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## The Scope of Congress's Thirteenth Amendment Enforcement Power After *City of Boerne v. Flores*

Jennifer Mason McAward

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## THE SCOPE OF CONGRESS'S THIRTEENTH AMENDMENT ENFORCEMENT POWER AFTER *CITY OF BOERNE V. FLORES*

JENNIFER MASON MCAWARD\*

*Section 2 of the Thirteenth Amendment grants Congress power “to enforce this article by appropriate legislation.” In Jones v. Alfred H. Mayer Co., the Supreme Court held that Section 2 permits Congress to define the “badges and incidents of slavery” and pass “all laws necessary and proper” for their abolition. Congress has passed a number of civil rights laws under this understanding of its Section 2 power. Several commentators have urged Congress to define the “badges and incidents of slavery” expansively and to use Section 2 to address everything from racial profiling to discrimination on the basis of gender and sexual orientation.*

*Jones, however, is in serious tension with City of Boerne v. Flores, which held that the Fourteenth Amendment’s virtually identical enforcement language permits only prophylactic legislation that is congruent and proportional to violations of judicially determined rights. Even more critically, Jones’s grant to Congress of substantive interpretive power runs afoul of the principles of separation of powers, judicial supremacy, and federalism that drove the Court in City of Boerne. Thus, the time is ripe to reconsider Jones and the proper scope of Congress’s Thirteenth Amendment enforcement power. This Article does precisely that, delving into the text, history, and structural implications of Section 2.*

*Ultimately, this Article considers three ways to approach Section 2: as a limited power to prevent and remedy coerced labor; as a broad power to define the badges and incidents of slavery and to protect a wide array of civil rights; and as a prophylactic power to prevent the de facto reemergence of slavery by addressing the historical incidents and badges of the slave system. This Article concludes that the prophylactic reading of Section 2 best comports with both the original meaning of the provision and the structural principles of separation of powers, judicial supremacy, and federalism.*

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## INTRODUCTION

As the Supreme Court has tightened its review of legislation passed pursuant to Congress's Fourteenth Amendment enforcement powers, many commentators have turned to the Thirteenth Amendment as a panacea—a source of congressional power for enhanced civil rights protections. Hailed as a “means for enforcing [the nation’s] foundational principles of liberty and general wellbeing,”<sup>1</sup> and yet lamented as

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

“missing” from constitutional dialogue,<sup>2</sup> the Thirteenth Amendment declares that “[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.”<sup>3</sup> Section 2 of the Amendment gives Congress the power “to enforce this article by appropriate legislation.”<sup>4</sup>

Congress has relied on its Section 2 power in passing a number of statutes, from the Civil Rights Act of 1866<sup>5</sup> and the Anti-Peonage Act of 1867,<sup>6</sup> to the Fair Housing Act of 1968,<sup>7</sup> the Victims of Trafficking and Violence Prevention Act of 2000,<sup>8</sup> and, most recently, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.<sup>9</sup> Some of these statutes seek to enforce the literal terms of Section 1 of the Amendment by protecting individuals from involuntary servitude.<sup>10</sup> Others are civil rights bills that prohibit discrimination on the basis of race, color, national origin, and, in some instances, religion.<sup>11</sup>

Few have questioned whether Section 2 in fact empowers Congress to pass such civil rights laws. On the contrary, Congress and academics have assumed, with justification, that the Section 2 power is expansive. In 1968, in *Jones v. Alfred H. Mayer Co.*, the Supreme Court rejected a Thirteenth Amendment challenge to the portion of the Civil Rights Act of 1866 that prohibits racial discrimination in property conveyances.<sup>12</sup> In *Jones*, the Court stated that Section 2 gives Congress “the power . . . rationally to

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

3. U.S. CONST. amend. XIII, § 1.

4. *Id.* § 2.

5. See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–1982 (2006)).

6. See Anti-Peonage Act of 1867, ch. 187, 14 Stat. 546 (1867) (codified at 18 U.S.C. § 1581 (2006) (criminal provision); 42 U.S.C. § 1994 (2006) (civil provision)).

7. See 42 U.S.C. §§ 3601–3631 (2006).

8. See 18 U.S.C. §§ 1589–1594 (2006).

9. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §§ 4701–4713, 123 Stat. 2190, 2835–44 (2009). Division E of the Act is denominated as the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. The Thirteenth Amendment portion of the Act imposes significant penalties on anyone “whoever, whether or not acting under color of law, willfully causes bodily injury to any person . . . because of the actual or perceived race, color, religion, or national origin of [that] person.” *Id.* § 4707. Other portions of the bill, justified under the Commerce Clause, would extend protection against hate crimes motivated by gender, sexual orientation, gender identity, or disability. *Id.*

10. See, e.g., 18 U.S.C. § 1581 (2006); 42 U.S.C. § 1994 (2006) (Anti-Peonage Act).

11. See, e.g., 42 U.S.C. §§ 1981–1982 (2006) (portions of the Civil Rights Act of 1866 prohibiting race discrimination in the exercise of contract and property rights); *id.* § 3604 (portion of Fair Housing Act of 1968 prohibiting discrimination on the basis of race, color, national origin, or religion); 18 U.S.C. § 245(b)(2)(B) (2006) (prohibiting the use of force against a person using a public program or facility on the basis of the person’s race, color, national origin, or religion).

12. 392 U.S. 409, 437–43 (1968).

determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”<sup>13</sup> *Jones* thus carved out a broad range of discretion for Congress in enforcing the Thirteenth Amendment and set forth a very deferential standard of judicial review with respect to enforcement measures.

*Jones* was the third in a trio of Warren Court decisions in which the Court took a consistently broad view of Congress’s power to enforce the Reconstruction Amendments. The Fourteenth and Fifteenth Amendments contain enforcement clauses very similar to that of the Thirteenth: each gives Congress the “power to enforce” its substantive provisions by “appropriate legislation.”<sup>14</sup> In *South Carolina v. Katzenbach*<sup>15</sup> and *Katzenbach v. Morgan*,<sup>16</sup> the Court considered the scope of Congress’s Fifteenth and Fourteenth Amendment enforcement powers, respectively. In each case, the Court held that Congress’s power was akin to that conferred by the Necessary and Proper Clause, and that *McCulloch v. Maryland* provided the basic test for measuring the propriety of congressional enactments.<sup>17</sup> Thus, “all means which are appropriate, which are plainly adapted to [a ‘legitimate’] end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”<sup>18</sup> *Jones* similarly invoked *McCulloch*, giving Congress wide-ranging discretion, not only to determine what means are appropriate to enforce the Thirteenth Amendment, but arguably also to define for itself the substantive ends of the Amendment, i.e., the badges and incidents of slavery.

In recent years, however, the Court has altered its approach to enforcement legislation and shown itself far less willing to defer to Congress. In *City of Boerne v. Flores*,<sup>19</sup> the Court articulated new limits on the scope of Congress’s power under Section 5 of the Fourteenth Amendment. Any statute purporting to be an exercise of that power must be “congruen[t] and proportiona[l]” to judicially identified violations of the rights articulated in Section 1 of the Fourteenth Amendment.<sup>20</sup> Using

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13. *Id.* at 440.

14. See U.S. CONST. amend. XIV, § 5 (giving Congress “power to enforce, by appropriate legislation, the provisions of this article”); *id.* amend. XV, § 2 (giving Congress “power to enforce this article by appropriate legislation”).

15. 383 U.S. 301 (1966).

16. 384 U.S. 641 (1966).

17. See *South Carolina*, 383 U.S. at 326; *Morgan*, 384 U.S. at 650.

18. 17 U.S. (4 Wheat.) 316, 421 (1819).

19. 521 U.S. 507 (1997).

20. *Id.* at 520.

this new standard, the Court has held that Congress exceeded its Section 5 power in passing several civil rights laws.<sup>21</sup> Recently, at least one member of the Court has suggested that the *City of Boerne* standard should apply in the Fifteenth Amendment voting rights context as well.<sup>22</sup> *City of Boerne* thus offers a substantially more restrictive standard for evaluating congressional action than *Jones*, despite the similar text of Sections 5 and 2.

In light of *City of Boerne*, *Jones* is arguably a remnant of the past. However, the Court itself has never explicitly questioned the *Jones* standard, and lower courts continue to invoke that standard to evaluate Thirteenth Amendment legislation.<sup>23</sup> Recent academic literature has suggested that Section 2 of the Thirteenth Amendment would empower Congress to pass legislation regarding everything from hate speech, to racial profiling, to abortion rights and gay rights.<sup>24</sup> Some have noted the

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21. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Title I of the Americans with Disabilities Act); *United States v. Morrison*, 529 U.S. 598 (2000) (Violence Against Women Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act).

22. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2524–25 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (indicating that the *City of Boerne* “congruence and proportionality” standard should apply in evaluating the Voting Rights Act). This case involved the preclearance requirement of the Voting Rights Act of 1965. A three-judge panel of the U.S. District Court for the District of Columbia held that the rational basis standard articulated in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), rather than the elevated “congruence and proportionality” standard of *City of Boerne v. Flores*, 521 U.S. 507 (1997), should apply. See *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008). A majority of the Supreme Court acknowledged the tension between the two standards but declined to resolve it. See 129 S. Ct. at 2512–13 (noting the parties’ disagreement whether “congruence and proportionality” or “rational[ity]” should be “the standard to apply in deciding whether . . . Congress exceeded its Fifteenth Amendment enforcement power”).

23. See, e.g., *Mitchell v. Cellone*, 389 F.3d 86, 87–88 (3d Cir. 2004) (holding the Fair Housing Act, 42 U.S.C. § 3601–3619 to be a valid exercise of congressional power under the Thirteenth Amendment to eliminate the badges and incidents of slavery); *United States v. Allen*, 341 F.3d 870 (9th Cir. 2003) (holding that acts of violence prohibited by 18 U.S.C. § 245(b)(2)(B) imposed a badge or incident of involuntary servitude on their victims and thus could be prohibited under the Thirteenth Amendment); *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002) (18 U.S.C. § 245(b)(2)(B), prohibiting violent interference with enjoyment of a public facility, could be applied to religious and/or racial attacks against Jews as a valid exercise of congressional power under the Thirteenth Amendment); *United States v. Nicholson*, 185 F. Supp. 2d 982 (E.D. Wis. 2002) (holding that 18 U.S.C. § 241, the civil rights conspiracy statute, and 42 U.S.C. § 3631, the criminal provision of the Fair Housing Act, are valid exercises of the Thirteenth Amendment’s enforcement power).

24. See Amar, *supra* note 2, at 158 (1992) (arguing that racial hate speech is a badge of servitude); Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment’s Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 401 (2000) (arguing that laws that control women’s reproductive rights are vestiges of the institution of slavery and manifestations of modern slavery); William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17 (2004) (analyzing racial profiling as a badge or incident of slavery); David P. Tedhams, *The Reincarnation of “Jim Crow”: A Thirteenth Amendment Analysis of Colorado’s Amendment*, 4 TEMP. POL. & CIV. RTS. L. REV. 133 (1994)

tension between *Jones* and *City of Boerne*,<sup>25</sup> but few have taken seriously the possibility that *Jones*'s viability might be in question.<sup>26</sup> To date, nobody has undertaken a comprehensive review of the *Jones* standard on its own merits, much less with an eye toward how the Court's approach in *City of Boerne* might affect its view of Congress's efforts under Section 2. This Article attempts to fill that gap by examining the proper scope of Congress's Section 2 enforcement power from the perspectives of constitutional text, history, and structure, and by considering how the structural concerns that motivated the Court in *City of Boerne* might play out in the Section 2 context.

Part I of this Article begins by providing some background on Congress's power to enforce the Reconstruction Amendments. Parts I.A and I.B note the language of the Thirteenth, Fourteenth, and Fifteenth Amendments' enforcement clauses and describe some statutes passed pursuant to Congress's power to enforce the Thirteenth Amendment. Parts I.C and I.D then trace how the federal judiciary has analyzed Reconstruction Amendment enforcement legislation, contrasting the Warren Court's approach with that of the modern Court in *City of Boerne*.

Part II focuses on Section 2 of the Thirteenth Amendment and attempts to flesh out the background information necessary to assess the proper scope of Congress's power under that Section. Part II.A explores the original meaning of Section 2 with reference to three legislative debates. The debates surrounding the ratification of the Thirteenth Amendment, the passage of the Civil Rights Act of 1866 (the first statute passed by Congress pursuant to its Section 2 power), and the ratification of the Fourteenth Amendment (which was proposed, in part, to resolve doubts about the constitutionality of the Civil Rights Act of 1866) provide a

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(arguing that Colorado law prohibiting protections for gays is a badge or incident of modern slavery); Alexander Tsesis, *Regulating Intimidating Speech*, 41 HARV. J. ON LEGIS. 389 (2004) (proposing a Thirteenth Amendment framework for regulating hate speech); see also Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1836–37 (2006) (arguing that Section 2 allows Congress to legislate regarding any conduct that “interfere[s] with fundamental rights . . . [or] the ideals of the Declaration of Independence and the Preamble”).

25. Those who have noted the tension use *Jones* as evidence that *City of Boerne* was wrongly decided. See, e.g., Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822–23 (1999); Evan H. Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127 (2001); Lawrence G. Sager, Commentary, *A Letter to the Supreme Court Regarding the Missing Argument in Brzonkala v. Morrison*, 75 N.Y.U. L. REV. 150 (2000).

26. See William M. Carter, Jr., *Judicial Review of Thirteenth Amendment Legislation: “Congruence and Proportionality” or “Necessary and Proper”?*, 38 U. TOL. L. REV. 973 (2007) (examining structural and pragmatic reasons why *Jones* should continue to stand after *City of Boerne*); cf. Tsesis, *supra* note 24 (assuming that *Jones* will continue to stand after *City of Boerne*).

multiplicity of perspectives on both the substantive coverage of Section 1 of the Amendment and the scope of Congress's Section 2 enforcement power. Part II.B examines the federal courts' historic approach to Congress's Section 2 power. Part II.C explores the "badges and incidents of slavery," a central concept in defining the outer limits of the Section 2 power.

Part III offers three different approaches to Congress's Thirteenth Amendment enforcement power and evaluates each from the perspectives of text, history, and constitutional structure. Part III.A evaluates the most restrictive view: that Section 2 limits Congress solely to enacting statutes directed at preventing or punishing efforts to hold a person in slavery or involuntary servitude. In other words, the Section 2 enforcement power is limited to the literal terms of Section 1. This view is arguably supported by a strict reading of the Amendment's text, as well as some framers' views of the scope of the Section 2 power. Moreover, this view sets clear lines for separation-of-powers purposes: it respects judicial supremacy and sets boundaries for Congress's enforcement efforts. If this view of Section 2 prevails, *Jones* was wrongly decided, and virtually all civil-rights-related Thirteenth Amendment legislation would fall, as statutes forbidding discrimination on the basis of race or anything else go well beyond the realm of slavery and involuntary servitude.

Part III.B considers the most expansive view of Congress's Section 2 power, namely, that offered by *Jones* and accepted by most modern Thirteenth Amendment scholars: that Congress can enforce Section 1 by first defining the badges and incidents of slavery, and then legislating to address them. Under this view, the federal courts will review Congress's findings as to both substance and remedy solely for rationality. This approach imbues Congress with wide-ranging discretion to decide, not only the permissible means by which to effectuate the Amendment's promise, but also the substantive ends to which the Amendment is addressed. Section 2, viewed in this light, arguably would empower Congress to pass wide-ranging civil rights laws that protect classes and target conduct far removed from the historical practice of slavery. Although it is possible to argue that placing substantive definitional power in Congress's hands is uniquely appropriate in the Thirteenth Amendment context, this approach raises red flags with respect to federalism, as well as the separation of powers, particularly as interpreted by *City of Boerne*. Thus, it likely goes further than the modern Court would or should be willing to go.

Part III.C posits the middle view: that Section 2 permits Congress to enforce Section 1 by passing “pure” enforcement legislation, as well as prophylactic legislation. Appropriate prophylactic legislation under Section 2 will target the necessary incidents and badges of slavery as a means of vindicating Section 1 and preventing the de facto reemergence of slavery. This approach would validate the Civil Rights Act of 1866 and, potentially, a small range of additional civil rights laws. This view vindicates the understanding of Section 2 advanced by the proponents of the Civil Rights Act of 1866 and fits comfortably within the Supreme Court’s current case law on prophylactic enforcement legislation. Further, by regarding the badges and incidents of slavery as a term of art with a fixed range of meaning, it constrains Congress’s substantive power to expand the ends of the Thirteenth Amendment and thus minimizes separation-of-powers and federalism concerns.

This Article concludes that the “middle” view should prevail, and that Section 2 of the Thirteenth Amendment is best read to give Congress broad discretion over the means by which the Thirteenth Amendment is implemented, but more limited discretion with respect to its proper ends. In passing prophylactic legislation, Congress cannot define the badges and incidents of slavery for itself, as *Jones* suggested, but rather must operate within the boundaries of the concept as understood through history and interpreted by the courts. Thus, Congress’s discretion is limited to determining which badges and incidents of slavery it will address and how to address them. While courts should defer to the remedial aspects of Congress’s actions, they should review actively the ends of such prophylactic legislation. Implemented in this way, the Thirteenth Amendment’s enforcement power will be sufficiently vigorous to allow Congress to enact core race-based civil rights protections. At the same time, though, this reading will cabin efforts to transform the Thirteenth Amendment into a source of wide-ranging federal power.

## I. BACKGROUND: CONGRESSIONAL POWER TO ENFORCE THE RECONSTRUCTION AMENDMENTS

### A. *The Reconstruction Amendments' Enforcement Powers*

President Lincoln issued the Emancipation Proclamation on January 1, 1863, freeing slaves in states whose citizens were “in rebellion against the United States.”<sup>27</sup> In late 1863 and early 1864, several constitutional amendments were proposed in Congress to abolish slavery in the entire United States,<sup>28</sup> but the efforts to pass such a provision began in earnest only in January 1864 when the Senate Judiciary Committee, led by Chairman Lyman Trumbull, began to draft an amendment abolishing slavery.<sup>29</sup>

The first section of the proposed amendment was ultimately modeled on the Northwest Ordinance of 1787, which declared that “[t]here shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted.”<sup>30</sup> The second section of the proposed amendment was based on language offered by Representative James F. Wilson of Iowa that “Congress shall have power to enforce the foregoing section of this article by appropriate legislation.”<sup>31</sup> Thus, as ratified in 1865, Section 1 of the Thirteenth Amendment declares that “[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.”<sup>32</sup> Section 2 of that Amendment states that “Congress shall have power to enforce this article by appropriate legislation.”<sup>33</sup>

Section 2 of the Thirteenth Amendment served as a model for enforcement clauses in the two other Reconstruction Amendments—the Fourteenth and Fifteenth—as well as five subsequent constitutional

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27. See ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM* 36 (2004).

28. See MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 49–53 (2001) (summarizing proposals).

29. *Id.* at 53.

30. An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio, ch. 8, 1 Stat. 51 (1789).

31. CONG. GLOBE, 38TH CONG., 1ST SESS. 21 (1863). Other proposals provided that “the Congress may make all laws which shall be necessary and proper to enforce this prohibition.” *Id.* at 1482 (proposal of Sen. Henderson); see also *id.* at 1483 (proposal by Sen. Sumner that “[a]ll persons are equal before the law, so that no person can hold another as a slave; and the Congress may make all laws necessary and proper to carry this declaration into effect everywhere within the United States and the jurisdiction thereof”).

32. U.S. CONST. amend. XIII, § 1.

33. *Id.* § 2.

amendments.<sup>34</sup> The enforcement provisions of the three Reconstruction Amendments are worded in virtually identical ways:

Thirteenth Amendment, § 2	“Congress shall have power to enforce this article by appropriate legislation.” <sup>35</sup>
Fourteenth Amendment, § 5	“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” <sup>36</sup>
Fifteenth Amendment, § 2	“The Congress shall have power to enforce this article by appropriate legislation.” <sup>37</sup>

To be sure, there are minute textual differences among the three provisions. However, the operative language in each is the same: Congress is mandatorily vested (“shall have”) with the “power to enforce,” and that power is limited to “appropriate legislation.”

### B. Thirteenth Amendment Legislation

Congress has passed a number of civil and criminal statutes pursuant to its Section 2 power. Most of those statutes target practices that are closely linked with slavery and involuntary servitude. For example, in 1867, Congress passed the Anti-Peonage Act, which imposes civil and criminal penalties for “the holding of any person to service or labor under the system known as peonage.”<sup>38</sup> Peonage is “a status or condition of compulsory service, based upon the indebtedness of the peon to the master.”<sup>39</sup> Other provisions of the criminal code outlaw the slave trade;<sup>40</sup>

34. *See id.* amends. XVIII, XIX, XXIII, XXIV, XXVI.

35. *Id.* amend. XIII, § 2.

36. *Id.* amend. XIV, § 5. Section 1 of the Amendment grants federal and state citizenship to “[a]ll persons born or naturalized in the United States,” and forbids any state to “abridge the privileges or immunities of citizens of the United States; . . . deprive any person of life, liberty, or property, without due process of law; [or] deny to any person within its jurisdiction the equal protection of the laws.” *Id.* § 1.

37. *See id.* amend. XV, § 2. Section 1 provides that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” *Id.* § 1.

38. The criminal provision of the Anti-Peonage Act is now codified at 18 U.S.C. § 1581 (2006), and the civil provision is at 42 U.S.C. § 1994 (2006).

39. *Clyatt v. United States*, 197 U.S. 207, 215 (1905).

40. *See* 18 U.S.C. §§ 1585–1588 (2006). The use of vessels in the slave trade is specifically

prohibit involuntary servitude;<sup>41</sup> and penalize forced labor,<sup>42</sup> human trafficking,<sup>43</sup> and sex trafficking.<sup>44</sup>

Other statutes passed pursuant to Congress's Section 2 power go well beyond prohibiting and remedying slavery and involuntary servitude. Congress's first act after the ratification of the Thirteenth Amendment was the passage of the Civil Rights Act of 1866. That law has been reenacted and recodified several times, and its main provision today is codified in 42 U.S.C. §§ 1981(a) and 1982. Section 1981(a) states:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.<sup>45</sup>

Section 1982 states: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal

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prohibited as well. *See id.* § 1582.

