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# The Union as it Wasn't and the Constitution as it Isn't: Section Five and Altering the Balance of Powers

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**THE UNION AS IT WASN'T AND THE CONSTITUTION AS IT ISN'T: SECTION FIVE AND ALTERING THE BALANCE OF POWERS**

*Elizabeth Reilly\**

Much [has been] said about the Union as it was and the Constitution as it is. [I] want[] the Union as it wasn't and the Constitution as it isn't.

— Andrew Jackson Hamilton urging ratification of the Fourteenth Amendment<sup>1</sup>

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I. INTRODUCTION

The original prototype of Section One of the Fourteenth Amendment, as introduced by its primary Framers, John Bingham of Ohio,<sup>2</sup> read:

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1. Governor Hamilton of Texas, speaking in Trenton, New Jersey about the central issue of the 1866 campaign. MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 137 (1986) (citing *New York Daily Tribune*, Sept. 11, 1866, at 5, cols 1-2).

2. Bingham originally introduced the idea of an amendment of this type on December 6, 1865. JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 48 (1956) (citing CONG. GLOBE, 39th Cong., 1st Sess. 14 (1865)). The Globe reports that Bingham introduced a “joint resolution to amend the Constitution of the United States so as to empower Congress to pass all necessary and proper laws to secure to all persons in every State of the Union equal protection in their rights, life, liberty, and property . . . .” CONG. GLOBE, 39th Cong., 1st Sess. 14 (1865). It was referred to committee. *Id.* The Joint Committee reported out this version in February 1866, a week after Johnson had vetoed the Freedmen’s Bureau Bill. JAMES, *supra* at 84.

The Congress shall have the 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 all persons in the several States equal protection in the rights of life, liberty, and property.<sup>3</sup>

Bingham went on to note expressly that “save the words conferring the express grant of power to the Congress,” the principles of the rights were already in the Constitution.<sup>4</sup> Had the power been given to Congress to enforce obedience to those principles, Bingham maintained that “that rebellion” would have been “an impossibility.”<sup>5</sup> Nonetheless, that power had been withheld “by every construction of the Constitution, its contemporaneous construction, its continued construction, legislative, executive, and judicial.”<sup>6</sup> Adherence to those “immortal bill of rights” had up to that point rested solely upon “the fidelity of the States.”<sup>7</sup> In Bingham’s mind, the power in Congress to enforce the rights was not only “the want of the Republic,” but also “absolutely essential to American nationality.”<sup>8</sup> On behalf of the Joint Committee on Reconstruction, Bingham recommended the Amendment “for the purpose of giving to the whole people the care in future of the unity of the Government which constitutes us one people, and without which American nationality would cease to be.”<sup>9</sup>

Thus did the Amendment and its framers herald the importance of Congress to meeting the purposes of the Amendment, especially the purposes of its grants of individual rights. Consistent with Republican legal and political ideology of the time,<sup>10</sup> the necessity of congressional power and an affirmative grant of that power infused the Amendment from its inception.

Nonetheless, concern about restricting the role of Congress was raised in the first case in which the Supreme Court interpreted the Amendment, *Slaughter-House Cases*,<sup>11</sup> despite its inapplicability to its

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

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. CURTIS, *supra* note 1, exhaustively documents the content of Republican ideology, especially at pp. 26-56.

11. 83 U.S. 36, 81 (1873) (dicta intimating limits on Section Five power such as the state action limitation as well as on subjects for equality legislation: “If, however, the States did not conform their laws to [the] requirements [of the equal protection clause], then by the fifth section of

facts. The restrictions intimated in *Slaughter-House* were imposed only three years later in *United States v. Cruikshank*.<sup>12</sup> In both instances, preservations of state power in the federal system and concerns about congressional vs. state power to define and protect rights underlay the reasoning. Recently, one of the most important and contentious issues in Fourteenth Amendment jurisprudence relates to Section Five of the Amendment and Congress' power with respect to individual rights. The Court continues to impose significant restraints on federalism grounds.<sup>13</sup> But current decisions also specifically raise separation of powers concerns when determining the reach of the congressional Section Five power.<sup>14</sup> Therefore, it is important to explore Section Five from the separation of powers perspective. I argue that the power conferred also encompassed a re-envisioning of the roles and boundaries of judicial and legislative power vis-à-vis individual rights.

Throughout the debates during the framing and ratification of the Amendment, an understanding of the need to recast the Union was coupled with the understanding that to do so, the Constitution itself needed to repudiate doctrines that had undermined both union and liberty.<sup>15</sup> This article argues that in reconstituting that Union, the 39th Congress and the Fourteenth Amendment not only altered the fundamental structural principles of the relationship between the states and the national government and the responsibility of government to protect individual liberties. It argues that the original structural

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the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands.”)

12. 92 U.S. 542, 554-55 (1876) (applying a state action requirement to validate indictments under the Civil Rights Act, impliedly creating that as a restriction on Congress's power to legislate to enforce the due process and the equal protection clauses: “The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States . . .”).

13. See *infra* text accompanying notes 30 and 31, and note 17.

14. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 525 (1997).

15. See, e.g., *id.* Chapters 3 and 5. Curtis quotes the illuminating argument of Governor Hamilton in this respect: “He wanted a Union of loyal men in which all, even the humblest, can exercise the rights of American freemen every where . . . . Any other [Union] than one which guaranteed these fundamental rights was worthless to him.” *Id.* at 137 (quoting *New York Daily Tribune*, Sept. 11, 1866, at 5, cols 1-2).

alignment of national powers and the boundaries of their respective spheres were also, of necessity and by understanding, recast as well.

## II. THE IMPORTANCE OF SECTION FIVE

Scholars have painstakingly revealed the intended shift in power from the states to the federal government to define and enforce individual rights in the Fourteenth Amendment.<sup>16</sup> The thoughtful – and wary – Framers were so thorough that they made certain to presciently –

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16. Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627 (1994) [hereinafter Aynes, *Justice Miller*]; Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) [hereinafter Aynes, *John Bingham*]; Garrett Epps, *Second Founding: The Story of the Fourteenth Amendment*, 85 OR. L. REV. 895 (2006); Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 LAW & CONTEMP. PROBS. 175 (Summer 2004) [hereinafter Epps, *Antebellum Political Background*]; Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 916 (1986) [hereinafter Kaczorowski, *Revolutionary Constitutionalism*] (“The framers understood the fundamental rights of citizenship to be the privileges and immunities of United States citizens, and therefore believed Congress could proffer a change in the Constitution that would fundamentally redefine the nature of American federalism.”). Kaczorowski notes this intended restriction of state powers to be guaranteed by federal protection of the rights, but also notes it was not a nationalization that overrode a federal character to the union. *Id.* at 885-90 (detailing the antebellum political theory of national citizenship and the rights it guaranteed, and noting that Taney’s acceptance of that theory required him in *Dred Scott* to find that blacks could not be citizens; the actions taken pursuant to that decision [denying national citizenship and the protection of rights] led to the Republican commitment to the Fourteenth Amendment and the Civil Rights Acts as necessary to supplant state power with national power in order to protect national rights through national citizenship and congressional authority); *id.* at 939-40 (“Because they believed that the thirteenth and fourteenth amendments directly secured the civil rights of United States citizens, federal legislators, judges, and attorneys understood that these amendments conclusively established that the national government possessed both primary authority over civil rights and ultimate responsibility for safeguarding citizens’ civil rights. *Despite this view, Republican legislators retained dual sovereignty and eschewed restructuring the United States into a unitary state. . . . [T]he states were expected to safeguard citizens’ rights. But the national government was committed to protecting and enforcing citizens’ rights as the need arose. This concept of federalism was radically different from the states’ rights-centered theory espoused by Southerners and conservative Democrats, and ultimately adopted by the Supreme Court in the Slaughter-House decision. . . . This new system was founded upon the old one. But, in developing it, Congress knowingly and purposely acted to revolutionize the structure of the federal union.*”) (emphasis added).

*See Slaughter-House Cases*, 83 U.S. 36, 82 (1873) (“[W]e do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights – the rights of person and of property – was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.”).

and probably less effectively than they had hoped<sup>17</sup> – alter separation of powers as well. In Section Five, they explicitly amended Article I to

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17. There is substantial evidence that the Framers believed that the Thirteenth and the Fourteenth Amendments provided Congress with the constitutional power to enact the Civil Rights Act of 1866 and later-enacted statutes. See, e.g., David Bogen, *Rebuilding the Slaughter-House: The Cases' Support for Civil Rights*, 42 AKRON L. REV. 1131, 1137 (2009) (citing CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866)) (statement of Rep. Stevens that provisions of Section One of the Amendment are all asserted in the organic law already and Constitutional Amendment will prevent repeal of the Civil Rights Act). CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866. at 2462 (statement of Rep. Garfield that the Amendment was to fix the Civil Rights bill in the Constitution); *id.* at 2465 (Rep. Thayer said “it is but incorporating in the Constitution of the United States the principle of the Civil Rights bill that has lately become law.”); *id.* at 2467 (Boyer, opposing the Amendment, said “the first section embodies the principles of the civil rights bill.”); *id.* at 2498 (statement of Rep. Broomall that Congress voted for Section One “in another shape, in the civil rights bill.”); *id.* at 2502, 2513 (statements of Rep. Raymond; Raymond had voted against the Civil Rights bill as beyond congressional power and opposed other sections of the proposed Fourteenth Amendment, but supported Section One, saying now the bill “comes before us in the form of an amendment to the constitution which purports to give Congress the power to attain this precise result.”).

