AFFIRMING THE THIRTEENTH AMENDMENT

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One of the best-kept secrets of our Constitution is the Thirteenth Amendment.[1] Section one declares, "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 within its jurisdiction."[2] Section two provides that Congress shall have power to enforce the Article by appropriate legislation.[3]

By abolishing slavery and the badges and indicia of servitude, the Thirteenth Amendment sought to guarantee universal civil and political freedom.[4] The amendment's promise of freedom invites expansive interpretation well beyond mere abolition of the institution of slavery. It allows for an interpretation that would place upon the federal government the duty to provide those who were formerly slaves with the capability to realize this new civil and political freedom.[5] On at least a few occasions, it appeared that the

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1. U.S. CONST. amend. XIII.

2. *Id.* at § 1.

3. *Id.* at § 2.

4. In the *Civil Rights Cases*, the Supreme Court recognized unanimously that the Thirteenth Amendment "establish[ed] and decree[d] universal civil and political freedom . . . [and] clothe[d] [C]ongress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States . . . ." 109 U.S. 3, 20 (1883).

This article uses the terms "badges and indicia of slavery" and "badges and indicia of servitude" interchangeably with "badges and incidents of slavery."

Sen. Trumbull of Illinois authored the Civil Rights Act of 1866 and an earlier vetoed measure (S. 60, 39th Cong., 1st Sess. (1866)). Sen. Trumbull, in reference to the vetoed measure, stated that the bill was designed to abolish "all badges of servitude." *See* CONG. GLOBE, 39th Cong., 1st Sess. 129, 323 (1866).

The term "badges and indicia of slavery" appears in an influential 1951 law review article by Professor Jacobus tenBroek in the context of a discussion of the Congressional debates leading to the passage of the Thirteenth Amendment. *See* tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 CAL. L. REV. 171, 179 (1951).

5. Professor Jacobus tenBroek was responsible for rescuing the Thirteenth Amendment's constitutional history and interpretation from decades of oblivion. *See generally* tenBroek, *supra* note 4. Professor Arthur Kinoy deserves primary credit for being the first scholar to demonstrate the Thirteenth Amendment's rele-

amendment's promise would be fulfilled: initially, upon enactment of post-Civil War civil rights laws;[6] and subsequently, on issuance of important federal court decisions in 1968[7] and 1984.[8] Each time, however, the amendment quickly fell into desuetude. This underutilization prevails today, when the amendment's creative and meaningful application is needed more than ever.

Soon after its ratification, the Thirteenth Amendment was recognized as offering a constitutional basis for federal affirmative action laws; the 1865 and 1866 Freedmen's Bureau Acts[9] and the Civil Rights Act of 1866[10] were enacted in reliance of the amendment.[11] Throughout most of its history, however, the Thirteenth Amendment began to suffer from what the first Justice Harlan described as a "too narrow and artificial"[12] Supreme Court interpretation. His prescient dissent in the 1883 *Civil Rights Cases*[13] would ultimately provide future generations with the constitutional analysis needed to overcome the Court's use of "subtle and ingenious verbal criticism[s]"[14] to defeat the Thirteenth Amendment's "substance and spirit."[15] But the majority's ingenious verbal criticisms in the *Civil*

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vance to current issues. *See, e.g.*, Arthur Kinoy, *Jones v. Alfred H. Mayer Co.: An Historic Step Forward*, 22 VAND. L. REV. 475, 477-79 (1969); Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967). For a complete list of scholars' applications of the Thirteenth Amendment to a variety of freedom rights, see Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 4-5, nn.16-21 (1995).

6. *See, e.g.*, Bureau of Refugees, Freedmen, and Abandoned Lands Act, ch. 200, 14 Stat. 173 (1866).

7. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (holding that statute requiring all United States citizens have same right as white citizens to own, purchase, or lease property bars discrimination in sale or rental of private or public property).

8. *See* Williams v. City of New Orleans, 729 F.2d 1554 (5th Cir. 1984) (holding that Title VII does not prohibit a race-conscious remedy and does not limit remedies to actual victims).

