### The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery

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#### I. Introduction

The Thirteenth Amendment's great promise remains largely unrealized. The Amendment surely accomplished its immediate purpose of dismantling the legal institution of chattel slavery and rejected the Founding compromise that legitimated that institution. But the immediate goal of the Amendment (the elimination of slavery) should be distinguished from the Amendment's promise (the elimination of the vestiges of slavery). Having accomplished the former, the Amendment has only rarely been extended to the latter.

The other Reconstruction Amendments have not shared this fate. The Fourteenth Amendment's Equal Protection Clause, having accomplished its initial purpose of clarifying congressional authority to overturn the Black Codes, developed into a robust jurisprudence providing for judicial review of all manner of unequal governmental treatment. The Fifteenth Amendment, which enfranchised the freedmen, similarly evolved into a remedy for many forms of discrimination in voting beyond disenfranchisement. Although they developed in fits and starts, and perhaps have not expanded as far as they could, both the Fourteenth and Fifteenth Amendments have developed into a broad jurisprudence of liberty and equality.

This article will explore the gap between the Thirteenth Amendment's promise and its implementation. Drawing on Critical Race Theory, this article argues that the relative underdevelopment of Thirteenth Amendment doctrine with regard to the badges and incidents of slavery is due to a lack of perceived interest convergence. The theory of interest convergence, in its

strongest form, suggests that civil rights gains seldom happen unless they are perceived as substantially furthering the material interests of dominant groups.

This Article proceeds in three parts. First, it explains the theory of interest convergence, with examples of its operation in practice. Second, it suggests that the perceived lack of interest convergence with regard to the Thirteenth Amendment's promise to eliminate the badges and incidents of slavery flows from an unstated misconception: that such a remedy would only or primarily apply to African-Americans. Finally, this Article asserts that to the extent that interest convergence theory has force, it is worth remembering that the Amendment's Framers intended to dismantle the lingering vestiges of the slave system and that those vestiges are not limited to African-Americans. Most notably, the Amendment's Framers specifically intended to protect abolitionists and other anti-racist whites whose actions and deeds were severely punished under the Black Codes and through less formal sanctions. I therefore briefly discuss an example where discrimination against whites would in my view clearly be a badge or incident of slavery: when anti-racist speech or action leads to retaliation against white individuals who object to racial discrimination.

### **II.** The Theory of Interest Convergence

#### A. Background

The theory of interest convergence reflects the legal realist perspective animating much of Critical Race Theory. Stated succinctly, interest convergence theory posits that substantive legal gains for minorities and other subordinated groups occur only when they converge (or are perceived as converging) with the interests of white elites. Professor Derrick Bell's formulation represents interest convergence theory in its strongest form:

[T]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the Fourteenth Amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the

superior societal status of middle and upper class whites <sup>1</sup>

Interest convergence theory therefore rejects the notion of classical legal theory that significant advances for subordinate groups occur as a matter of idealism, abstract justice, or the deployment of novel legal strategies to bring about the long-delayed proper application of legal principles. While all of these may play a role, interest convergence theory states that it is the actual or perceived alignment of the interests of the subordinated with those of the elite that is outcome determinative.

Not surprisingly, interest convergence theory, at least in its strongest form, has been controversial. What has made it particularly controversial is the claim made by Professor Bell and furthered by Professor Mary Dudziak that Brown v. Board of Education<sup>2</sup> provides an example of interest convergence in action.<sup>3</sup> The traditional narrative of *Brown* is that equality and fundamental fairness triumphed over the forces of intolerance in both law and public opinion, leading to the Court's holding that "separate but equal" was inherently unconstitutional. 4 Both Bell and Dudziak argued, however, that global and local political considerations provide a more compelling explanation for the decision in *Brown*. After all, "[t]he NAACP had been litigating school desegregation cases for decades, losing each time, or winning, at best, very narrow victories. Then, in 1954, the skies opened. The Supreme Court held, for the first time in a school desegregation case, that separate is never equal." Bell argued that the *Brown* decision

Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

<sup>&</sup>lt;sup>2</sup> 347 U.S. 483 (1954).

See generally Bell, supra note 4; MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000); Mary L Dudziak, Desegregation as a Cold War Imperative, 41 STANFORD L. REV. 61 (1988).

See Richard Delgado, Rodrigo's Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma, 41 HARV. C.R.-C.L. L. REV. 23, 31 (2006) (stating that interest convergence theory outraged many of Bell's readers "[who] found his thesis cynical and disillusioning, preferring to think of Brown as a great moral breakthrough, not a case of white people doing themselves a favor") (internal quotation marks omitted).

