Class as Caste: The Thirteenth Amendment's Applicability to Class-Based Subordination

William M. Carter, Jr.[*]

CONTENTS

INTRODUCTION

The Thirteenth Amendment currently enjoys a robust renaissance among legal scholars who contend that it provides a judicial remedy for and congressional authority to proscribe the "badges and incidents of slavery."[1] As discussed below, this interpretation, although not self-evident from the Amendment's bare text, is well supported by the Amendment's history and context, the Framers' explicit intentions, the legislative debates in Congress leading to the Amendment's adoption,

[*] Dean and Professor of Law, University of Pittsburgh School of Law.

1. The Thirteenth Amendment's Framers spoke extensively of eliminating the "badges" of slavery and the "incidents" of slavery. *See* Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 570–78 (2012). The unitary phrase "badges and incidents of slavery" is generally traced to the *Civil Rights Cases*. 109 U.S. 3, 20 (1883) (stating that the Thirteenth Amendment authorizes Congress to "pass all laws necessary and proper for abolishing all badges and incidents of slavery").

and the contemporaneous legal understanding of the ways in which the Slave Power that had come to dominate and distort American society.

This Article briefly explores whether the Thirteenth Amendment applies to class-based subordination and concludes that it generally does not, at least not in such broad terms. The Amendment's text, history, context, and intent do not support an interpretation of the Amendment as generally prohibiting discrimination or subordination based on social class distinctions per se that are completely detached from the legacy of chattel slavery or involuntary servitude. Rather, this Article argues, it is only when class-based distinctions are so impermeable and of such magnitude as to transform class into caste, thus constituting a near-total alienation from civil society akin to that characteristic of the system of slavery, that the Thirteenth Amendment would apply.

To be clear from the outset: in arguing that the Thirteenth Amendment does not reach generalized class-based subordination, this Article does not contend that these issues are unimportant. To the contrary, the increasingly rigid class-based stratification of our society,[2] rampant discrimination against the poor,[3] increasing income inequality,[4] and the concentration of enormous wealth in the hands of so few[5] are pressing social challenges that must be addressed, and the legal system has a role in addressing these challenges. This Article argues, however, that the Thirteenth Amendment is not the most appropriate tool to address these

---

2. *See, e.g.*, PABLO A. MITNIK & DAVID B. GRUSKY, PEW CHARITABLE TRUSTS & RUSSELL SAGE FOUND., ECONOMIC MOBILITY IN THE UNITED STATES 9 (2015), *available at* http://www.pewtrusts.org/~/media/assets/2015/07/economicmobilityintheunitedstates.pdf?la=en; Bernice Lott, *The Social Psychology of Class and Classism*, 67 AM. PSYCHOLOGIST 650, 650 (2012); Michael Hout, *How Class Works in Popular Conception: Most Americans Identify with the Class Their Income, Occupation, and Education Implies for Them* 3 (Univ. of Cal., Berkeley Survey Research Ctr., 2007), *available at* http://ucdata.berkeley.edu/rsfcensus/papers/Hout-ClassIDJan07.pdf.

3. *See, e.g.*, Heather Bullock, *Justifying Inequality: A Social Psychological Analysis of Beliefs About Poverty and the Poor* 2 (Nat'l Poverty Ctr., Working Paper No. 06-08, 2006), *available at* http://www.npc.umich.edu/publications/workingpaper06/paper08/working_paper06-08.pdf; *Discrimination, Inequality, and Poverty—A Human Rights Perspective*, HUMAN RIGHTS WATCH (Jan. 11, 2013), https://www.hrw.org/news/2013/01/11/discrimination-inequality-and-poverty-human-rights-perspective.

4. Jonathan Fisher, Jeffrey Thompson & Timothy Smeeding, *Income Inequality*, PATHWAYS, Special Issue 2015, at 22, 22, *available at* https://web.stanford.edu/group/scspi/sotu/SOTU_2015.pdf; Janet C. Gornick & Branko Milanovic, *Income Inequality in the United States in Cross-National Perspective: Redistribution Revisited* 3 (Lux. Income Study Ctr., 2015), *available at* https://www.gc.cuny.edu/CUNY_GC/media/CUNY-Graduate-Center/PDF/Centers/LIS/LIS-Center-Research-Brief-1-2015.pdf; MARK MATHER & BETH JAROSZ, POPULATION REFERENCE BUREAU, POPULATION BULLETIN: THE DEMOGRAPHY OF INEQUALITY IN THE UNITED STATES 3 (2014), *available at* http://www.prb.org/pdf14/united-states-inequality.pdf.