9. Congress passed the first Bureau of Refugees, Freedmen, and Abandoned Lands Act in March 1865. Ch. 90, 13 Stat. 507 (1865). The following year, Congress overrode President Andrew Johnson's veto and renewed the Act. Ch. 200, 14 Stat. 173 (1866). *See generally* DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868 (1979).

10. Ch. 31, 14 Stat. 27 (1866).

11. For a discussion of the impact of the Thirteenth Amendment on subsequent legislation, see tenBroek, *supra* note 4, at 183-200.

12. The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

13. *Id.*

14. *Id.*

15. *Id.*

Rights Cases[16] ensured that the amendment's promise of freedom would remain buried and ignored until the Second Reconstruction,[17] eighty-five years later.

A turning point occurred in 1968, during the peak of the 1960s civil rights movement. In *Jones v. Alfred H. Mayer Co.*,[18] the Court revived the anti-slavery amendment as an affirmative tool for providing economic rights.[19] Such rights have always been a central component of the freedom envisioned by the Thirteenth Amendment. The rights were key in the minds of the amendment's Framers[20] and were recognized as the amendment's core in *Jones v. Mayer*.[21]

But once again the power of the Thirteenth Amendment has become underutilized, just as it had during the period of retrenchment following Reconstruction. Despite the language in *Jones v. Mayer*, the Thirteenth Amendment has not been used as broadly or effectively as it could be to validate affirmative action programs designed to eradicate the badges and indicia of slavery.[22]

Although the *Jones v. Mayer* decision sought to restore the Thirteenth Amendment "to its rightful place in the constitutional scheme,"[23] it did not succeed in its mission. Jurists and lawyers who graduated from law school prior to the decision usually overlook or disregard the amendment's implications when faced with today's critical race issues. This is unfortunate, but not surprising. As law students, they were neither exposed to the amendment's history nor encouraged to explore the amendment's far-reaching potential in addressing racial inequality. I fear that the most recent crop of law school graduates has also not engaged in any serious discussion of the amendment because many believe that today's racial discrimination is unconnected to the past.

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16. *Id.* at 24 (holding that the Thirteenth Amendment did not authorize Congress to prohibit discriminatory refusals to serve a person in a public accommodation because "such an act of refusal has nothing to do with slavery or involuntary servitude").

17. The decade of the 1960s is sometimes referred to as the Second Reconstruction because of the civil rights movement.

18. 392 U.S. 409 (1968).

19. *Id.* at 413, 439, 440-41 (holding that 42 U.S.C. § 1982 bars private racial discrimination in the sale or rental of property and, thus construed, is authorized by the Thirteenth Amendment).

20. *See generally* tenBroek, *supra* note 4, at 173-83.

21. 392 U.S. at 441-43.

22. *See, e.g.*, Williams v. City of New Orleans, 729 F.2d 1554, 1572-80 (5th Cir. 1984) (Wisdom, J., concurring in part and dissenting in part) (finding that the Thirteenth Amendment contemplates race-conscious prospective relief).

23. *Id.* at 1578.

I propose to revive the Thirteenth Amendment's lost history and to demonstrate its current relevance. My focus is upon the use of the amendment to address the denial of equal economic opportunity to African-Americans and to others who share a similar history of exclusion based on race. This approach may appeal to those seeking alternatives to the Court's current racial equality doctrine, which obfuscates the link between the present and the past in considering affirmative action remedies.[24]

To appreciate the Thirteenth Amendment's relevance today, it is necessary first to travel back to Reconstruction's early years, when this nation had ratified the Thirteenth Amendment, granted freedom to African-Americans everywhere, and defeated the pro-slavery forces of the Confederacy. Foremost in the minds of the amendment's framers and opponents were two critical questions: what was the meaning of the freedom guarantee contained in the Thirteenth Amendment?; and what specific rights were deserving of affirmative government protections to a people who had been enslaved for two hundred years?[25]

