RACIAL CARTELS AND THE THIRTEENTH AMENDMENT ENFORCEMENT POWER

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INTRODUCTION

In the summer and winter of 1865, a moderately successful Boston novelist and newspaperman named John Townsend Trowbridge toured the South. The Civil War had ended, but the South still smoldered—figuratively, if not literally. On a steam-boat trip, Trowbridge came across an embittered Alabama planter who explained what he expected would happen once the federal government stopped its Reconstruction efforts:

> [T]hings will work back again into their old grooves. The nigger is going to be made a serf, sure as you live. It won't need any law for that. Planters will have an understanding among themselves: 'You won't hire my niggers, and I won't hire yours;' then what's left for them? They're attached to the soil, and we're as much their masters as ever. I'll stake my life, this is the way it will work.[2]

The entire Reconstruction project can be understood as an effort to prevent things from "work[ing] back again into their old grooves"—at least as this planter predicted.

The grooves of racialized caste are ancient and they are deep. So deep, in fact, that the people who fall into them scarcely know they are in a rut.[3] Instead, they appear to the unreflective person as a well-worn path, a shortcut, a trail through an otherwise incomprehensible wilderness of data.[4]

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2 J. T. TROWBRIDGE, THE SOUTH: A TOUR OF ITS BATTLE-FIELDS AND RUINED CITIES, A JOURNEY THROUGH THE DESOLATED STATES, AND TALKS WITH THE PEOPLE 427 (Hartford, L. Stebbins 1866).

3 *See infra* Part I.A.

4 *See* GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 17 (2002) (noting that "race"

The literature on discrimination and racism is vast and vibrant.[5] This essay cannot hope to match the theoretical work of these scholars. Instead, this piece has three more modest goals. First, relying on the work of Ian Haney López, among others, it surveys the existing theoretical explanations for structural racism, with particular emphasis on structural racism as the product of both unconscious conventions and invisible framing devices – what Haney López calls "institutions." Second, it aims to tie this idea of institutions with the work of Daria Roithmayr, Richard McAdams, and other scholars who identify racial discrimination as a type of cartel behavior. In particular, this essay ties these theories together by positing that the "glue" that holds racial cartels together in the modern era is often the product of tacit understandings, behavioral norms, and invisible framing devices that can nonetheless create the same type of detrimental social and economic effects for minorities that collusive cartel behavior produces.

Once I have outlined the framework for discussing structural racism, this essay turns to the third, more overtly legal point. What does the existence of institutions that lead to cartel-like results mean about modern government power to guide and keep the nation out of its rut? In answer, I turn to an often-mentioned, but under-theorized, legal resource—the Thirteenth Amendment. In particular, I will provide an account of how Congress, through its Section Two authority under the Thirteenth Amendment, is empowered to break these racialized cartels and to prevent their formation through "appropriate legislation." For if the structural racism in America can be traced back to aggregations of individual and private habits of mind and behavior – institutions – that related to maintaining slavery in the past, then we can discern in the Thirteenth Amendment the authority for government to fashion tools to change those institutions both in the present and in the future.

I. Structural Racism

A. *Theories of Racial Discrimination*

Theories of racial discrimination take a number of forms and have taken up thousands of pages.[6] At the risk of over-simplifying an extremely complex

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is descriptive of a manner that humans categorize and group information "to navigate their way through a murky, uncertain social world").

5 *See, e.g.*, Gary S. Becker, The Economics of Discrimination (2d ed. 1971); Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws (1992) [hereinafter Epstein, Forbidden grounds]; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987).

6 For much of this taxonomy, I am indebted to the work of Ian Haney López. *See* Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*,

and overlapping literature, the theories can be summarized as follows: First, there is the rational, intentional discriminator model. This is the economic argument that racial discrimination is, in fact, intentional (that is conscious) and rational (it actually maximizes the discriminator's interests).[7] Second, there is the intentional, irrational discriminator model. This model also assumes that discrimination is intentional (that is conscious), but argues that it is irrational (it does not maximize the discriminator's interests). These two models' shared assumption is intentionality; the discriminator knows and intends to discriminate.[8]

Intentional discrimination theories tend to center around questions of whether engaging in discrimination is, in fact, rational (interest maximizing), rather than around questions of whether it is intentional. For example, one way of describing the rationality of discrimination is that individuals assign a certain utility to indulging their "taste" for discrimination.[9] Under this model, for example, an employer's indulgence in a taste for racial discrimination (or catering to the taste for racial discrimination of the employer's customers or employees) is irrational because it fails to maximize that employer's material outcomes. Employers without a taste for discrimination will prosper at the expense those that do. Eventually, those that have a taste for discrimination will be squeezed out of the marketplace.[10]

Alternatively, some scholars argue that the discriminator's indulgence in a taste for discrimination is rational in the sense that the person's loss of pecuniary or material benefit is exceeded by the gain in personal utility to the individual by either indulging in the taste, or by catering to the discriminatory tastes of others.[11] Another version of this theory is that racial discrimination is rational because racial characteristics are actually predictive of some trait or characteristic the discriminator wants to select

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109 YALE L.J. 1717 (2000).

7 *Id.* at 1762 (noting one theory of racial discrimination that assumes that it is an efficient way of selecting for traits that are otherwise more difficult to assess).

8 *Id.* at 1761.

9 This theory was first advanced by Gary Becker. *See* BECKER, *supra* note 5, at 14–15 (creating economic model for calculating costs of tastes for discrimination).

10 *See, e.g.*, Daniel R. Fischel & Edward P. Lazear, *Comparable Worth and Discrimination in Labor Markets*, 53 U. CHI. L. REV. 891, 912 (1986) (noting such competitive disadvantage in labor markets).

