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THE THIRTEENTH AMENDMENT AND EQUAL PROTECTION: A STRUCTURAL INTERPRETATION TO "FREE" THE AMENDMENT

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ABSTRACT

The hope is that the Court will one day hold that the Thirteenth Amendment has its own equal protection clause or component and that strict scrutiny will not be used for benign racial classifications designed to eradicate current badges and incidents of slavery. This Article critiques the Court's decision in the *Civil Rights Cases* regarding the scope of section 1 of the Amendment and it offers a holistic or structural interpretation of the Amendment to include an equal protection component and a lesser standard of review than strict scrutiny. Essentially, the Thirteenth Amendment, if properly used, could become a public policy of equal protection that influences courts' interpretation of the Amendment, other constitutional provisions, and statutes.

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INTRODUCTION

This Article explores ways in which courts can incorporate an equal protection clause or component into the Thirteenth Amendment and the standards that courts should use when interpreting claims under the Amendment. Part I is primarily a critique of Justice Bradley's majority opinion in the *Civil Rights Cases*, with a conclusion that a current court should question the value of that opinion because of Bradley's possible judicial bias. Part II offers a holistic or structural approach to incorporating an equal protection clause or component into the Amendment and discusses various ways in which such can be done. It also offers a criticism of Congress's use of section 2 of the Amendment, suggests Congress's inaction as a reason why courts should be more willing to broadly interpret section 1 of the Amendment, and offers a standard that courts should use during their interpretations. Part III suggests some areas in which the Thirteenth Amendment could be applied.

I. THE COURT'S CURRENT INTERPRETATION OF THE AMENDMENT

Section 1, the chief substantive portion of the Thirteenth Amendment, provides a role for the Court and lower courts to shape and define the scope of and the remedial effects of the Amendment.[1]

1. The Thirteenth Amendment provides:
Section 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.
Section 2. Congress shall have power to enforce this article by appropriate legislation.
U.S. Const. amend. XIII, §§ 1–2.

Although some might fear that the Court, through judicial activism, will impermissibly invade Congress's section 2 authority, the Court is just as likely to be too conservative in its approach to interpreting the Amendment, as it has been in the past.[2] For example, the Court's decision in the *Civil Rights Cases*[3] is a narrow interpretation of section 1. Whether the Court will continue to value this opinion is an open issue. However, there is substantial reason for the Court to re-evaluate the opinion and give the Thirteenth Amendment the judicial development that it needs.

There are several factors that should motivate the Court's reinterpretation of the *Civil Rights Cases*, including whether Justice Joseph P. Bradley, the author of the opinion, was a biased man who allowed his worldview to improperly influence his opinion in that case.[4]

A. Judicial Bias

Although the Court does not normally consider whether the personal biases of its justices improperly influenced an opinion of the Court, it seems that Justice Joseph R. Bradley, the author of the *Civil Rights Cases*, was at best a conflicted person, and at worst a racist. There is an interesting contrast between his dissenting opinion in *Blyew v. United States*,[5] and his majority opinion in the *Civil Rights Cases*. In *Blyew*, the Court interpreted section 3 of the Civil Rights Acts of 1866, which conferred federal jurisdiction over claims "affecting persons who are denied" any rights under section 1 of the Act, which in part granted black men the right to testify against white men in court.[6] Justice Strong's majority opinion held that, despite that certain black witnesses would not have been allowed to testify against the white murderers in a Kentucky state court prosecution, the federal prosecution of the murderers did not fall within section 3's grant of federal jurisdiction because the "affecting" requirement

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2. Such conservatism may lead to courts deferring controversial issues to the political process, instead of engaging in proper judicial review. *See* Palmer v. Thompson, 403 U.S. 217, 227 (1971) (denying a Thirteenth Amendment claim by asserting that Congress had not exercised its section 2 authority regarding the desegregation of a city-owned swimming pool); *see also* Inura Fernando, *Litigating Climate Change—Of Politics and Political Questions: A Comparative Analysis of Justiciability of Climate Change in the United States and Canada*, 49 VICT. UNIV. WELLINGTON L. REV. 315, 322–24 (2018) (discussing some of the standards that the Court uses to determine whether an issue is a political question and therefore non-justifiable).

3. *See* The Civil Rights Cases, 109 U.S. 3, 24–25 (1883).

4. *See* text accompanying *infra* notes 18–51.

5. *See* Blyew v. United States, 80 U.S. 581, 598–99, 601 (1871). *But see The Civil Rights Cases*, 109 U.S. at 24–25.

6. *See Blyew*, 80 U.S. at 581 (emphasis omitted).

would be established only if the black witnesses themselves were parties to the prosecution, and not just witnesses.[7]

In contrast, Justice Bradley noted that the 1866 Act was enacted under Congress's section 2 authority, which he interpreted as giving Congress the authority to eradicate "badges and incidents" of slavery, and that any state law that prevented a black man from testifying against a white man, as Kentucky law did, was a badge and incident of slavery, the eradication of which was within Congress's section 2 authority.[8] His dissenting opinion comes fairly close to stating that the Thirteenth Amendment itself also proscribes badges and incidents of slavery. He stated:

> To conclude, I have no doubt of the power of Congress to pass the law now under consideration. Slavery, when it existed, extended its influence in every direction, depressing and disfranchising the slave and his race in every possible way. Hence, in order to give full effect to the National will in abolishing slavery, it was necessary in some way to counteract these various disabilities and the effects flowing from them. Merely striking off the fetters of the slave, without removing the incidents and consequences of slavery, would hardly have been a boon to the colored race. Hence, also, the amendment abolishing slavery was supplemented by a clause giving Congress power to enforce it by appropriate legislation. No law was necessary to abolish slavery; the amendment did that. The power to enforce the amendment by appropriate legislation must be a power to do away with the incidents and consequences of slavery, and *to instate the freedmen in the full enjoyment of that civil liberty and equality which the abolition of slavery meant*.[9]

The phrase—"full enjoyment of that civil liberty and equality which the abolition of slavery meant"—strongly shows that, at that time, Justice Bradley believed that the Thirteenth Amendment itself did more than just remove the chains from slaves' legs—or, in Justice

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7. In that decision, Justice Strong's opinion centered on the meaning of "affecting"—which Justice Strong defined to mean that, to be affected, a black person had to be a party to a civil or criminal proceeding—relying upon an earlier Court opinion in which the Court held that a criminal prosecution of one who committed an assault on a foreign minister, did not "affect" the minister to confer federal jurisdiction under the relevant federal statute which has similar "affecting" language as section 2 of the 1866 Act. *Id.* at 591–95 (citing United States v. Ortega, 24 U.S. 467 (1826)).

8. *Id.* at 599, 601 ("To deprive a whole community of this right, to refuse their evidence and their sworn complaints, is to brand them with a *badge* of slavery . . . Merely striking off the fetters of the slave, without removing the *incidents* and consequences of slavery, would hardly have been a boon to the colored race . . . The power to enforce the amendment by appropriate legislation must be a power to do away with the *incidents* and consequences of slavery, and to instate the freedmen in the full enjoyment of that civil liberty and equality which the abolition of slavery meant.") (emphasis added).

9. *Id.* at 601 (emphasis added).

Bradley's words, "merely striking off the fetters of the slave"—but that the Amendment also gave former slaves certain rights after they left the physical confines of the plantations.[10] These rights, if not conferred directly by the Amendment, were at a minimum achievable by Congress through legislation under its section 2 authority.[11]

However, about twelve years later, in 1883, Justice Bradley changed his view on the scope of the Amendment in his majority opinion in the *Civil Rights Cases*.[12] Whereas his dissenting opinion in *Blyew* gave a flicker of hope that the Amendment itself abolished badges and incidents of slavery, his majority opinion in the *Civil Right Cases* narrowly interpreted the scope of section 1 to encompass only chattel slavery and those disabilities that limited the civil freedom of slaves and were the crucial or decisive difference between being a slave and being freed.[13] Although his opinion does not attempt an exhaustive listing of those civil freedoms, he opined that they at least included the rights that Congress codified in the Civil Rights Act of 1866—the rights "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."[14] Therefore, the public accommodations provision of the Civil Rights Act was not within the scope of section 1 of the Thirteenth Amendment, because, in Justice Bradley's opinion, the public accommodations provision involved the social rights of citizens, which the Thirteenth Amendment was not intended to regulate or proscribe.[15] To support that conclusion, he noted that, during slavery, free blacks were not normally allowed equal public accommodations, and therefore, not having equal accommodations was not an essential feature of slavery.[16]

From a judicial review standpoint, there is one flaw in Justice Bradley's majority opinion—which might be a feature of the infancy

10. *Id.*

11. The juxtaposition of Justice Strong's and Justice Bradley's positions in *Blyew* is interesting. In the guise of a statutory interpretation of the Civil Rights Act of 1866, Justice Strong's majority opinion is also an interpretation of the scope of section 1 of the Thirteenth Amendment—in that his decision allows for Kentucky to continue to use a state statute to prevent former slaves, and any formerly free black person, from testifying against a white person. This is tantamount to a decision that the Thirteenth Amendment itself does not provide for equal protection or equal rights of African Americans, and that such equal protection could come only from a Congressional enactment under section 2 of the Amendment. In contrast, Justice Bradley seemed to believe that the Amendment itself outlawed badges and incidents, although there is some ambiguity in that conclusion. *See id.* at 592–93, 601.

12. The Civil Rights Cases, 109 U.S. 3, 20–25 (1883).

13. *Id.* at 21–22.

14. *Id.* at 16.

15. *Id.* at 22.

16. *Id.* at 25.

of the Court's development of judicial precedent, but it is a flaw that would not be tolerated today—he cited absolutely no legal sources or authority for any of his conclusions about the permissible scope of section 1 of the Thirteenth Amendment. He made no reference to any type of legislative history or other available sources that would have shown the various statements or other intentions of the Framers of the Thirteenth Amendment, which would have offered him some ideas about the intended scope of the Amendment. At best, he used some type of judicial notice of the differences between a free person and a slave, and the essential rights and freedom of each.[17]

17. This apparent judicial notice is shown in Bradley's statements:

> The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the [T]hirteenth [A]mendment, before the [F]ourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible from; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens. Whether this legislation was fully authorized by the [T]hirteenth [A]mendment alone, without the support which it afterwards received from the [F]ourteenth [A]mendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time (in 1866) Congress did not assume, under the authority given by the [T]hirteenth [A]mendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.
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> We must not forget that the province and scope of the [T]hirteenth and [F]ourteenth [A]mendments are different: the former simply abolished slavery: the latter prohibited the States from abridging the privileges or immunities of citizens of the United States, from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the [T]hirteenth [A]mendment, it has only to do with slavery and its incidents. Under the [F]ourteenth [A]mendment, it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities which have the effect to abridge any deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws. Under the [T]hirteenth [A]mendment the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary,

operating upon the acts of individuals, whether sanctioned by State legislation or not; under the [F]ourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings.

The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any State law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? Many wrongs may be obnoxious to the prohibitions of the [F]ourteenth [A]mendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse stealing, for example) to be seized and hung by the posse comitatus without regular trial; or denying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others. What is called calss [sic] legislation would belong to this category, and would be obnoxious to the prhibitions [sic] of the [F]ourteenth [A]mendment, but would not to the prohibitions of the [F]ourteenth when not involving the idea of any subjection of one man to another. The [T]hirteenth [A]mendment has respect, not to distinctions of race, or class, or color, but to slavery. The [F]ourteenth [A]mendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.

Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the states by the [F]ourteenth [A]mendment are forbidden to deny to any person? And is the [C]onsitution [sic] violated until the denial of the right has some state sanction or authority? Can the act of a mere individual, the owner of the inn, the public conveyance, or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the state, and presumably subject to redress by those laws until the contrary appears?

After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such a act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the state; or, if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which [C]ongress has adopted, or may adopt, for counteracting the effect of state laws, or state action, prohibited by the [F]ourteenth [A]mendment. It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the [F]ourteenth [A]mendment, [C]ongress has full power to afford a remedy under that [A]mendment and in accordance to it.

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank

Perhaps, the use of legislative history and other evidence of congressional intent was not pervasive during Justice Bradley's time on the Court—which might give him a pass for taking judicial notice of his own beliefs and thoughts but should not give him any deference when courts are evaluating congressional intent regarding the scope of section 1 of the Amendment.

And, that Justice Bradley's majority opinion in the *Civil Rights Cases* is not supported by legislative history, and prior Court precedent, raises questions about whether his own biases colored his judicial notice conclusions about the scope of the Amendment. There are three conflicting things about Justice Bradley's life that raise concerns about the value of his majority opinion in the *Civil Rights Cases*.

First, after his dissenting opinion in *Blyew* in 1871, he was appointed as the swing member of the Electoral Commission whose mission was to vote on whether Hayes or Tilden should win the presidential election of 1876.[18] Being the swing vote, both Republicans and the Democrats lobbied for his vote for their party's candidate, with some partisans visiting Bradley at his home on the night before his vote, which may have caused him to change how he would vote.[19] Being a Republican, he eventually voted for Hayes,[20] which enraged

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> of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as white citizens; yet no one, at that time, thought that it was any invasion of their personal status as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement.

Id. at 22–25.

18. *See* Benjamin C. Block, *Bradley, Breyer, Bush and Beyond: The Legal Realism of Legal History*, 15 U. FLA. J. L. & PUB. POL'Y 57, 68–70 (2003).

19. *Id.* at 70–71.

20. *Id.* at 70. One scholar made the following statement about Bradley's involvement on the Electoral Commission:

> Under the national compromise reached in 1877, "[t]he South agreed to cooperate with the election of [Rutherford B.] Hayes; [and] the North agreed to abandon its reconstruction aims and to renounce any further role in protecting and enforcing the rights of the freedman." During the critical weeks before the compromise, Congress established the Electoral Commission to decide disputed returns. Included on the Commission were four Supreme Court Justices empowered to choose a fifth. Bradley was selected, becoming the fifteenth member of the Commission. "By a straight party vote, 8 [Republicans]–7 [Democrats], the electoral votes of [the disputed returns in Florida, Louisiana, Oregon, and South Carolina] were awarded to the Republicans," securing the presidency for Hayes "by a single [electoral] vote—185–184." Questions about Bradley's integrity on this issue were entwined with doubts as to his independence on the court. The collaboration between Chief Justice Waite and Justice Bradley has been examined for its possible taint of political expediency: the Chief Justice's choice of Bradley for the Commission because

some of the Democrats, leading to Bradley's being excoriated in the press.[21] There were several conspiracy theories about whether he had acted improperly in casting his vote, including an allegation that he may have sold his vote for $200,000.[22] Given the substantial criticism and bad press that he received, he even felt compelled to write a response to explain his vote.[23] However, the controversy persisted.[24] We may never know the real truth regarding Bradley's role and action on the electoral commission.

