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# The Thirteenth Amendment and Constitutional Change

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# THE THIRTEENTH AMENDMENT AND CONSTITUTIONAL CHANGE

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Thank you all for having me here to join in this celebration of Professor Bell's life and legacy. I'd like to offer my sincere thanks to the University, President Sexton, Dean Morrison, Vice Dean Hertz, Mrs. Bell, the entire Bell family, and all of the family and friends who have joined here for this Lecture, which I hope will prove worthy of Professor Bell's legacy. I'm quite honored to be here at NYU. I've long been an admirer of NYU—both the university and the law school—for its deep commitment to both teaching and scholarship as well as the justified reputation of this law school as being committed to public interest, public service, and social justice.

Before turning to the substance of my talk, I'd like to share a few brief reflections on the reason that we all are gathered here tonight: the work and life of Professor Derrick Bell. Since being appointed Dean of the University of Pittsburgh School of Law in July 2012, one of the most remarkable things that I've been privileged to see is the legacy that Professor Bell, an alumnus of my law school, has left with us in Pittsburgh and the impact he has had on so many people. Since beginning my deanship, we have implemented several new initiatives in his honor at the law school: for example, our Black Law Students Association has renamed their annual legal clinic in his honor; we have established the Derrick Bell Fund for Excellence with support from the Bell family to encourage our students to pursue social justice; and our Law Review has dedicated its seventy-fifth anniversary issue to Professor Bell and hosted a corresponding symposium on Critical Race Theory in the spring of 2014. I've also had the opportunity to see the deep and abiding personal impact that Professor Bell had on his law school classmates as well his colleagues and the students who were lucky enough to get to know him during his Visiting Professorship at the University of Pittsburgh. Everyone who knew him—even those who ultimately disagreed with his viewpoints—held him in uniformly high regard for his intellect, his dedication to his students, and his fierce commitment to justice.

I will make three primary points in my lecture. First, I will describe the history and purpose of the Thirteenth Amendment in order to illuminate how the Amendment's context and intent can provide a basis for a more progressive vision for advancing civil rights. Second, I will discuss and analyze some of the

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major jurisprudence regarding the Thirteenth Amendment, both in Congress and the courts, and share with you some reasons as to why the Thirteenth Amendment, in my view, has been underutilized relative to its full possible scope. Last, I will discuss how the Thirteenth Amendment could prove to be more effective in addressing persisting forms of inequality that have escaped the reach of the Equal Protection Clause and other constitutional provisions.

The Thirteenth Amendment's text is rather brief. It provides 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."[1] The Amendment clearly outlaws chattel slavery or similar forms of forced labor. As discussed below, its Framers also intended the Amendment to eliminate what they called "the badges and incidents" of slavery: that is, the laws, customs, and social structures that supported slavery or arose therefrom.

Properly defining the content and scope of the Thirteenth Amendment's prohibition on the badges and incidents of slavery requires understanding slavery as its Reconstruction Framers did. Slavery involved more than forced labor, unequal treatment, and the property law rights and status of the owner and the owned. All of these were fundamental aspects of the slave system, but they were not its sum total. Rather, as revealed by the surrounding historical context and the debates leading to the adoption of the Thirteenth Amendment, the Amendment's Framers understood slavery to also include the surrounding infrastructure of customs, practices, and systemic forms of racial subordination that supported an ideology of white supremacy, which enabled the system of slavery to prosper and persist.[2] Beyond simply outlawing chattel slavery, the Framers also intended for the Amendment to provide the federal government with the power to eliminate the lingering vestiges of the slave system.[3]

Based on my research into the Thirteenth Amendment debates in Congress and the historical context in which the Amendment was adopted, I believe that the Thirteenth Amendment's proscription of the badges and incidents of slavery should be interpreted with regard to both its immediate purposes and its broader intended reach. First, in interpreting the Thirteenth Amendment, I suggest that we must begin by understanding slavery as did the Amendment's Framers. They recognized that only one racial group was systematically subjected to the horrors of American chattel slavery and that their descendants are therefore most likely to suffer the continuing impact of the legacies of the slave system. However,

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1. U.S. CONST. amend. XIII.

2. For an extension of the Thirteenth Amendment's Framers' intent, see William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 50–52 (2004) [hereinafter *Racial Profiling*]; William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1330–35 (2007) [hereinafter *Race, Rights, and the Thirteenth Amendment*]. *See also infra* pp. 585–87, for discussion of the Thirteenth Amendment debates.

