Congressional Authority to Interpret the Thirteenth Amendment

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Most scholars of the Thirteenth Amendment have argued that Section 2 grants Congress broad powers to pass civil rights legislation.² In a welcome contrarian article, Jennifer Mason McAward has taken the opposite tact. She argues for a more constrained perspective of congressional enforcement power.³ There have been few recent Supreme Court decisions on the Thirteenth Amendment for her and other scholars to draw upon; therefore, McAward's understanding is informed by the Rehnquist Court's Fourteenth Amendment jurisprudence.⁴ This article investigates the validity of McAward's claims about the historical lessons of the Amendment and the possibility that the Court will superimpose its Fourteenth Amendment conservatism unto the more liberal Thirteenth Amendment jurisprudence.

¹ Thanks to George Rutherglen and Robert Kaczorowski.

² Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. Pa. J. Const. L. 1337 (2009); Alexander Tsesis, Furthering American Freedom: Civil Rights & the Thirteenth Amendment, 45 B.C. L. Rev. 307, 358-59 (2004); Rebecca E. Zietlow, *Free at Last!*, 90 B.U. L. Rev. 255 (2010); Raja Raghunath, *A Promise the Nation Cannot Keep*, 18 Wm. & MARY BILL RTs. J. 395 (2009); James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law*, 1921-1957, 102 COLUM. L. Rev. 1, 119-20 (2002); Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. Rev. 973, 1007 (2002); Akhil Reed Amar, *The Case of the Missing Amendment*: R.A.V. v. City of St. Paul, 106 HARV. L. Rev. 124, 157 (1992).

³ 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).

⁴ *Id.* at 81.

McAward's argument is based on two claims. First, she claims that the Thirty-eighth Congress, which passed the proposed amendment for ratification unto y the states, never intended for the Thirteenth Amendment to grant Congress open-ended power to pass civil rights laws.⁵ Further, McAward infers that the Warren Court's expansive understanding of the Amendment in *Jones v. Alfred H. Mayer*,⁶ has been substantially narrowed by Rehnquist Court's narrow expostulation on Congress's enforcement power under the Fourteenth Amendment.⁷

Historical Argument

The Thirteenth Amendment was the first of three Reconstruction Amendments.⁸ Its primary purpose to grant Congress the power to protect freepersons against any effort to bind them to slavery or involuntary servitude. The concept of "freeperson" was broadly understood to include any of the privileges and immunities not enjoyed by persons in bondage.⁹ Congress only realized more explicit protections for equal rights would be needed when President Andrew Johnson tried to derail Reconstruction. At the time of Thirteenth Amendment's passage there

⁵ McAward, *supra* note ----, at 143, 145.

⁶ Jones v. Alfred H. Mayer, 392 U.S. 409 (1968).

⁷ City of Boerne v. Flores, 521 U.S. 507 (1997).

⁸ The Thirteenth, Fourteenth, and Fifteenth Amendments are collectively known as the Reconstruction Amendments because they were ratified in the Reconstruction Era just after the Civil War. Mario L. Barnes *et al.*, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 969 n.9 (2010).

⁹ Michael Vorenberg, *Citizenship and the Thirteenth Amendment: Understanding the Deafening Silence*, *in* The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment 58, 62, 64 (Alexander Tsesis ed., 2010).

was no conversation about the need for any further amendments. From the debates, it appears clear that members of Congress were confident that the Thirteenth Amendment would allow it to eliminated the lingering vestiges of slavery and all forms of labor exploitation. Radicals proceeded with the proposed Fourteenth Amendment only after their proposals for rebuilding the Union were met by President Andrew Johnson's repeated vetoes. And the disfranchisement of blacks ultimately lead to passage of the Fifteenth Amendment, which was meant to provide blacks with the full scope of political citizenship.

Debates on the Civil Rights Act of 1866¹³ demonstrate how Congressmen regarded their

 $^{^{\}tiny 10}$ Alexander Tsesis, We Shall Overcome: A History of Civil Rights and the Law 99 (2008).

Daniel S. Korobkin, *Republicanism on the Outside: A New Reading of the Reconstruction Congress*, 41 Suffolk U. L. Rev. 487, 489 (2008) (describing how ratification of the Fourteenth Amendment advanced over Johnson's veto); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1767 ("[i]t was only Johnson's repeated vetoes that forced the congressional Republicans to propose the Fourteenth Amendment as their election platform in 1866").

