

FALLING SHORT OF THE PROMISE OF THE THIRTEENTH AMENDMENT: TIME FOR CHANGE

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ABSTRACT

This Essay seeks to shine additional light on the potential of the underutilized Thirteenth Amendment (as contrasted to the much-litigated Fourteenth Amendment Equal Protection Clause) for advancing racial justice and equity. The Essay suggests the Thirteenth Amendment provides strong constitutional basis for an unapologetic embrace of the sorts of new, *race-conscious* measures that will be necessary to begin to achieve true racial equity in a country that for centuries has erected massive structural barriers to Black opportunity and advancement.

Rarely has the tragic fact of Black death been as urgently in need of interpretation and engagement as in this moment. America has been trying for a couple centuries now to reconcile its self-image as a shining beacon of democracy with the nation's corrupted and unjust practices. We have promised time and again to change from within, motivated by some crisis, moved by some uprising, shamed by some catastrophe that wore on our consciences. But each time we bowed to the inertia brought on by half-hearted measures.

- Michael Eric Dyson, 2020¹

A cry for racial justice some 400 years in the making moves us. The dream of justice for all will be deferred no longer. . . . A cry that can't be any more desperate or any more clear. And now a rise of political

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1. MICHAEL ERIC DYSON, LONG TIME COMING: RECKONING WITH RACE IN AMERICA 47-48 (2020).

extremism, white supremacy, domestic terrorism that we must confront and we will defeat. . . . We can deliver racial justice.

- Joseph R. Biden, Jr., January 20, 2021²

If we learned anything from 2020, that *annus horribilis*, it is that white supremacy is alive and well in America today. And that its proponents will go to shocking lengths to perpetuate it—as proven (yet again) by their riot and insurrection at the United States Capitol on January 6, 2021.

In 2020 we witnessed another series of egregious events, most shocking the videotaped murder of George Floyd by Minneapolis police, that galvanized the world—finally—to emphatically protest racially abusive police practices.³ As horrible as these events have been, however, there may be silver linings in the response. “Something feels different now, but how far are we willing to go?” asks Dr. Michael Eric Dyson. “Are we prepared to sacrifice tradition and convention for genuine transformation? Are we prepared to reckon with the disastrous social forces that have been unleashed in such unprecedented fashion?”⁴

Will this time be different? “To me, this feels less and less like just another iteration of the set-piece drama we’ve lived through so many times,” writes *Washington Post* columnist Eugene Robinson. “[A]n unjust killing, a few days of protest, a chorus of promises of reform, a return to normal, an all-too-brief interlude until the next unjust killing. This eruption feels like a potential inflection point, a collective decision that ‘normal’ is no longer acceptable.”⁵ And: “One of the most hopeful and heartening features of the current protests has been the images of people of all races, in this country and around the world, openly supporting anti-racism [and] . . . carrying Black Lives Matter posters in discussing the matter of state violence against black people,” *New York Times* columnist Charles Blow suggests.⁶ “The challenge here is to sustain the current sentiment and not let this version of Freedom Summer be yet another

2. Joseph R. Biden, Jr., Presidential Inaugural Address, Washington, D.C., (Jan. 20, 2021).

3. See, e.g., *How George Floyd’s Death Sparked Protests Around the World*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/world/2020/06/10/how-george-floyds-death-sparked-protests-around-world/>.

4. DYSON, *supra* note 1, at 47.

5. Eugene Robinson, *We Are the Governed. We No Longer Consent to Let the Police Kill Us*, WASH. POST (June 1, 2020), https://www.washingtonpost.com/opinions/we-are-the-governed-we-no-longer-consent-to-let-the-police-kill-us/2020/06/01/9fad7274-a440-11ea-bb20-ebf0921f3bbd_story.html.

