The Thirteenth Amendment, Disparate Impact, and Empathy Deficits

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CONTENTS

INTRODUCTION

Modern civil rights policy is, as the late Justice Scalia warned, at "war."[1] On the one hand, some laws, like Title VII of the Civil Rights Act of 1964 (Title VII) and the Fair Housing Act, can impose liability for decisions due to their racial impacts rather than their racial motivation.[2] Defendants in such cases can always respond that the challenged decision (a test, a criterion, an allocation) is necessary in some legally cognizable sense;[3] but the courthouse doors open with the prima facie case of disparate impact. On the other hand, the Fourteenth Amendment's Equal Protection Clause, ever since the ascent of the "color-blind" over the "antisubordination" reading of the Amendment, subjects even benign discrimination—that designed to help minorities—to searching constitu-

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1. Ricci v. DeStefano, 557 U.S. 557, 595 (2009) (Scalia, J., concurring).

2. *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015).

3. *See id.* at 2522–23.

tional scrutiny.[4] As a result, race-conscious decisions intended to alleviate disparate impacts under laws designed to enforce Equal Protection norms may themselves violate Equal Protection.[5] The Court has yet to defuse the conflict.

This Article offers some thoughts on how to subtly reframe the debate by looking at the problem of disparate impacts as a Thirteenth Amendment issue, and not solely as a Fourteenth Amendment one.[6] In this Article, I argue that modern systemic empathetic failures towards minorities, and those of African descent in particular, are legacies of an instrumentalist view of Black lives and Black labor. Once Blacks ceased to be useful as a source of property or service, there was a widespread desire to have them simply go away. These attitudes form an underappreciated historical "badge" or "relic" of slavery that Congress can address through its Section Two enforcement power. Even in the absence of such legislation, race-conscious policies designed to address systemic empathy deficits towards minorities, understood as a "badge" or "relic" of slavery, form a compelling governmental interest. This compelling government interest need not be subject to the most restrictive race-neutral and narrow-tailoring strictures of Equal Protection. The policies can be race-conscious because, unlike the commerce authority or the "colorblind" Equal Protection Clause, slavery was a race-conscious institution in America. One must be conscious of race to dismantle a race-conscious institution.

This Article proceeds in three parts. Part I explores the problem of modern disparate impact as arising from empathy deficits—the systematic inability of individuals to assess or to even "see" the pain of others, especially from certain racial and ethnic groups. Compared to the 1960s, disparate impacts in the twenty-first century are less likely the product of intentional overt discrimination.[7] Instead, disparate impacts occur because persons who hold the levers of economic, social, and political power simply do not figure into their calculus the effects of their deci-

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4. *See* Reva B. Siegel, *From Colorblindness to Antibalkinization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1286–87 (2011) (describing but casting doubt on this conventional account).

5. *See Inclusive Cmtys.*, 135 S. Ct. at 2523 (expressing concern that inadequate procedural safeguards in disparate impact cases will ineluctably lead to constitutionally suspect racial quotas).

6. For other treatments of disparate impact and the Thirteenth Amendment, see William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311 (2007), and Rebecca E. Zietlow, *Free at Last! Anti-subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255 (2010).

7. *See* Justin D. Levinson, *Introduction: Racial Disparities, Social Sciences, and the Legal System*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 1 (Justin D. Levinson & Robert J. Smith eds., 2012).

sions on certain populations.[8] In a demonstrable psychological sense, they do not "feel the pain" of others.[9] Aggregated over groups and compounded over time, this empathy deficit can generate the kind of disparate impacts we observe today—whether we are talking about courtrooms, boardrooms, or classrooms.

Part II relates this empirical and systemic concept of empathy deficits with the history of the Thirteenth Amendment and the Reconstruction Era. Beginning with the Founding, but accelerating during Reconstruction, the political consciousness of the American majority has always struggled with a deep desire for Blacks to simply vanish. This desire to erase Blacks from public consciousness and political concern manifested itself literally—through the colonization movement—and metaphorically—through the belief that the invisible hand of the market would take care of the "Negro problem."[10] That America ratified the Thirteenth Amendment, coupled with a statutory and, soon after, constitutional commitment to Black citizenship,[11] stands as a historical repudiation of the recurrent desire to wish away the whole matter of race, labor, and class.

