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CONGRESSIONAL AUTHORITY TO INTERPRET THE THIRTEENTH AMENDMENT

ALEXANDER TESIS*

I. INTRODUCTION

Most scholars of the Thirteenth Amendment have argued that Section 2 grants Congress broad powers to pass civil rights legislation.¹ Several critics have challenged this view, most expositively Jennifer Mason McAward, who has argued for adopting a more constrained perspective of congressional enforcement power.² There have been few recent Supreme Court decisions on the Thirteenth Amendment to draw upon and those that are available conceive of the Thirteenth Amendment expansively; therefore, the revisionist argument for a limited reading of the Thirteenth Amendment is informed by the Rehnquist Court's Fourteenth Amendment jurisprudence stemming from the holding in *City of Boerne v. Flores* and its

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1. See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 157 (1992); Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 983–84 (2002); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1805 (2010); James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 118–20 (2002); Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 439–40 (2009); Alexander Tsisis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 358–59 (2004); Alexander Tsisis, *Interpreting the Thirteenth Amendment*, 11 U. PA. J. CONST. L. 1337 (2009); Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 1007 (2002); Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 256 (2010).

2. Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U. L. REV. 77 (2010). See also David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 396 n.84 (2008) (discussing *City of Boerne v. Flores*); Jennifer S. Hendricks, *Women and the Promise of Equal Citizenship*, 8 TEX. J. WOMEN & L. 51, 78 (1998) (discussing the power that the Citizenship Clause bestows upon Congress).

progenies.³ This Essay will investigate the validity of claims about the historical lessons of the Thirteenth Amendment and the possibility that the Court will superimpose its Fourteenth Amendment conservatism unto the more liberal Thirteenth Amendment jurisprudence.

I will respond to two arguments positing that Congress's legislative authority under Section 2 of the Thirteenth Amendment should be limited to remedial legislation enacted to provide congruent and proportional redress for the violation of judicially identifiable rights.⁴ Under this constraining interpretation, Congress may not identify rights protected by the Thirteenth Amendment without prior judicial input.

The first argument I will address for applying the same judicial restraints to the Thirteenth Amendment as the Court adopted in *Boerne* has originalist overtones. It premises that statements made in the immediate aftermath of the Thirteenth Amendment are best indicative of the scope of legislative power provided Congress under Section 2, which contains the Enforcement Clause.⁵ The Thirty-eighth Congress, so the argument goes, which passed the proposed amendment for ratification onto the states, only intended the Thirteenth Amendment to be a limited grant of authority for Congress to pass remedial legislation that congruently responds to some judicially identified evil.⁶

The second argument I will address in this Essay is doctrinal.⁷ It claims that regardless of the original intent of the Amendment's framers, the Warren Court's expansive understanding of the Amendment in *Jones v. Alfred H. Mayer Co.*⁸ has been substantially weakened and modified by the Rehnquist Court's narrow expostulation on Congress's enforcement power under Section 5 of the Fourteenth Amendment.⁹ The new Section 5 doctrine is then transposed unto Section 2 interpretation to make the Supreme Court the only valid interpreter of the rights protected by both the Fourteenth and Thirteenth Amendments.¹⁰ My survey of the historical and jurisprudential background of the Thirteenth Amendment indicates that *Boerne's*

3. *City of Boerne v. Flores*, 521 U.S. 507 (1997); *see infra* text accompanying notes 86–91.

4. *See infra* Part IV.

5. *See infra* Part IV.

6. McAward, *supra* note 2, at 143.

7. *See infra* Part V.

8. 392 U.S. 409 (1968).

9. *See City of Boerne v. Flores*, 521 U.S. 507, 511 (1997) (holding that the Religious Freedom Restoration Act of 1993 exceeds Congress's power).

10. *See infra* Part V.

congruent and proportional test is inapplicable to the judicial review of Thirteenth Amendment enforcement authority.¹¹

II. THE HISTORICAL DEBATE

The Thirteenth Amendment was the first of three Reconstruction Amendments.¹² Its primary, initial purpose was to abolish slavery and to grant Congress the power to protect freepersons against any attempts to bind them to slavery or involuntary servitude.¹³ The concept of “freeperson” was broadly understood to include any of the privileges and immunities not enjoyed by persons in bondage.¹⁴ Congress only realized that more explicit constitutional protections for equal rights would be needed when President Andrew Johnson tried to derail Reconstruction.¹⁵ At the time of the Thirteenth Amendment’s passage there was no conversation about the need for any further amendments. From the debates, it appears clear that members of Congress were confident that the Thirteenth Amendment would allow legislators to eliminate the lingering vestiges of slavery and all forms of labor exploitation.¹⁶ Radicals proceeded with the proposed Fourteenth Amendment only after President Andrew Johnson repeatedly vetoed their legislative efforts to rebuild the Union and modify its federalist structure.¹⁷ Additionally, the disfranchisement of blacks

11. See *infra* Part II.

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

13. William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1322–23 (2007).

14. Michael Vorenberg, *Citizenship and the Thirteenth Amendment: Understanding the Deafening Silence*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 58, 63–64 (Alexander Tesis ed., 2010) [hereinafter TESIS, PROMISES OF LIBERTY].

15. See, e.g., Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361, 381 (2009) (discussing President Johnson’s veto); William M. Wiecek, *The Emergence of Equality as a Constitutional Value: The First Century*, 82 CHI-KENT L. REV. 233, 249 (2007) (same).

