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THE THIRTEENTH AMENDMENT, INTEREST CONVERGENCE, AND THE BADGES AND INCIDENTS OF SLAVERY

WILLIAM M. CARTER, JR.*

I. INTRODUCTION

The Thirteenth Amendment was intended to eliminate the institution and legacy of slavery. Having accomplished the former, the Amendment has rarely been extended to the latter. The Thirteenth Amendment's full scope therefore remains unrealized.

This Article explores the gap between the Thirteenth Amendment's promise and its implementation. Drawing on Critical Race Theory,[1] this Article argues that the relative underdevelopment of Thirteenth Amendment doctrine is due in part to a lack of perceived interest convergence in eliminating what the Amendment's framers called the "badges and incidents of slavery."[2] The theory of interest convergence, in its strongest form, suggests that civil rights gains seldom happen unless they are perceived as advancing, or at least not hindering, the material interests of dominant groups.

Part II of this Article will explain the theory of interest convergence and analyze major Thirteenth Amendment cases through an interest convergence prism. This Part contends that the cases in which courts have been receptive to badges and incidents of slavery

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1. Broadly defined, Critical Race Theory is a collection of themes aimed at "studying and transforming the relationship among race, racism, and power . . . . Unlike traditional civil rights [theory], critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law." RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 2–3 (2001).

2. *See infra* Part III. For a discussion of the Amendment's legislative history, *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) [hereinafter Carter, *Race, Rights, and the Thirteenth Amendment*].

claims have been those containing a strong component of actual or perceived interest convergence. Conversely, similar claims have failed in cases where interest convergence was lacking.

Part III will argue that the perceived lack of interest convergence regarding the badges and incidents of slavery is due to the misconception that such a remedy would only apply to African-Americans. I will argue, however, that the Amendment's framers intended to dismantle the lingering vestiges of the slave system and that those vestiges extend beyond African-Americans. For example, 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 by less formal sanctions. Part III, therefore, will briefly discuss a contemporary example where interest convergence would exist with regard to the badges or incidents of slavery: when anti-racist speech or action leads to retaliation against whites who object to racial discrimination.

To be clear from the outset, this Article does not argue that we should shift the focus of Thirteenth Amendment scholarship and advocacy from the subordinated to the privileged in search of areas of interest convergence. Indeed, such a shift in focus would likely prove futile because, as interest convergence theory recognizes, civil rights gains made through interest convergence can quickly slip away when the moment of convergence passes. Moreover, shifting focus would dishonor the legacies of those who endured centuries of bondage and subjugation and those who worked to secure slavery's end. Rather, I will contend that the Thirteenth Amendment's under-enforcement is partially explained by interest convergence theory, but further argue that viewing the Thirteenth Amendment as solely the province of African-Americans oversimplifies constitutional history. The Thirteenth Amendment's history and context reveal that its framers intended to abolish the entire system of slavery. Much like a flood, the system of slavery claimed immediate victims and left lasting effects upon the American landscape in its wake. While the Thirteenth Amendment provides a remedy where those effects remain in contemporary society, interest convergence theory suggests the limits of such a remedy in a judicial forum.

II. THE THEORY OF INTEREST CONVERGENCE

A. *Background*

Interest convergence theory reflects the legal realist perspective animating much of Critical Race Theory. Stated succinctly, interest

convergence theory posits that substantive legal gains for racial minorities seldom occur unless 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:

> The 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.[3]

Interest convergence theory therefore rejects the notions of classical legal theory that idealism, abstract legal doctrine, or the deployment of novel legal strategies will bring about significant advances in civil rights.[4] While all of these may play a role, interest convergence theory holds that it is the actual or perceived alignment of the interests of the elite with those of the subordinated that is outcome determinative in achieving substantive justice.[5]

Interest convergence theory has been controversial.[6] 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*[7] provides an example of interest convergence in action.[8] The

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

4. *See* Bryan L. Adamson, *The H'aint in the (School) House: The Interest Convergence Paradigm in State Legislatures and School Finance Reform*, 43 CAL. W. L. REV. 173, 174–75 (2006) (stating that interest convergence theory holds that the "victories gained by African Americans never arose out of an absolute moral imperative of restorative justice; those solutions represented, at best, results with which whites would also enjoy some tangible benefit"). *See also* William P. Marshall, *Judicial Takings, Judicial Speech, and Doctrinal Acceptance of the Model of the Judge as Political Actor*, 6 DUKE J. CONST. L. & PUB. POL'Y 1, 8 (2011) (explaining that Critical Legal Theorists reject classical legal theory and instead argue that "law [is] a manifestation of the political dominance of entrenched power structures, meaning that the law, taken as a whole, should be understood as favoring the interests of already politically dominant groups over the rights of the disenfranchised and marginalized" (internal citations omitted)).

