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Redefining the Badges and Incidents of Slavery

Nicholas Serafin

REDEFINING THE BADGES OF SLAVERY

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ABSTRACT

In The Civil Rights Cases *the Supreme Court held that Section 2 of the Thirteenth Amendment grants Congress the authority to eliminate the "badges of slavery." Many legal scholars have argued that some contemporary injustices impose a badge of slavery and thus can be addressed via Section 2 legislation. For example, Section 2 has been cited as grounds for addressing hate speech, racial profiling, sexual orientation discrimination, violence against women, limitations on the right to an abortion, sexual harassment, and more.*

But what precisely is a badge of slavery? Relatively few legal scholars have attempted to answer this prior question. Those who have argue that the badges metaphor referred narrowly to antebellum practices that threatened to reimpose chattel slavery. According to this view, few, if any, contemporary injustices threaten to reimpose chattel slavery, and so few, if any badges of slavery remain. Thus, legislation addressing contemporary injustices falls outside of Congress's Section 2 authority.

No one has attempted to defend a more expansive view of Section 2 by appealing to the legal history and to the original public meaning of the badges metaphor. This paper provides just such a defense. In this Article I demonstrate that the badges metaphor has always possessed a broad range of application. The badges metaphor extended beyond race and chattel slavery to gender- and class-based subordination. Moreover, the badges metaphor first appears not in the Civil Rights Cases, as is most often claimed, but in Dred Scott v. Sandford*. Justice Taney's usage of the metaphor in Dred Scott is deeply revealing and supports an expansive reading of Section 2, yet it has been overlooked by contemporary legal scholars.*

Drawing on the popular and legal history of the badges metaphor, I defend the view that a badge of slavery results from laws or social customs that impose stigmatic harms upon subordinate social groups. I then demonstrate how this expansive understanding of Section 2 can be used to support attempts to eradicate contemporary badges of slavery.

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INTRODUCTION

Section 2 of the Thirteenth Amendment grants Congress the authority to eliminate the "badges and incidents" of slavery.[1] What constitutes an incident of slavery is clear: the incidents of slavery are the legal restrictions, such as submission to a master and a ban on the ownership of productive property, that were inherent in the institution of slavery itself.[2] What constitutes a badge of slavery is far less certain, and relatively few legal scholars have examined the historical meaning of the metaphor.

[1] The Civil Rights Cases*,* 109 U.S. 3, 20 (1883) (holding that Section 2 grants Congress the "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States").

[2] *See, e.g.*, Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L., 570-2 (2012) (citing various historical sources indicating that "an "incident" of slavery was an aspect of the law that was inherently tied to or that flowed directly from the institution of slavery—a legal restriction that applied to slaves qua slaves or a legal right that inhered in slaveowners qua slaveowners"); *accord* George A. Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT (Alexander Tsesis ED., 2010) [hereinafter THE PROMISES OF LIBERTY] 163, 164.

Nevertheless, there has emerged a renewed interest in Section 2, such that the literature now abounds with proposals for eliminating contemporary badges of slavery. Section 2 has been cited as grounds for addressing hate speech,[3] the removal of confederate monuments,[4] racial profiling,[5] sexual orientation discrimination,[6] violence against women,[7] limitations on the right to an abortion,[8] sexual harassment,[9] sweatshop labor,[10] and more.[11]

Yet there is a widening gulf between those who invoke the badges metaphor in support of contemporary legislative proposals and those who have examined the history of the metaphor itself. For legal scholars like Jack Balkin, Akhil Amar, Alexander Tsesis, and Andrew Koppelman, the badges metaphor can be used to characterize a number of present day injustices, injustices that Congress can address via its Section 2 authority.[12] Lending support to this view is a series of modern cases, beginning with *Jones v. Alfred H. Mayer Co*., in which the Supreme Court held that Congress may "determine what are the badges and the incidents of slavery" and "translate that determination into effective legislation," subject only to rational basis review.[13] If this view is correct, Congress's Section 2 authority is more

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[3] *See* Akhil Reed Amar, *The Case of the Missing Amendments*: RAV v. City of St. Paul, 106 HARV. L. REV. 124, 155 (1992).

[4] Alexander Tsesis, *Confederate Monuments As Badges of Slavery*, 108 KY. L.J. 695 (2020).

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

[6] David P. Tedhams, *The Reincarnation of "Jim Crow": A Thirteenth Amendment Analysis of Colorado's Amendment 2*, 4 TEMP. POL. & CIV. RTS. L. REV. 133, 155 (1994).

[7] *See* Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1 (2006); *see also* Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207 (1992); *Pamela Bridgewater, Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 IOWA J. GENDER RACE & JUST. 401 (2000); Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. OF PA L. REV. 1097 (1998).

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

[9] Jennifer L. Conn, *Sexual Harassment: A Thirteenth Amendment Response*, 28 COLUM. J. OF L. & SOC. PROBS. 519 (1995).

[10] Samantha C. Halem, *Slaves to Fashion: A Thirteenth Amendment Litigation Strategy to Abolish Sweatshops in the Garment Industry*, 36 SAN DIEGO L. REV. 397 (1999).

[11] *See, e.g.,* Sarah C. Courtman, Comment, *Sweet Land of Liberty: The Case Against the Federal Marriage Amendment*, 24 PACE L. REV. 301 (2003).

[12] *See* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801 (2010); Amar, *supra* note 3; Koppelman, *supra* note 8; Tsesis, *supra* note 4.

[13] 392 U.S. 409, 440; *see also* Runyon v. McCrary, 427 U.S. 160, 170 (1976) (reaffirming Jones' holding that under Section 2 Congress has the power "rationally to determine what are the badges and the incidents of slavery, and...to translate that

expansive than is commonly recognized and Section 2 can be used to address a number of contemporary injustices.

The problem is that while this scholarship may be convincing in some respects, rarely do these authors offer much historical evidence regarding the meaning of the badges metaphor itself. Moreover, recent Articles by George Rutherglen, Jennifer Mason McAward, and William Carter Jr. have examined the history of the metaphor and have plausibly argued that Congressional authority under Section 2 is narrowly restricted. Broadly speaking, this latter group of legal scholars argues that the badges metaphor possesses a limited, historically determined meaning that cannot sustain most contemporary Section 2 proposals.[14] Drawing on legal history and on the original public meaning of the badges metaphor, these scholars contend that in the postbellum legal context the badges metaphor referred narrowly to practices that threatened to reimpose chattel slavery or its de facto equivalent. Since few, if any, contemporary injustices threaten to reimpose chattel slavery or its de facto equivalent, few, if any, badges of slavery remain. Hence, on this view, Congress generally lacks a predicate for the exercise of its Section 2 authority, and should Congress attempt to enact new Section 2 legislation, heightened judicial scrutiny would be warranted.

No one has yet attempted to defend an expansive view of Section 2 by appealing to legal history and to the original public meaning of the badges metaphor. This Article provides just such a defense. While legal scholars advocating for a narrow understanding of Section 2 present a compelling case, I argue in this Article that previous scholarship on the badges metaphor has overlooked just how often and how broadly the badges metaphor appeared in American public discourse. Furthermore, previous scholarship on the badges metaphor has misidentified the legal origins of the term. By introducing new historical and legal evidence I shall demonstrate that the badges metaphor, both in popular discourse and as a legal term of art, has always possessed a broad range of application. More specifically, I argue that the badges metaphor referred to state actions or social customs that stigmatized subordinate social groups. On the view I shall defend, laws or social customs that impose stigmatic harms upon particular groups are appropriate targets of Section 2 legislation.

In Section I I canvass recent legal scholarship regarding the badges metaphor and contemporary applications of Section 2. I demonstrate that

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determination into effective legislation") (citations omitted); Griffin v. Breckenridge 403 U.S. 88, 105 (1971) (concluding that "Congress was wholly within its powers under § 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men.").

[14] *See infra* Section I.

existing scholarship on the history of the badges metaphor largely cuts against an expansive understanding of Section 2. While my overall aim is to vindicate an expansive understanding of Section 2, legal scholars advocating for a restrictive understanding of Section 2 draw upon historical, textual, and legal evidence that cannot be ignored. Moreover, scholars who seek to eradicate contemporary badges of slavery have generally not engaged with the history of the metaphor. As a result, most contemporary badges proposals are not obviously grounded in any broader, historically-grounded account of Congress's Section 2 authority.

In Section II I revisit the history of the badges metaphor. I trace the origins of the badges metaphor to the Greco-Roman practices of physically marking slaves and other low status individuals. I then survey the development of the metaphor within feudal Europe and the appearance of the metaphor within 18th century American political discourse. The history I survey reveals that the badges metaphor extended beyond race and chattel slavery to gender- and class-based subordination. This is in part because the badges metaphor grew out of the republican intellectual tradition, according to which slavery consisted of the public or private exercise of arbitrary authority. I then consider the history of the badges metaphor in American constitutional law. Many constitutional law scholars have claimed that the badges metaphor first appears in early post-bellum cases such as *United States v. Rhodes*, *Blyew v. United States*, and *The Civil Rights Cases*.[15] As I demonstrate, however, the badges metaphor appears much earlier, in *Dred Scott v. Sandford*. The metaphor's appearance in *Dred Scott* is deeply revealing and supports an expansive reading of Section 2, yet it has been overlooked by contemporary legal scholars.

Finally, in Section III I discuss how Section 2 should be applied to contemporary issues. To ground this discussion I consider the constitutionality of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, a 2009 piece of federal legislation that Congress enacted in part under Section 2. While proponents of the restrictive interpretation have criticized the constitutionality of the Act, I argue that, given the historical usage of the badges metaphor, the Act is well within Congress's Section 2 authority. I then consider arguments for extending Section 2 to cover violence against women. I conclude by arguing that, in light of the history of the badges metaphor, any group that is singled out for status-based deprivations of rights, liberties, or privileges warrants Section 2 protection.

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[15] *See*, *e.g.*, Rutherglen, *supra* note 2 at 172-3; *accord* McAward, *supra* note 2 563; Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 826 n.301; Balkin, *supra* note 12 at 1817 n.64; James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 U.C.L.A. L. REV. 426, 428 (2018).

I. THE RESTRICTIVE INTERPRETATION

In the *Civil Rights Cases* the Supreme Court held that Section 2 of the Thirteenth Amendment grants Congress the "right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents."[16] While the phrase "badge of slavery" had been in circulation for some time, during the antebellum period literal slave badges were exceedingly rare, and references to the badges of slavery were plainly metaphorical.[17] Yet the *Civil Rights Cases* majority did not offer a clear definition of the metaphor, leaving undefined the full extent of Congress's Section 2 authority. An interpretation the badges metaphor is thus required in order to identify the limits of Congress's Section 2 authority. It is important to identify these limits because the potential scope of application of Section 2 is vast: the Thirteenth Amendment contains no state action requirement;[18] the Amendment can sustain legislation applicable to persons of all races;[19] and, according to current precedent, Congress may define the badges of slavery subject only to rational basis review.[20]

Legal scholars working on the history and meaning of the badges metaphor aim to provide historically informed guidelines for Section 2 legislation. According to Jennifer Mason McAward, for example, from

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[16] 109 U.S. 3, 20 (1883).

[17] *See* Rutherglen, *supra* note 2 at 165 (citation omitted).

[18] The Civil Rights Cases, 109 U.S. 3 at 20 (stating that the Thirteenth Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States").

[19] *See* United States v. Rhodes, 27 F. Cas. 785, 793 (C.C.D. Ky. I866) (No. 16,151) (holding that the Thirteenth Amendment "throws its protection over everyone, of every race, color, and condition"); The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 72 (1873) (asserting that "[u]ndoubtedly 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. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void."); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 286 (1976) (holding that 42 U.S.C. § 1981, "which derives its operative language from § 1 of the Civil Rights Act of 1866…explicitly applies to "*all* persons" (emphasis added), including white persons"); Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (concluding that § 1985 (3), enacted under the Thirteenth Amendment, applies to "racial, or perhaps otherwise class-based, invidiously discriminatory" private conspiracies); Shaare Tefila Congregation v. Cobb, 481 U. 615 (1987) (holding that 42 U. S. C. §§1981 applies to discrimination targeting Jewish individuals); Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) (holding that § 1981 applies to discrimination targeting individuals of Arabian ancestry because "Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics");

[20] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968).

historical work on the badges metaphor legal scholars can derive "an objective methodology under which Congress and the courts can analyze the historical record and translate that analysis into workable constraints on legislation."[21] McAward argues that the metaphor's historically narrow range of usage indicates that Congress's authority under Section 2 is similarly constrained. In her view, the badges metaphor possesses a "finite, historically-determined range of meaning," and from this historically-determined range of meaning one can derive a principled basis for preventing against Congressional overreach.[22]

As I discuss below, legal scholars who have examined the history of the badges metaphor have tended to take a much narrower view of Congress's Section 2 authority than legal scholars who have applied the badges metaphor to contemporary legal issues. According to McAward, for example, the claim that "Section 2 of the Thirteenth Amendment confers on Congress a broad power to legislate against discrimination generally overlooks this precise terminology and tends to devalue the immediate aftermath of the slave system."[23] In light of his reading of the badges metaphor, William M. Carter, Jr. is similarly skeptical of views according to which Congressional authority under Section 2 extends to "any discrimination that is suffered because of membership in any identifiable group."[24] Both scholars present a plausible and historically-supported account of the badges metaphor and of Section 2. In the following Part I unpack these views; in Section II I defend a historically grounded but more expansive view of the badges metaphor.