11 *See* Keith N. Hylton & Vincent D. Rougeau, *Lending Discrimination: Economic Theory, Econometric Evidence, and the Community Reinvestment Act*, 85 GEO. L.J. 237, 250–51 (1996) (noting scholars who argue that "[t]he taste discriminator will remain as long as he is willing to pay for the inefficiency created by his behavior"); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1622 (1991) (noting that an employer will incur a cost for *not* discriminating, whether the taste for discrimination is the employer's own taste, or the taste of the employer's customers or agents).

for or against.[12]

Richard McAdams offers a third, powerful and nuanced variation on this theme of the rational discriminator.[13] He argues that the intentional discriminator does not necessarily expect to see a direct personal benefit from discrimination. Instead, racial discrimination is a way to maximize the "group status" benefits of the group to which that discriminator belongs (or perhaps seeks to belong). The benefits to the discriminator come indirectly, by enhancing the esteem of the traits the discriminator shares with this group. The discriminator does this by degrading the traits of members of outsiders.[14] Whether the individual discriminator makes a conscious decision based on the fact that his specific discriminatory act will contribute to elevation of group status is not clear according to McAdams.[15]

Under these three models, the intentional rational discriminator, or the intentional, irrational discriminator, or the group status-enhancing discriminator, it is largely presumed that "(1) [a]ctors know their interests; (2) actors consciously weigh alternative means of maximizing their interests; and (3) actors act to maximize their interests."[16]

Finally, there is a fourth, more controversial model of discrimination articulated by Haney López among others. This theory rejects the conscious discriminator model, whether such model is rational or irrational. Instead, this model posits that discriminatory behaviors are not—or are no longer—motivated by conscious, intentional action, but are simply the effects of behavioral or cognitive inertia. Under this theory of racism, conscious intent, the fundamental assumption of the intentional, rational actor, is significantly reduced.[17] As Haney López describes them, institutional models of racism arise from either decisions made as a result of "stock prescriptions of conventional action, in which action stems from ingrained

12 *See* Jacob E. Gersen, *Markets and Discrimination*, 82 N.Y.U. L. REV. 689, 699 (2007) (observing that discrimination for a trait may be economically rational and persistent to the extent it is accurate). I will assume for purposes of this piece the observation made by other scholars, that "even if the stereotype is descriptively 'accurate,' it is normatively wrong to treat individuals differently on the basis of that stereotype in many contexts." Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 518 (2010).

13 Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995); *see also* Haney López, *supra* note 6, at 1764–69 (discussing McAdams's theory).

14 McAdams, *supra* note 13, at 1045 (observing that one way of enhancing the status of one's current traits is "by lowering the status accorded the traits of others").

15 *See* Haney López, *supra* note 6, at 1766 (noting that McAdams "acknowledg[es] that few if any actors proceed from a conscious interest in esteem"); *see also* McAdams, *supra* note 13, at 1060 (observing that "[w]hen one seeks to gain status by lowering the status of others," the strategy must by necessity deny that conscious denigration is taking place).

16 Haney López, *supra* note 6, at 1761. I am not as certain as Professor Haney López that McAdams's theory can be categorized appropriately as a theory of conscious rational action, but I will assume the characterization for purposes of this essay.

17 *Id.* at 1781–82.

habits and responses with virtually no conscious thought"[18]—what he calls "scripts"—or from conventional knowledge that "prescribes not the specifics of action[,] but its boundaries, channeling actors along certain courses" of action[19] —what he calls "paths"—or both.[20]

In this fourth model of discrimination, intent has little to do with the persistence of racism. Discriminators are not consciously maximizing their interests, whether those interests are defined as maximum material benefit, as indulging in a personal taste for discrimination, or as enhancing group status. Neither are the discriminators accurately making predictions based on physical characteristics. In Haney López's model, discriminators rarely behave consciously at all. Discriminators simply follow racialized conventions of behavior that have been laid down generations before, or make decisions within a "choice architecture,"[21] whose racialized nature is invisible or has long been forgotten.[22]

B. Cartels, Reconstruction, and the Institutional Ties That Bind

1. The Nature of Cartels.—These theories of racial discrimination are illuminating when considered alongside models of racial discrimination based on cartel behavior. As antitrust scholars know, "the primary goal of antitrust policy is to penalize cartels and to inhibit their formation."[23] As discussed more fully in Part II below, policies against racial subjugation can be articulated in a similar way, that their primary goal is the inhibition or punishment of racialized cartels.

The classic economic cartel consists of an agreement between competitors in restraint of trade. A variant of the shop–worn hypothetical is the two gas–station owners who meet in the middle of the highway and agree to set prices.[24] There is an agreement, it is in restraint of trade, and

18 *Id.* at 1781.

19 *Id.* at 1782.

20 *Id.* (noting that these two theories may operate together).

21 RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 3 (2008) (coining this term and describing a "choice architect" as one with "the responsibility for organizing the context in which people make decisions").

22 Or, as Oliver Wendell Holmes noted, "A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (Boston, Little, Brown & Co. 1881).

23 William H. Page, *Communication and Concerted Action*, 38 LOY. U. CHI. L.J. 405, 408 (2007).

24 For one such use of this often–used hypothetical, see Daniel J. Chepaitis, *The National Labor Relations Act, Non–Paralleled Competition, and Market Power*, 85 CALIF. L. REV. 769, 777–78 (1997).

it inures to the benefit of the cartel members.[25] In fact, cartels of the early antitrust era were actually written agreements between competitors that set terms for the collusion and punishments for breach.[26]

But antitrust scholars recognize that not all agreements in restraint of trade need to be express. "Conscious parallelism," the tacit understanding among competitors to coordinate action,[27] can also give rise to cartel-like effects.[28] Even though conscious parallelism standing alone has proven insufficient to sustain federal antitrust enforcement,[29] it still has powerful explanatory force in the area of anticompetitive theory. As one scholar recognizes, "conscious parallelism ... can be just as effective as an explicit price-fixing cartel at suppressing output and increasing price."[30] Judges require some evidence of agreement, "not so much because [judges] believe that there is any significant economic difference in the effect of the two practices, but because agreeing to suppress competition can be identified as a 'bad act' while merely following business instincts cannot."[31] As discussed below, this idea of intentionality motivates the analysis behind

25 *See* Daria Roithmayr, *Racial Cartels*, 16 MICH. J. RACE & L. 45, 50 (2010) (defining a cartel as "a group of actors who work together [through informal or formal agreements] to extract monopoly profits by limiting competition and restricting supply"); *see also* Page, *supra* note 23, at 408 ("[R]estraints of trade like coordinated pricing are only illegal under section 1 [of the Sherman Antitrust Act] if they are the product of an agreement.").

