The Thirteenth Amendment and Equal Educational Opportunity

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Inequities for Black Americans, including educational ones, are now often rooted in “neutral” policies—ones facially innocent, but effectively discriminatory. This Article helps establish the Thirteenth Amendment as a viable alternative in antidiscrimination law for challenging such policies. While undoing these policies has traditionally been the work of the disparate-impact theory, that theory’s success at bringing about enduring social change is stunted for several reasons.

The Amendment is rich legal ground into which we might instead sow new seed. Its social and legislative histories and Supreme Court precedent make clear that the Amendment was designed to eradicate social policies that entrench or perpetuate the vestiges of slavery, whether those policies are racially explicit or facially neutral. Accordingly, the Amendment overlaps with the disparate-impact theory’s original goal of remedying the present effects of past discrimination.

Appreciating the Amendment’s power requires recognizing that in abolishing slavery, the Amendment conferred freedom. And the views of the Amendment’s earliest advocates confirm that one of the most profound enactments of freedom for Black Americans was, among other things, obtaining an education. This Article is the first to explain why any

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education practice that discriminatorily denies access to public education for Black Americans also violates the Amendment’s conferral of meaningful freedom to Black Americans. The Article operationalizes the Amendment in this regard by applying it to a relatively popular context for disparate-impact challenges: school discipline policies.

This Article moreover emphasizes the special role of Congress acting on its power under the Amendment to define the aspects of such freedom and outlines how Congress might do so. Direct congressional action under the Amendment is vital because it mitigates the difficulties of judically enforced disparate-impact theory. Such action would also constitute an overdue reconciliatory step towards directly confronting slavery’s legacy, as the Amendment vests in Congress a responsibility to scrutinize any lingering barriers to Black Americans’ acts of freedom, like obtaining education. In outlining an education equity framework under the Thirteenth Amendment, the Article nods towards the Amendment’s enforcement possibilities as an anchor for antidiscrimination law beyond public education.

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I, too, live in the time of slavery, by which I mean I am living in the future created by it.

– Saidiya Hartman

INTRODUCTION

A police officer handcuffed two six-year-old Black American children at their school in Orlando, Florida in September 2019. One child’s grandmother reported that she was told that her granddaughter, Khia, had been charged with the crime of battery after having a tantrum. Khia was processed at a juvenile detention center, which included having her mugshot taken before her release.

Khia was close in age to Jmiyha Rickman, an eight-year-old girl with special needs in Alton, Illinois. Jmiyha was arrested six years prior at her school. Police officers cuffed her feet and hands, and they belted her waist before hauling her off in a police car and detaining her for close to two hours. As with six-year-old Khia, the police officers reported that Jmiyha had been having a tantrum.

Earlier in 2019, an 11-year-old Black American boy was arrested after he would not leave a classroom based on his refusal to stand for the pledge of allegiance to the American flag, which he thought represented a racist country. Not long after that, multiple police officers in Pennsylvania pinned

2. I use the term “Black American” throughout this Article to refer both to Black individuals born in the United States and foreign-born Black individuals living in the United States.


4. Id.


6. Id.

7. Id.

8. Id.

a Black American girl’s arms behind her back while a white police officer punched her and pulled her hair, eventually forcing her face down onto a cafeteria table. She ultimately was arrested for being involved in a physical altercation with another young student.\textsuperscript{10} The incident recalled what happened just five years before when a young Black American girl in South Carolina refused to turn over her cell phone in class.\textsuperscript{11} A police officer body-slammed her to the ground after ripping her from her chair with his forearm around her neck and before flinging her past a row of desks.\textsuperscript{12} She also was arrested.\textsuperscript{13}

Incidents like these underscore research from the last decade that highlight how school-discipline policies—in particular, the rise of “zero-tolerance” approaches\textsuperscript{14}—has not applied equally to Black American

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  year-old-arrested-after-refusing-to-stand-for-pledge-of-allegiance [https://perma.cc/7PW2-5AHT].
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\textsuperscript{12} \textit{Id}.

\textsuperscript{13} \textit{Id}.

\textsuperscript{14} Zero-tolerance policies generally focus on punishing student misbehavior rather than using preventive or alternative methods. Russell Skiba, \textit{The Failure of Zero Tolerance}, 22 RECLAIMING CHILDREN & YOUTH 27, 27–33 (2014), http://reclaimingjournal.com/sites/default/files/journal-article-pdfs/22_4_Skiba.pdf [https://perma.cc/NPK5-CR74]. They also instruct teachers and administrators to impose severe disciplinary consequences for student behavior, regardless of the individual circumstances. \textit{Id}.
students. And the racial disparities are growing. The most recent 2015-2016 schoolyear data demonstrate, for example, that though there were about 100,000 fewer suspensions nationwide than two years prior, the number of students being referred to law enforcement authorities and arrested on school grounds or at school activities increased. Black American students accounted for 15% of the student body in the 2015-2016 school year, but 31% of arrests and a disproportionately high number of suspensions.


18. Id. Data from the 2011-2012 schoolyear showed that Black American students were suspended and expelled at a rate three times greater than white students; though they represented only 16% of the student population, they represented 32-42% of students suspended or expelled. Office for Civil Rights, Civil Rights Data Collection Data Snapshot: School Discipline, U.S. DEP’T OF EDUC. 2 (Mar. 2014), https://www2.ed.gov/about/offices/list/ocr/docs/crddiscipline-snapshot.pdf [https://perma.cc/SXR2-7PHU]. They represented 27% of students referred to law enforcement and 31% of students subjected to a school-related arrest. Id. Between 2013 and 2014, though Black American students accounted for only 15.5% of all public-school students, they represented about 39% of students suspended from school. U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-258, K-12 EDUCATION: DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES 2 (Mar. 2018), https://www.gao.gov/assets/700/690828.pdf [https://perma.cc/BB2T-7VFS]. This was regardless of the type of disciplinary action, level of school poverty, or type of public school attended. Id. Significantly, while Black
Because of this racially warped approach to school discipline,\textsuperscript{19} Black American students are significantly more likely to become entrapped in what has been dubbed the “school-to-prison pipeline,” whereby discipline American boys face higher rates of school discipline than anyone else, data from the 2011-2012 school year demonstrated that Black girls are six times as likely to be suspended as white girls, while Black American boys are three times as likely to be suspended as white boys. Kimberlé Williams Crenshaw, \textit{Black Girls Matter: Pushed Out, Overpoliced and Underprotected}, \textit{African Am. Pol'y F.} 16, (Mar. 2015), https://www.atlanticphilanthropies.org/wp-content/uploads/2015/09/BlackGirlsMatter_Report.pdf [https://perma.cc/3FQK-KKN6].

policies funnel students from schools to the criminal justice system.\textsuperscript{20} Equal educational opportunities\textsuperscript{21} for Black Americans suffer as a result.\textsuperscript{22}

Litigants and advocates have increasingly challenged this discriminatory phenomenon primarily under disparate impact,\textsuperscript{23} a precious legal theory for effective antidiscrimination litigation and civil rights

\begin{itemize}
\item \textsuperscript{21} I borrow the “resource equality ideal” from Anne Alstott for my use of “equal educational opportunity.” Anne L. Alstott, \textit{Equal Opportunity and Inheritance Taxation}, 121 Harv. L. Rev. 469, 485 (2007). She explains: “Equality of opportunity contrasts with ‘equality of result.’” \textit{Id.} at 485–86. Under the “resource equality” approach, individuals must begin with an “equal share of society’s resources and with the capacities [needed] to choose a way of life.” \textit{Id.} at 486. As it directly relates to public education, Alstott concludes that “the equality of resources ideal suggests that every child should receive an equal investment.” \textit{Id.} Alstott rightly notes that the notion of equal opportunity is “more demanding of legal institutions” than is a merit-based framework, wherein opportunities are extended to those who are qualified. \textit{Id.} While the “merit principle” is important for fairness, that principle alone “would leave uncorrected the brute luck that affects early development and the resources to which one has success.” \textit{Id.}
\item \textsuperscript{22} Derek W. Black, \textit{Ending Zero Tolerance: The Crisis of Absolute School Discipline} 33–36, 45 (2016).
\end{itemize}
advocacy in the statutory civil rights context. Sociologists, social psychologists, and legal scholars have characterized the theory as a “crucial” legal tool, and leading civil rights advocates have framed it as “vital” for combatting discrimination. Again, discriminatory school policies, like discipline, are regularly challenged or scrutinized under the statutorily-based disparate-impact theory. As recently as 2016, the U.S. Department of Education’s (DOE) Office for Civil Rights (OCR) and the Department of Justice (DOJ) issued joint guidance to endorse the theory and aid public schools across the country in avoiding disparate impacts for minority students when disciplining students.

The disparate-impact theory originated close to fifty years ago as a relatively powerful instrument for remedying the effects of past discrimination for Black Americans in the employment context and has

24. When I refer to the existing disparate-impact framework or theory in this Article, I mean the theory in the statutory civil rights context. See generally, e.g., Washington v. Davis, 426 U.S. 229 (1976) (refusing to extend the same statutory disparate-impact principles to a finding of disparate impact under the Fourteenth Amendment).

As explained, infra Part I, the disparate-impact framework originally applied to employers under Title VII of the Civil Rights Act of 1964 and was since incorporated into other statutory contexts, including Title VI of the Civil Rights Act of 1964 (concerning federally funded institutions like public schools) and the Fair Housing Act. See Nicholas Stephanopoulos, Disparate Impact, Unified Law, 128 YALE L.J. 1566, 1597 (2019) (“Title VII’s burden-shifting approach has served as the template for how disparate impact liability is determined in every other area (except voting) that recognizes the theory.”).


27. See infra notes 54–56 and accompanying text.


29. See infra Part I for a discussion of disparate impact’s origins.
since been recognized in a range of other contexts.\footnote{Michael Selmi, Was Disparate Impact a Mistake?, 53 UCLA L. REV. 701, 705, 708, 715 (2006) ("[T]he disparate impact theory was not seen initially as a broad alternative concept of discrimination, but rather, the cause of action originated to deal with specific issues involving past intentional discrimination.")} The disparate impact framework differs slightly across statutory contexts, but the gist of it is the same: a practice or policy, despite being "neutral" on its face—that is, not discriminatory—is prohibited if it has a "disproportionately adverse effect" on a protected class and lacks a "legitimate rationale," or cannot be proven as necessary.\footnote{Inclusive Communities, 576 U.S. at 524–25 (applying the same disparate-impact logic of Title VII (outlawing employment discrimination) to the Fair Housing Act). The disparate impact standard used in Inclusive Communities is "substantially similar" to the Title VI standard that applies to discrimination in the public-school context. Civil Rights Division, Title VI Legal Manual, Section VII A, U.S. DEP’T OF JUSTICE (Mar. 18, 2019), https://www.justice.gov/crt/fcs/T6manual [https://perma.cc/8TTQ-DXJM]. Title VI of the Civil Rights Act of 1964 governs the disparate-impact theory in public schools, the context with which this Article is primarily concerned. Accordingly, I focus the Article’s disparate-impact discussion on Title VI.} Unlike a claim of “disparate treatment,” which implies discriminatory intent, a finding of disparate impact tends to connote unintentional or indirect discrimination.\footnote{Id. at 545–66.} The disparate-impact framework originated with the recognition that discriminatory motives could be disguised and that inequality could be easily perpetuated given the nation’s long history of discrimination against Black Americans.

Though it was most recently upheld by the Supreme Court in 2015,\footnote{See Selmi, supra note 30, at 706; Stephanopoulos, supra note 24, at 1633–34 (observing the “low volume of litigation” and “depressed win rate” for Title VI and Title VII plaintiffs); Charles F. Abernathy, Legal Realism and the Failure of the “Effects” Test for Discrimination, 94 GEO. L.J. 267, 286, 312 (2006) (addressing plaintiffs’ poor success rate for Title VI claims).} the disparate-impact framework’s remedial power for Black Americans, in both intangible and practical ways, is increasingly waning.\footnote{34. See Selmi, supra note 30, at 706; Stephanopoulos, supra note 24, at 1633–34 (observing the “low volume of litigation” and “depressed win rate” for Title VI and Title VII plaintiffs); Charles F. Abernathy, Legal Realism and the Failure of the “Effects” Test for Discrimination, 94 GEO. L.J. 267, 286, 312 (2006) (addressing plaintiffs’ poor success rate for Title VI claims).} First, the theory’s implicit recognition of “unintentional,” or innocent, discrimination has contributed to a hampered social understanding of intent, blame, and
accountability with respect to racial justice.\textsuperscript{35} Second, ominous tension between the Fourteenth Amendment Equal Protection Clause and the disparate-impact theory lingers.\textsuperscript{36} Third, as a practical matter, there is an increasingly high bar for plaintiffs to prove that a particular discriminatory practice is not “necessary” for an institution, or that a particular practice “caused” a disparate impact, both components that courts have required under the current doctrinal framework.\textsuperscript{37} Lastly, federal agencies have inconsistently enforced it as an anti-discrimination tool, despite agencies clearly being the most empowered to do so.\textsuperscript{38} These factors may be the reason for the relatively low number of school discipline disparate-impact cases that get litigated and the low success rates for disparate-impact plaintiffs.\textsuperscript{39} Regardless, the theory has undeniably struggled with eliminating facially neutral, discriminatory practices, including in the school discipline context.\textsuperscript{40}

\begin{footnotesize}
\begin{enumerate}
\item Selmi, supra note 30, at 773–74.
\item See infra Section III.D.
\item See infra Part I.
\item See id.
\item See Stephanopoulos, supra note 24, at 1633 (citing the low number of disparate-impact cases that reach federal court and the low success rates, though ultimately concluding that neither necessarily spoils the disparate-impact theory’s potential for social change).
\item See, e.g., Nora Gordon, Disproportionality in Student Discipline: Connecting Policy to Research, BROOKINGS (Jan. 18, 2018), https://www.brookings.edu/research/disproportionality-in-student-discipline-connecting-policy-to-research [https://perma.cc/8Y2Z-2XG8] (describing, among other things (1) the theoretical problems of proving how much of the racial gaps in discipline can be attributed to bias for purposes of making out a disparate impact claim and (2) the limited research on viable alternatives); Adrienne Green, When Schools Are Forced to Practice Race-Based Discipline, ATLANTIC (Aug. 26, 2015), https://www.theatlantic.com/education/archive/2015/08/teachers-say-no-disparate-impact-discipline/402144/ [https://perma.cc/DK6L-LJJ3] (reporting the response to the federal government’s recommendations to avoid disparate impacts in school discipline policies: “A recent Education Next poll of nearly 4,000 respondents (including oversamples of teachers, African Americans, and Hispanics) suggests that few people think the disparate-impact approach—which some have argued leads to racial quotas—is the best solution. Some of the strongest opposition seems to be from teachers, fewer than a fourth of whom support such policies, as well as those who identify as white.”).
\end{enumerate}
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The Thirteenth Amendment and Equal Educational Opportunity

The disparate-impact framework, weaknesses notwithstanding, is currently the only doctrinal structure available for claims challenging ostensibly neutral practices that discriminate against Black Americans.\footnote{Stephanopoulos, supra note 24, at 1636.} Insofar as neutral policies are the most pervasive forms of discrimination,\footnote{Andrea Flynn et al., Rewrite the Racial Rules: Building an Inclusive American Economy, ROOSEVELT INST., https://rooseveltinstitute.org/wp-content/uploads/2016/06/RI-RR-T-Race-201606.pdf [https://perma.cc/X8FQ-W7LD] (discussing how “race-neutral” policies have contributed to the oppression of Black Americans in a variety of contexts, including economics, political participation, and law enforcement).} a grave impediment to social justice for Black Americans thus exists.

Here enters the Thirteenth Amendment. This first of the Reconstruction Amendments was ratified in 1865 to officially confer freedom to Black Americans whom had been enslaved. Several scholars have offered the Amendment as a theoretically available alternative for the work of traditional disparate-impact claims.\footnote{See, e.g., Darrell A. H. Miller, The Thirteenth Amendment, Disparate Impact, and Empathy Deficits, 39 SEATTLE U. L. REV. 847, 848 (2016) (suggesting that racially disparate impacts typically reflect “systemic empathy deficits towards minorities,” and that those deficits constitute badges of slavery); see also Darrell A. H. Miller, A Thirteenth Amendment Agenda for the Twenty-First Century: Of Promises, Power, and Precaution, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 294 (Alexander Tsesis ed., 2010) (highlighting the potential for Thirteenth Amendment to abrogate felony disenfranchisement laws that have a disparate impact); id. at 295 (highlighting same for death penalty); Larry J. Pittman, A Thirteenth Amendment Challenge to Both Racial Disparities in Medical Treatments and Improper Physicians’ Informed Consent Disclosures, 48 ST. LOUIS U. L.J. 131, 180 (2003).} This is arguably in large part due to the Supreme Court’s declaration a century after the Amendment’s ratification that the Amendment empowered Congress to pass legislation abolishing “all badges and incidents of slavery.”\footnote{Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968). The Court then was clear from the beginning that Section 1 outlawed some incidents of slavery, even if it did not exhaust the possibilities of which ones. Throughout the Article, I use “badges” and “incidents” to generally represent any of these possibilities that might constitute the lingering vestiges of slavery. To quote James Pope: “It is of secondary importance whether we call these disabilities [engendered by slavery] badges, incidents, vestiges, relics, or rootlets; each signifies a component or aspect of the ‘slavery’ prohibited by Section 1. To}
Those remarkably simple collection of words interpreting the Thirteenth Amendment create a powerful opportunity for social change. Others have recognized this, even as the flailing disparate-impact theory continues to be endorsed, as is.45 Absent from that scholarship is a comprehensive discussion of the distinct advantages to basing in the Amendment those claims that would otherwise be governed by the floundering disparate-impact theory.46 This Article fills that gap. It explains why the disparate-impact theory’s shortcomings highlight the need for a renewed reliance on the Amendment to challenge facially neutral policies that discriminate against Black Americans. The aim here is to make evident the utility of the Thirteenth Amendment as a supplemental tool for comply with the command that slavery shall not ‘exist,’ we must determine which of them are so important to slavery and involuntary servitude that when they exist, it cannot be said that those conditions have been entirely eliminated.” James Gray Pope, Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery, 65 UCLA L. Rev. 426, 430 (2018). But see, e.g., 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 168 (Alexander Tsesis ed., 2010) (noting that “incidents of slavery” has a far more definite meaning than ‘badges of slavery’); Lawrence Sager, A Letter to the Supreme Court Regarding the Missing Argument in Brzonkala v. Morrison, 75 N.Y.U.L. Rev. 150, 152 (2000) (arguing that “relics” was a significant addition the Jones court added to the historic “badges and incidents” formulation and that the term was to indicate that “slavery not only had contemporary attributes but deeply ingrained, enduring consequences”). Jennifer McAward provides a detailed account of these terms. See Jennifer M. McAward, Defining the Badges and Incidents of Slavery, 14 U. Pa. J. Const. L. 561, 570–94 (2012).

45. See supra notes 23–28 and accompanying text.

46. Most scholars addressing this issue briefly discuss one or two advantages. See, e.g., Mehmet K. Konar-Steenberg, Root and Branch: The Thirteenth Amendment and Environmental Justice, 19 Rev. L.J. 509, 511 (2018) (noting the Fourteenth Amendment’s “hostility” to environmental justice disparate-impact claims and the general difficulty of proving disparate impact in the environmental justice context); Larry J. Pittman, Physician-Assisted Suicide in the Dark Ward: The Intersection of the Thirteenth Amendment and Health Care Treatments Having Disproportionate Impacts on Disfavored Groups, 28 Seton Hall L. Rev. 774, 860–71 (1998) (asserting that the United States health care policy’s racially disparate impact violates the Thirteenth Amendment and observing the “confusion” around the disparate-impact’s framework).
challenging facially neutral policies that discriminate, not a replacement for the disparate-impact theory.

This Thirteenth Amendment approach is appropriate for several reasons. It could overcome the disparate-impact theory's current weaknesses and its practical hurdles that have been roadblocks for any meaningful racial justice for Black Americans.\(^\text{47}\) The Amendment's history moreover reveals that its aim to remove all "badges and incidents" of slavery is, in several respects, inclusive of the same antidiscrimination goals the disparate-impact framework was originally intended to accomplish for Black Americans: eradicating the present effects of past discrimination. Indeed, the Supreme Court has repeatedly—and explicitly—left open the question of whether the Amendment encompasses practices with a disparate impact.\(^\text{48}\) And compellingly, the Thirteenth Amendment departs from the Fourteenth Amendment (the constitutional source of most racial justice claims) in that the Thirteenth Amendment not only can be race-conscious in its implementation, but arguably should be.\(^\text{49}\)

As part of this approach, Congress must assume its responsibility to enforce the Thirteenth Amendment by enacting legislation prohibiting neutral practices and policies that discriminate against Black Americans. This legislation would first require making clear and reasonable determinations that certain circumstances or injuries amount to badges and incidents of slavery. Claims, particularly those that might otherwise have

\(47\). I do not attempt to provide a comprehensive theoretical foundation for the Thirteenth Amendment as a source of all potential disparate-impact claims; for the same reasons that scholars have had before, this Article focuses only on the Amendment’s potential for Black Americans because “(1) they are the original subjects of the Thirteenth Amendment and (2) they are the most likely to suffer slavery’s badges and incidents.” William M. Carter, Jr., A Thirteenth Amendment Framework for Combating Racial Profiling, 39 HARV. C.R.-C.L. L. REV. 17, 21 (2004).


\(49\). See Miller, supra note 43, at 848. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223–29 (1995) (holding that all racial classifications by a local, state, or federal government must be strictly scrutinized, regardless of whether the government’s purpose in enacting legislation was benevolent); see also infra Section I.C and accompanying text (discussing constitutional problems the disparate-impact theory has had under the Fourteenth Amendment).
been unsuccessfully challenged under the current statutorily based disparate-impact theory, would flow from what should be more unencumbered congressional findings. This straightforward approach is supported by the Amendment’s social and legislative histories, as the Amendment’s proponents viewed the notion of post-slavery freedom richly and expansively. The histories also illustrate Congress’s special role in enacting legislation that would illuminate and operationalize these constitutional values. Lastly, this congressional approach to the Amendment’s enforcement would eliminate the issues that often pose problems for disparate-impact plaintiffs challenging discrimination.

To emphasize the potential for the Thirteenth Amendment in this regard, I explore its applicability to a context in which the disparate-impact theory has been most regularly employed: challenging school discipline practices in public education. The school discipline phenomenon holds discursive value in this Article because it most consistently receives national attention with respect to the disparate-impact concerns in schools—as evidenced by the plethora of advocacy reports, public-facing government documents, and media attention relative to other disparate-impact issues. This Article’s focus notwithstanding, I do not mean to suggest that only discrimination that the disparate-impact theory has been used to challenge would be appropriate for Thirteenth Amendment claims. Nor do I mean to suggest that school discipline be the sole education equity issue the Thirteenth Amendment might implicate. Indeed, the Amendment’s social and legislative histories confirm that others agreed with Black Americans who viewed attaining an education as one of the most significant attributes of freedom. Real freedom would have to mean, among other important things, the absence of any barrier to public education for Black Americans.

These include barriers like discriminatory school discipline policies. The U.S. American tradition of policing Black American bodies is informed by perceptions and social domination practices that are, if not identical, very dearly rooted in the same views and social customs that either underlay or helped perpetuate the United States’s enslavement of Black Americans. Accordingly, this Article holds that Congress should lead the way in enforcing the eradication of race-based policing in schools as a violation of the Thirteenth Amendment to the extent that such practices continue to

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50. See infra Part III.
impede real freedom. In outlining a potential application of the Thirteenth Amendment to racially discriminatory school discipline policies, the Article offers a potential alternative for generally challenging racial disparities in education or pursuing antidiscrimination litigation in other contexts altogether.

