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# THE 2013 HONORABLE CLIFFORD SCOTT GREEN LECTURE

## THE PROMISES OF FREEDOM: THE CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT

*William M. Carter, Jr.\**

Good afternoon everyone. Dean Epps, thank you for that kind introduction. It's great to see so many of my former colleagues, former students, and friends from the community who I got to know over the years. It's a particular pleasure to have Mrs. Green and the family here. It would be hard to overstate the impact of Judge Green's legacy on Temple, on the Philadelphia community, and on me personally. I've been a beneficiary of that legacy, and to the extent that I've had accomplishments in my career thus far, I'm always cognizant that I stand on the shoulders of giants, like Judge Green. So it's truly a deep honor to be here to deliver this year's Judge Clifford Scott Green Lecture.

I want to try to do three things in today's talk. First, I want to try to illuminate some of the history and the context of the Thirteenth Amendment. I think it's a constitutional provision that has gotten less attention in our scholarship and jurisprudence than it deserves and I'd like to share with you some of the background around the Amendment. Second, I want to talk a little bit about how, in my view, the full scope of the Thirteenth Amendment has yet to be realized and share some thoughts on why it remains an underenforced constitutional norm. Finally, I will provide examples that demonstrate the continuing relevance of the Thirteenth Amendment to addressing modern day issues.

First, let me just clarify at the outset: my work on the Thirteenth Amendment focuses on what its framers called the "badges and incidents of slavery," that is, the legacies and lingering effects of the system of chattel slavery in the United States. The Amendment also applies, of course, to literal forced labor and involuntary servitude, and we have some federal statutes based on the Thirteenth Amendment, like the Trafficking Victims Protection Act,<sup>1</sup> that outlaw sex trafficking as a form of modern-day slavery in its literal sense. My work, however, focuses on the Thirteenth Amendment's proscription of the badges and incidents of slavery.

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\* Dean, University of Pittsburgh School of Law. Dean Carter delivered this Lecture at the 2013 Hon. Clifford Scott Green Lecture on March 25, 2013, at the James E. Beasley School of Law, Temple University.

1. Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101–7113 (2012).

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Properly defining the badges and incidents of slavery requires understanding both the context and history of the Thirteenth Amendment. Examination of that history and context reveals that the badges and incidents of slavery should be defined according to the connection that a subordinating or discriminating practice or condition today has to the institution of slavery, and the connection that the group injured by that practice or condition has to the institution of slavery. In a moment I will demonstrate that visually to clarify what I propose to be the proper interpretation of the badges and incidents of slavery theory.

But first, by way of background, let me just say a few words on the text and history and context of the Thirteenth Amendment. The text of the Thirteenth Amendment, as you know, is very short. It contains two sections: Section 1 provides that neither slavery nor involuntary servitude shall exist in the United States or any place subject to their jurisdiction except as punishment for a crime. Section 2 says that Congress shall have the power to enforce this provision by appropriate legislation. The text is relatively simple, so the obvious question from skeptics is: If all the text proscribes is slavery and involuntary servitude, how do you get from there to a theory that it proscribes more than that—that is, one that prohibits the legacies of the slavery and the vestiges of the slave system? In other words, if the framers meant to proscribe the badges and incidents of slavery, why didn't they say that in the text of the Amendment? There are a variety of responses to that, but understanding the context in which the Amendment was written and the ideology of the people who wrote it proves the most persuasive.

The Reconstruction Republicans were heavily influenced by the ideologies of abolitionism and natural rights. Under such a worldview, not every aspect of “law” would need to be textually articulated. They believed that there were rights that existed that went beyond what would or could be articulated in a text, particularly a constitutional text. Moreover, when you read the debates around the Thirteenth Amendment leading to its ratification, you see that most of the debates in Congress were about what effect the Thirteenth Amendment would have on the rights and status of the freemen. Very little of those Congressional debates were about outlawing chattel slavery. There is a reason for that. The reason is that the Amendment in its final form was debated in 1864–1865 and was ratified in 1865. By that time, the end of the Civil War could already be seen, and it was clear that the Union was going to be victorious. Given that the war would have the effect of ending the legal institution of slavery, it makes sense that the Congressional debates were not about whether slavery would end or not. It was clear that it would end as a legal institution because the North was likely to be victorious. Rather, the proponents of the Amendment and their opponents in the debates, you will see, focused on what would be wrought at the end of slavery—what rights the freedmen would have, and, how and whether American society would go about dismantling the legacy of slavery.<sup>2</sup>