Second, Bradley may have harbored racist and sexist views.[25] There is no doubt that his supporters could say that he was just a man of his time. But, an opposing acknowledgment could be that so was Justice Harlan a man of his time, yet in his dissenting opinion in the *Civil Rights Cases* he still argued for a broader interpretation of the Thirteenth Amendment to include the badges and incidents of slavery.[26] But unlike Harlan's opinion, Bradley's opinion in the *Civil Rights Cases* appears to have been based on his pre-existing, very limited understanding of "equality" as stated in the Declaration of Independence.[27] In other words, instead of Jefferson's intent to apply the concept to all white men,[28] Bradley never thought that

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> he would "rubber stamp the sectional compromise." If, as has been theorized, Chief Justice Waite engineered Bradley's selection to the Electoral Commission with the understanding that Bradley would act on behalf of Rutherford Hayes, consequences at the executive level were predictable—Hayes would be elected; consequences for the Supreme Court were intimated—Bradley would acquiesce in the compromise by retreating from his reconstruction positions. Regardless of impulse, the Supreme Court declined to recognize federal authority in protecting the rights of persons of color. What remained was an unenforceable amendment glorifying the citizenship of persons recently enslaved. The legislation that Congress had produced over nearly a decade could find no objective beyond its own temporary existence. It was the legislation alone that "represented the post-war apex in federal accounting for civil rights."

Aremona G. Bennett, *Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Rights and Ambitions Following Emancipation, 1865–1910*, 70 CHI.-KENT L. REV. 439, 484–85 (1994).

21. Block, *supra* note 18, at 70.

22. *Id.* at 70–71.

23. *Id.*

24. *Id.* at 71–73.

25. Nedim Novakovic, Note, *Access to Justice: Reducing The Implicit Pushback Burden on Working-Class Pro Se Plaintiffs in Employment Law Cases*, 104 CAL. L. REV. 545, 546 (2016) (discussing Bradley's sexist attitudes about women).

26. The Civil Rights Cases, 109 U.S. 3, 34–36 (1883) (Harlan, J., dissenting). Justice Harlan is a good example that it is not the times that are important, but the man (perhaps the inner man) that is really important, and that some men in the same time can be more heroic than others. *Id.*

27. HON. JOSEPH P. BRADLEY, MISCELLANEOUS WRITINGS OF THE LATE HON. JOSEPH P. BRADLEY 90–93 (William Draper Lewis, A.Q. Keasbey & Charles Bradley eds., 1901).

28. *See id.* at 90.

even all white men were equal. At least one of his essays offers insight into his concept of equality. He stated:

> Does it mean social eqality? [sic] Such a state would make all the classes (I do not say orders) of society commingle their intercourse; would introduce the cobbler into the most elegant drawing room to take a cup of tea with the gayest belle of the town, or else, perhaps, to debate with grave Senators on the affairs of State. Could this have been meant? Certainly not. This is the least possible of all meanings that could be attached to the term. Men *will* choose their own company in whatever state of society you may choose to place them. This is the last vestige of liberty with which they are willing to part, and any state of society which forbids a man this privilege, I shall neither contend for nor against.[29]

Bradley's reference to social equality is too limiting because he used an example involving only the social contact of choosing whether to invite someone into your home for tea or a conversation.[30] In his argument, he did not consider public accommodations that are less intimate and less objectionable than being forced to invite someone into your home. In any event, it is reasonable to believe that Bradley's objection to social equality was operating when he opined in his majority opinion in the *Civil Right Cases* that anti-racial discrimination in public accommodations was not within the scope of the Thirteenth Amendment.[31] Although Bradley did not discuss social equality in the context of public accommodations, holding that the Thirteenth Amendment mandated such would have been against the principle of equality that he discussed in his essay on equality under the Declaration of Independence.[32] In his majority opinion in the *Civil Rights Cases*, he asserted:

> It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of

29. *Id.* at 91–92.
30. *See id.*
31. *See The Civil Rights Cases*, 109 U.S. at 24–25.
32. *See* BRADLEY, *supra* note 27, at 90–92.

> the [F]ourteenth [A]mendment, [C]ongress has full power to afford a remedy under that amendment and in accordance with it.[33]

In his essay, Bradley eventually concluded that in the Declaration of Independence equality means political equality: "In what, then, can this *political equality* consist? Does it consist in each man having an equal voice in the civil government of his country? This is what I conceive it to be. But this is exercised originally, and only so."[34] He goes on to explain that such political equality—the right to vote on an equal basis—exists only in its original form in that after one exercises his equal political power to elect a leader or to enact a constitution, he no longer has equal political power because a certain portion of that power is passed on to the leader or the constitution.[35]

The essay does not explain the role that free African Americans played in Bradley's political equality definition of equality, but it may be reasonable to assume that, in his opinion, and given his definition of political equality, that they were not equal under the Declaration of Independence and the U.S. Constitution until the passage of the Fifteenth Amendment, which attempted to give African Americans the right to vote.[36]

Third, and more importantly, it should be noted that Bradley was not an "abolitionist"; and that he described himself as being a "conservative of the conservatives" on the slave issue.[37] He was even critical of some Republicans who took a more radical view in support of ending slavery.[38] During his run for Congress in 1862, he emphasized in several speeches that he was for compromise with the southern states on the slave issue, and that his primary support for the Civil War was to preserve the Union and not to end slavery.[39] And that his support for the War, and against compromise with the Confederate States, was only after the South attacked the Union at Fort Sumter, after which he was in full support of the War and of a Union victory at all costs.[40] Bradley also was involved in formally

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33. *The Civil Rights Cases*, 109 U.S. at 24–25.

34. BRADLEY, *supra* note 27, at 92.

35. *See id.* In Regents v. Bakke, 438 U.S. 265, 391–94 (1978), Justice Marshall referenced Bradley's majority opinion in the *Civil Rights Cases* and was critical of the harmful effects of the opinion and of some of Bradley's statements therein.

36. The Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend XV, § 1.

37. *See* BRADLEY, *supra* note 27, at 130 (quoting Bradley: "You know that I never was an abolitionist. [Laughter.] You know that I was always a conservative of the conservatives.").

38. *Id.* at 107.

39. *Id.* at 113–14.

40. *See id.*

trying to broker a compromise with the Southern States before the War started.[41] Part of his compromise included his proposed Thirteenth Amendment to the Constitution, which would have allowed then-existing southern states to continue slavery in their boundaries and, if any new states were created in the Northwest Territory, it would have allowed those states to institute slavery within their boundaries after twenty years.[42] It also would have provided for the return of fugitive slaves to their masters in the southern states and for compensation from the county into which they had fled if the fugitive slaves were not returned.[43]

Despite Bradley's questionable background, some have attempted to cast his earlier opinions as being in furtherance of the Republican party's anti-slavery tradition, by pointing to various periods in his life and certain of his opinions.[44] While others have, instead of labeling him as a promoter of Republican viewpoints, noted that he was in a position of knowing the viewpoints and intentions of the Republican Congressmen who framed the Thirteenth Amendment—with one possible inference being that his majority opinion in the *Civil Rights Cases* and his dissenting opinion in the *Slaughter-House Cases* were based on that understanding and not on his own personal viewpoints and philosophy.[45] Other scholars have pointed to additional facts to show that he had a real understanding of the Framers' intent.[46]

But, it is somewhat odd in 2020 to be relying on such tenuous factors to determine whether Bradley knew the real intent of the Framers of the Thirteenth Amendment when he rendered his dissenting opinion in *Blyew* and his majority opinion in the *Civil Rights Cases*. Furthermore, there are other factors that support a conclusion that he may have not been trying to promote a Republican anti-slavery

41. *See id.* at 146.

42. *See id.* at 99.

43. *See* BRADLEY, *supra* note 27, at 99.

44. *See* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI.-KENT L. REV. 627, 671–74 (1994).

45. *See id.* at 672–74. Along that line, one writer points to the following things: (1) Bradley's uncle Theodore Frelinghuysen, under whom he read the law, argued a New Jersey anti-slavery case in that state's Supreme Court; (2) that Bradley was married to the daughter of Chief Justice Hornblower, who rendered the opinion in the New Jersey anti-slavery case (with the inference that this background connection could have influenced his thinking in his dissenting opinion in *Blyew*); (3) that he had authored several of the lower court opinions in the *Slaughter-House Cases*; (4) that he "possessed, enunciated, and made widely known, a theory of the Wartime Amendments that classified him, ideologically, among the radical Republican"; and (5) that "intent of the Fourteenth Amendment and its ideological underpinnings were widely known and Bradley was in a position to apply them." *Id.* at 672–74.

46. *See* Jonathan Lurie, *Mr. Justice Bradley: A Reassessment*, 16 SETON HALL L. REV. 343, 356–57, 359–60 (1986).

philosophy. First, he either supported slavery or he was not against it. This is clearly shown by his speeches and his efforts to reach compromise with the South, including his proposed Thirteenth Amendment that would have allowed the South not only to keep its slaves but to introduce slavery into the new territories.[47] And his writings show that he was very critical of those "radical Republicans" who took a more aggressive view in favor of abolishing slavery.[48]

Second, he simply did not believe in the "social equality" of men, as shown by his interpretation of "equality" in the Declaration of Independence.[49] And, in the *Civil Rights Cases*, it appears that he sought to further that belief as he seemed to have been mostly concerned with furthering the rights of white people to maintain a separation from and a segregation of black people.[50]

The simple notion of this Article is that Bradley's interpretation of the Thirteenth Amendment in the *Civil Rights Cases* should not be given any deference. This is so because he does not cite any legislative history or other sources to support his interpretation of the Amendment. Scholars' assumptions about what he probably knew or did not know about the Amendment Framers' intent are not sufficient to bolster the value of his majority opinion in that case. Because of Bradley's support for slavery and his willingness to compromise the slaves' rights—so that they would have forever remained enslaved—should cause the current Supreme Court to undertake a new analysis of the scope of section 1 to determine whether section 1 of the Amendment also proscribes "badges and incident" of slavery.

However, given the Court's adherence to stare decisis, it is uncertain how the current Court would approach Bradley's opinion in the *Civil Rights Cases*. In one of its more recent cases, *Jones v. Mayer*,[51] the Court gave mixed signals on what, if any, value Bradley's opinion has.

B. Influence of Bradley and the Civil Rights Cases

A possible motivating factor in the Court's willingness to still give value to Bradley's majority opinion is that the case was decided by justices who, because of the closeness in time to the enactment of the Thirteenth and Fourteenth Amendments, are believed to have some special insight about the motivation of the Framers' intent in enacting the Civil War Amendments. The Court has stated:

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47. *See* BRADLEY, *supra* note 27, at 98–99, 107, 113–14, 130.
48. *See id.* at 107.
49. *See* text accompanying *supra* notes 29–30.
50. *See* The Civil Rights Cases, 109 U.S. 3, 23–25 (1883).
51. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 (1968).

> The force of the doctrine of stare decisis behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time, who all had intimate knowledge and familiarity with the events surrounding the Amendment's adoption.[52]

However, the Court's decision in *Jones v. Mayer* is encouraging and instructive. The case involved whether Congress, under its section 2 powers, had the authority to outlaw racial discrimination in the sale of real property.[53] For the theme of this Article, there are two important aspects of the Court's opinion. First, regarding the scope of the Thirteenth Amendment, the Court relied on Justice Bradley's opinion in the *Civil Rights Cases* and quoted from the opinion: "'By its own unaided force and effect,' the Thirteenth Amendment 'abolished slavery, and established universal freedom.'"[54] The *Jones* Court did not go beyond this brief quote. Therefore, it is not clear whether the current Court will rely on Bradley's opinion to further restrict the scope of section 1 to only those rights which Congress identified in the Civil Rights statute that Bradley interpreted.[55]

Furthermore, although Bradley opined that the Amendment "established universal freedom," it is clear that he did not include the equal treatment of freed black people within the scope of or protection of universal freedoms, especially regarding private racial discrimination, which his *Civil Rights Cases* opinion held that Congress, even under its section 2 authority, did not have the authority to proscribe.[56] So, Bradley would have limited the scope of the Thirteenth Amendment to allow freed blacks to be relegated to second-class citizenship and status.[57] Such would be consistent with his idea that equality under the Declaration of Independence should not include social equality.

The second aspect of *Jones* is that the Court appeared to give a broader scope to Congress's authority under section 2. The Court stated:

> Whether or not the Amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed "Congress with power to pass

52. United States v. Morrison, 529 U.S. 598, 599 (2000).
53. *See Jones*, 392 U.S. at 412.
54. *Id.* at 439 (citing The Civil Rights Cases, 109 U.S. 3, 20 (1883)).
55. *See The Civil Rights Cases*, 109 U.S. at 22.
56. *See id.* at 17, 20.
57. *See id.* at 22–25.

> *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*."[58]

It seems that the only limitation is that Congress's determination as to what is a badge or incident of slavery must be reasonable or rationally related to some disability stemming from racial discrimination against at least African Americans; therefore, racial discrimination that prevented the sale of real property to African Americans was a badge and incident of slavery, and section 1982 was not unconstitutional nor beyond Congress's section 2 powers.[59]

In reaching this conclusion, unlike Bradley in the *Civil Rights Cases*, the *Jones* Court relied on its extensive study of the legislative history of section 1982.[60] The Court's relying on legislative history at least gives some objective way for one to evaluate the merits of the Court's reasoning, without having to give any credit or deference to the Court's closeness in time to the Congress that enacted section 1982 and any of its former versions.

Furthermore, the Court recognized that some of the Congressmen who were involved in the enactment of the Thirteenth Amendment and in the various versions of section 1982 might have been duplicitous and might have made bogus arguments to obfuscate or otherwise obstruct a true understanding of Congress's intent regarding the scope of section 1982.[61]

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58. *Jones*, 392 U.S. at 439 (emphasis added).
59. *See id.* at 413, 441 (quoting *The Civil Rights Cases*, 109 U.S. at 22).
60. *See id.* at 422, 427, 429, 431, 433, 435–36.
61. *See id.* at 439–40.

