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Article

***783 THE SUPREME COURT'S HISTORICAL ERRORS IN CITY OF BOERNE v. FLORES**

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Abstract: This Article addresses the quality of the Supreme Court's historical argument in interpreting Section Five of the Fourteenth Amendment in the 1997 case *City of Boerne v. Flores*. The *Boerne* Court referred to three historical moments relevant to understanding the meaning of Section Five. Namely, Congress's consideration of an early version of the Fourteenth Amendment in late 1865 and early 1866, the congressional debate on the Fourteenth Amendment from April to June of 1866, and the discussion of the Ku Klux Klan Act in 1871. Ultimately, the Court made several fundamental errors in discussing the history of the ratification of Section Five. The Court's narrow construction of Congress's authority under Section Five can therefore not be justified by the history of the Fourteenth Amendment.

INTRODUCTION

Although the Supreme Court's 1997 decision in *City of Boerne v. Flores* [FN1] that Congress exceeded its authority under Section Five of the Fourteenth Amendment [FN2] in enacting the Religious Freedom Restoration Act [FN3] has produced extensive commentary, [FN4] no one has assessed *784 the quality of the Court's historical argument in construing the proper interpretation of Section Five. The Court, however, relied heavily on an historical argument in support of its conclusion. It stated boldly that “[t]he Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of [Section Five].” [FN5] In this Article, I will argue that the Court made several fundamental errors in discussing the history of the ratification of Section Five of the Fourteenth Amendment. The Court's narrow construction of Congress's authority under Section Five in *Boerne* cannot be justified by the history of that constitutional amendment.

With hindsight, we can now see that the Supreme Court's decision in *Boerne* played an important role in the federalism revolution. [FN6] In contrast to the broad interpretation of Congress's powers found in the Court's 1966 decision in *Katzenbach v. Morgan*, the *Boerne* Court narrowly interpreted Congress's powers to enact legislation pursuant to Section Five. Whereas the *Katzenbach* Court interpreted Congress's Section Five powers to be the “same broad powers expressed in the Necessary and Proper Clause,” [FN7] the *Boerne* Court limited Congress's authority to “appropriate remedial measures” in which “there must be a congruence between the means used and the ends to be achieved.” [FN8] *785 For the first time in more than a century, the Court concluded that Congress had exceeded its authority in enacting legislation in the civil rights area. [FN9]

While I agree with the Court's holding in *Boerne* that the Religious Freedom Restoration Act (“RFRA”) was unconstitutional, [FN10] I disagree with the narrow, remedial standard that the Court created in *Boerne*. I have

criticized this standard elsewhere, arguing that it creates both a “crystal ball” and “phantom legislative history” problem for Congress. [FN11] Others have also criticized this and other recent Supreme *786 Court decisions as unnecessarily confining the role of Congress in enacting civil rights legislation. [FN12]

In this Article, I will make a much simpler and narrower argument—that the Supreme Court in *Boerne* relied on a misreading of the historical record in interpreting Section Five of the Fourteenth Amendment. Because legal commentators universally recognize that history should play a role in constitutional interpretation, it is important that such material receive thorough and careful consideration. Irrespective of whether one agrees with the Court's decision on policy grounds, it should be clear that there are serious flaws in the Court's historical analysis. [FN13]

The Rehnquist Court's misuse of this history is particularly troubling, because Justice Scalia has been highly critical of the inconsistent and arbitrary ways that legislative history has been considered in the statutory context. [FN14] While I disagree with the assertion of Justice Scalia that legislative history should be discarded as inherently arbitrary, I do agree that such materials need to be scrutinized to make sure that they are being examined in a way that sheds light on Congress's genuine intentions or original understanding. It is disturbing that such care has not been used by the Court's conservatives in interpreting the history of Section Five.

In Part I, I will examine the debate on constitutional and statutory interpretation to ascertain what criteria can be developed to examine*787 ratification history carefully in the Section Five context. In Part II of this Article, I will critique *Boerne* in light of these criteria. In Part III, I will apply these criteria to the history of Section Five to see what we can learn through a more careful examination of the legislative history concerning the ratifiers' intentions.

I. CRITERIA FOR CONSIDERING RATIFICATION HISTORY

Although the conservatives on the Rehnquist Court, led by Justice Scalia, have disavowed the use of legislative history to interpret ambiguous statutes, [FN15] no member of the Court has disavowed the importance of history in assessing the meaning of the Constitution. The Rehnquist Court has been quite enamored with historical arguments in the constitutional law context with Justice Kennedy, speaking for the conservative majority in *Alden v. Maine*, even displaying a willingness to examine the “pre-understanding” of a constitutional provision. [FN16] The more liberal members of the Court often refer to the Constitution*788 as a “living tree” and are more interested in finding a future-looking, rather than backward-looking, assessment of the Constitution's meaning. [FN17] Even the liberals, however, sometimes find a role for history in interpreting the Constitution. [FN18] The most important point *789 for the sake of this discussion is that the liberals have not disavowed the relevance of history in interpreting Section Five.

One reason that extrinsic sources are considered relevant for constitutional interpretation is that constitutional context is deliberately open-ended and vague so that it can adapt to changing circumstances. It is difficult to amend the Constitution so courts must have some flexibility to interpret the Constitution in a sensible fashion. We cannot expect the people to amend the Constitution continuously to overturn a “wrong” decision by the Court. Thus, the constitutional text is never held to the precise standard of unambiguous meaning that some jurists apply to statutes.

When conservatives discuss how history can be properly used in the constitutional context, and liberals discuss how history can be properly used in the statutory context, there is a broad range of agreement on what con-

stitutes proper use of history.

First, one should examine writing at the time of ratification so that we can understand “how the text ... was originally understood.” [FN19] *790 We should rarely look at statements made *after* the ratification of a constitutional provision. [FN20] The important temporal period is the moment (or the immediate moment before) the ratification of constitutional language. [FN21] If we do examine statements made after ratification, then we have to consider why those statements may be probative of Congress's intentions at the time of ratification.

Second, we should confine ourselves to the writings of “intelligent and informed people of the time” who supported ratification of a constitutional amendment. [FN22] We should consider:

(1) statements by the sponsor of the legislation or the particular provision at issue when it appears that members who might otherwise desire to amend the bill have relied on those statements; and (2) colloquies between the “major players” concerning a legislative provision when it appears that the majority of members are prepared to follow any consensus reached by those individuals. [FN23]

This material is found in the Congressional Record (or, as it was called at the time—the Congressional Globe). We should not consider statements from people who we suspect do not reflect the views of those who supported ratification. Opponents of ratification would not be a reliable source.

*791 In sum, both liberals and conservatives appear to be able to agree on some common guidelines for assessing historical material to ascertain the “original understanding.” As we will see, these tools were not used properly to assess the history of Section Five in *Boerne*.

II. CITY OF BOERNE V. FLORES

The issue in *City of Boerne v. Flores* was the constitutionality of the Religious Freedom Restoration Act (“RFRA”). RFRA prohibits the government from “substantially burden[ing]” a person's exercise of religion even if the burden results from a rule of general applicability unless the government can justify the action under a strict scrutiny framework. [FN24] Congress justified its authority to enact such legislation under its Section Five authority, arguing that it was protecting individuals' free exercise of religion. Because Congress was prohibiting conduct which the Supreme Court had found did not violate Section One of the Fourteenth Amendment, a broad interpretation of Congress's authority was necessary to conclude that RFRA was constitutional.

While recognizing that the *Katzenbach* opinion “could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in §1 of the Fourteenth Amendment,” [FN25] the *Boerne* Court rejected that interpretation. It rejected the “suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment.” [FN26] Instead, it found that the “Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause.” [FN27]

The Court made four serious errors in reaching this historical conclusion. First, the Court gave inappropriate weight to statements by the *opponents* of the Fourteenth Amendment. Although it may be true that some of these individuals opposed a broad role for Congress, there is no evidence that Section Five was ever modified in response to their concerns.

Hence, the Court correctly noted that Democrats and conservative Republicans “argued that the proposed Amendment would give Congress a power to intrude into traditional areas of state responsibility, a power incon-

sistent with the federal design central to the Constitution.”*792 [FN28] The Court quoted statements to that effect by Representatives Hale, Hotchkiss, and Rogers, and Senator Stewart, but failed to indicate whether those individuals voted for or against ultimate ratification of Section Five. Of the Representatives quoted by the Court, only Representative Hotchkiss voted for ratification of the Amendment. [FN29] Representative Hale abstained and Representative Rogers voted against the measure. [FN30] Professor Harris describes Representative Rogers as an “extreme opponent” of the Fourteenth Amendment. [FN31] The Court, therefore, gave inappropriate weight to statements by the opponents of the Fourteenth Amendment.

Second, there is no evidence that Section Five was ever modified in response to their concerns. Many of these individuals continued to oppose Section Five, even after the language was arguably narrowed, so that one might conclude that there were not material differences between the early version which they opposed and the ratified version: both versions enhanced Congress's power in ways that were not acceptable to the opponents of the Fourteenth Amendment. By contrast, the Amendment's original sponsors—Representative Bingham and Stevens—continued to support the version that was finally ratified. Thus, they apparently considered the ratified version to grant Congress sufficient powers so that it could enact civil rights legislation in the future.