6. Charles M. Blow, *Allies, Don’t Fail Us Again*, N.Y. TIMES (June 7, 2020), <https://www.nytimes.com/2020/06/07/opinion/white-privilege-civil-rights.html>.

moment when allies fail.”⁷ When it comes to matters of racial justice, the time for half-measures is past. “Rarely has the tragic fact of Black death been as urgently in need of interpretation and engagement as in this moment,”⁸ Dr. Dyson observes. And, for once, a sitting President is saying that Americans can no longer continue to separate themselves from the evils of white supremacy and systemic racism.⁹

This Essay seeks to shine additional light on the potential of the underutilized Thirteenth Amendment (as contrasted to the much-litigated Fourteenth Amendment Equal Protection Clause) for advancing racial justice and equity. Building upon two recent Articles, *The Thirteenth Amendment as Basis for Racial Truth & Reconciliation* (2020)¹⁰ and *Racial Justice Demands Truth & Reconciliation* (2018),¹¹ the Essay suggests the Thirteenth Amendment provides strong constitutional basis for an unapologetic embrace of the sorts of new, *race-conscious* measures that will be necessary to begin to achieve true racial equity in a country that for centuries has erected massive structural barriers to Black opportunity and advancement.

Until now, such measures have been thwarted by the Supreme Court’s cramped reading of the Equal Protection Clause.¹² The Thirteenth Amendment, in banning slavery outright, is not so limited.¹³ And the Supreme Court itself has clearly explained that Congress has broad scope under its Section 2 enforcement power “rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”¹⁴

Neither are State nor local governments constrained in their own efforts, legislative and otherwise, to eradicate the badges and incidents of slavery. Every law student learns that it is the *states*, not the federal government, that retain the general “police power” to regulate for the

7. *Id.*

8. DYSON, *supra* note 1 at 47.

9. Biden, *supra* note 2.

10. Michael A. Lawrence, *The Thirteenth Amendment as Basis for Racial Truth & Reconciliation*, 62 ARIZ. L. REV. 637 (2020) (discussing the Thirteenth Amendment’s potential for advancing meaningful racial justice reform).

11. Michael A. Lawrence, *Racial Justice Demands Truth & Reconciliation*, 80 U. PITT. L. REV. 69, 72 (2018) (detailing the history of four centuries of racial injustice in North America; discussing the need for remediation; and providing examples of local, state, and international truth and reconciliation processes).

12. *See infra* notes 20-289 and accompanying text; *see also* Lawrence, *Thirteenth Amendment*, *supra* note 10, at notes 25-59 and accompanying text.

13. *See infra* notes 29-445 and accompanying text; *see also* Lawrence, *Thirteenth Amendment*, *supra* note 10, at notes 92-187 and accompanying text.

14. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

health, safety, and welfare of the citizenry. And it is a dominant lodestar of conservative jurisprudence that guides courts to accord great respect and deference to state sovereignty and states' rights with respect to the states' police power prerogatives. So there is strong reason for the judiciary to apply the highest possible measure of deference to states' actions seeking to eradicate once and for all what they have identified to be the badges and incidents of slavery; and, correspondingly, there is little reason for courts to interfere with those actions.¹⁵

* * *

The Thirteenth Amendment, part of the Reconstruction Amendments, provides:

Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

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

Historian Eric Foner, the dean of Reconstruction studies, suggests in a new book, *The Second Founding*, that the changes brought about by the three constitutional amendments (the Thirteenth, Fourteenth, and Fifteenth) ratified during the Reconstruction era (the decade or so following the Civil War) were so profound that they “should be seen not simply as an alteration of an existing structure but as a ‘second founding,’ a ‘constitutional revolution’ . . . that created a fundamentally new document with a new definition of both the status of blacks and the rights of all Americans.”¹⁶ Professor Foner’s study describes how the amendments are evidence of “the rapid evolution of thinking in which previously distinct categories of natural, civil, political, and social rights merged into a more diffuse, more modern idea of citizens’ rights.” More importantly for present purposes, Foner suggests that “*more robust interpretations of the amendments are possible, as plausible, if not more*

15. See *infra* notes 29-44 and accompanying text.

16. ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* xx (2019).

so, in terms of the historical record, than how the Supreme Court has in fact construed them.”¹⁷