> Those who opposed passage of the Civil Rights Act of 1866 argued in effect that the Thirteenth Amendment merely authorized Congress to dissolve the legal bond by which the Negro slave was held to his master. Yet many had earlier opposed the Thirteenth Amendment on the very ground that it would give Congress virtually unlimited power to enact laws for the protection of Negroes in every State. And the majority leaders in Congress—who were, after all, the authors of the Thirteenth Amendment—had no doubt that its Enabling Clause contemplated the sort of positive legislation that was embodied in the 1866 Civil Rights Act. Their chief spokesman, Senator Trumbull of Illinois, the Chairman of the Judiciary Committee, had brought the Thirteenth Amendment to the floor of the Senate in 1864. In defending the constitutionality of the 1866 Act, he argued that, if the narrower construction of the Enabling Clause were correct, then
>
> > "the trumpet of freedom that we have been blowing throughout the land has given an 'uncertain sound,' and the promised freedom is a delusion. Such was not the intention of Congress, which proposed the constitutional amendment, nor is such the fair meaning of the amendment itself . . . I have no doubt that under this provision . . . we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was

The relevance of the *Jones* Court's reference to how different Congressmen attempted to change their arguments from the ones they made during the debate of the Thirteenth Amendment to the ones they made during Congress's subsequent enactment of the Civil Rights Act of 1866, is that—even if one were to believe in Bradley's closeness-in-time position of understanding the Framers' intent—there is no indication of which Congressmen's arguments or positions influenced him. During some of his speeches prior to the start of the Civil War, he expressed disdain for the Radical Republicans who were in favor of ending slavery;[62] instead, Bradley labeled himself as a "conservative" who did not want to deprive the South of its slaves.[63] There is no indication that Bradley, even if he knew the real intent of the Thirteenth Amendment's framers, would have been willing to give force to such intent in his court opinions, especially in his *Civil Rights Cases* opinion, given his unwillingness to accept their arguments during the debate over slavery before the start of the Civil War.

Therefore, just as the *Jones* Court did not rely on Bradley's understanding regarding the scope of Congress's section 2 authority, nor should a modern-day court rely upon Bradley's *Civil Rights Cases* opinion to in any way define or limit the scope of section 1 of the Thirteenth Amendment.

II. A HOLISTIC OR STRUCTURAL INTERPRETATION OF THE CIVIL WAR AMENDMENTS AND THE THIRTEENTH AMENDMENT

The general proposition is that the Civil War Amendments should be read as a unit and when ambiguity exists in one it can be resolved by relying on principles expressed in the other amendments, especially regarding the principle of equal protection. Some would label this type of reasoning a holistic approach to constitutional interpretation.[64]

> adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end."

Id.

62. *See* BRADLEY, *supra* note 27, at 107.

63. *See* Lurie, *supra* note 46, at 348–49.

64. *See* Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1267 (2001) ("Rather than justify the cleavage that exists under the Court's current Eleventh Amendment doctrine, I want to suggest that *Fitzpatrick* illustrates the possibilities of a more holistic form of constitutional interpretation in which parts of the Constitution adopted at different time periods are read together to create a principle with respect to the former parts that differs from the reading those parts previously had. *Fitzpatrick*, in a sense, gives the Fourteenth Amendment more 'weight' in interpretation than the Eleventh Amendment."). For other scholarship favoring a structural interpretation of the Constitution, see Zephyr Teachout,

This Article labels it as a structural approach to interpreting the Thirteenth Amendment.

There are two general propositions. First, the Thirteenth Amendment should be interpreted as having its own equal protection clause. Second, the Fourteenth Amendment's Equal Protection Clause establishes a constitutional policy of equal protection that should inform and be applicable to racial discrimination issues that are pursued under the Thirteenth Amendment.

A. Its Own Equal Protection Clause

Although it is not debatable that the Fourteenth Amendment does have an equal protection clause, one might assert that neither the Thirteenth Amendment nor the Fifteenth Amendment has an equal protection clause. But, a reasonable inference would show otherwise. The Thirteenth Amendment ended slavery so that black people would be treated as equally as white people, at least to the extent that an unequal system of enslaving only black people could no longer exist. As such, the Thirteenth Amendment's anti-slavery provision grants equal protection to African Americans.[65] The only open issue is how far this grant of equal protection extends. Some would argue that it extends only to the point of ending the physical bonds of slavery. Others, like this writer, argue that it also extends to certain "incidents" and "badges" of slavery. Even if one were to

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The Anti-Corruption Principle, 94 CORNELL L. REV. 341, 369, 397 (2009) (discussing an anti-corruption principle as a structural means of constitutional interpretation); *see also* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality*, *Federalism, and the Family*, 115 HARV. L. REV. 947, 949 (2002) (offering the history of women's struggle for the vote as a means of understanding and interpreting claims of sex discrimination). For a discussion that the Constitution should be read as a whole and that the Fourteenth Amendment Equal Protection Clause should be used to interpret the Bill of Rights Amendments, see Gabriel J. Chin and Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 919 (2015) ("[T]he Court has followed this approach. First, the protections of the Bill of Rights are read in light of the Fourteenth Amendment. They generally contain a nondiscrimination principle, often explicitly based on Fourteenth Amendment precedents."). These scholars cite some of the well-known proponents of a structural interpretation of the Constitution. *Id.* at 918–19 ("A range of modern scholars, such as Charles Black, John Hart Ely, Laurence Tribe, Akhil Amar, and Vicki Jackson, have argued against constitutional interpretation that treats clauses of the document in isolation. Their argument is a compelling one: The Constitution was adopted as a whole (and its subsequent amendments operate against the backdrop of that whole), and its various parts are most sensibly read if they are construed together."). For a detailed discussion of some of the principles and factors that courts should consider when deciding whether to adopt a structural interpretation, see Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1098–99 (2016).

65. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 98 (1980) (asserting that the Thirteenth Amendment "surely significantly reflects a concern with equality as well").

accept the limited interpretation of Justice Bradley—that section 1 of the Thirteenth Amendment covers only the items specified in the Civil Rights Act of 1866[66]—he or she would have to further acknowledge that equal protection is granted by section 1 to the extent of those items.

And, if one further follows Bradley's logic that section 1 of the Amendment granted only the rights listed in the Civil Rights Act of 1866, because they were "incidents" of slavery in that these were the things that were inflicted on slaves that could not legally be inflicted on free white men and free black men, then one is left with the possibility that Bradley's list might not be complete, because there were other things that slaves could not do or that they were forced to endure because they were slaves and not free. These things included: sexual abuse, including rape; forced pregnancy to produce children who could be sold to another plantation; preventing education, including learning how to read; preventing religious services to minimize possible discussion of rebellion; whippings as punishments; being subjected to harsh working conditions; being forced to "unconditional submission"; mental torture to cause slaves to feel that they were intellectually and otherwise inferior; being forced to live in a constant state of fear; having restrictions placed on their ability to travel; being subject to fugitive slave laws that allowed slaves to be returned back to their masters; being frequently forced to eat substandard food; being frequently supplied with inadequate medical treatment without any recourse; being unable to socialize with whites on an equal basis; being unable to work for wages on an equal basis as whites; and being subject to murder for any small infraction.[67] All of these were incidents of slavery, which under Bradley's rationale, should be included within the scope of section 1 of the Amendment to the same extent as the rights that are listed in the Civil Rights Act of 1866.

In sum, the above listed unequal treatments were inflicted on slaves because of their status as property—which is a different status than that of freed African Americans who, although discriminated against, were not subject to the same level of punishment and discriminatory treatment that slaves were.

If these additional "incidents" are indeed within the scope of section 1 of the Amendment, then, in outlawing them, the Amendment grants at least former slaves and their descendants equal protection against these acts of unequal treatment.

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66. *See* The Civil Rights Cases, 109 U.S. 3, 16 (1883).

67. *See People and Events, Condition of Antebellum Slavery 1830–1860*, PBS, https://www.pbs.org/wgbh/aia/part4/4p2956.html [http://perma.cc/F4P9-UQ8S].

B. Legislative History of Equal Protection

Elsewhere, this author has discussed the Amendment's legislative history with an emphasis on highlighting statements that show a broad understanding of the Amendment, including an understanding that would allow for equal protection under section 1 of the Amendment.[68] It might be understandable that there may be confusion regarding the scope of section 1 of the Amendment, especially because the legislative activity can be interpreted in different ways.[69]

One persuasive piece of legislative history is Senator Charles Sumner's proposed version of the Thirteenth Amendment that was rejected by the Senate Judiciary Committee.[70] First, Senator Sumner's proposed version of the Amendment had a clause that would have made freed slaves "equal before the law."[71] The Senate Judiciary Committee rejected that version for the current language of the Amendment that is based on language used in the Northwest Ordinance.[72] It is significant that Senator Trumbull, in preferring the current version of the Amendment, which does not have an explicit equal protection clause, did attempt to assure Sumner that the final version of the Amendment "[would] accomplish the [same] object."[73] Despite the fact that there is some ambiguity on whether the current version was intended to confer to freed African Americans equal treatment under the law, it seems that Trumbull thought that the current version conferred the same equality rights, as did other senators.[74]

However, some scholars have questioned whether the final version of the Amendment did in fact include the same type of equal protection that was included in Sumner's version. First, they theorized that the failure to use the same "equal before the law" language in the final version meant that Trumbull and others did not intend to include the same protection.[75] However, instead of being

68. *See* Larry J. Pittman, *Physician-Assisted Suicide in the Dark Ward: The Intersection of the Thirteenth Amendment and Health Care Treatments Having Disproportionate Impacts on Disfavored Groups*, 28 SETON HALL L. REV. 774, 859 (1998).

69. *See* MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 53–60 (Christopher Tomlins ed., 2001).

70. *Id.* at 55.

71. *Id.* at 53.

72. *Id.* at 55.

73. *Id.* at 56.

74. *Id.* at 55. The principal senators who believed that the final version conferred the same equality rights (civil rights) as Sumner's version were Senator Trumbull and Senator Howard. VORENBERG, *supra* note 69, at 55. Trumbull subsequently made the same argument during the debate and enactment of the Civil Rights Act of 1866. *Id.* The principal objector, who believed the final version did not confer equality rights, was Senator Cowan—he apparently believed that the final version conferred only freedom from physician bondage. *Id.* at 55–56.

75. *See* Herman N. Johnson, Jr., *From Status to Agency: Abolishing the Very Spirit*

a rejection of Sumner's efforts to include equal protection within the scope of section 1, Trumbull and others, being mindful that many senators hated Senator Summer, might have attempted to obtain those senators' votes by not including language from Sumner's version of the Amendment.[76] Furthermore, Trumbull seemed to indicate to Sumner during the debate of the Amendment that the final version did include that same equal protection, albeit inferentially.[77] And, during the debate of the Civil Right Act of 1866, Trumbull and others argued for a much broader interpretation of the Amendment that would indicate that it offered much broader protection than mere ending chattel slavery.[78]

Similarly, other senators and representatives during the debate over the Amendment thought that the Amendment provided for equal protection.[79] Some understood that the Amendment would "bring the Constitution into avowed harmony with the Declaration of Independence."[80] Elijah Ward believed that the purpose of the Amendment was "so that all persons shall be equal under the law, without regard to color."[81] And, Godlove S. Orth of Indiana believed that the Amendment represented the "self-evident truth, 'that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness.'"[82] Senator John Sherman of Ohio reasoned "that the first clause of the Thirteenth Amendment '*secures to every man* within the United States liberty in its broadest terms.'"[83] Some thought that the Amendment would be the final step.[84] Additionally, opponents believed that it would give certain rights including "equality under the law; protection of life liberty, and property."[85]

However, some scholars note the conflict in the different statements of senators and congressmen during the debate and believe

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of Slavery, 7 COLUM. J. RACE & L. 245, 257–59 (2017) (discussing some conflicting legislative history statements during the debate of the Thirteenth Amendment).

76. VORENBERG, *supra* note 69, at 57–58.

77. *Id.* at 56.

78. *See id.* at 55.

79. Pittman, *supra* note 68, at 821–25.

80. Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 179 (1951).

81. *See id.* at 175–76.

82. *Id.* at 178 (quoting Cong. Globe, 38th Cong., 2d Sess. 142–43 (1865) (statement of Senator Godlove S. Orth)).

83. Pittman, *supra* note 68, at 827 n.215 (citing one commentator's reference to Senator Sherman's statement) (emphasis added).

84. *See* G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1, 9 (1974).

85. *Id.*

that it is not possible to determine whether equal protection was intended to be within the coverage of the Amendment.[86] They believed that different supporters and opponents of the Amendment had different understandings about the scope of the Amendment and that some of them were intentionally trying to keep its meaning vague and uncertain to obtain either passage of the Amendment or some other advantage.[87]

C. A Matter of Interpretation

If the Court were to assume that the Amendment's legislative history is indeterminate as to whether section 1 includes "badges and incidents" of slavery, it could resolve that debate by resorting to a structural argument based on the equality policy that underlies all three of the Civil War Amendments.[88] As far back as the *Slaughter-House Cases*, some of the justices of the Court have believed that all three of the Civil War Amendments have a singular purpose:

> [A]nd on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, *and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him*. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.[89]

This "protection of the newly-made freeman . . . from oppression" implies equal protection from oppression, which can come through both section 1 and section 2 of the Amendment.[90] But, because there was no guarantee that Congress will enact any future laws, the only real way that the Amendment can definitively provide the equal protection that Justice Miller articulated in the above-stated quote is for section 1 of the Amendment itself to provide for that protection.

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86. Johnson, *supra* note 75, at 259–60 (discussing some conflicting legislative history statements from congressmen during the debate on the Thirteenth Amendment).

87. *Id.*

88. *See* text accompanying *infra* note 89.

