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Dawinder S. Sidhu

University of New Mexico - School of Law

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THE UNCONSTITUTIONALITY OF URBAN POVERTY

*Dawinder S. Sidhu**

INTRODUCTION

The founding generation, stung and aggrieved by “a history of repeated injuries and usurpations” in England,¹ laid down a charter of laws that placed a robust set of individual liberties beyond governmental intrusion or interference.² Thomas Jefferson termed the United States an “empire of liberty” that would safeguard and perpetually restore individual freedoms to the extent that they weakened in any area of the nation.³ This Article argues that the nation has breached this vital promise as liberty in urban areas has fallen below a constitutional minimum, and that the Thirteenth Amendment to the U.S. Constitution requires Congress to refresh liberty in these settings, consistent with Jefferson’s command and the Constitution’s guarantees.

Urban America is occupied by the “urban underclass”—the marginalized poor in America’s inner cities.⁴ Members of the urban

* Assistant Professor of Law and Regents’ Lecturer, University of New Mexico School of Law; J.D., The George Washington University; M.A., Johns Hopkins University; B.A., University of Pennsylvania. This Article grew out of and drew inspiration from the 2011 Law and Society annual conference, which was presided over by my mentor and colleague, Laura Gomez. Though I benefited from many in preparing this Article, I especially thank Anthony Alfieri, Matthew Bernstein, Samuel Bray, Camille Carey, William M. Carter, Jr., Paul Finkelman, Anil Kalhan, Ernesto Longa, Vanessa Lovelace, Douglas Massey, Max Minzner, James Pope, Andre L. Smith, Robert J. Smith, and the attendees of the Mid-Atlantic People of Color Conference at the University of Pennsylvania Law School for their insights, information, and encouragement; the staff of the *DePaul Law Review* for improving the quality and readability of this Article; Kara Dorr and Douglas Spoerl for their research assistance; the faculty and administration of the University of New Mexico School of Law for their generous assistance and support; and my family for their love. Any substantive errors rest with me and are regretted.

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

2. See *Engel v. Vitale*, 370 U.S. 421, 433 (1962) (“It was in large part to get completely away from . . . systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights . . .”).

3. See JOSEPH J. ELLIS, *AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC* 228 (2007) (“‘By enlarging the empire of liberty,’ Jefferson wrote, ‘we multiply its auxiliaries, and provide new sources of renovation, should its principles at any time degenerate in those portions of our country which gave them birth.’”).

4. I am aware of the unease that some have with respect to the terms “inner city” and “underclass.” See, e.g., Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1064 (1996) (“[F]ear of what is euphemistically called ‘the inner city’—a fear that has fueled the migration to

underclass are, generally defined, those who are economically impoverished, spatially relegated to ghettos,⁵ disproportionately African-American, subjected to discriminatory policies, and lacking prospects for social or physical advancement. They are a forgotten stratum of society—those on the fringe of both society and society's physical space. Violence and substance abuse are regular features of their experience, notwithstanding government programs designed to address these aspects of urban life. Consisting mainly of African-Americans and other minorities,⁶ members of the urban underclass are often the targets of race-based discrimination and race-conscious selective policing.⁷ Institutional shortcomings, entrenched and systemic failures of government programs in urban areas, and a related neglect as to the negative effects of these programs serve to perpetuate their economic station and fix their physical location.

As a result of the limited opportunities within these areas and the impact of these entrenched and systemic problems, members of the urban underclass are unable to be economically viable members of mainstream society (what may be termed "vertical liberty"), or to es-

the suburbs—has been a reference to the black poor."); *id.* at n.72 ("[T]he term 'underclass' . . . conveys a fearsome racial image . . ."); David Dante Troutt, *Ghettos Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427, 466 n.182 (2000) (expressing discomfort with the term "urban underclass" because it has been externally imposed on, rather than internally chosen by, "those who reside in inner-city ghettos"). I use "inner city" in a purely descriptive sense, to refer to certain space in American society, specifically urban areas where poverty, measured objectively according to federal baselines and comparatively as to surrounding regions, happens to be concentrated as a matter of undisputed fact. Similarly, the term "underclass," defined more fully in Part I.A., *infra*, is useful in that it conveys the subordinate economic and spatial position to which its members are relegated in the stratified America. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 142 (5th prtg. 1993) ("[T]he term [underclass] connotes people who are mired in poverty and unable to escape it."); see also WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 156 (2d ed. 1980) [hereinafter WILSON, *THE DECLINING SIGNIFICANCE OF RACE*] (explaining that the underclass are those positioned outside of mainstream society and are those at "the very bottom of the economic hierarchy"). Admittedly, no alternative to the term "underclass" is without complications. See, e.g., Bill E. Lawson, *Meditations on Integration*, in *THE UNDERCLASS QUESTION*, 1, 6 (Bill E. Lawson ed., 1992) (identifying problems with "ghetto poor" as a preferred term over "underclass"). The problem is not terminology, but rather that there are significantly poor individuals in our inner cities disconnected economically and spatially from mainstream society. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 6-8 (1987) [hereinafter WILSON, *THE TRULY DISADVANTAGED*].

5. "Ghetto" is interchangeable with "inner city" for purposes of this Article, a definitional practice, or shorthand, which is not uncommon in legal scholarship. See, e.g., Michelle Adams, *Separate and [Un]equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 422 n.24 (1996).

6. See *infra* notes 52-56 and accompanying text.

7. See *infra* notes 57-76 and accompanying text.

cape the geographic areas in which they live (what may be termed “horizontal liberty”).⁸ The specific absence of that which is needed to attain meaningful membership in modern American society suggests that today’s heterogeneous urban underclass has become, in effect, the modern iteration of the Negroes of the antebellum period. The want of sufficient *de facto* (practical) liberty, despite the possession of *de jure* (formal) liberty, is of constitutional significance.

In particular, the conditions of the urban underclass implicate the Thirteenth Amendment, which was ratified in 1865 in the wake of the Civil War and specifically prohibits the institution of slavery in the United States. Its text provides that “[n]either 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.”⁹ It further states that “Congress shall have power to enforce this article by appropriate legislation.”¹⁰

The Thirteenth Amendment’s seemingly straightforward command does not yield a simple, clear construction.¹¹ While the Amendment was designed to eliminate the slavery of Africans and their descendants, the Amendment’s own terms do not dictate whether it concerns, for example, only slavery or involuntary servitude as to Africans or African-Americans; the lingering consequences of slavery as felt by Africans or African-Americans; slavery or involuntary servitude as to anyone regardless of race or their relationship to nineteenth-century slavery; the remnants of slavery as encountered by anyone regardless of race or their relationship to nineteenth-century slavery; or any form of discrimination oppression, or subjugation.¹²

The Thirteenth Amendment, despite its indeterminacy, has been interpreted to possess a rather expansive scope. For example, scholars have read the Amendment to encompass human trafficking,¹³ hate

8. Prominent sociologist William Julius Wilson discussed “vertical and horizontal mobility,” much in the same sense that I speak of vertical and horizontal liberty. See WILSON, *THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 4, at 24.

9. U.S. CONST. amend. XIII, § 1.

10. *Id.* § 2.

11. See Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 577 (2002) (explaining that the Amendment intentionally contained ambiguous language to make it more politically attractive to a larger coalition and thereby ensure its passage).

12. See *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (expressing concern that the Thirteenth Amendment should not be stretched to reach beyond slavery to every possible form of discrimination or social wrong).

13. See Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981 (2002).

speech,¹⁴ child abuse,¹⁵ violence against women,¹⁶ abortion,¹⁷ the citizenship of children of immigrants,¹⁸ the autonomy of American workers,¹⁹ and U.S. corporations' exploitation of foreign laborers.²⁰ More relevant to this Article, scholars have also read the Amendment to cover racial profiling,²¹ limited housing opportunities,²² limited educational opportunities,²³ and the ability to travel.²⁴ It appears that this second subset of issues, while significant in and of itself, contains but components and symptoms of a larger problem: the continued existence of an urban underclass, which activates the Thirteenth Amendment's requirements.

This Article argues that the Thirteenth Amendment is a proper federal vehicle for correcting the conditions of the urban underclass. The Amendment, I posit, contemplates federal intervention in the state and local governments' handling of its most troubled areas. Such federal involvement is appropriate because those responsible for these physical areas have not ensured that their residents have the necessary predicates for full and independent participation in society. The Thirteenth Amendment, in other words, supports the federal govern-

14. See Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124 (1992).

15. See Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359 (1992).

16. See Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097 (1998).

17. See Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990).

18. See, e.g., Garrett Epps, *The Citizenship Clause: "A Legislative History"*, 60 AM. U. L. REV. 331, 389 (2010) ("[T]he proposition that the United States should alter its constitutional system to create a large internal population of native-born noncitizens, a hereditary subordinate caste of persons who are subjected to American law but do not belong to American society . . . looks very much like an old status that was supposedly cured by the Thirteenth Amendment.").

19. See Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438 (1989).

20. See Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973 (2002).

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

22. See Adams, *supra* note 5.

23. See Brief for Howard University as Amici Curiae Supporting Petitioners, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 189518 (arguing that the Thirteenth Amendment entitles African-Americans to preferential admissions in higher education); see also Rodric B. Schoen, *Nationalization of Public Education: The Constitutional Question*, 4 TEX. TECH L. REV. 63, 115 (1972) (arguing that the Thirteenth Amendment supports a federal guarantee of free public education); Derrick B. Reese, Comment, *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995): "The Quest for Equal Opportunity to a Quality Education," T. MARSHALL L. REV., Symposium 1996, at 125, 148-49.

24. See Griffin v. Breckenridge, 403 U.S. 88, 105-06 (1971) (holding that Congress may, pursuant to the Thirteenth Amendment, protect the right to interstate travel).

ment's establishment of a minimum floor of economic and educational conditions such that the urban underclass may possess meaningful horizontal and vertical liberty, as defined in this Article.

As a preliminary matter, it is critical to note that the term "urban underclass" is not an abstraction or hypothetical description of some amorphous, unidentifiable people—the urban underclass consists of real individuals in the United States. Moreover, this Article is not about a theory of constitutional law, but rather a legal means by which to address the conditions faced by the urban underclass.²⁵

I develop this argument in three steps. In Part II, drawing on sociological studies, I explore the factual characteristics of the urban underclass—its significant poverty; concentrated placement in urban settings; isolation from mainstream economic society; generational inheritance and passing on of poverty; disproportionate composition of people of color, especially African-Americans; experiences with public and private discrimination; and structural causes. In Part III, I present an overview of the Thirteenth Amendment, highlighting key Supreme Court cases and seminal articles interpreting both its meaning and its scope.

In Part IV, I translate the sociological findings of Part I into a legal argument under the Thirteenth Amendment as described in Part III. Specifically, I argue that the urban underclass's circumstances justify the imposition of federal remedial action under the Thirteenth Amendment, and that Congress should implement such action under its ample enforcement power. Part IV also responds to potential criticism, specifically, whether such relief is a mere proxy for welfare or government entitlements; whether such relief overlooks or discounts personal responsibility as a cause for the urban underclass's woes; whether such relief would comport with the Court's more stringent view of Congress's remedial authority in the Fourteenth Amendment context; whether such group-centric relief is impermissibly over inclusive; and, finally, whether the Commerce Clause is a more suitable

25. This Article thus aims to be contrasted with Felix Frankfurter's observation that "[t]he talk about the Thirteenth Amendment . . . is too silly for any practical lawyer's use." See James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 40 (2002) (internal quotation marks omitted). It also aims to be contrasted with legal theory that is irrelevant or harmful to social progress. See generally Dawinder S. Sidhu, *A Crisis of Confidence and Legal Theory: Why the Economic Downturn Should Help Signal the End of the Doctrine of Efficient Breach*, 24 GEO. J. LEGAL ETHICS 357 (2011) (criticizing the doctrine of efficient breach as being virtually useless to real-world contracting situations, and as contributing to an ethos that promotes socially and economically destructive behavior).

source of power for congressional action in urban areas. Part V concludes this Article.

Before proceeding, it is important to distinguish the present inquiry from the recent grassroots response to economic inequality and corporate greed, otherwise known as “Occupy Wall Street.”²⁶ This movement finds its origins primarily in the contemporary behavior of Wall Street banks and corporate officers who are alleged to have enriched themselves (illegally or imprudently) while the rest of society has been pushed further down the path of economic insecurity.²⁷ It seems to be a cathartic reaction to the growing distance between the very wealthy and all others, and to the regulatory “free pass” given to Wall Street banks and executives.²⁸ This Article is not about inequality or unfairness; it is about unconstitutionality and it is about those within urban areas whose economic and social conditions have fallen below a minimal threshold. It is about those who have been without meaningful liberty for generations, long before the current recession and Wall Street actions sufficiently agitated the “99%” into action.²⁹

II. THE URBAN UNDERCLASS

The “urban underclass” consists of members of American society who are generally extremely poor, spatially confined to depressed metropolitan areas, disproportionately African-American, and subject to public and private discriminatory policies, programs, and practices. Due to entrenched political and social frameworks, they lack the prospects necessary to change their adverse economic, social, or physical status. These institutional and structural constraints effectively predetermine their fate and handicap the fate of future generations. The purpose of this Part is to describe these characteristics in greater detail

26. See Colum Lynch, *NYC Demonstrations Spur Protests in Other U.S. Cities*, WASH. POST, Oct. 4, 2011, at A1 (describing the origins and message of “Occupy Wall Street”).

27. See *id.*

28. See *id.*

29. See generally Stacey Patton, Op-Ed, *Why African Americans Aren’t Embracing Occupy Wall Street*, WASH. POST, Nov. 25, 2011, http://www.washingtonpost.com/opinions/why-blacks-arent-embracing-occupy-wall-street/2011/11/16/gIQAwc3FwN_story.html (commenting on the contrast between “the income inequality and job scarcity that the Wall Street protesters are now railing against” with Black America’s historical and ongoing struggle for “day-to-day survival”). Of course, I do not by any means suggest or imply that the absence of social mobility is confined to the urban poor. See Fareed Zakaria, Op-Ed, *The Downward Path of Upward Mobility*, WASH. POST, Nov. 9, 2011, http://www.washingtonpost.com/opinions/the-downward-path-of-upward-mobility/2011/11/09/gIQAegpS6M_story.html (“[O]ver the past decade, growing evidence shows pretty conclusively that social mobility has stalled in this country.”).

and discuss their causes and their consequences for the urban underclass.³⁰

A. *General Characteristics*

The first signature quality of the urban underclass relates to its economic status—the urban underclass is marked by significant poverty. An individual may be classified as poor if he or she has “income less than that deemed sufficient to purchase basic needs of food, shelter, clothing, and other essential goods and services.”³¹ In real terms, an individual is poor, under the latest federal poverty guidelines, if he or she has an annual income of less than \$10,890.³² Members of the urban underclass fall well below this threshold. For example, in Chicago’s Robert Taylor Homes—once “the largest continuous stretch of public housing in the nation, [with] six of the United States’ [ten] poorest areas with populations of at least 2,500”—“41[%] of adult residents had incomes of less than \$5,000 a year.”³³

The statistics speak volumes about the economic situation of the underclass, though it is difficult to picture or appreciate their poverty through numbers alone. In his compelling account of life in Chicago’s projects, Professor Sudhir Venkatesh described his experience in the Robert Taylor Homes, which he called “the epitome of an ‘underclass’ urban neighborhood, with the poor living hard and virtually separate lives from the mainstream.”³⁴ As part of his research, Professor Venkatesh came upon an “apartment without a front door,” where he was “hit by a noxious odor of vomit, urine, and burned crack. . . . There were several mattresses spread about, some with bodies on them, and piles of dirty clothing and fast-food wrappers. The holes in the walls were stuffed with rags to keep out the rats.”³⁵ This depiction provides a brief window into the underclass’s existence.³⁶ Pervasive

30. The characteristics, causes, and consequences overlap and are not completely separable; however, for ease of discussion, I have broken this Part into these three sections.

31. U.S. DEP’T OF AGRIC., *RURAL POVERTY AT A GLANCE* 6 (2004), available at <http://www.ers.usda.gov/publications/rdr100/rdr100.pdf>.

32. Annual Update of the HHS Poverty Guidelines, 76 Fed. Reg. 3637, 3638 (filed Jan. 19, 2011).

33. Rick Kogan, *The Projects Project*, CHI. TRIB., Aug. 24, 2008, § 10 (Magazine), at 5. While the 2011 federal poverty lines are new, they still provide a useful baseline by which to assess the extent to which those in the underclass are financially impoverished.

34. SUDHIR VENKATESH, *GANG LEADER FOR A DAY: A ROGUE SOCIOLOGIST TAKES TO THE STREETS* 38 (2008).

35. *Id.* at 50.

36. In a speech on poverty, Professor Randall Kennedy offered a fuller account of poverty’s practical consequences:

[Poverty means] being dependent upon financial institutions, pay-day loan outputs that charge serious fees to service those unable to afford bank accounts; living in housing

drug trade, violence, prostitution, squatting, and a general sense of despair were all regular features of the Robert Taylor Homes, and therefore help illustrate the condition of the underclass.³⁷

Second, while such poverty is not exclusive to any specific area, the urban underclass is found in, and relegated to, metropolitan areas in which poverty is concentrated. "Areas of concentrated poverty are typically defined in the sociological literature as census tract areas where 40[%] or more of the residents live in households at or below the federal poverty line."³⁸ As examples of concentrated poverty, according to figures from 2000, in Atlanta, Georgia, 35.8% of the poor lived in areas falling under the definition of concentrated poverty, with corresponding percentages of 36.4% for Miami, Florida, and 43.5% for Fresno, California.³⁹ In the same year, Cleveland, Ohio had fifty-two "extreme poverty neighborhoods,"⁴⁰ Los Angeles, California boasted one hundred three, and New York, New York had the highest with two hundred forty-eight.⁴¹

that, with its mold, mice-dropping, roaches and nearby toxic dumps, exacerbates your child's asthma; being unable to pay an ambulance or an emergency bill, and having one's credit downgraded on account of delinquency; living in neighborhoods that are menaced simultaneously by criminals and police, who when dealing with the poor, fail all too often to remember that their job is to protect and serve—not harass and be intimidating; growing up in homes in which uneducated adults fail to prepare children for school in their most impressionable years; welcoming jail or even prison as the respite from the utter destitution of the street.

Randall Kennedy, Michael R. Klein Professor of Law, Harvard Law School, Address at the Center for Social Cohesion Symposium: U.S.'s Deepest Fault Line (2011) [hereinafter Kennedy Address]; cf. Robert J. Sampson & Charles Loeffler, *Punishment's Place: The Local Concentration of Mass Incarceration*, DAEDALUS, Summer 2010, at 20, 20 ("Incarceration in the United States is now so prevalent that it has become a normal life event for many disadvantaged young men . . .").

37. See VENKATESH, *supra* note 34, at 37–38 (noting that a gang, which exercised de facto control over part of the projects, engaged in drug dealing, "extortion, gambling, prostitution, selling stolen property, and countless other schemes."); see also *id.* at 105 (commenting on a drive-by in which a young boy and girl were accidentally shot and killed); *id.* at 8 ("The overriding sentiment was that given how the city operated, there was little chance for any significant social progress.").

38. David A. Dana, *Exclusionary Eminent Domain*, in 17 SUPREME COURT ECONOMY REV. 7, 49 (Ilya Somin & Todd J. Zywicki eds., 2009); see also SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 240 (2004) ("[C]oncentrated poverty [is] the share of poor people living in neighborhoods where at least 40[%] of their neighbors are also poor . . .").

