NOTES

WHEN THIRTEEN IS (STILL) GREATER THAN FOURTEEN: THE CONTINUED EXPANSIVE SCOPE OF CONGRESSIONAL AUTHORITY UNDER THE THIRTEENTH AMENDMENT IN A POST-*CITY OF BOERNE V. FLORES* WORLD

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INTRODUCTION

> *Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault . . . . If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States.*[1]

OR must it? This Note will attempt to demonstrate that the answer is no, and that the Thirteenth Amendment enabled the United States to provide Christy Brzonkala with a civil remedy for the violence she suffered. This Note will enter into a debate over how Supreme Court decisions involving the Fourteenth Amendment affect Congress's Thirteenth Amendment authority. It will demonstrate how, even if the Court's decisions in other areas have narrowed Congress's Thirteenth Amendment enforcement authority, Congress still possesses vast, unutilized legislative space. And this Note will crystallize its point with a concrete example—the struck-down Violence Against Women Act's civil remedy for victims of gender-based violence. It is this Note's goal to highlight the Thirteenth Amendment's untapped potential as a source for congressional legislation, and why that potential matters.

In *United States v. Morrison*, the Supreme Court held that Section 13981 of the Violence Against Women Act ("VAWA"),[2] which provided a federal civil remedy to victims of gender-based violence, was an unconstitutional exercise of congressional power under both the Article I Commerce Clause and Section Five of the Fourteenth Amendment ("Section Five").[3] While Congress invoked just these two powers in

[1] United States v. Morrison, 529 U.S. 598, 627 (2000).
[2] Violence Against Women Act, 42 U.S.C. § 13981 (2012), invalidated by *Morrison*, 529 U.S. 598.
[3] *Morrison*, 529 U.S. at 627.

adopting Section 13981,[4] they were not the only ones available. Even before *Morrison*, scholars had argued that Congress had a third source: the Thirteenth Amendment.[5]

The argument that the Thirteenth Amendment offers an alternative avenue of congressional authority is not a new one.[6] Besides domestic violence, scholars have posited the Thirteenth Amendment as authority for legislation regarding issues as diverse as abortion rights,[7] child abuse,[8] child labor,[9] mail-order bride services,[10] prostitution,[11] and racial profiling.[12] This proclivity to rely on the Thirteenth Amendment undoubtedly stems, at least in part, from two factors. The first is the Thirteenth Amendment's relatively unique scope of coverage, which includes not just state action, but private action as well.[13] A second reason is the Supreme Court's holding that Section Two of the Thirteenth

[4] 42 U.S.C. § 13981(a) (stating that "this part [was enacted] under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution"). Section Eight of Article I of the Constitution gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3.

[5] See, e.g., Joyce E. McConnell, Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment, 4 Yale J.L. & Feminism 207, 210 (1992); Marcellene Elizabeth Hearn, Comment, A Thirteenth Amendment Defense of the Violence Against Women Act, 146 U. Pa. L. Rev. 1097, 1098 (1998). Section One of the Thirteenth Amendment says that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1. Section Two provides, "Congress shall have power to enforce this article by appropriate legislation." Id. § 2.

[6] See, e.g., Jamal Greene, Thirteenth Amendment Optimism, 112 Colum. L. Rev. 1733, 1733–34 (2012) (citing a multitude of issues scholars have argued fall under Congress's Thirteenth Amendment legislative authority).

[7] See Andrew Koppelman, Forced Labor: A Thirteenth Amendment Defense of Abortion, 84 Nw. U. L. Rev. 480, 483 (1990).

[8] See Akhil Reed Amar & Daniel Widawsky, Commentary, Child Abuse as Slavery: A Thirteenth Amendment Response to *DeShaney*, 105 Harv. L. Rev. 1359, 1360 (1992).

[9] See Dina Mishra, Child Labor as Involuntary Servitude: The Failure of Congress to Legislate Against Child Labor Pursuant to the Thirteenth Amendment in the Early Twentieth Century, 63 Rutgers L. Rev. 59, 66–67 (2010).

[10] See Vanessa B.M. Vergara, Comment, Abusive Mail-Order Bride Marriage and the Thirteenth Amendment, 94 Nw. U. L. Rev. 1547, 1549 (2000).

[11] See Catharine A. MacKinnon, Prostitution and Civil Rights, 1 Mich. J. Gender & L. 13, 21–22 (1993).

[12] See William M. Carter, Jr., A Thirteenth Amendment Framework for Combating Racial Profiling, 39 Harv. C.R.-C.L. L. Rev. 17, 89 (2004).

[13] Risa L. Goluboff, The Thirteenth Amendment and the Lost Origins of Civil Rights, 50 Duke L.J. 1609, 1643–44 (2001) ("The Thirteenth Amendment . . . did not present the state action problem that plagued the Fourteenth and Fifteenth Amendments, many Reconstruction statutes, and the Bill of Rights.").

Amendment ("Section Two") allows Congress to "pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[14] The badges and incidents "hook" for legislative activity encompasses more than simply prohibiting slavery and involuntary servitude, and Congress has used Section Two to adopt legislation going beyond merely banning such bondage.

This hook stems from the Court's holding in *Jones v. Alfred H. Mayer Co.* that a law banning racial discrimination in all real estate transactions, even private ones, was a valid Section Two exercise.[15] And lower courts have used *Jones* in other contexts as well, especially for violent deprivations of civil rights.[16] The potentially expansive interpretation available to "badges and incidents of slavery," combined with the deferential review such enactments receive,[17] help explain why Section Two is an appealing legislative vehicle.

While the theoretical basis for robust congressional authority under the Thirteenth Amendment has a fair number of scholarly supporters, this sentiment is by no means unanimous.[18] Partly, this may stem from the unintuitive nature of the proposition that a provision enacted with

[14] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (emphasis omitted) (quoting The Civil Rights Cases, 109 U.S. 3, 20 (1883)).

[15] Id. at 413 ("We hold that [42 U.S.C.] § 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.").

[16] See United States v. Cannon, 750 F.3d 492, 505 (5th Cir. 2014) (ruling that § 249(a)(1) of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (2012), is a constitutional exercise of congressional authority under Section Two); United States v. Hatch, 722 F.3d 1193, 1205–06 (10th Cir. 2013) (same); United States v. Maybee, 687 F.3d 1026, 1031 (8th Cir. 2012) (same); see also United States v. Allen, 341 F.3d 870, 884 (9th Cir. 2003) (holding that 18 U.S.C. § 245(b)(2)(B) is a constitutional exercise of Congressional power under the Thirteenth Amendment); United States v. Nelson, 277 F.3d 164, 190–91 (2d Cir. 2002) (holding that 18 U.S.C. § 245(b)(2)(B)'s "prohibition against private violence motivated by the victim's race, religion, etc. . . . is a constitutional exercise of Congress's power under the Thirteenth Amendment"); United States v. Nicholson, 185 F. Supp. 2d 982, 991–92 (E.D. Wis. 2002) (holding that both 18 U.S.C. § 241, which criminalizes civil rights conspiracies, and 42 U.S.C. § 3631, the criminal section of the Fair Housing Act, are constitutional under Section Two). *Nelson* is a particularly salient case of an expansive interpretation of Section Two authority since the victim in that case was not black, but rather Jewish. *Nelson*, 277 F.3d at 177–80.

[17] *Jones*, 392 U.S. at 440 ("Congress has the power . . . rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.").

[18] Cf. Greene, supra note 6, at 1735 ("[I]t is quite unlikely that this or any presently conceivable Supreme Court will be moved even to entertain these questions.").

"negro slavery alone . . . in the mind of the Congress which proposed the thirteenth article"[19] can also be a vehicle to combat domestic violence, child abuse, or racial profiling, and it is easy to see the challenge in overcoming this conceptual oddity.

Yet this alone does not explain the hesitance. Another particularly compelling reason stems from the belief that the Supreme Court has, albeit indirectly, limited *Jones*. This limitation purportedly comes from decisions involving the enforcement clause of another Reconstruction Amendment, the Fourteenth.[20] In *City of Boerne v. Flores*,[21] the Court held that under Section Five,[22] Congress may only ensure that the provisions of that Amendment are enforced.[23] While this power includes the authority to pass prophylactic measures, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[24] Further, the Court held that the judiciary, not Congress, defines the substantive guarantees the Amendment protects.[25]

[19] The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1872).

[20] Scholars have noted that with its decision in *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013) (striking down Section Four of the Voting Rights Act as unconstitutional), the Court has taken a narrower view of the enforcement power of the Fifteenth Amendment, U.S. Const. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."), and that this narrowing potentially bolsters the argument that the Court has indirectly narrowed the Thirteenth Amendment's enforcement power as well. Cf. *Cannon*, 750 F.3d at 509 (Elrod, J., specially concurring) (noting the "growing tension between the Supreme Court's precedent regarding the scope of Congress's powers under § 2 of the Thirteenth Amendment and the Supreme Court's subsequent decisions regarding the other Reconstruction Amendments" and that "[t]his tension . . . is even more pronounced in light of . . . *Shelby County*"); Calvin Massey, The Effect of *Shelby County* on Enforcement of the Reconstruction Amendments, 29 J.L. & Pol. 397, 397 (2014) ("Did *Shelby County* import to the Fifteenth Amendment the congruence and proportionality test from the Fourteenth Amendment and, if so, might that test gravitate to the Thirteenth Amendment? This essay seeks to answer these questions."). Because the Fifteenth Amendment applications of *Shelby County* are still unknown, and because whatever impact *Shelby County* produces is not directly on point with the purpose of this Note, the *Shelby County* decision can simply serve, for this Note, as an additional piece of evidence of the disjunction between the Court's enforcement power jurisprudence under the Thirteenth Amendment and its enforcement power jurisprudence for the other Reconstruction Amendments.

[21] 521 U.S. 507 (1997).

[22] U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[23] *Boerne*, 521 U.S. at 519.

[24] Id. at 520.

[25] Id. at 529 (rejecting the notion that "Congress could define its own powers by altering the Fourteenth Amendment's meaning").

Relying in part on the similarity between the language of the Reconstruction Amendments' enforcement clauses,[26] multiple people, including Judge Jennifer Elrod of the U.S. Court of Appeals for the Fifth Circuit—writing in a concurrence to an opinion she wrote upholding the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, a law passed pursuant to the Thirteenth Amendment—have noted a tension between the *Boerne* and *Jones* tests.[27] Judge Elrod observed both that congressional usurpation of the Court's role in defining the scope of constitutional rights greatly concerned the *Boerne* Court, and that *Jones*, because it lets Congress define the "badges" and "incidents" of slavery, created just that situation for the Thirteenth Amendment.[28] Professor Jennifer McAward has further asserted that, in addition to this separation of powers issue, *Jones* also presents a second structural concern which drove the *Boerne* Court: federalism. Specifically, Professor McAward argues that Congress can use its Section Two authority to inappropriately encroach on the states.[29]

There is vigorous debate over whether or not Judge Elrod and Professor McAward are correct in their views,[30] and this Note enters that dialogue. However, it does so not by taking sides in the direct clash. Ra-

[26] Compare U.S. Const. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."), with id. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."), and id. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

[27] See United States v. Cannon, 750 F.3d 492, 511 (5th Cir. 2014) (Elrod, J., specially concurring); see also Jennifer Mason McAward, The Scope of Congress's Thirteenth Amendment Enforcement Power After *City of Boerne v. Flores*, 88 Wash. U. L. Rev. 77, 80–81 (2010) (noting the tension between *Boerne* and *Jones*). The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 makes it a crime to "willfully cause[] bodily injury to any person . . . because of the actual or perceived race, color, religion, or national origin of any person." 18 U.S.C. § 249(a)(1) (2012). Judge Elrod wrote about her doubts regarding *Jones* in a concurrence, as opposed to in the opinion of the court, since she regarded *Jones* as "binding precedent." *Cannon*, 750 F.3d at 509, 514 (Elrod, J., specially concurring).

[28] See *Cannon*, 750 F.3d at 511 (Elrod, J., specially concurring); see also McAward, supra note 27, at 79–81 (describing how *Jones* potentially leaves Congress with a large role via its ability to define what constitutes a badge or incident).

[29] McAward, supra note 27, at 141.

