

CONGRESSIONAL AUTHORITY TO INTERPRET THE THIRTEENTH AMENDMENT: A RESPONSE TO PROFESSOR TESIS

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In his essay “Congressional Authority to Interpret the Thirteenth Amendment,”¹ Alex Tsesis has responded to my article, “The Scope of Congress’s Thirteenth Amendment Enforcement Power After *City of Boerne v. Flores*.”² I hope to take this opportunity to further that dialogue, clarifying my own position and challenging Professor Tsesis’s arguments where necessary. Despite our disagreements, I believe we share a common purpose, namely, to provide useful and constitutionally sound guidance for Congress in the exercise of its Thirteenth Amendment enforcement power. I conclude this piece by suggesting some areas that are ripe for further exploration in pursuit of that goal.

I. The Section Two Power: Three Models

At the outset, let me summarize the context, inquiry, and arguments of my earlier article. Section Two of the Thirteenth Amendment gives Congress the power “to enforce this article by appropriate legislation.”³ Since the *Civil Rights Cases* in 1883, the Supreme Court has maintained that this provision empowers Congress not simply to pass laws outlawing slavery and involuntary servitude, but “to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”⁴ In *Jones v. Alfred H. Mayer Co.*, the Court invoked

¹ Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, available at <http://ssrn.com/abstract=1753224>.

² Jennifer Mason McAward, *The Scope of Congress’s Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U. L. REV. 77 (2010).

³ U.S. CONST. amend. XIII, § 2.

⁴ The Civil Rights Cases, 109 U.S. 3, 20 (1883).

this “canonical” language⁵ and expanded upon it, stating that Congress has “the power ... rationally to determine what are the badges and the incidents of slavery, [as well as] the authority to translate that determination into effective legislation.”⁶

Jones was part of a trio of Warren Court decisions that confirmed a generous understanding of Congress’s power to enforce the Reconstruction Amendments. In each of those cases, the Court held that *McCulloch v. Maryland* provided the basic test for measuring the propriety of congressional enactments,⁷ and that “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.⁸ *Jones* arguably went further, giving Congress discretion not only to determine what means are appropriate to enforce the Thirteenth Amendment, but arguably also to define for itself the legitimate ends of legislation, *i.e.*, the badges and incidents of slavery. As George Rutherglen has described, *Jones* expanded “the legitimate ends under the [Thirteenth 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.”⁹

As a doctrinal matter, the viability of *Jones* is in question in light of *City of Boerne v. Flores*. In that case, the Supreme Court substantially altered its approach to evaluating Fourteenth Amendment enforcement legislation. The Court clarified that the enforcement power conferred upon Congress is “‘remedial’” in nature and does not permit Congress to “decree the

⁵ George Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, in *THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT*, at 172 (Tsesis ed., 2010).

⁶ 392 U.S. 409, 440 (1968).

⁷ See *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (Fifteenth Amendment); *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966) (Fourteenth Amendment).

⁸ 17 U.S. (4 Wheat.) 316, 421 (1819).

⁹ Rutherglen, *supra* note 5, at 174.

substance of the Fourteenth Amendment’s restrictions on the States.”¹⁰ In addition to pure remedial legislation, the Court also preserved space for Congress to act prophylactically by “prohibit[ing] conduct which is not itself unconstitutional.”¹¹ However, the Court made clear that it will measure the propriety of prophylactic Fourteenth Amendment legislation by asking whether there is “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹²

City of Boerne’s decidedly non-deferential approach in evaluating Fourteenth Amendment enforcement legislation is clearly in tension with *Jones*’s extremely deferential approach, even though the enforcement provisions of the Thirteenth and Fourteenth Amendments are virtually identical.¹³ Rather than simply assume that *City of Boerne* spells the end for *Jones*, however, I decided to undertake a *de novo* assessment of the Section Two power. Just as *City of Boerne* was based in part on the Court’s reading of the Fourteenth Amendment’s drafting history and in part on the structural values of separation of powers and federalism, I set out to evaluate the proper scope of the Thirteenth Amendment enforcement power based on that Amendment’s own unique history, also informed by separation of powers and federalism principles.

I suggested three ways to conceptualize the breadth of the Section Two power: First, as a direct or “pure” enforcement power to “proscribe, prevent, or ‘remedy’” conduct that independently violates Section One.¹⁴ Second, as a “prophylactic” power to target an identifiable subset of civil rights violations -- the badges and incidents of slavery -- as a means of

¹⁰ 521 U.S. 507, 519 (1997).

¹¹ *Id.* at 519-20.

¹² *Id.* at 520.

¹³ In each, Congress is vested with the “power to enforce” each amendment and that power is limited to “appropriate legislation.” Compare U.S. CONST. amend. XIII, § 2, with U.S. CONST. amend. XIV, § 5.

¹⁴ *Tennessee v. Lane*, 541 U.S. 509, 559 (2004) (Scalia, J., dissenting).

preventing the reimposition of slavery or involuntary servitude. And third, as a broad, “substantive” power to define outright as well as eradicate the badges and incidents of slavery. I concluded that a combination of the “pure” and “prophylactic” readings of the Section Two power best comports with the text and history of the amendment as well as structural constitutional values. The third, “substantive” approach finds little, if any, support in the Amendment’s text, history, or structure.