26 *See* Page, *supra* note 23, at 410; *see also* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 296 (1897) (detailing an agreement between rail lines that included investigatory and penalty provisions).

27 As one scholar put it, the "hallmark [of conscious parallelism] is the absence of agreement.... 'A cartel is not set up explicitly; instead, firms establish parallel conduct understanding the accomplishment of a common purpose.'" Reza Dibadj, *Conscious Parallelism Revisited*, 47 SAN DIEGO L. REV. 589, 596 (2010) (quoting Hans-Theo Normann, *Conscious Parallelism in Asymmetric Oligopoly*, 51 METROECONOMICA 343, 343 (2000)).

28 *See, e.g.*, Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 30 (2008).

29 *Id.*; *see also* Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954) ("[T]his Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense."). Until recently, evidence of conscious parallelism *could* be circumstantial evidence of an agreement, leading to further discovery past the motion to dismiss stage. Whether that survives after *Bell Atlantic Corp. v. Twombly* is another matter. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 444, 556-57 (2008) (stating that "without more, parallel conduct does not suggest conspiracy" sufficient to get past the pleading stage); *see also In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 324 (3d Cir. 2010) (explaining that a plaintiff relying on evidence of parallel behavior alone must state facts that "raise[] a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action" (internal quotation marks omitted)).

30 Crane, *supra* note 28, at 30.

31 *Id.* at 30-31; *see also* Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1575 (1969) [hereinafter Posner, *Oligopoly*] ("The purpose of section 1 [of the Sherman Antitrust Act] is to deter collusion by increasing its costs; this suggests that the tacit colluder should be punished like the express colluder.").

race discrimination law as well.[32]

Classical economic theories presume that cartels, whether maintained by actual or tacit agreement, will inevitably collapse because of the defection problem. Cartel members are enticed by the lure of competitive advantage. These classical theories posit that, whenever possible, cartel members will defect or "cheat" by changing prices, outputs, or hiring.[33] For this reason, according to these theories, cartels must be maintained by government sanction, threat of extra-legal violence, or some combination of both.[34]

Some theorists of racial discrimination as cartel behavior incorporate these classical economic assumptions. They assume that discriminators act consciously and with an assessment of the costs and benefits of any course of action. The discriminator takes into consideration the threat of legal sanction for defecting from the cartel, the risk of extra-legal violence for defection, and the rewards versus the risks that come from defection. In each case, the decision whether to stick with the cartel or to defect is conscious and rational. The effect of legal sanction, government enforcement, or extra-legal violence is simply one additional data point that goes into the calculation. According to these classic economic models, the cartel ultimately will dissolve in the absence of extra-legal violence or government enforcement because everyone will determine that it is in his or her best interest not to discriminate.[35]

Recent scholarship on cartels casts some doubt on these lassiez-faire accounts of cartel stability. It appears that other types of cartel discipline are possible and effective, quite apart from official government sanction or threats of violence. For example, private dispute resolution procedures, personal or family relationships between cartel members, the creation of behavioral norms within the cartel, and the formation of a "group

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32 *See infra* Part I.B.2.

33 Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49 WM. & MARY L. REV. 1621, 1629–30 (2008); Page, *supra* note 23, at 413.

34 Richard A. Epstein, *The Status-Production Sideshow: Why Antidiscrimination Laws are Still a Mistake*, 108 HARV. L. REV. 1085, 1100–05 (1995) (suggesting race-based cartels in the South could not exist but for violence); *see also* Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 222–23 (1942) ("Some private trusts and cartels . . . [impose] scarcity by violence, sometimes privately through their police, sometimes indirectly through the armed forces of the governments which they dominate. . . .").

35 *See* Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1531 (2011) ("The Chicago School's neoclassical economic theories teach that irrationality is irrelevant to antitrust doctrine: rational firms eliminate irrationality from the marketplace."); *see also* EPSTEIN, FORBIDDEN GROUNDS, *supra* note 5, at 41–47 (arguing that the racial cartels will crumble); David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781, 825 (1998) ("[I]t is very difficult for a cartel, including a cartel of racist whites, to operate effectively unless the government intervenes on its behalf."). For more on the manner in whichr acial cartels form and enforce discipline, see Roithmayr, *supra* note 25, at 55–65.

identity" can all act to increase cartel cohesion and reduce defection.[36] Christopher Leslie, for instance, identifies an antebellum salt cartel that imposed "shunning" punishments upon defectors.[37] Or, as Richard Posner has written in the context of medieval guilds, a set of identity, familial, and professional norms can act to enforce cartel discipline.[38] Once these informal and insular norms are established, cartels can become difficult to discover and to break.[39]

Furthermore, these informal tools of cartel discipline may not appear to the cartel member as either coercive or wrong[40] —in fact, they may not register to the cartel member as discipline at all. Instead, they become simply, as a cartel member might say, "the way we do things."[41] These norms can actually come to be viewed within the cartel as a positive, or as a moral imperative. As Richard Posner suggests, some cartels are kept together by bonds of "tradition," "pride," "loyalty to *the guild*," and "equality *among guild members*."[42] Eventually, the cartel becomes "a social as well as a business alliance."[43] Or, to relate it back to Haney López's work, the norms of behavior and the structures of choice that hold together the cartel are invisible—they are a type of identity, a "script," or alternatively, they form the "boundaries" of what is conceivable, what is possible, what is morally acceptable.[44]

That these scripts or paths become invisible, or part of the "normative

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36 *See* Leslie, *supra* note 33, at 1630 (discussing mechanisms by which economic cartels police their members); *see also* Page, *supra* note 23, at 410 (observing that "loose-knit" "gentlemen's" agreements were target of antitrust legislation); Roithmayr, *Racial Cartels*, *supra* note 25, at 51 (identifying theories that suggest "that social norms are an effective way to police cartel members"). For a more extended discussion of the stability of cartels using these methods, see Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515 (2004) [hereinafter Leslie, *Distrust and Antitrust*].