5. Bell, *supra* note 3, at 523.

6. *See, e.g.*, Richard Delgado, *Explaining the Rise and Fall of African-American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 373 (2002) (reviewing MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) (stating that "Bell's hypothesis was greeted with cries of outrage, [d]eemed a cynical explanation of whites' benevolent conduct, [and] dismissed as the jaded speculation of a civil rights warrior who had given up on the promise of America")).

7. 347 U.S. 483 (1954).

traditional narrative of *Brown* explains that equality and fairness finally triumphed in both law and public opinion over the forces of intolerance, leading to the Court's holding that "separate but equal" was inherently unconstitutional.[9] Both Bell and Dudziak argued, however, that global and national political considerations provide a more compelling explanation for the decision in *Brown*.[10] After all, as Professor Richard Delgado noted in advancing the interest convergence thesis, "'[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 of the United States held, for the first time in a school desegregation case, that separate is never equal.'"[11] Bell contended that the *Brown* decision came about because dismantling *de jure* segregation at that time was consistent with the interest of white elites. He asserted that the ideological struggle 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.[12] Dudziak expanded this thesis by uncovering historical documents showing that the United States government's intervention on the side of the plaintiffs 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

8. Bell, *supra* note 3, at 518. *See generally* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (arguing that the U.S. government's interest in countering communist propaganda in the late 1940s and early 1950s helped to facilitate public school desegregation and the *Brown* decision).

9. *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)).

10. Dudziak, *supra* note 8, at 61–66; Bell, *supra* note 3, at 524.

11. Delgado, *supra* note 9, at 41 (quoting Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 372–73 (2002) (describing the interest convergence theory of *Brown*)).

12. Bell, *supra* note 3, at 523–26.

at home.[13]

Under this view, American apartheid ended only when it no longer served the material interests of white elites.

Because interest convergence theory is controversial, important nuances are often overlooked. Accordingly, three points will help to clarify interest convergence theory. First, interest convergence theory does not contend that individual whites perform a conscious calculus of whether certain advances in racial justice will work in their material self-interest. Rather, interest convergence theory suggests that whites are likely to react adversely to civil rights measures that they perceive as solely benefiting racial minorities.[14] Second, as to judges, interest convergence theory is not merely a variation on the theme that "all law is politics." Rather, given the narrow segment of the mostly white elite from which federal judges (and especially Supreme Court Justices) are drawn,[15] interest convergence theory suggests their worldview and life experience will generally be such that remedies perceived as benefiting only people of color are unlikely to find their favor.[16] Third, interest convergence theory acknowledges that altruism can motivate some persons who have nothing directly at stake in a given controversy to nonetheless demand justice on behalf of others. As Professor Bell recognized, "there were whites for whom recognition of the racial equality principle was sufficient motivation [to work toward both school desegregation and the abolition of slavery]. But [in both situations], the number who would act on morality alone was insufficient to bring about the desired racial reform."[17]

B. The Thirteenth Amendment and Interest Convergence

Thirteenth Amendment jurisprudence can be analyzed through the prism of interest convergence. Doing so requires unpacking the various strains of Thirteenth Amendment doctrine because the appli-

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13. Dudziak, *supra* note 8, at 62–63.

14. *See* Bell, *supra* note 3, at 525–26 (explaining that poor whites often "oppose social reform as 'welfare programs for blacks'").

15. *See, e.g.*, Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 987 (1993) ("Federal judges are members of a small elite professional class and are overwhelmingly white men.").

16. *See id.* ("[Federal judges] are likely to decide open cases in light of their own experiences, perceptions, needs, and interests and those of other members of their class."). *See also* Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 883 (1998) ("Supreme Court Justices are part of contemporary culture. As such, they are unlikely to try to coerce the nation into adopting policies that a substantial majority opposes.").

17. Bell, *supra* note 3, at 525.

cability of interest convergence theory may be more or less persuasive depending on the context.