16. ALEXANDER TESIS, WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW 99 (2008).

17. See, e.g., Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1767 (2007) (“It was only Johnson’s repeated vetoes that forced the congressional Republicans to propose the Fourteenth Amendment as their election platform in 1866 . . .”); Daniel S. Korobkin, *Republicanism on the Outside: A New Reading of the Reconstruction Congress*, 41 SUFFOLK U. L. REV. 487, 489 (2008) (describing how ratification of the Fourteenth Amendment advanced over President Johnson’s veto).

ultimately led to passage of the Fifteenth Amendment, which was meant to provide blacks with the full scope of political citizenship.¹⁸

Debates on the Civil Rights Act of 1866¹⁹ demonstrate how Congressmen regarded their power under Section 2 of the Thirteenth Amendment.²⁰ Many of them had been in Congress the year before, when the proposed amendment had been passed.²¹ During debates about the Thirteenth Amendment at the Thirty-eighth Congress, legislators repeatedly spoke of how changes to the Constitution would enable lawmakers to pass statutes for protecting individual rights.²² Many of the congressional speeches on the proposed Thirteenth Amendment evidence a clear understanding that the Enforcement Clause would expand legislative authority into matters that had previously been reserved to the states. Senator Reverdy Johnson expressed the hope that the Amendment would give practical application to the self-evident truths of the Declaration of Independence.²³

18. See Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1419 (2002) (stating that the Fifteenth Amendment “operationalized the legal and political equality of black citizens and was the last step necessary to integrate blacks into the polity fully and formally”). There is some debate as to whether the Republicans passed the Fifteenth Amendment to solidify their political power or to further ideals of political equality. I believe the debate has been settled in favor of the principled understanding of Republican efforts. See XI WANG, *THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE—NORTHERN REPUBLICANS, 1860–1910*, at xxii–xxiii (1997); LaWanda Cox & John H. Cox, *Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography*, 33 J. S. HIST. 303, 321. For the opposing view, see WILLIAM GILLETTE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* 46–49 (1965).

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

20. See Aviam Soifer, *Protecting Full and Equal Rights: The Floor and More*, in TESIS, PROMISES OF LIBERTY, *supra* note 14, at 196, 201 (“Much historical evidence . . . indicates quite convincingly that the Thirty-ninth Congress, in enacting the Civil Rights Act of 1866 and thus attempting to secure the fruits of victory after the horrendous . . . Civil War, understood that it was necessary to do something different to guarantee ‘practical freedom’ throughout the land.”).

21. See Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 6 (1995) (stating that “when the 39th Congress convened, virtually the same group of legislators who had debated and supported the Thirteenth Amendment enacted a civil rights bill”).

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

23. CONG. GLOBE, 38th Cong., 1st Sess. 1424 (1864) (“We mean that the Government in future shall be . . . one, an example of human freedom for the light and example of the

His sentiment was representative of the supermajority of senators and representatives who expected the Amendment to provide Congress with the power to protect each citizen's life, liberty, and pursuit of happiness.²⁴

Congressman James F. Wilson of Iowa, chairman of the House Judiciary Committee, emphasized that by conferring Congress with the power to pass laws even after the abolition of slavery the Amendment had fundamentally altered the structure of government.²⁵ He believed that the Thirteenth Amendment had granted Congress the power to pass laws securing "human equality" by treating persons of all races as "equals, before the law."²⁶ Federal laws passed pursuant to Section 2 would displace any contrary state laws by operation of the Supremacy Clause.²⁷ A representative from Illinois and close associate of Abraham Lincoln, Isaac Arnold, also foresaw that the Enforcement Clause of the Thirteenth Amendment presaged an increased federal authority to secure fundamental rights. Arnold believed that Section 2 provided Congress the authority to pass laws guaranteeing that "*equality before the law*" would "be the great corner-stone" of American governance.²⁸

When Senator Charles Sumner recommended including a phrase in the proposed Thirteenth Amendment stating that "[a]ll persons are equal before the law,"²⁹ other senators convinced him to abandon the motion. While there was a general consensus that slavery infringed on natural rights intrinsic to all humans, explicit mention of "equality" was contentious because it threatened to alienate

world, and illustrating in the blessings and the happiness it confers the truth of the principles incorporated into the Declaration of Independence, that life and liberty are man's inalienable right.").

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

25. CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864).

26. *Id.* at 1319.

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

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

29. *Id.* at 1483.

the already sparse Democratic Party support for the measure.³⁰ That is not to say that the Thirty-eighth Congress held a modern conception of fundamental rights; rather, by including the Enforcement Clause it anticipated passing new statutes to punish lingering vestiges of slavery and involuntary servitude. In this way, the Thirteenth Amendment was the first necessary step to achieving constitutional protections against racial inequality.³¹

The Supreme Court of the United States has drawn attention to the far-reaching legislative powers implied by Section 2:

[T]his Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its “burdens and disabilities”—included restraints upon “those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.”³²

This judicial interpretation of the Amendment’s scope is born out by its post-ratification history.

A year after the states ratified the Thirteenth Amendment, Congress proposed a bill entitled, “An Act to protect all persons in the United States in their civil rights and furnish the means of their vindication.”³³ After an extensive period of debate, Congress enacted the law, which became known as the Civil Rights Act of 1866,³⁴ over President Johnson’s veto.³⁵ Enacted just a year after the Amendment had been ratified, the statute is a telling indicator about what the Amendment’s framers understood of the congressional prerogative to pass civil rights legislation. The statute went far beyond the abolition

30. See MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 55 (2001) (discussing the Judiciary Committee’s decision to adopt the language of the Northwest Ordinance, “which simply prohibited slavery and involuntary servitude”).

