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Recommended Citation

Richard Delgado, *Four Reservations on Civil Rights Reasoning by Analogy: The Case of Latinos and Other Nonblack Groups*, 112 COLUM. L. REV. 1888 (2012).

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FOUR RESERVATIONS ON CIVIL RIGHTS REASONING BY ANALOGY: THE CASE OF LATINOS AND OTHER NONBLACK GROUPS

*Richard Delgado**

The protection of civil rights in the United States encompasses remedies for at least five separate groups. Native Americans have suffered extermination, removal, denial of sovereignty, and destruction of culture; Latinos, conquest and the indignities of a racially discriminatory immigration system. Asian Americans suffered exclusion, wartime internment, and discriminatory labor laws. Middle Eastern people suffer from suspicion that they are terrorists. Blacks suffered slavery and Jim Crow.

Yet our system of civil rights derives, in large part, from the experience of only Blacks, and aims to redress a single, momentous harm, namely slavery and its lingering effects. This is particularly true of the Thirteenth Amendment, which aims to abolish slavery and other conditions reminiscent of it.

American case law, particularly in connection with matters of race, proceeds largely through a process of analogy in which courts compare the case before them to a previous decision or statute. Nonblack groups sometimes have been able to analogize their predicaments to ones that Blacks suffer, but often this has proven difficult. Thus, afflictions that visit few Blacks, such as wartime internment and language discrimination, can easily go unremedied under American law.

This Essay discusses a number of obstacles that lie in the way of protecting Latinos and other nonblack minority groups under the current framework of statutory and constitutional civil rights, including the Thirteenth Amendment. After discussing drawbacks associated with a system of civil rights protection still inflected with the rhetoric and norms of the 1960s civil rights movement, the Essay closes by arguing that an increasingly multiracial society such as this one needs to develop a broader, more inclusive framework and—with Latinos in mind—sketches one.

INTRODUCTION

In a series of articles and books, Alexander Tsesis urges that the Thirteenth Amendment is an underappreciated source of civil rights protection for Blacks and other minority groups of color.[1] Although the

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Supreme Court has sharply curtailed Congress's ability to craft new civil rights legislation under traditional bases, such as the Fourteenth Amendment and Commerce Clause, it has yet to do so with the Thirteenth.[2]

The Thirteenth Amendment, which forbids slavery as well as badges and incidents of it, thus offers a promising source of civil rights power at a time when opportunities under those other clauses have been shutting down.[3] Tsesis and others show how the Supreme Court has narrowed the two traditional sources of civil rights protection, usually by finding no

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1. See, e.g., The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment (Alexander Tsesis ed., 2010) [hereinafter The Promises of Liberty] (containing essays on interpretation and history of Thirteenth Amendment and "demonstrating the enduring possibility of relying on [it] . . . to expand our federal government's role in enforcing . . . equal liberty"); Alexander Tsesis, The Thirteenth Amendment and American Freedom: A Legal History 3, 6–7, 112–60 (2004) [hereinafter Tsesis, Legal History] (urging attention to Thirteenth Amendment as underused tool for protecting interests of minorities and other disenfranchised groups and discussing some potential applications); Alexander Tsesis, A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment, 39 U.C. Davis L. Rev. 1773, 1776–77, 1832–48 (2006) [hereinafter Tsesis, Civil Rights Approach] (urging that Thirteenth Amendment can serve as broad remedy for racial wrongs, including ones with contemporary significance and future potential); Alexander Tsesis, Furthering American Freedom: Civil Rights & the Thirteenth Amendment, 45 B.C. L. Rev. 307, 359–60 (2004) (suggesting applications for Thirteenth Amendment in today's world); Alexander Tsesis, Gender Subordination and the Thirteenth Amendment, 112 Colum. L. Rev. 1641, 1688–90 (2012) [hereinafter Tsesis, Gender] (applying Thirteenth Amendment to address gender discrimination perpetrated by small, private employers); Alexander Tsesis, Interpreting the Thirteenth Amendment, 11 U. Pa. J. Const. L. 1337, 1338 (2009) (providing further analysis of Thirteenth Amendment's potential for civil rights reform).

2. See Tsesis, Legal History, supra note 1, at 3–4, 6–7, 44–46, 69–70, 112–17, 131–36 (noting Thirteenth Amendment is free of many doctrinal obstacles—such as state-action requirement, intent, and interstate economic impact—that fetter Fourteenth Amendment and Commerce Clause); Tsesis, Civil Rights Approach, supra note 1, at 1775 ("During the preceding decade, the Rehnquist Court significantly limited Congress's Commerce Clause and Fourteenth Amendment authority over civil rights."); see also Andrew Koppelman, Originalism, Abortion, and the Thirteenth Amendment, 112 Colum. L. Rev. 1917, 1933 (2012) [hereinafter Koppelman, Originalism] (calling Thirteenth Amendment "underenforced"). But see Jack M. Balkin & Sanford Levinson, The Dangerous Thirteenth Amendment, 112 Colum. L. Rev. 1459, 1460 (2012) (noting courts' narrow reading of Thirteenth Amendment).

3. See Tsesis, Legal History, supra note 1, at 92–96 (observing that Thirteenth Amendment, properly understood, contains "social and legal component" that aims at achieving equal liberty, including abolition of badges and incidents of slavery); see also Rebecca E. Zietlow, Conclusion: The Political Thirteenth Amendment, 71 Md. L. Rev. 283, 294 (2011) (summarizing recent symposium on Thirteenth Amendment and concluding that even though "the United States Supreme Court has done little to develop [its] meaning," Thirteenth Amendment has played vital background role in constitutional politics on key occasions and is likely to continue to do so in future).

state action or an insufficient economic impact—and how the Thirteenth Amendment can, with a little imagination, fill the gap.[4]

Tsesis also posits that a revitalized Thirteenth Amendment can aid nonblack minorities, such as Latinos, Asian Americans, Native Americans, and Middle Eastern people, gain relief from oppressive conditions.[5] By interpreting slavery and its present-day counterparts broadly, the Amendment can serve as a sturdy weapon in the struggle for equal rights for all, not just Blacks. He notes occasions when this has actually happened and encourages litigators and scholars to be on the lookout for additional opportunities.[6]

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4. See Tsesis, Legal History, supra note 1, at 86 (observing "'Congress has the power . . . rationally to determine'" conditions sufficiently like slavery as to justify prohibition (quoting Jones v. Alfred H. Mayer, Co., 392 U.S. 409, 440 (1968))); see also *Jones*, 392 U.S. at 413 (upholding application of federal civil rights law to reach discriminatory housing practices); Bailey v. Alabama, 219 U.S. 219, 242–45 (1911) (invalidating state law that criminalized breaching labor contract). But see United States v. Kozminski, 487 U.S. 931, 948 (1988) (declining to find Thirteenth Amendment violation in servitude that arose through psychological means); Selective Draft Law Cases, 245 U.S. 366, 390 (1918) (holding that forced military service is not badge or incident of slavery); Plessy v. Ferguson, 163 U.S. 537, 542–43 (1896) (holding that Thirteenth Amendment's scope is narrow and does not reach broad social practices, such as segregation, nor individual behavior); The Civil Rights Cases, 109 U.S. 3, 24 (1883) ("The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery."); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69 (1873) ("[T]he obvious purpose [of the Thirteenth Amendment] was to forbid all shades and conditions of African slavery."); Tsesis, Legal History, supra note 1, at 89–91 (citing occasions when Supreme Court has failed to find violation of Thirteenth Amendment in various discriminatory practices).

5. See Tsesis, Legal History, supra note 1, at 89 ("Congress can go much farther and pass new statutes . . . against discrimination that has burgeoned since the 1960s."); Tsesis, Civil Rights Approach, supra note 1, at 1845 ("The Amendment's protections apply to anyone who is subject to arbitrary restraints on the enjoyment of freedom."). Unfortunately, Congress declined to interpret the Thirteenth Amendment broadly, enacting harsh anti-Chinese, anti-Japanese, and anti-Mexican laws in spite of a Supreme Court decision that suggested that such laws could amount to slavery. See Robertson v. Baldwin, 165 U.S. 275, 282 (1897) (noting "the addition of the words 'involuntary servitude' were said . . . to have been intended to cover the system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different and less offensive name"); see also Race and Races: Cases and Resources for a Diverse America 302–23, 404–35 (Juan F. Perea et al. eds., 2d ed. 2007) (describing host of such measures enacted around this time).

6. See Tsesis, Legal History, supra note 1, at 137–60 (urging litigators to use Amendment to address Confederate symbols, hate speech and crime, access to contraception and abortion, marriage rights, procreation rights, parents' rights to guide upbringing of their children, discriminatory employment, and modern forms of peonage, such as contract labor); Tsesis, Civil Rights Approach, supra note 1, at 1845 (arguing "Jews and Arabs were among the groups classified as distinct races" and thus entitled to Thirteenth Amendment protection); Tsesis, Gender, supra note 1, at 1688–95 (urging that Amendment applies to discriminatory conditions of employment, human trafficking, gender-motivated violence, and hate crimes). In general, for Tsesis, the Amendment "should protect free and equal persons' rights to pursue qualitatively good lives." Tsesis, Civil Rights Approach, supra note 1, at 1846; see also William M. Carter, Jr., The Thirteenth

The purpose of this Essay is to sound a cautionary note. Although the law is constantly recognizing new remedies for old wrongs,[7] advances have generally favored groups that are either economically or politically powerful or seeking redress for grievances that society has already begun to condemn.[8] Unfortunately, many of the situations Tsesis has in mind (for example, Latinos complaining of heavy-handed immigration enforcement) fall into neither category. At the same time, the very considerations that motivated the Supreme Court to narrow the Fourteenth Amendment as a source of civil rights remediation are likely to reappear in connection with any effort to broaden the Thirteenth.[9]

This Essay discusses some of those barriers, focusing on groups like Latinos and Muslims that recently have been the subject of negative media attention. It begins by noting how two critical race theory tenets—racial realism and interest convergence—counsel skepticism regarding new legislative remedies for minorities, particularly during conservative times.

Amendment and Pro-Equality Speech, 112 Colum. L. Rev. 1855, 1860–64 (2012) (positing that Amendment's underlying values provide support for laws against racist speech); Andrew Koppelman, Forced Labor Revisited: The Thirteenth Amendment and Abortion, *in* The Promises of Liberty, supra note 1, at 226, 226–44 (suggesting Thirteenth Amendment approach to lift restrictions on right to abortion); Jeffrey J. Pokorak, Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities, 7 Nev. L.J. 1, 53 (2006) ("The history of rape as a badge of slavery . . . requires more than simple assertions of the right to exercise discretion . . . Such litigation would proceed under . . . the Thirteenth Amendment . . . ."); James Gray Pope, What's Different About the Thirteenth Amendment, and Why Does It Matter?, 71 Md. L. Rev. 189, 194–202 (2011) (noting Amendment suggests broad examination of relations of subjugation in society, including factory labor); Rebecca E. Zietlow, James Ashley's Thirteenth Amendment, 112 Colum. L. Rev. 1697, 1728–31 (2012) [hereinafter Zietlow, Ashley's Thirteenth Amendment] (urging that legal community should follow lead of influential drafter of Amendment and adopt broad interpretation that will include class- and labor-based oppression for anyone, Black or not). But see Mark A. Graber, Subtraction by Addition?: The Thirteenth and Fourteenth Amendments, 112 Colum. L. Rev. 1501, 1508 (2012) (positing that Fourteenth Amendment may have impliedly repealed or modified Thirteenth).

7. For a familiar example, see William L. Prosser, Privacy, 48 Calif. L. Rev. 383, 384 (1960) (explaining how right to privacy arose from "[p]iecing together old decisions in which relief had been afforded on the basis of defamation, or the invasion of some property right, or a breach of confidence or an implied contract" (footnotes omitted)).