Professor Tsesis suggests that I believe that Section Two does not convey on Congress any meaningful power to protect civil rights. This is not an accurate characterization of my position. Rather, I believe that *Jones* – and the *Civil Rights Cases* – were correct in ruling that Section Two permits Congress to pass not only “pure” enforcement legislation, but also legislation that addresses the badges and incidents of slavery. This latter type of legislation is prophylactic in the sense that it concerns conduct that does not independently violate Section One of the Thirteenth Amendment, but instead infringes on certain core civil rights. Moreover, I believe that *Jones* was correct in holding that courts owe *McCulloch*-style deference to the means by which Congress decides to attack the badges and incidents of slavery. The principal sponsors of the Amendment as well as the Civil Rights Act of 1866 clearly understood *McCulloch* to apply in the Section Two context.¹⁵

However, in my view, *Jones* was wrong to assign to Congress the substantive power to define the badges and incidents of slavery on its own, subject only to bare-bones rationality review. The historical record contains no evidence to support placing such a substantive power in Congress’s hands. The concept of the badges and incidents of slavery is not susceptible to

¹⁵ See, e.g., CONG. GLOBE, 39TH CONG., 1ST SESS. 322 (1866) (Sen. Trumbull) (“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.”).

open-ended interpretation, but rather refers to an identifiable set of public and perhaps private practices.¹⁶ Allowing Congress to label a particular practice a badge and incident of slavery without meaningful supervision by the courts is also problematic from the perspectives of separation of powers and federalism. It is not at all clear that the judiciary can validly convey an aspect of the judicial power to Congress by giving Congress power to define the ends of the Thirteenth Amendment legislation, *i.e.*, the badges and incidents of slavery. Moreover, giving Congress wide and largely unreviewable discretion to define the badges and incidents of slavery provides incentives for Congress to regulate conduct traditionally governed by the states.

Accordingly, in my earlier piece I concluded 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.¹⁷

¹⁶ See Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, Notre Dame Legal Studies Paper No. 10-22, available at <http://ssrn.com/abstract=1666967>. In that paper, I suggest that a badge and incident of slavery is "public or widespread private action, based on race or the previous condition of servitude, that mimics the law of slavery and that has significant potential to lead to the de facto reenslavement or legal subjugation of the targeted group." While a full discussion of the meaning of the badges and incidents of slavery is beyond the scope of this Essay, I believe it deserves fuller exploration elsewhere. See *infra* Part III.A.

¹⁷ McAward, *supra* note 2, at 84.

II. The Section Two Power: Three Points of Contention

A. *Section Two and the Ratification Debates*

Professor Tsisis is a strong defender of *Jones*'s approach to the Section Two power, and has suggested in other writings that Section Two provides "a means for enforcing [the nation's] foundational principles of liberty and general wellbeing."¹⁸ In his response to my piece, he grounds that approach in part in the Thirteenth Amendment's ratification debates, arguing that "[m]any of the congressional speeches on the proposed Thirteenth Amendment evidence a clear understanding that the enforcement clause would expand legislative authority into matters that had previously been reserved to the states,"¹⁹ and that through such legislation, Congress could "punish any private and public infringement against inalienable freedoms."²⁰

In fact, the members of the Thirty-Eighth Congress were quite unclear about the scope of Congress's power under the proposed Section Two. The quotes that Professor Tsisis uses to support his position do not reference the function of Section Two or the appropriate role of Congress in enforcing the Thirteenth Amendment. Representative James Wilson noted that "human equality" was the "sublime creed" of the 1776 Revolution, and that the new republic promised that "the poor, the humble, the sons of toil . . . were the peers, the equals, before the law."²¹ While Wilson identified slavery as the enemy of the Republic and urged passage of the Thirteenth Amendment as the way to "obliterate the last lingering vestiges of the slave system,"²² nowhere in that speech (or any other speech during the ratification process) did he

¹⁸ Alexander Tsisis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 309 (2004). *See also* ALEXANDER TSISIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM* 121 (2004) (suggesting that Section Two would empower Congress to provide a "federal guarantee to marry the partner of one's choice").

¹⁹ Tsisis, *supra* note 1, at 4.

²⁰ *Id.* at 6.

²¹ *See* Tsisis, *supra* note 1, at 5 & n.19 (citing CONG. GLOBE, 38TH CONG., 1ST SESS. 1319 (1864)).

²² CONG. GLOBE, 38TH CONG., 1ST SESS. 1324 (1864).

make specific reference to Congress's power to enforce the Thirteenth Amendment, much less explicate the scope of that power.

Similarly, Representative Isaac Arnold stated that the agony of the Civil War would lead to the birth of a “new nation [which] is to be wholly free. Liberty, *equality before the law* is to be the great corner-stone.”²³ He recognized that “[m]uch yet remains to be done to secure” the new nation, and urged passage of the Thirteenth Amendment as a central way to “consummate this grand revolution.”²⁴ His lofty rhetoric, however, made no mention of the Section Two power specifically, or the role of Congress more generally.