31. Rutherglen, *supra* note 27, at 1406 (“The Amendment was the necessary first step in recognizing a right to racial equality and in providing for enforcement of this right against private individuals.”). The Supreme Court first accepted Congress’s ability to prohibit private forms of discrimination in *The Civil Rights Cases*, 109 U.S. 3, 20 (1883). Later cases have persistently accepted the application of Section 2 to private acts of discrimination. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968) (“Thus, the fact that [§ 1982] operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem.”).

32. *Jones*, 392 U.S. at 441 (quoting *The Civil Rights Cases*, 109 U.S. at 22).

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

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

35. See TESIS, *supra* note 16, at 99 (elaborating on President Johnson’s veto).

of slavery, securing the equal right to sue, execute and enforce contracts, testify in court, and purchase and alienate property.³⁶

III. THE IMPACT ON FEDERALISM

Some scholars contest the claim that Congress passed the proposed Thirteenth Amendment in order to alter federalism substantially enough to make the protection of civil rights a national rather than state prerogative.³⁷ But the claim that the Amendment did little to alter federalism is belied by the 1866 debates on the civil rights bill. In the words of the Senate floor leaders of the Civil Rights Act, the law was meant to declare “that all persons in the United States should be free.”³⁸ Indeed, it seems illogical that almost immediately after winning the Civil War the abolitionist-minded Radical Republicans would have allowed southern states, which had fought such a bloody campaign to keep blacks in bondage, the sole province to safeguard civil rights. The breadth of power Congress defined for itself through the Civil Rights Act of 1866 unequivocally signaled the creation of congressional supremacy power over matters involving the protection of human rights.³⁹ The Thirteenth Amendment’s enforcement power enabled Congress to pass any laws needed to curtail the incidents of slavery and to preempt state efforts to undermine national policy.⁴⁰

36. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 17 (1866).

37. See, e.g., McAward, *supra* note 2, at 83 (“Although it is possible to argue that placing substantive definitional power in Congress’s hands is uniquely appropriate in the Thirteenth Amendment context, this approach raises red flags with respect to federalism . . .”). But see Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 2046 (2003) (asserting that in 1865 and 1866 a far-reaching understanding of federalism was at play that connected the Thirteenth Amendment to substantive equality); Alexander Tsisis, *Principled Governance: The American Creed and Congressional Authority*, 41 CONN. L. REV. 679, 715 (2009) (concluding on the basis of congressional debates that “immediately after ratification of the Thirteenth Amendment” Congress believed it was “no longer to be hamstrung by the federalism of a bygone era when the racist administration of criminal law was a state prerogative”). Calvin Massey also shares the view that the Thirteenth Amendment granted Congress broad civil rights authority. See Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 482 (2002) (concluding that “the 1964 Civil Rights Act should have been grounded in section 2 of the Thirteenth Amendment, which as interpreted by *Jones v. Alfred H. Mayer Co.*, gives Congress the power ‘rationally to determine what are the badges and the incidents of slavery’ and to act to eliminate those badges and incidents of our lamentable past”) (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968)).

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

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

40. I am interlinking the Supremacy Clause with Congress’s use of its legitimate authority under the Thirteenth Amendment. See *Haywood v. Drown*, 129 S. Ct. 2108, 2127

Speakers who supported passage of the bill demonstrated an expansive understanding of Congress's power to identify civil rights and pass laws to protect them. Senator Lyman Trumbull, the bill's floor leader, bespoke the absurdity of the claim that the Amendment was meant to do no more than to allow Congress to end specific instances of forced, hereditary labor.⁴¹ Broad-ranging federal legislation was necessary. Trumbull pointed out that unless they were "carried into effect" through Thirteenth Amendment legislation, the notions of equal and inalienable rights set out in the Declaration of Independence would be merely "abstract truths and principles."⁴²

Additionally, even though the Fourteenth Amendment with its Equal Protection Clause was still two years from ratification, Representative William Windom believed that on the basis of the Thirteenth Amendment alone Congress could pass laws consistent with "the absolute equality of rights" which the United States professed from the time of its founding but had "denied to a large portion of the people."⁴³ According to Windom's statement, Section 2 augmented Congress's authority, enabling it to produce laws necessary to reconstruct the nation in accordance with the founding principles.

Many of the Congressmen who voted for passage of the 1866 statute regarded it as just an installment of protections that would be necessary to protect freedpeople's ability to live as free citizens.⁴⁴ Even an opponent of the civil rights bill understood that Section 2 granted Congress the power to pass laws safeguarding the civil rights belonging to every man, including those "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property."⁴⁵

(2009) (Thomas, J., dissenting) (linking the doctrine of preemption to the Supremacy Clause); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540–41 (2001) (stating that the Supremacy Clause allows Congress to "pre-empt[] state action in a particular area"); *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 509 (1989) (mentioning Congress's "power under the Supremacy Clause . . . to pre-empt state law"); Rutherglen, *supra* note 27, at 1380–81 (stating that with the passage of the Reconstruction Amendments, including the Thirteenth Amendment, "[m]atters that previously had been the exclusive domain of the states were now subject to federal regulation that could, under the Supremacy Clause, displace state law").