EMORY L.J. 1397, 1419 (2002) (stating that the Fifteenth Amendment "operationalized the legal and political equality of black citizens and was the last step necessary to integrate blacks into the polity fully and formally"). There is some debate as to whether the Republicans passed the Fifteenth Amendment to solidify their political power or to further ideals of political equality. I believe the debate has been settled in favor of the principled understanding of Republican efforts. *See* LaWanda Cox & John H. Cox, *Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography*, in RECONSTRUCTION: AN ANTHOLOGY OF REVISIONIST WRITINGS 156, 172 (Kenneth M. Stamp & Leon F. Litwack eds., 1969) and XI WANG, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE—NORTHERN REPUBLICANS, 1860-1910, at xxii-xxiii. For the opposing view see WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 46-49 (1965).

¹³ The Civil Rights Act of 1866 contained a variety of provisions protecting freedoms against civil infringements, including the rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property." Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

power under Section 2 of the Amendment.¹⁴ Many of them had been in Congress the year before when the proposed amendment had been passed.¹⁵ During debates about the Thirteenth Amendment at the Thirty-Eighth Congress, repeatedly spoke of how changes to the Constitution would allow the legislative branch to pass laws for protecting individual rights.¹⁶ Many 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. Senator Reverdy Johnson expressed the hope that the Amendment would give practical application to the self-evident truths of the Declaration a practical application.¹⁷ His sentiment was representative of the supermajority in Congress, which expected the Amendment to provide Congress with the power to protect each citizen's life, liberty, and

¹⁴ Aviam Soifer, *Protecting Full and Equal Rights: The Floor and More, in* The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment 196, 201 (Alexander Tsesis ed., 2010) ("Much historical evidence . . . indicates quite convincingly that the Thirty-ninth Congress, in enacting the Civil Rights Act of 1866 and thus attempting to secure the fruits of victory after the horrendous . . . Civil War, understood that it was necessary to do something different to guarantee 'practical freedom' throughout the land.").

¹⁵ Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. REV. 1 (1995) (stating that "when the 39th Congress convened, virtually the same group of legislators who had debated and supported the Thirteenth Amendment enacted a civil rights bill").

¹⁶ See Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War*, 92 Am. HIST. REV. 45, 49 (1987) ("Congressional Republicans legislated to secure the civil rights of Americans . . . with the understanding that . . . the Thirteenth and then the Fourteenth Amendment . . . gave . . . all Americans the fundamental rights of citizenship and delegated to Congress the authority to protect citizens in their enjoyment of these rights").

¹⁷ CONG. GLOBE, 38th Cong., 1st Sess. 1424 ("We mean that the Government in future shall be . . . one, an example of human freedom for the light and example of the world, and illustrating in the blessings and the happiness it confers the truth of the principles incorporated into the Declaration of Independence, that life and liberty are man's inalienable right.").

pursuit of happiness.¹⁸

Iowa Congressman James F. Wilson, who was the chairman of the House Judiciary Committee, emphasized that by conferring Congress with the power to pass laws even after the abolition of slavery, the Amendment had fundamentally altered the structure of government. He believed that the Amendment would give Congress the power to pass laws securing "human equality" by treating persons of all races as "equals before the law." Federal laws passed pursuant to Section 2 would displace any contrary state laws by operation of the Supremacy Clause. Wilson believed Section 2 provided Congress the authority to pass laws guaranteeing that "equality before the law" would "be the great corner-stone" of American governance. 21

When Senator Charles Sumner recommended including a phrase in the proposed

Thirteenth Amendment stating that "all persons are equal before the law," other senators talked him into withdrawing the language. While explicit mention of "equality" was contentious

¹⁸ After the ratification of the Thirteenth Amendment, Senator Lyman Trumbull explained that "the liberty to which every citizen is entitled; that is the liberty which was intended to be secured by the Declaration of Independence and the Constitution of the United States originally, and more especially by the amendment which has recently been adopted." Cong. Globe, 39th Cong., 1st Sess. 474 (1866). Iowa Representative James F. Wilson avowed that "citizens of the United States, as such, are entitled to certain rights; and ... being entitled to those rights it is the duty of the Government to protect citizens in the perfect enjoyment of them. The citizen is entitled to life, liberty, and the right to property." Id. at 1294.

¹⁹ CONG. GLOBE, 38th Cong., 1st Sess. 1319 (1864).

²⁰ George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1381 (2008) ("Matters that previously had been the exclusive domain of the states were now subject to federal regulation that could, under the Supremacy Clause, displace state law.").

²¹ CONG. GLOBE, 38th Cong., 1st Sess. 2989 (1864).

²² CONG. GLOBE, 38th Cong., 1st Sess. 521 (1864); id. at 1483.

because it threatened to alienate the already sparse Democratic support for the measure, there was a general consensus that slavery infringed on natural rights intrinsic to all humans.²³ That is not to say that the Thirty-eighth Congress held a modern conception of fundamental rights but that by including the Enforcement Clause they anticipated federal legislation would be necessary to punish any private and public infringement against inalienable freedoms. In this way, the Thirteenth Amendment was the first necessary step to achieving constitutional protections against racial inequality.²⁴

The far-reaching implication of the legislative powers implied by Section 2 have not gone unrecognized: "This Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its 'burdens and disabilities'—included restrations [sic] 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" This interpretation of the Amendment's scope is born out by its post-ratification history.