[30] See, e.g., Alexander Tsesis, Congressional Authority to Interpret the Thirteenth Amendment, 71 Md. L. Rev. 40, 48 (2011) (disagreeing with McAward's interpretation of Section Two); see also Jennifer Mason McAward, Congressional Authority to Interpret the Thirteenth Amendment: A Response to Professor Tsesis, 71 Md. L. Rev. 60, 60 (2011) (responding to Tsesis's rejoinder).

ther, this Note attempts to reconcile the two viewpoints by showing that even if the thesis that *Boerne*-style analysis applies to Thirteenth Amendment legislation is accurate, there remains broad opportunity for congressional involvement. This Note will argue that even if Judge Elrod and Professor McAward are correct, they miss a fundamental point. Because of both the availability of enforcement legislation for direct constitutional violations, and several unique features of the Thirteenth Amendment that mitigate *Boerne*'s structural concerns, a *Boerne* regime would not limit congressional authority under the Thirteenth Amendment as much as one might think. And the robust power Congress still has, even under that narrower regime, only underscores how potentially significant Congress's unutilized Thirteenth Amendment authority is.

This Note proceeds in five Parts. Part I will lay out the current understanding of Congress's enforcement powers under the Thirteenth and Fourteenth Amendments.[31] Part II will next describe the debate surrounding interpretations of Congress's Thirteenth Amendment authority post-*Boerne*, outlining arguments that *Boerne* compels a narrower interpretation of such authority.[32]

In Part III, this Note will argue that even if the narrower conception of Section Two is correct, Congress, generally speaking, still has expansive Thirteenth Amendment authority.[33] That Part will first address how, even under a congruence and proportionality regime, Congress can unequivocally legislate against actual violations of the Thirteenth Amendment. This state of affairs calls for more vigorous interpretations of Section One, as such broader interpretations create more space for congressional action. Second, Part III will distinguish between the interbranch conflict in *Boerne* and its progeny, and the separation of powers concerns that purportedly arise with deference towards congressional

[31] See infra Part I.

[32] See infra Part II.

[33] See infra Part III. To be clear, Part III will not argue that all legislation that failed under the Fourteenth Amendment's congruence and proportionality regime could pass under the Thirteenth Amendment. This is especially true with *Boerne* itself, since in no conceivable way was the Religious Freedom Restoration Act ("RFRA") of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, invalidated by *Boerne*, 521 U.S. 507, designed to combat burdens on religious exercise, addressing slavery or involuntary servitude. While this is true in some cases, see infra Part IV, the general purpose of Part III is to highlight how legislation which could otherwise pass under the Thirteenth Amendment still may do so even under a congruence and proportionality test.

definition of badges and incidents of slavery. Finally, Part III will analyze the differences in federalism concerns between the Thirteenth and Fourteenth Amendments. These differences are infrequent abrogation of states' sovereign immunity, and the lack of a state action requirement under the Thirteenth Amendment. By importing the potency of legislation under Section One of the Fourteenth Amendment to the Thirteenth Amendment context, and by recognizing differences in the separation of powers and federalism issues between those two Amendments, this Note contributes to the debate over the Thirteenth Amendment by mitigating the impact of a switch to the *Boerne* standard.

As an example of how this Thirteenth Amendment analysis plays out, this Note will use Part IV as a case study to analyze Section 13981 of VAWA,[34] the same provision the Court struck down in *Morrison*.[35] Part IV will first demonstrate how gender-based violence is a form of involuntary servitude proscribed by Section One of the Thirteenth Amendment, and thus subject to congressional legislation. Next, the Part will discuss how a civil remedy is congruent and proportional to the risk of violation of the Thirteenth Amendment's ban on indentured servitude, an argument that goes further than previous literature by endorsing a prophylactic Thirteenth Amendment justification for domestic violence legislation. Finally, Part IV will show how *Morrison* does not limit Congress's Thirteenth Amendment authority. By both fusing previous arguments about how gender-based violence constitutes involuntary servitude to the congruence and proportionality framework, and by pushing those arguments beyond where they have gone before, this Note seeks to illustrate a potent case study of its overall thesis—that the congruence and proportionality test does not mean the end of robust Thirteenth Amendment authority.

Lastly, Part V of this Note will discuss the implications of this robust source of congressional authority under the Thirteenth Amendment, even in a post-*Boerne* landscape.[36] This Part will analyze not only the practical consequences of congressional regulations in areas such as domestic violence, but will also look at how this analysis could alter the parameters of broader legal discourse and the impact that might have.

[34] See infra Part IV.
[35] *Morrison*, 529 U.S. at 627.
[36] See Infra Part V.

I. THE CURRENT UNDERSTANDING

In the aftermath of the Civil War, the U.S. Constitution received three major changes: the Thirteenth, Fourteenth, and Fifteenth Amendments, collectively known as the "Reconstruction Amendments."[37] The Thirteenth Amendment banned "slavery [and] involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted."[38] The Fourteenth Amendment has many provisions, including a ban on any state "depriv[ing] any person of life, liberty, or property, without due process of law; [or] deny[ing] to any person . . . equal protection of the laws";[39] and the Fifteenth Amendment ensured that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[40] Each of these Amendments also gave Congress the power to enforce them through appropriate legislation.[41]

This Part will examine the Supreme Court's jurisprudence regarding Congress's enforcement power of two of these Amendments: the Thirteenth and Fourteenth.[42] Section A will address the Court's holdings regarding the Thirteenth Amendment, and Section B will flesh out the Court's Fourteenth Amendment doctrine. Once the Court's current approach becomes clear, the debate discussed in this Note presents itself more sharply.

A. Congressional Power Under the Thirteenth Amendment

Section Two of the Thirteenth Amendment, gives Congress "power to enforce this article by appropriate legislation."[43] Almost by definition, this allows Congress to pass laws ensuring that "[n]either slavery nor in-

[37] The Thirteenth Amendment was ratified on December 6, 1865; the Fourteenth Amendment was ratified July 9, 1868; and the Fifteenth Amendment was ratified on February 3, 1870. Civil War Sesquicentennial, U.S. Senate, http://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm, [http://perma.cc/C6ZN-U5YB].

[38] U.S. Const. amend. XIII, § 1.

[39] Id. amend. XIV, § 1.

[40] Id. amend. XV, § 1.

[41] Id. amend. XIII, § 2; id. amend. XIV, § 5; id. amend. XV, § 2.

[42] Although the Fifteenth Amendment is frequently, and justifiably, lumped together with the Thirteenth and Fourteenth Amendments, that Amendment is not directly on point to the focus of this Note and thus will not receive the same treatment as the other two Reconstruction Amendments. See supra note 20 and accompanying text.

[43] U.S. Const. amend. XIII, § 2.

voluntary servitude" exist within the United States.[44] Indeed, the Supreme Court has held that legislation under the Thirteenth Amendment, "so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not."[45] Importantly, this lack of a state action requirement is one of the features distinguishing the Thirteenth Amendment from its two contemporaries, as well as other laws and constitutional provisions.[46] Just what exactly this entails, however, has shifted over time.

1. Whom Section One Protects

The Thirteenth Amendment's driving purpose was "to end both slavery and its concomitant disabilities immediately."[47] The vast majority of those held in slavery were black people, either brought over from Africa or descended from people who had been.[48] The Supreme Court has observed that the goal of ending black slavery animated the Thirteenth Amendment's drafters.[49] Nevertheless, it has never held that the Thirteenth Amendment only applies to black slaves—rather it has "ratified the view that Congress is authorized . . . to legislate in regard to 'every race and individual.'"[50] Two explicit examples of the Court holding that the Thirteenth Amendment's protection covered more than just blacks, but also protected white people and Jewish people from race-based

[44] Id. § 1.

[45] The Civil Rights Cases, 109 U.S. 3, 23 (1883).

[46] See supra notes 38–40 and accompanying text; see also Goluboff, supra note 13, at 1643 ("The Thirteenth Amendment . . . did not present the state action problem that plagued the Fourteenth and Fifteenth Amendments, many Reconstruction statutes, and the Bill of Rights.").

[47] William M. Carter, Jr., Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery, 40 U.C. Davis L. Rev. 1311, 1322–23 (2007).

[48] Id. at 1314 (citing Kenneth M. Stampp, The Peculiar Institution: Slavery in the Ante-Bellum South 193 (1961)).

[49] The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1872) ("[N]egro slavery alone was in the mind of the Congress which proposed the thirteenth article.").

[50] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 288 n.18 (1976) (quoting Hodges v. United States, 203 U.S. 1, 16–17 (1906)).

harms, were *McDonald v. Santa Fe Trailer Transportation Co.*[51] and *Shaare Tefila Congregation v. Cobb*,[52] respectively.

While Section One clearly prevents any racially motivated form of slavery or involuntary servitude, there is every reason to believe it protects against all forms of those statuses, even absent racial motivation. First, the Amendment's text makes no reference at all to a racial (or any) motivation.[53] Second, the Court has implicitly accepted this assumption, noting an ability to "readily . . . deduce an intent to prohibit compulsion through physical coercion," without any specific reference to race.[54] Finally, the Court's jurisprudence towards peonage laws—both striking down state laws entrenching peonage,[55] and upholding Congress's power to pass a federal law abolishing peonage[56]—indicates the lack of any racial element; peonage, "a status or condition of compulsory service, based upon the indebtedness of the peon to the master,"[57] is independent of race. Judge Guido Calabresi observed that "[t]he most basic feature of 'slavery' or 'involuntary servitude'—the subjugation of one person to another by coercive means—remains the same regardless of whether a person is subjugated on grounds of race or for some other reason,"[58] and there is no reason to believe the Supreme Court would disagree with this insightful analysis.

2. What Section One Protects

While there are strong textual, historical, and precedential bases for believing the Thirteenth Amendment's protection covers any individual, what that protection entails is somewhat narrower. Section One bans

[51] 427 U.S. 273, 287–88 (1976) (holding that 42 U.S.C. § 1981, a law passed pursuant to the Thirteenth Amendment banning racial discrimination in employment, protected whites).

[52] 481 U.S. 615, 617–18 (1987) (holding that Jews could state a cause of action under 42 U.S.C. § 1982, another law adopted pursuant to the Thirteenth Amendment, against other whites). Key to this proposition was a finding from a case decided the same day, *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), that "Jews and Arabs were among the peoples then considered to be distinct races and hence within the protection of the statute." *Shaare Tefila*, 481 U.S. at 617–18.

[53] See U.S. Const. amend. XIII.

[54] United States v. Kozminski, 487 U.S. 931, 942 (1988).

[55] See Bailey v. Alabama, 219 U.S. 219, 245 (1911).

[56] Clyatt v. United States, 197 U.S. 207, 218 (1905).

[57] Id. at 215.

[58] United States v. Nelson, 277 F.3d 164, 179–80 (2d Cir. 2002) (Calabresi, J.) (footnote omitted).

both "slavery" and "involuntary servitude," and the Supreme Court has supplied definitions of both. Regarding slavery, the Court in *Hodges v. United States* drew from Webster's Dictionary to observe that "'slavery' is defined as 'the state of entire subjection of one person to the will of another,'"[59] while also noting a secondary definition that "recognizes the fact of subjugation, as 'one who has lost the power of resistance; one who surrenders himself to any power whatever.'"[60]

The Court defined Section One's protection against involuntary servitude in *United States v. Kozminski*, a case reversing convictions under 18 U.S.C. § 241 "for conspiracy to interfere with the Thirteenth Amendment guarantee against involuntary servitude."[61] The Court noted that "from the general intent to prohibit conditions akin to African slavery, . . . we readily can deduce an intent to prohibit compulsion through physical coercion."[62] Further, the Court observed that every time it found someone facing involuntary servitude, "the victim had no available choice but to work or be subject to legal sanction."[63] After discussing some examples when either physical or legal coercion does not constitute involuntary servitude,[64] the Court held that conspiracies to violate rights protected by the Thirteenth Amendment require "the use or threatened use of physical or legal coercion."[65]

In reaching this conclusion, the Court specifically rejected the argument that involuntary servitude covers other forms of coercion, such as psychological coercion.[66] However, the Court did allow that "a victim's age or special vulnerability may be relevant in determining whether a particular type or a certain degree of physical or legal coercion is suffi-

[59] 203 U.S. 1, 17 (1906).

[60] Id.

[61] 487 U.S. 931, 941 (1988). Since the conviction was specifically for interfering with rights protected under the Thirteenth Amendment, the Court could only "ascertain the precise definition of that crime by looking to the scope of the Thirteenth Amendment prohibition of involuntary servitude specified in our prior decisions." Id.

[62] Id. at 942 (citation omitted).

[63] Id. at 943.

[64] Id. at 943–44. Examples include, inter alia, *Hurtado v. United States*, 410 U.S. 578, 589 & n.11 (1973) (jury service), and *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918) (the military draft).

[65] *Kozminski*, 487 U.S. at 944.

[66] Id. ("The guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion.").

cient to hold that person to involuntary servitude."[67] Therefore, the test for what Section One protects as involuntary servitude is relatively straightforward: The victim, given any special vulnerabilities, needs to face either actual or threatened physical or legal coercion.