37 Leslie, *supra* note 33, at 1673–77.

38 Richard Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 10 (1993) [hereinafter Posner, *The Material Basis of Jurisprudence*].

39 *See* Leslie, *supra* note 33, at 1634; *see also* Peter C. Carstensen, *While Antitrust Was Out to Lunch: Lessons from the 1980s for the Next Century of Enforcement*, SMU L. REV. 1881, 1889–92 (1995) (discussing the work of Robert Axelrod to demonstrate how tacit collusion among competitors can be stable over time).

40 Leslie observes that "[a] social norm that belittles antitrust principles can become so pervasive that executives may fail to give any weight to the fact that antitrust violations are illegal." Leslie, *supra* note 33, at 1674–75.

41 Leslie, *Distrust and Antitrust*, *supra* note 36, at 585–90 (discussing how cartels create trust by developing social norms of cooperation and associations to perpetuate those social norms).

42 Posner, *The Material Basis of Jurisprudence*, *supra* note 38, at 10 (emphasis added). For more on the relationship between guilds and cartel behavior see McAdams, *supra* note 13, at 1059.

43 Posner, *The Material Basis of Jurisprudence*, *supra* note 38, at 10.

44 *See* Haney López, *supra* note 6, at 1819–20; *see also* Roithmayr, *supra* note 25, at 60–62 (discussing "internalized norms" as a method of cartel discipline).

universe"[45] in which we operate, makes the process of norm generation in combating cartel behavior all the more essential. As scholars have noted in the area of purely economic cartels, the process of developing informal norms against price fixing and anticompetitive conduct within firms, in addition to existing criminal and civil sanctions, can help deter cartel formation.[46] A similar type of norm creation and maintenance can be applied to racial cartels.

2. *Reconstruction History and Racial Cartels.*—Cartels as an economic model help explain racial discrimination's rise and persistence. I do not want to overstate the case. Not all aspects of antitrust theory or cartel behavior are directly translatable to the phenomenon of racial discrimination.[47] For example, there is disagreement as to the object of protection in these two types of analyses. In antitrust, the assumption, at least among some scholars, is that the law is designed to protect the consumer. Cartelization is prohibited because it tends to diminish competition and thereby harm consumers.[48] According to this view, economic decisions that actually benefit the consumer are not the target of traditional antitrust.[49] In antidiscrimination law, it is presumed that racial discrimination is itself a form of harm. The discrimination is experienced by the object of the harm, and without respect to whether some hypothetical consumer, or even all consumers, are better or worse off due to the discrimination.

Notwithstanding, understanding racism as a type of cartel behavior does help bridge disparate economic, behavioral and legal theories that, until recently, have tended to remain isolated. As Ian Ayres has suggested, the same equality norms "undergird[] the social concern with both civil rights and antitrust discrimination."[50] Whether African-Americans in particular are locked out of opportunity by governments or aggregates of private

45 *See* Robert M. Cover, *Nomos & Narrative*, 97 HARV. L. REV. 4, 4 (1983) (coining the phrase "normative universe").

46 Reeves & Stucke, *supra* note 35, at 1569–70.

47 *See* Miller, *White Cartels*, *supra* note 1, at 1045 & n.331 (making a similar disclaimer).

48 *See* Brunswick Corp. v. Pueblo Bowl-o-Mat, 429 U.S. 477, 487 (1977) ("The antitrust laws . . . were enacted for 'the protection of competition not competitors.'" (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

49 This view of the purpose of antitrust is subject to vigorous debate among antitrust scholars. *See* Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 138 (2011) (discussing debate in antitrust circles about whether antitrust protection extends to both buyers and sellers in a market); *see also* John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 196 (2008) (arguing that antitrust is designed to protect all consumers, not just end users). My purpose is not to take sides in this debate, but simply to show that the different goals of antitrust and antidiscrimination must be respected.

50 Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts are Unjustified*, 95 CALIF. L. REV. 669, 679 (2007).

citizens, and whether the motivation for the lock out is conscious or not, the results are the same.[51] It also gives some analytical coherence to both the power of Congress under the Thirteenth Amendment, and the doctrine that has built around its implementation in the Civil Rights Act of 1866.

It is apparent from the historical record that racialized restraints of trade, buttressed by government sanction and threat of violence, were among the initial strategies of Southern planters in the first few years of Reconstruction. Shortly following emancipation, planters engaged in express concerted action to control the labor force and to reduce the value of the freedman's power. They "often effected combinations or understandings among themselves not to contract with any former slave who failed to produce a 'consent paper' or proper discharge from his previous owner."[52] Planters conspired together to draft model agreements, fix wages, set standard penalties for breach of labor contracts, and restrict freedmen's ownership of real property.[53] Freedmen's Bureau agents sometimes broke up these combinations, but sometimes "[chose] to look the other way" when the cartels accomplished the Bureau's goal of maintaining labor stability.[54] Even if federal agents broke up the combinations, "planters kept themselves informed of what their neighbors were paying and paid no more,"[55] creating a similar kind of tacit or "conscious parallel" activity that has been the subject of traditional antitrust scholarship.[56]

White southerners also enlisted local and state positive law—in the form of the Black Codes—to keep cartel members in line. The Black Codes, as Eric Foner describes them, were a comprehensive attempt to regulate labor, property, taxation, justice, and education of the freedmen in such a way as "to put the state much in the place of the former master."[57] In some of these provisions, freedmen were constrained by law as to what occupations they could hold, restricted as to where they could rent property, and punished

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51 This is a fact that Justice Douglas seemed to appreciate. In the words of James Boyd White, Justice Douglas recognized that "when one group . . . ha[s] such a practical monopoly of private and public power that they may simply choose whether to achieve their objectives through the arms of the state or through concerted private action, it ought not matter which form of power they elect to use." James Boyd White, *What's Wrong With Our Talk About Race? On History, Particularity, and Affirmative Action*, 100 MICH. L. REV. 1927, 1946 (2002).