A year after the states ratified the Amendment, Congress a bill entitled, "An Act to

 $^{^{23}}$ See Michael Vorenberg, Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment 55 (2001)

VA. L. REV. 1367, 1406 (2008) ("The Amendment was the necessary first step in recognizing a right to racial equality and in providing for enforcement of this right against private individuals."). The Supreme Court fist accepted Congress's ability to prohibit private forms of discrimination in the *Civil Rights Cases* of 1883. 109 U.S. 3, 20. Later cases have persistently accepted the application of Section 2 to private acts of discrimination. *See*, *e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438 (1968) ("Thus, the fact that [the Act] operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem.").

²⁵ Jones v. Alfred H. Mayer, 392 U.S. 409 (1968), *quoting* Civil Rights Cases, 109 U.S. 3, 22 (1883).

protect all persons in the United States in their civil rights and furnish the means of their vindication.'26 After an extensive period of debate, Congress passed the law, which became known as the Civil Rights Act of 1866,27 over President Johnson's veto.28 Enacted just a year after the Amendment had been ratified, the statute is a telling indicator about what the Amendment's framers understood of the congressional prerogative to pass civil rights legislation. The statute went far beyond the abolition of slavery, securing the equal right to sue, execute and enforce contracts, testify in court, and purchase and alienate property.29

McAward takes issue with the claim that Congress passed the proposed Thirteenth

Amendment to alter federalism substantially enough to make civil rights a national rather than

state prerogative.³⁰ But her claim is belied by the debates on the bill. In the words of the Senate

²⁶ CONG. GLOBE, 39th Cong., 1st Sess. 129 (1866).

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

²⁸ ALEXANDER TSESIS, WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW 99 (2008) (elaborating on Johnson's veto).

²⁹ Ch. 31, 14 Stat. 27 (1866) (Civil Rights Act of 1866).

³⁰ McAward, *supra* note —, at 83 ("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"). *But see* Alexander Tsesis, *Principled Governance: The American Creed and American Authority* 41 Conn. L. Rev. 679, 715 (2009) (concluding on the basis of congressional debates that "immediately after ratification of the Thirteenth Amendment" Congress believed it was "no longer to be hamstrung by the federalism of a bygone era when the racist administration of criminal law was a state prerogative"); Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 Colum. L. Rev. 1992, 2046 (2003) (asserting that in 1865 and 1866 a far reaching understanding of federalism was at play that connected the Thirteenth Amendment to substantive equality). Calvin Massey also shares the view that the Thirteenth Amendment granted Congress broad civil rights authority. *See Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 482 (2002)

floor leaders of the Civil Rights Act, the law was meant to "declare that all persons in the United States should be free." Indeed, the notion that the Union had just won the Civil War in large part to end all the horrors associated with slavery and then simply returned the power over civil rights to the very states whom they had vanquished seems illogical. The breadth of power Congress defined for itself through the Civil Rights Act of 1866 unequivocally signaled the creation of congressional plenary power over human rights safeguards.³²

Speakers who supported passage of the bill demonstrated an expansive understanding of Congress's power to identify civil rights and pass laws to protect them. Senator Lyman Trumbull, the bill's floor leader bespoke the absurdity of the claim that the Amendment was meant to do no more than to allow Congress to end specific instances of forced, hereditary labor. Broad-ranging federal legislation was necessary. Unless they were "carried into effect," Trumbull pointed out, the notions of equal and inalienable rights would be merely "abstract truths and principles." Even though the Fourteenth Amendment with its Equal Protection Clause was still two years from ratification, Representative William Windom believed Congress could pass laws consistent with the "the absolute equality of rights" the United States professed at that time of its independence even though it had then "denied to a large portion of the people equality of

(concluding that "the 1964 Civil Rights Act should have been grounded in section 2 of the Thirteenth Amendment, which as interpreted by *Jones v. Alfred H. Mayer Co.*")

³¹ CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

³² Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153, 157-58 (2004).

³³ CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

rights.'84 According to Windom's statement, Congress's authority to pass laws to be coequal with the nation's founding principles.