It is true that over time the Supreme Court largely has been no friend to racial justice and equity.¹⁸ And it is not just the Supreme Court of old—of *Dred Scott* (1856), *Plessy v. Ferguson* (1896), or even *Korematsu* (1944) infamy¹⁹—that earn these low marks. It is the Supreme Court of today, of the modern twenty-first century that still turns a blind eye to the realities, on the ground, of systemic racial injustice. It is the Supreme Court of 2007, for example, striking down as unconstitutional two K-12 school districts’ racial balancing plans that had been designed to comply with the mandate to develop desegregation plans from *Brown v. Board of Education* fifty years earlier, stating, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²⁰ And it is the Supreme Court of 2013, holding that Congress’s exercise of its Fifteenth Amendment Section 2 enforcement power in reauthorizing a key portion of the Voting Rights Act of 1965 did not meet (a watered-down version of) rational basis review—notwithstanding an overwhelmingly bipartisan vote in Congress (98–0 in the Senate; 390–33 in the House) and mountains of congressional findings.²¹ (It adds insult to injury, with

17. *Id.* at xxv (emphasis added).

18. An anomalous exception is the period from 1953–1969 when Earl Warren served as Chief Justice, during which time the Court handed down a number of racial justice-friendly decisions, most notably *Brown v. Board of Education* in 1954. 347 U.S. 483 (1954). See generally, e.g., Michael A. Lawrence, *Justice-as-Fairness as Judicial Guiding Principle: Remembering John Rawls and the Warren Court*, 81 BROOK. L. REV. 673 (2016) (describing the equity-based jurisprudence of the Warren Court).

19. *Dred Scott v. Sanford*, 60 U.S. 393 (1857) (holding that a former slave is not a “citizen” entitled to bring a case in federal court); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that “separate but equal” public services do not violate the equal protection clause); *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that Japanese internment camps do not violate the Equal Protection Clause).

20. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007). Justice Stevens responded to Chief Justice Roberts’ reasoning in his dissent:

There is a cruel irony in The Chief Justice’s reliance on our decision in *Brown v. Board of Education*. The first sentence in the concluding paragraph of his opinion states: “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin.” This sentence reminds me of Anatole France’s observation: “[T]he majestic equality of the law, . . . forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.” The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, The Chief Justice rewrites the history of one of this Court’s most important decisions.

Id. at 798–99 (Stevens, J., dissenting) (citations omitted).

21. See *Shelby County v. Holder*, 570 U.S. 529, 550–51 (2013) (concluding that the statute was “[no longer] rational in both practice and theory”). This despite the fact that the

respect to the Court's future prospects regarding racial justice, to note that these two later cases were both decided even before the addition of three more conservative justices to the Court in 2017, 2018, and 2020.)²²

This Lochnerian sort of judicial activism is simply inappropriate in a constitutional system based on separation of powers and coequal branches of government. The Court is operating outside of its constitutional guardrails and needs to make a conscious effort to move back into its own lane. Part of that task will be to undertake its interpretive role with greater humility, and with increased recognition of the proper roles of the other players operating within the constitutional framework. A full discussion of the "departmental theory" of constitutional interpretation is beyond the scope of this Essay, but suffice it to say that there are numerous prominent constitutional scholars arguing against the propriety of the modern Court's insistence upon its own concept of strong judicial supremacy.²³

House and Senate Judiciary Committees held 21 hearings . . . [and compiled a 15,000 page] legislative record [that] presents countless 'examples of flagrant racial discrimination.' . . . [and which] was described by the Chairman of the House Judiciary Committee as "one of the most extensive considerations" of any piece of legislation that the United States Congress has dealt with in the 27 years' he had served in the House.

Id. at 565–93 (Ginsberg, J., dissenting) (stating the majority's decision to "[t]hrow[] out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet"). *See also*, Lawrence, *Thirteenth Amendment*, *supra* note 10, at note 163 and accompanying text.

22. Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett were confirmed as associate justices to the U.S. Supreme Court in 2017, 2018 and 2020, respectively.