41. *See id.* § 1584. Other statutes also penalize enticement and kidnapping for the purpose of keeping a person in slavery or involuntary servitude, *see id.* § 1583, and prohibit the removal of official documents for the purpose of keeping a person in slavery, peonage, or involuntary servitude, *see id.* § 1592.

42. *See id.* § 1589.

43. *See id.* § 1590. This section was a portion of the Victims of Trafficking and Violence Prevention Act of 2000, which Congress passed as an exercise of its Thirteenth Amendment power to combat involuntary servitude, as well as an exercise of its Commerce Clause power. *See* Pub. L. No. 106-386, § 102(b)(12), 114 Stat. 1466 (2000). The Act took broad-ranging action to prevent and remedy human trafficking, which it called "the largest manifestation of slavery today." *Id.* § 102(b)(1). Finding that victims are often forced through "sexual abuse, torture, starvation, imprisonment, threats, psychological abuse, and coercion" to "perform slavery-like labor," *id.* § 102(b)(6), Congress banned labor obtained through "threats of serious harm," "physical restraint," or threats that "another person would suffer harm or physical restraint." *Id.* § 112 (amending 18 U.S.C. § 1589). This provision was intended to supersede the Supreme Court's holding in *United States v. Kozminski*, 487 U.S. 931, 944 (1988), that 18 U.S.C. § 1584, which prohibits holding someone in "involuntary servitude," applies only to servitude accomplished through the use or threatened use of physical or legal coercion.

44. *See* 18 U.S.C. § 1591 (2006). Section 1595 also provides a civil remedy for victims of forced labor or trafficking. Another Reconstruction-era civil rights statute passed pursuant to Congress's Section 2 power is currently codified at 42 U.S.C. § 1985(3). That provision provides a cause of action against those who conspire "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws," where "another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States." *Id.* The criminal analogue of § 1985(3) is codified at 18 U.S.C. § 241.

45. 42 U.S.C. § 1981(a) (2006).

property.”<sup>46</sup> Both provisions have been interpreted broadly to cover a variety of private discriminatory acts,<sup>47</sup> and they have been interpreted in tandem with each other.<sup>48</sup>

In the modern era, the Fair Housing Act was passed as Title VIII of the Civil Rights Act of 1968.<sup>49</sup> In its original iteration, the Act made it unlawful “[t]o refuse to sell or rent after the making of a bona fide offer . . . a dwelling to any person because of race, color, religion, or national origin.”<sup>50</sup> Since then, the Act has been amended to prohibit discrimination on the basis of sex and familial status as well.<sup>51</sup> While courts have upheld the Act under Congress’s commerce power, some courts have also upheld it—at least as applied to acts of racial discrimination—as “a valid exercise of congressional power under the Thirteenth Amendment to eliminate badges and incidents of slavery.”<sup>52</sup>

The most recent piece of Thirteenth Amendment legislation is the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, signed by President Obama on October 28, 2009.<sup>53</sup> The law imposes significant penalties on “whoever, whether or not acting under color of law, willfully causes bodily injury to any person . . . because of the actual or perceived race, color, religion,” national origin, gender, sexual orientation, gender

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46. *Id.* § 1982.

47. *See, e.g.*, *Runyon v. McCrary*, 427 U.S. 160 (1976) (holding that § 1981 applies to race discrimination in contracts for private school education); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (holding that § 1982 applies to race discrimination in private housing developments); *see also* *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 296 (1976) (holding that whites, as well as racial minorities, can bring a § 1981 action); *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431, 440 (1973) (holding that “property” protected by § 1982 includes preferences in application process for membership in neighborhood pool).

48. *See, e.g.*, *Tillman*, 410 U.S. at 439–40 (“The operative language of both § 1981 and § 1982 is traceable to the Act of April 9, 1866 . . . . In light of the historical interrelationship between § 1981 and § 1982 [there is] no reason to construe these sections differently . . . .”).

49. 42 U.S.C. §§ 3601–3619 (2006).

50. Pub. L. No. 90-284, Title VIII, § 804(a), 82 Stat. 73, 83 (1968) (prior to 1988 amendment).

51. *See* Pub. L. No. 93-383, Title VIII, § 808(b)(1), 88 Stat. 729 (1975) (adding “sex” as protected category); Pub. L. No. 100-430, §§ 6(a)–(b)(2), (e), 15, 102 Stat. 1620, 1622, 1623, 1636 (1988) (adding “familial status” as a protected category). The Act is codified currently at 42 U.S.C. § 3604, and certain provisions bar discrimination on the basis of handicap as well. *See, e.g.*, 42 U.S.C. § 3604(c) (2006).

52. *United States v. Hunter*, 459 F.2d 205, 214 (4th Cir. 1972); *see also* *Williams v. Matthews Co.*, 499 F.2d 819, 825 (8th Cir. 1974). The amendments that added sex, familial status, and handicap as protected categories have been held to be proper under the Commerce Clause, but not the Thirteenth Amendment. *See, e.g.*, *United States v. Weiss*, 847 F. Supp. 819, 828–29 (D. Nev. 1994) (familial status); *Mich. Prot. & Advocacy Serv., Inc. v. Babin*, 799 F. Supp. 695, 730 (E.D. Mich. 1992) (handicap).

53. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §§ 4701–4713, 123 Stat. 2190, 2835–44 (2009).

identity, or disability of the victim.<sup>54</sup> The law's findings squarely ground its provisions targeting crimes based on race, color, national origin, and religion in Congress's Thirteenth Amendment enforcement power.<sup>55</sup>

Thus, while a majority of Thirteenth Amendment statutes target conduct associated with slavery and involuntary servitude, a minority are civil rights statutes that target discriminatory and violent conduct far removed from coerced labor. Most in this minority focus on racial discrimination. Sections 1981 and 1982, for example, are commonly used to remedy racial discrimination in a variety of contexts, including employment contracts,<sup>56</sup> workplace retaliation,<sup>57</sup> retail sales,<sup>58</sup> and housing contracts.<sup>59</sup> Some laws, however—including the Fair Housing Act and the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act—

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54. *Id.* § 4707 (to be codified at 18 U.S.C. § 249(a)); *cf.* 18 U.S.C. § 245(b)(2)(B) (2006) (making it a federal crime for any person to injure another because of the victim's race, color, religion, or national origin and because the victim was participating in or enjoying a public service or facility). The hate crimes provision in § 245(b)(2)(B) has been upheld as valid Thirteenth Amendment legislation, even as applied to violence against Jewish people. *See* *United States v. Nelson*, 277 F.3d 164, 190–91 (2d Cir. 2002); *see also* *United States v. Allen*, 341 F.3d 870, 883–84 (9th Cir. 2003); *United States v. Bledsoe*, 728 F.2d 1094, 1097 (8th Cir. 1984).

55. Section 4702 of the bill contains the following "Findings":

For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.

Moreover,

[b]oth at the time when the 13th, 14th, and 15th amendments to the Constitution of the United States were adopted, and continuing to date, members of certain religious and national origin groups were and are perceived to be distinct 'races'. Thus, in order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins, at least to the extent such religions or national origins were regarded as races at the time of the adoption of the 13th, 14th, and 15th amendments to the Constitution of the United States.

§ 4702(8). This caveat refers to two Supreme Court decisions in which the Court held that certain religious groups, namely Jews and Muslims, were deemed to be separate races in the mid-1800s and, thus, discrimination against these groups was racial discrimination. *See* *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (permitting claim of racial discrimination under § 1982 by Caucasian Jews); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987) (permitting claim of racial discrimination under § 1981 by an Arab Muslim). These findings, however, do not necessarily limit the operative language of the law, which, on its face, applies to hate crimes committed against any person on the basis of "religion."

56. *See, e.g., Kennedy v. D.C. Gov't*, 519 F. Supp. 2d 50 (D.D.C. 2007); *Seldon v. Nat'l R.R. Passenger Corp.*, 452 F. Supp. 2d 604 (E.D. Pa. 2006).

57. *See, e.g., CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008).

58. *See, e.g., Williams v. Staples, Inc.*, 372 F.3d 662 (4th Cir. 2004).

59. *See, e.g., Lindsay v. Yates*, 498 F.3d 434 (6th Cir. 2007); *Anderson v. Wachovia Mortgage Corp.*, 497 F. Supp. 2d 572 (D. Del. 2007).

protect a broader swath of civil rights by barring discrimination on the basis of religion, as well as race, color, and national origin.<sup>60</sup> These religion-based protections have applied to more than just religious groups like Jews and Muslims, whose members were regarded as separate races at the time the Thirteenth Amendment was ratified.<sup>61</sup> The Fair Housing Act, for example, has been used to protect non-Catholics<sup>62</sup> and to prohibit special treatment for Mormons<sup>63</sup> and “churchgoers and people of faith.”<sup>64</sup>

### C. *The Supreme Court’s Approach to Congress’s Enforcement Powers*

When Congress included enforcement language in Section 2 of the Thirteenth Amendment, it was not importing a new and untested concept into the Constitution. *McCulloch v. Maryland* was the first and seminal case to discuss the scope of Congress’s enforcement powers.<sup>65</sup> In *McCulloch*, the Court considered the constitutionality of Congress’s 1816 decision to charter the Second Bank of the United States. A number of states attempted to tax the Bank, and the state of Maryland went further, challenging Congress’s power to charter the Bank in the first place. Chief

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60. See *supra* note 54 and accompanying text.

61. Cf. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (permitting claim of racial discrimination under § 1982 by Caucasian Jews); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987) (permitting claim of racial discrimination under § 1981 by an Arab Muslim).

62. See *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990) (non-Catholics successfully sued a country club that barred them from selling or leasing homes on the club’s premises).

63. The U.S. Department of Housing and Urban Development, Utah Antidiscrimination and Labor Division, and ACLU of Utah used the Fair Housing Act to successfully pressure the city of Provo, Utah, to rework a proposed housing ordinance that would have discriminated against non-Mormons by exempting Brigham Young University students, 98.5% of whom are Mormon, from a requirement that all rental housing applicants must be subject to criminal background checks. See *Controversial Provo Ordinance Proposal Draws ACLU Ire*, ACLU OF UTAH REP., Sept. 2008, at 6, available at <http://www.acluutah.org/08Septnewsletter.pdf> (reporting change in proposed ordinance); Ace Stryker, *Cleanup or Shakedown: Provo Rental Ordinance Under Microscope*, UTAH DAILY HERALD, June 29, 2008, available at <http://www.heraldextra.com/content/view/271768/17/>; Letter from Marina Lowe, Staff Attorney, Am. Civil Liberties Union of Utah Found., Inc., to Provo City Council (July 15, 2008), [http://www.acluutah.org/ltr\\_Provo\\_City\\_Council\\_LL\\_Ordinance.pdf](http://www.acluutah.org/ltr_Provo_City_Council_LL_Ordinance.pdf).

64. Fair housing groups used the Act to sue a homeowners’ insurance company that provided special products to “churchgoers and people of faith,” and then obtained a settlement that expanded the company’s policies. See *Nat’l Fair Hous. Alliance, Inc. v. GuideOne Mut. Ins. Co.*, No. 5:07-cv-03643-SL (N.D. Ohio complaint filed Nov. 26, 2007); Rick Armon, *Policy Specials Called Illegal in Suit: Insurance Company Caters to Christians, Say Fair Housing Groups*, AKRON BEACON J., Nov. 28, 2007, [http://web.archive.org/web/20071202041637/www.ohio.com/news/top\\_stories/11880156.html?page=all&c=y](http://web.archive.org/web/20071202041637/www.ohio.com/news/top_stories/11880156.html?page=all&c=y); see also *Nat’l Fair Hous. Alliance, Inc. v. GuideOne Mutual Ins. Co.*, No. 5:07-cv-03643-SL (N.D. Ohio settlement order filed Mar. 13, 2009); Sarah Buckley, *GuideOne Insurance News Release, Fair Housing Media Statement*, GUIDEONE INSURANCE (Mar. 24, 2009), <https://www.guideone.com/AboutUs/NewsReleases/09fairhousing.html>.

65. 17 U.S. (4 Wheat.) 316 (1819).

Justice Marshall, writing for a unanimous Court, addressed this question by remarking first that the Constitution does not “partake of the prolixity of a legal code,”<sup>66</sup> but rather outlines those “important objects” from which “minor ingredients which compose those objects [may] be deduced.”<sup>67</sup> Thus, the Constitution sets out a broad set of goals and confers on Congress the power to create mechanisms to effectuate those goals. That power is not only implied from the nature of the Constitution itself, but also derives from the Necessary and Proper Clause, which explicitly gives Congress the power to make “all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution.”<sup>68</sup> Marshall concluded that this clause grants Congress wide discretion “to adopt any [means] which might be appropriate, and which were conducive to [constitutional] ends.”<sup>69</sup> When such means are challenged in a judicial forum, Marshall set forth the parameters by which such legislative choices should be judged:

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.<sup>70</sup>

The Court invoked the *McCulloch* principle in *Prigg v. Pennsylvania*, the decision upholding the constitutionality of the Fugitive Slave Act of 1793.<sup>71</sup> Congress passed the Act as a means to enforce the Fugitive Slave Clause of Article IV, which gave slave owners the right to recapture slaves who had fled into other states, but did not specifically authorize congressional legislation to enforce that right. The Court held that Congress had broad implied powers to enforce and create a prophylactic

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66. *Id.* at 407.

67. *Id.*

68. U.S. CONST. art. I, § 8, cl. 18.

69. *McCulloch*, 17 U.S. (4 Wheat.) at 415.

70. *Id.* at 421.

71. 41 U.S. (16 Pet.) 539 (1842).

remedy for that individual right.<sup>72</sup> *Prigg* thus extended *McCulloch*'s broad view of congressional power beyond the Article I context.

By the Reconstruction era, *McCulloch* and *Prigg* provided the prevailing framework regarding the scope of Congress's power to effectuate the express provisions of the Constitution.<sup>73</sup> As both cases established, that power was wide ranging, and courts would provide virtually complete deference to any means chosen by Congress to vindicate constitutional ends. The Reconstruction Amendments were written against this backdrop, but went further by including provisions that expressly provided for congressional enforcement power. In the late 1960s, the Warren Court issued a trio of decisions on the scope of Congress's powers under the Reconstruction Amendments that explicitly invoked the *McCulloch* approach.

The first decision was *South Carolina v. Katzenbach*,<sup>74</sup> which upheld Section 5 of the Voting Rights Act of 1965 as a proper exercise of Congress's power to enforce the Fifteenth Amendment. Section 5 of the Act required covered jurisdictions, mainly in the South, to receive preclearance for any new "standard, practice, or procedure with respect to voting."<sup>75</sup> The Court held that *McCulloch* provided "[t]he basic test to be applied,"<sup>76</sup> and that "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."<sup>77</sup> Citing extensive evidence regarding voting discrimination in most of the covered jurisdictions, the Court found that Congress was "entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered"<sup>78</sup> and upheld both the coverage formula and remedial provisions as rational and appropriate.<sup>79</sup>

The Court turned to the Fourteenth Amendment's enforcement power in *Katzenbach v. Morgan*.<sup>80</sup> That case dealt with the constitutionality of Section 4(e) of the Voting Rights Act of 1965, which barred states from requiring that graduates of Puerto Rican elementary schools pass an English literacy test in order to vote—even though the Supreme Court had

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72. *Id.* at 619.

73. Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 *FORDHAM L. REV.* 153 (2004).

74. 383 U.S. 301 (1966).

75. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (1965) (codified as amended at 42 U.S.C. § 1973c(a) (2006)).

76. 383 U.S. at 326.

77. *Id.* at 324.

78. *Id.* at 329.

79. *Id.* at 329–37.

80. 384 U.S. 641 (1966).

held in a prior case that the use of literacy tests was constitutional.<sup>81</sup> The *Morgan* Court again held that *McCulloch* governed the review of exercises of any enforcement power<sup>82</sup> and that the Court must grant Congress wide discretion and uphold any enactment as long as the Court can “perceive a basis upon which the Congress might resolve the conflict as it did.”<sup>83</sup>

The Court indicated that there were two possible bases for Congress’s action, one remedial and one substantive. Congress might simply have been acting to remedy widespread unconstitutional discrimination against Puerto Ricans by enhancing their voting power.<sup>84</sup> Alternatively, Congress might have made the substantive judgment that the use of literacy tests was unconstitutional, despite the Court’s holding to the contrary.<sup>85</sup> Indeed, the Court stated that Congress’s enforcement power did not “require a judicial determination [that the state practice in question] violated the [Fourteenth] Amendment” because otherwise “the legislative power [would be confined] to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional.”<sup>86</sup> Either way, the Court found that Congress was attempting to enforce the Fourteenth Amendment’s guarantee of equal protection and, therefore, deference was warranted.

Justice Harlan dissented, claiming that the majority read Section 5 “as giving Congress the power to define the *substantive* scope of the Amendment”—a job properly performed only by the judiciary.<sup>87</sup> In his view, Section 5 gave “Congress wide powers in the field of devising remedial legislation . . . to cure an established violation of a constitutional command,”<sup>88</sup> but reserved for the federal judiciary the ultimate question of whether particular state conduct in fact violates the Fourteenth Amendment.<sup>89</sup> The majority’s willingness to vest wide and largely unreviewable discretion in Congress to go beyond judicial interpretations,

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81. See *Lassiter v. Northampton Election Bd.*, 360 U.S. 45 (1959).

82. See *Morgan*, 384 U.S. at 651.

83. *Id.* at 653.

84. *Id.* at 652–53. Congress’s power under this rationale is relatively uncontroversial. See Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 IND. L. REV. 163, 172 (1998); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1230 (1978).

85. *Morgan*, 384 U.S. at 653–54.

86. *Id.* at 648–49.

87. *Id.* at 668 (Harlan, J., dissenting).

88. *Id.* at 666–67.

89. See *id.* at 667. In addressing substantive constitutional claims, the Court would give due deference to congressional findings regarding unconstitutional behavior, see *id.* at 668, but Harlan noted that Congress made no findings regarding the need for section 4(e) and chided the majority for hypothesizing a rational basis for the legislation, see *id.* at 669.

Harlan argued, would give Congress power, not only to provide further protection for individual rights, but also “to dilute equal protection and due process decisions of this Court.”<sup>90</sup>

The Court finally turned to the Thirteenth Amendment in 1968. Three years earlier, Joseph and Barbara Jones, an interracial couple, applied to purchase a home in a new suburban St. Louis, Missouri, subdivision. An agent of the developer, Alfred H. Mayer Co., refused to consider their application, informing them that the company had a “general policy not to sell houses and lots to Negroes.”<sup>91</sup> The Joneses brought suit, alleging that the company’s policy violated 42 U.S.C. § 1982, the property conveyance provision of the Civil Rights Act of 1866.<sup>92</sup> After both the district court and court of appeals ruled that § 1982 applied only to state action and not private refusals to sell, the Joneses brought their case before the Supreme Court in *Jones v. Alfred H. Mayer Co.*<sup>93</sup>

The Court spent the bulk of its analysis considering whether § 1982 should be read to prohibit all racial discrimination in property conveyances, both public and private.<sup>94</sup> Concluding that it should, the Court then turned to the question of whether it was within Congress’s power to enact such a prohibition: “Does the authority of Congress to enforce the Thirteenth Amendment ‘by appropriate legislation’ include the power to eliminate all racial barriers to the acquisition of real and personal

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90. *Id.* at 668. Justice Brennan, writing for the majority, responded to Justice Harlan’s final concern in a footnote, asserting that such deference was a sort of one-way ratchet and would not apply to any congressional statute that attempted “to dilute equal protection and due process decisions of this Court” because “[Section 5] grants Congress no power to restrict, abrogate, or dilute these guarantees.” *Id.* at 651 n.10 (majority opinion). The “ratchet” image was first coined in Jeffery L. Yablon, Developments, *Congressional Power under Section Five of the Fourteenth Amendment*, 25 STAN. L. REV. 885, 894 (1973), and Brennan’s “ratchet theory” is very controversial. *See, e.g.*, Sager, *supra* note 84, at 1230–39. “The notion that Congress’ power is unidirectional is by no means analytically essential to the result in *Katzenbach v. Morgan*, or to a judicial deference rationale.” *Id.* at 1231 n.63; *see also, e.g.*, *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding on Fourteenth Amendment grounds, *inter alia*, extension of federal franchise to 18-year-olds). In *Oregon*, Justice Brennan, writing for himself and Justices White and Marshall, offered a further defense of his “ratchet” theory, reiterating that although Section 5 was a broad grant of power to Congress, “Congress may not by legislation repeal other provisions of the Constitution[,] . . . strip the States of their power to govern themselves[,] . . . [or] undercut the Amendments’ guarantees of personal equality and freedom from discrimination . . .” *Id.* at 266–67 (Brennan, J., concurring in part and dissenting in part). This theory ultimately was rejected by the Court in *City of Boerne v. Flores*. *See infra* Part I.D.

91. *See Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115, 118 (E.D. Mo. 1966).

92. *See id.* at 118–19.

93. 392 U.S. 409, 412 (1968).

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

property?”<sup>95</sup> In the Court’s view, “the answer to that question [was] plainly yes.”<sup>96</sup>

The Court inquired whether the substantive goal of eliminating racial discrimination in property conveyances was a permissible “end” of Thirteenth Amendment legislation. Citing dicta from the 1883 *Civil Rights Cases*, the Court found it “clear that the Enabling Clause of [the Thirteenth] Amendment empowered Congress to do much more” than abolish slavery.<sup>97</sup> Section 2 instead “clothed ‘Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States,’”<sup>98</sup> including “the sort of positive legislation that was embodied in the 1866 Civil Rights Act.”<sup>99</sup> The Court stated the standard by which congressional action would be judged: “Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”<sup>100</sup> Thus, in choosing a substantive target for legislation, Congress must determine that the conduct in question is a “badge” or “incident” of slavery—a determination subject solely to rational basis review.

In addition to its expansive vision of the proper “ends” of the Thirteenth Amendment, the Court endorsed the *McCulloch* view of how to assess the “means” by which Congress chooses to achieve its goals, stating that Congress may choose any means it deems “‘necessary and proper’” to regulate the badges and incidents of slavery.<sup>101</sup> As in *South Carolina* and *Morgan*, this language incorporated the highly deferential rational basis test for measuring legislation set forth in *McCulloch v. Maryland*.

With respect to § 1982, the Court endorsed as rational Congress’s finding that the property developer’s race-based refusal to sell property to the Joneses was a badge and incident of slavery: “[W]hen racial discrimination herds men into ghettos and makes their ability to buy

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95. *Id.* at 439.