Delgado, *supra* note \_\_\_ at 41 (describing the interest convergence theory of *Brown*).

came about because dismantling *de jure* segregation at that time was consistent with the interest of white elites. He argued that the fight against communism and the potential for unrest among black servicemen returning from war counseled in favor of eliminating the glaring message of racial inequality sent by *de jure* segregation.<sup>6</sup> Dudziak expanded this thesis by uncovering historical documents showing the U.S. government's intervention in *Brown* was largely driven by geopolitical concerns:

[T]he international focus on U.S. racial problems [in the years following World War II] meant that the image of American democracy was tarnished. The apparent contradictions between American political ideology and practice led to particular foreign policy difficulties with countries in Asia, Africa and Latin America. U.S. government officials realized that their ability to sell democracy to the Third World was seriously hampered by continuing racial injustice at home.

Under this view, then, the moral wrong of segregation could not have been righted unless and until the interests of whites aligned with those of blacks in having it end.

# B. The Thirteenth Amendment and Interest Convergence

Thirteenth Amendment jurisprudence can also be analyzed through the prism of interest convergence. Doing so requires unpacking the various strains of Thirteenth Amendment doctrine, because applicability of interest convergence theory may be more or less persuasive depending on the context.

The most successful<sup>7</sup> aspect of modern Thirteenth Amendment jurisprudence has been its extension to contemporary instances of coercion, such as human trafficking, involuntary

Bell, *supra* note \_\_\_\_ at 523-26.

By "successful," I do not mean "best" or "most often argued." Rather, I am asserting that the Thirteenth Amendment has been more accepted as a basis for federal legislation and private causes of action when it has dealt with instances of coerced labor or physical confinement.

confinement, and forced labor.<sup>8</sup> The operation of interest convergence theory in such cases is fairly straightforward: prohibiting such practices aligns with the interests of white elites because any person of any race, given sufficient coercion, can be compelled to labor or confined against her will.<sup>9</sup>

By contrast, my preliminary research reveals very few cases where courts have ruled that a plaintiff has successfully stated a badges and incidents of slavery claim under Section 1 of the Amendment. Similarly, my initial research reveals very few statutes wherein Congress has invoked its power under Section 2 of the Amendment to enact legislation under a badges or incidents of slavery theory. The few cases and statutes that have successfully rested upon this ground can be viewed as instances of interest convergence.

United States v. Nelson<sup>10</sup> is the most thorough examination in the contemporary case law regarding the badges and incidents of slavery. Nelson arose out of the Crown Heights riots in New York City. According to the trial testimony in Nelson, a car driven by a Jewish person struck two African-American children, one of whom ultimately died from his injuries.<sup>11</sup> An angry crowd soon formed in the area. One of the defendants made a speech to the crowd, during which he repeatedly exhorted the crowd to, among other

For just a few examples, *see e.g.*, United States v. Kozminski, 487 U.S. 931 (1988) (holding that federal criminal statute based on the Thirteenth Amendment prohibiting "involuntary servitude" applies when victim was forced to labor under threat of physical force or restraint); United States v. Alzanki, 54 F.3d 994 (1st Cir. 1995) (affirming convictions for holding household worker in involuntary servitude). *See also* the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in various sections of 8, 20, 22, 27, 28, and 42 U.S.C.) (stating that "[t]he purposes of this [statute] are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims").

<sup>&</sup>lt;sup>9</sup> *Cf.* The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 72 (1872) (stating that although "negro slavery alone was in the mind of the Congress which proposed the thirteenth [amendment], it forbids any other kind of slavery, now or hereafter").

<sup>&</sup>lt;sup>10</sup> 277 F.3d 164 (2d Cir. 2002), cert. denied, 537 U.S. 835 (2002). *Id.* at 169.

things, "get the Jews." Some members of the crowd subsequently became violent and spotted Yankel Rosenbaum, a Jewish man wearing orthodox Jewish clothing, with some persons yelling "get the Jew, kill the Jew." Upon being caught by the crowd, Rosenbaum was beaten and stabbed by defendant Nelson and eventually died of his injuries. 14

The defendants were convicted under 18 U.S.C. § 245, which makes it a federal crime to interfere with a person's enjoyment of public facilities on account of his race, color, religion, or national origin. They appealed, arguing, *inter alia*, that Section 245 exceeded Congress's Thirteenth Amendment enforcement power, at least as applied to African-American defendants charged with attacking a Jewish man because of his religion.

The court began its analysis by noting that the Thirteenth Amendment's prohibition of slavery and involuntary servitude is race neutral and has been so interpreted by the Supreme Court. 16 From this proposition, however, the court still had to confront two significant subsidiary issues. First, the defendants targeted Rosenbaum because he was Jewish. As the court acknowledged, Jews, in contemporary society, are not thought to be a separate race. 17 Accordingly, even if the Thirteenth Amendment protects all racial groups, the court had to determine whether the Thirteenth Amendment protects non-racial classes. Second, race-based

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12 Id. at 170.
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Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with . . . any person because of his race, color, religion or national original and because he is or has been participating on or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any state or subdivision thereof . . . shall be fined under this title, or imprisoned . . . .