The most successful aspect of modern Thirteenth Amendment jurisprudence has been its extension to contemporary instances of coercion, such as human trafficking, involuntary confinement, and forced labor.[18] 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 (at least conceptually) be compelled to labor or confined against her will.[19]

The Thirteenth Amendment's history demonstrates that, in addition to abolishing chattel slavery and compelled labor, the Reconstruction Amendments' framers intended to eliminate the lingering vestiges of the slave system.[20] However, there have been very few cases where courts have accepted the badges and incidents of slavery theory of the Thirteenth Amendment. The few cases that have done so can be viewed as instances of interest convergence.

The United States Court of Appeals for the Second Circuit's opinion in *United States v. Nelson*[21] provides a recent illustration of interest convergence with regard to the badges and incidents of slavery. *Nelson* arose out of the Crown Heights riots in New York City. According to the trial testimony, a car driven by a Jewish person struck two African-American children, one of whom died from his injuries.[22] After the accident, an angry crowd soon formed. One of the defendants made a speech urging the crowd to, among other things, "get the Jews."[23] Members of the crowd subsequently spotted and targeted Yankel Rosenbaum, a Jewish man wearing orthodox Jewish clothing,

18. *See, e.g.*, United States v. Kozminski, 487 U.S. 931, 934, 952 (1988) (holding that a federal criminal statute based on the Thirteenth Amendment prohibiting "involuntary servitude" applies when the victim was forced to labor under threat of physical force or restraint or legal coercion); United States v. Alzanki, 54 F.3d 994, 998, 1000 (1st Cir. 1995) (affirming defendant's conviction for holding household worker in involuntary servitude in violation of statutes based upon the Thirteenth Amendment). S*ee also* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended at 22 U.S.C. § 7101 *et seq*) (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").

19. *Cf.* The Slaughter-House 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").

20. *See* Carter, *Race, Rights, and the Thirteenth Amendment*, *supra* note 2, at 1320–29.

21. 277 F.3d 164 (2d Cir. 2002).

22. *Id.* at 169.

23. *Id.* at 170.

and some shouted "get the Jew, kill the Jew."[24] Defendant Nelson stabbed Rosenbaum, who eventually died of his injuries.[25]

The two defendants were convicted for violating 18 U.S.C. § 245(b)(2)(B), 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.[26] On appeal, the defendants argued that the statute exceeded Congress's power to enforce the Thirteenth Amendment insofar as it prohibited religious, rather than racial, hate crimes.[27]

The *Nelson* court noted that the Thirteenth Amendment's prohibition of slavery and involuntary servitude is race-neutral and has been so interpreted by the Supreme Court.[28] As the court acknowledged, however, Jews are not thought to be a racial group in contemporary society.[29] Accordingly, even if the Thirteenth Amendment protects all *racial* groups, the court had to determine whether the Thirteenth Amendment protects non-racial classes.

The court reasoned that "race" is a "term of art" that is not necessarily limited to its contemporary meaning.[30] Thus, 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."[31] Indeed, as the *Nelson* court recognized, Supreme Court cases analyzing 42 U.S.C. §§ 1981 and 1982, statutes which are based on the Thirteenth Amendment, clearly hold that these statutes apply to Jewish persons.[32] Second, the court stated that Jews were in fact considered to be a distinct race at the time of the Amendment's ratification. Ac-

24. *Id.*

25. *Id.* at 170–71.

26. *Id.* at 168–69. The statute, as written at the time of the Crown Heights riots, stated:

> 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 origin and because he is or has been . . . participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof . . . shall be fined . . . or imprisoned . . . .

18 U.S.C. § 245(b)(2)(B) (1988). The indictment against the defendants alleged that the relevant "interference with public facilities" element was met because Rosenbaum was using the public streets when the defendants attacked him. *Nelson*, 277 F.3d at 171.

27. *Nelson*, 277 F.3d at 173–74.

28. *Id.* at 176.

29. *Id.* at 176–77.

30. *Id.* at 176.

31. *Id.* at 176–77.

