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# Congressional Authority to Interpret the Thirteenth Amendment: A Response to Professor Tsesis

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

JENNIFER MASON MCAWARD\*

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

I. THE SECTION 2 POWER: THREE MODELS

At the outset, let me summarize the context, inquiry, and arguments of my earlier article.<sup>3</sup> Section 2 of the Thirteenth Amendment gives Congress the power "to enforce this article by appropriate legislation."<sup>4</sup> Since the *Civil Rights Cases* in 1883, the Supreme Court of the United States has maintained that this provision empowers Congress not simply to pass laws outlawing slavery and involuntary servitude, but "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."<sup>5</sup> In *Jones v. Alfred H. Mayer Co.*,<sup>6</sup> the Court invoked this "canonical" language<sup>7</sup> and

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1. Alexander Tesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 40 (2011) [hereinafter Tesis, *Congressional Authority*].

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) [hereinafter McAward, *Enforcement Power*].

3. See generally *id.* at 77–84.

4. U.S. CONST. amend. XIII, § 2.

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

6. 392 U.S. 409 (1968).

7. George A. Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, in *THE PROMISES OF LIBERTY: THE HISTORY AND*

expanded upon it, stating that Congress has “the power . . . rationally to determine what are the badges and the incidents of slavery, [as well as] the authority to translate that determination into effective legislation.”<sup>8</sup>

*Jones* was part of a trio of Warren Court decisions<sup>9</sup> that confirmed a generous understanding of Congress’s power to enforce the Reconstruction Amendments.<sup>10</sup> In each of those cases, the Court held that *McCulloch v. Maryland* provided the basic test for measuring the propriety of congressional enactments,<sup>11</sup> and that “all means which are appropriate, which are plainly adapted to that [“legitimate”] end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”<sup>12</sup> *Jones* arguably went further, giving Congress discretion not only to determine what means are appropriate to enforce the Thirteenth Amendment, but arguably also to define for itself the legitimate ends of legislation, i.e., the badges and incidents of slavery.<sup>13</sup> As George Rutherglen has described, *Jones* expanded “the legitimate ends under the [Thirteenth Amendment] . . . from abolition of slavery to eliminating the consequences of slavery, with a concomitant increase in the appropriate means that Congress could choose to reach those ends.”<sup>14</sup>

As a doctrinal matter, the viability of *Jones* is questionable in light of *City of Boerne v. Flores*.<sup>15</sup> In that case, the Supreme Court substantially altered its approach to evaluating Fourteenth Amendment enforcement legislation.<sup>16</sup> The Court clarified that the enforcement power conferred upon Congress is “remedial” in nature and does not permit Congress “to decree the substance of the Fourteenth Amend-

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CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 163, 172 (Alexander Tsesis ed., 2010) (noting the phrase’s pervasiveness in the Supreme Court’s Thirteenth Amendment jurisprudence).

8. *Jones*, 392 U.S. at 440.

9. See also *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

10. See McAward, *Enforcement Power*, *supra* note 2, at 92–97 (noting that the Warren Court’s three decisions on the scope of Congress’s power typically found wide latitude for congressional enforcement).

11. See *Katzenbach*, 383 U.S. at 326 (finding broad congressional power to enforce the Fifteenth Amendment); *Morgan*, 384 U.S. at 650 (similarly authorizing Congress to enforce the Fourteenth Amendment under its expansive power).

12. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

13. Rutherglen, *supra* note 7, at 174 (describing *Jones*’s significance).

14. *Id.*

15. See McAward, *Enforcement Power*, *supra* note 2, at 80–82 (arguing that *Jones* is “arguably a remnant of the past”).

16. See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (adopting a congruence and proportionality standard for evaluating Fourteenth Amendment legislation).

ment's restrictions on the States."<sup>17</sup> In addition to pure remedial legislation, the Court also preserved space for Congress to act prophylactically by "prohibit[ing] conduct which is not itself unconstitutional."<sup>18</sup> However, the Court made clear that it will measure the propriety of prophylactic Fourteenth Amendment legislation by asking whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>19</sup>

*City of Boerne's* decidedly nondeferential approach in evaluating Fourteenth Amendment enforcement legislation is clearly in tension with *Jones's* extremely deferential approach, even though the enforcement provisions of the Thirteenth and Fourteenth Amendments are virtually identical.<sup>20</sup> Rather than simply assume that *City of Boerne* spells the end for *Jones*, however, I decided to undertake a *de novo* assessment of the Section 2 power.<sup>21</sup> Just as *City of Boerne* was based in part on the Court's reading of the Fourteenth Amendment's drafting history and in part on the structural values of separation of powers and federalism, I set out to evaluate the proper scope of the Thirteenth Amendment enforcement power based on that Amendment's own unique history, as informed by separation of powers and federalism principles.

I suggested three ways to conceptualize the breadth of the Section 2 power: first, as a direct or "pure" enforcement power to "proscribe, prevent, or 'remedy' conduct that independently violates [Section 1];"<sup>22</sup> second, as a "prophylactic" power to target an identifiable subset of civil rights violations—the badges and incidents of slavery—as a means of preventing the reimposition of slavery or involuntary servitude;<sup>23</sup> and third, as a broad, "substantive" power to define outright as well as to eradicate the badges and incidents of slavery.<sup>24</sup> I concluded that a combination of the "pure" and "prophylactic" read-

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17. *Id.* at 519.

18. *Id.* at 518.

19. *Id.* at 520.

20. Compare U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."), with U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

21. See McAward, *Enforcement Power*, *supra* note 2, at 82 (explaining the need to examine Congress's Section 2 enforcement power and scope from the view of "constitutional text, history, and structure").

22. See *id.* at 130–34 (discussing "The Most Restrictive Approach" (citing *Tennessee v. Lane*, 541 U.S. 509, 559 (2004) (Scalia, J., dissenting))).

23. See *id.* at 142–46 (discussing "The Middle Approach: Taking Prophylactic Legislation Seriously").

24. See *id.* at 134–41 (discussing "The Broadest Approach").

ings of the Section 2 power best comports with the text and history of the Amendment, as well as structural constitutional values.<sup>25</sup> The third, “substantive” approach finds little, if any, support in the Amendment’s text, history, or structure.<sup>26</sup>

Professor Tsesis suggests that I believe that Section 2 does not bestow on Congress any meaningful power to protect civil rights.<sup>27</sup> This is not an accurate characterization of my position. Rather, I believe that *Jones* and the *Civil Rights Cases* correctly ruled that Section 2 permits Congress to pass not only “pure” enforcement legislation, but also legislation that addresses the badges and incidents of slavery. This latter type of legislation is prophylactic in the sense that it concerns conduct that does not independently violate Section 1 of the Thirteenth Amendment, but instead infringes on certain core civil rights. Moreover, I believe that *Jones* correctly held that courts owe *McCulloch*-style deference to the means by which Congress decides to attack the badges and incidents of slavery. The principal sponsors of the Amendment as well as the Civil Rights Act of 1866 clearly understood *McCulloch* to apply to Section 2.<sup>28</sup>

In my view, however, *Jones* was wrong to assign to Congress the substantive power to define the badges and incidents of slavery on its own, subject only to bare bones rationality review. The historical record contains no evidence to support placing such a substantive power in Congress’s hands.<sup>29</sup> The concept of the badges and incidents of slavery is not susceptible to open-ended interpretation, but refers to an identifiable set of public and perhaps private practices.<sup>30</sup> Allowing Congress to label a particular practice a badge and incident

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25. See *id.* at 147 (asserting that “the best reading of the Section 2 power—from the perspectives of text, history, and structure—is one that allows for prophylactic legislation on the badges and incidents of slavery, but also regards that concept as having a determinate range of meaning over which courts can exercise meaningful supervision”).