The relevant "interference with public facilities" element was met because Rosenbaum was using the public streets when he was attacked.

<sup>13</sup> *Id*.

<sup>&</sup>lt;sup>14</sup> *Id* 

The relevant portion of 18 U.S.C. § 245 states:

*Id.* at 176.

<sup>17</sup> *Id.* at 176-77.

violence is not literal slavery or involuntary servitude. Because there was no allegation that Rosenbaum's assailants intended to subject him to literal enslavement or involuntary servitude, the court had to analyze whether religiously motivated violence against a Jewish person amounted to a badge or incident of slavery.

With regard to whether Jews, as a group, are protected by the Thirteenth Amendment, the court noted that "race" is a term of art that is not necessarily limited to its contemporary meaning. 18 Accordingly, the court held, the fact that Jews are not currently considered to be a distinct race "does not rule out Jews from the shelter of the Thirteenth Amendment." Indeed, as the Nelson court recognized, Supreme Court cases analyzing 42 U.S.C. §§1981 and 1982 (enacted pursuant to the Thirteenth Amendment) clearly hold that these statutes apply to Jewish person.<sup>20</sup> The *Nelson* court believed that these precedents applied by implication to the Thirteenth Amendment itself because Sections 1981 and 1982 were based on that Amendment.<sup>21</sup> Second, the court reasoned, Jews were in fact considered to be a distinct race at the time of the Amendment's ratification.<sup>22</sup> Accordingly, even if the badges and incidents of slavery power only encompasses racial discrimination, the court believed that the attack at issue could be considered a badge or incident of slavery inflicted upon the victim because of his "race" as that term would have been understood at the time the Amendment was adopted.

Nelson can be seen as an instance of interest convergence. The Nelson court itself noted the arguable irony that its detailed analysis and robust application of the badges and incidents of slavery theory occurred in this context. The court was "employ[ing] a constitutional provision enacted with the emancipation of black slaves in mind to uphold a criminal law as applied against black men who, the jury found, acted with racial motivations, but in circumstances in which they were, at least

<sup>18</sup> *Id.* at 176.

<sup>&</sup>lt;sup>19</sup> Id. at 177.

Id. at 177-78 (citing St. Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987) and Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987)).
 Id. at 178, 180.

Nelson, 277 F.3d at 178.

partly, responding to perceived discrimination against them."<sup>23</sup> To be clear, I believe *Nelson* was correctly decided and that the attack at issue indeed imposed a badge or incident of slavery within the scope of Congress's enforcement power. I therefore do not intend to denigrate the court's reasoning or the federal hate crimes statute in suggesting that interest convergence theory may help explain *Nelson*. But it seems plausible that the successful use of Thirteenth Amendment reasoning in the case was influenced by the fact that the Court and Congress saw an instance where the Thirteenth Amendment would as applicable to whites as to African-Americans in protecting them from racist violence. The fact that racial minorities are in fact more often the victims of hate crimes than whites does not detract from the equal applicability to whites of the Thirteenth Amendment when they are the victims of such violence.

Jones v. Alfred H. Mayer Co.<sup>24</sup> can also be analyzed through the prism of interest convergence. In Jones, the plaintiffs, an interracial couple, alleged that the defendant's refusal to sell property to them because the husband was African-American violated 42 U.S.C. § 1982, which prohibits racial discrimination in the sale or rental of property.<sup>25</sup> After concluding that Section 1982 does apply to purely private discrimination,<sup>26</sup> the Court further held that the Thirteenth Amendment provided Congress with the power to enact such a statute because it gave Congress the authority "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."<sup>27</sup>

To be sure, the *Jones* Court's reasoning was grounded in the unique harms segregation imposed on African-Americans. As the Court stated:

Just as the Black Codes, enacted after the Civil War to restrict the free exercise of [the freedmen's]

<sup>&</sup>lt;sup>23</sup> *Id.* at 191 n.27.

<sup>&</sup>lt;sup>24</sup> 392 U.S. 409 (1968).

Section 1982, originally enacted as part of the Civil Rights Act of 1866, provides: "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."

Jones, 392 U.S. at 421-22.