Many of the Congressmen who voted for passage of the 1866 statute regarded it to be only an installment of protections that would be necessary to protect freedpeople's ability to live as free citizens.³⁵ Even an opponent of the civil rights bill understood that Section 2 granted Congress the power to "exercise power" needed to pass a law to protect the "civil rights, fundamental rights belonging to every man as a free man," including those "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property."³⁶

McAward provides a detailed narrative of debates on the Thirteenth Amendment ratification and the most important statute passed the year thereafter. She ultimately concludes that while the debates are inconclusive, "there was no suggestion that Section 2 granted Congress any substantive power to define or expand its own vision of the Amendment's ends." To the contrary a close read of the Congressional Globe of the period leaves no doubt that in passing the Civil Rights Act of 1866, the Thirty-ninth Congress regarded its Section 2 power to grant it the

³⁴ *Id.* at 1159.

³⁵ See, e.g., id. at 1152 (statement of Rep. Thayer) ("The sole purpose of the bill is to secure to that class of persons the fundamental rights of citizenship; those rights which constitute the essence of freedom, and which are common to the citizens of all civilized States; those rights which secure life, liberty, and property, and which make all men equal before the law, as they are equal in the scales of eternal justice").

³⁶ *Id.* at 476 (statement of Rep. Saulsbury).

³⁷ McAward, 119.

authority to define rights essential to all free citizens and the ability to created a criminal remedy against their infringement. Passage of this statute signaled a revolutionary change to federalism; allowing Congress to affect behavior that had previously been at the sole discretion of the states. Anti-discrimination policy became a national rather than solely a state or local matter. Ten years after Congress found that blacks could not be citizens,³⁸ the Reconstruction Congress included the enforcement provision in the Thirteenth Amendment to remove any judicial discretion to abridge inalienable or congressionally created rights.

In the immediate aftermath of the ratification, it was Congress not the judiciary that took the lead in both identifying the rights of free-people and promulgating a statute to protect them. The notion that Congress lacks the authority to discern what violations are closely related to the incidents of slavery and involuntary servitude never entered the 1866 debate. Simply put, during the 1864, 1865, or 1866 debates congressmen debating passage of the Amendment and Civil Rights Act, respectively, did not so much as mention the possibility that the Court could overturn Congress's codification of rights and penalties.³⁹ Senator Trumbull, who as floor leader of the bill and represented the dominant viewpoint in the senate, asserted that Congress could secure

³⁸ Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 403-04, 407-08 (1856).

³⁹ Opposition to the Thirteenth Amendment actually warned that its ratification would grant Congress the power to pass civil rights laws. *See*, *e.g.*, Cong. Globe, 38th Cong., 1st Sess. 104 (Jan. 6, 1864) (statement of Senator Garrett Davis of Kentucky on state rights); *Id.* at 2962 (June 15, 1864); *Id.* at 2991(June 15, 1864). The opposition to the 1866 Act did regard the law to be unconstitutional, but did not mention that the Court would have a hand in passing judgment on Congress's exercise of it Section 2 authority. In 1870, persons wanting to reauthorize the Civil Rights Act under the Fourteenth Amendment were concerned about future Congress's vacating the law not the Court second-guessing Congress's interpretation of the badges and incidents of slavery and involuntary servitude. An Act to enforce the Right of Citizens of the United, ch. 114, §18, 16 Stat. 140 (1870).

liberties for all free persons, including the rights to travel, bring law suits, enter into contracts, and to own, inherit, and dispose of property.⁴⁰ Opponents of the bill adamantly protested that so sweeping a law would infringe on states' internal affairs in matters like contract formation and real estate transaction.⁴¹

Trumbull responded that the Civil Rights Act would not destroy federalism but provide "that all people shall have equal rights." Among these essential interests, he asserted, are "the right to life, to liberty, and to avail one's self of all the laws passed for the benefit of the citizen to enable him to enforce his rights" The reconstructed version of federalism granted Congress the role of safeguarding individual interests. This was not to the exclusion of the judiciary but in concert with it. States retained the exclusive power over ordinary legal matters, like contract formation and civil liability for tort claims, but the Thirteenth Amendment nationalized the protection of individual rights and granted Congress the principle responsibility of protecting them. Trumbull's summary of the bill's intent mirrored the full force of the Amendment's guarantee of freedom: "If the bill now before us, and which goes no further than to secure civil rights to the freedman, cannot be passed, then the constitutional amendment proclaiming freedom

⁴⁰ CONG. GLOBE, 39th Cong., 1st Sess. 474-75 (1866).

⁴¹ *Id.* at 476-78 (expressing concern that the law would infringe on states' rights over real estate transactions); *id.* at 595-96 (discussing states' property regulations).

⁴² *Id.* at 599.

⁴³ *Id.* at 600.

