80] or literalism, is the most accepted approach to Thirteenth Amendment interpretation.[81] Given that the Amendment textually prohibits only "slavery" and "involuntary servitude," a strict textualist interpretation would hold that the badges and incidents of slavery theory is unsound. Limiting the Thirteenth Amendment to its literal language arguably has the benefit of clarity, simplicity, and relative ease of application in comparison to the apparent indeterminacy of defining the badges or incidents of slavery.

Even the strict textualist approach, however, has proven more difficult to apply than it might seem. While it has always been clear that the Amendment outlaws chattel slavery or classical peonage, courts and scholars have struggled with what other forms of physical domination or economic exploitation should be seen as modern

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[79] CONG. GLOBE, 39th Cong., 1st Sess. 1621 (1866), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 1, at 193.

[80] The strict textualist approach posits that a law should be interpreted in accordance with "[t]he plain meaning . . . that it would have for a 'normal speaker of English' under the circumstances in which it is used." Brest, *supra* note 59, at 206. Under this approach, inquiries into legislative intent are limited to determining the meaning of the word used, not the broader purposes or "spirit" of the provision at issue.

[81] The cases rejecting claims of discrimination that do not amount to literal enslavement are too numerous to cite here. *See, e.g.*, James v. Family Mart, 496 F. Supp. 891, 894 (M.D. Ala. 1980) (rejecting plaintiff's claim for racial discrimination in employment, stating that "[p]laintiff's factual allegations do not involve a proper Thirteenth Amendment action [because they did not involve] involuntary servitude or compulsory labor").

equivalents of the "slavery or involuntary servitude" to which the Amendment explicitly speaks.[82] For example, in *United States v. Kozminski*,[83] farm owners who held two mentally retarded men to work on their farm were convicted of violating federal laws prohibiting involuntary servitude.[84] The two men worked on the farm up to seventeen hours per day, seven days a week, at first for fifteen dollars per week and then for no pay.[85] They were also physically and verbally abused, told not to leave the farm, denied adequate nutrition and medical care, isolated from the outside world, and one of the men was threatened with institutionalization if he disobeyed.[86] The issue before the Court was whether the trial court's jury instructions, which defined involuntary servitude as encompassing service compelled either by the use or threat of physical or legal coercion, or by psychological coercion, were within a proper reading of the relevant statutes.

The Supreme Court held that the "involuntary servitude" prohibited by the Thirteenth Amendment[87] and relevant federal statutes can only be imposed by physical or legal coercion or the threat thereof, and that psychological coercion alone, no matter how severe or successful, cannot create a condition of involuntary servitude.[88] The Court

[82] *See* Lauren Kares, Note, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, 80 CORNELL L. REV. 372 (1995) (discussing lack of consistent judicial methodology in interpreting what constitutes slavery or involuntary servitude).

[83] 487 U.S. 931 (1988).

[84] *Id.* at 934. The defendants were prosecuted under 18 U.S.C. § 241, which criminalizes conspiracies to interfere with rights secured by federal law, which includes the Thirteenth Amendment right to be free from slavery or involuntary servitude, and 18 U.S.C. § 1584, which makes it a crime to hold another person in involuntary servitude. *Id.*

[85] *Id.* at 935.

[86] *Id.*

[87] Because § 241 applies to conspiracies to violate rights secured "by the Constitution or laws of the United States, [it] incorporates the prohibition of involuntary servitude contained in the Thirteenth Amendment." *Id.* at 940. Accordingly, in construing the elements of a § 241 conspiracy in the context of the case, the Court was construing the underlying substantive right violated, namely, the Thirteenth Amendment. With regard to § 1584, the Court reasoned that "Congress' use of the constitutional language in a statute enacted pursuant to its constitutional authority to enforce the Thirteenth Amendment guarantee makes the conclusion that Congress intended the phrase to have the same meaning in both places logical, if not inevitable." *Id.* at 944-45. Therefore, the Court's holding on § 1584 should also be read as a holding regarding the Thirteenth Amendment, except insofar as the criminal nature of these statutes influenced the Court's holding.

[88] The Court also held, however, that "the record contains sufficient evidence of

reasoned that its precedents only supported a finding of involuntary servitude where the perpetrator used physical or legal coercion (such as the threat of criminal sanctions for refusing to work) to compel the victim's labor.[89] "The guarantee of freedom from involuntary servitude," the Court held, "has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion."[90]

Many have argued that the Court's decision in *Kozminski* was misguided, both as a matter of policy and of statutory interpretation.[91] For purposes of this Article, *Kozminski* is informative because the Court consulted a variety of non-textual sources even in taking a nominally literalist approach to the Thirteenth Amendment.[92] Among other interpretive aids, the Court examined its own Thirteenth Amendment precedent,[93] the "general intent" of the Thirteenth Amendment's framers,[94] the legislative history of the federal statutes at issue,[95] and the principle that ambiguity regarding criminal laws should be resolved in favor of lenity.[96] Additionally, the Court cited several policy concerns that it believed counseled against interpreting

physical or legal coercion to enable a jury to convict the Kozminskis even under the stricter standard of involuntary servitude that we announce today" and remanded for further proceedings. *Id.* at 953.

[89] *Id.* at 943 ("[W]e find that in every case in which this Court has found a condition of involuntary servitude, the victim had no available choice but to work or be subject to legal sanction.").

[90] *Id.* at 944. It is worth noting that none of the Court's prior cases had actually held, however, that compulsion of labor by psychological coercion could not amount to enslavement.

[91] *See, e.g.*, Joyce Koo Dalrymple, *Human Trafficking: Protecting Human Rights in the Trafficking Victims Protection Act*, 25 B.C. THIRD WORLD L.J. 451 (2005).

[92] Indeed, the Court's holding can be characterized as *anti*-textual. As Justice Brennan noted in his concurrence, the words "involuntary servitude" do not require that the imposition of servitude be accomplished by any particular means. *Kozminski*, 487 U.S. at 955 (Brennan, J., concurring) (arguing that Court's concerns about construing "involuntary servitude" to include service obtained by psychological coercion "are not textual concerns, for the text suggests no grounds for distinguishing among different means of coercing involuntary servitude").

[93] *Id.* at 943-44. As Professor Brest has noted, adherence to precedent is a form of non-textualist reasoning, because the system of precedent is based not on the text of the provision interpreted, but on policy concerns about stability of the legal system. *See* Brest, s*upra* note 59, at 229; *see also* Lawrence v. Texas, 539 U.S. 558, 577 (2003) (characterizing stare decisis as "a principle of policy") (internal quotation marks omitted).

[94] *Kozminski*, 487 U.S. at 942.

[95] *Id.* at 944-48.

[96] *Id.* at 952.

involuntary servitude as including service compelled by psychological coercion. The Court emphasized "slippery slope" concerns that such interpretation would risk "criminaliz[ing] a broad range of day-to-day activity,"[97] lack objective standards for determining when enslavement has occurred, and failed to provide fair notice to potential defendants.[98]

It was, of course, reasonable for the Court to consider non-textual materials and policy concerns in reaching its decision; dictionary definitions do not by themselves yield sensible meanings of constitutional text in all circumstances.[99] If a Thirteenth Amendment literalist accepts that the task of ascertaining the meaning of the Amendment's prohibition of slavery and involuntary servitude requires substantial exploration of non-textual materials and consideration of broader policy issues, then it would seem appropriate to employ those same methods in discerning the meaning of the badges and incidents of slavery. In sum, determining what constitutes a badge or incident of slavery via non-textual methods should not be substantially more difficult than determining what constitutes slavery or involuntary servitude via similar non-textual methods.

The fact remains, however, that the Thirteenth Amendment's prohibition of the badges and incidents of slavery is not expressed in the constitutional text, and from a pure strict textualist viewpoint this

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[97] *Id.* at 949.

[98] *Id.* at 949-50.

[99] Assuming that one is applying an originalist interpretation, citing definitions from contemporaneous dictionaries obviously does provide some guidance as to the commonly understood meaning of a particular word at the time that word was used in the constitutional text. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 559 (2004) (Scalia, J., dissenting) (citing 1860 edition of Noah Webster's *American Dictionary of the English Language*'s definition of word "enforce" in interpreting Congress's power under Fourteenth Amendment's Enforcement Clause). The assumption that contemporaneous dictionary definitions are conclusive is problematic, however, because it assumes that the framers were using their chosen words according to their commonly understood lay meaning, rather than as terms of art according to then-prevailing legal, philosophical, or political doctrines. More importantly, it also assumes that the framers' intention was that later interpreters of the constitutional text would be bound by and limited to the framers' understanding of those words. As to the latter point, Professor Cass Sunstein has noted that the Constitution's framers did not specify an interpretive method in the constitutional text. Given that, it is entirely possible that the framers' original understanding was that we would not be bound by their original understanding. *See* Sunstein, *supra* note 60, at 37; *cf.* Lawrence v. Texas, 539 U.S. 558, 578-79 (2003) (stating that framers of Fifth and Fourteenth Amendments did not attempt to define specifically rights protected by those Amendments because they understood that definition of "constitutional liberty" would evolve to meet changed social needs and norms).

would admittedly end the matter.[100] It is, however, substantially supported by an examination of the Amendment's historical context, its drafters' intent, and well over a century of Supreme Court precedent. As to the Amendment's context and purposes, "[w]hat the bare text does not show is the jagged gash between Amendments Twelve and Thirteen — a gash reflecting the fact that the Founders' Constitution *failed* in 1861-65 [and that] [t]he system almost died, and more than half a million people did die."[101] The Amendment's drafters therefore intended to draft a new constitution that radically differed from the original in its conception of rights and liberty. Moreover, as has been thoroughly noted elsewhere,[102] the Amendment's drafters clearly expressed their intent that it would "remov[e] every vestige of African slavery from the American Republic"[103] by "obliterat[ing] the last lingering vestiges of the slave system; its chattelizing [sic], degrading and bloody codes; its dark, malignant barbarizing spirit; all it was and is, everything connected with it or pertaining to it."[104] Finally, even if the Amendment's context and the expressed intent of its drafters are discounted as interpretive tools, the Supreme Court has also continually reaffirmed that the Amendment empowers Congress to eliminate the badges and incidents of slavery, not just literal slavery and involuntary servitude.[105] Accordingly, it is too late to limit the Thirteenth Amendment to literal slavery or involuntary servitude unless decades of precedent are to be disregarded.

B. Separation of Powers Approach: Broad Congressional Power and Narrow Judicial Power

The Thirteenth Amendment contains two sections. The first section provides that "[n]either slavery nor involuntary servitude . . . shall exist within the United States," and the second section states that

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[100] As noted above, however, most originalists are not strict textualists with regard to constitutional interpretation because they recognize that the context of constitutional language is important. *See supra* Part III.A.

[101] AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 360 (2005).

[102] *See, e.g.*, Carter, *supra* note 13, at 47-52.

[103] CONG. GLOBE, 38th Cong. 2nd Sess. 155 (1865), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 1, at 81 (statement of Rep. Davis).

[104] tenBroek, *supra* note 29, at 177 (citing CONG. GLOBE, 38th Cong., 1st Sess. 1199, 1319, 1321, 1324 (1864) (statements of Sen. Wilson of Massachusetts)).

[105] *See supra* Part II.B. The difference between what Congress is empowered to do under the Amendment's Enforcement Clause versus the scope of the Amendment in the absence of congressional legislation is explored in Part IV.B, *infra*.

"Congress shall have power to enforce this article by appropriate legislation."[106] Many judges and commentators who recognize that the Thirteenth Amendment's second section empowers Congress to legislate against the badges and incidents of slavery nonetheless apply a strict textualist interpretation to the first section. The reasoning in support of this interpretation is twofold. First, the Amendment's empowerment of Congress to act against the badges and incidents of slavery is presumed to create the negative implication that the power of judicial review under the Amendment is limited to conditions of actual enslavement. Second, some courts have also reasoned that it would be unwarranted to construe the judicial power under the Amendment as extending to the badges and incidents of slavery simply because the Supreme Court's Thirteenth Amendment cases have never directly addressed the question.

For example, in *Atta v. Sun Co.*,[107] a black woman sued for employment discrimination on the basis of her race and gender and alleged that such discrimination constituted a badge or incident of slavery. The court granted defendant's motion to dismiss the complaint, holding that, while the Thirteenth Amendment grants Congress the power to address the badges and incidents of slavery, "the Amendment *itself* [does not] reach[] forms of discrimination other than slavery and involuntary servitude."[108] The court held that plaintiff's claim therefore failed because she did not allege that she had been subjected to literal slavery or involuntary servitude and "the Amendment itself does not, in any way, address the issues of employment discrimination allegedly based on race or nationality."[109]

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[106] U.S. CONST. amend. XIII, §§ 1, 2.

[107] 596 F. Supp. 103 (E.D. Pa. 1984).

[108] *Id.* at 105.

