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THE RECONSTRUCTION POWER

JACK M. BALKIN*

Modern doctrine has not been faithful to the text, history, and structure of the Thirteenth, Fourteenth, and Fifteenth Amendments. These amendments were designed to give Congress broad powers to protect civil rights and civil liberties; together they form Congress's Reconstruction Power.

Congress gave itself broad powers because it believed it could not trust the Supreme Court to protect the rights of the freedmen. The Supreme Court soon realized Congress's fears, limiting not only the scope of the Reconstruction Amendments but also Congress's powers to enforce them in decisions like United States v. Cruikshank *and the* Civil Rights Cases*. Due to these early cases, Congress was often forced to use its Commerce Power to protect civil rights. Modern decisions beginning with* City of Boerne v. Flores *and* United States v. Morrison *have compounded these errors.*

When we strip away these doctrinal glosses and look at the original meaning and structural purposes underlying the Reconstruction Amendments, we will discover that the Reconstruction Power gives Congress all the authority it needs to pass modern civil rights laws, including the Civil Rights Act of 1964. That was the original point of these amendments, and that should be their proper construction today.

When it enforces the Reconstruction Amendments, Congress is not limited to remedying or preventing state violations of rights. It has long been recognized that Congress may reach private conduct through its Thirteenth Amendment powers to eradicate the badges and incidents of slavery. But Congress also has the power to enforce the Fourteenth Amendment's Citizenship Clause—a guarantee of equal citizenship that, like the Thirteenth Amendment, contains no state action requirement. The Citizenship Clause, designed to secure equality of citizenship for freedmen, gives Congress the corresponding power to protect the badges and incidents of citizenship. Congress may therefore ban discriminatory private conduct that it reasonably believes will contribute to or produce second-class citizenship.

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In addition to having powers to enforce the Citizenship Clause, Congress also may reach private action to prevent interference with federal constitutional rights. Along with its powers to enforce the Guarantee Clause, Congress may therefore reach private violence designed to deter political participation, terrorize political opponents, or undermine representative government.

The failure of state and local governments to guarantee equal protection of the laws was a central concern of the framers of the Fourteenth Amendment, and giving Congress the power to remedy this violence was thus one of the central purposes of the amendment. Today, this same power enables Congress to pass laws banning violence directed at women and other federal hate crimes legislation.

Finally, because of institutional differences between courts and legislatures, Congress may implement the state action requirement more broadly than courts currently do, for example, by imposing antidiscrimination norms on government contractors and operators of public accommodations. For this reason Title II of the 1964 Civil Rights Act, which bans discrimination in public accommodations, is not only a legitimate exercise of Congress's power to enforce the Fourteenth Amendment; it is a paradigmatic example of that power.

The Supreme Court did not reach these questions in 1964 because it feared that overturning old precedents like the 1883 Civil Rights Cases *would encourage Southern resistance to the new Civil Rights Act. But we should have no such compunction today. It is long past time to remedy the Supreme Court's errors, and reconstruct the great Reconstruction Power of the Constitution.*

INTRODUCTION: THE CIVIL RIGHTS ACT OF 1964 AND A QUESTION DEFERRED

In 1964, Congress passed the great Civil Rights Act, which prohibited discrimination in education, employment, and public accom-

modations.[1] Congress claimed authority to enact the new civil rights bill under its powers to enforce the Fourteenth Amendment and to regulate interstate commerce.

During congressional deliberations, senators grumbled that it seemed wrong to base the protection of civil rights on Congress's power to regulate the interstate sale of goods. The question was one of human dignity and the basic rights of citizenship. Surely if any congressional power was relevant, it was the power to enforce the Fourteenth Amendment's guarantee of equal protection of the laws.[2]

Lawyers from the Kennedy and Johnson administrations, however, argued that the Commerce Clause theory was the safer route. To reach the Fourteenth Amendment question, the Supreme Court would have to overturn a series of precedents dating back to the 1870s that had severely limited Congress's power to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments.[3] These decisions culminated in the 1883 *Civil Rights Cases*, which struck down an 1875 civil rights law banning racial discrimination in public accommodations.[4]

It was risky to ask the Supreme Court to overturn years of settled precedents; it was especially hazardous when the legislation at stake was crucial to the President's program and had taken such enormous political efforts to pass. A Supreme Court opinion striking down the

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[1] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000 (2006)).

[2] *See, e.g.*, *A Bill To Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 190–93 (1963) [hereinafter *Hearings*] (statement of Sen. John S. Cooper). Senator John O. Pastore explained:

> I believe in this bill, because I believe in the dignity of man, not because it impedes our commerce. . . . I like to feel that what we are talking about is a moral issue . . . . And that morality, it seems to me, comes under the 14th [A]mendment, . . . where we speak about equal protection of the law. I am saying we are being a little too careful, cagey, and cautious.

Id. at 252; *see also* REBECCA E. ZEITLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 114 (2006) ("Other supporters of the bill initially resisted the use of the commerce power, because they believed that the bill was intended primarily to enforce equality norms."). Eventually Congress compromised and placed constitutional authority for the bill under both the Commerce Clause and the Fourteenth Amendment. *Id.* at 115.

[3] *See* United States v. Reese, 92 U.S. 214 (1875) (limiting power to enforce Fifteenth Amendment); United States v. Cruikshank, 92 U.S. 542 (1875) (limiting power to enforce Fourteenth and Fifteenth Amendments); United States v. Harris, 106 U.S. 629 (1883) (limiting power to enforce Thirteenth and Fourteenth Amendments and striking down parts of Ku Klux Klan Act of 1871); The Civil Rights Cases, 109 U.S. 3 (1883) (limiting power to enforce Thirteenth and Fourteenth Amendments and striking down Civil Rights Act of 1875).

[4] 109 U.S. 3 (1883).

law would be devastating morally and politically. Better safe than sorry, the Justice Department lawyers reasoned.[5]

Moreover, if the Supreme Court overturned the *Civil Rights Cases*, it might encourage Southern noncompliance and make the new civil rights law unenforceable.[6] A decade earlier, in *Brown v. Board of Education*,[7] the Court had overturned *Plessy v. Ferguson*,[8] and the South had responded with massive resistance. Ten years of Southern intransigence had produced hardly any progress toward the integration of public schools. In fact, Congress passed Title VI of the new Act to ratify the result in *Brown* and withhold federal funds from schools that did not desegregate.[9] Why give Southern politicians a ready-made excuse to make trouble? Far better to rely on Congress's broad powers to regulate commerce that already had been established by the constitutional struggle over the New Deal. Many Southern Democrats did not like *Brown*, but they believed in the New Deal and the expansion of the federal commerce power that came with it.

The Justice Department lawyers were prudent. That December, the Supreme Court unanimously upheld the public accommodations provisions of Title II of the Civil Rights Act under the commerce

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[5] *See, e.g.*, *Hearings*, *supra* note 2, at 252 (statement of Burke Marshall, Assistant Att'y Gen. of the United States) ("I think if [the proposed civil rights bill] relied solely on the 14th [A]mendment, it might not be held constitutional. I think it would be a disservice to pass a bill that was later thrown out by the Supreme Court."); *id.* at 23, 28 (statement of Robert F. Kennedy, Att'y Gen. of the United States) (expressing concerns about Congress's Section 5 power given existing precedents and favoring commerce power as primary basis for legislation).

[6] *See* Bruce Ackerman, *Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1780–81 & n.137 (2007) (noting that Fourteenth Amendment theory risked strong dissent by Justice Harlan, which "would have provided a platform for every racist in the nation to urge a new round of defiance against the 1964 Act[ ]").

In deliberations within the Kennedy administration, Solicitor General Archibald Cox argued against relying on the Fourteenth Amendment. Overruling the *Civil Rights Cases*, he believed, would test the Court's prestige and legitimacy. *See* KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 189–90 (1997). On the other hand, using the Commerce Clause theory "was as easy as rolling off a log." *Id.* Gormley reports that Robert Kennedy initially preferred the Fourteenth Amendment theory, but, by the time he testified before Congress, Kennedy advised relying primarily on the Commerce Clause. *See supra* note 5.

[7] 347 U.S. 483 (1954).

[8] 163 U.S. 537 (1896).

[9] Civil Rights Act of 1964, Pub. L. No. 88-352, § 201–07, 78 Stat. 241, 243–46 (codified as amended at 42 U.S.C. § 2000d (2006)); *see* United States v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836, 856, 882 (5th Cir. 1966) (explaining that purpose of Title VI was to "rescue school desegregation from the bog in which it had been trapped for ten years"), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967); Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 94 (1966) ("[T]he principle of *Brown v. Board of Education* became more firmly law after its incorporation into [T]itle VI of the Civil Rights Act of 1964.").

power.[10] Although two Justices would have upheld the Act under Section 5 of the Fourteenth Amendment,[11] the Court conspicuously noted that it did not reach the issue, suggesting that a majority believed that discretion was the better part of valor.[12]

The Court took the easy path that day, with fateful consequences that I shall explore later on in this Article.[13] But almost fifty years later, we can surely ask about the correct answer to that deferred question: Was the great Civil Rights Act of 1964 really beyond Congress's powers to enforce the Fourteenth Amendment? Or were the *Civil Rights Cases* wrong?

Years later, Chief Justice Rehnquist would insist that the *Civil Rights Cases* and other early decisions limiting congressional power to protect civil rights had to be correct: After all, they reflected the views of Justices "appointed by President[s] Lincoln, Grant, Hayes, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment."[14] Yet the statutes that the Court struck down or limited were enacted by the same congressmen and senators who had passed the Reconstruction Amendments. Surely their construction of the amendments was entitled to even greater respect.

This Article argues that modern doctrine has not been faithful to the text, history, and structure of the Thirteenth, Fourteenth, and Fifteenth Amendments. These amendments were designed to give Congress broad powers to protect civil rights and civil liberties: Together they form Congress's Reconstruction Power. Congress gave itself these powers because it believed it could not trust the Supreme Court to protect the rights of the freedmen; and the Supreme Court soon realized Congress's fears, limiting not only the scope of the Reconstruction Amendments but also Congress's powers to enforce them. Modern decisions beginning with *City of Boerne v. Flores*[15] and *United States v. Morrison*[16] have compounded these errors.

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[10] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

[11] *Heart of Atlanta Motel, Inc.*, 379 U.S. at 279 (Douglas, J., concurring); *id*. at 291–93 (Goldberg, J., concurring).

[12] *See infra* notes 215–17 and accompanying text (noting that majority of Court had previously come close to striking down *Civil Rights Cases*).

[13] *See infra* Part V.

[14] United States v. Morrison, 529 U.S. 598, 622 (2000). This language is cribbed almost verbatim from *Collins v. Hardyman*, 341 U.S. 651, 657–58 (1951), written by Justice Jackson, for whom Chief Justice Rehnquist clerked. *Collins* was effectively overruled in *Griffin v. Breckenridge*, 403 U.S. 88, 95–103 (1971).

[15] 521 U.S. 507 (1997).

[16] 529 U.S. 598 (2000).

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When it enforces the Reconstruction Amendments, Congress is not limited to remedying or preventing state violations of rights. It has long been recognized that Congress may reach private conduct through its Thirteenth Amendment powers to eradicate the badges and incidents of slavery.[18] But Congress also has the power to enforce the Fourteenth Amendment's Citizenship Clause—a guarantee of equal citizenship that, like the Thirteenth Amendment, contains no state action requirement. The Citizenship Clause, designed to secure equality of citizenship for the freedmen, gives Congress the corresponding power to protect the *badges and incidents of citizenship*. Congress may therefore ban discriminatory private conduct that it reasonably believes will contribute to or produce second-class citizenship.[19] The scope of this power, as for all of Congress's enumerated powers, is established by the test of *McCulloch v. Maryland*: whether the means used are appropriate and plainly adapted to the constitu-

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[17] This Article is one of a series of studies applying the method of text and principle, which is premised on the idea that the familiar opposition between originalism and living constitutionalism is a false dichotomy. Constitutional interpretation requires fidelity to the original meaning of the text and to the principles stated by the text or that underlie the text. But fidelity to original meaning does not require fidelity to original expected applications: how the adopting generation would have expected the text would be applied. *See* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010) [hereinafter Balkin, *Commerce*] (employing method of text and principle to show why original meaning of Commerce Clause is consistent with modern state); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw. U. L. REV. 549, 549–59 (2009) (arguing that fidelity to original meaning requires fidelity to framers' choice of rules, standards, and principles to organize politics, but not to how they would have articulated abstract statements of principle or applied vague language in concrete circumstances); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 432–36 (2007) (distinguishing between fidelity to original meaning and original expected applications); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292–311 (2007) [hereinafter Balkin, *Abortion and Original Meaning*] (same).

The method of text and principle pays careful attention to the Constitution's text, structure, and history, including statements of principle and purpose by the adopting generation; but it does not treat previous constructions—either by the framers or by the Supreme Court—as necessarily binding on contemporary interpreters. This Article, for example, emphasizes how we should apply the structural purposes of the Reconstruction Amendments today; it also explains why many of the Supreme Court's early constructions are inconsistent with these purposes.

[18] *See infra* text accompanying notes 64–70.

[19] *See infra* text accompanying notes 72–80; Part V.A.

tional end.[20] The framers of the Reconstruction Amendments sought to ensure that the test of *McCulloch* would apply to the new powers created by the Reconstruction Amendments; that is why they included the word "appropriate" in the text of all three enforcement clauses.[21] Under the *McCulloch* test, if Congress reasonably could have concluded that banning discrimination in public accommodations and employment would help secure equal citizenship and prevent the maintenance of second-class citizenship, it had the authority to enact Title II and Title VII of the 1964 Civil Rights Act to enforce the Citizenship Clause.

Congress's powers to enforce the Fourteenth and Fifteenth Amendments also allow it to prevent private interference with federally guaranteed rights, including federal constitutional rights. Along with its powers to enforce the Guarantee Clause of Article IV, Section 4, Congress can prohibit violence designed to deter political participation, terrorize political opponents, or undermine representative government.[22]

Congress can also enforce the Equal Protection Clause by punishing or deterring private violence aimed at women or minority groups when state governments fail to give equal protection to victims. After the Civil War, southern whites terrorized blacks and white unionists, and local governments were either unable or unwilling to stop the violence. The failure of state and local governments to guarantee equal protection of the laws was a central focus of the Report of the Joint Committee on Reconstruction; giving Congress the power to remedy this violence was one of the central purposes of the Fourteenth Amendment. Today this same power enables Congress to pass federal hate crimes legislation as well as laws banning violence directed at women.[23]

Finally, because of institutional differences between courts and legislatures, Congress may implement the state action requirement more broadly than courts. State and local governments may have obligations to impose some constitutional norms on nominally private actors—for example, government contractors and operators of public accommodations. Courts may find it difficult to draw lines, however, and will therefore underenforce these obligations out of respect for democratic authority and administrative flexibility. Because Congress has democratic authority, it can apply constitutional norms flexibly—drawing lines that courts cannot or will not—and take political

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[20] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).
[21] *See infra* Part II.
[22] *See infra* Part V.B.
[23] *See infra* Part V.C.

responsibility for the results. It may therefore regulate some activities that courts would treat as private in the absence of explicit congressional authorization.[24]

During the civil rights protests of the early 1960s, for example, the Supreme Court declined to decide whether the Constitution protected sit-in protesters seeking to integrate segregated lunch counters; instead, the Justices deferred to Congress to pass civil rights legislation protecting minorities in places of public accommodation.[25] The Court's deference to Congress left space for legislation enforcing the Fourteenth Amendment. If Congress reasonably could conclude that states have a constitutional duty to outlaw discrimination in places of public accommodations, it may give courts statutory authority to enforce this norm. This constitutes an additional source of congressional power to pass Title II of the Civil Rights Act of 1964.[26]

I
THE STRUCTURAL PURPOSE OF THE ENFORCEMENT CLAUSES

Between 1865 and 1870, Congress passed three new amendments, each with an enforcement clause: Section 2 of the Thirteenth Amendment, Section 5 of the Fourteenth Amendment, and Section 2 of the Fifteenth Amendment. The language of each is virtually identical, giving Congress the "power to enforce" the provisions of the amendment "by appropriate legislation."[27] Enforcement clauses in subsequent amendments have used similar language.[28] The words "[t]he Congress shall have power" mirror the opening of Article I, Section 8's list of enumerated powers.[29] Indeed, the three enforcement clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments were the first congressional powers added since the adoption of the 1787 Constitution.

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[24] *See infra* Part V.D.

[25] *See infra* notes 213–16 and accompanying text.

[26] *See infra* text accompanying notes 213–18.

[27] Section 2 of the Thirteenth Amendment, passed in January 1865 and ratified in December 1865, states that "Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII, § 2. Section 5 of the Fourteenth Amendment, passed in June 1866 and ratified in June 1868, states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Id. amend. XIV, § 5. Section 2 of the Fifteenth Amendment, passed in February 1869 and ratified in February 1870, says that "[t]he Congress shall have power to enforce this article by appropriate legislation." *Id.* amend. XV, § 2.

[28] *Id.* amend. XVIII, § 2; *id.* amend. XIX, cl. 2; *id.* amend. XXIII, § 3; *id.* amend. XXIV, § 2; *id.* amend. XXVI, cl. 2.

[29] *Id.* art. I, § 8 ("The Congress shall have Power to . . . .").