89. The Slaughter-House Cases, 83 U.S. 36, 71–72 (1873) (emphasis added).

90. *See id.*

D. Two Ways to Incorporate Equal Protection into the Thirteenth Amendment

1. Construing Ambiguity in Favor of an Equal Protection Clause

If there is ambiguity in the meaning of section 1, the Court could resort to canons of interpretation to resolve the issue. If the text of the Amendment were a contract, the courts would normally construe any ambiguity against the drafters of the Amendment, who were Senator Trumbull and other sponsors.[91] That might mean that section 1 would not be interpreted to include badges and incidents. However, sometimes the Court infuses public policy into its interpretation and construes a text to further that policy. For example, the Court, when interpreting section 2 of the Federal Arbitration Act,[92] has changed the normal rule of contract interpretation such that any ambiguity in a contract for arbitration is construed in favor of arbitration to further the alleged federal policy in favor of arbitration.[93]

If the Court were to take the same approach to interpreting section 1 of the Thirteenth Amendment—that it takes when interpreting the Federal Arbitration Act—it would construe any ambiguity in the scope of section 1 in favor of the Amendment having an equal protection clause or component, which would be an interpretation that would be broad enough to allow the eradication of many of the badges and incidents of slavery and racial discrimination that still exist in this country.[94]

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91. *See* David Friedman, Note, *Arbitration Revisited: Preemption of California's Unconscionability Doctrine After Concepcion*, 11 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 21, 31 (2016) ("[T]he court construed ambiguities in contract interpretation in favor of the non-drafting party.").

92. Federal Arbitration Act, 9 U.S.C. § 2. Section 2 of the Act provides that contracts for arbitration are valid and enforceable. *Id.*

93. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."). Elsewhere, this author has argued that the Court has misinterpreted section 2 for its own purpose of funneling cases to arbitration to reduce federal courts' caseload. *See* Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 830–54 (2002).

94. Essentially all of the federal anti-racial discrimination laws that Congress has enacted establish a federal policy against racial discrimination. *See infra* note 169 and accompanying text. And, the U.S. Supreme Court, in assessing a racial discrimination allegation against an educational institution, acknowledged and applied the national policy against racial discrimination, noting that it stems from case law and a variety of federal anti-racial discrimination laws, including Title VI, the Voting Rights Act, and several Presidential Executive Orders against racial discrimination in different contexts. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 592–96 (1982) ("An unbroken line

2. Incorporating the Fourteenth Amendment Equal Protection Clause into the Thirteenth Amendment

There is another way for the Court to incorporate an equal protection clause into the Thirteenth Amendment. At least one scholar has emphasized that the Equal Protection Clause of the Fourteenth Amendment has been used to influence the interpretation of other constitutional amendments.[95] This principle is shown by how the Court has conflated the interpretation of the Fourteenth Amendment Equal Protection Clause and the Fifth Amendment Due Process Cause to apply the same level of judicial scrutiny for both States' and the Federal Government's use of racial classifications that either disadvantage or seek to benignly help different racial groups.[96] Initially, the Court had used the Fourteenth Amendment Equal Protection Clause and strict scrutiny to regulate only acts of state-sponsored discrimination challenged under the Fourteenth Amendment.[97] However, in a long line of cases, amply discussed in *Adarand Constructors v. Pena*,[98] the Court concluded that it will apply strict scrutiny to all racial classifications whether challenged under the Fourteenth Amendment Equal Protection Clause or under the Fifth Amendment Due Process Cause.[99] At first, the Court had applied a lower level of scrutiny to challenges under the Fifth Amendment Due Process Clause because that clause did not have an explicit equal protection element.[100] But, starting with *Bolling v. Sharpe*,[101] and

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of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.").

95. *See* Jackson, *supra* note 64, at 1276.

96. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

97. *See id.* at 222 ("With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments.").

98. *See id.* at 227.

99. *See id.*

100. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954). Although the Court's opinions are not entirely clear, the Court seemed to resolve racial discrimination claims under the Fifth Amendment by using an arbitrary standard to find that racial classifications were arbitrary and a violation of the Due Process Clause if they were not sufficiently justified. *See id.* at 499.

101. *Id.* at 500 ("[A]nd thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."). But, the *Bolling* Court then concluded that, "[i]n view of [the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.*

including *Korematsu v. United States*,[102] *McLaughlin v. Florida*,[103] *Loving v. Virginia*,[104] *Weinberger v. Wiesenfeld*,[105] and finally ending with *Adarand*, the Court established that it would use the same equal protection analysis to resolve racial classification challenges against the Federal Government as it uses to resolve challenges against States under the Equal Protection Clause of the Fourteenth Amendment.[106] It is reasonably clear that the Court thought that the equal protection policy and strict scrutiny should be applied to all racial classifications. And because that notion of equal protection stems from the Fourteenth Amendment Equal Protection Clause, it is clear that the equal protection policy has become a structural instrument that influenced the Court's interpretation of at least one other constitutional amendment—the Fifth Amendment and its Due Process Clause.

If the structural powers of the Fourteenth Amendment's Equal Protection Clause can influence the Court's interpretation of the Fifth Amendment, which does not even have an equal protection clause, then there is no good reason why that same equal protection policy should not be applied to other Amendments, including the Thirteenth Amendment. The type of holistic or structural argument that this Article is making is not outside of the mainstream of constitutional interpretation. Other legal scholars have written on the use of holistic and structural arguments.[107] One scholar referenced *Printz v. United States*[108] and *Alden v. Maine*[109] as two examples when alleged originalist or textualist Supreme Court justices have resorted to structural arguments to support desired outcomes.[110] In *Printz*—in a majority opinion by Justice Scalia (who held himself out as committed only to the text of the Constitution for constitutional interpretation)—the Court held that the Brady Handgun Violence Prevention Act's provision—that required local law enforcement officials to conduct background checks—was unconstitutional because it imposed an obligation on state officials to enforce federal laws.[111] The Court did not rely on any specific provision of the Constitution; instead it referenced several provisions of the Constitution where

102. *See* Korematsu v. United States, 323 U.S. 214, 234–35 (1944).
103. *See* McLaughlin v. Florida, 379 U.S. 184, 190–92 (1964).
104. *See* Loving v. Virginia, 388 U.S. 1, 10 (1967).
105. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).
106. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).
107. *See* Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U.L. REV. 1297, 1310–17 (2019).
108. *See* Printz v. United States, 521 U.S. 898, 905 (1997).
109. *See* Alden v. Maine, 527 U.S. 706, 730 (1999).
110. Colby, *supra* note 107, at 1299.
111. *Printz*, 521 U.S. at 933.

the States were recognized as having a separate existence from the federal government.[112] The Court also relied on legal sources, not contained in the text of the Constitution, such as the Framers' intent as stated in the Federalist Papers: "The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict."[113] The Court reasoned that the background check requirement would interfere with the separation of powers between the states and the federal government.[114] And, that it would also interfere with the separation of powers between the different branches of the federal government.[115]

In *Alden*, the Court held that aggrieved employees could not bring a state court action for overtime pay against their state employer without the state's consent to be sued.[116] The Court reasoned that the state had governmental immunity against such suits, not pursuant to the Eleventh Amendment, but because of the state's position as a sovereign entity in the federalism system that the U.S. Constitution created.[117] The implication is that for a state to be deemed a sovereign entity is its concomitant right to assert sovereign immunity against lawsuits.[118] Instead of relying on a particular amendment in the Constitution, the Court did an analysis of the

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112. *Id.* at 918–19. The Court stated:

> It is incontestable that the Constitution established a system of "dual sovereignty." . . . Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty[.]" . . . This is reflected throughout the Constitution's text, . . . including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the "Citizens" of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which "presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights[.]" . . . Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Id. (citations omitted).

113. *Id.* at 919.

114. *See id.* at 898, 919–21.

115. *Id.* at 922.

116. *See* Alden v. Maine, 527 U.S. 706, 712 (1999).

117. *Id.* at 713.

118. *See id.*

historical understanding of what it meant to be sovereign at the time of the adoption of the Constitution.[119]

The relevancy of *Alden* and *Printz* to the holistic or structural argument, on which much of this Article is based, is that, as the Court used a structural argument to resolve the sovereign immunity issues in those cases, it should use a holistic or structural approach to interpret the Thirteenth Amendment, by giving it an interpretation that would further the beneficial purpose of helping newly freed African Americans and their descendants to ensure that they have equal protection of the laws. This equal protection purpose comes from the structure of all three of the Civil War Amendments, which Justice Miller in the *Slaughter-House Cases* acknowledged as having a singular purpose, and from certain portions of the Thirteenth Amendment's legislative history.[120]

The Court's acknowledgment that the Thirteenth Amendment has its own equal protection clause, or that the Fourteenth Amendment Equal Protection Clause influences the resolution of racial classification challenges under the Thirteenth Amendment, would free up the Thirteenth Amendment to address acts of private racial discrimination that are not actionable under either the Fourteenth Amendment or Fifth Amendment. Then, courts will have more freedom to apply the Thirteenth Amendment and develop standards to control its application to racial discrimination.

E. No Interpretation that Causes a Constitutional Violation

The failure of courts to develop standards regarding the scope of section 1 is problematic because it leaves a gap where more unequal protection will exist. Normally, with statutory interpretation and constitutional interpretation, the Court tries to avoid interpretations that cause violations of the Constitution.[121] In the Thirteenth Amendment context, the Court is in danger of creating a situation that is similar to a violation of the Constitution if it continues to defer too much to Congress's section 2 powers instead of giving more attention to developing case law that does a better job at defining

119. *Id.* at 713–14.

120. *See* text accompanying *supra* notes 70–83, 89.

121. Russell L. Weaver, *Some Realism About* Chevron, 58 MO. L. REV. 129, 162 n.223 (1993) ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, a court should construe the statute to avoid such problems unless such intention is plainly contrary to the intent of Congress.") (citing DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

the scope of section 1 of the Amendment. In *Palmer v. Thompson*,[122] the Court, in rejecting a Thirteenth Amendment challenge to a racially discriminatory closing of Jackson, Mississippi's public swimming pools, referenced Congress's section 2 powers and asserted: "But Congress has passed no law under this power to regulate a city's opening or closing of swimming pools or other recreational facilities."[123] In *Memphis v. Green*,[124] the Court stated:

> "By its own unaided force and effect," the Thirteenth Amendment "abolished slavery" and "established universal freedom." . . . Whether or not the Amendment itself did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more.[125]

The problem with the Court's relying too heavily on Congress's section 2 powers is that it continues a system of second-class citizenship for anyone except white men. For their power, wealth, social, political and economic rights, white men do not have to wait for a congressional enactment to obtain any protection they desire. Such protections either predate the Constitution—as natural law and natural rights—or they come from the specific provisions of the Constitution and its amendments. For example, to obtain protection against alleged reverse discrimination or minority set asides, white men do not have to wait for Congress to enact any laws to protect them. Rather, the Court has provided such protection through strict scrutiny as it did in *Adarand*, where the Court, on its own volition, decided to apply strict scrutiny to a benign racial classification, even when it had previously applied a lower level of scrutiny and made a distinction between racial discrimination claims against states under the Fourteenth Amendment's Equal Protection Clause and such claims against the federal government under the Due Process Clause.[126]

When African Americans and other minorities—who fall within the Thirteenth Amendment's equal protection/anti-racial discrimination policy—have to depend on Congress to protect them through legislation under section 2 of the Amendment, or under the Commerce Clause for Title VII of the Civil Rights Act of 1964 (or under some other congressional authority), such a system of protection

122. Palmer v. Thompson, 403 U.S. 217, 226–27 (1971).
123. *Id.* at 227.
124. Memphis v. Green, 451 U.S. 100, 125 (1981).
125. *Id.*
126. *See* Adarand Constructors, Inc. v. Pena 515 U.S. 200, 227 (1995).

creates an unequal protection problem—with white men receiving protection directly under constitutional amendments while African Americans, other minorities, and even white women, having to receive protection from a congressional enactment. The problem with this unequal treatment is that it leaves the protection of minorities' rights to a Congress that is frequently dysfunctional and whose beneficence in favor of minorities depends on which political party has a majority of the U.S. House and Senate. Under such a system of protection, at best the protection of minorities will be cyclical; at worst it will continue to be inadequate and only marginally provide the type of protection and benign action that would be needed to eradicate racism and improve the lives of a large part of the African-American and other minority population.[127]

Therefore, to avoid an unequal protection situation, the Court should reconsider its Thirteenth Amendment jurisprudence and be willing to invigorate the amendment so that it will provide African Americans and other minorities the same type of constitutional protection that the Fourteenth Amendment and the Fifth Amendment, through the Court's use of strict scrutiny, provide for white men.

Furthermore, not only would a development of the law under the Thirteenth Amendment create a system whereby protection under the Thirteenth Amendment would be more in line with equal protection under the Fourteenth Amendment and the Fifth Amendment, but a claim under the Thirteenth Amendment would then reach more acts of racial discrimination because it would cover private discrimination and can arguably be construed to cover discrimination or unequal treatment that has a racially discriminatory impact, instead of having to be confined to acts of intentional racial discrimination that the Court has established for claims under the Fourteenth and Fifth Amendments.[128]

In sum, as long as the Court continues to defer to Congress's section 2 powers, instead of developing and interpreting section 1 of the Thirteenth Amendment to its fullest extent, there will be an unequal treatment of African Americans and other minorities in this country. The Thirteenth Amendment is broad enough for the

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127. *See* Ezra Klein, *Congressional Dysfunction*, VOX (May 15, 2015), https://www.vox.com/2015/1/2/18089154/congressional-dysfunction; Andrew Taylor, *Once Again, Congress Unable to Act During National Trauma*, AP NEWS (June 27, 2020), https://apnews.com/58cbed932fd14eb0bfb2ac54320bd649 [https://perma.cc/YJE3-UGPZ]; Sarah Binder, *Congress Can't Easily Pass Police Reforms. Here's Why*, WASH. POST (June 5, 2020), https://www.washingtonpost.com/politics/2020/06/05/congress-cant-easily-pass-police-reforms-heres-why [http://perma.cc/4MU6-PPND].

128. *See* text accompanying *infra* note 130.

Court to establish that it contains an equal protection component or that structurally the Fourteenth Amendment's Equal Protection Clause should be incorporated into the Thirteenth Amendment.

F. The Standards for Interpretation of an Equal Protection Challenge Under the Thirteenth Amendment

If an equal protection clause or component is within the scope of section 1 of the Thirteenth Amendment, the standard of judicial review should be unique to the Thirteenth Amendment in several respects. First, intentional discrimination should not be required, as is the case when one brings an Equal Protection Claim under the Fourteenth Amendment.[129] Elsewhere, this writer has argued that one should be able to bring a disproportionate impact claim under the Thirteenth Amendment.[130] Now, this Article further asserts that, in addition to its own equal protection clause or component, the Thirteenth Amendment arose out of a policy of beneficence,[131] in

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129. *See* Washington v. Davis, 426 U.S. 229, 240 (1976).