Part III of this Article highlights how disparate impact as a Thirteenth Amendment concern relates to legal doctrine. It discusses the Thirteenth Amendment power to legislate against "badges" and "relics" of slavery, and suggests that it, as opposed to the Commerce Clause, can serve as a stronger source of disparate impact authority in both a moral and legal sense, given the history in Part II.

I. DISPARATE IMPACT HISTORY, TAXONOMY, AND ETIOLOGY

Disparate impact is a theory that begins with *Griggs v. Duke Power Co*.[12] The Supreme Court in *Griggs*, construing Title VII, held that the statute prohibited facially neutral examinations that had the effect of dis-

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8. *See infra* Part II.

9. *See infra* Part II.

10. W. E. B. Du Bois, *The Study of the Negro Problems*, 11 ANNALS AM. ACAD. POL. & SCI. 1 (1898), *reprinted in* 568 ANNALS AM. ACAD. POL. & SOC. SCI. 13, 18–19 (2000) ("[I]f a Southern white man writes on the subject he is apt to discuss problems of ignorance, crime and social degradation; and yet each calls the problem he discusses *the* Negro problem, leaving in the dark background the really crucial question as to the relative importance of the many problems involved.").

11. *See* Civil Rights Act of 1866, 14 Stat. 27-30, 27 (declaring "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States"); *see also* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.").

12. 401 U.S. 424 (1971). For a summary of this history and the seeds of this taxonomy I relied upon Reva B. Siegel, *Race-Conscious But Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653 (2015).

advantaging minority candidates where there was no evidence that the exam was a business necessity.[13] Although controversy remains about whether *Griggs* properly construed Title VII,[14] Congress subsequently codified its holding, with modification, in the Civil Rights Act of 1991.[15]

Griggs was a case about statutory construction.[16] The constitutional parameters of disparate impact, by contrast, took an agnostic, then restrictive turn. In *Washington v. Davis*[17] and again in *Personnel Administrator of Massachusetts v. Feeney*,[18] the Court held that nothing in the judicially enforceable provisions of the Equal Protection Clause *required* a disparate impact theory of liability, although enforcement of Equal Protection norms, through disparate impact legislation, may be permitted.[19] Then, in *Ricci v. DeStefano*, the Roberts Court suggested that disparate impact as a theory, to the extent it allows race-conscious decisionmaking (at least in the absence of documented past discrimination), may actually *violate* the Equal Protection Clause.[20] Hence, the notion that Equal Protection is currently at "war" with itself.[21]

Disparate impact theory addresses three legacies of our sordid history of race discrimination.[22] The first is the intentional discriminator. Not the grotesque racial antagonist, but the cunning one: the one who understands that the old way is gone, that gratuitous racism usually "backfires," but that "the byproduct" of apparently race-neutral mechanisms will end up hurting one group more than another.[23] Disparate impact liability is aimed at "smoking out" these cunning intentional discriminators.[24]

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13. *Griggs*, 401 U.S. at 436.

14. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2526 (2015) (Thomas, J., dissenting) ("We should drop the pretense that *Griggs*' interpretation of Title VII was legitimate.").

15. *See* Siegel, *supra* note 12, at 656.

16. *See Griggs*, 401 U.S. at 425–26.

17. 426 U.S. 229 (1976).

18. 442 U.S. 256 (1979).

19. *See* Siegel, *supra* note 12, at 660–63.

20. *Id.* at 665–68.

21. *See, e.g.*, George Rutherglen, *The Origins of Arguments over Reverse Discrimination: Lessons from the Civil Rights Act of 1866*, *in* THE GREATEST AND GRANDEST ACT: THE CIVIL RIGHTS ACT OF 1866 FROM RECONSTRUCTION TO TODAY (Christian G. Samito ed.) (forthcoming 2017).

22. *See* Siegel, *supra* note 12, at 657–58 (developing this taxonomy).

23. *See* MATTHEW W. HUGHEY & GREGORY S. PARKS, THE WRONGS OF THE RIGHT: LANGUAGE, RACE, AND THE REPUBLICAN PARTY IN THE AGE OF OBAMA 95 (2014) (quoting the remarks of the late Lee Atwater, former Republican strategist).

24. *See* Ricci v. DeStefano, 557 U.S. 557, 595 (2009) (Scalia, J., concurring) (characterizing one view of disparate impact as "simply an evidentiary tool used to identify genuine, intentional discrimination—to 'smoke out,' as it were, disparate treatment"); *see also* Siegel, *supra* note 12, at 657.

