

THE SHIELD OF NATIONAL PROTECTION

The Text and History of Section 5 of the
Fourteenth Amendment

Text and History
Narrative Series





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The Text and History of Section 5 of the Fourteenth Amendment

By David H. Gans and Douglas T. Kendall

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Executive Summary

This report is being released at an important moment in the history of the Supreme Court and our Constitution. The Supreme Court has a full set of important constitutional decisions to issue in the coming rush toward the end of its 2008 term – most notably, *Northwest Austin Municipal Utility District No. 1 (NAMUDNO) v. Holder*, a constitutional challenge to a critical part of the 2006 extension of the Voting Rights Act – and these cases will frame the confirmation debate over President Obama’s nomination of Judge Sonia Sotomayor to the Supreme Court. *The Shield of National Protection*, the second in CAC’s Text and History Narrative Series, is deeply relevant to both the Court’s much-awaited decision in *NAMUDNO* and to the debate over the Supreme Court’s future that will take place during the summer’s confirmation process.

NAMUDNO is an easy case when judged in light of the Constitution’s text and history. The Civil War Amendments—the Thirteenth Amendment’s prohibition of slavery, the Fourteenth Amendment’s protection of equality and liberty, and the Fifteenth Amendment’s guarantee of the right to vote—each grant to Congress the power to enforce its guarantees by “appropriate legislation.” Written against the backdrop of *Dred Scott v. Sandford*, the Supreme Court’s ruling that helped bring on the Civil War, these Amendments were ratified to change the balance of power between the States and the federal government and provide Congress with the tools to protect fundamental rights. The framers who wrote these Amendments did not trust the States to protect liberty, equality, and the right to vote, and were more than a little suspicious of the Supreme Court, which had, after all, profoundly erred in *Dred Scott*, announcing that African Americans “had no rights which the white man is bound to respect.”

Sadly, the Supreme Court has never allowed Congress to fully exercise the power granted by these Amendments. The Court’s errors started early on, during the end of Reconstruction, when the Court ruled that Congress had no power to protect the constitutional rights of freedmen and other Americans against “private” action. These rulings allowed groups like the Ku Klux Klan to roam and rampantly deprive citizens of their constitutionally secured rights. Conservative Justices

on the modern Court have compounded this error by reaffirming these early rulings and by creating new, picked-out-of-thin-air, restrictions on the exercise of federal authority under the Civil War Amendments.

During the April oral argument in *NAMUDNO*, the Court’s conservatives displayed marked hostility to the Voting Rights Act and seemed ready to invalidate a portion of the Act that requires federal “preclearance” before changes in voting laws and procedures can be made in certain States. Sadly, to date, the progressives on the Court have provided only modest pushback to the Court’s flouting of constitutional text and history, which is one of the reasons why CAC has argued that President Obama should nominate Justices who will follow the Constitution’s text and history, and show how our nation’s foundational document points in a progressive direction. The *Shield* demonstrates that in profound ways the Supreme Court has gotten the text and history of the Constitution dead wrong. Rather than using the election of President Obama as an excuse for backtracking on our constitutional commitment to protecting civil rights and liberties – as opponents of the Voting Rights Act urge – President Obama’s election is the perfect opportunity to finally get the text and history of the Civil War Amendments right. ■

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Introduction

Section 5 of the Fourteenth Amendment was written to provide Americans with a “shield of national protection,” but today this constitutional armor is riddled with debilitating cracks. In deliberately sweeping language, Section 5 provides Congress with authority to protect, by “appropriate” legislation, the new constitutional rights to liberty and equality guaranteed by the Fourteenth Amendment. Congress was empowered to step in both when states threatened constitutional rights and when states failed to protect their citizens against violence and discrimination by private actors.

Conditions in the South at the end of the Civil War demanded this dramatic shift in the balance of power between the federal and state governments. In late 1865, Southern state governments passed a host of harsh and repressive measures that stripped the newly freed slaves of virtually every right enumerated in the Constitution in an effort to re-institute forced labor. At the same time, the freedmen and their allies were the targets of unrelenting violence, crimes that almost invariably were ignored by Southern governments. These dire conditions, documented in exhaustive detail by the congressional committee that drafted the Fourteenth Amendment, form the parchment upon which the Amendment was written. The Amendment’s congressional framers quickly demonstrated their plain understanding of their Section 5 powers, passing a series of civil rights statutes that broadly attacked both state action and state inaction that resulted in the deprivation of constitutional rights. If these statutes had only been enforced as written, nearly a century of racial violence and much of Jim Crow segregation could have been averted, but, tragically, this never came to be.

Instead, in the first two decades after ratification of the Fourteenth Amendment, the Supreme Court cut out the core of Section 5, striking down federal laws that aimed to protect Americans against

Congress was empowered to step in both when states threatened constitutional rights and when states failed to protect their citizens against violence and discrimination by private actors.

violence and discrimination that state governments deliberately ignored and refused to redress. In a series of rulings in the 1870s and 1880s, the Supreme Court turned a blind eye to murder, rape, lynching, and other crimes against the former slaves and their allies, ruling that Congress could not punish private conspiracies to deprive individuals of federal constitutional rights. The Court refused to recognize that the federal criminal laws at issue were necessary because states were refusing to protect the freedmen, a textbook denial of the equal protection of the laws promised by the Fourteenth Amendment. On similar reasoning, the Court invalidated the Civil Rights Act of 1875, holding that Congress was powerless to forbid the exclusion of African American persons from a wide range of public accommodations.

These rulings in the cases of *United States v. Cruikshank*,¹ *United States v. Harris*,² and the *Civil Rights Cases*³ are just as momentously wrong as the Court's long discarded ruling in *Plessy v. Ferguson*,⁴ but they remain on the books today. In fact, in 2000, the Court's five-justice majority in *United States v. Morrison*,⁵ which struck down the civil rights remedy of the Violence Against Women Act ("VAWA"), suggested that these cases were somehow entitled to added weight because they were decided soon after the ratification of the Civil War Amendments. Should we then return to *Plessy* and overrule *Brown v. Board of Education*⁶ because the *Plessy* Court was nearer in time to the framing of the Fourteenth Amendment? The Reconstruction Court badly mangled the text and history of Section 5 when it comes to the ability of Congress to step in when states fail to protect their citizens. The Court needs to correct these errors and take these cases off the books, not build upon them. Like *Plessy*, these cases were "wrong the day" they were "decided,"⁷ and the Court should say so.

Instead, the Court has been working to overturn the one thing about Section 5 the Reconstruction Court got right. While gutting the ability of Congress to protect Americans against private violence and discrimination, a divided Court in *Ex Parte Virginia*⁸ at least recognized broad congressional authority to require state governments and their officers to respect constitutional guarantees. The modern Court has chosen to cut back on this 1880 ruling. In 1997, in *City of Boerne v. Flores*,⁹ the Court held that congressional legislation enforcing the Fourteenth Amendment is subject to searching review, demanding a showing that the legislation is congruent and proportional to violations of constitutional rights, as measured by the Court's jurisprudence. Using this newly minted congruence and proportionality rule,

the Court has curtailed a number of important civil rights statutes, holding that Congress had not gathered enough of a record of pervasive unconstitutional acts by state governments.

Boerne and subsequent cases treat congressional power to enforce the Fourteenth Amendment as a disfavored, second class power, withholding the broad deference the Court normally gives to Congress when exercising other powers explicitly enumerated in the Constitution. The Court justifies this unique oversight of Congress as necessary to protect the Court's role as the Constitution's final interpreter, as well as to protect our system of federalism,¹⁰ but the irony is palpable. The Fourteenth Amendment was intended to change the balance of power between the federal and state governments and it was written against the back drop of *Dred Scott v. Sandford*,¹¹ the Supreme Court's ruling that helped bring on the Civil War. The framers of the Fourteenth

Scholars of all political stripes - left, right, and center - have detailed how dramatically Boerne and subsequent cases depart from the text and history of the Fourteenth Amendment.

Amendment did not trust the states to protect fundamental constitutional rights and were more than a little suspicious of the Supreme Court, which had, after all, just interpreted the Constitution to declare that African American persons "had no rights which the white man is bound to respect."¹² For the Supreme Court to impose unique limits on Section 5 in the name of protecting judicial supremacy and states' rights is to ignore this history.

Scholars of all political stripes – left, right, and center – have detailed how dramatically *Boerne* and subsequent cases depart from the text and history of the Fourteenth Amendment,¹³ but the debate on the Court remains decidedly one-sided. Progressives on the Court have offered little pushback to the majority's rewriting of the text and history. They have not forcefully presented the case that Congress should enjoy broad judicial deference to its efforts to make the Amendment's promise of liberty and equality for all a reality.

This Term, the Supreme Court faces a crossroads in *Northwest Austin Municipal Utility District No. 1 v. Holder* (NAMUDNO), a case challenging Congress' 2006 decision to reauthorize a critical provision of the Voting Rights Act of 1965. To decide plaintiff's constitutional challenge, the Court

in *NAMUDNO* must choose whether it will chip away at the unjustifiable limits imposed by *Boerne* or whether it will instead extend these limits to the nearly identical language of the Enforcement Clause included in the Fifteenth Amendment, which protects against racial discrimination in voting. There is only one result consistent with the Constitution's text and history, and CAC's *amicus curiae* brief filed with the Court lays out that text and history, showing how our Reconstruction Framers made their intent to vest Congress with broad power to enact "appropriate legislation" abundantly clear in the debates over the Fourteenth Amendment. If the Roberts Court is to be guided by the Constitution's text and history, *NAMUDNO* should be a ringing endorsement of congressional power to protect fundamental rights, including the right to vote secured by the Voting Rights Act of 1965.

Unfortunately, if oral argument is any guide, *NAMUDNO* could become the most pernicious of the Court's modern cases on congressional power. At oral argument, the Court's conservative majority seemed poised to apply *Boerne* aggressively to invalidate the renewal of the Voting Rights Act, even though *Boerne* has never been applied to a Fourteenth Amendment case involving racial discrimination

If oral argument is any guide, the Voting Rights Act case could become the most pernicious of the Court's modern cases on congressional power.

and has never been applied at all in a Fifteenth Amendment case. Throughout the argument, these Justices, including those who profess to follow originalist methods, flatly ignored the text and history of the Fourteenth and Fifteenth Amendments, acting as if the Justices' role were

to decide whether Congress was correct to renew the Voting Rights Act's ban on racial discrimination in voting. For the Court to tie Congress' hands when it comes to enforcing rights at the heartland of the Fourteenth and Fifteenth Amendments would be an extravagant rewriting of basic constitutional text and principle.

It is time for the Court to start getting the text and history of Section 5 of the Fourteenth Amendment right. Section 5 gives Congress broad power to enforce the liberty and equality secured by that Amendment. It allows Congress to prevent and deter the unconstitutional acts of state and local governments, regulate both governmental and private actions to make equality a reality, and provide all

Americans with federal remedies to ensure that the promises made by our Reconstruction framers are not reduced to mere parchment protections. ■

The Text and Original Meaning of the Enforcement Clauses

The Fourteenth Amendment is one of three Amendments – the Thirteenth, Fourteenth, and Fifteenth – adopted shortly after the Civil War, each containing an enforcement clause.¹⁴ Phrased in nearly identical language, each Enforcement Clause confers on Congress the authority to enact “appropriate” legislation to “enforce” the rights guaranteed by each respective Amendment. The breadth of these specific grants of power to Congress was no accident. The framers of the Civil War Amendments explained – over and over again – that the Enforcement Clauses were written to give Congress a broad power to secure the constitutional rights guaranteed by the three Amendments. Indeed, they repeatedly made the point that Congress had to have a broad enforcement power if the new

The framers of the Civil War Amendments explained - over and over again - that the Enforcement Clauses were written to give Congress a broad power to secure the constitutional rights guaranteed by the three Amendments.

constitutional protections were to be effective, and actually enjoyed by the individual Americans they were intended to protect.

The stories of the three Enforcement Clauses are intertwined: the Fourteenth Amendment’s Enforcement Clause

was shaped by the country’s experience with the Thirteenth Amendment, and experience under the Fourteenth Amendment, in turn, helped to shape the enforcement power granted to Congress by the Fifteenth Amendment. Thus, because the story of the Fourteenth Amendment’s Enforcement Clause begins with the Thirteenth Amendment, this text and history narrative begins there as well.