5. *See, e.g.*, CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2014, at 8 (2015).

challenges because subordination or discrimination based on class or poverty does not, at a generalized level, amount to a badge or incident of slavery. Moreover, the Thirteenth Amendment's intent, context, and history make clear that its Framers *were* concerned with specific forms of class-based subordination connected with or arising out of the system of slavery: examples of such subordination include the de jure or de facto economic subjugation of laborers via the extraction of their uncompensated labor through state or private action, the creation of conditions that effectively prohibited laborers' free choice of their employer and working conditions, and the maintenance of a labor system wherein the compensation and conditions of certain groups of workers were artificially suppressed through the exploitation of an even less empowered group of workers (i.e., slaves). In sum, this Article's skepticism regarding whether the Thirteenth Amendment can be fairly construed to prohibit class-based subordination is limited to class-based subordination in its broadest form, not in its particulars.

Regardless of whether the Thirteenth Amendment *could* be fairly construed to prohibit class-based subordination in general (which this Article argues against) or in the particulars (which very well may be the case, as discussed above), there is currently very little reason to believe that the Amendment *will* be so construed by the courts and policymakers charged with interpreting and enforcing it. As discussed in Part II.C, *infra*, there are significant reasons to be highly skeptical that the doctrinal groundwork has yet been laid for such a theory of the Thirteenth Amendment to take root; the federal courts (in particular, the Supreme Court) are therefore exceedingly unlikely to extend current doctrine in a single leap in order to incorporate such a theory.

After describing a defensible theoretical frame for when the Thirteenth Amendment's command to rid the country of the vestiges of the slave system applies to class-based subordination, this Article concludes by briefly sketching the outline of one such scenario: the insurmountable caste system created by mass incarceration. This caste system is created by the interlocking and mutually reinforcing effects of mass incarceration, such as felony disenfranchisement, barriers to employment, and widespread reincarceration due to inability to pay fines. These effects result in the near-complete alienation of former prisoners (particularly persons of color) from civil society.

I. THE THIRTEENTH AMENDMENT'S CURRENT SCOPE AND APPLICABILITY

A. The Thirteenth Amendment's History and Context

The Thirteenth Amendment was the culmination of a decades-long campaign by social movement and political actors to abolish slavery in the United States.[6] It was also in significant part a reaction to the specific cultural, legal, political, and economic structures that supported slavery or developed because of it. Understanding the Thirteenth Amendment therefore requires understanding the system of slavery the Amendment was designed to abolish and the forces its Framers were reacting against. Although a comprehensive examination of the nature of slavery and abolition is obviously beyond the scope of this Article, it is nonetheless worthwhile to review briefly the contemporaneous context in which the Amendment was adopted with an eye toward discerning the legal, historical, and social structures it was designed to abolish along with abolishing slavery itself.

Initially, slavery in the "new world" colonies followed the then-prevalent model of time-limited indentures or uncompensated labor for a finite (albeit often very lengthy) term of years.[7] As American slavery evolved in response to changing social and economic needs,[8] however, it became a system of perpetual, inheritable, race-based subjugation, under which the slaves were treated as property, and all blacks, even if free, were subject to the same stigmatization. The American slave regime, which existed as a matter of law for approximately 250 years,[9]

---

6. *See* Alexander Tsesis, *Introduction: The Thirteenth Amendment's Revolutionary Aims*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 6–12 (Alexander Tsesis ed., 2010) (tracing the history of abolitionism and its influence upon the Thirteenth Amendment); WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 15–16 (1977) (same).

7. Paul Finkelman, *Slavery in the United States: Persons or Property?*, *in* THE LEGAL UNDERSTANDING OF SLAVERY 105, 107 (Jean Allain ed., 2012) ("The first Africans in Virginia were treated as indentured servants, held for a term of years, and then eligible for freedom.").

8. *See generally id.* (describing the evolution of African slavery in the United States and how the laws and norms governing slavery changed in response to differing social and economic imperatives over time, for example: increasing slave populations in Southern states that were argued to justify more brutal control over the slaves, the greater fear of domestic slave rebellions as slave populations increased, the examples of successful slave rebellions abroad (as in Haiti), increasing dependence of southern economies upon slave labor and the concomitant fear that those economies would collapse without slave labor, and rising abolitionist sentiment over time in the North in favor of immediate emancipation rather than the gradualism that had previously prevailed).

9. The American institution of legalized chattel slavery is generally dated as beginning in 1619 with the sale of twenty enslaved Africans to British colonialists in North America. *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 20 (1978) (discussing the legal status of blacks in 1619 Jamestown). It is worth remembering that the history of legal enslavement has to date lasted a full century longer than the

both depended upon and gave rise to several mutually reinforcing legal, social, political, religious, and economic justifications and conditions. As is well known, the legal system formally legitimized the institution of slavery by defining slaves as "property" and by protecting the interests of slave owners in that property.[10] The legal system also further dehumanized blacks in a myriad of other ways, denying them the civil rights to which they would presumably be entitled were they considered to be full human beings and citizens of the United States.[11] Such denial of legal rights and civil status to both slaves and free blacks initially served primarily instrumental purposes, including: giving the owner the legal right to profit from the slave's labor without providing compensation; permitting and immunizing from prosecution or civil recourse the violence and coercion necessary to compel such labor; granting the master the legal right to purchase, lease, leverage, and dispose of slaves (and their children) without even the rudimentary labor protections afforded to non-slaves at the time; and, as with other chattel, giving the owner the legal right to dispose of it when its utility had ended.[12]

