Judicial Review of Thirteenth Amendment Legislation: 'Congruence and Proportionality' or 'Necessary and Proper'?

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JUDICIAL REVIEW OF THIRTEENTH AMENDMENT LEGISLATION: "CONGRUENCE AND PROPORTIONALITY" OR "NECESSARY AND PROPER"?

William M. Carter, Jr.*

I. INTRODUCTION

THE Thirteenth Amendment has relatively recently been rediscovered by scholars and litigants as a source of civil rights protections. Most of the scholarship focuses on judicial enforcement of the Amendment in lawsuits brought by individuals. However, scholars have paid relatively little attention as of late to the proper scope of congressional action enforcing the Amendment. The reason, presumably, is that it is fairly well settled that Congress enjoys very broad authority to determine what constitutes either literal slavery or, to use the language of Jones v. Alfred H. Mayer Co., a “badge or incident of slavery” falling within the Amendment’s purview.¹ Indeed, the Supreme Court has repeatedly held that the Thirteenth Amendment empowers Congress “to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”² Thirteenth Amendment legislation, the Court has stated, is to be reviewed only for its rationality. Thirteenth Amendment legislation is constitutional unless it can be said that the congressional determination that a given condition constitutes slavery, involuntary servitude, or a badge or incident thereof is wholly irrational.³

This broad “necessary and proper” interpretation of congressional authority under the Thirteenth Amendment therefore seems unassailable, until one recalls that prior to the Court’s decision in City of Boerne v. Flores,⁴ roughly the same interpretive framework existed regarding congressional power to protect civil rights under section 5 of the Fourteenth Amendment. Boerne and its progeny have systematically dismantled the prior “necessary and proper” structure supporting section 5 legislation, replacing it with a new and shaky edifice

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2. Id. (internal quotation marks omitted).
3. Id. at 440 (“Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation.”).
requiring Congress to demonstrate "congruence and proportionality" between the problem that Congress has chosen to address and the means it has selected to do so. The Court has made clear that it did not intend a mere rhetorical shift by virtue of this new test, but rather, Congress must now specifically demonstrate by factual findings in the congressional record that it has satisfied the Court's requirements.  

While the Supreme Court has not yet decided whether the "congruence and proportionality" test applies to the Thirteenth Amendment, it is reasonable to assume that this question will arise in the near future. In this article, I provide a preliminary analysis of the effect, if any, of Boerne and its progeny on the standard of review for assessing the constitutionality of Thirteenth Amendment legislation. In Part II, I discuss the standard of review currently applied to Thirteenth Amendment legislation. In Part III, I provide an overview of the Boerne "congruence and proportionality" test and discuss the underlying theoretical justifications for that test. Part IV identifies salient differences between the Thirteenth and Fourteenth Amendments and argues that these differences render the Boerne test's theoretical justifications inapplicable to most Thirteenth Amendment legislation. In Part V, I conclude that, despite Boerne, Congress continues to enjoy great latitude in the exercise of its power to enforce the Thirteenth Amendment to protect civil rights.

II. CURRENT STANDARDS FOR JUDICIAL REVIEW OF THIRTEENTH AMENDMENT LEGISLATION

The Thirteenth Amendment was Congress' first attempt to constitutionalize the end of slavery and usher in a new era of freedom and civil equality. The Amendment's Framers made clear that they intended the Amendment not only to eliminate the ownership of human beings, but also to eliminate the badges and incidents of slavery, that is, the legal disabilities and lingering effects of the freedmen's former condition of enslavement.  

The Amendment's drafters recognized that providing the former slaves with only the formal legal status of

5. See, e.g., Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 370-71 (2001) (criticizing the lack of findings in the Congressional Record in that case, stating:

Justice Breyer [in dissent] maintains that Congress applied Title I of the [Americans with Disabilities Act] to the States in response to a host of incidents representing unconstitutional state discrimination in employment against persons with disabilities .... [The material cited by Justice Breyer] consists not of legislative findings, but of unexamined, anecdotal accounts of adverse, disparate treatment by state officials .... These accounts, moreover, were submitted not directly to Congress but to the Task Force on the Rights and Empowerment of Americans with Disabilities ....)

Id. (internal quotation marks omitted).

freedom would not be sufficient to overcome the resistance of the slaveholding states to recognizing the freedmen as true citizens of the national community.\(^7\)

Because they recognized that guaranteeing the civil rights of the freedmen would require a substantial reordering of federal-state relations, the Amendment’s drafters envisioned congressional power to enforce the Amendment as both vigorous and broad. Section 2 of the Thirteenth Amendment empowers Congress to enact “appropriate legislation” to “enforce” the Thirteenth Amendment.\(^8\) Section 2 was, in the words of Senator Trumbull of Illinois, intended to emphasize Congress’ power to enforce the Amendment by legislating against the badges of slavery and to put such power “beyond cavil and dispute.”\(^9\)