Thus, as to the text, my answer is twofold. First, the drafters of the Thirteenth Amendment did not believe that they needed to delineate the full reach of the Amendment in its text. Second, the context in which they were operating was one in

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2. For more discussion of these debates, see William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1322–25 (2007).

which they knew that the legal institution of chattel slavery would end with the end of the war. The question was, what would come next?

So let me try to illuminate a little bit what those framers thought the Thirteenth Amendment would do. I should hasten to add at the outset: I am not purely a constitutional originalist myself. I have some criticisms of originalist methodology, but if a starting point for understanding the meaning of the Constitution is the intent or purpose or meaning that the framers had when they adopted these provisions, I think it is useful to talk about what they thought they were doing.

As noted earlier, the Thirteenth Amendment's framers, by the time of the war, had become deeply influenced by abolitionist and natural rights ideology. Prior to the coming of the Civil War, there was a consensus (at least among the moderate Republicans) that a gradualist approach would work best to end slavery. By the time of the war, however, the driving contingent of Republicans in Congress had been radicalized by a series of events. Of course, the dispute over Kansas and the *Dred Scott* decision contributed mightily to the radicalization of the framers of the Amendment, and by the time the Amendment was debated in Congress, you see that kind of radical abolitionist ideology coming through in the speeches and debates.<sup>3</sup>

So what did the Thirteenth Amendment's framers believe that they were doing? They believed that they were constitutionalizing the permanent end of chattel slavery. They believed that they were outlawing any form of forced labor akin to slavery. But they also, to quote the framers' words, believed they were not only ending slavery itself, but acting so as to obliterate the last lingering vestiges of slavery in America.<sup>4</sup> Representative Myers of Pennsylvania, arguing in favor of the Amendment, spoke in broad, natural rights language as to what it would accomplish. He stated, "[t]he great change . . . is that from slavery to freedom. Slavery gone, its laws, its prejudices, and its consequences should be buried forever."<sup>5</sup> Senator Henry Wilson of Massachusetts, another architect of the Amendment, noted that in his view the Amendment would "obliterate the last lingering vestiges of the slave system; its chattelizing [sic], degrading and bloody codes; its dark, malignant barbarizing spirit; all it ever was and is, connected with it or pertaining to it."<sup>6</sup> Senator Charles Sumner of Massachusetts was one of the primary architects of the Amendment, and he spoke in similar terms as to what the Amendment would do. He stated that the Amendment's goals were to "abolish[] slavery entirely . . . . It abolishes it root and branch. It abolishes it in the

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3. See ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM* 102 (2004) ("The Thirteenth Amendment . . . signaled a break from moderate anti-slavery leanings. Moderates wanted states gradually and separately to end slavery."); RONALD G. WALTERS, *AMERICAN REFORMERS: 1815–1860*, at 80 (1997) (noting that antislavery doctrine, from the 1830s onward, rejected what William Lloyd Garrison called the "pernicious doctrine of gradual abolition").

4. David P. Tedhams, *The Reincarnation of "Jim Crow": A Thirteenth Amendment Analysis of Colorado's Amendment 2*, 4 TEMP. POL. & CIV. RTS. L. REV. 133, 137 (1994) (citing CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864)) ("If this amendment shall be incorporated by the will of the nation into the Constitution of the United States, it will obliterate the last lingering vestiges of the slave system." (quoting Senator Henry Wilson of Massachusetts)).

5. Carter, *supra* note 2, at 1334–35 (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 1622 (1886)).

6. CONG. GLOBE, 38TH CONG., 1ST SESS. 1324 (1864).

general and the particular. It abolishes it in length and breadth and in every detail.”<sup>7</sup> To these framers, the end of slavery brought with it the end of the systems that supported or arose from slavery. They believed that slavery was more than a static catalogue of specific legal disabilities and specific property relationships.<sup>8</sup> Rather, they believed that slavery was an evolving matrix of subordination, stigmatization, and legacies of the system of human bondage. And they believed that when slavery fell, those systems that supported slavery would also fall.