[109] *Id.*; *see also* Wong v. Stripling, 881 F.2d 200, 203 (5th Cir. 1989) ("[A]lthough the [Thirteenth] amendment speaks directly only to slavery and involuntary servitude, the [Supreme] Court has recognized that [S]ection 2 [of the Amendment] empowers Congress to define and abolish the badges and incidents of slavery.") (internal quotation marks omitted) (rejecting plaintiff's claim because he did not allege violation of any such federal law); Washington v. Finlay, 664 F.2d 913, 927 (4th Cir. 1981) (rejecting plaintiff's Thirteenth Amendment claim regarding alleged dilutive effect of at-large districting scheme on minority voting strength, holding that "[w]hile congress may arguably have some discretion in determining what kind of protective legislation to enact pursuant to the thirteenth amendment, it appears that the amendment's independent scope is limited to the eradication of the incidents or badges of slavery and does not reach other acts of discrimination [including the vote dilution claims alleged]"); Davidson v. Yeshiva Univ., 555 F. Supp. 75, 78, 79 n.4 (S.D.N.Y. 1982) ("The thirteenth amendment [itself] addresses [only] involuntary servitude and peonage . . . Congress, on the other hand, may address the 'badges and

The court therefore concluded that the abolition of the badges and incidents of slavery is constitutionally delegated to Congress alone.

In *Alma Society v. Mellon*,[110] the plaintiffs challenged the constitutionality of state adoption laws that required the permanent sealing of adoption records. Plaintiffs argued, inter alia, that the statutes amounted to a badge or incident of slavery, analogizing their situation to that of enslaved children who were permanently severed from all family ties. The court rejected plaintiffs' claim, holding that their argument "simply does not conform to the Supreme Court's interpretations of the Thirteenth Amendment. The Court has never held that the Amendment itself, unaided by legislation as it is here, reaches the 'badges and incidents' of slavery as well as the actual conditions of slavery and involuntary servitude."[111] In the absence of such a direct statement from the Supreme Court, the *Alma Society* court believed that remedying the badges and incidents of slavery should be left to Congress.

The arguments underlying this "separation of powers" approach to the enforcement of the Amendment's prohibition of the badges and incidents of slavery are misguided and internally inconsistent. The Amendment's Enforcement Clause does *not* explicitly refer to the badges and incidents of slavery at all.[112] Thus, the holding that the Amendment's "explicit" empowerment of Congress to legislate against the badges and incidents of slavery limits judicial power to conditions of actual enslavement is misguided. The interpretive principle of *expressio unius est exclusio alterius*[113] (the "negative implication rule")

incidents' of slavery . . . ."). The *Finlay* court, however, failed to explain why voting discrimination was not in fact a badge or incident of slavery within the Amendment's "independent scope."

[110] 601 F.2d 1225 (2d Cir. 1979).

[111] *Id.* at 1237; *see also Atta*, 596 F. Supp. at 105 (stating that Supreme Court has never explicitly addressed scope of Amendment itself in absence of congressional legislation and, therefore, Amendment "does not operate as an independent ground for a cause of action" for badges and incidents of slavery) (internal quotation marks omitted); BUCHANAN, *supra* note 18, at 154 (stating that Supreme Court's decision in *Palmer v. Thompson*, 403 U.S. 217 (1971), indicates that Amendment's "self-executing force will apparently be confined to the narrow definitions of slavery and involuntary servitude contained in the Supreme Court decisions of the late nineteenth and early twentieth centuries [while] the definition and prohibition of badges of slavery will need to find support in congressional enforcement legislation under § 2 of the thirteenth amendment").

[112] *See* U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.").

[113] "A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY 620 (8th

only has logical force if something is actually expressed. To the contrary, the generally agreed-upon congressional power to prohibit the badges and incidents of slavery is drawn not from the text of Section 2 of the Amendment, but from the Supreme Court's cases interpreting the Amendment's legislative history. As I discuss below, this legislative history supports the power of both Congress and the courts to redress the badges and incidents of slavery.

Furthermore, those courts concluding that the Amendment itself does not reach the badges and incidents of slavery because the Supreme Court has never directly said so ignore the Court's plain statement in *Jones* that "[w]hether or not the Amendment *itself* did any more than [abolish slavery]" was "a question not involved in this case."[114] Thus, while the Court admittedly has not directly held that the Amendment itself reaches the badges and incidents of slavery, it also has not answered that question in the negative. Indeed, there are indications to the contrary. For instance, in *Memphis v. Greene*,[115] the Court stated that the existence of congressional power to eliminate the badges and incidents of slavery "is not inconsistent with the view that the Amendment has self-executing force."[116] Thus, the Court has made clear that the reach of the Thirteenth Amendment in the absence of congressional action remains an open question. Whatever else the Court may have implied by language in its cases leaving this question open should not be treated as a binding holding of the Court.[117] The conclusion that the Thirteenth Amendment is limited to conditions of literal enslavement may or may not be objectively correct, but it certainly is not dictated by any actual Supreme Court holdings on the subject.

More fundamentally, this "separation of powers" approach finds no support in the Amendment's legislative history or in principles of constitutionalism. The legislative history makes clear that "it was the purpose of [the Thirteenth Amendment itself] to relieve those who were slaves from the oppressive incidents of slavery."[118] Senator

ed. 2004).

[114] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).

[115] 451 U.S. 100 (1981). *Greene* is discussed in more detail in note 9, *supra.*

[116] *Id.* at 125.

[117] As Justice Scalia has forcefully reminded us in a different context, courts are "bound by *holdings*, not language." Alexander v. Sandoval, 532 U.S. 275, 282 (2001) (emphasis added).

[118] CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 1, at 169 (statement of Rep. Thayer of Pennsylvania in support of Civil Rights Act of 1866).

Trumbull, one of the Amendment's primary architects, believed that the general, constitutional "necessary and proper" power gave Congress sufficient authority to enforce the Amendment and legislate against the badges of slavery.[119] The Amendment's Enforcement Clause, he stated, was solely intended to put such power "beyond cavil and dispute . . . and I cannot conceive of how any other construction can be put upon it."[120] The power Senator Trumbull spoke of was the power to prohibit not only slavery but also those conditions that amounted to badges and incidents of slavery.[121] Similarly, Senator James Lane of Indiana argued that:

> If that second section [of the Thirteenth Amendment] were not embraced in the amendment at all [Congress's] duty would be as strong, the duty would be paramount, to protect them in *all rights* as free and manumitted people. I do not consider that the second section of that amendment does anything but declare what is the duty of Congress, after having passed such an amendment to the Constitution of the United States, to secure them in all their rights and privileges.[122]

Expressing similar views regarding the scope of the Thirteenth Amendment, Senator Charles Sumner of Massachusetts argued that it "abolishes slavery entirely . . . . It abolishes its root and branch. It abolishes it in the general and the particular. It abolishes it in length and breadth and then in every detail. . . . Any other interpretation belittles the great amendment and allows slavery still to linger among us in some of its insufferable pretensions."[123]

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[119] Senator Trumbull, relying on the theory of congressional power articulated in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), argued that the second section of the Thirteenth Amendment was unnecessary because "wherever a power was conferred upon Congress there was also conferred authority to pass the necessary laws to carry that power into effect" by virtue of the Necessary and Proper Clause. Kaczorowski, *supra* note 62, at 211.

[120] Cong. Globe, 39th Cong., 1st Sess. 322 (1866), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 1, at 108.

[121] *See, e.g.*, Douglas G. Smith, *A Lockean Analysis of Section One of the Fourteenth Amendment*, 25 HARV. J.L. & PUB. POL'Y 1095, 1011 (2002) ("[T]he destruction of slavery *necessarily* follows the destruction of the incidents to slavery" (quoting CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866))) (discussing Thirteenth Amendment as precursor to Fourteenth).

[122] Cong. Globe, 39th Cong., 1st Sess. 602 (1866), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 1, at 137 (emphasis added).

[123] Cong. Globe, 42d Cong., 2d Sess. 728 (1872), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 1, at 597.

Thus, Section 2 of the Thirteenth Amendment was not seen as creating a new power of Congress independent from the Amendment itself.[124] Rather, Section 2 was seen as needed to clarify or emphasize Congress's power and duty to enforce the principles already inherent in the Amendment, because the ratification of the Amendment itself likely would not end state resistance to civil rights for the freedmen.[125]

The Amendment's explicit grant of enforcement power to Congress to offer redress for the badges and incidents of slavery cannot reasonably be seen as creating the negative implication that the Amendment itself, in the absence of congressional enforcement, is limited to conditions of literal enslavement. The congressional debates reveal little disagreement[126] over separation of powers, that is,

[124] There is an important and under-explored distinction between whether the Thirteenth Amendment itself creates a right to be free of the badges and incidents of slavery and, if so, how that right can be enforced. It is possible that the Amendment, even in the absence of congressional action, creates a constitutional right to be free of the badges and incidents of slavery but that an individual does not have a private cause of action to enforce that right. For example, even if an individual does not have a private civil cause of action to enforce the inherent Thirteenth Amendment right to be free of the badges and incidents of slavery, a defendant in a criminal prosecution could nonetheless challenge evidence obtained as a result of racial profiling as amounting to an unconstitutional badge or incident of slavery. I briefly discuss this distinction below, but for purposes of critiquing the "separation of powers" cases discussed in this section, it is not necessary to definitively resolve the procedural issues regarding the existence or scope of an implied private cause of action under the Thirteenth Amendment. All I seek to establish here is that because the Amendment's framers intended for Congress to have the power to "enforce" the Thirteenth Amendment by prohibiting the badges and incidents of slavery, the Amendment itself must also prohibit the badges and incidents of slavery.

[125] For example, Senator Trumbull, in discussing the Civil Rights Act of 1866, cited various aspects of the Black Codes passed in the wake of the Civil War, such as racially selective vagrancy laws and pass systems that could result in the arrest, imprisonment, or practical re-enslavement of the freedmen. Trumbull stated that "[a]ll these laws, which were the incidents of slavery . . . *fell with the abolition of slavery*; but, inasmuch as such laws existed in various States, it was thought *advisable* to pass a law of Congress [i.e., the Civil Rights Act of 1866] securing to the colored people their rights in certain respects." CONG. GLOBE, 42d Cong., 1st Sess. 575 (1871), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 1, at 548 (emphasis added). Thus, by characterizing specific legislation against the badges and incidents of slavery as "advisable," rather than as constitutionally necessary, and by noting that the Black Codes were invalidated immediately upon adoption of the Thirteenth Amendment, Trumbull clearly believed that the Amendment itself reached the badges of slavery absent congressional legislation.

[126] The congressional record does contain at least one statement by Representative Cook of Illinois that supports the view that the Amendment itself, absent congressional implementing legislation, only reaches actual slavery or involuntary servitude. During the debates over the Civil Rights Act of 1866, Cook said the

the existence of concurrent power of Congress, the judiciary, and the executive branch to enforce the freedmen's rights.[127] They do reveal substantial disagreement about the proper role of the federal government vis-à-vis the states with regard to the rights of the freedmen, an argument that the Amendment's drafters ultimately won by securing the Amendment's approval.[128] Thus, the Thirteenth Amendment's legislative history reveals a constitutional design wherein slavery *and* its badges and incidents were to be eliminated with the Amendment's ratification. To the extent that adoption of the Amendment alone would not overcome state resistance, Congress was to be empowered to enact legislation specifically directed at

following:

> I suppose that chattel slavery could not exist even without this second section of the amendment. Suppose it had never been adopted, no court could hold that any man in any State had a right to hold another as his slave in the sense in which slaves had been held before; but it is apparent that under other names and in other forms a system of involuntary servitude might be perpetuated over this unfortunate race. They might be denied the right of freemen unless there was vested a power in the Congress of the United States to enforce by appropriate legislation their right to freedom.
>
> If that be not the meaning of the second section of this amendment, I see no meaning to it. The first section would have prohibited forever the mere fact of chattel slavery as it existed.

CONG. GLOBE, 39th Cong., 1st Sess. 1124 (1866), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 1, at 168. Cook therefore seems to have believed that absent Section 2, the Thirteenth Amendment would have prohibited only chattel slavery and that, but for Section 2, other forms of subjugation of the freedmen could have continued unimpeded. I admit that this contradicts my interpretation of the intended meaning of Section 2. Nonetheless, the vast weight of the legislative history indicates that the Amendment itself prohibits the badges of slavery, even in the absence of congressional action.

[127] As I discuss below, scholars have argued that the historical context reveals that Congress, in enacting the Reconstruction Amendments, did intend that it, and not the judiciary, have the primary authority to interpret and enforce the Amendments' guarantees. *See generally* Rebecca Zeitlow, *Juriscentrism and the Original Meaning of Section Five*, 13 TEMP. POL. & CIV. RTS. L. REV. 485, 487 (2004). This is not the same, however, as asserting that the Amendments' framers intended that Congress be the *exclusive* repository of the power to interpret and enforce the Amendments.

