Note

The *McCulloch* Theory of the Fourteenth Amendment: *City of Boerne v. Flores* and the Original Understanding of Section 5

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I. INTRODUCTION

Twentieth-century eyes have long read the Fourteenth Amendment as though it were addressed to the judiciary. The historical fact that the Supreme Court, and not Congress, has taken the lead in defining our constitutional liberties has left lawyers looking to the courts to fulfill the promises that lie at the amendment's core. Whether the amendment prevents a state from operating race-segregated schools, proscribing adult sexual activity, or sponsoring affirmative action has been seen first and often exclusively as a question for the courts. Constitutional scholars have likewise embraced such a judicial reading in their longstanding debate over whether the Fourteenth Amendment incorporates the Bill of Rights.[1] Academics have searched for the original intent of the amendment's Framers, all the while sharing the assumption that such a theory of *judicial* interpretation would lead to a satisfactory conclusion.

City of Boerne v. Flores[2] adopted the judicial reading in striking down Congress's attempt to provide its own content to the open guarantees of the

1. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE (1986); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

2. 521 U.S. 507 (1997).

amendment. In 1993, Congress passed the Religious Freedom Restoration Act (RFRA)[3] with the almost unanimous support of both houses,[4] employing its own power to enforce the Fourteenth Amendment to protect religious liberty against state infringement.[5] The act took aim at the Supreme Court's decision in *Employment Division v. Smith*,[6] which had read the First Amendment to provide no free exercise exemption from neutral laws of general applicability.[7] By restoring the balancing test that the Court had employed prior to *Smith*,[8] Congress asserted an independent authority to interpret the Fourteenth Amendment.[9] If the legislature determined that state action threatened the liberty interests guaranteed by the Fourteenth Amendment, it could enact laws to protect that right—even if the Supreme Court had decided the Fourteenth Amendment would not compel such a reading. The *Boerne* Court rejected that interpretation of the Fourteenth Amendment, finding that "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."[10] The Court examined the legislative debates on the amendment and found that the Framers understood Congress's power to be "remedial," limited to implementing legislation that directly or indirectly enforced judicially defined rights against state interference.[11] To allow Congress to

3. 42 U.S.C. § 2000bb (1994).

4. The House of Representatives passed RFRA unanimously. *See* 139 CONG. REC. 27,241 (1993). The Senate passed it by a vote of 97 to three. *See id.* at 26,416.

5. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); S. REP. NO. 103-111, at 13 (1993) (asserting power under Section 5 and the Necessary and Proper Clause); H. R. REP. NO. 103-88, at 9 (1993) (same).

6. 494 U.S. 872 (1990).

7. *See id.* at 879 (finding that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'" (citation omitted)).

8. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (finding that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment"); Sherbert v. Verner, 374 U.S. 398, 403 (1963) (requiring that "any incidental burden on the free exercise of appellant's religion . . . be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate'" (citation omitted)).

9. RFRA's stated purpose was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . ." 42 U.S.C. § 2000bb(b)(1) (1994). Prior to the *Smith* decision, the Supreme Court had at times applied the *Sherbert* test to require that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Smith*, 494 U.S. at 883.

10. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

11. *See id.* at 520 ("The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause."). The *Boerne* Court also grounded the remedial interpretation in the Court's precedent. *See id.* at 524-29. Although this Note will confine itself largely to addressing *Boerne*'s historical argument, a number of commentators have read the case law quite differently. *See, e.g.*, Erwin Chemerinsky, *The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601, 610-14 (1998); Robert Hoff, *Losing Our Religion: The Constitutionality of the Religious Freedom Restoration Act Pursuant to Section 5 of the Fourteenth Amendment*, 64 BROOK. L. REV. 377 (1998); Matt Pawa, Note, *When*

enforce an interpretation different from that of the judiciary would be to grant the legislature the substantive power to define constitutional meaning. As RFRA did not seek to protect such a judicially defined right, it went beyond Congress's power under the Fourteenth Amendment and, as such, reflected an impermissible attempt by the national government to regulate the states.

The problem with *Boerne* is not simply that it misread the ratification history but that it ignored the broader context that gave meaning to those debates. This Note argues that the *Boerne* Court, like many modern constitutional scholars, went astray in focusing upon the judicial branch as the ultimate interpreter of the Fourteenth Amendment.[12] While the Court may retain the last word, the judicial reading obscures the Framers' conviction that it would be Congress, and not the courts, that would be the first reader, and primary enforcer, of the Fourteenth Amendment. The amendment speaks in open generalities not because the Framers naively believed the judiciary might ascertain a definite meaning behind those words, but because they were interested in granting to the national government broad discretion to protect civil liberties against state infringement. Rather than seeking to codify a definite set of rights, the Framers undertook to grant future Congresses the discretion to protect civil liberties, as they might understand them, against state infringement.[13]

This Note revisits the legislative reading of the Fourteenth Amendment by articulating the theory of legislative discretion implicit within the text of the amendment. The Framers of the amendment, as well as judges and commentators of the era, expected courts to review acts of Congress under the deferential standard laid out by Chief Justice Marshall in *McCulloch v. Maryland*.[14] The amendment grants Congress the power to enforce its provisions by "appropriate" legislation, a word that called to their minds the Chief Justice's canonical opinion. In upholding Congress's power to charter a national bank, Marshall laid out the text through which nineteenth-century courts would review the constitutionality of an act of Congress: "Let the end be legitimate, let it be within the scope of the constitution, and

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the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section Five of the Fourteenth Amendment, 141 U. PA. L. REV. 1029 (1993).

12. The search for original intent remains important for judicial enforcement of the Fourteenth Amendment, of course. However, scholars' emphasis on judicial enforcement has encouraged them to presume definite answers that may not exist in the ratification history. *But see* AMAR, *supra* note 1, at 175 n.* (arguing for the judicial basis of incorporation but recognizing in a footnote that the Framers of the Fourteenth Amendment may have employed general language because "many congressional architects of Reconstruction envisioned not only judicial enforcement of section I but also—and perhaps more centrally—congressional enforcement").

13. Of course, as will be discussed below, the Court retains the ultimate authority to constrain Congress from extending the Fourteenth Amendment beyond any plausible reading of its text, and more importantly, to prevent Congress from impermissibly narrowing the amendment's scope.

14. 17 U.S. (4 Wheat.) 316 (1819).

all means which are *appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[15] Congressmen, judges, and legal commentators regularly drew on these words—often verbatim—as setting the standard by which courts would review an act of Congress.[16] In drafting Section 5 of the Fourteenth Amendment, the Republicans borrowed explicitly from *McCulloch* in granting Congress the power to enforce the provisions of the amendment by *appropriate* legislation.[17]

Under the *McCulloch* standard, Congress enjoyed interpretive discretion that extended not only to the means but also to the constitutional ends themselves. Modern commentators have read John Marshall's reminder that "it is a constitution we are expounding"[18] as a warrant for judicial license.[19] However, in *McCulloch*, those words licensed not judicial *freedom*, but judicial *deference* to the plausible interpretive acts of Congress. To take *McCulloch* seriously is to understand why the Supreme Court, after *Marbury v. Madison*,[20] struck down only one other act of Congress prior to the Civil War.[21] In contrast to *Boerne*'s neat but implausible distinction between the power to remedy and the power to define constitutional violations, *McCulloch* recognized that congressional legislation would inevitably shape constitutional meaning.

The *McCulloch* theory rests upon three propositions. First, a constitution designates only the broad outlines of its important objects.[22] Second, the public welfare requires Congress to have wide latitude in choosing the means by which it is to pursue such objects.[23] And third, a court will only strike down an act of Congress if there is a clear opposition

15. *Id.* at 421 (emphasis added).

16. *See infra* Part III.

17. *See infra* Section III.B.

18. *McCulloch*, 17 U.S. (4 Wheat.) at 407.

19. *See* Alex Kozinski & J.D. Williams, *It Is a Constitution We Are Expounding: A Debate*, 1987 UTAH L. REV. 977 (debating whether judges should read *McCulloch* as a license); Philip Kurland, *Curia Regis: Some Comments on the Divine Right of Kings and Courts "To Say What the Law Is,"* 23 ARIZ. L. REV. 581, 591 (1981) (arguing that whenever a judge quotes the *McCulloch* language, "you can be sure that the Court will be throwing the constitutional text, its history, and its structure to the winds in reaching its conclusion").

20. 5 U.S. (1 Cranch) 137 (1803).

21. The *Dred Scott* case struck down the provision of the Missouri Compromise that prohibited slavery from existing in Illinois. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 452 (1856). The Court did not, of course, accord the same deference to state laws that it did to the acts of its coordinate legislative branch. The *McCulloch* case, striking down Maryland's tax on the national bank, is but one example among many.

22. *See McCulloch*, 17 U.S. (4 Wheat.) at 407 (finding that a constitution's nature requires "that only its great outlines should be marked").

23. *See id.* at 421 ("[T]he sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution . . . .").

between the constitutional text and the law.[24] If these principles are accepted, then *Boerne*'s claim that Congress has no independent discretion in reading the text cannot be correct. Where the Constitution's text speaks in terms of broad principles, Congress may legislate under those broad terms. And a court may deny that action only when the law cannot be reconciled with the constitutional text. Under *McCulloch*, Congress's discretion goes well beyond the mere ability to select the means to judicially defined ends. At least that is what the Framers of the Fourteenth Amendment understood *McCulloch* to mean.

The Reconstruction Congress demonstrated its understanding in enacting the Civil Rights Act of 1866, just weeks before it considered Section 5. The Enforcement Clause of the Thirteenth Amendment—the textual predecessor of Section 5—granted Congress the power to enforce the amendment's substantive guarantees against slavery by "appropriate legislation."[25] The substance of the amendment prohibited slavery, yet under the Enforcement Clause the Republicans claimed the authority to enact the Civil Rights Act, which protected against state infringement a range of civil liberties, such as the rights of contract and property and the right to sue in court. To justify such power, congressional Republicans invoked "the celebrated case of McCulloch *vs.* The State of Maryland" as allowing Congress to read the amendment not simply to prohibit slavery, but to guarantee the "maintenance of freedom to the citizen."[26] The legislators who passed the Civil Rights Act introduced this same view into the Fourteenth Amendment.[27] They recognized that the privileges and immunities "are not and cannot be fully defined in their entire extent and precise nature," yet the Republicans would rely upon Congress's power "to pass laws which are *appropriate* to the attainment of the great object of the

24. *See id.* ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."); *see also* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810) (Marshall, C.J.) ("The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.").

25. U.S. CONST. amend. XIII, § 2.

26. CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (statement of Rep. Wilson); *see also* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 825 n.299 (1999) (discussing the link between congressional discretion under Thirteenth and Fourteenth Amendments). Indeed, the Supreme Court has recognized that while Section 1 of the Thirteenth Amendment prohibits slavery, Section 2 grants Congress the power to prohibit the "badges and incidents" of slavery. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).

27. Indeed, the breadth of such understanding led many legislators to remark that in light of the Thirteenth Amendment, the provisions of the Fourteenth Amendment addressed to civil liberty were unnecessary. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2465 (1866) (statement of Rep. Thayer). *But see id.* at 2462 (statement of Rep. Garfield) (arguing that the self-executing provision of Section 1 was necessary to ensure that a majority in Congress could not repeal the Civil Rights Act).

amendment."[28] So long as Congress pursued an end plausibly within the Constitution, and did so by means not prohibited, the Court would sustain legislative interpretations of the act.