3. *See id. See also* discussion *infra* pp. 585–87.

notwithstanding the Amendment's immediate focus on enslaved African-Americans, the Thirteenth Amendment also reaches beyond the descendants of the enslaved and extends, as per its Framers' intent, to eliminating the badges and incidents of slavery wherever and in whatever form they be found, even if the victim is not African-American.[4]

The contemporaneous historical context illuminates the Thirteenth Amendment's Framers' intent and concerns. The predominant view of anti-slavery whites and the early Republican Party in the antebellum period was that slavery should not be extended beyond the places where it already existed and would eventually wither on the vine in those places where it did exist.[5] The center of gravity in anti-slavery dialogue and action subsequently shifted toward full and immediate abolition, however, in reaction to a series of events in the decades immediately preceding the Civil War.[6] Most acute were the "Bleeding Kansas" dispute and the *Dred Scott* decision, which helped drive anti-slavery activists toward the belief that the time had come for the country to make a clean and complete break with the system of slavery.[7] That sentiment culminated and crystallized in the proposal that became the Thirteenth Amendment.

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4. I acknowledge that the many strains of originalism and non-originalism might have different implications for the interpretive method used in construing a constitutional provision. *See, e.g.*, *Race, Rights, and the Thirteenth Amendment*, *supra* note 2, at 1330–32 (discussing originalism in the context of Thirteenth Amendment interpretation). For purposes of this article, however, I proceed from the generally accepted principle of constitutional hermeneutics that the expressed views of the drafters as to the meaning and intent of constitutional text are a logical starting point for interpreting such text when meaning is in question.

5. *See* RONALD G. WALTERS, AMERICAN REFORMERS: 1815–1860, at 79 (1997) ("Prior to 1831, most white critics of slavery assumed that manumission would be gradual and ought not to cause social or economic dislocation.").

6. *See id.* at 80 (noting that the prevailing gradual abolitionist view shifted from the 1830s onward, with the predominant antislavery doctrine rejecting gradual abolition and instead calling for full and immediate emancipation).

7. Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). The Bleeding Kansas dispute refers to the series of often violent confrontations between pro- and anti-slavery forces in Kansas and adjacent territories beginning in the mid-1850s to determine whether they would be slave or free areas. The Kansas-Nebraska Act of 1854 purported to leave resolution of the slavery question in these territories to "popular sovereignty" (i.e., a vote of the free white settlers). This provoked a vehement reaction among free soil white settlers, who feared that allowing slavery would give an insurmountable economic advantage to those wealthy settlers who could work the new land with slave labor, and among Northern abolitionists, who had considered the question settled by the Missouri Compromise. *Dred Scott*, of course, was the Supreme Court decision invalidating the Missouri Compromise. For further discussion of how these and other events radicalized anti-slavery sentiment, see Andrew E. Taslitz, *Criminal Justice Successes and Failures of the Thirteenth Amendment*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 249 (Alexander Tsesis ed., Columbia Univ. Press 2010) ("[T]he Kansas–Nebraska Act and the *Dred Scott* decision widely convinced Republicans that a newly aggressive Slave Power was at work to nationalize slavery, taint Northern free labor, and crush Northern liberty."), and Rebecca Zietlow, *Congressional Enforcement of the Rights of Citizenship*, 56 DRAKE L. REV. 1015, 1023–24 (2008) ("While the members of the Supreme Court hoped their *Dred Scott* opinion would end the battle over rights of citizenship, instead it fanned the flames of abolitionist fervor and contributed to the tension over slavery that exploded into the Civil War".).

By the time of the final debates in Congress regarding the Thirteenth Amendment, Congressmen of both parties generally recognized that the legal institution of chattel slavery would end with the North's anticipated military victory in the Civil War.[8] The congressional debates therefore focused less upon whether slavery would or should end than they did upon two other main themes regarding what would follow the end of slavery. The first theme involved the issues of federalism and "states' rights," that is, whether the central government or state and local governments would be responsible for defining and protecting the freedmen's rights after the end of chattel slavery.[9] By establishing that "Congress shall have power to enforce this [Amendment] by appropriate legislation,"[10] the Thirteenth Amendment gave a clear answer: the primary power and responsibility regarding the freedmen's civil rights was to rest with Congress, not the states.