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

42. *Id.*

43. *Id.* at 1159.

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

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

IV. THE POWER TO DEFINE THE THIRTEENTH AMENDMENT

Jennifer Mason McAward, an author who believes that the Thirteenth Amendment should not be extended beyond judicially defined rights, provides a detailed narrative of debates on the Thirteenth Amendment's ratification and the most important statute passed the year thereafter.⁴⁶ She ultimately concludes that while the debates are inconclusive, "there was no suggestion that Section 2 granted Congress any substantive power to define or expand its own vision of the Amendment's ends."⁴⁷ To the contrary, I believe, a close reading of the *Congressional Globe* from the period leaves no doubt that in passing the Civil Rights Act of 1866, the Thirty-ninth Congress regarded its Section 2 power as the power to grant legislative authority to define rights essential to all free citizens and the ability to enact criminal and civil remedies against their infringement. Passage of this statute signaled a revolutionary change to federalism, allowing Congress to affect behavior that had previously been at the sole discretion of the states.⁴⁸ Antidiscrimination policy became a national rather than solely a state or local matter. Ten years after the Supreme Court found that blacks could not be citizens in *Dred Scott*,⁴⁹ the Reconstruction Congress included the enforcement provision of the Thirteenth Amendment to remove any judicial discretion to abridge inalienable or congressionally created rights.

In the immediate aftermath of the ratification, it was Congress, not the judiciary, that took the lead in both identifying the rights of free-people and promulgating statutes to protect them.⁵⁰ There is not so much as a hint in the 1866 debates to suggest that Congress lacks the authority to discern what discriminations, violations, and abuses are closely related to incidents of slavery and involuntary servitude. Simply put, during the 1864, 1865, and 1866 debates, Congressmen debating passage of the Amendment and Civil Rights Act, respectively, did not so much as mention the possibility that the Court could

46. See McAward, *supra* note 2.

47. See *id.* at 117.

48. See, e.g., Tsisis, *supra* note 37, at 715 (stating that after ratification of the Thirteenth Amendment Congress was "no longer to be hamstrung by the federalism of a by-gone era when the racist administration of criminal law was a state prerogative").

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

50. Prior to the ratification of the Fourteenth Amendment, the Reconstruction Congress enacted four statutes pursuant to its Thirteenth Amendment power: Peonage Act of 1867, ch. 187, 14 Stat. 546 (1867); Act of February 5, 1867, ch. 27, 14 Stat. 385 (1867) (expanding scope of habeas corpus statutes); Slave Kidnapping Act, ch. 86, 14 Stat. 50 (1866); Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

overturn Congress's codification of rights and penalties.⁵¹ Senator Trumbull, the floor leader of the bill who represented the dominant viewpoint in the Senate, asserted that Congress could secure liberties for all free persons, including the rights to travel, bring lawsuits, enter into contracts, and to own, inherit, and dispose of property.⁵² In identifying the rights of freemen, he did not seek guidance from the Court, nor was there such guidance from past precedents. The focus was on what rights were due to people who had emerged from bondage to citizenship, not on what rights the Supreme Court thought they possessed.⁵³ The unsuccessful opponents of the bill adamantly protested that so sweeping a law would infringe on states' internal affairs in matters like contract formation and real estate transaction.⁵⁴

Responding to this criticism, Trumbull said that the Civil Rights Act would not destroy federalism but provide "that all people shall have equal rights."⁵⁵ Among these essential interests, he asserted, are "the right to life, to liberty, and to avail one's self of all the laws passed for the benefit of the citizen to enable him to enforce his

51. Opposition to the Thirteenth Amendment actually warned that its ratification would grant Congress the power to pass civil rights laws. *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 104 (statement of Senator Garrett Davis of Kentucky on state rights); *id.* at 2962 (statement of Rep. William Steele Holman of Indiana); *id.* at 2991 (statement of Rep. Samuel Randall of Pennsylvania). During congressional debates about the merits of amending the Constitution, both the proponents and opponents of the proposed change to the fundamental law realized that Section 2 of the Thirteenth Amendment would substantially augment Congress's powers. The opposition to the 1866 Act did regard the law to be unconstitutional, but did not mention that the Court would have a hand in passing judgment on Congress's exercise of its Section 2 authority.

In 1870, persons wanting to reauthorize the Civil Rights Act under the Fourteenth Amendment were concerned about future Congresses vacating the law, but still stated no concern that the Court would second-guess legislative interpretation of the badges and incidents of slavery and involuntary servitude. An Act to Enforce the Right of Citizens of the United States, ch. 114, § 18, 16 Stat. 140, 144 (1870).

52. CONG. GLOBE, 39th Cong., 1st Sess. 474–75 (1866).

53. While the Citizenship Clause only formally became a part of the Constitution through Section 1 of the Fourteenth Amendment, Congress had included it in the Civil Rights Act. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866) ("Be it enacted . . . [t]hat all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."). This law was passed pursuant to Congress's Thirteenth Amendment power. *See* Balkin, *supra* note 1, at 1818 (discussing Congress's Thirteenth Amendment power); Bruce E. Boyden, *Constitutional Safety Valve: The Privileges or Immunities Clause and Status Regimes in a Federalist System*, 62 ALA. L. REV. 111, 152 (2010) (same).

54. CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866) (expressing concern that the law would infringe on states' rights over real estate transactions); *id.* at 595–96 (discussing states' property regulations).