Similarly, Senator Lane of Indiana argued that section 2 of the Thirteenth Amendment declared the duty of Congress to secure freedmen in all their rights and privileges.\(^10\) Senator Sumner of Massachusetts expressed similar views on the Thirteenth Amendment by stating that the Amendment abolishes slavery entirely .... It abolishes it root and branch. It abolishes it in the general and the particular. In abolishes it in length and breadth and then in every detail .... Any other interpretation belittles the great amendment and allows slavery still to linger among us in some of its insufferable pretensions.\(^11\)

Thus, section 2 was viewed as an emphasis on Congress’ power and duty to enforce the Amendment because the ratification of the Amendment alone likely would not end state resistance to civil rights for the freedmen.\(^12\)

The courts have generally accorded Congress broad deference when it exercises its power to enforce the Thirteenth Amendment. There have been no published cases since the 1920s striking down a law as exceeding Congress’

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\(^7\) Id. at 51-52.

\(^8\) See U.S. Const. amend. XIII, § 2.


\(^10\) CONG. GLOBE, 39th Cong., 1st Sess. 602 (1866), reprinted in THE RECONSTRUCTION AMENDMENTS’ DEBATES, supra note 9, at 137 (statement of Senator Lane of Indiana in support of the Civil Rights Act of 1866).

\(^11\) CONG. GLOBE, 42d Cong., 2d Sess. 728 (1872), reprinted in THE RECONSTRUCTION AMENDMENTS’ DEBATES, supra note 9, at 597.

\(^12\) For example, Senator Trumbull of Illinois, in discussing the Civil Rights Act of 1866, cited various aspects of the Black Codes passed in the wake of the Civil War, such as racially selective vagrancy laws and pass systems that could result in the arrest, imprisonment, or practical re-enslavement of the freedmen. Trumbull stated that “[a]ll these laws, which were the incidents of slavery .... fell with the abolition of slavery; but, inasmuch as such laws existed in various States, it was thought advisable to pass a law of Congress [i.e., the Civil Rights Act of 1866, pursuant to Section 2 of the Amendment] securing to the colored people their rights in certain respects.” CONG. GLOBE, 42d Cong., 1st Sess. 575 (1871), reprinted in THE RECONSTRUCTION AMENDMENTS’ DEBATES, supra note 9, at 548 (emphasis added).
As the Jones Court stated, in holding that Congress acted within the scope of its Thirteenth Amendment power in providing a civil cause of action under 42 U.S.C. §1982 for private housing discrimination, "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." Indeed, many courts, in rejecting "badges and incidents of slavery" claims brought by individual plaintiffs, have specifically stated that Congress enjoys the exclusive power to determine what amounts to a badge or incident of slavery. While Congress has rarely chosen to exercise its power to enforce the Thirteenth Amendment, its broad discretion to select appropriate means of enforcing the Amendment currently remains unchallenged.

13. See Corrigan v. Buckley, 271 U.S. 323, 330 (1926) (holding that the Thirteenth Amendment did not provide jurisdiction to hear a challenge to enforcement of a racially restrictive covenant, because the Amendment only reaches "condition[s] of enforced compulsory service of one to another [and] does not in other matters protect the individual rights of persons of the negro race").


15. See, e.g., Palmer v. Thompson, 403 U.S. 217, 226-27 (1971) ([A]lthough the Thirteenth Amendment is a skimpy collection of words to allow this Court to [hear badges and incidents of slavery claims], the Amendment does contain other words that we held in [Jones] could empower Congress to outlaw 'badges of slavery.' ) (internal quotation marks omitted). See also Wong v. Stripling, 881 F.2d 200, 203 (5th Cir. 1989) (noting that "[a]lthough the amendment speaks directly only to slavery and involuntary servitude, the Court has recognized that section 2 empowers Congress to define and abolish 'the badges and incidents of slavery'"); Davidson v. Yeshiva Univ., 555 F. Supp. 75, 78, 79 n.4 (S.D.N.Y. 1982) (noting that Congress "may address the 'badges and incidents' of slavery under the implementation section, section 2, of the Thirteenth Amendment by appropriate statutory enactment"). For criticism of this view of the relationship between congressional and judicial enforcement of the Thirteenth Amendment, see William M. Carter, Jr., Race, Rights and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery, 40 U.C. DAVIS L. REV. (forthcoming 2007), preliminary draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=888760.

III. THE ORIGINS OF “CONGRUENCE AND PROPORTIONALITY” REVIEW OF SECTION 5 LEGISLATION: BOERNE AND ITS PROGENY

The Supreme Court’s narrowing of congressional power to enforce the Reconstruction Amendments has thus far been limited to section 5 of the Fourteenth Amendment. Section 5, like the equivalent provisions of the Thirteenth and Fifteenth Amendments, empowers Congress to “enforce” these constitutional amendments by “appropriate legislation.”17 The traditional standard for determining whether Congress has acted within the scope of its Enforcement Clause power is the highly deferential standard articulated in cases like Katzenbach v. Morgan,18 under which “[i]t is not for [the Supreme Court] to review the congressional resolution of [the] factors [leading to the exercise of its section 5 power]. It is enough that [the Court] be able to perceive a basis upon which the Congress might resolve the conflict as it did.”19 The Katzenbach Court believed that the deferential approach articulated in McCulloch v. Maryland20 provided the appropriate standard of judicial review for section 5 legislation: “Let the end be legitimate, let it be within the scope of the [C]onstitution, 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 [C]onstitution, are constitutional.”21

