

THE ENFORCEMENT POWER IN CRISIS

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I. THE PROBLEM

It may seem hyperbolic to declare the enforcement power to be in crisis. But developments over the last decade have raised serious questions about the coherence and credibility of judicial scrutiny of enforcement legislation. At the same time, the results of that scrutiny—most notably, the Supreme Court’s 2013 decision in *Shelby County v. Holder*¹—threaten the legacy of the Second Reconstruction. If we recognize that enforcement power scrutiny appears analytically incoherent, lacking in competence-based credibility, and destructive of one of the crown jewels of the modern civil rights movement, it becomes less shrill to use the word “crisis” to describe the current state of affairs.

Two developments have caused much of the problem. First, 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. Most notably, its “congruence and proportionality” review of equal protection enforcement legislation has employed as its focal point the tiered scrutiny level a group enjoys. I have argued elsewhere that this approach misconceives the proper inquiry, by examining whether enforcement legislation is congruent and proportional to that judge-created decisional heuristic, rather than to any core equal protection requirements the challenged legislation seeks to enforce.²

This analytical mistake has become a high-stakes matter. The Court’s seeming abandonment of serious suspect class analysis, in favor of a more particularized, case-by-case inquiry into whether the challenged action reflects irrationality, or more frequently, “animus,” threatens to destabilize

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1 133 S. Ct. 2612, 2631 (2013) (striking down the formula governing the geographic scope of the Voting Rights Act’s preclearance provisions).

2 See, e.g., William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause*, 37 FLA. ST. U. L. REV. 451, 453 (2010); William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519, 524 (2005); see also WILLIAM D. ARAIZA, *ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW* (NYU Press, 2015).

its approach to congruence and proportionality review. Simply put, if the Court no longer seriously inquires whether a particular species of discrimination warrants heightened scrutiny, then enforcement legislation benefiting emerging groups or addressing emerging discrimination cannot be coherently analyzed for congruence and proportionality under the Court's current approach.³

Thus, unless the Court changes direction, groups who have not already had their suspect class status determined likely never will. Yet those groups—most notably gays and lesbians, but also others—are among the most visible advocates of equality legislation today. As they obtain anti-discrimination legislation that must be at least partially grounded on the enforcement power,⁴ the ambiguity surrounding their suspect class status will cloud the constitutionality of such laws.

Second, the Court has recently exhibited a marked willingness to second-guess the empirical or policy foundations for enforcement legislation. Such skepticism can be traced to the early years of modern enforcement power doctrine. Most (in)famously, in *Board of Trustees v. Garrett*,⁵ the Court disregarded as irrelevant most of the factual record supporting the enforcement power foundation of the Americans with Disabilities Act's ("ADA") employment provisions, and thus concluded that the law simply did not address a serious problem of unconstitutional discrimination. But *Garrett* could be bracketed—and its troubling implications for congressional power cabined—by observing that the Court understood the ADA as targeting a type of discrimination it believed presented only a trivial constitutional issue. The Court itself encouraged this reading of *Garrett* when, two years later, it upheld enforcement legislation aimed at sex discrimination. In that case, *Nevada Department of Human Resources v. Hibbs*, the Court stated that "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" justifying enforcement legislation.⁶

³ I have discussed this phenomenon in the context of the Court's decision in *United States v. Windsor*, and the significance of *Windsor's* methodology for the enforcement power. See William D. Araiza, *After the Tiers: Windsor, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367, 374 (2014).

⁴ See *Florida v. Seminole Tribe of Florida*, 517 U.S. 44, 47 (1996) (rejecting Article I as a source of power to render states liable for retrospective relief for violating federal law). Some regulatory areas, such as family and marriage law, may be entirely beyond the reach of the commerce power, thus rendering the enforcement power even more crucial. See *United States v. Lopez*, 514 U.S. 549, 564, 565 (1995) (suggesting such limits).

⁵ 531 U.S. 356 (2001) (holding that the employment provisions of the Americans with Disabilities Act do not constitute valid enforcement legislation).

⁶ 538 U.S. 721, 722 (2003).