32. *Id.* at 177–78 (citing St. Francis Coll. v. Al-Khazraji, 481 U.S. 604, 611 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617–18 (1987)).

cordingly, the court believed that the attack could be considered to have been motivated by the victim's "race" as that term would have been understood at the time the Amendment was adopted.[33] Finally, the *Nelson* court held that such hate crimes were badges and incidents of slavery, reasoning that "acts of violence or force committed against members of a hated class of people with the intent to exact retribution for and create dissuasion against their use of public facilities have a long and intimate historical association with slavery and its cognate institutions."[34]

Nelson can be seen as a case of interest convergence. The *Nelson* court itself alluded to this issue, noting with some apparent discomfort that it 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 partly, responding to perceived discrimination against them."[35] To be clear, I believe that *Nelson* was correctly decided and the attack at issue indeed imposed a badge or incident of slavery within the scope of Congress's enforcement power. I therefore do not, by suggesting that interest convergence theory may help explain *Nelson*, intend to imply that the result in *Nelson* was wrong. However, it seems plausible that the successful use of Thirteenth Amendment reasoning in *Nelson* was influenced by the fact that the court and Congress saw an instance where the Thirteenth Amendment would be as applicable to whites as to African-Americans in protecting them from racial violence.

Jones v. Alfred H. Mayer Co.[36] can also be analyzed through the prism of interest convergence. In *Jones*, 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.[37] After concluding that Section 1982 applies to discrimination by private individuals,[38] the Supreme Court further held that the Thirteenth Amendment provided Congress with the constitutional power to enact such a statute. The Amendment, the Court held, grants Congress the authority "to pass all laws necessary and proper for abolishing all badges

33. *Id.* at 178.
34. *Id.* at 189–91.
35. *Id.* at 191 n.27.
36. 392 U.S. 409 (1968).
37. *Id.* at 412.
38. *Id.* at 421–22.

and incidents of slavery in the United States."[39]

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] 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.[40]

Jones nonetheless also had a strong interest convergence component. By the time *Jones* was decided in 1968, widespread housing discrimination worked against both the national economic interest and the social interest of individual whites in public order and stability.[41] As to the national economic interest, racial discrimination against qualified black buyers had the effect of artificially limiting the 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 it.[42] Moreover, by the time of *Jones*, widespread racial segregation was arguably no longer in the interest of

39. *Id.* at 439 (quoting The Civil Rights Cases, 109 U.S. 3, 20 (1883)) (emphasis omitted) (internal quotation marks omitted).

40. *Id.* at 441–43.

41. In a narrow sense, racial discrimination in housing worked in the economic interests of particular sellers who wished to maintain segregated communities as a way to attract certain white customers. Racial segregation also produced a psychological benefit for some whites by allowing them to distinguish themselves socially and legally from oppressed blacks. *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, 1024 (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"). But interest convergence theory would suggest that the broader societal interests described above outweighed these individual benefits in *Jones*.

42. Brief of Henry S. Reuss as Amicus Curiae Supporting Petitioners at 10–11, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (No. 645) (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 which finance the construction of residences throughout the country."). 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. *Reuss, Henry Schoellkopf*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–PRESENT, http://bioguide.congress.gov/scripts/biodisplay.pl?index=r000165 (last visited Aug. 30, 2011).

white elites due to the civil unrest it caused. As one of the briefs in *Jones* argued:

> 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.[43]

Jones, therefore, had a substantial interest convergence component. Unlike other circumstances where only the civil rights of a subordinated group are at issue (for example, the consequences of mass incarceration of the mostly black and brown poor),[44] widespread housing discrimination perceptibly posed substantial threats to the economic and material conditions of the country and individual whites.

By contrast, such strong interest convergence was lacking in cases where the badges and incidents of slavery theory has been unsuccessful. Consider two older cases, *Palmer v. Thompson*[45] and *Memphis v. Greene*.[46] In *Palmer*, the plaintiffs sued the city of Jackson, Mississippi, for maintaining segregated public facilities.[47] After a ruling that such facilities violated the Equal Protection Clause, the city desegregated its public parks, auditoriums, zoo, and golf courses.[48] The city refused, however, to desegregate its public swimming pools, choosing instead to close them all rather than integrate them.[49]

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."[50] The Supreme Court rejected the plaintiffs'

43. Reuss, *supra* note 42, at 25.

44. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (explaining that the disproportionately large prison population of black males results in the denial of voting rights, public benefits, and educational opportunities as well as employment and housing discrimination).

45. 403 U.S. 217 (1971).

46. 451 U.S. 100 (1981).

47. *Palmer*, 403 U.S. at 218–19.

