

## ARTICLES

### DEFINING THE BADGES AND INCIDENTS OF SLAVERY

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*Most agree that Section 2 of the Thirteenth Amendment empowers Congress to legislate regarding the “badges and incidents of slavery.” Few, however, have explored in depth the precise meaning of this concept. The goal of this Article is to provide a historical and conceptual framework for interpreting and identifying the badges and incidents of slavery. It examines the original public meaning of the terms “badge of slavery” and “incident of slavery” as well as how the “badges and incidents” concept has been incorporated into and used in Thirteenth Amendment jurisprudence. It considers several analytical variables from historical, jurisprudential, and policy perspectives, including what populations Congress can protect; what actors Congress can regulate; and what types of conduct Congress can target under its Section 2 power.*

*Ultimately, this Article concludes that the best understanding of the “badges and incidents of slavery” refers to public or widespread private action, aimed at any racial group or population that has previously been held in slavery or servitude, that mimics the law of slavery and has significant potential to lead to the de facto reenslavement or legal subjugation of the targeted group. This limited definition will assist Congress in identifying ways in which it can fulfill the Thirteenth Amendment’s promise of universal civil and political freedom. At the same time, it will provide judicially enforceable limits for the exercise of the Section 2 power.*

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## INTRODUCTION

In June 1998, three white men tied James Byrd, Jr., an African American, to a truck and dragged him almost three miles, tearing his body to pieces and killing him.<sup>1</sup> Four months later, two men tortured and killed Matthew Shepard, a gay man.<sup>2</sup> In October 2009, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act became law, imposing significant criminal penalties on anyone who willfully injures another because of that person’s “actual or perceived race, color, religion, or national origin . . . gender, sexual orientation, gender identity or disability.”<sup>3</sup> Although the law requires that any crime predicated on gender, sexual orientation, gender identity,

<sup>1</sup> See Stephanie Elizondo Griest, *Black Leaders Honor Byrd Jr.*, LAREDO MORNING TIMES, June 8, 1999, at 4A (describing a spiritual gathering in Byrd’s honor a year after his death).

<sup>2</sup> See James Brooke, *Gay Man Dies From Attack, Fanning Outrage and Debate*, N.Y. TIMES, Oct. 13, 1998, at A1 (discussing the debate over the need for hate crimes legislation sparked by the killing of Matthew Shephard).

<sup>3</sup> National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 4707, 123 Stat. 2190, 2838–39. Division E of the Act is denominated as the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.

or disability have a link to interstate commerce, no such showing is required where the crime is motivated by the victim's race or color.<sup>4</sup> With respect to this latter class of cases, Congress made the following finding:

Slavery 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 persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.<sup>5</sup>

Through this finding, Congress invoked as its authority to pass this aspect of the hate crimes bill Section 2 of the Thirteenth Amendment. While Section 1 of that amendment declares that “[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction,”<sup>6</sup> Section 2 gives Congress the “power to enforce” that ban “by appropriate legislation.”<sup>7</sup>

On its face, Section 2 clearly permits legislation that directly enforces the ban on coerced labor by “proscrib[ing], prevent[ing], or remed[ying]” such conduct.<sup>8</sup> Indeed, Congress has passed a number of laws doing precisely that.<sup>9</sup> Since 1883, however, the Supreme Court has interpreted Section 2 as “empower[ing] Congress to do much more” than pass direct enforcement legislation.<sup>10</sup> Rather, Section 2 permits Congress “to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”<sup>11</sup> Under this facet of its Section 2 power, Congress has passed several civil rights bills that ostensibly target the “badges and incidents of slavery” by prohibiting both public and private racial discrimination in contracts, property conveyances, and housing sales, and penalizing

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4 *Id.* Crimes based on the victim's religion and national origin are covered by both the commerce and non-commerce sections of the law. *Id.*

5 *Id.* § 4702, 123 Stat. 2190, 2835–36.

6 U.S. CONST. amend. XIII, § 1.

7 *Id.* § 2.

8 *See Tennessee v. Lane*, 541 U.S. 509, 559 (2004) (Scalia, J., dissenting) (citing 1860 dictionary definitions of “enforce”).

9 *See, e.g.*, 18 U.S.C. § 1581 (2000) (criminalizing peonage); *id.* § 1584 (prohibiting involuntary servitude); *id.* §§ 1585–1588 (outlawing slave trade); *id.* § 1589 (penalizing forced labor); *id.* § 1590 (penalizing human trafficking); *id.* § 1591 (penalizing sex trafficking). *See also* 42 U.S.C. § 1994 (2006) (imposing civil remedies for peonage).

10 *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968).

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

racially-motivated crimes on public property.<sup>12</sup> The race- and color-based provisions of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act are the most recent of these efforts, given Congress's finding that both "public and private . . . racially motivated violence" is one of the badges and incidents of slavery.<sup>13</sup>

Few question that Section 2 permits Congress to legislate regarding the badges and incidents of slavery,<sup>14</sup> and this Article takes as a given this conception of the Section 2 power.<sup>15</sup> What, however, qualifies as a badge or incident of slavery? Does this concept refer only to a public law that discriminates against African Americans or, more generally, on the basis of race? Alternatively, does it encompass any public or private practice that "perpetuates [racial] inferiority?"<sup>16</sup> Or is its scope even broader, extending to "any act motivated by arbitrary class prejudice?"<sup>17</sup> Surprisingly, there is no generally accepted understanding as to the meaning of this often-invoked but under-theorized concept.

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12 See, e.g., Civil Rights Act of 1866, 42 U.S.C. § 1981a (2006) (establishing equal contract rights for citizens regardless of race); *id.* § 1982 (establishing equal property conveyance rights for citizens regardless of race); Fair Housing Act, 42 U.S.C. §§ 3601–19 (2006) (prohibiting discrimination in real estate transactions); 18 U.S.C. § 245(b)(2)(B) (2000) (addressing hate crimes committed while victim is using public facility).

13 National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 4702, 123 Stat. 2190, 2835–36 (2009).

14 But see DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888*, at 400–01 (1985) (arguing that the Thirteenth Amendment does not justify legislation unrelated to actual slavery).

15 As I have argued elsewhere, the best reading of the Thirteenth Amendment's text, history, and structure allows for prophylactic enforcement legislation aimed at the badges and incidents of slavery. See Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U. L. REV. 77, 130 (2010) (presenting three plausible readings of the amendment and concluding that the prophylactic reading is superior); see also *Jones*, 392 U.S. at 440 (holding that Section 2 gives Congress "the power . . . rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation"). Some might question whether the concept of the badges and incidents of slavery, which is not grounded in constitutional text, describes the outer boundaries of Congress's Section 2 power. My sense is that it does, and that the definition of the concept advanced in this piece is sufficiently broad to encompass all the conduct Congress may properly regulate under Section 2. Cf. *infra* pp. 596–97 and 625–27 (arguing that Section 2 does not empower Congress to regulate the relics and vestiges of slavery).

16 Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 116 (1990).

17 G. SIDNEY BUCHANAN, *The Thirteenth Amendment and the Badge of Slavery Concept: A Projection of Congressional Power*, in *THE QUEST FOR FREEDOM: A LEGAL HISTORY OF THE THIRTEENTH AMENDMENT* 175, 177 (1976); see also 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, 149–51, 155 (1994) (defending Buchanan's definition and applying it to homosexuals).

The past two decades have seen a surge in Thirteenth Amendment scholarship. While some have focused on expanding the judicially enforceable coverage of Section 1 of the amendment,<sup>18</sup> many have urged Congress to become more active in legislating under Section 2. Among the issues identified as “badges and incidents of slavery” and therefore within Congress’s purview are hate crimes,<sup>19</sup> hate speech,<sup>20</sup> racial profiling,<sup>21</sup> disproportionate capital sentencing of black defendants,<sup>22</sup> violence against women,<sup>23</sup> sexual harassment,<sup>24</sup> reproductive rights,<sup>25</sup> and gay marriage.<sup>26</sup> For some, the concept of the “badges and incidents of slavery” permits Congress to legislate for the special benefit of African Americans where there is a documented link between the identified problem and the institution of slavery and its historical aftermath. For others, it is more elastic, allowing Congress to pass legislation to address any oppressive behavior directed at any minority or powerless class of people.

If Section 2 of the Thirteenth Amendment were to confer on Congress a broad anti-discrimination power, the Supreme Court’s recent constriction of Congress’s power to legislate under Section 5 of

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18 See, e.g., Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1360 (1992) (arguing that the Thirteenth Amendment provides remedies for victims of child abuse).

19 See *supra* notes 3–7 and accompanying text (describing new hate crimes law).

20 See Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 126, 155–56 (1992) (arguing that the Court should have analyzed hate speech not only in terms of the First Amendment, but also the Thirteenth and Fourteenth Amendments).

21 See William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 20, 93 (2004) (arguing that racial profiling is a badge and incident of slavery redressable under the Thirteenth Amendment).

22 See Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 47–49 (1995) (arguing that the “disproportionate imposition of the death sentence on African Americans . . . is closely linked to the former system of slavery”).

23 See Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097, 1098 (1998) (invoking Section 2 of the Thirteenth Amendment as a source of Congress’s power to prohibit private instances of violence against women).

24 See Jennifer L. Conn, *Sexual Harassment: A Thirteenth Amendment Response*, 28 COLUM. J. L. & SOC. PROBS. 519, 556 (1995) (arguing that sexual harassment is a badge of slavery).

25 See Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment’s Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 401, 403 (2000) (suggesting that the Thirteenth Amendment is a vehicle for achieving equality of reproductive freedom between women of different races).

26 See Sarah C. Courtman, Comment, *Sweet Land of Liberty: The Case Against the Federal Marriage Amendment*, 24 PACE L. REV. 301, 328 (2003) (arguing that the inability of homosexual people to form marriage contracts equates to a “badge and incident of slavery” and violates the Thirteenth Amendment).

the Fourteenth Amendment<sup>27</sup> would not be as consequential, as Section 2 would present an alternative basis of legislative power. However, the self-executing rights conveyed by the two amendments are not identical, and therefore the conduct that Congress can reach under its enforcement powers under those amendments must be distinct. The Thirteenth Amendment promised the freed slaves “universal civil and political freedom.”<sup>28</sup> The concept of the “badges and incidents of slavery” is meant to assist Congress in identifying ways in which it can fulfill that promise and, at the same time, to mark the outer boundaries of the Section 2 power. Indeed, the terms “badge” and “incident” are terms of art that refer to specific aspects of the slave system and its legacy. To suggest 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, in which governments and individuals alike sought to achieve the de facto reenslavement of four million African Americans.

Accordingly, the goal of this Article is to provide a conceptual framework for interpreting and identifying the badges and incidents of slavery. Such a framework not only will provide a sound basis for future Thirteenth Amendment scholarship but, even more importantly, will assist Congress in crafting Thirteenth Amendment legislation and the federal courts in policing the outer boundaries of the Section 2 enforcement power. It will identify criteria by which modern social ills and injustices can be evaluated for redress under the Thirteenth Amendment.

Before proceeding, let me clarify what this Article does *not* do: First, it does not question that Congress can pass “pure” enforcement legislation under Section 2 to protect anyone, regardless of race, from any sort of privately or publicly sponsored slavery or involuntary servitude. There is no question that Section 1’s ban on slavery and involuntary servitude applies to people of all races and prohibits public and private action alike.<sup>29</sup> Indeed, as new forms of involuntary servitude emerge (through human trafficking, for example), Congress undoubtedly has authority to pass legislation that would prevent, pro-

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27 See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that Congress exceeded its power under Section 5 of the Fourteenth Amendment in passing the Religious Freedom Restoration Act of 1993).

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

29 See *Hodges v. United States*, 203 U.S. 1, 16–17 (1906) (“[The Thirteenth Amendment] reaches every race and every individual . . .”).

scribe, and/or remedy that conduct.<sup>30</sup> Legislation concerning the badges and incidents of slavery is a separate type of prophylactic enforcement legislation that Congress also can pass under the terms of Section 2.<sup>31</sup> While exploring the meaning of the badges and incidents of slavery will clarify the limits of Congress's power under this latter head of its Section 2 power, it will not affect the scope of its "pure" enforcement power.

Second, this Article does not question the scope of Congress's other constitutional enforcement powers. To the extent this Article concludes that certain types of conduct do not qualify as badges and incidents of slavery, that does not mean Congress is powerless to address them. The Commerce Clause, for example, might permit substantially similar legislative efforts.<sup>32</sup> The goal is not to tell Congress on what topics it may or may not legislate as a general matter. Rather, the goal is to guide Congress with respect to what topics it may or may not legislate under its Thirteenth Amendment enforcement power.

Third, this Article does not explore the scope of the right conveyed by Section 1 of the Thirteenth Amendment but takes as a given the prevailing judicial view that Section 1 bars only labor coerced by physical force or restraint.<sup>33</sup> Although some have proposed more expansive understandings of "involuntary servitude,"<sup>34</sup> hewing to current doctrine for purposes of this Article has at least two advantages. First, it respects judicial supremacy, a value on which the Supreme Court has placed particular emphasis in explicating Congress's role

<sup>30</sup> See, e.g., 18 U.S.C. § 1591 (2006) (penalizing sex trafficking).

<sup>31</sup> See McAward, *supra* note 15, at 84 (distinguishing between "pure" enforcement legislation and prophylactic legislation under the Thirteenth Amendment).

<sup>32</sup> Compare, e.g., *The Civil Rights Cases*, 109 U.S. at 3 (striking down the Civil Rights Act of 1875 because racial discrimination in public accommodations is not a badge or incident of slavery), with Civil Rights Act of 1964, Pub. L. No. 88-352, § 201, 78 Stat. 241, 243 (1964) (codified as amended at 42 U.S.C. § 2000a (2006)) (invoking the Commerce power to forbid racial discrimination in public accommodations).

<sup>33</sup> See *United States v. Kozminski*, 487 U.S. 931, 944–48 (1988) (holding that "involuntary servitude" prohibited by the Thirteenth Amendment requires a showing of physical force or restraint in holding a laborer).

<sup>34</sup> See, e.g., Amar & Widawsky, *supra* note 18 (arguing that child abuse is tantamount to slavery and therefore is barred by the Thirteenth Amendment). Some have argued that Section 1 itself bars not just slavery, but any badge or incident thereof. See ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* 90–91 (2004) ("[U]nder the right circumstances, the Court might allow a claim directly under section I, even absent congressional action."); William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1349 (2007) (pointing out the disparity between a literal interpretation of the Amendment and Congress's recognized powers to legislate beyond that interpretation).

in enforcing other Reconstruction amendments.<sup>35</sup> Also, it acknowledges the political reality that the Court is unlikely to alter prevailing Section 1 doctrine any time soon and therefore permits this Article to provide Congress meaningful guidance for its Thirteenth Amendment enforcement efforts within the current legal landscape. Indeed, although this Article accepts a relatively narrow view of the scope of the Section 1 right, that view is not inconsistent with permitting Congress to legislate with respect to the badges and incidents of slavery under its Section 2 power. Such legislation is prophylactic, targeting the badges and incidents of slavery not because they are themselves unconstitutional, but because eradicating them is a means to the end of preventing the de facto reestablishment of slavery.<sup>36</sup>

Finally, this Article does not seek to provide an exhaustive list of all “badges and incidents of slavery.” Even if it were hypothetically possible to draft such a list, this task is better left to Congress in the first instance. Congress is best suited to develop the factual and historical record that surely must underpin any such classification. The courts, in dialogue with Congress, are then suited to review such a finding. The goal here, rather, is to develop a historical and legal understanding of the terms “badge” and “incident” as they relate to the American institution of slavery and its aftermath, and then to parlay that understanding into an objective methodology under which Congress and the courts can analyze the historical record and translate that analysis into workable constraints on legislation.

With that goal in mind, Part I of this Article attempts to determine the original public meaning of the terms “badge” and “incident” of slavery by examining the usage of those terms in the law of slavery, abolitionist writings, popular commentary in newspapers and speeches, antebellum judicial opinions, and the congressional debates over the Thirteenth Amendment and the Civil Rights Act of 1866. It then traces judicial usage of the phrase “badges and incidents of slavery” as

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<sup>35</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (rejecting the contention that Congress has the power to determine what constitutes a constitutional violation). Admittedly, this Article proposes a major alteration of Supreme Court doctrine surrounding the Section 2 power. My willingness to rely on the Court’s Section 1 jurisprudence and yet reconsider its Section 2 jurisprudence stems in large part from the tension between the Court’s explanation of the Thirteenth Amendment enforcement power in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and the Court’s more recent (and more restrictive) interpretation of Congress’s parallel Fourteenth Amendment enforcement power in *City of Boerne*. I assume that, given a proper case, the Court itself would be inclined to revisit *Jones* in light of *City of Boerne*. Cf. McAward, *supra* note 15, at 146 n.391 (discussing application of stare decisis to *Jones*).

<sup>36</sup> See McAward, *supra* note 15, at 142–46 (explaining the advantages of, and necessary limitations on, the prophylactic approach).

a legal term of art in the Thirteenth Amendment context, from its genesis in late-nineteenth century briefs and judicial opinions to its modern-day interpretation.

Part II examines the ways in which Thirteenth Amendment scholars have attempted to define the “badges and incidents of slavery.” The Supreme Court has said that Congress has the power to define the badges and incidents of slavery, subject only to rational basis review.<sup>37</sup> Many scholars have taken that as an invitation to invoke the concept freely and argue that Congress can address an array of modern injustices pursuant to its Thirteenth Amendment enforcement power. However, there have been only limited instances where scholars have treated the “badge or incident” language as a term of art and reflected on what criteria are relevant to identifying a badge or incident of slavery for Thirteenth Amendment purposes.

Part III attempts to remedy this deficit. It draws from the materials discussed in Part I to propose a principled definition of the “badges and incidents of slavery.” It derives that definition by considering several variables in the analysis: First, whom does the concept protect? Should it apply to conduct directed against African Americans specifically, against any person on the basis of her race, or against a wider array of minority groups? Second, whose conduct does the concept govern? Should it apply to public actors only? Private actors? A subset of private actors whose conduct is widespread and/or influential? Third, to what conduct does the concept apply? Is it enough to show a historical link to slavery and its aftermath? Or should there be a causal element as well? Part III ultimately concludes that the best understanding of the “badges and incidents of slavery” refers to public or widespread private action, based on race or the previous condition of servitude, that mimics the law of slavery and that has significant potential to lead to the de facto reenslavement or legal subjugation of the targeted group.

In the end, this Article concludes that much of the current literature concerning the scope of Congress’s power to enforce the Thirteenth Amendment overshoots its target. The definition of the “badges and incidents of slavery” proposed in this Article is sufficiently narrow that Congress’s Thirteenth Amendment enforcement power may well have limited applicability today. Perhaps this is as it should be. The concept of the “badges and incidents of slavery” was

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<sup>37</sup> See *Jones*, 392 U.S. at 440 (“Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”).

not meant to empower Congress to address all modern forms of injustice, or even all modern manifestations of racial bias. Rather, it was designed to permit Congress to effectuate the promise made to the former slaves in 1865: that freedom meant not just release from their shackles, but federal protection for a core set of civil rights that would enable them to enjoy full and meaningful citizenship. The Thirteenth Amendment enforcement power can justify certain legislative efforts to address race discrimination, but Congress must turn to other sources of power to enact general civil rights protections.

## I. HISTORICAL UNDERSTANDINGS OF THE “BADGES” AND “INCIDENTS” OF SLAVERY

As a phrase, the “badges and incidents of slavery” is unique to the Thirteenth Amendment context, used as a term of art for the first time in the *Civil Rights Cases* in 1883. Since then, it has been the authoritative characterization of the subjects of Congress’s prophylactic enforcement power. Many have asserted that some particular conduct constitutes a “badge and incident of slavery,” but only a few have attempted to define the term. This Part seeks to determine, to the extent possible, the original meaning of the “badges of slavery” and “incidents of slavery” as well as to discern what the *Civil Rights Cases* Court meant when it coined the phrase “badges and incidents” and linked it to the Thirteenth Amendment.

### A. *Antebellum and Early Postbellum Use of the Terms*

The concepts of a “badge of slavery” and “incident of slavery” both predate the Thirteenth Amendment, appearing in antebellum judicial opinions and secondary resources. “Incident” was primarily a legal term, used in a clear and consistent way. The meaning of “badge” varied somewhat, as it appeared more often in popular commentary than legal analysis. After the war, the meaning of “incident” remained stable but that of “badge” continued to develop, particularly in legal parlance. By examining usage of these terms in ante- and early postbellum sources, it is possible to draw some general conclusions about their meaning by the time the *Civil Rights Cases* Court invoked them to describe the scope of Congress’s Thirteenth Amendment enforcement power.

#### 1. *Incident*

The 1857 edition of *Bouvier’s Law Dictionary* defines an “incident” as “[a] thing depending upon, appertaining to, or following another,

called the principal.”<sup>38</sup> Used in this sense, 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.

“Incident of slavery” was clearly a legal term of art, used often by antebellum courts and advocates discussing the “incidents” of ownership of property in slaves. For example, the U.S. Supreme Court, in *Prigg v. Pennsylvania*,<sup>39</sup> stated that because the Constitution’s Fugitive Slave Clause “contains a positive and unqualified recognition of the right of the owner in the slave . . . then all the incidents to that right attach also.”<sup>40</sup> The Court highlighted “the right to seize or recapture” as a principal incident of the property right that inhered in slaveowners, noting that this right “is universally acknowledged in all the slaveholding states.”<sup>41</sup> The Supreme Court of California also made clear that “where slavery exists, the right of property of the master in the slave must follow as a necessary incident.”<sup>42</sup> The Supreme Court of Alabama, in *Lee v. Mathews*, specified that one “incident” of ownership of female slaves was the owner’s property right in the children of such slaves.<sup>43</sup>

The term “incident” was also used by antebellum courts to refer to legal constraints and conditions placed on slaves themselves. The Supreme Court of Georgia, in *Neal v. Farmer*, included among the “many . . . incidents of slavery” the requirement that a slave obey the master’s commands or be subject “to beating, imprisonment, and every species of chastisement,” the prohibition on a slave “acquiring property for his own benefit,” and the status that a slave is “the subject of property—saleable and transmissible.”<sup>44</sup> That same court provided a more expansive list in *Bryan v. Walton*, describing how free blacks were subject to

the most humiliating incidents of his degradation.—Like the slave, the free person of color is incompetent to testify against a free white citizen.