3. What Section Two Protects

While Section One of the Thirteenth Amendment "is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances," and thus banned slavery and involuntary servitude "[b]y its own unaided force,"[68] the Thirteenth Amendment does more than just that. Section Two declares that "Congress shall have power to enforce this article by appropriate legislation."[69] As far back as 1883, the Supreme Court held in the *Civil Rights Cases* that Section Two "clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery,"[70] authority that goes beyond merely outlawing slavery and involuntary servitude.[71] Just how far that authority goes, however, has not only been the subject of vigorous debate,[72] but has also changed over time.[73]

In the *Civil Rights Cases*, the Court struck down the Civil Rights Act of 1875, which prohibited racial discrimination in public accommodations, as an unconstitutional exercise of congressional power under the Thirteenth and Fourteenth Amendments.[74] The Court held that Congress exceeded its Section Two authority since the Thirteenth Amendment only sought to "secure to all citizens . . . those fundamental rights which are the essence of civil freedom," and not "adjust what may be called the social rights of men and races in the community."[75] Since any Black

[67] Id. at 948 (referencing, among other examples, that "threatening . . . an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude," although it would not for a citizen).

[68] The Civil Rights Cases, 109 U.S. 3, 20 (1883).

[69] U.S. Const. amend. XIII, § 2.

[70] 109 U.S. at 20.

[71] See *Jones*, 392 U.S. at 439 ("[I]t is at least clear that [Section Two] . . . empowered Congress to do much more." (citing the *Civil Rights Cases*, 109 U.S. at 20.)).

[72] See, e.g., infra Part III.

[73] See Carter, supra note 47, at 1325–26.

[74] 109 U.S. at 25. Congress lacked Fourteenth Amendment authority since that Amendment focused only on state, not individual, action. Id. at 24.

[75] Id. at 22.

Code banning innkeepers from receiving African-American guests was only a device to prevent slaves from escaping, it was "no[t] part of the servitude itself," meaning Congress lacked authority to legislate against it.[76] The *Civil Rights Cases*, while acknowledging authority over badges and incidents, set the stage for a narrow conception of the Thirteenth Amendment, limited almost exclusively "to situations involving actual, forced labor."[77]

In 1968, the Court significantly expanded Section Two's scope. In *Jones*, the Court held that 42 U.S.C. § 1982, a statute which "bars all racial discrimination, private as well as public, in the sale or rental of property . . . is a valid exercise of the power of Congress to enforce the Thirteenth Amendment."[78] The Court set out a two-step method for applying this authority: First, Congress would "rationally . . . determine what are the badges and the incidents of slavery";[79] then Congress could "translate that determination into effective legislation."[80] Applying this test, the Court found that Congress did not irrationally determine that racial discrimination in property transactions was a badge or incident of slavery.[81] The Court noted that Black Codes replaced slavery as a tool ensuring black oppression, and that, likewise, "the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery."[82]

As *Jones* made clear, Congress has robust authority under Section Two.[83] It not only determines what constitutes a badge or incident of

[76] Id. at 21–22.

[77] Carter, supra note 47, at 1325; see also Risa L. Goluboff, The Lost Promise of Civil Rights 19 (2007) ("The lesson of *Hodges*, in combination with *Slaughter-House* and the *Civil Rights Cases*, was clear: only where slavery, or something closely approximating it, existed would the Thirteenth Amendment offer constitutional protection.").

[78] 392 U.S. at 413 (emphasis omitted).

[79] Id. at 440.

[80] Id.

[81] Id. at 440–41.

[82] Id. at 441–43.

[83] Signaling its break from prior precedent, the Court in a footnote both seemed to indicate that the *Civil Rights Cases* were decided incorrectly, and overturned *Hodges*, 203 U.S. 1, a case that limited Thirteenth Amendment authority to only conduct that actually violated Section One. *Jones*, 392 U.S. at 441 n.78.

slavery; it also determines the means to address such a problem.[84] Beyond that, such determinations get "substantial judicial deference."[85] After *Jones*, although Congress has not often utilized its Section Two authority, its attempts have succeeded.[86] This track record, reflecting *Jones*'s generous standard, underscores Section Two's appeal for advocates of various types of legislation.[87]

B. Congressional Power Under the Fourteenth Amendment

The Fourteenth Amendment contains several provisions addressing issues as diverse as birthright citizenship, government debt, and punishing Confederates.[88] Today, the most well-known, and frequently utilized, part of the Amendment is Section One, which reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[89]

Just as Section Two gives Congress the ability to enforce the Thirteenth Amendment, the Fourteenth's final section, Section Five, gives Congress authority to enforce that Amendment.[90] Section Five states, in language essentially synonymous with Section Two, that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[91] Unlike Section Two, Congress has not infrequently used its Section Five authority, and the Supreme Court has repeatedly

[84] See McAward, supra note 27, at 96.
[85] Id.
[86] See id. at 97; see also supra note 16 and accompanying text (citing cases upholding laws passed pursuant to Section Two).
[87] See supra notes 7–12 and accompanying text.
[88] See U.S. Const. amend. XIV.
[89] Id. § 1.
[90] Id. § 5.
[91] Id. This language is almost identical to the enforcement provisions of the other two Reconstruction Amendments. See supra note 26 and accompanying text.

ruled on the scope of this authority.[92] Though a controversial piece of doctrine,[93] one certainty is that Congress's Section Five authority is much narrower than its Section Two authority.[94]

Notwithstanding the disagreements over the Court's Section Five jurisprudence, Congress indisputably has authority to pass legislation enforcing the Amendment against actual violations. The Court reaffirmed this notion in *United States v. Georgia*, when it reversed the dismissal, on sovereign immunity grounds, of certain statutory claims seeking monetary damages a prisoner brought against the State of Georgia under the Americans with Disabilities Act ("ADA"), and remanded to see which of those claims also constituted Eighth Amendment violations.[95] Justice Scalia, writing for a unanimous Court, observed that the plaintiff's ADA claims "were evidently based, at least in large part, on conduct that *independently violated* the provisions of § 1 of the Fourteenth Amendment," distinguishing this case from several prominent Section Five cases that dealt with Congress's *prophylactic* authority under Section Five.[96] After noting unanimous support among the Justices for the proposition that Section Five gives Congress the authority to create private causes of action for *actual* violations of the Fourteenth Amendment, even those that abrogate sovereign immunity, the Court held that the Eleventh Circuit incorrectly dismissed ADA claims consisting of actual Eighth Amendment violations.[97] *Georgia* thus highlights how Sec-

[92] See Tiffany C. Graham, Rethinking Section Five: Deference, Direct Regulation, and Restoring Congressional Authority to Enforce the Fourteenth Amendment, 65 Rutgers L. Rev. 667, 688–94 (2013) (discussing cases).

[93] See, e.g., id. at 670; Michael W. McConnell, Comment, Institutions and Interpretation: A Critique of *City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 156 (1997); Robert C. Post & Reva B. Siegel, Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power, 78 Ind. L.J. 1, 2 (2003) (claiming that a key premise of the Court's Section Five jurisprudence "fundamentally misdescribes American constitutional culture"); see also Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 388–89 (2001) (Breyer, J., dissenting) ("The Court, through its evidentiary demands, its non-deferential review, and its failure to distinguish between judicial and legislative constitutional competencies, improperly invades a power that the Constitution assigns to Congress.").

[94] See McAward, supra note 27, at 100–01.

[95] 546 U.S. 151, 153, 159–60 (2006). Congress can use its Section Five authority to enforce the Eighth Amendment since that Amendment applies to the states via the Fourteenth Amendment's Due Process Clause. Id. at 157 (citing Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947) (plurality opinion)).

[96] Id. at 152, 157–58 (emphasis added).

[97] Id. at 158–59 ("While the Members of this Court have disagreed regarding the scope of Congress's 'prophylactic' enforcement powers under § 5 of the Fourteenth Amendment, no

tion Five provides Congress with unquestioned authority when legislating against actual violations of the Fourteenth Amendment.

The Court first fleshed out the current scope of congressional *prophylactic* power under Section Five in *Boerne*, when it held that Congress lacked authority to pass the Religious Freedom Restoration Act ("RFRA") as it applied to the states.[98] RFRA, which applied to all levels of governments, prevented any government from enacting a law, even if generally applicable, that substantially burdened religious exercise unless that law both furthered a compelling governmental interest, and was the least restrictive means of furthering that interest.[99] Congress enacted RFRA in response to the Court's decision in *Employment Division, Department of Human Resources v. Smith*,[100] which said a compelling interest was not required for generally applicable laws.[101]

The Court started its discussion by observing that Congress can only enforce the Fourteenth Amendment; it cannot "determine what constitutes a constitutional violation."[102] For prophylactic legislation to nevertheless be remedial, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[103] If legislation failed that test, it "may become substantive in operation and effect," and unlike remedial legislation, such substantive legislation was inappropriate. The Amendment's text and history, and the Court's case law, demonstrated this.[104]

Applying the congruence and proportionality test, the Court concluded that, because "[t]he substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pat-

one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions." (citations omitted)).

[98] 521 U.S. at 511.

[99] Id. at 515–16. Although RFRA attempted to implement Congress's view of the First Amendment's Free Exercise Clause, U.S. Const. amend. I, it adopted RFRA, as it applied to the states, pursuant to Section Five, *Boerne*, 521 U.S. at 515–16, since the Fourteenth Amendment's Due Process Clause "embraces the liberties guaranteed by the First Amendment." Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[100] 494 U.S. 872, 890 (1990).

[101] *Boerne*, 521 U.S. at 512–13.

[102] Id. at 519.

[103] Id. at 520.

[104] Id.

tern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*," RFRA failed.[105] This lack of congruence and proportionality indicated that RFRA attempted to define states' constitutional obligations, not remedy any violations of Supreme Court-established obligations.[106] The Court's role in determining constitutional provisions' meaning was crucial, since the twin themes underpinning *Boerne* were RFRA's "contradict[ions of] vital principles necessary to maintain [both] separation of powers and the federal balance."[107] Thus, since RFRA imposed a new constitutional standard both contrary to one the Court had adopted, and one that went—at great cost to state and local governments—well beyond preventing any violations of that standard, RFRA was not congruent or proportional to any Fourteenth Amendment harm. Accordingly, Congress had no authority under Section Five to enact it.

Since *Boerne*, the Supreme Court has applied the congruence and proportionality test on a number of occasions, frequently pertaining to abrogation of states' sovereign immunity,[108] and frequently ruling that Congress exceeded its authority.[109] An early example highlighting how stringent the congruence and proportionality test is was *Kimel v. Florida Board of Regents*.[110] In *Kimel*, the Court ruled that the Age Discrimination in Employment Act ("ADEA"), insofar as it abrogated states' sovereign immunity by barring age discrimination in employment and providing for monetary damages if violated, "exceeded Congress' authority under § 5 of the Fourteenth Amendment."[111] The Court looked for a pattern of states practicing unconstitutional age discrimination and

[105] Id. at 534. A key premise in this was the Court's observation that "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." Id. at 530.

[106] See id. at 536 ("When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is." (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).

[107] Id. The federalism concerns were primarily seen in RFRA's universal reach as it applied to areas of law that traditionally were state or local prerogatives. Id. at 532.

[108] One prominent example of the Court addressing legislation enacted pursuant to Section Five that did not abrogate the states' immunity was *Morrison*, where the Court ruled that neither Section Five nor the Commerce Clause gave Congress the authority to create a federal civil remedy for victims of gender-based violence. 529 U.S. at 627; see supra note 3 and accompanying text. *Morrison* is discussed in more depth in Part IV.

[109] See Graham, supra note 92, at 688–89.

[110] 528 U.S. 62, 91 (2000).

