Equality, Status, and Identity in American Constitutional Law

by

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Dedication

For my parents.

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Table of Contents

Abstract

In three essays I consider how American constitutional law might be refashioned according to status egalitarian principles. In "In Defense of Immutability," I take up the immutability criterion in 14th Amendment jurisprudence. In short, under the immutability criterion, social groups defined by the possession of an immutable trait receive heightened legal protection. Yet the Court has never clearly or persuasively defined "immutable," and most legal scholars now reject the immutability criterion as descriptively inadequate and morally implausible. In this chapter I offer a defense of the immutability criterion. In my view, the immutability criterion accurately captures an essential feature of unjust status hierarchies, namely, that dominant groups in a status hierarchy will tend to identify subordinate groups on the basis of stigmatized traits that possess a fixed social meaning. Equal Protection therefore requires the Court to look not to immutable physical or psychological traits but to the existence of immutable, stigmatized social identities. I conclude this Chapter by showing how my account of "social immutability" extends legal protection to traits such as language, hair, and gender presentation.

In "The Badges of Slavery Revisited," I consider Congress's authority under Section 2 of the 13th Amendment to abolish racial status hierarchy. Since at least the late 19th century Section 2 has been understood as granting Congress the authority to abolish the "badges and incidents" of slavery. Surprisingly, however, there has been little historical inquiry into the meaning of the badges metaphor. Recently, legal historians have argued that Congressional authority to remove the badges of slavery should extend only to practices that mirror chattel slavery. In fact, as I

argue in this Chapter, the badges metaphor was widely used in the antebellum period to condemn political subordination of many sorts, including misogynistic gender norms, exploitative labor relations, and segregation. Contemporary legal scholars who invoke the badges metaphor to condemn a wide variety of injustices, and not just those due to the legacy of chattel slavery, are thus correct in thinking that Section 2 remains an untapped font of legislative authority.

Finally, in "The Case for Unconditional Birthright Citizenship," I examine the moral justification for unconditional birthright citizenship. Contemporary egalitarians increasingly dismiss the practice as arbitrary and unjust; yet, in this essay I demonstrate that in multi-ethnic liberal democracies characterized by relatively high levels of immigration, unconditional birthright citizenship is necessary for creating a non-racialized, egalitarian national identity. Birthright citizenship expresses a fundamental legal commitment to incorporating, on equal terms, potentially vast demographic change into the body politic. Overall, I conclude that birthright citizenship has proven to be a deeply effective means by which to eliminate inherited status hierarchies and so deserves the support of contemporary egalitarians.

Introduction

Over the last twenty years egalitarians have paid increasing attention to inequalities of status among social groups. In my view, status egalitarians have persuasively demonstrated that egalitarian justice should be centered around abolishing unjust status hierarchies as opposed to simply redistributing material resources. But social status has many dimensions; though economic inequality and status inequality are surely mutually reinforcing, social status is not simply reducible to economic standing. Rather, unjust status hierarchies are supported by a broad range of public and private practices that do not themselves directly govern the distribution of material resources. Thus, while a fair distribution of material resources is plausibly a necessary condition for status equality, status inequalities cannot be rectified solely through the implementation of fair principles of distributive justice. Rather, if egalitarian principles of justice are to be realized, status egalitarian interventions must be responsive to particular status-enforcing practices within a variety of social and political domains.

In the following essays I take up the problem of status inequality in the context of American Constitutional law. More specifically, I consider some contemporary doctrinal puzzles in the Thirteenth and Fourteenth Amendments and attempt to provide status egalitarian solutions. Though status egalitarian principles, I believe, may be brought to bear on all aspects of the law, I am particularly interested in these Amendments because of the obvious affinities between status egalitarian principles and the animating ideals of the Reconstruction era. During Reconstruction, reformers spoke openly and incisively about status inequality, about the nature

and operation of the American racial caste hierarchy and, about the necessity of uprooting this system for good. In his public lecture, "The Question of Caste," for example, Charles Sumner, provides a compelling analysis of racial stigmatization, group identity, and entrenched status inequality. In Sumner's view, the American racial caste system operates by attaching various burdens and disabilities to groups arbitrarily identified by skin color. These burdens and disabilities are then "inherited" by subsequent generations, such that, over time, low status groups come to occupy a permanent subordinate status. Though his analysis is perhaps too narrow – skin color is but one signifier used to identify low status groups, as he surely would have recognized – Sumner's overall depiction of the American racial caste system has not dulled over time.

Indeed, as I argue in the first essay, "In Defense of Immutability," low status ascriptive racial identities are a key driver of status inequality. Moreover, law and legal institutions play a key role in creating and sustaining these identities. As I discuss in this essay, the Equal Protection clause of the 14th Amendment recognizes that subordinate groups are typically stigmatized or otherwise burdened on the basis of "immutable" characteristic that is taken to define that group's identity. According to the immutability criterion, social groups defined by the possession of an immutable trait thus should receive heightened legal protection. Yet the Court has never clearly or persuasively defined "immutable," and most legal scholars now reject the immutability criterion as descriptively inadequate and morally implausible. In this chapter I offer a defense of the immutability criterion. In my view, the immutability criterion accurately captures an essential feature of unjust status hierarchies, namely, that dominant groups in a status hierarchy will tend to identify subordinate groups on the basis of stigmatized traits that possess a fixed social meaning. Equal Protection therefore requires the Court to look not to immutable

physical or psychological traits but to the existence of immutable, stigmatized social identities. I conclude this Chapter by showing how my account of "social immutability" extends legal protection to traits such as language, hair, and gender presentation.

In the second essay, "The Badges of Slavery Revisited," I extend this analysis of identity and group signifiers to Section 2 of the Thirteenth Amendment. Since at least the late 19th century Section 2 has been understood as granting Congress the authority to abolish the "badges and incidents" of slavery. Surprisingly, however, there has been little historical inquiry into the meaning of the badges metaphor. Recently, legal historians have argued that Congressional authority to remove the badges of slavery should extend only to practices that mirror chattel slavery. In fact, as I argue in this Chapter, the badges metaphor was widely used in the antebellum period to condemn political subordination of many sorts, including misogynistic gender norms, exploitative labor relations, and segregation. Contemporary legal scholars who invoke the badges metaphor to condemn a wide variety of injustices, and not just those due to the legacy of chattel slavery, are thus correct in thinking that Section 2 remains an untapped font of legislative authority.

In the final essay, I turn to questions of national identity and social belonging. In "The Case for Unconditional Birthright Citizenship," I examine the moral justification for birthright citizenship. Contemporary egalitarians increasingly dismiss the practice as arbitrary and unjust; yet, in this essay I demonstrate that in multi-ethnic liberal democracies characterized by relatively high levels of immigration, unconditional birthright citizenship is necessary for creating a non-racialized, egalitarian national identity. Birthright citizenship expresses a fundamental legal commitment to incorporating, on equal terms, potentially vast demographic change into the body politic. Overall, I conclude that birthright citizenship has proven to be a

deeply effective means by which to eliminate inherited status hierarchies and so deserves the support of contemporary egalitarians.

Chapter 1:

In Defense of Immutability

Introduction

In *Obergefell v. Hodges*, Justice Kennedy observes that homosexuality is "both a normal expression of human sexuality and immutable."[1] Because homosexuality is immutable, Kennedy argues, same-sex marriage is the only recourse for gay individuals who seek the "profound commitment" that marriage offers.[2] Kennedy does not define immutability, nor does he explain why immutability is relevant to equal protection. Nevertheless, his statement places *Obergefell* squarely within a class of cases that, over the past fifty years, has dramatically expanded the scope of antidiscrimination law.[3] If *Obergefell* is any indication, the concept of immutability continues to play a substantial role in the Court's equal protection analysis.

At the same time, immutability is a perennial target of scholarly criticism. The immutability criterion has been attacked as, among other things, conceptually confused, over-inclusive, under-inclusive, irrelevant, and stigmatizing.[4] As Kenji Yoshino argued decades ago,

[1] 135 S. Ct. 2584, 2596 (2015).
[2] *Id.* at 2594.
[3] *See infra* Part I.
[4] *See infra* Parts I.B. and I.C.

"academic commentary seems univocal in calling for [the immutability criterion's] retirement."[5] More recent scholarship has largely borne out Yoshino's observation.[6] Indeed, since *Obergefell* calls to abandon the immutability criterion have continued apace.[7]

Yet there are good reasons to resist such calls. First, it is hard to deny that wrongful discrimination most often targets individuals on the basis of individual traits that are deeply difficult to change; as a conceptual tool for addressing wrongful discrimination, the immutability criterion thus is roughly on the right track. Moreover, it is unclear that scholars have identified a suitable replacement for the immutability criterion; indeed, some proposals seem bound to raise even thornier problems.[8] Abandoning the immutability criterion without a suitable replacement would dramatically weaken equal protection doctrine, an outcome that neither critics nor proponents of immutability should welcome.

The immutability criterion should not be rejected; but it must be reformed. In this paper I propose a new conception of immutability, which I call "social immutability." As I discuss in Part I, legal scholars and jurists have traditionally conceived of immutability as referring to individual traits that are physically or psychologically unchangeable. By contrast, on the social conception of immutability, courts should not attempt to identify traits that are immutable in

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[5] *See* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 518 (1998) (noting that "academic commentary seems univocal in calling for [the immutability criterion's] retirement"); Susan R Schmeiser, "Changing the Immutable," CONN. L. REV. 41 (2008): 1511. (observing that "[s]cholars argued convincingly in the 1990s that courts should discard immutability as a requirement for heightened scrutiny, compiling instances where courts already had done so") (citations omitted); MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (Oxford University Press, 2010), 118-22 (arguing that "the legal notion of immutability is confused").

[6] *See* Schmeiser, *supra* note 5.

[7] *See* Jessica A Clarke, "Against Immutability," YALE L.J. 125, 1 (2015).

[8] For example, *compare* Clarke, *supra* note 7 (arguing that the immutability criterion ought to be rejected in favor of expanded Title VII remedies such as statutory disparate impact standards) *with* Richard Primus *Of Visible Race-Consciousness and Institutional Role: Equal Protection and Disparate Impact After Ricci and Inclusive Communities*, *in* TITLE VII OF THE CIVIL RIGHTS ACT AFTER 50 YEARS: PROCEEDINGS OF THE NEW YORK UNIVERSITY 67TH ANNUAL CONFERENCE ON LABOR, JUNE 5-6, 2014 295 (2015) (noting that statutory disparate-impact standards are likely to survive only "in truncated form, as compared to what they once were").

either sense. Instead, courts should focus on the immutability of particular social *signifiers*. As I explain below, a social signifier is any observable property or relation commonly used to sort individuals into different social groups. Traits associated with race or sex are social signifiers. But many other properties and relations may also signify group membership, including hairstyle, gender expression, language, and much else.[9] On the social conception of immutability, a signifier is immutable when it possesses a low social status that persists throughout various social and political domains, regardless of the underlying nature of the signifier in question.[10]

In Section II I unpack the social conception of immutability. The social conception of immutability comprises two components: a descriptive account of trait-based discrimination and a normative account of equal protection. In II.A. I introduce the empirical work that underlies the descriptive account of trait-based discrimination. This work indicates that in settings characterized by group inequality individuals will tend to be assigned to high or low status social groups on the basis of observable signifiers. Often these signifiers will be very difficult to change; however, this will not necessarily be true of all such signifiers. It is more apt to think of group signifiers as 'fixed,' in the sense that, regardless of their biological or psychological bases, and regardless of how difficult they are to change, these signifiers possess a relatively stable social meaning that persists throughout various social and political domains. When a group

[9] *See infra* Section IV.

[10] While my view is novel, it is not entirely without precedent. *See*, *e.g.*, Samuel Marcosson, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 681 (2001) (arguing that, because, immutable characteristics are "socially constructed," the immutability criterion ought to cover characteristics "experienced by individuals within [a] culture as immutable"). By contrast, my account is concerned with ascriptive social identities, not with first-personal, subjective experience. Moreover, I do not claim that all characteristics that fall under the immutability criterion are socially constructed. *See infra* Part II.A. Richard Ford offers an account of "socially immutable" characteristics. *See* RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE 102 (2005). However, my account differs significantly in that I offer an empirical account of the social processes that generate immutable characteristics and defend changes to equal protection that Ford opposes. *See infra* IV.B. Finally, Jack Balkin connects immutability to status and stable social meaning. *See* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. (1997). His work, however, predates important doctrinal developments that my view explains and justifies.

signifier possesses a stable social meaning, individuals who bear the signifier can be reliably identified as belonging to a high or low status group. Low status individuals will then face discrimination on the basis of the low status group signifiers that they bear.

I then discuss, in II.B., the normative principles underlying the social conception of immutability. Drawing on recent developments in moral philosophy, I argue that relational egalitarianism provides a compelling normative basis for the immutability criterion. For relational egalitarians, justice requires that the state work to disestablish unjust group hierarchies. Relational egalitarianism thus shares much conceptual overlap with equal protection doctrine, which has long been construed as forbidding class and caste hierarchy. While relational egalitarians have not focused specifically on legal doctrine, relational egalitarian insights are directly relevant to the immutability debate. For example, relational egalitarian arguments suggest that, for the purposes of equal protection analysis, it is largely irrelevant whether immutable traits are biological or psychological in origin, or whether they are due strictly to accidents of birth or involve individual choice in some respect. Rather, on this view, any fixed social signifier that is associated with low status groups and that is used to deny members of low status groups access to material resources or high status institutions, relationships, and occupations, warrants protection under the immutability criterion.

In the remainder of the paper I consider the relationship between the social conception of immutability and legal doctrine. In Section III I argue that social immutability is consonant with existing 13th and 14th Amendment jurisprudence. In a number of areas – specifically, animus and stigma jurisprudence under the 14th amendment and the "badges of slavery" reading of the 13th amendment – equal protection requires that courts extend special solicitude to easily identifiable, low status social groups. The social conception of immutability similarly directs courts to pay

particular attention to the ways in which members of low status groups are wrongfully singled out. One substantial virtue of the social conception of immutability is that it provides a unified account of these seemingly disparate aspects of Constitutional antidiscrimination law.

Finally, in Section IV, I show how the social conception of immutability resolves existing controversies within Equal Protection doctrine surrounding gender expression, hair, and language. By relying on the traditional understanding of immutability, courts have issued a series of conflicting and confused rulings in each of these areas. The social conception of immutability, by contrast, provides a coherent rationale for extending 14th amendment protection to individuals who face discrimination on the basis of these signifiers. Overall, I demonstrate in the latter half of this Article that social immutability is central to understanding the past and shaping the future of antidiscrimination law.

I. The Immutability Criterion

In this Section I discuss the origins and development of the immutability criterion. The Court has never offered a complete definition of immutability, and scholars have offered a variety of reconstructive accounts. Additionally, the immutability criterion has evolved over time to incorporate multiple factors. It is therefore helpful to think of contemporary immutability as a synthesis of two distinct standards, which I shall refer to as "old" immutability and "new" immutability.[11]

A. Old Immutability

The Court first set forth the immutability criterion in *Frontiero v. Richardson*.[12] In *Frontiero*, a married female Air Force officer sought to obtain for her husband and for herself

[11] This framing follows Clarke, supra note 7 at 13-27.
[12] 411 U.S. 677, (1973).

various government benefits, which required the officer to claim her husband as a "dependent."[13] Under federal law a married serviceman could claim his wife as a dependent without providing proof of her dependence, whereas a married servicewoman could only claim her husband as a dependent after proving that he in fact relied upon her for over half of his financial support. In defense of the law, the military argued that, because wives are much more often financially dependent upon their husbands, it would be administratively convenient to require only servicewomen to prove the dependence of their partners.[14]

Holding that the law constituted unconstitutional discrimination against servicewomen, the Court argued:

> "[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . ."[15]

The Court here characterizes sex as immutable based on its similarity to race. But this simply raises further questions: how does the Court understand race? And in which respects, in the Court's view, is sex like race?

Perhaps, in the Court's view, race and sex are alike in that traits associated with race or sex are biologically heritable and unchangeable. Immutability, on this interpretation, would refer to biologically heritable and unchangeable traits. However, there are two problems with this reading. First, it is unclear at best that American courts historically have viewed race as biologically heritable. Certainly the theory of hypodescent undergirding various state racial

[13] *Id.* at 678.
[14] *Id*. at 688.
[15] *Id*. at 686.

classifications – from North Carolina's "one drop" rule to Virginia's one-fourth rule – indicated that some legislators considered race to be in some sense biologically heritable. Yet throughout the 19th century and into the early 20th century courts generally avoided endorsing a strictly biological account of race.[16] Instead, it was often left to local institutions and local actors to define and enforce racial categories.[17] Courts "consistently held that juries…should have great discretion in finding the "facts" of race," which included an individual's behavior, dress, and social associates.[18] Thus, if we are to rely on the Court's historical understanding of race, immutability does not necessarily refer to biologically heritable traits.

Second, national origin, alienage, and illegitimacy are among the class of immutable traits that trigger heightened scrutiny.[19] National origin, alienage, and illegitimacy, however, are plainly not biologically heritable. Rather, these traits are matters of social and political fact. This stands in marked contrast to the Court's later refusal to grant protected class status to other traits, such as certain forms of mental disability, that at least in some cases *are* biologically heritable.[20] As Cass Sunstein has pointed out, it seems that biological heritability is neither necessary nor sufficient for meeting the immutability criterion.[21]

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[16] Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375 (1999).
[17] *Id*. at 1381.
[18] *See also* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 117-133 (noting that "courts consistently held that juries should be allowed to see and hear the widest array of evidence and should have great discretion in finding the "facts" of race," such as an individual's behavior, dress, and social associates).
[19] Parham v. Hughes, 441 347, (Supreme Court). (noting that "the presumption of statutory validity may also be undermined when a State has enacted legislation creating classes based upon certain other immutable human attributes," including national origin, alienage, and illegitimacy) (citations omitted).
[20] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (refusing to recognize the mentally disabled as a "quasi-suspect class").
[21] Cass R Sunstein, *The anticaste principle*, 92 MICHIGAN LAW REVIEW, 2443 (1994).

Perhaps instead the *Frontiero* Court simply meant that an immutable trait is a trait that is, for whatever reason, impossible to shed.[22] Yet note that the *Frontiero* Court's definition of immutability also includes explicitly *normative* criteria. According to the *Frontiero* Court, discrimination on the basis of an immutable trait violates the principle that "legal burdens should bear some relationship to individual responsibility."[23] Discrimination on the basis of race or sex is unfair, on this view, because such discrimination burdens individuals on the basis of traits that they did not choose to adopt. Of course, whether an individual should be held responsible for possessing a particular trait has no bearing upon whether the trait itself is impossible to change. The former question concerns moral or legal norms, whereas the latter concerns the nature of the trait itself. A coherent understanding of immutability therefore must make sense of both the empirical and the normative criteria that indicate for the Court whether a particular trait satisfies the immutability criterion.

According to the old immutability criterion, then, a trait is immutable if it meets two conditions. First, the trait must be such that an individual is powerless to escape it or set it aside. Second, an individual must bear no moral responsibility for possessing the trait; the trait must be, in the language of *Frontiero*, an "accident of birth." As the *Frontiero* Court notes, this second condition reflects a moral concern, namely, that individuals should not be burdened on the basis of traits that they did not choose and cannot change.

B. Against Old Immutability

[22] *Cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 360 (1978) (Brennan, J., concurring in part and dissenting in part) (asserting that an immutable trait is simply a trait that an individual is "powerless to escape or set aside").
[23] *See supra* note 12 at 686 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175) (1972).

In the decades after *Frontiero* legal scholars advanced a number of influential criticisms of old immutability. As these criticisms are by now fairly well known, I shall only briefly canvas their main points. It is important to survey these criticisms, however, because, as I discuss below, while courts responded by adopting a new conception of immutability, it is doubtful that the new conception of immutability is a sufficient corrective.

According to Kenji Yoshino, old immutability is "both over- and underinclusive."[24] It is over-inclusive because "it is impossible for society to operate without discriminating on the basis of some immutable characteristics."[25] For example, suppose that height or intelligence are immutable characteristics. If immutable traits deserve protection, then the immutability criterion requires that Courts submit to heightened scrutiny legislation that differentially affects individuals on the basis of height or intelligence. Yet this is an implausible construal of equal protection. Expanding the scope of equal protection to all immutable traits, as the immutability criterion seemingly requires, opens the floodgates to new equal protection claims. Moreover, it is implausible that equal protection, which has traditionally been understood as forbidding "caste and class" legislation, should include within its scope traits such as height or intelligence, since individuals who differ in these traits do not constitute separate castes or classes.

In *Frontiero*, the Court acknowledged this point, suggesting that some immutable characteristics, such as intelligence or physical disability, do not receive protection because, unlike race or sex, intelligence and physical disability may be relevant to job performance or to one's ability to contribute to society.[26] As John Hart Ely pointed out, however, this suggests that immutability is not actually a factor in the Court's equal protection analysis; rather, it is

[24] *See* Yoshino, *supra* note 5 at 504.
[25] *Id*.
[26] *See supra* note 12 at 686-7.

relevance to legislative purpose that is truly important for determining when legislation wrongfully burdens a particular class of individuals.[27] The Court's answer to the over-inclusiveness objection, in other words, effectively vitiates immutability as a component of equal protection analysis.

According to the under-inclusiveness objection, the immutability criterion rests on the assumption that "legislation is less problematic if it burdens groups that can assimilate into mainstream society by converting or passing."[28] That is, the immutability criterion seemingly permits wrongful discrimination against individuals or groups, so long as these individuals or groups are able to hide or shed their distinctive traits, such as gays or religious minorities. Yet permitting such discrimination would inflict a number of serious harms upon targeted groups.

Ultimately it is unclear why the wrongfulness of discrimination should turn on whether a particular trait is mutable or immutable. As Laurence Tribe has pointed out, "even if race or gender became readily mutable by biomedical means, I would suppose that laws burdening those who chose to remain black or female would properly remain constitutionally suspect."[29] Here, again, immutability seems at best indirectly relevant to the wrongfulness of discriminatory legislation.

Another line of attack takes aim at the moral principle underlying old immutability. Recall that, according to the *Frontiero* Court, the immutability criterion protects individuals who are blameless for possessing stigmatized, immutable traits.[30] But what about individuals who consciously choose to take on stigmatized traits? As Jessica Clarke argues, the fairness principle

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[27] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST, 150 (1980).
[28] *See* Yoshino, supra note 5 at 501. *See also* Janet Halley, *Sexual Orientation and The Politics of Biology: A Critique of the Argument From Immutability"(1994) 46*, 3 STAN L REV, 509. (observing that "the characteristics that define anonymous and diffuse groups are often acutely mutable, especially when they can be hidden").
[29] Laurence Tribe, The Puzzling Persistence of Process Based Constitutional Theories, 89 YALE L.J. 1063, at 1074 n.52
[30] *Id*. at 686.

in *Frontiero* suggests that such individuals are to some extent morally culpable for their own misfortune and so are not owed legal protection.[31] Individuals who are responsible for possessing certain stigmatized traits may choose to "to dissemble about their status, conceal the trait, or avoid seeking needed assistance," lest they be subjected to permissible discrimination.[32] Yet this outcome seems likely only to further stigmatize members of subordinate groups. Overall, by focusing on the individual responsibility of victims of discrimination, the old immutability criterion "deflect[s] attention from questions about whether those in power have legitimate reasons for imposing moralizing judgments on citizens or employees."[33]

C. From Old Immutability to New Immutability

Partly in response to the criticisms of old immutability, in a number of post-*Frontiero* cases courts revised the immutability criterion. The new immutability criterion focuses less on accidents of birth, emphasizing instead the relationship between immutable traits, personal identity, and liberty. New immutability first gained judicial recognition in *Watkins v. U.S. Army*.[34] At issue in *Watkins* were new army regulations requiring the dismissal of all homosexual personnel. The case was brought by former U.S. Army Sergeant Perry J. Watkins, who had marked "yes" on a pre-enrollment medical form in response to a question regarding whether he had "homosexual tendencies."[35] Acting pursuant to the new regulations, the army discharged Sergeant Watkins and refused his reenlistment.

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[31] Kenji Yoshino refers to this general problem as the "assimilationist bias" of the immutability criterion. *See* Yoshino, *supra* note 5, at 490.
[32] *Id*. at 21.
[33] *See* Clarke, *supra* note 7, at 20.
[34] Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1988).
[35] *Id*. at 701.

Watkins challenged the discharge and reenlistment regulations on the grounds that they invidiously discriminated against individuals on the basis of sexual orientation.[36] Moreover, he argued, because homosexuals constitute a suspect or quasi-suspect class, the Army regulations must be submitted to strict scrutiny.[37] The Ninth Circuit Court of Appeals, finding for Watkins, accepted all three claims and concluded that the regulations failed strict scrutiny analysis.[38]

I shall gloss over the details of the opinion in order to focus on the court's conception of immutability. Canvassing previous accounts of immutability, Judge Norris, the opinion's author, notes that "by "immutability" the Court has never meant…that members of the class must be physically unable to change or mask the trait defining their class."[39] As Norris points out, non-white individuals may "pass" as white or even undergo pigment injections to effectively change their racial identity. Thus, while race is the paradigm case of immutability, at least some traits associated with race are, in fact, mutable. Similarly, Norris writes, "it may be that some heterosexuals and homosexuals can change their sexual orientation through extensive therapy, neurosurgery or shock treatment."[40] Norris's point is that if immutability is understood strictly, nothing is truly immutable, in which case the immutability criterion is worthless.

However, Norris argues, the conception of immutability contained in prior case law can be read in "a more capacious manner" as having been based not on physical immutability, strictly speaking, but upon the personal effects of changing certain deeply held traits.[41] According to Norris, "immutability" refers to "those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change

[36] *Id*. at 712.
[37] *Id*.
[38] *Id*. at 728-31.
[39] *Id*. at 726.
[40] *Id*.
[41] *Id*.

them, regardless of how easy that change might be physically."[42] Norris concludes that under this definition sexual orientation is an immutable characteristic.[43]

Some evidence suggests that the Supreme Court has adopted the new immutability criterion. For example, Kennedy's majority opinion in *Obergefell* begins with the claim that the Constitution grants certain rights "that allow persons, within a lawful realm, to define and express their identity."[44] For gay couples, Kennedy claims, "their immutable nature dictates that same-sex marriage" is the only way to exercise this liberty.[45] Here Kennedy ties together liberty and privacy with the right to foster and maintain certain core features of one's personal identity, themes familiar from Norris's majority opinion in *Watkins*. In light of Kennedy's opinion in *Obergefell*, it seems plausible that new immutability will constitute an important part of equal protection doctrine going forward.

Nevertheless, many legal scholars remain critical of the immutability criterion as a component of equal protection analysis. First, while new immutability shifts the focus from unalterable, physical traits to identity-related traits that are especially difficult to change, new immutability still takes into account whether an individual is responsible for possessing certain stigmatized traits. Thus, new immutability calls for "the same moralizing judgments as the old immutability."[46]

A good example of this problem can be seen in *Varnum v. Brien*, a pre-*Obergefell* gay marriage case.[47] In *Varnum*, the Iowa Supreme Court noted that the new immutability criterion allows for a separation of "truly victimized individuals from those who have invited

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[42] *Id*.
[43] *Id*.
[44] Obergefell 135 S. Ct. 2584, at 2593.
[45] *Id*. at 2594.
[46] *See* Clarke, *supra* note 7, at 35 (citation omitted).
[47] 763 N.W.2d 862 (Iowa 2009).

discrimination by changing themselves so as to be identified with the [stigmatized] group."[48] As Clarke rightly points out, the *Varnum* holding requires "stigmatizing judgments about who is "truly" victimized, based on whether a victim might have been able to change, hide, or downplay a disfavored characteristic."[49] According to the reasoning in *Varnum*, for example, a man who chooses to dress in traditionally feminine attire and who faces discrimination on this basis is not truly victimized, given that these aspects of his social presentation are matters of choice. But this is hardly a defensible result. Surely wrongful discrimination does not become permissible simply because its target has chosen to be identified with a stigmatized group.

New immutability also fails to protect individuals whose stigmatized traits are *in*essential to their personal identity. For example, Justice Blackmun, dissenting in *Bowers v. Hardwick*, notes that "[h]omosexual orientation may well form part of the very fiber of an individual's personality."[50] For Blackmun, this meant that the state could not punish homosexual individuals merely because of their status as homosexuals. Yet some individuals may be ambivalent or apathetic about the traits that supposedly form the fiber of their personality.[51] Some homosexual individuals, for instance, might believe that their homosexuality is not essential to their personal identity. Either the contemporary immutability criterion does not protect these individuals, or the Court must hold that, despite their protestations to the contrary, these individuals are in fact defined by their traits. But this, too, is an implausible result. Homophobic legislation presumably violates equal protection regardless of the personal identities of its victims, and

[48] *Id*. at 893.
[49] *See* Clarke, *supra* note 7, at 35 (citation omitted).
[50] 478 U.S. 186, 202 n.2 (1986).
[51] *See* Clarke, *supra* note 7, at 41 (arguing that the immutability criterion fails to cover traits "that individuals would prefer to disclaim as constitutive of their authentic selves, and those traits that individuals would prefer to change due to shame or stigma").

individuals should not be forced to accept the Court's definition of their personal identity in order to receive protection from wrongful discrimination.

Overall, new immutability fails as a replacement for old immutability. At the same time, however, it is difficult to ignore the tension to which I alluded in the Introduction, namely, that while scholarly critiques of immutability continue to "fill volumes,"[52] the Court's actual uses of the immutability criterion have been, on the whole, utterly defensible. In fact, what the academic criticisms surveyed above reveal is not that the immutability criterion should be abandoned but that the Court's immutability analysis requires a better empirical account of trait-based discrimination and a more plausible normative justification for the immutability criterion as a component of equal protection. I take up these desiderata in the following Section.

II. Social Immutability

In this Section I present a new conception of immutability, which I call "social immutability." In II.A. I set forth the empirical work that underlies my account of trait based discrimination. In II.B. I discuss the normative justification for the immutability criterion as a component of equal protection. First, though, I must be clear about the concepts and terminology used throughout the rest of the paper. Equal Protection jurisprudence is replete with references to immutable 'traits' and 'characteristics,'[53] terms often understood as referring to

[52] *See* Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1418-19 (2014).

[53] *See, e.g.*, Frontiero v. Richardson 411 U.S. 677, 686 (1973) (asserting that "sex, like race and national origin, is an immutable characteristic." Quoting Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 175 (1972)) (plurality opinion) (1973).); *see also* Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 472 n.24 (noting that "many immutable characteristics, such as height or blindness, are valid bases of governmental action and classifications under a variety of circumstances"); *see also* Plyler v. Doe, 457 U.S. 202, 220 (1982). (denying that "undocumented status an absolutely immutable characteristic").

settled features of individuals that are in some sense biologically or psychologically fixed.[54] However, I aim to defend a conception of immutability that is agnostic with regard to individual biology and psychology. To avoid the scientific connotations of 'trait' and 'characteristic' I shall therefore use the term 'social signifier.'

I define as a social signifier any observable property or relation in which the individual is involved, commonly used to sort individuals into groups. The function of a social signifier, as I am defining the concept, is to convey information about the various social groups to which an individual belongs. The groups to which an individual belongs comprise that individual's social identity.

Social signifiers may be visible characteristics of the body, such as skin color or hair texture. But social signifiers acquire their meaning as a matter of intersubjective recognition, and so a variety of properties or relations can come to be associated with different social groups. Social signifiers may comprise properties or relations such as speech patterns,[55] names,[56] addresses,[57] and much else.[58]

Social signifiers also convey information about the status of the social groups to which the individual belongs. Broadly speaking, the predominate social beliefs about various groups can be expected to take the following form: members of low status social groups will be

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[54] Merriam-Webster, for example, includes the following definition: "Trait. (n.d.). 1.a: a distinguishing quality (as of personal character) curiosity is one of her notable traits; b: an inherited characteristic." *Trait*. Webster's Third New International Dictionary, Unabridged. (2018).

[55] *See* Benjamin Munson & Molly Babel, *Loose Lips and Silver Tongues, or, Projecting Sexual Orientation Through Speech*, 1 LANGUAGE AND LINGUISTICS COMPASS 416, 420 (2007) (reviewing studies on perceived differences between gay, lesbian, and straight patterns of speech, the authors note the "growing consensus in the fields of laboratory phonology, psycholinguistics, and sociolinguistics that individuals invoke social expectations and social stereotypes when processing language").

[56] Michael Lavergne & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 998 (2004) (demonstrating that fictitious job applicants given first names typically associated with African-Americans receive fewer employer callbacks than fictitious job applicants given first names typically associated with whites).

[57] *Id*. at 1003.

[58] *See infra* Section IV.

stereotyped as characteristically possessing vices, disabilities, dispositions to act in morally discreditable ways, or other social deficiencies.[59] Members of high status social groups will be stereotyped as characteristically possessing virtues, capabilities, dispositions to act in morally creditable ways, or other social competencies.[60] Social signifiers associated with particular groups will then take on the moral valence of the stereotypical characteristics associated with that group.[61]

With this understanding of social signifiers in mind it is possible to distinguish broadly between two types of wrongful discrimination.[62] The first type consists of bare hostility towards members of a particular group.[63] The second type consists of differential treatment of individuals who bear low status social signifiers. An employer, for example, might refuse to hire

[59] Susan T Fiske, et al., *A model of (often mixed) stereotype content: Competence and warmth respectively follow from perceived status and competition (2002)*, *in* SOCIAL COGNITION 78, (2018). (reviewing literature demonstrating that low status groups are typically viewed as "openly parasitic (i.e., opportunistic, freeloading, exploitative)" as well as "hostile and indolent").

[60] *See* Peter A. Caprariello, Amy J.C. Cuddy, and Susan T. Fiske, "Social Structure Shapes Cultural Stereotypes and Emotions: A Causal Test of the Stereotype Content Model," GROUP PROCESSES & INTERGROUP RELATIONS 12, no. 2 (2009): (providing an overview of studies demonstrating that members of high status groups tend to be stereotyped as possessing above average competence).

[61] Note that the same characteristic can be differently valenced depending upon the social identity of the individual taken to bear the characteristic. White male executives who display anger were afforded higher status or salary relative to white male executives who did not, whereas black male executives were more likely to be rewarded for displaying characteristics associated with warmth. *See* Robert W Livingston & Nicholas A Pearce, *The Teddy-Bear Effect: Does Having a Baby Face Benefit Black Chief Executive Officers?*, 20 PSYCH. SCI. 1229 (2009). Likely this is because of the common stereotype associating black facial features with aggression and perceived aggression in black men with violence. *See* Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 PSYCH. SCI. 342, 345 (2004) (concluding that "[w]hen [racially ambiguous] faces were seen to display relatively hostile expressions (stereotypic of African Americans), individuals high in prejudice tended to categorize them as African American"); *see also* Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits Of Stereotyping of Blacks*, 34 JOURNAL OF PERSONALITY AND SOC. PSYCH. (1976) (finding support for the hypothesis "that the threshold for labeling an act as violent is lower when viewing a black committing the same act").

[62] To be clear, this is not meant to be an exhaustive account of the types of discrimination individuals or groups may face. My account of discrimination focuses solely on trait-based discrimination, as opposed to other forms, e.g., exclusion of minority groups from the political process. I thank Scott Hershovitz for encouraging me to clarify this point.