The question the Court has re-examined in a series of cases beginning in the mid-1990s is what it means for Congress to “enforce” the Fourteenth Amendment, i.e., what are the indicia that a given law exceeds even the broad enforcement power the Fourteenth Amendment grants Congress? The Court’s answer, as discussed below, has been to require specific factual findings in the congressional record that demonstrate the existence of the specific problem Congress seeks to address and for the Court to evaluate whether the congressional action is “congruent and proportional” to the problem Congress identifies.

17. See U.S. CONST. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”); U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); U.S. CONST. amend. XV, § 5 (“The Congress shall have power to enforce this article by appropriate legislation.”).
19. Id. at 653. See also Ex parte Virginia, 100 U.S. 339, 345-46 (1879):

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.

Id.
A. Boerne’s Test for Evaluating the Constitutionality of Section 5 Legislation

Boerne involved city authorities’ refusal to grant a permit for the expansion of a church located in a historic district. The church challenged the permit denial under the Religious Freedom Restoration Act (“RFRA”). Subsequent to the Supreme Court’s decision in Employment Division, Department of Human Resources of Oregon v. Smith, which held that rational basis review applied to such regulations, Congress enacted RFRA to reinstate strict scrutiny as the test for evaluating neutral governmental regulations, such as zoning laws, that had the effect of burdening the free exercise of religion. Congress based RFRA on its power to enforce Fourteenth Amendment rights, specifically the right to free exercise of religion as guaranteed through the Fourteenth Amendment’s Due Process Clause. The defendants argued that RFRA exceeded Congress’ enforcement power under section 5 of the Fourteenth Amendment, and the Supreme Court agreed. The Court reasoned that RFRA strayed beyond the kind of rights-enforcement authorized by section 5 but instead created new rights beyond the Amendment’s substantive scope.

The Court acknowledged that legislation intended to deter or prevent constitutional violations could fall within the scope of Congress’ section 5 enforcement power, even if the conduct prohibited is not itself unconstitutional. The Court reasoned that certain conduct that is not itself unconstitutional must be deterred in order to prevent constitutional violations. The Boerne Court noted, however, that the text of section 5 speaks of congressional “enforcement” of Fourteenth Amendment rights, not their creation. Thus, the Court believed that Congress’ section 5 power is not definitional in nature, but limited to enforcing previously defined constitutional rights. The Court stated that “[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.” Thus, despite the admittedly broad reach of congressional power to enact “prophylactic” legislation reaching conduct that is not itself unconstitutional in order to prevent or deter unconstitutional conduct, Congress cannot, according to Boerne, “make a substantive change in the governing [constitutional] law.”

To police the line between constitutionally permissible rights-enforcement and unconstitutional rights-creation by Congress, the Court held that Congress’ use of its enforcement power must demonstrate “congruence and proportionality” between the injury Congress seeks to prevent or remedy and the means used to accomplish that goal.
proportionality because Congress failed to identify in the legislative record a sufficient history of state laws passed due to religious bigotry. Rather, the legislative record demonstrated only occasional instances of governmental religious bigotry or intentional disregard of Free Exercise rights. It lacked the long history of state laws such as those directed specifically at infringing minorities' voting rights that justified the expansive sweep of the Voting Rights Act. Absent such a documented history, RFRA was neither congruent nor proportional to the harm actually identified by Congress because its "[s]weeping coverage ensure[d] its intrusion at every level of government" and could prohibit "official actions of almost every description and regardless of subject matter" if they had the effect of indirectly burdening a religious group or religious activity.

B. Boerne's Theoretical Foundations

The Court's decision in Boerne and later cases applying the "congruence and proportionality" test rests upon at least three major theoretical grounds. First, it emphasizes the Rehnquist Court's robust view of federalism and sovereign immunity. Under the Court's current jurisprudence, the Eleventh Amendment protects the states from civil actions by private citizens to which the state has not consented. Pursuant to the Fourteenth Amendment, Congress can enact laws overriding this immunity; however, Congress must be exceedingly clear that it intends to do so, and the congressional action must properly fall within the scope of Congress' Enforcement Clause power. Boerne and its progeny can be seen