Third, the Court misinterpreted why an earlier version of Section Five was tabled. Specifically, the Court noted that an early Bingham proposal, which gave broad power to Congress, was tabled and not again considered, suggesting that Congress had rejected the broader version on its merits. [FN32] In fact, it was postponed, with the support of Representative Bingham, not tabled. [FN33] What conclusion can be drawn from this postponement is a complicated question that can only be determined through a careful consideration of the full ratification process. As I will discuss, the decision to postpone was made after the Senate rejected an early version of the Fourteenth Amendment; that factor, rather than any opposition in the House, may have affected the *793 decision to postpone. The Court failed to acknowledge the multiple meanings that can be attributed to this postponement. I will consider those multiple meanings in Part III.

Finally, the Court gave inappropriate weight to post-hoc statements about the meaning of Section Five. The Court referred to the debate over the Ku Klux Klan Act in 1871 to support its view that Congress was granted narrow enforcement powers under Section Five, extensively quoting remarks offered by Representative Garfield in 1871 concerning his understanding of the meaning of Section Five. [FN34] But the Court did not explain why we should give weight to Representative Garfield's post-hoc statements about the meaning of Section Five. Although Representative Garfield did vote for ratification of the Fourteenth Amendment, he was not one of the original sponsors of the Fourteenth Amendment and did not discuss his views regarding the meaning of Section Five at the time of ratification.

A more careful examination of the history will show the seriousness of these errors.

III. SECTION FIVE

The Court in *City of Boerne v. Flores* referred to three historical moments that might be considered relevant to understanding the meaning of Section Five of the Fourteenth Amendment. The first historical moment was in late 1865 and early 1866, when the United States Congress was considering an earlier version of the Fourteenth Amendment. Because Congress was debating a version that was considerably different from that ultimately ratified, we need to be careful about interpreting this debate. The second important historical moment was from April to June 1866 when Congress was debating a version of the Fourteenth Amendment which was similar to the one that was ultimately ratified. We must be careful in interpreting this debate not to assume that Congress

was discussing the issues that are important to us today. The third important historical moment was on April 4, 1871, several years after the Amendment was ratified, when Congress discussed the scope of its Section Five authority in considering whether to enact the Ku Klux Klan Act pursuant to that authority. We need to bring the most skepticism to examining this material, because *794 Congress is discussing text that was ratified by a previous Congress. Post-hoc material is always of limited utility. [FN35]

A. *Early Version: December 1865-April 1866*

The first historical moment referred to in *Boerne* is consideration of the Fourteenth Amendment, which commenced on December 4, 1865, during the first session of the Thirty-Ninth Congress. Representative Stevens offered a resolution creating a Joint Committee on Reconstruction. [FN36] This resolution, which passed the House by a vote of 133 to 36, strictly on party lines, forbid the confederate states from being admitted to either house pending the Committee's report. [FN37] Although the President would ordinarily have opened this session with a state of the Union message, the House pre-empted the President by beginning the session with the resolution on reconstruction. [FN38] This step indicates the importance of the passage of the Fourteenth Amendment to the Republicans in the Thirty-Ninth Congress.

While Congress was creating the Joint Committee, bills were proposed to amend the Constitution. The Fourteenth Amendment—with its five parts—was not considered in that form in Congress for many months. In the opening months of debate, each section was considered as a separate resolution.

On December 5, 1865, Representative Stevens introduced the first version of what became Section One of the Fourteenth Amendment: “[a]ll national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color.” [FN39] This resolution did not address Congress's power and therefore is not comparable to Section Five. There was no debate on the resolution at that time. [FN40]

*795 On December 6, 1865, Representative Bingham introduced a joint resolution “to amend the Constitution of the United States so as to empower Congress to pass all necessary and proper laws to secure to all persons in every State of the Union equal protection in their rights, life, liberty, and property.” [FN41] It was referred to the Committee on the Judiciary; no debate occurred at that time. [FN42] Unlike the Stevens' proposal, this proposal would expand the powers of Congress but would not specifically guarantee rights to all individuals, absent action by Congress. [FN43] It is the foundation for what became Section Five.

The Senate considered the Joint Resolution to create a Reconstruction Committee on December 12, 1866. [FN44] The resolution passed, after being amended to eliminate any specific limitation on the Senate's right to take independent action pending a committee report. [FN45] The House agreed to the Senate's language on December 13th. [FN46] The members of the Committee were named in the House and Senate. [FN47]

Although our contemporary focus in considering the Fourteenth Amendment relates to the meaning of Sections One and Five, the other sections were very important at the time of ratification. An important issue was how representation for seats in Congress would be determined. With the Thirteenth Amendment arguably granting citizenship to African-Americans, and repealing the three-fifths clause, [FN48] the South's representation in Congress, if it was admitted to the Union without conditions on determining representation, would increase*796 dramatically. Section Two, as ultimately ratified, provides that representation shall include all male inhabitants, except that representation shall be reduced proportionally if certain male inhabitants are denied the right to vote.

[FN49] While many radical Republicans would have preferred to condition readmission to the Union on granting the franchise to African-Americans, this compromise position nonetheless gave the South an incentive to extend voting rights to African-Americans in order to increase its proportional representation in Congress. Section Two was the subject of lengthy debate in the House and Senate. [FN50]

While the representation amendment was being debated in Congress, the Committee on Reconstruction was also considering an equal protection provision. The Committee on Reconstruction met on January 20, 1866, and developed the following language: “Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty, and property.” [FN51] This language reflects the Bingham language, giving broad “necessary and proper” authority to Congress while also embodying the broad equal protection principles contained in the Stevens version. It also strengthened *797 the Stevens version through reference to “political rights,” which was intended “to open the way for Negro voting on a national scale.” [FN52]

Representative Bingham introduced another version of the Fourteenth Amendment on February 3, 1866 which read:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several states ... and to all persons in the several States equal protection in the rights of life, liberty, and property [FN53]

Its language is quite similar to the language proposed by the Committee on Reconstruction, but did not contain the “political rights” clause; instead it retained the strong “necessary and proper” clause. Representative Bingham presumably deleted the reference to political rights so that the Fourteenth Amendment would not be interpreted as requiring states to grant suffrage to newly freed slaves. Although the Republicans preferred such a requirement, they recognized that it was not politically feasible. Hence, the representation debate over what became Section Two was also influencing the content of the equality provision under what became Section One.

The House began debate on the Bingham language on February 27, 1866. [FN54] Representatives disagreed about whether the proposed Amendment created new powers for Congress or simply reinforced existing Congressional power under the “necessary and proper” clause. [FN55]

On February 28, 1866, debate focused on whether Section Five granted too much power to Congress. [FN56] This was the only time in the entire debate over the Fourteenth Amendment when this issue was central to the discussion. Representative Davis argued that he would not consent to “centralization of power in Congress in derogation of constitutional limitations, nor [would he] lodge there to-day [sic] any grant of power which may in other times, and under the control of *798 unprincipled political aspirants or demagogues, be exercised in contravention of the rights and liberties of [his] countrymen.” [FN57]

Representative Woodbridge responded to these federalism concerns by saying: “[t]he adoption of this amendment, Mr. Speaker, will be no shock upon the present well-arranged system, defining the powers of the General Government and the States, under which we have so happily lived.” [FN58] Similarly, Representative Bingham reassured the federalists:

[t]he proposition pending before the House is simply a proposition to arm the Congress of the United States, by the consent of the power of the United States, with the power to enforce the bill of rights as it stands in the Constitution to-day. It “hath that extent—no more.” [FN59]

Objections to this draft of the Fourteenth Amendment, however, did not come only from federalists. Radical Republicans objected to the language because it did not go far enough in creating substantive rights of equality. [FN60]

In one of the most confusing historical moments concerning the Fourteenth Amendment, the resolution was then postponed in the House by a vote of 110 to 37, with the key supporters of the resolution—Representatives Bingham and Stevens—voting in favor of postponement. [FN61] Was this postponement a response to the federalism objection, to the Radical Republican objections, or to some other *799 reason? The *Boerne* Court concluded that postponement was necessary in response to the federalism objections.

A close examination of the historical record suggests that it is very unlikely that the federalists should receive credit for the postponement in the House. At the time of postponement, the Fourteenth Amendment was also stalled in the Senate because of disagreement about the proper language for what became Section Two. [FN62] Objections were being offered by radical Republicans who were concerned that the proposed representation language did not sufficiently penalize the South for its role in the War. [FN63] The proposed language for Section Two could not pass the Senate on March 9, 1866 by the required two-thirds majority. [FN64] After it received a 25 to 22 vote of support, and various substitute propositions were submitted in an air of confusion, Senator Fessenden supported a postponement motion. [FN65]

Professor James cites the uncertainty of ratification of Section Two in the Senate as an important factor influencing postponement in the House. [FN66] Section Two was re-written extensively before a version was deemed acceptable by radical Senate Republicans. The language of Section Five, by contrast, received very little modification during the ratification process and there is no evidence that Democrats or moderate Republicans insisted on language changes in Section Five in exchange for ratification. Like the radical Republicans, they were far more concerned about the rules regarding representation in Congress. By examining Section Five out of the context of Section Two, the *Boerne* Court misunderstood the factors leading to postponement in the House and gave too much weight to a few comments made on one day of a lengthy ratification process.