<sup>27</sup> *Id.* at 439 (internal quotation marks omitted).

rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And 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.<sup>28</sup>

But *Jones* also had a strong interest convergence component. First, as at least one of the *amici* argued in *Jones* regarding private housing discrimination:

What has been done here at the expense of the civil rights of Negroes can equally be done at the expense of citizens of other national origins or of religious groups whose exclusion can be deemed profitable . . . . If Mr. Mayer [can] profit[] in the sale of racism as regards Negro citizens, he and other seekers after profit can do likewise as regards citizens of other national origins (Puerto Rican, Jewish, Italian, etc.), or as regards religious groups of citizens (such as Jehovah's Witnesses, Muslims, etc.), deemed by them likely to depress values."<sup>29</sup>

Second, it is true that racial discrimination in housing was in one sense in the economic interests of particular sellers who wished to maintain segregated communities as a way to attract certain white customers. It is also true that racial segregation produced a status benefit for some whites, enhancing their prestige by distinguishing them from socially and legally from oppressed blacks.<sup>30</sup> But racial segregation in 1968 (when *Jones* was decided) worked even more strongly against both the national economic interest in general and the social interest of individual whites. As to the national economic interest, racial discrimination against otherwise-qualified blacks had the effect of artificially limiting the

<sup>&</sup>lt;sup>28</sup> *Id.* at 442-43.

Amicus Curiae Brief by the National Council of the Churches of Christ at 5, 10, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), 1968 WL 112855.

See, e.g., Darrell A.H. Miller, White Cartels, The Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co., 77 FORDHAM L. REV. 999, 1025 (2008) (arguing that "racial discrimination produces group status benefits -- such as prestige -- that do not fit neatly within the material welfare-maximizing framework of classical economics").

demand for housing stock. The housing sector, of course, was and is an important component of the national economy, with many subsidiary businesses dependent upon the housing sector.<sup>31</sup> Moreover, by the time of *Jones*, widespread racial segregation was arguably no longer in the interest of white elites. As one of the briefs in *Jones* argued:

[By 1968,] the country had been rocked by large scale urban riots and protests against racial injustice. The riots and civil disturbances which plague our urban areas; the growing number of militant separatist movements; and the increasing alienation from the main stream of American life of many Negro Americans - all these have resulted in large part from segregated housing.<sup>32</sup>

[To be included: discussion of McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976), and the Matthew Shepard and James Byrd Hate Crimes Act (2009), based in part on the Thirteenth Amendment]

To the contrary, the cases where the badges and incidents of slavery theory of the Thirteenth Amendment has been unsuccessful can be seen as those where such strong interest convergence was lacking. For example, consider first two older cases, *Palmer v. Thompson*<sup>33</sup> and *Memphis v. Greene*.<sup>34</sup> In *Palmer*,

See, e.g., Amicus Curiae Brief of Henry S. Reuss at 10-11, 11 n.9, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), 1968 WL 112854 (stating that "[t]he construction, financing, sale, and rental of housing has an enormous impact on interstate commerce. Millions of tons of lumber, iron, bricks, and other building materials and products associated with the construction and improvement of homes move across state lines. So do vast amounts of the mortgage funds . . . . If housing were offered on an open basis, the demand for dwellings and for all the materials which go into a housing unit would be substantially increased."). Henry Reuss was a lawyer and congressman from Wisconsin who later served as chairman of the House Committee on Banking, Currency, and Housing and the House Committee on Banking, Finance, and Urban Affairs. See Biographical Directory of the United States Congress, 1774-Present, available at

http://bioguide.congress.gov/scripts/biodisplay.pl?index=r000165.

Amicus Curiae Brief of Henry S. Reuss at 25, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), 1968 WL 112854.

403 U.S. 217 (1971).

the city of Jackson, Mississippi, had been sued for maintaining segregated public facilities.<sup>35</sup> After a ruling that such facilities violated the Equal Protection Clause, the city desegregated its public parks, auditoriums, zoo, and golf courses.<sup>36</sup> However, the city refused to desegregate its public swimming pools, choosing instead to close them all rather than integrate them.<sup>37</sup>

Plaintiffs alleged that the city's action violated, *inter alia*, the Thirteenth Amendment as a badge or incident of slavery because it amounted to an official expression of the message that blacks were "so inferior that they [were] unfit to share with whites this particular type of public facility." The Court rejected plaintiffs' Thirteenth Amendment argument, stating that accepting their claim would require the Court to "severely stretch [the Amendment's] short simple words and do violence to its history." "39

The Court also rejected a Thirteenth Amendment claim in *Memphis v. Greene*. In *Greene*, the city of Memphis, at the request of residents of a predominantly white area, closed a street running through their neighborhood. The result of the street closing was to separate the white area from the African-American area bordering it. Residents of the African-American neighborhood sued, alleging *inter alia* that the city's actions imposed a badge or incident of slavery upon residents of the black neighborhood. The plaintiffs' Thirteenth Amendment claim was grounded in the fact that the separation of the neighborhoods

<sup>34</sup> 451 U.S. 100 (1981).

Id. at 218-19 (describing the procedural history of the case)

<sup>36</sup> Id. at 219.

Id.