I structure this Article in three Parts. In Part I, I provide a brief overview of the current disparate-impact framework’s doctrinal requirements and a discussion of its original aim regarding discrimination against Black Americans. I include, as a specific example, the disparate-impact standards under Title VI of the Civil Rights Act of 1964 with respect to challenging discriminatory public-school policies. I then discuss the specific reasons the disparate-impact theory’s power for accomplishing racial justice for Black Americans generally has suffered. I turn to the Thirteenth Amendment in Part II, where I discuss the Amendment’s relatively limited jurisprudence, in part to emphasize the sound legal foundation for utilizing the Thirteenth Amendment as a basis for antidiscrimination litigation. I next explore the legislative and social histories of the Amendment to illuminate why courts and legislators should liberally understand the concept of “freedom” for Black Americans to ensure the most faithful consideration and enforcement of claims brought under the Amendment that challenge racial

51. Others have discussed very different reasons why the Thirteenth Amendment is appropriate for the denial of education opportunities. See, e.g., Maria L. Ontiveros & Joshua R. Drexler, The Thirteenth Amendment and Access to Education for Children of Undocumented Workers: A New Look at Plyler v. Doe, 42 U.S.F.L. REV. 1045 (2008) (arguing that denying education to the children of undocumented workers should be prohibited by the Thirteenth Amendment because such denial is part of a system whereby undocumented workers “are a caste of workers of color . . . denied the rights of citizenship, and subject to human rights abuses”); Jeffrey Shulman, A Right to Literacy as the “Pathway from Slavery to Freedom?”, NAT’L CONSTITUTIONAL CTR. (Aug. 3, 2018), https://constitutioncenter.org/blog/a-right-to-literacy-as-the-pathway-from-slavery-to-freedom [https://perma.cc/BTRM-6UUS] (locating in the Thirteenth Amendment a fundamental right to education).

52. Here I think it important to clarify my use of the term “discrimination.” Ibram X Kendi describes how “racial discrimination” has been commandeered since the 1960s to “transform the act of discriminating on the basis of race” into a morally objectionable act. IBRAM X KENDI, HOW TO BE AN ANTIRACIST 19 (2019). But, as Kendi notes, “if racial discrimination is defined as treating, considering, or making a distinction in favor or against an individual based on that person’s race, then racial discrimination” is not objectionable. Id. I agree with his conclusion: “The defining question is whether the discrimination is creating equity or inequity.” Id.
discrimination. I note how such a concept of freedom necessarily encompasses the removal of discriminatory public-school discipline policies. In Part III, after connecting the common antidiscrimination goals of the Thirteenth Amendment and the disparate-impact theory, I endorse a two-part standard Congress could apply to reach a finding that racially discriminatory practices—like zero-tolerance public-school discipline policies—constitute a “badge and incident” of slavery and therefore are prohibited by the Amendment. I then explain Congress’s special authority to enact legislation based on such a finding and the relevant constitutional and political considerations. I end with a discussion of how the Thirteenth Amendment approach to barring facially neutral policies’ discrimination against Black Americans can avenge the current weaknesses of the traditional disparate-impact theory.

I. THE ORIGINS OF DISPARATE IMPACT AND PROBLEMS WITH ITS CURRENT ENFORCEMENT

The disparate-impact statutory framework’s origins and fate are relevant to the Thirteenth Amendment claims in the education context for several reasons. First, there is presently no federal constitutional right to education that might otherwise serve as grounds for antidiscrimination work. Second, discrimination has become increasingly subtle, which has rendered the intentional-discrimination framework inadequate for how discrimination actually works. The disparate-impact theory is a key antidiscrimination enforcement tool in the education context because education policies that explicitly discriminate against Black Americans are rare. The disparate-impact theory, for example, has been used to challenge

the racially discriminatory effects of school closures, inequitable school financing, biased school tests, and, of course, school discipline policies. Indeed, Title VI of the Civil Rights Act of 1964—a major source of the disparate-impact doctrine, as discussed below—has been substantially shaped by its enforcement in public schools.

Third, as already discussed, the disparate-impact theory continues to be advanced by scholars and litigants to challenge such policies, despite the fact that the theory has become decreasingly effective. The theory is functionally one of the few, if not only, doctrinal structures currently available for claims challenging ostensibly “neutral” practices that discriminate against Black Americans. This need not be so. The Thirteenth Amendment is poised to accomplish the same kind of work the disparate-impact theory was supposed to accomplish. Accordingly, such claims under


57. See infra Part I.


59. See infra Part I.

60. See id.

61. Stephanopoulos, supra note 24, at 1636.
the Amendment, despite its rare enforcement, would not be a radically new idea. And for reasons discussed in Section III.D, the Amendment is less likely to suffer the theory’s same unfortunate fate.

If the Amendment is to account for the disparate-impact theory’s faults, an appreciation of the Amendment’s potential for challenging facially neutral policies that discriminate requires an understanding both of the theory, itself, and its origins. This understanding reveals the overlap with the Amendment’s potential:remedying the present effects of past discrimination for Black Americans.

A. Griggs v. Duke Power Co. and Disparate Impact in the Public Education Context

The disparate-impact theory has its origins in the Civil Rights Act of 1964, under which federal agencies are authorized to enforce certain antidiscrimination requirements. Various agencies have long relied on this authority to promulgate rules, regulations, or other guidance that serve as the grounds for disparate-impact claims. Under the Civil Rights Act of 1964’s Title VII—which prevents employment discrimination—the Equal Employment Opportunity Commission (EEOC) first articulated the prototype for the disparate-impact analysis: whether neutral policies and practices that adversely affect members of protected minority groups cannot be justified by an employer as a business necessity.

It was the EEOC’s articulation of the disparate-impact analysis that the Supreme Court would ultimately adopt in the landmark decision, Griggs v. Duke Power Company. After Title VII’s passage, the employer in that case,

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62. See, e.g., 42 U.S.C. § 2000d-1 (2018) (empowering the federal government to terminate federal funding or assistance to any program or activity that fails to comply with the mandates of Title VI).


The Thirteenth Amendment and Equal Educational Opportunity

Duke Power Company, required that employee prospects or transfers pass two written examinations. Past intentional discrimination that resulted in a lack of educational opportunities meant that many Black Americans would do less well on the written examinations. The written examination requirements effectively maintained Duke Power's segregated job lines—that is, the requirements would disproportionately affect Black Americans relative to white employees. The Griggs Court adopted the EEOC guidance, holding that Title VII would not permit the employers to use screening policies with a disparate impact if those policies were not demonstrated to be job-related and a business necessity.

Griggs informs analogous versions of the Title VII disparate-impact analysis in other contexts. Under Title VI of the Civil Rights Act of 1964—which prohibits racial discrimination in federally funded programs and activities—the Department of Education has issued regulations that

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Subjective Judgments, 63 CHI.-KENT L. REV. 1, 1–2 (1987); see also Susan Carle, A New Look at the History of Title VII Disparate Impact Doctrine, 63 FLOR. L. REV. 251, 251 (2011) (outlining how the disparate-impact doctrine stemmed from a "moderate, experimentalist regulatory tradition" that motivated employers to reform racially discriminatory employment practices using laws and that this tradition was led by state-level nonlawyers before it was adopted by the EEOC).

66. See infra Part III for a discussion of barriers to education for Black Americans.
68. Id. at 431 ("The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."). Griggs referred to job relatedness and business necessity interchangeably. Id. at 424, 431–32. Griggs highlighted the Supreme Court's aims to limit Title VII's application to racial disparities that employers could not justify. Id. (explaining that "Congress directed the thrust" of Title VII "to the consequences of employment practices, not simply the motivation" and that Title VII thus requires the "removal of artificial, arbitrary, and unnecessary barriers to employment"—an end to policies that "operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability"). These aims were formalized years later in Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).
69. Title VI reads: "No person in the United States shall, on the ground of race... be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2018).
prohibit the use of practices and policies that have “the effect of subjecting individuals to discrimination because of their race” in public schools and educational programs.\footnote{34 C.F.R. § 100.3(b)(2) (2014) (emphasis added); see also 28 C.F.R. § 42.104(b)(2) (2014) (reiterating that a federal fund recipient cannot use “criteria or methods of administration” which “have the effect of subjecting individuals to discrimination because of their race, color, or national origin”). Agencies—not courts, as in the Title VII context—were the “first movers” in the development of disparate impact under Title VI. See Olatunde C.A. Johnson, The Agency Roots of Disparate Impact, 49 HARV. C.R.-C.L. L. REV. 125, 127, 133 (2014).}{\footnote{70}}

Flowing from this regulation is a Title VI disparate-impact prima facie claim that essentially tracks the traditional disparate-impact requirements. A plaintiff challenging a federally funded school program or policy must first show that a facially neutral policy has resulted in a racial disparity.\footnote{Powell v. Ridge, 189 F.3d 387, 394 (3d Cir. 1999) (citing Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985)), overruled on other grounds by Alexander v. Sandoval, 532 U.S. 275 (2001).}{\footnote{71}} Courts adjudicating Title VI disparate-impact claims have confirmed “no rigid mathematical threshold” to make out a prima facie case of disparate impact for affected minorities,\footnote{Groves v. Ala. State Bd. of Educ., 776 F. Supp. 1518, 1526 (M.D. Ala. 1991) (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994–95 (1988) (plurality opinion)).}{\footnote{72}} but statistical analyses are used to make “reliable inferences about racial disparities in a population based on the performance of a particular sample.”\footnote{Id. at 1527.}{\footnote{73}} Notably, courts also have interpreted a traditional disparate-impact claim to require a showing that a particular practice caused the racial disparity—that is, a plaintiff must go beyond simply showing “at the bottom line” that a statistical disparity exists to prove a causal relationship between the disparity and the challenged practice.\footnote{See Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656–57 (1989) (explaining that simply showing a “racial imbalance in the work force” is not enough in the Title VII context), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071, 1074 (codified as amended at 42 U.S.C. § 2000e-2(k) (2018)), as recognized in Raytheon Co. v. Hernandez, 540 U.S. 44, 52–53 (2003). Congress lessened this particularity requirement with the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(k)(1)(A) (2018) (noting that a plaintiff does not have to specify a particular employment practice if “the...
If a plaintiff makes out a prima facie case of disparate impact in the public-education context, the burden of proof shifts to the defendant to justify the practice or policy as "educationally necessary." Once a defendant proffers an educational-necessity defense for its policy or practice, the burden then shifts to the plaintiff to demonstrate that "the defendant overlooked an equally effective alternative with less discriminatory effects or that the proffered justification is no more than a pretext for racial discrimination.

In the Supreme Court's most recent consideration of the disparate-impact theory, the Court reaffirmed Griggs's logic for disparate-impact claims related to housing decisions under the Fair Housing Act. Taking their cue from this ruling, civil rights advocates continue to highlight the

75. Justice Thurgood Marshall laid the groundwork for this Title VI understanding in Guardians Association v. Civil Service Commission of New York, 463 U.S. 582, 623 n.15 (1983) (Marshall, J., dissenting). In his dissent, he articulated that "a prima facie showing of discriminatory impact shifts the burden to the recipient of federal funds to demonstrate a sufficient nondiscriminatory justification for the program or activity." Id. In Board of Education of City School District of New York v. Harris, the Supreme Court first explicitly articulated that this "burden" could be fulfilled by "proof of 'educational necessity,' analogous to the 'business necessity' justification applied under Title VII of the Civil Rights Act of 1964." 444 U.S. 130, 151 (1979).

As background, after Albemarle, the Supreme Court essentially diluted the "necessity" justification inquiry in the Title VII context to merely "whether a challenged practice serves...the legitimate employment goals of the employer." Wards Cove Packing Co., 490 U.S. at 659. The Court also switched the burden allocation between the parties: "The burden of persuasion...remains with the disparate-impact plaintiff...at all times." Id. (internal citations and quotation marks omitted). In the Civil Rights Act of 1991, however, Congress restored Title VII to its pre-Wards Cove framework. See Civil Rights Act of 1991 § 105, 42 U.S.C. § 2000e-2(k)(1) (2018).

76. Ridge, 189 F.3d at 394; see also Inclusive Communities, 576 U.S. at 533.

77. Inclusive Communities, 576 U.S. at 545-47.
disparate-impact theory as an antidiscrimination tool in the Title VI context with respect to public education. In July 2019, the United States Commission on Civil Rights issued a 224-page report reiterating the availability of disparate impact under Title VI as a tool to redress the disproportionate school discipline rates for Black American students.\textsuperscript{78} Citing \textit{Inclusive Communities}, the report summarized the framework for Title VI disparate-impact claims in the context of public schools, discussed \textit{supra}, and concluded that schools can rely only on discriminatory policies "that are necessary for legitimate, nondiscriminatory school interest."\textsuperscript{79}

Another important feature of Title VI disparate impact's current doctrine is that a private right of action is not available.\textsuperscript{80} Instead, disparate-impact litigants must first initiate Title VI suits by filing with a federal agency.\textsuperscript{81} After \textit{Sandoval} removed the private right of action to a disparate-impact claim, most public education Title VI disparate-impact claims do not reach federal court.\textsuperscript{82}

With the current doctrinal framework established, the next Section discusses the original concerns that gave rise to the disparate-impact theory, the understanding of which helps illuminate the commonality of its goal with the Thirteenth Amendment's potential to redress the present effects of generations of discrimination against Black Americans.

\textbf{B. The Original Concerns Giving Rise to Disparate-Impact Theory: Remediying Past Discrimination}

Early disparate-impact jurisprudence shows that the theory's origins were tied to specific concerns about a present perpetuation of past lawful


\textsuperscript{79} Id. at 19.

\textsuperscript{80} Sandoval, 532 U.S. at 293.

\textsuperscript{81} Id. But actions are still subject to judicial review. 42 U.S.C. § 2000d-2 (2018).

\textsuperscript{82} Instead, the Department of Education investigates disparate-impact complaints that parties file with it. See Office of Civil Rights, OCR Complaint Processing Procedures, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/ocr/complaints-how.html [https://perma.cc/58C6-X8PJ] (outlining the complaint processing procedures).
discrimination against Black Americans, especially seniority systems and written tests implemented after Title VII’s prohibition of racial discrimination in the employment context. Initially, particular focus was placed on challenging facially neutral seniority systems and written tests that employers began instituting after Title VII that perpetuated the same kinds of racial discrimination.\footnote{Selmi, supra note 30, at 708–16. Before the Civil Rights Act of 1964’s passage, employers tended to segregate Black Americans into less desirable, lower ranked positions, for which seniority tended not to accrue. See \textit{id.} at 708 (citing William B. Gould, \textit{Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964, 13 HOWARD L.J.} 1 (1967)); \textit{see also} Carle, supra note 64, at 281 (explaining that collaborations between state-level agencies and civil rights organizations “resulted in prototypical disparate impact cases” long before \textit{Griggs}).}

\textit{Local 189, United Papermakers v. United States}, for example, was an early federal case in which plaintiffs challenged the discriminatory effects of seniority systems, whereby hiring and promotion decisions were based on job seniority.\footnote{\textit{Id.} at 994. Though the Supreme Court ultimately did not accept that seniority systems perpetuating pre-Title VII discrimination violated Title VII in \textit{International Brotherhood of Teamsters v. United States}, 431 U.S. 324 (1977), the case also confirms that the federal government itself appreciated the discriminatory effects of facially neutral seniority systems. \textit{Id.} at 345, 352–53 (recognizing that although seniority systems can perpetuate past discrimination, they can be immunized under 42 U.S.C. § 2000e-2(h) (2018)).} The Fifth Circuit was interested not only in remedying the present effects of past discrimination, but also in defining those effects as present discrimination that could be tolerated only through a legitimate justification: “When an employer adopts a system that necessarily carries forward the incidents of discrimination into the present, his practice constitutes on-going discrimination, unless the incidents are limited to those that safety and efficiency require.”\footnote{\textit{Id.} at 345, 352–53 (recognizing that although seniority systems can perpetuate past discrimination, they can be immunized under 42 U.S.C. § 2000e-2(h) (2018)).}

Discrimination cases regarding testing policies also were grounded in a concern about perpetuating past lawful discrimination.\footnote{Selmi, supra note 30, at 714.} It was commonly intimated and understood that because of past education inequities between white and Black schoolchildren, an employer’s reliance on written tests for job opportunities would affect segregated job classifications.\footnote{\textit{Id.}} As
with the seniority cases, court cases challenging employers relying on tests arose chiefly against employers that had engaged in prior intentional discrimination.\textsuperscript{88} It was not difficult to conclude that the testing requirements would result in the segregation of Black Americans, even if it would be difficult to prove that an employer had a clear motive to do so.\textsuperscript{89}

This was no less the case for the written test requirements at question in \textit{Griggs v. Duke Power Company}.\textsuperscript{90} Ultimately, as much as \textit{Griggs} acknowledged Congress's objective in removing barriers of the past that would otherwise "favor an identifiable group of white employees,"\textsuperscript{91} \textit{Griggs} stopped short of defining the practices in dispute as intentional discrimination and instead permitted practices to continue if they were job-related.\textsuperscript{92} In failing to do so, \textit{Griggs} laid the groundwork for the frustration of the disparate-impact theory's purpose, especially in ways that encourage application of the Thirteenth Amendment as an alternative antidiscrimination tool.

In conclusion, notwithstanding that early cases focused on remediying past discrimination and framed perpetuating past discrimination as intentional, the disparate-impact theory was ultimately reconceptualized as an "alternative" to intentional discrimination to make federal discrimination complaints more palatable to employers, the original target of disparate-impact claims.\textsuperscript{93} Employers had resisted claims of intentional discrimination, which implied blame; it was expected that judges would

\begin{itemize}
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} 401 U.S. 424 (1971). Interestingly, the Court referenced its decisions in these other contexts as support for invalidating the employer's discriminatory practices. Selmi, supra note 30, at notes 76–77. For example, the Court relied on the voting-rights case, \textit{Gaston County v. United States}, 395 U.S. 285 (1969). The \textit{Griggs} Court explained that "because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race." \textit{Griggs}, 401 U.S. at 430.
\item \textsuperscript{91} \textit{Griggs}, 401 U.S. at 429–30.
\item \textsuperscript{92} See Selmi, supra 30, at 722 ("Griggs is properly seen as a norms-reinforcing decision rather than a broad or different interpretation of equality that challenged the status quo.").
\item \textsuperscript{93} See Alfred W. Blumrosen, \textit{Modern Law: The Law Transmission System and Equal Employment Opportunity} 73 (1993) (explaining the EEOC's decision to take such a position); Carle, supra note 64, at 251.
\end{itemize}
respond better to a precept of unintentional discrimination, as compared to labeling an employer an intentional discriminator.\textsuperscript{94}

For that reason and for others, the disparate-impact theory proved successful in challenges to written tests at least through the early 1980s.\textsuperscript{95}

But the reach of disparate impact would become increasingly limited over the years for a variety of reasons. These reasons, detailed in the Section below, especially compel consideration of the Thirteenth Amendment's utility for accomplishing the work the disparate-impact theory was designed to accomplish. An exploration of these reasons also reveal why the Thirteenth Amendment would be less susceptible to the roadblocks the disparate-impact theory continues to face.

\textit{C. The Erosion of the Disparate-Impact Theory on Constitutional and Symbolic Grounds}

Some of the earliest blows to disparate-impact liability concerned the theory's constitutional contours under the Fourteenth Amendment.\textsuperscript{96}

Though these cases were decided specifically in the Title VII context, their rulings bring much to bear on the status of the disparate-impact theory, more generally. The first major case in this regard is \textit{Washington v. Davis},\textsuperscript{97} which had issues similar to those in \textit{Griggs}. The \textit{Davis} Court made clear that the Equal Protection Clause, by itself, could not encompass disparate impact as a theory; the Court concluded that the test administration in that case could not appropriately be defined as discrimination under the Fourteenth Amendment because it was not intentional.\textsuperscript{98} In \textit{Personnel Administrator v. Feeney},\textsuperscript{99} the Supreme Court

\begin{itemize}
\item \textsuperscript{94} See Selmi, supra note 30, at 716.
\item \textsuperscript{95} \textit{Id.} at 754.
\item \textsuperscript{96} “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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or the property, without due process of law; without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” \textsc{U.S. Const.} amend. XIV.
\item \textsuperscript{97} 426 U.S. 229 (1976).
\item \textsuperscript{98} \textit{Id.} at 249–50.
\item \textsuperscript{99} 442 U.S. 256 (1979).
\end{itemize}
went on to find that even knowledge of a policy’s potential disparate impact (this time, on women) was not enough to establish a claim of intentional discrimination under the Equal Protection Clause.\(^{100}\)

As already mentioned, *supra*, in *Alexander v. Sandoval*,\(^ {101}\) the Court further limited the disparate-impact theory when it held that there is no private right of action to enforce disparate-impact statutory claims.\(^ {102}\) And more recently, in *Ricci v. DeStefano*, the Supreme Court suggested that the disparate-impact theory, to the extent it allows race-conscious decisionmaking (at least in the absence of documented past discrimination), potentially runs afoul of the Fourteenth Amendment’s Equal Protection Clause.\(^ {103}\) In doing so, the Court recognized a tension between disparate impact and the Fourteenth Amendment that still lingers today.\(^ {104}\)

Race-based solutions for disparate impacts continue to concern the Court for their potential to run afoul of the Fourteenth Amendment.\(^ {105}\) Indeed, the current, more conservative Supreme Court has gone on to endorse a “colorblind” reading of the Fourteenth Amendment, which subjects any racial “discrimination” to searching constitutional scrutiny, even if designed to benefit minorities.\(^ {106}\) The Court’s colorblind approach comports with the criticism conservatives have consistently levied against the disparate-impact theory—including that disparities in discipline rates, for example, reflect disparities in student behavior instead of

\(^{100}\) Id. at 279.


\(^{102}\) Id. at 293.

\(^{103}\) 557 U.S. 557, 594 (2009).

\(^{104}\) *Ricci*, 557 U.S. at 595–96 (Scalia, J., concurring) (“[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.”); see also Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law after Inclusive Communities*, 101 CORNELL L. REV. 1115, 1120–27 (2016).

\(^{105}\) See, e.g., *Inclusive Communities*, 576 U.S. at 542 (acknowledging that insufficient procedures in disparate impact might lead to the inappropriate use of racial quotas).

\(^{106}\) 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 the Court’s account and casting doubt on this formulation).
discrimination;\textsuperscript{107} that disparate-impact liability discriminates against whites;\textsuperscript{108} and that disparate-impact liability illegally encourages racial quotas.\textsuperscript{109}

Besides the potential constitutional problems with disparate-impact liability, the distortion of the disparate-impact theory’s aims has also contributed to a limited the meaning of “intentional” discrimination that, in turn, has resulted in less blame and accountability. As already discussed, supra, the notion of disparate impact was eventually reframed as an “alternative,” less culpable form of discrimination for strategic reasons; this reframing was appealing and even may have resulted in an increased number of settled discrimination claims.\textsuperscript{110} But construing the disparate-impact theory in this way resulted in a limited understanding of intentional discrimination.\textsuperscript{111} For example, relying on practices that will have questionable disparate impacts on protected minorities is often an intentional decision and should arguably be considered intentional discrimination. The idea that disparate impacts occur as a result of innocent—or even well-meaning—policies\textsuperscript{112} has resulted in a move away

\textsuperscript{107} See, e.g., U.S. COMM’N ON CIVIL RIGHTS, supra note 78, at 192–97 (dissenting statement of Comm’r Peter N. Kirsanow) (discussing the “very likely possibility that different behavior, rather than racial discrimination, results in different treatment”); see also Gail L. Heriot & Alison Somin, The Department of Education’s Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law, 22 TEX. REV. L. & POL. 471, 478 (2018) (arguing that “aggregate racial disparities in discipline . . . are the result of differences in behavior” rather than racial discrimination).