130. *See* Pittman, *supra* note 68, at 885–86. The problem with current laws that provide a remedy for racial discrimination is that they tend to require that the aggrieved party, normally an African American or other minority, to show that the targeted defendant was acting with the intent to discriminate. *Id.*; *Davis*, 426 U.S. at 240 (explaining claims under the Equal Protection Clause require a showing of discriminatory intent). In *Croker v. Boeing Co.*, 662 F.2d 975, 988–89 (3d Cir. 1981), *vacated*, 468 U.S. 1201 (1984), the Third Circuit Court of Appeals stated:

> Furthermore, we believe that policy considerations support this conclusion. In rejecting a discriminatory impact standard for fourteenth amendment claims, the Supreme Court noted that such a standard might "invalidate a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." Applying an impact standard to section 1981 raises similar concerns. In significant measure, an impact standard would have the very consequences that the Supreme Court sought to avoid in Washington v. Davis. In fact, because section 1981, unlike the fourteenth amendment, covers not only governmental but also private conduct, an impact standard applied to section 1981 could be more intrusive than would one applied to the fourteenth amendment. We do not address whether Congress could pass legislation under the thirteenth amendment requiring proof of impact only. Without, however, a clear indication that Congress intended section 1981 to reach nonpurposeful [sic] conduct or neutral regulations having a disproportionate impact, we are reluctant to ignore the concerns voiced in Washington v. Davis.

Id. It seems ironic that courts would be more concerned about not invalidating a host of "tax, welfare, public service, regulatory, and licensing statutes" than protecting people who may have a lower economic standing than some white Americans who have prospered because they have not been subject to a generation of discrimination. *Id.* at 988.

131. *See The Principle of Beneficence in Applied Ethics*, STAN. ENCYCLOPEDIA OF PHIL.

that it was an affirmative effort to help African-American slaves by freeing them from the bonds of slavery and the "badges and incidents" of slavery, as some argue.[132] Furthermore, the civil rights laws that Congress enacted under its section 2 authority, including the Civil Rights Act of 1866, were in furtherance of this beneficent effort to rid freed slaves, and their descendants, of continuing discrimination that many in the South, and elsewhere, used to continue as many of the disabilities of slavery as they could.[133]

The joint policy of equal protection and beneficence would support the use of different standards of review depending on whether a racial classification is for racial animus purposes; for benign purposes of remedying past discrimination; or for purposes of ensuring that slavery and other forms of hostile racial discrimination are not reinstated. If the classification is one that imposes hardship on African Americans and other minorities through either having a disproportionate impact, or if it was imposed out of racial animus, the one who imposed the classification should have to satisfy the strict scrutiny test that the classification serves a compelling state or private interest that cannot be satisfied with less restrictive alternatives.[134] However, if the classification is for a benign purpose, then the aggrieved person should be required to show that racial animus was the sole motivation for the classification.

Therefore, *Adarand* cries out for reinterpretation because the Court applied an Equal Protection analysis under the Fifth Amendment (using the strict scrutiny standard of the Equal Protection Clause of the Fourteenth Amendment).[135] The Thirteenth Amendment and its policies were not applied to the challenged minority set-aside. If the Thirteenth Amendment had been applied, the Court could have used the Amendment's equal protection/anti-racial discrimination and beneficence policies. Unless the aggrieved white subcontractors showed that the set-asides were motivated by the government's racial animus against them, they should have lost their challenge as long as the purpose of the set-aside was rationally related to the federal government's furthering of a policy of helping the minority contractors bridge the wealth gap between white Americans and African Americans.[136]

(Feb. 11, 2019), https://plato.stanford.edu/entries/principle-beneficence [http://perma.cc/YV7W-7WKD].

132. *See* Pittman, *supra* note 68, at 821–23.

133. *See* The Slaughter-House Cases, 83 U.S. 36, 70–72 (1873).

134. *See* Pittman, *supra* note 68, at 879.

135. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

136. *See id.* at 247–48 (Stevens, J., dissenting); *see also* Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 MICH. J. RACE & L. 51, 77–79 (1996).

Furthermore, unlike in *Adarand*, in which there was a dispute over whether the presumption of disadvantage that the government gave to some of the minority contractors was supported by the fact of their actually being disadvantaged,[137] a similar presumption that is given pursuant to Congress's section 2 authority should be allowed if it is rationally related to alleviating the systemic society-wide wealth gap between African Americans and white Americans, even if the disparity in a certain industry—where the set-aside or other program is applied—does not show a similar disparity or history of racial discrimination. For example, it is conceivable that Congress could develop an economic development plan that would be national in scope, in that it would have set aside strategies that would be applicable to many industries as a national strategy, although a racial or wealth disparity could not be historically or presently shown in some of the affected industries.[138] In such situations, the courts should defer to Congress's judgment in determining which policies and programs are needed to eradicate the present racial and wealth disparities that are "badges and incidents" of slavery. Any person wanting to challenge such programs would have to, pursuant to the approach taken in this Article, show that the relevant plans or programs were motivated solely by racial animus against the person. The difference between this approach and the approach in *Adarand* is that, instead of placing the burden of justifying an asserted benign racial classification on the beneficiaries of the classifications,[139] the burden would be placed on the alleged aggrieved parties. Given the Thirteenth Amendment's beneficence policy—as an amendment that was designed to primarily benefit African Americans, as were all of the Civil War Amendments—it would only be appropriate to have a more relaxed standard of review than strict scrutiny, to resolve challenges to racial classifications that fall within the scope of the Amendment.

This Article also asserts that the Thirteenth Amendment should not only be used as a means by which an aggrieved person can file a claim, but that it should also be used as an affirmative defense,

137. *Adarand*, 515 U.S. at 238–39.

138. *See* Emily Cochran & Sheryl Gay Stolberg, *$2 Trillion Coronavirus Stimulus Bill Is Signed into Law*, N.Y. TIMES (March 27, 2020), https://www.nytimes.com/2020/03/27/us/politics/coronavirus-house-voting.html [https://perma.cc/AX63-LDH8]. As an example of a national program that may award benefits to some who do not need the benefits, to achieve a broader societal objective, one can look no further than the Coronavirus stimulus checks that were designed to boost the economy despite that many wealthy people received the checks even though they would end up saving the money instead of spending it to support the economy which was the purpose for which the national government gave the checks.

139. *See Adarand*, 515 U.S. at 227–29.

whereby those who benefit from a racial classification, like the minority contractors in *Adarand*, can use the Amendment as an affirmative defense to support any programs or other initiatives, such as those at issue in *Adarand*.[140]

One can anticipate that there will be resistance if the Court changes its use of the strict scrutiny standard. However, there are several observations that are important to its doing so. First, there is nothing inherently special about the strict scrutiny standard. Some scholars have traced this standard back to certain statements that the Court made in *Korematsu v. United States*,[141] where the Court stated:

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.[142]

But, when one looks at the end result of the Court's holding—that Americans of Asian descent could be confined to camps—one is left with the belief that there is nothing inherently protective about the strict scrutiny standard.[143] Rather, its protection depends on who is defining the phrase "public necessity,"[144] and which justices make up the Supreme Court.

Furthermore, when one considers the reason why the Court continues to use the strict scrutiny standard when evaluating racial classifications, he or she might conclude that the standard stands on shaky ground, at least when applied to benign racial classifications. The reason for its continued use, as articulated by Justice O'Connor in *Richmond v. Croson*,[145] appears to be to "smoke out" the

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140. *See id.* at 204–05; Alexander Tsesis, *Confederate Monuments As Badges of Slavery*, 108 KY. L.J. 695, 712 (2020) (discussing the use of the Thirteenth Amendment as an affirmative defense and asserting that, "Cities seeking to remove confederate symbols can look to the Thirteenth Amendment as a source of affirmative defense against States seeking to bar their removal").

141. Korematsu v. United States, 323 U.S. 214, 216 (1944).

142. *Id.*

143. *See Adarand*, 515 U.S. at 236 (citing *Korematsu*, 323 U.S. at 223).

144. *See* David Orentlicher, *Politics and the Supreme Court: The Need for Ideological Balance*, 79 U. PITT. L. REV. 411, 413 (2018); *see also Supreme Court Justices Become Less Impartial and More Ideological When Casting the Swing Vote*, KELLOGG INSIGHT (Sept. 13, 2018), https://insight.kellogg.northwestern.edu/article/supreme-court-justices -become-less -impartial-and-more-ideological-when-casting-the-swing-vote [http://perma.cc/4PPR-7UYT].

145. Richmond v. Croson, 488 U.S. 469, 493 (1989).

use of "illegitimate racial prejudice or stereotype[s]."[146] That reason is premised on several propositions:

1. Application of strict scrutiny used for the purpose of assuring that the "remedial goal" is "important enough to warrant" the use of race, which the court believe is a "suspect tool";
2. That the means chosen "fit" this "compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[147]

First, as far as this writer can tell, none of these policy rationales come from either the language or the legislative history of the Equal Protection Clause of the Fourteenth Amendment. At best, they stem from the Court's efforts to find reasons to support its decision to use strict scrutiny. Second, there is nothing in either the language or the legislative history of the Fourteenth Amendment that mandates that racial classification (or race) can only be used for remedial purposes. Third, the narrowly tailored fit rule—to the extent

146. In *Croson*, Justice O'Connor stated:

> 1. Since the Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely on their race, Wygant's strict scrutiny standard of review must be applied, which requires a firm evidentiary basis for concluding that the underrepresentation of minorities is a product of past discrimination. Application of that standard, which is not dependent on the race of those burdened or benefited by the racial classification, assures that the city is pursuing a remedial goal important enough to warrant use of a highly suspect tool and that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. The relaxed standard of review proposed by Justice MARSHALL's dissent does not provide a means for determining that a racial classification is in fact "designed to further remedial goals," since it accepts the remedial nature of the classification before examination of the factual basis for the classification's enactment and the nexus between its scope and that factual basis. Even if the level of equal protection scrutiny could be said to vary according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case, since blacks constitute approximately 50% of the city's population and hold five of nine seats on the City Council, thereby raising the concern that the political majority may have acted to disadvantage a minority based on unwarranted assumptions or incomplete facts.

Id. at 472–73.

Given the 50% African American population in Richmond, perhaps the Court may have had reasons for suspicion of the set-aside in *Croson*, but such suspicion will not exist in every situation, and therefore, there is no real reason for applying strict scrutiny to all benign racial classifications.

147. *See id.* at 472, 493.

that its real purpose is to ensure, to the extent possible, that the real motivation for the classification is not "illegitimate racial prejudice or stereotype"—is not the only way to achieve that purpose[148] as courts can develop other evidentiary methods and hearings to determine when a racial classification is benign or based on racial animus.

For example, the test that this Article offers is that, when a proponent of a benign racial classification offers a rational purpose, including a benign purpose that is either remedial or for the purpose of eradicating "badges and incidents" of slavery (even when the particular industry has not had a history of intentional racial discrimination), the Court could apply either a preponderance of the evidence standard or a clear and convincing evidence standard (whichever burden the Court decides best serves the purpose of the Thirteenth Amendment) to determine whether the classification is rationally related to a remedial purpose or to a benign purpose of eradicating badges and incidents of slavery.[149] Then, the burden would shift to the aggrieved person to show, by the same burden of proof, that the proponents of the racial classifications were motivated solely by racial animus. And, the courts should require credible proof of animus instead of speculation or mere unsupported allegations. This method of proof would give meaning to the equal protection and beneficence policies that underlie the Thirteenth Amendment and would at the same time be consistent with the Fourteenth Amendment's prohibition against racial classification based on animus and a purpose to harm because of racial hatred or notions of racial inferiority.

Although no court has presently shifted the burden to the challenger of a congressional enactment under Congress's section 2 authority, some lower courts have given a broad interpretation to that section 2 authority. These courts will uphold the constitutionality of a Congressional enactment if it meets the "rational determination test" of *Jones v. Mayer*.[150] For example, in *United States v. Hatch*,[151] the Tenth Circuit Court of Appeals held that the Matthew

148. *Id.* at 493. Instead of trying to ferret out secreted racial animus, it would appear that the real reason for the fit test is to minimize the harmful effects that a racial classification would have on the aggrieved person, which, in the case of benign minority set-asides or preferences, would normally be a white person—as were the challengers in *Croson* and *Adarand*. *Id.* at 472–73; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 238–39 (1995).

149. This approach is broader than Justice Bradley's statement in the *Civil Rights Cases*, which indicates legislation or other action must be "corrective." The Civil Rights Cases, 109 U.S. 3, 13–14 (1883).

150. *See* Jones v. Mayer, 392 U.S. 409, 410, 440 (1968).

151. United States v. Hatch, 722 F.3d 1193, 1195 (10th Cir. 2013).

Shepard and James Byrd, Jr. Hate Crimes Act[152] was constitutional under Congress's section 2 authority because, in enacting the Act, Congress had rationally determined that violence based on race, color, religion, or national origin (as the Act prohibited) was a badge and incident of slavery; and therefore, that Act was properly within the scope of Congress's section 2 authority.[153] The Fifth Circuit Court of Appeals, in *United States v. Cannon*,[154] likewise held that the Hate Crime Act was a constitutional exercise of Congress's section 2 authority under the Thirteenth Amendment.[155]

In reaching its decision, the *Hatch* court realized that it was approving a broad application of Congress's section 2 authority,[156] but noted that Congress, in enacting the Hate Crime Act, has limited some of its application to certain conditions that existed in the 1860s.[157] The *Hatch* court stated:

> At its core, Hatch's argument raises important concerns we share. "Badges and incidents of slavery," taken at face value, puts emphasis solely on the conduct Congress seeks to prohibit, and it seems to place few limits on what that conduct might be. Given

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152. The portion of the Act at issue in *Hatch* was:

> (1) Offenses involving actual or perceived race, color, religion, or national origin.—Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person—
>
> (A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both. . . .

Id. at 1195, 1200 (citing 18 U.S.C. § 249(a)(1)).

153. In enacting the Hate Crime Act, Congress relied on the following finding:

> 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 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.

Id. at 1195, 1200–01.

154. United States v. Cannon, 750 F.3d 492, 494 (5th Cir. 2014).

155. *Id.* at 502.

> In conclusion, racially motivated violence was essential to the enslavement of African-Americans and was widely employed after the Civil War in an attempt to return African-Americans to a position of de facto enslavement. In light of these facts, we cannot say that Congress was irrational in determining that racially motivated violence is a badge or incident of slavery.