The passage of other legislation pursuant to the Section Five power, soon after its ratification and by a Congress composed of many members of the framing 39th Congress, is another testament to the belief that the power had been vested. See Wilson R. Huhn, *The Legacy of Slaughterhouse, Bradwell, and Cruikshank in Constitutional Interpretation*, 42 AKRON L. REV. 1053, 1074-75 (2009) (“[T]he framers of the 14th Amendment were, in fact, primarily concerned with addressing the practices of racial discrimination by private parties and the many acts of private violence being visited upon blacks and their white allies in the South . . . Congress enacted statute after statute prohibiting that discrimination and punishing that violence – and . . . Congress adopted the 14th Amendment with the avowed purpose. . . . to remove any possible doubts about the constitutionality of that legislation.”) (internal citations omitted) (hereinafter Huhn, *Legacy*).

The Court's subsequent declarations of unconstitutionality of those acts would thus appear to be in contravention to the Framers' intent about the scope of the power, and hence a usurpation of power by the Court.

That later Congresses were cognizant of this misconstruction of their efforts is apparent from debates on the Blaine Amendment in 1876: Senator Oliver Morton noted how the Court had gutted the Amendment: “The fourteenth and fifteenth amendments which we supposed broad, ample, and specific, have, I fear, been very much impaired by construction, and one of them in some respects, almost destroyed by construction. Therefore, I would leave as little as possible to construction. I would make [the proposed provisions of the Blaine amendment] so specific and so strong that they cannot be construed away and destroyed by the courts.” CURTIS, *supra* note 1 at 170 (citing 4 CONG. REC. 5585 (1876)).

The Section Five power, by extension with the Section Two power in the 15th Amendment, received a more liberal reading after 1966. *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).

But the first case to cut it back and to declare a congruence and proportionality test, which many believe is being applied more stringently than the necessary and proper test, explicitly invoked a structural understanding of separation of powers as limiting Congress's power. *City of Boerne v. Flores*, 521 U.S. 507 (1997). *Boerne* limits Section Five congressional power at least as much as, if not more than, the Commerce Power has been limited. In fact, since Congress's power to enact RFRA vis-à-vis the federal government was upheld, it would appear that the Court may well be restricting the Section Five power to protect rights more than it restricts the scope of the

afford Congress the power to legislate to enforce the Amendment: “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”<sup>18</sup> That enforcement power revolutionized the role of the legislature with respect to individual liberties, thus altering its role vis-à-vis the Court as the protector.

Bingham thought ensuring that Congress had the power to enforce rights contained in the Constitution was “the most important issue that would come before the Congress.”<sup>19</sup> He believed that those rights bound the states, but that they were not enforceable, “by every construction of the Constitution . . . legislative, executive and judicial”<sup>20</sup> Changing that interpretation, by changing the Constitution and according power to Congress, was a great object of the Amendment. Legislative power was important, because Bingham believed that “enforcement of the bill of rights is the want of the Republic,”<sup>21</sup> hence his proposed Amendment “to arm Congress with the power to compel obedience to the oath [to uphold the Constitution, including the guarantees of rights it contained].”<sup>22</sup> Although that congressional power was ultimately located in Section Five, nothing indicates that Bingham or Congress believed that the relocation diminished or failed to give Congress the power to enforce the rights secured by the enhanced Section One.<sup>23</sup>

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necessary and proper clause in evaluating legislation to enforce or define those same rights against the federal government. *But see* Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469 (1999) (arguing that the congruence and proportionality test is simply a definition of a test consistently applied in practice, if not in rhetoric). It hardly appears that the Section Five power is being recognized as an increase in Congress’s enumerated powers, especially vis-à-vis the Court. It is indeed ironic to find that the Section Five power is less expansive than the other powers Congress constitutionally possesses.

18. U.S. CONST. amend. XIV, § 5. Much of the debate concerning the need for congressional enforcement was focused upon the need for Congress to have power against the states. *See* Aynes, *John Bingham*, *supra* note 16, at 71-74.

19. CURTIS, *supra* note 1, at 62.

20. *Id.* at 63 (citing CONG. GLOBE, 39th Cong. 1st Sess. 1034 (1866)).

21. *Id.* at 82 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866)) (reviewing debates about the Civil Rights Bill of 1866, which Bingham believed exceeded the constitutional powers of Congress to pass, and hence desired an amendment to make clear that power within Congress to effectuate all the rights guaranteed by the Constitution).

22. *Id.*

23. *See* text accompanying notes 38-51 *infra*. Although the modern Court has made much of the shift in language from the Bingham prototype using “secure” to the final wording of Section Five using “enforce,” nothing indicates this to have been a substantive change. *Boerne*, 521 U.S. at 520-22. Rather, Bingham appears to have used the words interchangeably in debating before the Congress. *See* CONG. GLOBE, 39th Cong. 1st Sess. 813 (1866). When the language of “secure” was in the proposal first on the floor, Bingham responded to an opponent by asking “who are opposed to *enforcing* the written guarantees of the Constitution.” *Id.* (emphasis added). Senator

Despite its high purpose and its structural changes to the constitutional framework, the Fourteenth Amendment was not universally embraced as a vehicle for accomplishing its guarantees. The United States Supreme Court promptly eviscerated much of the meaning of Section One.<sup>24</sup> Congress, enacting Reconstruction statutes pursuant to its interpretation of the power granted to it and in response to the morphing abuses of rights being practiced in the former slave states, passed a significant number of measures to make those rights real and provide protection for their exercise.<sup>25</sup> *Cruikshank*, which struck down convictions for violating the Enforcement Act of 1870, introduced both the narrowing of congressional power to enforce rights and the state action limitation. It thus signaled limitations not simply upon promoting individual rights with federal power, but also on recognizing enhanced congressional prerogative to protect those rights. In the *Civil Rights Cases*, the Court used the state action limitation to strike down significant provisions of Congress's exercises of power to protect civil rights.<sup>26</sup> Other cases completed the task of severely restricting the reach of the Section Five power, striking down the laws passed pursuant to that power.<sup>27</sup> By 1883, the Amendment appeared to be all but impotent

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Howard, introducing the Amendment onto the floor of the Senate after the Joint Committee had fashioned it into its current multi-section format, stated that it gave "power on the part of Congress to give the [rights in the Constitution] full effect." CONG. GLOBE, 39th Cong. 1st Sess. 2766 (1866). Discussing the Civil Rights Bill, Lawrence of Ohio used the words interchangeably, claiming that without congressional power to enforce them, Government would be powerless to secure or protect rights guaranteed in the Constitution. CURTIS, *supra* note 1, at 77-78.

24. *Slaughter-House Cases*, 83 U.S. 36 (1873); *Bradwell v. Illinois*, 83 U.S. 130 (1873); *United States v. Cruikshank*, 92 U.S. 542 (1876); *Minor v. Happersett*, 88 U.S. 162 (1875).

25. *E.g.*, Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (originally entitled "An Act to protect All Persons in the United States in Their Civil Rights, and furnish the Means of their Vindication"); The Enforcement Act of 1870 (The Act of May 31, 1870), ch. 114, § 18, 16 Stat. 140 (1870) (originally entitled "An Act to enforce the rights of citizens of the United States"); Ku Klux Klan Act of 1871, ch. 22, § 2, 17 Stat. 13 (1871) (originally entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes"); Civil Rights Act of 1875, ch. 114, §§3-5, 18 Stat. 336, 337 (1875) (originally entitled "An act to protect all citizens in their civil and legal rights").

26. *Civil Rights Cases*, 109 U.S. 3 (1883) (finding the Civil Rights Act of 1875 was an unconstitutional exercise of power to reach conduct other than state action).

27. *See* Huhn, *Legacy*, *supra* note 16, text and note 124 (citing *Harris v. United States*, 106 U.S. 629, 640 (1883) (declaring provision of Ku Klux Klan Act unconstitutional, as "directed exclusively against the action of private persons, without reference to the laws of the States, or their administration by [the] officers [of the state] . . .")); *The Civil Rights Cases*, 109 U.S. 3 (1883) (striking down Civil Rights Act of 1875); *Baldwin v. Franks*, 120 U.S. 678 (1887) (following *Harris* in finding the Ku Klux Klan Act to be unconstitutional insofar as it applies to private action); *Hodges v. United States*, 203 U.S. 1, 14 (1906) (overturning convictions of a group of individuals for interfering with the civil rights of other individuals in violation of Civil Rights Act of 1866, in

as a source of congressional power, federal power, and individual rights.<sup>28</sup>

Congress resurrected the Amendment as a source of power to guarantee rights during the Civil Rights era of the 1960s, using the Commerce Power to support its legislation. A much-altered Supreme Court upheld those statutes, and began to articulate an interpretation of Section Five (and its companion Section Two of the Fifteenth Amendment) that accorded power to Congress to resolve existing problems to the guarantees of rights through far-reaching legislation.<sup>29</sup>

The recent Supreme Court decisions defining the scope of the Section Five power limit congressional power to interpret, define, or create rights. Instead, the Court describes that power as one to decree remedies for persistent state violations of recognized constitutional rights.<sup>30</sup> The cases taken together stand for the propositions that 1)

part because the statute could not be grounded upon the Fourteenth Amendment because “no action on the part of the state is complained of . . .”).

28. Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. Rev. 1, 4 (1996) (“The destruction of the Privileges or Immunities Clause and the development of an excessively broad state action doctrine had a profound impact on American history. They represented a one-two punch that did much to eliminate the Fourteenth Amendment as an effective protector of individual rights and democracy. Both were motivated in part by considerations of federalism, and in both cases the judicial solution was far broader than necessary.”).