There in fact was some specific discussion regarding Section Two in the congressional ratification debates, but it is not possible to draw from those statements any clear conclusions regarding the precise scope of Congress's power. Among supporters of the amendment, Senator Lyman Trumbull and Representative Chilton White both suggested that the scope of the Section Two power was akin to that conferred by the Necessary and Proper Clause.²⁵ While this power, as explicated in *McCulloch v. Maryland*,²⁶ gives Congress substantial latitude as to the means by which the amendment should be enforced, it does not answer the related question as to what the legitimate ends of enforcement legislation should be, *i.e.*, what the scope of the right conveyed by Section One of the Amendment is. Indeed, Senator Trumbull indicated a limited view on that latter question, stating that the effect of the amendment was to “ri[d] the country of slavery.”²⁷

²³ See Tesis, *supra* note 1, at 5 & n.21 (citing CONG. GLOBE, 38TH CONG., 1ST SESS. 2989 (1864) (emphasis in original)).

²⁴ CONG. GLOBE, 38TH CONG., 1ST SESS. 2989 (1864).

²⁵ See *id.* at 553 (Sen. Trumbull) (Section Two gives Congress the power to enforce the amendment with “proper” legislation); *id.* at 1313 (Section Two empowers Congress “to pass such laws as may be necessary to carry [Section One’s ban on slavery and involuntary servitude] into effect”); CONG. GLOBE, 38TH CONG., 2ND SESS. 214 (1865) (Rep. White) (noting that the Section Two power conferred on Congress “the plenary power to pass all necessary enactments to enforce this provision of the Constitution.”).

²⁶ 17 U.S. (4 Wheat.) 316 (1819).

²⁷ CONG. GLOBE, 38TH CONG., 1ST SESS. 1314 (1864).

Conversely, other supporters of the amendment, like Senator James Harlan, took a broad view of the rights conveyed by Section One,²⁸ but did not explicitly anticipate any role for Congress in enforcing those rights.²⁹

Congressional opponents of the amendment took a much broader view of the power Section Two would convey. They predicted that Congress would use its power to “declare all State laws based on [blacks’] political inequality with the white races null and void,”³⁰ to “invade any State to enforce the freedom of the African, . . . [will elevate] the African to the august rights of citizenship . . . [and will] strik[e] down the corner-stone of the Republic, the local sovereignty of the States,”³¹ and to guarantee “the freed negro the right of franchise.”³²

The lack of clarity during the congressional ratification debates with respect to the function of Section Two – and even the precise scope of the right conveyed by Section One – is understandable. As Earl Maltz and Michael Vorenberg have both noted, the primary focus of the ratification debates was universal emancipation. That focus “did not require a definition of slavery in the abstract or a description of the difference between ‘slavery’ and ‘freedom’ at the margins.”³³ “Republicans . . . 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,

²⁸ *Id.* at 1439-40 (suggesting that the amendment abolished not only slavery, but the “necessary incidents of slavery,” including “the prohibition of the conjugal relationship,” the “abolition of the parental relation,” the inability to “acquir[e] and hol[d] property,” the deprivation of “a status in court” and “the right to testify,” the “suppression of freedom of speech and the press” and the deprivation of education).

²⁹ See MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 103 (2001).

³⁰ CONG. GLOBE, 38TH CONG., 2ND SESS. 242 (1865) (Rep. Cox).

³¹ CONG. GLOBE, 38TH CONG., 1ST SESS. 2962 (1864) (Rep. Holman).

³² CONG. GLOBE, 38TH CONG., 2ND SESS. 180 (1865) (Rep. Mallory).

³³ EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 21 (1990) (noting that the “dearth of evidence” about the full scope of Sections One and Two “is not terribly surprising”).

they saw no urgency in codifying the rights of freedom for the postwar Union.”³⁴ While understandable, though, the lack of sharp focus on the Section Two power renders the congressional ratification debates an unhelpful source for determining the intended function and scope of that power.

The states’ ratification debates might be a better source of information. It is not entirely surprising that Section Two attracted more attention in that states than in Congress. The amendment’s opponents charged that Section Two would give Congress “unlimited power,”³⁵ and permit it to “rewrite state constitutions or abolish state courts and state legislatures,”³⁶ overturn discriminatory state laws,³⁷ and legislate “over the Negroes, and white men, too, after the abolishment of slavery.”³⁸

Even more important than opposition views, however, are the views of the states that ratified the amendment, particularly South Carolina, Alabama and Louisiana. South Carolina was the first of these to ratify, although it issued a declaration 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

³⁴ See VORENBERG, *supra* note 29, at 132 (“Republicans never meant to define for future generations the exact rights guaranteed by the amendment.”). See also *id.* at 190 (“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.); *id.* 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.”).

³⁵ *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)).

³⁶ *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)).

³⁷ *Id.* at 217–18 (citing S. JOURNAL, at 390–91 (Ky. 1863–64)).