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<sup>38</sup> BOUVIER’S LAW DICTIONARY 617 (7th ed. 1857).

<sup>39</sup> 41 U.S. 539 (1842).

<sup>40</sup> *Id.* at 613.

<sup>41</sup> *Id.* at 540. Another example is found in the arguments of counsel in *United States v. Amy*, 24 F. Cas. 792, 795 (C.C. Va. 1859) (No. 14,445) (Taney, J.). In that case, a slave owner protested as a violation of the Takings Clause the imprisonment of his slave for violating a federal mail theft law. *Id.* at 792. He argued that uncompensated forfeiture was inconsistent with the “incident of property in slaves,” and that “slave property is precisely like any other property, and . . . has identically the same legal incidents.” *Id.* at 806.

<sup>42</sup> *Ex parte Archy*, 9 Cal. 147, 163 (1858).

<sup>43</sup> 10 Ala. 682, 689 (1846).

<sup>44</sup> 9 Ga. 555, 567 (1851).

He lives under, and is tried by the same Criminal Code. He has neither vote nor voice in forming the laws by which he is governed. He is not allowed to keep or carry fire-arms. He cannot preach or exhort without a special license, on pain of imprisonment, fine and corporeal punishment. He cannot be employed in mixing or vending drugs or medicines of any description. A white man is liable to a fine of five hundred dollars and imprisonment in the common jail, at the discretion of the Court, for teaching a *free* negro to read and write; and if one *free* negro teach another, he is punishable by fine and whipping, or fine or whipping, at the discretion of the Court. To employ a free person of color to set up type in a printing office, or any other labor requiring a knowledge of reading or writing, subjects the offender to a fine not exceeding one hundred dollars.<sup>45</sup>

Of course, this list confirms that many substantial legal restraints applied to free blacks as well as slaves. However, the fact that such restraints were not exclusively applicable to slaves does not defeat the claim that those same restraints were necessarily applicable to slaves. In this latter sense, then, such legal restrictions were necessary incidents of slavery.<sup>46</sup>

Scholars of the law of slavery also have used the term “incident” to refer to the legal aspects of the slave system. First published in 1856, the second chapter of George Stroud’s *Sketch of the Laws Relating to Slavery*<sup>47</sup> is entitled “Of the Incidents of Slavery—the Relation of Master and Slave.” In that chapter, Stroud discusses laws governing the power of the master to control a slave’s labor, food, clothing, and punishment; the slave’s status as chattel owned by the master; the slave’s lack of enforceable property and contract rights; and the slave’s lack of standing to sue the master or to obtain redress for cruel treatment.<sup>48</sup> In the more recent *Southern Slavery and the Law, 1619–1860*, Thomas Morris confirms that “the concept of property, the notion of a person as a ‘thing,’ was obviously the central ‘incident’ of slavery.”<sup>49</sup>

45 14 Ga. 185, 202–03 (1853); see also *Tom v. State*, 27 Tenn. 86, 88 (1847) (terming as a “necessary incident to the institution of slavery” the duty of a runaway slave to submit to arrest).

46 I argue later in this piece that similar legal restrictions placed on free blacks, at least after the Civil War, constituted “badges of slavery.” See *infra* pp. 578–81.

47 GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 9 (Negro Univs. Press 1968) (1856).

48 *Id.* at 9–43.

49 THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 80 (1996); see also *id.* at 101, 130 (discussing inheritance, sale, and mortgage of slaves); STROUD, *supra* note 47, at 11 (stating that the “cardinal principle of slavery—that the slave is to be regarded as a thing,—is an article of property,—a chattel personal,—obtains as undoubted law in all of these states”).

The debates surrounding the ratification of the Thirteenth Amendment and the passage of the Civil Rights Act of 1866<sup>50</sup> further confirm this usage of the term “incident of slavery.” Although there was considerable debate as to the precise effect of the proposed amendment,<sup>51</sup> some supporters, including Senator James Harlan of Iowa, asserted that the amendment abolished not only slavery but its “necessary incidents.”<sup>52</sup> Harlan then listed the incidents of slavery including “the prohibition of the conjugal relation,” the “abolition . . . of the parental relation,” the inability to “acquir[e] and hol[d] property,” the deprivation of “a status in court” and “the right to testify,” the “suppression of the freedom of speech and of the press,” and the deprivation of education.<sup>53</sup> Similarly, during the debates over the Civil Rights Act of 1866, Senator Lyman Trumbull of Illinois, the chair of the Senate Judiciary Committee and the Act’s primary proponent, explained that the bill would outlaw the “incidents to slavery,” such as laws like the slave codes and the Black Codes<sup>54</sup> “that prevented the colored man going from home, that did

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50 The Civil Rights Act was proposed and defended as an exercise of Congress’s power to enforce the Thirteenth Amendment. Its first section voided the Black Codes by providing, in relevant part, that all United States citizens

without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . .

Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866).

51 Some members of Congress asserted that the amendment had the sole effect of abolishing slavery and had no bearing on individual rights. *See, e.g.*, CONG. GLOBE, 38TH CONG., 1ST SESS. 1465 (1864) (statement of Sen. Henderson) (denying that the amendment conferred “negro equality” and arguing that the amendment gave the freed slave “no right except his freedom”).

52 *Id.* at 1439–40 (statement of Sen. Harlan); *see also id.* at 1324 (statement of Rep. Wilson) (stating that the amendment “will obliterate the last lingering vestiges of the slave system; . . . all it was and is, everything connected with it or pertaining to it”); Jacobus ten-Broek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 177 (1951) (discussing the congressional statements of Wilson and Harlan).

53 CONG. GLOBE, 38TH CONG., 1ST SESS. 1439 (1864).

54 The “Black Codes” were passed by each state of the former confederacy and sought to reimpose many of the legal restrictions that had applied to slaves prior to emancipation, particularly in relation to the exercise of contractual and civil rights. For example, the codes required the freedmen to make annual written contracts for their labor and provided that they would be subject to arrest and forfeiture of the entirety of their annual wages if they left before the contract’s term. *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 39 (1866) (statement of Rep. Wilson) (decrying these codes as “degrading” and “arbitrary”). Vagrancy laws were strengthened in an effort to ensure that freedmen agreed to such contractual provisions; those who lacked a “home and support” were subject to arrest and enforced service to pay their debts. *Id.* For language of various states’ Black Codes, *see*

not allow him to buy or to sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated.”<sup>55</sup>

Judicial interpretations of the Thirteenth Amendment and the Civil Rights Act of 1866 followed quickly on the heels of their respective ratification and passage. One of the first types of claims courts confronted involved payments due under contracts for the purchase of slaves. Some courts initially held that the contracts were void in light of the Thirteenth Amendment, which had abolished “slavery and all its incidents, the laws supporting it, and all contracts based upon it.”<sup>56</sup> The Supreme Court, however, eventually held that the creditors in such cases had a vested right to recover under such contracts and that the Thirteenth Amendment did not destroy such vested rights by implication.<sup>57</sup> The Court agreed with counsel for the creditors that the right to recover on such contracts was not “an incident to the right to hold slaves in bondage.”<sup>58</sup> Rather, the incidents of slavery were “inchoate rights, wholly dependent upon the right to hold and sell slaves . . . [which] fell, with the abolition of slavery, as a part of it.”<sup>59</sup> For our purposes, the important part of the debate is not the precise question of the contracts’ validity, but rather the assumption held by both sides that the Thirteenth Amendment abolished

EDWARD MCPHERSON, *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 29–44* (Negro Univ. Press, 2d ed. 1969) (1875).

55 CONG. GLOBE, 39TH CONG., 1ST SESS. 322–23 (1866) (“With the destruction of slavery necessarily follows the destruction of the incidents to slavery. . . [and] [w]ith the abolition of slavery should go all the badges of servitude which have been enacted for its maintenance and support.”).

56 *Austin v. Sandel*, 19 La. Ann. 309, 315 (1867); *see also* *Osborn v. Nicholson*, 18 F. Cas. 846, 855 (E.D. Ark. 1870) (holding slave contract unenforceable and asking whether anyone could doubt that it was “the object and purpose of these amendments to strike down slavery and all its incidents, and all rights of action based upon it”). *But see* *Jacoway v. Denton*, 25 Ark. 625, 625, 633 (1869) (holding that slave contracts were still enforceable even though “we may seriously condemn slavery, and every circumstance and incident attendant upon it”).

57 *See* *Osborne v. Nicholson*, 80 U.S. (13 Wall.) 654, 662 (1871) (“[W]hen the thirteenth amendment . . . was adopted, the rights of the plaintiff in this action had become legally and completely vested. Rights acquired by a . . . contract executed according to statutes subsequently repealed subsist afterwards, as they were before, in all respects as if the statutes were still in full force.”).

58 Appellant’s Brief at 5, *Holmes v. Sevier*, 154 U.S. 582 (1872) (No. 31); *see also id.* at 9–10 (arguing that it was “absurd” to deem the contractual obligation “an incident of slavery” because “then the right to a farm, or a steam-mill, given in consideration of slaves, would be an incident of slavery, and the title would be divested, and would vest in the original owner upon the abolition of the institution”).

59 *Id.* at 6.

both slavery and its incidents, and that the incidents of slavery were the legal rights that necessarily accompanied the ownership of slaves.

Accordingly, the concept of an “incident of slavery” was well-developed in antebellum caselaw and commentary and quickly became a term of art used by Congress and the Supreme Court to describe the effect of the Thirteenth Amendment. An incident of slavery, as that term was used, was any legal right or restriction that necessarily accompanied the institution of slavery. Most often, “incident” was used to refer to the aspects of property law that applied to the ownership and transfer of slaves. It also was used to refer to the civil disabilities imposed on slaves by virtue of their status as property. In all, the term has clear, finite, historically determined meaning. It refers to a closed set of public laws that applied in the antebellum slaveholding states. Identifying an “incident of slavery,” then, is an exercise in historical inquiry.

## 2. *Badge*

While “badge of slavery” was a relatively common phrase before 1883, it was used more in a rhetorical rather than legal context. It is possible to identify a range of meanings for the term but difficult to define it precisely. Indeed, its meaning appeared to evolve from the antebellum to postbellum eras, particularly as it migrated from colloquial to legal use.

According to mid-nineteenth century dictionaries, the term “badge” referred to “[a] mark or sign worn by some persons, or placed upon certain things for the purpose of designation.”<sup>60</sup> It could be used in a literal (*e.g.*, “badge of authority”<sup>61</sup>) or figurative (*e.g.*, “badge of fraud”<sup>62</sup>) sense. In its most general sense, the term “badge of slavery” therefore refers to indicators, physical or otherwise, of African Americans’ slave or subordinate status.

As Professor George Rutherglen has pointed out, the phrase “badge of slavery” was used metaphorically as far back as the Roman

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60 BOUVIER’S LAW DICTIONARY 151 (7th ed. 1857); *see also* WEBSTER’S ENCYCLOPEDIA DICTIONARY OF THE ENGLISH LANGUAGE 93 (Fallows ed., 1900) (reprinting definitions from 1864 ed.) (defining “badge” as “[a] mark, sign, token, or thing, by which a person is distinguished, in a particular place or employment, and designating his relation to a person or to a particular occupation; as, the *badge* of authority”).

61 WEBSTER’S ENCYCLOPEDIA DICTIONARY OF THE ENGLISH LANGUAGE *supra* note 60, at 93 (reprinting definitions from 1864 edition).

62 BOUVIER’S LAW DICTIONARY, *supra* note 60 (noting that “badge” can be “used figuratively when we say, possession of personal property by the seller, is a badge of fraud” (internal quotation marks omitted)).

Empire to refer to “evidence of political subjugation.”<sup>63</sup> Indeed, in *The Wealth of Nations*, Adam Smith used the phrase to refer to trade and manufacture restrictions placed by the British on the colonies.<sup>64</sup>

Between the Revolutionary and Civil Wars, however, the phrase “badge of slavery” acquired a more specific range of meanings in American discourse with reference to the institution of slavery. In those years, the most consistent use of “badge of slavery” in both legal and political discourse referred to the skin color of African Americans. In some states and some courts, dark skin was presumptively a “mark or sign” of slave status.<sup>65</sup> As a Delaware state court explained in 1840, because “the condition, or status, of slavery could be predicated only of the negro and mulatto, their color became the badge of that status.”<sup>66</sup> As a consequence, some legal restrictions that applied to slaves, like the bar on testimony in any case involving a white person, also applied to free blacks because they also wore the badge of slavery.<sup>67</sup>

Antebellum 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. Many an abolitionist wrote longingly of the day when “the hue of the skin shall no longer be a badge of servitude and opprobrium.”<sup>68</sup> Indeed, the federal government’s official notice calling for black soldiers to fight in the war noted that, “[o]ne cannot exaggerate the call sounding in the ears of

63 See George 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* 163, 166 & n.23 (Alexander Tsesis ed., 2010) (citing P. CORNELIUS TACITUS, *THE ANNALS AND THE HISTORIES* bk. XV, at 31 (1952)) (recounting incident where a victorious general was asked to treat a conquered king so that he “might not have to endure any badge of slavery”); see also *id.* at n.19 (citing use of phrase during English Civil War).

64 See Rutherglen, *supra* note 63 at 166 (quoting 2 ADAM SMITH, *AN INQUIRY IN THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* bk. IV, ch. 7 at 582 (R.H. Campbell et al. eds., Liberty Fund 1981) (1776)) (explaining that trade restrictions “are only the impertinent badges of slavery imposed upon [the colonies] . . . without any sufficient reason . . . [by] the mother country”).

65 See MORRIS, *supra* note 49, at 21.

66 *State v. Whitaker*, 3 Del. 549, 550 (1840); see also *State v. Rash*, 6 Del. 271, 274 (Del. Ct. Gen. Sess. 1867) (“As slavery was exclusively confined to the black or colored race, color became the badge or sign of servitude . . .”).

67 See *Rash*, 6 Del. at 273–74; *Whitaker*, 3 Del. at 550.

68 Gerrit Smith, Editorial, *THE LIBERATOR*, March 7, 1835, at 39; see also, e.g., *VT. CHRONICLE* (Bellow Falls), July 18, 1834, at 116 (reprinting speech by Dr. Lyman Beecher which stated in part that “[h]ad Africans been the oppressors, and Americans the slaves, white complexion and straight hair would have been the badges of servitude and the occasions of prejudice; but since prejudice is the result of condition and character, it is invincible till the causes which created it are removed”).

all men, in whose veins flows the blood of Africa, and whose color has been the badge of slavery.”<sup>69</sup>

This was not the sole use of the phrase in abolitionist and other commentary, however. Some authors articulated concern that slavery had undermined the dignity of work and that labor itself was viewed “as a badge of slavery, and consequently as a degradation.”<sup>70</sup> Others identified psychological scars as the “badge of servitude, sunken deep into [a slave’s] mental constitution by the bondage of ages.”<sup>71</sup> Still others used the term to refer to legal restrictions that accompanied slavery<sup>72</sup> or even to slavery generally.<sup>73</sup>

Accordingly, before the Civil War, the concept of a “badge of slavery” was used widely in anti-slavery writings and the popular media and, to a lesser extent, in judicial writings. The term had variable meaning, although it was used predominantly to refer to the color of a slave’s skin. Indeed, the few judicial uses of the term used it in this sense. After the Civil War, however, the use of the term “badge of slavery” waned in popular discourse but obtained more widespread use in the legal world. With this migration, the term also took on a new range of meanings that reflected the reality of emancipation. Skin color was no longer a badge of slavery.<sup>74</sup> Instead, the term was used to reference ways in which southern governments and white citizens endeavored to reimpose upon freed slaves the incidents of sla-

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69 THE LIBERATOR (Boston), Jan. 1, 1864, at 4.

70 THE EMANCIPATOR (New York), Nov. 1, 1838, at 108; see also *The Anti-Labor Party*, NEW HAVEN DAILY PALLADIUM, Feb. 5, 1863 (“[I]n the South slavery has made labor the badge of servitude.”).

71 Frederick Douglass, “Henry Clay,” THE NORTH STAR (Rochester), Mar. 23, 1849, at 2. In this piece, Frederick Douglass reviewed a letter by Henry Clay regarding the prospects of emancipation. Presciently, Douglass articulated concern that even after emancipation, there would be “long and dark . . . years through which the freed bondman will have to pass” to cleanse himself of the badge of slavery. *Id.*

72 See *Affairs at the National Capital: Interesting Debate in the United States Senate*, N.Y. HERALD, Mar. 14, 1858, at 1 (reprinting congressional debate on the “Kansas question” and quoting Mr. Wade of Ohio as saying that “[t]he fugitive slave bill . . . is a badge of servitude and subjection [on the northern states] that cannot be tolerated by freeman”); Hamilton, *The Marriage Bill*, THE LIBERATOR (Boston), June 11, 1831, at 1 (arguing that a proposed law legalizing interracial marriage would “remove . . . a disgraceful badge of servitude . . . [and] declare [blacks’ and whites’] natural equality as human beings”).

73 See *The Voice of Delaware*, VT. CHRONICLE, Mar. 17, 1847, at 43 (reprinting Delaware state resolution that noted that “the badge of slavery” had devalued slaveholding land in that state).

74 See WHIG & COURIER (Bangor), July 13, 1865, at 1 (reprinting public letter by Governor of Maine) (“By the Emancipation Proclamation and the concurring legislation of Congress and the States, amending the organic law of the land, slavery has been abolished throughout the United States. Color is no longer a badge of servitude . . .”).

very or, more generally, to restrict their rights in such a way as to mark them as a subordinate brand of citizens.

Compared to the antebellum era, the rhetorical use of “badge of slavery” was quite rare in post-war public and political commentary.<sup>75</sup> During the debates over the Civil Rights Act of 1866, the bill’s sponsor, Senator Lyman Trumbull, used “badges of servitude” only twice, both times as a synonym for the “incidents of slavery.”<sup>76</sup> He 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.”<sup>77</sup>

The concept’s use as a legal term of art accelerated starting in the late 1860s when a trio of Supreme Court Justices began to transform and broaden the usage of “badge of slavery.” Starting in 1866, Justices Swayne, Bradley, and Woods regularly invoked the “badge of slavery” concept to refer to the broader set of political, civil, and legal disadvantages imposed on slaves, former slaves, and free blacks. Justice Swayne (riding circuit) authored *United States v. Rhodes*,<sup>78</sup> the first federal case to assess the scope of Congress’s Section 2 enforcement power and evaluate the Civil Rights Act of 1866. In the course of upholding the Act, he surveyed the law of slavery and the legal treatment of free blacks and freed slaves. After detailing the incidents of slavery, i.e., state laws that deprived slaves of contract and property rights and made it a crime to educate slaves,<sup>79</sup> Swayne commented that “[t]he shadow of the evil [of slavery] fell upon the free blacks. They 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.”<sup>80</sup> Thus, Swayne equated the “badges of . . . degradation” with the incidents of slavery and recognized that those legal constraints applied to free blacks.

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<sup>75</sup> Only a few examples of the term’s use in public commentary exist. See, e.g., Op-Ed., *The Constitutional Amendment*, N. AM. & U.S. GAZETTE (Philadelphia), Oct. 5, 1869 (denouncing attempts to deny suffrage to African Americans as “making badges of servitude where none should exist”); see also *Not According to Murray*, N. AM. & U.S. GAZETTE (Philadelphia) Apr. 22, 1875 (arguing that freed blacks were “idle and worthless” because “the ruling race . . . made labor a badge of servitude and wrong”).

<sup>76</sup> See CONG. GLOBE, 39TH CONG., 1ST SESS. 322 (1866) (statement of Sen. Trumbull) (“Those laws that prevented the colored man going from home, that did not allow him to buy or sell, or to make contracts . . . were all badges of servitude. . .”).

<sup>77</sup> *Id.* at 474.

<sup>78</sup> 27 F. Cas. 785 (D. Ky. 1866) (Swayne, J., on circuit).

<sup>79</sup> *Id.* at 793 (describing laws of Georgia, Virginia, Alabama, and Louisiana).

<sup>80</sup> *Id.*

The concept appeared again five years later in the dissenting opinion in *Blyew v. United States*.<sup>81</sup> In that case, Kentucky law barred two African-American witnesses from testifying at a criminal trial about the murder of a third African American.<sup>82</sup> Although the Civil Rights Act of 1866 gave the federal courts jurisdiction over cases “affecting persons” who are denied the right to testify in state court because of their race, the *Blyew* majority held that the fact that the murder victim was African American was insufficient to confer federal jurisdiction because the victim was not a “person in existence.”<sup>83</sup> Justice Bradley, joined by Justice Swayne, dissented, arguing that any case in which the crime victim—dead or alive—was African American fell under the purview of the Civil Rights Act.<sup>84</sup> To “deprive a whole class” of the right to complain and testify in criminal matters, Bradley argued, “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.”<sup>85</sup> Thus, as in *Rhodes*, the “badge of slavery” concept referred to a deprivation of civil rights legally imposed on African Americans.