52 LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 415 (1979).

53 *Id.* at 415–16 (identifying each of these strategies).

54 *Id.* at 416.

55 *Id.*

56 *See* Crane, *supra* note 28, at 30; Page, *supra* note 23, at 410; Posner, *Oligopoly*, *supra* note 31, at 1575–76.

57 ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 198 (1988) (quoting WILLIAM WATSON DAVIS, THE CIVIL WAR AND RECONSTRUCTION IN FLORIDA 425 (Faculty of Political Sci. of Columbia Univ. eds., 1913)) (internal quotation marks omitted).

for vagrancy if they did not have employment.[58] A Florida law criminalized insubordination.[59] "Antienticement" laws enforced the planter cartel by criminalizing defectors who would offer better terms to a freedman for his or her labor.[60] In addition, southerners solely or in the aggregate resorted to violence.[61] Freedmen were physically assaulted or harmed; white defectors from the cartel were punished by other whites.

Unquestionably, positive law and extra-legal violence helped enforce cartel discipline. But that is only part of the story. It is also apparent that racialized social norms, and the racialized framing for how choices are made and discretion exercised, also kept together the structures of the old slave system. As Haney López defines it, "[a] racial institution is any understanding of race that has come to be so widely shared within a community that it operates as an unexamined cognitive resource for understanding one's self, others, and the-way-the-world-is."[62]

Racial institutions functioned even in the absence of positive law and violence to keep together the unity of racial cartels in the South. For example, it was widely believed that African-Americans were lazy or unwilling to work. This stereotype justified slavery in the first instance and persisted during Reconstruction. In a remarkable example of confirmation bias, Carl Schurz noted that:

> By a large majority of those [whites] I came in contact with . . . every irregularity that occurred was directly charged against the system of free labor. If negroes walked away from the plantations, it was conclusive proof of the incorrigible instability of the negro, and the impracticability of free negro labor. If some individual negroes violated the terms of their contract, it proved unanswerably that no negro had, or ever would have, a just conception of the binding force of a contract, and that this system of free negro labor was bound to be a failure. If some negroes shirked, or did not perform their task with sufficient alacrity, it was produced as irrefutable evidence to show that physical compulsion was actually indispensable to make the negro work. If negroes, idlers or refugees crawling about the towns, applied to the authorities for subsistence, it was quoted as incontestably establishing the point that the negro was too improvident to take care of himself, and must necessarily be consigned to the care of a master.[63]

58 *Id.* at 200.

59 *Id.*

60 *Id.* For more on this point, see Bernstein, *supra* note 35, at 790–91, and Roithmayr, *supra* note 25, at 57.

61 LITWACK, *supra* note 52, at 416 (noting that "[i]n some regions, patrols of white men meted out summary justice to blacks who were not under contract to an employer or who were found to be in violation of a contract").

62 Haney López, *supra* note 6, at 1808.

63 CARL SCHURZ, REPORT ON THE CONDITION OF THE SOUTH (1865), *reprinted in* 1 SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ 310 (Frederic Bancroft ed., The Knickerbocker Press 1913) [hereinafter Schurz, REPORT ON THE CONDITION]; *see also* Reeves & Stucke, *supra* note 35, at 1533 (citing behavioral theories that recognize that people "give undue weight to evidence that supports our beliefs, while discounting evidence that undercuts our beliefs").

This shared "understanding" of African-Americans led to official vagrancy laws, but also to a set of assumptions about how labor contracts needed to be drafted and enforced, how to oversee work that needed to be done, and how to administer otherwise neutral laws, such as breach of contract.

The delegation of law enforcement obligations to private citizens was another example of racism becoming institutionalized. During slavery the law often deliberately enlisted the power of private citizens to accomplish its goals. Private parties were legally forbidden from interfering with the slave catching and kidnapping activities of private citizens, and were compelled to assist in such slave catching if called upon by government officials.[64]

A similar type of enforcement through private parties continued into Reconstruction. This time, however, the effort was not in express service of slavery, but in service of defending the community against "vagrants." In the early days of Reconstruction, any white person was permitted to question the employment status of any black person. If a black man or woman had no work, the private citizen was empowered to arrest the freedman as a vagrant.[65] Schurz noted that by deputizing all citizens to enforce the law, the Southern states had all but relegated African-Americans to life "under a sort of permanent martial law."[66] Justice Samuel Miller wrote a letter in 1866 with similar sentiments: "[a]s it *was*, the individual slave . . . [labored] for the individual white man. As it is *proposed to be*, the whole body of the negro race in each state, must belong to and [labor] for the whole body of the white people of that state. . . ."[67] Even when the language of the vagrancy statutes was race-neutral to comply with the 1866 Civil Rights Act, the understanding among the private enforcers was that African-Americans were the proper targets.[68]

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64 *See* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1838–40 (2010).

65 SCHURZ, REPORT ON THE CONDITION, *supra* note 63, at 326 (noting provisions that "invest[] every white man with the power and authority of a police officer as against every black man").