What was the structural purpose of the enforcement clauses? The purpose of the enumerated powers in Article I, Section 8 was to give the new federal government the power to legislate in cases where the states were severally incompetent.[30] The new powers in the Reconstruction Amendments served a different purpose: They gave Congress the power to protect equal citizenship and equality before the law. Article I, Section 8 powers were necessary because states could not effectively solve certain problems of governance; the Reconstruction Powers were necessary because history had shown that states would not protect equal citizenship and equality before the law. The enumerated powers of Article I, Section 8 allowed Congress to establish national standards to solve collective action problems; the enumerated powers of the Reconstruction Amendments allowed Congress to establish national standards to protect basic rights and liberties.

These new powers significantly affected the federal-state balance. They gave Congress the power to supervise state actors as well as to regulate some private conduct. Increasing congressional power at the expense of the states was the whole point of the new constitutional structure that followed the Civil War. As Justice Strong explained in *Ex parte Virginia*, the Reconstruction Amendments

> were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress. They are to some extent declaratory of rights, and though in form prohibitions, they imply immunities, such as may be protected by congressional legislation. . . . It is not said the judicial power . . . shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. . . . It is the power of Congress which has been enlarged. . . . Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. . . . Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. . . . Indeed, every addition of power to the gen-

[30] *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21, 26, 131–32 (Max Farrand ed., 1966) (reporting Resolution VI of Constitutional Convention laying out purposes of Congress's enumerated powers); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 178 (1996) (describing structural purpose of enumeration); *see also* Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1338–40 (1934) (same). For fuller discussion of this point, see Balkin, *Commerce*, *supra* note 17.

> eral government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.[31]

Creating constitutional constructions for Congress's Reconstruction Power raises four basic questions.

First, what standard of review should courts apply to determine whether legislation is within Congress's powers?

Second, does Congress's power to enforce the Reconstruction Amendments include only the power to pass legislation that remedies past violations and prevents future ones? Or does the power to enforce include the ability to enact what the Supreme Court has called "primary and direct"[32] legislation over particular subjects, akin to the enumerated powers in Article I, Section 8? For example, the Commerce Clause gives Congress the power directly to regulate interstate commerce regardless of whether any state has ever limited access to commerce.

Third, can Congress interpret the scope of the Reconstruction Amendments for itself, or must it follow what the Supreme Court considers to be a violation of the Reconstruction Amendments?

Fourth and finally, under what conditions can Congress reach private action under its powers to enforce the Reconstruction Amendments?

II
The Scope of Congressional Power

When Congress adopted the Reconstruction Amendments, it was generally accepted that grants of congressional power in Article I were subject to the test of *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[33]

The framers of the Reconstruction Amendments assumed that the *McCulloch* test would apply to Congress's new Reconstruction Powers, and the use of the term "appropriate" in the text of all three enforcement clauses reflects this assumption.[34] Moreover, adding new

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[31] *Ex parte* Virginia, 100 U.S. 339, 345–46 (1880).

[32] *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 18–19 (1883) (holding that Thirteenth, but not Fourteenth, Amendment gives Congress power to pass "primary and direct" legislation).

[33] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

[34] *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1118 (1866) (statement of Rep. James Wilson, Chairman, H. Comm. on the Judiciary) (arguing that proposed Civil Rights Act of 1866, designed to enforce Thirteenth Amendment, passed *McCulloch* test); Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 822–27 (1999) (arguing that framers of

enumerated powers meant that Congress could also pass legislation "necessary and proper for carrying into Execution"[35] the new powers; by its own terms, the Necessary and Proper Clause applies not merely to "the foregoing powers [of Article I, Section 8 but also] all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[36]

Contemporaneous Supreme Court decisions agreed. In *Ex parte Virginia*, the Court explained that

> [w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.[37]

Even the 1883 *Civil Rights Cases*, which read Congress's powers fairly narrowly, claimed that the Court was applying the *McCulloch* test.[38] This understanding continued through the civil rights revolution of the 1960s, when the Supreme Court upheld provisions of the Voting Rights Act of 1965 and gave a broad construction to the Civil Rights Act of 1866.[39]

Reconstruction Amendments used "appropriate" in enforcement clauses as reference to *McCulloch* test); Robert J. Kaczorowski, *Congress's Power To Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 200–03 (2005) (arguing that framers of Fourtheenth Amendment believed that *McCulloch* test would apply to legislation passed under Section 5); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 178 n.153 (1997) (noting that "supporters of the Amendment continued to invoke *McCulloch* in interpreting the reach of Section Five" when language of proposed amendment was altered from "necessary and proper" to "appropriate"); *id.* at 188 ("This term[, appropriate,] has its origins in the latitudinarian construction of congressional power in *McCulloch*.").

[35] U.S. CONST. art. I, § 8, cl. 18.

[36] *Id.*

[37] *Ex parte* Virginia, 100 U.S. 339, 345–46 (1880).

[38] The Civil Rights Cases, 109 U.S. 3, 13–14, 20 (1883).

[39] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968) (citing *McCulloch* test as standard for congressional power under Thirteenth Amendment); Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) ("Thus the *McCulloch v. Maryland* standard is the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment."); South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) ("The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States."); *see also* City of Rome v. United States, 446 U.S. 156, 177 (1980) ("[U]nder § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1[,] . . . so long as the prohibitions attacking racial discrimination in voting are 'appropriate,' as that term is defined in *McCulloch v. Maryland* and *Ex parte Virginia* . . . ."); James Everard's Breweries v. Day, 265 U.S. 545, 558–59 (1924) (applying *McCulloch* test to legislation passed to enforce Eighteenth Amendment).

The Supreme Court abruptly changed course in 1997 in *City of Boerne v. Flores*.[40] It held that Congress's enforcement powers under Section 5 of the Fourteenth Amendment were limited to remedies that were "congruen[t] and proportional[ ]" to the Supreme Court's view of what violates the Fourteenth Amendment.[41]

Boerne involved a constitutional challenge to the 1993 Religious Freedom Restoration Act (RFRA).[42] RFRA protected religious practices from government policies that imposed a substantial burden on their exercise. The government had to show that such policies were narrowly tailored to achieve a compelling governmental interest.[43] This test had been the Supreme Court's own doctrine until it reversed itself in the 1990 decision in *Employment Division v. Smith*.[44] *Smith* held that "neutral, generally applicable law[s]" did not violate the Free Exercise Clause even if they substantially burdened—or actually prohibited—religious exercise.[45]

In RFRA, Congress used its Section 5 powers to re-establish the previous constitutional test of religious freedom. Viewing the legislation as a threat to its interpretive authority, the Supreme Court held that RFRA was not within Congress's Section 5 powers to enforce the Fourteenth Amendment. (The Fourteenth Amendment incorporates the protections of the Free Exercise Clause against state and local governments.) The Court argued that its interpretation of the Free

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In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Supreme Court unanimously upheld parts of the Voting Rights Amendments of 1970 that extended nationwide bans on literacy tests. Different groups of Justices upheld a provision that lowered the voting age in national elections to eighteen and struck down a provision that would have lowered the voting age to eighteen in state elections. *Id.* at 117–19. All of the Justices assumed that the test of *South Carolina v. Katzenbach* (and hence *McCulloch*) applied to Congress's powers to enforce the Reconstruction Amendments. *See id.* at 128–29 (Black, J., announcing judgment of Court); *id.* at 141 (Douglas, J., concurring in part and dissenting in part); *id.* at 235–36 (Brennan, J., concurring in part and dissenting in part); *id.* at 286 (Stewart, J., concurring in part and dissenting in part); *id.* at 217 n.96 (Harlan, J., concurring in part and dissenting in part) (arguing that reasonableness was appropriate standard for five-year abolition of literacy tests). Nevertheless, Justice Black argued that "the Enforcement Clause of the Fourteenth Amendment [was not] intended to permit Congress to prohibit every discrimination between groups of people," *id.* at 127, and that there was no reasonable connection between banning age discrimination and preventing race discrimination. *Id.* at 127–30. Justice Harlan argued that the Fourteenth Amendment did not reach voting rights, *id.* at 153–54, and Justice Stewart argued that Congress could not ban age discrimination in voting because it had no independent interpretive power under Section 5. *Id.* at 296.

[40] 521 U.S. 507 (1997).

[41] *Id.* at 520.

[42] Religious Freedom and Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (2006)).

[43] *See id.* § 2000bb-1.

[44] 494 U.S. 872 (1990).

[45] *Id.* at 881.

Exercise Clause was supreme, even and especially when it changed its mind. It created the congruent and proportional standard to ensure that Congress tried to remedy only what the Court believed was a constitutional violation and did not use a different interpretation. Because RFRA offered a far broader set of protections for religious liberty than the Court was willing to offer, the Court held that it was not congruent and proportional; Congress could not justify RFRA either as a remedy for past violations of the Free Exercise Clause or as a means of preventing future violations.

Under the *McCulloch* standard, the case would look very different. In *McCulloch*, the Court held that Congress had the power to create a bank in order to further its Article I, Section 8 powers, including, among others, "to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies."[46] Creating a bank owned by a combination of public and private parties is not "congruen[t] and proportional[ ]" to those purposes; it lets the federal government do far more and in a rather roundabout way. It is not the means most closely connected to Congress's enumerated powers nor is it the method most respectful of state prerogatives. Under *McCulloch*, however, all this is irrelevant. The ends are clearly legitimate, and the means—creation of a national bank—helps the federal government achieve those ends, even if it does a lot more in the bargain. As Chief Justice Marshall put it, "where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."[47] Under Marshall's reasoning in *McCulloch*, RFRA is clearly constitutional; it was designed to enforce constitutional guarantees of freedom of religion—that is its stated purpose, after all—and it prevents future violations of the First Amendment.

Note, moreover, that under the *McCulloch* standard RFRA would be constitutional whether or not Congress may interpret the Reconstruction Amendments differently from the Supreme Court. Even if Congress has no independent interpretive authority, the question under *McCulloch* is whether RFRA reasonably furthers the Free Exercise Clause as the Court interprets it. It clearly protects religious freedom, remedies the effects of past constitutional violations, creates a prophylactic rule that obviates the problem of proving intention to discriminate, and thereby deters future violations. The Court might

[46] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).
[47] *Id.* at 423.

believe, as it did in *Boerne*, that violations of the *Smith* standard are sufficiently rare that such a broad measure is not necessary.[48] But under *McCulloch*, the relevant question is whether Congress reasonably could believe that a broad rule would help foster and protect religious liberty, either by remedying past government misbehavior or by addressing future contingencies.

In addition, the language of RFRA applies both to state and local governments and to the federal government.[49] In *Boerne*, the Supreme Court struck down RFRA as to the states but said nothing about its application to the federal government.[50] There is a good reason for this: Federal RFRA is legislation that organizes the internal operations of the federal government, and therefore falls squarely within Congress's powers under the Necessary and Proper Clause. In its horizontal aspect, the Clause gives Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[51] The test of constitutionality is that of *McCulloch*; RFRA easily passes that test.

All of which leads to the obvious question: Why *should* Congress have an easier time enforcing the First Amendment against the federal government than against the states? The basic purpose of the Fourteenth Amendment, after all, was to give Congress the power to impose the same rights protections on the states that bound the federal government.[52] If *Boerne* is a case about separation of powers, i.e., ensuring that Congress does not pass laws that interpret the

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[48] *See* City of Boerne v. Flores, 521 U.S. 507, 531–35 (1997) (arguing that violations in evidence in congressional findings were not congruent and proportional to RFRA's scope).

[49] *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 418 n.1 (2006).

[50] *See id.* (discussing reach of decision in *Boerne*).

[51] U.S. CONST. art. I, § 8, cl. 18. For further discussion of the clause, see Judge Easterbrook's succinct discussion in *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 400–01 (7th Cir. 2003). In *Gonzales*, 546 U.S. 418, the Supreme Court applied RFRA to the Controlled Substances Act with no suggestion of doubt about RFRA's constitutionality, although, to be sure, the issue was not properly before the Court.

[52] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard) (explaining that purpose of Section 1 of Fourteenth Amendment is "to restrain the power of the States and compel them at all times to respect these great fundamental guarantees" that apply to federal government); *id*. at 2459 (statement of Rep. Stevens) ("[T]he Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect . . . ."); *id*. at 1088–94 (statement of Rep. Bingham) (noting that central purpose of Fourteenth Amendment is to give Congress power to enforce Bill of Rights against states); *see also* ZEITLOW, *supra* note 2, at 50–52 (explaining that central purpose of Fourteenth Amendment was to empower Congress to protect rights against state governments).

Constitution differently from the way the Supreme Court does, the result makes no sense. Federal RFRA should be just as unconstitutional as state RFRA.[53] Perhaps, then, *Boerne* is really a case about federalism, i.e., ensuring that Congress does not trench too heavily on state prerogatives. But if so, it is contrary to the basic purpose of the Fourteenth Amendment: to ensure that Congress has the same power to enforce civil rights and civil liberties against the states as it does against the federal government.

Nothing in the text of the Fourteenth Amendment justifies the *Boerne* standard or its departure from the test of appropriateness announced in *McCulloch v. Maryland*. My point here is not simply that the Reconstruction Congress *expected* that courts would apply the test of *McCulloch*; the point, rather, is that the language of *McCulloch* is actually *embedded in the text* of Section 5, and, given the structural purposes of the Reconstruction Amendments, there is no good textual or structural reason to give Congress a narrower power.

III
The Meaning of "Enforce"

The second question is what it means to "enforce" the Reconstruction Amendments. To "enforce" a provision meant the same thing in 1868 that it does today: to ensure compliance with the provision and make it effective.[54] Thus, Congress can pass laws that create federal remedies and federal causes of action for violations of rights guaranteed by the Reconstruction Amendments. It can remedy past violations and prevent future ones. In addition, it can find legislative facts to justify the remedies and the prospective solutions it creates.

But Congress can do more than this. To see why, we must focus on important differences in the texts of the three Reconstruction Amendments. The Fifteenth Amendment is written as a basic prohibition on government action: Neither the United States nor any state may deny the right to vote based on "race, color, or previous condition of servitude."[55] The second sentence of Section 1 of the Fourteenth Amendment is quite similar: It says that "[n]o state" may

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[53] The mismatch between Congress's interpretation and the Court's is just as great, and the record of free exercise violations justifying a remedy against the federal government is even weaker since the record presumably would exclude evidence of violations by states and local governments.

[54] 1 Noah Webster, An American Dictionary of the English Language 72 (New York, S. Converse 1828), *available at* http://1828.mshaffer.com/d/search/word,enforce ("1. To give strength to; to strengthen; to invigorate" and "7. To put in execution; to cause to take effect; as, to enforce the laws").

[55] U.S. Const. amend. XV.

"abridge the privileges or immunities of citizens," "deprive any person of life, liberty, or property, without due process of law," or "deny to any person . . . the equal protection of the laws."[56] Enforcing *these* provisions means identifying, punishing, and deterring past, present, or future violations of what these texts protect or prohibit.

Other parts of the Reconstruction Amendments, however, are written differently. Take Section 1 of the Thirteenth Amendment and the first sentence of the Fourteenth Amendment, the Citizenship Clause. Neither is written as a simple prohibition on state conduct. Instead, they declare or announce changes in the status of vast populations. Section 1 of the Thirteenth Amendment says that henceforth "slavery . . . shall [not] exist within the United States."[57] The Citizenship Clause states that henceforth "[a]ll persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside."[58] The Thirteenth Amendment declares and bestows freedom on everyone in the United States; the Citizenship Clause declares and bestows citizenship on people born in the United States or who have become naturalized.

These two declarations are linked. The Reconstruction Republicans believed that once blacks became free, they enjoyed all the rights of citizens.[59] This was the theory behind the Civil Rights Act of 1866, which stated that persons born in the United States were citizens and enjoyed the same rights as enjoyed by white citizens.[60] The Citizenship Clause of the Fourteenth Amendment confirmed the declaration made in the 1866 Civil Rights Act and placed this declaration of citizenship in the Constitution.[61]

What does it mean for Congress to "enforce" these provisions, which simultaneously announce and enact a monumental change in status? How can Congress make these provisions effective and ensure fidelity to them?

When Congress enforces the Thirteenth Amendment, it can do far more than simply punish or prevent what courts could hold illegal under the Thirteenth Amendment—that is, slavery. Instead, Congress

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[56] *Id.* amend. XIV, § 1.

[57] *Id.* amend. XIII, § 1.

[58] *Id.* amend. XIV, § 1.

[59] *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 48 (1986) ("Republicans believed that the Thirteenth Amendment effectively overruled *Dred Scott* so that blacks were entitled to all rights of citizens.").

[60] Act of Apr. 9, 1866 (Civil Rights Act of 1866), ch. 31, 14 Stat. 27.

[61] *See* CONG. GLOBE, 39th Cong., 1st Sess., 2890 (1866) (statement of Sen. Howard) ("[The Citizenship Clause is] simply declaratory of what I regard as the law of the land already . . . .").

has the power to make people free *in practice* by wiping out the legal, social, and economic aspects of slavery. Slavery was not just legal ownership of people; it was an entire system of conventions, understandings, practices, and institutions that conferred power and social status and maintained economic and social dependency. As Chief Justice Taney famously explained in defending the denial of black citizenship in *Dred Scott v. Sandford*, slaves were "regarded as beings of an inferior order" because of their race, "altogether unfit to associate with the white race . . . [with] no rights that the white man was bound to respect."[62] Hence they were forbidden to marry, own their own labor, make contracts, own property, have access to courts, or enjoy the basic rights that free people expect and are entitled to as a matter of course. Moreover, Taney explained, the inferior status of blacks was built into the very fabric of social life, "and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion."[63]

To enforce the Thirteenth Amendment, Congress must disestablish all the institutions, practices, and customs associated with slavery and make sure they can never rise up again. This means that Congress has the power to dismantle the interlocking social structures and status-enforcing practices that were identified with slavery or that rationalized and perpetuated it. The way this insight is usually expressed is that Congress has the power to identify and eliminate the "badges and incidents of slavery."[64]

In the 1883 *Civil Rights Cases*, the Supreme Court agreed with the framers of the Thirteenth Amendment that congressional legislation under Section 2, like legislation under the Commerce Clause and the other Article I, Section 8 powers, does not have to remedy past or future violations of states. Instead, it "may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the

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[62] 60 U.S. (19 How.) 393, 407 (1857).