Id. at 266 (White, J., dissenting). Given that the city agreed to desegregate all its public facilities other than swimming pools, it seems likely that city officials and white residents found something about associating with blacks in this context to be particularly objectionable. It is reasonable to suppose that stereotypes regarding black "cleanliness" and of African-American men as hypersexualized predators created especially heightened resistance to integrating the pools. See generally JEFF WILTSE, CONTESTED WATERS: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA 154-180 (2007) (discussing the history of and resistance to efforts to desegregate municipal swimming pools).

Palmer, 403 U.S. at 226. 451 U.S. 100 (1981).

conveyed a stigmatizing message of blacks as "undesirable" persons whose presence would disrupt and devalue the "tranquil" white neighborhood. Plaintiffs also submitted expert testimony regarding the negative psychological effects on black residents of the resulting segregation, who would likely see the street closing as a "monument to racial hostility." The Court, while accepting that the Thirteenth Amendment reaches the badges and incidents of slavery, dismissed the Thirteenth Amendment argument in *Greene* in a single sentence: "To regard [the street closing] as a form of stigma so severe as to violate the Thirteenth Amendment would trivialize the great purpose of that charter of freedom."

In neither Palmer nor Greene is interest convergence readily apparent. Palmer concerned the city's operation of a discretionary public entertainment facility with limited fiscal impact and benefits, unlike *Jones*, which involved private discrimination that distorted a large and important sector of the American economy. Moreover, on an individual level, the harm of closing the pools would be felt most strongly not by white elites, but by lower income (disproportionately minority) individuals who could not afford private swimming clubs or personal pools.<sup>44</sup> Similarly, in *Greene*, the *de facto* segregation caused by the street closing worked in the interests of white elites, who would receive the financial and psychic benefits of living in an area designed and maintained "as an exclusive residential neighborhood for white citizens."45 Furthermore, the countervailing social forces providing interest convergence in a case like Brown or Jones were not nearly as strong in *Greene* or *Palmer*. By the 1970s-1980s, the specter of the kind of substantial urban unrest present at the time of *Jones* had receded. And while Cold War concerns of projecting an image of

<sup>41</sup> *Greene*, 451 U.S. at 109.

<sup>42</sup> Id. at 119.

Greene, 451 at 140 (Marshall, J., dissenting, quoting the trial testimony) (internal quotation marks omitted).

See generally WILTSE, supra note \_\_\_\_.

Id. at 137 (Marshall, J., dissenting) (citing the trial court's findings of fact). See also David Tyler, *Traffic Regulation or Racial Segregation: the Closing of West Drive and* Memphis v. Greene (1981), 66 TENNESSEE HISTORICAL QUARTERLY 56 (2007), available at http://dlynx.rhodes.edu/jspui/bitstream/10267/2400/1/Hollywood\_springdale\_David\_Tyler.pdf) (describing in detail the history of racial segregation and hostility in the era leading up to Greene).

racial egalitarianism abroad were still present at that time, the passions of the moment were very different at the time of *Brown* than during the détente period of the 1970s-1980s.

Similarly, interest convergence is lacking many of the lower court cases rejecting badges and incidents of slavery claims.<sup>46</sup> In *Rogers v. American Airlines*,<sup>47</sup> for example, an African-American woman sued her employer, challenging a grooming policy that prohibited the wearing of braided hairstyles. She claimed that the policy imposed a badge or incident of slavery in violation of the Thirteenth Amendment. She argued that prohibiting a black

<sup>46</sup> Lower court cases rejecting badges and incidents of slavery claims include NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990); Atta v. Sun Co., 596 F. Supp. 103 (E.D.Pa. 1984); Alma Soc'y v. Mellon, 601 F.2d 1225 (2d Cir. 1979); Lopez v. Sears, Roebuck & Co., 493 F. Supp. 801; Crenshaw v. City of Defuniak Springs, 891 F. Supp. 1548, 1556 (N.D. Fla. 1995); Sanders v. A.J. Canfield, 635 F. Supp. 85 (N.D. Ill. 1986); Wong v. Stripling, 881 F.2d 200 (5th Cir. 1989); Washington v. Finlay, 664 F.2d 913 (4th Cir. 1981); Davidson v. Yeshiva Univ., 555 F. Supp. 75 (S.D.N.Y. 1982); Keithly v. University of Texas Southwestern Medical Center, 2003 WL 22862798, No. Civ. A. 303CV0452L (N.D. Texas, Nov. 18, 2003) (unreported); Adams v. New York State Educ. F.Supp.2d , 2010 WL 4742168 (S.D.N.Y. 2010). Indeed, at least two courts have found that asserting the Thirteenth Amendment as a direct cause of action for the badges or incidents of slavery was so improper as to justify sanctions under Rule 11 of the Federal Rules of Civil Procedure. See Sanders, 635 F. Supp. at 87; Adams, 2010 WL 4742168 at \*43. The Adams court stated that it was imposing sanctions because it had previously warned counsel for one of the plaintiffs that "[t]he Supreme Court has clearly stated that there is no direct private right of action pursuant to the Thirteenth Amendment." Id. That is simply untrue. Neither the Supreme Court decisions the district court cited (Palmer and Jones) nor any other Supreme Court case has "clearly stated" any such thing. Jones, of course, "specifically reserved the question of whether the Amendment, in the absence of implementing legislation, reaches the badges and incidents of slavery." William M. Carter, Jr., Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery, 40 U.C. DAVIS L. REV. 1311, 1315 (2007) (quoting *Jones*, 392 U.S. at 439, which stated that "[w]hether or not the Amendment itself did any more than [abolish slavery]" was "a question not involved in this case"). As to Palmer, the Court did sound a strong note of skepticism about the reach of the Thirteenth Amendment in the absence of congressional action. See Palmer, 403 U.S. at 226-27. But in City of Memphis v. Greene, 451 U.S. 100, 125 (1981), the Court - after Palmer stated that Congress's power to eliminate the badges and incidents of slavery "is not inconsistent with the view that the Amendment has self-executing force,' i.e., it may provide a direct private cause of action (although Greene neither embraced nor rejected any particular view of the Amendment's scope). 527 F. Supp. 229 (S.D.N.Y. 1981).