48. *Id.* at 219.

49. *Id.*

50. *Id.* at 266 (White, J., dissenting). It seems likely that city officials and white residents found something particularly objectionable about associating with blacks in this context, given that the city did desegregate all its public facilities except for swimming pools. 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* JEFF WILTSE, CONTESTED WATERS: A SOCIAL HISTORY OF

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."[51]

The Court also rejected a Thirteenth Amendment claim in *Greene*.[52] In *Greene*, the city of Memphis, at the request of residents of a predominantly white neighborhood, closed a street running through their neighborhood. The street closing separated the white area from the African-American area bordering it.[53] 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.[54] The plaintiffs' Thirteenth Amendment claim was grounded in the fact that the separation of the neighborhoods conveyed a stigmatizing message of blacks as "undesirable"[55] persons whose presence would disrupt and devalue the "tranquil[]"[56] white neighborhood. The plaintiffs also submitted expert testimony regarding the negative psychological effects that the resultant segregation had on black residents, who would likely see the street closing as a "monument to racial hostility."[57] 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."[58]

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. *Jones*, by contrast, involved private discrimination that distorted a large and important sector of the national economy. Moreover, at an individual level, the harm of closing the pools in *Palmer* 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.[59] Similarly, in *Greene*, the *de facto* segregation caused

SWIMMING POOLS IN AMERICA 154–80 (2007) (discussing the history of and resistance to efforts to desegregate municipal swimming pools).

51. *Palmer*, 403 U.S. at 226.

52. Memphis v. Greene, 451 U.S. 100, 102 (1981).

53. *Id.* at 102–03.

54. *Id.* at 124.

55. *Id.* at 109.

56. *Id.* at 119.

57. *Id.* at 139–40 (Marshall, J., dissenting) (quoting trial testimony).

58. *Id.* at 128 (majority opinion).

59. WILTSE, *supra* note 50, at 154–80.

by the street closing worked in the interests of white elites, who would receive the financial and psychological benefits of living in an area designed and maintained "as an exclusive residential neighborhood for white citizens."[60] Furthermore, the countervailing social forces providing interest convergence in cases like *Brown* or *Jones* were not nearly as strong in *Greene* or *Palmer*. By the 1970s and 1980s, the specter of the substantial urban unrest present at the time of *Jones* had receded. And while Cold War concerns of projecting an image of racial egalitarianism abroad were still present at that time, the passions of the moment were very different at the time of *Brown* in the early Cold War era during the open hostilities abroad and the Red Scare at home, than during the détente period of the 1970s and 1980s.

Similarly, interest convergence is lacking in many of the lower court cases rejecting badges and incidents of slavery claims.[61] In *Rog-*

60. *Greene*, 451 U.S. at 137 (Marshall, J., dissenting). *See generally* David Tyler, *Traffic Regulation or Racial Segregation? The Closing of West Drive and* Memphis v. Greene *(1981)*, 66 TENN. HIST. Q. 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 Memphis in the era leading up to *Greene*).

61. Lower court cases rejecting badges and incidents of slavery claims include NAACP v. Hunt, 891 F.2d 1555, 1564 (11th Cir. 1990); Wong v. Stripling, 881 F.2d 200, 201, 203 (5th Cir. 1989); Washington v. Finlay, 664 F.2d 913, 916 (4th Cir. 1981); Alma Soc'y Inc. v. Mellon, 601 F.2d 1225, 1227–28 (2d Cir. 1979); Adams v. N.Y. State Educ. Dep't, 752 F. Supp. 2d 420, 424, 469–70 (S.D.N.Y. 2010); Crenshaw v. City of Defuniak Springs, 891 F. Supp. 1548, 1556 (N.D. Fla. 1995); Sanders v. A.J. Canfield, 635 F. Supp. 85, 87 (N.D. Ill. 1986); Atta v. Sun Co., Inc., 596 F. Supp. 103, 103–05 (E.D. Pa. 1984); Westray v. Porthole, Inc., 586 F. Supp. 834, 834–35, 838–39 (D. Md. 1984); Davidson v. Yeshiva Univ., 555 F. Supp. 75, 77–79 (S.D.N.Y. 1982); Lopez v. Sears, Roebuck & Co., 493 F. Supp. 801, 806 (D. Md. 1980); Keithly v. University of Texas Southwestern Medical Center, No. Civ. A. 303CV0452L, 2003 WL 22862798, at *3–4 (N.D. Tex. Nov. 18, 2003). Indeed, at least two courts have imposed Rule 11 sanctions on litigants who raised badges and incidents of slavery claims. *Sanders*, 635 F. Supp. at 87–88; *Adams*, 752 F. Supp. 2d at 469–70. The *Adams* court stated that it was imposing sanctions because it had previously warned counsel for 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." Carter, *Race, Rights, and the Thirteenth Amendment*, *supra* note 2, at 1314–15 (2007). *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) ("Whether 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 v. Thompson, 403 U.S. 217, 226–27 (1971). But in *Greene*, decided after *Palmer*, the Court 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," that is, it may provide a direct private cause of action (although *Greene* neither embraced nor rejected any particular view of the Amendment's scope). Memphis v. Greene, 451 U.S. 100, 125 (1981).

