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Title
Suppressing Learning About Race and Law: A New Badge of Slavery? — A Brief Commentary

Permalink
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Journal
National Black Law Journal, 29(1)

Author
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Publication Date
2024

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# SUPPRESSING LEARNING ABOUT RACE AND LAW:

## A New Badge of Slavery? – A Brief Commentary

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### Table of Contents

The National War on Learning About Race and Law . . . . . 4
Silenced Like a Slave – When African American Communities are Forbidden to Speak Truth to Power . . . . . 9
The Birth of Badges of Slavery . . . . . 12
The New Badge of Slavery . . . . . 19
The Importance of Using the Thirteenth Amendment in Stopping the Suppression of Learning About Race . . . . . 28
Conclusion . . . . . 32

There is a war being waged against African Americans and their ability to speak out against racial injustice, which is more intense than any attempt at suppression since post-Reconstruction in America. Higher education in America is being subjected to a widespread legislative effort to ban teaching Critical Race Theory (CRT). This legislation seeks to prohibit curricula which examine the relationship between race and law and which posit that "racism and sexism are pervasive in our society."[1] This is being done under the guise of attempting to prevent the promotion of anti-white racism.[2] Post-Reconstruction, the Ku Klux Klan rose as a major domestic terrorist organization that cloaked itself within

[1] Vanessa Miller, Frank Fernandez, Neal H. Hutchins, The Race To Ban Race: Legal And Critical Arguments Against State Legislation To Ban Critical Race Theory In Higher Education, 88 Mo. L. Rev. 61 at 63 ( 2023), note 2.

[2] Id.

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the pretense that it was protecting victimized, innocent white Americans from the horrors of Black people newly freed from slavery.[3] Today's legislative attack against race-conscious curricula puts that same oppressive intent in the hands of elected white officials who, albeit without sheets and hoods, disproportionately terrorize Black teachers and students into silence.[4]

While much of this legislative attack claims to be directed at Critical Race Theory, a scholastic doctrine that proponents of the suppression fail to properly define or explain, its impact and ultimate aim is much broader. The goal here appears to be stopping all protest against systemic racism and eliminating the study of topics, such as African American history, that reflect and document the existence of systemic racism in the 21st century.

Florida has been in the forefront of the attack on race-conscious education with legislation such as H.B. 7, which is designed to both villainize and eradicate Critical Race Theory[5]. Florida is not alone in its efforts opposing Critical Race

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[3] The Ku Klux Klan is considered "the first organized terror movement in American history." Fergus Bordewich. Klan War: Ulysses S Grant and the Battle to Save Reconstruction. (Penguin Random House (2023). The Ku Klux Klan focuses on opposition to civil rights by using violence and murder to suppress activists. *See*, Barbara Perry, ed., Hate and Bias: A Reader, ( Routledge, 2003).

[4] In Florida, for example, Black and Brown instructors within Florida's State University System are more likely to teach courses on race studies, Critical Race Theory, ethnic studies, and other courses that involve the viewpoints that the Stop W.O.K.E. Act is designed to suppress. Additionally, academic departments such as Departments of African American Studies at Florida State University, Florida International University, and the University of Florida, where discussions of race, white privilege, systemic inequality, and other viewpoints disfavored by the legislature will predictably occur, are heavily staffed by Black instructors. See, for example https://coss.fsu.edu/aas/faculty/, https://africana.fiu.edu/about-us/gallery/index.html, https://afam.clas.ufl.edu/faculty/

[5] In 2022, the Florida Legislature passed the Individual Freedom Act (IFA). (HB7). H.B. 7 prohibits "training or instruction that espouses, promotes, advances, inculcates, or compels . . . student[s] or employee[s] to believe eight specified concepts. These eight concepts were as follows:

> 1. Members of one race, color, national origin, or sex are morally superior to members of another race, color, national origin, or sex.
> 2. A person, by virtue of his or her race, color, national origin, or sex is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
> 3. A person's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, national origin, or sex.
> 4. Members of one race, color, national origin, or sex cannot and should not attempt to treat others without respect to race, color, national origin, or sex.
> 5. A person, by virtue of his or her race, color, national origin, or sex bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, national origin, or sex.

Theory; Florida is part of a national attack on CRT, the importance of diversity, and most significant for this Article, any recognition of the role that race and racism has played in the history, development, and application of law in the United States.[6]

Legislation such as H.B. 7 was decades in the making. It grew, inter alia, from political attacks on intellectuals of color to overt executive and legislative initiatives designed and implemented across the nation. Under the guise of protecting children,[7] this legislation has sought to stifle race-conscious education from the elementary to high school level. Pretending to be a bulwark against indoctrination and discomfort, it has sought to prevent articulation and discussion of transformational change that would counter the impact of institutional racism by denying the very existence of institutional racism.

Responses to legislation attacking race-conscious education has run the gamut from the defense of Critical Race Theory to the assertion of the First Amendment rights of teachers and students to express diverse viewpoints.[8] This

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> 6. A person, by virtue of his or her race, color, national origin, or sex should be discriminate against or receive adverse treatment to achieve diversity, equity, or inclusion.
> 7. A person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex.
> 8. Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, national origin, or sex to oppress members of another race, color, national origin, or sex.

(See*, Order Granting in Part and Denying in Part Motions for Preliminary Injunction, Pernell, et. al. v. Florida Board of Governors of the State University System*, et. al. Case No. 4:22cv304-MW/MAF, November 17, 2022, pages 3–4).

[6] Arkansas, Senate Bill 627 (April 2021). Arizona, H.B. 2906 (June 2021), Georgia, H.B. 1084 (January 2022), Iowa, House File 802 (March 2021), Idaho, H.B. 377 (April 2021), Kentucky, S.B.1 (January 2022), Mississippi, S.B. 2113 (January 2022), North Dakota, H.B. 1508 (November 2021), Oklahoma, H.B. 1775 (January 2021), South Carolina, H.B. 4100, South Dakota, H. B. 1012 (January 2022), Tennessee, S.B. 2290 ( February 2022), Texas, H.B. 3976 (March 2021), and Virginia, H.B. 127 ( January 2022).Hereinafter Anti- CRT laws.

[7] See,https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/

[8] In August of 2022, I agreed to be the lead named plaintiff in Pernell, et. al. v. Florida Board of Governors of the State University System, et. al. Case No. 4:22cv304-MW/MAF. On November 17, 2022, district court Judge Mark Walker issued a preliminary injunction barring the Florida Board of Governors of the State University System from the enforcement of this act. As of this writing, the State of Florida has appealed Judge Walker's decision to the U.S. Court of Appeals, Eleventh Circuit. Because this is ongoing litigation, I have not discussed the issues presented by that case particularly as they relate to the First and Fourteenth Amendment.

Article seeks to link the legislation to the history of oppression exemplified by slavery, specifically the struggle of enslaved people for self-determination and expression of opposition to the conditions and consequences of enslavement. The tool for combating the suppression represented by enactments such as H.B. 7 is the Thirteenth Amendment to the U.S. Constitution.

While recognizing intersectionality and its importance to critical race thinking, this Article begins in Part I with a discussion of the national efforts to suppress learning about race and law. Part II discusses the historical silencing of enslaved people and the origins of Thirteenth Amendment doctrine outlawing badges of slavery. Part III explores the new badges of slavery, and Part IV outlines the utility of Thirteenth Amendment doctrine in stopping legislation that suppresses learning about race. The Article provides a historical analysis of the Thirteenth Amendment and its application to both judicial doctrine and legislative power. This Article proposes that the Thirteenth Amendment is a source of both juridical and legislative remedies available today as a counter to the new attempt at badges of slavery.

This Article overall will discuss war against African Americans implicated in this legislation, including its linkage to other race-based suppression, such as denial of voting rights, which have been recognized as a basis for judicial intervention. Additionally, it will argue that not only is this attack motivated by current resistance and response to racial inequity, but it is also linked to the historical suppression of people who were enslaved and their descendants. The maintenance of a mindset built around the silencing of Black cries of injustice is a continuation of a "Plantation Mentality"[9] that is part and parcel of the badges of slavery specifically denounced by the Thirteenth Amendment.

## The National War on Learning About Race and Law

*"Until the philosophy which hold one race Superior and another Inferior Is finally and permanently Discredited And Abandoned. Everywhere is war. Me say war"*[10]

*Bob Marley – "War" from Rastaman Vibration, 1976*

Following the deaths of Trayvon Martin, George Floyd, and Breonna Taylor,[11] among others, Americans, many white, began to confront racial truths

[9] See, Laurie B. Green, Battling the Plantation Mentality: Memphis and the Black Freedom Struggle, Chapel Hill (2007).

[10] Based on the speech of Ethiopian Emperor Haile Selassie I, United Nations General Assembly, October 4, 1963.

[11] Professor Kimberle W. Crenshaw has long argued that the experience of Black women

that had been long denied. These deaths disillusioned the American public, similar to the media images of the Civil Rights Movement of the 1950s and 1960s, which depicted the fire-hosing of Black children, blowing-up of Black churches, and beating and killing of Black people who simply sought to ride public transport, eat, sleep, and vote like other Americans. The highly publicized deaths of Black people killed by the police in recent years were in stark contrast with the post-racial society[12] that many felt this nation had entered in the wake of the election of Barack Obama.

The spreading recognition that the legal system failed to protect the lives of African Americans in many instances led to a national outcry symbolized by Black Lives Matter.[13] Proposed antiracist measures ranged from defunding the police to the abolition of no-knock warrants.