26. *Id.* at 134–41.

27. See Tsesis, *Congressional Authority*, *supra* note 1, at 51–52.

28. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (Sen. Trumbull) (“Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end.”).

29. See McAward, *Enforcement Power*, *supra* note 2, at 134–41.

30. See Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. (forthcoming 2012) [hereinafter McAward, *Defining*] (manuscript at 8–9, on file with author) (suggesting that “badges and incidents of slavery” concerns “public or widespread private action, based on race or the previous condition of servitude, that mimics the law of slavery and that has significant potential to lead to the de facto reenslavement or legal subjugation of the targeted group”). While a full discussion of the meaning of the badges and incidents of slavery is beyond the scope of this Essay, I believe it deserves fuller exploration elsewhere. See *infra* Part III.A.

of slavery without meaningful supervision by the courts is also problematic from the perspectives of separation of powers and federalism. It is not at all clear that the judiciary can validly convey an aspect of the judicial power to Congress by giving Congress power to define the ends of Thirteenth Amendment legislation, i.e., the badges and incidents of slavery. Moreover, giving Congress wide and largely unreviewable discretion to define the badges and incidents of slavery provides incentives for Congress to regulate conduct traditionally governed by the states.

Accordingly, in my earlier piece I concluded that:

Section 2 of the Thirteenth Amendment is best read to give Congress broad discretion over the means by which the Thirteenth Amendment is implemented, but more limited discretion with respect to its proper ends. In passing prophylactic legislation, Congress cannot define the badges and incidents of slavery for itself, as *Jones* suggested, but rather must operate within the boundaries of the concept as understood through history and interpreted by the courts. Thus, Congress's discretion is limited to determining which badges and incidents of slavery it will address and how to address them. While courts should defer to the remedial aspects of Congress's actions, they should review actively the ends of such prophylactic legislation. Implemented in this way, the Thirteenth Amendment's enforcement power will be sufficiently vigorous to allow Congress to enact core race-based civil rights protections. At the same time, though, this reading will cabin efforts to transform the Thirteenth Amendment into a source of wide-ranging federal power.<sup>31</sup>

## II. THE SECTION 2 POWER: THREE POINTS OF CONTENTION

### A. *Section 2 and the Ratification Debates*

Professor Tsisis is a strong defender of *Jones's* approach to the Section 2 power, and has suggested in other writings that Section 2 provides a "means for enforcing [the nation's] foundational principles of liberty and general wellbeing."<sup>32</sup> In his response to my piece,

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31. McAward, *Enforcement Power*, *supra* note 2, at 84.

32. Alexander Tsisis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 309 (2004) [hereinafter Tsisis, *Furthering American Freedom*]. This view could broaden federal power substantially. See, e.g., ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* 121 (2004) [herei-

he grounds that approach in part in the Thirteenth Amendment's ratification debates, arguing that "[m]any of the congressional speeches on the proposed Thirteenth Amendment evidence a clear understanding that the Enforcement Clause would expand legislative authority into matters that had previously been reserved to the states,"<sup>33</sup> and that through such legislation, Congress could "protect each citizen's life, liberty, and pursuit of happiness."<sup>34</sup>

In fact, the members of the Thirty-eighth Congress were quite unclear about the scope of Congress's power under the proposed Section 2.<sup>35</sup> Not one of the quotes that Professor Tesis uses to support his position references the function of Section 2 or the appropriate role of Congress in enforcing the Thirteenth Amendment. These inapposite quotes lend no support to his claim regarding the original understanding of Section 2. For example, Representative James Wilson noted that "human equality" was the "sublime creed" of the 1776 Revolution, and that the new republic promised that "the poor, the humble, the sons of toil . . . were the peers, the equals, before the law."<sup>36</sup> While Wilson identified slavery as the enemy of the Republic and urged passage of the Thirteenth Amendment as the way to "obliterate the last lingering vestiges of the slave system,"<sup>37</sup> nowhere in his speech (or any other speech during the ratification process) did he make specific reference to Congress's power to enforce the Thirteenth Amendment, much less explicate the scope of that power.<sup>38</sup>

Similarly, Representative Isaac Arnold stated that the agony of the Civil War would lead to the birth of a "new nation [which] is to be wholly free. Liberty, *equality before the law* is to be the great cornerstone."<sup>39</sup> He recognized that "[m]uch yet remains to be done to secure" the new nation, and urged passage of the Thirteenth Amendment as a central way to "consummate this grand revolution."<sup>40</sup> His lofty rhetoric, however, made no mention of the Section 2 power spe-

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nafter TESIS, THIRTEENTH AMENDMENT] (suggesting Section 2 would empower Congress to provide a "federal guarantee to marry the partner of one's choice").

33. Tesis, *Congressional Authority*, *supra* note 1, at 43.

34. *Id.* at 44.

35. See McAward, *Enforcement Power*, *supra* note 2, at 105 (highlighting the various opinions regarding the scope of Congress's enforcement power during congressional debates).

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

37. *Id.* at 1324.

38. *Id.*

39. *Id.* at 2989 (emphasis in original).

40. *Id.*

cifically, or the role of Congress more generally.<sup>41</sup> The same is true of Senator Reverdy Johnson, who urged national unity and the abolition of slavery as a way of “illustrating . . . the truth of the principles incorporated into the Declaration of Independence.”<sup>42</sup> Johnson said nothing about how those principles would relate to Congress’s power to enforce the Thirteenth Amendment.<sup>43</sup>

The congressional ratification debates did, in fact, include some specific discussion regarding Section 2, but it is not possible to draw from those statements any clear conclusions regarding the precise scope of Congress’s power.<sup>44</sup> Among supporters of the Amendment, Senator Lyman Trumbull and Representative Chilton White both suggested that the scope of the Section 2 power was akin to that conferred by the Necessary and Proper Clause.<sup>45</sup> While this power, as explicated in *McCulloch v. Maryland*,<sup>46</sup> gives Congress substantial latitude as to the means by which the Amendment should be enforced, it does not answer the related question as to what the legitimate ends of enforcement legislation should be, i.e., how to define the scope of the right conveyed by Section 1 of the Amendment.<sup>47</sup> Indeed, Senator Trumbull indicated a limited view on that latter question, stating that the effect of the Amendment was to “ri[d] the country of slavery.”<sup>48</sup> Conversely, other supporters of the Amendment, like Senator James Harlan, took a broad view of the rights conveyed by Section 1,<sup>49</sup> but

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41. *Id.* at 2988–89.