[63] *Id.*

[64] The Civil Rights Cases, 109 U.S. 3, 20 (1883). For earlier versions of the expression, see the statement of Senator Trumbull, CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866), calling the deprivation of equal civil rights "a badge of servitude," and the statement of Senator Harlan, CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864), describing and listing the "incidents of slavery." In *Blyew v. United States*, 80 U.S. 581 (1872), Justice Bradley's dissenting opinion argued that "[t]he power to enforce the amendment by appropriate legislation must be a power to do away with the incidents and consequences of slavery, and to instate the freedmen in the full enjoyment of that civil liberty and equality which the abolition of slavery meant." *Id.* at 601.

United States."[65] The mistake of the *Civil Rights Cases* was construing this power narrowly; the Court held that racial discrimination in public accommodations could not be a badge or incident of slavery because free blacks had also been discriminated against in public accommodations before the Civil War.[66]

Perhaps the best example of Congress's enforcement powers is the very first bill passed to enforce the Thirteenth Amendment: the Civil Rights Act of 1866. It declares that persons born in the United States are citizens and it prohibits public and private racial discrimination on the basis of race.[67] It reaches well beyond what a court could be expected to strike down under the authority of a constitutional ban on slavery.[68] But that is precisely the point: The framers of the Thirteenth Amendment did not wish to leave the fate of blacks to the discretion of the Supreme Court, an institution which had failed them so often before. The enforcement clause of the Thirteenth

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[65] *The Civil Rights Cases*, 109 U.S. at 20. Because Section 1 of the Thirteenth Amendment "establish[es] and decree[s] universal civil and political freedom throughout the United States," the Court explained, Section 2 "clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *Id.*

[66] *Id.* at 24–25.

[67] Act of Apr. 9, 1866 (Civil Rights Act of 1866), ch. 31, 14 Stat. 27 (1866). In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Supreme Court held that the language of the Act prohibited purely private discrimination in real estate transactions. *Id.* at 437–43. Although a general ban on private racial discrimination surely falls within Congress's Section 2 powers, there is some debate whether the intended focus of the 1866 Act was so broad. *Compare id*. at 453–73 (Harlan, J., dissenting) (arguing that 1866 Act was intended to reach denials of equal civil rights under color of law or through custom), *with* Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 552–53, 556–61 (1989) (arguing that 1866 Act was addressed to customary private practices that perpetuated white supermacy). In any case, as discussed in Part V.C, *infra*, the Act was probably designed to reach at least some forms of private racial discrimination under a theory of state neglect.

[68] In addition, the 1866 Civil Rights Act, using language similar to the 1866 Freedmen's Bureau Act, Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176, also guarantees the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." Civil Rights Act of 1866, § 1, 14 Stat. at 27. Courts probably could not protect all of these rights simply by enforcing the Thirteenth Amendment's ban on slavery.

In *McDonald v. City of Chicago*, both the plurality and Justice Thomas's concurrence argued that this language of "full and equal benefit" was intended to be a substantive guarantee of the individual right to bear arms against states. 130 S. Ct. 3020, 3036, 3040–41 (2010) (plurality opinion); *id.* at 3074–75 (Thomas, J., concurring in part and concurring in the judgment). Indeed, the same evidence that the Court relied on shows that by using this general language, Congress sought to enforce all of the individual rights guarantees in the Constitution against the states. *See* CURTIS, *supra* note 59, at 71–73, 80–82, 104 (collecting examples of congressional intent to apply rights granted in Bill of Rights against states). Thus, if *McDonald*'s reasoning is correct, Congress used its Section 2 powers to enforce the Thirteenth Amendment to "incorporate" the Bill of Rights against the states by statute even before the passage and ratification of the Fourteenth Amendment.

Amendment gives Congress the power not only to prevent slavery but to establish freedom.[69] Therefore, as the Supreme Court explained in *Jones v. Alfred Mayer Co.*, "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."[70]

If Congress can reach private activity under Section 2 of the Thirteenth Amendment, what about under the Citizenship Clause of the Fourteenth Amendment, which is written in much the same way? The majority in the *Civil Rights Cases* did not even consider the possibility. Focusing on the Fourteenth Amendment's second sentence—which begins "[n]o State shall"—it assumed that enforcing the Fourteenth Amendment was limited to correcting state violations.[71] Justice Harlan's dissent, however, spotted the issue immediately: The Citizenship Clause, he argued, is also "of a distinctly affirmative character."[72] "The citizenship thus acquired . . . in virtue of an affirmative grant from the nation," Harlan explained, "may be protected . . . by congressional legislation of a primary direct character," and "is not restricted to the enforcement of prohibitions upon State laws or State action."[73]

Justice Harlan was entirely correct. Congress has the power to enforce the Citizenship Clause directly; and it can pass legislation that goes well beyond what any court could do in enforcing the Citizenship Clause. The constitutional declaration of citizenship was simultaneously a grant of the rights of citizenship.[74] The author of the Citizenship Clause, Senator Jacob Howard of Michigan, explained that its purpose was to put "the rights of citizens and freedmen under the civil rights bill [of 1866] beyond the legislative power of [those]

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[69] *See* CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull) (noting that Civil Rights Bill will give effect to Thirteenth Amendment's declaration abolishing slavery "and secure to all persons within the United States practical freedom").

[70] 392 U.S. at 440; *see also id.* at 441 n.78 (noting that all of the Justices in the *Civil Rights Cases* agreed that Thirteenth Amendment empowered Congress to eliminate "vestiges and incidents" of slavery).

[71] *The Civil Rights Cases*, 109 U.S. at 11.

[72] *Id.* at 46–47 (Harlan, J., dissenting).

[73] *Id.*

[74] The 1866 Civil Rights Act presupposed that a grant of citizenship automatically came with certain rights. The primary author of the 1866 Civil Rights Act, Senator Lyman Trumbull of Illinois, explained that:

> To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union. The right of American citizenship means something.

CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866).

who would . . . expose the freedmen again to the oppressions of their old masters."[75] A future Congress could not strip the freedmen of their citizenship and could not deny them the equal rights and equal respect that citizenship entailed. Just as the denial of equal civil rights was a badge and incident of slavery, the enjoyment of equal civil rights was a *badge and incident of citizenship*.[76]

Congress has the power under the Citizenship Clause reasonably to determine what are the badges and incidents of citizenship and protect them against both public and private violation. If Congress reasonably could conclude that a certain guarantee of equal rights or equal status is a marker or an element of equal citizenship, it may legislate to secure that guarantee. Conversely, if Congress reasonably could conclude that certain forms of discrimination or denial of equal rights would render a person a second-class citizen, it may pass legislation banning that discrimination or denial of equal rights. As Justice Harlan put it:

> If . . . exemption from discrimination, in respect of civil rights, is a new constitutional right, secured by the grant of State citizenship to colored citizens of the United States . . . why may not the nation, by means of its own legislation of a primary direct character, guard, protect and enforce that right?[77]

If this point seems remarkable today, it is only because the Supreme Court has so systematically undermined Congress's powers to enforce the Reconstruction Amendments that we have forgotten the obvious. Today, we revere Justice Harlan for his dissent in *Plessy v. Ferguson*. But his dissent in the *Civil Rights Cases*, demonstrating how the Court had sacrificed "the substance and spirit of the recent amendments of the Constitution . . . by a subtle and ingenious verbal criticism"[78] is equally deserving of our admiration.

Indeed, Justice Harlan's reasoning follows easily from *McCulloch*: Because Congress has the power to make citizens, it also has the power to make its grant of citizenship equal and effective; and

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[75] CONG. GLOBE, 39th Cong., 1st Sess. 2896 (1866).

[76] *See* Amar, *supra* note 34, at 824 (arguing for Congress's power to recognize "badges and incidents of freedom and citizenship"). For arguments that Congress can pass civil rights legislation to enforce the Citizenship Clause, see Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1099–1101 (2001), Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 356–63 (2006), Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717 (2003), and Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281 (2000).

[77] *The Civil Rights Cases*, 109 U.S. at 50 (Harlan, J., dissenting).

[78] *Id.* at 26.

if state officials or private parties refuse to treat newly created citizens as equals, Congress may provide remedies. This is precisely what Congress did in the 1866 Civil Rights Act, which both granted citizenship and enforced the grant.[79] A fortiori, Congress has the power to make any grants of citizenship required by the Constitution equal and effective. Since the end—securing equal citizenship—is clearly legitimate, *McCulloch* teaches us that all means reasonably adapted to achieve that end fall within Congress's power. The test is whether the legislation is a bona fide civil rights law that reasonably furthers Congress's power to secure equal citizenship status.

It follows that Congress's powers to abolish the badges and incidents of slavery and enforce equal citizenship are much broader than the powers of courts exercising judicial review. To uphold congressional legislation under Section 2 of the Thirteenth Amendment, courts do not have to hold that what Congress prohibits or prevents would be unconstitutional under the Thirteenth Amendment. In the same way, to uphold a civil rights measure under the Citizenship Clause, courts do not have to conclude that the discrimination or the abridgment of equal rights at issue would be unconstitutional under existing Fourteenth Amendment doctrine. Rather, the test is whether Congress could reasonably conclude that a certain practice causes or might lead to unequal, second-class citizenship; or, conversely, whether prohibiting a certain practice (for example, a certain form of discrimination) would further the goal of equal citizenship.

Thus, the Civil Rights Act of 1866 was both within Congress's power to enforce the Thirteenth Amendment and its power to enforce the Citizenship Clause of the Fourteenth Amendment. The Civil Rights Act helped eliminate the badges and incidents of slavery, and it helped guarantee the badges and incidents of citizenship. Fittingly, Congress passed the Act under each amendment, first in 1866 and then later as part of the Enforcement Act of 1870.[80]

IV
Congress's Authority To Interpret the Reconstruction Amendments

The third question is whether Congress has independent authority to interpret the Reconstruction Amendments when it

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[79] *See* Kaczorowski, *supra* note 34, at 208 ("Both supporters and opponents [of the Civil Rights Act of 1866] stated that [Congress's] constitutional authority to define and confer citizenship encompassed the power to define and enforce the rights of citizens."). The 1866 Act was a direct rebuke to the *Dred Scott* case, which had held that blacks could never be citizens.

[80] Act of May 31, 1870 (Enforcement Act of 1870), ch. 114, §§ 16, 18, 16 Stat. 140, 144.

enforces them, or whether it is bound by the Supreme Court's interpretation of what these amendments permit and prohibit. This is the central issue in *City of Boerne v. Flores*.[81] Note that one cannot really enforce or remedy constitutional violations unless one knows what constitutes a violation. The power to enforce an amendment presumes that *somebody* must have the power to interpret it. The question is who.

Once again, the example of the Thirteenth Amendment is instructive. The framers of the Thirteenth Amendment assumed that Congress would define the badges and incidents of slavery and decide what legislation was appropriate to eliminate them, and that the courts would defer to any reasonable construction.[82] As we have seen, the Supreme Court adopted this view in *Jones v. Alfred Mayer Co.*[83] Based on the same reasoning, I have argued that courts should defer to reasonable congressional judgments about what civil rights protections are necessary and proper to enforce the Citizenship Clause, further the goals of equal citizenship, and prevent second-class citizenship.

But these are examples of congressional powers, like the commerce power, to pass primary and direct legislation. What about provisions like the Equal Protection Clause, where Congress's job is to remedy or prevent constitutional violations?

In *City of Boerne*, the Supreme Court worried 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.'. . . Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."[84] This claim confuses the substantive power to amend the Constitution with the interpretive power to create and implement constitutional constructions. As Michael McConnell has explained, the same argument would apply equally to the Supreme Court. Under this logic, if the Supreme Court could "define its own powers" to enforce the Fourteenth Amendment, the Constitution would no longer be "superior paramount law, unchangeable by ordinary means" and it would

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[81] City of Boerne v. Flores, 521 U.S. 507 (1997).

[82] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (statement of Rep. Wilson) (citing *McCulloch* and arguing that "[o]f the necessity of the measure Congress is the sole judge"); *id.* at 475 (statement of Sen. Trumbull) ("[W]e have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States.").

[83] *See supra* note 70 and accompanying text.

[84] *City of Boerne*, 521 U.S. at 529 (1997) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

be subject only to shifting majorities on the Supreme Court.[85] Cynics may argue that this is precisely what happens all the time, but, if so, then they must concede that the Supreme Court amends the Constitution every time it decides a case. That is not how our constitutional system works. Rather, the federal courts, like Congress, have the power to offer constructions consistent with the basic framework. The question is whose construction is entitled to legal force when Congress passes legislation under its Reconstruction Power.[86]

The early history of the Reconstruction Amendments suggests that Congress believed that it had both the power and the obligation to interpret the Constitution when it passed enforcing legislation. Debates over the civil rights acts from 1866 through 1875 are full of speeches offering diverse interpretations of the new amendments.[87] This evidence is important not because the intentions of the framers bind us today but because they are evidence of the *constitutional structure* that the three new amendments created—that is, how a reconstructed Constitution was supposed to work. Including enforcement clauses in the text of the new amendments—something that was not true of any of the previous twelve amendments—presumed that Congress and the courts were coequal partners in interpreting and enforcing these provisions.

But if Congress and the Courts are coequal partners, how should courts review congressional legislation enforcing the prohibitions of the Fourteenth and Fifteenth Amendments?

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[85] McConnell, *supra* note 34, at 173–74.

[86] *Id.* at 169–70, 173–74.

[87] *Id.* at 175–76 (collecting examples of interpretive debates in passing Reconstruction Era civil rights acts). As McConnell points out:

> Under a purely remedial theory of congressional power, these debates were of no lasting legal significance. If the courts agreed with the list of protected rights, the congressional action would be redundant; if the courts disagreed, the congressional actions would be nugatory. Under a substantive theory, there was no need to be concerned about the meaning of the Amendment. Only the "interpretive" understanding of Section Five adequately explains why the Reconstruction Congresses debated at such length over precisely what rights would be protected under the several Civil Rights Acts: because their interpretation mattered. They were not content to leave the specification of protected rights to judicial decision. The interpretive understanding also explains why they thought it necessary to debate the meaning of the Fourteenth Amendment: because they understood their authority to be limited to enforcing the Amendment, which set determinate (if not always pellucid) limits on what Congress could do.

Id. at 176; *see also id.* at 176–81 (canvassing legislative history of Fourteenth Amendment and concluding that "nothing in that history suggests that Congress was expected to be limited to enforcing judicially decreed conceptions of [Fourteenth Amendment] rights").

To begin with, courts should ask whether Congress's interpretation infringes any constitutional right as the judiciary understands it. If Congress's interpretation does infringe a right, then courts should treat it exactly as they do other legislation passed under Article I, Section 8: They should strike it down. Thus, if the Religious Freedom Restoration Act had given special protections to Christians and Jews but not to members of other religions, or if it had imposed a special penalty on all Muslims, courts would have been entitled to hold that it violated the Establishment Clause, regardless of Congress's views to the contrary. Courts always retain the authority to exercise judicial review in cases or controversies properly before them, and they may strike down congressional laws that contract constitutional guarantees as the courts understand them. This point applies both to individual rights guarantees and to structural questions like federalism and the separation of powers. The scope of Congress's enforcement power is itself a structural question, but the point of the present exercise is to determine the proper scope of that power.

Suppose, then, that the law does not violate any constitutional guarantee as the reviewing court understands it, but instead interprets it more expansively than the courts would. How should courts review this legislation? Here are three rules of thumb.

1. Take McCulloch *seriously.* First, courts should ask whether, under *McCulloch*, the law is a reasonable means of enforcing the constitutional guarantee in question *as the court understands it*. When Congress enforces judicial interpretations of rights, it may protect those rights more broadly than courts because of institutional differences between courts and legislatures. Here are a few examples.

Legislation might seek to remedy past constitutional violations extending over large numbers of people and persisting over many years. This sort of remedy would be especially valuable when simply prohibiting future violations would lock in cumulative disadvantages to groups and individuals denied rights in the past. Obviously this sort of remedial legislation might be far broader in scope than the remedies and doctrines that courts could create in cases involving individual litigants.

Remedial legislation also might create rules or institutional reforms in order to deter future constitutional violations. Congress might do this by creating a wide variety of disincentives against unconstitutional practices, by easing burdens of proof, or by requiring disclosures, reports, or prior justifications that will subject activities to close scrutiny and discourage any tendencies toward bad behavior.

In addition, legislation can be premised on types of fact finding that courts are ill equipped to undertake—for example, about larger

social trends as opposed to actions occurring in a specific controversy. Legislatures often find facts differently from the way that courts do in jury trials, employing different standards for collecting and weighing evidence and making use of a wider array of resources.[88] Congress can find facts that show that activities that by themselves do not violate the Constitution are nevertheless often used for unconstitutional purposes.[89]

Congress might also find that particular policies are particularly well suited to remedy past constitutional violations. For example, the Supreme Court has held that pregnancy discrimination is not in and of itself sex discrimination (although it may be in some cases);[90] nevertheless, Congress prohibits state and local governments from discriminating on the basis of pregnancy in the Pregnancy Discrimination Act.[91] Through its deliberations about larger social trends, Congress might reasonably conclude that there is a connection between pregnancy discrimination and sex discrimination. A general prohibition on pregnancy discrimination may be a useful way of preventing entrenched forms of sex discrimination in workplaces, or it may smoke out sex discrimination that is hard to disentangle from pregnancy discrimination.