8. See, e.g., Duncan Kennedy, The Structure of Blackstone's *Commentaries*, 28 Buff. L. Rev. 205, 218 (1979) (noting tendency of Anglo-American law to reflect interests of ruling elite); Zietlow, Ashley's Thirteenth Amendment, supra note 6, at 1726–28 (noting even *Brown v. Board of Education* did little to address economic inequality and oppression).

9. That is, the same judicial system that imposed a state-action limitation, intent requirement, and a showing of a broad national economic impact could easily impose similar requirements on the Thirteenth Amendment. For example, courts could decline to find a current practice a badge or incident of slavery because it was not intentional; not broad and national in scope; not countenanced by regional law; or not aimed at a group marked by race. See infra notes 68–70 and accompanying text (suggesting conservative judiciary will likely narrow applications of Thirteenth Amendment).

Focusing next on relief through judicial expansion of existing law, this Essay shows how four barriers make this avenue problematic as well. It concludes by sketching a few ideas about sources of civil rights protection for nonblack groups that are less likely to founder on the shoals charted herein.

I. NEW REMEDIES IN DIFFICULT TIMES

Does the Thirteenth Amendment offer a promising new avenue for racial reform? Consider two possibilities. First, one might imagine invoking it (or legislation enacted under its authority) to remedy contemporary wrongs against Blacks, such as excessive incarceration, prisoner chain gangs, or extremely demeaning conditions of probation.[10] This approach would seek to apply a traditional remedy on behalf of its original beneficiaries, viz., Blacks, in an effort to right new wrongs against them. The argument would analogize the new wrongs to the original ones and urge that they are similar enough to warrant the same treatment.

Second, one might imagine invoking the Amendment on behalf of a nonblack group. Originally conceived as a means of banishing slavery and similarly degrading conditions for Blacks, the Amendment might well find use in today's multiracial society to alleviate ill treatment of other groups such as Muslims, Latinos, Asian Americans, or Native Americans.[11] Again, one can distinguish two types of degrading treatment—ones that resemble those that the black slaves suffered and those that, while severe, are not the same ones the slaves were forced to bear. Degrading and bewildering confinement in immigration detention facilities, far from friends, family, and legal assistance for long periods of time, might constitute an example of the latter. No slave suffered precisely this form of mistreatment, but currently many Latinos do.[12] In addition,

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10. For a discussion of these and similar contemporary wrongs, see, e.g., Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 173–248 (2010).

11. See, e.g., Tsesis, Legal History, supra note 1, at 158–60 (suggesting that Amendment might protect migrant workers); Maria L. Ontiveros, Immigrant Workers and the Thirteenth Amendment, *in* The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment, supra note 1, at 279, 279 (arguing "that the combination of current U.S. labor and immigration laws have [sic] created a caste of workers of color, laboring beneath the floor created for free labor, denied the rights of citizenship, and subject to human rights abuses that arguably violate the Thirteenth Amendment"); Zietlow, Ashley's Thirteenth Amendment, supra note 6, at 1728–31 (urging expansive interpretation that will improve status of all workers, not just Blacks).

12. On immigration detention, see, for example, Barbara A. Frey & X. Kevin Zhao, The Criminalization of Immigration and the International Norm of Non-Discrimination: Deportation and Detention in U.S. Immigration Law, 29 Law & Ineq. 279, 279 (2011) ("[T]he selective convergence of criminal and immigration law contributes to a violation of a broader human rights norm—that citizens and non-citizens alike are entitled to equal dignity and inalienable rights, and that any discriminatory treatment of non-citizens must

many recent state and local ordinances criminalize practically everything an undocumented immigrant might want to do—register a child in school, work, rent an apartment, visit an emergency room, or seek a ride from a friend.[13] Many of these ordinances resemble, in harshness and pervasiveness, Jim Crow laws and the Black Codes of former years.[14]

Could lawyers for Latino groups invoke the Thirteenth Amendment to challenge practices such as these? All such efforts would confront two obstacles. One consists of broad social headwinds that impede any advance by minority groups, particularly during conservative times.[15] And another consists of limitations inherent in judicial reasoning itself, particularly arguments that proceed by analogy.[16]

Both drawbacks seem rooted in the nature of the common law system. Since the inception of that form of law, the United States has opted for a set of simply stated rules, trading a degree of uncertainty at the pe-

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be proportional to achieving a legitimate state objective."); Andrew Bramante, Note, Ending Indefinite Detention of Non-Citizens, 61 Case W. Res. L. Rev. 933, 936 (2011) (arguing "that though the Supreme Court is not compelled by its precedents to strike down the indefinite-detention regulation, it has ample latitude to, and should, do so"). On the conditions in which many Latinos live, see Richard Delgado, Locating Latinos in the Field of Civil Rights: Assessing the Neoliberal Case for Radical Exclusion, 83 Tex. L. Rev. 489, 503 n.90 (2004) (book review) [hereinafter Delgado, Locating] (discussing United Nations study showing that all Blacks living in United States, considered as separate nation, would rank forty-sixth in world on index of human flourishing that included education, income, infant mortality, longevity, access to health care, and several other measures, while Latinos would rank sixty-eighth); Hope Yen, Census Shows Nearly Half of Americans Are Poor or Low-Income, Seattle Times (Dec. 14, 2011), http://seattletimes.nwsource.com/text/2017018125.html (on file with the *Columbia Law Review*) (noting Latinos topped list for poorest group at seventy-three percent).

13. On one such law in Alabama, see, for example, Campbell Robertson, Critics See "Chilling Effect" in Alabama Immigration Law, N.Y. Times, Oct. 28, 2011, at A14 (discussing how immigration law deters children who are illegal immigrants from attending school, even though all children have right to public education regardless of citizenship); Crisis in Alabama: Immigration Law Causes Chaos, ACLU, http://www.aclu.org/print/crisis-alabama-immigration-law-causes-chaos (on file with the *Columbia Law Review)* (last visited Aug. 7, 2012) (announcing that ACLU filed lawsuit charging that Alabama law is unconstitutional because it allows for "unlawful search and seizure[;] . . . unlawfully deters immigrant families from enrolling their children in public schools; unconstitutionally bars many lawfully present immigrants from attending public colleges or universities in Alabama; drastically restricts the right to enter into contracts; and interferes with federal power and authority over immigration matters").

14. On this period, see, for example, Race and Races: Cases and Resources for a Diverse America, supra note 5, at 148–62, 1036, 1051–52 (describing lynching, racism within armed forces, NAACP and struggle for civil rights, arrest rates, and prospects for ex-convicts).

15. See infra Part I.A (discussing how racial realism and interest convergence block advances by minority groups).

16. See infra Part I.B (examining limitations in legal reasoning that impede use of Thirteenth Amendment by nonblack groups).

riphery for clarity at the core.[17] Because of this feature, lawgivers will often encounter situations that call for either a new rule or an extension of an old one to cover the new situation. This constant process, which is both a strength and weakness of our system, leaves much open to discretion, judgment, and indeterminacy.[18] Consider, now, a number of factors that operate forcefully in the resulting vacuum, especially in the area of race.

A. *Broad Social Forces: Racial Realism and Interest Convergence*

1. *Racial Realism.* — Coined by the late Derrick Bell, "racial realism" holds that minorities are apt to experience, at most, intermittent and insecure gains.[19] With roots in legal realism—the notion that judicial reasoning responds to attitudinal and social pressures in addition to logic and the force of precedent—racial realism is both a generalization that Bell derives from examining legal history and a caution for reformers.[20] The descriptive part holds that racial progress usually traces a course full of peaks and valleys, with sudden breakthroughs followed by inevitable retrenchment.[21] In other words, racism, once deeply engrained in a society, rarely yields entirely to reform efforts. It is too profitable, comfortable, and convenient for those in charge to forgo entirely.

Racial realism holds that even with measures that are seemingly absolute on their face (like the Thirteenth Amendment, which forbids slavery in absolute terms and contains no state action or intent requirement), one can expect resistance, narrow interpretation, avoidance, or

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17. Richard Delgado, The Language of the Arms Race: Should the People Limit Government Speech?, 64 B.U. L. Rev. 961, 995 n.198 (1984).

18. For further theoretical discussion of this process, see Roberto Mangabeira Unger, The Critical Legal Studies Movement 1–4, 8–11 (1986) (positing that this type of legal process "contrasts with open-ended disputes about the basic terms of social life"); Robert W. Gordon, New Developments in Legal Theory, *in* The Politics of Law: A Progressive Critique 413, 420 (David Kairys ed., rev. ed. 1990) (discussing how lawyers create belief structures that "demobilize[]" them into thinking that world consists of objectively determined social relations, when in fact these rules "are not found in nature but are historically contingent"). On the role of these concepts in litigating Latino rights, see George A. Martinez, Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930–1980, 27 U.C. Davis L. Rev. 555, 559 (1994) (arguing "that exposing the exercise of judicial discretion and the lack of inevitability in civil rights cases is important . . . because it helps reveal the extent to which the courts have helped or failed to help establish [Latino] rights . . . [and] it may help break down barriers to racial reform").

19. Derrick Bell, Racial Realism, 24 Conn. L. Rev. 363, 373 (1992) ("Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary . . . short-lived victories . . . . We must acknowledge it and move on to adopt policies based on what I call: 'Racial Realism.'").

20. See id. at 363–65 (explaining how civil rights activists should reform strategies in similar way that Legal Realists reformed approach to American jurisprudence).

21. See id. at 373–74 (describing black history as series of advances and retreats, with few permanent gains).

delay.[22] For example, is a guest worker program that effectively chains Mexican workers to one employer, denies them the ability to organize or form a union, and assigns them to arduous, low-paid work under sweatshop conditions a case of modern-day slavery or peonage? One might think so.[23] But a court might reason that the program is not precisely like plantation-style slavery with shackles and whips. It did not remove the workers forcibly from their homes in another continent and transport them to the United States in chains. Nor is it identical to the prison work gangs for Blacks that sometimes ran afoul of antipeonage legislation enacted under the Thirteenth Amendment.[24]

One thinks of further differences: Were the guest workers not free to accept or reject the work at one point, perhaps when they signed up? Furthermore, who has standing? Only someone who is a current worker, or someone who was one a few years ago but has left? What if the denial of rights took place years ago and the statute of limitations has expired, yet the workers only now have been able realistically to consult a lawyer? What if the abuse occurred recently but the most promising plaintiff is now out of the country? A racial realist would point out that objections like these are apt to loom large, especially when a relatively powerless worker confronts a well-financed and influential adversary and is asserting a novel right to relief.[25]

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22. On the way courts in the period following Reconstruction interpreted civil rights protections narrowly, see William M. Wiecek, Emancipation and Civic Status: The American Experience, 1865–1915, *in* The Promises of Liberty, supra note 1, at 78, 89–94 (discussing how movement by Whites in southern states to subordinate status of Blacks was "consistently abetted by the U.S. Supreme Court, which rejected the more expansive abolitionist/Republican vision of a rights regime secured by federal power and unwittingly created legal opportunities for malevolent Southern legal ingenuity").

23. See Ontiveros, supra note 11, at 279–90 (analyzing whether immigrant workers might be considered slaves). On formal guest worker (Bracero) programs, see Latinos and the Law: Cases and Materials 433–38 (Richard Delgado et al. eds., 2007) [hereinafter Latinos and the Law] (providing history of temporary worker programs from World War I through "Operation Wetback").

24. See, e.g., David M. Oshinsky, Convict Labor in the Post-Civil War South: Involuntary Servitude After the Thirteenth Amendment, *in* The Promises of Liberty, supra note 1, at 100, 100–18 (describing "gaping hole" left by Thirteenth Amendment for criminal peonage); Woody R. Clermont, Unshackling the Punishment Clause: A Call for the End of Convict Slavery, 3 Freedom Center J. 1, 3 (2011) ("The concept of enslaving prisoners is not new; it stems from the 'Punishment Clause' in the Thirteenth Amendment . . . .").