42. *Id.* at 1424.

43. *Id.*

44. See McAward, *Enforcement Power*, *supra* note 2, at 105 (explaining that the supporters and opponents of the Amendment had different visions regarding the scope of Congress’s Section 2 power).

45. See CONG. GLOBE, 38th Cong., 1st Sess. 553 (1864) (Sen. Trumbull) (Section 2 gives Congress the power to enforce the Amendment with “proper” legislation); *id.* at 1313 (Section 2 empowers Congress “to pass such laws as may be necessary to carry [Section 1’s ban on slavery and involuntary servitude] into effect”); CONG. GLOBE, 38th Cong., 2d Sess. 214 (1865) (Rep. White) (noting that the Section 2 power conferred on Congress the “plenary power to pass all necessary enactments to enforce this provision of the Constitution.”).

46. 17 U.S. (4 Wheat.) 316, 421 (1819).

47. See McAward, *Enforcement Power*, *supra* note 2, at 103–08 (discussing the scant analysis given to the scope of the substantive right conferred by Section 1).

48. CONG. GLOBE, 38th Cong., 1st Sess. 1314 (1864).

49. *Id.* at 1439–40 (suggesting that the Amendment abolished not only slavery, but also the “necessary incident[s] of slavery,” including “the prohibition of the conjugal relation[ship],” the “abolition practically of the parental relation,” the inability to “acquir[e] and hol[d] property,” the deprivation of “a status in court” and “the right to testify,” the “suppression of [the] freedom of speech and of the press” and the deprivation of education).



did not explicitly anticipate any role for Congress in enforcing those rights.<sup>50</sup>

Congressional opponents of the Amendment took a much broader view of the power Section 2 would convey.<sup>51</sup> They predicted that Congress would use its power to “declare all State laws based on [blacks’] political inequality with the white races null and void,”<sup>52</sup> to “invade any State to enforce the freedom of the African . . . [will elevate] the African to the august rights of citizenship . . . [and will] strik[e] down the corner-stone of the Republic, the local sovereignty of the States,”<sup>53</sup> and to guarantee “the freed negro the right of franchise.”<sup>54</sup>

The lack of clarity during the congressional ratification debates with respect to the function of Section 2—and even the precise scope of the right conveyed by Section 1—is understandable. As Earl Maltz and Michael Vorenberg have both noted, the primary focus of the ratification debates was universal emancipation.<sup>55</sup> That focus “did not require a definition of slavery in the abstract or a description of the difference between ‘slavery’ and ‘freedom’ at the margins.”<sup>56</sup> Nor did it necessitate a codification of the rights that inhere in freedom.<sup>57</sup> Although understandable, the lack of sharp focus on the Section 2 pow-

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50. See MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 103 (2001) (explaining that Representative Harlan did not expect a serious need for federal government intervention after the Amendment’s passage).

51. See McAward, *Enforcement Power*, *supra* note 2, at 105 (describing the view taken by opponents of the Amendment, including the fear of limitless federal power over states).

52. CONG. GLOBE, 38th Cong., 2d Sess. 242 (1865) (Rep. Cox).

53. CONG. GLOBE, 38th Cong., 1st Sess. 2962 (1864) (Rep. Holman).

54. CONG. GLOBE, 38th Cong., 2d Sess. 180 (1865) (Rep. Mallory).

55. See EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869*, at 21 (1990) (emphasizing that Congress mostly debated the outlawing of slavery); VORENBERG, *supra* note 50, at 132 (explaining how the Amendment debate did not focus on specific rights for future generations).

56. MALTZ, *supra* note 55, at 21 (noting that the “dearth of evidence” about the full scope of Sections 1 and 2 “is not terribly surprising”).

57. See VORENBERG, *supra* note 50, at 132 (“Republicans never meant to define for future generations the exact rights guaranteed by the amendment.”); *see also id.* at 190 (“In those few instances . . . that Republicans did discuss the specific rights and powers conferred by the amendment, they evasively mentioned only those that the measure did *not* grant” such as political rights like suffrage and jury service.); *id.* at 132 (“The revolutionary potential of the amendment’s enforcement clause, which after the war would be used by Congress to override state laws denying civil rights, seemed to be lost on congressional Republicans in 1864.”).

er renders the congressional ratification debates an unhelpful source for determining the intended function and scope of that power.<sup>58</sup>

The states' ratification debates might be a better source of information. It is not entirely surprising that Section 2 attracted more attention in the states than in Congress. The Amendment's opponents in the states' debates charged that Section 2 would give Congress "unlimited power,"<sup>59</sup> and permit it to "rewrite state constitutions or abolish state courts and state legislatures,"<sup>60</sup> overturn discriminatory state laws, and legislate "over the Negroes, and white men, too, after the abolishment of slavery."<sup>61</sup>

Even more important than opposition views, however, are the views of the states that ratified the Amendment, particularly South Carolina, Alabama, and Louisiana. South Carolina was the first of these to ratify, although it issued a declaration stating that "any attempt by Congress toward legislating upon the political status of former slaves, or their civil relations, would be contrary to the Constitution of the United States, as it now is, or as it would be altered by the proposed amendment."<sup>62</sup> Alabama and Louisiana issued similar reservations as they ratified the Amendment.<sup>63</sup> Because other states ultimately voted to ratify the Thirteenth Amendment, the precise legal effect of these reservations is unclear. However, their relevance to de-

58. See McAward, *Enforcement Power*, *supra* note 2, at 103–08 (detailing the lack of clarity from the congressional ratification debates).

59. See VORENBERG, *supra* note 50, at 228 (quoting *Journal of the Mississippi Constitutional Convention of 1865*, as cited in Howard Devon Hamilton, *The Legislative and Judicial History of the Thirteenth Amendment*, 9 NAT'L B.J. 26, 33 (1951)).

60. *Id.* at 218 (citing CINCINNATI ENQUIRER, Feb. 1, 1865, at 1; CINCINNATI ENQUIRER, Feb. 11, 1865, at 2; 7 BREVIER LEGISLATIVE REPORTS OF THE STATE OF INDIANA 212 (1865) (Rep. James Humphreys)).

61. TESIS, THIRTEENTH AMENDMENT, *supra* note 32, at 48. Other state critics charged that Section 2 would permit Congress to "eat out the vitals of the States," see VORENBERG, *supra* note 50, at 218 n.22, and "emasculate" the states, *id.* (citing Hon. William H. Green, Speech on the Proposed Amendment of the Federal Constitution Abolishing Slavery 9 (1865)).

62. VORENBERG, *supra* note 50, at 230 (citing 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 606 (1894)). Indeed, in an effort to assuage South Carolina's delegates' concerns, Secretary of State William Seward wrote that Section 2 "is really restraining in its effect, instead of enlarging the powers of Congress." *Id.* at 229 (quoting MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, S. EXEC. DOC. NO. 39-26 at 254 (1966)).