At this historical moment, Congressman James Garfield likely captured the public consensus by recognizing that the right to freedom encompassed more than simply freeing African-Americans from bondage. "What is freedom?," asked Garfield rhetorically. "Is it the bare privilege of not being chained? If this is all, then freedom is a bitter mockery, a cruel delusion."[26] But if granting freedom meant more than government removing slavery's shackles, just how far would the right to freedom extend? Which badges and indicia of slavery would the federal government remove through affirmative action? In 1865 and 1866, this was the burning question.[27]

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24. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (holding that strict scrutiny should be applied in evaluating any race-based action by state and local governments, including affirmative action plans intended to remedy past discrimination against minorities: "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2112-13 (1995) (extending *Croson* to race-based action, including affirmative action, by the federal government).

25. *See generally* tenBroek, *supra* note 4, at 173-83.

26. JAMES A. GARFIELD, THE WORKS OF JAMES ABRAM GARFIELD, 1882-1883, at 86 (Burke A. Hinsdale ed., 1970).

27. Reconstruction historian Eric Foner describes the national debate that occurred immediately after the Civil War ended in 1865 over the meaning of freedom. Foner documents that African-Americans viewed their freedom as directly tied to gaining land rights in order to achieve economic independence from whites. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-

The South responded violently to the Thirteenth Amendment.[28] Congressional representatives reacted by expressly indicating their intention that freedom should include "those fundamental rights which are the essence of *civil* freedom,"[29] rights which pro-slavery forces had suppressed while maintaining the institution of slavery. By approving the Civil Rights Act of 1866,[30] which was grounded in the Thirteenth Amendment, the Reconstruction Congress ensured for African-Americans access to the courts, equality under the law, and elimination of formal barriers to exercise contract and property rights.[31] Voting and political rights were more controversial at first,[32] but by 1870, Congress embraced African-Americans' right to vote by approving the Fifteenth Amendment[33] and additional voting rights legislation.[34]

The issue that generated the most controversy following the passage of the Thirteenth Amendment was the government's role in promoting economic rights and economic independence. While the 1866 Reconstruction Congress was receptive to guaranteeing formal equality rights to enter contracts and own property, radical

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1877, at 77-78, 103-10 (1988). One Georgia planter stated: "They will almost starve and go naked before they will work for a white man, . . . if they can get a patch of ground to live on, and get from under his control." *Id.* at 104. *See also generally* tenBroek, *supra* note 4.

28. *See* FONER, *supra* note 27, at 119-20 (describing the pervasive wave of violence which followed the Civil War).

29. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 (1968).

30. Ch. 31, § 1, 14 Stat. 27 (1866).

31. Section 1 of the Civil Rights Act of 1866, *id.*, reads:

> [t]hat all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, 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, and shall be subject to like punishment, pains, and penalties and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

32. FONER, *supra* note 27, at 236-38.

33. U.S. CONST. amend. XV. Section 1 of the Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Section 2 declares: "The Congress shall have power to enforce this article by appropriate legislation."

34. Congress passed the Enforcement Act of 1870, ch. 114, 16 Stat. 140 (guaranteeing voting rights) and the Enforcement Act of 1871, ch. 22, 17 Stat. 13 (guaranteeing rights under the Fourteenth Amendment).

Republicans were divided on the issue of the extent to which Thirteenth Amendment freedoms required the government to act affirmatively to provide the resources to make such rights a reality for the overwhelmingly impoverished class of former slaves.[35]

In 1865, some abolitionists, such as Congressmen Wendell Phillips and George Julian and Senator Thaddeus Stevens, insisted that Reconstruction would be incomplete until African-Americans had access to land.[36] They urged government action to insure that African-Americans would not remain laborers, dependent upon the white planter class.[37] Congressman Julian accurately noted that without land reform, freedmen would be trapped in "a system of wages and slavery . . . more galling than slavery itself."[38]