The second main theme of the congressional debates involved the question of which affirmative rights, if any, the freedmen would or should have after the end of chattel slavery. This portion of the debates provides the greatest insight into defining the badges or incidents of slavery the Amendment's Framers intended the Thirteenth Amendment to prohibit. Some of the Thirteenth Amendment's supporters identified particular legal disabilities that they recognized as incidents and legacies of the slave system. For example, Senator Harlan spoke of disenfranchisement from the civil court system, the inability to serve on criminal juries, the inability to own property, and the violation of conjugal and familial relationships as badges and incidents of slavery.[11] More typically, however, the Amendment's Framers and supporters spoke in terms of broad, natural rights that would evolve as needed to eliminate the legacy of slavery entirely.[12] Senator Henry Wilson of Massachusetts, one of the Amendment's primary advocates, stated that the Thirteenth Amendment was

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

9. The Thirteenth Amendment debates are replete with discussion of the fact that the Thirteenth Amendment would enlarge federal power over civil rights. The Amendment's supporters acknowledged and urged that it would do so; its opponents resisted the Amendment on the grounds that such expansion was an improper usurpation of state authority. *See* Ex Parte Virginia, 100 U.S. 339, 345 (1879) (stating that the Thirteenth and Fourteenth Amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congrese [sic]"). *See also Racial Profiling*, *supra* note 2, at 50–51 (quoting the discussions of the federalism issue during the debates).

10. U.S. CONST. amend. XIII, § 2.

11. *See* CONG. GLOBE, 38th Cong., 1st Sess. 1439–40 (1864).

12. *See* HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875, at 392 (Harper & Row, 1982) ("Those who supported the Thirteenth Amendment 'expressed their convictions in organic imagery . . . Education from the past, forward motion, and adaptability to change were the constitutional qualities Republicans praised.'").

designed to "obliterate the last lingering vestiges of the slave system: its chattelizing, degrading, and bloody codes; its dark, malignant, and barbarizing spirit; all it was and is; everything connected to it or pertaining to it."[13] Senator Charles Sumner of Massachusetts, another leading advocate of the Thirteenth Amendment, articulated similarly broad goals, stating that the Amendment "abolishes slavery entirely, everywhere throughout this country. It abolishes it root and branch. It abolishes it in the general and the particular. It abolishes it in length and breadth and then in every detail."[14]

Notwithstanding these broad proclamations of purpose by the Thirteenth Amendment's Framers, for nearly a century, the Supreme Court treated the Amendment as a historical curiosity with little contemporary effect, consistently holding that the Amendment prohibited only chattel slavery or modern instances of literal involuntary servitude.[15] As a result of the Court's narrow early Thirteenth Amendment jurisprudence, the Amendment largely lay dormant until the 1960s when it was revived in *Jones v. Alfred H. Mayer Co.*[16] In *Jones*, the plaintiffs were an interracial couple seeking to buy a home in St. Louis. The plaintiffs claimed that the defendant refused to sell a home to the couple because the husband was African-American.[17] The plaintiffs sued under 42 U.S.C. § 1982, which was originally enacted as part of the Civil Rights Act of 1866 and was based on Congress's Thirteenth Amendment power to eliminate the badges and incidents of slavery.[18] The defendant argued that Congress's Thirteenth Amendment power did not reach private racial discrimination and was instead limited to enforcing the prohibition of literal enslavement.

The Supreme Court upheld § 1982 as a reasonable exercise of Congress's power to abolish all badges and incidents of slavery, whether imposed by governmental or private action.[19] The Court reasoned that:

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13. CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864).

14. CONG. GLOBE, 42nd Cong., 2d Sess. 728 (1872).

15. *See, e.g.*, Corrigan v. Buckley, 271 U.S. 323, 330 (1926) (holding that the Thirteenth Amendment did not provide jurisdiction to hear challenge to enforcement of racially restrictive covenant because Amendment only reaches "condition[s] of enforced compulsory service of one to another [and] does not in other matters protect the individual rights of persons of the negro race"); Hodges v. United States, 203 U.S. 1, 17 (1906) (holding that Amendment empowered Congress to outlaw only those private acts that amounted to actual physical enslavement, meaning "the state of entire subjection of one person to the will of another"); Plessy v. Ferguson, 163 U.S. 537, 542 (1896) (stating, in deciding that Thirteenth Amendment did not invalidate "separate but equal" doctrine, that "[s]lavery implies involuntary servitude—a state of bondage; the ownership of mankind as chattel, or at least the control of the labor and services of one man for the benefit of another"); United States v. Harris, 106 U.S. 629, 641 (1883) (holding that federal statute criminalizing conspiracies to interfere with federal civil rights "clearly cannot be authorized by the [Thirteenth Amendment] which simply prohibits slavery and involuntary servitude.").