The framers also believed that the constitutional meaning necessary to ensure the complete end of slavery and its legacies would need to evolve and adapt (remember their ideology was one of natural rights and abolition).<sup>9</sup> They understood that the law of slavery as it had developed over the preceding two centuries in America had, at every turn, evolved in a way designed to preserve human bondage. The legal system’s facilitation of slavery was not fixed. It evolved and adapted to serve the needs of the slave-holding society, and these framers believed that the new law of freedom would also need to evolve and adapt to serve a free society.<sup>10</sup>

Given that the history of the Thirteenth Amendment reveals at least the potential for a broad and robust constitutional theory addressing the legacies of slavery, one would think it would follow that we’d see a broad jurisprudence applying the Thirteenth Amendment. We do not see that, as I’ll illustrate in a moment. What we see instead is, with a couple of notable exceptions that I’ll draw your attention to, a very narrow, cramped, and cabined view of the Thirteenth Amendment’s reach that essentially, at least in its judicial interpretations, views it solely as prohibiting forced labor and involuntary servitude.

For example, the Supreme Court, as early as 1883 in the *Civil Rights Cases*,<sup>11</sup> nodded at the badges and incidents of slavery interpretation. Indeed, in the *Civil Rights Cases*, the Court specifically stated that the Amendment empowers Congress to “pass all laws necessary and proper for eliminating all badges and incidents of slavery.”<sup>12</sup> But

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7. CONG. GLOBE, 42D CONG., 2D SESS. 728 (1872).

8. HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875*, at 391–92 (1982).

9. *See id.* (describing the influence of abolitionist and natural rights philosophies on the Thirteenth Amendment’s drafters).

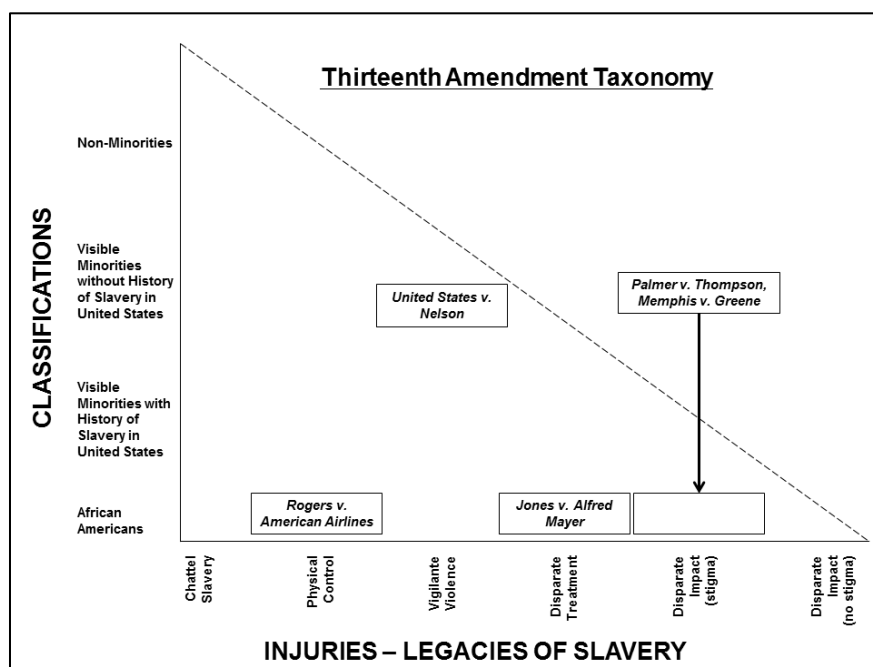
10. *See Rhonda V. Magee Andrews, The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 491–92 (2003) (recognizing the reconstruction of postslavery America is an ongoing project and the best guide is the writings of abolitionists).

11. 109 U.S. 3 (1883).