There has been a response to these antiracist efforts. The response was to elevate the narrative that the U.S. is a post-racial society. Proponents of this narrative characterize discussions about institutional racism as out-of-date and view them as attempts to burden white Americans with undue responsibility for their ancestors' actions. This vision seeks to return America to what proponents of this legislation view as a halcyon time where concerns of racially oppressed people were beneath notice and everybody knew and respected their place. The response is rooted in the same racial fear that precipitated the historic role of police as protectors against Black violence. The fear has deep roots in slavery and Reconstruction. Given the timing of the efforts to suppress the discussion

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falling victim to police violence needs particular attention as a point of intersectionality. See, Crenshaw, et. al., Say Her Name: Resisting Police Brutality Against Black Women, African American Policy Forum, Center for Intersectionality and Social Policy Studies (January 25, 2016).

[12] The term "post-racial" dates back at least to 1971 in an article appearing in the New York Times, dated October 5, which regarding the establishment of Southern Growth Policies boards in North Carolina, there were some 70 politicians and professors who believed their region of 60 million citizens had entered an era in which race relations were soon to be replaced as a major concern by population increase, industrial development, and economic fluctuations." James T. Wootens. "Compact Set Up for 'Post-Racial' South" The New York Times. (October 5, 1971) .

[13] Black Lives Matter began initially as a response to the death of Trayvon martin in 2012.[fn] Its original presence as a series of social posts following the acquittal of the Goerge Zimmerman, the killer of Trayvon Martin, took on added significance following the 2013 death of Micheal Brown in Ferguson, Missouri and the death the same year of Eric Garner in Staten Island New York.[fn] Ultimately these and other deaths of African Americans at the hands of police, without convictions of their killers, formed the basis of social and political protest that brought into question the idea of justice in our legal system for persons of color. George Chase, The Early History of the Black Lives Matter Movement, and the Implications Thereof, 18 Nevada Law Rev. 1091 (2018).

of race addressed herein and its proximity to voting suppression efforts, the fear may quite possibly be linked to the a perception of ever-growing political power among people of color, symbolized by the election of Obama.[14] This dream of returning to a perceived past was encapsulated in the political rhetoric of "Make America Great Again," the campaign slogan of President Donald Trump. America was apparently "great" when enslaved people knew their place and accepted the social order.

Chief among the organizations that sought to elevate this vision of America is the Heritage Foundation. Founded in 1973 in order to advance conservative activism, the Heritage Foundation distinguished itself from the conservative American Enterprise Institute by advocating for the Christian right, anti-communism, and neoconservatism.[15] By 1981, the Heritage Foundation became a major policymaker for the Reagan administration.[16]

In December 2020, just two years prior to legislative attacks on CRT, cited earlier,[17] Jonathan Butcher and Mike Gonzalez of the Heritage Foundation published a position paper entitled *Critical Race Theory, the New Intolerance, and Its Grip on America.*[18] Butcher and Gonzalez[19] direct their ire at Critical Race Theory claiming:

> CRT is well-established, driving decision-making according to skin color—not individual value and talent. As Critical Theory ideas become more familiar to the viewing public in everyday life, CRT's intolerance becomes "normalized," along with the idea of systemic racism for Americans, weakening public and private bonds that create trust and allow for civic engagement.[20]

This position paper seeks to alarm its readers by dubiously asserting that Critical Race Theory is the child of Critical Theory, or, to be more precise, its grandchild. Critical Theory is the immediate forebearer of Critical Legal Theory.

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[14] *Infra*, note 18.

[15] *See*, Jason Stahl, Right Moves: The Conservative Think Tank in American Political Culture Since 1945 (Univ. of North Carolina Press 2016).

[16] *See*, Andrew Blasko, Reagan and Heritage: A Unique Partnership, Commentary, https://www.heritage.org/conservatism/commentary/reagan-and-heritage-unique-partnership.

[17] *Supra*, note 6.

[18] https://www.heritage.org/node/24571991/print-display.

[19] Mike Gonzalez also authored The Plot to Change America (Encounter Books 2020) setting forth additional attacks on "identity politics" and articulates further opposition to "progressive anti-racism."

[20] *Id.*

This train of thinking invariably led to assertions that CRT is, in essence, a reformulation of Marxism and Nietzschean doctrine.[21]

Christopher Rufo, who left the Heritage Foundation to become the Senior Fellow for the Manhattan Institute,[22] became the major spokesperson and author of the continued attack on Critical Race Theory. He also continued the strategy of broadening the attack to include the concepts of equity, social justice, diversity and inclusion.[23]

Rufo's attacks on diversity, equity and inclusion were consistent with the Butcher and Gonzalez position paper. The Heritage Foundation and the Manhattan Institute were successful in prevailing on President Donald Trump to adopt their agenda against Critical Race Theory and diversity, which precipitated Trump's Executive Order on Combating Race and Sex Stereotyping,[24] issued on September 22, 2020. This executive order rejected "critical race theory," and following the logic of Rufo and his supporters, it also rejected diversity and initiatives to support diversity.[25]

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[21] As has been noted by Professor Davis Theo Goldberg, the attempts by Butcher, Gonzalez, and subsequently Christopher Rufo—a former Visiting Fellow for Domestic Policy Studies at the Heritage Foundation—to link CRT with Marxism and or Nietzsche fall victim to at least three criticisms: (1) the assumption that the driving influence for CRT comes primarily from white German Jewish men and not from the intellectual activity of numerous Black, Brown and Asian men and women; (2) that the Neo-Marxists claimed to be the fount of CRT, Herbert Marcus, Theodor Adorno, Max Horkheimer and Walter Benjamin, largely focused their analysis on antisemitism with little to no discussion of racism; and (3) in the principle writings underlying CRT, such as Critical Race Theory: The Key Writings that Formed the Movement, (Crenshaw, Gotanda, Peller, Ed. The New Press 1995), there is not one single reference to the claimed Neo-Marxists. See, David Theo Goldberg, War on Critical Race Theory, (Polity 1st edition (June 19, 2023)).

[22] The Manhattan Institute, founded in 1977 describes its mission as a think tank to develop and disseminate new ideas that foster greater economic choice and individual responsibility. https://manhattan.institute/about.

[23] David Theo Goldberg, *Meet Christopher Rufo—leader of the incoherent right-wing attack on "critical race theory"*, Salon.com:

> There is an obvious political strategy at work here: Renew the longstanding conservative hysteria over Marxism and communism by misreading CRT as substitutes for its terms. The goal is to set fire to the contemporary shift in American politics regarding race and racism unfolding since the George Floyd murder and BLM-inspired protests over a year ago.

https://www.salon.com/2021/08/01/meet-christopher-rufo—leader-of-the-incoherent-right-wing-attack-on-critical-race-theory.

[24] Executive Order 13950 of September 22, 2020.

[25] In significant part, Section 2 (a) (4) described as "outlawed" concepts:

> an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual's moral character is necessarily determined by his or her race or

Although rejected and abolished by President Joe Biden on his first day in office,[26] the Trump executive order engendered legislative action across the nation aimed at mitigating the perceived threat and fear of Critical Race Theory and discrediting expressions of a racial perspective on the impact of law.[27]

The battlefront in this campaign goes beyond the classroom and into the voting booth. All of the states identified above as having introduced or enacted legislation targeting Critical Race Theory and the teaching of the historical significance of race in the development of law, have also enacted or introduced legislation aimed at restricting voting rights in ways detrimental to the ability of persons of color to express their will in the voting booth.[28]

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> sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term "divisive concepts" also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.

[26] *Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, January 20, 2021.

[27] At least 15 states have enacted legislation to this effect: Arkansas, Senate Bill 627 (April 2021). Arizona, H.B. 2906 (June 2021), Florida, H.B. 7, Georgia, H.B. 1084 (January 2022), Iowa, House File 802 (March 2021), Idaho, H.B. 377 (April 2021), Kentucky, S.B.1 (January 2022), Mississippi, S.B. 2113 (January 2022), North Dakota, H.B. 1508 (November 2021), Oklahoma, H.B. 1775 (January 2021), South Carolina, H.B. 4100, South Dakota, H. B. 1012 (January 2022), Tennessee, S.B. 2290 ( February 2022), Texas, H.B. 3976 ( March 2021), and Virginia, H.B. 127 ( January 2022).

[28] As defined by the Brennan Center for Justice:

> Legislation is categorized as restrictive if it contains one or more provisions that would make it harder for eligible Americans to register, stay on the voter rolls, or vote as compared to existing state law. Brennan Center for Justice at NYU Law

https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2023#footnoteref2_9me94rd.

The below chart is just a partial listing of the anti-voting rights legislative actions taken by those states that have also committed to suppressing Critical Race Theory from 2021 to date:

**Anti CRT States that Have Introduced/Passed Voting Rights Restrictions**

| | |
|---|---|
| Arkansas | H.B. 1112, H.B. 1244, H.B.2358 |
| Arizona | H.B. 2243, H.B.2492 |
| Georgia | H.B. 1015, H.B. 1368 |
| Iowa | S.B. 1166 |
| Idaho | H.F. 590, H.S.B. 213 |
| Kentucky | H.B. 301 |
| Mississippi | H.B. 1510 |
| North Dakota | H.B. 1289 |

### Silenced Like a Slave – When African American Communities are Forbidden to Speak Truth to Power

*"[I]n regard to the ten thousand wrongs of the American slave, you would enforce the strictest silence, and would hail him as an enemy of the nation who dares to make those wrongs the subject of public discourse!"*

*—Frederick Douglass, What to the Slave Is the Fourth of July?*[29]

Punishing the enslaved African for speaking out against injustice was a hallmark feature of slavery. The language from the Mississippi Slave Code exemplifies this punishment:

> [Imprisonment at hard labor from up to twenty-one years to the death penalty for] using language having a tendency to promote discontent among free colored people, or insubordination among slaves.[30]

Professor William Carter documents, through the use of slave narratives, a history of the relationship between slavery and the need to suppress enslaved people's expression of free thought and opposition to oppression.[31] In the following passage, he relates the narrative of Charles Ball regarding the condition of slavery:

> Throughout the whole journey, until after we were released from our irons, he had forbidden us to converse together beyond a few words in relation to our temporary condition and wants, [and] he rigidly enforced his edict of silence. I presume that the reason of this prohibition of all conversation was *to prevent us from devising plans of escape*.[32]

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| | |
|---|---|
| Oklahoma | H.B. 364, H.B. 3365 |
| South Carolina | S.B. 108 |
| South Dakota | S.B. 112 |
| Tennessee | H.B. 1251 |
| Texas | H.B. 1026 |
| Virginia | H.B. 1970 |
| Florida | S.B. 524 |

Source: Brennan Center & NYU School of Law, State Voting Bills Tracker 2021–2023.