39. ALAN BERUBE & BRUCE KATZ, BROOKINGS INST. METRO. POLICY PROGRAM, *KATRINA'S WINDOW: CONFRONTING CONCENTRATED POVERTY ACROSS AMERICA* app. at 10 (2005), available at http://www.brookings.edu/metro/pubs/20051012_Concentratedpoverty.pdf.

40. *Id.* ("Extreme poverty neighborhoods are census tracts in which at least 40[%] of the population lives in families with incomes below the federal poverty threshold.").

41. *Id.*

The urban poor are concentrated in this fashion not because, as some suggest, the underclass has “group[ed] themselves together according to” their shared personal attributes, attitudes, or inclinations, and end up living in the inner city as a consequence.⁴² Rather, as eminent sociologist William Julius Wilson pointed out, the underclass finds itself in the inner city because the conditions of “disadvantaged neighborhoods” cause poor outcomes for its occupants.⁴³ Put differently, “[t]he primary source of [the underclass’s] subordination stems . . . from geography. Subordination is the result of living away from entry-level jobs and quality schools This is one instance in which one’s actual location literally defines one’s social position.”⁴⁴

The third signature quality of the urban underclass, as a logical consequence of the two aforementioned elements (extreme poverty and the urban locus of the concentrated poor) is that its members are effectively segregated from meaningful economic opportunities to escape their situation. Professor Wilson wrote that “many of the residents of our inner-city ghettos have become physically isolated from places of employment and socially isolated from the informal job networks that are often essential for job placement.”⁴⁵

Fourth, significant urban poverty is likely to be generational in nature.⁴⁶ As Patrick Sharkey discovered, “more than 70% of black children who are raised in the poorest quarter of American neighborhoods will continue to live in the poorest quarter of neigh-

42. WILLIAM JULIUS WILSON, *MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY* 46–47 (2009).

43. *Id.* at 47; see also MASSEY & DENTON, *supra* note 4, at 169 (“It is not a self-perpetuating ‘culture of poverty’ that retards black educational progress but a structurally created and sustained ‘culture of segregation’”). These structural causes are discussed towards the end of this Part.

44. Sergio J. Campos, *Subordination and the Fortuity of Our Circumstances*, 41 U. MICH. J.L. REFORM 585, 613 (2008); see also Reynolds Farley, *The Waning of American Apartheid?*, CONTEXTS, Summer 2011, at 36, 36 (“Where you live . . . determines much about what happens to you and your family, where your children attend school, how easily you can [access] health care (and the quality of that care), your exposure to crime, your opportunities for employment, the quality of your municipal services, your local tax rates, whether your home appreciates in value, and so on.”); Robert J. Sampson, *Racial Stratification and the Durable Tangle of Neighborhood Inequality*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 260, 277 (2009) (“[N]eighborhoods remained remarkably stable in their relative economic standing despite the in-flow and out-flow of individual residents.”); Zakaria, *supra* note 29 (“A student interviewed . . . put it succinctly, ‘The ZIP code you’re born in shouldn’t determine your destiny, but too often it does.’”).

45. WILSON, *supra* note 42, at 10.

46. Anmol Chaddha & William Julius Wilson, “Way Down in the Hole”: Systematic Urban Inequality and The Wire, 38 CRITICAL INQUIRY 164, 164–65 (2011) (“[T]he persistence and durability of concentrated disadvantage [in urban environments] is reproduced across generations.”).

borhoods as adults.”⁴⁷ Accordingly, in Professor Wilson’s words, “the disadvantages of living in poor, black neighborhoods, like the advantages of living in affluent, white neighborhoods, are in large measure inherited.”⁴⁸ For example, “most black families who lived in the poorest neighborhoods in the 1970’s [sic] continue to live in such neighborhoods today.”⁴⁹

The generational impact of severe poverty in the inner city is not news. In 1965, President Johnson said, “If we stand passively by while the center of each city becomes a hive of deprivation, crime and hopelessness . . . if we become two people, the suburban affluent and the urban poor, each filled with mistrust and fear for the other . . . then we shall effectively cripple each generation to come.”⁵⁰ The problem, therefore, as suggested by the concentrated poverty data above, is that generations continue to languish despite the knowledge that urban poverty more or less predetermines the fate of successive individuals.

The fifth signature quality of the urban underclass is that although it possesses no racial criteria for admission, it has an undeniable racial composition. Specifically, the urban underclass consists of people of various races, including Caucasians,⁵¹ though it acutely and disproportionately consists of African-Americans.⁵² Professor Wilson noted,

47. WILSON, *supra* note 42, at 52 (quoting Patrick Sharkey, *The Intergenerational Transmission of Context*, 113 AM. J. SOC. 931, 933 (2008)) (internal quotation marks omitted).

48. *Id.* (paraphrasing Sharkey).

49. *Id.* at 52–53; *see also id.* at 55 (“[T]he vast majority of black families living in America’s poorest neighborhoods come from families that have lived in similar environments for generations . . .” (quoting Patrick Sharkey, *The Intergenerational Transmission of Context*, 113 AM. J. SOC. 931, 964 (2008)) (internal quotation marks omitted)).

50. *America’s Wasted Blacks*, *ECONOMIST*, Mar. 30, 1991, at 11, 12 (alteration in original) (internal quotation marks omitted). The *Economist* further commented, “A generation has passed, and the crippling goes on.” *Id.*

51. The connection is not usually made between Caucasians and poverty despite the fact that, in raw numbers, most of the poor are Caucasians. *See* David D. Troutt, *Katrina’s Window: Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1134 (2008). Blacks are associated with poverty for a variety of reasons, including the fact that African-Americans “account for a disproportionate number of poor people in the United States.” MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* 68 (1999). The mass media tends to focus on blacks in discussions of the poor. *See id.* at 114 (“African Americans have generally dominated news media images of the poor since the late 1960s.”). Meanwhile, the white poor are more spatially diffuse and are therefore not identified with areas of concentrated poverty. *See* PAUL A. JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY* 63 (1997) (“[W]hites are only 18[%] of the concentrated poor, even though they account for more than half of the poor population nationally.”).

52. *See* MASSEY & DENTON, *supra* note 4, at 218 (“However one defines the underclass, it is clear that African Americans are overrepresented within in [sic] it.”); *see also* WILSON, *THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 4, at 154 (“The situation of marginality and redundancy created by the modern industrial society deleteriously affects all the poor, regardless of race. Underclass whites, Hispano-Americans, and native Americans all are victims . . . of class

"Sixty-five percent of the 2.4 million ghetto poor in the United States are black, 22[%] Hispanic, and 13[%] non-Hispanic and other races. Thus, to speak of the ghetto poor in the United States is to refer primarily to blacks and Hispanics."⁵³ To highlight the African-American representation in the urban underclass, consider that 27.1%, 53.2%, and 67.6% of blacks in Philadelphia, Pennsylvania; Louisville, Kentucky; and Miami, Florida, respectively, live in concentrated poverty.⁵⁴ When placed in comparison with the general population, of which blacks comprise 12.6%,⁵⁵ the percentages of blacks in urban areas is quite significant. Furthermore, whereas some cities are over half black, by contrast, blacks comprise "a relatively small percentage of the total suburban population—slightly over 8%."⁵⁶

Sixth, the urban underclass has been, and is still, subjected to discrimination, both private and public. Historic discrimination explains how an urban underclass was created with respect to African-Americans, the largest racial group in the urban underclass.⁵⁷ For the black subset of the urban underclass, Professor Wilson specifically documented that their situation has its origins in intentional discrimination: "racial oppression . . . created [a] huge black underclass, . . . and the technological and economic revolution of advanced industrial society combined to insure it a permanent status."⁵⁸ Advances in civil rights

subordination under advanced capitalism. It is true that blacks are disproportionately represented in the underclass population . . . and that about one-third of the entire black population is in the underclass.").

53. William Julius Wilson, *Public Policy Research and The Truly Disadvantaged*, in *THE URBAN UNDERCLASS* 460, 464 (Christopher Jencks & Paul E. Peterson eds., 1991).

54. BERUBE & KATZ, *supra* note 39.

55. *State & County QuickFacts: USA*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated Jan. 10, 2013).

56. Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729, 736 (2001).

57. Such historic discrimination is considered by some to be "far more important than contemporary discrimination in explaining the plight of the ghetto underclass." WILSON, *THE TRULY DISADVANTAGED*, *supra* note 4, at 32–33.

58. WILSON, *THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 4, at 120; *see also id.* at 154 ("[O]ne of the legacies of the racial oppression in previous years is the continued disproportionate black representation in the underclass."); *id.* at 162–63 ("[T]he problems of poor blacks are compounded by basic changes in our modern industrial economy . . ." (emphasis added)); WILSON, *THE TRULY DISADVANTAGED*, *supra* note 4, at 12 ("[A] racial division of labor has been created due to decades, even centuries, of discrimination and prejudice; [due to] impersonal economic shifts in advanced industrial society, the racial division of labor is reinforced."); *id.* at 141 ("Historic discrimination certainly helped create an impoverished urban black community in the first place."); KENNETH B. CLARK ET AL., *THE EDUCATIONALLY DEPRIVED: THE POTENTIAL FOR CHANGE* 49 (1972) (noting, in reference to the lower class, that "Negroes begin with the primary affliction of inferior racial status").

protections have not eliminated discrimination on the basis of race.⁵⁹ “[I]t is undeniable,” Professor Wilson wrote, “that discrimination continues to aggravate the social and economic problems of poor blacks.”⁶⁰

Such current discrimination takes several forms. With respect to private discrimination, African-Americans continue to face persistent discrimination in employment,⁶¹ housing,⁶² lending,⁶³ education,⁶⁴ and

59. This is not to diminish the progress that has been achieved since the civil rights era. See Leonard S. Rubinowitz with Ismail Alsheik, *A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 HOW. L.J. 841, 905 (2005) (“In the four decades after the 1964 Civil Rights Act became law, major changes have occurred in some of the areas that the Act addressed. Most notably, blacks’ access to public accommodations—restaurants, hotels, theaters—is remarkably greater than it was in 1964, especially in the South.”); see also WILSON, *THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 4, at 1 (“[M]any of the traditional barriers have crumbled under the weight of political, social, and economic changes of the civil rights era.”). But see *id.* at 2 (“It would be shortsighted to view the traditional forms of racial segregation and discrimination as having essentially disappeared in contemporary America”); *id.* at 136 (“[L]egislation [during the Civil Rights Era] did not sufficiently address the unique problems of de facto segregation and social class subordination confronting ghetto blacks.”); MASSEY & DENTON, *supra* note 4, at 82 (commenting on the persistence of the ghetto despite changes in law, attitudes of whites, and advances by middle-class blacks); *id.* at 84 (“[Though the] racial climate of the United States improved [in the aftermath of the civil rights movement], racism still restricted the residential freedom of black Americans; it just did so in less blatant ways. . . . [A]lthough racist attitudes and behaviors went underground, they did not disappear.”); *id.* at 97 (“The absence of overt discrimination does not mean that exclusionary practices have ended, however; rather, the character of discrimination has changed.”).

60. WILSON, *THE TRULY DISADVANTAGED*, *supra* note 4, at 140; see also *id.* at 146 (“[L]ong periods of racial oppression can result in a system of inequality that may persist for indefinite periods of time even after racial barriers are removed.”).

61. See, e.g., Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403 (1993) (examining racial discrimination in blue-collar jobs); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?: An Institutional Analysis*, 84 CALIF. L. REV. 493 (1996).

62. See, e.g., MARGERY A. TURNER ET AL., URBAN INST., *DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000* (2002), available at http://www.huduser.org/Publications/pdf/Phase1_Report.pdf (using testers to uncover and document discrimination in securing housing).

63. See, e.g., Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L. L. REV. 375 (2010).

64. See, e.g., 1 U.S. COMM’N ON CIVIL RIGHTS, *EQUAL EDUCATIONAL OPPORTUNITY PROJECT SERIES 3* (1996), available at <http://www.eric.ed.gov/PDFS/ED406472.pdf> (addressing the barriers to equality in educational opportunities, which remain forty years after *Brown v. Board of Education*); Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act’s Race-Conscious Accountability*, 47 HOW. L.J. 243, 244 (2004) (“The fulfillment of *Brown*’s promise has remained central to the struggle for civil rights in education and beyond, as most civil rights advocates agree that we have yet to fulfill this landmark decision in either letter or spirit. Today our schools are becoming segregated again while equality of educational opportunity has proved to be an elusive goal.” (citation omitted)); *id.* at n.6 (identifying scholars who support this assessment).

the acquisition of everyday goods,⁶⁵ among other facets of everyday life.⁶⁶ Verbal harassment⁶⁷ and hate crimes⁶⁸ are also part of the contemporary African-American experience. With respect to public discrimination, African-Americans are subject to racial profiling⁶⁹ and problems in the criminal justice system,⁷⁰ especially related to the “war on drugs.”⁷¹ They are denied meaningful police protection,⁷² emergency services,⁷³ and other everyday government services such as

65. See, e.g., Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 817–18 (1991).

66. See, e.g., Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 861–62 (1997) (“The United States’ historical policy of official hatred of the black race [is] evidenced by slavery and the subsequent widespread discrimination, whether de jure (mainly in the South) or de facto (in every part of the country) against black people in every sector of American life, including criminal justice, education, housing, employment, voting rights, health care, and family law.”).

67. See, e.g., RANDALL KENNEDY, *NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD* 145, 146 (Vintage Books 2003) (“*Nigger* has been used as a weapon of abuse and continues to be so used today . . .”).

68. See, e.g., FBI, *HATE CRIMES STATISTICS*, 2009, at 1 (2010), available at <http://www2.fbi.gov/ucr/hc2009/documents/victims.pdf> (finding that, of the 4,057 victims of hate crimes based on racial bias, “71.5[%] were victims because of an offender’s anti-black bias”).

69. See, e.g., Carter, *supra* note 21, at 20; Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296 (2001).

70. See, e.g., DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (Vintage Books 1997); David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 COLUM. HUM. RTS. L. REV. 97 (2007); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995).

71. See, e.g., Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER, RACE & JUST. 253, 265–66 (2002) (“While whites represent the vast majority of drug offenders, the races seem to have relatively similar appetites for illicit drugs. . . . Yet, whites seem less likely to be arrested; if arrested, less likely to be convicted; and if convicted, less likely to be imprisoned than members of other races.”); Ira Glasser, *American Drug Laws: The New Jim Crow*, The 1999 Edward C. Sobota Lecture, 63 ALB. L. REV. 703, 704 (2000) (“Jim Crow laws are a thing of the past. We don’t punish on the basis of skin color anymore, we tell ourselves. . . . On our highways, on our streets, in our airports, and at our customs checkpoints, . . . irrespective of class, and without distinctions based on education or economic status, skin color once again is being used as a cause for suspicion, and a sufficient reason to violate people’s rights.”); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 594 (2006) (“[T]he primary recipients of prison sentences during the height of the war on drugs and the war on crime have been African Americans.”). *But see* John P. Walters, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 107 (1994) (responding personally to charges that the “war on drugs” during his tenure in the federal government involved elements of racism).

72. See, e.g., VENKATESH, *supra* note 34, at 37, 83, 89 (observing that the police were rarely responsive to problems in or around the Robert Taylor Homes).

73. See, e.g., *id.* at 48, 215, 223 (observing that residents of the Robert Taylor Homes understood that an ambulance does not come when called).

trash pickup and street cleaning.⁷⁴ Such discrimination not only limits the opportunities for the urban underclass to improve their situation, but also reinforces and perpetuates their depressed economic and isolated spatial situation.⁷⁵ As prominent sociologists Douglas S. Massey and Nancy A. Denton made clear, “Not only does discrimination lead to segregation, but segregation, by restricting economic opportunities for blacks, produces interracial economic disparities that incite further discrimination and more segregation.”⁷⁶

The seventh signature quality of the urban underclass is that its members do not possess the political capital to encourage others to improve their conditions or circumstances.⁷⁷ Perhaps most obvious, the constituents to which policy makers and parties cater or listen are based elsewhere, such as middle-class whites.⁷⁸ Political power, in other words, is more likely to be situated where the jobs, the middle class, and the companies are themselves located—the suburbs.⁷⁹

74. See, e.g., MASSEY & DENTON, *supra* note 4, at 150–51; see generally Leah Platt Boustan, *Was Postwar Suburbanization “White Flight”? Evidence from the Black Migration*, 125 Q.J. ECON. 417, 417 (2010) (“Because many public goods are locally financed, segregation between the central city and the suburbs can generate disparities in access to education and other public services.”).

75. See Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595, 1610 (1995) (“That discrimination leads to segregation might seem to a casual observer obvious and in little need of defense or justification. What must not be overlooked nor ignored, however, is the cyclical or synergistic effect that discrimination has on the production of an underclass that is spatially limited to urban ghettos.”).

76. MASSEY & DENTON, *supra* note 4, at 109.

77. See Chaddha & Wilson, *supra* note 46, at 178 (“[P]olitical institutions have not been vehicles for pursuing meaningful improvements in the conditions of the black urban poor, even when black officials have been elected to office.”); see also *id.* at 180–81 (“[B]lack mayors were elected in many large cities for the first time. However, this apparent political empowerment has not seemed to produce meaningful improvements in the conditions of the urban black poor.”).

78. See CASHIN, *supra* note 38, at 267 (“[C]ities and many older suburbs . . . suffer in a state political economy that increasingly responds to more affluent suburban interests.”); see also Chaddha & Wilson, *supra* note 46, at 181 (“[A]lthough they may be significant in their electoral power, residents of poor, black neighborhoods cannot contribute much in governing capacity, and elected mayors are consistently dependent on the entrenched regime for governing authority.”); Zakaria, *supra* note 29 (“The dirty little secret about the U.S. welfare state is that it spends very little on the poor—who don’t vote much—lavishing attention instead on the middle class.”); Kennedy Address, *supra* note 36 (“Impoverishment means for many living apart from the so-called ‘mainstream American society,’ the sectors of a society to which politicians pay some heed.”).

79. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2046 n.6 (2002) (“[Suburbanites’] success [in fights over public education] is obviously related to their political power, which has grown substantially as a result of post-World War II population shifts away from the cities and into the suburbs.”); see also Richard C. Schragger, *Decentralization and Development*, 96 VA. L. REV. 1837, 1874–75 (2010) (“[I]n the twentieth and early twenty-first centuries, the great industrial cities no longer exercise the political power they once had, and both economic and political power has shifted to the suburbs.”).

The strategies of the parties in the 2012 presidential election offer an instructive example of this principle. Following a symposium on inequality, Professor Thomas B. Edsall wrote in the *New York Times* blog on the recent election:

Democrats have concluded that getting enough votes on [election night] precludes taking policy positions that alienate middle-class whites. In practice this means that on the campaign trail there is an absence of explicit references to the poor—and we didn't hear much about them at the Democratic National Convention either.⁸⁰

As to the opposition, Professor Edsall observed that “Republicans, in turn, see taking a decisive majority of white votes as their best chance of winning the presidency.”⁸¹

The other side of the parties' neglect of poor voters is the fact that, given their extreme poverty, members of the urban underclass are not inclined to make political contributions. In addition, most of those in urban areas, as shown above, are people of color. For this reason, Professor David Cole surmised, the political process will be “a less than satisfactory forum for their concerns.”⁸² To make matters worse, many people of color do not vote: “[T]he political process does not even hear from two-thirds of all young blacks.”⁸³ Change for the inner city by way of the democratic process is, in other words, improbable.⁸⁴

Eighth, individuals residing in areas of concentrated urban poverty interact disproportionately with the criminal justice system and experience mass incarceration. Robert J. Sampson and Charles Loeffler determined that these areas of disadvantage are “[h]ot spots for incar-

80. Thomas B. Edsall, Op-Ed., *Is Poverty a Kind of Robbery?*, N.Y. TIMES, Sept. 16, 2012, <http://campaignstops.blogs.nytimes.com/2012/09/16/is-poverty-a-kind-of-robbery/?hp>; see also David Crary, *For Democrats, a Focus on Middle Class, Not Poor*, ASSOCIATED PRESS, Sept. 9, 2012, <http://bigstory.ap.org/article/democrats-focus-middle-class-not-poor-0> (noting that, at the 2012 Democratic National Convention, attendees displayed signs stating “Middle Class First”).