³⁸ TSEIS, *supra* note 18, at 48. Other state critics charged that Section Two would permit Congress to “eat out the vitals of the States,” see VORENBERG, *supra* note 29, 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), and “emasculate” the states, *id.* (citing Hon. William H. Green, Speech on the Proposed Amendment of the Federal Constitution Abolishing Slavery 9 (1865)).

by the proposed amendment.”³⁹ Alabama and Louisiana issued similar reservations as they ratified the Amendment.⁴⁰ Because other states ultimately voted to ratify the Thirteenth Amendment, the precise legal effect of these reservations is unclear. However, their relevance to determining the original understanding or public meaning of Section Two is certainly probative. As George Rutherglen has observed, “[i]f the marginal states most reluctant to ratify had determined the meaning of the amendment, then it would have granted Congress hardly any enforcement powers at all.”⁴¹

All in all, the Thirteenth Amendment ratification debates are of limited utility on the precise question of Congress’s power under Section Two. While it is undoubtedly true that Section Two “expand[ed] legislative authority” into *some* “matters that had previously been reserved to the states,”⁴² neither the congressional nor state debates explored meaningfully the precise contours of that power or resolved definitively that Congress could “punish any private and public infringement of inalienable freedoms.”⁴³

B. The Civil Rights Act of 1866

Of course, the ratification debates are not the only source of historic reflection on the scope of the Section Two power. Professor Tsesis assumes that the debates regarding the Civil

³⁹ VORENBERG, *supra* note 29, at 230 (citing 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 606 (1894)). Indeed, in an effort to assuage South Carolina’s delegates’ concerns, Secretary of State William Seward wrote that Section Two “is really restraining in its effect, instead of enlarging the powers of Congress.” *Id.* at 229 (quoting MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, S. EXEC. DOC. NO. 39-26, at 254 (1966)).

⁴⁰ 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.

⁴¹ Rutherglen, *supra* note 5, at 170.

⁴² Tsesis, *supra* note 1, at 4.

⁴³ *Id.* at 6.

Rights Act of 1866 are relevant to determining the original meaning of Section Two.⁴⁴ While I am somewhat ambivalent about the relevance of these subsequent debates,⁴⁵ I am more interested here in discussing Professor Tsesis’s contention that “[t]he breadth of the power Congress defined for itself through the Civil Rights Act of 1866 unequivocally signaled the creation of congressional plenary power over human rights safeguards.”⁴⁶

There is no question that the ratification of the Reconstruction Amendments effected a massive shift in federal-state relations, particularly with respect to protecting the rights of the newly freed slaves. However, the passage of the Civil Rights Act of 1866, the first piece of enforcement legislation, does not come anywhere close to proving “congressional plenary power over human rights safeguards.” Tsesis’s breathtakingly broad assertion on this point is belied by the substance of the Act itself, the congressional debates on the Act, and the subsequent ratification of the Fourteenth Amendment.

Passed to vitiate the southern Black Codes, the 1866 Act provided, *inter alia*, that

all citizens 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.⁴⁷

To be sure, the Act secured a core set of rights for the freed slaves – rights essential for participation in civil society. At the same time, the rights conveyed were by no means a complete set of civil or human rights safeguards as we might understand them today. Indeed, supporters of the Act made clear that they had no intention of extending “social” or “political”

⁴⁴ See *id.* at 3-4.

⁴⁵ See McAward, *supra* note 2, at nn. 241-246 and accompanying text (discussing “how much the debates over the Civil Rights Act and Fourteenth Amendment should inform our inquiry into the original meaning of the Thirteenth Amendment”).

⁴⁶ Tsesis, *supra* note 1, at 8.

⁴⁷ See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–1982 (2006)).

rights to the freed slaves.⁴⁸ Thus, while the 1866 Act was groundbreaking in the sense that it was the first piece of federal legislation to displace state laws in the name of protecting the rights of a racial minority, it stopped well short of safeguarding all civil or human rights.

There was heated debate over the Civil Rights Act of 1866, one principal focus of which was the question whether Section Two was a sufficient source of power for its passage. Supporters argued that the Act was necessary and proper legislation to secure the freedom conveyed by Section One. The Act's principal sponsor, Senator Lyman Trumbull, acknowledged that he had been unclear during the ratification debates about the power conveyed by Section Two,⁴⁹ but now argued that Section Two gave Congress the power "to pass all laws necessary to give effect to the provision making all persons free."⁵⁰ Toward the end of effectuating the freedom conveyed by Section One, Trumbull argued that Congress could displace laws, like the Black Codes, "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."⁵¹ Such legal restraints were the "incidents to slavery" and the "badges of servitude."⁵² Representative James Wilson, the House sponsor who aligned himself with Trumbull, clarified that Congress's power to address the Black Codes was prophylactic in nature: "A man who enjoys the civil rights

⁴⁸ For example, Senator Trumbull made clear that the bill reached "civil rights" (which he attempted to define with reference to Privileges and Immunities Clause of Article IV) but not "political rights." CONG. GLOBE, 39TH CONG., 1ST SESS. 475-76 (1865).