Similarly, the Supreme Court has held that employment practices that have a disparate impact on women and minorities do not by themselves violate equal protection, although they may be evidence of constitutional violations.[92] Nevertheless, Congress has applied the dis-

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[88] *See* Fullilove v. Klutznick, 448 U.S. 448, 502–03 (1980) (Powell, J., concurring) (noting that Congress finds facts differently from courts and has no obligation to take evidence in same way that courts do); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1968 (2003) [hereinafter Post & Siegel, *Legislative Constitutionalism*] (noting institutional differences between legislative and judicial fact finding); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juriscentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 7–17 (2003) [hereinafter Post & Siegel, *Protecting the Constitution*] (same).

[89] For example, the Supreme Court once held that literacy tests by themselves did not violate the Fifteenth Amendment's protection of black suffrage. Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 53 (1959). Nevertheless, Congress could ban literacy tests under its powers to enforce the Fifteenth Amendment because it found that states had been using literacy tests to disenfranchise blacks and because it was difficult to prove invidious motivation. South Carolina v. Katzenbach, 383 U.S. 301, 333–35 (1966). Moreover, by imposing federal oversight and general federal voting requirements, Congress also discourages state and local officials from trying to devise new devices or strategems in the future to deny minority voting rights.

[90] Geduldig v. Aiello, 417 U.S. 484, 496–97, 496 n.20 (1974).

[91] Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2006)).

[92] *Compare* Washington v. Davis, 426 U.S. 229 (1976) (holding that employment practices with disparate impact do not violate U.S. Constitution without proof of intent to dis-

parate impact standard to state and local government employers through the 1972 amendments to Title VII of the 1964 Civil Rights Act.[93] Once again, disparate impact liability may not be required by the Constitution, but it helps prove and prevent intentional discrimination in workplaces, and it encourages employers to take steps to root out practices that stem from previous acts of intentional discrimination. Under the *McCulloch* standard, nothing more is required. As noted before, RFRA might well be constitutional under this approach.

We can draw an important lesson from these examples: In many cases the distinction between *remedial* authority and *interpretive* authority may not be very significant. Often, broader interpretations of constitutional rights can be understood as ways of securing and protecting courts' more limited interpretations, especially if we take Congress's fact-finding abilities into account.[94] Therefore, it may be very difficult to tell whether a statute like the Pregnancy Discrimination Act should be regarded as offering a broader interpretation of the Equal Protection Clause or merely the sort of fact finding and remedy for which legislatures and legislation are particularly suited. And if it is difficult to tell, courts should avoid needless constitutional conflicts out of respect for the democratic process.

McCulloch tells us that Congress may not use its powers as a pretext to gain other powers not granted.[95] But legislation like RFRA is anything but pretextual. Congress was insistent that it wanted to protect religious freedom more broadly than the Court would and that, in the process, it would also remedy and prevent violations that even the Court would recognize.[96] Moreover, if RFRA as applied to the states was pretextual, RFRA as applied to the federal government—which uses the same congressional interpretation of religious freedom—should be equally pretextual under the Necessary and Proper Clause

criminate), *with* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that employment practices with disparate impact are illegal under Title VII of 1964 Civil Rights Act unless justified by business necessity).

[93] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e (2006)).

[94] *See* Post & Siegel, *Legislative Constitutionalism*, *supra* note 88, at 1956 (using example of *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) to show how broad congressional legislation projects judicial interpretations of rights).

[95] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819) ("Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land.").

[96] *See* 42 U.S.C. § 2000bb(b) (2006) (stating purposes of RFRA in light of previous Supreme Court doctrines of religious freedom); S. REP. NO. 103-111, at 8–9, 14 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897–99, 1903–04 (same); H.R. REP. NO. 103-88m, at 6–7, 9 (1993) (asserting Congress's power to create statutory protections of religious liberty).

and therefore equally unconstitutional. The Supreme Court, however, has given no sign that it thinks federal RFRA is unconstitutional.

The *Boerne* Court rejected the *McCulloch* test and adopted the narrower test of "congruence and proportionality" because it was afraid that Congress might try to interpret the Constitution for itself.[97] To put it bluntly, the Court wanted to smoke out any attempt by Congress to think differently about the Constitution. The Supreme Court's desire to protect its turf is contrary to the structural purposes behind the Reconstruction Amendments. It is also counterproductive. Given the way that the Reconstruction Amendments were designed, courts should want Congress to take its enforcement role seriously. If courts can view congressional legislation as reasonably remedial under their own interpretation of the Constitution, they should not go out of their way to pick a fight with Congress.

2. Defer to reasonable interpretations. A second rule of thumb also seeks to avoid unnecessary interbranch conflicts. If Congress appears to have interpreted the Constitution differently from the Supreme Court, the Court should ask whether Congress's interpretation is reasonable, even if it is not the interpretation that the Court itself would have chosen in the first instance. If it is reasonable, the Court should uphold the legislation. That is because the Constitution specifically gives Congress the task of enforcing the amendments, and as long as its interpretation is reasonable, Congress is doing its job. In federal administrative law, if an agency is entrusted with enforcement of a statute, courts will usually defer to the agency's interpretation if it is reasonable.[98] This approach preserves democratic accountability over enforcement because if Congress does not like the agency's interpretation, it can always amend the statute to bring the interpretation back in line. In the same way, if a later Congress thinks that an existing enforcement statute protects constitutional rights too broadly, Congress can always amend the statute to bring it in line with the views of the federal courts.

Deferring to reasonable interpretations by Congress serves another purpose. Congress may reflect popular attitudes about the meaning of the Constitution better than the courts do. Sometimes courts can take advantage of this fact to improve their own understanding of social realities and constitutional norms. Robert Post and Reva Siegel give the example of sex equality. They point out that

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[97] City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997) (arguing that congruence and proportionality test allows courts to tell the difference "between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law").

[98] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

Congress decided that sex discrimination violated the Constitution before the Court did, through the Equal Pay Act of 1963, through applying Title VII's ban on sex discrimination to state and local employers, and through sending an Equal Rights Amendment to the states in 1972.[99] In *Frontiero v. Richardson*, the Court noted Congress's determination that sex discrimination violated equal protection; it concluded that Congress's interpretation not only was reasonable, but had become the best interpretation, and adopted it.[100] Giving Congress the space to adopt alternative but reasonable interpretations of the Reconstruction Amendments can help courts develop new constructions in response to changing circumstances in conversation with the political branches.[101]

Asking whether an interpretation is "reasonable" does not give Congress a blank check. Reasonable minds can and do often differ on important constitutional questions, but at any point in history, there is likely to be a bounded range of plausible answers.[102] Moreover, courts can devise tests to limit the range further. For example, Congress's interpretation is more likely to be reasonable if Congress has adopted the views of a substantial number of courts or Justices of the Supreme Court, especially over a long period of time; if it has adopted views held by many different government officials, including the state and local officials who will be governed by Section 5 legislation; or if it has adopted an interpretation of the analogous provisions of several different state constitutions. These tests provide some evidence, although not conclusive evidence, that Congress's interpretation is reasonable, even if it is not the interpretation that the Supreme Court has chosen.

In addition, the range of possible answers is further limited because Congress may not pick an interpretation that, in the Court's view, would violate existing constitutional rights or structural guarantees like federalism or the separation of powers. Thus, following the 1954 decision in *Brown v. Board of Education*, Congress could not use its enforcement powers to reinstitute the separate but equal rule of *Plessy v. Ferguson* on the grounds that it was the law of the land for fifty-eight years and many federal, state, and local officials firmly believed it was correct. Because of the decision in *Brown v. Board of*

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[99] Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 520 (2000) [hereinafter Post & Siegel, *Antidiscrimination Legislation*]; Post & Siegel, *Protecting the Constitution*, *supra* note 88, at 32–33.

[100] 411 U.S. 677, 687–88 (1973) (Brennan, J., plurality opinion).

[101] *See* Post & Siegel, *Legislative Constitutionalism*, *supra* note 88, at 2020–21, 2029–32; Post & Siegel, *Protecting the Constitution*, *supra* note 88, at 23–30.

[102] *See* McConnell, *supra* note 34, at 184 (arguing that congressional interpretation of Section 5 should be measured against "reasonable range of plausible interpretations").

Education, the separate but equal rule was no longer a permissible interpretation of the Equal Protection Clause, and Congress would be foreclosed from imposing racial segregation in public schools.

Under this basic approach, Congress's judgment in RFRA was probably a reasonable one. It did not constrict constitutional rights as the Court understood them, it gained the virtually unanimous support of both Houses of Congress, and it corresponded to thirty years of Supreme Court precedent.[103] It was also reasonable because the Court had limited the scope of free exercise rights in *Smith* out of respect for Congress and state legislatures and to give them greater discretion to solve the regulatory problems created by claims of free exercise. Congress responded to *Smith* by telling the Court that its previous solution was satisfactory and gave legislatures all the discretion they needed. It is certainly true that in the process Congress limited what individual states could do, but the point of the Reconstruction Amendments was to hold states to the same standards of protection for basic rights that applied to the federal government. If Congress believed it should hold the federal government to a higher standard than *Smith*'s, it was certainly reasonable for Congress to hold state governments to the same standard.

3. Pay attention to institutional differences. A third and final rule of thumb is that courts should defer to congressional interpretations if the court believes that Congress's remedies reflect important institutional differences between legislatures and courts. Suppose, for example, that Congress believes that discrimination against disabled persons is invidious, but the Supreme Court does not treat such discrimination as subject to special scrutiny. Courts might refrain from applying heightened scrutiny not because there is no prejudice against disabled people but because sometimes there are good reasons for treating disabled persons differently. It may be difficult for courts to understand and balance the relevant costs and benefits or to prove invidious motivation in specific cases. Given that differential treatment is sometimes but not always reasonable, courts might want to give legislatures plenty of room to consider the problem of discrimination and draw lines and tailor remedies for different social contexts. Courts may not feel they can do this as a constitutional matter because constitutional rules would be inflexible and would greatly limit legislative innovation. Nevertheless, courts would be able to

[103] *See* Sherbert v. Verner, 374 U.S. 398 (1963) (announcing compelling state interest test for burdens on free exercise); 139 CONG. REC. 27,239–41 (1993) (documenting unanimous vote in U.S. House of Representatives); *id.* at 26,416 (documenting 97-3 vote in U.S. Senate).

apply statutory distinctions authorized by a legislature that can be adjusted over time if they prove unworkable.

Similarly, one reason why the Supreme Court backed away from its older free exercise doctrines in *Smith* was that it was uncomfortable with having courts (rather than legislatures) strike the appropriate balance between government efficiency and the accomodation of a wide variety of possible minority religious practices.[104] The older strict scrutiny test required courts to decide how important or central the religious practice was to the affected group and to balance this factor against the social importance of the challenged laws and the difficulties of creating a series of exceptions for other religious groups. Thus, *Smith* in effect protects only a subset of the full free exercise right and leaves the task of full enforcement of religious liberty to legislatures.[105]

If Congress decides that it wants to treat discrimination against disabled persons as suspect, or if it wants to grant greater protection to religious minorities, it does not face the institutional limits that courts face. It has no reason to worry that it will create inflexible constitutional rules because as a legislature it can amend its remedies whenever it likes. It has no special reason to defer to legislative judgments because it is a legislature, and it is exercising legislative judgment. It is true that Congress's legislative judgment may override the legislative judgments of the individual states, but that is the whole point of the enforcement clauses.[106]

Therefore, if courts believe that Congress has adopted a different interpretation from that of the Supreme Court, they should try to determine whether the interpretation is explained by the different institutional strengths and competencies of legislatures relative to

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[104] *See* Emp't Div. v. Smith, 494 U.S. 872, 889 n.5 (1990) (expressing concern that "courts would constantly be in the business of determining whether the 'severe impact' of various laws on religious practice . . . suffices to permit us to confer an exemption").

[105] Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 59 (1993); *see also* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978).

[106] *See Ex parte* Virginia, 100 U.S. 339, 346 (1879) ("Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power."); *see also* City of Rome v. United States, 446 U.S. 156, 179 (1980) ("[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'" (quoting U.S. CONST. amend. XIV, § 5)); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) ("When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.").

courts, including, for example, (1) Congress's different and/or superior fact finding abilities; (2) Congress's superior ability to create different rules for different social contexts; and (3) the fact that Congress does not need to defer to legislative judgment in the way that courts sometimes must. If the difference in interpretation between Congress and the courts can reasonably be explained as flowing from one or more of these factors, courts should accept Congress's interpretation as reasonable even if courts would or could not adopt it because of their own unique institutional characteristics and constraints.[107]

In sum, courts can quite easily manage a world in which Congress has both interpretive and remedial power. Courts should uphold legislation based on distinctive congressional interpretations if (1) Congress could achieve the same result through remedial legislation if it accepted the Supreme Court's view; (2) Congress's interpretation is within a range of reasonable answers to the constitutional question; or (3) the differences between Congress's and the Court's interpretation can be explained by Congress's different institutional situation and strengths. Employing these rules of thumb, the federal courts and Congress can work harmoniously together instead of finding themselves at odds in enforcing the Reconstruction Amendments.

V
The Power To Reach Private Action

The fourth and final question is whether Congress can reach private action under its powers to enforce the Reconstruction Amendments. In the case of the Thirteenth Amendment, the answer has long been clear. Congress can outlaw both public and private discrimination in order to abolish the badges and incidents of slavery.[108]

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[107] In *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 367–68 (2001), the Supreme Court held that the Fourteenth Amendment did not give Congress power to enforce the Americans with Disabilities Act against state governments. Under existing precedents, discrimination against disabled persons need pass only a test of rational basis; therefore, a general ban on discrimination was not congruent and proportional to constitutional violations as defined by the Court's current equal protection jurisprudence. *Id.* at 366–67.

Under the approach offered here, however, the case would probably have come out differently. It is not unreasonable for Congress to conclude that at least some disability discrimination is invidious. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (reversing zoning decision motivated by prejudice against mentally disabled persons). Acting through civil rights statutes, Congress is better able than courts to draw lines that distinguish between reasonable and unreasonable disability discrimination; it can easily readjust these judgments over time in light of experience, and, as a representative body, it can be held democratically accountable for its decisions.

[108] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439–43 (1968); The Civil Rights Cases, 109 U.S. 3, 20 (1883).

In the 1883 *Civil Rights Cases*, however, the Supreme Court argued that when Congress enforces the Fourteenth Amendment, it can remedy only state action.[109] The Court therefore struck down the Civil Rights Act of 1875, which prohibited private racial discrimination in public accommodations such as inns, theaters, and transportation services.[110] The same year, in *United States v. Harris*, the Supreme Court overturned convictions for lynching and struck down parts of the Civil Rights Act of 1871.[111] Without a demonstration of state neglect to enforce the law, the Court argued, Congress could not reach violence by private parties.

Harris and the *Civil Rights Cases* severely limited Congress's powers to protect civil rights under the Fourteenth Amendment. As a result, when the Supreme Court considered a new public accommodations law in the Civil Rights Act of 1964, the Court upheld the statute as an exercise of the commerce power.[112] In 2000, the Supreme Court invoked *Harris* and the *Civil Rights Cases* once again in *United States v. Morrison*.[113] It struck down the Violence Against Women Act,[114] which allowed victims to sue persons who assault them on the basis of their gender.[115]

Morrison interpreted *Harris* and the *Civil Rights Cases* to mean that Congress cannot reach private action when it enforces the Fourteenth Amendment.[116] As I will show, neither case stands for this general proposition. Even if they did, the general proposition is incorrect.

Congress may regulate some private action directly under its powers to enforce the Citizenship Clause of the Fourteenth Amendment. Congress may also reach private action in order to prevent interference with rights guaranteed by the Federal Constitution. It can provide remedies for private action when states fail to give people equal protection of the laws. Finally, Congress may interpret the state action requirement differently from the way that courts do. It therefore may regulate some activities that courts would deem private in the absence of explicit congressional authorization.

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109 *The Civil Rights Cases*, 109 U.S. at 24–25.

110 *Id.* at 25–26.

111 106 U.S. 629, 638–41 (1883).

112 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964); Katzenbach v. McClung, 379 U.S. 294, 305 (1964).

113 529 U.S. 598, 602 (2000).

114 42 U.S.C. § 13981 (2006).

115 *Morrison*, 529 U.S. at 627.

116 *Id.* at 620–23.

A. Regulating Private Conduct Under the Citizenship Clause

The majority opinion in the *Civil Rights Cases* did not consider Congress's power to enforce the Citizenship Clause, which contains no state action requirement. Congress has the power to pass "primary [and] direct" legislation that it reasonably believes appropriate to secure the full, equal, and unimpeded enjoyment of citizenship status for all Americans.[117] To prevent some Americans from being relegated to a second-class form of citizenship, Congress may—and indeed must—reach private as well as public activity.

What was the civil rights movement of the 1960s about? If we focus only on *Brown v. Board of Education*, we might think it was only about ending state-sponsored segregation. But the modern civil rights movement did not begin with *Brown*; it began with the Montgomery Bus Boycott in December 1955 and it continued with students sitting at segregated lunch counters beginning in February 1960.[118] Rosa Parks refused to go to the back of a privately owned bus; the students at the Woolworth's counter demanded equal treatment by private owners.