30. Id. at 532-33.
31. Id. at 532.
33. Part of the Boerne Court's decision also rests upon the Court's textual analysis of the meaning of the word "enforce" as used in section 5. City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997).
34. I say "under the Court's current jurisprudence" because it is by no means self-evident from the text of the Eleventh Amendment that the States enjoy immunity from all such civil actions, since the Amendment's text speaks only of State immunity from suits against a State brought in federal court "by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI (emphasis added). Nonetheless, the Court has recently extended this relatively narrow textual immunity to suits by any person, not just a citizen of a different state, and to suits in federal or state courts. See, e.g., Garrett, 531 U.S. at 360 (holding that the Eleventh Amendment bars private individuals from collecting monetary damages for alleged violations of the Americans with Disabilities Act of 1990); Alden v. Maine, 527 U.S. 706, 730-31 (1999) ("[E]xercising its Article I powers Congress may subject the States to private suits in their own courts only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design ....").
35. See, e.g., Lane, 541 U.S. at 517 ("Our cases have also held that Congress may abrogate the States' Eleventh Amendment immunity" if Congress clearly expresses its intent to do so and then acts consistent with its constitutional authority.).
as a reinforcement of the Eleventh Amendment as well as general principles of state dignity by adopting a more stringent test for evaluating Congress’ exercise of its enforcement power at the expense of state and local authorities.\textsuperscript{36}

Second, one can argue that \textit{Boerne} is a reiteration of the basic constitutional scheme of limited government and implied or enumerated powers.\textsuperscript{37} Even in contexts where Eleventh Amendment immunity or federalism concerns are not at issue, Congress’ enforcement power, while broad, is not unlimited.\textsuperscript{38} Thus, if a law does not raise federalism concerns because it operates upon individuals rather than the states or if it only affects the states in ways that do not implicate sovereign immunity,\textsuperscript{39} the principle that Congress must act pursuant to some express or implied power found in the Constitution limits the congressional power to enact laws.\textsuperscript{40} Arguably, then, \textit{Boerne}’s congruence and proportionality standard applies to all congressional exercises of section 5 power. The structure of the Court’s decisions in \textit{Boerne} and its progeny supports this view, given that their analytical starting point is that Congress can trump the states’ Eleventh Amendment immunity in the exercise of its section 5 power, but only where (1) Congress has been exceedingly clear that its purpose is to do so, and (2) the law at issue is one that is a proper exercise of Congress’ section 5 power.\textsuperscript{41} The congruence and proportionality test is designed to evaluate only the latter requirement and would therefore presumably apply to any exercise of section 5 power.\textsuperscript{42}

Third, \textit{Boerne} can be taken as a statement regarding separation of powers or “juriscentrism” in constitutional interpretation.\textsuperscript{43} The problem the Court found in \textit{Boerne} was that Congress had strayed beyond “enforcing” the Fourteenth Amendment; more specifically, Congress had deviated \textit{from what the Supreme Court} had previously said the Fourteenth Amendment meant.\textsuperscript{44} Despite the Court’s reassurances in \textit{Boerne} and its progeny that the scope of Congress’ Enforcement Clause power “is not limited to mere legislative repetition of this Court’s constitutional jurisprudence,”\textsuperscript{45} the Court also emphasized its view that “it is the responsibility of this Court, not Congress, to define the substance of


\textsuperscript{38} \textit{Boerne}, 521 U.S. at 518 (“As broad as the congressional enforcement power is, it is not unlimited.”) (quoting \textit{Oregon v. Mitchell}, 400 U.S. 112, 128 (1970)).


\textsuperscript{40} See \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316, 405 (1819).

\textsuperscript{41} See, e.g., \textit{Garrett}, 531 U.S. at 364 (“\textit{[The Americans with Disabilities Act]} can apply to the States only to the extent that the statute is appropriate § 5 legislation.”).

\textsuperscript{42} \textit{Boerne}, 521 U.S. at 530.


\textsuperscript{44} \textit{Id.} at 519.

\textsuperscript{45} Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001).
constitutional guarantees." Under the *Boerne* analysis, the Court's first task is to "determine[] the metes and bounds of the constitutional right" that Congress is purportedly enforcing by examining the Court's own precedents defining the right at issue. Therefore, the Court performs the congruence and proportionality analysis with reference to the Court's prior definition of the constitutional right in question and not, for example, with reference to what Congress could have rationally determined to be the scope of a given constitutional provision. Having done so, the Court then examines whether Congress has identified a sufficient history and pattern of state violations of this constitutional right and whether Congress' chosen remedial scheme is congruent and proportional to the identified violation. Thus, *Boerne* can also be seen as an illustration of the Supreme Court asserting its supremacy in an inter-branch conflict regarding constitutional interpretation. Under this view, the fact that this conflict arose originally in the context of section 5 of the Fourteenth Amendment and happened to involve issues of state sovereign immunity is only part of the picture.