81. Edsall, *supra* note 80.

82. David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1081 (1999).

83. *Id.* at 1080.

84. See *id.* at 1062 (“Reliance on the political process . . . will simply ensure that minority interests within inner-city communities will be ignored.”); see also Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 590 (1999) (“[W]hile a state majoritarian consensus favoring decentralized zoning and taxing powers contributes to inequality of opportunity with respect to education, jobs, and housing for persons relegated to poor urban neighborhoods, state political processes are apt to reject efforts to redress these resulting inequalities.”). But see Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1167 (1998) (“African-American citizens are no longer excluded from the political process, and in fact exercise significant power in the nation’s [inner cities].”).

ceration,” and that this phenomenon is “hardly random.”⁸⁵ Instead, these areas are “systematically predicated by key social characteristics,” especially and including the “combination of poverty” and “racial isolation.”⁸⁶ The identified factors, according to Sampson and Loeffler, “suggest a self-reinforcing cycle that keeps some communities trapped in a negative feedback loop.”⁸⁷ Michelle Alexander took findings regarding mass incarceration a step further and argued that, “[l]ike Jim Crow (and slavery), mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race.”⁸⁸

In sum, as noted by Anmol Chaddha and Professor Wilson, “a fundamental principle of . . . urban inequality is that political, social, and economic factors reinforce each other to produce profound disadvantage for the urban poor.”⁸⁹

B. Causes

There are entrenched, structural causes to the condition of the urban underclass.⁹⁰ Prior to discussing those causes, some brief historical context is in order. In the aftermath of the Civil War, most African-Americans lived in the rural south, though they “increasingly

85. Sampson & Loeffler, *supra* note 36, at 21; *see also id.* at 22 (“[P]unishment is distinctly concentrated by place.”); *id.* at 25 (“[I]mprisonment is not randomly inscribed across the urban landscape.”).

86. *Id.* at 21; *see also id.* at 27 (“[Incarceration] is increased in certain social contexts in ways that cannot be explained by crime.”); *id.* at 28 (“[T]he cluster of features reflected in *concentrated disadvantage* is a prime candidate for the source . . . of incarceration.”).

87. *Id.* at 21; *see also id.* at 24 (“[T]here is a great deal of stability in the spatial logic of incarceration [over time].”); *id.* (identifying “an extremely high level of persistence” with respect to incarceration in certain areas); *id.* at 25 (“[A]gainst the march of time there is a fundamental inequality in the reach of incarceration across communities.”); *id.* at 27 (“[A]t all levels of concentrated disadvantage, crime rates significantly predict later incarceration as well.”); *id.* at 29 (“High levels of concentrated imprisonment, year after year, would seem unlikely to contribute to social-capital formation or other social processes that foster healthy communities.”); *id.* (“[C]oncentrated disadvantage strongly predicts later incarceration (adjusting for crime) and that incarceration strongly predicts later disadvantage (again adjusting for crime).”).

88. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 13 (2010).

89. Chaddha & Wilson, *supra* note 46, at 164; *see also id.* at 165 (“[V]arious institutions work together to limit opportunities for the urban poor . . .”).

90. Here, I recount “structural” causes, which are regarded as more important than “cultural” causes. *See* WILSON, *supra* note 42, at 61 (“[T]here is little evidence that cultural forces carry the power of structural forces. . . . Although cultural forces play a role in inner-city outcomes, evidence suggests that they are secondary to [structural forces.]”); *see also id.* at 135 (“[M]ore weight should be given to structural causes of inequality . . . because they continue to play a far greater role in the subjugation of black Americans and other people of color.”). For an overview of “cultural” causes, *see id.* at 42–56.

sought refuge and betterment in burgeoning cities of the South and North.”⁹¹ Jim Crow laws in the South, along with enhanced demand for labor in the North stemming from industrialization, drew more African-Americans north, specifically to northern cities where such economic opportunities were principally located.⁹² While industrialization spawned economic growth, the subsequent Great Depression “brought widespread unemployment to blacks in the North” and a “wave of factory closings,” which led to poverty among blacks and the physical deterioration of the cities that they occupied.⁹³

World War II created manufacturing needs, resulting in economic opportunities for blacks and others, and a concomitant resurgence of life in the cities.⁹⁴ In the postwar period, however, “cities underwent a crippling exodus of their populations and disinvestment by business industries.”⁹⁵ This “decentralization” was the result of “fundamental technological and economic changes,” including “[i]mprovements in transportation and communication,” and the availability of cheap land in the areas outside of the cities.⁹⁶ The middle class, including middle-class blacks, fled to the suburbs, leaving urban areas to house the poor and a disproportionate share of people of color.⁹⁷ For example, in

91. MASSEY & DENTON, *supra* note 4, at 18.

92. *See id.* at 26; Boustan, *supra* note 74, at 424 (“Rural blacks were attracted northward by economic opportunities in manufacturing and service sectors.”).

93. MASSEY & DENTON, *supra* note 4, at 43, 125, 126.

94. *See* Peter Dreier, *America's Urban Crisis: Symptoms, Causes, Solutions*, 71 N.C. L. REV. 1351, 1379 (1993) (“During World War II, the major sites of military manufacturing—shipbuilding, the auto industry (which produced tanks and trucks for war), and aerospace—were in major cities.”); *see also* Boustan, *supra* note 74, at 421 (“In the postwar period, black migrants settled disproportionately in central cities.”).

95. Patience A. Crowder, *More Than Merely Incidental: Third-Party Beneficiary Rights in Urban Redevelopment Contracts*, 17 GEO. J. ON POVERTY L. & POL'Y 287, 291 (2010); *see also* WILSON, *THE TRULY DISADVANTAGED*, *supra* note 4, at 135–36.

96. WILSON, *THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 4, at 92.

97. *See* MASSEY & DENTON, *supra* note 4, at 61, 67; *see also* WILSON, *THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 4, at 112 (“It was no coincidence that the white decline in the central city has accompanied the decentralization of American businesses.”). In explaining these demographic changes, Massey and Denton identify “[s]egregation, not middle-class out-migration, [as] the key factor responsible for the creation and perpetuation of communities characterized by persistent and spatially concentrated poverty.” MASSEY & DENTON, *supra* note 4, at 118. “As segregation rises, the neighborhood environment of whites steadily improves while that experienced by blacks progressively deteriorates; and this outcome is achieved without the movement of any nonpoor blacks out of the ghetto.” *Id.* at 123. Racial and class segregation together “yield[] a more marked deterioration in the neighborhood environment experienced by poor blacks.” *Id.* at 125. Boustan explained that “black arrivals reduced the overall demand for city residence in the mid-twentieth century, leading to white out-migration and, in some cases, falling housing prices.” Boustan, *supra* note 74, at 420. This “white mobility . . . reflected a distaste for racial diversity,” *id.* at 436, and “[s]ome white residents were undoubtedly concerned about the changing racial and socioeconomic composition of their immediate neighborhoods,” *id.* at 438. This seems to be confirmed by, among others, Maria Krysan, who wrote that “even if a neighbor-

1950 only 23.8% of Baltimore was black; by the year 2000, blacks constituted 64.3% of the city.⁹⁸ Signifying this suburbanization and the commensurate collapse of the manufacturing industry upon which many inner-city residents relied, in 2010, there were a reported 90,000 abandoned or vacant homes or residential lots in Detroit alone.⁹⁹ The spatial and economic situations of blacks and the poverty of urban settings can therefore be tied to decades-old developments.¹⁰⁰

Against this backdrop, Professor Wilson identified several structural failures that may explain the condition of the urban poor.¹⁰¹ The first of these failures is overt public and private racism. Such racism includes “the enduring effects of slavery, Jim Crow segregation, public school segregation, legalized discrimination, residential segregation,”¹⁰² and the exclusion of “virtually all black [urban] neighborhoods” by the Federal Housing Authority from access to mortgages.¹⁰³ Sociologists have noted that although “most of the formal barriers to integration have been eradicated,”¹⁰⁴ such overt tactics have given

hood is identical on all other dimensions, the presence of black residents makes the area less desirable for white homeseekers.” Maria Krysan, *Race and Residence from the Telescope to the Microscope*, CONTEXTS, Summer 2011, at 40.

98. JOHN RENNIE SHORT, ALABASTER CITIES: URBAN U.S. SINCE 1950, at 142 tbl.10.1 (2006); see also Boustian, *supra* note 74, at 438 (“[C]ities that received more black migrants from 1940 to 1970 lost a greater number of white residents.”); David M. Cutler, et al., *The Rise and Decline of the American Ghetto*, 107 J. POL. ECON. 455, 470–71, 495 (1999) (finding that segregation has declined since the “staggering levels” of 1970, but remains “very persistent”).

99. See Alex P. Kellogg, *Detroit Shrinks Itself, Historic Homes and All*, WALL ST. J., May 14, 2010, at A4, available at <http://online.wsj.com/article/SB10001424052748703950804575242433435338728.html>.

100. Kenneth Clark has written a groundbreaking historical account of urban poverty. See KENNETH B. CLARK, *DARK GHETTO: DILEMMAS OF SOCIAL POWER* (1965); see also DANIEL P. MOYNIHAN, OFFICE OF POLICY PLANNING AND RESEARCH, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965).

101. “Structural” forces refer to discrete actions that may be discriminatory or that embody stereotypes, as well as to systemic processes that “promote ongoing relations among members of the larger group.” WILSON, *supra* note 42, at 5. “Cultural” forces, by way of contrast, mean the relevant group’s behavioral and attitudinal responses to applicable structural forces. See *id.* at 133–34. For thoughts on how Wilson’s work can enrich legal education, see Anthony V. Alfieri, *Post-racialism in the Inner City: Structure and Culture in Lawyering*, 98 GEO. L.J. 921 (2010).

102. WILSON, *supra* note 42, at 152.

103. *Id.* at 28; see also Cutler et al., *supra* note 98, at 457 (“[From approximately 1940 to 1970], segregation was enforced by collective actions on the part of whites to limit the access of blacks to white neighborhoods.”); Donald F. Turner, Note, *The “New” Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1308 (1969) (“[T]he conditions of the ghetto environment which oppress them may be traced in part to past discriminatory practices in employment, housing, and education.”).

104. Cutler et al., *supra* note 98, at 476.

way to, and been renewed by, fresh, modern acts of discrimination that take subtle, decentralized forms.¹⁰⁵

Second are race-neutral political policies that contributed to the formation and perpetuation of the urban poor. Under this category, Professor Wilson pointed to “the building of freeway networks through the hearts of many cities,” which enabled the exodus of “better-off residents” and physically “wall[ed] off poor and minority neighborhoods from central business districts . . . resulting in even greater segregation and isolation.”¹⁰⁶ These highways “shifted jobs from the cities to the suburbs,” again fueling a withdrawal from the cities for those with the requisite resources.¹⁰⁷ Housing incentives for veterans, offered by the federal government, further encouraged the eligible to depart from the cities and establish roots in the suburbs.¹⁰⁸ Black isolation in the cities was thereby exacerbated.¹⁰⁹ Also, Professor Wilson added, federal public housing programs were initiated to construct public housing units, which were situated “overwhelmingly . . . in the overcrowded and deteriorating inner-city ghettos—the poorest and least powerful sections of the city and the metropolitan area.”¹¹⁰ Moreover, the federal government implemented “sharp spending cuts on direct aid to cities [that] dramatically reduced budgets for urban mass transit, economic development assistance, urban development action grants, social service block grants, local public works, compensatory education, public service jobs, and job training.”¹¹¹ Slashes in federal funding have had significant adverse effects, as “many central cities and inner suburbs lack the fiscal means to address the concen-

105. See MASSEY & DENTON, *supra* note 4, at 96–109 (describing a subtle bias against blacks in the housing context that remains today despite statutory fair housing guarantees); see also *id.* at 109 (“[D]iscrimination against blacks is widespread and continues at very high levels in urban housing markets.”); *id.* at 143 (noting that residential segregation is not only a historical legacy, but also an active process); Cutler et al., *supra* note 98, at 457–58 (“By 1990 . . . decentralized racism [had] replaced centralized racism as the factor influencing residential location.”); *id.* at 477 (“[S]egregation may still persist at high levels, even with no collective enforcement mechanism.”); *id.* at 496 (“[F]ormal barriers to integration were eliminated, but discriminatory white tastes remained.”).

106. WILSON, *supra* note 42, at 29 (citation omitted) (internal quotation marks omitted).

107. *Id.* at 144.

108. See *id.* at 30.

109. See *id.* at 144.

110. *Id.* at 33; see generally ORG. FOR ECON. COOPERATION AND DEV., ECONOMIC POLICY REFORMS: GOING FOR GROWTH 196 (2010) [hereinafter OECD REPORT], available at <http://www.oecd.org/dataoecd/2/7/45002641.pdf> (“Housing market and urban planning outcomes sometimes lead to the geographical concentration of disadvantaged households in particular housing estates.”).

111. WILSON, *supra* note 42, at 35.

trated problems of joblessness, family breakups, and failing public schools.”¹¹²

The third structural failure speaks to the “mismatch” between the economic opportunities and the skills of the urban poor. This mismatch operates in two ways. First, the urban underclass generally possesses a skill set that is more suitable for service-industry and manufacturing positions, whereas technological innovation has changed the landscape of the economy and favors more highly skilled employees.¹¹³ Thus, the urban poor are ill-equipped in terms of education and abilities for emerging and dominant job sectors.¹¹⁴ Second, lesser skilled jobs are “readily available” in the cities,¹¹⁵ although the prevailing economies that feature attractive wages and low-turnover have followed the middle class to the suburbs.¹¹⁶ Accordingly, the urban underclass is physically disconnected from the mainstream economy and lacks the training, resources, or social network to bridge the distance.¹¹⁷

Relatedly, one particular structural cause that merits emphasis is the quality of the public school systems in the inner city, which fail to provide the urban poor with a baseline of adequate skills or education to compete in the modern economy. Because the urban poor are physically isolated, they are generally confined to low-quality schools.¹¹⁸

112. *Id.* at 37; see also WILSON, *THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 4, at 112, 115; Chaddha & Wilson, *supra* note 46, at 178.

113. See WILSON, *supra* note 42, at 6–7, 40–41.

114. See WILSON, *THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 4, at 95, 107 (explaining that jobs mainly found in the city are “poorly paid, menial, and dead-end,” are “underpaid, uninteresting, dirty, and hard,” and are lacking in “respect, status, opportunity, or advancement”); see also *id.* at 95 (“[B]oth the lack of job expansion in the manufacturing sector and the fact that desirable jobs in the service industries require education and training mean that the better paid and more desirable positions into which workers can enter without special skills and/or higher education are decreasing in central cities . . .”).

115. *Id.* at 96; see also *id.* at 106, 166.

116. See *id.* at 92–93, 96; see also WILSON, *supra* note 42, at 10, 41.

117. See CLARK, *supra* note 100, at 11 (“The dark ghettos are social, political, educational, and—above all—economic colonies.”); see also WILSON, *THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 4, at 34; WILSON, *THE TRULY DISADVANTAGED*, *supra* note 4, at 60.

118. See OECD REPORT, *supra* note 110, at 15 (“[R]esidential socio-economic separation is often matched by schooling separation, primarily because a large proportion of students tend to attend schools in their own neighbourhood. The tendency of housing prices to internalise school quality further exacerbates this phenomenon.”); see also Chaddha & Wilson, *supra* note 46, at 173 (“[P]oor blacks in the inner city . . . had little meaningful employment nearby, inadequate schools and training opportunities for higher-skill jobs, and spatial barriers to employers that had relocated to the suburbs.”).

It is well-settled that a child's prospects for success in society are predicated on education. As stated by the Supreme Court in *Brown v. Board of Education*:

Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is the principle instrument in awakening the child to cultural values, in preparing him for late professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education.¹¹⁹

In other landmark cases, the Court has further clarified the importance of education to a child's development and ability to be a meaningful part of our society. In *Wisconsin v. Yoder*, the Court wrote that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society."¹²⁰ In *Plyler v. Doe*, the Court added, "We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests,"¹²¹ and identified public schools as "the primary vehicle for transmitting the values on which our society rests."¹²²

In the inner city, however, public education is often inadequate and fails to instill in children the basic capabilities to participate in mainstream economic society. To get a sense of the number of students dependent upon urban public schools for a proper education and the tools to escape their poverty, a coalition representing sixty-five of the nation's largest urban public school systems reported an enrollment of 6.8 million students; of those students, 65% were eligible to receive free or reduced price lunches on account of their homes' financial situation.¹²³ As a percentage of the country's public schools, schools in the coalition educate 28% and 24% of the nation's African-American and Hispanic students, respectively.¹²⁴

With respect to the quality of the schools these children attend, Professor Jean Anyon provided helpful insights into the plight of urban

119. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

120. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

121. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

122. *Id.* (quoting *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)) (internal quotation marks omitted).

123. *Fact Sheet*, COUNCIL OF THE GREAT CITY SCHS., <http://www.cgcs.org/Page/72> (last visited Dec. 29, 2012).

124. *Urban School Statistics*, COUNCIL OF THE GREAT CITY SCHS., <http://www.cgcs.org/Page/75> (last visited Dec. 29, 2012).

public education. To start, 79% of urban public school systems are funded at lower rates than other schools, and many face funding shortages.¹²⁵ Further, public schools in urban areas feature “[o]ld school buildings, many dating from the nineteenth and early twentieth centuries, [which] have not been well maintained.”¹²⁶ Within these schools, “[c]lassrooms typically have few instructional supplies and little equipment.”¹²⁷ With regard to teachers, urban public schools, when compared to advantaged schools, are less likely to have math and science teachers with math and science backgrounds or certificates in the appropriate field. As a result, these teachers are less confident and less able than their counterparts.¹²⁸ Additionally, there is a 50% greater shortage of teachers in urban areas compared to the national average.¹²⁹ The instruction itself is often “based on a cognitively low-level, unchallenging, [and] rote material.”¹³⁰

Due to these conditions, the academic achievement of the students is, perhaps unsurprisingly, modest. Looking at students in Newark, Professor Anyon cited to reports that only 45% of ninth graders graduate from public high school. Additionally, 40.8% of Newark’s public school students “score in the bottom quarter in standardized reading tests and 30% in the bottom quarter in math tests.”¹³¹ In addition, two out of three students in the Newark public school system are adjudged by the state to be in need of remedial assistance.¹³²

As with other urban school districts, Newark’s was characterized by “dirty and ill-equipped” classrooms and by teachers that were “uncertified or inappropriately certified for their current assignments,” “lack[ed] an understanding of the subjects they were teaching,” and gave “misinformation for students to copy into their notebooks.”¹³³ The classrooms contained insufficient “instructional materials, equipment, and supplies,” and the instruction itself was observed to be “unchallenging and often misdirected or inappropriate.”¹³⁴

Inadequate public schools are among the structural factors that functionally dictate and reinforce the situation of the urban under-

125. JEAN ANYON, *GHETTO SCHOOLING: A POLITICAL ECONOMY OF URBAN EDUCATIONAL REFORM* 7 (1997).

126. *Id.*

127. *Id.*

128. *See id.*

129. *See id.*

130. *Id.*

131. *See ANYON, supra* note 125, at 8.