12. *Civil Rights Cases*, 109 U.S. at 20. The Court, however, held that the Civil Rights Act of 1875 exceeded Congress’s Thirteenth Amendment authority by prohibiting segregation in places of public accommodation. The Court believed that the congressional badges of slavery power under the Amendment was limited to enforcing equality of “civil freedoms,” such as the right to make contracts or engage in judicial proceedings, but did not extend to “adjust[ing] what may be called the social rights of men and races in the community,” such as the integration of privately operated facilities. *Id.* at 22. The Court in the *Civil Rights Cases* therefore recognized that the Thirteenth Amendment was “undoubtedly self-executing without any ancillary legislation . . . [and] [b]y its own unaided force and effect it abolished slavery, and established universal freedom” and that both the self-executing core of the Amendment and legislation passed pursuant to § 2 encompassed the badges of slavery. *Id.* at 20. Where the Court disagreed with Congress in that case was regarding whether the particular subjects legislated against were in fact badges or incidents of slavery.

the actual application of the Thirteenth Amendment in that case (and in subsequent cases) was limited to forced labor and literal involuntary servitude. This largely remained true for nearly the next hundred years until the mid-1960s,<sup>13</sup> when *Jones v. Alfred H. Mayer Co.* resuscitated the Amendment.<sup>14</sup>

Before discussing *Jones*, I want to lay out what I see as the proper approach to interpreting the Thirteenth Amendment and then illustrate where *Jones* and a couple of other cases fall along this spectrum. As I noted at the beginning of my talk, it is my view that the history and context of the Thirteenth Amendment counsel us to interpret it with to reference to (1) the connection that the contemporary practice at issue has to the institution of slavery and (2) the connection that the injured party had to the institution of slavery. This interpretative approach can be illustrated visually as follows<sup>15</sup>:



13. See, e.g., *United States v. Harris*, 106 U.S. 629, 641 (1882) (holding that a federal statute criminalizing conspiracies to interfere with federal civil rights “clearly cannot be authorized by the [Thirteenth] amendment which simply prohibits slavery and involuntary servitude”); *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896) (stating, in deciding that the Thirteenth Amendment did not invalidate the ‘separate but equal’ doctrine, that “[s]lavery implies involuntary servitude—a state of bondage; the ownership of mankind as chattel, or at least the control of the labor and services of one man for the benefit of another”); *Hodges v. United States*, 203 U.S. 1, 17 (1906) (holding that the Amendment empowered Congress to outlaw only those private acts that amounted to actual physical enslavement, meaning “the state of entire subjection of one person to the will of another”); *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926) (holding that the Thirteenth Amendment did not provide jurisdiction to hear a challenge to enforcement of a racially restrictive covenant because the Amendment only reaches “condition[s] of enforced compulsory service of one to another [and] does not in other matters protect the individual rights of persons of the negro race”).

14. 392 U.S. 409 (1968).

15. This sort of visual representation is owed to Professor Darrell Miller, who suggested it after I originally articulated this interpretive approach at a conference.

Look first at the bottom left of the figure reproduced here, where the horizontal and the vertical axes come together. What I'm trying to show here is that there are certain groups and certain kinds of injuries that were central to the historical system of slavery and its legacy that the framers of the Thirteenth Amendment intended to abolish. Intuitively, when thinking about the Thirteenth Amendment, we think first, as we should, of individuals who are the descendants of slaves or associated with the descendants of slaves, that is, African Americans. Thus, forms of contemporary subordination suffered by African Americans that are linked to the system of slavery are at the core of what the Amendment was designed to eliminate. Thus, if you look across the horizontal axis, you'll see it runs from chattel slavery to other forms of physical control—such as vigilante violence, to intentional discrimination and disparate treatment, to stigmatizing disparate impact, to disparate impacts that may not have a stigmatizing effect. In sum, what this diagram shows is a taxonomy of injuries that, in my view, are part of the legacy of slavery. What I mean by that is that they have a specific link to the law, culture, and practice of slavery. Some of them were concrete aspects of the slave system—private violence by individuals or the mob, for example, was used to control the slaves and later the freedmen. Some are less concrete but nonetheless are legacies of the slave system. For example, there is a wealth of social science and social psychology literature that shows that many of the implicit associations that we have that lead to racial profiling—a belief in a correlation between race and danger, race and crime, or race and a propensity for violence—were not historical accidents; rather they were tools of subjugation of the slaves and later the freedmen.<sup>16</sup> So my theory is when we see those sorts of structures reproduced today, even if not reproduced intentionally, they should be considered to be badges or incidents of the slave system and, as such, outlawed by the Thirteenth Amendment.