A. From Political Rhetoric to Legal Term of Art

Only recently have legal scholars begun to examine the historical usage and meaning of the badges metaphor. While there is no scholarly consensus *per se*, for the sake of clarity I shall present the work of these scholars as a more or less unitary interpretive framework, which I will refer to as the "restrictive" interpretation of the badges metaphor.[25] According to the restrictive interpretation, there existed a rhetorical or political usage of "badge of slavery," which was common in political discourse during the antebellum period, and a distinctively *legal* usage of the metaphor, which was

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[21] *See* McAward, *supra* note 2 at 568.

[22] Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After* City of Boerne v. Flores, 88 WASH. U. L. REV. 77, 144 (2010).

[23] *See* McAward, *supra* note 2 at 566.

[24] 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, 1366 (2006).

[25] For a similar characterization of this debate, see George Rutherglen, *The Thirteenth Amendment, the Power of Congress, and the Shifting Sources of Civil Rights Law*, 112 COLUM. L. REV. 1551 (2012).

not.[26] On this view, though often invoked in political argument, the common, public usage of the metaphor lacked the relative clarity and stability of meaning of a legal term of art.[27] Whatever its original meaning, or meanings, in political discourse, the badges metaphor initially had no distinctively legal significance.

According to the restrictive interpretation, the badges metaphor, as a piece of political rhetoric, first circulated in the speeches and writings of American abolitionists and Republican politicians, for whom the badges metaphor primarily referred to the public association of African American skin color with chattel slavery.[28] For example, "in an argument before the Supreme Court in 1843, a lawyer for a slave seeking freedom…offered the following observation about American slavery: "[c]olour in a slaveholding state is a badge of slavery. It is not so where slavery does not exist.""[29] Similarly, during Congressional debates over the Civil Rights Act of 1866, Senator James Harlan of Iowa, describing the Roman practice of slavery, noted that "[c]olor at Rome was not even a badge of degradation. It had no application to the question of slavery."[30]

To be sure, as proponents of the restrictive interpretation acknowledge, skin color was perhaps not the only badge of slavery. During these same debates the Act's sponsor, Senator Lyman Trumbull, defined a badge of servitude as "any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens."[31] While this would seem to cut against the restrictive interpretation, McAward argues that Trumbull is here simply *equating* the badges metaphor with the legal incidents of slavery.[32] Similarly, for the abolitionist William Lloyd Garrison anti-miscegenation laws constituted "a disgraceful badge of servitude."[33] Yet, according to Rutherglen, "this sense of "badge" rarely

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[26] *See* McAward, *supra* note 2 at 576 (asserting that "[a]ntebellum legal references to the "badge of slavery" were relatively infrequent, but the term was commonly used in the rhetoric of abolitionists as well as the mainstream press"); *accord* Rutherglen, *supra* note 2 at 166 (observing that "[u]nlike its legal use, the political use of [the badges metaphor] was common in the antebellum era").

[27] *See* McAward, *supra* note 2 at 575 (asserting that "[i]t is possible to identify a range of meanings for the term but difficult to define it precisely"); *accord See* Rutherglen, *supra* note 2 at 164 (noting that the metaphor referred generally to "evidence of political subjugation" but possesses "inherent ambiguity").

[28] *See* Rutherglen, *supra* note 2 at 165-6; *accord* McAward, *supra* note 2 at 576 (arguing that "[a]ntebellum legal references to the "badge of slavery" were relatively infrequent, but the term was commonly used in the rhetoric of abolitionists as well as the mainstream press").

[29] *See* Rutherglen, *supra* note 2 at 166 (citation omitted).

[30] *See* CONG. GLOBE, 38th Cong. (1st Sess.) 1439 (1864).

[31] *See* CONG. GLOBE, 39th Cong. (1st Sess.) 474 (1866).

[32] *See* McAward, *supra* note 2 at 578.

[33] *See* Rutherglen, *supra* note 2 at 165. (citations omitted).

appeared in the law of slavery."[34] Overall, for proponents of the restrictive interpretation, throughout the 19th century the badges metaphor "had a relatively narrow range of meanings, referring to the color of an African American's skin or other indications of legal and social inferiority connected with slavery."[35]

After emerging in 19th century political discourse as a metaphorical reference to skin color and to the incidents of American slavery, the badges metaphor was then adopted by the federal courts.[36] According to proponents of the restrictive interpretation, and in the view of many other constitutional scholars, the origins of the metaphor as a distinctly legal term of art can be traced to a series of federal court cases concerning the scope of Congress's enforcement power under Section 2.[37] In the 1866 case *United States v. Rhodes*, for instance, Justice Swayne, riding circuit, observed that free African Americans during the antebellum period "had but few civil and no political rights in the slave states. Many of the badges of the bondman's degradation were fastened upon them."[38] Justice Bradley, dissenting in the 1871 case *Blyew v. United States*, asserted that to "deprive a whole class" of the right to provide testimony in criminal prosecutions "is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families, and their property unprotected by law."[39]

Writing for the majority roughly a decade later in the *Civil Rights Cases*, Justice Bradley once again invoked the metaphor, arguing that Section 2 "clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[40] But Bradley construed the metaphor narrowly, limiting the badges of slavery to public laws that approximated the "burdens and incapacities [that] were the inseparable incidents of [slavery]."[41] According to Bradley, during the antebellum period private acts of discrimination targeting free African Americans were not considered badges of slavery, because "no one at that time" thought that African Americans ought to be "admitted to all the privileges enjoyed by white citizens," such as equal access to public facilities.[42]

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[34] *See* Rutherglen, *supra* note 2 at 166.

[35] *See* McAward, *supra* note 2 at 581.

[36] *See* Rutherglen, *supra* note 2 at 172 (arguing that the "trajectory of [the metaphor's] rise to prominence was from Senator Trumbull to [Justice Bradley's] majority opinion in the Civil Rights Cases).

[37] *See supra* note 15.

[38] 27 F. Cas. 785, 793 (D. Ky. 1866).

[39] 80 U.S. (13 Wall.) 581, 599 (1872).

[40] The Civil Rights Cases, 109 U.S. 3, at 20 (1883).

[41] *Id*. at 22.

[42] *Id*. at 25.

The restrictive interpretation maintains that the metaphor's transformation into a distinctively legal term of art constituted a break with the metaphor as political rhetoric.[43] On this view, from *Rhodes* to the *Civil Rights Cases* the metaphor was "transform[ed] and broaden[ed]…to refer to the broader set of political, civil, and legal disadvantages imposed on slaves, former slaves, and free blacks."[44] This transformation followed post-emancipation attempts to re-enslave newly freed blacks, such that the badges metaphor, in the postbellum legal context, came to refer to public laws that threatened to reimpose chattel slavery or its de facto equivalent.[45]

In sum, proponents of the restrictive interpretation closely link the badges metaphor to the incidents of slavery and to postbellum practices that approximated the incidents of slavery. According to this view, there existed a rhetorical or political usage of the badges metaphor distinct from the legal term of art; the metaphor, as a legal term of art, referred to the incidents of slavery, and to legal disabilities imposed upon newly freed African Americans that approximated the incidents of slavery; and, the federal judiciary first took up the metaphor in cases such as *Blyew*, *Rhodes*, and the *Civil Rights Cases* as a gloss on the scope of Congressional authority under Section 2. From this historical analysis proponents of the restrictive interpretation conclude that Congress's contemporary Section 2 authority is limited to addressing contemporary legal attempts to reestablish chattel slavery or its de facto equivalent. Section 2, according to this view, is "prophylactic," in the sense that Section 2 forbids "conduct beyond actual enslavement" in order to prevent the "*de facto* reemergence" of slavery.[46]

In Section 2 I criticize these claims and offer an alternative view of the badges metaphor. First, however, to get a sense of what is at stake, I shall introduce some of the main questions concerning the badges metaphor and the scope of Section 2.

B. Defining the Scope of Section 2

It is helpful to frame the relationship between the badges metaphor and Section 2 as revolving around a set of interrelated questions.[47] First, to which groups does the metaphor apply? Is the imposition of badge of slavery limited to the descendants of slaves or to racial and ethnic minorities

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[43] *See* McAward, *supra* note 2 at 575 (claiming that the metaphor's "meaning appeared to evolve from the antebellum to postbellum eras, particularly as it migrated from colloquial to legal use").

[44] *Id*. at 578.

[45] *Id*. at 581, 569.

[46] *See* McAward, *supra* note 23 at 84.

[47] This framing roughly follows that of McAward. *See* McAward, *supra* note 2 at 605.

generally, or can badges of slavery be imposed upon other groups as well? Second, to which practices does the metaphor refer? Is the badges metaphor limited to practices that were integral to or closely associated with chattel slavery, or should other, less central aspects of chattel slavery fall within its scope? In this survey I shall describe approaches as restrictive or expansive depending upon the answers they provide to the above questions, though these descriptive labels are intended merely to situate different views in relation to the literature as a whole.

To which groups does the badges metaphor apply? The most restrictive approach to Section 2 identifies African Americans as the only group to which the badges metaphor can apply. Though this approach is generally rejected by courts and scholars, it is not without some prima facie support. As I noted above, according to the restrictive interpretation, the badges metaphor was used primarily to refer to the skin color of African Americans and to legal burdens associated with enslavement. Moreover, while members of the Reconstruction Congress evinced concern for other racial groups, African Americans were foremost in mind during the debates over the 13th Amendment and other Reconstruction-era legislation. No plausible approach to the badges metaphor – or to the 13th Amendment more broadly – can overlook the centrality of African American subjugation to American chattel slavery and to the badges thereof. On the other hand, the 13th Amendment was written in race-neutral terms, and subsequent court precedent has confirmed that the 13th Amendment extends to other racial groups.[48] Thus, while concern for the subjugation of African Americans surely lies at the heart of the 13th Amendment, the power to eliminate the badges of slavery under Section 2 may extend to other groups as well.

Much of the current debate surrounding the scope of the badges metaphor takes place between these two poles. Broadly speaking, proponents of a relatively expansive approach to Section 2 support the application of the badges metaphor to any social group that is subjected to some key aspect of American chattel slavery. Sydney Buchanan first staked out this position. According to Buchanan, any act of arbitrary, group-based prejudice imposes upon its victims a badge of slavery.[49] This is because, Buchanan argues, "[a] chief vice of the institution of slavery was its arbitrary irrationality."[50] Moreover, Buchanan claims, supporters of the Thirteenth Amendment and of the 1866 Civil Rights Act "were intensely concerned with [group-based]

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[48] *See supra* note 19.

[49] G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1069, 1074 (1975) (claiming that "[t]here is nothing in this language that confines the enforcement power of Congress to the protection of any particular race or class of persons").

[50] *Id*. at 1073.

prejudice."[51] Thus, for Buchanan, legislation targeting widespread, arbitrary, group-based prejudice is a valid exercise of Congressional authority under Section 2, regardless of the identity of the group toward which this prejudice is directed.