As slavery became fully entrenched, several factors became perceived as real threats to the economic and social order of the slaveholding South. Those factors included the growing black populations in slaveholding states, the concomitant fear of slave rebellions, and the abolitionist movement— which was tentative at first, then expressed with increasing vigor and virulence. Slavery thus became an ideological battle, and law and custom evolved in defense of slavery. Thus, while the panoply of laws and customs discussed above continued to serve their original instrumental purposes, they also served the expressive purpose of dehumanizing slaves (and by extension, all blacks) as completely un-

---

history of freedom from bondage (i.e., 1619 to the Thirteenth Amendment's ratification in 1865, versus 1865 to the present day).

10. *See, e.g.*, Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 646 (1842) (holding that the Fugitive Slave Act was a valid exercise of Congress's power to enforce constitutional rights—specifically, "property" rights of slave owners to recapture escaped slaves).

11. For example, slaves (and free blacks in most states) were denied "the rights to enforce contracts, sue, give evidence in court, inherit, and purchase, lease, hold, and convey real property." ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM 45 (2004) (citing CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (statement of Rep. Thayer)). They were also denied parental and familial rights, deprived of personal liberty, and denied the ability to receive an education. *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, 1324, nn.33–34 (2007) and accompanying text.

12. *See generally* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY (1982) (describing the instrumental features of the American slave system).

deserving of either civil rights or moral empathy.[13] This expressive function was important in relieving the tension always inherent in American slavery, that "a nation conceived in liberty and dedicated to equal rights happened also to be the nation, by the mid-nineteenth century, with the largest number of slaves in the Western Hemisphere."[14] Such potential social dissonance was lessened by the "othering" and dehumanization of the enslaved. If slaves (and as a corollary, all blacks) were presumed to be less than fully human, then *a fortiori* they were not entitled to the natural rights and freedoms—including freedom from bondage—that all human beings were presumed to possess. In sum, "the system of slavery depended not only upon the coercive power to deny freedom and equality to blacks but also to a significant degree upon the expressive power of law and custom to deny the validity of the *idea* of black freedom and equality."[15]

In addition to reconciling the ideal of liberty for all with the reality of the brutal enslavement of some, the American legal system abetted the system of slavery in numerous specific ways. The law provided a matrix of slavery-supporting structures by, for example, criminalizing certain conduct only when engaged in by blacks;[16] permitting warrantless searches, seizures, and arrests without cause or on the merest pretext;[17]

---

13. Thus, "any judicial protection of the slave would trigger further challenges to the legitimacy of the dehumanized status of blacks and slaves" because viewing slaves as rights-holders would erode the view that they were less than full human beings. HIGGINBOTHAM, JR., *supra* note 9, at 8.

14. David Brion Davis, *Foreword: The Rocky Road to Freedom—Crucial Barriers to Abolition in the Antebellum Years*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT xi, xvi (Alexander Tsesis ed., 2010).

15. William M. Carter, Jr., *The Thirteenth Amendment and Pro-Equality Speech*, 112 COLUM. L. REV. 1855, 1859 (2012).

16. Under the Slave Codes, the defendant's race was explicitly stated as a determinative element of various crimes. In Virginia, for example, "[s]laves could receive the death penalty for at least sixty-eight offenses, whereas for whites the same conduct was either at most punishable by imprisonment or was not a crime at all." A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 977 (1992). Notably, the pervasive conflation of blackness with a presumption of criminality also had the corollary effect of placing whites in constant fear of blacks, thereby making whites more willing to accept black subjugation in the name of white safety. William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 68–69 (2004) ("Th[e] myth of innate black immorality and criminality significantly aided the dehumanization of African Americans in the collective white mind. If all blacks were innate savages, not only were they less than human and therefore fit to be enslaved, but white guilt was also lessened by appealing to white fear as a justification for black enslavement."); WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812, at 109–10 (W. W. Norton & Co. 1977) (1968) (noting that the preamble to the South Carolina Slave Code specifically sought to justify the slave code as necessary to "tend[ing] to the safety and security of the [white] people of this Province and their estates.").