⁴⁹ See *id.* at 43 (responding to claim that Section Two was meant to be "restraining" in its effect upon Congress).

⁵⁰ *Id.* (noting that Congress would have such a power even without Section Two, but that Section Two was "was intended to put it beyond cavil and dispute" that Congress in fact had such a power). See also *id.* at 475 (Section Two "vests Congress with the discretion of selecting that 'appropriate legislation' which it is believed will best accomplish the end and prevent slavery").

⁵¹ *Id.* at 322.

⁵² *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."). See also *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").

mentioned in this bill cannot be reduced to slavery.”⁵³ Representative Burton Cook echoed this idea, stating that the civil rights bill was necessary legislation because persons denied the rights protected by the act “are not secured in the rights of freedom.”⁵⁴ Accordingly, supporters of the Act did not assert that Section Two granted power to safeguard all civil or human rights, but rather offered a more modest view that the Section Two empowered Congress to protect the subset of civil rights that necessarily inhered in the freedom granted by Section One.

Opponents of the 1866 Act generally asserted that Section Two permitted only “pure” enforcement legislation and that the rights guaranteed by the proposed Act went well beyond what was “appropriate” to enforce Section One. In the words of Representative Samuel Marshall, “Congress has acquired not a particle of additional power other than [the literal freeing of slaves] by virtue of this amendment.”⁵⁵ Senator Cowan found that Section Two empowered Congress only to break “the bond by which the negro slave was held to his master” and gave “the Negro the privilege of the habeas corpus, that is, 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.”⁵⁶

One of the bill’s most notable opponents was Representative John Bingham who, unlike most opponents, was sympathetic to the bill’s goals.⁵⁷ However, Bingham argued that Section

⁵³ *Id.* at 1294.

⁵⁴ *Id.* at 1124.

⁵⁵ *Id.* at 628. *See also id.* at 499 (Rep. Cowan) (Section Two 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 Two “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 Two] 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.”); *id.* at 1156 (Rep. Thornton) (“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”).

⁵⁶ *Id.* at 499.

⁵⁷ *See id.* at 1291.

Two was an insufficient source of congressional power to displace discriminatory state laws in light of the residual police power of the states protected by the Tenth Amendment.⁵⁸ He therefore argued in favor of the proposed Fourteenth Amendment as a much more solid basis for displacing discriminatory state laws.⁵⁹

Even if one assumes that the final passage of the 1866 Act over President Johnson's veto demonstrates that a supermajority of the Thirty-Ninth Congress believed Section Two was an adequate basis for the Act, subsequent events suggest that Representative Bingham's arguments left at least some lingering uncertainty as to the scope of the Section Two power. In short order, the Fourteenth Amendment was ratified and the Civil Rights Act of 1866 reenacted under Congress's Fourteenth Amendment enforcement power.⁶⁰ Indeed, Senator Luke Poland, who voted for the 1866 Act, noted that "[t]he power of Congress to [pass the Civil Rights Act of 1866] has been doubted and denied by persons entitled to high consideration."⁶¹ He argued that the proposed Fourteenth Amendment was therefore important because it would remove "doubt . . . as to the power of Congress to enforce principles lying at the very foundation of all republican government."⁶²

Professor Tsesis directs our attention to the statements of the Act's principal sponsor, Senator Trumbull, "perhaps the best person for explaining the meaning of the Thirteenth

⁵⁸ *Id.* 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." *Id.* at 1293. *See also id.* at 504-05 (statement of Sen. Johnson).

⁵⁹ *See id.* at 1291-93.

⁶⁰ *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).

⁶¹ CONG. GLOBE, 39TH CONG., 1ST SESS. 2961 (1866). 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 I thought, and still think, that very many members who voted for the bill also doubted the power of Congress to pass it." *Id.* at 2961.

⁶² *Id.*

Amendment because he had been the chairman of the Senate Committee on the Judiciary.”⁶³

Putting aside the fact that Trumbull failed to articulate a view of the Section Two power during the actual ratification debates and denied during the debates on the Act that it reached “political rights,”⁶⁴ Trumbull’s statements subsequent to the passage of the 1866 Act belie the claim that he understood Section Two to convey plenary power over human rights. In early debates⁶⁵ regarding what would become the Civil Rights Act of 1875, Trumbull stated that the 1866 Act “went to the verge of constitutional authority” by giving the freed slaves “the rights that belong to the individual as man and as a freeman under the Constitution of the United States.”⁶⁶ He opposed early versions of the 1875 Act that barred racial discrimination in schooling and transportation, arguing that such guarantees pertained to “political” or “social” rights over which Congress lacked the power to legislate.⁶⁷ Accordingly, it is clear that even the sponsor of the Civil Rights Act of 1866 did not understand Section Two to convey, or the Act to assert, plenary power over human rights safeguards, as we would understand them today.

Ultimately, one may conclude (as, incidentally, I do) that Section Two in fact provided an adequate basis for the passage of the Civil Rights Act of 1866. However, I find it quite difficult to agree with the additional proposition that passage of the Act “unequivocally signaled the creation of congressional plenary power over human rights safeguards.”⁶⁸ The history outlined above is one of, if not equivocation, at least manifest unease regarding the constitutional basis for the Act and reservations about the extent of the Section Two power. At most, supporters of

⁶³ Tsesis, *supra* note 1, at 12.

