THE THIRTEENTH AMENDMENT AS BASIS FOR RACIAL TRUTH & RECONCILIATION

Michael A. Lawrence*

[This is] a country whose existence was predicated on the torture of black fathers, on the rape of black mothers, on the sale of black children. . . . Having been enslaved for 250 years, black people were not left to their own devices [after slavery ended]. They were terrorized. In the Deep South, a second slavery ruled. In the North, legislatures, mayors, civic associations, banks, and citizens all colluded to pin black people into ghettos, where they were overcrowded, overcharged, and undereducated. Businesses discriminated against them, awarding them the worst jobs and the worst wages. Police brutalized them in the streets. And the notion that black lives, black bodies, and black wealth were rightful targets remained deeply rooted in the broader society.

- Ta-Nehisi Coates, 2014[1]

---

* Professor of Law and past Foster Swift Professor of Constitutional Law (2016–2019), Michigan State University College of Law. The Author thanks Davina Bridges, Brent Domann, Camille Loftin, Leif Midgorden, and Desirae Williams for their able research assistance. The Author also thanks the 13th Amendment scholars at "The 13th Amendment and Racial Justice" Symposium held at Chicago-Kent College of Law in November 2019 and elsewhere for their insights and work. *See infra* note 92 for a summary of some of those contributions. Thanks also to the Michigan State University College of Law faculty and administration for its support. As more specifically indicated below, this Article excerpts material from my prior work originally published as *Racial Justice Demands Truth & Reconciliation*, 80 U. PITT. L. REV. 69 (2018).

1. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC MONTHLY, June 2014, at 54, 61, 69.

INTRODUCTION

This Article builds upon the foundation laid in 2018 in *Racial Justice Demands Truth & Reconciliation*, which outlined the sad reality of "a persistent, deeply-rooted systemic racism [that] has worked, without interruption, to oppress people of color on this continent . . . [f]rom the earliest days of the slave markets of Virginia in 1619, to the [present-day's continuing] economic disadvantages and disproportionately-skewed criminal justice system."[2] The human toll of this centuries-long cruel travesty, as described by Ta-Nehisi Coates, is tragic and heartbreaking.[3]

The discussion continues in this Article through the review of various possible constitutional bases for efforts toward advancing the goal of racial truth and reconciliation in America. It begins conventionally enough in Part I, in considering the potential of the Fourteenth Amendment Equal Protection Clause for enabling the further steps needed to advance the elusive goals of a racially just society. It is the Equal Protection Clause, after all, that has been the constitutional basis for much racial and other social justice progress over the past 60-some years, beginning with *Brown v. Board of Education* in 1954 and continuing into the Civil Rights era and beyond. This Article explains, however, that arguments based on the Equal Protection Clause now face a number of steep challenges in the Supreme Court, to the point where many of the earlier gains have stagnated and even regressed, largely

2. Michael A. Lawrence, *Racial Justice Demands Truth & Reconciliation*, 80 U. PITT. L. REV. 69, 72 (2018) (detailing the history of four centuries of racial injustice in North America; discussing the need for remediation; and providing examples of local, state, and international truth and reconciliation processes).

3. *See* Coates, *supra* note 1.

due to the Court's adoption of an organizing approach based on the "anti-discrimination" principle.[4]

Part II provides background on the Thirteenth Amendment; gives a brief history of the Supreme Court's Thirteenth Amendment jurisprudence; discusses what sorts of things count as "badges and incidents of slavery" under Section 1; and explains why the Court's existing strong rational basis deference for Congress's Section 2 enforcement power is mandated in the Constitution's text and structure. This Part also explains how the Amendment, in its substance, requires adherence to an organizing approach based upon the "group-disadvantaging"[5] principle—an approach that offers a promising alternative for achieving robust progress in the racial justice realm.

Part III makes the case that ongoing aspects of the systemic discrimination that has plagued Black Americans for 400 years on this continent and the entire nearly 250-year history of the United States constitute "badges and incidents of slavery" that demand doctrinal attention under the Thirteenth Amendment. Specifically, Section 1 demands judicial enforcement of private and public violations alike (including public *in*action); and that, coupled with Congress's Section 2 enforcement power plus the inherent police power possessed by the states, authorizes (or even mandates) the broad use of all manner of governmental remedies, including unapologetically race-conscious affirmative action measures (an approach that is essentially forbidden under the Supreme Court's current Equal Protection doctrine). Such approaches are necessary to atone for and to reconcile, in moral and legal terms, the truth and reality of the long history of systemic, deeply embedded racial injustice and to begin to fulfill the nation's promise of liberty and justice for all.

I. THE FOURTEENTH AMENDMENT EQUAL PROTECTION CLAUSE

[N]or [shall any state] deny to any person . . . the equal protection of the laws.

- U.S. CONST. amend. XIV[6]

The Equal Protection Clause, once derided by Supreme Court Justice Oliver Wendell Holmes, Jr. as "the usual last resort of constitutional arguments," emerged from its nearly century-long dormancy with the 1954 *Brown v. Board of Education*[7] decision, in which the Supreme Court held that officially sanctioned, racially "separate but equal" public schools are unconstitutional,[8] terminating some 60 years of Court-sanctioned racial apartheid.[9] "Separate educational facilities are

4. *See infra* notes 16–18, 25–59 and accompanying text.

5. *See infra* notes 19–21, 60–67 and accompanying text.

6. The Equal Protection Clause has been held by the Supreme Court to apply to both state *and* federal government actions. *See* Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954).

7. Brown v. Bd. of Educ., 347 U.S. 483, 493–95 (1954).

8. *Id.*

9. *See* Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896) (affirming the competency of state and local governments to impose racially "separate but equal" accommodations on railroad cars and other public services).

inherently unequal," the *Brown* Court explained, "depriv[ing children] of the equal protection of the laws guaranteed by the Fourteenth Amendment."[10] In relatively short order thereafter, the Warren Court struck down racially discriminatory official practices in a broad range of contexts,[11] thus putting an end—over fierce southern opposition—to Jim Crow and paving the way for the legislative and social reforms of the Civil Rights Era.

The Equal Protection Clause finds its modern doctrinal roots in dicta—specifically, footnote 4 of the 1938 *Carolene Products* case, in which Justice Stone, in speculating upon possible exceptions for applying a default, deferential "rational basis" standard of review, wrote: "Nor need we enquire whether . . . [more exacting judicial scrutiny should] enter into the review of statutes directed at . . . racial minorities, . . . [or] whether prejudice against discrete and insular minorities . . . may call for a . . . more searching judicial inquiry."[12]

In the mid-late twentieth century, the Court gradually identified five such instances when heightened scrutiny of government action would apply; specifically, strict scrutiny applies to governmental "suspect" classifications based on: (1) race, (2) national origin, or (3) alienage; and intermediate scrutiny applies to suspect classifications based on (4) gender or targeted at (5) children born to parents out of wedlock.[13] As of today, all classifications other than these five are presumed to be constitutional so long as they are rationally related to a legitimate government intent—usually a very easy standard for the government to meet.[14]

A. Equal Protection: Emergence of the Anti-Discrimination Principle

In the course of formulating its modern Equal Protection doctrine over the past 50 years, the Supreme Court essentially had to choose from among two basic, competing organizing approaches: one based on the "anti-discrimination" principle or one based on the "group-disadvantaging" principle.[15] Despite strong arguments favoring the latter (as discussed below), which would have greatly advanced the cause of racial justice, the Court has instead come down strongly in favor of the anti-discrimination approach.[16]

An approach based on the anti-discrimination principle is premised upon "the general principle disfavoring classifications and other decisions and practices

---

10. *Brown*, 347 U.S. at 495.

11. *See, e.g.*, Johnson v. Virginia, 373 U.S. 61 (1963) (courtroom seating); Turner v. City of Memphis, 369 U.S. 350 (1962) (public restaurants); Gayle v. Browder, 352 U.S. 903 (1956) (municipal bus system); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (bathhouses and public beaches); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses).

12. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

13. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 685–86 (6th ed. 2019).

14. *See id.*

15. The group-disadvantaging principle is alternatively referred to as the anti-subordination principle.

16. *See infra* notes 19–24, 60–65 and accompanying text (group-disadvantaging); *infra* notes 17–18, 25–59 and accompanying text (anti-discrimination).

that depend on the race (or ethnic origin) of the parties affected."[17] "If a society can be said to have an underlying political theory," Paul Brest elaborated in 1976, "ours has not been a theory of organic groups but of liberalism, focusing on the rights of *individuals*, including rights of distributive justice. . . . [T]he antidiscrimination principle . . . attributes no moral significance to membership in racial groups."[18]

In direct contrast, an approach based on the group-disadvantaging principle considers the more relevant equality inquiry to be, as its name suggests, discriminations perpetrated against *groups*. Owen Fiss, also writing in 1976, countered that, "the group-disadvantaging principle . . . has as good, if not better, claim to represent the ideal of equality, one that takes a fuller account of social reality, and one that more clearly focuses the issues that must be decided in equal protection cases."[19] "The goal of the Equal Protection Clause is not to stamp out impure thoughts, but to guarantee a full measure of human dignity for all," added Professor Laurence Tribe in his influential hornbook, favoring something other than a rigid anti-discrimination type of approach.[20] "[M]inorities can also be injured when the government is 'only' indifferent to their suffering or 'merely' blind to how prior official discrimination contributed to it and how current official acts will perpetuate it."[21]

By the time Professors Fiss and Brest were writing in 1976, the anti-discrimination principle had already gained a foothold in the Supreme Court, but because the equal protection doctrine was still in its formative stages, Fiss and others hoped that the Court could in later years be persuaded toward adopting an approach more friendly to the group-disadvantaging principle.[22] "One purpose of this essay is simply to underscore the fact that the antidiscrimination principle is not the Equal Protection Clause, that it is nothing more than a mediating principle,"[23] he argued. "I want to bring to an end the identification of the Clause with the antidiscrimination principle. But I also . . . want to suggest that the antidiscrimination principle embodies a very limited conception of equality, one that is highly individualistic and confined to assessing the rationality of means."[24]

Fiss's fond hopes were not to be. In the nearly five decades following, the Court has applied an increasingly rigid anti-discrimination approach, which includes a couple of doctrinal features that create some truly bizarre (and harmful) outcomes from a racial justice standpoint.

---

17. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1 (1976).

18. *Id.* at 49–50 (emphasis added).

19. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 108 (1976).

20. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1516–19 (2d ed. 1988).

21. *Id.*

22. *See* Fiss, *supra* note 19; Brest, *supra* note 17.

23. Fiss, *supra* note 19. This Article replaces the term "mediating principle" with "organizing approach."

24. *Id.*

First, as described below, under the Court's anti-discrimination approach, there must be a showing of official discriminatory *purpose* in order for heightened scrutiny to apply.[25] It matters not whether a plaintiff can show the government action has a drastically disparate discriminatory effect on people of color; if the plaintiff is unable to demonstrate discriminatory purpose, the government's action will be presumed to be constitutional under the rational basis standard of review. Second, the Court now requires complete governmental race neutrality, whereby *any* governmental action that is race-conscious—i.e., that classifies on the basis of race—is presumed to be unconstitutional under the strict scrutiny standard of review. This same standard applies, in other words, regardless of whether the government's intent is to harm or help Black people, even in light of the knowledge of centuries of official oppression against people of color on this continent.

1. Anti-Discrimination Principle: Requirement for Discriminatory Purpose

Regarding the first feature of the anti-discrimination approach, the requirement for a showing of discriminatory governmental purpose, if there is merely evidence of discriminatory *effect* or *impact* (but not of purpose), rational basis review will apply—which of course is highly deferential toward the government.[26] This principle was first enunciated in *Washington v. Davis* in 1976, where the Court explained that while the Fourteenth Amendment's purpose is to prevent official, intentional racial discrimination, the "cases have not embraced the proposition that a law or other official act . . . is unconstitutional *solely* because it has a racially disproportionate impact."[27]

Washington involved an equal protection challenge to a written qualification test for police officers in Washington, D.C., which resulted in failing grades for a disproportionately high number of African-American applicants.[28] Because the challengers were unable to show discriminatory purpose, the Court applied rational basis review and rather easily upheld the validity of the test.[29]

Because the test in *Washington* did not on its face discriminate against racial minorities, it is tempting to conclude that it was not racially discriminatory. However, considering the invidious effects of centuries of deeply rooted, systemic educational discrimination against generations of minority communities of color, it is little wonder that there would be negative effects in terms of educational resources and opportunities, which ripples to the ability of test-takers to succeed.[30] In contrast, under an alternative group-disadvantaging approach, the Court could review the test under heightened scrutiny in order to provide equality to a distinctly identifiable racial group and strike down use of the test unless the government is able to meet its burden as to the necessity of the test score in the face of test score disparities between racial groups.

---

25. *See infra* notes 26–40 and accompanying text.
26. *See, e.g.*, CHEMERINSKY, *supra* note 13, at 686.
27. Washington v. Davis, 426 U.S. 229, 239 (1976).
28. *Id.* at 233.
29. *Id.* at 247–48, 252.
30. *See generally, e.g.*, Coates, *supra* note 1.

As Fiss observes, *Washington's* requirement that the plaintiff prove the government's discriminatory purpose "confronts the plaintiffs with enormous evidentiary burdens. No one can be expected to admit to charges of cheating, and rarely is the result so striking . . . as to permit only one inference—discrimination on the basis of a suspect criterion."[31]

Another case emblematic of how the Court's show-of-purpose requirement operates in real life is *McCleskey v. Kemp*.[32] In this 1987 case, McCleskey, a Black man who was on death row in Georgia after having been convicted of first-degree murder, challenged his death sentence on the grounds that the Georgia criminal justice system was rife with racial discrimination.[33] In support of his claims, he provided data from the Baldus study, an exhaustive, highly credible empirical work which demonstrated, for example, that "even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks."[34] Moreover, the study suggested those with the highest possibility of receiving the death sentence are Black defendants who kill white victims.[35]

Despite these facts, a narrow majority of the Supreme Court upheld his death sentence, reasoning that because there was no evidence of discriminatory purpose by the specific jury and prosecutor in his particular case, rational basis review should apply—despite the clear empirical data showing the discriminatory effect.[36] The Court stated, "McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence."[37] Moreover, to McCleskey's claim that the state as a whole was acting with a discriminatory purpose by allowing the capital punishment statute to remain in effect despite its racially discriminatory effects, the Court said "no":

> "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." For this claim to prevail, McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect.[38]

Talk about a difficult evidentiary burden. "The statistical evidence in this case relentlessly documents the risk that McCleskey's sentence was influenced by racial

---

31. Fiss, *supra* note 19, at 142.
32. McCleskey v. Kemp, 481 U.S. 279, 292 (1987).
33. *Id.* at 291–92.
34. *Id.* at 287.
35. *Id*.
36. *Id.* at 292–93 ("[A] defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'") (quoting Whitus v. Georgia, 385 U.S. 545, 550 (1967)).
37. *Id.*
38. *Id.* at 298 (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)) (citations omitted).

considerations," the dissent observed.[39] This is Georgia, after all, which for decades "operated openly and formally precisely the type of dual system the evidence shows is still effectively in place," thus, "Georgia's legacy of a race-conscious criminal justice system . . . indicates that McCleskey's claim is not a fanciful product of mere statistical artifice."[40] In short, the Court's elevation of form over substance in insisting that challengers must prove purposeful racial discrimination fails to account for on-the-ground evidence of centuries of systemic racial injustice.