In 1874, Justice Bradley (riding circuit) considered the scope of Congress’s Thirteenth Amendment enforcement power in *United States v. Cruikshank*.<sup>86</sup> In considering the constitutionality of the Enforcement Act of 1870, Bradley pointed to the Civil Rights Act of 1866 as the paradigm of Thirteenth Amendment enforcement legislation. In his view, the Amendment not only eradicated slavery but also “bestow[ed] liberty” on the former slaves.<sup>87</sup> Because

disability to be a citizen and enjoy equal rights was deemed one form or badge of servitude, it was supposed that congress had the power, under the amendment, to settle this point of doubt, and place the other races on the same plane of privilege as that occupied by the white race.<sup>88</sup>

The Civil Rights Act eliminated this “badge of servitude” for African Americans and thus was squarely within Congress’s Section 2 power.<sup>89</sup> However, Bradley found that the Enforcement Act of 1870 was unsupported by that power because it did not limit its protection to

81 80 U.S. (13 Wall.) 581, 596–97 (1871) (Bradley, J., dissenting).

82 *Id.* at 583.

83 *Id.* at 592–93.

84 *See id.* at 598–99 (Bradley, J., dissenting); *see also id.* at 599 (calling the majority’s “view of the law too narrow, too technical, and too forgetful of the liberal objects . . . [the Civil Rights Act] had in view”).

85 *Id.* at 599.

86 25 F. Cas. 707, 707–08 (D. La. 1874), *aff’d on other grounds*, 92 U.S. 542 (1875).

87 *Cruikshank*, 25 F. Cas. at 711.

88 *Id.*

89 *See id.*

those who were injured or deprived of equal rights “because of [their] race, color, or previous condition of servitude.”<sup>90</sup> Justice Bradley’s *Cruikshank* opinion, then, illuminates the concept of the badges of slavery in two different ways. First, he deemed the restrictions imposed by law on African Americans (on citizenship, property rights, contract rights, testimonial privileges, etc.) to be the badges of slavery. Second, such legal restrictions were badges of slavery only when applied to a person “by reason of his race, color, or previous condition of servitude.”<sup>91</sup> In other words, while Section 2 empowered Congress to address the badges of slavery, that concept was limited to legal restrictions placed on African Americans or others because of their race or experience as slaves.

With respect to this latter point, Justice Woods endorsed an even stricter limitation on who might be subject to the badges of slavery in his opinion (riding circuit) in *LeGrand v. United States*.<sup>92</sup> *LeGrand* held that Congress lacked power to pass Section 2 of the Force Act of 1871, which penalized conspiracies to deprive “any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws.”<sup>93</sup> Justice Woods reiterated that Section 2 of the Thirteenth Amendment gives Congress power “not only to protect the personal freedom of the enfranchised citizens, but to remove from them every badge and restraint of slavery and involuntary servitude.”<sup>94</sup> However, he noted that the statutory language would permit the prosecution of “two or more free white men . . . for conspiring to deprive another free white man of the right to testify,” or the same conspiracy by “two or more colored persons . . . against a white citizen, or against a colored citizen who had [never] been a slave.”<sup>95</sup> With this broad coverage, the statute “cannot be based on the amendment which prohibits slavery and involuntary servitude.”<sup>96</sup> In Justice Woods’s view, the power to remove “every badge and restraint of slavery and involuntary servitude” could not justify federal

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90 *Id.* at 712.

91 *Id.*

92 12 F. 577 (E.D. Tex. 1882) (holding that Section 2 of the Force Act of 1871 was too broad to be supported by Congress’s enforcement powers under the Constitution).

93 REV. STAT. tit. 70, § 5519, 70 Stat. 1076 (1875). The Supreme Court as a whole agreed with Justice Woods in *United States v. Harris*, 106 U.S. 629 (1883). The same language is currently codified at 42 U.S.C. § 1985(3) (2006). The Supreme Court upheld the statute against Thirteenth Amendment challenge in *Griffin v. Breckenridge*, 403 U.S. 88, 104 (1971), distinguishing *Harris* because *Harris* followed a now-discarded view that overbroad statutes should be invalidated in their entirety rather than treated as severable.

94 *LeGrand*, 12 F. at 581.

95 *Id.*

96 *Id.*

legislation to protect the rights of white people, or even African Americans who had not been slaves.

Thus, prior to the Thirteenth Amendment, the concept of a “badge of slavery” 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. In the years immediately following the Thirteenth Amendment, however, the concept became more of a term of art that referred to legal restrictions imposed by states on the civil rights of freed slaves. This shift in parlance makes sense. Prior to emancipation, slaves were necessarily subject to the legal incidents of their status. The only people subject to badges of slavery were free blacks who, by virtue of their skin color, were generally deemed inferior and often were subject to state laws that imposed on them some of the same legal restrictions imposed on slaves. After emancipation, however, color alone was no longer a badge of servitude. All people of African descent were free; nobody was subject to the legal incidents of slavery.

At the same time, however, the demise of slavery brought widespread state and private efforts to selectively reimpose its incidents and other civil disadvantages on the freedmen. The Black Codes were the first and paradigmatic example of such efforts, and the Civil Rights Act of 1866, which voided the Black Codes, therefore became the first and paradigmatic example of “appropriate” Section 2 legislation. Because the 1866 Act was litigated heavily, Justices Swayne, Bradley, and Woods had multiple opportunities to opine on the Black Codes and, in so doing, to transform the meaning of a “badge of slavery” to be a post-war synonym for the incidents of slavery.

The question, then, becomes whether to focus on the precise manner in which Justices Swayne, Bradley, and Woods used the term “badge of slavery,” or to attach greater importance to the fact that the term’s meaning evolved as southern society developed new ways to secure the legally inferior status of the freed slaves. In other words, had the meaning of “badge of slavery” finished its evolution by 1883, or was it still evolving? If the former, then “badge of slavery” has a meaning every bit as settled as “incident of slavery.” If the latter, however, “badge of slavery” could obtain new layers of meaning over time. While skin color was a badge of slavery before the war, the Black Codes imposed such a badge immediately after the war. After the demise of the Black Codes, the governments and citizens of the American South utilized less formal but equally virulent means—including widespread violence and discrimination, disparate enforcement of racially neutral laws, and eventually, Jim Crow laws—to

keep the freed slaves in an inferior status. These all could be regarded as fitting within the evolving meaning of the badges of slavery.

This question—whether “badge of slavery” had a static or evolving meaning—was at the heart of the *Civil Rights Cases*, as the Justices considered whether to treat widespread discrimination and oppression in the post-Reconstruction South as a badge of slavery that Congress could address under its Section 2 power.

### B. *The Civil Rights Cases*

The *Civil Rights Cases* presented the Supreme Court’s first opportunity to evaluate the scope of Congress’s power to enforce the Thirteenth Amendment. The case involved the first section of the Civil Rights Act of 1875, which provided that

all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.<sup>97</sup>

The Act initially was introduced in Congress in 1870,<sup>98</sup> and its preamble set forth its purpose of “recogniz[ing] the equality of all men before the law.”<sup>99</sup> The congressional debates regarding the Act’s constitutional basis focused primarily on the Fourteenth Amendment,<sup>100</sup> although Senator Frelinghuysen did argue that the law also was “appropriate to efface the existence of any consequence or residuum of slavery.”<sup>101</sup>

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97 Act of March 1, 1875, ch. 114, 18 Stat. 335, 336 (protecting all citizens in their civil and legal rights).

98 The original version of the Act proposed by Senator Sumner barred race discrimination in railroads, steamboats, public conveyances, hotels, licensed theaters, houses of public entertainment, cemeteries, jury duty, and public schools. See Bertram Wyatt-Brown, *The Civil Rights Act of 1875*, 18 W. POL. Q. 763, 763, 765 (1965). The final version omitted cemeteries and public schools from the Act’s coverage. See 18 Stat. at 336.

99 18 Stat. at 335. The Preamble also declared the purposes of “met[ing] out equal and exact justice to all” and “enact[ing] great fundamental principles into law.” *Id.*

100 CONG. GLOBE, 42ND CONG., 1ST SESS. 576–78 (1871) (statement of Sen. Carpenter).

101 2 CONG. REC. 3453 (1874). By contrast, Senator Allen Thurman of Ohio, in the course of denouncing the Act, declared that “neither the thirteenth nor the fifteenth amendment has anything whatever to do with this question.” 3 CONG. REC. 1791 (1875). Interestingly, Senator Lyman Trumbull, who had sponsored the Civil Rights Act of 1866 and promoted an expansive view of Congress’s Thirteenth Amendment enforcement power, opposed early versions of the Civil Rights Act of 1875. (He had retired from the Senate when the Act finally passed.) In his view, the 1866 Act “went to the verge of constitutional authority” by giving the freed slaves “the rights that belong to the individual as man and as a freeman under the Constitution of the United States.” CONG. GLOBE, 42ND CONG., 2D

By the time the Civil Rights Act reached the Supreme Court, though, the United States Solicitor General's office explicitly defended the law on Thirteenth as well as Fourteenth Amendment grounds. The *Civil Rights Cases* were five consolidated cases in which operators of hotels, transportation companies, and theaters were prosecuted for denying African Americans equal access to their facilities. Each posed the question of the constitutionality of the Civil Rights Act of 1875.

Justice Bradley authored the majority opinion in the *Civil Rights Cases*, holding that neither the Thirteenth nor Fourteenth Amendments provided authority for Section 1 of the Civil Rights Act of 1875. Justice Woods joined the opinion.<sup>102</sup> Consistent with his opinion in *Cruikshank*, Bradley articulated a strong view of the effect of Section 1 of the Thirteenth Amendment as “abolish[ing] slavery and establish[ing] universal [civil and political] freedom.”<sup>103</sup> He then articulated what has since become the standard description of Congress's Thirteenth Amendment enforcement power as the “power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”<sup>104</sup> Although Bradley made clear that this grant permits Congress to pass legislation that is “direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not,”<sup>105</sup> it also restricts Congress to the subject matter of “slavery.” “[D]istinctions of race, or class, or color,” Bradley explained, are in the purview of the Fourteenth Amendment and, by the terms of that amendment, constrain only state action.<sup>106</sup>

In light of the decisional law that preceded the *Civil Rights Cases*, it was no surprise that Justice Bradley invoked the concept of the “incidents of slavery” to describe the scope of Congress's Thirteenth Amendment enforcement power. However, the phrase “badges and incidents” was a new characterization of Congress's power, and its use raises the question whether it was meant to signal an enhanced or more expansive view of that power.

In Justice Bradley's understanding, the answer appears to be “no.” His analysis reveals little, if any, distinction between the “badges” and

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SESS. 901 (1872). However, he deemed schooling and transportation to be “political” or “social” rights over which Congress lacked the power to legislate. *Id.*; *see also id.* at 3189.

102 Justice Swayne retired from the Court two years before the *Civil Rights Cases* were decided.

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

104 *Id.* Later in the opinion, he stated that the Thirteenth Amendment “has only to do with slavery and its incidents,” perhaps indicating that, in his mind, the “badges” and “incidents” of slavery were synonymous. *Id.* at 23.

105 *Id.* at 23.

106 *Id.* at 24.

“incidents” of slavery. Rather, his use of those terms indicates that he used both to refer to post-emancipation public laws that reimposed the legal restrictions of slavery.<sup>107</sup> As in *Cruikshank*, he pointed to the Civil Rights Act of 1866 as “wip[ing] out . . . the necessary incidents of slavery” and securing “those fundamental rights which are the essence of civil freedom.”<sup>108</sup> And he concluded that a private party’s refusal to accommodate a person on the basis of that person’s race, “without any sanction or support from any State law or regulation,” cannot “be justly regarded as imposing any badge of slavery or servitude upon the applicant.”<sup>109</sup> Private discriminatory conduct, Bradley argued, was “an ordinary civil injury . . . subject to redress by . . . [state] laws.”<sup>110</sup>

As support for his conclusion, Bradley pointed to the treatment of free blacks before the abolition of slavery:

[They] enjoy[ed] all the essential rights of life, liberty and property the same as white citizens; 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 the enjoyment of accommodations in inns, public conveyances and places of amusement.<sup>111</sup>

In a passage telling of his limited view of the applicability of the “badges and incidents” concept beyond public law, Bradley stated that “[m]ere discriminations [against free blacks] on account of race or color were not regarded as badges of slavery.”<sup>112</sup> Moreover, “[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain.”<sup>113</sup> Thus, the Court per Justice Bradley endorsed the “static” view of the “badges of slavery,” equating them with post-war state laws that selectively reimposed the legal incidents of slavery.

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107 Justice Bradley listed the “burdens and incapacities” that were the “necessary incidents of slavery” in this country, namely, compulsory service, restraint of movement, disability to hold property, make contracts, having standing in court, and be a witness against a white person, and more severe punishments imposed on slaves than free for the same offenses. *Id.* at 22.

108 *Id.* Interestingly, unlike his opinion in *Cruikshank*, Bradley hedged on whether the Civil Rights Act of 1866 was fully supported by the Thirteenth Amendment or also by the Fourteenth Amendment. *See id.*

109 *Id.* at 23–24.

110 *Id.* at 24.

111 *Id.* at 25.

112 *Id.*

113 *Id.* at 24.

Solicitor General Samuel F. Phillips, who defended the Act on behalf of the United States,<sup>114</sup> and Justice Harlan, in his famous dissent, both embraced—at least implicitly—the evolutionary view of the “badges of slavery.” Phillips’ brief contains the first recorded argument that Section 2 of the Thirteenth Amendment empowers Congress to legislate against certain types of private conduct as a prophylactic means of preventing the reestablishment of the institutions of slavery or involuntary servitude. Harlan’s argument drew from Phillips’ but differed from it in some critical ways. Accordingly, it is important to examine both arguments in detail, as they provide different ways of conceptualizing the “badges and incidents of slavery.”

Solicitor General Phillips argued that when a private actor who serves the public discriminates against African Americans in a way that mimics the legal incidents of slavery and reflects the views of the community at large, Section 2 permits federal intervention because this conduct poses the risk of reinvigorating the institutions of slavery or involuntary servitude. Phillips began his argument by noting that the discriminatory conduct at issue in the cases affected African Americans’ ability to travel. Such a “[r]estraint upon the right of locomotion was a well-known feature of the slavery abolished by the thirteenth amendment . . . [an] incident . . . of the very essence of the institution.”<sup>115</sup>

Phillips then asserted that if a state directly imposed such an incident of slavery, that state action would be “plainly unconstitutional” and would “warrant, and even *demand*, legislation by Congress” in response.<sup>116</sup> Identical action by certain types of private actors permits a similar congressional response. In particular, discrimination by private actors whose businesses are “devoted to a public use, and so affected

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114 In 1879, the United States, then represented by Attorney General Charles Devens and Assistant Attorney General Edwin B. Smith, submitted a brief to the Supreme Court in three of the consolidated cases (Stanley, Ryan, and Nichols). In that brief, the United States defended the Act primarily on Fourteenth Amendment grounds, although it did assert Thirteenth Amendment grounds as well. However, the case was reargued three years later. The brief of Samuel F. Phillips, who was then the Solicitor General, was the only submission to the Court to discuss the constitutional basis for the Act. The defendants-respondents did not file any briefs or make any appearances before the Court. Interestingly, the vast majority of Phillips’ argument focused on the Thirteenth Amendment.

115 Brief for the United States at 15, 21, *The Civil Rights Cases*, 109 U.S. 3 (1883). Later in the brief, Phillips defines an “incident of slavery” as “a temperate expression of the law as received in the States in which slavery prevailed.” *Id.* at 23.

116 *Id.* at 20. “Inasmuch, then, as in times of slavery legislation like the act of 1875 would have touched that institution at the quick, its *specific* relation thereto can readily be recognized.” *Id.* at 23.

with a public [State] interest” is of greater significance and effect because it is a “reflection of the views of the community” and “tends to enlarge . . . a particular current in public opinion, and thus in its turn is fruitful of public, i.e., State, institutions.”<sup>117</sup> Such private action “points not remotely to the birth of corresponding State institutions.”<sup>118</sup> Therefore,

it is “appropriate legislation” against . . . [the institutions of slavery and involuntary servitude] to forbid any action by private persons which in the light of our history may reasonably be apprehended to tend, on account of its being incidental to quasi public occupations to create an institution . . . viz, custom &c. [of involuntary servitude].<sup>119</sup>

“[E]very rootlet of slavery has an individual vitality, and, to its minutest hair, should be anxiously followed and plucked up . . . .”<sup>120</sup>

Even though Phillips did not use the terms “badge” or “incident” of slavery, it is possible to derive from his argument a theory of the “badges of slavery” that Congress may address under its Thirteenth Amendment enforcement power. In addition to public laws that reimpose the incidents of slavery, badges of slavery are also private acts of racial discrimination that mirror the incidents of slavery, wrought by non-governmental actors who operate in a public context and whose actions reflect—and contribute to—community values. This aspect of Phillips’ argument recognizes that severe bias against African Americans was an integral aspect of the slave system that did not cease to operate with emancipation. When that bias finds voice and force in the actions of community leaders and businesses that serve the public, it threatens to stoke public sentiment and contribute to widespread custom that recreates a de facto institution of slavery where people of minority races are prevented from exercising the rights of free people.<sup>121</sup>

In his famous dissent, Justice Harlan articulated a view of the Section 2 power that fits somewhere in between those espoused by Jus-

117 *Id.* at 19, 24. Phillips argued that discrimination by innkeepers and passenger carriers, in particular, reflects the “views of whole communities of citizens.” *Id.* at 24. By contrast, “mere scattered trespasses against liberty committed by private persons” are isolated events that Congress cannot reach under the Thirteenth Amendment. *Id.* at 16. “There is no reason to apprehend that acts of mere violence may become a political institution.” *Id.* at 24.

118 *Id.* at 24.

119 *Id.* at 16. “[I]t is in the interest of national peace and good feeling to nip such institutions in the bud.” *Id.* at 24.

120 *Id.* at 25.

121 This possibility seemed a real threat to Phillips in the early 1880s. Whether it is a realistic threat today—and whether that should be the measure of Section 2 legislation—is discussed below. *See infra* Part III.C.

tice Bradley and Solicitor General Phillips. Harlan began, as Bradley did, by characterizing as “indisputable” that Section 2 empowered Congress to “eradicat[e] not simply . . . the institution [of slavery],” but also the “burdens and disabilities which constitute badges [and incidents] of slavery and servitude . . . its substance and visible form.”<sup>122</sup> Although Harlan conceded that Section 2 did not enable Congress “to define and regulate the entire body of the civil rights which citizens enjoy . . . in the several States,”<sup>123</sup> he asserted that Section 2 did empower Congress to “enact laws to protect . . . [freed slaves] against the deprivation, *because of their race*, of any civil rights granted to other freemen in the same State.”<sup>124</sup> He argued that the core premise of slavery was the inferiority of African Americans, and therefore that the Thirteenth Amendment’s grant of freedom necessarily required protection of freedmen against race discrimination. Congress’s legislative power, however, was limited to the actions of “States, their officers and agents, and . . . such individuals and corporations as exercise public functions and wield power and authority under the state.”<sup>125</sup>

Thus, Justice Harlan envisioned three requirements for legislative efforts to address the badges and incidents of slavery. First, such efforts must be made for the particular benefit of African Americans. Second, such efforts must seek to redress race discrimination in civil rights. And third, legislation may impose duties on state and private actors who exercise “public functions.” Justice Harlan noted that the Civil Rights Act of 1866 certainly satisfied these requirements<sup>126</sup> but also concluded that the Civil Rights Act of 1875 satisfied them as well.

With respect to each category of public conveyances, inns, and places of public amusement, Harlan detailed the high level of state licensure, control and regulation of each, concluding that each type of business performed either a “public or *quasi*-public function[.]”<sup>127</sup> Moreover, he asserted that “the power of locomotion” is an aspect of personal liberty at the “essence of civil freedom.”<sup>128</sup> Because race-based restrictions on that power were “burdens which lay at the very foundation of the institution of slavery,”<sup>129</sup> he concluded that such discrimination by the actors in question “is a badge of servitude the

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122 The Civil Rights Cases, 109 U.S. 3, 35 (1883) (Harlan, J., dissenting).

123 *Id.* at 36.

124 *Id.*

125 *Id.*

126 *See id.* at 36–37.

127 *See id.* at 37–43 (detailing state control over rates, safety, licensure, etc.).

128 *Id.* at 39.

129 *Id.*

imposition of which Congress may prevent under its [Thirteenth Amendment enforcement] power.”<sup>130</sup>

Thus, from the briefing and opinions in the *Civil Rights Cases*, we see three different approaches to conceptualizing the “badges and incidents of slavery” subject to congressional legislation. The narrowest view, endorsed by Justice Bradley for the majority, equates “badges” with “incidents” and holds that Congress may act to prevent states from enacting public laws or taking official action that would reimpose the legal restrictions of slavery. Justice Harlan and Solicitor General Phillips’ views, while both broader than Bradley’s, have great similarities but also significant differences. As to the particular conduct, both deemed something a badge of slavery if it mirrored a legal incident of slavery or infringed upon an aspect of liberty denied to slaves. Harlan indicated that the conduct must discriminate against African Americans while Phillips seemed to assume such a restriction but did not specifically articulate it. As to the actors capable of imposing a “badge and incident of slavery,” both Harlan and Phillips agreed that certain private parties were subject to congressional regulation. While both indicated that the appropriate private actors would be business owners who served some sort of “public interest,” Harlan appeared to regard that as a somewhat narrower set than Phillips. Harlan treated as “public or *quasi*-public” only businesses for which there was doctrinal legal support for such a classification. Phillips took a less formal approach, looking at any private business that was “devoted to a public use” and whose actions had potential to stoke public sentiment. However, Phillips added an additional element, requiring a likely causal link between the private conduct and reestablishment of slavery. Harlan’s analysis lacked an explicit requirement of causation.