25. For a more extensive discussion of reparations claims, see Ronald L. Mize, Jr., Reparations for Mexican Braceros? Lessons Learned from Japanese and African American Attempts at Redress, 52 Clev. St. L. Rev. 273, 275 (2005) ("From the successful reparations campaign for those who endured the Japanese internment camps, we can develop a proxy for other redress attempts to follow. From the repeatedly unsuccessful attempts at African-American reparations, we also can begin to recognize the long-standing roots of racial oppression . . . ."); Eric L. Ray, Comment, Mexican Repatriation and the Possibility for a Federal Cause of Action: A Comparative Analysis on Reparations, 37 U. Miami Inter-Am.

2. *Interest Convergence.* — A second tenet, also associated with Bell, is interest convergence. A close relative of racial realism, interest convergence posits that advances for Blacks and perhaps other minorities arrive only when they also are in the interest of elite Whites.[26] Mary Dudziak,[27] Michael Klarman,[28] and Phillip Klinkner and Rogers Smith[29] have put forward versions of this thesis in connection with black history, and this Essay's author has advanced a similar model to explain developments in Latino rights.[30] Interest convergence as a possible avenue for remedying racial wrongs is discussed later in this Essay.[31] For now, however, it is worth noting that most of the historians who find it a useful tool employ it descriptively to explain, after the fact, the twists and turns of black fortunes, and not to frame an agenda for reform.[32]

In either guise, interest convergence suggests a lesson for Thirteenth Amendment enthusiasts. Despite its seemingly unambiguous mandate ("Neither slavery nor involuntary servitude, except as a punishment for crime[,] . . . shall exist within the United States"[33]), experience shows that lawmakers are apt to find the Amendment applicable only when do-

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L. Rev. 171, 178–82 (2005) (discussing barriers to actions for wrongful deportations carried out during Operation Wetback and other immigration sweeps).

26. Derrick A. Bell, Jr., *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 523 (1980) [hereinafter Bell, Dilemma]. For a discussion of the role of interest convergence in critical race thought, see Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction 8, 20–24, 47, 145 (2d ed. 2012) [hereinafter Delgado & Stefancic, Critical].

27. See Mary L. Dudziak, Cold War Civil Rights: Race and the Image of American Democracy 15 (2000) ("Lynching and racial segregation provoked international outrage, and by 1949 race in America was a principal Soviet propaganda theme. These developments led the Truman administration to realize that race discrimination harmed U.S. foreign relations.").

28. See Michael J. Klarman, *Brown v. Board of Education* and the Civil Rights Movement 75 (2007) ("On many policy issues that become constitutional disputes, opinion correlates heavily with socioeconomic status, with elites tending to hold more liberal views on certain social issues, though not on economic ones.").

29. See Philip A. Klinkner & Rogers M. Smith, The Unsteady March: The Rise and Decline of Racial Equality in America 3–4 (1999) (noting that Black advances have proceeded unevenly, with most arriving during wartime).

30. See Richard Delgado, Rodrigo's Roundelay: *Hernandez v. Texas* and the Interest-Convergence Dilemma, 41 Harv. C.R.-C.L. L. Rev. 23, 31 (2006) [hereinafter Delgado, Roundelay] ("If you examine Latino legal history, you see the same interest convergence that explains *Brown v. Board of Education* . . . ." (internal quotation marks omitted)).

31. See infra Part II.A (examining how interest convergence can yield opportunities for civil rights reforms for nonblack groups).

32. Compare Stephen M. Feldman, Do the Right Thing: Understanding the Interest-Convergence Thesis, 106 Nw. U. L. Rev. 248, 258 (2012) ("As a historical thesis, interest convergence is especially provocative [because] . . . it suggests an ironic pattern in American history—a pattern that does not follow or mirror the major historical actors' declarations of purposes and reasons."), with Justin Driver, Rethinking the Interest-Convergence Thesis, 105 Nw. U. L. Rev. 149, 161 (2011) ("[Bell's] *Interest-Convergence* principally contemplates what will be, rather than what has been.").

33. U.S. Const. amend. XIII.

ing so benefits white elite groups. For example, racial profiling of Muslims,[34] oppressive local ordinances criminalizing most of the conditions of life for undocumented immigrants,[35] indefinite detention of suspected terrorists without a trial,[36] and a host of practices denying gay and lesbian individuals the same rights as heterosexuals[37] all would seem prime candidates for condemnation under the Amendment, since treatment of individuals in these groups could be characterized as degrading, dehumanizing, and pervasive. Yet no condemnation of any of these practices has come to pass. Bell, if he were still alive, might say that this is not because of doubt over how oppressive and degrading these conditions are, but rather because each of these conditions is a favorite child of some empowered group, such as the intelligence establishment.[38] The time to condemn these practices has not come simply because the interest of the majority still finds it useful to maintain these conditions.

The interest-convergence limitation would seem to set in most forcefully in connection with proposals for legislative relief. Might courts be less susceptible to pressures of this sort?

B. *Limitations Inherent in Legal Reasoning: Novel Remedies and the Role of Analogy*

When a new group clamors for relief from some oppressive condition, it may either take its cause to the legislature, to the streets, or to the courts. Since courts cannot craft an entirely new statute or remedy (that is, not without raising the complaint that they are being excessively activist), judicial relief would need to arrive through expansion of a preexisting doctrine. This requires that a judge declare the new griev-

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34. See Muneer I. Ahmad, A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion, 92 Calif. L. Rev. 1259, 1262 (2004) ("The physical violence exercised upon the bodies of Arabs, Muslims, and South Asians has been accompanied by a legal and political violence toward these communities.").

35. See, e.g., Heather Miller, Alabama's Immigration Law Does No Good, alabamacivilrights (Oct. 10, 2011), http://alabamacivilrights.wordpress.com/2011/10/10/alabamas-immigration-law-does-no-good (on file with the *Columbia Law Review*) (quoting chief sponsor of Alabama House Bill 56 as saying it aimed to "attack every area of an illegal alien's life"). For analysis of recent state and town laws that curtail the liberties of undocumented people, see Latinos and the Law, supra note 23, at 473–74, 477–80.

36. See David Cole, Closing Guantánamo: The Problem of Preventive Detention, Bos. Rev., Jan.–Feb. 2009, at 17, 17 ("[T]he problem with Guantánamo Bay . . . is not the detention of enemy combatants. The problem is that the Bush administration has denied fair hearings, resulting in the detention of many who were not enemy fighters . . . .").

37. See generally Anthony C. Infanti, Everyday Law for Gays and Lesbians and Those Who Care About Them (2007) (discussing disadvantages that legal system imposes on this group).

38. See Bell, Dilemma, supra note 26, at 523 (suggesting "remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites").

ance similar enough to ones that the system currently recognizes to warrant extending relief.[39]

This, in turn, entails a consideration of analogical reasoning. As already mentioned in this Part, American law often proceeds through a process in which courts compare the case before them to a known landmark, usually a previous decision or statute covering the issue in question.[40] The more dissimilar the current event to the previous one, the greater the leap that is required to see *this* as a case of *that*, and the lower the likelihood of success.[41]

As mentioned, civil rights doctrine in the United States encompasses remedies for at least five separate racial or ethnic groups, all standing on slightly different footings. Native Americans suffered extermination, removal, denial of sovereignty, and destruction of community land rights.[42] Latinos suffered conquest and associated indignities, followed by a sys-

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39. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 483–85 (1965) (deriving right to contraception from emanations and penumbras of other constitutional rights); see also Tsesis, Legal History, supra note 1, at 97 ("The amendment is a negative grant of freedom in that it prohibits arbitrary infringements against autonomy. Historical analysis is necessary to determine the extent to which such infringements are analogous to involuntary servitude.").

40. On the role of analogy in legal reasoning in general, see Pierre Schlag & David Skover, Tactics of Legal Reasoning 31–33, 64–69 (1986) (discussing variety of moves and countermoves, including how to attack improper analogy). On the role of analogy in legal reasoning in relation to the Thirteenth Amendment, see Tsesis, Legal History, supra note 1, at 97 (noting role of history in determining whether certain practices are sufficiently analogous to slavery and should therefore be prohibited); Koppelman, Originalism, supra note 2, at 1936 ("When we consider the self-executing Thirteenth Amendment, we are still asking the same question: is the practice complained of sufficiently analogous to [slavery]?").

41. How broadly or narrowly may legal actors legitimately deploy an analogy? In a commonly used example, a bystander shoots an intelligent Martian who has just arrived on Earth and is in the middle of a welcoming speech. Would this be murder? The Martian has limbs, a brain, and speaks English. An originalist might examine the text of the murder statute and ask whether it says anything about Martians, whereas a liberal constructionist might inquire whether the Martian is sufficiently like a human being to warrant prosecuting the shooter, and a progressive constitutionalist might consider whether the murder statute is broad enough to cover the shooting in light of contemporary norms and values. On the application of contemporary norms to modern interpretations of the Thirteenth Amendment, see Tsesis, Civil Rights Approach, supra note 1, at 1843–44 ("The ideas of the Thirteenth Amendment's framers, while invaluable, cannot be the endpoint of construction. . . . Their ideas and those of their abolitionist mentors are nevertheless essential for comprehending the Amendment's significance to contemporary incidents of involuntary servitude . . . ."). Is the Martian example itself a good analogy for an inquiry about the Thirteenth Amendment? Both concern the application of an ancient remedy to a novel situation. Yet the two situations are not precisely the same. On the role of analogy in Thirteenth Amendment jurisprudence, see supra note 40 (discussing analogical reasoning when applying Thirteenth Amendment to modern situations); infra notes 51–56 and accompanying text (discussing why analogical reasoning under Thirteenth Amendment offers little prospect of success, particularly with respect to nonblack minority groups).

42. See, e.g., Race and Races: Cases and Resources for a Diverse America, supra note 5, at 179–284 (discussing issues confronting Native Americans).

tem of laws very similar to those (Jim Crow) which society imposed on Blacks, but coupled with a highly restrictive immigration system.[43] Asian Americans suffered official exclusion, wartime internment, and discriminatory land and labor laws.[44] Middle Eastern people labor under official profiling based on suspicion that they may be plotting terrorism.[45] Blacks of course suffered slavery, Jim Crow, and lingering discrimination in every avenue of life.[46]

Furthermore, for each group the indignities have changed over time. A century ago, Blacks labored under the Black Codes; today, they suffer from the loss of industrial jobs, police profiling, and an educational system that seems to have given up on them.[47] Latinos, once the invisible minority, now find the heat turned up under them on a dozen different fronts.[48] Middle Eastern people suffer suspicion approaching that which black men invariably meet on city sidewalks and street corners.[49]

Despite this range of harms, which shift over time, our statutory and constitutional system of civil rights is based largely on the experience of only one of these groups, Blacks, and aims to redress a single, momentous harm whose heyday occurred more than a century ago, namely slavery, as well as its lingering effects.[50]

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43. See, e.g., id. at 285–396 (discussing issues confronting Latinos).

44. See, e.g., id. at 397–486 (discussing issues confronting Asian Americans).

45. See, e.g., Ahmad, supra note 34, at 1278 ("Both individual acts of hate violence and governmental racial profiling have helped to create a new racial construct: the 'Muslim-looking' person. The logic of post-September 11 profiling turns on an equation of being Muslim with being a terrorist.").

46. See Race and Races: Cases and Resources for a Diverse America, supra note 5, at 96–178 (examining range of issues that Blacks face).

47. See id. at 171–78 (looking at contemporary racism against Blacks).

48. See Latinos and the Law, supra note 23, at 141, 228, 307, 405, 634, 747–48 (discussing identity and social formation, English-only laws, school funding discrimination, immigration, employment discrimination, and coerced sterilization); Race and Races: Cases and Resources for a Diverse America, supra note 5, at 384–96 (discussing current issues facing Latinos).

