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# Arming the Second Amendment - And Enforcing the Fourteenth

William Araiza

*Brooklyn Law School*, [bill.araiza@brooklaw.edu](mailto:bill.araiza@brooklaw.edu)

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# Arming the Second Amendment— and Enforcing the Fourteenth

William D. Araiza \*

## *Abstract*

*This Article considers the timely and important question of Congress's power to enforce the Second Amendment. Such legislation would test the Court's current enforcement power doctrine, which ostensibly acknowledges a congressional role in vindicating constitutional rights while insisting on judicial supremacy in stating constitutional meaning. Second Amendment doctrine is complex and, importantly, methodologically varied. That complexity and variety would require the Court to perform a more nuanced, granular approach to the enforcement power than it has thus far in the modern era.*

*Part II quickly recaps the Court's Enforcement Clause jurisprudence. It concludes that its most recent enforcement power cases have left the doctrine adrift. Part III provides a similarly quick recap of the Supreme Court's and lower federal courts' Second Amendment jurisprudence. It identifies at least five steps that courts have taken in analyzing Second Amendment issues, which reflect varying levels of core constitutional meaning. That variation matters for the constitutionality of particular instances of congressional gun rights enforcement.*

*Part IV examines, and finds wanting, the extant approaches to congruence and proportionality review as they might apply to Second Amendment enforcement legislation. Part V offers an alternative approach, in which review of gun rights enforcement legislation would account for the different constitutional status of each step of Second Amendment doctrine. Part VI applies this*

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\* Professor of Law, Brooklyn Law School. Thanks to Joseph Blocher, Brannon Denning, Lawrence Rosenthal, Eugene Volokh, and participants at the Loyola University School of Law Constitutional Law Colloquium for comments on an earlier draft of this Article. Thanks also to Mark Potkewitz for fine research assistance.

approach, and works through its difficulties, using a hypothetical enforcement statute granting Americans the right to carry firearms in their automobiles.

Part VII briefly and speculatively expands the scope of this proposed approach to legislation enforcing other substantive Fourteenth Amendment rights. The difficulties posed by Second Amendment enforcement legislation would likely reappear in legislation enforcing such rights. It urges the Court to adopt an approach of this sort in order to credibly implement both its insistence on judicial supremacy in stating constitutional meaning and its acknowledgement of Congress's role in vindicating constitutional rights.

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### *I. Introduction*

When in 2008 the Supreme Court concluded that the Second Amendment bestowed a personal right to “keep and bear arms,”<sup>1</sup> and when two years later it concluded that that right applied in full to states via either the Fourteenth Amendment’s Due Process or Privileges and Immunities Clauses,<sup>2</sup> the Court embarked on a new doctrinal voyage.<sup>3</sup> One of the more interesting, but less remarked-upon, aspects of that voyage concerns the breadth of

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1. See *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (“There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”).

2. See *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (“[A] provision of the Bill of Rights that protects a right that is fundamental . . . applies equally to the Federal Government and the States. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.” (citation omitted)).

3. Many scholars have commented on the implications of the novelty of the gun possession right that the Court found in *Heller*. See, e.g., Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1478–81 (2009) (noting that the *Heller* test and definition used in *Heller* to determine what is excluded from the term “arms” has unclear implications in its applicability); Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1553 (2009) (arguing that “*Heller*’s greatest irony is that the mistakes and flaws of the opinion end up improving the decision”); Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187, 1191 (2015) (“This Article takes *Heller*’s conclusions about the original meaning of the Second Amendment as given and assesses whether they have produced—or even are capable of producing—an authentically originalist Second Amendment jurisprudence.”).

congressional power to enforce that right against states via the Fourteenth Amendment's Enforcement Clause.<sup>4</sup>

The question of Congress's power to enforce the Second Amendment has both a practical and doctrinal significance as well as a broader and more theoretical import. With regard to the former, it is relatively easy to envision a scenario in which Congress might wish to use its enforcement power in the gun rights context. Politically, the Second Amendment right is a popular one in many parts of the country (and, to be more granular, in many parts of many states), yet many states and localities still enact strong gun control measures.<sup>5</sup> The resulting regulatory patchwork provides an attractive target for political forces that would prefer more robust gun possession rights at a broader (particularly national) level.<sup>6</sup> At the same time, the

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4. See U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this [amendment]."). Indeed, this Article appears to be the first in-depth treatment of this issue since the Court adopted the individual rights understanding of the Second Amendment in *Heller*. Cf. Brannon Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm,"* 21 HARV. J.L. & PUB. POL'Y 719, 754, 762 (1998) (considering the possibilities of congressional enforcement of the Second Amendment under the then-recently-decided case of *City of Boerne v. Flores*).

5. For example, in the November 2016 elections, voters in California, Nevada, and Washington enacted gun control measures. The Nevada measure dealt with background checks. See THE BACKGROUND CHECK INITIATIVE, at 1 (2014), <http://nvsos.gov/sos/home/showdocument?id=3440> (displaying Nevada's laws on background checks). The Washington initiative restricted gun access for potentially dangerous persons. See INITIATIVE MEASURE NO. 1491, at 1 (2016), [https://sos.wa.gov/\\_assets/elections/initiatives/Final\\_Text\\_1016.pdf](https://sos.wa.gov/_assets/elections/initiatives/Final_Text_1016.pdf) ("This act is designed to temporarily prevent individuals who are at high risk of harming themselves or other from accessing firearms . . ."). While the California measure enacted an array of limitations and requirements related to gun possession. See TEXT OF PROPOSED LAW, PROPOSITION 51, at 1 <http://vig.cdn.sos.ca.gov/2016/general/en/pdf/text-proposed-laws.pdf#prop63> ("This initiative measure is submitted to the people in accordance with the provisions of Section 8 of Article II of the California Constitution."). Maine voters rejected a proposal to impose background checks on certain types of gun transactions. See AN ACT TO REQUIRE BACKGROUND CHECKS FOR GUN SALES, at 4, <http://www.maine.gov/sos/cec/elec/citizens/background.pdf> (summarizing the rejected proposal).

6. This patchwork, and the seemingly conflicting preferences of different parts of the country, also raises the question of whether such local preferences can be accommodated under Second Amendment doctrine. See Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 107 (2013) (arguing for such accommodation). In turn, the doctrine's ability to accommodate different gun

tragic reality of continued mass shootings will spur continued pushes for gun control legislation, especially at the state and local level where such efforts are more likely to succeed. At the national level, the emergence of control of the political branches by a party committed to robust protection of guns rights makes it likely, or at the very least plausible, that federal legislative initiatives protecting such rights will emerge, especially when states and localities are seen as infringing them.

From a doctrinal perspective, the Second Amendment provides an interesting enforcement power case study for the simple reason that the Enforcement Clause likely provides the most attractive constitutional foundation for federal gun rights legislation. Indeed, the enforcement power is almost tailor-made for legislation protecting gun *possession*, given the Court's holding in *United States v. Lopez*<sup>7</sup> that simple possession of a gun in a school zone is not conduct regulable under the commerce power.<sup>8</sup>

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regulation regimes raises the subsequent question about whether such flexibility militates against federal enforcement legislation enacting a single national rule governing the relevant gun regulation issue.

7. 514 U.S. 549 (1995).

8. See *id.* at 551 (holding that the Gun-Free Zones Act of 1990 exceeds the authority of Congress under the Commerce Clause because "[t]he Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce"). This fact also means that the enforcement power would play a role greater than simply providing a constitutional foundation for particular federal legislative remedies, in particular, damages remedies, which are unavailable when Congress regulates pursuant to its most important Article I powers. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (holding that the Indian and Interstate Commerce Clauses do not allow Congress to impose retrospective remedies on non-consenting states); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 636 (1999) ("*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers . . ."); but see *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 375 n.12 (2006) (carving out an exception for Congress's Article I authority to enact bankruptcy laws). By contrast, the fact that the federal commerce power does not extend to regulating gun possession, whatever the remedies Congress chooses to authorize, makes the enforcement power crucial not just for purposes of the availability of certain remedies, but for the potential for federal regulation of any sort. To be sure, Congress might invoke its Article I Spending Clause power when regulating how states deal with gun *possession*. But even this power has come under new scrutiny. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012) (finding that Congress exceeded its Spending Clause power when it conditioned Medicaid grants to the states upon a state's

The Second Amendment enforcement issue is also interesting for deeper and broader reasons. The first concerns methodology. The Supreme Court has insisted that the Second Amendment right is most appropriately identified by a historically-based original understanding of that right, rather than what Justice Scalia, writing for the Court in *District of Columbia v. Heller*,<sup>9</sup> derided as “interest balancing.”<sup>10</sup> This insistence that Second Amendment questions be decided based on originalist methodology—a methodology that Justice Scalia himself described as reflecting an understanding of the Constitution as “in its nature the sort of ‘law’ that is the business of the courts”<sup>11</sup>—raises important questions about the appropriate role

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acceptance of the Affordable Care Act’s expansion of the Medicaid program).

The late Calvin Massey argued that the scope of the enforcement power should turn in part on whether the enforcement legislation in question made retrospective relief such as damages available. See Calvin Massey, *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV. 1, 8 (2007) (“When Congress seeks to prevent possible constitutional wrongs by enabling injured private parties to bring suit for damages, however, the meaning of congruence and proportionality becomes contested.”). In most enforcement power cases—for example, those dealing with legislation regulating state government employment discrimination—the stakes focus on the availability of retrospective relief, given the availability of the commerce power as a source for federal regulation of states as long as that regulation does not include a private right of action for damages. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555–56 (1985) (reasoning that Congress’s actions in providing San Antonio Metropolitan Transit Authority employees “the protections of the wage and hour provisions of the FLSA contravened no affirmative limit on Congress’s power under the Commerce Clause”); *Seminole Tribe*, 517 U.S. at 72 (“Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.”). The stakes are higher in the narrower gun context because the commerce power is unavailable to justify even that more limited federal regulation. See *Lopez*, 514 U.S. at 567 (“To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power . . .”). The fact that federal enforcement of gun possession rights might have to rely fully on the enforcement power, as opposed to partially on the commerce power, would raise an additional complexity for the enforcement power if Professor Massey was correct that the analysis turns in part on the remedy Congress sought to impose. This Article brackets this important question.

9. 554 U.S. 570 (2008).

10. *Id.* at 635.

11. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849,

of Congress in contributing to that understanding. Simply put, what constitutes “appropriate”<sup>12</sup> enforcement legislation when the rights Congress seeks to enforce are revealed through an analysis that is largely the work of judges? Indeed, what is Congress’s role when those rights are identified through originalist analysis that purports to uncover core constitutional meaning,<sup>13</sup> rather than judicial doctrine that reflects doctrinal heuristics that are chosen largely because of their judicial manageability?<sup>14</sup>

This theoretical question may soon have significant practical implications that encompass, but also go beyond, the Second Amendment. One striking aspect of the Court’s modern Enforcement Clause jurisprudence has been its recent focus on challenges to legislation enforcing the Equal Protection Clause, rather than the Due Process Clause. Since the first two cases decided under the modern “congruence and proportionality” standard, both handed down nearly twenty years ago,<sup>15</sup> the Court has decided only one significant Enforcement Clause case involving enforcement of substantive rights.<sup>16</sup> The Court’s focus

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854 (1989). Indeed, Justice Scalia went on to suggest that underlying the principle of judicial review is “the perception that the Constitution . . . is in its nature the sort of ‘law’ that is the business of the courts—an enactment that has a fixed meaning that is *ascertainable through the usual devices familiar to those learned in the law*.” *Id.* (emphasis added).

12. U.S. CONST. amend. XIV, § 5.

13. See, e.g., Robert Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Courts, Culture, and Law*, 117 HARV. L. REV. 4, 32 (2003) (“Scalia advocates originalism as a philosophy of constitutional interpretation because . . . it emphasizes that the ‘interpretation of the Constitution . . . is . . . essentially lawyers’ work . . . .’” (quoting ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 46 (1997))).

14. Cf. *United States v. Windsor*, 133 S. Ct. 2675, 2716 (2013) (Alito, J., dissenting) (“The modern tiers of scrutiny . . . are a heuristic to help judges determine when classifications have that ‘fair and substantial relation to the object of the legislation’ [required by equal protection].” (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971))).

15. See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (creating a congruence and proportionality test to determine whether Congress has acted with proper authority and applying it to legislation enforcing the Free Exercise Clause); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 652 (1999) (applying the congruence and proportionality test to a statute defended as enforcing property rights in patents against state infringing conduct).

16. See *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (finding that Title



on equality-enforcing legislation has led to an enforcement power jurisprudence that has turned heavily on the level, or tier, of judicial protection enjoyed by the equality right Congress is seeking to vindicate.<sup>17</sup> Because the Court has determined the level of scrutiny by sometimes-explicit invocations of the culture's evolving understanding of equality,<sup>18</sup> as well as by reference to the mediating principle of the protected group's access to the political process,<sup>19</sup> there has been ample, if sometimes unacknowledged, room for Congress to participate in the task of vindicating equality rights via legislation.<sup>20</sup>

The protection of substantive rights may be different. To the extent originalist analysis insists that the scope and nature of a substantive right reflect an understanding of law that is "the business of the courts"<sup>21</sup> to explicate, such rights may be more resistant to congressional attempts to contribute to their full vindication.<sup>22</sup> Thus, the Court's turn toward originalist analysis

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II of the ADA, as applied to cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress's enforcement power under the Fourteenth Amendment). Another Enforcement Clause case dealing with substantive rights, *United States v. Georgia*, 546 U.S. 151 (2006), is relatively less significant for purposes of understanding Enforcement Clause doctrine, but is nevertheless discussed at *infra* note 153 and *infra* note 278 and accompanying text. A final case, *Shelby County v. Holder*, 133 S. Ct. 2612, 2629 (2013), considered Congress's cognate power to enforce the Fifteenth Amendment, which prohibits racial discrimination in voting. See *infra* notes 172–181 and accompanying text (discussing *Shelby County*).

17. See *infra* Part II.A.1 (explaining those cases).

18. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 687–88 (1973) (plurality opinion) (relying in part on legislative guidance when determining that sex discrimination is a serious national problem).

19. See *id.* at 685 (providing such a process-based approach to the level of scrutiny question); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985) (performing a similar analysis).

20. See, e.g., Post, *supra* note 13, at 23–27 (noting this potential in the context of the Court's early congruence and proportionality jurisprudence).

21. See Scalia, *supra* note 11, at 854 (underlying the principle of judicial review is "the perception that the Constitution . . . is in its nature the sort of 'law' that is the business of the courts").

22. To be sure, one should not overstate this distinction between equality rights, whose vindication requires recourse to cultural understandings, and substantive rights, whose vindication turns on purely legal analysis. For example, to the extent that courts uncover unenumerated substantive due process rights via an analysis of the nation's history and tradition, substantive due process methodology could be understood to require courts to consider how modern American culture has interacted with and related to that tradition. See,

when interpreting substantive constitutional rights, such as Bill of Rights provisions (as well as their incorporated analogues), may require a new approach to congruence and proportionality when attention turns to enforcement legislation, such as gun rights legislation, that aims at enforcing such rights. At the very least, such a new approach is required if the Court is to avoid the unacceptably restricted vision of the enforcement power that allows Congress only to craft remedies for judicially-determined constitutional violations.<sup>23</sup> The Second Amendment provides an opportunity to consider this issue. But the resulting analysis will apply far more broadly than the gun possession right.

The Second Amendment constitutes an excellent vehicle for this examination. Gun rights litigation is widespread, and the Court's refusal to clarify its jurisprudence since incorporating the Second Amendment in 2010<sup>24</sup> means that lower courts have faced a wide variety of challenges with only limited Supreme Court guidance. The result has been a complex, multi-stage doctrine that takes *Heller's* historical/originalist analysis only as its starting point.<sup>25</sup> This complexity further distances potential Second Amendment enforcement issues from the mine run of the

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*e.g.*, Post, *supra* note 13, at 85 (“[D]ue process doctrine has historically engaged in remarkably candid efforts to interpret and apply cultural values . . .”). Such cultural engagement would also be required to the extent a judge adopted an approach to substantive due process methodology that self-consciously asked about the importance of the asserted right to one’s ability to live an autonomous life. See *id.* at 88 (“Instead of identifying constitutionally protected liberty interests by reference to the contemporary significance of tradition, it began to identify such interests by directly evaluating the intrinsic value of liberty itself.”). Similarly, an important element of Fourth Amendment doctrine—the question of whether Americans have a reasonable expectation of privacy in a given context—requires courts to understand modern American culture. See generally WILLIAM D. ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW 235–38 (2015) [hereinafter ARAIZA, ENFORCING]. Thus, at least some substantive rights doctrines are heavily influenced by cultural understandings.

23. Since *Boerne*, only Justice Scalia has taken a position this extreme. See *Lane*, 541 U.S. at 554 (Scalia, J., dissenting) (arguing for this more limited understanding of the enforcement power in cases other than those evaluating racial equality enforcement legislation).

24. See *infra* notes 187–191 and accompanying text (describing the Court’s most recent opinions on the issue).

25. See *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008) (explaining *Heller's* originalist methodology).

Court's Enforcement Clause jurisprudence up to now, which has relied heavily on the general level of scrutiny appropriate for the particular type of discrimination Congress is seeking to deter.<sup>26</sup> But the Second Amendment is not the only substantive constitutional provision that is governed by such a complex doctrinal structure.<sup>27</sup> Thus, the insights one gleans from the Second Amendment example may provide a useful template for future enforcement power issues.

A particular facet of the Second Amendment provides a final reason for its usefulness as a case study. Lower court Second Amendment jurisprudence has sometimes involved claims of penumbral rights—that is, claims that the Second Amendment protects not just the right to possess a gun for self-defense, but also collateral rights such as the right to transport a gun, to conceal a gun on one's person, and even the right to attain proficiency in the use of a gun, say, by accessing target range practice.<sup>28</sup> If Congress legislates to protect such rights under the banner of enforcing the Second Amendment, the Court will be faced with an additional complicating factor when it reviews the constitutionality of such legislation.

In short, legislation enforcing the Second Amendment is politically plausible, and will force the Court to apply its congruence and proportionality standard in a novel doctrinal and jurisprudential context. That challenge will be exacerbated by both the seeming complexity of Second Amendment doctrine as it has developed in the lower courts and the existence of penumbral Second Amendment rights that Congress may seek to protect. Both of these latter characteristics will increase the difficulty the Court will face when it considers Congress's role in vindicating constitutional rights that the Court insists can be authoritatively

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26. See *supra* note 8 (noting the interplay between the Enforcement Clause and the Second Amendment after *Lopez*).

27. See Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT 227, 228 (2006) (noting the variety of doctrinal tests courts apply to different Bill of Rights provisions).

28. See, e.g., *Murphy v. Guerrero*, No. 1:14-CV-00026, 2016 WL 5508998, at \*20 (D. N. Mar. I Sept. 28, 2016) (considering restrictions on transport); *Peruta v. County of San Diego*, 824 F.3d 919, 926 (9th Cir. 2016) (considering restrictions on concealed carry); *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011) (considering restrictions on firing ranges); *Ezell v. City of Chicago*, 846 F.3d 888, 893 (7th Cir. 2017) (same).

identified only via a methodology that views law-stating as exclusively “the business of the courts.”<sup>29</sup> Thus, an investigation into Congress’s power to arm the Second Amendment is important not just for reasons specific to that right. Rather, the conclusions we can draw about that power may be highly relevant to Congress’s other attempts to enforce the Fourteenth Amendment in contexts in which originalism plays a major role in constitutional analysis.

This Article proceeds in five parts. Part II provides part of the necessary background for this inquiry by telling, in an abbreviated fashion, the story of the enforcement power,<sup>30</sup> beginning with the foundational case of *City of Boerne v. Flores*.<sup>31</sup> This story focuses on the Court’s application of *Boerne*’s “congruence and proportionality” standard, both in the context of substantive, due process-based rights, and equality rights.<sup>32</sup> Comparing how the Court has applied that test to these two types of legislation suggests the difficulty the Court may face if and when it confronts legislation enforcing the Second Amendment.

Part III provides the remainder of the necessary background by telling, in similarly abridged form, the story of *Heller*, its methodology for identifying the scope of the Second Amendment right, and the lower courts’ applications of *Heller*.<sup>33</sup> While *Heller* did not purport to provide—and indeed, explicitly disclaimed any pretense to providing—a comprehensive answer to the question of what the Second Amendment protects and what it does not, its methodology, holding, and *dicta* will likely channel the Court’s future encounters with that right, both in its directly litigated form,<sup>34</sup> and in the form of challenges to congressional legislation enforcing it. In particular, when two years after *Heller*, the Court

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29. Scalia, *supra* note 11, at 854.

30. See *infra* Part II (describing the background necessary for this Article).

31. See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (setting a congruence and proportionality standard).

32. See *infra* Part II (highlighting the use of the congruence and proportionality standard).

33. See *infra* Part III (describing Second Amendment jurisprudence through an analysis of *Heller*).

34. See, e.g., *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (applying *Heller* to the question of the protected status of possession of a stun gun).

held that the Second Amendment applies to states,<sup>35</sup> the Court imported *Heller*'s main features and thus made them directly relevant to both litigation challenging state and local gun restrictions and congressional enforcement legislation.<sup>36</sup> Part III considers the Second Amendment doctrine emerging from the lower courts, and what that doctrine suggests for efforts at congressional enforcement.<sup>37</sup>

Part IV discusses how the extant Enforcement Clause doctrine set forth in Part II might apply to legislation enforcing the Second Amendment.<sup>38</sup> It concludes that existing enforcement power doctrine is not fully up to the task of appropriately enforcing the Second Amendment.<sup>39</sup> At least until recently, equal protection enforcement doctrine turned heavily on the suspect class status of the group that the enforcement legislation seeks to protect.<sup>40</sup> Such suspect class analysis largely reflects courts' institutional competence-based concerns about fuller judicial enforcement of the equal protection guarantee. These characteristics render the equal protection enforcement model inapt for the different context of the Second Amendment. Because Second Amendment doctrine does not reflect the same level of concern about institutional competence, the Second Amendment may be less underenforced, and thus less amenable to aggressive congressional supplementation via enforcement legislation.

The cases considering congressional enforcement of due process rights fare no better as models. Those cases all considered rights better defined than the Second Amendment right.<sup>41</sup> Those more precise definitions allowed the Court to compare meaningfully the enforced constitutional right with the

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35. See *McDonald v. City of Chicago*, 561 U.S. 742, 788 (2010) (applying the Second Amendment via the Fourteenth Amendment).

36. See *id.* at 788 (incorporating parts of the *Heller* analysis).

37. See *infra* Part III (examining the lower courts' decisions).

38. See *infra* Part IV (providing analysis connecting the Enforcement Clause with potential future legislation on the Second Amendment).

39. See *infra* Part IV (providing an analysis and concluding that the current jurisprudence is insufficient).

40. See *Kimel v. Bd. of Regents*, 528 U.S. 62, 85–86 (rejecting the Enforcement Clause argument for a statute that protected the equality rights of a non-suspect class).

41. See *infra* Part IV.B (detailing “four cases involving federal legislation defended as enforcing Fourteenth Amendment due process rights”).

enforcement statute as part of its congruence and proportionality review.<sup>42</sup> That increased precision also allowed the Court to examine the legislative record to determine whether it reflected congressional findings revealing constitutional violations Congress had the authority to target.<sup>43</sup> As Part IV explains, the relative lack of clarity in Second Amendment doctrine renders these approaches inapt in the Second Amendment context.<sup>44</sup>

Part V offers a more granular approach to the enforcement power as applied to the Second Amendment.<sup>45</sup> This approach requires courts evaluating enforcement legislation to parse the relevant underlying rights doctrine to determine the constitutional status of each component of that doctrine.<sup>46</sup> It observes that some of those components reflect the Court's fundamental understanding of what the Constitution requires, rather than decisional heuristics that suggest judicial underenforcement of the right and, accordingly, a larger role for

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42. Cf. *infra* Part IV.B

Applying this approach to the Second Amendment is helpful only to the extent that Second Amendment doctrine can be stated in a sufficiently clear and determinate way that it provides the same kind of clear reference point for congruence and proportionality analysis that the doctrinal test for judicial access rights provided in *Lane*. Unfortunately, Second Amendment doctrine is not that straightforward.