The Reconstruction Court invoked this tradition in interpreting Congress's power under Section 5 of the Fourteenth Amendment. In its first construction of that clause, in *Ex parte Virginia*,[29] the Court described Congress's power in words that tracked *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 . . . if not prohibited, is brought within the domain of congressional power."[30] Although that language lay dormant for nearly a century, the Court of the civil rights era revived it during the voting rights cases of the 1960s, according Congress substantial discretion to go beyond the Court's reading of the Civil War amendments in order to protect civil liberties.[31] The *Boerne* Court itself honored the *McCulloch* reading, quoting *Ex parte Virginia*[32] at the beginning of its inquiry and devoting a section of the opinion to affirming its consonance with the voting rights precedents.[33] But the Court honored *McCulloch* more in the breach than in the observance. While *McCulloch* may remain in name the standard by which the Court reviews congressional acts under the Fourteenth Amendment, *Boerne*'s holding casts the law away from those constitutional moorings.

Although numerous modern commentators have recognized *McCulloch* as the appropriate standard for the interpretation of Section 5 legislation, none has looked closely at what that theory meant to the Framers of the amendment.[34] This Note seeks to remedy that defect by articulating the

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28. *Id.* at 2765-66 (statement of Sen. Howard) (emphasis added).

29. 100 U.S. 339 (1879).

30. *Id.* at 345-46.

31. *See* Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966) ("[T]he *McCulloch v. Maryland* standard is the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment."); South Carolina v. Katzenbach, 383 U.S. 301, 326-27 (1966) (quoting *Ex Parte Virginia* and describing the *McCulloch* language as the "classic formulation" of congressional power).

32. *See Boerne*, 521 U.S. at 517-18 (quoting *Ex parte Virginia*, 100 U.S. at 345-46). Ironically, the *Boerne* Court also cited *McCulloch* at the beginning of its legal analysis, albeit for the proposition that "[u]nder our Constitution, the Federal Government is one of enumerated powers." *Id.* at 516.

33. *See id.* at 526-529.

34. *See, e.g.*, Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right: Reflections on* City of Boerne v. Flores, 39 WM. & MARY L. REV. 793, 811-12 (acknowledging the tension between *Marbury* and *McCulloch* in the Court's Section 5 jurisprudence); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 185-88 (1997) (finding the *McCulloch* standard to require the "presumption of constitutionality"); Pawa, *supra* note 11, at 1059 (noting that "the Court rarely accepts congressional power to prohibit conduct that does not itself violate the Constitution"); Rachel Toker, Note, *Tying the Hands of Congress:* City of Boerne v. Flores, 33 HARV. C.R.-C.L. L. REV. 273, 276-78, 286-87 (1998) (examining the *McCulloch* standard against voting rights precedent). Two other scholars have recognized that Congress's broad discretion under the Thirteenth

McCulloch theory of judicial review implicit in the text of the Fourteenth Amendment. Part II argues that *Boerne*'s historical analysis provides an unsatisfactory account of the original understanding of Section 5. The *Boerne* Court limited its inquiry to the legislative debates and found that the rejection of an earlier version of the amendment signaled a strong desire to limit Congress's discretion in shaping constitutional meaning.[35] This Part argues that the alterations in the text invited judicial enforcement and introduced the "state action" requirement but did not change Congress's ability to provide plausible substance to those guarantees. The Fourteenth Amendment remained a grant of power to Congress, the scope of which must be determined in light of *McCulloch v. Maryland*.

Part III explores how the Framers of the Fourteenth Amendment understood the *McCulloch* theory of judicial review. From its issuance, commentators and judges looked to the case for guidance in reviewing acts of Congress. Judges cited it frequently, and each time they found that it confirmed Congress's assertion of power. Section III.A explores the "original understanding" of *McCulloch*, looking first to the case itself and then to the work of its earliest interpreters. The great constitutional treatises of the early nineteenth century by Justice Joseph Story and Chancellor James Kent read *McCulloch* as the authoritative text on congressional power. The Supreme Court relied upon it throughout the antebellum era, and by the 1860s, judges recognized *McCulloch* as the definitive and canonical exposition of congressional power.

The Reconstruction Congress would invoke these works, and the *McCulloch* decision itself, in drafting the Fourteenth Amendment. Section III.B returns to the congressional debates themselves to show how the *McCulloch* theory of congressional power found its way into the text. The drafters of the amendment drew on *McCulloch* and the Civil Rights Act of 1866 as precedents for the discretion later Congresses would enjoy under the Fourteenth Amendment. Both within Congress and before the states, the ratification debates read the Fourteenth Amendment as primarily a grant of power to Congress to legislate under *McCulloch*. Section III.C shows how the Supreme Court brought this same understanding to its early

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Amendment calls into question *Boerne*'s narrow reading of the Fourteenth. *See* Amar, *supra* note 26, at 822-25; William G. Buss, *An Essay on Federalism, Separation of Powers, and the Demise of the Religious Freedom Restoration Act*, 83 IOWA L. REV. 391, 417-18 (1998).

35. *See Boerne*, 521 U.S. at 520-24. In limiting its inquiry to the historical debates, the *Boerne* Court was not alone. Few of the scholars who have considered historical evidence in arguing for or against the constitutionality of RFRA have gone beyond a narrow reading of the ratification debates. *See, e.g.*, Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1577-88 (1995); Chemerinsky, *supra* note 11, at 608-10; Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 626-42 (1996). For some exceptions, see Amar, *supra* note 26, at 822-25; Lupu, *supra* note 34, at 810-12; and McConnell, *supra* note 34, at 185-88.

interpretation of the Fourteenth Amendment. Against the background of the Reconstruction Court's struggle to balance constitutional innovation with the federal structure, two themes emerge: The Fourteenth Amendment was a story about congressional power, and Congress would enjoy substantial interpretive discretion in legislating that content.

Part IV concludes by briefly examining the issues raised by the *McCulloch* theory outlined in this Note. Even if the argument from original understanding is convincing, is such a vision of judicial deference to congressional action desirable? This Part argues that allowing both the judiciary and the legislature to compete with the states in expanding the zone of liberty reflects the best traditions of our constitutional government and might increase the democratic legitimacy of "substantive due process." Rather than threatening the federalist balance, granting Congress an increased role in protecting national liberties holds true to a federalism that recognizes a national government of enumerated and limited powers.

II. *BOERNE*, BINGHAM, AND THE TEXT OF THE AMENDMENT

City of Boerne v. Flores was a zoning dispute that became a vehicle for a constitutional challenge. The case arose as a controversy between city and church authorities over plans to enlarge a Catholic church that the city had designated a historic landmark. After the city denied the building permit, the church sued in federal district court, alleging a RFRA violation, among other claims. On a motion to dismiss, the district court found RFRA unconstitutional and certified the issue to the higher courts.[36] The Supreme Court thus granted certiorari solely on the question of whether RFRA lay within Congress's power under Section 5 of the Fourteenth Amendment.

The Court concluded that it did not. Section 5 granted Congress the power to "enforce" the "provisions of this article."[37] That power, in the Court's eyes, was either "remedial" or "substantive." If it was remedial, then Congress's power was limited to remedying or preventing violations of rights that were recognized by the courts. But if not remedial, the power could only be substantive, allowing Congress to alter constitutional meaning. However, "Congress does not enforce a constitutional right by

36. *See* Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995), *rev'd*, 73 F.3d 1352 (5th Cir. 1996), *rev'd*, 521 U.S. 507 (1997).

37. *See Boerne*, 521 U.S. at 519 ("In assessing the breadth of § 5's enforcement power, we begin with its text. Congress has been given the power 'to enforce' the 'provisions of this article.'"). *But see* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). By omitting the crucial words, "by appropriate legislation," the Court directed its inquiry to who defines the "provisions of this article" rather than the scope of Congress's power to pass "appropriate" legislation. As this Note argues, this word, "appropriate," the Framers' link to the *McCulloch* understanding of judicial review, is necessary for interpreting the constitutional text.

changing what the right is."[38] The Court adopted the remedial view and then drew upon the ratification history and its own precedent for support. As RFRA neither remedied nor prevented the violation of the religious liberty recognized by *Employment Division v. Smith*, it exceeded Congress's Section 5 power.

It is *Boerne*'s treatment of the ratification history that is the concern of this Part. *Boerne*'s historical argument rested almost entirely upon the rejection of Representative John Bingham's first draft of the Fourteenth Amendment. According to the *Boerne* Court, "The objections to the Committee's first draft of the Amendment, and the rejection of the draft, have a direct bearing on the central issue of defining Congress' enforcement power."[39] The first draft gave Congress "primary power to interpret and elaborate on the meaning"[40] of the amendment, which in the Court's view amounted to substantive enforcement powers. The opposition the draft faced and its replacement with the text that was ultimately adopted suggested to the *Boerne* Court that Congress had endorsed a "remedial" version of the amendment, one that took the power to read the amendment out of the hands of Congress and turned it over to the Court.[41] As this Part argues, the ratification history that *Boerne* considers provides scant support for such a reading. Although the changes in the text address significant interpretive issues, they do not limit—or enhance—Congress's discretion in the exercise of power to enforce the Fourteenth Amendment.

A. *The Text of the First Draft*

On February 13, 1866, Representative John Bingham, a leading Republican from Ohio,[42] presented to the House of Representatives a draft amendment on behalf of the Joint Committee on Reconstruction:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to

38. *Boerne*, 521 U.S. at 519.
39. *Id.* at 520.
40. *Id.* at 524.
41. *See id.* at 520-24.
42. Representative John Bingham was a Republican moderate and a member of the Joint Committee on Reconstruction. His leading role in drafting the Fourteenth Amendment has made him the protagonist—or the target—of several studies on the original understanding of the text. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY 136-45 (1977); CURTIS, *supra* note 1, at 120-26; Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993); Fairman, *supra* note 1, at 25-26.

> all persons in the several States equal protection in the rights of life, liberty, and property.[43]

Bingham's draft embodied an express grant of power to Congress to enforce the constitutional liberties that the antislavery Republicans believed had been denied in the slaveholding South prior to the Civil War and were again being denied to freed blacks and their white political allies in the South.[44] To Republican eyes, the amendment would grant the national government the powers that had been withheld—either by the states' jealousy of national power at the Founding or by subsequent misinterpretation by the courts—to enforce the obligations of the Constitution, including the Bill of Rights.[45]

The first phrase of the text announced that the amendment would add to the catalogue of Congress's enumerated powers. Echoing the text of Article I, Section 8, which lists the powers of Congress, the amendment provided, "The Congress shall have power . . . ." It then borrowed verbatim from the Necessary and Proper Clause[46] to ensure that the grant of power would include the implied powers arising under that clause. Substantively, the amendment granted Congress the power to enforce the two constitutional provisions that the Republicans believed provided the essential guarantees of civil liberty: the Privileges and Immunities Clause and the Fifth Amendment.

Although these textual provisions were self-executing, no express grant of power to Congress provided for their enforcement. Many Republicans believed the Bill of Rights and the Privileges and Immunities Clause bound the states,[47] but the federal judiciary had rejected such a reading, and Congress so far had been powerless to enforce those guarantees.[48] As Bingham said on the House floor, "[I]t has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce

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43. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

44. A number of legal historians have emphasized the "antislavery origins" of the Republicans' concern for civil liberty. *See, e.g.*, JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 105-08 (1951); *see also* CURTIS, *supra* note 1, at 6-7, 36-40 (discussing antislavery legal theory).

45. *See* AMAR, *supra* note 1, at 145-48 (discussing competing antebellum theories of the Bill of Rights).

46. U.S. CONST. art. I, § 8, cl. 18.

47. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1062 (1866) (statement of Rep. Kelley) ("This amendment, will, in my judgment, but reinvigorate a dormant power . . . ."); *see also* CURTIS, *supra* note 1, at 48 ("Republicans who expressed their view on the subject rejected the ruling in *Barron v. Baltimore* that the guaranties of the Bill of Rights did not limit the states." (footnote omitted)).