29. *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). The cases were understood to create a “ratchet theory,” whereby Congress had the power to legislate to protect and enforce rights in excess of what were considered to be the minimal, or fundamental baseline, rights recognized and enforced by the Court.

30. *E.g.*, *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Title I of the Americans with Disabilities Act); *United States v. Morrison*, 529 U.S. 598, 625-27 (2000) (Violence Against Women Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86, 91 (2000) (Age Discrimination in Employment Act); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 674 (1999) (Trademark Remedy Clarification Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647-48 (1999) (Patent and Plant Variety Protection Remedy Clarification Act); *Boerne*, 521 U.S. at 532, 536 (Religious Freedom Restoration Act). Although the Court upheld congressional exercises of power in two cases, both relied heavily upon distinctive fundamental rights already recognized by the Court and empirical findings by Congress that the states were problematic actors in inhibiting those rights. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 735 (2003) (holding that the Family and Medical Leave Act family leave provisions are constitutional as applied to states on the basis of “the States’ record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits . . . [resting the holding] on congressional findings that, at the time the FMLA was enacted, States ‘relied on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits.’”); *Tennessee v. Lane*, 541 U.S. 509, 531 (2004) (holding Title II of the Americans With Disabilities Act, requiring states to provide access to buildings, valid as

Congress may only enact remedies to enforce a Court-understood violation of the Fourteenth Amendment; 2) the prescribed remedy must be congruent with and proportionate to empirical evidence and findings of state violations, or be a prophylaxis against state violations found to occur and to need prevention by a prophylaxis; 3) the legislation must operate against state action only, and 4) Congress must use statutory language that is unmistakably clear about the intent to explicitly override state sovereign immunity as embodied in the Eleventh Amendment. These decisions have revitalized scholarship on the original and historical meaning of the Section Five grant of power.<sup>31</sup>

This article aims to contribute to that conversation by looking at historical, philosophical, legal, and pragmatic sources to illuminate the purposes of the Amendment with respect to the balancing of powers among the respective spheres of the branches of national government. Section Five<sup>32</sup> was a revolutionary grant of power to Congress, not simply in the federalism context. I argue that it profoundly reconceived the role of the national legislature vis-à-vis individual rights. It was not merely a sharp departure from previous constitutional theory but also used the lessons of history to turn that theory on its head.

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applied to court buildings because access to the building was necessary in support of the fundamental right of access to the courts, stating “Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services . . .”).

31. E.g., Robert Kaczorowski, *The Supreme Court and Congress's Power To Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 *FORDHAM L. REV.* 153 (2004) [hereinafter Kaczorowski, *The Supreme Court*]; Robert Kaczorowski, *Congress's Power To Enforce Fourteenth Amendment Rights: Lessons From Federal Remedies the Framers Enacted*, 42 *HARV. J. ON LEGIS.* 187 (2005) [hereinafter Kaczorowski, *Congress's Power*]; Michael McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 *HARV. L. REV.* 153, (1997); Rebecca Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 *AKRON L. REV.* 717 (2003); Ruth Colker, *The Supreme Court's Historical Errors in City of Boerne v. Flores*, 43 *B.C. L. REV.* 783 (2002); James W. Fox, Jr., *Re-readings and Misreadings: Slaughter-House, Privileges and Immunities, and Section Five Enforcement Powers*, 91 *KY. L.J.* 67 (2002); Christopher Banks, *The Constitutional Politics of Interpreting Section 5 of the Fourteenth Amendment*, 36 *AKRON L. REV.* 425 (2003); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943 (2003); Owen Fiss, *Between Supremacy and Exclusivity*, 57 *SYRACUSE L. REV.* 187 (2007); Marci Hamilton, *What is Rehnquist Federalism?*, 155 *U. PA. L. REV.* 8 (2007); John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 *SUP. CT. REV.* 353; John T. Valauri, *McCulloch and the Fourteenth Amendment*, 13 *TEMP. POL. & CIV. RTS. L. REV.* 857 (2004).

32. This analysis similarly applies to the analogous Section Two in both the Thirteenth and Fifteenth Amendments. U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XV, § 2.

First, the Framers of the Amendment perceived the Court<sup>33</sup> as having failed in its role as a bulwark of individual liberties,<sup>34</sup> especially in *Prigg*<sup>35</sup> and *Dred Scott*.<sup>36</sup> “The framers vividly remembered the capture of the judiciary by the Slave Power, and they feared it had not yet fully freed itself.”<sup>37</sup> The need for Congress to have a recognized and active role was so strongly perceived that the original draft of Section One proposed by John Bingham was focused on granting Congress the power to secure the necessary rights.<sup>38</sup>

This reflects a sense that Congress needed to take an active role in recognizing and protecting the privileges and immunities of citizenship

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33. Although the *Slaughter-House* and *Cruikshank* courts focused exclusively upon state failure to protect rights as behind the meaning of the Amendment, the 39th Congress also was concerned about the Court’s role in facilitating slavery, e.g., in *Dred Scott v. Sandford*, 60 U.S. 393, 451-52 (1857) and *Prigg v. Pennsylvania*, 41 U.S. 539, 611 (1842). See *infra* text accompanying notes 105 to 109. Epps, *Antebellum Political Background*, *supra* note 16, at 210 (“The Slave Power reading also casts doubt on any argument that the purpose of the Fourteenth Amendment was primarily to empower the federal judiciary and strengthen its role as arbiter of constitutional rights. The framers vividly remembered the capture of the judiciary by the Slave Power, and they feared it had not yet fully freed itself. In fact, it seems much more probable Congress intended to grant itself a co-equal role with the courts in the clearly political work of defining what constitutes ‘privileges and immunities,’ ‘due process of law,’ and ‘equal protection of the laws.’ Congressional statutes might set the goals; the courts would enforce them. Both branches might be involved, but the Court’s current vision of itself at the center, with Congress relegated to an occasional role as an auxiliary enforcer of court decisions, seems far from what Slave Power-minded framers intended.”).

34. CONG. GLOBE, 39th Cong., 1st Sess. 1062 (1866) (statement of Rep. Kelley) (criticizing “all that has been done judicially in furtherance of this great wrong” of slavery).

35. *Prigg v. Pennsylvania*, 41 U.S. 539, 611 (1842) (upholding an exclusive congressional power to enact the Fugitive Slave Act under the terms of Article IV and invalidating state laws providing due process protections to captured African-Americans).

36. *Dred Scott v. Sandford*, 60 U.S. 393, 451- 52 (1857) (striking down Congress’s power to regulate the territories by prohibiting slavery in the Missouri Compromise: “[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words – too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights. Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.”).

37. Epps, *Antebellum Political Background*, *supra* note 16, at 210.

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

and equal protection of the laws, as a first matter.<sup>39</sup> As Garrett Epps contends,

it seems much more probable Congress intended to grant itself a co-equal role with the courts in the clearly political work of defining what constitutes “privileges and immunities,” “due process of law,” and “equal protection of the laws.” Congressional statutes might set the goals; the courts would enforce them. Both branches might be involved, but the Court’s current vision of itself at the center, with Congress relegated to an occasional role as an auxiliary enforcer of court decisions, seems far from what Slave Power-minded framers intended.<sup>40</sup>

In *Boerne*, the Supreme Court interpreted the elision of Congress from Section One and replacement of it in Section Five as an enforcement power as evidence that Congress’s power was diminished: “no longer plenary but remedial.”<sup>41</sup> However, there is no history explaining the change that would indicate any substantive alterations.<sup>42</sup>

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39. See Kaczorowski, *The Supreme Court*, *supra* note 31; Kaczorowski, *Congress’s Power*, *supra* note 31; Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 16.

40. Epps, *Antebellum Political Background*, *supra* note 16, at 210.

41. See, e.g., *Boerne*, 521 U.S. at 522. Michael McConnell criticizes the Court’s history and argument extensively. McConnell, *supra* note 31, at 173-75. The Court argues that the change reflected opposition to giving Congress “too much legislative power at the expense of the existing constitutional structure.” *Boerne*, 521 U.S. at 520. The Court cast its concern in separation of power terms: “If Congress could define its own powers by altering the Fourteenth Amendment’s meaning . . .” *Id.* at 173 (citing *Boerne*, 521 U.S. at 529). McConnell demonstrates that the existing structure of concern to both framers and opponents was federalism – the ability to legislate directly with respect to the states and hold states directly accountable via injunction or damages remedies. McConnell argues, “Congress did not consider itself limited to enforcing judicially determined rights under the Fourteenth Amendment.” *Id.* at 174-75 (citing debates about the scope of the Amendment and its power), and concludes that:

Only the ‘interpretive’ understanding of Section Five adequately explains why the Reconstruction Congresses debated at such length over precisely what rights would be protected under the several Civil Rights Acts: because their interpretation mattered. . . .

The historical evidence presented in the *Boerne* opinion . . . does not support the more extreme claim that Congress lacks independent interpretive authority.

*Id.* at 176.

See Harrison, *supra* note 31, at 367-69 (2007) (quoting John Bingham and both proponents and opponents of the Fourteenth Amendment on whether it enabled Congress to regulate the states themselves, in contrast with acting directly against state officers). The interrelationship of Congress’s powers with those of the Court were not directly addressed. Harrison argues at length that the history supports the retention of the Eleventh Amendment sovereign immunity to the states, and instead authorized Congress to proceed with legislation that was operative against state actors and other individuals, rather than against the states qua states. *Id.* at 385.