The second is the ignorant discriminator. This person has no conscious hostility towards a certain group, but because of implicit bias or other subconscious mechanisms, this person reveals discriminatory preferences in his or her choices.[25] The empirical and experimental evidence for this type of bias is substantial and increasing.[26] Disparate impact theory aimed at implicit bias is designed to encourage debiasing policies or, more problematically, to punish the unconscious offender.[27]

The third is the institutional discriminator.[28] Like the ignorant discriminator, this person does not consciously make a discriminatory decision. But unlike the ignorant discriminator, the decision need not be the product of individual implicit bias; it could be that the architecture for choice—"the known world" as it were[29]—does not permit any decision but the discriminatory one.[30] The institutional discriminator, in the language of Ian Haney López, is simply following a "script" or a "path" in which the alternative is literally inconceivable.[31] There is no ontological alternative, in part because the persons who may inhabit this alternative are never "seen."[32] Here, disparate impact theory is designed to make the invisible person visible, to uncover alternatives, to demonstrate that the

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25. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 ("Recognition of disparate-impact liability . . . permits plaintiffs to counteract unconscious prejudices and disguised animus . . . ."); Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2160 (2013); Siegel, *supra* note 12, at 657.

26. *See, e.g.*, Cheryl Staats, *State of the Science: Implicit Bias Review 2014*, 2014 KIRWAN INST. FOR STUDY RACE & ETHNICITY, *available at* http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf (compiling studies). *But cf.* Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006) (criticizing some of the methods and conclusions of implicit bias studies).

27. *See* Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67, 67 (2010) (raising concerns about implicit bias as a source of liability).

28. Professor Siegel refers to this as "structural discrimination." Siegel, *supra* note 12, at 657.

29. *Cf.* EDWARD P. JONES, THE KNOWN WORLD (2003) (providing a fictional account of black slaveholders in a fictitious Virginia county).

30. *See* Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1808 (2000) ("A racial institution is any understanding of race that has come to be so widely shared within a community that it operates as an unexamined cognitive resource for understanding one's self, others, and the-way-the-world-is."); *see also* Darrell A.H. Miller, *Racial Cartels and the Thirteenth Amendment Enforcement Power*, 100 KY. L.J. 23, 33 (2012).

31. López, s*upra* note 30, at 1781–83.

32. Some preliminary experimental data suggests that when White females are primed for interpersonal goals (romantic partner, friend, neighbor, coworker) and then given a visual awareness task, they were more likely to overlook African-American males than White males on a diminishing scale based on the personalness of the goal. By contrast, when there is no priming, African-Americans were marginally more likely to be seen, the hypothesis being that they become salient as a threat. Jazmin L. Brown-Iannuzzi et al., *The Invisible Man: Interpersonal Goals Moderate Inattentional Blindness to African Americans*, 143 J. EXPERIMENTAL PSYCHOL.: GEN. 33 (2013).

frames in which choice take place are not the only frames available to show that there are, in fact, other worlds.[33]

Empathy, or rather its deficit, helps explain the persistence of all three types of disparate impact. But for my purposes, empathy is especially pertinent to the problem of the ignorant and the institutional discriminator. Empathy has become a significant topic of scholarly investigation among sociologists, behavioral economists, cognitive scientists, and (more recently) legal scholars. Although researchers define empathy in various ways,[34] I follow those who define empathy to mean "perspective taking": the cognitive ability to understand another person's emotions and motivations.[35] This type of empathy can, but need not, lead to sympathy or altruism.[36] For my purposes, empathy is epistemic but not necessarily relational.[37]

For the ignorant discriminator, the decisionmaker may not accurately assess the disutility suffered by the person discriminated against. In a provocative set of experiments, researchers have demonstrated that people perceive the pain of a person of another race differently than a person of their own race.[38] Further, Blacks are perceived as experiencing less pain than Whites by all persons.[39] However, the reasons for this perception are still being investigated.[40] One theory is that "intergroup empathy gaps" are the product of perceptions about whether the person belongs within or without the perceiver's racial group. A potentially confounding theory is that perception of Black pain is reduced because Blacks are assumed to be of a lesser economic status.[41] Because they are of a lesser status, perceivers assume Black lives to be harder overall and, as such,

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33. López, s*upra* note 30, at 1781–83.

34. *See* Frederique de Vignemont & Tania Singer, *The Empathetic Brain: How, When and Why?*, 10 TRENDS COGNITIVE SCI. 435, 435 (2006).