2. Anti-Discrimination Principle: Requirement for Race-Neutrality

Under the second feature of the anti-discrimination principle—the requirement for race-neutrality, or "color-blindness"—*all* governmental race-conscious measures are presumptively unconstitutional. The first iteration of this requirement originated in 1944,[41] when the Court announced that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny."[42]

This early statement focused on restrictions *curtailing* the rights of a single racial minority group—that is to say, government actions which *harmed* the group. It was from these foundations that the Court held in *Brown*, in 1954, that laws mandating racial segregation in schools—laws which harm people of color—are presumptively unconstitutional.[43]

Over the succeeding decades, the modern Court broadened this test to include not only government actions which harm a racial minority group but also, counter-intuitively, those that *help* previously disadvantaged racial minority groups—i.e., affirmative action plans. The Court first addressed affirmative action in 1978 in *Regents of the University of California v. Bakke*,[44] which overturned a racial set-aside program. The Court held that race may be used as one factor in promoting diversity but did not settle upon a standard of review.[45]

This changed in the 1990s and 2000s when the Court firmly established its present-day strict scrutiny standard for race-conscious affirmative action programs. The Court first enunciated the approach in the government contracting context, in *Adarand Constructors, Inc. v. Pena*, stating, "we hold today that all racial classification, imposed by whatever federal, state, or local government actor, must

---

39. *Id.* at 328 (Brennan, J., dissenting).

40. *Id.* at 328–29 (Brennan, J., dissenting).

41. This followed from the Court's speculations in *Carolene Products* footnote 4 upon imposing differing standards of review in differing circumstances. *See supra* note 12 and accompanying text.

42. Korematsu v. United States, 323 U.S. 214, 216 (1944). Ironically, after enunciating the "strict scrutiny" standard, the Court went on to uphold the government's exclusion of all persons of Japanese ancestry from designated military areas and their relocation to internment camps, reasoning that the government's actions were essentially justified by "pressing public necessity." *Id.* at 216–18.

43. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

44. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

45. *See id.* at 311–19.

be analyzed by a reviewing court under strict scrutiny."[46] The Court first imposed strict scrutiny as the standard of review for higher education affirmative action plans in 2003 in *Grutter v. Bollinger*,[47] later reaffirming its use in 2016 in *Fisher v. University of Texas at Austin*.[48] In the course of its development, the Court's anti-discrimination approach has regularly engendered spirited opposition at any given time from four of the following dissenting justices: Justices Blackmun, Breyer, Ginsburg, Souter, Stevens, and later, Justices Kagan and Sotomayor. For example, as argued by Justice Stevens, dissenting in *Adarand*:

> There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially," should ignore this distinction.
>
> . . .
>
> The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. . . .
>
> The Court's explanation for treating dissimilar race-based decisions as though they were equally objectionable is a supposed inability to differentiate between "invidious" and "benign" discrimination. But the term "affirmative action" is common and well understood. Its presence in everyday parlance shows that people understand the difference between good intentions and bad.[49]

---

46. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (adding that "[i]n other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests").

47. Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("We have held that all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.' . . . We apply strict scrutiny to all racial classifications to '"smoke out" illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.'") (first quoting *Adarand*, 515 U.S. at 227; and then quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion)).

48. Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2207–08, 2221 (2016) ("[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, . . . [r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny.") (first quoting *Richmond*, 488 U.S. at 505; and then quoting Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 308 (2013)).

49. *Adarand*, 515 U.S. at 243, 245 (Stevens, J., dissenting); *see also infra* note 59 and accompanying text.

From a racial equity standpoint, the problem with the majority's color-blind, strict scrutiny approach in these cases is crystalized in the 2007 case, *Parents Involved in Community Schools v. Seattle ("PICS")*.[50] In *PICS*, two school districts, one in Seattle, Washington, and one in Jefferson County (Louisville), Kentucky, were taking active efforts by using race-conscious formulas requiring racial enrollments to fall within certain ranges. This was done in attempt to comply with the 1954 mandate of *Brown v. Board of Education* to maintain desegregated school districts.[51] Despite the fact that the school districts were doing exactly what the spirit and text of *Brown* would require them to do, a plurality of the Court, applying strict scrutiny, struck down the plans. Indeed, the plurality imposed an even *more* rigorous review here than in the higher education context (where *Grutter* held that achieving diversity is a compelling interest) by holding that racial diversity is *not* a compelling governmental purpose in the K-12 educational context.[52] In other words, in the view of the *PICS* plurality, race cannot be considered in K-12 districting[53]—despite the *Brown* Court's directive to the contrary 50 years earlier.

Chief Justice Roberts explained for the plurality:

> Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."[54]

Accordingly, the plurality continued, "Allowing racial balancing as a compelling end in itself would 'effectively assur[e] that race will always be relevant in American life, and that the "ultimate goal" of "eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race" will never be achieved.'"[55]

In sum, according to the plurality, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[56] Chief Justice Roberts thus provided a perverse, formalist twist on the logic of a couple icons in the equal protection pantheon: Justice Harlan's *Plessy v. Ferguson* dissent ("Our constitution is color-blind, and neither knows nor tolerates classes among citizens.")[57]; and the *Brown v. Board of Education* plaintiffs' brief ("[T]he Fourteenth Amendment

---

50. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 551 U.S. 701 (2007) (involving K-12 schools, not higher education).

51. *Id.* at 709–10.

52. *Id.* at 725.

53. Justice Kennedy's concurrence in *PICS* agreed with the four dissenters that racial diversity *may* be a compelling interest, but he agreed with the plurality that the plans were not sufficiently narrowly tailored because they were too race-conscious. *Id.* at 783–84 (Kennedy, J., concurring).

54. *Id.* at 730 (majority opinion) (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).

55. *Id*. (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (plurality opinion)).

56. *Id.* at 748.

57. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

prevents states from according differential treatment to American children on the basis of their color or race.") and oral argument ("We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.").[58]

We pause for a moment to consider the irony of the plurality's 2007 reasoning, just some 50 years after *Brown*—a point that was not lost on Justice Stevens in dissent:

> There is a cruel irony in THE CHIEF JUSTICE's reliance on our decision in *Brown v. Board of Education*. The first sentence in the concluding paragraph of his opinion states: "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin." This sentence reminds me of Anatole France's observation: "[T]he majestic equality or the la[w], . . . forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." THE CHIEF JUSTICE fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, THE CHIEF JUSTICE rewrites the history of one of this Court's most important decisions.[59]

In short, by requiring public entities to strictly adhere to a "color-blind" approach devoid of racial considerations, the current Court completely misses the point of *Brown*, and in so doing, does grievous harm to the cause of achieving racial justice in America.

B. Equal Protection: The (Preferred) Group-Disadvantaging Principle

While an anti-discrimination approach has a certain formalist appeal—*of course* fair-minded folks would prefer, in theory, that race should never need to be a factor in government decision-making, much in the way that, say, for example, eye color is irrelevant[60]—it completely ignores the reality of the deeply embedded racial injustice that still exists in this country after 400 years of systemic oppression. This is not a level playing field. The sad irony of the Court's approach in equating, for analytical purposes, helpful government actions with harmful government actions is that it is *much* more difficult for government to pass laws intended to help people of color than to pass laws intended to assist, say, poor people. Both are worthy recipients of government assistance, yet under the Court's doctrinal equal protection framework only the latter are realistically able to receive directed government help.

In marked contrast, an approach based on the group-disadvantaging principle ameliorates the inherent problems posed by the anti-discrimination principle, by allowing—and perhaps mandating[61]—race-*conscious* governmental approaches. As Professor Owen Fiss explained in 1976, "blacks were the intended

---

58. *PICS*, 551 U.S. at 747 (citations omitted).

59. *Id.* at 798–99 (Stevens, J., dissenting) (citations omitted).

60. *See, e.g.*, RICHARD A. WASSERSTROM, *Racism and Sexism*, *in* PHILOSOPHY AND SOCIAL ISSUES: FIVE STUDIES 23–43 (1980).

61. *See infra* note 192 and accompanying text.

primary beneficiaries, [and] it was a concern for their welfare that prompted the [Equal Protection] Clause."[62] It is thus odd to premise interpretation of the Clause on *rejecting* group identity. "There are natural classes, or social groups, in American society and blacks are such a group," he explains.[63] "Blacks are viewed as a group; they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of the group; and much of our action, institutional and personal, is based on these perspectives."[64]

We should not allow the ideal of individualism or of a "classless society" to obfuscate the social importance of group identity, Fiss suggested. "Even if the Equal Protection Clause is viewed as the means for furthering or achieving these individualistic ideals . . . , there is no reason why the Clause . . . must be construed as though it is itself governed by that ideal."[65]

The utter failure of the group-disadvantaging principle to establish a foothold with a Supreme Court majority in the following decades (and the resultant sorts of bizarre outcomes described above)[66] prompted scholarly critiques that lamented the failed promise of the Equal Protection Clause to backstop more robust racial justice reforms. Writing in 2002, for example, Professor Robin West lauded the overarching theme contained within the 1976 Fiss article ("Proposal"), but suggested that it made three important missteps that "hampered the evolution" of equal protection doctrine.[67] I discuss two of those in some depth here.

1. The Proposal's Misstep on the State "Inaction" Issue

The Proposal's first mistake was "accept[ing] and endors[ing] the argument that the Equal Protection Clause, because it clearly is directed at states, rather than private actors, is therefore directed at state action, rather than state inaction."[68] The text of the Clause, after all, "explicitly targets not state action, but rather, state inaction," Professor West argued.[69] In mandating that "[n]o state shall deny to any person the equal protection of the law," the Clause "seemingly forbids the states from failing to take, or refusing to take, or neglecting to take, whatever action is

62. Fiss, *supra* note 19, at 147.
63. *Id.* at 148.
64. *Id.*
65. *Id.* at 150.
66. *See* discussion *supra* Section I.A.
67. Robin West, *Groups, Equal Protection and Law*, 2 ISSUES LEGAL SCHOLARSHIP [i], 1–2 (2002) (suggesting that the proposal's first mistake was in not embracing the position that the Equal Protection Clause was directed not only to state action but also state *in*action; its second mistake was in failing to "countenance the possibility that the Court would take a more regressive position on race matters than the elective branches;" and its third mistake was in "fail[ing] to tie his own proposed principle to a deeper understanding of the point of law, and of constitutional law in particular."); *see also, e.g.*, Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607, 1624–25 (2012) (criticizing the Court's judicially created state action requirement as improperly thwarting Congress's ability to properly enforce the Reconstruction Amendments).
68. West, *supra* note 67, at 2.
69. *Id.*

required (such as passing legislation) that otherwise would equally protect citizens from some unspecified danger."[70]

The Proposal concluded that targeting state inaction would come too close to effectively applying the Clause to private action, which is prohibited.[71] West thought this conclusion gave away too much: "To point the clause and the courts toward state inaction rather than state action is not at all the same thing as pointing them toward private rather than state conduct, or private actors rather than state officials," she explained.[72] "[I]t just doesn't follow . . . that it is state action, rather than state inaction, which is [the Clause's] primary target."[73] Instead, "[a] state's failure to criminalize private violence perpetrated by one group of citizens against another group of citizens (such as violence visited upon freed blacks, for example, in the wake of the civil war, or violence inflicted in patriarchal families upon spouses, or children)," she speculates, "might well be an example, even a paradigmatic example, of a state's denial of equal protection; likewise its failure to enforce criminal laws forbidding such conduct or its failure to prosecute those who breach them."[74]

Conflating state inaction with private misconduct "completely shield[s] the moral and political problem of egregious state inaction, or neglect, from constitutional scrutiny," which leads to the dire consequence of distracting from "what was . . . intended [to be a] core target of the Equal Protection Clause – the failure of states to accord freed blacks the equal protection of laws prohibiting private violence against them."[75] As a result, this broad-based, ambitious goal for the clause goes unmet. "[W]e are deprived of the experience," she lamented, "of a century long judicial development of the meaning of the clause from *that* starting point – a state's failure to protect its citizens—rather than from the quite different point of departure – irrational legislation – which the modern court assumes to be the nub of the phrase."[76]

Recall *McCleskey*, for example, in which the State of Georgia, through its own inaction, perpetuates a system that allows for gross racial disparities in capital sentencing.[77] Under the Proposal, "we are deprived of the opportunity to understand and develop what might be the 'penumbral' effects of the Equal Protection Clause, were it to be understood as one essentially forbidding state inaction in the face of unacceptable private conduct, rather than irrational state action."[78] Extending further, "it seems that a state sponsored affirmative action plan, designed to remedy the all too foreseeable consequences of slavery, Jim Crow, and then both intentional and negligent private racial subordination, would readily fall into the 'penumbra' of the equal protection clause. Similarly," she posited, "legislation aimed at alleviating

---

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 2–3.
76. *Id*. at 3.
77. *See supra* notes 32–40 and accompanying text.
78. West, *supra* note 67, at 3.

the harshest impact of private conduct in the economic sphere might be viewed as within a justified 'penumbra' of the Equal Protection Clause."[79]

Moreover, "[t]he failure of the state to take actions that alleviate the disadvantage caused to poor women and their children by virtue of the non-existence of publicly funded child care," for example, "or the failure of states to enact appropriately progressive taxation schemes, or to enforce laws against criminal violence" might then all be subject to challenge under the Equal Protection Clause, as might the failure "to enact laws against hate crimes, or to address the consequences of private sphere racial discrimination . . . if we view state inaction . . . as the nub of the phrase."[80]

West suggested that the Proposal's recognition in the literature of the Equal Protection Clause's prohibition of state inaction "might have strengthened the coherence of [the] group disadvantage principle, as well as, perhaps, its chances of eventual implementation. . . . When a state does take action to address private sphere oppression through something like state-sponsored affirmative action," moreover, "it would certainly strengthen the case for its constitutionality, if we had a better sense of the possible unconstitutionality of its failure to act at all."[81]

2. The Proposal's Misstep on the Supreme Court's Commitment and Congress's Role

The second mistake that hampered the 1976 proposal was its assumption that the Court would naturally tend to protect minorities from the oppressive actions of majoritarian legislatures.[82] This focus on the Court was misplaced, because by its textual terms, Section 5 of the Fourteenth Amendment gives the power to enforce the Equal Protection Clause to Congress, not the Court.[83] Moreover, "[t]here is just no reason," Professor West reasoned, "beyond an increasingly irrational faith based almost exclusively on the *Brown* decision and the particular Court that decided it, to think that the Supreme Court is the institutional body attitudinally inclined to correct for the oppressive tendencies of self-serving majorities."[84]

The Proposal thus put the group-disadvantaging principle on shaky ground by not adequately accounting for the fact that the modern judiciary (aside from the highly anomalous Warren Court and early Burger Court) "will be attracted to an individual fairness, 'treat likes alike' understanding of the Equal Protection Clause, rather than a group disadvantaging understanding. They will do so, furthermore, not because of some inexplicable, will-o'-the-wisp political conservatism, but rather, for jurisprudential reasons that go to the heart of judicial ideals."[85] Simply, "[t]here is

---

79. *Id.*

80. *Id.*

81. *Id.* at 3–4; *see also infra* note 191(suggesting that state *in*action would violate the Thirteenth Amendment).