63. See HERMAN BELZ, A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS, 1861 TO 1866, at 159 (1976); see also 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 610 (explaining that Alabama ratified the Amendment on the "understanding that it does not confer upon Congress the power to Legislate upon the political status of Freedmen in this State."); see also McAward, *supra* note 2, at 132 n.344 (noting that although Florida and Mississippi issued similar reservations, their ratification votes came after December 18, 1865).

termining the original understanding or public meaning of Section 2 is certainly probative. As George Rutherglen has observed, “[i]f the marginal states most reluctant to ratify had determined the meaning of the amendment, then it would have granted Congress hardly any enforcement powers at all.”<sup>64</sup>

All in all, the Thirteenth Amendment ratification debates are of limited utility on the precise question of Congress’s power under Section 2. While it is undoubtedly true that Section 2 “expand[ed] legislative authority” into *some* “matters that had previously been reserved to the states,”<sup>65</sup> neither the congressional nor state debates explored meaningfully the precise contours of that power.

### B. *The Civil Rights Act of 1866*

Of course, the ratification debates are not the only source of historic reflection on the scope of the Section 2 power. Professor Tesis assumes that the debates regarding the Civil Rights Act of 1866 are relevant to determining the original meaning of Section 2.<sup>66</sup> While I am somewhat ambivalent about the relevance of these subsequent debates,<sup>67</sup> I am more interested here in discussing Professor Tesis’s contention that “[t]he 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.”<sup>68</sup>

There is no question that the ratification of the Reconstruction Amendments effected a massive shift in federal-state relations, particularly with respect to protecting the rights of the newly freed slaves. However, the passage of the Civil Rights Act of 1866, the first piece of enforcement legislation under the Thirteenth Amendment, does not prove that Section 2 empowers Congress to legislate—unchecked, no less—regarding human rights as a general matter.<sup>69</sup> The substance of

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64. Rutherglen, *supra* note 7, at 170.

65. Tesis, *Congressional Authority*, *supra* note 1, at 43.

66. *See id.* (claiming that the “[d]ebates on the Civil Rights Act of 1866 demonstrate how Congressmen regarded their power under Section 2 of the Thirteenth Amendment.”).

67. *See* McAward, *Enforcement Power*, *supra* note 2, at nn.241–46 and accompanying text (discussing to what extent the ratification debates over the Civil Rights Act and Fourteenth Amendment should inform any probe into the Thirteenth Amendment’s original meaning).

68. Tesis, *Congressional Authority*, *supra* note 1, at 46.

69. *See, e.g.*, David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 396 (2008) (“The Thirteenth Amendment forbade slavery, not racial discrimination; it did not authorize Congress to legislate equal civil rights.”).

the Act itself, the congressional debates on the Act, and the subsequent ratification of the Fourteenth Amendment all belie Tsesis's breathtakingly broad conception of congressional power.<sup>70</sup>

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

[all citizens] shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.<sup>71</sup>

To be sure, the Act secured a core set of rights for the freed slaves—rights essential for participation in civil society.<sup>72</sup> At the same time, the rights conveyed were by no means a complete set of civil or human rights safeguards as we might understand them today.<sup>73</sup> Indeed, supporters of the Act made clear that they had no intention of extending “social” or “political” rights to the freed slaves.<sup>74</sup> Thus, while the 1866 Act was groundbreaking in the sense that it was the first piece of federal legislation to displace state laws in the name of protecting the rights of a racial minority, it stopped well short of safeguarding all civil or human rights.

The Civil Rights Act of 1866 generated heated debate regarding Congress's power to pass the Act under Section 2. Supporters argued that the Act was necessary and proper legislation to secure the free-

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70. Tsesis, *Congressional Authority*, *supra* note 1, at 46 (“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.”).

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

72. See, e.g., Barry L. Reftin, Comment, *The Lost Clauses of Section 1981: A Source of Greater Protection After Patterson v. McLean Credit Union*, 138 U. PA. L. REV. 1209, 1210 (1990) (noting that section 1981 was intended to comprehensively “secure civil rights for the freed slaves”).

73. Compare Civil Rights Act of 1866, § 1 (granting to freed slaves the right to contract, to participate in legal actions, and to hold, buy and sell real and personal property) with Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948) (defining human rights as including the rights to recognition as a person before the law, to be free from degrading treatment and arbitrary arrest, and to be considered innocent until proven guilty, among others).

74. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 475–76 (1866) (Sen. Trumbull) (asserting that the bill reached “civil rights,” defined with reference to the Privileges and Immunities Clause of Article IV, but not “political rights”).

dom conveyed by Section 1.<sup>75</sup> The Act's principal sponsor, Senator Lyman Trumbull,<sup>76</sup> acknowledged that he had been unclear during the ratification debates about the power conveyed by Section 2,<sup>77</sup> but argued that Section 2 gave Congress the power "to pass all laws necessary to give effect to the provision making all persons free."<sup>78</sup> To effectuate the freedom conveyed by Section 1, Trumbull argued that Congress could displace laws, like the Black Codes, "that prevented the colored man going from home, that did not allow him to buy or to sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated."<sup>79</sup> Such legal restraints were the "incidents to slavery" and the "badges of servitude."<sup>80</sup> Representative James Wilson, the House sponsor who aligned himself with Trumbull,<sup>81</sup> clarified that Congress's power to address the Black Codes was prophylactic in nature: "A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery."<sup>82</sup> Representative Burton Cook echoed this idea, stating that the civil rights bill was necessary legislation because persons denied the rights protected by the act "are not secured in the rights of freedom."<sup>83</sup> Accordingly, supporters of the Act did not assert that Section 2 granted power to safeguard all civil or human rights, but rather offered a more modest view that Section 2 empowered

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75. *See, e.g., id.* at 475 (Sen. Trumbull) (arguing that Section 2 provided Congress with the discretion to implement the legislation that would be most effective in preventing slavery).

76. *See generally* Rebecca E. Zietlow, *The Rights of Citizenship: Two Framers, Two Amendments*, 11 U. PA. J. CONST. LAW 1269, 1281–82 (2009) (noting that the Senate Judiciary Committee chose Senator Trumbull's proposed language for the 1866 Civil Rights Act).

77. *See* CONG. GLOBE, 39th Cong., 1st Sess. 43 (1866) (responding to claims that Section 2 was meant to be "restrictive" in its effect upon Congress).

78. *Id.* (noting that Congress would have such a power even without Section 2, but that Section 2 "was intended to put it beyond cavil and dispute" that Congress in fact had such a power); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (Sen. Trumbull) (Section 2 "vests Congress with the discretion of selecting that 'appropriate legislation' which it is believed will best accomplish the end and prevent slavery").

79. *Id.* at 322.

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

81. *See* Michael L. Rich, *Coerced Informants and Thirteenth Amendment Limitations on the Police-Informant Relationship*, 50 SANTA CLARA L. REV. 681, 706 n.151 (2010) (noting that Senator Lyman Trumbull and Representative James F. Wilson were the principal drafters of the Thirteenth Amendment).

82. CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (Rep. Wilson).

83. *Id.* at 1124 (Rep. Cook).

Congress to protect the subset of civil rights that necessarily inhered in the freedom granted by Section 1.