[29] Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?* (1860).

[30] Code Miss. 1798 to 1848, ch. 37, art. 2, § 1 at sec. 32. See also, J. Clay Smith, Jr., *Justice and Jurisprudence and The Black Lawyer, 69* Notre Dame. L. Rev. *1077, 1107* (1994).

[31] See, William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 Tex. L. Rev. 1065 (2021).

[32] *Id.* at 1112–1113. [ emphasis added] See also, Charles Ball, Fifty Years in Chains; or The Life of an American Slave 290–91 (1859) [hereinafter BALL, FIFTY YEARS IN

Henry Clay Bruce recounts how he, after being falsely accused of riding the slave master's horse too hard, was beaten not so much for the treatment of the horse but for having the temerity to dispute a white man's word.[33]

The sin of the slave was not just in disagreeing, but in having an opinion at all. As the narrative of James Pennington recounts regarding the beating of his father:

> [The owner then] drew forth the cowhide from under his arm, fell upon [my father] with most savage cruelty, and inflicted fifteen or twenty severe stripes with all his strength, over his shoulders and the small of his back. As he raised himself upon his toes, and gave the last stripe, he said, "By the [Lord,] I will make you know that *I am master of your tongue as well as of your time*![34]

Anne Clark, while a slave in Mississippi also witnessed the shooting death of her father for no greater sin than protesting a beating.[35]

Mastering the slave's tongue was a central tenet of slavery. Another prime example is the Alabama Slavery Code of 1833:

> S42. If any slave or free person of color shall preach to, exhort, or harangue any slave or slaves, or free persons of color, unless in the presence of five respectable slave-holders, any such slave or free person of color so offending, shall, on conviction before any justice of the peace, receive, by order of said justice of the peace, thirty-nine lashes for the first offence, and fifty lashes for every offence thereafter; and any person may arrest any such slave or free person of color, and take him before a justice of the peace for trial: Provided, That the negroes so haranguing or preaching, shall be licensed thereto, by some regular body of professing Christians immediately in the neighborhood, and to whose society or church such negro shall properly belong.[36]

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CHAINS], https://docsouth.unc.edu/fpn/ball/ball.html [https://perma.cc/6GRU-SM78].

[33] Henry Clay Bruce, The New Man: Twenty-Nine Years a Slave, Twenty-Nine Years a Free Man (1895).

[34] *Id.* at 1101.

[35] Clark writes,

> My poppa was strong. He never had a lick in his life. He helped the marster, but one day the marster says, 'Si, you got to have a whoppin' and my poppa says, 'I never had a whoppin' and you can't whop me.' An' the marster says, 'but I kin kill you,' and' he shot my poppa down. My mama tuk him in the cabin and put him on a pallet. He died.

*Interview by Federal Writers' Project of the Works Progress Administration for the State of Texas with Mother Anne Clark, Formerly Enslaved Pers.*, in El Paso, Tex. (1937), https://tile.loc.gov/storage-services/service/mss/mesn/mesn-161/mesn-161.pdf.

[36] John G. Akin, *A Digest of the Laws of the State of Alabama* - 1833, Alabama Department of Archives and History, Montgomery, Alabama. https://users.wfu.edu/zulick/340/slavecodes.html.

There are few images more ingrained in our 20th to 21st Century popular cultural perception, regarding an enslaved Black man speaking out against his captivity, as strong as that presented in the 1997 film *Amistad*.[37] While perhaps more apocryphal than historically accurate in its recounting of dialogue, its central character Joseph Cinque, the Mende leader, speaks the electrifying line: "Give us, us free. Give us, us free. Give us, us free. Give us, us free. Give us, us free."[38] Regardless of whether Cinque ever uttered that immortal line, it is significant that whatever protest against enslavement was articulated by the Mende captives, it was soon lost in a legal battle that largely centered more on whether they were cargo, and if so, whose cargo were they.[39] Although ultimately the U.S. Supreme Court affirmed the federal district court's prior, finding that the Mende captives acted as freemen and that they were entitled to take any measures necessary to secure their freedom, the Court did not do so in any way that acknowledged the right of slaves to protest their existence as purported slaves or the conditions of slavery.[40]

Mastering the slave's tongue was a central tenet of slavery not only in the United States, but also throughout the Diaspora. As Professor Marisa J. Fuentes notes regarding the violence visited upon slave women in the Caribbean,

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[37] The 1997 film recounts events leading up to the U.S. Supreme Court decision in United *States v. Schooner Amistad*, *Infra*, note 28. On June 27, 1839, the Spanish ship, "The Amistad," left the port of Havana, Cuba, with 53 African slaves on board. During the voyage, there was an uprising in which the slaves killed the captain and took possession of the ship. On August 26, 1839, Lieutenant Thomas Gedney, of the American ship "Washington," discovered "The Amistad" off the Long Island shore and brought all persons involved into the district court of Connecticut. Two passengers, Ruiz and Montez, claimed the alleged slaves were their property and requested the relief of having their property released to them. The alleged slaves argued that they were native-born, free Africans who had been unlawfully and forcibly kidnapped to be sold as slaves.

[38] There appears to be no surviving text as to what, if anything, the Mende defendants actually said during their trial, in large part because anything said was in Mende, with no authenticable translation available. Nonetheless, on August 31, 1839, the New York Sun newspaper published a lithograph purporting to present a portrait of Cinque with an accompanying translation of a speech to his fellow Mende captives while on board the Amistad which states:

> Brothers, we have done that which we purposed, our hands are now clean for we have Striven to regain the precious heritage we received from our fathers . . . I am resolved it is better to die than to be a white man's slave. . .

Library of Congress Prints and Photographs Division Washington, D.C. 20540 USA http://hdl.loc.gov/loc.pnp/pp.print.

[39] *Infra*, note 34.

[40] See, *United States v. Schooner Amistad*, 40 U.S. (15 Pet.) 518 (1841).

"shrieks and cries are a rhetorical genre of the enslaved . . . the sound of someone wanting to be heard".[41]

It is not insignificant to note that people of color are subject to punishment yet again, under the various anti-CRT enactments which are the subject of this Article. Tenure loss, job loss, and civil punishment[42] replace the whip and rod, but the impact is the same—at least for academics who would suggest disagreement with traditional white-dominated doctrine.[43] The result unfortunately, is like the fate suffered by Bruce, who in order to stop the beatings responded to the slave master question, " will you have the impudence to dispute a white man's word again?" with the answer "no".[44]

## The Birth of Badges of Slavery

*"The man born and bred a slave, even if freed, never loses wholly the feeling or manner of a slave."*

Mary Clemmer Ames, Outlines of Men, Women, and Things[45]

Slavery was formally abolished with the ratification and proclaiming[46] of the Thirteenth Amendment to the U.S. Constitution in 1865.[47] But as soon

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[41] Marisa J. Fuentes, Dispossessed Lives: Enslaved Women, Violence and the Archive, Univ, of Penn. Press, 143 (2016).

[42] Florida's H.B. 7 commands the Board of Governors to "adopt regulations to implement this section as it relates to state universities." § 1000.05(6)(b), Fla. Stat. (2022). Pursuant to this command the Florida Board of Governors enacted regulations which provided each university to follow certain investigatory protocols, including informing the Board of Governors through the Office of Inspector General if the university's "investigation finds that an instruction or training is inconsistent with the university regulation, and "take prompt action to correct the violation by mandating that the employee(s) responsible for the instruction or training modify it to be consistent with the university regulation, and issue disciplinary measures where appropriate and remove, by termination if appropriate, the employee(s)" if they fail or refuse. *Board of Governors Regulation 10.005 (4)(a) 2–3.*

[43] In what is in essence a companion piece to H.B. & Florida in 2022 enacted Senate Bill 7044 allowing the State to remove tenure from faculty at state universities who continue to express "political viewpoints", such as systemic racism, in the classroom that are opposed to state-endorsed doctrine.

[44] Carter, *supra*, note 31 at 1098.

[45] Mary Clemmer Ames, Outlines of Men, Women, and Things, Hurd and Houghton (1873).

[46] Although President Abraham Lincoln's Emancipation Proclamation was effective on January 1, 1863, the Confederate states were slow to acknowledge the end of slavery, and the last of such states, Texas, was forced to acknowledge slavery's end by the arrival, on June 19, 1865, of General Gordon Granger and his presenting of Lincoln's proclamation, just six months prior to the effective date of the Thirteenth Amendment.