82. West, *supra* note 67, at 4.

83. U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

84. West, *supra* note 67, at 4.

85. *Id.* at 5 ("[T]he very point of adjudicative law: whatever else courts do . . . they must, somehow, treat 'like cases alike.'").

no fit at all . . . between the 'group disadvantage' understanding of equal protection, and either jurisprudential conceptions of law, shared understandings of the Constitution, or judicial role and function."[86]

A point the Proposal failed to make is that it is the *legislature's* responsibility, in enforcing the Equal Protection Clause, to consider the effects of majoritarian actions on minority groups. As contrasted with courts, "[l]egislatures are charged with the moral work of passing laws that will protect citizens against various sorts of dangers, including the dangers posed them by other private parties," Professor West explained.[87] "What legislatures are *supposed* to do is enhance the well-being of as large a 'group' as possible, and alleviate the effects of disadvantage. And, they ought to do that—alleviate group disadvantage—equally."[88]

Moreover, "the Equal Protection Clause, mediated by a principle of 'preventing group disadvantage,' can be understood in a very straightforward way as constitutionalizing—and hence elevating—the *obligation* of legislatures to do so."[89]

* * *

In the real world, of course, under the modern Supreme Court's anti-discrimination-principle approach to the Equal Protection Clause, Congress and state legislatures have not adequately considered it to be their "right" (much less their "obligation") to prevent group disadvantage, especially when added to the Court's narrow conception of Congress's Fourteenth Amendment Section 5 authority.[90]

And in the final analysis, it is highly unlikely the Supreme Court will undertake a wholesale doctrinal change to the Fourteenth Amendment Equal Protection Clause at this advanced stage, especially given the Court's current composition. The next Part therefore explains how the Thirteenth Amendment offers a promising alternative for advancing racial truth and reconciliation through various means,[91] including the systematic application of race-conscious remedies.

---

86. *Id.* at 5–6 ("[C]ourts don't routinely—or ever—strive to 'not disadvantage groups' (or advantage them). Rather, every judicial action . . . [is done] with full or partial awareness that the collateral damage of judicial action might be that someone or some group is being disadvantaged.").

87. *Id.* at 6.

88. *Id.*

89. *Id*. (emphasis added).

90. *See infra* notes 161–62 and accompanying text.

91. As part of this enterprise, it is helpful to migrate the theoretical underpinnings of the group-disadvantaging mediating principle (discussed in Part I, *supra*) to the discussions involving the Thirteenth Amendment. The Thirteenth Amendment offers a promising approach for actuating the group-disadvantaging principle. While neither Owen Fiss nor Robin West expressly address the potential for Thirteenth Amendment arguments, if the Fourteenth Amendment Equal Protection Clause (which in essence was created to bolster the Thirteenth Amendment) was intended primarily to benefit and protect Blacks, certainly the root provision itself—i.e., the Thirteenth Amendment—would do at least the same. *See supra* note 62 and accompanying text.

II. THE THIRTEENTH AMENDMENT AS GROUNDS FOR RACIAL TRUTH AND RECONCILIATION

> *§1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.*
>
> *§2. Congress shall have power to enforce this article by appropriate legislation.*
>
> - U.S. CONST. amend. XIII

The Thirteenth Amendment, for all of its historical significance and import in formally abolishing slavery from the constitutional firmament, has received relatively little attention in the courts and (until recently[92]) scholarly commentary. This Part provides some Thirteenth Amendment background, gives a brief history of the Supreme Court's Thirteenth Amendment cases, discusses what sorts of things count as "badges and incidents of slavery" under Section 1, and explains why the Court's existing strong rational basis deference for Congress's Section 2 enforcement power is mandated in the text and structure of the Constitution.

---

92. Somewhat remarkably, given the Amendment's massive potential for advancing racial justice, it has only been within the last dozen years or so that scholarly momentum around the Thirteenth Amendment has begun to coalesce. Earlier works certainly existed, see, for example, Alexander Tsesis, *Freedom to Integrate: A Desegregationist Perspective on the Thirteenth Amendment*, 38 U. TOLEDO L. REV. 791, 791 n.5 (2007), but more concerted collective Thirteenth Amendment project efforts probably originated with a conference at the University of Toledo in 2007. *See* Symposium, *A New Birth of Freedom: The Thirteenth Amendment—Past, Present and Future*, 38 U. TOLEDO L. REV. 791 (2007). Subsequent scholarly gatherings focusing on various aspects of the Thirteenth Amendment have been held at numerous venues. *E.g.*, THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT (Alexander Tsesis ed., 2010) (compiling many papers from this conference at the University of Chicago); Symposium, *The Maryland Constitutional Law Schmooze*, 71 MD. L. REV. 12 (2011) (University of Maryland); Symposium, *The Thirteenth Amendment: Meaning, Enforcement, and Contemporary Implications*, 112 COLUM. L. REV. 1447 (2012) (Columbia University); *13th Amendment Symposium*, CARNEGIE MELLON UNIV., https://www.cmu.edu/history/cause/archived-activities/20th-aniv/13thamendment/index.html (last visited July 25, 2020) (Carnegie Mellon and the University of Pittsburgh in 2015); *Thirteenth Amendment and Economic Justice Symposium*, WILLIAM S. BOYD SCH. L., https://scholars.law.unlv.edu/amend13/ (last visited July 25, 2020) (University of Nevada, Las Vegas in 2018); *Trauma, Policing & The 13th Amendment: The Long Arc to Freedom*, https://www.law.uci.edu/centers/cbghp/activities/022219-Trauma-Policing-13th-A-Draft-Schedule.pdf (last visited July 25, 2020) (University of California Irvine in 2019); Symposium, *The Original Meaning and Continuing Relevance of the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL. 1 (2017) (Georgetown University); *The Thirteenth Amendment and Racial Justice*, CHICAGO-KENT C.L., http://blogs.kentlaw.iit.edu/13th/ (last visited July 25, 2020) (Chicago-Kent Law School in 2019). For a useful overview on the development of Thirteenth Amendment scholarship over the past dozen years, see, for example, Maria Ontiveros, Introduction, *The Thirteenth Amendment Through the Lens of Class and Labor*, 39 SEATTLE U.L. REV. 659 (2016) and Alexander Tsesis, Introduction, *Into the Light of Day: Relevance of the Thirteenth Amendment to Contemporary Law*, 112 COLUM. L. REV. 1447 (2012).

A. Thirteenth Amendment Background

For a brief period following the abolition of slavery, hopes for improved racial justice were high. During the Reconstruction years following the Civil War (roughly 1865–1877), the federal government employed unabashedly race-conscious and other measures to begin to remedy some of the gross race-based injustices perpetrated during the some four-score-and-seven-years of the nation's history.[93]

An early measure was the Emancipation Proclamation itself, in which Abraham Lincoln, on January 1, 1863, declared all slaves in the rebellious states to be free and allowed for Black men to serve in the Union Army and Navy.[94] Two years later in January 1865, General William T. Sherman, following his famous "March to the Sea" from Atlanta to Savannah, ordered the seizure of certain Florida, Georgia, and South Carolina coastal properties for redistribution (in 40-acre parcels) to the nearly 20,000 former slaves and other Blacks in the area.[95]

Later that month, on January 31, 1865, Congress passed the Thirteenth Amendment (the first of three "Reconstruction Amendments"), stating that: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[96] The Amendment, which "nullified the constitutional provisions . . . (e.g., the Fugitive Slave Clause; the 1808 Importation Clause)[97] that had enabled slavery to exist . . . [and gave Congress the enforcement power], was ratified by . . . the states and became part of the Constitution [that same year,] on December 6, 1865."[98]

---

93. *See, e.g.*, *infra* notes 99–102 and accompanying text.

94. *The Emancipation Proclamation*, NAT'L ARCHIVES, https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation (last updated Apr. 17, 2019) (noting that by the end of the War nearly 200,000 Blacks had served in the Union forces); *see also* Lawrence, *supra* note 2, at 80–81.

95. DAVID J. EICHER, THE LONGEST NIGHT: A MILITARY HISTORY OF THE CIVIL WAR 739 (2001); *see also* L.M. Dayton, *Special Field Orders, No. 14* (Jan. 16, 1865), *in* 1-47 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES: CORRESPONDENCE, ETC. 60–62 (1895), https://texashistory.unt.edu/ark:/67531/metapth142234/ (last updated Apr. 22, 2020).

96. U.S. CONST. amend. XIII, § 1. *See generally* James M. McPherson, *Emancipation Proclamation and Thirteenth Amendment*, *in* THE READER'S COMPANION TO AMERICAN HISTORY (Eric Foner & John A. Garraty eds., 2014). Ironically and tragically, the "except as a punishment for crime whereof the party shall have been duly convicted" language of the Thirteenth Amendment has been turned in such a way to allow the continued oppression of people of color in the succeeding 150 years, especially in the last 60 years since the demise of Jim Crow laws. *See infra* note 169.

97. U.S. CONST. art. IV, § 2, cl. 3; art. I, § 2, cl. 3.

98. McPherson, *supra* note 96; *see also* Lawrence, *supra* note 2, at 81. The Fourteenth Amendment, containing the Section 1 Equal Protection and Due Process Clauses, was passed by Congress on June 18, 1866, and ratified by three-quarters of the states on July 9, 1868. Section 1 was created largely to deal with Southern intransigence in affording the freedmen their rights. Section 2 expressly supersedes the Article I three-fifths clause:

The framers of the Thirteenth Amendment and the ratifying states had a full, first-hand view of the atrocities committed against Black people throughout the land, and they intended for the Amendment to serve as "a constitutional guarantee of the government to protect the rights of all and secure the liberty and equality of its people."[99] For its part, Congress determinedly took up the cause of providing race-conscious and other remedies to help cement, guarantee, and protect the rights of Black Americans. For example, it created the U.S. Bureau of Refugees, Freedmen, and Abandoned Lands (the "Freedmen's Bureau") through the Freedmen's Bureau Acts of 1865 and 1866.[100] The Freedmen's Bureau, "in addition to providing medical aid, housing, food, schools, and legal assistance . . . was authorized to set apart for freedmen 'such tracts of [not more than 40 acres of] land within the insurrectionary states as shall have been abandoned, or to which the United States shall have acquired title by confiscation or sale, or otherwise.'"[101] "By

---

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. CONST. amend. XIV, §§ 1–2.

99. REBECCA E. ZIETLOW, THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION 125 (2018).

100. *See* James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 475 (2018) (citing Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430–32 (1997) (citing enactments providing relief to "destitute colored women and children" and to destitute "colored" persons in the District of Columbia)); Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW U. L. REV. 477, 560–62 (1998) (citing enactments providing benefits and protection to "colored" soldiers, sailors, marines, and "heads of families of the African race"); *id.* at 559–60 (citing the Freedmen's Bureau Act and other legislation providing benefits based on "previous condition of servitude," a phrase that was "fully interchangeable" with the Black race in contemporary discourse). For a concise discussion of the literature on this point, including counterarguments, see PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1114–17 (5th ed. 2006).

101. Lawrence, *supra* note 2, at 85 (citing *Freedmen's Bureau*, HISTORY, http://www.history.com/topics/black-history/freedmens-bureau) (quoting "Freedmen's Bureau Bill" (approved March 3, 1865), as reproduced in BRUCE FROHNEN, THE AMERICAN NATION: PRIMARY SOURCES (Liberty Fund, 2008)). The Bureau could boast of a number of accomplishments during its years of existence from 1865–1872:

> [T]he Freedmen's Bureau fed millions of people, built hospitals and provided medical aid, negotiated labor contracts for ex-slaves and settled labor disputes. It also helped former slaves legalize marriages and locate lost relatives, and assisted black veterans. The bureau also was instrumental in building thousands of schools for blacks, and helped to found such colleges as Howard University in Washington, D.C., Fisk University in Nashville, Tennessee, and Hampton University in Hampton, Virginia. The bureau frequently worked in conjunction with the American Missionary Association and other private charity organizations.

Freedmen's Bureau, HISTORY, http://www.history.com/topics/black-history/freedmens-bureau. That said, ultimately the Bureau failed in its efforts to meaningfully redistribute land to Black ownership, when "most of the confiscated or abandoned Confederate land was eventually restored to the original owners." *Id.*

such representations, the prospect of 'forty acres and a mule' became the great hope toward greater independence for millions of newly-freed slaves."[102]

But it was not to be. As I have described elsewhere,[103] a series of events over the next decade served to thwart racial progress:

> Clearly serendipity was not smiling upon supporters of racial equality after 1872. Progress was stunted by the huge gains made by Democrats in the 1874 mid-term elections (made possible by concerted voter suppression efforts as well as a crippling economic depression in 1873 and 1874); and [President Ulysses] Grant's advocacy was further weakened by political scandals within his administration.[104] The *coup de grace* was the "Compromise of 1877," involving the disputed presidential election of 1876 – again with reports of widespread voter intimidation by Democrats - when Republicans agreed, in exchange for the Southern Democrats' support for Republican nominee Rutherford Hayes, to remove federal military oversight and to support home-rule in the South. Without such oversight, the Southern States – which had always fiercely resented and resisted the Freedman's Bureau and other aspects of Reconstruction – were free to enact their racially discriminatory practices and policies, and "the endeavor to reconstruct the nation on a platform of civil rights for the freedmen had essentially ended. [105]

Describing the post-War decade, W.E.B. Du Bois poignantly lamented, "The slave went free; stood a brief moment in the sun; then moved back again toward slavery."[106]

B. Case History

The Supreme Court's first explication of the Thirteenth Amendment was in the *Civil Rights Cases of 1883*.[107] In that consolidated case, which involved a challenge to the constitutionality of the Civil Rights Act of 1875 in prohibiting certain private, race-based discriminations, the Court first coined the phrase "badges and incidents of slavery": "[I]t is assumed that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[108] Although the Court ultimately decided that "denial to any

---

102. Lawrence, *supra* note 2, at 85.

103. *Id.* at 89.