[111] Id. at 66–67.

found none, in large part since age classifications receive merely rational basis review under the Equal Protection Clause.[112] By contrast, the ADEA, "through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[113] *Kimel* thus served to severely limit congressional authority under Section Five to combat discrimination against nonsuspect classes—since rational basis review proscribes very little conduct, almost any comprehensive remedy would fail the congruence and proportionality test.[114]

Such a scenario played out one year later, when the Court ruled in *Board of Trustees of the University of Alabama v. Garrett* that Title I of the ADA (the same law, but different Title, at issue in *Georgia*), which subjected states to monetary damages if they discriminated in employment on the basis of disability, exceeded Congress's Section Five authority.[115] Disability discrimination, similar to age discrimination, receives rational basis review,[116] and Congress "did [not] in fact identify a pattern of irrational state discrimination in employment against the disabled."[117] Further, the Court noted that the ADA's requirements "far exceed[ed] what is constitutionally required in that it makes unlawful a range of alternative responses that would be reasonable but would fall short of imposing an 'undue burden' upon the employer."[118]

Interestingly, two subsequent forays into Section Five produced different outcomes and upheld congressional enactments. In *Nevada Department of Human Resources v. Hibbs*, the Court upheld Congress's abrogation of states' sovereign immunity in the context of the Family Medical Leave Act,[119] while *Tennessee v. Lane* upheld Title II of the ADA "as it applies to the class of cases implicating the fundamental right of access to the courts."[120] *Hibbs* and *Lane* underscore the im-

[112] Id. at 86.
[113] Id.
[114] See Robert C. Post & Reva B. Siegel, Essay, Equal Protection by Law: Federal Antidiscrimination Legislation After *Morrison* and *Kimel*, 110 Yale L.J. 441, 461 (2000).
[115] 531 U.S. 356, 360, 374 (2001).
[116] Id. at 366 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985)).
[117] Id. at 368.
[118] Id. at 372.
[119] 538 U.S. 721, 725–26, 740 (2003).
[120] 541 U.S. 509, 533–34 (2004).

portance of the tier of scrutiny involved. In both cases, because of the state conduct the legislation sought to remedy, the Court used a heightened standard of review to evaluate that conduct—*Hibbs* addressed gender-based classifications, which receive intermediate scrutiny,[121] and *Lane* dealt with the right of access to the courts, which requires at least as vigorous a review.[122] These higher standards made it easier for Congress to demonstrate the requisite showing of a pattern of unconstitutional state conduct, which in turn helped the Court uphold the relevant statutes.[123] Indeed, such heightened scrutiny, especially in *Lane*, was likely required to reach these outcomes, as *Garrett* had struck down one part of the ADA only three years before.[124] This use of a higher tier of scrutiny highlights one way that Congress can overcome the imposing congruence and proportionality standard, creating space under Section Five to enact prophylactic legislation.

II. THE DEBATE

In fleshing out the Supreme Court's current doctrines governing Congress's enforcement authority under the Thirteenth and Fourteenth Amendments, Part I demonstrated the divergent scope of these powers. Part II discusses one reason that divergence matters—that *Jones* is now arguably in tension with *Boerne* and its progeny.[125] This Note joins the debate over that contention.[126] This Part examines one academic formu-

[121] *Hibbs*, 538 U.S. at 736 (citing Craig v. Boren, 429 U.S. 190, 197–99 (1976)).

[122] *Lane*, 541 U.S. at 529.

[123] Id. at 528–29; *Hibbs*, 538 U.S. at 735–37.

[124] Cf. Graham, supra note 92, at 692–93 ("The Court was much more forgiving in these two cases about the quantum of evidence necessary in order to prevail—since the standard of review was higher, there was a smaller universe of government action that would survive review. Therefore, the Court was willing, in effect, to presume the existence of a constitutional violation if Congress was able to show at least *some* evidence of one.").

[125] See, e.g., United States v. Cannon, 750 F.3d 492, 511 (5th Cir. 2014) (Elrod, J., specially concurring) (noting the "tension" between *Jones* and *Boerne*); United States v. Hatch, 722 F.3d 1193, 1203–04 (10th Cir. 2013) (noting the "worthwhile questions" *Boerne* raises about *Jones*); Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 823 (1999); McAward, supra note 27, at 81; George Rutherglen, The Thirteenth Amendment, the Power of Congress, and the Shifting Sources of Civil Rights Law, 112 Colum. L. Rev. 1551, 1571 (2012).

[126] Compare McAward, supra note 27, at 147 (arguing that *Boerne* points to structural concerns with the scope of Congress's Section Two power under *Jones*), with Tsesis, supra note 30, at 56 ("If the Court were to follow McAward's suggestion that it narrow *Jones* based on its rationale in *Boerne*, it would be deviating from over a hundred years of precedent.").

lation of the argument that *Boerne* narrowed *Jones*. While this Note argues that there is robust, untapped Thirteenth Amendment authority even under a *Boerne*-like framework, and thus not take sides on *Boerne*'s specific impact on *Jones*,[127] highlighting some of the reasons people perceive a disjunction between *Boerne* and *Jones* might prove useful.

Professor Jennifer McAward has made an articulate case that *Jones* is in tension with *Boerne*, and thus "a remnant of the past."[128] She began her argument with a historical analysis of the Thirteenth Amendment, and concluded that though the historical record does not point towards one unambiguously correct interpretation, "there was no suggestion that Section Two granted Congress any substantive power to define or expand its own vision of the Amendment's ends."[129] Beyond the historical record, McAward addressed other issues to make her case.

First, she noted the textual similarities between Section Two and Section Five.[130] These similarities support the inference that they confer substantially similar powers to Congress, importing by implication *Boerne*'s limitations to the Thirteenth Amendment. Moving beyond the text, McAward also argued that the pair of structural concerns that prompted the *Boerne* Court to adopt the congruence and proportionality test—separation of powers and federalism—are also very present in *Jones*. Separation of powers problems persist, she claimed, because *Jones* "granted an aspect of the judicial power to Congress by giving Congress power to define the ends of the Thirteenth Amendment as well."[131] *Jones*, she contended, implicates federalism concerns since a robust Section Two could create a federal police power, encroaching on areas typically under state purview.[132]

While this Note does not address whether McAward's historical account or her ultimate doctrinal conclusion are correct—but rather as-

[127] See infra Part III.

[128] McAward, supra note 27, at 81–82.

[129] Id. at 117. The record that McAward drew on included congressional and state debates surrounding the Thirteenth Amendment's ratification, congressional debates over the Civil Rights Act of 1866, and debates over the Fourteenth Amendment's adoption. Id. at 102.

[130] Id. at 85–86; see also supra note 26 and accompanying text (noting the textual similarities between the Reconstruction Amendments).

[131] McAward, supra note 27, at 140.

[132] See id. at 141; see also McAward, supra note 30, at 76–80 (discussing the separation of powers and federalism concerns *Jones* implicates, particularly in light of *Boerne*).

sumes they are—her thesis nevertheless illustrates the key elements of the argument that *Jones* did not correctly explicate Congress's Section Two power. Part II's introduction of these elements in turn facilitates Part III's goal of demonstrating how even after grafting the congruence and proportionality test onto Section Two, Congress still has a vast, untapped source of power to use.

III. WHY CONGRESS HAS EXPANSIVE THIRTEENTH AMENDMENT AUTHORITY POST-*BOERNE*

After examining the contours of the Supreme Court's Thirteenth and Fourteenth Amendment jurisprudence, and the debate over the latter's effect on the former, this Note now moves towards its main goal—demonstrating how even if the *Boerne* congruence and proportionality test applies to the Thirteenth Amendment, Congress still possesses vast, untapped legislative power. Without taking sides on whether Judge Elrod and Professor McAward are correct, but rather assuming they are, Part III lays out three broad arguments supporting this thesis. First, it describes how even under the congruence and proportionality test, Congress has unquestioned authority to pass enforcement legislation against direct violations of the Thirteenth Amendment. So long as one does not take an unduly cramped view of what Section One proscribes, this itself gives Congress a large amount of legislative authority. Next, this Part responds to the argument that *Jones* poses separation of powers problems by noting that, unlike *Boerne*, there is no adversarial clash regarding the Thirteenth Amendment, as the Supreme Court and Congress do not disagree on the meaning of that constitutional provision. Finally, this Part innovatively explores how various features of the Thirteenth Amendment mitigate the federalism concerns that drove the *Boerne* Court. This Part thus demonstrates how, generally speaking, the importation of *Boerne* analysis to the Thirteenth Amendment is not fatal for robust congressional authority.[133]

[133] To be clear, this Note recognizes that other concerns, besides those Elrod and McAward express, might prevent the Supreme Court from adopting a broad conception of Congress's Thirteenth Amendment authority. For example, certain Justices might read *Boerne* to embody a third structural concern to which there is no easy solution. Or, some Justices may have general theories of constitutional interpretation that preclude taking a broad view of Section One, thus undermining one of the bases this Note relies on. As this Note

Most importantly, as Justice Scalia made clear in *United States v. Georgia*, congruence and proportionality analysis applies only when Congress acts *prophylactically*; when legislating against *actual* violations, Congress has much more power, even so far as abrogating sovereign immunity.[134] Accordingly, so long as Congress legislates against actual Section One violations, whether or not the Court grafts *Boerne* onto the Thirteenth Amendment is immaterial. Importantly, several arguments for novel Thirteenth Amendment applications root themselves in Section One.[135] In light of this, *Georgia* highlights one mechanism through which Congress, even under a congruence and proportionality test, would retain potent Thirteenth Amendment authority. This fusion of the *Boerne* framework with arguments that certain conduct—for example gender-based violence—violates Section One is one of this Note's largest contributions towards showing why such a framework does not, by itself, severely restrict Congress's Thirteenth Amendment power. Having observed the principal reason for robust Thirteenth Amendment authority, this Part now seeks to advance the literature by mitigating *Boerne*'s pair of structural concerns, further demonstrating Congress's expansive Thirteenth Amendment power, even within the *Boerne* paradigm.

A. Lack of Adversarial Clash Means Fewer Separation of Powers Concerns

As mentioned above, an important concern driving the Supreme Court towards the rigid congruence and proportionality test was separation of powers. Any congressional definition of the scope of the constitutional rights it was protecting would encroach upon the Court's role to define the law.[136] In *Boerne*, the Court felt that Congress assumed this role by "attempt[ing] a substantive change in constitutional protections."[137] As Judge Elrod observed in her special concurrence in *United States v. Cannon*, a case upholding a law passed pursuant to the Thir-

seeks to address, strictly on its own terms, the argument that *Boerne* limits Congress's Section Two authority, it does not weigh in on these other issues.

[134] 546 U.S. 151, 158–59 (2006).

[135] See, e.g., Koppelman, supra note 7, at 486 ("[T]his essay will focus on the first [section of the Thirteenth Amendment].").

[136] See supra notes 106–07 and accompanying text.

[137] *Boerne*, 521 U.S. at 532.

teenth Amendment, "*Jones*'s articulation of [Congress's authority] is thus in tension with" *Boerne*, since Congress, under *Jones*, "has just such a power to define 'badges' and 'incidents' of slavery" that the Court found troubling in *Boerne*.[138]

While Judge Elrod is certainly correct that giving Congress broad definitional authority over the badges and incidents of slavery could expand the scope of permissible Thirteenth Amendment legislation, this dynamic alone does not present the separation of powers problems that frightened the *Boerne* Court vis-à-vis RFRA. Fundamentally, this is because *Boerne* represented a literal adversarial clash between the Court's interpretation of the Free Exercise Clause and that of Congress.[139] The Court held that the Free Exercise Clause did not contain a compelling interest test for neutral and generally applicable laws, but Congress thought it did (or at least should), and so Congress enacted RFRA.[140]

The Court's first two forays into the intersection of the Equal Protection Clause and sovereign immunity post-*Boerne*, *Kimel v. Florida Board of Regents*[141] and *Board of Trustees of the University of Alabama v. Garrett*,[142] demonstrate a similar disagreement.[143] In both cases, Congress used its Section Five authority to proscribe conduct that had a rational basis, the only requirement to pass constitutional muster.[144] Again, there was an adversarial clash—Congress sought to outlaw conduct the Court deemed constitutional.

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[138] 750 F.3d 492, 511 (5th Cir. 2014) (Elrod, J., specially concurring).

[139] See McConnell, supra note 93, at 153 ("[*Boerne*] arose from a fundamental difference of opinion between Congress and a current majority of the Court over the scope and meaning of the Free Exercise Clause.").

[140] See 42 U.S.C. § 2000bb(b)(1) (2012) (listing RFRA's first purpose as "to restore the compelling interest test as set forth in [earlier Free Exercise Clause cases] and to guarantee its application in all cases where free exercise of religion is substantially burdened").

[141] 528 U.S. 62 (2000).

[142] 531 U.S. 356 (2001).

[143] See supra notes 110–18 and accompanying text.

[144] See *Garrett*, 531 U.S. at 372 ("[W]hereas it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities, the ADA requires employers to mak[e] existing facilities used by employees readily accessible to and usable by individuals with disabilities." (second alteration in original) (citation omitted)); id. ("The ADA also forbids 'utilizing standards, criteria, or methods of administration' that disparately impact the disabled, without regard to whether such conduct has a rational basis." (citing 42 U.S.C. § 12112(b)(3)(A) (2012))); *Kimel*, 528 U.S. at 86.