49. See Ahmad, supra note 34, at 1278 (noting that contemporary Muslim-looking construct "relies upon a reductive equation of certain perceived identity characteristics with specific, suspect conduct" and comparing it to "earlier profiling regimes [under which] . . . African American . . . appearance has been equated with criminality").

50. See, e.g., Richard Delgado, Derrick Bell's Toolkit—Fit to Dismantle That Famous House?, 75 N.Y.U. L. Rev. 283, 290–91, 297–98 (2000) [hereinafter Delgado, Toolkit] (discussing how civil rights thought tends to view Blacks as "paradigmatic," and nonblack groups receive attention only to extent that their issues can be analogized to those of Blacks); Juan F. Perea, The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought, 85 Calif. L. Rev. 1213, 1219–20 (1997) [hereinafter Perea, Binary Paradigm] ("[T]he Black/White binary paradigm . . . [is] the conception that race in America consists, either exclusively or primarily, of only two constituent racial groups, the Black and the White. . . . The mere recognition that 'other people of color' exist . . . is merely a reassertion of the Black/White paradigm.").

Nonblack groups sometimes have been able to analogize their predicaments to ones that Blacks suffer,[51] just as the latter have sometimes been able to win relief for new injuries by comparing them to ones that their slave ancestors suffered, but often the effort has failed. Thus wartime internment,[52] language discrimination,[53] suppression of Native American religions,[54] and profiling based on presumed foreign appearance[55]—afflictions that do not stem from the enslavement of Blacks—have largely gone without redress under American law, even though these injuries might appear comparable to ones that lie at the heart of our system of racial remedies.[56]

Why? Aside from the broad societal forces mentioned above (racial realism and interest convergence), four drawbacks associated with judicial reasoning weigh against most of these expansions, particularly ones proceeding under new, broad banners such as the Thirteenth Amendment.

1. *History Shows Little Grounds for Optimism.* — The first reason why one should not be overly sanguine about the prospect of an expanded role for judicial activism under the Thirteenth Amendment is, simply, that history shows little tendency toward expansion in closely related areas. In this sense, Professor Tsesis's remedy is at war with itself. The prime reason he urges attention to the Thirteenth Amendment as a new means of redressing racial wrongs is that courts have been cutting back

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51. E.g., Hernandez v. Texas, 347 U.S. 475, 478 (1954) ("Throughout our history differences in race and color have defined easily identifiable groups . . . . But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection."). For a discussion of the relatively limited benefit the *Hernandez* decision brought litigators for Latino causes, see Delgado, Roundelay, supra note 30, at 36–40.

52. See, e.g., Korematsu v. United States, 323 U.S. 214, 223–24 (1944) (upholding wartime internment of West Coast Japanese individuals).

53. See Hernandez v. New York, 500 U.S. 352, 371–72 (1991) (affirming prosecutor's dismissal of Spanish-speaking jurors for fear that they might not pay exclusive attention to official translation of court testimony). On Latino language rights in English-only regimes, see Juan F. Perea, Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English, 77 Minn. L. Rev. 269, 357–71 (1992) (discussing discriminatory, anti-Hispanic origins of English-only movements).

54. See Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990) (denying Native American group right to ingest peyote as part of religious practice).

55. See Ahmad, supra note 34, at 1278–82 (discussing racial profiling of "Muslim-looking" individuals).

56. That is, each of these practices seems comparable, but not identical, to ones that Blacks suffered during the Jim Crow era. Evaluating such claims requires an examination of reasoning by analogy. See supra notes 39–41 and accompanying text (discussing role of analogy in finding relief under Thirteenth Amendment for claims made by nonblack groups).

on the scope of the Fourteenth.[57] But the Thirteenth and Fourteenth Amendments are constitutional twins. Aiming to redress many of the same wrongs—namely slavery, Jim Crow, and other demeaning practices aimed at Blacks—the Reconstruction Congress enacted them both during a period of civil rights fervor.[58]

But if one reflects on the tenor of our times,[59] especially in light of the two interpretive principles (racial realism and interest convergence) mentioned above, one sees that such a doctrinal breakthrough is unlikely. Merely substituting one Reconstruction Amendment (the Thirteenth) for another (the Fourteenth), which is suffering contraction right now, is unlikely to yield a much better result. The lesson one draws from the nearest set of historically analogous material, then, is that courts are unlikely to see new harms as similar enough to historic ones as to require relief. They will, in short, reject analogies to historic harms under the Thirteenth Amendment, just as they have been doing increasingly under the Fourteenth.

2. *Empathy Decreases the Greater the Analogical Leap.* — Empathy—seeing your pain as like mine—is very often a function of seeing a sufferer as like oneself, as a member of one's own kind.[60] It is hard to empathize with the fate of a being or person radically unlike oneself or one's kin. Norm theory holds that we respond to news of another's misfortune by reference to how normal or abnormal we find the predicament *for that person.*[61] We read about a famine in sub-Saharan Africa but remain un-

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57. See supra notes 1–6 and accompanying text (discussing Professor Tsesis's theories regarding use of Thirteenth Amendment as new source of civil rights protection for various groups).

58. See Tsesis, Legal History, supra note 1, at 2–3, 37–48, 112–17 (discussing legislative history and scope of Reconstruction Amendments); Tsesis, Civil Rights Approach, supra note 1, at 1811, 1834–37 (noting similar origin and sweep of two provisions, which went into force after Congressional debate over need to dismantle slavery and black subordination).

59. To wit, conservative, especially in matters of race. See, e.g., Michael K. Brown et al., Whitewashing Race: The Myth of a Color-Blind Society 3–5 (2003) (critiquing conservative insistence that America is now colorblind).

60. On the role of empathy in the law, see, for example, Martha C. Nussbaum, From Disgust to Humanity: Sexual Orientation and Constitutional Law, at xviii–xix (2010) (asserting "the capacity for imaginative and emotional participation in the lives of others is an essential ingredient" of legal regime of equal respect); Richard Delgado, Rodrigo's Eleventh Chronicle: Empathy and False Empathy, 84 Calif. L. Rev. 61, 67–68 (1996) [hereinafter Delgado, Empathy] (urging critical examination of concept of empathy and noting that it can be misguided, superficial, or insincere); Lynne N. Henderson, Legality and Empathy, 85 Mich. L. Rev. 1574, 1576 (1987) (discussing how judges should use empathy both in their discovery of facts and justifications for conclusions).

61. See, e.g., Richard Delgado, Rodrigo's Twelfth Chronicle: The Problem of the Shanty, 85 Geo. L.J. 667, 674 (1997) ("[O]ur response to someone in need is a function of what we believe is normal for that person. . . . If we believe that the person in need is usually wretched—and that such a condition is his or her ordinary one—then we are less likely to intervene." (internal quotation marks omitted)).

moved, because we believe that famines are common in that part of the world.[62]

But if our next-door neighbor shows up on our doorstep, desperate from not having eaten for three days because her husband deserted her, leaving her penniless, we are immediately alarmed.[63] This is not supposed to happen in nice neighborhoods like ours. We offer her some food and put her in touch with a lawyer and a social service agency that can provide temporary relief.

Similarly, with the legal system, the more analogous a current case strikes us to a previous one in which our intuition was clear, the more likely we are to want to dispose of it in similar fashion.[64] The common law proceeds largely through a process of analogy in which courts compare the case before them to a known landmark, usually a previous decision or a statute bearing on the issue in question.[65] The more dissimilar the event to the previous one, the greater the analogical and imaginative leap required to see it as a case of the earlier one, and the lower the likelihood of success.

Although the mental process behind empathy and analogical reasoning is similar, the payoffs differ in the two cases, particularly when a petitioner asks a court to apply analogical reasoning on behalf of a new group or to condemn a new wrong suffered by an old one. In ordinary life, empathy benefits the holder, by permitting insight into the feelings and desires of another person.[66] By enabling the empathic individual to be a better lover, negotiator, or neighbor, it enables the possessor to make advantageous trades and get what he or she wants in return.[67]

With judges, however, many of the incentives weigh in the opposite direction. A court that falls into the habit of pronouncing this like that (some earlier harm) too often can bring down the wrath of the gods. Ju-

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62. Id.

63. See id. ("[I]f our middle-class neighbor shows up at our door having lost his or her job and been evicted, we are much more solicitous. Hunger is abnormal for such a person. Everyone rushes in to help." (internal quotation marks omitted)).

64. See, e.g., Roscoe Pound, The Spirit of the Common Law 1 (1921) ("Although [common law] is essentially a mode of judicial and juristic thinking, . . . it succeeds everywhere in molding rules, whatever their origin, into accord with its principles and in maintaining those principles in the face of formidable attempts to overthrow or to supersede them.").

65. See id. at 12 ("Legal history . . . may be made to show us the analogies, . . . which have developed as the potential bases of legal growth. It may be made to show us the ideals . . . to which jurists and judges have sought to make law conform by . . . use of these analogies . . . .").

66. See Delgado, Empathy, supra note 60, at 75 ("Empathic people ought to get ahead. The capacity ought to confer an evolutionary advantage . . . ." (internal quotation marks omitted)).

67. See id. ("If one has the ability to perceive what the other person wants, one can offer him or her that and get what one wants in return." (internal quotation marks omitted)).

dicial activism these days is practically an epithet.[68] Few judges hoping to advance, not to mention avoid reversal, will engage in it very often. And, as mentioned, many of the types of case that Professor Tsesis hopes will fall under a reinvigorated Thirteenth Amendment will lie at two removes from their historical prototype, slavery.[69] First, they will stem from contemporary harms that resemble slavery in some but not all respects. Second, some will target different groups, such as Latinos or Middle Eastern people. Thus, these cases will require the type of double analogical leap that courts increasingly refuse to perform under the Fourteenth Amendment, the nearest constitutional analog. To suppose that they will seize on the opportunity to do so under the Thirteenth is to place a great deal of faith in the power of analogical reasoning.[70]

3. *Constitutional Structure and the Separation of Powers.* — A further reason for skepticism over the alacrity with which courts, at least, are apt to deploy the Thirteenth Amendment to protect new, disfavored groups is the plenary power doctrine. Under this doctrine, congressional decisions related to immigration generally should not be subjected to judicial scrutiny.[71] For two groups currently subject to harsh treatment—Latinos and Middle Eastern people—much of their misery arrives through the system of immigration enforcement, almost all of which falls under either congressional or presidential authority, or, at any rate, might appear to do so in the eyes of a timid court fearful of exceeding its proper scope.

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68. See, e.g., Adam Cohen, Are Liberal Judges Really Judicial Activists?, Time (June 9, 2010), http://www.time.com/time/nation/article/0,8599,1995232,00.html (on file with the *Columbia Law Review*) ("To hear conservatives tell it, America has long been under attack by liberal judges who use vague constitutional clauses to impose their views.").

69. See supra notes 5–6 and accompanying text (suggesting that Thirteenth Amendment can help nonblack minorities gain relief from oppressive conditions).

70. For example, the Japanese did not need reparations for slavery; rather, they needed it for wartime internment. Latinos do not require freedom from the badges and incidents of slavery, but rather the badges and incidents of conquest, including loss of ancestral lands, destruction of culture, suppression of their native language, and a public school system that systematically renders their history invisible. A model of redress should be tailored to the history of the group to which it will be applied. Occasionally, society will treat Asians or Latinos as it did the slaves, such as by requiring them to do coolie-style labor or forcing them into farm crews for work under unremittingly harsh conditions. Then, nothing is wrong with applying an abolitionist model or a statute enacted under the authority of the Thirteenth Amendment. But these nonblack groups will experience many indignities that the slaves did not endure, so trying to force them into a paradigm—the Thirteenth Amendment—for which they are ill suited is a poor approach. See Delgado, Toolkit, supra note 50, at 297 ("Binary thinking can easily allow one to believe that America made only one historical mistake—for example, slavery. If so, the prime order of business is to redress that mistake by making its victims whole; the concerns of other groups would come into play only insofar as they resemble [slavery] . . . .").