The Thirteenth Amendment eradicated slavery and, for the first time in the Constitution’s history, explicitly gave Congress the power to enforce the freedom granted to the men and women held as slaves. In President Abraham Lincoln’s words, the Amendment was a “king’s cure” for the evils of slavery, which paved the way for “the reunion of all the states perfected and so effected as to remove all causes of disturbance in the future.”¹⁵ Passed at Lincoln’s urging and ratified by several states in his memory,

the Amendment radically transformed the Constitution.¹⁶ As the Amendment's framers explained, the Thirteenth Amendment would not only "obliterate the last lingering vestiges of the slave system [and] its chattelizing, degrading, and bloody codes";¹⁷ it would also "bring the Constitution into avowed harmony with the Declaration of Independence"¹⁸ and ensure that "the rights of mankind, without regard to color or race, are respected and protected."¹⁹

The grant of enforcement power to Congress was critical to secure the protection of fundamental rights, and true freedom. Not surprisingly, apologists for slavery objected vociferously to this new grant of power, complaining that it "confers on Congress the power to invade any State to enforce the freedom of the African in war or peace" and "strikes down the corner-stone of the Republic, the local sovereignty of the States"²⁰ Indeed, in their minds, the Amendment was "unconstitutional" because it "would revolutionize rather than amend the Constitution."²¹

This new congressional enforcement power was put to use almost immediately. As the 39th Congress met in late 1865 – before the formal announcement of the ratification of the Thirteenth Amendment – Southern states were trying to wipe out the promise of freedom. States across the South passed Black Codes, harsh and discriminatory laws that sought to re-institutionalize forced labor,²² and turned a blind eye to the daily "acts of cruelty, oppression, and murder"²³ that Southern whites perpetrated to terrify and intimidate the newly freed slaves. In Congress, "[w]itness after witness spoke of beatings and woundings, burnings and killings, as well as deprivations of property and earnings and interference with family relations – and the impossibility of redress or protection"²⁴

The framers of the Thirteen Amendment immediately pushed for legislation to enforce the promise of freedom inherent in the abolition of slavery. Senator John Sherman argued that the Thirteenth Amendment "secures to every man within the United States liberty in its broadest terms" and provides "an express grant of power to Congress to secure this liberty by appropriate legislation."²⁵ Senator Ly-

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man Trumbull similarly saw the Thirteenth Amendment’s Enforcement Clause as a grant of power to “secure freedom to all people in the United States. . . . [T]he clause . . . vests Congress with the discretion of selecting that ‘appropriate legislation’ which it is believed will best accomplish the end and prevent slavery.”²⁶ This view was common ground. Virtually all the framers agreed that the Enforcement Clause “meant, first, that Congress shall have the power to secure the rights of freemen to those men who had been slaves” and, “secondly, that Congress should be the judge as to what legislation is appropriate and necessary to secure these men the rights of free men”²⁷

These understandings drew on some of the most famous precedents on congressional power under the Constitution decided by the Supreme Court before the Civil War, *McCulloch v. Maryland*²⁸ and *Prigg v. Pennsylvania*.²⁹ In *McCulloch*, Chief Justice Marshall set out the foundational understanding of the scope of congressional power under Article I – that the Constitution explicitly authorizes congressional

The framers of the Thirteenth Amendment demonstrated their broad understanding of the Enforcement Clause in the debates over the Civil Rights Act of 1866.

legislation “appropriate” to carry out the powers enumerated in Article I of the Constitution.³⁰ *McCulloch*’s formulation, as the Supreme

Court’s Article I jurisprudence has recognized ever since, gave Congress broad regulatory authority. When Congress legislates to carry out one of its enumerated powers, it may use any appropriate means in aid of that power, so long as it does not run afoul of any specific constitutional prohibition. Judicial review of such legislation is narrow, limited to the question whether Congress could rationally conclude that its statute was appropriate to carry out the federal power in question.³¹

Prigg provided an extreme example of this judicial deference, implying a broad congressional power not enumerated anywhere in the Constitution. In *Prigg*, the Court upheld the Fugitive Slave Act of 1793, which established a comprehensive federal remedial scheme to ensure the return of purported fugitive slaves to their owners, and in so doing, recognized congressional power to regulate the conduct of both state officials and private persons in order to enforce the Fugitive Slave Clause,³² even though the Clause did not contain any explicit grant of power to Congress with respect to fugitive slaves.³³ As

in *McCulloch*, the Court's opinion read the Constitution to give Congress broad power to which courts had to defer: "The end being required . . . the means to accomplish it are given also; . . . the power flows as a necessary means to accomplish the end."³⁴ Thus, *Prigg* was the very first example of a case upholding enforcement legislation to protect a constitutional right. Though the framers of the Thirteenth Amendment abhorred the "right" the *Prigg* Court recognized, they incorporated *Prigg*'s understanding of congressional power into the Amendment's Enforcement Clause, and enlisted it in support of freedom, "turn[ing] the artifice of slavery on itself."³⁵

Having seen the Supreme Court mangle the Constitution in Dred Scott v. Sandford, the framers wanted to ensure that Congress could enforce the Civil War Amendments, even if a reluctant Supreme Court would not.

The framers of the Thirteenth Amendment demonstrated their broad understanding of the Enforcement Clause in the debates over the Civil Rights Act of 1866, which recognized as citizens all persons born in the United States, the former slaves included, and forbade both state officials and private persons from depriving any citizen of the rights to make and enforce contracts, sue in court, give evidence, and own property based on race. Under the legislation, African American citizens were to have the same rights as were enjoyed by white citizens, including the protection of all laws "for the security of person and property."³⁶

Led by Senator Trumbull, the Republicans in Congress argued that the Civil Rights Act was valid legislation enforcing the Thirteenth Amendment. Not surprisingly, the Democrats, who had opposed the Thirteenth Amendment as an initial matter, argued that the proposed legislation went far beyond forbidding slavery,³⁷ and intruded on the constitutional province of the States.³⁸ Despite these objections, Congress passed the Civil Rights Act of 1866 under the authority conferred by the Thirteenth Amendment, overcoming President Johnson's veto of the bill. This remarkable vote – the first time in U.S. history a major piece of legislation was passed over a presidential veto³⁹ – provides powerful evidence of the framers' broad understanding of the original meaning of the Enforcement Clause of the Thirteenth Amendment.

At the same time, the opposition to the Civil Rights Act crystallized the need for additional constitutional change. Rather than leave the matter up for continued debate and challenge in the courts, Republicans in Congress pushed for another constitutional amendment. Two months after final passage of the Act, Congress sent to the states for ratification the Fourteenth Amendment, which wrote into the Constitution protections for liberty and equality, forbidding state abridgements of fundamental rights and demanding that states afford equal protection to all persons. The Fourteenth Amendment's Enforcement Clause - Section 5 - erased any lingering doubts about the constitutionality of the Civil Rights Act

Howard, in a speech presenting the Amendment to the Senate, explained that the Fourteenth Amendment would change the balance of power between the federal government and the States by giving Congress the power to enforce constitutional rights.

of 1866.⁴⁰ Going forward, Section 5 ensured that the Civil Rights Act of 1866 was constitutional. More important, it further cemented in the Constitution the idea that Congress would share with the Supreme Court the responsibility for

enforcing constitutional rights. Having seen the Supreme Court mangle the Constitution in *Dred Scott v. Sandford*, the framers wanted to ensure that Congress could enforce the Civil War Amendments, even if a reluctant Supreme Court would not.⁴¹

The debates on the Fourteenth Amendment demonstrate that Congress was to have a central role in realizing the constitutional rights secured by the Amendment, continuing the tradition of broad congressional power begun with the Thirteenth Amendment's Enforcement Clause.⁴² Senator Jacob Howard and Representative John Bingham, both members of the Joint Committee on Reconstruction that was responsible for the text of the Fourteenth Amendment, delivered important speeches explaining Congress' power under the Enforcement Clause. Howard, in a speech presenting the Amendment to the Senate, explained that the Fourteenth Amendment would change the balance of power between the federal government and the States by giving Congress the power to enforce constitutional rights.

Senator Howard recognized that "there is no power given in the Constitution to enforce and carry out any of the[] guarantees [of the Bill of Rights]. . . . They stand simply as a Bill of Rights in the

Constitution, without power on the part of Congress to give them full effect. . . . [I]t is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given Congress to that end. This is to be done by the fifth section of the amendment Here is a direct affirmative delegation of power to carry out all the principles of these guarantees, a power not found in the Constitution.”⁴³ Thus, the Enforcement Clause “casts upon Congress the responsibility of seeing to it, for the future, that all sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property.”⁴⁴ As Howard explained, Sections 1 and 5 would work together to make the Constitution’s promise of liberty and equality real. The specific guarantees in the first section “taken in connection with [congressional power in] the fifth . . . will, if adopted by the States, forever disable . . . them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who happen to be within their jurisdiction. It establishes equality before law, and it gives to the humblest, the poorest, the most despised of the race the same rights and same protection before the law”⁴⁵

In the House debates, John Bingham made a similar argument. He argued that “there remains a want now in the Constitution of the country”: “It is the power of the people, the whole

“The war grew out of systematic violation of individual rights by State authority. The war ended with the vindication of individual rights by national power.”

people of the United States . . . by congressional enactment . . . to protect by national law the privileges or immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.”⁴⁶ Section 5’s grant of power to Congress filled this want, correcting the defect in the Constitution that had led “to many instances of State injustice and oppression . . . [and] flagrant violations of the guaranteed privileges of citizens of the United States”⁴⁷

In an 1870 speech, Carl Schurz, a moderate Republican Senator from Missouri, summed up the revolution in constitutional law produced by the Civil War Amendments and their respective Enforcement Clauses:

The war grew out of systematic violation of individual rights by State authority. The war ended with the vindication of individual rights by national power. The revolution found the rights of the individual at the mercy of the States; it rescued them from their arbitrary discretion, and placed them under the shield of national protection. It made the liberty and rights of every

citizen in every State a matter of national concern. . . . It grafted upon the Constitution of the United States the guarantee of national citizenship; and it empowered Congress, as the organ of the national will, to enforce that guarantee by national legislation. That is the meaning of that great revolution.⁴⁸

The opponents of the Fourteenth Amendment did not disagree with these understandings. To the contrary, they recognized the broad power the Enforcement Clause conferred and bemoaned the results, pointedly referring to the passage of the Civil Rights Act of 1866. During debates on the Fourteenth Amendment, Senator Thomas Hendricks called the Enforcement Clause “most dangerous,” observing that “during this session there has been claimed for th[eir words] such force and scope of meaning as that Congress might invade the jurisdiction of the States.”⁴⁹ Other Democrats objected that the Clause would “invest all powers in the General Government,” consolidating power in “one imperial despotism.”⁵⁰ Acting on these fears, some Southern state legislatures opposed ratification, and President Johnson and his supporters tried to strip Section 5 from the Amendment, pushing an alternative proposal without any grant of power to Congress.⁵¹ These efforts to eliminate Section 5’s enforcement power failed, and “the American people ratified the Fourteenth Amendment . . . [k]nowing full well that this language authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality.”⁵²

As written and ratified, the Fourteenth Amendment’s Enforcement Clause gave Congress the power to enforce the constitutional rights spelled out in Section 1. In writing the Enforcement Clause as they did, the framers sought to do more than simply add to the list of plenary congressional powers enumerated in Article I and elsewhere in the Constitution; they invested Congress with a central role in enforcing the constitutional rights protected by the document. Indeed, the framers specifically rejected an earlier proposed version of the Fourteenth Amendment drafted by John Bingham, which would have granted no specific rights but would have added to Congress’ enumerated legislative powers under the Constitution.⁵³

The Fourteenth Amendment used the Thirteenth Amendment as a model, spelling out new constitutional rights to liberty and equality and giving Congress the leading role in enforcing those rights through legislation. As Representative Bingham explained, the Amendment’s grant of power to Congress was “full and complete,” giving Congress a comprehensive power to secure the constitutional

rights the Fourteenth Amendment safeguards.⁵⁴ In the final wording, the framers appropriately struck a balance between ensuring congressional enforcement of constitutional rights and federalism. Congress would have broad authority to enforce constitutional rights, but states would continue to legislate on matters of local governance in cases outside of or in addition to federal constitutional protections.

Two years after the Fourteenth Amendment's ratification, in 1870, the nation ratified the Fifteenth Amendment, forbidding racial discrimination in voting. Like the Thirteenth and Fourteenth Amendments that preceded it, the

Fifteenth Amendment explicitly granted Congress the power to enact "appropriate legislation" to secure the right to vote. During debates on the Fifteenth Amendment, the

Like the Thirteenth and Fourteenth Amendments that preceded it, the Fifteenth Amendment explicitly granted Congress the power to enact "appropriate legislation" to secure the right to vote.

framers made clear that the Fifteenth Amendment's Enforcement Clause, like that of the Thirteenth and Fourteenth Amendments on which it was based, gave Congress a broad, "affirmative power"⁵⁵ to secure the right to vote. During the very same year in which the Fifteenth Amendment was ratified, Congress invoked its Enforcement Clause in support of legislation to secure the right to vote, reflecting the framers' judgment that that the Fifteenth Amendment "is ample and full and clothes Congress with all the power to secure the end which it declares shall be accomplished."⁵⁶ As Senator Morton explained, the Enforcement Clause "is intended to give to Congress the power of conferring upon the colored man the full enjoyment of his right. We so understood it when we passed it. . . . [T]he second section was put there to enable Congress itself to carry out the provision. It was not to be left to state legislation."⁵⁷

The model set by the Thirteenth, Fourteenth and Fifteenth Amendments is now deeply imbedded in our constitutional scheme. The Eighteenth Amendment includes an identical Enforcement Clause, as do the Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments. ■

Congressional Power to Regulate Private Action

Section 5 of the Fourteenth Amendment was written and ratified to give Congress the power to enact nationwide federal civil rights legislation applying across-the-board to all persons, including both state officials and private actors. The Supreme Court has never recognized this basic point, even though it is uncontrovertible that the Fourteenth Amendment was added to the Constitution to shore up the constitutional foundation for the country's first nationwide civil rights statute, the Civil Rights Act of 1866. The Supreme Court's opinions in this area have gotten Section 5 dead wrong.

THE RIGHT TO PROTECTION: "THE MOST VALUABLE OF ALL RIGHTS"

The key to understanding congressional power to regulate private action under Section 5 lies in the right to protection, a right jointly secured by the Privileges or Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment.⁵⁸ The right to protection has a long lineage; it was reflected in the writings of influential English writers, including John Locke and William Blackstone, as well as in numerous early American state constitutions. Chief Justice Marshall affirmed this right in *Marbury v. Madison*: "The very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to provide that protection."⁵⁹ Securing the right to protection as a constitutional duty of the States was one of the very reasons the Fourteenth Amendment was added to the Constitution – immediately after the Civil War, Southern states left the newly freed slaves utterly unprotected from violent reprisals and other wrongs at the hands of white terrorist groups.

While the right to protection is rarely mentioned in constitutional debates these days, the framers of the Fourteenth Amendment treated it as one of the fundamental rights guaranteed by the Privileges or Immunities Clause. It is "self evident," Rep. Samuel Shellabarger observed in 1866, "that protection

by the government is the right of every citizen.”⁶⁰ The framers regularly looked to *Corfield v. Coryell*, a well known 1823 ruling, to establish the contours of the Privileges or Immunities Clause, and *Corfield* listed “protection by the government” as one of the fundamental rights that belong to “citizens of all free governments.”⁶¹ Likewise, the Equal Protection Clause created a constitutional obligation to protect all persons, citizen and noncitizen alike; states could not turn a blind eye to criminal acts and private violations of rights committed against any disfavored group. As Senator Jacob Howard put it in his famous speech explaining the Fourteenth Amendment, the Amendment “gives to the humblest, the poorest, and most despised of the race the same rights and same protection before the law as it gives to the most powerful”⁶²

Section 5 conferred on Congress the power to secure the right to protection. Thus, when states sat idly by while the freedmen were murdered and lynched and their rights trampled,

Section 5 conferred on Congress the power to secure the right to protection. Thus, when states sat idly by while the freedmen were murdered and lynched and their rights trampled, Congress had clear constitutional authority to provide the protection the Fourteenth Amendment secured.