23. *See, e.g.*, Tabatha Abu El-Haj, *Linking the Questions: Judicial Supremacy as a Matter of Constitutional Interpretation*, 89 WASH. U. L. REV. 1309, 1317-1322 (2012) (stating that nowhere does the Constitution designate the Court as its exclusive interpreter:

Scholars of popular constitutionalism have turned to history to show that judicial supremacy is not inevitable. . . . By the early nineteenth century, the departmental theory emerged as the dominant [competing theory]. From James Madison to Franklin Delano Roosevelt, a series of Presidents and prominent constitutional thinkers took the view that each department of government had been granted an independent responsibility to interpret the Constitution. . . . Each branch would be a check against the potential tyranny of the others, and the public would ultimately adjudicate, including at the polls.

Moreover, with respect to Philip Bobbitt's commonly-discussed six modalities of constitutional interpretation - historical, textual, structural, doctrinal, prudential, and ethical:

[T]he judiciary is uniquely situated only with respect to some. . . . The Court's claim to expertise is strongest when it is engaging in interpretive modalities for which lawyers are uniquely trained and the judicial forum is particularly well suited. . . . The Court's claim to interpretive expertise is at its lowest ebb when it resolves constitutional ambiguity through interpretive modalities for which lawyers are not uniquely trained. Specifically, where the Court's interpretation of the Constitution ultimately rests on prudential and ethical argument, it lacks a special claim to interpretive expertise. Nonjudicial actors are at least as good at making these sorts of arguments about the Constitution, if not better. Prudential arguments are essentially policy arguments. They are arguments about the consequences of competing constitutional rules, and they turn on empirical facts. Policy arguments are a regular feature of legislative hearings as well as official and private

Indeed, according to Eric Foner, “in terms of the historical record, . . . more robust interpretations of the amendments are [at least as] plausible” as the interpretations heretofore made by the Supreme Court. His assessment mirrors and echoes that of many constitutional scholars whose studies also conclude that the Reconstruction Amendments are powerful tools provided within our constitutional framework that can be validly utilized by governmental entities at all levels to enact meaningful measures designed to achieve greater racial justice and equity.

To give just one prominent example, Yale Law Professor Jack Balkin argues that all three of the Reconstruction Amendments are entitled to high deference under the well-understood and long-accepted principle first set down by Chief Justice John Marshall in *McCulloch v. Maryland*: “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are *appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are Constitutional.”²⁴ “The framers of the Reconstruction Amendments sought to ensure that the test of *McCulloch* would apply to the new powers created by the Reconstruction Amendments,” Balkin explains; “that is why they included the word ‘appropriate’ in the text of all three enforcement clauses.”²⁵

As briefly discussed above, however, over time, the Supreme Court has not adhered to the deferential *McCulloch*-based understanding.²⁶ The fact that a majority on the Supreme Court has repeatedly failed to honor the constitutional design does not mean the constitutional design

legislative debates. Similarly, the Executive, especially its administrative arm, has both expertise and experience in empirical, consequentialist reasoning as well as established procedures and forums. . . . Judges, by contrast are not particularly well positioned to adjudicate policy debates, lacking both technical experience.

Id. at 1332-1335 (citing Philip Bobbitt, *The Modalities of Constitutional Argument*, CONSTITUTIONAL INTERPRETATION 12-22 (1991)). An awareness of departmental theory by the Supreme Court would be most beneficial. Specifically, the Court would understand that it will always retain the “first crack” at an issue under our concept of judicial review, but the Court would also be aware of its own inherent limitations and maintain proper humility about its own circumscribed role in a system based on separation of powers among co-equal branches of government.

24. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) (emphasis added). The Court was speaking in reference to the scope of Congress’s power under the Necessary and Proper Clause of the U.S. Constitution. See Jack Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1807, 1811 (2010); see also Lawrence, *Thirteenth Amendment*, *supra* note 10, at notes 169-183 and accompanying text.

25. Jack Balkin, *supra* note 24, at 1807; see also Akhil Amar, *An(Other) Afterword on the Bill of Rights*, 87 GEO. L. J. 2347, 2352 (1999) (“The framers of these Amendments said again and again that Congress should have the same broad enforcement power here that the antebellum Court had affirmed under the Necessary and Proper Clause in cases like *McCulloch* and *Prigg*.”).