By contrast, there is no direct clash with the congressional definition of badges and incidents. First, as far back as the *Civil Rights Cases*, the Court observed that "it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[145] *Jones*'s explicit holding on this point eighty-five years later entrenches the notion that the Court itself deems legislation on badges and incidents within congressional power.[146] The Court routinely looks to its own precedent to set the scope of the right Congress legislates on,[147] and any tension between *Jones* and *Boerne*, at least regarding separation of powers, stems from a too-large congressional role, not the inclusion of badges and incidents in the Thirteenth Amendment's orbit.[148]

It is true that, since the Thirteenth Amendment gives Congress the power to legislate on the badges and incidents of slavery, giving Congress the power to define the badges and incidents of slavery, subject to rational basis review, makes it "difficult to conceive of a principle that would limit congressional power."[149] However, this sort of issue is different from saying that Congress invokes power to enforce the Thirteenth Amendment via legislation that is *contrary to* the Supreme Court's interpretation of that Amendment. Under *Boerne*, defining the scope of a constitutional provision in a manner inconsistent with the Court's interpretation is the problem.

When the Court applied the congruence and proportionality test in *Nevada Department of Human Resources v. Hibbs*, it held that Congress

[145] 109 U.S. 3, 20 (1883).

[146] 392 U.S. at 439 ("Whether or not the Amendment *itself* did any more than [abolish slavery] . . . it is at least clear that [Section Two] of that Amendment empowered Congress to do much more. For that clause clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*.'" (quoting *The Civil Rights Cases*, 109 U.S. at 20)).

[147] See Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728–29 (2003) (citing cases showing heightened scrutiny for gender-based classifications, as well as earlier cases that applied a lesser standard and allowed "state laws limiting women's employment opportunities"); *Garrett*, 531 U.S. at 367 (relying on precedent to determine the constitutional standard for discrimination against the disabled); *Kimel*, 528 U.S. at 82–83 (same, for age discrimination).

[148] See supra note 125 and accompanying text.

[149] Cannon, 750 F.3d at 511 (Elrod, J., specially concurring) (quoting *Boerne*, 521 U.S. at 529).

satisfactorily documented "unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits," without citing a single holding that states administered such benefits unconstitutionally.[150] Instead, the Court looked to cases defining the standard of scrutiny for gender-based classifications, applied that standard to the record Congress compiled, and held that Congress had satisfactorily demonstrated unconstitutional state conduct.[151] The administration of family leave benefits thus was added to the realm of conduct where illicit gender-based discrimination was found, joining such areas as the sale of beer,[152] the military's processes for declaring a spouse a dependent,[153] and admission into a military school.[154] Just as Congress compiled evidence showing unconstitutional state conduct based on the Court's jurisprudence in other cases,[155] so too could Congress look at cases interpreting the scope of Section Two to see if a particular area of legislation fits within the badges and incidents framework.

Alternatively, the Court may lay out some definition of badges and incidents, or parameters that any badge or incident must meet, and these parameters would bind congressional legislation under Section Two. An analogy to the Commerce Clause is helpful. Although the Supreme Court generally "defers to Congress's rational policy goals," Congress can only regulate "economic activity" under the Commerce Clause; accordingly, noneconomic activity and economic inactivity are both outside that purview.[156] Similarly, should the Court require certain conditions for Section Two legislation, Congress must abide by those to avoid

[150] 538 U.S. at 735.
[151] Id. at 728–35.
[152] Craig v. Boren, 429 U.S. 190, 209–10 (1976).
[153] Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (plurality opinion).
[154] United States v. Virginia, 518 U.S. 515, 545–46 (1996).
[155] Cf. Post & Siegel, supra note 93, at 11 ("The second stage of the *Garrett* test asks whether Congress has assembled evidence demonstrating that a constitutional right has been systematically violated . . . .").
[156] Craig L. Jackson, The Limiting Principle Strategy and Challenges to the New Deal Commerce Clause, 15 U. Pa. J. Const. L. 11, 54–55 (2012); see NFIB v. Sebelius, 132 S. Ct. 2566, 2591 (2012) (holding that Congress could not enact the individual mandate provision of the Affordable Care Act under the Commerce Clause because it regulated inactivity); *Morrison*, 529 U.S. at 617 (holding that Congress did not have power to enact a federal civil rights remedy for victims of gender-based violence since such violence is not an economic activity).

"attempt[ing] a substantive change in constitutional protections."[157] However, until the Court lays out such conditions, grafting the congruence and proportionality test onto Section Two would not generate the separation of powers problems the Court found in *Boerne*, *Kimel*, and *Garrett*, when Congress legislated in a fashion directly contrary to the Court's jurisprudence.[158] As cases like *Hibbs* demonstrate, the mere addition of a course of conduct not previously held unconstitutional does not violate the congruence and proportionality test. This dynamic, which did not exist in the Free Exercise Clause context, does exist with Section Two, and demonstrates how, as an initial matter, *Boerne* is far from fatal for robust congressional authority under the Thirteenth Amendment.

B. Thirteenth Amendment Features Mean Fewer Federalism Concerns

Besides separation of powers concerns, apprehensiveness about federalism also drove the Supreme Court towards the congruence and proportionality test.[159] Just like the separation of powers problems, however, the federalism issues in the Thirteenth Amendment context are less problematic than they are for Section Five, meaning fewer exercises of legislative authority are likely to be found unlawful. This reduction in federalism issues under the Thirteenth Amendment stems both from its unique lack of a state action requirement and from several other factors particular to the Thirteenth Amendment. This relative lack of federalism concerns further underscores the robust space Congress has for Thirteenth Amendment legislation, even under the congruence and proportionality test.

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[157] *Boerne*, 521 U.S. at 532. Some authors have in fact proposed certain limitations on the scope of badges and incidents of slavery. See, e.g., Carter, supra note 47, at 1365–69.

[158] A closer look at *Kimel* and *Garrett* highlights the point even further. The Equal Protection Clause allows disparate treatment so long as a balancing test is met. See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) ("To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose."). This balancing analysis exists for other constitutional rights as well. See, e.g., First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 786 (1978) (citing cases to describe how government regulations of speech must demonstrate that the regulation furthers a compelling interest and is "closely drawn to avoid unnecessary abridgement"). By contrast, the Thirteenth Amendment has no balancing component.

[159] See supra note 107 and accompanying text.

1. Lack of a State Action Requirement: Sovereign Immunity

The vast majority of Supreme Court cases applying the congruence and proportionality test involve an abrogation of state sovereign immunity.[160] This presents obvious federalism issues, since the whole purpose of abrogation is to make states liable for monetary damages, one of the more direct "hits" on a state that is possible.[161] Likely, this ubiquity of sovereign immunity abrogation stems from the nature of the Fourteenth Amendment, which "embod[ies] significant limitations on state authority."[162] Therefore, whatever federalism concerns underpin the congruence and proportionality test and point towards its stringent application, they are highest when legislation abrogates sovereign immunity.

The Court itself has hinted at this.[163] This hint came from a dictum in *Garrett*, where the Court observed in a footnote that although Congress unconstitutionally abrogated states' sovereign immunity from monetary damages in suits brought by private individuals, states were still liable to "private individuals" seeking "injunctive relief."[164] As Professor Calvin Massey observed, "it may be a recognition that in a nonabrogation context the scope of the enforcement power is broader than when abrogation is at issue."[165] The *Garrett* Court, Massey noted, relied on *Ex parte Young*,[166] which he described "as the apparent source of authority for private actions against states seeking injunctive relief for state violations of Title I of the ADA."[167] He noted that the Court's mere citation of

[160] See Graham, supra note 92, at 688–89 ("[A]lmost all of [the cases following *Boerne*] challenged the validity of a Congressional abrogation of state sovereign immunity.").

[161] Cf. Alden v. Maine, 527 U.S. 706, 713 (1999) ("[A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today.").

[162] Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

[163] Calvin Massey, Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power, 76 Geo. Wash. L. Rev. 1, 50 (2007) ("The Court has intimated that Congress may have even greater freedom to prevent constitutional injury when abrogation of state sovereign immunity is not at issue. If this is so, the meaning of congruence and proportionality must differ from the abrogation context.").

[164] *Garrett*, 531 U.S. at 374 n.9.

[165] Massey, supra note 163, at 24.

[166] 209 U.S. 123 (1908).

[167] Massey, supra note 163, at 27. *Young* allows injunctions against officials since

> [an] officer in proceeding under such [unlawful] enactment[s] comes into conflict with the superior authority of that Constitution [or other laws], and he is in that case stripped of his official or representative character and is subjected in his person to the

Young "does not dispose of the question, though, because a suit under *Ex parte Young* may be brought to ensure compliance with any federal law, no matter what the source of federal authority for its enactment."[168]

While Massey is certainly correct that the *Garrett* footnote does not by itself establish that Congress faces a less stringent congruence and proportionality test, several clues indicate that it does. First, if Massey's alternative implication for the footnote, that Congress had authority to pass Title I of the ADA under the Commerce Clause,[169] is correct, that, at a minimum, is consistent with a less strenuous congruence and proportionality test under Section Five for nonabrogation legislation. The Court has explicitly held that, unlike under Section Five, Congress cannot abrogate states' sovereign immunity under the Commerce Clause.[170] However, Congress clearly has authority to pass Title I as it applies to private employers, or in any nonabrogation context.[171] This simple illustration underscores how, at least when it comes to the Commerce Clause, there is greater authority in the nonabrogation context, something not inconsistent with Congress possessing greater power under Section Five when not abrogating sovereign immunity.

Second, the Court has forcefully declared that sovereign immunity is key to maintaining independent state control of its sovereignty,[172] some-

> consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Young, 209 U.S. at 159–60.

[168] Massey, supra note 163, at 27.

[169] Id. at 24.

[170] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–73 (1996) ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). Although *Seminole Tribe* dealt with abrogation under the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, the Court specifically held that there is "no principled distinction in favor of the States to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause." *Seminole Tribe*, 517 U.S. at 63.

[171] See Massey, supra note 163, at 26–27 ("Title I deals with employment, a quintessentially economic activity that is almost certain, in the aggregate, to affect interstate commerce substantially.").

[172] See Alden v. Maine, 527 U.S. 706, 749 (1999) ("A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. Such plenary federal control of state governmental processes denigrates the separate sovereignty of the States." (citation omitted)).

thing Massey characterizes as "state autonomy."[173] As a theoretical matter, sovereign immunity's importance calls for a tighter fit between the harm addressed and the means used to address it.[174] Massey has observed, for example, that one "cannot reasonably expect Congress to be attentive to fiscal problems of states, for federal legislators have no responsibility with respect to those funds and no accountability for their collection or expenditure."[175] This disconnect suggests a stronger need to cabin legislation abrogating sovereign immunity, and the vehicle to do so is a stringent congruence and proportionality test.[176] Indeed, scholars, including Massey, have argued that this dichotomy points towards more congressional authority under Section Five in the nonabrogation context, inferring a strong theoretical basis that the *Garrett* dictum implies this less stringent test.[177]

Incorporating this analysis into the Thirteenth Amendment, almost no conceivable legislation Congress might pass pursuant to that Amendment involves the abrogation of states' sovereign immunity.[178] A major reason is the Thirteenth Amendment's lack of a state action requirement, which both broadens its reach and decreases abrogation's importance. Beyond that, the heartland scenario that the Thirteenth Amendment proscribes, one person owning another person as chattel,[179] inherently ap-

[173] Massey, supra note 163, at 28.

[174] Id. at 50 ("The central concern of abrogation of state sovereign immunity is protection of the sovereignty of the states and autonomous state governance by preservation of the public fisc. Those concerns become of lesser importance when abrogation is not at issue . . . .").

[175] Id. at 41.

[176] See id. at 42 ("When abrogation is not at issue, however, strict adherence to tiered scrutiny as a device to apply congruence and proportionality is neither necessary nor particularly helpful to preservation of federalism principles.").

[177] See id. at 7 ("[W]ithin the outer zone, Congress should be free to prohibit state practices that have not been determined by the Supreme Court to be constitutionally valid when a substantial portion of such practices materially interferes with an inchoate constitutional right. . . . [T]his standard is more flexible than that which applies in the abrogation context."); see also Graham, supra note 92, at 670 (arguing "that Congress should have the flexibility to invalidate state practices, including those that the Court has not yet determined are unconstitutional, when sovereign immunity is not at stake, . . . subject . . . to a rational basis standard of review.").

[178] The most conceivable sort of legislation would be legislation abrogating a state's sovereign immunity if a state held someone in slavery or involuntary servitude. This would easily pass muster under even the most stringent congruence and proportionality test, since, as *Georgia* makes clear, Congress can legislate against actual Fourteenth Amendment violations. See United States v. Georgia, 546 U.S. 151, 158 (2006).