66 *Id.*

67 CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862–1890, at 129 (2d prtg. 2004) (1939). Unfortunately, this sentiment did not extend to Justice Miller's thinking when it came to discrimination without compulsion of law, but as the consequence of aggregated private preferences or notions of property rights. Justice Miller joined the majority in the *Civil Rights Cases*. *See* The Civil Rights Cases, 109 U.S. 3, 24 (1883) (finding that public accommodation laws could not be supported by Thirteenth Amendment enforcement power).

68 *See* Miller, *White Cartels*, *supra* note 1, at 1030 n.231.

II. THIRTEENTH AMENDMENT ENFORCEMENT POWER AND RACIAL CARTELS

> Give me the power to cut up slavery, root and branch, wherever the federal authority legitimately extends, and I will open veins enough to bleed the monster to death. Breathe into our national life a sentiment strong enough to ripen into such legislation, and the backbone of the slave power will be broken.[69]

So said the Quaker and Indiana Congressman George Washington Julian in 1857. George Julian got what he wanted. As Lea VanderVelde writes, the Thirteenth Amendment presumes an "end–state"; an America in which slavery, that "agreement with hell,"[70] is extirpated.[71] Radical Republicans in the nineteenth century were certain in what they wanted; they wanted slavery and everything associated with it eliminated.[72]

The Thirteenth Amendment states: "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."[73] Slavery as physical compulsion is clearly contemplated by the text of the Amendment. But the Court has stated that the power of Congress under Section Two of the Thirteenth Amendment extends beyond mere personal servitude. It also empowers Congress with a power to legislate against the "badges" or "incidents,"[74] or even the "relic[s]" of slavery.[75]

To the extent that racial discrimination in the South can be understood as a type of cartel behavior, supported by positive law and extra–legal violence, it seems indisputable that Congress understood *at least* the first two supports to be legitimate targets of Thirteenth Amendment enforcement

69 George Washington Julian, Speech Delivered at Raysville (July 4, 1857), *in* GEORGE W. JULIAN, SPEECHES ON POLITICAL QUESTIONS 146 (New York, Hurd and Houghton 1872).

70 The quote is from William Lloyd Garrison in his denunciation of the Constitution as a pro–slavery document. SANDFORD LEVINSON, CONSTITUTIONAL FAITH 66 (1988) (quoting a remark by Garrison in WALTER MERRILL, AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON 205 (1963)).

71 Lea VanderVelde, *The Thirteenth Amendment of Our Aspirations*, 38 U. TOL. L. REV. 855, 857 (2007).

72 Contemporaries of the Radical Republicans were much more circumspect as to what the Thirteenth Amendment would achieve. For a discussion of the controversy over the Thirteenth Amendment and its meaning, see MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT (2001).

73 U.S. CONST. amend. XIII.

74 Griffin v. Breckenridge, 403 U.S. 88, 105 (1971); The Civil Rights Cases, 109 U.S. 3, 20 (1883).

75 Jones v. Alfred H. Mayer, Co., 392 U.S. 409, 442–43 (1968) (finding that the refusal to sell property to interracial couples, and thereby relegating them to racial "ghettos," could be considered a relic of slavery). For criticism about the scope of the Thirteenth Amendment addressing "relics" of slavery, see Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. (forthcoming 2012), *available at* http://ssrn.com/abstract=1666967.

power. In 1866, for instance, Congress passed the first Civil Rights Act. That Act provided that all citizens, of every race and color, should be able:

> to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[76]

With the 1866 Civil Rights Act, Congress created federal guarantees that would abrogate operation of the Black Codes, the positive law that had supported the racial cartels of whites in the South. There has been little question since the latter twentieth century that Congress possesses the authority to use the Thirteenth Amendment in this fashion.[77]

In addition, passage of the 1866 Civil Rights Act laid the foundation to curtail the extra-legal violence that also supported these racialized cartels. It empowered the federal government to prosecute "any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act."[78] Again, today, there is little question of Congress's authority under the Thirteenth Amendment to target extra-legal violence.[79]

It is the third leg of this stool, the societal norms, the scripts and paths that were part of maintaining a slave culture,[80] that form the fundamental question about the power of Congress under the Thirteenth Amendment in the twenty-first century. Put simply, does the ability of Congress to enforce the Thirteenth Amendment's prohibition on slavery and its badges and incidents through "appropriate legislation" end at the stage in which intentionality disappears, and classical economic theory predicts that

76 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981-82 (1991)).

77 *See* 42 U.S.C. § 1981 (1991) (stating the Act applies to government and non-government actors).

78 Civil Rights Act of 1866 § 2; *see Alfred H. Mayer Co.*, 392 U.S. at 427-30 (observing that the Civil Rights Act of 1866, passed under the Thirteenth Amendment, was aimed at both state action and private actors). *But cf.* Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 722, 733 (1989) (recognizing that the Civil Rights Act of 1866 as subsequently reenacted "is both a Thirteenth and a Fourteenth Amendment statute" but holding that modern-day section 1983 is the exclusive remedy for damages actions against state officers acting under color of state law).

79 *See Griffin*, 403 U.S. at 105 ("Congress was wholly within its powers under s 2 of the Thirteenth Amendment in creating 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.").

80 *Cf.* Balkin, *supra* note 64, at 1817 ("Slavery was not just legal ownership of people; it was an entire system of conventions, understandings, practices, and institutions that conferred power and social status and maintained economic and social dependency.").

racialized cartels will disintegrate on their own? Or does the Thirteenth Amendment also permit legislation that would prevent the creation of these cartels as well?[81] To date, the Court has consistently side-stepped the direct question of whether the Thirteenth Amendment enforcement power enables Congress to deal with disparate impacts created by private choices, rather than disparate treatment.[82]

History is illuminating, although seldom definitive. As Michael Vorenberg has written, history cannot provide us with a "true" meaning of the Thirteenth Amendment, as "Americans were left to work out the origins and meanings of freedom long after the measure was adopted."[83] It is difficult to discount the observations of the generation immediately following the war, however. Those on the ground after the war quickly appreciated that the Reconstruction Congress confronted not only a political, but also a *cultural* challenge.