104. *Id.* (citing RONALD C. WHITE, AMERICAN ULYSSES: A LIFE OF ULYSSES S. GRANT 542, 550, 569, 571–72 (2016)).

105. *Id.* (quoting WHITE, *supra* note 104, at 580–81 ("[A joint electoral commission appointed by the House and Senate] awarded Hayes all twenty electoral votes – by a vote of 8 to 7. Hayes, while still losing the popular vote. 4.2 million to 4.0 million, won the electoral vote 185 to 184.")).

106. W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 26 (Transaction Publishers 2011) (1935).

107. Civil Rights Cases, 109 U.S. 3 (1883).

108. *Id.* at 20. See Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561 (2012) for illuminating discussion of the meaning of the terms "badges" and "incidents" during the antebellum, Civil War, and post-Civil War periods.

person of admission to the accommodations and privileges of an inn, a public conveyance, or a theater, does [not] subject that person to any form of servitude, or tend to fasten upon him any badge of slavery,"[109] the case did establish a couple firm baselines regarding the nature of the Thirteenth Amendment. First, it 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"—i.e., it is self-executing; second, it "establish[es] and decree[s] universal civil and political freedom throughout the United States."[110]

In *Plessy v. Ferguson* (1896), infamous for its holding that "separate but equal" Jim Crow racial segregation laws do not violate the Fourteenth Amendment Equal Protection Clause, the Court also reasoned that it was "too clear for argument" that the laws did not violate (a narrow reading of) the Thirteenth Amendment:

> Slavery implies involuntary servitude, . . . a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services.[111]

The next development occurred in *Hodges v. United States* (1906),[112] in which the Court reversed a jury's convictions of several whites who had taken up arms and chased away Black workers from their place of employment at an Arkansas sawmill. The plaintiffs brought claims under the Civil Rights Act of 1866, which protected the right "to make and enforce contracts . . . to the full and equal benefit . . . as is enjoyed by white citizens."[113] The Court reasoned that the prosecutions could not be justified under the Thirteenth Amendment, which is "as clear as language can make it . . . . The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another."[114]

Some have declared *Hodges* thus to be the "nadir of Thirteenth Amendment jurisprudence," in that the Court "left little doubt that [it] was doing away with the badges and incidents doctrine altogether" by limiting Section 1's prohibition to literal "slavery" and "involuntary servitude,"[115] and that Congress's Section 2 enforcement authority is limited as well only to such cases.[116] "For the next six decades spanning the constitutional revolution of the 1930s and the resurgence of

---

109. *Civil Rights Cases*, 109 U.S. at 21–22 (stating instead: "The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. 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.").

110. *Id.* at 20.

111. Plessy v. Ferguson, 163 U.S. 537, 542 (1896).

112. Hodges v. United States, 203 U.S. 1, 6–7 (1906).

113. *Id.* at 4 (quoting Section 1977).

114. *Id.* at 16.

115. Pope, *supra* note 100, at 455–56 (citing McAward, *supra* note 108, at 589).

116. "The things denounced are slavery and involuntary servitude, and Congress is given power to enforce [only] that denunciation." *Id.* at 456 (quoting *Hodges*, 203 U.S. at 16).

the civil rights movement that began during World War II and continued through the 1960s," Professor Pope explains, "*Hodges* erased the badges and incidents doctrine and blocked the development of a Thirteenth Amendment jurisprudence of race."[117] The Supreme Court heard only one Thirteenth Amendment case, *Corrigan v. Buckley* (1926), where it denied a claim

> that a racially restrictive real property covenant violated the Amendment, citing *Hodges* for the proposition that [it] reached nothing more than "a condition of enforced compulsory service of one to another," and . . . "does not in other matters protect the individual rights of persons of the negro race."[118]

Finally, in 1968 the Court moved toward acknowledging the full scope that the Thirteenth Amendment's proponents had intended for it, holding in *Jones v. Alfred H. Mayer Co.*[119] that the Civil Rights Act of 1866 prohibited both private and state-backed discrimination in housing cases, and that the Thirteenth Amendment authorized Congress to prohibit private acts of discrimination as among "the badges and incidents of slavery."[120] The Court, in an opinion by Justice Potter Stewart, expressly overruled *Hodges* in stating that Congress *does* in fact have broad power under Section 2 "rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."[121]

The Court did not expressly address Section 1, however: "Whether or not the Amendment *itself* did any more than [abolish slavery and involuntary servitude is] a question not involved in this case."[122] In the course of affirming Congress's broadened authority, though, the Court implicitly conceded that Section 1 could involve badges and incidents well beyond the literal "slavery" and "involuntary servitude."[123] Pointing to the framers' *original intent* and *original understanding*, the Court explained, "many . . . opposed the Thirteenth Amendment on the very ground that it would give Congress virtually unlimited power to enact laws for the protection of Negroes in every State. And the majority leaders in Congress—who were, after all, the authors of the Thirteenth Amendment," the Court continued, "had no doubt that its Enabling Clause contemplated the sort of positive legislation that was embodied in the 1866 Civil Rights Act."[124] The Court noted that the proponents'

> chief spokesman, Senator Trumbull of Illinois, the Chairman of the Judiciary Committee, had brought the Thirteenth Amendment to the floor of the Senate in 1864. In defending the constitutionality of the 1866 Act, he argued that, if the [opponents'] narrower construction

---

117. *Id.*
118. *Id.* at 457 (quoting Corrigan v. Buckley, 271 U.S. 323, 330 (1926)).
119. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).
120. *Id.* at 439.
121. *Id.* at 440.
122. *Id.* at 439.
123. *Id.* ("Congress [may] pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.").
124. *Id.* at 439–40 (citing Cong. Globe, 38th Cong., 1st Sess. 1366, 2616, 2940-2941, 2962, 2986; Cong. Globe, 38th Cong., 2d Sess. 178-180, 180, 182, 192, 195, 239, 241-242, 480-481, 529).

> of the Enabling Clause were correct, then the trumpet of freedom that we have been blowing throughout the land has given an "uncertain sound," and the promised freedom is a delusion. Such was not the intention of Congress, which proposed the constitutional amendment, nor is such the fair meaning of the amendment itself . . . . I have no doubt that under this provision . . . we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end.[125]
>
> "Surely," the Court concluded, "Senator Trumbull was right."[126]

It is difficult to overstate *Jones'* significance. The case "elevated the Thirteenth Amendment jurisprudence of slavery to its historic zenith. For the first time a majority of the Court embraced the Republican position on the constitutionality of the 1866 Act, albeit shifted to Section 2."[127] Although the Court's reasoning—that "[a]t the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live"[128]—"was deployed to support the proposition that Congress had acted 'rationally,' it lacked the language of deference," suggests Professor Pope.[129] Justice Stewart "[wrote] directly for the Court, without interposing Congress. His opinion echoed the Republican proponents . . . in its dual focus on actual oppression and practical freedom . . . . [Stewart] found in freedom from housing discrimination a right essential . . . to avoid reducing the Amendment to a 'paper guarantee.'"[130]

Since *Jones*, few Thirteenth Amendment issues have come before the Supreme Court in the subsequent half-century. On those few occasions, the Court has declined to offer any substantive doctrinal commentary on the nature and scope of Section 1's prohibitions of "badges and incidents of slavery." In two cases, the Court upheld Congress's Section 2 power to enforce without looking with any depth into the scope of the underlying Section 1;[131] while in two other cases, the Court summarily rejected Section 1 claims while commenting upon Congress's authority to take further action.[132]

---

125. *Id.* at 440 (quoting remarks of Senator Howard of Michigan) (citing Cong. Globe, 39th Cong., 1st Sess. 322).

126. *Id.*

127. Pope, *supra* note 100, at 458.

128. *Jones*, 392 U.S. at 443.

129. Pope, *supra* note 100, at 458.

130. *Id.* at 458–59.

131. Runyon v. McCrary, 427 U.S. 160 (1976); Griffin v. Breckenridge, 403 U.S. 88 (1971).

132. City of Memphis v. Greene, 451 U.S. 100 (1981); Palmer v. Thompson, 403 U.S. 217 (1971). *See generally* Pope, *supra* note 100, at 459–62.

In the former category, the Court in *Griffin v. Breckenridge* upheld claims brought under § 1985 (enacted as the Ku Klux Klan Act of 1871) by several Black plaintiffs who had been attacked because of their race by two white men, reasoning that Congress, in light of the Thirteenth Amendment's goal "that the former slaves and their descendants should be forever free," could rationally have decided to devise "a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men."[133] Then in *Runyon v. McCrary*, the Court reasoned that because the purpose of the Civil Rights Act of 1866 (which had been duly enacted under Congress's Thirteenth Amendment Section 2 authority) was to guarantee that "a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man," private racial discrimination in the contracting for private education was unlawful.[134]

In the latter category, *Palmer v. Thompson* was a case in which the City of Jackson, Mississippi chose to shut down all of its public pools following a federal court decision declaring unconstitutional its practice of operating the pools on a segregated basis.[135] Black plaintiffs claimed that Jackson's action constituted a "badge or incident of slavery," and hence violated the Thirteenth Amendment.[136] Justice Black, for the Court, disagreed, stating simply: "To reach that result from the Thirteenth Amendment would severely stretch its short simple words and do violence to its history."[137] The Court did, however, cite with approval the proposition established in *Jones v. Alfred Mayer* that the Amendment does "empower Congress to outlaw 'badges of slavery.' . . . But Congress has passed no law under this power to regulate a city's opening or closing of swimming pools or other recreational facilities."[138]

In the other case involving a Section 1 claim, *City of Memphis v. Greene*, the Court rejected several Black plaintiffs' claim that the city's closure of a particular road was a "badge and incident of slavery" because of its racial motivation and disproportionate effect on Black motorists and property values.[139] "[Any] inconvenience [to motorists who are somewhat inconvenienced by the street closing] cannot 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."[140] As an explanation, Justice Stevens noted that almost any traffic regulation, like a temporary detour during construction or a one-way street, could affect residents of adjacent or nearby neighborhoods differently.[141] To find such "inevitable" effects "so severe as to violate the Thirteenth Amendment would trivialize the great purpose of that charter of freedom."[142]

---

133. *Griffin*, 403 U.S. at 105.
134. *Runyon*, 427 U.S. at 179.
135. *Palmer*, 403 U.S. at 218–19.
136. *Id.*
137. *Id.* at 226.
138. *Id.* at 227.
139. *See* City of Memphis v. Greene, 451 U.S. 100, 102 (1981).
140. *Id.* at 128.
141. *Id.*
142. *Id.*

Greene thus provided "the Court's first and only clear holding on the merits of a Section 1 badges-and-incidents claim since *Plessy v. Ferguson* in 1896."[143] As of today, however, some 40 years after *Greene*, the Supreme Court has not again touched upon badges and incidents. "Meanwhile, the lower courts have effectively left in place the Court's most recent statement on the Section 1 question, namely *Hodges*'s [narrow dictionary] definitions of slavery and servitude. For the past half century, no court has applied Section 1 directly to anything other than the coercion of labor," Professor Pope observes.[144]

Pope describes the doctrinal conundrum that the Supreme Court's silence causes within the federal judiciary: "[W]ith the Supreme Court maintaining that the question is 'open,' . . . [w]e might envision *Hodges* . . . as a kind of legal zombie, lumbering around blocking doctrinal development despite the extraction of its substance by *Jones* . . . . As a result," he suggests:

> we now have a truly extraordinary situation . . . . According to the [Nation's] highest tribunal . . . , there is no official answer to one of the most basic and momentous questions of Thirteenth Amendment doctrine. And because there is no answer, there cannot be a principled official explanation for that (nonexistent) answer.[145]

C. Badges and Incidents of Slavery

With the Supreme Court's and lower courts' silence, it has been left to scholars to fill in the blanks on what constitutes Section 1 "badges and incidents of slavery."[146] A growing number argue that there is strong historical support for a

---

143. Pope, *supra* note 100, at 461.

144. *Id.* at 461–62 ("[S]ome [lower courts] point to the Supreme Court's practice of declining to identify or remedy any Thirteenth Amendment violation other than the imposition of slavery or involuntary servitude, a practice that was mandated for six decades by *Hodges*. Others simply assert that Section 1 does not ban the badges and incidents."). Lower courts should be encouraged to take up the Court's invitation to interpret § 1. This is the rare opportunity for lower courts to participate in the process of doctrinal development, rather than having the doctrine handed down to them from on high. Different courts will no doubt disagree, so eventually there will be the inevitable circuit split, which will encourage further doctrinal development from the Supreme Court, itself a scary proposition, but necessary if progress toward achieving greater racial justice is to be made. *See infra* notes 148–58 and accompanying text.

145. Pope, *supra* note 100, at 462–63 ("Not since *Hodges* have the courts considered whether the outlawing of 'slavery' and 'involuntary servitude' in Section 1 might require eliminating each component, badge, or incident of slavery and not just the core features of human property and physical or legal coercion of labor."); *see also* William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1317 (2007) (describing the lower courts' approach as "misguided, . . . disregarding[, as it does,] Supreme Court precedent, the Amendment's legislative history, its historical context, and its framers' intent.").

146. Another aspect of the Supreme Court's failure to offer guidance on the issue is that it encourages over-optimistic or excessive claims.