ers v. American Airlines,[62] 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 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."[63] 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."[64]

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* involved what Kenji Yoshino calls 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."[65] 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. Accordingly, the interests of black women in a case like *Rogers* would be unlikely to converge to any significant degree with those of white women, white men, or even most black men, since "beauty" standards

62. 527 F. Supp. 229 (S.D.N.Y. 1981).

63. *Id.* at 231–32. *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, 193 (2008) (arguing that black women have legitimate claims under §§ 1981 and 2000(a) when denied access to white hair salons).

64. *Rogers*, 527 F. Supp. at 231 (internal quotation marks omitted). Quite separate from the interest convergence issue, the quoted portion of the *Rogers* court's reasoning makes no sense. The court stated that plaintiff might have had a badges and incidents of slavery claim if she had alleged that she did not have the option of leaving her job. This conflates compelled labor, one concern of the Thirteenth Amendment, with the badges and incidents of slavery, a separate and independent concern.

65. 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 772, 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. *Id.* at 777–78.

operate very differently for women than men.

To be sure, the explanatory power of interest convergence theory has limits, and cannot fully account for developments in civil rights law. In particular, the schism in the Thirteenth Amendment case law regarding whether the badges and incidents of slavery are ever judicially cognizable under Section 1, or whether eliminating the vestiges of slavery is solely a congressional power under Section 2, provides an alternative doctrinal explanation for the differences in the cases discussed in this Part.[66] *Jones* and *Nelson* involved statutes where Congress had proscribed the conduct at issue under its Section 2 power,[67] as did the earlier Supreme Court cases upon which the *Nelson* court relied.[68] By contrast, *Palmer*, *Greene*, and *Rogers* (and many of the other lower court cases rejecting badges and incidents of slavery claims) involved plaintiffs asserting badges and incidents of slavery claims directly under the Thirteenth Amendment itself, not a statute enacted pursuant thereto.[69]

Moreover, case law provides counterexamples where interest convergence was arguably present yet the plaintiffs' claims nonetheless failed. For example, *Warth v. Seldin*[70] 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 town of Penfield (a suburb of Rochester, New York), had a zoning law that prohibited the construction of low-income or multi-family dwellings.[71] Given the correlation between race and income, the beneficiaries of a change to the zoning policy would likely have disproportionately been racial minorities.[72] The plaintiffs in *Warth* consisted of

66. For further discussion of this issue, see generally Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 37 (2011); Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power after* City of Boerne v. Flores, 88 WASH. U. L. REV. 77 (2010); Carter, *supra* note 2, at 1311; William M. Carter, Jr., *Judicial Review of Thirteenth Amendment Legislation: "Congruence and Proportionality" or "Necessary and Proper"?*, 38 U. TOL. L. REV. 973 (2007).

67. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438–39 (1968); United States v. Nelson, 277 F.3d 164, 180 (2d. Cir. 2002).

68. St. Francis Coll. v. Al-Khazraji, 481 U.S. 604, 606 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 616 (1987).

69. Moreover, interest convergence theory is subject to the criticism that the story one draws from a series of events depends on the narrative frame chosen. 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*.

70. 422 U.S. 490 (1975).

71. *Id.* at 493–96.