Jack Balkin defines slavery more narrowly than Buchanan but defends a view that is perhaps just as expansive. According to Balkin, "[s]lavery was not just legal ownership of people; it was an entire system of conventions, understandings, practices, and institutions that conferred power and social status and maintained economic and social dependency."[52] Thus, for Balkin, if Congress is to eliminate the badges of slavery it must "disestablish all the institutions, practices, and customs associated with slavery and make sure they can never rise up again."[53] Balkin defends a "class-protecting strategy," according to which Congress may protect minority groups from practices that would deny them equal citizenship.[54] For instance, Balkin argues that Congress could rationally conclude that certain practices impose second-class citizenship upon women and LGBTQ individuals, implying that his approach extends to any group subject to systematic private or public discrimination.[55]

Contemporary Section 2 proposals generally follow Buchanan and Balkin in assuming that other groups can bear a badge of slavery.[56] But proponents of the restrictive interpretation have taken issue with this assumption. William M. Carter, Jr., for example, maintains that inclusive approaches to the badges metaphor "minimize[] the Amendment's historical context and marginalize[] the reality of chattel slavery and its effects upon the enslaved and society by treating slavery merely as a stepping stone to the admittedly laudable goal of combating all forms of inequality."[57] According to Carter, though non-racial groups may be subjects of Section 2 legislation, a badges of slavery claim must evince a fairly close connection to the history of American chattel slavery. Section 2 legislation must target practices that are "closely tied to the structures supporting or created by the system of slavery."[58]

McAward, pressing a number of structural and historical points, defends perhaps the most restrictive approach to the badges metaphor. Expansive approaches, she argues, would encroach upon the judiciary, for they would "allow Congress to grant substantial civil rights protections to

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[51] *Id*. at 1076.
[52] *See* Balkin, *supra* note 12 at 1817.
[53] *Id*.
[54] *Id.* at 1852.
[55] *Id*. at 1835-6; 1851-2.
[56] *See*, *e.g*. *supra* note 7.
[57] *See* Carter Jr., *supra* note 24.
[58] *Id*. at 1369.

groups that the Supreme Court has not yet deemed to be suspect or quasi-suspect classes deserving of heightened federal protection under the Fourteenth Amendment."[59] Moreover, as a historical matter, McAward takes issue with Buchanan's claim that Reconstruction Republicans were concerned with group-based prejudice *per se*. As McAward reads the historical record "the clear expectation was that [Section 2] concerned itself specifically with race and the legacy of American slavery."[60] In McAward's view, Section 2 only licenses Congress "to protect people from the badges and incidents of slavery imposed on account of race or previous condition of servitude," a conclusion that would clearly rule out Section 2 proposals that include non-racial groups.[61]

To which practices does the badges metaphor refer? Contemporary scholars differ over the range of contemporary practices that can be thought to impose a badge of slavery, and much of this debate turns on questions similar to those surveyed above, namely, the historical usage of the badges metaphor; the nature of chattel slavery and its aftermath; the pre- and post-enactment legislative record; and the extent to which Reconstruction changed the structure of the American government.

Here, again, Sydney Buchanan's work on the 13th Amendment stands as the most expansive approach to Section 2 legislation. Recall that, for Buchanan, the central evil of slavery consisted of widespread group-based prejudice.[62] Widespread, group-based prejudice, Buchanan argues, has the "capacity to clog the channels of opportunity."[63] The victims of such prejudice "tend[] to be thwarted at every turn in [their] pursuit of normal human endeavors."[64] In other words, victims of widespread group-based prejudice suffer the same general type of harm as did the victims of chattel slavery, and so Congress possesses the authority under Section 2 to prevent such prejudices from taking root.

Balkin defends a similarly open-ended view of Congress's Section 2 authority. According to Balkin, the "badges and incidents of slavery" refers to "all the institutions, practices, and customs associated with slavery."[65] Since Congress possesses the power to eliminate the badges of slavery, Balkin argues, "Congress has the power to dismantle the interlocking social structures and status-enforcing practices that were identified with slavery or that rationalized and perpetuated it."[66] For Balkin, as well as Buchanan, the

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[59] *See* McAward, *supra* note 2 at 613.
[60] *Id*.
[61] *Id*. at 614.
[62] *See* Buchanan, *supra* note 49 at 1073.
[63] *Id*. at 1078.
[64] *Id*.
[65] *See* Balkin, *supra* note 12 at 1817.
[66] *Id*.

badges metaphor would seemingly justify Section 2 legislation that reaches the kind of group-based prejudice that, when brought before a court, now generally falls under the Equal Protection Clause of the Fourteenth Amendment. One consequence of this approach is that Section 2 might cover a broader range of persons and conduct than that covered by the Equal Protection clause, given that the 13th Amendment has no state action requirement.[67]

Other scholars applying the badges metaphor to contemporary legal issues have not generally defended or cited more expansive views of Section 2 authority. Rather, contemporary applications of the badges metaphor tend to rely on specific, individual comparisons between evils that persisted under slavery and present day concerns. Jeffrey J. Pokorak, for example, observes that "antebellum prejudices and practices kept the prosecution of rape of a Black woman a rare, if extant, occurrence."[68] In Pokorak's view, contemporary disparities in the legal protections afforded to black female victims of rape thus constitute badges of slavery.[69] Andrew Koppelman argues that anti-abortion laws impose involuntary servitude upon pregnant women who would otherwise terminate their pregnancies, violating Section 1 of the 13th Amendment. But such laws also violate Section 2, Koppelman argues, "[b]ecause the subordination of women, like that of blacks, has traditionally been reinforced by a complex pattern of symbols and practices, [and] the amendment's prohibition extends to those symbols and practices."[70]

Contemporary applications of the badges metaphor tend to follow a similar argumentative strategy. That is, scholars offering contemporary Section 2 proposals have tended to assume that present-day inequities that are sufficiently analogous to a central aspect or aspects of chattel slavery constitute badges of slavery.[71] While I am sympathetic to such arguments, and while my analysis of the badges metaphor in Section II is intended to vindicate an expansive view of Section 2, it is nevertheless hard to deny that

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[67] *Id*. at 1806.

[68] See Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of and Remedies for, Prosecutorial Race-of- Victim Charging Disparities*, 7 NEV. L.J. 1, 7 (2006).

[69] *Id*.

[70] Andrew Koppelman, *Forced Labor, Revisited: The Thirteenth Amendment and Abortion*, *in* THE PROMISES OF LIBERTY *supra* note 2, at 233.

[71] *See*, *e.g*., Jennifer L. Conn, *Sexual Harassment: A Thirteenth Amendment Response* COLUM. J. L. & SOC. PROBS. 519, 551 (1995) (discussing the maltreatment of female slaves and concluding that "today's working women experience some of the same differences in their treatment based exclusively on their sex"); *see also* David P. Tedhams, *The Reincarnation of "Jim Crow": A Thirteenth Amendment Analysis of Colorado's Amendment*, 4 TEMP. POL. & CIV. RTS. L. REV. 133, 165. (1994) (asserting that, analogous to "Jim Crow" laws, Colorado's Amendment 2 imposed a badge of slavery by stigmatizing gay and lesbian individuals).

the badges metaphor has been "often-invoked but under-theorized."[72] For example, note that, while Balkin draws upon the history of the metaphor, the few examples he cites are primarily references to the incidents of chattel slavery, not its badges, and thus do not obviously support his broader view, namely, that Congress, utilizing its Section 2 authority, may eliminate all contemporary "status-enforcing practices."[73] Similarly, though Koppelman draws a plausible analogy between child-birth and indentured servitude, he presents almost no historical evidence regarding the usage of the badges metaphor in support of his conclusion that laws restricting access to abortion impose badges of slavery.[74]

Proponents of the restrictive interpretation have constructed a far more historically-supported account of the meaning of the badges metaphor and the contours of Section 2. McAward, for example, citing the early postbellum statements of litigators, legislators, and Supreme Court justices, argues that two conditions must be met for a contemporary practice to impose a badge of slavery. Recall that, on the restrictive interpretation, the badges metaphor, as a legal term of art, referred to the incidents of slavery and to laws that attempted to reimpose chattel slavery or its de facto equivalent upon African Americans.[75] This usage suggests that Section 2 legislation targeting the badges of slavery must be limited to addressing contemporary practices that "mirror a historical incident of slavery."[76] Section 2 is prophylactic, in that it may only reach contemporary practices, public or private, that "pose a risk of causing the renewed legal subjugation of the targeted class."[77] Given that the badges metaphor "is ambiguous and potentially expansive, and Congress could easily manipulate it to cover conduct far removed from the historical core of the slave system itself," these limiting conditions provide guidance to courts reviewing Section 2 legislation for Congressional overreach.[78]

To get a sense of the practical implications of this debate, it is helpful to consider a few examples. Again, according to the restrictive interpretation, Section 2 legislation may only address conduct that, "left unaddressed, would have the cumulative effect of subordinating an entire race to the point that it would render it unable to participate in and enjoy the benefits of civil society."[79] According to this view, the Civil Rights Act of 1866 is a paradigmatic example of Section 2 legislation that satisfies the restrictive

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[72] *See* McAward, *supra* note 2 at 564.
[73] *See* Balkin, *supra* note 12 at 1817.
[74] *See* Koppelman, *supra* note 8 at 487.
[75] *See supra* Section I.A.
[76] *See* McAward, *supra* note 2 at 622.
[77] *Id*.
[78] *See* McAward, *supra* note 22 at 137.
[79] *See* McAward, *supra* note 2 at 629.

interpretation, for the Act "addressed state laws that sought to reimpose the incidents of slavery by restricting freed slaves' fundamental civil liberties."[80] By contrast, most modern applications of the badges metaphor address conduct that, though wrongful, would not lead to the reimposition of chattel slavery or its de facto equivalent. Regardless of one's normative commitments, it is hard to believe that laws forbidding gay marriage or restricting access to abortion would reduce gays or women to chattel slaves or indentured servants nor would such laws plausibly threaten to reestablish chattel slavery. Thus, for proponents of the restrictive interpretation, Section 2 provides no authority to Congress to address these injustices.

Proponents of the restrictive interpretation do not limit their analysis only to hypothetical uses of Section 2. Consider, for example, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (the "HCPA"). The HCPA includes two sections, 249(a)(1) and 249(a)(2), identifying the classifications that receive protection under the Act. Section 249(a)(1) establishes criminal penalties for assaults motivated by the victim's "actual or perceived race, color, religion, [or] national origin."[81] Section 249(a)(1) was enacted pursuant to Congress's Thirteenth Amendment Section 2 authority to eradicate the badges and incidents of slavery. The Act's Findings section states that "[s]lavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at race, color or ancestry."[82] According to this section, "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude."[83]

Section 249(a)(2) of the HCPA establishes criminal penalties for assaults motivated by the victim's "gender, sexual orientation, gender identity, or disability."[84] Though Section 249(a)(2) was enacted pursuant to Congress's Commerce Clause authority, it is likely that the constitutionality of both 249(a)(2) will ultimately depend upon Congress's Section 2 authority. This is because, in light of contemporary Commerce Clause jurisprudence it is doubtful that Congress's Commerce Clause authority is sufficient to sustain Section 249(a)(2).[85] This leaves Section 2 as the other possible source of

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[80] *Id*. at 628.

[81] 18 U.S.C. § 249 (Supp. IV 2011).

[82] *Id*.

[83] *Id*.

[84] 18 U.S.C. § 249(a)(2) (2012).

[85] United States v. Morrison, 529 U.S. 598, 610-11, (observing that "*Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor").

legislative authority for this Section of the Act. As Calvin Massey observed, 249(a)(2) will survive "only if courts accept the fiction" that the badges of slavery include non-racial badges of slavery.[86]

For proponents of the restrictive interpretation, the HCPA is likely unconstitutional. 249(a)(2) is unconstitutional because the badges concept referred specifically to race-based chattel slavery.[87] But 249(a)(1) is also unconstitutional because, on the restrictive interpretation, Section 2 legislation is warranted only if such legislation targets conduct that, left unchecked, would lead to the reestablishment of chattel slavery or its de facto equivalent, and "it is mercifully difficult to envision any racist act" such that "one could reasonably fear the return of an entire race (or even a single individual of that race) to slavery or legally subordinate status."[88] At the very least, Congress has provided no evidence indicating a causal connection between racially-motivated violence and the reestablishment of chattel slavery.[89] For proponents of the restrictive interpretation, because Congress has neglected to provide evidence establishing a link between bias-motivated violence and the reemergence of chattel slavery, 249(a)(1) likely outruns Congress' Section 2 authority.

Finally, note that the restrictive interpretation is also at odds with the Court's holding in *Jones,* that Congress may define the badges of slavery subject only to rational basis review.[90] If, as the restrictive interpretation maintains, the badges metaphor possesses "a finite range of meaning that is tied closely to the core aspects of the slave system and its aftermath," courts confronted with challenges to Section 2 legislation must carefully scrutinize such legislation to ensure that Congress has not extended the concept beyond its original scope of application.[91] Thus, whereas *Jones* requires that Section 2 legislation be submitted only to rational basis review, McAward "would revise *Jones* by clarifying that Congress's discretion is limited to identifying which badges and incidents of slavery it will address – not defining them outright – and then determining how it will address them."[92] Moreover, for

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[86] *See The Effect of* Shelby County *on Enforcement of the Reconstruction Amendments*, 29 J.L. & POL. 397, 426 (2014).