[63] Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) (arguing that "if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"). I discuss the relationship between the social conception of immutability and animus doctrine in Part III.A.

an individual who bears a low status social signifier, on the grounds that the signifier reliably indicates (in the employer's eyes) the possession of morally discreditable characteristics that fail meritocratic hiring criteria.

This change in terminology marks substantive differences between the social conception of immutability and current doctrine. First, current doctrine assumes that group boundaries simply fall out of natural differences in biologically or psychologically fixed traits. However, distinctions drawn between social groups often have no basis in the biological or psychological study of human traits and characteristics. Even in cases where a group boundary roughly tracks some empirically determinate difference, the social meaning of the boundary is often deeply conditioned by historical practices, material inequalities, cultural norms, folk knowledge, etc.[64]

On my view, group signifiers possess a social functional role: they are indicators of social boundaries. Importantly, group signifiers can perform this function regardless of whether they are physically or psychologically unchangeable. Indeed, the underlying nature of group signifiers is irrelevant here. To maintain the boundaries between high and low status groups, it is simply necessary that a sufficient number of individuals associate a particular signifier with a particular social group and believe that this signifier cannot be changed; or, that members of low status groups are unwilling to shed the signifier, which is itself taken to be a morally discrediting fact about such individuals. Ultimately, as the social psychologist Henri Tajfel observes, "[t]he only "reality" tests that matter with regard to group characteristics are tests of social reality."[65] In other words, group signifiers and social boundaries will tend to be real to the extent that

[64] As Charles Tilly notes with regard to gender boundaries, for instance, "[t]hey correspond approximately to genetically based variations in physiology, yet they incorporate long historical accumulations of belief and practice." CHARLES TILLY, DURABLE INEQUALITY 64 (1998).
[65] HENRI TAJFEL, HUMAN GROUPS AND SOCIAL CATEGORIES : STUDIES IN SOCIAL PSYCHOLOGY 258 (1981).

individuals understand them to be real and to the extent that individuals act on this understanding.

The second important difference between my account and current doctrine is that on the current conception of immutability a stigmatized characteristic is protected if it is fundamental to personal identity. However, this confuses personal identity and social identity. As I noted above, an individual who bears some socially salient characteristic may judge that this characteristic is not a fundamental part of their personal identity.[66] This is because personal identities are idiosyncratic and dependent upon an individual's self-understanding.[67]

By contrast, an individual's social identity does not so depend upon the individual's self-understanding. Social identities are ascriptive: if an individual is taken to meet the criteria for membership within a particular social group, they will be identified as a member of that group and will be treated according to the relevant set of social norms, regardless of whether the individual personally identifies as a member of this group.[68]

Social identities are constructed on the basis of widely understood and relatively stable social judgments regarding the signifiers typically associated with various social groups. Of course, to say that these social judgments are widely understood is not to say that they are widely shared; the meaning and status of a signifier will likely be contested, particularly as subordinate groups seek to overturn the negative connotations of the signifiers associated with their group.[69]

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[66] *See supra* n.51.
[67] Peggy A. Thoits & Lauren K. Virshup, *Me's and We's*, *in* SELF AND IDENTITY: FUNDAMENTAL ISSUES, 106-107 (1997).
[68] For classic sociological accounts of ascription in social relations, *see* RALPH LINTON, THE STUDY OF MAN (New York, 1936), *D. Appleton-Century Company, New York* (1936): 113-31.; PARSONS TALCOTT, THE SOCIAL SYSTEM (Routledge, 2013), 41-2.; Kingsley Davis, HUMAN SOCIETY (New York: Macmillan Co., 1949). Leon Mayhew, "Ascription in Modern Societies," SOCIOLOGICAL INQUIRY 38, no. 2 (1968). For work on the connections between ascription, status inequality, and identity formation, *See* Theodore D Kemper, "On the Nature and Purpose of Ascription," AM. SOC. REV. (1974). and Mary Jane Collier and Milt Thomas, "Cultural Identity: An Interpretive Perspective," THEORIES IN INTERCULTURAL COMMUNICATION 99 (1988).
[69] *See*, *e.g.*, Claud Anderson & Rue L Cromwell, *" Black is Beautiful" and the Color Preferences of Afro-American*

As I argue in Part II.B., social immutability targets caste hierarchies; thus, it is the social judgments of dominant groups that merit scrutiny. For now the important point is that, for the social immutability criterion, it is unnecessary for courts to examine an individual's personal identity. Instead, courts need only consider whether an individual was discriminated against for bearing a signifier that is constitutive of or associated with a low status social identity.

A. Identity and Impermeability

In this Part I discuss some empirical research concerning the processes by which social identities are formed and group hierarchies are maintained. It is important to present such work for two reasons. First, having argued that immutability should not be understood as referring to biological or psychological traits of individuals, it is necessary to provide an account of what it is that the immutability criterion should protect. The empirical work introduced below is part of this account. Second, in antidiscrimination cases litigators, advocates and other interested parties may frame their arguments around (their understanding of) the Court's immutability analysis.[70] An empirical account of signifiers and group hierarchy may thus help to inform the legal and

Youth, 46 THE JOURNAL OF NEGRO EDUCATION, 76-7 (1977). (describing the "Black is Beautiful" slogan as an attempt to counter skin color discrimination by asserting a "positive self-concept and self-acceptance for people of African descent in America"). *See also* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS ### (Random House Trade Paperbacks. 2007). (describing the slogan "Gay is good" as performing a similar function for the gay rights movement).

[70] *See*, for example, Brief of *Amici Curiae* American Psychological Association, The American Psychiatric Association, The National Association Of Social Workers, Inc., and The Colorado Psychological Association in support of Respondents, Romer v. Evans, 517 U.S. 620 (noting that "[a] number of researchers have found familial patterns and biological correlates of adult homosexual orientation, suggesting that genetic, congenital, or anatomical factors may contribute to its development…The scientific literature thus strongly indicates that sexual orientation is far from being a voluntary choice") (citations omitted). Though the Brief does not explicitly mention the immutability criterion, such language is reminiscent of old immutability.

political strategies of parties seeking to expand equal protection to new signifiers and social groups.

I begin with Social Identity Theory, a theoretical framework for explaining and predicting certain recurrent features of intergroup status conflict. Social Identity Theory posits three psychological processes that drive group formation and intergroup conflict.[71] *Social categorization* refers to the tendency of individuals to sort themselves and others into groups on the basis of meaningful criteria. Social categories are often constructed around visually salient physical features of the human body.[72] As I discuss below, however, in such cases social categorization may take place *regardless* of whether these physical features are physically unchangeable.

The mere fact of categorization affects individual cognition and behavior with regard to members of other groups. For example, once a social category has been constructed and disseminated widely, individuals tend to rely on these categories and their associated signifiers, in some cases automatically, as cognitive shortcuts for processing social information.[73] For instance, individuals generally tend to accentuate the perceived differences between groups or categories;[74] ingroup members tend to view outgroups as more homogenous than the ingroup;[75]

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[71] Henri Tajfel & John C. Turner, AN INTEGRATIVE THEORY OF INTERGROUP CONFLICT: THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 33 (1979). For meta-analytic reviews of the evidence supporting the key concepts of Social Identity Theory, *see* Naomi Ellemers, *The Influence of Socio-Structural Variables on Identity Management Strategies*, 4 EUROPEAN REV. OF SOC. PSYCH. 27 (1993); *see also* B. Bettencourt et al., *Status Differences and In-Group Bias: A Meta-Analytic Examination of the Effects of Status Stability, Status Legitimacy, and Group Permeability*, 127 PSYCH. BULLETIN 520 (2001).

[72] C. Douglas McCann et al., *Person Perception in Heterogeneous Groups*, 49 JOURNAL OF PERSONALITY AND SOC. PSYCH. 1449 (1985); Charles Stangor et al., *Categorization of Individuals on the Basis of Multiple Social Features*, 62 JOURNAL OF PERSONALITY AND SOC. PSYCH. 207 (1992).

[73] *See generally*, C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Categorical Person Perception*, 92 BR. J. OF PSYCH. 239 (2001).

[74] H. Tajfel & A. L. Wilkes, *Classification and Quantitative Judgement*, 54 BR. J. OF PSYCH. 101 (1963); Olivier Corneille et al., *On the Role of Familiarity with Units of Measurement in Categorical Accentuation: Tajfel and Wilkes (1963) Revisited and Replicated*, 13 PSYCH. SCI. 380 (2002); Joachim Krueger & Myron Rothbart, *Contrast and Accentuation Effects in Category Learning*, 59 JOURNAL OF PERSONALITY AND SOC. PSYCH. 651 (1990).

[75] David De Cremer, *Perceptions of Group Homogeneity as a Function of Social Comparison: The Mediating Role of*

and, ingroup members are more willing to engage in cooperative behavior with and to expect reciprocation from other members of the ingroup.[76]

In a status hierarchy, individuals will also form beliefs about the moral character of members of outgroups. Members of high status groups, for example, will seek to attribute to members of low status social groups stereotypical characteristics that possess a negative moral valence: vices, disabilities, dispositions to act in morally discreditable ways, or other social deficiencies.[77] When a social signifier becomes associated with a low status social group, the signifier will also take on the negative moral valence of the characteristics stereotypically attributed to this group.

Social comparison is the process by which group signifiers acquire social meaning. As Tajfel argues, the status of group signifiers is a result of intergroup comparisons: group signifiers "achieve most of their significance in relation to perceived differences from other groups and the value connotation of these differences."[78] In other words, group signifiers may have no biological basis and may have little or no significance outside of a particular social environment. Nevertheless, so long as individuals treat them as indicative of significant group differences, group signifiers will be no less real and no less meaningful for individuals than other aspects of the social world.

Group Identity, 20 CURRENT PSYCH. 138 (2001); Jennifer G. Boldry et al., *Measuring the Measures: A Meta-Analytic Investigation of the Measures of Outgroup Homogeneity*, 10 GROUP PROCESSES & INTERGROUP RELATIONS 157 (2007).

[76] Toshio Yamagishi & Toko Kiyonari, *The Group as the Container of Generalized Reciprocity*, 63 SOC. PSYCH. QUARTERLY 116 (2000); Lowell Gaertner & Chester A Insko, *Intergroup Discrimination in the Minimal Group Paradigm: Categorization, Reciprocation, or Fear?*, 79 JOURNAL OF PERSONALITY AND SOC. PSYCH. 77 (2000); DONALD R. KINDER & CINDY D. KAM, ETHNOCENTRIC FOUNDATIONS OF AMERICAN OPINION 21-24 (2009).

[77] See Fiske, supra note 59.

[78] Henri Tajfel, *Social Identity and Intergroup Behaviour*, 13 SOC. SCI. INFORM. 65, 71 (1974).

Finally, *social identification* denotes "the extent to which people define themselves (and are viewed by others) as members of a certain social category."[79] Simply identifying as a member of a group is sufficient to prompt discriminatory treatment toward outsiders.[80] Individuals tend to overestimate the similarities between themselves and fellow members of their groups, and ingroup members tend to rate their own group higher on positive characteristics and lower on negative characteristics.[81] By contrast, ingroup members tend to believe that outgroups are relatively homogenous, particularly with regard to characteristics stereotypically associated with the outgroup.[82] Likely these phenomena are due in part to the fact that, beginning at a young age, individuals tend to conceive of social groups in terms of essences or natural kinds, particularly when members of an outgroup are perceived as sharing the same visual signifiers.[83]

I note here one departure from Social Identity Theory. Social Identity Theory, as originally conceived, defines a social identity is a type of self-description. However, in what follows I shall focus specifically on ascriptive social identities. As the anthropologist Fredrik Barth observed in his classic study of ethnic group boundaries, ascriptive social identities result from a process of social labeling, whereby a social category is imposed upon a set of individuals

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[79] *See* Ellemers, *supra* note 88, at 29.

[80] Michael Billig & Henri Tajfel, *Social categorization and similarity in intergroup behaviour*, 3 EUROPEAN JOURNAL OF SOCIAL PSYCHOLOGY (1973).

[81] Jordan M. Robbins & Joachim I. Krueger, *Social Projection to Ingroups and Outgroups: A Review and Meta-Analysis*, 9 PERSONAL. AND SOC. PSYCH. REV. 32 (2005). Rupert Brown, *Social Identity Theory: Past Achievements, Current Problems and Future Challenges*, 30 EUROPEAN JOURNAL OF SOC. PSYCH., 745, 747 (2000) (citing a variety of studies, the author notes that "it is by now a common-place that group members are prone to think that their own group and its products are superior to other groups (and theirs) and to be rather ready behaviourally to discriminate between them as well").

[82] *See, e.g.*, Mark Rubin & Constantina Badea, *Why Do People Perceive Ingroup Homogeneity on Ingroup Traits and Outgroup Homogeneity on Outgroup Traits?*, 33 PERSONALITY AND SOC. PSYCH., Bulletin 31 (2007).

[83] *See, e.g.*, Vincent Yzerbyt et al., The psychology of group perception 81 (2004) (reviewing literature demonstrating that "[w]hen one or several perceptual cues point to the entitativity of a group of people, perceivers are inclined to infer the presence of some essence shared by these people. As a result, they may often end up making strong assumptions about the inductive potential and unalterability associated with group membership"); *see also* Kinder & Kam, *supra* note 76, at 33. (noting evidence to the effect that "[e]arly on, children display an inclination to parse the social world into "natural kinds." They believe that race and sex and ethnicity belong to the living world, and that differences between races or sexes or ethnicities are rooted in biology, or blood, or some such underlying essence").

who (it is believed) possess a common set of signifiers.[84] Crucially, it is not necessary that a particular individual endorse or identify with the social identity she has been ascribed; rather, so long as an ascriptive social identity is "intersubjectively widely recognized" it will continue to shape social reality.[85]

Social categorization, social comparison, and social identification are processes that characterize the formation of group identities and their associated signifiers. To explain how these processes affect intergroup dynamics, I will introduce one last piece of terminology. Much work on intergroup conflict focuses on the relative *permeability* of group boundaries; that is, the extent to which individuals in a social system can move between groups.[86] In order to maintain their dominant social position, high status groups will generally seek to maintain relatively impermeable group boundaries. This is because when most members of a low status group are barred from high status groups or social positions it is far more difficult for lower status groups to improve their standing in the status hierarchy. Ascribing to others a fixed, low status social identity – especially a low status ethnic, racial, or gender identity – is a common method by which dominant groups maintain impermeable group boundaries. As Barth puts it, such identities are "superordinate to most other statuses, and define[] the permissible constellations of statuses, or social personalities" that low status individuals may assume.[87]

To be sure, group boundaries will be absolutely impermeable only in the most extreme caste hierarchies; in all other cases, there will be varying degrees of individual mobility. Yet it is important to note that permeability is not simply reducible to the number of low status

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[84] FREDRIK BARTH, ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION OF CULTURE DIFFERENCE 10 (1998).
[85] RICHARD JENKINS, SOCIAL IDENTITY 154 (2014).
[86] *See generally* Naomi Ellemers et al., *The Influence of Permeability of Group Boundaries and Stability of Group Status on Strategies of Individual Mobility and Social Change* 29 BRITISH JOURNAL OF PSYCH. 236 (1990).
[87] *See* BARTH, *supra* note 84, at 17.

individuals who are able to join higher status groups, for even where individual mobility is possible, conditions of entry and exit are often tied to a particular group's position in the status hierarchy. For instance, in hypergamous caste societies, women are expected to raise their status by 'marrying up' into a higher class or caste but are generally forbidden from 'marrying down.'[88] In other cases, entry into higher status groups is conditioned upon hiding, downplaying, or shedding a signifier associated with a low status identity.[89] As these examples indicate, even when group boundaries are permeable in some respects, they may nevertheless serve to reinforce the subordinate position of low status groups.

Note also that group boundaries often will exhibit a certain symmetry with respect to high and low status individuals. Relatively impermeable group boundaries function most obviously so as to prevent low status individuals from joining high status groups. However, in many cases higher status individuals will be generally prevented from joining lower status groups as well. This is because, for a status hierarchy based on ascriptive social identities to operate, there must exist clearly demarcated signifiers that possess separate meanings and separate statuses. Clearly demarcated signifiers effectively identify who is to receive and who is to be denied access to material goods and to high status occupations, roles, and relationships. When enough individuals adopt signifiers associated with statuses or ascriptive identities different from their own, the meaning or status of the signifier may become ambiguous and thus ineffective for distinguishing between members of high and low status groups. As I discuss below, it is for this reason that Equal Protection immutability doctrine affords protection to individuals from high status groups who bear relatively lower status signifiers.[90]

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[88] LOUIS DUMONT, HOMO HIERARCHICUS : THE CASTE SYSTEM AND ITS IMPLICATIONS 116-8 (1980).
[89] *See* Yoshino, *supra* note 5, at 490 (arguing that "courts more likely to withhold heightened scrutiny from groups that can change or conceal their defining trait").
[90] *See infra* Part IV.A.

Overall, relatively impermeable group boundaries can be successfully maintained when low status individuals are ascribed a social identity that possesses a uniformly low status across a variety of social and political contexts. In order to ensure this outcome, high status groups often will claim that certain traits associated with low status groups are immutable, regardless of the underlying biological or psychological facts. Furthermore, high status groups will seek to ensure that these purportedly immutable characteristics carry a negative moral valence. An individual who bears these characteristics will be taken to possess morally discreditable attributes and dispositions that can be invoked as grounds for denying the individual equal access to high status roles, occupations, and relationships.

The main point is that members of high status groups do not need to possess an accurate understanding of human traits or personal identity in order to exclude members of low status groups. To be sure, low status social identities are often constructed on the basis of signifiers that are difficult to change, such as skin pigmentation and hair texture. By protecting signifiers that are difficult to change, the contemporary immutability criterion is thus broadly on target. But any signifier that is closely associated with members of low status groups and that, in relation to low status individuals, possesses a negative moral valence, will suffice for maintaining relatively impermeable social boundaries. Any plausible conception of immutability must take this fact into account.

B. Relational Equality and Equal Protection

In this Part I turn to the normative basis of the immutability criterion. As I noted above, the *Frontiero* Court's concern for individual responsibility fails to justify the immutability criterion: presumably equal protection would still forbid discrimination on the basis of race, even

if an individual were to knowingly take on a different race.[91] In other words, the normative principle introduced in *Frontiero* is effectively at odds with one of the central purposes of the Equal Protection clause, namely, eliminating racial discrimination in order to ensure equal citizenship for blacks and other subordinated groups.

A more plausible normative foundation for the immutability criterion can be found by considering the history of equal protection as a bulwark against the formation of caste hierarchies.[92] Throughout the 19th century, antislavery activists and politicians regularly invoked the metaphor of caste to describe the unequal status of racial groups within the United States.[93] These references to caste were not mere rhetorical flourishes but instead represented a fairly sophisticated understanding of the mechanics of group hierarchy and social group formation.

For example, in his public lecture, "The Question of Caste," Charles Sumner observes that caste hierarchies entrench permanent inequalities of status. At the heart of a caste hierarchy, Sumner argues, there lies a division of social groups into those who receive "hereditary rank and privilege" and those who receive "hereditary degradation and disability."[94] According to Sumner, within the United States "the Caste claiming hereditary rank and privilege is white; the Caste doomed to hereditary degradation and disability is black or yellow, and it is gravely asserted that this difference of color marks difference of race, which in itself justifies the discrimination."[95] Though his language is reminiscent of the biological conception of immutability that I considered above and rejected, Sumner is identifying one of the key

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[91] *See supra* n.29.
[92] Jack M. Balkin, "Abortion and Original Meaning," CONST. COMMENT. 24 (2007) (citing the anti-caste arguments of the Joint House-Senate Committee on Reconstruction, whose members drafted the 14th Amendment).
[93] Scott Grinsell, *The Prejudice of Caste: The Misreading of Justice Harlan and the Anticlassification*, 15 MICH. J. RACE & L., 39-53 (2009).
[94] CHARLES SUMNER, THE QUESTION OF CASTE: LECTURE (Boston: Wright & Potter, Printers, 1869), 10.
[95] *Id*.

mechanisms by which group status hierarchies are sustained over time, namely, the association of subordinate groups with low status social signifiers, signifiers that are taken as grounds for discriminatory treatment. Other discussions of caste, both before and after Sumner's time, evince a similar sophistication with regard to group signifiers and caste hierarchy.[96]

Sumner's observations suggest that a plausible normative justification for the immutability criterion must directly address the relationship between the imposition of legal burdens and the processes that sustain status hierarchies. Recently, egalitarian moral philosophers such as Elizabeth Anderson and Samuel Scheffler have focused specifically the nature of group status hierarchy, and their analyses are instructive for the immutability debate. For these 'relational egalitarians,' equality comprises "a kind of social relation between persons" and egalitarian justice requires that all persons receive "an equality of authority, status, or standing" with regard to important social relationships.[97] On this view, whether an individual or a group is regarded as an equal can only be determined by looking at how the individual or group fares across a wide range of social and political settings. This is so for two reasons: first, what constitutes equal status will depend upon the social norms and shared meanings within particular contexts; and, second, an individual or group may receive equal treatment in one setting but yet may be subject to degradation and other status harms in other settings.

To be sure, relational egalitarians do not ignore the importance of individual responsibility; relational egalitarians would agree with the *Frontiero* Court's insight that, in general, legal burdens ought to bear some relationship to individual responsibility. However, for relational egalitarians the primary aim of just political institutions is to ensure that individuals are

[96] Grinsell, MICH. J. RACE & L., 320 (2009). (characterizing 19th century discussions of caste as a "richly articulated set of arguments about the nature of status-based harm").
[97] Elizabeth Anderson, *The Fundamental Disagreement Between Luck Egalitarians and Relational Egalitarians*, 40 Canadian Journal of Philosophy, 1 (2010) (citation omitted).

regarded as full and equal members of society. This requires first and foremost the elimination of "social relationship[s] by which some people dominate, exploit, marginalize, demean, and inflict violence upon others."[98] The elimination of these relationships is required, relational egalitarians argue, even when individuals bear some responsibility for their own misfortune.[99]

Relational egalitarian arguments, though primarily philosophical, are directly relevant to the immutability debate. First, relational egalitarianism requires that individuals receive protection from wrongful discrimination regardless of whether they have chosen to adopt signifiers associated with low status groups. Adapting the language of *Frontiero*, a relational egalitarian justification of the immutability criterion might run as follows: irrespective of individual responsibility, legal burdens ought not be such that they create or maintain socially immutable, low status social identities.

Relational egalitarianism also provides a coherent framework for other aspects of the immutability criterion. For example, because they view equality as a social relationship, relational egalitarians recognize that a group's social position is not simply reducible to its share of political power or its control over material resources and economic opportunities. Whether a group is regarded as an equal depends upon whether the members of the group are allowed equal access to a variety of status-conferring social institutions, practices, occupations, and relationships.

By comparison, consider Justice Scalia's observation that gays constitute a "politically powerful" group with a "high disposable income," and hence do not warrant the Court's

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[98] *See* Elizabeth S. Anderson, *What is the Point of Equality?*, 109 ETHICS 287, 313 (1999).

[99] For relational egalitarians just criminal punishment, which may carry a stigma, is permissible, though even here there are limitations upon how the extent to which a person may be stigmatized for breaking the law.

protection.[100] While accurate in some respects,[101] Scalia's argument overlooks the fact that singling out a group for exclusion from a traditionally status-conferring social institution such as marriage plainly signals that the group is of low standing. In fact, it is not uncommon for low status groups to possess certain advantages over high status groups. For example, in late 19th century Germany Jewish individuals claimed an above average share of national income, and many individual Jews attained prominent positions in social and political life.[102] Nevertheless, German Jews were excluded from Gentile dueling clubs, which were at the time important status signifiers.[103] Dueling "allow[ed] for people to make claims to equality as individuals," a claim that non-Jewish Germans refused to recognize.[104] The point is that the relative status of a group can only be determined by looking closely at a range of status-conferring practices, norms, and institutions, which is just what the social immutability criterion requires.

Finally, relational egalitarianism provides support for expressivist aspects of equal protection doctrine. Broadly speaking, expressivist accounts of law hold that, in addition to their regulative functions, laws also may express commonly understood, public meanings.[105] The public meaning of a law may be inferable from the writings, statements, intentions, or other actions of legislators, but the public meaning of a law is not necessarily a product of these

[100] Romer v. Evans, 517 U.S. 620, 645, 648 (1996).
[101] Christopher S. Carpenter & Samuel T. Eppink, *Does It Get Better? Recent Estimates of Sexual Orientation and Earnings in the United States*, 84 SOUTHERN ECONOMIC JOURNAL, 426, 433-4 (2017). (Finding both that "gay men earn significantly higher wages than comparable heterosexual men" and that "lesbians have significantly higher annual earnings than similarly situated heterosexual women, conditional on full-time work").
[102] TILL VAN RAHDEN, JEWS AND OTHER GERMANS: CIVIL SOCIETY, RELIGIOUS DIVERSITY, AND URBAN POLITICS IN BRESLAU, 1860-1925, (Madison, Wis.: University of Wisconsin Press, 2008), 63.
[103] *See generally* Mika LaVaque-Manty, *Dueling for Equality: Masculine Honor and the Modern Politics of Dignity*, 34 POL. THEORY 715 (2006).
[104] *Id*. at 716.
[105] *See generally* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

actions. As a communal form of expression, the expressive content of a law can be ascertained only "in light of the community's other practices, its history, and shared meanings."[106]

Social immutability is an expressivist view in two respects. First, social immutability is concerned with ascriptive social identities, which are constructed on the basis of widely understood and relatively uniform social judgments regarding group signifiers. Relational egalitarian principles thus cannot be put into practice without a clear understanding of these social judgments. In order to eliminate hierarchies based on race or gender, for example, it is necessary to first understand which signifiers are publicly recognized as expressing a racial or gender identity.

Second, it is to be expected that politically dominant groups will seek to formalize their status judgments through law.[107] Relational egalitarianism thus requires courts to scrutinize legislation for impermissible expressive content; that is, content which "express[es] contempt, hostility, or inappropriate paternalism toward racial, ethnic, gender, and certain other groups, or that constitute[s] them as social inferiors or as a stigmatized or pariah class."[108] When the Court ignores or overlooks the status judgments expressed in law, dominant groups are able to use the authority of the state to maintain relatively impermeable boundaries between high and low status groups.[109]

C. The Social Immutability Criterion

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[106] Id. at 1525.
[107] *See*, for example, infra Part IV.B.
[108] *See* Anderson and Pildes, *supra* note 106 at 1533.
[109] Compare, for example, Plessy v. Ferguson, 163 537, (Supreme Court). (asserting that if "the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is...solely because the colored race chooses to put that construction upon it") with Brown v. Board of Education, 347 483, (Supreme Court). (holding that separate facilities are "inherently unequal").

I now turn to the social immutability criterion itself. A social signifier satisfies the social immutability criterion when it meets two conditions: first, the signifier is constitutive of or closely associated with a low status social identity; second, those who are taken to bear the signifier generally face relatively greater obstacles to joining high status groups, taking on high status social roles and occupations, or acquiring the means necessary for obtaining higher status. Such obstacles include but are not limited to wrongful discrimination, stigmatization, stereotyping, and other forms of arbitrary bias.

In the next two Sections I discuss some practical matters of application. In Section III I consider the relationship between social immutability and existing antidiscrimination doctrine. To get a sense of how the social immutability criterion would operate in practice, I then demonstrate, in Section IV, that the social conception of immutability resolves some ongoing problems within antidiscrimination law.

IV. Social Immutability and Judicial Precedent

Social immutability ties together three longstanding doctrines within antidiscrimination law: the Court's hostility toward legislation that evinces animus towards identifiable social groups; the Court's hostility toward legislation that stigmatizes certain social identities; and, the Court's endorsement of the authority of Congress, under section 2 of the 13th amendment, to abolish the "badges and incidents" of slavery. Each of these doctrines requires the Court to closely scrutinize legislation targeting low status social identities and group signifiers. To be sure, each of these doctrines addresses low status social identities and group signifiers in a different fashion, each has its own political and legal history, and each has its own source of Constitutional authority. Regardless, the social conception of immutability provides a

conceptually unified account of these seemingly disparate aspects of constitutional antidiscrimination law, which suggests that social immutability is less a departure from and more an extension of legal and normative principles immanent within Equal Protection doctrine.

A. Animus

Animus has often been glossed as an illicit subjective intent: a bare desire to harm[110] or a "fit of spite."[111] Yet Akhil Amar and Susannah Pollvogt have convincingly shown that the Court's animus jurisprudence is best understood as targeting public laws that irrationally disadvantage particular groups based on their social status, regardless of the subjective intent behind such laws. For example, according to Amar, a piece of legislation evinces unconstitutional animus when it "singles out a named class of persons for status-based disadvantage." [112] This was, Amar argues, the constitutionally sound principle underlying Justice Kennedy's majority opinion in *Romer v. Evans*, a case taking up an amendment to the Colorado Constitution which preemptively overruled attempts to grant "protected status" to gays, lesbians, and bisexual individuals. As Amar rightly points out, Kennedy does not argue that a hostile intent *per se* is unconstitutional; rather, Kennedy holds that equal protection is violated because the Colorado amendment constituted "a status-based enactment[,]... a classification of persons undertaken for its own sake."[113]

According to Pollvogt, *explicitly* singling out a particular group is neither necessary nor sufficient for the Court to conclude that a particular piece of legislation evinces unconstitutional animus. As Pollvogt argues, it is unclear that the anti-miscegenation law at issue in *Loving v.*

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[110] Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) (holding that "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest").
[111] Romer v. Evans, 517 U.S. 620, 636.
[112] Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203, 225 (1996).
[113] *Id*. at 227. (citation omitted)

Virginia explicitly singled out blacks as a group, for the law as written applied equally to blacks as well as to whites; nevertheless, the Court correctly concluded that the law constituted an expression of white supremacy.[114] *Loving* suggests, then, that explicitly singling out a social group is not a necessary component of animus-based legislation.

Conversely, singling out may not be sufficient for a finding of animus. For example, in *Cleburne v. Cleburne Living Center*, the Court states that legislation singling out the mentally disabled is not inherently unconstitutional, for such legislation often "reflects the real and undeniable differences between the [mentally disabled] and others."[115] The problem instead was that the Cleburne City Council had failed to demonstrate the existence of a rational relationship between the trait of mental disability and the zoning ordinance at issue, which suggested to the Court that the ordinance in fact rested upon "vague generalizations"[116] about and "irrational prejudices"[117] toward the mentally disabled.

The unifying principle behind *Romer*, *Cleburne*, and other animus cases is that unconstitutional animus exists when public laws arbitrarily "create and enforce distinctions between social groups—that is, groups of persons identified by status rather than conduct."[118] As the Court has recognized, while the specific motivation for drawing such distinctions may vary, in all such cases low status groups are arbitrarily targeted on the basis of their social identities or on the basis of signifiers with which they are associated. Animus doctrine and the social conception of immutability thus share the same foundational insight, which is that low status signifiers associated with subordinated groups are often regarded, due to prejudice,

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[114] Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 925-6 (2012) (citing Loving v. Virginia, 388 U.S. 1, 11 (1967)).
[115] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 at 444.
[116] *Id*. at 465.
[117] *Id*. at 450.
[118] *See* Pollvogt, *supra* note 114, at 926.

stereotyping, unsubstantiated fear, and other forms of arbitrary bias, as proxies for morally condemnable conduct. Moreover, both animus doctrine and the social conception of immutability recognize that the 14th amendment forbids legislation that enshrines such biases in law.

B. Stigma

While *Cleburne* is typically read as an animus case, Justice Marshall observes in his concurring opinion that animus is often directed towards stigmatized social groups.[119] Though Marshall does not draw the connection, animus jurisprudence arguably shares much conceptual and sociological overlap with another area of equal protection, namely, the Court's 14th amendment stigma jurisprudence. The Court has explicitly acknowledged that a concern for stigmatic racial harm is central to the 14th Amendment.[120] Notably, the Court has extended stigma doctrine to reach cases of sex discrimination, drawing explicitly upon cases involving racially stigmatic harm,[121] as well as to sexual orientation discrimination.[122] Most recently, for instance, in *Obergefell*, Justice Kennedy points out that legislation banning same sex marriage will result in "children suffer[ing] the stigma of knowing their families are somehow lesser," an echo of the "Doll Test" famously cited in *Brown*.[123]

While the Court has not always been clear as to what constitutes a legislative imposition of stigma, the general thrust of the doctrine is clear: a law imposes stigma when it demeans, degrades, or otherwise marks as possessing inherently low status a particular social identity.[124]

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[119] City of Cleburne 473 U.S. at 466 (1985).
[120] Powers v. Ohio, 499 U.S. 400, 408-410 (1991) (noting that stigmatic harm arising from racial discrimination "reflects the central concern of the Fourteenth Amendment").
[121] Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984).
[122] Lawrence v. Texas, 539 U.S. 558, 575 (2003).
[123] 347 U.S. 483, 494-5 n.11 (1954).
[124] The *locus classicus* for work on stigma is, of course, ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 12 (2009) (defining stigma as "an attribute that is deeply discrediting") But legal scholars differ

Thus, both stigma jurisprudence and the social conception of immutability recognize that dominant groups will seek to maintain their position in the status hierarchy by marking certain social identities as inherently inferior. Yet, as the Court has long recognized, the existence of an underclass of stigmatized social identities is incompatible with the egalitarian promise of the 14th amendment. Overall, this suggests that the Court's stigma jurisprudence and the social conception of immutability draw upon the same empirical and normative framework.

C. The Badges of Slavery

The social conception of immutability also has a foot planted in 13th amendment jurisprudence. While there is a long history of understanding Section 2 of the 13th amendment as granting Congress the power to abolish the "badges of slavery" in the United States,[125] only recently has the meaning of this phrase been brought to light. According to George Rutherglen, for example, a "badge of slavery" generally referred to the fact that "[f]rom certain external features, an individual's social position could be inferred."[126] Within the American antislavery movement, "badge of slavery" was used more specifically to refer to the fact that African American skin color was publicly and widely associated with subordinate political status.[127]

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over how to apply Goffman's insights to legal doctrine. *See, e.g.*, Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8 (1976) (describing stigma as a type of "psychological injury"); Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 249-74 (1982) (describing stigma as arising from a "breakdown in empathy," causing low status individuals to be "set apart and treated as not quite fully human"); Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STANFORD LAW REVIEW 317, 351 (1987) (arguing that "[t]he injury of stigmatization consists of forcing the injured individual to wear a badge or symbol that degrades him in the eyes of society"); Robin A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 NYUL REV., 891 (2004) (focusing specifically on "the negative citizenship effects of racial stigma").

[125] The Civil Rights Cases, 109 U.S. 3, 24 (1883).

[126] *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 (2010).

[127] *Id*., 165.

After the ratification of the 13th amendment this phrase was transformed into a term of art referring more narrowly to *postbellum* legal restrictions placed upon black citizens.[128]

The social conception of immutability and the "badges of slavery" understanding of the 13th amendment presuppose that status hierarchies operate by associating certain social groups with observable and widely understood low status signifiers. Consider, for example, that 19th century usages of the phrase "badges of slavery" referred to observable signifiers, such as skin color or hair texture, commonly associated with different racial groups, as well as to *postbellum* laws targeting blacks.[129] The badges metaphor thus referred to an observable property or relation (in this case, a legal relation) used to sort individuals into racial groups and to convey information about the relative status of these groups.