⁴⁴ *Id.* at 599-600.

to all the inhabitants of the land is a cheat and a delusion." Trumbull was perhaps the best person for explaining the meaning of the Thirteenth Amendment because he had been the chairman of the Senate Committee on the Judiciary, which had reported the language that Congress adopted and states ratified. Congressman James Garfield, who would eventually become President of the United States, declared in similar terms that if "freedom" meant no more than the abolition of slavery, then it was "a bitter mockery" and "a cruel delusion." The provisions of the Civil Rights Act of 1866 indicate that, less than half a year after the Thirteenth Amendment's ratification, the dominant political view regarded Section 2 of the Amendment as a grant of congressional power to identify what rights to protect, to establish a rational policy for combating discrimination, and to promulgate legitimate laws to achieve that end.

Doctrinal Argument

McAward also presents a second argument for increased restraint in interpreting the Thirteenth Amendment. She points to recent limitations the Supreme Court placed on Congress's exertion of power under Section 5 of the Fourteenth Amendment and extrapolates that because Section 2 of the Thirteenth Amendment is similarly worded, the current Court would likely

⁴⁵ Cong. Globe, 39th Cong., 1st Sess. 1761 (1866).

⁴⁶ HORACE WHITE, THE LIFE OF LYMAN TRUMBULL 224 (1913).

⁴⁷ Congressman James A. Garfield, Oration Delivered At Ravenna, Ohio July 4, 1865, *in* The Works of James Abram Garfield 86 (Burke A. Hinsdale ed., 1882).

⁴⁸ Jones, 392 U.S. 440-41 ("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.").

standard of review that the Court established in *Jones* has not been overturned, "[i]n light of *City of Boerne*, *Jones* is arguably a remnant of the past." McAward believes that the holding in *Boerne* should be extrapolated to prohibit Congress from defining what forms of subordination constitute the badges and incidents of slavery and involuntary servitude. If adopted such an interpretation could threaten recently enacted statutes, most notably the Victims of Trafficking and Violence Prevention Act of 2000⁵² and Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, that were passed pursuant to congressional Thirteenth Amendment authority. According to McAward's interpretation, the constitutionality of these two statutes is questionable because they 'target discriminatory and violent conduct far removed from coerced labor." Her position implicitly consents to the Court's rejection of Congress's ability to identify, prevent, and punish civil rights violation through its Section 5 authority. Based on her approval of the Rehnquist Court's exertion of exclusive authority to interpret Section 1 of the Fourteenth Amendment, McAward urges that the Court be consistent by also diminishing Congress's ability

⁴⁹ McAward, *supra* note ----, at 81.

⁵⁰ McAward, *supra* note ----, at 81.

⁵¹ McAward, *supra* note ----, at 84 ("Congress cannot define the badges and incidents of slavery for itself, as *Jones* suggested").

⁵² 18 U.S.C. §§1589-1594 (2006). The TVPA goes beyond simply prohibiting coercive labor. It provides victims with immigration status, 8 U.S.C. § 1101(a)(15)(T-U), and grants a private cause of action, 18 U.S.C. § 1595.

⁵³ Pub. L. No. 111-84, §§ 4701-4713, 123 Stat. 2835 (2009).

⁵⁴ McAward, *supra* note ----, at 79.

to rely on Section 2 to identify and wipe out all existing forms of legal, social, civil, and economic forms of subordination that lawmakers can reasonably link to the incidents of slavery or involuntary servitude.

With so much at stake, essentially facing the possibility that unelected judges rather than the people's representatives identify the essential components of civil and social freedom, it is worth assessing the validity of McAward's claims about *Boerne* and its implication to Thirteenth Amendment interpretation. An unfortunate feature of McAward's article is that she fails to critique *Boerne* itself. So, while she accepts that the opinion constrains congressional Thirteenth Amendment authority she has not assessed whether the majority in that case correctly interpreted Congress's Fourteenth Amendment authority.⁵⁵ Many commentators have faulted the Court for its judicial infringement on congressional authority,⁵⁶ which has thus far not directly affected Thirteenth Amendment precedents. But McAward's claim is that it should do just. If she is correct, federal legislators can no longer identify the badges and incidents of involuntary servitude absent prior judicial guidance.⁵⁷ All Congress could do under Section 2 would be to

⁵⁵ McAward recognizes that prior academic literature that has differentiated between Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment, indicating *Boerne* did not diminish the value of *Jones*, but she does not engage with the extant arguments. McAward, *supra* note ----, at 82 n.25.

⁵⁶ See, e.g., Robert C. Post and Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 Yale L.J. 1943 (2003); Robert C. Post and Reva B. Siegel, Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power, 78 Ind. L.J. 1 (2004); Alexander Tsesis, Furthering American Freedom: Civil Rights & the Thirteenth Amendment, 45 B.C. L. Rev. 307 (2004); Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 822-23 (1999).