[87] *See* McAward, *supra* note 2 at 630 (defining a badge of slavery as "public or widespread private action, based on race or previous condition of servitude").

[88] *See* McAward, *supra* note 2 at 626.

[89] Jennifer Mason McAward, McCulloch *and the Thirteenth Amendment*, 112 COLUM. L. REV. 1769, 1807 (2012) (asserting that 249(a)(1) "lacks any indication that the victims of race-based hate crimes are at risk of having their Section 1 rights violated, either by being treated as slaves or denied basic civil freedom; nor does the analysis feature any finding that federalizing such crimes will alleviate that risk").

[90] 392 U.S. 409, 443 (1968).

[91] *See* McAward, *supra* note 22 at 142.

[92] *Id*.

proponents of the restrictive interpretation, revising *Jones* in this way would have the added benefit of bringing the Court's Thirteenth Amendment jurisprudence more into line with its recent Fourteenth Amendment jurisprudence.[93]

To be sure, the restrictive interpretation is not wholly at odds with contemporary uses of Section 2. For example, McAward raises the possibility that disparate impact claims might fall under Section 2.[94] But on her view, in order to sustain such claims it would have to be shown that the disparities in question, if left unaddressed, would bring about the reemergence of chattel slavery, involuntary servitude, or their de facto equivalents, and "[t]his could be a very difficult showing to make."[95] Ultimately it is unclear whether, in practice, the restrictive interpretation would allow for any contemporary Section 2 legislation, though proponents of the restrictive interpretation accept this result as "the unavoidable consequence of remaining true to Supreme Court doctrine that Section 1 protects only against slavery and coerced labor and to the prophylactic purpose of Section 2 legislation."[96]

Overall, the restrictive interpretation constitutes a plausible, historically-grounded interpretation of the badges metaphor, an interpretation that rules out virtually all contemporary proposals for eradicating purported badges of slavery. Few of these proposals have engaged at length with the history of the metaphor; none have demonstrated that the targeted conduct, left unaddressed, would bring about the reemergence of chattel slavery, involuntary servitude, or their de facto equivalents. In many cases, this argument would be rather difficult to defend. Having set forth the main issues, I shall now turn to the badges metaphor itself. As I demonstrate in the next Section, the history of the badges metaphor is significantly underexplored and thus warrants further analysis on its own. After revisiting this history I shall present and defend an expansive account of Section 2.

II. REDEFINING THE BADGES OF SLAVERY

The restrictive interpretation of the badges metaphor rests on three

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[93] *Id*. at 138 (noting that "one would expect Congress's Section Two power and *Jones* to be cabined in the same way that *City of Boerne* cabined Congress's Fourteenth Amendment enforcement powers"). *But see* Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 40 (2011) (arguing that "the 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.").

[94] *See* McAward, *supra* note 2 at 610 n.253.

[95] *Id*. at 617 n.290.

[96] *Id*. at 627.

key claims: first, that in American political discourse the metaphor, though somewhat vague, primarily referred to African American skin color and to the incidents of chattel slavery; second, that the metaphor as it appeared in American political discourse was distinct from the metaphor as a legal term of art; and, third, that the legal term of art first emerged in early postbellum Supreme Court cases solely as a reference to the attempted re-enslavement of newly freed African Americans. For proponents of the restrictive interpretation, contemporary applications of the badges metaphor under Section 2 are historically supported and thus constitutionally sound only if they similarly target attempts to reestablish chattel slavery or its de facto equivalent. On this view, since few contemporary injustices threaten to reestablish chattel slavery or its de facto equivalent, Section 2 is largely dead letter.

In this Section I introduce historical evidence that rebuts each of these claims. Contemporary scholarship on Section 2 overlooks a great deal of the intellectual history of the badges metaphor and thus misconstrues the meaning of the metaphor in American political discourse and jurisprudence. This is likely due in part to the fact that the badges metaphor was actually not a single term but rather a cluster of tropes referring to various stigmatizing laws and customs. Indeed, as proponents of the restrictive interpretation acknowledge, politicians, judges, and others often used synonymous constructions, such as "badge of degradation," "badge of disgrace," "badge of servitude," and "badge of subjection," interchangeably with "badge of slavery."[97] Other, similar constructions referred to laws or social practices restricting the rights of African Americans as imposing a "mark of servitude"[98] or "mark of degradation,"[99] phrases that drew upon the literal definition of a badge as "a distinctive device, emblem, or mark."[100] Once these synonymous constructions are taken into account it becomes clear that the linguistic norms governing usage of the badges metaphor were far more expansive than the restrictive interpretation allows.

I demonstrate in this Section that the badges metaphor was for centuries a common trope in the Western political tradition. Originating in the Roman Republican practice of physical status markings, the metaphor was taken up in the 17th and 18th centuries by republican critics of monarchical government, feminist and labor activists, and other moral

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[97] *Id*. at 578 (equating "badge of degradation" and "badge of servitude" with "badge of slavery"); *see also* Rutherglen, *supra* note 2 at 168 (noting usage of "badge of degradation" to refer to slavery).

[98] ANONYMOUS, AFRICAN SERVITUDE: WHEN, WHY, AND BY WHOM INSTITUTED. BY WHOM, AND HOW LONG, SHALL IT BE MAINTAINED? (1860).

[99] *See infra* Section II.C.

[100] *See* Rutherglen, *supra* note 2 at 165 (citing the Oxford English Dictionary definition of a badge).

reformers. As a legal term of art, the badges metaphor first appeared not in *Rhodes*, *Blyew*, and the *Civil Rights Cases*, as is commonly claimed, but in the majority and concurring opinions in *Dred Scott v. Sanford*. A close reading of Justice Taney's majority opinion in *Dred Scott* demonstrates that the badges metaphor referred to state actions or social customs that stigmatized subordinate social groups. In the following Section, I discuss the implications of adopting a stigma-based interpretation of the badges metaphor for Section 2 legislation.

A. Origins and Development

The origins of the badges metaphor lie in the Greco-Roman practices of marking slaves, convicts, prisoners of war, and other low status individuals. To some extent status markings were a solution to the practical problem of identification; as many Athenians recognized, slaves made up a significant proportion of the Athenian population yet could not be reliably distinguished from free citizens.[101] In his commentaries on the Athenian constitution, for example, Psuedo-Xenophon claims despairingly that in Athens slaves and citizens were often indistinguishable.[102] Writing approximately eighty years later, Aristotle attempts to solve the problem by suggesting that "[i]t is nature's intention also to erect a physical difference between the bodies of freemen and those of slaves."[103] Yet, he admits, frequently enough slaves have the appearance of freemen, and vice versa.[104]

Writing contemporaneously, (the actual) Xenophon describes one conventional solution for identifying slaves, namely, affixing a "public mark" onto the slave's body.[105] Branding or, more commonly, tattooing the skin was used by the Greeks to identify and derogate low status individuals, particularly slaves, prisoners of war (who were often sold into slavery), and convicts.[106] Delinquent slaves and convicts often had their faces tattooed with the name of their crimes.[107] In the *Laws*, for instance, Plato proposes

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[101] ROBERT K. SINCLAIR, DEMOCRACY AND PARTICIPATION IN ATHENS 196-7 (1991) (noting that while estimates vary widely, slaves in classical Athens likely made up somewhere between one-fourth and one-third of the total population).

[102] Ps. Xen. Const. Ath. 1 (arguing that "if it were customary for a slave…to be struck by one who is free, you would often hit an Athenian citizen by mistake on the assumption that he was a slave." The problem, he claims, is that "[f]or the people there are no better dressed than the slaves and metics, nor are they any more handsome").

[103] Pol. 1254b27-34.

[104] *Ibid*.

[105] Ways 4.21.

[106] Christopher P. Jones, *Stigma: Tattooing and Branding in Graeco-Roman Antiquity*, 77 THE JOURNAL OF ROMAN STUDIES 139, 147 (1987).

[107] *Id*. at 143.

that "if anyone is caught committing sacrilege, if he be a slave or a stranger, let his offence be written on his face and his hands."[108] The Greek term for puncturing or marking the skin, στίζειν, referred to marks, στῖγμᾰ, or *stigma*, signifying disgrace and degradation.[109]

Under the Roman Empire slaves were also marked by tattoos or brands; however, Roman slaves were also fitted with a *signaculum*, a lead stamp or badge affixed permanently around the neck.[110] In addition to evidence documenting literal badges of slavery, there is at least some evidence that slave badges were understood metaphorically as well. As Rutherglen points out, in the *Annals* Tacitus writes of an episode in which a conquered king requests through an intermediary that he not have to "endure any badge of slavery."[111] Interestingly, however, the phrase used, *imaginem servitii*, refers to an "image" or "likeness" of servitude, not to a literal badge, or *signaculum*, which is understandable in light of the fact that accompanying the king's plea is a list of acts, such as surrendering his sword, that would not constitute a literal badge but would, for a king, surely give off an image of subjugation.[112]

Though the origins of the badges metaphor lie in antiquity, it is not until the 17th and 18th centuries that one finds it in widespread use. While the use of metal slave collars persisted well into the 18th century, during this period the scope of the badges metaphor greatly expands.[113] For example, for hundreds of years prior to the American Civil War writers throughout the English-speaking world used the metaphor, or a variant, to condemn perceived acts of political oppression in the form of taxation[114], tything[115], tributary payments[116], the imposition of curfews,[117] and political borders.[118]

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[108] 8 Pl., *Leg*. 854D.

[109] *See* Jones, *supra* note 106 at 142.

[110] ALISON E COOLEY, THE CAMBRIDGE MANUAL OF LATIN EPIGRAPHY 101, 198 (2012).

[111] *See* Rutherglen, *supra* note 2 at 163, 166 & n.23 (citations omitted).

[112] *Ann*. 15.31.

[113] William W. Heist, *The Collars of Gurth and Wamba*, 4 THE REV. OF ENG. STUD., 362-64 (1953) (discussing the usage of metal serf collars in 18th century Scotland).

[114] WILLIAM BLACKSTONE, THE OXFORD EDITION OF BLACKSTONE'S: COMMENTARIES ON THE LAWS OF ENGLAND: BOOK I: OF THE RIGHTS OF PERSONS 209 (2016).

[115] James Tyrrell, BIBLIOTHECA POLITICA, 548 (1718).

[116] THOMAS GREENWOOD, THE HISTORY OF THE GERMANS FIRST BOOK, 426 (1836).

[117] KNOWLEDGE SOCIETY FOR PROMOTING CHRISTIAN, THE HISTORY OF ENGLAND 24 (1854) (describing as a badge of servitude a "law directing that all fires should be put out at the tolling of a bell at eight o'clock").

[118] FRANCIS PALGRAVE, THE LORD AND THE VASSAL : A FAMILIAR EXPOSITION OF THE FEUDAL SYSTEM IN THE MIDDLE AGES, WITH ITS CAUSES AND CONSEQUENCES 82-3 (1844). (observing that ancient German tribes "considered it a badge of servitude to be obliged to dwell in a city surrounded by walls").

In 17th Century England, members of the egalitarian, republican Leveller and Digger movements objected to copyhold tenure as "the ancient and almost antiquated badge of slavery."[119] Writing nearly a century later, David Hume argued that the English monarch's prerogative of wardship, which permitted the monarch to take over the profits of an estate in certain circumstances, constituted a badge of slavery.[120] 18th writers invoked the badges metaphor in condemnation of police entry into private homes,[121] economic restrictions on colonial commercial activity,[122] and cultural forms of oppression: according to William Blackstone, for example, a badge of slavery was imposed upon the English during the 11th century Norman Conquest of England, because the occupiers forced English courts to use the French language.[123]

While slave badges of a sort were in use in various parts of the United States throughout the 18th and 19th centuries, the practice was uncommon.[124] References to the badges of slavery in this period are plainly metaphorical and refer to other forms of subordination, such as the wearing of livery – a uniform, badge, or other visual element "signify[ing] possession and ownership, that of the lord over the servant."[125] Some Americans loudly condemned the wearing of livery; in an 1882 Congressional debate New York House Representative William Robinson furiously declared that "Jefferson would never have let one of his employés" wear this "degrading…badge of slavery."[126] Austrian journalist Francis Joseph Grund noted the "unwillingness of the poorer classes of Americans to hire themselves out as servants" and their refusal to "submit to the wearing of a livery or any other badge of servitude."[127] American jurists also tied the badges metaphor to signifiers and practices associated with feudal hierarchy. In the *Civil Rights Cases*, for example, the majority notes that, during the Ancien Régime "all inequalities and observances exacted by one man from another were servitudes or badges of slavery" which the revolutionary National Assembly,

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[119] ROGER CHARLES RICHARDSON, TOWN AND COUNTRYSIDE IN THE ENGLISH REVOLUTION 184 (1992).