16. 392 U.S. 409 (1968).

17. *Id.* at 412.

18. *Id.* at 422 ("In its original form, 42 U.S.C. s 1982 was part of s 1 of the Civil Rights Act of 1866.").

19. *Id.* at 412.

> Just as the Black Codes, enacted after the Civil War to restrict the free exercise of [the freedmen's] rights, were substitutes for the slave system, so [too] the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.[20]

*Jones* seemed to open the door to an expansive vision of constitutional authority to redress the lingering vestiges of slavery and consequent forms of systemic inequality in ways that equal protection doctrine does not.[21] The Supreme Court, however, moved quickly to close that door. *Palmer v. Thompson* is one example of the Supreme Court's post-*Jones* reluctance to broadly apply the Thirteenth Amendment.[22] *Palmer* arose when the City of Jackson, Mississippi, refused to comply with an order to integrate its swimming pools, even after reluctantly agreeing to integrate its other public facilities.[23] As Judge Leon Higginbotham explains in his seminal book *In the Matter of Color*, stereotypes about black cleanliness and black dangerousness—particularly the perceived threat of sexual violence to white women—and the stigma attached to commingling of the races in intimate settings such as swimming pools had produced in whites a deep and visceral aversion to sharing public swimming facilities with blacks.[24] The *Palmer* plaintiffs sued the city to force it to allow black residents to have access to the public pools. They alleged, inter alia, that the city's actions were tantamount to an official public statement of proclamation of African-Americans' inferiority to whites and that such stigmatization imposed a badge or incident of slavery in violation of the Thirteenth Amendment.[25] The Supreme Court summarily rejected the Thirteenth Amendment argument, stating that the plaintiffs' claim, if accepted, "would severely stretch [the Amendment's] short simple words and do violence to its history."[26] Although the *Palmer* Court refused to find that the Thirteenth Amendment standing alone created a self-executing cause of action for badges or incidents of slavery, the Court did

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20. *Id.* at 441–43.

21. For further discussion of how the requirements of discriminatory purpose and state action severely constrain the reach of the Equal Protection Clause to address systemic racial inequality, disparate impact, and unconscious bias, see Carter, *Racial Profiling*, *supra* note 2, at 33–44.

22. 403 U.S. 217 (1971).

23. *Id.* at 219. *See also* Brief for Petitioners at 4, *Palmer*, 403 U.S. 217 (No. 107), 1970 WL 136648, at *4 ("The City of Jackson and the State of Mississippi have for many years maintained a steel-hard, inflexible, undeviating official policy of segregation." (quoting United States v. City of Jackson, 318 F.2d 1, 5 (5th Cir. 1963)) (internal quotation marks omitted). For a detailed discussion of the context of the city's actions in *Palmer*, see William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2, 22–24 (2011).

24. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1980).

25. *Palmer*, 403 U.S. at 219–20.

26. *Id.* at 226.

reaffirm *Jones* in holding that Section 2 of the Thirteenth Amendment empowers Congress to legislate in order to remedy or prevent the badges or incidents of slavery. While the *Palmer* Court signaled its own discomfort with adopting a badges and incidents of slavery remedy as a matter of judicial interpretation,[27] it left the door open to appropriate congressional action.

Congress, however, has infrequently exercised its power under Section 2 of the Thirteenth Amendment.[28] The most notable recent examples of federal law passed pursuant to the Thirteenth Amendment involve federal hate crimes legislation. Two federal courts of appeals have recently upheld these statutes against constitutional challenges. The first case, *United States v. Nelson*,[29] arose out of the Crown Heights riots. Existing tensions between black and Jewish residents of the neighborhood exploded into riots after two African-American children were struck and severely injured by a car driven by a Jewish person.[30] Shortly after the traffic accident an angry crowd gathered, some of whom attempted to attack the driver.[31] After the driver and the children were removed from the scene, the two defendants, who were African-American, participated in inciting a mob to attack Yankel Rosenbaum, a man visibly identifiable as Jewish by his Orthodox garb.[32] He was stabbed and subsequently died of his injuries.[33] The defendants were prosecuted for violating 18 U.S.C. § 245, which makes it a federal crime to "injure[], intimidate[] or interfere[] with . . . any person because of his race, color, religion or national origin."[34] The defendants argued that the convictions could not be sustained because the statute, as applied, exceeded Congress's Thirteenth Amendment power.[35] Their arguments were twofold. First, the defendants argued that even if the Thirteenth Amendment authorizes