48. *See* Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1861) (reading the Fugitive Slave Clause as imposing an obligation upon state officials unenforceable by the national government); Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding that the Bill of Rights does not limit the states).

obedience to these requirements of the Constitution."[49] The new amendment would expressly grant Congress that power, providing "in effect that Congress shall have the power to enforce by appropriate legislation all the guarantees of the Constitution."[50] In presenting this draft, Bingham believed that this amendment would do nothing more than grant Congress the power to enforce rights already existing as self-executing provisions in the Constitution.

Several problems with this reading of the amendment came to light as the amendment was debated. Chief among these concerns, as the *Boerne* Court recognized, was that "[t]he proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure."[51] Democrats and some Republicans expressed concern that the proposed language would grant Congress the power to pass legislation upon all matters concerning life, liberty, and property in the states.[52] These concerns reflected two distinct issues. First, most Democrats opposed granting Congress any control over civil liberties. The Founders had entrusted such local legislation to the domain of the states. Allowing the federal government to intrude into the states' domestic affairs ran contrary to the whole scheme of federalism.[53] Under such a view, any version of the amendment that granted Congress power to enforce constitutional liberties against the states would prove unpalatable.

Several legislators, however, offered a second and more restricted critique of the reach of the amendment. These men feared that the equal protection language of the proposed amendment would grant Congress the power not merely to protect citizens from discrimination, but to pass general legislation to make laws equal across the states. Representative Hale of New York, for instance, argued that the amendment was not merely a provision "that when the States undertake to give protection which is unequal Congress may equalize it; it is a grant of power in general terms . . . ."[54] The problem for Hale was not the idea that the federal government should enforce constitutional guarantees against state infringement, but that such powers were not limited to cases in which the states themselves abridged existing constitutional guarantees.

In addition to these concerns about scope, some Republicans criticized the text for its exclusive dependence on Congress as the protector of

49. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

50. *Id.* at 586 (statement of Rep. Donnelly).

51. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

52. *See id.* at 520-21 (citing statements of representatives); *see also* Michael P. Zuckert, *Congressional Power Under the Fourteenth Amendment—The Original Understanding of Section Five*, 3 CONST. COMMENTARY 123, 129-31 (1986) (detailing the divisions among Republican legislators).

53. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1085 (1866) (statement of Rep. Davis).

54. *Id.* at 1064-65.

constitutional liberties. Rather than incorporating substantive rights into the Constitution, the amendment merely granted Congress the power to pass legislation to protect those rights. However, any legislation taken to secure those rights could be undone by hostile congressional majorities in the future. As Representative Hotchkiss argued, "[T]his amendment proposes to leave it to the caprice of Congress; and your legislation upon the subject would depend upon the political majority of Congress . . . ."[55] While the Republicans were in control of the government, they should create an amendment that would entrench constitutional limitations on state action.

In the face of these concerns, Bingham's proposal failed to win the two-thirds vote required to pass. Instead, the House voted to table the proposal until April.[56] In the meantime, the Joint Committee on Reconstruction began work on a new version of the amendment, one that would appeal to a wider audience. The new version was reported to Congress on April 30, 1866.

B. *The Second Version of the Amendment*

The new version of the amendment included a number of significant changes. Taken as a whole, it had a broader scope. Sections 2, 3, and 4 addressed other problems of Reconstruction.[57] Section 1, together with the Enforcement Clause of Section 5, reflected the concerns of the original Bingham proposal. Those provisions read:

> Section One. 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 Five. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.[58]

Under the new text, the guarantees of the amendment were self-executing and were limited expressly to constraining state action. The reach of the enforcement powers, which in the first version had tracked the Necessary and Proper Clause, now borrowed instead from the second section of the

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55. *Id.* at 1095.

56. *See* Zuckert, *supra* note 52, at 131 (examining the meaning of the vote to postpone).

57. Section 2 denied the Southern states additional representation from newly freed slaves who lacked the right to vote. *See* U.S. CONST. amend. XIV, § 2. Section 3 barred former rebels from holding federal office. *See id.* § 3. Section 4 repudiated the Confederate war debt and precluded former slaveowners from seeking compensation for emancipation. *See id.* § 4.

58. CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866). The first sentence of the present Section 1, defining national citizenship, was added by the Senate. *See* CURTIS, *supra* note 1, at 89.

Thirteenth Amendment, allowing Congress to "enforce" the amendment "by appropriate legislation."

Boerne read those changes as having turned the substantive Congressional power into a remedial one.[59] This claim indeed amounts to the heart of *Boerne*'s historical argument. Under the original draft of the amendment, Congress had the power not only to enforce constitutional guarantees, but also to dictate their substantive content. By altering the language to make it self-executing, the new draft restricted Congress to enforcing substantive constitutional provisions, as interpreted by the Court. The *Boerne* Court did not say precisely which changes led from the "substantive" to the "remedial" reading of the amendment, but it emphasized that the new amendment created "self-executing limits on the States" and quoted the new language of Section 5.[60] The remedial reading could arise out of: (1) the self-executing aspect of the final version; (2) the limitation of the amendment's scope to state action; or (3) the textual changes to the Enforcement Clause itself.[61] None of these amendments to the text, however, reduces Congress's discretion to interpret for itself the meaning of the constitutional guarantees that the amendment expressly grants it the power to enforce.

1. *Self-Executing*

The new version most obviously differs from the older one in that it is self-executing. The original Bingham draft was exclusively a grant of power to Congress. By itself, it placed no new limits on the states; instead, it authorized Congress to create such limits as would ensure that the privileges and immunities and equal protection of the citizens would not be abridged. Those Republicans were concerned that, should their party lose control of Congress, any civil rights legislation might be repealed. As the Republican Representative James Garfield, speaking in favor of the revised version, remarked:

> The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when [the Democratic party] comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in

59. *See Boerne*, 521 U.S. at 522 ("Under the revised Amendment, Congress' power was no longer plenary but remedial.").

60. *Id.*

61. *See* McConnell, *supra* note 34, at 178-79 (discussing other alterations between the two drafts).

> the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it.[62]

The Republicans made the amendment self-executing in order to enlist the courts in enforcing those guarantees, even in the absence of congressional legislation.

Enlisting the judiciary, however, did not of itself restrict congressional enforcement. Not a single statement in Congress reflected that idea. On the contrary, the record speaks of enlisting the courts to enforce the amendment only when Congress failed to act or was unduly restrictive in protecting constitutional liberties. Supporters and opponents continued to assume that the amendment would be primarily a grant of power to Congress. Representative Harding, for instance, spoke against the new bill because "it transfers to Congress from the States all power of control over their own citizens."[63] Senator Howard, in introducing the revised draft to the Senate, also expressed his belief that Congress would remain the primary enforcer of the self-executing amendment:

> The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section of this amendment . . . .[64]

Many Republicans regarded congressional enforcement as the only way in practice to secure the guarantees of the Fourteenth Amendment. The courts had already failed to exercise their power to enforce the guarantees of Article IV's Privileges and Immunities Clause and the Fifth Amendment

62. CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866); *see also id.* at 1095 (statement of Rep. Hotchkiss) (criticizing original draft's dependence upon "caprice of Congress"); *id.* at 2459 (statement of Rep. Stevens) (recognizing that the amendment would protect the Civil Rights Act from a hostile congressional majority).

63. *Id.* at 3147.

64. *Id.* at 2766. Likewise, Representative Eliot read Section 1 to concern Congress's power, saying, "I support the first section because the doctrine it declares is right, and if, under the Constitution as it now stands, *Congress* has not the power . . . then, in my judgment, such power should be distinctly conferred." *Id.* at 2511. Representative Raymond read Section 1 as substantially similar to the original Bingham draft: "[N]ow . . . it is again proposed so to amend the Constitution as to confer upon Congress the power to pass [the Civil Rights Act]." *Id.* at 2502; *see also id.* at 2961 (statement of Sen. Poland) (reading Section 1 as a grant of congressional power); *id.* at app. 255 (statement of Rep. Baker) (describing the amendments as granting Congress the power to protect liberty).

against the states.[65] However, none of those politicians, such as Representative Garfield, who sought to enlist support for judicial enforcement, suggested that the changes would reduce the legislative role in protecting civil rights.

The *Boerne* Court, however, read the alterations to restrict Congress's power under the amendment.[66] Under the old language, Congress had the substantive power to define the constitutional limitations it was to secure. Now it was limited to "the power to make the substantive constitutional prohibitions against the States effective."[67] But this does not follow from the text. Under the original version, the Court would retain its role in deciding whether Congress had enacted a law within the scope of its enumerated power. In fact, given the Bingham draft's express textual references to the existing Constitution, one might infer that the Republicans were consciously restricting the scope of Congress's new power to the existing judicial interpretation of those obligations. Bingham's proposal did not expressly grant Congress any new discretion to define these old terms. Instead, it granted Congress the power to enforce against the states limitations that were expressly referenced by other provisions of the text.

If Congress passed a law under the original draft, the Supreme Court would still have to ask, was Congress enacting a law to secure "privileges and immunities" or the "equal protection" in the enjoyment of civil rights? Suppose, for instance, that Congress enacted a law, pursuant to its power under the Fourteenth Amendment, to strike down a state law that prohibited African-Americans from voting. According to Bingham and other Republicans, the right to vote was not guaranteed by either the "privilege and immunity" or the "equal protection" prongs of the Fourteenth Amendment.[68] If Congress nevertheless passed the law, there is nothing in either the original or final versions of the text to suggest that the Supreme Court would be unwilling to strike it down.

Under the original version of the amendment, the Court would ask, has Congress passed a law appropriate to securing a "privilege or immunity" or to ensuring "equal protection" in the rights of life, liberty, and property? Precisely the same question would arise under the final version. There the Court would ask, has Congress passed a law to remedy a state's abridgement of a "privilege or immunity," a denial of equal protection, or a deprivation of due process? Because the state has acted, the Court would

65. *See, e.g., id.* at 1054 (statement of Rep. Higby) (supporting the amendment for giving "vitality and life" to limitations against the states that "have received such a construction that they have been entirely ignored and have become as dead matter in that instrument"); *id.* at 1062 (statement of Rep. Kelley) (criticizing "all that has been done judicially in furtherance of this great wrong" of slavery).

66. *See Boerne*, 521 U.S. at 522-23.

67. *Id.* at 522.

68. *See infra* text accompanying note 150.

still determine whether the state's action restricted a liberty within the meaning of the text. Nothing in the text suggests that Congress's power was any more substantive under the first version of the amendment than under the second. While the self-executing language permits the Court to interpret the language prior to legislative action, that fact cannot, of itself, suggest that the Court should apply a new standard for evaluating an act of Congress. Indeed, the history shows that the Framers believed the judiciary would apply the same standard.[69]

2. *State Action*

In one sense, though, the new draft was "remedial." The original draft of the amendment granted Congress broad powers to regulate local activity. The national legislature could pass any laws that might, in its discretion, secure freedom and equality in the enjoyment of constitutional rights. Under the new draft, Congress could pass only legislation to remedy state violations of those rights; it could not pass general legislation that did not address itself to state violations.[70] The *Boerne* Court placed great weight on this fact. Indeed, the opinion included several quotations from Republican leaders to the effect that the amendment now targeted unjust state action rather than allowing Congress simply to guarantee civil liberty.[71] Likewise, the opinion quoted suggestively from a later debate in the House in which Representative Garfield stated, "[W]e cannot, by any reasonable interpretation, give to [§ 5] . . . the force and effect of the rejected [Bingham] clause."[72] Garfield's argument, like the statements in the ratification debates, spoke precisely to the state action principle. The revised version, unlike the previous one, limited Congress's (and the Court's) power to remedying unconstitutional state action. In this sense, the

69. *See infra* Part III.