Accordingly, the *Civil Rights Cases* marked a critical moment for understanding the scope of Congress’s Thirteenth Amendment enforcement power. The majority articulated what has become the authoritative view of the appropriate targets of congressional action, namely the “badges and incidents of slavery.” The majority’s limited view of the coverage of that concept is largely consistent with the judicial usage of its component parts (i.e., “badges” and “incidents”) up to that point. However, the Solicitor General’s brief and Justice Harlan’s dissent point to a broader understanding of the “badges and incidents of slavery” that might better account for and respond to the legacy of slavery and the southern response to emancipation, which

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130 *Id.* at 43.

was broader, deeper, and more virulent than a set of discriminatory state laws. As it was, however, the *Civil Rights Cases* embraced a view of the “badges and incidents of slavery” that substantially cabined Congress’s Thirteenth Amendment power for the eighty-five years that followed.

### C. *Post-Civil Rights Cases Interpretations*

The *Civil Rights Cases* marked the beginning of a long period of legislative and judicial neglect of the Thirteenth Amendment. Congress enacted no new legislation pursuant to its Section 2 power. And the federal courts took increasingly restrictive approaches to the Thirteenth Amendment, ruling, for example, in *Plessy v. Ferguson* that a Louisiana law that mandated railroads to maintain “equal but separate accommodations for the white, and colored races”<sup>131</sup> did not impose a “badge of slavery or servitude.”<sup>132</sup>

In 1906, *Hodges v. United States* marked the nadir of Thirteenth Amendment jurisprudence, when—despite years of dicta to the contrary—the Court held that Congress lacked the power to pass the Civil Rights Act of 1866.<sup>133</sup> In *Hodges*, the Court struck down the convictions of several white men convicted of threatening and harassing African-American workers at a sawmill, and thereby denying them of their right under the Act to make and enforce contracts without regard to race. The Court held that Section 2 permitted Congress to legislate regarding the actual condition of slavery, but not its badges and incidents.<sup>134</sup>

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<sup>131</sup> 163 U.S. 537, 540 (1896).

<sup>132</sup> *Id.* at 542–43 (finding that the law had “no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude”). *Plessy* involved a challenge to a state, not federal, law and therefore the Court was not in a position to pass definitively on Congress’s Section 2 power. However, *Plessy* goes one step farther than the *Civil Rights Cases*, indicating that a state law that required segregation would not be redressable by Congress. Justice Harlan again dissented, concluding that “[t]he arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution.” *Id.* at 562 (Harlan, J., dissenting).

<sup>133</sup> 203 U.S. 1, 14–15, 20 (1906). One year earlier, the Court had “entertain[ed] no doubt” about Congress’s power under Section 2 to ban peonage, “defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master.” *Clyatt v. United States*, 197 U.S. 207, 208, 215, 218 (1905) (upholding the Peonage Act of 1867, then codified at sections 1990 and 5526 of the Revised Code and now codified at 42 U.S.C. § 1994 and 18 U.S.C. § 1581 (2006)).

<sup>134</sup> *Hodges*, 203 U.S. at 18 (“[N]o mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery.”). This view prevailed on the Court until *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 n.87 (1968), overruled *Hodges*. See, e.g., *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926) (refusing to exercise jurisdiction in case

Justice Harlan again dissented, reiterating that under Section 2, “Congress may not only prevent the reestablishing of the institution of slavery, pure and simple, but may make it impossible that any of its incidents or badges should exist or be enforced in any State or Territory of the United States.”<sup>135</sup>

The limited view of *Hodges* did not stop civil rights advocates and commentators from continuing to invoke the concept of the badges of slavery. Newspaper articles from roughly the first half of the twentieth century reveal that the phrase was often used to refer to Jim Crow laws and other official forms of segregation.<sup>136</sup> Indeed, at least one widely regarded political commentator, Walter Lippmann, suggested that Section 2 of the Thirteenth Amendment would justify the Civil Rights Act of 1964 because it attacked “[s]egregation in public places” which was a “badge of slavery.”<sup>137</sup>

By 1968, the meaning of “badge of slavery” evolved even further, encompassing widespread privately enforced housing discrimination. That year, in *Jones v. Alfred H. Mayer Co.*, the Supreme Court overruled *Hodges* and vitiated the *Civil Rights Cases*’ narrow understanding of the badges and incidents of slavery.<sup>138</sup> After a private property developer refused to sell a home to an interracial couple, the question arose whether the property conveyance provision of the Civil Rights Act of 1866, codified at 42 U.S.C. § 1982, prohibited racial discrimi-

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where defense claimed that enforcement of racially restrictive covenant would violate Section 1 the Thirteenth Amendment because the Amendment reaches only “condition[s] of enforced compulsory service of one to another, [and] does not in other matters protect the individual rights of persons of the negro race”).

<sup>135</sup> *Hodges*, 203 U.S. at 27.

<sup>136</sup> See, e.g., *Cobb Ridicules Specious “Gag” of Race Hater*, CHI. DEFENDER, July 1, 1922, at 8 (quoting NAACP attorney as stating that “[t]he arbitrary separation of citizens on a basis of race at a public celebration is a badge of servitude”); Benjamin E. Mays, *Segregation as Law Resulted in Lynching’s Establishment as a Southern Practice*, PITTSBURGH COURIER, July 8, 1950 (quoting book author as stating that “the courts have held that . . . the Constitution . . . has not outlawed the badges of slavery, such as jim crowism”); *Negroes See Coercion: Tallahassee Accused in Case Against 21 in Car Pool*, N.Y. TIMES, Oct. 9, 1956, at 44 (quoting civil rights attorney as describing racial segregation in city buses as “nothing more than a badge of servitude”); *Supreme Court Debate: Is Segregation Unlawful? High Court Hears Five School Suits*, PITTSBURGH COURIER, Dec. 13, 1952, at 1, 4 (recounting Thurgood Marshall’s oral argument in *Brown v. Board of Education* where he argued that segregated education “perpetuates the badge of slavery for Negro children”); see also *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 867–68 (5th Cir. 1966) (terming segregated schools a badge of slavery).

<sup>137</sup> Walter Lippmann, Editorial, *Segregation Is Badge of Slavery: Civil Rights Bill Bound to Pass*, BOS. GLOBE, Aug. 15, 1963, at 16 (“Segregation in public places is a badge of slavery and servitude, and the obligation and the power of Congress to erase the badge derives from the decision to abolish slavery.”).

<sup>138</sup> 392 U.S. 409, 443 n.78 (1968).

nation by private sellers. Concluding that it did,<sup>139</sup> the Court then turned to the question whether it was within Congress's power to enact such a prohibition: "[D]oes the authority of Congress to enforce the Thirteenth Amendment 'by appropriate legislation' include the power to eliminate all racial barriers to the acquisition of real and personal property?"<sup>140</sup> In the Court's view, "the answer to that question . . . [was] plainly yes."<sup>141</sup>

Citing the *Civil Rights Cases*, the Court found it "clear that the Enabling Clause of . . . [the Thirteenth] Amendment . . . clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*,'"<sup>142</sup> including "the sort of positive legislation that was embodied in the 1866 Act."<sup>143</sup> In a footnote, the Court added that Section 2 empowered Congress "to eradicate the last vestiges and incidents of a society half slave and half free."<sup>144</sup> Rather than define the "badges," "incidents," and "vestiges" of slavery, the Court stated that "Congress has the power . . . rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."<sup>145</sup> The Court then endorsed as rational Congress's finding that the property developer's racial discrimination was a badge and incident of slavery, noting the historical link between the race-based denial of property rights and slavery: "Just as the Black Codes, enacted after the Civil War to restrict the free exercise of . . . [civil] rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes."<sup>146</sup> The Court concluded that "when racial discrimina-

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139 *Id.* at 420–37. Justice Harlan filed a strong dissent on this question, arguing that the majority's "construction of § 1982 as applying to purely private action is almost surely wrong and, at the least, is open to serious doubt." *Id.* at 450 (Harlan, J., dissenting).

140 *Id.* at 439.

141 *Id.* Although the focus of Justice Harlan's dissent was the statutory construction issue, he noted briefly that the Court's ruling on Congress's constitutional authority to pass § 1982 was dubious. *See id.* at 476–77 (Harlan, J., dissenting).

142 *Id.* at 439 (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)).

143 *Id.* at 439–40. The Court pointed specifically to statements made by Senator Lyman Trumbull and Representative James Wilson made in defense of the 1866 Act. *See id.* at 440 (quoting CONG. GLOBE, 39TH CONG., 1ST SESS., 322 (1866)) (asserting that Section 2 gave Congress the power to "destroy all these discriminations in civil rights against the black man . . . . Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper.").

144 *Id.* at 441 n.78.

145 *Id.* at 440.

146 *Id.* at 441–42.

tion herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.”<sup>147</sup>

The *Jones* Court thus invoked the operative language of the *Civil Rights Cases* but added an additional gloss by indicating that Section 2 empowers Congress to outlaw private race discrimination in housing because such discrimination was not only a “badge” or “incident” of slavery, but also a “vestige” and “relic” of slavery.<sup>148</sup> The *Jones* majority may well have used the latter two terms in an offhand way as synonyms for a badge of slavery. Indeed, the Court did not suggest that the “badges and incidents” formulation was analytically inadequate, or comment that “vestige” and “relic” were meant to expand the subjects of congressional action under the Thirteenth Amendment.

Since *Jones*, however, many commentators have seized upon the “vestige” and “relic” language in order to expand the coverage of Congress’s Section 2 power. For example, Professor Lawrence Sager has argued that there is an important distinction between “badges and incidents of slavery”—which are the “contemporary attributes” of slavery—and the “relics of slavery”—which are “deeply ingrained, enduring consequences” such as the history of race discrimination.<sup>149</sup> There is a solid basis for these distinctions: “vestige” and “relic” have different connotations than “badge.” While “badge” refers to a physical or metaphorical indication of subordinate status,<sup>150</sup> “relic” is defined as “[s]omething that has survived the passage of time, especially an object or custom whose original culture has disappeared.”<sup>151</sup> A “vestige” is a “visible trace, evidence, or sign of something that once existed but exists or appears no more.”<sup>152</sup> Thus, because the latter terms refer to the products of history, rather than indicators of current subordination, they cover a potentially much larger range of conduct and situations than do “badges” and “incidents.”

Even though the *Jones* Court gave no indication that it meant for “relic” and “vestige” to have independent operative force, it is worth

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147 *Id.* at 442–43.

148 *Jones* added a second component to the *Civil Rights Cases* framework by stating that Congress could define for itself the meaning of the “badges and incidents of slavery,” subject only to rationality review in the federal courts. For comments on the propriety of this approach, see McAward, *supra* note 15, at 135–41.

149 See Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in Brzonkala v. Morrison*, 75 N.Y.U. L. REV. 150, 152 (2000) (arguing that *Jones*’ explanation of the Thirteenth Amendment enforcement power provides a template for understanding how the Fourteenth Amendment enforcement power might justify the Violence Against Women Act).

150 See *supra* notes 60 & 63 and accompanying text.

151 THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

152 *Id.*

examining their usage prior to *Jones* in order to evaluate the potential impact of their inclusion in the Section 2 analysis. Both were used in popular commentary, political debates, and—to a much lesser extent—judicial decisions. From the Reconstruction Era through the time of *Jones*, “relic of slavery” was used to reference discriminatory public laws and government practices.<sup>153</sup> For example, laws that prohibited interracial marriages or limited the availability of marriage between African Americans, were denounced as relics of slavery,<sup>154</sup> as were laws barring in-court testimony by African Americans,<sup>155</sup> permitting punishment by whipping post,<sup>156</sup> and mandating segregation.<sup>157</sup> Both before the Civil War and through the turn of the century, the term “vestige of slavery” generally was used by abolitionists and politicians but not the popular press. In the vast majority of uses, the phrase had no particularized meaning but rather referred in general to the eradication of slavery.<sup>158</sup> On rare occasion, the abolitionist press used “vestige of slavery” to refer to racially discriminatory public laws.<sup>159</sup> One member of Congress argued that the Civil Rights Act of

153 In addition to the examples below, one member of the House of Representatives applied the term to proposed legislation that would have required Chinese laborers to register and carry a passport within the United States. See 13 CONG. REC. 2183 (1882) (statement of Rep. Dawes). Also, there are a handful of instances in which private race discrimination was called a “relic of slavery.” See, e.g., SOUTHWESTERN CHRISTIAN ADVOCATE (New Orleans), Aug. 10, 1882, at col. F (describing an inn’s refusal to serve an African American clergyman as a “reli[c] of slavery in its ghostly form”).

154 See Editorial, *Editorial Notes*, N.Y. FREEMAN, Mar. 5, 1887, at col. C (discussing interracial marriage); *At Home and Abroad*, 54 FRANK LESLIE’S ILLUSTRATED NEWSPAPER (New York), June 10, 1882, at 247 (describing marriage between African Americans).

155 See Editorial Bulletin, *The Negro Testimony Bill*, DAILY EVENING BULL. (San Francisco), Mar. 24, 1862, at col. A (lauding repeal of bill barring testimony by African Americans against whites, and commenting that people are “hostile to slavery and its relics”).

156 See *Whipping in Virginia: Exercise of the Worst Relic of Barbarism and Slavery—Two Negroes Receive Twenty Stripes Each—Stoical Indifference of the Offenders—An Ex-Hangman Applies the Lash*, MILWAUKEE SENTINEL, June 22, 1872, at col. E.

157 T.E. Mattingly, Letter to the Editor, *Relic of Slavery*, WASH. POST, Jan. 28, 1953, at 12 (“Segregation in the Nation’s Capital is a denial that all the relics of human slavery have been legally abolished.”); *Publisher Itemizes His Opposition to School Bias*, ATLANTA DAILY WORLD, July 14, 1953, at 2 (“I am against racial segregation because: It is a relic of slavery.”). Notably, the same author referred to segregation as “[a] badge of servitude.” *Id.*

158 See, e.g., CONG. GLOBE, 38TH CONG., 2D SESS. 155 (1865) (statement of Rep. Davis) (stating that the path to legal equality for the freed slaves depended on “removing every vestige of African slavery from the American Republic”); CONG. GLOBE, 38TH CONG., 1ST SESS. 1324 (1864) (statement of Rep. Wilson) (stating that the Thirteenth Amendment would “obliterate the last lingering vestiges of the slave system; its chattelizing, degrading, and bloody codes; its dark, malignant, barbarizing spirit”).

159 *Middlesex County Latimer Committee*, LIBERATOR (Boston) 1843, at 3 (calling anti-miscegenation laws “the last legal vestige of slavery”); George B. Vashon, Editorial, N. STAR (Rochester), Jan. 28, 1848, at 2 (calling school segregation in Massachusetts the “last vestige of slavery”).

1866 would “ri[d] the country of every vestige of slavery, in form and in fact.”<sup>160</sup>

After the turn of the century, however, both terms obtained additional layers of meaning. Some used “relic of slavery” to refer to tense race relations<sup>161</sup> and structural racial disparities, including with respect to literacy<sup>162</sup> and self-confidence.<sup>163</sup> Even more notably, starting in the Civil Rights Era, the term “vestige of slavery” was used by civil rights advocates to refer to all types of racial discrimination, public and private, and to link the condition of modern African Americans with historical slavery. For example, in a 1953 speech to the National Urban League Convention, Thurgood Marshall (then-Special Counsel to the NAACP) called for “the abolition of the vestiges of slavery,” which, he said, are “second-class citizenship, threat of physical violence, residential segregation, and denial of the right of employment.”<sup>164</sup>

There were only two significant judicial uses of “relic of slavery”—and none of “vestige”<sup>165</sup>—prior to *Jones*. Although neither case focused on the question of congressional enforcement of the Thirteenth Amendment,<sup>166</sup> both cases articulated concern over racial dis-

160 CONG. GLOBE, 39TH CONG., 1ST SESS. app. 56 (1866) (statement of Rep. Julian).

161 See *Southerners May Support Mitchell's Bill as "The Lesser of Two Evils;" Other Bills Appear Too Drastic*, PLAINDEALER (Kansas City), Apr. 9, 1937, at 1 (quoting Rep. Arthur Mitchell, speaking in support of a new federal lynching law, as saying that “most of the lynchings have taken place in the South where the Negro is struggling against the bitterness which is a relic of slavery and the Reconstruction period”).

162 See Editorial, *Mr. Gorman's Boomerang*, N.Y. DAILY TRIB., May 9, 1901, at 6 (calling black illiteracy “a relic of slavery”).

163 T. Nelson Baker, Editorial, *A Negro's View of the Race Problem*, 88 CONGREGATIONALIST & CHRISTIAN WORLD (Boston), May 30, 1903, at 763 (“As a relic of slavery there is an inborn feeling in both the white and the colored child that the latter is inferior.”).

164 Jack Saunders, *Segregation Hit by 1,000 at Urban League Convention*, PITTSBURGH COURIER, Sept. 19, 1953, at 31; see also E.W. Kenworthy, *Rights Bill: The Arguments in Congress*, N.Y. TIMES, Aug. 4, 1963, at 10E (noting that Attorney General Robert Kennedy testified before Congress that the Civil Rights Act of 1964 was justified by the Thirteenth Amendment “because discrimination is a ‘vestige of slavery’”); Emanuel Perlmutter, *Warren and Young Warn of Effects of Racial Bias*, N.Y. TIMES, Nov. 20, 1969, at 56 (quoting speech given by Chief Justice Earl Warren after his retirement from the Supreme Court in which he called for “a massive assault upon our urban problems, free from racial prejudice and from the vestiges of slavery”).

165 The only possible notable use is *Edwards v. Habib*, in which the court stated that “the Reconstruction amendments were enacted . . . to eradicate forever the vestiges of slavery and the black codes.” 397 F.2d 687, 693 (D.C. Cir. 1968). This might suggest that the “vestiges of slavery” was a category that included more than just the Black Codes and similar public laws, but without further commentary it is impossible to draw a clear conclusion.

166 *United States v. Jefferson County Board of Education* did state that the Civil Rights Act of 1964 was “appropriate and proper legislation under the Thirteenth and Fourteenth Amend-

crimination resulting in African Americans' "second-class citizenship," and equated a "relic of slavery" with a "badge of slavery."<sup>167</sup> Concurring in *Bell v. Maryland*,<sup>168</sup> a case dealing with a "sit-in" protest that resulted in criminal trespass charges, Justice Douglas stated: "Segregation of Negroes in the restaurants and lunch counters of parts of America is a relic of slavery. It is a badge of second-class citizenship."<sup>169</sup> He went on to note other relics of slavery, including racial discrimination against court witnesses and segregation in schools, courtrooms, and public parks.<sup>170</sup> In *United States v. Jefferson County Board of Education*,<sup>171</sup> Judge John Minor Wisdom upheld several school districts' desegregation plans, asserting that state governments have an affirmative duty to "eradicate all relics, 'badges and indicia of slavery' lest Negroes as a race sink back into 'second-class' citizenship."<sup>172</sup>

Thus, at the time of *Jones*, the concepts of the "relics" and "vestigial" of slavery had evolved from covering discriminatory state laws to including widespread public and private racial discrimination as well. Unlike the concept of "badges and incidents" articulated by the Solicitor General in the *Civil Rights Cases*, though, there appears to be no overt causal element in the concept of "relics and vestiges." As discussed above, the former covers conduct that could potentially cause the reinvigoration or reimposition of a de facto slave system. The concept of "relics" and "vestigial" does not require such a causal link. Rather, it is a consequential concept that covers conduct that arguably is the product of slavery but does not necessarily point to its re-

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ments," but did not link the concept of a "relic of slavery" to congressional enforcement legislation. 372 F.2d 836, 856 (5th Cir. 1966).

167 See *Bell v. Maryland*, 378 U.S. 226, 260 (1964) (Douglas, J., concurring) ("Segregation of Negroes . . . is a relic of slavery. It is a badge of second-class citizenship."); *Jefferson Cnty. Bd. of Educ.*, 372 F.2d at 873 (arguing that "relics, 'badges and indicia of slavery'" may cause African-Americans to "sink back into 'second-class' citizenship" (citation omitted)).

168 378 U.S. 226 (1964).

169 *Id.* at 260 (Douglas, J., concurring); see also *id.* at 247–48 ("The Black Codes were a substitute for slavery; segregation was a substitute for the Black Codes; . . . [and segregation in restaurants] is a relic of slavery.").

170 *Id.* at 248 n.4. Along these same lines, Justice Douglas concurred in *Jones*, noting that the Civil Rights Act of 1866 took aim at "some" of the badges of slavery but others persisted into modern times. *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 445–46 (1968) (Douglas, J., concurring) (listing state and private actions). He catalogued the "spectacle of slavery unwilling to die," including state actions, such as laws designed to keep African Americans from voting and from jury service, anti-miscegenation laws, segregation in courtrooms and schools, and segregation in public facilities. *Id.* at 445. He also included private actions, including refusals to sell or rent property to African Americans, to provide service in restaurants and motels, and to admit African Americans to labor unions. *Id.* at 447–48.

171 372 F.2d 836 (5th Cir. 1966).

172 *Id.* at 873 (quoting *The Civil Rights Cases*, 109 U.S. 3 (1883) (Harlan, J., dissenting)).

turn. Accordingly, characterizing Congress's power as extending to the "vestiges" and "relics" of slavery could substantially broaden the reach of federal power to cover any act of injustice that could be tied in some way—however attenuated—to the system of slavery. This would be a significant departure from the concept of "badges and incidents" as developed prior to *Jones*.

The question, then, is whether the concept of "relics" or "vestiges" of slavery should be privileged over that of the "badges and incidents of slavery" for purposes of the Thirteenth Amendment analysis. I suggest that the answer is no. First, the language of "relics" and "vestiges" lacks historical pedigree in the Thirteenth Amendment context when compared to the language of "badges and incidents." Indeed, the latter has been described as "canonical in interpreting the [Thirteenth] [A]mendment."<sup>173</sup> Second, there is nothing in *Jones* that suggests that the Court's references to relics and vestiges was analytically significant or designed to expand the appropriate subjects of Thirteenth Amendment enforcement legislation beyond that permitted by the concept of the badges and incidents of slavery. Indeed, the *Jones* Court cited the language of the *Civil Rights Cases* with approval and its analysis suggested that it viewed the terms as synonymous. Finally, though, my concern about extending the Section 2 power to cover the relics and vestiges of slavery boils down to the absence of a causal element in that concept. I discuss the importance of this element in greater detail in Part III.C. For now, suffice it to say that I regard the *Jones* Court's references to relics and vestiges as an interesting but ultimately unwarranted diversion from the task of identifying the proper subjects of congressional legislation in the Thirteenth Amendment context.