The full name of the famous August 1963 march on Washington where Martin Luther King, Jr. delivered his "I Have a Dream" speech was the "March on Washington for Jobs and Freedom"—a reference to private employment discrimination.[119] King and his followers demanded an end to private and public discrimination, and in this famous speech King argues that the protection of "civil rights" demands protection from both public and private acts of power:

> There are those who are asking the devotees of civil rights, "When will you be satisfied?" We can never be satisfied as long as the Negro is the victim of the unspeakable horrors of police brutality.
>
> We can never be satisfied as long as our bodies, heavy with fatigue of travel, cannot gain lodging in the motels of the highways and the hotels of the cities. We cannot be satisfied as long as the Negro's basic mobility is from a smaller ghetto to a larger one.
>
> We can never be satisfied as long as our children are stripped of their selfhood and robbed of their dignity by signs stating "for whites only." We cannot be satisfied as long as a Negro in Mississippi cannot vote and a Negro in New York believes he has nothing for which to vote. No, we are not satisfied, and we will not

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117 The Civil Rights Cases, 109 U.S. 3, 46, 50 (1883) (Harlan, J., dissenting).

118 TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63, at 128–31 (1988) (discussing Montgomery Bus Boycott); *id.* at 271–75 (discussing sit-ins).

119 THOMAS F. JACKSON, FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE 1 (2006).

> be satisfied until justice rolls down like waters and righteousness like a mighty stream.[120]

The protesters assembled in Washington that day understood that Jim Crow in the South was not simply an exercise of state power; it relied on the private power of individuals to deny blacks opportunities in housing, employment, and public accommodations like restaurants and buses. Whatever people may have believed in 1883 when the *Civil Rights Cases* were decided, it had become clear to the American people by the 1960s that blacks would never be free and equal citizens if they were routinely subjected to the indignities, harassment, and impediments of private discrimination. The Civil Rights Acts of 1964 and 1968 addressed these concerns.

The constitutional constructions in the *Civil Rights Cases* reflected the prejudices of their time. By 1883, the revolutionary spirit of Reconstruction had dissipated and reaction had set in.[121] The United States was in a period of racial retrenchment in which the rights of blacks were slowly constricted. Striking down the last great civil rights act passed by the Reconstruction Congress, Justice Bradley complained that giving Congress the power to ban public accommodations discrimination "would be running the slavery argument into the ground" and would make blacks "the special favorite of the laws."[122] It is difficult to read these passages in the *Civil Rights Cases* today and not feel the same sense of shock and embarrassment that we associate with the language of *Plessy v. Ferguson*.[123] And yet although *Plessy* was effectively overturned in *Brown v. Board of Education*, the Supreme Court has never overturned the *Civil Rights Cases*. Instead

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[120] Martin Luther King, Jr., I Have a Dream, Keynote Address at the March on Washington for Jobs and Freedom (Aug. 28, 1963), *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 218–19 (James Melvin Washington ed., 1991).

[121] As C. Vann Woodward put it, the *Civil Rights Cases* were the "juristic fulfillment of the Compromise of 1877," in which the North ended Reconstruction and acquiesced in a long process of racial retrenchment that culminated at the turn of the century with the passage of Jim Crow laws throughout the South. C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH 1877–1913, at 216 (1971); *see also* C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 245 (1951) (describing *Civil Rights Cases* as "a sort of validation of the Compromise of 1877"). For a more sympathetic account of the *Civil Rights Cases*, see Pamela Brandwein, *A Judicial Abandonment of Blacks? Rethinking the "State Action" Cases of the Waite Court*, 41 LAW & SOC'Y REV. 343, 344–45 (2007), which argues that although the Waite Court limited Congress's reconstruction power, the Court's wholesale abandonment of blacks came much later.

[122] *The Civil Rights Cases*, 109 U.S. at 24, 25.

[123] 163 U.S. 537 (1896). Bradley's argument in the *Civil Rights Cases* is based on the distinction between civil and social equality, which was also the basis of the decision in *Plessy*. *Id.* at 551–52.

Congress and the courts have worked around this unjust precedent, using the Commerce Clause as the major vehicle for civil rights legislation in the twentieth century.

Yet the *Civil Rights Cases* were wrong. The second sentence of the Fourteenth Amendment may require state action, but the first sentence does not. The Citizenship Clause endows Congress with the power to pass all laws that are necessary and proper to secure equal citizenship and prevent second-class citizenship.

Under *McCulloch*, the test is whether laws like the Civil Rights Acts of 1964 and 1968 are genuine civil rights laws that reasonably further the constitutional end of securing the benefits of full and equal citizenship for "[a]ll persons born or naturalized in the United States."[124] These great civil rights acts surely pass this test. The Violence Against Women Act of 1994, held unconstitutional in *United States v. Morrison*, also passes this test. It provides a federal cause of action to compensate for the failure of state and local law enforcement to take gender-motivated crimes seriously. Congress could reasonably conclude that women do not enjoy equal status as citizens if they must fear for their bodily safety because states will not protect torts and crimes directed against them.[125]

What about future civil rights acts? Consider, for example, an act that protects homosexuals from private discrimination in public accommodations, housing, and employment. Assuming that this act does not violate any constitutional right as the courts understand it,[126] the question is whether Congress could reasonably conclude that homosexuals would be denied the full and equal benefits of citizenship status without such protections or that these protections will help them secure those benefits.

Courts should ask whether it is reasonable to believe that citizens now have a right to expect freedom from this kind of discrimination in public accommodations, housing, and employment and whether securing these guarantees would prevent homosexuals from being treated as second-class citizens. In *Romer v. Evans*,[127] for example, the Supreme Court argued that freedom from discrimination in housing, employment, education, public accommodations, and health

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[124] U.S. CONST. amend. XIV, § 1, cl. 1.

[125] *Morrison* did not consider the Citizenship Clause argument; instead, it asked whether VAWA enforced the Equal Protection Clause. United States v. Morrison, 529 U.S. 598, 619–27 (2000). Its answer to that question was also incorrect, for reasons described *infra* text accompanying notes 151–54, discussing *Morrison*, and *infra* Part V.C.

[126] *Cf.* Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000) (holding that application of New Jersey's public accommodations law to the Boy Scouts violated First Amendment).

[127] 517 U.S. 620 (1996).

and welfare services was essential to equal status in society: "These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[128]

Note that this analysis does not turn on whether courts believe that sexual orientation is a suspect classification when they review state legislation. The question, rather, is whether Congress might reasonably conclude that homosexuals are subject to unjust private discrimination that prevents them from enjoying their status as full and equal citizens. If so, then the law is within Congress's powers to enforce the Citizenship Clause.

What about homosexuals who are noncitizens? Congress has the power to include them in civil rights laws because it has plenary power to regulate immigration and naturalization under the commerce power and the naturalization power. Congress may reasonably conclude that prohibiting discrimination against noncitizens on U.S. soil will promote good will among immigrant populations within the United States and further the country's immigration and naturalization policies.[129] Moreover, Congress might reasonably conclude that extending federal antidiscrimination laws to aliens on U.S. soil either furthers or is required by the equal protection guarantees of the Fifth Amendment's Due Process Clause.

These examples show that what Americans today regard as garden-variety civil rights laws fall easily within Congress's powers to enforce the Citizenship Clause. But one should not conclude from these easy cases that Congress's enforcement powers are unlimited. In fact, they are far narrower than Congress's powers under the Commerce Clause and the General Welfare Clause. Congress must be able to show that proposed legislation reasonably furthers equal citizenship status and prevents second-class citizenship. Most federal laws do not qualify under this test.

As we have seen, however, the kinds of laws that Americans believe are necessary to securing equal citizenship can change over time. In 1868, few would have thought that freedom from private employment discrimination was important to enjoying equal citizenship status; in 1968 most Americans would have. (This was, of course, the point of the March on Washington for Jobs and Freedom.) Public understandings about citizenship might reach even further today. Consider, for example, laws that prevent placing hazardous wastes in

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[128] *Id.* at 631.

[129] This is true even if some members of immigrant groups oppose homosexuality.

areas with disproportionate effects on poor people or minorities, sweatshop regulations, or laws prohibiting discrimination by military contractors.

Nevertheless, most Americans would not think a wide swath of federal economic regulations—in areas ranging from defense expenditures to tax incentives, agricultural subsidies, workplace safety regulations, or the protection of the environment—further equal citizenship and prevent second-class citizenship. Therefore courts would be justified in holding that these laws are not reasonably calculated to enforce the Citizenship Clause, although, of course, Congress might enact them under the Commerce Clause or the General Welfare Clause.

All of this might change: Perhaps in time Americans will come to believe that without certain general environmental protections, workplace safety rules, or tax deductions, people become second-class citizens. Constitutional politics has changed public attitudes about the requirements of equal citizenship before, and it may do so again, just as it changed public attitudes about the federal government's responsibility for regulating the national economy. If this happens, courts may be authorized to expand the scope of Congress's power to enforce the Citizenship Clause—not because courts should take instructions from public opinion polls but because the social meaning of citizenship has changed, as it did in the 1960s.

B. Deterring Private Interference with the Enjoyment of Constitutionally Protected Rights

Next consider congressional enforcement of the Fifteenth Amendment and the second sentence of the Fourteenth Amendment. Each of these texts has a state action requirement. Nevertheless, Congress can still reach some private activity through "appropriate" enforcement legislation. Congress has the power to prevent private parties from interfering with or conspiring to prevent access to and enjoyment of rights guaranteed by the Constitution.

The framers of the Fourteenth Amendment, many of them abolitionists, were keenly aware of the Fugitive Slave Clause of Article IV[130] and the legislation that Congress had passed to enforce the rights created by that clause. The Reconstruction Amendments were designed to give Congress at least as much power to protect civil liberties after the Civil War as Congress had to protect slavery before the Civil War.

Like the second sentence of the Fourteenth Amendment, the Fugitive Slave Clause was directed at state action. No state shall "in

[130] U.S. CONST. art. IV, § 2, cl. 3.

Consequence of any Law or Regulation therein . . . discharge[ ] from . . . Service or Labor" slaves who escape from other states. These slaves must "be delivered up on Claim of the Party to whom such Service or Labor may be due."[131] As Justice Story explained in *Prigg v. Pennsylvania*, "[t]he clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control, or restrain."[132] In *Prigg*, the Supreme Court held that the Fugitive Slave Clause gave Congress the power to regulate both state and private actors to protect slaveholders' rights to their escaped slaves. Congress could reach private actors even though the text of the Clause was directed to state action and even though the Constitution did not explicitly grant any power to enforce it. Drawing on *McCulloch*, Justice Story argued that there was an implied power to enforce rights created by the Constitution and that Congress had the power to pass appropriate legislation to protect the rights of slaveholders, including against any parties, private or public, who would try to interfere with them.[133]

Prigg upheld the Fugitive Slave Act of 1793. Section 4 of the Act made it a crime for private parties to "obstruct or hinder" slaveholders or their agents who are apprehending a person they believe to be an escaped slave or to "rescue . . . harbor or conceal" a person designated as an escaped slave.[134] In 1850, Congress passed a new Fugitive Slave Act, which also regulated private action.[135] Section 5 of the Act required private persons to assist in the capture of escaped

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131 The Clause reads:

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Id. Similarly, the Extradition Clause of Article IV, Section 2 imposes a duty on state officials who discover a fugitive from justice in their state:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

Id. art. IV, § 2, cl. 2.

132 41 U.S. (16 Pet.) 539, 612 (1842).

133 *Id.* at 615–17; *see also* Robert J. Kaczorowski, *The Supreme Court and Congress's Power To Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153, 164–88 (2004) (describing 1793 Fugitive Slave Act and Supreme Court's broad construction of congressional power in *Prigg*).

134 Act of Feb. 12, 1793 (Fugitive Slave Act of 1793), ch. 7, § 4, 1 Stat. 302, 305 (repealed 1864).

135 Act of Sept. 18, 1850 (Fugitive Slave Act of 1850), ch. 60, 9 Stat. 462 (repealed 1864).

slaves when called on by federal commissioners.[136] Section 7 made it a crime for private parties to "obstruct, hinder, or prevent" slaveholders or their agents from arresting escaped slaves, to "rescue, or attempt to rescue" escaped slaves, to "aid, abet, or assist" their escape, or to "harbor or conceal" them.[137] In *Ableman v. Booth*,[138] decided a year after *Dred Scott v. Sandford*,[139] Chief Justice Taney announced that the 1850 Fugitive Slave Act was also constitutional.[140] Before the Civil War, Congress and the courts had protected the rights of slaveholders from public and private interference through nationwide protections. Following the Civil War, members of the Reconstruction Congress argued that Congress should enjoy equal power to enforce the new constitutional rights guaranteed by the Reconstruction Amendments.[141] The 1866 Civil Rights Act was even modeled on elements of the Fugitive Slave Acts.[142] The principal author of the Civil Rights Act, Senator Lyman Trumbull of Illinois, announced that many of the Civil Rights Act's provisions "are copied from the late fugitive slave act . . . . The act that was [used for] punishing persons who should aid negroes to escape to freedom is now to be applied by the provisions of this bill to the punishment of those who shall undertake

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136 *Id.* at 462–63.

137 *Id.* at 464; *see also* Kaczorowski, *supra* note 133, at 191–204 (describing the Fugitive Slave Act of 1850 and federal cases broadly construing congressional power).

138 62 U.S. (21 How.) 506, 526 (1858).

139 60 U.S. (19 How.) 393 (1857).

140 *Ableman*, 62 U.S. at 526 ("[T]he act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States . . . ."). Taney's remarks are technically dicta. The issue in *Abelman* was whether the Wisconsin Supreme Court could interfere with a federal proceeding; however, because the Wisconsin Court's justification was that the Fugitive Slave Act was unconstitutional, Taney sought to make unmistakably clear that the Act was constitutional.

Whether or not the 1850 Fugitive Slave Act was within Congress's powers to enforce Article IV, it was constitutionally problematic on other grounds. The Act denied blacks accused of being runaway slaves trial by jury and other due process protections. It created federal commissioners who could issue certificates of removal on the basis of *ex parte* testimony or affidavits, but prohibited any testimony by the accused. *See* Act of Sept. 18, 1850 (Fugitive Slave Act of 1850), ch. 60, § 6, 9 Stat. 462, 463–65. Moreover, the federal commissioner was paid ten dollars if a certificate was awarded but only five dollars if it was refused. *Id.* at 464. On the history of the Act, see Earl M. Maltz, *Slavery, Federalism, and the Constitution:* Ableman v. Booth *and the Struggle Over Fugitive Slaves*, 56 CLEV. ST. L. REV. 83, 87–89 (2008), and Robert J. Kaczorowski, *Fidelity Through History and to It: An Impossible Dream?*, 65 FORDHAM L. REV. 1663, 1682–85 (1997).

141 Kaczorowski, *supra* note 34, at 200. For example, Representative James Wilson, Chairman of the House Judiciary Committee, argued that Congress had ample authority to pass the Civil Rights Act of 1866 based on the theory of *Prigg*. CONG. GLOBE, 39th Cong., 1st Sess. 1118, 1294 (1866).

142 Kaczorowski, *supra* note 34, at 204–05. Proponents of the Civil Rights Act noted the connection between the Bill's provisions and those in the Fugitive Slave Act. *See id.* at 205–16 (giving comprehensive account of debates over congressional power to pass Civil Rights Act).

to keep them in slavery."[143] "Surely," Trumbull argued, "we have the authority to enact a law as efficient in the interests of freedom . . . as we had in the interest of slavery . . . ."[144] Before the Civil War, anti-slavery advocates had argued against congressional power to enforce the Fugitive Slave Act. After the war, a few, like John Bingham, still maintained this position and, as a result, voted against the Civil Rights Act.[145] However, most Republican congressmen disagreed with Bingham; they supported the Act's constitutionality, and they passed the 1866 Act by overwhelming margins sufficient to overcome President Johnson's veto.[146]

In construing the Reconstruction Power, therefore, a good rule of thumb is that its scope must be at least as great as the power to protect the rights of slaveholders before the Civil War. At the very least, Congress has the power to make it a crime or a tort for private parties deliberately to interfere with rights guaranteed by the Constitution or the Reconstruction Amendments or to aid, abet, or conspire with others to interfere with these rights.

Consistent with this approach, Congress can pass antilynching laws that punish attempts by private parties to prevent accused persons from enjoying due process of law, the equal protection of the laws, the right to trial by jury, and other criminal procedure protections contained in the Bill of Rights. Congress can also prevent private parties from conspiring to terrorize people who exercise their First Amendment rights to take unpopular political opinions or to organize politically or their Second Amendment right to bear arms.

In addition, Congress can make it a tort or crime for private parties to attempt to prevent people from enjoying their Fifteenth Amendment right to vote, if the private interference is motivated by race, color, or previous condition of servitude.[147]

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143 CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866); *id.* at 1759–60 (making similar arguments in debates about whether to overturn President Andrew Johnson's veto of Civil Rights Act).

144 *Id.* at 475. Congressmen made similar claims that broad protections for slavery in *Prigg* justified broad powers to protect freedom and equality in the debates over the Ku Klux Klan Act of 1871. *E.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 375 (1871) (statement of Rep. Lowe); *id.* at App. 70 (statement of Rep. Shellabarger).

145 CONG. GLOBE, 39th Cong., 1st Sess. 1291–92 (1866); *id*. at 1367 (recording Bingham's vote against Civil Rights Act).