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27. The Supreme Court has not explicitly held, either in *Palmer* or in other post-*Jones* cases, that the Thirteenth Amendment only reaches the badges and incidents of slavery when a federal statute so directs. The Court has nonetheless sent a fairly strong signal that it is skeptical of arguments that interpret the badges and incidents clause to provide a private cause of action in the absence of an applicable federal statute. The lower courts have largely followed that signal, generally holding that in the absence of congressional legislation identifying a condition as a legacy of slavery and authorizing a cause of action to redress it, the Thirteenth Amendment only reaches literal involuntary servitude or physical restraint. For further discussion of this issue in the lower courts, see Carter, *Race, Rights, and the Thirteenth Amendment*, *supra* note 2, at 1339–55.

28. Based on a brief informal review, the following statutes, originally enacted in the wake of the Civil War, are based upon Congress's Thirteenth Amendment power: 42 U.S.C. § 1981 (2000) (protecting the equal rights of all citizens to make and enforce contracts); 42 U.S.C. § 1982 (2000) (protecting equal rights to buy, sell, and lease property); 42 U.S.C. § 1985(3) (2000) (providing for a civil cause of action for conspiracies to deprive persons of equal protection of the law); 42 U.S.C. § 1994 (2000) (prohibiting peonage); and 18 U.S.C. § 1581 (2000) (providing for criminal penalties for imposing peonage).

29. 277 F.3d 164 (2d Cir. 2002).

30. *Id.* at 169–70.

31. *Id.* at 169.

32. *Id.* at 170.

33. *Id.* at 170–71.

34. *Id.* at 171.

35. *Id.* at 173.

Congress to proscribe the badges and incidents of slavery, such power only extends to protecting *racial* groups from such vestiges of slavery. Because Jews in contemporary America are not considered a separate "race," the defendants argued that the Thirteenth Amendment's protections could not extend to them. Second, the defendants argued that even if Congress's Thirteenth Amendment power could extend protection to Jews, it would be inconsistent with the Amendment's purposes to apply federal hate crimes law to punish African-American defendants, since blacks were the original beneficiaries of the Thirteenth Amendment's protection.

The *Nelson* court rejected the defendants' arguments. The court acknowledged that Jews are not considered a separate race in contemporary American society and that African-Americans were the Thirteenth Amendment's original intended beneficiaries.[36] Nevertheless, the court reasoned that the victim's race is not determinative of the scope of Congress's Thirteenth Amendment power to redress the badges and incidents of slavery.[37] The court's view was that slavery and its cognate institutions distorted American society as a whole by embedding pro-slavery laws, customs, and norms into American law and culture. One aspect of the social control essential to maintaining the slave system was that the legal system allowed private actors to inflict violence with impunity upon members of an identifiable racial group.[38] The *Nelson* court held that, because the Framers of the Thirteenth Amendment intended to give Congress the power to eliminate all vestiges of slavery, Congress could rationally use this power to enact the federal hate crimes statute and identify, prevent, and punish such violence today as a badge or incident of slavery.

*United States v. Hatch*[39] is the second recent case involving the Thirteenth Amendment and federal hate crimes law. In *Hatch*, the defendants kidnapped a developmentally disabled Native American man, assaulted him, and branded a swastika into his arm using heated metal. The defendants were prosecuted and convicted under the federal James L. Byrd and Matthew Shepard Hate Crimes Act.[40] The defendants appealed their convictions, arguing, inter alia, that the Act exceeded Congress's Thirteenth Amendment power.[41] The Tenth Circuit

36. *Id.* at 176–77.

37. *Id.* at 177.

38. *See id.* at 185–91.

39. 722 F.3d 1193 (10th Cir. 2013). In the interest of full disclosure, I co-authored an amicus brief in *Hatch* along with several other legal scholars.

40. 18 U.S.C. § 249 (2012).