(citations omitted).

43. See *infra* Part IV.B (“The *Florida Prepaid* Court also had the benefit of a relatively well-defined constitutional right, which allowed it to search the legislative record for examples.”).

44. See *infra* Part IV

In contrast to the free exercise and property rights contexts in the Second Amendment context the Court has both identified a core version of the right, but also strongly hinted that more penumbral, and thus necessarily hazier, versions may exist as well. The vaguer nature of those latter rights makes it harder for a court considering Second Amendment enforcement legislation to examine Congress's factual record to determine whether it reveals violations of the constitutional right.

(citations omitted).

45. See *infra* Part V (providing another approach to the Second Amendment issue).

46. See *infra* Part V (allowing “for a congressional role in vindicating Second Amendment rights to the extent Congress is institutionally relatively well-suited to contribute to particular components of courts’ doctrinal analysis”).

congressional enforcement.<sup>47</sup> However, it also identifies components of the doctrine that partially rely on estimations of the empirical world, and which thus might be particularly amenable to congressional input.<sup>48</sup> Those varied components of Second Amendment doctrine suggest a nuanced answer to the question of how much latitude Congress should enjoy when it seeks to enforce the Second Amendment right.

Part VI concludes the Article by considering how the lessons learned from the Second Amendment example apply to the enforcement power more generally.<sup>49</sup> It identifies several challenges the Court will likely confront in future Enforcement Clause cases, and explains how the approach laid out in this Article offers the best hope for meeting them.<sup>50</sup>

## II. The Enforcement Power Since *Boerne*

### A. *Boerne*

The Court established its modern enforcement power doctrine in the 1997 case *City of Boerne v. Flores*.<sup>51</sup> *Boerne* considered an Enforcement Clause challenge to the Religious Freedom Restoration Act (RFRA).<sup>52</sup> Congress enacted RFRA in 1993 in order to overturn the Court's decision three years earlier in *Employment Division, Department of Human Resources of*

47. See *infra* Part V (considering Congress's comparative institutional advantages over courts).

48. See *infra* Part V (explaining the varying levels of deference Congress ought to receive).

49. See *infra* Part VI (broadening the applicability of the Article's approach).

50. See *infra* Part VI (explaining the need for a new approach to these cases).

51. See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (“[W]hether Congress has exceeded its § 5 powers turns on whether there is a ‘congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’”).

52. See generally Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended in scattered sections of 42 U.S.C. and 5 U.S.C.). See *Boerne*, 521 U.S. at 511 (analyzing whether RFRA exceeded the scope of Congress's enforcement power).

*Oregon v. Smith*,<sup>53</sup> which gave a narrow reading to the First Amendment's Free Exercise Clause.<sup>54</sup> While ostensibly refraining from overruling any prior Free Exercise Clause cases, *Smith* announced a rule that markedly deviated from many of those earlier precedents by concluding that neutral and generally-applicable laws did not implicate the Free Exercise Clause.<sup>55</sup> Thus, for example, while under pre-*Smith* jurisprudence the Court might have given careful scrutiny to a temperance law that had the effect of impairing Roman Catholic ritual consumption of wine, under the *Smith* rule such a law would not implicate the Free Exercise Clause as long as it was a religion-neutral regulation that applied to alcohol consumption generally. Following this approach, in *Smith* itself the Court found that an Oregon law disallowing unemployment benefits for workers fired for misconduct did not implicate the Free Exercise Clause, even though the law was applied to two Native American employees of a drug treatment facility who were dismissed for engaging in sacramental use of peyote.<sup>56</sup>

*Smith* was highly unpopular across the political spectrum, and Congress enacted RFRA by huge bi-partisan margins.<sup>57</sup>

53. 494 U.S. 872 (1990).

54. See *id.* at 882 ("Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now."); U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion].").

55. See *Smith*, 494 U.S. at 879 ("Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

56. See *id.* at 890 ("Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug.").

57. See Donna Barry et al., *Infographic: RFRA Repercussions*, CTR. AM. PROGRESS (May 7, 2015, 2:24 PM), <https://www.americanprogress.org/issues/religion/news/2015/05/07/112783/infographic-rfra-repercussions/> (last visited Sept. 8, 2017) ("The federal Religious Freedom Restoration Act, or RFRA, passed in 1993 with broad bipartisan support and an aim to protect the right of Americans to freely believe and worship according to their consciences.") (on file with the Washington and Lee Law Review).



Boiled down, RFRA required that any state<sup>58</sup> law or regulation that imposed a substantial burden on religious exercise be justified by a compelling interest that the law was narrowly tailored to accomplish.<sup>59</sup> This standard, of course, imposes a very high hurdle. Even more significantly, that hurdle stands in direct opposition to *Smith*'s rule that only laws targeting religious practice implicate the Free Exercise Clause.<sup>60</sup> In addition to the implicit challenge it posed to the Court's supremacy in constitutional interpretation, RFRA also imposed significant federalism costs, given its imposition of a rule of conduct that applied regardless of the state's intent to impair religion-motivated conduct, and, indeed, regardless even of whether the challenged action had a disparate impact on such conduct.<sup>61</sup> For example, *Boerne* itself involved a city's application of a generally-applicable historic district zoning rule to a church that wished to demolish its structure located in that district and build a larger, modern building.<sup>62</sup>

In *Boerne*, the Court struck down RFRA's Enforcement Clause foundation.<sup>63</sup> Writing mostly<sup>64</sup> for a six justice majority,

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58. RFRA also applies to the federal government. That aspect of the statute does not implicate the Enforcement Clause, and thus was not at issue in *Boerne*, the case that struck down the law's applicability to states. See *Boerne*, 521 U.S. at 511 (analyzing only whether RFRA exceeded the scope of Congress's enforcement power).

59. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3, 107 Stat. 1488 (codified as amended in scattered sections of 42 U.S.C. and 5 U.S.C.).

60. Indeed, as Justice Kennedy noted in *Boerne*, RFRA's requirement of narrow tailoring went even beyond the Court's pre-*Smith* jurisprudence that Congress found constituted an appropriate accommodation of regulatory prerogatives and religious freedom. See *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (noting that RFRA "imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify").

61. See *id.* at 534 ("RFRA's substantial-burden test, however, is not even a discriminatory effects or disparate-impact test. It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals.").

62. For a comprehensive and detailed description of the controversy that gave rise to *Boerne*, see generally JEROLD WALTMAN, CONGRESS, THE SUPREME COURT, AND RELIGIOUS LIBERTY: THE CASE OF *BOERNE V. FLORES* (2013).

63. RFRA's applicability to the federal government was not an issue in *Boerne*.

64. See *infra* note 78 (providing information about the breakdown of the

Justice Kennedy recognized that the Enforcement Clause gave Congress the power to enact legislation that did more than simply prescribe remedies for court-found constitutional violations.<sup>65</sup> Nevertheless, he wrote that legislation enforcing the Fourteenth Amendment<sup>66</sup> had to be “congruen[t] and proportion[al]” to the underlying constitutional violation the legislation sought to deter.<sup>67</sup> Applying that standard to RFRA, he found that the law “far exceed[ed]”<sup>68</sup> any constitutional violations that Congress had uncovered in its hearings on RFRA. Identifying the relevant underlying constitutional violation as laws enacted out of “religious bigotry,”<sup>69</sup> he observed that those hearings had failed to uncover evidence of such conduct on the part of states.<sup>70</sup>

Continuing, he characterized RFRA as an unusually harsh and wide-ranging law.<sup>71</sup> Unlike the Voting Rights Act of 1965, whose constitutionality as legislation enforcing the Fifteenth

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justices’ views in the opinions).

65. See *Boerne*, 521 U.S. at 517–18 (reestablishing the Court’s stance that Congress’s power is broad).

66. The Court has been ambiguous about whether the standard it announced in *Boerne* applies as well to legislation enforcing the other Reconstruction Amendments, or other constitutional amendments that provide similarly-worded enforcement authority to Congress. See generally *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (failing to state whether the standard it announced in *Boerne* applies as well to legislation enforcing the other Reconstruction Amendments, or other constitutional amendments that provide similarly-worded enforcement authority to Congress).

67. See *Boerne*, 521 U.S. at 520 (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”).

68. See *id.* at 534 (“The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*.”).

69. See *id.* at 530 (reviewing RFRA’s legislative record to determine if it included examples of “modern instances of generally applicable laws passed because of religious bigotry”).

70. See *id.* at 535 (“In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry.”).

71. See *id.* at 532 (The Act’s “[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter”).

Amendment had been established three decades before,<sup>72</sup> Justice Kennedy observed that RFRA lacked any geographical limitation or sunset provision.<sup>73</sup> As noted earlier, nor did it require a disparate impact on the protected group or conduct as a trigger.<sup>74</sup> Again as noted above, he observed that not only was strict scrutiny “the most demanding test known to constitutional law,”<sup>75</sup> but that that standard went beyond the showing required by the Court’s pre-*Smith* Free Exercise jurisprudence.<sup>76</sup> For these reasons, he concluded that RFRA was not congruent and proportional to the free exercise right it was ostensibly designed to enforce.<sup>77</sup>

Justice Kennedy’s analysis commanded impressive support across the Court’s ideological spectrum. Five justices spanning that spectrum from Justices Thomas to Ginsburg joined his opinion in relevant part.<sup>78</sup> Of the remaining three justices, Justice O’Connor explicitly endorsed the Court’s Enforcement Clause analysis, expressing disagreement only with the Court’s understanding of the underlying free exercise right,<sup>79</sup> Justice

72. See *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966) (holding that the relevant “portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment”). A particular Voting Rights Act provision dealing with English literacy tests, as applied to citizens educated in Spanish, was upheld as legislation enforcing the Fourteenth Amendment. See *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966) (“We therefore conclude that [§] 4(e), in the application challenged in this case, is appropriate legislation to enforce the Equal Protection Clause . . .”).

73. See *City of Boerne v. Flores*, 521 U.S. 511, 533 (1997) (noting that section five of the Fourteenth Amendment does not require geographic restrictions but “[w]here . . . congressional enactment pervasively prohibits constitutional state action . . . [geographical] limitations . . . tend to ensure Congress’[s] means are proportionate”).

74. See *id.* at 535 (noting that the test for RFRA is the substantial burdens test, not the disparate-impact test).

75. See *id.* at 534 (“Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law.”).

76. See *id.* at 535 (“Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise.”).

77. See *id.* at 536 (concluding that “RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance”).

78. See *id.* at 509 (including Justices Rehnquist, Stevens, Thomas, and Ginsburg as well as Justice Scalia, who did not join Kennedy’s historical analysis).

79. See *id.* at 544–45 (O’Connor, J., dissenting)

Breyer joined most of Justice O'Connor's opinion and indicated his general (though not complete) agreement with her approval of the Court's Enforcement Clause analysis,<sup>80</sup> and Justice Souter did not express a view on the Enforcement Clause issue.<sup>81</sup> Thus, no justice affirmatively disagreed with the congruence and proportionality standard, and at least seven, and possibly eight, justices embraced it.<sup>82</sup>

### 1. *The Enforcement Power in Its First Post-Boerne Decade*

After *Boerne*, most of the Court's encounters with the enforcement power involved legislation defended as enforcing the equal protection rights of particular groups against unconstitutional discrimination.<sup>83</sup> However, the Court's first post-*Boerne* encounter with the enforcement power considered a law defended as legislation enforcing the right to be free of property infringements without due process of law. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>84</sup> the Court struck down, as exceeding the

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[I]f I agreed with the Court's standard in *Smith*, I would join the [majority] opinion. As the Court's careful and thorough historical analysis shows, Congress lacks the power to decree the substance of the Fourteenth Amendment's restrictions on the States. . . . Accordingly, whether Congress has exceeded its § 5 powers turns on whether there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.

(internal quotes and citation omitted).

80. See *id.* at 566 (Breyer, J., dissenting) (expressing vague agreement with most of O'Connor's approval of the majority's Enforcement Clause analysis).

81. See *id.* at 565 (Souter, J., dissenting) (noting the inability of the majority to soundly decide the Enforcement Clause question).

82. See *supra* notes 77–81 and accompanying text (outlining the Justices' opinions and arguments).

83. See generally *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327 (2012) (reviewing an enforcement statute targeting sex discrimination); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (same); *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001) (reviewing an enforcement statute targeting disability discrimination); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (reviewing an enforcement statute targeting age discrimination); *United States v. Morrison*, 529 U.S. 598 (2000) (reviewing an enforcement statute targeting sex discrimination).

84. 527 U.S. 627 (1999).

enforcement power, an amendment to federal patent laws that abrogated state sovereign immunity from patent infringement lawsuits.<sup>85</sup> Writing for the same five-justice majority that had generated the Court's federalism revolution of the 1990s,<sup>86</sup> Chief Justice Rehnquist concluded that the law failed *Boerne's* congruence and proportionality test because, as with RFRA, Congress had failed to demonstrate a pattern of state violations of the underlying right.<sup>87</sup> He also noted the availability of state tort remedies for at least some of these violations; based on this latter conclusion, he questioned whether states were in fact depriving patent holders of their property without due process.<sup>88</sup>

Justice Stevens, dissenting for the similarly-durable four-justice bloc opposing the majority bloc's federalism jurisprudence,<sup>89</sup> argued that the enforcement statute satisfied *Boerne's* congruence and proportionality standard.<sup>90</sup> He argued

85. See *id.* at 647 ("The historical record and the scope of coverage therefore make it clear that the Patent Remedy Act cannot be sustained under § 5 of the Fourteenth Amendment.").

86. See generally *United States v. Lopez*, 514 U.S. 549 (1995) (striking down a federal law as exceeding Congress's power under the Interstate Commerce Clause); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that Congress lacked the power to use its power to regulate interstate commerce or commerce with Indian tribes to make non-consenting states liable for retrospective relief); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (vindicating a claim of state sovereign immunity despite the prospective nature of the relief requested); *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress lacked the power to commandeer state law enforcements); *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (rejecting a claim that a state had waived its sovereign immunity by participating in federally-regulated activity). Another federalism case from that decade, *New York v. United States*, 505 U.S. 144 (1992), was decided by this same five-justice majority, joined by Justice Souter, who would defect from this coalition in the remaining federalism cases of the decade. See *New York*, 505 U.S. at 149 (holding that Congress lacked the power to commandeer state legislatures).

87. See *Florida Prepaid*, 527 U.S. at 640 ("In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations.").

88. See *id.* at 644 ("The primary point made by these witnesses, however, was not that state remedies were constitutionally inadequate, but rather that they were less convenient than federal remedies, and might undermine the uniformity of patent law.").

89. See *supra* note 86 (identifying cases of new federalism jurisprudence).

90. See *Florida Prepaid*, 527 U.S. at 649 (Stevens, J., dissenting) (claiming that the *Boerne* decision "amply supports congressional authority to enact the

that Congress did in fact have in front of it evidence of past state constitutional violations—intentional deprivations of patent rights.<sup>91</sup> Foreshadowing arguments that would be made in other opinions urging the upholding of enforcement legislation, he also argued that Congress was aware of the likelihood that states would increasingly violate property rights in patents.<sup>92</sup> He further argued that the protection of such rights provided a legitimate reason for Congress to insist on a uniform application of patent laws, via patent litigation in federal court, rather than commending victims of alleged state government infringement to state law tort remedies in the state's own courts.<sup>93</sup>

In retrospect, *Florida Prepaid* can be seen as the harbinger of the justices' attitudes toward enforcement legislation. A thin majority would insist on stringent application of the congruence and proportionality test, including an insistence on facts demonstrating an actual record of state conduct that judicial doctrine deems unconstitutional. The dissenters, by contrast, would allow Congress more latitude in detecting the potentiality of constitutional violations by state actors.

After *Florida Prepaid*, the Court's Enforcement Clause jurisprudence shifted focus, toward legislation defended as enforcing equal protection rights. In a series of cases—*United States v. Morrison*,<sup>94</sup> *Kimel v. Florida Board of Regents*,<sup>95</sup> *Board*

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Patent Remedy Act”).

91. Justice Stevens hedged on the question of whether such deprivations had to be intentional in order to violate the Constitution; nevertheless, he argued that, assuming that intent was required, that requirement was met in *Florida Prepaid* because the victim of the alleged state infringement conduct alleged that that conduct was willful. *See id.* at 653–54 (Stevens, J., dissenting) (“Respondent College Savings Bank has alleged that petitioner’s infringement was willful. The question presented by this case, then, is whether the Patent Remedy Act, which clarified Congress’[s] intent to subject state infringers to suit in federal court, may be applied to willful infringement.”).

92. *See id.* at 656–57 (providing a list of cases in which states and their instrumentalities have been involved in patent cases).

93. *See id.* at 659 (“Even if such remedies might be available in theory, it would have been ‘appropriate’ for Congress to conclude that they would not guarantee patentees due process in infringement actions against state defendants.”).

94. *See* 529 U.S. 598, 602 (2000) (affirming the appellate ruling that Congress lacked constitutional authority to enact the civil remedy under 42 U.S.C. § 13981).

95. *See* 528 U.S. 62, 67 (2000) (concluding that the “ADEA does contain a

of *Trustees of the University of Alabama v. Garrett*,<sup>96</sup> and *Nevada Department of Human Resources v. Hibbs*,<sup>97</sup> the Court considered whether provisions of, respectively, the Violence Against Women Act (VAWA), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) were supportable as enforcement legislation.<sup>98</sup> In each of these cases, the Court's analysis focused on whether the statutory provision at issue was "appropriate" legislation enforcing the equal protection rights of the group the given statute benefitted—women in case of VAWA and the FMLA, elderly persons in the case of the ADEA, and disabled persons in the case of the ADA.<sup>99</sup>

The first of these cases, *Morrison*, can be dealt with quickly. The Court in that case relied heavily on the fact that the VAWA provision at issue regulated private parties by making a perpetrator of gender-motivated violence liable to a federal law cause of action brought by his victim.<sup>100</sup> Even though this

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clear statement of Congress'[s] intent to abrogate the States' immunity, but that the abrogation exceeded Congress'[s] authority under § 5 of the Fourteenth Amendment").

96. See 531 U.S. 356, 360 (2001) (deciding "whether employees of the State of Alabama may recover money damages by reason of the State's failure to comply with the provisions of Title I of the Americans with Disabilities Act of 1990").

97. See 538 U.S. 721, 724 (2003) (finding that "employees of the State of Nevada may recover money damages in the event of the State's failure to comply with the family-care provision of the" FMLA).

98. Except for VAWA, the Commerce Clause *bona fides* of these statutes were unquestioned, a conclusion that also allowed their application to states. See *Garcia v. San Antonio Metro. Trans. Agency*, 469 U.S. 528, 557 (1985) (upholding under the Commerce Clause legislation that imposed regulatory duties on states acting as economic actors). However, in *Seminole Tribe*, the Court found that retrospective relief against state government violators, ordered at the behest of private litigants, exceeded Congress's authority under the Commerce Clause. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 75 (1996) (holding that Congress lacked the power to make retrospective relief, such as damages, available against non-consenting states). That holding left the Enforcement Clause as the only viable constitutional foundation for such remedies. *Id.*

99. See *supra* notes 94–97 (citing cases where the Court's Enforcement Clause jurisprudence shifted focus, toward legislation defended as enforcing equal protection rights).

100. See *Morrison*, 529 U.S. at 604 (describing the procedural posture of *Brzonkala v. Virginia Polytechnic and State University*).

provision was defended on the ground that state and local law enforcement often under-investigated and under-enforced gender-motivated violence, *Morrison* rejected its Enforcement Clause foundation<sup>101</sup> because the law regulated private parties rather than state actors.<sup>102</sup>

*Kimel* is the first of these cases that involved a statute explicitly regulating states and thus actually requiring in-depth consideration of the congruence and proportionality standard.<sup>103</sup> While *Kimel*'s application of that standard is relatively brief, it nevertheless created the template for future Enforcement Clause cases involving equality-enforcing legislation. In *Kimel*, Justice O'Connor, writing for the same five-justice majority as that in *Morrison* and *Florida Prepaid*, began by observing that age was not a suspect classification under the Court's equal protection jurisprudence.<sup>104</sup> For the majority, that conclusion in turn justified skeptical review of the ADEA's congruence and proportionality to what it had concluded was the trivial constitutional problem posed by age discrimination.<sup>105</sup> That review led Justice O'Connor to conclude that the ADEA

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101. See *id.* at 627 (concluding that Congress's "power under § 5 does not extend to the enactment of § 13981"). The same justices that rejected the provision's Enforcement Clause foundation also held the provision to exceed Congress's power to regulate interstate commerce. See *id.* ("Congress'[s] effort in § 13981 to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under § 5 of the Fourteenth Amendment.").

102. The Court reasoned that this private-party remedy against other private parties rendered the provision per se inappropriate enforcement legislation, based on early Enforcement Clause precedent, and also meant that the law failed *Boerne*'s congruence and proportionality test. See *id.* at 621–25 (stating precedent); *id.* at 625–27 (performing congruence and proportionality analysis). The Court also quickly noted at the end of its analysis that the VAWA provision also failed congruence and proportionality because it applied throughout the nation, even though Congress had documented the problem of official neglect of gender-motivated crimes in fewer than half the states. See *id.* at 626 ("Congress'[s] findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States.").

103. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81–82 (2000) (highlighting the congruence and proportionality standard). But see *supra* note 102 (noting *Morrison*'s congruence and proportionality analysis).

104. See *Kimel*, 528 U.S. at 83 ("Age . . . does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it.").

105. See *id.* at 82–83 (performing such skeptical review).



prevented very little conduct that was likely to be unconstitutional.<sup>106</sup>

To be sure, Justice O'Connor acknowledged that the Enforcement Clause authorized Congress to enact "reasonably prophylactic legislation"—that is, legislation that prohibited conduct that did not in itself violate the Fourteenth Amendment.<sup>107</sup> That concession required her to examine Congress's legislative record, to determine whether Congress had identified a pattern of state constitutional violations in this area that justified a prophylactic deterrent.<sup>108</sup> She concluded that that record revealed only "isolated sentences clipped from floor debates and legislative reports," an evaluation that led her to conclude that the ADEA's application to states was "an unwarranted response to a perhaps inconsequential problem."<sup>109</sup>

The next case, *Garrett*, posed a more difficult question for the Court. *Garrett* involved an enforcement power challenge to the employment provisions of the ADA.<sup>110</sup> Two factors made *Garrett* a harder case than *Kimel*. First, unlike the ADEA, the ADA featured a voluminous legislative record, which identified a long list of instances of state discrimination against disabled employees.<sup>111</sup> Second, the Court's disability discrimination jurisprudence was more nuanced than its age discrimination counterpart.<sup>112</sup> Most importantly, in 1985, in *City of Cleburne v. Cleburne Living Center*,<sup>113</sup> the Court had concluded that a city's

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106. See *id.* at 86 (stating the ADEA would "prohibit[] substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard").

107. See *id.* at 88 ("[W]e have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation.").

108. See *id.* at 89 ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation.").

109. *Id.* at 89.

110. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) ("We decide here whether employees of the State of Alabama may recover money damages by reason of the State's failure to comply with the provisions of Title I of the [ADA] . . .").

111. See *id.* at 368 (noting the legislative record).

112. See *infra* notes 113–117 (discussing the analytical differences between age discrimination and disability discrimination cases).

113. 473 U.S. 432 (1985).

discrimination against intellectually disabled persons violated the Equal Protection Clause because it was based on “irrational prejudice.”<sup>114</sup> That conclusion confounded the normal equal protection template, in which discrimination against non-suspect classes—including the disabled—normally triggered the most deferential rational basis review that almost necessarily resulted in a rejection of the equal protection claim.<sup>115</sup> Indeed, in contrast to *Cleburne*’s analysis of disability discrimination, the Court’s age discrimination jurisprudence in *Garrett* followed exactly the normal equal protection template.<sup>116</sup> Together, these two factors painted a picture in which the ADA’s employment provisions targeted discrimination that at least potentially raised a more serious constitutional problem, and which Congress had identified as occurring frequently.<sup>117</sup>

Despite these differences, in *Garrett* the Court adhered closely to the template it had created a year before in *Kimel*. Writing for the same five-justice majority as that in *Florida Prepaid*, *Morrison*, and *Kimel*, Chief Justice Rehnquist began by dismissing the idea that *Cleburne* suggested that disability

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114. See *id.* at 450 (requiring the permit in this case “to rest on an irrational prejudice against the mentally retarded, including those who would occupy the Featherston facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law”).