## II. POST-*JONES* LITIGATION AND SCHOLARSHIP REGARDING THE MEANING OF THE "BADGES AND INCIDENTS OF SLAVERY"

Since *Jones*, litigants and scholars alike have invoked Congress's power over the "badges and incidents of slavery" (as well as slavery's relics and vestiges) as a novel constitutional argument against various forms of injustice.<sup>174</sup> Most have focused on race-based discrimination,

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<sup>173</sup> Rutherglen, *supra* note 63, at 172.

<sup>174</sup> Congress generally has not responded to these suggestions. It has passed only a limited amount of Thirteenth Amendment legislation in the modern era. *See, e.g., supra* notes 12–13 and accompanying text.

including hate crimes,<sup>175</sup> hate speech,<sup>176</sup> racial profiling,<sup>177</sup> employment discrimination,<sup>178</sup> criminal sentencing disparities,<sup>179</sup> and race-based peremptory challenges.<sup>180</sup> However, many have gone beyond race, claiming that everything from municipal lawn mowing ordinances,<sup>181</sup> to sealed adoption records,<sup>182</sup> to human cloning,<sup>183</sup> to restrictions on reproductive rights,<sup>184</sup> to sex discrimination<sup>185</sup> and harassment,<sup>186</sup> to discrimination against gay people<sup>187</sup> are badges and

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- 175 See *United States v. Nelson*, 277 F.3d 164, 189 (2d Cir. 2002) (“It is important to understand that acts of violence or force committed against members of a hated class of people with the intent to exact retribution for and create dissuasion against their use of public facilities have a long and intimate historical association with slavery and its cognate institutions.”); Jason A. Abel, *Americans Under Attack: The Need for Federal Hate Crime Legislation in Light of Post-September 11 Attacks on Arab Americans and Muslims*, 12 ASIAN L.J. 41, 43 (2005) (“I argue that the proper response to these hate crimes, or any hate crime, for that matter, should be to expand current federal hate crime legislation, specifically with the enactment of the Local Law Enforcement Enhancement Act (LLEEA).”).
- 176 See Amar, *supra* note 20, at 126 (discussing the “centrality of the Reconstruction Amendments in the hate-speech debate”); Petal Nevella Modeste, *Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment*, 44 HOW. L.J. 311, 312 (2001) (“While other authors have suggested that tort remedies be established for injuries suffered as a result of racist words, this article maintains that the only way to protect victims of race hate speech from its ill effects is to criminalize its dissemination altogether.”).
- 177 See Carter, *supra* note 21, at 19 (“This Article contends that the Thirteenth Amendment, in contrast to the equal protection paradigm that is currently the focus of racial profiling jurisprudence and scholarship, provides a stronger constitutional basis for combating this lingering vestige of slavery.”).
- 178 See *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984) (discussing alleged racially discriminatory policies in the selection, training, and promotion of New Orleans police officers).
- 179 See Colbert, *supra* note 22, at 38–49 (discussing, in part, the importance of race in capital sentencing decisions).
- 180 See *id.* at 38–43 (discussing prosecutors’ use of peremptory challenges as weapons for striking prospective African Americans from juries); Colbert, *supra* note 16.
- 181 See *Rowe v. City of Elyria*, 38 Fed. Appx. 277, 283 (6th Cir. 2002) (addressing the plaintiff’s argument that “forcing him to mow the grass . . . may be fairly characterized as a ‘badge or incident of slavery’”).
- 182 See *Alma Soc’y Inc. v. Mellon*, 601 F.2d 1225 (2d Cir. 1979) (discussing whether adult adoptees are constitutionally entitled to obtain their sealed adoption records).
- 183 See Sean Charles Vinck, Note, *Does the Thirteenth Amendment Provide a Jurisdictional Basis for a Federal Ban on Cloning?*, 30 J. LEGIS. 183, 183 (2003) (“Because of cloning’s potential to impose ‘badges and incidents’ of slavery on cloned persons, the Thirteenth Amendment is a plausible source of authority for a ban on human cloning.”).
- 184 See Bridgewater, *supra* note 25, at 409–10 (tracing restrictions on women’s reproductive freedom to the reproductive abuse of female slaves during the antebellum period).
- 185 See Emily Calhoun, *The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination*, 61 MINN. L. REV. 313, 323–24 (1977) (arguing that Congress has authority pursuant to the Thirteenth Amendment to legislate against private sex discrimination).
- 186 See Conn, *supra* note 24, at 519 (suggesting that Congress may legislate against sexually harassing speech by invoking its authority under the Thirteenth Amendment).

incidents of slavery. Few, however, have engaged in any systematic analysis regarding precisely what a badge or incident of slavery is. Generally, one of two assumptions is at the heart of most invocations of the concept. First, those who focus on race discrimination often assume that any modern analogue of historical bias against African-Americans is a badge or incident of slavery. Second, those who take a broader view of the permissible subjects of regulation generally assume that any type of class-based oppression is a badge or incident of slavery because slavery itself was a system of class-based oppression. Both approaches are distinctly different from the “causal” approach articulated in the Solicitor General’s brief in the *Civil Rights Cases*.

The “historical link” view of the badges and incidents of slavery originated in *Jones* itself, where the Court tied “the exclusion of Negroes from white communities” to “the Black Codes” to “the slave system” itself.<sup>188</sup> Judge A. Leon Higginbotham utilized this same mode of analysis in *Pennsylvania v. Local Union No. 542*, a case which alleged that union members had harassed and intimidated African Americans who had sued the union for race discrimination.<sup>189</sup> After finding that several statutes empowered the court to enjoin the harassment,<sup>190</sup> he held that those statutes were valid under the Thirteenth Amendment:

“What does the beating of black litigants in this case have to do with the ‘badges and incidents’ of slavery? How can the attitudes of defendants be related to the institution of slavery which was eradicated more than 100 years ago?” The answer is that these racist acts are as related to the incidents of slavery as each roar of the ocean is related to each incoming wave. *For slavery was an institution which was sanctioned, sustained, encouraged and perpetuated by federal constitutional doctrine. Today’s conditions on race relations are a sequelae and consequence of the pathology created by this nation’s two and a half centuries of slavery.*<sup>191</sup>

187 See Courtman, *supra* note 26, at 328 (suggesting that the inability of homosexuals to enter into a marriage contract is akin to slave’s inability to contract and is thus a “badge and incident of slavery”); Tedhams, *supra* note 17, at 134 (arguing that laws that stigmatize homosexuals create “badges of slavery”).

188 *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 441–42 (1968) (“Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes.”).

189 347 F. Supp. 268 (E.D. Pa. 1972).

190 He found that 42 U.S.C. §§ 1981, 1985(2), and 1985(3) all provided jurisdiction. See *id.* at 284–85.

191 *Id.* at 299; see also *R.I. Chapter, Associated Gen. Contractors of Am., Inc. v. Kreps*, 450 F. Supp. 338, 361 (D.R.I. 1978) (stating that, despite a color-blind ideal, Congress continues to have power to protect African Americans specifically by “eradicat[ing] the vestiges of slavery, its badges and incidents” because “current ‘racist acts are as related to the inci-

Higginbotham detailed the rights denied to African Americans (slave and free) before the Civil War, including access to federal court, labor rights, liberty, equality, justice, human dignity, and family integrity.<sup>192</sup> Using *Jones* as a baseline, he concluded that if the Thirteenth Amendment permitted Congress to ensure equal access to housing, it would also permit Congress to ensure equal access to the courts and to employment opportunities.<sup>193</sup> Thus, in Judge Higginbotham's view, a badge and incident of slavery for Thirteenth Amendment purposes was any public or private discriminatory conduct aimed at African Americans, because all such discrimination is a "sequelae and consequence" of slavery.<sup>194</sup>

Judge John Minor Wisdom of the Fifth Circuit articulated a similar view in *Williams v. City of New Orleans*.<sup>195</sup> The plurality in that case disapproved a consent decree that included a promotions quota designed to remedy years of racially discriminatory employment practices in the New Orleans Police Department.<sup>196</sup> Judge Wisdom concurred and dissented in part, asserting that Title VII permitted affirmative action efforts on behalf of African Americans, and that, so read, Title VII was validly enacted under Congress's Thirteenth Amendment enforcement power.<sup>197</sup> He stated that a badge of slavery or inferiority occurs whenever a "present discriminatory effect upon blacks as a class can be linked with a discriminatory practice against blacks as a race under the slavery system."<sup>198</sup> In other words, "all practices that continue[] to label blacks as inferior because of their race" are badges of slavery as long as the practice is "historically linked with

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dents of slavery as each roar of the ocean is related to each oncoming wave" (quoting *Pennsylvania v. Local Union No. 542*, 347 F. Supp. 268, 299 (E.D. Pa. 1972)).

192 See *Local Union No. 542*, 347 F. Supp. at 299–300.

193 See *id.* at 301.

194 *Id.* at 299 (internal quotation marks omitted).

195 729 F.2d 1554, 1570 (5th Cir. 1984) (en banc) (Wisdom, J., concurring in part and dissenting in part); see also *Fullilove v. Klutznick*, 448 U.S. 448, 509–10 (1980) (Powell, J., concurring) (arguing that Section 2 of the Thirteenth Amendment permitted Congress to pass minority set-aside). Cf. *Regents of the U. of Cal. v. Bakke*, 438 U.S. 265, 400–02 (1978) (Marshall, J., dissenting) (detailing the history and legacy of slavery and legal inequality for African Americans and concluding that current inequalities result "not merely [from] the history of slavery alone, but also [from the fact] that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color, he never even made it into the pot").

196 See *Williams*, 729 F.2d at 1562–64 (plurality opinion).

197 See *id.* at 1574–78 (Wisdom, J., concurring in part and dissenting in part).

198 *Id.* at 1577.

slavery or involuntary servitude.”<sup>199</sup> Discrimination against African-American officers in the New Orleans Police Department was intimately linked with slavery, which at its core involved the “race-based denial of equal economic opportunities,”<sup>200</sup> as well as post-Reconstruction prejudice. “The under-representation of blacks on the force since 1898, or perhaps since 1874–77, is a badge of slavery: it is a sign, readily visible in the community, that attaches a stigma upon the black race.”<sup>201</sup>

Thus, in the view of both Judges Higginbotham and Wisdom, for conduct to constitute a badge of slavery, it must (1) target African Americans as a class, (2) in a way that labels them inferior, and (3) is historically linked to slavery and its aftermath. While there is a causal element to their analysis, that the conduct must stigmatize, the primary focus is on the historical link to slavery. Although neither jurist used the language of “relics” or “vestiges,” their emphasis on the legacy of slavery rather than the consequences of the current conduct indicates thinking more in line with a “relics and vestiges” approach to the Section 2 power.<sup>202</sup>

Other scholars and judges have utilized a similar approach, arguing for Thirteenth Amendment coverage of modern forms of race discrimination and harassment where it is possible to analogize that conduct to an aspect of slavery. For example, Professor Douglas L. Colbert has suggested that racially discriminatory employment practices, peremptory challenges, and capital punishment sentencing practices can all be viewed as badges of slavery because there is a historical link between slavery and these current disparities.<sup>203</sup> Professor Akhil Reed Amar has argued that Congress could criminalize burning a cross on the lawn of an African-American family because such “in-

199 *Id.* at 1578–79. Judge Wisdom had asserted in a 1966 decision that segregated schools placed a badge of slavery upon African-American children. *See United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 873 (5th Cir. 1966).

200 *Williams*, 729 F.2d at 1579–80 (Wisdom, J., concurring in part and dissenting in part).

201 *Id.* at 1580; *see also id.* at 1572–73 (“Under the thirteenth amendment, the Constitution contemplates, and the equal protection clause of the fourteenth amendment does not prohibit, race-conscious, class-based, prospective relief . . . [in a case] in which discrimination in a state governmental unit is system-wide, institutional, and the product of a long history of discrimination against blacks as a group to continue what amounts to a caste system.”).

202 *See supra* notes 149–72 and accompanying text (discussing meaning of “relics” and “vestiges” of slavery).

203 *See, e.g., Colbert, supra* note 16, at 32–54 (noting that the Thirteenth Amendment’s legislative history points to the Amendment’s purpose as uprooting and destroying slavery). Professor Alexander Tsesis has stated that the analysis of whether particular conduct constitutes a badge or incident of slavery requires “compar[ing] contemporary harms to past practices.” TSESIS, *supra* note 34, at 118.

tentional trapping of a captive audience of blacks, in order to subject them to face-to-face degradation and dehumanization on the basis of their race” is “temporary involuntary servitude, a sliver of slavery.”<sup>204</sup> And Judge Guido Calabresi has argued that the act of injuring any person “because of his race, color, religion or national origin” and “because he is . . . enjoying any [state-administered] benefit . . . program [or] facility”<sup>205</sup> is a badge of slavery because “there exist indubitable connections . . . between slavery and private violence directed against despised and enslaved groups . . . [and] between post Civil War efforts to return freed slaves to a subjugated status and private violence directed at interfering with and discouraging the freed slaves’ exercise of civil rights in public places.”<sup>206</sup>

More recently, Professor William Carter, Jr., has articulated a slightly more nuanced, historically based framework for understanding the badges and incidents of slavery.<sup>207</sup> Carter asserts that a badge of slavery is any public or private act of “discrimination and subordination” aimed at African Americans, which “provided essential legal and societal support for slavery and . . . [was] also part of de jure and de facto attempts to return the freedmen to a condition of servitude and sub-humanity after formal emancipation.”<sup>208</sup> Examples of conduct that invokes the “stigma of blackness” and thus constitutes a badge of slavery include preemptory jury challenges against African Americans, racial profiling, hate crimes, housing discrimination, inequality in the administration of criminal and civil justice, and syste-

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204 Amar, *supra* note 20, at 158 & n.183. Amar acknowledges, however, that “[m]ore historical research . . . is needed to trace the usage of [the “badge of slavery”] among abolitionists, freedmen, and Reconstruction Republicans. Perhaps the phrase had some narrow and precise meaning wholly irrelevant to private racist oppression . . .” *Id.* at 156 n.175.

205 This conduct is criminalized by 18 U.S.C. § 245(b)(2)(B) (2006).

206 *United States v. Nelson*, 277 F.3d 164, 190 (2d Cir. 2002) (upholding the conviction of two African American men under 18 U.S.C. § 245(b)(2)(B) for killing an orthodox Jewish man as he walked down a city sidewalk). Writing for the majority, Judge Calabresi stated that badges of slavery were not just race-based actions, but that interfering with a person’s use of a public facility because of his religion is also a badge of slavery because Section 1 of the Thirteenth Amendment protects all persons from slavery without regard to race or membership in any other class. *Id.* at 179–80. Judge Calabresi’s analysis does not address the question of whether the category of those whom Congress can protect from the “badges and incidents of slavery” under Section 2 is coextensive with the category of those whom the judiciary can protect from “slavery and involuntary servitude” under Section 1.

207 *See* Carter, *supra* note 34, at 1317 (criticizing current approaches to “construing the Thirteenth Amendment’s self-executing prohibition of the badges and incidents of slavery . . . [as] misguided”).

208 *Id.* at 1367–68 (giving examples of race-based conduct that “either existed in the same form during slavery or is closely analogous thereto”).

matic denial of equal education opportunities.<sup>209</sup> Carter also asserts that non-racial classes can be subject to the badges and incidents of slavery, where the injury or discrimination is “closely tied to the structures supporting or created by the system of slavery” and manifests “fear [and] group stigma . . . in law and custom.”<sup>210</sup> Carter provides the examples of religiously motivated hate crimes and racial profiling of Arabs and Muslims.<sup>211</sup>

Carter’s approach, while primarily historical in nature, puts an interesting twist on the causal element developed in the Solicitor General’s *Civil Rights Cases* brief. For Carter, if the conduct in question historically was part of the effort to reestablish a de facto slave system in the South, it is a badge of slavery regardless of whether it continues to pose that risk today.<sup>212</sup> Thus, he folds causation into the historical inquiry rather than treating it as a separate element to be evaluated currently.

The most expansive conceptualization of the “badges and incidents of slavery” has been proffered by Professor G. Sidney Buchanan. Buchanan regards a “chief vice of the institution of slavery [] as its arbitrary irrationality, which effected a concomitant denigration of human dignity.”<sup>213</sup> Thus, he asserts that “any act motivated by arbitrary class prejudice . . . which, in its cumulative manifestations, has assumed a pattern of regional significance”<sup>214</sup> imposes “a badge of slavery upon its victim.”<sup>215</sup> Racial prejudice—public or private—is the paradigm of conduct Congress may address under the Thirteenth Amendment because such prejudice (1) was at the core of slavery,<sup>216</sup> (2) “has assumed a pattern of regional significance . . . in the historical experience of American society,”<sup>217</sup> and (3) “clog[s] the channels of opportunity”<sup>218</sup> and “places a heavy toll on the human spirit.”<sup>219</sup>

According to Buchanan, however, racial discrimination is not the only conduct that imposes a badge of slavery. Rather, drawing from classes protected by civil rights laws and equal protection jurispru-

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209 *See id.* at 1368, 1376.

210 *Id.* at 1317–18, 1369.

211 *Id.* at 1369–74.

212 Notably, the second portion of Carter’s theory of the badges and incidents of slavery continues to seek a historical link to slavery, but contains no causal element. *Id.* at 1371–74.

213 G. Sydney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, HOW. L. REV. 1070, 1073 (1975).

214 *Id.* at 1072, 1077.

215 *Id.* at 1072.

216 *See id.* at 1073.

217 *Id.* at 1077.

218 *Id.* at 1078.

219 *Id.*

dence, Buchanan argues that discrimination or tortious conduct based on race, color, religion, sex, national origin, and alienage, and perhaps even age, handicap, criminal history, hippie lifestyle, and political association constitutes a badge of slavery.<sup>220</sup> “[T]here is nothing in the nature of the trait upon which a given act of discrimination is based that limits congressional power under § 2 of the thirteenth amendment.”<sup>221</sup> Rather, the analytical keys are whether the “prejudice is arbitrary and has assumed a pattern of regional significance.”<sup>222</sup>

Thus, neither the identity of the victim nor a specific historical link to the slave system is a dispositive factor for Buchanan.<sup>223</sup> Rather, his focus rests primarily on arbitrary class-based oppression that mirrors slavery only in the most general way.<sup>224</sup> Interestingly, though, he draws a distinction between isolated private conduct and private conduct that has “regional significance.”<sup>225</sup> This portion of his theory, at least, echoes Solicitor General Phillips’ brief in the *Civil Rights Cases* which limited the concept of the badges and incidents of slavery to private action that “reflect[s] . . . the views of the community” and thus “tends to enlarge . . . a particular current in *public opinion*.”<sup>226</sup> Overall, however, Buchanan admits that his proposed framework “accord[s] generous power to Congress” to legislate broadly under the Thirteenth Amendment.<sup>227</sup>

Some have specifically invoked Buchanan’s class-based oppression framework as the basis for arguing that specific types of bias constitute badges and incidents of slavery. For example, David Tedhams

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<sup>220</sup> *Id.* at 1084. One note presaged Buchanan’s approach. See Note, Jones v. Mayer: *The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1019, 1026 (1969) (suggesting that “badges and incidents” could be construed to protect “all minority groups . . . suffering today under conditions that could reasonably be called symptoms of a slave society, inability to raise a family with dignity caused by unemployment, poor schools and housing, and lack of a place in the body politic”).

<sup>221</sup> See Buchanan, *supra* note 213, at 1084.

<sup>222</sup> *Id.*

<sup>223</sup> See *id.* at 1073 (noting that there is a “palpable . . . historical link” between slavery and modern acts motivated by arbitrary prejudice).

<sup>224</sup> Carter has criticized Buchanan’s approach as untethered from Thirteenth Amendment history. See Carter, *supra* note 34, at 1364–65.

<sup>225</sup> See Buchanan, *supra* note 213, at 1078 (excluding from the concept of badges and incidents of slavery prejudice that is “manifested only in random and isolated behavior” and does not “pervasively foreclose[]” the target “from realizing his human potential”).

<sup>226</sup> Brief for the United States, *supra* note 115, at 24.

<sup>227</sup> See Buchanan, *supra* note 17, at 1085. He claims that “countervailing constitutional postulates” can limit Congress from using its Thirteenth Amendment power to “penetrat[e] too deeply into the inner circle of associational choice,” but admits that they are unlikely to do so. *Id.*

cited Buchanan in arguing that Colorado's Amendment 2, which prohibited gay people from bringing discrimination claims, "stigmatizes [gays] with a badge of inferiority . . . [in violation of] the Thirteenth Amendment's spirit of equality."<sup>228</sup>

Others have utilized a hybrid historical/class-based oppression framework, arguing that the badge of slavery concept covers any form of modern-day oppression as long as the oppression echoes a slavery-specific practice in some way. Some have linked the sexual abuse of female slaves to current issues regarding domestic violence and reproductive rights.<sup>229</sup> Others, including Professor Alexander Tsesis, have focused on gay marriage, asserting that because slaves were not permitted to marry, Congress may, under Section 2, provide a "federal guarantee to marry the partner of one's choice."<sup>230</sup> Overall, Tsesis adopts a broad view of the Section 2 power, arguing that to allow Congress to "end any remaining vestiges of servitude and their concomitant forms of subordination"<sup>231</sup> by passing "positive legislation that furthers people's ability to enjoy their lives."<sup>232</sup>

Ultimately, in my view, neither the "historical link" nor "class-based oppression" models fully express the proper scope of the concept of the badges and incidents of slavery. As Professor George Rutherglen—who stands alone in acknowledging any ambiguity regarding the meaning of the "badges and incidents of slavery"<sup>233</sup>—has recognized, a thorough historical exegesis of the terms "badge" and "incident" is relevant to the concept's ultimate definition.<sup>234</sup> Also relevant in my view are structural constitutional principles such as separation of powers and federalism, which provide perspective on the precise function of Section 2 legislation aimed at the badges and incidents of slavery. The next Part grapples with these historical and

<sup>228</sup> Tedhams, *supra* note 17, at 149–51, 165.