[128] *See* Carter, *supra* note 13, at 49-50 (noting that legislative history reveals that primary debate over Thirteenth Amendment was regarding federalism or "states' rights," not over preserving institution of slavery).

overcoming any such continued resistance.[129] The actual rights and promises created, however, rested in the Amendment itself.

The Amendment's advocates would have seen no need for a specific authorization for the judiciary in a proper case to enforce the Amendment's prohibition of the badges and incidents of slavery. Advocates assumed that such judicial power existed under commonly understood principles of judicial review. During the debates over the Civil Rights Act of 1866, passed pursuant to the Thirteenth Amendment, senators discussed such principles. For example, Representative James Wilson of Iowa argued that congressional authority for the Act existed under the Thirteenth Amendment by virtue of the doctrine of implied powers. Quoting James Madison's *Federalist No. 43* and Justice Joseph Story's opinion in *Prigg v. Pennsylvania*,[130] Representative Wilson stated that "a right . . . implies a remedy" and that "the national Government, in the absence of all positive provisions to the contrary, is bound, through its own proper department, legislative, *judicial*, or executive . . . to carry into effect all rights and duties imposed upon it by the Constitution."[131] In relying on the established jurisprudence regarding judicial review and implied powers, and drawing no distinction between the power of the three federal branches in enforcing constitutional guarantees, Representative Wilson clearly believed that the federal government as a whole had the power to enforce the Thirteenth Amendment and had a correlative duty to exercise that power to eliminate the lingering vestiges of slavery. Furthermore, Representative Wilson's remarks were made in the context of the Civil Rights Act of 1866, which was not directed at prohibiting forced labor, but instead sought to enforce the

[129] For example, in a speech in 1865 in support of his Freedmen's Bureau bill based upon Section 2, Senator Trumbull argued that "any legislation or any public sentiment which deprived any human being in the land of those great rights of liberty will be in defiance of the [Thirteenth Amendment]; and if the state and local authorities, by legislation or otherwise, deny these rights, it is incumbent on us to see that they are secured." BUCHANAN, *supra* note 18, at 18-19 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 77 (1866)).

[130] 41 U.S. (16 Pet.) 539 (1842). In *Prigg*, the Court held that the Fugitive Slave Act was constitutional and a valid exercise of Congress's plenary power to enforce constitutional rights (specifically, the "property" rights of slave owners). For a detailed examination of Congress's use of its constitutional powers to enforce slavery in the antebellum era and how the Radical Republicans in the post-war era transformed this history into a mandate for vigorous federal enforcement of the Reconstruction Amendments, see generally Kaczorowski, *supra* note 62.

[131] Kaczorowski, *supra* note 62, at 216 (emphasis added) (internal quotations omitted) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1294 (statement of Rep. Wilson)).

Amendment's purpose of ending slavery's badges and incidents by creating enforceable rights for the freedmen to the benefits of citizenship.[132] In short, "[n]either the legislative history of the Amendment itself nor the debates over the use of Section 2 to adopt the Civil Rights Act of 1866 conclusively show that Congress intended the [courts] to have no role in the enforcement of the Thirteenth Amendment."[133] Barring such conclusive evidence, we should not lightly assume that the Thirteenth Amendment, unlike all other constitutional protections of individual rights, requires deviation from the settled principles of judicial review under which both the courts and Congress have concurrent power to enforce the Constitution.

Finally, the "separation of powers" approach to Thirteenth Amendment interpretation is also inconsistent with the Supreme Court's decisions regarding express and implied powers. Under the Constitution, Congress's power to enforce a constitutional right cannot be wholly detached from the substance of the right it is enforcing.[134] In a series of recent cases, beginning with *City of Boerne v. Flores*,[135] the Court has reiterated that Section 5 of the Fourteenth

[132] The Civil Rights Act of 1866 provided criminal and civil penalties for violations of the substantive rights enumerated in the Act. Section 1 of the Act provided that:

> [All citizens], of every race and color . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Civil Rights Act, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. §§ 1981 and 1982 (1968)).

[133] Pittman, *supra* note 11, at 832.

[134] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) (standing for principle that Congress must act within scope of its express or implied constitutional powers).

[135] 521 U.S. 507 (1997); *see also* Tennessee v. Lane, 541 U.S. 509 (2004) (holding that Title II of Americans with Disabilities Act was within Congress's Section 5 power); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (holding that Family and Medical Leave Act was within Congress's Section 5 power); Bd. of Trustees v. Garrett, 531 U.S. 356 (2001) (noting that Title I of American with Disabilities Act when applied to state employers exceeded Congress's Section 5 power); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that Age Discrimination in Employment Act exceeded Congress's Section 5 power as applied to state employers); United States v. Morrison, 529 U.S. 598 (2000) (stating that civil remedy provided in Violence Against Women Act was within Congress's Section 5 power); Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (holding that

Amendment empowers Congress to "enforce" preexisting constitutional rights, not create them.[136] In order to police the line between enforcement and creation of constitutional rights, the Court has held that Section 5 legislation must demonstrate "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become [impermissibly] substantive in operation and effect."[137] Thus, while the Court has continued to recognize that Congress, in the exercise of its Enforcement Clause power, may adopt legislation reaching a "*somewhat* broader swath of conduct"[138] than is prohibited by the Fourteenth Amendment's text or the Court's interpretations thereof, Congress cannot "work a substantive change in the governing [constitutional] law."[139]

Congress's attempt to abrogate state sovereign immunity in Patent and Plant Variety Protection Remedy Clarification Act exceeded Congress's Section 5 power to enforce Due Process Clause).

[136] While the *Boerne* line of cases deals only with Section 5 of the Fourteenth Amendment, there is no reason to believe that the Court would apply the basic principles articulated in those cases any differently with regard to the enforcement clauses of the other Reconstruction Amendments.

[137] *Boerne*, 521 U.S. at 520.

[138] *Lane*, 541 U.S. at 533 n.24 (emphasis added and internal quotation marks omitted); *see also Garrett*, 531 U.S. at 365 (noting that congressional Enforcement Clause power is not limited to "mere legislative repetition" of Supreme Court's Fourteenth Amendment jurisprudence).

[139] *Lane*, 541 U.S. at 520 (internal quotation marks omitted). The general separation of powers principles articulated in the *Boerne* line of cases are relatively uncontroversial. Congress cannot create constitutional rights, but Congress can, in seeking to enforce constitutional rights, enact so-called prophylactic legislation reaching subjects that are not in themselves unconstitutional in order to prevent or deter constitutional violations. *See Lane*, 541 U.S. at 518. Until *Boerne*, it was well-accepted that Congress enjoys a great deal of discretion in the exercise of its Enforcement Clause power and that the judiciary was to assess the constitutionality of Enforcement Clause legislation under a standard roughly akin to abuse of discretion or plain error review. Under such a standard of review, a court would not ask whether it would have made the same determination that Congress did, but whether Congress's determination was unreasonable. *See, e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966) ("It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did"). The greatest change *Boerne* wrought relates not to abstract principles of separation of powers but to the methodology the Court has chosen for determining when Congress has exceeded its Enforcement Clause power and how much deference Congress should be granted with regard to enforcing the Fourteenth Amendment. *See, e.g.*, Zeitlow, *supra* note 127, at 487 (arguing that Court, under *Boerne* test, "seems to view itself as the primary protector of individual rights, to the point that it closely scrutinizes attempts of the coordinate branches to protect those rights"). Departing from the deferential "necessary and proper"

The general acceptance that Congress can validly "enforce" the Thirteenth Amendment by legislating against the badges and incidents of slavery also, under the *Boerne* analysis, requires acceptance that the Amendment prohibits the badges and incidents of slavery in some form. If the Amendment itself solely prohibits literal enslavement, such congressional action would amount to creating a new right to be free of the badges and incidents of slavery, which would be unconstitutional under *Boerne*. Yet no court has questioned that the Thirteenth Amendment empowers Congress to prohibit the badges and incidents of slavery. The constitutionality of congressional "badges and incidents of slavery" legislation depends on such legislation being rationally aimed at enforcing the preexisting Thirteenth Amendment right to be free of the same.[140]

There are four possible ways to resolve the tension between the recognized power of Congress to remedy the badges and incidents of slavery and the prevailing interpretation of the Amendment, in the absence of congressional action, as only reaching literal enslavement. The first possibility is that even if the Amendment only reaches literal enslavement, congressional legislation prohibiting the badges and incidents of slavery is constitutional because such legislation qualifies as "prophylactic." In other words, Congress could believe that legislating against the vestiges of slavery is necessary to "prevent and deter"[141] some actual unconstitutional conduct, that is, literal enslavement. The problem with this argument is that it is not readily

standard of review, the *Boerne* test requires that Congress support its Enforcement Clause legislation by making specific factual findings of "a relevant history and pattern of constitutional violations" of the type the legislation addresses. *Lane*, 541 U.S. at 521. By so requiring, the *Boerne* test necessitates that the judiciary must now "regularly check Congress's homework to make sure that [Congress] has identified sufficient constitutional violations to make its remedy congruent and proportional." *Lane*, 541 U.S. at 558 (Scalia, J., dissenting); *see also Garrett*, 531 U.S. at 370 (parsing total number of disabled persons in United States and number of such persons employed by states in comparison to number of instances of state discrimination against disabled that Congress cited). I disagree with this aspect of *Boerne*. Nonetheless, the general principles of express and implied powers articulated in *Boerne* provide useful guidance in pointing out the flaws in the assumption that Congress can enjoy carte blanche power under the Thirteenth Amendment to address the badges and incidents of slavery even if the Amendment itself solely reaches literal slavery or involuntary servitude.

[140] This does not mean, however, that the role of Congress and the courts in interpreting the Thirteenth Amendment must be precisely the same. As I discuss below, there may be practical reasons why courts should be more circumspect than Congress in enforcing the Amendment's prohibition of the badges and incidents of slavery.

[141] *See Lane*, 541 U.S. at 518, 533 n.24.

apparent that prohibiting the lingering effects of the system of African slavery is necessary to prevent or deter the reemergence of a system of ownership of human beings. Nowhere in *Jones*, for example, did the Court indicate that it believed congressional action against private housing discrimination was constitutional solely or even in part because such discrimination could lead to the recurrence or imposition of literal chattel slavery. Rather, the *Jones* Court believed that the Thirteenth Amendment, in addition to eliminating chattel slavery, also eliminated the badges and incidents of slavery as an independent evil no longer to be tolerated in American society.

A second theoretical justification for the "separation of powers" cases discussed in this section would be that the Thirteenth Amendment itself does encompass the badges and incidents of slavery as well as literal enslavement, but that it does not provide a private cause of action to remedy this constitutional violation. It is not unknown for the law to create a right without expressly (or even implicitly) creating an individually enforceable remedy for violations of that right.[142] Perhaps, then, the separation of powers approach to the badges and incidents of slavery is persuasive if considered not in terms of the substantive right at issue, but rather, in terms of the enforceability of that right. However, there are at least two significant problems with this explanation. First, none of the cases holding that the Amendment itself applies only to literal enslavement unless and until Congress says otherwise have actually relied upon this distinction between rights and remedies.[143] Second, it is unquestioned that the Amendment's prohibition of literal enslavement or involuntary labor is self-executing and individually enforceable.[144] Assuming that the Amendment prohibits both literal enslavement and the badges and incidents of African slavery, there is no logical reason to assume that only one of the Amendment's substantive rights would provide a self-executing individual cause of action while the other

[142] *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. . . . Without [such an indication], a cause of action does not exist and courts may not create one . . . ."); Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 312 (1995) ("The guarantees of the Bill of Rights and the Civil War Amendments are virtually silent about the consequences of transgression.").

[143] *See, e.g.*, Atta v. Sun Co., 596 F. Supp. 103, 105 (E.D. Pa. 1984) ("[T]he Amendment *itself* does not, *in any way* reach forms of discrimination other than slavery and involuntary servitude.") (second emphasis added).

[144] *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 20 (1883) (stating that Thirteenth Amendment is "self-executing without any ancillary legislation").

would not.[145]

There are two remaining logical resolutions of this issue. Arguably, *Jones* and the many other Supreme Court cases affirming Congress's badges and incidents of slavery power are wrong because such legislation so far exceeds the Thirteenth Amendment's substantive guarantees that Congress has crossed the constitutional line between rights-enforcement and rights-creation. But *Jones* has not been overruled, and we may therefore continue to assume that Congress can prohibit the badges and incidents of slavery as a valid exercise of its enforcement power. The remaining alternative is that the "separation of powers" cases I have criticized in this section are wrong: given Congress's accepted power to "enforce" the Thirteenth Amendment by prohibiting the badges and incidents of slavery, the Amendment itself, by inference, also reaches the badges and incidents of slavery.

