McCulloch and the Thirteenth Amendment

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Section 2 of the Thirteenth Amendment gives Congress the "power to enforce" the ban on slavery and involuntary servitude "by appropriate legislation." The conventional view of Section 2 regards this language as an allusion to McCulloch v. Maryland's explication of Congress's executory powers, and holds that Congress has substantial, and largely unreviewable, power to determine both the ends and the means of Section 2 legislation.

This Essay argues that the conventional view departs from the original meaning of Section 2. It demonstrates that McCulloch preserved a role for judicial review with respect to both the ends and means of federal legislation. This role was clearly part of the understanding and anticipated application of McCulloch by the time the Thirteenth Amendment was ratified and the Civil Rights Act of 1866 enacted. This Essay concludes that Section 2 preserves a role for meaningful judicial review and grants Congress power to regulate conduct that threatens the reinvigoration of slavery or involuntary servitude, but not near-plenary power over all civil or human rights.

INTRODUCTION .................................................................1770
I. THE MCCULLOCH POWER ..........................................................1774
   A. McCulloch ...........................................................................1775
   B. The Antebellum Understanding of McCulloch..........................1778
II. THE MCCULLOCH ORIGINS OF SECTION 2 .................................1784
   A. The Text and Ratification Understanding of Section 2.................1784
   B. Section 2 and the Civil Rights Act of 1866 ..............................1787
   C. Judicial Interpretation of Section 2..........................................1792
   D. McCulloch, Jones, and Section 5 of the Fourteenth Amendment ........................................................................................................1796
III. RESTORING THE MCCULLOCH VISION OF SECTION 2 ................1797
   A. Identifying the Ends of the Thirteenth Amendment....................1797
   B. Defining the Badges and Incidents of Slavery............................1801
INTRODUCTION

Section 2 of the Thirteenth Amendment gives Congress the “power to enforce” the ban on slavery and involuntary servitude “by appropriate legislation.” Although this language was an innovation as a matter of constitutional text, the concept of “appropriate legislation” was well known as a matter of constitutional law. The text of Section 2, it is commonly assumed, alludes to the Supreme Court’s explication of Congress’sexecutory powers in *McCulloch v. Maryland*: Thus, “all means which are appropriate, which are plainly adapted to [a legitimate] end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”

Since the 1880s, members of the Supreme Court have regarded *McCulloch* as demonstrating “the spirit in which the [Thirteenth] Amendment is to be interpreted, and develop[ing] fully the principles to be applied” in evaluating Section 2 legislation. In the *Civil Rights Cases*, the Court held that Section 2 empowers Congress to outlaw slavery and involuntary servitude, and also “to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.” In 1968, in *Jones v. Alfred H. Mayer Co.*, the Court further stated 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.”

The conventional view is that the *Civil Rights Cases* and *Jones* simply applied *McCulloch* deference to the Thirteenth Amendment enforcement power by giving Congress substantial, and largely unreviewable, power to determine both the means and the ends of Section 2 legislation. Under this view, Section 2 provides Congress an untapped but potentially expansive power to address everything from hate crimes, hate speech, ra-
cial profiling, and disproportionate capital sentencing of black defendants, to violence against women, sexual harassment, and restrictions on reproductive rights and gay marriage.

I have argued elsewhere that, properly understood, the Section 2 power is far less sweeping than the conventional view suggests. It permits regulation not of every civil rights issue but only of conduct that will prevent or remedy violations of Section 1, including a discrete subset of racially discriminatory behavior. Previously, I have noted the link between McCulloch and Section 2 and assumed that the former was consistent with this more limited view of the Section 2 power. This Essay explores and ultimately confirms that assumption, thus challenging the conventional view that McCulloch licenses expansive, and virtually unchecked, congressional power in the Thirteenth Amendment context.

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13. See Pamela D. Bridgewater, Reproductive Freedom as Civil Freedom: The Thirteenth Amendment’s Role in the Struggle for Reproductive Rights, 9 J. Gender Race & Just. 401, 403 (2000) (suggesting Thirteenth Amendment can be used "to protect against modern reproductive abuses . . . via the history of slave breeding").

14. Cf. Sarah C. Courtman, Comment, Sweet Land of Liberty: The Case Against the Federal Marriage Amendment, 24 Pace L. Rev. 301, 328 (2003) (arguing prohibitions on same-sex marriage "put homosexuals . . . in the same position as freed slaves after the civil war: free in name only and shackled in the eyes of the state").

15. See Jennifer Mason McAward, The Scope of Congress’s Thirteenth Amendment Enforcement Power After City of Boerne v. Flores, 88 Wash. U. L. Rev. 77, 142-47 (2010) [hereinafter McAward, Scope] (rejecting expansive view that Thirteenth Amendment gives Congress power to define and address badges and incidents of slavery, subject only to rational basis review); see also Jennifer Mason McAward, Congressional Authority to Interpret the Thirteenth Amendment: A Response to Professor Tsesis, 71 Md. L. Rev. 60, 63-64 (2011) (criticizing expansive view from perspectives of history, separation of powers, and federalism).


17. McAward, Scope, supra note 15, at 117.
Indeed, this Essay argues that current Thirteenth Amendment doctrine departs from the original meaning of Section 2—including *McCulloch* as it was understood when the Amendment was ratified—in three ways. First, the doctrine confuses the ends and means of Thirteenth Amendment legislation. Second, it improperly minimizes the role of the judiciary in reviewing the ends of such legislation as well as the concept of the badges and incidents of slavery. And third, it fails to preserve a sufficiently meaningful role for the Court to assess the fit between Congress’s choice of means and constitutional ends.

As Part I explains, the standard, post-New Deal account of *McCulloch* posits that Congress has near-plenary power in passing executory legislation. However, while *McCulloch* established that Congress enjoys wide discretion in assessing the necessity of the means by which it pursues constitutional ends, the opinion also provided multiple areas for meaningful judicial review. The ends must be “legitimate,” and the chosen means must “tend[] directly to” a legitimate end. These elements of the decision, which constrained Congress and preserved a role for the Court, shaped the understanding and application of *McCulloch* throughout the mid-nineteenth century. *Prigg v. Pennsylvania,* a case cited by the drafters of the Thirteenth Amendment, bears this out. In *Prigg,* the Court upheld the Fugitive Slave Act of 1793 not out of institutional deference but after performing an independent review of constitutional ends as well as the means employed by the statute.

Part II considers the *McCulloch* origins of Section 2. The sponsors of the Civil Rights Act of 1866 (who also were the sponsors of the Thirteenth Amendment) argued that Section 2 empowered Congress to protect certain civil rights as a means to the end of securing the demise of slavery. They invoked *McCulloch* and *Prigg* to counter opponents’ arguments that Section 2 permitted only legislation directly pertaining to coerced labor. The Act’s supporters did not, however, suggest that Section 2 empowered Congress to define the ends of the Thirteenth Amendment. Nor did they claim that any causal relationship between means and ends, however attenuated, would suffice for Section 2 pur-

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19. Id. at 419.
21. See infra note 158 (noting Representative James F. Wilson used *Prigg* to argue Congress has power to protect natural rights of citizens).
24. See infra notes 142, 151–154, 158 and accompanying text (describing invocations of *McCulloch* and *Prigg*).
25. See infra notes 143–145 and accompanying text (noting Act’s supporters agreed with critics that Constitution defined ends of Thirteenth Amendment).
poses. Rather, they emphasized—and any reasonable observer would have recognized—the close causal link between the rights protected by the Act and a state of meaningful freedom for the former slaves. This same view of Section 2 prevailed in the Supreme Court until Jones.

Part III considers how to restore the McCulloch vision of Section 2. It accepts that Section 2 permits Congress to pass laws that target the badges and incidents of slavery. The McCulloch vision of Section 2, however, requires a more precise understanding of why and how Congress is permitted to regulate this conduct. Congress is empowered to address the badges and incidents of slavery not because they are themselves unconstitutional and therefore their eradication is an end in itself, but because doing so is a means to the end of preventing the reinvigoration of slavery or involuntary servitude. In other words, the concept of the badges and incidents of slavery forms the outer boundary of Congress's prophylactic enforcement power under Section 2.

Therefore, Part III addresses three related issues: the scope of the right conveyed by Section 1, the scope of Congress's power to define the badges and incidents of slavery, and the scope of Congress's power to regulate the badges and incidents of slavery. The McCulloch vision of Section 2 suggests that current doctrine inappropriately minimizes the role of the judiciary with respect to all three issues. By treating the badges and incidents of slavery as ends in and of themselves, and by allowing Congress to define that concept, Jones misallocated the Court's own substantive definitional power. Furthermore, the understanding of McCulloch that prevailed during the 1860s preserved some space for the Court to ensure that Congress's chosen means are not "remote" from the goal of preventing the return of slavery.

Ultimately, the true McCulloch reading of the Thirteenth Amendment safeguards a role for meaningful judicial review of Section 2 legislation and provides discretion for Congress to regulate not only conduct directly tied to slavery and involuntary servitude themselves, but also a limited subset of discriminatory conduct that threatens the rein-

27. See infra Part II.C (describing "consistent methodology" in Court's evaluation of Section 2 legislation until "major shift" with Jones).
28. See, e.g., text accompanying note 215.
29. See McAward, Scope, supra note 15, at 142 ("[T]o constitute an adequate limitation on Congress's power, the 'badges and incidents of slavery' must be understood as a term of art with a finite range of meaning that is tied closely to the core aspects of the slave system and its aftermath.").
30. See John Marshall, Marshall's "A Friend to the Union" Essays [hereinafter Marshall, Union], in John Marshall's Defense of McCulloch v. Maryland 91, 100 (Gerald Gunther ed., 1969) ("[W]hen [the Court] uses 'conducive to,' that word is associated with others plainly showing that no remote, no distant conduciveness to the object, is in the mind of the court.").
vigoration of slavery or involuntary servitude. Although this view runs counter to conventional "Thirteenth Amendment optimism," it does not preclude Congress from protecting a broad array of civil rights. Rather, it encourages Congress to focus on enforcing the unfulfilled promises of the Fourteenth and Fifteenth Amendments and harnessing its broad Commerce Clause power. At the same time, this view acknowledges the fundamental success of the Thirteenth Amendment and avoids the redundancy that would arise if Section 2 were viewed as a source of near-plenary power over all civil or human rights.

I. THE MCCULLOCH POWER

Since the ratification of the Thirteenth Amendment, the Supreme Court has held that *McCulloch v. Maryland* provides the proper standard for evaluating legislation passed pursuant to Congress's Section 2 power. The standard view of *McCulloch*, at least since the New Deal, emphasizes Congress's virtually unchecked discretion to choose the means by which to pursue constitutional ends. In the Thirteenth Amendment context, the Court has invoked *McCulloch* to hold that Section 2 empowers Congress both to define and eradicate the "badges and incidents of slavery." In fact, *McCulloch* preserved a meaningful role for judicial review, both with respect to Congress's choice of means and particularly with respect to its pursuit of ends. Even more importantly, these elements of the opinion were critical to the public understanding and judicial application of *McCulloch* in the years preceding the ratification of the Thirteenth Amendment. Thus, invoking *McCulloch* in the Section 2 context does not inexorably lead to the conclusion that minimal judicial

31. See Jamal Greene, Thirteenth Amendment Optimism, 112 Colum. L. Rev. 1733, 1735 (2012) (defining Thirteenth Amendment optimists as those who "argu[e] that the Amendment prohibits . . . practices that one opposes but that do not in any obvious way constitute either chattel slavery or involuntary servitude").
32. 17 U.S. (4 Wheat.) 316 (1819).
33. See, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443-44 (1968) (holding Civil Rights Act of 1866 was "appropriate" legislation as described in *McCulloch*).
35. See Jones, 392 U.S. at 440 ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate the determination into effective legislation."); The Civil Rights Cases, 109 U.S. 3, 20 (1883).
oversight of legislation regarding the badges and incidents of slavery is appropriate. Rather, a proper understanding of McCulloch and the original public meaning of Section 2 might well require a refinement of current Section 2 doctrine.