[47] Thirteenth Amendment:

Section 1

discovered, beyond ending chattel slavery,[48] the Thirteenth Amendment—with its extensive legislative history—encompasses more than physical freedom.[49] In 1883, the U.S. Supreme Court established in *The Civil Rights Cases* that the Thirteenth Amendment was intended to abolish not only chattel slavery, but also the badges and incidents of slavery.[50]

In *The Civil Rights Cases*,[51] various plaintiffs described as "persons of color" or "colored" brought actions pursuant to the 1875 Civil Rights Act,[52] against various private businesses for denial of services based on race, including admission to theaters, cabs, cars, and inns. After the plaintiffs prevailed under the Act regarding criminal charges, the defendants appealed to the Supreme Court, claiming that the Civil Rights Act was an unconstitutional use of congressional power provided by the Thirteenth and Fourteenth Amendments. While the Court concluded that there was no viable Fourteenth Amendment claim due to lack of state action,[53] the Court went on to state that in addition to ending chattel slavery the Thirteenth Amendment empowered the U.S. Congress to "pass all laws necessary and proper for abolishing all badges and incidents of slavery."[54]

While the narrow scope of badges of slavery adopted by the Court in the *Civil Rights Cases* was later significantly broadened by *Jones v. Alfred Mayer*

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> 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.

[48] Chattel slavery generally refers to the concept that enslaved people were the personal property of their owners for life, a source of labor or a commodity that could be willed, traded or sold like livestock or furniture.

[49] *See*, William M. Carter, Race, *Rights and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. Davis L. Rev. 1311, 1324 (2007).

[50] *The Civil Rights Cases*, 109 U.S. 3 (1883).

[51] *United States v. Stanley, United States v. Ryan, et al.*, *Id.* note 35.

[52] 18 St. 335.

[53] *Supra*, note 49 at 20. As noted by Professor Carter:

> The Court, however, held that the Civil Rights Act of 1875 exceeded Congress's Thirteenth Amendment authority by prohibiting segregation in places of public accommodation. The Court believed that congressional power under the Amendment was limited to enforcing equality of "civil freedoms," such as the right to make contracts or engage in judicial proceedings, but did not extend to "adjust[ing] what may be called the social rights of men and races in the community," such as the integration of privately operated facilities.

*Supra* note 40 at 1325, note 37.

[54] *Supra* note 50 at 20.

*Co*,[55] the recognition of the concept of badges and incidents of slavery was based on a long history.[56] Since at least the fifteenth century, the term "incidents of slavery" has acquired a meaning referring to the legal consequences of the status of slavery, such as inability to own property or to hold office.[57]

In 1866, U.S. Supreme Court Justice Noah Haynes Swayne, riding circuit, wrote the District Court decision in *United States v. Rhodes*.[58] In *Rhodes*, several white men were accused of burglarizing the home of Nancy Talbot, an African American. Pursuant to Kentucky law, Talbot was precluded from testifying, despite being the victim of the crime, because Black Kentucky citizens were deemed incompetent to testify in court because of race.[59] The refusal to allow Talbot to testify because of race was charged as a violation of the Civil Rights Act of 1866.[60] This case was the first test of congressional power under Section 2 of the Thirteenth Amendment.[61]

In concluding that the indictment was sufficient, and that the circuit court might take jurisdiction under the Civil Rights Act, Swayne stated:

> Slaves were imperfectly, if at all, protected from the grossest outrages by the whites. Justice was not for them. The charities and rights of the domestic relations had no legal existence among them. The shadow of the evil fell upon the free blacks. They had but few civil and no political rights in the slave states. Many of the *badges* of the bondman's degradation were fastened upon them.[62]

By equating testimonial incompetency because of race with "badges of the bondman's degradation," Swayne recognized that the badges of slavery involved more than just the existence of slave status itself. The Thirteenth Amendment rights of Talbot, a free Black woman, were violated due to a pernicious consequence of African Americans once having been slaves, not due to a formal incident of actual slavery.

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[55] 392 U.S. 409 (1968). *See also*, *infra*, note 67.

[56] *See* George A. Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, in The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment 163 (Alexander Tsesis ed., 2010).

[57] *See*, George M. Stroud, A Sketch of the Laws Relating to Slavery in the Several States of the United States of (2d ed. 1856).

[58] 27 F. Cas. 785 (D. Ky. 1866).

[59] Ky. Rev. Stat. ch. 107, sec. 1 (Stanton 1867).

[60] The Civil Rights Act of 1866, 14 Stat. 27–30. The Act declared all persons born in the United States to be citizens, "without distinction of race or color, or previous condition of slavery or involuntary servitude."

[61] See, Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 Journal of Constitutional Law 561,578 (2012).

[62] 27 F. Cas. At 793 (emphasis added).

Of particular significance to this Article, Justice Swayne's language speaks to the connection between the African American desire to be heard[63] regarding systemic racial injustice and badges of slavery. This point is further made in by Justice Joseph P. Bradley, joined by Justice Swayne in dissent, six years later in *Blyew v. United States*.[64]

The defendants, Blyew and Kennard, claimed that no Black witness could testify against them pursuant to the Kentucky statute which stated:

> That a salve[sic], negro, or Indian, shall be a competent witness in the case of the commonwealth for or against a salave [sic], negro, or Indian, or in a civil case to which only negroes or Indians are parties, but in no other case.

The defendants objected to the removal of the case to federal court pursuant to the Civil Rights Act of 1866, because the Act provided that federal court jurisdiction was premised on "all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts of the State or locality where they may be, any of the rights given by the act (among which is the right to give evidence, and to have full and equal benefit of all laws and proceedings

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[63] Judge Swayne speaks specifically to the denial of Nancy Talbot's right to testify ( p. 785) in the context of the Civil Rights Act of 1866 protecting rights heretofore denied enslaved persons, including the right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, sell and convey real and personal property; and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens" Id. at 786.

[64] 80 U.S. (13 Wall.) 581 (1871). This was the first time that the U.S. Supreme addressed the Kentucky statute suppressing Black witnesses and the Circuit Court opinion by Swayne in *Rhodes*, rejecting the viability of the Kentucky statute and affirming the federal court's power under the Civil Rights Act of 1866 to hear such claims. The fact pattern of *Blyew* is a horrific example of racial violence that is as atrocious as any historic account of racial brutality. Two white men, Blyew and Kennard entered the home of an African American family named Foster. Following a dispute between the white men and the Fosters over the housing of a white woman companion, the white men attacked the Foster family with an axe killing four family members and injuring others, including children. The bodies were then hacked into pieces, including Jack Foster, his wife Sallie, and his blind grandmother. Richard, the 16-year-old son, escaped immediate death by hiding under the body of his father, but later succumbed to his injuries. Two other children, Laura (age 8) and Amelia (age 6), survived, but Amelia suffered axe wounds to the head.

The testimony of Blyew and Kennard revealed that a significant part of the motivation for the monstrous violent acts committed was that Kennard believed "there would soon be another war about the niggers; that when it did come, he intended to go to killing niggers, and he was not sure that he would not begin his work of killing them before the war should actually commence." 80 U.S. 581 at 585. See, in general, Leon A. Higginbotham Jr, Shades of Freedom: Racial Politics and Presumptions of the AMerican Legal Process. Oxford University Press (1998). pp. 79–80.

for the security of person and property as is enjoyed by white citizens)."[65] The defendants contended that because White men were the subject of prosecution, and not Black people, African Americans were not therefore affected persons within the meaning of the Civil Rights Act.

In dissenting from the majority opinion that "affecting persons" was limited to instances where the defendant was Black, Bradley, joined by Swayne, argued:

> To deprive a whole class of the community of this right, to refuse their evidence and their sworn complaints, is to brand them with a *badge of slavery*; is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families, and their property unprotected by law.[66]

Although the term "badges of slavery" has not been always amenable to precise definition, its meaning was addressed by the Court in *Jones v. Alfred Mayer Co.*[67] In *Jones*, plaintiffs sought relief under 42 U.S.C. 1982[68] based on the refusal of the defendant, a private company, to sell them a home because the Joneses were an interracial married couple. Whether the Act could constitutionally apply to private entities depended on whether the Thirteenth Amendment granted such power to Congress. This was an opportunity for the Court to address its very narrow prior holding in *Hodges v. United States*[69]. In *Hodges*, the U.S. Supreme Court declared that the Thirteenth Amendment did not empower Congress to pass the Civil Rights Act of 1866 because congressional

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[65] 80 U.S. 581.

[66] *Id.* at 599 (emphasis added).

[67] *Supra*, note 55.

[68] "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."

[69] 203 U.S. 1 (1906). Various white private citizens of Arkansas were indicted under the Civil Rights Act of 1866 for threatening and harassing African American workers at a sawmill in order to drive the Black workers away from employment. Such conduct of intimidation was part of violent vigilante movement prevalent in the late 19th Century – early 20th Century known as "whitecapping". Arising after the Civil War, whitecapping was associated with poor white hate groups such as the Ku Klux Klan, the Night Riders, and the Bald Knobbers. Through violence and intimidation, Whitecappers sought to drive African American and Mexican Americans to abandon their homes and property as well as jobs that Whitecappers believed should be the province of white men. Whitecapping became so widespread that federal officials at the state level, in this case including Arkansas, sought legal action to stop the practice once it had spread to intimidation of merchants and businesses. Whitecappers often responded to these efforts at imposing legal restraint by using connections with prominent lawyers and officials to defend them. In *Hodges*, the defendants were represented by the lieutenant governor and a candidate running for state prosecutor. *See in general*, William Holmes, "*Whitecapping: Agrarian Violence in Mississippi*, 1902–1906." 35 The Journal of Southern History 165 (1969).

power under section 2 of the Thirteenth Amendment was limited to eradication of slavery and not its badges and incidents.[70]

The *Jones* court overruled *Hodges* and went on to adopt an expansive reading of the Thirteenth Amendment, to include not only the power to enact laws abolishing the actual condition of slavery but "all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[71]

The inclusion of "badges of slavery" with "incidents of slavery" was enhanced by a footnote to the opinion, which declared that congressional power extended to eliminating the last "vestiges" of slavery.[72] Additionally, the Court concluded 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[73].