Congress had clear constitutional authority to provide the protection the Fourteenth Amendment secured. Congress drew on this understanding of constitutional authority in enacting the Civil Rights Act of 1866, even before the Fourteenth Amendment was written. In response to systematic violation of fundamental rights in the South, the Act “secure[d] the protection which every Government owes to its citizens.”⁶³ As Rep. William Lawrence made the point, the Civil Rights Act was necessary because “rebel masters” in control in the South were denying to the former slaves “the benefit of all laws for the protection of their civil rights.”⁶⁴

The basic point – that Congress could legislate against state officials and private persons to secure the right to protection – was invoked by Congress time and again during Reconstruction in passing civil rights legislation. The most comprehensive discussion of congressional power to redress denials of equal protection came in the 1871 debates over the Ku Klux Klan Act, which created new federal crimes aimed at conspiracies to deprive individuals of their constitutional rights. The Klan and

other terrorist groups mercilessly savaged the former slaves and their Republican allies, and Congress seized on the absolute failure of state governments to prevent or redress the violence as the justification for federal legislation to secure the equal protection of the laws.⁶⁵ As one Congressman explained the tragic state of affairs requiring federal action: “ministers of the Gospel . . . have been scourged because of their political opinions, . . . humble citizens have been whipped and wounded for the same reason . . . houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent.”⁶⁶

These conditions, little different from those in 1866 when the Fourteenth Amendment was written, demanded a congressional remedy. Republicans in Congress – most of whom had helped secure the pas-

It was a common refrain that “[a] State denies equal protection whenever it fails to give it. Denying includes inaction as well as action. A State denies protection as effectually by not executing as by not making laws.”

sage of the Fourteenth Amendment as well as the other Civil War Amendments – stressed that the Amendment secured a right to protection, and that Congress could legislate against individuals

when states failed to protect their residents from criminal acts. “A systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens is a denial of equal protection . . . and justifies . . . the active interference of the only power that can give it.”⁶⁷ It was a common refrain that “[a] State denies equal protection whenever it fails to give it. Denying includes inaction as well as action. A State denies protection as effectually by not executing as by not making laws.”⁶⁸ Rep. Samuel Shellabarger argued that the Equal Protection Clause provides for “equal laws and protection for all; and whenever a State denies that protection Congress may by law enforce that protection.”⁶⁹ Senator John Pool called the right to protection “the most valuable of all rights without which all others are worthless” and contended that “[w]here any State, by commission, or omission, denies this right to protection of the laws, Congress may . . . enforce and maintain it. . . . It must punish the offender against the rights of the citizen; for in no other way can protection of the laws be secured and its

denial prevented.”⁷⁰ Representative James Garfield (a future U.S. President) perfectly captured the right to protection: “where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them . . . [the Enforcement Clause] empowers Congress to step in and provide justice to those persons who are thus denied equal protection.”⁷¹

In these debates, the framers made clear that the text of Section 1 – which imposes a set of constitutional prohibitions on states – does not mean that Congress can only regulate state action under Section

5. States could violate the fundamental right to protection secured by the Privileges or Immunities and Equal Protection Clauses by simply refusing to protect individuals against private violence or other

Senator John Pool called the right to protection “the most valuable of all rights without which all others are worthless.”

private wrongs. When this occurred, Congress had the authority, under Section 5, to step in to protect people from private violence in order to remedy and prevent the state’s failure to carry out its constitutional duties. Section 5, in other words, was never understood to limit Congress’ options solely to the regulation of state actors.

In writing and reading Section 5 to permit regulation of private conduct, the framers drew on the Supreme Court’s own reading of federal power to enforce the Fugitive Slave Clause in *Prigg*.⁷² As discussed above, *Prigg* held that Congress had the authority to regulate the acts of both state actors and private persons to enforce the constitutional right of return of escaped slaves, even though the text of the Fugitive Slave Clause only limited state action and did not explicitly give Congress any legislative power whatsoever. *Prigg* and its progeny permitted Congress to provide both civil and criminal penalties against private individuals who interfered with the slave owner’s federal constitutional right to the return of his or her escaped slave, and created a comprehensive remedial scheme to vindicate a slave owner’s federal rights.⁷³ Throughout Reconstruction, the framers drew parallels between the Fourteenth Amendment and the Fugitive Slave Clause interpreted in *Prigg*, pointing out that both protected rights against state infringement and both empowered congressional enforcement (though this authority was

implied in the Fugitive Slave Clause and explicit in Section 5 of the Fourteenth Amendment).⁷⁴ Prigg, they argued, “fix[ed] the interpretation of the Constitution . . . as authorizing affirmative legislation in protection of the rights of federal citizenship under federal law”⁷⁵

THE RETREAT FROM RECONSTRUCTION

Sadly, darkness in this nation came quickly after the enlightenment of Reconstruction. The political will to secure equal protection to all Americans began to dissipate in the waning days of President Grant’s second term in office. The Supreme Court set the stage for the Jim Crow era in America in a

A Supreme Court that had expansively read the Fugitive Slave Clause to create a sweeping implied congressional power turned around and refused to give the same expansive interpretation to the express grant of authority to Congress in Section 5.

series of rulings that sharply limited congressional power and effectively left African Americans in the South without any protection against Klan violence and other assaults on their equal citizenship. A Supreme Court that had expansively read the Fugitive

Slave Clause to create a sweeping *implied* congressional power turned around and refused to give the same expansive interpretation to the *express* grant of authority to Congress in Section 5.

In a series of decisions beginning with *United States v. Cruikshank*⁷⁶ in the mid-1870s, and continuing in the 1880s with *United States v. Harris*⁷⁷ and the *Civil Rights Cases*,⁷⁸ the Supreme Court invalidated some of the most important civil rights laws passed during Reconstruction, holding that Congress lacked the power to regulate the conduct of private persons. Ignoring the text and history supporting congressional enforcement of the right to protection, these cases reasoned that because the Fourteenth Amendment uses the phrase “[n]o state shall,” in describing the prohibitions of Section 1, congressional legislation could only be directed to fixing constitutional violations by the States themselves.

In *Cruikshank*, the Court annulled the convictions of three men growing out of the infamous massacre in Colfax, Louisiana, “the bloodiest single act of carnage in all of Reconstruction,”⁷⁹ in which

a white mob killed scores of African American men who were defending a local courthouse, many after the freedmen had surrendered.⁸⁰ Specifically, the Court invalidated a federal statute prohibiting conspiracies to prevent or hinder individuals from exercising their constitutional rights, holding that the Fourteenth Amendment did not alter principles of federalism that leave the protection of citizens to the States. That Amendment, the Court put starkly, “does not . . . add anything to the rights which one citizen has under the Constitution against another.”⁸¹

The Court did not even consider the argument that the federal government was enforcing the freedmen’s right to the equal protection of the laws in the face of the State’s refusal to bring the white mob to justice.

Because the murderers were private persons, the federal government had no right to intervene. “The only obligation resting on the United States,” Chief Justice Waite declared, “is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the federal government is limited to the enforcement of this guaranty.”⁸² The Court did not even consider the argument that the federal government was enforcing the freedmen’s right to the equal protection of the laws in the face of the State’s refusal to bring the white mob to justice. Thus, “[i]n the name of federalism, the decision rendered national prosecution of crimes committed against black officials virtually impossible, and gave a green light to acts of terror where local officials either could not or would not enforce the law.”⁸³

Cruikshank’s approach was repeated in 1883 in *Harris*, which overturned the indictment of R.G. Harris and nineteen other white men for lynching four African American men in Tennessee. Emphasizing the private action/state action line, the Court held that Congress lacked the power to prohibit lynching by private persons under the federal law criminalizing conspiracies to deprive individuals of the equal protection of the laws. The statute was invalid, the Court concluded, because “[i]t applies, no matter how well the State may have performed its duty. . . . [T]he section of the law is directed exclusively against the action of private persons, without reference to the laws of the states, or their administration by the officers of the state.”⁸⁴ As in *Cruikshank*, the Court asserted that principles of federalism gave the federal government no role to play even though Tennessee had taken no action to redress the lynching

and secure the right to protection to the freedmen. Although the decision, in theory, left it open to Congress to pass a narrower statute that targeted states that were refusing to protect African Americans from violence, by 1883 Congress no longer had any interest in enforcing the Fourteenth Amendment.

Later that year, the *Civil Rights Cases* invoked these same principles in invalidating critical parts of the most far-reaching of all Reconstruction laws, the Civil Rights Act of 1875, which prohibited racial discrimination on ships and railroads and at hotels, theaters and other places of public accommodation. Emphasizing, once again, that the Fourteenth Amendment only limits governmental action, the Court held that Congress may only “adopt appropriate legislation for correcting the effects of such prohibited

The text and history of the Fourteenth Amendment demolish the Court’s holdings in Cruikshank, Harris, and the Civil Rights Cases.

state law and state acts”⁸⁵ According to the Court, the Civil Rights Act was invalid because it did not regulate constitutional wrongs committed by the states. “[I]t makes no reference whatever to any supposed or

apprehended violation of the Fourteenth Amendment on the part of the states It does not profess to be corrective of any constitutional wrong committed by the states; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in states which have the justest laws . . . and whose authorities are ever ready to enforce such laws”⁸⁶ Thus, the Court erased one of the most important statutes passed during Reconstruction, shutting out the former slaves from the Amendment’s promise of equal citizenship. It took 90 years and the passage of the Civil Rights Act of 1964 to finally outlaw racial discrimination in the provision of public accommodations in America.

The text and history of the Fourteenth Amendment demolish the Court’s holdings in *Cruikshank*, *Harris*, and the *Civil Rights Cases*. These cases should have been ringing endorsements of congressional power to protect the newly freed slaves when states turned a blind eye to murder and lynching, and permitted white business owners to run roughshod over basic common law rights of access to public accommodations. Congress had compiled a massive record of the States’ willful blindness to violence and other wrongs committed against African Americans, particularly in the South, and had ample basis to conclude that states across the nation were committing pervasive textbook violations of the Equal

Protection Clause. If Congress had any role in securing the Fourteenth Amendment’s right to protection, it was on these facts. Indeed, little had changed since Congress had written the Civil Rights Act of 1866 to protect the newly freed slaves in their basic rights as citizens from hostile state and private action, and the Fourteenth Amendment – all agree – gave Congress the power to pass the Act.

The Court’s textual argument advanced in *Cruikshank*, *Harris*, and the *Civil Rights Cases* was flat out wrong. The Fourteenth Amendment was written as a prohibition on the States not to limit the power of Congress, but to make crystal clear that its commands were limitations on the conduct of state governments. Before the Civil War, in *Barron v. City of Baltimore*, the Supreme Court had ruled that the Constitution’s Bill of Rights did not limit state governments because there was no “plain and intelligible language” including the States in the prohibitions of the Bill of Rights.⁸⁷ Section 1 of the Fourteenth Amendment was written with this precedent in mind, making it clear that the constitutional guarantees constrained states. As Yale Law School’s Akhil Amar has put it, “[t]he Supreme Court Justices in *Barron* had asked for ‘Simon Says’ language, and that’s exactly what the framers of the Fourteenth Amendment gave them.”⁸⁸ Thus, Section

1’s “No State” language did not support the Court’s harsh limit on the authority of Congress under Section 5. In each of the invalidated statutes,

Congress had provided federal protections against private action because the States were defaulting on their obligation to afford the equal protection of the laws.

Congress had provided federal protections against private action because the States were defaulting on their obligations to afford the “equal protection of the laws” to all, regardless of race. The conflict with Section 1’s “No State” language was entirely the Court’s invention.

Moreover, under the key pre-Civil War precedents, limits on state action did not disable Congress from regulating both state actors and private persons. As discussed above, in *Prigg* the Court ruled that Congress had the power to regulate private actors to enforce the protections of the Fugitive Slave Clause, even though the text provided only a limit on state action and gave no explicit grant of power to Congress. The Reconstruction Court turned its back on this approach, reading the explicit textual grant of power in Section 5 to provide less congressional power to secure equal citizenship than the silent

Fugitive Slave Clause gave Congress to support slavery, a point hammered home in Justice Harlan's blistering dissent in the *Civil Rights Cases*.⁸⁹

Perhaps the most that could be said in the Court's defense was that the statutes enacted by Congress were not narrowly tailored to the goal of securing the right to protection: they established nationwide prohibitions that applied even in states where the rights of all Americans were studiously observed. Of course, the cases before the Court did not remotely raise this issue of overbreadth – all involved jurisdictions that were standing idly by in the face of murder, lynchings, and blatant discrimination. The Court reached out to invalidate the statutes in their entirety, throwing out basic principles of judicial restraint to rule based on imaginary hypothetical cases. Not surprisingly, the modern Court now rejects this extravagant use of judicial power: “[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.”⁹⁰ In any event, the Court had no plausible explanation why *Prigg*'s approach – permitting nationwide enforcement legislation even if not universally necessary – did not apply equally to Section 5.⁹¹

THE MODERN COURT AND CONGRESSIONAL POWER TO SECURE THE RIGHT TO PROTECTION

These same cases still haunt us to this day. More than a century later, the text and history of the right to protection, and congressional power to enforce it, remain buried. Worse still, in *United States v. Morrison*, the modern Supreme Court treated the authors of the horrendous Supreme Court opinions in *Cruikshank*, *Harris*, and the *Civil Rights Cases* as the real framers of the Fourteenth Amendment, opining that these rulings have the status of super-precedents virtually immune from reconsideration because they were decided soon after the Amendment's ratification. The *actual* framers who struggled to guarantee all Americans a fundamental right to protection, and ensure that States did not turn a blind eye to the private invasion of rights – men like John Bingham, Jacob Howard, and Samuel Shellabarger – are ignored, though they should be the heroes of this constitutional story.