55. *Id.* at 599.

rights”⁵⁶ Trumbull was perhaps the best person for explaining the meaning of the Thirteenth Amendment because he had been the chairman of the Senate Committee on the Judiciary, which had reported the language that Congress adopted and states ratified.⁵⁷ His reference to the phrase from the Declaration of Independence indicates that the most prominent congressional advocate of the Civil Rights Act thought the Thirteenth Amendment incorporated the Declaration’s safeguards of liberty into the Constitution and granted Congress the power to safeguard them.⁵⁸ This reconstructed version of federalism granted Congress the role of securing individual interests. Nor was this legislative power to identify and protect fundamental rights to the exclusion of the judiciary, but in concert with it.⁵⁹ States retained the sole power to regulate ordinary legal matters, such as contract formation and civil liability for tort claims, but the Thirteenth Amendment nationalized the protection of civil rights and granted Congress the principal responsibility of protecting them.⁶⁰ Trumbull’s summary of the bill’s purpose mirrored the full force of the Amendment’s guarantee of freedom: “If the bill now before us, and which goes no further than to secure civil rights to the freedman, cannot be passed, then the constitutional amendment proclaiming freedom to all the inhabitants of the land is a cheat and a delusion.”⁶¹ Congressman James Garfield, who would eventually become President of the United States, declared in similar terms that if “freedom” meant no more than the abolition of slavery, then it was “a bitter mockery” and “a cruel delusion.”⁶² The provisions of the Civil Rights Act of 1866 indicate that, less than half a year after the Thirteenth Amendment’s ratification, the dominant political view regarded Section 2 of the Amendment as a grant of congressional power to identify what rights to protect, to establish a rational policy for combating discrimination, and to promulgate legitimate laws to achieve that end.⁶³

56. *Id.* at 600.

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

58. CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866).

59. *Id.* at 599–600.

60. *Id.*

61. *Id.* at 1761.

62. Congressman James A. Garfield, *Suffrage and Safety: Oration Delivered at Ravenna, Ohio (July 4, 1865)*, in *THE WORKS OF JAMES ABRAM GARFIELD* 86 (Burke A. Hinsdale ed., 1882).

63. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440–41 (1968) (“Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”).

V. CONFLICT OF INTERPRETATION: A DOCTRINAL INQUIRY

In her recent article, Jennifer Mason McAward presents a doctrinal argument for restrained interpretation of Congress's Thirteenth Amendment powers.⁶⁴ She points to limitations that the Supreme Court placed on Congress's exertion of power under Section 5 of the Fourteenth Amendment and extrapolates that because Section 2 of the Thirteenth Amendment is similarly worded, the current Court would likely interpret them similarly.⁶⁵ The upshot of that argument is that while the rational basis standard of review the Court established in *Jones v. Alfred H. Mayer Co.*⁶⁶ has not been overturned, "[i]n light of *City of Boerne*, *Jones* is arguably a remnant of the past."⁶⁷ McAward believes that the holding in *City of Boerne v. Flores*⁶⁸ should be extrapolated to prohibit Congress from defining what forms of subordination constitute the badges and incidents of slavery and involuntary servitude.⁶⁹ This perspective would place restraints on legislative discretion that no court has ever imposed in the nearly century and a half since the Thirteenth Amendment was ratified.

VI. EFFECTS OF A NARROW INTERPRETATION OF SECTION 2 ENFORCEMENT POWER

If Congress is indeed barred from deliberating on and designating conduct as being a persistent incident of involuntary servitude, then the Court might strike statutes—such as the Victims of Trafficking and Violence Prevention Act of 2000⁷⁰ and the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act⁷¹—which were partly or wholly passed pursuant to congressional Thirteenth Amendment authority.⁷² Even more disconcerting, the interpolation of Fourteenth Amendment jurisprudence onto the Thirteenth Amendment

64. See McAward, *supra* note 2, at 142–46 (arguing for a controlled view of the Thirteenth Amendment powers Congress possesses).

65. *Id.* at 80–81.

66. 392 U.S. 409 (1968).

67. McAward, *supra* note 2, at 81.

68. 521 U.S. 507 (1997).

69. McAward, *supra* note 2, at 84 (“Congress cannot define the badges and incidents of slavery for itself, as *Jones* suggested”).

70. Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified in scattered sections of 8, 18, 20, 27, 42 U.S.C. (2006)) The Act goes beyond simply prohibiting coercive labor. It provides victims with immigration status, 8 U.S.C. § 1101(a)(15)(T–U) (2006), and grants a private cause of action, 18 U.S.C. § 1595 (2006).