> 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

broader reading that would include not only incidents of *literal* slavery or involuntary servitude but also, for example, the sorts of rights guaranteed in the Civil Rights Act of 1866 and more. This, Professor Pope suggests, would "restart the process, commenced by the Thirty-Ninth Congress in 1865 but derailed in *Plessy* and *Hodges*, of identifying and protecting Thirteenth Amendment rights. Whether, this process is led by judges, legislators, or social movements, it is long overdue."[147]

Regarding the original intentions of the drafters and original understandings of the ratifying states about the nature and scope of Section 1's outright prohibition of slavery and involuntary servitude, the proponents "affirmed that the Amendment guaranteed a set of 'natural' or 'civil' rights extending beyond freedom from the physical or legal coercion of labor."[148] The Amendment's House floor leader proclaimed that the amendment would be "a constitutional guarantee of the government to protect the rights of all and secure the liberty and equality of its people."[149] Some supporters referred to "incidents" or "vestiges" of slavery.[150]

Another event contemporaneous with the Thirteenth Amendment's creation offers key insights into how we think about the Amendment today. Specifically, the Civil Rights Act of 1866, passed less than six months after the

---

> to . . . 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.

Carter, *supra* note 145, at 1317; *see also* Richard Delgado, *Four Reservations on Civil Rights Reasoning by Analogy: The Case of Latinos and Other Nonblack Groups*, 112 COLUM. L. REV. 1883, 1885–86 (2012) (sounding a "cautionary note" for broad interpretations of the Thirteenth Amendment which would "aid nonblack minorities, such as Latinos, Asian Americans, Native Americans, and Middle Eastern people, [in] gain[ing] relief from oppressive conditions"). For discussion on various broader interpretations, see, for example, Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1938 (2012) (suggesting regarding the abortion debate that "[f]orced pregnancy and childbearing are . . . analogous to the slavery that existed before the Civil War"); Alexander Tsesis, *Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1688–94 (2012) (outlining arguments for the Amendment's grant of authority to Congress to protect against various forms of gender subordination, including gender-motivated violence and gender-based employment discrimination).

147. Pope, *supra* note 100, at 486; *see also* Carter, *supra* note 145; McAward, *supra* note 108.

148. Pope, *supra* note 100, at 434 (citing Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 174–79 (1951)); MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 190–91, 220–21 (2001); HERMAN BELZ, A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS, 1861-1866 118, 160 (2000); Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 473–74 (1989); VORENBERG, *supra*, at 229–30 (discussing "the views of conservative proponents, including President Andrew Johnson and the few Democrats who supported the Amendment").

149. Pope, *supra* note 100, at 434 (citing ZIETLOW, *supra* note 99).

150. *Id.*

Amendment was ratified,[151] "went beyond the mere outlawing of full-fledged slavery and involuntary servitude to guarantee a modest but significant array of civil rights."[152] Violating the Act did not require proof that anyone had been placed in chattel slavery or involuntary servitude; instead, denial of the same rights enjoyed by white citizens—like the freedom to make contracts, participate in court proceedings, own property, and enjoy the "full and equal benefit of all laws and proceedings for the security of person and property"[153]—was enough to trigger the Act. Accordingly, the Act's main supporters argued that the Amendment's prohibition of "slavery" and "involuntary servitude" already fully guaranteed the rights detailed in the Act.[154]

In identifying what sorts of practices today might constitute a badge or incident of slavery, commentators have examined two factors: (1) group targeting in core cases involving those with African ancestry and a history of slavery or servitude; and (2) some degree of causal, genealogical, analogical, or functional connection between a particular injury and the law, practice, or experience of slavery or effective re-enslavement of Black Americans post-slavery.[155] Professor Pope explains, "[s]ome say that both elements are required, while others maintain that group targeting alone should suffice. It also seems that, in some cases, a nexus with slavery or involuntary servitude by itself suffices; no group targeting is necessary."[156]

The disparate employment and other opportunities for different individuals based on skin color may be interpreted as a "badge of slavery" and hence, prohibited by Section 1 of the Thirteenth Amendment. In this respect,"being born with black skin is roughly equivalent to being born with a felony conviction," according to some studies.[157] The effects of job discrimination are a far cry from the sorts of

---

151. The Supreme Court has stated when interpreting constitutional provisions that acts of Congress:

> closely following the ratification of a constitutional provision can supply "weighty evidence" of the provision's meaning. . . . [The Act is important] both because it spawned landmark judicial decisions about the Amendment's scope, and because [it] set the template for [continuing] arguments about the badges and incidents of slavery.

Id. at 436–37 (citations omitted).

152. *Id.* at 437.

153. *Id.* (quoting Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27).

154. *Id.* at 436, 439–40.

155. *Id.* at 470 (citing G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment: Chapter IV*, 12 HOUS. L. REV. 592, 595 (1975) (stating that group targeting alone suffices); Carter, *supra* note 145, at 1366 (stating that both are required); McAward, *supra* note 108, at 608, 620–21 (stating that both are required)). McAward proposes an interesting template, but ultimately it gives away too much—Congress should not need to be browbeaten into accepting that the Supreme Court is infringing upon its broad enforcement authority.

156. Pope, *supra* note 100, at 468.

157. *Id.* at 473–74 (citing Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 955–62 (2003)). "According to two highly regarded empirical studies, black job applicants face pervasive and severe race-based, but not provably intentional, discrimination.

traffic inconveniences faced by the Black individuals in *Greene*. "The labor freedom of African Americans, [which was] a central, if not the central, concern of the Amendment, . . . would appear to be exactly 'the sort of impact on a racial group that might be prohibited by the Amendment itself,'" Professor Pope explains. "Regardless of whether the disparity results from concealed conscious bias, unconscious bias, or unnoticed institutional tilts, it carries forward slavery's exclusion of African Americans from the system of free labor."[158]

D. Congress's Section 2 Power to Enforce

While the Supreme Court declined in *Jones* to address in express terms its own interpretation of Section 1, it was crystal-clear in stating that Congress has broad authority to define the concept of "badges and incidents of slavery" for itself and to control how it exercises its Section 2 enforcement power.[159] "[Congress has power] rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation," the Court explained; and quoting again from *The Civil Rights Cases*, the Court stated "Congress [has] power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[160]

This Section explains why the strong rational basis deference for Congress's Section 2 enforcement authority enunciated by the Court in 1968 properly adheres to core textual and structural principles applicable to all three of the Reconstruction Amendments; it also points out some of the unique features of the Thirteenth Amendment vis-à-vis the other two.

Those with a clean criminal record encounter about the same rate of success as whites with a drug felony conviction," Pope reports. *Id.*

> To isolate the effect of a criminal record on the job search, Pager sent pairs of young, well-groomed, well-spoken college men with identical resumes to apply for 350 advertised entry-level jobs in Milwaukee. One member of each pair reported that he had served an 18-month prison sentence for cocaine possession, while the other did not. One pair was black while the other pair was white. Pager totaled up the number of call-backs obtained by each tester. For her black testers, the callback rate was 5 percent if they had a criminal record and 14 percent if they did not. For whites, it was 17 percent with a criminal record and 34 percent without.

Id.; *see also* Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 785–86 (2009) (reporting "results of an experimental study in New York City replicating the Milwaukee study's finding of a rough equivalence between the impact of a felony conviction and that of black skin").

158. Pope, *supra* note 100, at 474 (first citing Darrell A.H. Miller, *The Thirteenth Amendment, Disparate Impact, and Empathy Deficits*, 39 SEATTLE U. L. REV. 847, 850–52 (2016) (same, but with additional analysis and documentation) and then citing Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235 (2016) (recounting the evolution of discrimination to avoid legal strictures)).

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

160. *Id.* at 439–40; *see also infra* notes 164–68 and accompanying text (discussing the origins of the "necessary and proper" language in *McCulloch v. Maryland*).

Given the current Supreme Court's excessive, near-*Lochnerian* activism in striking down a broad range of federal legislation,[161] however, it is well to proceed with care in asserting a broad Thirteenth Amendment Section 2 enforcement power for Congress. Specifically, the Court has consistently applied greater scrutiny than rational basis to the other Reconstruction-era Amendments. The Court found that Congress's Fourteenth Amendment Section 5 enforcement power was not entitled to real rational basis review but rather had to meet a heightened "congruent & proportional" means–end test, for example;[162] and that Congress's exercise of its Fifteenth Amendment Section 2 enforcement power in reauthorizing a key portion of the Voting Rights Act of 1965 did not meet (a watered-down version of) rational basis review—notwithstanding an overwhelmingly bipartisan vote in Congress (98–0 in the Senate; 390–33 in the House) and mountains of congressional findings.[163]

Jack Balkin argues that all three of the Reconstruction Amendments are entitled to high deference under the well-understood and long-accepted principle first set down by Chief Justice John Marshall in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[164] "The framers of the Reconstruction Amendments sought to ensure that the test of

---

161. *See infra* notes 162–63 and accompanying text; *see also, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); United States v. Morrison, 529 U.S. 598 (2000); Alden v. Maine, 527 U.S. 706 (1999); Printz v. United States, 521 U.S. 898 (1997); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992).

162. City of Boerne v. Flores, 521 U.S. 507, 519–21, 524 (1997) ("Congress' power under § 5 . . . extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment. . . . Legislation which alters the meaning of the [underlying provision] cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. . . . The power to interpret the Constitution in a case or controversy remains in the Judiciary."). For criticisms of the Court's approach, see, for example, Eric Foner, *The Supreme Court and the History of Reconstruction – and Vice-Versa*, 112 COLUM. L. REV. 1585, 1585–1606 (2012), which points out the Court's faulty historical understanding of the Reconstruction period.

163. *See* Shelby County v. Holder, 570 U.S. 529, 550–51 (2013) (concluding that the statute was "[no longer] rational in both practice and theory"). This despite the fact that the

> House and Senate Judiciary Committees held 21 hearings . . . [and compiled a 15,000 page] legislative record [that] presents countless 'examples of flagrant racial discrimination.' . . . [and which] was described by the Chairman of the House Judiciary Committee as 'one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 years' he had served in the House.

Id. at 565–93 (Ginsberg, J., dissenting) (stating the majority's decision to "[t]hrow[] out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet").

164. McCulloch v. Maryland, 17 U.S. 316, 421 (1819) (emphasis added). The Court was speaking in reference to the scope of Congress's power under the Necessary and Proper Clause of the U.S. Constitution. *See* Jack Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1807, 1811 (2010).

McCulloch would apply to the new powers created by the Reconstruction Amendments," Balkin explains, "that is why they included the word 'appropriate' in the text of all three enforcement clauses."[165]

As discussed briefly above, however, over time the Supreme Court has not adhered to the deferential *McCulloch*-based understanding.[166] The fact that a majority on the Supreme Court has repeatedly failed to honor the constitutional design does not mean the constitutional design disappears. "The statesmen who drafted the Reconstruction Amendments gave Congress independent enforcement powers because they feared that the Supreme Court would prove an unreliable guarantor of liberty and equality. Their fears were proved correct. Time and again, the Supreme Court hobbled Congress's enforcement powers through specious technicalities and artificial distinctions," Balkin notes.[167] "These limitations are not required either by the Constitution's original meaning or by principles of federalism. Quite the contrary: Fidelity to text, structure, and history gives Congress broad authority to protect equal citizenship and equality before the law," he concludes, asserting, "It is long past time to remedy the Supreme Court's errors, and reconstruct the great Reconstruction Power of the Constitution."[168]

Sadly, however, we live in a world where a Supreme Court majority still adheres to the specious reasoning of the likes of *Boerne* and *Shelby County*, so we must attempt to protect the Thirteenth Amendment, at least, from the Court's overreaching grasp. And there *are* compelling textual and structural arguments that the Thirteenth Amendment enforcement authority stands alone, even when compared to the analogous provisions in the other two Reconstruction Amendments. First, the Thirteenth Amendment is the only one of the three whose Section 1 rights-protecting text is free of any sort of limiting component,[169] stating simply that "neither slavery nor involuntary servitude . . . shall exist within the United

---

165. Balkin, *supra* note 164, at 1807; *see also* Akhil Amar, *An(other) Afterword on the Bill of Rights*, 87 GEO. L. J. 2347, 2352 (1999) ("The framers of these Amendments said again and again that Congress should have the same broad enforcement power here that the antebellum Court had affirmed under the Necessary and Proper Clause in cases like *McCulloch* and *Prigg*.").

166. *See supra* notes 161–63 and accompanying text.

167. Balkin, *supra* note 164, at 1861.

168. *Id.*

169. The Amendment does provide one caveat, allowing for involuntary servitude in the case of "punishment for crime whereof the party shall have been duly convicted." Tragically, this caveat itself has been devastatingly weaponized against people of color. *See, e.g.*, 13TH (Netflix 2016) (documenting the history of how the "duly convicted" clause has been disproportionately applied against people of color); *see also* Symposium, *Trauma, Policing & The 13th Amendment: The Long Arc to Freedom*, Univ. of Calif.-Irvine 2019, https://www.law.uci.edu/centers/cbghp/activities/022219-Trauma-Policing-13th-A-Draft-Schedule.pdf (discussing "how the legacy of the 13th Amendment both liberates through the abolition of slavery and yet serves as a tool to exploit the vulnerable by permitting slavery so long as an individual is convicted of a crime"); *supra* note 96.

States . . . ."[170] Both of the others extend their protections only against *government* abridgement:[171] Section 1 of the Fourteenth Amendment provides,

> No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property, without due process of law; nor [shall any *State*] deny to any person within its jurisdiction the equal protection of the laws.[172]

And Section 1 of the Fifteenth Amendment reads, "The right of citizens of the United States to vote shall not be denied or abridged by the *United States* or by any *State* on account of race, color, or previous condition of servitude."[173]

Arguably this textual distinction can explain the federalism concerns that dominated the Court's reasoning in *Boerne* (Fourteenth Amendment) and *Shelby County* (Fifteenth Amendment). In *Boerne*, the Court placed significant weight on the Amendment's legislative history—i.e., during the drafting process the framers intentionally narrowed the scope of the Section 5 enforcement power—to justify imposing greater restrictions on Congress today.[174] Specifically, the Court pointed out, after the Amendment's opponents had argued during the debates "that the proposed Amendment would give Congress power to intrude into traditional areas of state responsibility, a power inconsistent with the design central to the Constitution, . . . [u]nder the [subsequently] revised Amendment, Congress's power was no longer plenary but remedial."[175]

Similarly, in *Shelby County*, in striking down Congress's exercise of its Fifteenth Amendment Section 2 enforcement power, the Court focused heavily on the harms done to notions of state sovereignty by the 2006 reauthorization of the Voting Rights Act.[176] "The Framers of the Constitution," the Court explained, "intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections."[177] Moreover, in a passage whose very length is instructive in demonstrating the weight the Court attached to the sovereignty issue, it added:

> States retain broad autonomy in structuring their governments and pursuing legislative objectives . . . . This "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." . . . [F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power. . . . Not

---

170. U.S. CONST. amend. XIII, § 1.

171. Accordingly, Congress is able to reach *private* action only through the Thirteenth Amendment. *See supra* notes 120, 125 and accompanying text.