Opponents of the 1866 Act contended that Section 2 permitted only “pure” enforcement legislation and that the proposed act guaranteed rights far in excess of what was appropriate to enforce Section 1.<sup>84</sup> In the words of Representative Samuel Marshall, “Congress has acquired not a particle of additional power other than [the literal freeing of slaves] by virtue of this amendment.”<sup>85</sup> Similarly, Senator Cowan found that Section 2 empowered Congress only to break “the bond by which the negro slave was held to his master” and gave “the negro the privilege of the *habeas corpus*; that is, if anybody persisted in the face of the constitutional amendment in holding him as a slave, that he should have an appropriate remedy to be delivered.”<sup>86</sup>

Representative John Bingham was one of the bill’s most notable opponents, in large part because he was sympathetic to the bill’s goals.<sup>87</sup> Bingham argued, however, that Section 2 was an insufficient source of congressional power to displace discriminatory state laws in light of the residual police power of the states protected by the Tenth Amendment.<sup>88</sup> He therefore argued in favor of the proposed Fourteenth Amendment as a much more solid basis for displacing discriminatory state laws.<sup>89</sup>

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84. See, e.g., *id.* at 499 (Rep. Cowan) (Section 2 empowered Congress only to break “the bond by which the negro slave was held to his master.”); *id.* at 1123 (Rep. Rogers) (arguing that Section 2 “enable[s] Congress to lay the hand of Federal power, delegated by the States to the General Government, upon the States to prevent them from re-enslaving the blacks which it could not do before the adoption of this amendment to the Constitution”); *id.* at 1268 (Rep. Kerr) (“I hold that [Section 2] gives no power to Congress to enact any such law as this or any other law, except such only as is necessary to prevent the reestablishment of slavery.”); *id.* at 1156 (Rep. Thornton) (“the only power conferred upon Congress by the second section of that amendment is the power to enforce the freedom of those who have been thus emancipated”).

85. *Id.* at 628 (Rep. Marshall).

86. *Id.* at 499 (Sen. Cowan).

87. See *id.* at 1291 (Rep. Bingham) (noting that he “make[s] no captious objection to any legislation in favor of the rights of all before the law,” but asserting that the enforcement of the Bill of Rights lies within the authority of the states).

88. *Id.* According to Bingham, the Civil Rights Act proposed “[t]o reform the whole civil and criminal code of every State government by declaring that there shall be no discrimination between citizens on account of race or color in civil rights or in the penalties prescribed by their laws.” *Id.* at 1293. See also *id.* at 504–05 (Sen. Johnson) (asserting that under the Civil Rights Act, it would be impossible for states to draw a distinction between anyone entering the state, no matter how long he or she has been in that state).

89. See *id.* at 1291–93 (Rep. Bingham) (arguing that the Civil Rights Act imposed obligations outside the realm of congressional power).

Even if one assumes that the final passage of the 1866 Act over President Johnson's veto<sup>90</sup> demonstrates that a supermajority of the Thirty-ninth Congress believed Section 2 was an adequate basis for the Act, subsequent events suggest that Representative Bingham's arguments left at least some lingering uncertainty as to the scope of the Section 2 power. In short order, the Fourteenth Amendment was ratified and the Civil Rights Act of 1866 reenacted under Congress's Fourteenth Amendment enforcement power.<sup>91</sup> Indeed, Senator Luke Poland, who voted for the 1866 Act, noted that Congress's power to pass the Civil Rights Act of 1866 "has been doubted and denied by persons entitled to high consideration."<sup>92</sup> He argued that the proposed Fourteenth Amendment was therefore important because it would remove "doubt . . . as to the power of Congress to enforce principles lying at the very foundation of all republican government."<sup>93</sup>

Professor Tesisis directs our attention to the statements of the Act's principal sponsor, Senator Trumbull, "perhaps the best person for explaining the meaning of the Thirteenth Amendment because he had been the chairman of the Senate Committee on the Judiciary."<sup>94</sup> Putting aside the fact that, during ratification debates, Trumbull failed to articulate a view of the Section 2 power<sup>95</sup> and denied that the Act reached "political rights,"<sup>96</sup> Trumbull's statements subsequent to the passage of the 1866 Act belie the claim that he understood Section 2 to convey plenary power over human rights. In early debates regarding what would become the Civil Rights Act of 1875, Trumbull stated that the 1866 Act "went to the verge of constitutional authority" by giving the freed slaves "the rights that belong to the individual as man and as a freeman under the Constitution of the

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90. See Daniel S. Korobkin, *Republicanism on the Outside: A New Reading of the Reconstruction Congress*, 41 SUFFOLK U. L. REV. 487, 489 (2008) (describing how the Civil Rights Act of 1866 passed over President Johnson's veto).

91. See An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes, ch. 114, § 18, 16 Stat. 140, 144 (1870).

92. CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866). Representative Henry Raymond, who voted against the Civil Rights Act, noted that he "regarded it as very doubtful, to say the least, whether Congress, under the existing Constitution, had any power to enact such a law; and I thought, and still think, that very many members who voted for the bill also doubted the power of Congress to pass it." *Id.* at 2502.

93. *Id.* (Sen. Poland).

94. Tesisis, *Congressional Authority*, *supra* note 1, at 50.

95. See CONG. GLOBE, 39th Cong., 1st Sess. 43 (1866) (Sen. Trumbull) (acknowledging this failure).

96. See *id.* at 476 (Sen. Trumbull) ("This bill has nothing to do with the political rights or *status* of parties. It is confined exclusively to their civil rights, such rights as should appertain to every free man." (emphasis in original)).

United States.”<sup>97</sup> He opposed early versions of the 1875 Act that would have barred racial discrimination in schooling and transportation, arguing that such guarantees pertained to “political” or “social” rights over which Congress lacked the power to legislate.<sup>98</sup> Accordingly, it is clear that even the sponsor of the Civil Rights Act of 1866 did not understand Section 2 to convey, or the Act to assert, supreme power over human rights as we would understand them today.

Ultimately, one may conclude (as, incidentally, I do) that Section 2, in fact, provided an adequate basis for the passage of the Civil Rights Act of 1866. However, I find it quite difficult to agree with the additional proposition that passage of the Act “unequivocally signaled the creation of congressional supremacy power over matters involving the protection of human rights.”<sup>99</sup> The history outlined above displays manifest unease, if not equivocation, regarding the constitutional basis for the Act, and expresses reservations about the extent of the Section 2 power.<sup>100</sup> At most, supporters of the bill believed that Section 2 permitted Congress to safeguard core civil rights as a means of ensuring and protecting Section 1’s grant of freedom—not human rights as a general matter.<sup>101</sup>

### C. *Structural Considerations and the Relevance of the Fourteenth Amendment*

In addition to the historical record, structural values of separation of powers and federalism bear heavily on how to interpret the scope of the Section 2 power. Professor Tsesis claims that *City of Boerne’s* analytical framework is inapposite<sup>102</sup>—and therefore that my willingness to consider some of the structural principles that under-

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97. CONG. GLOBE, 42nd Cong., 2d Sess. 901 (1872) (Sen. Trumbull). Senator Trumbull retired from the Senate before the final passage of the Civil Rights Act of 1875. See Senate Historical Office, *Senators of the United States 1789–2011*, UNITED STATES SENATE, May 9, 2011, available at [www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf](http://www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf) (noting that Senator Lyman Trumbull retired from the Senate on March 8, 1873).