<sup>229</sup> See, e.g., Bridgewater, *supra* note 25, at 410–11, 423 (arguing that government-mandated Norplant use was akin to sexual abuse of female slaves and thus a "relic of slavery"); Hearn, *supra* note 23, at 1144 ("[M]odern violence against women is a badge and incident of nineteenth-century slavery . . . involv[ing] reduced citizenship rights"); see also TSESIS, *supra* note 34, at 124 (discussing alternative rationale for *Griswold v. Connecticut* and arguing that "laws and practices intrusive of marital autonomy [such as laws barring married couples' use of contraceptives] . . . resemble the coercion of involuntary servitude").

<sup>230</sup> TSESIS, *supra* note 34, at 121; see also Courtman, *supra* note 26, at 328 (likening the legal incompetence of gays to marry to slavery's restrictions on contract rights).

<sup>231</sup> TSESIS, *supra* note 34, at 116.

<sup>232</sup> *Id.* at 114.

<sup>233</sup> See Rutherglen, *supra* note 63, at 177 (noting that the term is ambiguous and can be criticized as having "uncertain meaning, and unprincipled application" or lauded as a basis for "racial equality and federal civil rights legislation").

<sup>234</sup> *Id.* at 164.

structural principles in an attempt to provide a framework for understanding the “badges and incidents of slavery.”

### III. CONCEPTUALIZING THE “BADGES AND INCIDENTS OF SLAVERY”

What, then, are the “badges and incidents” of slavery that Congress can outlaw under the Thirteenth Amendment? The *Jones* Court left it to Congress to define the concept itself. However, it is possible—and, indeed, necessary—to derive a principled definition that will advance the purposes of the amendment itself while at the same time delineating the outer boundaries of the Section 2 power and providing judicially enforceable limits on this aspect of Congress’s power. Deriving this principled definition will require a response to three subsidiary issues: Whom can Congress protect? Whose conduct can Congress govern? And what conduct can Congress target?

Before turning to these issues, however, it is important to clarify the premise which undergirds the following discussion—one that I have explored in much greater depth elsewhere:<sup>235</sup> that Congress’s Section 2 power to address the badges and incidents of slavery is prophylactic in nature. In other words, Section 2 permits Congress to pass “pure” enforcement legislation that remedies actual violations of Section 1 of the Thirteenth Amendment (i.e., enslavement and involuntary servitude) as well as “prophylactic” legislation that targets otherwise constitutional conduct in order to deter violations of Section 1. Legislation that targets the badges and incidents of slavery is of the latter type: although the prohibited conduct may not violate Section 1 itself, Congress may address it in order to prevent any cumulative effect that poses a real risk of the reimposition of slavery and involuntary servitude.

The prophylactic reading of Section 2, particularly as compared to the view that would limit Congress to passing “pure” enforcement legislation, permits Congress to be proactive in ensuring the permanent demise of slavery. At the same time, the prophylactic view is more limited than that endorsed by the *Jones* majority. Rather than allow

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<sup>235</sup> See McAward, *supra* note 15. In this piece, I explored three possible approaches to the Section 2 power: (1) that Congress can pass only ‘pure’ enforcement legislation; (2) that Congress can both define and eradicate the badges and incidents of slavery (i.e., the *Jones* Court’s view); and (3) that Congress can address the badges and incidents of slavery, understood as a term of art with a fixed range of meaning, as a prophylactic exercise. Drawing from the original understanding of Section 2, as well as its structural implications, I concluded that the final conception was the most appropriate. See *id.* at 130–46. However, I left the task of defining the badges and incidents of slavery for another day. See *id.* at 143 n.387.

Congress to define for itself the badges and incidents of slavery, subject only to minimal court supervision, the prophylactic view requires a more concrete definition of that concept so that Congress has clear boundaries within which it can operate and so that courts can provide meaningful supervision of congressional action. Because prophylactic legislation is simply a means to the end of “deter[ring] or remed[ying]” the reimposition of slavery or involuntary servitude,<sup>236</sup> the definition of “the badges and incidents of slavery” is necessarily limited in its breadth. Indeed, this prophylactic approach shapes the answers to some of the subsidiary issues I address below.

Ultimately, I propose the following as a working definition of the badges and incidents of slavery that Congress may address under its Section 2 power: public or widespread private conduct that targets a group on the basis of race or previous condition of servitude, that mimics the law of slavery, and that poses a substantial risk that the members of the targeted population will be returned to de facto slavery or otherwise denied the ability to participate in the basic transactions of civil society.

A. *Whom Can Congress Protect from the Badges and Incidents of Slavery?*

Most courts and scholars have assumed that Section 2 empowers Congress to protect all racial, and perhaps even some non-racial, groups. In *McDonald v. Santa Fe Trail Transportation Co.*, the Supreme Court held that the Civil Rights Act of 1866 protects all persons—including white persons—from discrimination on the basis of race.<sup>237</sup> The Court did not address whether the Section 2 power justified such statutory coverage, but the Court’s holding implicitly assumed that discrimination against white people is a badge or incident of slavery, redressable under Section 2.<sup>238</sup> Subsequent cases held that the Act protected all racial groups from discrimination,<sup>239</sup> again intimating that Section 2 permitted Congress to address all types of racial discrimination. In *Griffin v. Breckenridge*, the Supreme Court went even

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<sup>236</sup> *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

<sup>237</sup> 427 U.S. 273, 280 (1976).

<sup>238</sup> *See Carter*, *supra* note 34, at 1358 n.169 (“The Court in *McDonald* did not carefully link discrimination against whites to the vestiges of slavery that the Thirteenth Amendment was designed to abolish.”).

<sup>239</sup> *See Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987) (permitting claim of racial discrimination under § 1982 by Caucasian Jews because Jews were deemed a separate race in 1865); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 612 (1987) (allowing claim of racial discrimination under § 1981 by Arab Muslim because Muslims were deemed a separate race in 1865).

further, holding that Congress acted within its Section 2 power in passing 42 U.S.C. § 1985(3), which created civil liability for private conspiracies motivated by “racial, or perhaps otherwise class-based, invidiously discriminatory animus” that seek to deprive the plaintiff “of the equal enjoyment of rights secured by the law to all.”<sup>240</sup>

The question of what class or classes of people Congress can protect under its Section 2 power deserves greater exploration than courts and commentators have given it to date. It is true that Section 1 of the Thirteenth Amendment protects any person from being subjected to slavery or involuntary servitude,<sup>241</sup> and that Section 2 allows Congress to pass laws that remedy the actual conditions of slavery and involuntary servitude without reference to race or any other personal characteristic of the victim. However, as discussed above, this “pure” enforcement legislation is different from prophylactic legislation aimed at the “badges and incidents of slavery.” Under this latter aspect of the Section 2 power, Congress may be more constrained in what it can do and whom it can protect, since the concept of the “badges and incidents of slavery” is anchored to the American system of slavery, in which people of African descent were uniquely subjected to an oppressive system of violence and coerced labor.<sup>242</sup>

There are four possible protected categories for purposes of this aspect of the Section 2 power. When a person experiences what otherwise qualifies as a badge or incident of slavery, Section 2 might enable Congress to legislate to protect that person if she is targeted because of: (1) her African-American race; (2) her race generally; (3) her previous condition or slavery or involuntary servitude in the United States; or (4) her membership in any discrete class of persons. Although there is no clearly correct answer here, I can say that I find Approach Four to be the least plausible theory and a combination of Approaches Two and Three to be the most plausible.

Approach One finds support in both the historical and judicial records. The presumed inferiority of African Americans animated

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<sup>240</sup> 403 U.S. 88, 102, 105 (1971). The Second Circuit made this assumption more explicit in *United States v. Nelson*, in which it upheld a federal hate crimes law as valid Thirteenth Amendment legislation. See 277 F.3d 164 (2d Cir. 2002) (upholding 18 U.S.C. § 245(b)(2)(B)). The court held that the Thirteenth Amendment “extends its protections to religions directly, and thus to members of the Jewish religion,” *id.* at 179, and that Congress rationally could have found crimes motivated by animus against Jews to be “badges and incidents of slavery,” *id.* at 180–81.

<sup>241</sup> See *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

<sup>242</sup> See Carter, *supra* note 34, at 1365 (“The fact that the [Thirteenth] Amendment prohibits the actual enslavement of any person does not compel the conclusion that any person of any race or class can suffer a badge or incident of slavery.”).

the American system of chattel slavery, and every antebellum public use of the terms “badge” or “incident” of slavery referred specifically to the treatment of slaves and/or free blacks.<sup>243</sup> The liberation of African American slaves was the principal goal of the Thirteenth Amendment, and the response to the Amendment’s ratification was similarly focused on the status of that race. Just as the Black Codes subjected the freed slaves to badges of slavery, the Civil Rights Act of 1866—the first legislation passed pursuant to Section 2—was clearly designed to vitiate those codes and secure civil rights for African Americans. Postbellum, every judicial discussion of “the badges and incidents of slavery” has referred specifically to the legal and social treatment of African-Americans.<sup>244</sup> Indeed, in his *LeGrand* opinion, Justice Woods specifically stated his view that Section 2 did not empower Congress to legislate on behalf of white people.<sup>245</sup>

The legislative record, however, supports Approach Two. In the debates over the Civil Rights Act of 1866, several members of Congress, including the Act’s main sponsor, clearly stated that the law was intended to protect all people from racial discrimination in the exercise of certain civil rights, not just the freed slaves.<sup>246</sup> Although many in those debates voiced doubts that Section 2 empowered Congress to protect civil rights at all, nobody questioned that Congress could protect people of all races in the exercise of those rights. Indeed, this view of the 1866 Act’s coverage (and its implicit assumption regarding the scope of the Section 2 power) has prevailed in the Supreme Court<sup>247</sup> and appears to be settled precedent.<sup>248</sup> Moreover, Congress’s subsequent legislative efforts to eradicate the “badges and incidents of slavery” generally have been aimed at discrimination on the basis

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243 See *supra* Part I.A.

244 See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441–43 (1968); *The Civil Rights Cases*, 109 at 25; *Blyew v. United States*, 80 U.S. 581, 599 (1871) (Swayne, J., dissenting); *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 873 (5th Cir. 1966); *Pennsylvania v. Local Union No. 542*, 347 F. Supp. 268, 299 (E.D. Pa. 1972); *LeGrand v. United States*, 12 F. 577, 581 (E.D. Tex. 1882); *United States v. Cruikshank*, 25 F. Cas. 707, 711 (D. La. 1874), *aff’d on other grounds*, 92 U.S. 542 (1876); *United States v. Rhodes*, 27 F. Cas. 785, 793 (D. Ky. 1866) (Swayne, J., on circuit).

245 See *LeGrand*, 12 F. at 581–82.

246 Senator Trumbull introduced the bill and described it as applying to “every race and color.” CONG. GLOBE, 39TH CONG., 1ST SESS. 211 (1866). He later reiterated that the Civil Rights Act of 1866 would “appl[y] to white men as well as black men.” *Id.* at 599; see also *id.* at 474, 504 (statement of Sen. Howard) (noting that with “respect to all civil rights . . . there is to be hereafter no distinction between the white race and the black race”).

247 See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

248 See *supra* notes 237–40 and accompanying text.

of race and color generally.<sup>249</sup> This suggests that Congress itself understands this aspect of its Section 2 power as empowering it to protect people of all races from the badges and incidents of slavery. The fact that judicial references to the “badges and incidents of slavery” have focused on the treatment of African Americans may reflect the reality that most inequitable treatment has centered on that particular race, but it does not necessarily circumscribe the theoretical scope of the Section 2 power.

There is obvious tension between the legislative “color consciousness” that Approach One would permit and the “color-blind” approach that some would require of government actors under the Fifth and Fourteenth Amendments.<sup>250</sup> However, this tension does not necessarily rule out Approach One. As Professor Akhil Reed Amar has pointed out in a different context, “doctrinal rules implementing the Fourteenth Amendment’s basic principles must be sensitively crafted in light of Thirteenth Amendment principles. Neither Amendment ‘trumps’ the other; rather, they must be synthesized into a coherent doctrinal whole.”<sup>251</sup> Thus, if the Thirteenth Amendment taken on its own merits clearly permits race-conscious action on behalf of African Americans to remediate the badges and incidents of slavery, then Fourteenth Amendment doctrine must accommodate

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249 See, e.g., 18 U.S.C. § 245(b)(2)(B) (2006) (criminalizing injuring any person “because of his race, color, religion or national origin” and “because he is . . . enjoying any [state-administered] benefit . . . program [or] facility”); National Defense Authorization Act for Fiscal Year 2010, § 4707 (2009) (penalizing anyone who willfully injures another because of that person’s “actual or perceived race, color, religion, or national origin . . . gender, sexual orientation, gender identity or disability”). Of course, Congress has used its Thirteenth Amendment enforcement power to protect non-racial groups from slavery and involuntary servitude. See, e.g., Anti-Peonage Act of 1867, ch. 187, 14 Stat. 546 (1867) (codified at 18 U.S.C. § 1581 (2006) (criminal provision) & 42 U.S.C. § 1994 (2006) (civil provision)); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified at 18 U.S.C. §§ 1589–1594 (2006)). However, this “pure” enforcement legislation differs from enforcement legislation aimed at the “badges and incidents of slavery.” See *supra* notes 243–44 and accompanying text.

250 See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 752 (2007) (Thomas, J., concurring) (“[A]s a general rule, all race-based government decisionmaking—regardless of context—is unconstitutional.”). Current doctrine does not absolutely preclude race-conscious state action. Rather, it deems only certain justifications sufficiently compelling to justify such action. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 327–33 (2003) (noting that diversity can be a compelling interest in the higher education setting). However, many have critiqued the color-blind approach. See, e.g., *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in the judgment) (“[A]s an aspiration, . . . [the color-blindness] axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.”).

251 Amar, *supra* note 20, at 157 n.180.

those antecedent constitutional principles.<sup>252</sup> Indeed, Approach One might well point to the limits of “color blindness” doctrine and provide a jurisprudential “hook” for greater flexibility in dealing with certain disparities facing African Americans.<sup>253</sup>

Still, despite the potential appeal of Approach One, Approach Two seems to be the preferable course. The historical, jurisprudential, and legislative records all provide independent support for Approach Two. Moreover, Approach Two recognizes that the eradication of race discrimination of any kind is a national priority. Just as Section 5 of the Fourteenth Amendment permits Congress to enforce the Equal Protection Clause by forbidding states from apportioning burdens and benefits on the basis of race,<sup>254</sup> Section 2 of the Thirteenth Amendment permits Congress to ensure that neither state nor private actors impose the badges and incidents of slavery on members of any racial group. Although there would be substantial overlap in the potential coverage of the two enforcement provisions, they are not duplicative given the broader scope of private action that Congress can regulate under Section 2.<sup>255</sup> Thus, given the historical support for Approach Two, the breadth of its coverage, and its jurisprudential “fit,” it would seem to be the better path in interpreting the scope of the Section 2 power.

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252 This is not to say that the Thirteenth Amendment enforcement power should be understood completely independent of principles developed in the Fourteenth Amendment context. As I have written elsewhere, many of the principles that informed the Supreme Court’s understanding of Congress’s Fourteenth Amendment enforcement power in *City of Boerne v. Flores* have direct relevance in the Thirteenth Amendment context. See McAward, *supra* note 15, at 145–46.

253 For example, one could imagine certain federal affirmative action programs finding justification under the Thirteenth Amendment rather than the Fourteenth. One also could ask whether Approaches One and Two are mutually exclusive. For example, Section 2 of the Thirteenth Amendment might empower Congress to protect all people from certain acts of race discrimination (as it did in the Civil Rights Act of 1866), and also to provide specific protections for African Americans (e.g., by approving an affirmative action program). If such an affirmative action program were subject to a Section 2 challenge, an analysis similar to that employed in *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009), might be appropriate. In that case, the Supreme Court dealt with a clash between Title VII’s disparate impact and disparate treatment provisions and found guidance in Fourteenth Amendment case law that “certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a strong basis in evidence that the remedial actions were necessary.” *Id.* at 2675 (internal quotation marks omitted).

254 See, e.g., *Nevada Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (“Because racial classifications are presumptively invalid, most of the States’ acts of race discrimination violated the Fourteenth Amendment.”).

255 See *infra* Part III.B (discussing actors subject to Section 2 power).

Approach Three takes a different tack in identifying the populations that Congress may protect in its efforts to eradicate the badges and incidents of slavery. It focuses on historical status rather than race, stating that Congress may protect any person or group of people who have been held in slavery and involuntary servitude and who continue to experience the badges or incidents of their former status. This approach is similar to Approach One in that it would allow Congress to protect African Americans as a class, but not white people. However, it would also permit Congress to legislate for the benefit of other discrete groups that have endured conditions of involuntary servitude in this country, including victims of human trafficking<sup>256</sup> and immigrants in debt bondage,<sup>257</sup> as well as those affected by arrangements resembling the “coolie”<sup>258</sup> and “peonage”<sup>259</sup> systems. The “badges” and “incidents” that each protected population might experience will differ based on that group’s unique history and current experiences.

On its face, this Approach would seem to be the most tailored approach to Section 2 legislation. Although African Americans were uniquely subject to chattel slavery in our history, this Approach recognizes that other groups have experienced conditions that violate Section 1 of the Thirteenth Amendment. While there may be less residual class-based discrimination against these other groups, Approach Three preserves Congress’s ability to respond should any issues arise.<sup>260</sup>

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256 See Kevin Bales & Becky Cornell, *The Next Step in the Fight Against Human Trafficking: Outlawing the Trade in Slave-Made Goods*, 1 INTERCULTURAL HUM. RTS. L. REV. 211, 221 (2006) (explaining congressional intervention in human trafficking).

257 See Elizabeth M. Dunne, Comment, *The Embarrassing Secret Of Immigration Policy: Understanding Why Congress Should Enact An Enforcement Statute For Undocumented Workers*, 49 EMORY L.J. 623, 631 (2000) (describing immigration policy decisions’ effect on undocumented workers); see also 18 U.S.C. § 1584 (2000) (prohibiting sale into involuntary servitude). The original version of the law, the Padrone Act, addressed the practice of bringing Italian youth to American cities and exploiting their labor. See Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 291 (2010) (discussing the Padrone Act).

258 See Renee C. Redman, *From Importation of Slaves to Migrant Laborers: The Struggle to Outlaw American Participation in the Chinese Coolie Trade and the Seeds of United States Immigration Law*, 3 ALB. GOV’T L. REV. 1, 2 (2010) (describing the coolie trade).

259 See Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 981 (2002) (describing the peonage system).

260 For example, victims of sex trafficking often experience abuse and emotional difficulties after their release, without receiving sufficient assistance from government authorities. See JANICE G. RAYMOND & DONNA M. HUGHES, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES 87–88 (2001) (describing women’s difficulties leaving the sex industry).

The downside of Approach Three, however, is that it is hard to square with the nature of the Section 2 power. The prophylactic aspect of that power is meant to permit Congress both to remedy *and* prevent violations of Section 1. Limiting prophylactic legislation only to those who have experienced actual slavery or involuntary servitude overlooks the deterrent aspect of the power. If, for example, a state were to pass a “White Code” that limited the legal capacity of white citizens to convey property and enforce contracts, one would think that Congress would be able to respond under Section 2 even though white people have never been enslaved as a class.<sup>261</sup> A public law such as a “White Code,” because it denies to an entire racial class certain core civil rights, might well be deemed to portend future restrictions akin to slavery.<sup>262</sup> Accordingly, Approach Three is at best an incomplete expression of the class protected by Section 2.

Approach Four would permit Congress to use its power to protect people of any class who experience any conduct that otherwise would qualify as a badge or incident of slavery. The focus of this approach is on the nature of the conduct rather than the identity of the victim. First proposed by Professor Buchanan and since utilized by other scholars, this approach gives Congress the most expansive power of all the approaches discussed here. Congress, for example, could attempt to pass a federal law sanctioning gay marriage, arguing that because restrictions on marriage and contract rights were incidents of slavery, state restrictions on gay marriage impose those same incidents on a modern minority population.<sup>263</sup> Similarly, one could argue that because sexual violence against slave women was a badge and in-

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<sup>261</sup> This same critique could be leveled at Approach One as well.

<sup>262</sup> The logical retort would be to ask why, under my overall approach, Congress could protect white people but not women, gays, or other nonracial minorities who might be subject to a similar code denying fundamental civil rights. My response, simply, is that structural principles and the historical record must impose some limits on the scope of the Section 2 power. The concept of the badges and incidents of slavery is historically rooted in slavery, which, in our history, is tied inextricably with the concept of race. While the Fourteenth Amendment’s more general language has been construed to provide protections for other powerless groups, the Thirteenth Amendment can only be read so far. Given the domination of white owners in the slave system, it is enough of a stretch to say that Congress can protect all races under Section 2. Extending the prophylactic legislative power farther would be ahistorical and turn Congress’s power into a general civil rights power. *See infra* notes 263–70 and accompanying text. It is also worth pointing out that Congress would always be able to protect members of any group who are subjected to actual slavery or involuntary servitude.