This expanded scope of the Thirteenth Amendment creates a need to define and distinguish between four concepts: (1) incidents of slavery; (2) relics of slavery; (3) vestiges of slavery; and (4) badges of slavery. As noted earlier, "incidents of slavery" is largely associated with the legal consequences of the status of slavery, such as inability to own property or to hold office.[74] "Relic of slavery" has been associated with "something [that] survived the passage of time, especially an object or custom whose original culture has disappeared,[75] while a "vestige of slavery" is associated with a "visible trace, evidence or sign of something that once existed but exists no more."[76]

"Badges of slavery" is different from "incidents", 'vestiges" or "relics" of slavery. As used by the courts and the legislature, the term's existence can best be understood as metaphorical.[77] As George Rutherglen points out, to ascribe a literal definition to the Court's use of "badges of slavery" would render the term

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[70] *Id.* at 18.

[71] *Supra* note 55 at 439.

[72] "Whatever the present validity of the position taken by the majority on that issue—a question rendered largely academic by Title II of the Civil Rights Act of 1964, 78 Stat. 243 (see Heart of Atlanta Motel v. United States, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258; Katzenbach v. McClung, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290)—we note that the entire Court agreed upon at least one proposition: The Thirteenth Amendment authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but *also to eradicate the last vestiges and incidents* of a society half slave and half free, by securing to all citizens, of every race and color, "the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." 392 U.S. note 78 (emphasis added).

[73] 392 U.S. 442–443.

[74] Sketch, *supra*, note 57.

[75] McAward, *supra*, note 61 at 592.

[76] *Id.*

[77] See, George Rutherglen, *supra*, note 56.

meaningless in a post-slavery context.[78] A more realistic meaning of "badge of slavery" as used by the Court in *Jones,* and in courts since, may be that which is proposed by Jennifer McAward. Based on the historical and structural usage of the term, she proposes that "badges of slavery" are those actions, be they private or public, which are based on race or previous conditions of servitude, which mimic the laws of slavery and have the potential to lead to *de facto* re-enslavement.[79]

Such a standard is consistent with *Jones*. The inability to own or contract for ownership of land because of race, is part and parcel of slavery.

Since the *Jones* decision, examination of what is meant by "badges of slavery," particularly in lower courts, builds on its metaphoric significance and link the use of the phrase to its historic context. In *Pennsylvania v. Local Union No. 542*,[80] Judge Higginbotham granted injunctive relief regarding a petition to stop harassment, intimidation, and a course of violence against African Americans in their pursuit of a lawsuit against a local union for discrimination. In granting an injunction *pendente lite* Judge Higginbotham stated:

> Those who are not students of American racial history, might ask: "What does the beating of black litigants in this case have to do with the 'badges and incidents' of slavery? How can the attitudes of defendants be related to the institution of slavery which was eradicated more than 100 years ago?" The answer is that these racist acts are as related to the incidents of slavery as each roar of the ocean is related to each incoming wave. *For slavery was an institution which was sanctioned, sustained, encouraged and perpetuated by federal constitutional doctrine. Today's conditions on race relations are a sequelae and consequence of the pathology created by this nation's two and a half centuries of slavery.*[81]

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[78] *Id.* at page 2:

Taken literally, it means a distinctive device, emblem, or mark . . . worn as a sign of office, such as a sheriff's badge. Figuratively, it is a "distinguishing 'sign,' emblem, token, or symbol of any kind, as in The Red Badge of Courage, the famous novel about the Civil War. Eliminating the literal badges of slavery makes no sense in a system in which slaves did not wear badges. The obvious analogue to literal badges in American slavery, of course, was dark skin and the other physical characteristics of African-American slaves. Yet this analogy cannot yield a literal sense of "badges of slavery," since Congress is powerless to eliminate the physical characteristics of race. What it can act upon, of course, are the social consequences of race, but these are badges of slavery only in a figurative sense.

[79] McAward, *supra* note 61 at 630.

[80] 347 F. Supp. 268 (E.D. Pa. 1972).

[81] *Id.* at 299.

Judge Wisdom's analysis in *Williams v. City of New Orleans*[82] follows a similar line of reasoning. In *Williams*, a class of Black applicants and members of a city police department complained of racially discriminatory policies in selection, training, and promotion of city police officers. Concurring in part and dissenting in part, with the majority concluding that Title VII does not bar race-based affirmative action, but that the district court did not abuse its discretion in rejecting a proposed consent decree, Judge Wisdom declared that a badge of slavery occurs "[w]hen a present discriminatory effect upon blacks as a class can be linked with a discriminatory practice against blacks as a race under the slavery system. . ."[83]

McAward sums up the Higginbotham and Wisdom position as providing for a three-part test: (1) does the purported badge target African Americans as a class; (2) does the purported badge label African Americans as inferior; and (3) is there a historical link between the purported badge and slavery or its aftermath.[84]

If "badge of slavery" is a metaphor for actions consistent with the McAward standard, how should Thirteenth Amendment protection impact the legislative action to suppress learning about race? Is forcing African Americans into silence out of fear of retribution, when they seek to protest—or even point out—systemic racism the new badge of slavery?

### The New Badge of Slavery

*"[T]he Florida Department of Education (FDOE) does not approve the inclusion of the Advanced Placement (AP) African American Studies course in the Florida Course Code . . . . the content of this course . . . lacks educational value."* – Letter from the Florida Department of Education, January 12, 2023

"*When you devalue my history, and say it lacks educational merit, that is demeaning to us,"* - Rev. R. B. Holmes, Jr., Pastor of Bethel Missionary Baptist Church, Tallahassee Florida, January 23, 2023

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[82] 729 F. 2d 1554 (5th Cir. 1984).
[83] *Id.* at 1577.
[84] McAward, *supra*, note 61 at 600.

In the wake of *Jones*, it is not only clear that Congress has the constitutional power to legislate for the elimination of badges of slavery,[85] but it also has the power to prophylactically define the badges of slavery[86].

With a focus on "spectacle[s] of slavery unwilling to die,"[87] the U.S. Supreme Court has discussed the Thirteenth Amendment in fairly broad terms.[88] For example, the expanded conception of badges of slavery includes blocking African Americans from traveling on public highways[89].

"Badges of slavery" is a metaphoric descriptor. It is not limited to the original indicators of formal slavery such as chains, brands, torture, and imprisonment. It is necessary to understand the significance of the metaphor if we are to consider the legal ramifications of the consequences of slavery in a modern context.[90] As discussed earlier, if the Thirteenth Amendment is to have any modern-day context, conceptualizing "badges of slavery" as a metaphor is necessary.[91] The extent of the metaphor, when applied to 20th, now 21st century usage, generates no small amount of ambiguity and at least two schools of thought—restrictive and expansive—as to current application.

The debate, as described by Nicholas Serafin, is tied largely to whether the meaning of "badges of slavery" is to be viewed narrowly through a historical lens, which views the concept as containing only practices "that threatened to reimpose chattel slavery or its *de facto* equivalent."[92] Serafin cites the works

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[85] In *Jones*, the Court stated: "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." 392 U.S. at 440. Additionally, the court recognized that congressional action pursuant to the Thirteenth Amendment was only to rational basis analysis. See, George Rutherglen, *supra*, note 56.

In light of the "appropriate legislation" language in section 2 of the Thirteenth Amendment, congressional power to achieve the legitimate ends of the Amendment was much like the *McCulloch v. Maryland*, 17 U.S. 316 (1819) determination of congressional power under the Necessary and Proper Clause, United States Constitution Art. I, Section 8.

[86] Jennifer McAward, *Congressional Authority to Interpret the Thirteenth Amendment: A Response to Professor Tsesis*, 71 Maryland Law Rev. 60, 63 (2011), [ The Thirteenth Amendment based legislation can be prophylactic "in the sense that it concerns conduct that does not independently violate Section 1 of the Thirteenth Amendment, but instead infringes on certain core civil rights." See also, Darrell A.H. Miller, White *Cartels, The Civil Rights Act Of 1866, and The History of Jones V. Alfred H. Mayer Co.*, 77 Fordham Law Rev. 999, 1004 (2008).

[87] *Jones*, *supra* note 55 at 445.

[88] Johnathan Markovitz, *A Spectacle of Slavery Unwilling to Die: Curbing Reliance on Racial Stereotyping in Self-Defense Cases*, 5 Univ. Cal-Irvine L. Rev. 873.

[89] *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

[90] See, Nicholas Serafin, *Redefining the Badges of Slavery*, 56 U. RICH L. REV. 1291 (2022).

[91] *Supra*, note 67.

[92] Serafin, *supra*, note 90, at 1293.

of George Rutherglen[93], Jennifer Mason Award,[94] and William Carter, Jr.[95] as supportive of this narrow, restrictive, view which if applied would effectively limit "badges of slavery" to symbols of the imposition of actual, physical slavery.[96]

The contrasting expansive view looks at the concept of badges of slavery in a modern context that refers "to state actions or social customs that stigmatized subordinate social groups."[97] This understanding of the metaphor is rooted not only in the legal history, but also the larger public meaning of the term that may well have influenced the drafters of the Thirteenth Amendment, and therefore serves as a more realistic perception of the intended scope of congressional power under section 2.

Without taking the expansive view, the "badges of slavery" concept within the Thirteenth Amendment becomes virtually useless in the modern context. Its literal meaning would be a "distinctive device, emblem, or mark . . . worn as a sign."[98] Translated to the slavery experience, the true "badge of slavery" would be skin color and those practices that threatened to reimpose chattel slavery or its *de facto* equivalent. Such an approach has little traction in the 21st century. Subjugation of people of color, equally as pernicious as chattel slavery can now be accomplished without assertion of physical ownership of persons against their will or symbolizing such. It is these less literal "badges of slavery" that the modern perspective recognizes and in cases such as *Pennsylvania v. Local Union No. 542*[99] (local union discrimination) and *Williams v. City of New*

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[93] *Supra*, note 47.