The vertical axis of the diagram above represents the fact that there are also a variety of structures that were central to the slave system, or that supported it, that are within the scope of the Thirteenth Amendment, even where the victim is not African-American. I'll return to that in a moment, but it would first be helpful to review *Jones v. Alfred H. Mayer Co.*, which reinvigorated the badges and incidents of slavery theory. In *Jones*, an interracial couple, sought to purchase a property in a segregated neighborhood.<sup>17</sup> The seller refused to sell the property to them because the husband was African American, so the Joneses therefore sued under 42 U.S.C. § 1982, which prohibits private racial discrimination in the sale or lease of property.<sup>18</sup> The main question presented was whether § 1982 was constitutional. It could not be constitutionally grounded in the Fourteenth Amendment, because the Court has read that Amendment as only applying where there is state action. Since the defendant was a

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16. For further background on this subject, see William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 56–70 (2004) and sources cited therein.

17. *Jones*, 392 U.S. at 412.

18. Section 1982, originally enacted as part of the Civil Rights Act of 1866, provides: “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” 42 U.S.C. § 1982 (2012).

nonstate actor, the Court considered whether Congress had the power to prohibit such discrimination under the Thirteenth Amendment and concluded that it did.<sup>19</sup> The Court stated:

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

The Court's reasoning was that there are certain private forms of discrimination that, when enforced or given license by the legal system, may replicate some of the aspects of the slavery system—such as segregating white communities from an “undesirable” and “dangerous” nonwhite community. To return to the earlier diagram, *Jones* would fall near the midpoint of the horizontal axis. The cause of the discrimination was that one of the plaintiffs was African American. And the case involved not just a single isolated instance of discrimination, but a widespread practice based upon widely shared social attitudes.

After *Jones*, however, the Court quickly sought to close the door that it had opened, certainly due at least in part to the conservative turn the Court was taking. I'll discuss one example here. *Palmer v. Thompson* involved the city of Jackson, Mississippi, which had been sued in the 1960s by a coalition of civil rights groups to desegregate its public facilities.<sup>21</sup> The city of Jackson was one of the bastions of Jim Crow, one of the fiercest defenders of the system of segregation, even to the point where the city deployed a device known as the “Thompson Tank,” named after the mayor of Jackson at that time—a tank loaded with high powered water that would be used to hose down the demonstrators and marchers to push them away from the areas in which they were demonstrating. As a result of lawsuits, the city in fact desegregated all of its public facilities but for one category: swimming pools. Now, I must note that some of the most important work on this issue comes from Judge Higginbotham, a friend of Temple and a friend of the Green family. His wonderful book, *In the Matter of Color*, does a masterful job of examining these issues in detail, and he has a wonderful chapter noting the resistance in both the South and the North to desegregating the swimming pools.<sup>22</sup> Drawing on some of the social science and social psychology literature, he offers an explanation that I believe is almost certainly correct.

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19. *Id.* at 439.

20. *Id.* at 441–43.

21. *Palmer v. Thompson*, 403 U.S. 217 (1971).

22. See A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 41–47* (1978) (describing culture of white male domination and rejection of interracial sexual relations). For further discussion of this stereotype, see Martha A. Myers, *The New South's "New" Black Criminal: Rape and Punishment in Georgia, 1870-1940*, in *ETHNICITY, RACE, AND CRIME: PERSPECTIVES ACROSS TIME AND PLACE* 145, 146 (Darnell F. Hawkins, ed., 1995) (examining the treatment of black men convicted of sexual assault within the criminal justice system) and GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY 1817-1914*, at 252 (1987) (describing a belief that uplifting blacks was futile and that the race was “reverting to barbarism”).