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

72. McAward, *supra* note 2, at 79.

interpretation could signal the demise of 42 U.S.C. §§ 1981 and 1982.⁷³ Both of those statutes were passed after Congress, not the Court, identified wrongs associated with the badges and incidents of involuntary servitude.⁷⁴ According to McAward's interpretation, the constitutionality of these two statutes is questionable because they "target discriminatory and violent conduct far removed from coerced labor."⁷⁵ Her position implicitly consents to the Court's rejection of Congress's ability to identify, prevent, and punish civil rights violations through its Section 5 authority. Based on an approval of the Rehnquist Court's exertion of exclusive authority to interpret Section 1 of the Fourteenth Amendment, McAward urges that the Court be consistent by also diminishing Congress's ability to rely on Section 2 to identify and wipe out all existing forms of legal, social, civil, and economic subordination that lawmakers can reasonably link to the incidents of slavery or involuntary servitude.⁷⁶

With so much at stake, essentially facing the possibility that unelected judges rather than the people's representatives identify the essential components of civil and social freedoms, it is worth assessing the validity of McAward's claims about *Boerne* and its implication to Thirteenth Amendment interpretation. An unfortunate feature of McAward's article is that she fails to analyze *Boerne* itself.⁷⁷ So while she accepts that the opinion constrains congressional Thirteenth Amendment authority, she has not assessed whether the majority in that case correctly interpreted Congress's Fourteenth Amendment authority.⁷⁸ Many commentators have faulted the Court for intruding

73. 42 U.S.C. § 1981 (2006) (originally enacted as Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."); 42 U.S.C. § 1982 (originally enacted as part of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27) ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."); John E. Nowak, *The Rise and Fall of Supreme Court Concern for Racial Minorities*, 36 WM. & MARY L. REV. 345, 388 (1995) (mentioning that Congress passed §§ 1981 and 1982 based on its Thirteenth Amendment grant of authority).

74. See *supra* text accompanying notes 33–36.

75. McAward, *supra* note 2, at 89.

76. *Id.* at 142–47 (putting forth a "middle" approach to Congress's Section 2 power that "best accounts for the history, text, and structural consequences of the Amendment").

77. See generally McAward, *supra* note 2.

78. McAward recognizes that prior academic literature has differentiated between Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment, indi-

on congressional authority through its holding in *Boerne*,⁷⁹ which has thus far not directly affected Thirteenth Amendment precedents. But McAward's claim is that it should do just that. If she is correct, federal legislators can no longer identify the badges and incidents of involuntary servitude absent prior judicial guidance.⁸⁰ In that scenario, all Congress can do under Section 2 is to pass "prophylactic legislation" when "the badges and incidents of slavery arguably threaten to interfere with judicially recognized rights."⁸¹

VII. EVIDENCE OF BROAD ENFORCEMENT POWER UNDER SECTION 2

As I discussed earlier in this Essay, one of the clearest indicators that Section 2 of the Thirteenth Amendment was a sweeping grant of constitutional power to Congress was that the Civil Rights Act of 1866, which Congress initially passed pursuant to Section 2, extended the reach of federal governance far beyond the enumerated provisions of Section 1.⁸² Congress did not need to conduct any hearings to know that the rights protected under the 1866 Act—which included protections for property ownership, testimonial privilege, and contractual empowerment—were fundamental to the nature of free citizenship.⁸³ Neither did it need the Court to identify which rights were fundamental to freedpeople. In more than 140 years of hearing cases arising from that statute, the Court has never required any such congressional statement of proof to justify the statute's provisions.⁸⁴ This fundamentally contrasts with *Boerne*, where the Court required Congress to

cating *Boerne* did not diminish the value of *Jones*, but she does not address the extant arguments. *Id.* at 82 n.25.

79. See, e.g., Amar, *Intratextualism*, *supra* note 1, at 822–23; 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 (2003); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003); Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307 (2004).

80. McAward, *supra* note 2, at 142 ("While the judiciary will use *McCulloch*-style deference with respect to Congress's choices, it will actively review the ends to which Section 2 legislation is aimed to ensure that Congress does not encroach on the Court's role by substantively expanding the concept of the badges and incidents of slavery.").

81. *Id.* (quoting Calvin Massey, *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV. 1, 6 (2007)) (internal quotation marks omitted).

82. See *supra* text accompanying notes 33–36.

83. See *supra* text accompanying notes 33–36.

84. Cf. McAward, *supra* note 2, at 79–81 (discussing "the badges and the incidents of slavery" as a standard that requires little congressional justification for statutes arising under the Thirteenth Amendment).

provide extensive congressional fact-gathering to show more than anecdotal evidence of violations of a fundamental right.⁸⁵

The Court has clearly distinguished the types of conduct that can be regulated under the two amendments. One of those differences, which McAward overlooks, is the Court's application of the state action doctrine to the Fourteenth Amendment but not to the Thirteenth Amendment. *Boerne* and its progeny deal with Congress's efforts to prohibit state actions, not private behaviors that infringe on constitutional or statutory rights.⁸⁶ In *Boerne*, the Court held that Section 5 does not grant Congress the authority to place conditions on state and local authorities pursuant to the Religious Freedom and Restoration Act.⁸⁷ Consistent with that decision, *Kimel v. Florida Board of Regents* held that Congress lacked authority to pass a provision of the Age Discrimination in Employment Act that abrogated state sovereign immunity.⁸⁸ Later, in *Board of Trustees of the University of Alabama v. Garrett*, the Court found that the Fourteenth Amendment did not grant Congress the power to enforce a provision of the Americans with Disabilities Act against a state employer.⁸⁹ In an unexpected turn of events, *Nevada Department of Human Resources v. Hibbs* found that Congress properly relied on Section 5 to prohibit gender-based discrimination in the workplace.⁹⁰ Additionally, *Tennessee v. Lane* allowed Congress, pursuant to its power under the Due Process Clause, to abrogate the immunity of a state that failed to provide the disabled with adequate access to courtrooms.⁹¹ All five of these decisions have been predicated on the state action requirement, which is completely inapplicable to the analysis of Thirteenth Amendment enforcement authority. Thus, the entire line of cases arising from *Boerne* is irrelevant to *Jones v. Alfred H. Mayer Co.*, which dealt with private and not state discrimination.