[120] THE HISTORY OF ENGLAND, 372 (1775).

[121] JOHN PHILLIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 41 (1988).

[122] ADAM SMITH, AN INQUIRY IN THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, 582 (1776).

[123] WILLIAM BLACKSTONE, THE OXFORD EDITION OF BLACKSTONE'S: COMMENTARIES ON THE LAWS OF ENGLAND: BOOK IV: OF PUBLIC WRONGS, 269 (2016).

[124] *See supra*, note 17.

[125] MATTHEW WARD, THE LIVERY COLLAR IN LATE MEDIEVAL ENGLAND AND WALES: POLITICS, IDENTITY AND AFFINITY 20 (2016).

[126] 14 Cong. Rec. 795 (1883).

[127] Francis J. Grund, THE AMERICANS IN THEIR MORAL, SOCIAL, AND POLITICAL RELATIONS 66 (1837).

"in its effort to establish universal liberty, made haste to wipe out and destroy."[128] Likely the majority is referring to the National Assembly's *Decree on the Abolition of the Nobility*, which abolished, among other signifiers of hierarchy, the wearing of livery.[129]

19th century feminists also commonly invoked the badges metaphor. In an early feminist work, *Appeal of One Half the Human Race, Women*, Irish socialists Anna Doyle Wheeler and William Thompson draw an extended analogy between sexual subordination and slavery.[130] In their view, "woman's peculiar efforts and powers…are looked upon as an additional badge of inferiority and disgrace."[131] Similarly, in his well-known 19th century feminist essay *The Subjection of Women*, John Stuart Mill points to the social benefits to be gained "by ceasing to make sex…a badge of subjection."[132] In a letter to the abolitionist Gerrit Smith, Elizabeth Cady Stanton claims that 19th century women's dress, which was both visually distinctive and physically confining, was a sort of badge, for it signified that one was a member of a low status group: "why proclaim our sex on the house-tops" asks Stanton, "seeing that it is a badge of degradation, and deprives us of so many rights and privileges wherever we go?"[133] African American women held in bondage were doubly disadvantaged in this respect, in that slave clothing signified both subordinate gender status *and* subordinate racial status. For example, Harriet Ann Jacobs, in her memoir, Incidents in the Life of a Slave Girl, describes the cheap linsey-woolsey dress given to her by her master's wife as "one of the badges of slavery."[134]

Pointing to similarities between the plight of disenfranchised women and that of disenfranchised African Americans, the suffragist activist Virginia Minor observed of 19th century women that "[h]er disfranchised condition is a badge of servitude."[135] Stanton used the badges metaphor to compare abolitionism and the burgeoning women's rights movement, arguing that "[t]he badge of degradation is the skin and sex."[136] Similarly, in a letter

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[128] 109 U.S. 3, 21.

[129] J. HARDMAN (ED.), THE FRENCH REVOLUTION SOURCEBOOK 113 (1999).

[130] WILLIAM THOMPSON, APPEAL OF ONE HALF THE HUMAN RACE, WOMEN, AGAINST THE PRETENSIONS OF THE OTHER HALF, MEN, TO RETAIN THEM IN POLITICAL, AND THENCE IN CIVIL AND DOMESTIC, SLAVERY (1825).

[131] *Id*. at 206.

[132] JOHN STUART MILL, "The Subjection of Women," THE COLLECTED WORKS OF JOHN STUART MILL, VOL. 21, (ED. JOHN M. ROBSON) 335, (1984).

[133] ELIZABETH CADY STANTON, et al., HISTORY OF WOMAN SUFFRAGE 841 (1887).

[134] HARRIET ANN JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL: WRITTEN BY HERSELF 12 (2009).

[135] *See* Stanton, *supra* note 133 at 730.

[136] ELIZABETH CADY STANTON, et al., THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY: IN THE SCHOOL OF ANTI-SLAVERY, 1840 TO 1866 414 (1997).

decrying the denial of women's voting rights, the abolitionist William Lloyd Garrison writes of his "hope…to see the day when neither complexion nor sex shall be made a badge of degradation."[137] The suffragist activist Angelina Grimke, protesting the segregation of Quaker meeting houses by seating herself in an area reserved for blacks, explained that "[w]hile you put this badge of degradation on our sisters, we feel that it is our duty to share it with them."[138]

Others saw in the American system of slavery a more general denigration of labor itself. An 1864 editorial in the New York Times notes one welcome effect of emancipation, namely, that "labor, losing its badge of degradation should become honorable."[139] William Jay, drafter of the constitution of the American Antislavery Society, argued that, for the emancipated slave, "labor is no longer the badge of his servitude."[140] Though such texts specifically discuss the connotation of labor in the midst of chattel slavery, there was a more general worry that labor itself stigmatized the laborer, regardless of complexion. For example, Booker T. Washington argues in *Up from Slavery* that "[t]he whole machinery of slavery was so constructed as to cause labour, as a rule, to be looked upon as a badge of degradation, of inferiority."[141] Massachusetts Senator and abolitionist Henry Wilson invoked this worry as a reason for passing the 13th amendment, which would, he claimed, uplift "the poor white man…impoverished, debased, dishonored by the system that makes toil a badge of disgrace."[142] The British pamphleteer and parliamentarian William Cobbet similarly railed against working-class poverty, which, he claimed was "the great badge, the never-failing badge of slavery."[143]

This broad range of meaning is evident even in the statements of anti-slavery Congressmen during debates over how to best assist free African Americans. For example, though the political origins of the badges metaphor are commonly traced to Congressional debates over the Civil Rights Act of 1866, this is not the first appearance of the phrase in the Congressional

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[137] *See* Stanton, *supra* note 133 at 370.

[138] Id. at 394.

[139] *The Freedmen in South Carolina*, N.Y. Times, February 28, 1864.

[140] WILLIAM JAY, AN INQUIRY INTO THE CHARACTER AND TENDENCY OF THE AMERICAN COLONIZATION, AND AMERICAN ANTI-SLAVERY SOCIETIES 193 (1835). *See also* HENRY WARD BEECHER, NORWOOD: OR, VILLAGE LIFE IN NEW ENGLAND 286 (1868) (discussing the social stigmatization of "[w]orking people, in a community where work is the badge of servitude").

[141] BOOKER T. WASHINGTON, UP FROM SLAVERY 17 (2013).

[142] CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864).

[143] THE POOR MAN'S FRIEND; OR ESSAYS ON THE RIGHTS AND DUTIES OF THE POOR 3 vol. 4 (1826).

record.[144] During 1864 Senate debates over the repeal of the Fugitive Slave Acts and the first Freedmen's Bureau Act, Massachusetts Senator and chair of the Senate's Select Committee on Slavery and Freedom Charles Sumner repeatedly invoked the metaphor to condemn racial segregation in public facilities as well as the pernicious political influence of the slave-holding states more generally. "The Fugitive Slave Bill," Sumner declared, was "imposed upon the North as a badge of subjugation."[145] In a later speech, defending a provision of the Freedmen's Bureau Act that guaranteed court access to newly freed African Americans, Sumner argued that unequal access to civil and military tribunals constituted a "disability and exclusion" that imposed "the badge of Slavery."[146]

According to the restrictive interpretation, during the antebellum period the badges metaphor primarily referred to the legal incidents of chattel slavery or to the status connotations of black skin.[147] However, as we have seen, historically the metaphor has possessed a broad range of meanings. During the antebellum period the metaphor was invoked in condemnation not just of racial injustice but also of unjust economic and political relations, including those based on gender and class.[148] Moreover, as Sumner's usage indicates, a badge of slavery could be imposed even upon free African Americans who faced racial discrimination in access to public facilities. The first premise of the restrictive interpretation, that in American political discourse the metaphor referred only to African American skin color and to the incidents of chattel slavery, is belied by the historical examples presented above.

Even for American critics of chattel slavery the metaphor was not limited to the legal incidents of racialized chattel slavery or to the status connotations of black skin; rather, the metaphor could refer to a variety of signifiers associated with racial hierarchy, such as segregated seating and racially exclusionary access to public institutions. References to skin color, gendered dress, uniforms, manual labor, and physical segregation imply that badges of slavery were visible signifiers of subordinate social status.[149] But the badges metaphor denoted other forms of subordination as well. Taxation, tything, tributary payments, the imposition of curfews, and Fugitive Slave Acts were

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[144] *See*, *e.g.*, McAward, *supra* note 2 at 578; *accord* Rutherglen, *supra* note 2 at 168;

[145] Charles Sumner, HIS COMPLETE WORKS, VOLUME XI: VOLUME 11, 126 (2020).

[146] Charles Sumner, A BRIDGE FROM SLAVERY TO FREEDOM (1864), 13.

[147] *See supra* Section I.

[148] To be fair, Rutherglen and McAward both acknowledge that the badges metaphor is found outside of American discourse regarding chattel slavery; yet they do not take into account the extensive linguistic and conceptual history of the metaphor, nor do they attempt to incorporate this history into their analyses of Section 2.

[149] *Cf.* Rutherglen, *supra* note 2 at 166 (noting that the badges metaphor referred to "certain external features [from which] an individual's social position could be inferred").

also condemned as badges of slavery, indicating that the badges metaphor was not strictly limited to visible signifiers. As I discuss below, in one of the badges' metaphor earliest appearances in American constitutional law the metaphor refers not to visible signifiers but to stigmatizing laws and social customs.[150]

The badges metaphor, then, was not strictly limited to visual signifiers but included other indicators of subordinate status. What unifies the various invocations of the badges metaphor, then, is not any particular *type* of signifier. Rather, it is a concern for social signifiers, of whatever sort, that stigmatize and degrade members of a discrete social group who are deprived of important rights or liberties. A rough definition of a badge of slavery thus runs as follows: a badge of slavery is a public indicator of subordinate political or social status. This reading of the badges metaphor makes the best sense of the historical usages I surveyed above. Moreover, it has the virtue of drawing a close connection between the equal protection principle underlying both the Thirteenth and Fourteenth Amendments.[151]

B. The Badges of Republican *Slavery*

This rough definition of the badges metaphor is a useful starting point; however, it is incomplete. To see this, we must move beyond particular examples to examine the conceptual framework underlying the badges metaphor's many uses. In short, the badges metaphor must be understood in light of the republican conceptual framework that structured much 18th and 19th century American political discourse regarding slavery and subordination. 18th and 19th century American political discourse drew deeply from two fonts of republican thought.[152] The first was that of

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[150] *See infra* Section II.C.

[151]. *See* 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, 200 (1951) (demonstrating that "[a]t the very foundation of the system constructed out of the Thirteenth Amendment and the Freedmen's Bureau and Civil Rights Bills is an idea of 'equal protection'"); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 48 (1986) (noting that "Republicans believed that the Thirteenth Amendment effectively overruled Dred Scott so that Blacks were entitled to all rights of citizens"); Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 157 n.180 (1992) (discussing the Thirteenth and Fourteenth Amendments and arguing that "[n]either Amendment 'trumps' the other; rather they must be synthesized into a coherent doctrinal whole"). As I have argued elsewhere, equal protection, in the Fourteenth Amendment context, is best conceived of as providing legal protections against discrimination on the basis of low-status social signifiers. *See In Defense of Immutability*, 2020 BYU L. Rev. 275 (2020).

[152] There is a vast literature on the development and spread of republican ideas. There is a similarly expansive literature on the relevance of republican ideas to the contemporary

republican Rome. For Roman historians such as Tacitus, Livy, Cicero, Sallust, and Gaius, liberty is understood in terms of the basic distinction between citizen and slave.[153] As Gaius writes in his *Institutes*, in legal terms a citizen was *sui juris*, or under his own authority, whereas a slave was *potestate domini*, that is, subject to the jurisdiction of their masters.[154] As such, slaves were "perpetually subject or liable to harm or punishment," or to other arbitrary interference, from their masters.[155] But slavery was not thought of as a strictly legal condition. Roman moralists and historians believed that anyone who was subject to the will of another, whether as a matter of public authority or private power, lived in a state of servitude.[156] Not just individuals but entire political communities could be considered slaves in this sense.[157]

The distinction between the citizen, who is in some significant respect independent, and the slave, whose choices can be arbitrarily interfered with, is not only central to republican thought;[158] it is also central to 18th and 19th century American political discourse concerning slavery. In political pamphlets and other public writings, educated 18th Americans, well-versed in the works of Tacitus and the other major Roman historians, self-consciously drew upon the republican conception of slavery.[159] In John Adams' work, for example, the badges metaphor appears amidst a number of

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American legal system. *See*, *e.g.*, JOHN GREVILLE AGARD POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (2016); QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM (2012); CAROLINE ROBBINS, THE EIGHTEENTH-CENTURY COMMONWEALTHMAN: STUDIES IN THE TRANSMISSION, DEVELOPMENT, AND CIRCUMSTANCE OF ENGLISH LIBERAL THOUGHT FROM THE RESTORATION OF CHARLES II UNTIL THE WAR WITH THE THIRTEEN COLONIES (2004); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (2017); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (2011); Mortimer N.S. Sellers, AMERICAN REPUBLICANISM (1994); Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 THE JOURNAL OF AMERICAN HISTORY 11 (1992); Robert E. Shalhope, *Republicanism And Early American Historiography*, 39 THE WM. AND MARY Q. 334 (1982). For an overview of republican concepts within modern legal theory, *see generally* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1987).