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There is something about this particular kind of facility that made the city so adamantly opposed to desegregating it: the stigmatization of blacks, particularly black men, as dangerous sexual predators who were not fit to be in that sort of environment with white women, as well as notions of cleanliness and white “purity.”

After the city refused to desegregate the pools, a group of plaintiffs sued invoking the Thirteenth Amendment’s proscription of the badges and incidents of slavery theory (among other theories).<sup>23</sup> The Supreme Court rejected their claim, stating that it believed the plaintiff’s Thirteenth Amendment argument would “severely stretch [the Amendment’s] short, simple words and do violence to its history.”<sup>24</sup> The Court dismissed it out of hand, and spent no more than a paragraph rejecting the Thirteenth Amendment claim.<sup>25</sup> An interesting aside: one would think there was also a viable equal protection claim here. Not so, according to the Court. The Court said that the only command of the Equal Protection Clause is that similarly situated people be treated the same. Here everyone *was* being treated the same: nobody could use the pools because they were closed. Poof! No discrimination.

In the Court’s view, the *Palmer* case was outside the scope of the Thirteenth Amendment. I believe it should have been seen as within the scope of the Thirteenth Amendment for the following reasons. Understanding the legacy of segregation and discrimination in Jackson, Mississippi at that point in time, understanding the stigmatization that had been associated with African Americans sharing intimate spaces with whites, and understanding that the stigmatization and stereotypes surrounding such issues did not arise by accident but rather were used as a means of social control over the slaves and the freedmen, would lead one to the conclusion that the kind of official stigmatization at issue in *Palmer* is indeed a badge or incident of slavery.

By contrast, a relatively recent circuit court case took a far less formalistic approach to the Thirteenth Amendment. *United States v. Nelson* was a case that arose out of the Crown Heights riots in the 1990s.<sup>26</sup> The riots were triggered when an African American child was killed by a car driven by a Jewish person in Crown Heights.<sup>27</sup> Several days of rioting followed, and one evening, one of the defendants made an angry speech in which he repeatedly exhorted the crowd to “get the Jews,” in his words.<sup>28</sup> As he was giving this speech, a young man named Yankel Rosenbaum happened to be passing through the area. He was visually identifiable as an Orthodox Jew due to his clothing and his hair.<sup>29</sup> Upon seeing him, the defendants urged the crowd to chase him. Rosenbaum was beaten and stabbed, and later died from his injuries.<sup>30</sup> The defendants, two African Americans, were prosecuted under the federal hate crimes law, 18 U.S.C. § 245.<sup>31</sup> In their appeal, the defendants challenged the scope of that law, arguing that it

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23. *Palmer*, 403 U.S. at 226.

24. *Id.*

25. *Id.* at 226–27.

26. *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002).

27. *Id.* at 169.

28. *Id.* at 170.

29. *Id.* (describing Rosenbaum as a “bearded man in orthodox Jewish dress”).

30. *Id.*

31. The relevant portion of 18 U.S.C. § 245 states:



was not supportable under the Thirteenth Amendment—because the badges and incidents of slavery theory could not reach religious discrimination.<sup>32</sup>

The court, in rejecting their claim, essentially acknowledged both that American Jews were not subjected to chattel slavery in the United States and that we do not today generally think of Jews as a nonwhite racial group. Nonetheless, the court found the Thirteenth Amendment’s proscription of the badges and incidents of slavery was intended to do more than just protect black people from being put in chains. Rather, citing the words of the Amendment’s framers, the court found that it was intended to eliminate every lingering vestige of the slave system and its cognate institutions. The court further found that the ability of a group of private individuals to inflict violence with impunity upon a visually identifiable member of a historically despised class amounted to such a vestige of the slave system. In the court’s view, the Reconstruction Congresses clearly believed that this sort of mob violence would have no place in our constitutional order after the Thirteenth Amendment, whether or not it was inflicted upon an African American person.<sup>33</sup> Accordingly, the court upheld the convictions because it saw this case as being within the scope of the badges and incidents of slavery that the Thirteenth Amendment prohibits.<sup>34</sup>

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

18 U.S.C. § 245 (2012). The relevant “interference with public facilities” element was met because Rosenbaum was enjoying the use of the streets of the City of New York when he was attacked.