⁶⁴ CONG. GLOBE, 39TH CONG., 1ST SESS. 476 (1865).

⁶⁵ He had retired from the Senate when the Act finally passed.

⁶⁶ CONG. GLOBE, 42ND CONG., 2D SESS. 901.

⁶⁷ *See id.*; *see also id.* at 3189.

⁶⁸ Tsesis, *supra* note 1, at 8.

the bill believed that Section Two permitted Congress to safeguard core civil rights as a means of ensuring and protecting Section One's grant of freedom.

C. Structural Considerations and the Relevance of the Fourteenth Amendment

In addition to the historical record, structural values of separation of powers and federalism bear heavily on how to interpret the scope of the Section Two power. Professor Tsesis claims that *City of Boerne*'s analytical framework is inapposite – and therefore that my willingness to consider some of the structural principles that undergirded that opinion is misplaced – because there is a key “analytical distinction between the Fourteenth and Thirteenth Amendments,” namely, that the former addresses only state action while the latter addresses both state and private action.⁶⁹ While this difference between the amendments is undoubtedly true, I do not believe it bears on the question whether federalism and separation of powers -- constitutionally-based metavalues that coexist with the Constitution's rights-granting provisions -- are relevant to the analysis of the Section Two power.

Separation of powers, particularly the relative roles of Congress and the federal courts in determining the substance of constitutional rights, played a major role in *City of Boerne*. There, the Court clarified that the power to “enforce” the provisions of the Fourteenth Amendment is a “remedial” power that does not permit Congress to “determine what constitutes a constitutional

⁶⁹ *Id.* at 17-18. Professor Tsesis also chides me for “fail[ing] to critique *Boerne* itself.” *Id.* at 14. Of course, there is no shortage of literature on *City of Boerne*. Rather than enter that fray, I independently examined Section Two of the Thirteenth Amendment with an eye toward the transcendent structural values identified in *Boerne* (and without reference to the opinion's Fourteenth-Amendment-specific analysis.) I regard this approach as more constructive as it enabled me to provide Congress concrete guidance as to its Thirteenth Amendment enforcement efforts within the current legal landscape.

violation.”⁷⁰ Judicial supremacy, while controversial,⁷¹ is an “indispensable feature of our constitutional system,”⁷² that is grounded in both theory and a long line of caselaw that designates the Supreme Court as the final arbiter of the meaning of the Constitution.⁷³

Jones creates space for the same type of institutional clash that the Court confronted in *City of Boerne* by permitting Congress essentially to define the scope of its own power by resolving the substantive meaning of the badges and incidents of slavery. Others have recognized the broad potential effect of placing such substantive definitional power in the hands of Congress. As Larry Tribe has put it, *Jones* conveys a power to “define the infringement of [any] righ[t] as a form of domination or subordination and thus an aspect of slavery, and proscribe such infringement as a violation of the Thirteenth Amendment.”⁷⁴ George Rutherglen characterized *Jones* as expanding “the legitimate ends under the [Thirteenth Amendment] . . . from abolition of slavery to eliminating the consequences of slavery.”⁷⁵

⁷⁰ 521 U.S. 507, 519-20 (1997). 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*, 1 Cranch 137, 177 (1803)).

⁷¹ 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).

⁷² *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

⁷³ See *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”). See also Larry Alexander & Frederick 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).

⁷⁴ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-15, at 926-27 (3d ed. 2000).

⁷⁵ Rutherglen, *supra* note 5, at 174.

There is certainly an argument to be made that placing such substantive power in Congress's hands is appropriate in the Thirteenth Amendment context. Larry Sager has argued that Section One is a judicially underenforced constitutional norm, the potential coverage of which is substantially greater than the Court's limited holdings regarding the scope of Section 1's self-executing right.⁷⁶ Accordingly, Congress might be uniquely well-positioned to have an interpretive role in enforcing the Thirteenth Amendment.⁷⁷ From this perspective, one can understand *Jones* as creating space for "an important and productive constitutional dialectic between coequal and coordinate federal branches."⁷⁸

Conversely, it is reasonable to note the tension between *Jones* and *City of Boerne* and question the propriety of empowering Congress to define the badges and incidents of slavery for itself. It is possible that the Section One right is not judicially underenforced at all, and therefore that by placing such substantive power in Congress's hands, *Jones* cedes a core aspect of the judicial power to Congress. The "prophylactic" understanding of the Section Two power for which I advocate – in which Congress develops, and the Court meaningfully reviews, the factual and historical record for identifying particular conduct as a badge and incident of slavery – safeguards the Supreme Court's role as the final arbiter of the meaning of Section One of the Thirteenth Amendment while respecting Congress's superior fact-finding capacity regarding the effects of certain discriminatory conduct.

⁷⁶ Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1219 n.21 (1978) ("[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."); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 433 (1993) ("[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.'").