115. See *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (“The State need therefore assert only a rational basis for its age classification.”); *Vance v. Bradley*, 440 U.S. 93, 108–09 (1979) (“Because Congress desired to maintain the competence of the Foreign Service, the mandatory retirement age of 60 rationally furthers its legitimate objective . . .”); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (stating that rational basis is “a relatively relaxed standard reflecting the Court’s awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one”).

116. See *Garrett*, 531 U.S. at 367 (“A classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993) (applying traditionally deferential rational basis scrutiny to a disability classification))); *Gregory*, 501 U.S. at 470 (applying the same equal protection analysis); *Vance*, 440 U.S. at 108–09 (same); *Murgia*, 427 U.S. at 314 (same).

117. See *Garrett*, 531 U.S. at 367 (“Congress made a general finding in the ADA that ‘historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.’” (quoting 42 U.S.C. § 12101(a)(2) (2002))).

discrimination merited special judicial scrutiny.<sup>118</sup> Instead, he described *Cleburne* as applying “minimum ‘rational basis’ review”<sup>119</sup> to strike down a government action that simply “made no sense.”<sup>120</sup> He then proceeded to minimize the force of Congress’s factual record documenting state government employment discrimination against the disabled.<sup>121</sup> Among other things, he dismissed as irrelevant examples from local governments<sup>122</sup> and insisted that any remaining examples would only be relevant if they revealed discrimination that would have been adjudged unconstitutional had they been litigated in a court.<sup>123</sup> More broadly, he rejected the relevance of Congress’s finding that, as a general matter, society continued to isolate and discriminate against disabled persons.<sup>124</sup> With Congress’s record cut down to size, and the significance of the underlying constitutional violation minimized, the way was clear for the Chief Justice to conclude, as Justice O’Connor had in *Kimel*, that the ADA was a disproportionate response to what the Court declared to be an insignificant constitutional problem.<sup>125</sup>

In the next case, *Hibbs*, the Court continued to ground its Enforcement Clause analysis on the suspect class status of the group the challenged enforcement legislation sought to protect.<sup>126</sup> *Hibbs* considered the family-care leave provision of the FMLA—a provision that gave workers uncompensated time off from work to

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118. See *id.* at 367–68 (2001) (noting that the Fourteenth Amendment does not require states to make accommodations for the disabled if the state has a rational basis for its decision).

119. *Id.* at 366

120. *Id.* at 366 n.4.

121. See *id.* at 369–72 (revealing the Court’s general dismissal of Congress’s record).

122. See *id.* at 369 (“[T]he Eleventh Amendment does not extend its immunity to units of local government.”).

123. See *id.* at 370 (observing that constitutional violations will rarely arise from adverse and disparate treatment). Justice Kennedy’s concurrence emphasized this point in particular. See *id.* at 374–76 (Kennedy, J., concurring) (stating that no judicial documentation of constitutional violations exists).

124. See *id.* at 369–70 (majority opinion) (noting that adverse and disparate treatment generally do not amount to a constitutional violation).

125. See *id.* at 374 (“[T]o uphold the Act’s application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in *Cleburne*.”).

126. See generally *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

care for sick relatives.<sup>127</sup> In a departure from the Court's application of the congruence and proportionality analysis up to that point, the Court upheld this provision of the FMLA as valid enforcement legislation protecting women's equal protection rights.<sup>128</sup> Chief Justice Rehnquist, who wrote for himself and Justice O'Connor and the four justices who had dissented in the earlier post-*Boerne* cases, began his analysis by recognizing that sex classifications merited heightened judicial scrutiny.<sup>129</sup> That fact gave him the latitude to credit the type of legislative record evidence that he had found inadequate two years earlier in *Garrett*.<sup>130</sup>

After according generous review to the evidence supporting the FMLA's enforcement power *bona fides*, Chief Justice Rehnquist then distinguished *Kimel* and *Garrett*. He did so expressly on the ground of the different levels of constitutional protection accorded sex discrimination as compared with either disability or age discrimination.<sup>131</sup> He wrote the following immediately after concluding that "[i]n sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation."<sup>132</sup>

We reached the opposite conclusion in *Garrett* and *Kimel*. In those cases, the § 5 legislation under review responded to a purported tendency of state officials to make age- or

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127. See *id.* at 724 ("[It] entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons, including the onset of a 'serious health condition' in an employee's spouse, child, or parent." (citation omitted)).

128. As the Court explained, the family-care leave provision aimed at ensuring that women were not penalized for taking time off work to care for sick relatives, by granting all employees a right to take such leave. See *id.* at 736–37 (discussing these aims of the provision).

129. See *id.* at 730 ("The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny . . .").

130. See *id.* (relying on evidence of private-sector discrimination). But see *id.* at 730 n.3 (noting evidence stating, in general terms, that state government conduct in this area "differs little" from that of private sector actors).

131. See *id.* at 735–36 (stating that discrimination based on age or disability is not evaluated under the heightened standard for sexual discrimination, but rather utilizes a rational basis standard).

132. *Id.* at 735.

disability-based distinctions. Under our equal protection case law, discrimination on the basis of such characteristics is not judged under a heightened review standard, and passes muster if there is a rational basis for doing so at a class-based level . . . . Thus, in order to impugn the constitutionality of state discrimination against the disabled or the elderly, Congress must identify, not just the existence of age- or disability-based state decisions, but a widespread pattern of irrational reliance on such criteria. We found no such showing with respect to the ADEA and Title I of the [ADA].

Here, however, Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny. Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test—it must “serve important governmental objectives” and be “substantially related to the achievement of those objectives”—it was easier for Congress to show a pattern of state constitutional violations.<sup>133</sup>

Thus, in all three of these cases, the Court’s identification of the suspect class status of the benefitted group was foundational to its enforcement power analysis.<sup>134</sup> The significance of this fact

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133. *Id.* at 735–36 (citations, internal quotations, and brackets omitted).

134. See, e.g., Y. Frank Ren, *Fixing Fourteenth Amendment Enforcement Power: An Argument for a Rebuttable Presumption in Favor of Congressional Abrogation of State Sovereign Immunity*, 94 B.U. L. REV. 1459, 1464–68 (2013) (noting the importance to the Court’s enforcement power analysis of the scrutiny level accorded to direct constitutional claims involving the right protected by the enforcement legislation); see also *id.* at 1469 (“In many [enforcement power cases invalidating the enforcement legislation] the Court emphasized how important the levels of scrutiny were in its congruence and proportionality analysis.”); *id.* at 1471 (“*Boerne* and its progeny clarified that Congress’s authority to pass legislation under its enforcement power is not limitless, but rather restricted based on the importance of the right that Congress intended to protect.”); Gillian Egan, *Unreasonable Requirements for Reasonable Enforcement: “Congruence and Proportionality” After Coleman v. Court of Appeals of Maryland*, 43 CUMB. L. REV. 29, 38 (2013) (“In reviewing whether legislation meets [the requirements of congruence and proportionality], the court applies the level of scrutiny such a classification usually receives in Equal Protection cases, whether it be rational, intermediate, strict, or some other standard.”); Massey, *supra* note 8, at 2

The distilled product of [the post-*Boerne* Enforcement Clause] cases is the notion that judicial deference to Congress concerning the proper scope of such preventive measures varies in rough proportion to the level of judicial scrutiny the Court invokes to test the validity of state actions that allegedly violate the Fourteenth Amendment.

See also Even Tsen Lee, *The Trouble with City of Boerne, and Why It Matters for*

goes beyond the (perhaps unsurprising) insight that congruence and proportionality review relies heavily on the constitutional status of the problem the enforcement legislation targets.<sup>135</sup> In the *Kimel/Garrett/Hibbs* trilogy, what mattered to the Court was not so much that constitutional status of *simpliciter*, but rather, that status as translated into a judicially-workable doctrine via the tiered scrutiny framework.<sup>136</sup> That framework, which rests ultimately on the political process-based reasoning derived from the famous footnote four of *United States v. Carolene Products Co.*,<sup>137</sup> assigns to different classifications different levels of judicial scrutiny depending on the Court's perception of the burdened group's ability to protect itself in the majoritarian political process.<sup>138</sup> Most notably, the lowest-tier standard of review, rational basis, rests on a presumption that groups assigned that standard can protect themselves in the political process and thus do not need extraordinary judicial protection.<sup>139</sup> Thus, the tiers of scrutiny are decisional heuristics rather than expressions of core constitutional principle. As explained later,<sup>140</sup>

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*the Fifteenth Amendment as Well*, 90 DENV. U. L. REV. 483, 502 (2012) (approving of this approach).

135. See Ren, *supra* note 134, at 1469 (noting how carefully Enforcement Clause doctrine in these cases focused the Court's congruence and proportionality analysis on the level of scrutiny triggered by the type of discrimination targeted by the challenged enforcement legislation).

136. See *id.* ("In . . . these cases, the Court emphasized how important the levels of scrutiny were in its congruence and proportionality analysis.").

137. 304 U.S. 144 (1938).

138. See *id.* at 152 n.4 (discussing "prejudice against discrete and insular minorities" and its impact on the political process, and the resultant need for more careful judicial review when such prejudice was found to exist).

139. See *Vance v. Bradley*, 440 U.S. 93, 96–97 (1979)

Appellees have not suggested that the [challenged] statutory distinction . . . burdens a suspect group or a fundamental interest; and in cases where these considerations are absent, courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws. The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

140. See *infra* notes 219–232 and accompanying text (discussing the Court's continued silence on the standard of review).

this fact further complicates congruence and proportionality review.

The Court's next Enforcement Clause case, *Tennessee v. Lane*,<sup>141</sup> marked the effective end of the Court's first decade of applying *Boerne*.<sup>142</sup> *Lane* differed from the *Kimell/Garrett/Hibbs* trilogy because it chose to test, and ultimately uphold, the application of the enforcement statute in question on due process rather than equal protection grounds.<sup>143</sup> Nevertheless, *Lane* reinforced the basic idea developed in that trilogy—that the fate of an enforcement statute would turn on whether it enforced a right judicial doctrine treated as constitutionally significant. *Lane* dealt with the public services provisions of the ADA—that is, those provisions that guaranteed access to “the services, programs or activities of a public entity.”<sup>144</sup> It involved a lawsuit by two physically disabled persons—a court reporter and a defendant in a criminal case—who were unable to access the upper floors of a state courthouse.<sup>145</sup> When they sued the state, it pleaded sovereign immunity, and alleged that the public services provision exceeded Congress's power under the Enforcement Clause.<sup>146</sup>

Writing for a five-justice majority (the justices in the *Hibbs* majority minus Chief Justice Rehnquist),<sup>147</sup> Justice Stevens began by acknowledging that the Court could analyze the statute as either enforcing the equal protection rights of disabled persons

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141. See 541 U.S. 509, 513 (2004) (deciding “whether Title II exceeds Congress' power under § 5 of the Fourteenth Amendment”).

142. To be sure, the Court did decide one final case in the decade after *Boerne*. See generally *United States v. Georgia*, 546 U.S. 151 (2006) (ruling in 2006, nine years after *Boerne* was decided in 1997). *Georgia* is discussed at *infra* note 153 (explaining that case as involving legislation enforcing the Fourteenth Amendment as applied to conduct that, if proven, was conceded to violate the Fourteenth Amendment) and at *infra* note 281.

143. See *Lane*, 541 U.S. at 515 (upholding the application of the ADA challenged in that case as legislation enforcing the Due Process Clause).

144. *Id.* at 509 (quoting 42 U.S.C. § 12132 (2012)).

145. See *id.* at 513–14 (stating that the defendant crawled up two flights of steps and the court reporter was deprived of work opportunities).

146. See *id.* at 514 (“[T]he Eleventh Amendment bars private suits seeking money damages for state violations of Title I of the ADA.”).

147. Chief Justice Rehnquist wrote the principal dissent for himself and Justices Kennedy and Thomas. Justice Scalia dissented separately.

or the due process right to access the judicial process.<sup>148</sup> Concluding that a ruling focused on the latter right would be narrower, Justice Stevens chose to consider whether the public services provision was a congruent and proportional enforcement of the constitutional right to courthouse access.<sup>149</sup> Regardless of the reason,<sup>150</sup> his decision to narrow the focus of his analysis allowed him to conclude that the public services provision was indeed “congruent and proportional to its object of enforcing the right of access to the courts.”<sup>151</sup> He argued that the ADA’s standard—that public services provide “reasonable modifications” to their programs to allow disabled access—was “perfectly consistent” with the Court’s constitutional standard for access to the judicial process: That “within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard in its courts.”<sup>152</sup> Thus, in *Lane*, the scope of the underlying right played a crucial role in the congruence and proportionality analysis, just as it had in the three preceding enforcement power cases.<sup>153</sup>

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148. See *Lane*, 541 U.S. at 514–15 (recognizing that there were two ways to analyze the statute).

149. See *id.* at 522–23 (noting that these provisions of the ADA guaranteed against both irrationality disability discrimination and “a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review”).

150. Presumably, this choice was also influenced by his desire to avoid the implications of *Garrett*, which had frowned upon enforcement legislation aimed generally at the equal protection rights of disabled persons.

151. *Tennessee v. Lane*, 541 U.S. 509, 531 (2004).

152. *Id.* at 532 (internal quotation marks omitted).

153. The final case of *Boerne*’s first decade was *Georgia*. In *Georgia*, a unanimous Court held that a federal law was valid Enforcement Clause legislation to the extent it simply creates a private cause of action for conduct that violates the Fourteenth Amendment itself. *United States v. Georgia*, 546 U.S. 151, 159 (2006). *Georgia* dealt with the ADA’s public services provision—the same provision at issue in *Lane*—as applied to a state prison’s alleged denial of a number of services to a disabled inmate. *Id.* at 154–55. Most importantly, the inmate-plaintiff alleged, and the state-defendant conceded, that the state’s conduct, if proven, would violate both the ADA and the Eighth Amendment (and hence the Due Process Clause of the Fourteenth). *Id.* at 157.

Thus, *Georgia* posed the straightforward question of whether the ADA’s provision of money damages for violations of the public services provision constituted appropriate enforcement of the Fourteenth Amendment’s Due Process Clause when applied to conduct that was alleged actually to violate the Due Process Clause. So understood, it should come as no surprise that the Court



### B. The Enforcement Power Today

Since *Lane*, the Supreme Court has decided two significant cases considering the breadth of the enforcement power.<sup>154</sup> Both of them have called into the question the Court's post-*Boerne* approach.

The first of these cases returned to the question of the constitutionality of prophylactic enforcement legislation,<sup>155</sup> but adopted an analysis that raised questions about the durability of the template created by the prophylactic legislation cases discussed above. In *Coleman v. Court of Appeals of Maryland*,<sup>156</sup> the Court considered the personal-care leave provision of the FMLA—the same statute whose family-care leave provision was upheld in *Hibbs*.<sup>157</sup> Both the personal and family-care leave provisions were defended as measures enforcing the equal protection right to sex equality.<sup>158</sup> As noted earlier, much of the defense for the family-care leave provision centered on the argument that stereotypical views about women's primary

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unanimously upheld this application of the ADA's public services provision. As Justice Scalia explained in writing the opinion for the Court:

While the Members of th[e] Court have disagreed regarding the scope of Congress's "prophylactic" enforcement powers under § 5 of the Fourteenth Amendment, no one doubts that § 5 grants Congress the power to "enforce . . . the provisions" of the Amendment by creating private remedies against the States for *actual* violations of those provisions.

*Id.* at 158 (citations omitted). But just as *Georgia* states an unremarkable proposition of Enforcement Clause doctrine, it adds little to the far more nuanced issues discussed in other post-*Boerne* cases.

154. To repeat a point made earlier, a third case, *Georgia*, posed a more straightforward enforcement power question that did not cause controversy among the justices. See *supra* note 153 (discussing *Georgia*); *infra* note 155 and accompanying text (same).

155. Cf. *Georgia*, 546 U.S. at 158 (noting the disagreement among the justices about the constitutionality of enforcement legislation that is prophylactic in nature).

156. 566 U.S. 30 (2012) (plurality opinion).

157. See *id.* at 33 ("The statute in question is the Family and Medical Leave Act of 1993 . . ."); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724 (2003) (finding that "employees of the State of Nevada may recover money damages in the event of the State's failure to comply with the family-care provision" of the FMLA).

158. See *Coleman*, 566 U.S. at 42 (noting the defense in detail).

responsibility for domestic affairs (including caretaking) led employers to disfavor women as employees.<sup>159</sup>

The personal-care leave provision was defended on similar, but distinct grounds. In addition to arguing that that provision ensured sex equality by prohibiting pregnancy discrimination (an argument the Court rejected for other reasons<sup>160</sup>), defenders of the personal-care leave provision also insisted that it served as a “necessary adjunct to the family-care leave provision sustained in *Hibbs*.”<sup>161</sup> The argument was that the family-care leave provision, while intended to promote sex equality, would have had the perverse effect of encouraging sex discrimination if enacted as a standalone provision.<sup>162</sup> The theory was that providing family care leave, when coupled with lingering perceptions that family care was a woman’s job, made women *even less* desirable as employees.<sup>163</sup> On this theory, women would still disproportionately ask for such leave (or would be perceived as doing so)—but now, with the family-care leave provision in place, they would have a right to it. According to its defenders, the personal-care leave provision stepped in to equalize either the reality or least the perception of the burdens male and female workers would place on employers via FMLA leave.<sup>164</sup> With both men and women asking for personal care leave, defenders argued, FMLA leave in general would come to be seen less as a woman’s right and more as an employee’s right, which in turn would tend to equalize men’s and women’s desirability as employees.<sup>165</sup>

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159. See *supra* note 128 (discussing the aim of the family-care leave provision).

160. See *Coleman*, 566 U.S. at 39 (rejecting the argument that the provision addressed any pregnancy-related discrimination in which states might be engaging).

161. *Id.* at 37.

162. See *id.* at 39 (noting the plaintiff’s argument that “[w]hen the self-care provision is coupled with the family-care provisions, the self-care provision could reduce the difference in the expected number of weeks of FMLA leave that different employees take”).

163. See *id.* at 45, 60–61 (Ginsburg, J., dissenting) (explaining this argument).

164. See *id.* at 39 (stating the plaintiff’s argument that men would be encouraged to take more time off while women continue to take the same amount).

165. See *id.* (noting the plaintiff’s argument that increased leave for both sexes would reduce the number of people viewing it as strictly a women’s right).

A four-justice plurality, speaking through Justice Kennedy, rejected this analysis.<sup>166</sup> He characterized the argument recounted above as “overly complicated” and “unconvincing,”<sup>167</sup> concluded that it lacked support in the legislative record, and argued that it created an internal contradiction to the extent advocates also argued that the self-care leave provision helped women because women took *more* personal care leave time than men.<sup>168</sup>

But what Justice Kennedy said is less important than what he did not say. At no point did Justice Kennedy cite *Hibbs*’s language about sex equality meriting heightened judicial protection, and *Hibbs*’s follow-on conclusion that therefore “it was easier”<sup>169</sup> for Congress to justify legislation enforcing that right. Instead, what he expressed was impatience and skepticism about whether the personal-care leave provision did in fact effectively enforce that right—sentiments that at the very least stand in some tension with the “easier” congressional task described in *Hibbs*.<sup>170</sup>

It is difficult to know whether *Coleman* portends a new era of Enforcement Clause jurisprudence, or is simply a one-off case

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166. Justice Scalia provided the fifth vote, but he refused to join the plurality’s analysis as he had previously renounced his agreement with the congruence and proportionality standard in favor of an even more stringent standard for judging enforcement legislation. *Id.* at 44–45 (Scalia, J., concurring).

167. *See id.* at 40 (plurality opinion) (“Petitioner’s overly complicated argument about how the self-care provision works in tandem with the family-care provisions is unconvincing and in the end does not comply with the clear requirements of *City of Boerne*.”).

168. *See id.* at 40 (“But if the first defense is correct, the second defense is wrong. In other words, if employers assume women take self-care leave more often than men (the first defense), a self-care provision will not provide an incentive to hire women.”).

169. *See Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (“Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations.”).

170. *Cf.* Robert Post & Reva Segal, *Equal Protection by Law: Federal Antidiscrimination Protection After Morrison and Kimel*, 110 YALE L.J. 441, 461 (2000) (“If the exercise of congressional Section 5 power [had to] be congruent and proportional to behavior that a court would hold unconstitutional under rational basis review, virtually all antidiscrimination legislation, except that protecting racial minorities and women, [would] be rendered beyond Congress’s Section 5 power[s].”).

dealing with an enforcement statute that was perhaps unusually poorly justified.<sup>171</sup> A subsequent case, however, does suggest that *Coleman* may in fact presage evolution in Enforcement Clause doctrine. In *Shelby County v. Holder*,<sup>172</sup> the Court struck down the coverage formula governing the preclearance provisions of the Voting Rights Act (VRA).<sup>173</sup> That result effectively invalidated the preclearance provisions themselves, a crucial component of the VRA.

*Shelby County*'s significance for the enforcement power is unclear, given the Court's ambiguity about the doctrinal standard it was applying.<sup>174</sup> But despite that ambiguity, its analysis at least raises the possibility that *Coleman* may not be a one-off in its focus on the effectiveness of the statute in enforcing the constitutional right at issue. Just as in *Coleman*, in *Shelby*

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171. This weakness may be traced to the fact that, at base, Congress was likely targeting pregnancy discrimination with the personal care leave provision. The Court rejected this justification because of insufficient findings of such discrimination by the states—but also perhaps, as Justice Ginsburg noted in her dissent, because the Court refused to accept the proposition that pregnancy discrimination *is* sex discrimination. See *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 54–55 (2012) (plurality opinion) (Ginsburg, J., dissenting) (discussing precedent that distinguished discrimination on the basis of pregnancy from discrimination on the basis of sex, but noting that “this case is a fit occasion to revisit that conclusion”).

172. 133 S. Ct. 2612 (2013).

173. The Court suggested that it was reviewing those provisions as a measure designed to enforce both the Fourteenth and the Fifteenth Amendments, and referred to an earlier opinion construing the VRA as “guiding” the Court’s review. See *id.* at 2622 n.1 (noting that the decision in *Northwest Austin Municipal Utility District Number One v. Holder* “guides our review under both Amendments in this case”). However, that earlier opinion said essentially nothing about the standard of review—a silence that was repeated in *Shelby County* itself. See generally *Shelby County*, 133 S. Ct. at 2612. On its own merits, this raises the important question of whether *Boerne*’s congruence and proportionality standard applies to legislation enforcing the Fifteenth Amendment (and, by implication, legislation enforcing the Thirteenth, and perhaps legislation adopted pursuant to similarly-worded enforcement clauses in other constitutional amendments). Cf. Derek Muller, *Judicial Review of Congressional Power Before and After Shelby County v. Holder*, 8 CHARLESTON L. REV. 287, 303–06 (2013) (discussing the possible reasons for the Court’s refusal to settle this question in *Shelby County*). For our more limited purposes, *Shelby County* introduces new considerations into the analysis of legislation enforcing Fourteenth Amendment rights, as noted in the text following this note. See generally *Shelby County*, 133 S. Ct. at 2612.