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

33. *Nelson*, 277 F.3d at 189–90 (discussing the use of such private violence by slave masters to maintain control over the enslaved and the continued use of such violence with impunity after the end of slavery to prevent the freedmen from exercise their legal freedom in meaningful ways). Had any of these critical elements been missing, the court indicated that the statute’s constitutionality until the Thirteenth Amendment might have been a closer question. *See id.* at 191 n.25 (stating “a statute, for example, that federally criminalized private racially motivated violence quite generally [without requiring that such violence interfere with use of a public facility] might or might not be constitutional under the Thirteenth Amendment”). For arguments that Congress does have the power under the Thirteenth Amendment to pass general hate crimes legislation, see TESIS, *supra* note 3, at 149–54.

34. There are two additional factual circumstances in *Nelson* that, although not expressly relied upon by the court, establish that the attack in that case amounted to a badge or incident of slavery within the analytical framework this Article proposes. First, *Nelson* involved mob violence. Far from being an isolated incident of racial or religious hatred motivated by one individual’s animosity toward the victim’s heritage, the victim’s stabbing in *Nelson* was the culmination of what can only be characterized as a mob lynching. *See Nelson*, 277 F.3d at 169–70. Second, the trigger for the lynch mob was not just that the victim was Jewish, but *identifiably* Jewish. *Id.* at 170 (noting that the victim was wearing Orthodox Jewish attire and that the crowd shouted “get the Jew” after seeing him). Thus, the victim’s identity was highly relevant, as illustrated by the court’s recognition that Jews have historically been a “hated class of people.” *Id.* Mob violence targeting a person because of his identifiable membership in a hated class was one of the primary tools white supremacists used to maintain slavery and control over the freedmen after the end of slavery. *See, e.g., id.* at 189 (observing that “there is widespread agreement among scholars of slavery that slavery . . . centrally involve[d] the master’s

In sum, we see an oscillation of interpretations of the Thirteenth Amendment, ranging from very narrow to quite broad. On the whole, however, the Amendment remains underenforced in comparison to the broad scope the contemplated in its legislative history, the ideology of its drafters, and the historical circumstances in which it was adopted. Let me offer a few reasons why I believe the Thirteenth Amendment has, on the whole, remained an underenforced constitutional norm. First, slippery slope concerns, as we know, are never far from the minds of judges and legislators who are considering new or novel theories applications of constitutional law. I'll give you an example of what might be the kind of slippery slope that the lower courts at least are concerned about. Recently, People for the Ethical Treatment of Animals (PETA) brought a Thirteenth Amendment suit. PETA brought a Thirteenth Amendment lawsuit on behalf of orcas.<sup>35</sup> You won't be surprised to learn that the court dismissed the case for failure to state a claim, believing there was no way in which the captivity of orcas was within the scope of the "slavery" that the Thirteenth Amendment abolished.<sup>36</sup> So, if you're concerned as a legislator or as a judge about opening the door to those kinds of cases, you may not want to crack the door at all.

Another possible explanation deals with the difference between Section 1 of the Thirteenth Amendment, the substantive prohibition, and Section 2, the enforcement clause, which says that Congress shall have the power to enforce the prohibition. There are some lower courts that have concluded that all the Amendment prohibits is literal slavery or forced labor unless Congress passes a statute, as in *Jones*, saying it prohibits more.<sup>37</sup> If Congress tells us the Amendment prohibits more, we would be happy to enforce that prohibition. But until it does so, we're not going to act. Now there's a *Marbury v. Madison*,<sup>38</sup> *McCulluch v. Maryland*,<sup>39</sup> *City of Boerne v. Flores*,<sup>40</sup> problem in that kind of reasoning. The idea would be that Congress gets a blank check to define

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constant power to use private violence against the slave" with both impunity in fact and immunity in law). See also ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 119–20 (1970); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 41–49 (1997) (describing the history of lynching); DONALD NIEMAN, *TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-68*, at 98 (1979); Akhil Reed Amar, Comment, *The Case of the Missing Amendments: R.A.V. v. St. Paul*, 106 HARV. L. REV. 124, 156 (1992) (describing the evocative history of "white racist violence").