A. McCulloch

McCulloch addressed the question of Congress's power to charter the Bank of the United States. Article I of the Constitution did not expressly empower Congress to charter a bank, and some, including James Madison and Thomas Jefferson, argued that the Necessary and Proper Clause permits "only the means which are 'necessary,' not those which are merely 'convenient,' for effecting the enumerated powers."[36] Chartering a bank was unconstitutional because, at best, it "might be conceived to be conducive to the successful conducting of the finances; or might be conceived to tend to give facility to the obtaining of loans."[37] Supporters of the Bank, including Alexander Hamilton, criticized this reading of the Clause as unfairly limiting Congress.[38] Rather, the sovereign has the right to employ means that are "needful, requisite, incidental, useful, or conducive to" "the attainment of the ends of" "every power vested in a Government."[39]

McCulloch ultimately became a test case on the bank's constitutionality.[40] In his famous opinion, Chief Justice Marshall sided with the Hamiltonian understanding of congressional power. First, Marshall stated that Congress had implied power to "select any appropriate means" by which to effectuate Congress's enumerated powers "to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies."[41] He rejected the argument that the Necessary and Proper Clause limited the scope of that implied power, declining to read the term "necessary" as restricting Congress's discretion to means that are "indispensable."[42] Instead, he held that the Clause empowered Congress to employ "any means calcu-

39. Id. at 545, 548.
42. Id. at 413.
lated to produce the end, and not [just those] without which the end would be entirely unattainable." The assessment of the "degree of necessity" between the chosen means and the constitutional end is a task for the legislature. "This court disclaims all pretentions to such a power." Accordingly, "[l]et the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Since the New Deal, the standard reading of *McCulloch* emphasizes Congress's wide latitude in choosing the means by which to effectuate its enumerated powers and posits that the Court must accord near-complete deference to those choices. As Evan Caminker has described, a law is valid as long as "it is sufficiently tailored to carry into execution" a legitimate governmental end or power. While Congress's choice of legislative means must be "plainly adapted" or "conducive to" a legitimate end, these standards "lack independent bite," and are assessments for Congress solely to make.

There are elements of the *McCulloch* opinion, however, that point to judicially enforceable limits on Congress's power. Indeed, as the next section will discuss, those limiting elements formed the prevailing understanding of *McCulloch* in the years leading to the ratification of the Thirteenth Amendment. Most obviously, Marshall's famous conclusion begins with the caveat that the end being pursued must be "legitimate" and "within the scope of the constitution." Thus, any piece of legislation must be directed toward—and measured against—constitutional norms. Indeed, later in the opinion, Marshall wrote that "it would be the [Court's] painful duty" to strike down any law that pursued an end "prohibited by the constitution" or where Congress, "under the pretext of

43. Id. at 413–14.
44. Id. at 423.
45. Id. at 421.
47. Caminker, supra note 46, at 1137; see also Burroughs v. United States, 290 U.S. 534, 548 (1934) ("[T]he closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.").
executing its powers, pass[es] laws for the accomplishment of objects not entrusted to the Government." 49 At the very least, McCulloch envisioned that the Court would police the outer boundaries of legislative power by ensuring the constitutional legitimacy of legislative ends.50

In addition, McCulloch also contains language that contemplates at least some judicially enforceable constraints on Congress’s choice of means. Despite the disclaimer that the Court would not inquire into the “degree of . . . necessity” between Congress’s chosen means and constitutional ends, the opinion set forth a number of objective standards that Congress’s chosen means must satisfy. Means must be “appropriate,” consistent with both the “letter and spirit of the constitution,” and “plainly adapted,” “really calculated to effect,” and “tend[ing] directly to” a legitimate end. David Currie argued that Marshall used this language to signal that “tenuous connections to granted powers will not pass muster,” and that the Court will supervise “the reasonableness of the means” to ensure their appropriateness. 56 Randy Beck has posited that these limits “prevent Congress from employing remote means that, by definition, operate through a lengthy chain of cause and effect relationships.” 57

Thus, as Keith Whittington puts it, the view that McCulloch stands for “judicial deference to the plausible interpretive acts of Congress” is in-


52. Id. at 421.

53. Id.

54. Id. at 423.

55. Id. at 419.


complete and misleading. Rather, *McCulloch* was “an emphatic assertion of judicial authority to resolve contested constitutional issues,” while leaving “factual policy judgments” to Congress. Even the “appropriate means” standard set out a fairly clear boundary for legislative action, which the judiciary could then monitor for incursions.

As the following section will discuss, it was this more limited understanding of *McCulloch* that prevailed in the period between the opinion and the ratification of the Thirteenth Amendment. Indeed, Chief Justice Marshall himself played a role in shaping this understanding. In a series of anonymous essays written after the release of *McCulloch*, Marshall emphasized that the opinion had expressly reserved judicial power to strike down laws passed “for the accomplishment of objects, not intrusted to the government.” He also denied that *McCulloch* gave Congress unlimited discretion, stating that Congress’s chosen means may neither be “remote” nor have only “distant conduciveness to the object.” Thus, Marshall himself asserted that Congress’s choice of ends, as well as its choice of means, was subject to judicial review.

### B. The Antebellum Understanding of McCulloch

The Supreme Court’s application of *McCulloch* in the remainder of the antebellum period demonstrates that *McCulloch* indeed created space for deferential but meaningful judicial review of both the ends and means of federal legislation. In those decades, the Supreme Court “was routinely asked to resolve constitutional questions involving the scope of the legislative authority of Congress and to enforce constitutional limits against that coordinate branch.” In a recent article, Keith Whittington surveyed cases in which the Supreme Court reviewed federal legislation during that period. He concluded that the Court “rarely showed much self-consciousness about exercising its own authority to evaluate the con-

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58. Whittington, Judicial Review, supra note 34, at 1294 (quoting Engel, supra note 46, at 118).
59. Id. at 1294.
61. Id. at 372.
62. Marshall, Union, supra note 30, at 100.
63. See John Marshall, Marshall’s “A Friend of the Constitution” Essays [hereinafter Marshall, Constitution], in John Marshall’s Defense of *McCulloch v. Maryland*, supra note 30, at 184, 186–87 (“In no single instance does the court admit the unlimited power of congress to adopt any means whatever, and thus to pass the limits prescribed by the constitution.”).
64. Marshall, Union, supra note 30, at 100.
65. See also Barnett, supra note 56, at 211–14 (describing early historical understanding of Clause as rejecting notion that “Congress was the sole judge of a measure’s necessity and propriety”); id. at 206–07 (“A showing of ‘necessity’ should neither be so ‘strict’ that no statute can pass muster nor so lenient that any statute can pass.”).
66. Whittington, Judicial Review, supra note 34, at 1325.
stitutionality of federal legislation, and"—tellingly—"it did not often articulate a standard of review that emphasized an especially high standard of deference to Congress on constitutional issues."67

The most important case of the antebellum era for these purposes is *Prigg v. Pennsylvania,*68 in which the Court affirmed the power of Congress to pass the Fugitive Slave Act of 1793. *Prigg* is often cited as a corollary to *McCulloch*69—confirmation that the Court will indeed afford broad deference to Congress and an indication that Congress’s power to enforce the Thirteenth Amendment should be similarly broad. A close reading of *Prigg,* however, confirms that the Court upheld the Act not primarily out of deference to Congress, but after performing an independent review of the statute. The Court actively reviewed the ends pursued by Congress and deferred only to the unremarkable means chosen in pursuit of those ends. While the substance of *Prigg*'s constitutional interpretation might well be subject to question, its methodology reveals a more active and less deferential understanding of the Court’s role vis-à-vis Congress than one might expect given the modern perception of *McCulloch.*

*Prigg* considered the Fugitive Slave Clause, which provides:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, But shall be delivered up on Claim of the Party to whom such Service or Labour may be due.70

On its face, the Clause is directed at state action, and thus it is possible to regard the Clause only as a “self-executing prohibition on the free states from interfering with the slave owner’s right to recapture his runaway slaves.”71 An alternative, much broader reading of the Clause regards it as “an affirmative constitutional guarantee of the slaveholder’s prop-

67. Id. Whittington suggests that this might well be due less to the text of *McCulloch* itself than to the political ascendency of Jeffersonians and Jacksonians, which rendered *McCulloch* politically “dead” and ineffectual until it was “cited and revived by nationalists after the Civil War.” Id. at 1296. Whatever the Court’s motives, however, its practice certainly informed public understanding of the relative roles of the Court and Congress.

68. 41 U.S. (16 Pet.) 539 (1842).


70. U.S. Const. art. IV, § 2, cl. 3.

71. Kaczorowski, supra note 69, at 161; see also Akhil Reed Amar, America’s Constitution: A Biography 261 (2005) ("Article IV pointedly withheld any general authority to implement the 'Service or Labour' clause in free states.")
The Clause contains no express grant of congressional enforcement power, and the scope of any implied enforcement power would depend upon the substantive construction of the clause itself. Enforcement of the narrow view might permit remedies for state violations of slaveholders' property rights, while enforcement of the broad view might permit protection of slaveholders' rights regardless of state action.

The Second Congress passed, and President Washington signed, the Fugitive Slave Act of 1793. The Act created extradition and rendition procedures as well as a civil cause of action in which the owner of a fugitive slave could seek damages from "any person who shall knowingly and willingly obstruct or hinder" the recapture of a fugitive slave. There was no debate on the question of Congress's power to pass the Act. However, by protecting the common law right of recapture, the Second Congress appears to have embraced the broad view of the individual right protected by the Fugitive Slave Clause and assumed that it had power to enforce that right.

In Prigg, the Court affirmed that the Clause "contains a positive and unqualified recognition of the right of the owner in the slave," including the right "to seize and recapture his slave." The Court's interpretive method, however, is revealing. The Court did not defer to Congress's substantive understanding of the Clause but rather approached the question de novo, looking to the text of the provision "with all the lights and aids of contemporary history." Alluding to McCulloch, the Court then held that Congress had implied power to enforce the right recognized by the Clause and indicated that it would defer to Congress's choice of means with respect to how to enforce that right.