On my account, then, while the social conception of immutability falls under a 14th amendment heading, it is nevertheless closely related to the "badges of slavery" component of the 13th amendment. This is a welcome result given that the 13th and 14th amendments are both based on a principle of equal protection.[130] The Civil Rights Act of 1866, for example, enacted shortly after the ratification of the 13th amendment promised to all the "full and equal benefit of all laws."[131] Doubts about the constitutionality of the Act under the 13th Amendment lead to the passage of the 14th Amendment, which, by affording to all citizens "the equal protection of the

[128] Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 575 (2011) (asserting that the phrases's "meaning appeared to evolve from the antebellum to postbellum eras, particularly as it migrated from colloquial to legal use").
[129] As Senator Lyman Trumbull argued in defense of the constitutionality of the Civil Rights Act of 1866, "any statute which is not equal to all…is, in fact, a badge of servitude which, by the Constitution, is prohibited." *See* CONG. GLOBE, 39th Cong. (1st Sess.) 503-504 (1866).
[130] Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 200 (1951) (demonstrating that "[a]t the very foundation of the system constructed out of the Thirteenth Amendment and the Freedmen's Bureau and Civil Rights Bills is an idea of "equal protection""); *see* Curtis, *supra* note 132, at 48 (noting that "Republicans believed that the Thirteenth Amendment effectively overruled Dred Scott so that blacks were entitled to all rights of citizens").
[131] *See* Civil Rights Act, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. §§ 1981 and 1982 (1968)).

laws," incorporated and expanded upon the equal protection principles contained within the 1866 Act.[132]

Given their historical backgrounds and shared normative principle, the 13th and 14th Amendments are best read in conjunction.[133] And this is just what the social conception of immutability implies. The social conception of immutability joins the normative principle of equal protection with a generalized account of status hierarchies and social signification. Thus, though it is intended primarily as a 14th amendment doctrine, social immutability draws constitutional authority from the 13th amendment as well. At the same time, it helps to explain the close connection between the two amendments.

D. Conclusion

My aim in this Section was to show that the insights and principles underlying social immutability appear in roughly the same form throughout constitutional antidiscrimination law. No doubt my analysis has glossed over many significant differences between the cases and doctrines surveyed above. Offhand, animus doctrine seems best suited for merely occasional instances of legislative bias, as in *Moreno*, and for legislation that arbitrarily targets groups of individuals who evince genuine differences, as in *Cleburne*. Stigma doctrine seems better suited for legislative attempts to more permanently affix a low status to particular social identities, as was the case in *Obergefell*. Finally, a badges of slavery analysis may be particularly relevant for

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[132] *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 103 (1986) ("noting that, while most Republicans denied that the Act and the 14th Amendment were identical, "[i]t is clear that the amendment incorporated the principles of the bill").

[133] *See* Akhil Reed Amar, *The Case of the Missing Amendments*: RAV v. City of St. Paul, 106 HARV. L. REV. 124, 157 n.80 (arguing that "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").

addressing public and private practices that subordinate individuals on the basis of race. But the important point is that some of the main insights of the social conception of immutability are already present within existing equal protection doctrine.

V. Applications

In this Part I show how the social conception of immutability can guide Equal Protection doctrine moving forward. The argument here is that by adopting a principled agnosticism with regard to the underlying nature of protected signifiers, the social conception of immutability extends antidiscrimination protection to signifiers associated with gender identity, culture, and ethnicity.

A. Gender Identity and Expression

Over the last two decades equal protection principles have expanded to include gays and lesbians within the scope of those protected under antidiscrimination law. The same cannot be said, however, for transgender individuals, despite the fact that transgender individuals face widespread public and private discrimination.[134] Seeking to build on the legal victories won by gays and lesbians, some transgender activists have argued that gender identity satisfies the contemporary immutability criterion.[135] Other transgender advocates worry, however, that the immutability argument will fail to advance transgender rights, for it may be the case that some

[134] *See generally* JAIME M. GRANT ET. AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011); Kevin M Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause* 57 BCL REV. 507, 526-40 (2016) (providing an overview of Congressional exclusions of transgender individuals from various antidiscrimination laws).

[135] Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, *in* TRANSGENDER RIGHTS 16, (Paisley Currah et al. eds., 2006). (noting that "the litigation strategies of transgender rights advocates are very much informed by the legacies of the civil rights movement...especially in the emphasis on immutability").

identities or practices that fall under the transgender heading reflect individual choice.[136] But acknowledging that at least some aspects of transgender identity or expression are (to some extent) a matter of choice risks undermining the immutability argument, both in the courtroom and in the public sphere.

Social immutability opens up a promising source of legal protection for transgender individuals. Social immutability depicts transgender discrimination as a form of caste-preserving, social boundary enforcement. Transgender individuals – particularly those who are publicly visible as such – threaten to undermine the traditionally rigid distinction between masculine and feminine gender signifiers. It is for this reason that gender boundary enforcement measures often focus on gender presentation in public spaces. For instance, a number of 19th century laws made it a crime for an individual to appear in public in "dress not belonging to his or her sex."[137] Though no longer formally regulated to this extent, gender boundaries are often informally enforced in public spaces, particularly through verbal harassment or physical violence directed towards individuals who are perceived as deviating from the traditional sex-gender system.[138]

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[136] Heidi M. Levitt & Maria R. Ippolito, *Being Transgender: The Experience of Transgender Identity Development*, 61 JOURNAL OF HOMOSEXUALITY, 1727, 1754 (2014) (a study of transgender identity development concluding that transgender identity and expression may reflect "highly individualized choices in relation to available resources as well as the benefits and dangers…within social contexts at hand"); *see* also Currah, supra note 135, at 18 (noting the potential of "construct[ing] gender as a choice in legal arguments").

[137] *See generally* WILLIAM N. ESKRIDGE, GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 27 (2009).

[138] *See generally* Ki Namaste, *Genderbashing: Sexuality, Gender, and the Regulation of Public Space*, 14 ENVIRONMENT AND PLANNING D: SOCIETY AND SPACE 221 (discussing evidence of public assaults motivated by "perceived transgression of normative sex-gender relations") (1996). One complication worth noting here is that gender boundaries are asymmetrically enforced, in that transgender women seem to face far more hostility than transgender men. One plausible explanation for this asymmetry is that, for many cisgender heterosexual men, homophobia is used to police the boundaries of masculinity, such that *any* same sex sexual contact throws into serious doubt one's masculine identity. Cisgender heterosexual men thus may fear that they will be 'tricked' into forming intimate relationships with opposite gender but same sex individuals. Sexual deception is often cited, for example, as the motivating factor behind the murder of transgender women by cisgender heterosexual men. The infliction of brutal violence upon transwomen, who are cast as "effeminate" and therefore deviant men, serves as a means by which to reaffirm one's masculinity. By contrast, this logic does not obtain for cisgender heterosexual women, for it is the infliction of violence, and not same sex sexual contact, that is destabilizing to conventional feminine identity. *See* generally Kristen Schilt & Laurel Westbrook, *Doing Gender, Doing Heteronormativity:*

According to the social conception of immutability, whether individual choice is involved in any aspect of sex or gender is irrelevant. In fact, social immutability does not purport to explain how or why an individual comes to personally identify one way or another. The social conception of immutability instead attempts to identify and explain cases in which individuals are generally prevented from crossing social boundaries, where those crossings threaten existing social hierarchies.[139] The relevant inquiries thus concern, first, whether an individual is arbitrarily discriminated against on the basis of a signifier that is associated with a low status social identity and, second, whether those who are taken to bear the signifier generally face discriminatory treatment in various social and political domains.

Of course, one might argue that transgender discrimination does not quite fit this mold. An individual who, say, transitions from presenting as a woman to presenting as a man may face discrimination not because he bears male signifiers *per se* but simply because he bears gender signifiers that do not match his assigned sex at birth. But here it is important to recall why the social conception of immutability focuses on signifiers in the first place. Clearly demarcated signifiers of masculinity and femininity are required in order to maintain a gender hierarchy. According to the social conception of immutability, however, equal protection forbids arbitrary discrimination that reinforces unjust status hierarchies, and this remains so regardless of the signifiers born by victims of discriminatory treatment.

The argument that social immutability extends to transgender identity is further bolstered by recent developments in asylum law. Under the Immigration and Nationality Act of 1956, an

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"Gender Normals," Transgender People, and the Social Maintenance of Heterosexuality, 23 GENDER & SOCIETY 440 (2009).

[139] For the sake of space I must elide a more detailed analysis of hierarchy and social boundaries accounting for the more specific differences between various social boundaries. For example, transgender women, who move from a dominant to a subordinate status group, seem to face more persecution than transgender men, but this is not true for whites who attempt to pass as black, who tend to face derision but not persecution. Blacks who pass as whites, however, face both.

individual is eligible for asylum if they are unwilling to return to their country of origin due to a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[140] The Act leaves undefined, however, what constitutes membership in a "particular social group." The Board of Immigration Appeals first defined "particular social group" as "a group of persons all of whom share a common immutable characteristic."[141] While courts have not settled on a uniform definition of "immutable characteristic" in the asylum context, a few recent cases have come strikingly close to adopting something like social immutability.

In *Hernandez-Montiel v. INS*, for instance, the Ninth Circuit reviewed the BIA's denial of asylum to Geovanni Hernandez-Montiel, a gay, transgender asylum seeker who testified to being raped by Mexican police and "attacked with a knife by a group of young men who called him names relating to his sexual orientation."[142] An immigration judge denied Hernandez-Montiel's request for asylum, arguing that because Hernandez-Montiel "wears typical female clothing sometimes, and typical male clothing other times, he cannot characterize his assumed female persona as immutable or fundamental to his identity."[143] Upon review, however, the Ninth Circuit rejected this reasoning. The Ninth Circuit identified Hernandez-Montiel as belonging to a class of "gay men with female sexual identities."[144] These men, the court wrote, face persecution because they "outwardly manifest their identities through characteristics traditionally associated with women, such as feminine dress, long hair and fingernails."[145] In other words, in

[140] *See* Immigration and Nationality Act, 8 U.S.C. § 1l01(a)(42) (2006).
[141] Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).
[142] Hernandez-Montiel v. INS, 225 F.3d 1084, 1088 (9th Cir. 2000).
[143] *Id*. at 1089 (internal citation omitted).
[144] *Id*. at 1094.
[145] *Id*. at 1094.

the Ninth Circuit's view, gender signifiers, though mutable, may nonetheless constitute fundamental parts of an individual's personal identity.[146]

Of course, the *Hernandez-Montiel* decision still relies on the conception of personal identity I criticized above.[147] However, other circuit courts have begun to recognize, at least in asylum cases, that individuals are often targeted for persecution on the basis of an ascriptive social identity. The Second Circuit, for example, has defined "particular social group" as a group "comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor — or in the eyes of the outside world in general."[148] Similarly, the Third Circuit has developed a doctrine of "imputed membership in a social group" that explicitly includes individuals who do not personally identify as homosexual but who are socially identified as homosexual and persecuted on these grounds.[149] As one scholar has argued, transgender individuals may be able to bring a claim under an "imputed identity" standard.[150]

These recent developments in asylum law find direct support from the social conception of immutability. Descriptively, the social conception of immutability explains how mutable signifiers may be fundamental to an ascribed, low status social identity. Normatively, the social conception of immutability extends legal protection to individuals who face discrimination on the basis of their imputed (which is to say, ascribed) identity. The Second Circuit's claim that certain social groups face persecution because they share a "fundamental characteristic…in the eyes of the outside world" nicely captures both the empirical and normative dimensions of social

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[146] *See also* Reyes-Reyes v. Ashcroft, 384 F.3d 782 (9th Cir. 2004).
[147] *See supra*, n.51.
[148] Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991).
[149] Amanfi v. Ashcroft, 328 F.3d 719, 721 (3rd Cir. 2003).
[150] *See generally* Joseph Landau, *Soft Immutability and Imputed Gay Identity: Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 FORDHAM URB. LJ 237 (2004).

immutability.[151] And from the other direction, litigators and scholars of asylum law have argued that these asylum cases should inform equal protection.[152] The social conception of immutability provides a unified account of why antidiscrimination law must extend to transgender individuals both in asylum law and in constitutional equal protection.

B. Hair

Social immutability also extends equal protection to signifiers associated with particular racial groups, regardless of whether the adoption and display of these signifiers is the result of individual choice. This constitutes a departure from current doctrine, according to which signifiers resulting from accidents of birth denote race, which is protected under antidiscrimination law, while signifiers resulting from individual choice denote ethnicity or culture, which is not. This distinction, however, is implausible.

For example, in a number of cases black employees have challenged corporate grooming policies forbidding hairstyles, such as cornrows or dreadlocks, commonly associated with black individuals. Plaintiffs typically claim that these policies place undue burdens on individuals for adopting cultural practices associated with their racial group. Renee Rogers, for instance, challenged American Airlines' policy forbidding cornrows on the grounds that cornrows are "reflective of cultural, historical essence of the Black women in American society."[153] Similarly, Charles Eatman, challenging a United Parcel Service policy forbidding uncovered dreadlocks,

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[151] Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991).
[152] *See* Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles or Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 404-5 (2001) (arguing that Hernandez-Montiel "promises to provide a useful mode of analysis in a wide range of sex- and sexual orientation-based claims, including those concerning…violations of equal protection"); *see also* Landau, *supra* note 150, (2004); *see also* Anthony R Enriquez, Note, *Assuming Responsibility for Who You Are: The Right to Choose "Immutable" Identity Characteristics*, 88 NYUL REV. 373 (2013).
[153] Rogers v. American Airlines, Inc, 527 F. Supp. 229, 231-2 (S.D.N.Y. 1981).

claimed that his hair was an important connection to "African identity and heritage."[154] Though acknowledging that their hairstyles were in part due to choice, both plaintiffs argued that burdening an individual on the basis of a cultural signifier associated with race is effectively a form of race-based discrimination.

Hair discrimination cases are generally resolved in favor of the employer, and most of these cases follow a similar dialectic. Defendant employer offers (what courts take to be) a legitimate business rationale for their grooming policy, such as the need to present a conventional, professional image. Courts tend to argue that the forbidden hairstyles are commonly but not *exclusively* adopted by or associated with black individuals; hence, policies forbidding these hairstyles are formally race-neutral. And while acknowledging that the hair of many black individuals is particularly well-suited for locked hairstyles, courts often assert that, because adopting a particular hairstyle is a matter of individual choice, hairstyles reflect culture, not race, and so are not eligible for protection under antidiscrimination law.[155]

As a number of scholars have pointed out, these arguments do not take into account the history of using hair texture to classify and subordinate black individuals. For example, Thomas Jefferson, in his *Notes on the State of Virginia*, claimed that blacks could never be incorporated into the state due to their supposed "physical and moral" differences, among which he included the absence of "flowing hair."[156] Indeed, hair type, to a greater extent than skin color, was often determinative of racial categorization.[157] In the 1806 decision *Hudgins v. Wrights*, for instance,

[154] Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 259 (S.D.N.Y. 2002).
[155] Rogers 527 F. Supp. at 232.
[156] NOTES ON THE STATE OF VIRGINIA 145 (1999).
[157] ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH 60-2 (1982).

the Supreme Court of Virginia asserted that a "wooly head of hair" was the predominant "ingredient in the African constitution."[158]

In light of this history the judicial reasoning evident in hair discrimination cases seems especially implausible. In *Eatmen v. UPS*, for instance, blacks constituted ninety-four percent of the employees affected by UPS's grooming policies. Various UPS managers "told [Eatmen] that he looked like an alien and like Stevie Wonder, twice compared his hair to 'shit,' linked his hair to 'extracurricular' drug use, requested a pair of scissors (as if to cut off the locks), and pulled his hair."[159] Nevertheless, the court held that these comments were not racially discriminatory because they did not, in the court's view, mention Eatmen's race.[160]

To be sure, one might argue that courts have not overlooked this history but are simply working within the constraints of current equal protection doctrine, according to which mutable characteristics are not protected. Curiously, however, courts have repeatedly reaffirmed the holding of *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.*, according to which corporate grooming policies forbidding "afro" hairstyles *could* be considered racially discriminatory.[161] In this case, Beverly Jeanne Jenkins was denied a promotion on the grounds that "she could never represent Blue Cross with [her] afro."[162] According to the majority opinion, "[a] lay person's description of racial discrimination could hardly be more explicit. The reference to the Afro hairstyle was merely the method by which the plaintiff's supervisor allegedly expressed the employer's racial discrimination."[163]

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[158] Hudgins v. Wright, 11 Va. (1 Hen. & M.) 134 (1806).
[159] Eatman 194 F. Supp. 2d at 264.
[160] *Id*. at 265.
[161] 538 F.2d 164, 167 (7th Cir. 1975) (en banc).
[162] *Id*. at 168.
[163] *Id*.

This is a puzzling result, given that one could offer the same arguments in defense corporate grooming policies forbidding afro hairstyles. After all, not all individuals racialized as black grow hair suitable for an afro hairstyle, whereas some non-black individuals do; moreover, growing and maintaining an afro is to some extent due to individual choice, given that an individual could simply keep their hair closely cropped or shaved entirely. Nevertheless, courts have repeatedly (and, in my view, correctly) observed that policies forbidding afro hairstyles support an inference of racial discrimination, on the grounds that afros are immutable whereas locked hairstyles are not.

Why do courts seem to understand the connotations of an "afro ban" but not the connotations of a ban on locked hair styles? On my reading, the real crux of the hair discrimination cases lies in the fact that since at least the mid-1960s the afro has been commonly associated with a more self-consciously confrontational style of black political activism.[164] Indeed, the association of the Afro with militant black political movements is widely accepted among scholars of the subject.[165] Consider that *Jenkins* was decided in 1976; in this cultural moment it would indeed have been difficult to ignore the connotations of a workplace policy forbidding afros. By contrast, locked hairstyle do not seem to have acquired the same widespread political valence, at least among a (generally white) judiciary, which partly explains why a courts perceive the social connotations of an afro ban as opposed to the social connotations of a ban on locked hairstyles.

Ultimately the logic in hair discrimination cases falters because no hairstyle is immutable, strictly speaking. As Kobena Mercer observes, all hairstyles rely on "artificial

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[164] Robin D.G. Kelley, *Nap Time: Historicizing the Afro*, 1 FASHION THEORY 339, 339 (1997) (noting that "the Afro has clearly been the most powerful symbol of Black Power style politics").
[165] *Id*. at 340 (observing that "the Afro's long-standing association with post-1966 black militancy has become "common sense" in the world of hair scholarship").

techniques to attain their characteristic shapes and hence political significance."[166] Courts should thus abandon the traditional immutability analysis and consider directly the political significance of corporate grooming policies.

It is important to be cautious here, however, since much scholarship critical of hair discrimination doctrine urges courts to expand antidiscrimination law to protect an individual's self-conceived ethnic, cultural or racial identity. Camille Gear Rich, for example, argues that plaintiffs like Charles Eatmen are engaged in acts of "race/ethnicity performance," which she defines as "behavior or voluntarily displayed attribute which, by accident or design, communicates racial or ethnic identity or status."[167] According to Rich, the current conception of immutability "devalues the psychological and dignitary interests that employees have in race/ethnicity performance."[168]

While sympathetic to these proposals, I believe that they face two decisive objections. First, it is unnecessary for courts to consider whether an individual is adopting or performing a particular identity. This objection is similar to the objection raised above against the personal identity conception of immutability: just as a gay individual might not believe that their sexual orientation is fundamental to their personal identity, it is likely that at least some black individuals adopt a locked hairstyle not because it is essential to their ethnic, cultural or racial identity but out of, say, aesthetic preference or simple convenience. Yet racial and cultural identity models would deny protection to such individuals.[169] This outcome is implausible.

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[166] Kobena Mercer, *Black Hair/Style Politics*, OUT THERE: MARGINALIZATION AND CONTEMPORARY CULTURES 247–64 (Russell Ferguson et al. eds. 1990).
[167] Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U.L. REV. 1134, 1139 (2004). *See also* D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987, 1035 (2017) (arguing that for plaintiffs like Renee Rogers, "hair texture and the ways in which it grows and is styled are central to *their* personhood as Black women").
[168] *Id*. at 1141.
[169] *See* Rich, *supra* note 167, at 1211.

Suppose, for example, that a black individual 'passing' as white were 'exposed' and then subjected to humiliating treatment at work. Surely antidiscrimination law should afford this individual relief, even though they had clearly *refused* to perform their assigned racial identity. As the social conception of immutability makes clear, antidiscrimination law must protect individuals from arbitrary discrimination regardless of how they personally relate to their stigmatized signifiers.

Second, ethnic or cultural identity models require that courts identify which aspects of a culture are essential to identity. However, there are good reasons to be skeptical that courts can or even should engage in this sort of inquiry. Cultures, especially in a multicultural society, are dynamic and overlapping. It is unclear how courts would decide which cultural phenomena belong to which groups, especially given that social groups themselves often internally disagree over what is essential to their group's identity.[170] Even if a consensus were to emerge, a court's decision to ratify certain cultural signifiers as expressive of an authentic racial identity will "discredit anyone who does not fit the culture style ascribed to her racial group."[171] At least one court has declined to protect cultural signifiers for these reasons,[172] and it seems unlikely that other courts will be more inclined to wade into these murky waters, especially given that courts have consistently declined to engage in similar inquiries with regard to religious beliefs and practices.[173]

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[170] For example, compare KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 845 (2007) (drawing up a list of attributes constitutive of gay culture) with FORD, *supra* note 10, at 71-2 (criticizing attempts, including Yoshino's, to "define group differences with sufficient formality as to produce a list of traits at all").
[171] Richard T. Ford, *Race as Culture – Why Not*, 47 UCLA L. REV., 1803, 1811 (1999).
[172] EEOC v. Catastrophe Management Solutions, 837 F.3d 1156, 1170-72 (11th Cir. 2016).
[173] *See, e.g.*, Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) (asserting that it is "not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds"); *see also* United States v. Lee, 455 U. S. 252, 263 n.2 (STEVENS, J., concurring) (asserting an "overriding interest in keeping the…out of the business of evaluating the relative merits of differing religious claims"); *see also* Lyng v. Northwest Indian Cemetery Protective Assn, 485 U.S. 439, 457-457 (1988) (asserting that it is not the Court's role to find "that some sincerely held religious beliefs and practices are not

On the social conception of immutability, signifiers constitutive of or closely associated with stigmatized or subordinated social identities, whether mutable or immutable, receive protection under antidiscrimination law. To be sure, there will likely be cases in which it is unclear that a signifier meets these criteria; thus, courts must still inquire into how particular social identities are constructed. However, with regard to hair discrimination, it is not just that hair texture is associated with black individuals; hair texture has also been used historically and legally to construct blackness as a racial category. Thus, corporate grooming policies and workplace behaviors that implicitly or explicitly demean hairstyles associated with black individuals thereby contribute to the stigmatization of black identity.[174]

It is also important to distinguish my view from a similar view defended by Richard Ford. Ford argues that bans on locked hairstyles violate Title VII only when such bans are used by employers as *proxies* for racial identity.[175] Thus, he claims, if Renee Rogers were able to demonstrate that American Airlines banned cornrows in order to screen out black women from the applicant pool, then Rogers' claim should be sustained. However, on Ford's view the same would be true if Rogers were able to demonstrate that American Airlines banned, say, hoop earrings in order to screen out black women from the applicant pool, even if hoop earrings are not generally associated with black social identity. In both cases, Ford argues, the grooming policy might constitute evidence of a discriminatory intent, but the existence of a discriminatory

"central" to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit").

[174] To be clear, my analysis is limited to corporate grooming policies that specifically target hairstyles commonly associated with black individuals. I do not address the more difficult question of whether *all* corporate grooming policies that draw distinctions based on social identities – such as gender-specific grooming policies – are impermissible. For a critical discussion of this broader question *see* Robert C. Post et al., PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW (2001).

[175] *See* Ford, *supra* note 10, at 199.

intent still must be proved in court.[176] In the absence of an intent to discriminate, he concludes, neither policy is objectionable.

Though the conception of immutability that I have been defending similarly forbids discrimination by proxy, the differences between Ford's view and mine are significant. Ford introduces the notion of discrimination by proxy because, in his view, bans on locked hairstyles do not themselves constitute disparate treatment nor do they constitute wrongful disparate impact. According to Ford, if a ban on mutable traits or behaviors is to constitute disparate treatment, it must be shown that these traits or behaviors are essential to a particular group's identity, "such that a workplace rule prohibiting the behavior or trait would be illicit discrimination *per se*, just as a rule requiring that all employees have fair skin would be racial discrimination *per se*."[177] Ford is highly skeptical, however, of claims that certain mutable traits or behaviors are essential to racial group identity.[178]

Moreover, Ford argues, bans on locked hairstyles do not constitute disparate impact, because such bans "do not *deprive* anyone of job opportunities."[179] Rather, Ford claims, such bans merely disfavor employees who prefer "unconventional hairstyle[s]."[180] According to Ford, when faced with a ban on locked hairstyles, "[p]resumably some will change their hairstyle in order to get or keep the job."[181]

While Ford is rightfully skeptical of claims that locked hairstyles are essential to black cultural identity, he fails to consider that mutable signifiers can become part of a group's *social* identity. To see this point, consider Ford's observation that, while a grooming policy banning

[176] *Id*.
[177] *Id*. at 180.
[178] *Id*. at 97-99.
[179] *Id*. at 185.
[180] *Id*. at 139.
[181] *Id*. at 199.

locked hairstyles might constitute evidence of a discriminatory intent, a grooming policy banning or disfavoring dark skin constitutes discrimination *per se*. Why would this latter policy constitute discrimination *per se*? Ford's approach suggests that this policy is racially discriminatory *per se* because it constitutes irrefutable *evidence* of a racially discriminatory intent.[182] However, this might not be true in all cases. Suppose, for example, that the employer is a newly-arrived foreigner who is totally unfamiliar with the American racial caste system. For this employer, hiring employees with lighter skin, regardless of their racial categorization, is important for projecting a conventional, business-like image. Though this policy will disadvantage potential employees who prefer not to engage in skin lightening treatments, presumably some will change their skin tone in order to get or keep the job.

Despite the absence of a racially discriminatory intent, this policy would plainly constitute discrimination *per se*. What makes the act discriminatory *per se* is not the intent, or lack thereof, but the fact that the act targets a signifier that is constitutive of a subordinated social identity. That is, even if an employer were entirely unaware of the relationship between dark skin and American racial categories, a policy disfavoring dark skin would inherently stigmatize black social identity because dark skin is partly constitutive of African American social identity. This holds true even if some individuals would change their skin tone in order to get or keep the job, for the expressive meaning of the policy – that dark skin is unconventional and unprofessional – plainly stigmatizes African American social identity, regardless of the employer's intent.

But once this point is acknowledged the inquiry turns to determining which signifiers are constitutive of the relevant social identity. Given that, as we saw above, hair texture and

[182] *Id*. at 180. (arguing that per se arguments, "if accepted…would make the claim of discrimination irrefutable").

hairstyle have long been used to construct blackness as a racial category, it is hardly plausible to argue that policies disfavoring hairstyles associated with black individuals merely disfavor unconventional and mutable cultural preferences. To be sure, my account takes on board Ford's insight regarding discrimination by proxy: intent is relevant in cases where employers adopt idiosyncratic policies in order to screen out protected social groups. My account differs from Ford's, however, in two important respects: first, on my view, discrimination *per se* is not simply a matter of intent; it is also a matter of the objective social meaning of policies that disfavor signifiers associated with protected social groups; second, because mutable signifiers can be used to define particular social groups, policies that disfavor these signifiers constitute discrimination *per se*. Thus, the social conception of immutability provides support for the claim that workplace grooming policies targeting hairstyles adopted by or associated with black individuals are discriminatory *per se*.

C. Language

In a number of cases courts have held that the possession of a foreign accent and the ability to speak multiple languages are protected characteristics under antidiscrimination law, on the grounds that patterns of speech often denote racial or ethnic background. Yet language discrimination cases, like hair discrimination cases, often follow a tortuous logic. In language discrimination cases courts have struggled to distinguish between the immutable and mutable characteristics of language; to identify the connections between language, ethnicity, and personal identity; and to separate out legitimate language regulation from mere arbitrary bias. As I shall argue in this Part, the results have been scattershot and unconvincing.

The Supreme Court recognized nearly one century ago that language can be used to identify and subordinate ethnic or cultural outsiders. In the 1923 case *Nebraska v. Meyer* the

Court subtly addressed the post-World War I, anti-German bias underlying the state's restrictions on foreign language instruction. In the Court's view, the desire to form a linguistically homogenous polity is understandable, given the "[u]nfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries."[183] However, the Court concluded, the chosen means are impermissible because "[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue."[184] These aspects of the case suggest that *Meyer*, though most often read as a touchstone for substantive due process rights,[185] can plausibly also be read as an early animus case, wherein language is targeted as a proxy for national origin.

This reading of *Meyer* gains plausibility from another language discrimination case close in time. In the 1926 case *Yu Cong Eng et al. v. Trinidad, Collector, et al.* the Court invalidated Act No. 2972 of the Philippine Legislature, the so-called Chinese Book-keeping Act.[186] The Act made it unlawful for any person or corporation engaged in commercial activity in the Philippine Islands "to keep its account books in any language other than English, Spanish, or any local dialect."[187] The claimed purpose of the Act was to facilitate the accurate tally and collection of a general sales tax. While the vast majority of the 12,000 Chinese merchants to whom the tax applied could neither read nor write in any of the local languages, violators of the Act could be fined up to $5000 and could be imprisoned for up to two years.[188]

The Court, citing *Meyer*, frames its holding in terms of due process: in the Court's view, the Act constitutes an "oppressive and arbitrary" infringement upon the liberty of the affected

[183] Meyer v. Nebraska, 262 U.S. 390, 402 (1923).
[184] *Id*. at 401.
[185] Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1509 (1998).
[186] 271 U.S. 500 (1926).
[187] *Id*. at 508.
[188] *Id*. at 513-4, 518.

Chinese merchants.[189] However, just as in *Meyer* there is a clear equal protection issue at stake, which comes out in the Court's analysis of the Act itself. Rejecting a number of alternate constructions, some of which may have preserved the constitutionality of the Act, the Court asserts that there is no "doubt that the Act...was chiefly directed against the Chinese merchants" and that the Act is "obviously intended chiefly to affect [Chinese merchants] as distinguished from the rest of the community."[190] On these grounds the Court declares the Act a violation of Equal Protection.

In light of *Meyer* and *Yu Cong Eng* there is ample precedent for including language discrimination within antidiscrimination law, and contemporary courts accept that speakers of foreign languages deserve protection. Yet there is considerable disagreement over the grounds for providing such protection. As one court noted recently, "[t]hat minority language groups are vulnerable to majoritarian politics is clear...what is not yet clear is how best to protect them."[191]

Some courts have applied a conventional immutability analysis. In *Garcia v. Gloor,* for instance, the Fifth Circuit Court of Appeals considered a Title VII challenge to an employer's rule prohibiting bilingual employees engaged in sales work from speaking Spanish on the job.[192] Finding in favor of the employer, the Court noted that "[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth."[193] Yet the workplace regulation in question applied only to bilingual employees, and, according to the Court, "the language a person who is multi-lingual elects to speak at a particular time is by

[189] *Id*. at 525.
[190] *Id*. at 514, 528.
[191] Smothers v. Benitez, 806 F. Supp 299, 305 (Dist. Court, D. Puerto Rico 1922) (citation omitted).
[192] 618 F. 2d 264 (5th Cir. 1980)
[193] *Id*. at 270.

definition a matter of choice."[194] Thus, in the Court's view the employer's policy did not discriminate on the basis of a protected characteristic.[195]

In other cases, courts have focused on the significance that language often has for an individual's personal identity. In *Gutierrez v. Municipal Court*, for instance, the Ninth Circuit Court of Appeals considered a challenge to a municipal court policy forbidding employees from speaking any language other than English, except when acting as translators or during breaks or lunchtime.[196] Holding that "English-only rules generally have an adverse impact on protected groups and...should be closely scrutinized," the court argued that an individual's primary language "remains an important link to...ethnic culture and identity."[197] The *Gutierrez* opinion, and others like it, invoke language familiar from the personal identity conception of immutability I discussed above.[198]

Other courts, however, have avoided the immutability question, arguing instead that language is often a proxy for, if not partly constitutive of, race or national origin. In *Hernandez v New York*, for example, the Supreme Court reviewed a New York state prosecutor's decision to exercise peremptory challenges to exclude Spanish speaking individuals from serving as jurors for a trial in which Spanish language testimony would be central.[199] Three of the four excluded individuals were Hispanic; yet, the prosecutor denied that he sought to exclude Hispanic individuals, maintaining instead that he wished to exclude only individuals who "might have

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[194] *Id*. at 270.
[195] *Id*. at 272.
[196] 838 F. 2d 1031 (9th Cir. 1988).
[197] *Id*. at 1040, 1039. *See also Smothers v. Celeste Benitez* 806 F. Supp 299, 309 (holding that "[t]he use of one's language is an important aspect of one's ethnicity, and should not be sacrificed to government or business interests without good cause").
[198] *See supra* Part I.C.
[199] 500 U.S. 352 (1991).

difficulty in accepting the translator's rendition of Spanish-language testimony," a category that extended to Hispanics and non-Hispanics alike.[200]

While deeming the prosecutor's reasoning race-neutral, the plurality opinions split over how to conceive of the connection between language and race or national origin. Citing *Meyer* and *Yu Cong Eng*, Justice Kennedy observed that "for certain ethnic groups and in some communities...proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."[201] By contrast, according to Justice O'Connor "no matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race."[202] For O'Connor, a language-based peremptory challenge would violate Equal Protection only if it served as a mere pretext for racial discrimination.

Despite these differences, in most language cases the practical upshot is the same: regardless of how they conceive of language and the relationship between language and race or national origin, courts tend to carefully scrutinize language-based regulations. Since, in my view, this is as it should be, it may seem pedantic to insist upon a clearer understanding of language for antidiscrimination law. However, the persistence of such varied and conflicting rationales is indicative of deeper flaws in the doctrine.

First, attempts to distinguish between the immutable and mutable aspects of language have led to implausible results. For example, while the *Gloor* court argued that monolinguism and is immutable, this characteristic can be changed; for some individuals, the change may be relatively easy.[203] Second, though it is no doubt true that language can constitute a central part

[200] *Id*. at 361.
[201] *Id*. at 371.
[202] *Id*. at 375.
[203] Garcia 618 F. 2d at 270.

of an individual's ethnic identity, this is not true in every case. An individual may decide to speak in their native tongue merely for convenience, while a native English speaker who adopts a second language may not identify as a member of the associated ethnic group. Yet if language ought to receive some form of protection under antidiscrimination law, presumably such individuals ought to receive protection. An employer who discriminates on the basis of ethnicity should not be shielded from legal repercussions merely because the victim does not identify with the relevant ethnic group.

Finally, while it is unclear that language is constitutive of race or ethnicity, Justice O'Connor's suggestion, that no matter how closely language serves as a proxy for race language discrimination is not race discrimination, is untenable. As the court properly recognized in *Meyer* and *Yu Cong Eng*, language discrimination is often a form of racial or ethnic discrimination. At the same time, however, it is plausible that some workplace regulations restricting language choice reflect legitimate business needs and that, when properly tailored, such regulations neither express nor cater to racial or ethnic hostility. For instance, a business might reasonably require that, when carrying out business transactions, employees communicate in the language of the business's customers. The same cannot be said, however, for workplace regulations that cater to customers who prefer to be served only by same-race employees.