B. April 20, 1866-May 10, 1866

After the defeat of the representation amendment in the Senate, the Committee on Reconstruction was in search of a successful compromise proposal. The second important historical moment referred *800 to by the *Boerne* Court in its Section Five analysis began when an Indiana reformer named Robert Dale Owen came forth in April 1866 with a five-part proposal that paralleled the language ultimately ratified by Congress. [FN67] This proposal did not grant immediate suffrage to African-Americans, which disappointed Stevens, but he agreed to support the proposal before the Joint Committee because it appeared that it could be ratified. [FN68] Owen's plan was approved by the Committee on Reconstruction on April 21, with some modifications. [FN69] Owen's language changed the “necessary and proper” clause contained in prior versions to a “legitimate” clause.

In subsequent committee debate, significant changes were made to the Owen proposal which Professor James categorizes as making “Owen's proposal ... almost unrecognizable.” [FN70] Admittedly, the version adopted by the Committee on April 29, 1866 was considerably stronger than Owen's proposal. [FN71] The important point, however, is *801 that the Committee never modified the Section Five language proposed by Owen. It is not clear that anyone even paid any attention to Owen's modification of the Section Five language, because the reason for it to be modified from “necessary and proper” to “appropriate” was never explained by any member of Congress. By ignoring Owen's role in drafting the new language, the *Boerne* Court assumed that this lan-

guage change was proposed by the Amendment's key proponents.

Representative Stevens introduced this version of the Fourteenth Amendment on April 30, 1866, and no debate occurred at that time. [FN72]

Senator Fessenden performed a similar function in the Senate. [FN73] He discussed the proposed Fourteenth Amendment in the Senate on May 2, 1866. [FN74] The measure was not specifically debated at that time but he generally explained that it was a compromise measure “which seemed to be the best scheme with regard to reconstruction upon which they could come to a unanimous or nearly unanimous agreement.” [FN75]

The Fourteenth Amendment was next considered in Congress on May 8, 1866. [FN76] Representative Stevens opened the debate, in part, with these words:

[t]his proposition is not all that the committee desired. It falls far short of my wishes, but it fulfills my hopes. I believe that it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to *802 be consulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this. [FN77]

Because Representative Stevens was one of two key leaders who supported the Fourteenth Amendment in the House of Representative, historians have given considerable weight to his views. The *Boerne* Court assumed that the finally-ratified version of Section Five withdrew important enforcement powers from Congress and thereby “fell short of his wishes.” [FN78] In the context of the contemporary debate about the scope of Congress's power to enact legislation to remedy potential (but not actual) violations of the Constitution, it is therefore argued that Stevens' comments are evidence that those who proposed limited powers for Congress prevailed when Section Five was ratified. But as Professor tenBroek has argued, “[t]he mere fact that the so-called negative form emerged after the federalism objection does not necessarily mean that the federalism objection was the cause of the change or that the new language was intended to obviate the objection.” [FN79]

An examination of Stevens' statement, in context, makes it doubtful that he had Section Five in mind when he made this statement that the Amendment fell short of his “wishes.” Stevens discussed Sections One, Two and Three extensively, made a brief statement about Section Four and did not mention Section Five. [FN80] It does not appear that he even considered Section Five to be of much importance. He described Section Two as “the most important in the article.” [FN81]

In his description of Section One, Stevens described no disappointment. He spoke of the importance of these rights being specified in the Constitution so that “[t]his amendment once adopted cannot be annulled without two thirds of Congress.” [FN82] He indirectly alluded to Section Five when he said: “[t]he Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the *803 unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all.” [FN83] The scope of Congress's power, however, seemed to be of less concern to Stevens than the scope of Section One's constitutional authority, because he presumed that constitutional challenges under Section One would be more likely than congressional action under Section Five. In particular, he was doubtful of the ability of the liberals to retain control of Congress to enact enforcement legislation under Section Five. Thus, speaking of legislative civil rights, he said, “[a]nd I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed. The veto of the President and their votes on the bill are conclusive evidence of that.” [FN84] The important point, for him, was that

an amendment can only be repealed by a two-thirds vote. Thus, he wanted protection from a future, more conservative Congress and did not envision a liberal Congress that might enact legislation to enforce civil rights.

Representative Stevens also made it clear that he was disappointed with the weakening of Section Two that occurred during the drafting process. [FN85] In the version considered by Congress on May 8th, a state lost its right to representation in Congress in proportion to its denial of suffrage to adult male citizens. [FN86] Stevens would have preferred that a state entirely forfeit its representation in Congress if it failed to provide full enfranchisement. [FN87] When Stevens earlier said that the states would object to a stronger version of the Fourteenth Amendment, it appears that he had Section Two in mind. Professor James has explained that Stevens was “mortifi[ed] at the defeat of the *804 committee's first proposition on representation.” [FN88] He must have believed “that the amendment just reported was all that could pass the two houses.” [FN89]

Representative Stevens also criticized Section Three as being too lenient. [FN90] This section prohibited rebels from voting for members of Congress and electors of the President until 1870. [FN91] Stevens argued that, at the least, the prohibition should be “extended to 1876, and [should] include all State and municipal as well as national elections.” [FN92] Despite his objections to Section Three, he said, “I will move no amendment, nor vote for any, lest the whole fabric should tumble to pieces.” [FN93] Stevens then mentioned Section Four, made no mention of Section Five, and moved to recommit the joint resolution to the Committee on Reconstruction. [FN94]

In the debate that followed, there was little discussion that related to Section Five. The bulk of the discussion instead involved Sections Two and Three. [FN95] Representative Thayer, who ultimately voted for ratification of the Fourteenth Amendment, objected to Sections Two and Three, because they served to divide the country and disenfranchise some citizens. [FN96] Similarly, Representative Boyer, who opposed ratification, objected to Section Three because it denied “altogether the right of the Federal Government to disenfranchise the majority of the citizens of any State on account of their past participation in the rebellion.” [FN97] When he mentioned Section Five, he simply said, “[u]pon this latter [Section Five] it will not be necessary to remark.” [FN98] If Section Five were controversial, one would have expected more discussion of it.

*805 In response to these comments, Representative Kelley, who voted for ratification, supported the importance of Sections Two and Three, because he thought it important not to permit the rebels to govern the country. [FN99] Representative Kelley did express some disappointment that Section Five was not stronger, because he wanted it to go further and “at once enfranchise every loyal man in the country.” [FN100] He apparently did not want to leave that step to the states or Congress; he wanted it addressed directly in the Fourteenth Amendment. He may have viewed Section Five as giving Congress the power to enfranchise African-American men but, like Representative Garfield, may have been concerned that a conservative Congress would not take that step. Ultimately, the right to vote was guaranteed through the ratification of the Fifteenth Amendment. [FN101]

Representative Schenck, who eventually voted for ratification, responded to criticisms of Section Three. [FN102] Representative Smith, who opposed ratification, then spoke in opposition to Section Three, arguing that it is improper to disenfranchise citizens. [FN103]

Discussion of the Fourteenth Amendment resumed on May 9, 1866. [FN104] Representative Broomall spoke in favor of the Amendment although he stated, “[i]t is not what I wanted. How far short of it!” [FN105] He defended the importance of Sections Two and Three but did not discuss Section Five at all. Representative Shanklin spoke next and argued that Sections Two and Three act to keep the South out of the union. [FN106] When

Representative Raymond spoke about the Fourteenth *806 Amendment, he described the five parts of the Fourteenth Amendment as constituting “five in form, but only four in substance.” [FN107] He then went on to discuss the first four parts of the Fourteenth Amendment, entirely ignoring Section Five. [FN108] Raymond made no mention of the fact that the Bingham version of Section Five was stronger than the version before Congress on May 9, 1866. He was simply trying to show that the Republicans were inconsistent in saying that Congress already had the power which they now were seeking to add to Congress's list of powers.

Representative Wilson later asked Representative Raymond to explain why he was opposed to Congress having those powers, even if he thought that Congress did not previously have those powers. [FN109] Representative Raymond responded by saying that he did intend to vote to ratify the Fourteenth Amendment: “I shall vote for that amendment cheerfully, because I think Congress should have that *807 power.” [FN110] In fact, the record reflects that Raymond did vote in favor of ratification. [FN111]

Representative Miller spoke in support of the ratification of the Fourteenth Amendment. [FN112] He mentioned each of the five sections and then explained why he supported them. As to Section Five, he said:

[t]he fifth section gives to Congress the power to enforce the provisions of this article by appropriate legislation. This of course is requisite to enforce the foregoing sections, or such of them as may be adopted, and is too plain to admit of argument; and in fact is not, as I am aware, contested by any gentleman in this House. [FN113]

His comment about Section Five being uncontroversial is consistent with the recorded debate.