174. See *supra* note 173 (noting this ambiguity).

*County* the Court faulted the fit between the enforcement statute and the constitutional right it sought to vindicate.<sup>175</sup> According to the Court, the problem with the VRA was that the preclearance provisions' coverage formula, unchanged in over fifty years, no longer reflected contemporary realities about minority political participation in the covered jurisdictions.<sup>176</sup> Chief Justice Roberts, writing for the five-justice majority, cited evidence of minority voter registration and turnout in those jurisdictions to conclude that those areas no longer exhibited unusually high levels of minority voter exclusion as compared with non-covered jurisdictions.<sup>177</sup>

One can disagree with that conclusion—indeed, the dissenters did so, vociferously,<sup>178</sup> as have many scholars.<sup>179</sup> For our purposes, however, the important point is that the Court tested enforcement legislation and found it wanting, but not because, as in *Kimel* or *Garrett*, it attacked a constitutionally-insignificant problem. Such a rationale would have been utterly implausible, given the centrality of racial equality to the Fourteenth Amendment and the very subject-matter of the Fifteenth Amendment—racial equality in

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175. See *Shelby County*, 133 S. Ct. at 2625–30 (concluding that the VRA's preclearance formula no longer reflected current conditions).

176. See *id.* at 2618 (“[T]he conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”).

177. See *id.* at 2625 (“[V]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009))).

178. See *id.* at 2633 (Ginsburg, J., dissenting) (stating that “the Court today terminates the remedy that proved to be best suited to block” the discrimination targeted by the VRA).

179. See, e.g., Kareem Crayton & Jane Junn, *Five Justices, Section 4, and Three Ways Forward in Voting Rights*, 9 DUKE J. CONST. L. & PUB. POL’Y 113, 113 (2013) (“[T]he decision is one of several demonstrating the Court’s skepticism about federal safeguards for racial minorities’ role in political discourse.”); Richard Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 726–38 (2014) (criticizing the Court’s analysis in *Shelby County* as “false minimalism”); Joel Keller, *Shelby County and the End of History*, 44 U. MEM. L. REV. 357, 358 (2013) (discussing the Court’s failure to recognize the power of the past and the burden of memory likewise resulted in an incomplete analysis of the continued necessity, and thus the continued constitutionality, of the federal-oversight provision).

voting rights.<sup>180</sup> Rather, just as in *Coleman*, the *Shelby County* Court omitted any statement about the importance of the right and how that importance influenced its enforcement power analysis. Instead, and again distantly, but distinctly echoing *Coleman*, the Court focused on whether the enforcement statute constituted a well-designed weapon against the constitutional violations the statute targeted.<sup>181</sup>

Thus, *Coleman* and *Shelby County* may herald a new approach to enforcement power analysis, one that deemphasizes or even ignores the constitutional status of the right the enforcement statute seeks to protect and focuses instead on how well the statute accomplishes its stated task. If so, one must wonder whether this new approach supersedes or provides an alternative to the one applied in *Kimel*, *Garrett*, *Hibbs*, and *Lane*, or instead, whether such an “effectiveness” inquiry constitutes a new threshold test that applies before the approach in the *Kimel* line is triggered. In any event, it is clear that analysis under the

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180. Indeed, for this reason, one scholar, who otherwise applauds the Court’s use of its own constitutional rights doctrine to establish the degree of latitude Congress enjoys to enforce that particular right (the approach taken in *Kimel*, *Garrett*, and *Hibbs*), expressed concern about the then-impending possibility that the Court could invalidate the VRA’s preclearance provisions. See Lee, *supra* note 134, at 502 (discussing the preclearance provisions); *id.* (“Race discrimination, no less under the Fifteenth Amendment than the Fourteenth, is the most suspect kind of state action. When Congress acts pursuant to its Fourteenth or Fifteenth Amendment enforcement powers to combat such action, those enactments must be given the widest berth possible.”).

181. Compare *Shelby County v. Holder*, 133 S. Ct. 2612, 2628 (2013)

In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.

*With Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 40 (2012) (describing the plaintiffs’ justification of the FMLA’s family care leave provision as “overly complicated” and “unpersuasive”). To be sure, *Shelby County* also relied on other rationales to cast doubt on the coverage formula. Most notably, it argued that a principle of “equal sovereignty” presumptively required that burdens placed on all states be equal—a requirement that was not met by the coverage formula’s selection of particular states and counties to bear the burdens of the preclearance provisions. See *Shelby County*, 133 S. Ct. at 2623–24 (“[T]he fundamental principles of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.”).

congruence and proportionality standard—which had been relatively stable, if controversial—may be becoming unsettled. It is also possible that these cases herald an Enforcement Clause doctrine unmoored from underlying constitutional rights doctrine, in which the Court engages in standardless, ad hoc scrutiny of an enforcement statute’s effectiveness.<sup>182</sup> These possibilities behoove us to consider how congruence and proportionality review might operate in new enforcement clause contexts, such as legislation enforcing the Second Amendment.

### III. *Heller*, Its Methodology, and Lower Court Applications

Since the Court’s 2008 *Heller* decision, finding the Second Amendment to guarantee a personal right of gun possession, and especially its 2010 *McDonald* decision, which incorporated that right to apply against the states, lower courts have puzzled over a variety of issues related to the gun possession right.<sup>183</sup> Most fundamentally, they have considered the doctrinal significance of the distinction between what *Heller* described as the “core”<sup>184</sup> right of law-abiding citizens to use commonly-preferred weapons to defend themselves in their home and presumptively less “core” possession rights. Relatedly, they have considered the proper standard of review for evaluating restrictions on different locations for gun possession (e.g., in the home or in public), restrictions on possessing certain types of weapons, and restrictions on possession by different types of persons (e.g., felons, recipients of domestic violence restraining orders, and mentally ill persons).<sup>185</sup> Finally, they have considered the proper

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182. See generally William D. Araiza, *The Enforcement Power in Crisis*, 18 U. PA. J. CONST. L. ONLINE 1 (2015) [hereinafter Araiza, *Crisis*] (discussing problems with the Court’s current approach to congruence and proportionality review).

183. See *supra* notes 152–159 (discussing the issues that the Supreme Court has left unresolved regarding gun possession rights).

184. See *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008) (stating that requiring firearms to be kept inoperable in the home prevents people from being able to protect their home, the “core” reason to possess a firearm).

185. See *id.* at 626–27 (“[O]ur opinion should [not] be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . .”).

analytical framework for analyzing restrictions on collateral rights related to gun possession and use (e.g., restrictions on target practice facilities and on the sale of firearms).<sup>186</sup>

The Supreme Court has provided almost no guidance on these difficult questions. Because both *Heller* and *McDonald* dealt with infringements on what *Heller* described as the core Second Amendment right,<sup>187</sup> they did not have cause to address other gun regulations that cannot be so described.<sup>188</sup> Aside from a brief *per curiam* opinion described by a concurring justice as “grudging,” which held that the Second Amendment protects the possession of stun guns, since *McDonald*, the Court has steadfastly refused to comment on the scope of the Second Amendment right.<sup>189</sup> This silence is not for lack of opportunity to speak, because *McDonald* made the Second Amendment “fully applicable” to the states,<sup>190</sup> the Court has denied certiorari in several cases where the lower court has upheld a gun restriction—sometimes in the face of a vigorous dissent from that denial.<sup>191</sup>

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186. Other scholars have described these issues slightly differently. *See, e.g.*, Volokh, *supra* note 3, 1443 (describing “scope justifications,” “burden justifications,” “danger reduction justifications,” and “government as proprietor justifications” for regulating gun possession).

187. *See Heller*, 554 U.S. at 628–29 (describing the law in terms that make it clear that it infringes the right the majority described as the core of the Second Amendment); *McDonald v. City of Chicago*, 561 U.S. 742, 749 (2010) (describing the laws challenged in that case as “similar” to the District of Columbia law so described in *Heller*).

188. *See Heller*, 554 U.S. at 635 (“[T]here will be time enough to expound upon the historical justifications for the [gun regulations the Court suggested were constitutional] if and when those [regulations] come before us.”).

189. *See Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (2016) (Alito, J., concurring) (stating that “[t]his Court’s grudging *per curiam* now sends the case back to” the same state court that rejected the Second Amendment claim originally).

190. *See McDonald*, 561 U.S. at 750 (“Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.”).

191. *See Peruta v. California*, 137 S. Ct. 1995, 1996–2000 (2017) (Thomas, J., dissenting) (stating disapproval of the Court denying certiorari); *Friedman v. City of Highland Park*, 136 S. Ct. 447, 447–50 (2015) (Thomas, J., dissenting) (same); *Jackson v. City of San Francisco*, 135 S. Ct. 2799, 2799 (2015) (Thomas, J., dissenting) (same); *Sessions v. Binderup*, 137 S. Ct. 2323, 2323 (2017) (Ginsburg & Sotomayor, JJ., dissenting) (dissenting without opinion from denial of certiorari).



This failure to clarify the Second Amendment right is also not due to the lack of need for such clarification. On the contrary, lower courts interpreting the Second Amendment have disagreed with each other<sup>192</sup> and have often been quite tentative in the breadth of their holdings.<sup>193</sup> This lack of a confident consensus among the lower courts reflects fundamental difficulties in creating a coherent Second Amendment jurisprudence. Those difficulties, while themselves noteworthy, are not the main focus of this Article. Rather, this Article focuses on how those difficulties will further complicate the already-challenging task of applying congruence and proportionality review to legislation enforcing the Second Amendment. In turn, that complexity will illustrate the broader problem courts will have in applying the congruence and proportionality standard to legislation enforcing other substantive rights protected by the Due Process Clause.<sup>194</sup>

This Part of the Article begins the process of proving these propositions by examining the complexities of Second Amendment jurisprudence and considering how they impact the enforcement power as it relates to the Second Amendment.<sup>195</sup> Part IV considers how the Court's extant approaches to congruence and proportionality review might respond to the challenges posted by Second Amendment enforcement legislation.<sup>196</sup> Part V will offer a more granular approach to the

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192. See *Kolbe v. Hogan*, 813 F.3d 160, 182 (4th Cir. 2016) (recognizing its disagreement with other courts about the proper analysis of the constitutionality of complete prohibitions on certain types of weapons).

193. See, e.g., *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J., concurring)

There may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions . . . . The whole matter strikes us as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree.

See also *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (declining to "get more deeply into the 'levels of scrutiny' quagmire" than necessary to decide the case in front of before it).

194. See *infra* Part VII (noting the crucial need for a new approach).

195. See *infra* notes 199–241 and accompanying text (discussing the Second Amendment caselaw and its implications).

196. See *infra* Part IV (discussing the different paths the Court could take if

Second Amendment enforcement issue.<sup>197</sup> Part VI will conclude by suggesting that this approach may be more generally useful when the Court confronts legislation enforcing other substantive Fourteenth Amendment rights.<sup>198</sup>

### *A. The Second Amendment's Emerging Doctrinal Structure*

Much of the difficulty courts have experienced in Second Amendment cases stems from *Heller*'s identification of a "core" right of law-abiding citizens to possess a gun for self-defense,<sup>199</sup> and its further observation that that right is "most acute" in the home.<sup>200</sup> This identification of a Second Amendment "core" logically implies the existence of a Second Amendment periphery consisting of gun possession rights that are not part of the amendment's core, but nevertheless enjoy some degree of constitutional protection.<sup>201</sup> Indeed, lower courts have recognized not only such peripheral possession rights, but also penumbral rights beyond mere possession.<sup>202</sup>

This recognition of a Second Amendment core and periphery has helped create a structure in which a given gun control law may be subject to different levels of judicial scrutiny, depending on how closely the regulations approach the heart of the Second

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presented a Second Amendment question).

197. See *infra* Part V (discussing each step of the Second Amendment analysis in greater detail).

198. See *infra* Part VI (discussing the enforcement of Fourteenth Amendment rights more generally).

199. See *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008) (stating that a law preventing one from having the ability to protect his home is unconstitutional); see also *id.* at 599 (defining self-defense as "the central component" of the Second Amendment right).

200. See *id.* at 628 (describing the gun prohibition in the challenged law as "extend[ing], moreover, to the home, where the need for defense of self, family, and property is most acute").

201. See *Peruta v. County of San Diego*, 742 F.3d 1144, 1153 (9th Cir. 2014) (referencing passages from *Heller* that "alone, though short of dispositive, strongly suggest that the Second Amendment secures a right to carry a firearm in some fashion outside the home"); see also *infra* note 211 and accompanying text (discussing protection in the home).

202. See generally *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) [hereinafter *Ezell I*] (protecting the right to access a firing range); *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017) [hereinafter *Ezell II*] (same).

Amendment right. That complex structure poses a difficult enough challenge for any inquiry into whether a federal gun rights enforcement law is congruent and proportional to the underlying Second Amendment right. But the matter becomes even more complicated when one realizes that these inquiries require different interpretive methodologies. In turn, those different methodologies relate in different ways to Congress's particular institutional capacities compared with those of courts—and thus have different impacts on the latitude and deference Congress should enjoy in enacting enforcement legislation.

Consider one relatively common lower court approach to Second Amendment issues in which the first step requires a historical analysis of whether a particular gun possession right, or the exercise of that right by a particular person, falls completely outside the protection offered by the Second Amendment.<sup>203</sup> For example, when considering whether domestic violence misdemeanants enjoy the constitutional right to possess a gun, a number of courts have examined whether historically such persons had enjoyed that right. Some courts that answer that question in the negative (that is, courts that have found that historically such persons did not enjoy gun possession rights) have stopped their analysis at that point.<sup>204</sup> By contrast, courts concluding that such persons did in fact enjoy that right have

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203. See *Silvester v. Harris*, 843 F.3d 816, 820–21 (9th Cir. 2016) (describing an approach starting with this scope inquiry as one adopted by a majority of the federal circuit courts); *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) (describing this as the “prevailing” approach); see also *Ezell I*, 651 F.3d at 703 (applying this analysis). Cf. *Volokh*, *supra* note 3, at 1449–53 (noting a preliminary “scope” question in Second Amendment cases, asking whether the asserted gun possession conduct is entirely outside the scope of the Second Amendment’s protection); Rosenthal, *supra* note 3, at 1200 (“[T]he first prong, while ostensibly focused on historical evidence of original meaning, operates only to defeat Second Amendment claims.”).

204. See *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)

The first question [in Second Amendment analysis] is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee. This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid.

(internal quotation and citation omitted).

then applied some level of ends-means scrutiny, with the intensity of that scrutiny often turning on the proximity of the asserted right (now held to be within the Second Amendment's overall zone of protection) to the Amendment's core.<sup>205</sup>

The cases applying this approach reveal the existence of up to five analytical steps, each of which is governed by a distinct methodology.<sup>206</sup> The first step—determining whether the asserted right comes within the Second Amendment's protected zone at all—appears to require a binary yes/no decision, reached, at least in most cases, by a historical analysis.<sup>207</sup> The second step—determining whether the challenged law constitutes a substantial burden on the right<sup>208</sup>—requires some degree of judgment from

205. See *Nat'l Rifle Ass'n*, 700 F.3d at 195 (“[A] ‘severe burden on the core Second Amendment right of armed self-defense should require a strong justification,’ but . . . ‘laws that do not implicate the central self-defense concern of the Second Amendment . . . may be more easily justified . . . .’” (quoting *Chester*, 628 F.3d at 682)).

206. Courts have often described this approach as entailing simply two steps—the “scope” inquiry the text identifies as the first step, and then the selection and application of the appropriate scrutiny level, which courts often describe as one step, but may include as many as four. See *supra* note 203 (citing examples).

207. See, e.g., *Silvester*, 843 F.3d at 821 (“Under [Ninth Circuit] case law, the court in the first step asks if the challenged law burdens conduct protected by the Second Amendment, based on a historical understanding of the scope of the right.” (internal quotation omitted)). To be sure, courts have expressed doubts about their ability to competently perform such an analysis, in part because of the anachronistic nature of many of these questions. See, e.g., Allan Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 750 (2012) (“[R]ecognizing the difficulty of making comparisons across centuries during which so many vast technological, legal, social, and other changes have occurred.”); *id.* at 752 n.315 (citing cases acknowledging this problem in the context of laws restricting gun rights for domestic violence misdemeanants); *Chester*, 628 F.3d at 680 (“Moreover, it appears to us that the historical data is not conclusive on the question of whether the founding era understanding was that the Second Amendment did not apply to felons.”); Carlton F.W. Lawson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1376 (2009) (noting the difficulty of justifying an originalist-based conclusion about the constitutionality of felon disarmament laws); see also *Ezell I*, 651 F.3d at 704–06 (analyzing whether target range regulation was a longstanding historical practice that immunized such regulation from Second Amendment review); *County of San Diego*, 824 F.3d at 939 (using the same history-centered review when determining whether the Second Amendment protected the right to carry a concealed weapon).

208. See Rosenthal, *supra* note 3, at 1202 (noting this inquiry).

the court. A judge confronting this question would presumably have to apply the empirical facts of the situation (literally, how burdensome the regulation is) to a legal standard that might draw its content from other constitutional rights doctrines that impose an analogous requirement.<sup>209</sup> The third step—determining the proximity of the asserted right to the *Heller*-identified Second Amendment “core”<sup>210</sup>—also requires judgment. Recall that *Heller* described the need for self-defense as “most acute” in the home, thus, as one judge has written, “suggesting that some form of the right applies where that need is not ‘most acute.’”<sup>211</sup> Determining how to analyze claimed infringements of that less central “form of the right” requires judges to make a choice that is presumably *not* a binary one, unless (implausibly) all rights other than home self-defense fall into the same category with respect to their distance from *Heller*’s home-centered core. Such a decision, then, inevitably requires a degree of sensitive judgment, akin to locating a right on a sliding scale of importance or fundamentality.<sup>212</sup> The fourth step—settling on the applicable scrutiny level—presumably turns to a great degree on the

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209. See Volokh, *supra* note 3, at 1454–55 (noting the existence of analogous “burden” inquiries in other constitutional rights doctrines).

210. See *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008) (“We must also address the District’s requirement (as applied to respondent’s handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional.”).

211. See *United States v. Masciandaro*, 638 F.3d 458, 468 (4th Cir. 2011) (Niemeyer, J., writing separately) (“The Court stated that its holding applies to the home, where the need ‘for defense of self, family, and property *is most acute*,’ *Heller*, 128 S. Ct. at 2817 (emphasis added), suggesting that some form of the right applies where that need is not ‘most acute.’”). But see *Peruta v. County of San Diego*, 742 F.3d 1144, 1153 (9th Cir. 2014) (suggesting that armed self-defense is a core Second Amendment right wherever it occurs).

212. See, e.g., *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016) (using sliding scale imagery to describe how to determine the appropriate standard of review based on an estimation of the proximity of the claimed right to the Second Amendment core and the severity of the burden); *Ezell I*, 651 F.3d 684, 708 (7th Cir. 2011)

[L]aws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate . . . and modest burdens . . . may be more easily justified. *How much more easily depends on the relative severity of the burden and its proximity to the core of the right.*

(emphasis added).

outcome of the third step—that is, on how the court characterizes the right’s proximity to the core of the Second Amendment.<sup>213</sup> Finally, the fifth step—applying that scrutiny—involves evaluating policy considerations about the importance of the asserted government interests, the effectiveness of the law in accomplishing those interests, and the availability of alternative means of attaining those interests.<sup>214</sup>

### *B. Second Amendment Doctrine and Congressional Enforcement Power*

These steps thus reflect a variety of decision-making methodologies: historical inquiries seeking a yes/no answer to the protected status of gun possession conduct, judgments about the severity of the burden a law places on a claimed right and about the proximity of particular conduct to the core conduct the Second Amendment protects, doctrinal decisions about the appropriate level of scrutiny to apply, and policy-laden analysis applying the scrutiny level ultimately chosen.<sup>215</sup> The sheer range of these approaches alone would seriously complicate a court’s examination into whether a federal gun rights enforcement statute was congruent and proportional to the underlying right it

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213. See *Silvester*, 843 F.3d at 821 (using sliding scale imagery); *Ezell I*, 651 F.3d at 708 (describing the appropriate standard of review in that particular case as “more rigorous . . . than that applied” in an earlier Second Amendment case, “if not quite ‘strict scrutiny’”).

214. Indeed, such analysis could come quite close to the “interest balancing” Justice Scalia criticized in *Heller*. See *Ezell I*, 651 F.3d at 710 (concluding that “the [challenged] firing-range ban is wholly out of proportion to the public interests the City claims it serves”).

215. Cf. Volokh, *supra* note 3, at 1446 (proposing that courts adopt a three-step test: (1) a scope inquiry; (2) an inquiry into the burden level the regulation imposes on the right; and (3) an inquiry into the “danger reduction” the regulation accomplishes, which roughly tracks, respectively, steps one, two to three, and four to five in the text); Rosenthal, *supra* note 3, at 1200–01 (describing “the prevailing approach” as involving a “two-pronged inquiry”—an initial scope inquiry followed by the application of “an appropriate form of means-end scrutiny” (citations omitted)); *id.* at 1201 (identifying that second prong as involving “two analytically distinct steps, in which, first, the extent of the burden on the right of lawful, armed defense is assessed in order to determine, then, the extent to which the challenged regulation will be regarded as constitutionally suspect” (citations omitted)).

sought to protect. But the problem is even more serious than that. If a court's performance of congruence and proportionality review seeks to account for Congress's institutional strengths in making particular types of determinations,<sup>216</sup> that review would have to take several different forms in the process of analyzing the same enforcement statute.

Yet another complexity also bears noting before we apply this approach to the enforcement power. The Court's decisions in *Kimel*<sup>217</sup> and *Garrett*,<sup>218</sup> to accord skeptical scrutiny to enforcement legislation because the law in question protected a non-suspect class, are subject to the criticism that it elevates suspect class analysis, and the tiered scrutiny that follows, from the status of mere decisional heuristic to constitutional law. Both judges<sup>219</sup> and scholars<sup>220</sup> have observed that suspect class analysis, and in particular the deference the rational basis standard shows to legislation burdening groups that fall under the default "non-suspect" category, reflects judicial restraint rather than core constitutional meaning. Those critics observe that such *judicial* restraint may be admirable, but does not justify cabining *congressional* power, given the character of

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216. I have argued elsewhere that congruence and proportionality review should in fact take account of Congress's particular institutional capabilities, and how those capabilities allow Congress to provide appropriate and meaningful input to the task of vindicating constitutional rights. See ARAIZA, ENFORCING, *supra* note 22, at 258 (arguing for incorporating congressional institutional capacities to bolster Congress's role in constitutional rights vindication); see also William D. Araiza, *Deference to Congressional Factfinding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 882 (2013) [hereinafter Araiza, *Deference*] (explaining the particular types of legislative findings in rights-protecting legislation that merit the most and the least judicial deference).

217. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 63 (2000) (applying skeptical review in the age discrimination context).

218. See *Bd. of Trs. of Ala. v. Garrett*, 531 U.S. 356, 357 (2001) (applying skeptical review in a case brought under the ADA).

219. See *id.* at 382–84 (Breyer, J., dissenting) ("Rational-basis review—with its presumptions favoring constitutionality—is 'a paradigm of *judicial* restraint.'" (emphasis added) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993))).

220. See, e.g., Robert Post & Reva Segal, *Legislative Constitutionalism and Section Five Power: Policentric Interpretations of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1967 (2003) (discussing judicial reluctance to "closely scrutinize legislative choices" as a reflection of rational basis review as judicial restraint).

rational basis review, and suspect class analysis more generally, as a decisional heuristic motivated by concerns about institutional competence rather than a statement of core constitutional meaning.<sup>221</sup> As a result, congruence and proportionality review focused on the results of suspect class analysis—that is, the review performed by the Court in the *Kimell/Garrett/Hibbs* trilogy—ends up testing enforcement legislation for congruence and proportionality against the wrong referent—the benefitted group’s suspect class status—rather than core constitutional meaning itself.<sup>222</sup>

For our purposes, this critique means that before the Second Amendment doctrinal steps noted earlier become relevant to enforcement legislation, they must be evaluated to determine whether they constitute core constitutional law as opposed to mere decisional heuristics. This is not a novel distinction. Nearly thirty years ago, Lawrence Sager’s classic article on underenforced constitutional norms distinguished between “institutional” and “analytical” justifications for judicial decisions enforcing rights.<sup>223</sup> According to Dean Sager, court decisions relying on concerns about institutional competence to justify narrow readings of rights result in rights that should be considered judicially underenforced, and thus appropriately subject to additional protection by other actors, including Congress when it uses its Enforcement Clause authority.<sup>224</sup> By contrast, “analytical” reasons for reading a right narrowly relate to the Court’s “understanding of the [constitutional] concept itself.”<sup>225</sup> The results of such latter analyses were, in Dean Sager’s view, less susceptible to supplementation by other actors,

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221. See, e.g., Massey, *supra* note 8, at 21 n.95 (citing scholars making a similar argument).