35. *Tilikum v. Sea World Parks & Entm't, Inc.*, 842 F.Supp.2d 1259 (S.D.Cal. 2012).

36. *Id.* at 1262–64 ("Unlike the other constitutional amendments relied upon by [Plaintiffs], the Thirteenth Amendment targets a single issue: the abolition of slavery within the United States. The Amendment's language and meaning is clear, concise, and not subject to the vagaries of conceptual interpretation . . . . [T]here is simply no basis to construe the Thirteenth Amendment as applying to non-humans.").

37. See, e.g., *Sumpter v. Harper*, 683 F.2d 106, 108 (4th Cir. 1982) ("Plaintiff's assertion that the defendant may be guilty of violating the Thirteenth Amendment is also meritless. That Amendment, of course, prohibits slavery and involuntary servitude. While it restrains the conduct of private parties, as well as public entities, there simply is no representation in plaintiff's complaint that she was subjected to these impositions. Rather, her contention seems to be that defendant's conduct saddles her with a 'badge or incident of slavery.' True or not, defendant's behavior violates Federal law if, but only if, it breaches some statute enacted pursuant to Section 2 of the Amendment.").

38. 5 U.S. 137 (1803).

39. 17 U.S. 316 (1819).

40. 521 U.S. 507 (1997).

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the badges and incidents of slavery in any way it wants, but until and unless it does so, the judiciary has no power to enforce the underlying context of the Amendment. That approach is troubling from a doctrinal prospective, but nonetheless, that's the reasoning that a lot of the lower courts have cited.

I'll give you one other reason as to why the Thirteenth Amendment may remain underenforced: It's hard for us to talk about the law and reality of freedom because we don't talk much about the law and reality of slavery. Slavery is not a comfortable subject for dialogue in American society. And I guess this is related to the slippery slope concern. If you really believe that the Thirteenth Amendment requires the outlawry of all of the legacies of slavery, then we're all going to be mighty busy because those legacies run deep and wide. But we're not in the habit of having that dialogue about slavery itself, and that makes it awfully difficult to have a dialogue, judicial or otherwise, about the legacies of slavery.

Finally, I'll address one brief final point in closing. In spite of the persistent underenforcement of the Thirteenth Amendment, we do see some promising signs. The Second Circuit's decision in *Nelson* is promising and is a hopeful sign for those of us who believe the Amendment can do more. And we recently saw Congress use the Amendment's proscription of the badges and incidents of slavery expansively in the James L. Byrd and Matthew Shephard Hate Crimes Act,<sup>41</sup> which expanded the scope of federal hate crimes law and, in doing so, employed same kind of reasoning that *Nelson* employed, reasoning that violence inflicted upon an individual because of his or her identifiable membership in a historically despised minority group is one of the core legacies of slavery. We shall see whether the Act survives constitutional challenge. Such a challenge was raised in the first prosecution that the Department of Justice brought under the newly expanded law, in *United States v. Beebe*.<sup>42</sup> I'm pleased to say that I coauthored an amicus brief arguing that this new federal hate crimes law was indeed within the scope of the Thirteenth Amendment, and the Tenth Circuit agreed.<sup>43</sup> I am sure, however, that additional constitutional challenges will be forthcoming.

In closing, let me reiterate that while I believe the Thirteenth Amendment does have a broader reach than simply ending the property relationship between master and slave as it existed in the Nineteenth Century, I also believe that it would do a profound disservice to the legacy of those who suffered under slavery and those who strove to end it if we detach the Thirteenth Amendment from the historical experience of American slavery. I believe that there is much work to be done by the Amendment's proscription of the badges and incidents of slavery, but I believe that we must also keep that work focused on the legacies of that institution.

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41. 18 U.S.C. § 249 (2012).

42. 807 F. Supp. 2d 1045 (D.N.M. 2011).

43. Since the delivery of this lecture, the Tenth Circuit affirmed the District Court's decision in *Beebe* and upheld the constitutionality of the statute under the Thirteenth Amendment. See *United States v. Hatch*, 722 F.3d 1193, 1205–06 (2013).