Carl Schurz recognized this fact soon after surveying the condition of the South. Schurz wrote that the "[t]he principal cause" of the "rebellion" was "that the Southern people cherished, cultivated, idolized their peculiar interests and institutions in preference to those which they had in common with the rest of the American people."[84] This, to Schurz, explained "the importance of the negro question as an integral part of the question of union in general, and the question of reconstruction in particular."[85] Whites in the South had come to regard "blacks [as] their property by natural right"[86] and neither the war nor emancipation had loosened their "ingrained feeling that the blacks at large belong to the whites at large, and whenever opportunity serves they treat the colored people just as their profit, caprice or passion may dictate."[87] Schurz's diagnosis of the medicine needed for success was bold and it was stark: "[I]t is not only the political machinery of the States and their constitutional relations to the

81 *See id.* (noting that to truly "enforce the Thirteenth Amendment, Congress must disestablish all the institutions, practices, and customs associated with slavery and make sure they can never rise up again").

82 *See* Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390 n.17 (1982) ("We need not decide whether the Thirteenth Amendment itself reaches practices with a disproportionate effect as well as those motivated by discriminatory purpose, or indeed whether it accomplished anything more than the abolition of slavery."); City of Memphis v. Greene, 451 U.S. 100, 125–29 (1981) (finding that closing a section of street did not violate enforcement legislation under Section Two of the Thirteenth Amendment, and declining to find Thirteenth Amendment Section One violation, but not deciding scope of Section Two power). For more on this topic, see William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1328–29 (2007).

83 VORENBERG, *supra* note 72, at 3–4.

84 SCHURZ, REPORT ON THE CONDITION, *supra* note 63, at 306.

85 *Id.*

86 *Id.* at 320 (quoting a letter from a commission of Freedmen's Bureau) (citation omitted) (internal quotation marks omitted).

87 *Id.*

General Government, *but the whole organism of Southern society that must be reconstructed*, or rather constructed anew, so as to bring it in harmony with the rest of American society."[88]

Indeed, the Civil Rights Act of 1866 passed over the veto of President Andrew Johnson, who believed—much like classical economists—that an equilibrium between freedmen and their former masters would arise as a natural product of market forces.[89] Freedmen organizations and Black newspapers at the time of the Thirteenth Amendment's ratification also seemed wary of relying too heavily on the simple operation of the free market.[90] After all, so many gradualist antebellum thinkers had assumed that the invisible hand of the market would slowly strangle slavery and all its incidents without the necessity for war or constitutional amendments.[91]

If one accepts that the project of the Thirteenth Amendment, in fact all of Reconstruction, was to get at societal conventions themselves, whether upheld by positive law, extra-legal violence, or neither, then this has important implications for congressional power. Acts of individuals and legislators that invidiously set apart African-Americans for disparate treatment in a manner that has a slavery-era analog are clearly within the scope of the Thirteenth Amendment power. But Carl Schurz recognized that something more revolutionary was required. The glue of convention, of trust, of group identity that had held together the political, economic, and social conventions of slavery in the South had to be denatured.[92] Under this reading of the Thirteenth Amendment enforcement power,

88 *Id.* at 355 (emphasis added).

89 As President Andrew Johnson said at the time of the veto, the Civil Rights Act of 1866 "frustrates" an adjustment that should be "left to the laws that regulate capital and labor." *See* Miller, *White Cartels*, *supra* note 1, at 1035-36 (quoting President Andrew Johnson, Veto of the Civil Rights Act (Mar. 27, 1866), *in* PRESIDENTIAL DOCUMENTS: THE SPEECHES, PROCLAMATIONS, AND POLICIES THAT HAVE SHAPED THE NATION FROM WASHINGTON TO CLINTON 146, 149 (J.F. Watts & Fred L. Israel eds., 2000)).

90 VORENBERG, *supra* note 72, at 83 (noting that "African Americans, while embracing much of free-labor ideology, rejected that strain of it that envisioned labor and capital working out equitable arrangements organically, without government intervention").

91 As one delegate to the Constitutional Convention was reported to have said: "Let us not intermeddle [with slavery]. As population increases poor laborers will be so plenty as to render slaves useless. Slavery in time will not be a speck in our Country." JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA, at 444 (Gaillard Hunt et al. eds., 1920) (remarks of Oliver Ellsworth); *see also* Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 LAW & CONTEMP. PROBS. 175, 190 (2004) (noting Framers' belief in gradual death of slavery).

92 The fact that Southern whites with no property interest in slaves willingly enforced slave-owners' economic interests is a powerful testament to this type of informal norms working in a cartel-like fashion. *See* Miller, *White Cartels*, supra note 1, at 1028; *see also* Balkin, *supra* note 64, at 1817 (suggesting that the Thirteenth Amendment empowers Congress "to dismantle the interlocking social structures and status-enforcing practices that were identified with slavery or that rationalized and perpetuated it").

Reconstruction America equipped Congress with a powerful solvent.

III. Implications

Understanding the Thirteenth Amendment enforcement power as a power designed to destroy and to prevent racialized cartels has a number of implications for current doctrine and future legislation. First, it offers conceptual support for those cases in which the Court has extended the Civil Rights Act of 1866 and the "badge or incident" of slavery concept to non–African Americans punished for their affiliations with African–Americans. For, if one purpose of the Thirteenth Amendment enforcement power is to disrupt the mechanisms that support racialized cartels, then it seems reasonable that those persons who suffer for defection from these cartels should have some right to recover under legislation passed pursuant to the Thirteenth Amendment.