42. See McConnell, *supra* note 31, at 176-78 (noting that although the *Boerne* court claims the original Section One was tabled, in fact that motion was defeated and Bingham himself asked to postpone consideration until April). The April consideration followed the enactment of the Civil

Rather, there appears to have been discussion about whether the Necessary and Proper Clause already gave Congress sufficient power to restrict the States through legislation on matters within the scope of the Amendment, or if Congress needed a direct grant of power to ensure an enumerated power undergirded their implied powers to legislate with respect to the matters contained in the Amendment.<sup>43</sup>

The actual shift of the grant of power from the section guaranteeing rights to a separate, last section of the Amendment occurred in the Joint Committee on Reconstruction. It occurred as part of reconceptualizing the separate parts of the constitutional changes the Committee was proposing into a single, multi-subject amendment to meet the goals of Congress and the realities of their being parts of a unified whole.<sup>44</sup>

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Rights Act of 1866 and President Johnson's veto of that Act. *Id.* McConnell claims that the veto, if anything, inspired more radical support for an amendment, rather than dampening Congress's goals with respect to its reach and congressional power. *Id.* See also Colker, *supra* note 31, at 792-93 (arguing that the earlier version of the Amendment was postponed).

43. Aynes, *John Bingham, supra* note 16, at 71 ("According to Bingham, Article IV, Section 2 applied the provisions of the Bill of Rights against the states, but the absence of an express clause granting Congress enforcement authority meant that while a compact existed that bound the states to comply with Section Two, no remedy was available when the states breached this obligation . . . . Bingham's constitutional theory, the enforcement theory, holds that the Fourteenth Amendment provides the enforcement power absent from Article IV, Section 2."). Bingham seems most concerned about the power to reach the states, understandably since that was the source of the problems leading to the Civil War, and hence might not directly have referred to congressional power to enforce rights against the national government. Senator Howard explicitly explained one view that congressional power had not otherwise been granted and would not otherwise be expected to be read in through the second clause of the Necessary and Proper Clause. Wilson R. Huhn, *Congress Has the Power to Enforce the Bill of Rights Against the Federal Government; Therefore FISA is Constitutional and the President's Terrorist Surveillance Program is Illegal*, 16 WM. & MARY BILL RTS. J. 537, 545 n.48 (2007) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866)). Senator Howard stated:

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 [of the Bill of Rights]. 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, which declares that "the Congress shall have power to enforce by appropriate legislation the provisions of this article."

*Id.* Cf. Kaczorowski, *Revolutionary Constitutionalism, supra* note 16, at 866-67 (1986) ("The most important question for the framers was whether the national or the state governments possessed primary authority to determine and secure the status and rights of American citizens.").

44. See JAMES, *supra* note 2, at 101-104 (documenting the multi-section version proposed by Robert Dale Owen to Thaddeus Stevens, who embraced it enthusiastically and took it to the Joint Committee, where it also received a favorable reception; noting that Bingham confined his concerns and actions to making sure the rights section was sufficiently broad and specific; and positing that the move into Section Five provided Bingham with the opportunity to treat Section One for the first

Section Five does make the power as stated consistent with the manner and language in which the previous Thirteenth and later Fifteenth Amendments accorded the power, and technical drafting might account for it. In the Joint Committee, when fashioning the final version of the Amendment it would report out, the committee voted to approve the wording of Section Five before considering Bingham's final version of Section One.<sup>45</sup> Thus, the grant of congressional power preceded the full definition of the rights Congress would receive the power to enforce.

Before the change, Bingham had repeatedly emphasized on the floor of Congress that a lack of power in Congress to effectuate and enforce the rights already contained in the Constitution had permitted the States to defy their duty to uphold those rights.<sup>46</sup> He attributed that lack of power to the original framers' decision to protect slavery, a protection inconsistent with effectuating the Bill of Rights, privileges and immunities, and due process against the states.<sup>47</sup> After the change, Bingham told the House that the first section was designed to give Congress "power to do what hitherto it had possessed no power to accomplish. . . . to protect by national law the privileges and immunities of all the citizens of the republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State."<sup>48</sup>

A demotion of the importance of congressional power or the reach of it receives no support from the historical record.<sup>49</sup> One comment that

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time as a positive restriction upon the powers of the States, consistent with the restrictions that Chief Justice Marshall appeared to require in *Barron v. Baltimore*).

45. *Id.* at 113.

46. *Id.* at 84-85 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1034, 1064, 1088 (1866)).

47. *Id.* at 87 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1089-90 (1866)).

48. *Id.* at 129-130 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866)). James notes that "a comparison of his remarks at this time with those made in February in explanation of his original amendment clearly demonstrates that his purpose had remained unchanged." *Id.* at 130 (footnote omitted).

49. The *Boerne* Court's reliance upon the unfavorable reception the prototype received from Congress as explaining the removal of congressional power from Section One and hence its weakening, is not borne out by the record of the actions taken and the debates surrounding them. The first version in December 1865 was referred to the newly created Joint Committee. JAMES, *supra* note 2, at 47-48. The February referral to the House was withdrawn by Bingham because of a failure to have the House approve considering it under a special order of business. James recounts that a shrewd Stevens counseled recommitment to Committee so the Joint Committee could maintain control of the calendar when it was brought up. *Id.* at 83. After Johnson vetoed the Freedmen's Bureau Bill, Bingham introduced the Amendment again as a source for the congressional power Johnson had denied existed. *Id.* at 84-85. At that time, the Democrats and other opponents argued against it either as a superfluity (all the rights being already guaranteed, with Bingham vigorously noting the Supreme Court's refusal to recognize the enforceability of those rights or Congress's power to effectuate them) or as a radical centralization of power in the

might lend credence to a desire to weaken the congressional power was made by a Democratic opponent to the Amendment. In earlier floor debates, Andrew Rogers of New Jersey, a member of the Joint Committee (who had voted against reporting out that proposal<sup>50</sup>), attacked the prototype of Section One of the Amendment as a move to centralize power unduly. He argued that rather than increase public unrest by amending the Constitution, Congress should be content to leave enforcement of the rights contained in the Constitution to the court, as in the past.<sup>51</sup> Bingham had already pointed out that the courts had denied to themselves the power to enforce the rights against the states, which is why Bingham emphasized the need for Congress to have power – the lack of which he claimed as a cause of the War.<sup>52</sup> Rogers repeated many the same arguments on the last day of debate on the full multi-section Amendment.<sup>53</sup> He decried the force of the Amendment to make the Civil Rights Act of 1866 constitutional; hence, he objected to congressional powers to define and enforce rights against the states.<sup>54</sup> By objecting to the amendment's power to do this, he appears to support the conclusion that the power for Congress to do what he had earlier wished kept solely in the province of the courts was indeed intended to be vested. Although not solely based upon his objections to Sections One and Five, Rogers' vote against the Amendment indicates he did not see any sufficient weakening of the powers it contained.<sup>55</sup>

Consistent with his declarations during the debates on the Amendment, Bingham recalled in 1871 that the final form of Section One embraced more, not less, than his original proposition, because it

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national government, to the derogation of state authority (a concern about national power generally, not about congressional power specifically, to supplant the states because all legislation could be about life, liberty, or property, a charge that Bingham again vigorously refuted by noting the power was with respect to rights contained in the Constitution already that were not being enforced or enforceable against the states). *Id.* at 85-87. To prevent a failure to pass by the two-thirds margin necessary, Bingham moved to table and it was returned to committee. This motion was a Republican led and passed motion, and James notes that some in favor of it wanted the Senate to handle the representation issue first. *Id.* at 87. The redraft occurred, as noted above, as part of a single restructuring of the multiple proposals before the Congress that needed to be addressed by constitutional amendment.

50. JAMES, *supra* note 2, at 82-83 (stating the Rogers voted against reporting the February version).

51. CONG. GLOBE, 39th Cong. 1st Sess. Appx. 133 (1866) (printing the speech given immediately after Bingham's speech at 1034).

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

53. JAMES, *supra* note 2, at 129 (citing CONG. GLOBE, 39th Cong. 1st Sess. 2538-2539 (1866)). Rogers was primarily concerned about centralizing power in the national government. *Id.*

54. *Id.*

55. *Id.*

affirmatively ensured that the states would be subject to the Bill of Rights in contravention to earlier Supreme Court precedent in *Barron* and followed the advice of *Barron* to state a specific limitation upon the states' powers and accord Congress the stated power.<sup>56</sup> He noted that the Amendment was an "express prohibition on every State of the Union, which may be enforced under existing laws of Congress, and such other laws for their better enforcement as Congress may make."<sup>57</sup>

Second, the alteration in Section One, setting the rights out starkly, has great rhetorical power and strengthens the grant of rights. The change could well have been designed to enhance the status of the rights, rather than to diminish Congress's ability to recognize and enforce them.<sup>58</sup> Third, the change makes the rights self-executing, rather than dependent upon Congress alone to give them meaning.<sup>59</sup> The rights accorded cannot be ignored by any branch – including the Court – but are the responsibility of each branch of government to ensure. Making the Court responsible as well is hardly proof that Congress removed its own responsibility or intended to diminish it drastically. The entire design seems aimed at increasing the reach, meaning, and reality of the sweeping grant of rights that generated the Amendment itself.<sup>60</sup> Coupled

56. *Id.* at 104-105 (citing CONG. GLOBE, 42nd Cong., 1st Sess. Appx. 84-85 (1871)).