132. *See id.*

133. *Id.*

134. *Id.*

class.¹³⁵ The modern economic industries, which have stable positions and opportunities for advancement, require high levels of education.¹³⁶ The data above suggests that those in the inner city are not supplied with such education and therefore rarely have the chance to vie for anything but menial or dead-end jobs. In other words, “school essentially prepares the students for the social positions they [already] occupy.”¹³⁷

As explained by Justice Clarence Thomas, “Today . . . the promise of public school education has failed poor inner-city blacks. . . . The failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives.”¹³⁸

C. Consequences

The urban underclass is, in practical effect, economically, spatially, and generationally stuck in the conditions that form and solidify its economic and physical position in American society, and is without the resources to trigger the changes in the institutional causes of its predicament.¹³⁹ With respect to the economy, the urban underclass generally does not possess the threshold skills that are required in today’s tech-based economy, and is situated in areas removed from today’s viable and growing job sectors.

To put it more directly, the urban underclass is considered unnecessary in, and extraneous to, the modern economy, and is thereby marginalized both economically and socially. Professor John O. Calmore wrote that a “significant segment of today’s poor . . . are superfluous not only to the economy, but also to the nation’s societal organization.”¹⁴⁰ David Simon, *Baltimore Sun* reporter and creator of the Baltimore-based series *The Wire*, made this point with typical candor: “These really are the excess people in America. Our economy

135. Indeed, Professor Anyon suggested that to reform public schools requires reform of the other entrenched frameworks of which public schools are a by-product. *See id.* at 13 (“[U]ntil the economic and political systems in which the cities are enmeshed are themselves transformed [there is] little chance of effecting long-lasting educational changes in city schools.”).

136. *See WILSON, THE TRULY DISADVANTAGED*, *supra* note 4, at 39–41.

137. Chaddha & Wilson, *supra* note 46, at 182.

138. *Zelman v. Simmons-Harris*, 536 U.S. 639, 682–83 (2002) (Thomas, J., concurring); *see also WILSON, THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 4, at 171–72.

139. *See WILSON, THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 4, at 2 (“[T]he black underclass is in a hopeless state of economic stagnation, falling further and further behind the rest of society.”).

140. John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 *FORDHAM L. REV.* 1927, 1943 (1999). Professor Calmore also noted the “isolation and expendability” of the poor. *Id.*

doesn't need them [They are] unprepared for the technocracy of the modern economy, [and yet] we pretend to need them."¹⁴¹

The public school systems in urban settings are inadequate—in terms of the buildings, classrooms, teachers, materials, supplies, and instruction—to give urban students the tools to participate effectively in the modern economy.¹⁴² “The black poor today are hemmed into racial ghettos [without] the resources to escape these ghettos, and thus they are trapped in inadequate public schools and lack access to employment, which is growing in the suburbs,” observed Professor Leroy D. Clark.¹⁴³

As suggested by Professor Clark's apt use of the terms “hemmed” and “trapped,” members of the urban underclass do not have the ability to meaningfully choose or adopt better neighborhoods and thereby benefit from improved conditions and enhanced opportunities.¹⁴⁴ Their educational inadequacy helps determine their limited economic viability, which in turn confines their ability to move to locations where attractive employment prospects lie or obtain the necessary resources to move.¹⁴⁵ In other words, the urban underclass is physically and economically marginalized, and effectively stuck in this situation.¹⁴⁶

That the urban underclass is physically isolated and without the means to physically traverse outside of the bounds of the urban environment is demonstrated powerfully by sociological surveys. In a study of blacks on the South Side of Chicago, many respondents reported that they had never left the area surrounding their immediate

141. See Bill Moyers, *The Straight Dope*, GUERNICA (Apr. 1, 2011), http://www.guernicamag.com/interviews/2530/simon_4_1_11; see also WILSON, *THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 4, at 97 (“Blacks constitute a sizable percentage of . . . corporate sector workers who have become redundant because of advancing technology . . .”).

142. See *supra* notes 125–35 and accompanying text.

143. Leroy D. Clark, *Movements in Crisis: Employee-Owned Businesses—A Strategy for Coalition Between Unions and Civil Rights Organizations*, 46 *How. L.J.* 49, 62–63 (2002).

144. See WILSON, *THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 4, at 121 (referring to younger inner-city blacks who are “locked” in the low-wage job market); see also *America's Wasted Blacks*, *supra* note 50 (“[Underclass blacks] are trapped there by crime, drugs, unemployment and poor education.”).

145. A colleague pointed out that society tends to turn away, figuratively and literally, from members of the underclass, who are seen as agents of anti-social behavior that possess undesirable traits and are blameworthy for their situation, or otherwise repulsive. In this sense, members of the urban underclass are dehumanized. It therefore may be argued that restoring their perceived dignity is a precondition for restoring their economic and social viability through remedial actions.

146. See WILSON, *THE TRULY DISADVANTAGED*, *supra* note 4, at 158 (“[M]any residents of isolated inner-city neighborhoods have no other option but to remain in those neighborhoods.”).

neighborhood, and those that did only left when they were adults.¹⁴⁷ Discussing a similar study on inner-city blacks, a commentator observed that for one family, “a trip to Chicago’s downtown is described almost as if it were a trip to another country or to an amusement park.”¹⁴⁸ In light of such data, Massey and Denton observed, “Ironically, within a large, diverse, and highly mobile post-industrial society such as the United States, blacks living in the heart of the ghetto are among the most isolated people on earth.”¹⁴⁹

The effects of this physical isolation and attendant lack of minimal resources is perhaps most acutely exemplified by the situation in New Orleans in the wake of Hurricane Katrina. As Professor Wilson noted, “In 2005 . . . Hurricane Katrina exposed concentrated poverty in New Orleans. When television cameras focused on the flooding, the people trapped in houses and apartments, and the vast devastation, many Americans were shocked to see the squalid living conditions of the poor.”¹⁵⁰ Importantly, Professor Wilson added that “although many residents were able to flee, the very poor, lacking automobiles or money for transportation and lodging, stayed to wait out the storm, with tragic results.”¹⁵¹ Because the urban poor in New Orleans possessed “limited resources,” they were “trapped in their neighborhoods . . . and were vulnerable to natural disasters.”¹⁵² As expressly mentioned by Professor Wilson and as suggested by this discussion, the problems of inadequate resources and physical isolation are “not unique to New Orleans.”¹⁵³

As a result of their physical isolation and exposure to the conditions within their isolated physical settings, the probability of modest eco-

147. MASSEY & DENTON, *supra* note 4, at 161. I am reminded of scenes from HBO’s Baltimore-based *The Wire* in which characters portraying inner-city blacks revealed their acute isolation. For instance, in an exchange between “Cutty,” a former gang member, and Duquan, a teenager uncertain about his place in life, Cutty instructs Duquan that, the “world is bigger than [the streets], at least that’s what they tell me.” Duquan asks, “Like, how do you get from here to the rest of the world?”, to which Cutty responds, “I wish I knew.”). See, *The Wire: React Quotes* (HBO television broadcast Feb. 3, 2008).

148. Reggie Oh, Comment, *Apartheid in America: Residential Segregation and the Color-Line in the Twenty-First Century*, 15 B.C. THIRD WORLD L.J. 385, 411 n.177 (1995) (citing ALEX KOTLOWITZ, *THERE ARE NO CHILDREN HERE* 172 (1991)).

149. MASSEY & DENTON, *supra* note 4, at 77; see also Chaddha & Wilson, *supra* note 46, at 174 (“Many poor black residents live in public housing projects where they are generally confined to interactions with their neighbors and remain socially isolated from the rest of the city. Other than the police, there are almost never visitors from other neighborhoods.”).

150. WILSON, *supra* note 42, at 25–26.

151. *Id.* at 26.

152. *Id.* Professor Kennedy similarly identified among poverty’s consequences the inability “to flee a flooding city, for lack of transportation, or alternative housing.” Kennedy Address, *supra* note 36.

153. WILSON, *supra* note 42, at 26.

conomic success for the urban underclass is practically a foregone conclusion. In other words, the disadvantaged geographic position of the members of the urban underclass effectively determines their life chances.¹⁵⁴ "Identical individuals with similar family backgrounds and personal characteristics will lead very different lives and achieve different rates of socioeconomic success depending on where they reside."¹⁵⁵ As Massey and Denton implied, differences in effort, motivation, or support will not have a significant impact on the economic progress of an individual within the urban underclass—he or she will likely still be mired in poverty and remain in the same physical space.

That space—the inner city—is the site of significant social pathologies and problems, including rampant drug trafficking; pervasive drug abuse; destructive, drug-related violence; widespread use of prostitution and sex as a form of currency; homelessness; and AIDS, as well as other major health concerns that may be attributable in some part to drug usage and prostitution.¹⁵⁶ These social ills have a profound impact on the urban poor.¹⁵⁷ Because the urban underclass is fixed both economically and physically, its members are routinely subjected to these serious social difficulties.¹⁵⁸ As the urban underclass remains in the same relative economic position and spatial location, this social disorder attains the degenerative power to become more pronounced and therefore inflict greater harm on those within its reach.¹⁵⁹ In fact, recent sociological research suggested that prolonged exposure to the violence and social disorder of the urban environment has adverse effects on the health and cognitive functioning of the members of the

154. See MASSEY & DENTON, *supra* note 4, at 149–50.

155. *Id.* at 149.

156. This account should not be construed as condoning the extent to which those in urban environments are themselves responsible for engaging in destructive, anti-social behavior. This is to note only, as a descriptive matter, that these issues exist in the inner cities and therefore those in urban climates face the negative consequences. In other words, this description is about factual situations, not assigning or apportioning blame. In any case, I address how the urban underclass's contribution to its circumstances relates to the underclass's entitlement to Thirteenth Amendment relief in Part III.B.

157. WILSON, *supra* note 42, at 36.

158. See, e.g., Peter R. Pitegoff, *Urban Revitalization and Community Finance: An Introduction*, 27 U. MICH. J.L. REF. 613, 620 (1994) ("[U]rban ghettos are witness to burgeoning social ills, from the AIDS epidemic to drug-related violence . . .").

159. See Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 511 (1995) (book review) ("[T]he combination of residential racial segregation and concentration of poverty does not simply concentrate crime, disease, and other deleterious conditions, but also enhances and augments them . . .").

urban underclass, which “undermine their ability to compete in the socioeconomic order.”¹⁶⁰

In short, the urban underclass is mired at the economic margins as well as the physical corners of society, lacks the capabilities or economic wherewithal to enhance its situation, and lacks the requisite political influence to convince others to act meaningfully in its interest. Therefore, the stratified system is maintained, the circumstances below coalesce and perpetuate, and there exists little reason for optimism that the governing structure and conditions of the underclass will be modified positively.¹⁶¹ By way of summary, Professor Calmore offered this helpful assessment of the urban underclass:

Those who experience it live under harsh and interlocking circumstances that reinforce the elements of poverty in ways that are very different from those of other poor people. Not only is their space generally racialized, but also they are socially isolated, geographically constrained, and, for many, their poverty is concentrated within high-poverty neighborhoods. Thus, they experience poverty not simply as individuals, but as members of a poor community

The racialized inner-city poor, particularly African Americans and Puerto Ricans, experience concentrated poverty in their neighborhoods that is compounded by a spatial and geographic marginalization that deepens their intersectional racist and economic subordination.¹⁶²

The remainder of this Article discusses the extent to which the Constitution, specifically its Thirteenth Amendment, should have anything to do with these circumstances, based on applicable precedent and scholarship.

III. THE THIRTEENTH AMENDMENT

The Thirteenth Amendment is implicated and violated by the conditions of the urban underclass. This Part offers an overview of the

160. Douglas S. Massey, *Segregation and Stratification: A Biosocial Perspective*, 1 DuBois Rev. 7, 22 (2004); see generally Robert J. Sampson et al., *Durable Effects of Concentrated Disadvantage on Verbal Ability Among African-American Children*, 105 Proc. Nat'l Acad. Sci. 845 (2008) (“[L]iving in a severely disadvantaged neighborhood reduces the later verbal ability of black children on average by . . . a magnitude that rivals missing a year or more of schooling.”).

161. The significance, persistence, and apparent intractability of the situation of the urban underclass helps prove my point that government entities charged with safeguarding or monitoring the individual rights of Americans must continue to focus and dedicate their efforts on these issues, rather than dilute their functions by assuming a limitless set of international human rights matters. See Lisa Crooms & Dawinder Sidhu, Debate, *The Future of the U.S. Commission on Civil Rights*, 159 U. Pa. L. Rev. Pennumbra 127 (2010), <http://www.pennumbra.com/debates/pdfs/USCCR.pdf>. While domestic civil or constitutional rights issues may be reframed as human rights issues and thus may fall within the purview of such government entities, other such matters may be best assumed by other government bodies.

162. Calmore, *supra* note 140.

Thirteenth Amendment's history and meaning based primarily on Supreme Court decisions and aided by academic scholarship.

A. History

The Framers' revolutionary and generous concept of liberty did not extend to "blacks" or "Negroes,"¹⁶³ who were in the United States as slave laborers.¹⁶⁴ Instead, it expressly permitted and perpetuated slavery.¹⁶⁵ Most notably, the U.S. Constitution counted slaves as three-fifths of a person for purposes of representation in the House of Representatives,¹⁶⁶ prevented Congress from restricting slavery until 1808,¹⁶⁷ and mandated that fugitive slaves be returned to their owners,¹⁶⁸ among other things.¹⁶⁹

The Framers and the people of the early republic were well aware of this obvious discrepancy¹⁷⁰ between the ideals of the nascent nation

163. For a brief discussion on the use of the terms "blacks," "Negroes," and "slaves" by the Framers, see PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 6 (2d ed. 2001).

164. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 326 (1978) (Brennan, J., concurring in part and dissenting in part) ("Our Nation was founded on the principle that 'all Men are created equal.' Yet candor requires acknowledgment that the Framers of our Constitution, to forge the [Thirteen] Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery."); *id.* at 388 (Marshall, J., concurring in part and dissenting in part) ("When the colonists determined to seek their independence from England, they drafted a unique document . . . proclaiming as 'self-evident' that 'all men are created equal' and are endowed 'with certain unalienable Rights' The self-evident truths and the unalienable rights were intended, however, to apply only to white men.").

165. Slavery, as noted in a famous English case, is contrary to natural law and thus can exist only as a creature of positive law. See *Sommersett's Case*, (1772) 98 Eng. Rep. 499 (K.B.) 510; 12 Geo. 3, 19.

166. U.S. CONST. art. I, § 2, cl. 3.

167. *Id.* § 9, cl. 1

168. *Id.* art. IV, § 2, cl. 3; see also *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 613 (1842) ("[W]e have not the slightest hesitation in holding, that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave . . .").

169. See James W. Fox, Jr., *Citizenship, Poverty, and Federalism: 1787-1882*, 60 U. PITT. L. REV. 421, 428 n.12 (1999) ("There are ten clauses which can be considered to refer directly or indirectly to slavery, to compromises based on slavery, or to protection against fears of slave activity.").

170. Cf. Michele Goodwin, *Nigger and the Construction of Citizenship*, 76 TEMP. L. REV. 129, 149 (2003) ("The economic empowerment and growth of the United States depended upon the unpaid labor of African slaves Slavery became the source for the economic power and growth of the United States."); Ariela Gross, *When is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CALIF. L. REV. 283, 310 (2008) ("Rather than slavery being an anomaly in an otherwise unbroken tradition of American liberty and equality, slavery was a fundamental building block of that tradition.").

and the codification of the practice of slavery.¹⁷¹ For example, John Adams was once asked, “Is it not incompatible with the glorious Struggle America is making for her own Liberty, to hold in absolute Slavery a Number of Wretches [subject to] Despair on one Side and the most flattering Promises on the other . . . ?”¹⁷² Similarly, Benjamin Rush, a signatory of the Declaration of Independence and member of the Continental Congress, regarded slavery as “a vice which degrades human nature, and dissolves that universal tie” between men.¹⁷³ “The plant of liberty,” he added, “is of so tender a nature that it cannot thrive long in the neighbourhood of slavery.”¹⁷⁴ Jefferson pondered whether this significant exception to the paeans to liberty and equality, while acceptable to colonialists, was nonetheless normatively repugnant and would thus cause America to suffer at the hands of God.¹⁷⁵

Thomas Paine claimed that while the Framers had “it in our power to begin the world over again”¹⁷⁶ and advance a theory of liberty that extended in practice to all humans, they effectively punted the issue of slavery, and forced future Americans to contend with the disjunction between liberty and slavery.¹⁷⁷ The tension between the two

171. See generally EDMUND SEARS MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 6 (1975) (discussing the “paradox” of the union of freedom and slavery in America and, particularly, in Virginia).

172. ELLIS, *supra* note 3, at 38. Also, in a letter to her husband, Abigail Adams stated, “I wish there was not a slave in the province; it always appeared a most iniquitous scheme to me to fight ourselves for what we are daily robbing and plundering from those who have as good a right to freedom as we have.” See Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 6 n.4 (1985) (citation omitted) (internal quotation marks omitted).

173. BENJAMIN RUSH, *AN ADDRESS TO THE INHABITANTS OF THE BRITISH SETTLEMENTS, ON THE SLAVERY OF THE NEGROES IN AMERICA* (2d ed. 1773), reprinted in *THE ANTI-SLAVERY CRUSADE IN AMERICA* 1, 26 (James M. McPherson & William Loren Katz eds., 1969).

174. *Id.*

175. See A. Leon Higginbotham, Jr. & Greer C. Bosworth, “*Rather Than the Free*”: *Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 20–21 (1991) (quoting THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* (1800)). As Jefferson stated, “Indeed I tremble for my country when I reflect that God is just; that his justice cannot sleep forever . . . ! The Almighty has no attribute which can take side with us in such a contest.” *Id.* Frederick Douglass similarly wrote, “Every slaveholder in the land stands perjured in the sight of Heaven, when he swears his purpose to be, the establishment of justice—the providing for the general welfare, and the preservation of liberty to the people of this country; for every such slaveholder knows that his whole life gives an emphatic lie to his solemn vow.” Alexander Tsesis, *Furthering American Freedom: Civil Rights & The Thirteenth Amendment*, 45 B.C. L. REV. 307, 320 (2004) (citation omitted).

176. THOMAS PAINE, *COMMON SENSE AND OTHER WRITINGS* 48 (Gordon S. Wood, ed. Modern Library 2003) (1776).

177. See GORDON S. WOOD, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT* 27–28 (2006) (describing the optimistic view that, as slavery was on the verge of extinction in the North, slavery would organically die out in southern states). Chief Justice Oliver Ellsworth, consistent with this view, said, “As population increases, poor labourers will be so

culminated violently, of course, in a bloody civil war.¹⁷⁸ The Union states triumphed over their confederate brethren, and enacted the Civil War Amendments¹⁷⁹ to the Constitution to “ensure that the constitutional concept of citizenship with all attendant rights and privileges would henceforth embrace Negroes.”¹⁸⁰

Among these was the Thirteenth Amendment, which provides that “[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction,” with an exception for criminal punishment.¹⁸¹ It further empowers Congress “to enforce this article by appropriate legislation.”¹⁸² Whereas Section One prohibits conduct, Section Two enables Congress to enact implementing legislation.