72. *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 exclud-

three groups: individuals who wanted to live in Penfield, but claimed they could not due to the lack of affordable housing; Rochester property owners who claimed that Penfield's exclusionary practices increased their tax rates since Rochester had to accommodate those in need of affordable housing; and home builders who wanted to construct such housing in Penfield.[73] 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* (for example, the magnitude of the housing sector as a portion of the American economy) would seem to be equally applicable in *Warth*. But the *Warth* Court dismissed their claims for lack of standing, holding that plaintiffs could not prove that the ordinance caused their alleged injuries.[74]

While this Article recognizes the limits of interest convergence theory, this Part has argued that attention to interest convergence provides at least a partial explanation for the different results in the cases discussed above. In the final Part of this Article, I briefly address what interest convergence theory might contribute to Thirteenth Amendment scholarship and litigation.

III. INTEREST CONVERGENCE IN THIRTEENTH AMENDMENT SCHOLARSHIP AND ADVOCACY

Interest convergence theory would posit that significant acceptance of the badges and incidents of slavery theory is unlikely unless and until it coincides with or is perceived 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 indicates that its framers intended to both end chattel slavery and to "obliterate the last lingering vestiges of the slave system."[75] This expansive purpose provides a source of alternate authority for civil rights remedies beyond those currently recognized under equal protection doctrine. Yet, because the badges and inci-

ing persons of minority racial and ethnic groups, since most such persons have only low or moderate incomes").

73. *Id.* at 496–97.

74. *Id.* at 518. As to the individual plaintiffs, the Court found that they had not alleged that they would have been able to live in Penfield but for the ordinance (since, for example, they might not be able to afford any housing that might be built absent the ordinance). *Id.* at 505–07. As to the homebuilders, the Court held that they too had failed to show causation because, for example, they would not necessarily have built low-income housing in Penfield even if the ordinance were changed. *Id.* at 516–17.

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

dents of slavery analysis must in some way be tied to the system of slavery, an intuitive reaction may be that it is therefore limited to African-Americans.[76] 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. Interest convergence theory would therefore suggest that it is unlikely to be successful.

This instinctive reaction that the badges and incidents of slavery analysis is limited to African-Americans is based upon a misunderstanding. It is true that African-Americans would likely be the most directly benefited class of a vibrant contemporary Thirteenth Amendment jurisprudence. It is also true that the Thirteenth Amendment's framers saw providing civil equality for the freed slaves as one of their immediate aims. Those framers, however, also understood that slavery distorted American society in ways beyond individual instances of discrimination against blacks. The Amendment was intended to "remove[] every vestige of African slavery from the American Republic."[77] 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 that slavery harmed more than the enslaved. They believed that slavery had injured the *country*, that it had become "the master of the Government and the people,"[78] and that the "death of slavery [would be] the life of the Nation."[79]

As one example of slavery's collateral effects, 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.[80] Moreover, the laws supporting slavery not on-

76. As I have written elsewhere, I believe the badges and incidents of slavery theory of the Thirteenth Amendment requires that the contemporary condition or discrimination at issue have a substantial and direct historical link to the institution of chattel slavery. *See generally* Carter, *Race, Rights, and the Thirteenth Amendment*, *supra* note 2; *see also* William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 61 (2004) (arguing that racial profiling is a badge or incident of slavery because of its connection to the history of using race as a proxy for criminality as a means of controlling the slaves and later, the freedmen). Others may disagree with my particular formulation, but few would suggest that the Thirteenth Amendment applies to conditions having no link whatsoever to slavery.

77. CONG. GLOBE, 38th Cong., 2d Sess. 154, 155 (1865) (statement of Rep. Davis of New York).

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

79. *Id.* at 1319.

80. Representative Ashley of Ohio, for example, stated during the Thirteenth Amendment debates that slavery "has for many years defied the government and trampled upon the national Constitution, by kidnapping, imprisoning, mobbing, and murdering white citizens of the United States guilty of no offense except protesting against its terrible

ly punished those whites who actively opposed slavery but also those who were deemed to be insufficiently attentive to maintaining racial subjugation. Pennsylvania's Slave Code, for example, obliged every white person to apprehend and whip slaves found traveling in violation of the pass system (that is, discovered more than ten miles from the master's home without permission in writing).[81] Any white person who failed to do so was subject to fines and penalties.[82] Furthermore, by creating a large, unpaid, and coerced labor pool, the system of slavery injured the white working class by driving down their wages and making labor seem dishonorable.[83]

Drawing upon this history, I explore in a forthcoming article[84] whether the Thirteenth Amendment can be interpreted to extend protection to whites in situations where their opposition to racial injustice or exclusion either puts them at physical or economic risk, or where protecting such opposition is necessary to promote full equality. For example, current employment discrimination doctrine provides inadequate protection for anti-racist speech or action in the workplace. Lower courts have held that individuals who are not members of a protected class, who have no direct association with a protected class, and who were not themselves victims of discrimination, cannot establish a *prima facie* case of a racially hostile work environment.[85] Moreover, while federal employment discrimination laws

crimes." CONG. GLOBE, 38th Cong., 2d Sess. 138, 139 (1865). *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 "[a]bolitionists 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").