96. *Id.*

97. *Id.* (citing *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)). See *infra* notes 267–88 and accompanying text for a discussion of the *Civil Rights Cases*.

98. *Id.* (emphasis omitted).

99. *Id.* at 439–40. The Court pointed specifically to statements made by Senator Lyman Trumbull and Representative James Wilson in defense of the 1866 Act. See *id.* at 440 (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 322 (1866)) (asserting that Section 2 gave Congress the power to “destroy all these discriminations in civil rights against the black man . . . Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper . . .”); *id.* at 443–44.

100. *Id.* at 440.

101. See *id.* at 439.

property turn on the color of their skin, then it too is a relic of slavery.”<sup>102</sup> Moreover, the Court found that Congress’s decision to ban that conduct was a rational way to address that relic of slavery.<sup>103</sup>

Justice Douglas concurred in *Jones*, agreeing with the majority that Section 2 empowered Congress to “remov[e] . . . badges of slavery.”<sup>104</sup> In his view, the Civil Rights Act of 1866 took aim at “some” badges and incidents of slavery, but others persisted into modern times.<sup>105</sup> Justice Douglas catalogued the “spectacle of slavery unwilling to die,” including state actions, such as laws designed to keep African Americans from voting and from jury service, antimiscegenation laws, segregation in courtrooms and schools, and segregation in public facilities.<sup>106</sup> He also included private actions, including refusals to sell or rent property to African Americans, to provide service in restaurants and motels, and to admit African Americans to labor unions.<sup>107</sup>

The *Jones* Court thus placed its imprimatur on the view that Section 2 constituted a significant grant of legislative power, both to define the permissible ends of legislation (i.e., by defining the “badges and incidents of slavery”) and to craft effective means to accomplish those ends. *Jones* also confirmed that legislation passed pursuant to Section 2 deserves substantial judicial deference. In essence, *Jones* utilized an enhanced *McCulloch v. Maryland*-type view of Section 2. In the words of one commentator, *Jones* expanded “the legitimate ends under the [Thirteenth

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102. *Id.* at 442–43. In the *Civil Rights Cases*, the Court itself had stated previously that the badges and incidents of slavery “included restraints upon ‘those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.’” *Id.* at 441 (quoting *The Civil Rights Cases*, 109 U.S. 3, 22 (1883)) (alteration in original). The Court’s use of the term “relic” and its relationship to “badges and incidents” is not entirely clear. *Id.* at 441. On one hand, it could just be a poetic twist offered by the Court. However, Professor Lawrence Sager has argued that there is an important distinction between “badges and incidents of slavery,” which are the “contemporary attributes” of slavery, and the “relics of slavery,” which are its “deeply ingrained, enduring consequences” such as the history of race discrimination. See Sager, *supra* note 25, at 152 (arguing that *Jones*’ explanation of the Thirteenth Amendment enforcement power provides a template for understanding how the Fourteenth Amendment enforcement power might justify the Violence Against Women Act).

103. *Jones*, 392 U.S. at 444. Eight years after *Jones*, in *Runyon v. McCrary*, 427 U.S. 160, 172–73 (1976), the Court held that 42 U.S.C. § 1981 barred race discrimination in contracts for private educational services and that, so applied, Section 1981 was a valid exercise of Congress’s Section 2 power.

104. *Jones*, 392 U.S. at 444 (Douglas, J., concurring).

105. *Id.* at 449.

106. See *id.* at 445–46.

107. See *id.* at 447. The second Justice Harlan dissented, arguing primarily that the majority’s construction of the statute was imprudent and incorrect. See *id.* at 450 (Harlan, J., dissenting). He noted briefly, however, that the Court’s ruling on Congress’s constitutional authority to pass § 1982 was dubious. See *id.* at 476–77.

Amendment] . . . from abolition of slavery to eliminating the consequences of slavery, with a concomitant increase in the appropriate means that Congress could choose to reach those ends.”<sup>108</sup>

Since *Jones*, federal courts have upheld at least seven statutes challenged on Thirteenth Amendment grounds and struck down none.<sup>109</sup> Congressional determinations that a variety of practices—from racial discrimination in private clubs to religion-based violence in public facilities—constitute badges and incidents of slavery have been upheld, with courts generally deferring to Congress and engaging in little to no independent analysis.<sup>110</sup> While *Jones* has not been applied outside the Thirteenth Amendment context,<sup>111</sup> it has proven to be a highly deferential standard when applied to laws passed under the Section 2 power. Though Congress has not passed an overwhelming amount of Thirteenth Amendment legislation, its Section 2 efforts have been uniformly upheld under *Jones*.

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108. See George Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, in PROMISES OF LIBERTY: THIRTEENTH AMENDMENT ABOLITIONISM AND ITS CONTEMPORARY VITALITY (Alexander Tsesis ed., forthcoming 2010) (manuscript at 14), available at [http://law.bepress.com/uvalwps/uva\\_publiclaw/art68](http://law.bepress.com/uvalwps/uva_publiclaw/art68).

109. See *Runyon v. McCrary*, 427 U.S. 160 (1976) (upholding § 1981 as applied to race discrimination in contracts for private school education); *Griffin v. Breckenridge*, 403 U.S. 88 (1971) (holding that § 1985 was a valid exercise of the Thirteenth Amendment power); *Mitchell v. Cellone*, 389 F.3d 86 (3d Cir. 2004) (holding the Fair Housing Act, 42 U.S.C. §§ 3601–3631, to be a valid exercise of the Thirteenth Amendment power); *United States v. Allen*, 341 F.3d 870 (9th Cir. 2003) (holding that acts of violence prohibited by 18 U.S.C. § 245(b)(2)(B) imposed a badge or incident of involuntary servitude on their victims and thus could be prohibited under the Thirteenth Amendment power); *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002) (18 U.S.C. § 245(b)(2)(B), prohibiting violent interference with enjoyment of a public facility, could be applied to religious and/or racial attacks against Jews as a valid exercise of the Thirteenth Amendment power); *United States v. Garcia*, No. 02-CR-1105-01, 2003 WL 22938040 (W.D.N.Y. Dec. 2, 2003) (holding that the Migrant and Seasonal Worker Protection Act was a valid exercise of the Thirteenth Amendment power); *U.S. v. Nicholson*, 185 F. Supp. 2d 982 (E.D. Wis. 2002) (holding that 18 U.S.C. § 241, the civil rights conspiracy statute, and 42 U.S.C. § 3631, the criminal provision of the Fair Housing Act, are valid exercises of the Thirteenth Amendment power).

110. See, e.g., *Nelson*, 277 F.3d 164; *Watson v. Fraternal Order of Eagles*, 915 F.2d 235, 241–42 (6th Cir. 1990) (holding that denying service at a private club violated 42 U.S.C. § 1981); *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 120–21 (5th Cir. 1973) (holding that the “anti-blockbusting” provision of the Fair Housing Act was valid under Section 2 of the Thirteenth Amendment); *United States v. Hunter*, 459 F.2d 205, 214 (4th Cir. 1972) (holding that the Fair Housing Act was a valid exercise of Congress’s Thirteenth Amendment power); *Espinoza v. Hillwood Square Mut. Ass’n*, 522 F. Supp. 559 (E.D. Va. 1981) (upholding the application of the Fair Housing Act to discrimination based on ancestry).

111. See George Rutherglen, *The Thirteenth Amendment, the Power of Congress, and the Politics of Civil Rights 2* (Va. Pub. Law & Legal Theory Research Paper Series No. 2009-10, 2009), available at <http://ssrn.com/abstract=1473160> (noting that the significance of *Jones* and Section 2 is “far less than the Commerce Clause, or perhaps even section 5 of the Fourteenth Amendment, both of which support most modern civil rights legislation”).

*D. A New View of Congress's Enforcement Powers: City of Boerne v. Flores*

In 1997, the Supreme Court took a sharp turn in its approach to legislation enacted pursuant to Section 5 of the Fourteenth Amendment. In *City of Boerne v. Flores*,<sup>112</sup> the Court invalidated the Religious Freedom Restoration Act (RFRA). RFRA had been enacted in response to—indeed, to overrule—the Court's earlier holding in *Employment Division, Department of Human Resources v. Smith*.<sup>113</sup> Whereas *Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest,<sup>114</sup> RFRA required that any such law be supported by a compelling interest and be the least restrictive means of furthering that interest.<sup>115</sup> Thus, the question for the Court was whether RFRA was validly enacted pursuant to Congress's Section 5 power.<sup>116</sup>

The majority held that Section 5 did not empower Congress to pass RFRA.<sup>117</sup> The Court began by acknowledging that Section 5 is “a positive grant of legislative power.”<sup>118</sup> However, the Court clarified, the power to “enforc[e]” the provisions of the Fourteenth Amendment is a “remedial” power and not one to “decree the substance of the Fourteenth Amendment's restrictions on the States” or “to determine what constitutes a constitutional violation.”<sup>119</sup> The latter power resides with the Court itself.

On this point, *City of Boerne* characterized *Katzenbach v. Morgan* as an unexceptional case in which Congress had enacted a “reasonable” law

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112. 521 U.S. 507 (1997).

113. 494 U.S. 872 (1990).

114. *See id.* at 884–85.

115. *See* 42 U.S.C. § 2000bb-1 (2006).

116. *City of Boerne*, 521 U.S. at 511.

117. *Id.* at 536. Justices O'Connor, Souter, and Breyer dissented on the ground that *Smith* had been incorrectly decided. *Id.* at 544–66 (O'Connor, J., dissenting; Souter, J., dissenting; and Breyer, J., dissenting). Justice O'Connor, however, made it clear that she agreed with the majority's analysis regarding the scope of Congress's Section 5 power. *See id.* at 545 (O'Connor, J., dissenting).

118. *Id.* at 517 (majority opinion) (quoting *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

119. *Id.* at 519 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)). The Court noted that “[i]f Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be ‘superior paramount law, unchangeable by ordinary means.’” *Id.* at 529 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The Court found support for the remedial-substantive distinction in the legislative history of the Fourteenth Amendment. *See id.* at 520. *But see* Ruth Colker, *The Supreme Court's Historical Errors in City of Boerne v. Flores*, 43 B.C. L. REV. 783 (2002) (cataloguing historical errors in majority opinion); Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115 (1999) (questioning majority's reading of the legislative history).

in response to “unconstitutional discrimination by [the state of] New York.”<sup>120</sup> Thus, the Court claimed that “interpreting *Morgan* to give Congress the power to interpret the Constitution ‘would require an enormous extension of that decision’s rationale.’”<sup>121</sup> Despite the Court’s claim that *Morgan* was consistent with the mode of analysis in *City of Boerne*, the majority opinion hewed much more closely to Justice Harlan’s *Morgan* dissent, which emphasized that the Court should preserve its own supreme role in interpreting the Constitution.

The *City of Boerne* Court acknowledged that “the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies.”<sup>122</sup> Further, the Court made clear that legislation can be remedial and thus constitutional, “even if in the process it prohibits conduct which is not itself unconstitutional.”<sup>123</sup> However, the Court made clear that it will measure the propriety of a congressional act under Section 5 by asking whether there is “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>124</sup> RFRA, which was a thinly veiled attempt to overrule the Supreme Court’s ruling in *Smith*, failed to satisfy that test.<sup>125</sup> Without identifying any instances of deliberate religious persecution by a state,<sup>126</sup> Congress drafted a law with “[s]weeping coverage” that imposed “substantial costs” on the states.<sup>127</sup> The Court concluded that RFRA was far “out of proportion to a supposed remedial or preventive object.”<sup>128</sup>

Since *City of Boerne*, the Court has held that several civil rights statutes failed to satisfy the congruence and proportionality test,<sup>129</sup> while

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120. 521 U.S. at 528. The *City of Boerne* Court thus determined that the first rationale of the *Morgan* Court—that Congress had perceived and sought to remedy unconstitutional discrimination against New York’s Puerto Rican population—was the most plausible explanation for the Court’s judgment. *Id.*; see also *supra* note 84.

121. *City of Boerne*, 521 U.S. at 528 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 296 (1970)).

122. *Id.* at 519–20.

123. *Id.* at 518.

124. *Id.* at 520.

125. See *id.* at 530–36.

126. See *id.* at 530.

127. See *id.* at 532, 534.

128. *Id.* at 532.

129. See, e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Title I of the Americans with Disabilities Act); *United States v. Morrison*, 529 U.S. 598 (2000) (Violence Against Women Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act).

two others were valid exercises of Congress's Section 5 power.<sup>130</sup> In this series of cases, the Court has refined and clarified the "congruence and proportionality" test, stating that the inquiry should proceed according to a number of steps. First, a court must confirm that Congress has chosen "an appropriate subject for prophylactic legislation"<sup>131</sup> by "identify[ing] the constitutional right or rights that Congress sought to enforce" through the statute in question,<sup>132</sup> and ensuring that Congress—in its legislative history and findings—"identified a history and pattern" of constitutional violations by the states with respect to that right.<sup>133</sup> Assuming there is such a legislative record, the court must then determine whether the statute in question "is an appropriate response to this history and pattern"<sup>134</sup> by asking whether the rights and remedies created by the statute are congruent and proportional to the constitutional right being enforced and the record of constitutional violations adduced by Congress.<sup>135</sup>

Although there are differences of opinion on the propriety of *City of Boerne's* approach,<sup>136</sup> scholars and courts alike generally agree that the "congruence and proportionality" standard endorsed by *City of Boerne* is significantly more stringent than the rational basis test of *Morgan*.<sup>137</sup> First,

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130. See *Tennessee v. Lane*, 541 U.S. 509 (2004) (Title II of the Americans with Disabilities Act (as applied to access to the courts)); *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (Family and Medical Leave Act of 1993).

131. *Lane*, 541 U.S. at 529.

132. *Id.* at 522. Notably, in both *Hibbs* and *Lane*, Congress was seeking to protect a class of people (women) or protect a fundamental right (access to the courts) that warrants heightened judicial scrutiny. In such cases, the Court has explained, "it [will be] easier for Congress to show a pattern of state constitutional violations." *Hibbs*, 538 U.S. at 736.

133. *Lane*, 541 U.S. at 541 (Rehnquist, C.J., dissenting) (quoting *Garrett*, 531 U.S. at 368). The focus on state action derives from the longstanding rule that private conduct does not violate the Fourteenth Amendment. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) ("Individual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment."); *United States v. Harris*, 106 U.S. 629, 639 (1883) (quoting *Virginia v. Rives*, 100 U.S. 313, 318 (1880)) ("[T]hese provisions of the Fourteenth Amendment have reference to state action exclusively, and not to any action of private individuals.").

134. *Lane*, 541 U.S. at 530 (majority opinion).

135. See *id.* at 548 (Rehnquist, C.J., dissenting).

136. Compare, e.g., Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469, 470 (1999) (supporting *City of Boerne* and characterizing it as "the first modern reiteration . . . of time-honored constitutional and remedial principles"), and Rotunda, *supra* note 84, at 179 (defending "congruence and proportionality" standard), with Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003) (arguing for return to rational basis review in the Section 5 context), and Melissa Hart, *Conflating Scope of Right with Standard of Review: The Supreme Court's "Strict Scrutiny" of Congressional Efforts to Enforce the Fourteenth Amendment*, 46 VILL. L. REV. 1091, 1102 (2001) (advocating judicial restraint in which "only very clear constitutional violations by democratically-elected legislators should be found unconstitutional by the courts").

137. See, e.g., Caminker, *supra* note 25, at 1133 ("Section 5 measures have 'suddenly been

by limiting Congress to a remedial role, *City of Boerne* forecloses any substantive participation by Congress in the development of constitutional norms.<sup>138</sup> Second, by requiring Congress to craft remedies that are congruent and proportional to specifically determined constitutional violations, *City of Boerne* limits the range of Congress's discretion.<sup>139</sup> Professor Evan Caminker has argued that "congruence" and "proportionality" are two distinct inquiries that mirror, but tighten substantially, the minimal scrutiny involved in the *McCulloch* "necessary and proper" analysis. The congruence inquiry "mimics the requirement that executory Article I legislation be 'proper'"<sup>140</sup> and asks "whether the measure actually prevents or remedies a sufficient quantity of identifiable constitutional violations or is instead too underinclusive."<sup>141</sup> The proportionality inquiry corresponds "to the question of 'necessity' for Article I legislation,"<sup>142</sup> as both focus on "the calibration or balance between the magnitude of the prophylactic remedy and the magnitude of the wrong or problem being addressed."<sup>143</sup> However, the question of necessity "is not subject to meaningful judicial scrutiny in the Article I context,"<sup>144</sup> while the *City of Boerne* line of cases "applies rigorous scrutiny" to legislative judgments.<sup>145</sup> Thus, *City of Boerne* is best regarded as a substantial departure from *Morgan*—and *McCulloch*—in the Fourteenth Amendment context.

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saddled with something between intermediate and strict scrutiny, effectuating what can only be understood as a substantial, albeit not conclusive, presumption of unconstitutionality." (quoting 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 959 (3d ed. 2000)); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 165 (1997) (The "'congruence and proportionality' standard appears to be more rigorous than the standard of review applied in earlier Section Five cases, such as *Katzenbach v. Morgan*."); cf. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 235 (D.D.C. 2008) (characterizing *City of Boerne* and *South Carolina v. Katzenbach* as articulating "two distinct standards for evaluating the constitutionality of laws enforcing the Civil War Amendments," with the former being "more rigorous" and the latter being "less demanding").

138. Many have argued that there is an appropriate interpretive role for Congress with respect to the Reconstruction Amendments. See, e.g., Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61; Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743 (1998); McConnell, *supra* note 137; Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000).

139. See Caminker, *supra* note 25, at 1133.

140. *Id.* at 1156.

141. *Id.* at 1154.

142. *Id.* at 1156.

143. *Id.* at 1154.

144. *Id.* at 1156.

145. *Id.* at 1158.

In 2009, when confronted with a challenge to Congress's 2006 extension of the preclearance provisions of the Voting Rights Act, the Supreme Court ducked the question of whether and how the *City of Boerne* standard should affect Fifteenth Amendment legislation.<sup>146</sup> While this question continues to percolate in the courts, the focus of this paper is on the Thirteenth Amendment: whether *Jones* articulates the proper standard of review for Thirteenth Amendment legislation, or whether *City of Boerne's* renewed emphasis on judicial supremacy and separation of powers should affect that analysis. The next section attempts to flesh out the primary materials relevant to the answer.

## II. SECTION 2 OF THE THIRTEENTH AMENDMENT: HISTORY AND STRUCTURE

### A. *Original Meaning of the Scope of Section 2*

This section turns to the historical record in an effort to assess the original meaning of Section 2 of the Thirteenth Amendment. The two-year span from 1864 to 1866 afforded three moments for serious reflection on the meaning and scope of Congress's enforcement power. The first was the proposal and ratification of the Thirteenth Amendment, which led to sustained debate in both Congress and the states. The second was the passage of the Civil Rights Act of 1866, the first piece of enforcement legislation proposed under Section 2. The third was the proposal of the Fourteenth Amendment, which was motivated, in part, to respond to concerns that the 1866 Act was beyond Congress's Section 2 power. Although the historical record yields no definitive answers, these debates provide a helpful lens into both the scope of the substantive right conferred by Section 1 and the possible boundaries of the Section 2 power.<sup>147</sup>

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146. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2512–13 (2009) (noting the parties' disagreement whether "congruence and proportionality" or "rational[ity]" should be "the standard to apply in deciding whether . . . Congress exceeded its Fifteenth Amendment enforcement power").

147. Indeed, in the Fourteenth Amendment context, *City of Boerne's* analysis of the scope of Congress's Section 5 powers rested in large part on the majority's understanding of the legislative history and original understanding of that provision. That portion of *City of Boerne* has been subjected to repeated and withering criticism, pointing out that the Court paid too much attention to the provision's opponents, see, e.g., Colker, *supra* note 119, at 791, and too little attention to evidence that the final text of Section 5 was intended to refer to and incorporate the *McCulloch* standard, see, e.g., Engel, *supra* note 119, at 117. Whatever historical errors underlie *City of Boerne*, however, should not stop us from looking to the Thirteenth Amendment ratification debates in Congress and the states for assistance in discerning the original meaning of Section 2.

### 1. *Thirteenth Amendment Ratification Debates in Congress and the States*

The Senate Judiciary Committee reported the Thirteenth Amendment on February 10, 1864. The full Senate debated that proposal six weeks later and voted 38–6 in favor on April 8, 1864.<sup>148</sup> The House of Representatives debated but rejected the measure in June 1864.<sup>149</sup> After the November 1864 elections, in which President Lincoln won reelection and the Republican Party boasted large gains in Congress, the House reconsidered the proposed amendment, passing it by the requisite two-thirds margin (119–56) on January 31, 1865.<sup>150</sup>

The ratification debates gave many members of Congress license to wax eloquent in general terms about equality,<sup>151</sup> slavery,<sup>152</sup> and the Union.<sup>153</sup> However, questions regarding the precise scope of the substantive right conferred by Section 1 and the extent of Congress's power under Section 2 generally received scant analysis.<sup>154</sup> Moreover, the Senators and Representatives who did speak to these issues offered a range of answers.<sup>155</sup>

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148. See CONG. GLOBE, 38TH CONG., 1ST SESS. 1490 (1864); see also VORENBERG, *supra* note 28, at 61.

149. See EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 19 (1990); cf. U.S. CONST. art. V (setting forth process for amending the Constitution and requiring a two-thirds vote in each house of Congress).

150. See CONG. GLOBE, 38TH CONG., 2D SESS. 531 (1865).

151. See, e.g., CONG. GLOBE, 38TH CONG., 1ST SESS. 1482–83 (1864) (statement of Sen. Sumner). But see *id.* at 1484 (Sen. Powell) (expressing doubts about racial equality).

152. See, e.g., *id.* at 1369.

153. See, e.g., *id.* at 1419–24; see also Note, *The “New” Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1299 (1969) (characterizing Thirteenth Amendment debates as “conducted on a level of hyperbole befitting the fervor which had attached itself to the issue after thirty years of agitation”).