222. I have made this argument in other venues. For this discussion, see ARAIZA, ENFORCING, *supra* note 22, at 141–69.

223. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217–18 (1978) (“What I want to distinguish between here are reasons for limiting a judicial construct of a constitutional concept which are based upon questions of propriety or capacity and those which are based upon an understanding of the concept itself.”).

224. See *id.* at 1228–42 (discussing cases in which the underenforcement thesis is properly applied).

225. *Id.* at 1218.



at least when such supplementation was performed under the banner of enforcing or vindicating that right.<sup>226</sup> While he wrote two decades before *Boerne* and *Boerne's* application to equal protection enforcing legislation, Dean Sager's distinction foreshadowed both judicial and scholarly critiques of the Court's skeptical review of such legislation.<sup>227</sup>

Dean Sager's institutional/analytical distinction requires that we consider the degree to which the Second Amendment is judicially "underenforced" and thus appropriately susceptible to aggressive congressional supplementation via the Enforcement Clause.<sup>228</sup> Unfortunately, the complexity of Second Amendment doctrine means that this inquiry does not always yield an unambiguous answer. Sometimes the inquiry is straightforward. Most notably, the first step in Second Amendment analysis—whether, as a historical matter, particular gun possession conduct was understood as protected by the Second Amendment—is answered (at least ostensibly<sup>229</sup>) by an analysis that relies heavily on constitutional text and originalist analysis.<sup>230</sup> Without engaging the ongoing, well-known, and voluminously-documented debate about the merits of originalism, or whether it constitutes the only legitimate approach to constitutional interpretation,<sup>231</sup> the fact that originalist analysis

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226. See *id.* at 1240 ("[W]here, because of analytical . . . concerns, the Court has determined that given conduct does no violence to the substantive norm of the fourteenth amendment, Congress cannot use section 5 as authority to legislate against that conduct.").

227. See *Bd. of Trs. of Ala. v. Garrett*, 531 U.S. 356, 382–85 (2001) (Breyer, J., dissenting) (critiquing the Court's application of rational-basis review); William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519, 525–26 (2005) (arguing that the Court's Equal Protection Clause decisions under rational-basis review reflect the same distinction Dean Sager drew).

228. See *supra* note 224 and accompanying text (discussing the underenforcement thesis as applied to specific cases).

229. See *supra* note 207 (citing sources conceding the difficulty courts have encountered reaching reliable conclusions under such analysis).

230. See, e.g., *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016) (discussing examination of historical evidence and historical understanding as the first step in determining a challenged law's burden on conduct protected by the Second Amendment).

231. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991) (noting a variety of "modalities," or tools, of constitutional interpretation).

self-consciously aims at uncovering the core law of the Constitution suggests that this first doctrinal step is not a decisional heuristic.<sup>232</sup> To use Dean Sager's terminology, this first doctrinal step relies on "analytical" reasoning rather than concerns about courts' "institutional" limitations.<sup>233</sup> As such, the room for congressional supplementation is correspondingly narrowed. As set out below, other doctrinal steps may not have that status. Thus, Congress may enjoy more latitude to contribute to courts' resolution of those latter steps.

Consider an example illustrating the methodological variety of these steps. Hypothesize a federal law that protects the rights of Americans to carry loaded guns in their automobiles. A defender of that law's constitutionality as "appropriate" legislation enforcing the Second Amendment<sup>234</sup> might first argue that carriage of a gun in a car, by analogy to historical antecedents, comes within the protection of the Second Amendment.<sup>235</sup> She might then argue that the federal enforcement statute protects against state laws that completely prohibit, or at least severely restrict, such carriage, and thus that the federal law protects against substantial burdens on the Second Amendment right.

That same person might then argue that the prevalence of automobile travel today, and the nature of one's automobile as a fundamentally private space, render the need for self-defense while traveling only slightly less "acute" than *Heller's* core home self-defense right.<sup>236</sup> She might then argue that the importance of

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232. See Scalia, *supra* note 11, at 854

Central to [Chief Justice Marshall's defense of judicial review in *Marbury v. Madison*] . . . is the perception that the Constitution . . . is in its nature the sort of "law" that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law.

(emphasis added).

233. See Sager, *supra* note 223, at 1218 (noting the analytical framework).

234. See U.S. CONST. amend. XIV, § 5 (authorizing Congress to enact "appropriate" legislation enforcing Fourteenth Amendment rights).

235. Cf. *United States v. Jones*, 565 U.S. 400, 406 (2012) (considering a somewhat analogous question in the context of the Fourth Amendment).

236. For a provocative examination of the role of the automobile as a locus for intensely private pursuits, see generally Sara Seo, *The New Public*, 125 YALE L.J. 1616 (2016).

that right justifies its careful protection from state regulation, *i.e.*, that such state regulation should trigger strict scrutiny—a result that, in turn, would give Congress more leeway to enforce that right, at least under the Court’s existing enforcement power template.<sup>237</sup> Finally, she could argue, as part of the ultimate review of the law for congruence and proportionality, that Congress merits deference when it makes determinations about the social reality of both the safety risks of driving (for example, long-distance driving through sparsely populated areas or sleeping in one’s car) and, conversely, the public safety risks of loaded guns in cars.

The point is not so much that each of these steps would present courts with a challenge—although each one surely would. Rather, the main point is that the focus of congruence and proportionality review would have to continually shift, as the methodology for judging the enforcement statute shifted with each step in the analytical sequence outlined above. Further, as the methodology shifted, the deference due Congress’s determinations would similarly shift, as the character of courts’ analysis moves (to use Dean Sager’s terminology) between analytical and institutional. For example, a court might well conclude that Congress’s conclusion about the historical pedigree of unrestricted carriage of weapons did not merit any particular deference, since that would be a conclusion about historical practice, a topic about which Congress does not enjoy any particular expertise or authority relative to courts. Indeed, to the extent originalist analysis purports to uncover core constitutional meaning based on Dean Sager’s “analytical” reasoning, a court decision allowing Congress to make the relevant originalist determinations about the scope of a constitutional right would

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237. See, *e.g.*, *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (concluding that the heightened protection accorded sex equality under the Fourteenth Amendment made it “easier for Congress to show a pattern of state constitutional violations” justifying enforcement legislation); *id.* at 735 (comparing its review of sex equality-enforcement legislation with legislation enforcing the equal protection rights of non-suspect classes, and concluding that the non-suspect nature of the benefitted classes imposed on Congress a tougher evidentiary burden when seeking to justify that latter type of legislation); see also *supra* note 134 (citing authorities describing the Court’s Enforcement Clause jurisprudence as applied to equality-enforcing legislation as turning heavily on the suspect class status of the group that legislation seeks to protect).

essentially cede to Congress the power to declare such core meaning, in contravention of *Boerne*.<sup>238</sup> By contrast, its conclusions about the acuteness of the need for self-defense while driving might well merit deference, given Congress's presumed superior knowledge of, and ability to draw conclusions about, social reality in 21st-century America.<sup>239</sup>

This very quick discussion of the automobile carriage hypothetical does not even begin to provide a complete analysis of the implications of Second Amendment doctrine for congressional attempts to enforce gun possession rights. More comprehensive analyses of Congress's power to enforce the Second Amendment follow in Parts IV and V.<sup>240</sup> What this brief discussion illustrates, however, is the variety and complexity of the questions that underlying doctrine poses for the enforcement power.<sup>241</sup> The prospect of enforcement legislation protecting Second Amendment rights, and the possibility of enforcement legislation protecting substantive Fourteenth Amendment rights more generally, demands an approach to the enforcement power question that accounts for this variety and complexity.

#### *IV. Arming the Second Amendment: Existing Approaches*

Given the little that we know so far about the Supreme Court's approach to Second Amendment adjudication, what doctrinal paths would present themselves should the Court confront legislation enforcing Second Amendment rights? Part II's discussion of the Court's Enforcement Clause jurisprudence suggests some possibilities.<sup>242</sup> However, those possibilities are

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238. See *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (stating that Congress's passage of the RFRA was an "attempt [to] change . . . constitutional protections" rather than remedial or preventive legislation).

239. See ARAIZA, ENFORCING, *supra* note 22, at 169–93 (arguing that Congress's superior understanding of contemporary social reality should trigger judicial deference to congressional determinations based on such understanding).

240. See *infra* Parts IV, V (applying existing approaches to the enforcement power to Second Amendment issues and offering a new approach).

241. See *supra* Part III (noting the variety and complexity of questions posed by underlying Second Amendment doctrine).

242. See *supra* Part II (discussing the Court's extant Enforcement Clause doctrine).

complicated by the doctrinal approaches adopted in part by the *Heller* Court and by the lower courts charged with applying *Heller* to different types of regulations, as discussed in Part III.<sup>243</sup> This Part of this Article re-examines those possibilities in light of the complexities of Second Amendment doctrine.<sup>244</sup> Part V offers another approach to Congress's power to enforce the Second Amendment, and, by analogy, its power to enforce other Fourteenth Amendment substantive rights provisions.<sup>245</sup>

### A. The Equal Protection/Tiered Scrutiny Approach

An important part of the Court's post-*Boerne* Enforcement Clause jurisprudence consists of the *Kimel/Garrett/Hibbs* trilogy of equal protection enforcement cases.<sup>246</sup> In those cases the Court adopted strong presumptions disfavoring or favoring enforcement legislation based on, respectively, the presumptive constitutionality or unconstitutionality of the conduct that legislation targets.<sup>247</sup> For example, as discussed in more detail in Part II, in *Garrett*, the Court's skeptical enforcement power review of the ADA's employment provisions flowed largely from what the Court described as the constitutionally trivial status of disability discrimination.<sup>248</sup> By contrast, two years later in *Hibbs*,

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243. See *supra* Part III (identifying the approaches to Second Amendment questions taken by lower courts).

244. See *infra* notes 246–341 (reexamining the Second Amendment Enforcement Clause issue in light of underlying Second Amendment doctrine).

245. See *infra* Part V (offering a new, more granular, approach to Enforcement Clause doctrine).

246. This Article does not extensively discuss *Morrison*, given its primary focus on the fact that the VAWA did not directly regulate states. See *United States v. Morrison*, 529 U.S. 598, 626 (2000) (“Section 13981 is also different from these previously upheld remedies in that it applies uniformly throughout the Nation. Congress[s] findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States.”).

247. See *supra* notes 103–133 and accompanying text (discussing the *Kimel*, *Garrett*, and *Hibbs* decisions); see also Massey, *supra* note 8, 9–14 (embracing the methodology in those three cases as a general approach to enforcement power cases); Lee, *supra* note 180, at 488–89 (embracing that methodology).

248. See Bd. of Trs. of Ala. v. *Garrett*, 531 U.S. 356, 368 (2001) (“The legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the

the Court's far more hospitable reception to the FMLA's family-care leave provision largely stemmed from the Court's recognition that sex discrimination poses a serious constitutional concern.<sup>249</sup> As the Court stated in *Hibbs*, the more serious constitutional question sex discrimination poses made it "easier for Congress to show a pattern of state constitutional violations."<sup>250</sup>

Judges and scholars have critiqued the Court's heavy reliance on suspect class analysis in its enforcement power jurisprudence, arguing that the results of such analysis constitute judicial heuristics rather than core constitutional law.<sup>251</sup> As explained earlier,<sup>252</sup> congruence and proportionality review focused on the results of suspect class analysis—that is, the review performed by the Court in the *Kimell/Garrett/Hibbs* trilogy—ends up testing enforcement legislation for congruence and proportionality against the wrong referent—the benefitted group's suspect class status—rather than core constitutional meaning itself.<sup>253</sup> To return to Dean Sager's terminology,<sup>254</sup> when such heuristics take the form of deferential rational basis review, the resulting institutional competence-motivated judicial restraint is best understood as resulting in an underenforced constitutional norm. In turn, that underenforcement leaves room for appropriate exercises of other branches' powers to more fully vindicate that norm.<sup>255</sup>

This critique is partially moot in the case of the Second Amendment. In *Heller*, the Court downplayed reliance on heuristics such as tiered scrutiny, in favor of direct, unmediated

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disabled.”).

249. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (“The impact of the discrimination targeted by the FMLA is significant.”).

250. *Id.*

251. See Massey, *supra* note 8, at 21 n.95 (citing scholars making a similar argument).

252. See *supra* notes 219–222 and accompanying text (discussing rational basis review and judicial restraint as it relates to suspect class analysis).

253. See *supra* note 222 and accompanying text (providing other venues in which the same argument is made).

254. See *supra* notes 223–224 and accompanying text (discussing Dean Sager's underenforcement thesis).

255. See *supra* note 224 (discussing the underenforcement thesis as applied to specific cases).

examination of the core constitutional right.<sup>256</sup> That search for core constitutional meaning led the majority to conclude that the Second Amendment—on its own, unmediated by decision rules such as suspect class analysis—protected the right of law-abiding citizens to possess a commonly-owned type of functioning gun for self-defense purposes in the home.<sup>257</sup> Because the challenged District of Columbia law prevented such possession,<sup>258</sup> the Court found it to violate the core meaning of the Second Amendment.<sup>259</sup>

To be sure, lower courts after *Heller* have not been able to avoid tiered scrutiny analysis as easily as *Heller* itself, given that they have had to confront gun restrictions that did not destroy the core right as Justice Scalia described it.<sup>260</sup> Nevertheless, tiered scrutiny in Second Amendment cases may differ from its equal protection cousin in not being based on judicial heuristics. In particular, courts in Second Amendment cases have decided to apply such scrutiny not based on any mediating principle such as political process analysis, but instead as a reflection of the impact of the law on core Second Amendment values.<sup>261</sup> Thus, tiered scrutiny analysis in Second Amendment cases may in fact have a closer connection to core constitutional law than in the equal protection context, even if it still reflects the “interest balancing” Justice Scalia derided in *Heller*.<sup>262</sup> For that reason, court

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256. See *District of Columbia v. Heller*, 554 U.S. 570, 579–605 (2008) (examining the constitutional meaning of the Second Amendment by examining the operative clause, prefatory clause, their meanings, and the relationship between the clauses).

257. See *id.* at 573–636 (using the meaning of the Second Amendment to support the right of citizens to own and possess a firearm for self-defense).

258. The law struck down in *Heller* prohibited the possession of handguns in the home and required that lawfully possessed guns (such as long guns) kept in the home be kept in a disassembled state, so as to render them non-functional. *Id.* at 575.

259. See *id.* at 635 (“In sum, we hold that the District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.”).

260. See Rosenthal, *supra* note 3, at 1203–04 (noting the prevalence of “interest-balancing” in post-*Heller* lower court litigation).

261. See *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016) (explaining that the level of scrutiny in such non-core cases turns on the proximity of the infringed-upon right to the Second Amendment’s core and the challenged law’s degree of intrusion into that right).

262. See *Heller*, 554 U.S. at 635 (“The Second Amendment is no different

decisions about the relevant scrutiny level may reflect less underenforcement of the Second Amendment right than analogous decisions in equal protection cases.<sup>263</sup> Thus, such Second Amendment decisions may leave relatively less room for aggressive enforcement legislation, as compared with the situation with equal protection.<sup>264</sup>

But another, more practical, problem arises when we consider the utility of Second Amendment tiered scrutiny to the enforcement power question. In the decade since *Heller*, courts considering Second Amendment claims have often selected intermediate scrutiny as the appropriate standard.<sup>265</sup> This causes not a conceptual problem like the one identified above, but rather, an indeterminacy problem. Put bluntly, in comparison to rational basis or strict scrutiny review, intermediate scrutiny (at least in its classic incarnation<sup>266</sup>) provides far less of a predictable thumb on the scale either favoring or disfavoring the constitutionality of enforcement legislation.<sup>267</sup> That indeterminacy would likely be particularly pronounced in the Second Amendment context, given that such scrutiny is triggered

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[from the First Amendment]. Like the First, it is the very product of an interest balancing by the people—which Justice Breyer would now conduct for them anew.”).

263. See Sager, *supra* note 223, at 1218, 1228–42 (discussing the underenforcement thesis and the difference in “institutional” and “analytical” reasons for examining rights).

264. See *id.* (examining the need for other actors to supplement constitutional rights based on the Court’s use of analytical versus institutional readings of rights).

265. See *Silvester*, 843 F.3d at 827 (using intermediate scrutiny in analyzing a law regulating firearm use and ownership); see also *United States v. Hosford*, 843 F.3d 161, 168–70 (4th Cir. 2016) (same).

266. By “classic incarnation,” I mean the formulation which self-consciously locates itself “between [the] extremes of rational basis and strict scrutiny,” *Clark v. Jeter*, 486 U.S. 456, 461 (1986), rather than the version espoused in *United States v. Virginia*, 518 U.S. 515, 571–72 (1996) (citing *Jeter*), which has been described as a type of proto-strict scrutiny. See, e.g., Kevin Rolando, *A Decade Later: United States v. Virginia and the Rise and Fall of “Skeptical Scrutiny,”* 12 ROGER WILLIAMS U. L. REV. 182, 182–85 (2006) (labeling the Court’s use of a toughened intermediate scrutiny in *United States v. Virginia* as more akin to strict scrutiny).

267. See, e.g., Kimberly Jenkins, *Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools*, 47 WM. & MARY L. REV. 1953, 1997–98 (2006) (citing and discussing scholars’ characterizations of intermediate scrutiny as indeterminate).



by infringements on gun rights that are conceded to be peripheral to the core right *Heller* recognized, but which nevertheless enjoy meaningful constitutional protection.<sup>268</sup> It is thus difficult to see how courts' use of intermediate scrutiny predictably influences the outcome of a congruence and proportionality analysis, in the way that the Court's use of rational basis scrutiny for age and disability discrimination effectively doomed the enforcement power argument for, respectively, the ADEA in *Kimel* and the ADA in *Garrett*, and in the way that employment of heightened scrutiny for sex discrimination<sup>269</sup> effectively paved the way for the Court's approval of the FMLA in *Hibbs*.<sup>270</sup>

### *B. The Due Process Approach*

The Court's due process enforcement cases may provide a more promising approach to the Court's evaluation of Second Amendment enforcement legislation. Indeed, focusing on those cases makes intuitive sense, given that a plurality of the Court found that the Due Process Clause provided the appropriate doctrinal home for an incorporated Second Amendment.<sup>271</sup> Since

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268. See, e.g., *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 692–99 (6th Cir. 2016) (applying intermediate scrutiny to a federal law denying a gun license to anyone who had ever been committed to a mental institution, and finding that application of that law to the plaintiff failed that level of scrutiny).

269. To repeat a point made earlier, while sex discrimination ostensibly receives the same “intermediate scrutiny,” the accompanying text describes as providing only indeterminate guidance for the congruence and proportionality inquiry; by the time *Hibbs* was decided sex discrimination had been treated by the Court in a way that suggested not “classic” intermediate scrutiny, but rather something approaching strict scrutiny. See *supra* note 266 and accompanying text (discussing differences between a “classic” version of intermediate scrutiny and a more toughened version similar to strict scrutiny). Thus, that level of scrutiny did in fact provide significant guidance for the Court in *Hibbs*, even while I suggest that “classic” intermediate scrutiny may not provide similar guidance in the Second Amendment context.

270. See *Lee*, *supra* note 180, at 496–97 (concluding that, in the context of congressional enforcement of rights that receive intermediate scrutiny, the congruence and proportionality standard requires an assessment of fit, but suggesting that such an assessment lacks clear standards).

271. See *McDonald v. City of Chicago*, 561 U.S. 742, 758–59 (2010) (plurality opinion) (arguing for the use of the Due Process Clause in analyzing Fourteenth Amendment protections of state infringement of Second Amendment rights); *id.* at 805–06 (Thomas, J., concurring in part and concurring in the judgment)

*Boerne*, the Court has decided four cases involving federal legislation defended as enforcing Fourteenth Amendment due process rights.<sup>272</sup> In reverse chronological order, those cases are *Georgia*,<sup>273</sup> *Lane*,<sup>274</sup> *Florida Prepaid*,<sup>275</sup> and *Boerne*<sup>276</sup> itself.

### 1. Georgia

The most recent of these cases, *United States v. Georgia*,<sup>277</sup> can be dispensed with quickly. In *Georgia*, the Court unanimously agreed that, whatever else Congress might be able to accomplish through the enforcement power, it unquestionably could legislate judicial remedies for state conduct that actually violates the Fourteenth Amendment. In a sense, that holding is trivial.<sup>278</sup> Particularly in the Second Amendment context, a holding that Congress has the power to legislate remedies for judicially-found constitutional violations says very little about the

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(discussing the Privileges and Immunities Clause as a more appropriate authority to protect Second Amendment rights).

272. See *infra* Part IV.A.1–3 (examining the cases and their implications).

273. See *infra* note 277 (discussing *Georgia*).

274. See *infra* Part IV.A.2 (discussing *Lane*).

275. See *infra* Part IV.A.3 (discussing *Florida Prepaid*).

276. See *infra* Part IV.A.3 (discussing *Boerne*).

277. 546 U.S. 151 (2006). For details on the case, see *supra* note 153 and accompanying text (discussing whether the ADA's provision of money damages for violations of the public services provision constituted appropriate enforcement of the Fourteenth Amendment's Due Process Clause when applied to conduct that was alleged to have violated the Due Process Clause).

278. Indeed, it is telling that the Court was unanimous in *Georgia*, despite having split badly on every other enforcement power case after *Boerne*. See *id.*

While the Members of this Court have disagreed regarding the scope of Congress's 'prophylactic' enforcement powers under § 5 of the Fourteenth Amendment . . . no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions.

(citations omitted). It may also be telling that the Court's brief opinion upholding this use of the enforcement power was written by Justice Scalia, who by 2006 had gone on record as taking the most restrictive view of that power of all the justices. See *Tennessee v. Lane*, 541 U.S. 509, 554 (2004) (Scalia, J., dissenting) (repudiating the congruence and proportionality test and, with the exception of racial equality legislation, limiting Congress to enacting remedies for actual judicially-decreed Fourteenth Amendment violations).

potential scope of congressional power, given the vagueness and uncertainty of current Second Amendment doctrine. That vagueness and uncertainty potentially opens up significant room for congressional participation in the project of vindicating Second Amendment rights—but only if we can conclude both that that vagueness reflects courts' institutional competence-derived hesitancy in stating clearer rules and that Congress possesses the expertise or authority to provide clearer guidance.

That uncertainty—and hence, the potential for more robust congressional power—arises most explicitly in the context of gun regulations that implicate something other than the core *Heller* right to law-abiding citizens' self-defense in the home via the use of weapons commonly employed for that purpose. As Part III noted, regulations going beyond that narrow description trigger judicial scrutiny that potentially involves a sequence of varied analytical approaches.<sup>279</sup> As it also noted, some of those approaches may be resistant to meaningful congressional input.<sup>280</sup> Others, however, implicate empirical data and policy analysis that might well benefit from the input Congress is well-suited to provide.<sup>281</sup> Indeed, to the extent that sequence of analysis ultimately ends with a seemingly ad hoc reweighing of the costs and benefits of regulation under the guise of intermediate scrutiny, congressional input could be particularly useful.

## 2. Lane

The remaining due process cases go beyond *Georgia's* minimalist endorsement of enforcement legislation that simply provides remedies for judge-found constitutional violations.<sup>282</sup>

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279. See *supra* Part III (reviewing the analytical approaches).

280. See *supra* Part III (explaining how some of these approaches may not be amenable to congressional input).

281. Cf. Michael McConnell, *Institutions and Interpretations: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 184–92 (1997) (arguing that Congress is institutionally well-suited to contribute to the interpretation of constitutional provisions to the extent that interpretation rests on empirical or policy judgments).