17. *See* Carter, *supra* note 16, at 64 and authorities cited therein (discussing slave code provisions and law enforcement practices authorizing race-based searches, seizures, and arrests without individual suspicion and without judicial process).

restricting freedom of movement through, *inter alia*, requiring that slaves have and display a pass from the master when unaccompanied by a white person;[18] prohibiting the education of slaves;[19] prohibiting civil marriages;[20] prohibiting slaves (and in many states, free blacks) from owning property or forming binding contracts;[21] and, of course, denying the fundamental rights of citizenship, including the rights to vote, to due process, to free speech, and to be judged by a jury of one's peers.[22]

The Framers designed the Thirteenth Amendment to eliminate this racial caste-based alienation from civil society and also to eliminate the supporting laws and customs enforcing it.[23] These laws and customs were not merely instances of unequal treatment imposed solely through the ill intent of discrete actors. Rather, the "Slave Power," as it became known, was understood to be systemic and deeply interwoven into the fabric of American society.[24] Slavery, under this view, had become "the master of the Government and the people";[25] conversely, then, the "death

18. *See id.* at 63 and authorities cited therein (describing the pass requirements of various slave codes).

19. *See* WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS 319–23 (Negro Univ. Press 1968) (1853) (surveying the various legal penalties for violating laws prohibiting educating slaves).

20. *See, e.g.*, LA. CIV. CODE art. 182 (De St. Romes 1825). *See generally* Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299 (2006).

21. *See, e.g.*, ALA. CODE § 1018 (Brittan and DeWolf 1852); LA. CIV. CODE art. 174 (De St. Romes 1825).

22. For examples of provisions limiting voting to white males at least 21 years of age, see, for example, MD. CONST. of 1776, art. II; N.C. CONST. of 1776, arts. VII, VIII; VA. CONST. of 1830, art. III, § 14. *See also* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 316–20 (rev. ed. 2000). For an example of free speech limitations, see GA. CODE ch. XXXIV, art. 16 (Trow 1845) (restricting persons of color from preaching or exhorting without a license). With regard to jury trial rights, see, for example, GA. CODE ch. XXXIV, art. 27 (Trow 1845); TENN. CODE pt. III, tit. 4, ch. 5, art. II, § 4002 and pt. II, tit. 5, ch. 3, art. IV, § 2633 (Eastman 1858) (limiting jury service to whites).

23. For example, Senator Henry Wilson of Massachusetts, one of the Thirteenth Amendment's most forceful advocates in Congress, argued during the Thirteenth Amendment debates that the Amendment was designed to "obliterate the last lingering vestiges of the slave system; its chattelizing [sic], degrading, and bloody codes; its dark, malignant, barbarizing spirit; all it was and is, everything connected with it or pertaining to it." CONG. GLOBE, 38th Cong., 1st Sess. 1199, 1319, 1321, 1324 (1864).

24. "The idea of a southern 'Slave Power' that dominated national politics . . . emerged in the 1830's and became part of the nation's political discourse in the years leading up to the Civil War." Sandra L. Rierson, *The Thirteenth Amendment as a Model for Revolution*, 35 VT. L. REV. 765, 801 (2011). Indeed, Senator (and later Vice President) Henry Wilson's three-volume treatise surveying slavery and slavery's destruction was entitled the "History of the Rise and Fall of the Slave Power in America." *See* HENRY WILSON, HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA (Samuel Hunt ed., 1872).

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

of slavery [would be] the life of the Nation."[26] By the 1850s, what had been clear to the enslaved since the Founding had finally become clear to both the mainstream and more radical Republicans: that the Constitution's compromise with slavery had failed. These Republicans became the driving force behind the Thirteenth Amendment. The series of political and constitutional crises[27] that accelerated the path to war revealed in stark relief that the still-young nation could not endure "permanently half slave and half free. . . . It [would] become *all* one thing, or *all* the other."[28] The Thirteenth Amendment constitutionalized the practical end result of the Civil War: that the Slave Power would no longer rule the nation; that the maintenance of a permanent racial caste system would no longer be abetted or condoned by law; and that the badges and incidents of slavery would be abolished along with slavery itself.

B. The Thirteenth Amendment's Framers and Their Understanding of the Relationship Between Slavery, Race, and "Class"

The Thirteenth Amendment's Framers expressed little explicit concern during the framing debates regarding class *qua* class. This is unsurprising for several reasons. First, our contemporary language regarding "class" had not at the time of the Thirteenth Amendment debates truly entered the American jurisprudential, philosophical, ideological, or lay lexicons.[29] Second, the urgent issue was slavery and the consequences thereof, not social class in the way we think of it today.[30] Third, the incidents of slavery that the Framers did discuss and that do relate to what we conceive of today as class issues were generally discussed as *consequences* of slavery rather than as independent targets of the Thirteenth Amendment. For example, the depression of working-class whites' wages due to competing unpaid slave labor was discussed at some length in the framing debates as one of the many damaging consequences of the Slave Power; but it was slavery itself, rather than the low wages availa-

---

26. *Id.* at 1319.