woman from wearing an Afrocentric hairstyle reflected "a [slave] master mandate that one wear hair [in a manner] divorced from one's historical and cultural perspective [but that is instead] consistent with the 'white master' dominated society and [beauty] preference thereof."<sup>48</sup> The court dismissed her claim, holding that the Thirteenth Amendment "prohibits [only] practices that constitute a badge of slavery and, unless a plaintiff alleges she does not have the option of leaving her job, does not support claims of racial discrimination in employment."<sup>49</sup>

It is difficult to locate any convergence of plaintiff Rogers's interests with those of white elites. Her claim, by definition, was unique to black women (or at least women of color) who are excluded from economic opportunities due to their unwillingness to conform to white beauty standards. Rogers, in short, involved what Kenji Yoshino has called a refusal to "cover:" that is, Ms. Rogers refused to accede to demands to "modulate her conduct to make [it] easy for those around her to disattend her known stigmatized trait."50 A demand to cover, of course, is only imposed on those possessing the stigmatized trait. Thus, eliminating the grooming policy's demand to cover in *Rogers* would presumably be of little benefit to those not possessing that trait, i.e., white women. Accordingly, the interests of black women in a case like Rogers would not converge in any significant way with those of white women (or white men or presumably most men of color, for that matter, since "beauty" standards operate very differently for women than men).

The explanatory power of interest convergence theory has limits, of course, and cannot fully account for developments in

<sup>&</sup>lt;sup>48</sup> Cf. Constance Dionne Russell, Styling Civil Rights: The Effect of §1981 and the Public Accommodations Act on Black Women's Access to White Stylists and Salons, 24 HARV. BLACKLETTER L.J. 189 (2008).

Rogers, at 231 (emphasis added and internal quotation marks omitted).

Kenji Yoshino, Covering, 111 YALE. L.J. 769, 837 (2002). Yoshino states that demands to assimilate can superficially be distinguished between demands to convert (to change one's identity), demands to pass (to hide one's identity) and demands to cover, which involves "making a disfavored trait easy for others to disattend." *Id.* at 780. Yoshino argues, however, that covering demands, although nominally less burdensome than demands to pass or convert, may be more damaging to individuals than is usually acknowledged.

civil rights law.<sup>51</sup> For example Warth v. Seldin<sup>52</sup> is arguably contrary to interest convergence theory with regard to housing segregation. Warth, like Jones, involved attempts to integrate a segregated community. In Warth, the community was segregated by class, rather than race. The suburb of Penfield, New York, had a zoning law that prohibited the construction of low-income or multi-family dwellings. Given the correlation between race and income, the beneficiaries of a change to the zoning policy would likely have disproportionately been racial minorities.<sup>53</sup> The plaintiffs in Warth included (1) individuals who wanted to live in Penfield, but claimed they could not due to the lack of affordable (low income and/or multifamily) housing and (2) an association of home builders who wanted to construct such housing in Penfield but were prohibited by the ordinance from doing so. Thus, the interest convergence in Warth was apparent in the coalition that brought the lawsuit. Moreover, many of the same factors that interest convergence theory would suggest were important in *Jones* (e.g., the magnitude of the housing sector as a portion of the American economy) would seem to be equally applicable in