154. See VORENBERG, *supra* note 28, at 132 (“Republicans never meant to define for future generations the exact rights guaranteed by the Amendment. They were interested mainly in eliminating the institution of slavery that had caused the war. And because few of them were able to envision a time without war, they saw no urgency in codifying the rights of freedom for the postwar Union.”). But see *id.* at 190–91 (“In those few instances . . . that Republicans did discuss the specific rights and powers conferred by the Amendment, they evasively mentioned only those that the measure did *not* grant,” such as political rights like suffrage and jury service.); see also MALTZ, *supra* note 149, at 21 (noting that the “dearth of evidence” about the full scope of Sections 1 and 2 “is not terribly surprising” because resolution of the basic question of federal abolition of slavery “did not require a definition of the nature of slavery in the abstract or a description of the difference between ‘slavery’ and ‘freedom’ at the margins”).

155. See VORENBERG, *supra* note 28, at 132 (“The revolutionary potential of the Amendment’s enforcement clause, which after the war would be used by Congress to override state laws denying civil rights, seemed to be lost on congressional Republicans in 1864.”).

The most limited view of Section 1 is that it guarantees solely freedom from coerced labor, and does not affirmatively provide for civil rights. One source of support for this view comes from the fact that Section 1 was modeled on the Northwest Ordinance, whose prohibition on slavery had been repeatedly viewed as compatible with civil rights restrictions on free blacks.<sup>156</sup> For example, as Professor Earl Maltz has pointed out, until 1857, the constitution of the State of Oregon banned slavery in language that paralleled the Northwest Ordinance and, at the same time, barred black people from making contracts and holding property.<sup>157</sup> Similarly, during the Thirteenth Amendment debates, Senator Lyman Trumbull of Illinois urged passage of the Amendment as “the only effectual way of ridding the country of slavery.”<sup>158</sup> Senator John Henderson, a Missouri War Democrat and early proponent of the Thirteenth Amendment, advocated this view as well, denying that the Amendment conferred “negro equality” and arguing that the Amendment gave the freed slave “no right except his freedom.”<sup>159</sup>

The narrow view, however, had its detractors. As Representative William Holman of Indiana put it, “[m]ere exemption from servitude is a miserable idea of freedom.”<sup>160</sup> Several members of Congress—the Amendment’s supporters and opponents alike—saw Section 1 as a broader grant of rights. According to supporter Representative Ebon Ingersoll of Illinois, the Amendment secured to each “black man . . . certain inalienable rights,” including the rights “to live, and live in a state of freedom[,] . . . to till the soil, [and] to . . . enjoy the rewards of his own labor” without infringement by any “white man.”<sup>161</sup> Likewise, supporter Senator James Harlan of Iowa suggested that the Amendment abolished

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156. See CONG. GLOBE, 38TH CONG., 1ST SESS. 1489 (1864) (Sen. Jacob Howard) (advocating for use in the Amendment of language “employed by our fathers in the [Northwest] ordinance of 1787, an expression which has been adjudicated upon repeatedly, which is perfectly well understood both by the public and by judicial tribunals”).

157. See MALTZ, *supra* note 149, at 22 (noting that state constitutions in Oregon and Illinois used the antislavery language of the Northwest Ordinance side-by-side with language restricting the rights of free blacks).

158. CONG. GLOBE, 38TH CONG., 1ST SESS. 1314 (1864).

159. *Id.* at 1465. Professor Earl Maltz has argued that the Amendment would not have passed the House without the support of conservative emancipationists, and, thus, “any broader understanding of the Thirteenth Amendment would have led to the defeat of the proposal in Congress.” MALTZ, *supra* note 149, at 24, 27.

160. CONG. GLOBE, 38TH CONG., 1ST SESS. 2962 (1864). Holman, who opposed the Amendment, warned that Section 1’s abolition of slavery guaranteed both freedom from servitude and freedom to participate in the government. See *id.* Likewise, Representative Joseph Edgerton of Indiana stated that the Amendment would accomplish “the political and social elevation of Negroes to all the rights of white men.” *Id.* at 2987.

161. *Id.* at 2990.

not only slavery, but the “necessary incidents of slavery,” including “the prohibition of the conjugal relation,” the “abolition practically of the parental relation,” the inability to “acquir[e] and hol[d] property,” the deprivation of “a status in court” and “the right to testify,” the “suppression of freedom of speech and the press,” and the deprivation of education.<sup>162</sup>

The congressional debates also saw a divide of opinion regarding the scope of Congress’s power under Section 2. Opponents of the Amendment uniformly foresaw a broad and dangerous federal power that would disrupt state laws and mandate political equality between the races.<sup>163</sup> Supporters of the Amendment, by contrast, were opaque at best with respect to the effect of Section 2. Some appeared to take a narrow view of Congress’s power. For example, Senator Harlan, despite his broad view of the rights conveyed by Section 1, did not explicitly anticipate any role for Congress in enforcing those rights.<sup>164</sup>

Senator Trumbull, however, appeared to envision fairly broad congressional power, at least with respect to the means by which the Amendment should be enforced. On the day he introduced the proposed Amendment to the Senate, Senator Trumbull made a brief statement in which he paraphrased Section 2, saying it would give Congress the power to enforce the Amendment with “proper” legislation.<sup>165</sup> On the first day of

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162. *Id.* at 1439–40; *see also id.* at 1324 (Rep. Wilson) (stating that the Amendment “will obliterate the last lingering vestiges of the slave system; . . . all that was and is, everything connected with it or pertaining to it”); Rutherglen, *supra* note 108, at 6 (stating that Harlan implied “that [the] incidents of slavery would be abolished by the Amendment itself”); 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, 177 (1951). Even for the Amendment’s supporters, however, the substantive promise went only so far and did not encompass political rights such as voting. *See, e.g.*, CONG. GLOBE, 38TH CONG., 2D SESS. 202 (1865) (Rep. McBride) (“A recognition of natural rights is one thing, a grant of political franchises is quite another. We extend to all white men the protection of law when they land upon our shores. We grant them political rights when they comply with the conditions which those laws prescribe. If political rights must necessarily follow the possession of personal liberty, then all but male citizens in our country are slaves.”); *see also supra* note 160 (noting views of opponents).

163. For example, Representative Samuel Cox of Ohio, who likely thought that Section 1 conveyed only a limited right against coerced labor, predicted federal legislation to “declare all State laws based on [blacks’] political inequality with the white races null and void.” CONG. GLOBE, 38TH CONG., 2D SESS. 242 (1865); *see also* MALTZ, *supra* note 149, at 18. Likewise, Representative Holman worried that Section 2 “confers on Congress the power to invade any State to enforce the freedom of the African[,] . . . [will elevate] the African to the august rights of citizenship[,] . . . [and will] strike down the corner-stone of the Republic, the local sovereignty of the States.” CONG. GLOBE, 38TH CONG., 1ST SESS. 2962 (1864). Representative Robert Mallory of Kentucky warned that Section 2 would empower Congress to guarantee “the freed negro the right of franchise.” CONG. GLOBE, 38TH CONG., 2D SESS. 180 (1865).

164. *See* VORENBERG, *supra* note 28, at 103.

165. CONG. GLOBE, 38TH CONG., 1ST SESS. 553 (1864).

the Senate debates, he gave a lengthier statement in which he described Congress's power as that "to pass such laws as may be necessary to carry [Section 1's ban on slavery and involuntary servitude] into effect."<sup>166</sup> Trumbull's use of the terms "necessary" and "proper" to describe the scope of Congress's Section 2 power to pass "appropriate legislation" were almost certainly meant to allude to the Necessary and Proper Clause and Chief Justice John Marshall's famous explanation of Congress's broad enforcement powers in *McCulloch v. Maryland*.<sup>167</sup>

After the Thirteenth Amendment passed both the House of Representatives and the Senate, the states began their own ratification debates. Unsurprisingly, Section 2's grant of congressional power received more attention and concern in the states than it did in Congress. In the Union states, support for the Amendment was broad but not unanimous.<sup>168</sup> Some opponents of ratification articulated concerns about the scope of Congress's power under Section 2 and the risk it posed to the federal system.<sup>169</sup> For example, in Ohio and Indiana, detractors claimed that Congress would use its Section 2 power to "rewrite state constitutions or abolish state courts and state legislatures."<sup>170</sup> In Michigan, one state senator warned against giving the federal government "a despotic power that will most assuredly, ultimately eat out the vitals of the States."<sup>171</sup> An Illinois state senator warned that congressional enforcement would "emasculate" the states.<sup>172</sup> The Kentucky legislature, motivated by concerns that Congress might be empowered to overturn discriminatory state laws, considered a resolution that would have rejected Section 2

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166. *Id.* at 1313.

167. 17 U.S. (4 Wheat.) 316 (1819); *see also supra* notes 65–70 and accompanying text (describing *McCulloch*'s holding). This connection between the Thirteenth Amendment's enforcement clause and the Necessary and Proper Clause would be made explicitly during the congressional debates over the Civil Rights Act of 1866, as well as in early judicial decisions regarding the scope of the Thirteenth Amendment. *See infra* notes 199, 251–252 and accompanying text; *see also* CONG. GLOBE, 38TH CONG., 2D SESS. 214 (1865) (Rep. White) (noting that Section 2 conferred upon Congress "the plenary power to pass all necessary enactments to enforce this provision of the Constitution").

168. In New York, for example, the Democratic legislative minority managed to block ratification. However, after President Lincoln was assassinated, the political climate changed and the New York legislature quickly ratified the Amendment. *See VORENBERG, supra* note 28, at 214.

169. *See id.* at 218.

170. *Id.* at 218 (citing CINCINNATI ENQUIRER, Feb. 1, 1865, at 1; CINCINNATI ENQUIRER, Feb. 11, 1865, at 2; BREVIER LEGISLATIVE REPORTS OF THE STATE OF INDIANA 212 (Cyrus L. Dunham)).

171. *Id.* at 218 (citing PROTEST OF THE HON. LOREN L. TREAT, SENATE DOC. NO. 38, DOCUMENTS ACCOMPANYING THE JOURNAL OF THE SENATE OF THE STATE OF MICHIGAN AT THE BIENNIAL SESSION OF 1865, at 4).

172. *Id.* (citing Hon. William H. Green, Speech on the Proposed Amendment of the Federal Constitution Abolishing Slavery 9 (1865)).

entirely.<sup>173</sup> Ultimately, however, Kentucky simply voted against ratification, joining Delaware as one of only two Union states to do so.<sup>174</sup>

The states of the former Confederacy—with the exception of Mississippi—joined in ratifying the Amendment. However, those states consistently echoed a single, major concern: the scope of Section 2’s enforcement power and its potential to subject states to federal control. As one Mississippi delegate explained: “‘The [second] section gives to Congress broad, and almost, I may say, unlimited power. . . . I am not willing to trust to men who know nothing of slavery the power to frame a code for the freedmen of the State of Mississippi.’”<sup>175</sup> Accordingly, the Mississippi legislature rejected ratification, publishing a report that stated in part that Section Two was “‘a dangerous grant of power . . . which, by construction, might admit federal legislation in respect to persons, denizens and inhabitants of the state.’”<sup>176</sup>

In the course of South Carolina’s debates, the provisional governor explained the state delegates’ “fear that the second section may be construed to give Congress power of local legislation over the Negroes, and white men, too, after the abolishment of slavery.”<sup>177</sup> To this concern, Secretary of State William Seward responded that Section 2 “‘is really restraining in its effect, instead of enlarging the powers of Congress.’”<sup>178</sup> Seward’s message assuaged these concerns sufficiently to garner South Carolina’s ratification. However, South Carolina issued a declaration with its ratification, stating that “‘any attempt by Congress toward legislating upon the political status of former slaves, or their civil relations, would be contrary to the Constitution of the United States as it now is, or as it would be altered by the proposed amendment.’”<sup>179</sup> Alabama and Louisiana issued

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173. *Id.* at 217–18 (citing S. JOURNAL, at 390–91 (Ky. 1863–64)).

174. *See id.* at 216–17. Delaware and Kentucky ultimately ratified the Thirteenth Amendment in February 1901 and March 1976, respectively. New Jersey initially blocked ratification, but ratified the Amendment in 1866 after it had been declared as officially adopted. *See id.* at 232 n.61.

175. *Id.* at 228 & n.50 (quoting *Journal of the Mississippi Constitutional Convention of 1865*, as cited in Howard Devon Hamilton, *The Legislative and Judicial History of the Thirteenth Amendment*, 9 NAT’L B.J. 26, 33 (1951)).

176. *Id.* at 230 (citing REPORT OF THE JOINT STANDING COMMITTEE [OF MISSISSIPPI] ON STATE AND FEDERAL RELATIONS). Mississippi ultimately ratified the Thirteenth Amendment in March 1995. *See infra* note 344.

177. TESIS, *supra* note 27, at 48.

178. VORENBERG, *supra* note 28, at 229 (quoting MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, S. EXEC. DOC. NO. 39-26, at 254 (1966)). In response to Seward’s claim, indignant former general Ben Butler wrote to Congressman Thaddeus Stevens, suggesting that Congress should pass a broad civil rights bill “so that hereafter no sophistry can claim that the word ‘appropriate’ is a restrained word.” *Id.* (citing Letter from Gen. Butler to Rep. Stevens (Nov. 20, 1865) (Library of Congress, Thaddeus Stevens MSS)).

179. *Id.* at 230 (citing 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES

similar reservations as they ratified the Amendment.<sup>180</sup> On December 18, 1865, Secretary of State Seward issued a proclamation declaring that the Amendment had been ratified by the requisite number of states (twenty-seven) and was thus adopted as part of the Constitution.<sup>181</sup>

## 2. *Debates over the Civil Rights Act of 1866*

Even as they were debating the Thirteenth Amendment, both Mississippi and South Carolina enacted “Black Codes”—laws that restricted the freed slaves in their exercise of contractual and civil rights. For example, the codes required the freedmen to make annual written contracts for their labor and provided that they would be subject to arrest and forfeiture of the entirety of their annual wages if they left before the contract’s term.<sup>182</sup> Vagrancy laws were strengthened in an effort to ensure that freedmen agreed to such contractual provisions; those who lacked a “home and support” were subject to arrest and enforced service to pay their debts.<sup>183</sup> By the end of 1866, all southern states had enacted such codes.<sup>184</sup>

The Thirty-Ninth Congress convened on December 4, 1865 and, on January 5, 1866—shortly after the Thirteenth Amendment was ratified by the states—began considering a civil rights measure that took direct aim at the southern Black Codes. Senator Lyman Trumbull, chair of the Senate Judiciary Committee, proposed the act, entitled “An Act To protect all Persons in the United States in their Civil Rights, and furnish the means of their vindication.”<sup>185</sup> The bill was eventually enacted as the Civil Rights Act of 1866. As passed, Section 1 of the Act provided that:

[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or

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OF AMERICA 606 (1894)).

180. See HERMAN BELZ, *A NEW BIRTH OF FREEDOM* 159 (1976); see also 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 610 (noting that Alabama ratified the Amendment on the “understanding that it does not confer upon Congress the power to Legislate upon the political status of Freedmen in this State.”). Florida and Mississippi also issued similar reservations, although their ratification votes came after December 18, 1865.

181. See VORENBERG, *supra* note 28, at 233.

182. See CONG. GLOBE, 39TH CONG., 1ST SESS. 39 (1866) (Rep. Wilson reporting on black codes in South Carolina, Mississippi, Louisiana, and Georgia).

183. See *id.*

184. VORENBERG, *supra* note 28, at 230.

185. CONG. GLOBE, 39TH CONG., 1ST SESS. 129 (1866).

involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.<sup>186</sup>

The second section of the Act declared that anyone who, acting under color of law, deprived a person of rights secured by the first section was guilty of a misdemeanor.<sup>187</sup> The third section vested jurisdiction over such misdemeanors in the U.S. district courts and provided concurrent jurisdiction over state court cases involving persons who were unable to enforce in state court the rights guaranteed by the first section.<sup>188</sup>

The Civil Rights Act was proposed and defended as an exercise of Congress's Section 2 power, and the debates over the Act contain a much more thoughtful reflection on the scope of that power than do the ratification debates. In a departure from the position taken during the congressional ratification debates, supporters saw the Act not as an articulation of the rights guaranteed directly by Section 1, but rather as a clear example of necessary and proper legislation to secure the freedom conveyed by Section 1. Opponents took the view that the sole effect of Section 1 was the abolition of slavery and, therefore, that the only appropriate laws for Section 2 purposes were those that punished physical enslavement.

Senator Trumbull was the leading proponent of the bill and of an expansive reading of Congress's Section 2 power. Three weeks before he introduced the bill, Trumbull was asked about the purpose of Section 2<sup>189</sup> and admitted that he might not have made it clear in the course of the

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186. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–1982 (2006)).

187. *See id.* § 2.

188. *See id.* § 3. The latter sections of the Act, not Section 1, were the source of most debate and controversy in Congress. *See BELZ, supra* note 180, at 162.

189. Senator Saulsbury asked Senator Trumbull about the scope of Section 2, invoking Secretary of State Seward's claim that Section 2 was meant to be "restraining" in its effect upon Congress. CONG. GLOBE, 39TH CONG., 1ST SESS. 43 (1866); *see also supra* note 178 and accompanying text (recounting Seward's claim).

debates over the Thirteenth Amendment.<sup>190</sup> In response, he explained that “Congress would have had the power, even without the second clause, to pass all laws necessary to give effect to the provision making all persons free.”<sup>191</sup> However, Section 2 “was intended to put it beyond cavil and dispute” that Congress, in fact, had such a power.<sup>192</sup> Noting that certain rights are inherent in the freedom granted by Section 1, Trumbull argued that Congress would have power under Section 2 to pass legislation to ensure that the freed slaves would have “the privilege to go and come when they please, to buy and sell when they please, to make contracts and enforce contracts.”<sup>193</sup> Even more, Trumbull added, what is “appropriate legislation” for Section 2 purposes “is for Congress to determine, and nobody else.”<sup>194</sup>

After he introduced the bill, Senator Trumbull continued to emphasize a broad view of Congress’s Section 2 power. Alluding to the slave codes and Black Codes, he explained that “laws that prevented the colored man going from home, that did not allow him to buy or to sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated, were all badges of servitude.”<sup>195</sup> Trumbull argued that Section 2 gave Congress the power to “destroy all these discriminations in civil rights against the black man.”<sup>196</sup> He reiterated: “Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end.”<sup>197</sup>

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190. CONG. GLOBE, 39TH CONG., 1ST SESS. 43 (1865).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 322; *see also id.* at 322–23 (“With the destruction of slavery necessarily follows the destruction of the incidents to slavery. . . [and] [w]ith the abolition of slavery should go all the badges of servitude which have been enacted for its maintenance and support.”); *id.* at 474 (noting that any law that denied civil rights to people on the basis of color is “a badge of servitude which, by the Constitution, is prohibited”). For a description of the origins and meaning of the terms “badges” and “incidents” of slavery, *see infra* Part II.C.

196. CONG. GLOBE, 39TH CONG., 1ST SESS. 322 (1866). Trumbull made clear that the bill was not intended to reach “political rights.” *See id.* at 476. Rather, he defined “civil rights” as natural rights and invoked the Privileges and Immunities Clause of Article IV in an effort to give content to those rights. *See id.* at 475.

197. *Id.* at 322; *see also id.* at 475 (“Then, under the constitutional amendment which we have now adopted, and which declares that slavery shall no longer exist, and which authorizes Congress by appropriate legislation to carry this provision into effect, I hold that we have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States.”).

In the House debates, Representative James Wilson of Iowa aligned himself with Trumbull's views. He pointed to Section 2 as the express source of Congress's power to pass the Act,<sup>198</sup> invoking *McCulloch v. Maryland* and noting that the legitimate end of the bill "is the maintenance of freedom to the citizen."<sup>199</sup> The bill's means are appropriate to the end because "[a] man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery."<sup>200</sup> Indeed, "[o]f the necessity of the measure Congress is the sole judge."<sup>201</sup> Wilson also defended the power of Congress as "necessarily implied from the entire body of the Constitution."<sup>202</sup> He characterized the rights conveyed by the Act as only "those rights which belong to men as citizens of the United States"<sup>203</sup> and cited *Prigg v. Pennsylvania*<sup>204</sup> for the proposition that "[t]he possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy."<sup>205</sup>

Thus, Trumbull and Wilson focused less on Section 1 of the Amendment—which, in their view, provided only freedom from slavery—and more on Section 2 and the power of Congress to ensure that freedom by eradicating the Black Codes and protecting certain civil rights.<sup>206</sup> They were joined in this approach by Representative Burton Cook of Illinois and Senator Jacob Howard of Michigan.<sup>207</sup> According to Cook, Section 1

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198. *See id.* at 1118; *see also id.* at H. App. 157.

199. *Id.* at 1118.

200. *Id.*

201. *Id.*

202. *Id.* at H. App. 157.

203. *Id.* at 1294. An early draft of the Civil Rights Act contained an additional provision barring "discrimination in civil rights or immunities among citizens of the United States." *Id.* at 1296 (motion to remove that provision). This provision spurred heated debate, *see, e.g., id.* at 1294 (Rep. Wilson) (denying that the Act would extend federal jurisdiction over "the school laws and jury laws and franchise laws of the States"), and occasioned the most intense discussion regarding the enforcement power of Congress.

204. 41 U.S. 539 (1842).

205. CONG. GLOBE, 39TH CONG., 1ST SESS. 1294 (1866). At least one commentator views Wilson's reference to *Prigg* as a tacit acknowledgment that the Section 2 power was insufficient to support the Civil Rights Act. *See* ALFRED AVINS, THE RECONSTRUCTION AMENDMENTS' DEBATES, at x (1967).

206. As Trumbull put it, "[l]iberty and slavery are opposite terms; one is opposed to the other." CONG. GLOBE, 39TH CONG., 1ST SESS. 474 (1866).

207. Senator John Sherman of Ohio argued for this approach even before the introduction of the Civil Rights Act of 1866. On December 13, 1865, while debating a proposal to nullify southern Black Codes, Sherman argued that Section 2 expressly gave Congress the power "to secure all their rights of freedom by appropriate legislation." *Id.* at 41. "Now unless a man may be free without the right to sue and be sued, to plead and be impleaded, to acquire and hold property, and to testify in a court of justice, then Congress has the power by the express terms of this amendment, to secure all these rights."