282. See *supra* note 153 and accompanying text (“But just as *Georgia* states an unremarkable proposition of Enforcement Clause doctrine, it adds little to

These cases pose the question whether one can apply the congruence and proportionality test in a way that allows a meaningful role for Congress to enact prophylactic rules of conduct while respecting *Boerne's* insistence on judicial superiority in stating constitutional meaning.<sup>283</sup>

The first logical candidate for this inquiry is *Lane*.<sup>284</sup> Most of *Lane* is devoted to presenting evidence of state deprivations of the particular right at issue—the right of disabled persons to access the judicial process<sup>285</sup>—and defending its decision to evaluate the ADA's public services provision as applied to that particular right.<sup>286</sup> But for our purposes its most helpful component is its comparison of the ADA (as applied to the courthouse access right) with the doctrinal test that the Court uses to decide claims of unconstitutional denial of that access.<sup>287</sup> In performing that comparison, the Court noted the similarity between the ADA's "reasonable accommodation" requirement and the underlying constitutional doctrine's requirement that, "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard' in its courts."<sup>288</sup> After considering applications of that constitutional standard,<sup>289</sup> it concluded that, just as with the ADA's reasonable accommodation requirement, "[e]ach of [those constitutional] cases makes clear that ordinary

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the far more nuanced issues discussed in other post-*Boerne* cases.").

283. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (stating that the RFRA "contradicts vital principles necessary to maintain separation of powers and the federal balance" and that the Court's precedent must control).

284. See *Lane*, 541 U.S. at 527 (applying the congruence and proportionality test).

285. See *id.* at 527 ("With respect to the particular services at issue in this case, Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities.").

286. See *id.* at 531 ("Congress[s] chosen remedy for the pattern of exclusion and discrimination described above . . . is congruent and proportional to its object of enforcing the right of access to the courts.").

287. See *id.* at 532 ("[The ADA's] duty to accommodate is perfectly consistent with the well-established due process principle that, 'within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard' in its courts." (citation omitted)).

288. *Id.* at 532 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

289. See *id.* at 532–33 (examining cases in which the constitutional standard has been applied).

considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts."<sup>290</sup> Thus, the Court concluded:

Judged against this backdrop, [the ADA's] affirmative obligation to accommodate persons with disabilities in the administration of justice cannot be said to be so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It is, rather, a reasonable prophylactic measure, reasonably targeted to a legitimate end.<sup>291</sup>

Applying this approach<sup>292</sup> to the Second Amendment is helpful only to the extent that Second Amendment doctrine can be stated in a sufficiently clear and determinate way that it provides the same kind of clear reference point for congruence and proportionality analysis that the doctrinal test for judicial access rights provided in *Lane*.<sup>293</sup> Unfortunately, Second Amendment doctrine is not that straightforward.<sup>294</sup> As Part III explained, Second Amendment cases often require a sequence of analytical steps featuring different methodologies.<sup>295</sup> To make

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290. *Id.* at 533.

291. *Id.* (footnote, citations, and internal quotations omitted).

292. For the sake of clarity, note that *Lane's* approach is similar to, but nevertheless distinct from, the tiered scrutiny approach associated with the post-*Boerne* Court's equal protection-based enforcement power doctrine, discussed in the prior section of this Article. See *supra* Part IV (discussing examples of the tiered scrutiny approach in *Kimel*, *Garrett*, and *Hibbs*). The tiered scrutiny approach focuses on the three tiers of judicial equal protection scrutiny—rationality, intermediate, and strict—and how those tiers can inform Enforcement Clause questions. By contrast, *Lane's* approach focuses on the particular doctrinal test governing the underlying constitutional right that the enforcement legislation seeks to vindicate. Such a doctrinal test could conceivably be expressed as one of the tiered scrutiny levels normally associated with equal protection, or it could be a completely *sui generis* test, as in *Lane* itself. See *Tennessee v. Lane*, 541 U.S. 509, 532 (2004) (describing the judicial test for evaluating infringements on the right to access the court system).

293. See *Lane*, 541 U.S. at 531 (establishing that Congress's objective of enforcing the right of access to courts is congruent and proportional to Congress's remedy for violations of that objective).

294. See *supra* notes 246–256 and accompanying text (discussing these methodologies for examining congruence and proportionality in the Second Amendment context).

295. See *supra* notes 246–256 and accompanying text (discussing that the range in the methodological approaches can make a court's examination more

matters worse, many Second Amendment cases end with an application of a hazy balancing of the gun possession right with the government's interest, often labeled "intermediate scrutiny."<sup>296</sup> To be sure, this characterization of Second Amendment doctrine is not necessarily a criticism; there may be good reasons for both courts' multi-step/methodologically-varied approach and the intermediate scrutiny that often constitutes its last step. But both components of this description make it conceptually difficult—if not all-but impossible—to simply do what *Lane* did: place the challenged enforcement statute alongside the judicial doctrine governing the underlying constitutional right, and determine whether the first is sufficiently similar to the second that one can pronounce the congruence and proportionality test either satisfied or unmet.<sup>297</sup>

The ambivalent state of Second Amendment doctrine thus suggests that courts will often lack clear doctrinal guideposts for performing congruence and proportionality review of gun rights legislation. This is not always the case: if nothing else, *Heller's* identification of a core Second Amendment right strongly suggests that enforcement legislation directly vindicating that core right should receive a favorable judicial reception. But even this statement requires qualification: for example, query whether a court would accord such a favorable reception to an enforcement statute that removed what courts might consider a trivial burden on that core right.<sup>298</sup> Leaving aside such details, the larger point remains: once we get past enforcement legislation vindicating core Second Amendment rights, congruence and proportionality analysis becomes murky in direct relation to the degree that underlying Second Amendment doctrine becomes incapable of either expression as a clear statement or a relatively straightforward application.

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difficult and complicated).

296. See *supra* notes 269–270 and accompanying text (describing as unclear the balancing of the right to the government's interest).

297. See *Lane*, 541 U.S. at 532–33 (comparing the ADA with the judicial doctrinal test).

298. Compare Volokh, *supra* note 3, at 1483–87 (suggesting that bans on "assault weapons" might be constitutional given the continued availability of similar types of weapons), with *Kolbe v. Hogan*, 813 F.3d 160, 181–82 (4th Cir. 2016) (applying strict scrutiny to a state prohibition on possessing a particular type of weapon).

### 3. Boerne and Florida Prepaid

The difficulties that attend congruence and proportionality analysis as performed in *Lane*—that is, analysis keyed to judicial doctrine governing the underlying right<sup>299</sup>—should lead us to consider other approaches to congruence and proportionality review. One alternative would have the Court focus on the factual support Congress amassed in favor of the enforcement statute. The Court took this path in *Boerne*<sup>300</sup> itself, as well as in *Florida Prepaid*,<sup>301</sup> the second Enforcement Clause case decided during the congruence and proportionality era.

In *Boerne*, the Court focused its inquiry in part on whether Congress had amassed an adequate factual record demonstrating widespread state violations of the underlying First Amendment right as the Court described it—that is, the right to be free of government action motivated by religious bigotry.<sup>302</sup> Examining the legislative record, the Court concluded that Congress had found little, if any, evidence of the constitutionally-prohibited conduct.<sup>303</sup> Similarly, in *Florida Prepaid*, the Court's primary objection to the federal patent rights protection law was the lack

299. See *supra* note 292 and accompanying text (discussing *Lane*'s approach).

300. See *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (discussing the RFRA's legislative record's lack of examples of modern laws passed because of religious bigotry and comparing to the Voting Rights Act legislative record).

301. See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 640 (1999) ("Unlike the . . . record of racial discrimination confronting Congress in the voting rights cases . . . Congress came up with little evidence of infringing conduct on the part of the States." (citation omitted)).

302. See *Boerne*, 521 U.S. at 535 (describing the underlying Free Exercise right in these terms).

303. See *id.* at 530–32 (finding no support of widespread violations of the Free Exercise Clause in the legislative record). To be sure, *Boerne* also worried that RFRA's broad liability rule was simply disproportionate to the underlying constitutional rule as expressed in *Smith*. See *id.* at 532–35 (noting the disproportionality with the rule); see also *Florida Prepaid*, 527 U.S. at 639

RFRA failed to meet [the congruence and proportionality] test because there was little support in the record for the concerns that supposedly animated the law. And . . . RFRA's provisions were so out of proportion to a supposed remedial or preventive object that RFRA could not be understood as responsive to, or designed to prevent, unconstitutional behavior.

(citation and internal quotations omitted).

of a factual record of widespread state conduct depriving patent holders' property rights without due process.<sup>304</sup>

This focus on facts has the benefit of redirecting the Court's attention away from examining how closely a challenged enforcement statute tracks the judicial doctrine governing the underlying right Congress seeks to vindicate. Thus, it promises to avoid, or at least reduce, the problem that arises when Congress seeks to enforce a right that is governed by either an indeterminate doctrinal test such as intermediate scrutiny<sup>305</sup> or an intricate doctrinal structure that makes such a comparison highly complex,<sup>306</sup> both of which characterize Second Amendment doctrine. It also promises to focus the Court's attention where, as an institutional matter, Congress can perhaps play a particularly helpful role: the finding of broad social facts that bear on the extent to which a judicially-recognized right is being violated.<sup>307</sup>

Unfortunately, this approach to enforcement power review, just like the approach in *Lane*, is viable only if the underlying constitutional rights doctrine is reasonably clear. The *Boerne* Court had in front of it a constitutional right—the First Amendment's Free Exercise right—that, as the Court explained

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304. See *Florida Prepaid*, 527 U.S. at 640 ("In enacting the Patent Remedy Act . . . Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."); *id.* at 642 ("Though patents may be considered 'property' for purposes of our analysis, the legislative record still provides little support for the proposition that Congress sought to remedy a Fourteenth Amendment violation in enacting the Patent Remedy Act."); *id.* at 645 ("The legislative record thus suggests that the Patent Remedy Act does not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic § 5 legislation.").

305. See *supra* notes 265–270 and accompanying text (reviewing examples of intermediate scrutiny analysis).

306. See *supra* Part III (discussing Second Amendment doctrine).

307. This optimism, however, must be tempered by the possibility that the resulting Second Amendment analysis may vary depending on local conditions—for example, the possibility that the government interest side of the analysis, most notably its interest in crime control, may vary depending on the urban or rural nature of the jurisdiction in question. See Blocher, *supra* note 6, at 104 (arguing that local preferences can be accommodated under Second Amendment doctrine); see also *infra* note 330 (noting that the fact-finding approach to Second Amendment enforcement legislation becomes more complex if one assumes that Second Amendment analysis legitimately accounts for local differences).



it, was sharply defined. Seven years before *Boerne*, in *Smith*, the Court had explicitly rejected a broader understanding of that right—one that found the Free Exercise Clause implicated any time a government action had the effect of burdening religious practice.<sup>308</sup> Instead, *Smith* conceived of the Free Exercise right as one that arose only when the challenged law targeted religion specifically.<sup>309</sup> That seemingly sharp definition<sup>310</sup> allowed the *Boerne* Court to examine RFRA's legislative record in order to determine whether Congress had identified examples of state violations of the right as thus defined.<sup>311</sup>

The *Florida Prepaid* Court also had the benefit of a relatively well-defined constitutional right, which allowed it to search the legislative record for examples.<sup>312</sup> To be sure, the violation

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308. See *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 883 (1990) (discussing the *Sherbert* test).

309. See *id.* at 872 (“[T]he Clause does not relieve an individual of the obligation to comply with a law . . . if the law is not specifically directed to religious practice . . .”).

310. In reality, the matter is significantly more nuanced than this. Scholars have argued that *Smith*'s rule, which the *Boerne* Court described in terms suggesting that it was a clearly-delineated, core constitutional law rule, was in fact partially the product of the *Smith* Court's anxiety about courts' ability to completely apply a broader Free Exercise right requiring courts to weigh the social importance of a particular regulation against the rights of believers whose religious conduct might be impacted by that regulation. See McConnell, *supra* note 281, at 189–92 (explaining that “the real logic of the *Smith* decision has to do with institutional roles”); Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 58–59 (1993) (noting the Supreme Court's view that the judicial branch is “not equipped to balance religious interests against governmental concerns”); ARAIZA, ENFORCING, *supra* note 22, at 239–40 (reading the *Smith* opinion as both containing a “restrictive reading” of the right at issue and noting the Supreme Court's view that the judiciary is ill-equipped to conduct the required analysis). Whether or not *Boerne* correctly described *Smith* as stating a core constitutional law rule is beyond the scope of this Article. Rather, this Article assumes that *Boerne* correctly described *Smith*, and assesses what that description means for the usefulness of *Boerne*'s fact-finding-based approach to enforcement power questions in other contexts, such as the Second Amendment.

311. See *City of Boerne v. Flores*, 521 U.S. 507, 530–32 (1997) (conducting an analysis of the “RFRA's legislative record” and noting no “modern instances of generally applicable laws passed because of religious bigotry”).

312. See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 642–46 (1999) (explaining that the legislative record identifies instances only of “state patent infringement that do not necessarily violate the Constitution”).

targeted by the enforcement legislation at issue in *Florida Prepaid*—deprivations of patentees’ property rights without due process—is not one identifiable with complete clarity.<sup>313</sup> As the Court has often stated, due process is a flexible concept.<sup>314</sup> Thus, whether a deprivation of a patent-holder’s right was or was not accompanied by adequate process is not an obvious determination.<sup>315</sup> Nevertheless, that determination would at least be focused on a discrete set of considerations.<sup>316</sup>

In contrast to the free exercise and property rights contexts,<sup>317</sup> in the Second Amendment context, the Court has both identified a core version of the right,<sup>318</sup> but also strongly hinted that more penumbral, and thus necessarily hazier, versions may exist as well.<sup>319</sup> The vaguer nature of those latter rights makes it harder for a court considering Second Amendment enforcement legislation to examine Congress’s factual record to determine whether it reveals violations of “the constitutional right.”<sup>320</sup> Quite literally, in Second Amendment

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313. See *id.* at 645 (noting that the large variety of products which the government purchases makes it difficult to discern “the patent status of any particular invention or device or product” (citing S. REP. NO. 102-280, at 10 (1992))).

314. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (explaining the well-established principle that “due process is flexible and calls for such procedural protections as the particular situation demands”).

315. See *Florida Prepaid*, 527 U.S. at 643 (explaining the complexity of determining when a “State’s infringement of a patent” creates “a deprivation of property without due process”).

316. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (setting forth a three-part test for determining when a deprivation of a liberty or property interest comports with due process).

317. See *supra* notes 310, 313 (noting the argument that the Free Exercise right as explicated in *Smith* was not clearly and sharply delineated and noting the similarly blurry boundaries of the right to be free of deprivations of property without due process).

318. See *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008) (discussing the “core lawful purpose of self-defense”).

319. See *id.* at 635 (explaining why the case fails to convey a clear understanding of the Second Amendment right in its entirety).

320. See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (providing an example of a readily identifiable definition of the right at issue allowing a court to search the legislative record).

cases going beyond the *Heller*-identified core, it is not clear what exactly that “right” is.<sup>321</sup>

There is a real irony to this conclusion. Justice Scalia’s opinion in *Heller* criticized the dissenters in that case for seeking to muddy, through what he derided as “interest balancing,” what he viewed as a clear, unambiguous right.<sup>322</sup> And indeed, if his analysis is sound (a question on which this Article takes no position), then the particular right at issue in *Heller* itself—the right of law-abiding Americans to possess, for self-defense purposes in the home, the type of weapon Americans prefer for that purpose—is a reasonably unambiguous one.<sup>323</sup> But, as lower courts have discovered when trying to apply *Heller* to challenges to other types of gun restrictions, that clarity vanishes once a plaintiff claims a Second Amendment right that extends beyond the one vindicated in *Heller* itself.<sup>324</sup> In turn, the doctrinal tests courts have employed to evaluate such claims make the gun possession right look less like the clearly-focused right described in *Heller*—and also less like the Free Exercise right (as *Boerne*

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321. See *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J., concurring) (describing the application of the Second Amendment right as a “*terra incognita* that courts should only enter upon necessity and only then by small degree”).

322. See *Heller*, 554 U.S. at 634 (“We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.”).

323. To be sure, ambiguity can creep in at any part of this formula. Is someone who was adjudicated as a juvenile delinquent, or a jay-walker, “law-abiding?” See *Masciandaro*, 638 F.3d at 458 (considering a related question). Is a car the equivalent of a home for a traveling salesman? See *id.* at 467 (concluding that a car is not a home for the purposes of applying the Second Amendment). And, of course, what guns have Americans traditionally favored for self-defense? See *Heller*, 554 U.S. at 629 (noting that “handguns are the most popular weapon chosen by Americans for self-defense in the home”). Nevertheless, leaving aside these definitional questions, the core Second Amendment right as stated by *Heller* is reasonably clear, certainly as compared to other rights, such as the abortion right or the right to be free of a government taking of one’s property. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (announcing and explaining the “undue” burden standard governing abortion rights claims); *Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104, 123–25 (1978) (setting forth a multi-factor balancing test for determining when a land-use regulation constitutes a taking of property).

324. See *Masciandaro*, 638 F.3d at 475 (describing the uncertain nature of applying the Second Amendment right).

described it)<sup>325</sup> and the due process property right at issue in *Florida Prepaid*.<sup>326</sup> Therefore, the muddiness of the underlying Second Amendment right renders a pure record-based review of the type performed in *Boerne* and *Florida Prepaid* less attractive as a methodology for performing congruence and proportionality review.<sup>327</sup>

This lack of clarity is not simply a matter of the Court's refusal to clarify and expound on the Second Amendment right.<sup>328</sup> Even if the Court were to decide additional Second Amendment cases, it would need to craft a jurisprudence that recognized and accounted for the non-core, penumbral, nature of gun possession rights beyond the one asserted in *Heller* itself. That jurisprudence—whether it mirrored lower courts' adoption of a multi-stage, methodologically varied inquiry, or simply applied a vague “intermediate scrutiny” standard—would likely not provide results that could be easily and predictably transferred to other gun possession issues.<sup>329</sup> Thus, it seems as though *Heller's*

325. See *supra* note 310 and accompanying text (noting the *Boerne* Court's treatment of the Free Exercise right).

326. See *supra* notes 312–316 and accompanying text (discussing how the right to have one's patent property taken without due process is at least potentially explainable in clear terms).

327. See *Boerne*, 521 U.S. at 530 (providing an example of a case in which the Supreme Court examined the “RFRA's legislative record” to assist in resolving the issues presented).

328. See *supra* note 191 (citing the cases raising Second Amendment issues on which the Court has denied certiorari, despite dissenting justices' arguments that the Second Amendment right needs more clarification).

329. For example, Eugene Volokh has observed that *Heller's* “scope” analysis—that is, its analysis of whether a particular gun possession right came within the Second Amendment's protection at all—is best understood as a historical inquiry. See Volokh, *supra* note 3, at 1498 (emphasizing a lack of “research on the historical scope limitations on the right to bear arms”). As Professor Volokh points out, that sort of historical methodology means, among other things, that answers to particular “scope” questions cannot provide answers by analogy to other scope questions. See *id.* at 1447 (explaining the utility of analogies regarding the scope of constitutional rights). For example, an historical answer to the question of whether minors are completely disenfranchised from Second Amendment rights says nothing about the question of whether persons who are barely over the age of majority can be similarly disenfranchised. See *id.* (providing an illustrative example of an analogy regarding minors possessing guns). While the analogy is not precise, application of intermediate scrutiny to one type of gun restriction—say, restrictions on possessing guns on a certain type of property—would nevertheless similarly fail to provide definitive answers to other challenges to

recognition of non-core Second Amendment rights condemns the Court—and us—to a jurisprudence that will not provide easy answers to gun rights questions.<sup>330</sup> In turn, that lack of easy answers will make it more difficult for Congress to amass a record of clear constitutional violations justifying enforcement legislation.<sup>331</sup>

### *V. Arming the Second Amendment: A More Granular Approach*

The extant body of congruence and proportionality cases fails to provide adequate models for reviewing Second Amendment enforcement legislation.<sup>332</sup> This reality requires that we consider a final alternative path. This final path abandons reliance on a bird's-eye view of Second Amendment doctrine, and instead calls for more granular consideration of what Congress can add to the individual analytical steps that doctrine calls for.<sup>333</sup> This approach holds the promise of rescuing congruence and

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gun restrictions because the inputs into the intermediate scrutiny inquiry would be different.

330. The fact-finding approach to Second Amendment enforcement legislation is further complicated if one assumes that Second Amendment analysis legitimately accounts for local differences that might affect aspects of any interest balancing or tiered scrutiny courts accord to a gun regulation. See Blocher, *supra* note 6, at 104–05 (discussing the ability of the Second Amendment to facilitate varying local preferences). For example, if a court legitimately gives more weight to a jurisdiction's crime control justification for gun control than to another's because of the first jurisdiction's higher crime rate, then query whether a generally-applicable gun rights enforcement law could be coherently analyzed under the congruence and proportionality standard. *Id.* In such a situation, perhaps a reviewing court would be forced to perform congruence and proportionality review as applied to a particular plaintiff's situation, including the jurisdiction in which he wished to exercise the rights granted by the enforcement legislation. Cf. *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (reviewing the congruence and proportionality of the public services provision of the ADA as applied to claims of courthouse access).

331. See *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (providing an example of a readily identifiable definition of the right at issue allowing a court to search the "RFRA's legislative record" for violations of the Constitution).

332. See Araiza, *Crisis*, *supra* note 182, at 1–2 (describing "enforcement power scrutiny" as "analytically incoherent").

333. See Araiza, *Deference*, *supra* note 216, at 892 (discussing the more narrowly focused, or "granular," questions regarding Congress's "fact-finding capabilities and authority").

proportionality review from the dead end into which it has wandered—a dead end illustrated both by the Court’s ad hoc rejection of the enforcement legislation in *Coleman* and *Shelby County*,<sup>334</sup> as well as by the Second Amendment example this Article has considered.<sup>335</sup> More generally, it allows Congress a meaningful role in the project of vindicating Second Amendment rights while also respecting the Court’s insistence on its own supremacy in stating constitutional meaning—an insistence firmly imposed by a broad consensus of the Court in *Boerne*.<sup>336</sup>

This proposed approach follows lower courts’ construction of Second Amendment doctrine based on the limited guidance *Heller* provides.<sup>337</sup> It considers what the character of each step in that doctrine means for Congress’s ability to contribute to courts’ analysis, based on Congress’s comparative institutional advantages over courts.<sup>338</sup> Thus, it allows for a congressional role in vindicating Second Amendment rights to the extent Congress is institutionally relatively well-suited to contribute to particular components of courts’ doctrinal analysis.<sup>339</sup>

This approach requires a theory about what roles Congress is in fact comparatively well-suited to play in the project of vindicating constitutional rights.<sup>340</sup> In other writing I have developed principles governing the types of congressional

334. See Araiza, *Crisis*, *supra* note 182, at 1 (stating that “the Court has created both analytical confusion and practical dead-ends by focusing on its enforcement power analysis on judicially created doctrine”).

335. See *supra* note 321 and accompanying text (explaining the problem that would arise if the Court applied current approaches to congruence and proportionality review to Second Amendment enforcement legislation).

336. See *Boerne*, 521 U.S. at 508 (noting the power to interpret is the role of the judiciary).

337. See *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (providing a definition of the Second Amendment right as “the right to keep and bear arms”).

338. See Araiza, *Crisis*, *supra* note 182, at 1 (discussing Congress’s ability to find facts).

339. I have elaborated on this process in more detail elsewhere. See Araiza, *Deference*, *supra* note 216, at 882 (explaining that “Congress is institutionally capable of more careful fact-finding than courts, and its political legitimacy *does* militate in favor of deference” (emphasis added)); ARAIZA, ENFORCING, *supra* note 22, at 235–38 (elaborating on that argument).