146 *Id.* at 1809 (reporting Senate vote to override 33-15), *id.* at 1861 (reporting House vote to override 122-41).

147 This point is made in Justice Bradley's circuit opinion in *United States v. Cruikshank*, 25 F. Cas. 707 (Bradley, Circuit Justice, C.C.D. La. 1874) (No. 14,897), *aff'd*, 92 U.S. 542 (1875):

> [The Fifteenth Amendment] confers a positive right which did not exist before. . . . The right shall not be denied [which means that] the right shall be enjoyed; the right, namely, to be exempt from the disability of race, color, or

The Enforcement Act of 1870 and the Ku Klux Klan Act of 1871 also contained provisions that criminalized private conduct. Each act made it a crime for private parties to conspire to violate rights guaranteed by the Reconstruction Amendments.[148] These statutes were passed in the wake of widespread political terrorism in the South; private gangs sought to frighten blacks and white Republicans to prevent them from exercising their rights to vote, assemble, exercise free speech, and participate in politics.[149] Through terror tactics, whites sought to regain political control in the South, and they ultimately succeeded.[150]

> previous condition of servitude, as respects the right to vote. . . . [T]he amendment, notwithstanding its negative form, substantially guaranties the equal right to vote to citizens of every race and color. . . . [C]ongress has the power to secure that right not only as against the un-friendly operation of state laws, but against outrage, violence, and combinations on the part of individuals, irrespective of the state laws. Such was the opinion of [C]ongress itself in passing the law at a time when many of its members were the same who had consulted upon the original form of the amendment in proposing it to the states. . . . [However,] [t]o bring [conspiracies] within the scope of the amendment and of the powers of [C]ongress they must have for motive the race, color or previous condition of servitude of the party whose right is assailed.

Id. at 712–14. The Supreme Court agreed. *See* United States v. Cruikshank, 92 U.S. 542, 555–56 (1875) (requiring pleading of intent to discriminate on account of race); *see also Ex parte* Yarborough, 110 U.S. 651, 666 (1884) (holding that Congress can reach private action "when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself"); *cf.* United States v. Reese, 92 U.S. 214, 218 (1875) ("[The Fifteenth] [A]mendment has invested . . . United States [citizens] with a new constitutional right[,] . . . [but] [i]t is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere, and provide for its punishment.").

148 Act of Apr. 20, 1871 (Ku Klux Klan Act of 1871), ch. 22, § 2, 17 Stat. 13, 13–14 (codified at 42 U.S.C. § 1985, 18 U.S.C. § 241 (2006)); Act of May 31, 1870 (Enforcement Act of 1870), ch. 114, §§ 4–6, 16–18, 16 Stat. 140, 141, 144.

149 *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 342–43, 425–44 (1988) (describing Klan's "reign of terror" against blacks and white Unionists in South designed to reestablish control of Southern whites and Democratic Party); Michael Kent Curtis, *The Klan, The Congress, and The Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments and the State Action Syllogism: A Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381, 1382–83, 1397–1400 (2009) (describing a campaign of political terror against blacks and their white allies designed to keep them from exercising political rights and to prevent biracial democracy in South).

150 Similar terror tactics have been repeated at different times in many parts of the world, where paramilitary organizations or even private groups of thugs seek to achieve political dominance by terrorizing their political opponents and racial and religious minorities. On the history of the use of terrorist tactics for political ends, see JULIE MAZZEI, DEATH SQUADS OR SELF-DEFENSE FORCES?: HOW PARAMILITARY GROUPS EMERGE AND CHALLENGE DEMOCRACY IN LATIN AMERICA (2009) (describing how paramilitary organizations are created, inter alia, to prevent political reforms); BRUCE HOFFMAN, INSIDE TERRORISM (2006); EARL CONTEH-MORGAN, COLLECTIVE POLITICAL VIOLENCE: AN INTRODUCTION TO THE THEORIES AND CASES OF VIOLENT CONFLICTS 253–76 (2004);

In *United States v. Morrison*, Chief Justice Rehnquist argued that Congress could not create nationwide remedies under its Section 5 powers if the problem was regional and Congress offered no evidence that violations of constitutional rights occurred in all states.[151] But the Enforcement Act of 1870 and the Ku Klux Klan Act of 1871 were not limited to particular parts of the country. As Michael Kent Curtis points out, general nationwide statutes "avoid claims that one region is being singled out and remove one source of resentment and resistance."[152] They allow the federal government to deal with "new outbreaks of political terrorism . . . immediately," and "they cannot be blocked in Congress by a faction that stands to benefit politically from terrorism."[153] Without such statutes, "the forces of terror and fraud [can] elect their preferred representatives and block remedial legislation. That is what happened in the United States after 'Redemption.'"[154]

The Fugitive Slave Acts of 1793 and 1850 are instructive. It was obvious to everyone that opposition to slavery was greater in some portions of the country than in others. But these Acts were not limited to states like Pennsylvania or Massachusetts that had histories of abolitionist sentiment. The Fugitive Slave Acts applied equally to all states, whether or not they were ready and willing to return slaves under state law.[155] Nor did Congress have to produce explicit findings that the problem of escaped slaves was uniform nationwide or that special legislation was necessary to deter private interference with the return of escaped slaves.

The Enforcement Act and the Ku Klux Klan Act recognized constitutional limits on Congress's enforcement powers by requiring a showing of intent to deprive citizens of rights guaranteed by the Constitution. The intent requirement ensured that Congress could not regulate violent conduct generally (which would supplant state tort and criminal law) but could regulate only politically (or racially) motivated violence aimed at preventing people from exercising their constitutional rights.

Congress's powers to punish private acts of political terrorism are buttressed by its powers to enforce the Guarantee Clause of Article

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WALTER LAQUEUR, A HISTORY OF TERRORISM (2001) (presenting general history of terrorism).

151 United States v. Morrison, 529 U.S. 598, 626–27 (2000).

152 Curtis, *supra* note 149, at 1417.

153 *Id.*

154 *Id.*

155 Act of Sept. 18, 1850 (Fugitive Slave Act of 1850), ch. 60, § 6, 9 Stat. 462, 463 (repealed 1864); Act of Feb. 12, 1793 (Fugitive Slave Act of 1793), ch. 7, § 1, 1 Stat. 302, 302 (repealed 1864).

IV, Section 4, under which the United States promises to "guarantee to every State in this Union a Republican Form of Government . . . ."[156] The Guarantee Clause appears in the same article as the Fugitive Slave Clause, and there is no reason to think that Congress enjoys less power to enforce the Guarantee Clause against private parties. In fact, the Clause's references to "[i]nvasion" and "domestic [v]iolence" presume the power to reach private action.[157] Congress can enforce the Guarantee Clause by making it a crime or a tort to attempt to keep people from exercising the rights necessary to a republican form of government—including the rights of members of the political community to vote, speak, publish, assemble, protest, and organize politically.[158]

Early federal court interpretations agreed that Congress could prevent private interference with federal constitutional rights. Judge (later Justice) William B. Woods's circuit opinion in *United States v. Hall* upheld an indictment under the 1870 Enforcement Act for private conspiracy to interfere with First Amendment rights.[159] After the *Slaughter-House Cases*[160] greatly limited the scope of the Privileges or Immunities Clause, however, the federal courts applied this theory quite narrowly.

In *United States v. Cruikshank*,[161] the Supreme Court dismissed indictments arising out of the infamous Colfax Massacre, one of the

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156 U.S. CONST. art. IV, § 4.

157 U.S. CONST. art. IV, § 4, cl. 2.

158 *See* WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 24–28, 33, 42, 57–59, 67–68 (1972) (noting that purpose of Guarantee Clause included preventing use of violence to take over governments); Akhil Reed Amar, *Guaranteeing a Republican Form of Government: The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 760, 762 (1994) (arguing that central purpose of Guarantee Clause is protecting popular sovereignty); Curtis, *supra* note 149, at 1416 ("No state can be Republican where a minority is permitted to use tactics of terror to deny their opponents the rights of speech, press, association, and franchise and to thwart majority rule.").

159 United States v. Hall, 26 F. Cas. 79, 80–81 (C.C.S.D. Ala. 1871) (No. 15,282). Judge Woods's analysis was the result of correspondence with Justice Bradley. *See* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876, at 16 (2005) ("[P]ortions of [Woods's opinion in *Hall*] were verbatim copies of Justice Bradley's letter."). Bradley and Woods assumed that the Privileges or Immunities Clause applied the Bill of Rights against the states. Congress could enforce these rights against private action because it would be "unseemly" to "interfere with state enactments" and because Congress might lack effective means to "compel the activity of state officials" to ensure fair enforcement of their own laws. Id. at 15; *Hall*, 26 F. Cas. at 81.

160 83 U.S. (16 Wall.) 36, 74–75 (1873) (sharply distinguishing between rights of national citizenship protected by Privileges or Immunities Clause and all other rights, which were left to protection by state governments). *United States v. Cruikshank*, 92 U.S. 542 (1875), confirmed and extended this narrow construction.

161 92 U.S. 542 (1875).

worst episodes of political violence during Reconstruction. Chief Justice Waite's opinion assumed that Congress could criminalize private conspiracies against rights granted by the Federal Constitution or rights that were "attribute[s] of national citizenship."[162] However, Waite argued that Congress did not have the power to enforce the Bill of Rights against the states. These rights were not among the privileges or immunities of national citizenship that the Fourteenth Amendment protected against state interference.

Instead, Waite argued, the rights described in the Bill of Rights—which included the rights of speech and assembly—were natural rights pre-existing the Constitution. He argued that they were "secured" by the Constitution from federal interference, but they were not rights "granted" (i.e., created) by the Constitution itself.[163] These and other natural rights were attributes of state citizenship, and citizens had to look to the states for their protection.[164] The distinction between "granted" and "secured" rights severely limited the rights that Congress could protect from private interference.

Waite acknowledged that the right to petition Congress for a redress of grievances was a privilege or immunity of national citizenship created by the Federal Constitution; Congress could protect this right from private interference.[165] The problem in *Cruikshank* was that the indictment did not allege any interference with this right.[166] Similarly, the Fifteenth Amendment created a new federal constitutional right against government infringements of the right to vote on the basis of race, color, or previous condition of servitude. However, the indictments did not specify that the conspiracies at issue were racially motivated.[167] Finally, the indictments charged that the defendants engaged in a general conspiracy to interfere with rights granted and secured by the Federal Constitution. While this allegation was fully consistent with the Court's theory of congressional power, the

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[162] *Id.* at 552.

[163] *Id*. at 551–54.

[164] *Id.* at 549, 551–54 (arguing that right to free speech, right to bear arms, and right to due process of law are natural rights which states have duty to protect).

[165] Later decisions agreed that Congress could protect rights created by the Constitution from private violence. *See In re* Quarles, 158 U.S. 532, 534–36 (1895) (right to protection for persons reporting violations of federal law); Logan v. United States, 144 U.S. 263, 283–84 (1892) (right to security while in custody of federal marshal); *Ex parte* Yarbrough, 110 U.S. 651, 660–62 (1884) (right to vote for presidential electors or members of Congress and right to regulate federal elections under Article I, section 4); *cf.* United States v. Waddell, 112 U.S. 76, 78–79 (1884) (right of access to federal homestead).

[166] *Cruikshank*, 92 U.S. at 552–53 (1875).

[167] *Id.* at 555–56.

problem was that these counts did not specify *which* federally protected rights had been violated, so they were unduly vague.[168]

Cruikshank's crabbed, unsympathetic reading of the Constitution and Congress's 1870 Enforcement Act made it quite difficult for blacks to protect their constitutional rights in the face of a systematic campaign of terror and violence in the South. The result in *Cruikshank*, however, depends on three features, none of which should be controlling today. The first, and most obvious, is the set of inflexible pleading rules that the Court used to dismiss the indictments.[169] The second is the Court's extension of the recently decided *Slaughter-House Cases*, which incorrectly narrowed the scope of the Privileges or Immunities Clause. Today, of course, courts use the Fourteenth Amendment's Due Process Clause to achieve what the Privileges or Immunities Clause was designed to do: incorporate the Bill of Rights and protect implied fundamental rights.[170] The third is the Court's theory that individual rights in the Bill of Rights are not *granted* by the Constitution but only *secured* against government interference. This argument is premised on the existence of natural rights that pre-exist the state, but the conclusion does not follow from the premise. Constitutions protect natural rights by creating *legal* rights; these legal rights are created and granted by the adoption of the Constitution and its amendments just like any other legal rights. Whether or not the right of assembly is a natural right, the right contained in the text of the Constitution is a legal right created by the adoption of the constitutional text. Similarly, when courts or legislatures recognize a natural right as one of the privileges or immunities of citizens of the United States (or a right protected by the Due

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168 *Id.* at 557–59.

169 *See* Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2155–60 (1993) (noting Justice Bradley's "extremely technical reading of the indictment" in circuit court decision, which was then followed by Supreme Court in Chief Justice Waite's opinion).

170 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (protecting right of intimate association between same sex couples under Due Process Clause); Duncan v. Louisiana, 391 U.S. 145, 148–50 (1968) (listing incorporated rights and incorporating right to trial by jury in criminal cases). I believe that these tasks are properly performed by the Privileges or Immunities Clause rather than the Due Process Clause. *See* Balkin, *Abortion and Original Meaning*, *supra* note 17, at 313–14, 318.

In *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), at least five Justices specifically refused to revisit *Slaughter-House*. *Id.* at 3030 (plurality opinion); *id*. at 3089 (Stevens, J., dissenting). Only Justice Thomas argued that the Second Amendment was a privilege or immunity of citizens of the United States. *Id*. at 3086 (Thomas, J., concurring in part and concurring in the judgment). Even so, Section 5 of the Fourteenth Amendment gives Congress the power to protect fundamental rights regardless of whether courts locate them in the Due Process or Privileges or Immunities Clauses.

Process or Equal Protection Clauses), they recognize that there is a legal right as well.

Shorn of these problems, *Cruikshank* stands for the proposition that Congress can prevent private conspiracies to interfere with rights granted and secured by the Federal Constitution. That proposition is consistent with the constitutional text, and it is valid today.[171]

C. Securing the Equal Protection of the Laws from State Neglect

Congress also has the power to enforce the constitutional guarantee of equal protection of the laws against private parties. Following the Civil War, whites in the South terrorized blacks and white unionists; victims were murdered, raped and lynched; their property was stolen and their houses were burned. All of these acts violated state tort or criminal law, but state and local officials in the South turned a blind eye to this violence. The Joint Committee on Reconstruction, which drafted and proposed the Fourteenth Amendment, also prepared a report outlining the reasons for the new amendment.[172] This report contains pages and pages of examples of private violence, pri-

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[171] *In re Quarles* summarized the cases from *Cruikshank* to *Logan* as stating the following principle:

> Every right created by, arising under, or dependent upon the Constitution, may be protected and enforced by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object.

158 U.S. 532, 535 (1895). A modern version of this theory appears in *United States v. Guest*, 383 U.S. 745 (1966), in which six Justices argued that Congress could outlaw private conspiracies against the right to travel. *Id.* at 762 (opinion of Clark, J., joined by Black and Fortas, JJ., concurring); *id.* at 782 (opinion of Brennan, J., joined by Warren, C.J., and Douglas, J., concurring in part and dissenting in part). Justice Brennan argued that "[Section] 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect . . . right[s] created by and arising under that Amendment; . . . Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection." *Id.* at 782 (Brennan, J., concurring in part and dissenting in part). Justice Clark argued that "there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." *Id.* at 762 (Clark, J., concurring).

In *United States v. Morrison*, Chief Justice Rehnquist dismissed these opinions as dicta and sniffed that "[t]his is simply not the way that reasoned constitutional adjudication proceeds." 529 U.S. 598, 624 (2000). However, the year before *Morrison*, the Supreme Court agreed that the right to travel is one of the privileges or immunities of citizens of the United States. *See* Saenz v. Roe, 526 U.S. 489, 503 (1999). It would seem to follow that even under the logic of *Cruikshank*, Congress can reach private conspiracies to violate this right. *See Cruikshank*, 92 U.S. at 552–53 (1876) (noting that Congress can reach private interference with "attribute[s] of national citizenship" such as the right to petition Congress).

[172] REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION (Gov't Printing Office, 1866).

marily against blacks and secondarily against whites who opposed secession and supported black interests. In fact, as Laurent Frantz once pointed out, there is far more evidence of private violence and lack of state enforcement in the Joint Committee's Report than evidence of discriminatory state legislation.[173]

We often think that the primary and immediate purpose of the Fourteenth Amendment was to respond to the Black Codes, draconian laws passed after the abolition of slavery that stripped blacks of basic civil rights.[174] But the Joint Committee's Report focused particularly on the lack of legal protection for blacks in the South. The majority of the injustices reported were examples of private violence and the failure of states to protect blacks and white unionists from this violence. Some 150,000 copies of this report were printed, and excerpts were given to the press; the Republicans used the report, the Fourteenth Amendment, and the Civil Rights Act of 1866 as the basis of their congressional campaign in the 1866 elections.[175] We must therefore regard the protection of blacks and their white allies from private violence as a central and immediate purpose of the new amendment in addition to abolishing the Black Codes. Congressional power to protect people from such violence is, as Jed Rubenfeld would say, a "paradigm case" of the powers the Fourteenth Amendment was designed to create.[176] A reasonable construction of the enforcement clause of the Fourteenth Amendment must at least give Congress the power to prevent lynchings and private violence directed at people when states will not afford the victims the equal protection of the laws.