**IV. DIFFERENCES BETWEEN THE THIRTEENTH AND FOURTEENTH AMENDMENTS FOR BOERNE PURPOSES**

There has been a great deal of criticism of *Boerne* and it is not my purpose to examine fully that criticism here. Rather, having described the primary theoretical bases for the congruence and proportionality standard, I now examine why that standard is inappropriate for assessing at least certain types of Thirteenth Amendment legislation. In short, there are significant differences between at least some legislation enforcing the Thirteenth and Fourteenth Amendments that make the *Boerne* standard particularly troubling if imported wholesale into the Thirteenth Amendment context. Stated briefly, those differences are as follows:

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46. *Id.*
47. *Id.* at 368.
50. I have elsewhere argued that the *Boerne* standard implicitly supports a robust interpretation of judicial authority to prohibit the badges and incidents of slavery. *See generally* Carter, Jr., *supra* note 6; Carter, Jr., *supra* note 15. In those articles, I argued that the *Boerne* standard is incompatible with lower court cases holding that only Congress can prohibit the badges and incidents of slavery, and further holding that, in the absence of such congressional action, the Thirteenth Amendment is limited to conditions of literal slavery or involuntary servitude. *Boerne* requires a substantial linkage between the enforcement mechanism Congress has chosen and the constitutional right it is seeking to enforce. Consequently, if Congress can "enforce" the Thirteenth Amendment by legislating against the badges and incidents of slavery, then the Thirteenth Amendment itself must also, at least to some extent, prohibit the badges and incidents of slavery. Otherwise, legislation against the badges and incidents of slavery would amount to rights-creation rather than rights-enforcement. As will become apparent throughout this section, this argument is consistent with the critiques I raise as to *Boerne*'s applicability to Thirteenth Amendment
(A) Most Thirteenth Amendment legislation does not implicate state sovereign immunity.

(B) Most Thirteenth Amendment legislation falls well within the boundaries of the Supreme Court's current interpretations of the Thirteenth Amendment and therefore does not create a conflict between Congress' and the Supreme Court's power to interpret the Constitution.

(C) The Thirteenth Amendment's prohibition of the badges and incidents of slavery, properly construed, deals primarily with the elimination of race-based subordination or the substantial equivalent thereof. Since the aim of most Thirteenth Amendment legislation is eliminating racial subordination, Congress' enforcement power is at its maximum in a way that it was not in Boerne.

A. Boerne's Sovereign Immunity Rationale Is Inapplicable to Most Thirteenth Amendment Legislation

Boerne arose in the context of Fourteenth Amendment legislation that was directly applicable to the states. If one reads Boerne as primarily resting upon concerns of sovereign immunity and state dignity, then its rationale is inapplicable to most Thirteenth Amendment legislation. The Thirteenth Amendment, unlike the Fourteenth, is not limited to state action. Indeed, the vast majority of existing Thirteenth Amendment legislation applies to private individuals and not to state action or state actors. Thus, federal legislation providing a civil cause of action against a private individual who engages in housing discrimination or abridgement of the right to enter into contracts on the basis of race would not raise sovereign immunity or federalism concerns. Prosecutions of individuals under criminal statutes passed pursuant to the Thirteenth Amendment, whether they punish literal enslavement or the imposition of certain badges or incidents of slavery, similarly do not raise concerns about "state dignity." Accordingly, if the primary concern of Boerne is respect for the states as sovereigns, the Boerne framework is simply inapplicable to much of the legislation passed pursuant to the Thirteenth Amendment.

legislation. While Boerne's particular test for assessing the constitutionality of Enforcement Clause legislation is inappropriate for reviewing Thirteenth Amendment legislation, the basic principle that Congress cannot enact Enforcement Clause legislation that is wholly divorced from the constitutional right at issue far predates Boerne and remains sound.

51. Boerne, 521 U.S. at 511-12.
53. See supra note 16.
55. Both §§ 1981 and 1982 can be applied to States or state actors, which would raise sovereign immunity issues. See, e.g., 42 U.S.C. § 1981 (2000) (stating that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law") (emphasis added). My point is that when those statutes are applied to private individuals rather than States, sovereign immunity and federalism concerns are not present.
B. Separation of Powers Concerns Regarding Thirteenth Amendment Legislation

The *Boerne* test, however, is based on concerns beyond federalism and state sovereign immunity. As noted earlier, the *Boerne* analysis starts from the proposition that Congress can trump the states' sovereign immunity, but only where Congress has been clear that it intends to do so and where the legislation falls properly within the scope of Congress' Enforcement Clause power.\(^{56}\) Thus, *Boerne* also embodies the Court's view of what constitutes proper "enforcement" of the Fourteenth Amendment and the other Reconstruction Amendments by extension.\(^{57}\) Whether one takes a "textualist" approach based on the meaning of the word "enforce" as used in the Reconstruction Amendments, or believes that the *Boerne* test serves as a useful reminder to Congress regarding separation of powers or the Supreme Court's supremacy in constitutional interpretation, there are limits to Congress' enforcement power. While I do not question this basic proposition, I do question whether the *Boerne* test is the appropriate means for construing the limits on Congress' power to enforce the Thirteenth Amendment.

It is important to recall that the Religious Freedom Restoration Act ("RFRA"), at issue in *Boerne*, involved Congress seeking to "overturn" an earlier Supreme Court interpretation of the Fourteenth Amendment. In *Employment Division v. Smith*,\(^{58}\) the Court had held that rational basis review applied to laws that only incidentally or unintentionally burdened the free exercise of religion. Consequently, only those laws intentionally discriminating against religious groups or religious practices would trigger strict scrutiny. By contrast, in RFRA, Congress purported to exercise its power to enforce the Fourteenth Amendment by passing a law that made strict scrutiny the test for facially neutral governmental regulations of general applicability that had the effect of burdening a religious group or religious practice.\(^{59}\) As such, the Court saw a direct conflict

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\(^{59}\) Id. at 886-87.