Congress had previously approved a mechanism for *redistributing* Confederate land to freed slaves by passing the Confiscation Act of 1862,[39] which authorized the President to *seize* such land.[40] Shortly after approving the Thirteenth Amendment, both Houses approved versions of the Second Confiscation Act aimed at empowering the government to distribute land to former slaves.[41] When, however, the House and Senate could not agree on a joint version, they passed an alternative, affirmative action measure, the Freedmen's Bureau Act.[42] The Act reflected Republicans' "widespread belief . . . that the federal government must shoulder broad responsibility for the emancipated slaves including offering them some kind of access to land."[43]

During the Bureau's first few months of operation, the policy of providing "protection, land and schools"[44] to African-Americans resulted in a significant redistribution of the 850,000 acres it controlled.[45] But this aggressive land redistribution policy suddenly came to a halt after President Andrew Johnson altered the character of the Bureau. As a result, much of the land was returned to its

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35. FONER, *supra* note 27, at 236-37.

36. *Id.* at 235-36.

37. *Id.*

38. *Id.* at 68.

39. Ch. 195, 12 Stat. 589 (1862).

40. *Id.*

41. FONER, *supra* note 27, at 68.

42. Bureau of Refugees, Freedmen, and Abandoned Lands Act, ch. 200, 14 Stat. 173 (1865).

43. FONER, *supra* note 27, at 68.

44. *Id.* at 159.

45. *Id.* at 158-59.

original owners.[46] Thereafter, during the Bureau's three-year life, few African-Americans could afford to purchase land.[47]

African-Americans generally remained convinced in the period immediately after the War that the government's commitment to freedom included fundamental land reform.[48] Most viewed land ownership as "central to the Black community's effort to define the meaning of freedom,"[49] and as necessary for achieving economic independence.[50] Baptist minister Garrison Frazier spoke for many when he explained that the quest for land was needed to gain freedom from white control, which prevented African-Americans from "reap[ing] the fruit of [their] own labor."[51] African-Americans' claim to land was clear and direct: they and their ancestors had worked land owned by whites for 200 years without compensation. As one former slave declared: "[A]ll the wealth of the white man has been made by negro labor, and . . . negroes were entitled to their fair share of all these accumulations."[52]

In some instances, African-Americans succeeded in both gaining and then maintaining possession of Confederate lands. For example, in 1865, 40,000 African-Americans followed General Sherman's military order and permanently settled on 400,000 acres in South Carolina's Sea Islands.[53] But these self-help efforts failed to receive significant legislative support.[54] Only a few Republicans saw land distribution as the solution to the effects of slavery and as a

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46. *Id.* at 161.

47. *Id.* at 161.

48. *Id.* at 290, 374-75.

49. *Id.* at 110. A. Warren Kelsey, an investigator who was hired by Northern textile manufacturers to investigate investment possibilities in the post-War South, captured the importance that land had for African-Americans' enjoyment of their freedom:

> The sole ambition of the freedman at the present time appears to be to become the owner of a little piece of land, there to erect a humble home, and to dwell in peace and security at his own free will and pleasure. If he wishes, to cultivate the ground in cotton on his own account, to be able to do so without anyone to dictate to him hours or system of labor, if he wishes instead to plant corn or sweet potatoes—to be able to do *that* free from any outside control . . . . That is their idea, their desire and their hope.

Id. at 109.

50. *Id.* at 374.

51. *Id.* at 70.

52. *Id.* at 290.

53. *Id.* at 70-71.

54. Congressman Thaddeus Stevens' proposal to confiscate confederate land received the support of approximately twenty percent of the House of Representatives. MICHAEL L. BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION: 1863-1869, at 149-50 (1974).

means to end African-American dependence on the white planter class.[55]

Congress' passage of the 1866 Civil Rights Act[56] indicated a readiness to offer affirmative federal protection against state laws and practices which had prevented slaves from owning property, but it also demonstrated an unwillingness to approve fundamental land reform.[57] Redistribution of only ten percent of confederate-owned land would have provided each African-American family with "forty acres and a mule."[58] The measure, however, seriously threatened to restructure the prevailing economic system.[59] Eventually, Congress settled on the modest results achieved by the short-lived Freedmen's Bureau[60] and the property rights protections contained in the 1866 Act.