71. See Chae Chan Ping v. United States, 130 U.S. 581, 606–07 (1889) ("The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments.").

A court weighing a demand for relief from one of the forms of mistreatment listed above, then, is apt to perform a type of analogical reasoning different from the one a petitioner urges. Instead of analogizing the harm to a badge or incident of slavery, the court is likely to analogize the event (e.g., race-based immigration laws and quotas, limitations on asylum, profiling, waterboarding, deportation) to a badge or incident of sovereign power or the president's ability to manage international affairs and the military.[72] As mentioned earlier, analogy operates much more forcefully and reliably in favor of the powerful, not the weak.[73] When our legal system denied relief to Japanese individuals interned in wartime camps,[74] to Latinos asserting language rights,[75] and to Native Americans resisting removal from their ancestral lands[76] or seeking to ingest peyote as part of their religion,[77] it saw few constitutional problems. The law is apt to protect powerful groups, such as publishers, military officers, or consumers, more assiduously than it does ones who are currently unpopular or considered to be in the way of progress.

4. *Custom and Mindset: The Role of the Black-White Binary Paradigm of Race.* — A further consideration weighing against a revitalized Thirteenth Amendment as a source of constitutional power to redress racial wrongs for nonblack groups is what has come to be known as the black-white binary paradigm of race.[78] Articulated most forcefully in our time by Juan Perea, the black-white binary is the name for the tendency of most legal and racial discourse to place two groups, and them alone, at the center of analysis.[79]

In our society, those two groups are Blacks and Whites. Other groups may at times command attention, but their treatment must be subordinate to that of the two prime players in America's history.[80] Those

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72. That is, the court is likely to see the practice in terms of presidential or congressional authority.

73. See supra note 8 and accompanying text.

74. Korematsu v. United States, 323 U.S. 214, 223–24 (1944) (upholding wartime internment of West Coast Japanese individuals).

75. See supra note 53 (discussing language discrimination against Spanish-speaking individuals).

76. See Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573–74 (1823) (articulating doctrine of Manifest Destiny as basis for displacing Native Americans from ancestral lands).

77. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990) (denying Native American group right to ingest peyote as part of religious practice).

78. See supra note 50 (defining black-white binary paradigm).

79. Perea, Binary Paradigm, supra note 50, at 1219–20. On some of the consequences of a binary approach to civil rights, see Delgado, Toolkit, supra note 50, at 291–306 (examining "ways that binary thinking . . . can end up harming even the group whose fortunes one is inclined to place at the center").

80. See Perea, Binary Paradigm, supra note 50, at 1228 ("The reified binary structure of discourse on race leaves no room for people of color who do not fit the rigid Black and White boxes supplied by the paradigm.").

two groups are virtually constitutive of what is meant by race—with them, one sees racial conflict, drama, and redemption in their starkest, most paradigmatic forms.[81] Analysis of racial problems and issues in these terms is, for Perea, the "normal science" of American legal thought.[82]

If one understands the relations of Blacks and Whites and their history with each other, one will grasp what it means to speak of race and racism in their most basic senses—or so the binary holds.[83] Perea and others show how this binary paradigm structures much of our thinking about race and civil rights and shapes the work of several influential writers.[84] Other scholars, including this author, show how it has guided judicial thinking, as well.[85]

The black-white binary paradigm of race enters into and reinforces each of the three above reservations.[86] But it also constitutes a fourth, independent reason for doubting whether the Thirteenth Amendment will find application anytime soon as a source of civil rights protection for nonblack groups. For the binary means, first, that nonblack groups will always strike most observers as peripheral actors in the ongoing racial drama. Latinos, for example, are apt to strike many as nonminorities,[87] even though their history, treatment, and current condition are in many

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81. See id. at 1219 ("If one conceives of race and racism as primarily of concern only to Blacks and Whites, and understands 'other people of color' only through some unclear analogy to the 'real' races, this just restates the binary paradigm with a slight concession to demographics.").

82. See id. at 1217 ("[N]ormal science seems 'an attempt to force nature into the performed [sic] and relatively inflexible box that the paradigm supplies. No part of the aim of normal science is to call forth new sorts of phenomena; indeed those that will not fit the box are often not seen at all.'" (quoting Thomas S. Kuhn, The Structure of Scientific Revolutions 24 (2d ed. 1970))).

83. See, e.g., Peter Baker, A Splinter on the Race Advisory Board: First Meeting Yields Divergent Views on Finding "One America," Wash. Post, July 15, 1997, at A4 (discussing views of Race Advisory Board Chairman John Hope Franklin who asserted that inasmuch as this nation "cut its eyeteeth" on racism against Blacks, it would not be necessary for board to consider other groups). In recent times, the binary and its associated mindset make it very difficult for those in the American South to take seriously racism in the form of anti-Latino statutes. There, racial oppression has historically targeted Blacks so that, understandably perhaps, the region is attuned to that variety only.

84. See Perea, Binary Paradigm, supra note 50, at 1221–39 (discussing work of Andrew Hacker, Cornel West, Toni Morrison, and writers in white studies school).

85. See, e.g., Delgado, Toolkit, supra note 50, at 296–97 (describing how Supreme Court justices who championed civil rights for Blacks have also supported legality of racist acts against nonblack groups).

86. See supra notes 57–77 and accompanying text (discussing drawbacks associated with judicial reasoning that weigh against using Thirteenth Amendment to address harms against nonblack groups).

87. See, e.g., Delgado, Locating, supra note 12, at 490 (discussing how author Paul Brest "warn[s] of the danger of dilution when well-meaning activists and administrators extend civil rights programs to groups beyond their original beneficiaries").

ways comparable to those of Blacks.[88] Asians are apt to seem like "model minorities," with high average levels of education, intact families, and little tendency to engage in crime.[89] Native Americans are apt to strike most observers as noble, spiritual creatures who now, finally, have been able to win economic relief by operating gambling casinos on Indian reservations.[90] Some are now rich, drive expensive cars, and send their kids to private schools.[91]

Some observers may cite a second concern, namely that devoting attention to nonblack causes will dilute effort or empathy that ought, by right, to be reserved for Blacks, the group most deeply wounded by racism and the one about whom America has, deservedly, the most troubled social conscience.[92] Once America finishes reckoning with its transgressions toward this group, then and only then will attention properly turn toward redress for ones whose suffering has been lighter.

Finally, in the minds of some, the black-white binary of race is not the name of an intellectual error or blind spot but instead a fully justifiable way of setting priorities. White racism against Blacks illustrates its purest and most virulent form. If one understands how racism operates in this sphere, understanding and countering its milder manifestations with other groups will be easier.[93]

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88. That treatment includes, for example: a war of aggression that sliced Mexico roughly in half; immigration enforcement that separates families from their children; English-only laws that operate harshly against Spanish speakers; school segregation in the Southwest; signs saying "No dogs or Mexicans"; and management of the island of Puerto Rico as, in effect, a U.S. colony for over a century. See generally Latinos and the Law, supra note 23 (detailing these and other forms of harsh treatment).

89. See, e.g., Delgado & Stefancic, Critical, supra note 26, at 81–82 (discussing stereotype of studious, socially conforming Asian); Robert S. Chang, Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, 81 Calif. L. Rev. 1241, 1258–65, 1308–12 (1993) ("This history of discrimination and violence, as well as the contemporary problems of Asian Americans, are obscured by the portrayal of Asian Americans as a 'model minority.'").

90. On this common stereotype of the noble savage, see, for example, Richard Delgado & Jean Stefancic, Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?, 77 Cornell L. Rev. 1258, 1269–70 (1992) [hereinafter Delgado & Stefancic, Images] (discussing how Hollywood's "'noble savage' films reversed the stereotype [built on images of 'war dances, exotic dress, drunkenness, surprise attacks, scalping, raiding, raping, tomahawks, tomtoms, and torture'] in the opposite direction, portraying Native Americans with exaggerated nobleness").

91. Or so a casual observer may believe on the basis of a single visit to an elegant casino on Indian land.

92. See Delgado, Locating, supra note 12, at 490 ("Individualistic, no-nonsense Americans have a limited stock of empathy . . . . Why risk compassion fatigue by extending our civil rights sympathies to groups who do not really need them?").

93. See id. at 497 (describing how black-white binary paradigm "retains much of its original descriptive force" and "[w]hile the issues facing nonblack groups such as Latinos and Asians are worthy of consideration, policymakers should focus first on the larger problems of African Americans, the alleviation of which can give other racial minority groups resolve to combat their own social injustices").

At best, then, our habits in matters of race will result in an "out of mind" phenomenon for nonblack groups. They will simply find it hard to have others take their racial plight seriously. In former years, the Bracero Program[94] and Operation Wetback[95] prompted no hue and cry from the ACLU or amicus curiae briefs from the NAACP Legal Defense Fund. Anti-immigration forces today speak in tones that, if they were directed at Blacks, would be deemed unmistakably racist, yet few condemn them as such.[96]

Few notice that deportation, which the current Administration is embracing with particular fervor,[97] operates somewhat like the slave trade[98] but in reverse. Few notice that *Chae Chan Ping v. United States*[99] is the functional analog, for Latinos, of *Plessy v. Ferguson*[100] (for Blacks) in the way it prevents the legal system from confronting widespread injustices against an entire group.[101] Still fewer notice that immigration law

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94. On formal guest worker (Bracero) programs, see Latinos and the Law, supra note 23, at 433–38 (examining history of guest worker programs from World War I through "Operation Wetback").

95. "Operation Wetback" was a widespread program carried out under federal auspices that rounded up Mexican-looking individuals for deportation during a period of economic downturn. See Latinos and the Law, supra note 23, at 437–38 (discussing genesis and effects of "Operation Wetback").

96. For example, immigrants from Latin America are said to arrive in waves or hordes, to be highly fertile and eager to produce "anchor babies," to cluster together, and to resist Americanization and the acquisition of American values, language, and hygiene. See, e.g., Leo R. Chavez, Immigration Reform and Nativism: The Nationalist Response to the Transnationalist Challenge, *in* Immigrants Out! The New Nativism and the Anti-Immigrant Impulse in the United States 61, 61 (Juan F. Perea ed., 1997) [hereinafter Immigrants Out] (discussing "rhetoric of exclusion" used by proponents of restrictive immigration legislation); Richard Delgado, Rodrigo's Corrido: Race, Postcolonial Theory, and U.S. Civil Rights, 60 Vand. L. Rev. 1691, 1718–38 (2007) (exploring development and persistence of "dirt, sexuality, and jabber" as Latino stereotypes).

97. See, e.g., Daniel Kanstroom, Deportation Nation, N.Y. Times, Aug. 31, 2012, at A27 (discussing fates of many deportees); Louis Jacobson, Has Barack Obama Deported More People Than Any Other President in U.S. History?, Tampa Bay Times PolitiFact (Aug. 10, 2012), http://www.politifact.com/truth-o-meter/statements/2012/aug/10/american-principles-action/has-barack-obama-deported-more-people-any-other-pr/ (on file with the *Columbia Law Review*) (noting Obama Administration's high rate of deportation).

98. That is, deportation often breaks up families, removes human beings without warning from the communities where they have set down roots and, after an indefinite period in a large, impersonal detention center, sends them to what may be (for children, at least) a completely alien land, and does so on a grand scale. See Editorial, Migrants' Freedom Ride, N.Y. Times, July 29, 2012, at SR10.

99. 130 U.S. 581, 606 (1889) (declining to reverse exclusion of Chinese man who left United States with certificate guaranteeing his right to return, during which time Congress enacted exclusion for everyone who was Chinese).