\(^{60}\) City of Boerne v. Flores, 521 U.S. 507, 515-16 (1997). This kind of direct conflict was also present in *Kimel* and *Garrett*. In *Garrett*, the Court stated that "the result of [the Court's earlier Equal Protection decisions regarding disability discrimination] is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational." *Garrett*, 531 U.S. at 367. Thus, Title I of the ADA, which requires employers (including States) to make "reasonable accommodations" for disabled employees, regardless of whether denying an accommodation would be "rational," directly conflicted with the Court's prior determinations of what the Fourteenth Amendment requires. Similarly, in *Kimel*, the Court noted that under its Equal Protection jurisprudence, "States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." *Kimel* v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000). The ADEA, in the Court's view, directly conflicted with this precedent because "its broad restriction on the use of age as a discriminating factor [prohibited] substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Id.* at 86.
between what the Court (in Smith) had said the Fourteenth Amendment meant and what Congress (in RFRA) said it meant.\(^6\)

By contrast, there is a much lower possibility of this kind of direct conflict between the Court's and Congress' interpretations of the Thirteenth Amendment. The Court has not yet reached any definitive holding regarding the meaning of the Amendment's proscription of the badges and incidents of slavery. While the Court has been clear that the Thirteenth Amendment's Enforcement Clause empowers Congress to legislate to eliminate the badges and incidents of slavery and that such legislation will only be reviewed for its rationality, the Court has never directly addressed whether the Thirteenth Amendment itself, absent implementing legislation, prohibits the badges and incidents of slavery or only literal enslavement.\(^6\) While this ambiguity raises its own problems regarding judicial enforcement of the Thirteenth Amendment,\(^6\) the point for Boerne purposes is the ambiguity itself. Since the Court has never squarely resolved whether the Thirteenth Amendment itself does or does not prohibit the badges and incidents of slavery, congressional legislation addressing the same cannot be said to conflict with any prior determination of the Amendment's meaning by the Court. Of course, this could abruptly change should the Supreme Court rule that the Thirteenth Amendment itself only applies to literal enslavement and not the badges and incidents of slavery. Until such time, however, federal legislation proscribing what Congress rationally determines to be a badge or incident of slavery runs little risk of intruding on the separation of powers or the Supreme Court's presumed role as ultimate arbiter of the Constitution's meaning.\(^6\)

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61. This conflict was not necessarily irreconcilable in Boerne. Assuming, as the Court did, that Congress can enact "prophylactic" legislation reaching beyond the strict confines of the Supreme Court's constitutional decisions, it is not inconsistent for the Fourteenth Amendment to have a somewhat different substantive reach depending on the branch of government—the Supreme Court or Congress—that is enforcing it. Nonetheless, for purposes of my analysis regarding Boerne's applicability to Thirteenth Amendment legislation, I am taking Boerne as it is rather than discussing why it may be wrong.

62. See, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) ("Whether or not the Amendment itself did any more than [abolish slavery]" was "a question not involved in this case"); Memphis v. Greene, 451 U.S. 100, 125 (1981) (stating that the existence of congressional power to eliminate the badges and incidents of slavery "is not inconsistent with the view that the Amendment has self-executing force," but not directly answering the question).

63. See generally Carter, Jr., supra note 15.

64. Arguably, a directly conflict with a definitive Supreme Court holding on the meaning of the Thirteenth Amendment is only one way in which congressional enforcement action could run afoul of Boerne principles. It is also possible that the Boerne analysis would reject congressional enforcement action that does not affirmatively conform to the existing state of the Supreme Court's case law. There is some support in the case law for this interpretation of Boerne. See, e.g., College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999) ("[P]etitioner points to no decision of this Court (or of any other court, for that matter), recognizing [the specific constitutional right Congress was allegedly enforcing].") (emphasis added). My point is that there is greater room for "prophylactic" federal legislation where it does not directly conflict with an affirmative pronouncement by the Court on the subject at hand.
C. Boerne’s Inapplicability to Congressional Action Enforcing Racial Equality

Boerne and its progeny all involved congressional action outside of the area of racial inequality. Members of the Court have indicated that Congress enjoys greater deference in the enactment of “prophylactic” legislation where that legislation deals with those areas of discrimination that receive heightened scrutiny under the Court’s precedents. In rejecting a Boerne challenge to the federal Family and Medical Leave Act’s (“FMLA”) applicability to state employers, the Court in Nevada Department of Human Resources v. Hibbs reasoned:

Congress [in the FMLA] directed its attention to state gender discrimination, which triggers a heightened level of scrutiny. Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test—it must serv[e] important governmental objectives and be substantially related to the achievement of those objectives,—it was easier for Congress to show a pattern of state constitutional violations. Congress was similarly successful in South Carolina v. Katzenbach, where we upheld the Voting Rights Act of 1965: Because racial classifications are presumptively invalid, most of the States’ acts of race discrimination violated the Fourteenth Amendment.6

Similarly, Justice Scalia, dissenting in Tennessee v. Lane, argued:

[A]ll of our later cases except Hibbs that give an expansive meaning to “enforce” in [section] 5 of the Fourteenth Amendment, and all of our earlier cases that even suggest[ed] such an expansive meaning in dicta, involved congressional measures that were directed exclusively against, or were used in the particular case to remedy, racial discrimination.67

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66. Hibbs, 538 U.S. at 736 (internal quotation marks and citations omitted).

67. Lane, 541 U.S. at 561. Because, in Justice Scalia’s view, a more expansive view of congressional enforcement power in the area of racial discrimination accords with the original purposes of the Fourteenth Amendment, he would “leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5 to prevent or remedy racial discrimination by the States.” Id. at 564 (Scalia, J., dissenting). Justice Scalia would therefore not only agree that federal legislation is more likely to meet the Boerne test when Congress has acted with regard to racial discrimination than in other areas, he would jettison the congruence and proportionality test altogether when it comes to legislation directed at racial discrimination. When Justice Scalia giveth, however, he also taketh away: in reviewing congressional legislation not directed at racial discrimination, he would reject the congruence and proportionality test in favor of a strict definition of the word “enforce” that
Thus, several members of the Court appear willing to accept an expansive view of Congress' section 5 enforcement power in those substantive areas where the Court itself would apply heightened or strict scrutiny, i.e., race or gender.

The reasoning is that the *Boerne* test requires an assessment of the scope of the legislation at issue versus the scope of the problem addressed. While Congress can enact "prophylactic" legislation reaching conduct that is not in itself *prima facie* unconstitutional, such legislation will not be considered "proportional" under *Boerne* if it reaches too far beyond unconstitutional conduct. For example, in *Kimel v. Florida Board of Regents*, the Court held that the Age Discrimination in Employment Act ("ADEA"), as applied to state employers, was not a valid exercise of Congress' section 5 enforcement power under the *Boerne* standard. The Court reasoned:

> Our Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so. ... Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. The [ADEA], through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.

Thus, prophylactic federal legislation in the areas of race or gender is more likely to survive a *Boerne* challenge.

While there are several problems with this definition of the proportionality needed for section 5 legislation to be constitutional under *Boerne*, it is instructive for Thirteenth Amendment purposes. All existing Thirteenth Amendment legislation going beyond literal enslavement—that is, addressing the badges and incidents of slavery—deals with race or other "suspect classifications," such as religion. As such, this legislation should be seen as congruent and proportional under *Boerne* because it only reaches those subject areas that have already received heightened scrutiny from the Court and are closest to the core of the original concerns of the Amendment's drafters.

To be clear, it is possible (and, in my view, desirable) that the Thirteenth Amendment be seen as authorizing civil rights legislation in areas other than would not include prophylaxis but only the literal enforcement of Fourteenth Amendment rights as previously defined by the Supreme Court. *Id.* at 539 (Scalia, J., dissenting).

68. *Kimel*, 541 U.S. at 81.
69. *Id.* at 86.
70. One significant criticism is that the standard is far too "juriscentric" since the assessment of proportionality of section 5 legislation is "[judged] solely against the backdrop of [the Court's] equal protection jurisprudence," and not, for example, with regard to what Congress, in the exercise of its independent constitutional functions, could rationally have determined to be the scope of the Equal Protection Clause. *Id.*
71. See statutes listed in *supra* note 16.
72. See, e.g., 18 U.S.C. § 245 (2000) (imposing criminal penalties for injuring or intimidating a person because of his race or religion while the victim was using a public facility).
racial discrimination. I have elsewhere proposed that content be given to the Amendment’s proscription of the badges and incidents of slavery by reference to two factors: (1) the connection that the class to which the plaintiff belongs has to the institution of chattel slavery, and (2) the connection that the complained-of injury has to that institution. Thus, a court presented with a badges and incidents of slavery claim made directly under the Thirteenth Amendment should perform an intensive historical inquiry, the goal of which would be to ascertain whether the contemporary injury asserted is one that arose out of and bears a substantial connection to the system of African slavery in the United States. This analysis would not necessarily limit the badges and incidents of slavery remedy to African Americans. Rather, the remedy would be applicable to any person as long as that person can show that the nature and genesis of the injury bears a substantial relationship to the evil the Thirteenth Amendment was designed to eradicate: namely, chattel slavery and the lingering effects and societal deformations that chattel slavery wrought.