⁷⁷ Sager, *Fair Measure*, *supra* note 76, at 1239–40.

⁷⁸ McAward, *supra* note 2, at 140.

With respect to federalism, the particular concerns that have informed the Court's post-*Boerne* cases (from *Garrett* and *Kimel* to *Hibbs* and *Lane*) are not present in the Thirteenth Amendment context, as Congress has not attempted to use Section Two power to abrogate a state's sovereign immunity. However, this does not mean that federalism is irrelevant to the Section Two calculus. By permitting Congress to define the badges and incidents of slavery, *Jones* put its imprimatur on a power of near-plenary proportions that could permit Congress to attack any form of discrimination against any group. This conception of the Section Two power carries substantial federalism costs.

Jones has given rise to a cottage industry of labeling various injustices as badges and incidents of slavery. Most commentators and litigants have focused on aspects of race-based discrimination,⁷⁹ although many have gone beyond race, claiming that everything from municipal lawn mowing ordinances,⁸⁰ to sealed adoption records,⁸¹ to human cloning,⁸² to restrictions on reproductive rights,⁸³ to sex discrimination⁸⁴ and sexual harassment,⁸⁵ to

⁷⁹ See, e.g., *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002) (racial and religious hate crimes); Jason A. Abel, *Americans Under Attack: The Need for Federal Hate Crime Legislation in Light of Post-September 11 Attacks on Arab Americans and Muslims*, 12 ASIAN L.J. 41 (2005) (hate crimes); Petal Nevella Modeste, *Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment*, 44 HOW. L. J. 311 (2001) (hate speech); Akhil Reed Amar, Comment, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124 (1992) (same); William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17 (2004) (racial profiling); *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984) (employment discrimination); Douglas Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 38-49 (1995) (criminal sentencing disparities); *id.* at 38-43 (race-based peremptory challenges).

⁸⁰ *Rowe v. City of Elyria*, 38 Fed. App. 277, 283 (6th Cir. 2002).

⁸¹ *Alma Soc. Inc. v. Mellon*, 601 F.2d 1225 (2d Cir. 1979).

⁸² See Sean Charles Vinck, *Does the Thirteenth Amendment Provide a Jurisdictional Basis for a Federal Ban on Cloning?*, 30 J. LEGIS. 183 (2003).

⁸³ See Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 401 (2000).

⁸⁴ See Emily Calhoun, *The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination*, 61 MINN. L. REV. 313 (1977).

⁸⁵ See Jennifer L. Conn, *Sexual Harassment: A Thirteenth Amendment Response*, 28 COLUM. J. L. & SOC. PROBS. 519 (1995).

discrimination against gay people⁸⁶ are badges and incidents of slavery. By indicating that Congress would have wide latitude to regulate such a vast array of injustices and discriminatory conduct, *Jones* created a Thirteenth Amendment-specific federalism concern, namely, that Congress could attempt to utilize the Thirteenth Amendment enforcement power as a general police power.⁸⁷

Professor Tsisis claims that I argue that the Thirteenth Amendment did not “alter federalism substantially enough to make civil rights a national rather than state prerogative.”⁸⁸ That is not my position. Rather, I agree that Section Two gives Congress the power to protect core civil rights as a prophylactic measure against the reimposition of slavery and involuntary servitude. I simply contend that Section Two does not give Congress plenary power to regulate conduct far removed from the oppression of slavery and its immediate aftermath. There is a substantial difference between reading Section Two as creating a strong, focused federal power and reading it as creating an undifferentiated police power. Acknowledging the relevance of federalism helps in the effort to strike a proper balance.

III. The Section Two Power: Three Areas for Exploration

Perhaps the most valuable function of this dialogue with Professor Tsisis is to underscore the need for further exploration and debate regarding Congress’s role in enforcing the Thirteenth Amendment. Although there is some very fine literature on Section Two,⁸⁹ there is space for

⁸⁶ See, e.g., David P. Tedhams, *The Reincarnation of “Jim Crow:” A Thirteenth Amendment Analysis of Colorado’s Amendment 2*, 4 TEMP. POL. & CIV. RTS. L. REV. 133 (1994).

⁸⁷ 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).

⁸⁸ Tsisis, *supra* note 1, at 7.

⁸⁹ See, e.g., William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311 (2007); Darrell A.H. Miller, *A Thirteenth Amendment Agenda for the Twenty-first Century: Of Promises, Power, and Precaution*, in THE PROMISES OF LIBERTY: THE HISTORY AND

more. In this final section, I suggest three related areas that might be ripe for additional scholarly reflection.

A. What are the badges and incidents of slavery?

The concept of the “badges and incidents of slavery” has been the touchstone for Thirteenth Amendment enforcement legislation since the *Civil Rights Cases*. However, there is no widely accepted definition of that concept, or even its outer boundaries. The *Civil Rights Cases* indicated that the concept applied only to discriminatory public laws like the Black Codes and specifically rejected the suggestion that private acts of race discrimination in public accommodations constituted badges and incidents of slavery. *Jones* essentially overruled the *Civil Rights Cases* on this point, acquiescing in Congress’s determination that private acts of race discrimination in property transactions were badges and incidents of slavery.