On my view, there is no need to shoehorn language into the traditional immutability framework. What is needed for antidiscrimination law is not an account of what language is but an account of how language functions within status hierarchies. On the social conception of immutability, language is of particular interest as a social signifier because a spoken language, like hair texture, skin color, and gender expression, is an easily observable property that is often used by dominant groups to categorize and subordinate minority groups. While Justice Kennedy

is exactly right to claim that language, in some cases, is akin to race or ethnicity, this is not because of any intrinsic features of language itself. It is instead because language, like skin color, is often used by dominant groups to sort individuals into distinct social groups. The social conception of immutability thus requires that language restrictions be carefully scrutinized.

To some extent courts have already adopted this view. For example, in *Pemberthy v. Beyer*, another case dealing with the exclusion of Spanish-speaking jurors, the Third Circuit argues that "[b]ecause language-speaking ability is so closely correlated with ethnicity, a trial court must *carefully* assess the challenger's actual motivation even where the challenger asserts a rational reason to discriminate based on language skills."[204] For the *Pemberthy* court, "the dispositive question is the factual question of subjective intent."[205] For some scholars, the *Pemberthy* holding, though imperfect, is sufficiently protective of linguistic minorities. According to Andrew P. Averbach, for instance, "[a]lthough language minorities may face a difficult task in demonstrating intent," the holding in *Pemberthy* "affords them an opportunity to challenge some of the most common (and often the most invidious) types of language discrimination."[206]

On my view, *Pemberthy* falls short in two respects. First, as I have discussed in this Part, signifiers such as hair, dress, and language are not only used as proxies for a particular social identity; rather, they may be used to construct the identity itself. There is thus no reason to require that plaintiffs prove the existence of a discriminatory intent *in addition to* the intent to discriminate against signifiers that are constitutive of a particular social identity. This would be

[204] Pemberthy v. Beyer, 19 F. 3d 857, 872 (3rd Cir. 1994) (emphasis in original).
[205] *Id*.
[206] Andrew P. Averbach, *Language Classifications and the Equal Protection Clause: When Is Language a Pretext for Race or Ethnicity*, 74 BUL REV. 481, 502 (1994).

akin to requiring that plaintiffs prove the existence of an intent to discriminate against African Americans in addition to an intent to discriminate against black skin.

Second, requiring subordinate groups to prove the existence of a discriminatory intent is both unfair and bound to underprotect. Linguistic minorities, which are often politically and socially isolated, are likely to be at a disadvantage with regard to investigating economic and political majorities. Moreover, given that, as various courts have recognized, language discrimination has a long history in the United States, there is more than enough reason to shift the evidentiary burden to those who seek to impose language restrictions.

Conclusion

Overall, the social conception of immutability is able to explain recent developments within the law and to provide a principled basis for deciding future cases in a manner consistent with historical equal protection principles. The basic insight of the social conception of immutability is that immutability analysis should be used to prevent dominant groups from constructing or relying upon relatively fixed, stigmatized signifiers in order to maintain socially impermeable group boundaries. For this purpose, the biological or psychological traits, individual choices, and personal identities of stigmatized individuals are normatively irrelevant.

The move away from focusing on individual choice and personal identity is also important, given the demographic trajectory of American society. Consider Wendy Greene's astute observation:

> [I]n light of increased immigration, cultural diversity, interracial marriage, and transracial adoption, as well as the formal recognition of multi-racial identity and more fluid self-characterizations of racial, ethnic, religious, and gender identity, claims stemming from misperceptions about a plaintiff's protected status may become as commonplace as traditional claims of discrimination based upon an individual's self-classified identity. [207]

[207] D. Wendy Greene, *Categorically Black, White, or Wrong: Misperception Discrimination and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 91 (2013).

Current political trends notwithstanding, it does seem likely that future generations increasingly will be able to choose among a panoply of racial, cultural, ethnic, and gender identities. Yet if current immutability doctrine is retained, these choices will undercut an important source of protection against discriminatory treatment, thereby allowing impermeable group boundaries to persist and caste hierarchies to endure. As I hope to have demonstrated in this paper however, the social conception of immutability is a promising alternative.

Chapter 2:

The Badges of Slavery Revisited

Introduction

Section 2 of the Thirteenth Amendment grants Congress the authority to eliminate the "badges and incidents" of slavery.[1] What constitutes an incident of slavery is clear: the incidents of slavery are the legal restrictions, such as forced labor and restraints on movement, that were inherent in the institution of slavery itself.[2] By contrast, what constitutes a badge of slavery is far less certain, and, despite over a century of legal usage, few legal scholars have examined the historical meaning of the metaphor. Nevertheless, alongside the recent reawakening of scholarly interest in the Thirteenth Amendment there has emerged a renewed interest in Section 2, such that the literature now abounds with proposals for eliminating modern-day badges of slavery. Section 2, for example, has been cited as grounds for addressing hate speech,[3] racial profiling,[4] sexual orientation discrimination,[5] violence against women,[6] limitations on the right to an

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

[2] 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 (Alexander Tsesis ed. 2010);Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L., 570-2 (2011).(citing various historical sources indicating that "an "incident" of slavery was an aspect of the law that was inherently tied to or that flowed directly from the institution of slavery—a legal restriction that applied to slaves qua slaves or a legal right that inhered in slaveowners qua slaveowners").

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

[4] William M Carter Jr, *A Thirteenth Amendment framework for combating racial profiling*, 39 HARV. CR-CLL REV., 20-24 (2004).

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

[6] Jeffrey J Pokorak, *Rape as a badge of slavery: The legal history of, and remedies for, prosecutorial race-of-victim charging disparities*, 7 NEV. LJ (2006). see also Jack M Balkin, *The Reconstruction Power*, 85 NYUL REV., 1851-2 (2010).

abortion,[1] and sexual harassment.[2] Indeed, it seems that for many legal scholars Section 2 is expanding just as Congressional authority under other Reconstruction Amendments is contracting.

However, there is a widening gulf between scholars who have examined the history of the badges metaphor and scholars who invoke the metaphor in support of contemporary legislative proposals. Broadly speaking, the former argue that the badges metaphor possesses a limited, historically determined meaning that cannot sustain most contemporary Section 2 proposals. Drawing on legal history and on the original public meaning of the badges metaphor, these scholars maintain that in the postbellum legal context the badges metaphor referred to practices that threatened to reimpose chattel slavery or its de facto equivalent.[3] According to this view, few, if any, badges of slavery remain; hence, legal scholars hoping to advance civil rights law via Section 2 must look elsewhere.

Heretofore no one has attempted to defend an expansive view of Section 2 by appealing to legal history and to the original public meaning of the badges metaphor. This paper provides just such a defense. As I shall demonstrate, the history of the badges metaphor remains substantially underexplored; revisiting this history reveals that the badges metaphor, both in popular discourse and as a legal term of art, has always possessed a broad range of meanings. Indeed, by revisiting this history I aim to show that an expansive view of Section 2 is well-supported by the legal history and original public meaning of the badges metaphor.

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[1] Andrew Koppelman, *Forced labor: A Thirteenth Amendment defense of abortion*, 84 NW. UL REV. (1989).
[2] ; see also Jennifer L. Conn, *Sexual harassment: a Thirteenth Amendment response*, 28 COLUMBIA JOURNAL OF LAW AND SOCIAL PROBLEMS (1995);Pamela D Bridgewater, *Reproductive freedom as civil freedom: the Thirteenth Amendment's role in the struggle for reproductive rights*, 3 J. GENDER RACE & JUST. (1999).
[3] McAward, U. PA. J. CONST. L., 569 (2011).

In Section I I canvass contemporary legal scholarship regarding the origins of the badges metaphor and contemporary applications of Section 2. In I.A. I demonstrate that existing scholarship on the history of the badges metaphor largely cuts against a broad understanding of Section 2. While my overall aim is to vindicate contemporary applications of the badges metaphor, I argue that scholars who seek to apply the badges metaphor to contemporary injustices have failed to engage with the history of the metaphor and, as a result, most contemporary Section 2 proposals are not obviously grounded in the legislative or jurisprudential history of the Thirteenth Amendment.

In Section II I revisit the history of the badges metaphor. In II.A I trace the origins of the badges metaphor to the Greco-Roman practices of physically marking slaves and other low status individuals. I then survey the development of the metaphor within the feudal system of medieval Europe and the appearance of the metaphor within 18th century American political discourse. The history I survey reveals that, contrary to existing historical scholarship, the badges metaphor extended beyond race and chattel slavery to gender- and class-based subordination. This is because the badges of slavery grew out of the republican intellectual tradition; accordingly, as I demonstrate in II.B, familiarity with the republican conceptions of slavery and liberty are essential to understanding what the badges metaphor originally meant. In II.C I revisit the history of the badges metaphor in American law. There I demonstrate that the badges metaphor first appears not in the *Civil Rights Cases*, as is most often claimed, but in *Dred Scott v. Sanford*. Justice Taney's usage of the metaphor in *Dred Scott* is deeply revealing and supports an expansive reading of Section 2, yet it has been entirely overlooked by contemporary legal scholars.

In Sections III and IV I turn to questions of application. In Section III I discuss how an expansive reading of Section 2 can be expected to fare in the current legal environment. Traditionally the Court has submitted Section 2 legislation only to rational basis review. However, over the last several decades the Supreme Court has begun reigning in Congress's authority under the Fourteenth and Fifteenth Amendments, respectively, and some legal scholars believe that, given the opportunity, the Court would place similar limits Congress's Thirteenth Amendment authority. In III.C I argue that, in light of the legislative history and text of the Thirteenth Amendment, there is no basis for applying heightened scrutiny to Section 2 legislation. In III.D I argue that, supposing that the Court *does* apply heightened scrutiny to the Thirteenth Amendment, it is nevertheless too early to know the extent to which this would constrain Congress's Section 2 authority. It may, for example, mean only that Congress must adduce a robust evidentiary basis for Section 2 legislation, a requirement that in no way rules out an expansive reading of Section 2.

Finally, in Section IV I consider some contemporary proposals for eliminating the badges of slavery. Restrictive views of the badges metaphor call into question not only proposed Section 2 legislation but also extant antidiscrimination law. As I argue in Section IV, however, the history of the badges metaphor supports those who argue that Section 2 extends beyond race and beyond slavery strictly understood.

I. Legal Scholarship and the Badges Metaphor

While contemporary legal scholars have advanced a variety of proposals for regulating or forbidding practices that purportedly impose a badge of slavery, there has been comparatively little research into the history and meaning of the badges metaphor itself. What research exists suggests that many of these proposals are only tenuously related to the badges metaphor, at least

as the metaphor was understood and put to use during the postbellum period. Many contemporary badges proposals thus seem to lack any plausible historical basis or constitutional footing. In fact, the problem may be worse, for it extant antidiscrimination law may also rest upon an ahistorical interpretation of the badges metaphor and so may be vulnerable to legal challenge.[4]

Scholars working on the history and meaning of the badges metaphor aim to provide historically informed guidelines for Section 2 legislation. According to Jennifer Mason McAward, for example, from historical work on the badges metaphor legal scholars can derive "an objective methodology under which Congress and the courts can analyze the historical record and translate that analysis into workable constraints on legislation."[5] For McAward, it is important to find workable constraints on Section 2 legislation because the potential scope of application is vast: the Thirteenth Amendment contains no state action requirement; the Amendment applies to persons of all races; Congressional legislation under Section 2 has reached practices that, according to critics, bear little resemblance to chattel slavery; and, after *Jones* and subsequent cases, Congress may define the badges of slavery subject only to rational basis review.[6] In McAward's view, the badges metaphor possesses a "finite, historically-determined range of meaning," and from this historically-determined range of meaning one can derive a principled basis for preventing or rectifying Congressional overreach.[7]

As I discuss below, legal scholars who have examined the history of the badges metaphor have tended to take a much narrower view of Congress's Section 2 authority than legal scholars

[4] See infra Section I.b.
[5] McAward, U. PA. J. CONST. L., 568 (2011).
[6] But see infra Section III.
[7] Jennifer Mason McAward, *The scope of Congress's Thirteenth Amendment enforcement power after City of Boerne v. Flores*, 88 WASH. UL REV., 69 (2010).

who have applied the badges metaphor to contemporary legal issues. In McAward's view, for example, the claim that "Section 2 of the Thirteenth Amendment confers on Congress a broad power to legislate against discrimination generally overlooks this precise terminology and tends to devalue the immediate aftermath of the slave system."[8] Similarly, in light of his reading of the badges of slavery concept, William M. Carter, Jr. expresses "skepticism about the Thirteenth Amendment as a remedy for generalized class discrimination."[9] Though ultimately I shall reject such views, they draw upon historical, textual, and legal evidence that cannot be ignored. In the following Section I present this evidence; in Section II I defend a historically grounded but more expansive view of the badges metaphor.

a. The History of the Badges Metaphor

Only recently have legal scholars begun to examine the historical usage and meaning of the badges metaphor. George Rutherglen and Jennifer Mason McAward have provided the most thorough accounts of the transition of the phrase from antebellum political rhetoric to postbellum legal term of art, while William M. Carter, Jr. has considered the application of the phrase in light of the Reconstruction Framer's understanding of class-based subordination.[10] While there is no scholarly consensus *per se*, Rutherglen and McAward have undertaken the most detailed analyses on the badges metaphor and they are generally in agreement as to the history of the phrase. Carter's work, though concerned more with legislative intent than with linguistic meaning, is in important respects congruent the work of Rutherglen and McAward. Thus, for sake of clarity I shall present the work of these scholars as a more or less unitary interpretive

[8] McAward, U. PA. J. CONST. L., 566 (2011).
[9] William M Carter Jr, *Class as Caste: The Thirteenth Amendment's Applicability to Class-Based Subordination*, 39 SEATTLE UL REV., 825 (2015).
[10] Id. at.

framework, which I will refer to below as the "restrictive" interpretation of the badges metaphor.[11]

Rutherglen and McAward each distinguish between a rhetorical or political usage of "badge of slavery," which, they claim, was common in public discourse during the antebellum period, and a distinctively legal usage of the phrase, which was not.[12] According to McAward, for example, "[w]hile "badge of slavery" was a relatively common phrase…it was used more in a rhetorical rather than legal context."[13] On this view, though often invoked in political argument, the common, political usage of the concept lacked the relative clarity and stability of meaning of a legal term of art. Rutherglen, citing instances of the phrase in the writings of John Adams, George Washington, Adam Smith, Edmund Burke, and Tacitus, asserts that the phrase referred generally to "evidence of political subjugation" but possesses "inherent ambiguity."[14] In McAward's view, "[i]t is possible to identify a range of meanings for the term but difficult to define it precisely."[15]

Whatever its original meaning, or meanings, in public discourse, Rutherglen and McAward claim that the phrase had no distinctively legal significance. On their view, the badges metaphor would emerge as a legal term of art only later, out of the speeches and writings of American abolitionists and Republican politicians.[16] For American abolitionists and

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[11] For a similar characterization of this debate, see George Rutherglen, *The Thirteenth Amendment, the power of Congress, and the shifting sources of Civil Rights law*, 112 COLUM. L. REV. (2012).

[12] McAward, U. PA. J. CONST. L., 576 (2011). (asserting that "[a]ntebellum legal references to the "badge of slavery" were relatively infrequent, but the term was commonly used in the rhetoric of abolitionists as well as the mainstream press").

[13] Rutherglen, 166. 2010.(observing that "[u]nlike its legal use, the political use of [the badges metaphor] was common in the antebellum era").

[14] McAward, U. PA. J. CONST. L., 575 (2011).

[15] Id. at.

[16] Rutherglen, 165-6. 2010.(noting William Lloyd Garrison's reference to the prohibition against the marriage of interracial couples as "a disgraceful badge of servitude" but arguing that "this sense of "badge" rarely appeared in the law of slavery"). McAward, U. PA. J. CONST. L., 576 (2011).(arguing that "[a]ntebellum legal references to the "badge of slavery" were relatively infrequent, but the term was commonly used in the rhetoric of abolitionists as well as the mainstream press").

Republican politicians, Rutherglen and McAward argue, the badges metaphor primarily referred to the public association of African American skin color with slave status. For example, during Congressional debates over the Civil Rights Act of 1866, Senator James Harlan of Iowa, describing the Roman practice of slavery, noted that "[c]olor at Rome was not even a badge of degradation. It had no application to the question of slavery."[17] Similarly, as Rutherglen points out, "in an argument before the Supreme Court in 1843, a lawyer for a slave seeking freedom…offered the following observation about American slavery: "[c]olour in a slaveholding state is a badge of slavery. It is not so where slavery does not exist"").[18]

But skin color was not the only badge of slavery. During these same debates the Act's sponsor, Senator Lyman Trumbull, defined a badge of servitude as "any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens."[19] In McAward's view, Trumbull is here simply *equating* the badges metaphor with the legal incidents of slavery.[20] Throughout the 19th century, she concludes, the phrase "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."[21]

According to Rutherglen and McAward, after emerging in 19th century political discourse as a metaphorical reference to skin color and to the incidents of the American slave system, the badges metaphor was then taken up by the federal courts.[22] In their view, and in the view of many other constitutional scholars, the origins of the phrase as a distinctly legal term of art can be traced to a series of federal court cases concerning the scope of Congress's enforcement

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[17] CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864).
[18] Rutherglen, 166. 2010.
[19] *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 474 (1866)
[20] McAward, U. PA. J. CONST. L., 578 (2011).
[21] Id. at, 581.
[22] Rutherglen, 172. 2010.(arguing that the "trajectory of [the metaphor's] rise to prominence was from Senator Trumbull to [Justice Bradley's] majority opinion in the Civil Rights Cases).

power under Section 2.[23] In the 1866 case *United States v. Rhodes*, for instance, Justice Swayne, riding circuit, observed that free blacks during the antebellum period "had but few civil and no political rights in the slave states. Many of the badges of the bondman's degradation were fastened upon them."[24] Justice Bradley, dissenting in the 1871 case *Blyew v. United States*, asserted that to "deprive a whole class" of the right to provide testimony in criminal prosecutions "is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families, and their property unprotected by law."[25]

Writing for the majority roughly a decade later in the *Civil Rights Cases*, Justice Bradley once again invoked the phrase, arguing that Section 2 "clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[26] But Bradley construed the metaphor narrowly, limiting the badges of slavery to public laws that approximate the "burdens and incapacities [that] were the inseparable incidents of [slavery]."[27] According to Bradley, during the antebellum period private acts of discrimination targeting free blacks were not considered badges of slavery, because, Bradley argues, "no one at that time" thought that black individuals ought to be "admitted to all the privileges enjoyed by white citizens," such as equal access to public facilities.[28]

Rutherglen and McAward maintain that the phrase's transformation into a distinctively legal term of art constituted a break with public usage.[29] According to McAward, from *Rhodes*

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[23] James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV., 428 (2018).(asserting that in the Civil Rights Cases Justice Bradley introduced the phrase "badges and incidents of slavery" into the Supreme Court's lexicon").
[24] 27 F. Cas. 793 (D. Ky. 1866) (Swayne, J., on circuit).
[25] 80 U.S. (13 Wall.) 581, 599 (1871) (Bradley, J., dissenting).
[26] The Civil Rights Cases, 109 U.S. at 20.
[27] Id. at 22.
[28] Id. at 25.
[29] McAward, U. PA. J. CONST. L., 575 (2011). (claiming that the metaphor's "meaning appeared to evolve from the antebellum to postbellum eras, particularly as it migrated from colloquial to legal use.").

to the *Civil Rights Cases* the phrase was "transform[ed] and broaden[ed]…to refer to the broader set of political, civil, and legal disadvantages imposed on slaves, former slaves, and free blacks."[30] In McAward's view, this transformation followed post-emancipation attempts to re-enslave newly freed blacks.[31] As she argues, the badges metaphor, in the postbellum legal context, referred to practices that threatened to reimpose chattel slavery or its de facto equivalent.[32]

In sum, Rutherglen and McAward offer a series of interpretive claims closely linking the badges metaphor to the incidents of slavery and to postbellum practices that substantially mimicked the incidents of slavery. Taken together, Rutherglen and McAward maintain that there existed a rhetorical or political usage of the badges metaphor distinct from the legal term of art; that the legal term of art arose out of abolitionist and Republican references to African American skin color, to the incidents of slavery, and to legal disabilities imposed upon newly freed blacks; and, that the federal judiciary first took up the metaphor in cases such as *Blyew* and *Rhodes* as a gloss on the scope of Congressional authority under Section 2. In Section 2 I contest each of these claims. First, however, to get a sense of what is at stake, I shall introduce some of the main questions concerning the badges metaphor and the scope of Section 2.

b. The Scope of Section 2

It is helpful to frame the relationship between the badges metaphor and Section 2 as revolving around a set of interrelated questions.[33] First, to which groups does the concept apply? That is, is the imposition of badge of slavery limited to the descendants of slaves or to racial minorities generally, or can badges of slavery be imposed upon other groups as well? Second, to

[30] Id. at, 578.
[31] Id. at, 581.
[32] Id. at, 569.
[33] This framing broadly follows that of McAward.

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

To which groups does the badges metaphor apply? The most restrictive approach to Section 2 identifies African Americans as the only group to which the badges metaphor can apply. Though this approach is generally rejected by courts and scholars, it is not without some prima facie support. As I noted above, according to Rutherglen and McAward, the badges metaphor was used primarily to refer to the skin color of African Americans or to legal burdens suffered by African Americans as a group. Moreover, American chattel slavery and the postbellum Black Codes enacted in various Southern states were plainly intended to subordinate African Americans. Finally, while members of the Reconstruction Congress evinced concern for other racial groups, African Americans were foremost in mind during the debates over the 13th Amendment and other Reconstruction-era legislation. No plausible approach to the badges metaphor can overlook the centrality of African American subjugation to American chattel slavery and to the badges thereof.

On the other hand, the 13th Amendment was written in race-neutral terms, and subsequent court precedent has confirmed that the 13th Amendment covers all racial groups.[34] Thus, while

[34] See Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 72 (1873) (asserting that "[u]ndoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void.") See also St. Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, (1987).

concern for the subjugation of African Americans surely lies at the heart of the 13th Amendment, the power to eliminate the badges of slavery under Section 2 plausibly extends to other groups as well.

Much of the current debate surrounding the application of the badges metaphor takes place between these two poles. Broadly speaking, proponents of a relatively expansive approach to Section 2 support the extension of the badges metaphor to any social group that is subjected to some important aspect of American chattel slavery. Sydney Buchanan, writing shortly after the *Jones* decision, first staked out this position. According to Buchanan, any act of arbitrary class prejudice imposes upon its victims a badge of slavery.[35] This is because, Buchanan argues, "[a] chief vice of the institution of slavery was its arbitrary irrationality."[36] Moreover, Buchanan claims, supporters of the Thirteenth Amendment and of the 1866 Civil Rights Act "were intensely concerned with class prejudice."[37] Thus, for Buchanan, legislation targeting widespread arbitrary class prejudice is a valid exercise of Congressional authority under Section 2, regardless of the identity of the class toward which this prejudice is directed.

Jack Balkin defines slavery more narrowly than Buchanan but defends a view that is perhaps just as expansive. According to Balkin, "[s]lavery was not just legal ownership of people; it was an entire system of conventions, understandings, practices, and institutions that conferred power and social status and maintained economic and social dependency."[38] Thus, for Balkin, if Congress is to eliminate the badges of slavery it must "disestablish all the institutions, practices, and customs associated with slavery and make sure they can never rise up again."[39]

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[35] G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1069, 1074 (1975). (claiming that "[t]here is nothing in this language that confines the enforcement power of Congress to the protection of any particular race or class of persons").
[36] Id. at, 1073.
[37] Id. at, 1076.
[38] Balkin, NYUL REV., 1817 (2010).
[39] Id. at.

Citing *Jones*, Balkin defends a "class-protecting strategy," according to which Congress may protect minority groups from practices that would deny them equal citizenship.[40] For instance, Balkin argues that Congress could reasonably conclude that certain practices impose second-class citizenship upon women and gays, implying that his approach extends to any group subject to systematic private or public discrimination.[41]

As the work of Balkin and Buchanan suggests, contemporary Section 2 proposals tend to adopt a more expansive reading of the badges metaphor. But more recent analyses of the badges metaphor have taken issue with such views. William M. Carter, for example, is skeptical of views according to which Congressional authority under Section 2 extends to non-racialized forms of class prejudice under Section 2, arguing that such views neglect the historical context in which the Thirteenth Amendment was debated and enacted. According to Carter, "[t]he Thirteenth Amendment's Framers expressed little explicit concern during the framing debates regarding class *qua* class."[42] This is so, he claims, because "our contemporary language regarding "class" had not at the time of the Thirteenth Amendment debates truly entered the American jurisprudential, philosophical, ideological, or lay lexicons."[43] Rather, he argues, "the urgent issue was slavery and the consequences thereof, not social class in the way we think of it today."[44]

According to Carter, to the extent that Reconstruction Republicans thought in class-based terms, it was strictly a consequence of their "understanding of slavery as a system that permanently demarcated social class by race."[45] Thus, he argues, a badges of slavery claim must

[40] Id. at, 1852.
[41] Id. at, 1835-6; 1851-2.
[42] Carter Jr, SEATTLE UL REV., 820 (2015).
[43] Id. at.
[44] Id. at.
[45] Id. at, 821.

evince a fairly close connection to the institution of slavery, understood in this sense. More specifically, Carter argues that a badges of slavery claim depends upon two conditions: first, "the connection between the class to which the plaintiff belongs and the institution of chattel slavery;" and, second, "the connection the complained-of injury has the institution of chattel slavery."[46] On this view, "the paradigmatic badges and incidents of slavery claim…would involve a plaintiff who is a descendant of the enslaved or who was injured because of his perception as such (e.g., an African American person)."[47] But, according to Carter, practices that are "closely tied to the structures supporting or created by the system of slavery" may also impose a badge of slavery, irrespective of group identity. Thus, for Carter, badges of slavery claims, while paradigmatically applicable to African Americans, extend to other groups as well.

McAward, pressing a number of structural and historical points, defends perhaps the most restrictive approach. Expansive approaches, she argues, would encroach upon the judiciary, for they 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."[48] Moreover, as a historical matter, McAward takes issue with Buchanan's claim that Reconstruction Republicans were concerned with class-based prejudice *per se*. As McAward reads the historical record, "the clear expectation was that [Section 2] concerned itself specifically with race and the legacy of American slavery."[49] In McAward's view, Section 2 only licenses Congress "to protect people from the badges and incidents of slavery imposed on account of race or previous condition of

[46] Id. at, 825.
[47] William M Carter Jr, *Race, rights, and the thirteenth amendment: Defining the badges and incidents of slavery*, 40 UC DAVIS L. REV., 1366 (2006).
[48] McAward, U. PA. J. CONST. L., 613 (2011).
[49] Id. at.

servitude."[50] This would clearly rule out much of the proposed Section 2 legislation surveyed above.

To which practices does the concept refer? For Reconstruction Republicans the incidents of slavery comprised the legal consequences of being held a slave. The badges metaphor, though sometimes invoked in reference to incidents of slavery, referred to a broader range of formal and informal practices that subjugated African Americans in both the antebellum and postbellum periods. Contemporary scholars differ over the range of contemporary practices that can be thought to impose a badge of slavery, and much of this debate turns on questions similar to those surveyed above, namely, the history and usage of the badges metaphor; the nature of chattel slavery and its aftermath; the pre- and post-enactment legislative record; and the extent to which Reconstruction changed the structure of the American government.

Here, again, Sydney Buchanan's work on the 13th Amendment stands as the most expansive approach to Section 2 legislation. Recall that, for Buchanan, the central evil of slavery consisted of widespread, arbitrary class prejudice.[51] Widespread, arbitrary class prejudice, Buchanan argues, has the "capacity to clog the channels of opportunity."[52] The victims of such prejudice "tend[] to be thwarted at every turn in [their] pursuit of normal human endeavors."[53] In other words, victims of widespread, arbitrary class prejudice suffer the same general type of harm as did the victims of chattel slavery, and so Congress possesses the authority under Section 2 to prevent such biases from taking root.

Balkin defends a similarly open-ended view of Congress's Section 2 authority. According to Balkin, the "badges and incidents of slavery" refers to "all the institutions,

[50] Id. at, 614.
[51] Buchanan, HOUS. L. REV., 1073 (1975).
[52] Id. at, 1078.
[53] Id. at.

practices, and customs associated with slavery."[54] Since Congress possesses the power to eliminate the badges of slavery, Balkin argues, "Congress has the power to dismantle the interlocking social structures and status-enforcing practices that were identified with slavery or that rationalized and perpetuated it."[55] For Balkin, as well as Buchanan, the badges metaphor would seemingly justify Section 2 legislation that reaches the kind of class prejudice that, when brought before a court, now generally falls under the Equal Protection Clause of the Fourteenth Amendment. One consequence of this approach is that Section 2 might cover a broader range of persons and conduct than that covered by the Equal Protection clause, given that the 13th Amendment has no state action requirement.[56]

Other scholars applying the badges metaphor to contemporary legal issues have not generally defended or cited more expansive views of Section 2 authority. Rather, contemporary applications of the badges metaphor tend to rely on specific, individual comparisons between evils that persisted under slavery and present day concerns. Jeffrey J. Pokorak, for example, observes that "antebellum prejudices and practices kept the prosecution of rape of a Black woman a rare, if extant, occurrence."[57] In Pokorak's view, contemporary disparities in the legal protections afforded to black female victims of rape thus constitute badges of slavery.[58] Andrew Koppelman argues that anti-abortion laws impose involuntary servitude upon pregnant women who would otherwise terminate their pregnancies, violating Section 1 of the 13th Amendment. But such laws also violate Section 2, Koppelman argues, "[b]ecause the subordination of women,

[54] Balkin, NYUL REV., 1817 (2010).
[55] Id. at.
[56] Id. at, 1806.
[57] Pokorak, NEV. LJ, 7 (2006).
[58] Id. at.

like that of blacks, has traditionally been reinforced by a complex pattern of symbols and practices, [and] the amendment's prohibition extends to those symbols and practices."[59]

Contemporary applications of the badges metaphor tend to follow a similar argumentative strategy. That is, scholars working with the badges metaphor have tended to assume that present-day inequities that are sufficiently analogous to a central aspect or aspects of chattel slavery constitute badges of slavery. While I am sympathetic to such arguments, and while my analysis of the badges metaphor in Section II is intended to vindicate an expansive view of Section 2, it is nevertheless hard to deny that the badges metaphor has been, in McAward's words, "often-invoked but under-theorized."[60] Contemporary scholarship drawing analogies between the evils of chattel slavery and contemporary injustices may be convincing in some respects, but rarely does this scholarship offer much substantive historical evidence regarding the meaning of the badges metaphor. This is unfortunate, for there is at least a prima facie case to be made that contemporary scholars have stretched the badges metaphor beyond recognition.

McAward, for example, drawing upon the early postbellum statements of litigators, legislators, and Supreme Court justices, argues that two conditions must be met if a contemporary practice is to count as a badge of slavery.[61] First, recall that, according to McAward, the badges metaphor was invoked in the early postbellum period as a synonym for the incidents of slavery or as a reference to discriminatory state laws that attempted to reimpose the incidents of slavery – or their de facto equivalent – upon African Americans.[62] This usage,

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[59] Andrew Koppelman, *Forced Labor, Revisited: The Thirteenth Amendment and Abortion*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 233, (2010).
[60] McAward, U. PA. J. CONST. L., 564 (2011).
[61] Carter Jr, UC DAVIS L. REV., 1366 (2006).
[62] See supra n. 9.

McAward argues, suggests that Section 2 badges legislation must be limited to addressing contemporary practices that "mirror a historical incident of slavery."[63]

Balkin, by comparison, also draws upon the history of the metaphor; yet the few examples he cites are primarily references to the incidents of chattel slavery, not its badges, and thus do not obviously support his broader view, namely, that Congress may eliminate all contemporary "status-enforcing practices."[64] Similarly, though Koppelman draws a plausible analogy between child-birth and indentured servitude, he presents almost no historical evidence regarding the usage of the badges metaphor in support of his conclusion that laws restricting access to abortion constitute badges of slavery. Given the apparent lack of evidence supporting either of these applications of the badges metaphor, McAward's restrictive interpretation seems better supported by the historical record.

Second, on McAward's view, Section 2 legislation may only reach contemporary practices, public or private, that "pose a risk of causing the renewed legal subjugation of the targeted class."[65] This condition is necessary because, for McAward, Section 2 is ultimately "prophylactic" in nature, in that Section 2 forbids "conduct beyond actual enslavement" in order to prevent the "*de facto* reemergence" of slavery.[66] McAward is primarily concerned with the balance of power between Congress and the judiciary. In her view, the badges metaphor "is ambiguous and potentially expansive, and Congress could easily manipulate it to cover conduct far removed from the historical core of the slave system itself."[67] Moreover, in light of *Jones*, courts reviewing Section 2 legislation must apply a highly deferential standard of review,

[63] McAward, U. PA. J. CONST. L., 622 (2011).
[64] Balkin, NYUL REV., 1817 (2010).
[65] McAward, U. PA. J. CONST. L., 622 (2011).
[66] McAward, WASH. UL REV., 69 (2010).
[67] Id. at, 63.

potentially giving Congress free reign to enact new civil rights legislation. By contrast, McAward argues, a prophylactic understanding of Section 2 would give some meaningful role to courts as arbiters of legislation targeting the badges of slavery.[68]

To get a sense of the practical implications of McAward's view, it is helpful to consider a few examples. For McAward, Section 2 legislation may only address conduct that, "left unaddressed, would have the cumulative effect of subordinating an entire race to the point that it would render it unable to participate in and enjoy the benefits of civil society."[69] The Civil Rights Act of 1866, she argues, is a paradigmatic example of prophylactic Section 2 legislation, for it "addressed state laws that sought to reimpose the incidents of slavery by restricting freed slaves' fundamental civil liberties."[70] By contrast, she claims, most modern applications of the badges metaphor address conduct that, though wrongful, would not otherwise lead to the reimposition of slavery.

Consider, for instance, the 2009 Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. The Act imposes criminal penalties on individuals who willfully injure others on the basis of "actual or perceived race [or] color."[71] The "Findings" section of the Act includes the claim 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."[72] As McAward points out, however, "there is no specific finding linking racial hate crimes to a threatened reemergence of slavery or involuntary servitude;" thus, on her view, the Act reaches beyond Congress's Section 2 authority. In fact, McAward is skeptical that any hate

[68] Id. at, 68.
[69] McAward, U. PA. J. CONST. L., 629 (2011).
[70] Id. at, 628.
[71] 18 U.S.C. § 249(a)(1) (2012).
[72] Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. (2007).

crimes legislation could be justified by reference to Section 2: it is, she argues, "mercifully difficult to envision any racist act" that could realistically threaten to reimpose chattel slavery or involuntary servitude upon African Americans or other racial groups.[73]

McAward's view is also at odds with *Jones*. According to McAward, because the badges metaphor possesses a "a finite range of meaning that is tied closely to the core aspects of the slave system and its aftermath," Courts must scrutinize Section 2 legislation to ensure that Congress has not expanded the concept beyond its original scope of application. Thus, whereas *Jones* requires that Section 2 legislation be submitted only to rational basis review, McAward "would revise *Jones* by clarifying that Congress's discretion is limited to identifying which badges and incidents of slavery it will address – not defining them outright – and then determining how it will address them."[74] Revising *Jones* in this way would have the added benefit of bringing the Court's Thirteenth Amendment jurisprudence more into line with its Fourteenth and Fifteenth Amendment jurisprudence.[75]

Finally, McAward's view rules out virtually all of the contemporary scholarship proposing new applications for the badges metaphor. None of this scholarship attempts to demonstrate that the targeted conduct, left unaddressed, would bring about the reemergence of chattel slavery, involuntary servitude, or their de facto equivalents. In many cases, this argument would be rather difficult to sustain. Regardless of one's normative commitments, it is hard to believe that laws forbidding gay marriage or abortion would reduce gays or women to slaves or indentured servants. On McAward's view, such laws thus do not impose a badge of slavery and so are not appropriate targets of Section 2 legislation.