70. This state action reading remains the simplest reading of the text. *See* The Civil Rights Cases, 109 U.S. 3, 17-19 (1883); McConnell, *supra* note 34, at 179. Still, John Bingham and later commentators have argued that the change in language was merely cosmetic. *See* CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871) (statement of Rep. Bingham); CURTIS, *supra* note 1, at 161-62; TENBROEK, *supra* note 44, at 200-05. In debating the Civil Rights Act of 1871, Bingham stated that he introduced the "No State shall" language in order to follow Chief Justice Marshall's guidance in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). In *Barron*, Chief Justice Marshall held that the Bill of Rights was not meant to place limits on the states, since if "the framers of these amendments intended them to be limitations on the power of the State governments, they would have imitated the framers of the original Constitution, and have expressed that intention." *Id.* at 250. Bingham argued that he revised the amendment accordingly so that its prohibition on the states would echo the constitutional limitations in the original constitutional text. *See* CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871).

71. *See Boerne*, 521 U.S. at 522-23 (quoting Reps. Bingham and Stevens and Sen. Howard).

72. *Id.* at 523 (quoting CONG. GLOBE, 42nd Cong., 1st Sess., app. 151 (1871) (second and third alterations in original)).

changes in the amendment ensured that Congress's enforcement powers would be remedial.

Nevertheless, this definition of remedial does not speak to the issue in *Boerne*: Does Congress have the discretion to interpret what constitutes a violation of those rights? *Boerne* argued that by limiting Congress to remedying unconstitutional state action, the new draft necessarily assumed that there must be some external standard, provided by the courts, that would measure whether a constitutional violation had occurred. But as this Note argued earlier, the courts would have had the same responsibility to apply such an external standard under the original Bingham proposal. There, they would have been obliged to determine whether Congress was acting to secure a constitutional guarantee within the meaning of the text. Thus, the state action requirement does not speak to how a court should determine whether Congress has exceeded its power to enforce the amendment.

3. *The Text of the Enforcement Clause*

Might the changes in the description of Congress's enforcement powers have been intended to limit its discretion? Under the original version, Congress had the power to pass all laws "necessary and proper" to secure the stated goals. Under the final version, that power was limited to a conceivably more modest role in "enforc[ing] the provisions of this article by appropriate legislation."[73] Such a change in text might signal a desire to limit legislative discretion under the amendment. As the *Boerne* Court asserted, "Congress does not enforce a constitutional right by changing what the right is."[74] Did the shift from "secure" to "enforce" and from "necessary and proper" to "appropriate" suggest a narrowing of Congress's power under the Fourteenth Amendment?

Again, the historical record weighs heavily against such a consideration. The text of Section 5 arises directly from the Enforcement Clause of the Thirteenth Amendment.[75] The debates over the Thirteenth Amendment do not explain why Congress chose the phrase "appropriate" instead of "necessary and proper," but the word was clearly chosen with the Supreme Court's opinion in *McCulloch v. Maryland* in mind.[76] There, Chief Justice Marshall read the Necessary and Proper Clause to grant

73. U.S. CONST. amend. XIV, § 5.

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

75. *See supra* text accompanying note 25.

76. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (statement of Rep. Wilson); Amar, *supra* note 26, at 823-25; *see also* United States v. Rhodes, 27 F. Cas. 785, 791 (C.C.D. Ky. 1866) (No. 16,151) ("In McCullough v. Maryland, Chief Justice Marshall used the phrase 'appropriate' as the equivalent and exponent of 'necessary and proper' in the preceding paragraph." (citation omitted)).

Congress the power to employ "all means which are *appropriate*, which are plainly adapted" to an end within the scope of the Constitution.[77] Congress's power to enforce the ends of the amendment by "appropriate legislation" thus invoked the contemporary understanding of "necessary and proper."[78]

Legislators in the debates used the terms "appropriate" and "necessary and proper" interchangeably. Congressman Donnelly, for instance, read "necessary and proper" in the original draft to provide "in effect that Congress shall have the power to *enforce by appropriate legislation* all the guarantees of the Constitution."[79] Likewise, Senator Howard presented the bill to the Senate by finding that it brought the power to enforce the Constitution's guarantees "within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper."[80]

Similarly, there does not appear to be any relevant distinction between the amendment's grant of the power to "secure" and the power to "enforce." John Bingham referred to the original proposal as granting Congress "the power to *enforce* the bill of rights as it stands in the Constitution today."[81] Representative Raymond found the final version of the amendment to provide for "securing an equality of rights to all citizens."[82] The changes in the enforcement language of the amendment thus do not appear to have reflected any inclination to change the scope of Congress's power under the amendment. It seems more likely that once Congress decided to make the Fourteenth Amendment self-executing, the drafters deliberately phrased the Enforcement Clause to echo that of the Thirteenth.

The way in which many Republicans understood Congress's power under the Thirteenth Amendment weighs conclusively against any suggestion that the new Enforcement Clause narrowed Congress's power. This point will be argued in greater detail in Section III.B, but it should be sufficient to touch upon it here. In the months during which Congress debated both versions of the Fourteenth Amendment, it also passed the Civil Rights Act of 1866, which declared the freed slaves to be citizens and

77. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis added).

78. Judges would also accept that "appropriate" referred to "necessary and proper." *See Ex parte* Virginia, 100 U.S. 339, 345-46 (1879) (paraphrasing *McCulloch* in describing the extent of congressional power under Section 5); *Rhodes*, 27 F. Cas. at 791 (describing *McCulloch* as the source of the Thirteenth Amendment's Enforcement Clause).

79. CONG. GLOBE, 39th Cong., 1st Sess. 586 (1866) (emphasis added).

80. *Id.* at 2765-66.

81. *Id.* at 1088 (emphasis added); *see also id.* at 1034 (statement of Rep. Bingham) ("[I]f the grant of power had been originally conferred upon the Congress of the nation, and legislation had been upon your statute-books to *enforce* these requirements of the Constitution in every state, that rebellion, which has scarred and blasted this land, would have been an impossibility." (emphasis added)).

82. *Id.* at 2502.

protected them against discriminatory state action. Although Bingham believed that the Fourteenth Amendment was necessary in order to grant Congress the power to enact the Civil Rights Act, he was among the minority in his party.[83] Most Republicans believed that the Constitution already gave Congress that power, and in both houses of Congress, they cited the Thirteenth Amendment for support.[84]

To the Republicans, the power to pass "appropriate" legislation to enforce the amendment's prohibition on slavery carried with it, under the *McCulloch* standard, the broad powers to effect the general objects of the amendment. Senator Trumbull, for instance, found that the adoption of the Thirteenth Amendment granted Congress the power "to protect every person in the United States in all the rights of person and property belonging to a free citizen."[85] Senator Sherman stated that the amendment not only guaranteed liberty, but included

> an express grant of power to Congress to secure this liberty by appropriate legislation. Now, unless a man may be free without the right to sue and be sued, to plead and be impleaded, [etc.] . . . then Congress has the power, by the express terms of this amendment, to secure all these rights.[86]

The broad manner in which such Republicans understood Congress's power to enforce the Thirteenth Amendment by "appropriate" legislation militates against the claim that the same text in the Fourteenth Amendment limited congressional discretion.

In sum, the *Boerne* Court's reading of the legislative history of the Fourteenth Amendment does not hold up under scrutiny. The alterations to the original Bingham version speak to the issues of state action and judicial enforcement, but they do not provide any support for a narrowing of Congress's power to enforce the amendment's constitutional guarantees. That does not necessarily imply the "substantive" theory of the amendment that *Boerne* posed as an alternative, but it does point to the need for a more satisfactory understanding of Congress's power under the Fourteenth Amendment. That answer, as this Note has suggested, lies in the contemporary understanding of "appropriate" powers and requires a

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83. *See id.* at 1291 (statement of Rep. Bingham).

84. In addition to the Thirteenth Amendment, Republicans relied upon their interpretation of the Bill of Rights and Article IV, Section 2. *See* CURTIS, *supra* note 1, at 80-83.

85. CONG. GLOBE, 39th Cong., 1st Sess. 77 (1865).

86. *Id.* at 41; *see also id.* (statement of Sen. Wilson) ("I believe that the constitutional amendment has been adopted, and that under the second section of that amendment we have the power to pass [the bill]."); *id.* at 43 (statement of Sen. Trumbull) ("[The Enforcement Clause] was inserted expressly for the purpose of conferring upon 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.").

broader inquiry into the significance of *McCulloch v. Maryland* for the Framers of the Fourteenth Amendment.

III. THE *MCCULLOCH* THEORY OF THE FOURTEENTH AMENDMENT

Calling *McCulloch v. Maryland* a landmark decision is a bit like calling Michael Jordan a basketball all-star. The subject describes the label better than the label describes the subject.[87] Of the many interesting themes raised by the case—the process of constitutional interpretation, the notion of implied powers, and, of course, federalism—one of the more neglected is that of separation of powers. For the issue of judicial review was just as critical to *McCulloch* as it was to *Marbury*. While *Marbury* established the power of judicial review over federal laws, it was *McCulloch* that told nineteenth-century judges how they were to go about that job. *McCulloch* told them that the Court would give Congress substantial deference in its assertion of powers "appropriate" to a defined constitutional end. And it was with this conception that the Framers drafted the Fourteenth Amendment.

This Part explores the meaning of the *McCulloch* tradition for the Framers of the Fourteenth Amendment. Section III.A looks at the opinion itself and then traces its rapid ascent into the canons of constitutional law. Nineteenth-century legal scholars understood judicial review of federal actions against the deferential standard of *McCulloch*. Section III.B argues that the Framers of the Fourteenth Amendment incorporated this tradition into the text of the amendment. Section III.C shows how the Reconstruction Court's interpretation of the amendment likewise continued the tradition of judicial deference that began with *McCulloch v. Maryland*.

A. *The Original Understanding of* McCulloch

The facts in *McCulloch* are familiar. In order to help the federal government shoulder wartime national debt, Congress chartered the Second Bank of the United States in 1816. The Bank, always a tempting target for enemies of finance, national power, or local competition, soon found itself

87. *See* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 973 (1998) ("At least within the field of constitutional law, almost everyone seems to agree that *McCulloch* is canonical."); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 244 (1998) ("No one, I suspect, would be surprised to learn that *Marbury v. Madison*, *McCulloch v. Maryland*, and *Brown v. Board of Education* appear in every major constitutional law casebook now on the market." (footnotes omitted)). Balkin and Levinson cite one study that recognized *McCulloch* as one of ten cases included in every constitutional law casebook. *See* Balkin & Levinson, *supra*, at 974 n.43 (citing Jerry Goldman, *Is There a Canon of Constitutional Law?*, AM. POL. SCI. ASS'N NEWSL., Spring 1993, at 2, 2-4).

faced with discriminatory taxes in a number of states, including Maryland.[88] James McCulloch, cashier of the Baltimore branch, refused to pay, and the State brought suit to claim $15,000 in taxes.[89] The litigation raised in the first place the interesting but relatively minor question of whether a state could tax a corporation chartered by the federal government. But in claiming the right to tax, Maryland also challenged Congress's power to charter the Bank. Turning to that issue first, Marshall went beyond the confines of the case to elucidate his theory of federalism, the scope of implied powers, and the manner in which the judiciary is to review an act of Congress.