57. *Id.* at 106 (citing CONG. GLOBE, 42nd Cong., 1st Sess. Appx. 84 (1871)).

58. Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115, 133 (1999) ("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.").

59. See Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 16, at 912 (arguing that the Fourteenth Amendment "was an affirmative exercise of constitutional authority, and its framers understood it to be a self-executing guarantee of civil rights"); Engel, *supra* note 58, at 125-26 ("[S]ome Republicans criticized the text for its exclusive dependence on Congress as the protector of constitutional liberties. Rather than incorporating substantive rights into the Constitution, the amendment merely granted Congress the power to pass legislation to protect those rights. As Representative Hotchkiss argued, 'This amendment proposes to leave it to the caprice of Congress; and your legislation upon the subject would depend upon the political majority of Congress . . . .'" (citing CONG. GLOBE, 39th Cong., 1st Sess. at 1095 (1866)).

60. See text accompanying notes 35 to 51 *supra*. See McConnell, *supra* note 31, at 178 n.151 ("[F]lack argued that the change from the Bingham draft to the final version was 'a mere change in dress, but not in meaning.' He stated that Bingham, the author of both versions, 'kept the same object in view, and thought that the section, as finally reported and adopted, was as strong as the first one, and intended it to . . . confer the same powers upon Congress.' He denied that Congress was limited to 'corrective' legislation and maintained that 'Congress was unquestionably empowered to define or declare, by law, what rights and privileges should be secured to all citizens.'" (citing HORACE FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 65, 68, 81 (1908)); Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 16, at 913-14 ("Congress's purpose in adopting a revised version of the amendment partially explains why the original version was worded as a delegation of authority. Congressman John A. Bingham noted that the purpose of

with its assuring or reaffirming congressional power to enact legislation such as the Civil Rights Acts of 1866, a truncating of congressional powers to protect only those rights that Court interpretation made clear pre-existed that legislation makes little sense.<sup>61</sup>

Structurally, the Section Five<sup>62</sup> power reflects a significant conceptual change in congressional powers. First, Section Five enumerates a positive power to legislate for individual rights.<sup>63</sup> The Article I Section Eight enumerated powers do not relate to rights, but to governing a nation. Article I Section Nine contains prohibited powers, a number of them designed to protect rights of individuals or prerogatives of states.<sup>64</sup> The Bill of Rights restricts the powers of Congress to legislate in ways infringing upon those declared rights.<sup>65</sup>

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his proposed amendment was to arm Congress with the constitutional authority to enforce the Bill of Rights. . . . To fill this gap in the governmental guarantee of fundamental rights, Bingham worded his proposed amendment as an express delegation of congressional authority to enforce civil rights. However, the proposed amendment was changed at the behest of Congressman Giles W. Hotchkiss of New York. Hotchkiss complained that by merely empowering Congress to enact laws for the protection of civil rights at some future date, the proposal actually left the citizen unprotected. . . . Hotchkiss wanted civil rights 'secured by a constitutional amendment that legislation could not override.' He sought an amendment that did more than merely authorize legislation; one that was self-executing, so that the protection of citizens' rights would not have to depend upon the uncertainty of future legislation. He added, 'Then if the gentleman wishes to go further, and provide by laws of Congress for the enforcement of these rights, I will go with him.'" (internal footnotes omitted).

61. McConnell states that he finds no contrary authority before *Boerne* arguing that the change of congressional authority from Section One to Section Five was intended to and did effectuate a diminution in the substance of the power Congress intended to accord itself, particularly with respect to the substitution of the term "enforce" for "secure," upon which this argument would have to hinge. McConnell, *supra* note 31, at 178 ("The pertinent question, which the *Boerne* Court failed to address, is how any of these changes diminished the power of Congress. Two of the changes (switching the verb in Section Five from 'secure' to 'enforce' and changing the standard of review from 'necessary and proper' to 'appropriate') were mere changes in nomenclature, with no substantive significance.").

62. The similar Section Two in the Thirteenth and Fifteenth Amendments also reflect these changes. See U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XV, § 2.

63. *United States v. Guest*, 383 U.S. 745, 784 (1966) (Brennan, J., concurring in part and dissenting in part) ("Viewed in its proper perspective, § 5 of the Fourteenth Amendment appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens."). See Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 16, at 915, 918, 925 (demonstrating that the Amendment was designed to confer positive power, through a declaration of rights as positive law, and to empower Congress to add content to the rights so granted, rather than to limit the scope of those rights).

64. There is an awful exception in Clause One, designed to prevent Congress from prohibiting the slave trade until 1808, although it was thought to protect state powers. See *Barron v. Mayor and City Council of Baltimore*, 32 U.S. 243, 248 (1833) ("[Article 1, section 9] restrictions . . . are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government . . . . The ninth section having enumerated, in the nature of a

Section Five, conversely, accords Congress a primary role as a bulwark of, not a potential threat to, individual rights.<sup>66</sup> It is a fundamental reconception of role both with respect to the states<sup>67</sup> and with respect to the legislative branch as being suited to exercise national power to secure individual liberties. Congress's reimagining of its role pursuant to these powers also enabled it to use the Commerce Clause as a vehicle for protecting the Fourteenth Amendment-type rights in the Civil Rights Act of 1964.<sup>68</sup>

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bill of rights, the limitations intended to be imposed on the powers of the general government, the tenth proceeds to enumerate those which were to operate on the state legislatures.”).

65. *Barron*, 32 U.S. at 250 (“Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. *These amendments demanded security against the apprehended encroachments of the general government* – not against those of the local governments.”) (emphasis added). *Cf. Cruikshank*, 92 U.S. at 552 (“Only such existing rights were committed by the people to the protection of Congress as came within the general scope of the authority granted to the national government” and the Bill of Rights “left the authority of the States just where they found it, and added nothing to the already existing powers of the United States.”).

Note that Republican ideology deemed the rights in the body of the Constitution and the bill of rights to apply to the states, but to have been unenforceable under the 1787 Constitution.

66. It is therefore not surprising that the 39th Congress looked to the powers granted from the runaway slave clause's (U.S. CONST., art. IV, sec. 2, cl. 3) positive rights statement and duty imposition to urge that Congress should now be explicitly given the power to enforce rights on behalf of individuals. *See infra* notes 67 to 81 and accompanying text.

67. *See Kaczorowski, Revolutionary Constitutionalism, supra* note 16.

68. Congress had serious debates over using only the Section Five power in the Civil Rights Act of 1964, fearing the limited scope of its Court-interpreted reach, despite its being a more intuitively proper source of the powers sought to be exercised. *See* Rebecca E. Zeitlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281, 293-94 (2000). The Commerce Power's reach, and applicability because of the negative impact private discrimination had on interstate commerce, carried the day in Congress, and eventually in the Court. *See id.* (citing *A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce, 1963: Hearings on S. 1732 Before the Senate Comm. on Commerce*, 88th Cong. 252 (1964)); *id.* at n.80 (testimony of Attorney General Robert Kennedy that “the law would be ‘clearly constitutional’ under the Commerce Clause, but not clearly under the Fourteenth Amendment” (citing *Hearings on S. 1732 Before the Senate Comm. on Commerce*, 88th Cong. 28)); *id.* at n.81 (comments of Senator Pastore: “I believe in this bill, because I believe in the dignity of man, not because it impedes our commerce . . . I like to feel that what we are talking about is a moral issue, . . . And that morality, it seems to me, comes under the 14th amendment . . . [and] equal protection of the law.” (citing *Hearings on S. 1732 Before the Senate Comm. on Commerce*, 88th Cong 252)); *id.* (comments of Senator Monroney, “a Democratic Senator sympathetic with the policy of the law, worried about the use of the Commerce Clause ‘on matters which have been for more than 170 years thought to be within the realm of local control . . . [If] we pass this bill, even though the end we seek is good, I wonder how far we are stretching the Constitution.’” (citing *Hearings on S. 1732 Before the Senate Comm. on Commerce*, 88th Cong. 66-67)).

Before the Civil War Amendments, Congress's powers with respect to individual rights were more negative powers, limits upon other powers that might be exercised to impinge upon those declared rights. *Dred Scott* made clear that the Fifth Amendment held "a total absence of power" in Congress to legislate with respect to property and liberty, even within the federal sphere.<sup>69</sup> The only legislative power "in favor of" rights that had been upheld was the power to legislate on fugitive slaves, because the Constitution had conferred a "power coupled with a duty" on the federal government, in the judgment of the Court.<sup>70</sup> John Bingham decried that "it has been the want of the Republic that there

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In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), the Court upheld the constitutionality of the public accommodations law as within Congress's Commerce Clause powers.

69. See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1857) (finding in the Fifth Amendment a "total absence of power" in Congress with respect to property and liberty, precluding Congress from abolishing slavery in the territories and thus effectively freeing slaves brought into that territory).