As shown above, it requires elaborate theoretical and doctrinal gymnastics to believe that Congress enjoys carte blanche power to prohibit the badges and incidents of slavery while simultaneously believing that the Amendment itself only reaches literal enslavement. The simplest way to understand this Thirteenth Amendment "separation of powers" dichotomy is that it simply is not justifiable as a theoretical and doctrinal matter. It is, however, understandable by reference to external concerns that have led to the judiciary's

[145] Moreover, even if it were true that the Amendment itself prohibits the badges and incidents of slavery but that this constitutional right is unenforceable in private lawsuits until Congress provides explicit statutory authorization for such a cause of action, such authorization already exists in the form of 42 U.S.C. § 1983, which provides a federal civil cause of action for the deprivation of "any rights, privileges, or immunities secured by the Constitution and laws" by persons acting under color of state law. 42 U.S.C. § 1983 (2006). Additionally, non-damages lawsuits alleging deprivation of constitutional rights by governmental officials are authorized by the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Section 1983 and *Ex parte Young* do leave a gap with regard to the Thirteenth Amendment; namely, they speak only to the availability of a federal cause of action for deprivation of constitutional rights caused by governmental action, while the Thirteenth Amendment reaches private conduct. Arguably, then, the "separation of powers" approach critiqued in this section could be read as saying that private individuals do not have a cause of action to enforce the Thirteenth Amendment against *other private individuals* absent express congressional authorization. As noted above, however, there does not seem to be any doubt that private persons have a direct cause of action under the Thirteenth Amendment against other private persons for the imposition of literal enslavement or involuntary servitude. There is no apparent reason as a doctrinal matter or from the legislative history to treat the Amendment's right to be free of the badges and incidents of slavery any differently for purposes of individual enforceability.

intentional under-enforcement of the Thirteenth Amendment.[146] Thus, the most persuasive explanation for "the great disparity between the scope of section 1 and section 2 of the thirteenth amendment" is that the courts have intentionally "confined [their] enforcement of the amendment to a set of core conditions of slavery, but that the amendment itself reaches much further; in other words, the thirteenth amendment is [intentionally] judicially underenforced" for reasons that have nothing to do with the Amendment's actual meaning and scope.[147]

The judiciary's near-total abdication of its role as an enforcer of the right to be free of the badges and incidents of slavery is at least partially explainable by reference to judicial reluctance to delve into the history of slavery and concerns about the potential reach of the Amendment were it fully enforced. With regard to a frank judicial examination of the lingering effects of the institution of slavery, there is no reason to believe judges are different from the rest of us. American slavery is routinely treated as a subject of vague historical interest. It is seen as having little contemporary relevance because discourse about slavery's lingering contemporary effects raises uncomfortable questions about the congenital distribution of material, social, and psychological benefits between the descendants of the

[146] By speaking of the Thirteenth Amendment's "under-enforcement," I mean that it is under-enforced not in the sense of how often it is applied, but rather, that judicial applications of the Thirteenth Amendment (with the notable exception of *Jones*) have not nearly exhausted the conceptual or theoretical space one would expect the Amendment's proscription of the "badges and incidents of slavery" to have in light of its language, historical context, and legislative history. Professor Lawrence Sager has argued that such under-enforcement can be understood by reference either to "institutional" concerns of judicial "propriety or capacity" or "analytical" concerns about the meaning of the constitutional concept at issue. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217-18 (1978). The Supreme Court has expressed both institutional and analytical concerns regarding badges and incidents of slavery claims brought directly under the Thirteenth Amendment. For the former, see, for example, Palmer v. Thompson, 403 U.S. 217, 226-27 (1971) (stating that Amendment does not authorize courts "to legislate new laws to control the operation of swimming pools throughout the length and breadth of this Nation"). For the latter, see Memphis v. Greene, 451 U.S. 100, 128 (1981) (finding that street closing that effectively segregated minority community from white community could not "be equated to an actual restraint on the liberty of black citizens that is in any sense comparable to the odious practice the Thirteenth Amendment was designed to eradicate"). It is unclear whether the lower court opinions rejecting badges and incidents of slavery claims have rested on institutional or analytical concerns, because the lower courts simply have not given the issue much analysis.

[147] Sager, *supra* note 146, at 1219 n.21.

enslaved, the descendants of the slave master, and those who fall on either side of this divide by association. From this implicit discomfort arises the second external concern: given the Amendment's clear applicability to the conduct of private individuals[148] and possible applicability to systemic, unintentional, or "disparate impact" discrimination,[149] judges are understandably reluctant to embrace it. A judicial remedy that reached the unintentional reinforcement of systemic vestiges of slavery that may not be the active "fault" of anyone alive today would be a powerful remedy indeed. It surely raises difficult questions that judges might rather avoid.

Discomfort and difficulty, however, are hardly sufficient justification for complete judicial refusal to enforce a constitutional provision. As the Supreme Court has noted regarding the judicial role:

> With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us . . . . Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty.[150]

I realize, however, that there are institutional concerns that may counsel for a more circumspect (as opposed to non-existent) judicial role in enforcing the right to be free of the badges and incidents of slavery. Recognition that the Thirteenth Amendment itself prohibits the badges and incidents of slavery does not mean that the role of the judiciary and Congress in enforcing the Thirteenth Amendment must be precisely the same. A constitutional structure in which the elected branch has broader enforcement power than the appointed branch is reasonable. First, as a matter of democratic and constitutional theory, viewing the Constitution as conferring broad enforcement authority on politically accountable actors (i.e., Congress) is consistent with ensuring the kind of "continued popular input in shaping constitutional meaning" that is appropriate in a democracy.[151] To the

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[148] *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 421-22 (1968).

[149] *See supra* note 52 (citing Gen'l Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982), and *Greene*, 451 U.S. at 100).

[150] *Ex parte Young*, 209 U.S. at 143 (internal quotation marks omitted).

[151] Larry D. Kramer, *The Supreme Court 2000 Term — Foreword: We the Court*, 115 HARV. L. REV. 4, 13 (2001); *see also* Zeitlow, *supra* note 127, at 488 ("Because federal courts are not politically accountable when they create rights of belonging, they impose them externally upon a community. On the other hand, when the legislative branch creates rights of belonging, it represents a decision within the community to effectuate a more inclusive vision of that community.").

contrary, once a federal judge is appointed, the public's role in directly shaping constitutional meaning is finished. Affording Congress broad definitional latitude in defining the badges and incidents of slavery can be seen as fostering public debate about the institution of chattel slavery, its legacy, and what steps "we the people" believe are appropriate remedies.

Second, as a pragmatic matter of institutional capacity and propriety, Congress possesses factfinding and policymaking powers that courts do not. In some circumstances, the question of whether a particular condition or form of discrimination constitutes a badge or incident of slavery could be so highly fact-specific that answering the question would require tools that courts do not readily possess.[152] There could also be institutional concerns regarding enforceability.[153] In circumstances where such concerns are not at issue, however, the courts are fully able to declare a condition a badge or incident of slavery by doing what is properly within their constitutional and institutional sphere: examining the available evidence presented by the parties to a specific dispute and determining whether that evidence proves a sufficient relationship to the institution of chattel slavery that the plaintiff's injury in the case at hand is a badge or incident thereof.[154]

[152] For example, courts lack the ability to hold hearings around the country to gather evidence from persons other than the direct stakeholders or witnesses in a particular Thirteenth Amendment lawsuit or who do not qualify as experts for evidentiary purposes.

[153] For example, a judge could perhaps reasonably find that the failure of the federal government to provide African Americans with reparations for slavery amounts to a failure to remedy the badges or incidents of slavery, but such a finding would more likely be enforceable if rendered by Congress, given the impact such reparations would have on the federal budget.

[154] In Part IV, *infra*, I provide examples of situations that I believe are so closely and demonstrably linked to the institution of chattel slavery and the societal structures created by it that they amount to badges or incidents of slavery. I acknowledge that, even as to such situations, some may question the competence of judges to evaluate complex historical issues regarding what practices or conditions are legacies of slavery. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 226-27 (1971) (stating, in rejecting plaintiffs' badges and incidents of slavery claim, that "[e]stablishing this Court's authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a law-making power far beyond the imagination of the amendment's authors"); United States v. Nelson, 277 F.3d 164, 185 n.20 (2d Cir. 2002) ("[T]he task of defining 'badges and incidents' of servitude is by necessity . . . inherently legislative."). Ascertaining the badges and incidents of slavery would inevitably require judges to consider and assess complex historical and sociological evidence. Doing so, however, would not stretch the boundaries of judicial competence beyond the commonly

Finally, while the available historical evidence does not support the proposition that the Thirteenth Amendment's drafters would have intended for the courts to have *no* role in enforcing the Amendment's proscription of the badges and incidents of slavery, there is some evidence that the Amendment's framers intended Congress to have the primary — but not exclusive — power of enforcing the Reconstruction Amendments. The context of the debates leading to the adoption of the Fourteenth Amendment, for example, can be read as showing that "the Reconstruction Era Congress was primarily preoccupied with its own role, and not the role of the Court, in defining and enforcing constitutional values."[155] Thus, it is entirely reasonable as a matter of "original intent" to interpret the Reconstruction Amendments as vesting Congress with broad, and even primary, enforcement power. The historical evidence does not, however, support the judiciary's complete exclusion from providing redress for the badges and incidents of slavery.

C. Expansionist Approach: As a Remedy for Any Class-Based Discrimination

Many scholars and litigants have argued that the Thirteenth Amendment's prohibition of the badges and incidents of slavery should be read as broadly as possible, without regard to whether the complained-of injury arises out of the system of chattel slavery in any but the vaguest fashion.[156] For example, in *Keithly v. University of Texas Southwestern Medical Center*,[157] the plaintiff argued that the

accepted judicial role if limited to cases where actual evidence and expert testimony, as opposed to the judge's conjecture or policy preferences, forms the basis for decision. Indeed, the Supreme Court frequently relies upon historical evidence in its constitutional decisions, most notably when ascertaining the scope of substantive due process. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 559 (2003) ("It should be noted, however, that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."). For a fuller discussion of the use of history in constitutional adjudication, see generally Edward P. Steegmann, *Of History and Due Process*, 63 IND. L.J. 369 (1988).

[155] Zeitlow, *supra* note 127, at 492.

[156] It is worth recalling at this point that I am focusing on the Thirteenth Amendment's prohibition of slavery's "badges and incidents," not the Amendment's equally important prohibition of slavery, involuntary labor, physical domination, or other forms of compelled servitude. As noted earlier, the Amendment's prohibition of compelled service logically does not require that the victim be a member of a particular racial group nor that his current enslavement be linked to historical slavery. *See supra* note 25 and accompanying text.

[157] No. 303CV0452L, 2003 WL 22862798 (N.D. Tex. Nov. 18, 2003).

Thirteenth Amendment provided a constitutional basis for the Americans with Disabilities Act. The plaintiff argued that Congress's Thirteenth Amendment power reaches "various forms of discrimination — race-based or otherwise" and that "unjust employment practices and invidious, class-based discrimination are both 'badges and incidents' of slavery and involuntary servitude."[158] The court rejected the plaintiff's Thirteenth Amendment argument first, because the Americans with Disabilities Act was not actually passed pursuant to the Thirteenth Amendment and second, because the court believed that the disabled are not a "race" within the meaning of the Thirteenth Amendment jurisprudence.[159]

While there may be reasonable arguments that the Thirteenth Amendment reaches disability discrimination, what makes the Thirteenth Amendment argument in *Keithly* problematic is the casual use of the Amendment as a jurisprudential "Hail Mary." It does not appear that there was any serious consideration of whether discrimination against the disabled constitutes a badge or incident of slavery in any concrete sense beyond the bald assertion that the Amendment reaches "various forms of discrimination."[160]

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[158] *Id.* at *3.

[159] *Id.* at *3-*4.

[160] Similarly, in *Wong v. Stripling*, 881 F.2d 200 (5th Cir. 1989), a Chinese American physician contended that the private hospital where he worked revoked his hospital privileges because of his race. He argued that the hospital's actions violated his Thirteenth Amendment right to "equal protection" and that the Amendment's proscription of the badges and incidents of slavery "extends to any abuse predicated upon race." *Id.* at 203. Like the plaintiff in *Keithly*, it does not appear that the *Wong* plaintiff made any particular effort to tie his claim to the structures created by or essential to literal slavery. The court, in rejecting his claim, held that "[t]he proscription in the thirteenth amendment is a broad one, but no court has held that its words alone create a general right to be free from private racial discrimination in all areas of life." *Id.* By criticizing the arguments in these cases, I do not mean to suggest that the Amendment cannot be seen as applying to persons other than the original subjects of the Amendment at the time of its enactment (i.e., the freedmen). My criticism is not of creative arguments in favor of extending the Amendment beyond its most clearly discernable original intentions as adopted in 1865, but rather of the failure to engage in the type of careful analysis that would justify such extensions. Overly creative interpretations of the Amendment that pay little attention to its actual history and context can result in cases and scholarship diminishing the Amendment rather than strengthening it. Sounding a note of caution, Thomas J. Henderson, former chief counsel for the Lawyers' Committee for Civil Rights Under Law, has argued that "[c]are should be taken in asserting the Thirteenth Amendment as a source of congressional authority [for civil rights legislation], and particular effort is necessary to relate the prohibited conduct to slavery and the post-Civil War conditions to which the amendment was directed." Thomas J. Henderson, *Strategies for Civil Rights Litigators amid the Supreme Court's Constitutional Counterrevolution*,

The Supreme Court has made clear that the Thirteenth Amendment does empower Congress to pass legislation applicable to racial groups other than African Americans,[161] yet has remained silent as to whether the substantive core of the Amendment extends this far. Moreover, even if the Amendment's self-executing prohibition of the badges and incidents of slavery is race-neutral, it remains unresolved whether it also applies to non-racial classes. The Supreme Court has never directly addressed this issue, but it has implied that the Amendment may authorize Congress to enact legislation protecting non-racial classes, while still not addressing whether the Amendment itself reaches this far in the absence of congressional action.