Id.

156. *Hatch*, 722 F.3d at 1204.

157. *Id.* at 1205.

> slaves' intensely deplorable treatment and slavery's lasting effects, nearly every hurtful thing one human could do to another and nearly every disadvantaged state of being might be analogized to slavery—and thereby labeled a badge or incident of slavery under *Jones*'s rational determination test. In effect, this interpretation gives Congress the power to define the meaning of the Constitution—a rare power indeed. And many legal scholars have encouraged broad use of Section 2 power in essentially this way, which would arguably raise the sort of federalism concerns articulated in *City of Boerne, Lopez, and Morrison*. Others have argued for a narrower interpretation that relates more directly to slavery as an institution rather than to any individual feature of slavery.[158]

G. Congress's Inaction Warrants an Expanded Use of Section 1 of the Amendment

An expanded use of section 1 of the Amendment is needed because Congress has not used its section 2 authority as expansively and proactively as it should. Despite Congress's initial enactment of the Civil Rights Act of 1866, and several other Reconstruction Era statutes, the racial hostility and discriminatory practices against African Americans continued—in a virtually legal manner—after slavery ended in 1865 until Congress decided to take some action in 1964 with the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.[159] That the political and economic onslaughts against African Americans had been persistent is shown by the fact that the Civil Rights Act and Voting Rights Act were still needed in 1964 and 1965, despite Congress having ratified the Thirteenth, Fourteenth, and Fifteenth Amendments about one hundred years before then. So the harrowing conclusion is that African Americans in this country have really been free in their political, civil, and economic rights for only approximately fifty-five years. Thus, one should not be surprised by the large gap in wealth between African Americans and white Americans.

Admittedly, a substantial number of African Americans, based on their percentage of the American population, have moved above the poverty level, primarily fueled by the enactment of social security.[160] But, the poverty rate of African Americans is still more than

158. *Id.* at 1204.

159. For a discussion of the persistent violence that private persons and state officials used in the South to deny the newly freed African Americans their social, political, and economic rights, see Bennett, *supra* note 20, at 439–41.

160. *See* Kathleen Romig, *Social Security: A Vital Protection for African American People of All Ages*, CTR. ON BUDGET & POL'Y PRIORITIES (July 2019), https://www.cbpp.org

twice that of white Americans.[161] The median African-American family's household wealth is only 10.2 percent of the median white family's wealth (about $17,409 versus $171,000), which some commentators attribute in part to the systemic racial discrimination in home ownership that was caused by racially discriminatory housing policies, including policies that stem from the federal government.[162] It should be noted that redlining as a housing policy of the federal government—where African Americans were not given loans to build or buy homes in white suburban areas—did not end until Congress enacted the Fair Housing Act in 1968.[163]

What this means is that—while on the one hand Congress enacted the Civil Rights Act of 1866, the statute that created the section 1983 cause of action, and several Reconstruction Era laws that proscribe violence and conspiracy against African Americans[164]—Congress, on the other hand, did not take any legislative action against harmful employment discrimination, voting rights discrimination, public accommodations discrimination, or systemic redlining discrimination until the 1960s, despite that some of these forms of discrimination are the current reasons for the substantial wealth gap between white Americans and African Americans. This means that generations after generations of African Americans and their descendants have been financially disadvantaged by Congress's inattention to systemic economics, social and political discrimination against African Americans.[165]

What this also means is that Congress—in knowingly failing to use its section 2 authority—has been willing to let African Americans and other minorities suffer for a long time.[166] For example,

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/blog/social-security-a-vital-protection-for-african-american-people-of-all-ages [http://perma.cc/5DBW-26SH].

161. Elise Gould & Jessica Schieder, *Poverty Persists 50 Years After the Poor People's Campaign*, ECON. POL'Y INST. (May 17, 2018), https://www.epi.org/publication/poverty-persists-50-years-after-the-poor-peoples-campaign-black-poverty-rates-are-more-than-twice-as-high-as-white-poverty-rates [http://perma.cc/X2BW-3MQR].

162. Janelle Jones, John Schmitt & Valerie Wilson, *50 Years After the Kerner Commission*, ECON. POL'Y INST. (Feb. 26, 2018), https://www.epi.org/publication/50-years-after-the-kerner-commission [http://perma.cc/5HB5-DGVQ].

163. Terry Gross, *A 'Forgotten History' of How the U.S. Government Segregated America*, NPR (May 3, 2017), https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america [http://perma.cc/948T-N9SH].

164. *See infra* note 169.

165. Joni Hersch & Jennifer Bennett Shinall, *Fifty Years Later: The Legacy of the Civil Rights Act of 1964*, 43 J. POL'Y ANALYSIS & MGMT. 424, 428–29, 441 (2015).

166. The last statute that Congress enacted under its section 2 powers occurred in 2009 during President Barack Obama's Administration when Democrats were in charge of both houses of Congress. It took about eight years to enact the law, with the Bill having to be reintroduced in Congress from 2000 to 2009. *See* Elliot C. McLaughlin,

during the debate of the Matthew Shepard and James Byrd, Jr. Act, Attorney General Eric Holder testified in support of the law; and, he recalled that during 1998 he had testified in favor of an earlier version of the bill and that in the interim, from then to 2009, when Congress finally enacted the bill into law, about 77,000 hate crimes had occurred in America.[167]

This willingness to accept others' suffering from racial discrimination is going to continue in the future as the U.S. House and Senate are divided by the two political parties competing for majority party status; they are deadlocked because one party is hesitant to vote for the proposed laws that another party offers out of fear that it will lose an advantage in the next election, and because there is a new resurgence of racism and nationalism where the American public may be becoming more tribal and, therefore, Congress may not be inclined to, or may not be politically able to, exercise its section 2 powers to eradicate existing "badges and incidents" of slavery. For example, Congress has not tried to use its section 2 authority since the 2009 enactment of the Matthew Shepard and James Byrd, Jr. law—which took more than ten years to enact—when the first African-American president, Barack Obama, was in office.[168]

The position of this Article is not that Congress has not had some success in using its section 2 authority to enact laws that have helped African Americans and other minorities.[169] However, all of

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There are Two Names on the Federal Hate Crimes Law. One is Matthew Shepard. The Other Is James Byrd, Jr., CNN (Apr. 25, 2019), https://www.cnn.com/2019/04/24/us/james-byrd-hate-crime-legislation-john-king-execution/index.html [http://perma.cc/UD7Z-E9U4].

167. *Holder Pushes for Hate-Crimes Law; GOP Unpersuaded*, CNN POLITICS (June 25, 2009), https://www.cnn.com/2009/POLITICS/06/25/holder.hate.crimes [http://perma.cc/3MZZ-HK8W] ("Specifically, he said, more than 77,000 hate crime incidents were reported by the FBI between 1998 and 2007, or 'nearly one hate crime for every hour of every day over the span of a decade.'").

168. *See* McLaughlin, *supra* note 166.

169. One scholar notes that more recently, instead of relying on its Thirteenth Amendment section 2 authority, Congress has chosen to rely on the Commerce Clause and on the Fourteenth Amendment for the authority to enact civil rights legislation. *See* Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. PA. J. CONST. L. 1337, 1338 (2009). This author is not aware of any current scholarship that quantifies the success that the various civil rights statutes, which Congress enacted under section 2 of the Thirteenth Amendment, have had. Undoubtedly, many African Americans and other minorities have benefited from section 1981 and section 1982, as well as from Title VII, Title VI, and other federal civil rights laws enacted under both section 2 of Congress's authority and under the Commerce Clause, including the Civil Rights Act of 1964. As a matter of fact, the current middle class of African Americans may owe their success to the freedom of opportunities that these laws provided for them. However, there is much more work to be done. There is at least one estimate that it will take about 228 years for the wealth of Black families to equal the wealth of white families today. Aimee Picchi, *How Long Will it Take Black Families to Catch Up with White Wealth*, CBS NEWS (Aug. 9, 2016), https://www.cbsnews.com/news/heres-how-long-it-will-take-black-families-to-catch-up-with-whites [http://perma.cc/8M7Y-AD7Q].

these federal civil rights laws are "corrective" in that they provide either a private civil claim or a criminal remedy for acts of racial discrimination that have already occurred.[170] But for many African Americans, these laws have done little to proactively remedy the harmful economic effects of slavery and of hundreds of years of racial discrimination.[171] In other words, Congress has not proactively passed legislation to eradicate the remaining economic disparity between African Americans and white Americans. This type of legislation would involve creating systems and programs that would reduce the remaining systemic racism and discrimination that currently exist in this country, and it would also create the type of educational and economic development that would help African Americans be better able to use the so-called "equal playing field" that really does not exist in this country.[172] Some of this work would probably require studies, commissions, and experts to identify areas that need special legislation; to identify the types of programs and initiatives that would, once and for all, remedy the harmful effects of past acts of slavery and racial discrimination, and current "badges and incidents" of slavery; and to create a system of equality that would, at some point in the future, produce an environment where all races of people in America will really have an equal protection of laws and opportunities. Congress has the resources and can obtain the expertise to do the job, but it currently lacks the will to do so.

In the meantime, Congress's failure to deal with the historical personal and economic effects from centuries of racial discrimination allows the substantial advantages that white Americans have over African Americans to continue. It maintains the unequal economic and social positions of African Americans and other minorities when compared to white Americans. And therefore, Congress is at least complicit in the unequal protection of African Americans and the racial discrimination that some of them suffer.[173]

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170. Some of the statutes that Congress has enacted are: 42 U.S.C. § 1981 (Equal Rights Under the Law); 42 U.S.C. § 1982 (Property Rights of Citizens); 42 U.S.C. § 1983 (Civil Action for Deprivation of Rights); 42 U.S.C. § 1985 (Conspiracies to Interfere with Civil Rights); 18 U.S.C. § 242 (Deprivation of Rights Under Color of Law); 18 U.S.C. § 241 (Conspiracy Against Rights); and 42 U.S.C. § 1994 (Peonage Abolished).

171. *See* Bennett, *supra* note 20, at 441, 490 (discussing how violence has been used to prevent gains by African Americans).

172. *See* Jones et al., *supra* note 162.

173. For an argument that the lack of police investigation into rape can be an equal protection violation of rape victim's rights, see Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1287 (2016) ("When the Equal Protection Clause was conceived, the [F]ramers were chiefly concerned with the states' failure to provide black citizens with protection from private violence. After passage of the Fourteenth Amendment, the 'protection model' of equal protection, along with the federal power to enforce it, lay dormant.").

Furthermore, an argument can be made that Congress's failure to take action to correct at least the harmful economic disparity between African Americans and white Americans—which was caused by slavery and subsequent racial discrimination in housing patterns and redlining, and other governmental action in financing and controlling the location of federally subsidized housing—may be actionable under the Fifth Amendment Due Process Clause, if such a claim were available against Congress. The Eighth Circuit Court of Appeals' decision in *NLRB v. Mansion House Center Management Corp.*[174] is instructive. First, the Eighth Circuit held that the Equal Protection Clause is incorporated into the Due Process Clause of the Fifth Amendment.[175] Therefore, the NLRB, being a federal agency, could not enforce an order that a company must bargain with a union that had a history of racial discrimination with continuing effects.[176] The court then held that doing so would violate the equal protection/due process rights of those employees who suffered discrimination.[177] The court stated: "When a governmental agency recognizes such a union to be the bargaining representative it significantly becomes a willing participant in the union's discriminatory practices. Although the union itself is not a governmental instrumentality the National Labor Relations Board is."[178]

Furthermore, Congress, if it had a desire to do so, may be uniquely suited to provide the type of remedial programs that would be needed to eradicate some of the economic disparity and hardship that many African Americans suffer in both rural and urban areas. Dawinder S. Sidhu, *The Unconstitutionality of Urban Poverty*, 62 DEPAUL L. REV. 1, 56 (2012). One scholar states:

> In sum, the economic and physical limitations on the liberty of the urban underclass, which are traceable in part to racial discrimination and which disproportionately impact African-Americans and people of color, confer upon the urban underclass the right to remedial efforts under the Thirteenth Amendment that will give them the ability to minimally participate in mainstream society. Those remedies should entail an improvement of the conditions within the urban environment, especially with respect to education; strengthened efforts to eliminate discrimination that precludes mobility; and a recalibration of the federal policies that directly affect the urban poor, especially the "war on drugs." The responsibility for the remedy should reside with Congress because it has significant enforcement power under the Amendment, resources to implement comprehensive solutions to a complex and national problem, and the public support to back its conditions-focused efforts in these areas. Congressional involvement in this area would not only have the potential to enhance the welfare and lives of many Americans, but would also help fulfill the promise of an Amendment that has been heretofore underenforced despite its grand purpose and vision.

Id.

174. NLRB v. Mansion House Ctr. Mgmt. Corp., 473 F.2d 471, 472 (8th Cir. 1973).
175. *Id.* at 472.
176. *Id.* at 473.
177. *Id.*
178. *Id.*

Additionally, the court held that a union—with a history of having practices that racially discriminated against African American workers—could not continue those practices even if the union did not have any present racial animus.[179] The court held that the union had to take affirmative actions to eradicate the present effects of the historical racial discrimination that was having present effects on African American's participation in the union.[180]

In imposing a duty on the union to correct the present effects of its former intentional discriminatory practices, the court referenced *Green v. County School Board Of New Kent County*.[181] There, the Court held that a local government's school plan, which intentionally created a dual system of segregated schools, did not provide equal protection despite that the schools currently had a "freedom of choice" school assignment plan—given that there still were current effects from the former plan's segregated school system.[182]

The bottom line of *Mansion House Center* and *Green* is that affirmative steps must be taken to eradicate the present effects of former racial discrimination; and the failure to do so—when the present system is perpetuating, reinforcing, and rejuvenating the former discrimination—establishes complicity in the denial of equal protection and is violative of the Equal Protection Clause and the Due Process Clause.