\textsuperscript{110} Selmi, supra note 30, at 706.

\textsuperscript{111} Id.

\textsuperscript{112} Id.
from assigning fault or blame for acts in ways that fail to "trigger greater social responsibility." In a significant way, then, focused efforts on defining disparate impact as "unintentional" discrimination restricted the definition and legal development of intentional discrimination.

Notably, the earlier court case analyses that gave rise to disparate-impact theory had recognized the presence of intentional discrimination in its disparate-impact claims. One such case was Quarles v. Philip Morris, Incorporated. The court in that case, in siding with the plaintiffs, included a detailed focus on how the maintenance of the seniority system was a form of intentional discrimination and even equated the two: "[T]he defendants have intentionally engaged in unlawful employment practices by discriminating on the ground of race against Quarles, and other Negroes similarly situated. This discrimination, embedded in seniority and transfer provisions of collective bargaining agreements, adversely affects the conditions of employment and opportunities for advancement of the class." Notably, the earlier court case analyses that gave rise to disparate-impact theory had recognized the presence of intentional discrimination in its disparate-impact claims. One such case was Quarles v. Philip Morris, Incorporated. The court in that case, in siding with the plaintiffs, included a detailed focus on how the maintenance of the seniority system was a form of intentional discrimination and even equated the two: "[T]he defendants have intentionally engaged in unlawful employment practices by discriminating on the ground of race against Quarles, and other Negroes similarly situated. This discrimination, embedded in seniority and transfer provisions of collective bargaining agreements, adversely affects the conditions of employment and opportunities for advancement of the class." Now, however, disparate-impact claims are commonly understood as the absence of intent. This is also true for the school discipline context. Such an understanding underscores the characterization of discipline policies' effect as the unfortunate consequence of well-intentioned practices aimed at keeping schools safe. As a result, even if the policies are challenged and rectified, schools still evade culpability for intentionally relying on unduly discriminatory policies.

113. Id. at 707 ("Ironically, the move to the disparate-impact theory may have alleviated some of that perceived need as it sent a signal that intentional discrimination was largely a thing of the past.").


115. Id. at 519 (emphasis added).

116. See, e.g., Selmi, supra note 30, at 706 ("The disparate impact theory has often been justified based on the difficulty of proving intentional discrimination, particularly in cases where evidence of overt bias or animus is lacking."); Stephanopoulos, supra note 24, at 1604 (noting that the legislative histories of major antidiscrimination laws "establish that [they] may be violated by racial disparities even in the absence of discriminatory intent").

If we want to induce a greater sense of social responsibility to eradicate race-based inequities, this kind of culpability is necessary for perpetrators of discrimination. It is especially vital when the ultimate goals of such accountability are inextricably tied to a national reckoning with how slavery’s vestiges still manifest and are perpetuated by institutions, as with school discipline policies.\textsuperscript{118} It is only through a direct reckoning with slavery’s legacy that racial justice will come about.\textsuperscript{119} As explained in Section III.D.4, housing race-conscious disparate-impact-like claims in the Thirteenth Amendment would ensure this important confrontation, given that the claims would flow from determinations about a practice’s connection to slavery.

The next Section, however, first discusses how the disparate-impact theory has suffered for other practical reasons, problems that, as will be explained, the Thirteenth Amendment also could theoretically circumvent.

\textit{D. Disparate Impact’s Other Practical Hurdles}

Beyond the disparate-impact theory’s constitutional trouble and its deficiencies with respect to accountability for what should be considered intentional discrimination, several other aspects of the theory contribute to its inability to bring about any meaningful change. Practically, disparate-impact plaintiffs continue to struggle in fulfilling the judicially developed elements of “necessity” and “causation” that a disparate-impact claim generally requires.\textsuperscript{120} Moreover, federal agencies have not consistently employed the disparate-impact theory to smoke out discrimination. I consider each of these below.

\textsuperscript{118} See infra Part III for a discussion of the ties between slavery and certain school discipline policies.

\textsuperscript{119} \textsc{Equal Justice Initiative}, \textsc{Slavery in America: The Montgomery Slave Trade 76} (2018), https://eji.org/wp-content/uploads/2020/05/slavery-in-america-report2.pdf [https://perma.cc/36CS-YCSP] ("While it is tempting to divorce the racial injustice of our past from today’s issues of racial fairness and equality, it is irresponsible to ignore this historical context. In the United States, the legacy of slavery, racial terror, and segregation can be seen and felt in myriad ways.").

\textsuperscript{120} See generally infra notes 121–131 and accompanying text (discussing the judicial development of these standards).
1. Rebutting the Necessity Justifications

Overcoming the necessity prong of the traditional disparate-impact framework is notoriously difficult for plaintiffs to satisfy and often masks the exercise of judicial whim regarding the merits of a challenged employer practice. Empirical studies of Title VI show that the disparate-impact framework’s necessity defense frequently accounts for plaintiffs’ defeats in disparate-impact cases.

There are similar problems in the public-school context under Title VI related to “education necessity.” Jennifer Braceras, a former Commissioner of the United States Commission on Civil Rights, concludes, for example, that evaluating an educational goal when litigating education discrimination claims is difficult because of the “absence of clear and objective criteria by which to judge the ‘necessity’ of a particular educational policy ….” For Braceras, the education necessity is even less feasible than business necessity, which, because it embodies productivity and profit margins, is more feasible since such factors are quantifiable.

It is not difficult to imagine how determining the kinds of school discipline policies that are “necessary” might specifically give courts trouble.

121. Selmi, supra note 30, at 769.

122. Stephanopoulos, supra note 24, at 1622. In his survey of three hundred decisions from the 1980s, 1990s, and 2000s, Michael Selmi found in the Title VII context that plaintiffs prevailed in only twenty to twenty-five percent of these disputes, Selmi, supra note 30, at 738–39, and that the necessity prong “always proved [a] greater hurdle” than establishing a racial disparity, id. at 749. Moreover, because courts tend to shy away from labeling ambiguous behavior as discriminatory, they often will defer to employee practices in making those determinations. Id. at 769 (considering Title VII).


124. Id. at 1193. I agree with Jennifer Braceras only insofar as she argues that the necessity standard’s lack of clarity is not clear enough for courts to apply. I have previously proposed that the U.S. Department of Education issue a regulation that better informs the education necessity standard. See generally Brence Pernell, Aligning Necessity Educational Necessity with Title VI, 90 N.Y.U. L. Rev. 4 (2015).
Judges often lack confidence in their abilities to critically evaluate the policies chosen by schools. Consequently, they are likely to defer to the educational institutions, which they presume are better equipped to evaluate and make normative judgments about various educational issues. Such judicial reluctance is even more magnified when schools justify the discipline practices as necessary for goals like maintaining school safety or preventing academic disruptions. It is difficult to argue that such justifications do not correspond to a school’s educational goal. Indeed, some conservative lawmakers have even gone so far as to suggest that disparate-impact enforcement may have contributed to recent school shootings by making schools less capable of protecting students for fear of disparate-impact liability.

In sum, the necessity prong generally proves difficult for discrimination plaintiffs who must rely on courts to reject necessity defenses in order to identify discrimination.


126. Id. at 316–17 nn.342–43.

127. See, e.g., In re Cumberland County Sch. Dist., [1992-1993 Transfer Binder] 19 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. (LRP) 505, 508–10 (1992) (investigating disciplinary actions for students of color and concluding that the harsher punishments of students of color compared to those of white students were because of “extenuating circumstances such as prior disciplinary records”).


129. Mehmet K. Konar-Steenberg provides a somewhat similar analysis, arguing for the Thirteenth Amendment as a viable source for achieving environmental justice given, among other things, environmental justice advocates’ struggle with proving disparate-impact claims. See Konar-Steenberg, supra note 46, at 524–30. And in arguing the viability of disparate-impact claims under the Thirteenth Amendment, Larry Pittman similarly criticized the then-developing “confusion surrounding the plaintiff’s and defendant’s respective burdens of production and persuasion” in the Title VII disparate-impact context. Pittman, supra note 46, at 879–80. That confusion prompted Pittman...
2. Proving Causation

Another barrier for disparate-impact plaintiffs is proving causation—that is, the evidence shows that the school’s action caused the disparate impact—the meaning of which is not entirely clear under the Title VI regime. Some have argued that unlike in the employment context, disparate-impact claims in the education context might require “more than sheer statistical evidence” when filing with the DOJ or DOE. And most recently, in Inclusive Communities, discussed supra, the Supreme Court recently suggested an even more demanding “robust” causation requirement, a standard that may go on to prove difficult for disparate-impact plaintiffs in several contexts, including Title VI.

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130. See, e.g., Elston v. Talladega Cty. Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993) (“The plaintiff’s duty to show that a practice has a disproportionate effect by definition requires the plaintiff to demonstrate a causal link between the defendant’s challenged practice and the disparate impact identified.”). But see Sandoval v. Hagan, 197 F.3d 484, 508 (11th Cir. 1999) (avoiding a hard causation requirement and instead requiring a plaintiff to demonstrate that a neutral policy “casts” an adverse and disproportionate effect on a protected class), rev’d on other grounds sub nom. Alexander v. Sandoval, 532 U.S. 275 (2001).

131. Cf. Adira Siman, Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color, 14 CORNELL J. L. & PUB. POL’Y 327, 344 (2005) (“Since there is clear evidence that zero tolerance policies disproportionately affect minorities, as long as sufficient data on school discipline practices is available, it is likely that a zero tolerance challenge will meet the initial burden. Moreover, a court may give additional weight to evidence that the implementation of a zero-tolerance policy resulted in increased disparities or a significant growth in the numbers of minority students disciplined.” (citations omitted)).

132. Inclusive Communities, 576 U.S. at 540–44.
3. Agencies’ Inconsistent Enforcement

The Supreme Court’s 2001 ruling in *Alexander v. Sandoval* that there is no private right of action to bring a disparate impact claim under Title VI further limits disparate-impact claims’ potential reach. The DOJ pointed out in its Title VI Manual, updated in November 2018, that federal “agencies’ critical role [in enforcing Title VI disparate-impact regulations] . . . increased after the Supreme Court’s 2001 decision in *Alexander v. Sandoval*.”

In line with this role, both the DOJ and the DOE’s Offices for Civil Rights are legally obligated to enforce Title VI and its implementing regulations. The DOJ enforces Title VI as it relates to all recipients of federal financial assistance, including schools. The DOJ also enforces Title VI upon referral from other federal funding agencies or through intervention in an existing lawsuit; it also coordinates the enforcement of Title VI government-wide.

The regulatory enforcement scheme for pursuing disparate-impact claims in the public education context is straightforward: if a recipient of federal assistance is found to have discriminated and does not voluntarily comply with DOE standards for addressing the policy’s discriminatory

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133. 532 U.S. 275, 293 (2001) (foreclosing the ability of private litigants to directly initiate Title VI disparate-impact suits in federal court without first filing with a federal agency).


136. See, e.g., 34 C.F.R. § 100.3 (2012) (defining “discrimination” for the purposes of Title VI enforcement).


138. The Department of Justice’s (DOJ) Office for Civil Rights (OCR) at the Office of Justice Programs (OJP) “is the principal DOJ office that enforces Title VI through the administrative process.” Office of Justice Programs, U.S. Dep’t of Justice, *Title VI of the Civil Rights Act of 1964 1*, https://www.ojp.gov/sites /g/files/xyckuh241/files/media/document/ocr_titlevi.pdf [https://perma.cc/5FW9-MNQD].
impact, the DOE can either initiate fund termination proceedings or refer the matter to the DOJ for appropriate legal action. In the context of education, private parties can file disparate-impact complaints with the DOE, which has the power to investigate, review, and revoke federal funds under Title VI. But, unfortunately, the willingness of federal agencies to address disparate-impact claims has fluctuated significantly over the years because of political whims, a fact particularly true with respect to school discipline policies.

139. See Civil Rights Div., U.S. Dep’t of Justice, Title VI Legal Manual, supra note 137, at 80–81 (explaining that the agency may refuse to grant or continue assistance or refer “the violation to the Department of Justice for judicial action”).

140. 42 U.S.C. § 2000d-1 (empowering the federal government to terminate federal funding or assistance to programs and activities that do not comply with the Title VI mandates); see also 34 C.F.R. § 100.3(b)(2) (2014); 28 C.F.R. § 42.104(b)(2) (2014) (reiterating that a federal fund recipient cannot use “criteria or methods of administration” that “have the effect of subjecting individuals to discrimination because of their race, color, or national origin”).

141. In September 2010, for example, Thomas Perez, Assistant Attorney for Civil Rights at the DOJ, commented on the increasing efforts of the federal government to address the disproportionate impact of school discipline policies on students of color. Thomas E. Perez, Assistant Att’y Gen. for Civil Rights, U.S. Dept. of Justice, Remarks as Prepared for Delivery by Assistant Attorney General for Civil Rights Thomas E. Perez at the Civil Rights and School Discipline: Addressing Disparities to Ensure Equal Educational Opportunities Conference (Sept. 27, 2010), http://www.justice.gov/crt/speeches/perez_eosconf_speech.php [https://perma.cc/4YS9-H9UH]. Perez described “policy development and enforcement” that went towards “a mission to ensure that all students at every level can access a quality education on an equal basis.” Id. Russlyn Ali, former Assistant Secretary of the DOE’s OCR, unequivocally announced in the same year that “disparate impact is woven through all civil rights enforcement of this administration.” Mary Ann Zehr, Obama Administration Targets ‘Disparate Impact’ of Discipline, Educ. Week (Oct. 7, 2010) http://www.edweek.org/ew/articles/2010/10/07/07disparate_ep.h30.html [https://perma.cc/H8WF-3HYN]. Such direction under President Barack Obama significantly contrasted with that of the prior Republican administration. See Nick Anderson, Duncan Will Pressure Schools to Enforce Civil Rights Laws, Wash. Post (Mar. 8, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/07/AR2010030702285.html [https://perma.cc/X26D-3GZ2] (reporting that Secretary Duncan stated: “The truth is that, in the last decade, the Office for
In the end, then, the disparate-impact theory veered from its original aims as it relates to antidiscrimination for Black Americans.\textsuperscript{142} Meanwhile, Civil Rights has not been as vigilant as it should have been in combating gender and racial discrimination \ldots \). This prompted Ali to comment that it was her “understanding \ldots that disparate impact was not a theory that was used during the last administration in education.” Zehr, supra note 141 (reporting that the disparate-impact cases approved under the George W. Bush Administration were highly scrutinized “because some officials felt that the Clinton Administration had abused the disparate-impact approach to bring ‘frivolous or ideologically motivated cases’
).


\textsuperscript{142} But see Stephanopoulos, supra note 24, at 1633 (“[L]awsuits’ numbers and success rates are a poor guide to a legal theory’s social value”). He explains a theory could still be symbolically significant because it (1) “preserve[s] some awareness that existing racial hierarchies are products of past discrimination and that a level-playing-field approach today could help those hierarchies perpetuate themselves indefinitely” and (2) might have already altered social
ostensibly neutral practices and policies that actually discriminate against Black Americans persist.\textsuperscript{143} Expanding the disparate-impact theory\textsuperscript{144} and taking steps to fix the theory\textsuperscript{145} are options, but they should not be the only ones. Remedying the present effects of past racial discrimination against Black Americans, the disparate-impact theory’s original objective, should remain an important national goal. But meaningful racial justice will require national accountability and collective social responsibility. For all the ways that the disparate-impact theory has failed to do as much, grounding remedial legislation with a disparate-impact hook in the Thirteenth Amendment is a way to accomplish this goal. The rest of the Article discusses why and how to do so.

II. THE THIRTEENTH AMENDMENT: CONCEPTUALIZING FREEDOM, LEGISLATIVE HISTORY, AND JURISPRUDENCE

The Thirteenth Amendment is primed to pick up where the traditional, statutory-based disparate-impact theory has left off in order to achieve both that theory’s original goals and the Thirteenth Amendment’s promise of racial justice for Black Americans. This Part discusses the Thirteenth Amendment’s promise in that regard, specifically by (1) considering the freedom the Amendment was to actually confer; (2) highlighting the Amendment’s relevant social and legislative histories; and (3) surveying the Amendment’s jurisprudence and major legislation passed under the Amendment.

A. Notions of “Practical Freedom” for Black Americans

The Thirteenth Amendment of the United States Constitution states:

\begin{quote}
behavior, thereby yielding “infrequent and ineffective” litigation. \textit{Id.} at 1633–34. He argues for the expansion of the disparate-impact theory because “it has produced real improvements in employment and housing practices—and that it would be even more effective in vote denial cases.” \textit{Id.} at 1635–36.
\end{quote}

\textsuperscript{143} Selmi cites the small statistical success of disparate-impact claims and concludes that the disparate-impact theory, ultimately, has brought about little social change. \textit{Selmi, supra} note 30, at 705, 738–42.

\textsuperscript{144} See Stephanopoulos, \textit{supra} note 24, at 1582.

\textsuperscript{145} See, \textit{e.g.}, Pernell, \textit{supra} note 124, at 1374.
Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.146

The Amendment marked the first time that the Constitution would mention the word "slavery." And, poignantly, the Amendment’s enshrining of Congress with the power to enforce this anti-slavery Amendment would be the first time an amendment would expand the federal government’s power, setting a precedent of broad federal authority over civil rights.147 The Amendment specifically increased congressional power to regulate civil rights as part of the constitution’s freedom project.148

Black American political leaders contended that abolishing slavery included not only outlawing formal slavery, but also eliminating all other elements of the slave system.149 This comports with the fact that well before the Civil War, Black American individuals, communities, and activists were already actively asserting a range of public rights not formally extended to them, highlighting their active imaginations of free public lives for themselves.150 Even during the antebellum era, Black Americans had their...
own understanding of freedom as a legal and constitutional status. And especially because the education of enslaved Black Americans was a criminal offense intimately tied to maintaining the institution of slavery, Black Americans would obviously understand freedom to mean access to education.

That fact, along with what newly freed Black Americans did do after the abolition of slavery—for example, reuniting with families, demand land, build churches, and particularly relevant here, seek educational opportunities—is indicative of how they envisioned the kind of freedom the Thirteenth Amendment granted. Towards the end of the Civil War, for example, the Black-owned New Orleans Tribune advanced a program for Black Americans that included a range of rights, including Black male suffrage, division of land, and equal access to public schools and transportation. It was in such ways that Black Americans sought to "throw off the badge of servitude" and claim, as citizens, "the blessings of equal liberty." Legislators joined Black Americans in grappling with what freedom after the Thirteenth Amendment would mean. Indeed, the idea of freedom had "rarely been so well parsed as it was during the formal debates on the Thirteenth Amendment granted.

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152. See, e.g., Heather Williams, Self-Taught 18 (2005) ("The presence of literate slaves threatened to give lie to the entire [slave] system.").

153. Laura Edwards, Response to Rebecca Scott’s "Discerning a Dignitary Offense," Law & Hist. Rev. 1, 4–6, 13 (May 2020) (arguing that the existence of homegrown notions from Black Americans and others of what equality, by way of "law or rights," should look like).

154. See, e.g., Williams, supra note 152, at 40 ("Large numbers of newly freed people manifested [an] intense interest in becoming literate."); Reconstruction and Its Aftermath, LIBR. CONGRESS https://memory.loc.gov/ammem/aaohtml/exhibit/aopart5.html [https://perma.cc/Q6CE-7SDX] (noting that in the years after the Civil War, "[f]ormer slaves of every age took advantage of the opportunity to become literate. Grandfathers and their grandchildren sat together seeking to obtain the tools of freedom.").

155. Foner, supra note 147, at 51–52.

156. Id.

157. Vorenberg, supra note 147, at 61–114; Baher Azmy, Modern Slavery and a Reconstructed Civil Rights Agenda, 71 Fordham L. Rev. 981, 1008–17 (summarizing relevant legislative history).
Amendment. Republicans "intended the Thirteenth Amendment to have an evolving and dynamic interpretation." More specifically, the Amendment's primary architects were strongly influenced by abolitionist philosophy on the nature of a just society and therefore that the "abolitionists' broader purposes of reconceptualizing [their] Constitution to guarantee equality... must guide Thirteenth Amendment jurisprudence." Notably, one of the two major ways abolitionists attempted to fulfill the "promise of freedom" was via "black education." During the legislative debates, Illinois's Senator Lyman Trumbull recognized the "difficulty" of defining slavery and "liberty," but nonetheless described the Thirteenth Amendment as one to enforce "natural liberty." Relatedly, Thirteenth Amendment supporters intended it to be a tool of vibrant legal power that addressed much more than the


159. Carter, supra note 158, at 1331.

160. Id. at 1333; see also Tsesis, supra note 148, at 7–8 (describing the "abolitionist interpretation of liberty" and noting its inspiration for Radical Republicans during the Thirteenth Amendment debates in "espousing... natural rights ideals").


163. Id.
prohibition of physical servitude. The Amendment’s House floor leader, Representative James Ashley, for example, declared that the Amendment was to provide “a constitutional guarantee of the government to protect the rights of all and secure the liberty and equality of its people.” The Amendment’s legislative history reveals that all but the most conservative proponents of the Amendment either implicitly supported or outright affirmed the Amendment’s guarantee of a set of “natural” or “civil” rights extending beyond freedom from the physical or legal coercion of labor.

While individual legislators’ statements are not necessarily indicative of a constitutional provision’s intent, a fair number of legislators on both sides suggested that the Amendment either would, or should, go beyond emancipation and grant other substantial rights to Black Americans that slavery had precluded. Especially relevant is Senator James Harlan of Iowa’s list of the “necessary incidents and peculiar characteristics of slavery” that would need to be addressed; the list included not only things like freedoms of speech and press, but also barriers to Black Americans’ education.

The next Section builds on this understanding of freedom and demonstrates how central Black Americans’ education was to that understanding.

164. Jacobus tenBroek, Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment, 39 CALIF. L. REV. 171, 175 (1951).
166. tenBroek, supra note 164, at 174–79; see also VORENBERG, supra note 147.
168. Pope, supra note 44, at 433 (noting that the Amendment’s opponents, in particular, “portrayed it as a fearsomely sweeping measure that would topple traditional hierarchies not only of race, but also of sex”).
B. Education as Freedom

Understanding the relationship between racially discriminatory school policies and the Thirteenth Amendment requires a specific appreciation of the extent to which it was commonly understood that denial of educational opportunities for Black Americans was a key feature of slavery. Slavery insisted on a lack of education; accordingly, education for Black Americans represented “more than a symbol of freedom; it was freedom.”171 And it was a particularly special enactment of the new freedom assured by the Thirteenth Amendment.172 In the words of one enslaved man from South

171. Theresa Perry & Claude Steele, Young, Gifted and Black 13 (Asa Hilliard ed., 2004). Free Black Americans were about three times more likely to be literate than enslaved Blacks. See William J. Collins & Robert A. Margo, Historical Perspectives on Racial Differences in Schooling in the United States, in 1 HANDBOOK OF THE ECONOMICS OF EDUC. 107, 119 tbl4 (Eric A. Hanushek & Finis Welch eds., 2006); see also Perry & Steele, supra at 51 (“The philosophy of education that [Black Americans] developed was informed by the particular ways in which literacy and education were implicated in the oppression of African Americans.”).