Returning to the present, we find that two centuries after the end of slavery, African-Americans' economic status today remains the most serious vehicle for continuing slavery's badges and indicia. Being born into conditions of poverty today effectively prevents most African-American children from enjoying full citizenship rights, almost as effectively as being born into slavery once did. The struggle to achieve the "century-old promise of equality of economic opportunity,"[61] has shifted from the post-Civil War Thirteenth Amendment claim to land to the post-*Brown v. Board of Education*[62] claim for inclusion in the mainstream educational system and the workplace. Just as the Thirteenth Amendment was invoked to grant economic rights to African-Americans in the post-Civil War era, so too should it be invoked to grant economic rights to African-Americans today.

For the past two decades, affirmative action has been a preferred method for remedying the systematic disqualification from the marketplace of people with a history of exclusion. Still, as the economic "designated hitter" for striking down racial barriers, government-sponsored affirmative action plans have run into serious, and potentially fatal, judicial roadblocks. The most serious, of

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55. *See* FONER, *supra* note 27, at 235-36.

56. Ch. 31, 14 Stat. 27 (1866).

57. *See* FONER, *supra* note 27, at 245.

58. *Id.* at 70-71. Foner identifies the origin of "forty acres and a mule" with General Sherman's order that each African-American family was entitled to forty acres of land and assistance from the army's mules upon settling in the Sea Islands of South Carolina. *Id.*

59. *Id.* at 164-65.

60. *See* discussion *supra* note 9.

61. Fullilove v. Klutznick, 448 U.S. 448, 463 (1980) (plurality op.).

62. 347 U.S. 483 (1954).

course, has been the Supreme Court's ability to forge a majority view which treats affirmative action remedies in the same manner as racial classifications that had previously maintained the economic monopoly of the white majority within a racial caste system.[63] Despite Justice O'Connor's hope to the contrary in *Adarand Constructors, Inc. v. Pena*,[64] applying the strict scrutiny standard is likely to result in judicial invalidation of the typical affirmative action plan.

I know from teaching Fourteenth Amendment equal protection jurisprudence that a universally applied standard of equal protection has enormous appeal for law students. Many are easily seduced by the guarantee of formal equality. They see it as eliminating racial barriers and including everyone on the same competitive playing field, where the ground rules promise equal economic opportunity. Few white students consider the built-in advantages they have as a result of membership in an historically preferred group, choosing instead to join Justice Scalia's chorus that "we are all Americans."[65] Like many of this nation's leaders, they are quick to disclaim personal or societal responsibility for eradicating the structural barriers which the economically and socially disadvantaged must overcome. In brief, current Fourteenth Amendment jurisprudence threatens to accomplish what Justice Marshall often warned against: by ignoring the past, we fail to appreciate that a racially neutral equal protection standard perpetuates this nation's racially exclusionary policies.[66]

With this bleak equal protection doctrine as background, the Thirteenth Amendment's appeal is hard to resist, particularly for those who still share a vision of a multi-racial, diverse society. The amendment has significant potential in the context of affirmative action. Unlike the Fourteenth Amendment, a Thirteenth Amendment analysis immediately links African-Americans' exclusion from today's desirable occupations and business opportunities first to slavery's absolute disqualification and then to segregation's contin-

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63. *See* discussion *supra* note 23.

64. Justice O'Connor wrote:

> Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' . . . The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.

Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995).

65. *Id.* at 2119 (Scalia, J., concurring) ("In the eyes of government, we are just one race here. It is American.").

66. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 550 (1989) (Marshall, J., dissenting).

uing color barrier. The Thirteenth Amendment considers current exclusionary economic practices and conditions as among slavery's primary badges of inferiority and demands that they be eliminated. Affirmative hiring and promotion plans are viewed from the perspective of the injured parties, not from the perspective of the so-called innocent party.