⁵⁷ McAward, *supra* note —, at 142 ("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

pass "prophylactic legislation" when "the badges and incidents of slavery arguably threaten to interfere with judicially recognized rights." ⁵⁸

As I discussed earlier in this essay, one of the clearest indicators that Section 2 was a sweeping grant of constitutional power to Congress was that the Civil Rights Act of 1866, which Congress initially passed pursuant to Section 2, extended the reach of federal governance far beyond the enumerated provisions of Section 1 of the Thirteenth Amendment.⁵⁹ Congress needed no hearings to know that the rights protected under the 1866 act—which included protections for property ownership, testimonial privilege, and contractual empowerment—were fundamental to the nature of free citizenship. Neither did it need the Court to identify which rights were fundamental to freedpeople. In more than 140 years of hearing cases arising from that statute, the Court has never required any such congressional statement of proof to justify the statute's provisions. This fundamentally contrasts from *Boerne*, where the Court required Congress to provide extensive congressional fact-gathering to show more than anecdotal evidence of violations of a fundamental right.⁶⁰

McAward might have reflected on the important difference between Sections 1981 and 1982, on the one hand, both of which were passed pursuant to the Court's Thirteenth Amendment Authority, and the law struck down in *Boerne*, on the other, which Congress passed

substantively expanding the concept of the badges and incidents of slavery.").

⁵⁸ McAward, *supra* note ----, at 142, internal quotations omitted.

⁵⁹ Supra text accompanying notes ----.

⁶⁰ *Boerne*, 521 U.S. 530-31 (proclaiming that "[m]uch of the discussion" of congressional committee hearings about the RFRA "centered upon anecdotal evidence" and therefore failed to prove a "widespread pattern of religious discrimination in this country").

pursuant to the Fourteenth Amendment. *Boerne* and its progenies deal with Congress's efforts to prohibit state actions that infringe on constitutional or statutory rights. ⁶¹ In *Boerne*, the Court held that Section 5 does not grant Congress the authority to place conditions on state and local authorities pursuant to the Religious Freedom and Restoration Act. ⁶² Consistently with that decision, *Kimel v. Florida Bd of Regents* held that Congress lacked authority to pass a provision of the Age Discrimination in Employment Act that abrogated state sovereign immunity. ⁶³ Later, in *University of Alabama v. Garrett*, the Court found that the Fourteenth Amendment did not grant Congress the power to enforce provisions of the Americans with Disabilities Act against the states. In an unexpected turn of events, *Nevada Department of Human Resources v. Hibbs* found that Congress properly relied on Section 5 to prohibit gender based discrimination in the workplace. ⁶⁴ And *Tennessee v. Lane* allowed Congress, pursuant to its power under the Due Process Clause, to abrogate the immunity of a state that failed to provide the disabled with adequate access to courtrooms. ⁶⁵ All five of these decisions have been predicated on the state action requirement, which is completely inapplicable to the analysis of Thirteenth Amendment

⁶¹ I have argued elsewhere that the Court should reconsider the validity of the state action requirement because it is predicated on a politically motivated interpretation of federalism meant to thwart civil rights reform. Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. Rev. 307, 365-67 (2004). *See also* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1831-37 (2010); Robert J. Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 U. Kan. L. Rev. 1015, 1043 (1997).

⁶² 521 U.S. at 519.

^{63 528} U.S. 62, 82-83 (2000).

^{64 538} U.S. 721, 734-35 (2003).

^{65 541} U.S. 509, 511 (2004).

enforcement authority. Thus, the entire line of cases arising from *Boerne* is irrelevant to *Jones v*.

Alfred H. Mayer, which dealt with private and not state discrimination.

The Court has long contrasted Fourteenth Amendment state action requirements from the Thirteenth Amendment authority to pass legislation directly affecting private conduct. The Court's earliest contrast between the two came in the *Slaughterhouse Cases* in 1873.66 The majority's analysis in that case clearly distinguished clauses of the two amendments. The majority narrowly construed the Privileges and Immunities Clause,67 the Equal Protection Clause,68 and the Due Process Clause.69 Its rationale for upholding the state law against the Thirteenth Amendment challenge issue was on entirely separate grounds related to the conditions of involuntary servitude and the abolition of slavery.70 In his dissent to *Slaughterhouse*, Justice Field also differentiated between the two amendments.71 McAward thus presumes away what the Court has always taken for granted: the analytical distinction between the Fourteenth and

^{66 83} U.S. 36 (1873).

⁶⁷ *Id.* at 74 (recognizing a small set of privileges and immunities associated with national citizenship).

⁶⁸ *Id.* at 81 ("We doubt very much whether any action of a State not directed by way of discrimination against [African Americans] as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.").