172. See Peggy Cooper Davis, Education for Sovereign People, in A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 138 (Kimberly Jenkins Robinson ed., 2019) (“It is reasonable to posit ... that access to education is an aspect of freedom assured by the Thirteenth Amendment.”); Williams, supra note 152, at 29 (“Whites feared that literacy would render slaves unmanageable. Blacks wanted access to reading and writing as a way to attain the very information and power that whites strove to withhold from them.”); id. at 40 (“Large numbers of newly freed people manifested [an] intense interest in becoming literate.”); id. at 46 (“African Americans had their own visions of freedom. They had had generations to contemplate a world in which they could claim the benefits of their own labor and make choices for themselves and their children. These critical choices often included becoming literate.”); Susan O’Donovan, Becoming Free in the Cotton South 138 (2010) (stating that “other items figured into freedom’s agendas: acquisition ... of education” for Black Americans).

The intensity with which whites opposed Black Americans receiving an education after emancipation also underscores how important education was. See Williams, supra note 152, at 59 (“White Southern responses to African American education, both elementary and advanced, proved complex and shifting. Initial shock gave way to envy, anger, and resentment as education threatened the remnants of the antebellum social structure.”); Henry Allen Bullock, A History of Negro Education in the South: From 1619 to the Present 38 (1967) (showing how, following the Civil War, “the South, in keeping with
Carolina, education was a "coveted possession." Scores of personal narratives of the enslaved reinforce Black Americans’ view of education as freedom in their retelling of the desire for literacy and the prices they were willing to pay to become literate.

Enslaved Black Americans pursued learning because it was one of the most effective ways to claim one’s humanity and citizenship. Education allowed for freedom to be asserted both for oneself and for other Black Americans, making it an especially powerful act of resistance. Literate enslaved Black Americans were not only the catalysts for several slave rebellions, but also a major mechanism by which enslaved Black Americans were kept abreast of anti-slavery efforts. Connecticut’s Reverend Leonard Bacon, a leading advocate of returning enslaved Black Americans to the continent of Africa had warned that were Black Americans to be

its traditional prejudices, hurriedly erected barriers against the realization of two of the Negro’s most pressing aspirations: the aim to become a full-fledged citizen and the desire to educate his children.

173. WILLIAMS, supra note 152, at 36.

174. Id. at 90 (“African Americans understood literacy to be closely associated with freedom.”); id. at 69 (“In newspaper editorials, letters to public officials, speeches at conventions, and statements to white citizens, black individuals and organizations . . . asserted a right to education.”).

175. See generally id. at 17–35 (documenting the various extremes Black Americans went to maintain education before emancipation); Davis, supra note 172, at 169 (“Despite the difficulty of knowing how many African Americans were literate before or just after the Civil War, we now know with certainty that enslaved people took consistent and dangerous actions in pursuit of literacy and the freedom it brought.”); PERRY & STEELE, supra note 171, at 14.

176. WILLIAMS, supra note 152, at 70 (“Alongside traditionally defined civil rights . . . freedpeople propounded a new right: the right to attend school.”).

177. Davis, supra note 172, at 164–81; WILLIAMS, supra note 152, at 17, 20, 22–23; PERRY & STEELE, supra note 171, at 11.

178. Davis, supra note 172, at 168 (“Learning and teaching reading and writing were among the most impactful acts of resistance to slavery.”).

179. PERRY & STEELE, supra note 171, at 14; WILLIAMS, supra note 152, at 31 (“In addition to providing concrete information about the physical location of freedom and the means to get there, literacy had the potential to help enslaved people articulate objections to the very existence of the institution of slavery.”).
"raise[d] ... to an intellectual existence," they would "stand forth ... in all the terrors of a long injured people, thirsting for vengeance."  

Public education was, moreover, key to removing the remnant features of slavery for Black Americans and incorporating them into the U.S. American citizenry. The Thirteenth Amendment and subsequent legislation, discussed infra, demonstrate that many (primarily Republican) Congressmen believed that by ending slavery, the Amendment had overturned the Supreme Court's Scott v. Sandford ruling that Black Americans could not be citizens.

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181. See Cong. Globe, 40th Cong., 1st Sess. 169 (1867) (statement of Sen. Cole) (arguing that to change the culture of subjugation, states needed to extend those rights, including education, necessary for Black people to participate in government); Inst. For Educ. Equity & Opportunity, Education in the 50 States: A Deskbook of the History of the State Constitutions and Laws about Education 36 (2008) (“With expansion of citizenry to the newly freed African-American populations, the country correspondingly expanded the right to education [to freedmen] to assure the ability of these new citizens to participate in a democratic society.”).

For other, more direct affirmative constitutional theories recognizing a right to education under the Fourteenth Amendment as a citizen, see generally Derek W. Black, The Constitutional Compromise to Guarantee Education, 70 Stan. L. Rev. 735 (2018) (arguing that the Fourteenth Amendment’s original intent included a commitment to guarantee education as a core aspect of state citizenship); Goodwin Liu, Education, Equality, and National Citizenship, 116 Yale L.J. 330 (2006) (positing that education is a privilege or immunity of national citizenship that the Fourteenth Amendment guarantees and that the right is to be enforced by Congress).

182. Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857) [hereinafter Dred Scott] (refusing citizenship to enslaved Black Americans because they were “regarded as beings of an inferior order” because of their race, “altogether unfit to associate with the white race ... [with] no rights which the white man was bound to respect”).

183. Zietlow, supra note 169, at 282. Congress eventually would make explicit its view that Black Americans who had been enslaved were citizens in its ratification of the Citizenship Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1.
Building on that belief, for Republican members of Congress, public education would ensure the new Black American citizens’ “capacity to engage in democratic self-government” and the prevention of being “subject[ed] to domination by the elite class.”\textsuperscript{184} The federal Bureau of Education, created in 1867, similarly posited a concept of education as one that “every child in the land . . . receive” in order to “qualify him to discharge all the duties that may devolve upon him as an American citizen.”\textsuperscript{185} Citizenship requires sufficient education not only for civic participation, but also for “productive work and the self-reliance, respect, and autonomy that work entails.”\textsuperscript{186}

Denying public education to Black Americans went hand in hand with enslaving them and denying them rights as citizens and full persons.\textsuperscript{187} Accordingly, Republican congressional members weighing their new power under the Thirteenth Amendment averred that a minimum degree of education for formerly enslaved Black Americans was central to being fully free citizens. They explicitly articulated that laws that, among other things, “did not allow [Black Americans] to be educated, were all badges of servitude made in the interest of slavery and as a part of slavery.”\textsuperscript{188} “[W]e must see to it that the man made free by the Constitution of the United States . . . is a freeman indeed; that he can go where he pleases; . . . that he can go into the schools and educate himself and his children . . .”\textsuperscript{189} As Senator Ignatius Donnelly of Minnesota expressed, “If it is . . . true that we must make the freedmen fully free . . . then it is equally necessary that education should accompany freedom.”\textsuperscript{190} Black Americans had long recognized as much, and

\textsuperscript{184} Black, supra note 181, at 743.
\textsuperscript{185} CONG. GLOBE, 39th Cong., 1st Sess. 3045 (1866) (statement of Rep. Moulton).
\textsuperscript{186} Liu, supra note 181, at 345.
\textsuperscript{187} See Williams, supra note 152, at 7 (arguing that allowing the education of slaves would have undermined the dehumanizing rationale for and practice of slavery); Susan P. Leviton & Matthew H. Joseph, An Adequate Education for All Maryland’s Children: Morally Right, Economically Necessary, and Constitutionally Required, 52 Md. L. Rev. 1137, 1155 (1993) (indicating that elites, “principally wealthy property and slave owners,” had blocked public education prior to the Civil War).
\textsuperscript{188} CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Trumbull) (emphasis added).
\textsuperscript{189} Id. at 111 (Rep. Wilson).
\textsuperscript{190} Id. at 589 (Rep. Donnelly).
the particular zeal with which they built and maintained schools,\textsuperscript{191} and formally advocated for a public school system after the Thirteenth Amendment's enactment,\textsuperscript{192} is testament.

Republican Congressmen understood that any policies preventing access to education "never would have been thought of or enacted anywhere but for slavery, and when slavery falls they fall also."\textsuperscript{193} Because slavery required the absence of education for Black Americans, real freedom for Black Americans would have to mean ensuring access to it. If the history of the Amendment's early legislation—and the legislation itself—are any indication, Republican Congressmen similarly understood the Amendment's scope. I discuss the early legislation and the respective history in the next Section.

\textit{C. Early Thirteenth Amendment Legislation}

It is with a generous notion of freedom under the Thirteenth Amendment that the majority Republican Congress, acting on its newly conferred power took some of the first major reparative steps towards legislating what day-to-day freedom for Black Americans should look like.

1. Legislative Acts

An appropriate place to begin for consideration of such legislation is the oft overlooked Second Freedmen's Bureau Bill,\textsuperscript{194} passed in January 1866

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\textsuperscript{191} Williams, supra note 152, at 44 ("Even when northern whites served as the teachers, freedpeople built schools, paid teachers, and made other contributions to the educational effort."); see Davis, supra note 172 at 171 (Kimberly Jenkins Robinson, ed., 2019) ("After the war's end, freedpeople intensified their quest for education as a perquisite to free civic participation"); Williams, supra note 152, at 70 (describing historical accounts of freedpeople "attempting to insert a right to education into their newly gained freedom").

\textsuperscript{192} Williams, supra note 152, at 134–35.

\textsuperscript{193} Cong. Globe, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Trumbull). Senator William Stewart of Nevada similarly stated, "We have given him freedom, and that implies that he shall have all the civil rights necessary to the enjoyment of that freedom." Id. at 298 (statement of Sen. Stewart).

\textsuperscript{194} See Mark A. Graber, The Second Freedmen's Bureau Bill's Constitution, 94 Tex. L. Rev. 1361, 1376 (2016) (concluding that Congress was obligated to "root
after the Amendment’s ratification and intended to temporarily provide refugees and the formerly enslaved with “the goods and services they needed to make the transition from slavery to full American citizenship.” The purpose was to avoid the formerly enslaved “falling into a permanent state of destitution inconsistent with the independence necessary for full citizenship in a democratic republic.” In this way, Republicans immediately began legislating under their Thirteenth Amendment power with an understanding of the sumptuous kind of freedom the Amendment was to convey.

Building on the Second Freedmen’s Bureau Bill was the Civil Rights Act of 1866, which was designed to be permanent and would enumerate the fundamental rights of free persons and citizens. The Civil Rights Act of 1866 specifically entitled Black Americans to rights of equality before the law with respect to contract, property, and security of the person. In doing so, it went well beyond outlawing full-fledged slavery and involuntary servitude in order to guarantee an important array of civil rights. Proof of a violation of the Act did not require a showing that anyone had been placed in a condition of chattel slavery or involuntary servitude; only proof that a person had been “depriv[ed] of any right secured or protected by this act” was required. Sufficient to trigger the Act was a victim’s denial of “the same right . . . as is enjoyed by white citizens” to contract, participate in court proceedings, own property, and take advantage of the “full and equal benefit of all laws and proceedings for the security of person and

out laws and practices that had previously supported racial subordination”).

Graber remarks: “This focus on the Civil Rights Act of 1866 rather than on the Second Freedmen’s Bureau Bill reflects contemporary constitutional practice rather than Republican priorities and thinking during the winter of 1865–1866.” Id. at 1362. He explains that this is because “contemporary civil rights law and policy are devoted to enumerating the fundamental rights of free persons and citizens—the most important of which is the right to be free from discrimination in the distribution of certain goods and services on the basis of certain traits.” Id.

197. FONER, supra note 195, at 243–44.
198. See Civil Rights Act of 1866, ch. 31.
199. Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (emphasis added).
property.”

Underscoring this Act for Republicans was what Senator Trumbull referred to as “practical freedom” for Black Americans, a belief that aligned with that of Black Americans of the time but contrasted significantly with Democrats’ contention that the Amendment should confer only freedom from physical bondage.

Congress acted on that more expansive view of the Thirteenth Amendment’s guarantee of freedom and enacted what was originally conceived of as the Supplementary Civil Rights Act, or the 1875 Civil Rights Act that was intended to supplement the 1866 Civil Rights Act. The 1875 Act was the culmination of Congress’s broad interpretation—and Congress’s power to act on that interpretation—of the Thirteenth Amendment’s prohibition of slavery as the affirmative granting of

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200. Id. § 1 (emphasis added).
203. The 1875 Act also was intended to clarify the reach of the more recently enacted Fourteenth Amendment. See, e.g., Michael W. McConnell, Institutions and Interpretation: A Critique of City of Boerne v. Flores, 111 Harv. L. Rev. 153, 175 (1997) (“[S]upporters of the [1875 Civil Rights] Act insisted that it merely enforced rights already established by the Fourteenth Amendment.”); Jack Balkin, The Reconstruction Power, 85 N.Y.U. L. Rev. 1801, 1815, 1823 (2010) (describing the debates over the 1875 Act as “full of speeches offering diverse interpretations” of the Fourteenth Amendment). The Fourteenth Amendment was to supplement the Thirteenth Amendment, a discussion of which is beyond this Article’s scope. See, e.g., Mark Graber, Symposium: The Thirteenth Amendment: Meaning, Enforcement, and Contemporary Implications, 112 Colum. L. Rev. 1501, 1522–23 (2012) (recognizing the “common view that the Fourteenth Amendment was designed to provide more secure foundations for legislation implementing Reconstruction,” but recognizing that the Fourteenth Amendment “may have undermined some rights originally protected by the Thirteenth Amendment”).
“pleasurable liberties” and rights. The 1875 Act granted “full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement.”

2. Legislative History

The legislative histories of the 1866 and 1875 Acts also describe the Thirteenth Amendment’s aim with language that reflects an intention for Congress to enforce the Amendment expansively in order to reach slavery’s vestiges in all of its forms. The debates over the 1866 Act reveal how, especially for Republicans, the Amendment guaranteed a right to the “full and equal benefit of all laws.” More specifically, during the 1866 Act’s debate, Senator John Sherman of Ohio (eventually the Secretary of the Treasury and then Secretary of State), demanded that Congress protect free citizens’ rights to do things like raise a family, travel, and, most pertinently, pursue an education. Significantly, to preserve the 1866 Act, Congress, for one of the first times in this nation’s history, overrode a president’s veto, an action by Congress that reinforced its original understanding of the Amendment.


206. See id.


209. Tsesis, supra note 148, at 12.

The 1875 Act, incorporating what historian Amy Dru Stanley has dubbed “a radical right to happiness” for Black Americans, arguably went even further with respect to Republicans in Congress advocating a broad interpretation of the Amendment. Senator Charles Sumner of Massachusetts, author of that legislation, had explained that although emancipation had resulted in rights like access to courtrooms, such rights were “not enough,” as “[t]he new-made citizen is called to travel for business, for health, or for pleasure” and “longs . . . for respite and relaxation, at some place of amusement . . . The denial of any right is wrong.”

As Stanley summarizes, “[e]mancipation [of Black American slaves] would bring a fundamental right to be an amusement seeker,” a “concept of freedom that was both sensuous and steeped in the ways of the marketplace” and that in the 1875 Act supplement was an “inherent right to . . . experience rapture in public.” Although the Supreme Court ultimately denied the constitutionality of the Civil Rights Act of 1875, discussed, infra, Justice Harlan, in his dissent in The Civil Rights Cases, also articulated an expansive definition for a badge and incident of slavery, espousing the Thirteenth Amendment as one “establish[ing] universal freedom.” Justice Harlan would echo that argument close to two decades later in Hodges v. United States, where he explained that the Thirteenth Amendment contemplated giving “full effect” to the Amendment’s “bestowment of liberty.”

The respective legislative histories of the 1866 and 1875 Acts—and the Acts themselves—evidence both Congress’s and the public’s conception of what the Thirteenth Amendment was to accomplish as it pertained to the liberation of Black Americans. In protecting Black American citizens from social discrimination, in all of its sundry forms, Congress, by enforcing the Amendment, would ensure that Black Americans would enjoy the same citizen privileges as their white counterparts—that is, that Black Americans would be free in the truest sense. The Acts were an implicit recognition of the fact that the system of slavery was not “unitary,” and instead consisted

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211. Stanley, supra note 204.
213. Stanley, supra note 204.
of a “bundle of disabilities, bound together by conventions.”216 The Thirteenth Amendment is therefore implicated as it relates to any of these disabilities, as each one was a part of slavery.217

Flowing from this understanding is the conclusion that “[t]o comply with the command that slavery shall not ‘exist,’” is to require determining which of the “disabilities” referenced above are “so important to slavery and involuntary servitude that when they exist, it cannot be said that those conditions have been entirely eliminated.”218 If the legislative histories of the Amendment, the subsequent 1866 Act, and especially the 1875 Act confirm anything, it is that the “disabilities” that would also need to be eradicated—outside of physical bondage—were numerous and variable. Understanding slavery as the absence of such rights would have to encompass an understanding of slavery as the absence of educational opportunities for Black Americans. As already discussed, Black Americans themselves especially believed as much, given that denial of such opportunities was one of slavery’s key features.

Notwithstanding this understanding of freedom under the Thirteenth Amendment, the next Section discusses Supreme Court’s evolution in its own understanding of the Thirteenth Amendment’s purpose and power.

D. Thirteenth Amendment Jurisprudence

1. The Civil Rights Cases

It was the 1875 Act that spawned the Supreme Court’s few rulings on race and the Thirteenth Amendment. In The Civil Rights Cases,219 the Court, ruling on the 1875 Act’s constitutionality, first introduced the phrase

216. Darrell A.H. Miller, The Thirteenth Amendment and the Regulation of Custom, 112 COLUM. L. REV. 1811, 1848 (2012). Not less than a decade before the 1866 Act, for example, the Supreme Court had similarly explained that “the basic aspects of social life for most of the nation’s history reflected Black Americans’ inferior status,” and that “men in every grade and position in society daily and habitually [had] acted upon [knowledge of this inferior status] . . . without doubting for a moment the correctness of this opinion.” Dred Scott, 60 U.S. at 407 (emphasis added).


218. Pope, supra note 44, at 430.

“badges and incidents of slavery” into the Court’s idiolect.\textsuperscript{220} Though the Court interpreted the Thirteenth Amendment as authorizing Congress to “pass all laws necessary and proper for abolishing all badges and incidents of slavery,” it also interpreted Congress’s power as limited to ensuring only “those fundamental rights which are the essence of civil freedom”—in other words, civil and legal rights.\textsuperscript{221} Thus, while the Supreme Court welcomed an interpretation of the Thirteenth Amendment that recognized freedom as beyond physical bondage, it imposed a limit in such a way that contravened not only the understanding Black Americans had of the Amendment, but also the understanding of Republican legislators when they enacted it.

The Court determined that the 1875 Act exceeded Congress’s power because the Amendment was to protect only “political rights”—those rights that “free” Black Americans had already enjoyed and that the formerly enslaved did not.\textsuperscript{222} In sum, the Court found that the Amendment did not empower Congress to ensure social rights for Black Americans,\textsuperscript{223} and it was this social-rights rationale that allowed the Court to distinguish the 1875 Act from the 1866 Act.\textsuperscript{224} Nonetheless, the Court did at least recognize that the freedom the Amendment intended to confer went beyond the absence of physical bondage—even if limited to certain kinds of rights—and in doing so, established a badges-and-incidents doctrine with which it would continue to wrestle.

2. \textit{Plessy v. Ferguson} and \textit{Hodges v. United States}

In \textit{Plessy v. Ferguson}, the Court chipped at the badges-and-incidents doctrine it had established in \textit{The Civil Rights Cases}.\textsuperscript{225} The \textit{Plessy} Court, very narrowly applying the standard in \textit{The Civil Rights Cases}, found that the owner of a public conveyance who excluded people of color imposed no “badge of slavery or servitude” that fell under the Thirteenth Amendment’s purview.\textsuperscript{226} The Court’s original badges-and-incidents doctrine established

\textsuperscript{220}. \textit{Id.} at 20.
\textsuperscript{221}. \textit{Id.} at 20–22.
\textsuperscript{222}. \textit{Id.} at 25.
\textsuperscript{223}. \textit{The Civil Rights Cases}, 109 U.S. at 22.
\textsuperscript{224}. Balkin, supra note 203, at 1854.
\textsuperscript{225}. \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896).
\textsuperscript{226}. \textit{Id.} at 542–43.
in *The Civil Rights Cases* suffered an even tougher blow a decade after *Plessy.* In *Hodges v. United States*, an armed group of whites pushed away eight Black American laborers from the Arkansas sawmill that employed them. A jury convicted the white group members of preventing the employees from exercising their right "to make and enforce contracts" as whites could, a right protected by the 1866 Act. The Court disagreed, explaining that since the Black American laborers had no master, they could not be in a condition of slavery or involuntary servitude under Section 1 of the Amendment; the Amendment therefore could not support the white group's prosecution, because Congress could not reach the group's activity via the statute enacted under its Thirteenth Amendment Section 2 power. With this rationale for defining Section 1's terms, the Court effectively limited Congress's Section 2 power to ensuring not even legal rights (as it had in *The Civil Rights Cases*), but rather to proscribing only private acts that physically enslave a person. Accordingly, the *Hodges* decision effectively erased the badges-and-incidents doctrine *The Civil Rights Cases* had established, and a Thirteenth Amendment jurisprudence on race was severely inhibited.

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229. *Id.*
230. *Id.* at 17–20.
231. *Id.*
232. *Id.* at 16–17.
233. See Pope, *supra* note 44, at 457. Contrastingly, after *Plessy*’s “equal but separate” standard, civil rights advocacy began to heavily rely on the Fourteenth Amendment. *Id.* After *Hodges* in 1906, and up until 1968, only one Thirteenth Amendment race case, *Corrigan v. Buckley*, reached the Supreme Court, wherein the Court rejected a claim that a racially restrictive real property covenant violated the Amendment because, under *Hodges*, the Amendment prohibits only “slavery and involuntary servitude” and “does not in other matters protect the individual rights of persons of the negro race.” 271 U.S. 323, 330 (1926).
3. Badges and Incidents under *Jones v. Alfred H. Mayer Company*\(^{234}\)

The most significant development post-*Hodges* was in 1968; after more than one hundred years during which the Amendment had been functionally obsolete, the Supreme Court restored the Thirteenth Amendment as a potential source of civil rights protections in *Jones*. In *Jones*, the defendant had refused to sell property to an interracial couple because the husband was Black American.\(^{235}\) The plaintiff couple argued that the defendant violated 42 U.S.C. § 1982, which Congress enacted under Section 2 of the Thirteenth Amendment, and which prohibits racial discrimination in the sale or rental of property.\(^{236}\) The question before the Court was whether § 1982 reached purely private discrimination—like the refusal to sell the property—and, if so, whether the exercise of congressional power under § 1982 was constitutional.\(^{237}\) The Court concluded not only that § 1982 applied to purely private discrimination,\(^{238}\) but also that the Amendment had provided Congress with the power to enact § 1982 because Congress was authorized “to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”\(^{239}\) Indeed, the *Jones* Court acknowledged that it had already recognized as much in 1883 in *The Civil Rights Cases*.\(^{240}\)

The *Jones* Court went on to find that a refusal to sell property to Black Americans because of their race was such a badge and incident of slavery and in violation of the Civil Rights Act of 1866.\(^{241}\) The Court did not hold that such discrimination violates Section 1 of the Amendment, and therefore did not reject *Hodges*'s dictionary definitions of slavery and involuntary

\(^{234}\) 392 U.S. 409 (1968).