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[73] McAward, U. PA. J. CONST. L., 626 (2011).
[74] McAward, WASH. UL REV., 68 (2010).
[75] Id. at, 64. (noting that "one would expect Congress's Section Two power and Jones to be cabined in the same way that City of Boerne cabined Congress's Fourteenth Amendment enforcement powers").

To be sure, McAward's view is not wholly at odds with contemporary Section 2 proposals. For example, McAward gestures toward the possibility that disparate impact claims might fall under Section 2.[76] But on her view, in order to sustain such claims it would have to be shown that the disparities in question, if left unaddressed, would bring about the reemergence of chattel slavery, involuntary servitude, or their de facto equivalents. As McAward acknowledges, "[t]his could be a very difficult showing to make."[77] Overall, then, it is unclear whether, in practice, McAward's view would allow for any contemporary Section 2 legislation, though, as she argues, "this is the unavoidable consequence of remaining true to Supreme Court doctrine that Section 1 protects only against slavery and coerced labor and to the prophylactic purpose of Section 2 legislation."[78]

c. Conclusion

Analyses of the badges metaphor inevitably move beyond the history of the phrase to incorporate broader considerations, such as the balance of power between Congress and the judiciary, the balance of power between the federal government and the states, the nature of American slavery, and much else. Of course, this brief survey cannot do justice to all of the issues relevant to debates regarding Section 2, let alone the 13th Amendment as a whole. Regardless, having set forth the main issues, I shall now turn to the badges metaphor itself. The history of the badges metaphor is significantly underexplored and thus warrants further analysis on its own. Indeed, as I demonstrate in the next Section, the history of the badges metaphor largely vindicates expansive approaches to Section 2.

II. The Badges of Slavery Revisited

[76] McAward, U. PA. J. CONST. L., 610 n.253 (2011).
[77] Id. at, 617 n.290.
[78] Id. at, 627.

The restrictive interpretation of the badges metaphor rests on three key claims: first, that in American political discourse the metaphor, though somewhat vague, primarily referred to African American skin color and to the incidents of chattel slavery; second, that the metaphor as it appeared in American political discourse was distinct from the metaphor as a legal term of art; and, third, that the legal term of art first emerged in early postbellum Supreme Court cases solely as a reference to the attempted re-enslavement of newly freed blacks. For Rutherglen and McAward, the upshot of these claims is that contemporary applications of the badges metaphor under Section 2 are historically supported and thus constitutionally sound only if they similarly target attempts to re-enslave African Americans. This is the heart of the restrictive interpretation of the badges metaphor.

In the remainder of the Section I introduce historical evidence that rebuts each of these claims. In Part A I argue that contemporary scholarship on Section 2 overlooks a great deal of the intellectual history of the badges metaphor and thus misconstrues the meaning of the metaphor in American political discourse. As Rutherglen and McAward acknowledge, politicians, judges, and abolitionists often used related phrases, such as "badge of degradation," "badge of servitude," and "badge of subjection," interchangeably with "badge of slavery."[79] Taking into account these synonymous phrases, it is clear that the linguistic norms governing usage of the badges metaphor were far more expansive than is commonly thought. In fact the badges metaphor was for centuries a common political trope in the Western legal tradition. Originating in Roman republican discourse, the metaphor was later taken up in the 17th and 18th

[79] Id. at, 578.(equating "badge of degradation" and "badge of servitude" with "badge of slavery"); see also Rutherglen. 2010.

centuries by European republican critics of monarchical government, American feminist activists, and other moral reformers.

The restrictive interpretation thus overlooks the truly broad scope of the badges metaphor within antebellum and postbellum political discourse. The badges metaphor, as I discuss below, did not solely, or even primarily, refer to African American skin color or to the incidents of chattel slavery. Indeed, even among American abolitionists the metaphor was not limited in application to African American skin color or even to racialized, chattel slavery. Moreover, it is fair to assume that the American political actors who invoked the metaphor did so with some awareness of the metaphor's intellectual history, especially given that 18th and 19th century Americans widely and self-consciously drew upon Roman legal concepts and republican thought.[80]

In Part C I address the emergence of the badges metaphor in Supreme Court jurisprudence and the supposed distinction between the metaphor as political rhetoric and the metaphor as a legal term of art. Recall that, according to Rutherglen and McAward, the political usage of the metaphor was vague and inherently unclear, whereas the metaphor as a legal term of art possessed a precise and stable meaning. In support of this latter claim, Rutherglen and McAward, among many others, argue that the badges metaphor first appeared as a legal term of art in *Blyew*, *Rhodes*, and the *Civil Rights Cases* and referred only to legal restrictions imposed upon newly freed African Americans.

In fact, this argument fails to account for an earlier and more revealing appearance of the phrase, namely, that in Justice Taney's majority opinion in *Dred Scott v. Sanford*. In *Dred Scott* Taney does not simply equate the badges metaphor with the incidents of slavery or with African

[80] See infra II.b.

American skin color. Rather, Taney claims that a badge of slavery could result from discriminatory laws that targeted whites as well as informal social practices that subordinated blacks. The key point for Taney is that a badge of slavery results from formal as well as customary practices that publicly stigmatized blacks as a social class. In other words, Taney's usage of the badges metaphor is much in keeping with the metaphor at it was used in the ordinary political discourse, suggesting that a badge of slavery at law was originally much broader than the restrictive interpretation maintains.

As I argue in Part D, the upshot of this historical analysis is that a badge of slavery is a socially salient law or custom whose public meaning stigmatizes an identifiable, subordinate social group. This definition makes the best sense of the historical usage and intellectual lineage of the metaphor. To be sure, I do not purport to provide in this Section a complete chronicle of the badges metaphor. No doubt my historical overview will be in many respects incomplete. Nevertheless, I hope to bring to light those aspects of history that have been neglected in much contemporary scholarship on the badges metaphor. Only then may we determine what sort of contemporary legislation this metaphor might support.

a. Origins and Development

The origins of the badges metaphor lie in the Greco-Roman practices of marking slaves, convicts, prisoners of war, and other low status individuals. To some extent status markings were a solution to the practical problem of identification; as many Athenians recognized, slaves made up a significant proportion of the Athenian population yet could not be reliably distinguished from free citizens.[81] In his commentaries on the Athenian constitution, for

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

example, Psuedo-Xenophon claims despairingly that in Athens slaves and citizens were often indistinguishable.[82] Writing approximately eighty years later, Aristotle attempts to solve the problem by suggesting that "[i]t is nature's intention also to erect a physical difference between the bodies of freemen and those of slaves."[83] Yet, he admits, frequently enough slaves have the appearance of freemen, and vice versa.[84]

Writing contemporaneously, (the actual) Xenophon references one conventional solution for identifying slaves, namely, affixing a "public mark" onto the slave's body.[85] Branding or, more commonly, tattooing the skin was used by the Greeks to identify and derogate low status individuals, particularly slaves, prisoners of war (who were often sold into slavery), and convicts.[86] Delinquent slaves and other convicts often had their faces tattooed with the name of their crimes.[87] In the *Laws*, Plato proposes that "if anyone is caught committing sacrilege, if he be a slave or a stranger, let his offence be written on his face and his hands."[88] The Greek term for puncturing or marking the skin, στίζειν, thus referred to marks, στΐγμᾰ, or *stigma*, signifying disgrace and degradation.[89]

Under the Roman Empire slaves were also marked by tattoos or brands; however, Roman slaves were also fitted with a *signaculum*, a lead stamp or badge affixed permanently around the neck.[90] Moreover, in addition to evidence documenting literal badges of slavery, there is at least

[82] Ps. Xen. Const. Ath. 1 (arguing that "if it were customary for a slave…to be struck by one who is free, you would often hit an Athenian citizen by mistake on the assumption that he was a slave." The problem, he claims, is that "[f]or the people there are no better dressed than the slaves and metics, nor are they any more handsome").
[83] *Pol*. 1254b27-34.
[84] Ibid.
[85] *Ways* 4.21.
[86] Christopher P Jones, *Stigma: tattooing and branding in Graeco-Roman antiquity*, 77 THE JOURNAL OF ROMAN STUDIES, 147 (1987).
[87] Id. at, 143.
[88] 8 Pl., *Leg*. 854D.
[89] Jones, THE JOURNAL OF ROMAN STUDIES, 142 (1987).
[90] ALISON E COOLEY, THE CAMBRIDGE MANUAL OF LATIN EPIGRAPHY 101, 198 (Cambridge University Press. 2012).

some evidence that slave badges were understood metaphorically as well. As Rutherglen points out, in the *Annals* Tacitus writes of an episode in which a conquered king requests through an intermediary that he not have to "endure any badge of slavery."[91] Interestingly, however, the phrase used, *imaginem servitii*, refers to an "image of servitude," not to a literal badge, or *signaculum*, which is understandable in light of the fact that accompanying the king's plea is a list of acts, such as surrendering his sword, that would not constitute a literal badge but would, for a king, surely give off an image of subjugation.[92]

After its emergence in antiquity, usage of the badges metaphor appears to have subsided, for it is not until the 17th and 18th centuries that one finds it in widespread use. While metal slave collars were in use throughout this period and persisted well into the 18th century, during this period the scope of the badges metaphor greatly expands.[93] For example, for hundreds of years prior to the American Civil War writers throughout the English-speaking world used the phrase, or a variant, to condemn perceived acts of political oppression in the form of taxation[94], tything[95], tributary payments[96], the imposition of curfews,[97] and political borders.[98] In 17th Century England, members of the egalitarian, republican Leveller and Digger movements

[91] Rutherglen, 163, 166 & n.23. 2010. (citing P. Cornelius Tacitus, The Annals and the Histories Bk. Xv, At 31 (1952))
[92] *Ann*. 15.31.
[93] William W Heist, *The Collars of Gurth and Wamba*, 4 THE REVIEW OF ENGLISH STUDIES, 362-64 (1953). (discussing the usage of metal serf collars in 18th century Scotland)
[94] WILLIAM BLACKSTONE, THE OXFORD EDITION OF BLACKSTONE'S: COMMENTARIES ON THE LAWS OF ENGLAND: BOOK I: OF THE RIGHTS OF PERSONS 209 (Oxford University Press. 2016).
[95] James Tyrrell, *Bibliotheca politica or, An enquiry into the antient constitution of the English government, with respect to the just extent of the regal power ... In fourteen dialogues. Collected out of the best authors, antient and modern*, 548 (1718).
[96] THOMAS GREENWOOD, THE HISTORY OF THE GERMANS FIRST BOOK... THE BARBARIC PERIOD 426 (1836).
[97] KNOWLEDGE SOCIETY FOR PROMOTING CHRISTIAN, THE HISTORY OF ENGLAND 24 (Society for Promoting Christian Knowledge. 1854). (describing as a badge of servitude a "law directing that all fires should be put out at the tolling of a bell at eight o'clock").
[98] THE LORD AND THE VASSAL : A FAMILIAR EXPOSITION OF THE FEUDAL SYSTEM IN THE MIDDLE AGES, WITH ITS CAUSES AND CONSEQUENCES 82-3 (John W. Parker. 1844). (observing that ancient German tribes "considered it a badge of servitude to be obliged to dwell in a city surrounded by walls").

objected to copyhold tenure as "the ancient and almost antiquated badge of slavery."[99] Writing nearly a century later, David Hume argued that the English monarch's prerogative of wardship, which permitted the monarch to take over the profits of an estate in certain circumstances, constituted a badge of slavery. 18th writers invoked the badges metaphor in condemnation of police entry into private homes,[100] economic restrictions on colonial commercial activity,[101] and cultural forms of oppression: according to William Blackstone, for example, a badge of slavery was imposed upon the English during the 11th century Norman Conquest of England, because the occupiers forced English courts to use the French language.[102]

While slave badges of a sort were in use in various parts of the United States throughout the 18th and 19th centuries, the practice was not widespread.[103] References to the badges of slavery in this period are plainly metaphorical and refer to other forms of subordination, such as the wearing of livery – a uniform, badge, or other visual element "signify[ing] possession and ownership, that of the lord over the servant."[104] Some Americans loudly condemned the wearing of livery; in an 1882 Congressional debate New York House Representative William Robinson furiously declared that "Jefferson would never have let one of his employés" wear this "degrading…badge of slavery."[105] Austrian journalist Francis Joseph Grund noted the "unwillingness of the poorer classes of Americans to hire themselves out as servants" and their

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[99] ROGER CHARLES RICHARDSON, TOWN AND COUNTRYSIDE IN THE ENGLISH REVOLUTION 184 (Manchester University Press. 1992).
[100] JOHN PHILLIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 41 (University of Chicago Press. 1988).
[101] ADAM SMITH, AN INQUIRY IN THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 582 (R. H. Campbell, A. S. Skinner, W. B. Todd eds., 1981) Bk. IV, ch. 7 (1776).
[102] WILLIAM BLACKSTONE, THE OXFORD EDITION OF BLACKSTONE'S: COMMENTARIES ON THE LAWS OF ENGLAND: BOOK IV: OF PUBLIC WRONGS 269 (Oxford University Press. 2016).
[103] See HARLAN GREENE, et al., SLAVE BADGES AND THE SLAVE-HIRE SYSTEM IN CHARLESTON, SOUTH CAROLINA, 1783-1865 (McFarland. 2008).
[104] Ward 20. In Sir Walter Scott's *Ivanhoe*, for instance, the two serfs of the Saxon Lord Cedric, Gurth, a swineheard, and Wamba, a jester, wear iron slave collars. In *Ivanhoe*, Wamba's collar is described as a "badge of servitude," a descriptor similarly applied to a livery uniform in Scott's earlier work, *Waverly*.
[105] (14 Cong. Rec. 795 (1883).

refusal to "submit to the wearing of a livery or any other badge of servitude."[106] American jurists also tied the badges metaphor to signifiers and practices associated with feudal hierarchy. In *The Civil Rights Cases*, for example, the majority notes that, during the Ancien Régime "all inequalities and observances exacted by one man from another were servitudes or badges of slavery" which the revolutionary National Assembly, "in its effort to establish universal liberty, made haste to wipe out and destroy."[107] Likely the majority is referring to the National Assembly's *Decree on the Abolition of the Nobility*, which abolished, among other signifiers of hierarchy, the wearing of livery.[108]

19th century women's rights advocates also invoked the badges metaphor. In his well-known 19th century feminist essay *The Subjection of Women*, for example, John Stuart Mill points to the social benefits to be gained "by ceasing to make sex…a badge of subjection."[109] In a letter to the abolitionist Gerrit Smith, Elizabeth Cady Stanton claims similarly that 19th century women's dress, which was both visually distinctive and physically confining, was a sort of badge, for it signified that one was a member of a low status group: "why proclaim our sex on the house-tops" asks Stanton, "seeing that it is a badge of degradation, and deprives us of so many rights and privileges wherever we go?"[110] African American women held in bondage were doubly disadvantaged in this respect, in that slave clothing signified both subordinate gender status *and* subordinate racial status.[111]

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[106] J Francis, *Grund, The Americans in Their Moral, Social, and Political Relations, 2 vols*, 2 LONDON: LONGMAN, 66 (1837).
[107] Civil Rights Cases, 109 3, (Supreme Court).
[108] J. Hardman (ed.), *The French Revolution Sourcebook*, London, Arnold, 1999, p.113.
[109] Mill, John Stuart "The Subjection of Women," in *Essays on Equality, Law, and Education*, of The Collected Works of John Stuart Mill, vol 21, ed. John M. Robson, Toronto: University of Toronto Press, 1984, orig pub. 1869.
[110] ELIZABETH CADY STANTON, et al., HISTORY OF WOMAN SUFFRAGE 841 § 1 (Susan B. Anthony. 1887).
[111] For example, Harriet Ann Jacobs, in her memoir, Incidents in the Life of a Slave Girl, describes the cheap linsey-woolsey dress given to her by her master's wife as "one of the badges of slavery." HARRIET ANN JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL: WRITTEN BY HERSELF 12 § 119 (Harvard University Press. 2009).

Pointing to similarities between the plight of disenfranchised women and that of disenfranchised blacks, the suffragist activist Virginia Minor observed of 19th century women that "[h]er disfranchised condition is a badge of servitude."[112] This comparison was not uncommonly drawn. Stanton used the badges metaphor to compare abolitionism and the burgeoning women's rights movement, arguing that "[t]he badge of degradation is the skin and sex."[113] Similarly, in a letter decrying the denial of women's voting rights, the abolitionist William Lloyd Garrison writes of his "hope…to see the day when neither complexion nor sex shall be made a badge of degradation."[114] The suffragist activist Angelina Grimke, protesting the segregation of Quaker meeting houses by seating herself in an area reserved for blacks, explained that "[w]hile you put this badge of degradation on our sisters, we feel that it is our duty to share it with them."[115]

Others saw in the American system of slavery a more general denigration of labor itself. An 1864 editorial in the New York Times notes one welcome effect of emancipation, namely, that "labor, losing its badge of degradation should become honorable."[116] William Jay, drafter of the constitution of the American Antislavery Society, argued that, for the emancipated slave, "labor is no longer the badge of his servitude."[117] Though such texts specifically discuss the connotation of labor in the midst of chattel slavery, there was a more general worry that labor itself had been made a badge of degradation, regardless of the complexion of the laborer. For

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[112] ELIZABETH CADY STANTON, et al., HISTORY OF WOMAN SUFFRAGE 730 § 2 (Susan B. Anthony. 1887).
[113] E.C. STANTON, et al., THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY: IN THE SCHOOL OF ANTI-SLAVERY, 1840 TO 1866 414 (Rutgers University Press. 1997).
[114] ELIZABETH CADY STANTON, et al., HISTORY OF WOMAN SUFFRAGE 370 § 3 (Susan B. Anthony. 1887).
[115] Id. at, 394, § 1.
[116] *The Freedmen in South Carolina*, N.Y. Times, February 28, 1864, Page 2.
[117] WILLIAM JAY, AN INQUIRY INTO THE CHARACTER AND TENDENCY OF THE AMERICAN COLONIZATION, AND AMERICAN ANTI-SLAVERY SOCIETIES 193 (Leavitt, Lord. 1835). See also HENRY WARD BEECHER, NORWOOD: OR, VILLAGE LIFE IN NEW ENGLAND 286 § 84 (Charles Scribner. 1868). (discussing the social stigmatization of "[w]orking people, in a community where work is the badge of servitude").

example, Booker T. Washington argues in *Up from Slavery* that "[t]he whole machinery of slavery was so constructed as to cause labour, as a rule, to be looked upon as a badge of degradation, of inferiority."[118] Massachusetts Senator and abolitionist Henry Wilson invoked this worry as a reason for passing the 13th amendment, which would, he claimed, uplift "the poor white man…impoverished, debased, dishonored by the system that makes toil a badge of disgrace."[119] The British pamphleteer and parliamentarian William Cobbet similarly railed against working-class poverty, which, he claimed was "the great badge, the never-failing badge of slavery."[120]

In sum, according to Rutherglen and McAward, during the antebellum period the badges metaphor was used primarily to refer to the legal incidents of racialized chattel slavery or to the status connotations of black skin. However, as we have seen, historically the metaphor has possessed a broad range of meanings, and during the antebellum period the metaphor was invoked in condemnation not just of racial injustice but also of unjust economic and political relations, including those based on gender and class.[121] These applications of the badges metaphor are in keeping with the rhetoric surrounding slavery generally. As the historian Eric Foner has shown, in 18th century American political discourse "slavery was primarily a political category, shorthand for the denial of one's personal and political rights by arbitrary government."[122] This usage continued into the 19th century, influencing not just the abolitionist movement but the early feminist and workers' movements as well.

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[118] BOOKER T. WASHINGTON, UP FROM SLAVERY (Penguin Books. 1986).
[119] CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864)
[120] Cobbett, *The Poor Man's Friend; or Essays on the Rights and Duties of the Poor* vol. 4 (London: W. Cobbett, 1826), 3.
[121] To be sure, Rutherglen and McAward both acknowledge that the badges metaphor is found outside of American discourse regarding chattel slavery; yet they do not take into account the extensive linguistic and conceptual history of the metaphor, nor do they attempt to incorporate this history into their analyses of Section 2.
[122] ERIC FONER, THE STORY OF AMERICAN FREEDOM 29 (WW Norton & Company. 1999).

Even for American critics of chattel slavery the metaphor was not limited to the legal incidents of racialized chattel slavery or to the status connotations of black skin; rather, the metaphor could refer to a variety signifiers associated with slavery, such as clothing or segregated seating. Thus, the first premise of the restrictive interpretation, that in American political discourse the metaphor referred only to African American skin color and to the incidents of chattel slavery, is belied by the historical examples presented above.

The historical examples provided above suggest a rough definition. The many references to social signifiers – badges, skin color, gendered dress, uniforms, manual labor, physical segregation – indicates that a practice that imposes a badge of slavery must be socially meaningful.[123] More specifically, invocations of the badges metaphor almost uniformly evince a concern for status, hierarchy, and stigmatization. Furthermore, these examples refer both to formal political or legal authority and to social custom, indicating that a badge of slavery could refer not only to state action but also to community norms and customs. A rough definition of a badge of slavery thus runs as follows: a badge of slavery is a socially salient law or custom whose public meaning stigmatizes an identifiable, subordinate social group.

b. The Badges of *Republican* Slavery

This rough definition is a useful starting point; however, it is incomplete. To see this, we must move beyond particular examples to examine the conceptual framework underlying the metaphor's many uses. In short, the badges metaphor must be understood in light of the republican conceptual framework that structured much 18th and 19th century American political discourse regarding slavery and subordination. Understanding the political and legal meaning of

[123] On the relationship between social signifiers and discrimination, see [In Defense of Immutability].

the badges metaphor therefore requires some familiarity with republican ideas. Of course, there is a vast literature on the development and spread of republican ideas.[124] There is a similarly expansive literature on the relevance of republican ideas to the contemporary American legal system.[125] It would be impossible to do justice to either bodies of work in such a short space. However, my aim here is narrow. My argument is simply that the 18th and 19th century Americans who invoked the badges metaphor were drawing upon a distinctly republican conception of slavery, which included but was not limited to racialized, chattel slavery.

18th and 19th century American political discourse drew deeply from two fonts of republican thought. The first was that of republican Rome. For Roman historians such as Tacitus, Livy, Cicero, Sallust, and Gaius, liberty is understood in terms of the basic distinction between citizen and slave.[126] As Gaius writes in his *Institutes*, in legal terms a citizen was *sui juris*, or under his own authority, whereas a slave was *potestate domini*, that is, subject to the jurisdiction of their masters.[127] As such, slaves were "perpetually subject or liable to harm or punishment," or to other arbitrary interference, from their masters.[128] But slavery was not thought of as a strictly legal condition. Roman moralists and historians believed that anyone who was subject to the

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[124] See, for example, JOHN GREVILLE AGARD POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (Princeton University Press. 2016);QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM (Cambridge University Press. 2012);CAROLINE ROBBINS, THE EIGHTEENTH-CENTURY COMMONWEALTHMAN: STUDIES IN THE TRANSMISSION, DEVELOPMENT, AND CIRCUMSTANCE OF ENGLISH LIBERAL THOUGHT FROM THE RESTORATION OF CHARLES II UNTIL THE WAR WITH THE THIRTEEN COLONIES (Liberty Fund. 2004);BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (Harvard University Press. 2017);GORDON S WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (UNC Press Books. 2011);Mortimer NS Sellers, *American republicanism*, *in* AMERICAN REPUBLICANISM (1994);Daniel T Rodgers, *Republicanism: the Career of a Concept*, 79 THE JOURNAL OF AMERICAN HISTORY (1992);Robert E Shalhope, *Republicanism and early American historiography*, THE WILLIAM AND MARY QUARTERLY: A MAGAZINE OF EARLY AMERICAN HISTORY AND (1982);JOYCE OLDHAM APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION (Harvard University Press. 1992);Alan Gibson, *Ancients, moderns and Americans: The republicanism-liberalism debate revisited*, 21 HISTORY OF POLITICAL THOUGHT (2000).

[125] For an overview of republican concepts within modern legal theory, see generally Cass R Sunstein, *Beyond the republican revival*, 97 YALE LJ (1987).

[126] PETER GARNSEY, IDEAS OF SLAVERY FROM ARISTOTLE TO AUGUSTINE 26 (Cambridge University Press. 1996).

[127] D 1.6.1.

[128] SKINNER, 40-44. 2012.

will of another, whether as a matter of public authority or private power, lived in a state of servitude.[129] Not just individuals but entire political communities could be considered slaves in this sense.[130]

The distinction between the citizen, who is in some significant respect independent, and the slave, whose choices can be arbitrarily interfered with, is not only central to republican thought;[131] it is also central to 18th and 19th century American political discourse concerning slavery. In political pamphlets and other public writings, educated 18th Americans, well-versed in the works of Tacitus and the other major Roman historians, self-consciously drew upon the republican conception of slavery.[132] In John Adams' work, for example, the badges metaphor appears amidst a number of references to Tacitus' view of slavery; Tacitus, as I noted above, provides one of the earliest examples of the badges metaphor.[133] Educated 19th century Americans also would have been familiar with classical views of slavery, and references to antiquity similarly colored 19th century political discourse.[134]

But to fully appreciate how deeply the Roman republican vocabulary influenced American discourse on slavery, it is necessary to consider a second source of republican rhetoric, namely, the writings of 17th century English Commonwealthmen such as Henry Neville, James Harrington, and Algernon Sidney.[135] These writers exhibited a similar indebtedness to the

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[129] Id. at, 42.
[130] Id. at, 44.
[131] PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 31 (OUP Oxford. 1997).(noting that "in the republican tradition...liberty is always cast in terms of the opposition between liber and servus, citizen and slave").
[132] Sellers, 20. 1994. (noting that a "[f]amiliarity with Livy, Sallust, Cicero and others provided colonists with a well-developed and well-admired alternative to monarchy, and a republican ideology")
[133] John Adams & Charles Francis Adams, The works of John Adams, second President of the United States 561 (Little, Brown and company [etc.] 1850). (citing Tacitus's view of slavery in support of the claim that ancient monarchies subjected citizens to slavery).
[134] MARGARET MALAMUD, ANCIENT ROME AND MODERN AMERICA 41 (John Wiley & Sons. 2009). (observing that "[l]ate eighteenth- century and early nineteenth-century readers used in schools contained a number of passages on the topic of slavery and liberty including several passages taken from Roman historians" such as Tacitus).
[135] BAILYN, 43. 2017.

Roman republican conception of slavery. According to Sidney, for example, "[h]e is a slave who serves the best and gentlest man in the world, as well as he who serves the worst; and he does serve him, if he must obey his commands, and depends upon his will."[136] For the Commonwealthmen, slavery was very often described as subjection to arbitrary, which is to say unchecked, power. 17th century farmers and artisans, for instance, sought "to abolish all arbitrary Power." Similarly, Sydney held that "laws are not made by kings…because nations will be governed by rule, and not arbitrarily."[137] For Sydney, "the multitude [who live] under the yoke" of an arbitrary ruler bear "a badge of slavery."[138]

18th century American writers widely adopted the concepts and vocabulary of Sidney and other Commonwealthmen. In 18th century political texts, for example, "arbitrary," becomes a watchword denoting tyrannical power, especially that wielded by the British monarchy over the colonies. According to one author, the British government possessed "a settled, fixed plan for *enslaving* the colonies, or bringing them under arbitrary government."[139] For many 18th century Americans, arbitrary power characterized despotic regimes, for a despot was "bound by no law or limitation but his own will."[140]

19th century labor republicans and abolitionists were also wont to rely, implicitly or explicitly, on this rhetoric. Labor republican Seth Luther, for instance, decried the "tyrannical government of the mills," which, he claimed, was defined by "one sided and arbitrary rule" over

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[136] ALGERNON SIDNEY & HENRY A CRAM, DISCOURSES CONCERNING GOVERNMENT 319 (J. Darby. 1704).
[137] JAMES HARRINGTON, THE POLITICAL WORKS OF JAMES HARRINGTON: PART ONE 171 (Cambridge University Press. 2010). (asserting that to be free under government is "not to be controlled but by the law; and that framed by every private man unto no other end…than to protect the liberty of every private man, which by that means comes to be the liberty of the commonwealth")
[138] SIDNEY & CRAM, 442. 1704.
[139] BAILYN, 119. 2017. (emphasis in original); Adams & Adams, 108. 1850.
[140] THOMAS JEFFERSON, et al., NOTES ON THE STATE OF VIRGINIA / [ELECTRONIC RESOURCE] BY THOMAS JEFFERSON ; EDITED WITH AN INTRODUCTION AND NOTES BY WILLIAM PEDEN 142 (Chapel Hill, North Carolina : The University of North Carolina Press, 1982. 1982). ("in his Notes on the State of Virginia, argues that "laws, to be just, must give a reciprocation of right; that, without this, they are mere arbitrary rules of conduct, founded in force.")

wage-laborers.[141] Angelina Grimke, whose invocation of the badges metaphor I noted above, wrote of the "arbitrary power" that slave owners wielded over slaves.[142] In a letter from William Lloyd Garrison to the editor of the Boston *Courier*. Garrison quotes extensively from Sidney's *Discourses on Government* "in order to show, beyond all contradiction, that Algernon Sidney *was an Abolitionist of the modern school*, as "fanatical," "incendiary," "denunciatory," and "blood-thirsty," as even [British abolitionist] George Thompson himself.[143] Garrison then proceeds to quote Sidney's definition of slavery, according to which a slave is "a man who can neither dispose of his person or goods, but enjoys all at the will of his master."[144]

To be sure, from the fact that many 18th and 19th century Americans used classically republican vocabulary one cannot conclude that they understood slavery in precisely the same manner.[145] Even among abolitionists there were deep disagreements over what were the core components of slavery.[146] Likely the same point can be made with regard to the badges metaphor: given the evident disagreement over what constituted slavery there surely also would have been disagreement over how to identify its badges. It would thus be too quick to conclude from the evidence given above that from usage of the badges metaphor one can infer a commitment to philosophical republicanism.

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[141] ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY 77 (Cambridge University Press. 2014).
[142] NANCY WOLOCH, EARLY AMERICAN WOMEN: A DOCUMENTARY HISTORY, 1600-1900 234 (Wadsworth Pub Co. 1992).
[143] WILLIAM LLOYD GARRISON, A HOUSE DIVIDING AGAINST ITSELF, 1836-1840 § 2 (Harvard University Press. 1971). (emphasis in original).
[144] Id. at.
[145] Don Herzog, *III. Some Questions for Republicans*, 14 POLITICAL THEORY, 481 (1986). (observing that a shared republican vocabulary is consistent with profound conceptual differences)
[146] According to William Lloyd Garrison, for example, even under a broader, republican understanding of slavery "[i]t seems to us an abuse of language to talk of the 'slavery of wages.'" "Free and Slave Labor," *The Liberator* XVII, no. 13 (March 26, 1847), 50.

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

The restrictive interpretation fails to account for this evidence and thus is unable to explain why the badges metaphor was so often invoked in condemnation of gender and class subordination, not to mention other perceived injustices that bore little resemblance to racialized chattel slavery and its aftermath. The republican interpretation, by contrast, provides a unified explanation of the metaphor's many appearances in European and American political discourse. In Section IV I show how this republican interpretation can inform contemporary proposals for identifying badges of slavery. But first, I must discuss one of the earliest and most significant appearances of the badges metaphor in American jurisprudence, namely, that in *Dred Scott.*

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

The first objection to the restrictive interpretation is that within American political discourse the badges metaphor was never limited to the incidents of chattel slavery, or even to race. The badges metaphor was a widely-used political shorthand for broader republican political commitments, according to which slavery was subjection to arbitrary authority. The second objection to the restrictive interpretation concerns the origin and meaning of the

metaphor specifically within American jurisprudence. The badges metaphor does not first appear, as is often claimed, in *Blyew*, *Rhodes*, or the *Civil Rights Cases*.[147] Rather, the badges metaphor appears earlier, in *Dred Scott v. Sanford*. This is significant because Rutherglen and McAward draw a distinction between the metaphor as expansive, if vague, political rhetoric and the metaphor as narrow and precisely defined legal term of art; yet, in *Dred Scott* Taney respects no such distinction. In fact, Taney's usage of the badges metaphor is of a piece with the examples I introduced above.

The facts, holding, and aftermath of *Dred Scott* are, of course, rather infamous. Yet Justice Taney's opinion repays close scrutiny; in a bit of historical irony, for the question at hand there is much that can be gleaned from his racist logic. First, recall that Taney's opinion is not simply intended to rebut the claim that Scott's residences in a free state and in federal territory rendered him a free citizen. Taney endeavors to show more generally that African Americans always were and always would be excluded from the "new political family which the Constitution brought into existence."[148] In Taney's view, at the founding of the republic African Americans were fundamentally and permanently excluded from the American body politic.

To establish this point Taney introduces pre- and post-ratification evidence to the effect that African Americans had always been considered not just non-citizens but also non-*persons*, subject to the "absolute and despotic power" of others.[149] As evidence Taney introduces a number of colonial and state anti-miscegenation laws. But Taney focuses less on the penal function of these laws and more on the fact that such laws served to express the white majority's view of black inferiority. Taney cites one anti-miscegenation law, for example, forbidding

[147] See Rutherglen supra n.29. McAward, U. PA. J. CONST. L., 563 (2011). See also Akhil Reed Amar, *Intratextualism*, HARVARD LAW REVIEW, 826 n.301 (1999).; Balkin, NYUL REV., 1817 (2010).
[148] Dred Scott v. Sandford, 60 393, (Supreme Court).
[149] Id. at, 406.

> "the marriage of any white person with any negro, Indian, or mulatto, and inflicts a penalty of fifty pounds upon anyone who shall join them in marriage, and declares all such marriage absolutely null and void, and degrades thus the unhappy issue of the marriage by fixing upon it the stain of bastardy."[150]

Note that, in addition to its immediate penal consequences, the expressive effect of this law, and others like it, is to place a *stain* – that is, a social stigma – upon the attempted marriage.[151] Note also that bastardy was as much a legal condition as a social condition: in addition to lacking the right of inheritance, bastards were also viewed as social outcasts.[152] For Taney, the point of such laws was not just to punish racial boundary crossing but, perhaps more importantly, to place "the strongest mark of inferiority and degradation" upon blacks as a class.[153]

Needless to say, Taney's opinion is a grotesquerie of moral reasoning. Nevertheless, his usage of the phrases "mark of degradation" and "badge of disgrace," which are plainly synonymous with "badge of slavery," is instructive.[154] First, Taney's usage of the metaphor

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[150] Id. at, 413. (citation omitted)

[151] For contemporary work on stain and stigma, see Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICHIGAN LAW REVIEW, 212-13 (1996).