41. As the *Hatch* court noted, when Congress enacted this provision in 2009 to expand the scope of federal hate crimes law, it expressly relied upon Section 2 of the Thirteenth Amendment. Among the congressional findings supporting the use of its Thirteenth Amendment power, Congress stated:

> For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread

affirmed the convictions and upheld the Act, holding that "Congress's enforcement power under Section 2 [of the Thirteenth Amendment] extends to eradicating slavery's lingering effects, or at least some of them."[42] The court reasoned, similar to *Nelson* and in reliance upon *Jones*, "Congress could rationally conclude that physically attacking a person of a particular race because of animus toward or a desire to assert superiority over that race is a badge or incident of slavery,"[43] given the key role that such private violence against a despised and subordinated racial group played in supporting the system of slavery.

*Hatch*, along with a similar constitutional challenge in *United States v. Cannon*,[44] has attracted considerable attention from advocacy groups that oppose federal hate crimes law and seek to return Thirteenth Amendment jurisprudence to its pre-*Jones* scope. Such groups have filed amicus briefs seeking to overturn defendants' convictions in both cases.[45] These cases are of tremendous importance, inasmuch as, if a circuit split develops, the Supreme Court may well reexamine the scope of Congress's badges and incidents of slavery power.[46]

Finally, it is worth exploring the potential benefits of a more robust application of the Thirteenth Amendment. First, the Supreme Court has consistently held that the Thirteenth Amendment, unlike the Fourteenth, does not have a state action requirement.[47] Thus, the Thirteenth Amendment, unlike the Equal Protection Clause, can be applied to the actions of private individuals that inflict a badge or incident of slavery, thereby reaching forms of subordination that currently lack any constitutional remedy. Second, the Supreme Court has

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> public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.

*Hatch*, 722 F.3d at 1200.

42. *Id.* at 1197.

43. *Id.* at 1206.

44. 750 F.3d 492 (5th Cir. 2014).

45. *See, e.g.*, Brief of Amici Curiae Cato Institute, Reason Foundation, and Individual Rights Foundation in Support of Petitioner in Hatch v. United States, 2013 WL 6002203; Supplemental Brief for Amici Curiae Todd Gaziano, Gail Heriot, and Peter Kirsanow in United States v. Cannon, 2013 WL 4505756.

46. The Supreme Court recently denied certiorari in *Hatch*. Hatch v. United States, 722 F.3d 1193 (10th Cir. 2013), *cert. denied*, 2014 WL 1124872 (U.S. Mar. 24, 2014) (No. 13-6765). The Fifth Circuit in *Cannon* recently upheld the Act as well, albeit with some seeming reluctance. *See Cannon*, 750 F.3d at 505 ("Even if the legal landscape regarding the [Thirteenth Amendment] has changed in light of [intervening cases since *Jones*], absent a clear directive from the Supreme Court, we are bound by prior precedents. . . . We therefore continue to follow the Supreme Court's binding precedent in *Jones*."). A special concurrence in *Cannon* by Judge Elrod expressly called upon the Supreme Court to take up the issue of the reach and scope of Congress's badges and incidents of slavery power. *See id.* at 509–14 (Elrod, J., concurring).

47. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 179 (1976) ("It has never been doubted" that the Thirteenth Amendment "includes the power to enact laws . . . operating upon the acts of [private] individuals . . . .").

also left open the possibility that the Thirteenth Amendment embraces disparate impact discrimination, in contrast to the Court's interpretation of the Equal Protection Clause as reaching only purposeful discrimination.[48] Thus, forms of systemic and structural subordination or individual discrimination arising from unconscious bias, which are effectively immunized from serious equal protection review due to the absence of purposefully discriminatory action, would be subject to constitutional scrutiny under a Thirteenth Amendment disparate impact theory.[49]

There remain a variety of barriers to greater legislative and judicial enforcement of the Thirteenth Amendment power to redress the badges and incidents of slavery. For example, in a recent article drawing upon Professor Bell's work,[50] I argued that one reason for the continued judicial reluctance to employ the Thirteenth Amendment to address the legacies of slavery may be a perceived lack of interest convergence. At the risk of some oversimplification, Professor Bell's interest convergence theory posits that advances in civil rights seldom happen solely out of altruism; rather, dramatic and/or durable advances in civil rights only occur when such advances, although putatively on behalf of minority groups, also advance the interests of the privileged majority. If interest convergence theory is correct, we should not be surprised that the full intent of the Thirteenth Amendment has never been fully realized, inasmuch as the Thirteenth Amendment's original genesis in advancing black liberty makes it seem that its contemporary applicability would have little relevance to privileged racial groups. Thus, as I have written elsewhere, "[t]o the extent that the badges and incidents of slavery theory is perceived [as only benefitting blacks], it would seem to have little utility to white elites. Interest convergence theory would therefore suggest that it is unlikely to be successful" in capturing the public, judicial, and legislative imagination.[51]