In particular, the schism in the Thirteenth Amendment case law regarding whether the badges and incidents of slavery are ever judicially cognizable under Section I, or whether it is instead solely a legislative power under Section 2, provides an additional doctrinal explanation for the differences in the cases discussed in this section. Jones, McDonald, and Nelson all dealt with statutes where Congress had proscribed the conduct at issue under its Section 2 power, as did the earlier Supreme Court cases upon which the Nelson court relied. See St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987). By contrast, Palmer, Greene, and the lower court cases discussed in this section concerned plaintiffs asserting badges and incidents of slavery claims directly under the Thirteenth Amendment itself, not a statute pursuant thereto. For a further discussion of this issue, see generally William M. Carter, Jr., Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery, 40 U.C. DAVIS L. REV. 1311 (2007). Moreover, interest convergence theory is of course subject to the criticism that the story one draws from a series of events depends on the narrative frame chosen or the story the interpreter wishes to tell. In other words, one could arguably reconceptualize cases like *Brown*, *Jones*, or *Nelson* as lacking interest convergence or find interest convergence in cases like *Greene*, Palmer, or Rogers.

<sup>&</sup>lt;sup>52</sup> 422 U. S. 490 (1975).

See id. at 496 (noting that the plaintiffs had argued, inter alia, that "by precluding low- and moderate-cost housing, the town's zoning practices also had the effect of excluding persons of minority racial and ethnic groups, since most such persons have only low or moderate incomes").

*Warth*. But the *Warth* Court dismissed their claims for lack of standing, holding that, among other problems, plaintiffs could not prove that the ordinance caused their alleged injuries.<sup>54</sup>

## III. Interest Convergence in Thirteenth Amendment Scholarship

In this final section, I briefly address what interest convergence theory might have to teach for purposes of Thirteenth Amendment scholarship. Interest convergence theory would posit that significant acceptance of the badges and incidents of slavery theory is unlikely unless and until it coincides or is seen as coinciding with the interests of white elites. In this regard, the Thirteenth Amendment's greatest theoretical strength may be its greatest practical weakness. The Amendment's history strongly suggests that its Framers intended to end chattel slavery and also to "obliterate the last lingering vestiges of the slave system." This expansive purpose provides a source of alternate authority for civil rights remedies beyond those currently recognized under equal protection. And yet, because the badges and incidents of slavery analysis must in some sense be tied to the system of slavery, 56 a common instinctive reaction is that it would be limited to African-Americans. To the extent that the badges and incidents of slavery theory is perceived in such terms, it would seem to have little utility to white elites and interest convergence theory would therefore suggest that it is unlikely to be successful.

Id. at 502-512. As to the individual plaintiffs, the Court held that they had not alleged that they would have been able to live in Penfield but for the ordinance (since, *e.g.*, they might not be able to afford any housing that might be built absent the ordinance). As to the homebuilders, the court held that they too had failed to show causation because, *e.g.*, they would not necessarily have built low-income housing in Penfield even if the ordinance were lifted.

CONG. GLOBE, 38th Cong., 1st Sess. 1199, 1324 (1864) (statement of Sen. Wilson of Massachusetts)).

As I have written elsewhere, I believe the badges and incidents of slavery theory of the Thirteenth Amendment is only sensible when the contemporary condition or discrimination at issue bears a fairly substantial historical link to the institution of chattel slavery. *See generally* Carter, *Race, Rights, and the Thirteenth Amendment.* Others may disagree, of course, with the particular formulation I have articulated, but few would suggest that the Thirteenth Amendment applies to conditions having no link whatsoever to slavery.

However, the instinctive reaction that the badges and incidents of slavery analysis is limited to African-Americans is based on a misunderstanding. It is true that African-Americans would likely be the most directly benefited class of a vibrant Thirteenth Amendment. It is also of course true that the Thirteenth Amendment's Framers saw providing civil equality for the freed slaves as one of their immediate aims. But those Framers also understood that slavery distorted American society in ways beyond discrimination against blacks. The Amendment was intended to "remove[] every vestige of African slavery from the American Republic."57 There is certainly room for disagreement regarding the substantive scope and content of those vestiges, but one thing is clear: the Amendment's Framers understood slavery to harm more than the slaves. They believed that slavery had injured the country, that it had become "the master of the government and the people,"58 and that the "death of slavery [would be] the life of the Nation."59

The system of slavery severely punished abolitionist whites. The Amendment's Framers recognized that white abolitionists were harassed and attacked for their opposition to slavery. 60 Moreover, the laws supporting slavery not only punished those whites who actively opposed it but also those who were deemed to be insufficiently attentive to maintaining racial subjugation. Pennsylvania's Slave Code, for example, obliged every white

CONG. GLOBE, 38th Cong., 2nd Sess. 155 (1865) (statement of Rep. Davis of New York)

Cong. Globe, 38th Cong., 1st Sess. 1199, 1323 (1864) (statements of Sen. Wilson of Massachusetts).