However, more recently the Court has exhibited similar skepticism when considering enforcement legislation targeting discrimination the Court itself recognizes as implicating fundamental constitutional commitments. In the 2012 case *Coleman v. Court of Appeals*,⁷ it concluded that a different provision of the same statute challenged in *Hibbs*,⁸ the Family and Medical Leave Act (“FMLA”), was invalid enforcement legislation, despite its earlier recognition of sex discrimination as a central equal protection concern. And, of course, there is *Shelby County*. There too the Court found that enforcement legislation exceeded Congress’s power, despite the Fourteenth and Fifteenth Amendments’ central focus on the racial equality right Congress sought to enforce in the Voting Rights Act (“VRA”).⁹

Coleman and *Shelby County* shattered the Court’s earlier template, in which legislation enforcing constitutional rights the Court itself recognized as fundamental received more deferential scrutiny. In one sense this is a welcome development: this Article began by arguing that the Court’s enforcement power doctrine inappropriately keys enforcement power review to the constitutional status of the enforced right, *as courts recognized that right through decisional heuristics such as tiered scrutiny analysis*. By abandoning that approach, the Court has laid the groundwork for an approach that employs the correct focal point for congruence and proportionality review—the actual meaning of the Fourteenth Amendment provision at issue.

But in pointing toward a solution to one problem, the Court has likely created another. After *Coleman* and *Shelby County*, courts now face a wide open field when considering how much deference to accord congressional judgments supporting the factual and policy bases for particular enforcement legislation. Justice Antonin Scalia identified this problem as early as 2004, when he criticized the congruence and proportionality test as “flabby” and enmeshing the Court in a disrespectful, “policy-driven” “check[ing]” of Congress’s “homework.”¹⁰ Even more trenchantly, in *Coleman* he observed that both the plurality’s and the dissent’s application of the congruence and proportionality test appeared plausible to him.¹¹

That indeterminacy constitutes the heart of this second problem. Today the Court apparently feels no hesitation in second-guessing quintes-

7 132 S. Ct. 1327 (2012) (holding that the self-care provision of the Family and Medical Leave Act does not constitute valid enforcement legislation).

8 *Hibbs*, 538 U.S. at 725.

9 *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

10 *Tennessee v. Lane*, 541 U.S. 508, 554, 557–58 (2004) (Scalia, J. dissenting) (discussing the dangers of and problems with the “congruence and proportionality” standard).

11 132 S. Ct. at 1338 (Scalia, J., concurring in the judgment).

entially legislative judgments about the factual foundations or policy need for enforcement legislation. To illustrate this point, consider the verdict the *Coleman* plurality rendered on the policy arguments supporting the FMLA's self-care provision: "overly complicated" and "unconvincing."¹² Consider also *Shelby County*, which devoted just one sentence to rejecting the argument that the preclearance provisions' coverage formula was appropriate to deter previously discriminatory jurisdictions from backsliding.¹³ Clearly, this freedom to disagree with Congress about such policy matters extends, not just to issues the Court considers to lay at the periphery of the Reconstruction Amendments' concerns, but to issues that reside at their very center. Just as troublingly, no objective guideposts guide the Court's review of such matters.

II. A NEW FRAME

These problems are serious, as matters of logic, institutional competence, and concrete results. A new enforcement power issue, not yet a live legal question, highlights these concerns. This new issue potentially offers the Court the opportunity to rectify its enforcement power jurisprudence. But it also threatens to expose deep problems with the congruence and proportionality approach the Court has now applied for nearly two decades.

A. *The Promise*

In the 2008 case *Heller v. Doe*, the Court, using an explicitly originalist analysis, held that the Second Amendment protected an individual right to possess firearms.¹⁴ Two years later, in *McDonald v. City of Chicago*,¹⁵ it held that that right, in its precise, *Heller*-announced form, applied to the states via the Fourteenth Amendment. Together, *Heller* and *McDonald* recognized a new right—i.e., a right the Court had not previously acknowledged.

The Second Amendment presents a potentially interesting opportunity for the Court to reconsider its enforcement power jurisprudence. To be sure, Congress must provide that opportunity by legislating to protect the gun possession right. But it's at least plausible that the requisite legislative coalition could be crafted. In turn, such legislation, especially to the

¹² *Id.* at 1336 (plurality opinion).

¹³ See 133 S. Ct. at 2627 ("Under [the deterrence] theory, however, § 5 would be effectively immune from scrutiny; no matter how 'clean' the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior.").

¹⁴ 554 U.S. 570, 635 (2008).