98. CONG. GLOBE, 42nd Cong., 2d Sess. 901 (1872) (Sen. Trumbull); see also *id.* at 3189 (“I know of no civil right that I have that a colored man has not, and I say it is a misnomer to talk about this being a civil rights bill. If the Senator from Ohio means social rights, if he means by legislation to force the colored people and white people to go to church together, or to be buried in the same grave-yard, that is not a civil right.”).

99. Tsesis, *Congressional Authority*, *supra* note 1, at 46

100. See *supra* text accompanying notes 69–98.

101. See *supra* text accompanying notes 95–98.

102. Tsesis, *Congressional Authority*, *supra* note 1, at 54 (“*Boerne* and its progeny deal with Congress’s efforts to prohibit state actions, not private behaviors, that infringe on constitutional or statutory rights.”).



girded that opinion is misplaced<sup>103</sup>—because there is a key “analytical distinction between the Fourteenth and Thirteenth Amendments”—namely, that the former addresses only state action while the latter addresses both state and private action.<sup>104</sup> While this difference between the amendments is undoubtedly true, I do not believe it bears on the question of whether federalism and separation of powers, as constitutionally based metavalues that coexist with the Constitution’s rights-granting provisions, are relevant to the analysis of the Section 2 power.

Separation of powers, particularly the relative roles of Congress and the federal courts in determining the substance of constitutional rights, played a major role in *City of Boerne*.<sup>105</sup> There, the Court clarified that Congress possesses a “remedial power” to enforce the provisions of the Fourteenth Amendment, rather than the broader ability to “determine what constitutes a constitutional violation.”<sup>106</sup> Judicial supremacy, while controversial,<sup>107</sup> is an “indispensable feature of our constitutional system,”<sup>108</sup> that is grounded in both theory and a long line of case law designating the Supreme Court as the final arbiter of the meaning of the Constitution.<sup>109</sup>

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103. *See id.* (claiming that I overlook the differences in the Court’s application of the state action doctrine to the Thirteenth and Fourteenth Amendments).

104. *Id.* at 55. Professor Tesisis also chides me for “fail[ing] to analyze *Boerne* itself.” *Id.* at 52. Of course, there is no shortage of literature on *City of Boerne*. *See, e.g.*, Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115, 136 (1990). Rather than enter that fray, I independently examined Section 2 of the Thirteenth Amendment with an eye toward the transcendent structural values identified in *Boerne* (and without reference to the opinion’s Fourteenth Amendment-specific analysis.) I regard this approach as more constructive as it enabled me to provide Congress concrete guidance as to its Thirteenth Amendment enforcement efforts within the current legal landscape.

105. *See City of Boerne v. Flores*, 521 U.S. 507, 527–29 (1997) (discussing the need to limit legislative powers).

106. *Id.* at 519. The Court noted that “[i]f Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be ‘superior paramount law, unchangeable by ordinary means.’” *Id.* at 529 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

107. *See, e.g.*, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 128–44 (2004) (criticizing judicial supremacy as contrary to the original understanding that individual citizens should play a role giving content to specific constitutional principles); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 91–98 (1998) (arguing that judicial modesty, in which court decisions align with popular opinion and the views of the other branches of government, promotes greater stability than judicial supremacy).

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

109. *See United States v. Morrison*, 529 U.S. 598, 617 n.7 (2000) (“[E]ver since *Marbury* this Court has remained the ultimate expositor of the constitutional text.”); *United States v. Nixon*, 418 U.S. 683, 704 (1974) (noting the “responsibility of this Court as ultimate in-

*Jones* creates space for the same type of institutional clash that the Court confronted in *City of Boerne* by permitting Congress essentially to define the scope of its own power by resolving the substantive meaning of the “badges and incidents of slavery.”<sup>110</sup> The broad potential effect of placing such substantive definitional power in the hands of Congress has not gone unnoticed. As Laurence Tribe has stated, *Jones* conveys a power to “define the infringement of [any] righ[t] as a form of domination or subordination and thus an aspect of slavery, and proscribe such infringement as a violation of the Thirteenth Amendment.”<sup>111</sup> Similarly, George Rutherglen characterized *Jones* as expanding “the legitimate ends under the [Thirteenth Amendment] . . . from abolition of slavery to eliminating the consequences of slavery.”<sup>112</sup>

There is certainly an argument to be made that placing such substantive power in Congress’s hands is appropriate in the Thirteenth Amendment context. For example, Lawrence Sager has argued that Section 1 is a judicially underenforced constitutional norm, the potential coverage of which is substantially greater than the Court’s limited holdings regarding the scope of Section 1’s self-executing right.<sup>113</sup> Accordingly, Congress might be uniquely well-

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terpreter of the Constitution” (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)); see also Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1369–81 (1997) (defending judicial supremacy because authoritative interpretation provides stability and coordination); Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CALIF. L. REV. 1013, 1018–24 (2004) (critiquing popular constitutionalism and praising judicial review for providing stability and protection against tyranny of the majority); Daniel Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387, 411 (asserting that judicial decisions interpreting the Constitution are equivalent to federal common law and therefore binding).

110. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440–42 (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.”).

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

112. Rutherglen, *supra* note 7, at 174.

113. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1219 n.21 (1978) [hereinafter Sager, *Fair Measure*] (“[T]he great disparity between the scope of § 1 and § 2 of the thirteenth amendment is that the court has confined its enforcement of the amendment to a set of core conditions of slavery, but that the amendment itself reaches much further; in other words, the thirteenth amendment is judicially underenforced.”); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 433 (1993) (“The underenforcement model . . . explains . . . the disparity between the self-executing provisions of the Thirteenth Amendment and Congress’s considerably more vast power under Section 2 of that Amendment to outlaw the ‘relics of slavery.’”).

positioned to have an interpretive role in enforcing the Thirteenth Amendment.<sup>114</sup> From this perspective, one can understand *Jones* as creating space for “an important and productive constitutional dialectic between coequal and coordinate federal branches.”<sup>115</sup>

Conversely, it is reasonable to note the tension between *Jones* and *City of Boerne* and question the propriety of empowering Congress to define the badges and incidents of slavery for itself. It is possible that the Section 1 right is not judicially underenforced at all, and therefore that *Jones* cedes a core aspect of the judicial power to the legislature by placing such substantive power in Congress’s hands.<sup>116</sup> The “prophylactic” understanding of the Section 2 power for which I advocate—in which Congress develops, and the Court meaningfully reviews, the factual and historical record for identifying particular conduct as a badge and incident of slavery<sup>117</sup>—safeguards the Supreme Court’s role as the final arbiter of the meaning of Section 1 of the Thirteenth Amendment. At the same time, this approach respects Congress’s superior fact-finding capacity regarding the effects of certain discriminatory conduct.<sup>118</sup>

The federalism concerns that informed the Court’s post-*Boerne* cases<sup>119</sup> are not present in the Thirteenth Amendment context, as Congress has not attempted to use Section 2 power to abrogate a state’s sovereign immunity. This does not mean, however, that federalism is irrelevant to the Section 2 calculus. By permitting Congress to define the badges and incidents of slavery, *Jones* put its imprimatur

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114. Sager, *Fair Measure*, *supra* note 113, at 1239–40.