Sadly, the Supreme Court has never even given any real consideration to this lost text and history.

During the 1960s – when Congress began to enact civil rights legislation that regulated states and private individuals after a 75-year slumber – the Warren Court looked to other bases of congressional power to sustain that legislation. In *Heart of Atlanta Motel v. United States*,⁹² the Supreme Court upheld the public accommodations provisions of the Civil Rights Act of 1964 under the Commerce Clause. Based on the record Congress had compiled, the Court upheld the Act’s public accommodations provisions, finding them a rational way to stamp out racial barriers to the free flow of commerce.⁹³ Only Justice

Douglas and Justice Goldberg argued that the Act should be upheld as a valid exercise of congressional power to enforce the Fourteenth Amendment.⁹⁴

The upshot of *Heart of Atlanta*, thus, was to limit the damage done by the *Civil Rights Cases* without undermining in any way the Court’s

precedent. Congress had the green light to enact civil rights legislation applying to all persons, but only so long as the legislation regulated the national economy. The decision made the Commerce Clause, not Section 5, the critical basis of congressional power to enact civil rights legislation.⁹⁵ This move was well-suited to uphold civil rights legislation aimed at corporations and other businesses, which could be easily defended as federal regulation of the national economy. But, over the long haul, emphasizing the Commerce Clause – rather than Section 5, the natural textual home for congressional power – “tie[d] civil rights legislation to a story about cumulative effects on interstate commerce”⁹⁶ and created the mistaken impression that Congress has “more power to protect sales of barbecue sauce than to protect racial equality.”⁹⁷

Other Warren Court cases, too, eschewed Section 5 as a basis for civil rights legislation that applied to both state officials and private persons. In *Jones v. Alfred Meyer Co.*,⁹⁸ the Court invoked the Thirteenth Amendment, not the Fourteenth, in upholding the Civil Rights Act of 1866’s ban on racial discrimination in the sale of private property as a valid exercise of congressional power. The Court

The actual framers who struggled to ensure that States did not turn a blind eye to the private invasion of rights - men like John Bingham, Jacob Howard, and Samuel Shellabarger - are ignored, though they should be the heroes of this constitutional story.

concluded that the Thirteenth Amendment’s Enforcement Clause authorized Congress to ban private racial discrimination, quoting at length from the arguments the framers made in defense of the 1866 Act. “Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation.”⁹⁹ *Jones* made no mention of Section 5, even though it is uncontested that the Fourteenth Amendment had been written to ensure Congress had the power to enact the 1866 Act.

By using the Thirteenth Amendment’s Enforcement Clause for authority in *Jones*, the Court vindicated the Civil Rights Act of 1866 but established no new precedent that Congress could use going forward to enact new Enforcement Clause legislation. A century after the abolition of slavery, Congress would be hard-pressed to use the power to abolish the badges of slavery to enact new civil rights

The Court’s evasion of the Cruikshank-Harris-Civil Rights Cases trilogy during the 1960s came home to roost over a quarter century later in United States v. Morrison.

statutes. Because of the *Jones* Court’s specific focus on the Thirteenth Amendment, *Cruikshank*, *Harris* and the *Civil Rights Cases* all remained good law, and congressional power

to regulate private actors under the Fourteenth Amendment continued to be severely limited. Outside some narrow confines – other Reconstruction-era legislation concerning badges of slavery under the Thirteenth Amendment¹⁰⁰ and violations of structural federal rights such as the right to travel¹⁰¹ – Congress had to show an economic nexus to justify civil rights legislation aimed at private actors.

The Court’s evasion of the *Cruikshank-Harris-Civil Rights Cases* trilogy during the 1960s came home to roost over a quarter century later in *United States v. Morrison*,¹⁰² which held unconstitutional the civil rights remedy Congress provided in the Violence Against Women Act (“VAWA”) to any person subjected to gender-based violence, such as rape and sexual assault. In passing the Act, Congress concluded that a federal civil rights remedy was necessary to secure equal protection for women because state criminal justice systems routinely refused to protect women from sexual violence. But the main defense of the Act was under the Commerce Clause. Taking their cue from *Heart of Atlanta*, the Act’s defenders – both the Department of Justice and the women’s rights groups who represented the plaintiff

– relied principally on the Commerce Clause to uphold the Act; Section 5, once again, took a back seat to arguments about congressional power to regulate the economy. The Court majority rejected both theories. In a lengthy opinion that focused almost exclusively on the Commerce Clause, the Court held that neither the Commerce Clause nor Section 5 empowered Congress to enact VAWA’s civil rights remedy against private persons who commit gender-based violence.

In its brief discussion of Section 5, Chief Justice Rehnquist’s opinion for the Court viewed the case through the same flawed lens the Court had used to disable Reconstruction. Reaffirming *Harris* and the *Civil Rights Cases*, the Court held that Congress lacked power over private actors under the Enforcement Clause. According to the

Court, this limit on congressional power was “necessary to prevent the Fourteenth Amendment from obliterating the Framers’ care-

The Morrison Court rejected as constitutionally irrelevant Congress’ findings that, across the nation, the States were defaulting on the equal protection mandate.

ful balance of power between the States and the National Government.”¹⁰³ Indeed, the Court found that *Harris* and the *Civil Rights Cases* were special precedents, effectively immune from reconsideration. “Every Member [of the Court] had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur – and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.”¹⁰⁴

In the process, the Court actually expanded these precedents significantly. *Harris* and the *Civil Rights Cases* had emphasized that Congress could only regulate in response to constitutional violations by States. *Morrison*’s reading was broader. *Morrison* held that Congress simply could not regulate private conduct, plain and simple, even as part of a statutory scheme to remedy violations of the Fourteenth Amendment by the States. The *Morrison* Court rejected as constitutionally irrelevant Congress’ findings that, across the nation, the States were defaulting on the equal protection mandate. Congress could not provide remedies against private conduct, even if the consequence was that state governments – acting on gender-based stereotypes – left women unprotected from sexual assaults.

This result is a bitter pill because *Morrison* would have been the ideal case to rehabilitate the text

and history of Section 5. The framers of the Fourteenth Amendment had regularly invoked the Enforcement Clause to secure the right of protection to men and women alike when states refused to do so – essentially what Congress had done in enacting VAWA.¹⁰⁵ This was no incursion on federalism; it was simply ensuring equal protection to all, regardless of sex, which is exactly what the text of the Fourteenth Amendment requires.¹⁰⁶ Far from deserving super-precedent status, *Harris* and the *Civil Rights Cases* got the history dead wrong. They were efforts to “undo Reconstruction”¹⁰⁷ and substitute “a more racially conservative [vision]. . . hostile to the expansion of the federal civil rights,”¹⁰⁸ not fulfill the Fourteenth Amendment’s original meaning. They should be undone, not celebrated. Tragically, no one on the Court called the majority to task for its shoddy history. The dissenters put all their eggs in the Commerce Clause basket; there was no dissent from the Court’s reading of the Enforcement Clause.¹⁰⁹ ■

Congressional Power to Enforce the Fourteenth Amendment Against State Action

The Supreme Court’s long-standing failure to recognize the right to protection and preserve Congress’ ability to protect individuals when the States fail to do their jobs is only one part of the sad history of the Supreme Court’s treatment of Section 5. The second part concerns Congress’ power to prevent the States from directly violating constitutionally protected rights of individuals. Here, the text is so clear that no Justice, ever, has questioned Congress’ power to act. The only questions have been about the scope of Congress’ power and the deference afforded to Congress by the Court in determining that constitutionally-protected rights are at risk. Remarkably, in this part of the story, the Reconstruction Supreme Court got the text and history of Section 5 right and it is only the modern Court that is to blame for unjustifiable departures from the words and original meaning of this key constitutional provision.

SECTION 5 AND THE *McCULLOCH* MODEL

The text and history of Section 5 give Congress broad legislative authority to protect the Amendment’s guarantees of liberty and equality against all hostile state action, a power just as broad and sweeping as the powers entrusted to Congress in Article I. The framers not only looked to Chief Justice Marshall’s famous opinion in *McCulloch v. Maryland* as the measure of congressional enforcement powers, they used words – “appropriate legislation” – that track the most famous passage of *McCulloch*: “Let the ends 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 consistent with the letter and spirit of the constitution, are constitutional.”¹¹⁰ Just as *McCulloch* recognized the constitutional authority of Congress to enact appropriate legislation to “carry into Execution” Article I powers, Section 5 gives Congress the authority to enact “appropriate” legislation to “enforce” the commands of the

Fourteenth Amendment.¹¹¹

This textual connection was no accident. In writing the Enforcement Clause, the drafters intended to incorporate *McCulloch*-like understandings of congressional power. Indeed, the framers repeatedly invoked *McCulloch* in their contemporaneous debates over the Civil Rights Act of 1866. *McCulloch*, the framers argued, settled any question of congressional power to pass the Act. In the Senate debates on the Act, James Wilson explicitly invoked and applied the “celebrated case” of *McCulloch* to validate the Civil Rights Act:

The end is legitimate, because it is defined by the Constitution itself. The end is the maintenance of freedom to the citizen. . . . A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery. Anything which protects him in the possession of these rights insures him against reduction 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. . . . This is the doctrine of the Constitution, as declared by the highest tribunal known to our laws.¹¹²

Many other framers made similar points either invoking *McCulloch* explicitly,¹¹³ or using *McCulloch*-style reasoning to defend the Act’s civil rights protections.¹¹⁴ The framers left no doubt that *McCulloch* translated into a broad enforcement power, permitting Congress to go beyond what courts would forbid under the self-executing provisions of Section 1.¹¹⁵

The framers of Section 5 of the Fourteenth Amendment were adamant about the need for *McCulloch*-style deference in part because they were skeptical of the Supreme Court. The framers “did not entrust the fruits of the Civil war to the unchecked discretion of the Court that decided *Dred Scott v. Sandford*.”¹¹⁶ Having seen the Court mangle the Constitution in *Dred Scott*, Section 5 provided a remedy against the tyranny of a Supreme Court unfaithful to the Constitution’s text and history. However narrowly the Supreme Court construed the rights and liberties guaranteed by the Fourteenth Amendment, Congress could ensure proper enforcement and enjoyment of the new constitutional guarantees through appropriate legislation.

The Citizenship Clause of the Fourteenth Amendment, of course, overruled *Dred Scott*’s specific holding, freeing the nation from “future judicial tyranny such as we have experienced at the hands of the Supreme Court.”¹¹⁷ But the framers were worried that the courts would refuse to enforce the Civil War Amendments properly. As Senator James Wilson argued during debates over the Civil Rights Act of

1866, one reason the Thirteen Amendment's Enforcement Clause was necessary was that courts might interpret the Thirteenth Amendment's prohibitions narrowly only to prohibit slavery "in the sense in which slaves were held before" and not to reach "other names and in other forms a system of involuntary servitude might be perpetuated They might be denied the right of freemen unless there was vested a power in Congress to enforce by appropriate legislation their right to freedom."¹¹⁸ The specific grant of enforcement power to Congress protected against the danger that courts would not or could not adequately protect the new constitutional guarantees; it was the means to "enable Congress . . . to secure to citizens the actual enjoyment of the rights and privileges guaranteed."¹¹⁹

Not only were the framers of the three Enforcement Clauses worried that the courts might frustrate the new constitutional rights of liberty and equality, they recognized advantages in having multiple institutions committed to enforcing constitutional rights.¹²⁰ Thus, while they recognized that courts could, and hopefully would, enforce the new constitutional guarantees, "the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative, because in each the amendment itself provided that it shall be enforced by legislation on the part of Congress."¹²¹ Congress' legislative remedy was "to take every step that might be necessary to secure the colored man in the enjoyment of these [constitutional] rights."¹²² Thus, as Akhil Amar has argued, "the most sensible reading of the Fourteenth Amendment would involve both courts and Congress in the task of protecting truly fundamental rights against the States, with states generally held to whichever standard was . . . more protective of fundamental freedoms"¹²³

In the series of congressional measures enforcing the Civil War Amendments between 1866 and 1875, Congress did not hesitate to act on its own reading of the Constitution, viewing the Supreme Court's opinions as relevant but not dispositive on questions of congressional power.¹²⁴ When the Supreme Court effectively wrote the Privileges or Immunities Clause – intended to protect substantive fundamental rights from hostile state action – out of the Fourteenth Amendment in the *Slaughterhouse Cases*,¹²⁵ Congress continued to look to the Constitution's text and history for the true measure of what the Constitution meant. During debates over the Civil Rights Act of 1875, the Reconstruction framers called *Slaughterhouse* a "great mistake,"¹²⁶ which had perverted the Constitution by "assert[ing] a

principle of constitutional law which I do not believe will ever be accepted by the profession or the people of the United States.”¹²⁷ Congress had to act on its own view of the Fourteenth Amendment,¹²⁸ and “should not halt any longer to admire the beauties of a Supreme Court decision now than at the time a perverted and blind public sentiment made the *Dred Scott* decision possible”¹²⁹

EX PARTE VIRGINIA & KATZENBACH: THE SUPREME COURT GETS IT RIGHT

While *Cruikshank*, *Harris* and the *Civil Rights Cases* got the text and history of the Fourteenth Amendment dead wrong, *Ex Parte Virginia*¹³⁰ – decided by a divided court in 1880, three years before *Harris* and the *Civil Rights Cases* – got the text and history right, recognizing broad congressional power to mandate that state laws respect the Fourteenth Amendment’s guarantees of liberty and equality. In *Ex Parte Virginia*, the Supreme Court upheld the 1875 Civil Rights Act’s ban on racial discrimination in

“It is not said that the judicial power of the general government shall extend to enforcing the prohibitions and protecting the rights and immunities guaranteed. . . . It is the power of Congress which has been enlarged. . . . Such enforcement is no invasion of state sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact.”