172. U.S. CONST. amend. XIV, § 1.

173. U.S. CONST. amend. XV, § 1.

174. The Court explained that in Section 5 cases Congress must demonstrate "a congruence and proportionality between the injury to be prevented or remedied and the means to that end," rather than meet the traditional deferential rational basis standard of review. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

175. *Id.* at 520–22.

176. Shelby County v. Holder, 570 U.S. 529, 543–44 (2013).

177. *Id.* at 543.

> only do States retain sovereignty under the Constitution, there is also a "fundamental principle of *equal* sovereignty" among the States. . . . The Voting Rights Act sharply departs from these basic principles. It suspends "*all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C." States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own . . . . And despite the tradition of equal sovereignty, the Act applies to only nine States . . . .[178]

By contrast, the Thirteenth Amendment has no such baggage. Besides lacking any textual reference to "States," the Amendment's legislative history is clean as well. While its opponents, mostly Southern Democrats, certainly opposed the imposition of the Amendment's constraints on the states, they lost the debate. Simply put, no opposition views on the matter of federalism—protecting states from the Amendment—managed to carry the day during the Thirteenth Amendment debates.[179] Instead, as noted above,[180] the Amendment's proponents' views prevailed, as expressed by Senator Trumbull, who brought the Amendment to the floor in 1864: "[T]he second clause . . . says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. . . . Congress [may] adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end."[181]

The Court added, "Surely Senator Trumbull was right. Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."[182] None of the Thirteenth Amendment cases, moreover, have expressed the federalism concerns expressed in cases involving the other two amendments.

In sum, in terms of original intent and original understanding, clearly the framers of the Thirteenth Amendment managed to prevail with their vision of a broad Section 2 enforcement power, whereas the framers of at least the Fourteenth had to scale back their original broader vision. And the fact that the Thirteenth Amendment is broader in scope—i.e., it applies to *all* action, public and private, whereas the other two Amendments are limited solely to *state* action—one may reasonably conclude that it inherently presents fewer direct federalism concerns. Accordingly, there is less basis for the Court to intrude upon Congress's authority.

The second textual and structural argument that Congress's Thirteenth Amendment enforcement authority stands alone involves the fact that the Amendment's Section 1 rights-protecting text makes no reference to "law" ("neither slavery nor involuntary servitude . . . shall exist within the United States");[183]

---

178. *Id.* at 543–44 (internal citations omitted).

179. *See generally* Pope, *supra* note 100101, at 433–34.

180. *See supra* notes 125–26 and accompanying text.

181. Jones v. Alfred Mayer Co., 392 U.S. 409, 440 (1968) (quoting Cong. Globe, 39th Cong., 1st Sess., 322).

182. *Id.*

183. U.S. CONST. amend. XIII, § 1.

whereas the Due Process and Equal Protection Clauses of Section 1 of the Fourteenth Amendment *do* speak of "law" ("nor shall any State deprive any person of life, liberty, or property, without due process of *law*;" and "nor deny to any person within its jurisdiction the equal protection of the *law*.").[184] The distinction is potentially significant. A court's very first task, after all, is to read the words of a constitution, statute, or contract and attempt to understand and distinguish how those words and phrases are used either in isolation or in contradistinction with other words or phrases appearing either within the same document or elsewhere. Indeed, the U.S. Reports are replete with cases undertaking the task of textual interpretation.[185]

Here, it makes interpretive sense that the judiciary, as the Constitution's designated expositor of "what the law is,"[186] would have some proper role in determining the scope of Congress's enforcement of a textual provision that requires either "due process of law" or "equal protection of the laws." By contrast, because the Thirteenth Amendment text speaks nowhere of "law(s)," it also makes interpretive sense that the judiciary's role would be more circumscribed in such cases. Stated another way, this textual distinction arguably makes a difference in the relative scope of Congress's power in the two provisions: Congress's Thirteenth Amendment enforcement power is entitled to the heaviest possible deference by the judiciary; whereas the Court has slightly more basis to review Congress's Fourteenth Amendment enforcement power.[187]

III. A NEW DAY (AND NEW WAY) FOR RACE-CONSCIOUS REMEDIES

Nearly one-fourth of all white Southerners owned slaves, and upon their backs the economic basis of America—and much of the Atlantic

---

184. U.S. CONST. amend. XIV, § 1.

185. *See, e.g.*, Almendarez-Torres v. United States, 523 U.S. 224 (1998); Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687 (1995); Rector of the Holy Trinity Church v. United States, 143 U.S. 457 (1892).

186. Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

187. From a textualist standpoint, this novel theory is at least as plausible as the current Supreme Court's existing Eleventh Amendment state sovereign immunity doctrine, in which a 5–4 majority ignores the plain meaning of the constitutional text ("The Judicial power of United States shall not be construed to extend to any suit . . . against one of the United States by Citizens of another State") in order to advance its preferred view that state sovereign immunity disallows suits even by citizens of the *same* state. *See* Alden v. Maine, 527 U.S. 706, 712 (1999). Even the most cursory review reveals that the constitutional text says no such thing—rather, the text only prohibits suit by citizens of *another* state (i.e., so-called "diversity" jurisdiction). Writing for the majority, Justice Kennedy pens two of the more embarrassing passages in the U.S. Reports: "The phrase [Eleventh Amendment immunity] is convenient shorthand but something of a misnomer, for the sovereign immunity of the States *neither derives from nor is limited by the terms of the Eleventh Amendment.*" *Id.* at 713 (emphasis added). And, "we have looked to 'history and experience, and the established order of things,' rather than *'[a]dhering to the mere letter' of the Eleventh Amendment*, in determining the scope of the States' constitutional immunity from suit."*Id.* at 727 (emphasis added) (citations omitted) (quoting Hans v. Louisiana, 134 U.S. 1, 13–14 (1890)).

> *world—was erected. In the seven cotton states, one-third of all white income was derived from slavery. By 1840, cotton produced by slave labor constituted 59 percent of the country's exports. The web of this slave society extended north to the looms of New England, and across the Atlantic to Great Britain, where it powered a great economic transformation and altered the trajectory of world history. "Whoever says Industrial Revolution," wrote the historian Eric J. Hobsbawm, "says cotton." . . . In 1860 there were more millionaires per capita in the Mississippi Valley than anywhere else in the country.*
>
> - Ta-Nehisi Coates, 2014[188]

The sorts of race-based economic and other injustices Coates describes that existed during 250 years of slavery on this continent did not end with slavery's official abolition in 1865; rather, the discrimination just took on different, progressively more subtle forms. Starting with the Black Codes immediately after the Civil War; moving into a century of formal practices such as Jim Crow apartheid, widespread vote suppression, the federal government's racially-discriminatory housing loan programs and other practices; and continuing to today's stark racial disparities in matters of criminal justice/policing, wealth accumulation, educational opportunity and more, one can draw a direct line from the economic and human horrors of slavery straight to the present day.[189] There is no getting around the hard truth that the United States is "a country whose existence was predicated on the torture of black fathers, on the rape of black mothers, on the sale of black children," and that today, 150-plus years after the end of slavery, "the notion that black lives, black bodies, and black wealth [a]re rightful targets remain[s] deeply rooted in the broader society."[190]

Justice demands amends. This Part argues that these continuing racial disparities, resulting as they do from the deep-seated well and strong legacy of white supremacy that exists in this country, constitute the sorts of "badges and incidents of slavery" that the Thirteenth Amendment is designed to abolish and prevent. Specifically, Section 1 demands judicial enforcement to forbid private and public (including public *in*action[191]) violations alike; and Section 2 authorizes—maybe

---

188. Coates, *supra* note 1, at 27–29 ("The wealth accorded America by slavery was not just in what the slaves pulled from the land but in the slaves themselves. 'In 1860, slaves as an asset were worth more than all of America's manufacturing, all of the railroads, all of the productive capacity of the United States put together,' the Yale historian David W. Blight has noted. 'Slaves were the single largest, by far, financial asset of property in the entire American economy.'").

189. *See infra* notes 214–44 and accompanying text.

190. Coates, *supra* note 1, at 22, 53.

191. See *supra* notes 68–81 and accompanying text for discussion of the failure of the Supreme Court's Equal Protection Clause doctrine (which uses an anti-discrimination organizing approach) to consider government *in*action as possibly violating the Clause. This Article argues, by contrast, that both its suggested approaches—i.e., an organizing approach using the group-disadvantaging principle and applying the Thirteenth Amendment—require considering a government's *in*action—e.g., failure to prevent group discrimination against Black Americans—a potential violation of the Thirteenth Amendment. To paraphrase Robin

mandates[192]—the broad use of government remedies through Congress's enforcement power coupled with the inherent police powers of the states. These remedies should include unapologetically race-conscious measures such as affirmative action (an approach forbidden under the Supreme Court's current Equal Protection doctrine[193]). Such measures to remedy racial injustices are no less appropriate today than they were at the end of the Civil War with, for example, Sherman's "forty acres" order.[194] These approaches are necessary to atone for and to reconcile, in moral and legal terms, the truth and reality of the long history of systemic, deeply-embedded racial injustice, and to begin to fulfill the nation's promise of liberty and justice for all. Until this occurs, the Thirteenth Amendment's mandate to abolish slavery and involuntary servitude will remain unfulfilled.

A. A Doctrinal Way Forward

Congress, the Executive, and the states have not done nearly enough to recognize and respond to the reality of continued race-based discrimination in America. Viewed through a Thirteenth Amendment lens, this systemic racial injustice is a modern-day perpetuation of the "badges and incidents of slavery." For *centuries*, the State of Georgia and its predecessor governments allowed for the enslavement (and correspondingly brutal treatment) of many thousands of Black people, and for another century after the abolition of slavery, continued to actively perpetuate a system of racial apartheid and to implicitly tolerate a program of racial terror in the form of hundreds of lynchings and other atrocities. When the State of Georgia is then shown in the late-twentieth century to disproportionately sentence Blacks to death substantially more frequently than whites, how can one fail to make the connection back to slavery?[195]

That the Supreme Court, in reviewing cases and controversies involving matters of racial justice under its traditional Equal Protection rubrics,[196] fails to account for this history is disturbing and problematic, to say the least. The Court's formalistic requirement in *McCleskey*, that the defendant must show discriminatory purpose on the part of the specific prosecutor and jury, simply fails to address the systemic, deep-rooted reality of slavery and its toxic aftereffects in Deep-South Georgia society.[197]

West, even if "[a] state's failure to criminalize private violence perpetrated by one group of citizens against another group of citizens (such as violence visited upon freed blacks, for example, in the wake of the civil war)" does not violate the Equal Protection Clause, it "might well be an example, even a paradigmatic example, of a state's [violation of the Thirteenth Amendment]; likewise its failure to enforce criminal laws forbidding such conduct or its failure to prosecute those who breach them." West, *supra* note 67, at 2.

192. It is possible that the Thirteenth Amendment creates not only negative obligations—i.e., government shall not discriminate-in-effect/impact—but also positive obligations—i.e., government *shall* act/regulate to eliminate private/unofficial discrimination. *See, e.g.*, *supra* note 191.

193. *See supra* notes 41–59 and accompanying text.

194. *See supra* note 95 and accompanying text.

195. *See supra* notes 32–40 and accompanying text.

196. *See supra* notes 25–59 and accompanying text.

197. *See supra* notes 32–40 and accompanying text.

Given the sad truth and long history of such examples of official and unofficial racial oppression, it is important that governments at all levels—federal, state, and local—begin to take a more active redemptive role in the racial justice realm. This would naturally include initiating and passing increasingly assertive legislation and other measures, and it would not be unusual for such efforts to use race-based metrics of one sort or another (including "quotas"[198]), whether in school admissions, government contracting, employment consideration, scholarship awards, and so on. The Thirteenth Amendment, as interpreted herein, easily permits straightforward race-conscious affirmative action measures of this nature.[199]

Legislatures possess unique institutional attributes that suit them well to the process of implementing the group-disadvantaging principle that resides at the core of the Thirteenth Amendment. "Legislatures are charged with the moral work of passing laws that will protect citizens against various sorts of dangers, including the dangers posed them by other private parties," Robin West explains.[200] "Legislatures, . . . unlike courts, do, ideally, work toward the end of passing laws that will alleviate 'group disadvantage.' This is not," she observes, "what happens by virtue of interest group lobbying, rather, this is the ideal itself."[201]

Granted, the Supreme Court has not been friendly to race-conscious legislative efforts, regardless of source, so one might understandably be chary about the prospects of survival of even, say, an exquisitely designed and well-supported piece of state or federal legislation initiating a race-conscious affirmative action plan. First, it is important to note that the Court has decided these cases almost exclusively within the Fourteenth Amendment Equal Protection context, where the anti-discrimination principle's "treat likes alike" ethos has assumed a stranglehold on judicial doctrine.[202]

---

198. Race-based quotas are perfectly acceptable in the Thirteenth Amendment context discussed herein. Compare that to the Equal Protection context in which such quotas are forbidden. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 334 (2003) ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system.").

199. *See, e.g*, Pope, *supra* note 100, at 474–75 ("Judge John Minor Wisdom and several Thirteenth Amendment scholars have suggested that the Amendment could support race-conscious affirmative action.") (citing Williams v. City of New Orleans, 729 F.2d 1554, 1578–79 (5th Cir. 1984) (Wisdom, J., concurring in part and dissenting in part); Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 32–38 (1995); McAward, *supra* note 108, at 610 n.253; Miller, *supra* note 159, at 295)).

200. West, *supra* note 67, at 6.

201. *Id.*

202. For discussion of how a separate progressive Thirteenth Amendment jurisprudence (for supporting race-conscious affirmative action, for example) can be melded together with existing conflicting Fourteenth Amendment jurisprudence, see Pope, *supra* note 100, at 477 ("Neither Amendment 'trumps' the other . . . rather they must be synthesized into a coherent doctrinal whole.' . . . [T]he Fourteenth Amendment was enacted not to cut back on the Thirteenth, but to strengthen the effort to ensure that citizens of all colors would enjoy the 'same right[s]' as were 'enjoyed by white citizens.") (quoting Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 157 n.180 (1992)).

Importantly from a judicial review standpoint, a major advantage of the Thirteenth Amendment is that the constitutional text,[203] together with persuasive historical, structural,[204] and theoretical[205] arguments, suggests the Supreme Court's proper role is to act somewhat against type[206] in protecting Black people as a *group*, since it was Blacks as a *group* who suffered the effects of formal slavery and continue to suffer from "badges and incidents of slavery" to this day. Accordingly, legislatures and other government actors at any level should be able to proceed confidently, comfortable in the knowledge that their efforts stand on solid constitutional ground.