\(^{235}\) Id. at 412.

\(^{236}\) Section 1982 was originally enacted as part of the Civil Rights Act of 1866 and states: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." Civil Rights Act of 1866, 14 Stat. 27 (codified at 42 U.S.C. § 1982 (2018)).

\(^{237}\) *Jones*, 392 U.S. at 419.

\(^{238}\) Id. at 436.

\(^{239}\) Id. at 439 (internal quotation marks omitted).

\(^{240}\) Id. at 439–42 (citing *The Civil Rights Cases*, 109 U.S. at 20, 22).

\(^{241}\) Id. at 441–43.
servitude. Instead, Justice Potter Stewart’s opinion for the Court focused on Section 2:

By its own unaided force and effect [the Amendment] abolished slavery, and established universal freedom. Whether or not the Amendment itself did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.242

Applying that rationale, the Court found that “when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.”243 With this ruling, the Court relied on the same language it had in The Civil Rights Cases to endorse the Amendment as prohibitory of “the badges of continued racial discrimination.”244 The phrase “badges and incidents,” however, now had a “very different sense and spirit” because of Jones.245 No ruling has disrupted Jones since.

The Supreme Court has yet to apply the most capacious understandings of freedom conferred under the Amendment, but its last major ruling on the Amendment’s reach in Jones is a critical step in that direction. Indeed, Jones has been praised for reclaiming Reconstruction’s original purpose of

242. Id. at 439 (internal quotations omitted).
243. Id. at 442–43 (emphasis added).
244. Rutherglen, supra note 44, at 175.
245. Id. at 176; see also id. at 177 (recognizing the “obvious tensions” between the two rulings and concluding that the “ambiguity inherent in the Thirteenth Amendment may be more durable than any attempt to resolve it”); id. at 164 (“The inherent ambiguity in th[e] phrase [‘badges and incidents’] is the key to understanding its role, initially in political thought and then in constitutional interpretation.”).

We have little post-Jones jurisprudential guidance on what constitutes a “badge” or “incident” or “relic” of slavery. Jennifer McAward, mining then-contemporary dictionaries and considering the colloquial usage of those terms, explains that “incident of slavery” generally referred to the slave system’s property law attributes; “badge of slavery” was in reference to Black Americans’ subordinate social position. McAward, supra note 44, at 575.
transforming the U.S. Constitution.\textsuperscript{246} Either way, Jones minimally ensures that Congress would be well within its Section 2 power to enact legislation prohibiting badges and incidents of slavery like school discipline policies that disproportionately affect Black American students.\textsuperscript{247}

Notwithstanding the limited Supreme Court jurisprudence, legislators, abolitionists, and the Black American community had a broad vision of what the Thirteenth Amendment should—and could—accomplish towards the goal of racial justice when it was enacted. This understanding of the Amendment’s original goals should inform how we understand the Amendment’s purpose, as it concerns racial justice claims today. Chief among the kinds of freedom Black Americans and Republican legislators envisioned the Amendment as conferring were rights, like access to education, that were explicitly denied to the enslaved.

Relevantly, conceptualizing the Amendment in the way Jones endorses aligns with the disparate-impact theory’s original aim of reparative work for Black Americans, that which the next Section discusses.

\textit{E. Overlap Between Thirteenth Amendment and Current Claims Challenging Discriminatory Facialy Neutral Policies}

If the Thirteenth Amendment was intended to address the “badges and incidents” of slavery, as discussed, \textit{supra}, then it becomes clear how the

\textsuperscript{246} See Robert J. Kaczorowski, \textit{The Enforcement Provisions of the Civil Rights Act of 1866: Legislative History in Light of} Runyon v. McCrary, 98 \textit{Yale L.J.} 565, 565 (1989) (arguing that the 1866 Act’s framers had “a theory of constitutional delegation of plenary congressional authority to secure fundamental rights which they invoked in their efforts to enforce civil rights”).

\textsuperscript{247} Since Jones, lower courts have consistently followed the Hodges rationale, finding that Section 1 renders the Amendment self-executing only insofar as it prohibits literal slavery, involuntary servitude, or other kinds of coerced labor. Carter, \textit{supra} note 158, at 1316. This jurisprudential state of things for the Thirteenth Amendment has prompted the “envision[ing] [of] Hodges’s reading of Section 1 as a kind of legal zombie, lumbering around blocking doctrinal development” of Section 1’s self-executing power. Pope, \textit{supra} note 44, at 463. But Pope argues that “badges and incidents are directly prohibited by Section 1” such that “courts could enforce them directly and legislators could enact laws ‘appropriate’ to remedy or prevent them.” Id. at 430 (emphasis added). \textit{See infra} Part III for a discussion of the disagreement between scholars about the viability and utility of treating Section 1 as self-executing.
Amendment’s aim includes what the disparate-impact theory was originally conceived to accomplish: addressing the present effects of past discrimination. It is thus unsurprising that the Supreme Court, in its most recent consideration of the disparate-impact standard, used language similar to that of the Jones Court. Specifically, in Inclusive Communities, Justice Anthony Kennedy began his opinion by acknowledging the remaining “vestiges” of racial discrimination in ultimately endorsing the continued viability of disparate-impact claims in the housing context.248

Notwithstanding the continued struggles of the disparate-impact theory, discussed supra, this overlap between the goals of the disparate-impact, as most recently recognized by a relatively conservative Supreme Court, and the Thirteenth Amendment is significant. In Jones, the Supreme Court affirmed its understanding that the Thirteenth Amendment authorized Congress to “eradicate” what it also deemed to be the “last vestiges and incidents of a society half slave and half free.”249 Jones, like Inclusive Communities, addressed housing discrimination and identified it as a badge and incident of slavery because it was a “substitute for the Black Codes” which, in turn, had been a “substitute for the slave system.”250 For the Jones Court, “the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live.”251 In many ways, the disparate-impact theory, as it was originally conceived, was to ensure that same “freedom,” thus revealing the overlap between it and the Thirteenth Amendment’s aims.

Part III later considers the specific standard to be applied under the Amendment to account for past discrimination, but as a general matter, extrapolating the Jones Court’s broad understanding of the Thirteenth Amendment’s scope to Black Americans’ right to be free from current discriminatory and exclusionary school policies is not difficult.252 The 1866

248. Inclusive Communities, 576 U.S. at 528.
249. 392 U.S. 409, 441 n.78 (1968) (emphasis added).
250. Id. at 442.
251. Id. at 443.
252. Carter, supra note 158, at 1367 n.210 (asserting that it is “unquestionable that systematic denial of equal educational opportunities” by de jure segregation or by “neglect and under-funding”—also practices challenged under the disparate-impact theory, see, e.g., Powell v. Ridge, No. 98 cv-01223 (3d. Cir.), https://www.pubintlaw.org/wp-content/uploads/2012/04/Powell-Third-Circuit-Opinion.pdf [https://perma.cc/B7MT-F3ZS]—violate the Thirteenth
The Thirteenth Amendment and Equal Educational Opportunity

Act reflected Congress’s understanding of the relationship between race, slavery, and economic exploitation and its understanding of broad congressional authority to remedy that legacy.\footnote{Zietlow, supra note 169, at 278, 280.} So, too, might modern Thirteenth Amendment legislation reflect an understanding of the continued synthesis between race and deprived education opportunity so central to the system of slavery—specifically in ways that encompass antidiscrimination work that would otherwise fall under the disparate-impact theory’s purview.

To be sure, it is not my argument that school discipline policies with disparate impacts on Black American youth constitute slavery or that the resulting injuries from slavery and school discipline are the same. In Jones, the Court deferred to Congress not on how it sought to eliminate forced labor, but rather on Congress’s identification of housing discrimination—what Laurence Tribe aptly describes as “a form of domination and thus an aspect of slavery.”\footnote{Laurence H. Tribe, American Constitutional Law 333 (2d ed. 1988).} School policies that result in the disproportionate discipline, criminalization, and exclusion of Black Americans from educational opportunities also constitute “a form of domination and thus an aspect of slavery.” Indeed, contrary to criticism that slavery was something of the ancient past, “domination and enforced social dependency do not disappear in modern societies” and instead “reappear in new guises, sometimes through public power, sometimes through private power, and sometimes through a combination of both.”\footnote{Jack M. Balkin, The Dangerous Thirteenth Amendment, 112 Colum. L. Rev. 1459, 1475 (2012) (with Sanford Levinson) (describing the Thirteenth Amendment as “dangerous” for this reason).} Public schools’ perpetuation of racially exclusionary discipline policies embodies this truth. I discuss Congress’s important role more thoroughly in Part III, but I note here that

\footnote{Amendment as a badge and incident of slavery); see also Miller, supra note 43, at 295 (arguing the Thirteenth Amendment’s applicability to affirmative action and stating that Congress could “recognize that restrictions on the type of availability of education among slaves were an essential component of maintaining the slave-owning culture”); Michael J. Kaufman, BADGES AND INCIDENTS: A TRANSDISCIPLINARY HISTORY OF THE RIGHT TO EDUCATION IN AMERICA 1 (2019) (observing that Congress and the Supreme Court have never “fully recognized that the ongoing lack of educational opportunities afforded to African Americans is attributable to those badges and incidents” the Thirteenth Amendment authorizes Congress to eradicate).}
Section 2 would seem to involve the choice of “appropriate” legislation by Congress to assure that no such aspect of slavery—that is, no “badges and incidents,” as rationally determined by Congress—shall exist.256

Tellingly, the Supreme Court has explicitly left open the question of whether the Thirteenth Amendment contemplates something akin to traditional disparate-impact claims. It first did so in City of Memphis v. Greene, a case that involved a challenge to the city’s decision to close a road linking a Black neighborhood to a white neighborhood. The Court emphasized that it did not need to “speculate” about “impact[s]” on racial groups that “might be prohibited by [the Thirteenth Amendment] itself.”257

Later, in General Building Contractors Association v. Pennsylvania, the Court held that 42 U.S.C. § 1981—a companion statute to 42 U.S.C. § 1982 that grants “the same rights enjoyed by whites” to contract and buy property, among others—strictly contemplates intentional discrimination.258 But, importantly, in General Building, the Court underscored its point in Greene that the question whether “the Thirteenth Amendment itself [also] reaches practices with a disproportionate effect” is an open one.259

The next Part discusses Congress’s special role in enforcing the Amendment in this regard, with a focus on Congress’s power and responsibility to enforce Thirteenth Amendment claims against policies, like those concerning school discipline, with undue disparate impacts; the

259. Id. at 390 n.17 (1982). See also Konar-Steenberg, supra note 46, at 524–26; Carter, supra note 158, at 1628; McAward, supra note 44, at 616–17. In his constitutional treatise, Erwin Chemerinsky maintains that “the Thirteenth Amendment requires proof of a discriminatory purpose,” based on the United States Supreme Court’s decision in City of Memphis v. Greene, 451 U.S. 100 (1981). ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 728 n.135 (4th ed. 2011). But this conclusion belies the Court’s plain statement in Greene that it “need not speculate about the sort of impact on a racial group that might be prohibited by the Amendment itself” and that it “merely hold[s]” that the disparate impact at question in that case was insufficient to rise to a Thirteenth Amendment violation. Greene, 451 U.S. at 128–29. And, as already discussed, the Supreme Court reiterated in General Building Contractors Association that it “need not decide whether the Thirteenth Amendment itself reaches practices with a disproportionate effect as well as those motivated by discriminatory purpose.” 458 U.S at 390 n.17; see also Konar-Steenberg, supra note 46, at 524–26 (finding several reasons for why Chemerinsky’s conclusion “misperceives” Greene).
standard Congress should apply in determining when and how to carry out such enforcement; and the political and constitutional limits of enforcement. Part III ends by evaluating the advantages of congressional enforcement of the Thirteenth Amendment over the disparate-impact theory.

III. Congress’s Enforcement of Thirteenth Amendment Claims Challenging Discriminatory, Facialy Neutral Policies

This Part builds on the Thirteenth Amendment’s legislative background and jurisprudence to make the case for the Amendment’s fitness for challenging facially neutral policies that discriminate against Black Americans, and specifically under Congress’s Section 2 power.

A. Congress’s Thirteenth Amendment Power to Prohibit Facialy Neutral Policies that Discriminate

Again, Section 2 of the Thirteenth Amendment plainly authorizes Congress to enforce Section 1. In fact, the Supreme Court in Palmer v. Thompson, while rejecting the Section 1 claim before it, articulated its reservation to extend the Thirteenth Amendment to claims not contemplated by Congress.260 And as with Section 1, the legislative debates over the Thirteenth Amendment enforcement power under Section 2 demonstrate the influence of antebellum abolitionist thought, including a particular emphasis on securing fundamental rights via the Amendment.261 The debates also demonstrate the intention to vest Congress specifically with the power to enforce those rights.262

As previously discussed, the Second Freedmen’s Bureau Bill and the Civil Rights Act of 1866 were two of the first congressional actions under

260. 403 U.S. 217, 218–19 (1971). In rejecting the plaintiffs’ Thirteenth Amendment claim under Section 1, the Court expressed its belief that recognizing the plaintiffs’ claim “would severely stretch [the Amendment’s] short simple words and do violence to its history.” Id. at 226. The Court described the Amendment as a “skimpy collection of words” that authorizes Congress to enact appropriate legislation, but observed that “Congress ha[d] passed no law under this power to regulate a city’s opening or closing of swimming pools or other recreational facilities.” Id. at 226–27.


262. Id.
what was its newly conferred Thirteenth Amendment enforcement power. During the debate over the Second Freedmen's Bureau, Republicans like Representative Thomas Eliot of Massachusetts stated that "[t]he slave becomes freedman, and the freedman man, and the man citizen, and the citizen must be endowed with all the rights which other men possess." And new equal citizenship of the formerly enslaved "affirmative[ly] obligat[ed]" Congress to take action to protect that status. The 1866 Act's proponents broadly construed Congress's discretion as to how Section 1 would be enforced. Then-Representative John Sherman of Ohio argued, for example, that "it is not only a guarantee of liberty to every inhabitant of the United States, but an express grant of power to Congress to secure this liberty by appropriate legislation." And Representative Martin Thayer from Pennsylvania famously explained during the Civil Rights Act of 1866 legislative debates his view of the relationship of the Amendment's two sections:

I thought when I voted for the amendment to abolish slavery that I was aiding to give real freedom for the men who had so long been groaning in bondage. I did not suppose that I was offering them a mere paper guarantee. And when I voted for the second section of the amendment, I felt in my own mind certain that I had placed in the Constitution and given to Congress ability to protect and guaranty the rights which the first section gave them.

263. Graber, supra note 194, at 1376.


265. Id. at 111–12 (providing abundant legislative history); see also Jennifer M. McAward, McCulloch and the Thirteenth Amendment, 112 COLUM. L. REV. 1769, 1789–90 (2012).

266. Tsesis, supra note 148, at 13.

267. CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (emphasis added).
Congress has acted on this power to enforce the Thirteenth Amendment; any such congressional act now would be in the same tradition. While the needle has not moved much on the issue of congressional power under the Thirteenth Amendment in recent years at the Supreme Court level, federal appellate courts recently have confirmed and applied Jones’s endorsement of Congress’s power to remove the badges and incidents of slavery in various forms. For example, the Second Circuit, in upholding a federal hate crimes statute passed under the Thirteenth Amendment, acknowledged Congress’s power to legislate against institutions similar to that of slavery, including inflicting violence on an identifiable racial group. The Tenth Circuit, too, recently upheld a federal hate crimes act, and, in doing so, found that Congress can enforce legislation to eliminate badges of slavery—a power that "extends to eradicating slavery’s lingering effects."

We have evidence that Section 2, rather than merely bestowing power to Congress, signals Congress’s constitutional responsibility to enforce the guarantees of freedom of the Thirteenth Amendment. Republican legislators, for example, understood Section 2 to “mandate[e]” that Congress, not the courts, take action to “enable[] freedmen to transition from slavery to full citizenship.” Regarding the Second Freedmen’s Bureau Bill, for example, Republicans invested in actualizing the Amendment’s commitments described the Bill as "fulfilling a constitutional obligation rather than as an act of legislative grace." Senator Trumbull put it plainly: "[T]he obligation to take care of [the formerly enslaved] is a constitutional obligation imposed upon us as a Government." Notably, the Republican Congress specified that this obligation extended to granting

268. See supra Part II.
271. CONG. GLOBE, 39th Cong., 1st Sess. 91 (1865) (emphasizing Congress's "duty to see that [the emancipation of freedmen] is wholly done"). See Graber, supra note 194, at 1364 ("Republicans... uniformly insisted that Congress was the institution constitutionally charged with realizing the promise of the Thirteenth Amendment, not the Supreme Court of the United States.").
272. Graber, supra note 194, at 1384.
educational opportunities for those formerly enslaved. For those Congressmen, the charge was clear: "We are interfering in behalf of the negro; let us interfere to educate him." Goodwin Liu has levied similar arguments regarding Congress’s responsibility under Section 5 of the Fourteenth Amendment to enforce a right to education as a matter of national citizenship. Liu explains why Congress’s Section 5 power should be treated as not just a public policy matter, but also a "matter of constitutional duty." Like Section 5, Section 2 under the Thirteenth Amendment differs from other kinds of congressional power in that "it does not merely name a substantive field of permissible regulation, such as interstate commerce, copyright, or naturalization," but rather is a special kind of legislative authorization to enforce the Thirteenth Amendment. As courts have "authority" to exercise discretion that "necessarily implies a correlative responsibility," so does Congress have a responsibility under the power that Section 2 of the Thirteenth Amendment represents.

In light of such congressional power and responsibility for enforcement, it is also worth considering what enforcement means. In short, it is "to ensure compliance with the [Amendment] and make it effective." Congress can enact laws codifying federal remedies and federal causes of action for violations of rights the Thirteenth Amendment guarantees, "remedy[ing] past violations and prevent[ing] future ones." And importantly, it can find legislative facts that justify the remedies and

274. Graber, supra note 194, at 1386–87 ("Republicans vigorously insisted that the Thirteenth Amendment obligated Congress to pass measures educating former slaves.").
276. Liu, supra note 181, at 399. Section 5 of the Fourteenth Amendment states that Congress "shall have power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]." U.S. Const. amend. XIV.
277. Liu, supra note 181, at 363.
278. Id.
279. Id. at 364.
280. Balkin, supra note 203, at 1815.
281. Id.
solutions for the future that it creates.282 (I outline a framework for such findings in the context of racially discriminatory school policies in the next Section.) In this way, I invoke the “conscientious legislator” approach to making constitutional meaning, an approach whereby legislators seek in good faith to fulfill the Thirteenth Amendment’s values.283 The Thirteenth Amendment’s enforcement power is a “linchpin” of Congress’s power over civil rights and provides Congress with an “innovative means both to evaluate and to act upon any remaining vestige or incident of servitude.”284

Congress has authority under Section 2 to enact civil rights legislation, given slavery’s bond to race discrimination.285 But without appropriate legislative findings by Congress, the Thirteenth Amendment risks becoming a “generalized non-discrimination mandate,” which would be erroneous; the Amendment was intended to outlaw only the badges and incidents of slavery, even if in a more expansive sense.286 Accordingly, any “rational” determinations by Congress of slavery’s components must be specifically informed by the abundant historical and social science evidence of slavery’s legacy in this country, and, in particular, slavery’s legacy on the current lives of Black Americans.287 As already mentioned, slavery was not only a system

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282. Id. at 1818 (stating that “[t]he framers of the Thirteenth Amendment did not wish to leave the fate of blacks to the discretion of the Supreme Court, an institution which had failed them so often before”).


284. Tsesis, supra note 148, at 10.


287. Notably, members of Congress have demonstrated a serious willingness to significantly invest in researching the legacies of slavery for purposes of making congressional determinations, albeit in the context of reparations. For example, Representative Sheila Jackson Lee introduced and argued a bill in July 2019 that would authorize $12 million for a 13-member commission to study the effects of slavery and make recommendations to Congress. Sheryl Gay Stolberg, At Historic Hearing, House Panel Explores Reparations, N.Y. TIMES (July 19, 2019), https://www.nytimes.com/2019/06/19/us/politics/slavery-reparations-hearing.html [https://perma.cc/UDN7-CUZ9]. Senator Cory Booker introduced companion legislation in the Senate. Id. The bill was reintroduced in January 2021. Char Adams, NBC NEWS, Joe Biden Could Send a Message to Black Americans with This Reparations Bill (Jan. 8, 2021),
of forced physical labor, but also one of regulating all parts of Black Americans’ lives, that which required the support of a complex and interconnected system of laws, social customs, and cultural conditions.\textsuperscript{288} Congressional determinations of what constitutes a badge could reflect the system’s entirety; by doing so, it will “capture” adverse race-based outcomes, in all of its social forms, that disparate-impact claims aimed to root out.

As it specifically relates to this Article’s example of school discipline, it is not my argument that Congress enact legislation that would trigger a Thirteenth Amendment claim any time an individual Black American child is disciplined in a public school. Neither is it my argument that Congress’s Section 2 power to make legislative findings and enact laws prohibiting racially discriminatory practices be understood as free reign to regulate public education’s day-to-day operations. Congress’s authority would be limited to stopping certain types of abuses. An appropriate limiting principle would be that the badges-and-incidents standard apply to public education institutions to the extent that Black American students are disproportionately punished in ways, for reasons, and at rates that recall slavery’s racialized legacy.\textsuperscript{289} That two-part standard’s specific contours are outlined in the next Section.

\textsuperscript{288} See Miller, supra note 216, at 1848.

\textsuperscript{289} I stop short of endorsing this standard as a \textit{required} limiting principle for applying the Thirteenth Amendment, as doing so would preclude other persuasive arguments that, for example: (1) Reconstruction resulted in a “reconstructed Constitution” that outlaws certain discrimination practices, even absent proof that such discrimination clearly aligns with properties of slavery, see, e.g., Peggy Cooper Davis, \textit{Women, Bondage, and the Reconstructed Constitution, in 4 Women and the United States Constitution} 53–54 (Sibyl Schwarzenbach ed., 2003) (advancing the idea of a Reconstructed Constitution that is based on antislavery principles that should be “understood to encompass opposition to subordination in many forms and on many grounds. Especially on grounds of race and gender.”); or (2) that the
B. Legislative Findings to Identify a “Badge” or “Incident”

Scholars have proposed standards for analyzing civil rights-based complaints rooted in the Thirteenth Amendment. The most prominent is a two-prong analysis, wherein the congressional determination is such that the badge and incident is found to (1) have a cognizable link to the institution of slavery; and (2) “pose a risk of causing the renewed legal subjugation of the targeted class.” Some endorse both elements; others have suggested that group targeting (the second prong) alone suffices.

Still other scholars espouse that the application of the badges-and-incidents-of-slavery framework to an institution involves demonstrating a “concrete connection” to the slave system via either the “class to which the plaintiff belongs” or via the “complained-of injury.”

relevant question under the Thirteenth Amendment is more generally “whether there continue to be indicia of servitude that interfere with the lives, liberties, and well-beings of persons within the United States.”


Carter, supra note 158, at 1362, 1366; see also Patricia Okonta, Race-Based Political Exclusion and Social Subjugation: Racial Gerrymandering as a Badge of Servitude, 49 Colum. Hum. Rts. L. Rev. 254, 287–294 (considering the Thirteenth Amendment as a basis for challenging racial gerrymandering and applying the two prongs). James Pope has described the two prongs as “(1) group targeting, with African ancestry and previous condition of servitude being the core cases, and (2) some causal, genealogical, analogical, or functional connection between the particular injury (for example, a denial of the right to testify or a violent infliction of physical harm) and the law, practice, or experience either of chattel slavery itself or of the post-slavery resubjugation of African Americans.” Pope, supra note 44, at 468.