¹⁵ 561 U.S. 742, 749–50 (2010).

extent it focuses on gun *possession* rights, would likely find its most convenient constitutional foundation in the enforcement power.¹⁶

Two characteristics of the Second Amendment right would make a challenge to that law an interesting case study. First, the right's novelty means that the Court would be writing on a largely blank slate when construing the right Congress sought to enforce. Thus, those interpretations of the Second Amendment would turn relatively more heavily on the Court's self-consciously originalist parsing of the text, rather than on pre-existing precedent which might otherwise channel the Court away from a purely originalist approach.¹⁷

The Court's adoption of an explicitly originalist methodology for identifying a right carries implications for its analysis of legislation enforcing that right. Originalist methodology claims to uncover actual constitutional meaning, as revealed through what originalists believe is its true source—the original meaning of the constitutional text. This differs fundamentally from the decisional heuristic of suspect class analysis, which by contrast seeks judicially manageable methods of reaching results consistent with presumed constitutional meaning, rather than uncovering that meaning itself.¹⁸

Thus, congruence and proportionality review of legislation enforcing a right explicated through originalist methodology would presumably use as its focal point a judicial statement of the underlying right that portrayed itself as expressing core constitutional meaning. Such review would therefore likely avoid the mistake the Court has made in its equal protection enforcement jurisprudence of focusing its review on the wrong target. Indeed, such review might cast into sharp relief the mistakenness of that jurisprudence. To be clear, none of this necessarily suggests originalism's superiority as a methodology; that debate is far too extensive to evaluate here.¹⁹ Nevertheless, for an originalist Court, originalism's claim that it aims precisely at, and is uniquely capable of, uncovering true constitution-

16 Cf. *United States v. Lopez*, 514 U.S. 549, 551 (1995) (striking down a federal gun possession statute as exceeding the commerce power).

17 Cf. Kurt Lash, *Originalism, Popular Sovereignty and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1473 (2007) (noting how an originalist judge's fidelity to non-originalist precedent might precipitate a conflict with her commitment to originalism).

18 See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2716 (2013) (Alito, J., dissenting) ("Underlying our equal protection jurisprudence is the central notion that a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation The modern tiers of scrutiny . . . are a heuristic to help judges determine when classifications have that fair and substantial relation") (internal quotations and brackets omitted).

19 For a useful guide to the history and current status of the debate over originalism, see Stephen Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185 (2008).

al meaning²⁰ suggests that an enforcement power decision involving an originalist-construed right may exert a helpful gravitational pull on enforcement power jurisprudence more generally.

To be sure, such a refocusing would not make congruence and proportionality review easier for courts. One of the collateral benefits of the Court's pre-*Coleman* approach to equal protection enforcement legislation is that it simplifies the analysis considerably. Under that approach, enforcement legislation targeting a suspect classification merits deferential review, while legislation targeting a non-suspect classification requires more stringent scrutiny.²¹ By embedding that deference choice into the analysis, this approach to congruence and proportionality review allows the Court to elide difficult questions about the deference properly due Congress's fact-findings and policy judgments supporting enforcement legislation.

Abandoning that approach, in favor of one that uses core constitutional meaning as its focal point, will require the Court to face the deference question more explicitly. This is particularly true in the context of equal protection enforcement legislation, given the vagueness inherent in the core equal protection requirements that government act rationally and in pursuit of a public purpose.²² That vagueness necessarily increases the importance of the Court's receptivity to Congress's arguments that either empirical facts or legislative policy judgments support a connection between equal protection's core requirements and the challenged enforcement statute.

B. *The Peril*

Such refocused congruence and proportionality review of equal protection enforcement legislation would potentially be encouraged by the precedent of a case where the Court similarly focused on core constitutional meaning when reviewing a gun rights enforcement statute. But attempts to implement such refocused enforcement power review may

20 See, e.g., Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329, 330 (2013) ("Because originalism fixes a constitutional provision's meaning at the moment of its framing or ratification, new originalists argue, judges are constrained from supplanting the real Constitution with their own values.").

21 See, e.g., *Hibbs*, 538 U.S. at 736 (stating that "it was easier" for Congress to show a pattern of unconstitutional state conduct when Congress sought to enforce the equal protection right to sex equality, as opposed to the equal protection right to non-discrimination on the basis of age or disability).

22 For a statement about the overall vagueness of the equal protection guarantee, see Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). For a discussion of the analytical complexity of the concept of irrational government action, see H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 267–76 (2011).

demonstrate the limitations of the congruence and proportionality test more generally. Indeed, a hypothetical gun statute might pose that challenge in its starkest terms.

Consider the Second Amendment in more detail. *Heller* employed originalist methodology to conclude that the Second Amendment protects an individual firearms possession right, the “core” of which consists of the right to possess commonly available weapons for self-defense²³—most “acute[ly]”²⁴ in the home. The right may also extend beyond the home: *Heller* presumptively approved of laws restricting gun possession in “sensitive” public places (e.g., schools), thus intimating that other public areas might be open for gun possession.²⁵

How does this statement of the right affect Congress’s latitude to enact legislation enforcing it? In explicitly stating core Second Amendment meaning, *Heller* seemingly clarifies enforcement power analysis by providing an unambiguous focal point for congruence and proportionality review. But this seeming clarity—which solves the first problem this Article has identified—rely pushes the difficult work to the next problem it noted: the deference question.