⁶⁹ *Id.* at 80-81 (rejecting a substantive due process claim that a business monopoly deprived independent butchers of their liberty to pursue their occupation).

⁷⁰ *Id.* at 49-51, 72.

⁷¹ *Id.* at 90-91 (Field, J., dissenting) (relying on the legislatures broad reading of the Thirteenth Amendment to comprehend the meaning of "involuntary servitude," and separately criticizing the majorities interpretation of the Fourteenth Amendment).

Thirteenth Amendments.

Despite narrowly construing the Thirteenth and Fourteenth Amendments in the *Civil Rights Cases*, in a manner similar to the *Slaughterhouse Cases*, the Court nevertheless drew very clear distinctions between them. The Court regarded the state action requirement of the Fourteenth Amendment to be an essential contrast between the two. The *Civil Rights Cases* held that the 1875 Civil Rights Act, with its provisions against public accommodations discriminations, was beyond the scope of Congress's state action empowerment.⁷² The Court's rationale for finding the law to be an unconstitutional use of Thirteenth Amendment power was different, even though its ultimate judgment about the statute's unconstitutionality was the same.⁷³ Thus even in one of the Supreme Court's most formidable attacks on civil rights legislation, it nevertheless differentiated between Congress's enforcement powers under Section 5 and Section 2, in large part because it held that the Thirteenth Amendment applies to private contracts but that the Fourteenth Amendment does not.

While the Court has to this day retained the literalist construct of the Fourteenth Amendment's state action provision, 74 it has never transplanted it into its Thirteenth

⁷² *Civil Rights Cases*, 109 U.S. 3, 17 (1883) ("[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual . . . is simply a private wrong").

⁷³ *Id.* at 20-23 (conceding that Congress has the power to pass necessary and proper laws for ending privately perpetrated incidents of involuntary servitude, but finding that public accommodation law went beyond that grant of authority because it regulated social not civil conduct).

⁷⁴ United States v. Morrison, 529 U.S. 598, 621 (2000) (citing to the *Civil Rights Cases* as an early example of the Court's adopted "state action" requirement). It is interesting to note that while the Court has decide to be literalist in its textualist interpretation of the Fourteenth

jurisprudence. While in his dissent to the *Civil Rights Cases*, Justice Harlan disagreed with the judgment of the Court, like the majority he differentiated between the purposes, language, and meaning of the two amendments.⁷⁵ The Court's and dissent's distinction between the two amendments leads to the conclusion that the entire line of cases following *Boerne*, which constrain Congress's use of its power to regulate the conduct of state actors, is entirely inapplicable to *Jones*, which upheld congressional regulation of private discrimination.⁷⁶ If the Court were to follow McAward's suggestion that it narrow *Jones* based on its rationale in *Boerne*, it would be deviating from over a hundred years of precedent.

McAward might ultimately be correct that the Court will overturn long established

Amendment, its interpretations of some other constitutional provisions have not followed that method of interpretation. For instance, the first Amendment can be read to govern Congress alone, but the court has found that it applies to the state. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). The Court has also filed a non-literalist approach with the Eleventh Amendment; an area where the majority has turned a constitutional provision related to diversity jurisdiction into a statement of sovereign immunity. Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 446 (2004) (recognizing that "we have recognized that the States' sovereign immunity is not limited to the literal terms of the Eleventh Amendment'); Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991) ("we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty").

⁷⁵ Civil Rights Cases, 109 U.S. at 36 (Harlan, J., dissenting) (stating that the Thirteenth Amendment's guarantee of "freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races"); *id.* (Harlan, J., dissenting) (arguing that Section 5 of the Fourteenth Amendment authorized Congress to enact "appropriate legislation . . . and such legislation may be of a direct and primary character, operating upon states, their officers and agents, and also upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the state").

⁷⁶ *Jones*, 392 at 413 n.5 (differentiating between the Fourteenth Amendment's state action requirement and the Thirteenth Amendment's grant to of congressional authority).

decisions; although, even here there is room to doubt her conclusion because both liberal and conservative courts have retained and, indeed, bolstered the broad reading of the Thirteenth Amendment.⁷⁷ What makes McAward's argument plausible is the Rehnquist and Roberts Courts' willingness (and in the case of *Citizens United* downright eagerness) to strike precedents and federal statutes, leaving a high degree of uncertainty about whether controversial laws can survive judicial fiat.⁷⁸ Political motivations clearly influence judicial outcomes,⁷⁹ with *Bush v*. *Gore* is the crowning achievement of judicial politicisation.⁸⁰ The conservative composition of the Roberts Court might lead it to overturn one of the jewels of the Warren Court, *Jones v. Alfred H. Mayer*. But such a possibility is only speculative. In any case, the legal realist perspective on the Court, recognizing that individual proclivities play an important role in how cases are

The Warren Court decided *Jones v. Alfred H. Mayer*, while the Burger Court extended the decision in *Runyon v. McCrary*, 427 U.S. 160, 170 (1976) (adopting the *Jones* test of whether a "prohibition was within Congress" power under § 2 of the Thirteenth Amendment 'rationally to determine what are the badges and the incidents of slavery, and . . . to translate that determination into effective legislation.""). The Rehnquist Court also reaffirmed *Jones* in Patterson v. McLean Credit Union, 491 U.S. 164, 175-76 (1989); Domino's Pizza, Inc. v. McDonald 546 U.S. 470, 476 (2006).