26. See *supra* notes 24-25 and accompanying text.

disappears, however. “The statesmen who drafted the Reconstruction Amendments gave Congress independent enforcement powers because they feared that the Supreme Court would prove an unreliable guarantor of liberty and equality. Their fears were proved correct. Time and again, the Supreme Court hobbled Congress’s enforcement powers through specious technicalities and artificial distinctions,” Balkin notes.²⁷ “These limitations are not required either by the Constitution’s original meaning or by principles of federalism. Quite the contrary: Fidelity to text, structure, and history gives Congress broad authority to protect equal citizenship and equality before the law,” he concludes, asserting, “[i]t is long past time to remedy the Supreme Court’s errors, and reconstruct the great Reconstruction Power of the Constitution.”²⁸

Among the Reconstruction Amendments, the Thirteenth, in some important respects, stands separate from the Fourteenth and Fifteenth Amendments. Specifically with regard to the Supreme Court’s consideration of the three amendments, on the rare occasions when the Court has spoken in any depth on the Thirteenth Amendment—principally the *Civil Rights Cases* (1883)²⁹ and *Jones v. Alfred Mayer* (1968)³⁰—it has described in broad terms Congress’s plenary authority to define and regulate “badges and incidents of slavery.”

Moreover, there are compelling textual and structural arguments that Congress’s Thirteenth Amendment enforcement authority stands separate, even when compared to the analogous provisions in the other two Reconstruction Amendments. First, the Thirteenth Amendment is the only one of the three whose Section 1 rights-protecting text is free of any sort of limiting component,³¹ stating simply: “Neither slavery nor

27. Balkin, *supra* note 24, at 1861.

28. *Id.*

29. *Civil Rights Cases*, 109 U.S. 3 (1883) (holding that Congress has power under the Thirteenth Amendment to regulate “badges and incidents” of slavery).

30. *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968) (reaffirming that “[s]urely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”).

31. The Thirteenth Amendment does provide one caveat, allowing for involuntary servitude in the case of “punishment for crime whereof the party shall have been duly convicted.” Tragically, this caveat itself has been devastatingly weaponized against people of color. *See, e.g.*, 13TH (Netflix 2016) (documenting the history of how the “duly convicted” clause has been disproportionately applied against people of color); *see also* Symposium, *Trauma, Policing & The 13th Amendment: The Long Arc to Freedom*, Univ. of Calif.-Irvine 2019, <https://www.law.uci.edu/centers/cbghp/activities/022219-Trauma-Policing-13th-A-Draft-Schedule.pdf> (discussing “how the legacy of the Thirteenth Amendment both liberates through the abolition of slavery and yet serves as a tool to exploit the vulnerable by permitting slavery so long as an individual is convicted of a crime”).

involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.”³²

Both of the others extend their protections only against *government* abridgment:³³ Section 1 of the Fourteenth Amendment provides:

No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property, without due process of law; nor [shall any *State*] deny to any person within its jurisdiction the equal protection of the laws.³⁴

And Section 1 of the Fifteenth Amendment reads, “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.”³⁵ Arguably this textual distinction can explain the federalism concerns that dominated the Court’s reasoning in *City of Boerne v. Flores* (Fourteenth Amendment) and *Shelby County v. Holder* (Fifteenth Amendment). In *Boerne*, for example, regarding Congress’s exercise of its Fourteenth Amendment enforcement power, the Court says, “RFRA’s sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description,” and so the Court imposes a heavier burden on Congress to demonstrate the statute is “congruent and proportional.”³⁶ The Court placed significant weight on the Amendment’s legislative history—*i.e.*, during the drafting process, the framers intentionally narrowed the scope of the Section 5 enforcement power—to justify imposing greater restrictions on Congress today. Specifically, the Court pointed out, after the Amendment’s opponents had argued during the debates “that the proposed Amendment would give Congress power to intrude into traditional areas of state responsibility, a power inconsistent with the design central to the Constitution, . . . [u]nder the [subsequently] revised Amendment, Congress’s power was no longer plenary but remedial.”³⁷

32. U.S. CONST. amend. XIII, § 1.

33. Accordingly, Congress is able to reach *private* action only through the Thirteenth Amendment.

34. U.S. CONST. amend. XIV, § 1 (emphasis added).

35. U.S. CONST. amend. XV, § 1 (emphasis added).

36. The Court explained that in Section 5 cases Congress must demonstrate “a congruence and proportionality between the injury to be prevented or remedied and the means to that end,” rather than meet the traditional deferential rational basis standard of review. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

37. *Id.* at 520–22.