115. McAward, *Enforcement Power*, *supra* note 2, at 140.

116. See Lauren Kares, Note, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, 80 CORNELL L. REV. 372, 379 (1995) (“Another view of the dichotomy between the judicial restraint in constructing the Amendment’s first section and the liberal grant of power found in the second section is that the Court has abdicated its role as interpreter of the Constitution.”).

117. See McAward, *Enforcement Power*, *supra* note 2, at 130 (noting that the prophylactic approach to Section 2 limits Congress’s discretion “to choosing which badges and incidents of slavery to target and how to target them”).

118. See *id.* at 130–34 (describing the “prophylactic” approach to interpreting the Section 2 power).

119. See, e.g., *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 364–65 (2001) (holding that Title I of the Americans with Disabilities Act (“ADA”) did not validly abrogate states’ Eleventh Amendment immunity); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000) (holding that the Age Discrimination in Employment Act did not validly abrogate states’ Eleventh Amendment immunity); *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 725 (2003) (holding that the Family Medical Leave Act did validly abrogate states’ Eleventh Amendment immunity); *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (holding that Title II of the ADA validly abrogated states’ Eleventh Amendment immunity in cases involving the right of access to the courts).

on a power of near-plenary proportions that could permit Congress to attack any form of discrimination against any group.<sup>120</sup> This conception of the Section 2 power carries substantial federalism costs.

*Jones* has given rise to a cottage industry of labeling various injustices as badges and incidents of slavery. Most commentators and litigants have focused on aspects of race-based discrimination,<sup>121</sup> although many have gone beyond race, claiming that everything from municipal lawn mowing ordinances,<sup>122</sup> sealed adoption records,<sup>123</sup> and human cloning,<sup>124</sup> to restrictions on reproductive rights,<sup>125</sup> sex discrimination<sup>126</sup> and sexual harassment,<sup>127</sup> and discrimination against homosexuals<sup>128</sup> are badges and incidents of slavery. By indicating that Congress would have wide latitude to regulate such a vast array of injustices and discriminatory conduct,<sup>129</sup> *Jones* created a Thirteenth Amendment-specific federalism concern—namely, that Congress

120. See, e.g., G. Sidney Buchanan, *The Thirteenth Amendment and the Badge of Slavery Concept: A Projection of Congressional Power*, in *THE QUEST FOR FREEDOM: A LEGAL HISTORY OF THE THIRTEENTH AMENDMENT* 175, 177 (1976) (defining a badge of slavery as “any act motivated by arbitrary class prejudice”).

121. See, e.g., *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002) (racial and religious hate crimes); *Williams v. City of New Orleans*, 729 F.2d 1554, 1556 (5th Cir. 1984) (employment discrimination); Jason A. Abel, *Americans Under Attack: The Need for Federal Hate Crime Legislation in Light of Post-September 11 Attacks on Arab Americans and Muslims*, 12 *ASIAN L.J.* 41, 55–58 (2005) (hate crimes); William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 *HARV. C.R.-C.L. L. REV.* 17, 47–70 (2004) (characterizing racial profiling as a badge of slavery); Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 *HARV. C.R.-C.L. L. REV.* 1, 43–49 (1995) (criminal sentencing disparities); *id.* at 38–43 (race-based peremptory challenges); Petal Nevella Modeste, *Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment*, 44 *HOW. L.J.* 311, 341–43 (2001) (arguing that hate speech is a “badge of slavery”); Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 *HARV. L. REV.* 124, 155–60 (1992) (discussing the application of the Thirteenth Amendment to hate speech).

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

123. *Alma Soc’y Inc. v. Mellon*, 601 F.2d 1225, 1227–29 (2d Cir. 1979).

124. Sean Charles Vinck, *Does the Thirteenth Amendment Provide a Jurisdictional Basis for a Federal Ban on Cloning?*, 30 *J. LEGIS.* 183, 185–89 (2003).

125. Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment’s Role in the Struggle for Reproductive Rights*, 3 *J. GENDER RACE & JUST.* 401, 409–10 (2000).

126. Emily Calhoun, *The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination*, 61 *MINN. L. REV.* 313, 349–62 (1977).

127. Jennifer L. Conn, *Sexual Harassment: A Thirteenth Amendment Response*, 28 *COLUM. J. L. & SOC. PROBS.* 519, 548–50 (1995).

128. David P. Tedhams, *The Reincarnation of “Jim Crow:” A Thirteenth Amendment Analysis of Colorado’s Amendment 2*, 4 *TEMP. POL. & CIV. RTS. L. REV.* 133, 149–65 (1994).

129. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440–43 (1968) (stating that Congress surely has the power to define the badges and incidents of slavery).

could attempt to utilize the Thirteenth Amendment enforcement power as a general police power.<sup>130</sup>

Professor Tesis claims I argue that the Thirteenth Amendment did not “alter federalism substantially enough to make the protection of civil rights a national rather than state prerogative.”<sup>131</sup> This is not my position. Rather, I agree that Section 2 gives Congress the power to protect core civil rights as a prophylactic measure against the re-imposition of slavery and involuntary servitude.<sup>132</sup> I simply contend that Section 2 does not give Congress plenary power to regulate conduct far removed from the oppression of slavery and its immediate aftermath. There is a substantial difference between reading Section 2 as creating a strong, focused federal power and reading it as creating an undifferentiated police power. Acknowledging the relevance of federalism helps in the effort to strike a proper balance.<sup>133</sup>

### III. THE SECTION 2 POWER: THREE AREAS FOR EXPLORATION

Perhaps the most valuable function of this dialogue with Professor Tesis is to underscore the need for further exploration and debate regarding Congress’s role in enforcing the Thirteenth Amendment. Although there is some very fine literature on Section 2,<sup>134</sup> there is space for more. In this final section, I suggest three related areas that might be ripe for additional scholarly reflection.

#### A. *What Are the Badges and Incidents of Slavery?*

The concept of the “badges and incidents of slavery” has been the touchstone for Thirteenth Amendment enforcement legislation since the *Civil Rights Cases*.<sup>135</sup> There is, however, no widely accepted

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

131. Tesis, *Congressional Authority*, *supra* note 1, at 46.

132. See, e.g., McAward, *Enforcement Power*, *supra* note 2, at 142–46.

133. See generally *id.* at 146 (noting that “[t]he ‘middle’ approach to the Section 2 power also cabins the risks to federalism” raised by the broad approach).