<sup>263</sup> *See, e.g.*, TSESIS, *supra* note 34, at 63; Courtman, *supra* note 26, at 328 (comparing homosexuals to freed slaves).

cident of slavery, Congress has the power to provide federal criminal remedies for sexual violence against women generally.<sup>264</sup>

Putting aside the question whether these are desirable outcomes,<sup>265</sup> it is clear that Approach Four would have profound effects with respect to the scope of Congress's power under Section 2. From a federalism point of view, it has the potential to transform Section 2 into a general police power (or at least a general civil rights power) that would give Congress jurisdiction over issues generally thought to be the proper subject of state regulation.<sup>266</sup> Indeed, read in this way, Section 2 would overlap in large part with—and even supplant—the Commerce Clause as the justification for some of the most far-reaching federal legislation.<sup>267</sup> Moreover, it would allow Congress to grant substantial civil rights protections to 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.<sup>268</sup> It is hard to find substantial support for Approach Four.

In addition to the structural concerns outlined above, the historical record clearly indicates that the Thirty-Eighth and Thirty-Ninth Congresses did not think the Section 2 power extended so far, at least insofar as it justified civil rights legislation concerning the badges and incidents of slavery. Rather, the clear expectation was that this cornerstone of the Reconstruction concerned itself specifically with race and the legacy of American slavery.<sup>269</sup> Although many groups of people have been subjected to persecution and inequity throughout

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264 Cf. Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. L. REV. 480, 486–511 (1990) (arguing that compelled motherhood is an “involuntary servitude” as well as a “badg[e] of slavery” (internal quotation marks omitted)); Sager, *supra* note 149, at 152–53 (defending the Violence Against Women act by drawing an analogy between slavery and discrimination against women).

265 Cf. Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1657 (1993) (“No matter how tempting or righteous the desired result may be, one must always be ready to recognize when the reading has become too tenuous, the proposed doctrine too vague, the implications too risky.”).

266 The original draft of the Civil Rights Act of 1866 provided that “there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery.” CONG. GLOBE, 39TH CONG., 1ST SESS. 474 (1866). However, this provision was removed because “civil rights” was too ambiguous and some feared that including the term could lead to a grant of suffrage rights. See Gerhard Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89, 103 (tracing the history of 1866 Act).

267 *But cf.* *United States v. Morrison*, 529 U.S. 598, 617–19 (2000) (striking down aspects of Violence Against Women Act as unjustified by Commerce Clause).

268 See, e.g., *Romer v. Evans*, 517 U.S. 620, 631–32 (1996) (declining to treat gays as a suspect class).

269 See *supra* notes 50–55 and accompanying text.

American history, the Thirteenth Amendment was designed only to deal with the most pervasive and perfidious of these, namely, racialized chattel slavery. This has clearly been the assumption of subsequent Congresses, which have used Section 2 legislation to deal with various types of discrimination and maltreatment on the basis of race or color.<sup>270</sup>

Overall, keeping in mind the prophylactic purpose of giving Congress power to address the badges and incidents of slavery, a combination of Approaches Two and Three provides the best articulation of the populations that Congress may protect. In other words, Section 2 licenses Congress to protect people from the badges and incidents of slavery imposed on account of race or previous condition of servitude. Protecting these specific populations from the badges and incidents of slavery best comports with the purpose of prophylactic legislation, as well as the historical context of the Thirteenth Amendment, the expectations of those Congresses that ratified and implemented the amendment, the understanding of subsequent Congresses, and the structural implications of an overly expansive approach to defining the badges and incidents of slavery.

*B. Whose Conduct Can Congress Govern?*

Having identified the populations that Congress can protect, the next question is from whom Congress can protect them. There are three general categories of actors who Congress might regulate under its power to eradicate the badges and incidents of slavery: governments, private actors engaged in conduct that has widespread community approval or effect, and private actors engaged in purely private, “one-off” action. The best evidence supports the conclusion that both public and private actors can impose a badge or incident of slavery. However, the concept includes only private action that is so widespread or influential as to pose the risk that, cumulatively, that action will result in the de facto reimposition of slavery or involuntary servitude. Thus, some, but not all, private action is subject to congressional regulation under Section 2.

There is no doubt that public laws and actions can impose a badge or incident of slavery. The Civil Rights Act of 1866—widely hailed as paradigmatic Section 2 enforcement legislation—displaced the Black Codes, public laws that reimposed some of the legal incidents of the

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<sup>270</sup> See, e.g., *supra* notes 3–7 and accompanying text (describing new hate crimes law).

slavery regime.<sup>271</sup> Indeed, the *Civil Rights Cases* majority held that the concept of the badges and incidents of slavery referred *only* to state action.<sup>272</sup> Even Justice Harlan's dissent would have treated the private entities in question as quasi-public actors for purposes of the Section 2 analysis.<sup>273</sup> Although the Solicitor General's brief in the *Civil Rights Cases* argued that a badge of slavery could also encompass certain measures taken by nongovernmental actors, there was no question that the concept also covered governmental actions.<sup>274</sup>

Although one might take issue with the *Civil Rights Cases* majority's limited view of what constitutes state action, as Justice Harlan did, it is not immediately clear that the majority was wrong to limit the coverage of the Section 2 power to public actors. At that point in time, there were no recorded instances (save the Solicitor General's brief) of either the term "badge" or "incident"<sup>275</sup> being used to refer to anything other than discriminatory state laws. The very definition of an "incident" of slavery refers to public laws that governed slaves and their owners.<sup>276</sup> And after the ratification of the Thirteenth Amendment, the term "badge" of slavery was regarded in judicial circles as a post-emancipation synonym for "incident."<sup>277</sup> Thus, when the *Civil Rights Cases* Court coined the phrase "badges and incidents of slavery" as the touchstone for Congress's Section 2 power, the prevailing view

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271 *Jones* held that the Civil Rights Act of 1866 also applied to private action, although there is ongoing debate about the accuracy of this finding. See EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869*, at 70–78 (1990) (detailing arguments on both sides and concluding that "only racially discriminatory state action was intended to be prohibited"); Casper, *supra* note 266 (criticizing the *Jones* Court's reading of legislative history). This question is related to, but ultimately different from, the question whether Section 2 gives Congress the power to regulate both state and private action. Neither the *Jones* majority nor dissent addressed this issue in any depth. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 476–77 (1968) (Harlan, J., dissenting) (expressing general concerns about the constitutional basis of the majority's holding). Some members of Congress in 1866 did express doubts whether Section 2 provided a sufficient grant of power for passage of the Civil Rights Act, although those doubts did not focus on the public/private action distinction. See, e.g., CONG. GLOBE, 39TH CONG., 1ST SESS., 504–505 (1866) (Sen. Johnson) (expressing concern over the potentially further reaching effects of the Act); *id.* at 1290–93 (Rep. Bingham) (asserting that Congress should have a more limited power).

272 According to the Court, any broader coverage "would be running the slavery argument into the ground." *The Civil Rights Cases*, 109 U.S. 3, 24 (1883).

273 See *id.* at 42 (Harlan, J., dissenting) (suggesting that the law may regulate, to some extent, the manner in which private businesses can conduct their business).

274 See Brief for the United States, *supra* note 115, at 19–20 (explaining that actions by governmental as well as private actors are both capable of violating civil rights).

275 Or, for that matter, "relic" or "vestige." See *supra* notes 153–60 and accompanying text.

276 See *supra* note 38 and accompanying text.

277 See *supra* notes 80–96 and accompanying text.

was that the concept of “badges and incidents” applied to public laws or other forms of state action that discriminated on the basis of race.

Limiting the concept of the badges and incidents of slavery to public actors would have substantial consequences, but it would not completely emasculate the protections current Section 2 legislation offers. Certainly, one immediate effect would be the disruption of some legislation thought to be valid under the Thirteenth Amendment. Sections 1981 and 1982, for example, would no longer apply to private discriminatory acts<sup>278</sup> and therefore would be removed from the arsenal of many civil rights lawyers.<sup>279</sup> Likewise, the portion of the recent Matthew Shepard and James A. Byrd Hate Crimes Act that proscribes private violence motivated by race would lack a constitutional predicate. However, other statutes would fill much of the breach. Title VII covers racial discrimination in employment contracts.<sup>280</sup> The Fair Housing Act bars racial discrimination in property conveyances.<sup>281</sup> And federal criminal law already punishes racially motivated crimes committed on public property.<sup>282</sup> Moreover, the recent hate crimes bill could be made constitutional fairly easily, if it were amended to require a link to interstate commerce, as it does for crimes predicated on gender and sexual orientation.

The Section 2 power still could play an important role in dealing with racially discriminatory state action. One might think that limiting the Section 2 power to state action would render the Thirteenth Amendment enforcement power superfluous, as the Fourteenth Amendment (and legislation pursuant to Congress’s power to enforce that amendment) already bars racially discriminatory state action. However, Congress’s Thirteenth Amendment power may offer some significant advantages over the existing analytical framework under the Fourteenth Amendment. For example, while the Fourteenth Amendment remedies only intentionally discriminatory state

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278 The Civil Rights Act of 1991, which amended Section 1981 to provide explicitly that “[t]he rights protected by . . . [that provision] are protected against impairment by non-governmental discrimination as well as against impairment under color of State law,” 42 U.S.C. § 1981(c), did not cite a constitutional basis for the amendment. Presumably, Congress thought it was acting under its Thirteenth Amendment enforcement power.

279 See, e.g., *Williams v. Staples, Inc.*, 372 F.3d 662 (4th Cir. 2004) (vindicating § 1981 claim for racial discrimination in retail shopping setting).

280 See *Johnson v. Ry. Exp. Agency, Inc.*, 421 U.S. 454, 459–60 (1975) (noting overlapping but not identical coverage of § 1981 and Title VII).

281 See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413–17 (1968) (noting overlapping but not identical coverage of § 1982 and the Fair Housing Act).

282 See 18 U.S.C. § 245(b)(2)(B) (2006) (prohibiting racially motivated crimes on public property).

actions,<sup>283</sup> the Supreme Court has left open the question whether disparate impact claims are cognizable under the Thirteenth Amendment.<sup>284</sup> Similarly, there is no reason to think that the concept of the badges and incidents of slavery contains an intent requirement.<sup>285</sup> Thus, Congress's power to address the badges and incidents of slavery might permit it to address certain racial disparities that fall outside the purview of the Fourteenth Amendment.

Consider, for example, criminal justice enforcement disparities with respect to jury service<sup>286</sup> and the imposition of the death penalty.<sup>287</sup> Each is a product of state action and each has a long history that is traceable to slavery and its aftermath.<sup>288</sup> However, while these disparities continue today, it is very difficult to prove discriminatory intent in any individual case.<sup>289</sup> One could argue that these widespread disparities impose a badge of slavery on African Americans and therefore that Section 2 of the Thirteenth Amendment would permit Congress to take federal action to ensure more even-handed administration of justice. Although it is not clear that this hypothetical claim would prevail,<sup>290</sup> it at least suggests that the Thirteenth Amendment

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283 See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that the Fourteenth Amendment requires a showing of discriminatory intent).

284 See *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 390 n.17 (1982) (stating that it "need not decide whether the Thirteenth Amendment itself reaches" disparate impact claims).

285 The causation requirement discussed in Part III.C does not require a showing of intent.

286 See EQUAL JUSTICE INITIATIVE, *ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY* (2010) (tracing post-Civil War legal bars on jury service to modern-day racial disparities in the application of peremptory challenges).

287 See EQUAL JUSTICE INITIATIVE, *THE DEATH PENALTY IN THE UNITED STATES* (2007) (noting that while only half of murder victims are white, 80% of cases resulting in execution involved a white victim); *National Statistics on the Death Penalty and Race*, DEATH PENALTY INFO. CENTER, <http://deathpenaltyinfo.org/race-death-row-inmates-executed-1976#Vic> (last updated Nov. 18, 2011) (noting that only seventeen whites have been executed for a crime involving a black victim since 1976, while 254 African Americans have been executed over the same period when the victim was white).

288 See EQUAL JUSTICE INITIATIVE, *supra* note 286 (charting racial discrimination in jury selection from the Civil War to present day); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1 (1990) (tracing the history of racial discrimination in jury selection); Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15 (2002) (discussing the history of racial disparities in death penalty).

289 See Maxine Goodman, *A Death Penalty Wake-Up Call: Reducing the Risk of Racial Discrimination in Capital Punishment*, 12 BERKELEY J. CRIM. L. 29, 43-57 (2007) (discussing the difficulties in proving racial discrimination in death penalty cases); Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 465 (1996) (discussing difficulties in proving *Batson* claims).

290 As discussed in the next section, those challenging these state practices would also have to prove that the disparities threaten the reimposition of slavery or involuntary servitude. See *infra* Part III.C. This could be a very difficult showing to make.

enforcement power—even if limited to public actors—might have modern applications that the Fourteenth Amendment does not.<sup>291</sup>

The *Civil Rights Cases* majority was certainly correct to include state action in its conceptualization of the “badges and incidents of slavery.” The question is whether it was correct to limit its definition *only* to state action. One can argue that at least certain private actors also can impose a “badge of slavery.” Indeed, because Section 1 of the Thirteenth Amendment explicitly bars both public and private action, Section 2 legislation presumptively applies to both sets of actors as well.<sup>292</sup> This presumption is not dispositive here because prophylactic “badges and incidents” legislation is only a subset of Section 2 legislation and thus not necessarily subject to all of the same conditions as “pure” enforcement legislation.<sup>293</sup> However, the law of slavery, in many respects, was designed to shield private acts of violence and subordination from public view. Furthermore, the response to emancipation, in many respects, utilized private acts of discrimination and oppression to maintain the freed slaves’ inferior status. Thus, it would require a certain disregard for history to suggest that only public laws could impose a badge of servitude.

As discussed earlier, the term “badge of slavery” at its most general level refers to physical and metaphorical indicators of slave or subordinate status.<sup>294</sup> Before the Civil War, the term referred primarily to African Americans’ skin color.<sup>295</sup> In the years immediately following the war, it referred primarily to discriminatory public laws.<sup>296</sup> While the *Civil Rights Cases* majority tacitly viewed that evolution in meaning as complete, Solicitor General Phillips’ brief in the *Civil Rights Cases* implicitly suggested that the term could also refer to other means by which the freed slaves were effectively subordinated and denied the

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291 Of course, there are types of intentional state discrimination, like Jim Crow laws and legally segregated schools, that Congress arguably could have addressed through its Section 2 power. See, e.g., *United States v. Jefferson Cty Bd. of Ed.*, 372 F.2d 836, 867–68 (5th Cir. 1966) (asserting that segregated schools placed a badge of slavery upon African-American children). Cf. *Debra P. v. Turlington*, 654 F.2d 1079, 1085 (5th Cir. 1981) (per curiam) (Tjoflat, J., dissenting) (calling “black functional illiteracy” a “badge of slavery”). However, after *Brown v. Board of Education*, 347 U.S. 483 (1954), and the Civil Rights Act of 1964, this point is moot.

292 See, e.g., George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1377, 1386 (2008) (arguing that the Thirteenth Amendment has been and should be interpreted to apply to both state and private action.).

293 See *supra* note 235 (discussing the difference between prophylactic legislation on the badges and incidents of slavery and “pure” enforcement legislation).

294 See *supra* notes 60–64 and accompanying text.

295 See *supra* notes 65–67 and accompanying text.

296 See *supra* notes 76–96 and accompanying text.

right to participate in civil society, including discrimination in and exclusion from certain private transactions.<sup>297</sup> Although the *Civil Rights Cases*' holding effectively stunted the legal development of the term "badge,"<sup>298</sup> the development of the terms "relic" and "vestige" of slavery illustrates how "badge" might have evolved, at least in terms of the actors capable of engaging in conduct cognizable under Section 2.<sup>299</sup> After the turn of the century, both terms shifted from references to public laws to private conduct, including racial violence and discrimination.<sup>300</sup> While "relic" and "vestige" were not used specifically as legal terms of art in the Thirteenth Amendment context and are not dispositive of the meaning of "badge," the definitional evolution experienced by each term at least signals that, in the post-war years, private conduct became an increasingly important means of subjugating African-Americans—supplementing and perhaps even supplanting state law.

It was not until 1968 that the *Jones* Court reversed the *Civil Rights Cases* and resolved that a private actor could impose a "badge of slavery."<sup>301</sup> Although many have questioned *Jones*' statutory holding that the Civil Rights Act of 1866 was intended to cover all private action,<sup>302</sup> those critics did not assert that Congress lacked the power to regulate private action under Section 2.<sup>303</sup> Regardless, Congress has amended the statute to clarify that in fact it does cover "nongovernmental discrimination,"<sup>304</sup> and there has been no suggestion since that Congress lacked the power under Section 2 to regulate at least some private actors.<sup>305</sup> However, there has also been virtually no discussion as to the

297 See *supra* notes 117–20 and accompanying text.

298 "Badge of slavery" was invoked occasionally by civil rights lawyers after the *Civil Rights Cases*, but it continued to refer to public forms of discrimination, like Jim Crow laws. See *supra* notes 136–37.

299 As I discuss below, the evolving meaning of "relics" and "vestiges" is affirmatively unhelpful when it comes to understanding the causation aspect of the "badges and incidents of slavery." See *infra* Part III.C.

300 See *supra* notes 161–72 and accompanying text.

301 Because the facts of *Jones* were concerned with commercial real estate discrimination by a property developer, the Court did not have occasion to distinguish between widespread and isolated private conduct. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412–16 (1968).

302 See, e.g., Casper, *supra* note 266.

303 See Casper, *supra* note 266 (criticizing logic and historical analysis of *Jones*). Justice Harlan noted that the constitutional basis of the Court's ruling was questionable, but he did not elaborate on his concerns. See *Jones*, 392 U.S. at 476–77 (Harlan, J., dissenting).

304 See Civil Rights Act of 1991, codified at 42 U.S.C. § 1981(c) (providing that "[t]he rights protected by . . . [42 U.S.C. § 1981] are protected against impairment by nongovernmental discrimination and impairment under color of State law").

305 See, e.g., George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303, 344–51 (questioning whether the "full and equal bene-

limits of this proposition: Are there certain types of private action that Section 2 does not empower Congress to address?

There are several approaches one could take in distinguishing among types of private actors.<sup>306</sup> First, one could focus (as Justice Harlan did in his *Civil Rights Cases* dissent), on whether the private entity was performing a public function as defined by Fourteenth Amendment doctrine.<sup>307</sup> Of course, public function doctrine today is more limited than it was at the time of the *Civil Rights Cases*,<sup>308</sup> so this category of actors is likely to be relatively small.<sup>309</sup> Moreover, since the purpose of public function doctrine is to identify “state actors,” it is not clear that this approach would include any truly private actors in the pool of actors subject to Thirteenth Amendment regulation.

Second, one could focus on numbers and say that Congress can regulate private actors who participate in widespread, common forms of discrimination. For example, private property developers who promoted residential segregation, such as the Alfred H. Mayer Co., (the defendant in *Jones*), controlled so much property and engaged in such common practices that they could be subject to congressional regulation under this theory.<sup>310</sup> This idea is analogous to the Fourteenth Amendment concept of custom, in which the unwritten but “persistent and widespread discriminatory practices of state officials” obtain the force of law.<sup>311</sup> Indeed, it harkens back to the role of custom in the nineteenth century, in which “pervasive private practices”

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fit” clause of the Civil Rights Act of 1991 should apply to private actors but conceding that the bar on discrimination in making and enforcing contracts applies to private actors).

<sup>306</sup> The easy answer would be to decline to draw such a distinction and instead say that all private actors are capable of imposing a badge of slavery. However, the development and usage of the term “badge of slavery” and related concepts belies such a broad view, as historically there was a clear focus on public actors. Thus, in adding private actors to the mix, one must be careful not to overstep.

<sup>307</sup> See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295–297 (2001) (examining the factors historically assessed by the Court when determining whether or not challenged activity is State action).

<sup>308</sup> See G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 346 n.83 (1997) (“In no subsequent Supreme Court decision has the Court been willing to apply the public function analysis as liberally as advocated by Justice Harlan in the *Civil Rights Cases*.”).

<sup>309</sup> For example, in his *Runyon v. McCrary* dissent, Justice White argued that the concept of a badge of slavery does not extend to intimate private transactions like “[a] racially motivated refusal to hire a Negro or a white babysitter or to admit a Negro or a white to a private association.” 427 U.S. 160, 211 (1976) (White, J., dissenting).

<sup>310</sup> See *Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115, 119 (E.D. Mo. 1966) (noting that the area denied to the Jones family was designed to accommodate one thousand people); Karl Taeuber, *Negro Residential Segregation: Trends and Measurement*, 12 SOC. PROBS. 42 (1964) (measuring racial segregation in cities).

<sup>311</sup> *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167–68 (1970).

were an accepted source of law.<sup>312</sup> In light of the analogy to the law of custom, identifying private parties who engage in widespread acts of discrimination would seem to be an easily administrable test. However, this approach seems potentially underinclusive, as it would exclude the “instigator,” i.e., the private party whose act of discrimination or violence is so influential that it ultimately replicates itself.

Thus, a third way to approach this issue might focus on the social status of the actor and likely effect of his or her action. This was the approach endorsed by Solicitor General Phillips in his *Civil Rights Cases* brief.<sup>313</sup> The key inquiry is whether the private actor has such influence or capacity to shape public opinion that her actions are likely to generate (or already reflect) a trend of wider subjugation of the targeted class. Although it differs from the previous approaches, it retains appealing elements from each: In reality, private actors who qualify often will be community leaders, those performing public functions, or those whose conduct is already part of a wider custom. This approach—with its joint focus on the status of the actor and the effect of her action—recognizes that some private actors do have the capacity to impose a badge of slavery. However, it identifies those actors in a sufficiently limited way to alleviate concerns that Congress could use its Section 2 power to regulate every private party who engages in a discriminatory act. It also dovetails with the causal element I propose in the following section, which helps focus on what types of conduct Congress can regulate.