When Representative Eliot spoke in favor of ratification of the Fourteenth Amendment, he echoed earlier comments about it not going as far as one might wish:

[t]his amendment is not, as I believe, all that ought to be offered by that committee and passed by this House and made by the loyal Legislatures of the United States a part of our organic law; but it is right as far as it goes, and upon careful examination I find contained in it no compromise of principle. That being settled I am willing to defer to the opinions of other gentlemen, and be content with the best that can be obtained. [FN114]

His explanatory comments, however, reflected no disappointment with Section Five. He explained:

I voted for the civil rights bill, and I did so under a conviction that we have ample power to enact into law the provisions of that bill. But I shall gladly do what I may to incorporate into the Constitution provisions which will settle the *808 doubt which some gentlemen entertain upon that question. [FN115]

His reservations related to the compromises reached under Sections Two and Three, not Five.

Debate in the House resumed on May 10, 1866. [FN116] Representative Randall opened the debate. [FN117] He defended the first four sections and did not mention Section Five at all. Representative Strouse spoke next. [FN118] His comments were confined to political issues concerning the effects of Sections Two and Three; he did not speak to Section Five. [FN119]

The next speaker was Representative Banks. [FN120] His comments concerned what he perceived to be the disenfranchisement of the southern states under the Fourteenth Amendment if they decline to accept the terms of the amendment. [FN121] In response, Representative Eckley defended Sections Two and Three, saying:

[t]he only objection I have to the proposition is that it does not go far enough. I would disenfran-

chise them forever. They have no right, founded in justice, to participate in the administration of the Government or exercise political power. If they receive protection in their persons and property, are permitted to share in the nation's bounties, and live in security under the broad aegis of the nation's flag, it is far more than the nation owes them. [FN122]

Representative Beaman then reiterated his opposition to Section Three, because it did not go far enough: “[i]t seems to me that the third section will be found useless in its results and impracticable in its operation, while it is calculated to foster irritation and bad blood among the people of the South.” [FN123] The Amendment would have been inoperative because electors for President and Vice President can be appointed by the legislatures. It was insufficient because it did not extend*809 to the election of Senators. He therefore urged the rules to permit amendment to Section Three before the final vote. [FN124]

The discussion continued with respect to the political consequences of ratification of the Fourteenth Amendment. Representative Farnsworth then spoke in favor of ratification. [FN125] As with earlier speakers, he discussed each of the first four sections of the Fourteenth Amendment but did not mention Section Five. Shortly before the vote on this version of the Fourteenth Amendment, Representative Bingham spoke in support. [FN126] He, too, said nothing about Section Five. Representative Stevens closed the debate by reiterating his disappointment with Section Three:

Gentlemen tell us it is too strong—too strong for what? Too strong for their stomachs, but not for the people. Some say it is too lenient. It is too lenient for my hard heart. Not only to 1870, but to every rebel who shed the blood of loyal men should be prevented from exercising any power in this Government. That, even, would be too mild a punishment for them. [FN127]

Under the rules of the House, an amendment could not be offered to the proposed language if the version under consideration was seconded. It was seconded and Representative Garfield was not able to introduce an amendment which would have permanently barred rebels from holding any political office. [FN128] The vote was then taken on the joint resolution. It passed by a vote of 128 to 37, with 19 members not voting, meeting the required two-thirds margin. [FN129] The vote was strictly along party lines, with Representative Raymond, who had criticized the amendment, voting in favor of it. [FN130]

In sum, we can find evidence that Stevens was disappointed with the language ratified in Sections One, Two or Three of the Constitution but no evidence that he was disappointed with the language ratified in Section Five. The language changes that were made during the ratification process seemed necessary to secure the ratification of the states, not the ratification of Congress. There is no evidence that *810 any language change to Section Five altered the vote of a single conservative member of Congress. But the states were concerned about losing their representatives to Congress and about certain citizens being disenfranchised. The language of Sections Two and Three were modified to alleviate those concerns. The members of the House who objected to the broader version of Section Five continued to oppose ratification even after that language was changed. So, there is no evidence that any additional votes were secured in reliance on that change in language.

Senator Fessenden initially announced that debate in the Senate on the amendment which had been ratified by the House would begin on May 21, 1866. [FN131] In fact, sickness prevented Fessenden from exercising his duties and Senator Howard took over the role of introducing and defending the proposed amendment. [FN132] Consideration of the amendment began in the Senate on May 23, 1866. [FN133] In his opening statement about the proposed amendment, he made little reference to Section Five. His sole statement on that subject in his open-

ing remark was: “[t]he power which Congress has, under this amendment, is derived, not from [Section One], but from the fifth section, which gives it authority to pass laws which are appropriate to the attainment of the great object of the amendment.” [FN134] He acknowledged that Section Two did not entirely satisfy him, because he would have preferred direct African-American suffrage but he supported the *811 amendment as an appropriate compromise. [FN135] He also expressed his reservations with Section Three as failing to provide for the disqualification of rebels for both federal and state office. [FN136] In the debate that followed his remarks, no reference was made to Section Five. The discussion focused instead on the payment of rebel debt. [FN137]

Whatever dissatisfaction existed with the proposed language of the Fourteenth Amendment was not extensively discussed in a public session. The Senate soon went into an executive session [FN138] and the Republican caucus met to discuss language modifications. Four changes were proposed from the caucus on May 30, 1866: (1) the insertion of the definition of “citizen” in Section One; (2) a few textual changes to Section Two; (3) an entirely new Section Three; and (4) a substitute for Section Four. [FN139] The House language with respect to Section Five went unchanged. In the debate which followed in the Senate, Section Five received no discussion, although there was still criticism of the rules regarding representation and the lack of protection for African-American suffrage. [FN140] Some minor changes occurred during the debate in the Senate; but none of these changes affected Section Five. [FN141] A vote was taken in the Senate on June 8, 1866. [FN142] The vote was 33 to 11, with 5 Senators not casting ballots. [FN143]

The debate in the Senate is not very illuminating, because most of the decisionmaking occurred in the Republican caucus. The vote was taken before the printed report of the Joint Committee was available, leading some historians to complain that there was “so much haste after so much delay.” [FN144] All we really know is that Senator Sumner, and his radical colleagues, who had opposed the ratification of an earlier version based on nearly identical principles, voted in favor of this final version. [FN145]

On June 13, Representative Stevens reported to the House that the Joint Committee had examined the Senate amendments to the resolution passed by the House and unanimously recommended that *812 the changes should be accepted. [FN146] After little discussion, the vote was 120 to 32. [FN147]

In sum, the debate in the House and Senate focused on Sections Two, Three and Four, not Sections One or Five. Although some federalism objections were made in the early days of the debate, these objections were largely discontinued as focus was placed on the rules regarding representation in Congress and on whether the newly freed slaves should be entitled to vote. Because of concern that southern Democrats would come to control Congress in the near future, there was little concern about Congress overstepping its power under Section Five. Today's issues—the meaning of the phrase “equal protection” and the scope of Congress's authority—were simply not the main issues of the day in 1866. In particular, there is no evidence whatsoever that the language change from “necessary and proper” to “appropriate” was a deliberate attempt to gain more votes in favor of the Amendment. This language change was never discussed, in contrast to the language changes to Section Two, Three, and Four which received extensive discussion. Too much historical weight has been given to what was viewed at the time as an inconsequential language change.

C. Ku Klux Klan Act Adoption: 1871

The 1871 debate over the adoption of the Ku Klux Klan Act can also provide us with some insight about the intended meaning of Section Five. Representatives Bingham and Garfield engaged in a lengthy colloquy which is reprinted in the Appendix to the Congressional Globe in 1871. The issue is whether Congress has the enforce-

ment authority to enact the Ku Klux Klan Act (H.R. No. 320). Representative Garfield argued that Section Five did not grant Congress sufficient authority to enact the Act.

There are two important points to consider to understand Garfield's testimony. First, one must understand the extremely broad scope of the Ku Klux Klan Act that was under consideration. Section Two of the bill as introduced by Representative Shellabarger, made it a crime to conspire to violate the “rights, privileges or immunities” to which a citizen is entitled under the “Constitution and laws,” by acts, which if committed in an area under the jurisdiction of the United States, would constitute “murder, manslaughter, mayhem, robbery, *813 assault and battery, perjury, subornation of perjury, criminal obstruction of legal process, or resistance of officers ..., arson, or larceny” [FN148] Representative Shellabarger later introduced an amendment to limit the scope of the section to situations in which there is a deprivation of “equal protection of the laws, or of equal privileges or immunities under the laws.” [FN149] This language was ultimately adopted by Congress and signed into law by President Grant.

Scholars have disputed whether Representative Shellabarger introduced this amendment in response to Representative Garfield's criticisms that the Ku Klux Klan Act was drafted too broadly to be within Congress's authority. One student note argued that this amendment was drafted to limit the scope of the Ku Klux Klan Act. [FN150] Professor Steven Shatz disputes this interpretation of the amendment. He argues that “[i]t is unclear whether the amendment was substituted simply to clarify the intent of the section as originally drafted or, on the other hand, to limit the scope of the section.” [FN151]

*814 We do not need to resolve the issue of Representative Shellabarger's intent to assess what this particular bill tells us about Congress's understanding of the scope of Section Five of the Fourteenth Amendment. Of course, the debates of 1871 cannot tell us anything definitely about the intention of the Congress of 1868 when it ratified Section Five because it is not the same Congress. Moreover, the debate in 1871 concerns the interpretation of already-ratified language rather than the more basic question of whether Section Five should be ratified at all. Nonetheless, to the extent that the 1871 debate is helpful to our understanding of the intentions of the 1868 Congress, one must note an important aspect of the 1871 debate—the Ku Klux Klan Act was passed by Congress. In other words, Representative Garfield's argument that the bill gave too much power to Congress was ultimately not accepted by a majority of Congress. [FN152]

Another way to understand the historical record concerning the passage of the Ku Klux Klan Act is to say that it provides us with insight as to what a contemporary Congress thought was the scope of its authority. The best evidence of that authority would be the language of the Ku Klux Klan Act itself. Did it comport with a broad or narrow understanding of Congress's power?