100. 163 U.S. 537, 551–52 (1896) (upholding separate but equal facilities for Blacks, thereby placing host of social practices and laws beyond judicial review).

101. *Chae Chan Ping* first articulated the plenary power doctrine in immigration law, which placed that body of law beyond judicial review—just as *Plessy* did for a host of social

judges regularly justify harsh action against Latin American petitioners in disparaging language reminiscent of that of sheriffs and governors in the pre-Civil Rights Era South.[102]

Temporal Rises and Falls. — Critics of the black-white binary paradigm of race analyze a number of its drawbacks for race reformers, including its impairment of racial coalitions among outgroups.[103] They also call attention to how society often arranges groups' gains and setbacks in a predictable sequence, so that when one group advances, another experiences regression and defeat.[104] The black-white binary of race can easily conceal this checkerboard of racial progress, so that groups celebrate too soon, not realizing that their current good fortune is destined to be short-lived.[105] By the same token, in a period when society feels guilty about Blacks and offers them relief from oppressive conditions, it may be making life hard for Japanese, Latinos, or Native Americans, and vice versa.[106]

Unless one understands this pattern—something that the black-white binary of race can obscure—one is apt to gain little traction from analogical reasoning. A court or legislature is likely to meet one group's request dismissively, if, for example, it feels that the nation has sufficiently discharged its obligation toward another that is more central to

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practices that demeaned Blacks. See *Chae Chan Ping*, 130 U.S. at 602–03 ("[I]f the power mentioned is vested in Congress, any reflection upon its motives . . . would be entirely uncalled for. This court is not a censor of the morals . . . of the government . . . . When once it is established that Congress possesses the power to pass an act, our province ends . . . .").

102. See Michele Benedetto, Crisis on the Immigration Bench: An Ethical Perspective, 73 Brook. L. Rev. 467, 468 (2008) ("As Judge Richard Posner noted in 2005, the adjudication of cases by immigration judges has 'fallen below the minimum standards of legal justice.'" (quoting Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005))). On the use of disparaging metaphors by the anti-immigration movement, see Keith Cunningham-Parmeter, Alien Language: Immigration Metaphors and the Jurisprudence of Otherness, 79 Fordham L. Rev. 1545, 1558 (2011) ("[T]he images of ethnicity and danger contained in immigration metaphors create the impression that immigrants can *only* be described in terms of alienage and criminality.").

103. See Delgado, Toolkit, supra note 50, at 302–06 ("[D]ichotomous thought impairs groups' ability to forge useful coalitions.").

104. Id. at 291–93 ("The history of minority groups in America reveals that while one group is gaining ground, another is often losing it."). For example, during World War II, Chinese individuals gained citizenship, while Japanese people were sent to internment camps.

105. See id. at 286–93 ("Even today, the patchwork of progress for one group coming with retrenchment for another continues. . . . [A]t a time when Indian litigators are winning striking breakthroughs for tribes, California has been passing a series of anti-Latino measures . . . .").

106. See id. at 291–93, 296–99 ("Binary thinking can easily allow one to believe that America made only one historical mistake—for example, slavery. If so, the prime order of business is to redress that mistake . . . [and] the concerns of other groups would come into play only insofar as they resemble . . . that one great mistake.").

the struggle for civil rights.[107] Similarly, the court or federal agency may feel, consciously or not, that the group one is championing is simply not a minority group in the same way that another is, such as Blacks or Native Americans.[108] By merely pronouncing another group central to analysis, a recalcitrant decisionmaker may rationalize doing nothing for a second group.

II. REMEDIES FOR NEW WRONGS OR GROUPS

Where, then, shall one look for sources of protection for Blacks facing new forms of oppression or nonblack groups in need of it for new or old varieties? As before, it is useful to address separately potential remedies tapping broad social forces and ones seeking relief narrowly in the form of doctrinal reinterpretation of existing law.

A. *Interest Convergence*

For both black and nonblack groups, one avenue worth investigating is simply interest convergence.[109] Bell, its originator, usually thought of it as a barrier—an explanation for the infrequency of Blacks' advances and their tendency to erode once the celebrations died down and their use to the white establishment ceased.[110]

Still, interest convergence may, with a little imagination, yield opportunities for civil rights reformers. For example, social sentiment is currently set against Latinos, especially ones who are working-class and undocumented,[111] and is even more up in arms over terrorism originating in Middle Eastern communities.[112] Although these observations suggest that difficult times lie ahead for both groups, advocacy could well

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107. See id. at 296–99 (observing how Supreme Court justices known for supporting civil rights also supported legality of racist acts against nonblack groups).

108. See, e.g., Delgado, Locating, supra note 12, at 497–98 (noting how several scholars "make arguments casting doubt on Latinos' entitlement to civil rights solicitude, including affirmative action, because they are not deserving"); Richard Delgado, Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary, 75 Tex. L. Rev. 1181, 1191–92 (1997) (book review) ("Blacks, and even Indians, were here originally or from very early days. Once society decided to count them as citizens, their thoughts and preferences began to figure into the political equation. . . . A Mexican peasant . . . can come here only at sufferance . . . .").

109. See supra notes 26–32 and accompanying text (defining interest convergence as practice of permitting breakthroughs for Blacks only when doing so also benefits Whites).

110. See, e.g., Delgado & Stefancic, Critical, supra note 26, at 20–24 (explaining Bell's use of concept).

111. On the current wave of anti-Latino broadcasting, popular uproar, and laws, see, e.g., id. at 471–83, 548–630.

112. See, e.g., Ahmad, supra note 34, at 1262 ("[T]he phenomenon of hate violence toward Arabs, Muslims, and South Asians is one that appeared to need little explanation; it was accepted as a regrettable, but expected, response to the terrorist attacks.").

turn interest convergence to their advantage, while the country's obsession with the "China threat" offers an additional opportunity.[113]

1. *Muslims and Interest Convergence.* — The foreign policy establishment currently is fixated on what it sees as an internal struggle within Islam between a moderate, democratizing faction and a fundamentalist, puritanical one that embraces a strict interpretation of Sharia law, subjugates women, and rejects Western values, which it sees as corrupt, hedonistic, and evil.[114] The West, naturally, would like to strengthen the hand of the first faction vis-à-vis the second.

Recently, radical Islamic leaders have been condemning the West, particularly the United States, for its mistreatment of women, whom these spokespersons see as being compelled to dress provocatively and sell their sexuality for the benefit of men.[115] They also charge that it is Americans, not they, who are religiously intolerant, citing, especially, attacks on Muslims or the Muslim religion.[116]

These conditions resemble those Bell used to explain interest convergence in his famous article Brown v. Board of Education *and the*

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113. See infra Part II.A.3 (discussing how China has recently become topic of interest due to its growing power and global presence).

114. See, e.g., Mohamad Bazzi, Fertile Crescent, N.Y. Times Book Rev., Sept. 11, 2011, at 11, 11–12 (book review) (noting struggle within Islam between radical, jihad-embracing faction and more moderate group); Bernard Haykel, Threat Level, N.Y. Times Book Rev., Sept. 11, 2011, at 13, 13 (book review) (noting "features of American Islam that render it largely immune to Al Qaeda's appeal" but claiming "Al Qaeda's defeat will be complete only if the Arab Spring uprisings bring . . . personal dignity and greater economic opportunity to the peoples of the Arab world"); Thomas L. Friedman, Trust, but Verify, N.Y. Times, Jan. 18, 2012, at A21 ("America needs to offer the Islamists firm, quiet . . . and patient engagement that says: 'We believe in free and fair elections, human rights, women's rights, minority rights, free markets, civilian control of the military, [and] religious tolerance . . . and we will offer assistance to anyone who respects those principles.'"); Samuel J. Rascoff, Uncle Sam Is No Imam, N.Y. Times, Feb. 21, 2012, at A25 (noting United States has been making efforts to build networks of "acceptable" Muslim leaders); Peter Schmidt, Cables Spilled by WikiLeaks Portray College Campuses as Ideological Battlegrounds, Chron. Higher Educ. (Dec. 8, 2010), http://chronicle.com/article/Cables-Spilled-by-WikiLeaks/125659/ (on file with the *Columbia Law Review*) (discussing how State Department cables increasingly showed concern over radical Islam and need for West to counter it by easing up on U.S. Muslims and admitting more foreign students in U.S. universities); see also infra note 115 and accompanying text (noting bin Laden denounced United States "for its exploitation of women's bodies in dress, advertising, and popular culture" in 2002 "letter to the American people").

115. See Scott Shane, Pornography Is Found in Bin Laden Compound Files, U.S. Officials Say, N.Y. Times, May 14, 2011, at A7 (noting that in 2002 "letter to the American people," bin Laden denounced United States for exploiting women's bodies in dress, advertising, and popular culture).

116. See, e.g., Profile: Anwar al-Awlaki—Terrorist Propaganda, Anti-Defamation League (Nov. 24, 2009), http://www.adl.org/main_Terrorism/anwar_al-awlaki.htm?Multi_page_sections=sHeading_2 (on file with the *Columbia Law Review*) (noting al-Awlaki's call for retaliation against those involved in cartoons ridiculing Prophet Mohammed).

Interest-Convergence Dilemma.[117] There, Bell scandalized many readers when he posited that *Brown*, the crown jewel of American jurisprudence, arrived in 1954—nearly sixty years after *Plessy v. Ferguson*—not in response to a belated spasm of judicial conscience. Instead, *Brown* arrived when it did because white elite interests required such a breakthrough.[118]

Reminding his readers that the NAACP had been litigating school desegregation cases in the South for decades, getting nowhere or winning, at best, narrow victories, Bell asked why the Court handed down, for the first time, in 1954, a sweeping decision that essentially gave his old employer, the NAACP Legal Defense Fund, everything it had been asking for.[119]

Bell offered two related reasons, both centering on Cold War politics. In 1954, the United States was in the opening stages of a worldwide competition against an atheistic, monolithic adversary, the Soviet Union, for the loyalties of the uncommitted Third World, much of which was brown, black, or Asian.[120] Every time the world press splashed photos of Southern sheriffs beating peaceful civil rights protesters, the Soviets won points at the United States' expense.[121] They could make gains by pointing out to uncommitted nations in Latin America, Asia, and Africa how poorly the United States treated human beings with brown skin, and how these nations would fare better by aligning with the Soviet camp rather than with the United States.[122]

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117. See supra notes 26–32 and accompanying text (introducing interest convergence, which posits that advances for Blacks and perhaps other minorities arrive only when they also are in interest of elite Whites).

118. See Bell, Dilemma, supra note 26, at 524–26 ("[T]he decision in *Brown* to break with the Court's long-held position on these issues cannot be understood without some consideration of the decision's value to whites . . . ."); see also Derrick Bell, Race, Racism, and American Law 25–27, 62, 67–68 (6th ed. 2008) (tracing role of interest convergence in several black advances).

119. See Bell, Dilemma, supra note 26, at 523–24 ("[T]he issue of school segregation and the harm it inflicted on black children did not first come to the Court's attention in the *Brown* litigation: blacks had been attacking the validity of these policies for 100 years.").

120. See id. at 524 ("[T]he decision helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples.").

121. See id. ("*Time* magazine . . . predicted that the international impact of *Brown* would be scarcely less important than its effect on the education of black children . . . ."); see also Dudziak, supra note 27, at 113–14 ("*Brown* and the image of American democracy it projected were thought to be of the utmost importance in a world torn by Cold War animosities.").

122. See Bell, Dilemma, supra note 26, at 524 (discussing United States' need for credibility in developing countries); see also Dudziak, supra note 27, at 113 (describing importance of United States' international image during Cold War); Juan Williams, Eyes on the Prize: America's Civil Rights Years, 1954–1965, at 39, 41–45, 52, 57 (1987) (noting attention focused on killing of black teenager Emmett Till for saying "Bye, Baby" to white woman).