Recently, scholars have claimed that the second phrase of the Necessary and Proper clause, correctly understood, accords Congress power to legislate affirmatively to guarantee the rights in the Bill of Rights, arguing that they are "other Powers vested by this Constitution in the Government of the United States." U.S. CONST. art. I, § 8, cl. 2. See Huhn, *supra* note 43, at 543-45 (arguing that ensuring that federal power is exercised consistent with limitations on that power from the Bill of Rights is included in the phraseology "all other powers vested," but recognizing there is no specific enumerated grant of power). However, it does not appear that Congress or the Court took such a power seriously before the Civil War; Representative Wilson's argument (see *infra* note 63) appears to be a departure from previous conduct and arguments. (See Bingham's argument at CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866), *infra* note 52). Although I do not dispute Professor Huhn's conclusion, perhaps only in a post-Section Five (and post-New Deal) regime would that understanding be comprehensible as a principle of constitutional structure. The pre-Civil War practice of American government does not appear to incorporate that understanding in the powers exercised by Congress or the relations between Congress and the Court with respect to protecting individual rights and liberties, especially those not specifically defined as opposed to those stated in ways needing interpretation. Cf. *Prigg*, 41 U.S. at 539; U.S. CONST. art. IV. On the other hand, Robert Post and Reva Siegel point out that the pre-Reconstruction Amendments Courts were not strong in imposing judicial exclusivity on interpreting constitutional meaning, leaving room for Congress through the necessary and proper clause. Post & Siegel, *supra* note 31. But examples of legislation to enforce positive individual rights as distinct from legislation connected to enumerated powers in the body of the Constitution, other than the ill-fated Missouri Compromise, do not come readily to hand.

70. In what is probably a reference to *Prigg* and the limits on affirmative power that could be inferred from it, Taney went on to state: "The only power [over slave property] conferred [on Congress by the Constitution] is the power coupled with the duty of guarding and protecting the owner in his rights." *Dred Scott*, 60 U.S. at 452.

For instance, the Fugitive Slave Act, using federal agents nominally to protect the "property" of slaveholders that had crossed state lines, was tethered to the judicial power through the language of "on claim of" and the explicit duty of return in the runaway slave clause of Article IV, Section Two Clause Three, which clause was held to bestow power and duty on the national government to enforce it as a positive right. See *Prigg v. Pennsylvania*, 41 U.S. 539, 611-15 (1842).

was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements [the Bill of Rights] of the Constitution.”<sup>71</sup> Even if the Bill of Rights is a source of power to legislate, it is so only through operation of the Necessary and Proper Clause, rather than through a positive and explicit enumeration of power.<sup>72</sup> Had such a power to legislate affirmatively with respect to rights been well understood, Section Five would have been unnecessary, or have drawn no comment.<sup>73</sup> Michael Kent Curtis discusses the widely shared Republican belief, forged in the crucible of anti-slavery activism, that the Bill of Rights applied to the States, but that Congress was not empowered to enforce it by virtue of Supreme Court interpretations making it applicable only against the federal government (*Barron*) and disempowering Congress generally with respect to enforcing rights in

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

72. Using the Bill of Rights as a source for legislated restrictions on legislative grants of power that rely upon other enumerated powers is different from arguing that Congress has the power to *initiate* protections for individual rights drawing from nothing other than the limitations expressed in the Bill of Rights. Cf. Richard Henry Seamon, *Domestic Surveillance For International Terrorists: Presidential Power and Fourth Amendment Limits*, 35 HASTINGS CONST. L.Q. 449, 495 at n.190 (2008) (responding to Judge Posner’s comment that Congress has no power analogous to Section Five to enforce the Fourth Amendment by arguing that once Congress grants the power in legislation to conduct surveillance, the Necessary and Proper clause entitled Congress to limit that authority in line with its interpretation of Fourth Amendment limits).

73. See *supra* note 68. And, in introducing the Fourteenth Amendment onto the floor of the Senate, Senator Howard explicitly explained the view of the need for congressional power that had not otherwise been granted and would not otherwise be expected to be read in through the second clause of the Necessary and Proper Clause. Huhn, *supra* note 43, at 545 n.48 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866)). Senator Howard stated:

Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees [of the Bill of Rights]. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. 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, which declares that “the Congress shall have power to enforce by appropriate legislation the provisions of this article.”

*Id.* (alteration in original).

the Constitution (*Dred Scott*).<sup>74</sup> Bingham expressed the upshot of this ideology when he opined that slavery, enshrined at the framing, had made it necessary to disable the federal government from enforcing rights.<sup>75</sup> Some of the members of the 39th Congress argued a possible exception to this narrow reading of power, which they located in *Prigg v. Pennsylvania*.<sup>76</sup> Others, including the main proponent of the Congressional Power Clause, John Bingham, were not convinced that such a congressional power existed or had been recognized by *Prigg*.<sup>77</sup> “Bingham’s conviction that an express enforcement provision was required proved correct in *Ex Parte Virginia*, where the Court stated, ‘Were it not for the fifth section of the Fourteenth Amendment, there might be room for argument that the first section is only declaratory of the moral duty of the State, as was said in *Commonwealth of Kentucky v.*

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74. CURTIS, *supra* note 1, at Chapter 3. *But see* Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 16, at 933-34 (“Bingham’s and Howard’s belief that a fourteenth constitutional amendment was necessary to give Congress authority to enforce Bill of Rights guarantees appears to have been a minority view among congressional Republicans. This does not imply, however, that a majority viewed the Bill of Rights itself as a grant of legislative authority. *The majority view on this question is not known, as it was not debated. Nonetheless, a majority of Republicans could have rejected the notion that the Bill of Rights granted legislative authority and still believed that Congress could legislate to secure Bill of Rights guarantees by virtue of the thirteenth amendment.*”) (emphasis added).

75. JAMES, *supra* note 2, at 87.

76. 41 U.S. 539 (1842). During the debates on the Civil Rights Act of 1866, James Wilson of Iowa claimed Congress had the power to enact the legislation in accord with the theory of *Prigg*, which had recognized congressional power to enforce constitutionally guaranteed rights. CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866). He urged turning the pro-slavery arguments against themselves, making them into a force for good. *Id.* See Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 16, at 933 (arguing that congressional Republicans recognized a “broad nationalist legal theory of constitutional interpretation which attributed to Congress affirmative authority to secure all rights derived from or recognized by the Constitution. Congressman Wilson, for example, applied this theory of constitutional interpretation to the Bill of Rights and declared: ‘The possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy . . . . The power is with us to provide the necessary protective remedies. If not, from whom shall they come? From the source interfering with the right? Not at all. . . .’ Citing the Supreme Court decision in *Prigg v. Pennsylvania* as authority, Wilson insisted, ‘That is the doctrine laid down by the courts. There can be no dispute about this.’” (first omission in original)). John Bingham disagreed that the power existed, hence his urgency in proposing the Fourteenth Amendment and his focus on congressional power in the initial draft offered in February 1866. *Id.*; see Zeitlow, *supra* note 68, at 325-26 (“Throughout the ratification debates, Republican supporters of the Fourteenth Amendment referred to *Prigg* to argue that Section 1 of the Amendment, including the Citizenship Clause, gave Congress implied powers to protect freed slaves. The Framers intended to turn *Prigg* on its head, protecting the rights of those freed from slavery with the very powers once used to enslave. Equally important, the *Prigg* Court had recognized congressional power to require private parties to return fugitive slaves even though Article IV referred only to state action.”) (citing Engel, *supra* note 58, at 139).

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

*Dennison*.<sup>78</sup> The Framers were quite cognizant – and according to the Supreme Court in 1879 quite correct – that they were inhabiting new territory when they empowered Congress to protect rights.

A close examination of the Court's analysis in *Prigg* reveals that Justice Story carefully tethered Congress's power to enforce only textually explicit constitutional powers that vested the judicial power through the language of "on claim of" and the duty of return in the runaway slave clause of Article IV, Section Two, Clause Three. Story further cabined the power by noting that the clause, fundamental to creating the Union, had been conceptualized as bestowing power on the national government to enforce it as a positive right.<sup>79</sup> The reasoning of *Prigg* is carefully constricted. It is only positive rights, coupled with duties, that require and encompass grants of affirmative power; limitations on power are not recognized as affirmative grants of power: "[T]he national government [must have legislative power to act] in cases where rights are intended to be absolutely secured, and duties are positively enjoined by the constitution."<sup>80</sup> There is language that

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78. Aynes, *John Bingham*, *supra* note 16, at 80 n.140 (citing *Ex Parte Virginia*, 100 U.S. 339, 347 (1879)). See *Commonwealth of Kentucky v. Dennison*, 65 U.S. 66 (1860) (refusing on grounds of federalism to enforce federal law in the Fugitive Slave Act of 1850 directly to compel a state officer to act).

79. See *Prigg*, 41 U.S. at 611 ("Historically, it is well known, that the object of this clause was to secure to the citizens of the slave-holding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slave-holding states; and indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted, that it constituted a fundamental article, without the adoption of which, *the Union could not have been formed*. Its true design was, to guard against the doctrines and principles prevalent in the non-slaveholding states, by preventing them from intermeddling with, or obstructing, or abolishing, the rights of the owners of slaves.") (emphasis added); *id.* at 612 ("The clause manifestly contemplates the existence of a *positive, unqualified right* on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control or restrain.") (emphasis added).

80. *Id.* at 620. See also *id.* at 612 ("The clause manifestly contemplates the existence of a *positive, unqualified right* on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control or restrain.") (emphasis added); *id.* at 614 ("the clause . . . implies *at once a guarantee and duty*") (emphasis added); *id.* at 541 ("It cannot well be doubted, that the constitution requires the delivery of the fugitive, on the claim of the master; and the natural inference certainly is, that *the national government is clothed with the appropriate authority and functions to enforce it*. The fundamental principle applicable to all cases of this sort would seem to be, that *where the end is required*, the means are given; and *where the duty is enjoined*, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is intrusted.") (emphasis added).

arguably exceeds this boundary.<sup>81</sup> However, it follows language coupling the right with a duty: “If, indeed, the constitution guaranties the right, and if it requires the delivery, . . . the fundamental principle . . . would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist . . . .”<sup>82</sup> Justice Story gives examples of constitutional grants of rights granting legislative power to fulfill them, but the examples are notably limited to powers or duties imposed in the body of the Constitution.<sup>83</sup> As Justice Taney’s concurring opinion hints, those rights in the body of the Constitution were given to the national government as guardian; hence it could legislate to effectuate them by preventing states from interfering.<sup>84</sup>

The Bill of Rights did not occupy such a place, being instead limits on the national government.<sup>85</sup> Therefore, before the Reconstruction Amendments, there was no general understanding that Congress possessed power to legislate to secure individual rights and privileges, especially those framed as limitations upon governmental power, in the absence of a positive enumeration granting that power. Rights were conceived as needing protection from, not by, Congress.