Consider some examples. What if Congress enacts a law giving Americans a right to possess ammunition? One would think that such a law would easily survive enforcement power review, given the necessary connection between ammunition and the use of a gun for self-defense. But even this straightforward case elides difficult questions of degree. For example, what deference should a court accord congressional judgments that rights to possess a particular amount or type of ammunition are necessary to vindicate the core right identified in *Heller*? Hundreds of rounds? Armor-piercing bullets? Even assuming away these difficulties, more difficult issues immediately arise. What about firing ranges? If the *Heller* right is the right to use a gun for self-defense, could Congress enact a law prohibiting states from restricting firing ranges, or even the outdoor discharge of weapons, on the theory that such activities were necessary to allow Americans to develop the skills requisite to armed self-defense? What about restrictions on transporting guns? Surely, a right to possess arms for self-defense is difficult to vindicate if one can’t transport the weapon. Could Congress decide that a right to transport a weapon constitutes a necessary adjunct to the *Heller* self-defense possession right?

These questions are difficult because they implicate both Congress’s power to find facts and make policy, as well as the Court’s power, asserted

²³ 554 U.S. at 630.

²⁴ *Id.* at 628.

²⁵ *See, e.g.,* *Peruta v. County of San Diego*, 742 F.3d 1144, 1153 (9th Cir. 2014) (reasoning in this manner).

in *City of Boerne v. Flores*, to decree ultimate constitutional meaning.²⁶ In other words, legislation like these hypothetical laws might be justified as resting on Congress's fact- or policy-based conclusions about what is necessary in order to vindicate the core right announced in *Heller*. But it could also be viewed as effectively *expanding* the scope of that right, and thus violating the judicial interpretive supremacy principle underlying *Boerne*.

III. BACK TO THE FUTURE?

How should a court decide whether such laws reflect Congress's judgments about the best ways to enforce the Second Amendment, or alternatively, its attempt to re-interpret the Second Amendment more expansively? Leaving aside Justice Scalia's rejection of any congressional power to craft prophylactic enforcement legislation other than in the area of race,²⁷ the only plausible way to balance these roles is for the Court to "check Congress's homework"²⁸—that is, scrutinize with some care its fact-finding record and policy analysis. If we exclude the cases where that scrutiny was aided by a thumb on the scales in one direction or another (that is, the cases where equality enforcing legislation received either skeptical or deferential review based on the suspectness of the targeted discrimination), then we are left essentially with three cases: *Coleman*, *Shelby County*, and *Boerne* itself.²⁹

A. *Coleman* and *Shelby County*

These cases are not encouraging models. In *Coleman* the Court simply pronounced the plaintiff's policy defense of the FMLA's self-care provision "overly complicated" and "unconvincing," despite Justice Ruth Bader Ginsburg's argument, in dissent, laying out a plausible explanation for how self-care leave available on a sex-neutral basis counteracted sex stereotyping.³⁰ *Shelby County* fares no better, especially if we focus on the VRA defenders' argument that the preclearance provisions' coverage formula

26 See *Boerne*, 521 U.S. at 536 ("It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference. Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution.") (internal citation omitted).

27 See 541 U.S. at 559–61 (Scalia, J., dissenting).

28 See *id.* at 557–58.

29 The Court has decided other enforcement power cases since *Boerne*. But, for reasons beyond the scope of this short Article, they do not furnish models of the sort at issue here.

30 See 132 S. Ct. at 1336 (majority opinion) (pronouncing the argument "overly complicated" and "unconvincing"); *id.* at 1339, 1347–49 (Ginsburg, J., dissenting) (explaining how self-care leave available on a sex-neutral basis counteracted sex stereotyping).

made sense because those provisions deterred the covered jurisdictions from backsliding on their acknowledged improvement in protecting voting rights.³¹ Chief Justice John Roberts' majority opinion failed to seriously engage that argument. His entire response consisted of a one sentence complaint that accepting the deterrence argument would justify indefinite VRA renewals.³² Notwithstanding the casualness of his (non)response, his concern is reasonable: any deterrence argument requires counter-factual analysis that courts are ill-suited to perform. But that observation just begs the question how courts should respond to that challenge. If courts *are* ill-suited to perform such review, then perhaps they should not try, or at least should show some respect for Congress's conclusions.