134. See, e.g., William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311 (2007); Darrell A. H. Miller, *A Thirteenth Amendment Agenda for the Twenty-first Century: Of Promises, Power, and Precaution*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 291 (Alexander Tesis ed., 2010); Rutherglen, *supra* note 7; TESIS, THIRTEENTH AMENDMENT, *supra* note 32; Tesis, *Furthering American Freedom*, *supra* note 32; Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255 (2010).

135. See McAward, *Enforcement Power*, *supra* note 2, at 127 (“The phrase ‘badges and incidents of slavery’ entered Thirteenth Amendment parlance in the *Civil Rights Cases*, and

definition of that concept, or even its outer boundaries. The *Civil Rights Cases* indicated that the concept applied only to discriminatory public laws like the Black Codes,<sup>136</sup> and specifically rejected the suggestion that private acts of race discrimination in public accommodations constituted badges and incidents of slavery.<sup>137</sup> *Jones* essentially overruled the *Civil Rights Cases* on this point, acquiescing in Congress's determination that private acts of race discrimination in property transactions were badges and incidents of slavery.<sup>138</sup>

Since *Jones*, courts and commentators have asserted that a wide range of conduct can be deemed a badge and incident of slavery.<sup>139</sup> However, only a few scholars have reflected on this category at a more conceptual level.<sup>140</sup> Deeper exploration of the meaning of the "badges and incidents of slavery" is essential to help Congress identify future subjects for Thirteenth Amendment legislation. Questions for reflection might include whether the concept of the badges and incidents of slavery: (1) limits what populations Congress may protect under its Section 2 power; (2) permits Congress to address private as well as public action; (3) requires a historical link between modern conduct and the legal treatment of slaves; and (4) requires a causal link between modern conduct and a state of actual slavery or involuntary servitude.

### B. *What Modern-Day Applications Does the Section 2 Power Have?*

Since the Civil Rights Act of 1866, Congress has passed a fair amount of Section 2 legislation, most of which I would characterize as

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'quickly became the Supreme Court's standard gloss upon the powers of Congress under the Thirteenth Amendment.'" (quoting Rutherglen, *supra* note 7, at 172).

136. See *The Civil Rights Cases*, 109 U.S. 3, 22 (1883) (noting with approval the Civil Rights Act of 1866).

137. *Id.* at 24–25.

138. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 442–43 (1968).

139. See *supra* text accompanying notes 114–125.

140. See, e.g., Buchanan, *supra* note 120, at 182 (defining a badge of slavery as "any form of arbitrary prejudice which, in its cumulative manifestations, has assumed a pattern of regional significance"); Carter, *supra* note 134, at 1366–67 (asserting that a badge of slavery is any public or private act of "discrimination and subordination" aimed at African-Americans, which "provided essential legal and societal support for slavery and [was] also part of de jure and de facto attempts to return the freedmen to a condition of servitude and sub-humanity after formal emancipation"); McAward, *Defining*, *supra* note 30 (defining a badge and incident of slavery as "public or widespread private action, based on race or the previous condition of servitude, that mimics the law of slavery and that has significant potential to lead to the de facto reenslavement or legal subjugation of the targeted group").

“pure” enforcement legislation.<sup>141</sup> Laws aimed explicitly at the badges and incidents are far fewer in number,<sup>142</sup> although the most recent piece of Thirteenth Amendment legislation—the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act<sup>143</sup>—falls in this category. The Act, signed in October 2009, provides criminal penalties for willfully injuring another because of, among other things,<sup>144</sup> that person’s “actual or perceived race, color, religion, or national origin.”<sup>145</sup> This particular provision was explicitly justified in Thirteenth Amendment terms:

Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.<sup>146</sup>

Deeper reflection on the scope of the Section 2 power and the meaning of the badges and incidents of slavery will provide a basis for evaluating the constitutionality of the new hate crimes law and, specifically, Congress’s claims regarding race-based hate crimes. More generally, it will assist Congress by charting a course for future Section 2 legislation. Depending on how one conceives of the badges and incidents of slavery, Section 2 might be an untapped source of broad power to address residual racial disparities and even discrimination against other minorities. Conversely, Section 2 might have few potential modern applications. Either way, Congress will benefit immensely from renewed focus on the scope of the Section 2 power.

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141. *See, e.g.*, 18 U.S.C. § 1581 (2006) (criminalizing peonage); *id.* § 1584 (prohibiting involuntary servitude); *id.* §§ 1585–1588 (outlawing the slave trade); *id.* § 1589 (penalizing forced labor); *id.* § 1590 (penalizing human trafficking); *id.* § 1591 (penalizing sex trafficking); *see also* 42 U.S.C. § 1994 (2006) (imposing civil remedies for peonage).

142. *See, e.g.*, 42 U.S.C. §§ 3601–3619 (2006) (promulgating standards to reduce discrimination in housing); 18 U.S.C. § 245(b)(2) (2006) (criminalizing hate crimes committed while victim is using public facility).

143. Pub. L. No. 111-84, §§ 4701–4713, 123 Stat. 2190, 2835–44 (codified at 18 U.S.C. § 249 (2011)).

144. For example, other parts of the law bar violence based on “gender, sexual orientation, gender identity or disability.” *See id.* at § 4707.

145. *Id.*

146. *Id.* at § 4702.

C. *How Should the Judiciary Evaluate Section 2 Legislation?*

*Jones* set forth a very deferential standard of review for Thirteenth Amendment legislation.<sup>147</sup> Like *Katzenbach v. Morgan* and *South Carolina v. Katzenbach*, *Jones* indicated that *McCulloch v. Maryland* should provide the basic approach for evaluating the fit between a law's means and ends.<sup>148</sup> However, *Jones* added an additional layer of deference, holding that Congress's determination of the law's ends themselves—i.e., the identification of something as a badge or incident of slavery—should also be reviewed solely for rationality.<sup>149</sup>

In light of *City of Boerne*, it seems sensible to reconsider these holdings in the Thirteenth Amendment context, whether such review leads to a reaffirmance or revision of one or both layers of rational basis review as set forth in *Jones*. Questions for reflection might include: (1) What evidentiary record should Congress have to compile to justify designating something a badge or incident of slavery? (2) With what degree of deference should a federal court review a congressional finding that particular conduct is a badge or incident of slavery? (3) With what degree of deference should a federal court review the means by which Congress addresses conduct properly designated a badge or incident of slavery? (4) Is there a role for congruence and proportionality review in the Section 2 context?

IV. CONCLUSION

Resolving the proper scope of Congress's power to enforce the Thirteenth Amendment requires an understanding not only of the Thirteenth Amendment's drafting history, but also of the relative interpretive powers of Congress and the federal courts and of basic questions of federalism. Although Professor Tsesis and I maintain very different approaches to the historical record and structural values relevant in this area, we agree that Section 2 is an important source of legislative power with respect to at least some subset of civil rights. I hope that this brief dialogue will serve as a call for further scholarly reflection on both the theoretical scope and modern applications of the Section 2 power.

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147. See *supra* text accompanying notes 110–112.

148. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443–44 (1968). See *supra* text accompanying notes 9–12.

149. See *Jones*, 392 U.S. at 440–41 (evaluating Congress's definition of “badges and incidents” as not an “irrational one”).