A strong argument can be made that the Ku Klux Klan Act, as enacted, did reflect a broad understanding of Congress's power, because it made conduct unlawful irrespective of the existence of state action. In 1883, the United States Supreme Court interpreted the Ku Klux Klan Act as making it unlawful for twenty men to take four prisoners from jail and beat them, despite the fact that state action was not alleged in the action. [FN153] It held that the Ku Klux Klan Act could not constitutionally reach such conduct, but did not dispute that the language of the Act was intended to reach such conduct.

Interestingly, the interpretation of the Ku Klux Klan Act rendered by the Supreme Court in 1883 was similar to the broad view of Section Five presented by Representative Bingham on the state action requirement—that Congress could pass legislation pursuant to Section Five which regulated *private* conduct without evidence of

state action. The Court said:

[The Ku Klux Klan Act] is not limited to take effect only in case the State shall abridge the privileges or immunities of citizens of the United States, or deprive any person of life, ***815** liberty, or property without due process of law, or deny to any person the equal protection of the laws. It applied, no matter how well the State may have performed its duty. Under it private persons are liable to punishment for conspiring to deprive any one of the equal protection of the laws enacted by the State. [FN154]

Democrats and conservative Republicans had opposed the original version of Section Five drafted by Representative Bingham because they argued it upset the correct balance between Congress and the states. Yet, the Congress which ratified the Fourteenth Amendment also passed a statute under its Section Five enforcement authority which was understood to upset that balance by creating, in essence, a federal criminal and civil conspiracy statute which regulated purely private activity without a state action requirement. One therefore must wonder whether Representative Bingham's view on the state action requirement did, in fact, prevail when Section Five was ratified. [FN155]

There are two important lessons to be learned from these decisions involving the Ku Klux Klan Act. First, this dispute should remind us that the primary issue in the ratification debate about the scope of Congress's authority had to do with the state action requirement, not the issue of whether Congress could use a broader lens than the courts in determining what is an equal protection violation. The latter dispute is a contemporary one. The former dispute is the one that animated the Thirty-Ninth Congress. When we interpret the ratification debates' references to broad and narrow interpretations of Congressional authority, we should not assume that those debates are referring to our present debate about the scope of Congress's power.

Although it is not the purpose of this Article to re-examine the decisions with respect to the state action requirement, it seems quite ***816** possible that the Supreme Court has interpreted Section Five too narrowly in that respect. [FN156] The ratifiers of the Fourteenth Amendment arguably did intend to give Congress the authority to enact legislation like the Violence Against Women Act, [FN157] to protect African-American's civil rights, and even against violations by private actors. [FN158]

But what can this debate tell us about our current controversy—the scope of Congress's power to abrogate state sovereign immunity? By analogy, I would be willing to argue that the ratifiers did envision a broad rather than narrow role for Congress under Section Five. It wanted Congress to be able to go further than merely barring conduct that would be unconstitutional under Section One, since the Ku Klux Klan Act banned private conduct that would not be unconstitutional under Section One. As a philosophical matter, it saw a role for Congress's power under Section Five to be broader than a court's power under Section One to find that conduct was unconstitutional.

***817** The ratifiers of the Fourteenth Amendment supported a broader role for Congress than is reflected in the Supreme Court's most recent Section Five jurisprudence. The current standard puts a very high burden of proof on Congress if it wants to go beyond the terms of what the Court has explicitly said is unconstitutional under Section One. It imposes a high documentation requirement on Congress that has, so far, proven to be illusive. [FN159] Clearly, the ratifiers of the Fourteenth Amendment did want to expand Congress's enforcement authority while also giving individuals the right to seek direct enforcement in the courts. The ratifiers were concerned that Congress would again be dominated by conservative Democrats and wanted to make sure that the judiciary could be a source for the enforcement of equal protection rights. But their primary faith was in Congress.

They wanted to have the power to enact laws such as the Civil Rights Acts and the Ku Klux Klan Act. The fact that they chose to enact such laws on the heels of the ratification of Section Five suggests that they thought they were giving themselves broad enforcement authority. Thus, the *Boerne* Court is correct to try to learn some lessons from the post-ratification debate, but it gets those lessons backwards. A Congress that wanted to have the authority to enact the Ku Klux Klan Act would not have wanted Section Five to be interpreted narrowly.

CONCLUSION

An investigation into the history of Section Five cannot support the narrow interpretation of this provision created by the Supreme Court in *City of Boerne v. Flores*. There is no evidence that the “necessary and proper” language was dropped from Section Five to assuage the federalists. The Congress which ratified Section Five was a contemporary of the Congress which passed the Ku Klux Klan Act, and thereby understood itself to have power to remedy potential, but not actual, constitutional violations by state actors. The *Boerne* Court has turned that piece of history on its head, assuming that the opponents rather than the proponents of the Ku Klux Klan Act controlled Congress in both 1868 and 1871.

History cannot provide us with precise answers as to the exact test that should exist under Section Five for the scope of Congress's authority. But history can demonstrate that the *Boerne* Court was too narrow in its determination of the proper role for the Court. The history***818** of the Fourteenth Amendment does *not* confirm the remedial, rather than substantive, nature of Section Five despite the Supreme Court's argument to the contrary. [\[FN160\]](#) If the Rehnquist Court is to use history as a guidepost in interpreting the Constitution then it has an obligation to conduct a fuller and more balanced historical inquiry.

[\[FN1\]](#). Heck-Faust Memorial Chair in Constitutional Law, Ohio State University. I would like to thank the library staff at the Michael E. Mortiz for its vigorous efforts on my behalf to attain the historical material that I cite in this article.

[\[FN1\]](#). 521 U.S. 507 (1997).

[\[FN2\]](#). “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.

[\[FN3\]](#). The Religious Freedom Restoration Act prohibits government from “substantially burden[ing]” a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden: “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1 (1993).

[\[FN4\]](#). A Westlaw search revealed that fifty-eight articles have been published that use the term “*Boerne*” in their title. Those articles, of course, are only a small percentage of all of the articles that discuss this decision. *See, e.g.*, David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31; Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 SUP. CT. REV. 79; Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right— Reflections on City of Boerne v. Flores*, 39 WM. & MARY L. REV. 793 (1998); Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment*

After City of Boerne v. Flores, 32 IND. L. REV. 163 (1998).

[FN5]. *Boerne*, 521 U.S. at 520.

[FN6]. By the “federalism revolution,” I mean the contraction in Congress's authority to enact legislation. *See, e.g., Bd. of Trs. of the Univ. of Ala. v. Garrett*, 521 U.S. 356 (2001) (ADA Title I invalid as applied to the states); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (ADEA invalid as applied to the states); *Alden v. Maine*, 527 U.S. 706 (1999) (Fair Labor Standards Act invalid as applied to states); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (Trademark Remedy Clarification Act invalid as applied to states); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (Patent and Plant Variety Protection Remedy Clarification Act invalid as applied to the states); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (Indian Gaming Regulatory Act invalid).

[FN7]. 384 U.S. 641, 650 (1966).

[FN8]. *Boerne*, 521 U.S. at 530. In *Boerne*, the Court recognized that there was language in the opinion in *Katzenbach* “which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment.” *Id.* at 527-28. The Court held, however, that “[t]his is not a necessary interpretation, however, or even the best one.” *Id.* at 528. Instead, it reinterpreted the holding in *Katzenbach* as resting on one of two possible propositions: (1) that Congress had found that the Voting Rights Act provision was necessary as a “remedial measure” to deal with “discrimination in governmental services;” or (2) that Congress concluded that New York's literacy requirement, which was invalidated by the Voting Rights Act provision, “constituted an invidious discrimination in violation of the Equal Protection Clause.” *See id.* at 528-29 (quoting *Katzenbach*, 384 U.S. at 656). Thus, it limited Congress's authority to “appropriate remedial measures” in which “there must be a congruence between the means used and the ends to be achieved.” *Id.* at 530. This “congruence” test had not been used explicitly in prior Section Five cases and therefore reflected the narrowing scope of Section Five under the holding in *Boerne* as compared with the broad “appropriate legislation” holding in *Katzenbach*.

More recently, in *Kimel*, the Court acknowledged that Congress has the authority to enact “reasonably prophylactic legislation” which “prohibits very little conduct likely to be held unconstitutional,” but, in such a case, Congress apparently needs to construct a strong legislative record demonstrating that it had “reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age.” 528 U.S. at 88-91. Strong remedial measures are apparently only appropriate when the evil that is being addressed by the remedial measures is substantial; Congress has the burden of demonstrating the substantiality of the evil when it acts prophylactically. *Id.* The *Kimel* decision's emphasis on the strength of the legislative record is a contrast to the lenient manner in which the Court examined the adequacy of the legislative record in *Katzenbach*. Hence, the Court has created both substantive and procedural requirements that Congress must now meet in order to use its Section Five powers which has resulted in a considerable narrowing of Congress's authority under Section Five.