To the extent that Congress employs a similar framework in enacting Thirteenth Amendment legislation, it should enjoy the kind of judicial deference several members of the Court have indicated is appropriate when Congress legislates in the area of race. Because the test I have proposed for defining the badges and incidents of slavery is aimed at discerning those instances of modern racialization and subordination that replicate or reinforce the lingering effects of the system of slavery, federal legislation addressing such should readily meet Boerne’s congruence and proportionality test because it would be at the core of the Amendment’s original concerns. However, to the extent that Congress enacts legislation that is further reaching and is not tied (even in the relatively progressive manner I have proposed) to the historical facts of slavery and original concerns of the Amendment’s drafters, I would suggest that the current Court is highly unlikely to find that such legislation meets the Boerne test.

In addition to believing that Thirteenth Amendment legislation against the badges and incidents of slavery that is reasonably tied to the specific lingering effects of slavery would survive a Boerne challenge, I would go further and argue, as Justice Scalia has, that the congruence and proportionality test should

73. See Carter, Jr., supra note 15.
74. Some scholars have argued that the Thirteenth Amendment is a kind of general equal protection mandate authorizing far-reaching congressional action in the areas of class, gender, sexual orientation, etc., even if the subject acted against has no tie to the historical facts of American slavery. See, e.g., G. Sidney Buchanan, The Quest for Freedom: A Legal History of the Thirteenth Amendment 177 (1976) (arguing that “[f]or purposes of congressional enforcement power under the [T]hirteenth [A]mendment, any act motivated by arbitrary class prejudice should be regarded as imposing a badge of slavery upon its victim” and therefore within the scope of the congressional enforcement power); David P. Tedhams, The Reincarnation of “Jim Crow:” A Thirteenth Amendment Response to Colorado’s Amendment 2, 4 Temp. Pol. & Civ. Rts. L. Rev. 133, 142 (1994) (arguing that “any unequal law is a badge of servitude”) (emphasis added). Regardless of whether one agrees or disagrees that it would be desirable as a normative matter for Congress’ Thirteenth Amendment power to reach this far, it is highly unlikely that the Supreme Court would uphold such legislation under Boerne.
75. See supra note 57.
not be applied at all to congressional action—under any of the Reconstruction Amendments—in furtherance of the goal of racial equality. There are many reasons for taking this position, only two of which I will articulate here.

First, from an originalist perspective and as a matter of separation of powers, Congress should have the greatest latitude when acting in areas closest to the original purposes of the Reconstruction Amendments. I am by no means a strict originalist, and there is compelling evidence that the Thirteenth Amendment’s Framers intended for the Amendment to have an evolving and dynamic meaning. My point is only that we have some additional reassurance that Congress is acting within its appropriate constitutional role when it acts in those areas most clearly authorized by the Constitution. Thus, there is less need for the courts, by means of the Boerne test, to “regularly check Congress’ homework to make sure that [Congress] has identified sufficient constitutional violations to make its remedy congruent and proportional” when Congress is acting in the area of racial subordination.

The second reason is historical. In the forty years from 1856 to 1896—during which Congress was girding for war with the South, enacting the Reconstruction Amendments after the war’s end, and enforcing them during the brief Reconstruction period via a variety of civil rights measures that were incredibly progressive for their time—the Supreme Court was issuing rulings that were protective of the white supremacist regime Congress was attempting to dismantle. This institutional history should make the courts cautious in assuming that their interpretations of the scope of the Constitution’s protections for racial equality are necessarily superior to Congress’. Thus, courts should provide Congress deference in enacting laws directed at eliminating the badges and incidents of slavery.

V. CONCLUSION

The Court’s continuing restriction of congressional power to enforce the Fourteenth Amendment is highly troubling. While the Court has not had occasion to reach the issue, it is arguable that when the question arises, the Court could apply the congruence and proportionality standard to congressional action to enforce the Thirteenth Amendment. Such a move would be a grave mistake. Even assuming the continued application of Boerne to Fourteenth Amendment

76. See Carter, Jr., supra note 15.
78. The Supreme Court’s decisions during this time include Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856) (infamously declaring that enslaved Africans “had no rights which the white man was bound to respect”); the Civil Rights Cases, 109 U.S. 3, 22 (1883) (holding that the Civil Rights Act of 1875, prohibiting segregation in places of public accommodation, exceeded Congress’ Thirteenth Amendment authority by attempting to “adjust what may be called the social rights of men and races in the community”); United States v. Harris, 106 U.S. 629, 641 (1882) (holding that a federal statute criminalizing conspiracies to interfere with federal civil rights “clearly cannot be authorized by the [Thirteenth Amendment which simply prohibits slavery and involuntary servitude.”); and Plessy v. Ferguson, 163 U.S. 537, 542 (1896) (holding that the Thirteenth Amendment did not invalidate the separate-but-equal doctrine).
legislation, there are substantial differences between the type of legislation authorized under the Thirteenth and Fourteenth Amendments that counsel that *Boerne* should not be applied to laws enacted pursuant to the Thirteenth Amendment. The Court has already unjustifiably minimized Congress' role with regard to the Fourteenth Amendment. It is my hope that it will refuse to extend to the Thirteenth Amendment *Boerne*'s ahistorical and anti-constitutional limitations on congressional power.