[152] A 1939 article on the sociology of illegitimacy opens with the following observation: "The bastard, like the prostitute, thief, and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity, an undeniable evidence of contramoral forces; in short, a problem-a problem as old and unsolved as human existence itself" Kingsley Davis, *Illegitimacy and the social structure*, 45 AMERICAN JOURNAL OF SOCIOLOGY, 215 (1939).; see also John Witte Jr, *Ishmael's bane: The sin and crime of illegitimacy reconsidered*, 5 PUNISHMENT & SOCIETY, 328, 335 (2003). (arguing that illegitimate children "bore the permanent stigma of their sinful and criminal conception," which precluded them from "positions of social visibility and responsibility").

[153] Dred Scott v. Sandford, at 416.

[154] "Mark of degradation" and similar phrases were often used interchangeably with the badges metaphor. In Dred Scott, for instance, Taney, quoting Gibbon's *The History of the Decline and Fall of the Roman Empire*, writes that the 6th century emperor Justinian I "removed the badge of disgrace" from Roman slaves with the intended effect that "whoever ceased to be a slave obtained without reserve or delay the station of a citizen." Dred Scott v. Sandford, at 479. (citation omitted).

demonstrates that the distinction drawn by Rutherglen and McAward between the badges metaphor in public and political discourse and the badges metaphor as a legal term of art is illusory. Consider, for example, that Taney's usage of the metaphor is echoed, to opposite effect, by the abolitionist William Loyd Garrison. For Garrison, prohibitions against interracial marriage constituted "disgraceful badge[s] of servitude."[155] But Rutherglen characterizes Garrison's usage as political, not legal. That is, according to Rutherglen Garrison is pointing out that "[l]aws against miscegenation, insofar as they applied to whites and free blacks, did not draw out a consequence of actual slavery but were an indication of symbolic slavery."[156] While Rutherglen claims that "[t]his sense of "badge" rarely appeared in the law of slavery," one would be hard pressed to find a more canonical example of 19th century legal views of slavery than those expressed in *Dred Scott*.

Second, while Rutherglen and McAward maintain that Supreme Court justices used the badges metaphor as a synonym for the legal incidents of slavery, it is clear that Taney is not simply equating the two. Rather, Taney is using the badges metaphor to refer to the *expressive content* of laws that worked to subordinate African Americans. Moreover, Taney recognizes that the expressive content of these laws can only be understood in light of the community's wider social customs and beliefs regarding interracial marriage and the status of African Americans as a group, not just those who were enslaved. The badges metaphor, in other words, referred not just to the legal mechanisms that maintained slavery but also to the social customs and beliefs that stigmatized African Americans as a whole.

[155] Rutherglen, 165. 2010.(citing THE LIBERATOR (June 11, 1831), quoted in Louis Ruchames, Race, Marriage and Abolition, 40 J. NEGRO HIST. 250, 253 (1955)).
[156] Rutherglen, COLUM. L. REV., 166 (2012).

This reading is bolstered by Taney's claim that state anti-miscegenation laws "stigmatized" and "impressed…deep and enduring marks of inferiority and degradation" upon African Americans.[157] A stigma, like a badge of slavery, is not simply reducible to a particular legal burden. Rather, a law stigmatizes its targets when it expresses the view that a certain social identity is inherently degraded or inferior.[158] The badges of slavery, like stigma, are matters of social meaning and social status, a conceptual overlap that is to be expected in light of the historical origins of the badges metaphor in physical status markings.[159]

Third, Taney's opinion rebuts the restrictive interpretation's claim that a badge of slavery consisted only of laws restricting the rights of African Americans. While Taney introduces various colonial and state laws prohibiting interracial marriage as placing a mark of degradation upon African Americans, such laws also punished whites, if to a lesser extent. For example, Taney quotes from a similar Maryland law from 1717 that is even more explicit. According to this law, "any white man or white woman who shall intermarry…shall become servants during the term of seven years."[160] Such examples indicate that a badge of slavery did not only consist of laws restricting the rights of African Americans. In Taney's view the point of anti-miscegenation laws was to maintain an "impassable barrier" between racial groups.[161] While a law restricting the civil rights and political rights of African Americans was the most direct route to this outcome, the racial boundary Taney sought to defend could be reinforced by punishing whites as well. This result is hard to square with the claim that a badge of slavery referred only to legal restrictions imposed upon African Americans.[162] It is understandable, however, if the

[157] Dred Scott v. Sandford, at 416.
[158] Amar, MICHIGAN LAW REVIEW, 224 n.81 (1996).
[159] See supra Section II.
[160] Dred Scott v. Sandford, at 408.
[161] Id. at, 409.
[162] See supra n.9.

badges metaphor referred not primarily to particular legal sanctions but to the expressive purpose of these sanctions. And the expressive purpose, as Taney makes dreadfully clear, was to reinforce the stigmatization of African Americans as a group.

In fact, understanding the badges metaphor solely as referring to particular legal sanctions fails to make sense of Taney's overarching argument in *Dred Scott*. Again, in *Dred Scott* Taney is ultimately trying to demonstrate that African Americans had never been considered part of the American body politic. Taney is clearest on this point when he acknowledges the existence of free African Americans prior to the ratification of the Constitution. During this period, free African Americans faced legal discrimination of various sorts; yet they were also recognized as holding important legal rights and powers, suggesting that, even if not full citizens, free African Americans nonetheless possessed some standing within the American political community.[163] But for Taney this point is irrelevant, because free African Americans, he claims, "were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free."[164] In other words, according to Taney, even those African Americans free from slavery where socially perceived as bearing its badges, again drawing a connection between badges of slavery and group-based stigmatization.

Finally, with this argument Taney is drawing a clear connection between the badges metaphor and another concept central to understanding the Thirteenth Amendment, namely, custom. The Thirteenth Amendment directly regulates private conduct, for, as the framers of the amendment were aware, social customs and white cultural and behavioral norms were essential

[163] DON EDWARD FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 349 (Oxford University Press, USA. 2001).
[164] Dred Scott v. Sandford, at 411.

to the legitimation and maintenance of the slave system as a whole and the law of slavery in particular.[165] Courts relied on local customs "to fill gaps or resolve ambiguities" in the law of slavery as well as to "to generate the legal, social, and civil disabilities of the enslaved."[166] Courts cited local custom, for example, when settling on punishments for African Americans who assaulted whites.[167] Additionally, white cultural and behavioral norms, which presupposed the servile status of all African Americans, free or enslaved, also served to bolster the slave system and "to replicate the slave system appear in the immediate post-emancipation period."[168] Taney's usage of the badges metaphor similarly links white beliefs about black inferiority and customary practices with laws reinforcing black subordination. For the purposes of crafting Section 2 legislation, custom is an essential concept, a point to which I return in Section IV.

In sum, Taney's usage of the badges metaphor is highly revealing, and it cuts against the restrictive interpretation. Contrary to the restrictive interpretation, in *Dred Scott* the badges of slavery include but are not strictly limited to the incidents of slavery. A badge of slavery could be imposed by laws that targeted whites as well as blacks. The crucial element, for Taney, was that such laws, in conjunction with social customs and communal norms, publicly stigmatized African Americans as a whole. It would seem, then, that there was no fundamental discontinuity between the badges metaphor in American political discourse and the metaphor as a legal term of art. The badges metaphor, for Taney, Garrison, and others of this period, referred not solely, or

[165] Darrell AH Miller, *White Cartels, the Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co*, 77 FORDHAM L. REV., 1032 (2008). (noting that "Congress received ample evidence of discrimination by collectives of Southerners acting as legislatures, but it also heard evidence of discrimination perpetrated by collectives of Southerners acting in their private capacity").
[166] Darrell AH Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 COLUM. L. REV., 1815, 1825 (2012).
[167] Id. at 1825.
[168] Miller, COLUM. L. REV., 1832 (2012).

even primarily, to the legal incidents of slavery; rather, the badges metaphor referred to socially salient laws or customs whose public meaning stigmatized an identifiable social group.

It is instructive to compare Taney's usage of the badges metaphor with Justice Harlan's usage several decades later in the *Civil Rights Cases*. While many scholars cite the *Civil Rights Cases* as among the first jurisprudential appearances of the badges metaphor, relatively fewer note the significant divergence between the majority and dissent regarding the meaning of the term. According to Justice Bradley, writing for the majority, prior to the abolition of slavery "[m]ere discriminations on account of race or color were not regarded as badges of slavery."[169] Thus, he argues, the Thirteenth Amendment cannot sustain the provisions of the Civil Rights Act of 1876 banning discrimination in public accommodations. By contrast, according to Justice Harlan, "discrimination practiced [sic] by corporations and individuals in the exercise of their public or *quasi*-public functions is a badge of servitude," and, as such, is a proper target of Thirteenth Amendment regulation.[170]

For McAward "it is not immediately clear that the majority was wrong to limit the coverage of the Section 2 power to public actors," because, she claims, "the term "badge" of slavery was regarded in judicial circles as a post-emancipation synonym for "incident."[171] As the analysis of *Dred Scott* reveals, however, this is inaccurate; it is the majority's restricted interpretation, not Harlan's, that lacks historical pedigree. Though employing the metaphor to opposite ends, Harlan's usage of the metaphor follows Taney's in that it supposes that not only state discrimination but discrimination on behalf of private actors acting in a public capacity may impose badges of slavery. In fact, Harlan invokes *Dred Scott* to castigate the majority's crabbed

[169] Civil Rights Cases, at 25.
[170] Id. at, 43.
[171] McAward, U. PA. J. CONST. L., 615 (2011).

construal of the Reconstruction Amendments, a refrain he would sound again in *Plessy v. Ferguson*, where Harlan reiterates his view that the "arbitrary separation of citizens on the basis of race while they are on a public highway is a badge of servitude."[172] Far from crediting the majority opinion in the Civil Rights Cases, the majority opinion in the *Civil Rights Cases* should be regarded as the "anti-canonical" view of the badges metaphor, from which any plausible contemporary theory of the badges metaphor must diverge.[173]

d. Conclusion

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

To be sure, the majority opinions in *Bylew* and the *Civil Rights Cases* adopted a narrow reading the badges metaphor. The majorities in these cases, however, also adopted an artificially narrow and reactionary conception of the Thirteenth and Fourteenth Amendments.[174] It is thus

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[172] Plessy v. Ferguson, at 562.

[173] Richard A Primus, *Canon, anti-canon, and judicial dissent*, 48 DUKE LJ, 254 (1998). (describing anti-canonical Constitutional texts as containing "[t]he arguments that the canonical judicial opinions rejected comprise a set of texts, which we can imagine as parallel to (and as the mirror image of) the canonical texts themselves").

[174] ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY (NYU Press. 2004). (noting that "[t]he Supreme Court's holding in the Civil Rights Cases, coupled with a Republican reevaluation of the party's priorities and a presidential policy of appeasing the South following the Compromise of 1877, put a halt

unsurprising that these majorities would put forward a similar interpretation of the badges metaphor. But for contemporary courts, legislators, and scholars who seek to understand the original legal meaning of the badges metaphor, there is little reason to follow suit.

III. The Badges of Slavery After *Boerne*

In the previous Section I criticized the historical basis of the restrictive interpretation of the badges metaphor. But proponents of the restrictive interpretation do not rely on historical arguments alone. Rather, proponents of the restrictive interpretation also point to a spate of recent Supreme Court decisions, beginning with *City of Boerne v. Flores*, that have collectively weakened Congress's Reconstruction-era enforcement powers. In *Boerne*, the Court placed new limitations on Congress's ability to enforce the substantive provisions of the Fourteenth Amendment. Prior to *Boerne* the Court subjected Congressional enactments under Section 5 of the Fourteenth Amendment to the relatively deferential, means-ends analysis set forth in *McCulloch v. Maryland*; after *Boerne* Congress must demonstrate that Section 5 legislation is "congruent and proportional" to the evil to be remedied, a standard that is understood to be much more stringent.[175]

The Court has also seemingly limited Congress's enforcement power under the Fifteenth Amendment. In its 2013 decision, *Shelby County v. Holder*, the Court struck down Section 4(b) of the Voting Rights Act (VRA) of 1965. Section 4(b) contained the Congressionally-sanctioned formula that determined which states would be subject to the preclearance requirement of Section 5.[176] Though the *Shelby County* majority did not articulate a standard of review, the decision was plainly a departure from *South Carolina v. Katzenbach*, a 1966 case in which the

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to Reconstruction and the systematic attempt to end discrimination").

[175] 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 956, 959 (3d ed. 2000).

[176] Shelby Cnty. v. Holder, 133 S. Ct. 2612-19 (2013).

Court both upheld the preclearance formula and determined that the appropriate standard of review was that of *McCulloch*'s means-ends test.[177] Although it is unclear whether, in light of *Shelby County*, all Congressional legislation under the Fifteenth Amendment must now satisfy the congruence and proportionality test, *Shelby County*, like *Boerne*, suggests that "Congress's power to enforce the Reconstruction Amendments is ebbing."[178]

It is unclear whether the Court will extend *Boerne* and *Shelby County* limitations on Congressional power to the Thirteenth Amendment. For proponents of the restrictive interpretation, *Boerne* and *Shelby County* are welcome signs, insofar as they indicate that the Court is unlikely to allow Congress to enact Thirteenth Amendment legislation on the basis of an expansive interpretation of the badges metaphor.[179] In this Section, however, I shall argue that, at present, *Boerne* and *Shelby County* are not fatal to an expansive interpretation of the badges metaphor. To be clear, neither *Boerne* nor *Shelby County* bear on the historical meaning of the badges metaphor itself. We should seek a historically accurate interpretation of the badges metaphor and a theory of how Congress can utilize the metaphor in crafting Section 2 legislation regardless of recent Court precedent. Moreover, these precedents are controversial, and, in my view, subvert the legitimate institutional aims of the Reconstruction Congresses.

Nevertheless, the Court shows no signs of revisiting *Boerne* or *Shelby County* any time soon, and thus they bear on the practical implications of my project. On the one hand, if in the near-term the Court continues to clamp down on Congress's Reconstruction-era enforcement powers, then my project may best be understood as an attempt to broaden, over the long term, the

[177] South Carolina v. Katzenbach, 383 301, (Supreme Court). (citations omitted)
[178] Calvin Massey, *The Effect of Shelby County on Enforcement of the Reconstruction Amendments*, 29 JL & POL., 426 (2013).
[179] McAward, WASH. UL REV., 71 (2010). (noting that a restrictive approach "alleviates the structural constitutional concerns that have driven City of Boerne and its progeny").

"constitutional commonsense" regarding plausible and implausible constructions of Section 2.[180] But changes in constitutional commonsense require political activism, legal advocacy, larger shifts in public opinion, and other changes in constitutional culture; hence, to construe my project as attempting a shift in constitutional commonsense, though not in itself a drawback, is to deprive it of some immediate, pragmatic bite.

On the other hand, as I argue below, the Court's Reconstruction jurisprudence is in flux, and it is important not to overstate the known significance of *Boerne* or *Shelby County*. McAward claims, for example, that, after *Boerne*, *Jones* "is arguably a remnant of the past."[181] Yet this is too quick. Even if we assume that *Boerne* represents the Court's settled view of Congress's Fourteenth Amendment enforcement authority, it is a separate question as to whether the arguments presented in *Boerne* can be fairly applied to the Thirteenth Amendment. Moreover, there is lingering uncertainty over the meanings of *Boerne* and *Shelby County*, especially with regard to how the congruence and proportionality test applies to traditional areas of Fourteenth and Fifteenth Amendment legislation. In Part A I discuss *Boerne* and *Shelby County*, and in Part B I argue that the historical arguments presented by the majority in *Boerne* are plainly inapplicable to the Thirteenth Amendment. In Part C I argue that too little is yet known of the congruence and proportionality test to say whether it rules out an expansive interpretation of the badges metaphor. Overall, I shall demonstrate that *Boerne* and *Shelby County* have not ruled out an expansive interpretation of the badges metaphor.

a. From *Boerne* to *Shelby County*

[180] JACK M BALKIN, CONSTITUTIONAL REDEMPTION 180-2 (Harvard University Press. 2011).
[181] McAward, WASH. UL REV., 5 (2010).

In *City of Boerne v. Flores*, the Court took up a challenge to the Religious Freedom Restoration Act (RFRA), a piece of Congressional legislation enacted in response to an earlier Court decision, *Employment Division v. Smith*. In *Smith* the Court held that neutral, generally applicable laws that burden religious practices do not have to meet a "compelling government interest" standard.[182] Shortly thereafter, and seeking, in effect, to overturn *Smith*, Congress enacted RFRA, which prohibited the government from substantially burdening religious practice unless the government could demonstrate that the prohibition was the least restrictive means of furthering a compelling government interest.[183] Invoking its enforcement authority under Section 5 of the Fourteenth Amendment, Congress enacted RFRA in order to protect, in the Court's words, "the free exercise of religion, beyond what is necessary under *Smith.*"[184] As presented by the majority, the key question in *Boerne* revolves around the nature and extent of Congress's Section 5 enforcement authority: does Section 5 limit Congress to enacting only remedial legislation, which aims to correct for or prevent violations of established constitutional rights, or does Section 5 permit Congress to define for itself the substance of Fourteenth Amendment?

To the majority, the drafting history of the Fourteenth Amendment "confirms the remedial, rather than substantive, nature of the Enforcement Clause."[185] In short, the majority's historical argument is as follows: the initial draft of what would become the Fourteenth Amendment granted to Congress the "power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty,

[182] Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 872, (Supreme Court).
[183] City of Boerne v. Flores, 521 507, (Supreme Court). (citations omitted)
[184] Id. at, 517.
[185] Id. at, 520.

and property."[186] Various members of Congress objected to what, in their eyes, appeared to be a grant of plenary power to Congress concerning matters traditionally left to state legislatures. The Joint Committee on Reconstruction tabled the Amendment.[187] After a brief interregnum, the text of the Amendment was redrafted, with Section 1 of the redrafted Amendment limiting Congress to correcting for State infringements of constitutional rights, while Section 5 of the redrafted Amendment granting Congress the "power to enforce, by appropriate legislation," substantive provisions of Section 1 against the states.[188] In the majority's view, "[u]nder the revised Amendment, Congress's power was no longer plenary but remedial. Congress was granted the power to make the substantive constitutional prohibitions against the States effective."[189]

The *Boerne* majority then proceeds to consider whether RFRA can be considered remedial or substantive in nature. To be considered remedial, the majority argues, Section 5 legislation must evince a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[190] By this standard, the majority claimed, RFRA was plainly more than remedial. In passing RFRA Congress had identified no contemporary examples of legislation enacted in furtherance of religious bigotry. To the majority this stood in marked contrast to the VRA, for which Congress had marshalled substantial evidence of racial discrimination in voting.[191] Yet, despite Congress having failed to identify any examples of bigoted legislation, RFRA restrictions applied to all agents of the state at all levels of government.[192] For the majority, RFRA was thus "so out of proportion to a supposed remedial or preventive object" that it could only be understood as "attempt[ing] a substantive change in

[186] Cong. Globe, 39th Cong., 1st Sess., 1034 (1866).
[187] City of Boerne v. Flores, at 521-2. (citations omitted)
[188] U.S. Const. amend. XIV, § 5.
[189] City of Boerne v. Flores, at 522.
[190] Id. at, 520.
[191] Id. at, 530-31.
[192] Id. at, 532.

constitutional protections."[193] RFRA thus exceeded Congressional authority under Section 5. Section 5, the majority concludes, permits Congress to enact remedial legislation, it does not permit Congress, in the majority's words, "to determine what constitutes a constitutional violation."[194] Determining what constitutes a constitutional violation is a task that, in the majority's view, falls solely within the purview of the judiciary.[195]

Boerne marked a dramatic and controversial shift in the Court's 14th Amendment jurisprudence, the consequences of which are yet to be fully determined. The precise contours of the congruence and proportionality test are unclear,[196] and the justificatory basis of standard itself is uncertain.[197] But a few conclusions can be drawn with some confidence. First, after *Boerne*, Section 5 legislation has been "saddled with something between intermediate and strict scrutiny," such that Section 5 legislation faces "a substantial, albeit not conclusive, presumption of unconstitutionality."[198] A number of Congressional enactments under Section 5 have failed to rebut this presumption. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, for example, the Court struck down the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), on the grounds that Congress had neither "identif[ied] conduct transgressing the Fourteenth Amendment's substantive provisions" nor

[193] Id. at.
[194] Id. at, 519.
[195] Id. at, 536.
[196] See infra III.d.
[197] See, e.g., Evan H Caminker, *" Appropriate" means-ends constraints on Section 5 powers*, STANFORD LAW REVIEW, 1179 (2001). (surveying various rationales but concluding that "the Court cannot persuasively explain why [the congruence and proportionality standard] applies uniquely to Section 5 measures and not to all necessary and proper Article I measures as well"); see also, Ruth Colker, *The Supreme Court's Historical Errors in City of Boerne v. Flores*, 43 BCL REV., 784 (2001). (demonstrating that "[t]he Court's narrow construction of Congress's authority under Section Five in Boerne cannot be justified by the history of that constitutional amendment").
[198] Caminker, STANFORD LAW REVIEW, 1133 (2001).

"tailor[ed] its legislative scheme to remedying or preventing such conduct."[199] Other Section 5 enactments have been struck down on similar grounds.[200]

Second, though the Court has not formally announced *Boerne*'s application beyond the Fourteenth Amendment, the Court appears willing to extend a similar form of heightened scrutiny to other areas of Congressional Reconstruction enforcement authority. At least, this was how many interpreted the holding of *Shelby County*.[201] To be sure, the *Shelby County* majority nowhere cites *Boerne*, perhaps given the awkward fact that in *Boerne* the Court had praised the evidentiary record adduced in support of the VRA. Nor does the *Shelby County* majority invoke the "congruence and proportionality" standard; indeed, as the dissent points out, the majority fails to identify *any* standard of review.[202] Nevertheless, the Court was unwilling to follow *Katzenbach* and *Boerne* by deferring to Congressional judgment with regard to the coverage formula, further suggesting that Congress's Reconstruction enforcement authority is in decline, which bodes poorly for an expansive view of Section 2.

To these inauspicious signs a few other, more general points must be added. The enforcement clauses of the Reconstruction Amendments are nearly identical; each states that Congress "shall have power" to enforce the Amendment by "appropriate legislation," phrases borrowed from the *McCulloch* reading of the Necessary and Proper Clause.[203] While a good deal of historical evidence suggests that this was the intention of the framers of the Reconstruction

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[199] College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd, 527 666, (Supreme Court).
[200] United States v. Morrison, 529 598, (Supreme Court). (striking down the Violence Against Women act, on the grounds that "ver, the language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government" (citing City of Boerne v. Flores, 521 U. S. at 520-24 (1997)).
[201] Richard L Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J., 731 (2013). ("Shelby County may be read as treating Boerne as having overruled Katzenbach's rationality standard").
[202] Shelby County, Ala. v. Holder, 133 2612, (Supreme Court). (Justice Ginsburg, dissenting)
[203] Amar, HARVARD LAW REVIEW, 822 (1999).

Amendments, it is nevertheless possible that a future Court, simply as a matter of interpretive consistency, will interpret Section 2 to limit Congress's Thirteenth Amendment authority, thereby matching the current limitations on Congress's Fourteenth and Fifteenth Amendment enforcement authority.

But perhaps most significant is the fact that *Boerne* and its progeny, along with *Shelby*, are representative of a broader shift in the institutional relationship between the Court and Congress in the post-Warren Court era. Whereas the Warren Court had been generally deferential to Congress with regard to civil rights legislation, more recent Courts have tended to constrain Congressional authority in this area and to be far more skeptical of Congressional interpretations of the Constitution that differ from the Court's own.[204] For those worried that the Court will only continue to restrict Congress's Reconstruction-era enforcement authority, it is difficult to deny that "current signs remain somewhat ominous."[205] At the very least, it cannot be taken for granted that a future Court will submit Section 2 legislation to rational basis review, as did the majority in *Jones*.

At the same time, however, it is important not to project more certainty onto the Court's jurisprudence than is justified by the caselaw. The Court has yet to answer some critical questions regarding its view of Congress's Reconstruction-era enforcement authority, and it would be precipitous to draw firm conclusions about Congress's Section 2 authority before these answers are provided. To be sure, if in the near future Congress becomes interested in exercising

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[204] Robert C Post & Reva B Siegel, *Protecting the Constitution from the people: Juricentric restrictions on Section Five power*, 78 IND. LJ, 5 (2003). (arguing that, in light of Boerne, the Court has "allocate[d] the task of constitutional interpretation exclusively to courts, attributing to Congress the subsidiary role of enforcing judicially articulated constitutional rights"). See also, Michael W McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV., 154 (1997). (arguing that in Boerne "[t]he Court presupposed that the judiciary has exclusive authority to interpret the Constitution, and…held that Congress had no right to legislate on the basis of an interpretation of the Constitution contrary to judicial precedent").

[205] Caminker, STANFORD LAW REVIEW, 1198 (2001).

– narrowly or expansively – its Section 2 authority it would be wise to proceed with great caution, a point to which I shall return below. Nevertheless, as I demonstrate in the following Parts, it is simply false to claim at this point that the Court's recent jurisprudence precludes an expansive interpretation of the badges metaphor.

b. *Boerne* and Thirteenth Amendment History

The *Boerne* majority's analysis of the drafting of the Fourteenth Amendment has been widely criticized by a number of legal scholars, and it is worth briefly reviewing some of these criticisms; as we shall see, the majority's historical argument, weak as it is, is weaker still when applied, *mutatis mutandis*, to the Thirteenth Amendment. More precisely, while the *Boerne* majority's historical argument turns on an apparent ambiguity in the drafting of the Fourteenth Amendment regarding the nature and extent of Congressional enforcement authority, there was no such ambiguity in the drafting process of the Thirteenth Amendment: during the drafting process the proponents of the Thirteenth Amendment explicitly cited *McCulloch* as the standard of review for Section 2 legislation and explicitly granted to Congress the sole authority to define the badges and incidents of slavery. Ultimately, the evidence weighs strongly against applying a *Boerne*-like historical analysis to the drafting of and legislative intent behind Section 2.

As I noted above, the *Boerne* majority places great emphasis on the fact that, while the first draft of the Fourteenth Amendment granted to Congress plenary power to directly enforce the privileges, immunities, and equal rights of every citizen, in response to objections from various Congressmen the Amendment was rewritten. This reading is roughly accurate but misconstrues the nature of the objections and debate. As Ruth Colker has shown, "the primary issue in the ratification debate about the scope of Congress's authority had to do with the state

action requirement," not Congress's authority to independently interpret the Constitution.[206] Indeed, during the Congressional debates over the Fourteenth Amendment no other standard of review was even mentioned. The changes to the text of the draft Amendment also bear out this point. Section 5 was never a sustained focus of debate and during the drafting process underwent only superficial changes.[207] Section 5 as first written granted Congress the power "to make all laws necessary and proper" for enforcing the provisions of the Amendment.[208] The redrafted Section 5 granted to Congress the power to enforce the provision of the Amendment "by appropriate legislation."[209]

But setting aside the historical accuracy of the *Boerne* majority's reasoning, in the Thirteenth Amendment context it is clear from the Congressional record that "necessary and proper" and "appropriate" were both intended to signal to the Court that *McCulloch* provided the standard by which to assess Congress's Reconstruction enforcement powers. After introducing the Thirteenth Amendment to the Senate, for instance, Senator Trumbull described Section 2 as granting Congress the power to enforce the Amendment with "proper" legislation, and stated that Section 2 allowed Congress "to pass such laws as may be necessary" the ensure the rights guaranteed in Section 1.[210] As Trumbull would make clear later, during the debates over the Civil Rights Act, in his view what is "appropriate legislation" for Section 2 purposes "is for Congress to determine, and nobody else."[211] Section 2, Trumbull argued, "was intended to put it

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[206] Colker, BCL REV., 815 (2001).
[207] Id. at, 812. (concluding that, [i]n sum, the debate in the House and Senate focused on Sections Two, Three and Four, not Sections One or Five...In particular, there is no evidence whatsoever that the language change from "necessary and proper" to "appropriate" was a deliberate attempt to gain more votes in favor of the Amendment").
[208] CONG. GLOBE, 38th Cong., 1st Sess. 21 (1863).
[209] U. S. Const. art. XIV, § 5.
[210] Cong. Globe, 38th Cong., 1st Sess. 1313 (1864).
[211] CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865).

beyond cavil and dispute" Congress's authority to enforce the Thirteenth Amendment.[212] Other Republican Congressmen echoed Trumbull's view of Section 2. Representative James Wilson, for example, floor manager of the Civil Rights Act, argued that Congress was to be the "sole judge" of necessary Thirteenth Amendment legislation, citing *McCulloch* as precedent.[213] Even opponents of the Amendment conceded that Congressional authority under Section 2 was subject to the deferential *McCulloch* test.[214]

While McAward acknowledges that "there was general agreement that Congress would have broad discretion, in the mold of *McCulloch* and *Prigg*, to determine the means by which the amendment's substantive guarantee would be enforced," she argues that "there was no suggestion that Section Two granted Congress any substantive power to define or expand its own vision of the Amendment's ends."[215] But this omission is puzzling only if one projects contemporary categories onto the past. The fear that Congressional interpretation of Constitutional rights is inherently "expansive" and thus incompatible with judicial supremacy is of recent vintage and thus it is unsurprising that the Reconstruction-era Congressional debates would omit reference to the issue.[216]

As Michael McConnell points out, "Congress engaged in extensive debates over the substantive reach of the various Reconstruction era Civil Rights Acts" because it was taken for granted that Congress possessed independent authority to interpret the Constitution.[217] During

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[212] CONG. GLOBE, 39th Cong., 1st Sess. 43 (1866).
[213] See CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866).
[214] CONG. GLOBE, 39TH CONG. 1156. (Sen. Davis) (arguing that Section 2 restates Congress's "necessary and proper" power).
[215] McAward, WASH. UL REV., 44 (2010).
[216] Steven A Engel, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 THE YALE LAW JOURNAL, 152 (1999). (demonstrating that, given their understanding of McCulloch's deferential standard of review, the Framers of the Thirteenth and Fourteenth Amendments did not "embrace[] a rather formalist separation between Congress's power to "enforce" and to " define"" the Reconstruction Amendments.
[217] McConnell, 176.

the debates over the Thirteenth Amendment neither the supporters nor the *opponents* of the Amendment challenged this independent interpretive authority. This is not, of course, to argue that Congressional interpretations of constitutional rights must be determinative. But it is to suggest that the Court's apparent hostility towards Congressional interpretations of the Reconstruction Amendments runs counter to their author's aims. This hostility is particularly troubling in light of the fact that the meaning of the badges metaphor has evolved over time in response to changing laws, customs and social norms, and, as an institutional matter, Congress is better suited than the Court for identifying which contemporary practices impose badges of slavery.[218]

Moreover, during the debates over the Thirteenth Amendment it was widely understood that *McCulloch* granted very broad authority to Congress to enact any reasonable legislative means to carry out legitimate Constitutional ends. In the Thirteenth Amendment context, this meant that Congress was to receive broad authority to adopt any and all reasonable means to enforce the ends of Section 2, namely the elimination of the badges and incidents of slavery. Senator Trumbull, I noted above, asserted that a badge of slavery comprised "any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens."[219] In order to "destroy all these discriminations in civil rights against the black man," he maintained, "it is for Congress to adopt such appropriate legislation as it may think proper."[220] In other words, there was no discussion of granting Congress the power to change the substantive ends of the Thirteenth Amendment because this was unnecessary. Members of the

[218] The same point applies to Congressional evidence-gathering in the Fourteenth Amendment context. See, for example, Post & Siegel, IND. LJ, 15 (2003). (observing that " Congress commonly holds hearings to generate and consolidate the political will to respond to public problems and conflicts. Legislative hearings educate the nation and summon it to action; they have political functions that are without judicial analogy") (citation omitted).
[219] See infra n.26.
[220] CONG. GLOBE, 39TH CONG., 1ST SESS., 322 (1866).

Reconstruction Congress confident that, under the deferential *McCulloch* standard, Congress would possess all of the authority it needed in order to eliminate the badges of slavery. It is only in recent times that this confidence has been cast into doubt.

c. Congruence and Proportionality

In the Previous Part I argued that the historical evidence weighs overwhelmingly against applying heightened scrutiny to Section 2. But it would be imprudent to rest my case for an expansive interpretation of the badges metaphor on history alone. Regardless of history, a Court seeking to limit Congress's Thirteenth Amendment power could, no doubt, find a reason for so doing. Thus, it is important to consider what ramifications there might be for Section 2 if a future Court were to apply *Boerne*'s congruence and proportionality standard in the Thirteenth Amendment context. As I shall argue here, there is a good case to be made that the congruence and proportionality standard does not rule out an expansive interpretation of the badges metaphor.

Though there is little doubt that *Boerne* places new constraints on Congress's Fourteenth Amendment enforcement authority, the congruence and proportionality test itself remains surprisingly underdeveloped. This is because, as Calvin Massey points out, in the vast majority of post-*Boerne*, Section 5 cases, the Court's congruence and proportionality analysis has been interwoven with a number of subsidiary issues, such as the prophylactic abrogation of state sovereign immunity.[221] In *Florida Prepaid*, for example, Congress invoked its Section 5 enforcement authority partly in order to abrogate States' sovereign immunity from patent infringement suits. The Court's unwillingness to defer to Congress here may have been due less

[221] Massey, JL & POL., 418-9 (2013). (noting that "[m]ost of the cases that have applied the congruence and proportionality test...have involved congressional attempts to abrogate the states' sovereign immunity," meaning that "the Court has been forced to decide the scope of the enforcement power in a context that challenges both federalism principles and the primacy of the Court as constitutional interpreter").

to the congruence and proportionality test and more due to the Court's concern for state sovereign immunity. Regardless of whether one finds this concern for state sovereign immunity warranted, the point is that the presence of Eleventh Amendment concerns has to some extent clouded the primary issue, namely, the precise extent to which the congruence and proportionality test limits Congress's Fourteenth Amendment enforcement authority when abrogation is not involved.

The abrogation of state sovereign immunity, however, is not the only issue complicating our understanding of congruence and proportionality. The Court's deference to Congress also seems to turn on the nature of the conduct targeted by Section 5 legislation. In *Florida Prepaid*, the Patent Remedy Act held states liable for conduct – patent infringement – that, while illegal, is not a violation of any Fourteenth Amendment right.[222] This may have been another reason as to why the Court was less willing to defer to Congressional judgment. By comparison, in *Nevada Department of Human Resources v. Hibbs*, the Court upheld the Family and Medical Leave Act of 1993, which allowed for private suits against states that violated the family-care provisions of the Act.[223] As the Court explained, the crucial difference between *Florida Prepaid* and *Hibbs* was that in *Hibbs* "Congress directed its attention to state gender discrimination," a potential violation of equal protection.[224] The Court reasoned that, because gender discrimination triggers heightened scrutiny, it is more difficult for states to demonstrate that such discrimination is constitutionally permissible; hence, "it was easier for Congress to show a pattern of state constitutional violations."[225] In other worse, when addressing presumptively unconstitutional state conduct, Congressional exercises of Section 5 authority bear a relatively lighter evidentiary

[222] Id. at, 11.
[223] 538 U.S. 721 (2003).
[224] Nevada Dept. of Human Resources v. Hibbs, 538 721, (Supreme Court).
[225] Id. at.

burden. It thus seems that, even when abrogation is at issue, the Court remains mindful of Congress's authority to target conduct that violates the 14th Amendment.