state jury selection in a resounding affirmation of congressional power to set aside unconstitutional discriminatory state action. *Ex Parte Virginia* explicitly recognized that the Enforcement Clauses – here, that of the Fourteenth Amendment – expanded congressional power, changing our constitutional understandings of federalism. Re-

ferring to the Enforcement Clauses, the Court observed: “All the amendments derive much of their force from this latter provision. It is not said that the *judicial power* of the general government shall extend to enforcing the prohibitions and protecting the rights and immunities guaranteed. . . . It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate

legislation. . . . Such enforcement is no invasion of state sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact.”¹³¹

Importantly, the Court properly recognized the links between the power of Congress under the Enforcement Clauses and its power under the Necessary and Proper Clause spelled out in *McCulloch*. Like the text of the Enforcement Clauses, the Court’s explanation of congressional power tracks the very language Chief Justice Marshall used in *McCulloch*: “Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection

of the laws against State denial and invasion, if not prohibited, is brought within the domain of congressional power.”¹³² Thus, as

“As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”

the words and original meaning of the Enforcement Clauses reflect, the same deference due to congressional legislation under Article I should apply when Congress enforces the Civil War Amendments. The Court found it obvious that Congress could forbid state officers from making race-based exclusions from jury service. “We do not perceive how holding an office under a State . . . can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience.”¹³³

Eighty-six years later – after the end of the long Jim Crow era in which the Civil War Amendments were blatantly ignored – the Warren Court echoed these conclusions in two landmark opinions sustaining provisions of the Voting Rights Act of 1965. In *South Carolina v. Katzenbach*,¹³⁴ the Court upheld the Act’s preclearance requirement, which, broadly described, requires states with a history of voting discrimination to submit for federal pre-approval any change in laws or procedures relating to voting. In sustaining the Act as valid legislation to enforce the Fifteenth Amendment, the Court recognized the sweeping enforcement powers of Congress : “As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial

discrimination in voting.”¹³⁵

Dismissing South Carolina’s argument that the Amendment was only to be enforced by the courts, Chief Justice Warren’s majority opinion pointed to the Enforcement Clause to demonstrate that “the Framers indicated that Congress was to be chiefly responsible for implementing [Fifteenth Amendment] rights”¹³⁶ Again, the Court explicitly looked to *McCulloch* as the proper measure of congressional power. “The basic test to be applied . . . is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified The Court has subsequently echoed his language in describing each of the Civil War Amendments.”¹³⁷ Thus, Congress cannot be constrained to any “artificial rules.”¹³⁸ The enforcement power “like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitation, other than are prescribed in the constitution.”¹³⁹ The Court found the Act unquestionably valid under *McCulloch*’s deferential framework, given the well-documented record showing that stringent federal remedies were necessary to redress a long history of defiance of the Fifteenth Amendment’s command.

*Katzenbach v. Morgan*¹⁴⁰ sounded similar themes in upholding the Act’s protection of the right to vote for language minorities. Because the English literacy test at issue in *Morgan* applied across the board and did not on its face deny the franchise on the basis of race or color, this portion of the Act was defended as appropriate under Section 5 of the Fourteenth Amendment to enforce the command of the Equal Protection Clause and prevent the denial of the right to vote to persons educated in languages other than English. Again, the Court rejected the argument that Congress was limited to setting aside laws that the courts would rule unconstitutional, drawing on the text and history of the Amendment and *Ex Parte Virginia*. Congress could legislate broadly subject only to the broad confines of *McCulloch*. “[T]he *McCulloch v. Maryland* standard is the measure of what constitutes ‘appropriate legislation’ under [section] 5 of the Fourteenth Amendment. Correctly viewed, [section] 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”¹⁴¹ Justice Brennan’s opinion for the Court in *Morgan* found the Act’s ban on literacy tests appropriate under *McCulloch*.

Specifically, it found the Act “plainly adapted” to the goal of securing equal protection, and, in line with *McCulloch*, accorded substantial deference to Congress’ conclusion that the “need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement.”¹⁴² Weighing the “competing considerations” was for Congress; judicial review was limited to the question whether “we perceive a basis on which Congress might predicate a judgment” that a state literacy requirement “constituted an invidious discrimination in violation of the Equal Protection Clause.”¹⁴³

BOERNE: THE SECOND REWRITING OF SECTION 5

Dissenting in *Morgan*, the second Justice Harlan outlined a new challenge to congressional power under Section 5. He argued that Congress only had a right to intervene to correct matters that the Court would regard as constitutional violations. While he was willing to recognize a broad remedial power, Justice Harlan insisted that the Supreme Court control what constitutes a violation of constitutional rights. Harlan’s argument featured only in separate opinions – his own and Justice Stewart’s in *Oregon v. Mitchell*¹⁴⁴ in 1970 and then-Justice Rehnquist’s dissent in *City of Rome v. United States*¹⁴⁵ in 1980 – until the Court revolutionized its Section 5 jurisprudence in its 1997 ruling in *City of Boerne v. Flores*.¹⁴⁶

Boerne, which held unconstitutional the Religious Freedom Restoration Act (“RFRA”), established significant new limits on congressional power to regulate state and other government actors.¹⁴⁷ *Boerne* substituted *McCulloch*-style review with a new, more demanding test, which the Court called congruence and proportionality. This newly-minted test calls for searching judicial review of federal laws enacted pursuant to Section 5, reminiscent of the heightened or strict scrutiny used to test violations of fundamental constitutional rights.¹⁴⁸ Thus, *Boerne* abandoned *McCulloch* as the measure of what constitutes appropriate legislation. Surprisingly, there was no dissent to the Court’s new reading of Section 5.

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Justice Kennedy seized on the word “enforce” in Section 5 as a decisive word of limitation. “Legislation which alters the meaning of the [Fourteenth Amendment] cannot be said to be enforcing [it]. Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”¹⁴⁹ The Fourteenth Amendment’s drafting history, Justice Kennedy argued, bolstered this reading. The framers refused to give Congress a plenary power to legislate as to life, liberty, and property, akin to its Article I powers, and instead limited Congress to enforcing the rights enumerated in Section 1.¹⁵⁰ This history, the Court argued, “confirms the remedial, rather than substantive, nature of the Enforcement Clause.”¹⁵¹ As Justice Harlan had in *Morgan*, Justice Kennedy made clear that Congress had no choice but to hew to the Court’s precedents in legislating under the Enforcement Clause. Any other course would conflict with the Supreme Court’s role as final interpreter of the Constitution, and would allow Congress to alter the Constitution’s meaning¹⁵² and overhaul the balance of powers between the States and the federal government.¹⁵³ Strict judicial review, according to the Court, was necessary to enforce both separation of powers and federalism principles.

To determine whether congressional legislation was truly remedial, the Court crafted the congruence and proportionality test, which gauges whether there is a tight fit between a statutory mandate and findings of pervasive constitutional violations by states (as determined by the Court’s case law). “There must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.”¹⁵⁴ The Religious Freedom Restoration Act flunked this test; indeed, the whole point of the statute was to restore protection to religious freedom that the Supreme Court had removed in a much-criticized 1990 decision, *Employment Division, Department of Human Resources of Oregon v. Smith*.¹⁵⁵ Obviously, if Supreme Court precedents were the controlling frame, RFRA was doomed. Not surprisingly, the Court said as much. “RFRA cannot be considered remedial, preventative legislation, if those terms have any meaning It appears, instead, to attempt a substantive change in constitutional protections.”¹⁵⁶ Its “[s]weeping coverage ensures its intrusion at every level of government,” exacting “substantial costs [that] far exceed any pattern or practice of unconstitutional conduct under the

Free Exercise Clause as interpreted in *Smith*.¹⁵⁷ The dissenters basically agreed – they simply thought that *Smith* was wrong (or had serious doubts about its correctness) and should be reconsidered or overruled.¹⁵⁸

Boerne might have been viewed as an outlier case – after all, Congress had by statute attempted to displace the Supreme Court’s interpretation of the right to the free exercise of religion and mandate a constitutional standard of review for all future cases – but the Court did not treat it in this fashion.

Rather, in a series of cases decided between 1999 and 2001, the Court aggressively applied this new congruence and proportionality standard to hold unconstitutional in whole or in part four different federal statutes, including two of the most important modern federal anti-discrimination

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laws, the Age Discrimination in Employment Act (“ADEA”) and the Americans with Disabilities Act (“ADA”).¹⁵⁹ For example, in *Kimel* and *Garrett*, the Court held that the ADEA and the employment discrimination provisions of the ADA were not valid exercises of congressional power under Section 5, and thus were unconstitutional to the extent they allowed individuals to sue the States for monetary damages.¹⁶⁰ Because the Court had read the Equal Protection Clause to permit age and disability discrimination when rationally related to legitimate government purposes, Congress could not use Section 5 to ban these forms of invidious discrimination.¹⁶¹ Belatedly, the Court’s more liberal justices recognized the dangers posed by the congruence and proportionality test and they issued strongly-worded dissents. Four Justices complained that the Court “threaten[ed] to read Congress’ power to pass prophylactic legislation out of [the Enforcement Clause] altogether,”¹⁶² micromanaged Congress,¹⁶³ and ignored Section 5’s specific grant of power to Congress “to require more than the [constitutional] minimum” and to use “the same broad powers expressed in the Necessary and Proper Clause”¹⁶⁴

WHY BOERNE IS WRONG

Boerne and its progeny profoundly misread the text and history, ignoring the central role intended for Congress in enforcing the Fourteenth Amendment. *Boerne* substituted the *McCulloch*-style deference that was the model for the Enforcement Clauses with strict and probing judicial review, closely testing the necessity of and findings in support of congressional legislation against the Supreme Court's interpretation of the Constitution. "[N]o other positive constitutional grant of power to Congress . . . is treated with such suspicion and hostility by the Court."¹⁶⁵

In rejecting *McCulloch*-style deference, *Boerne* reasoned that such an approach would allow Congress to redefine the meaning of the Fourteenth Amendment as determined by the Supreme Court.

“[N]o other positive constitutional grant of power to Congress. . . is treated with such suspicion and hostility by the Court.” Adding insult to injury, Boerne was deeply wrong in suggesting that concerns about federalism stand in the way of Congress exercising its broad power to enforce the Civil War Amendments.

But this move only compounded the Court's errors. The Court's argument that it had exclusive power over the Fourteenth Amendment ignored the text of the Fourteenth Amendment – as *Ex Parte Virginia* rightly stressed

“[i]t is the power of Congress which has been enlarged”¹⁶⁶ – and its history, which showed that the framers were deeply distrustful of the Supreme Court and wanted to make sure Congress could ensure proper enforcement and enjoyment of the new constitutional guarantees.

Boerne's error, thus, was not that it described enforcement power as remedial – the text confers a power to secure constitutional rights – but in treating the Supreme Court's decisions as the only correct measure of whether enforcement clause legislation was, in fact, remedial. As Judge Michael McConnell has put it, “Section Five was born of the conviction that Congress – no less than the courts – has the duty and the authority to interpret the Constitution.”¹⁶⁷ The Supreme Court, of course, would still retain the responsibility of ensuring that Congress did not trample on any constitutionally-guaranteed

protections in passing enforcement legislation,¹⁶⁸ but absent such a conflict, questions about the scope of congressional power would be largely left to Congress, subject only to the reasonableness review that has long been the hallmark of Article I jurisprudence guided by *McCulloch*. This was the balance struck by *McCulloch*, and the text of Section 5 specifically incorporated *McCulloch*'s understandings of congressional power.

Adding insult to injury, *Boerne* was deeply wrong in suggesting that concerns about federalism stand in the way of Congress exercising its broad power to enforce the Civil War Amendments. In giving Congress a central role in enforcing the new guarantees of citizenship, liberty, and equality, the framers of the Civil War Amendments transformed constitutional understandings of federalism. The “federal balance,” to use Justice Kennedy’s phrase, now gave Congress a central role in “keep[ing] the States within their orbits” and “in harmony with . . . the Constitution of the country.”¹⁶⁹ As the Court itself said in *Ex Parte Virginia*, “[s]uch enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact.”¹⁷⁰ It was Justice Kennedy’s opinion in *Boerne* that undermined the “federal balance,” imposing unjustifiable obstacles on Congress’ power to enforce the Civil War Amendments. As Justice Ginsburg has written recently, “[l]egislation calling upon all government actors to respect” the “equal-citizenship stature” and “dignity of individuals . . . is entirely compatible with our Constitution’s commitment to federalism, properly conceived.”¹⁷¹

In two recent cases decided in 2003 and 2004, *Nevada Department of Human Resources v. Hibbs*¹⁷² and *Tennessee v. Lane*, Justice Kennedy lost the five justice majority needed to enforce stringent limits on Section 5 and the Court limited *Boerne*’s reach. In *Hibbs* and *Lane*, the Court held that Congress can create prophylactic rules to vindicate rights that the Supreme Court has already recognized, so long as it creates a record of pervasive constitutional violations by the states. In *Hibbs*, the Court upheld the family care provisions of the Family and Medical Leave Act and in *Lane*, the public services provisions of the Americans with Disabilities Act, as constitutional enforcement legislation.¹⁷³ But even this modicum of enforcement power is now in doubt. Justice Kennedy appears deeply committed to enforcing a strict version of the congruence and proportionality test he coined in *Boerne*,¹⁷⁴ and only four

members of the majority in *Hibbs* and *Lane* remain on the Court. Chief Justice Roberts and Justice Alito have replaced Chief Justice Rehnquist and Justice O'Connor, both members of the *Hibbs* majority,¹⁷⁵ and if these new Justices side with the dissenters in *Lane* and *Hibbs*, these cases are not likely to be enduring precedents.