### C. What Conduct Can Congress Target?

After Congress identifies a state actor or influential private actor who engages in conduct that targets a group because of race or previous condition of servitude, the final question is whether the conduct in question amounts to a “badge and incident of slavery.” It is tempting to attach that label to many modern manifestations of racial injustice, and it is undoubtedly true that much of today’s racial in-

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<sup>312</sup> George Rutherglen, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 VA. L. REV. 925, 931 (2003); see also *id.* at 940 (noting that after the Thirteenth Amendment, “the persistent effects of customs relegating African-Americans to the status of property continued to influence the content and enforcement of state law”).

<sup>313</sup> See Brief for the United States, *supra* note 115, at 19, 23–24 (arguing that regulation of quasi-public actors under Thirteenth and Fourteenth Amendments is constitutional).

equality is traceable in some way to slavery and its aftermath.<sup>314</sup> However, for the concept of “badges and incidents of slavery” to adequately guide congressional enforcement efforts under the Thirteenth Amendment, there must be a set of limiting principles that point to a discernable range of meaning for the concept. This section proposes that for conduct to constitute a badge and incident of slavery, it must satisfy two criteria: First, the conduct must mirror a historical incident of slavery. Second, the conduct must pose a risk of causing the renewed legal subjugation of the targeted class.

The historical element provides an important link between the institution of slavery and modern conduct.<sup>315</sup> The restriction of slaves’ most elemental rights and liberties was at the core of the institution of slavery, and therefore it makes sense to look for conduct that infringes on those same rights or liberties. Indeed, a “badge” of slavery historically has been understood as an analogue to the actual legal incidents of slavery.<sup>316</sup> Because either public or private conduct can rise to the level of a “badge of slavery,”<sup>317</sup> exact duplication of the law of slavery is not required. Rather, regulated conduct must echo the slave codes by seeking to restrict some of the same rights and freedoms that were also restricted by official means under slavery.

Examples that satisfy this historical link abound. Jim Crow laws requiring racially segregated facilities in most areas of public life certainly echoed laws preventing slaves from traveling outside their plantations without the express permission of their masters.<sup>318</sup> Anti-miscegenation laws had direct parallels to slave-era laws that banned

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314 See, e.g., Joe R. Feagin, *Documenting the Costs of Slavery, Segregation, and Contemporary Racism: Why Reparations Are in Order for African Americans*, 20 HARV. BLACKLETTER L.J. 49 (2004) (discussing links between slavery and modern racial disparities).

315 As discussed in Part III.A, racial classes are not the only ones subject to the badges and incidents of slavery. Section 2 allows Congress to protect others who have been held in slavery or involuntary servitude. The question then would be whether the conduct in question has a link to their particular experience of involuntary servitude. However, given the prominence of race-based chattel slavery in our history, I will spend the rest of this discussion focusing on how to identify the “badges and incidents” of that particular type of slavery.

316 See *supra* notes 65–96 and accompanying text (discussing the meaning of “badge of slavery”).

317 See *supra* notes 138–47 and accompanying text (explaining the Supreme Court’s decision in *Jones v. Alfred H. Mayer Co.*).

318 See MORRIS, *supra* note 49, at 338 (discussing “pass laws”); see also Brief for the United States, *supra* note 115, at 15, 21 (claiming that the refusal of private businesses to serve African Americans effected a “[r]estraint upon the right of locomotion [which] was a well-known feature of the slavery abolished by the thirteenth amendment . . . [an] incident . . . of the very essence of the institution”).

slaves from marrying altogether.<sup>319</sup> Privately enforced racially restrictive covenants that barred African Americans from living in certain neighborhoods mirrored slave-era laws that barred slaves from entering contracts and owning real and personal property.<sup>320</sup> And racially motivated hate crimes, as the Second Circuit has found, “have a long and intimate historical association with slavery and its cognate institutions.”<sup>321</sup> Race-based private violence against slaves was decriminalized and continued in “staggering proportions in the immediate aftermath of the [Civil War]”<sup>322</sup> to dissuade “the exercise, by black Americans, of the rights and habits of free persons.”<sup>323</sup>

I agree that a historical link between modern conduct and slavery is a necessary component of the Section 2 calculus.<sup>324</sup> While necessary, though, the historical element is not sufficient because it does not adequately delimit the Section 2 power. If a historical tie to slavery, however attenuated, were the sole determinant of Congress’s power, that power would be broad indeed—a power to “define the infringement of . . . [any] righ[t] as a form of domination or subordination and thus an aspect of slavery, and proscribe such infringement as a violation of the Thirteenth Amendment.”<sup>325</sup> The other limiting principles I propose in this Article (i.e., that Congress may protect only racial groups and others formerly enslaved,<sup>326</sup> and may regulate only state and widespread private action)<sup>327</sup> might well narrow the range of conduct that Congress can address under Section 2.

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319 *Compare* Act of Feb. 9, 1881, ch. 3283, 1881 Fla. Laws 86 (making the maximum punishment for miscegenation a fine of \$1000), *invalidated by* *Loving v. Virginia*, 388 U.S. 1, 2 (1967), *with* Act of Feb. 14, 1866, ch. 556, 1866 Ky. Acts 37 (making the minimum punishment for miscegenation five years in prison), *invalidated by* *Loving*, 388 U.S. at 2, *and* *Estill v. Rogers*, 64 Ky. 62 (1866) (affirming that slaves lacked the capacity to marry prior to emancipation), *and* STROUD, *supra* note 47, at 41 (describing a Louisiana law barring slave marriage).

320 *Compare* STROUD, *supra* note 47, at 29–33 (describing various gathering laws that prohibited slaves from having legal property rights), *with* *Shelley v. Kraemer*, 334 U.S. 1, 4–5 (1948) (describing a racially restrictive covenant signed by property owners).

321 *United States v. Nelson*, 277 F.3d 164, 189 (2d Cir. 2002).

322 *Id.* at 190 (quoting ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877*, at 119 (1988)) (internal quotation marks omitted).

323 *Id.*

324 *See, e.g.,* *Williams v. City of New Orleans*, 729 F.2d 1554, 1577 (5th Cir. 1984) (en banc) (Wisdom, J., concurring in part and dissenting in part) (arguing that Congress can take remedial action if a present discriminatory effect on African Americans is connected to a discriminatory practice under the institution of slavery); Carter, *supra* note 34, at 1365–66 (explaining that badges or incidents of slavery must be connected to the effects of chattel slavery on African Americans in the modern era).

325 LAURENCE H. TRIBE, *1 AMERICAN CONSTITUTIONAL LAW* § 5-15, at 927 (3d ed. 2000).

326 *See supra* Part III.A.

327 *See supra* Part III.B.

However, the structural principles of federalism and separation of powers demand an additional limitation—beyond history—on the conduct that Congress can address under Section 2. The rationale behind the passage of the Civil Rights Act of 1866 illuminates the need for and function of this additional limitation.

The Civil Rights Act of 1866 demonstrates that the Thirteenth Amendment generation understood Section 2 to permit federal protection of core civil rights, not only because state laws infringing on those rights hearkened back to slavery, but also because the protection of those rights was an important means to the end of ensuring freedom and preventing the reimposition of slavery by a different name.<sup>328</sup> This prophylactic understanding of Congress's enforcement power, i.e., one that permits federal regulation of otherwise constitutional conduct in order to prevent constitutional violations,<sup>329</sup> serves important structural values. From a federalism perspective, it acknowledges a strong national power to protect federal rights without permitting it to devolve into an undifferentiated police power. From a separation-of-powers perspective, it safeguards the Supreme Court's role as the final arbiter of the meaning of Section 1 of the Thirteenth Amendment while respecting Congress's superior fact-finding capacity regarding the effects of certain discriminatory conduct.

To advance these structural values and respect the prophylactic nature of the Section 2 power, I propose adding a causal element to the enforcement analysis. In particular, to fall within the ambit of Congress's Section 2 power, I suggest that the conduct in question not only must have a historical link to slavery, but also must have serious potential to lead to future violations of Section 1 of the Thirteenth Amendment. In other words, even if one can draw a link between modern conduct and an incident of slavery, that conduct is only a "badge and incident of slavery" for Thirteenth Amendment purposes if it is sufficiently virulent or prevalent as to threaten the reemergence of slavery or involuntary servitude.<sup>330</sup>

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328 See McAward, *supra* note 15, at 143 & n.385 (citing CONG. GLOBE, 39TH CONG., 1ST SESS. 1118 (1866)) (noting that the Civil Rights Act of 1866 was justified in part because the rights conveyed would prevent reenslavement).

329 See *City of Boerne v. Flores*, 521 U.S. 507, 518–20 (1997) (explaining the nature of Congress's prophylactic enforcement power under the Fourteenth Amendment).

330 An alternative to regarding causation as a definitional element of the badges and incidents of slavery is to conceive of it as an independent limit on Congress's enforcement power—a way of measuring and ensuring a "fit" between the ends set out in Section 1 and the means chosen by Congress. See Jennifer Mason McAward, *McCulloch and the Thirteenth Amendment*, 112 COLUM. L. REV. (forthcoming 2012). Viewed either way, the fundamental

Virtually every commentator since *Jones* has assumed that the “badges and incidents of slavery” can refer to contemporary issues of injustice. Thus, many have engaged in efforts to “compare contemporary harms to past practices”<sup>331</sup> in an effort to identify the “lingering effects of slavery.”<sup>332</sup> However, this inquiry lacks a causal element. Focusing on the effects of historical slavery is distinctly different from focusing on the causes of slavery’s potential renewal. The former approach equates the concept of “badges and incidents” with that of the “relics” and “vestiges” of slavery.<sup>333</sup> However, the very point of the history and causation requirements articulated here is to keep those concepts distinct, and to ensure that Congress passes Section 2 legislation that is truly prophylactic.

The brief filed by Solicitor General Phillips in the *Civil Rights Cases* first suggested this causal element. Specifically, he argued that Section 2 permits Congress “to forbid any action . . . which in the light of our history may reasonably be apprehended to tend . . . to create an *institution . . . viz, custom &c.*” of involuntary servitude.<sup>334</sup> Even though this idea was not adopted by either the majority or dissenting opinions,<sup>335</sup> it provides a sensible and theoretically sound framework for analyzing Thirteenth Amendment legislation. It certainly would have been reasonable for Congress in 1866 to view the Black Codes as having both the purpose and effect of keeping the freed slaves in a state of powerlessness and virtual dependence on their former masters. Similarly, one can comprehend how, in 1875, Congress could have seen widespread public accommodations discrimination in the South as posing a real risk of the de facto resurrection of slavery. The immediacy of the experience of slavery, combined with the virulence of the response to emancipation, certainly suggested that the freed slaves were at substantial risk of having their contractual rights, as well as other fundamental liberties, abridged to the point that threatened their ability to participate in the basic transactions of civil society. And even in the early part of the twentieth century, Congress

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question would be the same: whether the conduct that Congress seeks to regulate threatens the reinvigoration of a state of slavery or involuntary servitude.

331 TESIS, *supra* note 34, at 118.

332 Carter, *supra* note 34, at 1319.

333 See *supra* notes 149–52 and accompanying text (contrasting the meaning of “badge” of slavery with the meaning of “relic” and “vestige” of slavery).

334 Brief for the United States, *supra* note 115, at 16.

335 This idea also has been overlooked in the more recent debates about the Section 2 power. It is one purpose of this Article to draw new attention to Phillips’ suggestion and evaluate its propriety and relevance in the current debates about the scope of the Section 2 power.

might reasonably have determined that Jim Crow laws and other widespread efforts to enforce racial segregation tended to threaten the reemergence of slavery or at least perpetuate the legal subjugation of African Americans. Thus, the Thirteenth Amendment could have provided a constitutional basis outside of the Commerce Clause for Congress to address the widespread, officially endorsed racial discrimination that characterized this nation from the post-Civil War period through the 1960s. Accordingly, under the framework articulated in this Article, the Civil Rights Acts of 1866, 1875, and even perhaps 1964 could satisfy the historical and causal elements of the Section 2 analysis.<sup>336</sup>

While the above may demonstrate that Congress underutilized its Thirteenth Amendment enforcement power in the Reconstruction and Jim Crow eras, the more pressing question is what, if any, modern applications the Section 2 power might have. The causation inquiry advocated here is a strict one. At this point in our nation's history, it is mercifully difficult to envision any racist act—alone or in combination—that abridges such fundamental liberties 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. Consider, for example, the most recent piece of Section 2 legislation. Do hate crimes pose a substantial risk that a particular racial class will be returned to slavery or involuntary servitude?<sup>337</sup> While Congress hypothetically could amass evidence to support such a finding, it has not done so to date.<sup>338</sup> Congress's findings in the bill indicate that racial hate crimes are widespread and virulent and mirror some of the incidents of slavery in their effect on victims' rights.<sup>339</sup> However, despite

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<sup>336</sup> As this paragraph implies, Congress is best situated to assess the potential risks and effects of discriminatory behavior. Ideally, therefore, Congress would build a record and make findings on this point that the Court could then review. *Cf.* *United States v. Lopez*, 514 U.S. 549, 563 (1995) (encouraging congressional findings that would enable the Court "to evaluate the legislative judgment that the activity in question substantially affected interstate commerce"). *Cf. also* *McAward*, *supra* note 330 (discussing the deference to which courts should accord such findings in the Thirteenth Amendment context).

<sup>337</sup> Although the hate crimes bill applies to crimes based on the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim, the only one of these characteristics relevant for Thirteenth Amendment purposes is race. *See supra* notes 3–7 and accompanying text (explaining that Congress invoked its enforcement power under Section 2 of the Thirteenth Amendment in passing the race aspect of the hate crimes bill).

<sup>338</sup> To be fair, Congress had no reason to make a record on this point. Its basic findings of fact would certainly satisfy the Court under the deferential standard set out in *Jones*.

<sup>339</sup> *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 4702, 123 Stat. 2190, 2835–36 (2009) (codified at 18 U.S.C. § 249) (finding that hate crimes are "serious, widespread, and interstate in nature" and "frequently savage[] the community

Congress's assertion that "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude,"<sup>340</sup> there is no specific finding linking racial hate crimes to a threatened reemergence of slavery or involuntary servitude.<sup>341</sup>

Perhaps this means that the concept of the "badges and incidents of slavery" refers to a nearly empty set. One could argue that this is the unavoidable consequence of remaining true to Supreme Court doctrine that Section 1 protects only against slavery and coerced labor<sup>342</sup> and to the prophylactic purpose of Section 2 legislation. Moreover, it is a testament to the effectiveness (and limited nature) of the Amendment: although courts have jurisdiction under Section 1 to deal with modern manifestations of slavery and involuntary servitude, Section 2's grant of prophylactic enforcement power to Congress is virtually obsolete.

For those who have called the Thirteenth Amendment enforcement power a modern "means for enforcing . . . [the nation's] foundational principles of liberty and general wellbeing"<sup>343</sup> this result would be highly upsetting. One possible way to retain the modern applicability of Section 2 might be to change the relevant timeframe of the causation inquiry. Professor Carter has taken this approach, identifying a badge and incident of slavery by asking whether the challenged conduct was "part of de jure and de facto attempts to return the freedmen to a condition of servitude and sub-humanity after formal emancipation."<sup>344</sup> In other words, even if particular conduct does not pose a risk of slavery today, it is a badge and incident of sla-

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sharing the traits that caused the victim to be selected," impede "[t]he movement of members of targeted groups," and prevent members of targeted groups "from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity").

<sup>340</sup> *Id.* at 2836.

<sup>341</sup> There are a few statements by witnesses and members of Congress that allude to restrictions of civil rights that flow from hate crimes. *See, e.g.*, 155 CONG. REC. H4945 (daily ed. Apr. 29, 2009) (statement of Rep. Nadler) ("[Hate crimes are] intended to say to members of a group, don't be who you are. Don't go where you're not wanted. Do not exercise your civil rights to be yourself, to speak publicly, to go wherever you want.") These statements, however, do not directly address the Thirteenth Amendment question.

<sup>342</sup> *See United States v. Kozminski*, 487 U.S. 931 (1988) (holding that psychological coercion is not enough to violate the rights guaranteed by Section 1 of the Thirteenth Amendment because that section should be narrowly construed to prohibit slavery and forced labor involving the use or threatened use of physical or legal coercion), *superseded by statute*, 18 U.S.C. § 1589 (2006).

<sup>343</sup> Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 309 (2004).

<sup>344</sup> Carter, *supra* note 34, at 1367.

very if, during the post-war and Reconstruction eras, it was part of the effort to reestablish a de facto slave system in the South.

This approach, however, conflates the historical requirement with the causation requirement. The relevant inquiry is whether, at the time Congress passes a law, it is constitutionally empowered to do so.<sup>345</sup> Because the Civil Rights Act of 1866 addressed state laws that sought to reimpose the incidents of slavery by restricting freed slaves' fundamental civil liberties, it was valid as passed. With respect to the new hate crimes bill, however, there are two relevant questions: whether racial hate crimes carry the potential to reenslave African Americans today and whether historically they were an aspect of the slave system. Congress is only entitled to pass hate crimes legislation today if both prongs of this inquiry are satisfied.

Another possible response to the concern that a heightened causation requirement would render the Section 2 power nugatory might be to relax that requirement by drawing metaphors from the concept of slavery. For example, instead of asking whether the conduct in question would "tend . . . to create an *institution* [of slavery or involuntary servitude],"<sup>346</sup> we could ask whether it has the potential to perpetuate the "relics" or "vestiges" of slavery or would tend to foment societal racial disparities. Such inquiries presumably would be much easier to satisfy—too easy to satisfy, in fact. Slavery and involuntary servitude are the touchstones of the Thirteenth Amendment enforcement power, not racial injustice writ large. In keeping with the prophylactic purpose of Section 2, Congress may not remove its focus too far from the reality of slavery when it attempts to classify conduct as a badge and incident of slavery.

Another possible metaphor that presents a closer call is to ask whether the conduct in question has the potential to return African Americans to "second-class citizenship."<sup>347</sup> Several have used this

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<sup>345</sup> See, e.g., *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (explaining that a court evaluating a statute must consider the legislative facts at the time the statute was enacted).

<sup>346</sup> Brief for the United States, *supra* note 115, at 16.

<sup>347</sup> Or to "civil slavery," defined by Virginia lawyer and abolitionist St. George Tucker as a state that

exists whenever there is an inequality of rights, or privileges, between the subjects or citizens of the same state . . . ; for the pre-eminence of one class of men must be founded and erected upon the depression of another; and the measure of exaltation in the former, is that of the slavery of the latter.

ST. GEORGE TUCKER, A DISSERTATION ON SLAVERY 16–17 (Negro Univs. Press 1970) (1796).

formulation in the Thirteenth Amendment context,<sup>348</sup> and I have already shown some flexibility in this direction, stating that the causation inquiry should target conduct that portends slavery, “threaten[s] [one race’s] ability to participate in the basic transactions of civil society,”<sup>349</sup> or returns a racial class to “legally subordinate status.”<sup>350</sup> In my view, each of these formulations comes much closer to capturing the essence of slavery and its aftermath, namely, the complete disenfranchisement of an entire race.<sup>351</sup> “Second-class citizenship”—understood in this vein—is another potential way to describe this state of powerlessness.

“Second-class citizenship,” however, is also sufficiently ambiguous that it could be interpreted to refer to racial disparities that do not, in fact, portend the actual legal subjugation of African Americans. Thus, allowing any metaphors to enter the “badges and incidents” inquiry poses the risk that Congress could use them as a backdoor way to expand the scope of Section 2 enforcement legislation. The key, it seems, is resisting the urge to take the “second-class citizenship” metaphor too far and insisting on a rigorous causation analysis. To determine whether a particular racial disparity or injustice is a badge or incident of slavery, Congress must assess the likelihood that, left unaddressed, the conduct in question 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.<sup>352</sup> The prophylactic nature of the Section 2 power demands no less.

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348 Judge John Minor Wisdom assumed the “second-class citizenship” metaphor applied in the Thirteenth Amendment context, stating that “the Wartime Amendments created an affirmative duty that the States eradicate all relics, ‘badges and indicia of slavery’ lest Negroes as a race sink back into ‘second-class’ citizenship.” *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 873 (5th Cir. 1966) (emphasis omitted).

349 *See supra* pp. 606, 626.

350 *See supra* p. 627.

351 Indeed, the *Civil Rights Cases* majority acknowledged that the Civil Rights Act of 1866 “vindicate[d] those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.” 109 U.S. 3, 22 (1883). Because the majority endorsed the 1866 Act as a valid use of the Section 2 power, this statement suggests the Court will uphold legislation that seeks to protect a certain subset of legal rights.

352 The precise metric by which Congress is to measure this risk, and the standard of review under which the Court is to review its findings, is beyond the scope of this Article.

## CONCLUSION

Since the *Civil Rights Cases* in 1883, it has been widely accepted that Section 2 of the Thirteenth Amendment gives Congress the power to enforce that amendment by legislating regarding the “badges and incidents of slavery.” There is, however, no similarly accepted understanding of what a badge and incident of slavery is. Indeed, *Jones v. Alfred H. Mayer, Co.* empowered Congress to define the concept for itself, subject to only the most minimal rational basis review.

The premise of this Article is that there must be—and, indeed, is—a more precise way to conceptualize and identify the badges and incidents of slavery. Drawing from the historical usage of the terms “badges of slavery” and “incidents of slavery” and from the structural principles that must govern any exercise of the Section 2 power, this piece considers the “badge and incident” concept from the perspective of victims, perpetrators, and hallmarks of conduct. Ultimately, this Article proposes that a badge and incident of slavery for Thirteenth Amendment purposes is public or widespread private action, based on race or previous condition of servitude, that mimics the law of slavery and has significant potential to lead to the de facto enslavement or legal subjugation of the targeted group.