1. The Badges and Incidents of Slavery as Applied Beyond African Americans

The Amendment's drafters did intend to extend the Amendment's protection beyond African Americans, at least in some circumstances. For example, Representative Robert Ingersoll of Illinois argued during the Thirteenth Amendment debates that the Amendment would apply to "the seven millions of poor white people who live in the slave States but who have never been deprived of the blessings of manhood by reason of . . . slavery,"[162] presumably by virtue of the free labor pool that slavery provided, which drove down the wages of the white laboring class and made labor seem dishonorable.[163] Similarly, the Amendment's framers recognized that white abolitionists were harassed and attacked for their opposition to slavery.[164] In addition,

HUM. RTS., Fall 2002, at 20, 22. Similarly, in critiquing Professor Akhil Reed Amar's seminal Thirteenth Amendment article, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1992), Judge Alex Kozinski and Eugene Volokh argued that "[n]o matter how tempting or righteous the desired result may be, one must always be ready to recognize when the reading has become too tenuous, the proposed doctrine too vague, the implications too risky." Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1657 (1993).

[161] *See generally* St. Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, (1987); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

[162] Tsesis, *Furthering American Freedom*, *supra* note 13, at 327 (citing CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864)).

[163] For example, during the Thirteenth Amendment debates, Representative Wilson of Iowa argued that "the poor white man" had been "impoverished, debased, dishonored by the system that makes toil a badge of disgrace . . . ." Colbert, *Liberating the Thirteenth Amendment*, *supra* note 13, at 10.

[164] During the Thirteenth Amendment debates, for example, Representative Ashley of Ohio noted that "[s]lavery has for many years defied the government and trampled

some contemporaneous judicial decisions construed the Thirteenth Amendment as applying beyond the freedmen.[165]

The Supreme Court and the lower federal courts have held that Congress, pursuant to its Thirteenth Amendment power, can protect persons who are not African American from discrimination because of their race. Prior to *McDonald v. Santa Fe Transportation Co.*,[166] the Court had applied 42 U.S.C. §§ 1981 and 1982 to whites only in circumstances where they had been injured not because of their race, but because of their association with blacks.[167] In *McDonald*, however, the Court held that § 1981's legislative history demonstrated that it was intended "to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race,"[168] despite the fact that the statute's immediate concern was to protect African Americans. The Court further held that such a construction of § 1981 was consistent with Congress's power to define and prohibit the badges and incidents of slavery.[169]

United States v. Nelson[170] provides the most thorough examination in the contemporary case law regarding whether and in what circumstances the Thirteenth Amendment's proscription of the badges and incidents of slavery extends beyond African Americans.

upon the National Constitution, by kidnapping, mobbing, and murdering white citizens of the United States guilty of no offense except protesting against its terrible crimes." tenBroek, *supra* note 29, at 178l; *see also* Andrews, *supra* note 69, at 497 n.50 ("Abolitionists were intimidated, threatened, and beaten to near death when speaking in the North; in the South and Midwest, whether black or white, one could be killed for advocating the end of slavery."); STAMPP, *supra* note 5, at 211 (noting that slave codes "were quite unmerciful toward whites who interfered with slave discipline").

165 *See, e.g.*, Kaczorowski, *supra* note 31, at 901 (stating, in finding Civil Rights Act of 1866 to be constitutional under Thirteenth Amendment, that Amendment "throws its protection over every one, of every race, color and condition" (citing United States v. Rhodes, 27 F. Cas. 785, 793 (C.C.D. Ky. 1867) (No. 16,151))).

166 427 U.S. 273 (1976).

167 *See generally* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).

168 *McDonald*, 427 U.S. at 295.

169 *Id.* at 288. The Court in *McDonald* did not carefully link discrimination against whites to the vestiges of slavery that the Thirteenth Amendment was designed to abolish. The holding of *McDonald* is nonetheless consistent with the generally accepted interpretation of Congress's authority to enact prophylactic legislation that reaches conduct that is not in itself unconstitutional in order to prevent or deter constitutional violations. For a fuller discussion of this issue, see *supra* Part III.B. Thus, while *McDonald* is informative as to the reach of congressional power, it does not provide definitive guidance as to whether the Amendment itself, in the absence of congressional enforcement, proscribes badges and incidents of slavery suffered by persons who are not African American.

170 277 F.3d 164 (2d Cir. 2002), *cert. denied* 537 U.S. 835 (2002).

According to the trial testimony in *Nelson*, a Jewish driver struck two African American children, one of whom ultimately died from his injuries.[171] An angry crowd soon formed in the area. One of the defendants made a speech to the crowd, during which he repeatedly exhorted the crowd to, among other things, "get the Jews."[172] Some members of the crowd became violent and spotted Yankel Rosenbaum, a Jewish man wearing distinctive Orthodox Jewish clothing, with some persons yelling "get the Jew, kill the Jew."[173] Upon being caught by the crowd, Rosenbaum was beaten and stabbed by defendant Nelson and eventually died of his injuries.[174]

Following Nelson's acquittal on state charges, both defendants were convicted under 18 U.S.C. § 245, which makes it a federal crime to interfere with a person's enjoyment of public facilities on account of his race, color, religion, or national origin.[175] They appealed, arguing, inter alia, that § 245 exceeded Congress's Thirteenth Amendment power, at least as applied to African American defendants charged with attacking a Jewish man because of his religion. [176]

The court began its analysis by noting that the Thirteenth Amendment's prohibition of slavery and involuntary servitude is race neutral and that the Supreme Court had interpreted it in the same manner.[177] From this proposition, however, the court still had to

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[171] *Id.* at 169.

[172] *Id.* at 170.

[173] *Id.*

[174] *Id.*

[175] The relevant portion of 18 U.S.C. § 245 states:

> Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with . . . any person because of his race, color, religion or national original and because he is or has been . . . participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof . . . shall be fined under this title, or imprisoned . . . .

18 U.S.C. § 245(b) (2001). The relevant "interference with public facilities" element was met because Rosenbaum was enjoying the use of New York City's streets when he was attacked.

[176] As the *Nelson* court itself noted, it is perhaps ironic that its detailed and robust analysis of the Thirteenth Amendment's scope occurred in the context of a case where the court was "employ[ing] a constitutional provision enacted with the emancipation of black slaves in mind to uphold a criminal law as applied against black men who, the jury found, acted with racial motivations, but in circumstances in which they were, at least partly, responding to perceived discrimination against them." *Nelson*, 277 F.3d at 191 n.27.

[177] *Id.* at 176.

confront two significant subsidiary issues. First, the defendants targeted Rosenbaum because he was Jewish. As the court acknowledged, Jews, in contemporary society, are not thought to be a separate race.[178] Accordingly, even if the Thirteenth Amendment protects all racial groups, the court had to determine whether the Thirteenth Amendment protects non-racial classes. Second, race-based violence is not literal slavery or involuntary servitude. Because there was no allegation that Rosenbaum's assailants intended to subject him to literal enslavement or involuntary servitude, the court had to analyze whether religiously motivated violence against a Jewish person amounted to a badge or incident of slavery.

With regard to whether Jews, as a group, are protected by the Thirteenth Amendment, the court noted that "race" is a term of art that is not necessarily limited to its contemporary meaning.[179] Accordingly, the court held, the fact that Jews are not currently considered to be a distinct race "does not rule out Jews from the shelter of the Thirteenth Amendment."[180] Indeed, as the *Nelson* court recognized, Supreme Court precedent discussing certain statutes enacted pursuant to the Thirteenth Amendment clearly held that these statutes apply to Jews.[181] The *Nelson* court believed that these precedents applied by implication to the Thirteenth Amendment itself because §§ 1981 and 1982 were based on that Amendment.[182] Second, the court reasoned, Jews were in fact considered to be a distinct race at the time of the Amendment's ratification.[183] Accordingly, even if the badges and incidents of slavery power only encompasses racial discrimination, the court believed that the attack at issue could be considered a badge or incident of slavery inflicted upon the victim because of his "race," as that term would have been understood at the time the Amendment was adopted.

The *Nelson* court's analysis of this first major issue has several analytical flaws that illustrate the confusion surrounding the Thirteenth Amendment. The most significant problem is that the court conflated the Amendment's prohibition of slavery and involuntary servitude with its equally important purpose of eliminating the badges and incidents of slavery. The fact that the

[178] *Id.* at 176-77.

[179] *Id.* at 176.

[180] *Id.* at 177.

[181] Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (holding that § 1982 applies to discrimination against Jewish persons).

[182] *Nelson*, 277 F.3d at 178, 180.

[183] *Id.* at 178.

Amendment's prohibition of actual enslavement is race-neutral does not necessarily mean that its prohibition of the lingering effects of slavery is also race-neutral. Any person can, of course, be subjected to actual enslavement through physical, economic, or legal coercion. That does not mean, however, that any person who suffers any injury based on his membership in an identifiable group has suffered a badge of slavery related to the system of African slavery. The *Nelson* court did not directly address this issue, but rather assumed that because the Amendment's prohibition of slavery is race-neutral, so too is its prohibition of the contemporary legacies of slavery.

While the court's conclusion that Jews could be considered a "race" drew upon Supreme Court precedent, the court's "bootstrapping" such holdings into a conclusion about the Amendment itself is problematic as a doctrinal matter.[184] It assumes that Congress's enforcement power under Section 2 of the Thirteenth Amendment is coextensive with the scope of Section 1. Therefore, finding that a federal law is constitutional under the Thirteenth Amendment would indicate that the same subject matter is within the Amendment's scope even in the absence of an act of Congress. The problem is that although the Supreme Court has never conclusively addressed Section 1's scope,[185] the Court has held that Congress is empowered by the Reconstruction Amendments to "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."[186] Therefore, the fact that Congress could validly proscribe violence against Jews under a federal hate crimes law does not necessarily mean that such violence constitutes a badge or incident of slavery in violation of the Amendment itself.[187]

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[184] Given that the *Nelson* court was in fact interpreting a federal law enacted pursuant to Congress's Section 2 power, its discussion of this issue is dicta. Nonetheless, it is worth examining in the broader context of the Amendment's meaning generally.

[185] *See* Carter, *supra* note 13, at 75-82.

[186] Tennessee v. Lane, 541 U.S. 509, 518 (2004). The Court's discussion of this issue in *Lane* was in the specific context of Section 5 of the Fourteenth Amendment, but the Court gave no indication that this general rule regarding congressional power applied only to that Amendment.

[187] Later in its discussion, the court did state that "[t]he existence of the Amendment's second section, however, renders consideration of the independent scope of Section One unnecessary," because prohibiting religiously motivated violence "falls comfortably within the limits of Congress's broad powers of enforcement under Section Two . . . ." *Nelson*, 277 F.3d at 180-81. The court, however, failed to reconcile this statement with its earlier assumption that cases construing the scope of 42 U.S.C. §§ 1981 and 1982 are directly relevant to the scope of the Amendment itself.

2. The Badges and Incidents of Slavery as Applied to Non-Racial Classes

Even assuming that the Thirteenth Amendment's prohibition of the badges and incidents of slavery applies to all racial discrimination, it remains unresolved whether it applies to non-racial classes. In *Griffin v. Breckenridge*,[188] African American plaintiffs brought suit under 42 U.S.C. § 1985(3)[189] against white defendants who had attacked them in the mistaken belief that they were civil rights activists. The Court held that § 1985(3), enacted pursuant to the Thirteenth Amendment, reaches private conspiracies to interfere with a person's civil rights and that a showing of state action is therefore unnecessary.[190] The Court further held, however, that a violation of § 1985(3) requires proof of intentional discrimination.[191] In reaching this conclusion, the Court stated that § 1985(3) requires a showing of discriminatory purpose, meaning "some racial, *or perhaps otherwise class-based*, invidiously discriminatory animus behind the conspirators' action."[192]

Nelson,[193] discussed above, is also informative with regard to whether the Amendment's proscription of the badges and incidents of slavery should be applied to non-racial classes. In addition to holding that private violence against Jews should be considered a badge or incident of slavery because, inter alia, Jews were considered to be a separate, non-white race at the time of the Amendment's ratification, the *Nelson* court alternatively held that the Thirteenth Amendment "extends its protections to religions directly, and thus to members of the Jewish religion, without [regard to] historically changing conceptions of race."[194] The court reasoned that the "slavery" and "involuntary servitude" prohibited by the Thirteenth Amendment's

[188] 403 U.S. 88 (1971).