The best and most recent indication of how the promise of the Thirteenth Amendment can be fulfilled in the twenty-first century is a 1984 opinion, *Williams v. City of New Orleans*.[67] In *Williams*, Judge Wisdom[68] was joined by five judges of the United States Court of Appeals for the Fifth Circuit in advocating, for the first time, the application of a Thirteenth Amendment analysis in upholding an affirmative action hiring and promotion agreement between the City of New Orleans and its police department.

In *Williams*, Judge Wisdom and his colleagues once again heeded their duty as federal judges to enforce the Constitution with moral courage and intellectual honesty. In rejecting the Reagan Justice Department's challenge to affirmative action, Judge Wisdom's 1984 opinion built upon the Supreme Court's analysis in *Jones v. Alfred H. Mayer Co.*[69] Judge Wisdom affirmed Congress' power to pass anti-discrimination laws like Title VII[70] in order to outlaw employment "practices that continue to burden blacks with badges of inferiority."[71]

Judge Wisdom's historical analysis linked the present exclusion of African-American police officers in New Orleans to slavery's and segregation's "denial of equal economic opportunities, especially in

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67. 729 F.2d 1554, 1572-80 (5th Cir. 1984) (Wisdom, J., concurring in part and dissenting in part).

68. Judge Wisdom, who wrote the concurring opinion in *Williams*, has always been a profile in judicial courage. Appointed by President Eisenhower as a conservative Republican, he was one of several Fifth Circuit judges who bravely enforced the Supreme Court's desegregation mandate in Brown v. Board of Education, 347 U.S. 483 (1954). For an example of Justice Wisdom's enforcement of civil rights, see United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966). For a general discussion of the role of Judge Wisdom and his colleagues on the Fifth Circuit in enforcing civil rights laws, see JACK BASS, UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE SUPREME COURT'S *Brown* Decision into a Revolution for Equality (1981).

69. 392 U.S. 409 (1968) (upholding Congress' power to pass laws intended to abolish badges and incidents of slavery, such as a private developer's refusal to sell a home to an African-American family).

70. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1994).

71. *Williams*, 729 F.2d at 1578.

governmental jobs requiring the exercise of authority."[72] Judge Wisdom demonstrated the close link between slavery, the Black Codes, and Jim Crowism and the modern discriminatory practices within the New Orleans Police Department which had disqualified African-Americans from becoming police officers and left them "relegated . . . to the bottom of the caste system."[73] By viewing the New Orleans Police Department's contemporary discrimination through the lens of a long national history of discrimination, the court was able to recognize the continuing nature of a government system which had maintained racial inferiority by means of its hiring and promotion practices. The opinion's constitutional analysis provides a model for applying the Thirteenth Amendment to affirmative action. The *Williams* court declared that "[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, the present effect may be eradicated under the auspices of the [T]hirteenth [A]mendment."[74]

Some might say I am still travelling in a time warp, unwilling to accept the reality that the Thirteenth Amendment has about as much chance of receiving a broad interpretation today as it did a century ago, when the Supreme Court summarily dismissed Homer Plessy's Thirteenth Amendment argument.[75] Maybe this is true, but is it not possible that there are a few "Justice Wisdoms" out there, who take their oaths to uphold the Constitution so seriously that they are willing to consider such an interpretation? Or maybe a Justice Harlan or two, who see the Constitution as written for the ages and who are prepared to leave a future generation with evidence that at the end of the twentieth century, not all judges saw the Constitution as race-neutral. At a minimum, we can seek more modest goals, such as encouraging more members of the legal academy to teach the Thirteenth Amendment, so that more law students and lawyers will consider the potential for its use in practice. For what I fear most, as we head into the twenty-first century separated by racial chasms, is what the future might look like if the courts and the legal academy continue to collectively deny this nation's past. By revitalizing the Thirteenth Amendment, we can ensure that we

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72. *Id.* at 1579.

73. *Id.* at 1580.

74. *Id.* at 1577.

75. *See* Plessy v. Ferguson, 163 U.S. 537, 542-43 (1896) (holding that separate railway coaches for African-Americans and whites have "no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude").

do not complacently permit ourselves to bury the promise of freedom once again.