85. *City of Boerne v. Flores*, 521 U.S. 507, 530–31 (1997) (proclaiming that “[m]uch of the discussion” of congressional committee hearings about the Religious Freedom and Restoration Act of 1993 “centered upon anecdotal evidence” and therefore failed to prove a “widespread pattern of religious discrimination in this country”).

86. I have argued elsewhere that the Court should reconsider the validity of the state action requirement because it is predicated on a politically motivated interpretation of federalism meant to thwart civil rights reform. Tesis, *supra* note 79, at 365–67. See also Balkin, *supra* note 1, at 1831–37; Robert J. Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 U. KAN. L. REV. 1015, 1043 (1997).

87. 521 U.S. at 519.

88. 528 U.S. 62, 82–83 (2000).

89. 531 U.S. 356, 360 (2001).

90. 538 U.S. 721, 734–35 (2003).

91. 541 U.S. 509, 511 (2004).

The Court has long contrasted Fourteenth Amendment state action requirements from the Thirteenth Amendment authority to pass legislation directly affecting private conduct. The Court's earliest contrast between the two came in the *Slaughter-House Cases* in 1873.⁹² The majority's analysis in that case clearly distinguished the clauses of the two amendments. The majority narrowly construed the Privileges and Immunities,⁹³ the Equal Protection,⁹⁴ and the Due Process Clauses.⁹⁵ Its rationale for upholding the state law against the Thirteenth Amendment challenge was on entirely separate grounds related to the conditions of involuntary servitude and the abolition of slavery.⁹⁶ In his dissent to *Slaughter-House*, Justice Field also differentiated between the two amendments.⁹⁷ To superimpose Fourteenth Amendment jurisprudence unto the Thirteenth Amendment, therefore, presumes away what the Court has always taken for granted: the analytical distinction between the Fourteenth and Thirteenth Amendments.

Despite narrowly construing the Thirteenth and Fourteenth Amendments in *The Civil Rights Cases*, in a manner similar to the *Slaughter-House Cases*, the Court nevertheless drew very clear distinctions between them. The Court regarded the state action requirement of the Fourteenth Amendment to be an essential contrast between the two. *The Civil Rights Cases* held that the 1875 Civil Rights Act, with its provisions against public accommodations discriminations, was beyond the scope of Congress's state action empowerment.⁹⁸ The Court's rationale for finding the law to be an unconstitutional use of Thirteenth Amendment power was different than its analysis of the Fourteenth Amendment, even though its ultimate

92. 83 U.S. (16 Wall.) 36 (1873).

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

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

95. *Id.* at 80–81 (rejecting a Fourteenth Amendment due process claim that a business monopoly deprived independent butchers of their liberty to pursue their occupation).

96. *Id.* at 49–51, 72.

97. *Id.* at 90–91 (Field, J., dissenting) (relying on the legislature's broad reading of the Thirteenth Amendment to comprehend the meaning of "involuntary servitude," and separately criticizing the majority's interpretation of the Fourteenth Amendment).

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

judgment about the statute's unconstitutionality was the same.⁹⁹ Thus even in one of the Supreme Court's most formidable attacks on civil rights legislation, it nevertheless differentiated between Congress's enforcement powers under Section 5 and Section 2, in large part because it held that the Thirteenth Amendment applies to private contracts but that the Fourteenth Amendment does not.¹⁰⁰ While in his dissent to *The Civil Rights Cases* Justice Harlan disagreed with the judgment of the Court, like the majority he differentiated between the purpose, language, and meaning of the two amendments.¹⁰¹ The Court's and dissent's distinction between the two amendments leads to the conclusion that the entire line of cases following *Boerne*, which constrain Congress's use of its power to regulate the conduct of state actors, is entirely inapplicable to *Jones*, which upheld congressional regulation of private discrimination.¹⁰² If the Court were to follow McAward's suggestion that it narrow *Jones* based on its rationale in *Boerne*, it would be deviating from over a hundred years of precedent.

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

100. *United States v. Morrison*, 529 U.S. 598, 621 (2000) (citing to *The Civil Rights Cases* as an early example of the Court's adopted "state action" requirement). It is interesting to note that while the Court has decided to be literalist in its textualist interpretation of the Fourteenth Amendment, its interpretations of some other constitutional provisions have not followed that method of interpretation. For instance, the First Amendment can be read to govern Congress alone, but the Court has found that it applies to the states. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Court has also taken a non-literalist approach with the Eleventh Amendment, an area where the majority has turned a constitutional provision related to diversity jurisdiction into a statement of sovereign immunity. *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 446 (2004) (stating that "we have recognized that the States' sovereign immunity is not limited to the literal terms of the Eleventh Amendment"); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty.>").

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

102. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 n.5 (1968) (differentiating between the Fourteenth Amendment's state action requirement and the Thirteenth Amendment's grant of congressional authority).