The enforcement mechanisms created by the Act were fairly standard—executive and judicial procedures designed directly to vindicate

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72. Kaczorowski, supra note 69, at 163.
73. See id. at 162-63 ("[T]his view would be the most consistent with the state action interpretation of the Fourteenth Amendment . . . which limit[s] Congress's legislative powers to remedying the prohibited state action.").
74. Id. at 163.
75. Act of Feb. 12, 1793 (Fugitive Slave Act of 1793), ch. 7, § 3-4, 1 Stat. 302, 302-05 (repealed 1864).
76. Kaczorowski, supra note 69, at 164. But see Paul Finkelman, Sorting Out Prigg v. Pennsylvania, 24 Rutgers L.J. 605, 620-21 (1993) (arguing existence of state fugitive slave laws at time of framing shows "the Fugitive Slave Clause was merely an admonition to the states to return fugitive slaves").
78. Id. at 610.
79. Id. at 616, 619.
80. Id. at 620. The Court also held that Congress's power to enforce the right of recaptaining was exclusive, and not concurrent with the states. See id. at 623 (right of recaptaining is "uncontrolled and uncontrorollable by state sovereignty or state legislation").
81. "Standard" in the sense of being typical types of remedies. Obviously, the subject
the individual right of recapture.\textsuperscript{82} Unsurprisingly, then, the Court held the Act to be "clearly constitutional, in all its leading provisions."\textsuperscript{83} However, the Court did not defer wholesale to the remedies chosen by Congress. It invalidated a portion of the Act that required state magistrates to issue certificates of removal for fugitive slaves upon proof of the owner's claims.\textsuperscript{84} Compelling state officials to enforce federally protected rights was an "unconstitutional exercise of [Congress's] power of interpretation."\textsuperscript{85} That duty fell exclusively to the federal government.\textsuperscript{86} Thus, the Court's selective approval of the enforcement mechanisms in the 1793 Act demonstrates that it was prepared to subject even Congress's choice of means to some baseline of independent judicial review.\textsuperscript{87}

\textit{Prigg} provides an important lesson regarding the order in which Congress and the Court may act. In 1793, the Second Congress did not have the benefit of judicial interpretation regarding the Fugitive Slave Clause or Congress's enforcement powers generally. Despite (or perhaps because of) this lack of definitive guidance, the Second Congress engaged in its own constitutional interpretation, deciding for itself that the Clause recognized an individual right enforceable by Congress. This sequence demonstrates that Congress need not be reactive to the Court but can proactively interpret constitutional provisions. At the same time, though, \textit{Prigg} demonstrates that when Congress's judgment is challenged, the Court will engage in de novo review of the Constitution's substantive guarantees. While the Court pointed to Congress's action as evidence of the original meaning of the Fugitive Slave Clause, it took

\begin{itemize}
  \item 82. See supra note 75 and accompanying text (describing extradition and rendition procedures and remedies available to slaveholders under Act); see also Tennessee v. Lane, 541 U.S. 509, 559 (2004) (Scalia, J., dissenting) (noting one way to enforce constitutional rights is to "create a cause of action through which the citizen may vindicate" those rights).
  \item 83. \textit{Prigg}, 41 U.S. (16 Pet.) at 622.
  \item 84. Id. ("[W]ith the exception of that part which confers authority upon state magistrates, [the Act is] free from reasonable doubt and difficulty, upon the grounds already stated.").
  \item 85. Id. at 615-16.
  \item 86. Id. at 623 ("[T]he natural, if not the necessary, conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments . . . to carry into effect all the rights and duties imposed upon it by the constitution."). This portion of the opinion engendered several separate opinions. See, e.g., id. at 627-29 (Taney, C.J., dissenting) ("[I]t never has been suggested, that the states could not uphold and maintain [constitutional rights] . . . . On the contrary, it has always been held to be [states'] duty . . . . to enforce them; and the action of the general government has never been deemed necessary, except to . . . prevent their violation.").
\end{itemize}
pains to make clear that it engaged in its own independent assessment of
the argument.\footnote{88 See, e.g., \textit{Prigg}, 41 U.S. (16 Pet.) at 622–23 ("But we do not wish to rest our present opinion upon the ground either of contemporaneous exposition, or long acquiescence, or even practical action . . . . On the contrary, our judgment would be the same, if the question were entirely new, and the act of congress were of recent enactment.").}

As the next Part discusses, the sponsors of the Civil Rights Act of 1866, the first piece of Section 2 legislation, invoked \textit{Prigg} and \textit{McCulloch} in describing the scope of Congress’s power under Section 2.\footnote{89 See infra Part II.B (describing use of \textit{McCulloch} and \textit{Prigg} in debates over 1866 Civil Rights Act).} Modern commentators have seized on these invocations to argue for an expansive understanding of Congress’s power to enforce the Thirteenth Amendment. Professor Akhil Amar has argued that \textit{Prigg} and \textit{McCulloch}’s “view[s] of sweeping congressional power” should form one of the “basic interpretive ground rules” regarding the scope of Congress’s power to enforce the Reconstruction Amendments.\footnote{90 Amar, Document, supra note 69, at 85.} Similarly, Professor Robert Kaczorowski has argued that \textit{Prigg} and \textit{McCulloch} confirm that Congress has “plenary power to enforce” constitutionally guaranteed rights.\footnote{91 Kaczorowski, supra note 69, at 179.}

The “crucial point” of \textit{Prigg}, Professor Kaczorowski argues, is the Court’s unanimous holding that where the Constitution secures a right, “Congress [has] plenary power to enforce [it] and to remedy all violations, even when the constitutional recognition of a right is in the form of a prohibition against the states from interfering with it.”\footnote{92 Id. at 184.} Just as the Fugitive Slave Clause empowered Congress to create private remedies for violations of the right of recaption, he argues, the Thirteenth Amendment “delegated plenary power to Congress to enforce liberty” by “defin[ing] and secur[ing] the civil liberties of all Americans.”\footnote{93 Id. at 210–11.}

Kaczorowski’s assessment of \textit{Prigg} juxtaposes the private cause of action created by the Fugitive Slave Act of 1793 with the state action-oriented text of the Fugitive Slave Clause. This shows, Kaczorowski argues, that Congress’s enforcement power permits broad-ranging remedies against actors not explicitly mentioned in the constitutional text.\footnote{94 See id. at 184 (stating that Congress has “plenary power to enforce [constitutionally secured rights] and to remedy all violations, even when the constitutional recognition of a right is in the form of a prohibition against the states from interfering with it.

95 See \textit{Prigg} v. Pennsylvania, 41 U.S. (16 Pet.) 539, 622 (1842) ("[T]he right to seize and retake fugitive slaves, and the duty to deliver them up . . . . and of course the corresponding power in Congress to use the appropriate means to enforce the right and duty, derive their whole validity and obligation exclusively from the Constitution.")}
scope of the constitutional right, as interpreted by the Court, dictated the broad scope of permissible remedies that Congress could create.\textsuperscript{96} 

\textit{Prigg} also does not support Kaczorowski's characterization of Congress's power as "plenary." The term "plenary" refers to complete, unreviewable power.\textsuperscript{97} While \textit{Prigg} certainly acknowledged broad congressional enforcement power,\textsuperscript{98} it was far from plenary. The Court's de novo review of Congress's substantive interpretation of the Fugitive Slave Clause, and its decision to strike down the Act's requirement that state magistrates issue certificates of removal, show that the Court perceived judicially enforceable limits on Congress's discretion, both with respect to Congress's choice of means and definition of ends.\textsuperscript{99} These limits undermine Kaczorowski's claim that \textit{Prigg} supports a Thirteenth Amendment power to "define and secure the civil liberties of all Americans."\textsuperscript{100}

Professor Amar acknowledges that neither \textit{Prigg} nor Section 2 conveyed "plenary" power on Congress.\textsuperscript{101} He also asserts, quite correctly, that \textit{Prigg} recognized broad power "to protect slave masters, even in legislation over private parties."\textsuperscript{102} However, his conclusion that Congress should have "power to protect ex-slaves" that is "equally broad" as the power approved in \textit{Prigg}\textsuperscript{103} requires clarification. A \textit{Prigg}-based reading of the Section 2 power indicates that Congress has broad power to prevent and remedy conduct that violates the judicially determined parameters of the right conveyed by Section 1, namely, freedom from coerced labor.\textsuperscript{104} \textit{Prigg} does not, however, suggest that Section 2 gives Congress power to address civil rights generally or to protect individuals who are not at risk

\textsuperscript{96} See id. at 619 ("The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end.").

\textsuperscript{97} See Black's Law Dictionary 1273 (9th ed. 2009) ("Full; complete; entire."); Oxford English Dictionary 1093 (1989) ("Complete, entire, perfect; not deficient in any element or respect.").

\textsuperscript{98} See \textit{Prigg}, 41 U.S. (16 Pet.) at 620 (rejecting "limited construction of the Constitution" and noting Congress "has, on various occasions, exercised powers which were necessary and proper means to carry into effect rights expressly given, and duties expressly enjoined thereby").

\textsuperscript{99} See id. ("These cases are . . . to show that the rule of interpretation, insisted upon at the argument, is quite too narrow to provide for the ordinary exigencies of the national government, in cases where rights are intended to be absolutely secured, and duties are positively enjoined by the Constitution.").

\textsuperscript{100} Kaczorowski, supra note 69, at 211.

\textsuperscript{101} See Amar, Document, supra note 69, at 108 (observing Congress's power to enforce the Reconstruction Amendments "is not plenary—wholly plenary power is hard to reconcile with the basic structure of enumerated power that the Reconstruction Amendments accept rather than repudiate").

\textsuperscript{102} Id. at 71.

\textsuperscript{103} Id.

\textsuperscript{104} See McAward, Defining, supra note 16, at 625–26 (critiquing \textit{Civil Rights Cases} and arguing that Civil Rights Act of 1875 was valid under Section 2).
of Section 1 violations. While other constitutional provisions may well give Congress more sweeping power,\textsuperscript{105} the Section 2 power, even read in light of \textit{Prigg}, has a more limited scope.

Thus, while one can agree that \textit{McCulloch} and \textit{Prigg} are relevant to the scope of the Section 2 power, a close reading of those opinions supports only certain propositions. First, Congress may precede the Court in interpreting the substantive scope of constitutional guarantees. Second, any such interpretation is informative, but not dispositive, to the Court's independent review of the question. And third, Congress has broad but not unlimited power to choose the means by which to remedy violations of constitutional rights. In other words, the scope of the legislative power identified in \textit{Prigg} and the role of the Court in reviewing its exercise are precisely what one might expect given \textit{McCulloch}: active judicial review of the ends pursued by Congress and deferential but meaningful judicial review of the means chosen by Congress. It was this set of understandings about the relationship between Congress and the Court that formed the backdrop for the ratification of the Thirteenth Amendment.