Marshall began his analysis by examining the nature of the federal government. The national government draws its power directly from the ratification of the sovereign people and so does not depend upon the states for its existence. The government is one of enumerated powers, supreme within its sphere of action, but its powers are limited to those objects designated by the Constitution. There is no enumerated power providing for the establishment of a bank; however, the Constitution does not "partake of the prolixity of a legal code."[90] Instead, the Constitution marks those "great outlines" and designates "those important objects" from which those "minor ingredients which compose those objects [may] be deduced from the nature of the objects themselves."[91] In construing the scope of those powers, "we must never forget that it is a constitution we are expounding."[92] As such, the Constitution delimits its ends at a high level of generality. In order to effectuate them, Congress must have the implied power to enact the means conducive to those ends.

These implied powers must not only be presumed, but they are explicitly granted by the text itself, which provides Congress with the power to make "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution . . . ."[93] Maryland argued for a construction of "necessary and proper" that would limit Congress's discretion to those means "without which the power given would be nugatory."[94] But Marshall, arguing from

88. The Second Bank bore some of the responsibility for the animosity it created. Reckless management of its credit had contributed to the ruin of a number of state banks. *See* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 505 (Fred B. Rothman & Co. 1987) (1926).

89. *See* Gerald Gunther, *Introduction* to JOHN MARSHALL'S DEFENSE OF *McCULLOCH V. MARYLAND* 1, 3-4 (Gerald Gunther ed., 1969).

90. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

91. *Id.*

92. *Id.*

93. U.S. CONST. art. I, § 8, cl. 18.

94. *McCulloch*, 17 U.S. (4 Wheat.) at 415. Thomas Jefferson had argued against the constitutionality of the first national bank on similar lines. *See* Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank, *in* 19 PAPERS OF THOMAS JEFFERSON 275, 278-80 (Julian P. Boyd ed., 1974).

text, history, and structure, recognized the phrase to express Congress's power "to adopt any [means] which might be appropriate, and which were conducive" to the ends designated by the Constitution.[95]

Under such a principle of construction, Marshall found that Congress had frequently exercised powers that were neither expressly granted nor strictly necessary, but instead were conducive to the achievement of other ends. For instance, Congress had required that various federal officers swear oaths of loyalty. Such oaths were not strictly necessary to the government's power, nor was that power provided for in the Constitution.[96] Still, "he would be charged with insanity" who suggested that it was outside the legislature's discretion to exact such a security for faithful performance.[97] Likewise, Marshall found it incontrovertible that Congress may punish the violation of any of its laws, even though the text expressly granted the power to punish only certain crimes, such as counterfeiting or piracy. The power to establish post offices and federal courts implied that Congress had the power to punish mail theft or perjury. Marshall found that past practice had uniformly construed the Necessary and Proper Clause broadly.

Turning to the language that would resound throughout American jurisprudence, Marshall explained how a court is to construe Congress's implied powers:

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. *Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.*[98]

These words, the *McCulloch* standard, invite substantial deference to Congress's choice of means in the pursuit of ends recognized by the Constitution. As the Constitution marks only the "great outlines" of those ends, Congress has substantial discretion, in undertaking the means, to shape the meaning of those ends.

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95. *McCulloch*, 17 U.S. (4 Wheat.) at 415.
96. *See id.* at 416.
97. *Id.*
98. *Id.* at 421 (emphasis added).

The legislative act at issue in *McCulloch* illustrates that point. The Constitution makes no mention of the power to establish a bank, yet Marshall found that Congress might charter a bank so long as it is a means appropriate to a legitimate constitutional end. What end was that? In deciding the issue, Marshall speaks of the Bank as an "essential instrument in the prosecution of its fiscal operations."[99] Earlier, he explained that the Bank promoted the "great powers" of taxation, government borrowing, regulating commerce, and providing for the national defense. While the Bank could not be seen as strictly necessary to any one power, it was conducive to the pursuit of any of those objects. As such, the Court sustained the constitutionality of the Bank.

Marshall's contemporaries recognized *McCulloch*'s significance, yet it was not on its face a radical decision. The authoritative construction of the Necessary and Proper Clause, the language that would be indelibly associated with *McCulloch*, dated back fourteen years to one of Marshall's early decisions, *United States v. Fisher*.[100] Just three years earlier, Justice Story had applied the same reasoning in reviewing Congress's power to grant the Supreme Court appellate review over cases in state courts in *Martin v. Hunter's Lessee*.[101] In that case, Justice Story recognized, "The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or declare the means by which those powers should be carried into execution."[102] As such, the Constitution leaves it to the legislature, "from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require."[103] Prior to *McCulloch*, the Marshall Court had understood Congress to have wide discretion in interpreting its enumerated powers.

Nevertheless, *McCulloch* involved not simply general principles, but also the Court's recognition of the constitutionality of the Bank of the United States, one of the most contentious issues of the era.[104] In this respect, Marshall's contemporaries immediately recognized the importance of the decision, which was reprinted throughout the country.[105] Although the Bank lay at the center of the debate, many critics focused on Marshall's

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99. *Id.* at 422.

100. 6 U.S. (2 Cranch) 358, 396 (1805) ("Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.").

101. 14 U.S. (1 Wheat.) 304 (1816).

102. *Id.* at 326.

103. *Id.* at 326-27.

104. *See* 1 WARREN, *supra* note 88, at 503.

105. *See id.* at 511. For more on contemporary reactions, see *id.* at 511-24.

broad language, arguing that it granted Congress an unlimited license to trespass on the rights of the states, free from judicial scrutiny.[106]

McCulloch soon became the authoritative interpretation of congressional power. The most influential treatises of the era relied upon *McCulloch*'s interpretation of the scope of congressional power. Justice Story's *Commentaries on the Constitution of the United States*, which would be quoted time and again during the Reconstruction debates, emphasized the Court's obligation to recognize the broad discretion Congress enjoyed in relating means to ends.[107] As Story explained, "Where the power is granted in general terms, the power is to be construed, as co-extensive with the terms, unless some clear restriction upon it is deducible from the context."[108] Story quoted *McCulloch* to explain how a court should read the boundaries of powers under the Constitution:

> [C]ongress must have a wide discretion as to the choice of means; and the only limitation upon the discretion would seem to be, that the means are appropriate to the end. And this must admit of considerable latitude; for the relation between the action and the end . . . is not always so direct and palpable as to strike the eye of every observer.[109]

Likewise, Chancellor Kent, in his 1826 treatise, *Commentaries on American Law*, included a lengthy description of Marshall's reasoning in a chapter entitled "Of Judicial Constructions of the Power of Congress."[110]

The Supreme Court applied the *McCulloch* reasoning in upholding congressional discretion throughout the antebellum era. In *Gibbons v. Ogden*,[111] the Court granted Congress wide latitude in regulating intrastate navigation under the Commerce Clause. In *United States v. Coombs*,[112] the Court similarly sustained an act of Congress punishing crimes outside U.S.

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106. Spencer Roane described *McCulloch* as a ' judicial *coup de main*" that granted Congress "a *general* letter of attorney . . . . [T]here is no earthly difference between an *unlimited* grant of power, and a grant limited in its terms, but accompanied with *unlimited* means of carrying it into execution." Spencer Roane, *Hampden No. I*, RICHMOND ENQUIRER, June 1819, *reprinted in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND*, *supra* note 89, at 107, 110; *see also* Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* JAMES MADISON'S "ADVICE TO MY COUNTRY" 34, 34 (David B. Mattem ed., 1997) (finding *McCulloch* to "substitute for a definite connection between means and ends, a Legislative discretion as to the former to which no practical limit can be assigned").

107. Story's *Commentaries* were cited numerous times in the congressional debates over the Fourteenth Amendment. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1093 (1866) (statement of Rep. Bingham); *id.* at 1294 (statement of Rep. Shellabarger).

108. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 407 (Fred B. Rothman & Co. 1991) (1833).

109. *Id.* at 417.

110. *See* JAMES KENT, COMMENTARIES ON AMERICAN LAW 236-39 (Legal Classics Library 1986) (1826).

111. 22 U.S. (9 Wheat.) 1 (1824).

112. 37 U.S. (12 Pet.) 72 (1838).

territorial waters on the grounds that it fell within Congress's power to regulate foreign commerce. In *Prigg v. Pennsylvania*,[113] Justice Story found that Congress's implied powers extended to passing laws appropriate to enforcing the Fugitive Slave Clause even though the Clause itself granted no express power to Congress.[114] Likewise, Chief Justice Taney, hardly a nationalist, continued *McCulloch*'s broad reading of legislative discretion, sustaining the constitutionality of the Fugitive Slave Act of 1850 in *Ableman v. Booth*.[115]

Taney's majority opinion in *Dred Scott v. Sandford*,[116] the only case in which the Court struck down an act of Congress during the antebellum era, notably made no reference to Congress's powers under *McCulloch*. In that case, a majority of the Court found that Congress's power to regulate the territories did not extend to prohibiting slavery under the Missouri Compromise. *McCulloch* did appear, however, in the dissenting opinion of Justice McLean, who took issue with the majority's description of congressional power as "delegated and restricted."[117] Instead, Justice McLean argued that the Court must construe Congress's power to make all "needful regulations" concerning the territories under the standard set by *McCulloch*.[118] McLean quoted the *McCulloch* standard and concluded that, should Congress decide that prohibiting slavery from a territory would raise the value of public lands or be conducive to "any other ground connected with the public interest," then the Court should recognize Congress's discretion.[119]

Despite *Dred Scott*, courts and commentators continued to read *McCulloch* as the standard by which courts should evaluate the propriety of

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113. 41 U.S. (16 Pet.) 539 (1842).

114. *See id.* at 615 ("If, indeed, the Constitution guarantees the right . . . the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it."). Throughout the Reconstruction debates, a number of Republicans seized on *Prigg*'s notion of implied powers to argue that the Bill of Rights, the Privileges and Immunities Clause of Article IV, Section 2, and later the Citizenship Clause of Section 1 of the Fourteenth Amendment gave Congress the implied powers to pass direct legislation to protect the freed slaves. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (statement of Rep. Wilson) (arguing for implied congressional power to enforce the Bill of Rights); CURTIS, *supra* note 1, at 81, 159 (describing the congressional debates over *Prigg*); *see also* The Civil Rights Cases, 109 U.S. 3, 49-50 (1883) (Harlan, J., dissenting) (arguing for implied congressional power to reach private discrimination under the Citizenship Clause of the Fourteenth Amendment).

115. 62 U.S. (21 How.) 506 (1858); *see also* JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 170-71 (New York, Hurd & Houghton 1870) (arguing that *McCulloch*'s "liberal and high national views" had not been "abandoned, or in the least degree modified, in later times when the court has been composed of other judges under the leadership of C. J. Taney"). Of course, one might also read *Ableman*'s endorsement of national power to reflect Taney's support for the legality of slavery. *See infra* text accompanying notes 116-119 (discussing *McCulloch*'s absence from *Dred Scott*).

116. 60 U.S. (19 How.) 393 (1856).

117. *Id.* at 446.

118. *Id.* at 542 (McLean, J., dissenting).