VIII. PLAUSIBILITY OF A NARROW SECTION 2 ENFORCEMENT POWER

McAward might ultimately be correct that the Court will overturn long established decisions; although, even here there is room to doubt her conclusion because both liberal and conservative courts have retained and, indeed, bolstered the robust reading of the Thirteenth Amendment.¹⁰³ What makes McAward's argument plausible is the Rehnquist and Roberts Courts' willingness (and, in the case of *Citizens United*, downright eagerness) to strike precedents and federal statutes, leaving a high degree of uncertainty about whether controversial laws can survive judicial fiat.¹⁰⁴ Political motivations clearly influence judicial outcomes,¹⁰⁵ with *Bush v. Gore* as the crowning achievement of judicial politicization.¹⁰⁶ The conservative composition of the Roberts Court might lead it to overturn one of the jewels of the Warren Court, *Jones v. Alfred H. Mayer Co.* But such a possibility is only speculative. In any case, the legal realist perspective on the Court, recognizing that individual proclivities play an important role in how cases are decided, is different from the one which McAward embraces. Her argument is predicated on transplanting Fourteenth Amendment precedents, which as I pointed out earlier have been based on the state action requirement, onto the Thirteenth Amendment corpus of private rights discrimination, not on a legal realist perspective.¹⁰⁷

103. The Warren Court decided *Jones v. Alfred H. Mayer Co.*, while the Burger Court extended the decision in *Runyon v. McCrary*, 427 U.S. 160, 170 (1976) (adopting the *Jones* test of whether a "prohibition was within Congress's power under Section 2 of the Thirteenth Amendment 'rationally to determine what are the badges and the incidents of slavery, and . . . to translate that determination into effective legislation'" (quoting *Jones*, 392 U.S. at 440)). The Rehnquist Court also reaffirmed *Jones* in *Patterson v. McLean Credit Union*, 491 U.S. 164, 175–76 (1989), and the Roberts Court did the same in *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006).

104. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (finding that the Religious Freedom Restoration Act was unconstitutional); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–57 (2007) (holding that an anti-trust complaint must be non-speculative and plausible); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940 (2009) (extending the "plausibility" pleading standard to all complaints governed by Federal Rule of Civil Procedure 8); *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (altering corporate campaign finance spending precedent). Compare the recent trend of judicial assertion of constitutional, interpretational primacy to the early Court: Prior to 1866, the Supreme Court had only twice found federal laws unconstitutional. The two cases were *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803), and *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 452 (1856). In 1866, *Ex parte Garland* held unconstitutional an ex post facto law meant to disbar many southern attorneys. 71 U.S. (4 Wall.) 333, 381 (1866).

105. Richard A. Posner, *A Political Court*, 119 HARV. L. REV. 31, 52–54 (2005).

106. *Bush v. Gore*, 531 U.S. 98 (2000).

107. See *supra* text accompanying notes 85–91.

I am an optimist and there is reason to hope that the Court will not engraft its interpretation of Section 5 onto Section 2 cases. One reason this bears mention is that the Court appears to have stepped back from the forcefulness with which *Boerne* hamstrung Congress's ability to identify constitutionally protected rights. While soon after creating the "congruent and proportionality" test for prophylactic legislation the Court further eroded Congress's Section 5 authority when it overturned provisions of two civil rights laws in *Garrett* and *Kimel*, the Court finally slowed its incursion into legislative powers in *Hibbs* and *Lane*.¹⁰⁸ This new twist on its interpretation might indicate that the Court is looking for a way of avoiding the potential consequences of striking an unpredictable number of other civil rights laws on politically charged grounds.

Furthermore, the Court's history indicates that where it has constricted legislative powers under the Fourteenth Amendment, it has found alternative means of upholding statutes. For instance, rather than overturning its holding in the *Civil Rights Cases*, which had found that Congress lacked the authority to pass laws prohibiting public accommodations segregation, the Court upheld a closely related law under an alternative grant of power.¹⁰⁹ Congress had relied both on the Fourteenth Amendment and Commerce Clause to justify passage of Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations whose "operations affect commerce, or if discrimination or segregation by it is supported by State action."¹¹⁰ But in upholding that law in *McClung* and *Heart of Atlanta Motel* the Court only justified Congress's use of its power to regulate interstate commerce.¹¹¹ Likewise, whereas *Boerne* limited Congress's power to enforce Section 1 of the Fourteenth Amendment, Congress's mention of the Thirteenth Amendment in the Victims of Trafficking and Violence Prevention Act and the Matthew Shepard Act might suffice for the Court to uphold them on the basis of its broad interpretation of the badges and incidents of involuntary servitude.¹¹²

108. *See supra* text accompanying notes 86–91.

109. *See supra* text accompanying notes 98–102.

110. 42 U.S.C. § 2000a(b) (2006).

111. *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (finding Congress had the authority to prohibit racial discrimination in restaurants whose business relies on interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261–62 (1964) (holding that Title II was an appropriate exercise of the commerce power to a public accommodation serving interstate travelers).

112. *See supra* text accompanying notes 72–74.

IX. CONCLUSION

The history of the Thirteenth Amendment and the Court's long-established interpretation of Congress's power to enforce its provisions raise significant doubts about the claim that the Court is likely to interpolate *Boerne's* congruent and proportionality test into Thirteenth Amendment jurisprudence. Congressional debates at the time of the Amendment's ratification and statements about the Civil Rights Act of 1866 demonstrate that it was meant to drastically alter federalism by granting Congress the supreme power to identify and protect civil rights. Neither does the recent line of cases that have narrowly interpreted the Fourteenth Amendment's Enforcement Clause diminish the continued vibrancy of legislative efforts to combat existing incidents and badges of involuntary servitude. The Court has always compartmentalized its interpretation of the Thirteenth and Fourteenth Amendments, and there is no indication that it will deviate from that pattern.