\section*{II. The \textit{McCulloch} Origins of Section 2}

\textit{McCulloch} and \textit{Prigg} were well known to those who debated the Thirteenth Amendment and the Civil Rights Act of 1866, the first piece of legislation proposed under Section 2 of the Amendment. The scope of the Section 2 power did not receive much attention during the ratification debates, but it was a focal point of the debates over the Act, during which the Act's supporters invoked \textit{McCulloch} and \textit{Prigg} in describing the power of Congress under Section 2. This Part explores the historical record in an effort to understand precisely how the framers of Section 2 understood those cases and envisioned the relative roles of Congress and the Court in enforcing the Thirteenth Amendment.\textsuperscript{106}

\subsection*{A. The Text and Ratification Understanding of Section 2}

The text of the Thirteenth Amendment itself was modeled on legal sources well known to the framers. Section 1 draws from the language of the Northwest Ordinance of 1787 and declares that "[n]either slavery

\textsuperscript{105} Indeed, Professor Amar's \textit{Prigg} argument has focused primarily on Congress's power to enforce the Fourteenth Amendment's Citizenship Clause. See Amar, Document, supra note 69, at 71, 105 (suggesting Citizenship Clause gave Congress "power to enact certain laws designed to affirm that blacks were equal citizens, worthy of respect and dignity")

\textsuperscript{106} Although the main argument of this Article focuses on the original public meaning of Section 2, most "originalist" Thirteenth Amendment scholarship has focused primarily on the congressional debates. See, e.g., Kaczorowski, supra note 69, at 201-11 (discussing Senator Trumbull's explanation of Thirteenth Amendment). In order to evaluate this scholarship, and because the debates are at least relevant to determining original public meaning, this section focuses on those same debates.
nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction". 107 Section 2’s declaration that "Congress shall have power to enforce this article by appropriate legislation" 108 alludes to McCulloch, in which the Supreme Court held that Congress may "select any appropriate means" by which to effectuate its enumerated powers. 109

Representative James F. Wilson proposed the enforcement language of Section 2 but did not explain its intended scope. 110 Although no records remain from the deliberations of the Judiciary Committee that drafted the Thirteenth Amendment, 111 two comments made during the ratification debates by Senator Lyman Trumbull, the committee’s chairman, suggest that he envisioned a link between “appropriate” legislation and the McCulloch standard. After noting that Section 2 gives Congress the power to enforce the amendment with “proper” legislation, 112 Trumbull later described Congress’s power as that “to pass such laws as may be necessary to carry [the ban on slavery and involuntary servitude] into effect.” 113 These comments, which use the terms “necessary,” “proper,” and “appropriate” interchangeably, certainly suggest that the power to pass appropriate legislation was akin to the power conferred on Congress by the Necessary and Proper Clause, as explicated in McCulloch. 114

Most commentators read this history to say that Section 2 incorporates the McCulloch standard. 115 Some then regard this as conclusive evi-

107. U.S. Const. amend. XIII, § 1; accord Northwest Ordinance of 1787, art. VI, 1 Stat. 51 n.(a) (“There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted.”); Cong. Globe, 38th Cong., 1st Sess. 1488 (1864) (noting extent to which proposed amendment tracked Jeffersonian ordinance).


111. See Michael Vorenberg, Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment 53 (Christopher Tomlins ed., 2001) (“It is difficult to reconstruct the committee’s deliberations because no record of them survives.”).


113. Id. at 1313.

114. 17 U.S. (4 Wheat.) at 423 (using “appropriate” to describe scope of Congress’s power under Necessary and Proper Clause); see supra notes 62–65 and accompanying text (describing McCulloch).

115. See, e.g., Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 825 n.299 (1999) [hereinafter Amar, Intratextualism] [describing how Representative Wilson quoted “verbatim Section 2 of the Thirteenth Amendment and then explicitly link[ed] its wording to the key words from McCulloch”]; Balkin, supra note 6, at 1810 (“When Congress adopted the Reconstruction Amendments, it was generally accepted that grants of congressional power in Article I were subject to the test of McCulloch v. Maryland . . . .”); Caminker, supra note 46, at 1159–65 (describing how framing debates indicate Section 2’s
dence that Congress has plenary power to enforce the Thirteenth Amendment. However, linking *McCulloch* to the text of Section 2 does not necessarily resolve the respective roles of Congress and the Court in enforcing the Thirteenth Amendment. Rather, it simply raises the question of precisely how the scope of congressional power under *McCulloch* and *Prigg* was understood at the time of the Thirteenth Amendment.

The congressional ratification debates occasioned no sustained reflection on Section 2. Congress’s enforcement power received greater attention in the state ratification debates, however, where the amendment’s opponents objected that Congress would use its power to “emasculate” the states. Whether motivated by genuine federalism-based concerns or by a raw desire to preserve white supremacy, the states of the former confederacy were united in their concern about the scope of Congress’s power. South Carolina’s delegates engaged in an interesting colloquy with Secretary of State William Seward on this point. The state’s delegates were fearful “that the second section may be construed to give Congress power of local legislation over the Negroes, and white men, too, after the abolishment of slavery.” Seward responded that Section 2 “is really restraining in its effect, instead of enlarging the powers of Congress.”

It is not clear whether Seward’s message described his true understanding of Section 2 or was merely a strategic ploy to obtain ratification of the Amendment. If the former, his statement provides at least some evidence that Section 2 was not meant to provide Congress with expansive enforcement power. If the latter, Seward was successful but not entirely reassuring. South Carolina did ratify the amendment but issued its own declaration 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

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use of “appropriate” was “selected with the *McCulloch* standard in mind”).

116. See, e.g., Kaczorowski, supra note 69, at 212 (describing Senator Trumbull’s view that “Congress had to have the same plenary power to enforce the constitutional rights that inhere in a state of freedom as it had to enforce the constitutional rights of slave owners”).

117. See McAward, Scope, supra note 15, at 103 (“[Q]uestions regarding . . . the extent of Congress’s power under Section 2 generally received scant analysis.”).

118. Vorenberg, supra note 111, at 218 (citing William H. Green, Speech on the Proposed Amendment of the Federal Constitution, Abolishing Slavery 9 (1865)); see also id. (noting detractors in Ohio and Indiana claimed Congress would use its Section 2 powers to “rewrite state constitutions or abolish state courts and state legislatures”).

119. Id. at 230 (quoting Mississippi’s objection that Section 2 provided “dangerous grant of power”).


121. Vorenberg, supra note 111, at 229 (quoting Message from the President of the United States, S. Exec. Doc. No. 39-26, at 198 (1866)).
be altered by the proposed amendment." 122 Alabama and Louisiana issued similar reservations as they ratified the Amendment. 123

The legal effect of these reservations is unclear in light of subsequent state ratification votes. At the very least, however, the Seward colloquy and the reservations demonstrate that Section 2 was not universally understood as an expansive grant of congressional power at the time of ratification.

B. Section 2 and the Civil Rights Act of 1866

Shortly after the Thirteenth Amendment was ratified, the Thirty-Ninth Congress began considering what would become the Civil Rights Act of 1866. The debates over the Act included substantial reflection on Congress’s Section 2 power. Passed over President Johnson’s veto, lingering doubts about the adequacy of Congress’s power to pass the Act led to the ratification of the Fourteenth Amendment and the subsequent reenactment of the Act in 1870. 124

The impetus for the Act was the southern states’ enactment of Black Codes. 125 Mississippi and South Carolina were the first to pass such codes in 1865, and the rest of the southern states soon followed suit. 126 Many of the codes contained explicit racial classifications, requiring black workers to sign annual labor contracts and providing that they would be subject to arrest and forfeiture of the entirety of their annual wages if they left before the contract’s term. 127 Some laws forbade blacks from renting land in urban areas and others limited blacks to the occupations of farmer and servant. 128 The primary goal of the Black Codes was to restrict the freedmen’s available labor options in order to “get things back as near to slavery as possible.” 129

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122. Id. at 290 (citing 2 U.S. Dep’t of State, Documentary History of the Constitution of the United States of America 1787-1870, at 606 (1894)).
123. See Herman Belz, A New Birth of Freedom 159 (2d ed. 2000) (listing states that declared Congress had no power to legislate on political status or civil relations of former slaves).
124. For an elaboration on the history of the Civil Rights Act of 1866, see McAward, Scope, supra note 15, at 108-14 (describing debates over Section 2 power to counteract Black Codes in certain states).
125. See id. (noting Act “took direct aim at the southern Black Codes”).
126. Id. at 108.
127. See Cong. Globe, 39th Cong., 1st Sess. 39 (1866) (describing variety of state Black Codes); see also Eric Foner, Reconstruction: America’s Unfinished Revolution, 1863-1877, at 199 (2002) (“[The Black Codes’] centerpiece was the attempt to stabilize the black work force and limit its economic options apart from plantation labor.”).
128. See Foner, supra note 127, at 200 (describing Black Codes).
129. Id. at 199 (quoting Letter from Benjamin F. Flanders to Henry C. Warmoth (Nov. 23, 1865), in Henry Clay Warmoth Papers, 1798–1955, microformed on Collection No. 00752, The Wilson Library, University of North Carolina at Chapel Hill (S. Historical Collection)).
On January 5, 1866, Senator Lyman Trumbull, chair of the Senate Judiciary Committee, proposed what ultimately became the Civil Rights Act of 1866. As enacted, the first section of the Act provides:

[A]ll 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; and such citizens, of every race and color . . . 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, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

The second section declared that anyone who, acting under color of law, violated rights secured by the first section was guilty of a misdemeanor.

The remaining sections adopted the enforcement structure of the Fugitive Slave Law of 1850, vesting jurisdiction over such misdemeanors in the U.S. district courts and providing concurrent jurisdiction over state court cases involving persons who were unable to enforce in state court the rights guaranteed by the first section.

There was substantial uncertainty in the Thirty-Ninth Congress as to whether Section 2 of the Thirteenth Amendment provided Congress adequate authority to pass the bill. Opponents argued that because Section 1 of the Amendment abolished slavery, the end pursued by any enforcement legislation must be the demise of "the status or condition of slavery." They argued that appropriate legislation would have a tight means-ends fit, like laws providing the privilege of habeas corpus for any person held as a slave. The Civil Rights Act was not appropriate legislation because it "confer[red] civil rights which are wholly distinct and unconnected with the status or condition of slavery" and conferred these rights on people of all races, not just the slaves freed by Section 1. Therefore the Act lacked a "logical and legal connection" to the Amendment.

Unlike most opponents of the Act, who would have been content with its defeat, Representative John Bingham supported the substantive rights conveyed by the Act, regarding them as natural rights belonging to

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131. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.
132. Id. § 2.
134. Id. at 476 (statement of Sen. Willard Saulsbury, Sr.).
135. Id. at 499 (statement of Sen. Edgar Cowan).
136. Id. at 476 (statement of Sen. Willard Saulsbury, Sr.).
137. Id.
all citizens.\textsuperscript{138} However, in his view, Section 2 did not empower Congress to “reform the whole civil and criminal code of every State government.”\textsuperscript{139} Thus, Bingham voted against the Act\textsuperscript{140} but recommended the passage of what would become the Fourteenth Amendment in order to shore up the constitutional basis of the rights conveyed by the Act.\textsuperscript{141}

The Act’s sponsors and supporters, particularly Senator Trumbull and Representative Wilson, mounted a two-pronged defense of the Act. They defended it both as appropriate prophylactic legislation under Section 2 of the Thirteenth Amendment to protect the rights of former slaves, and as an exercise of Congress’s implied power under \textit{McCulloch} to enforce the natural rights of all citizens.\textsuperscript{142} Viewed as a whole, their arguments reveal a clear view of how they understood Section 2 to operate as well as important insights on how \textit{McCulloch} and \textit{Prigg} relate to the scope of congressional power.