B. Back to Boerne?

Perhaps *Boerne* itself provides the most apt model for congruence and proportionality review keyed to the core meaning of the Fourteenth Amendment right Congress seeks to enforce. In *Boerne*, Justice Anthony Kennedy was careful to begin his analysis, not by discussing the enforcement power, but by summarizing the Court's analysis in *Employment Division v. Smith*³³, the case that triggered the Religious Freedom Restoration Act ("RFRA").³⁴ Later, after setting forth his understanding of the enforcement power and announcing the congruence and proportionality test, he applied that understanding by considering whether RFRA's legislative record contained "examples of modern instances of" laws that violated *Smith's* rule—i.e., "generally applicable laws passed because of religious bigotry."³⁵

Thus, in *Boerne*, Justice Kennedy first identified the core meaning of the Free Exercise right RFRA ostensibly sought to enforce, before applying congruence and proportionality review. One might therefore consider *Boerne* a model of congruence and proportionality review that focuses on the correct target—core constitutional meaning rather than decisional heuristics.

Unfortunately, the matter is more complex. First, *Smith* itself is more ambiguous than Justice Kennedy implied. *Smith* rejected the then-prevailing approach to Free Exercise claims not just because it was supposedly incorrect as a matter of constitutional law, but also because of concern that judges were incapable of performing that analysis in a princi-

31 See 133 S. Ct. at 2627 (acknowledging the backsliding argument).

32 See *supra* note 13.

33 494 U.S. 872 (1990).

34 See 521 U.S. at 512–14.

35 *Id.* at 530.

pled fashion.³⁶ To the extent *Smith* rests in part on concerns about judicial competence, it looks less like a pure statement of core constitutional law to which a religious exercise enforcement statute could appropriately be compared for congruence and proportionality.³⁷

Second Amendment and equal protection jurisprudence may be similarly resistant to such “pure” judicial statements of core constitutional principle that stand completely divorced from decisional heuristics adopted for institutional competence reasons. Already, lower courts grappling with *Heller* are employing the very interest balancing Justice Scalia criticized in *Heller* itself.³⁸ This should not be surprising: once one considers laws regulating conduct other than the core conduct *Heller* identified as protected, one might expect courts to default to such judicial decision rules. But to the extent these cases reflect relatively heavier doses of such decision rules and lighter doses of core constitutional principle, Second Amendment jurisprudence starts looking more like the equal protection doctrine this Article suggests furnishes the wrong focal point for congruence and proportionality review. More importantly, over time perhaps both of these doctrines *necessarily* start comprising heavier doses of such decision rules, if, as some originalists acknowledge, core constitutional principles sometimes simply run out before they decide difficult, concrete, cases.

C. *The Need For Deference*

This analysis suggests that the deference question—the second of the two challenges this Article has identified as facing the Court’s enforcement power doctrine—is unavoidable. To put the matter bluntly, at some point the Court must realize that congruence and proportionality scrutiny has to rest on one of two foundations. Either the Court must continue using judicial doctrine as the focal point for such review, even when that doctrine does not logically furnish the appropriate target; or it must develop principled rules governing when to defer to congressional judgments supporting enforcement legislation, as tested against core constitutional principles. Doctrine (such as equal protection suspect class status) and deference principles can each guide the Court’s review of Congress’s

36 See 494 U.S. at 889 n.5 (“[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.”).

37 See ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE, *supra* note 2, at 238-242.

38 See, e.g., Allan Rostron, *Justice Breyer’s Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 757 (2012) (“Struggling to work within the more categorical framework of decisionmaking favored by Justice Scalia [in *Heller*], the lower courts have essentially wound up embracing the sort of interest balancing that Justice Breyer recommended and that Scalia vociferously denounced.”).

factual and policy judgments. Until recently, the Court has used doctrine. In *Coleman* and *Shelby County*, the Court ignored it.³⁹

This abandonment of judicial doctrine as the focal point for congruence and proportionality review is laudable. But that abandonment in turn triggers a need for other guideposts for judicial review. Those guideposts must take the form of a set of deference principles, explicitly stated and applied in as principled a manner as possible.⁴⁰ To ignore both doctrine and deference is to risk unmooring congruence and proportionality review entirely, leaving the Court free to “check” Congress’s factual and policy “homework” at its whim.⁴¹ That may be the worst possible outcome, one that would truly throw the enforcement power into crisis.

39 See *supra* notes 7–11 and accompanying text.

40 I and others have attempted to provide such deference principles. See William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 906–26 (2013); Eric Berger, *Deference Determinations and Stealth Constitutional Decisionmaking*, 98 IOWA L. REV. 465, 498–518 (2013).

41 See *supra* note 10.