119. *Id.* at 543.

an act of Congress. In the 1860s, courts continued to cite it as the authoritative definition of the scope of national power,[120] and noted treatises likewise relied upon the Chief Justice's language in *McCulloch*.[121] In *United States v. Rhodes*,[122] Justice Swayne, sitting on circuit, sustained the Civil Rights Act of 1866 through a detailed reading of the judicial precedents that had developed since *McCulloch*. The Justice recognized that Congress's power to pass "appropriate" legislation under the Thirteenth Amendment reflected "a phrase which had been enlightened by well-considered judicial application."[123] After quoting the *McCulloch* standard, the Justice examined the kinds of acts that the Supreme Court had recognized as appropriate to Congress's enumerated powers: the taxing power, the Commerce Clause, the power to establish post offices, and to raise and support armies and navies. For Justice Swayne, the lesson of these cases was that "[a]ny exercise of legislative power within its limits involves a legislative, and not a judicial question. It is only when the authority given has been clearly exceeded, that the judicial power can be invoked."[124] Relying upon *McCulloch*, Justice Swayne found that the court "entertain[ed] no doubt of the constitutionality of the act in all its provisions."[125] The Civil Rights Act fell within Congress's appropriate powers under the Thirteenth Amendment.[126]

As *Rhodes* reveals, at the time of the ratification of the Fourteenth Amendment, courts and commentators recognized *McCulloch* as the standard by which judges should review the constitutionality of an act of Congress. Moreover, they recognized that under such a standard, courts should invalidate legislative acts only if they could not be reconciled with any enumerated power. Such an understanding reached almost universal acceptance in the federal judiciary, and it was the broad *McCulloch* standard that would inform the drafting and the ratification of the Fourteenth Amendment.

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120. *See, e.g.*, United States v. Marks, 26 F. Cas. 1162, 1163 (C.C.D. Ky. 1869) (No. 15,721) (finding that "it is now universally admitted that . . . if the end be legitimate, all the means which are appropriate and adapted to the end are likewise legitimate, and may be applied and used by congress in their discretion"); United States v. Fairchilds, 25 F. Cas. 1035, 1036 (W.D. Mich. 1867) (No. 15,067); Latham's Case, 1 Ct. Cl. 149 (1864), *available in* 1864 WL 2250, at *9.

121. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 63-64 (Da Capo Press 1972) (1868); POMEROY, *supra* note 115, at 165-71. For a discussion of the influence of these two commentators in the 1860s, see Aynes, *supra* note 42, at 89-94.

122. 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151).

123. *Id.* at 793.

124. *Id.*

125. *Id.* at 794.

126. Justice Swayne notably reserved the question of whether the Thirteenth Amendment would grant Congress the right to confer political rights. *See id.* at 794.

B. McCulloch *and the Ratification of the Fourteenth Amendment*

The *McCulloch* theory of legislative power was on the minds of opponents and supporters of the Fourteenth Amendment. When the Framers borrowed Marshall's words, they borrowed from the tradition of legislative discretion that courts had recognized under this standard. The same Congress had exercised that discretion in legislating under the Enforcement Clause of the Thirteenth Amendment. In debating both Bingham's original version and his final draft, Republicans and Democrats alike spoke of the Fourteenth Amendment as a vehicle of congressional power that would provide Congress with the power to legislate when, in its discretion, states threatened civil liberties.

Republicans relied upon the Thirteenth Amendment to grant Congress the power to protect the civil liberties of its citizens under the Civil Rights Act. The Framers of the Thirteenth Amendment had recognized that Congress would enjoy the discretion to construe the amendment broadly in enacting legislation under its Enforcement Clause.[127] Immediately following the Secretary of State's declaration that the Thirteenth Amendment had been ratified, Republicans pushed Congress to employ that discretion to protect the civil rights of the freedmen.[128] In so doing, Congressmen expressly invoked *McCulloch* as a guide to understanding the scope of congressional power.[129] Speaking on the House floor, Representative Wilson quoted the *McCulloch* standard and then applied it to the Civil Rights Act:

> Who will say that the means provided by this . . . bill are not appropriate for the enforcement of the power delegated to Congress by the second section of the amendment abolishing slavery, which I have quoted? 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.

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127. *See* TENBROEK, *supra* note 44, at 144-51 (arguing that supporters and opponents in Congress adopted a broad interpretation of congressional power under the Thirteenth Amendment).

128. The day after the Secretary's message, Senator Trumbull announced that he would present drafts of what would become the Civil Rights Bill and the Freedmen's Bureau Bill. *See* CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864-68, at 1161-62 (Vol. VI of Oliver Wendell Holmes Devise History of the Supreme Court (Paul A. Freund ed., 1971)).

129. The Republican interpretation did not catch the Democrats by surprise. Representative Holman, an Indiana Democrat, believed that the appropriate legislation might include granting the freedmen citizenship rights. *See* CONG. GLOBE, 38th Cong., 1st Sess. 2962 (1864). *But see* FAIRMAN, *supra* note 128, at 1156-59 (arguing that the Thirteenth Amendment would not have been ratified if such a construction was expected).

> This settles the appropriateness of this measure, and that settles its constitutionality.[130]

Wilson read the purpose of the Thirteenth Amendment to be the "maintenance of freedom to the citizen," and any measures that Congress took to protect the liberty of the citizen fell within the appropriate scope of the Thirteenth Amendment.

Senator Trumbull likewise read the Enforcement Clause to grant Congress the power to "pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States."[131] The relevant question, said another legislator, was whether the rights protected by the act "can be said to come within the rule laid down by the Supreme Court in innumerable cases, that in order to entitle this Government to assume a power as an implied power of this Government it 'must appear that it is appropriate and plainly adapted to the end.'"[132] Representative Cook followed that guide in interpreting the meaning of "appropriate":

> When Congress was clothed with power to enforce that provision by appropriate legislation, it meant two things. It meant, first, that Congress shall have power to secure the rights of freemen to those men who had been slaves. It meant, secondly, that Congress should be the judge of what is necessary for the purpose of securing to them those rights.[133]

Cook, like Justice Swayne and many other Republicans,[134] read the Thirteenth Amendment not as a narrow prohibition against legal slavery, but as granting Congress the "power to secure the rights of freemen to those men who had been slaves." Such a reading followed *McCulloch*, which directed legislators and judges to remember that a Constitution marks out only the "great outlines" of powers. Legislators and judges recognized Congress's right to define quite broadly the ends of its powers, and the means appropriate to those ends.

Representative Thayer's recognition that Congress had the sole power to judge the "necessity" of an action taken pursuant to its power also arises directly out of *McCulloch*.[135] Such an idea was to recur throughout the

130. CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866).

131. *Id.* at 475.

132. *Id.* at 1294 (statement of Rep. Shellabarger) (quoting STORY, *supra* note 108, at 416).

133. *Id.* at 1124.

134. Like Justice Swayne, Chief Justice Chase also recognized the Civil Rights Act to fall within Congress's power under the Thirteenth Amendment. *See In re* Turner, 24 F. Cas. 337, 339 (C.C.D. Md. 1867) (No. 14,247).

135. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819) ("[W]here the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to

debates. Another congressman read *McCulloch* for the proposition that "[i]f a certain means to carry into effect any of the powers expressly given by the Constitution to the Government of the Union be an appropriate measure, not prohibited by the Constitution, the degree of necessity is a question of legislative discretion, not of judicial cognizance."[136] The judicial role extends to assuring that Congress pursues an end appropriate to the national government. When such an end falls within those "great outlines" of the constitutional text, it is not for judges to inquire into how necessary such a measure is to that end.

The Republicans who passed the Civil Rights Act brought that same understanding to the Fourteenth Amendment. Senator Howard, in introducing the revised version of the amendment to the Senate, found that the courts had hitherto been unable to describe all of the privileges and immunities of the citizens of the United States. The Senator recognized that judges had attempted to define such rights, most notably in Justice Bushrod Washington's opinion in *Corfield v. Coryell*.[137] However, Howard suggested it would be a "somewhat barren discussion" to try to describe them, for they "are not and cannot be fully defined in their entire extent and precise nature."[138] The supporters of the amendment expressed little concern over these ambiguities since under *McCulloch* they did not have to answer the question. The text of the amendment provided the principle that later Congresses would have the power to protect. Under *McCulloch*, Congress would enjoy the discretion to supply content to those "broad outlines" marked by the amendment.[139]

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undertake here to inquire into the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.").

136. CONG. GLOBE, 39th Cong., 1st Sess. 1836 (1866) (statement of Rep. Lawrence).

137. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230). For the influence of *Corfield*, see AMAR, *supra* note 1, at 176-78.

138. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). Contemporary scholars have provided alternative explanations for such deliberate ambiguity. William Nelson suggests that the Republicans regarded the issue primarily at the level of political principle. Section 1 sought to entrench in the Constitution the North's victory in the Civil War, not a specific set of rights. *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 61 (1988). Raoul Berger suggests, but rejects, the idea that the Republicans hoped by vagueness to obscure the radicalism of the amendment from its ratifiers. *See* BERGER, *supra* note 42, at 99-116.

139. The congressional debates suggest that the Framers understood congressional power under Section 5 to go beyond the "ratchet theory" described by Justice Brennan in *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966). Congress has no power to reduce the level of constitutional protection recognized by the judiciary. Indeed, the Framers enlisted the judiciary in order to ensure that the Civil Rights Act might survive a hostile Congress. *See supra* note 62 and accompanying text. However, the Framers did not believe that congressional power was limited to enhancing the protection of rights recognized by the judiciary. Just as Congress might define the "badges and incidents of slavery" under the Thirteenth Amendment, they had discretion in defining the privileges and immunities protected under the Fourteenth Amendment. For a discussion of the *Boerne* Court's interpretation of the ratchet, see Buss, *supra* note 34, at 422-32.

The opponents of the amendment shared this understanding and feared congressional discretion. The Democrats invoked the precedent of the Thirteenth Amendment. As one predicted, "We know what the result of this will be, for we have already seen it tested."[140] Another suggested, "When these words were used in the amendment abolishing slavery they were thought to be harmless, but during this session there has been claimed for them such force and scope of meaning as that Congress might invade the jurisdiction of the States.... As construed this provision is most dangerous."[141] Under such a reading, the amendment would grant Congress the power to "strike down those State rights and invest all power in the General Government."[142] As such, the amendment was "most dangerous to liberty. It saps the foundation of the Government; it destroys the elementary principles of the States; it consolidates everything into one imperial despotism."[143] While Democrats may have exaggerated those fears, the concerns reflected Congress's past construction of its power under the Thirteenth Amendment.

During the national ratification debate, Democrats throughout the states feared the broad power that Congress would enjoy under the Fourteenth Amendment. James E. Bond, in his recent study of eleven Southern states, notes that "those who attacked Section 1 focused on Congress's Section 5 power to define and enforce the privileges and immunities of citizenship."[144] Southern legislatures recognized that the "failure to define privileges and immunities necessarily left to Congress that power under Section 5."[145] In state after state, Southern politicians expressed the belief that Congress's power to pass "appropriate legislation" left the content of Section 1 subject to the construction of future Congresses.[146] In those states, the supporters of the amendment did not deny Congress's power over civil rights; instead, they emphasized that the national legislature already

140. CONG. GLOBE, 39th Cong., 1st Sess. 3147 (1866) (statement of Rep. Harding).

141. *Id.* at 2940 (statement of Sen. Hendricks).

142. *Id.* at 2500 (statement of Rep. Shanklin).

143. *Id.* at 2538 (statement of Rep. Rogers).

144. JAMES E. BOND, NO EASY WALK TO FREEDOM 254-55 (1997).

145. *Id.* at 38 (citing William Sharkey, JACKSON CLARION, Sept. 28, 1866); *see also id.* at 104 ("The principal concern that white Alabamians expressed about Section 1 was Congress's power under Section 5 to define the privileges and immunities of citizenship.").