340. See ARAIZA, ENFORCING, *supra* note 22, at 235–38 (elaborating on the rights defined by Congress and how that interacts with the rights defined by the judiciary).

determinations that merit particularly great or little judicial deference.<sup>341</sup> Boiled down, those principles call for very little deference to congressional findings that shade into legal conclusions, moderate deference to empirical findings, and very great deference to findings that reflect value judgments.<sup>342</sup> In reverse order, these varying levels of deference account for Congress's authority to speak for the moral values of the American people, its fact-finding capabilities (leavened with proper skepticism about Congress's incentives to use those capabilities effectively), and, finally, *Boerne's* insistence that courts enjoy ultimate authority to declare constitutional meaning.<sup>343</sup>

To illustrate this approach, return to the hypothetical enforcement legislation discussed earlier: a federal law giving Americans the right to carry loaded guns in their automobiles.<sup>344</sup> As noted earlier,<sup>345</sup> a court considering a direct Second Amendment challenge to a state law restricting such carriage could perform as many as five distinct analytical steps.<sup>346</sup> First, it would determine, using a historical analysis, whether such a

341. See *id.* at 169–93 (enumerating six principles describing the amount of deference courts should apply to Congress's findings of fact in various contexts).

342. By “value judgments” I mean conclusions that reflect moral intuitions or conclusions, as distinct from objectively verifiable empirics. See Araiza, *Deference*, *supra* note 216, at 897–98 (describing such judgments). Such findings—for example, that a certain type of discrimination is fundamentally unfair—reflect neither empirical findings nor legal analysis. *Id.* While such findings may be quite relevant to legal issues where such value judgments influence the ultimate doctrinal answer (for example, in equal protection issues), they are less relevant in issues such as the scope of some substantive rights, such as the Second Amendment gun possession right. See Volokh, *supra* note 3, at 1447 (explaining the utility of analogies regarding the scope of constitutional rights). For simplicity, and because value judgments may play a lesser role in legislation enforcing the Second Amendment, this Article does not discuss this category.

343. See *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997) (noting the power of the judicial branch to interpret).

344. See *supra* notes 234–235 and accompanying text (discussing the hypothetical and its implications).

345. See *supra* notes 203–214 and accompanying text (discussing the five possible steps conducted in an analysis of the application of the Second Amendment).

346. See *supra* notes 203–214 and accompanying text (reciting the five steps in detail).

right fell within the scope of the Second Amendment at all.<sup>347</sup> Assuming a positive answer to that question, the next step would be to determine whether that restriction imposed a substantial burden on the right.<sup>348</sup> Assuming that the regulation did constitute such a burden, the third step would require a court to determine the proximity of that right from the core right identified in *Heller*.<sup>349</sup> Based on that proximity, the fourth step would require the court to select a particular standard of review, while the fifth and final step would entail application of that review.<sup>350</sup>

Consider the different characters of these inquiries, and Congress's relative institutional capacity to contribute to their resolution.<sup>351</sup> The first question—whether the right in question falls within the scope of the Second Amendment—is one that lower courts have generally tried to answer based on a historical/originalist analysis.<sup>352</sup> There is no particular reason to believe that Congress is any better than courts at performing that analysis. Perhaps more importantly, to the extent such analysis purports to uncover the actual meaning of the constitutional

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347. See *supra* notes 203–214 and accompanying text (discussing the cases where a historical analysis was applied to determine whether the right at issue is covered by the Second Amendment).

348. See *supra* notes 203–214 and accompanying text (noting the cases where the question involved whether the government action imposed a substantial burden on the right at issue).

349. See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (discussing the core aspect of the right).

350. See *supra* notes 203–214 and accompanying text (discussing the cases applying the concluding steps in the analysis).

351. As will become clear, any fact-findings or other non-legal conclusions that might be relevant to these doctrinal inquiries are empirical in nature. See ARAIZA, ENFORCING, *supra* note 22, at 234–35 (noting the relative inapplicability of value judgments to Second Amendment enforcement legislation). For this reason, this Article does not further discuss the value-judgement findings identified earlier in the text. See *supra* note 342 and accompanying text (explaining the definition of value judgement). But see *infra* note 419 (recognizing that other substantive rights may be susceptible to congressional enforcement via legislation reflecting such value judgments).

352. See *supra* note 203 and accompanying text (observing that a “historical analysis” is utilized by several courts); see also *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013) (concluding that a federal law prohibiting “domestic violence misdemeanants” from possessing weapons implicated rights protected by the Second Amendment, given the lack of a historical foundation for disarming such persons).



provision in question—here, the actual scope of the Second Amendment as understood by the framing generation—allowing Congress a role in answering such questions cedes to Congress some degree of authority in determining core constitutional meaning, in contravention of *Boerne*.<sup>353</sup> Indeed, Justice Scalia's insistence that originalist methodology reflects a vision of law as "the business of the courts"<sup>354</sup> necessarily implies that Congress has little authority to contribute to determinations reached via that methodology—at least no more than other individuals or institutions who might be able to offer persuasive argumentation on the point.<sup>355</sup>

More generally, and beyond the implications of adopting an originalist methodology, one might worry about allowing Congress a role in determining the scope of a given constitutional right.<sup>356</sup> Our instincts might label such questions inherently legal—and, at least under one understanding of the separation of powers, therefore inherently judicial.<sup>357</sup> *Boerne* embraced this

353. In this context, "core" does not refer to the Second Amendment's *Heller*-identified home self-defense "core," but, instead, refers more generally to actual constitutional meaning, rather than any construction derived from decisional heuristics such as tiered scrutiny review. In this sense, the notion of "core" constitutional meaning is closely related to Dean Sager's identification of rights through a process of "analytical" reasoning, as opposed to reasoning derived from courts' concerns about their institutional competence to state and enforce the full extent of a particular right. See *supra* notes 223–227 and accompanying text (noting the distinction between analytical reasoning and institutional competence reasoning in practice).

354. See Scalia, *supra* note 11, at 854 (referencing the "business of the courts").

355. Cf. Araiza, *Deference*, *supra* note 216, at 887–93 (discussing the proper weight courts should accord congressional findings based on their persuasiveness as opposed to Congress's authority to make such findings).

356. To be sure, scholars disagree about whether such a congressional role violates the separation of powers or, alternatively, whether Congress enjoys at least some degree of authority to interpret the Constitution, subject perhaps to only deferential review by courts. Compare David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 59–71 (arguing in favor of such congressional authority), with *id.* at 63 n.93 (citing scholars who take the opposing position).

357. Cf. Volokh, *supra* note 3, at 1449 (describing the "scope" inquiry as one seeking to determine whether "the restriction is outside the terms of the right as set forth by the constitution" and suggesting that its answer is found by recourse to "the constitutional text, the original meaning, or our understanding of background constitutional norms").

latter, judicial-supremacist, understanding.<sup>358</sup> Given that this Article seeks to find a viable approach to applying *Boerne's* standard, it takes that understanding as a background assumption. Consider, then, this instinct. As a rough analogy, one would probably not intuitively accept that Congress could enact legislation enforcing the First Amendment's Speech Clause by determining, *contra* current doctrine, that as a historical matter obscene speech fell within the "scope" of the First Amendment's free speech guarantee.<sup>359</sup> One would think, then, that Congress should have little influence over this first stage of doctrinal analysis.

The second inquiry courts often perform in Second Amendment cases considers whether a particular gun regulation imposes a substantial burden on the asserted right.<sup>360</sup> While one might consider this primarily an empirical inquiry, on the theory that the substantiality of a burden can only be judged based on the facts,<sup>361</sup> a moment's reflection suggests that the matter is not that straightforward. The substantiality of a burden can also be understood as a legal standard.<sup>362</sup> Lower courts applying this requirement in Second Amendment cases have implicitly recognized the law-intensive nature of this inquiry by analogizing to other constitutional rights doctrines when deciding what

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358. See *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) (explaining that the Supreme Court "has had primary authority to interpret" the Constitution).

359. See *Cole*, *supra* note 356, at 54–55 (making a similar suggestion); *Ezell I*, 651 F.3d 684, 702 (7th Cir. 2011) (drawing a similar comparison when considering how to apply the "scope" step of Second Amendment analysis).

360. See, e.g., *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012) ("Rather, heightened scrutiny is triggered only by those restrictions that . . . operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self defense . . ."); *Nordyke v. King*, 644 F.3d 776, 786 (9th Cir. 2011) (inquiring into the substantiality of the burden imposed by a challenged gun regulation).

361. Cf. *Volokh*, *supra* note 3, at 1458 (arguing that a particular sub-part of the substantiality inquiry requires "an inquiry into the functional magnitude of the restriction" on the constitutional right); *id.* at 1460 ("Estimating the burden [a particular gun restriction places] on self-defense will require considering how a particular hypothetical defense scenario is likely to play out under different regulatory schemes . . .").

362. See, e.g., *Decastro*, 682 F.3d at 167–68 (analogizing the "substantial burden" inquiry in Second Amendment cases to those in abortion, takings, and right to marry cases); see also *Volokh*, *supra* note 3, at 1454–55 (noting analogous inquiries in other constitutional rights areas).

constitutes a “substantial burden.”<sup>363</sup> Indeed, when one remembers that the linchpin of the right to abortion is whether the challenged abortion restriction imposes a “substantial obstacle,”<sup>364</sup> one realizes the potentially outcome determinative nature of a congressional conclusion about substantiality.<sup>365</sup> Given its potential significance, a conclusive determination by Congress that a given gun regulation constitutes a substantial impairment could conceivably amount to a statement of constitutional meaning, with serious implications for *Boerne*’s insistence that courts maintain the ultimate authority over such statements.<sup>366</sup>

To be sure, this is not to suggest that federal enforcement legislation has nothing to say about the substantiality question, or that a court would be justified in ignoring congressional findings that speak to the substantiality of the burden imposed by a particular gun regulation.<sup>367</sup> It’s obviously true that even the

363. See *Decastro*, 682 F.3d at 167–68 (referring to the “substantial burden” in the constitutional areas of abortions, takings, and the right to marry); see also Volokh, *supra* note 3, at 1454–55 (discussing the “substantial burden” inquiry in different constitutional doctrine cases).

364. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837 (1992) (“An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.”).

365. See *id.* (explaining that a “substantial obstacle” prohibition “protect[s] the central right recognized by *Roe* while at the same time accommodating the State’s profound interest in potential life”).

366. See *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997) (explaining that the exercise of “the interpretive power” is the judicial branch’s responsibility).

367. Indeed, it may be that the conclusions about the substantiality of the burden are different in the abortion and gun rights contexts. In particular, a conclusion that a law places a “substantial obstacle” in the path of a woman seeking an abortion is an ultimate legal conclusion about the constitutionality of such a law, while a conclusion that a gun restriction “substantially burdens” a Second Amendment-protected right merely allows the plaintiff’s challenge to advance to the next stage of analysis. Compare *Casey*, 505 U.S. at 877 (“A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”), with, e.g., *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (concluding that a finding that a restriction constitutes a substantial burden on the core Second Amendment right triggers a heavier burden of persuasion on the government at the subsequent stages of analysis). Thus, one might argue that a gun rights enforcement statute denominating a particular type of a regulation as a “substantial burden” on Second Amendment rights does not threaten the Court’s

most inherently legal issues embed significant factual or empirical components. To the extent that findings from Congress help create the empirical context for the court's ultimate judgment on the substantiality question, those findings merit some degree of judicial respect. By the same token, however, to the extent such findings conclusively answer the substantial burden question, judicial control over constitutional meaning requires that such deference cannot be absolute.

The third inquiry requires courts to determine how far the right at issue lies from the *Heller*-identified core of the Second Amendment.<sup>368</sup> Making this proximity determination constitutes a delicate business. How is one to determine "how far" a

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authoritative role in stating constitutional meaning to the same degree as a federal law denominating a particular type of abortion restriction as a "substantial obstacle." *Casey*, 505 U.S. at 877. *See also* Araiza, *Deference*, *supra* note 216, at 910–13 (counseling very little judicial deference to congressional fact-findings that essentially state legal conclusions). Nevertheless, a congressional finding on the question of whether a particular gun restriction constitutes a "substantial burden" on Second Amendment rights does have significant legal impact: an affirmative finding on that question allows the Second Amendment analysis to continue, while a negative finding on that question stops the analysis. *See, e.g.*, ARAIZA, ENFORCING, *supra* note 22, at 912 (explaining the implications of congressional fact-findings in a related context).

368. *See, e.g.*, *Ezell I*, 651 F.3d 684, 708 (7th Cir. 2011) (stating that "laws restricting activity lying closer to the margins of the Second Amendment right . . . may be more easily justified" than those that impose "a severe burden on the core Second Amendment right"); *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (following *Ezell I*'s approach). While at first glance this inquiry might seem quite similar to the question of the substantiality of the burden, courts have distinguished the two. *Id.* For example, in *Chovan*, the Ninth Circuit recognized that a federal law prohibiting domestic violence misdemeanants from possessing guns did not implicate the core Second Amendment right of law-abiding citizens to possess guns for home self-defense. *See Chovan*, 735 F.3d at 1138 (stating that the Second Amendment right in *Heller* does not apply to non-law-abiding citizens). Nevertheless, it acknowledged that the law's permanent prohibition on gun possession constituted a substantial burden on the relevant Second Amendment right—recognizing that that right lay at some distance from the core right the Amendment recognizes. *See id.* at 1138 (stating that the regulation in question "does not implicate the core Second Amendment right, but it does place a substantial burden on the right"). Together, these second and third inquiries establish the seriousness of the infringement on the right: the second considers the weight (or "substantiality") of the infringement, while the third considers the constitutional centrality of the right suffering the infringement. *See generally supra* notes 203–214 and accompanying text (discussing the five possible steps conducted in an analysis of Second Amendment application).

particular gun right lies from the *Heller*-identified core?<sup>369</sup> This is a highly conceptual question, given the inability to express concretely the distance between a penumbral and a core right. Certainly, it is not a question that can be described as unambiguously empirical. Indeed, the entire idea of denominating rights as “core” and “peripheral” (and thus the process of measuring the distance between such rights) seems to be a legal enterprise, analogous in character to the identification of something as a right to begin with.<sup>370</sup> To the extent congruence and proportionality review requires that the ultimate power to state constitutional meaning remains lodged with courts, the ultimate proximity determination, just like the ultimate determination about the existence of a right, must remain with courts.<sup>371</sup>

Nevertheless, *Heller* introduces notes of ambiguity into this analysis.<sup>372</sup> That ambiguity again highlights our earlier insight that even legal questions trigger factual inquiries that are susceptible to meaningful congressional input.<sup>373</sup> Recall Justice Scalia’s statement, when explaining his description of the core Second Amendment right, that self-defense needs are “most acute” in the home.<sup>374</sup> To the extent he was providing an explanation for why the Second Amendment right was originally thought to be most pressing in the home, that statement simply provides an explanatory backdrop for his discovery, through legal (originalist) analysis, of a particular right.<sup>375</sup> By contrast, if the

369. See *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008) (holding that the “core lawful purpose” of firearm possession is “self-defense”).

370. Compare, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (“[R]eferences to excretory and sexual material surely lie at the periphery of First Amendment concern.” (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978))), with *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (“[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values . . . .” (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983))).

371. See *Boerne*, 521 U.S. at 508 (noting the interpretive role of the courts).

372. See *infra* notes 373–376 and accompanying text (explaining the ambiguity).

373. See *supra* note 216 and accompanying text (discussing Congress’s “fact-finding capabilities and authority”).

374. See *Heller*, 554 U.S. at 628 (describing the home as “the place where the importance of the lawful defense of self, family, and property is most acute”).

375. *Id.*

right itself is a more general right of self-defense, with Justice Scalia explaining that that right is “most acute” in the home because empirically that’s where the right is most important, then, as with our automobile carriage example, Congress might have a role in delineating its scope—for example, by finding that automobile travel exposes Americans to an unusually high risk of crime.<sup>376</sup>

The difference between these characterizations tracks the difference, explained above,<sup>377</sup> between legal conclusions and findings of fact (including broad social facts), and the different levels of deference appropriate for these distinct types of congressional conclusions.<sup>378</sup> As suggested by our analysis of Second Amendment doctrinal steps so far, Congress should enjoy a more robust role in vindicating rights—including Second Amendment rights—when it finds such facts, rather than when it offers legal conclusions that more directly influence the contour of the underlying right.<sup>379</sup>

The distinction between the leeway Congress enjoys when it finds empirical facts bearing on the importance of the right at issue, and when instead Congress simply decrees that a certain right exists or is of a particular importance, becomes even sharper when one moves to the fourth and fifth inquiries: respectively, the identification and then application of the appropriate scrutiny standard.<sup>380</sup> Both of these determinations

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376. See Araiza, *Deference*, *supra* note 216, at 905–26 (explaining the distinction between congressional findings of empirical fact and findings that constitute legal conclusions).

377. See *supra* note 342 and accompanying text (explaining and defining value judgements).

378. Cf. Post, *supra* note 13, at 80 (noting that the Court’s characterization of libraries in [*United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 235–36 (2003)] was integral to the justices’ conflicting conclusions about the First Amendment claim in that case, but that such characterizations require an understanding of society’s view of libraries and their appropriate role in society).

379. This tentative lesson requires the caveat that a doctrinal focus on local facts may necessarily limit the relevance of more generally-applicable facts supporting enforcement legislation. See Blocher, *supra* note 6, at 135–36 (discussing the ability of the Second Amendment to facilitate varying local preferences).

380. See *supra* notes 203–214 and accompanying text (discussing the possible steps involved in an analysis of Second Amendment applications).

involve evaluating facts against a legal standard.<sup>381</sup> The identification of the appropriate standard of review requires a judge to determine what the results of the second and third steps noted above (respectively, the substantiality of the burden and the proximity of the impacted gun right to *Heller*'s core)<sup>382</sup> mean for how stringently the gun restriction should be reviewed.<sup>383</sup> Similarly, application of that standard requires the judge to evaluate the importance of the asserted government interest, and how well-tailored the challenged law is to vindicating that interest.<sup>384</sup>

At first blush, the nature of these final two determinations suggests Congress's comparatively smaller role in influencing them via enforcement legislation.<sup>385</sup> If the Court insists (as it has since *Boerne*) that it enjoys ultimate supremacy over the meaning of the Constitution, then it must have the final say over evaluative judgments of the sort made in these final two analytical steps.<sup>386</sup> Those judgments—for example, that strict scrutiny is called for in a particular gun rights case, or that a given gun restriction is sufficiently narrowly tailored to withstand such scrutiny—are fundamentally legal in character, even if they require an understanding of the background empirics of a given issue.<sup>387</sup>

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381. See *supra* notes 203–214 and accompanying text (discussing the possible steps involved in an analysis of Second Amendment applications).

382. See *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (noting the lower court's Second Amendment analysis involving two steps).

383. See *supra* notes 203–214 and accompanying text (describing the five potential steps conducted in a Second Amendment analysis).

384. See *Kolbe v. Hogan*, 813 F.3d 160, 181–82 (4th Cir. 2016) (finding that strict scrutiny is the applicable standard of review for the Second Amendment claim at issue).

385. See *supra* notes 203–214 and accompanying text (providing explanations of the five possible analytical steps for applications of the Second Amendment and the role of courts in each step).

386. See *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997) (noting that the power to interpret is the role of the judiciary).

387. See, e.g., *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 129 (1989) (refusing to defer to an asserted congressional finding that a particular content-based speech restriction was the only effective way of protecting minors, on the ground that “while we do not ignore [that finding], it is our task in the end to decide whether Congress has violated the Constitution”).

At the very least, as a practical matter such judgments often come close to dictating the result in a given case. For example, a determination that a given gun restriction triggers strict scrutiny makes it quite likely that the restriction will be struck down, a reality reflected by the expression “strict in theory, fatal in fact.”<sup>388</sup> Conversely, a determination that a given restriction is narrowly tailored to a compelling government interest all-but decides an individual rights case in favor of the government.<sup>389</sup> If Congress enjoyed a large role in making those determinations, it would essentially be dictating the results of constitutional cases.<sup>390</sup> Indeed, on one reading such congressional declarations would dictate not just results, but the outcome of a reasoning process that is understood to be the particular province of courts.<sup>391</sup> Whatever the merits of an argument that Congress *should* enjoy that power, or should at least enjoy significant deference when it makes such determinations,<sup>392</sup> this result is impossible—or at least quite difficult—to square with *Boerne*.<sup>393</sup>

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388. Gerald Gunther, *The Supreme Court 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

389. See *Sable*, 492 U.S. at 129 (providing an example of a case where the Court suggested that deferring to a congressional judgment about the outcome of strict scrutiny review would effectively allow Congress to determine whether its own law violated the Constitution).

390. See *Boerne*, 521 U.S. at 508 (explaining that the interpretive function, specifically of the Constitution, is the role of the judicial branch).

391. See, e.g., Post, *supra* note 13, at 58 (“Whether a classification serves a ‘compelling’ governmental interest or is ‘narrowly tailored’ are questions that must be answered primarily by reference to the legal precedents of the Court.”).

392. See, e.g., Cole, *supra* note 356 (arguing for such deference).

393. To be sure, if one reads *Boerne* narrowly, as responding to a statute (RFRA) that was unusually threatening to the judicial power, then one could conceivably find room for a larger, legitimate congressional role in making the judgments discussed in the text. For example, one could read RFRA’s explicit approval of the pre-*Smith* doctrinal rule governing free religious exercise as an explicit challenge to the Court’s power to determine the meaning of constitutional rights. See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, §§ 2–3, 5–6, 107 Stat. 1488 (codified as amended in 42 U.S.C. § 2000bb (2012)) (highlighting Congress’s RFRA finding that the doctrinal test set forth in pre-*Smith* case law constituted “a workable test for striking sensible balances between religious liberty and competing prior governmental interests”), *invalidated by Boerne*, 521 U.S. at 507. On this theory, an enforcement statute that “merely” concluded that a given test (say, strict scrutiny) was satisfied might be understood as posing less serious of a challenge



But ambiguity creeps into these final steps as well. It is impossible to ignore the reality that these final two doctrinal determinations above involve distinct sub-inquiries. Some of those inquiries, to the extent they're more heavily empirical rather than reflective of pure legal analysis, may merit relatively greater judicial receptiveness to congressional input.<sup>394</sup> To return again to our hypothetical enforcement statute, a congressional determination that gun possession in automobiles is the only practical way for Americans to defend themselves against a serious threat to their safety would be difficult for a court to reject, given the respect due Congress's empirical judgments.<sup>395</sup> Of course, courts—and in particular the Supreme Court—have shown themselves willing to privilege their own view of the world, even as against competing visions from Congress and state legislatures.<sup>396</sup> But to say that such self-confidence (if not arrogance) exists in the judiciary is not to say that it is wise or desirable. A more humble judicial response to Congress's fact-finding capability might acknowledge respect for both Congress's capacity for empirical investigation and, when relevant to enforcement power analysis, its authority to speak for the values of the American people.<sup>397</sup> The deference that would

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to the Court's law-declaring power. An even less serious challenge might be detected in a statute that merely decided that a particular doctrinal test (say, strict scrutiny) was warranted given the facts relevant to a particular gun possession context. Nevertheless, even these latter two types of enforcement statutes would effectively dictate the outcome of constitutional cases, and as such, would likely encounter a serious argument that they conflicted with at least the spirit of *Boerne*.

394. See Araiza, *Deference*, *supra* note 216, at 906–26 (setting forth principles for deference determinations that depend in part on the type of fact for which deference is claimed).

395. *Id.*

396. See generally Jennifer Mason McAward, *Supreme Court—October Term 2012—Foreword: The Confident Court*, 47 LOYOLA L.A. L. REV. 379 (2014). The reference in the text to *state* legislatures should again serve as a reminder that local regulatory responses to local conditions may justify their own deference, which might in turn limit the respect appropriately accorded *congressional* findings about national conditions more generally. See Blocher, *supra* note 6, at 134 (discussing local preferences in relation to Second Amendment applications); *supra* note 330 (discussing same). The prospect of such jurisdiction-specific deference only increases the complexity of the deference calculus in the Second Amendment enforcement context.