27. *See* William M. Carter, Jr., *The Thirteenth Amendment and Constitutional Change*, 38 N.Y.U. REV. L. & SOC. CHANGE 583, 585 nn.6–7 (2014) (describing how the Kansas-Nebraska dispute regarding extension of slavery into the frontier territories and the Supreme Court's decision in *Dred Scott* sharpened the divisions that ultimately led to war).

28. Abraham Lincoln, Address at the Republican State Convention (June 16, 1898), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461 (Roy P. Basler ed., 1953) (emphasis in original).

29. *See, e.g.*, SOCIAL CLASS AND STRATIFICATION: CLASSIC STATEMENTS AND THEORETICAL DEBATES 2, 4 (Rhonda F. Levine ed., 1998); DENNIS GILBERT & JOSEPH A. KAHL, THE AMERICAN CLASS STRUCTURE 4, 8 (3d ed. 1987).

30. Indeed, slavery and its consequences, in the minds of the Framers and many members of the public on both sides of the debate, was an existential issue for the survival of the Nation.

ble to nonslave laborers, that was viewed as the condition to be addressed by the Thirteenth Amendment.[31]

Although the framing debates do not directly address class issues, they do, however, reveal an understanding of slavery as a system that permanently demarcated social class by race. The Framers conceptualized slavery as establishing a racial caste system for both slaves and free blacks. Justice Harlan provided the most familiar (albeit retrospective) recitation of the Framers' views in this regard in his *Plessy v. Ferguson*[32] dissent:

> [I]n view of the [C]onstitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our [C]onstitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.
>
> . . . .
>
> It was adjudged in [*Dred Scott*] that the descendants of Africans who were imported into this country, and sold as slaves, were not included nor intended to be included under the word 'citizens' in the [C]onstitution . . . and, whether emancipated or not . . . had no rights or privileges but such as those who held the power and the government might choose to grant them. The recent amendments of the [C]onstitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the states, a dominant race,-a superior class of citizens,-which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race.[33]

---

31. For example, Representative Ingersoll of Illinois stated during the Thirteenth Amendment debates that the Amendment would apply to "the seven millions of poor white people who live in the slave States but who have ever been deprived of the blessings of manhood by reason of . . . slavery," presumably by virtue of the unpaid labor pool that slavery provided, which drove down the wages of the white laboring class and made labor seem dishonorable. CONG. GLOBE, 38th Cong., 1st Sess. 2989, 2990 (1864). Similarly, Representative Wilson of Iowa argued during the debates that "the poor white man" had been "impoverished, debased, dishonored by the system that makes toil a badge of disgrace." *See* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 10 (1995) (citing CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864)). Moreover, some early judicial decisions construing the Thirteenth Amendment interpreted it as applying beyond the freedmen, at least in principle. *See, e.g.*, United States v. Rhodes, 27 F. Cas. 785, 793 (C.C.D. Ky. 1866) (No. 16,151), *cited in* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 901 (1986) (stating, in finding the Civil Rights Act of 1866 to be constitutional under the Thirteenth Amendment, that the Amendment "throws its protection over every one, of every race, color, and condition").

32. 163 U.S. 537 (1896).

33. *Id.* at 559–60 (citation omitted).

Justice Harlan's dissent may be of somewhat limited value as an exercise in pure history in discerning how the Framers actually viewed issues of class through the prism of the Thirteenth Amendment. Among other reasons, his dissent was not written contemporaneously with the framing experience and therefore may suffer from both presentism and inaccuracy; moreover, it was, like much historical information that is cited in the context of litigation, history deployed for instrumental purposes rather than history *qua* history. As a jurisprudential matter, however, Justice Harlan's summary of the Framers' views of slavery as creating a race-based caste system can be a useful starting point for Thirteenth Amendment interpretation. Reviewing the original source material (i.e., the Thirteenth Amendment debates) reveals that Justice Harlan's account of this issue is consistent with the views the Framers expressed.[34] It is also consistent with the actual American experience of slavery. For example, if slavery were separable from notions of permanence and impermeability characterizing racial caste norms, then one would expect that the legal disabilities, discrimination, and stigmatization associated therewith would have been limited to those blacks who were actually enslaved. Former slaves and the free black descendants of slaves would not have been subjected to the same legal and social subordination as slaves if slavery were merely about servitude, as opposed to being equally about racial caste and white supremacy. As a simple example, the "one-drop rule"[35] would have made little sense were it not for the racial caste conception of slavery: a racial caste is (conceptually) something that is inheritable via lineal descent; a labor status is not.