[94] *Supra*, note 52.

[95] William M. Carter, Jr., A Thirteenth Amendment Framework for Combating Racial Profiling, 39 Harv. C.R.-C.L. L. Rev. 17 (2004).

[96] As Serafin states:

> According to the restrictive interpretation, the badges metaphor, as a piece of political rhetoric, first circulated in the speeches and writings of American abolitionists and republican politicians, for whom the badges metaphor primarily referred to the public association of African American skin color with chattel slavery. For example, "in an argument before the Supreme Court in 1843, a lawyer for a slave seeking freedom . . . offered the following observation about American slavery: 'Colour in a slaveholding state is a badge of slavery. It is not so where slavery does not exist.'" Similarly, during Congressional debates over the Civil Rights Act of 1866, Senator James Harlan of Iowa, describing the Roman practice of slavery, noted that "[c]olor at Rome was not even a badge of degradation. It had no application to the question of slavery.

*Supra*, note 88 at 1297–1298.

[97] Serafin, *supra*, note 90 at 1293.

[98] See, Rutherglen, *supra*, note 56.

[99] *Supra*, note 80.

*Orleans*[100] (racially discriminatory policies in selection, training, and promotion of city police officers) discussed earlier.

Exploration of the expansive view of badges of slavery by courts have been limited. However, scholars have not been as reluctant as the courts in exploring this view. Professor Akhil Reed Amar, for example, argues that raced-based hate speech should be considered a badge of slavery.[101] Amar suggests that a more effective, alternative basis of analysis in *R.A.V. v. City of St. Paul*[102] might have been the Thirteen Amendment prohibition of badges of slavery.

In *R.A.V.*, the petitioner, after allegedly burning a cross on a Black family's lawn, was charged with a violation of a St. Paul Minnesota ordinance which prohibits the display of a symbol which one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." The Court held the ordinance invalid under the First Amendment, on its face because "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[103]

Amar suggests that a more appropriate way to consider the constitutionality of the ordinance was not through "viewpoint discrimination," proscribed by the First Amendment, but through the Thirteenth Amendment's ban on badges of slavery. The suppression of race-based hate speech, when viewed through the lens of the Thirteenth Amendment is justifiably different from a First Amendment analysis. He states:

> [T]he majority failed to consider whether the Reconstruction Amendments might provide a principled basis for such distinctions. The minority in R.A.V. seemed more willing to allow hate-speech

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[100] *Supra*, note 82.

[101] See Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 Harv. L. Rev. 124, 155 (1992).

[102] 505 U.S. 377 (1992).

[103] The 9–0 majority states;

> The ordinance, even as narrowly construed by the State Supreme Court, is facially unconstitutional because it imposes special prohibitions on those speakers who express views on the disfavored subjects of "race, color, creed, religion or gender." At the same time, it permits displays containing abusive invective if they are not addressed to those topics. Moreover, in its practical operation the ordinance goes beyond mere content, to actual viewpoint, discrimination. Displays containing "fighting words" that do not invoke the disfavored subjects would seemingly be useable ad libitum by those arguing in favor of racial, color, etc., tolerance and equality, but not by their opponents.

505 U.S. at 378.

> regulations specifically tailored to protect "groups that have long been the targets of discrimination.[104]

When looked at in the context of badges of slavery, racist pejoratives aimed at African Americans and the burning of crosses, cease to be merely objectionable viewpoints but fall into the historical context associated with conditions of slavery properly subject to prohibition under the Thirteenth Amendment.[105]

Another scholar exploring the expansive view of badges of slavery is Alexander Tsesis. Tsesis's, *Confederate Monuments as Badges of Slavery*[106] makes the case for viewing confederate monuments as vestiges of the slavery: "They represent a lost political and military cause, fought against the Union in an effort to retain a system of chattel property in humans."[107]

Moreover, racial profiling when viewed in the context of the history of slavery, is argued by William M. Carter to be a badge of slavery.[108] Regarding determining suspicion of criminal conduct by the color of an individual's skin Carter states:

> African Americans continue today to carry this "badge" or stigma arising from slavery. Racial profiling depends on the assumption that persons of certain races (usually African Americans) are more likely to engage in crime. This assumption is not made based upon detailed statistical analyses of crime patterns, but rather most often upon what an individual officer believes he "knows" about who commits more crime. The conventional wisdom about race and crime has been heavily influenced by the racialization of the criminal law, which arose out of the law and underpinnings of the slave system.[109]

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[104] Amar, *supra* note 101 at 126.

[105] Amar states:

> The Thirteenth Amendment's abolition of slavery and involuntary servitude speaks directly to private, as well as governmental, misconduct; indeed, it authorizes governmental regulation in order to abolish all of the vestiges, "badges and incidents" of the slavery system. The [ Court] could well have argued that the burning cross erected by R.A.V. was such a badge.

*Id.* at 155.

[106] 108 KY. L.J. 695 (2020).

[107] *Id.* at 708.

[108] See, William M. Carter, Jr., A Thirteenth Amendment Framework for Combating Racial Profiling, 39 HARV. C.R.-C.L. L. REV. 17 (2004).

[109] *Id.* at 65.

An expansive view of badges of slavery also allows, in the context of racial profiling, recognition that such profiling results in restrictions on mobility mirroring that of slavery.[110]

Using the Thirteenth Amendment's prohibition against the badges of slavery as a tool for further fighting racism has been put forth by several scholars even in the absence of judicial determination of such application. Additional areas suggested for Thirteenth Amendment scrutiny include race-based peremptory challenges,[111] racial disparity in capital punishment,[112] environmental justice and the African American community,[113] racial justice in the health care industry,[114] as well as racial aspects of our presidential electoral system.[115]

Combating racism by application of the Thirteenth Amendment requires more than simply naming all claimed racial discrimination as badges of slavery. Even an expansive view of Thirteenth Amendment requires that the purported badge of slavery be symbolic of the actual conditions of servitude. Thus, in *Wong v. Stripling*[116] a Chinese American physician's claim that a private hospital imposed a badge of slavery when it discriminated against him because of race could not be sustained. The Thirteenth Amendment argument was rejected by the court where the plaintiff failed to make even a symbolic link between the discrimination he allegedly suffered and any aspect of slavery.

One uniting concept in the various expansive applications of badges of slavery is the symbolism that speaks to the perception of slavery. Images and practices may appear to be race neutral, when in fact, they symbolize racial suppression when viewed through a historical perspective. When a racial perspective based on history is applied, images and practices that may appear race-neutral take on a much more race-sinister significance, and are thus less

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[110] "Race-based restraint on freedom of movement is also the reality under a racial profiling regime. The point is not that racial profiling is the equivalent of flogging slaves found off the plantation. Instead, the point is that during slavery, blacks were denied freedom of movement based on their race and that widespread racial profiling has the same effect today." *Id.* at 64.

[111] Douglas L. Colbert, Challenging the Challenge: *Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1 (1990).

[112] Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 Harv. C.R.-C.L. L. Rev. 1 (1995).

[113] Marco Masoni, *The Green Badge of Slavery*, 2 Geo. J. on Fighting Poverty 97 (1994).

[114] 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 (2003).

[115] Victor Williams & Alison M. Macdonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 Marq. L. Rev. 201, 230 (1994).

[116] 881 F.2d 200 (5th Cir. 1989).

likely to be explained away or cured by application of legal principles that fail to recognize the slavery-related implications.

It is hard to imagine a more vivid representation of slavery-related imagery than that the trial of Bobby Seale. In 1969, Bobby G. Seale[117] was arraigned on charges, pursuant to the Federal Anti-Riot Statute that he, along with seven other individuals, conspired to disrupt the 1968 Democratic National Convention. Seale's co-defendants had retained the services of attorney William Kunstler to represent them. Bobby Seale, in large part because of a previous attorney-client relationship, was represented by California attorney Charles R. Garry. When, prior to the date set for trial, Garry notified the court that he could not attend the set court date because of recovery from surgery, the presiding judge, Julius Hoffman refused to grant an extension or continuance and instead insisted that Seale accept Kunstler as his attorney also. Both Seale and Kunstler objected to this order.

After insisting on his right to retain counsel of his choice, Bobby Seale was brought to trial under protest. His courtroom insistence on his right to counsel was so vociferous that Judge Hoffman responded with what has become the iconic image of racial injustice.



Howard Brodie, artist. [Bobby Seale attempting to write notes on a legal pad while bound and gagged in the courtroom during the Chicago Eight conspiracy trial in Chicago, Illinois], between October 29 and November 5, 1969. Color crayon and on white paper. Prints and Photographs Division, Library of Congress. (039.00.00) LC-DIG-ppmsca-51105 © Estate of Howard Brodie

[117] Bobby Seale was widely known as a co-founder of the Black Panther Party. He was nationally famous as an alleged "Black Radical" in the 1960's. Seale was one of eight people charged with conspiracy related to the 1968 Democratic National Convention protest.

Seale was bound and gagged at his own trial for insisting on his constitutional right to counsel. While the propriety of Judge Hoffman's denial of a continuance led eventually to an abuse of discretion determination by the Seventh Circuit,[118] the image of Seale is nonetheless a stunning and iconic, graphic symbol of badges of slavery in the justice system.

While race or slavery is never mentioned as a factor in either Judge Hoffman's decision or the Court of Appeals decision, the association of this image with the historical reality of slavery has a particular meaning to the African American community and, similar to other events encompassed by the expansive view of badges of slavery, it is "evidence of political subjugation".[119] Forced Black obedience is the quintessence of slavery.[120]

The State of Florida's decision to declare African American Studies to be without educational value,[121] combined with the legislation which prohibits the

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[118] *United States v. Seale*, 461 F. 2d 345 (7th Cir. 1972).