146. *See id.* at 217 ("What is 'appropriate legislation?' The Constitution is silent; therefore, it is left for the Congress to determine." (quoting JOURNAL OF THE SENATE OF THE STATE OF TEXAS, 11th Legis., 421-22)); *see also id.* at 238 ("It will be contended that [members of Congress] are the proper judges of what constitutes appropriate legislation. If therefore, the amendment be adopted, and a fractional Congress ... be empowered 'to enforce it by appropriate legislation,' what vestige of hope remains to the people of those States?" (quoting Governor Jenkins of Georgia)); *id.* at 34 (Mississippi); *id.* at 56-57 (North Carolina); *id.* at 87 (Louisiana); *id.* at 104 (Alabama); *id.* at 126-27 (South Carolina); *id.* at 148-51 (Virginia); *id.* at 173-74 (Florida); *id.* at 192-93 (Arkansas); *id.* at 236-38 (Georgia).

possessed such power—as evidenced by the Civil Rights Act.[147] That Democrats feared Congress's discretion more than the text of Section 1 is reflected in a compromise proposal, reportedly drafted by President Johnson and several Southern governors, that left Section 1 largely intact but removed Section 5.[148] The Southern ratification debates recognized that Congress would enjoy broad discretion to legislate under its own understanding of Section 1.

The Northern debates were somewhat more circumspect in describing Congress's power. Republicans sought to downplay the openness of the amendment, insisting that it would not wreak a fundamental change in the federalist system. The amendment extended only to those rights that states had no power, under the Constitution or natural law, to abridge in the first place.[149] A state that guaranteed those rights had nothing to fear from the national legislature, which could be trusted to respect states' rights. Republicans generally agreed that the new amendment did not grant suffrage to blacks, a point that angered radicals but that many Republicans saw as necessary to secure ratification.[150] Some claimed, not always convincingly, that the amendment did nothing more than give Congress the power to ensure equal treatment in the enjoyment of state-created rights.[151]

This minimalist talk was problematic, however. Republicans, like their opponents, embraced a theory of legislative discretion that provided no ready boundaries to such a broad grant of congressional power. Even if the amendment might be construed on an equal-treatment principle, it need not be so construed. And under *McCulloch*, Congress would have the discretion to adopt either plausible interpretation. The Reconstruction Court would take it upon itself to narrow the amendment, indeed to read the Privileges or Immunities Clause out of the amendment. Such a move was unexpected, although perhaps to Republican eyes, not unprecedented.[152] As the next section shows, the Reconstruction Court did this while still embracing the *McCulloch* reading of congressional power, and indeed, it did so precisely because it viewed Congress's power under Section 5 in *McCulloch*, rather than in *Boerne*, terms.

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147. *See, e.g., id.* at 78 (quoting NEW ORLEANS TRIBUNE, Mar. 18, 1866); *id.* at 123 (quoting LANCASTER LEDGER (South Carolina), Oct. 31, 1866).

148. *See* JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 139-42 (1984).

149. *See* CURTIS, *supra* note 1, at 145; JAMES, *supra* note 148, at 42-44; NELSON, *supra* note 138, at 120-21.

150. *See, e.g.*, NELSON, *supra* note 138, at 126-27.

151. *See id.* at 121-22.

152. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 3038 (1866) (statement of Sen. Yates) (describing the Fourteenth Amendment as "a guarantee which protects us from future judicial tyranny such as we have experienced under the decisions of the Supreme Court"); *id.* at 1062 (statement of Rep. Kelley); sources cited *supra* note 47.

C. *The Fourteenth Amendment Before the Reconstruction Court*

The Reconstruction Court is not widely known for its expansive reading of congressional power under the Fourteenth Amendment. In such famous decisions as the *Slaughter-House Cases*[153] and the *Civil Rights Cases*,[154] the Court narrowed the scope of the liberties protected by the Fourteenth Amendment and struck down acts of Congress enacted to protect civil liberties. On the other hand, the Court's visible struggle with the meaning of the amendment—its appreciation of the threat to the existing federalist balance—demonstrated a broad understanding of the scope of congressional power. The Court recognized the Fourteenth Amendment to be an express grant of power to Congress, and it understood Congress to have wide discretion in passing laws pursuant to recognized constitutional ends. The conservative Court found itself drawn to narrowing the ends covered by the Fourteenth Amendment precisely because it felt obliged to defer to Congress's interpretation of the scope of those ends.

The Reconstruction Court embraced *McCulloch* as setting out "the fullest consideration" of the extent of Congress's powers, a case that adopted a construction "that has ever since been accepted as determining its true meaning" and "is familiar to the legal profession, and, indeed, to the whole country."[155] In 1870, the Court described this conception in the *Legal Tender Cases*,[156] a set of cases that considered the constitutionality of Civil War acts that had declared paper money equivalent to coins for the payment of debts. In 1869, a divided Court in *Hepburn v. Griswold*[157] struck down the Legal Tender Acts for exceeding Congress's enumerated powers. A year later, the Court, still divided, reversed itself and sustained the constitutionality of the acts.[158] The majority and dissenting opinions in both cases framed the issue through the lens of *McCulloch*.[159] Did the power to declare notes legal tender fall within the scope of an enumerated power of

153. 83 U.S. (16 Wall) 36 (1873).

154. 109 U.S. 3 (1883).

155. The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 538 (1870); *see also* Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 45 (1867) (describing the *McCulloch* decision as "one every way important, and . . . familiar to the statesman and the constitutional lawyer").

156. 79 U.S. (12 Wall.) 457.

157. 75 U.S. (8 Wall.) 603 (1869).

158. The *Hepburn* Court, which had only eight justices, divided five to three. After President Johnson's tenure, Congress provided for the appointment of nine justices. *See* An Act to Amend the Judicial System of the United States, ch. 22, 16 Stat. 44 (1869). Although the act was passed prior to *Hepburn*, it took effect a month later in December 1869. Justice Grier resigned from the bench in February 1870, and as a result, two new justices, Strong and Bradley, were appointed. The *Legal Tender Cases* were decided by a margin of five to four.

159. *See Hepburn*, 75 U.S. at 614-15 (quoting *McCulloch* language); *id.* at 631 (Miller, J., dissenting) (discussing *McCulloch*); *Legal Tender Cases*, 79 U.S. at 532 (same); *id.* at 570 (Chase, C.J., dissenting) (quoting *McCulloch*). Justice Bradley also discussed *McCulloch* in his concurring opinion in the *Legal Tender Cases*, 79 U.S. at 568.

Congress? The dispute between the two sides was not over whether to accept the *McCulloch* approach, but over the level of generality to ascribe to the designated objects of the Constitution.[160]

These opinions on federal power prove enlightening when read against their authors' future views in *Slaughter-House* and *Ex parte Virginia*. The majority opinion in *Hepburn*, written by Chief Justice Chase, found that the legal tender acts could not be fairly implied from any of Congress's enumerated powers.[161] Justice Miller, who would write the majority opinion in *Slaughter-House*, disagreed with that reading. In his *Hepburn* dissent, he endorsed the broad reading of *McCulloch*, arguing that "if we adopt the construction of Chief Justice Marshall . . . which has never to this day been overruled or questioned," then the Court must conclude that the legal tender acts were "conduc[ive] towards the purpose of borrowing money, of paying debts, of raising armies, of suppressing insurrection."[162] And as the acts were "conducive" to those broad purposes, the Court must find them within the choice of means available to Congress. Justice Miller's broad construction of constitutional ends in *Hepburn* presages his fear in *Slaughter-House* of permitting Congress to regulate civil rights under the Fourteenth Amendment.

A year later, the Court provided an extensive analysis of *McCulloch* in adopting the dissenters' view in the *Legal Tender Cases*. Justice Strong drafted the majority opinion, and it was he who would apply this understanding in evaluating Congress's Section 5 powers in *Ex parte Virginia*. After recognizing the serious consequences of holding the acts unconstitutional, the Court explained the presumption of constitutionality that had long governed its review of legislative acts. "It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt."[163] The Court would require clear evidence of congressional overreaching before it would overturn a duly enacted law. Justice Strong wrote that *McCulloch* reminded the judiciary that the Constitution speaks not in "minute details," but "prescribes outlines, leaving the filling up to be deduced from the outlines."[164] In defining constitutional powers, the Court must defer to Congress's discretion in passing measures conducive to

160. *See Legal Tender Cases*, 79 U.S. at 539 ("Even in *Hepburn v. Griswold*, both the majority and minority of the court concurred in accepting the doctrines of *McCulloch v. Maryland* as sound expositions of the Constitution, though disagreeing in their application.").

161. *See Hepburn*, 75 U.S. at 616-17. Just two years earlier, the Chief Justice, sitting on circuit, had sustained the constitutionality of the Civil Rights Act under the Thirteenth Amendment. *See In re* Turner, 24 F. Cas. 337, 339 (C.C.D. Md. 1867) (No. 14,247).

162. *Hepburn*, 75 U.S. at 635 (Miller, J., dissenting).

163. *Legal Tender Cases*, 79 U.S. at 531.

164. *Id.* at 532.

those purposes, "subject only to the restrictions that they be not prohibited, and be necessary and proper . . . ."[165] The *McCulloch* standard, which "has ever since been accepted as determining" the scope of congressional power, "also marks out with admirable precision the province of this court," which Justice Strong defined as follows:

> Before we can hold the legal tender acts unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government, not appropriate in any degree (for we are not judges of the degree of appropriateness), or we must hold that they were prohibited.[166]

So long as the act is "appropriate in any degree," "conducive to the execution" of a legitimate constitutional end (read broadly), and not expressly prohibited, the act lies within the discretion of Congress. Against such a broad standard, Justice Strong found that the legal tender acts were constitutional.

Three years later in the *Slaughter-House Cases*, the Supreme Court approached the Fourteenth Amendment with this understanding in mind. The case arose out of a Louisiana state law that granted a monopoly to a slaughterhouse corporation, restricting all slaughtering of animals in New Orleans to the stockyards of the corporation. A group of butchers challenged the statute in part on the ground that it violated their constitutional rights under the Fourteenth Amendment.[167] A majority of the Court rejected the butchers' claim on the basis that the butchers did not show the violation of a right protected by the amendment. The amendment protected the "privileges and immunities of the citizens *of the United States*," yet these were distinct from the "privileges and immunities of the citizen *of the States*."[168] The Framers' decision to employ the former language rather than the latter, which arose from Article IV, Section 2, indicated an intent to protect only peculiarly federal civil rights, and not the more familiar panoply of civil rights. As the dissenting judges pointed out, this surprising reading of original intent ran contrary to the expressed statements of the Framers of that amendment who relied upon Justice Washington's famous definition in *Corfield v. Coryell* in drafting the Privileges or Immunities Clause.[169]

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165. *Id.* at 534.

166. *Id.* at 538-39.

167. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

168. *Id.* at 74.

169. *See id.* at 98 (Field, J., dissenting) (discussing the congressional debates' understanding of privileges and immunities); *id.* at 129 (Swayne, J., dissenting) ("[The majority] defeats, by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted.").

The *Slaughter-House* majority was conscious of its twisted reading of that history but found itself compelled to reach such a conclusion by considering the consequences of the alternative. The Court recognized that the argument "is not always the most conclusive which is drawn from the consequences . . . of a particular construction of an instrument."[170] However, to read the Fourteenth Amendment to allow Congress to protect civil liberties against the states would "fetter and degrade the State governments by subjecting them to the control of Congress" and "radically change[] the whole theory of the relations of the State and Federal governments to each other . . . ."[171] In the face of such consequences, the Court found itself obliged to construe the language as narrowly as possible.

Although *Slaughter-House* did not involve an act of Congress, the Court was most concerned about the effect its decision would have upon the scope of congressional power under the Fourteenth Amendment. In defining the threat of a broad reading of the Privileges or Immunities Clause, the majority opinion found:

> [W]here it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?
>
> All this and more must follow, if the [broad reading] be sound. For not only are these rights subject to the control of Congress *whenever in its discretion* any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as *in its judgment* it may think proper on all such subjects.[172]

The Court's primary concern with allowing the amendment to incorporate civil rights was that it would permit Congress to legislate "whenever in its discretion" any of those rights are "supposed" to be abridged. The majority opinion emphasized Congress's independent authority to legislate according to its own understanding of the Privileges or Immunities Clause. Should it admit that the clause comprised those "fundamental" rights that, in Justice Washington's words, "belong, of right, to the citizens of all free governments,"[173] then it would have to accept Congress's freedom to legislate according to its own understanding of those terms. In order to

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170. *Id.* at 78.