Similarly, in *Shelby County*, in striking down Congress's exercise of its Fifteenth Amendment Section 2 enforcement power, the Court focused heavily on the harms done to notions of state sovereignty by the 2006 reauthorization of the Voting Rights Act.³⁸ "The Framers of the Constitution," the Court explained, "intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections."³⁹ Moreover, in a passage whose very length is instructive in demonstrating the weight the Court attached to the sovereignty issue, it added:

States retain broad autonomy in structuring their governments and pursuing legislative objectives. . . . This "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." . . . [F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power. . . . Not only do States retain sovereignty under the Constitution, there is also a "fundamental principle of equal sovereignty" among the States. . . . The Voting Rights Act sharply departs from these basic principles. It suspends "all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C." States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own. . . . And despite the tradition of equal sovereignty, the Act applies to only nine States. . . .⁴⁰

By contrast, the Thirteenth Amendment has no such baggage. Besides lacking any textual reference to "States," the Amendment's legislative history is clean as well. While its opponents, mostly Southern Democrats, certainly opposed the imposition of the Amendment's constraints on the states, they lost the debate. Simply put, no opposition views on the matter of federalism—protecting states from the Amendment—managed to carry the day during the Thirteenth Amendment debates.⁴¹ Instead, the Amendment's proponents' views prevailed, as expressed by Senator Trumbull, who brought the Amendment to the floor in 1864: "[T]he second clause . . . says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery," the Court stated in 1968, quoting from the contemporaneous *Congressional Globe*. "Congress [may] adopt

38. *Shelby County v. Holder*, 570 U.S. 529, 543–44 (2013).

39. *Id.* at 543.

40. *Id.* at 543–44 (internal citations omitted).

41. See generally James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 433–34 (2018).

such appropriate legislation as it may think proper, so that it be a means to accomplish the end.”⁴²

The Court added: “Surely Senator Trumbull was right. Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”⁴³ Moreover, none of the Thirteenth Amendment cases have expressed the federalism concerns expressed in cases involving the other two amendments.

In sum, in terms of original intent and original understanding, it is clear that the framers of the Thirteenth Amendment managed to prevail with their vision of a broad Section 2 enforcement power, whereas the framers of at least the Fourteenth had to scale back their original broader vision. And given the fact that the Thirteenth Amendment is broader in scope—*i.e.*, it applies to *all* action, public and private, whereas the other two Amendments are limited solely to *state* action—one may reasonably conclude that it inherently presents fewer direct federalism concerns. Accordingly, there is little or no basis for the Court to intrude upon Congress’s Thirteenth Amendment authority.⁴⁴

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42. Jones v. Alfred Mayer Co., 392 U.S. 409, 440 (1968) (quoting Cong. Globe, 39th Cong., 1st Sess., 322).

43. *Id.* at 441.

44. See also Lawrence, *Thirteenth Amendment*, *supra* note 10, at notes 169-83 and accompanying text.

The second textual and structural argument that Congress’s Thirteenth Amendment enforcement authority stands alone, is novel and untested. Nevertheless, it goes like this: The Thirteenth Amendment’s Section 1 rights-protecting text makes no reference to “law” (“neither slavery nor involuntary servitude . . . shall exist within the United States”); whereas the Due Process and Equal Protection Clauses of Section 1 of the Fourteenth Amendment *do* speak of “law” (“nor shall any State deprive any person of life, liberty, or property, without due process of law;” and “nor deny to any person within its jurisdiction the equal protection of the law.”). Here, it makes interpretive sense that the judiciary, as the Constitution’s expositor of “what the law is” (*Marbury v. Madison*, 5 U.S. 137, 177 (1803) (emphasis added) (stating, “It is emphatically the province and duty of the judicial department to say what the law is.”)) would have some proper role in determining the scope of Congress’s enforcement of a textual provision that requires either “due process of law” or “equal protection of the laws.” By contrast, because the Thirteenth Amendment text speaks nowhere of “law(s),” it also makes interpretive sense that the judiciary’s role would be more circumscribed in such cases. Stated another way, this textual distinction arguably makes a difference in the relative scope of Congress’s power in the two provisions: Congress’s Thirteenth Amendment enforcement power is entitled to the heaviest possible deference by the judiciary; whereas the Court perhaps has more basis to review Congress’s Fourteenth Amendment enforcement power.