It is even less clear how the congruence and proportionality standard operates when state abrogation is not at issue. *United States v. Morrison* remains the most recent major case in which the Court struck down Section 5 legislation that did *not* attempt to abrogate state sovereign immunity. In *Morrison* the Court considered the constitutionality of Section 13981 of the Violence Against Women Act, which established a private cause of action for victims of gender-motivated violence.[226] On the one hand, the *Morrison* majority is dismissive of the evidentiary record put forth in support of Section 13981. According to the majority, Section 13981 established a remedy that applied nationwide, despite the fact that Congress's "findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States."[227] Yet the Court focuses its Section 5 analysis almost entirely upon the state action question, and the crucial problem with Section 13981 is that Congress imposed liability upon private actors for state misconduct.[228]

It is thus difficult to know what, if anything, *Morrison* adds to our understanding of the congruence and proportionality test. Perhaps the congruence and proportionality test motivated the majority's skeptical view of the evidentiary record. But if the congruence and proportionality test merely requires that Congress provide evidence of a nationwide problem in order to justify a nationwide legislative solution is hardly an insurmountable obstacle to future Section 5 legislation.

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[226] United States v. Morrison.
[227] Id. at, 626-27.
[228] Id. at, 625. (asserting that "the remedy is simply not corrective in its character, adapted to counteract and redress the operation of such prohibited [s]tate laws or proceedings of [s]tate officers") (internal quotations omitted) (citations omitted)

Overall, it is still too soon to say for sure how much of Congress's Section 5 authority *Boerne* has revoked and how this might (or might not) affect Congress's Section 2 authority. It is likely the case that neither question can be resolved at least until the Court hears a "pure" Section 5 case, that is, a Section 5 case in which Eleventh Amendment issues are not raised and in which Congress targets state violations of 14th amendment rights. To date the congruence and proportionality test has been applied almost solely in conjunction with subsidiary issues, such as sovereign immunity and state action, that have no clear analogues in the Thirteenth Amendment context. Ultimately, given the uncertainty as to *Boerne*'s effect on the 14th Amendment, it would be highly premature to assert that *Boerne* sounded the death knell for an expansive view of the badges metaphor.

Of course, this analysis does not reach *Shelby County*. Does *Shelby County* indicate that the Court will apply congruence and proportionality test outside of the Fourteenth Amendment context? Here, again, it is too early to say, in part because of the opacity of the *Shelby County* majority opinion. Because the majority did not identify a standard of review, there are different ways of interpreting the majority's main objection to the coverage formula. On one reading, the crux of the majority opinion lies in its application of the "principle of equal sovereignty," which disfavors "disparate treatment of States."[229] The coverage formula for the VRA, which called for disparate treatment of the covered states, violated this principle and so was struck down. But on this reading, the congruence and proportionality test is largely irrelevant, and the longer term jurisprudential significance of *Shelby County* turns on whether the Court will be presented with future opportunities to apply the principle of equal sovereignty. It is hard to see how any badges

[229] Shelby County, 133 S. Ct. at 2623-4 (citations omitted).

legislation would implicate this principle, in which case *Shelby County* has no bearing on Section 2.

On the other hand, perhaps in *Shelby County* the majority was applying the congruence and proportionality test *sub silentio*.[230] If this reading is accurate, it would indicate that the Court is willing to apply the congruence and proportionality test outside of the Fourteenth Amendment context. Moreover, having applied the standard in the Fifteenth Amendment context, it would be difficult to see why the Court would refrain from applying the standard in the Thirteenth Amendment context as well.

Yet before drawing any firm conclusions it is important to keep in mind what, according to the *Shelby County* majority, were the crucial flaws of the coverage formula. As supporters of the VRA's preclearance regime acknowledged, the coverage formula relied on data that was thirty-five years out of date, and the evidentiary record showed "that there is more similarity than difference" between covered and non-covered jurisdictions.[231] According to one proponent of the VRA, "the most one can say in defense of the [coverage] formula is that it is the best of the politically feasible alternatives or that changing the formula would disrupt settled expectations."[232] Congress was made aware of the Constitutional infirmities in relying on such data but did nothing to address it.[233] Even some of *Shelby County*'s most strident critics acknowledge that Congress's decision (or lack thereof) to reauthorize the coverage formula

[230] Massey, JL & POL., 422 (2013). (proposing that Shelby County Shelby County "amounts to a de facto application of the congruence and proportionality test to congressional power to enforce the Fifteenth Amendment").
[231] Northwest Austin Mun. Utility Dist. v. Holder, 557 193, (Supreme Court).
[232] Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174, 208 (2007)
[233] Hasen, WM. & MARY BILL RTS. J., 715 (2013). (noting that "Congress willfully ignored the problems with the coverage formula which legal scholars brought to Congress's attention and which were amply covered by a Senate report written by Republican committee staffers who were deeply skeptical of the Act's continuing constitutionality") (citation ommitted).

might not have satisfied the rational basis test, let alone the congruence and proportionality test.[234]

Suppose, then, that *Shelby County* offers a glimpse of how the Court might apply the congruence and proportionality test in the Thirteenth Amendment context. Does this foreclose an expansive reading of the badges metaphor? I think not. Roughly, one lesson of (the latter reading of) *Shelby County* seems to be that, even when Congress targets violations of constitutional rights, Congress still must clearly identify a contemporary pattern of rights violations, and the evidentiary record must be, in the Court's eyes, sufficiently robust so as to justify the legislative response. In this regard, *Shelby County* can be usefully compared with *Hibbs*. The *Hibbs* majority noted that the legislative record included empirical studies and expert testimony indicating that gender discrimination in parental leave policies was ongoing, widespread, and pervasive in both the public and private employment sectors.[235] By contrast, as I noted above, the legislative record in *Shelby County*, at least with regard to the coverage formula, was considerably more ambiguous.

Thus, if the congruence and proportionality test is carried over into the Thirteenth Amendment context, the most significant effect may only be that any potential Section 2 legislation will require a robust, up-to-date evidentiary record if it is to satisfy the congruence and proportionality test. This is surely a departure from *Jones*, and it is disappointing for those who maintain, as I do, that *Boerne* and *Shelby County* willfully misunderstand the import of Reconstruction's institutional reordering. However, it is important to keep in mind where we began. According to proponents of the restrictive interpretation of the badges metaphor, *Boerne* effectively overruled *Jones*, such that an expansive interpretation of the badges metaphor is a

[234] Id. at, 742. (proposing that Congress "was not even acting rationally" in its failure to update the coverage formula).
[235] Nevada Dept. of Human Resources v. Hibbs, at 730-33.

practical non-starter. As I have argued here, however, this is far from the best reading of the current legal landscape. Even supposing that future Section 2 legislation will receive some form of heightened scrutiny, which it may not, a robust, up-to-date evidentiary record may be all that is needed if the legislation is to survive.

d. Conclusion

There is no compelling historical basis for applying *Boerne* to Section 2. The legislative history of the Thirteenth Amendment indicates that Section 2 legislation is properly reviewable under the *McCulloch* means-ends standard of review. Moreover, as an institutional matter, Congress is far better able to determine which contemporary practices impose stigmatizing or demeaning badges of slavery. In my view, *Jones* was thus correctly decided. But this is not to say that the Court must simply rubber-stamp any proposed Section 2 legislation. I agree with McAward in holding that the badges metaphor can provide a principled basis for the Court's review of Section 2 legislation. However, as I argued in Section II, the metaphor has always possessed a broad range of application, and it would be entirely appropriate for Congress to determine that some contemporary practices fall within the historical meaning of the metaphor.

McAward is likely right to argue that, given the opportunity, the current Court will not follow the precedent established in *Jones*. Yet there is little that can be gleaned from this observation, too little to rule out an expansive interpretation of the badges metaphor. In the event that the Court overrules *Jones* and imports the congruence and proportionality standard into the Thirteenth Amendment context, this may mean only that Congress will have to be diligent in amassing an evidentiary record in support of any Section 2 legislation. But this requirement does not rule out an expansive interpretation of the badges metaphor. In the concluding Part I provide some initial guidelines for crafting Section 2 legislation that expands

the reach of the 13th Amendment but stands a fighting chance of surviving the congruence and proportionality test.

IV. Eradicating the Contemporary Badges of Slavery

Legal scholars are increasingly hopeful that the Thirteenth Amendment, and Section 2 specifically, can serve as a source of authority for civil rights legislation. Particularly after *Boerne* and *Shelby County*, it seems that the Thirteenth Amendment must pick up the slack previously carried by the Fourteenth and Fifteenth Amendments. My arguments in this Article are meant to vindicate, to some extent, these hopes. Because the expansive interpretation of the badges metaphor is firmly supported by the text, history, and jurisprudence of Section 2, it would be eminently reasonable for Congress to adopt an expansive interpretation of the badges metaphor for the purposes of enacting Section 2 legislation. In order to demonstrate what kinds of legislation the expansive view of Section 2 can sustain, in this Part I shall consider some examples of badges legislation in light of the arguments and evidence provided above. There are, of course, far too many proposed pieces of Section 2 legislation to consider in this space; however, the analysis provided herein is intended to serve as a general starting point for evaluating any proposal that relies on an expansive interpretation of the badges metaphor.

To begin, it is helpful to briefly restate the definition of the badges metaphor: a badge of slavery result from socially salient laws or customs whose public meaning stigmatizes an identifiable, subordinate social group. According to historical patterns of usage, badges of slavery were imposed by, but were not limited to, segregation in public facilities, bans on interracial marriage, and inequalities in civil rights. Badges of slavery could be imposed by laws and customs that punished or ostracized blacks directly or that punished or ostracized whites in service of stigmatizing blacks. But while African Americans were the paradigmatic targets of

the badge of slavery, historically the metaphor was never limited to chattel slavery or to race. Both before and after the American Civil War, as used by abolitionists as well as by their opponents, the badges metaphor referred to formal and informal practices that stigmatized individuals on the basis of gender, class, and other determinants of social status. Underlying these various usages was a republican conception of liberty. According to this conception of liberty, to be a slave is to lack the social standing and means by which to protect oneself from arbitrary interference. A badge of slavery publicly identifies one as a member of this subordinate social class.

This definition of the badges metaphor is sufficient to sustain contemporary Section 2 legislation and at least some proposed pieces of Section 2 legislation. Consider first the Shepard-Byrd Hate Crimes Act of 2009. Section 249(a)(1) of the Shepard-Byrd Act establishes criminal penalties for assaults motivated by the victim's "actual or perceived race, color, religion, [or] national origin."[236] Enacted pursuant to Congress's Section 2 authority, this portion of the act contains no further jurisdictional element. According to the Act's Findings section "[s]lavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at race, color or ancestry;" hence, to eradicate the badges of slavery it is necessary to eradicate racially-motivated violence.[237] By contrast, Section 249(a)(2) of the Act establishes criminal penalties for assaults motivated by the victim's "gender, sexual orientation, gender identity, or disability."[238] While this portion of the state was enacted pursuant to Congress's authority under the Commerce Clause, it is doubtful that Congress's Commerce

[236] 18 U.S.C. § 249(a)(1) (2012).
[237] *Id*.
[238] 18 U.S.C. § 249(a)(2) (2012).

Clause authority is sufficient to sustain Section 249(a)(2).[239] This leaves Section 2 as the other possible source of legislative authority for this Section of the Act.

While most scholars to consider the issue believe that Section 249(a)(1) remains valid law, Section 249(a)(2) appears far less likely to withstand legal challenge. Relative to race, Congress receives less deference from the Court with regard to gender, sexual orientation, and gender identity, and no deference with regard to disability. The evidentiary burden for sustaining Section 249(a)(2) will thus be relatively heavier. But a more fundamental problem is that there is no precedent for Congressional legislation targeting badges of slavery that are not based on race. According to Calvin Massey, Section 249(a)(2) will survive "only if courts accept the fiction" that the badges of slavery include non-racial badges of slavery, a possibility that narrow interpretations of the badges metaphor almost certainly rule out.[240]

Yet there is no reason why Congress or the courts must adopt a narrow interpretation of the badges metaphor. Both Sections of the Shepard-Byrd Act fall within Congress's Section 2 authority if Section 2 is understood according to the expansive interpretation of the badges metaphor that I have defended here. First, the original public meaning of the badges metaphor was such that usage of the badges metaphor was not restricted to race. Given that, according to historical usage, women, laborers, and other subordinate groups could bear a badge of slavery, it is hardly a stretch to claim that members of other communities might bear this badge as well. Moreover, extending antidiscrimination protections to new groups through analogical argument

[239] *See Morrison,* 529 U.S. at 610-11, 120 S.Ct. 1740 (observing that "*Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor").
[240] Massey, JL & POL., 426 (2013).

is familiar and uncontroversial in the Fourteenth Amendment setting; there is no obvious reason as to why courts cannot reason similarly in a Thirteenth Amendment setting.[241]

Second, the republican conception of liberty underlying the badges metaphor, according to which slavery is subjection to the arbitrary authority of another, provides a compelling analysis of the type of crime to which the Shepard-Byrd Act is a response – namely, bias-motivated violence. Bias-motivated crimes are, in part, "message crimes," in that while the violent act may directly target a single individual, the act conveys hostile and demeaning attitudes towards a larger group.[242] As recent studies have shown, members of the victim class who learn of such violence are indirectly victimized; these indirect victims "feel themselves to be equally vulnerable to victimization… Regardless of context, there is a constant fear of assault."[243] Indirect victims of bias-motivated violence fear, with good reason, that they are not fully protected by existing law and that this lack of equal protection leaves members of their group subject to the violent and arbitrary impulses of malicious actors. It is thus plausible to claim that bias-motivated violence is just the sort of injustice to which, historically, the badges metaphor has been applied.

Finally, bias-motivated violence, though no longer formally permitted, endures as a customary means of enforcing group-based hierarchy, and thus is a proper target for 13th Amendment legislation. The interplay between the customary infliction of violence and the legal subordination of identifiable groups is most obvious in the case of chattel slavery. In many jurisdictions courts took into consideration local customs and social norms regarding the

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[241] Frontiero v. Richardson, 411 677, (Supreme Court). (extending 14th amendment protection to women on the grounds that "[s]ex, like race...is an immutable characteristic").

[242] PAUL IGANSKI & JACK LEVIN, HATE CRIME: A GLOBAL PERSPECTIVE 41 (Routledge. 2015). (observing that hate crimes "convey to the victim and those who share the victim's identity that they are devalued, unwelcome, denigrated, despised, and even hated").

[243] Barbara Perry, *Exploring the community impacts of hate crime*, *in* THE ROUTLEDGE INTERNATIONAL HANDBOOK ON HATE CRIME 51, (2014).

permissibility of inflicting violence on slaves.[244] Violence targeting members of the LGBTQ community exhibits striking parallels. For example, juries may consider masculine social norms as mitigating factors in cases involving homophobic assaults. Invoked successfully to this day, so-called "gay panic" defense strategies "rely on the notion that a criminal defendant should be excused or justified if his violent actions were in response to a (homo)sexual advance."[245] In this way contemporary criminal defense law legitimizes masculine social norms permitting, if not demanding, homophobic violence. With regard to both racial violence and anti-LGBTQ violence, then, violent social customs have played and continue to play crucial roles in the legal subordination of outcast groups. Given the functional similarities between these forms of customary violence, the Thirteenth Amendment is a proper source of Constitutional authority for Section 249(a)(2).

In sum, Section 249(a)(2) ought to be upheld as within Congress's Section 2 power: historically, the badges metaphor was never restricted only to racial groups; bias-motivated violence deprives members of the LGBTQ community of the kind of liberty that Section 2 is meant to protect; and, bias-motivated violence is the kind of status-enforcing social custom the Thirteenth Amendment was intended to eradicate. To be sure, it is undeniable that racialized chattel slavery is the core evil to which the Thirteenth Amendment as a whole was a response; thus, for non-racial injustices, the plausibility of extending Thirteenth Amendment protections might turn on the degree to which the targeted conduct mirrors important aspects of chattel slavery. Since group-based violence was, of course, central to chattel slavery, Section 2 proposals that protect other groups from targeted violence should receive maximum deference from the Court. But when Congress targets conduct that is further and further removed from

[244] See supra Miller, n.74.
[245] Cynthia Lee, *The gay panic defense*, 42 UC DAVIS L. REV., 475 (2008).

even a broad reading of the badges metaphor, there may be then good reason for the Court to require a relatively more robust evidentiary record.

Though I have only here considered the Shepard-Byrd Act, the foregoing analysis points toward a some criteria for analyzing contemporary Section 2 proposals. First, Section 2 should not be restricted to race or, more specifically, to criminal activity that target individuals on the basis of race, given that this restriction is inconsistent with the historical usage of the badges metaphor. Second, Section 2 should not be restricted to chattel slavery or to the core components thereof. Rather, potential Section 2 legislation would do well to abide by the observation of Senator Trumbull, who argued that "*any* statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens" imposes a badge of slavery.[246]

Conclusion

To modern ears, the rhetorical usage of slavery that was common throughout the 18th and 19th centuries sounds overblown, perhaps even offensive in how promiscuously the term was applied. To some extent this is an apt response: to place taxation on a plane with the ownership of human beings is to lack moral perspective. It is easy to pair this response with another, namely, that even when we wish to address serious injustices, Section 2 is not the appropriate route. Even if one accepts the evidence I have provided for the expansive interpretation, it is difficult not to wonder whether addressing child abuse, for example, under Section 2 really is "running the slavery argument into the ground."[247]

Yet it is important to keep in mind that this expansive usage of the badges metaphor was widespread even among those who suffered slavery's worst effects. To Booker T. Washington,

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[246] *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 474 (1866)
[247] *The Civil Rights Cases,* 109 U.S. *at* 24, 25.

badges of slavery were evident in manual labor; to Harriet Ann Jacobs, badges of slavery could be found in the cheap clothing she was forced to wear as a slave.[248] Moreover, the metaphor was also invoked by those who clearly perceived, if from a distance, slavery's evils. Garrison, for example, saw the badges of slavery in racial and gendered subordination. The badges metaphor was thus a source of solidarity for groups who suffered, to differing extents and in different ways, from forms of oppression that shared some important commonalities. To Angelina Grimke, while the badges of slavery persisted it was a duty for others to wear them as well.

It is no doubt true that slavery possessed many meanings and that there was no postbellum consensus regarding the political implications of a constitutional commitment to equality. But similar points can be made with regard to the meaning of equality in the Fourteenth Amendment as well. In such cases, though constrained by historical patterns of usage, our interpretive task inevitably involves normative judgments of various kinds. We must construct clear and coherent principles from Congressional records, laws and other texts that were not necessarily generated with this purpose in mind; and we must weigh these interpretations against other Constitutional commitments and values that have arisen over time and which also command our allegiance. The narrow interpretation of the badges metaphor, no less than the expansive interpretation, requires these judgments. Both interpretations draw on history as a guide for contemporary understandings of Section 2. But as I hope to have shown in this Article, only the expansive interpretation is capable of sustaining for the present and future the nascent egalitarian promises of the past.

[248] See supra II.a

Chapter 3:

The Case for Unconditional Birthright Citizenship

Introduction

My aim in this paper is to explain and defend the political morality of unconditional birthright citizenship. By 'unconditional birthright citizenship' I mean to refer to the policy of granting citizenship at birth to all individuals born within the political territory of the state, without further qualifications or conditions. According to the Library of Congress, as of November 2018 thirty-three countries offer unconditional birthright citizenship.[1] Forty-three countries offer birthright citizenship, subject to certain conditions; in many states, for example, citizenship is granted at birth only if one or both of the child's parents are already citizens.[2] Though there are obvious similarities between the two policies, I aim to defend only unconditional birthright citizenship. This is because, as I argue below, unconditional birthright citizenship is a normatively distinct type of citizenship policy. As to non-birthright forms of citizenship, my argument has no direct bearing. While I believe that states have moral obligations to offer non-birthright citizenship in other cases, I shall not here consider the merits of other policies regarding the conditions of eligibility for gaining citizenship.

Birthright citizenship has long been neglected within political philosophy, though recent work on immigration and citizenship has called into question the moral justification for this

[1] *Birthright Citizenship Around the World*. Retrieved from https://www.loc.gov/law/help/birthright-citizenship/global.php

[2] *Id.*

policy. While nativists on the political right, perhaps unsurprisingly, reject unconditional birthright citizenship, (at least for non-White groups), a number of political philosophers and political theorists with broadly egalitarian leanings now reject the policy as well. To some egalitarian critics, unconditional birthright citizenship is morally arbitrary and presupposes an implausible view of membership within a political community. For these critics, unconditional birthright citizenship is incompatible with egalitarian justice and ought to be replaced by a morally plausible principle of social membership. Typically the proposed replacement principle asserts something like the following: whether an individual has a claim to citizenship depends upon whether that individual possesses (or can be expected to possess) genuine social ties to the political community. On this view, it is only after an individual has become a social member of the community that they acquire a moral claim to citizenship.

My aim in this paper is to defend unconditional birthright citizenship against these egalitarian critics. In broad outline, my argument is as follows: it is a mistake to assume that citizenship policy should be guided by abstract and ahistorical philosophical principles of social membership. In part this is because citizenship policy is not merely a means by which to secure the rights of individuals who have become members of the political community. While this is one important aspect of citizenship, it is not the only aspect, or even the most important. Citizenship policy, I maintain, is a means by which a political community collectively defines itself and articulates its most important values. To normatively evaluate any given citizenship policy, then, we must consider the social meaning of a particular citizenship policy, especially in light of a political community's history. Only then will we be in a position to determine whether a particular citizenship policy violates principles of egalitarian justice.

In Section I I briefly describe the emergence of unconditional birthright citizenship. As I discuss there, unconditional birthright citizenship has tended to emerge in post-colonial states beset by deeply entrenched hierarchies based on racial or ethnic identity. While the historical exposition here, of necessity, will be brief, it will allow me to identify some common normative principles underlying unconditional birthright citizenship policies. In Section II I canvass some influential egalitarian criticisms of birthright citizenship, namely, that birthright citizenship is morally arbitrary and incompatible with morally plausible principles of social membership. As I shall argue in Section III, these criticisms either misconstrue the normative principles underlying unconditional birthright citizenship or misperceive the nature of citizenship policy. As I hope to show, unconditional birthright citizenship is central to creating a non-racialized, egalitarian national identity and thus is eminently morally defensible.

I. Birthright Citizenship: Origins and Development

Here I shall briefly describe two historical periods that figure heavily in the development of unconditional birthright citizenship. The first period ranges from the emergence of birthright subjecthood in English common law to the extension of birthright citizenship to African Americans in the postbellum United Sates. To begin, citizenship is traditionally understood as structured around two principles: jus sanguinis and jus soli. According to the principle of jus sanguinis, citizenship is acquired via descent, typically from father to child. According to the principle of jus soli, citizenship is acquired via birth within the political territory of the state. Jus soli is originates in English common law, which contained a principle of birthright subjecthood. The earliest statement of birthright subjecthood can be found in the 1608 legal decision Calvin's

Case. Calvin's Case grew out of the legal, political, and economic unification of Scotland and England under the Scottish king James I. The question presented in Calvin's Case concerned the legal status of Scottish subjects under English law: "were Scots aliens or were they subjects, capable of possessing and asserting at least some of the rights of English subjects, including holding land and suing in English courts?"[1]

The jurist Sir Edward Coke's account of Calvin's Case, the best known of several accounts written, set forth the rule of birthright subjecthood:

> Every one born within the dominions of the King of England, whether here or in his colonies or dependencies, being under the protection of – therefore, according to our common law, owes allegiance to – the King and is subject to all the duties and entitled to enjoy all the rights and liberties of an Englishman.[2]

As justification for this rule, Coke cites a number of previous cases and statutory law, which, he thought, were "so copious in this point, as, God willing, by the report of this case shall appear."[3] Coke also found justification for this view of subjecthood in natural law: "And the reason hereof is, for that God and nature is one to all, and therefore the law of God and nature is one to all. By this law of nature is the faith, ligeance, and obedience of the subject due to his Sovereign or superior…"[4]

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[1] Polly J Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE JL & HUMAN., 81 (1997).

[2] *Id.*, citing Herbert Broom, Constitutional Law Viewed in Relation to Common Law 31 (London, W. Maxwell & Son, 2d ed. 1885).

[3] Calvin v. Smith, 77 Eng. Rep. 377, 381 (K.B. 1608).

[4] *Id.* at 392.

The immediate upshot of Calvin's Case was that Scottish subjects were under the authority of the English crown and were owed, in return, various rights and entitlements. But the broader significance of Calvin's Case lay in Coke's statement of the reciprocal principle of natural "ligeance," or allegiance, to the sovereign, for it is this principle that would later be cited as justification for birthright citizenship. Calvin's Case was well known, for example, to 18th century American political actors through their familiarity with various commentaries on English common law. During this period, invocations of the principle of allegiance, as the basis for birthright citizenship, abound.

For many 19th century Republicans, the principle of allegiance provided a natural solution to the problem of African American citizenship. Indeed, so familiar was this principle that, in Congressional debates Republican congressman often asserted that African American citizenship was already guaranteed by the common law. For example, according to Republican James F. Wilson of Iowa, Chairman of the House Judiciary Committee and House bill manager, Section 1 of the Fourteenth Amendment, which provided for unconditional birthright citizenship, was "merely declaratory of what the law now is."[5] While such claims no doubt offered certain rhetorical advantages, they were also basically accurate, given the longstanding American tradition of understanding citizenship through the framework provided by English common law. As one Republican Senator put it during the debates over the 1866 Civil Rights Act, "every man, by his birth, is entitled to citizenship, and that upon the general principle that he owes allegiance to the country of his birth, and that country owes him protection. That is the foundation, as I understand it, of all citizenship."[6]

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[5] *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 1115 (1866).

[6] S*ee, e.g.,* CONG. GLOBE, 39th Cong., 1st Sess. 570 (1866) (statement of Sen. Morrill).

One cost, however, to relying on a legal principle so familiar was that Reconstruction Republicans in Congress, at least as I read the debates, say remarkably little about the theory of citizenship they are advancing, despite the fact that extending birthright citizenship to African Americans and other racial groups would strike at the root of the American racial caste hierarchy. For a more explicit discussion of this sort, it is necessary to turn to a separate, and slightly earlier, historical period in which jus soli was put into practice elsewhere. This is the period from 1810 to 1826, during which nine former Spanish colonies – Venezuela, Colombia, Chile, Peru, Bolivia, Argentina, Uruguay, Ecuador, and Paraguay – and the former Portuguese colony of Brazil achieved independence and enacted national constitutions that explicitly endorsed birthright citizenship. As Diego Acosta has shown, the constitutions of these newly independent states drew heavily upon the Spanish Constitution of 1812.[7] Though the Spanish Constitution of 1812 did not adopt jus soli, it did grant formal equality to Spaniards born within the Americas. As Acosta observes, by acknowledging the equal status of Spaniards born outside of Spain, the Spanish Constitution presented a "ground-breaking and pluralistic vision of the nation."[8] By including Spaniards residing in the colonies within the Spanish nation, the Spanish government sought to prove that the Spanish nation was "united by common political and economic interests" and faced "a collective national destiny."[9]

The newly independent states of South America faced a similar, though considerably more difficult, problem. In addition to a weak national government and an inchoate national identity, the former colonies were beset by the legacies of Spanish colonialism and racialized

[7] Diego Acosta, *Open Borders in the nineteenth century: constructing the national, the citizen and the foreigner in South America*, 3-5 (2017).

[8] *Id*. at, 4.

[9] *Id*., citing M. L. Rieu-Millan, Los Diputados Americanos en las Cortes de Cádiz (Madrid: Consejo Superior de Investigaciones Científicas, 1990), p. 173.

slavery. Thus, the first task of the new governments was to make "citizens out of colonial subjects" and to forge "national communities from colonial societies marked by stark social divisions."[10] Moreover, seeking to control large territories but lacking the requisite population size, the former colonies strongly encouraged European immigration, adding to the already difficult task of creating a unified citizenry.[11]

In Acosta's view, jus soli was a principle well suited to "new, still politically fragile, states that were in the process of national construction and assertion over their territories and populations."[12] On the one hand, unconditional birthright citizenship, along with guarantees of equal treatment of foreigners, helped promote immigration, as it would secure the property rights and legal status of immigrants and their descendants. On the other hand, for many elites within these newly independent states, birthright citizenship was part of a larger project of racial egalitarianism. In 1821, for example, José de San Martín, the liberator of Peru, proclaimed the moral equality of the aboriginal population, asserting that "in the future the aborigines shall not be called Indians or natives; they are children and citizens of Peru and they shall be known as Peruvians."[13] In the 1814 Mexican constitution, Mexican independence leader José María Morelos declared that "[s]lavery is forever prohibited, as well as distinctions based on race (castas), leaving everyone equal, and only vice and virtue will distinguish one American from

[10] N. P. Appelbaum, A. S. Macpherson and K. A. Rosemblatt, 'Introduction. Racial Nations,' in N. P. Appelbaum, A. S. Macpherson and K. Alejandra Rosemblatt (eds.), Race and Nation in Modern Latin America (Chapel Hill: University of North Carolina Press, 2003) pp. 1-31, p. 4.

[11] Acosta, 17 (2017).

[12] Id. at, 6.

[13] Peru, Decree of August 27, 1821, cited in B. Anderson, Imagined Communities. Reflections on the Origin and Spread of Nationalism (London: Verso, 1983), pp. 49-50.

another."[14] Overall, birthright citizenship was part of a broader rejection of the "official ethnoracial distinctions that had undergirded and rationalized the colonial hierarchy."[15]

To be sure, birthright citizenship was nowhere a panacea for racial hierarchy. In both South America and the United States, even after the introduction of birthright citizenship much of old order remained. Nevertheless, it is it is remarkable that, for egalitarian reformers on both continents, birthright citizenship lie at the foundations of a conception of social belonging and national identity in which ascriptive criteria like race and ethnicity would have no bearing on one's claim to equal status. This historical trajectory should give pause to critics who urge the abandonment of birthright citizenship, a point to which I shall return in Section III.

II. Carens and the Argument from Future Expectations

I shall now turn to contemporary philosophical criticisms of birthright citizenship. While birthright citizenship is a sorely neglected topic within contemporary political philosophy, it has not escaped philosophical notice entirely. Joseph Carens has provided a philosophically robust defense of birthright citizenship for the children of citizens and for the children of legal residents, and his defense is nested within a more general philosophical account of social membership within a liberal democratic state. Starting with Carens' account will allow me to introduce some of the main questions at issue in the birthright citizenship debate. Additionally, though I shall ultimately reject Carens' account, starting here will also allow me to introduce some important claims that I shall develop later in the paper.

[14] Levene, *Manual de historia del derecho argentino*, 462, cited in Mirow, Matthew C. Latin American Law: A History of Private Law and Institutions in Spanish America, 146. Austin: University of Texas Press, 2004.

[15] MARA LOVEMAN, NATIONAL COLORS: RACIAL CLASSIFICATION AND THE STATE IN LATIN AMERICA 80 (Oxford University Press, USA. 2014).

a. From Social Membership to Citizenship

Carens' defense of birthright citizenship is grounded in an account of the moral significance of living within a shared political community. To live within a political community, according to Carens, is to be a social member of that community. Social membership, Carens argues, is "normatively prior to citizenship."[16] By this Carens means that an account of the moral significance of social membership is required in order to provide a principled basis for determining who is morally entitled to citizenship and the legal rights that accompany citizenship. By contrast, democratic theorists, Carens observes, have traditionally sought only to provide an account of how the state may treat citizens, what resources the state must provide to each citizen, and other questions of democratic governance. Such accounts simply presuppose that individuals are entitled to citizenship. As Carens points out, however, democratic theory requires an account of why it is that individuals possess a moral claim to citizenship and the legal rights that accompany citizenship.[17] There must be, in other words, some facts about individual interests that generate a moral claim to citizenship.

Carens begins his account of citizenship by describing the interests of individuals who live together as members of a shared political community. According to Carens, members of a shared political community will, over time, become deeply rooted within that community and will develop profoundly important relationships. Given the significance to the individual of these relationships, Carens argues, members of a shared political community possess a "fundamental interest" in being able to maintain their various ties to that community.[18] On Carens' view, because there are various kinds of communal ties, members possess a variety of

[16] JOSEPH CARENS, THE ETHICS OF IMMIGRATION 160 (Oxford University Press. 2013).
[17] *Id.* at.
[18] *Id.* at, 24.

fundamental interests in their community. These include a fundamental interest in security of residence, in access to public employment, and in access to redistributive social programs.[19] Perhaps most importantly, members possess a fundamental interest "in seeing [themselves] and in being seen by others as someone who belongs in the political community in which [they] live[]."[20] In other words, individuals over time will develop a fundamental interest in social membership within the political community.

Carens maintains that an individual's fundamental interest in social membership generates a moral claim to legal rights and to legal status within that community. To establish the connection between fundamental interests and this moral claim to legal rights and to legal status, Carens appeals to an argument familiar from human rights discourse, namely, that states are morally obligated to respect a basic set of human rights "that all human beings enjoy against all states simply in virtue of their humanity."[21] But Carens distinguishes between general human rights, which protect "generic human interests," and "membership-specific human rights," which protect interests arising from "particular connections to particular communities."[22] On Carens' view, states are obligated to uphold general human rights, such as the right to freedom of religion or the right to a fair trial, regardless of the identity of the rights-holder.[23] Yet, Carens argues, states are not obligated to extend membership-specific rights to human beings as such. If membership-specific rights depend upon membership-specific interests, and if membership-specific interests are generated only when individuals possess connections to a

[19] *Id.* at, 91-2.
[20] *Id.* at, 24.
[21] *Id.* at, 161.
[22] *Id.*
[23] *Id.* at 93.

particular political community, then an individual who possesses no ties to the community has no basis for a claim to membership-specific rights.

For example, according to Carens rights to security of residence, access to public employment, and access to redistributive social programs, cannot be denied to members of the political community. But states do not act wrongly if they deny these rights, or deny an equal measure of these rights, to non-members. As Carens writes, "[t]he simple fact of one's humanity is not sufficient to create a moral claim to these rights…Moral claims to [membership-specific rights] depend primarily upon where one lives and how long one has lived there."[24] As Carens sums up his view, "living in a society over time makes one a member and being a member generates moral claims to legal rights and to legal status."[25]

By why does this claim to legal status and legal rights amount to a claim to citizenship? The answer to this question, Carens argues, lies in the basic moral obligations of democratic states. As I noted above, Carens believes that all states are morally obligated to afford members of the political community membership-specific rights, such as the rights to public employment and access to redistributive social programs; these rights are meant to protect membership-specific fundamental interests. For democratic states, Carens argues, this moral obligation extends to the state's citizenship policies. That is, according to Carens, "in a democratic framework, the state is morally obliged to take…fundamental interests into account in its citizenship policies."[26] Since members of a political community possess a fundamental interest in belonging in that community, and in being recognized as belonging in that community, members have a moral claim citizenship. This is because, as Carens argues, in democratic states,

[24] *Id.* at 161.
[25] *Id.* at 159-60.
[26] *Id.* at 25.