In doctrinal terms, this means a couple of things: (1) the Court has an important role in striking down, under heightened "strict scrutiny" review, those governmental actions (or *in*actions[207]) where there is evidence of discriminatory *impact* or *effects* against Black people as a group, but not necessarily evidence of discriminatory purpose;[208] and (2) the Court should give great deference, under strong "rational basis" review, to race-conscious federal or state governmental efforts designed to free Black people as a group from various "badges and incidents of slavery." As noted above, both of these presumptions are directly counter to those employed by the Court in its current Equal Protection cases.[209]

Of course, it is another question altogether whether the Supreme Court (again) abdicates *its* constitutional responsibility by improperly exceeding its authority, as it has done in cases involving the Fourteenth and Fifteenth Amendments.[210] At its root, the Constitution is designed to separate powers in order

---

203. See *supra* notes 179–187 and accompanying text for discussion of the textual uniqueness of the Thirteenth Amendment vis-à-vis the Fourteenth and Fifteenth Amendments.

204. *See supra* notes 159-60, 164–68 and accompanying text.

205. See *supra* notes 19–24, 60–65 and accompanying text for discussion of the "group-disadvantaging" principle. While the principle was prominently advanced by Owen Fiss in 1976 and Robin West in 2002 in the context of the Fourteenth Amendment Equal Protection Clause, it provides useful and valuable theoretical grounding in the Thirteenth Amendment context as well. *See supra* notes 200–01 and accompanying text; Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403, 405–06 (1993); Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 258–59 (2010) (discussing the group-disadvantaging (or anti-subordination) focus in Thirteenth Amendment theory).

206. *See supra* note 85 and accompanying text (discussing the judiciary's natural tendency to seek to "treat likes alike").

207. *See supra* note 191.

208. The Supreme Court suggests in *Greene* that racially discriminatory impact alone might offend Section 1. "To decide the narrow constitutional question presented by this record," the Court stated, "we need not speculate about the sort of impact on a racial group that might be prohibited by the Amendment itself." Memphis v. Greene, 451 U.S. 100, 128–29 (1981); *see also* Pope, *supra* note 100, at 473–74 (citing Miller, *supra* note 166, at 848; Boddie, *supra* note 158, at 416–19; McAward, *supra* note 108, at 616–17; 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, 777 (1998)).

209. *See supra* notes 25–59 and accompanying text.

210. *See supra* notes 161–63, 166–68 and accompanying text.

to enable: (1) *co-equal branches* of the national government, e.g., Congress, each to operate without undue interference within their own scope of authority; and (2) *sovereign states* to operate with measured independence in order to allow their own legislatures to exercise the police power to provide for the health, safety, and welfare of their citizens. One hopes that when it comes to reviewing cases involving the Thirteenth Amendment, the Court will exercise a modicum of judicial modesty, instead of acting, as it too often does,[211] as strict overseer. As Learned Hand once famously wrote in criticizing an overly active Court: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."[212]

B. Truth: Real-World Facts

A sampling of the sorts of factors and data that would justify prompt race-conscious state and federal legislative and executive measures (which would properly be subjected to judicial oversight only under the default highly deferential rational basis standard of review[213]) include the following:[214]

- *Wealth.* Whites constitute 77% of overall population and hold *90%* of the national wealth; Blacks constitute 13% of population and hold *2.6%* of the national wealth.[215]
- *Employment.* Blacks are *two times* as likely to be unemployed as whites.[216]
- *Education.* Black students are *three times* more likely than white students to be suspended for the same infractions.[217]

---

211. *See supra* notes 161–63, 166–68 and accompanying text.

212. LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

213. *See supra* notes 160, 164–65 and accompanying text.

214. *See generally 7 Ways We Know Systemic Racism Is Real*, BEN & JERRY'S (last visited Feb. 22, 2020) [hereinafter *7 Ways*], https://www.benjerry.com/whats-new/2016/systemic-racism-is-real (providing organizational summary of these factors and data).

215.

> According to one study, white families hold 90% of the national wealth, Latino families hold 2.3%, and black families hold 2.6%. Not only that, the Great Recession hit minority families particularly hard, and the wealth gap has increased. Think about this: for every $100 white families earn in income, black families earn just $57.30.

Id.; *see also* Emily Badger, *Whites Have Huge Wealth Edge Over Blacks (But Don't Know It)*, N.Y. TIMES (Sept. 18, 2017), https://www.nytimes.com/interactive/2017/09/18/upshot/black-white-wealth-gap-perceptions.html; *infra* notes 234–243 and accompanying text.

216. Drew Desilver, *Black Unemployment Rate Is Consistently Twice that of Whites*, PEW RES. CTR. (Aug. 21, 2013), https://www.pewresearch.org/fact-tank/2013/08/21/through-good-times-and-bad-black-unemployment-is-consistently-double-that-of-whites/. "[O]ver the past 60 years, no matter what has been going on with the economy (whether it's been up or down). . . . [B]lacks with college degrees are twice as likely to be unemployed as all other graduates." *7 Ways*, *supra* note 214.

217. *See* U.S. Dep't of Educ. Office for Civil Rights, *Civil Rights Data Collection: Data Snapshot (School Discipline)* (Mar. 21, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf. "Overall, black students represent 16% of student

- *Criminal Justice.* Blacks make up *40%* of the prison population (they make up 13% of the overall population).[218]
- *Housing.* Blacks are shown *18%* fewer homes and 4% fewer rental units than whites.[219]
- *Surveillance.* Blacks are *31%* more likely to be pulled over than whites.[220]
- *Healthcare.* According to one study, *67%* of doctors have a bias against Black patients.[221]

---

enrollment and 27% of students referred to law enforcement. And once black children are in the criminal justice system, they are 18 times more likely than white children to be sentenced as adults." *7 Ways*, *supra* note 214.

218. Kim Farbota, *Black Crime Rates: What Happens When Numbers Aren't Neutral*, HUFFINGTON POST (Sept. 2, 2016), https://www.huffpost.com/entry/black-crime-rates-your-st_b_8078586.

> [W]hen black people are convicted, they are about 20% more likely to be sentenced to jail time, and typically see sentences 20% longer than those for whites who were convicted of similar crimes. And . . . a felony conviction means, in many states, that you lose your right to vote . . . . [M]ore than 7.4% of the adult African American population is disenfranchised (compared to 1.8% of the non-African American population).

7 Ways, *supra* note 214; *see also infra* notes 236–42 and accompanying text.

219. "A recent study demonstrated that people of color are told about and shown fewer homes and apartments than whites. Black ownership is now at an all-time low (42%, compared to 72% for whites)." *7 Ways*, *supra* note 214. *See generally* Emily Badger, *Redlining: Still a Thing*, WASH. POST (May 28, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/05/28/evidence-that-banks-still-deny-black-borrowers-just-as-they-did-50-years-ago/.

220. Christopher Ingraham, *You Really Can Get Pulled Over for Driving While Black, Federal Statistics Show*, WASH. POST (Sept. 9, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/09/09/you-really-can-get-pulled-over-for-driving-while-black-federal-statistics-show/. "If you're white, you don't usually need to worry about being monitored by the police. But the day-to-day reality for African Americans is quite different. More than half of all young black Americans know someone, including themselves, who has been harassed by the police." *7 Ways*, *supra* note 214; *see also infra* notes 243–44 and accompanying text.

221. Tara Culp-Ressler, *Why Racism Is a Public Health Issue*, THINKPROGRESS (Feb. 3, 2014), https://thinkprogress.org/why-racism-is-a-public-health-issue-b01056c63e44/.

> African Americans in particular face discrimination in the world of healthcare too. A 2012 study found that a majority of doctors have "unconscious racial biases" when it comes to their black patients. Black Americans are far more likely than whites to lack access to emergency medical care. The hospitals they go to tend to be less well funded, and staffed by practitioners with less experience. But even black doctors face discrimination: they are less likely than their similarly credentialed white peers to receive government grants for research projects. And it seems that facing a lifetime of racism leaves African Americans vulnerable to

1. Economic Injustice

As noted, some of the more insidious effects of decades and centuries of racial discrimination are economic.[222] The sobering fact is that, despite some progress in racial justice in the last half-century, Blacks still lag shockingly behind whites in economic terms, due to the endemic, systemic discrimination they have always faced, and continue to face to this day. As Paul Campos reports in a July 29, 2017 article in *The New York Times*:

- "The income gap between black and white [] Americans . . . remains every bit as extreme as it was five decades ago," at every income level. (Black households in 1967 earned an average of between 55 and 67% as much as white households. Those ratios remain the same today.)[223]
- "The median white household has about 13 times the wealth of the median black household — and much of that wealth is transferred between generations. This remarkable gap helps perpetuate the consequences of centuries of social and economic injustice."[224]
- "Many black children . . . attend schools that once again are as segregated as they were in the 1960s, and they are far more likely to become trapped in a prison-industrial complex."[225]
- Recent research shows "black job applicants for low-wage jobs receive callback interviews or job offers at half the rate of equally well-qualified white applicants and that black and Latino applicants with clean records 'fare no better' than white applicants just released from prison."[226]

"These numbers should shock us," Campos suggests.[227] "Consider that in the mid-1960s, Jim Crow practices were still being dismantled and affirmative action hardly existed. Yet a half-century of initiatives intended to combat the effects of centuries of virulent racism appear to have done nothing to ameliorate inequality between white and black America."[228] How can it be that these efforts have had so little effect? The deep roots of centuries of racism "offer more than adequate explanations for what should be considered a scandalous state of affairs in regard to race-based economic inequality."[229] Campos concludes, adding that "[a] genuine populist movement would unite working- and middle-class Americans of all

---

developing stress-related health issues that can lead to chronic issues later in life.

7 Ways, *supra* note 214.

222. The discussion that follows in *infra* Sections III.B.1–III.B.3 is excerpted (with revisions) from Lawrence, *supra* note 2, at 99–104, 112–13.

223. Paul F. Campos, *White Economic Privilege Is Alive and Well*, N.Y. TIMES (July 29, 2017), https://www.nytimes.com/2017/07/29/opinion/sunday/black-income-white-privilege.html.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

backgrounds, rather than dividing them by exploiting false beliefs about the supposed loss of white economic privilege."[230]

These economic inequalities exist throughout the nation, regardless of geography. From around 1916–1970, huge numbers (more than six million) of Black Americans moved in the "Great Migration" from the South to the North, Midwest, and West for jobs in factories and relief from the indignities of Southern racism.[231] While migrants were able to escape the overt discrimination of the South, they encountered more subtle, but no less damaging, discriminatory practices in the North.

One practice that has greatly hindered generations of Black Americans' financial well-being is the so-called redlining of neighborhoods, where the federal Home Owners Loan Corporation long required that any property it insured be covered by a restrictive covenant; and real estate agents—even long after the practice was banned in 1968—guided prospective buyers, based on their race, only to certain neighborhoods.[232] This process triggered a self-fulfilling prophecy of lessened economic prospects for Black people. First, they are guided to less affluent, more economically depressed areas, which forces them to resort to more risky loans provided by lenders engaging in an array of predatory lending practices.[233]

People of color were disproportionately affected, for example, by the 2008 recession and foreclosure crisis, when millions of Americans lost their homes under the terms of subprime mortgages and other risky loan practices.[234] Ta-Nehisi Coates explains that starting in 2005, Wells Fargo began marketing Wealth Building Strategies seminars to Black customers, supposedly to assist in building generational wealth. After the 2008 foreclosure crisis exposed the seminars as little more than devices to steer folks into predatory loans without regard for creditworthiness, the Justice Department in 2010 sued Wells Fargo for its discriminatory practices. According to *The New York Times*, affidavits in the case disclosed that:

> [L]oan officers referr[ed] to their black customers as "mud people" and to their subprime products as "ghetto loans."
>
> "We just went right after them," Beth Jacobson, a former Wells Fargo loan officer, told *The Times*. "Wells Fargo mortgage had an emerging-markets unit that specifically targeted black churches because it figured church leaders had a lot of influence and could convince congregants to take out subprime loans."
>
> . . .

230. *Id.* (commenting that conservatives like Charles Murray blame the "pathological" black working class culture but note that some of this "pathology" now manifests itself in the white working class as well (who themselves are also suffering economically, at the expense of the rich, much more than they were 50 years ago)).

231. *Great Migration*, HISTORY.COM, http://www.history.com/topics/black-history/great-migration (last updated Jan. 16, 2020).

232. Coates, *supra* note 1, at 36–37.

233. *Id*. at 62–63.

234. *See generally, e.g.*, J.S Rugh & Douglas Massey, *Racial Segregation and the American Foreclosure Crisis*, 75(5) AM. SOC. REV. 629 (2010).