The *Slaughter-House Cases*¹⁸³ represents the Supreme Court’s first consideration of the contents of the Thirteenth Amendment. It affords readers helpful insights into the circumstances giving rise to the Amendment—namely slavery and the Civil War—, its purpose, and its place among the Reconstruction Amendments. Because the case addressed these issues as they were understood at a time closest to the end of slavery and the war itself—when the history of the Amendment was a recent memory and its effects were still raw and deeply felt in the nation—it presents a particularly useful perspective on these foundational aspects of the Thirteenth Amendment.

In the *Slaughter-House Cases*, the Court recounted the events, especially the Civil War, leading up to the passage of the Thirteenth Amendment and the other Reconstruction Amendments. Slavery, of course, was the “foundation of the quarrel.”¹⁸⁴ The Civil War, the Court said, boiled down to a struggle between the “armies of free-

plenty as to render slaves useless. Slavery in time will not be a speck in our country.” *Id.* at 28 (internal quotation marks omitted).

178. *Ex parte Virginia*, 100 U.S. 339, 363 (1879) (Field, J., dissenting) (“The institution of slavery in a portion of the country was the cause of constant irritation and crimination between the people of the States where it existed and those of the free States, which finally led to a rupture between them and to the civil war. . . . [T]he loyal States . . . determin[ed] that not only should the Union be preserved, but that the institution which, in their judgment, had threatened its dissolution should be abolished.”); see also Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721, 726 (2003) (“Slavery was ended because of violence, and not just any violence but war, and not just any war but the Civil War [T]he brute force of muskets and bayonets was the most direct cause of the liberation of four million African American slaves.”).

179. U.S. CONST. amends. XIII, XIV, XV.

180. *Bell v. Maryland*, 378 U.S. 226, 301 (1964) (Goldberg, J., concurring).

181. U.S. CONST. amend. XIII, § 1.

182. *Id.* § 2.

183. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

184. *Id.* at 68.

dom” and an “unlawful rebellion.”¹⁸⁵ Once the Union prevailed, “slavery, as a legalized social relation, perished.”¹⁸⁶ President Abraham Lincoln’s Emancipation Proclamation “declared slavery abolished” in the nation.¹⁸⁷

The results of the Civil War and the declaration, on their own, the Court noted, were an insufficient guarantee to the victors that the Union would be without slavery. “[T]hose who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive”¹⁸⁸ Accordingly, “they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles.”¹⁸⁹ Thus, the Thirteenth Amendment was born.¹⁹⁰ The Amendment, the Court explained, served as a “grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government,” including “millions of slaves.”¹⁹¹

While the Thirteenth Amendment constituted a “formal recognition . . . of the abolition of slavery” in the Union, states nonetheless enacted “laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value.”¹⁹² Though Congress “supposed that, by the [T]hirteenth [A]rticle of [A]mendment, they had secured the result of their labors,” these Jim Crow laws “forced upon the statesmen . . . the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much.”¹⁹³ Accordingly, Congress passed the Fourteenth Amendment.¹⁹⁴

With this context in mind, the Court summarized the purpose and effect of the Reconstruction Amendments, including the Thirteenth Amendment:

[I]n the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can

185. *Id.*

186. *Id.*

187. *See id.*

188. *Id.*

189. *Slaughter-House Cases*, 83 U.S. at 68.

190. *Id.*

191. *Id.* at 68–69.

192. *Id.* at 70.

193. *Id.* “[T]he condition of the slave race, without further protection of the Federal government, be almost as bad as it was before.” *Id.*

194. *See id.*

fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.¹⁹⁵

B. Meaning

With an understanding of why Congress enacted the Thirteenth Amendment and the Supreme Court's views on its historical import, the question becomes what substantive meaning may be attached to its text.

1. State Action

With respect to state action, in the *Civil Rights Cases*, another early, major exposition on the Amendment, the Supreme Court clarified that the Amendment's proscription on "slavery" or "involuntary servitude" is not tied to state actors. As the Court explained, "[t]he [A]mendment is not a mere prohibition of [s]tate laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."¹⁹⁶ In other words, the Amendment's ban on slavery and involuntary servitude applies to state agents and private actors.¹⁹⁷ This Amendment holds the distinction as the only constitutional Amendment that regulates private conduct.¹⁹⁸

195. *Slaughter-House Cases*, 83 U.S. at 71.

196. *The Civil Rights Cases*, 109 U.S. 3, 20 (1883); see also *id.* at 23 ("Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not . . .").

197. See *United States v. Nelson*, 277 F.3d 164, 175 (2d Cir. 2002) ("[T]he Thirteenth Amendment eliminates slavery and involuntary servitude generally, and without any reference to the source of the imposition of slavery or servitude. Accordingly, . . . Congress's powers under the Thirteenth Amendment are not limited by any analogue to the State Action Doctrine The Thirteenth Amendment . . . reaches purely private conduct."). This opinion, authored by Circuit Judge Guido Calabresi, offers an excellent summary of Thirteenth Amendment principles. Judge Calabresi's useful and accessible language helps to illustrate the Supreme Court's interpretation of the Amendment.

198. See George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1370 (2008) ("The Thirteenth Amendment stands out in the Constitution as the only provision currently in effect that directly regulates private action.").

2. Beneficiaries

With respect to whom the Thirteenth Amendment protects, the Supreme Court noted in the *Slaughter-House Cases*, that “while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter.”¹⁹⁹ The Amendment’s absolute prohibition, however, is not limited to the slavery of blacks. “We do not say that no one else but the negro can share in this protection.”²⁰⁰ “While the thirteenth article of amendment was intended primarily to abolish African slavery, it equally forbids Mexican peonage or the Chinese coolie trade, when they amount to slavery or involuntary servitude”²⁰¹ As the Court later explained:

It is the denunciation of a condition and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the nation, it commits every race and every individual thereof. Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo Saxon are as much within its compass as slavery or involuntary servitude of the African.²⁰²

Relatedly, “race” itself has been interpreted broadly. For example, the legislative history of the Amendment refers to “the Scandinavian races, as well as the Chinese, Latin, Spanish,” “Anglo-Saxon races,” “Jews, Mexicans, blacks, and Mongolians,” “Gypsies,” and “Germans,” which all ostensibly may be covered by the Amendment.²⁰³ Indeed, whites may seek relief under the Amendment as well.²⁰⁴

199. *Slaughter-House Cases*, 83 U.S. at 72.

200. *Id.*

201. *Id.* at 37.

202. *Hodges v. United States*, 203 U.S. 1, 16–17 (1906); see also *Nelson*, 277 F.3d at 176 (“There can, therefore, be no doubt that the Thirteenth Amendment’s prohibitions extend, at the least, to all race-based slavery or servitude.”); *The Civil Rights Cases*, 109 U.S. 3, 33 (1883) (Harlan, J., dissenting) (“The terms of the Thirteenth Amendment are absolute and universal. They embrace every race which then was, or might thereafter be, within the United States.”).

203. See *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 612 (1987) (citations omitted); see also *id.* at 613 (holding that Arabs are a race within the meaning of 42 U.S.C. § 1981).

204. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295–96 (1976) (“[Section 1981, which was passed pursuant to the Thirteenth Amendment,] was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race. Unlikely as it might have appeared in 1866 that white citizens would encounter substantial racial discrimination of the sort proscribed under [Section 1981], . . . Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves.”); cf. Michael Kent Curtis, *The Klan, the Congress, and the Court*, 11 U. PA. J. CONST. L. 1381, 1385 (2009) (“Slavery not only undermined liberty for Americans of African descent, but also undermined liberty for whites.”); see generally Amar & Widawski, *supra* note 15, at 1359 (“The Amendment embraced

To be sure, the language of the Amendment does not indicate that the “slavery” or “involuntary servitude” must be race-based in order for its protections to accrue. Instead, consistent with the Amendment’s absolute terms, it seems that the Amendment’s shield “remains the same regardless of whether a person is subjugated on grounds of race or for some other reason.”²⁰⁵

This suggests that the beneficiaries of the Amendment are indeed quite expansive. That said, those seeking to invoke the Amendment should be mindful that the original intended recipients of the protections of the Amendment were African slaves. Accordingly, the Court instructed that “in any fair and just construction of any section or phrase of [the Civil War Amendments], it is necessary to look to the purpose which we have said was the pervading spirit of them all [and] the evil which they were designed to remedy.”²⁰⁶ One scholar has persuasively reformulated this cautionary principle by providing that the greater relationship the challenged conduct affecting non-African-Americans has to the conditions affecting African slaves, the greater the claim may be to the protections of the Thirteenth Amendment.²⁰⁷

3. *Prohibitions*

With respect to what conduct falls within the Amendment’s prohibitions, the Court in the *Slaughter-House Cases* noted that the Amendment’s ban on slavery *and* involuntary servitude indicated that the Amendment prohibited not only traditional notions of “slavery,” but also “all shades and conditions of African slavery.”²⁰⁸ Expanding the scope of the Amendment in this fashion was practically important, the Court stated, because there were oppressive practices, such as the use of serfs on plantations, that would have technically evaded the defini-

not only those slaves with some African ancestry, but all persons, whatever their race or national origin.”).

205. *Nelson*, 277 F.3d at 179–80. To be sure, the Thirteenth Amendment concerns itself primarily, but not exclusively, with race-based conduct. See Amar, *supra* note 14, at 156 (“Section [One] of the Thirteenth Amendment is not logically tied to race; it protects persons of all races against slavery and involuntary servitude. However, . . . race-based oppression . . . may be specially targeted and punished.”).

206. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1872).

207. See William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1317–18 (2007) (“[P]ersons who are not African American can also suffer a badge or incident of slavery when the injury at issue is proximately traceable to the system of slavery. . . . Conversely, where the harm suffered is less directly traceable to the system of slavery, the injured party must be able to show that her group’s current status, history, and societal perception are sufficiently similar to those actually enslaved such that inequality arising out of or based upon that status is an outgrowth or legacy of slavery.”).

208. *Slaughter-House Cases*, 83 U.S. at 69.

tion of slavery, but which would nonetheless run afoul of the larger category of “involuntary servitude.”²⁰⁹

In the *Civil Rights Cases*, the Court did not continue this expansive, pragmatic theme. The Court initially suggested that the Amendment’s scope was broad: the Thirteenth Amendment not only nullified slavery, but also “clothe[d] Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”²¹⁰ It clarified, however, that the “badges and incidents of slavery” are to be construed narrowly, to mean only that which is necessary to “those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens.”²¹¹ As core examples, the Court identified “[c]ompulsory service” and “restraint of . . . movements” as among the “the inseparable incidents of the institution.”²¹² The Court specifically opined that “the social rights of men and races in the community” and the denial of admission to public accommodations were not badges or incidents of slavery.²¹³ The Court reasoned that “[i]t would be running the slavery argument into the ground to make [the Thirteenth Amendment] apply to every act of discrimination,” such as a person deciding who he wants to interact or do business with.²¹⁴

Subsequently, in *Hodges v. United States*, the Court further narrowed the reach of the Amendment, equating its entire scope to the definition of “slavery” as found in Webster’s Dictionary; the Amendment therefore prohibited only “the state of entire subjection of one person to the will of another.”²¹⁵

The Court overruled *Hodges* in *Jones v. Alfred H. Mayer Company*²¹⁶ and, in doing so, restored to some degree the broader vision of the Thirteenth Amendment’s reach. In *Jones*, the Court was called upon to ascertain whether 42 U.S.C. § 1982—which guarantees “[a]ll citizens of the United States . . . the same rights, in every State and

209. See *id.*

210. The Civil Rights Cases, 109 U.S. 3, 20 (1883).

211. *Id.* at 35 (Harlan, J., dissenting).

212. *Id.* at 22 (majority opinion).

213. *Id.* at 22, 24.

214. *Id.* at 24.

215. *Hodges v. United States*, 203 U.S. 1, 17 (1906) (internal quotation marks omitted). A decade later, the Court similarly observed that the Thirteenth Amendment “was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results.” *Butler v. Perry*, 240 U.S. 328, 332 (1916).

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

Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property”²¹⁷—was a valid exercise of Congress’s power under the enforcement section of the Thirteenth Amendment.²¹⁸ The Court stated that, in *Hodges*, it had improvidently overlooked the principle that this enforcement section “clothed ‘Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*’”²¹⁹ This authority, the Court held, plainly “included the power to eliminate all racial barriers to the acquisition of real and personal property,”²²⁰ the subject of 42 U.S.C. § 1982. The Court thus revived the “badges and incidents of slavery” component of the Thirteenth Amendment’s general scope, noting that Congress has the authority “rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”²²¹ Unlike the *Civil Rights Cases*, in which the “badges and incidents of slavery” were read quite narrowly, *Jones* left to Congress the authority to supply the contents of this phrase, provided that such construction is within the considerable bounds of reason.²²²

The Court has reaffirmed the *Jones* recalibration of the scope of the Thirteenth Amendment in finding that Congress may enact both criminal and civil laws, that, pursuant to the Amendment, “extend far beyond the actual imposition of slavery or involuntary servitude.”²²³ Accordingly, the Court has held that 42 U.S.C. § 1985(3), which generally prohibits discriminatory conspiracies to deprive another of protected rights, including the right of interstate travel,²²⁴ and 42 U.S.C. § 1981, which provides, generally, that the right to make and enforce contracts shall be equal among citizens,²²⁵ are valid exercises of Congress’s power under the Thirteenth Amendment.

217. 42 U.S.C. § 1982 (2006).

218. See U.S. CONST. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”).

219. *Jones*, 392 U.S. at 439 (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)).

220. *Id.*

221. *Id.* at 440.

222. See G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1069, 1071 (1975) (“Congress, in defining badges of slavery, can expand the self-executing force of the [T]hirteenth [A]mendment, that is, Congress can define given conduct as constituting a badge of slavery even though such conduct would not be prohibited by the [T]hirteenth [A]mendment unaided by congressional legislation.”).

223. *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971).

224. See, e.g., *id.* at 105–06.

225. See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 179 (1976).

By contrast, when Congress has not implemented legislation under its Thirteenth Amendment enforcement authority, the Court has struck down attempts to expand the scope of the Amendment beyond a prohibition against actual slavery. For example, the Court declined to hold that “[t]he denial of the right of Negroes to swim in pools with white people is . . . a ‘badge or incident’ of slavery” because the judiciary’s particular “authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a law-making power far beyond the imagination of the Amendment’s authors.” The Court added that the Amendment may empower Congress “to outlaw” the denial complained of in the case as a “badge of slavery.”²²⁶ In a separate case in which Congress had not acted, the Court declined to hold that the closure of a street to allegedly cut off blacks was a badge or incident of slavery, as the closure amounted to an “inconvenience [that] cannot be equated to an actual restraint on the liberty of black citizens that is in any sense comparable to the odious practice the Thirteenth Amendment was designed to eradicate.”²²⁷

The Amendment, on its own, appears to prohibit only conduct that would amount to slavery.²²⁸ The enforcement section of the Amendment, however, “empower[s] Congress to do much more,”²²⁹ and the Court has deferred to congressional determinations as to what constitutes a “badge or incident of slavery” under the Amendment.²³⁰ The precise contours of the extent to which Congress may reasonably in-

226. *Palmer v. Thompson*, 403 U.S. 217, 226–27 (1971).

227. *City of Memphis v. Greene*, 451 U.S. 100, 128 (1981).

228. *See id.* at 125–26 (“[T]he Court left open the question whether [Section One] of the Amendment by its own terms did anything more than abolish slavery.”).

229. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968); *see also* *United States v. Nelson*, 277 F.3d 164, 184–85 (2d Cir. 2002) (“[The Court’s decisions] serve[] to underscore the extent to which Congress’s powers under Section Two of the Thirteenth Amendment extend beyond the prohibition on actual slavery and servitude expressed in Section One.”); *id.* at 185 (“Congress, through its enforcement power under Section Two of the Thirteenth Amendment is empowered, to control conduct that does not come close to violating Section One directly.”).

230. *See Nelson*, 277 F.3d at 184 ([The Court has shown an] unwillingness . . . to apply Section One of the Thirteenth Amendment where Congress had not acted under Section Two [and a] willingness . . . to affirm Congress’s choices when it had acted under the latter section . . .); *see also* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1822 (2010) (“The framers of the Thirteenth Amendment assumed that Congress would define the badges and incidents of slavery and decide what legislation was appropriate to eliminate them, and that the courts would defer to any reasonable construction.”); Rebecca E. Zietlow, *Conclusion: The Political Thirteenth Amendment*, 71 MD. L. REV. 283, 283 (2001) (“The United States Supreme Court has done little to develop the meaning of the Thirteenth Amendment. . . . It would, however, be a grave mistake to interpret the lack of judicial doctrine as a lack of constitutional meaning. Congress has played the principal role in determining the meaning of the Thirteenth Amendment’s promise of freedom.”).

voke the Amendment to address what it believes to be conduct related to slavery or its characteristics are unclear,²³¹ but are generally considered to be quite broad.²³²

The Court has cautioned, however, that Congress's authority is not limitless—Congress may not use the Amendment to effectively cancel other provisions of the Constitution, subvert the federalist structure of the government, or minimize enumerated rights.²³³ Beyond these rather modest limitations, Congress's enforcement power under the Thirteenth Amendment extends broadly, under *Jones*, to a rational determination of what is a "badge or incident of slavery."²³⁴ Indeed, since *Jones*, federal courts have not invalidated any statutes passed by Congress under its Thirteenth Amendment enforcement power.²³⁵

4. *Affirmative Obligations*

Apart from negating certain conduct, the Thirteenth Amendment compels the federal government to take positive action to ensure that the freedom of the freed slaves is meaningful. As the Court noted in the *Slaughter-House Cases*, "[L]ying at the foundation of each [Reconstruction Amendment]," is not only "the freedom of the slave race,"—the prohibition against slavery and its manifestations—but also "the security and firm establishment of that freedom," that is, the guarantee of genuine liberty.²³⁶ Later, in the *Civil Rights Cases*, the Court explained that the Amendment "abolished slavery" and "established universal freedom."²³⁷

231. See Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 960 n.278 (2003) ("[T]he Thirteenth Amendment is a categorical prohibition against slavery, but the indeterminacy problem arises with respect to the question of how much freedom Congress has to provide remedies for what it defines as violations of that Amendment." (citation omitted)); see also Rutherglen, *supra* note 198, at 1393 ("The inherent ambiguity in this phrase admits a corresponding spectrum of conclusions about the range of congressional power, from narrowly addressing only the essential components of slavery to broadly regulating every practice associated with it.").

232. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 926–27 (3d ed. 2000) ("Congress possesses an almost unlimited power to protect individual rights under the Thirteenth Amendment [and is virtually] free, within the broad limits of reason, to recognize whatever rights it wishes, define the infringement of those rights . . . and proscribe such infringement as a violation of the Thirteenth Amendment.").

233. See *Oregon v. Mitchell*, 400 U.S. 112, 128–29 (1970).

234. See *Jones*, 392 U.S. at 439–40; see also Tsesis, *supra* note 11, at 590 ("[*Jones*] established a low rationality threshold for determining whether Congress had overstepped its authority in enacting laws . . .").

235. See Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U. L. REV. 77, 97 (2010); see also *id.* at n.109 (listing cases in which the federal courts upheld Thirteenth Amendment legislation).

236. *The Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 71 (1872).

237. *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

Indeed, the legislative history makes plain that such liberty, not just the formal banishment of slavery, was at the heart of the Thirteenth Amendment. Representative James Garfield, for example, stated that if the freedom contemplated by the Amendment was tied only to being free from bondage, this freedom would be “a bitter mockery” and “a cruel delusion.”²³⁸

Similarly, in the midst of landmark civil rights legislation, President Lyndon Johnson said, in an address at Howard University:

[De jure] freedom is not enough.

. . . [I]t is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.