171. *Id.* For a sympathetic modern reading, see 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 95-96 (1991), which discusses the difficulty in integrating the Civil War amendments into the original federalist structure.

172. *Slaughter-House*, 83 U.S. at 77-78 (emphasis added).

173. Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230) (defining "Privileges and Immunities" in Article IV).

avoid the consolidation of power that would follow, the majority on the *Slaughter-House* Court found themselves obliged to read civil liberties right out of the Privileges or Immunities Clause.[174]

Although *Slaughter-House* redefined the Fourteenth Amendment, the Reconstruction Court retained its broad reading of congressional power under the amendment. In *Ex parte Virginia*,[175] the Court sustained a provision of the Civil Rights Act of 1875 that criminalized the exclusion of persons from jury service on account of race. In so doing, it recognized the amendment to be a grant of power to Congress and applied the *McCulloch* standard in reviewing legislative action. The Court emphasized that the text gave the federal judiciary no explicit power to void state action, and, "[w]ere it not for the fifth section of that amendment, there might be room for argument that the first section is only declaratory of the moral duty of the State."[176] It was from that section that "the amendments derive much of their force,"[177] and under it Congress must enjoy the discretion provided by *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 or invasion, if not prohibited, is brought within the domain of congressional power.[178]

Within the narrowed confines of the Fourteenth Amendment, the Court recognized that Congress retained substantial latitude to pursue its ends.

The Reconstruction Court of the 1870s thus endorsed the *McCulloch* understanding of congressional power. Although the justices did not always agree upon its application, the Court consistently demonstrated its customary deference to Congress's assertion of its power. Congress had the power to pass all laws, not expressly prohibited, that were plainly adapted to a legitimate constitutional end. *Slaughter-House* excluded civil rights from the text of the Fourteenth Amendment in order to prevent Congress from exercising such discretion. The Court's jurisprudence demonstrates how the amendment's Framers, as well as other lawyers of the era, understood the *McCulloch* theory, even though its specific holdings undermined the ends the Republicans pursued.

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174. Of the three dissenters, only Justice Swayne confronted the majority's concern for broad *McCulloch* powers. He recognized that "the power conferred is novel and large," yet argued that such powers were precisely in line with "the intent of those by whom the instrument was framed and of those by whom it was adopted." *Slaughter-House*, 83 U.S. at 129 (Swayne, J., dissenting).

175. 100 U.S. 339 (1879).

176. *Id.* at 347.

177. *Id.* at 345.

178. *Id.* at 345-46.

The Court's concern for the federal balance would soon lead away from the *McCulloch* theory of congressional power. The decline of the *McCulloch* theory in the *Lochner* era[179] is not the subject of this Note, but it is worth acknowledging in passing the Civil War amendments' influence upon the rise of the judicial imperialism of that era.[180] In the *Civil Rights Cases*, decided in 1883, the Court denied Congress the latitude to define the "badges and incidents of slavery" under the Thirteenth Amendment.[181] The Court, with a view of congressional discretion more akin to *Boerne* than to *Slaughter-House*, rejected Congress's attempt to proscribe private discrimination in places of public accommodation. The majority did not consider whether the federal act was a plausible attempt to further emancipation; instead, it defined the amendment narrowly and struck down the applicable provisions of the Civil Rights Act of 1871.[182]

Alone in dissent was Justice Harlan, who recognized that the majority's opinion "abandoned" the "rule of construction" laid out in *McCulloch*.[183] Justice Harlan, quoting the *McCulloch* language, noted that "[t]his court has always given a broad and liberal construction to the Constitution, so as to enable Congress, by legislation, to enforce rights secured by that instrument."[184] Harlan invoked such antebellum opinions as *Prigg* and *Ableman* that had recognized significant congressional discretion in enforcing the federal rights of slave masters. He demanded that the Court give the same reading to the amendment that emancipated the slaves. Harlan thus found that under the legislature's "express power to enforce that amendment, by appropriate legislation," Congress "may enact laws to

179. So named for *Lochner v. New York*, 198 U.S. 45 (1905). Although *Lochner* struck down a state regulation as inconsistent with the Due Process Clause, the *Lochner* Court demonstrated similar aggressiveness in constraining congressional interpretation of its power under the Commerce Clause. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918) (rejecting Congress's power to proscribe the interstate traffic of goods produced by child labor); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (rejecting Congress's power to regulate a monopoly on manufacturing under the Sherman Act).

180. The strong relationship between the Civil War amendments and the rise of the *Lochner* Court requires further exploration. Not only is the substantive liberty of contract rooted in free labor concerns, *see* William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, the shift in the Court's mode of judicial review—the decline of *McCulloch* and the rise of "judicial imperialism"—is rooted in part in the Court's attempt to protect the federalist balance from the Civil War amendments, *cf.* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998) (describing *Lochner* and *Slaughter-House* as attempts to synthesize the concerns of the founding and Reconstruction eras for federalism and individual rights).

181. *See* The Civil Rights Cases, 109 U.S. 3, 20-21 (1883). The *Civil Rights Cases* also rejected Congress's ability to reach private discrimination under Section 5 of the Fourteenth Amendment. For a discussion of the debate over the "state action" doctrine, see *supra* note 70. That debate poses a major interpretive question that even under a *McCulloch* reading of the amendment would seem fit for judicial determination.

182. *See Civil Rights Cases*, 109 U.S. at 21-22.

183. *Id.* at 51 (Harlan, J., dissenting).

184. *Id.* at 50-51.

protect that people against the deprivation, because *of their race*, of any civil rights granted to other freemen in the same State . . . ."[185] Harlan invoked the broad reading of ends, and the allowance for Congress's plausible attempts to achieve those ends, that had been characteristic of judicial review earlier in the nineteenth century. The dissent thus remained faithful to the *McCulloch* origins of the amendment, even as the majority backed away from that understanding of judicial review.

IV. CONCLUSION

This Note has described the theory of judicial review that was understood by the Framers of the Fourteenth Amendment—one sharply at odds with the Court's holding in *City of Boerne v. Flores*. Instead of embracing a rather formalist separation between Congress's power to "enforce" and to "define" the amendment, the Framers expected that Congress would have the discretion to pass acts that arguably fell within the broad guarantees of the amendment. The Framers of the Thirteenth Amendment, who would soon draft the Fourteenth, were not concerned about whether a court would find that the self-executing prohibition against slavery implied an end to state violations of civil liberties. They instead focused upon their power to pass such legislation as appropriate to the ends of the amendment. And it was under the deferential *McCulloch* line that they understood the act to fall within their power.

Had the Supreme Court approached *Boerne* through *McCulloch*, there is little doubt that it would have sustained the constitutionality of RFRA. *McCulloch* recognized that the Constitution delineated only the broad outlines of its enumerated powers, yet the *Boerne* Court struck down a law according to five Justices' particular conception of the acknowledged free exercise right. *McCulloch* accorded Congress liberal discretion in legislating under its powers, yet the Court found that Congress had no discretion to depart from the judicial construction of the amendment. Finally, *McCulloch* recognized that a court should strike down a congressional act only when it cannot be reconciled with the constitutional text, yet the Court struck down RFRA even though four of nine Justices in *Employment Division v. Smith*[186] had shared Congress's interpretation of religious liberty. Had *Boerne* taken *McCulloch* seriously, it would have been a much easier case.

McCulloch challenges *Boerne*'s dichotomy between "substantive" and "remedial" powers. For the *Boerne* Court, Congress either was bound by the pronouncements of the judiciary or had plenary power to write the

185. *Id.* at 36.
186. 494 U.S. 872 (1990).

constitutional text. *McCulloch* suggests that this was a false choice. The Court in *Employment Division v. Smith* had to interpret a self-executing provision of the constitutional text. The *Boerne* Court had to determine whether an act of Congress was appropriate to the legislative power enumerated in the text. These tasks surely are related, but they are distinct nonetheless. The judiciary's determination of the most compelling meaning of the constitutional text does not define the universe of what may be appropriate measures under that text. And the Framers of the Fourteenth Amendment understood the outer perimeter of what is appropriate in terms of *McCulloch*.

The primary purpose of this Note, however, has not been to defend the merits of RFRA as such. Instead, the purpose has been to call into question a reading of the Fourteenth Amendment's history that would deny the national legislature the power to participate in articulating our national civil liberties. The Reconstruction Congress drafted an amendment that would grant Congress the power to protect rights that "are not and cannot be fully defined in their entire extent and precise nature."[187] The drafters recognized that subsequent Congresses would have the discretion to legislate according to alternative meanings of the text. So they amended the text to enlist the courts, not in fear of congressional overreaching, but to ensure that the judicial branch of government would secure liberties should Congress fail to do so.

The Fourteenth Amendment thus relies upon both Congress and the courts to protect civil liberty. These two institutions need not always agree. Indeed, as others have noted, the distinct institutional perspectives of these branches may lead them to different conclusions over the guarantees in Section 1 of the amendment.[188] However, the Framers designed the amendment so as to ensure that when the branches do disagree, it would be the most expansive understanding of liberty that triumphs. The *McCulloch* theory of the Fourteenth Amendment thus should be preferred not simply because it better fits the original understanding of the amendment, but because it enlists the legislative branch's institutional competence in the service of both liberty and democracy.

The Supreme Court has played a noble but not uncontroversial role in applying the guarantees of the Fourteenth Amendment during the twentieth century. The "counter-majoritarian difficulty" has plagued every effort to

187. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

188. *See, e.g.*, David Cole, *The Value of Seeing Things Differently:* Boerne v. Flores *and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 59 (recognizing "important institutional differences" that would lead Congress and courts to different interpretations of the amendment); McConnell, *supra* note 34, at 185 ("[I]t must be understood it must be understood that differences in interpretation between judicial and legislative bodies are not solely a product of intellectual disagreement (let alone pretext), but are a natural and predictable result of institutional differences.").

expand the scope of national civil rights.[189] In recent years, the Court has shied away from discovering new rights that lack firm roots in our historical traditions.[190] However, arguments against judges creating these rights lose much of their force when it is the national legislature that gives birth to them. The Fourteenth Amendment granted Congress the discretion to debate and reach consensus on those civil liberties worthy of national protection. An amendment that provides such an avenue for political activism furthers both democracy and liberty, and it is an avenue that the *Boerne* opinion would seem to foreclose.

The Supreme Court has revived principles of federalism that had perhaps been neglected as a result of the achievements of the modern Court. *United States v. Lopez*, in particular, emphasizes that there remain spheres of local activity that the broad powers of the national government cannot reach.[191] Even so, we must be sensitive to those objects that the people of the United States, by constitutional amendment, have entrusted to their representatives in the national legislature. The Fourteenth Amendment, as its history reveals, did precisely that. In the broad guarantees of that text, the Framers ensured that their successors would have the power to deliberate and to protect, as a nation, those civil liberties that they held most dear.

189. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962) (positing the tension between democracy and judicial review as the fundamental problem of modern constitutional theory).

190. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997) (rejecting the right to physician-assisted suicide); Bowers v. Hardwick, 478 U.S. 186 (1986) (rejecting the right to homosexual sodomy).

191. *See* United States v. Lopez, 514 U.S. 549 (1995) (finding the Gun-Free School Zones Act to exceed congressional power).