Carter, supra note 158, at 1362, 1366; see also id. (asserting that "a badges or incidents of slavery claim must demonstrate some concrete connection either
I apply the full two-prong standard below to show that the disparate impact of school discipline policies is, in fact, a badge of slavery given the historic link of such practices to the institution of slavery and its qualification as modern-day re-marginalization of Black Americans.

1. Prong One – Discriminatory School Policies’ Cognizable Links to Slavery

   a. The Myths of Black Social Deviancy and Educability

As a starting point, any congressional determination of a “badge and incident” could begin with the recognition of the uniqueness of slavery as an institution in the United States relative to other societies. While not everything that has a connection to slavery or is discriminatory in nature constitutes a badge of slavery, U.S. American slavery was tied specifically to powerful stereotypes of Black Americans’ racial inferiority, unlike slavery in most societies.294 See generally ROBERT J. COTTROL, THE LONG, LINGERING SHADOW: SLAVERY, RACE, AND LAW IN THE AMERICAN HEMISPHERE (2013) (providing a comparative perspective on race and slavery between Latin America and the United States and discussing how the United States established a system of racial hierarchy as part of its slave system). As to why the narrative of racial inferiority was created in the first place, answers offered have included that the narrative was used to justify the extreme violence against other humans, see IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA (2016), and that doing so would disrupt the potential for class solidarity between enslaved Black Americans and poor whites, see, e.g., KERI LEIGH MERRITT, MASTERLESS MEN: POOR WHITES AND SLavery in the
As it pertains to school discipline, the inferiority stereotype specifically plays out via the false notions of Black criminality and the ineducability of Black Americans. And the stereotypes persist today in ways that undeniably contribute to the disparate social outcomes for Black Americans, including being disproportionately disciplined in school and having education opportunities threatened, if not altogether destroyed.

i. Social Deviancy

With respect to criminality, more generally, the expectation that Black Americans always will act in socially deviant ways, and the reliance on that expectation to penalize Black Americans with government action is a practice that can be directly traced to the American institution of slavery. The supposed criminality of Black Americans was a phenomenon that arose

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296 This has been referred to as the “historical nexus” test, Pittman, supra note 46, at 856–57, which asks not whether a specific practice claimed as a badge and incident of slavery existed during slavery, but rather whether the condition grew out of the system of slavery, which includes “the social, legal and cultural structures supporting enslavement and white dominance,” Carter, supra note 47, at 66–67. Larry Pittman has argued that the “historical nexus” test embraces a recognition that “slavery rested on a theory of black inferiority.” Pittman, supra note 46, at 856–57; see also Carter, supra note 47, at 67 (acknowledging that under Pittman’s approach, arguably all forms of racial prejudice would qualify as a badge of slavery, but pointing out that the Thirteenth Amendment is not “a generalized non-discrimination mandate” because the Amendment’s framers “intended to outlaw the badges and incidents of slavery (albeit in a broad sense), not all forms of racial prejudice that might ever exist”).

out of slavery.\textsuperscript{298} The dehumanizing myths of Black Americans included that they had innate criminal dispositions; it was thought, for example, that “[t]reachery, theft, stubbornness and idleness … are such consequences of their manner of life at home [in Africa] as to put it out of all doubt that these qualities are natural to them and not originated by their state of slavery.”\textsuperscript{299}

As early as the seventeenth century, this suspected criminality was used to maintain social control over both freed and enslaved Black Americans.\textsuperscript{300} Slave Codes,\textsuperscript{301} in particular, both grew from and reinforced the myths of Black criminality.\textsuperscript{302} They were a major state-sanctioned tool for social control and were used to racialize crime in a way that supported not only slavery as an economic institution, but also white dominance over Black Americans, even in geographic regions of the country less dependent on

\begin{itemize}
\item \textsuperscript{298} See, e.g., Katheryn K. Russell, The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, and Other Macroaggressions 15 (1998) (noting that “[r]ace was the most important variable in determining punishment under the Slave Codes”). In South Carolina, for example, Black Americans received regularly scheduled searches and seizures under the Slave Codes due to their suspected criminality. A. Leon Higginbotham, Jr., In the Matter of Color, Race and the American Legal Process: The Colonial Period 276 (1978). And Georgia law in the early 1800s, for example, justified enslaving Black Americans over eight years and until age twenty-one because “the permitting of free Negroes and persons of color to rove about the country in idleness and dissipation [sic], has a dangerous tendency.” Winthrop D. Jordan, White Over Black: American Attitudes Toward the Negro, 1550-1812, 408–09 (2d ed. 2012) (citations omitted)).
\item \textsuperscript{299} Jordan, supra note 298, at 305 (citations omitted).
\item \textsuperscript{300} See Carter, supra note 47, at 64.
\item \textsuperscript{301} See John Hope Franklin & Alfred A. Moss, From Slavery to Freedom 140–41 (2006) (explaining that as slavery grew in the earlier colonial era, Slave Codes were developed to confirm that “slaves are not people but property; laws should protect the ownership of such property and should also protect whites against any dangers that might arise from the presence of large numbers of slaves” and that “slaves should be maintained in a position of due subordination in order that the optimum of discipline and world could be achieved”).
\item \textsuperscript{302} Jordan, supra note 298, at 109 (“Getting slave regulations onto paper … provided opportunity for delineating the characteristics of Negroes in such terms as to leave no doubt that stringent measures with them were utterly necessary.”).
\end{itemize}
slavery. Consider, for example, South Carolina's preamble to its Slave Code:

[Because] negroes and other slaves... are of barbarous, wild, savage natures, and such as renders them wholly unqualified to be governed by the [general] laws... it is absolutely necessary, that such other...laws...be made and enacted, for the good regulating and ordering of them, as may restrain the disorders, rapines and inhumanity, to which they are naturally prone and inclined... State and federal courts reinforced these myths. According to the Supreme Court of Alabama, for example, one of the defining characteristics of Black Americans was their "capability of committing crimes;" otherwise, according to that court, they were "incapable of performing civil acts" and considered "things, not persons." After the height of Slave Codes, the myth of the natural Black American criminal was eventually integrated into the "scientific" literature of racial Darwinism, with prominent scholars arguing then that Blacks, "once freed from the control of the slaveholders...quickly reverted to savagery." After slavery formally ended, states continued to use the law to perpetuate the dominant-subservient social relationship between Black Americans and whites that slavery had enshrined.

Black Americans' supposed propensity for deviant behavior has consistently justified laws, segregation, and less formal technologies of

303. Id. at 408–09.
304. Id. at 109–10.
308. See generally Douglas A. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II (2008) (discussing generally the period after the Emancipation Proclamation during which mostly Black American convicts were "leased" through forced, government-operated labor camps); Franklin & Moss, supra note 301, at 250–53 (discussing the Black Codes, laws that were "speedily enacted" after the Thirteenth Amendment to "ensure Black Americans' role as a laboring force in the South" and noting their stark similarities to the Slave Codes).
discipline used to control them. During the Jim Crow era, and well beyond, the myth of Black American men setting out to sexually violate the purity and virtue of white women was used to justify lynching and other violence against Black American communities. Throughout the 1960s and 1970s, periods during which "street crime" was a hot political issue, images of Black American criminality were heavily propagated, while the stereotypes of "crack mothers" and drug dealers continued the perpetuation of the Black criminality myth during the crack epidemic of 1980s and 1990s.

The myth of Black American inferiority in this respect was a practice that arose out of slavery and continues until today. And the myth has a clear cognizable link to school discipline outcomes for Black American children. In a recent study, for example, Stanford University researchers gave K-12 school teachers all the same school records that described two misbehaviors over the course of four days by a student and asked them how they would respond. The teachers were randomly assigned to read about


313. S. Plous & Tyrone Williams, Racial Stereotypes From the Days of American Slavery: A Continuing Legacy, 25 APPLIED SOC. PSYCHOL. 795, 811 (1995) (“Our findings indicate that when social desirability biases are minimized, some 20% of the public expresses a belief that blacks are innately inferior in thinking ability, and a majority endorses at least one racial stereotype concerning inborn ability. In addition, roughly 50% of the public endorses at least one stereotypical difference in anatomy between blacks and whites.”).

different students in the incidents. Teachers reported more negative responses to the misbehavior if it was by a student they believed to be Black American (indicated by traditionally Black American names), as opposed to a student they believed to be white. Teachers also wanted to more severely discipline the Black American student for the misbehavior and were more likely to anticipate that the Black student would be suspended in the future. The researchers further found that the racial disparity in the teachers’ responses could be attributed to the fact that they were more likely to believe the Black American student regularly misbehaved. Exacerbating this problem are findings that teachers’ negative racial stereotypes associated with Black American students increase the likelihood that teachers will view infractions over time as a “problematic pattern.”

315. Id. at 618.
316. Id. at 621.
317. Id. at 622.
318. Id.
319. Id. This research aligns with other studies of stereotypes of Black Americans. One 2014 study, for example, found that people generally view Black American boys as older and less innocent starting at the age of 10. Press Release, Am. Psychol. Ass’n, Black Boys Viewed as Older, Less Innocent Than Whites, Research Finds (Mar. 6, 2014), https://www.apa.org/news/press/releases/2014/03/black-boys-older [https://perma.cc/UVZ4-RMAE]. One of the study’s authors, Phillip Goff, explained, “Children in most societies are considered to be in a distinct group with characteristics such as innocence and the need for protection.” Id. He went on to note that Black American boys, in particular, “can be seen as responsible for their actions at an age when white boys still benefit from the assumption that children are essentially innocent.” Id. A 2017 study found that Black American girls, ages 5 to 14, were viewed as less innocent and more mature for their age. Kimberlé Williams Crenshaw, Black Girls Matter: Pushed Out, Overpoliced and Underprotected, AFRICAN AM. POL’Y F. (2015) (with Priscilla Ocen & Jyoti Nanda), https://www.atlanticphilanthropies.org/wp-content/uploads/2015/09/BlackGirlsMatter_Report.pdf [https://perma.cc/ZU6X-M53S]. In that study, survey respondents more frequently reported that, compared to white girls, Black American girls need less nurturing, less protection, to be supported less, to be comforted less, are more independent, know more about adult topics, and know more about sex.
Informing the myth of Black American social deviancy are common associations of Black Americans with uncontrollable animals. In one recent study, 176 mostly white, male police officers were tested to see if they held an unconscious "dehumanization bias" against Black people by having them match photos of people with photos of big cats or apes. Researchers concluded that the officers commonly dehumanized Black Americans, and those who did were most likely to be the ones with a history of using force on Black American children in custody. A similar study demonstrated that the "Black American/ape" association predicted actual racial disparities in police violence toward Black American children.

The myth of Black propensity for crime originated in slavery; it obviously persists and still powerfully matters today. This intentionally constructed myth is based on the historical notion, since slavery, that social deviance inheres to Black Americans; the myth now manifests in the grossly disproportionate school discipline rates for young Black American children, thereby demonstrating a cognizable link to slavery.

ii. Academic Deficiency

Perceptions of Black American children as social menaces are related to stereotypes of Black American students as academically deficient. This
stereotype is based on yet another stubborn Black American inferiority myth: Black Americans as generally more stupid.\footnote{138} In the early 1800s, for example, national leaders like President Thomas Jefferson published his commonly shared beliefs that Black Americans’ ability to “reason” was “much inferior” to whites, while “in imagination they are dull, tasteless, and anomalous.”\footnote{139} Jefferson flat-out concluded that Black Americans were “inferior to whites in the endowments of the body and mind.”\footnote{140} President James Madison thought Jefferson’s words “too valuable not to be made known” to the general public.\footnote{141} After the abolition movement began to gain momentum, proslavery whites doubled down on their arguments that Black Americans were intellectually inferior.\footnote{142}

The nineteenth and early twentieth centuries went on to be dominated by scientific racism similarly claiming the intellectual superiority of whites.\footnote{143} By the time of the mid-twentieth century, it was a “core belief” of American society that Black Americans were inherently intellectually, morally, and culturally inferior to whites.\footnote{144} The universally accepted bromides were these: “Blacks are lazy and not smart. Blacks are prone to lawbreaking and violence.”\footnote{145}
Essentially trafficking in the same Jeffersonian views of Black Americans’ intellectual inferiority, psychologist Arthur Jenson published a paper in the *Harvard Educational Review* over a century later in 1969 claiming that Black Americans had lower genetic intelligence than whites and Asians.\(^{334}\) Fifteen years later, *The Bell Curve*, which made similar claims to Jensen’s with respect to Black Americans, was published.\(^{335}\) And research today still finds that most whites perceive Black Americans as lazier or less intelligent.\(^{336}\) This perhaps explains why teachers tend to have lower academic expectations for Black American students than they do for white students.\(^{337}\)

In the root of educational inequalities “lies the pervasive ideological insistence on the inevitability of black inferiority and white supremacy,”\(^{338}\) which, in sum, also helps demonstrate a cognizable link to slavery.

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338. Austin, *supra* note 332, at 80. One application of this prong’s group-targeting element has been one centered on group subordination, while the other application has been one centered on classification. See Pope, *supra* note 44, at 469 (noting the conflicting approaches). The Supreme Court has ruled that the statutory language at issue in *Jones* prohibits racial discrimination against whites. See McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 287–88 (1976) (noting, among other things, that the original draft of the 1866 Civil Rights Act provided that “there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race”). Under the *McDonald* approach, the concern is about racial classifications. Scholars have rightly explained, however, that the
b. Race-Based Barriers to Education Opportunities

Another practice with a cognizable link to slavery are state-sanctioned actions, like discriminatory public-school discipline policies, that result in a far lower quality public-school experience for Black Americans, if not barriers to obtaining an education, altogether.339

Of course, very few Black Americans during slavery were educated because they were enslaved. Over time, a fear that Black American literacy would threaten the slave system intensified, given its potential to foment rebellion.340 In response, whites, especially in the Deep South, regularly passed laws forbidding the enslaved to learn to read or write and made it a crime for others to teach them.341 This was to prevent the enslaved from engaging in acts like, for example, forging freedom passes or reading abolitionist literature.342 Moreover, recalling the stereotypes of Black Americans’ academic deficiency discussed, supra, whites relied on the status of the enslaved as property to confirm their view that Black Americans

anti-classification approach is erroneous because the Thirteenth Amendment prevents practices—slavery and involuntary servitude—that are defined by domination and exploitation. Pope, supra note 44, at 471. “Thirteenth Amendment legislation targets racial ‘discrimination’ not as a means of establishing some kind of ‘meritocracy’ (which might or might not assist in eliminating slavery and involuntary servitude), but as a means of preventing the subjugation prohibited by Section 1.” Id.


340. Williams, supra note 152, at 122 (“Cognizant of the revolutionary potential of black literacy, white elites enacted laws in slave states to proscribe teaching enslaved and sometimes free blacks to read or white. The timing of these antiliteracy laws often exposed the close association in white minds between black literacy and black resistance. Whether the threat to slavery came in the form of a slave rebellion or talk of abolition, southern lawmakers linked black literacy to the institution’s demise . . . .”).

341. See id.; see also Wahl, supra note 43, at 17 n.51. Approximately eight-five percent of Black Americans ages twenty to twenty-nine were illiterate prior to the war. See William J. Collins & Robert A. Margo, Historical Perspectives on Racial Differences in Schooling in the United States, in 1 HANDBOOK OF THE ECON. OF EDUC. 107, 119 tbl4 (Eric A. Hanushek & Finis Welch eds., 2006).

342. See, e.g., Williams, supra note 152, at 29.
neither could benefit from nor need the “independence of mind that an education was meant to foster.”

In the aftermath of the Civil War, the “legacies of slavery” still would go on to determine extremely high rates of illiteracy among Black Americans, as they obviously had no exposure to formal schooling. The first generations of newly freed Black Americans completed, on average, far fewer years of formal schooling than whites. In the South, Black Americans generally had access to racially segregated public schools, where they received a qualitatively inferior education. Though the Supreme Court’s Brown v. Board of Education decision theoretically outlawed racial segregation in public schools, predominately white schools specifically targeted Black American students in integrated schools with harsher discipline policies to control them. These policies were based on several of the same stereotypes of Black Americans discussed supra and ultimately resulted in the deprivation of equal educational opportunities for Black American students. Even after more than 60 years since Brown, public schools now remain largely segregated, which has costs for achieving racial


345. Id.
348. BLACK, supra note 22, at 33–36.
349. Id. at 33.
350. See Gary Orfield et al., Harming our Common Future: America’s Segregated Schools 65 Years After Brown, THE CIVIL RIGHTS PROJECT 4–9 (May 19, 2019), https://escholarship.org/uc/item/23j1b9nv [https://perma.cc/X94L-HSGX] (discussing the current rates of segregation and how segregation has "strong, negative relationships with the achievement, college success, long-term employment and income of students of color").

351. See Bertocchi, supra note 346, at 581–95.

352. See, e.g., BLACK, supra note 22, at 53–54 (summarizing studies that attribute achievement gaps between white and Black American students to harsh discipline policies and practices); Petras, supra note 339, at 223–37; see also Chance W. Lewis et al., African American Male Discipline Patterns and School District Response Resulting Impact on Academic Achievement: Implications for Urban Educators and Policy Makers, 1 J. AFRICAN AM. MALES EDUC. 10 (2010).

353. U.S. COMM’N ON CIVIL RIGHTS, supra note 78, at 18.

354. Id. at 5; see also Russell Skiba & Jeffrey Sprague, Safety Without Suspensions, 66 EDUCATIONAL LEADERSHIP 38 (2008); Russell Skiba et al., The Color of
corresponds with the fact that schools with relatively larger minority and poor populations are more likely to implement criminal justice-oriented disciplinary policies like suspensions, expulsions, police referrals, and arrests in the first instance. And relying on these kinds of exclusionary discipline practices either result in or risk Black American students experiencing a wide range of correlated educational, economic, and social problems, including negative repercussions for their academic success and involvement with the criminal justice system.

The latter point is worth elaboration as it relates to resubjugation, in that the school discipline phenomenon also fuels the pipeline of Black Americans to prisons. The United States now leads the world in incarcerating its citizens; given the disproportionately high number of Black Americans this nation incarcerates, it is now commonly understood that “[m]ass incarceration is, predominantly, black incarceration.” In 2017, for example, Black American men were six times as likely to be incarcerated as white men. And in 2018, Black Americans constituted nearly a third of the sentenced prison population, almost triple the 12 percent they make of the U.S. adult population.


356. See generally, e.g., WALD & LOSEN, supra note 19; Smith & Harper, supra note 19.

357. See id.; supra notes 19–20 and accompanying text.


Because the general function of public education has not changed, these kinds of threats to educational attainment for Black Americans are as threatening to the real freedom of Black Americans now as they were to enslaved Black Americans then. Centuries after Congress and Black Americans, themselves, had already recognized the importance of public education for citizenship and personhood, as discussed, supra, the Supreme Court would again refer to citizenship in Brown v. Board of Education when it articulated that education "is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."\textsuperscript{361} And in cases thereafter, the Court has reiterated the significant role of public education to personal dignity and social status, stating that "education prepares individuals to be self-reliant and self-sufficient participants in society"\textsuperscript{362} and that "by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority."\textsuperscript{363}

Education remains indispensable for civic participation, a decent livelihood, and overall personhood. Current school discipline trends threaten those very things and are in several respects a metastasis of the social relationships that both arose out of slavery and lead to the renewed social subjugation of Black Americans. Discipline practices, as discriminatorily enacted on Black American students, therefore qualify as badges and incidents of slavery. As they were during slavery, impediments to education for Black Americans are impediments to Black Americans becoming full—and free—members of the nation's citizenry.

The next Sections discuss how Congress is empowered and specially poised to enforce this Thirteenth Amendment standard, despite the problems its sister, the Fourteenth Amendment, has faced with respect to the congressional enforcement power of antidiscrimination laws.

\textsuperscript{362} Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) ("[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.").
\textsuperscript{363} Plyler v. Doe, 457 U.S. 202, 222 (1982); see also Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("The American people have always regarded education and acquisition of knowledge as matters of supreme importance . . . ").
C. The Constitutional Limits and Politics of Congressional Enforcement

In *Oregon v. Mitchell*, the Supreme Court explained the limits of Congress's power under Section 2 of the Thirteenth Amendment. The Court recognized three specific restrictions: 1) Congress may not "by legislation repeal other provisions of the Constitution;" 2) Congress may not "strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation;" and 3) Congress may "only 'enforce' the provisions of the amendments and may do so only by 'appropriate legislation.'" None of these recognized limitations preclude Congress from enacting and enforcing a statute prohibiting certain facially neutral policies from having a disparate impact on Black Americans.

Congress's Section 2 enforcement power under the Thirteenth Amendment fits comfortably within the federalist system Reconstruction Congress designed, wherein Congress would help ensure what has been referred to as "rights of belonging" for Black Americans. Moreover, Section 2 "enables the twenty-first century Congress to reconsider the meaning of belonging, equality, and liberty, and to synthesize these concepts into a meaningful policy of anti-subordination." Indeed, at least one lower federal court has explicitly acknowledged Congress's Section 2 authority to potentially enforce legislation prohibiting racially disparate impacts on Black Americans.

365. *Id.* (citing *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966)) ("Congress has no power under the enforcement sections to undercut the amendment's guarantees of personal equality and freedom from discrimination, or to undermine those protections of the Bill of Rights which we have held the Fourteenth Amendment made applicable to the States.").
366. *See also* Pittman, supra note 46, at 896.
367. Zietlow, supra note 169, at 266.
368. *Id.* at 261; see infra Section III.D.3, for a discussion of antisubordination principles under the Thirteenth Amendment.
369. *See Lewis v. Bethlehem Steel Corp.*, 440 F. Supp. 949, 964 (D. Md. 1977) (finding that "unquestionably, Congress could have provided for the establishment of a § 1981 [passed under the Thirteenth Amendment] claim upon proof of discriminatory impact or effect alone" (emphasis added)).
Such theoretical assurances of Congress’s Thirteenth Amendment enforcement power aside, it is worth considering the potential implications of the Supreme Court’s increasing hostility in the last two decades to Congress’s “Reconstruction Powers” under the Thirteenth, Fourteenth, and Fifteenth Amendments. Jack Balkin reminds us that Congress generally reserved broad powers for itself in each of the Reconstruction Amendments because it feared that the Supreme Court would not do enough to protect the rights of the newly freed men. The Civil Rights Cases, discussed supra, are an example of how the Supreme Court realized Congress’s fears in the Thirteenth Amendment context, when it determined that the Thirteenth and Fourteenth Amendments did not empower Congress to outlaw racial discrimination by private individuals.

More recently, in City of Boerne v. Flores, the Court held that the Religious Freedom Restoration Act of 1993 exceeded Congress’s powers under Section Five of Fourteenth Amendment. The Court again questioned Congress’s power under Section Five of the Fourteenth Amendment in United States v. Morrison, where it held that Congress exceeded its authority in enacting the Violence Against Women Act’s civil remedy provision as Congress can legislate only against “state action” and cannot rely on the Fourteenth Amendment to regulate the conduct of private actors. In Boerne, the Court relied on the principle that Congress cannot enforce a constitutional right not connected to the substance of the right it is enforcing. The Court clarified the difference between enforcement and the creation of constitutional rights, holding that congressional acts authorized by the constitution must entail “congruence and proportionality between the injury to be prevented or remedied and the means adopted to

370. Id.
371. Balkin, supra note 203, at 1805 (“Congress gave itself these [Reconstruction] [P]owers because it believed it could not trust the Supreme Court to protect the rights of the freedmen; and the Supreme Court soon realized Congress’s fears, limiting not only the scope of the Reconstruction Amendments but also Congress’s powers to enforce them. Modern decisions beginning with City of Boerne v. Flores and United States v. Morrison have compounded these errors.”).
373. 529 U.S. 598, 621 (2000).
374. 521 U.S. at 520.
that end.” Without such a connection, according to the Court, “legislation may become [impermissibly] substantive in operation and effect.” The Boerne Court suggested that legislation failing this congruence-and-proportionality analysis might impinge on state sovereign immunity.