. . . We seek not just freedom, but opportunity. We seek not just legal equity, but human ability, not just equality as a right and a theory, but equality as a fact and equality as a result.²³⁹

The descriptive, factual state of a people may be translated into a cognizable legal harm. Professor Akhil Amar articulates the proposition that, for the government to make good on its Thirteenth Amendment promise of freedom, a requisite measure of freedom is required. He stated that “for one truly to be a citizen in a democracy and to participate in the democratic process, one needs a minimum amount of independence. Economic independence is necessary if the citizen is to be able to deliberate on the common good”²⁴⁰ “[I]n order for a democracy to work,” Professor Amar added, “people must have a stake in society.”²⁴¹ Accordingly, “freedom under the Thirteenth Amendment implies a notion of some minimal entitlement,” and the Amendment should be interpreted “to guarantee each American a certain minimum stake in society.”²⁴² “Otherwise,” he warned, the government “really failed to set the slaves free—free from economic dependence.”²⁴³

In a separate, co-authored article, Professor Amar stated that “[t]he Thirteenth Amendment is concerned not only with the purity of state

238. Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. PA. J. CONST. L. 1337, 1354 (2009) (internal quotation marks omitted).

239. Lyndon B. Johnson, U.S. President, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 635, 636 (1966). Dr. Martin Luther King, Jr. also once remarked, “What good is it to be allowed to eat in a restaurant if you can’t afford a hamburger?” See WILLIAM JULIUS WILSON, POWER, RACISM, AND PRIVILEGE: RACE RELATIONS IN THEORETICAL AND SOCIOHISTORICAL PERSPECTIVES 154 n.38 (1976).

240. Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimum Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37, 38 (1990).

241. *Id.*

242. *Id.* at 41, 40.

243. *Id.* at 40.

statute books, but also with the reality of freedom in America.”²⁴⁴ In other words, “the broad command that slavery *shall not exist* does more than impose an absolute duty on private would-be enslavers; it also imposes a duty on the state to provide an adequate apparatus to enforce the emancipation of all persons within its jurisdiction.”²⁴⁵ The failure of the government to meet this responsibility implicates the Thirteenth Amendment. Professor Amar made clear that, under the Amendment, “certain *private* action is banned, but also that certain state *inaction* is prohibited.”²⁴⁶ Professor Baher Azmy appears to agree. He wrote that the Thirteenth Amendment, properly understood, “promote[s] economic independence and social mobility.”²⁴⁷ Other scholars have further reaffirmed this construction of the Amendment.²⁴⁸

Similarly, the *Harvard Civil Rights-Civil Liberties Law Review* published a note on the disconnect between de jure freedom and de facto freedom, and proposed that the Thirteenth Amendment does more than ensure the former. Referring to the emancipated slaves, the note indicated that “[f]reed of all such restrictions, one may fulfill his aspirations within the limits of his inner resources. Yet if those resources have not been fully developed—possibly because of past external barriers—he may still not be a ‘free man.’”²⁴⁹ The note explained that there are African-Americans with

inadequate incomes . . . and no prospect of greater earning power. They may not be free to attend the best schools or obtain the best jobs because their ghetto upbringing has left them inadequately trained or motivated. For them, mere freedom from discriminatory refusals to sell property is [an] irrelevant abstraction. . . . [A] prohibition on present practices alone will not free Negroes of the scars left by past discrimination. . . . The [T]hirteenth [A]mendment’s

244. Amar & Widawski, *supra* note 15, at 1379.

245. *Id.* at 1380.

246. *Id.* at 1381; see also Neal Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 817 (1993) (“The clearest case for a suit against the government or its officials occurs when police with knowledge of specific incidents of slavery fail to act.”).

247. Azmy, *supra* note 13, at 984.

248. See, e.g., FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 154 (1999) (“[T]he Thirteenth Amendment is now more consonant with a positive guarantee of freedom and equal participation in civil society.”); Buchanan, *supra* note 222, at 621 (noting that the Reconstruction Amendments were a “response to a system that had held blacks in legal and economic bondage”); Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. REV. 1, 54 (1995) (“Claims by African Americans that they are entitled to the employment and educational opportunities that were historically denied them can be considered within the Thirteenth Amendment’s mandate to eliminate one of slavery’s primary badges of inferiority: the denial of equal economic opportunity.”).

249. Turner, *supra* note 103, at 1307.

protection of freedom could, then, support positive remedial legislation—such as compensatory education or job training programs in Negro areas—as well as negative prohibitions of discriminatory conduct.²⁵⁰

Legal scholars have validated this vision of the Thirteenth Amendment, and it is consistent with early Supreme Court pronouncements and the Amendment's legislative history.

5. *Intent Requirement*

The government's affirmative duties may be activated even if an issue that implicates the Thirteenth Amendment lacks discriminatory intent or motive. The Supreme Court in *Griffin v. Breckenridge* held that 42 U.S.C. § 1985(3), which prohibits conspiracies to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws,"²⁵¹ contains an intent requirement.²⁵² Later, in *General Building Contractors Ass'n v. Pennsylvania*, the Court ruled that 42 U.S.C. § 1981, which provides for an equal right to make and enforce of contracts, requires purposeful discrimination.²⁵³

These cases may suggest to some that the Thirteenth Amendment, in all its possible forms, can be triggered only by an intent to discriminate. The Court in *General Building Contractors Ass'n* limited its decision to determining whether § 1981 contains an intent requirement and expressly refused to decide whether the Thirteenth Amendment reaches only those "practices . . . motivated by discriminatory purpose."²⁵⁴ It may be tempting to apply the Court's narrow holding to all circumstances in which the Amendment may be implicated or to specifically conclude that the Amendment demands a discriminatory purpose. The Court, however, did not foreclose Thirteenth Amendment causes of action premised on disparate impact.²⁵⁵

Indeed, the Court held in *City of Memphis v. Greene* that a challenged street closure presented African-Americans with an inconvenience, but not a stigma that rose to the level of a constitutional

250. *Id.* at 1308.

251. 42 U.S.C. § 1985(3) (2006).

252. See *Griffin v. Breckenridge*, 403 U.S. 88, 103 (1971). To state a cognizable § 1985(3) claim, "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." *Id.* at 102.

253. See *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982).

254. *Id.* at 390 n.17.

255. See *id.*; see also Carter, *supra* note 21, at 86 ("At a minimum, it is fair to say that the Court has not yet rejected a disparate impact theory under the Thirteenth Amendment.").

violation under the Thirteenth Amendment.²⁵⁶ In deciding the narrow constitutional question, the Court specifically stated that it “need not speculate about the sort of impact on a racial group that might be prohibited by the Amendment itself.”²⁵⁷ This case indicates, at least impliedly, that there is a threshold above which a disparate impact claim becomes cognizable under the Amendment.²⁵⁸

Leading Thirteenth Amendment scholars, having reviewed the legislative history of the Thirteenth Amendment, all seem to conclude that for the Thirteenth Amendment to include disparate impact situations would be to uphold the original intent of the Amendment’s framers. For example, Professor William M. Carter, Jr. found that “[t]he Thirteenth Amendment’s [f]ramers did not intend to eliminate slavery and its lingering effects only where they are intentionally inflicted.”²⁵⁹ Professor Rebecca E. Zietlow similarly noted that “Congress could use [its enforcement power under the Thirteenth Amendment] to outlaw practices that have a discriminatory impact on racial minorities, regardless of evidence of discriminatory intent.”²⁶⁰ Professor Darrell A. H. Miller also encouraged this interpretation of the Amendment—Congress can invoke the enforcement power “if it can rationally determine that isolated instances of discrimination, if aggregated over a broad spectrum of persons, would have the effect of locking out African Americans from valuable social, economic, or political opportunities.”²⁶¹

In short, activating the government’s affirmative duties need not be based on intentional practices or conduct—that discriminatory conditions exist should, on its own, trigger the government’s functions under the Thirteenth Amendment. That is, once the government knows of conditions related to slavery in its jurisdiction, the government must eradicate it; otherwise, the government opens itself up to challenges that it has not satisfied its Thirteenth Amendment obligations.²⁶²

256. *City of Memphis v. Green*, 451 U.S. 100, 128 (1981).

257. *Id.* at 128–29.

258. See Darrell A. H. Miller, *The Stain of Slavery: Notes Toward an Attainder Theory of the Thirteenth Amendment*, 38 U. TOL. L. REV. 1011, 1015 n.29 (2007) (“[A]t least theoretically, the Thirteenth Amendment applies to acts of both disparate treatment and disparate impact.”).

259. Carter, *supra* note 21, at 87.

260. Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 311 (2010).

261. 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, 1045 (2008).

262. See Amar & Widawsky, *supra* note 15, at 1381.

With an understanding of the meaning of the Thirteenth Amendment, it is important to point out that the contents of the Amendment apply to modern circumstances. It is "more than a mere nineteenth-century relic, written only to reform a 'peculiar' time and place."²⁶³ It does not, by its own text, contain a sunshine provision, nor is the conduct that may give rise to Thirteenth Amendment violations only capable of occurring in certain, past times.²⁶⁴ Even so, the lingering effects of such conduct may continue to seep into the present and thus may be the proper object of the Thirteenth Amendment.

C. Enforcement

The discussion above contemplates an expansive Thirteenth Amendment mandate to abolish slavery and affirmatively remedy the conditions that limit the possession or enjoyment of meaningful freedom, a mandate unrestrained by the state action doctrine, the race of the affected citizens, or the intent to discriminate.

That said, the Amendment's vision has been only partially fulfilled, and even then to a modest extent. In 1951, Professor Jacobus tenBroek observed:

In the political, social, economic and judicial history of the United States, the Thirteenth Amendment has had a minor, even an insignificant part. Its history, subsequent to enactment, has never lived up to its historic promise as the "grand yet simple declaration of the personal freedom of all of the human race within the jurisdiction of this government."²⁶⁵

More recently, perhaps the most influential proponent of the notion that the Thirteenth Amendment is underenforced, Professor Lawrence Sager, focused specifically on the courts' reluctance to interpret the self-executing scope of the Amendment beyond the prohibition of slavery and involuntary servitude.²⁶⁶ The courts may be unwilling to

263. See *id.*

264. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1872).

265. Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 171 (1951) (quoting *Slaughter-House Cases*, 83 U.S. at 36).

266. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1219 n.21 (1978) [hereinafter Sager, *Fair Measure*] ("One explanation of the great disparity [sic] between the scope of [Section 1 and Section 2] of the [T]hirteenth [A]mendment is that the [C]ourt has confined its enforcement of the [A]mendment to a set of core conditions of slavery, but that the [A]mendment itself reaches much further; in other words, the [T]hirteenth [A]mendment is judicially underenforced."); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 433 (1993) ("[T]here is a gap between the reach of the Thirteenth Amendment, which sensibly includes the obligation of repair, and the judicial enforcement of the Thirteenth Amendment, which . . . stops short of structural repair.").

reach the “full conceptual boundaries” of the Amendment,²⁶⁷ and therefore accept dead weight between its full meaning and its actual enforcement, due to concerns regarding the “propriety of unelected federal judges’ [sic] displacing the judgments of elected state officials, or . . . the competence of federal courts to prescribe workable standards of state conduct and devise measures to enforce them.”²⁶⁸

In addition to the courts, contemporary scholars have understood that Congress’s powers under the Amendment have remained dormant.²⁶⁹ Thus, whether one focuses on the courts or Congress, it may be fairly said that the remnants of slavery have been left largely untended to by the federal government. Historically, and at present, “the Thirteenth Amendment remains a sparsely used . . . part of the Constitution.”²⁷⁰

In what follows, this Article argues that the conditions affecting the urban underclass lie squarely within the bounds of the Thirteenth Amendment and thus require government involvement.

IV. APPLICATION OF THE THIRTEENTH AMENDMENT TO THE URBAN UNDERCLASS

In this Part, this Article explains my view that the sociological findings with respect to the urban underclass, as described in Part II—the limited opportunities for social mobility and actual mobility, where the urban poor are disproportionately African-American and Hispanic, and where at least some of the residual conditions of the urban poor stem from de jure discrimination—activate the legal protections that were contemplated by the Thirteenth Amendment, as described

267. Sager, *Fair Measure*, *supra* note 266, at 1213.

268. *Id.* at 1217. The premise of Professor Sager’s underenforcement theory is that a constitutional right is akin to a Platonic ideal, with objective dimensions. Professor Daryl J. Levinson argued, however, that a constitutional right depends, pragmatically, on its remedies. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 924 (1999) (“Remedial equilibration leaves no room for a distinction between the abstract, analytic definitions of constitutional rights and remedial concerns that prevent courts from enforcing those rights to their ‘true’ limits . . .”).

269. See Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1849 (2006) (“Despite the Court’s recognition of broad congressional authority to define the incidents and badges of involuntary servitude, Congress has rarely exercised its enforcement power under the Thirteenth Amendment.”); see also McAward, *supra* note 235, at 141 (“Congress has been relatively restrained in the legislation it has passed pursuant to Section 2.”); Jennifer R. Hagan, Comment, *Can We Lose the Battle and Still Win the War? The Fight Against Domestic Violence After the Death of Title III of the Violence Against Women Act*, 50 DEPAUL L. REV. 919, 959 (2001) (“The Thirteenth Amendment represents a rarely used constitutional weapon, designed to provide Congress with the power to remedy occasions of involuntary servitude . . .”).

270. Tsesis, *supra* note 175, at 349.

in Part III. The conditions contributing to these limited opportunities require corrective action, pursuant to the Amendment, in order to afford the urban underclass the minimal ability to participate in mainstream American society. After arguing why the Amendment, as interpreted by the Supreme Court and given further meaning by scholars, supports this view, this Article addresses anticipated responses to refine the scope and contents of this argument.

A. Analysis

The urban underclass is defined, ultimately, by two traits: economic marginalization and physical marginalization. These traits speak to social isolation and spatial isolation; poverty and place; and financial depression and constrained space.²⁷¹ These two fundamental aspects of the urban underclass agitate the concerns underlying the Thirteenth Amendment. These elements—the lack of economic (vertical) liberty and physical (horizontal) liberty—, when coupled with the other characteristics of the urban underclass, fully trigger the protections of the Amendment. They thus require the federal government to undertake remedial efforts to enable the urban underclass to elevate from its subordinated economic position and escape the concentrated clusters of urban poverty.

First, the denial of economic liberty can give rise to a cognizable Thirteenth Amendment problem. The Supreme Court has made clear that the Amendment not only bans slavery and the vestiges of the institution, but also affirmatively guarantees some minimum threshold of liberty to individuals that allows them to participate in economic society.²⁷² Otherwise, the Amendment's guarantee of freedom is of little value.²⁷³ Therefore, "freedom under the Thirteenth Amendment

271. See *id.* (referring to the urban poor as "clients in poverty and place"); see also *supra* notes 32–47 and accompanying text.

272. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872) ("[L]ying at the foundation of [the Reconstruction Amendments is] the freedom of the slave race [and] the security and firm establishment of that freedom . . ." (emphasis added)); see also *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) ("By its own unaided force and effect [the Thirteenth Amendment] abolished slavery, and established universal freedom.").

273. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 434 (1968) (clarifying that the Thirteenth Amendment cannot be reduced to a "mere paper guarantee"); see also Amar, *supra* note 240, at 38 ("[F]or one truly to be a citizen in a democracy and to participate in the democratic process, one needs a minimum amount of independence."); Tsesis, *supra* note 238, at 1354 (explaining that according to the Amendment's legislative history, freedom from bondage alone would render freedom "a bitter mockery" and make the Amendment "a cruel delusion").

implies a notion of some minimal entitlement" or "a certain minimum stake in society."²⁷⁴

The urban underclass does not have this minimal stake.²⁷⁵ Thus, the de facto freedom that they possess is not only empty as a practical matter, but also legally deficient as a constitutional one. Whereas the Thirteenth Amendment sought to eliminate de jure oppression of the slave race, today, certain conditions collectively serve to keep the urban underclass at the fringes of both the economy and certain geographic areas. Those conditions may be read as a new manifestation or contemporary iteration of the more direct, overt subordination that achieved the purpose of confining a class of people to their social positions.²⁷⁶ Massey and Denton stated in their groundbreaking sociological analysis of the underclass that the "urban ghetto . . . represents the key institutional arrangement ensuring the continued subordination of blacks in the United States."²⁷⁷ Additionally, Iris Young wrote that explicit oppression and exploitation of slave labor have been effectively replaced by the systematic marginalization of those that the economy "cannot or will not use."²⁷⁸

To be clear, it is not only the static economic state of the urban underclass that may generate Thirteenth Amendment concerns, but also the fact that the members of the urban underclass are without the ability to improve their socioeconomic position. The snapshot of the economic condition of the urban underclass alone is troubling, but the wider, ongoing narrative, in which the underclass cannot change their condition over time, is what warrants greater attention under the Amendment.

Indeed, the inadequate educational system has failed to provide the urban poor with the necessary tools to enhance their ability to participate in the mainstream economy—a denial that can be traced without difficulty to the core of the Amendment's concerns.

274. Amar, *supra* note 240, at 41, 40; *see also* Azmy, *supra* note 13, at 984 (noting that the enactors of the Amendment believed that it would promote[] economic independence and social mobility).

275. *See* Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983, 1012 (1990) ("Today's reality is, however, that race and poverty together have produced [a] social development . . . inconsistent with even a minimal concept of a republican government: a permanent underclass, cut off by walls of discrimination, illiteracy, hopelessness, and, perhaps worst, [a] lack of education for participation in the community.").

276. *See* WILSON, *THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 4, at 2 ("[W]hereas the old barriers bore the pervasive features of racial oppression, the new barriers indicate an important and emerging form of class subordination.").

277. MASSEY & DENTON, *supra* note 4, at 18.

278. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 53 (1990).

Frederick Douglass once said that “[e]ducation . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free.” Today many of our inner-city public schools deny emancipation to urban minority students.²⁷⁹

“If society cannot end racial discrimination,” Justice Thomas added, “at least it can arm minorities with the education to defend themselves from some of discrimination’s effects.”²⁸⁰ Sociological evidence favors the conclusion that the urban poor have not been so minimally empowered. This evidence includes the fact that the members of the urban underclass are not equipped to be part of the modern economy and are without the ability to trek to locations where jobs are centrally located.

Similarly, this assessment was made during the civil rights movement:

Emancipated with inadequate skills and resources, the Negroes of the nineteenth century had no bootstraps by which to lift themselves out of poverty. In succeeding years, they have faced racial discrimination blocking almost all channels of social mobility. Thus, the Negro community has never had the opportunity to recover from the ordeal of slavery.²⁸¹

Sociological studies on the negligible involvement of the urban poor in the economy cut against any notion that, decades later, the opportunity for economic advancement has arrived for the urban underclass, many of whom are African-American. The absence of such opportunity to advance economically, or vertically, and thus the absence of the baseline conditions necessary for meaningful participation in society, can provide the basis for a legitimate grievance under the Thirteenth Amendment.

Apart from the denial of economic liberty, the denial of physical, or horizontal, liberty also establishes a cognizable Thirteenth Amendment problem. The inability of slaves to move beyond accepted boundaries or travel broadly was a fundamental part of slavery. Slave masters possessed the legal right to control the physical whereabouts of their slaves.²⁸² Indeed, the Constitution’s fugitive slave clause required that runaway slaves be returned to their owners.²⁸³ Accord-

279. *Zelman v. Simmons-Harris*, 536 U.S. 639, 676 (2002) (Thomas, J., concurring) (alterations in original).

280. *Id.* at 683.

281. Turner, *supra* note 103, at 1310.

282. See Rutherglen, *supra* note 198, at 1399 (“The denial of liberty entailed the denial of physical freedom, allowing the master to control the slave’s presence and movement and denying the slave any right to travel or access to the means of doing so.”).