[179] See supra note 47 and accompanying text.

plies more so to private conduct than state action. In fact, a survey of major Thirteenth Amendment cases reveals that they typically involve conduct between two private individuals.[180] Given the Thirteenth Amendment's orientation, both conceptually and practically, towards private action, almost all legislation passed pursuant to it would, by definition, not involve abrogation. As a result, the Court would likely apply the less rigorous congruence and proportionality test that *Garrett* hinted exists for such circumstances, meaning Congress would have, similar to the Commerce Clause, more power under Section Two than it would otherwise have in a typical Section Five abrogation scenario.

2. Lack of a State Action Requirement: Examining Morrison

While the fact that most potential Thirteenth Amendment legislation would not abrogate states' sovereign immunity suggests more robust Thirteenth Amendment authority, this alone is not dispositive. For even outside the abrogation context, congressional enforcement of the Reconstruction Amendments raises federalism concerns.[181] Indeed, post-*Boerne*, the only time the Supreme Court has applied the congruence

[180] See, e.g., United States v. Kozminski, 487 U.S. 931, 934 (1988) (criminal prosecution for keeping intellectually disabled people in involuntary servitude); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 616 (1987) (desecration of a synagogue); Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 606 (1987) (private employment discrimination); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 275 (1976) (same); *Jones*, 392 U.S. at 413 (private housing discrimination); Clyatt v. United States, 197 U.S. 207, 215 (1905) (criminal prosecution for holding someone in peonage); The Civil Rights Cases, 109 U.S. 3, 4 (1883) (private discrimination in public accommodations); United States v. Djoumessi, 538 F.3d 547, 549 (6th Cir. 2008) (criminal prosecution for holding an immigrant in peonage); United States v. Nelson, 277 F.3d 164, 168–69 (2d Cir. 2002) (criminal prosecution for religiously motivated assault).

[181] Cf. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009) (noting the "federalism costs" that Section Five of the Voting Rights Act, passed pursuant to Congress's authority to enforce the Fifteenth Amendment, imposes); *Boerne*, 521 U.S. at 532 ("Sweeping coverage ensures [RFRA's] intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. . . . The reach and scope of RFRA distinguish it from other measures passed under Congress' enforcement power."); McAward, supra note 30, at 77–78 ("By permitting Congress to define the badges and incidents of slavery, *Jones* put its imprimatur on a power of near-plenary proportions that could permit Congress to attack any form of discrimination against any group. This conception of the Section 2 power carries substantial federalism costs." (footnote omitted)).

and proportionality test outside the abrogation context[182]—*Morrison*—it struck down legislation as beyond Congress's Section Five authority.[183] While that result, if anything, points towards narrow authority, a close analysis indicates this is not so.

Part IV of this Note, which applies the *Boerne* analysis to a Thirteenth Amendment justification for the law rejected in *Morrison*, will address the case in more depth,[184] but for the purpose of generalizing across Thirteenth Amendment applications *Morrison* does contain one important message. The state action requirement, the same factor pushing Congress to most commonly invoke Section Five when abrogating states' sovereign immunity,[185] caused the Court to strike down the law at issue.[186]

In *Morrison*, the Supreme Court held that Congress did not have authority, under either the Commerce Clause or Section Five of the Fourteenth Amendment, to enact Section 13981(c) of VAWA, which gave victims of gender-based violence a federal civil remedy against their attackers.[187] Regarding Section Five, the Court fixated on the Fourteenth Amendment's state action requirement.[188] The government argued that Section 13981(c) met this requirement since Congress compiled

> a voluminous . . . record [containing] evidence that many participants in state justice systems . . . perpetuat[e] an array of erroneous stereotypes and assumptions [that] often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably

[182] See Graham, supra note 92, at 688–89, 689 n.110 (describing *Morrison* as "[t]he exception" to the trend of cases regarding Congress's Section Five power post-*Boerne* as addressing abrogation of states' sovereign immunity).

[183] See 529 U.S. at 627 ("[W]e conclude that Congress' power under §5 does not extend to [the law at issue].").

[184] Infra Section IV.C.

[185] See Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (characterizing the Fourteenth Amendment as "embody[ing] significant limitations on state authority").

[186] Cf. Massey, supra note 163, at 26 ("*Morrison* appears to stand simply for the proposition that the enforcement power . . . is limited to remedies against state actors.").

[187] See supra text accompanying notes 3–4.

[188] *Morrison*, 529 U.S. at 624 (quoting The Civil Rights Cases, 109 U.S. 3, 18 (1883), to reaffirm its holding).

> lenient punishments for those who are actually convicted of gender-motivated violence.[189]

According to the government, "this bias denies victims of gender-motivated violence the equal protection of the laws," meaning "that Congress . . . acted appropriately in enacting a private civil remedy against the perpetrators of gender-motivated violence to both remedy the States' bias and deter future instances of discrimination in the state courts."[190]

The Court, relying heavily on the fact that Section 13981(c)'s cause of action laid against, and thus made liable for damages, not "any State or state actor, but [the] *individuals* who have committed criminal acts motivated by gender bias," rejected this argument.[191] The disjunction between the party that generated the constitutional impropriety and the party against whom the cause of action laid was too much for the Court.[192] After *Morrison*, it seems like no Section Five legislation could pass muster without applying directly to state actors.

The distinction between that holding and any Thirteenth Amendment legislation is readily apparent. As mentioned before, the Thirteenth Amendment, unlike the Fourteenth, has no state action requirement.[193] Without that requirement, there is no reason to think the Court would graft one onto Thirteenth Amendment legislation, even under a congruence and proportionality test. And if past is prologue, the Court will have no problem holding that Congress's Thirteenth Amendment authority extends to purely private conduct.[194]

*3. Pre-*Jones *Applications Mitigate Federalism Concerns*

While the Thirteenth Amendment's lack of a state action requirement lends itself to a more forgiving application of the congruence and proportionality test than the Supreme Court typically uses for Section Five,

[189] Id. at 620.
[190] Id.
[191] Id. at 626 (emphasis added).
[192] See id. The Court also noted another problem with Section 13981: It applied nationwide, even though Congress only had findings about any gender-based discrimination in a handful of states, another contrast with prior cases, where the remedy applied only to states where a problem existed. Id. at 626–27.
[193] See supra text accompanying note 46.
[194] See supra text accompanying note 180.

there still are potential federalism problems with an expansive interpretation. The main fear is that if "Congress [can] define the badges and incidents of slavery, [it has] a power of near-plenary proportions," creating a risk that the Thirteenth Amendment will be used as "a general police power."[195]

Although any congressional authority under the Thirteenth Amendment would, almost by definition, expand federal power, pre-*Jones* cases showing support for a strong federal role mitigate these concerns. For example, even the Reconstruction-era Court, operating against a jurisprudential backdrop which endorsed a fairly narrow view of the Thirteenth Amendment's coverage,[196] still held, on multiple occasions, that the Thirteenth Amendment proscribed peonage.[197] This inclusion of peonage within the Thirteenth Amendment's orbit speaks volumes, since peonage involves the intersection of two areas of law typically left to the states—criminal law and contract law.

The Court underscored the link between peonage and these two state-dominated areas in *Bailey v. Alabama*, when it ruled that an Alabama statute "compelling personal service in liquidation of a debt" violated the Thirteenth Amendment.[198] The statute in question required, inter alia, "a contract in writing by the accused for the performance of any act or service."[199] Additionally, the statute in question provided criminal sanctions for violating these particular types of contracts.[200] Yet the Court reasoned, notwithstanding the Thirteenth Amendment's allowance of involuntary servitude "as a punishment for crime whereof the party shall have been duly convicted,"[201] "[i]t does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other."[202]

[195] McAward, supra note 30, at 77–78, 79.
[196] See supra text accompanying note 77.
[197] See supra text accompanying notes 55–57; see also Goluboff, supra note 77, at 143–44 (describing the Supreme Court's peonage jurisprudence from the early part of the twentieth century).
[198] 219 U.S. 219, 227 (1911); id. at 245 (Holmes & Lurton, JJ., dissenting).
[199] Id. at 232 (majority opinion) (quoting Ex parte Riley, 10 So. 528, 529 (Ala. 1892)).
[200] Id. at 227–28.
[201] U.S. Const. amend. XIII, § 1.
[202] *Bailey*, 219 U.S. at 244.

In *Bailey*, the Supreme Court carried out its "gravest and most delicate duty," and declared an Alabama statute unconstitutional.[203] It did so even though the statute dealt with contractual remedies, an area generally governed by state law.[204] And as Justice Holmes pointed out, the Court's holding effectively limited the remedies available for certain breaches of contracts by preventing Alabama from "throw[ing] its weight on the side of performance."[205] Additionally, beyond striking down a state law (and a state contract law at that), *Bailey* dealt with crime, an area typically reserved for state control.[206] The fact that the Court, well before *Jones*, used the Thirteenth Amendment to strike down a state criminal law dealing with breach of contract remedies underscores just how much space the Amendment creates for federal legislation before it runs into federalism concerns. Combining this with the lack of abrogations of states' sovereign immunity, and the lack of a state action requirement, the robust space for Thirteenth Amendment legislation, even under a congruence and proportionality regime, becomes visible.

IV. SECTION 13981(C), THE CIVIL REMEDY FOR GENDER-BASED VIOLENCE, AS A CASE STUDY

Part III has described Congress's generally robust power under the Thirteenth Amendment, even under a congruence and proportionality regime. Part IV provides a case study demonstrating this authority—Section 13981(c) of VAWA, which provided a federal civil remedy for victims of gender-based violence. This example is particularly potent since the Supreme Court struck down this remedy in *Morrison*, in part

[203] See Furman v. Georgia, 408 U.S. 238, 431 (1972) (Powell, J., dissenting) ("The review of legislative choices, in the performance of our duty to enforce the Constitution, has been characterized . . . as 'the gravest and most delicate duty that this Court is called on to perform.'" (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring))).

[204] See Hudson v. Cent. Ga. Health Servs., No. 5:04CV301(DF), 2005 WL 4145745, at *6 n.1 (M.D. Ga. Jan. 13, 2005); cf. DDB Techs., L.L.C. v. MLB Advanced Media, L.P., 517 F.3d 1284, 1290 (Fed. Cir. 2008) ("Although state law governs the interpretation of contracts generally . . . . [w]e have . . . treated [the issue in the case] as a matter of federal law." (citation omitted)).

[205] *Bailey*, 219 U.S. at 247 (Holmes, J., dissenting).

[206] See United States v. Lopez, 514 U.S. 549, 564 (1995) (characterizing criminal law as an area of law "where States historically have been sovereign").

because it exceeded Congress's Section Five authority.[207] By demonstrating that Section 13981(c) passes muster under the Thirteenth Amendment, this Note further underscores the breadth of Congress's Thirteenth Amendment power.

The main argument supporting Thirteenth Amendment authority to enact Section 13981(c) is that gender-based violence is a form of involuntary servitude directly proscribed by Section One, rendering it immune to congruence and proportionality analysis. While Section A of this Part will rely on arguments formulated by other authors to demonstrate how certain forms of gender-based violence constitute involuntary servitude, by rooting this contention in Section One, this Note fuses the debate over the nature of gender-based violence with the debate over *Boerne's* application to the Thirteenth Amendment.

Next, Section B will show how even one-off incidents of gender-based violence fall within the Thirteenth Amendment's orbit, even under congruence and proportionality, pushing previous arguments that gender-based violence constitutes involuntary servitude further than they typically go. After laying out these claims, Section C will then address how the Court's *Morrison* holding does not eliminate Congress's Thirteenth Amendment authority to reenact Section 13981(c), bringing this Note's main point to life through a concrete example.

No matter how expansive or constricted one's view of Congress's Reconstruction Amendments authority is, there is no doubt that Congress can remedy and punish actual violations of those Amendments. This Part will attempt to show how gender-based violence fits into Section One as a form of involuntary servitude, falling cleanly within Congress's Thirteenth Amendment authority.

As mentioned in Subsection I.A.2, the Supreme Court held in *United States v. Kozminski* that involuntary servitude requires that a victim, given any special vulnerabilities, face either actual or threatened physical or legal coercion.[208] And a canvas of Thirteenth Amendment precedents, including *Kozminski* itself, highlights that the Thirteenth Amendment's protections apply to everyone, not just descendants of antebellum black slaves.[209] Based on these precedents, Professors Akhil Amar and Daniel

[207] *Morrison*, 529 U.S. at 627.
[208] 487 U.S. 931, 952 (1988); see supra text accompanying notes 61–67.
[209] See supra text accompanying notes 50–58.