[153] PETER GARNSEY, IDEAS OF SLAVERY FROM ARISTOTLE TO AUGUSTINE 26 (1996).

[154] D 1.6.1.

[155] QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM 40-44 (2012).

[156] *Id*. at 42.

[157] *Id*. at 44.

[158] PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 31 (1997) (noting that "in the republican tradition...liberty is always cast in terms of the opposition between liber and servus, citizen and slave").

[159] *See* Sellers, *supra* note 152 at 20 (noting that a "[f]amiliarity with Livy, Sallust, Cicero and others provided colonists with a well-developed and well-admired alternative to monarchy, and a republican ideology").

references to Tacitus' view of slavery; Tacitus, as I noted above, provides one of the earliest examples of the badges metaphor.[160] Educated 19th century Americans also would have been familiar with classical views of slavery, and references to antiquity similarly colored 19th century political discourse.[161]

To fully appreciate how deeply the Roman republican vocabulary influenced American discourse on slavery, it is necessary to consider a second source of republican rhetoric, namely, the writings of 17th century English Commonwealthmen such as Henry Neville, James Harrington, and Algernon Sidney.[162] These writers exhibited a similar indebtedness to the Roman republican conception of slavery. According to Sidney, for example, "[h]e is a slave who serves the best and gentlest man in the world, as well as he who serves the worst; and he does serve him, if he must obey his commands, and depends upon his will."[163] For the Commonwealthmen, slavery was very often described as subjection to arbitrary, which is to say unchecked, power. 17th century farmers and artisans, for instance, sought "to abolish all arbitrary Power." Similarly, Sydney held that "laws are not made by kings…because nations will be governed by rule, and not arbitrarily."[164] For Sydney, "the multitude [who live] under the yoke" of an arbitrary ruler bear "a badge of slavery."[165]

18th century American writers widely adopted the concepts and vocabulary of Sidney and other Commonwealthmen. In 18th century political texts, for example, "arbitrary," becomes a watchword denoting tyrannical power, especially that wielded by the British monarchy over the colonies. According to one author, the British government possessed "a settled, fixed plan for *enslaving* the colonies, or bringing them under arbitrary government."[166] For many 18th century Americans, a despot was a ruler "bound by no law or limitation but his own will," and the exercise of arbitrary

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[160] JOHN ADAMS & CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS 561 (1850) (citing Tacitus's view of slavery in support of the claim that ancient monarchies subjected citizens to slavery).

[161] MARGARET MALAMUD, ANCIENT ROME AND MODERN AMERICA 41 (2009). (observing that "[l]ate eighteenth- century and early nineteenth-century readers used in schools contained a number of passages on the topic of slavery and liberty including several passages taken from Roman historians" such as Tacitus).

[162] BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 43 (2017).

[163] ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 319 (1704).

[164] JAMES HARRINGTON, THE POLITICAL WORKS OF JAMES HARRINGTON 171 (2010) (asserting that to be free under government is "not to be controlled but by the law; and that framed by every private man unto no other end…than to protect the liberty of every private man, which by that means comes to be the liberty of the commonwealth").

[165] See Sidney, supra note 163 at 442.

[166] *See* BAILYN, *supra* note 152 at 119.

power characterized despotic regimes.[167]

19th century labor republicans and abolitionists were also wont to rely, implicitly or explicitly, on this rhetoric. Labor republican Seth Luther, for instance, decried the "tyrannical government of the mills," which, he claimed, was defined by "one sided and arbitrary rule" over wage-laborers.[168] Angelina Grimke, whose invocation of the badges metaphor I noted above, wrote of the "arbitrary power" that slave owners wielded over slaves.[169] In a letter from William Lloyd Garrison to the editor of the Boston *Courier*, Garrison quotes extensively from Sidney's *Discourses on Government* "in order to show, beyond all contradiction, that Algernon Sidney *was an Abolitionist of the modern school*, as "fanatical," "incendiary," "denunciatory," and "blood-thirsty," as even [British abolitionist] George Thompson himself.[170] Garrison then proceeds to quote Sidney's definition of slavery, according to which a slave is "a man who can neither dispose of his person or goods, but enjoys all at the will of his master."[171]

As the historian Eric Foner observes, in 18th century American political discourse "slavery was primarily a political category, shorthand for the denial of one's personal and political rights by arbitrary government."[172] This usage continued into the 19th century, influencing not just the abolitionist movement but the early feminist and workers' movements as well. To be sure, from the fact that many 18th and 19th century Americans used classically republican vocabulary to condemn slavery one cannot conclude that they understood slavery in precisely the same manner.[173] Even among abolitionists there were deep disagreements over what were the core components of slavery.[174] Likely the same point can be made with regard to the badges metaphor: given the evident disagreement over what constituted slavery there surely also would have been disagreement over how to identify its badges. It would thus be too quick to conclude from the evidence given above that from usage of the badges metaphor one can infer a commitment to philosophical

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[167] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 142 (1982).

[168] ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH 77 (2014).

[169] NANCY WOLOCH, EARLY AMERICAN WOMEN: A DOCUMENTARY HISTORY, 1600-1900 234 (1992).

[170] WILLIAM LLOYD GARRISON, THE LETTERS OF WILLIAM LLOYD GARRISON, vol. II 219 (1971).

[171] *Id*.

[172] THE STORY OF AMERICAN FREEDOM 29 (1994).

[173] Don Herzog, *Some Questions for Republicans*, 14 POL. THEORY 473, 481 (1986). (observing that a shared republican vocabulary is consistent with profound conceptual differences).

[174] According to William Lloyd Garrison, for example, even under a broader, republican understanding of slavery "[i]t seems to us an abuse of language to talk of the 'slavery of wages.'" "Free and Slave Labor," *The Liberator* XVII, no. 13 (March 26, 1847), 50.

republicanism.

At the same time, however, the badges metaphor cannot be fully understood shorn of the broader republican conceptual framework that structured 18th and 19th century American political discourse. The restrictive interpretation requires that we ignore this framework, narrowing our understanding of the badges metaphor to those instances in which the metaphor referred to African American skin color or to the incidents of racialized chattel slavery. But this is an arbitrary restriction, for there is no evidence that Republicans and abolitionists limited their usage of the metaphor in this way, let alone other 18th and 19th century American political actors. Indeed, as I have shown above, there is a good deal of evidence demonstrating just the opposite.

The restrictive interpretation fails to account for this evidence and thus is unable to explain why the badges metaphor was so often invoked in condemnation of gender and class subordination, not to mention other perceived injustices that bore little resemblance to racialized chattel slavery and its aftermath. Taking into account the republican background to the badges metaphor, by contrast, provides a plausible explanation of the metaphor's many appearances in European and American political discourse. Republicanism provided for European and American reformers a conceptual vocabulary useful for identifying and denouncing certain group-based deprivations of important rights and liberties. Importantly, on the republican view, groups deprived of important rights and liberties possessed a separate, and unequal, *status*. While chattel slavery constituted the extreme end of status inequality, the badges metaphor was very often applied to inequalities that fell far short of racialized, chattel slavery.

C. The Badges of Slavery from Dred Scott *to* The Civil Rights Cases

Proponents of the restrictive interpretation maintain that, in American political discourse, the badges metaphor referred narrowly "to the color of an African American's skin or other indications of legal and social inferiority connected with slavery."[175] As I demonstrated above, however, the badges metaphor was a widely-circulated political trope, or cluster of tropes, commonly used to condemn subjection to arbitrary exercises of authority. The metaphor was never restricted only to the law of slavery but included discriminatory practices targeting free African Americans. The metaphor also ranged beyond race to include class and gender.

The second objection to the restrictive interpretation concerns the

[175] *See* McAward, *supra* note 2 at 581.

origin and meaning of the metaphor within American jurisprudence. The badges metaphor does not first appear, as proponents of the restrictive interpretation assert, in *Blyew*, *Rhodes*, or the *Civil Rights Cases*. Rather, the badges metaphor appears earlier, in *Dred Scott v. Sanford*.[176] Moreover, in *Dred Scott* Taney does not use the metaphor to refer only to the incidents of chattel slavery. As I shall demonstrate here, Taney uses the badges metaphor to refer to state actions or social customs that stigmatized African Americans, whether free or enslaved. That a badge of slavery could be imposed upon free African Americans, living in states that had permanently abolished slavery, is further evidence against the restrictive interpretation.

The facts, holding, and aftermath of *Dred Scott* are, of course, well known: Scott, an enslaved African American, brought suit in federal court, arguing that upon establishing residence in a free state and in federal territory he and his family had become American citizens.[177] Recall that Taney's majority opinion is not simply intended to rebut the claim that Scott and his family were citizens. Taney endeavors to show more generally that African Americans always were and always would be excluded from the "new political family which the Constitution brought into existence."[178]

Taney's argument revolves around proving that African Americans had always been treated as an outcast group, and he repeatedly uses the badges metaphor to describe the stigmatizing effect of laws that maintained racial hierarchy. Racially discriminatory laws, according to Taney, "stigmatized" and "impressed…deep and enduring marks of inferiority and degradation" upon African Americans as a group.[179] As Taney recognized, however, in some states free African Americans could become citizens and could vote, suggesting that, even if not granted the full rights of citizenship, free African Americans possessed some standing within their political communities.[180] Yet Taney maintains that the existence of free African Americans does not refute his argument, for free African Americans "were identified in the public mind with the race to which they belonged, and

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[176] The badges metaphor appears in both Chief Justice Taney's majority opinion and in Justice Daniel's concurrence. In his concurring opinion, Justice Daniel, comparing American slavery to slavery in ancient Rome, notes that Roman slaves bore a "badge of disgrace." 60 U.S. (19 How.) 393, 479. I focus primarily on Taney's opinion, as his usage is most clearly at odds with the restrictive interpretation.

[177] For a comprehensive overview of the issues involved in the *Dred Scott* decision, see DON EDWARD FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978).

[178] 60 U.S. (19 How.) 393, 406.

[179] *Id*. at 416.

[180] *Id*. at 572-4; *accord* Fehrenbacher *supra* note 177 at 66 (observing that "the evidence is that by implication, sufferance, and inadvertence they often classified [free African Americans] as [citizens]").

regarded as a part of the slave population rather than the free."[181]

Taney's point is that even those African Americans free from the legal incidents of slavery nevertheless bore its badges. To support this claim Taney cites a number of laws in free states that denied important rights and privileges to African Americans.[182] It is worth paying particular attention to Taney's discussion of anti-miscegenation statutes, for Taney focuses less on the penal function of these laws and more on the fact that such laws served to express the white majority's view that free African Americans were less than full citizens. For example, Taney cites one anti-miscegenation law forbidding

> "the marriage of any white person with any negro, Indian, or mulatto, and inflicts a penalty of fifty pounds upon anyone who shall join them in marriage, and declares all such marriage absolutely null and void, and degrades thus the unhappy issue of the marriage by fixing upon it the stain of bastardy."[183]

This law, Taney asserts, imposed a "mark of degradation" upon African Americans.[184] But note that Taney is not referring solely to the legal restrictions on interracial marriage; rather, he is referring to the expressive effect of such laws.[185] Anti-miscegenation laws, as Taney is keen to point out, placed a stain – that is, a social stigma – upon those who would enter into such marriages and upon the children of any such marriages.[186]

Taney's usage of the badges metaphor in *Dred Scott* is deeply revealing, and it cuts against the restrictive interpretation. First, Taney's usage of the metaphor demonstrates that the purported distinction between the metaphor in political discourse and the metaphor as a legal term of art is illusory. Consider, for example, that Taney's usage of the metaphor is echoed, to opposite effect, by the abolitionist William Loyd Garrison. For Garrison, too, prohibitions against interracial marriage constituted "disgraceful badge[s] of servitude."[187] But note that Rutherglen characterizes Garrison's usage as political, not legal. That is, in Rutherglen's view,

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[181] 60 U.S. (19 How.) 393, 411. Emphasis added.