[119] See, George Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, in The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment 163, 166 & n.23 (Alexander Tsesis ed., 2010).

[120] See, *Neal v. Farmer*, 9 Ga. 555, 567 (1851) "The condition of a villein [ sic.], had many of the incidents of slavery. His service was uncertain, and he was bound to do whatever his lord commanded. He was liable to beating, imprisonment, and every species of chastisement."

[121] The January 12, 2023, letter from The Office of Articulation, Florida Department of Education, to the director of the College Board Florida Partnership states:

> Please allow this letter to serve as confirmation that the Florida Department of Education (FDOE) does not approve the inclusion of the Advanced Placement (AP) African American Studies course in the Florida Course Code Directory and Instructional Personnel Assignments (adopted in State Board of Education Rule 6A-l.09441, Florida Administrative Code). As presented, the content of this course is inexplicably contrary to Florida law and significantly lacks educational value.

The College Board is a non-profit organization that connects students to college success and opportunity. See, https://about.collegeboard.org. The College Board's Advanced Placement Program (AP) is an extensive program that offers high school students the chance to participate in what the College Board describes as college-level classes, reportedly broadening students' intellectual horizons and preparing them for college work. It also plays a large part in the college admissions process, showing students' intellectual capacity and genuine interest in learning. See, https://apcentral.collegeboard.org/about-ap/what-ap-stands-for.

Arkansas has now joined Florida. On August 14, 2023, the Arkansas Education Department announced that it will not allow credit for AP African American Studies. See, https://apnews.com/article/college-board-advanced-placement-african-american-arkansas-74a5e3199469bd188c7c99a0cf6c7285. The Arkansas decision is particularly ironic when it is remembered that Little Rock Arkansas is where *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) began. A response from the Arkansas Legislative Black Caucus speaks to the significance of this suppression of the ability of the Black community to both learn about speak out against the legacy of slavery: "This further perpetuates the marginalization of African Americans

teaching of Critical Race Theory,[122] imposes a code of silence over the descendants of slaves that in practical ways harkens back to the suppression of protest through speech detailed above, as part of the daily life of the slave.[123]

The actions of Florida, Arkansas, and at least twenty other states,[124] demonstrate that the 21st century has introduced new badges of slavery.

Without a critical perspective on history "there is no basis for comprehensive advocacy efforts for racial and economic justice"[125] that combat the legacy of slavery. The linkage between speaking out on conditions and aftermaths associated with slavery has been so significant that in the past 25 years at least eleven National Book Awards have gone to historical or historical fiction works on the Black experience and the consequences of slavery.[126] Yet the silencing of those voices, or just as importantly, silencing the teaching and discussion of those voices, is not only the suppression of free speech when done by legislative

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and denies all students the opportunity to learn about the unique history and experiences or our community." https://www.cnn.com/2023/08/15/us/arkansas-ap-black-history-reaj/index.html#:~:text=Students%20in%20Arkansas%20public%20high,officials%20told%20districts%20last%20week.

[122] *Supra*, note 2.

[123] Florida and Arkansas are somewhat unique in its targeting all African American history as lacking educational value. However, a significant number of states, including those cited earlier, have either enacted or introduced for consideration, provisions that would effectively bar African American history within the breath of broad, vague language that would prohibiting instruction concerning "divisive" concepts including race.

[124] *Supra*, note 3.

[125] Shriver Center on Poverty Law, *Attacks on Critical Race Theory Undermine Advocacy for Racial and Economic Justice*, June 28, 2022, https://www.povertylaw.org/article/attacks-on-critical-race-theory-undermine-advocacy-for-racial-and-economic-justice.

[126] List of National Book Award Winners since 1998 centered on the African American experience and the aftermath of slavery:

2022 – Imani Perry, South to America
2021 – Jason Mott, Hell of a Book
2021 – Tiya Miles, All that She Carried: The Journey of Ashley's Sack, a Black Family Keepsake
2020 – Les Payne and Tamara Payne – The Dead are Arising: The Life of Malcolm X
2019 – Sarah M. Bloom, The Yellow
2018 – Jeffrey C. Stewart, The New Negro: The Life of Alain Locke
2016 - Colson Whitehead, The Underground Railroad
2016 – Ibram X. Kendi, Stamped from the Beginning
2013 – James McBride, The Good Lord Bird
2004 – Kevin Boyle, Arc of Justice
1998 – Edward Ball, Slaves in the Family

See, National Book Foundation; National Book Awards by Year, https://www.nationalbook.org/national-book-awards/years.

fiat, but also imposing a "plantation mentality"[127] of intimidation. Such threatened silencing has caused at least one writer to ponder whether the voice of such a preeminence as Frederick Douglass might not be relegated to pre-emancipation silence. This new badge of slavery falls within the pattern of concern addressed by post-*Jones* courts.

State abolition of African American history combined with imposition of punishment for suggesting racial injustice while teaching is a virtual binding and gagging of faculty and students that reflects the plantation life of slavery.

## The Importance of Using the Thirteenth Amendment in Stopping the Suppression of Learning About Race

*"Involuntary servitude was banned by the Thirteenth Amendment to the US Constitution, but nothing was done to confront the ideology of white supremacy. Slavery didn't end in 1865; it just evolved."*

Jim Wallis, American theologian, 2016[128]

The proponents of governmental suppression of African American discussion of the significance of race in schools justify their position by asserting the right "to protect" white Americans from being forced to feel personally "responsible", "guilty", or "distressed" by instruction regarding the existence of institutional racism.[129]

The Thirteen Amendment could be particularly useful in countering these justifications. Unlike Equal Protection[130] and Due Process under the Fourteenth

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[127] Plantation Mentality – A mentality in which society is divided into a ruling class and a worker class along racial lines, See, in general, Laurie B. Green, Battling the Plantation Mentality, *supra*, note 9.

[128] Jim Wallis, America's Original Sin: Racism, White Privilege, and the Bridge to a New America, Brazos Press; First Edition (2016).

[129] In Florida see H.B. 7, Individual Freedom Act. For similar provisions in other states see; Arkansas, Senate Bill 627 (April 2021). Arizona, H.B. 2906 (June 2021), Georgia, H.B. 1084 (January 2022), Iowa, House File 802 (March 2021), Idaho, H.B. 377 (April 2021), Kentucky, S.B.1 (January 2022), Mississippi, S.B. 2113 (January 2022), North Dakota, H.B. 1508 (November 2021), Oklahoma, H.B. 1775 (January 2021), South Carolina, H.B. 4100, South Dakota, H. B. 1012 (January 2022), Tennessee, S.B. 2290 ( February 2022), Texas, H.B. 3976 ( March 2021), and Virginia, H.B. 127 ( January 2022).

[130] *Washington v. Davis*, 426 U.S. 229 (1976)

> [W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.

*Id.* at 242.

Amendment, the Thirteenth Amendment's proscription of badges of slavery is neither subject to the intent analysis of the Fourteenth Amendment, nor the balancing of interests approach of Due Process.[131]

Indeed, the proponents of the Thirteenth Amendment indicated that its purpose was to be broadly applied and "flexible enough to eliminate the vestiges of slavery in whatever form they might be found."[132] The prophylactic power granted to Congress under the Thirteenth Amendment is "to pass all laws necessary and proper for abolishing all badges and incidents of slavery.[133] As such, it is not limited by the state's interest asserted by the proponents of the legislation suppressing race-conscious education.[134]

The authors of the Thirteenth Amendment, like theologian Jim Wallis who is quoted above, concluded that without congressional enforcement power, the Thirteenth Amendment itself would not be sufficient to quash entrenched resistance to the ending of slavery and its consequences.[135] The Thirteenth

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Carter also notes;

> while the Equal Protection Clause is limited to instances of intentional or purposeful discrimination, the Court has not so limited the Thirteenth Amendment.51 Thus, applying the Thirteenth Amendment to unintentional or "disparate impact" discrimination remains possible.

Carter, *supra*, note 49 at1328.

[131] See, *Nebbia v. New York*, 291 U.S. 502 (1934); *United States v. Carolene Products*, 304 U.S. 144 (1938).

[132] Carter, *supra*, note 49 at 1325.

[133] Even under the more restrictive view of badges of slavery expressed by the Court in *The Civil Rights Cases*, 109 U.S. 3 (1883), there was still recognition of the significant power granted Congress to end badges of slavery. As Carter states:

> In the Civil Rights Cases the Court therefore recognized that the Thirteenth Amendment was "undoubtedly self-executing without any ancillary legislation [and] . . . [b]y its own unaided force and effect it abolished slavery, and established universal freedom" and that both the self-executing core of the Amendment and legislation passed pursuant to Section 2 encompassed the badges of slavery. . . . . Where the Court disagreed with Congress in that case was regarding whether the particular subjects legislated against were in fact badges or incidents of slavery.

[134] See, Marcellene Elizabeth Hearn, *Comment, A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. Pa. L. Rev. 1097, 1143 (1998).

[135] Carter notes:

> Senator Trumbull, in discussing the Civil Rights Act of 1866, cited various aspects of the Black Codes passed in the wake of the Civil War, such as racially selective vagrancy laws and pass systems that could result in the arrest, imprisonment, or practical re-enslavement of the freedmen. Trumbull stated that "[a]ll these laws, which were the incidents of slavery . . . fell with the abolition of slavery; but, inasmuch as such laws existed in various States, it was thought advisable to pass a law of Congress [i.e., the Civil Rights Act of 1866] securing to the colored people their rights in certain respects.

Amendment grants powers to both Congress and the judiciary that could be wielded against legislation that suppresses race-conscious education. These powers will be discussed in turn below.