Indeed, that could be precisely what happens this term in one of the most momentous Supreme Court cases in recent memory. In *Northwest Austin Municipal Utility District No. 1 v. Holder* (NAMUD-NO), the Supreme Court is considering once again the constitutionality of the preclearance requirement of the Voting Rights Act, upheld in *South Carolina v. Katzenbach* and repeatedly reaffirmed since. The plaintiff argues that the *Boerne* congruence and proportionality limits should be extended to the Court's jurisprudence under the Enforcement Clause of the Fifteenth Amendment, and that the preclearance requirement is now unconstitutional because it is no longer necessary to remedy racial discrimination in voting. The Obama Administration, joined by Constitutional Accountability Center as a "friend of the court," argue that the Court should get the text and history of the Fourteenth Amendment right, and begin retreating from *Boerne*, rather than extend it into new areas. After an oral argument marked by hostility to the Act by the Court's conservatives, there appears to be a real possibility that the Court will apply *Boerne* to invalidate the Voting Rights Act's preclearance requirement. Such a ruling would strike at the very core of congressional power under the Fourteenth and Fifteenth Amendments, reflecting a total abandonment of the text and history of these Amendments. Even in its recent cases, as problematic as they are, the Supreme Court has continued to hold out the Voting Rights Act, including its preclearance provision, as the archetype of valid enforcement legislation. A decision to reverse course, and invalidate the renewal of the preclearance requirement, would cast a heavy pall over the constitutionality of many other significant pieces of civil rights legislation.

Landmark civil rights statutes that prohibit state action that leads to discriminatory results – including Section 2 of the Voting Rights Act as amended in 1982 and the disparate impact provisions of the Civil Rights Act of 1964 – would be sure to come under fire. Challenges to these statutes have uniformly failed,¹⁷⁶ but all that could change in the face of a Supreme Court ruling invalidating the preclearance provision of the Voting Rights Act. Likewise, provisions and applications of the Americans

with Disabilities Act and the Family and Medical Leave Act not specifically upheld in *Lane* and *Hibbs* might be in serious danger. In short, should the Court nullify the renewal of the preclearance provision of the Voting Rights Act, many other statutes could fall in its wake. ■

Conclusion: Towards the Restoration of the Shield of National Protection

The Court's rulings over the past twelve years have left Section 5 of the Fourteenth Amendment in tatters. In *Morrison*, the Supreme Court announced what amounts to a per se rule that Congress cannot regulate private actors at all under Section 5. In *Boerne* and its progeny, the Court ruled that Congress can regulate state action only in exceedingly narrow circumstances. The Court has whittled down the Constitution's text – meant to be “as full as any other grant of power to Congress”¹⁷⁷ in the words of Fourteenth Amendment author John Bingham – to next to nothing. Despite frequent reminders that “Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence,”¹⁷⁸ these cases do not leave Congress much room to formulate “appropriate” legislation. The Court's doctrine makes a mockery of the text and history of Section 5.

To be sure, the impact of these rulings is limited significantly by the breadth of the Court's interpretation of other constitutional provisions including, most importantly, the Commerce Clause. Indeed, the Court has used the Commerce Clause to permit Congress to enact legislation that Section 5 was designed to authorize, preferring to look for an alternate basis for federal power in Article I rather than challenge older Supreme Court decisions that got the text and history of Section 5 wrong. But that is not the end of the story for at least three reasons. First, the Court has also been aggressive in recent years in cutting back on Commerce Clause authority – imposing limits on what is authorized, as in *Morrison*,¹⁷⁹ narrowly interpreting statutes to avoid Commerce Clause limits,¹⁸⁰ and refusing to allow Congress to use the Commerce Clause to authorize suits for money damages against the States, as in *Garrett* and *Kimel*.¹⁸¹ Combined, these legal developments have produced rulings that limit the ability of Congress to fully protect some of our society's most vulnerable citizens: the disabled in *Garrett*, victims of sexual violence in *Morrison*, the elderly in *Kimel*. These cases show why it is vital that we get the text and history of Section 5 right.

Second, the trajectory of these rulings in the Roberts Court is far from settled. If, in the *NAMUDNO* case, the Court strikes down the renewal of the preclearance provision of the Voting Rights Act as

beyond congressional authority, the decision could usher in a wave of Supreme Court rulings limiting critical federal statutes, some of which rely exclusively on the authority of the Civil War Amendments.

Finally, and perhaps most importantly, there is a critical payoff to getting the text and history of the Fourteenth Amendment right: our constitutional conversations will reflect the Constitution we actually have – the Constitution as it was ratified by the American people. In the first volume of Constitutional Accountability Center’s Text and History Narrative Series, *The Gem of the Constitution: The Text and History of the Privileges or Immunities Clause of the Fourteenth Amendment*, we chronicled how the Supreme Court effectively wrote the Privileges or Immunities Clause out of the Fourteenth Amendment in the *Slaughterhouse Cases* in 1873 and how this ruling has distorted and impoverished the conversation about fundamental rights in this country.

A similar dynamic is at work with Section 5 and the debate over the role of the federal government. It makes little sense that the Supreme Court had to strain in cases like *Heart of Atlanta Motel* to uphold the public accommodations provisions of the 1964 Civil Rights Act under the Commerce Clause, when this bar against racial discrimination is at the heartland of what Section 5 was intended to authorize. Similarly, in *Morrison*, the Court’s discussion of Section 5 seems almost like an afterthought – as noted above, the *Morrison* dissenters do not even engage on this issue – even though the basic problem with the majority’s ruling is its refusal to recognize VAWA as a textbook example of the type of federal protection Section 5 was ratified to authorize. Off the Court, similarly, conservatives and liberals endlessly debate the Commerce Clause and the intentions of our 1787 framers regarding the scope of federal authority, while generally leaving Section 5 and our Reconstruction framers out of the conversation.

This conversation needs to change. The Civil War Amendments, and particularly the Fourteenth Amendment, deliberately and dramatically shifted the federal/state balance of power in this nation. The text and history of the Enforcement Clauses show that the protection of civil rights “is a national commitment,” just as “central to Congress’s work as the regulation of the national economy” or the plethora of other enumerated powers set forth in Article I.¹⁸² Congress’ broad power to legislate to protect the “equal citizenship stature”¹⁸³ of all Americans – written into the text of the Constitution by the Enforcement Clauses – reflects our Constitution’s design that the Supreme Court and Congress, working

together, can make our foundational document's promise of liberty and equality a reality. It is time we took the text and history of the Enforcement Clauses seriously. ■

Endnotes

- 1 92 U.S. (2 Otto) 542 (1876).
- 2 106 (16 Otto) 629 (1883).
- 3 109 U.S. 3 (1883).
- 4 163 U.S. 537 (1896).
- 5 529 U.S. 598 (2000).
- 6 347 U.S. 483 (1954).
- 7 *Planned Parenthood v. Casey*, 505 U.S. 833 863 (1992).
- 8 100 U.S. 339 (1880).
- 9 521 U.S. 507 (1997).
- 10 For a sketch of the Court’s vision, see Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1094-99 (2001).
- 11 60 U.S. (19 How.) 393 (1857).
- 12 *Id.* at 407.
- 13 For some leading accounts, see JOHN T. NOONAN, NARROWING THE NATION’S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002); Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL’Y 991, 1002-03 (2008); Robert Kaczorowski, *The Supreme Court and Congress’s Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORD L. REV. 153, 167-88 (2004); NATHAN NEWMAN AND J.J. GASS, A NEW BIRTH OF FREEDOM: THE FORGOTTEN HISTORY OF THE 13TH, 14TH AND 15TH AMENDMENTS (2004); Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham’s Theory of Citizenship*, 36 AKRON L. REV. 717 (2003); Balkin & Levinson, *supra*, at 1094-1102; Evan Caminker, “Appropriate” Means-Ends Constraint on Section 5 Powers, 53 STAN. L. REV. 1127, 1158-66 (2001); Akhil Reed Amar, *Foreward: The Document and the Doctrine*, 114 HARV. L. REV. 26, 102-09 (2000); Catherine A. McKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 153-155 (2000); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 818-27 (1999); Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 758-67 (1998); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 169-95 (1997).
- 14 U.S. Const., Amdt. XIII, § 2; Amdt. XIV, § 5; Amdt. XV, § 2.
- 15 8 THE COLLECTED WORKS OF ABRAHAM LINCOLN 254-55 (Roy P. Basler ed., 1953).
- 16 On the debates, see Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 174-83 (1951).
- 17 Cong. Globe, 38th Cong., 1st Sess. 1324 (1864) (Sen. Wilson); *see also* Cong. Globe, 38th Cong., 2d Sess. 155 (1865) (Rep. Davis) (noting that Amendment would “remov[e] every vestige of African slavery from the American Republic”).
- 18 Cong. Globe, 38th Cong., 1st Sess. 1482 (1864) (Sen. Sumner); Cong. Globe, 38th Cong., 2d Sess. 142 (1865) (Rep. Orth) (“The effect of such amendment will be . . . a practical application of that self-evident truth, ‘that all men are created equal;

that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.”).

- 19 Cong. Globe, 38th Cong., 1st Sess. 2989 (1864) (Rep. Ingersoll); *id.* at 2990 (“[T]his amendment . . . will secure to the oppressed slave his natural and God-given rights.”); *see also id.* at 1324 (Sen. Wilson) (“[T]he sacred rights of human nature . . . will be protected . . .”); *id.* at 1439 (Sen. Harlan) (discussing how slavery led to the violation of fundamental constitutional rights); Cong. Globe, 38th Cong., 2nd Sess. 139 (1865) (Rep. Ashley) (same).
- 20 Cong. Globe, 38th Cong., 1st Sess. 2962 (1864) (Rep. Holman); *see also id.* at 2616 (Rep. Herrick) (“[T]he slavery issue . . . is legitimately merged in the higher issue of the right of States to control their domestic affairs . . .”); *id.* at 2983 (Rep. Mallory) (“You do not intend . . . to leave them to the tender mercies of those States. You propose by a most flagrant violation of their rights to hold the control of this large class in these various States in your own hands.”).
- 21 *See* tenBroek, *supra*, at 175.
- 22 *See* DAVID H. GANS & DOUGLAS T. KENDALL, *THE GEM OF THE CONSTITUTION: THE TEXT AND HISTORY OF THE PRIVILEGES OR IMMUNITIES CLAUSE* 10 (2008) [hereafter *THE GEM*].
- 23 *See* REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION xvii (1866). On the Joint Committee, *see THE GEM* at 9-10. For a good overview of the Joint Committee’s findings, *see* Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 685-90 (2003).
- 24 *See* JACOBUS TENBROEK, *EQUAL UNDER LAW* 203-04 (1966). As one North Carolina Freedmen’s Bureau agent told the Joint Committee: “Of the thousand cases of murder, robbery, and maltreatment of freedmen that have come before me, and of the very many cases of similar treatment of Union citizens . . . , I have never yet known a single case in which the local authorities . . . made any attempt . . . to redress any of these wrongs or to protect such persons.” REPORT OF THE JOINT COMMITTEE, pt. II, at 209; *see also* Cong. Globe, 39th Cong., 1st Sess. 95 (1866) (“[T]he freedmen are exposed to untold hardships and atrocities.”); *id.* at 339 (“[C]ombinations of returned rebel soldiers have been formed for the express purpose of persecuting, beating most cruelly, and . . . actually murdering the returned colored soldiers of the Republic.”); *id.* at 517 (“In Mississippi houses have been burned and Negroes have been murdered.”)
- 25 Cong. Globe, 39th Cong., 1st Sess. 41 (1865).
- 26 Cong. Globe, 39th Cong., 1st Sess. 475 (1866); *see also* Cong. Globe, 39th Cong., 1st Sess. 43 (1865) (“The second clause of the Amendment was inserted . . . for the purpose . . . of preventing States Legislatures from enslaving . . . those whom the first clause declared should be free. It was inserted expressly for the purpose of conferring on Congress authority by appropriate legislation to carry the first section into effect. . . . What that ‘appropriate legislation is, is for Congress to determine, and nobody else.”); Cong. Globe, 39th Cong., 1st Sess. 322 (1866) (“Who is to decide what appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end.”).
- 27 Cong. Globe, 39th Cong., 1st Sess. 1124 (1866) (Rep. Cook); *see also id.* at 602 (Sen. Lane) (arguing that the slaves “are free by the constitutional amendment lately enacted, and entitled to all the privileges and immunities of other free citizens of the United States. It is made your especial duty by the second section of that amendment, by appropriate legislation, to carry out that emancipation.”); *id.* at 1151 (Rep. Thayer) (“I thought when I voted for the amendment to abolish slavery that

I was aiding to give real freedom to the men . . . [W]hen I voted for the second section of the Amendment, I felt in my own mind certain that I had . . . given to Congress ability to protect and guaranty the rights which the first section gave them.”); *id.* at 1183 (Sen. Pomeroy) (“[W]hat is ‘appropriate legislation’ on the subject, namely securing the freedom of all men? It can be nothing less than throwing about all men the essential safeguards of the Constitution.”).

28 17 U.S. (4 Wheat.) 316 (1817).

29 41 U.S. (16. Pet.) 539 (1842).

30 *McCulloch*, 17 U.S. at 421 (emphasis added). For more discussion of *McCulloch*, see Caminker, *supra*, at 1134-41; Engel, *supra*, at 134-40.

31 See *Gonzales v. Raich*, 545 U.S. 1, 22 (2006); *id.* at 37, 39 (Scalia, J., concurring); *Eldred v. Ashcroft*, 537 U.S. 186, 199-208, 212-13 (2003); *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 276-80 (1981); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62 (1964); *United States v. Darby*, 312 U.S. 100, 118-21 (1941); *Burrough v. United States*, 290 U.S. 534, 547-48 (1934).

32 The Fugitive Slave Clause, Art. IV, 2, cl.3, 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 Service or Labour may be due.”

33 For discussions of *Prigg*’s reading of congressional power, see Kaczorowski, *supra*, at 167-88; Amar, *supra*, at 69-70. For later cases, see *Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1859) (declaring 1850 Act “in all its provisions, fully authorized by the Constitution of the United States”). For additional discussion of *Prigg*, see *infra* at 17-18.

34 *Prigg*, 41 U.S. at 619.

35 Cong. Globe, 39th Cong., 1st Sess. 1118 (1866) (Rep. Wilson).

36 14 Stat. 27 (1866).

37 Cong. Globe, 39th Cong., 1st Sess. 1156 (1866) (Rep. Thornton) (“The sole object of that amendment was to change the status of the slave to that of a freeman . . .”).

38 See, e.g., Cong. Globe, 39th Cong., 1st Sess. 1121 (1866) (Rep. Rogers) (“This act of legislation would destroy the foundations of the government as they were laid and established by our fathers, who reserved to the States certain privileges and immunities which ought sacredly to be preserved to them.”); *id.* at 1271 (Rep. Kerr) (“It takes a long and fearful step toward the complete obliteration of State authority and the reserved and original rights of the States.”).