397. See Araiza, *Deference*, *supra* note 216, at 882 (arguing that

flow from such an acknowledgement could give Congress a meaningful role even in these last two steps of Second Amendment analysis.<sup>398</sup>

In sum, this more granular approach to the enforcement power in Second Amendment cases calls for recognizing the distinct analytical steps that make up Second Amendment analysis, the extent to which each of those steps includes inquiries that are particularly susceptible to meaningful congressional input, and the nature of that input.<sup>399</sup> Thus, it combines the approach taken by some post-*Boerne* cases, which keyed judicial review of enforcement legislation to the judicial doctrine governing the underlying right, with the approach taken in *Florida Prepaid* and *Boerne* itself, which considered the extent to which Congress had found facts relevant to the underlying right.<sup>400</sup>

Both of these approaches contain kernels of truth. The first approach, most clearly exemplified by *Lane* and the *Kimel/Garrett/Hibbs* trilogy, reflects the post-*Boerne* reality that enforcement legislation must hew relatively closely to the Court's own statement of underlying constitutional law.<sup>401</sup> The second approach recognizes that Congress may find facts that are particularly relevant to a conclusion that states are in fact violating the underlying constitutional rule.<sup>402</sup> But both of these approaches also suffer from flaws. The approach tying enforcement legislation to constitutional doctrine ignores the important role Congress can play in vindicating the

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congressional findings that reflect value judgments should enjoy significant judicial deference); ARAIZA, ENFORCING, *supra* note 22, at 234–35 (noting that value judgments may play a lesser role in legislation enforcing some substantive rights).

398. See Araiza, *Deference*, *supra* note 216, at 882 (discussing the benefits of judicial deference that preserves “meaningful” congressional participation).

399. See Araiza, *Deference*, *supra* note 216, at 892 (explaining the appropriate analysis of Congress's “fact-finding capabilities”).

400. See *City of Boerne v. Flores*, 521 U.S. 507, 527 (1997) (providing an example of a case where the court was able to utilize facts found by Congress to determine if constitutional rights were invaded).

401. See *supra* notes 141–153 and accompanying text (discussing *Lane* and the *Kimel/Garrett/Hibbs* trilogy).

402. See *Boerne*, 521 U.S. at 531 (noting a “lack of support in the legislative record” to show findings that the constitutional right in question had been violated).

court-announced rule—a role that can become especially prominent when the relevant analysis turns on conclusions or findings Congress is best-suited to reach.<sup>403</sup> Relatedly, it also ignores the reality that many constitutional rights doctrines are best described as a set of judicial heuristics or decision rules that reflect institutional competence concerns, rather than statements of core constitutional meaning.<sup>404</sup> For its part, the fact-finding based approach to congruence and proportionality, as important as it is, is inadequate without a doctrinal anchor setting the boundaries for judicial judgments about the relevance and weightiness of Congress's findings.<sup>405</sup> *Coleman* and *Shelby County* demonstrate how, without such an anchor, enforcement power review degenerates into an ad hoc critique of Congress's handiwork.<sup>406</sup> This Article's proposed approach combines these two approaches, and in doing so takes the best from each while avoiding each one's distinctive shortcomings.<sup>407</sup>

## VI. Conclusion: Enforcing the Fourteenth Amendment

The analysis so far has focused on congressional power to enforce the Second Amendment. But the insights gained up to now allow us to broaden our focus and consider the lessons this analysis provides for Congress's enforcement power more generally. This broader inquiry is timely. The Court's current

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403. See ARAIZA, ENFORCING, *supra* note 22, at 169–93 (describing the deference which courts should give to various types of congressionally found facts).

404. See *supra* notes 223–227 and accompanying text (connecting this idea with Dean Sager's distinction between “analytical” and “institutional” foundations for particular judicial statements and enforcement of rights).

405. See Araiza, *Crisis*, *supra* note 182, at 3–4 (noting that “the Court apparently feels no hesitation in second-guessing quintessentially legislative judgements about the factual foundations or policy need for enforcement legislation” and that currently “no objective guideposts guide the Court's review of such matters”).

406. See *id.* at 3 (noting that “[a]fter *Coleman* and *Shelby County*,” courts essentially have unlimited discretion regarding “how much deference to accord congressional judgements supporting the factual and policy bases for particular enforcement legislation”).

407. See *supra* notes 403–406 and accompanying text (discussing the problems associated with these two approaches to enforcement legislation).

approach to congruence and proportionality has reached a conceptual dead end.<sup>408</sup> As Part II explained, after a period in which the nature of the enforcement power challenges reaching the Court allowed it to use decisional heuristics to guide its analysis,<sup>409</sup> more recent enforcement power cases have left the Court adrift.<sup>410</sup> In particular, the Court in *Coleman* and *Shelby County* essentially reweighed in an ad hoc manner the factual and policy judgments Congress made when enacting, respectively, the FMLA and the Voting Rights Act.<sup>411</sup> Such ad hoc analysis leaves the Court vulnerable to the charge that it is simply disagreeing with those judgments, under the guise of finding enforcement legislation to fail the Enforcement Clause's "appropriateness"<sup>412</sup> requirement.<sup>413</sup> The Enforcement Clause demands a better approach.

#### *A. A More Granular Enforcement Clause Jurisprudence*

The more granular analysis called for in Part V reflects such an alternative.<sup>414</sup> Under this approach, the Court would apply

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408. See Araiza, *Crisis*, *supra* note 182, at 1 (explaining that the "Court has created both analytical confusion and practical dead-ends by focusing its enforcement power analysis on judicially created doctrine, rather than core constitutional meaning").

409. See *supra* note 103 and accompanying text (discussing *Kimel*, *Garrett*, and *Hibbs*).

410. See Araiza, *Crisis*, *supra* note 182, at 3–4 (noting a lack of "objective guideposts to guide the Court's review of such matters").

411. See *supra* note 182 and accompanying text (providing a detailed overview of the analyses conducted in *Coleman* and *Shelby County*).

412. See U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by *appropriate* legislation, the provisions of this article." (emphasis added)); see also *id.* amend. XV, § 2 ("The Congress shall have power to enforce this article by *appropriate* legislation." (emphasis added)).

413. This critique is not limited to those favoring a broader enforcement power. See *Tennessee v. Lane*, 541 U.S. 509, 554, 557–58 (2004) (Scalia, J., dissenting) (explaining, in similar terms, the reasons Justice Scalia was repudiating the congruence and proportionality test in favor of a more restrictive approach).

414. See *supra* Part V (rejecting a broad understanding of Second Amendment jurisprudence and advocating a more granular consideration of what Congress can add to the analytical framework of Second Amendment doctrine).

congruence and proportionality review only after carefully considering how Congress's unique institutional capacities allow it to contribute insights to the questions judicial doctrine poses for evaluating the particular constitutional right at issue.<sup>415</sup> This approach respects *Boerne's* insistence on judicial supremacy in stating constitutional meaning.<sup>416</sup> In particular, courts remain responsible for stating the judicial doctrine that poses the questions to which Congress can contribute insights in the search for answers.<sup>417</sup> At the other end of the process, courts also retain the ultimate authority to determine whether Congress's insights do in fact justify a particular answer to the given enforcement power question.<sup>418</sup> But in the middle, Congress's capacities—in particular, its capacities both to find empirical facts and to express the values of the American people<sup>419</sup>—give it a meaningful role, if not in stating constitutional meaning, then in vindicating it through legislation imposing concrete rules of conduct on state governments and other actors. The analysis in Part V exemplifies how courts could effectuate that congressional role.<sup>420</sup>

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415. See *supra* Part V (arguing that congressional findings can help to create an empirical context for the court's ultimate judgment and are, thus, due a degree of judicial respect).

416. See *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) (stating the Court's acknowledgment of its supreme authority to resolve cases and controversies).

417. This approach avoids the enforcement power review becoming an ad hoc critique of congressional action as occurred in *Coleman* and *Shelby County*. See generally *Coleman v. Court of Appeals of Md.*, 566 U.S. 30 (2012); *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

418. See *Boerne*, 521 U.S. at 524–27 (presenting the Court's history of ruling on Congress's use of the enforcement power in Fourteenth Amendment jurisprudence).

419. The fact that some substantive rights areas may not be susceptible to enforcement legislation grounded in Congress's claims to be instantiating Americans' value judgments, see *supra* note 351 and accompanying text, does not mean that such judgments are irrelevant to all enforcement legislation enforcing substantive rights. See ARAIZA, ENFORCING, *supra* note 22, at 236 (suggesting one substantive rights area where value judgments may in fact support enforcement legislation).

420. See *Boerne*, 521 U.S. at 524–27 (explaining that the Enforcement Clause limits Congress to a remedial role rather than a role in defining Fourteenth Amendment rights).

Can this new congressional role be squared with the concept of congruence and proportionality review? At one level, that formula presents itself, literally, as a classic proportionality test. So understood, one can perhaps understand why the Court in the *Kimell/Garrett/Hibbs* trilogy, and even in *Lane*, relied so heavily on the degree to which the challenged enforcement legislation tracked the importance or centrality of the underlying constitutional right that legislation sought to enforce.<sup>421</sup> The more granular approach this Article proposes requires a more nuanced understanding of the concepts of “congruence” and “proportionality.”<sup>422</sup> As it has made clear, the proposed approach to congruence and proportionality requires a far more intricate analysis than the application of a simple thumb on the scale favoring or disfavoring enforcement legislation based on the importance or centrality of the underlying right Congress seeks to enforce,<sup>423</sup> or even a simple comparison of the rules of conduct laid down by the Constitution and the enforcement statute in question.<sup>424</sup> Rather, this understanding would require courts to think about “congruence” and “proportionality” in a more holistic way, by considering the degree to which enforcement legislation, and especially the congressional findings underlying it, help answer the questions posed by courts’ constitutional doctrine.<sup>425</sup>

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421. See *Tennessee v. Lane*, 541 U.S. 509, 532–33 (2004) (noting how analogous the Americans with Disabilities Act’s “reasonable accommodation” requirement was to the underlying constitutional law rule); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (“The FMLA aims to protect the right to be free from gender-based discrimination in the workplace.”); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) (beginning its inquiry with the limitations placed upon the states in their treatment of the disabled by § 1 of the Fourteenth Amendment).

422. See *supra* Part V (treating congruence and proportionality review as embedding fact and policy inquiries).

423. See *Garrett*, 531 U.S. at 356 (engaging in a skeptical review of legislation enforcing the equal protection rights of disabled persons); *Hibbs*, 538 U.S. at 721 (engaging in a more relaxed review of legislation enforcing the equal protection rights of women).

424. See *supra* Part IV (referencing how *Lane* plotted the Americans with Disabilities Act’s “reasonable accommodation” requirement against the underlying constitutional rule).

425. See *supra* Part V (suggesting a fix for the wrong-turn in congruence and proportionality review that has led to arguably ad hoc review of enforcement legislation).

Under this approach, an enforcement statute would be congruent and proportional if it enacted a substantive rule of conduct reflecting the relevant core constitutional law, as supported by appropriate congressional determinations.<sup>426</sup> For example, the employment provisions of the Americans with Disabilities Act—the provisions struck down in *Garrett*—would have been upheld to the extent Congress had demonstrated that employment discrimination against the disabled was largely marked by either irrationality or animus, the core rules governing the equal protection guarantee.<sup>427</sup> Similarly, the self-care leave provision of the FMLA—the provision struck down in *Coleman*—would have been upheld if Congress had demonstrated that that provision targeted the same phenomenon that persuaded the Court to uphold the FMLA's family-care leave provision, namely, employers' perceptions about women's relative undesirability as employees given their presumed domestic responsibilities.<sup>428</sup> Note that the defenders of the self-care leave provision did in fact make this argument in *Coleman*; however, the plurality rejected it as “overly complicated” and “unconvincing.”<sup>429</sup> Under this Article's approach, congressional

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426. See *supra* Part V (applying this approach to the hypothetical law giving Americans the right to carry loaded firearms in their cars).

427. See, e.g., H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 275 (2011)

The baseline of the American constitutional order is a government that acts rationally, but not merely in the sense that it has reasons for what it does; rationality in traditional thought has also meant that government's actions are undertaken in good faith and for reasons that are generally seen to be appropriate.

428. Of course, the personal-care provision targeted that phenomenon indirectly, by providing personal-care leave in order to neutralize the effect of the assumption that women would be the primary users of FMLA family-care leave. 29 U.S.C. § 2612 (2012). As noted earlier in the discussion of *Coleman*, see *supra* notes 156–170 and accompanying text, defenders of the personal-care provision noted that Congress concluded that employers perceived family-care leave as a woman's benefit that rendered women less desirable as employees. Thus, the argument made by the plaintiffs was that the provision of family-care leave encouraged additional sex discrimination that would be mitigated by the provision of personal-care leave. See *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 39 (2012) (discussing the mitigating inclusion of personal-care leave). Nevertheless, the phenomenon itself is similar, with the only difference being the directness with which the statute targeted the constitutional wrong.

429. See *Coleman*, 566 U.S. at 40 (“Petitioner's overly complicated argument

findings about social reality<sup>430</sup>—here, employer perceptions and likely reactions to the provision of family-care leave—should have enjoyed a level of deference the *Coleman* plurality did not accord.<sup>431</sup>

Other congressional determinations might merit less weight in the enforcement power calculus. For example, as this Article has argued throughout, judicial decisions that have the status of statements of core constitutional meaning are not appropriately subject to supplementation by Congress.<sup>432</sup> To take a Second Amendment example, an enforcement statute that declared that the core of the Second Amendment includes the right of public carriage of a firearm would contradict *Heller*'s identification of the home as the locus for the core Second Amendment right.<sup>433</sup> Of course, *Heller* did not rule out Second Amendment protection for gun possession outside the home.<sup>434</sup> As this Article has also suggested, Congress could play a valid and useful role in enacting enforcement legislation that applies the relevant judicial doctrine to facts that Congress is particularly well-suited to find, especially when that doctrine extends beyond its core application.<sup>435</sup> But statements of core constitutional meaning—what Dean Sager identifies as “analytically-[derived]”

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about how the self-care provision works in tandem with the family-care provision is unconvincing and in the end does not comply with the clear requirements of *City of Boerne*.”).

430. See ARAIZA, ENFORCING, *supra* note 22, at 169–93 (acknowledging Congress’s unique understanding of social reality and arguing that courts ought to defer to congressional determinations based on such understanding).

431. See *Coleman*, 566 U.S. at 40 (“Petitioner’s overly complicated argument about how the self-care provision works in tandem with the family-care provisions is unconvincing and in the end does not comply with the clear requirements of *City of Boerne*.”).

432. See *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) (“The power to interpret the Constitution in a case or controversy remains in the Judiciary.”).

433. See *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) (“The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute.”).

434. See *United States v. Masciandaro*, 638 F.3d 458, 468 (4th Cir. 2011) (stating that *Heller*’s designation of the home as the place where the need for defense is most acute “suggest[s] that some form of the right applies where that need is not ‘most acute’”).

435. See *supra* Part V (labeling Congress’s fact-finding ability a unique institutional capability).



constitutional interpretations—remain immune from congressional countermanding via enforcement legislation.<sup>436</sup>

These quick examples illustrate the complexity of the approach this Article suggests. It requires the Court to distinguish between its statements of core constitutional meaning and mere decisional heuristics such as equal protection tiered scrutiny analysis.<sup>437</sup> It thus requires the Court to understand which congressional determinations shade over into conclusions about the content of constitutional law, which *Boerne* insists remain the ultimate province of the judiciary.<sup>438</sup> But at the same time this approach obliges the court to be sensitive to the types of determinations Congress is best-suited to make, and how those determinations help answer the questions the Court's doctrine demands be answered.<sup>439</sup>

### *B. Challenges*

These inquiries are sensitive and difficult. But this more nuanced understanding of congruence and proportionality, even if difficult and challenging to apply, is necessary.

#### *1. The Challenge of Variety*

It is necessary, first, because of the great diversity of doctrinal tests governing substantive rights protected by the Due Process Clause. In a world in which the subject-matter of enforcement legislation migrates beyond equal protection group rights and toward the substantive rights protected by the Due

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436. See Sager, *supra* note 223, at 1241 (“[I]t is appropriate for the Supreme Court to overturn a congressional enactment under [§] 5 if it finds that the enactment cannot be justified by any analytically defensible conception of the relevant constitutional concept.”).

437. See ARAIZA, ENFORCING, *supra* note 22, at 50–83 (explaining tiered scrutiny).

438. See *Boerne*, 521 U.S. at 524 (stating the supreme authority of the judiciary to sit and decide cases and controversies as delegated in Article III of the United States Constitution).

439. See *supra* Part V (discussing the benefits of Congress's institutional capacities and advocating for the courts' utilization of these capacities of Congress in judicial analysis).

Process Clause,<sup>440</sup> a simple proportionality inquiry, guided by a straightforward decisional heuristic such as tiered scrutiny, is inadequate to the task.<sup>441</sup> Substantive constitutional rights doctrine is strikingly diverse. Every Bill of Rights provision that has been incorporated (and that therefore is susceptible to congressional enforcement) brings with it its own doctrinal structure.<sup>442</sup> Sometimes those doctrines will share elements,<sup>443</sup> while some inquiries will be *sui generis* to that particular right.<sup>444</sup> That variety necessarily renders congruence and proportionality review similarly variegated—at least if that review aspires to be a credible evaluation of enforcement legislation that both respects Congress’s admittedly broad authority to enforce the Fourteenth Amendment but also recognizes the Court’s insistence on its ultimate authority to state constitutional meaning.

## 2. The Challenge of Complexity

Even within the realm of any given constitutional right, the internal complexity of many constitutional rights doctrines poses a serious challenge to congruence and proportionality review. The Second Amendment example this Article has explored reveals how intricate any given doctrine may be.<sup>445</sup> There is no reason to believe that the Second Amendment is unique. For example, free speech doctrine is remarkably complex, and has only grown more

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440. For example, in addition to gun rights, it is possible to envision enforcement legislation that targets controversial local police practices and local and state takings of property.

441. See Winkler, *supra* note 27, at 228–32 (noting and describing the various doctrinal tests courts apply to different Bill of Rights provisions).

442. See *id.* (stating the applicable test for each amendment of the Bill of Rights).

443. See *id.* at 236 (noting common approaches across several different areas of fundamental rights doctrine); see also Volokh, *supra* note 3, at 1460–61 (noting that adjudications of substantive rights claims often include an inquiry into the substantiality of the burden that the challenged law imposes on the claimed right).

444. See Winkler, *supra* note 27, at 231–32 (discussing the possibility of the Eighth Amendment as *sui generis*).

445. See *supra* Part III.B (considering how the variant doctrinal approaches in Second Amendment jurisprudence would complicate a court’s congruence and proportionality review).

so in recent years with innovations such as the government speech doctrine.<sup>446</sup> Fourth Amendment doctrine is riddled with exceptions.<sup>447</sup> Establishment Clause doctrine has long been criticized for drawing fine distinctions that seem to lack principled bases.<sup>448</sup>

This complexity necessarily translates into Enforcement Clause inquiries, given *Boerne's* insistence that enforcement legislation meaningfully relate to the court-announced meaning of the underlying right Congress seeks to vindicate.<sup>449</sup> Indeed, applying the congruence and proportionality standard to legislation enforcing such rights will enmesh courts in even more daunting challenges, as that standard will require application of an imprecise proportionality test to doctrine that is already difficult to apply.

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446. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("The government-speech doctrine is relatively new, and correspondingly imprecise."); *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009) (Stevens, J., concurring) (describing the government speech doctrine as "recently minted").

447. See Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 45 (2008) (discussing the search incident to a lawful arrest doctrine and asking readers to "[c]ompare this to the rest of Fourth Amendment law, which is riddled with exceptions, caveats, and uncertainty").

448. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 110–11 (1985) (Rehnquist, J., dissenting).

For example, a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip.

(citations omitted).

449. See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (creating the congruency and proportionality standard for § 5 enforcement).

### 3. The Challenge of Methodology

Yet the challenge is even more difficult than that. As the Second Amendment example has illustrated, different components of particular individual rights doctrines stand in different relations to the Constitution.<sup>450</sup> To originalists, the original understanding of the Constitution constitutes pure constitutional law—that is, the core meaning of the relevant constitutional text, unmediated by decisional heuristics or indirect sources of meaning.<sup>451</sup> Other components—for example, equal protection’s tiered scrutiny structure—are best understood as such heuristics.<sup>452</sup> Still other components—for example, empirical inputs into determinations that go into the application of tests such as strict or intermediate scrutiny—are not themselves law, even if those inputs (for example, a finding that no other policy alternative furthers the government’s goal as effectively)<sup>453</sup> all-but determine the outcome of the constitutional issue at hand. If the Court wishes to apply congruence and proportionality in a way that respects Congress’s legitimate role in vindicating constitutional meaning, then it will have to determine the constitutional status of each component of the underlying constitutional rights doctrine at issue in order to decide how much of a role Congress has in enforcing that component.<sup>454</sup> The Second Amendment example this Article has examined illustrates this difficulty, given the different

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450. See *supra* Part III (noting the methodological variety of the various analytical steps in Second Amendment doctrine).

451. See Rosenthal, *supra* note 3, at 1189 (discussing originalism as “regard[ing] the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present” (citation omitted)).

452. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2716 (2013) (Alito, J., dissenting) (“The modern tiers of scrutiny . . . are a heuristic to help judges determine when classifications have that ‘fair and substantial relation to the object of the legislation [required by equal protection].’”).

453. See Winkler, *supra* note 27, at 227 (considering an example that purported to answer the narrow tailoring question posed by the relevant legal doctrine).

454. See *supra* Part III (noting the different constitutional statuses of different parts of Second Amendment caselaw.).

constitutional statuses of the particular analytical steps lower courts have undertaken when deciding gun rights cases.<sup>455</sup>

This challenge is particularly salient in light of the rise of originalist analysis over the last several decades. Proponents of originalism often argue that one of its merits is that it seeks to uncover the actual law of the Constitution.<sup>456</sup> The claim that originalist analysis uncovers the actual law of the Constitution, when combined with *Boerne*'s insistence that courts are the ultimate expositors of that law,<sup>457</sup> necessarily means that doctrinal decisions grounded on originalist analysis must remain immune from congressional questioning or countermanding. But at the other end of the spectrum, doctrinal components that rest on empirical or social judgments, such as the effectiveness of alternative means for government to reach its legitimate goals, must presumably be susceptible to a heavy dose of congressional input.

### *VII. Conclusion: The Imperative of a New Approach*

The combination of varied doctrinal inputs and different interpretive methodologies in any given subject-area poses a serious challenge for congruence and proportionality review. As this Article has suggested, credible performance of such review will require courts to parse carefully the individual components of a given constitutional rights doctrine (such as the right to gun possession) to determine which components are amenable to which types of congressional input.<sup>458</sup>

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455. See *supra* Part III.A (detailing the difficult doctrinal structure that defines Second Amendment jurisprudence).

456. Indeed, sophisticated defenders of more recent versions of originalism explicitly distinguish between (originalist) constitutional "interpretation" and so-called "constitutional construction," which is appropriate when the core meaning of the document runs out before deciding a case. See Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. L. REV. 923, 972–90 (2009) (explaining the distinction and applying the distinction in the context of the Second Amendment).

457. See *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) (stating the judiciary's supreme role in the resolution of cases and controversies).

458. See *supra* Part V (using the Second Amendment example to suggest this more nuanced approach to understanding Congress's enforcement power).

Without doubt, this task poses an exceptionally difficult challenge. But that challenge must be addressed, unless the Court remains content with more simplistic approaches to congruence and proportionality.<sup>459</sup> Up to now the Court has been able to make do with such simplistic approaches, in large part because so many of its enforcement power cases have dealt with equal protection, which features an ostensibly-simple doctrinal structure that, at least on its face, is well-suited to translation into the enforcement power context.<sup>460</sup> As the Second Amendment example makes clear,<sup>461</sup> however, the Court may well be on the verge of encountering enforcement power cases where the underlying right cannot be so easily described. As it encounters those more difficult cases, it will have to decide how seriously it wants to take both its insistence on stating constitutional meaning and its ostensible respect for congressional determinations that Congress is best-suited to make. The Court's decisions will determine its true degree of interest in treating the national legislature seriously as a partner in the project of vindicating constitutional meaning.

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459. See *supra* Part II.B (charting the Court's formulaic approach to Enforcement Clause cases post-*Boerne*).

460. See *generally* *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

461. See *supra* Part III.B (discussing the intricacies of the Second Amendment right and the enforcement power).