[189] Section 1985(3) provides a federal civil action for conspiracies to deprive "any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws." 42 U.S.C. § 1985(3) (2003).

[190] *Griffin*, 403 U.S. at 96.

[191] Although the *Griffin* Court held that § 1985(3) requires proof of intentional discrimination, the Court has never clarified whether the Amendment itself is limited to intentional discrimination or whether proof of disparate impact is sufficient. *See, e.g.*, Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390 n.17 (1982) (stating that "whether the Thirteenth Amendment itself reaches practices with a disproportionate effect as well as those motivated by discriminatory purpose [is an open question]," but holding, however, that 42 U.S.C. § 1981 requires proof of discriminatory intent).

[192] *Griffin*, 403 U.S. at 102 (emphasis added).

[193] United States v. Nelson, 277 F.3d 164 (2d Cir. 2002).

[194] *Id.* at 179.

text are neither linguistically nor conceptually limited to any particular race nor, in fact, to "race" at all.[195] The court held that the Thirteenth Amendment protects religions directly because "§ 1981 and, by implication, the Thirteenth Amendment [itself], protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics."[196] The court found that Jews are a defined and identifiable ethnic group and that the victim was attacked by virtue of his membership in that ethnic group.[197] Because of this, the court held that "Congress could rationally have determined that the acts of violence covered by [federal hate crimes law] impose a badge or incident of servitude on their victims"[198] even if violence on the basis of the victim's religion was not within the scope of Section 1 of the Amendment.[199]

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[195] *Id.* As noted above, this reasoning is problematic. The fact that any person can be subjected to physical bondage does not mean that any person can suffer an injury rationally related to the system of African slavery. *See supra* pp. 1357-61.

[196] *Nelson*, 277 F.3d at 180 (citing St. Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987) (internal quotation marks omitted)). The *Nelson* court also cited Supreme Court dicta from *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971), wherein the Court stated that a violation of 42 U.S.C. § 1985(3) requires proof of "some racial, *or perhaps otherwise class-based*, invidiously discriminatory animus behind the conspirators' action." *Id.* (emphasis added).

[197] While the victim in *Nelson* was apparently identifiable as Jewish because he was wearing the distinctive clothing associated with Orthodox Judaism, most Jews likely would not be identifiable solely by their appearance. It is unclear whether visually identifiable membership in a particular ethnic group was a prerequisite for the court's affirmation of the constitutionality of federal hate crimes laws that apply to attacks motivated by the victim's religion.

[198] *Nelson*, 277 F.3d at 185.

[199] The court's reasoning here was unclear. The court could have been saying that Section 2 empowers Congress to prohibit violence on the basis of religion as a badge or incident of slavery and that the Amendment's self-executing core reaches this far as well. Or, the court could have been saying that Section 1 only prohibits actual slavery or involuntary servitude (or does reach the badges and incidents of slavery, but only those imposed on account of the victim's race), but that Section 2 empowers Congress to go substantially beyond what is directly prohibited by Section 1. There are statements in the case that would support either construction. For the first construction, see *id.* at 175 ("[M]uch of the doctrine surrounding the Amendment implicates both [Section 1 and Section 2]."), 177 ("It follows that the scope of the 'races' protected by the Thirteenth Amendment cannot be narrower than the scope of the 'races' [§§ 1981 and 1982] themselves protect."), and 180 ("§ 1981 and, by implication, the Thirteenth Amendment, 'protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.'"). For the second construction, see *id.* at 184 ("*Congress* has been vested, by Section Two . . . , with the authority to prohibit conduct that the *courts* are unable to say violates Section One directly."), 185

Some scholars have relied on the *Griffin* Court's dictum above to argue that, for example, "for purposes of congressional enforcement power under the thirteenth amendment, any act motivated by arbitrary class prejudice should be regarded as imposing a badge of slavery upon its victim."[200] Under this view, the badges and incidents of slavery include any "preconceived judgment or opinion" used to determine "a person's fitness for a particular function primarily upon factors that have no rational bearing" on the decision at hand.[201] Such an interpretation of the Thirteenth Amendment is appealing as a matter of social justice. It treats the Amendment as an instrument of radical social change, one intended to dismantle fundamental societal inequality. This interpretation also posits the federal government's constitutional duty and authority to ensure real equality for all, rather than adhering to the formalistic "colorblind" view of equal protection currently ascendant in the Supreme Court's jurisprudence.[202] Finally, it has the virtue of recognizing that subordination and inequality are not limited to certain racial or ethnic groups, but are the function of a profoundly hierarchical society.

Despite the merits of this approach to defining the badges of slavery, it is problematic in terms of the Thirteenth Amendment's history and

("Congress, through its enforcement power under Section Two . . . is empowered to control conduct that *does not come close* to violating Section One directly.") (emphasis added), and 185 n.20 ("[T]he task of defining 'badges and incidents' of servitude is by necessity . . . inherently legislative.").

[200] BUCHANAN, *supra* note 18, at 177; *cf.* David P. Tedhams, *The Reincarnation of "Jim Crow": A Thirteenth Amendment Response to Colorado's Amendment 2*, 4 TEMP. POL. & CIV. RTS. L. REV. 133, 141-42 (1994) (arguing that *any* unequal law is badge of servitude). Buchanan's discussion, at least, is limited to considering congressional enforcement power, as he seems to believe that the badges of slavery concept is one solely of congressional power under Section 2 (Enforcement Clause), as opposed to being inherent in the Amendment itself.

[201] BUCHANAN, *supra* note 18, at 177, 179-85.

[202] *See* Colbert, *Liberating the Thirteenth Amendment*, *supra* note 13, at 34 ("[B]y ignoring this nation's history of racism, the justices reframe the Reconstruction Amendments' specific purpose of ending whites' oppression of African Americans into a generalized prohibition of 'race discrimination.'"); Darren Lenard Hutchinson, *Progressive Racial Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455, 1457 (2002) (arguing that abstract colorblindness doctrine "treats as acceptable the existing unequal distribution of social resources and weakens efforts to redistribute social resources in a more egalitarian fashion"); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 499 (2003) ("Acceding to a worldview on [sic] which racial inequity is primarily the product of present bad actors rather than largely a matter of historically embedded hierarchies fosters the misdescription of a central social problem and therefore helps make it less likely that the problem will be addressed through appropriate means.").

context.[203] The reasoning underlying the broadest definitions of the badges and incidents of slavery is as follows:

(1) The Amendment declares that neither slavery nor involuntary servitude shall exist in the United States;
(2) Nothing in the Amendment's language or subsequent judicial interpretation limits this prohibition to a particular race; therefore,
(3) The "badges of slavery" power can be applied to remedy any form of discrimination against persons of any race or class.[204]

I ultimately agree that the Amendment's prohibition of badges and incidents of slavery reaches beyond African Americans, at least in certain circumstances. I disagree, however, with the reasoning described above because it skips over an important analytical step and seeks to answer the wrong question. The fact that the Amendment prohibits the actual enslavement of any person does not compel the conclusion that any person of any race or class can suffer a badge or incident of slavery. Enslavement, involuntary servitude, or their modern equivalents are not "badges and incidents" of slavery: they *are* slavery. The question of whether a person suffers slavery's lingering effects — the badges and incidents of slavery — is a different question from whether that person is literally enslaved or compelled to labor on behalf of another.

IV. INTERPRETING AND APPLYING THE BADGES AND INCIDENTS OF SLAVERY

As the preceding discussion makes clear, there is general agreement in the cases and scholarship that the Thirteenth Amendment empowers Congress to prohibit what it rationally determines to be

[203] Professor Alexander Tsesis has argued that "unspecific historical reasoning exposes [judicial] holdings to the originalist detraction that courts are engaging in judicial lawmaking." TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM, *supra* note 13, at 117. In rebutting criticisms that an expansive interpretation of the Thirteenth Amendment amounts to judicial activism, he argues for an interpretive approach that "requires finding that an abridgement of liberty is significantly connected to the incidents or badges of servitude" by "compar[ing] contemporary harms to past practices." *Id.* at 117, 118.

[204] *See* BUCHANAN, *supra* note 18, at 179; *see also* United States v. Nelson, 277 F.3d 164 (2002) (reasoning in part, as discussed *supra*, that (1) terms of Thirteenth Amendment's prohibition of slavery and involuntary servitude are race-neutral, (2) Jews were considered separate race at time of Amendment's adoption, and, therefore, (3) bias-motivated violence against Jews is within Amendment's prohibition of badges and incidents of slavery).

badges and incidents of slavery. However, there is currently no consistent approach to determining the Thirteenth Amendment's self-executing scope that would comport both with the Amendment's original purposes as well as a vision of the Amendment as having continuing vitality. The strict textualist and separation of powers approaches would limit the Amendment's self-executing scope to literal slavery or involuntary servitude. This has the benefit of apparent simplicity, but is unsupportable as a matter of originalism and contradicts or ignores the Amendment's historical context, principles of judicial review, and Supreme Court doctrine regarding the relationship between Congress's Enforcement Clause power and the Amendment upon which such power is based. The expansionist approach would hold that the badges and incidents of slavery remedy applies to any discrimination that is suffered because of membership in any identifiable group. It is appealing as a matter of social justice, but is unworkable because it admits of no limiting interpretive principle. It also minimizes the Amendment's historical context and marginalizes the reality of chattel slavery and its effects upon the enslaved and society by treating slavery merely as a stepping stone to the admittedly laudable goal of combating all forms of inequality.

Determining whether a particular injury or form of contemporary inequality constitutes a badge or incident of slavery requires a discourse about the historical facts of chattel slavery. Such a searching examination requires a concrete inquiry into slavery's systemic effect upon the descendants of the enslaved and the society that engaged in and was shaped by the practice of human enslavement. I do not believe that the badges or incidents of slavery are limited to those practices or conditions that existed during slavery. I do believe, however, that a badges or incidents of slavery claim must demonstrate some concrete connection either to the effects that slavery had upon its immediate victims (African Americans) or upon American laws, customs, or traditions.

A. Justification for a Two-Pronged Approach to Defining the Badges and Incidents of Slavery

This Article advocates that the badges and incidents of slavery prohibited by the Thirteenth Amendment be defined with reference to two primary issues: (1) the connection between the class to which the plaintiff belongs and the institution of chattel slavery, and (2) the connection the complained-of injury has to that institution. The paradigmatic badges and incidents of slavery claim under this approach, therefore, would involve a plaintiff who is a descendant of

the enslaved or who was injured because of his perception as such[205] (e.g., an African American person) and who raises a claim attacking a law, custom, practice, or condition that existed during slavery and was an essential aspect thereof. Thus, for example, claims by African Americans attacking race-based peremptory jury challenges,[206] racial profiling,[207] hate crimes,[208] housing discrimination,[209] inequality in the administration of criminal and civil justice, and systematic denial of equal education opportunities would all fall comfortably within the theory articulated here. These situations all involve forms of discrimination and subordination that provided essential legal and societal support for slavery and were also part of de jure and de facto attempts to return the freedmen to a condition of servitude and sub-humanity after formal emancipation.[210]

[205] The "perceived as" element is added because not all persons in the United States who identify or are perceived as "African American" are in fact descendents of the enslaved, because some came as immigrants after the Civil War and others are descendants of free blacks. (As to the latter point, see, for example, The Civil Rights Cases, 109 U.S. 3, 25 (1883) ("There were thousands of free colored people in this country before the abolition of slavery.")). Moreover, the very nature of slavery was to destroy the connection to and documentation of the kind of direct family ties that would be needed to establish that one is in fact a descendant of someone who was enslaved. It would be a strange theory that refused to recognize that a badge or incident of slavery has occurred when a Caribbean immigrant or a descendant of free blacks is injured because he is perceived as sharing the stigma associated with being "black" that arose out of and was essential to chattel slavery. It would be even stranger still to defeat a badges and incidents of slavery claim because of the plaintiff's inability to establish direct family ties to the enslaved when the system of slavery was directly responsible for the unavailability of such evidence. The "perceived as" element can be analogized to the framework under the Americans with Disabilities Act, where a plaintiff can state a claim for disability discrimination not only if he or she actually has a disability but is perceived as disabled by the defendant. *See* 42 U.S.C. §§ 12102(2)(A)-(C) (2006) (defining covered "disabilities" as "physical or mental impairment[s] that substantially limit[] one or more of the major life activities" *or* "being regarded as having such an impairment").

[206] *See, e.g.*, Colbert, *Challenging the Challenge*, *supra* note 13 (arguing that race-based peremptory challenges violate Thirteenth Amendment).

[207] *See, e.g.*, Carter, *supra* note 13 (arguing that racial profiling of African Americans is badge or incident of slavery).

[208] *Cf.* United States v. Nelson, 277 F.3d 164 (2d Cir. 2002) (holding that federal hate crimes law is constitutional under Thirteenth Amendment).