C. The Thirteenth Amendment as Applied by the Courts and Congress

Notwithstanding the history and context described in Sections A and B, *supra*, the Thirteenth Amendment's full potential scope remains under-realized. The Amendment's goal of empowering the federal government to proscribe and remediate the vestiges of slavery has not been matched by the scope of its application in the courts and in Congress. In the area of racial discrimination, Congress has not since the Reconstruction era relied upon the Thirteenth Amendment to enact civil rights legis-

34. For example, Senator Henderson of Missouri stated, "I will not be intimidated by the fears of negro equality. The negro may possess mental qualities entitling him to a position beyond our present belief. If so, I shall put no obstacle in the way of his elevation. There is nothing in me that despises merit or envies its rewards." CONG. GLOBE, 38th Cong., 1st Sess. 1463, 1465 (1864).

35. The "one-drop" rule was the legal conception that any cognizable fractional percentage of black lineal descent defined an individual as being on the black side of the legal, social, and cultural color lines, the corollary being that "purity" of a white bloodline was a requirement in order to qualify as white and obtain the benefits associated therewith. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1737 (1993).

lation.[36] Moreover, cases where courts have rejected litigants' claims based upon the badges and incidents of slavery theory of the Thirteenth Amendment itself are legion,[37] while cases accepting that theory are few and far between.[38] The track record regarding assertions that nonracial subordination amounts to a badge or incident of slavery is equally dismal. Research for this Article reveals exactly one federal statute since Reconstruction enacted pursuant to Congress's Thirteenth Amendment power to proscribe the badges and incidents of slavery as to nonracial classes,[39] no cases where litigants have actually succeeded in pressing

36. During Reconstruction, Congress exercised its power under the Thirteenth Amendment's Enforcement Clause to enact several civil rights statutes prohibiting what Congress believed to be badges or incidents of slavery. 42 U.S.C. § 1981 (2012) (protecting the equal rights of all citizens to make and enforce contracts), 42 U.S.C. § 1982 (protecting equal rights to buy, sell and lease property), 42 U.S.C. § 1983 (providing civil action for deprivation of rights), and 42 U.S.C. §§ 1987–1991 (describing federal proceedings for enforcing civil rights) were all originally enacted as part of the Civil Rights Act of 1866, 14 Stat. 27. 42 U.S.C. § 1994 (prohibiting peonage) was originally enacted as part of the Peonage Abolition Act of 1867, 14 Stat. 546. 42 U.S.C. § 1985(3) (providing criminal penalties and civil liability for conspiracies to violate civil rights) was originally enacted as part of the Civil Rights Act of 1871, Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13.

37. I am speaking here of cases alleging constitutional claims directly under Section 1 of the Amendment, rather than under a statute enacted pursuant to Section 2 of the Amendment whereby Congress has defined the complained-of injury as a badge or incident of slavery. For further discussion, see, for example, Carter, *supra* note 11, at 1339–55.

38. Lower court cases rejecting badges and incidents of slavery claims include NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990); Wong v. Stripling, 881 F.2d 200 (5th Cir. 1989); Washington v. Finlay, 664 F.2d 913 (4th Cir. 1981); Alma Soc'y Inc. v. Mellon, 601 F.2d 1225 (2d Cir. 1979); Adams v. N.Y. State Educ. Dep't, 752 F. Supp. 2d 420 (S.D.N.Y. 2010); Keithly v. Univ. of Tex. Sw. Med. Ctr., 2003 WL 22862798, No. Civ.A. 303CV0452L (N.D. Tex., Nov. 18, 2003); Crenshaw v. City of Defuniak Springs, 891 F. Supp. 1548, 1556 (N.D. Fla. 1995); Sanders v. A.J. Canfield Co., 635 F. Supp. 85 (N.D. Ill. 1986); Atta v. Sun Co., 596 F. Supp. 103 (E.D. Pa. 1984); Davidson v. Yeshiva Univ., 555 F. Supp. 75 (S.D.N.Y. 1982); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981); Lopez v. Sears, Roebuck & Co., 493 F. Supp. 801 (D. Md. 1980). Indeed, at least two courts have found that asserting that the Thirteenth Amendment provides a direct cause of action for the badges or incidents of slavery is so fanciful as to be frivolous under Rule 11 of the Federal Rules of Civil Procedure. *See Adams*, 752 F. Supp. 2d at 426; *Sanders*, 635 F. Supp. at 87. The only case that (admittedly noncomprehensive) research for this Article revealed wherein a court has accepted such a badges and incidents of slavery claim is Vann v. Kempthorne, 467 F. Supp. 2d 56 (D.D.C. 2006). The court there found that a Thirteenth Amendment claim could be brought against the Cherokee Nation, notwithstanding its sovereign immunity. *Id.* at 67. Even *Vann*, however, is at least implicitly based upon the overlay of congressional approval for allowing the badges and incidents of slavery claim to proceed, rather than acceptance that the self-executing core of Section 1 itself provides redress for the badges and incidents of slavery. In *Vann*, the court found that Congress, in enacting the Treaty of 1866, "incorporated the principles of the Thirteenth Amendment and the Civil Rights Act of 1866" into the Treaty and thereby made Thirteenth Amendment rights (including the right to be free from the badges and incidents of slavery) applicable to the Cherokee Nation. *Id.* at 68. Moreover, the district court's holding that the treaty abrogated the tribe's sovereign immunity was reversed on appeal. Vann v. Kempthorne, 534 F.3d 741 (D.C. Cir. 2008) (leaving undisturbed, however, the finding that the Thirteenth Amendment claim (and other claims) could proceed against individual tribal officers, notwithstanding the immunity of the tribe as sovereign).