35. *See id.* (identifying one concept of empathy as "perspective-taking").

36. *See id.*; *see also* Stephanie D. Preston & Frans B. M. de Waal, *Empathy: Its Ultimate and Proximate Bases*, 25 BEHAV. & BRAIN SCI. 1, 4 tbl.2 (2002); Darrell A.H. Miller, Iqbal *and Empathy*, 78 UMKC L. REV. 999, 1009 (2010).

37. Lauren Wispé, *The Distinction Between Sympathy and Empathy: To Call Forth a Concept, a Word Is Needed*, 50 J. PERSONALITY & SOC. PSYCHOL. 314, 318 (1986) (distinguishing between empathy, which is "knowing," and sympathy, which is "relating").

38. *See, e.g.*, Alessio Avenanti, Angela Sirigu & Salvatore M. Aglioti, *Racial Bias Reduces Empathetic Sensorimotor Resonance with Other-Race Pain*, 20 CURRENT BIOLOGY 1018 (2010); Luis Sebastian Contreras-Huerta et al., *Racial Bias in Neural Empathic Responses to Pain*, PLOS ONE, Dec. 23, 2013, at 1; Matteo Forgiarini, Marcello Gallucci & Angelo Maravita, *Racism and the Empathy for Pain on Our Skin*, FRONTIERS PSYCHOL. (May 23, 2011), journal.frontiersin.org/article/10.3389/fpsyg.2011.00108/full; Sophie Trawalter, Kelly M. Hoffman & Adam Waytz, *Racial Bias in Perceptions of Others' Pain*, PLOS ONE, Nov. 14, 2012, at 1.

39. *See* Trawalter, Hoffman & Waytz, *supra* note 38.

40. *See id.*; *see also* Sophie Trawalter & Kelly M. Hoffman, *Got Pain? Racial Bias in Perceptions of Pain*, 9 SOC. & PERSONALITY PSYCHOL. COMPASS 146 (2015).

41. Trawalter, Hoffman & Waytz, *supra* note 38, at 5.

assume Blacks to experience pain to a lesser degree than persons of higher economic status, who have easier lives and tend to be White.[42]

For the institutional discriminator, the lack of empathy may simply make the person blind to alternative ways to construct choice. The problem could be based on lock-in effects that arise from the costs of switching, as Daria Roithmayr has extensively studied.[43] But the problem could also be that the cost-benefit analysis never comes into play because no one ever investigates, or even imagines, the predicates for such an analysis. For example, a generation of women received treatment for heart disease based on studies conducted primarily on men.[44]

I do not mean to suggest that disparate impact can be entirely eliminated. Disparate impact is inevitable because people must make decisions: firefighters must be hired, police must be dispatched, traffic lights must be installed, and tax dollars must be collected and spent.[45] No individual or group has the cognitive capacity to calculate every utility function for every person generated by every decision.[46] A choice to hold class at eight in the morning is going to disadvantage those who need to sleep until ten. But disparate impact as a legal doctrine and as a normative claim does not concern the impacts on everyone: disparate impact concerns the effects on those who are consistently under regarded, who have less access to mechanisms to ensure their concerns are heard, and for whom the Constitution has been amended to address that systematic lack of concern.[47] How the history of slavery, Reconstruction, and Thirteenth Amendment fits into this picture is the subject of Part II.

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42. *Id.* at 5, 7.

43. *See* Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y & L. 197, 231–36 (2004). *See generally* DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE (2014).

44. *See* Press Release, U.S. Dep't of Health & Human Servs., Lack of Studies on Women Limits Usefulness of Research on Coronary Heart Disease (July 10, 2003), *available at* http://archive.ahrq.gov/news/press/pr2003/chdwmpr.htm ("[M]any of the tests and therapies that are used to treat women for [coronary heart disease] are based on studies conducted predominantly in men."); *see also* 151 CONG. REC. S2273 (2005) (statement of Sen. Snowe) (noting that physicians assumed that aspirin's heart-protective effects on men applied equally to women).

45. *Cf.* Roger Clegg, *Silver Linings Playbook: "Disparate Impact" and the Fair Housing Act*, *in* CATO SUPREME COURT REVIEW: 2014–2015, at 165, 174 (Ilya Shapiro ed., 2015) ("There is probably *no* selection or sorting criterion that doesn't have a disparate impact on some group or subgroup.").

46. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 214–15 (1995) (discussing limits on human ability to make decisions that lead to optimal outcomes).

47. *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1177 (6th ed. 2014).

II. SLAVERY AND EMPATHY DEFICITS: EMANCIPATION, EMIGRATION, AND INVISIBLE HANDS

Making the Black body disappear once its service was no longer required or compelled was a fantasy of antebellum politics—both North and South.[48] For example, Thomas Jefferson, in his *Notes on the State of Virginia*, dreamed of gradual emancipation followed by colonization of the former slaves "to such place as the circumstances of the time should render most proper."[49] Many southern states required manumitted former slaves to leave the state or face fine or reenslavement.[50] Abraham Lincoln admitted that his "first impulse" to address slavery in America was to "free all the slaves, and send them to Liberia."[51] In 1862, a draft bill from the Congress's Select Committee on Emancipation and Colonization planned gradual emancipation in the Border States; it proposed twenty million dollars "for the purpose of deporting, colonizing, and settling the slaves so emancipated . . . in some state, territory, or dominion beyond the limits of the United States."[52] An antebellum opponent of slavery, Orestes Brownson, believed that colonization was the best future for the emancipated because the "mutually instinctive aversion to intermarriage" between Blacks and Whites meant there was no hope of forming a multiracial post-war society.[53] This was because "marriage is the basis of the family, and the family is the basis of general society; when therefore the different races or varieties are separated by too broad an interval for the family union, it is clear that they cannot form one and the same society."[54] In other words, because it was impossible for Whites to

48. *See* GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA 86 (2006) (observing that Whites from both the North and the South "expected the freed slaves to disappear within a generation or two"). Frederick Douglass dramatized this sentiment in his autobiography. *See* FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS: AN AMERICAN SLAVE 47–48 (1849) (describing his grandmother, dying alone and without family, abandoned in a shack, once she had ceased to be of any further economic use).

49. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 144 (1832).

50. Virginia, Florida, North Carolina, Maryland, Tennessee, Texas, and Kentucky had such regulations. *See* Jenny Bourne Wahl, *Legal Constraints on Slave Masters: The Problem of Social Cost*, 41 AM. J. LEGAL HIST. 1, 14 n.46 (1997); *see also* A. Leon Higginbotham, Jr. & F. Michael Higginbotham, *"Yearning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1228 (1993).

51. ABRAHAM LINCOLN, THE PORTABLE ABRAHAM LINCOLN 51 (Andrew Delblanco ed., Penguin Books 2009) (1992).

52. Sandra L. Rierson, *The Thirteenth Amendment as a Model for Revolution*, 35 VT. L. REV. 765, 849 (2011) (quoting H.R. REP. NO. 37-576 § 3, at 32 (1862)).

53. ORESTES AUGUSTUS BROWNSON, *Emancipation and Colonization*, *in* 3 BROWNSON'S QUARTERLY REVIEW 220, 233 (1862).

54. *See id.*; *see also* Rierson, *supra* note 52, at 843.

see Blacks as marriage partners or family members, it was impossible to see them as fellow citizens.[55]

The Thirteenth Amendment opted for a "hard shove" of immediate abolition rather than a "nudge" of gradual emancipation.[56] But the dream that former slaves would simply vanish lingered. There were some ideas of a post-war colonization movement,[57] but as it became clear that no widespread and voluntary Black emigration was likely to materialize, White desire to have the newly emancipated Black body disappear took subtler forms. President Andrew Johnson vetoed the Civil Rights Bill and the Freedmen's Bureau Bill, confident that the invisible hand of the marketplace could resolve the "Negro problem."[58] Market forces would effortlessly readjust the relationship between labor and capital, Blacks and Whites.[59] This notion that there was an ineluctable, unconscious, and normal relationship between labor and capital and between the races was the animating theory of the Waite Court's later Reconstruction cases.[60] By the time the federal troops pulled out of the South as part of the Compromise of 1877, the bile of a mid-century southern malcontent probably expressed the feelings of many White Americans: "Would to God, they (meaning the negroes) were back in Africa, hell, or some other sea-port town, *anywhere* but here."[61]

III. BADGES OF SLAVERY, EMPATHY DEFICITS, AND THE THIRTEENTH AMENDMENT

The Thirteenth Amendment to the United States Constitution states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction[,]" and that "Congress shall have power to enforce this article by appropriate legislation."[62] The Court has not held the Thirteenth Amendment itself prohibits

55. *See* David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L.Q. 213, 230, 236 (2015) (discussing the viewpoints on intermarriage and citizenship of Brownson and his contemporaries); *cf.* Brown-Iannuzzi et al., *supra* note 32, at 33–37 (discussing different perceptions based on whether a person considers a member of another race a potential marriageable partner).