For Section 2 purposes, supporters characterized the Act as an abrogation of the Black Codes, passed on behalf of “persons who are liable to be reduced to a condition of slavery.”\textsuperscript{143} Trumbull and Wilson agreed with their critics that the end that Congress could pursue under Section 2 was “defined by the Constitution itself”—specifically, to give “effect to the great declaration that slavery shall not exist in the United States,”\textsuperscript{145} and to “maintain[...]. . . freedom.”\textsuperscript{146} The real point of departure between the Act’s supporters and opponents was on the question of what means were appropriate to that end. As Trumbull described, Congress’s chosen means was the elimination of the Black Codes, which instituted “the very restrictions which were imposed . . . in consequence of the existence of slavery,”\textsuperscript{147} even if they did “not make a man an absolute slave.”\textsuperscript{148} Thus, the Act required equal protection of the same civil rights the Black Codes had denied to African Americans.\textsuperscript{149} Wilson explained that the bill’s

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\item \textsuperscript{138} Id. at 429–30 (statement of Rep. John Bingham).
\item \textsuperscript{139} Id. at 1293.
\item \textsuperscript{140} See id. at 1367.
\item \textsuperscript{141} See id. at 1291–93 (“I should remedy [discrimination] not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future.”).
\item \textsuperscript{142} See, e.g., id. at 1117–18 (statement of Rep. James F. Wilson) (noting “it is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen” and contending Congress decides necessity of enforcement measures under \textit{McCulloch}).
\item \textsuperscript{143} Id. at app. 157 (statement of Rep. James F. Wilson).
\item \textsuperscript{144} Id. at 1118.
\item \textsuperscript{145} Id. at 474 (statement of Sen. Lyman Trumbull).
\item \textsuperscript{146} Id. at 1118 (statement of Rep. James F. Wilson); see also id. at 475 (statement of Sen. Lyman Trumbull) (noting “end in view” is to “secure freedom to all people in the United States”).
\item \textsuperscript{147} Id. at 474 (statement of Sen. Lyman Trumbull).
\item \textsuperscript{148} Id. at 475.
\item \textsuperscript{149} See id. (describing how various discriminatory state laws violated rights of free-
means were appropriate to the end because "[a] man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery." In other words, the Act's supporters defended it as a prophylactic measure, passed on behalf of former slaves and with a close causal relationship between the rights protected and the end of securing the demise of slavery.

Trumbull and Wilson defended Congress's power to make this causal assessment. According to Trumbull, Section 2 conveyed to Congress the "right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States." He emphasized that what is "appropriate legislation" for Section 2 purposes "is for Congress to determine, and nobody else." Wilson specifically invoked *McCulloch* as providing the guiding principle for how the Section 2 power "shall . . . be exercised." After quoting *McCulloch*, he asserted that the enforcement mechanisms utilized by the Act were certainly "appropriate" to safeguard "those rights which . . . are [a citizen's] sure defense against efforts to reduce him to slavery[.] . . . This settles the appropriateness of this measure, and that settles its constitutionality. Of the necessity of the measure Congress is the sole judge."

Trumbull and Wilson also propounded a non-Thirteenth Amendment constitutional defense of the Act, likely in response to concerns that the rights conveyed by the first section of the Act extended beyond the freed slaves to northern blacks and white people who were not at risk of re-enslavement. They characterized the rights protected by the first section as the natural rights of citizens, pointing to the Declaration of Independence and the Privileges and Immunities Clause (as interpreted in *Corfield v. Coryell*) for support. Neither man re-

150. Id. at 1118 (statement of Rep. James F. Wilson); see also id. (claiming Section 2 is sufficient basis for Act insofar as it protects "citizens who may be in danger of being subjected to slavery or involuntary servitude"); id. at 503–04 (statement of Sen. Jacob Howard) (arguing it would make "mockery of emancipation" to leave Congress without power to assist those who had been denied "family,. . . property,. . . [and] the right to acquire or use any instrumentalities of carrying on the industry of which he may be capable").

151. Id. at 475 (statement of Sen. Lyman Trumbull).

152. Id. at 43. Trumbull also acknowledged limits to this proposition, repeatedly disclaiming the intention (and implicitly the power) to legislate with respect to the "political rights or status of parties." Id. at 476. Wilson, too, disclaimed the right of Congress to legislate regarding suffrage, jury service, or the right to attend racially integrated schools. Id. at 1117 (statement of Rep. James F. Wilson).

153. Id. at 1118.

154. Id.

155. See id. (prefacing natural citizenship rights argument with acknowledgment that "this bill may have a broader application . . . which would reach the cases of persons designed to be protected by the [Amendment]").


flected on whether Congress had the power to define the rights of citizenship, but focused instead on its power to protect those rights. On that point, Wilson invoked both *McCulloch* and *Prigg* to demonstrate that Congress in fact had such power.\(^{158}\)

The dual arguments offered in support of the Act provide some insight as to both the nature of the Section 2 power as well as the role of *McCulloch* and *Prigg* in Reconstruction-era congressional thinking. The Thirteenth Amendment defense of the Act was limited in scope, emphasizing that the bill was a prophylactic measure designed to secure the freedom of the former slaves by vitiating the Black Codes. Trumbull and Wilson made no claim that *McCulloch* empowered Congress to interpret the substantive ends that Congress could pursue under Section 2, much less to opine on substantive questions of citizenship and rights.\(^{159}\) Rather, they invoked *McCulloch* and *Prigg* with respect to Congress's power to craft effective enforcement mechanisms, arguing that those cases gave Congress discretion to utilize a broad range of protective and remedial means, not just those directly and indispensably related to constitutional ends.

On this latter point, Trumbull and Wilson did assert repeatedly that, under *McCulloch*, Congress is the sole judge of the necessity of enforcement legislation. This interpretation, however, does not necessarily describe how a reasonable observer would have understood *McCulloch* in 1866. *Prigg* would have informed expectations as to how *McCulloch* would apply in operation, and *Prigg* demonstrated that Congress has broad but not complete discretion with respect to its choice of means, and that the Court does not defer completely to Congress's enforcement choices. Indeed, Trumbull and Wilson both pointed out that the Act was efficacious in securing the demise of slavery, a justification they would not have had to offer if it were universally understood that Congress was the sole judge of necessity. Thus, Trumbull's and Wilson's invocations of *McCulloch* do

\(^{158}\) Id. at 1118, 2512 (statements of Rep. James F. Wilson) (declaring *McCulloch* provides Congress discretion to choose means and *Prigg* "declared that the possession of the right carries with it the power to provide a remedy").

\(^{159}\) Professor Kaczorowski argues that the first section of the Act demonstrates that the Thirty-Ninth Congress understood Section 2 to empower Congress to define and confer civil rights as well as to enforce and protect them. Kaczorowski, supra note 69, at 225 (noting Wilson’s statement that “the right to exercise this power [to pass the Civil Rights Act] . . . runs with the rights it is designed to protect” (emphasis omitted)). However, this argument conflates the Section 2 defense of the bill with the natural rights defense of the bill. Wilson and Trumbull did not use Section 2 to justify their substantive efforts to define the rights of citizens.
not necessarily represent the prevailing view of that case in 1866, and were broader than necessary to sustain Congress’s choice of means in the Act.

C. Judicial Interpretation of Section 2

The Supreme Court consistently has invoked *McCulloch* as providing the proper framework for judicial review of Section 2 legislation. The way in which the Court has applied *McCulloch*, however, has varied. In the decades immediately following the ratification of the Thirteenth Amendment, the Court did not hesitate to evaluate the ends and sometimes even the means of Section 2 legislation. Since the late 1960s, however, the Court has held that *McCulloch* deference applies to Congress’s definition of the badges and incidents of slavery, as well as Congress’s determination regarding how to address them.

The first case to address the Section 2 power was *United States v. Rhodes*. Justice Noah Swayne, riding circuit, upheld the Civil Rights Act of 1866, stating that *McCulloch* demonstrated “the spirit in which the [Thirteenth] Amendment is to be interpreted, and developed fully the principles to be applied” in evaluating Section 2 legislation. Thus, in order to “abolish slavery” and “guard . . . against the recurrence of the evil,” Section 2 “authorizes congress to select . . . the means that might be deemed appropriate to the end. . . . Any exercise of legislative power within its limits involves a legislative, and not a judicial question. It is only when the authority given has been clearly exceeded, that the judicial power can be invoked.”

Swayne thus defined the constitutional “end” as the prevention of slavery itself. He noted the deference due to Congress’s choice of means, but also preserved a role for the judiciary to police the outer boundaries of the Section 2 power. Moreover, he noted the close causal link between the Act and the end sanctioned by Section 1: “Blot out this act and deny the constitutional power to pass it, and the worst effects of slavery might speedily follow. It would be a virtual abrogation of the amendment.”

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160. See infra notes 162–183 and accompanying text (discussing Court’s treatment of Section 2 legislation until mid-twentieth century).
161. See infra notes 183–189 and accompanying text (recounting change in Court jurisprudence with *Jones*).
162. 27 F. Cas. 785 (Swayne, Circuit Justice, C.C.D. Ky. 1866) (No. 16,151).
163. Id. at 792.
164. Id. at 793.
165. Cf. United States v. Cruikshank, 25 F. Cas. 707 (Bradley, Circuit Justice, C.C.D. La. 1874) (No. 14,897) (holding Enforcement Act of 1870 was not valid under Section 2 because it protected all persons against certain conspiracies, whereas Section 1 permitted only legislation on behalf of “colored citizens”), aff’d on other grounds, 92 U.S. 542 (1876).
166. *Rhodes*, 27 F. Cas. at 764. The Supreme Court in fact did hold that Congress
United States v. Harris, decided in 1883, marked the Court’s first collective consideration of Congress’s Section 2 power. The case involved a challenge to the second section of the Civil Rights Act of 1871, which provided criminal penalties for conspiracies to deprive “any person or class of persons,” regardless of race, “of the equal protection of the laws, or of equal privileges or immunities under the laws.” Interestingly, the Court cited McCulloch only for the proposition that “every valid act of Congress must find in the Constitution some warrant for its passage,” thus indicating that McCulloch supported judicial review of congressional enforcement legislation.

The Court stated that Section 2 empowered Congress “to protect all persons . . . in the enjoyment of that freedom which it was the object of the amendment to secure.” However, because the Civil Rights Act covered conspiracies against white people and persons who were never enslaved, the Court concluded that the Act “clearly cannot be authorized by the amendment which simply prohibits slavery and involuntary servitude.” Thus, the Court articulated its own sense of the ends sanctioned by the Thirteenth Amendment and determined that the means utilized by the Civil Rights Act were insufficiently related to those ends.

Ten months later, in the Civil Rights Cases, the Court struck down the Civil Rights Act of 1875, which had guaranteed “the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, or other places of public amusement” regardless of race. The Court held that neither the Thirteenth nor Fourteenth Amendment empowered Congress to pass the law.

Writing for the majority, Justice Bradley asserted that Section 1 of the Thirteenth Amendment not only “abolished slavery” but also “established . . . universal civil and political freedom throughout the United States.” Although he did not specifically cite McCulloch, he indicated that Congress’s Section 2 power tracked its power under the Necessary and Proper Clause and “clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.” This formulation marks the first appearance of the con-
cept of the "badges and incidents of slavery" in Thirteenth Amendment jurisprudence.\footnote{177} Even more notably, this formulation identifies the elimination of the badges and incidents of slavery, and not just of slavery itself, as a permissible end under Section 2.

For Justice Bradley, this expanded understanding of ends was not particularly consequential, as his definition of the badges and incidents of slavery excluded “[m]ere [private] discriminations on account of race or color,” such as those prohibited by the 1875 Act.\footnote{178} Thus, in terms of methodology, the majority engaged in searching review of the ends targeted by Congress and struck down the Act because it pursued an end not sanctioned by the Thirteenth Amendment.