283. See U.S. CONST. art. IV, § 2, cl. 3.

ingly, the Supreme Court recognized that "restraint of . . . movements" is an "inseparable incident[] of the institution" of slavery that falls squarely within the core of the Amendment's original concerns.²⁸⁴

While the slaves freed by the Thirteenth Amendment were actually restrained and faced the specter of being returned should they escape, today's urban underclass is functionally restrained, without the meaningful ability to move out of its urban settings. The sociological findings regarding the urban poor who have not traveled outside of the inner city, lack the means to travel broadly or commute, and were unable to flee pending natural disasters demonstrate that the urban underclass is effectively restricted to certain areas. Though there are no technical property lines beyond which they cannot legally traverse and no individuals required to return them to their starting points, the members of the urban underclass nonetheless remain trapped in their physical surroundings. In *Jones*, the Supreme Court stated that "when racial discrimination herds men into ghettos . . . , it too is a relic of slavery" that offends the Thirteenth Amendment.²⁸⁵

Others have recognized the parallels between the slaves' lack of physical liberty and the limitations on inner-city individuals' functional ability to physically move. For example, commentators have drawn the analogy between plantations and ghettos: "The present seems depressingly continuous with the past . . . the continuity of plantation and ghetto is borne in upon us";²⁸⁶ "[l]ike the localized plantation economy, the ghetto consisted of an enclosed area where educational and employment resources were limited";²⁸⁷ "the whip of the plantation was replaced by the boundaries of the ghetto";²⁸⁸ and "the inner city [is] the 'welfare plantation' of the current age in that it possesses many characteristics of the southern slave plantations."²⁸⁹

The limited opportunity for the urban underclass to move out of its physical environment at all, let alone to take part in the heart of the economy in the suburbs, has its remnants in the absence of freedom of slaves to leave their masters' compounds. Moreover, it is an additional manifestation of the absence of the minimal stake in society

284. *The Civil Rights Cases*, 109 U.S. 3, 22 (1883).

285. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 442-43 (1968).

286. C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* 162 (1966).

287. JACQUELINE JONES, *THE DISPOSSESSED: AMERICA'S UNDERCLASSES FROM THE CIVIL WAR TO THE PRESENT* 278 (1992).

288. WILLIAM H. GRIER & PRICE M. COBBS, *BLACK RAGE* 26 (1968).

289. Alfreda A. Sellers-Diamond, *Disposable Children in Black Faces: The Violence Initiative as Inner-City Containment Policy*, 62 UMKC L. REV. 423, 425 n.10 (1994).

that the Thirteenth Amendment ensures, as the meaningful freedom of movement is a precondition for participation in the modern economy. The spatial confinement of the urban underclass thus may be considered a legitimate concern under the Amendment.

These two central characteristics of the urban underclass—their limited economic position and restrained physical situation—are, on their own, valid Thirteenth Amendment concerns. Other facets of the urban underclass, added to these two elements, provide an even stronger case that the urban underclass is entitled to Thirteenth Amendment protection.

First, while the Thirteenth Amendment reaches individuals of all races,²⁹⁰ it was undoubtedly enacted with African slaves in mind.²⁹¹ Put differently, if there is any race that may seek to be safeguarded by the Thirteenth Amendment, and it is clear that no race is categorically excluded from the Amendment's protections, African-Americans may possess the greatest entitlement to the Amendment's protection because of the unique mistreatment that was visited upon their race.²⁹² As to the urban underclass, a vast majority of its members are African-Americans.²⁹³ Accordingly, they are, in terms of race, the closest to the intended beneficiaries of the Thirteenth Amendment.²⁹⁴

Second, and relatedly, the substantive heart of the Thirteenth Amendment is overt racial discrimination. The Amendment reaches not only overt discrimination grounded in racial animus, but also practices and policies that may have a racially discriminatory effect. In *City of Memphis v. Greene*, the Court suggested that a discriminatory impact case could be cognizable under the Amendment.²⁹⁵ Indeed, one scholar interpreted *Greene* to hold that

to the extent that racial discrimination that is a "badge and incident" of slavery is also outlawed by the Thirteenth Amendment, one could not enforce facially neutral policies and procedures that

290. See *supra* Part III.B.2.

291. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1872).

292. See Carter, *supra* note 207, at 1317–18 (suggesting that the greater the relationship between one's race or harm to the African-American or the "system of slavery," the greater claim one may lay claim to the Thirteenth Amendment); see also MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 146 (1963) ("It is impossible to create a formula for the future which does not take into account that our society has been doing something special *against* the Negro for hundreds of years. How then can he be absorbed into the mainstream of American life if we do not do something special *for* him now . . . ?").

293. See *supra* notes 52–53 and accompanying text.

294. Massey and Denton argue that race is a more salient explanation than economy or class for the situation of the ghetto poor. See MASSEY & DENTON, *supra* note 4, at 85–87. To the extent that they are correct, the argument that the urban underclass implicates the Thirteenth Amendment becomes more forceful.

295. See *City of Memphis v. Greene*, 451 U.S. 100, 128–29 (1981).

subject African Americans and other minorities to conditions having a disproportionate impact on them in the exercise of their natural rights of "life, liberty, and the pursuit of happiness."²⁹⁶

With respect to the urban underclass, Professor Wilson has shown that part of the structural causes for the existence of an urban underclass consists of overt discrimination committed by public and private actors. This discrimination includes the powerful, residual effects of slavery, segregation, and public discrimination.²⁹⁷ Turner similarly noted that "the conditions of the ghetto environment which oppress them may be traced in part to past discriminatory practices in employment, housing, and education."²⁹⁸ Accordingly, the urban underclass not only contains the racial composition, but is also subject to the type of conduct—the effects of slavery and overt discrimination—that is at the core of the Thirteenth Amendment.²⁹⁹

Additionally, though not all members of the urban underclass are African-Americans or people of color, and though there are other causes to the urban underclass's predicament that are not tied to overt discrimination, there is at least part of the urban underclass, in terms of race and structural causes, whose entitlement to Thirteenth Amendment protection is amply supported. This is not to say that the Thirteenth Amendment exclusively covers members of the urban underclass who are African-American, or who have been subjected to overt discrimination or the consequences thereof, but only to place beyond dispute that some members of the urban underclass are at the core of the Thirteenth Amendment's protections. While others in the urban underclass may not be so close to the center, they may nonetheless be within the ambit of the Amendment's commands principally due to their considerable poverty and perpetual economic and spatial marginalization.

If the urban underclass is entitled to remedial action pursuant to the Thirteenth Amendment, the question becomes what may be the possi-

296. Larry J. Pittman, *Physician Assisted Suicide in the Dark Ward: The Intersection of The Thirteenth Amendment and Health Care Treatments Having Disproportionate Impacts on Disfavored Groups*, 28 SETON HALL L. REV. 774, 873 n.384 (1998).

297. WILSON, *supra* note 42, at 28, 152–53.

298. Turner, *supra* note 103, at 1308.

299. It is these distinguishing features that distance the urban underclass from the slippery slope possibility that the Thirteenth Amendment would be invoked to right every possible injury premised on difference. Accordingly, it cannot be reasonably said that this Article's interpretation of the Thirteenth Amendment would open up the Amendment to serve as a remedy for all possible civil rights wrongs. This Article is mindful, specifically, of the concern that the Thirteenth Amendment can be read as an amorphous catchall with respect to discrimination. See Carter, *supra* note 207, at 1317 (arguing against the view that the Thirteenth Amendment is a "generalized constitutional remedy for all forms of discrimination").

ble content of such relief.³⁰⁰ As the constitutional infirmities with respect to the urban underclass are tied to their economic and spatial marginalization, the remedy should have the purpose and effect of improving the conditions in the urban environments such that the urban poor may possess the minimal opportunity to take part in the modern economy and mainstream society.³⁰¹ In general, this relief would trigger enhancements in housing, education, and infrastructure such that the urban underclass may attain the minimal abilities to break free from its economic isolation.³⁰² For example, as the *Economist* once proposed, "It means expensive policies . . . to lure better teachers and school managers into the cities, to build transport links to the suburbs where the jobs are, [and] to train young people for jobs."³⁰³ Not any jobs will suffice. Those jobs, as Professor Wilson stated, should have the capacity "to enhance social mobility."³⁰⁴ "Social mobility," he adds, "leads to geographic mobility."³⁰⁵ Nor will just any location for the jobs suffice. While enhancing transportation to jobs in the suburbs may be advisable, it would be optimal if jobs that may facilitate social mobility were located in urban environments themselves.³⁰⁶

More specifically, if social mobility is the objective, and if geographic mobility may follow from it, relief under the Thirteenth Amendment would, at a minimum, entail compensatory job training and compensatory education, including early childhood education.³⁰⁷

300. It is beyond the scope of this Article to prescribe the precise contents of such remedial legislation. This Article attempts to furnish the legal predicate, under the Thirteenth Amendment, for congressional remedial action designed to improve the conditions of the urban underclass. That said, some preliminary thoughts on remedies may be appropriate.

301. Whatever shape the remedy takes, policy makers should ensure that it assists the urban underclass, and not those already relatively advantaged. See WILSON, *THE TRULY DISADVANTAGED*, *supra* note 4, at 110–11, 114–15; see also WILSON, *THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 4, at 110.

302. See WILSON, *THE TRULY DISADVANTAGED*, *supra* note 4, at 158 ("[T]he most realistic approach to the problems of concentrated inner-city poverty is to provide ghetto underclass families and individuals with the resources that promote social mobility.").

303. *America's Wasted Blacks*, *supra* note 50, at 14.

304. WILSON, *THE TRULY DISADVANTAGED*, *supra* note 4, at 122.

305. *Id.* at 158; see also MASSEY & DENTON, *supra* note 4, at 145 ("[T]he process of geographic mobility . . . accompanies socioeconomic achievement.").

306. This recommendation would be consistent with the view that urban planning should place a premium on "mixed-use" development, that is, development that integrates residential opportunities with meaningful employment opportunities. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 175 (Vintage Books 1992) (1961) ("[R]esidential districts lacking mixture with work do not fare well in cities.").

307. Other programs that may attend such educational instruction, such as nutrition and exercise programs, may be legitimate parts of, or corollaries to, the educational initiatives that are the central focus of such remedies. Combating racial isolation in schools may also be appropriate. If the conditions of the urban underclass are a constitutional violation, those conditions could give rise to desegregation orders, that is, decrees by federal district court judges (similar to

Public intellectual Fareed Zakaria similarly noted, "The ingredients [for social mobility] are obvious: decent health care and nutrition for children, good public education, high-quality infrastructure—including broadband Internet—to connect all regions and all people to market opportunities, and a flexible and competitive free economy."³⁰⁸ Enhanced efforts to reintegrate ex-offenders are also appropriate.³⁰⁹ More comprehensive, long-term reform may warrant consideration as well.³¹⁰

In addition, eminent sociologists suggest that improvements in the economic position of the urban underclass are insufficient to enable its members to rise out of their economic and spatial isolation because race remains an imposing obstacle to their advancement. "[R]ace clearly predominates."³¹¹ "[N]o matter how much blacks earned they remained spatially separated from whites. . . . [R]ising economic status had little or no effect on the level of segregation that blacks experienced."³¹² Accordingly, relief directed towards the urban underclass must heighten attempts to eliminate racist conduct, including in the

those following *Brown v. Board of Education*) to achieve greater racial integration in inner-city schools. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (declaring that racial segregation in public education is inherently unequal); *Brown v. Bd. of Educ.*, 349 U.S. 294, 299–300 (1955) (authorizing federal district courts to issue desegregation orders to school districts operating segregated schools and to monitor the districts' timely and good faith progress towards implementing a unitary system). Such orders may solve the paradox created by *Milliken v. Bradley*, 418 U.S. 717 (1974), which limited the ability of federal judges to issue multi-district desegregation orders, in that the racial isolation, including "white flight," may be the result of the sum of unconstitutional conditions in urban settings, not necessarily de jure segregation. See *Missouri v. Jenkins*, 515 U.S. 70, 94–95 (1995) (refusing to bless desegregation order that sought to respond to "white flight" when segregation was not the product of de jure segregation).

308. Zakaria, *supra* note 29; see also Helen F. Ladd & Edward B. Fiske, Op-Ed., *Class Matters. Why Won't We Admit It?*, N.Y. TIMES, Dec. 11, 2011, <http://www.nytimes.com/2011/12/12/opinion/the-unaddressed-link-between-poverty-and-education.html>.

309. See Sampson & Loeffler, *supra* note 36, at 29–30.

310. Suggestions as to more extensive reform often relate to the economy and criminal justice system. See WILSON, *THE TRULY DISADVANTAGED*, *supra* note 4, at 121–24 (arguing for universal economic reform "designed to promote full employment and balanced economic growth," which will benefit all participants in the economic system, especially the urban poor); Douglas S. Massey, *The Past & Future of American Civil Rights*, DAEDALUS, Spring 2011, at 37, 51 ("[T]he contemporary civil rights movement must make criminal justice reform a central goal, demanding a repeal of legal gimmicks such as three-strikes laws, mandatory minimum sentencing, and harsher penalties for crack than for powdered cocaine.").

311. MASSEY & DENTON, *supra* note 4, at 85. In a more recent essay, Massey and others suggest that race is slowly giving way to class as the major factor in explaining the spatial isolation of the urban poor. See Douglas S. Massey et al., *The Changing Bases of Segregation in the United States*, 626 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 74–76 (2009).

312. MASSEY & DENTON, *supra* note 4, at 85–87; see also *id.* at 88 ("Only blacks experience a pattern of constant, high segregation that is impervious to socioeconomic influences.").

housing and lending contexts, that serves to constrain the horizontal and vertical liberty of the urban underclass.³¹³

Such constitutional remedial relief should also include a critical re-examination by the government of its active role in urban environments, particularly its approaches to drugs in the inner city.³¹⁴ The “war on drugs,” which has been waged primarily against poor African-Americans in the inner city,³¹⁵ has “emphasized arrest and incarceration rather than prevention and treatment.”³¹⁶ In doing so, this strategy has arguably reinforced the “widespread and deeply rooted public association of racial minorities with crime and drugs,”³¹⁷ and failed to mitigate or address the root causes of drugs in the inner city.³¹⁸

The result has been a vicious cycle of drugs, related violence, and poverty in the inner city; some have charged that this consequence mirrors the purpose of Jim Crow, to specifically limit the opportunities of African-Americans.³¹⁹ The federal government should answer for its part in maintaining the status of the urban underclass. In particular, federal approaches with respect to housing, drugs, and related

313. See MASSEY & DENTON, *supra* note 4, at 229–31 (explaining that dismantling the ghetto requires, among other things, stricter prohibition against race-based discrimination in housing and lending); see also Massey, *supra* note 310, at 51.

314. See Chaddha & Wilson, *supra* note 46, at 170 (“Faced with the expectation of producing numbers, police departments are encouraged to focus on poor, [inner-city] neighborhoods to provide a greater number of arrests, especially by targeting the open-air drug trade.”); see also *id.* at 168 (“[T]he incarceration rate is substantially higher for residents in neighborhoods of concentrated disadvantage.”).

315. See, e.g., MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME AND PUNISHMENT IN AMERICA* 4 (1995) (“Anyone with knowledge of drug-trafficking patterns and of police arrest policies and incentives could have foreseen that the enemy troops in the War on Drugs would consist largely of young, inner-city minority males.”).

316. Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 277 (2009); see also Marc Feldman, *Political Lessons; Legal Services for the Poor*, 83 GEO. L.J. 1529, 1615–16 (1995) (“Although African-Americans and Latinos have long been over-represented within the criminal system, the ‘war on drugs’ has magnified this situation. The over-representation is so significant that one can only conclude that the ‘war on drugs’ has targeted poor people of color as its enemy: The data on this point are simply overwhelming.”). For well-informed proposals on a new system of drug enforcement in inner cities, see Kurt L. Schmoke, *Forging a New Consensus in the War on Drugs: Is It Possible?*, 10 TEMP. POL. & CIV. RTS. L. REV. 351, 356–57 (2001).

317. Fellner, *supra* note 316, at 277.

318. See, e.g., Alexander Polikoff, *America and its Black Ghettos*, in PUBLIC HOUSING AND THE LEGACY OF SEGREGATION 99, 102 (Margery Austin Turner et al. eds., 2009) (“The war on drugs, which is producing no demonstrable effect on drug availability, drug crime rates, or crime rates generally, is directly responsible for the drug black market and for the crime it breeds while diverting money from education and social initiatives.”).

319. See Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839, 845 (2002) (“Just as Jim Crow responded to emancipation by rolling back many of the newly gained rights of African-Americans, the drug war is again replicating the institutions and repressions of the plantation . . .”); see also ALEXANDER, *supra* note 88, at 13.

crime have failed to quell these issues and have contributed to the perpetuation of the urban underclass.³²⁰ A Thirteenth Amendment remedy for the urban underclass may thus compel the federal government to reorient its approaches to drugs in urban areas and improve the conditions in urban areas such that engaging in the drug trade is not seen as the most attractive, or only viable, option to generate an acceptable standard of living.³²¹ As Sampson and Loeffler wrote, "Unless an alternative policy is implemented, the evidence suggests, a subset of communities will continue to produce concentrated disadvantage, concentrated crime, and concentrated imprisonment."³²²

As 2011 marked the fortieth anniversary of the "war on drugs"³²³ and the release of multiple reports on its "devastating consequences" for individuals and societies,³²⁴ this may be an opportune moment to consider the extent to which the Thirteenth Amendment's guarantee of freedom may require the federal government to revisit, and make

320. See *supra* notes 72–74, 78, 105–06, 325–29 and accompanying text.

321. Compare ELLIOT LIEBOW, *TALLY'S CORNER: A STUDY OF NEGRO STREETCORNER MEN* 32 (Rowman & Littlefield 2003) (1967) ("[T]he most important fact is that a man who is able and willing to work cannot earn enough money to support himself, his wife, and one or more children. A man's chances for working regularly are good only if he is willing to work for less than he can live on, and sometimes not even then."), with WILSON, *THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 4, at 108 ("[I]llegal activities, in many respects, provide a more lucrative alternative to low-wage employment."). One expression of the "choice" inner-city residents have between these low-skill, low-wage jobs and selling drugs can be found in hip hop music. See Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983 (2004) (noting that hip-hop music can provide powerful insights into the little-known experiences of black youth, particularly as they relate to the criminal justice system). One example of this can be found in an autobiographical verse by Raekwon of the Wu Tang Clan. He said, "Only way, I begin to G' off was drug loot." WU-TANG CLAN, *C.R.E.A.M.*, on ENTER THE WU-TANG (36 Chambers 1993) (emphasis added). In other words, the only means by which he could make thousands of dollars was by selling drugs. Of course, the allure of such money alone can lead some to a life of drug distribution, even without the possession of such money. See GZA/GENIUS, *Duel of the Iron Mic*, on LIQUID SWORDS (Geffen Records 1995) ("[C]ontrol the avenues that's the dream that's sold. . . . [S]horty's not a shorty no more, he's livin' heartless / Regardless of the charges, claims to be the hardest / individual, critical thoughts, criminal minded / Blinded by illusion, findin' it confusin'"); see also JAY-Z, *Izzo (H.O.V.A.)*, on THE BLUEPRINT (2001) ("[L]ife stories told through rap. . . . [I sold drugs] so hopefully you won't have to go through that / I was raised in the projects, roaches and rats.").