39. Since Reconstruction, the only federal statute this author can identify as being based explicitly upon Congress's power under Section 2 of the Thirteenth Amendment is the Matthew Shep-

claims that the Thirteenth Amendment itself provides a remedy for nonracial discrimination, and only one Supreme Court case that even examines in passing (in brief *dictum*) whether the badges and incidents of slavery encompasses class-based discrimination.[40]

The near-total absence of federal legislation addressing nonracial discrimination under the Thirteenth Amendment together with litigants' lack of success in pressing such claims, is not, of course, conclusive proof that the Thirteenth Amendment cannot be fairly interpreted to prohibit class-based subordination. The absence of developments in this direction in the case law and the legislative process does indicate, however, that neither the courts nor Congress are currently likely to embrace the Amendment as applicable to class-based subordination. I have long been skeptical that, as a practical matter, courts would embrace such a theory.[41] That skepticism has only increased over time, given that constitutional equality doctrine has generally grown only more cabined and cramped as time has progressed.

Moreover, it is fair to say that the Thirteenth Amendment's self-executing applicability remains less than completely secure, even in its applicability to race-based injuries clearly linked to slavery.[42] Indeed, recent federal hate crimes legislation wherein Congress has explicitly exercised its Section 2 power to define a condition as a badge or incident of slavery is now being questioned in light of recent Supreme Court decisions limiting the scope of Congress's power to enforce the other Reconstruction Amendments.[43] My overarching point is that I am cautious

---

ard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111–84, div. E., § 4702(7), 123 Stat. 2190, 2835 (2009) (codified at 18 U.S.C. § 249 (2012)), which, *inter alia*, extended federal hate crimes law to cover attacks based upon sexual orientation.

40. In Griffin v. Breckenridge, 403 U.S. 88 (1971), the Court held that a violation of 42 U.S.C. § 1985(3) (2012), originally enacted as part of the Civil Rights Act of 1866 and based upon the Thirteenth Amendment, requires proof of "some racial, or *perhaps otherwise class-based*, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102 (emphasis added). The emphasized portion is *dictum* because *Griffin* itself involved racial discrimination, not "class." In any event, the Court's brief statement is far too conditional and undefined to present the basis for a robust theory of the discrimination based on social class as a badge or incident of slavery.

41. *See* Carter, *supra* note 11, at 1355–65.

42. Despite the voluminous evidence of original intent that the Amendment would end both slavery and its concomitant vestiges, the Supreme Court has never directly held that the Thirteenth Amendment itself provides a cause of action to address the badges and incidents of slavery (although it noted in Memphis v. Greene, 451 U.S. 100, 125 (1985), that Congress's power to enforce the Thirteenth Amendment "is not inconsistent with the view that the Amendment has self-executing force," and in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968), specifically left open the question of "[w]hether or not the Amendment itself did any more than [abolish slavery].").

43. *See, e.g.*, United States v. Hatch, 722 F.3d 1193 (10th Cir. 2013) (rejecting defendants' challenge to the constitutionality of the James L. Byrd and Matthew Shephard Hate Crimes Act, 18 U.S.C. § 249 (2012), which relied in part upon the Thirteenth Amendment to expand the scope of federal hate crimes law).

about seeking further doctrinal extensions that may weaken the foundational badges and incidents of slavery doctrine by moving too far too fast, and I am also skeptical in any event that such extensions would be judicially embraced without prior step-by-step evolution of the doctrine.

II. CLASS AS CASTE: THE PERSISTENT EFFECTS OF MASS INCARCERATION

I have previously advocated for an interpretive approach that would define the scope of the badges and incidents of slavery theory with reference to two touchstones: (1) the connection the group to which the plaintiff belongs or that Congress seeks to protect has to the institution of chattel slavery; and (2) the connection the complained of injury or proscribed condition has to the institution of chattel slavery.[44] Cases in which those two touchstones overlap completely would be the clearest example of a condition amounting to a legacy of the system of slavery. Where they do not overlap completely, I have argued that as the connection of the plaintiff (or the protected class) to the legacy of slavery grows weaker, the connection that the complained-of injury has to the system of slavery must grow correspondingly stronger in order for the claim or statute to be within the badges and incidents of slavery power.