This structure resulted, in practice, in Congress’s role being to steer clear of violating rights, not to be the positive declarer and protector of rights. But theory pre-dating Republican theory and extant at the 1787 founding also supported this understanding of Congress’s role. The original theoretical underpinnings of the structure of constitutional government focused on the need to restrict Congress rather than empower it as a force for preserving rights. The Court was a counterweight to prevent Congress from impinging upon rights. The Fourteenth Amendment in Section Five drastically altered this theoretical construct of the Court championing individual rights by

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81. *Id.* at 616 (“[T]he national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution.”).

82. *Id.* at 615 (emphasis added).

83. *Id.* at 618-20.

84. *Id.* at 628-29 (Taney, J., concurring).

85. *See* *Barron v. City of Baltimore*, 32 U.S. 243, 247 (1833) (“The powers [the people] conferred on this [national] government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes. If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states.”).

cabining congressional power. In the Reconstruction Amendments, the positive and affirmative grant of power to Congress was seen as critical to ensuring that the rights were indeed realized and enforced.<sup>86</sup>

The Federalist Papers recognized the legislative power as a potential source of danger to individuals and to states.<sup>87</sup> In the search for a governmental structure protective of liberty, it was deemed more important to cabin legislative power than to entrust it with defining and protecting individual liberties. Because it was hard to constitute limits to legislative power, the principle of limited government depended upon the judicial power to confine the legislature to its own powers. Without that check, reserving rights would be meaningless. The courts would guard the Constitution and individual rights from legislative encroachment.<sup>88</sup>

Broad legislative power was feared as the power to have “liberties exterminated.”<sup>89</sup> The ability for majorities to override minority interests and rights posed significant problems for structuring a government less likely to wield this power. Enumerating legislative powers was one method for protecting the union from the danger of the legislative prerogative.<sup>90</sup> In addition, the concept was to prevent legislative power

86. See, e.g., Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 16, at 889 (“[I]n *Barron v. Baltimore*, the Supreme Court had held that the fifth amendment and presumably the entire Bill of Rights were limitations upon the power of the national government, not delegations of affirmative authority to secure fundamental rights. Consequently, neither the comity clause nor the Bill of Rights gave the national government authority to secure the fundamental rights of its citizens within the state of the citizens’ residence, even under the broad antebellum nationalist view of citizenship.”).

87. The Federalist Papers characterize the legislative power as that most dangerous to liberty, apt to draw “all power into its impetuous vortex” and able to usurp power and thus to interfere with rights. The Federalist No. 48 (James Madison). Acknowledging that the Necessary and Proper clause had excited considerable opposition as the way to “exterminate liberties,” Publius sought to explain the limits of the clause and touted the structural protections curbing legislative power built into the Constitution. The Federalist No. 33 (Alexander Hamilton); The Federalist No. 44 (James Madison). Federalist 51, drawing upon arguments first explicated in Federalist 10, noted that rights would be protected by the extent of the new nation and the factions it would naturally possess. The Federalist No. 51 (Alexander Hamilton or James Madison). But Publius relied heavily upon the other branches, the states, and the people to act as guardians against such encroachment. The Federalist No. 44 (James Madison).

88. The Federalist No. 78 (Alexander Hamilton).

89. The Federalist No. 33 (Alexander Hamilton).

90. The Federalists originally argued that the limited powers afforded through Article I to Congress, and to the national government generally, were sufficient to protect individual rights, i.e., conceptualizing Article I powers as protecting rights negatively by precluding congressional incursion because of a lack of power. The Federalist No. 41 (James Madison) (no power to invade rights because of the limitations of enumeration); The Federalist No. 44 (James Madison) (limits on legislative power are a “constitutional bulwark in favor of personal security and private rights” [referring to Article I, Section 9]); limitations on Congress exceeding its granted powers included

from encroaching on states, because the states were thought to be better designed to protect liberties, being closer to the people, and hence necessarily more responsive to their demands and needs.<sup>91</sup> There was apparently no thought to accord the legislature a greater expanse of power to act positively on behalf of liberties; rather, the legislature was a source of “interferences in cases affecting personal rights.”<sup>92</sup> The resources of the Framers were expended finding methods to cabin legislative power, not to empower it as a protector of rights.

Even the Bill of Rights, necessitated by demands for written protections for fundamental liberties, was conceived as operating by restricting legislative and executive powers that might otherwise encroach on rights in the presumed exercise of enumerated powers. There is great rhetorical power and meaning in the first words being “Congress shall make no law . . . .”<sup>93</sup>

The Court, on the other hand, was thought to be a protector of rights, including against legislative encroachment. The balance of powers struck was designed to limit legislative power within itself and to enforce those limitations through the “least dangerous” branch, the Court.<sup>94</sup> The Bill of Rights similarly entrusted the Court with the protection of those liberties.<sup>95</sup>

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the executive, the judiciary, the people, and the state legislatures jealously guarding their own prerogatives); The Federalist No. 45 (James Madison) (the powers delegated are “few and defined” with states retaining powers concerning the “lives, liberties and properties of the people”); The Federalist No. 46 (James Madison) (any infringement of liberties would be opposed by the states); The Federalist No. 84 (Alexander Hamilton) (no need to except rights from “powers not granted” because the people retain those powers; the Constitution itself is a bill of rights). Other methods included separating powers (The Federalist Nos. 48 (James Madison), 51 (Alexander Hamilton or James Madison)), using a bicameral form of legislature, relatively short terms of office (The Federalist No. 37), especially in the popularly elected House of Representatives (The Federalist No. 53 (Alexander Hamilton or James Madison)), equal state representation in the Senate and state selection of Senators (The Federalist No. 62 (Alexander Hamilton or James Madison), and Senate ability to check factions thus preventing unjust majoritarian rule (The Federalist No. 63 (Alexander Hamilton or James Madison)).

91. The Federalist Nos. 44 (James Madison), 45 (James Madison), 46 (James Madison). See Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 16, at 871 (“Prior to the Civil War, the states defined the status and enforced the rights of the individual.”); *id.* at 872 (“the states functioned as the primary guarantors of the fundamental rights of American citizens”).

92. The Federalist No. 44 (James Madison).

93. U.S. CONST. amend. I.

94. The Federalist No. 78 (Alexander Hamilton).

95. See Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. Rev. 1, 10 (1996) (“A bill of rights, Madison said, would give legitimacy to principles of liberty, help the people to internalize these values, and provide a basis for rallying against abuses of power. It would also give new power to the courts. Madison announced, with

Had the power to legislate to protect rights been generally understood, or had Congress been sanguine that the Executive and the Court would recognize and enforce an exercise of that power, Section Five would not have been deemed critical. Yet key framers repeatedly refer to the grant of power as essential to achieve the goals of the Amendment.<sup>96</sup> The recurrence of the grant of power in all three Reconstruction Amendments reinforces the inference that there was a felt need to make it abidingly clear that power existed, not to be denied by the President<sup>97</sup> or the United States Supreme Court.<sup>98</sup> When Section Five prominently reconceived Congress's role with respect to liberty,<sup>99</sup> it necessarily affected the Court's role<sup>100</sup> as well, restriking the balance between the two branches.<sup>101</sup>

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excessive optimism, that 'courts of justice' would form 'impenetrable barriers' against violations of the liberties in the Bill of Rights.") (emphasis added) (citing 2 THE BILL OF RIGHTS, A DOCUMENTARY HISTORY 1025, 1030-31 (Bernard Schwartz ed., 1971); Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301 (1990)).

96. Bingham referred to the grant of power to enforce rights as in his prototype as "the most important issue that would come before the Congress." CURTIS, *supra* note 1, at 62 (citing CONG. GLOBE, 39th Cong. 1st Sess. 1034 (1866)). Howard, introducing the Amendment into the Senate, stated that "therefore it is necessary, if [the rights of section one] 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 . . . ." CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

97. The 39th Congress was adopting the Fourteenth Amendment at a time when "President Andrew Johnson, a Democratic Conservative, actually encouraged Southern resistance through his policy of appeasement. This continuing Southern hostility to the Union led Republicans and Southern Unionists to believe that the spirit that had led the South to secede had survived the Civil War." Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 16, at 875. Johnson vetoed the Civil Rights Act of 1866 citing a lack of congressional constitutional power to enact it. See JAMES, *supra* note 2, at 97-98.

98. *Dred Scott*, 60 U.S. 393. Cf. *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) (holding the Court had power to review legislation to determine whether Congress had acted within the constitutional limits of its power).

99. Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 1643, at 877 ("Because Northern Republicans needed to preserve their Civil War victory over state sovereignty and slavery, they established in law the primacy of United States citizenship and with it the primacy of Congress's authority to secure the rights of American citizens."); *id.* at 885 ("Congressman William Lawrence transformed this point of political theory into a matter of practical necessity when he warned that congressional protection of civil rights was 'essential to preserve the national life and the means of national existence.'") (citing CONG. GLOBE, 39th Cong., 1st Sess. 1836 (1866)). See Engel, *supra* note 5858, at 124-25 ("Although [the Privileges and Immunities Clause and the Fifth Amendment] 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, but the federal judiciary had rejected such a reading, and Congress so far had been powerless to enforce those guarantees.").

100. By enforcing rights against the states, the Fourteenth Amendment also expanded the power of the Supreme Court to review state conduct and legislation to ensure it did not transgress these newly-created limitations upon state power. This was an object as well as a consequence of

Even in the current restrictive view of Section Five powers, the balance of powers differs from the antebellum concept and practice. Section Five authorizes Congress to enact active and prophylactic protections and enforcement of critical guaranteed rights and liberties formerly conceived as limitations on power.<sup>102</sup> Not only can Congress legislate with respect to rights – a newly conferred power in Section Five

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making the rights in Section One self-executing. William Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, in *CIVIL RIGHTS IN AMERICAN HISTORY: MAJOR HISTORICAL INTERPRETATIONS* 758-59 (Kermit Hall ed., 1987) (arguing Congress intended to empower the federal courts as partners in enforcing rights, and that post-Amendment history “reveals a consistent determination by Congress and the courts to enhance the powers and role of the federal courts, not to emasculate them.”). *Cf.* *Slaughter-House Cases*, 83 U.S. 36 (limiting privileges and immunities in order to prevent “excessive” congressional and Court power to affect the states).

101. McConnell argues that the Framers meant to protect rights better than they had been protected by the Supreme Court by granting Congress this power – i.e., that the Section Five grant of power alters the power interrelationships between the branches of the federal government as well. *See* McConnell, *supra* note 31, at 176 (“[The Framers of the Fourteenth Amendment] were not content to leave the specification of protected rights to judicial decision.”). *See* Engel, *supra* note 58, at 117 (“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.”); *id.* at 122 (“[A]llowing 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 . . . . 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.”); *id.* at 124 (“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.”). *Cf.* Joseph Blocher, *Amending the Exceptions Clause*, 92 MINN. L. REV. 971 (2008) (noting how later-enacted amendments alter the constitutional text to accommodate them, for instance how the First Amendment explicit restriction of congressional power [“Congress shall make no law”] amends Article I, and also restricts executive power with respect to those rights, amending Article II).

102. *Boerne*, 521 U.S. 507. The Court’s opinion begins with the theory of enumerated powers (at 516) and proceeds to find Congress has the enumerated power to act upon the limiting “self-executing” provisions of Section 1 of the Amendment by virtue of the enumerated Section 5 power: “All must acknowledge that § 5 is ‘a positive grant of legislative power’ to Congress.” *Id.* at 517 (citation omitted). The court then notes that the enforcement power has wide, but not unlimited application: “Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’s enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . . .” *Id.* at 518. In so acting, “[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution,” although *Boerne* reserves ultimate interpretive power as to the substance of a constitutional guarantee to the Court, which Congress may not alter. *Id.* at 535.

– but it can also legislate prophylactic remedies, effectively going beyond current Court pronouncement when necessary. As *Boerne* notes, “All must acknowledge that § 5 is ‘a positive grant of legislative power’ to Congress,” and that the “sweep of Congress’s enforcement power” is wide, if not unlimited. Congress, because of the Section, has power, and hence “not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.”<sup>103</sup> Pragmatically, this active role has developed into a relationship between the Court and Congress that Robert Post and Reva Siegel refer to as poliocentric.<sup>104</sup> The two branches participate mutually in recognizing threats to rights, the reach of those rights and methods of protecting them.<sup>105</sup> Using the methods peculiarly suited to their respective institutional competencies and roles, the conversation results in mutually recognized new understandings of rights and their enforcement.<sup>106</sup> Congress can continue to emphasize noticing and correcting infringements when they are systemic. Systemic wrongs are the least likely to result in a blameworthy actor causing harm, and thus they are difficult to identify, fight, and correct through court action. Congress alone has the ability to respond with a method that can prevent, provide accessible enforcement mechanisms, and remedy these wrongs.<sup>107</sup> Congress thus still occupies a place affirmatively designed to make it a protector of liberties, not simply their chief predator.

### III. CONCLUSION

Legal and political theory about the appropriate role of Congress with respect to identifying, protecting and enforcing personal liberties changed significantly from the time of the original framing in 1787 to the time of the framing of the Reconstruction Amendments. Congress was originally conceived of as a predator on personal rights, leading to a legal regime of enumerated powers coupled with rights provisions that were considered solely as a source negating congressional power. By

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103. *Id.* at 517, 518, 535 (emphasis added).

104. Post & Siegel, *supra* note 31.

105. *Id.*

106. *Id.* Although Post and Siegel may fear that current Court cases have reduced Congress’s role in the poliocentric relationship unduly and inappropriately, pragmatically, the conversation continues.

107. *Id.*; see also Denise C. Morgan & Rebecca E. Zietlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. 1347, 1350 (2005) (arguing that “Congress has a unique and important role to play in providing a nationally uniform baseline of rights of belonging,” and “that only Congress can adequately protect those rights”).

the time of the framing of the Fourteenth Amendment, Congress was seen as necessary to recognizing and enforcing rights, and was affirmatively granted a positive power to do so through the operation of Section Five.

Legal and political realities of the time support this reconception of Congress and significant grant of additional powers. The framing of the Fourteenth Amendment proceeded at a time when the Executive was seen both as having too much power and as affirmatively interfering with the work and goals of Reconstruction, especially with respect to the rights of freedmen and the quashing of the Slave Power, as necessary to lasting peace, stability, and Union. The Amendment was designed to and did shift power over Reconstruction to the Congress. One aspect of that shift was enshrined in the alteration of the pardoning power incorporated into Section 3. Hence, the Amendment effectuated a power shift between Congress and the Executive that empowered Congress relative to the Executive.

Similarly, the failure of the original Constitution to maintain the Union and protect citizens and rights was squarely acknowledged as having deep roots in slavery. The 39th Congress perceived that not only had former as well as the current Executive fallen under the sway of the Slave Power, but that the Supreme Court had also been influenced, that “slavery had ‘polluted’ and ‘defiled’ the judiciary.”<sup>108</sup> The Supreme Court’s role in stripping Congress of any power to enforce rights, even federally on the basis of the Fifth Amendment and consistently with nearly a century of practice, was much on the minds of the Framers, whose final amendment explicitly overruled the worst aspects of *Dred Scott* in the citizenship clause of Section One and the empowerment clause of Section Five.<sup>109</sup> The Court had also rendered states impotent to protect rights of alleged fugitive slaves by finding an exclusive congressional power coupled with a duty. The inconsistency of these two decisions, sharing in common only the effect of protecting slavery, made the Framers at best skeptical of the Court’s role in protecting liberties, and hence more determined to wrest power in that arena for the Congress as well. The Framers of the Fourteenth Amendment were exceedingly cautious because their deeply held values and views had

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108. CURTIS, *supra* note 1, at 83.

109. Note that John Bingham, one of the greatest champions of increased congressional power as a necessity, also believed that the Supreme Court had misinterpreted the Constitution, requiring written correction in addition to simply empowering Congress. *Id.* at 62. Thus, Bingham appears to believe that although constitutional power might not survive Supreme Court denial, constitutional principle was not changed by such misinterpretation.

been trampled consistently, and their use of precedent had been twisted, grants of power read out and successes in altering outcomes by both statutes and amendment rendered null.<sup>110</sup> They knew from experience that only great clarity and forceful grants of power, done redundantly to reinforce their purpose, would work.<sup>111</sup> Misconstruction was an acknowledged problem.<sup>112</sup>

Thus, skeptical of the Court as a protector of rights, Congress provided to itself the constitutional power to protect rights and guard against misconstruction. Whether or not the Framers focused upon the exact new parameters of relative powers, it cannot be denied that they did focus on the need to enhance congressional powers. That enhancement, into arenas not before recognized as belonging to Congress, of necessity altered the balance between the Court and Congress as well.

In addition to its well-recognized changes to individual rights and federal-state powers, the Fourteenth Amendment also effectuated a change, practically and ideologically, in the former balance among the three branches of national power. The Framers and ratifiers did indeed create both a Union that had not yet been fashioned, and a Constitution that is dramatically different in where and how it strikes the balance of power on behalf of liberty.

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110. Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 J. CONST. L. 1295, 1305-07 (forthcoming 2009).

111. CURTIS, *supra* note 1, at 141 (quoting Lyman Trumbull in a speech in Illinois that the “[14th Amendment’s §1 is] an unnecessary provision perhaps, since the abolition of slavery and the passage of the Civil Rights Bill; still the declaration of the great principles of individual freedom and civil liberty *cannot be too often repeated*, and may well find a place in the fundamental law of the land”) (citing *Cincinnati Commercial*, Sept. 3, 1866, at 2, col.3) (emphasis added).

112. CURTIS, *supra* note 1, at 140 (giving examples showing that Republicans believed that even if their theory that the Thirteenth Amendment and the Civil Rights Act of 1866 granted power was correct that they needed redundancy in the Constitution to ensure it, to “entrench[ ] and fortif[y] in the Constitution and laws by the most complete and undeniable guarantees . . . *beyond all doubt and misconstruction*”) (citing General Martindale reading the New York Sailors and Soldiers Convention address adopted by the convention, in *Albany Evening Journal*, Sept. 21, 1866, at 1, col. 3) (emphasis added).