The Reconstruction Congress, following a long history of Anglo-American thought, believed that the right of protection by the government was one of the most basic rights of citizens; it was a basic requirement of civil liberty and of equality before the law.[177] The text

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[173] Laurent B. Frantz, *Congressional Power To Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1354 & nn.10–13 (1964) (collecting examples in report of discriminatory legislation and private violence).

[174] *See, e.g.*, JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 41 (2005) (arguing that central purpose of Fourteenth Amendment was to outlaw Black Codes). On the history of the Black Codes, see FONER, *supra* note 149, at 198–209.

[175] BENJAMIN B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 264–65 (1914); Frantz, *supra* note 173, at 1355.

[176] *See* RUBENFELD, *supra* note 174, at 15–19 (arguing that constitutional interpretation should begin with "paradigm cases" of constitutional violations of rights); JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 180–90 (2001) (same).

[177] On the Reconstruction Congress's views, see Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 546–61

of the Fourteenth Amendment reflects the importance of this right in two different ways. First, protection by government is a privilege or immunity of citizens of the United States; it is one of the basic rights listed in *Corfield v. Coryell*,[178] and Senator Howard lists it in his famous speech introducing the Fourteenth Amendment.[179] Second, the Equal Protection Clause says that states may not deny the equal protection of the laws to any person in their jurisdiction. Section 1, in combination with Section 5, Howard explained, "establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty."[180]

When states neglect to protect people within their jurisdiction from private injury, for example through a custom or practice of nonenforcement, this is state action within the meaning of the Fourteenth Amendment.[181] This idea appears both in the debates over the Ku Klux Klan Act,[182] and in the first judicial construction of Section 5 in *United States v. Hall*: "Denying [equal protection] includes inaction as

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(1991). A good example is the statement of the chairman of the House Judiciary Committee, Representative James Wilson of Iowa, in the debates over the Civil Rights Act of 1866: "The highest obligation which the Government owes to the citizen in return for the allegiance exacted of him is to secure him in the protection of his rights." CONG. GLOBE, 39th Cong., 1st Sess. 1295 (1866).

178 6 Fed. Cas. 546, 551 (C.C.E.D. Pa. 1825) (No. 3230).

179 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

180 *Id.* at 2766. Introducing the Fourteenth Amendment in the House, Representative Thaddeus Stevens argued that "Whatever law protects the white man shall afford equal protection to the black man. Whatever means of redress is afforded to one shall be afforded to all." *Id.* at 2459.

The idea that the Fourteenth Amendment and, in particular, the Equal Protection Clause imposes an affirmative duty on states to protect people equally appears so clearly in the debates of the Reconstruction Congress that some scholars have argued that the Equal Protection Clause is *primarily* or *solely* concerned with remedying unequal enforcement or nonenforcement of the laws protecting citizens and other persons. *See* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1 (2008); John Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 YALE L.J. 1385, 1433–51 (1992); Earl A. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499 (1985). As I have explained elsewhere, the Clause is not so limited—for it also reaches class legislation and other arbitrary forms of government decision making—but it clearly includes this most basic of rights. *See* Balkin, *Abortion and Original Meaning*, *supra* note 17, at 315–16.

181 *See* Brandwein, *supra* note 121, at 345–47, 356–57, 363–64 (discussing different versions of state neglect theory).

182 For example, Representative (later President) James Garfield argued that Congress had the power to pass the Ku Klux Klan Act of 1871 because:

> [E]ven where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe the last clause of the first section

well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection."[183]

As with its other enumerated powers, Congress may choose all appropriate means to protect the right of equal protection from state neglect. Congress can give individuals rights to sue the state and local government officials who fail to protect them. But often a far more efficient method is to allow victims to sue their attackers instead.

Federal lawsuits against state and local officials are likely to make them especially defensive and oppositional. Because local officials have limited resources for law enforcement, and because they cannot be everywhere, it may be difficult to prove in court that they deliberately failed to come to a person's aid for improper reasons. Finally, damage suits against state and local officials may actually be counterproductive if they use up government resources that could be better employed to protect people and fight crime.[184]

Direct federal lawsuits against attackers, on the other hand, do not drain state and local coffers, and they do not use up state and local law enforcement resources—indeed, they supplement them. Moreover, because local law enforcement officials are not being sued themselves, they may be more likely to cooperate with—or at least not

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> empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection.

CONG. GLOBE, 42d Cong., 1st Sess. App. 153 (1871). Garfield eventually voted for the Klan Act even though the statute did not require proof of state neglect. *See* CONG. GLOBE, 42d Cong., 1st Sess. 808 (recording Garfield's vote); Curtis, *supra* note 149, at 1412.

183 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282) (Woods, J.).

184 *Hall* offers related justifications in explaining why it is "appropriate" for Congress to create individual causes of action against private attackers:

> [T]o insure . . . adequate protection [of rights], as well against state legislation as state inaction, or incompetency, the amendment gives [C]ongress the power to enforce its provisions by appropriate legislation. And as it would be unseemly for [C]ongress to interfere directly with state enactments, and as it cannot compel the activity of state officials, the only appropriate legislation it can make is that which will operate directly on offenders and offenses, and protect the rights which the amendment secures. The extent to which [C]ongress shall exercise this power must depend on its discretion in view of the circumstances of each case. If the exercise of it in any case should seem to interfere with the domestic affairs of a state, it must be remembered that it is for the purpose of protecting federal rights, and these must be protected even though it interfere with state laws or the administration of state laws.

Id. at 81–82.

Justice Bradley's circuit court opinion in *Cruikshank* takes a similar view: If states withhold remedies for violations of Fifteenth Amendment rights, "undoubtedly, [C]ongress has the power to pass laws to directly enforce the right and punish individuals for its violation, because that would be the only appropriate and efficient mode of enforcing the amendment." United States v. Cruikshank, 25 F. Cas. 707, 713 (Bradley, Circuit Justice, C.C.D. La. 1874) (No. 14,897), *aff'd*, 92 U.S. 542 (1875).

actively hinder—the investigation or prosecution of a federal lawsuit. Finally, suits against attackers obviate difficult problems of proving in court that law enforcement officials failed to aid a victim for invidious reasons.

What is a constitutionally appropriate remedy for state underprotection? Four good pieces of evidence are the Civil Rights Act of 1866, the Enforcement Act of May 1870, the Ku Klux Klan Act of 1871, and the Civil Rights Act of 1875. These acts were passed by the same people who wrote the Reconstruction Amendments, and although their construction of the Constitution does not bind us today, these statutes give us a sense of how a Congress using the *McCulloch* standard believed it could draft enforcement legislation. It is worth remembering that Congress gave itself enforcement powers because it did not trust the Supreme Court.[185] Its fears were well founded: The Supreme Court struck down parts of these statutes or severely limited their reach.[186] To recover Congress's structural conception, we must view these statutes free of the restrictions created by decades of unsympathetic Supreme Court precedents.

There are two basic models for remedying state neglect—one focused on protecting *rights* and the other focused on protecting *classes*. We have already discussed the first model: Congress can ban private interference with the enjoyment or exercise of rights protected by the Federal Constitution, as it did in portions of the 1870 Enforcement Act and the 1871 Ku Klux Klan Act. Congress does not have to offer evidence that state officials have failed to protect these rights because the federal government has independent power to protect federal rights from private conspiracies.

Congress adopted a rights-protecting strategy in the early 1870s because private violence by the Klan and other vigilante groups was not directed solely at blacks; it was also directed at those whites in the South who might vote Republican or otherwise support black civil rights. Without the support of a substantial number of whites, blacks

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185 *See* ROBERT J. HARRIS, THE QUEST FOR EQUALITY 30 n.15, 53–54 (1960) ("[Radical Republicans] did not trust the judiciary in general and the Supreme Court in particular . . . ."); Frantz, *supra* note 173, at 1356 ("[T]he federal judiciary . . . was looked upon with considerable distrust."); McConnell, *supra* note 34, at 182 ("Section Five of the Fourteenth Amendment was born of the fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power.").

186 The Civil Rights Cases, 109 U.S. 3, 10–14, 17–18, 24–25 (1883) (limiting power to enforce Thirteenth and Fourteenth Amendments and striking down Civil Rights Act of 1875); United States v. Harris, 106 U.S. 629, 637–43 (1883) (limiting power to enforce Thirteenth and Fourteenth Amendments and striking down parts of Ku Klux Klan Act); United States v. Cruikshank, 92 U.S. 542, 554–56 (1875) (limiting power to enforce Fourteenth and Fifteenth Amendments); United States v. Reese, 92 U.S. 214, 217–18 (1875) (limiting power to enforce Fifteenth Amendment).

would lose majority support. The goal of the violence, therefore, was not only to terrorize blacks but also to terrorize anyone else who would stand up for their rights. As we have seen, the Supreme Court greatly undermined this approach in *United States v. Cruikshank*.[187]

The second model focuses on protecting *classes of people* that states fail to protect from violence or other infringements of their rights (including common law and state statutory rights). Congress adopted this strategy in the Civil Rights Act of 1866 and the Enforcement Act of 1870;[188] in Section 2 of the Ku Klux Klan Act of 1871, which banned conspiracies to deprive people of equal protection of the laws;[189] and in the Civil Rights Act of 1875, which banned racial discrimination in places of public accommodation.[190] This was also the strategy of the modern Violence Against Women Act of 1994, which created a civil cause of action against those who perpetrated "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender."[191]

The point of these statutes was to supplement state law enforcement systems without displacing them. Congress created remedies for private discrimination based on race because states had turned a blind eye to violence and intimidation of blacks. Similarly, the Violence Against Women Act created a private cause of action for crimes and torts based on gender. These wrongs, which include rape, sexual assault, and domestic violence, are *gender marked*: They are widely viewed as the kinds of crimes that happen mostly to women, and they happen to women in part because of stereotypical views about male dominance and the subordinate position of women in society. Because these crimes and torts are gender marked in this way, state and local

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[187] As Michael Kent Curtis points out, enforcement statutes that focused on racial motivation would have been insufficient. *See* Curtis, *supra* note 149, at 1398–1400. Blacks and whites were often targeted for their political activities; without biracial support, Republican candidates would have been unable to win majority support and blacks would have been especially vulnerable. Hence Congress focused on conspiracies to interfere with federally protected rights. The Supreme Court largely undermined this approach in *Cruikshank* through its pleading requirements and its distinction between granted and secured rights. *See supra* text accompanying notes 161–71.

[188] The 1866 Act created a civil cause of action when citizens are denied the same civil rights as enjoyed by white citizens, Act of Apr. 9, 1866 (Civil Rights Act of 1866), ch. 31, 14 Stat. 27; the 1870 Act extended this protection to "persons." Act of May 31, 1870 (Enforcement Act of 1870), ch. 114, §§ 16, 18, 16 Stat. 140, 144.

[189] Act of Apr. 20, 1871 (Ku Klux Klan Act of 1871), ch. 22, § 2, 17 Stat. 13, 13–14 (codified at 42 U.S.C. § 1985, 18 U.S.C. § 241 (2006)).

[190] Act of Mar. 1, 1875 (Civil Rights Act of 1875), ch. 114, 18 Stat. 335.

[191] 42 U.S.C. § 13981(d)(1) (2006).

law enforcement systems have been less willing or less able to prosecute them.

This class-protecting strategy does not create a perfect fit between the constitutional end and the means: It does not remedy all of the violence against the group that the state underprotects. For example, criminals might attack blacks not out of racial animus but solely to get their money; in fact, criminals may target blacks precisely because crimes against blacks are underenforced so criminals know they are less likely to be caught. Congress, however, may decide that the problems of state underenforcement are greatest for crimes motivated by private animus or by a belief that members of a group should be subordinate and put in their place; Congress may decide that the reason why individuals choose victims of a particular group is related to the reasons why state officials often refuse to come to their aid.

In the nineteenth century, the Supreme Court took a very narrow view of the state neglect theory. It differed from the views of the congressional Republicans—who had drafted both the Civil Rights Acts and the Reconstruction Amendments—in three important respects.

First, congressional Republicans believed that Congress could remedy state failures to address both politically motivated violence and racially motivated violence. After *Cruikshank*, the Supreme Court essentially limited Congress's power to situations involving racially motivated violence.[192] Moreover, the Supreme Court read civil rights statutes unsympathetically so that they failed to match the Court's theories of state neglect. For example, if a civil rights statute or an indictment did not specifically require proof of racial discrimination, the Court refused to infer this requirement.[193]

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[192] *See* Brandwein, *supra* note 121, at 357.

[193] In *United States v. Cruikshank*, the Supreme Court dismissed indictments under the 1870 Enforcement Act for "conspir[ing] to prevent certain citizens of the United States . . . from enjoying the equal protection of the laws of the State and of the United States." 92 U.S. 542, 554 (1876) (dismissing fourth and twelfth counts of indictment). The Court objected that "[t]here is no allegation that this was done because of the race or color of the persons conspired against." *Id.*; *see also* United States v. Cruikshank, 25 F. Cas. 707, 714–15 (Bradley, Circuit Justice, C.C.D. La. 1874) (No. 14,897) (arguing for requirement of racial motive to establish federal jurisdiction), *aff'd*, 92 U.S. 542 (1875).

In *United States v. Harris*, the Court struck down parts of the Ku Klux Klan Act that punished conspiracies to deny equal protection of the laws. Relying on *Cruikshank*, it did not adopt a reasonable limiting construction requiring proof of racial motive or class-based discrimination. 106 U.S. 629, 639–40 (1883). The Court's failure to do this created a serious problem. A theory of state neglect required some reason to believe that states were not enforcing their laws, but there was no evidence that states failed to enforce their criminal law generally. *Id.* at 639 ("[The Ku Klux Klan Act] applies, no matter how well the state may have performed its duty. Under it private persons are liable to punishment for conspiring to deprive any one of the equal protection of the laws enacted by the State.").

Second, congressional Republicans believed that once Congress found widespread violence and underenforcement in the South, it could create a nationwide statute. "It did not limit the law to specific districts where the problem currently existed," Michael Kent Curtis points out. "Nor did it condition prosecution on any finding of a denial of protection by the state."[194] Under both *McCulloch* and *Prigg*, courts should defer to Congress's judgment about the nature and scope of the remedy.[195] However, the Supreme Court struck down portions of the Klan Act and the Civil Rights Act of 1875 because they applied whether or not particular states had neglected to enforce the law fairly.[196]

Third, although the issue was somewhat more controversial, a majority of congressional Republicans believed that equal access to public accommodations was a civil right; therefore they had the power to outlaw racial discrimination in public accommodations in the 1875 Civil Rights Act.[197] In the 1883 *Civil Rights Cases*, the Supreme Court

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In *Griffin v. Breckenridge*, the Court did what the *Harris* Court would not do; it adopted a limiting construction. 403 U.S. 88, 102 (1971) ("The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."). The Court upheld the civil provisions of the Klan Act under Section 2 of the Thirteenth Amendment and as a means of protecting the federally guaranteed right to travel. *Id.* at 104–07.

In *Bray v. Alexandria Clinic*, 506 U.S. 263 (1993), the Supreme Court refused to apply the Klan Act to persons conspiring to obstruct access to abortion clinics. Justice Scalia's majority opinion argued that there was no interference with the right to travel and that intent to oppose abortion was not equivalent to sex discrimination. *Id.* at 268–77.

194 Curtis, *supra* note 149, at 1414.

195 Justice Bradley's circuit opinion in *Cruikshank* also pointed out that in cases of state neglect of rights guaranteed by the Fifteenth Amendment,

> [C]ongress has the power to secure that right not only as against the unfriendly operation of state laws, but against outrage, violence, and combinations on the part of individuals, irrespective of the state laws. Such was the opinion of [C]ongress itself in passing the law at a time when many of its members were the same who had consulted upon the original form of the amendment in proposing it to the states. And as such a construction of the amendment is admissible, and the question is one at least of grave doubt, it would be assuming a great deal for this court to decide the law, to the extent indicated, unconstitutional.

25 F. Cas. at 713. As noted before, Bradley argued that proof of racial motivation was required. *Id*.

196 *Harris*, 106 U.S. at 639; The Civil Rights Cases, 109 U.S. 3, 14 (1883) ("[The 1875 Civil Rights Act] applies equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws as to those which arise in states that may have violated the prohibition of the amendment.").

197 *Compare* McConnell, *supra* note 34, at 175 ("[S]upporters of the [1875 Civil Rights] Act insisted that it merely enforced rights already established by the Fourteenth Amendment."), *and* Michael W. McConnell, *Originalism and the Desegregation Decisions*,

disagreed; it treated access to public accommodations as merely a "social right,"[198] just as it would thirteen years later in *Plessy v. Ferguson*.[199] The Court's theory of social rights allowed it to distinguish the Civil Rights Act of 1866. Like the 1875 Act, the 1866 Act also applied nationwide and did not require any showing of state neglect. Nevertheless, because it protected basic civil rights, the Court argued that the 1866 Act was a constitutional means of remedying state neglect.[200]

None of the Court's constructions should bind us today. Under the *McCulloch* standard, the test is whether Congress could reasonably conclude that banning violence against members of a certain group would help them gain equal protection of the laws, either by compensating for state neglect or encouraging states to take crimes and torts more seriously. Congress can pass nationwide statutes if it believes this solution is appropriate. Under *McCulloch*'s presumption

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81 VA. L. REV. 947, 993–95 (1995) (arguing that supporters of Civil Rights Act of 1875 viewed access to public accommodations as a civil right), *with* Brandwein, *supra* note 121, at 354–55 (arguing that, despite Congress's decision to ban discrimination in public accommodations in Civil Rights Act of 1875, there was disagreement among Republicans concerning whether access to public accommodations was part of civil freedom).