[FN9]. Not since the Court invalidated the Civil Rights Act of 1875 as exceeding Congress's state action authority under the Fourteenth Amendment, have statutes been invalidated as exceeding Congress's authority in the civil rights area. *Compare* *The Civil Rights Cases*, 109 U.S. 3 (1883) (Civil Rights Acts exceeding Congress's power under Thirteenth and Fourteenth Amendments because they have no state action requirement), *with Kimel*, 528 U.S. at 83 (ADEA exceeding Congress's power under Fourteenth Amendment because it is not a proper prophylactic measure), *and United States v. Morrison*, 529 U.S. 598 (2000) (Violence Against Women Act ex-

ceeding Congress's power under the Commerce Clause because it was not regulating economic activity and under the Fourteenth Amendment because it failed to meet the state action requirement).

[FN10]. See generally Ruth Colker, *City of Boerne Revisited*, 70 U. CIN. L. REV. 455 (2002) (arguing that RFRA violated the “necessary and proper clause” as well as the establishment clause).

[FN11]. Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 85-86 (2001). Problems are created for Congress when the Court takes one of the following approaches:

[u]nder the crystal ball approach, the Court effectively penalizes the enacting Congress for failing to create a detailed legislative record, even though such a record requirement could not reasonably have been anticipated at the moment of legislative deliberation and enactment Under the phantom legislative history approach, the Court expresses interest in considering legislative history when assessing constitutionality, but then establishes and applies a legal standard for review that even a detailed legislative record could not possibly satisfy.

Id.

[FN12]. See generally A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New “On the Record” Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001).

[FN13]. This article does not presuppose that the historical record should determine the outcome in determining the meaning of Section Five. At most, those materials should be one source in determining the appropriate meaning of Section Five. For further discussion of my views on constitutional interpretation, see Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1008 n.15 (1986). I focus on the Congressional Globe, because it has been recognized by conservatives and liberals alike as the most authoritative source on the history of Section Five. In order for Section Five to be ratified as a constitutional amendment, it had to be approved by two-thirds of both Houses of Congress and two-thirds of the states. See U.S. CONST. art. V. The recorded debate in the House and Senate is therefore some indication of the ratifiers' intentions although a complete history would also discuss whatever records are available in the state legislatures. The Court has never made reference to the debate in the state legislatures and I have made no attempt to examine that material.

[FN14]. See *infra* note 15 and accompanying text.

[FN15]. Justice Scalia's impact on the Court in terms of his utter skepticism of the value of legislative history is well known. His views were captured in his statement from the decision in *Bank One Chicago v. Midwest Bank & Trust Co.*:

In my view a law means what its text most appropriately conveys, whatever the Congress that enacted it might have “intended.” The law *is* what the law *says*, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it Moreover, even if subjective intent rather than textually expressed intent were the touchstone, it is a fiction of Jack-and-the-Beanstalk proportions to assume that more than a handful of those Senators and Members of the House who voted for the final version of the ... Act, and the President who signed it, were, when they took those actions, aware of the drafting evolution that the Court describes; and if they were, that their actions in voting for or signing the final bill show that they had the same “intent”

516 U.S. 264, 279 (1996) (Scalia, J., concurring). The following points about legislative history can be discerned

from this and other excerpts from Scalia's opinions about the use of legislative history: (1) [t]he application of legislative history is hopelessly manipulable; use of legislative history places too much power in the hands of the judiciary by allowing it to engage in judicial statute writing; (2) [a] particular statement in legislative history does not necessarily express the will of the majority; it may only reflect the rationale of the speaker; and (3) [l]egislative history can be deceptive, because arguments can be buried in legislative history—to be recited by courts in future litigation—when those arguments were not even known to most members of Congress. Nonetheless, Scalia accepts the use of such materials for the purposes of constitutional interpretation, failing to explore why more safeguards exist in that context for protecting against deceptive uses of history. For further discussion of Scalia's views, see generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: AN ESSAY* (1997).

[FN16]. 527 U.S. 706, 713 (1999). Justice Kennedy said:

We have ... sometimes referred to the States' immunity from suit as “Eleventh Amendment immunity.” The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and 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 (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Id. at 713. Justice Kennedy, therefore, did not rely on the text of the Eleventh Amendment to resolve the question of whether Congress could subject a state to suit in a state court without its consent. Instead, he relied on the historical evidence preceding the ratification of the Constitution and the Eleventh Amendment.

[FN17]. Professor Cass Sunstein has argued that the Equal Protection Clause should be interpreted through a more forward-looking lens than the Due Process Clause. See Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

The Due Process Clause often looks backward; it is highly relevant to the Due Process issue whether in existing or time-honored convention, described at the appropriate level of generality, is violated by the practice under attack. By contrast, the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure.

Id. The Court, however, has never adopted his distinction between the Equal Protection and Due Process Clause in the Fourteenth Amendment.

[FN18]. History has played a more prominent role in examining the Due Process Clause than the Equal Protection Clause of the Fourteenth Amendment. Compare *Roe v. Wade*, 410 U.S. 113, 131-47 (1973) (employing historical analysis), with *Brown v. Bd. of Educ.*, 347 U.S. 483, 490 n.4 (1954) (recognizing that public education was not widespread at the time that the Fourteenth Amendment was ratified and that compulsory school attendance laws were not generally adopted until 1918). Both liberals and conservatives have relied on history in interpreting Section Five. Liberals often do not use history to assist them in interpreting the Equal Protection Clause in Section One, because the ratifiers had a limited commitment to racial justice in areas we consider important today such as education. See generally Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955). By contrast, liberals use history to assist them in interpreting the Due Process Clause in Section One. The controversy between the liberals and conservatives is over the scope of the history inquiry. Compare *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (majority framing the proper historical

question as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.”), *with id.* at 206 (Blackmun, J., dissenting) (dissent framing the appropriate historical question as whether all individuals to control “the nature of their intimate associations with others.”).

The liberals on the Court have never directly discussed why they rely more heavily on history in interpreting the Due Process Clause than the Equal Protection Clause in Section One. Moreover, the liberals have never explained why they rely on history in the Section Five context—when interpreting Congress's power to enforce the Equal Protection Clause—despite the fact that they do not rely on history to define in the first instance the meaning of the Equal Protection Clause in Section One. This Article will assume that history will continue to play some role in interpreting Section Five while recognizing that one could argue that liberals should be consistent in disavowing the usefulness of history for determining the meaning of the Equal Protection Clause in Section One and Congress's enforcement powers with respect to the Equal Protection Clause in Section Five.

[FN19]. SCALIA, *supra* note 15, at 38. Scalia has argued:

In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear I will consult the writings of some men who happened to be delegates to the Constitutional Convention— Hamilton's and Madison's writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. Thus I give equal weight to Jay's pieces in *The Federalist*, and to Jefferson's writings, even though neither of them was a Framers. What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.

Id. at 37-38.

[FN20]. “[Probative legislative history] excludes any post-enactment deliberations by either the executive or legislators. Such statements are not subject to legislative deliberation and are not relevant. Additionally such statements almost always reflect the speaker's current political needs and not those of the enacting legislature.” Abner J. Mikva & Eric Lane, *The Muzak of Justice Scalia's Revolutionary Call to Read Unclear Statutes Narrowly*, 53 SMU L. REV. 121, 131 (2000).

[FN21]. This first subpoint, as Scalia acknowledges, is a controversial point. Nonoriginalists, like myself, would argue that we should not confine ourselves to the views of the people at the time of ratification. A central aspect of a constitution's deliberate flexibility is that it be a “living tree” and updated with the times. If we agree that it is appropriate for the constitutional text not to be a legal code, so that it can flexibly consider varied constitutional problems, it makes little sense to confine that flexibility to the time of the people who ratified the document. If we want to confine ourselves to that time period then we might as well have asked our forebearers to draft a more precise constitutional text. I will not join the temporal debate in this article, but do want to note that there is an inconsistency in recognizing the value of the flexibility of constitutional text and then limiting that flexibility to a discrete time period from many years ago. By examining a historical source to help us understand the meaning of Section Five, I do not want to foreclose the usefulness of also examining more contemporary sources.

[FN22]. *See* SCALIA, *supra* note 15, at 37-38.

[FN23]. Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You*?, 45 VAND. L. REV. 561, 576 (1992).

[FN24]. Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1 (1993).

[FN25]. *City of Boerne v. Flores*, 521 U.S. 507, 527-28 (1993).

[FN26]. *Id.* at 527.

[FN27]. *Id.* at 520.

[FN28]. *Id.* at 521.

[FN29]. CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866).

[FN30]. *Id.* Section Five of the Fourteenth Amendment passed the House by a vote of 128-37 on May 10, 1868, with 19 members of Congress not voting. In order to pass by the required two-thirds margin, the House needed 124 votes in favor of the Amendment. *See id.*

[FN31]. ROBERT J. HARRIS, *THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS AND THE SUPREME COURT* 40 (1960).