“prohibited forever the mere fact of chattel slavery as it existed,”<sup>208</sup> but Section 2 gave Congress “power to secure the rights of freemen to those men who had been slaves” and set Congress as “the judge of what is necessary for the purpose of securing to them those rights.”<sup>209</sup> In Cook’s view, the civil rights bill was necessary legislation because persons denied the rights protected by the Act “are not secured in the rights of freedom.”<sup>210</sup> Senator Howard likewise defended the proposed Act, claiming that the Thirteenth Amendment was intended “to give to Congress precisely the power over the subject of slavery and the freedmen which is proposed to be exercised by the bill now under our consideration.”<sup>211</sup>

Opponents of the bill took issue with this broad interpretation of Section 2 and instead took the view articulated by Representative Anthony Thornton that “[t]he sole object of [Section 1] was to change the *status* of the slave to that of a freeman; and the only power conferred upon Congress by the second section of that amendment is the power to enforce the freedom of those who have been thus emancipated.”<sup>212</sup> Opponents of the bill did not contest the idea that the Section 2 enforcement power was akin to the power of Congress under the Necessary and Proper Clause,<sup>213</sup> but rather took a very limited view of what would constitute appropriate legislation. For some, the only appropriate legislation would be that directly related to maintaining the former slaves’ new status as freedmen. As Representative Samuel Marshall put it, “Congress has acquired not a particle of additional power other than [the literal freeing of slaves] by virtue of this amendment.”<sup>214</sup> Senator Cowan found that Section 2 “was intended . . . to give the Negro the privilege of the *habeas corpus*, that is,

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To say that a man is a freeman and yet is not able to assert and maintain his right, in a court of justice, is a negation of terms.” *Id.*

208. *Id.* at 1124.

209. *Id.*

210. *Id.*

211. *Id.* at 503; *see also id.* at 1152 (Rep. Thayer) (“[B]y virtue of the second section of [the Thirteenth Amendment] Congress has express power to pass laws which will guaranty and insure these great rights and immunities of citizenship.”).

212. *Id.* at 1156.

213. *See id.* at 576 (Sen. Davis) (agreeing that Section 2 essentially reiterated Congress’s “necessary and proper” power).

214. *Id.* at 628; *see also id.* at 499 (Rep. Cowan) (stating that Section 2 empowered Congress only to break “the bond by which the negro slave was held to his master”); *id.* at 1123 (Rep. Rogers) (arguing that Section 2 “enable[s] Congress to lay the hand of Federal power, delegated by the States to the General Government, upon the States to prevent them from re-enslaving the blacks which it could not do before the adoption of this amendment to the Constitution”); *id.* at 1268 (Rep. Kerr) (“I hold that [Section 2] gives no power to Congress to enact any such law as this or any other law, except such only as is necessary to prevent the reestablishment of slavery.”).

if anybody persisted in the face of the constitutional amendment in holding him as a slave, that he should have an appropriate remedy to be delivered.”<sup>215</sup>

At least two of the Act’s opponents took a somewhat broader view of appropriate legislation. Representative Thornton acknowledged that “Congress has the power to punish any man who deprives a slave of the right of contract, or the right to control and recover his wages,” but denied the power to legislate on any subjects beyond that.<sup>216</sup> Representative Columbus Delano conceded that Section 2 gave Congress the power to legislate regarding the “necessar[y] incident[s] to freedom,”<sup>217</sup> but took a narrow view of that category, doubting that anyone could believe “that the right to testify or to inherit is a necessary condition of freedom.”<sup>218</sup>

All opponents, however, agreed that protecting the rights listed in the Civil Rights Act went beyond what was appropriate. In the words of Senator Willard Saulsbury,

[t]he attempt now under the power given, which relates simply and solely to one subject-matter, the abolition of the *status* or condition of slavery, to confer civil rights which are wholly distinct and unconnected with the *status* or condition of slavery, is an attempt unwarranted by any method or process of sound reasoning.<sup>219</sup>

According to Representative Michael Kerr, the bestowal of “civil privileges having no necessary connection with . . . personal freedom” is “wholly unauthorized,”<sup>220</sup> and the expansive view of the Section 2 power taken by the Act’s supporters would allow Congress to “revolutionize all the laws of the states everywhere.”<sup>221</sup>

On February 2, 1866, the Senate voted in favor of the bill by a vote of 33 to 12, with five abstentions. The House of Representatives approved the bill on March 13, by a vote of 111 to 38, with thirty-four abstentions.<sup>222</sup> However, on March 27, 1866, President Andrew Johnson

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215. *Id.* at 499.

216. *Id.* at 1156.

217. *Id.* at H. App. 158 (Rep. Delano). Delano eventually voted in favor of the Civil Rights Act, but all of his statements argue against it. *See id.* at 1367, 1861.

218. *Id.* at H. App. 158.

219. *Id.* at 476.

220. *Id.* at 623.

221. *Id.*; *see also id.* at 1271 (Rep. Kerr) (“The anti-slavery amendment of the Constitution had one very simple object to accomplish when gentlemen on the other side of this House desired to secure its adoption; but now it is confidently appealed to as authority for this bill and almost every other radical and revolutionary measure . . .”).

222. *See id.* at 1367.

vetoed the Act. Drawing on the views of the Act's opponents, Johnson stated that "[i]t cannot . . . be justly claimed that, with a view to the enforcement of [Section 1 of the Thirteenth Amendment], there is at present any necessity for the exercise of all the powers which this bill confers."<sup>223</sup> He also objected to the bill on federalism grounds, claiming that Congress had legislated with respect to rights that had been "considered as exclusively belonging to the States . . . [relating] to [their] internal police and economy."<sup>224</sup> Johnson argued that if Congress could properly legislate on those topics, it could also "repeal . . . all State laws discriminating between the two races on the subjects of suffrage and office" or declare who had the right to vote.<sup>225</sup>

The Senate and House debates after the veto broke no new ground. Senator Trumbull again maintained that the civil rights protected by the Act are "those inherent, fundamental rights which belong to free citizens or free men in all countries,"<sup>226</sup> such as "the right of personal security, the right of personal liberty, and the right to acquire and enjoy property."<sup>227</sup> In his view, Section 2 empowered Congress "to do whatever is necessary to protect the freedman in his liberty."<sup>228</sup> Senator Cowan countered that the liberty granted to the former slaves was merely "[t]he right to go wherever one pleases without restraint or hinderance on the part of any other person."<sup>229</sup> Because the Civil Rights Act extended protection to "free negroes and mulattoes" and not just the freed slaves, Cowan argued, it went well beyond congressional power under Section 2.<sup>230</sup>

Ultimately, Congress overrode Johnson's veto. On April 6, 1866, the Senate voted 33–15 to override the veto, with one abstention,<sup>231</sup> and on April 9, the House of Representatives approved an override by a vote of 122–41, with twenty-one abstentions.<sup>232</sup>

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223. *Id.* at 1681.

224. *Id.*

225. *Id.*

226. *Id.* at 1757.

227. *Id.* (quoting JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 38 (1826)). Trumbull juxtaposed these "civil rights" with "political privileges" like voting and holding office, on which the law would have no bearing. *See id.*

228. *Id.* at 1759.

229. *Id.* at 1784. Cowan again indicated that "appropriate" legislation would be a law providing the writ of habeas corpus and a cause of action for damages for an African American who was unlawfully restrained or kidnapped. *Id.*; *cf. supra* text accompanying note 215.

230. CONG. GLOBE, 39TH CONG., 1ST SESS. 1784 (1866).

231. *Id.* at 1809.

232. *Id.* at 1861.

### 3. *Debates Regarding the Fourteenth Amendment*

Perhaps the most influential opponent of the Civil Rights Act was Representative John Bingham of Ohio. According to Bingham, the Civil Rights Act proposed “[t]o reform the whole civil and criminal code of every State government by declaring that there shall be no discrimination between citizens on account of race or color in civil rights or in the penalties prescribed by their laws.”<sup>233</sup> Bingham, in fact, supported this objective,<sup>234</sup> but believed that Section 2 was an insufficient source of congressional power to accomplish it. In his view, the Act violated the residual power of the states under the Tenth Amendment to punish offenses against the life, liberty, and property of citizens.<sup>235</sup> Therefore, he thought that another constitutional amendment would be necessary to displace discriminatory state laws.<sup>236</sup>

Bingham introduced what would become the Fourteenth Amendment just before the Civil Rights Act was introduced by Trumbull.<sup>237</sup> As the debates on both proceeded, it became clear that, in Bingham’s view, the proposed Amendment would provide surer constitutional footing for the rights conveyed by the Act. Although the Fourteenth Amendment debates did not occasion further substantial reflection on Congress’s Section 2 power, they did provide some insight as to the unease of the Act’s supporters and opponents alike as to the Act’s constitutionality. For example, Senator Luke Poland, who voted for the Civil Rights Act, noted that “[t]he power of Congress to [pass the Act] has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government . . . .”<sup>238</sup> Representative Henry Raymond, who voted against the Civil Rights Act, noted that he “regarded it as very doubtful, to say the least, whether Congress, under the existing Constitution, had any power to enact such a law; and [he] thought . . . that very many members who voted for the bill also doubted the power of Congress to pass it . . . .”<sup>239</sup> Indeed,

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233. *Id.* at 1293.

234. *See id.* at 1291.

235. *Id.*; *see also id.* at 504–05 (Sen. Johnson).

236. *See id.* at 1291–93.

237. *See* MALTZ, *supra* note 149, at 54.

238. CONG. GLOBE, 39TH CONG., 1ST SESS. 2961 (1866).

239. *Id.* at 2502. Certainly, not all who voted for the Act had doubts as to Congress’s power. *See, e.g., id.* at 3035 (Sen. Henderson) (“I never doubted the power of Congress to pass [the Act]. I never doubted that the Government would be disgraced if it failed to establish for the private citizen the muniments of freedom intended to be secured by them.”).

the Civil Rights Act of 1866 was reenacted in 1870 after the ratification of the Fourteenth Amendment.<sup>240</sup>

Overall, it is difficult to know how much the debates over the Civil Rights Act and Fourteenth Amendment should inform our inquiry into the original meaning of the Thirteenth Amendment. As a general matter, the original meaning of legislation is usually to be discerned only from contemporaneous debates, not conduct and statements that postdate enactment.<sup>241</sup> In this particular context, the enactment of the southern Black Codes between the ratification of the Amendment and the passage of the Civil Rights Act at least suggests that the Thirty-Ninth Congress might have had an enhanced view compared to that of the Thirty-Eighth Congress as to what type of legislation might be “appropriate” to enforce the Thirteenth Amendment.<sup>242</sup> At the very least, the swift proposal and passage of the Fourteenth Amendment, followed by the reenactment of the Civil Rights Act, suggests a level of uncertainty as to whether Section 2, in particular, provided sufficient power for Congress to enact the Act.

On the other hand, enactment of enforcement legislation immediately in the wake of the ratification of a new constitutional amendment is a rare event that might well shed light on the scope of the enforcement power. Indeed, even after a presidential veto, the Act received the support of two-thirds of both the Senate and the House.<sup>243</sup> An important parallel exists in the passage of the Judiciary Act of 1789, an act that is generally regarded as shedding light on the meaning of Article III.<sup>244</sup> The debates over the

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240. See An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes, ch. 114, § 18, 16 Stat. 140 (1870).

241. See *Doe v. Chao*, 540 U.S. 614, 626–27 (2004) (“[W]e have said repeatedly that ‘subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.’” (quoting *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng’rs*, 531 U.S. 159, 170 n.5 (2001))); cf. Colker, *supra* note 119, at 790 (“We should rarely look at statements made *after* the ratification of a Constitutional provision. The important temporal period is the moment (or the immediate moment before) the ratification of constitutional language.”); Abner J. Mikva & Eric Lane, *The Muzak of Justice Scalia’s Revolutionary Call to Read Unclear Statutes Narrowly*, 53 SMU L. REV. 121, 131 (2000) (“[Probative legislative history] excludes any post enactment declarations by either the executive or legislators. Such statements are not subject to legislative deliberation and are not relevant. Additionally such statements almost always reflect the speaker’s current political needs and not those of the enacting legislature.”).

242. Professor David Currie has criticized those who would turn to the debates over the Civil Rights Act to discern the meaning of the Thirteenth Amendment, noting that the Act’s supporters “made no such [expansive] claim[s] when there was still time to vote [the Thirteenth Amendment] down.” DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888*, at 400–01 (1985). Indeed, Currie calls this “the Trojan Horse theory of constitutional adjudication.” *Id.* at 401.

243. See *supra* notes 231–32 and accompanying text.

244. “Just as the Judiciary Act of 1789 is considered a guide to the meaning of Article III, the 1866 Act can guide interpretation of the Thirteenth Amendment.” Darrell A.H. Miller, *White Cartels*,

Civil Rights Act involved many of the same legislators who voted upon the Amendment itself, and their comments are illuminating with respect to their own understandings of the extent of Congress's Section 2 power—perhaps as intended originally, and at least as that power was reconceived in light of the intervening year's events, particularly the passage of the Black Codes.<sup>245</sup>

Ultimately, it is impossible to draw any firm conclusions from the historical record as to the precise meaning of Section 2 of the Thirteenth Amendment.<sup>246</sup> However, the rough parameters of the debate do emerge: For some, the Amendment guaranteed the end of slavery but no more. For others, it was a promise of affirmative freedom and a grant of congressional power to secure a limited set of civil rights deemed essential to that freedom. While 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, there was no suggestion that Section 2 granted Congress any substantive power to define or expand its own vision of the Amendment's ends.

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*The Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co.*, 77 FORDHAM L. REV. 999, 1044 (2008) (citations omitted); cf. *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (interpreting original meaning of Copyright Clause in part by looking to the first federal copyright statute passed by the First Congress); VORENBERG, *supra* note 28, at 236 (noting that the Republican members of the Judiciary Committee made broad claims about the purpose of the Amendment that they had not made during the actual debates on the Amendment); *id.* at 237 (“In 1864 Trumbull did not foresee the need for specific civil rights legislation, and therefore he was mute on the question of enforcement. But . . . the appearance of black codes in the South made him better appreciate and articulate the potential of the enforcement clause.”).

245. Professor Akhil Amar has suggested that the passage of the Civil Rights Act just one year after the ratification of the Thirteenth Amendment and just before the ratification of the Fourteenth Amendment indicates that Congress took a broad view of its Section 2 power, and thus of the meaning of enforcement clauses generally. Amar argues that the Civil Rights Act was “broad substantive legislation ranging far beyond the self-executing rights under Section 1,” and by passing such a law “[a]t the very moment that they were proposing another ‘enforcement’ clause in the Fourteenth Amendment, [Congress spoke] loud and clear about what the parallel enforcement clause of the Thirteenth Amendment meant. And they said it meant more than mere remedial legislation.” Amar, *supra* note 25, at 823. Accordingly, in Amar’s view, *City of Boerne*’s inflexible remedial-only standard should yield to a more moderate standard, and *Jones* should remain untouched. *See id.* at 824–25.

246. “The quest to determine which interpretation of the Thirteenth Amendment is most credible or most authoritative is endless and, to a certain extent, pointless, for the measure *never* had a single, fixed meaning.” VORENBERG, *supra* note 28, at 237; *see also id.* at 249–50 (noting that it is not fair to assume that there was an original understanding of the Thirteenth Amendment because “[p]eople of the time were easily distracted from the Amendment by other legislation, by elections, and most importantly, by the Civil War. Their attitudes toward the Amendment were never steady; they evolved in relation and in reaction to very different sorts of measures and events.”).

### B. *Judicial Approaches to the Section 2 Power*

Whatever doubts members of Congress had about the constitutionality of the Civil Rights Act of 1866, the federal courts uniformly have regarded it as the paradigm of “appropriate” Section 2 legislation. Generally, courts have taken a broad view of Congress’s power to choose the means by which the Thirteenth Amendment’s promise will be implemented, but a much more limited view of the appropriate ends of Thirteenth Amendment legislation. Although *Jones*’s approval of the 1866 Civil Rights Act was unsurprising in this respect,<sup>247</sup> its permissive and deferential approach to future congressional attempts to substantively define the badges and incidents of slavery was a departure from earlier case law. This section traces how the federal courts have approached the scope of Congress’s Section 2 power from the Reconstruction era through the modern era.

The first two attempts to assess the scope of Congress’s enforcement power came from Supreme Court Justices sitting as Circuit Justices. *United States v. Rhodes*<sup>248</sup> came quickly on the heels of the passage of the Civil Rights Act of 1866. Two white men had burglarized the home of Nancy Talbot, an African American, and were prosecuted in federal court under the third section of the newly passed Act<sup>249</sup> on the ground that Kentucky courts would have forbidden Talbot—but not a white citizen—from testifying against them.<sup>250</sup> They challenged their convictions, claiming in part that the 1866 Act was beyond the power of Congress to enact.

Supreme Court Justice Noah Swayne, sitting as a Circuit Justice, rejected that challenge. He invoked *McCulloch v. Maryland* as his guide for interpreting Section 2.<sup>251</sup> In his view, *McCulloch*’s broad view of congressional enforcement powers showed “the spirit in which the Amendment is to be interpreted, and develop[ed] fully the principles to be

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247. *But see* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1390–91 (2008) (noting that *Jones* contradicted the *Civil Rights Cases* with respect to whether acts of private racial discrimination constituted a badge or incident of slavery).

248. 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151).

249. Section 3 gave federal courts jurisdiction over “all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be, any of the rights secured to them by the first section of this act.” Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (1866). The first section of the Act gave all persons “the same right in every State and Territory in the United States . . . to sue, be parties, and give evidence . . . as is enjoyed by white citizens.” *Id.* § 1.

250. *Rhodes*, 27 F. Cas. at 785–86.

251. *Id.* at 791.

applied.”<sup>252</sup> He found that while the first section of the Thirteenth Amendment “abolish[es] slavery . . . and guards . . . against the recurrence of the evil,”<sup>253</sup> the second section

authorizes congress to select, from time to time, the means that might be deemed appropriate to the end. It employs a phrase which had been enlightened by well-considered judicial application. Any exercise of legislative power within its limits involves a legislative, and not a judicial question. It is only when the authority given has been clearly exceeded, that the judicial power can be invoked.<sup>254</sup>

Noting that the Civil Rights Act of 1866 was passed in close proximity to the ratification of the Amendment by many of the same members of Congress who had voted for the Amendment,<sup>255</sup> Justice Swayne upheld the Act in its entirety:

[W]ho will say it is not an “appropriate” means of carrying out the object of the first section of the Amendment, and a necessary and proper execution of the power conferred by the second? Blot out this act and deny the constitutional power to pass it, and the worst effects of slavery might speedily follow. It would be a virtual abrogation of the Amendment.<sup>256</sup>

Swayne thus appeared to regard the constitutional “end” as the prevention of slavery itself, and the means employed by Congress in the Act as sufficiently effective in advancing that goal.

Justice Joseph Bradley took a similar view of the constitutional ends but, for the first time, articulated boundaries as to the permissible means of Section 2 legislation. Sitting as a Circuit Justice in *United States v. Cruikshank*,<sup>257</sup> he sustained a challenge to the Enforcement Act of 1870,

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252. *Id.* at 792. In addition to *McCulloch*, Justice Swayne also cited Justice Joseph Story’s Commentaries on the Constitution as a guide. *See id.* at 791–92 (“Judge Story says: ‘In the practical application of government, then, the public functionaries must be left at liberty to exercise the powers with which the people, by the constitution and laws, have entrusted them. They must have a wide discretion as to the choice of means; and the only limitation upon the discretion would seem to be that the means are appropriate to the end; and this must admit of considerable latitude . . . . If the end be legitimate, and within the scope of the constitution, all the means which are appropriate, and which are plainly adapted to that end, and which are not prohibited, may be constitutionally employed to carry it into effect.’”) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 432 (1833)).

253. *Id.* at 793.

254. *Id.*

255. *Id.* at 794.

256. *Id.*

257. 25 F. Cas. 707 (C.C.D. La. 1874) (No. 18,497), *aff’d on other grounds* 92 U.S. 542 (1876).

which penalized conspiracies to hinder the “free exercise and enjoyment of any right or privilege granted or secured to [any citizen, regardless of color] by the constitution or laws of the United States.”<sup>258</sup> Justice Bradley stated that Section 2 gave Congress “the power not only to legislate for the eradication of slavery, but the power to give full effect to this bestowment of liberty on these millions of people.”<sup>259</sup> He cited the Civil Rights Act of 1866 as appropriate Section 2 legislation because “disability to be a citizen and enjoy equal rights was deemed one form or badge of servitude,” and because the Act “place[d] the other races on the same plane of privilege as that occupied by the white race.”<sup>260</sup> The Enforcement Act, however, was beyond Congress’s Section 2 power because it did not require that the victim’s “race, color, or previous condition of servitude” be the motivating factor for charged conspiracy.<sup>261</sup> Thus, in Justice Bradley’s view, Congress’s Section 2 power was broad in the sense that it enabled Congress to pass civil rights laws to eradicate the badges of slavery, but limited in the sense that it enabled Congress to protect only those targeted on account of race, color, or previous condition of servitude.

The Supreme Court, as a whole, first considered the scope of Congress’s Section 2 power in 1883 in *United States v. Harris*,<sup>262</sup> adopting Justice Bradley’s *Cruikshank* approach. *Harris* concerned the constitutionality of section 2 of the Civil Rights (Ku Klux Klan) Act of 1871, which provided criminal penalties for conspiracies to deprive “any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws.”<sup>263</sup> The Court held that the Act was beyond Congress’s power under any of the Reconstruction Amendments. With respect to the Thirteenth Amendment, the Court began by stating that

[i]t is clear that [the] amendment, besides abolishing forever slavery and involuntary servitude within the United States, gives power to Congress to protect all persons . . . from being in any way subjected

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258. An Act To enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes, ch. 114, § 6, 16 Stat. 140, 141 (1870).

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

260. *Id.*

261. *See id.* at 713–14.

262. 106 U.S. 629 (1883).