56. *See* Rierson, *supra* 52, at 862 (using these descriptors).

57. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 6 (Francis Parkman Prize ed., History Book Club 2005) (1988).

58. *See* Miller, *supra* note 30, at 38.

59. *Id.*

60. *See* James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank *(1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 393 (2014).

61. H.R. REP. NO. 39-101, at 328 (1866).

62. U.S. CONST. amend. XIII.

disparate impacts.[63] Neither has the Court extended disparate impact theories to the Amendment's most salient enforcement legislation, the Civil Rights Act of 1866.[64] However, the Court has left open the possibility that the Thirteenth Amendment, alone or through congressional legislation under Section Two, could reach some kinds of disparate impacts.[65] The Court has stated that congressional power to enforce the Thirteenth Amendment is not limited to preventing or punishing only involuntary servitude, but is aimed at preventing the reemergence of an institution—American slavery.[66] Congress has the power, therefore, to enact legislation aimed not only at slavery as a labor practice, but also as a racialized institution composed of "badges," "incidents," and "relics."[67]

A "badge" or "incident" of slavery, as George Rutherglen has argued, can be understood as a technical term, referring to the specific legal and political disabilities of slavery.[68] But, as Rutherglen notes, the term "badge" can also be a metonym for the kinds of attitudes or behaviors that were constitutive of slavery as an American institution.[69] These attitudes and behaviors were race-specific in a way that is impossible to ignore. In this sense, the kind of systematic empathy deficit, the invisibility of Black people once their instrumentality is estimated and liquidated, is a consequence of slavery. If that understanding of "badge" is correct, then the ability to legislate under Section Two of the Thirteenth Amendment may support race-conscious disparate impact remedies that tend to confound conventional Commerce Clause and Fourteenth Amendment rationales.[70] Even in the absence of such a legislative exercise, the effort to minimize disparate impact as a relic of slavery can serve as a moral compass with which to orient other types of policy prescriptions.[71]

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63. City of Memphis v. Greene, 451 U.S. 100, 101 (1981).

64. Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982).

65. *Id.* at 389 n.17 ("We need not decide whether the Thirteenth Amendment itself reaches practices with a disproportionate effect as well as those motivated by discriminatory purpose, or indeed whether it accomplished anything more than the abolition of slavery."); *see also Greene*, 451 U.S. at 128–29 ("To decide the narrow constitutional question presented by this record we need not speculate about the sort of impact on a racial group that might be prohibited by the Amendment itself.").

66. *See generally* Darrell A.H. Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 COLUM. L. REV. 1811 (2012).

67. *Id.* at 1813.

68. *See* George A. Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 163 (Alexander Tsesis ed., 2010).

69. *See id.*

70. *See* Zietlow, *supra* note 6, at 288.

71. *See* GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866, at 13 (2013) (noting the "pervasive indirect effects" of the Thirteenth Amendment on civil rights law and political argument).

The relationship between Thirteenth Amendment enforcement and other express and implicit constitutional values is a tense one.[72] Recognizing the capacity of Congress to reach disparate impacts as a badge or relic of slavery does not completely resolve the conflict. However, thinking of empathy deficits as a product of the racialized institution of slavery supplies a new conceptual angle to the problem. Slavery was an institution marked by neglect as much as by intent, and policies designed to prevent its reemergence should be able to reflect that truth.[73]

CONCLUSION

In Charles Black's estimation, the southern caste system sprung from "that most hideous of errors, that *prima materia* of tragedy, the failure to recognize kinship."[74] Failure to recognize—or even to see—minorities in America—minorities *as* America—is a habit of mind that persists one hundred and fifty years after emancipation. It is a habit the Court should let us break.

72. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976) (holding that Section Two enforcement legislation could not be defeated by substantive due process, privacy, or freedom of association concerns in the context of a private school).

73. *See* Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 617 (2012) ("[T]here is no reason to think that the concept of the badges and incidents of slavery contains an intent requirement.").

74. Charles L. Black, Jr., *My World with Louis Armstrong*, 95 YALE L.J. 1595, 1599 (1986).