Since *Jones*, courts and commentators have asserted that a wide range of conduct can be deemed a badge and incident of slavery.⁹⁰ However, only a few scholars have reflected on this category at a more conceptual level.⁹¹ Deeper exploration of the meaning of the “badges and incidents of slavery” is essential to help Congress identify future subjects for Thirteenth Amendment legislation. Questions for reflection might include whether the concept of the

CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT, at 172 (Tsesis ed., 2010); Rutherglen, *supra* note 5; Tsesis, THE THIRTEENTH AMENDMENT, *supra* note 18; Tsesis, *Furthering American Freedom*, *supra* note 18; Rebecca Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. Rev. 255 (2010).

⁹⁰ See *supra* notes 79-86 and accompanying text.

⁹¹ See, e.g., 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) (defining a badge of slavery as “any act motivated by arbitrary class prejudice . . . which, in its cumulative manifestations, has assumed a pattern of regional significance”); Carter, *supra* note 89 (asserting that a badge of slavery is any public or private act of “discrimination and subordination” aimed at African Americans, which “provided essential legal and societal support for slavery and [was] also part of de jure and de facto attempts to return the freedmen to a condition of servitude and sub-humanity after formal emancipation”); McAward, *supra* note 16 (defining a badge and incident of slavery as “public or widespread private action, based on race or the previous condition of servitude, that mimics the law of slavery and that has significant potential to lead to the de facto reenslavement or legal subjugation of the targeted group”).

badges and incidents of slavery: (1) limits what populations Congress may protect under its Section Two power; (2) permits Congress to address private as well as public action; (3) requires a historical link between modern conduct and the legal treatment of slaves; and (4) requires a causal link between modern conduct and a state of actual slavery or involuntary servitude.

B. What modern-day applications does the Section Two power have?

Since the Civil Rights Act of 1866, Congress has passed a fair amount of Section Two legislation, most of which I would characterize as “pure” enforcement legislation.⁹² Laws aimed explicitly at the badges and incidents are far fewer in number, although the most recent piece of Thirteenth Amendment legislation falls in this category.⁹³ The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, signed in October 2009, provides criminal penalties for willfully injuring another because of – among other things⁹⁴ – that person’s “actual or perceived race, color, religion, or national origin.”⁹⁵ This particular provision was explicitly justified in Thirteenth Amendment terms:

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

⁹² See, e.g., 18 U.S.C. § 1581 (2000) (criminalizing peonage); *id.* §§ 1585-1588 (2000) (outlawing slave trade); *id.* § 1584 (prohibiting involuntary servitude); *id.* § 1589 (penalizing forced labor); *id.* § 1590 (penalizing human trafficking); *id.* § 1591 (penalizing sex trafficking). See also 42 U.S.C. § 1994 (2000) (imposing civil remedies for peonage).

⁹³ See, e.g., Fair Housing Act, 42 U.S.C. §§ 3601-19; 18 U.S.C. § 245(b)(2)(B) (hate crimes committed while victim is using public facility).

⁹⁴ Other parts of the law bar violence based on “gender, sexual orientation, gender identity or disability.” The law requires that such crimes have a link to interstate commerce. See National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 4707 (2009).

⁹⁵ *Id.* Division E of the Act is denominated as the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.

racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.⁹⁶

Deeper reflection on the scope of the Section Two power and the meaning of the badges and incidents of slavery will provide a basis for evaluating the constitutionality of the new hate crimes law and, specifically, Congress's claims regarding race-based hate crimes. More generally, it will assist Congress by charting a course for future Section Two legislation. Depending on how one conceives of the badges and incidents of slavery, Section Two might be an untapped source of broad power to address residual racial disparities and even discrimination against other minorities. Conversely, Section Two might have few potential modern applications. Either way, Congress will benefit immensely from renewed focus on the scope of the Section Two power.

C. How should the judiciary evaluate Section Two legislation?

Jones set forth a very deferential standard of review for Thirteenth Amendment legislation. Like *Katzenbach v. Morgan* and *South Carolina v. Katzenbach*, *Jones* indicated that *McCulloch v. Maryland* should provide the basic approach for evaluating the fit between a law's means and ends. However, *Jones* added an additional layer of deference, holding that Congress's determination of the law's ends themselves – *i.e.*, the identification of something as a badge or incident of slavery – should also be reviewed solely for rationality.

In light of *City of Boerne*, it seems sensible to reconsider these holdings in the Thirteenth Amendment context, whether such review leads to a reaffirmance or revision of one or both layers of rational basis review as set forth in *Jones*. Questions for reflection might include: (1) What evidentiary record should Congress have to compile to justify designating something a

⁹⁶ *Id.*

badge or incident of slavery? (2) With what degree of deference should a federal court review a congressional finding that particular conduct is a badge or incident of slavery? (3) With what degree of deference should a federal court review the means by which Congress addresses conduct properly designated a badge or incident of slavery? (4) Is there a role for congruence and proportionality review in the Section Two context?