263. An Act To enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, ch. 22, § 2, 17 Stat. 13, 13–14 (1871). The same language is currently codified at 42 U.S.C. § 1985(3) (2006). The Supreme Court upheld the statute against Thirteenth Amendment challenge in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), distinguishing *Harris* because *Harris* followed a now-discarded view that overbroad statutes should be invalidated in their entirety rather than treated as severable.

to slavery or involuntary servitude, except as a punishment for crime, and in the enjoyment of that freedom which it was the object of the Amendment to secure.<sup>264</sup>

The Court pointed approvingly to the Civil Rights Act of 1866, suggesting that the Act was a clear example of permissible enforcement legislation.<sup>265</sup> However, because the Ku Klux Klan Act on its face covered conspiracies against white people or persons who were never enslaved, the Court concluded that the Act “clearly cannot be authorized by the Amendment which simply prohibits slavery and involuntary servitude.”<sup>266</sup>

Ten months after *Harris*, in the *Civil Rights Cases*,<sup>267</sup> the Court continued to point to the Civil Rights Act of 1866 as the paradigm of Thirteenth Amendment enforcement legislation. In that decision, the Court struck down the Civil Rights Act of 1875,<sup>268</sup> which had guaranteed “the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement,”<sup>269</sup> regardless of race. In addition to its famous holding that the Fourteenth Amendment governs only state, not private, action, the Court also held that Congress lacked power under the Thirteenth Amendment to pass the law.<sup>270</sup>

Justice Bradley wrote the majority opinion and, consistent with his view in *Cruikshank*, asserted that Section 1 of the Thirteenth Amendment not only “abolished slavery” but also “establish[ed] . . . universal civil and political freedom throughout the United States.”<sup>271</sup> Although he endorsed the *McCulloch* view 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,”<sup>272</sup> he again took a limited view of the badges and incidents of slavery that Congress could address. He defined the “necessary incidents” of slavery—those that “constitut[ed] its substance and visible form”—as including compulsory service; restraint of movement; and “disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like

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264. *Harris*, 106 U.S. at 640.

265. *See id.*

266. *Id.* at 646.

267. 109 U.S. 3 (1883).

268. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

269. *Id.*

270. *The Civil Rights Cases*, 109 U.S. at 25.

271. *Id.* at 20.

272. *Id.*; *see also id.* at 21 (stating that under Section 2, Congress has “a right to enact all necessary and proper laws for the obliteration and prevention of slavery”).

burdens and incapacities.”<sup>273</sup> However, “[m]ere discriminations on account of race or color,” such as denials of admission to public accommodations on the basis of race, were not “badges of slavery.”<sup>274</sup> Indeed,

[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre

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Thus, the majority opinion in the *Civil Rights Cases* indicated that the judiciary would defer to congressional determinations as to the proper means of enforcing the Thirteenth Amendment, but would be less deferential to congressional efforts to define the “badges and incidents of slavery,” i.e., the “ends” of the Amendment itself. Although the Court invoked *McCulloch*’s permissive standard, it concluded that Congress had acted impermissibly and irrationally by passing the Civil Rights Act of 1875.

Justice Harlan dissented, chiding the majority for its lack of true deference to Congress’s judgment.<sup>276</sup> He juxtaposed the majority opinion with *McCulloch* and *Prigg*, and argued that the inclusion of Section 2 in the Thirteenth Amendment represented a conscious choice to empower Congress to protect “freedom and the rights necessarily inhering in a state of freedom.”<sup>277</sup> Thus, in Harlan’s view, Section 2 empowers Congress “to protect [freed slaves] against the deprivation, *because of their race*, of any civil rights granted to other freemen in the same State.”<sup>278</sup> Because public conveyances, inns, and places of public amusement are all public or quasi-public in nature,<sup>279</sup> Justice Harlan concluded that “discrimination practised by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude the imposition of which Congress

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273. *Id.* at 22.

274. *Id.* at 25.

275. *Id.* at 24. Similarly, in *Plessy v. Ferguson*, 163 U.S. 537, 542–43 (1896), the Court rejected a claim that a Louisiana law that required African Americans to occupy “equal but separate” railroad cars violated the Thirteenth Amendment.

276. *The Civil Rights Cases*, 109 U.S. at 28–30, 34 (Harlan, J., dissenting).

277. *Id.* at 34–35.

278. *Id.* at 36. Justice Harlan clarified that he did “not contend that the Thirteenth Amendment invests Congress with authority, by legislation, to define and regulate the entire body of the civil rights which citizens enjoy, or may enjoy, in the several States.” *Id.*

279. *See id.* at 37–42.

may prevent under its power, by appropriate legislation, to enforce the Thirteenth Amendment.”<sup>280</sup>

Thus, in the two decades following passage of the Civil Rights Act of 1866, the Court and its members articulated a consistent view of the operation and boundaries of the Section 2 power: (1) Congress was empowered, not only to prevent and punish slavery and involuntary servitude, but also could seek to abolish the “badges and incidents of slavery” by affirmatively protecting certain civil rights; (2) The “badges and incidents” of slavery included race-based discrimination in state laws pertaining to contract rights, property rights, and recognition in court, but not race-based discrimination in privately operated public accommodations; (3) The Court actively evaluated whether legislation targeted the badges and incidents of slavery; and (4) The Court deferred to the means by which Congress chose to address the badges and incidents of slavery.

Despite the Court’s numerous approving references to the Civil Rights Act of 1866 in its early Thirteenth Amendment cases,<sup>281</sup> the first time the Supreme Court as a whole had occasion to consider the constitutional basis for the Act was in *Hodges v. United States*.<sup>282</sup> In a surprising move, the Court struck down the convictions of several white men who threatened and harassed African American workers at a sawmill, and thereby denied the workers’ right under the Act to make and enforce contracts without regard to race. The Court held that Congress lacked the power to pass the Act.<sup>283</sup> The Court began by noting that the Thirteenth Amendment’s prohibition on slavery and involuntary servitude was absolute and protected people of all races: “[w]hile the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the Nation.”<sup>284</sup> The only

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280. *Id.* at 43. Justice Harlan also dissented in *Plessy v. Ferguson*, arguing, in part, that “[the Thirteenth Amendment] not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country.” 163 U.S. at 555 (Harlan, J., dissenting). In his view, “[t]he arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution.” *Id.* at 562.

281. *See, e.g., The Civil Rights Cases*, 109 U.S. at 22.

282. 203 U.S. 1 (1906). One year earlier, the Court had “entertain[ed] no doubt” about Congress’s power under Section 2 to ban peonage, defined as “a status or condition of compulsory service, based upon the indebtedness of the peon to the master.” *Clyatt v. United States*, 197 U.S. 207, 215–18 (1985) (upholding the Peonage Act of 1867, then codified at sections 1990 and 5526 of the Revised Code, and now codified at 42 U.S.C. § 1994 and 18 U.S.C. § 1581).

283. *Hodges*, 203 U.S. at 18–19.

284. *Id.* at 16.

protection Congress could extend under Section 2, however, was from the actual condition of slavery; the badges and incidents of slavery were not permissible topics of legislation.<sup>285</sup> Thus, Congress had exceeded its power by attempting to regulate the performance of private contracts when, in fact, Section 2 limited it to regulating only conduct that actually enslaved a person: “no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery.”<sup>286</sup>

Justice Harlan again dissented, calling the majority’s conception of congressional power “entirely too narrow”<sup>287</sup> and reiterating that under Section 2, “Congress may not only prevent the reestablishing of the institution of slavery, pure and simple, but may make it impossible that any of its incidents or badges [including the disability to make valid contracts for one’s services] should exist or be enforced in any State or Territory of the United States.”<sup>288</sup> Thus, the ruling in *Hodges* rejected forty years of jurisprudence and instead vindicated the view of the opponents of the Civil Rights Act of 1866, namely, that the only proper end of Section 2 legislation was the destruction of the actual conditions of slavery and involuntary servitude.

It was not until 1968, in *Jones*, that the Supreme Court again had occasion to consider the scope of Congress’s Section 2 power. In upholding the Civil Rights Act of 1866 as a proper exercise of that power, *Jones* overruled *Hodges*, claiming that it “rested upon a concept of congressional power under the Thirteenth Amendment irreconcilable with . . . the *Civil Rights Cases* and incompatible with the history and purpose

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285. *Id.* at 19. This view prevailed on the Court until *Jones* overruled *Hodges*. See, e.g., *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926) (refusing to exercise jurisdiction in case where defense claimed that enforcement of racially restrictive covenant would violate Section 1 of the Thirteenth Amendment because the Amendment reaches only “condition[s] of enforced compulsory service of one to another, [and] does not in other matters protect the individual rights of persons of the negro race”).

286. *Hodges*, 203 U.S. at 18; see also *id.* at 36 (Harlan, J., dissenting) (“The opinion of the court, it may be observed, does not, in words, adjudge [the Civil Rights Act of 1866] to be unconstitutional. But if its scope and effect are not wholly misapprehended by me, the court does adjudge that Congress cannot make it an offense against the United States for individuals to combine or conspire to prevent, even by force, citizens of African descent, solely because of their race, from earning a living.”).

287. *Id.* at 37.

288. *Id.* at 27. Justice Harlan made clear that “the disability to make valid contracts for one’s services was . . . an inseparable incident of the institution of slavery which the Thirteenth Amendment destroyed; and as a combination or conspiracy to prevent citizens of African descent, solely because of their race, from making and performing such contracts, is thus in hostility to the rights and privileges that inhere in the freedom established by that Amendment.” *Id.* at 38. Harlan also stated that, aside from the scope of Section 2, Section 1 of the Amendment, “by its own force[.] . . . destroyed slavery and all its incidents and badges.” *Id.* at 27; see also VORENBERG, *supra* note 28, at 240 (characterizing *Hodges* as dealing the Court’s “strongest blow against the [Thirteenth Amendment by declaring] that state courts were the exclusive arbiters of violations of the . . . Amendment”).

of the Amendment itself.”<sup>289</sup> Thus, *Jones* squarely embraced the idea that the proper ends of Section 2 legislation include the eradication, not only of the actual conditions of slavery and involuntary servitude, but also of the badges and incidents of slavery. Notably, even though *Jones* invoked the *Civil Rights Cases* as support for this proposition, it went further than that case by holding that Congress could conclude that private acts of racial discrimination—as opposed to discriminatory public laws—were badges and incidents of slavery.<sup>290</sup> Indeed, *Jones* arguably went further than any prior case by holding that Congress’s determination of what constituted a badge and incident of slavery was subject only to rational basis review.<sup>291</sup>

### C. *Defining the Badges and Incidents of Slavery*

As the above sections demonstrate, the concept of the “badges and incidents of slavery” features prominently in the ratification, implementation, and judicial evaluation of Section 2 of the Thirteenth Amendment. *Jones* solidified the prominence of the concept, placing in Congress’s hands the power to define the badges and incidents of slavery. Thus, it is important to probe what this phrase and its constituent terms likely meant to the members of Congress and the Justices who used them, and to understand how Congress might conceptualize them today.

Professor George Rutherglen has studied the origins and meaning of the terms “badges of slavery” and “incidents of slavery” and found that they were used frequently, even before the Civil War.<sup>292</sup> Of the two, “incidents of slavery” had a more firmly established legal meaning. It referred to the legal consequences of servitude—“the various disabilities imposed upon slaves in different southern states.”<sup>293</sup> This definition comports with the sense in which the term was used in the congressional debates regarding Section 2 and the Civil Rights Act of 1866. Senators Harlan and Trumbull, in particular, described the “incidents” of slavery that would disappear by virtue of the Amendment: compulsory service, the inability to marry, interference with family relationships, the deprivation of education, the suppression of speech, the inability to acquire property,

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289. *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 441 n.78 (1968).

290. *See id.* at 442–43.

291. *See id.* at 440.

292. Rutherglen, *supra* note 108, at 2–5.

293. *Id.* at 4 (citing GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA (2d ed. 1856)).

and the deprivation of any status in a court of law, either as a litigant or a witness.<sup>294</sup>

The term “badges of slavery,” although used in the antebellum period, had a less precise meaning. According to Rutherglen, a “badge” of slavery was a characteristic indicative of slave status or political subjugation, rather than a legal consequence flowing from such a condition.<sup>295</sup> The term was not used in the law of slavery, but was often used metaphorically in political discourse to describe a trait that was “evidence of political subjugation.”<sup>296</sup> The term is sufficiently ambiguous that it permits a range of definitions. It is possible to understand the term narrowly, lacking “independent significance” and “add[ing] only metaphorical connotations [to the phrase “incidents of slavery”] that [have] no operative legal effect.”<sup>297</sup> The term was not used at all in the ratification debates, and it appeared during the debates on the Civil Rights Act of 1866 only in Senator Trumbull’s comments. The two times he used that phrase, Trumbull appeared to understand the term narrowly and in line with the incidents of slavery, defining a “badge of servitude” as a law “which deprives any citizen of civil rights which are secured to other citizens.”<sup>298</sup>

However, it is also possible to take a more expansive view of “badges of slavery,” interpreting it as a reference to “symbolic manifestations of political and social [racial] inferiority.”<sup>299</sup> Indeed, Justice Douglas endorsed such a broad understanding in his *Jones* concurrence, referring to the “badges of slavery” that “remain today.”<sup>300</sup> In his view, “discriminatory practices,” ranging from private efforts to promote segregation in housing, schools, and public accommodations, to public laws and customs resisting integration, reveal “prejudices, once part and parcel of slavery”<sup>301</sup> and “a spectacle of slavery unwilling to die.”<sup>302</sup>

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294. See CONG. GLOBE, 38TH CONG., 1ST SESS. 1439 (1864) (Sen. Harlan) (listing them as “[s]ome of the incidents of slavery”); see also CONG. GLOBE, 39TH CONG., 1ST SESS. 322–23 (1865) (Sen. Trumbull). Trumbull also used the term “badges of slavery” to describe the same types of legal restrictions. See *id.* at 474.

295. See Rutherglen, *supra* note 108, at 5–6.

296. *Id.* at 4.

297. *Id.* at 3.

298. CONG. GLOBE, 39TH CONG., 1ST SESS. 322–23, 474 (1866).

299. Rutherglen, *supra* note 247, at 1368; see also Rutherglen, *supra* note 108, at 2, 15 (describing the “badges” of slavery as the “social consequences of race,” including race discrimination).

300. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445 (1968) (Douglas, J., concurring).

301. *Id.* at 449.

302. *Id.* at 445.

The phrase “badges and incidents of slavery” entered Thirteenth Amendment parlance in the *Civil Rights Cases*,<sup>303</sup> and “quickly became the Supreme Court’s standard gloss upon the powers of Congress under the Thirteenth Amendment.”<sup>304</sup> The *Civil Rights Cases* majority used the term to describe the permissible subjects of Thirteenth Amendment legislation, while at the same time giving it a limited construction, barring Congress from legislating against private, commercial acts of racial prejudice.<sup>305</sup> In a single stroke, “this phrase became authoritative . . . [and] also lost its expansive implications” for almost a century.<sup>306</sup>

In *Jones*, the Court retained the “badges and incidents” framework but conceptualized it in a much broader way, sanctioning Congress’s decision to treat private, commercial racial discrimination as a badge and incident of slavery.<sup>307</sup> Moreover, *Jones* gave Congress wide-ranging discretion to define the term in future debates subject only to rational basis review in the courts.<sup>308</sup>

Since *Jones*, the federal courts have deferred on several occasions to Congress’s conclusion that certain types of conduct constitute badges or incidents of slavery. In *Griffin v. Breckenridge*,<sup>309</sup> the Supreme Court held that Congress could rationally conclude that “conspiratorial, racially discriminatory private action” that aims to deprive African Americans “of the basic rights that the law secures to all free men” is a badge and incident of slavery.<sup>310</sup> Likewise, in *Runyon v. McCrary*,<sup>311</sup> the Court held that racial discrimination in contracts for private education could be understood as a badge and incident of slavery.<sup>312</sup> The Court has, however, demonstrated the boundaries of the term, stating in *City of Memphis v.*

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303. 109 U.S. 3 (1883). Justice Bradley had used the phrase “badge of slavery” in his *Cruikshank* opinion. See *United States v. Cruikshank*, 25 F. Cas. 707, 711 (C.C.D. La. 1874) (No. 18,497), *aff’d on other grounds* 92 U.S. 542 (1876).

304. Rutherglen, *supra* note 108, at 11.

305. *The Civil Rights Cases*, 109 U.S. at 20–22; see also Rutherglen, *supra* note 108, at 3 (stating that the Court’s decision in the *Civil Rights Cases* “failed to give any independent significance [to the term ‘badges of slavery’], and used it only as a ‘more colorful way of referring to the legal consequences of slavery’”).

306. Rutherglen, *supra* note 108, at 11.

307. See *Jones*, 392 U.S. at 440–41.

308. See *id.* at 440.

309. 403 U.S. 88 (1971).

310. See *id.* at 105 (holding that Congress was within its power to create 42 U.S.C. § 1985(3) (2006)); see also 42 U.S.C. § 1985(3) (2006) (creating a federal cause of action for damages for conspiracies to deprive any person “of the equal protection of the laws, or of equal privileges and immunities under the laws”).

311. 427 U.S. 160 (1976).

312. *Id.* at 173–75.

*Greene*<sup>313</sup> that a city's decision to close a street did not impose a badge of slavery on black motorists, living in a nearby subdivision, who regularly used that road.<sup>314</sup>

The most notable analysis from the lower federal courts regarding the meaning of "badges and incidents of slavery" is found in *United States v. Nelson*,<sup>315</sup> in which the Second Circuit upheld a Civil Rights Era anti-intimidation law as valid Section 2 legislation. The statute, 18 U.S.C. § 245(b)(2)(B), criminalizes the use of force motivated by animus against the victim's race, color, religion, or national origin, and by the victim's use of public facilities or programs.<sup>316</sup> The court found that such violence had "a long and intimate historical association with slavery and its cognate institutions."<sup>317</sup> Moreover, after the Civil War, private violence continued and intensified, directed at African Americans who attempted to exercise civil rights in public places.<sup>318</sup> Thus, the court concluded that Congress could rationally have determined that "interfering with a person's use of a public [facility] because he is black is a badge of slavery."<sup>319</sup>

In the growing body of Thirteenth Amendment literature, academics have asserted that many modern forms of oppression are badges and

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313. 451 U.S. 100 (1981).

314. *See id.* at 126. Notably, there was no congressional finding in this case to which the Court could defer. Rather, the Court was faced with the argument that Section 1 itself outlawed the badges and incidents of slavery. Rather than decide that issue, the Court simply stated that the city's decision did not constitute a badge or incident. *See id.* at 125–26. Justice Marshall dissented, arguing that the street closing "obviously damage[d] and stigmatize[d]" African Americans and therefore that it amounted to a "badge or incident of slavery forbidden by the Thirteenth Amendment." *Id.* at 153, 154 n.18. In *Palmer v. Thompson*, the Court did not resolve whether a city's decision to close its public swimming pools rather than desegregate them imposed a badge of slavery on African Americans. *See* 403 U.S. 217, 227 (1971).

315. 277 F.3d 164 (2d Cir. 2002).

316. *See* 18 U.S.C. § 245(b)(2)(B) (2006) (criminalizing the use of force to "injur[e] . . . any person because of his race, color, religion or national origin and because he is or has been participating in or enjoying any [state or local government] benefit, service, privilege or program").

317. *Nelson*, 277 F.3d at 189 (citing RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 30 (1977); Andrew Fede, *Legitimized Violent Slave Abuse in the American South, 1619–1865: A Case Study of Law and Social Change in Six Southern States*, 29 AM. J. LEGAL HIST. 93, 95 (1985)) (noting that violence was central to the slave system and sanctioned by southern law in order to promote white supremacy).

318. *See id.* at 190 (citing ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877*, at 119).

319. *Id.* (quoting *United States v. Bledsoe*, 728 F.2d 1094, 1097 (8th Cir. 1984)). *Nelson* upheld the convictions of two African American men for stabbing an orthodox Jewish man on a city street because he was Jewish. *See id.* at 169–71. The Court determined that Section 1's ban on slavery applied to Jews, regardless of race. *See id.* at 179–80. The Court assumed that private violence aimed at Jewish people is a badge of slavery that Congress could target under Section 2. *See id.* at 190–91. For a cogent critique of the court's reasoning on this final point, see William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1360–61 (2007).

incidents of slavery and thus subject to federal regulation. These “badges and incidents” relate in varying degrees to the legacy of slavery. Professor William Carter, Jr., has argued that any form of discrimination or subordination that was essential to the slave system or to postemancipation attempts at reenslavement is a badge or incident of slavery.<sup>320</sup> Professor G. Sidney Buchanan has offered a much more expansive definition, claiming that “any act motivated by arbitrary class prejudice” is a badge of slavery.<sup>321</sup> Other authors have asserted that discrimination against women<sup>322</sup> and gays,<sup>323</sup> as well as restrictions on reproductive rights,<sup>324</sup> are badges and incidents of slavery.<sup>325</sup>

Thus, the concept of badges and incidents of slavery has a range of possible meanings. It could refer to the essential legal components of slavery,<sup>326</sup> to a broader set of legal and social practices associated with slavery,<sup>327</sup> or, most broadly, to any modern manifestation of bias and discrimination.<sup>328</sup> It could be associated solely with discrimination against African Americans, with racial discrimination generally, or, most broadly, with discrimination against any oppressed class of people. Because *Jones* allows Congress to define, as well as legislate, regarding the badges and

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320. See Carter, *supra* note 319, at 1367. Carter argues that race-based peremptory jury challenges, racial profiling, hate crimes, housing discrimination, inequality in the administration of criminal and civil justice, and systematic denial of equal education opportunities qualify as badges and incidents. See *id.* Generally, in Carter’s view, the targets of a badge or incident of slavery are African Americans, although it is possible to conceive some forms of conduct that, by their nature, are so linked to the slave system—such as hate crimes and racial profiling—that they are badges and incidents of slavery, no matter who the target is. See *id.* at 1369–76; see also Amar, *supra* note 2, at 158 (arguing that racist cross burnings are a badge and incident of slavery because “if mere refusal to deal with another on the basis of race can constitute a badge of servitude, surely . . . the intentional trapping of a captive audience of blacks, in order to subject them to face-to-face degradation and dehumanization on the basis of their race,” also qualifies).

321. G. Sidney Buchanan, *The Thirteenth Amendment and the Badge of Slavery Concept: A Projection of Congressional Power*, in *THE QUEST FOR FREEDOM: A LEGAL HISTORY OF THE THIRTEENTH AMENDMENT* 175, 177 (1976).

322. See Sager, *supra* note 25, at 152–53; see also Emily Calhoun, *The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination*, 61 MINN. L. REV. 313, 349–62 (1977).

323. See Tedhams, *supra* note 24 (arguing that Colorado’s Amendment 2, later struck down by the Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996), created a badge or incident of slavery because it placed gay people in a subordinate status).

324. See Bridgewater, *supra* note 24, at 410–15 (2000); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990).

325. One court has rejected the argument that discrimination against the disabled is a badge and incident of slavery. See *Keithly v. Univ. of Tex. Sw. Med. Ctr.*, No. 303CV0452L, 2003 WL 22862798 (N.D. Tex. Nov. 18, 2003).