Widawsky have characterized the Thirteenth Amendment's "central concern . . . [as] not labor, not adulthood, not blackness, not state action, not biology, but *slavery*—a system of dominance and subservience, often on a personal scale, and the reduction of human beings to the status of things."[210] The nature of gender-based violence, with the batterer exploiting his power over the victim, using physical coercion, links such violence to the Thirteenth Amendment.

A. Gender-Based Violence in Long-Term Abusive Relationships

One broad way to group gender-based violence episodes is longevity—those that are sustained, systematic abusive relationships; and those that are one-off episodes of violence—and each type presents different issues for assessing Thirteenth Amendment coverage.[211] Addressing the former, Professor Joyce McConnell, in comparing the stories of three battered women to the stories of three successful criminal prosecutions for involuntary servitude, noted how similar they were.[212] She observed that battering is not simply physical violence, but is rather a larger system of control over these women's lives. Beyond violence, this control manifests itself through isolating the victims, denying them money or medical care, threatening abuse or removal of children, and other "coercive techniques."[213] McConnell noted that the women she profiled suffered a level of violence and physical coercion at least equivalent to that of the victims of the involuntary servitude cases she canvassed,[214] easily exceeding *Kozminski's* threshold of physical coercion.

The level of coercion in battered women cases with regular, gruesome physical abuse is clearly sufficient under *Kozminski* to render a domestic violence victim's relationship with her batterer involuntary. Section 13981(c), by allowing the cause of action only for "crime[s] of violence motivated by gender," further demonstrates this. By definition, this en-

[210] Amar & Widawsky, supra note 8, at 1384.

[211] Cf. Hearn, supra note 5, at 1162 (noting a distinction between "long-term severe battering relationship[s]," and "isolated violent crimes and cases of battering").

[212] See McConnell, supra note 5, at 239–43.

[213] Id. at 233, 240.

[214] See id. at 241. For example, one involuntary servitude case McConnell cites, *Pierce v. United States*, 146 F.2d 84 (5th Cir. 1944), involved a man who "posted bond for female prisoners in exchange for their services . . . . He regularly beat the women if they refused to prostitute for him; . . . he threatened them with further physical abuse; and he did not clear their debts, no matter how much they worked or earned." McConnell, supra note 5, at 226.

tails physical coercion, for otherwise the actions would not be violent.[215] Thus, the distinguishing feature between women in long-term battering relationships and successful criminal prosecutions for involuntary servitude is the former's lack of an economic component.[216]

As Professors McConnell and Hearn demonstrate, however, an economic component, such as an employee-employer relationship, is not necessary for involuntary servitude under the Thirteenth Amendment. First, McConnell points out that the distinction fails on its own terms, since gender-based violence enables the batterer to focus on his job and avoid household tasks the victim performs (such as cooking and cleaning), increasing his own economic productivity.[217] Even more clearly, these women engaged in an economic activity, or at least an activity that has economic value. If the batterer wanted his house cleaned, but did not want to do the work himself, he would need to hire someone else to do it. As such, when gender-based violence occurs in a relationship where the victim plays some role in performing tasks that materially aid the batterer, the relationship clearly has an economic component.

Moving beyond the traditional understanding of economic relationships, when the gender-based violence escalates to rape, that too has an economic analogue: prostitution, where people pay for sex they otherwise would not have.[218] Accordingly, just as a batterer's victim's contributions in cooking his meals saves him money he would otherwise spend on a cook or at restaurants, he saves money he would otherwise spend on sex. While courts do not typically assess one's potential value in the prostitution market in doing so, they do regularly award damages for loss of both sexual and nonsexual relations.[219] Loss of consortium, for example, awards monetary damages for the loss of "society, companionship, love, affection, aid, services, support, sexual relations and the comfort of [one's spouse] as special rights and duties growing out of the

[215] 42 U.S.C. § 13981(c) (2012).

[216] See Hearn, supra note 5, at 1159 (citing McConnell, supra note 5, at 242).

[217] McConnell, supra note 5, at 245.

[218] See id. at 226 (describing two prostitution cases prosecuted under the Thirteenth Amendment, *Pierce*, 146 F.2d 84, and *Bernal v. United States*, 241 F. 339 (5th Cir. 1917)). While these cases clearly have an employee-employer dynamic, with prostitute and pimp, if a batterer rapes his victim, one could conceive this as saving money he would need to spend on a prostitute for sex, similar to how his victim's contributions in cooking his meals saves him money he would otherwise spend on a cook or at restaurants.

[219] Id. at 245.

marriage covenant."[220] Thus, the sexual and nonsexual aspects of the relationship that the batterer seeks to maintain can be understood as having economic value. Although this specific injury, at least in states with this definition, applies only to married couples, nonmarried couples still experience some of these relational benefits. Given all this, the absence of an employee-employer relationship in abusive long-term relationships is not fatal for classifying these relationships as a form of slavery proscribed by Section One of the Thirteenth Amendment.

Two potential objections to this classification are: (1) that such relationships begin voluntarily; and (2) that victims have opportunities to leave, thus rendering the relationship not "involuntary servitude." Both of these objections have flaws. The Supreme Court directly addressed the voluntariness point in *Bailey v. Alabama*, when it struck down a peonage law.[221] The Court specifically held that the fact that a debtor held in peonage had previously contracted with the creditor does not make "the condition of servitude . . . less involuntary," since "[t]he contract exposes the debtor to liability for the loss due to the breach, but not to enforced labor."[222] By analogy then, the fact that a woman voluntarily entered a relationship with an abusive partner does not make her "condition of servitude . . . less voluntary." If anything, the battered woman has a stronger case, since the peon expressly bargained for a contract that could expose him to forced labor, while no woman would voluntary enter a relationship containing extreme levels of abuse as an explicit condition.

The argument that women in these relationships have opportunities to leave and fail to do so, making the relationship not involuntary, is equally deficient. First, the criminal involuntary servitude statute, 18 U.S.C. § 1584, which is based on the Thirteenth Amendment,[223] explicitly criminalizes the involuntary servitude of "any other person for any term,"[224] rendering even isolated incidents of involuntariness sufficient to establish liability. Indeed, Judge Jeffrey Sutton of the Sixth Circuit has used such reasoning to reject the "opportunity to escape" argument from a criminal defendant, observing that since "some portion of [the victim's]

[220] Kirk v. Koch, 607 So. 2d 1220, 1224 (Miss. 1992).
[221] 219 U.S. 219, 245 (1911).
[222] Id. at 242.
[223] See *Kozminski*, 487 U.S. at 944–45.
[224] 18 U.S.C. § 1584(a) (2012).

stay" was involuntary, that sufficed for a conviction.[225] Second, failure to attempt an escape stems from fear of physical retribution—based on either the experience of others, threats of such physical abuse, or both—and that is enough for a conviction of involuntary servitude.[226]

For a variety of reasons, this fear permeates abusive relationships.[227] First, as Hearn explains, "a woman is more likely to be killed after separation from an abusive partner than before separation."[228] Beyond that potentially fatal risk, Hearn points out that:

> [B]ecause severe battering often involves systematic economic and social isolation of the victim, the abused woman may lack the financial resources to support herself. Also, her batterer may stalk her or show up at her workplace. When the woman has children, the economic and safety problems are magnified. Batterers may threaten and abuse the children, kidnap them after the mother leaves, or file for custody of the children in common.[229]

In any sense of the phrase, these structural conditions function as "special vulnerabilities" that contextualize whether the batterer's coercion, or threats of coercion, "could plausibly have compelled the victim to serve."[230] Both case law and practical reality demonstrate that neither voluntary entry into a relationship nor failure to take advantage of escape opportunities renders a battered relationship voluntary, providing a strong basis for including these long-term abusive relationships under Section One.

As long-term abusive relationships fall within Section One's prohibition on involuntary servitude, there is no doubt that, in these situations, Congress can enact Section 13981(c). That federal remedy provided victims with a cause of action against their batterers "for the recovery of compensatory and punitive damages, injunctive and declaratory relief,

[225] United States v. Djoumessi, 538 F.3d 547, 552–53 (6th Cir. 2008) (emphasis omitted).

[226] See, e.g., United States v. Bibbs, 564 F.2d 1165, 1168 (5th Cir. 1977).

[227] See McConnell, supra note 5, at 233 ("In one study, 68% of the battered women reported feeling trapped."); cf. id. at 240–42 (describing the contexts that made three battered women feel unable to escape).

[228] Hearn, supra note 5, at 1160 (emphasis omitted) (citing Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1, 72–75 (1991)).

[229] Id. at 1160–61(footnotes omitted).

[230] *Kozminski*, 487 U.S. at 952.

and such other relief as a court may deem appropriate." [231] It functions as a direct enforcement provision, punishing the violator of the Thirteenth Amendment for conduct that violates the Thirteenth Amendment. As Justice Scalia observed for a unanimous Supreme Court in *United States v. Georgia*, "no one doubts that § 5 [of the Fourteenth Amendment] grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions."[232] Justice Scalia's analysis took place in the context of the *Boerne* congruence and proportionality test. If the same test applies to the Thirteenth Amendment, the same result should also. Nobody doubts that under Section Two of the Thirteenth Amendment, Congress can enforce the prohibitions of Section One by creating private remedies against those who violate it. And unlike the Fourteenth Amendment, the Thirteenth Amendment covers both state action and private conduct.[233] Under *Georgia's* logic, Congress has Thirteenth Amendment authority to enact Section 13981(c) for cases of long-term battering.

B. One-Off Incidents of Gender-Based Violence

Beyond encompassing long-term abusive relationships, Section 13981(c) by its terms also covered one-off incidents of gender-based violence, such as a case of stranger rape. The argument for including these incidents in Section One's prohibition is less airtight, as they lack the element of the batterer's systematic control over the victim.[234] Indeed, Hearn thinks that these cases need a basis of authority beyond Section One.[235] As this Section will demonstrate, however, such hesitance is

[231] 42 U.S.C. § 13981(c) (2012).

[232] United States v. Georgia, 546 U.S. 151, 158 (2006).

[233] Goluboff, supra note 13, at 1643–44 ("The Thirteenth Amendment . . . did not present the state action problem that plagued the Fourteenth and Fifteenth Amendments, many Reconstruction statutes, and the Bill of Rights."); see also supra notes 38–40 and accompanying text (comparing the texts of the Reconstruction Amendments).

[234] Cf. Hearn, supra note 5, at 1162 ("[I]solated violent crimes and cases of battering . . . would not meet McConnell's expanded definition of involuntary servitude.").

[235] Id. at 1162–63. Hearn is skeptical that courts would accept the argument that these isolated incidents "are part of a continuum of violence against women and represent incidents of the modern involuntary servitude of severe battering," and thus seeks to locate broader coverage for all gender-based violence as "a badge and incident of nineteenth-century slavery." Id.

misplaced—both because one-off incidents are within Section One's purview; and because, in the alternative, Section 13981(c)'s remedy against these isolated acts of violence is a prophylactic piece of legislation that satisfies the congruence and proportionality test.

As an initial matter, these acts clearly contain physical coercion, and are unequivocally involuntary from the victim's perspective. The facts of *Morrison*, itself a one-off incident, perfectly demonstrate this:

> Brzonkala's friend and Crawford then left the room. Morrison immediately asked Brzonkala if she would have sexual intercourse with him. She twice told Morrison 'no,' but Morrison was not deterred. As Brzonkala got up to leave the room, Morrison grabbed her and threw her, face-up, on a bed. He pushed her down by the shoulders and disrobed her. Morrison turned off the light, used his arms to pin down her elbows, and pressed his knees against her legs. Brzonkala attempted to push Morrison off, but to no avail. Without using a condom, Morrison forcibly raped her.
>
> Before Brzonkala could recover, Crawford came into the room and exchanged places with Morrison. Crawford also raped Brzonkala by holding down her arms and using his knees to pin her legs open. He, too, used no condom. When Crawford was finished, Morrison raped her for a third time, again holding her down and again without a condom.[236]

There is no conceivable meaning of the word involuntary that does not describe the scenario like the one Christy Brzonkala faced.

Given these instances' involuntariness, the next question is whether they constitute servitude. Although there is no long-term, systemic control of the victim, neither the Thirteenth Amendment nor the criminal involuntary servitude statute includes a temporal element; any period of involuntariness is sufficient.[237] Further, any episode involving rape or attempted rape has an economic component attached,[238] and violent conduct not involving rape does as well, as part of an effort to develop a re-

[236] Brzonkala v. Va. Polytechnic Inst. and State Univ., 169 F.3d 820, 906 (4th Cir. 1999) (Motz, J., dissenting).