<sup>&</sup>lt;sup>59</sup> *Id.* at 1319.

As but one example, Representative Ashley of Ohio noted during the Thirteenth Amendment debates that "[s]lavery has for many years defied the government and trampled upon the National Constitution, by kidnapping, mobbing, and murdering white citizens of the United States guilty of no offense except protesting against its terrible crimes." *See also* KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 211 (1961) (noting that the slave codes "were quite unmerciful toward whites who interfered with slave discipline"); Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 497 n.50 (2003) (stating that "abolitionists were intimidated, threatened, and beaten to near death when speaking in the North; in the South and Midwest, whether black or white, one could be killed for advocating the end of slavery").

person to apprehend and whip slaves found traveling in violation of the pass system (*i.e.*, discovered more than ten miles from the master's home without permission in writing).<sup>61</sup> Any white person who failed to do so was subject to fines and penalties.<sup>62</sup> Furthermore, the system of slavery injured the white working class because the free labor pool slavery provided drove down their wages and made labor seem dishonorable.<sup>63</sup>

Drawing upon this history, my current work in progress explores whether the Thirteenth Amendment can be interpreted to extend protection to whites in situations where their opposition to racial injustice or exclusion either (1) puts them at physical or economic risk or (2) where protecting such opposition is necessary to promote full equality. To provide a concrete example: current Title VII doctrine provides inadequate protection for anti-racist speech or action in the workplace. The lower courts have held that individuals who are not members of a protected class, who have no direct association with a protected class, and were not themselves victims of discrimination cannot establish a *prima facie* case of a racially hostile work environment.<sup>64</sup> Moreover, while Title VII does provide protection against retaliation, current case law is unclear as to the degree of connection necessary between the retaliation complainant and the victim of the discrimination in

A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD 171 (1978).

For example, Representative Robert Ingersoll of Illinois argued during the Thirteenth Amendment debates that the Amendment would help "the seven millions of poor white people who live in the slave States [who themselves] have never been deprived of the blessings of manhood by reason of . . . slavery," but were nonetheless injured economically thereby. Alexander Tsesis, Furthering American Freedom: Civil Rights & the Thirteenth Amendment, 45 B.C. L. REV. 307, 327 (2004) (citing CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864)). Similarly, Representative Wilson of Iowa argued that "the poor white man" had been "impoverished, debased, dishonored by the system that makes toil a badge of disgrace . . . ." Douglas L. Colbert, Liberating the Thirteenth Amendment, 30 HARV. C.R.-C.L. L. REV. 1, 10 (1995).

See, e.g., Bermudez v. TRC Holdings, 138 F.3d 1176, \_\_\_\_ (7th Cir. 1998) ("If unease on observing wrongs perpetrated against others were enough to support litigation, all doctrines of standing and justiciability would be out the window . . . . No employer can purge the workplace of all comments that are offensive -- or even of all comments that imply substantive violations of Title VII.").

order for a claim of retaliation to be cognizable under Title VII.<sup>65</sup> In an era of "new racism" or "second generation" racism where outright racial hostility will seldom be expressed in the presence of racial minorities, providing robust protection to those ant-racist whites willing to confront racism will become increasingly critical. Thus, my current work in progress will argue that the Thirteenth Amendment can provide such protection. As such, it is an example of a Thirteenth Amendment theory that is consistent with interest convergence.<sup>66</sup>

#### Conclusion

This Article suggests that interest convergence theory may account in part for the relatively limited success of the badges and incidents of slavery theory of the Thirteenth Amendment. I do not believe that a perceived lack of interest convergence provides a full explanation, but it is worth considering whether Thirteenth Amendment scholarship and advocacy could benefit from a dose of healthy skepticism and legal realism regarding its opportunities for success.

<sup>65</sup> Cf. Thompson v. North American Stainless, LP, 131 S.Ct. 863 (2011). Thompson involved an employee who claimed he was fired after his fiancée, who worked for the same company, had filed a gender discrimination charge. The Court, while "declin[ing] to identify a fixed class of relationships for which third-party reprisals are unlawful," stated that "[w]e expect that firing a close family member will almost always meet the [] standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so . . . . " *Id.* at 868. Thompson is somewhat different than the scenario I have in mind, which would be the opposite, e.g., if the fiancé had been punished for objecting to discriminatory treatment of his partner. Moreover, my current work in progress will explore not only the Thirteenth Amendment implications of this scenario, but also the scenario in which the employee protesting discrimination has no direct connection at all to a protected class. For example, imagine a white employee at an all white company who routinely experiences a racially hostile work environment even though it is not directed at him (e.g., constant use of racial epithets) or who objects to racial exclusion at such a workplace. It is worth noting that I did not originally conceive of that project in interest convergence terms. Rather, I believe that it is an under-explored area of the Thirteenth Amendment having contemporary significance.