The Supreme Court may have to ultimately decide the issue of whether Boerne’s "congruence and proportionality" analysis also applies to the Thirteenth Amendment. But for now, the Court’s declaration in Jones remains: The Thirteenth Amendment empowers Congress “to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.” Thirteenth Amendment legislation, the Court has stated, is reviewed for its rationality; that is, the legislation is constitutional unless the congressional determination that a given condition constitutes slavery, involuntary servitude, or a badge or incident thereof is wholly irrational. Some have offered reasons for why Jones’s rationality test—which generally awards deference to Congress—should be reevaluated after Boerne. Scholars like Jennifer McAward, for example, characterize

375. Id.
376. Id.
377. Id. at 527–32.
378. See, e.g., William M. Carter, Jr., Judicial Review of Thirteenth Amendment Legislation: “Congruence and Proportionality” or “Necessary and Proper”, 38 U. Tol. L. Rev. 973, 974 (2007) (stating that “it is reasonable to assume that this question will arise in the near future” for the Supreme Court); Pope, supra note 44, at 432.
379. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (quoting the Civil Rights Cases, 109 U.S. 3, 20 (1882)); see United States v. Cannon, 750 F.3d 492, 505 (2014) (considering a challenge to Congress’s definition of “badges” and “incidents” for purposes of a hate crimes act and concluding: “Flores . . . never mentioned the Thirteenth Amendment or Jones, and did not hold that the ‘congruence and proportionality’ standard was applicable beyond the Fourteenth Amendment. We therefore continue to follow the Supreme Court’s binding precedent in Jones.”).
381. See, e.g., Jennifer Mason McAward, Congressional Authority to Interpret the Thirteenth Amendment: A Response to Professor Tsesis, 71 Mo. L. Rev. 60, 61 n.15 (2011) (arguing that “[i]n light of Boerne, Jones is arguably a remnant of the past”); McAward, supra note 264, at 109.
Jones as a Thirteenth Amendment counterpart to Katzenbach v. Morgan, in which the Supreme Court notably concluded with respect to the Fourteenth Amendment that "[i]t is not for [the Supreme Court] to review the congressional resolution of [the] factors [leading to the exercise of its Section 5 power]." As already discussed, the Boerne Court eventually reined in Congress's enforcement powers under the Fourteenth Amendment, as, per Katzenbach, congressional conclusions "are entitled to much deference . . . [but] Congress's discretion is not unlimited."

McAward has asserted that Boerne should similarly prompt us to reconsider Jones, as "neither text nor history" supports the broad reading of Congress's Section 2 power under the Thirteenth Amendment that Jones, for many, suggests.

Others, however, have argued that the Jones rationality test is more appropriate for considering Thirteenth Amendment legislation than is Boerne's "congruence and proportionality" analysis. Such arguments, for example, include the fact that the Court's decision in Boerne was largely informed by concerns over state dignity and state sovereign immunity. These concerns are less applicable to the Thirteenth Amendment given that it, unlike the Fourteenth Amendment, is not limited to state action and its legislation is moreover directed mostly to private individuals. Another argument is that Boerne and its progeny have all concerned congressional action that does not concern racial equality, and this is not by accident: the Court has suggested greater deference to Congress in enacting legislation that deals with discrimination issues that the Court has generally subjected

382. McAward, supra note 264, at 135 ("While the Morgan Court appeared to defer to Congress's substantive judgments as to the scope of the Fourteenth Amendment, the Jones Court explicitly stated that Congress has the power to determine the full reach of the Thirteenth Amendment by defining for itself the badges and incidents of slavery." (footnotes omitted)).


384. Boerne, 521 U.S. at 536.

385. McAward, supra note 264, at 135.

386. See, e.g., Carter, supra note 378, at 981–88; Alexander Tsesis, Congressional Authority to Interpret the Thirteenth Amendment, 71 Md. L. Rev. 40, 51–58 (2011) (suggesting additional reasons for the Court ultimately retaining the Jones test).

to stricter scrutiny.\textsuperscript{388} \textit{Boerne} is thus less relevant to the Thirteenth Amendment, given that it does reach areas of discrimination that deal with racial inequality.

To the extent that the same \textit{Boerne} "congruence and proportionality" analysis will be held to apply to the Thirteenth Amendment, Congress would still be well within its constitutional power under Section 2 to enact legislation prohibiting the badges and incidents of slavery, like the kind of disparate impact I propose in this Article—but only if the Court accepts that the Amendment prohibits the badges and incidents of slavery under Section 1, and in some form other than literal enslavement.\textsuperscript{389} Whether or how the Court will ever do so—or whether or how the Court will reconcile any other tension between \textit{Jones} and \textit{Boerne}—is beyond the scope of this Article. I emphasize here only that the role of Congress I endorse in this Article comports with the congressional enforcement role envisioned by the Court in \textit{Jones}, which remains the relevant Thirteenth Amendment standard. Minimally, then, there would be little precedential basis for the Court, even a more conservative one like today's, to not apply \textit{Jones}.

\textit{Jones} and its progeny, if taken seriously, also insulate Congress's enforcement power under the Thirteenth Amendment from the kind of damage the Fourteenth Amendment suffered in \textit{Morrison}.\textsuperscript{390} Notably, of Congress's Reconstruction Power, the Thirteenth Amendment is unique in that it does not require even a state action to trigger enforcement—Congress is empowered to regulate both public and private action to remove the badges and incidents of slavery.\textsuperscript{391} Thus, \textit{Morrison} would appear

\textsuperscript{388} Id. at 985–87.

\textsuperscript{389} Carter, supra note 158, at 1347–55; see also Rebecca E. Zietlow, \textit{The Promise of Congressional Enforcement}, in \textit{THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT} 188 (Alexander Tsesis ed., 2010) ("The Court's rulings in \textit{Boerne} and \textit{Morrison} indicate that the extent of Congress's section 2 power likely will depend on the degree to which Congress's decisions are consistent with the Court's interpretation of the Thirteenth Amendment.").

\textsuperscript{390} See Zietlow, supra note 389, at 188 (arguing that after \textit{Morrison}, the “oft-overlooked section 2 of the Thirteenth Amendment has considerable potential to resolve the dilemma” of a “Congress wishing to expand rights of belonging, those rights that promote an inclusive vision of who belongs to the national community of the United States and that facilitate equal membership in that community”).

\textsuperscript{391} See \textit{Griffin v. Breckenridge}, 403 U.S. 88, 105 (1971); Balkin supra note 203, at 1831–32 (stating that as to “whether Congress can reach private action under
to be inapposite. Some scholars have gone so far as to assert that the Supreme Court’s most recent ruling and reasoning with respect to deference to congressional power suggests continued deference to Congress under Section 2, “allowing Congress substantial authority to use it to expand rights of belonging” and leaving “ample room for the legislature to enforce the Thirteenth Amendment.”

Indeed, unlike in the Fourteenth Amendment context, where the Court’s undue encroachment on Congress’s power to develop and enforce civil rights has been criticized, it is the judiciary’s willingness to take a backseat role to Congress in defining what constitutes badges and incidents of slavery under the Thirteenth Amendment that has been criticized.

Whatever the scope of judicial enforcement, the Thirteenth Amendment unequivocally “speaks directly to Congress and independently its powers to enforce the Reconstruction Amendments,” “[i]n the case of the Thirteenth Amendment, the answer has long been clear. Congress can outlaw both public and private discrimination in order to abolish the badges and incidents of slavery”). Some legal scholars have gone so far as to suggest that Congress has broader authority under Section 2 of the Thirteenth Amendment than it does under Section 5 of the Fourteenth Amendment, which states that Congress has power to enforce the Fourteenth Amendment’s antidiscrimination provisions. See Tribe, supra note 254, at 330–50.


393. See Balkin, supra note 203, at 1805–06.

394. See, e.g., Carter, supra note 158, at 1319 (“[W]ile courts should accord substantial deference to congressional determinations that particular injuries or conditions are lingering effects of slavery, they should also, in the absence of applicable federal legislation, exercise their independent constitutional authority to say what the law is regarding the Thirteenth Amendment.” (internal quotation marks omitted)); Pope, supra note 44, at 432–33 (acknowledging the current doctrine that “Congress enjoys the power rationally to identify and eliminate the badges and incidents,” but criticizing that it “as a practical matter, thwarts jurisprudential development” of Section 1’s self-executing scope (internal quotation marks omitted)); see also infra Section III.D for a discussion of the disagreement between scholars about the viability and utility of treating Section 1 as self-executing.

395. See infra notes 434–437 (discussing the judiciary’s potential role of enforcing the Thirteenth Amendment to the extent that its Section 1 is self-enforcing).
binds Congress to its commands.\textsuperscript{396} And legislation under the Thirteenth Amendment forbidding racially discriminatory school policies as a badge and incident of slavery would appear to be more than constitutionally protected as an act of congressional power.

Recent congressional action shows why future legislation under the Thirteenth Amendment would not be impractical. In the last major congressional election of November 2020, connecting modern-day social ills to slavery was a major campaign issue, with several candidates who openly endorsed the issue ultimately winning.\textsuperscript{397} In fact, just several days into the convening of the most recent Congress, legislation was re-introduced to authorize financing a commission to study slavery’s effects on Black Americans and recommend appropriate action to be taken by what is now a mostly Democratic Congress.\textsuperscript{398} This legislation aligns precisely with the congressional action this Article proposes, albeit under a different constitutional justification.

Specific legislation reforming school discipline might be even more practical. For example, both sides of the bitterly divided Congress of the Trump Administration managed to cross the political aisle and pass a historic criminal justice reform bill, a feat many thought impossible just a few years ago. That legislation, among other things, aims to reform sentencing, reduce recidivism, and reduce the size of federal prisons.\textsuperscript{399} Indeed, in an unexpected turn of events, commentators dubbed conservatives the “leader” on criminal justice reform.\textsuperscript{400} Conservatives’ emphasis on “second chances”\textsuperscript{401} easily dovetails with a reformation of overly harsh school discipline policies. This is especially so, considering leading conservatives’ observation that the judicial system

\textsuperscript{396} Liu, supra note 181, at 339 (considering the Fourteenth Amendment, which also a congressional enforcement clause).


\textsuperscript{398} See Adams, supra note 287.


\textsuperscript{401} Id.
“disproportionately punishes the black community” and their critiques of overly draconian punitive policies.\textsuperscript{403} Even conservatives have begun to make the conflict between an overly harsh punitive system and the Thirteenth Amendment’s abolitionist goals,\textsuperscript{404} and have also noted the conflict of such a system with the traditional conservative values of government restraint, dignity, preservation of the family, and fiscal conservatism.\textsuperscript{405}

Regardless, even if Thirteenth Amendment legislation seems impractical currently, Congress obviously changes with elections. Thus, despite whether this Congress pursues any Thirteenth Amendment legislation, this Article lays the necessary groundwork for a future Congress willing to take up the charge.


\textsuperscript{404} Arthur Rizer & Lars Trautman, \textit{The Conservative Case for Criminal Justice Reform}, \textsc{Guardian} (Aug. 5, 2018), https://www.theguardian.com/us-news/2018/aujg/05/the-conservative-case-for-criminal-justice-reform [https://perma.cc/PZP4-SVR4] (“Lincoln ... linked slavery to the war when he advocated abolition, first with the Emancipation Proclamation and then via the 13th amendment. These connections between conservatives, Republicans and abolition are relevant to the current debate because many believe that reforming a capricious criminal justice system is a natural cause for the party that ended slavery. In this view, a system that deems and degrades generations of Americans has no place in a civilized society. Many conservatives are beginning to believe also that it has no place on the right.”).

\textsuperscript{405} See generally id. (discussing each of those values as evidence of why criminal justice reform might appeal to conservatives).
D. Overcoming the Traditional Disparate-Impact Claims' Weaknesses

The previous Section charted the viable path forward for the Thirteenth Amendment's ability to encompass claims challenging facially neutral discriminatory policies, including specifically those challenging public-school discipline practices. This last Section outlines the departures from the traditional disparate-impact theory as part of such a Thirteenth Amendment path and discusses the advantages of the approach for overcoming the disparate-impact theory's identified challenges.

1. Ending the Analysis at Congress's Determination

For Thirteenth Amendment claims challenging facially neutral discriminatory policies, ending the inquiry at Congress's rational determination ultimately avoids the same deficiencies that plague traditional disparate-impact claims, explained supra. First, unlike traditional disparate-impact claims, private rights of action would theoretically be available by explicit congressional mandate for pursuing Thirteenth Amendment claims. And the claims would not be subject to whether federal agencies wanted to resist or pursue them for political reasons.

Moreover, a straightforward claim grounded in a congressional determination regarding the relationship between slavery and discriminatory school discipline, would not be as likely to suffer from being rebutted with the cumbersome defense standards developed by the judiciary, including a defendant's "necessity" justification—oft the fatal blow to most current disparate-impact claims—or a strict proof of causation, which, as discussed, supra, also proves difficult for discrimination plaintiffs. This assumes a Congress that seeks to legislate in a way that intentionally relaxes any necessity or causation considerations in light of these difficulties, as a matter of good policy. This also assumes a Congress acting on its explicitly reserved Section 2 power to enforce the Amendment based on its rational findings.

In that regard, I make a distinction between "legislative rationality" on the one hand and the weak judicial doctrine of rational basis on the other hand, the latter of which "serves not as a genuine test of rationality but as a paradigm of judicial restraint."406 Legislative rationality is something more.

It requires that Congress "pursue a deliberative inquiry" and make findings that result from hearings, reports, and public debate about what constitutes a badge and incident of slavery.\textsuperscript{407} And as discussed, \textit{infra}, Congress is better positioned to enforce the Amendment in this regard based on this unique policymaking ability. Congress's factfinding should ultimately lead it to take enforcement actions—for example, create relevant causes of action and remedies—that are reasonably related to dismantling the badges and incidents.

The disparate-impact theory, for the most part, has not benefitted from congressional findings for enforcement purposes in this way. Instead, the theory has developed largely in the judicial context. And, as already discussed, it is in this context that the judicially developed concepts like "necessity" defenses\textsuperscript{408} or a causation requirement\textsuperscript{409} have ultimately weakened the theory as a tool for antidiscrimination plaintiffs. Any such judicial limits on claims that are based on legislative findings under Section 2 would risk encroaching on Congress's especially reserved power to enforce the Thirteenth Amendment. Assuming Congress does not exceed its constitutionally defined enforcement power, any judicial inquiry should therefore end at whether Congress rationally determined that the challenged practice is a badge and incident of slavery,\textsuperscript{410} and whether a plaintiff's claim comports with that determination.

2. Mitigating the Judiciary's Propensity to Not Recognize Less Overt Discrimination

   a. Practical Advantages

\textsuperscript{407} \textit{Id.}

\textsuperscript{408} See Selmi, \textit{supra} note 30, at 753 ("The disparate impact theory was a judicial creation built on a slippery foundation that, in its business necessity prong, required a normative judgment that challenged practices were discriminatory."); \textit{see also generally supra} notes 54–61 and accompanying text (discussing judicial creation of these standards).

\textsuperscript{409} See \textit{supra} notes 74–75 and accompanying text; Selmi, \textit{supra} note 30, at 753 (observing that with the increasing "difficulty to establish causation or a clear business justification," the disparate-impact theory "began to weaken and, ultimately, to dissolve"); \textit{see also generally supra} notes 54–61 and accompanying text (discussing judicial creation of these standards).

\textsuperscript{410} \textit{Jones v. Alfred H. Mayer Co.}, 392 U.S. 409, 440 (1968).
Ending any judicial inquiry at a congressional determination for
disparate-impact-like claims would avoid the unfortunate fate of the
traditional disparate-impact theory in other ways. As discussed, supra, a
Thirteenth Amendment claim challenging facially neutral policies would
have to prove only that a challenged practice constitutes a badge and
incident in alignment with a determination already made by Congress
under its Section 2 powers. This burden for plaintiffs avoids the dilemma of
courts generally failing to observe discrimination right before them, which
generally "require[s] persuading [courts] that discrimination explains the
observed disparities." This is unfortunately a discussion that more
commonly escapes the judiciary, and for courts to accept the disparate-
impact theory as a "legitimate form of discrimination," it is necessary to
develop a "justification" that comports with a nationally accepted
commitment to racial equality. Theoretically, a congressional
determination that certain practices constitute badges and incidents of
slavery in violation of the Thirteenth Amendment will have expressed such
a commitment before it even gets to a court.

Other scholars have found that the Thirteenth Amendment powers are
"best deployed in legislative rather than judicial advocacy," as a practical
matter, Congress has unique factfinding and policymaking power in its work
to expound on constitutional norms. Moreover, Congress would not
suffer the same kinds of enforceability problems others have recognized

411. Selmi, supra note 30, at 770.
412. Id.
413. Carter, supra note 158, at 1319 ("Congress may, in some cases and for
pragmatic reasons, be the better branch of government to define what
conditions amount to badges of slavery."); Miller, supra note 216, at 1841–42
("It is up to Congress, through enforcement, to tease out the customs of
slavery from untainted customs, and for the people, through their
representatives, to work out the meaning of slavery and freedom through that
remedial process."); see also Richard Parker, "Here the People Rule:" A
CONSTITUTIONAL POPULIST MANIFESTO (1994) (encouraging popular involvement
in constitutional interpretation).
414. See Liu, supra note 181, at 365; Carter, supra note 158, at 1354 (noting that
"as a pragmatic matter of institutional capacity and propriety, Congress
possesses factfinding and policymaking powers that courts do not" and that
"[i]n some circumstances, the question of whether a particular condition or
form of discrimination constitutes a badge or incident of slavery could be so
highly fact-specific that answering the question would require tools that
courts do not readily possess").
that the judiciary would likely suffer.\textsuperscript{415} And even if federalism concerns would require that some role of enforcement for the judiciary be preserved,\textsuperscript{416} Congress still may be in the better position for a different, broader, or even stronger enforcement role given how its discretionary power differs from courts’ tendency to focus on legal norms. This is especially so for claims that might otherwise have been pursued under the traditional disparate-impact theory.

Moreover, there is little compelling reason to wait for the Supreme Court to help Congress delineate what qualifies as lingering vestiges of slavery, especially when the Court has been in no rush to do so. As others have observed, this kind of “judicial constitutionalism” is “less compatible with progressive constitutional arguments” and moreover suffers from major opportunity costs, as “Thirteenth Amendment-inspired legislation does not require a Thirteenth Amendment judicial justification.”\textsuperscript{417}

Indeed, somewhat presciently, Republicans who passed some of the earliest pieces of legislation under the Thirteenth Amendment power understood that courts could not eradicate slavery\textsuperscript{418} and that Congress needed “substantial discretion” to design policies would ensure that newly freed Black Americans would be able to enjoy the “full rights of citizens of a democratic republic.”\textsuperscript{419} Such policies would need to respond to local—and ever-evolving—social circumstances and would therefore require a “high degree of nimbleness” and “knowledge of conditions on the ground.”\textsuperscript{420} This would help Congress craft meaningful legislation and determine when full liberation for Black Americans had actually been accomplished. Republicans knew that the judiciary lacked the flexibility and institutional

\begin{itemize}
\item \textsuperscript{415} Carter, supra note 158, at 1354 (observing potential “institutional concerns regarding enforceability” and citing an example of how a finding congress might go about more easily enforcing reparations for slavery due to budget concerns).
\item \textsuperscript{416} See id. at 1353 (“[T]here are institutional concerns that may counsel for a more circumspect (as opposed to non-existent) judicial role in enforcing the right to be free of the badges and incidents of slavery.”).
\item \textsuperscript{417} Jamal Greene, Thirteenth Amendment Optimism, 112 Colum. L. Rev. 1733, 1757 (2012).
\item \textsuperscript{418} Graber, supra note 194, at 1363.
\item \textsuperscript{419} Id. at 1364.
\item \textsuperscript{420} Id. at 1372.
\end{itemize}
capacity to carry out such requirements. Congress, not the courts, would need to lead the way “in removing all badges and incidents of slavery in American constitutional life.”

To be sure, a head-on confrontation with questions about the legacy of slavery, regardless of which institution takes it on, is likely to be fraught with discomfort and tension. But the judiciary, especially, has traditionally been hesitant to wrestle with the history of slavery. This hesitancy comports with others’ recognition that the Thirteenth Amendment remains underenforced “because the idea of eliminating ‘slavery’ or ‘involuntary servitude,’ taken seriously, promises far too much emancipatory potential for comfort, at least for those who benefit from the status quo and the ideologies that justify it.” But this reality also suggests why Congress is in a better position to enforce the Amendment. As discussed, supra, rigorous findings by Congress that already contemplate slavery’s connections to modern-day racial disparities would not only be powerful on their own, but also would avail a judiciary that seemingly either cannot or will not otherwise take the necessary steps to properly enforce such claims on its own.

b. Symbolic Advantages

As an important symbolic matter, vesting the Thirteenth Amendment powers in Congress—especially for disparate-impact-like claims—also signals to the public its own evolving role in determinations about the

421. Id. at 1400.
422. Id. at 1363; see also id. at 1400–01 (concluding that the “welfare provisions of the Second Freedmen’s Bureau Bill fell by the wayside partly because judges and justices felt they lacked the capacity to translate those constitutional obligations into judicially enforceable rules”).
423. Carter, supra note 158, at 1352 (“With regard to a frank judicial examination of the lingering effects of the institution of slavery, there is no reason to believe judges are different from the rest of us. American slavery is routinely treated as a subject of vague historical interest. It is seen as having little contemporary relevance because discourse about slavery’s lingering contemporary effects raises uncomfortable questions about the congenital distribution of material, social, and psychological benefits between the descendants of the enslaved, the descendants of the slave master, and those who fall on either side of this divide by association.”).
424. Balkin, supra note 255, at 1470 (describing the Thirteenth Amendment as “dangerous” for this reason).
The Thirteenth Amendment and Equal Educational Opportunity

legacy of slavery.\textsuperscript{425} This kind of opportunity is unavailable under the traditional disparate-impact theory. Upon recognition that the Thirteenth Amendment’s Section 2 charges Congress with a constitutional duty of enforcement, the same analysis Goodwin Liu has proposed with respect to the Fourteenth Amendment is triggered:

[T]he inquiry proceeds from the standpoint that Congress, unlike a court, is neither tasked with doing legal justice in individual cases nor constrained by institutional concerns about political accountability. Instead, Congress can draw on its distinctive capacity democratically to elicit and articulate the nation’s evolving constitutional aspirations . . . . By mediating conflict and marshaling consensus on national priorities, including the imperatives of distributive justice, Congress can give effect to the Constitution in ways the judicial process cannot.\textsuperscript{426}

In this respect, what Liu refers to as the “legislated Constitution” is rendered “dynamic, aspirational, and infused with national values and commitments.”\textsuperscript{427} Understanding Congress’s role in this way aligns with the

\textsuperscript{425} Carter, supra note 158, at 1354 (“Affording Congress broad definitional latitude in defining the badges and incidents of slavery can be seen as fostering public debate about the institution of chattel slavery, its legacy, and what steps ‘we the people’ believe are appropriate remedies.”). However, once a “federal judge is appointed, the public’s role in directly shaping constitutional meaning is finished.” Id. at 1353–54.