Justice Harlan dissented, but his methodology did not differ substantially from the majority’s. Invoking \textit{Prigg}, he argued that “for the protection of rights guaranteed by the Constitution, [Congress] may employ such means, not prohibited, as are necessary and proper, or such as are appropriate, to attain the ends proposed.”\footnote{179} Justice Harlan agreed with the majority that the end toward which Congress can legislate under Section 2 is “the eradication, not simply of the institution [of slavery], but of its badges and incidents.”\footnote{180} Harlan differed from the majority in his definition of that concept, which in his view included discrimination by “such individuals and corporations as exercise public functions and wield power and authority under the State.”\footnote{181} He accordingly found the 1875 Act to be appropriate legislation within the meaning of Section 2.\footnote{182}

Thus, all of the Justices in the \textit{Civil Rights Cases} viewed \textit{McCulloch}, the Necessary and Proper Clause, or both as providing the framework for understanding the scope of the Section 2 power. Yet neither the majority nor the dissent asserted that \textit{McCulloch} required deference to Congress with respect to identifying the permissible ends of Thirteenth Amendment enforcement legislation. Rather, both opinions independently assessed the scope of the right conveyed by the Amendment and the definition of the badges and incidents of slavery. Only Justice

\footnote{177} See McAward, Defining, supra note 16, at 570 (noting first use of term in \textit{Civil Rights Cases}).
\footnote{178} \textit{The Civil Rights Cases}, 109 U.S. at 25. Justice Bradley stated that the aim of the Thirteenth Amendment was to eliminate legal restraints on “those fundamental rights which appertain to the essence of citizenship,” including compulsory service, restraint of movement, “disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities.” Id. at 22. He also stated that “[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make.” Id. at 24.
\footnote{179} Id. at 29 (Harlan, J., dissenting).
\footnote{180} Id. at 35; cf. id. at 36 (recognizing Congress may not “define and regulate the entire body of the civil rights which citizens enjoy”).
\footnote{181} Id. at 36.
\footnote{182} Id. at 51.
Harlan discussed the role of McCulloch deference in any depth, and he acknowledged that it was limited to Congress's choice of means.\textsuperscript{183}

Thus, in the two decades following the ratification of the Thirteenth Amendment, the Court utilized a consistent methodology in evaluating Section 2 legislation. While the Court acknowledged that McCulloch mandated deference with respect to Congress's choice of means, the Court did not understand those cases as constraining it from engaging in an independent assessment of the ends sanctioned by the Amendment, the meaning of the concept of the badges and incidents of slavery, or even some baseline review of Congress's choice of means. The Court showed little, if any, hesitation in declaring that Section 2 did not empower Congress to protect certain racial groups (e.g., white people) or to punish private acts of discrimination.\textsuperscript{184}

Jones v. Alfred H. Mayer Co., decided in 1968, marked a major shift in the Court's approach to Section 2.\textsuperscript{185} In that case, the Court upheld the property conveyance provisions of the 1866 Act as "appropriate legislation," accepting that McCulloch governed the scope of its review.\textsuperscript{186} However, it made an interesting analytical move regarding the ends that Congress can pursue under Section 2. The Court explicitly refused to consider whether Section 1 did anything more than "abolish[] slavery, and establish[] universal freedom," but embraced the holding of the Civil Rights Cases that Section 2 "empowered Congress to do much more," namely, "pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."\textsuperscript{187} Essentially, the Court acknowledged that there is a meaningful difference between the abolition of slavery and the abolition of the badges and incidents of slavery. But it treated the latter as a legitimate legislative end under Section 2, even though that end was not explicitly sanctioned by Section 1 of the Amendment. The Court also held that it would defer on two levels to legislation addressing the badges and incidents of slavery. First, it would review solely for rationality Congress's substantive "determin[ation] what are the badges and the incidents of slavery."\textsuperscript{188} Second, it would accord the same level of deference to Congress's decision how "to translate that determination into effective legislation."\textsuperscript{189} Thus, the Jones Court held

\begin{itemize}
  \item \textsuperscript{183} See id. (arguing Congress's role is to decide whether legislation is "best adapted to the end to be attained").
  \item \textsuperscript{184} See, e.g., supra note 171 and accompanying text (noting Court's rationale in striking down 1871 Civil Rights Act as beyond scope of Section 2 power because it covered whites and blacks who were never slaves).
  \item \textsuperscript{185} 392 U.S. 409 (1968).
  \item \textsuperscript{186} Id. at 439-40.
  \item \textsuperscript{187} Id. at 439 (quoting The Civil Rights Cases, 109 U.S. at 20 (majority opinion)).
  \item \textsuperscript{188} Id. at 440.
  \item \textsuperscript{189} Id. The Court endorsed Congress's finding that the property developer's race-based refusal to sell property was a badge and incident of slavery, and that banning such conduct was a rational way to address that relic of slavery. Id. at 442-43.
\end{itemize}
that it would defer to Congress’s assessment not only of appropriate means but also of substantive ends under the Thirteenth Amendment.

D. McCulloch, Jones, and Section 5 of the Fourteenth Amendment

While Jones remains the governing standard for Thirteenth Amendment legislation, the Court has tightened its review of legislation passed under Section 5 of the Fourteenth Amendment, the text of which is virtually identical to Section 2. In City of Boerne v. Flores, the Court asserted that it alone has power to “determine what constitutes a constitutional violation,” and therefore to set the ends that Congress can pursue legislatively. Boerne also created a framework under which the Court will evaluate the fit between statutory means and constitutional ends. It will ask whether there is “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”

Many have criticized Boerne’s reinvigoration of the judicial role, while others defend it as “the first modern reiteration . . . of time-honored constitutional and remedial principles.” While a full evaluation of Boerne is well beyond the scope of this piece, it is possible to read Boerne simply as the Court’s effort to apply in the Fourteenth Amendment context the understanding of McCulloch that prevailed during the antebellum and Reconstruction eras. The Court’s assertion of interpretive supremacy, acknowledgment of Congress’s “wide latitude” in determining

190. See United States v. Beebe, 807 F. Supp. 2d 1045, 1049 (D.N.M. 2011) (“Jones remains the controlling relevant precedent in interpreting Section Two of the Thirteenth Amendment.”).

191. Compare U.S. Const. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”), with id. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”).


193. Id. at 519.

194. See, e.g., Caminker, supra note 46, at 1133 (“While Boerne itself . . . might be explicable on narrow grounds, the other statutory provisions invalidated in Boerne’s wake should have been upheld . . . .”); Michael W. McConnell, Institutions and Interpretation: A Critique of City of Boerne v. Flores, 111 Harv. L. Rev. 153, 165 (1997) (arguing Boerne limited Congress “to enforcing the Fourteenth Amendment as construed by the Court”).

195. Marci A. Hamilton & David A. Schoenbrod, The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment, 21 Cardozo L. Rev. 469, 470 (1999); see also Beck, Heart of Federalism, supra note 50, at 409 (arguing Boerne’s “analytical framework implements McCulloch’s promise to strike down pretextual exercises of Congressional power”); Ronald D. Rotunda, The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores, 32 Ind. L. Rev. 163, 190 (1998) (praising Boerne as proof that limits exist on Congress’s Section 5 power).

196. Admittedly, the Court did not frame its analysis in these terms but rather examined the ratification history of the Fourteenth Amendment for evidence of intent to expand Congress’s substantive interpretive power. See Boerne, 521 U.S. at 520–24 (reading legislative history as confirming remedial, rather than substantive, nature of Section 5). But see Engel, supra note 46, at 117 (questioning majority’s reading of legislative history).
how best to “remedy or prevent unconstitutional actions,” and effort to articulate a standard to police the limits of that latitude are entirely consistent with the antebellum- and Reconstruction-era understanding of McCulloch described above.

Many have noted the tension between Boerne and Jones and have assumed that the deference embraced by Jones is truer to McCulloch than the more active review espoused by Boerne. Indeed, because the Court has struck down a significant amount of Fourteenth Amendment legislation under the Boerne standard, some have encouraged Congress to use Section 2 as an alternative source of power to protect a broad array of civil rights. While this strategy is rational given Jones, it is not at all clear that the Court would reaffirm Jones’s holding regarding standards for judicial review if the issue were presented today. Nor is it clear that the Court should, as the best understanding of the ratification and immediate post-ratification history of the Thirteenth Amendment creates space for more searching and meaningful review of Section 2 legislation than Jones contemplates.

III. RESTORING THE McCULLOCH VISION OF SECTION 2

A. Identifying the Ends of the Thirteenth Amendment

Section 2 gives Congress the “power to enforce this article by appropriate legislation.” Thus, Congress is empowered “[t]o put in execution” and “to cause to take effect” the right conveyed by Section 1 of the amendment, namely, the right to be free from “slavery” and “involuntary servitude.” As McCulloch, Prigg, and the history of Section 2 in

198. See supra notes Parts I.A, II.A, and II.B (describing earlier understanding of McCulloch).
199. See, e.g., Amar, Intratextualism, supra note 115, at 822–23 (noting inconsistency between Boerne and Jones and rejecting argument that Jones should be disregarded in Boerne’s favor); Lawrence G. Sager, Commentary, A Letter to the Supreme Court Regarding the Missing Argument in Brzonkala v. Morrison, 75 N.Y.U. L. Rev. 150, 152 (2000) (arguing Jones may be understood after Boerne as exercise of Congress’s remedial authority and that Congress has authority to address “enduring ‘relics’ of slavery”). But see McAward, Scope, supra note 15, at 79–81 (noting tension and stating “Jones is arguably a remnant of the past”).
200. See, e.g., Sager, supra note 199, at 152–53 (arguing Violence Against Women Act is valid because discrimination against women is “enduring, pervasive, and tentacular,” similar to “badges, incidents, and relics of slavery” (internal quotations omitted)).
204. U.S. Const. amend. XIII, § 1.
Congress and the courts all make clear, the judiciary retains the final power to interpret these terms and to establish what ends Congress may pursue. While Prigg implicitly acknowledged that Congress can precede the Court in interpreting particular constitutional provisions, the Court demonstrated that it would not hesitate to review that interpretation de novo.

Section 1 uses terms that had well-established and virtually synonymous meanings—focused on labor bondage—when the Amendment was ratified. Most of the Court’s Section 1 jurisprudence has focused on the meaning of involuntary servitude and consistently has emphasized that Section 1 conveys a right to be free of coerced labor. The most recent Section 1 case was United States v. Kozminski, where the Court stated that involuntary servitude within the meaning of Section 1 requires a showing of labor “enforced by the use or threatened use of physical or legal coercion.”

With respect to the abolition of slavery, the Court has characterized Section 1 as a “grand yet simple declaration of the . . . freedom of four millions of slaves.” In the Civil Rights Cases, the Court stated that Section 1 “establish[ed] . . . universal civil and political freedom throughout the United States.” While it is sensible to equate the abolition of slavery with the conferral of freedom, the Court has never explored how the concept of universal civil and political freedom might translate to an affirmative self-executing right under Section 1. Indeed, the Civil Rights Cases Court obviously did not regard freedom from private race discrimination as an essential aspect of the freedom conferred by Section 1.

The Court also has not explored in any depth whether Section 1 “itself did any more than” abolish slavery. Although there have been periodic suggestions in dicta and dissent that Section 1 itself “prevents the imposition of any burdens or disabilities that constitute badges of slavery

205. See supra Parts I, II.A (discussing McCulloch, Prigg, and legislative history of Section 2). But see Balkin, supra note 6, at 1823 (arguing Reconstruction Amendments “presumed that Congress and the courts were coequal partners in interpreting and enforcing these provisions”).