322. Sampson & Loeffler, *supra* note 36, at 29.

323. See Charles Blow, Op-Ed., *Drug Bust*, N.Y. TIMES, June 10, 2011, at A21 ("[June 17, 2011] marked the 40th anniversary of one of the biggest, most expensive, most destructive social policy experiments in American history: The war on drugs.").

324. GLOBAL COMM'N ON DRUG POLICY, *WAR ON DRUGS 2* (2011), available at <http://www.globalcommissionondrugs.org/Report>; see also THE BECKLEY FOUNDATION & THE ALL-PARTY PARLIAMENTARY GRP. ON DRUG POLICY REFORM, *THE GLOBAL INITIATIVE FOR DRUG POLICY REFORM* (2011), available at <http://www.beckleyfoundation.org/pdf/Global%20Initiative%20Proposal%201.pdf>.

practical amends for, its policies in the inner cities and attendant myopia as to the negative externalities of those policies.³²⁵

If the enhancement of urban conditions to achieve social mobility is the remedy, the next question becomes what arm of the federal government should assume the responsibility to implement it. On this point, it would be best for Congress to respond. This is so for at least three reasons, the first of which is legal. As noted above, Congress possesses generous latitude under its Thirteenth Amendment enforcement powers to define what constitutes "badges and incidents of slavery."³²⁶ Congress's determination must only be rational,³²⁷ and the copious sociological research on the urban underclass, the peaks of which have been discussed herein, provides support for the rationality of any congressional finding that the urban underclass is a valid object of Thirteenth Amendment corrective action. By contrast, the self-executing scope of the Amendment, and thus the courts' enforcement power under it, unaided by congressional approval, is quite circumspect³²⁸ and therefore unlikely to yield a legally sufficient remedial scheme.

A second reason why Congress is best situated to take ownership over possible remedies is practical. Congress has the fact-finding capabilities and resources to examine the problems of the inner city and devise appropriate solutions.³²⁹ This is especially true given the extensiveness of the problems, their penetration into different sectors and segments of society (for example, housing and education), and their national scope. Considerations of judicial economy and efficiency suggest that Congress is the better equipped body to tackle this issue, given its magnitude.

A third reason is institutional. The remedies that focus on improving the conditions within urban settings are politically palatable. For example, Professor Wilson noted that a 1990 survey found that 68% of whites were in favor of "spending more money on the schools in black neighborhoods," and 59% and 70% of white males and white females, respectively, favored "special job training and education for

325. See WILLIAM JULIUS JONES, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 195 (Vintage Books 1997) (1996) ("If we are to fashion remedies for black poverty, we need to understand the origins and dynamics of inequality in the African-American community. . . . [B]lack leaders and policymakers now need to give more attention to remedies that will make a concrete difference in the lives of the poor.").

326. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439–40 (1968).

327. See *id.*

328. See *City of Memphis v. Greene*, 451 U.S. 100, 125–26 (1981).

329. See Carter, *supra* note 207, at 1354 ("[A]s a pragmatic matter of institutional capacity and propriety, Congress possesses [fact-finding] and [policy making] powers that courts do not.").

blacks.”³³⁰ By way of comparison, only 18% of white males and 13% of white females favored “job preferences for blacks.”³³¹ Congress is, by its very nature, responsive to the citizenry and public opinion.³³² Judicial decisions, by contrast, are to be insulated and independent from such reactions.³³³ As the focus of the remedial efforts contemplated herein are politically popular, it may be sensible for Congress to take ownership over them and see that they are carried out.³³⁴

In sum, the economic and physical limitations on the liberty of the urban underclass, which are traceable in part to racial discrimination and which disproportionately impact African-Americans and people of color, confer upon the urban underclass the right to remedial efforts under the Thirteenth Amendment that will give them the ability to minimally participate in mainstream society.³³⁵ Those remedies should entail an improvement of the conditions within the urban environment, especially with respect to education; strengthened efforts to eliminate discrimination that precludes mobility; and a recalibration of the federal policies that directly affect the urban poor, especially the “war on drugs.” The responsibility for the remedy should reside with Congress because it has significant enforcement power under the Amendment, resources to implement comprehensive solutions to a complex and national problem, and the public support to back its conditions-focused efforts in these areas. Congressional involvement in this area would not only have the potential to enhance the welfare and lives of many Americans, but would also help fulfill the promise of an Amendment that has been heretofore underenforced despite its grand purpose and vision.³³⁶

330. WILSON, *supra* note 42, at 139–40.

331. *Id.* at 140.

332. See generally THE FEDERALIST NO. 57 (James Madison) (“[F]requent elections . . . support in the members [of the House of Representatives] an habitual recollection of their dependence on the people . . .”).

333. See generally THE FEDERALIST NO. 78 (Alexander Hamilton) (“[T]he independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society.”).

334. See WILSON, THE TRULY DISADVANTAGED, *supra* note 4, at 118 (“An important consideration in assessing public programs targeted at particular groups . . . is the degree of political support those programs receive . . .”).

335. This is not to suggest that those who do not possess the attributes of the urban underclass are not entitled to relief under the Thirteenth Amendment. This is only an attempt to provide the doctrinal foundation for relief under the Amendment specifically for the urban underclass. At least initially, it appears that the same legal analysis could justify Thirteenth Amendment remedial action for Native-Americans on reservations and, perhaps, even for the rural poor.

336. See William M. Carter, Jr., *The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery*, 71 MD. L. REV. 21, 21 (2011) (“The Thirteenth Amendment was intended to eliminate the institution and legacy of slavery. Having accomplished the former, the

B. Clarifying Principles

A theory of constitutional law that encourages Congress to undertake greater involvement in America's urban areas may be considered dramatic and drastic, and is thus likely to be met with some degree of skepticism. It appears that significant federal action is needed in light of the significance of the limited opportunities that the urban poor possess, particularly when the restraints on these opportunities can be traced in part to de jure discrimination and, arguably, to the government's own policies.³³⁷ That said, it would be helpful to refine the contours of this Article's thesis in order to assuage potential concerns regarding the preceding material.

The first possible criticism of this Article may be that its suggestion that the urban underclass is entitled to relief under the Thirteenth Amendment is a mere cover for an argument that these individuals are entitled to welfare or other government entitlements. This Article's argument is not a veiled attempt to seek "handouts" for the urban poor. It is, by contrast, a constitutionally supported appeal for the enhancement of conditions in the inner city in order to empower the urban poor to rise up out of their economic status and physical locations. Dr. Martin Luther King, Jr. wrote that for an African-American to be "absorbed into the mainstream of American life, [we must] balance the equation and *equip him* to compete on a just and equal basis"³³⁸ Professor Wilson similarly observed that "the key conclusion from a public policy perspective is that programs created to alleviate poverty, joblessness, and related forms of social dislocation should place primary focus on changing the social and economic *situations* . . . of the ghetto underclass."³³⁹ The relief prayed for in this Article, in short, must relate to the *conditions* of the urban underclass, though its members will be the indirect beneficiaries of the improvement of those conditions.

Nor does this argument posit that all conditions in the urban environments must be precisely equal to those in the suburbs or other

Amendment has rarely been extended to the latter. The Thirteenth Amendment's full scope therefore remains unrealized."); *see also supra* Part III.C.

337. *See* MASSEY & DENTON, *supra* note 4, at 217–18. Yet, the expansive scope of a remedy does not automatically invalidate it or make it unworthy of consideration. *See, e.g.,* Brown v. Plata, 131 S. Ct. 1910 (2011) (ordering the California prison system to reduce its prison population by over 100% due to conditions in the prisons that violate the Eighth Amendment to the Constitution).

338. KING, *supra* note 292, at 146 (emphasis added).

339. WILSON, THE TRULY DISADVANTAGED, *supra* note 4, at 138 (emphasis added).

parts of the nation.³⁴⁰ Improving the conditions in the inner cities is not a proxy for some redistributive mechanism or a justification for a zero-sum game in which the more affluent must sacrifice the quality of their conditions to elevate those of the urban poor. Rather, the purpose of this Article is to argue that the conditions in the urban environments must meet a basic threshold that enables its residents to be able to at least compete economically and traverse spatially.

As a second possible criticism, some may claim that this Article ignores or condones the urban underclass's own anti-social behavior.³⁴¹ Myron Magnet, for example, declared that the American underclass is primarily defined by "not so much their poverty or race as their behavior—the chronic lawlessness, drug use, out-of-wedlock births, non-work, welfare dependency, and school failure."³⁴² The underclass, he continued, "describes a state of mind and a way of life," as opposed to an "economic condition."³⁴³ More recently, prominent Republican Newt Gingrich stated:

Really poor children in really poor neighborhoods have no habits of working and have nobody around them who works, so they literally have no habit of showing up on Monday [or] staying all day. They have no habit of 'I do this and you give me cash' unless it's illegal.³⁴⁴

The implication is that the members of the urban underclass are responsible by and large for their situation and that, as a consequence, adopting a better perspective and lifestyle may lead invariably to enhancements in their particular stations.³⁴⁵

This Article rejects the "either-or" proposition suggested by Magnet, Gingrich, and others, namely that either the urban underclass gets its collective act together, or it will persist in its own economic squalor and be confined to the same deteriorating space. The structural

340. *Cf. Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("Such an opportunity [for education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").

341. *See Chaddha & Wilson, supra* note 46, at 165 ("Americans remain strongly disposed to the idea that individuals are largely responsible for their own economic situations.").

342. Myron Magnet, *America's Underclass: What to Do?*, *FORTUNE*, May 11, 1987, at 130, 130.

343. *Id.*

344. Jonathon Easley, *Gingrich: Poor Kids Have Bad Work Habits 'Unless It's Illegal'*, *HILL*, Dec. 1, 2011, <http://thehill.com/video/campaign/196663-gingrich-poor-children-have-bad-work-habits-unless-its-illegal>.

345. Professor Wilson and others dispute this suggestion, pointing out instead, through their sociological work, that poverty and geography are the determining qualities of the urban underclass. *See WILSON, supra* note 42, at 47; *see also MASSEY & DENTON, supra* note 4, at 169; Chaddha & Wilson, *supra* note 46, at 165, 168. They acknowledge, at the same time, that the urban environment is home to drugs, violence, prostitution, and other social ills. *See, e.g., WILSON, supra* note 42, at 36.

causes identified by Professor Wilson demonstrate that there are historical and institutional reasons for the urban underclass's existence, which are unrelated to the conduct, however destructive, of the urban underclass. This Article addresses the extent to which those causes contribute to the position of the urban underclass. It further embodies the hope, expressed by Professor Wilson, that "changes in the economic and social situations of the ghetto underclass will lead to changes in cultural norms and behavior patterns."³⁴⁶

A third possible criticism may arise out of the Supreme Court's decision in *City of Boerne v. Flores*. In that case, the Supreme Court pared down Congress's enforcement powers under the Fourteenth Amendment,³⁴⁷ allowing Congress to pass prophylactic legislation only if there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."³⁴⁸ *Boerne* has led some to question whether Congress's broad enforcement power under the Thirteenth Amendment, as set forth in *Jones*, is in doubt.³⁴⁹

The relief discussed in this Article is not prophylactic, or preventative of a constitutional harm. It is to remedy, in part, the lingering effects of discrimination. Accordingly, even if *Boerne* were to be applied in the Thirteenth Amendment context, the Supreme Court's more stringent take on Congress's Fourteenth Amendment enforcement power would not limit the scope of Congress's Thirteenth Amendment enforcement power as invoked with respect to the urban underclass.³⁵⁰

Though *Boerne* may not technically apply to the remedial efforts necessary to improve the conditions of the urban underclass, the relief contemplated by this Article may nonetheless pass constitutional muster under a more demanding view of Congress's enforcement power. More specifically, the remedy would not redefine the substantive

346. WILSON, THE TRULY DISADVANTAGED, *supra* note 4, at 159; *see also id.* at 61 ("[C]ulture is a response to social structural constraints and opportunities.").

347. *See* U.S. CONST. amend. XIV, § 5.

348. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

349. *See, e.g.,* McAward, *supra* note 235.

350. *See* *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) (explaining that *Boerne* recognized a distinction between "remedial legislation and substantive redefinition," the latter being beyond the scope of Congress's powers under Section 5 of the Fourteenth Amendment, and employed a "congruence and proportionality" test to determine whether Section 5 legislation is "remedial" and therefore within Congress's Section 5 authority); *see also* *Alaska v. EEOC*, 564 F.3d 1062, 1068 (9th Cir. 2009) ("[T]he congruence and proportionality requirement applies only to prophylactic legislation; it doesn't apply to a direct remedy for unconstitutional conduct."). Here, the denial of horizontal and vertical liberty to the urban underclass is, as shown in this Article, directly offensive to the Thirteenth Amendment.

rights of those benefiting from the legislation, but would rather confer upon the urban underclass protections that are already said to be covered by the Thirteenth Amendment, including the absence of meaningful freedom to take part in society and the functional restrictions on physical movement. The remedy, in other words, would expand the potential class of people who may benefit from Thirteenth Amendment legislation, not expand the rights of the Amendment itself.³⁵¹ Accordingly, under *Jones* or *Boerne*, remedies designed to fix the conditions affecting the urban underclass may survive judicial scrutiny.³⁵²

The fourth criticism may be that the Supreme Court has expressed a clear interest in striking down, on overinclusiveness grounds, remedies with the ostensible purpose of addressing past discrimination. In the context of racial preferences, for example, the Court has reviewed whether the remedial programs are limited to only those groups who have been victimized by discrimination. “[R]emedial relief [must be tailored] to those who truly have suffered the effects of prior discrimination,” the Court wrote.³⁵³ Thus, members of a given race as a whole cannot be provided relief without regard to whether they have suffered those effects.³⁵⁴ The Thirteenth Amendment remedies—designed to reach the urban underclass and to take effect in urban areas—may reach those who are not economically impoverished or spatially restricted. Indeed, poor urban areas are home to the poor and non-poor.³⁵⁵ Accordingly, it seems that an overinclusiveness problem may exist for remedial legislation directed towards the urban underclass.

The overinclusiveness inquiry, however, is generally part of a strict analysis of the challenged practice or law.³⁵⁶ The standard of review with respect to Congress’s enforcement power under the Thirteenth Amendment is one of mere rationality, and is therefore quite leni-

351. See McAward, *supra* note 235, at 142–43 (advancing a test to reconcile *Boerne* with Congress’s enforcement powers under the Thirteenth Amendment).

352. See Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 40, 41–42 (2011) (“[T]he historical and jurisprudential background of the Thirteenth Amendment indicates that *Boerne*’s congruent and proportional test is inapplicable to the judicial review of Thirteenth Amendment enforcement authority.”).

353. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989).

354. *Id.*

355. See WILSON, *THE TRULY DISADVANTAGED*, *supra* note 4, at 46.

356. See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2741–42 (2011) (striking down a statute on overbreadth grounds).

ent.³⁵⁷ Accordingly, the overinclusiveness requirement likely does not apply to Thirteenth Amendment remedial acts by Congress.³⁵⁸

A fifth and final criticism is tied to a commenter's question on an earlier draft: Why could not Congress simply use its authority under the Commerce Clause to assist the urban poor? Admittedly, there may be other sources of power that Congress may use for this purpose. Still, there is undeniably a unique and special dimension to legislation that says, in effect, that the situation of the urban poor today is sufficiently close to slavery and its vestiges such that remedial efforts are appropriate. The Commerce Clause does not at all convey this important legal and social message.³⁵⁹ Moreover, as a practical matter, the Supreme Court has never struck down a congressional act passed pursuant to the Thirteenth Amendment's enforcement power, whereas the same cannot be said for Commerce Clause.³⁶⁰

V. CONCLUSION

The urban underclass consists of the marginalized and forgotten. They are spare beings in the stratified American system. They are the human remainder—the difference between those with minimal economic and social wherewithal, and those who fall below this modest threshold. They have been denied the ability to participate in our modern economic system and to even traverse outside of their depressed physical areas. They are trapped, and this situation is passed on to successive generations, creating an ongoing flow of individuals below mainstream society. As time presses on, the urban underclass is

357. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968); see also Tsesis, *supra* note 269, at 1836 (“The Thirteenth Amendment standard of review is a low-level, rational basis scrutiny.”).

358. At least one scholar contends that Thirteenth Amendment remedial efforts should, as a normative matter, be subject to strict scrutiny. See Pittman, *supra* note 296, at 859–60 (1998). But see *Alma Soc’y Inc. v. Mellon*, 601 F.2d 1225, 1233–34 (2d Cir. 1979) (rejecting arguments that the Thirteenth Amendment imposes strict or intermediate scrutiny).

359. See Linda C. McClain, *Involuntary Servitude, Public Accommodation Laws, and the Legacy of Heart of Atlanta Motel, Inc. v. United States*, 71 MD. L. REV. 83, 129 (2011) (referencing a senator’s statement that offered “the Thirteenth and Fourteenth Amendments as a better foundation than the commerce power” for discrimination in places of public accommodation because, the senator maintained, “human dignity was at stake in discrimination, [and] to label this as a matter of commerce insulted such dignity”).

360. The Supreme Court’s recent ruling as to whether Congress possessed the authority to enact the Patient Protection and Affordable Care Act further indicates that Commerce Clause jurisprudence is not only murky, but that the Court itself is inclined to find limitations on Congress’s ability to invoke the Commerce Clause. See *Nat’l Fed. of Indep. Buss., v. Sebelius*, 132 S. Ct. 2566 (2012) (holding that Congress did not have the power, under the Commerce Clause, to enact the minimum coverage provision of the Act); see also Randy Barnett, Op-Ed., *We Lost on Health Care. But the Constitution Won*, WASH. POST, June 29, 2012 (explaining that the Court’s decision is a victory in the sense that it recognized clear limits on the Commerce Clause power).

replaced and repopulated by newer members; those on the higher ends of the economic spectrum are also replaced and repopulated. Each group plays its respective role, with the former languishing and struggling to get by while the latter enjoys a meaningful chance at relative prosperity.

This Article is a modest attempt to show why the decades-old cycle is not constitutionally sustainable. The urban underclass has been denied a great deal: the basic opportunity and tools to compete in today's modern world. This Article aims to show why they cannot also be denied a constitutional remedy for the conditions that reinforce and perpetuate their economic and social positions.

In the context of American westward expansion, Jefferson declared that the government would "provide new sources of renovation" to the principles of liberty should they "at any time degenerate in those portions of our country which gave them birth."³⁶¹ With that expansion now complete, it is necessary to look inward to those physical portions of the nation in which liberty is below a constitutional minimum, and appeal to the federal government to renew the liberty that is lacking in urban America.

In the Baltimore-based television series *The Wire*, the city's mayor called a press conference to address the city's "most vulnerable citizens."³⁶²

[T]hose who have fallen through the cracks of our society, those who command the least of our attentions and efforts. They seemingly have little to endear themselves to politicians. They don't vote, by and large. They don't contribute to campaigns. They offer little to a city's tax base and, to the extent that our government is made aware of their existence, it responds by trying to mitigate the damage done by their presence. We open a food bank here, a shelter there. We try to move them away from downtown, away from our communal areas, away from our schools, away from our homes. If you were to judge our society by the manner in which we treat those lost on our streets we would have cause to be shamed. . . . I believe that in the end we will be judged not by our efforts on behalf of those who vote for us, or those who contribute to our campaigns, or those who provide for our tax base. I believe that we will be judged by what we provide to the weakest and most vulnerable. That is the test.³⁶³

Sociological evidence demonstrates that our society has failed that test. This Article argues that the Thirteenth Amendment compels us to do better.

361. See ELLIS, *supra* note 3, at 228.

362. *The Wire: The Dickensian Aspect* (HBO television broadcast Feb. 10, 2008).

363. *Id.*