At the same time, U.S. servicepersons of color were returning in large numbers from World War II and Korea, where they had fought for democracy and human rights, in many cases experiencing a relatively racism-free working environment (namely, the U.S. military) for the first time.[123] These veterans were unlikely to settle back meekly into the former regime of second-class jobs and deference to Whites. For the first time in years, racial unrest loomed.[124]

For both reasons, according to Bell, the U.S. establishment chose that moment to arrange a spectacular breakthrough for Blacks.[125] When the Supreme Court ruled as it did in *Brown*, the U.S. press trumpeted the breakthrough, which the world press promptly picked up and broadcast.[126] *Brown v. Board of Education*, then, was a (short-lived) victory for black rights.[127] But it ended up advancing white elite interests even more. Subsequent research in the files of the U.S. State Department and in the letters and memoirs of Supreme Court Justices corroborated what Bell merely posited in his groundbreaking article: When the U.S. Justice Department threw its weight on the side of the NAACP for the first time in a school desegregation case, it was responding to repeated exhortations by the State Department to do so, and for the very reasons Bell hypothesized.[128]

If, as seems likely, interest convergence and international appearances played a large part in producing *Brown v. Board of Education* and other advances for Blacks, what does that augur for the current situation?

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123. Bell, Dilemma, supra note 26, at 524 ("*Brown* offered much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home."); see also Dudziak, supra note 27, at 83–88 (highlighting role of U.S. military in managing United States' image during Cold War competition).

124. See Dudziak, supra note 27, at 85 (discussing A. Philip Randolph's concerns that segregation in armed services would be "a great threat to Negro youth and the internal stability of our nation"); Dorothy Butler Gilliam, Paul Robeson: All-American 137 (1976) (noting Paul Robeson's 1949 speech to World Congress of Partisans of Peace in which he stated "[i]t is unthinkable . . . that American Negroes would go to war on behalf of those who have oppressed us for generations . . . against a country [the Soviet Union] which in one generation has raised our people to the full human dignity of mankind" (quotation marks and citation omitted)).

125. See supra notes 120–124 and accompanying text (describing impact of international image and racial unrest in armed services on *Brown* decision).

126. See Dudziak, supra note 27, at 107 ("Within an hour after the [*Brown*] decision was handed down, the Voice of America broadcast the news to Eastern Europe.").

127. Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 42–57, 127–38 (2d ed. 2008) (documenting small amount of progress that landmark decision actually yielded).

128. See Dudziak, supra note 27, at 90–102 ("The Justice Department filed amicus curiae briefs to inform the Court of important interests at stake beyond those presented by the parties to the cases."); see also Delgado, Roundelay, supra note 30, at 42–55 (explaining that interest convergence also contributed to breakthrough case of *Hernandez v. Texas* for Latino civil rights).

As mentioned, the United States enjoys little credibility in the minds of at least some in the Muslim world by virtue of its poor treatment of domestic minorities and women.[129] Religious fundamentalists and jihadists ask their uncommitted followers if the West offers them a form of social life worthy of emulation.[130] If our daily record includes reductions in women's reproductive services, racial profiling of Latino and Muslim men, voting identification laws seemingly aimed at reducing black and brown electoral influence, and a widening wealth and earnings gap between ordinary people and the super rich, why should Muslims follow our example?[131]

To strengthen moderate, secular forces in the Muslim world, the United States must hold itself out as an example of moderate, secular, and tolerant government. It cannot deplore fundamentalist Muslim schools (*madrasas*) that teach female subjugation and a theocratic form of government[132] while it is deporting large numbers of brown-skinned people,[133] jailing many more,[134] and requiring schools to teach Creationism[135] and post the slogan "in God we trust" on its walls.[136] Nor can one easily condemn strict enforcement of Sharia law while the U.S. judicial system insists on original intent and a literal interpretation of a two-hundred-year-old document.[137] Simple interest convergence may easily, then, end up offering greater hopes for minority advances than litiga-

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129. See supra note 115 and accompanying text (discussing Osama bin Laden's critiques of treatment of women in Western culture).

130. See supra notes 115–116 and accompanying text (discussing how many of America's adversaries in Muslim world make propaganda points by pointing out flaws in United States' social record).

131. See Keith B. Richburg, 10 Years After 9/11, World's Sympathy Has Waned, Wash. Post, Sept. 7, 2011, at A1 (reporting on Pew Research Center survey, which showed that "large majorities of Muslims have an unfavorable opinion of the United States").

132. See, e.g., Christopher M. Blanchard, Cong. Research Serv., RS 21654, Islamic Religious Schools, *Madrasas*: Background 3 (2008) (discussing curriculum in Muslim religious schools and concerns that these schools are teaching children to hate Western countries).

133. See supra notes 99–102 and accompanying text (discussing racist tones of anti-immigration rhetoric).

134. See Alexander, supra note 10, at 173–248 (noting parallels between current system of incarceration and slavery and Jim Crow).

135. See Elizabeth Flock, Law Allows Creationism To Be Taught in Tennessee Public Schools, Wash. Post (Apr. 11, 2012), http://www.washingtonpost.com/national/law-allows-creationism-to-be-taught-in-tenn-public-schools/2012/04/11/gIQAAjqxAT_story.html (on file with the *Columbia Law Review*) (noting many Americans favor this approach and other states appear poised to follow suit).

136. See David A. Fahrenthold, House Treads Familiar Territory in Vote To Uphold "In God We Trust," Wash. Post, Nov. 3, 2011, A4 (explaining that House voted 396 to 9 to reaffirm motto and encourage its display in all public schools and government buildings).

137. See Samuel A. Marcosson, Original Sin: Clarence Thomas and the Failure of the Constitutional Conservatives 2–4 (2002) (discussing turn toward originalism and intent of Framers).

tion proceeding on the basis of a strained interpretation of the Thirteenth Amendment.

2. *Latinos and Interest Convergence.* — What about Latinos in particular? Interest convergence played a large part in producing the single biggest breakthrough for Latino civil rights, *Hernandez v. Texas*, which for the first time declared Latinos a minority group entitled to protection under the Fourteenth Amendment.[138] U.S. power brokers and the intelligence establishment were then highly concerned over Latin American uprisings, peasant groups, land revolts, and the possibility that Soviet adversaries might gain a foothold in the region.[139] They also feared leftist movements in domestic Latino circles.[140]

Could today's Latinos tap similar concerns? The United States government currently faces no military or economic threat exactly comparable to what it did from the Soviet Union in the fifties. Yet, insurgent indigenous activism in Central and South America is a matter of concern, as is the current raft of leftist leaders in Venezuela, Bolivia, and Cuba.[141] Domestically, Latinos have now reached sufficient numbers—one-sixth of the U.S. population[142]—that they can easily tip a national election. And one of the United States' major rivals, China, has begun making commercial and political inroads in Latin America.[143] It is not far-fetched to suppose that Latinos, like Muslims, may benefit from tactful invocation of international appearances to secure better treatment from domestic authorities, including the courts.

3. *China, Russia, and Interest Convergence.* — Moderate, democratizing Islam is not the only foreign group the United States now finds in its interest to cultivate. China and Russia are both emerging as serious competitors for influence in regions where U.S. authority was once exclusive.

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138. 347 U.S. 475, 477–78 (1954) ("The State of Texas would have us hold that there are only two classes—white and Negro—within the contemplation of the Fourteenth Amendment. The decisions of this Court do not support that view."); see also Delgado, Roundelay, supra note 30, at 42–55 (discussing how interest convergence and elite concerns over Cold War image helped produce breakthrough in Latino legal rights).

139. See Delgado, Roundelay, supra note 30, at 44–48 (discussing U.S. officials' concerns about unrest in Latin America).

140. See id. at 48–49 (discussing U.S. officials' concerns about unrest in major U.S. cities, including Los Angeles and Denver).

141. See, e.g., José Luis Morín, Latino/a Rights and Justice in the United States: Perspectives and Approaches 17–25, 35–41 (2005) (discussing U.S. meddling, coups, and invasions in that region); Seven Latin American Nations Join Mexico in Arizona Immigration Lawsuit, Huffington Post (July 19, 2010), http://www.huffingtonpost.com/2010/07/20/seven-latin-american-nation_652440.html (on file with the *Columbia Law Review*) (noting repressive anti-immigration law in Arizona drew disfavor in several Latin American countries).

142. See Sabrina Tavernise, Hispanic Children in Poverty Exceed Whites, Study Finds, N.Y. Times, Sept. 29, 2011, at A16 ("Hispanics make up 16 percent of the overall American population . . . .").

143. See, e.g, James C. McKinley, Jr., Mexico Builds Trade Ties with China, N.Y. Times, Sept. 13, 2005, at A3 (describing China's growing influence in Latin America).

In particular, China has begun to cast its eye on Latin America, while Russia is newly assertive there and elsewhere. For example, when the United States condemned Russian mistreatment of dissenters and its conduct of fraudulent elections, Russian leaders pointed out that our record in these spheres was little better.[144] Three new U.S. rivals (Muslim fundamentalists, China, and Russia) could as well have pointed out the United States' own vast disparities of wealth, particularly with respect to Latinos, over seventy percent of whom live in poverty,[145] many without medical insurance and, in the case of the undocumented, in constant fear of deportation. Neither China nor Russia maintains such a ruthless policy with respect to deportation, border enforcement, or immigration restriction as the United States does.[146] Can it be long before they discover this avenue for making points at the United States' expense?

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144. See, e.g., Ellen Barry, On TV, Putin Is Dismissive of Critics Far and Near, N.Y. Times, Dec. 16, 2011, at A5 (describing how Russian Prime Minister Vladimir Putin "lashed out repeatedly at the United States" and stated that Senator John McCain "has enough civilian blood on his hands"); Tom Balmforth, Defiant Putin Mocks and Praises Opposition, Touts Vague Reform, Radio Free Europe/Radio Liberty (Dec. 15, 2011), http://www.rferl.org/content/putin_annual_callin_tv_show/24422335.html (on file with the *Columbia Law Review*) (criticizing Senator John McCain's role in Vietnam in response to McCain's assertion that Arab Spring uprisings would come to Russia); see also Putin Takes Jab at U.S., Windsor Star (Can.), Oct. 18, 2011, at D6 (noting Russian leader warned that our system, with its high inflation, growing debt, and widespread obesity, is no better than Russia's); Heather Maher, Clinton in Central Asia: Seeking Balance Between Realpolitik and Rights, Radio Free Europe/Radio Liberty (Oct. 25, 2011), http://www.rferl.org/content/clinton_in_central_asia_–_seeking_balance_between_realpolitik_and_rights/24370606.html (on file with the *Columbia Law Review*) ("But Clinton's meetings with the two authoritarian rulers have some observers asking whether the United States can maintain its moral status as a defender of human rights if it strikes bargains with governments that abuse them."); Putin Warns "Mistakes" Could Bring Back '90s Woes, Radio Free Europe/Radio Liberty (Oct. 17, 2011), http://www.rferl.org/content/putin_mistakes_could_bring_back_1990s_woes/24362626.html (on file with the *Columbia Law Review*) (reporting Russian leader warned West to mind its own business and not obsess over minor Russian curtailment of civil liberties).