198 The Civil Rights Cases, 109 U.S. 3, 22 (1883).

199 163 U.S. 537, 542–43, 550–51 (1896).

200 The *Civil Rights Cases* justified the Civil Rights Act of 1866 on a state neglect theory: "This law is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified." 109 U.S. at 16. Drawing a contrast to the 1875 Act, Justice Bradley argued that

> Congress did not assume [in the Civil Rights Act of 1866] to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

Id. at 22.

Justice Harlan's dissent argued that the right to public accommodations was a basic civil right traditionally protected by the common law. *Id.* at 37–43 (Harlan, J., dissenting). Note that this explains Justice Harlan's dissent in both the *Civil Rights Cases* and *Plessy*: He believed that equal access to railway carriages and other public accommodations was an attribute of civil equality. Thus the Civil Rights Act of 1866 was not distinguishable.

Harlan's argument is quite powerful, especially since the majority assumed for purposes of argument that equal access to public accommodations was "one of the essential rights of the citizen which no State can abridge or interfere with." *Id.* at 19. If so, then Congress should be able to remedy state neglect to protect these rights just as it could remedy state neglect to protect basic civil rights in the 1866 Act.

The distinction between civil equality and social equality that was at issue in both *Plessy* and the *Civil Rights Cases* is not part of modern equal protection law. It was exploded by the decisions in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), which prohibited segregation in public schools, and *Loving v. Virginia*, 388 U.S. 1, 2 (1967), which prohibited bans on interracial marriage. Each of these cases required states to enforce what nineteenth-century lawyers would have considered social equality.

of constitutionality, courts should take judicial notice of any evidence that would support the reasonableness of Congress's conclusions, whether in the legislative record or not.[201] However, Congress may make findings of fact to justify its solutions: The Report of the Joint Committee on Reconstruction detailed the problem of racial violence after the Civil War that justified the Civil Rights Act of 1866, and the debates over the Klan Act are filled with discussions of the problem of violence and terrorism in the South. Similarly, before enacting VAWA, Congress held extensive hearings and produced large amounts of data about deficiencies in state and local law enforcement,[202] including information from task forces from twenty-one states and testimony from state and local law enforcement officials who argued that a federal remedy was necessary.[203]

Statutes like the Ku Klux Klan Act or VAWA are based on a theory of state neglect, but Congress can pass other kinds of hate

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[201] *See* Cox, *supra* note 9, at 105 ("[T]he practice of relying upon the legislative record when it exists should not be taken to show that such a record is required.").

[202] Following several years of hearings, Congress concluded that "bias and discrimination in the [state] criminal justice system often deprive[ ] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." H.R. REP. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853. Senate Reports on VAWA reached the same conclusions:

> From the initial report to the police through prosecution, trial, and sentencing, crimes against women are often treated differently and less seriously than other crimes. Police may refuse to take reports; prosecutors may encourage defendants to plead to minor offenses; judges may rule against victims on evidentiary matters; and juries too often focus on the behavior of the survivors—laying blame on the victims instead of on the attackers.

S. REP. No. 103-138, at 42 (1993); *see also* S. REP. No. 102-197, at 34 (1991) (finding that gender stereotypes pervade law enforcement with respect to rape and domestic violence leading to differential treatment and underenforcement); United States v. Morrison, 529 U.S. 598, 629–31 & nn.3–8 (Souter, J., dissenting) (collecting evidence in congressional record on problem of gender stereotypes in state and local law enforcement systems).

[203] *See Morrison*, 529 U.S. at 630 n.7 (collecting citations to twenty-one different state task force reports). A letter signed by state attorneys general representing thirty-seven different states presented before Congress stated that:

> [T]he current system for dealing with violence against women is inadequate. Our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds. [VAWA] would begin to meet those needs by . . . creating a specific federal civil rights remedy for victims of gender-based crime.

Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 103d Cong. 34–36 (1993) (letter of Robert Abrams, Att'y Gen. of New York); *see also Violence Against Women: Victims of the System: Hearing on S. 15 Before the S. Comm. on the Judiciary*, 102d Cong. 37–39 (1991) (resolution adopted by National Association of Attorneys General unanimously urging VAWA's passage); Brief for State of Arizona, et al. as Amici Curiae Supporting Petitioners, United States v. Morrison, 529 U.S. 598 (2000) (No. 99-5, 99-29), 1999 WL 1032809 (brief of thirty-six states and Puerto Rico supporting constitutionality of VAWA).

crime statutes as well. As noted previously, Congress may outlaw private conspiracies designed to prevent the exercise of federal constitutional rights and access to federal facilities. Even the *Slaughter-House Cases* recognized that among the privileges or immunities of citizens is the right to unimpeded access to facilities created or protected by federal law.[204] Congress can punish hate crimes directed against religious groups and political groups because campaigns of private violence discourage and inhibit their First Amendment rights. Congress can also reach politically motivated violence under the Guarantee Clause if it reasonably believes that this violence interferes with representative government. Under the Thirteenth Amendment, Congress may punish racially motivated violence in order to eliminate the badges and incidents of slavery.[205] Finally, Congress has the power to enforce the badges and incidents of citizenship under the Citizenship Clause. This allows Congress to criminalize violence against both racial and non-racial groups—for example, identified by gender, religion, or sexual orientation—if it reasonably concludes that patterns of violence contribute to second-class citizenship.

D. Congressional Power To Interpret the State Action Requirement

The Fifteenth Amendment and the Privileges or Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment limit state action. But "state action" is often difficult to define. In fact, it is a conclusory term: "State action" describes those actions and failures to act for which we should hold state and local governments responsible. Put another way, if governments have a constitutional duty to do something (or not do something), or a constitutional duty to require others to do something (or not do something), then there is state action.[206] Thus, inquiries about state action often can be rephrased in terms of the state's failure to enforce constitutional norms.

For example, to decide whether organizing political party primaries that include only white voters constitutes state action, we have to decide whether states have a constitutional duty to regulate these primaries to open them to blacks.[207] To decide whether enforcement

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[204] 83 U.S. 36, 79 (1873) (citing Crandall v. Nevada, 73 U.S. 35, 44 (1867)).

[205] Griffin v. Breckenridge, 403 U.S. 88, 104–05 (1971).

[206] For a useful formulation, see Mark Tushnet, *State Action in 2020*, *in* THE CONSTITUTION IN 2020 (Jack M. Balkin & Reva B. Siegel eds., 2009).

[207] *See, e.g.*, Terry v. Adams, 345 U.S. 461, 473–74 (1953) (finding that exclusion of blacks from Jaybird Democratic Association was state action); Smith v. Allwright, 321 U.S. 649, 664–65 (1944) (holding that exclusion of blacks from voting in Democratic primary was state action) (overruling Grovey v. Townsend, 295 U.S. 45 (1935)); *see also* Nixon v. Condon, 286 U.S. 73, 88–89 (1932) (holding that delegation of qualifications to political

of racially restrictive covenants in housing is state action, we must decide whether the state judiciary has a constitutional duty to refuse to enforce these covenants, especially if it refuses to enforce a variety of other covenants on grounds of public policy.[208]

Similarly, to decide whether the operations of businesses who contract with the state constitute state action, we might ask whether states have any duty to control what their independent contractors do—either through contracts or through regulation. If states have a duty, then it is fair to say that the state is responsible for violations of constitutional norms by their contractors.[209] To decide whether discrimination by public accommodations—restaurants, hotels, and bus companies, for example—is state action, we might ask whether states have any duty to regulate public accommodations to ensure that they do not discriminate. If states have such a duty, then it is fair to say that the state is responsible for any discrimination that occurs.[210]

Asking the question this way shows why the state action doctrine is so complicated; even if the white primary cases seem easy today, the other examples get increasingly messy. Perhaps states should require *some* contractors, *some* licensees, *some* state-chartered corporations, and *some* public accommodations to accept *some* constitutional norms (for example, nondiscrimination), but it might be very awkward to treat them all the same way or impose the full panoply of constitutional obligations on them.

Because of these difficulties, courts will usually underenforce the constitutional obligations of state action in practice. They may not be able to draw arbitrary lines between different kinds of rights or between different kinds of public accommodations, contractors, licensees, or corporations. Expanding state action in one situation may have unforeseen and undesirable consequences for others. Courts may be unable to adopt flexible doctrines that can adapt quickly to changed conditions. As a result, courts will often err on the side of giving legislatures flexibility and discretion to determine what constitutional duties they will take on and what constitutional norms they will impose on others.

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party committee was state action); Nixon v. Herndon, 273 U.S. 536, 539–41 (1927) (finding that statutory ban on black voting in primary violated Fourteenth Amendment).

[208] *See* Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that enforcement of racially restrictive covenants constituted state action).

[209] *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 721–26 (1961) (finding state action where blacks were excluded from restaurant that leased space in building owned by city parking authority).

[210] A fortiori, if the state also enforces the right to discriminate through its trespass laws, there is state action because the state had a duty to prevent the discrimination in the first place.

The institutional limitations of courts suggest that Congress can play an important role in enforcing the state action requirement in ways that courts cannot. It might make sense, for example, to apply nondiscrimination norms to public accommodations, but not free speech doctrines or search and seizure rules. One might want to ban discrimination in public accommodations but exempt small businesses or owner-occupied bed-and-breakfasts. Similarly, one might want to apply nondiscrimination rules only to contractors who do more than a certain amount of business with the state, who have direct contact with the public, or who directly provide services to the public. One might want to apply some (but not all) constitutional norms to corporations or licensees whose businesses are affected with important public interests or who perform important public services, but not other business entities.

These are all plausible policy solutions for civil rights legislation, but they are not the sort of solutions that courts can easily create through constitutional doctrine. Congress, on the other hand, can draw lines of this sort, balancing a host of different normative and factual considerations. Moreover, Congress can adjust its remedies over time to reflect changing conditions and evolving public values. This is precisely what happened during the 1960s. As a result of the civil rights movement, the public supported applying anti-discrimination norms to public accommodations, employment, and housing, but not necessarily to all other areas of social life.

Courts can review Congress's interpretation of state action using the rules of thumb developed earlier.[211] First, courts should decide if applying constitutional norms to an entity would violate that entity's own constitutional rights. If not, courts should defer to broader constructions of state action (1) if Congress's interpretation would be appropriate remedial or prophylactic legislation using the Supreme Court's narrower doctrines of state action; (2) if Congress's interpretation of state action is reasonable; or (3) if one can explain the differences between Congress's and the Supreme Court's interpretation by institutional differences between Congress and the courts.

Letting Congress interpret state action more broadly under Section 5 than courts do under Section 1 can enhance the legitimacy of both branches. Courts may have to strain to apply constitutional requirements to what looks like private action; doing so may disfigure doctrine and generate public criticism of the courts for overreaching. As a democratically elected branch, Congress can apply constitutional norms flexibly and selectively and take political responsibility for what

[211] *See supra* text accompanying notes 87–108.

it does. It can extend constitutional norms in response to changing public values and correct its errors through legislation. Meanwhile. the Supreme Court can preserve a core set of understandings about state responsibility.

The struggle over civil rights in the 1960s—which led to the passage of the Civil Rights Act of 1964—offers a good example of how courts and Congress can cooperate. The civil rights movement sought to establish that both public and private discrimination against blacks made them second-class citizens. Legal maintenance of Jim Crow depended not only on the doctrine of separate but equal, but also on the state action doctrine and a narrow conception of state responsibility for racial inequality.[212]

During the middle of the twentieth century the Supreme Court sought to protect black civil rights by loosening the state action requirement.[213] But there were limits on what it could do. When civil rights protestors staged sit-ins demanding service in segregated establishments in the early 1960s, the Supreme Court repeatedly found ways to reverse trespass convictions.[214] Faced with a seemingly endless supply of sit-in cases, the Supreme Court was under enormous pressure to expand its state action doctrines even further and hold that Section 1 of the Fourteenth Amendment applied directly to restaurants, stores, and other public accommodations. Ultimately the Court decided that Congress was institutionally better suited to protect blacks from private discrimination.[215] The Court, in turn, would

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[212] *See* Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 70 (1967) (describing separate but equal and state action doctrines as "fraternal twins[,] . . . the Medusan caryatids upholding racial injustice"); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 276–79 (1991) (discussing legal criticisms of state action doctrine during this period).

[213] *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967); Evans v. Newton, 382 U.S. 296 (1966); *Burton*, 365 U.S. 715; Barrows v. Jackson, 346 U.S. 249 (1953); Terry v. Adams, 345 U.S. 461 (1953); Hurd v. Hodge, 334 U.S. 24 (1948); *Shelley*, 334 U.S. 1; Smith v. Allwright, 321 U.S. 649 (1944). *See generally* Black, *supra* note 212, at 92 (analyzing Supreme Court's loosening of state action requirement).

[214] *See* Post & Siegel, *Antidiscrimination Legislation*, *supra* note 99, at 487 n.228 (collecting cases). Matters came to a head in *Bell v. Maryland*, 378 U.S. 226 (1964), as the Court pondered the state action question while Congress was debating the Civil Rights Act of 1964.

[215] *See* Post & Siegel, *Antidiscrimination Legislation*, *supra* note 99, at 497–501 (noting Court's decision to defer to Congress); BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 188–89 (1985) (describing difficulties in deliberations over *Bell v. Maryland*); Klarman, *supra* note 212, at 274–77 (same). The Court finally decided *Bell v. Maryland* for the sit-in protestors on non-constitutional grounds. *Bell*, 378 U.S. at 237–42 (reversing convictions and remanding in light of change in Maryland law). The Court left the civil rights question to Congress, which had just passed the 1964 Civil Rights Act. Justice Hugo Black, who dissented in *Bell v. Maryland*, hinted that Congress might

give broad deference to Congress to pass federal civil rights legislation.[216]

As we have seen, the Supreme Court upheld Title II of the 1964 Civil Rights Act under the commerce power; it never officially decided whether discrimination in public accommodations was state action or whether Congress had authority to outlaw such discrimination through its Section 5 powers. Nevertheless, Congress could legitimately adopt this interpretation of state action—and it did.

First, this interpretation of state action would easily have been justified by institutional differences between courts and legislatures, as explained above. Unlike the courts, Congress could draw lines including some businesses but not others, and it could extend anti-discrimination norms but not other constitutional norms.

Second, Congress's judgment that discrimination in public accommodations was state action would have been a reasonable judgment, particularly in 1964. It was the view of at least three Justices in *Bell v. Maryland* (and possibly five).[217] It was also the view of Justice Harlan, dissenting in the *Civil Rights Cases*.[218] Perhaps most importantly, it was the view of the Congress that passed the 1875 Civil Rights Act; many of its members had drafted the Fourteenth Amendment and passed the first civil rights acts to enforce it. The Court did not reach these questions because it did not want to take on the *Civil Rights Cases*; it feared that overturning that eighty-year-old precedent would encourage Southern resistance to the new Civil Rights Act. But we should have no such compunction today. Title II of the 1964 Civil Rights Act is not only a legitimate exercise of Congress's power to enforce the Fourteenth Amendment; it is a paradigmatic example of that power.

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adopt a broader interpretation of state action under Section 5 than would be appropriate for courts under Section 1. His dissent repeatedly stressed that he decided only what Section 1 required independent of any legislation by Congress. *See Bell*, 378 U.S. at 319, 335, 338–39, 343, 344 n.44 (Black, J., dissenting); *see also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 278–79 (1964) (Black, J., concurring).

216 This is essentially what the Supreme Court did in upholding the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Similarly, in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), *United States v. Guest*, 383 U.S. 745 (1966), *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Supreme Court gave Congress broad latitude to implement the Reconstruction Amendments. *See supra* text accompanying note 39.

217 *See* SCHWARTZ, *supra* note 215, at 173–89 (draft opinion of Justice Clark finding state action in public accommodations); Klarman, *supra* note 212, at 274–76, 275 n.293.

218 *See* The Civil Rights Cases, 109 U.S. 3, 58–59 (1883) (Harlan, J., dissenting) ("[R]ailroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, [for purposes of enforcing the Fourteenth Amendment,] because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation.").

Conclusion

This essay has outlined several different theories for enacting modern civil rights legislation. These theories of congressional enforcement significantly overlap in practice. For example, Congress could have passed the entire Civil Rights Act of 1964 through its powers to enforce the Citizenship Clause and it could have passed Title II of the Act through interpreting the state action requirement more broadly than the courts. Similarly, Congress might pass federal hate crimes laws to enforce the Thirteenth Amendment, the Citizenship Clause, the Privileges or Immunities Clause, the Due Process Clause, or the Equal Protection Clause.

This redundancy is not a bug; it is a feature. The structural purpose of the three Reconstruction Amendments was to secure equal citizenship and equality before the law. These amendments gave Congress all the powers necessary to enforce these structural principles. If a constitutional power to secure equal citizenship was missing, *that* would have been a defect. Because all three amendments are directed to the same ends, we should expect that methods of enforcing them will overlap significantly.

The statesmen who drafted the Reconstruction Amendments gave Congress independent enforcement powers because they feared that the Supreme Court would prove an unreliable guarantor of liberty and equality. Their fears were proved correct: Time and again, the Supreme Court hobbled Congress's enforcement powers through specious technicalities and artificial distinctions. These limitations are not required either by the Constitution's original meaning or by principles of federalism. Quite the contrary: Fidelity to text, structure, and history gives Congress broad authority to protect equal citizenship and equality before the law. It is long past time to remedy the Supreme Court's errors, and reconstruct the great Reconstruction Power of the Constitution.