"citizenship is the legal status by which we recognize a human being as an official member of the political community."[27]

To recap: Carens begins with an account of social membership in order to derive a principled basis for determining who has a moral claim to citizenship. Members of a shared political community, he argues, will, over time, develop profoundly important ties to the community, such that they will come to possess a fundamental interest in belonging, and being recognized as belonging, within that community. An individual who acquires a fundamental interest in belonging within a particular political community possesses a moral claim to legal rights and legal status within that political community. This is because, in liberal democratic states, citizenship is the legal status afforded to individuals who possess a moral claim to belonging. Thus, members of a shared political community within a democratic state have a moral claim to citizenship.

b. Future Expectations and Birthright Citizenship

I now turn to Carens' defense of birthright citizenship for the children of citizens and for the children of legal residents. To set up this argument it is necessary first to examine who, in Carens' view, ought to be considered a social member of a democratic state, for it is not immediately clear that Carens' view is compatible with birthright citizenship for any individual. As I discussed in the previous Section, Carens believes that social members of a democratic state possess a moral claim to citizenship within that state. But the acquisition of social membership is a process that unfolds over time: as Carens writes, "residence and length of stay…are the only factors that play a role in the formal arguments about who should count as a member and how strong particular membership claims are."[28] Of course, a newborn child has resided within a

[27] *Id.* at 24.
[28] *Id.* at 164.

particular political community for only a very short period of time; hence, this principle is seemingly at odds with any form of birthright citizenship, a problem for Carens given that birthright citizenship, of some sort, is a widespread (and presumably widely endorsed) policy within contemporary democratic states, and Carens takes himself to be drawing upon widely endorsed democratic principles. By examining how Carens avoids this impasse, we will be in a position to see why Carens defends birthright citizenship for some individuals and why he stops short of defending unconditional birthright citizenship.

According to Carens, because the acquisition of social membership takes place over time, individuals who have lived within a political community for their entire lives possess the strongest claim to social membership, and thus the strongest claim to citizenship.[29] But Carens does not limit citizenship to lifelong residents of the political community. Carens argues that immigrants who have lived within the political community for a sufficient amount of time will also develop substantial communal ties and thus also will come to possess a moral claim to citizenship. This holds true for legal immigrants as well as for "irregular migrants," or those "noncitizens living within the territory without official authorization."[30] For Carens, how these individuals entered the political community is not immediately morally irrelevant. "[P]eople can be members of a society even when they are not citizens," Carens argues, "and…their membership gives them moral claims to legal rights."[31] Overall, on Carens' view, any individual who resides within a state for a sufficient amount of time will acquire a moral claim to social membership and thus a moral claim to citizenship.

[29] *Id.* at 22-29.
[30] *Id.* at 1.
[31] *Id.* at 160.

Yet Carens does not maintain that the state should grant citizenship only to those individuals who have already acquired social membership. This would rule out birthright citizenship entirely, since clearly newborn children have resided within the state for only a short period of time. Instead, Carens argues, plausibly, that "a state cannot avoid adopting rules regarding the transmission of citizenship whose underlying rationale rests in part on generalizations, probabilities, and expectations about human lives and relationships."[32] A newborn child's moral claim to birthright citizenship, then, turns on the likelihood that the child will become a social member of the political community. In other words, a child has a moral claim to birthright citizenship only when there are sufficiently high "future expectations of [that child] living in the society."[33]

Carens acknowledges that these expectations will not be fulfilled in every case. A child granted birthright citizenship may leave the political community at a young age, never to return. Yet, he argues, there is little reason to suppose that permanent outward migration will occur to such an extent that it creates serious problems for the political community.[34] Moreover, Carens claims, there is little harm done to the political community when citizenship is granted to an individual who later exits the community.[35] Thus, he concludes, the argument for birthright citizenship based on future expectations of social membership is not refuted simply by pointing out that, in some cases, these expectations may go unfulfilled.

Citing these expectations-based considerations, Carens argues that a state is morally obligated to grant birthright citizenship to the children of its citizens and to the children of settled, legal immigrants. As to the former, Carens maintains that "[a] baby born to resident

[32] *Id.* at 29.
[33] *Id.* at 36.
[34] *Id.* at 25.
[35] *Id.*

citizens is likely to develop a strong sense of identification with the political community in which she lives and in which her parents are citizens."[36] A child of resident citizens, Carens claims, "is likely to see herself and to be seen by others as someone who belongs in that community."[37] Given this likelihood, Caren maintains, a child born to resident citizens possesses "a fundamental interest in being recognized as a member of that particular political community."[38] As we saw above, for Carens, democratic states are morally obligated to afford citizenship to individuals who possess a fundamental interest in being recognized as a social member of the political community. Because the children of resident citizens possess this fundamental interest, it follows, on Carens view, that democratic states are morally obligated to afford citizenship to the children of resident citizens.

As to the children of settled, legal immigrants, Carens argues that "the most important circumstances shaping a child's relationship with the state from the outset are the same for the child of immigrants as they are for the child of resident citizens."[39] That is, these children, just like the children of citizens, "are likely to grow up in the state, to receive [their] social formation there, and to have [their] life chances and choices deeply affected by the state's policies."[40] Thus, according to Carens, the children of settled, legal immigrants also possess a fundamental interest in being recognized as a social member of the political community, and hence a moral claim to citizenship. Note, however, that, on Carens' view, a child of settled, legal immigrants "has a somewhat weaker claim to membership than the child of resident citizens."[41] This is because, according to Carens, citizenship provides an important connection to the political

[36] *Id.* at 24.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 31.
[40] *Id.* at 30.
[41] *Id.* at 31.

community, and it is the depth of one's connections to the political community that generates a moral claim to membership. A child whose parents are citizens thus possesses an important social connection that children of settled immigrants lack.[42]

While Carens defends birthright citizenship for the children of citizens and for the children of settled, legal immigrants, he argues that democratic states are not morally obligated to expand birthright citizenship beyond these two groups. His argument on this point, however, is ambiguous. On the one hand, Carens appeals to the argument from future expectations as justification for the claim that a child born to tourists or temporary visitors does not have a moral claim to birthright citizenship. As he writes, "[i]t is only when birthplace is linked to future expectations of living in the society that it gives rise to such a claim" and "[i]t seems reasonable to expect that the child will be raised elsewhere, presumably in her parents' home state, not in the place where she happened to be born."[43] This would suggest that any child who can be reasonably expected to be raised in a particular state has a moral claim to birthright citizenship. On the other hand, he claims that the situation for the children of irregular migrants is "a bit more complicated," and the argument from future expectations does not seem to play as central a role.[44] Nevertheless, and presumably drawing upon the argument from future expectations, Carens maintains that the children of irregular migrants are not owed birthright citizenship.[45]

In light of the facts surrounding contemporary patterns of migration to economically advanced liberal democracies, it is not clear that the argument from future expectations rules out birthright citizenship for the children of irregular migrants in these states. Though circumstances differ by country, generally speaking, over the last several decades large numbers of migrants

[42] *Id.*
[43] *Id.* at 36.
[44] *Id.* at 36 n. 31.
[45] *Id.* at 38.

arrived seeking the higher wages associated with employment in an economically advanced democracy. In some cases migrants arrived legally via "guest worker" programs that were intended to provide an inexpensive, though temporary, labor pool for domestic producers. In other cases migrants arrived illegally but were tolerated, if not implicitly welcomed, given the well-known under-enforcement of laws forbidding employers from hiring irregular migrants. But regardless of the particular political and legal circumstances, in all such countries there now exist large communities of irregular migrants and their descendants, who, in countries where they are denied birthright citizenship, generally also lack citizenship and other important legal rights.

In light of these longstanding patterns of migration it is difficult to deny that economic migration, even when formally limited to temporary employment, strongly tends toward long-term membership within the receiving state. The likelihood that children of irregular migrants will grow up as members of the political community is especially high given that, as Carens argues, liberal democratic states are morally (and, in many cases, legally) required to incorporate these children into the political community through some form of public education.[46] Of course, one might worry that unconditional birthright citizenship increases the risk of granting citizenship to children who will eventually emigrate; yet, Carens accepts that "every birthright citizenship law runs that risk to some degree."[47] In other words, unconditional birthright citizenship cannot be ruled out merely because it may lead to an increase in citizen outmigration.

One would think, then, given the demonstrably high likelihood that the children of irregular migrants will grow up as members of the political community, that Caren's argument from future-expectations ultimately supports unconditional birthright citizenship.

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[46] *Id.* at 135.
[47] *Id.* at 38.

Surprisingly, however, Carens maintains that the children of irregular migrants are not owed birthright citizenship. Though Carens does not offer an explicit argument, presumably his conclusion is based on the argument from future expectations. Recall that, for Carens, "residence and length of stay…are the only factors" that bear on one's moral claim to social membership.[48] Newly arrived, irregular migrants, by this criterion, have no moral claim to social membership. Moreover, according to Carens, it is a "a corollary of the conventional view of the state's right to control immigration" that states are "morally entitled to apprehend and deport migrants who settle without authorization."[49] That is, irregular migrants who have settled without authorization, and who have not resided within the territory long enough to acquire social membership, are liable to deportation. Where birthright citizenship is not universal, the children of such migrants are also liable to deportation. And this liability may undercut the expectation that the child will acquire social membership.

To see this last point, it is important to recall that the argument from future expectations is not an argument simply about where an individual can be expected to live but an argument about the kinds of social ties that an individual can be expected to form in relation to the political community. Perhaps, on Caren's view, a child who is liable to deportation can develop these social ties, but only in truncated form. Perhaps, for Carens, the ongoing threat of deportation prevents the development of a sense of rootedness in the wider political community. It is not entirely implausible to think that the child of irregular migrants who are liable to deportation is unlikely to develop a strong sense of identification with the political community in which she lives, since this community views her as an outsider who does not belong and who, according to law, has no right to remain. If, as I have suggested, an ongoing liability to deportation tends to

[48] *Id.* at 164.
[49] *Id.* at 130.

preclude the development of important social ties, then this fact may explain why Carens stops short of defending unconditional birthright citizenship.

In sum, Carens' argues that liberal democratic states are morally obligated to afford birthright citizenship to children who can be expected to become social members of the political community. In Carens' view, it is generally the case that the children of citizens and the children of settled, legal immigrants will become social members of the political community. Thus, he argues, these children are morally entitled to birthright citizenship. But Carens denies that the state is morally obligated to afford birthright citizenship to the children of irregular migrants. Though he does not make the argument explicit, I have suggested that, on Carens' view, there are grounds for thinking that the children of newly arrived irregular migrants will not develop social ties and thus will not become social members of the political community. Liberal democratic states, in Carens' view, are thus not morally obligated to afford these children birthright citizenship. For Carens, liberal democratic states that offer unconditional birthright citizenship do so on the basis of certain self-avowed national ideals, such as an openness to immigration, that other liberal democratic states are under no moral obligation to adopt.[50]

c. Rejecting the Argument from Future Expectations

In the previous Part I noted that Carens refrains from endorsing unconditional birthright citizenship, and I offered an argument in an attempt to explain why he draws this conclusion. My own view is that Carens has misunderstood his own position and that the argument from future expectations requires unconditional birthright citizenship. In my view it is clear that the children of newly-arrived irregular migrants will develop robust social ties, threats of deportation notwithstanding. However, I shall not press this point, because, as I shall argue here, the

[50] *Id.* at 38.

argument from future expectations is fundamentally flawed, and ultimately cannot justify birthright citizenship for any individual.

To begin, recall that the argument from future expectations asserts that the children of citizens and of resident, legal immigrants are likely to become social members of the political community and thus are morally entitled to birthright citizenship. These children, the argument runs, are likely to develop profoundly important social ties, such that they will come to possess a moral claim to citizenship. In making this argument, Carens draws upon some general observations about how individuals tend to develop social ties within a community. As he writes, "[m]ost people do develop deep and rich networks of relationships in the place where they live, and this normal pattern of human life is what makes sense of the idea of social membership."[51] The idea seems to be, roughly, that throughout the course of their lives individuals normally development important sets of social ties to a particular place, and it is through these ties that individuals become social members of their community.

The problem, however, is that this notion of social development is ambiguous between a descriptive understanding of social development and a prescriptive understanding of social development. Most often, as in the quotation just provided, Carens writes as if he is relying on a descriptive understanding of social development. That is, Carens views the individual development of social ties as a process that naturally attends life in a political community. On Carens' view, it would seem that certain individuals are simply born into the political community with preexisting ties that render their eventual social membership more likely than others. According to Carens, these individuals satisfy the future expectations threshold and thus have a moral claim to birthright citizenship.

[51] *Id.* at 168.

In reality, however, the development of social ties is not a purely natural phenomenon. Rather, it is a value-laden process. By "value-laden" I mean the following: while virtually all individuals will develop social ties throughout the course of their lives, the number, depth, and breadth of ties an individual develops will depend in large part upon the surrounding community's social norms, values, ideals, and institutions concerning social membership and inclusion. These norms, values, ideals, and institutions – which I shall refer to collectively as "practices of social inclusion" – determine who is to be regarded as an outsider, who is to be regarded as full member of society, and what full membership entails.

For example, an individual will develop robust relationships with members of the wider community only if members of that community treat that individual as worthy of recognition and basic respect; an individual who seeks to enter into relationships with others but who is shunned or simply ignored by her community will find no partners willing to reciprocate. Similarly, an individual will develop a full panoply of important interests in the community only if the individual is incorporated into the community's social and political institutions. An individual who is excluded from, say, the public education system is prevented from developing more specific interests, such as an interest in how educational funds are distributed or an interest in a particular school's administration.

Similarly, an individual will develop important community-related identities only if members of that community include the individual in identity-forming projects and processes. For example, it is very difficult, if not impossible, to develop a coherent identity as, say, a member of a political party if one is formally or informally excluded from participating as an equal in the political process. It is also very difficult, if not impossible, to develop a coherent identity as a member of the community if one is regularly regarded and treated as an outsider.

Of course, in all but the most extreme cases, even marginalized individuals will develop some social ties. However, presumably on Carens' view these ties may not suffice if they are ties to others who also lack a strong connection to the wider political community. Suppose, for example, that a member of an ostracized ethnic minority is socially connected only to co-ethnics, who themselves lack robust social ties to the wider political community. If we assume that the argument from future expectations is merely descriptive – that is, that the argument simply takes the existing social connections as given – then members of this ethnic minority, despite possessing robust internal social ties, may have a very weak claim to citizenship.

On Carens' view, an individual who is likely to develop important social ties to the surrounding community possesses a moral claim to birthright citizenship. As I have suggested, however, whether an individual will develop these ties depends upon the community's practices of social inclusion: if the community's practices of social inclusion are such that a particular individual is regarded as an actual or potential member, then that individual will be very likely develop important social ties and thus will satisfy the argument from future expectations. If I am right, then, Carens' argument from future expectations amounts to the following claim: an individual who is regarded as a member according to their community's practices of social inclusion possesses a moral claim to birthright citizenship. With regard to the children of irregular migrants, Caren's argument from future expectations, in effect, holds that these children are not owed birthright citizenship because these children are not regarded as members according to their community's practices of social inclusion. Children who are not regarded as members by their community will not develop important social ties, and thus, according to the argument from future expectations, do not possess a moral claim to birthright citizenship.

But this argument begs the question. That is, Carens' argument simply presupposes that a community does no wrong if it adopts practices of social inclusion that prevent certain individuals or certain groups from developing important social ties. However, a community's decision to prevent a group of individuals from developing robust social ties requires moral justification, if such can be provided. This is particularly true in the case of children, for preventing children from developing important social ties risks inflicting profound psychological and material harms upon these children. Thus, a community's collective decision to prevent the children of irregular migrants from developing important social ties requires normative justification. To be sure, as I noted above, Carens maintains that a community is morally required to afford the children of irregular migrants access to essential public goods, such as public education and healthcare. However, he does not consider whether a community must justify its overall decision to exclude the children of irregular migrants from social membership The argument from future expectations, which takes as given a community's practices of social inclusion, cannot provide this normative justification.

Note that this objection applies to Carens' account of birthright citizenship in its entirety. Recall Carens' justification for affording birthright citizenship to the children of citizens: the children of citizens are owed birthright citizenship because they can be expected to become social members of the political community. However, whether the children of citizens will become social members also depends upon a particular community's practices of social inclusion. Here, too, practices of social inclusion, and not considerations of future expectations, are doing (or failing to do) the justificatory work with regard to citizenship. Of course, it is difficult to conceive of a liberal democratic state in which the children of citizens were not treated as social members. Moreover, I take it that there are morally sound reasons for treating

the children of citizens as social members. The point, however, is not that birthright citizenship for the children of citizens is or is not justified. The point is that the argument from future expectations cannot independently justify birthright citizenship for any group of individuals.

The argument from future expectations thus cannot justify birthright citizenship even for the children of legal citizens, let alone the children of settled residents or irregular migrants. With regard to the normative justification of citizenship policy, it is a political community's practices of social inclusion, and not future expectations of social membership, that are of primary interest. To normatively evaluate citizenship policy, then, we must normatively evaluate the political community's social practices of inclusion, since these are what determine who can be expected to develop social ties. In fact, as I shall discuss below, this proposed distinction is slightly misleading: it is more accurate to say that a political community's citizenship policies are themselves part of that community's practices of social inclusion. In other words, citizenship policy is not only a means by which a political community recognizes and secures social ties; rather, citizenship policy is also a means by which a political community constructs a collective identity and, in so doing, expresses a view of who belongs within the community. A normative evaluation of citizenship policy thus must take into account these other dimensions of citizenship policy that Carens does not fully explore. As I hope to show, when we expand our view of citizenship to include these other dimensions of citizenship, the case for birthright citizenship is strengthened considerably.

d. Coda: *Jus nexi*

While I believe that the failure of Carens' argument from future expectations paves the way for a more direct defense of birthright citizenship, I must first address an increasingly prominent alternative, namely, simply rejecting birthright citizenship across the board. While

nativists on the political right, perhaps unsurprisingly, reject birthright citizenship, (at least for certain non-White groups), some political theorists with broadly egalitarian leanings now reject the policy as well. Ayelet Shachar and Stephanie DeGooyer, for example, maintain that birthright citizenship is indefensible for any individual or group. Shachar rejects Carens' argument from future expectations, on the grounds that future expectations are merely a proxy for what really matters, namely, genuine ties to the political community. Yet by relying on a proxy, she claims, birthright citizenship will almost certainly be over-inclusive, for it is plausible that some individuals born within the political community will subsequently emigrate. An individual born within a political community who then emigrates and lives the rest of her life abroad has little substantive connection to birthplace and so, it would seem, no basis for a claim of citizenship. Hence, birthright citizenship will inevitably include individuals who lack genuine ties to the political community.

As per birthright citizenship itself, Shachar and DeGooyer press two objections. First, they claim, it is unclear why the location of an individual's birth should determine their country of residence, particularly since across the globe there are massive disparities in health, wealth, and opportunity. Individuals who happen to be born outside of the political territory of a wealthy country may suffer severe shortfalls in life chances as a result. Yet the location of one's birth is morally arbitrary. For Shachar, who draws on familiar, luck egalitarian intuitions, it is unfair that an individual's life chances should turn so dramatically on a fact over which they have no control and bear no responsibility. Conversely, Shachar claims, birthright citizenship constitutes an undeserved windfall to those born within wealthy countries. In both cases, she concludes,

birthright citizenship reinforces vast differences in life outcomes on the basis of a fact that is arbitrary from the moral point of view.[52]

Schachar and Degooyer also object to certain views of social membership that (in their view) birthright citizenship endorses. According to this objection, given its historical basis in the feudal principle of allegiance, birthright citizenship rests upon a morally implausible view of social membership. The feudal principle of allegiance, recall, asserts that subjects born within a political territory are bound, for life, by a set of reciprocal obligations to the sovereign of that territory. But this principle seems incompatible with a democratic conception of citizenship, which rejects the hierarchical subject / sovereign relation as well as the notion of permanent allegiance. Separately, DeGooyer worries that birthright citizenship and the accompanying rhetoric of "natural born" citizens reinforces a pernicious belief that certain individuals are "natural born" citizens with "a biological attachment to the United States."[53] This worry is not unfounded; as I discuss below, racialized notions of national identity are often couched in biological terms. If birthright citizenship reinforces such thinking, as DeGooyer believes, then this would provide egalitarians with a powerful argument against the policy.

Shachar and DeGooyer seek to provide an alternative both to birthright citizenship and to Carens' argument from future expectations. According to their view, an individual has a right to citizenship only if that individual possesses actual ties to the political community. While an individual born within the political community arrives bearing some of these ties, birth within the political community, on their view, is not sufficient to establish a basis for citizenship. It is only when an individual has demonstrated a robust set of genuine ties to the community that she

[52] AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY 14 (Harvard University Press. 2009). See, also, DeGooyer, S. (2019, July). Rethinking Birthright. *Boston Review*. Retrieved from http://bostonreview.net/law-justice/stephanie-degooyer-rethinking-birthright

[53] DeGooyer, S., Rethinking Birthright.

becomes eligible for citizenship. Shachar terms this policy "earned citizenship" or *jus nexi*. [54] According to Shachar, an individual's eligibility for *jus nexi* citizenship depends upon "the actual conduct of the person, taking into account not only the circumstances of his or her admission into the country but also the establishment of genuine ties…in the political community."[55]

DeGooyer endorses the *jus nexi* principle but makes explicit a point Shachar leaves implicit, namely, that implementation of the *jus nexi* principle would require a bureaucratic assessment of each individual's ties to the political community. As DeGooyer points out, to satisfy the *jus nexi* principle, "everyone would have to formally demonstrate their material attachment to the United States."[56] For DeGooyer, this means that each resident would be granted an opportunity to demonstrate to the state that they are sufficiently connected to the political community. In order to make their case, DeGooyer suggests, residents could present evidence of "length of residence and social and economic relationships in the country" to state agencies charged with enforcing the *jus nexi* principle.[57] As DeGooyer points out, such an inquiry is not without precedent, for American immigration law already requires some potential citizens to prove that they stand in a particular relationship to the political community. A marriage between a citizen and a non-citizen, for example, must be sufficiently documented if the non-citizen is to receive citizenship. The *jus nexi* principle would simply require this sort of documentation for every individual who wishes to become a citizen, regardless of the location of their birth.

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[54] SHACHAR, 162. 2009.

[55] Ayelet Shachar, *Earned citizenship: property lessons for immigration reform*, 23 YALE JL & HUMAN., 10 (2011).

[56] DeGooyer, S., Rethinking Birthright.

[57] *Id.*

In rejecting Carens' argument from future expectations I argued that any account of birthright citizenship must take into other aspects of citizenship policy, such as a political community's practices of social inclusion. In a sense, this is what Shachar and DeGooyer have done: for Shachar and DeGooyer, birthright citizenship requires practices of social inclusion that exclude the global poor and presuppose an inegalitarian principle of social membership – namely, permanent allegiance on behalf of subjects to their sovereign. On their view, no one is born a full member of the political community; an individual's actual ties to the political community are the only morally relevant factor with respect to citizenship policy. For those dissatisfied both with Carens' argument from future expectations and with birthright citizenship, *jus nexi* may represent a way forward.

III. Birthright Citizenship and National Identity

According to Shachar and DeGooyer, birthright citizenship presupposes a morally implausible view of citizenship and social belonging For the sake of clarity I shall address each of Shachar's and DeGooyer's criticisms separately. First, I shall address the claim that birthright citizenship presupposes permanent allegiance between subject and sovereign. Shachar is surely right to argue that birthright citizenship, as it developed in English common law, expressed a commitment to an anti-egalitarian, subject-sovereign understanding of social belonging. However, this reading of birthright citizenship omits two crucial developments that I surveyed in Section I, namely, the introduction of birthright citizenship into South American settler states and the extension of birthright citizenship to African-Americans in the postbellum United States. In the former, birthright citizenship was thought necessary for abolishing racial hierarchy and for

creating a new, non-racialized national identity. The same can be said of birthright citizenship in the postbellum United States, though here the task was less the creation of a national identity and more the reconstruction of an existing national identity so as to include the formerly enslaved and other subordinate groups.

Of course, Shachar and DeGooyer might accept that, in political communities struggling to abolish formal caste hierarchy, birthright citizenship is useful insofar as it treats as morally irrelevant ascriptive criteria such as race. However, they might argue, in political communities that have achieved at least formal equality for all citizens, birthright citizenship is far less compelling. In these cases, birthright citizenship, let us suppose, is no longer necessary for bringing about formal equality. Hence, birthright citizenship must be justified by some other principle. By contrast, Shachar and DeGooyer might continue, *jus nexi* is premised upon a view of social membership according to which one's actual ties to the political community are the deciding factor. And arguably this is a more plausible view of social membership. That is, compared with location of birth, the nature and extent of an individual's ties to a particular community is a more plausible basis for deciding whether or not that individual has some further claim to membership within the community. According to this argument, then, whatever value birthright citizenship may have possessed in the past, contemporary birthright citizenship is committed to a morally implausible principle of social membership, whereas *jus nexi* is not.

Yet this reply overlooks the fact that citizenship policy is not only a means by which to secure important social ties. The problem here is that, like Carens, Schachar and DeGooyer view citizenship primarily as a means by which the state recognizes and formalizes existing social ties. Citizenship has other important functions, however, and thus other dimensions by which it can and should be evaluated. For example, in my view citizenship policy, of whatever sort,

inevitably contains expressive content. More specifically, a citizenship policy typically will express a political community's views about what it is that ties the community together; about what makes this particular community distinct and valuable; and, about what kind of person the community values and seeks to include. Citizenship, on this view, reflects a sort of idealized self-understanding. And this self-understanding will form part of the basis for the construction of a collective or national identity.

Though a complete conception of national identity lies outside the bounds of this paper, let us suppose that a national identity comprises certain claims about the history and future of the political community, the principles that are foundational to that community, and about the values that members of that community endorse. In my view, the existence of a national identity can affect both state and individual action. As to the former, as Rogers Brubaker puts the point in his study of French and German citizenship, "judgments of what is in the interest of the state are mediated by self-understandings, by cultural idioms, by ways of thinking and talking about nationhood."[58] In other words, how a political community conceives of itself in public discourse can shape perceptions of the state's interests, which in turn can constrain the range of legitimate political actions that state officials may undertake.

At the individual level, a national identity may exert a powerful grip upon large numbers of individuals within the political community. For large members of any given political community, beliefs about national identity will likely be highly salient for social life. One would expect, for example, that national identity functions partly as a normative standard for members of the political community and that individuals will be praised or rewarded for adopting the positive characteristics associated with this identity. Individuals may come to understand

[58] ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 16 (Harvard University Press. 2009).

themselves, their values, and their ties to the community partly in terms of their national identity. Of course, as I am describing it, national identity falls partly within the realm of political psychology, and thus almost certainly there will be idealizations, or outright falsehoods, of various sorts. But my claim is not that any given national identity is necessarily a philosophically coherent project. My claim instead is that, simply as a matter of fact, national identity plays a significant role in social and political life, and thus egalitarians have a very strong reason to attend to the sort of national identity that citizenship policy enacts.

My argument, then, is that the normative evaluation of citizenship must take into account not only philosophical principles of political membership but also the relationship between citizenship policy and national identity. And once this second dimension of normative analysis is introduced, arguments for and against birthright citizenship take on a very different cast, for I maintain that birthright citizenship plays a crucial role in the construction of a non-racialized, egalitarian national identity. In my view, birthright citizenship, particularly in a multi-ethnic society in which immigration levels are relatively high, expresses a fundamental legal commitment to incorporating, on equal terms, potentially vast demographic change into the body politic. In other words, to endorse birthright citizenship is to endorse a long-term fluidity in the demographic makeup of the political community; it is to accept that the histories, racial and ethnic characteristics, cultures, languages, and traditions of the citizenry are varied and will only broaden over time.

One way to appreciate the significance of this aspect of birthright citizenship is to consider the statements of white American political elites who openly fear demographic change. In short, these statements generally reveal a deep anxiety about the demographic composition of the United States over the long term. To take but one example, since Justice Taney, in *Dred*

Scott v. Sanford, proclaimed that African Americans, and presumably all other non-white racial groups, were excluded from the "new political family, which the Constitution brought into existence," white elites have often discussed the racial composition of the American body politic in familial terms.[59] In fact, as recent statements by nativists in the United States make clear, for those concerned about the preservation of white identity, non-white birthrates comprise an existential threat.[60] Following the logic of the familial metaphor, presumably for these whites to incorporate non-white groups into the American political community is to effect significant "biological" change and into the American "bloodline."

Cast against this background, unconditional birthright citizenship is significant indeed, though perhaps easily misunderstood. DeGooyer, recall, views birthright citizenship as reinforcing a pernicious belief that certain individuals are "natural born" citizens with "a biological attachment to the United States."[61] But this interpretation of birthright citizenship gets the expressive content exactly backwards. Though it is understandable why the language of "natural born" citizens could be worrying to egalitarians, as it might reinforce a genetic view of citizenship, it is important to keep in mind the other side of the coin, namely, that every individual born within the territory can lay claim to the "natural born" designation. In other words, the children of undocumented immigrants and the descendants of slaves have an equal, "natural" claim to citizenship no less than any other children. In this way birthright citizenship does not endorse but instead repudiates the biological understanding of citizenship, insofar as it recognizes that any individual born within the state, regardless of their ascriptive identity or heritage, and regardless of the arbitrary circumstances surrounding their birth, is an equal citizen.

[59] Dred Scott v. Sandford, at 403.

[60] As Iowa Congressman Steve King put it, for example, "We can't restore our civilization with somebody else's babies."

[61] DeGooyer, S., Rethinking Birthright.

In short, unconditional birthright citizenship makes arbitrariness in individual arrival into the political community a virtue of sorts, not a vice. This point is worth unpacking, since for Shachar and DeGooyer, birthright citizenship ought to be rejected on the grounds that it is based on a morally arbitrary fact about individuals, namely, the location of their birth. There are two major weaknesses with the objection from moral arbitrariness. First, it would be impossible to implement citizenship policy that did not rely, at some point, on a morally arbitrary fact about the individual. In any plausible citizenship regime, for any citizen there will almost certainly exist some morally arbitrary fact that influenced or even determined their eligibility for citizenship. Consider, for example, a 'pure' *jus nexi* citizenship regime, in which citizenship is granted only to individuals who are able to demonstrate sufficient social ties to the political community. Individuals who are born into the community will have an obvious advantage with regard to the opportunity to develop a sufficient set of social ties to the political community. Indeed, arguably most citizens in a *jus nexi* regime will owe their social ties largely to the fact that they were born into the political community. In a *jus nexi* regime moral arbitrariness is not eliminated but simply relocated. The same is plausibly true for other citizenship policies as well.

Second, it is unclear why, specifically with regard to birthright citizenship, arbitrariness per se is supposed to be morally concerning. To be sure, it is a deeply unsettling fact about global inequality that the location of one's birth plays a hugely determinative role in one's life chances, and I shall take it for granted that individual actors and states have pressing moral obligations to ameliorate global inequality. But it is hard to see how these points pose an objection specifically to birthright citizenship. In my view, arbitrariness becomes morally relevant when its effects threaten to undermine equal relations between individuals. As Elizabeth Anderson puts the point, egalitarian justice seeks not to eliminate arbitrariness for its

own sake but to "create a community in which people stand in relations of equality to others."[62] The fact, then, that an individual might not have acquired citizenship had her circumstances been different in some minor way is only relevant insofar as it threatens to undermine equal relations between individuals within the political community. But this sort of arbitrariness, I have argued, poses no threat to the state's ability to equalize relations between members of the political community. Indeed, it is just the opposite: by acknowledging the arbitrariness of individual birth, birthright citizenship policies recognize that no individual or group possesses a special connection to or heightened status within the political community.

Conclusion

In sum, I have argued that in multi-ethnic and multi-racial societies with relatively high levels of immigration unconditional birthright citizenship is essential to constructing and maintaining an egalitarian national identity. It is possible, of course, that there are other citizenship policies that might yield this result. But if there are, I do not believe that philosophers have yet identified them. Unconditional birthright citizenship, I maintain, is unique in its an openness to the future composition of the body politic. At a time when the achievement of a non-racialized, egalitarian national identity appears to be receding from the horizon, egalitarians must think carefully before abandoning this captivating view.

[62] Elizabeth S Anderson, *What is the Point of Equality?*, 109 ETHICS, 289 (1999).

Concluding Remarks

I shall conclude here with some observations regarding future directions for my work on status, law, and equality. One immediate topic for investigation is the application of social immutability to immigration law. As I briefly describe in Chapter 1, immigration law has incorporated the immutability criterion as a test for determining whether an individual ought to be granted asylum. In short, whereas an individual who is a victim of random violence typically does not thereby have a claim to asylum, an individual who faces violent persecution as a member of a "particular social group" does typically receive asylum. Courts first imported the old immutability framework into the definition of "particular social group," though now at least some federal courts have moved closer toward something like the social immutability criterion.

I believe that there are two interesting avenues to explore here. First, it would be helpful to bring into the immigration context some of the evidence and theory concerning social group formation, as many legal scholars lament the undertheorized and seemingly confused "particular social group" test. Currently, many asylum cases are initially heard by administrative judges who believe that victims of group-based violence who do not possess a genetically immutable characteristic have no claim to asylum. Yet, particularly in countries where antidiscrimination law is weak, it seems likely that many asylum cases will involve violence that is used as a sort of social group boundary enforcement mechanism, and the evidence provided in support of the social immutability criterion would give courts a powerful analytical tool for assessing asylum cases. Second, in addition to exploring the empirical overlap between social immutability and

the "particular social group" criterion, it would be interesting to explore the normative overlap between equal protection and asylum law. Equal protection is cast in terms of persons, not citizens, and thus equal protection principles must have some import for asylum cases. How should anti-caste principles of Equal Protection inform asylum and immigration law? How would an anti-caste approach differ from a more traditional, human rights approach? And what changes in immigration and asylum law might be warranted from an anti-caste perspective?

The second area of future interest I shall discuss is not explicitly mentioned in any of the above chapters but is nevertheless foundational to the project I have now completed. I am interested in the basis of equality: the property or capacity in virtue of which individuals are moral equals. While the law is imbued with the value of equality and the equal protection of persons, the law does not seem to presuppose any particular basis of equality. More worryingly, contemporary moral philosophers have been unable to identify a plausible basis of equality suitable for a liberal democracy. In my view, the basis of equality is what I call the "cooperative capacity." By this I mean the collection of relational human capacities that allows individuals to engage in robust social cooperation. On my view, it is in virtue of possessing the cooperative capacity that individuals are moral equals.

I believe this answer to the basis of equality problem solves a number of problems. First, this basis of equality, unlike, say, a religious basis of equality, is consistent with political liberal restrictions on public reason. The cooperative capacity view does not require any controversial metaethical or moral claims; rather, the cooperative capacity view is based on uncontroversial empirical claims about human faculties and social behavior. Second, this basis of equality avoids the problems the plague other scalar bases of equality. Traditionally, scalar views run aground because they carry the inegalitarian implication that individuals with "more" of the

relevant equality property deserve more rights, distributive goods, social standing, etc. But the cooperative capacity, though it is a scalar property, is not scalar in value. That is, an individual who is better able to cooperate than others is not, in virtue of that fact, more valuable than others and thus is not owed more rights, goods, or standing. Third, I believe that the cooperative capacity view is appropriately egalitarian, in the sense that it includes individuals who possess non-standard cognitive or emotive faculties. Since these individuals nevertheless are often able to engage in robust social cooperation, they are rightly afforded equal status.

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