[182] *Id*. at 415.

[183] *Id*. at 413. (citation omitted)

[184] *Id*.

[185] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1525 (2000) (asserting that in addition to their regulative functions, laws also may contain expressive content that can be ascertained only "in light of the community's other practices, its history, and shared meanings").

[186] On the connection between stain and stigma, *see* Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 M. L. REV. 203, 209 (1996).

[187] *See* Rutherglen, *supra* note 2 at 165. (citations omitted).

Garrison is pointing out that "[l]aws against miscegenation…did not draw out a consequence of actual slavery but were an indication of symbolic slavery."[188] While Rutherglen argues that "[t]his sense of "badge" rarely appeared in the law of slavery," one would be hard pressed to find a more canonical example of 19th century legal views of slavery than those expressed in *Dred Scott*.[189]

Taney's focus on anti-miscegenation laws reveals yet another weakness of the restrictive interpretation. According to the restrictive interpretation, a badge of slavery, as a legal term of art, referred only to laws restricting the rights of African Americans.[190] However, the anti-miscegenation laws that Taney cites threatened punishment for whites, albeit to a lesser extent than blacks. Whites who attempted to intermarry would be temporarily made servants, a degraded status for a white citizen though one still superior to that of a chattel slave.[191] In Taney's view the point of such laws was to maintain an "impassable barrier" between racial groups, thereby reinforcing the stigmatized status of African Americans as a group.[192] While a law restricting the rights of African Americans was the most direct route to this outcome, the racial boundary Taney sought to defend could be reinforced by punishing whites as well. Only a stigma-based interpretation is able to explain how, in states that had permanently abolished slavery, a law restricting the rights of free African Americans and whites imposed a badge of slavery.

Finally, it is important to note that Taney's reasoning draws a clear connection between the badges metaphor and another concept central to understanding the Thirteenth Amendment, namely, custom. The Thirteenth Amendment directly regulates private conduct, for, as the framers of the amendment were aware, social customs were essential to the legitimation and maintenance of the slave system as a whole and to the law of slavery in particular.[193] Courts relied on local customs "to fill gaps or resolve

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[188] *Id*. at 166.

[189] *Id*. To be sure, Taney's opinion has been widely "condemned as a striking example of poor scholarship and weak legal reasoning." Paul Finkelman, *Was* Dred Scott *Correctly Decided? An "Expert Report" for the Defendant*, 12 LEWIS & CLARK L. REV. 1219, 1223 (2008). At the same time, "the Taney opinion *is,* for all practical purposes, *the* Dred Scott decision and therefore a historical document of prime importance." *See* Fehrenbacher, *supra* note 177 at 337.

[190] *See supra* note 44.

[191] For example, Taney quotes from a 1717 Maryland law stating that "any white man or white woman who shall intermarry…with any negro or mulatto…shall become servants during the term of seven years." 60 U.S. (19 How.) 393, 408 (citations omitted). Taney quotes a similar Massachusetts law which threatened punishment for the individual, irrespective of their race, who officiated at interracial unions. *Id*. at 413.

[192] 60 U.S. (19 How.) 393, 409.

[193] Darrell A.H. Miller, *White Cartels, the Civil Rights Act of 1866, and the History of*

ambiguities" in the law of slavery as well as to "to generate the legal, social, and civil disabilities of the enslaved."[194] Courts cited local customs, for example, as justification for imposing heightened punishments for enslaved individuals who assaulted whites but lesser punishments for whites who assaulted enslaved African Americans.[195] By legally sanctioning these violent customs, courts both ratified and reinforced their stigmatizing effect, a point to which I shall return in Section III.

Taney's usage of the badges metaphor similarly links racially discriminatory custom with laws maintaining African American subordination. As Justice Taney surely must have known, a law annulling interracial marriages could stigmatize its targets only in virtue of the fact that interracial couples faced severe social sanction from whites committed to maintaining racial hierarchy.[196] Similarly, a law which fixed upon an interracial marriage the "stain of bastardy" also drew upon private custom, as the degraded status of a bastard was as much a social as a legal condition.[197] The broader point is that, as Taney's analysis indicates, a badge of slavery was not simply equivalent to a legal incident of slavery, nor was it solely a reference to skin color. Rather, a badge of slavery was imposed by state

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Jones v. Alfred H. Mayer Co., 77 FORDHAM L. REV. 999, 1032 (2008). (noting that "Congress received ample evidence of discrimination by collectives of Southerners acting as legislatures, but it also heard evidence of discrimination perpetrated by collectives of Southerners acting in their private capacity").

[194] Darrell A.H. Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 COLUM. L. REV. 1811, 1815, 1825 (2012).

[195] *Id*. at 1825. *See also* Mark Tushnet, *The American Law of Slavery, 1810–1860: A Study in the Persistence of Legal Autonomy*, 10 Law & Soc'y Rev. 119, 143 (1975). (Noting that in one North Carolina case, the court concluded that "the habits of humility and obedience which belong to the condition of the slave…required by the inveterate usages of our people…clearly forbid that an ordinary assault or battery should be deemed, as it is between white men, a legal provocation").

[196] For example, an 1871 report from the Richmond Daily Dispatch notes that a white woman discovered living with an African American man was "tarred and feathered and exiled from the county." DeNeen L. Brown *Before* Loving v. Virginia*, Another Interracial Couple Fought in Court for their Marriage* June 12, 2017 https://www.washingtonpost.com/news/retropolis/wp/2017/06/11/before-loving-v-virginia-another-interracial-couple-fought-in-court-for-their-marriage/

[197] A 1939 article on the sociology of illegitimacy opens with the following observation: "The bastard, like the prostitute, thief, and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity, an undeniable evidence of contramoral forces; in short, a problem-a problem as old and unsolved as human existence itself." Kingsley Davis, *Illegitimacy and the Social Structure*, 45 AMERICAN JOURNAL OF SOCIOLOGY 215 (1939); see also John Witte Jr, *Ishmael's Bane: The Sin and Crime of Illegitimacy Reconsidered*, 5 PUNISHMENT & SOC'Y, 327, 335 (2003) (arguing that illegitimate children "bore the permanent stigma of their sinful and criminal conception," which precluded them from "positions of social visibility and responsibility").

actions or social customs that stigmatized subordinate groups.

It is instructive to compare Taney's usage of the badges metaphor with how the metaphor was used several decades later in the *Civil Rights Cases*. In the *Civil Rights Cases* there is a telling divergence between the majority and dissent regarding the meaning of the metaphor. Justice Bradley, writing for the majority, claims that prior to the abolition of slavery "[m]ere discriminations on account of race or color were not regarded as badges of slavery."[198] "There were thousands of free colored people in this country before the abolition of slavery" Bradley asserts, "yet no one at that time thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations" in access to public facilities.[199] Thus, he argues, Section 2 cannot sustain the provisions of the Civil Rights Act of 1876 banning discrimination in public accommodations.

For proponents of the restrictive interpretation "it is not immediately clear that the majority was wrong to limit the coverage of the Section 2 power to public actors," because "the term "badge" of slavery was regarded in judicial circles as a post-emancipation synonym" for the incidents of slavery.[200] Yet, as we have seen, in *Dred Scott* Taney, following the common meaning of the metaphor, uses the badges metaphor to refer to racially discriminatory laws in states that had *abolished* slavery. Such laws imposed badges of slavery not because they maintained or attempted to reimpose the slave system; they imposed badges of slavery because, in conjunction with the white community's social customs, they imposed a stigma upon African Americans as a group.

A more historically grounded understanding of the badges metaphor is to be found in Justice Harlan's dissent. According to Justice Harlan, "discrimination practised [sic] by corporations and individuals in the exercise of their public or *quasi*-public functions is a badge of servitude," and, as such, is a proper target of Thirteenth Amendment regulation.[201] Though employing the metaphor to opposite ends, Harlan's usage of the metaphor follows Taney's in that it supposes that public discrimination reinforced by private custom may impose a badge of slavery. In fact, in his opinion Harlan invokes *Dred Scott* to castigate the majority's cramped construal of the Reconstruction Amendments. This is a refrain Harlan would sound again in *Plessy v. Ferguson*, where Harlan reiterates his view that the "arbitrary separation of citizens on the basis of race while they are on a public highway

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[198] The Civil Rights Cases, 109 U.S. 3, 25 (1883).
[199] *Id*.
[200] *See* McAward, *supra* note 2 at 615.
[201] The Civil Rights Cases, 109 U.S. 3, 43 (1883).

is a badge of servitude."[202] Of course, the *Plessy* majority infamously denies that segregation marks African-Americans with "a badge of inferiority."[203] That the restrictive interpretation aligns more closely with the *Plessy* majority opinion than with Harlan's now-canonical dissent provides yet another reason to reject the view.[204]

Ultimately the restrictive interpretation is untenable. The badges metaphor was by no means unique to American political discourse, nor did it refer solely to chattel slavery or to the incidents thereof. Long before it entered American political discourse the badges metaphor referred to a wide variety of formal and informal stigmatizing practices. American political actors who took up the metaphor followed this broad pattern of usage, such that for many politically active 19th century Americans stigmatizing practices associated with race, class, and gender imposed badges of slavery. Moreover, the badges metaphor as a legal term of art, first appearing in *Dred Scott*, did not fundamentally deviate from the metaphor as found in popular or political discourse. In both cases a badge of slavery referred to state actions or social customs that stigmatized subordinate groups.

III. ERADICATING THE CONTEMPORARY BADGES OF SLAVERY

Section 2 is not limited to preventing the reimposition chattel slavery or its de facto equivalent. Section 2 grants Congress the authority to target stigmatizing laws and social customs, for these practices impose a badge of slavery. I shall now discuss how this interpretation of Section 2 can be applied in practice. As there are far too many proposed uses of Section 2 to discuss in this space, the discussion here is meant to be illustrative. My aim is to provide a general approach to constructing and assessing Section 2 arguments in light of the expansive interpretation I presented above.

First, consider again the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (the "HCPA"). The HCPA falls within Congress's Section 2 authority, and the expansive interpretation of the badges metaphor explains why. On the expansive interpretation, to determine whether 249(a)(1) is a valid exercise of Congress's Section 2 authority it is necessary to determine whether bias-motivated violence is a social custom that imposes stigmatic harm upon a particular group. Though a concern for stigmatic harm traditionally sounds in equal protection, the doctrine is readily transferrable to the Thirteenth Amendment context. Whether considered under the Fourteenth or the Thirteenth Amendment, the determining factor is whether

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[202] Plessy v. Ferguson, 163 U.S. 537, 562 (1896).

[203] *Id*. at 551.

[204] On the canonization of Harlan's *Plessy* dissent, see Richard A. Primus, *Canon, Anti-canon, and Judicial Dissent*, 48 DUKE L.J. 243, 256-7 and 245 n.14 (1998).

the act in question singles out a particular group for status-based deprivations of rights, liberties, or privileges that are generally available to others.[205]

Bias-motivated racial and ethnic violence imposes stigmatic harm in this sense. Though bias-motivated violence results in harm to individual victims, such crimes are symbolic acts that single out particular groups. As hate crime researcher Barbara Perry observes, bias-motivated violence is "generally directed toward those whom our society has traditionally stigmatized and marginalized" with the intended aim of "reaffirm[ing] the precarious hierarchies that characterize" social and political life.[206] Through the infliction of brutal violence perpetrators intend "not only to subordinate the victim, but also to subdue his or her community, to intimidate a group of people" defined by a particular trait or perceived difference from the norm.[207] This message of intimidation does not go unheard: as survey evidence reveals, members of a community targeted by bias-motivated violence report fearing, with good reason, that they are not fully and equally protected by existing law and that this lack of protection leaves members of their group subject to the violent and arbitrary impulses of malicious private actors.[208]

The long history of private violence targeting racial and ethnic minorities in the United States largely tracks these generalizations. For example, violence directed towards African Americans in the post-Reconstruction era was not simply an attempt to reestablish chattel slavery. Rather, as legal historian Ely Aaronson notes, extralegal violence targeting African Americans, alongside the state's unwillingness to seek redress for black victims, "symbolize[d] and enforce[d] the second-class status of African Americans."[209] Similar points apply to violence directed towards ethnic minorities. As Perry notes, ethnic violence, for perpetrators, is a means by which to punish groups who are perceived to have "overstep[ped] their boundaries by assuming they, too, are worthy of first-class citizenship."[210] Indeed, the recent surge of attacks targeting Asian-Americans is but the latest episode in a long history of violence aimed at subordinating and stigmatizing

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[205] *See* Amar, *supra* note 186 (asserting that a law imposes a stigma when "it singles out a named class of persons for status-based disadvantage").