39 See U.S. Congress, Presidential Vetoes, 1789-1988, S. Pub. 102-12, 103rd Cong., 2d Sess. 1-30 (Washington: GPO, 1992).

40 See, e.g., ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-77, at 257 (1988); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPAL TO JUDICIAL DOCTRINE 104 (1988); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 86 (1986). For discussions in Congress, see 39th Cong., 1st Sess. 2462 (1866) (Rep. Garfield) (“[W]e propose to lift that great and good law . . . and fix it . . . in the eternal firmament of the Constitution”); *id.* at 2465 (Rep. Thayer) (supporting the Amendment for “incorporating in the Constitution . . . the principle of the civil rights bill which has lately become a law”); *id.* at 2498 (Rep. Broomall) (urging that we “place the power to enact the [civil rights] law unmistakably in the Constitution. On so vital a point I wish to make assurance doubly assure.”); *id.* at 2511 (Rep. Eliot) (“I shall gladly do what I may do to incorporate into the Constitution provisions which will

settle doubt . . . upon [the Civil Rights Act].”); *id.* at 2961 (Sen. Poland) (“It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the foundation of all republican government . . .”).

41 For further discussion of this point, see *infra* at 28-30.

42 Cong. Globe, 39th Cong., 1st Sess. 2498 (1866) (Rep. Broomall) (“We propose . . . to give power to the Government of the United States to protect its own citizens within the States . . . Who will deny the necessity of this? No one.”); *id.* at 2511 (Rep. Miller) (“This of course is requisite to enforce the foregoing sections . . . and is too plain to admit of any argument; and in fact is not, as I am aware, contested by any gentlemen in this House.”); *id.* at app. 255 (Rep. Baker) (“This section was of course necessary in order to carry the proposed article into practical effect.”).

43 Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866).

44 *Id.* at 2768.

45 *Id.* at 2766; *see also id.* at 2961 (Sen. Poland) (“Congress should be invested with the power to enforce th[e Privileges or Immunities Clause] throughout the country and compel its observance.”).

46 Cong. Globe, 39th Cong., 1st Sess. 2542 (1866); *see also id.* at 2459 (Rep. Stevens) (“This amendment . . . allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all.”).

47 *Id.* at 2542.

48 Cong. Globe, 41st Cong., 2nd Sess. 3608 (1870); *see also* Cong. Rec., 43rd Cong., 1st Sess. 4153 (1874) (Sen. Pease) (“[T]he thirteenth, fourteenth, and fifteenth amendments . . . have provided a new policy in this government, a policy that defines, recognizes, and protects the rights, the privileges, and the immunities of American citizenship, and has given to Congress . . . the right to legislate for their protection . . .”); *id.* at app. 303 (Sen. Alcorn) (“Was the Government under which we lived changed by reason of the revolution . . . ? Did not the thirteenth, fourteenth, and the fifteenth amendments change the form of this government? They extended the limits of this government; they gave an increased power to this government . . .”).

49 Cong. Globe, 39th Cong., 1st Sess. 2940 (1866); *see also id.* at 3147 (Rep. Harding) (“We know what the results of this will be, for we have already seen it tested.”).

50 *Id.* at 2500 (Rep. Shanklin); *id.* at 2538 (Rep. Rogers).

51 *See* James W. Fox, *Re-Readings and Misreadings: Slaughter-House, Privileges or Immunities, and Section Five Enforcement Power*, 91 KY. L.J. 67, 103 (2002); Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115, 144-45 (1999).

52 AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 363 (2005).

53 For comparison of Bingham’s proposal with the final version of the Enforcement Clause, *see Ruth Colker, The Supreme Court’s Historical Errors in City of Boerne v. Flores*, 43 B.C. L. REV. 783, 794-812 (2002); McConnell, *supra*, at 176-81; Engel, *supra*, at 122-34; Michael P. Zuckert, *Congressional Power Under the Fourteenth Amendment – The Original Understanding of Section Five*, 3 CONST. COMMENT. 123, 125-47 (1986).

54 Cong. Globe, 42nd Cong., 1st Sess. app. 83 (1871).

55 Cong. Globe, 40th Cong., 3rd Sess. 727 (1869) (Rep. Bingham).

- 56 Cong. Globe, 41st Cong., 2nd Sess. 3563 (1870) (Sen. Carpenter); *see also id.* at 3655 (Sen. Howard) (“Their intention and purpose were . . . to secure to the colored man by proper legislation the right to go to the polls and quietly and peacefully deposit his ballot there.”).
- 57 Cong. Globe, 41st Cong., 2nd Sess. 3670 (1870).
- 58 For an excellent discussion of the right to protection, see Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991); *see also* Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. LAW. 221, 230-35 (2006); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1433-51 (1992); Michael Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 426-437 (1990).
- 59 5 U.S. (1 Cranch) 137, 163 (1803).
- 60 Cong. Globe, 39th Cong., 1st Sess. 1293 (1866); *id.* at 343 (Sen. Wilson) (“[T]he poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and proudest man in the land.”).
- 61 *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823). On *Corfield*, see THE GEM at 6-7.
- 62 Cong. Globe, 39th Cong., 1st Sess. 2766 (1866); *see also* Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 129 (1991) (“[T]he plainest possible meaning of the Fourteenth Amendment mandate . . . is that no state may deny to any citizen the protection of its criminal and civil law against private violence and private violation.”).
- 63 Cong. Globe, 39th Cong., 1st Sess. 1262 (1866) (Rep. Broomall).
- 64 *Id.* at 1833.
- 65 On the Act, see FONER, *supra*, at 454-59. For a discussion of the right to protection arguments made in defense of the Act, see Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON CIV. RTS. L. J. 219, 224-252 (2009).
- 66 Cong. Globe, 42nd Cong., 1st Sess. 428 (1871) (Rep. Beatty).
- 67 *Id.* at 459 (1871) (Rep. Coburn).
- 68 *Id.* at 501 (Sen. Frelinghuysen); *see also id.* at 482 (Rep. Wilson) (“[T]he true meaning of the constitutional provision is that the State shall provide equal protection Failing to do this, whether that failure is the result of inaction or inability . . . the remedy lies with Congress.”); *id.* at 506 (Sen. Pratt) (“One of the definitions of the verb ‘deny’ is ‘not to afford; to withhold.’ Now, can it with fairness be said this equal protection is not denied, when it is withheld, when it is not afforded.”); *id.* at app. 300 (Rep. Stevenson) (“Unexecuted laws are no protection. . . . Union men, white or black, are ‘denied’ the protection of the laws as completely as if the laws excepted . . . ‘all cases of outrage by Klu Klux upon Republicans, white or colored.’”); *id.* at 692 (Sen. Edmunds) (“‘Protection,’ mark the word . . . ; it appears in the Fourteenth Amendment.”).
- 69 *Id.* at app. 71; *see also id.* at 334 (Rep. Hoar) (“[I]t is an effectual denial . . . of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection.”); *id.* at 501 (Sen. Frelinghuysen) (“It is the citizen’s right to have laws for his protection, and to have them executed, and it is the constitutional right and duty of the General Government to see to it that the fundamental rights

of citizens of the United States are protected.”); *id.* at 697 (Sen. Edmunds) (“It is security to the citizen that he shall have the protection of law.”); *id.* at app. 251 (Sen. Morton) (“It means to confer upon every person the right to such protection, and therefore gives to Congress the power to secure enjoyment of that right.”).

70 *Id.* at 608.

71 *Id.* at app. 153.

72 As noted, the framers of Section 5 also drew on the Supreme Court’s foundational Article I precedent, *McCulloch v. Maryland*. For extended discussion of *McCulloch*, see *infra* at 27-28.

73 See Amar, *supra*, at 70 (“[T]he Court . . . gave Congress power to legislate directly upon private parties even though Article IV only speaks of States.”); Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1357 (1964) (noting *Prigg*’s holding that “the mere recognition of a right in the federal Constitution gives Congress implied power to protect it from interference by private acts”); see also Kaczorowski, *supra*, at 164-88, 191-93, 202-04 (discussing the statutory schemes of the Acts of 1793 and 1850 and the Supreme Court precedents which upheld them); Cong. Globe, 41st Cong., 2nd Sess. 3680 (1870) (Sen. Carpenter) (“[A] southern master . . . required that the Government of the United States should execute the duty which . . . , the Supreme Court had decided, the Constitution cast on the government. . . . It was not merely to punish a man who violated his right, but it was putting the machinery of the Government into operation to enforce it.”); Cong. Rec., 43rd Cong., 1st Sess. 4149 (1874) (Sen. Howe) (noting that the 1850 Act “was not directed to any State; it was directed to all the citizens in all the States”).

74 See Cong. Globe, 42nd Cong., 1st Sess. 375 (1871) (Rep. Lowe) (“Both impose a prohibition upon State authority; both affirm a right under Federal authority.”); *id.* at app. 70 (Rep. Shellabarger) (“[N]otice that [the Fugitive Slave Clause] is in restraint of the power of the States, just as is the first section of the fourteenth amendment.”).

75 *Id.* at app. 70 (Rep. Shellabarger).

76 92 U.S. (2 Otto) 542 (1876). The same Term, the Court also decided *United States v. Reese*, 92 U.S. 214 (1876), which used a strained reading of legislation enforcing the Fifteenth Amendment as the excuse to invalidate the legislation, rather than save it. The Court abandoned principles of judicial restraint in the push to undo Reconstruction. See Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 134 (1994) (discussing *Reese*).

77 106 (16 Otto) 629 (1883).

78 109 U.S. 3 (1883).

79 FONER, *supra*, at 530.

80 See *id.* at 437; McConnell, *supra*, at 135. For a recent retelling of the full story of the Colfax massacre, see Charles Lane, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (2008).

81 *Cruikshank*, 92 U.S. 554-55.

82 *Id.* at 555.

83 FONER, *supra*, at 531.

84 *Harris*, 106 U.S. at 639-40.

85 *Civil Rights Cases*, 109 U.S. at 11.

86 *Id.* at 14. *The Civil Rights Cases* were followed in two additional early 20th century rulings: *James v. Bowman*, 190 U.S. 127

- (1903) (holding invalid a statute prohibiting denial of right to vote based on bribery); *Hodges v. United States*, 203 U.S. 1 (1906) (holding Congress lacked power to punish a conspiracy to prevent African American workers from working in a sawmill).
- 87 See *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833). On *Barron* and the framers' intent to apply the Bill of Rights to the States, see THE GEM at 4-14.
- 88 AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 164 (1998). John Bingham, the primary drafter of Section One, described how *Barron* led to the Fourteenth Amendment's "no State" language. "Acting upon [*Barron*'s] suggestion, I did imitate the framers of the original Constitution. As they had said 'no State shall emit bills of credit . . . , I prepared the provision of the first section of the fourteenth amendment as it stands in the Constitution" Cong. Globe, 42nd Cong., 1st Sess. app. 84 (1871).
- 89 *Civil Rights Cases*, 103 U.S. at 53 (Harlan, J., dissenting).
- 90 *United States v. Raines*, 362 U.S. 17, 22 (1960) (overruling *United States v. Reese*, 92 U.S. 214 (1876)).
- 91 See McConnell, *supra*, at 137 (questioning "why does Congress lack the power to determine on a nationwide basis that federal law is needed to protect constitutional rights that are frequently (even if not universally) denied?").
- 92 379 U.S. 241 (1964).
- 93 *Id.* at 257-58, 261-62.
- 94 *Id.* at 279-86 (Douglas, J., concurring); *id.* at 376-77 (Goldberg, J., concurring). Sixth months earlier, in *Bell v. Maryland*, 378 U.S. 226 (1964), both Justices Douglas and Goldberg argued that the Fourteenth Amendment guaranteed a right of equal access to public accommodations, making any state action to enforce a policy of segregation unconstitutional. In light of this constitutional mandate, both argued that, under the Enforcement Clause, Congress had clear authority to bar racial discrimination in access to public accommodations.
- 95 See, e.g., *EEOC v. Wyoming*, 460 U.S. 226 (1983) (upholding extension of Age Discrimination in Employment Act to state and local governments under the Commerce Clause).
- 96 Balkin & Levinson, *supra*, at 1100.
- 97 Laycock, *supra*, at 758. See also *infra* at 40-41.
- 98 392 U.S. 409 (1968).
- 99 *Id.* at 440.
- 100 *Griffin v. Breckenridge*, 403 U.S. 88 (1971), which invoked the Thirteenth Amendment in upholding a provision of the Klux Klan Act creating a civil cause of action for conspiracies to deprive a person of constitutional rights, followed this pattern as well. "Congress was wholly within its power under s[ection] 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men." *Id.* at 105. This was an odd result – the statute itself uses words taken from the Fourteenth Amendment – which made sense only as an effort to avoid a conflict with the late 19th century rulings invalidating Reconstruction-era civil rights legislation regulating private actors.
- 101 *United States v. Guest*, 383 U.S. 745 (1966), for example, invoked the right to travel, calling it a structural right not limited by the Fourteenth Amendment's state action requirement, to support a criminal conspiracy conviction against private

individuals who terrorized African American persons. *Id.* at 757-59. Interestingly, six Justices argued that Congress had the power under the Fourteenth Amendment's Enforcement Clause to punish "all conspiracies – with or without state action -- that interfere with Fourteenth Amendment rights." *Id.* at 762 (Clark, J., concurring); *id.* at 781-84 (Brennan, J., concurring). But only Justice Brennan's concurrence, also joined by Chief Justice Warren and Justice Douglas, explained its rationale, making the case a missed opportunity to revisit the meaning of the Fourteenth Amendment's Enforcement Clause.

102 529 U.S. 598 (2000).

103 *Id.* at 620.

104 *Id.* at 622.