When this principle is applied to the U.S. Congress, one could argue that, despite Congress's immense authority under section 2 of the Thirteenth Amendment, it has done little to enhance the economic conditions of African Americans and other minorities, even though such substantial economic disparity, when compared to the wealth of white Americans, stems from hundreds of years of American slavery and the post-slavery racial discrimination that many States, their white population, and certain federal agencies used to continue a near-slavery society where former slaves and their descendants were kept in an inferior, second-class citizenship in their social, political, and economic positions in this country. Just like the federal agency was complicit with the union's discrimination in *Mansion House Center* and the school system's new "'freedom of choice' plan" in *Green* was complicit with the system's former racial discrimination,[183] Congress is complicit due to its failure to use its

179. *Id.* at 477.
180. *Mansion House Ctr. Mgmt. Corp.*, 473 F.2d at 477.
181. *Id.* at 476–77 (citing Green v. Cnty. Sch. Bd. of New Kent Cnty., 391 U.S. 430 (1968)).
182. *Green*, 391 U.S. at 439–42.
183. *Mansion House Ctr. Mgmt. Corp.*, 473 F.2d at 477; *Green*, 391 U.S. at 441.

section 2 authority to improve the economic condition of African Americans and other minorities.

Although there may be no legal recourse against Congress for its failure to act in this respect, as the Court will probably say that such matters involve political questions that are not justiciable,[184] the most logical legal consequence that should flow from Congress's inaction is that the Court, when interpreting section 1 of the Thirteenth Amendment, should not use the potentiality of Congress's section 2 authority as a rationale for not aggressively interpreting section 1 and developing precedent for the Amendment that African Americans and other citizens can use as an avenue to break down present barriers—that continue to produce the social and economic disparities with white Americans which stem from slavery and persistent post-slavery racial discrimination.

Even if one does not accept the argument that Congress's inaction has made it complicit in the current effects that African Americans and other minorities experience from centuries of racial discrimination, he or she should be receptive to an argument that, in the face of such inaction, aggrieved persons should not be blamed for trying to use the Constitution itself to obtain any permissible remedy, including using the Thirteenth Amendment.

Despite that, in some areas, there is much support for self-help measures—because some believe in a small government where the federal government should not provide for all of its citizens' needs—such a philosophy should not apply to measures that Congress needs to enact to eradicate the lingering effects of centuries of slavery and subsequent racial discrimination, especially when such eradication probably requires a broad study of and a balancing and prioritizing of different spending and governmental obligations. But, even if such a small government philosophy is applied, it would be just another reason why aggrieved African Americans, other minorities, and supportive white American should be able to challenge present-day policies and practices that continue to promote historical and current racial discrimination. And they should be able to challenge such discrimination by bringing a direct claim under the Thirteenth Amendment.

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184. *See* Zivotofsky v. Clinton, 566 U.S. 189, 194–95 (2012) (discussing the political question doctrine). It should be noted even States and private corporations can take proactive steps to remedy their prior racial discrimination if they meet the strict scrutiny test. Richmond v. Croson, 488 U.S. 469, 488, 490–92 (1989). Therefore, there is no legitimate reason to believe that Congress cannot use its section 2 authority to take remedial measures. The only difference is that rational basis should be used and not strict scrutiny, unless there is legitimate evidence that Congress was motivated by racial animus in the action that it took—a racial animus burden shifting approach pursuant to the rational basis standard that this Article proposes. *See* text accompanying *supra* notes 132–42.

III. NEEDED APPLICATIONS OF THE THIRTEENTH AMENDMENT

A. Unequal Pay for African Americans, Especially African-American Females

In 1963, Congress enacted the Equal Pay Act of 1963, which was supposed to ensure that women earn equal pay for comparable work that men do.[185] However, despite any success that this law has had for some women, African-American females still earn about sixty-three percent on the dollar as compared to white men for comparable work, and this disparity starts early in life and does not end until a black female's death.[186] There may be many reasons why the disparity in wages exists between African Americans and white Americans, including intentional racism; unconscious racism or implicit bias; a lack of premarket skills that some African Americans may bring to the job market;[187] African Americans' alleged failures to negotiate for better wages; and African Americans' access to fewer networking opportunities.[188] But, regardless of whether the disparity is based on racism or some other factor, an aggrieved worker, or group of workers, who believes that the disparity is because of their race and that the effect of that disparity is to relegate them to second-class citizenship, with second-class opportunities, should be able to challenge the wage disparity by bringing a section 1 of the Thirteenth Amendment claim. The basis of the claim could be that the unequal pay denies them equal protection of the law (or opportunity) and is therefore a violation of the Thirteenth Amendment's equal protection clause or component, as articulated in this Article. Because the Thirteenth Amendment prevents private action from enslaving African Americans, thereby denying them equal protection, it should also prevent private racial discrimination that relegates them to a system of lower wages that tends to cause them to

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185. 29 U.S.C. § 206(d)(1).

186. P.R. Lockhart, *Tuesday is Black Women's Equal Pay Day. Here's What You Should Know About the Gap*, VOX (Aug. 7, 2018), https://www.vox.com/identities/2018/8/7/17657416/black-womens-equal-pay-day-gender-racial-pay-gap [http://perma.cc/2P74-KFN2]. This wage disparity exists despite that Congress has enacted Title VII (under its Commerce Clause powers) and the Equal Pay Act of 1963 (under its Commerce Clause powers). *See* Equal Pay Act of 1963, Pub. L. No. 88-38 § 2(b), 3(d), 77 Stat. 56, 56–57.

187. *See* Pedro Carneiro, James J. Heckman & Dimitriy V. Masterov, *Labor Market Discrimination and Racial Differences in Premarket Factors*, 48 J.L. & ECON. 1, 2 (2005) (arguing that a lack of premarket skills may account for some of the disparity in wages between African Americans and white Americans).

188. *See* Gowri Ramachandran, *Pay Transparency*, 116 PA. ST. L. REV. 1043, 1058–59 (2012) (discussing various reasons why a pay disparity exists between African American employees and white employees).

be in a lower economic class of citizenship, which has a downward spiral of bad consequences, including having to live in lower economic residential areas, with worse schools and fewer opportunities for them and their children. The downward spiral of lower economic opportunities and status was an essential feature of slavery and post-slavery racial discrimination that attempted to create a system of "near slavery" that sought, and still seeks, to maintain white supremacy over African Americans. Admittedly, all acts of wage disparity might not fall within this downward spiral, but many do. For example, it is not unreasonable to believe that some long-standing employer and corporate cultures and practices are more tied to slavery and long-standing efforts to maintain white supremacy, including corporations whose buildings and wealth were built on the backs of slave labor and its financial benefits.

And, where such long-standing history of economic benefits from slavery exists, aggrieved African Americans, who suffer wage disparity stemming from that history of slavery involvement, should be able to bring a direct claim under section 1 of the Thirteenth Amendment to vindicate and remedy their rights to equal wages for equal work; or, they should be able to raise the Thirteenth Amendment equal protection clause as an affirmative defense when someone challenges an affirmative action plan that an employer uses to remedy such racial disparity.

For example, a number of banks,[189] other corporations, and universities have acknowledged that they owned slaves or otherwise benefited from slavery.[190] If such institutions still have racially discriminatory wage structures that disadvantage African-American men and women, then those aggrieved persons should have access to a section 1 of the Thirteenth Amendment claim. To establish standing to bring such a claim, the aggrieved plaintiff would have to show a present injury from the discrimination and that the statute of limitations has not run on the claim. And, if the claim is by an aggrieved person challenging an affirmative action plan, then the employer would have to show—under the *Jones*-inspired standard of review for benign racial classification (as articulated in this

189. *See* David Teather, *Bank Admits It Owned Slaves*, THE GUARDIAN (Jan. 21, 2005), https://www.theguardian.com/world/2005/jan/22/usa.davidteather [http://perma.cc/J8YZ-V6LA].

190. *See In re* African-American Slave Descendants Litigation, 471 F.3d 754, 757 (7th Cir. 2006) (dismissing claims against certain companies that were involved with the slave industry, either through the ownership of slaves or the financing of certain slavery-related activities); *see also* Katie Reilly, *3 Ways America's Elite Universities Benefited from Slavery*, TIME (Nov. 7, 2017 3:19 PM), https://time.com/5013728/slavery-universities-america [http://perma.cc/8YUV-PGJF].

Article)[191]—that the claim is rationally related to the obtainment of equal protection as provided under section 1 of the Thirteenth Amendment and the challenger would have to show that the benign plan was solely motivated by racial animus.

If Congress was really using its section 2 of the Thirteenth Amendment powers, and was really concerned about the wage disparity, it could take sufficient action to eradicate that disparity—at the very least, it could study the disparity and see whether it is related to slavery and its incidents, and then take appropriate legislative action to end the disparity. The fact that Congress has not taken sufficient action is additional evidence that African Americans and other minorities cannot really afford to wait until Congress enacts laws to protect them. Therefore, there should be a right for aggrieved African Americans and other minorities to bring claims directly under the Thirteenth Amendment equal protection clause, as reflected in section 1 of the Amendment.

B. Lack of Reparations (Or at Least the Study of Reparations)

The goal here is not to do a detailed study of or argue for reparations. The focus is to show that Congress, since the end of slavery in 1865, has not given sufficient attention to the issue, despite reparations being given to others in this country.[192] Only recently has there been a Congressional hearing to discuss the subject, with one modest proposal—that Congress establish a commission to study the issue—not getting much traction, despite the fact that the Democratic Party is in control of the U.S. House.[193] It should be noted that the current reparations-related bill pending before Congress is H.R. 40, and it has been introduced every year from 1989 until 2017, without being passed in either house of Congress.[194] It is a bill that asked only that a commission be created to study the effects of slavery on current African Americans.[195] One would think that in a country as educationally inclined as the United States that most Americans would have no problem with at least studying an issue.[196]

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191. *See* text accompanying *supra* notes 58–59.

192. *See* Taryn Luna, *California task force will consider paying reparations for slavery*, L.A. TIMES (Sept. 30, 2020), https://www.latimes.com/California/story/2020-09-30/california-task-force-reparations-slavery-gavin-newsom-shirley-weber (discussing reparations to Japanese-Americans because of their interment in camps during World War II).

193. *See* Sheryl Gay Stolberg, *At Historic Hearing, House Panel Explores Reparations*, N.Y. TIMES (June 19, 2019), https://www.nytimes.com/2019/06/19/us/politics/slavery-reparations-hearing.html [http://perma.cc/Y4VN-QJNQ].

194. *Id.*

195. *Id.*

196. For a discussion of reparations, see Stephanie Ebbs, *Georgetown University*

One is left to wonder whether the failure to study reparations is just another act that devalues African Americans; that the failure is based on racism; that the political leaders believe that no reparations are due because of the civil rights laws that have been enacted; or that some believe that the opportunity to live in this country is reparations enough.[197]

Even if one were to argue that the mere act of freeing the slaves from years of inhuman treatment is sufficient reparations for slavery, the continued racial discrimination, after slavery, probably warrants additional reparations. Perhaps the political system is working like it always has worked, or the way that it has become. The lobbyists and public organizations with influence and money are the ones that get laws passed that are favorable to them and their constituencies. In any event, that Congress has not seriously considered reparations for so many years is just another example that its section 2 authority should not be used to prevent the Court and other federal courts from interpreting section 1 of the Thirteenth Amendment to develop much needed law in this area.

If Congress will not provide for reparations, then perhaps states and private institutions will. Recently, both Georgetown University and Princeton University acknowledged their involvements in slavery and they agreed to pay reparations.[198] With private institutions, like the ones referenced above, there does not appear to be any impediment to giving reparations because the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment are not applicable.

However, when a state actor or federal actor grants the reparations, a person might lodge a challenge against the reparations under at least the Equal Protection Clause and the Due Process Clause. Furthermore, one might expect that the Court will conduct its normal strict scrutiny analysis as performed in *Parents Involved in Community Schools v. Seattle School District*.[199] That is, the Court would

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Announces Reparations Fund to Benefit Descendants of Slaves Once Sold by the School, ABC NEWS (Oct. 30, 2019), https://abcnews.go.com/Politics/georgetown-university-announces-reparations-fund-benefit-descendants-slaves/story?id=66642286 [http://perma.cc/RYC7-UTYR]; *see also* Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/?gclid=EAIaIQobChMI5N3FxaCT6wIVBNvACh2jMgG-EAAYASAAEgLHW_D_BwE [http://perma.cc/8CV9-ETR3].

197. *Id.*

198. *Id.*; *see also* Valerie Russ, *Princeton Theological Seminary Pledges $27 Million Reparations Plan*, THE INQUIRER (Oct. 22, 2019), https://www.inquirer.com/news/reparations-princeton-theological-seminary-slavery-repent-27-million-20191022.html [http://perma.cc/5DXF-XQ8M].

199. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701, 702 (2007).

probably apply strict scrutiny and resolve the litigation by considering whether the giving of reparations serves a compelling state interest and whether the means are narrowly tailored.[200]

But, as argued above and throughout this Article, a standard that is less rigorous than strict scrutiny should be used. And, it should not be too hard to link many of the disparities that African Americans currently suffer to either slavery or the racial discrimination that continued in its aftermath.[201]

Congress, if it were of the mind to do so, could study and enact appropriate legislation under section 2 to grant reparations to eradicate the harmful effects of the racial history of this country, and it could experiment with different methods, including urban development, scholarships to African Americans who live in depressed school districts, and other methods to undo the present effects of hundreds of years of slavery and another hundred years or so of de jure and de facto segregation, and other acts of racial discrimination.

But, if Congress does not act, private entities, like Georgetown and Princeton, should be encouraged to give their own versions of reparations, and so should state governments.[202] They should be able to use section 1 of the Thirteenth Amendment and its lower standard of review, at least as an affirmative defense to any challenges to reparations programs.

C. Inadequate Funding of Education

In fiscal year 2016–2017, the total U.S. expenditure on K–12 public education was $736 billion, with the federal government contributing eight percent, the States contributing forty-seven percent ($346 billion); and local government contributing forty-five percent ($370 billion),[203] with eighty-two percent or $269 billion of that amount from local property taxes.[204] However, there is a belief that in many states the poorest school districts receive less funding for education than richer school districts, although the gap may be narrowing.[205]

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200. *See infra* Section III.C.

201. *See* Coates, *supra* note 196.

202. *See* Neil Vigdor, *North Carolina City Approves Reparations for Black Residents*, N.Y. TIMES (July 16, 2020), https://www.nytimes.com/2020/07/16/us/reparations-asheville-nc.html/ [http://perma.cc/PB4D-4R22]; Luna, *supra* note 192.

203. *The Condition of Education*, *Public School Revenue Sources*, IES/NCES, https://nces.ed.gov/programs/coe/indicator_cma.asp [http://perma.cc/9M8R-H373].