207. See Joseph E. Worcester, A Dictionary of the English Language 1314, 1352 (1860) (defining “slavery” as “servitude; bondage” and “servitude” as “slavery; bondage”).

208. 487 U.S. 931, 944 (1988); see also Plessy v. Ferguson, 163 U.S. 537, 542 (1896) (“Slavery implies . . . the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services.”).


211. See id. at 20–25 (holding refusal by private inn owner to serve black patrons “has nothing to do with slavery or involuntary servitude”).

or servitude, the Court has never held this to be the case. Indeed, Jones reserved this question while, at the same time, quoting the Civil Rights Cases for the proposition that Section 2 allows Congress to "abolish all badges and incidents of slavery in the United States." As discussed above, this formulation simultaneously recognizes the distinction between slavery and its badges and incidents and treats both as proper ends that Congress can pursue under Section 2.

Even though the Civil Rights Cases formulation has become part of the Thirteenth Amendment "canon[,]" it is not self-evidently correct that Congress can pursue the badges and incidents of slavery as ends in themselves. Certainly, the Court has never held outright that Section 1 extends that far, and the language of Section 1 as well as the history surrounding the Civil Rights Act of 1866 all point to a more limited understanding of the ends sanctioned by the Amendment. In the debates over the 1866 Act, it was widely agreed that the sole end that could be pursued by Congress under Section 2 was ensuring the continued abolition of slavery and protecting a meaningful state of civil freedom for the former slaves.

The impact of the Civil Rights Cases formulation hinges on how one defines the concept of the "badges and incidents of slavery." If it refers only to the legal apparatus of slavery—the constellation of rights that inhere in slaveowners and restrictions that bound slaves—then Section 1 did necessarily dismantle that system and void those laws. Under this definition, Section 2 legislation would have a limited focus on public laws that attempted to reestablish that system. If, however, the concept of the "badges and incidents of slavery" refers to a broader set of public and private discriminatory practices, disaggregated from the corpus of slave law, treating the elimination of the badges and incidents of slavery as an end in itself for Thirteenth Amendment purposes would radically in-

213. Plessy, 163 U.S. at 555 (Harlan, J., dissenting); see also Bailey v. Alabama, 219 U.S. 219, 241 (1911) ("The words involuntary servitude have 'a larger meaning than slavery.' . . . The plain intention was to abolish slavery of whatever name and form and all of its badges and incidents." (quoting The Slaughter-House Cases, 83 U.S. (1 Wall.) at 69)).
215. See supra notes 175-189 and accompanying text (discussing Court’s analysis of scope of Section 2 power in Civil Rights Cases and Jones).
217. U.S. Const. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").
218. See supra Part II.B (discussing legislative history of Civil Rights Act of 1866).
219. See supra notes 134, 144-146 and accompanying text (noting agreement between Act’s supporters and critics regarding proper end of Section 2 legislation).
crease the number of legislative means that might be appropriate in achieving that end.

Given the Supreme Court's reluctance to decide whether Section 1 "itself did any more than" abolish slavery, it is at least possible (and arguably better) to regard the Civil Rights Cases as an inartful statement of the true parameters of the Section 2 power. Section 2 does permit Congress to regulate the badges and incidents of slavery. However, it does so not because such badges and incidents are themselves necessarily unconstitutional, but because such regulation is a means to secure the demise of slavery. In other words, Section 2 clothes Congress with power to pass all laws necessary and proper, including laws targeting the badges and incidents of slavery, to ensure the permanent abolition of slavery.

This theory is consistent with the primary justification offered by the sponsors of the Civil Rights Act of 1866, who did not argue that the Black Codes violated Section 1 of the Amendment. While repressive, the Codes did not effect a wholesale return of slavery. At the same time, it was widely agreed that they were an effort to shape a labor system as close to slavery as possible without crossing the line. By voiding these laws and conveying a right to be free from racial discrimination in the exercise of basic civil rights, the Civil Rights Act ensured that the law's beneficiaries could not "be reduced to slavery."

This theory also would harmonize the Supreme Court's approach to Congress's Thirteenth and Fourteenth Amendment enforcement powers. In Boerne, the Court claimed for itself the power to "determine what constitutes a constitutional violation," but acknowledged that Congress is empowered to regulate some constitutional conduct in a prophylactic effort to "remedy or prevent unconstitutional actions and measures." In the Thirteenth Amendment context, the same analytical structure applies. The Court has the final word over what constitutes slavery and involuntary servitude. And Congress is empowered to regulate the badges and incidents of slavery because such legislation is prophylactic. It regulates conduct that does not otherwise violate Section 1 of the Amendment in order to prevent unconstitutional conduct—namely, slavery and involuntary servitude.

221. See The Civil Rights Cases, 109 U.S. 3, 20 (1883) ("[The Thirteenth Amendment] clothes Congress with power to pass all laws necessary and proper for abolishing badges and incidents of slavery in the United States.").
222. See supra notes 143-150 and accompanying text (describing arguments of supporters of 1866 Civil Rights Act).
225. Id. at 518-20.
Thus, hewing to current Supreme Court doctrine regarding the right conveyed by Section 1 of the Thirteenth Amendment has several virtues and limited vices. Focusing on coerced labor takes seriously the text of Section 1 and comports with the understanding advanced by the Amendment’s sponsors during the debates over the 1866 Act. It also aligns the Thirteenth and Fourteenth Amendment enforcement powers post-Boerne. And while it reinterprets the language of the Civil Rights Cases, it does so in a manner that preserves Congress’s ability to regulate the badges and incidents of slavery.

Of course, questions remain. How is Congress to identify the badges and incidents of slavery? And what latitude does Congress have in regulating them? The next sections address these issues.

B. Defining the Badges and Incidents of Slavery

The concept of the badges and incidents of slavery is susceptible to a range of definitions. Some have asserted that the concept refers only to public laws, while others claim it encompasses private discrimination based on race or other immutable characteristics. I have argued elsewhere that the concept in fact has a more limited meaning, discernible from the historical usage of the terms “badge” and “incident” of slavery prior to the Civil Rights Cases. Drawing from that history, I have proposed that the concept refers to (and therefore that the Section 2 power is limited to) “public or widespread private action, based on race or previous condition of servitude, that mimics the law of slavery and has significant potential to lead to the de facto re-enslavement or legal subjugation of the targeted group.”

Even if mine is the most supportable definition, there are many approaches that likely would withstand the deferential rationality review mandated by Jones. Congress might determine, for example, that because arbitrary prejudice was at the core of southern chattel slavery, “any act...
motivated by arbitrary class prejudice was therefore a badge and incident of slavery. Under this definition, Congress could then use Section 2 to regulate virtually any discriminatory act committed against any subset of the population. Such a construction would render the Fourteenth Amendment enforcement power superfluous and would raise federalism concerns by permitting Congress to regulate conduct generally thought to be subject to state police power. Therein lies the risk of Jones: Giving Congress the power to adopt its own meaning of the badges and incidents of slavery essentially permits Congress to set the scope of its Section 2 power. Such a possibility emphasizes the importance of preserving a meaningful role for the judiciary in defining the badges and incidents of slavery and, with it, determining the outer bounds of the Section 2 power.

But if, as the previous section argues, Congress can regulate the badges and incidents of slavery not as ends in themselves, but as a means to the end of preventing or remediying coerced labor, was Jones necessarily wrong to give Congress the power to define the badges and incidents of slavery? Just as McCulloch posited that the ends pursued by Congress must be "legitimate," it held that Congress deserves substantial discretion in its assessment of how to achieve constitutional ends. If the "badges and incidents of slavery" is a category of means, then Congress arguably should have considerable leeway in dealing with that category of conduct.

The problem with the "badges and incidents of slavery" formulation is that it is still a concept that requires independent definition, whether it is treated as a means or an end. There must be a substantive framework for understanding what a badge and incident of slavery is before Congress can designate a particular type of conduct as falling into that category, much less decide how to regulate it. Even if Congress's regulatory choices warrant deference, there is value and wisdom in giving the Court power to supervise the definitional aspect of this endeavor, even if such definitions are not constitutional questions per se. Indeed, the Court is institutionally equipped to articulate a definitional framework.

231. Buchanan, supra note 228, at 177.
232. Cf. Balkin, supra note 6, at 1820 ("Just as the denial of equal civil rights was a badge and incident of slavery [redressable under Section 2 of the Thirteenth Amendment], the enjoyment of equal civil rights was a badge and incident of citizenship [enforceable under Section 5 of the Fourteenth Amendment].").
233. Others are more sanguine on this point. See, e.g., Amar, Intratextualism, supra note 115, at 824 (noting concept of "badges and incidents of slavery" identifies desirable "middle ground" where "Congress has less than plenary and more than remedial power"). However, Jones does not cabin Congress's substantive or remedial discretion in any meaningful way.
234. See supra Part II (discussing influence of McCulloch and Prigg on early understanding of Congress's Section 2 Power).
235. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("We admit, as all must admit, that the powers of government are limited . . . ").
for the badges and incidents of slavery, guided by objective historical sources rather than its own policy preferences. Without the Court’s involvement and commitment to a distinct analytical methodology, Congress would have unbounded discretion to set the scope of its Section 2 power.

C. Regulating the Badges and Incidents of Slavery

Even if one agrees that the Court has the ultimate authority to define and enforce the concept of the “badges and incidents of slavery,” Congress’s institutional expertise allows it to determine whether regulating a particular badge or incident of slavery will make the violation of Section 1 less likely. McCulloch indicates that these types of judgments deserve substantial but not wholesale deference. That opinion disclaimed judicial power to assess the “degree of necessity” between the chosen means and the constitutional end but as Part I notes, it did not disclaim the Court’s power to consider the baseline questions of whether legislation is “plainly adapted to” and “tend[s] directly to” a legitimate end. Indeed, Prigg shows that the Supreme Court did not believe itself disempowered to review Congress’s chosen means of enforcing the Fugitive Slave Clause. Thus, McCulloch—particularly as understood and applied in the years leading up to the ratification of the Thirteenth Amendment—established that the Court owed Congress substantial deference with respect to its factual and causal assessments, yet it did not entirely foreclose judicial review of the causal and regulatory decisions underlying executory legislation.

In other constitutional contexts, the Supreme Court recently has taken a more vigorous role in evaluating Congress’s causal assessments and regulatory choices—perhaps in an attempt to re-embrace the true legacy of McCulloch as embodied in Section 2. In United States v. Comstock, the Court upheld a federal civil commitment statute under the Necessary and Proper Clause. While a five-member majority cited McCulloch and discussed the deference due Congress’s means-ends assessments, it ultimately relied on its own assessment of “five considerations” in determining that the statute was an appropriate means of executing Congress’s

236. See McAward, Defining, supra note 16, at 570–82 (discussing legal and popular uses of terms “badge” and “incident” predating Thirteenth Amendment and Civil Rights Cases).


238. Id. at 419, 421; see also Marshall, Constitution, supra note 63, at 186–87 (justifying and explaining Court’s opinion in McCulloch); Marshall, Union, supra note 30, at 100 (same).

239. See Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 568 (1842) (discussing Congress’s chosen method of enforcing Fugitive Slave Clause); see also supra notes 77–87 (discussing Prigg Court’s review and selective approval of Fugitive Slave Act of 1793).

enumerated powers. Separate opinions by the other Justices were even more candid about the need for the Court to assure itself that Congress was pursuing a constitutional end and had not adopted means too attenuated from that end.