[FN32]. *See Boerne*, 521 U.S. at 521-22.

[FN33]. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

[FN34]. *See Boerne*, 521 U.S. at 523-24.

[FN35]. Another important historical moment was the ratification process in the states. The Court makes no mention of that process; hence, I will not discuss it in this article. But a complete consideration of the Amendment's ratification should consider that important step of the process.

[FN36]. CONG. GLOBE, 39th Cong., 1st Sess. 6 (1865).

[FN37]. *Id.* It is important to remember that the confederate states were not represented in Congress when it ratified the Fourteenth Amendment. *See* JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 150 (1956).

[FN38]. JAMES, *supra* note 37, at 38-39.

[FN39]. CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865). According to Professor tenBroek, Representative Stevens introduced a somewhat modified version of the Fourteenth Amendment on January 12, 1866 that stated: “[a]ll laws, state or national, shall operate impartially and equally on all persons without regard to race and color.” JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 188 (1951).

[FN40]. CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865).

[FN41]. *Id.* at 14.

[FN42]. *Id.*

[FN43]. Representative Bingham introduced a somewhat modified version of his earlier version of the Fourteenth Amendment on January 12, 1866, which contained the following language: “Congress shall have power to make all laws necessary and proper to secure to all persons in every State within the Union equal protection in their rights of life, liberty, and property.” TENBROEK, *supra* note 39, at 188. This version, like Bingham's earlier version gave Congress broad powers through a “necessary and proper” clause.

[FN44]. CONG. GLOBE, 39th Cong., 1st Sess. 25 (1865).

[FN45]. *Id.* at 25-40.

[FN46]. *Id.* at 46.

[FN47]. The members in the House included Thaddeus Stevens, Elihu B. Washburne (Il), Justin S. Morrill (Vt), Henry Grider (Ky), John A. Bingham (Oh), Rosco Conkling (NY), George S. Boutwell (Ma), Henry T. Blow (Mo), and Andrew J. Rogers (NJ). The members in the Senate included William P. Fessenden (Me), George W. Grimes (Ia), Jacob M. Howard (Mi), Reverdy Johnson (Md), George H. Williams (Or), and Ira Harris (NY). JAMES, *supra* note 37, at 41, 43-44. Representative Thaddeus Stevens chaired the group in the House and Senator William P. Fessenden headed the group in the Senate, with Fessenden serving as the Chairman of the Joint Committee.

[FN48]. Under Article I, Section 2, persons who were not “free” were counted as three-fifths of a person for the purpose of determining representatives to Congress. U.S. CONST. art. I, § 2.

[FN49]. U.S. CONST. amend. XIV, § 2.

[FN50]. On January 8, 1866, Representative Blaine suggested language for an early version of Section Two which would have prevented a state from counting any persons who were not granted civil or political rights for the purpose of determining representation in Congress. Blaine's suggested language stated:

[r]epresentation and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers, which shall be determined by taking the whole number of persons except those to whom civil or political rights or privileges are denied or abridged by the constitution or laws of any State on account of race or color.

CONG. GLOBE, 39th Cong., 1st Sess. 141-42 (1866) (*italics omitted*). Throughout the debate on the Fourteenth Amendment, the representation amendment received the most attention and was the subject of frequent revision until the end.

[FN51]. TENBROEK, *supra* note 39, at 188; *see also*, JAMES, *supra* note 37, at 53 (discussing this language.) The Subcommittee of the Joint Committee on Reconstruction offered the following, slightly different version of the Fourteenth Amendment on January 27, 1866: “Congress shall have the power to make all laws which shall be necessary and proper to secure all persons in every State full protection in the enjoyment of life, liberty, and property; and to all citizens of the United States in any State the same immunities and also equal political rights and privileges.” CONG. GLOBE, 39th Cong., 1st Sess. (1866). This language continued to use the broad “necessary and proper” language proposed by Representative Bingham and there continued to be no discussion about the merits of this language in the Congressional Globe.

[FN52]. JAMES, *supra* note 37, at 81.

[FN53]. *Id.* at 82.

[FN54]. CONG. GLOBE, 39th Cong., 1st Sess. 1054 (1866). Representative Higby opened the debate by saying that the proposed language “will only have the effect to give vitality and life to portions of the Constitution that probably were intended from the beginning to have life and vitality, but which have received such a construction that they have been entirely ignored and have become as dead matter in that instrument.” *Id.*

[FN55]. U.S. CONST. art. I, § 8; CONG. GLOBE, 39th Cong., 1st Sess. 1057 (1866).

[FN56]. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1087-88 (1866).

[FN57]. *Id.* at 1087.

[FN58]. *Id.* at 1088.

[FN59]. *Id.*

[FN60]. *See id.* at 1095. Representative Hotchkiss spoke in opposition to the proposed language because, in his opinion, the proposed amendment did not go far enough in giving individuals a guaranteed right of equality. The proposed language, he argued, left the enforcement of equality “to the caprice of Congress.” *See id.* He then said:

His amendment is not as strong as the Constitution now is. The Constitution now gives equal rights to a certain extent to all citizens. This amendment provides that Congress may pass laws to enforce these rights. Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as a part of the organic law of the land, subject only to be defeated by another constitutional amendment Let us have a little time to compare our views upon this subject, and agree upon an amendment that shall secure beyond question what the gentleman desires to secure. It is with that view, and no other, that I shall vote to postpone this subject for the present.

Id.

[FN61]. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

[FN62]. *Id.* at 1288-89.

[FN63]. *See id.*

[FN64]. *Id.* at 1289.

[FN65]. *Id.*

[FN66]. *See* JAMES, *supra* note 37, at 87 (“Opposition within the Republican majority seemed to center about those who opposed the resolution on principle and those who thought it impractical to pass on more amendments before the representation resolution had been decided upon in the Senate.”).

[FN67]. The proposal included the following language:

Section 1. No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons, because of race, color, or previous condition of servitude.

Section 2. From and after the fourth day of July, eighteen hundred and seventy-six, no discrimination shall be made in any state nor by the United States, as to the enjoyment, by classes of persons, of the right of suffrage, because of race, color, or previous condition of servitude.

Section 3. Until the fourth day of July, eighteen hundred and seventy-six, no class of persons, as the right of any of whom to suffrage, discrimination shall be made by any State, because of race, color, or previous condition of servitude, shall be included in the basis of representation.

Section 4. Debts incurred in aid of insurrection, or of war against the Union, and claims of compensation for loss of involuntary service or labor, shall not be paid by any State nor by the United States.

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

Id. at 100.

[FN68]. *Id.* at 101.

[FN69]. *Id.* at 107.

[FN70]. *Id.* at 114.

[FN71]. The Committee's April 29th version stated:

Section 1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States which may be included within this Union according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever in any State the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of male citizens shall bear to the whole number of such male citizens not less than twenty-one years of age.

Section 3. Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice-President of the United States.

Section 4. Neither the United States nor any State shall assume or pay any debt or obligation already incurred, or which may hereafter be incurred, in aid of insurrection or of war against the United States, or any claim for compensation for the loss of involuntary service or labor.

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

JAMES, *supra* note 37, at 115-16.

[FN72]. CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866).

[FN73]. JAMES, *supra* note 37, at 120.

[FN74]. CONG. GLOBE, 39th Cong., 1st Sess. 2332-33 (1866).

[FN75]. *Id.*

[FN76]. *Id.* at 2459.

[FN77]. *Id.*

[FN78]. *Id.* The *Boerne* Court stated that: “[t]he revised Amendment proposal did not raise the concerns expressed earlier regarding broad congressional power to prescribe uniform national laws with respect to life, liberty, and property.” *Boerne*, 521 U.S. at 523.

[FN79]. TENBROEK, *supra* note 39, at 203.

[FN80]. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

[FN81]. *Id.*

[FN82]. *Id.*

[FN83]. *Id.*

[FN84]. *Id.*

[FN85]. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). Stevens says,

I admit that this article is not as good as the one we sent to death in the Senate. In my judgment, we shall not approach the measure of justice until we have given every adult freedman a homestead on the land where he was born and toiled and suffered.

Id.

[FN86]. *Id.*

[FN87]. *Id.* at 2460. Stevens therefore stated:

This section allows the States to discriminate among the same class, and receive proportionate credit in representation. This I dislike. But it is a short step forward. The large stride which we in vain proposed is dead; the murderers must answer to the suffering race. I would not have been the perpetrator. A load of misery must sit heavy on their souls.

Id.

[FN88]. JAMES, *supra* note 37, at 125.

[FN89]. *Id.*; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

[FN90]. CONG. GLOBE, 39th Cong., 1st Sess. 2460 (1866).

[FN91]. *Id.*

[FN92]. *Id.*

[FN93]. *Id.*

[FN94]. *Id.*

[FN95]. As Professor tenBroek has noted: “[l]ike the February debates, those of May and June were preoccupied mainly with the patently political sections of the amendment, [sections 2 and 3](#).” TENBROEK, *supra* note 39, at 208.