204. *Id.*

205. Lauren Camera, *In Most States, Poorest School Districts Get Less Funding*, U.S. NEWS & WORLD REP. (Feb. 27, 2018), https://www.usnews.com/news/best-states/articles/2018-02-27/in-most-states-poorest-school-districts-get-less-funding [http://perma.cc/6EYR-TMBG]. Historically, school districts with high rates of low-income students did not

There is wide variation in funding from state-to-state, and from district-to-district within a state.[206]

However, in the United States, there remains substantial educational achievement gaps between white students and African-American students and other minority students, primarily because of the way in which the funding of public education is distributed.[207]

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receive as many resources, including the number of high-quality teachers, counselors, and course offerings; however, some believe that there has been a narrowing of the disparity in funding. *Id.*

Despite the amount of money spent in the U.S. on K–12 education, U.S. students rank behind other developed countries in the achievements of its students in math and other subjects. *See* Dana Goldstein, *'It Just Isn't Working': PISA Test Scores Cast Doubt on U.S. Education Efforts*, N.Y. TIMES (Dec. 3, 2019), https://www.nytimes.com/2019/12/03/us/us-students-international-test-scores.html [http://perma.cc/J627-SU96]; *see also* Lauren Camera, *U.S. Students Show No Improvement in Math, Reading, Science on International Exam*, U.S. NEWS & WORLD REP. (Dec. 3, 2019), https://www.usnews.com/news/education-news/articles/2019-12-03/us-students-show-no-improvement-in-math-reading-science-on-international-exam [http://perma.cc/4V8J-DB5T].

206. *See* Michelle Chen, *How Unequal School Funding Punishes Poor Kids: Our System for Funding Education is Broken, and It's Hurting Society's Most Vulnerable*, THE NATION (May 11, 2018), https://www.thenation.com/article/archive/how-unequal-school-funding-punishes-poor-kids [http://perma.cc/Q7FX-C6ML]. One writer states:

> In other states, concentrated in the South, funding is both inadequate and stagnant. The worst-funded states also tend to neglect the basic educational interventions that could close the gaps in academic performance by underfunding early-childhood education, paying their teachers lower wages, and failing to tackle high turnover rates and major gaps in staffing levels. The massive workload on teachers is compounded by low student-to-faculty ratios that keep children cycling through overburdened schools, overworked teachers, and curricula inadequate for meeting basic state standards—which in turn results in year upon year of "underperforming" ratings for the district.

Id.

207. One writer states:

> On average, school districts serving the largest concentrations of students of color receive approximately $1,800 less per student in state and local funding than those serving the fewest students of color, and the differentials are even greater within states. For example, in Illinois, per-pupil funding ranged from $8,500 to $32,000 in 2016, with suburban districts in Cook County outspending nearby Chicago by more than $10,000 per pupil.
>
> The great divide in funding comes largely from reliance on local property taxes. Districts with higher property values bring in more property tax revenues and provide correspondingly higher funding for schools than poorer districts do. States typically offset these disparities to some extent, but rarely provide an equitable system that can respond to student needs. Funding disparities are so acute and widespread that lawsuits have been filed in more than 40 states in an attempt to remedy inequities.
>
> Inadequate school funding derails the future for students already struggling against the odds—intensifying disparities that harm society as a whole by reducing young people's capacity to contribute to society. When we provide adequate funding for resources such as well-prepared teachers and school leaders, smaller class sizes (especially in the early years), and extended learning time, we see returns in the form of improved student outcomes.

Jeff Raikes & Linda Darling-Hammond, *Why Our Education Funding Systems Are*

There may be multiple reasons for the disparity, but one reason is the way that local governments' funding of education is mostly based on property taxes—with suburban communities with higher property values being able to collect more property taxes to contribute to public education.[208] In contrast, many urban and other low-income communities, with lower property values, are less able to contribute adequate money for public education.[209] One study showed that "a 10% increase in per-pupil spending for all 12 years of public school resulted in an increase in 10 percentage points in graduation rates and a reduction of 6 percentage points in adult poverty rates."[210] And that a twenty-two percent increase in per-pupil spending "would be large enough to eliminate the educational attainment gap between children from low-income and nonpoor families."[211] Clearly, there is a need for attention towards solving the funding gap between high-income neighborhoods and school districts and low-income neighborhoods and school districts.[212]

Given the racial discrimination in housing patterns from redlining in lending to African Americans and other minorities, it is reasonable to believe that much of the disparity in the local funding of education can in part be attributed to slavery and subsequent racial discrimination. In addition to many people just not wanting to live in the same neighborhood with someone from a different race, the primary culprit is segregated housing patterns which have been created by the manner in which the U.S. government has allowed and contributed to redlining and other racially discriminatory housing and lending practices.[213] One is reminded of the Court's statement in *Jones v. Mayer*:

> Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.[214]

Derailing the American Dream, LEARNING POL'Y INST. (Feb. 18, 2019), https://learningpolicyinstitute.org/blog/why-our-education-funding-systems-are-derailing-american-dream [http://perma.cc/EZ6D-DK8G].

208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. Coates, *supra* note 196.
214. Jones v. Mayer, 392 U.S. 409, 441–43 (1967).

Therefore, it would appear that Congress, under its section 2 authority, could enact laws to ameliorate the harmful effects stemming from the funding of K–12 public education. It could probably create a system where the collective pool of property taxes is more evenly distributed between high-property-value suburban neighborhoods and low-income urban communities, given that such disparity in property values is probably a relic of slavery and subsequent racial discrimination. Under the rational relation test that *Jones* and lower-level cases have applied to Congressional enactments under section 2,[215] such legislation would probably be upheld under the Thirteenth Amendment.

However, to date, Congress has not enacted such legislation, despite the substantial detrimental effects that unequal funding of public education has had and will continue to have on African Americans. Such inaction by Congress again shows that it cannot be depended on to do things that are necessary to really equalize the statuses of white Americans and African Americans, and other minorities.

This is the reason why the Court needs to develop appropriate jurisprudence under section 1 of the Thirteenth Amendment that would allow aggrieved African Americans and other minorities to protect themselves. Instead of developing such jurisprudence, the Court may have further instilled racial discrimination in the funding of K–12 education—and the harmful effects that it is having on African Americans and other minorities—by relying on the Fourteenth Amendment Equal Protection Clause to resolve educational policy issues, instead of relying upon the Thirteenth Amendment.

For example, in *Parents Involved in Community Schools v. Seattle School District*,[216] Chief Justice Roberts held that two public school districts' school assignments plans—which used race to assign students to different schools within the school districts—were a violation of the Equal Protection Clause of the Fourteenth Amendment.[217] Despite that the assignment plans were for the benign purpose of having a certain percentage composition in different schools in the districts, the Court applied strict scrutiny and held that the schools' articulated purposes for the plans were not a compelling state interest[218] and that the plans were not narrowly tailored because the school districts did not show that they had tried non-racial alternatives to achieve their goals.[219]

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215. *See, e.g.*, *id.* at 440–41.

216. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701 (2007).

217. *Id.* at 747–48.

218. The Court listed various ways in which the schools district labeled their interests: "racial diversity, avoidance of racial isolation, racial integration [but] they offer no definition suggesting that their interest differs from racial balancing." *Id.* at 732.

219. *Id.* at 735.

In reaching its decision, the Court noted that the school districts' use of race in student assignments was not for a historically allowable purpose of remedying prior school segregation, given that the Seattle school system had never been racially segregated and the Jefferson County School system had already remedied prior segregation.[220] The Court rejected arguments that, because the use of race was benign, that a lesser standard of review than strict scrutiny should be used, in part citing *Adarand* that strict scrutiny should be used even when a racial classification is for a benign purpose.[221]

The problem with the *Parents Involved in Community Schools* case is that the Court did not consider the Thirteenth Amendment's implications, apparently because the school districts did not offer the Amendment to support their defense.[222] The Thirteenth Amendment connection is that the racial composition in the school districts that the schools' assignment plans were trying to change probably stemmed from the prior segregation in housing patterns that the Court incorrectly labeled as social discrimination.[223] The Court stated: "But in Seattle the plans are defended as necessary to address the consequences of racially identifiable housing patterns. The sweep of the mandate claimed by the district is contrary to our rulings that remedying past societal discrimination does not justify race-conscious government action."[224]

The use of the Thirteenth Amendment would have allowed an evaluation of the housing patterns in the school districts to determine whether they were based on intentional racial segregation by the government and private citizens, through the use of redlining, violence, or other acts of racial discrimination. And, if such racial discrimination could be traced back to slavery and Black Codes and Jim Crow laws, then that racial discrimination that led to the segregated housing patterns, that led to the racial imbalance in the Seattle and Jefferson County School systems, would be a badge and incident of slavery that Congress could remedy by appropriate legislation under its section 2 authority.

And, if Congress could remedy such present effects of alleged societal discrimination under its section 2 authority, but will not do so, then there should be no reason why state entities, such as the Seattle and Jefferson County school districts, cannot do so. As the

220. *Id.* at 720.
221. *Id.* at 720, 741–42.
222. *See Parents Involved in Cmty. Sch.*, 551 U.S. at 710–11 (noting petitioners raised only a Fourteenth Amendment claim).
223. *Id.* at 731.
224. *Id.*

Court recognized in *Jones v. Mayer*, as quoted above, such housing pattern discrimination may be a "relic of slavery."[225]

Therefore, when the aggrieved white students in *Parents Involved in Community Schools* filed their Equal Protection Clause claim under the Fourteenth Amendment, the school districts and African-American residents of those districts should have raised section 1 of the Thirteenth Amendment as an affirmative defense, thereby forcing the Court to consider the impact of the Thirteenth Amendment on the school districts' use of race to balance students' school assignments in the relevant school districts.

And, as argued above, the Court should use the same deferential standards that it uses for Congressional enactments under section 2 of the Thirteenth Amendment—which is whether the asserted action or law that is designed to eradicate badges and incidents of slavery is a "rational determination" or is rationally related to the eradication of a badge and incident of slavery.[226] The same deferential standards should be used when either a private person or state entity brings a claim directly under the Thirteenth Amendment or defends a claim against them by raising section 1 of the Amendment, as an affirmative defense, when their actions or programs are alleged to be a violation of another constitutional amendment.

CONCLUSION

The Court has not engaged in a broad interpretation of section 1 of the Amendment. This Article offers a holistic or structural way in which an equal protection clause or component can be incorporated into section 1 of the Amendment. The hope is that such an incorporation will expand the use of section 1 such that it will one day have a similar coverage as the Fourteenth Amendment when interpreting claims of racial discrimination and the use of benign racial classifications, but that a different standard than strict scrutiny will be used. To the extent that the courts will interpret the Thirteenth Amendment and the other Civil War amendments as having a singular purpose of providing equal protection to African Americans and other minorities, there is a possibility that the interpretation of the Amendment will not be strictly controlled by trying to determine whether a current act of racial discrimination or a benign classification involves "badges and incidents" of slavery. Instead, any act of racial discrimination will be within the Amendment's coverage, as the Tenth Circuit in *Hatch* seems to imply.[227]

225. Jones v. Mayer, 392 U.S. 409, 442–43 (1967).
226. *Id.* at 439.
227. *See* text accompanying *supra* notes 156–58.

As a closing matter, it should be noted that there is nothing special about the Thirteenth Amendment as a source of legal authority. Both the courts and legal scholars should "free" the Amendment from artificial constraints. In other words, courts should be willing to apply the Amendment to new situations whenever such situations fall within the scope of the Amendment, including determining new applications and interpretations of the Amendment.

Similarly, some legal scholars who write articles on and otherwise participate in Thirteenth Amendment discourse should "free" the Amendment from their paternal or maternal instincts to protect the Amendment from possible erroneous interpretations by conservative justices and judges. Such scholars fear that a conservative Supreme Court might render conservative precedents that are contrary to an expansive interpretation of the Amendment. Although timing is important to all adjudication—and it should certainly be given its due respect—there is nothing about the Thirteenth Amendment that would necessitate any enhanced consideration of the timing of litigation. One must be resigned to the reality that the history of the Supreme Court is one of the Court having made bad decisions that it frequently corrected in subsequent legal opinions, some of which the Court rendered decades after the original erroneous decision. For example, *Plessy v. Ferguson*,[228] an erroneously decided opinion, which the Court rendered in 1896 to create the "separate but equal" doctrine, remained good law for fifty-eight years until the Court, in *Brown v. Board of Education*[229] in 1954, held that the doctrine violated the Fourteenth Amendment.[230] Surely, few scholars would argue that Mr. Homer Plessy—instead of filing a lawsuit to address a then-current act of racial discrimination—should have waited until 1954 to file his claim (when the statute of limitations would have probably barred the claim) in hopes of getting a more liberal or progressive Court in 1954 than existed in 1896 when the Court decided his claim.

One can make similar observations about aggrieved parties who have asked the Court to interpret the Fourth Amendment to address then-existing controversies. For example, the Court's Fourth Amendment jurisprudence has gone from an erroneous decision in *Olmstead v. United States*[231]—that the Fourth Amendment did not

228. Plessy v. Ferguson, 163 U.S. 537, 537–38 (1896), *overruled by* Brown v. Bd. of Ed., 347 U.S. 483 (1954).

229. Brown v. Bd. of Ed., 347 U.S. 483 (1954).

230. *Id.*

231. Olmstead v. United States, 277 U.S. 438, 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

protect one from a warrantless wiretapping that did not involve a physical intrusion onto the targeted person's property—to a later decision in *Katz v. United States*[232] that the Fourth Amendment does protect one from a warrantless search if the targeted person had a reasonable expectation of privacy in the relevant activity, even if there was no physical invasion on his or her property.[233] No one today would suggest that Mr. Olmstead, who was targeted with a warrantless wiretapping in 1928, and a subsequent criminal prosecution,[234] should have waited until 1967 when the Court in *Katz* changed its Fourth Amendment standard to a "reasonable expectation of privacy" standard.[235]

In sum, this Article proposes a theory of incorporating an equal protection clause or equal protection theory into the Thirteenth Amendment, which cries out for current litigation and Court interpretation of claims by currently aggrieved persons who should not have to wait for the membership of the Court to change to a more liberal or progressive majority before such litigation is presented to the Court.[236]

232. Katz v. United States, 389 U.S. 347 (1967), *superseded by statute*, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 212, *as recognized in* United States v. Torres, 751 F.2d 875, 887 (7th Cir. 1984).

233. *Id.* at 353.

234. *Olmstead*, 277 U.S. at 455.

235. *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring).

236. *See* Luna, *supra* note 192.