145. See Yen, supra note 12 (noting Latinos topped list for poorest group at seventy-three percent).

146. U.S. policy toward immigrants has often been rude, see, e.g., Kevin R. Johnson, The New Nativism: Something Old, Something New, Something Borrowed, Something Blue, *in* Immigrants Out, supra note 96, at 165, 167–73 (describing impact of xenophobia on U.S. immigration policy since nineteenth century), and even lethal, see, e.g., Bill Ong Hing, The Dark Side of Operation Gatekeeper, *in* Latinos and the Law, supra note 23, at 459, 459–68 (same); Alejandro Portes & Ruben G. Rumbaut, Legacies: The Story of the Immigrant Second Generation, *in* Latinos and the Law, supra note 23, at 411, 411–14 (same); John Ross, Days of the Dead, *in* Latinos and the Law, supra note 23, at 408, 408–11 (noting some of our policies are producing deaths along United States-Mexico border). Policies toward immigrants in Russia and China seem almost benign by comparison. See, e.g., Matthew A. Light, What Does It Mean to Control Migration? Soviet Mobility Policies in Comparative Perspective, 37 Law & Soc. Inquiry 395, 425 (2012) (noting former Soviet Union's highly bureaucratic and controlling immigration policy, and how current U.S. immigration policy is similar and "increasingly experimenting with repressive police methods"); Lisa Bonjanovic, Russia's New Immigration Policy Will Boost the Population,

B. *Reviving Treaty Rights and Modern Land Claims:* Lobato v. Taylor

A recent Colorado Supreme Court decision[147] suggests another avenue for at least one domestic group that does not raise some of the problems likely to arise when proceeding under the Thirteenth Amendment.[148] For Latinos, as already discussed, some of the most pressing problems are not close analogs to ones confronting Blacks.[149] As mentioned, many of those problems stem from conquest, the single most formative experience for this group and the counterpart of slavery for Blacks.[150]

Conquest, which superimposed one culture and set of laws, language, and citizenship rights on top of another, is responsible for many of the problems listed earlier—loss of language rights, discrimination based on a foreign-sounding name and accent, and presumed foreignness based on looks and appearance—issues that plague few Blacks.[151] History also yields a different set of stereotypes for each group: Blacks, for example, are portrayed as stupid, musical, sexually promiscuous, and of low moral character.[152] Asian Americans are seen as neat, fastidious, interested in math and science, and as living boring, predictable lives.[153]

Latinos are considered whipped, slack people, lacking in ambition, and deserving of the kind of contempt reserved for losers.[154] In order to overcome this stereotype, Latinos must come to terms with the legacy of conquest and a system of laws, practices, and social conventions that continues to keep the group down. A recent Colorado land-rights decision and subsequent congressional report addressed that very challenge, em-

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EuroMonitor International (June 14, 2007, 12:19 PM), http://blog.euromonitor.com/2007/06/russias-new-immigration-policy-will-boost-the-population.html (on file with the *Columbia Law Review*) (noting Russia encourages immigration to counter declining birth rate); Shen Haimei, Inflow of International Immigrants Challenges China's Migration Policy, Brookings Inst. (Sept. 8, 2011), http://www.brookings.edu/research/opinions/2011/09/08-china-immigrants-shen (on file with the *Columbia Law Review*) (observing China is becoming destination for immigrants, especially those who are educated).

147. Lobato v. Taylor, 71 P.3d 938 (Colo. 2002) (en banc).

148. See supra Part I.B (describing limitations of expanding Thirteenth Amendment protections to nonblack groups).

149. See supra notes 50–56 and accompanying text (discussing nonblack groups' unsuccessful attempts to analogize their predicaments to ones that Blacks suffer).

150. See, e.g., Latinos and the Law, supra note 23, at 2, 8–15, 218–19 (discussing role of conquest in shaping Latino history).

151. See supra notes 51–56 and accompanying text (observing that many problems facing nonblack communities are not experienced by Blacks).

152. See, e.g., Delgado & Stefancic, Images, supra note 90, at 1262 (describing dominant image of Blacks in popular theater and literature of late eighteenth century).

153. On the model minority stereotype of the quiet, studious Asian, see supra note 89 and accompanying text.

154. Delgado & Stefancic, Images, supra note 90, at 1273 (describing dominant image of Mexican Americans in United States).

ploying the language and spirit of the Treaty of Guadalupe Hidalgo, a major concord with Mexico.

In *Lobato v. Taylor*, a group of Mexican American farmers sued Taylor, a developer from North Carolina, who had acquired 77,700 acres of land in southern Colorado for his own use and development.[155] The villagers and farmers who lived in the region had been in the practice of grazing cattle and gathering water and firewood on that very parcel, dating to an ancient deed to a wealthy settler named Charles Beaubien under which he purchased an even larger parcel of land that included Taylor's 77,700 acres.[156] The deed to Beaubien's land set aside a portion of it—the one that the contemporary villagers claimed—for the communal use of Beaubien's friends and neighbors and their descendants to use for grazing, hunting, watering cattle, and recreation.[157]

Beaubien, who apparently was eager to attract new settlers to the then thinly populated region, did not reckon with Anglo law, however. Spanish and Mexican law recognized communal land, called *ejidos*;[158] American law, reflecting the spirit of capitalism, did not. With individual parcels, Mexicans who chose to stay after the change of regime could continue to own and live on their lands, but, under the Treaty of Guadalupe Hidalgo (which ended the War with Mexico) were required to re-register them under American law according to a complex system of requirements, before a series of skeptical land courts and commissions.[159] Many failed to complete the arduous process and lost their lands. But Beaubien, being wealthy and influential, did not.

After he died, the parcel passed through a few intermediate owners until it came into the hands of the developer, Taylor, who promptly closed it off to the outside world.[160] When the locals sued to establish their right to continue to use the land, the issue before the Colorado court system was the validity of the 1863 Beaubien document and the use rights it conferred on the villagers and neighbors.[161]

This, in turn, entailed construing the document in light of then-prevailing terms and usages, viz., shortly after the Treaty of Guadalupe Hidalgo and during a period when Anglo law was fast developing in the region. As the Colorado court put it:

> We are attempting to construe a 150 year-old document written in Spanish by a French Canadian who obtained a conditional grant to an enormous land area under Mexican law and perfected it under American law. Beaubien wrote this document

155. 71 P.3d 938, 943 (Colo. 2002) (en banc).

156. Id.

157. Id.

158. See Latinos and the Law, supra note 23, at 34.

159. See id. at 24–34, 862–64.

160. 71 P.3d. at 943.

161. Id. at 944–45.

> when he was near the end of his adventurous life in an apparent attempt to memorialize commitments he had made to induce families to move hundreds of miles to make homes in the wilderness. It would be the height of arrogance and nothing but a legal fiction for us to claim that we can interpret this document without putting it in its historical context.
>
> For the most part, the document is reasonably specific in identifying places where rights are to be exercised.[162]

The Colorado Supreme Court upheld most of the claims,[163] and a few years later the federal Government Accountability Office (GAO), responding to persistent questions about land rights in the Southwest, issued a report to Congress exploring the legality of these ancient claims.[164] One of the options it listed for Congress to consider was returning all federal land formerly in the hands of community groups, like the parcel in *Lobato*, to its original owners;[165] another was simply paying for land that was lost through procedures lacking in due process in the post-Treaty years.[166]

Even though *Lobato* did not turn squarely on treaty rights, it suggested an avenue for litigating at least some Mexican land claims and possibly other rights, such as those pertaining to language or bilingual education.[167] Such an approach would begin to craft "civil rights" law for Latinos that better suits their circumstances and history than either of the two great civil rights Amendments, which were enacted with the predicament of the newly freed black slaves in mind. For Latinos, this would mean development of law aimed at countering the badges and incidents of conquest, not of slavery. A similar search for Native Americans could aim to produce law-strengthening sovereignty.[168] And one for Middle

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162. Id. at 947–48.

163. Id. at 957 (upholding villagers' rights to graze and gather firewood and timber but rejecting their request to hunt, fish, and use property for recreation).

164. U.S. Gen. Accounting Office, GAO-04-59, Treaty of Guadalupe Hidalgo: Findings and Possible Options Regarding Longstanding Community Land Grant Claims in New Mexico 161–70 (2004) (listing five bases for possible redress for lost lands in Southwest).

165. Id. at 167–68.

166. Id. at 168–69.

167. Community activists have long believed that the Treaty of Guadalupe Hidalgo and various subsequent Good Neighbor-type pacts with Mexico provide implicit protection for cultural and language rights. See Latinos and the Law, supra note 23, at 15–34, 172–74 (noting treaty, as enacted, contained only set of narrow protections, having to do with land and federal citizenship; left out were host of cultural practices and customs that many Mexicans held dear, such as speaking Spanish or owning land in common).

168. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559–60 (1832) (noting Native Americans enjoy some incidents of sovereignty, but are nevertheless defeated nations who are dependents of United States, hence not fully self-governing); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573–74 (1823) (affirming Anglo displacement of Native American lands under doctrine of Manifest Destiny and negating all claims of Native American sovereignty).

Eastern people would aim to counter presumed foreignness and the associations—entirely undeserved in the vast majority of cases—with anti-Americanism and terror by research into international treaties and conventions.

Further Advantages of the Treaty Approach. — For Latinos, at least, treaties offer more promise than the Thirteenth Amendment, rooted as it is in Reconstruction ferment centering on the plight of Blacks.[169] Courts can expand treaty rights and apply them to new circumstances without making the large analogical leap that, as already discussed, these other sources require. Judges can reason that in doing so, they are merely following Congress's sovereign will, thereby countering the plenary power platitudes that regularly block progress in immigration-related cases.[170]

Even when a treaty does not speak directly to an issue, the court can reason that the agreement, at least, sought to bring the group within the American polity and is responsible for the group's having resided here for a long time,[171] thus diminishing the force of the plenary power doctrine and increasing the role for judicial scrutiny of a harsh practice. Framing an issue in treaty terms thus legitimates judicial activism on behalf of a group and permits courts to take grievances more seriously than they could if they saw them in conventional terms. A much-cited decision holds that an alien is "accorded a generous and ascending scale of rights as he increases his identity with our society."[172] A group whose presence in the United States came about through a legitimate source, namely a treaty entered into by two governments, ought to benefit from a similar degree of presumptive legitimacy and protection.

With indigenous groups, a similar effort is underway in other Anglo-American common law countries. In Canada[173] and Australia,[174] native people have won substantial concessions through litigation challenging ancient bases for Anglo dispossession. In the United States, the Native American sovereignty movement has brought about reparations and offi-

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169. See supra note 58 and accompanying text (discussing enactment of Thirteenth Amendment during period of civil rights fervor).

170. See supra note 71 (discussing how Congress's harsh immigration policies are not subject to stringent judicial review).

171. See Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) (noting if immigrant has resided in this country for long period of time, he or she is more likely to be integrated in polity and have stronger case for remaining).

172. Id.

173. Calder v. British Columbia (Attorney General), [1973] S.C.R. 313, 314–15 (Can.) (affirming indigenous land title preexisted Western settlement and providing conceptual basis for overhaul of Canadian land ownership laws).

174. Mabo v Queensland (No. 2) (1992) 175 CLR 1, 48 (Austl.) (rejecting doctrine of terra nullius, which justified Anglo displacement of indigenous land rights, and setting stage for return of traditional lands).

cial apologies from state and federal authorities for similar transgressions and seems poised to produce even more.[175]

CONCLUSION

If expansion of existing remedies seems unlikely in today's climate, civil rights scholars and advocates should consider new avenues. The two suggested herein (interest convergence and treaties) promise to avoid many of the drawbacks that plague Reconstruction-era approaches. By carefully appealing to U.S. geopolitical interests and invoking the spirit and letter of specific treaties that introduced a group into U.S. society, nonblack minority groups may, with diligent effort, make small but important advances.

175. See, e.g., Robert Williams, Savage Anxieties: The Invention of Western Civilization 236–45 (forthcoming 2012) (discussing sovereignty movement and its insistence on treaty enforcement in United States and Canada). On the quest for reparations and apologies for victims of historic injustice, including Native Americans, Japanese, and Blacks, see Roy L. Brooks, Atonement and Forgiveness: A New Model for Black Reparations, at xii–xiii (2004) ("At least in principle, the federal government has already accepted the idea that it, like other governments, should provide redress for past atrocities committed against an innocent people.").