⁷⁸ See, e.g., Boerne, (finding that the Religious Freedom Restoration Act was unconstitutional); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554-57 (2007) (holding that an anti-trust complaint must be non-speculative and plausible); Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (extending the "plausibility" pleading standard to all complaints governed by Federal Rule of Civil Procedure 8); Citizens United v. Federal Election Com'n, 130 S. Ct. 876, 913 (2010) (altering settled precedent about corporate campaign finance spending). Compare the recent trend of judicial assertion of constitutional, interpretational primacy to the early Court: Prior to 1866, the Supreme Court had only twice found federal laws unconstitutional. The two cases were Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) and Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 452 (1856). In 1866, Ex parte Garland held unconstitutional an ex post facto law meant to disbar many southern attorneys. 71 U.S. (4 Wall.) 333, 381 (1866).

⁷⁹ Richard A. Posner, *A Political Court*, 119 HARV. L. REV. 31, 53-54, 71 (2005).

⁸⁰ Bush v. Gore, 531 U.S. 98 (2000).

decided, is different from the one for which McAward argues. Hers is an argument predicated on transplanting Fourteenth Amendment precedents, which as I pointed out earlier have been predicated on the state action requirement, onto the Thirteenth Amendment corpus of private rights discrimination, not on a legal realist perspective.

I am an optimist and there's reason to hope that the Court will not ingraft its interpretation of Section 5 onto Section 2 cases. One reason that bears mention, is that the Court appears to have stepped back from the forcefulness with which *Boerne* hamstrung Congress's ability to identify constitutionally protected rights. While soon after creating the "congruent and proportionality" test for prophylactic legislation the Court further eroded Congress' Section 5 authority when it overturned provisions of two civil rights laws in *Garrett* and *Kimel*, the Court finally slowed its incursion into legislative powers in *Hibbs* and *Lane*. This new twist on its interpretation might indicate that the Court is looking for a way of avoiding the potential consequences of striking an unpredictable number of other civil rights laws on politically charged grounds.

Furthermore, the Court's prior history indicates that where it has constricted legislative powers under the Fourteenth Amendment it found alternative means of upholding statutes. For instance, rather than overturning its holding in the *Civil Rights Cases*, which had found that Congress lacked the authority to pass laws prohibiting public accommodations segregation, the Court upheld a closely related law under an alternative grant of power. Congress had relied both on the Fourteenth Amendment and Commerce Clause to justify passage of Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations whose "operations"

affect commerce, or if discrimination or segregation by it is supported by State action."* But in upholding that law in *McClung* and *Heart of Atlanta* the Court only justified Congress's use of its power to regulate interstate commerce. Likewise, whereas *Boerne* limited Congress's power to enforce Section 1 of the Fourteenth Amendment, Congress's mention of the Thirteenth Amendment in Victims of Trafficking and Violence Prevention Act and Matthew Shepard Act might suffice for the Court to uphold them on the basis of its broad interpretation of the badges and incidents of involuntary servitude.

Conclusion

The history of the Thirteenth Amendment and the Court's long-established interpretation of Congress's power to enforce its provisions raise significant doubts about Jennifer Mason McAward's argument. Congressional debates at the time of the Amendment's ratification and statements about the Civil Rights Act of 1866 demonstrate that it was meant to drastically alter federalism by granting Congress the supreme power to identify and protect civil rights. Neither does the recent line of cases that have narrowly interpreted the Fourteenth Amendment's Enforcement Clause place in doubt the continued vibrance of legislative efforts to combat existing incidents and badges of involuntary servitude. The Court has always compartmentalized its interpretation of the Thirteenth and Fourteenth Amendments, and there is no indication that it

⁸¹ 42 U.S.C. § 2000a(b) (2006).

⁸² Katzenbach v. McClung, 379 U.S. 294, 305 (1964) (finding Congress had the authority to prohibit racial discrimination in restaurants whose business relies on interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding that Title II was an appropriate exercise of the commerce power to a public accommodation serving interstate travelers).

would deviate from that pattern.