105 For a nice discussion of this point, see McKinnon, *supra*, at 153-155.

106 See AMAR, *supra*, at 260-61 n.* ("Unlike the later Fifteenth Amendment, section 1 pointedly spoke not of race but of more general liberty and equality."); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 321-22 (2007) ("The original meaning of the Fourteenth Amendment, which guarantees civil equality and equality before the law for all persons . . . presents no bar to the conclusion that sex discrimination violates the Constitution. The text of Section 1 does not exclude women from its protections, and the underlying principle of equal citizenship applies to men and women equally.").

107 Amar, *supra*, at 107.

108 Balkin & Levinson, *supra*, at 1099.

109 The lead dissent, filed by Justice Souter, argued that VAWA was valid under the Commerce Clause, and did not address the Fourteenth Amendment's Enforcement Clause. *Morrison*, 529 U.S. at 628 n.1 (Souter, J., dissenting). Justice Breyer's dissent, too, focused solely on the Commerce Clause, though he added some comments critical of the majority's reading of the Enforcement Clause. *Id.* at 664 (Breyer, J., dissenting) (noting that he "need not consider" congressional authority under the Fourteenth Amendment but "doubting the Court's reasoning rejecting that source of authority").

110 *McCulloch*, 17 U.S. at 421.

111 See Paulsen, *supra*, at 1002; Caminker, *supra*, at 1159; Amar, *supra*, at 825-26; McConnell, *supra*, at 188; Engel, *supra*, at 131-32.

112 Cong. Globe, 39th Cong., 1st Sess. 1118 (1866).

113 *Id.* at 1294 (Rep. Shellabarger); *id.* at 1836 (Rep. Lawrence).

114 *Id.* at 322, 475, 1759 (Sen. Trumbull); *id.* at 1124 (Rep. Cook); *id.* at 1152 (Rep. Thayer). Indeed, this was a common refrain throughout the Reconstruction era – *McCulloch* was the measure of congressional power under the Enforcement Clauses. See Cong. Globe, 42nd Cong., 2nd Sess. 728 (1872) (Sen. Sumner) ("When I assert that Congress has an ample power over this question, I rely upon a well known text . . . *McCulloch vs. State of Maryland*. . . . The Supreme Court will not undertake to sit in judgment on the means employed by Congress in carrying out a power which exists in the Constitution. . . . Here is the definition of citizenship and the right to equal protection of the laws . . . both placed under the safeguard of the nation. Whatever will fortify these is within the power of Congress, by express grant."); Cong. Rec., 43rd Cong., 1st Sess. 414 (1874) (Rep. Lawrence) ("The power to secure equal civil rights by 'appropriate legislation' is an express power; and Congress, therefore, is the exclusive judge of the proper means to employ. This has been settled in

McCulloch”); *see also* Cong. Globe, 41st Cong., 2nd Sess. 3882 (1870) (Rep. Davis) (“No broader language could be adopted than this with which to clothe Congress with power. . . . Congress is clothed with so much power as is necessary and proper to enforce the two amendments to the Constitution, and is to judge from the exigencies of the case what is necessary and what is proper.”); Cong. Rec., 43rd Cong., 2nd Sess. 980 (1875) (Rep. Hale) (citing *McCulloch* for the proposition that “Congress are authorized to select in their own discretion all measures . . . to remedy the great evil against which the [fourteenth] amendment proposes to guard”).

- 115 Amar, *supra*, at 822-23; *see also* Jones, 392 U.S. at 443-44 (adopting Wilson’s reasoning).
- 116 Laycock, *supra*, at 765; *see also* Caminker, *supra*, at 1163; McConnell, *supra*, at 182.
- 117 Cong. Globe, 39th Cong., 1st Sess. 3038 (1866) (Sen. Yates); *see also id.* at app. 101 (Sen. Yates) (“[T]hat decision is wiped out; it has gone down to a kindred doom”).
- 118 *Id.* at 1124; *see also* Cong. Globe, 42nd Cong., 1st Sess. 504 (1871) (Sen. Pratt) (“[T]hey were not satisfied to leave it to the courts alone to execute this provision, and to pronounce all the consequences and incidents which followed the abolition of slavery; they chose to invest Congress with power to enforce that article by appropriate legislation.”); Cong. Globe, 42nd Cong., 1st Sess. app. 229 (1871) (Sen. Boreman) (“[C]are was taken to avoid the difficulties which had hitherto been thrown in the way of a fair construction of this great instrument by the gentlemen who were called the ‘strict constructionists’.”).
- 119 Cong. Globe, 42nd Cong., 1st Sess. 375 (1871) (Rep. Lowe).
- 120 See Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 157-65 (1995).
- 121 Cong. Globe, 42nd Cong., 2nd Sess. 525 (1872) (Sen. Morton); *see also* Cong. Globe, 42nd Cong., 1st Sess. 577 (1871) (Sen. Carpenter) (“[T]hey are not left . . . to be disposed of by the courts as the cases should arise . . . , but Congress is clothed with the affirmative power and jurisdiction to correct the evil.”)
- 122 Cong. Globe, 41st Cong., 2nd Sess. 3670 (1870) (Sen. Morton); *see also* Cong. Globe, 39th Cong., 1st Sess. 1759 (1866) (Sen. Trumbull) (“Th[e Enforcement] clause authorizes us to do whatever is necessary to protect the freedmen in his liberty”); Cong. Globe, 42nd Cong., 1st Sess. 695 (1871) (Sen. Edmunds) (observing that Enforcement Clause gave Congress power to make constitutional guarantees “effectual” and “protect the liberty of all people wherever it might be assailed”); Cong. Rec., 43rd Cong., 1st Sess. 4085 (1874) (Sen. Carpenter) (arguing that Enforcement Clause of the Fifteenth Amendment was added to allow Congress “to act affirmatively” and ensure that “the right to vote should be enjoyed”).
- 123 Amar, *supra*, at 826.
- 124 See McConnell, *supra*, at 175-76.
- 125 83 U.S. (16 Wall.) 36 (1873). For a discussion of *Slaughterhouse*, see THE GEM at 14-19.
- 126 Cong. Rec., 43rd Cong., 1st Sess. 4116 (1874) (Sen. Boutwell).
- 127 *Id.* at 4148 (Sen. Howe); *see also* CURTIS, *supra*, at 177.
- 128 *Id.* at app. 304 (Sen. Alcorn) (“This is one branch of this Government, the legislative department; the judiciary is another branch; and we go forward without regard to the opinions of each other”). In making these arguments, the framers drew on the argument Lincoln had made in the wake of *Dred Scott*. Lincoln argued that we should respect the Court’s judgment – he would make no attempt to free *Dred Scott* – but that other organs of the federal government were not obliged to conduct themselves under rulings like *Dred Scott* that were unfaithful to the Constitution. For an excellent discussion of

Lincoln's views, see Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227 (2008).

129 Cong. Rec., 43rd Cong., 1st Sess. 417 (1874) (Rep. Walls).

130 100 U.S. 339 (1880).

131 *Id.* at 345, 346; *see also id.* at 346 (“Nor can [a State] deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.”).

132 *Id.* at 345-46; *see also United States v. Rhodes*, 27 F. Cas. 785, 791-93 (D. Ky. 1866) (Swayne, J.) (discussing *McCulloch* roots of Enforcement Clause power under the Thirteenth Amendment in upholding Civil Rights Act of 1866).

133 *Ex Parte Virginia*, 100 U.S. at 345.

134 383 U.S. 301 (1966).

135 *Id.* at 324.

136 *Id.* at 326.

137 *Id.* at 326-27.

138 *Id.* at 327.

139 *Id.* (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)).

140 384 U.S. 641 (1966).

141 *Id.* at 651.

142 *Id.* at 653.

143 *Id.* at 656; *see also id.* at 653. For subsequent cases following *Morgan*, see *City of Rome v. United States*, 446 U.S. 156, 173-78 (1980) (upholding the 1975 extension of the Voting Rights Act's preclearance requirement); *Oregon v. Mitchell*, 400 U.S. 112, 130-34 (1970) (Black, J.) (upholding ban on racially discriminatory literacy tests); *id.* at 144-47 (Douglas, J., concurring in part and dissenting in part); *id.* at 216-17 (Harlan, J., concurring in part and dissenting in part); *id.* at 231-36 (Brennan, J., concurring in part and dissenting part); *id.* at 282-84 (Stewart, J., concurring in part and dissenting in part). 400 U.S. 112, 204-09 (1970) (Harlan, J., concurring in part and dissenting in part); *id.* at 296 (Stewart, J., concurring in part and dissenting in part). *Mitchell* invalidated provisions of the Voting Rights Act securing the right to vote in state and local elections to 18-year-old citizens. Although no majority coalesced on any one opinion, five Justices concluded that Congress could not regulate age qualifications for voting in state and local elections under the Fourteenth Amendment's Enforcement Clause. One year later, the Twenty-Sixth Amendment overturned *Mitchell*'s result.

145 446 U.S. 156, 210-11 (1980) (Rehnquist, J., dissenting).

146 521 U.S. 507 (1997).

147 *Boerne* did not disturb RFRA's application to the federal government, which does not depend on congressional enforcement power under Section 5. *See Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 424 n.1 (2006).

148 *See Caminker, supra*, at 1131; McConnell, *supra*, at 166; Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 477 (2000).

149 *Boerne*, 521 U.S. at 519.

150 *Id.* at 520-24.

151 *Id.* at 520.

152 *Id.* at 529 (rejecting the idea that “Congress could define its own powers by altering the Fourteenth Amendment’s meaning”).

153 *Id.* at 536 (arguing that RFRA “contradicts vital principles necessary to maintain . . . the federal balance”).

154 *Id.* at 520.

155 494 U.S. 872 (1990). For discussion of *Smith*, see McConnell, *supra*, at 153-54, 157-61.

156 *Boerne*, 521 U.S. at 532.

157 *Id.* at 532, 534.

158 *Id.* at 544-45 (O’Connor, J., dissenting); *id.* at 565-66 (Souter, J., dissenting) (calling for re-argument on the question of whether *Smith* was correctly decided); *id.* at 566 (Breyer, J., dissenting) (same).

159 See *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

160 In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court held that Congress could not subject the States to suit for money damages for violating federal statutes enacted pursuant to congressional powers enumerated in Article I of the Constitution. To overcome this principle of state sovereign immunity, Congress needed to point to a grant of authority to Congress at the expenses of the States, such as the power granted to Congress in Section 5. Thus, *Seminole Tribe* made the scope of Section 5 critical to providing federal damage remedies against the States.

161 *Garrett*, 531 U.S. at 366-72; *Kimel*, 528 U.S. at 82-90.

162 *Florida Prepaid*, 527 U.S. at at 660 (Stevens, J., dissenting).

163 *Garrett*, 531 U.S. at 376-85 (Breyer, J., dissenting).

164 *Id.* at 386 (Breyer, J., dissenting) (quoting *Morgan*, 384 U.S. at 650).

165 *Post & Siegel, supra*, at 477.

166 *Ex Parte Virginia*, 100 U.S. at 345.

167 McConnell, *supra*, at 183.

168 *Cf. Boerne*, 521 U.S. at 536-37 (Stevens, J., concurring) (arguing that RFRA violated the Establishment Clause).

169 Cong. Globe, 39th Cong., 1st Sess. 1088 (1866).

170 *Ex Parte Virginia*, 100 U.S. at 346.

171 *Tennessee v. Lane*, 541 U.S. 509, 537 (2004) (Ginsburg, J., concurring).

172 538 U.S. 721 (2003).

173 *Hibbs*, 538 U.S. at 727-28 (“Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.”); *Lane*, 541 U.S. at 520 (“When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.”).

174 See *Hibbs*, 538 U.S. at 744-59 (Kennedy, J., dissenting); *Lane*, 541 U.S. at 538-554 (Rehnquist, C.J., dissenting) (dissent joined in full by Justice Kennedy).

- 175 Dissenting in *Lane*, Justice Scalia argued that the Enforcement Clauses give Congress no authority to enact prophylactic rules. *Lane*, 541 U.S. at 558-59. In Scalia's view, the Enforcement Clauses simply provide a way for Congress to facilitate judicial review, or require states to report constitutional violations. *Id.* at 559-60. Justice Scalia's view tracks that of Northern Democrats during Reconstruction, who argued to no avail that Section 5 "does not confer on Congress one particle of additional power," see Cong. Globe, 42nd Cong., 2nd Sess. 763 (1872) (Sen. Davis); Cong. Rec., 43rd Cong., 2nd Sess. 948 (1875) (Rep. Finck), and entrusted enforcement of the Fourteenth Amendment solely to the judiciary. Cong. Rec., 43rd Cong., 1st Sess. 4084 (1874) (Sen. Thurman) ("The proper remedies before were, and now are, nothing but the judgments of courts, to be rendered in such a way as Congress might provide . . ."); *id.* at 4162 (Sen. Kelly) ("[T]he fifth section . . . was simply giving the authority to Congress to make a case and present it so that it might be taken to the highest court of the United States"). This is like giving Brutus and other anti-federalist opponents more weight in interpreting the 1789 Constitution than the Federalist Papers of James Madison and Alexander Hamilton. Scalia's opinion is at war with Section 5's text and history – a sorry statement about a self-professed originalist judge.
- 176 See, e.g. *United States v. Blaine County, Mont.*, 363 F.3d 897, 903-09 (9th Cir. 2004) (upholding Section 2 of the Voting Rights Act as valid enforcement legislation); *In re Employment Discrimination Litigation Against the State of Alabama*, 198 F.3d 1305, 1318-24 (11th Cir. 1999) (upholding disparate impact provisions of Title VII of the Civil Rights Act of 1964 as valid enforcement clause legislation).
- 177 Cong. Globe, 42nd Cong., 1st Sess. app. 83 (1871).
- 178 *Garrett*, 531 U.S. at 365; see also *Kimel*, 528 U.S. at 81 ("Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment.").
- 179 See *Morrison*, *supra*; *United States v. Lopez*, 514 U.S. 549 (1995).
- 180 See *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste of No. Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).
- 181 *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).
- 182 Balkin & Levinson, *supra*, at 1100.
- 183 *Lane*, 541 U.S. at 536 (Ginsburg, J., concurring).

Appendix

THE THIRTEENTH AMENDMENT

Section 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.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

THE FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

THE FIFTEENTH AMENDMENT

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

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