Notwithstanding my skepticism about the Thirteenth Amendment as a remedy for generalized class discrimination, one example where applying the framework above may lead to the conclusion that a class-based distinction amounts to a badge or incident of slavery involves the most severe and persistent effects of mass incarceration. The thesis is straightforward: racialized policies giving rise to mass incarceration result in a permanent caste distinction of such magnitude and impermeability as to arguably amount to a badge or incident of slavery. Many of the Thirteenth Amendment's Framers specifically argued that the Amendment would forbid the permanent subordination under color of law of a despised and identifiable group.[45] It is, of course, true that the specific

44. Carter, *supra* note 11, at 1366–78.

45. For example, Senator Trumbull of Illinois, one of the Senate's primary champions of the Thirteenth Amendment, stated the debates regarding the Civil Rights Act of 1866 (enacted pursuant to the Thirteenth Amendment):

> With the destruction of slavery necessarily follows the destruction of the incidents to slavery.
>
> Those laws that prevented the colored man from going from home, that did not allow him to buy or to sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated, were all badges of servitude made in the interest of slavery and as a part of slavery. They never would have been thought of or enacted anywhere but for slavery, and when slavery falls they fall also.
>
> . . . .

groups they were concerned with were the freedmen and free blacks, but the reasoning is instructive. As noted in Part II.A, *supra*, the Framers understood the system of slavery as involving more than uncompensated labor. Rather, while slavery worked its most brutal and direct effects upon those actually enslaved, the all-encompassing Slave Power was seen as having perverted the country as a whole. One aspect of the Slave Power was that it legalized white supremacy and demonized non-whiteness. Thus, nonslave blacks suffered the same civil disabilities in the slaveholding states (and many non-slaveholding states) as blacks who were actually enslaved. Moreover, the line between slave and nonslave status for blacks was as simple as crossing a state line into a slaveholding state. Phrased differently, then, all members of a group sharing a common immutable characteristic (i.e., African descent) were bounded within the same category: subject to enslavement and subject to the same civil disabilities. It was this feature and function of the Slave Power that the Thirteenth Amendment found philosophically objectionable and inconsistent with American democracy: the use of a single trait or status (race/non-whiteness) as permanently defining one's status before the law for all time, with no possibility of redemption as a member of civil society.[46]

The persistent effects of mass incarceration create a large, racialized, near-permanent underclass unable to overcome its alienation from civil society. In short, racialized legislation, law enforcement actions, and prosecutorial policies have led to massive racial disparities in those incarcerated. The status of having been incarcerated results in alienation from civil society in a wide variety of circumstances. Felony disenfranchisement laws render persons affected by the laws and policies leading to mass incarceration unable to directly influence the very law and policies at issue. The extreme difficulty of securing legitimate employment as an ex-offender due to many employers' policies against hiring ex-offenders incentivizes some ex-offenders to commit sustenance crimes

---

> I have no doubt that under [the Thirteenth Amendment] we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing.

CONG. GLOBE, 39th Cong., 1st Sess. 321, 322 (1866).

46. The Thirteenth Amendment's Framers argued that nothing but innate ability and hard work should represent a ceiling to human worth and achievement, at least in the eyes of the law. For example, during the Thirteenth Amendment debates, Representative Wilson of Iowa characterized the founding American principle as follows: "[T]he new [American] Republic . . . proclaimed in the ear of all humanity that the poor, the humble, the sons of toil, whose hands were hardened by honest labor, whose limbs were chilled by the blasts of winter, whose cheeks were scorched by the suns of summer, were the peers, the equals, before the law, of kings and princes and nobles . . . ." CONG. GLOBE, 38th Cong., 1st Sess. 1319 (1864). The most famous living example of this ethos among the Framing generation was, of course, President Lincoln's rise from humble origins.

(e.g., shoplifting and petty theft) or drug-trafficking crimes (because the underground drug economy is in many neighborhoods the most readily-available source of income), leading to their reincarceration. For those who avoid participation in the underground economy, the absence of available legitimate work often renders them unable to pay the panoply of fines levied repeatedly and disproportionately upon persons of color (as recently documented in Ferguson, Missouri[47] and elsewhere), and the inability to pay such fines often results in reincarceration and their further alienation from civil society. Thus, the racialized caste boundary created and reinforced by the carceral state remains permanent.

CONCLUSION

This Article has argued that generalized class-based discrimination is unlikely to be found to be a badge or incident of slavery. Nonetheless, there may be particularized instances of status discrimination that are tied sufficiently closely to the legacy of slavery and to the Framers' expressed intentions in adopting the Thirteenth Amendment that they may well be within the Amendment's scope. Expanding the scope of the Thirteenth Amendment's proscription of the badges and incidents of slavery is most likely to be successful via modest, step-by-step, doctrinal evolution.

47. U.S. DEP'T OF JUSTICE, INVESTIGATION OF FERGUSON POLICE DEPARTMENT 3 (2015), *available at* https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.