[209] *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (upholding statute that provided equal rights in housing context).

[210] The practice of excluding African Americans from jury service, in addition to being based upon deeply ingrained prejudices of African Americans as intellectually unsuitable for such service, also had the purpose and the effect of immunizing white crime against African Americans from effective prosecution. *See* Colbert, *Challenging the Challenge*, *supra* note 13, at 38-42. The use of race as a predictor of or proxy for

Once one moves beyond the paradigmatic cases — those cases where the plaintiff is African American and asserts a contemporary injury that either existed in the same form during slavery or is closely analogous thereto — it becomes more difficult analytically and historically to establish a badge or incident of slavery. Thus, if the plaintiff is not African American, it becomes more difficult to prove, as

criminality supported the system of slavery because it was used to create the myth that Africans were "black beasts" with an inherent propensity for criminality that justified their restraint (i.e., enslavement). *See* Carter, *supra* note 13, at 57-58.

The ability of the slave master to inflict violence upon the enslaved with impunity supported the system of slavery by providing a second tier of enforcement in addition to the legal status of slaves as property. Moreover, private racial violence was a routine aspect of the post-Civil War regime of oppressing the freedmen and reestablishing control over them after the legal system of slavery had ended. *See Nelson*, 277 F.3d at 189 ("[A]cts of violence or force committed against members of a hated class of people with the intent to exact retribution for and create dissuasion against their use of public facilities have a long and intimate historical association with slavery and its cognate institutions.").

As the Supreme Court recognized in *Jones*, private housing discrimination against African Americans was a substitute for state sanctioned segregation and resulted in "herd[ing] men into ghettos and [made] their ability to buy property turn on the color of their skin." *Jones*, 392 U.S. at 442-43. Such discrimination, therefore, was a badge or incident of slavery because denial of the right to own property on the basis of one's race was a key disability imposed by the slave system, and because the segregation that resulted from private housing discrimination created physical and symbolic separation that reinforced the "otherness" of African Americans. With regard to criminal and civil justice, scholars have long noted that the Reconstruction Congresses, through the Thirteenth and Fourteenth Amendments and the Civil Rights Act of 1866, intended to guarantee blacks the right to enforce contracts in federal and state courts and to be free from "corrupt law enforcement practices that allowed crimes against them to go unpunished, and subjected them to arrest, trial, and conviction of crimes by hostile and prejudiced sheriffs, judges, and juries." Kaczorowski, *supra* note 31, at 883.

Finally, while I have not found cases or articles specifically analyzing the issue under the Thirteenth Amendment, it is unquestionable that systematic denial of equal educational opportunities, either by way of the type of de jure racial segregation at issue in *Brown v. Board of Education*, 347 U.S. 483 (1954), or by virtue of the neglect and under-funding of the urban public schools which most African American children attend, is a badge or incident of slavery. The Amendment's framers recognized that denial of African Americans' educational opportunities was one of the key features of the system of slavery. For example, Senator Harlan of Iowa, during the Thirteenth Amendment debates, stated that the incidents of slavery to be abolished by the Amendment included the prohibition of blacks' ability to be educated. *See* tenBroek, *supra* note 29, at 177-78 (citing CONG. GLOBE, 38th Cong., 1st Sess. 1439, 1440 (1864)); *see also* WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS 319-23 (Negro Univs. Press 1968) (1853) (discussing penalties for violating antebellum prohibitions against educating enslaved). This list is, of course, intended to be illustrative rather than exclusive as to which situations are within the core of the badges and incidents of slavery theory.

a matter of "proximate cause," that the injury is a badge or incident of slavery. Even as to non-African American persons, however, there may be particular injuries or forms of discrimination so closely tied to the structures supporting or created by the system of slavery that the plaintiff's personal link to that institution becomes less determinative. Moreover, even as to African Americans, there may be injuries or forms of discrimination that do not amount to a badge or incident of slavery. I provide examples of such situations below.

B. Application of the Badges and Incidents of Slavery Analysis

Distinguishing between those instances of discrimination and subordination that have a "concrete connection" to the slave system and those that do not is not an easy task and to some extent depends on case-by-case analysis. This Article, therefore, is not intended to provide an exhaustive catalogue of every conceivable situation that might or might not constitute a badge or incident of slavery. Rather, my goal is to reorient the Thirteenth Amendment analysis away from both intentional disregard of the Amendment's broad original purposes and from the type of overbroad interpretation that is likely to render the Amendment meaningless in practice.

It is only by reference both to the actual historical facts of the system of slavery and the Amendment's drafters' transformative purposes that a practicable, yet dynamic, interpretation can emerge. Therefore, in the following two sections, I briefly apply my methodology for defining the badges and incident of slavery to two concrete situations: religiously motivated hate crimes and racial profiling of Arabs and Muslims. These two examples do not necessarily represent all of the situations in which the badges and incidents of slavery remedy might apply, nor are the preliminary conclusions I reach here necessarily correct. Rather, these examples are selected because they are illustrative of several lingering vestiges of the slave system: fear, group stigma, and the manifestation thereof in law and custom.

1. Religiously Motivated Hate Crimes

Nelson, discussed above, held that a hate crime against a Jewish victim constituted a badge or incident of slavery.[211] The *Nelson* court's conclusion was correct in application, but not as a general principle that religious discrimination always constitutes a badge or incident of

[211] United States v. Nelson, 277 F.3d 164, 213 (2d Cir. 2002).

slavery. While Jews were obviously never enslaved in the United States, the critical factor rendering the attack in that case a badge or incident of slavery was the centrality of the injury at issue to the institution of chattel slavery. As the court noted, "acts of violence or force committed against members of a hated class of people with the intent to exact retribution for and create dissuasion against their use of public facilities have a long and intimate historical association with slavery and its cognate institutions."[212] The important limiting principles in *Nelson*, then, were that (1) the injury at issue (violence that has the purpose or effect of intimidation) was based upon membership in a definable and historically despised minority group, and (2) such injuries were real, concrete aspects of the system of slavery and its supporting private customs and public laws (retaliation against members of the despised group in order to discourage their use of public facilities that all other citizens could freely use).[213]

There are two additional facts in *Nelson* that, although not expressly relied upon by the court, establish that the attack in that case amounted to a badge or incident of slavery within the analytical framework this Article proposes. First, *Nelson* involved mob violence. Far from being an isolated incident of racial or religious hatred motivated by one individual's animosity toward the victim's heritage, the victim's stabbing in *Nelson* was the culmination of what can only be characterized as a mob lynching.[214] Second, the trigger for the lynch mob was not just that the victim was Jewish, but *identifiably* Jewish.[215] Thus, the victim's identity was highly relevant, as illustrated by the court's recognition that Jews have historically been a "hated class of people" [216] and its tacit acknowledgement that they have been

[212] *Id.* at 189.

[213] *See id.* at 189-90 (discussing use of such private violence by slave masters to maintain control over enslaved persons, and continued use of such violence after slavery's abolition to prevent freedmen from exercising their legal freedom in meaningful ways). Had any of these critical elements been missing, the court indicated that the statute's constitutionality until the Thirteenth Amendment might have been a closer question. *See id.* at 191 n.25 ("[A] statute, for example, that federally criminalized private racially motivated violence quite generally [without requiring that such violence interfere with use of a public facility] might or might not be constitutional under the Thirteenth Amendment."). For arguments that Congress does have the power under the Thirteenth Amendment to pass general hate crimes legislation, see TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM, *supra* note 13, at 149-54.

[214] *See Nelson*, 277 F.3d at 169-70.

[215] *Id.* at 170 (noting that victim was wearing Orthodox Jewish attire and that crowd shouted "get the Jew" after seeing him).

[216] *Id.* at 189; *cf.* Westberry v. Gilman Paper Co., 507 F.2d 206, 210 (5th Cir. 1975)

the targets discrimination as virulent (if perhaps not as widespread or systemic) as that inflicted upon the descendants of the enslaved. Mob violence targeting a person because of his identifiable membership in a hated class was one of the primary tools white supremacists used to maintain slavery and control over the freedmen after the end of slavery.[217] If the Thirteenth Amendment does not promise at least the freedom from fear of mob violence on our public streets because of one's identifiable membership in a historically hated minority, it promises very little indeed. I do not believe that all of these factors need be present in every case alleging a badge or incident of slavery. But the confluence of these factors in *Nelson* demonstrates that the case involved an injury sufficiently linked to the institution of slavery and the structures essential to and created by it to be considered a lingering vestige of that institution within the analytical framework this Article proposes.

2. Racial Profiling of Arabs and Muslims in Terrorism Investigations

The efficacy and constitutionality of using race, ethnicity, or religion as a predictor of who is likely to engage in terrorist acts has been the subject of much controversy.[218] The full extent of this debate is beyond the scope of this Article. However, in addition to raising substantial concerns under the Fourth Amendment and the Equal Protection Clause, I do believe that the singling out of Arabs and Muslims for suspicion of terrorism based in whole or in part on their race or religion constitutes a badge or incident of slavery under the approach this Article suggests. Again, as an initial matter, neither Arabs nor Muslims were subjected to chattel slavery in the United

(noting, in construing scope of § 1985(3), that "[t]he aim of the [Thirteenth] amendment is to provide protection for racial groups which have historically been oppressed").

[217] *See, e.g.*, *Nelson,* 277 F.3d at 189 ("[T]here is widespread agreement among scholars of slavery that slavery . . . centrally involve[d] the master's constant power to use private violence against the slave [with both impunity in fact and immunity in law]."); *see also* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 119-20 (1970); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 41-49 (1997); DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868, at 98 (1979); Amar, *supra* note 13, at 156.

[218] For two very different views as to why racial profiling should not be used in terrorism investigations, see Nelson Lund, *The Conservative Case Against Racial Profiling in the War on Terrorism*, 66 ALB. L. REV. 329 (2003); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1585-86 (2002).

States. Yet the injury at issue bears such an intimate connection to the societal structures both supporting and created by slavery that it should be seen as a badge or incident of slavery. It is, in fact, the modern manifestation of an evil that is inconsistent with our Reconstructed Constitution. The argument that racial or religious profiling of Arabs and Muslims[219] today violates the Thirteenth Amendment depends not on generalities about whether all racial prejudice amounts to a badge or incident of slavery but rather, as with all badges and incidents of slavery claims, rests upon the understanding that slavery engraved certain specific prejudices that were useful to a slaveholding society into American law and custom.

Racial profiling occurs when law enforcement officials use race as an indicator of possible criminality. While defenders of racial profiling argue that it is an effective law enforcement tool that simply relies upon accurate data regarding rates of criminality among various ethnic groups,[220] the practice of racial profiling is invariably influenced by explicit or implicit stereotypes and assumptions about the dangerousness of the "other."[221]

Elsewhere, I have argued that the historical de jure and de facto entwinement of blackness with "dangerousness" and the use of law enforcement power to enforce this stigma renders racial profiling of African Americans a badge or incident of slavery.[222] It is true that the presumption of congenital criminality or increased likelihood of dangerousness has most often been applied to African Americans. The centrality of racialized law enforcement to the institution of slavery, however, renders it a badge or incident of slavery when applied to any person who is singled out for law enforcement attention solely or primarily because of his or her identifiable membership in a feared or hated minority.

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[219] A person can, of course, be of Arab descent and not Muslim, or be a Muslim of non-Arab descent. While a person's ethnic descent is usually visible and a person's religion generally is not, I am using those terms interchangeably for purposes of this brief discussion under the assumption that the stigma of group dangerousness is applied similarly to both groups in the post-September 11 environment.

[220] *See, e.g.*, Heather MacDonald, *The Myth of Racial Profiling*, CITY J., Spring 2001, at 1, *available at* http://www.city-journal.org/html/11_2_the_myth.html (arguing that opposition to racial profiling arises out of "willful blindness to the demographics of crime").

[221] *See, e.g.*, DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 149 (2002) ("Much of what we think of as racial profiling comes from attitudes and beliefs people hold about certain racial or ethnic groups.").

[222] *See generally* Carter, *supra* note 13.

Race-based criminal suspicion was crucial to the institution of American slavery in several ways. First, the myth of blacks' inherent, criminal propensity (and, particularly, violent criminality) was key to dehumanizing the enslaved as "beasts" or chattel over whom brutal control was both needed and justified.[223] Second, the various slave codes in force during slavery and the Black Codes that replaced them after the Civil War enshrined the connection between skin color and criminality into law. These codes added both the enforcement power and perceived legitimacy of the law to the customary stigmatization of blacks as inherently predisposed toward criminality. Third, these oppressive law enforcement practices were based upon explicit appeals to white fear and were thought necessary to ensure white safety.[224]

The stigma created by the ex ante correlation of race and dangerousness and the use of law enforcement power to enforce this stigma arose out of the system of slavery, was essential thereto, and continues to exist today. When law enforcement officials apply this stigma to Arabs and Muslims because of their supposedly greater risk of terrorist violence due to their race or ethnicity, such officials are replicating one of the key aspects of the slave system: namely, subjugation of a feared group by virtue of reductionist reasoning equating membership in that group with a negative trait associated with the group as a whole.[225] The Thirteenth Amendment's drafters, while divided on certain aspects of what substantive changes the Amendment would work,[226] agreed that, at a minimum, the Amendment would guarantee civil equality, including full equality before the law.[227] When law enforcement officials single out members

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[223] *See, e.g.*, A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR, RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 8 (1978) (noting that issue of white safety and fear of insurrection helped legitimate "the dehumanized status of blacks and slaves" by treating them as inherently dangerous).