[206] IN THE NAME OF HATE: UNDERSTANDING HATE CRIMES 3 (2001).

[207] *Id*. at 10.

[208] Barbara Perry, *Exploring the Community Impacts of Hate Crime*, *in* THE ROUTLEDGE INTERNATIONAL HANDBOOK ON HATE CRIME (Nathan Hall, Abbee Corb, Paul Giannasi and John G. D. Grieve ED.S, 2015) 51 (reviewing evidence demonstrating that members of the victim class who learn of bias-motivated violence "feel themselves to be equally vulnerable to victimization… Regardless of context, there is a constant fear of assault.").

[209] ELY AARONSON, FROM SLAVE ABUSE TO HATE CRIME: THE CRIMINALIZATION OF RACIAL VIOLENCE IN AMERICAN HISTORY 97 (2014).

[210] *See* Perry, *supra* note 208 at 61.

communities perceived as foreign.[211] Given the stigmatizing intent and effect of bias-motivated violence, 249(a)(1) is well-within Congress's Section 2 authority.

A slightly different analysis is required for Section 249(a)(2) of the HCPA. Section 249(a)(2) establishes criminal penalties for assaults motivated by the victim's "gender, sexual orientation, gender identity, or disability."[212] The constitutionality of Section 249(a)(2) turns on whether Congress can use its Section 2 authority to protect non-racial groups. As I demonstrated above, according to historical usage, women, laborers, and others could bear a badge of slavery.[213] There is thus a *prima facie* case for including non-racial groups under Section 2.

That being said, it is undeniable that chattel slavery uniquely targeted African Americans, and given the close association of chattel slavery with racial subordination, Section 2 proposals that include non-racial classifications will likely face skepticism from courts, among other legal actors. Whereas many scholars who have offered Section 2 proposals seem to assume that Section 2 straightforwardly extends to all groups, I propose a compromise: while it is within Congress's authority to extend Section 2 coverage to non-racial groups, when exercising this authority Congress must provide evidence that the stigmatic harms targeted are fairly closely analogous to stigmatic harms suffered by African Americans. This higher evidentiary standard would ensure that Section 2 legislation does not drift too far from the one of the core aims of the Thirteenth Amendment, namely, protecting African Americans from stigmatizing and degrading treatment.

249(a)(2) is a valid use of Congress's Section 2 authority, even assuming a heightened evidentiary standard. This is because violence targeting individuals on the basis of gender, sex, or sexual orientation is closely analogous to violence targeting racial minorities. First, as a number of feminist scholars have pointed out, both forms of bias-motivated violence serve to single out and stigmatize the victim's broader social group in order to maintain group hierarchy.[214] Moreover, historically the criminal justice system has similarly failed to protect gays and lesbians from violent attack

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[211] *See* Perry, *supra* 208 at 59-65.

[212] For the sake of space my argument focuses on the inclusion of sexual orientation in the HCPA; separate arguments would need to be made for other classifications.

[213] *See supra* Section I.A.

[214] *See* Perry, *supra* 208 at 83 (observing that "[j]ust as racially motivated violence seeks to reestablish "proper" alignment between racial groups, so too is gender-motivated violence intended to restore men and women to "their place.""). *See also* Catharine A MacKinnon, *Reflections on Sex Equality under Law*, YALE L. J. (1991) (noting evidence demonstrating that "[w]omen are sexually assaulted because they are women: not individually or at random, but on the basis of sex, because of their membership in a group defined by gender.") (citations omitted).

and often failed to prosecute those who commit such attacks. In fact, in some cases state agents are among those perpetrating homophobic violence.[215] Violence targeting LGBTQ individuals thus bears important similarities to violence targeting African Americans.

The case for Section 2 authority is even stronger given the relationship between customary homophobic violence and criminal defense law. Consider that most state courts still permit the so-called "gay panic" defense in criminal trials. The gay panic defense is an informal defensive strategy that relies "on the notion that a criminal defendant should be excused or justified if his violent actions were in response to a (homo)sexual advance."[216] In gay panic cases masculine social customs regarding the infliction of homophobic violence are used to generate a special set of legal disabilities for LGBTQ individuals.[217] The defense also accords a special set of legal privileges for heterosexual men: according to one analysis, for example, the gay panic defense successfully leads to a reduction of charges in about one-third of all cases in which it is raised, despite the fact that "the majority of these homicides involve incredible violence."[218] By permitting the gay panic defense the law incorporates and legitimizes heterosexist social customs, just as the law of slavery incorporated and legitimized social customs regarding the infliction violence upon the enslaved.[219]

Analogical arguments can be used to extend Congress's Section 2 authority to other groups as well. Contemporary legal scholars have plausibly argued, for example, that private violence targeting women imposes a badge of slavery. Though none of these scholars have offered a historical interpretation of the badges metaphor, these arguments nonetheless persuasively demonstrate that gender-based violence stigmatizes women. First, as I noted in Section II, 19th century abolitionists and feminists invoked the badges metaphor to draw attention to commonalities between race and gender subordination. For 19th century feminists, one crucial commonality was their similar susceptibility to private violence and a lack of legal

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[215] *See generally* Kirstin S. Dodge, *Bashing Back: Gay and Lesbian Street Patrols and the Criminal Justice System*, 11 LAW & INEQ. 295 (1992).

[216] Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 475 (2008).

[217] In a notorious 2015 case James Miller successfully employed this strategy, receiving a six-month sentence after stabbing to death his neighbor, Daniel Spencer Julie Compton, *Alleged 'gay panic defense' in Texas murder trial stuns advocates*, NBC News, (May 2, 2018, 11:12 AM PDT), https://www.nbcnews.com/feature/nbc-out/alleged-gay-panic-defense-texas-murder-trial-stuns-advocates-n870571

[218] W. Carsten Andresen, The Conversation. https://theconversation.com/i-track-murder-cases-that-use-the-gay-panic-defense-a-controversial-practice-banned-in-9-states-129973

[219] *See supra* Section I.C.

recourse.[220] A convincing argument for Section 2 legislation including gender classifications would build on this analogy by noting that, similar to racial and ethnic violence, contemporary gender-based violence "terrorizes the collective by victimizing the individual" in order to "establish an "appropriate" hierarchy in which men are dominant, women subordinate."[221] Moreover, the stigmatizing effects of gender-based private violence endure in part due to the unwillingness of state actors to fully investigate and prosecute such crimes.[222] Violent crimes targeting African American women, in particular, are systematically under prosecuted.[223]

Though this is just the outline of an argument for extending Section 2 coverage to women, the similarities to racially bias-motivated racial violence are apparent. Just as with the HCPA, through a combination of private violence and state neglect women are singled out for a status-based disability. To be sure, expanding Section 2 coverage to new groups via analogical reasoning may seem foreign to Thirteenth Amendment jurisprudence. Identifying new groups that warrant heightened antidiscrimination protection has become almost exclusively a Fourteenth Amendment issue. Yet it is worth revisiting this common assumption about the appropriate method of interpretation for each Amendment. As the history surveyed in Section II reveals, many groups adopted the badges metaphor precisely because they saw analogies between the stigmatization inherent in chattel slavery and their own subordinate position. Furthermore, as Alexander Tsesis has argued, expanding the scope of the Fourteenth Amendment to include new groups goes "well beyond the text of the Amendment, the intent of its founders, and the internal coherence of its sections."[224] And yet it is hard to imagine a modern equal protection doctrine that lacks protections for women, among other groups.[225] The historical usage of the badges metaphor indicates that we should be similarly willing to extend the scope of Section 2. Regardless of identity, any group that is singled out for status-based deprivations of rights, liberties, or privileges warrants Section 2 protection.

CONCLUSION: SECTION 2 OPTIMISM

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[220] Alexander Tsesis, *Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1661-7 (2012).

[221] *See* Perry, *supra* 210 at 83.

[222] *See*, *e.g.*, Andrea Quinlan, *Visions of Public Safety, Justice, and Healing: The Making of the Rape Kit Backlog in the United States*, 29 SOC. & LEGAL STUD. 225 (2020) (discussing the history of the "hundreds of thousands of untested forensic sexual assault kits sitting in police storage facilities and forensic labs across the United States").

[223] *See* Pokorak, *supra* note 69.

[224] See Alexander Tsesis, *Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1681 (2012).

[225] *Id*.

A badge of slavery referred to state actions or social customs that stigmatized subordinate groups. Going forward, Section 2 proposals and arguments should seek to demonstrate that the targeted injustice singles out particular groups for status-based deprivations of rights, liberties, or privileges that are generally available to others. I believe that this definition best accounts for the historical evidence, and that badges of slavery endure to this day, prompting a renewed need for Section 2 legislation. Yet it is also reasonable to wonder whether expansive uses of Section 2 can find traction outside of the legal academy.

The skeptical reactions that greet many badges proposals stem from a paradox inherent in contemporary Thirteenth Amendment scholarship. As Jamal Greene observes, many legal scholars are Thirteenth Amendment "optimists," in that they believe that "the Amendment prohibits in its own terms, or should be read by Congress to prohibit, practices that one opposes but that do not in any obvious way constitute either chattel slavery or involuntary servitude as those terms are ordinarily understood."[226] Most Thirteenth Amendment proposals – such as using the Amendment to combat abortion restrictions and racial profiling – are optimistic in this sense. But as Greene points out, the suggestion that any of these injustices "qualif[y] as slavery or may be regulated as such does not merely feel technically incorrect as a matter of current legal doctrine; it intuitively seems to misunderstand the English language and the terms of art used within it."[227] That is, no matter how clever the argument or how compelling the analogy, a good deal of contemporary Thirteenth Amendment proposals simply do not survive first contact with the text of the amendment.

As Greene acknowledges, however, the legal and political import of Section 2 is far from settled. Indeed, one of the main points of his Article is to juxtapose "the relative narrowness of Section 1 and the relative generativity of Section 2."[228] For Greene the generativity of Section 2 will not come from judicial interpretation, which, he believes, will almost surely disappoint Thirteenth Amendment optimists. For Greene the generativity of Section 2 must come instead from political mobilization and Congressional legislation. In his view, Section 2 "burden[s] Congress with a constitutional responsibility to root out pervasive and demeaning inequality and subjugation even in the absence of local governmental action."[229] Focusing on Section 2, as opposed to Section 1, "may help, in small ways, to motivate the political

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[226] Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1735 (2012).

[227] *Id*. at 1736.

[228] *Id*. at 1766, n.178.

[229] *Id*. at 1763.

process necessary to craft legislation ultimately grounded in other substantive provisions."[230]

I am slightly more optimistic than Greene, in that I do not foreclose the possibility that a future Court could take up the expansive interpretation of the badges metaphor. The expansive interpretation possesses a respectable judicial lineage, running from Taney's anti-canonical majority opinion in *Dred Scott* to Harlan's canonical dissent in *Plessy,* and then on to *Jones*, upon which a future Court may rightly wish to build. Nevertheless, Greene's caution is well-taken, and one underlying aim of this Article has been to show how Section 2 arguments might contribute to the sort of political and legislative mobilization that he envisions. Debates over the badges metaphor are, of course, debates about the ways in which certain words were used in the past. At the same time they are, more importantly, debates over how to frame the relationship between past practices and present conditions. If we conceive of slavery as a temporally discrete legal regime, and if we understand the badges metaphor as a reference to distinct features of this regime, then the 13th Amendment likely is a dead end for most contemporary purposes.

As I have argued in this Article, however, the historical evidence does not compel these interpretative choices. On the contrary, many who used the badges metaphor sought to eradicate not just a particular legal regime but also the commitments to group hierarchy, stigma, and subordination that underlay the slave system. Accordingly, Section 2, and the badges metaphor, call on Congress and the public to eradicate the lingering traces of group stigma, in whatever form they are found. To do so requires public discussion and debate over the extent to which contemporary inequalities follow from, or at least reflect, the unjust hierarchies of the past. This is a discussion that some vehemently wish to avoid.[231] But this resistance is, perhaps, a hopeful indication of the critical potential that Section 2 retains.

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[230] *Id*. at 1756.

[231] See, e.g., Char Adams, *Republicans Announce Federal Bills to 'Restrict the Spread' of Critical Race Theory*, NBC NEWS, May 12, 2021, 1:54 PM PDT, https://www.nbcnews.com/news/nbcblk/republicans-announce-federal-bills-restrict-spread-critical-race-theory-n1267161