> In 2009, half the properties in Baltimore whose owners had been granted loans by Wells Fargo between 2005 and 2008 were vacant; 71 percent of these properties were in predominantly black neighborhoods.[235]

2. Criminal Justice and Policing

If there is one thing in America still as certain as the sunrise, it is the regularity of incidents of racial discrimination in the criminal justice system. The news sometimes comes in bunches—police killings and abuses of unarmed Black men, for example,[236] and then the acquittal of the responsible police officer—but

---

235. Coates, *supra* note 1, at 62.

236. Victims include (to name a few): Daniel Prude, Jacob Blake, George Floyd, Breonna Taylor, Rayshard Brooks, Michael Brown, Eric Garner, Walter Scott, Tamir Rice, Freddie Gray, Philando Castile, Samuel DuBose, Stephon Clark, Diante Yarber, etc. *See, e.g.*, Laura Ly, Taylor Romine & Hollie Silverman, *Rochester Mayor and Police Chief Promise Reform After Daniel Prude's Death, as City Sees Fifth Night of Protests*, CNN (Sept. 7, 2020), https://www.cnn.com/2020/09/07/us/daniel-prude-rochester-protest-monday/index.html (Mr. Prude); Julie Bosman & Sarah Mervosh, *Wisconsin Reels After Police Shooting and Second Night of Protests*, N.Y. TIMES (Aug. 24, 2020), https://www.nytimes.com/2020/08/24/us/kenosha-police-shooting.html (Mr. Blake); Evan Hill, et al., *How George Floyd was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/video/us/100000007159353/george-floyd-arrest-death-video.html ?searchResultPosition=11 (Mr. Floyd); Richard A. Oppel, Jr. & Derrick Bryson Taylor, *Here's What You Need to Know About Breonna Taylor's Death*, N.Y. TIMES (Aug. 13, 2020), https://www.nytimes.com/article/breonna-taylor-police.html (Ms. Taylor); Courtney Vinopal & Zoe Rohrich, *What We Know About the Killing of Rayshard Brooks*, PBS NEWSHOUR (June 17, 2020), https://www.pbs.org/newshour/nation/what-we-know-about-the-killing-of-rayshard-brooks (Mr. Brooks); Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. TIMES (Aug. 10, 2014), https://www.nytimes.com /2014/08/11/us/police-say-mike-brown-was-killed-after-struggle-for-gun.html (Mr. Brown); Ray Sanchez, *Choke Hold by Cop Killed NY Man, Medical Examiner Says*, CNN (Aug. 2, 2014), https://www.cnn.com/2014/08/01/justice/new-york-choke-hold-death/index.html (Mr. Garner); Jamelle Bouie, *Broken Tail Light Policing: When Cops Stop Black Drivers for Minor Traffic Violations, It's Often a Pretext for Something More Sinister*, SLATE (Apr. 8, 2015), http://www.slate.com/articles/news_and_politics/politics/2015/0 (Mr. Scott); Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 29, 2015), https://www.nytimes.com/2015/12/29/us/tamir-rice-police-shootiing-cleveland.html (Mr. Rice); *Freddie Gray's Death in Police Custody – What We Know*, BBC (May 23, 2016), http://www.bbc.com/news/world-us-canada-32400497 (Mr. Gray); Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html (Mr. Castile); Jess Bidgood & Richard Pérez-Peña, *Mistrial in Cincinnati Shooting as Officer Is Latest Not to Be Convicted*, N.Y. TIMES (June 23, 2017), https://www.nytimes.com/2017/06/23/us/raymond-tensing-samuel-dubose-cincinnati.html (Mr. DuBose); Laurel Wamsley, *Video Shows Sacramento Police Shooting Unarmed Black Man In Grandparents' Backyard*, NPR (Mar. 22, 2018), https://www.npr.org/sections /thetwo-way/2018/03/22/59605107/video-shows-sacramento-police-shoot-unarmed-black-man-in-grandparents-backyard (Mr. Clark); Matt Stevens, *Police Kill Black Man With Barrage of Bullets Outside California Wal-Mart*, N.Y. TIMES (Apr. 19, 2018), https://www.nytimes.com/2018/04/19/us/diante-yarber-barstow-shooting.html (Mr. Yarber).

one should make no mistake: systemic racial injustice is playing out day in and day out like a repeating thread in the American social and legal fabric.

The spring and summer of 2020 have seen yet another series of egregious events, most horrifically with the shocking, videotaped murder of George Floyd by Minneapolis police, that have galvanized the world—finally—to emphatically protest racially abusive police practices.[237] The widespread responses calling for major police reform are hopeful. One may be excused, however, for wondering how long it will be before the next crisis or newsworthy event dissipates the current furor and energy—just like every other time before. But maybe this time will be different. "To me, this feels less and less like just another iteration of the set-piece drama we've lived through so many times — an unjust killing, a few days of protest, a chorus of promises of reform, a return to normal, an all-too-brief interlude until the next unjust killing," writes *Washington Post* columnist Eugene Robinson. "This eruption feels like a potential inflection point, a collective decision that 'normal' is no longer acceptable."[238] And: "One of the most hopeful and heartening features of the current protests has been the images of people of all races, in this country and around the world, openly supporting anti-racism [and] . . . carrying Black Lives Matter posters in discussing the matter of state violence against black people," *New York Times* columnist Charles Blow suggests.[239] "The challenge here is to sustain the current sentiment and not let this version of Freedom Summer be yet another moment when allies fail."[240]

In her 2010 book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander describes the gross racial injustices that exist within America's criminal (in)justice system:

> [S]omething akin to a racial caste system currently exists in the United States.
>
> . . .
>
> [M]ass incarceration . . . emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow. . . . Once [people who have been incarcerated] are released, they are . . . relegated to a racially segregated and subordinated existence. Through a web of laws, regulations, and informal rules, all of which are powerfully reinforced by social stigma, they are confined to the margins of mainstream society and denied access to the mainstream economy. They are legally denied the ability to obtain employment, housing, and public

---

237. *See, e.g.*, *How George Floyd's Death Sparked Protests Around the World*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/graphics/world/2020/06/10/how-george-floyds-death-sparked-protests-around-world/.

238. Eugene Robinson, *We Are the Governed. We No Longer Consent to Let the Police Kill Us*, WASH. POST (June 1, 2020), https://www.washingtonpost.com/opinions/we-are-the-governed-we-no-longer-consent-to-let-the-police-kill-us/2020/06/01/9fad7274-a440-11ea-bb20-ebf0921f3bbd_story.html.

239. Charles M. Blow, *Allies, Don't Fail Us Again*, N.Y. TIMES (June 7, 2020), https://www.nytimes.com/2020/06/07/opinion/white-privilege-civil-rights.html.

240. *Id.*

> benefits—much as African Americans were once forced into a segregated, second-class citizenship in the Jim Crow era.[241]

Bryan Stevenson adds:

> This country is very different today than it was forty years ago. In 1972, there were 300,000 people in jails and prisons. Today, there are 2.3 million. The United States now has the highest rate of incarceration in the world. We have seven million people on probation and parole. And mass incarceration, in my judgment, has fundamentally changed our world. In poor communities, in communities of color, there is this despair, there is this hopelessness that is being shaped by these outcomes. One out of three Black men between ages of 18 and 30 is in jail, in prison, on probation and parole. In urban communities across the country—Los Angeles, Philadelphia, Baltimore, Washington—50 to 60 percent of all young men of color are in jail or prison or on probation or parole . . . .
>
> [Moreover,] my state of Alabama, like a number of states, actually permanently disenfranchises you if you have a criminal conviction. Right now in Alabama, 34 percent of the Black male population permanently lost the right to vote. We're actually projecting that in another 10 years, the level of disenfranchisement will be as high as it's been since prior to the passage of the Voting Rights Act. And there is this stunning silence.[242]

Moreover, systems of policing are, and have long been, heavily skewed against the rights of people of color. A sampling of reputable studies, as well as data from the FBI and elsewhere, shows "evidence of a significant bias in the killing of unarmed black Americans relative to unarmed white Americans, in that the probability of being black, unarmed, and shot by police is about 3.49 times the probability of being white, unarmed, and shot by police on average."[243] And according to a *Washington Post* summary of a Stanford study of police practices in Oakland, California:

---

241. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2, 4 (The New Press 2012).

242. Bryan Stevenson, *We Need to Talk About an Injustice*, TED (Mar. 2012), at 5:32, 6:58, https://www.ted.com/talks/bryan_stevenson_we_need_to_talk_about_an_injustice#t-748427.

243. Cody T. Ross, *A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011–2014*, PLOS (Nov. 5, 2015), http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0141854; *see also* German Lopez, *There Are Huge Racial Disparities in How US Police Use Force*, VOX, https://www.vox.com/identities/2016/8/13/17938186/police-shootings-killings-racism-racial-disparities (last updated Nov. 14, 2018) ("Black people are much more likely to be shot by police than their white peers . . . . [A]nalysis of the available FBI data . . . found that US police kill black people at disproportionate rates: Black people accounted for 31 percent of police killing victims in 2012, even though they made up just 13 percent of the US population."); Kia Makarechi, *What the Data Really Says About Police and Racial Bias*, VANITY FAIR (July 14, 2016), https://www.vanityfair.com/news/2016/07/data-police-racial-bias.

> Regardless of the area of the city, disproportionate treatment by race was similar and the raw totals were stunning . . . . 2,890 African Americans [were] handcuffed but not arrested in a 13-month period, while only 193 whites were cuffed. When Oakland officers pulled over a vehicle but didn't arrest anyone, 72 white people were handcuffed, while 1,466 African Americans were restrained . . . . [Moreover, u]sing only the words an officer uses during a traffic stop, we can predict [with 66 percent accuracy] whether that [officer] is talking to a black person or a white person.[244]

Clearly, America needs to think hard about alternative approaches to policing.

3. Congressional Factfinding - H.R. 40

Evidence of these sorts of disparities cries out for response, including serious consideration of governmental reparations, a topic which has been receiving increased attention in the last few years.[245] A logical next step would be for Congress to take up H.R. 40 ("Commission to Study and Develop Reparation Proposals for African-Americans Act"), first introduced by Rep. John Conyers in 1989 and reintroduced in every subsequent Congress.[246] The Bill proposes:

> To address the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to study and consider a national apology and proposal for reparations for the institution of slavery, its subsequent de jure and de facto racial and economic discrimination against African-Americans, and the impact of these forces on living African-Americans, to make recommendations to the Congress on appropriate remedies, and for other purposes.[247]

Why has H.R. 40 never been advanced out of committee? Nkechi Taifa (co-founder of N'COBRA) suggests: "It's because it's black folks making the claim . . . . People who talk about reparations are considered left lunatics. But all we are talking about is studying [reparations]."[248] Taifa continues, "As John Conyers has said, we study everything. We study the water, the air. We can't even study the

---

244. Makarechi, *supra* note 243.

245. *See, e.g.*, Jorge G. Castañeda, *Reparations: A Conversation Worth Having*, N.Y. TIMES (Apr. 12, 2019), https://www.nytimes.com/2019/04/12/opinion/international-world/reparations-a-conversation-worth-having.html). A more complete discussion of reparations is beyond the scope of this Article. *See, e.g.*, *We Stand in Support of H.R. 40 and Reparations for African Americans*, BEN & JERRY'S (Oct. 17, 2019), https://www.benjerry.com/about-us/media-center/reparations-statement.

246. *See generally, e.g.*, Sheila Jackson Lee, *H.R. 40 Is Not a Symbolic Act. It's a Path to Restorative Justice*, ACLU (May 22, 2020), https://www.aclu.org/news/racial-justice/h-r-40-is-not-a-symbolic-act-its-a-path-to-restorative-justice/.

247. H.R. 40, 116th Cong. (2019). In 2008, the U.S. House of Representatives did issue a formal apology in the form of H.R. Res. 194; and in 2009, the U.S. Senate unanimously passed Concurrent Resolution 26. *See* Lawrence, *supra* note 2, at 111–12.

248. Coates, *supra* note 1, at 23 (quoting Nkechi Taifa). N'COBRA stands for: "National Coalition of Blacks for Reparations in America."

issue? This bill does not authorize one red cent to anyone."[249] Coates suggests it is past time for Congress to take up H.R. 40.[250] After all, "[a] crime that implicates the entire American people deserves its hearing in the legislative body that represents them."[251]

Congress held hearings on H.R. 40 for the first time ever in the summer of 2019.[252] No further action had been taken as of the date of publication.

C. Thought Experiment - Hypothetical: Thirteenth Amendment Exam Question

This article concludes with the following thought experiment, constructed in the form of a law school exam question hypothetical, designed to prompt ideas and spur discussion:

> Certain faculty members at a state university take seriously their felt responsibility to comply with the Thirteenth Amendment's mandate to eliminate all "badges and incidents of slavery" at their institution. They are the faculty advisors for a student journal, a prestigious student activity where students gain valuable writing and editing experience, and which helps with students' job prospects. Historically, the percentage of Black students on the journal has been exceedingly low, much lower even than the percentage of Black students in the general student population.
>
> State University is subject to a state law known as Proposal X, which was created by referendum in 2010, requiring that race not be considered in admission decisions by any school receiving state funds.
>
> The faculty members strongly believe that centuries of broad-ranging systemic racial injustice play a role in the low numbers of Black students, so they institute a race-conscious recruiting and application process for the journal, including firm target quotas. They are aware that race-conscious affirmative action programs are highly disfavored by the Supreme Court on Equal Protection grounds, but they proceed nonetheless on the theory that the Thirteenth Amendment authorizes—and perhaps even *mandates*—race-conscious affirmative action to help erase the "badges and incidents of slavery" represented by the Black students' lessened educational resources, etc. that have led to their difficulty in qualifying for the journal.
>
> Moreover, they are aware that the practice would violate Proposal X, but they argue that the statute itself is unconstitutional as applied to Black Americans because it fails, in direct violation of the Thirteenth Amendment, to allow for State remediation of the "badges and incidents of slavery."

---

249. *Id.*
250. *Id.*
251. *Id.* at 60.
252. Sheryl Gay Stolberg, *At Historic Hearing, House Panel Explores Reparations*, N.Y. TIMES (June 19, 2019), https://www.nytimes.com/2019/06/19/us/politics/slavery-reparations-hearing.html.

> The program is successful, and the advisors are pleased that by the second year, the numbers of Black students on the journal have increased dramatically. Thereafter they contact like-minded faculty at public universities in a number of other states, and within the next couple of years faculty advisers have initiated similar programs with the student journals at their institutions, with similarly successful results in dramatically increasing the numbers of Black students on the journals.
>
> The advisors have known all along that they will possibly (or likely) face a lawsuit on equal protection grounds, but they are willing to take their chances, believing that their Thirteenth Amendment arguments will prevail.
>
> Discuss the constitutionality of the advisors' actions.

CONCLUSION

This Article has reviewed various possible constitutional bases for efforts toward advancing the elusive goals of a racially just society in America. This Article explained that, while much racial justice work has been accomplished in the name of equal protection, arguments based on the Fourteenth Amendment Equal Protection Clause face a number of steep challenges in the Supreme Court (largely due to the Court's adoption of an organizing approach based on the "anti-discrimination" principle), to the point where now many of the earlier gains have stagnated and even regressed.

This Article also discussed the comparative merits of Thirteenth Amendment arguments, adding to a growing chorus of scholars explaining that the Amendment's Section 1 charge that "neither slavery nor involuntary servitude shall exist" in America, coupled with Congress's Section 2 enforcement power, provides strong constitutional grounds for implementing meaningful measures toward achieving robust progress in the racial justice realm. Further, this Article explained how these arguments are premised on an organizing approach based on the "group-disadvantaging" principle.

Finally, this Article made the case that on-going aspects of the systemic race-based discrimination that continues to exist in America constitutes "badges and incidents of slavery" that demand attention under the Thirteenth Amendment. Specifically, it explained that Section 1 demands judicial enforcement of private and public violations alike (including public *in*action) and that Congress's Section 2 enforcement power, coupled with the inherent police power possessed by the States, authorizes (or even mandates) the broad use of all manner of governmental remedies, including unapologetically race-conscious affirmative action measures. This Article concludes that such approaches are necessary to atone for and to reconcile, in moral and legal terms, the truth and reality of the long history of systemic, deeply embedded racial injustice in America, and to begin to fulfill the nation's promise of liberty and justice for all.