Recent Commerce Clause and Fourteenth Amendment decisions also provide examples of this shift in the Court's approach. For Commerce Clause purposes, the analogous question is whether the conduct that Congress has chosen to regulate has a substantial effect on interstate commerce. After decades of deferring to Congress on this issue, the Court took a much more active role in United States v. Lopez and United States v. Morrison, in which the Court struck down, respectively, the Gun-Free School Zones Act of 1990 and a federal civil remedy for the victims of gender-motivated violence. While the precise analyses of those cases are not relevant here, two aspects of the Court's methodology in assessing "substantial effects" deserve comment. First, in Lopez, the Court encouraged (but did not require) Congress to develop a factual record and issue findings that "would enable [the Court] to evaluate the legislative judgment" regarding the effect of the regulated activity on interstate commerce. Second, in both Lopez and Morrison, the Court demonstrated its willingness to scrutinize Congress's causal assessments carefully and to vindicate its own judgment that the conduct in question was too attenuated from interstate commerce to satisfy the demands of the Commerce Clause.

Similarly, the Court embraced a far less deferential standard for its review of Fourteenth Amendment enforcement legislation in Boerne. The

241. Id. at 1965.
242. See id. at 1975 & n.7 (Thomas, J., dissenting) (criticizing Court for skipping McCulloch's first step of determining whether end is legitimate).
243. See id. at 1966-67 (Kennedy, J., concurring in the judgment) (arguing Court should use more than rational basis scrutiny in evaluating means-ends fit); id. at 1970 (Alito, J., concurring in the judgment) ("The Necessary and Proper Clause does not give Congress carte blanche.").
246. It is not entirely clear that Lopez and Morrison mark a distinct new era in Commerce Clause jurisprudence. See Gonzales v. Raich, 545 U.S. 1, 23 (2005) (referring to "larger context of modern-era Commerce Clause jurisprudence" beyond Lopez and Morrison).
247. 514 U.S. at 563. But cf. Raich, 545 U.S. at 21 ("[W]hile we will consider congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress' authority to legislate.").
248. See Lopez, 514 U.S. at 563-67 ("P)ossession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."); see also Morrison, 529 U.S. at 609-15 (summarizing Lopez); cf. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2646 (2012) (Scalia, Kennedy, Thomas, and Alito, JJs., dissenting) ("[T]he Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not carte blanche for doing whatever will help achieve the ends Congress seeks by the regulation of commerce.").
Court clarified that Congress can enforce Fourteenth Amendment rights by regulating otherwise constitutional conduct, but held that there must be "a congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end."\(^{249}\) This standard is meant to help the Court evaluate whether Congress's regulation of constitutional conduct will substantially prevent or remedy unconstitutional conduct.\(^{250}\) As in the Commerce Clause context, the Court has encouraged Congress to build a detailed record—here, demonstrating "evidence of a pattern of constitutional violations" by the States.\(^{251}\) Moreover, the Court has embraced a less deferential stance in determining whether the statute in question "is an appropriate response to this history and pattern."\(^{252}\)

Each decision mentioned above seems to be grounded in the implicit acknowledgment that the Court must play a more meaningful role in scrutinizing Congress's causal assessments and regulatory choices than the post-New Deal reading of \textit{McCulloch} would have it.\(^{253}\) Even if some of those decisions are susceptible to criticism that the Court has supplanted \textit{McCulloch}'s framework of deference with too stringent a level of scrutiny,\(^{254}\) their essential insight can guide reform efforts in the Thirteenth Amendment context.

\(^{249}\) City of Boerne v. Flores, 521 U.S. 507, 520 (1997).
\(^{250}\) Id. at 519 (noting congruence and proportionality standard draws line between "measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law").

\(^{253}\) See Gonzales v. Raich, 545 U.S. 1, 52 (2005) (O'Connor, J., dissenting) (expressing concern that unless Congress proffers more than "mere assertion" in favor of its regulation, "the Necessary and Proper Clause will always be a back door for unconstitutional federal regulation"); cf. Printz v. United States, 521 U.S. 898, 923 (1997) (describing Necessary and Proper Clause as "the last, best hope of those who defend ultra vires congressional action").

\(^{254}\) See Caminker, supra note 46, at 1147 (arguing Boerne "clearly deviated from the Court's longstanding articulation and application of the more deferential \textit{McCulloch} means-ends standard"); Powell, supra note 34, at 750–51 (arguing Comstock evinces "a belief in the constitutional propriety of subjecting congressional choices to close judicial examination that is fundamentally alien to" \textit{McCulloch}). In United States v. Morrison, for example, the Court struck down a provision of the Violence Against Women Act even though there was an extensive congressional record documenting the link between gender-motivated violence and interstate commerce. 529 U.S. at 615 (rejecting Congress's findings linking violent crime to interstate commerce as "attenuated" and "unworkable");
How might this insight translate to the Thirteenth Amendment context? First, it points to the value of a well-constructed congressional record. Although the Court cannot mandate that Congress follow particular procedures, it would be helpful if Congress, in passing Section 2 legislation, developed a record that demonstrated a link between the regulated conduct and the threat of Section 1 violations.

Second, the Court must play some role in reviewing Congress’s findings. While *McCulloch* clearly contemplates judicial deference, it also provides administrable standards for judicial review—the Court can ask whether Congress’s regulation will “tend[] directly to” prevent or remedy violations of Section 1. Conversely, the Court can examine whether Congress’s regulation has only “distant conduciveness to the object.” Perhaps the best rule would be for the Court to defer to a congressional record that adequately supports the causal link, even if there is other, conflicting evidence on point. Indeed, several commentators “have suggested that the thoroughness of legislative procedures—e.g., whether Congress took a ‘hard look’—might sometimes make a determinative difference” with respect to whether the Court is willing to defer to congressional findings. One might call this a modified congruence and proportionality standard that vindicates *McCulloch* as understood by the framers of the Thirteenth Amendment: a standard that balances a meaningful judicial role with the deference due to Congress.

The clearest rejoinder to these proposals is that the sponsors of the Civil Rights Act of 1866 explicitly stated their understanding that the Court would have no role in reviewing the efficacy of Thirteenth Amendment legislation. Trumbull and Wilson repeatedly invoked *McCulloch* and *Prigg* and claimed that such a judgment was exclusively in Congress’s province. As discussed above, however, their claims on this point are not in line with the then-prevailing understanding or the expected application of those cases. Given the language of *McCulloch*, Marshall’s public explanations of the case’s holding, and the Court’s own post-*McCulloch* precedent, including *Prigg*, an informed observer in the 1860s would have perceived a meaningful role for the Court even with respect to assessing the means-ends fit of federal legislation. Trumbull’s and Wilson’s claims are not solely determinative of the original public meaning of Section 2, and, particularly on this point, unfairly and un-

contra id. at 634 (Souter, J., dissenting) (defending rationality of Congress’s judgment “in view of the data amassed”).

256. Marshall, Union, supra note 30, at 100.
257. *Morrison*, 529 U.S. at 663 (Breyer, J., dissenting) (collecting sources).
258. See supra notes 151–154 and accompanying text (describing defense of congressional power by Trumbull and Wilson).
259. See supra Part II.B (evaluating Senator Trumbull and Representative Wilson’s invocations of *McCulloch* and *Prigg*).
necessarily minimize the role of the judiciary in policing the outer bounds of the Section 2 power.

How might these proposals work with respect to real legislation? The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act is the most recent law passed under Congress's Section 2 power. In relevant part, the law imposes criminal penalties on anyone who willfully injures another because of that person's "actual or perceived race, color . . . or national origin."260 In its findings, Congress noted that race-based hate crimes were widespread and had serious consequences for the victim and her community.261 Then, Congress stated:

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.262

This analysis is surely rational on all counts and thus comports with Jones.263 But the analysis lacks two critical elements. First, although it implicitly suggests that the badges and incidents of slavery require a historical tie to slavery, it does not explicitly invoke a definition of that concept, much less attempt to satisfy its elements. Second, the analysis lacks any indication that the victims of race-based hate crimes are at risk of having their Section 1 rights violated, either by being treated as slaves or denied basic civil freedom; nor does the analysis feature any finding that federalizing such crimes will alleviate that risk. If Congress did amass a record that would support such findings, the Court would almost certainly defer to it. But Congress has not done so.

To date, Congress has used Section 2 to pass a relatively limited range of laws, most of which have focused directly on slavery and involuntary servitude.264 The few that have sought to regulate the badges and incidents of slavery (such as the Civil Rights Act of 1866 and the recent

261. Id. § 249 note.  
262. Id.  
264. See, e.g., 18 U.S.C. § 1581 (2006) (criminalizing peonage); id. § 1584 (criminalizing involuntary servitude); id. §§ 1585–1588 (criminalizing slave trade); id. § 1589 (criminalizing forced labor); id. § 1590 (criminalizing human trafficking); id. § 1591 (criminalizing sex trafficking).
Hate Crimes Act) have focused on widespread race-based discrimination. Thus, Congress has not yet invoked the full range of its Section 2 power as interpreted in Jones.

There is, however, no guarantee that this restraint will last. As the Court more strictly scrutinizes legislation passed under Congress's Commerce and Fourteenth Amendment powers, it is entirely plausible that Congress could rely more heavily on its Thirteenth Amendment enforcement power to address a wide variety of racial and nonracial civil rights issues. Indeed, many scholars have urged Congress in this direction. Thus, it is important for practical as well as theoretical reasons to reconsider Jones and to theorize more precisely regarding Congress's power to define and regulate the badges and incidents of slavery.

**CONCLUSION**

Congress's power to enforce the Thirteenth Amendment is commonly assumed to track its power to pass executory legislation, as described in *McCulloch v. Maryland*. However, the sense of plenary congressional power that conventionally accompanies invocations of *McCulloch* is not, in fact, an accurate view of that opinion, much less the Section 2 power. *McCulloch* preserved a role for the judiciary to review actively the ends of federal legislation and deferentially (but meaningfully) the means utilized by Congress to achieve those ends. This judicial role was clearly part of the understanding and anticipated application of *McCulloch* by the time the Thirteenth Amendment was ratified and the Civil Rights Act of 1866 enacted.

In the Section 2 context, this reading of *McCulloch* permits a greater judicial role in defining the ends sanctioned by the Thirteenth Amendment as well as the concept of the badges and incidents of slavery. And while it mandates deference to Congress's choices in regulating the badges and incidents of slavery, it also permits some level of judicial oversight of the means-ends fit between legislation and the ends set forth in Section 1 of the Amendment.

Given the Supreme Court's recent willingness to strike down legislation passed pursuant to Congress's Commerce Clause and Section 5 powers, there is an understandable desire to identify an alternative constitutional basis for Congress's civil rights agenda. However, Section 2 of the Thirteenth Amendment alone cannot bear this weight. It would be far better to make sure that the real *McCulloch* view of congressional power is vindicated in every enforcement context. Such an approach might require a revision of Jones and even a modification of the congruence and proportionality standard of *Boerne*, but it would be preferable to

265. See supra notes 6–14 and accompanying text (detailing scholars' use of Thirteenth Amendment to address various social problems).
the current view that would shoehorn all civil rights enforcement into the Thirteenth Amendment.