For example, retaliation claims by whites under the Civil Rights Act of 1866 and its modern equivalents present a frequently unrecognized problem of constitutional authority under Section Two of the Thirteenth Amendment. If the Civil Rights Act of 1866 operates against private conduct that Congress can rationally determine constitutes a "badge" or "incident" of slavery, then how is it that a person who is not racially discriminated against herself can have standing to sue for discrimination directed against others? That is, if a white person asserts that she has been fired because an employer or company has discriminated against an African–American, how can it be the white person has suffered a "badge" or "incident" of slavery sufficient to support congressional power? Such a construction would seem to stretch the ability of Congress to enforce the Thirteenth Amendment through "appropriate" legislation to its limits.

The constitutional implications present themselves in the 1969 case *Sullivan v. Little Hunting Park, Inc.*[93] In *Sullivan*, Paul Sullivan was the white owner of a home and a rental property in a residential community in Virginia. The residential community included a park and a playground operated by a corporation in which the community members owned shares.[94] Sullivan rented his property to an African–American named T.R. Freeman, Jr.; and, under the by–laws of the corporation, Sullivan was allowed to assign his shares to the park and playground to Freeman subject to approval by the corporation's board of directors.[95] The directors refused to approve the assignment based on Freeman's race.[96] Sullivan objected to the board's

93 Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).

94 *Id.* at 234–35.

95 *Id.*

96 *Id.* at 235.

decision and was expelled from the corporation as a consequence.[97]

Absent the argument that Sullivan is asserting some kind of third-party standing of Freeman,[98] it is difficult to see how Sullivan's expulsion from the corporation was a type of injury that evinces a "badge" or "incident" of slavery. It is, after all, the private discrimination against *Freeman's* race that motivated the board's decision, not Sullivan's. However, if one understands the Thirteenth Amendment enforcement power as designed to break up the power of racialized cartels, then the result seems far more sensible. Congress's authority under section two empowers it to disrupt the creation and maintenance of racialized cartels. Racialized cartels use internal private norm enforcing mechanisms—like ostracism, expulsion, shame, etc.—to enforce the cartels and to maintain social and economic status.[99] Therefore, Congress has authority under section two to disrupt racialized cartels by arming defectors, like Sullivan, with a right of action against the cartel's norm enforcers.[100]

Second, it suggests that there is a constitutional backdrop beyond the intentionality framework of Equal Protection that can serve as a source of legislative authority by policy makers interested in the problems of structural racism. Equal protection doctrine as it currently stands requires some evidence of disparate treatment. The Court has yet to strike down all legislation aimed at state-created disparate impacts on the grounds that such legislation is not "congruent" or "proportional" to section one of the Fourteenth Amendment, or is otherwise outside the scope of Congress' authority,[101] but the risk of invalidity is there. Further, the Court has edged ever closer to finding that some laws enacted under Congress' commerce power aimed at disparate impacts are themselves violations of Equal Protection.[102] If the Thirteenth Amendment is understood as empowering Congress to prevent racialized cartels, it offers some hope that efforts to regulate disparate impact may survive these challenges. At the very least, the Thirteenth Amendment could be used to support legislation that obliges policy makers to consider the impact that their decisions will have

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97 *Id.*

98 This is a position that Justices Thomas and Scalia took in a much later case. *See* CBOCS W., Inc. v. Humphries, 553 U.S. 442, 467 (2008) (Thomas, J., dissenting).

99 *Cf.* Leslie, *supra* note 33, at 1674 (discussing shunning as a type of cartel enforcing mechanism).

100 *See* Miller, *A Thirteenth Amendment Agenda*, *supra* note 1, at 298 n.18.

101 *See* Okruhlik v. Univ. of Ark. *ex rel.* May, 255 F.3d 615, 625-27 (8th Cir. 2001) (discussing whether Title VII as passed pursuant to § 5 authority is constitutional as it applies to disparate impacts); *see also* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736-39 (2003) (applying a quasi-disparate impact analysis to determine the constitutionality of the Family and Medical Leave Act).

102 *See* Ricci v. DeStefano, 129 S.Ct. 2658, 2683 (2009) (Scalia, J., concurring) ("[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how-and on what terms-to make peace between them.").

on groups tied to a history of slavery. Congress already does this with respect to regulation affecting economic interests;[103] it is not a stretch to have the same considerations apply in the area of racial justice.[104]

And finally, it is worth noting that the power of Congress under the Thirteenth Amendment is not without its own set of problems and temptations which must be respected and controlled. Not every form of individual preference, whether aggregated or not, can be properly identified as a "badge," an "incident," or a "relic" of slavery, nor should it. Nor does the fact that the Thirteenth Amendment contains more specific authority to stamp out racial inequality than, say, the Commerce Clause power mean that the Thirteenth Amendment power supersedes all other protections in the constitutional text.[105] What this argument about Thirteenth Amendment power says is that, as Jack Balkin notes, the Thirteenth Amendment enforcement power is both broader and more structural than the existing understandings will admit, and must be taken seriously, rather than relegated to a state of constitutional desuetude.[106]

Conclusion

This essay has attempted to pull tighter the threads that link theories of structural racism, theories of cartel behavior, and theories of the remedial powers of Congress under the Thirteenth Amendment. But, as the participants in this symposium are aware, further work remains. Reconstruction is an inter–generational project, an "unfinished revolution," in the words of historian Eric Foner. The challenge of racial inequality in the twenty–first century comes not from monstrous men of evil intent, but from forgetfulness and comfortable complacency. We must be vigilant; we must be diligent. For, despite its appearances, Reconstruction is a verb, not a noun.

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103 *See* 5 U.S.C. § 603(a) (2006) (requiring federal agencies to prepare an impact study on how a rule will affect small businesses and other small entities).

104 *Cf.* Exec. Order No. 12,898, § 1–103(a), 59 Fed. Reg. 7629 (Feb. 11, 1994) (requiring agencies to identify "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low–income populations"); 40 C.F.R. § 7.35 (b)–(c) (2010) (addresing disparate impact in EPA funding).

105 *See* Balkin, *supra* note 64, at 1824 (noting that powers to enforce Reconstruction Amendments are themselves subject to other constitutional limits).

106 *See id.* at 1816–18.