[237] See supra notes 223–26 and accompanying text.

[238] See supra text accompanying notes 218–20.

lationship with the victim.[239] As a result, these one-off incidents, just like their long-term counterparts, constitute involuntary servitude for Thirteenth Amendment purposes. Consequently, they receive similar treatment under the analysis of *Georgia*, and Congress has the power to enact Section 13981(c) for all cases of gender-based violence.[240]

Although there is a strong case for treating one-off episodes of gender-based violence as Section One violations, should courts refuse to deem them as such, Congress can still legislate against them. *Boerne* makes clear that prophylactic measures "can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional."[241] That isolated incidents potentially are not involuntary servitude does not automatically deprive Congress of authority to subject them to Section 13981(c) liability.

For Congress to have that authority, however, it must demonstrate a congruence and proportionality between the harm remedied and the means chosen.[242] Here, congruence is incredibly strong. The only differences between long-term battering and one-off battering are the greater time period during which the former lasts and, derivative of that, the more entrenched and systematic control the batterer possesses over the victim's life. However, the conduct that helps render the victim's servitude involuntary is essentially the same in both scenarios—physical coercion in the form of extreme physical abuse, occasionally including sexual abuse and rape.

Additionally, the Section 13981(c) remedy also meets the *Boerne* proportionality threshold. A comparison to *Tennessee v. Lane*, where the Court upheld a prophylactic requirement—reasonable accommodation for access to the courts—is particularly helpful.[243] As an initial matter, the Court recognized that since disabled people's access to the courts had been a "'difficult and intractable proble[m]' [it] warranted 'added

[239] See supra text accompanying note 220. If the nonsexualized violence was not related to any sort of relational desire, it is difficult to see how the victim would have a cognizable claim under Section 13981(c), since the cause of action only extends to "crime[s] of violence motivated by gender," 42 U.S.C. § 13981(c), a phrase defined as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender," id. § 13981(d)(1).

[240] See supra text accompanying notes 231–33.

[241] *Boerne*, 521 U.S. at 518.

[242] See id. at 520.

[243] 541 U.S. 509 (2004).

prophylactic measures in response.'"[244] Such a characterization aptly describes gender-based violence.[245] The appropriateness of a preventive remedy is especially strong in the case of rape, since a disproportionately small number of rapists may commit a frighteningly large proportion of all rapes,[246] and since the worst domestic violence, that ending in homicide, tends to escalate over time.[247]

Further, beyond these prudential reasons for considering preventive legislation especially appropriate, they impose de minimis additional obligations. Unlike *Lane*, where governments had to affirmatively modify existing building structures,[248] the sole obligation Section 13981(c) imposed was to refrain from committing acts of gender-based violence. This obligation costs nothing to fulfill and is functionally superfluous, as state criminal and tort law already proscribes the relevant conduct. Beyond that, the liability that batterers face under Section 13981(c) is linked directly to their conduct in the episode they face liability for—be it damages, a declaratory judgment, or an injunction.[249] And none of this factors in the reasons why, generally speaking, applying the congruence and proportionality test to Thirteenth Amendment legislation produces a more expansive legislative power than applying the same test to the Fourteenth.[250] In light of this analysis, Section Two's preventive legislation component provides a second hook for Section 13981(c)'s propriety towards one-off episodes of gender-based violence.

[244] Id. at 531 (first alteration in original) (citing Nevada Dept. of Human Res. v. Hibbs, 538 U.S. 721, 737 (2003)).

[245] Cf., e.g., Ross Douthat, Op-Ed., Stopping Campus Rape, N.Y. Times, June 28, 2014, at SR11, http://www.nytimes.com/2014/06/29/opinion/sunday/ross-douthat-stopping-campus-rape.html?_r=0 (describing sexual violence as "a grave, persistent problem"); Susan White, School Continues Partnership with Pitt County to Prevent Domestic Violence Homicides, Univ. of N.C. Sch. of Soc. Work (Oct. 29, 2014), http://ssw.unc.edu/about/news/preventing_domestic_violence_homicides ("[Intimate partner murders are] 'an intractable problem that we need to figure out.'").

[246] Cf. David Lisak and Paul M. Miller, Repeat Rape and Multiple Offending Among Undetected Rapists, 17 Violence and Victims 73, 73 (2002) ("A majority of these undetected rapists were repeat rapists . . . . The repeat rapists averaged 5.8 rapes each.").

[247] See Karina Bland, Signs Almost Always Precede Deadly Domestic Violence Cases, USA Today (June 10, 2012, 9:32 AM), http://usatoday30.usatoday.com/news/nation/story/2012-06-10/domestic-violence-signs/55496458/1 (quoting an expert on domestic violence regarding the pattern of escalation common in domestic violence fatalities).

[248] *Lane*, 541 U.S. at 531–32.

[249] See 42 U.S.C. § 13981(c).

[250] See supra Part III.

C. Why Morrison *Does Not Control*

One reason this Note chose Section 13981(c) for its case study is that *Morrison* explicitly held that Congress lacked the power to enact this provision under its Commerce Clause and Section Five authority.[251] The robust power Congress possesses under the Thirteenth Amendment becomes clearer if that authority suffices to adopt Section 13981(c). Since *Morrison* did not address Congress's Thirteenth Amendment authority, and the government did not argue the point, that holding is not binding on the foregoing analysis. Nevertheless, distinguishing the Supreme Court's analysis in *Morrison* from the Thirteenth Amendment analysis highlights the attributes that make the Thirteenth Amendment such a robust source of congressional authority.[252]

The Court held Section 13981(c) an improper exercise of Congress's Section Five authority because the Fourteenth Amendment governs state actors, and Section 13981(c) applied only to private individuals.[253] While correct, this is irrelevant for the Thirteenth Amendment. Without any state action requirement, application of Section 13981(c) to private individuals presents no problem under the Thirteenth Amendment. Past Court precedents, upholding Thirteenth Amendment legislation which applies to private individuals, further underscore this point.[254]

Additionally, Section 13981(c)'s universal applicability, when contrasted with Congress's findings showing discrimination in only a minority of states, troubled the Court.[255] Given its applicability to private conduct, however, this point is inapposite for the Thirteenth Amendment—every state has private individuals who commit acts of gender-

[251] See supra notes 3–4 and accompanying text.

[252] To be clear, this is not to say that the Supreme Court will, anytime soon, distinguish *Morrison* away on Thirteenth Amendment grounds. Rather, instead of projecting what the Court (or Congress, for that matter) will do, this Section merely describes, doctrinally, why *Morrison's* holding would not restrict Congress from passing a version of Section 13981(c) under the Thirteenth Amendment.

[253] *Morrison*, 529 U.S. at 626 ("Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias."); see also Massey, supra note 163, at 26 ("*Morrison* appears to stand simply for the proposition that the [Section Five] power . . . is limited to remedies against state actors.").

[254] See supra notes 178–80 and accompanying text.

[255] *Morrison*, 529 U.S. at 626–27.

based violence.[256] These distinctions suffice to demonstrate a different result for Congress's power under the Thirteenth Amendment as compared to the Fourteenth.

The Court's Commerce Clause analysis is likewise not controlling. The Court, analyzing Commerce Clause precedent, observed that although an intrastate activity's substantial effects on interstate commerce can serve as a basis for regulation under the Commerce Clause, such activity must be economic in nature.[257] Acts of gender-based violence are not economic in nature, the Court reasoned, and thus Congress could not use its Commerce Clause authority to regulate them.[258]

Notwithstanding the Court's underestimation of the economic component of gender-based violence,[259] this restriction is also not binding on Congress's Thirteenth Amendment authority. First, unlike the Commerce Clause, the Thirteenth Amendment does not have a jurisdictional limitation to only interstate activity.[260] Congress can regulate noneconomic activity if that activity involves the channels or instrumentalities of interstate commerce, even to protect them from solely intrastate threats.[261] It is only when Congress relies solely on intrastate activity having substantial effects on interstate commerce that the need for an economic condition arises. Since the Thirteenth Amendment applies universally, it can rely on noneconomic, but nonetheless federal, interests that apply locally. As Judge Diana Motz pointed out in dissent when an en banc Fourth Circuit decided *Morrison*, Section 13981(c) serves just such an interest—the vindication of civil rights.[262]

Additionally, perhaps as a way to avoid Congress's power becoming all-encompassing, the Court emphasized that the enumeration of Congress's powers limits not only Congress's overall authority, but also

[256] See, e.g., John D. Sutter, List: States Where Rape Is Most Common, CNN (Feb. 4, 2014, 9:52 AM), http://www.cnn.com/2014/02/03/opinion/sutter-alaska-rape-list/.

[257] *Morrison*, 529 U.S. at 611.

[258] Id. at 617.

[259] See supra notes 217–20 and accompanying text (describing economic value provided by members of relationships).

[260] Compare U.S. Const. art. I, § 8, cl. 3 (giving Congress the authority "[t]o regulate commerce . . . among the several States"), with U.S. Const. amend. XIII (giving Congress authority without any similar limiting condition).

[261] See *Morrison*, 529 U.S. at 609.

[262] See Brzonkala v. Va. Polytechnic Inst. and State Univ., 169 F.3d 820, 930 (4th Cir. 1999) (Motz, J., dissenting) ("[Section 13981(c)] governs an area—civil rights—that has been a critically important federal responsibility since shortly after the Civil War.").

Congress's Commerce Clause authority.[263] By contrast, the Reconstruction Amendments each expanded Congress's power and altered the balance of federal-state relations, as even early Thirteenth Amendment cases recognized.[264] The Supreme Court has itself endorsed this proposition in the sovereign immunity context. The force of the Reconstruction Amendments' alteration of the federal-state balance is so strong that, even though an otherwise-valid congressional enactment under Article I cannot abrogate states' sovereign immunity,[265] a valid Section Five enactment can.[266] The similar impact of the Thirteenth Amendment on the balance of federal-state relations further underscores how *Morrison's* Commerce Clause analysis is irrelevant to a Thirteenth Amendment justification for Section 13981(c), and why such a justification is proper.

CONCLUSION

This Note has attempted to demonstrate not only that Congress has robust authority under the Thirteenth Amendment, but also that this authority survives even the importation of the congruence and proportionality test used for Section Five of the Fourteenth Amendment. This authority, which has largely gone untapped, is important not just as a way to solve problems, like gender-based violence, which are important

[263] *Morrison*, 529 U.S. at 638–39 (Souter, J., dissenting) ("The majority stresses that Art. I, § 8, enumerates the powers of Congress . . . implying the exclusion of powers not enumerated. It follows, for the majority, not only that there must be some limits to 'commerce,' but that some particular subjects arguably within the commerce power can be identified in advance as excluded, on the basis of characteristics other than their commercial effects.").

[264] See supra notes 196–206 and accompanying text; see also Jacobus tenBroek, Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment, 39 Calif. L. Rev. 171, 176 (1951) ("[T]he case of those who resisted the passage of the Thirteenth Amendment was built almost entirely on opposition to the expansion and consolidation of the national power.").

[265] Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999); but see Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 379 (2006) (holding that the Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, enables Congress to hold states amenable to certain bankruptcy procedures, notwithstanding a sovereign immunity defense.).

[266] *Florida Prepaid*, 546 U.S. at 636–37 ("While reaffirming the view that state sovereign immunity does not yield to Congress' Article I powers, this Court . . . also reaffirmed . . . that Congress retains the authority to abrogate state sovereign immunity pursuant to the Fourteenth Amendment."); see also Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996) ("[T]he Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution." (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976))).

themselves. It also serves to orient our understanding of the balance of federal-state relations, as affected by the Reconstruction Amendments, which provide a vehicle for national solutions to national problems. And perhaps even more importantly, using the Thirteenth Amendment as a mechanism for addressing certain awful, systematic problems such as gender-based violence can help the body politic conceptualize those problems as the awful, systematic problems they actually are.[267] As the case of gender-based violence demonstrates, in a world where the congruence and proportionality test limits congressional authority under the Fourteenth Amendment, there still is vast, unutilized authority for Congress under the Thirteenth Amendment.

[267] Cf. United States v. Djoumessi, 538 F.3d 547, 554 (6th Cir. 2008) ("[E]ven on its own terms, involuntary servitude is not too strong a phrase to describe what Djoumessi and his wife did to this fourteen-year-old girl. 'In the jury's view, [the defendant] was part of a conspiracy that substituted for a promised education and compensation a regime of psychological cruelty and physical coercion that took some of the best years of a young girl's life. For that, involuntary servitude is not too strong a term.'" (second alteration in original) (quoting United States v. Udeozor, 515 F.3d 260, 272 (4th Cir. 2008))).