[FN96]. CONG. GLOBE, 39th Cong., 1st Sess. 2465 (1866). Representative Thayer said, “[w]hat will continue to be the condition of the country if you adopt this feature of the proposed plan? Continual distraction, continued agitation, continued bickerings, continued opposition to the law, and it will be well for the country if a new insurrection shall not spring from its bosom.” *Id.*

[FN97]. *Id.* at 2467.

[FN98]. *Id.*

[FN99]. *Id.* at 2468. Representative Kelley said:

Who ought to govern this country? The men who for more than four years sustained bloody war for its overthrow, or they whom my colleague designates as “that proscriptive body of men known as the great Union party” who maintained the Government against the most gigantic rebellion since that which Satan led?

Id. at 2465.

[FN100]. *Id.* at 2469.

[FN101]. Section One of the Fifteenth Amendment, which was ratified in 1870, states: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” [U.S. CONST. amend. XV, § 1](#).

[FN102]. CONG. GLOBE, 39th Cong., 1st Sess. 2469-71 (1866).

[FN103]. *See id.* at 2472.

[FN104]. *Id.* at 2498.

[FN105]. *Id.*

[FN106]. *See id.* at 2501. He said, for example: “[d]ischarge your joint committee on reconstruction; abolish your Freedmen's Bureau; repeal your civil rights bill, and admit all the delegates from the seceded States to their seats in Congress, who have been elected according to the laws of the country and possess the constitutional qualification, and all will be well.” *Id.*

[FN107]. CONG. GLOBE, 39th Cong., 1st Sess. 2502 (1866).

[FN108]. *See id.* Nonetheless, his comments indirectly reference Section Five. His comments include a recitation of the events that occurred before the current version of Section Five was proposed:

And now, sir, with regard to these amendments, five in form, but only four in substance, I have this to say: that, with one exception, they are such as commend themselves to my approval. The principle of the

first, which secures an equality of rights among all the citizens of the United States, has had a somewhat curious history. It was first embodied in a proposition introduced by the distinguished gentleman from Ohio, [Mr. Bingham,] in the form of an amendment to the Constitution, giving Congress power to secure an absolute equality of civil rights in every State of the Union. It was discussed somewhat in that form, but, encountering considerable opposition from both sides of the House, it was finally postponed, and is still pending. Next it came before us in the form of a bill, by which Congress proposed to exercise precisely the powers which that amendment was intended to confer, and to provide for enforcing against State tribunals the prohibitions against unequal legislation. I regarded it as very doubtful, to say the least, whether Congress, under the existing Constitution, had any power to enact such a law; and I thought, and still think, that very many members who voted for the bill also doubted the power of Congress to pass it, because they voted for the amendment by which that power was to be conferred. At all events, acting for myself and upon my own conviction on this subject, I did not vote for the bill when it was first passed, and when it came back to use from the President with his objections I voted against it. And now, although that bill became a law and is now upon our statute-book, it is again proposed so to amend the Constitution as to confer upon Congress the power to pass it.

Id.

[FN109]. *Id.* at 2512.

[FN110]. *Id.* at 2513.

[FN111]. *Id.* at 2545.

[FN112]. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2510-11 (1866).

[FN113]. *Id.*

[FN114]. *Id.* at 2511.

[FN115]. *Id.*

[FN116]. *Id.* at 2530.

[FN117]. CONG. GLOBE, 39th Cong., 1st Sess. 2530-31 (1866).

[FN118]. *Id.* at 2531.

[FN119]. *Id.* at 2531-32.

[FN120]. *Id.* at 2532.

[FN121]. *Id.* at 2532-34.

[FN122]. CONG. GLOBE, 39th Cong., 1st Sess. 2535-36 (1866).

[FN123]. *Id.* at 2537.

[FN124]. *Id.*

[FN125]. *See id.* at 2539-41.

[FN126]. *See id.* at 2541-43.

[FN127]. CONG. GLOBE, 39th Cong., 1st Sess. 2544 (1866).

[FN128]. *Id.* at 2545.

[FN129]. *Id.*

[FN130]. *See id.* at 2545; *see also* JAMES, *supra* note 37, at 131.

[FN131]. JAMES, *supra* note 37, at 134.

[FN132]. *Id.* at 135. Senator Howard explained: “Mr. President, I regret that the state of the health of the honorable Senator from Maine [Mr. Fessenden] who is chairman, on the part of the Senate of the joint committee of fifteen, is such as to disable him from opening the discussion of this grave and important measure.” CONG. GLOBE, 39th Cong., 1st Sess. 2764-65 (1866).

[FN133]. CONG. GLOBE, 39th Cong., 1st Sess. 2763 (1866). Senator Fessenden did participate in debate on that day so it is unclear whether it was illness that caused him not to fulfill his duties as Committee Chair.

[FN134]. *Id.* at 2766. In a later passage he reiterated that point with the following statement:

[Section five] gives to Congress power to enforce by appropriate legislation all the provisions of this article of amendment. Without this clause, no power is granted to Congress by the amendment or any one of its sections. It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it imposes upon Congress this power and this duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment.

Id. at 2768.

[FN135]. *See id.* at 2766-67.

[FN136]. *Id.* at 2768.

[FN137]. *See id.* at 2768-69.

[FN138]. CONG. GLOBE, 29th Cong., 1st Sess. 2771 (1866).

[FN139]. *See* JAMES, *supra* note 37, at 142.

[FN140]. *See id.* at 148.

[FN141]. *See id.* (describing the changes).

[FN142]. CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866).

[FN143]. *Id.*

[FN144]. JAMES, *supra* note 37, at 150.

[FN145]. *See id.* at 149-50.

[FN146]. CONG. GLOBE, 39th Cong., 1st Sess. 3144 (1866).

[FN147]. *Id.* at 3149.

[FN148]. CONG. GLOBE, 42nd Cong., 1st Sess. 317 (1871) (remarks of Rep. Shellabarger). The second section of the bill:

provides that if two or more persons shall, within the limits of any State, band, conspire, or combine together to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal, process or resistance of officers in discharge of official duty, arson, or larceny, and if one or more of the parties to said conspiracy or combination shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy or combination, whether principals or accessories, shall be deemed guilty of a felony, and upon conviction thereof shall be liable to a penalty of not exceeding \$10,000, or to imprisonment not exceeding ten years, or both, at the discretion of the court; provided, that if any party or parties to such conspiracy or combination shall, in furtherance of such common design, commit the crime of murder, such party or parties so guilty shall, upon conviction thereof, suffer death; and provided also, that any offense punishable under this act, begun in one judicial district of the United States and completed in another, may be dealt with, inquired of, tried, determined, and punished in either district.

Id. at 317.

[FN149]. *Id.* at 477 (language that Rep. Shellabarger introduced).

[FN150]. *See* Mark Fockele, Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402, 412 (1979).

[FN151]. Steven F. Shatz, *The Second Death of 42 U.S.C. Section 1985(3): The Use and Misuse of History in Statutory Interpretation*, 27 B.C. L. REV. 911, 914 n.17 (1986).

[FN152]. CONG. GLOBE, 42nd Cong., 1st Sess. 522 (1871).

[FN153]. *See United States v. Harris*, 106 U.S. 629, 644 (1883).

[FN154]. *Id.* at 639.

[FN155]. It was not until 1951 that the Court began to import a state action requirement into the Ku Klux Klan Act as a matter of statutory interpretation. *See Collins v. Hardyman*, 341 U.S. 651 (1951). The Court interpreted the phrase “equal protection of law” to contain an implicit state action requirement. It stated:

[I]t is clear that this statute does not attempt to reach a conspiracy to deprive one of rights, unless it is a deprivation of equality, of “equal protection of law,” or of “equal privileges and immunities under the law” [P]rivate discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so.

Id. at 661.

[FN156]. See [United States v. Morrison](#), 529 U.S. 598, 621 (2000) (emphasizing the “time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action” and holding that VAWA cannot be justified under Section Five because of insufficient evidence of state action underlying the statutory scheme).

[FN157]. I say “like” the Violence Against Women Act, because, of course, the ratifiers of the Fourteenth Amendment did not contemplate that amendment applying to issues of gender equality, especially since the Fifteenth Amendment explicitly only extended suffrage to additional *men*. This observation again raises the question of why it makes sense for history to influence the meaning of Section Five when it does not influence the meaning of Section One's Equal Protection Clause.

[FN158]. The *Morrison* Court does briefly examine the history of the Fourteenth Amendment to justify its narrow interpretation of the state action requirement. It cites some cases from the Nineteenth Century, in which the Court had concluded that Congress exceeded its authority in regulating private conduct under Section Five and says:

The force of the doctrine of stare decisis behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.

[Morrison](#), 529 U.S. at 622. Although the Court's statement about the composition of the Court is factually correct, I would assert that it is even more relevant that the Congress which had recently ratified the Fourteenth Amendment thought it had granted itself the power to enact legislation under Section Five which banned purely private conduct. If we are to consider the understanding of the text, at the time that it was ratified by the “intelligent and informed people of the time” then I would argue that the views of the ratifying Congress should take precedence over the views of a later Supreme Court that was not part of the ratification process.

[FN159]. For a critique of the Court's Section Five standard, see generally Colker, *supra* note 11.

[FN160]. See [Boerne](#), 521 U.S. at 520.
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