326. See Rutherglen, *supra* note 247, at 1393.

327. See Carter, *supra* note 319, at 1367.

328. See Buchanan, *supra* note 321, at 177.

incidents of slavery, subject only to minimal rationality review, the Section 2 power is arguably as narrow or broad as Congress chooses to make it. The next section explores the consequences of vesting this level of discretion in Congress.

### III. THREE POSSIBLE APPROACHES TO CONGRESS'S SECTION 2 POWER

The trajectory of the Section 2 power—from its drafting, to its implementation by Congress, to its interpretation by the courts—suggests three possible ways to understand the scope of that power. This Part discusses each approach and evaluates it from the perspectives of constitutional text, history, and structure. Ultimately, I conclude that the appropriate approach to the Section 2 power requires a limited revision of *Jones*. Section 2 does allow Congress to legislate regarding the badges and incidents of slavery. However, the power is best understood as a prophylactic power, and the concept of the “badges and incidents of slavery” is best understood as referring to a defined set of practices associated with slavery and postemancipation attempts at de facto reenslavement. Congress’s discretion, accordingly, is limited to choosing which badges and incidents of slavery to target and how to target them. *Jones*’s suggestion that Section 2 empowers Congress to define for itself the badges and incidents of slavery would create serious separation-of-powers issues if taken to its logical limit.

#### A. *The Most Restrictive Approach*

One could argue that the question of Congress’s power to enforce the Thirteenth Amendment is really quite simple: To date, the federal courts have articulated a very limited range of rights protected under Section 1 of the Thirteenth Amendment. Specifically, courts have held that the Amendment is judicially enforceable only to remedy actual slavery and involuntary servitude, defined as the “control by which the personal service of one man is disposed of or coerced for another’s benefit.”<sup>329</sup>

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329. *Bailey v. Alabama*, 219 U.S. 219, 241 (1911); *see also, e.g.*, *United States v. Kozminski*, 487 U.S. 931 (1988) (holding that “involuntary servitude” prohibited by the Thirteenth Amendment requires showing of physical force or restraint); *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926) (stating that the Thirteenth Amendment addresses only “condition[s] of enforced compulsory service of one to another”); *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896) (stating that the Thirteenth Amendment invalidated “involuntary servitude—a state of bondage; the ownership of mankind as chattel, or at least the control of the labor and services of one man for the benefit of another”); Sager, *supra* note 25, at 151 (“Section 1 of the Thirteenth Amendment abolishes slavery, but the Court clearly does not think that Section 1 empowers the judiciary to police private acts of racial intolerance.”); *cf.*

Therefore, Congress may enforce that right by passing legislation that would prevent, penalize, or remedy this conduct. Indeed, Congress has passed many such laws, prohibiting involuntary servitude,<sup>330</sup> the slave trade,<sup>331</sup> peonage,<sup>332</sup> and forced labor,<sup>333</sup> and banning related conduct such as kidnapping or removing official documents for the purpose of keeping a person in slavery, peonage, or involuntary servitude.<sup>334</sup> However, in the name of enforcing the individual right to be free from coerced labor, Congress may not legislate on the badges and incidents of slavery, either as historically understood or as reconceptualized to reach modern-day forms of discrimination and bias.

This text-based interpretive approach echoes one Justice Scalia recently offered in the Fourteenth Amendment context in *Tennessee v. Lane*.<sup>335</sup> He looked to the 1860 edition of Noah Webster's American Dictionary of the English Language, which defined "enforce" as: "To put in execution; to cause to take effect; as, to *enforce the laws*."<sup>336</sup> Thus, he argued, the grant of enforcement power limits Congress purely to passing laws that "proscribe, prevent, or 'remedy'" conduct that independently violates the Constitution,<sup>337</sup> and does not, as a general matter, permit Congress to enact "prophylactic legislation."<sup>338</sup>

As a textual matter, Justice Scalia's argument fits the Thirteenth Amendment well. The language of Section 1 does not, on its face, invite

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*Sterier v. Bethlehem Area Sch. Dist.*, 987 F.2d 989 (3d Cir. 1993) (holding that mandatory community service programs do not violate Thirteenth Amendment). On occasion, the Court has acknowledged the possibility that Section 1's self-executing right might be broader than its literal terms and extend to things like the badges and incidents of slavery, but has gone no further than noting and refusing to foreclose that possibility. See *City of Memphis v. Greene*, 451 U.S. 100, 125 (1981) (noting that Congress's enforcement power "is not inconsistent with the view that the Amendment has self-executing force"); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) ("Whether or not the [Thirteenth] Amendment *itself* did any more than [abolish slavery] is a question not involved in this case."). But see *Hodges v. United States*, 203 U.S. 1, 27 (1906) (Harlan, J., dissenting) ("[B]y its own force, [the Thirteenth] Amendment destroyed slavery and all its incidents and badges.").

330. See 18 U.S.C. § 1584 (2006). Other statutes also penalize enticement and kidnapping for the purpose of keeping a person in slavery or involuntary servitude, see *id.* § 1583, and prohibit the removal of official documents for the purpose of keeping a person in slavery, peonage or, involuntary servitude, see *id.* § 1592.

331. See *id.* §§ 1585–1588. The use of vessels in the slave trade is specifically prohibited as well. See *id.* § 1582.

332. See *id.* § 1581 (criminal provision); 42 U.S.C. § 1994 (2006) (civil provision).

333. See 18 U.S.C. § 1589 (2006).

334. See *id.* §§ 1583, 1592.

335. 541 U.S. 509 (2004).

336. *Id.* at 559 (Scalia, J., dissenting) (citing J. WORCESTER, *DICTIONARY OF THE ENGLISH LANGUAGE* 484 (1860)) ("To put in force; to cause to be applied or executed; as, 'To enforce a law.'").

337. *Id.*

338. *Id.*

broad-ranging interpretation. Its proscription of slavery and involuntary servitude is precise, not “vague and elastic,” as Justice Frankfurter once described the Constitution’s “[g]reat concepts” that were “purposefully left to gather meaning from experience.”<sup>339</sup> Given the Court’s limited interpretation of that language, Congress is left with the power to “proscribe, prevent, or ‘remedy’” coerced labor. Nothing more, nothing less.

This approach finds some support in the historical record. In the congressional ratification debates, two prominent supporters of the Amendment—Senators Trumbull and Henderson—stated that the only right conveyed by Section 1 was physical freedom.<sup>340</sup> Even though Senator Trumbull also indicated that the Section 2 power would track *McCulloch*,<sup>341</sup> this is not inconsistent with finding that the “appropriate” substantive end toward which Congress can legislate is limited to the eradication of coerced labor. The state ratification debates also suggest a limited view of Congress’s enforcement power. Recognizing the potential implications of Section 2, South Carolina, Alabama, and Louisiana issued reservations that Congress lacked power to legislate on the “political status” or “civil relations” of the former slaves.<sup>342</sup> Just as the narrowest grounds offered in support of a court’s judgment can form the court’s holding,<sup>343</sup> one could argue that these states’ understanding of Section 2 necessarily limits the scope of Congress’s power.<sup>344</sup> Indeed, as George Rutherglen has observed, “the marginal votes necessary to obtain the two-thirds majorities necessary in Congress [and in the legislatures of the

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339. *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting). Frankfurter’s examples of great constitutional concepts were the Commerce Clause and the Due Process Clause.

340. *See* CONG. GLOBE, 38TH CONG., 1ST SESS. 1314 (1864) (Sen. Trumbull); *see also id.* at 1465 (Sen. Henderson).

341. *See id.* at 553, 1313; *see also supra* text accompanying notes 165–66.

342. *See supra* notes 179–80 and accompanying text.

343. *See* *Marks v. United States*, 430 U.S. 188 (1977).

344. On the other hand, even though the votes of South Carolina, Alabama, and Louisiana were necessary for ratification in the sense that they triggered Secretary of State Seward’s December 18 ratification pronouncement, they were not ultimately necessary for the Amendment’s ratification. By the end of January 1866, five other states (Oregon, California, Florida, Iowa, and New Jersey) had voted to ratify the Amendment without reservation. *See* U.S. CONST. amend. XIII, *reprinted in* U.S.C.A. HISTORICAL NOTE, at LXVI (2006) (setting forth ratification information for Thirteenth Amendment). Four other states have voted to ratify as well: Texas, Delaware, Kentucky, and Mississippi. *See id.* (noting Mississippi’s 1995 ratification of the Amendment). Florida, however, issued a reservation similar to South Carolina’s. *See* EDWARD MCPHERSON, *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION* 24–25 (1871).

ratifying states] were based on a severely limited view of congressional power to enforce the Amendment.”<sup>345</sup>

The limited view finds more support in the debates over the Civil Rights Act of 1866, when the Act’s opponents uniformly argued that the Act exceeded the Section 2 power because it went beyond actual slavery and involuntary servitude. While this view did not prevail—the Act passed over these objections—the subsequent ratification of the Fourteenth Amendment and the 1870 reenactment of the Civil Rights Act gives credence to the comments of Senator Poland and Representative Raymond regarding residual doubt about Congress’s power to pass the bill, even among those who voted for it in the first instance.<sup>346</sup>

From a structural standpoint, restricting the permissible scope of Congress’s enforcement efforts is appealing for its formalism and clarity. It respects federalism by limiting the extent to which federal legislation can displace the general state police power. Indeed, this was a major concern of opponents of both the Thirteenth Amendment and the Civil Rights Act of 1866. Furthermore, limiting Congress’s enforcement efforts to purely nonsubstantive remedial measures has appeal as a formal separation-of-powers matter. Because Section 2 legislation would be limited to efforts to vindicate Section 1 of the Thirteenth Amendment as interpreted by the Supreme Court, this view is highly respectful of judicial supremacy. Moreover, it provides clear parameters for congressional action.

Still, there are substantial drawbacks to this position. As a historical matter, this is not necessarily the best representation of the original meaning of the Section 2 power if one is willing to look beyond the ratification debates. The passage of the Civil Rights Act, however close, indicates that a broader view of Section 2 prevailed among members of Congress. As a structural matter, this position appears to limit Congress’s power unnecessarily. The *City of Boerne* Court, which was clearly motivated by separation-of-powers concerns and a desire to preserve judicial supremacy, explicitly preserved a prophylactic role for Congress in enforcing the Fourteenth Amendment.<sup>347</sup> Thus, *City of Boerne* indicates that separation-of-powers principles do not demand a literal approach to enforcement legislation. Moreover, the restrictive view would be a major departure from precedent. Every Supreme Court case (save *Hodges*<sup>348</sup>) to

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345. Rutherglen, *supra* note 108, at 8.

346. See *supra* notes 238–39 and accompanying text.

347. See *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

348. *Hodges*, of course, espoused the “pure enforcement” view. However, *Hodges* was a notable

consider the Section 2 power accepts that Congress's power extends to legislation concerning the badges and incidents of slavery.<sup>349</sup> Thus, the principle of *stare decisis* would counsel against the restrictive view.<sup>350</sup>

The consequences of taking the restrictive view of Congress's Section 2 power would be substantial in theory: *Jones* would be overruled and *Hodges* restored. Yet, in practice, the consequences would be fairly limited. A considerable amount of Section 2 legislation, including the Anti-Peonage Act and criminal prohibitions on slavery and involuntary servitude,<sup>351</sup> is pure enforcement legislation and thus would remain intact. Moreover, much of the civil-rights-related legislation that Congress has passed under the Thirteenth Amendment—from the Civil Rights Act of 1866 to the Fair Housing Act—likely would be sustained as appropriate legislation under the Commerce Clause.<sup>352</sup>

### B. The Broadest Approach

On the opposite end of the spectrum, the most generous approach to Congress's Section 2 enforcement power is that of *Jones*. By permitting Congress both to define and legislate regarding the badges and incidents of slavery, *Jones* arguably placed in Congress's hands the power to define

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departure and was overruled by *Jones*.

349. See *supra* Part II.B.

350. The principle of *stare decisis* has much clearer application in this context than it does with respect to the question of whether *Jones* should be modified or retained. Cf. *infra* note 391 (applying *stare decisis* analysis to *Jones*). Congress has repeatedly relied on the premise that Section 2 permits more than just remedial legislation. See *supra* notes 45–55 and accompanying text (describing statutes). Indeed, the Civil Rights Act of 1866 itself demonstrates that a more generous understanding of the Section 2 power was historically necessary for Congress to secure the Thirteenth Amendment's promise of freedom. See *supra* notes 182–86, 195, 200 and accompanying text (describing context and rationale of the Act). Although the concept of the badges and incidents of slavery deserves further exegesis, and the relative roles of Congress and the courts with respect to identifying the badges and incidents of slavery require further clarification, the basic idea that Section 2 empowers Congress to address the badges and incidents of slavery warrants continued respect. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (plurality opinion) (stating that the application of *stare decisis* depends on a rule's workability, reliance value, factual underpinnings, and doctrinal consistency). Even Justice Scalia has recognized an important role for *stare decisis* in evaluating the scope of Congress's enforcement power in matters pertaining to race. Although he would dispense with prophylactic legislation as a general matter, he has recognized that Congress generally has broader discretion to combat racial discrimination. See *Tennessee v. Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting).

351. See *supra* notes 38–44 and accompanying text.

352. The viability of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act would be a closer question. At the very least, the provisions on race-based crimes would have to be rewritten to mirror the act's provisions with respect to hate crimes based on gender and sexual orientation. Even with those revisions, however, it is not entirely clear whether the statute will withstand scrutiny; cf. *United States v. Morrison*, 529 U.S. 598 (2000).

the substantive reach of the Thirteenth Amendment itself. Because the concept of the badges and incidents of slavery is sufficiently ambiguous and its potential reach so broad, Congress could use its definitional power to “expand the ends that could be achieved under the Thirteenth Amendment, moving from abolition of the narrowly defined incidents of slavery to prohibiting the badges of continued racial discrimination,” as well as discrimination on other bases.<sup>353</sup> Thus, it is possible to read *Jones* as ceding both substantive and remedial power to Congress and opening the possibility that the Thirteenth Amendment will be treated as a source of general federal power to pass civil rights legislation.

Read in this light, *Jones* is akin to *Katzenbach v. Morgan*, its Fourteenth Amendment counterpart from the Warren Court era.<sup>354</sup> In *Morgan*, the Court suggested that the Fourteenth Amendment’s enforcement power would permit Congress to legislate based on its own assessment of the constitutionality of a particular practice, even if that assessment conflicted with the Court’s. While the *Morgan* Court appeared to defer to Congress’s substantive judgments as to the scope of the Fourteenth Amendment,<sup>355</sup> the *Jones* Court explicitly stated that Congress has the power to determine the full reach of the Thirteenth Amendment by defining for itself the badges and incidents of slavery. Further, just as *Morgan* was read as “clear[ing] the way for a vast expansion of congressional legislation promoting human rights,”<sup>356</sup> *Jones* has been characterized as permitting legislation to protect “against arbitrary infringement of fundamental rights.”<sup>357</sup>

Neither text nor history supports this broad reading of the Section 2 power. While the appropriate subjects of enforcement legislation may extend more broadly than the “restrictive” approach would allow, the concept of enforcement does not easily extend to reach efforts to define the substantive reach of the Amendment. Moreover, the historical record does not indicate that any of the framers of the Thirteenth Amendment contemplated, much less endorsed, such an expansive view of Congress’s

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353. Rutherglen, *supra* note 108, at 15. Moreover, if Congress may legislate regarding the badges and incidents of slavery under its power to “enforce this article,” then “this article”—Section 1 of the Amendment—presumably protects a right to be free of the badges and incidents of slavery as well. See Carter, *supra* note 319, at 1349. The Supreme Court, however, has expressly refused to consider whether Section 1 “itself did any more than [abolish slavery].” *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 439 (1968); see also *Memphis v. Greene*, 451 U.S. 100, 125 (1981).

354. 384 U.S. 641 (1966).

355. See *id.* at 653–54.

356. Archibald Cox, *The Supreme Court 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 107 (1966).

357. TSESIS, *supra* note 27, at 86.

interpretive powers. Although the most prominent supporters of the Civil Rights Act of 1866 understood Section 1 of the Thirteenth Amendment as an affirmative grant of freedom and Section 2 as a source of power to secure freedom by abolishing the incidents of slavery, there was no suggestion that the badges and incidents of slavery had an open-ended meaning, much less that Congress had discretion to set that meaning. Rather, when the terms were used, they had definite content and referred to the core attributes of the historical practice of slavery and its immediate aftermath. Senator Harlan, for example, described the “incidents” of slavery as including compulsory service, the inability to marry, interference with family relationships, the deprivation of education, the suppression of speech, the inability to acquire property, and the deprivation of any status in a court of law, either as a litigant or a witness.<sup>358</sup> Senator Trumbull used both “badges” and “incidents” of slavery to refer to “law[s] that denied civil rights to people on the basis of color.”<sup>359</sup>

In passing the Civil Rights Act of 1866, Congress used its discretion in the *McCulloch* and *Prigg* sense, namely, to choose which of the badges and incidents of slavery it would target and then to determine the means by which freedom would be ensured and the badges and incidents of slavery abolished. In other words, from the perspective of those who supported the Thirteenth Amendment and the Civil Rights Act of 1866, Congress had remedial, but not substantive, discretion.

From a structural standpoint, the propriety of the broad reading of the Section 2 power is debatable. It certainly creates serious separation-of-powers concerns by fostering institutional tension between Congress and the courts and challenging the premise of judicial supremacy, an “indispensable feature of our constitutional system.”<sup>360</sup> Indeed, the Court

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358. See CONG. GLOBE, 38TH CONG., 1ST SESS. 1439 (1864) (Sen. Harlan) (listing “[s]ome of the incidents of slavery”).

359. CONG. GLOBE, 39TH CONG., 1ST SESS. 474 (1866).

360. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); see also *United States v. Morrison*, 529 U.S. 598, 617 n.7 (2000) (“[E]ver since *Marbury* this Court has remained the ultimate expositor of the constitutional text.”); *United States v. Nixon*, 418 U.S. 683, 704 (1974) (quoting *Baker v. Carr*, 369 U.S. 186, 210–11 (1962)) (noting the “responsibility of this Court as ultimate interpreter of the Constitution”). Although judicial supremacy is established doctrine, it has been subject to substantial criticism in academic circles. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (criticizing judicial supremacy as contrary to the original understanding that individual citizens should play a role giving content to specific constitutional principles); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998) (arguing that judicial modesty, in which court decisions align with popular opinion and the views of the other branches of government, promotes greater stability than judicial supremacy); *infra* note 369 (discussing departmentalism). But see Larry Alexander & Frederick

has taken care to guard its interpretive primacy in the specific context of congressional enforcement efforts. *City of Boerne* explicitly repudiated *Morgan*'s suggestion that Congress could vindicate its own understanding of the Equal Protection Clause in the exercise of its Fourteenth Amendment enforcement powers. The Court stated that this reading of *Morgan* would give Congress unlimited power and subject the Constitution to "[s]hifting legislative majorities," instead of treating it as "superior paramount law, unchangeable by ordinary means."<sup>361</sup> The Court clarified that Congress's power to enforce the provisions of the Fourteenth Amendment does not entitle Congress to "chang[e] what the right is"<sup>362</sup> or "determine what constitutes a constitutional violation."<sup>363</sup> Thus, *City of Boerne* squarely rejected Congress's attempt to overrule the Court's earlier ruling in *Smith*, holding that the constitutional grant of enforcement power forbade such substantive efforts and permitted prophylactic legislation only to the extent that it was congruent and proportional to judicially declared rights violations.<sup>364</sup>

The broad reading of the Section 2 power raises similar concerns, as it permits Congress to prohibit conduct that the Court itself might view as consistent with, or entirely outside the purview of, Section 1 of the Amendment. To be sure, the concept of the "badges and incidents of slavery" does provide some nominal outer boundaries for congressional action. However, that concept 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. Such a definition might well withstand the highly deferential rationality review mandated by *Jones*.<sup>365</sup>

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Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (defending judicial supremacy because authoritative interpretation provides stability and coordination); Erwin Chemerinsky, *In Defense of Judicial Review*, 92 CALIF. L. REV. 1013 (2004) (critiquing popular constitutionalism and praising judicial review for providing stability and protection against tyranny of the majority); Daniel Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387 (asserting that judicial decisions interpreting the Constitution are equivalent to federal common law and therefore binding). Whoever may have the better theoretical argument, *City of Boerne* clearly signals that, as a doctrinal matter, Congress must defer to the federal courts with respect to interpreting the Reconstruction Amendments.

361. *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

362. *Id.* at 519.

363. *Id.*

364. *Id.* at 520, 532.

365. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968); see also *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (applying rationality review); cf. *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 183 (1980) (Brennan, J., dissenting) (criticizing highly deferential rational basis review because it virtually "immunizes social and economic legislative classifications from judicial review"). But see *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (striking down local

Thus, having the ability to define the concept of the “badges and incidents of slavery” could enable Congress to use its Section 2 power to “chang[e] what the right is”<sup>366</sup> that is protected by the Thirteenth Amendment—transforming it from a self-executing prohibition on coerced labor to a universal guarantee of civil rights. Accordingly, one would expect Congress’s Section 2 power and *Jones* to be cabined in the same way that *City of Boerne* cabined Congress’s Fourteenth Amendment enforcement powers. The two enforcement provisions are *in pari materia*,<sup>367</sup> and the structural concerns that drove *City of Boerne* seem equally operative in the Thirteenth Amendment context.<sup>368</sup>

Putting aside doctrinal consistency, however, one can argue that—whatever the proper rule in the Fourteenth Amendment context—giving Congress broad substantive power is uniquely appropriate in the Thirteenth Amendment context.<sup>369</sup> As Professor Larry Sager has theorized,

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zoning ordinance under rational basis scrutiny on the basis that it discriminated against the mentally retarded); *Romer v. Evans*, 517 U.S. 620 (1996) (striking down Colorado state constitutional provision under rational basis scrutiny on the basis that it was motivated by animus against gays).

366. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

367. See BLACK’S LAW DICTIONARY 807 (8th ed. 2004) (“on the same subject; relating to the same matter”).

368. See Amar, *supra* note 25, at 822; Sager, *supra* note 25, at 152 (“Section 5 of the Fourteenth Amendment and Section 2 of the Thirteenth Amendment are structurally and formally parallel provisions, and the division of authority between the Court and Congress in one ought to hold in the other as well.”); see also Caminker, *supra* note 25, at 1198 (noting that it is possible that “the Court might be inclined . . . to let its new-found concern for means-ends rigor bleed over into any future constructions of the scope of executory Article I and other powers as well”). Certainly, *City of Boerne*’s rationale of wanting “to protect the judiciary’s actual or apparent interpretive supremacy concerning the scope of constitutional rights appl[ies] equally to support heightened constraints on congressional power across the board,” including in the Section 2 context. *Id.* The broad discretion given Congress in *Jones* raises similar red flags about the separation of powers and preservation of judicial supremacy. *Id.*

369. The willingness of the *Jones* (and *Morgan*) Court to entrust Congress with wide discretion in enforcing the Thirteenth Amendment is, at a very basic level, consistent with the departmentalist emphasis on interpretive coordinacy. In contrast to the Court’s own strong declarations of its interpretive supremacy, departmentalist scholars long have emphasized the interpretive competence of the legislative and executive branches. See, e.g., Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 988 (1987) (rejecting the proposition that “the Court’s constitutional interpretations . . . mean[] the same as the Constitution itself”); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 225–26 (1994) (same). Given the coequal and coordinate nature of the three branches of the federal government, they argue that each branch should have independent authority and responsibility for interpreting the Constitution “within the spheres of their enumerated powers.” *Id.* at 218; see also Meese, *supra*, at 985–86; cf. THE FEDERALIST NO. 49, at 282 (James Madison) (Clinton Rossiter ed., 1999) (stating that no branch “can pretend to an exclusive or superior right of settling the boundaries between their respective powers”); THE FEDERALIST NO. 78, at 435–36 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (declaring that judicial review does not “by any means suppose a superiority of the judicial to the legislative power”). One could argue that Congress has the best institutional capacity to answer fact-specific questions about what conditions are badges or incidents of slavery. See *United States v. Nelson*, 277 F.3d 164,

the judiciary underenforces certain constitutional norms out of concern about judicial restraint and deference to the decisions of elected officials.<sup>370</sup> In such instances, Sager argues, it is appropriate for Congress to fill the gap between the judicial explication and the full conceptual reach of the constitutional provision.<sup>371</sup> Moreover, courts should defer to congressional interpretive efforts in order to facilitate constitutional development.<sup>372</sup>

The broad reading of the Section 2 power seems to fit well with Sager's underenforcement thesis.<sup>373</sup> If the Thirteenth Amendment indeed is an affirmative guarantee of freedom, there is a substantial conceptual gulf between that promise and the Court's limited holdings regarding the scope of Section 1's self-executing right. Indeed, *Jones* explicitly left open the question of Section 1's independent reach;<sup>374</sup> the Court has not foreclosed the possibility that the Section 1 right might extend beyond what the Court's current holdings would allow. Moreover, the Court's willingness to defer to Congress's definition of the badges and incidents of slavery indicates the Court's own acquiescence (*imprimatur*, even) in a scheme under which the two coordinate branches share substantive responsibility for bringing the Thirteenth Amendment's promise to fruition. The Court may well have determined that Congress is better situated as an institution to assess and respond to the legacy of slavery and the entrenchment of racial bias and violence.<sup>375</sup> Indeed, by focusing

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185 n.20 (2002) ("the task of defining 'badges and incidents' of servitude is by necessity . . . inherently legislative"); *see also* Carter, *supra* note 319, at 1353–54; *cf.* *United States v. Kozminski*, 487 U.S. 931, 951 (1988) (referring to "the inherently legislative task of defining 'involuntary servitude'").

370. Sager, *supra* note 84, at 1216–18; *see also* McConnell, *supra* note 137, at 156 ("[W]hen Congress interprets the provisions of the Bill of Rights for purposes of carrying out its enforcement authority under Section Five, it is not bound by the institutional constraints that in many cases lead the courts to adopt a less intrusive interpretation from among the textually and historically plausible meanings of the clause in question.").

371. Sager, *supra* note 84, at 1239–40.

372. *See id.* at 1241–42.

373. Sager has stated that "[t]he underenforcement model . . . explains . . . the disparity between the self-executing provisions of the Thirteenth Amendment and Congress's considerably more vast power under Section 2 of that Amendment to outlaw the 'relics of slavery.'" Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 433 (1993); *see also* Sager, *supra* note 84, at 1219 n.21 ("[T]he great disparity between the scope of § 1 and § 2 of the thirteenth amendment is that the court has confined its enforcement of the Amendment to a set of core conditions of slavery, but that the amendment itself reaches much further; in other words, the thirteenth amendment is judicially underenforced.").

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

375. *See* Carter, *supra* note 319, at 1353–54 (noting that allowing Congress to define the badges and incidents of slavery permits for democratic consideration and public debate about the legacy of slavery and the appropriate approach to racial discrimination); Note, *supra* note 153, at 1302 ("As

Congress's efforts on the badges and incidents of slavery and reserving the power of judicial review, however deferential, the Court arguably set enforceable boundaries for Congress's actions while, at the same time, providing Congress with substantial interpretive leeway. Thus, *Jones*, broadly read, arguably lays the groundwork for an important and productive constitutional dialectic between coequal and coordinate federal branches.

Still, this Sagerian account of the Section 2 power does not alleviate all the separation-of-powers concerns outlined above. First, the Amendment arguably is not underenforced at all. The ratification debates reveal that at least some supporters of the Amendment believed that its sole effect was the abolition of slavery and similar practices.<sup>376</sup> From this point of view, the Court's decisions explicating the Section 1 right are coextensive with the theoretical scope of that right. If so, the Court in *Jones* ceded its power to Congress, and any substantive expansion by Congress will go beyond the actual meaning of the Thirteenth Amendment.

Second, even if the Section 1 right is broader than the Court's current case law admits, it is not at all clear that the Court can validly enlist Congress as a partner in expanding the reach of Section 1. The Section 2 power is clearly akin to the enforcement power as explained in *McCulloch*, which gives Congress wide discretion only as to the means by which constitutional ends will be enforced. In *Jones*, the Court essentially granted an aspect of the judicial power to Congress by giving Congress power to define the ends of the Thirteenth Amendment as well.

With respect to federalism, most of the Court's post-*Boerne* decisions have confronted legislation in which Congress attempted to use its Fourteenth Amendment enforcement powers to abrogate state sovereign immunity.<sup>377</sup> This context raises concern about safeguarding state sovereignty and protecting the public fisc. The Court has been protective of these interests and has crafted the congruence and proportionality test to ensure that prophylactic legislation stays within narrow bounds.

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modern perceptions of [the evils associated with slavery] grow, the response may take on an increasingly broader scope."); Mark D. Rosen, *Was Shelley v. Kramer Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 485 n.183 (2007) (noting that Congress is better suited to determine "what qualifies as a badge or incident or slavery" because that "likely turns on highly fact-sensitive considerations that are likely to change over time with shifts in communities' socioeconomic status and changes in cultural sensibilities").

376. See *supra* notes 158–59 and accompanying text.

377. See, e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Title I of the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act).

This particular federalism concern doesn't present itself in the Thirteenth Amendment context,<sup>378</sup> as Congress has not—at least to date—used its Thirteenth Amendment enforcement power to authorize suits against states. Rather, Thirteenth Amendment legislation generally targets private, individual action.<sup>379</sup> However, legislation that controls private conduct raises a separate federalism concern, namely, that Congress could attempt to exercise such a high degree of control over private citizens that it will transform the Thirteenth Amendment enforcement power into a general police power at the expense of the states.<sup>380</sup> Indeed, at the time of ratification, one of the principal concerns voiced by the opponents of the Thirteenth Amendment, and Section 2 in particular, was that it would destroy the federal-state balance and enable Congress to legislate on matters traditionally falling under the purview of the state's police powers.<sup>381</sup>

It is certainly true that all of the Reconstruction Amendments intentionally altered the federal-state balance, and that the Thirteenth Amendment, in particular, has been the basis for displacing some state laws. The Civil Rights Act of 1866, for example, negated the Black Codes. However, the worst fears of the Thirteenth Amendment's opponents have not come to fruition, as Congress has been relatively restrained in the legislation it has passed pursuant to Section 2. Still, the broad reading of the Section 2 power certainly raises concerns on the federalism front. If Congress has wide latitude to both define and legislate regarding the badges and incidents of slavery, there is a heightened risk that it will attempt to regulate conduct traditionally governed by the states. The broad reading, then, potentially fosters a situation in which the federal government could stray beyond its enumerated powers and encroach on traditional state functions.

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378. Cf. Caminker, *supra* note 25, at 1198 (noting that the *City of Boerne* rationale of wanting “to protect state sovereignty values by narrowing Congress’ authority to regulate states qua states . . . [has] little direct implication for Congress’ exercise of . . . Enforcement Clause authority to regulate private behavior”).

379. See Rutherglen, *supra* note 247, at 1367.

380. Cf. Calvin Massey, *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV. 1, 40, 42 (2007) (discussing this concern in the Fourteenth Amendment context).

381. See *supra* notes 163, 169–80 and accompanying text.

*C. The Middle Approach: Taking Prophylactic Legislation Seriously*

There is a “middle approach” that takes a more limited view of the Section 2 power and of *Jones* than discussed in the previous section. Under this approach, Section 2 permits Congress to pass, not only legislation on slavery and involuntary servitude *per se*, but also prophylactic legislation to address the badges and incidents of slavery. Such prophylactic legislation is permissible because the badges and incidents of slavery arguably “threaten to interfere with judicially recognized rights,”<sup>382</sup> and, thus, their prohibition is a means toward the end of preventing slavery and involuntary servitude. However, to constitute an adequate limitation on Congress’s power, the “badges and incidents of slavery” must be understood as a term of art with a finite range of meaning that is tied closely to the core aspects of the slave system and its aftermath.

Thus, the middle approach 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.<sup>383</sup> While the judiciary will use *McCulloch*-style deference with respect to Congress’s choices, it will actively review the ends to which Section 2 legislation is aimed to ensure that Congress does not encroach on the Court’s role by substantively expanding the concept of the badges and incidents of slavery. This approach respects the proper role of the courts and Congress. It also maintains federalism by refusing to countenance efforts to use the Thirteenth Amendment as a source of federal power to enact wide-ranging civil rights protections unconnected to the legacy of slavery.

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382. Massey, *supra* note 380, at 6. *But see* Carter, *supra* note 319, at 1349–50 (“it is not readily apparent that prohibiting the lingering effects of the system of African slavery is necessary to prevent or deter the reemergence of a system of ownership of human beings”).

383. To my knowledge, nobody has suggested re-reading *Jones* and interpreting the Section 2 power in this way, although this approach admittedly draws from the principles and concerns articulated by Justice Harlan in his *Morgan* dissent with respect to the Fourteenth Amendment enforcement power. *See supra* notes 87–90 and accompanying text. Professor Amar once noted—in the context of critiquing *City of Boerne*—that the Thirteenth Amendment concept of the “badges and incidents of slavery” identifies a desirable “middle ground” where “Congress has less than plenary and more than remedial power.” Amar, *supra* note 25, at 824. While I agree with this statement to the extent that it aligns with my view of Congress’s prophylactic legislative power, *see supra* text accompanying note 382, I do not share Professor Amar’s sense that *Jones*—with its grant of substantive definitional power and highly deferential standard of review—in fact cabins Congress’s discretion in a meaningful way. *See* Amar, *supra* note 25, at 823–24.

The historical record contains considerable support for this view of the Section 2 power.<sup>384</sup> Despite vocal opposition, the predominant understanding of the Section 2 power articulated in the 1866 debates was that it permitted a federal response to the southern Black Codes—state and local laws that sought to reinvigorate some of the incidents of slavery, including restrictions on the rights of African Americans to enter into contracts, convey property, and access local courts. Legislators viewed the Black Codes as incompatible with the Thirteenth Amendment’s abolition of slavery (and, perhaps, its tacit promise of freedom), and conceived the Civil Rights Act of 1866 as a means of cementing the demise of the slave system. As Representative James Wilson said, “[a] man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery.”<sup>385</sup>

The Civil Rights Act of 1866 thus exemplifies the contours of the Section 2 power as originally understood. First, the substantive end toward which Congress may legislate includes the abolition of slavery and the prevention of its *de facto* reemergence. Second, to that end, Congress may provide federal protection against laws and practices that impose the badges and incidents of slavery. Such protection is prophylactic in the sense that it targets conduct beyond actual enslavement, but does so in order to cement the demise of slavery and to ensure a system in which all people can engage in the basic transactions of civil life, regardless of race.

Third, there are limits as to how far Congress may legislate in this prophylactic sense. The appropriate targets for prophylactic legislation are the “incidents to slavery” and the “badges of servitude.” These concepts include (as Senators Trumbull and Harlan explained) race-based restrictions on contract and property rights and access to the courts, as well as legal impediments to education, free speech, and family integrity.<sup>386</sup> Although there may be additional “incidents” and “badges” of slavery that Congress can address, it is clear that these concepts do not refer to every legal deprivation or private act that disadvantages African Americans, much less other minority groups.<sup>387</sup> For example, even the most ardent supporters of the Act denied that Congress would have the power to

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384. This is true if one assumes that the debates regarding the Civil Rights Act of 1866 are relevant to a proper understanding of the scope of the Section 2 power. *See supra* notes 241–45 and accompanying text.

385. CONG. GLOBE, 39TH CONG., 1ST SESS. 1118 (1866).

386. *Id.* at 322, 323; *see also id.* at 474, 1439–40.

387. Articulating a precise definition is beyond the scope of this piece, although George Rutherglen and Chip Carter have done interesting work on this issue. *See supra* Part II.C. My sense is that Carter’s definition, *see supra* note 320 and accompanying text, is overinclusive to the extent that he is willing to include non-race-based discrimination in the concept.

displace antimiscegenation laws or extend voting rights to African Americans.<sup>388</sup> In other words, the concept of the “badges and incidents of slavery” has a finite, historically determined range of meaning. In passing the Civil Rights Act of 1866, Congress did not invent the idea of the badges and incidents of slavery. Rather, it identified elements of preexisting concepts and crafted a legislative scheme to eradicate them.

Fourth, *McCulloch* and *Prigg*, repeatedly invoked by the Act’s sponsors, provide the proper framework for understanding the scope of Congress’s discretion under Section 2. Those cases held that Congress enjoys wide discretion to determine the means by which to pursue constitutional ends.<sup>389</sup> They did not suggest that Congress enjoys discretion to interpret the substantive provisions of the Constitution or determine proper ends. Thus, in the Thirteenth Amendment context, legislation must always be directed toward the eradication, prevention, and remedy of slavery and coerced labor. This goal is set by Section 1 of the Amendment, as interpreted by the Supreme Court. Congress, however, has wide discretion to determine the manner in which it will achieve that goal. It may decide that legislation outlawing the practices at the core of the slave system and its aftermath—the badges and incidents of slavery—is a necessary prophylactic step, and it may decide which badges and incidents of slavery to address and how to address them. However, that prophylactic power does not permit Congress to expand the definition of the badges and incidents of slavery or engage in substantive interpretive efforts.

Viewed in this light, the Civil Rights Act of 1866 was a remedial step within the discretion of Congress. The end of the law—preventing the *de facto* reemergence of slavery—was clearly within the meaning of Section 1 of the Amendment. To that end, Congress decided to preempt laws and practices that sought to reimpose some of the incidents of slavery on the recently freed slaves. The laws and practices targeted by the Act—deprivation of status to freely contract, convey property, and access the

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388. See, e.g., CONG. GLOBE, 38TH CONG., 2D SESS. 202 (1865) (Rep. McBride) (“A recognition of natural rights is one thing, a grant of political franchises is quite another. We extend to all white men the protection of law when they land upon our shores. We grant them political rights when they comply with the conditions which those laws prescribe. If political rights must necessarily follow the possession of personal liberty, then all but male citizens in our country are slaves.”).

389. See *supra* text accompanying notes 65–72. Of course, some are skeptical that *McCulloch* imposes any meaningful limits on the power of Congress. See, e.g., 1 ANNALS OF CONG. 1948–49 (Joseph Gales ed., 1791) (speech of James Madison) (“If implications . . . can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.”). But see J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 623 (2002) (arguing that *McCulloch* “require[s] a relatively close proximity between a legislative measure and the enumerated powers of Congress”).

courts—were undeniably historical incidents of the slave system. Thus, Congress’s decision to target those specific practices, and to do so by creating federally enforceable rights and remedies, was a discretionary choice due great deference under *McCulloch* and *Prigg*. In other words, the passage of the Civil Rights Act of 1866 evidences that Section 2 empowers Congress to legislate as an act of remedial discretion, but not to engage in substantive constitutional interpretation.

How, then, are the courts today to evaluate the propriety of modern-day Section 2 legislation? How are they to determine whether a law is truly prophylactic? The key appears to lie in the definition of the “badges and incidents of slavery,” or at least the identification of the outer boundaries of this concept. Contrary to *Jones*, this ultimately is a task for the courts, not Congress. Congress, of course, may assert that a targeted practice is a badge or incident of slavery, and provide legislative findings that justify its conclusion. However, the first query in any Thirteenth Amendment challenge will be a rigorous assessment of whether, in fact, the conduct Congress has targeted falls within that definition. If it does, the next inquiry is the highly deferential question of whether Congress had a rational basis for the way in which it treated that particular badge or incident of slavery.<sup>390</sup>

This “middle” approach to the Section 2 power alleviates the structural constitutional concerns that have driven *City of Boerne* and its progeny. From a separation-of-powers standpoint, this approach respects the Supreme Court’s role as the authoritative interpreter of the substantive promise of Section 1. Congress’s role is to effectuate that promise by passing preventive, remedial, and even prophylactic legislation, not to engage in independent interpretive efforts. Just as *City of Boerne* recognized that prophylactic legislation is consistent with judicial supremacy, this “middle” approach is also compatible with the premise of judicial supremacy. Allowing Congress to address the badges and incidents of slavery does not allow it to deny or undercut the Court’s own

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390. The congruence and proportionality standard utilized by the Court in the Fourteenth Amendment setting does not appear to be particularly useful in the Thirteenth Amendment context. In *City of Boerne*, the Court concluded that *McCulloch* deference was not envisioned by the framers of the Fourteenth Amendment. *But see supra* note 119. The Court, therefore, devised the congruence and proportionality test to assess prophylactic legislation passed pursuant to the Fourteenth Amendment. The history of the Thirteenth Amendment, however, makes it clear that *McCulloch* and *Prigg* were meant to guide subsequent judicial efforts. The key for Thirteenth Amendment purposes, then, is to apply that deference in the proper setting, namely, with respect to Congress’s legislative choices. The flaw of *Jones* is that it deprived the courts of a meaningful role in identifying which subjects are truly committed to Congress’s discretion.

holdings that Section 1 of the Thirteenth Amendment eradicated slavery and prohibits coerced labor. Rather, understanding Section 2 to permit prophylactic legislation allows Congress to effectuate the promise of Section 1, as interpreted by the Court, by attacking the constituent elements of the historical system of slavery.

The “middle” approach to the Section 2 power also cabins the risks to federalism that the “broad” approach raised. Of course, the Reconstruction Amendments effected a clear and intentional shift in the federal-state balance, securing federal power to displace certain oppressive and discriminatory state laws and practices. Indeed, the ratification of the Thirteenth Amendment and the passage of the Civil Rights Act of 1866 demonstrate Congress’s power to target state laws and private practices that perpetuate the southern system of slavery. However, Section 2 does not give Congress power to target any law or practice it finds objectionable. By limiting the range of prophylactic measures Congress can take in the name of eliminating the badges and incidents of slavery, the “middle” view ensures that Congress acts within its enumerated powers and does not unduly encroach on the general state police power.

The “middle” view is not without its own downsides and institutional costs. It maintains only elements of *Jones* and thus does not abide completely by the principle of *stare decisis*.<sup>391</sup> Moreover, by reasserting its power to review the ends of Thirteenth Amendment legislation, the Court certainly runs the risk of antagonizing Congress. Despite these costs, however, this approach to the Section 2 power best accounts for the history, text, and structural consequences of the Amendment.

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391. The factors governing the *stare decisis* analysis do not yield a clear answer with respect to whether *Jones* warrants reconsideration regarding its allocation of substantive definitional power to Congress. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (plurality opinion) (outlining four factors). On one hand, *Jones* has proven workable and capable of modern application, see *id.* at 854–55, as Congress continues to pass laws under its Section 2 power. See *supra* notes 49–55 and accompanying text. On the other hand, Section 2 legislation since *Jones* has been relatively rare, and it is hard to say that *Jones* is “subject to a kind of reliance” that warrants special solicitude. See *Casey*, 505 U.S. at 854. Ultimately, the decisive factor is likely to be whether *Jones*—or, at least, the portion of *Jones* that allows Congress to define the badges and incidents of slavery—is a “remnant of abandoned doctrine.” *Id.* at 855. *City of Boerne* marks a clear jurisprudential shift on this issue away from the Warren-Court-era line of cases of which *Jones* is a part. See *supra* notes 137–45 and accompanying text. The next few years are likely to reveal whether the Court is willing to extend the *City of Boerne* rule—or, at least, the structural principles underlying that decision—to the other Reconstruction Amendments’ enforcement provisions. See *supra* notes 22, 146 (describing recent challenge to the Fifteenth Amendment enforcement power). Given this mixed analysis, my proposal depends more on the merits of *Jones*, rather than the “prudential and pragmatic considerations” related to *stare decisis*. *Casey*, 505 U.S. at 854.

## CONCLUSION

Since the Supreme Court decided *Jones* in 1968, courts and commentators alike have assumed that Congress has broad power to enforce the Thirteenth Amendment. Under *Jones*, Congress not only can act to prevent and remedy the condition of coerced labor; it also can define and regulate the badges and incidents of slavery subject only to rational basis review in the courts. This latter aspect of the *Jones* conception of the Section 2 power is problematic. Giving Congress substantive power to define the badges and incidents of slavery is not consistent with the text or history of Section 2 of the Thirteenth Amendment. Moreover, as *City of Boerne* and its progeny make clear, there are real separation-of-powers and federalism concerns that arise from giving Congress such substantive power. Accordingly, this piece argues that the best reading of the Section 2 power—from the perspectives of text, history, and structure—is one that allows for prophylactic legislation on the badges and incidents of slavery, but also regards that concept as having a determinate range of meaning over which courts can exercise meaningful supervision.