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48. *See* Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390 & n.17 (1982) (holding that 42 U.S.C. § 1981 applies only to intentional discrimination, but that "[w]e need not decide [as a general matter] whether the Thirteenth Amendment itself reaches practices with a disproportionate effect as well as those motivated by discriminatory purpose"); City of Memphis v. Greene, 451 U.S. 100, 128–29 (1981) ("To decide the narrow constitutional question presented by this record we need not speculate about the sort of impact on a racial group that might be prohibited by [the Thirteenth Amendment] itself. We merely hold that the impact [in this case] . . . does not reflect a violation of the Thirteenth Amendment.").

49. For further discussion, see *Racial Profiling*, *supra* note 2, at 33–36, 86–87. *Cf.* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 499 (2003) ("Acceding to a worldview on which racial inequity is primarily the product of present bad actors rather than largely a matter of historically embedded hierarchies fosters the misdescription of a central social problem and therefore helps make it less likely that the problem will be addressed through appropriate means.").

50. William M. Carter, Jr., *The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery*, 71 MD. L. REV. 21, 21 (2012) ("[T]he relative underdevelopment of Thirteenth Amendment doctrine is due in part to a lack of perceived interest convergence in eliminating what the Amendment's framers called the 'badges and incidents of slavery.'").

51. *Id.* at 36.

To be clear, I believe that the proper interpretation of the badges and incidents of slavery requires focusing on the legacies of slavery and understanding that those legacies are primarily felt by the descendants of those enslaved (i.e., African-Americans). However, a full understanding of the system of slavery and the oppressive structures it created reveals that the Amendment's goal was to eliminate all of the vestiges of the slave system, some of which may be felt by persons other than African-Americans. The Thirteenth Amendment's Framers believed that slavery had become "the master of the Government and the people,"[52] and that the "death of slavery [would be] the life of the Nation."[53] Slavery, for example, demanded the acquiescence of whites in black subordination, and slavery's laws and customs therefore severely punished whites who stood in favor of black liberty.[54] Slavery infringed abolitionists' freedom of speech in opposition to slavery, freedom of worship when support of abolition was based on religious principles, freedom of assembly to gather in opposition to black enslavement, and freedom of travel to places where support of abolition was punished by law and by private action, and endangered their economic liberty and personal safety.[55] Understanding the slave system's full reach and lingering contemporary effects may therefore help to illuminate that eradicating the badges and incidents of slavery is a project that benefits us all.

In closing, I believe that a robust Thirteenth Amendment jurisprudence directly furthers Professor Bell's legacy by bringing to light uncomfortable truths about lingering systemic subordination and forcing us to address them. To the students gathered here, I would encourage you to also further his legacy by continuing to pursue the things that drew you to law school in the first place. You will find as you enter the legal profession that you will need to have a special resiliency to maintain a commitment to social justice in the face of a variety of distractions and enticements that will be presented throughout your career. I cannot guarantee that there is glory or even victory in the struggle for social justice, but I can tell you that it will be worthwhile and that there is a joy to the struggle itself, as shown through the life and work of Professor Bell.

Finally, to Professor Bell's family and friends, know that Professor Bell lives on as an inspiration for us to have the same unwavering commitment to justice that he possessed, so that we can say to ourselves—as I know he could when he came to the end of his own path—that "I have fought a good fight; I have finished my course; I have kept the faith."[56]

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52. CONG. GLOBE, 38th Cong., 2d Sess. 154, 155 (1865) (statement of Rep. Davis of New York).

53. CONG. GLOBE, 38th Cong., 1st Sess. 1199, 1323 (1864) (statement of Sen. Wilson of Massachusetts).

54. For further discussion, see generally William M. Carter, Jr., *The Thirteenth Amendment and Pro-Equality Speech*, 112 COLUM. L. REV. 1885 (2012).

55. *See id.*

56. 2 *Timothy* 4:7 (King James).