\textsuperscript{426} Id. at 339–40 (internal footnotes and quotation marks omitted).

\textsuperscript{427} Id. at 340 (internal footnotes and quotation marks omitted). The evolving understanding of the Second Amendment’s guarantees provides a compelling example of how powerful popular social understanding of constitutional provisions can be. Consider that in a 1991 interview, former Chief Justice Warren E. Burger, a preeminent conservative, declared that the Second Amendment was “the subject of one of the greatest pieces of fraud, I repeat the word fraud, on the American public by special interest groups.” Joan Biskupic, Guns: A Second (Amendment) Look, WASH. POST. (May 10, 1995), https://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/courtguns051095.htm#:~:text=The%20Second%20Amendment%20has%22has%20been,former%20chief%20justice%20Warren%20E [https://perma.cc/9P2R-4KW7]. He expressed often that the “right to bear arms” belongs only to the states, despite the fact that figures like President Bill Clinton, the National Rifle Association, and, indeed, much of the general
call for the kinds of reparative work that coping with the legacy of slavery requires of us: “full acceptance of our collective biography and its consequences” that is “more than recompense for past injustices” and more akin to “a national reckoning that would lead to spiritual renewal.”

Of course, reaching determinations about what current social inequalities can be traced to the institution of slavery is likely to be at least somewhat contentious for Congress as well. But the clear charge to Congress to take on the challenge remains, and past examples of Congress taking up this charge are instructive. Throughout history, the predominate modes of political thought have dictated Congress’s understanding about the Thirteenth Amendment’s reach in response to such charge and subsequent action. Congress, for example, first discharged its duty to enforce the guarantee of freedom for Black Americans in ways during Reconstruction that went well beyond addressing physical bondage. It since continued to enforce laws reflecting expansive notions of freedom under the Thirteenth Amendment in order to address various forms of

public had fostered the opposing view that the Second Amendment guarantees an individual’s right to bear arms. Id. Notably, at the time of Justice Burger’s statement, no federal court had ever endorsed that view. Id.

That changed just a short time later, when, in 2008, the Supreme Court concluded that the Second Amendment should be read to protect an individual’s right to possess a firearm for self-defense. District of Columbia v. Heller, 554 U.S. 570, 614 (2008). Relevant here is the Heller majority opinion’s statement that the judicial belief that the Second Amendment protected only the militia’s ability to possess weapons “cannot nullify the reliance of millions of Americans . . . upon the true meaning of the right to keep and bear arms.” Id. at 624 n.24; see Reva B. Siegel, Dead or Alive: Originalism as Popular Constitutionalism in Heller, 122 Harv. L. Rev. 191, 201 (2008) (arguing that such a statement invites a consideration of how national debate leading up to Heller influenced the Court’s decision).

While this Second Amendment example is specific to the judiciary, it nonetheless highlights how the Thirteenth Amendment might similarly be imbued with society’s beliefs and values in the form of responsive congressional action. The Second Amendment example also suggests a potentially important role for courts with respect to enforcement of the Thirteenth Amendment, even if there are special advantages to primarily legislative enforcement.

428. Coates, supra note 287.

429. Tsesis, supra note 148, at 19.

430. See supra Part II.
racial discrimination. Congress must continue to do the same as it relates to addressing the hampering effects of racially discriminatory policies, and it is especially important, given the judiciary's collective failure to do so in any significant way.

It is worth acknowledging that this endorsement of Congress's special role in enforcing the Thirteenth Amendment—and the benefits of congressional enforcement specifically with respect to disparate-impact-like challenges—conflicts with others' view of the benefits of treating Section 1 as self-executing. Jones, of course, seemed to at least suggest that Section 1, itself, outlaws badges and incidents—that is, Section 1 is self-executing, even without congressional action. But the question is officially open, and the Court has continued to avert the question by focusing instead on Congress's power under Section 2 to define badges and incidents.

431. Zietlow, supra note 389, at 184–86 (summarizing congressional acts under the Thirteenth Amendment to address racial discrimination). The more recent Civil Rights Act of 1991 has also been characterized federal civil rights legislation that “fittingly sought to review and confirm a broad understanding” of the 1866 Act and that the Civil Rights Act of 1991 represented the “concurrence” of Congress with the constitutional holdings of Jones v. Mayer. Rutherglen, supra note 44, at 176. It also has been suggested that recent enactments—e.g., the Local Law Enforcement Hate Crimes Prevention Act of 2009—suggest that Congress may be becoming less hesitant to use its Section 2 power under the Thirteenth Amendment. Zietlow, supra note 389, at 188.

432. See generally, e.g., Pope, supra note 44.

433. See id. at 459 (citing Richard Davies Parker, The "New" Thirteenth Amendment: A Preliminary Analysis, 82 HARV. L. REV. 1294, 1319–20 (1969)). In City of Memphis v. Greene, the Court articulated that Congress's power to eliminate the badges and incidents of slavery "is not inconsistent with the view that the Amendment has self-executing force," but the Court did not confirm its view of the Amendment's scope, 451 U.S. 100, 125 (1981), and decided "to leave . . . open" the question of whether Section 1 was self-executing. Id. at 126.

434. Reiterating the Court's focus on Section 2 were several Section 2 cases that followed Jones. In Griffin v. Breckenridge, Black American individuals who had been attacked by white men who mistakenly associated them with a civil rights organization, sued the men under the Ku Klux Klan Act of 1871. 403 U.S. 88, 90–91 (1971). That congressional act, now Section 1985(3), provides a federal tort action against conspiracies to deprive a person of equal protection. The Court held that the statute, as applied to the plaintiffs, fell within the congressional power the Thirteenth Amendment conferred. Justice
Some lament that fact, arguing that were Section 1 to be recognized as prohibiting, of its own accord, “badges and incidents” of slavery, then those prohibitions could be directly enforced by courts, and Congress could just make laws to remedy them.\textsuperscript{435} One argument is that a full appreciation of the self-executing nature of Section 1 would allow for “[a]ll Americans . . . [to] claim the constitutional right to be free from the badges and incidents of slavery, instead of a mere privilege to seek legislation from Congress identifying and banning them.”\textsuperscript{436} James Pope finds that social movements, too, would benefit from being able to more “persuasively invoke the Amendment in support of resistance to perceived badges and incidents of slavery” like the display of Confederate battle flags and the disproportionate number of unarmed Black men killed by police.\textsuperscript{437}

\begin{quote}
Stewart, author of Jones, reasoned in Griffin that it was wholly rational for Congress to create “a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men” given the nation’s commitment “to the proposition that the former slaves and their descendants should be forever free.” Id. at 105. A few years later, in Runyon v. McCrary the Court again upheld the Civil Rights Act of 1866 in its prohibition of racial discrimination in the making and enforcement of contracts for private education. 427 U.S. 160, 179 (1976).

James Pope criticizes the Court’s “exclusion” of the “basic question” throughout this jurisprudence as being “without serious inquiry of [the Court’s] appropriateness as a means of enforcing Section 1 (which would hardly be possible without first deciding whether Section 1 itself bans the badges and incidents) while rejecting claims brought directly under Section 1 with slim reasoning and a nod to Congress’s power to go further.” Pope, supra note 44, at 459 (emphasis added). William Carter offers a response: “[T]he most persuasive explanation for ‘the great disparity between the scope of section 1 and section 2 of the Thirteenth Amendment’ is that the courts have intentionally ‘confined [their] enforcement of the amendment to a set of core conditions of slavery, but that the amendment itself reaches much further; in other words, the Thirteenth Amendment is [intentionally] judicially underenforced.’” Carter, supra note 158, at 1352 (quoting Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1217–18 (1978)).
\end{quote}

\textsuperscript{435} Pope, supra note 44, at 430.
\textsuperscript{436} Id.
\textsuperscript{437} Id. at 430–31. Pope also briefly considers the implications of Section 1 as self-executing in the context of disparate-impact claims. Id. at 473–74.
Others retort, however, that such “optimism” about Section 1’s self-executing scope has no “contemporary relevance and make[s] little strategic sense,” especially because Section 1 has never been interpreted to prohibit, of its own accord, “badges and incidents” of slavery. If the Thirteenth Amendment holds promise for overcoming the traditional disparate-impact theory’s problems, it is hard to deny that primarily legislative enforcement of the Amendment holds particular advantages. Again, these advantages include the unique policymaking, factfinding, and enforcement powers of Congress, as well as the fact that Congress is an elected branch.

The advantages also include likely avoiding the same kinds of problems with the judiciary regarding identifying and naming discrimination that the disparate-impact theory has had. One such problem is the judiciary’s propensity to side with the defendant “justifications,” discussed supra, that are proffered in response to the disparate-impact claims. This fact underscores why Congress is especially poised to lead enforcement of similar claims under the Thirteenth Amendment. The enforcement of disparate-impact claims generally requires an assessment of difficult trade-offs that courts are not as institutionally positioned to calculate and do not have as much democratic legitimacy to advance. Indeed, in one Thirteenth Amendment case the Court considered since Jones v. Alfred H. Mayer Co, the Court majority rejected a claim grounded in Section 1 because a “review of the [defendant] justification . . . demonstrate[d] that [the challenged action’s] disparate impact on black citizens could not . . . be fairly characterized as a badge or incident of slavery.” In this regard, the plaintiffs’ Section 1 claim suffered the same fate as most disparate-impact claims that are left solely to judicial decision-making and do not involve a congressional enforcement mechanism.

That same case underscores another relevant pitfall on the part of the judiciary: identifying discrimination. In Greene, the Court concluded that the

438. Greene, supra note 417, at 1737–38; see also American Bar Public Education Division, Slavery v. Liberty: The History and Relevance of the Thirteenth Amendment @150, YouTube, (Dec. 16, 2015), https://www.youtube.com/watch?v=m6fmIjjcjmU&t=2642s [https://perma.cc/GY2E-EE7Z] (at 01:04:00), [recognizing that the language of Section 1 maybe important for social mobilization, but that Section 2 is distinctly important for mobilizing Congress).


defendant had "no racially discriminatory motive" and characterized the defendant's interests as "legitimate."\textsuperscript{441} This conclusion of the evidence sharply contrasted with the dissenting Justices' recognition that "the evidence . . . combined with a dab of common sense, paint[ed] a far different picture" than the one painted by the Court majority.\textsuperscript{442} The dissenting Justices noted that the defendant's explanations for its action "[t]oo often in our Nation's history . . . have been little more than code phrases for racial discrimination"\textsuperscript{443} and that the plaintiffs were "being sent a clear, though sophisticated, message" that they were being racially discriminated against.\textsuperscript{444} The Justices' wildly varying assessments of the same evidence in \textit{Greene} highlight the potential benefit of Thirteenth Amendment Section 2 claims grounded in pre-determined congressional findings as to what constitutes unlawful discrimination.

3. Tension Between Disparate-Impact Claims and the Fourteenth Amendment and Shortcomings of Commerce and Spending Powers

Another benefit of grounding claims that challenge facially neutral discriminatory policies in the Thirteenth Amendment is that it is much likelier to avert the problems the Fourteenth Amendment has increasingly posed for traditional disparate-impact claims. If "badge" is to be understood as encompassing of a larger social culture and system of racial subordination and white supremacy, discussed \textit{supra}, then the Thirteenth Amendment's Section 2 powers can support the kinds of "race-conscious disparate-impact remedies" that tend to trip up rationales under the Fourteenth Amendment.\textsuperscript{445} Whether Thirteenth Amendment claims challenging facially neutral discriminatory practices end up promoting race-conscious policies should not be as much of an issue because slavery, as outlawed by the Thirteenth Amendment, was a race-conscious institution. The Fourteenth Amendment's "colorblind" Equal Protection Clause is not affected. As discussed, \textit{supra}, the Thirteenth Amendment guarantees a different individual right—namely the "right not to be branded

\textsuperscript{441} Id.
\textsuperscript{442} Id. at 155 (Marshall, J., dissenting) (emphasis added).
\textsuperscript{443} Id. at 135–36.
\textsuperscript{444} Id. at 147.
\textsuperscript{445} Miller, \textit{supra} note 43, at 856.
with a badge of group subordination or otherwise subjugated based on race.”\textsuperscript{446} That right equates to a “positive guarantee against... race discrimination.”\textsuperscript{447} And the simple fact is that “[o]ne must be conscious of race to dismantle a race-conscious institution.”\textsuperscript{448}

Despite the availability of the Thirteenth Amendment in that regard, laws against racial discrimination may also be justified under Congress's Commerce Power\textsuperscript{449} and Spending Power\textsuperscript{450} as well. Such justifications have been criticized as an unfortunate consequence of the Supreme Court failing to overturn its racist decisions of the 1880s—specifically The Civil Rights Cases\textsuperscript{451}—that undercut the Reconstruction Amendments' potential for effecting social change.\textsuperscript{452} Challenging racial discrimination under the

\textsuperscript{446} Pope, supra note 44, at 473.

\textsuperscript{447} Zietlow, supra note 169, at 266.

\textsuperscript{448} Miller, supra note 43, at 848; see also Zietlow, supra note 169, at 266. Another advantage is that the Court has held that the Thirteenth Amendment is, unlike the Fourteenth Amendment’s Equal Protection Clause, not limited to just state action, but rather also applies to purely private conduct imposing either slavery or a badge and incident of slavery. See, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409, 421–22 (1968).


\textsuperscript{451} 109 U.S. 3, 20 (1883) (holding that neither the Thirteenth nor the Fourteenth Amendment empowered Congress to outlaw certain kinds of racial discrimination by private individuals the Civil Rights Act of 1875 was implemented to eradicate); see also United States v. Morrison, 529 U.S. 598, 621 (2000) (relying on the Civil Rights Cases over a century later for the proposition that Congress exceeded its power under the Fourteenth Amendment in enacting the Violence Against Women Act).
Commerce Power or Spending Power risks sacrificing the reconciliatory import of race-conscious remedies,\textsuperscript{453} or at least remedies that explicitly harken back to the tragedy of racial inequality that slavery entrenched. As Jack Balkin concludes: "If Congress believes that a law is necessary and proper to promote equal citizenship, it should have the power to pass it without using the fiction that inequality affects interstate commerce."\textsuperscript{454} The Thirteenth Amendment remains available as a source of such power to Congress.

4. Assigning Blame and Naming Intentional Discrimination

Finally, claims challenging facially neutral discriminatory policies that are grounded in the Thirteenth Amendment would address the accountability problem of the traditional disparate-impact theory: failing to name what arguably should be considered intentional discrimination and to assign culpability when appropriate to do so.

To avoid blameworthiness in this way shortchanges the important role blame plays not only in promoting honest accountability, but also in cultivating both a readiness to remedy discrimination and a basis for doing so. Claims challenging facially neutral discriminatory policies that stem from congressional determinations made pursuant to Thirteenth Amendment powers would address this very issue. Such determinations constitute an explicit social commitment by Congress to purge society of the relics of race-based slavery, the ultimate blameworthy institution.\textsuperscript{455} It


\textsuperscript{453} See, e.g., Miller, supra note 43, at 856 (observing that "race-conscious disparate-impact remedies . . . tend to confound conventional Commerce Clause . . . rationales").

\textsuperscript{454} Balkin, supra note 452; but see, e.g., McAward, supra note 264, at 133 (stating that "if Jones was overturned, much of the civil-rights-related legislation that Congress has passed under the Thirteenth Amendment—from the Civil Rights Act of 1866 to the Fair Housing Act—likely would be sustained as appropriate legislation under the Commerce Clause").

\textsuperscript{455} Miller notes that "empathy deficits" were "a product of the racialized institution of slavery" and that 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." Miller, supra note 43, at 856–57. Miller argues that such deficits "form an underappreciated historical 'badge' or 'relic' of
would thus matter less whether one could argue, however unreasonably so, that engaging in acts that have been determined by congressional representatives to perpetuate a badge and incident of slavery does not constitute intentional discrimination. The acts already will have been deemed sufficiently blameworthy given its established ties to the institution of slavery.

In many ways, the failure of the disparate-impact theory has been a failure to convince courts that with respect to certain practices, Black Americans did not elect their outcomes; the lingering discrimination of a powerful system of oppression chose their fate. In challenging discriminatory public-school policies, specifically, it is not difficult to rationalize the outcomes under theories, even under the traditional disparate-impact model, as the “natural, unintended” result of neutral public-school policies governing individual decisionmaking. But the application of a Thirteenth Amendment analysis yields separate compelling reasons for why the discriminatory policies need to be eradicated. In particular, a Thirteenth Amendment analysis would help explain why, notwithstanding the traditional disparate-impact theory, public-school discipline policies that so dramatically affect Black Americans should be treated differently. Such policies are discernible legacies of slavery given the barriers they entrench for Black American children’s access to public education, and the policies’ roots in myths of Black American intellectual inferiority and inherent criminality.

**Conclusion**

Two years ago marked the anniversary of when many acknowledge that some of the first enslaved Africans arrived to the shores of what is now the United States. Those ultimately enslaved in the United States would be subjected not only to inconceivable violence and physical subjugation, but

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456. See, e.g., U.S. COMM’N ON CIVIL RIGHTS, supra note 78, at 177 (noting the dissent of Gail Heriot, who criticizes the fact that the report ignores that Black American students simply misbehave more and that the discipline statistics reflect that fact).

also a complex social and political apparatus of domination primarily configured by a white American imagination. Slavery went beyond the legal ownership of humans and was comprised of "an entire system of conventions, understandings, practices, and institutions that conferred power and social status and maintained economic and social dependency." To justify their treatment of those they enslaved, white Americans created a powerful myth of Black American inferiority that dehumanized them. Black Americans' dehumanization was essential to the maintenance of slavery as an institution; without that treatment, the American promise of liberty and equality among all of its citizens could not be taken seriously. And one of the many other powerful ways of reinforcing this dehumanization and controlling Black Americans was the creation of barriers to public education.

Most accept that the Thirteenth Amendment was to end slavery in its physical form. Less appreciate the Amendment's purpose to outlaw more than that. This is so despite what both legislative history and the views of then-contemporary Black Americans suggest about how actual freedom was conceptualized. To Black Americans, legislators, and others, freedom meant, among other things, being educated without encumbrance. Supreme Court precedent—with its focus on Congress's role in removing the "badges and incidents" of slavery under the Thirteenth Amendment—echoes the truth of this broad conceptualization of freedom.

While the Thirteenth Amendment resulted in the removal of bondage and forced servitude, the deeply entrenched myth of Black American inferiority persisted. It is that myth of Black inferiority with which the United States still contends today in its quest for racial justice. As Saidiya Hartman writes:

If slavery persists as an issue in the political life of black America, it is not because of an antiquarian obsession with bygone days or the burden of a too-long memory, but because black lives are still imperiled and devalued by a racial calculus and a political arithmetic that were entrenched centuries ago. This is the afterlife of slavery—skewed life chances, limited access to health and education, premature death, incarceration, and impoverishment.

458. Balkin, supra note 203, at 1817.
459. EQUAL JUSTICE INITIATIVE, supra note 119.
460. Hartman, supra note 1, at 6.
One of the many aspects of slavery’s “afterlife” is racially discriminatory school policies in public schools. The same myths of inferiority that were created and perpetuated to justify and maintain slavery—specifically, Black Americans’ inherent intellectual inferiority and social deviancy—inform, if not justify, discriminatory school policies concerning discipline and punishment. And those same policies have the effect of creating access barriers to Black Americans’ education, again, a key feature of the system of slavery.

It is for these reasons that the Thirteenth Amendment is a more than appropriate legal ground for challenging ostensibly neutral, but racially discriminatory, school policies. These are policies that disproportionately enact violence on Black American bodies, feed Black American children into prisons, and deprive Black Americans of meaningful life opportunities. Freedom from such practices—a freedom defined by more than not being in physical bondage—is a more “practical” freedom, that which Reconstruction Senator Trumbull defined as the mechanism by which “each individual has the power to pursue his own happiness according to his own views of his interest and the dictates of his conscience, unrestrained, except by equal, just, and impartial laws.”461 This is the form of Black American liberation that the Thirteenth Amendment imagined. And it is this kind of practical freedom that is in the spirit of that radically new “Re-constructed” constitutional system the Reconstruction Amendments birthed.462

Bolstering the argument for the Thirteenth Amendment as home to such claims are the challenges we know those same claims would face if brought under the disparate-impact theory. In this regard, the Thirteenth Amendment is especially appropriate because of its common aims with the original intention of the disparate-impact theory to remedy the lingering effects of past discrimination. The zenith of such discrimination was the system of slavery, but the disparate-impact theory has increasingly struggled to bring about social change in a way that challenges slavery’s vestiges in a meaningful way. Courts, legislators, advocates, and, crucially, the citizenry at large—would do well to join in relying on the Thirteenth Amendment to fill this gap.463 Doing so would not only honor both the

461. 2 Cong. Rec. 383 (1874).
462. Davis, supra 289, at 66.
463. Sanford Levinson distinguishes between the “Constitution of Conversation,” comprised of constitutional clauses that are regularly litigated and the “Constitution of Settlement,” which refers to constitutional provisions that structure our basic politic and are hardly litigated because they are deemed
Amendment's clear purpose and the disparate-impact theory's original intent, but also force the United States to reckon seriously with slavery's legacy.

The humiliation and violence of racially discriminatory school policies notwithstanding, such practices are hardly the most pernicious or socially injurious that are at risk of persisting if the nation fails to do so. To this point, theArticle nods towards the Thirteenth Amendment’s potential as salve for the failures of the disparate-impact theory in challenging race-neutral discriminatory practices in contexts beyond public education. How, for example, might other early prominent acts of freedom performed by Black Americans inform and connect to other specific sites of discrimination today?

Though legislators may not agree on how to address social issues like racially discriminatory school discipline, Congress is constitutionally empowered—and vested with the responsibility—to inquire and act under the Thirteenth Amendment to address such policies as a legacy of slavery. Congressional action holds particular advantages over judicial enforcement and would, moreover, be a critical step towards a meaningful consideration of what that legacy still brings to bear on life opportunities for Black Americans. Even good faith disagreement following a real commitment to act is preferable to what has been the functional neglect of the Thirteenth Amendment’s power and promise.

Some are concerned about the Thirteenth Amendment’s “risk” of being used to confront many structural aspects of our society with respect to race, in response to which I invoke Justice Brennan’s implicit suggestion

_obvious. Sanford Levinson, Framed: America’s Fifty-One Constitutions and the Crisis of Governance_ 17–27 (2012). Balkin assigns the Thirteenth Amendment to a “third possibility,” what he deems the “Constitution of Silence,” because, among other provisions, the Thirteenth Amendment “could be remarkably important, but which contemporary lawyers, judges, and scholars have, for one reason or another, chosen to ignore.” Balkin, _supra_ note 255, at 1471. Balkin concludes: “The point is not that these clauses are irrelevant to modern life; rather, the point is that, taken seriously, they might be altogether too relevant.” _Id._

464. One scholar has highlighted the unfortunate reality that the Amendment’s potential for creating “a truly radical transformation of the American social and political order” is exactly why the Thirteenth Amendment has been neglected. Balkin, _supra_ note 255, at 1470. Particularly relevant here is his explanation that if “ending” slavery is interpreted to mean “embarking on the project of ending domination in social life, and securing self-rule and self-
of the absurdity of “too much justice.”\textsuperscript{465} Instead, focused activation of the Thirteenth Amendment may achieve the antidiscrimination work other legal frameworks have struggled to address and challenge entrenched structural inequality, a way we move towards real freedom for Black Americans—in schools and beyond.