A. *Congressional Power to Eliminate Badges of Slavery*

A congressional inquiry, pursuant to section 2 of the Thirteenth Amendment, into the legislation suppressing learning about race and law could provide an important venue for addressing the impact of this legislation on the African American community. In addition to legislative action which could protect both educators and students, the pursuit of such action would require a legislative fact-finding process. The power to conduct a fact-finding hearing has roots as far back as The Federalist Papers.[136] In *McGrain v. Daugherty*[137] the Supreme Court recognized the power of Congress to grant its hearings subpoena powers and to hold non-cooperating witnesses in contempt. Witnesses who lie before a congressional committee may be held in contempt.[138]

The power to conduct extensive investigation has ranged as far back as 1859[139] to the expansion of subpoena power for all standing committees in the Legislative Reorganization Act of 1946.[140] Such hearings and the accompanying media coverage could provide marginalized communities with an opportunity to voice a counternarrative to state-sponsored silencing.

B. *Judicial Power to Eliminate Badges of Slavery*

But the power of the Thirteenth Amendment goes beyond congressional authorization of actions designed to define and eliminate the badges of slavery. While section 2 of the Thirteenth Amendment authorizes Congress to define and eliminate badges of slavery, it does not *a fortiori* preclude courts from also eliminating badges of slavery. A forum for African American communities to give voice to the impact that alleged race-neutral institutional policies have on the day-to-day life of the community can be a basis for ending the impact of badges of slavery.

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*Supra*, note 49 at 1344.

[136] James Madison stated in The Federalist, No. 51, "In framing a government which is to be administered by men over men . . . you must first enable the government to control the governed; and in the next place oblige it to control itself." Madison, *The Federalist Papers* No. 51.

[137] 273 U.S. 135 (1927).

[138] *Sinclair v. United States*,279 U.S. 263 (1929).

[139] *Facts of the Recent Invasion and Seizure of the United States Armory at Harpers Ferry*, December 14, 1859 The Congressional Globe p. 141.

[140] Public Law (United States) 79–601.

Explicit empowerment of Congress to legislate against the badges and incidents of slavery limits judicial power to conditions of actual enslavement.[141] As a consequence, this view takes the position that defining state conduct, such as the enactment of the legislation that is the subject of this Article, as a badge of slavery can only be done through an act of Congress. This view essentially takes the position that the inclusion of section 2 as an authorization of congressional action to bar badges of slavery, in effect, limits the judicial review power of section 1 to the abolition of conditions of actual enslavement.[142]

Case such as *Atta v. Sun Co*[143] and *Alma Society v. Mellon*[144], support this disjunctive view. In *Atta*, the plaintiff alleged that employment discrimination, based on race, was a badge or incident of slavery. In denying the plaintiff's claim against a private employer the court said, citing to *Lopez v. Sears, Roebuck, & Co*.[145]:

> Although the Thirteenth Amendment provides the constitutional basis for claims arising under 42 U.S.C. § 1981 and other implementing statutes, it does not operate as an independent ground for a cause of action [for employment discrimination].[146]

*Alma Society* decided earlier that a state statute which required the sealing of adoption records did not amount to a badge of slavery. The court held that the U.S. Supreme Court had never found that the Thirteenth Amendment, unaided by congressional legislation, reaches badges of slavery.[147]

Both courts determined, in the absence of guidance from the U.S. Supreme Court, that judicial power to define and eliminate badges of slavery did not exist. However, there is significant indication from the Supreme Court that if this issue were to be determined, a finding of judicial power would exist. In *Memphis v. Greene*[148] the Court considered a class action which challenged the closing of the north end of a two-lane city street that traversed a white residential community, with plaintiffs residing in predominately Black area to the north. Although the Court rejects the application of the Thirteenth Amendment to this case, the court did take the opportunity to state that the existence of congressional power

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[141] Carter, *supra*, note 49 at 1341.
[142] *Id.* at 1340.
[143] 596 F. Supp. 103 (E.D. Pa. 1984).
[144] 601 F.2d 1225 (2d Cir. 1979).
[145] 493 F.Supp. 801, 807 (D.Md.1980).
[146] *Supra*, note 143 at 105.
[147] *Supra*, note 144 at 1237.
[148] 451 U.S. 100 (1981).

to legislate regarding the badges of slavery "is not inconsistent with the view that the Amendment has self-executing force."[149]

Additionally, the legislative history of the Thirteenth Amendment supports the conclusion that any grant of power to Congress to eradicate the badges of slavery is concurrent with judiciary's ability to do so as well.[150] The amendment was not perceived as creating a new power to be wielded by Congress, but rather to expressly indicate the duty of Congress to enforce the principles of section 2.[151]

The Thirteenth Amendment's prohibition of badges of slavery thus becomes a powerful and unequalled tool in fighting back against the suppression of the right to speak out against racial injustice and to thereby address the significance of race in our legal history. Neither the burden of proving racial animus nor the balancing of state's rights can justify the silencing of the African American community like twenty-first century slaves.

## Conclusion

*before I'd be a slave*
*I'd be buried in my grave*
*And go home to my Lord and be free*
*Oh, freedom*
*Post-Civil War African-American freedom song*

The goal of the proponents of suppressing race-conscious education has been to legislate slave-like silence by presenting a system that uses for its justification a one-sided narrative of horrors that will occur if "slaves" are allowed to talk back, such as race-hatred, guilt and the unfair treatment of Whites as revenge for acts of racism that they did not personally commit. Recognizing such binding and gagging as a pernicious badge of slavery that the Thirteenth Amendment was designed to eliminate allows for national action and consensus-building of disapproval. The tools of the Thirteenth Amendment, if

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[149] *Id.* at 125. See also, Carter, *supra*, note 49 at 1342.

[150] See, note 151, *infra*.

[151] Senator Trumbull, one of the architects of the Thirteenth Amendment, viewed Section 2 as an extension of "necessary and proper" power granted to Congress under the Constitution. See, Cong. Globe, 39th Cong., 1st Sess. 322 (1866), *reprinted in* The Reconstruction Amendments' Debates, *supra* note 5, at 108. See also, Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153, 176 n.89 (2004).

exercised by our legislative and judicial branches, allow for a forum where counternarratives can be presented.

The stakes here are high. Imposed slavery badges of silence, while of particular significance for African Americans, has implications for other silenced communities. Despite some interpretations to the contrary,[152] the metaphor of "badges of slavery" has found suggested application outside of race-based oppression, including sexual orientation discrimination,[153] violence against women,[154] sexual harassment,[155] sexual exploitation,[156] and sweatshop conditions.[157]

As we look to the future for freedom from the badges of slavery under the Thirteenth Amendment, one significant question purportedly outside of the race limitation is that posed by one of the unanswered question in *Dobbs v. Jackson Health Organization*.[158] While not going into the detail of the U.S. Supreme Court overturning *Roe v. Wade*,[159] we are nonetheless left with the burning question and image of women being forced against their will to bear children. There is perhaps no more stunning an image of slavery than women being forced to be breeders for the children of their masters.

The Thirteenth Amendment implications of such a symbol of slavery, while not addressed by the Court, has nonetheless received the attention of scholars.[160] The issue of abortion is not devoid of race-based slavery implications, as noted by Professor Bridgewater.[161] Statistical data shows that, as late as

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[152] See *Crenshaw v. City of Defuniak Springs*, 891 F. Supp. 1548, 1556 (N.D. Fla. 1995) (indicating that most courts have uniformly held that the Amendment does not reach forms of discrimination other than slavery or involuntary servitude).

[153] David P. Tedhams, *The Reincarnation of "Jim Crow": A Thirteenth Amendment Analysis of Colorado's Amendment 2*, 4 Temp. Pol. & C.R. L. Rev. 133, 134 (1994).

[154] Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 Nev. L.J. 1 (2006).

[155] Jennifer L. Conn, *Sexual Harassment: A Thirteenth Amendment Response*, 28 COLUM. J.L. & SOC. PROBS. 519, 519 (1995).

[156] Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 Wash. & Lee Race & Ethnic Anc. L.J. 11 (2001).

[157] Samantha C. Halem, *Slaves to Fashion: A Thirteenth Amendment Litigation Strategy to Abolish Sweatshops in the Garment Industry*, 36 San Diego L. Rev. 397, 398 (1999).

[158] 505 U.S. ___, 142 S.Ct. 2228 (2022).

[159] 410 U.S. 113 (1973).

[160] Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 483–84 (1990); Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. Gender Race & Just. 401 (2000) Pamela D. Bridgewater, Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence, *supra*, note 156.

[161] *Supra*, note 154. Professor Bridgewater argues that our understanding of slavery should be broadened to include forced reproduction. She further concludes that female slaves had a slavery all their own, and that by better understanding the unique experience of female

2020, African American women have the highest rate of abortion (39 percent of all abortion as opposed to 33 percent for Whites).[162]

Ending these legislative attempts to perpetuate conditions of slavery by prohibiting race-conscious education is everybody's concern. The future of a society depends on discussing its differences and resolving them, not on pretending that the differences do not exist. The future of a people requires their ability to speak truth to power.[163] Such power was denied to enslaved people. A Black enslaved person had no rights which a white man was bound to respect,[164] even the freedom to speak.

slaves, we might better understand and not tolerate modern day practices which perpetuate reproductive exploitation.

[162] KFF, *Reported Legal Abortions by Race of Women Who Obtained Abortion by the State of Occurrence*, https://www.kff.org/womens-health-policy/state-indicator/abortions-by-race/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.

[163] The phrase "Speak Truth to Power" is thought to have originated in Bayard Rustin's *Speak Truth to Power: a Quaker Search for an Alternative to Violence*, American Friends Service Committee (1955).

[164] *Dred Scott v. Sandford*, 60 US 393 (1857).