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

82. *Id.*

83. 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 ever been deprived of the blessings of manhood by reason of . . . slavery," but were nonetheless economically injured thereby. CONG. GLOBE, 38th Cong., 1st Sess. 2989–90 (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 . . . ." CONG. GLOBE, 38th Cong., 1st Sess. 1319, 1324 (1864).

84. William M. Carter, Jr., *The Thirteenth Amendment and Anti-Racist Speech* (tentative title), 112 COLUM. L. REV. (forthcoming 2012) (manuscript on file with the author).

85. *See, e.g.*, Bermudez v. TRC Holdings, Inc., 138 F.3d 1176, 1180–81 (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 employ-

do provide protection against retaliation,[86] the current doctrine is unclear as to when opposing discrimination is protected conduct entitling the objecting employee to the shield of anti-retaliation law.[87] 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 antiracist whites willing to confront racism will become increasingly crucial. Thus, my forthcoming article will argue that such protection can be grounded in the Thirteenth Amendment. As such, it is an example of a Thirteenth Amendment theory that is consistent with interest convergence theory.[88]

IV. CONCLUSION

Interest convergence theory suggests that the Thirteenth Amendment's promise is unlikely to be fully realized as long as the badges and incidents of slavery theory is perceived as solely protecting African-Americans. I do not believe that the lack of perceived interest convergence provides a complete explanation for the Thirteenth Amendment's under-enforcement. Nor do I argue that scholars and

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er can purge the workplace of all comments that are offensive—or even of all comments that imply substantive violations of Title VII.").

86. *Cf.* Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863 (2011). *Thompson* involved an employee who claimed he was fired as retaliation against his fiancée after she had filed a gender discrimination charge against the company for which they both worked. *Id.* at 865. 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. In *Thompson*, the firing was in retaliation against the discrimination complainant, that is, the company retaliated against the woman who had filed a discrimination complaint by firing her fiancé. *Id.* at 865. My forthcoming article will explore not only the Thirteenth Amendment implications of this scenario, but also a scenario in which the employee opposing discrimination or a racially hostile work environment has no direct connection at all to an individual in a protected class and where the retaliation is against the objecting employee. 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 (for example, constant use of racial epithets) or who objects to racial exclusion at such a workplace.

87. *See, e.g.,* Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 82 (2002) (arguing that although some courts have upheld plaintiffs' claims in such cases under "theories of third-party standing, retaliation, and discrimination based on interracial association[,] [t]he doctrines suffer from sometimes serious strains in reasoning and unintended consequences, and these weaknesses have not only led other courts to restrict their reach, but have also provided a weak foundation for more vigorous protection of intergroup solidarity").

88. It is worth noting that I did not originally conceive of that project in interest convergence terms. Rather, I believe that it is an underexplored area of the Thirteenth Amendment having contemporary significance.

advocates should focus their civil rights efforts on the interests of white elites to the detriment of focusing on those most disadvantaged by the legacy of slavery.[89] I do suggest, however, that it is worth considering whether Thirteenth Amendment scholarship and advocacy could benefit from a dose of legal realism regarding its opportunities for success.

89. Indeed, a key corollary of interest convergence theory is that civil rights progress that occurs during times of perceived interest convergence can just as easily be lost when the moment of convergence passes. *Cf.* Michelle Alexander, Op-Ed., *In Prison Reform, Money Trumps Civil Rights*, N.Y. TIMES, May 14, 2011, at WK 9 (stating that current budgetary constraints have produced an interest convergence moment where conservatives have recognized that "[i]n this economic climate, it is impossible to maintain the vast prison state without raising taxes on the (white) middle class," but arguing that efforts to end mass incarceration should instead be grounded in appeals to fundamental social justice).