[224] For example, the South Carolina slave code stated that the code was necessary to "tend to the safety and security of the [white] people of this province and their estates" in light of the "disorders, rapines and inhumanity[] to which [blacks] are naturally prone and inclined." WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at 109-10 (1968).

[225] For the views of a security expert regarding the dangers of relying on stereotypes in terrorism investigations, see Clark Kent Ervin, Op-Ed., *The Usual Suspects*, N.Y. TIMES, June 27, 2006, at A17 ("[I]t is unjust to [stereotype] a whole group of people on account of the misdeeds of a few.") (arguing against use of racial profiling in terrorism investigations).

[226] *See supra* note 33 (discussing debate among Republican factions regarding whether Amendment would guarantee freedmen's social and political rights as well as civil rights).

[227] *See supra* note 207.

of minority groups for suspicion because of the assumption that group status is a signal of danger, the resulting climate of fear and dehumanization should be considered a badge or incident of slavery cognizable under the Thirteenth Amendment.[228]

3. The "Digital Divide" and the Badges and Incidents of Slavery

I have provided two examples of how the Thirteenth Amendment analysis proposed in this Article might apply to situations involving non-African Americans. In this section I demonstrate the limits of the badges and incidents of slavery theory via an example of a substantial form of inequality affecting African Americans that I believe does not amount to a Thirteenth Amendment violation. That example is the so-called "digital divide," or the highly racialized gap in access to and use of information technology. As the National Telecommunications and Information Administration ("NTIA") has consistently recognized, race and wealth are highly correlated with access to and use of computers, the Internet, and other forms of information technology. NTIA findings make clear that the digital divide cannot be accounted for solely by differences in family income, but also contains a significant racial component. As but one example of the relevant data, NTIA has found that that "a child in a *low-income* White family is *three times* as likely to have Internet access as a child in a comparable Black family, and *four times* as likely to have access as children in a comparable Hispanic household."[229]

[228] As but one example of the inequality and fear racial profiling creates, a recent study financed by the National Institute of Justice indicates that Arab Americans have a substantial fear of racial profiling in the post-September 11 climate. Andrea Elliot, *After 9/11, Arab-Americans Fear Police Acts, Study Finds*, N.Y. TIMES, June 12, 2006, at A15 (noting that Arab Americans responding to study "reported an increasing sense of victimization, suspicion of government and law enforcement, and concerns about protecting their civil liberties").

[229] NAT'L TELECOMM. AND INFO. ADMIN., DEP'T OF COMMERCE, FALLING THROUGH THE NET: DEFINING THE DIGITAL DIVIDE, pt. I, *available at* http://www.ntia.doc.gov/ntiahome/fttn99/part1.html (last visited Mar. 12, 2007) (first emphasis added). While a complete analysis of this complex issue is well beyond the scope of this Article, and while there is significant debate as to whether ethnicity or income is a more significant determinant of access to and use of information technology, it is worth noting that other studies have also concluded that income disparities between racial and ethnic groups only partially account for the digital divide. *See, e.g.*, Robert Fairlie, *Race and the Digital Divide*, CONTRIBUTIONS TO ECON. ANALYSIS & POL'Y, 2004, *available at* http://www.bepress.com/cgi/viewcontent.cgi?article=1263&context=bejeap (last visited Mar. 12, 2007) ("The digital divide between races, however, is not simply an 'income divide' as income differences explain only 10 to 30 percent of the gaps in access to technology.").

The digital divide is by most accounts a real and significant problem, with African Americans and Latinos grossly overrepresented in the ranks of those without sufficient access to vital tools of our information age. This information disparity is sure to perpetuate and perhaps worsen existing racial inequalities. And yet, under the analysis proposed in this Article, it is not likely to amount to a badge or incident of slavery. When considering the digital divide as to African Americans, the first part of my proposed framework, which requires an examination of the link between the aggrieved individual and the institution of chattel slavery, is easily satisfied. It is the second part — which requires an examination of the relationship between the complained-of injury and chattel slavery — that is weakest in the digital divide context.

Disparities in access to information technology surely have real-world consequences for those on the wrong side of the digital divide. The fact that such disparities are not attributable to intentional racial discrimination by governmental actors is not determinative for Thirteenth Amendment purposes because the Amendment applies to both private and government action[230] and because the Supreme Court has held open the possibility that the Amendment reaches disparate impact discrimination.[231] Nor is the problem that, from an originalist perspective, the Amendment's drafters could not have anticipated the rise of digital technology. While this is true, this Article advocates an evolutionary view of the Thirteenth Amendment's scope.[232] Finally, the fact that a contemporary form of inequality may not have existed in precisely the same form in American slaveholding society does not, under my proposed framework, prevent it from being recognized as a badge or incident of slavery today.[233]

In my view, the barrier that prevents the digital divide from being considered a badge or incident of slavery is that it has little connection to the institution of chattel slavery. It is neither analogous to a situation that existed during American slavery nor is it a contemporary form of inequality that arose out of the conditions endured by or socio-legal subordination imposed upon the enslaved. At best, it can be said that during slavery, the enslaved were denied access to the same free flow of information that free persons enjoyed and that limiting enslaved persons' intellectual freedom was a means of

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[230] *See* sources cited *supra* note 50.

[231] *See* sources cited *supra* note 52.

[232] *See supra* Part II.

[233] *See* discussion *supra* Part IV.

constraining their physical and economic freedom. While this is a reasonable argument, it presents at least one significant problem under the theory of the badges and incidents of slavery that this Article advocates. Despite the tremendous importance of information technology, the digital divide likely does not impose or arise out of a stigma of the type that characterizes the badges and incidents of slavery. One of the primary legacies of slavery is the stigma of blackness, which encompasses a host of negative characteristics, none of which is likely to be evoked by racially disparate access to information technology. Absent such a tie to the institution of chattel slavery, the digital divide, while unjust as a matter of policy and even potentially violative of other provisions of federal or state law, would not be considered a badge or incident of slavery under the approach this Article advocates.[234]

C. The "Black-White Binary Paradigm" and Commonality of Oppression: Criticism and Response

This Article proposes that the badges and incidents of slavery be evaluated with specific reference to the damaging effects of the institution of slavery itself and the experience of African Americans under that system and thereafter. While I have endeavored to make clear that this analytical structure does not limit the applicability of the badges and incidents of slavery remedy solely to African Americans, one significant criticism of my proposal is that it plays into the "Black-White Binary Paradigm" that has come under increasing criticism in the critical race studies literature.[235] The problem presented by the Black-White Binary Paradigm of civil rights has been neatly encapsulated as follows: "We have a place for the Negro and a place for the white man: the Mexican is not a Negro, and the white man refuses him equal status."[236] In other words, the Black-White Binary Paradigm is "the conception that race in America consists, either exclusively or primarily, of only two constituent racial groups, the Black and the White."[237] While recognizing the centrality of the

[234] It is worth reiterating that the analysis in this section of examples and counter-examples of the badges and incidents of slavery is highly preliminary and is intended only to explore the limits of the theory proposed herein.

[235] Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 1213 (1997) (internal quotation marks omitted).

[236] *Id.*

[237] *Id.* at 1219.

African American experience to American law and history, critics of this paradigm argue that by constructing our understanding of civil rights law solely with reference to the African American experience with white racism, and by forcing the experiences of other groups to fit this paradigm, we marginalize non-black racial minorities.

While this is a serious criticism of the approach advocated in this Article and it deserves more consideration than I can provide here, a few responses are appropriate. First, one can desire a society based upon equality of all persons while recognizing that not every legal remedy need apply in the same way to all persons in every conceivable situation even if such a result would be desirable as a matter of policy.[238] The interpretative approach advocated in this Article concedes the applicability of the axiom that the fact that one has a hammer does not make every problem a nail. Second, it is important as a matter of reparative justice and historical accuracy not to lose sight of the fact that only African Americans were held as property in this country and systematically dehumanized and brutalized both by law and by private action sanctioned or ignored by the legal system. [239] It is clear that African Americans generally fare the worst today in almost every conceivable category: they tend to have lesser educational achievement and opportunity, worse health, less family wealth, lower incomes, less political power, and are disproportionately the subjects of the criminal justice system.[240] Last, to state a perhaps

[238] *Cf.* United States v. Nelson, 277 F.3d 164, 191 n.27 (2d Cir. 2002) ("[T]he post-Civil War amendments' specific historical focus on [protecting] black Americans and the amendments' generally egalitarian language are all too often in tension.").

[239] Professor Joyce McConnell, who has forcefully argued that violence against women can be a form of involuntary servitude prohibited by the Thirteenth Amendment, has just as forcefully argued against the "women as slaves" metaphor:

> No matter how rhetorically useful this metaphor [may seem, it] . . . remains grossly inaccurate and inherently racist. It obscure[s] the fact that white women were slaveholders or beneficiaries of the slave system. It fail[s] to recognize that even though there were significant legal, political and social restraints on white women, they did not as a class suffer in the way that African Americans did under slavery. Finally, it ignore[s] the fact that African American women were slaves and that other women were not, no matter what their subordinate legal or socio-economic status.

McConnell, *supra* note 11, at 207-08.

[240] *See, e.g.*, Harold A. McDougall, *For Critical Race Practitioners:* Race, Racism and American Law (4th ed.) *by Derrick Bell*, 46 HOW. L.J. 1, 9 n.37 (2002) (book review) (providing statistics of various socioeconomic measures); *see also id.* at 37 ("The incidence of black arrest, arraignment, detention without parole, conviction, harsh sentencing (the death penalty in particular) and denial of parole is, in every instance,

redundant proposition, but one that can be easily overlooked: in construing a constitutional tool intended to remedy the lingering effects *of slavery*,[241] the system of slavery itself should provide the point of reference, not merely as a pro forma starting point but as an integral part of the analytical structure.

CONCLUSION

The Thirteenth Amendment provides a vibrant legal basis for Congress and the judiciary to craft legal remedies to confront the legacies of slavery in the United States. It would be misguided as a matter of originalism to interpret the Thirteenth Amendment as a mere historical curiosity whose sole purpose was accomplished with the end of chattel slavery. If the Thirteenth Amendment is to realistically mean anything, however, it cannot mean everything. While it is tempting in the current regressive climate in the area of civil rights to turn to the relatively blank slate of the Thirteenth

massively higher than the incidence for white accused."); Edmund L. Andrews, *Blacks Hit Hardest by Costlier Mortgages*, N.Y. TIMES, Sept. 14, 2005, at C1 (reporting that Federal Reserve's 2005 nationwide lending survey revealed that blacks were three times as likely as whites at similar income levels to have costlier "sub-prime" home mortgages which, for buyer of $200,000 home, would translate to extra $3,000 in annual interest payments); Bob Herbert, Op-Ed, *An Emerging Catastrophe*, N.Y. TIMES, July 19, 2004, at 17 (detailing employment crisis among black men). While the statistics cited above usually are given in terms of "blacks," which presumably includes recent African immigrants, for example, there is every reason to believe that the statistics would be worse if limited to descendants of the enslaved, i.e., "African Americans." For example, the descendants of the enslaved fare much worse in higher education at elite schools than African immigrants. The reasons for this are the subject of much debate. *See* Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, N.Y. TIMES, June 24, 2004, at A1 (noting that more than majority of black students at Harvard "were West Indian and African immigrants or their children, or to a lesser extent, children of biracial couples"). Despite the depressing litany above, however, I also recognize that despite all the challenges African Americans face, they are arguably "the most well-to-do nonwhites in the world" by global socioeconomic measures. McDougall, *supra*, at 13 n.52 (quoting Derrick Bell, RACE, RACISM AND AMERICAN LAW (4th ed. 2000)).

[241] Some would argue that differences in social status are primarily biological or otherwise innate and not caused by sociological conditions or the history of past discrimination. *See, e.g.*, RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994) (arguing that differences in achievement are at least partially attributable to innate differences in intelligence); MICHAEL LEVIN, WHY RACE MATTERS: RACIAL DIFFERENCES AND WHAT THEY MEAN 213 (1997) (same). I do not intend to enter the "biology as destiny" debate here because others have already shown the flaws in these theories. *See, e.g.*, THE BELL CURVE WARS: RACE, INTELLIGENCE, AND THE FUTURE OF AMERICA (Steven Fraser ed., 1995) (collecting writings debating THE BELL CURVE).

Amendment as a remedy for a variety of social injustices, detaching the Amendment's interpretation from the legacy of slavery is likely to diminish its force as a legal remedy.