Where does all of this leave us today as we strive to move toward a more racially-just society? Professor Foner's recent observations from the professional historian's perspective are important, albeit sobering:

More recently, we have experienced a slow retreat from the ideal of racial equality. We live at a moment in some ways not unlike the 1890s and early twentieth century, when state governments, with the acquiescence of the Supreme Court, stripped black men of the right to vote and effectively nullified the constitutional promise of equality. . . . As history shows, progress is not necessarily linear or permanent. But neither is retrogression.⁴⁵

So while the road may seem blocked against racial justice and equity at the moment, because retrogression is “not necessarily linear or permanent,” we may hope that there *is* a path for progress—and the Thirteenth Amendment may indeed provide an avenue by which federal and state lawmakers may proceed, and open an off-ramp of sorts for the Supreme Court from the confining strictures of its Fourteenth Amendment equal protection doctrine.

Even though the Reconstruction amendments have not (yet) been interpreted to achieve their full potential by the Supreme Court, they still remain an enduring “declaration of popular rights. They retain unused latent power that, *in a different political environment, may yet be employed to implement in new ways the Reconstruction vision of equal citizenship for all.*”⁴⁶

Who knows? Maybe this precise moment in time—2021—is the sort of “different political environment” Professor Foner imagines. Specifically, now that Democrats control both Congress and the Presidency,⁴⁷ perhaps they can muster the political will to employ the always-available, but as-yet-unused, tool of the Thirteenth Amendment “to implement in new ways the Reconstruction vision of [Black] equal citizenship.”⁴⁸ And the Supreme Court, for its part, would then stay within its own constitutional guardrails to allow Congress to exercise its plenary power to erase the badges and incidents of slavery by whatever rational terms Congress might determine—as the framers of the Thirteenth Amendment originally intended.

45. FONER, *supra* note 16, at xxix.

46. *Id.* (emphasis added).

47. One can imagine that this would be an issue that some Republicans would support as well.

48. FONER, *supra* note 16, at xxix.

In sum, Professor Foner’s lifetime project of studying the history of the Reconstruction era, together with the work of many other historians and constitutional scholars, has demonstrated that the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments—the Republican majorities in Congress at the time—intended nothing short of a “‘constitutional revolution’ . . . that created a fundamentally new document with a new definition of both the status of blacks and the rights of all Americans.”⁴⁹ And, especially with regard to the Thirteenth Amendment, the framers intended that Congress should have plenary “power to enforce this article with appropriate legislation”⁵⁰—a constitutional delegation of authority expressly acknowledged and accepted by the Supreme Court.⁵¹

49. *Id.* at xx.

50. U.S. CONST. amend. XIII, § 2.

51. *See supra* notes 42-43 and accompanying text. It seems eminently reasonable that at least some of the three newest justices on the Supreme Court, *see supra* note 22, all of whom prominently identify as “originalists,” would acknowledge the original intent of the Thirteenth Amendment’s framers to delegate to Congress the broad authority to legislate to advance racial equity—especially when the Supreme Court’s own precedent has established the same: “Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.” *Jones*, 392 U.S. at 441. If so, those two, three (or more) conservative justices would then join the three liberal justices (presumably) in deferring to Congress’s authority and upholding its legislation. State and local governments could follow suit with legislation of their own seeking to promote racial equity by erasing the badges and incidents of slavery, and the Court would likewise honor their inherent sovereign police power prerogatives to regulate for the public health, safety and welfare.