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## Dignity and Second Amendment Enforcement—Response to William D. Araiza’s, Arming the Second Amendment and Enforcing the Fourteenth

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# Dignity and Second Amendment Enforcement—Response to William D. Araiza’s, Arming the Second Amendment and Enforcing the Fourteenth

Darrell A.H. Miller\*

## *Abstract*

*William Araiza’s insightful article, Arming the Second Amendment, has one essential, hidden component: dignity. Dignity helps explain the peculiar hydraulics of Congress’s power to enforce section five of the Fourteenth Amendment—a jurisprudence in which the less scrutiny the Court itself applies to a given class or right, the more scrutiny it applies to congressional efforts to protect that same class or right. Dignity helps explain the Court’s halting approach to Reconstruction Amendment enforcement power more generally – an approach in which constitutional versus unconstitutional legislation turns on seemingly insignificant regulatory distinctions. And dignity’s role in § 5 enforcement helps explain the efforts of gun rights advocates to portray themselves as disempowered and despised members of a subordinate class. Araiza has cogently broken down the complicated mechanics of the Court’s equal protection, substantive rights, and § 5 enforcement power jurisprudence, but it is notions of dignity that seems to drive this particular constitutional engine.*

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*I. Introduction*

William Araiza’s wonderfully insightful article, *Arming the Second Amendment*, has one essential, hidden component: dignity. Dignity helps explain the peculiar hydraulics of Section 5 enforcement power—a jurisprudence in which the less scrutiny the Court itself applies to a given class or right, the more scrutiny it applies to congressional efforts to protect that same class or right. Dignity helps explain the Court’s halting approach to Reconstruction Amendment enforcement power more generally, an approach in which constitutional versus unconstitutional legislation turns on seemingly insignificant regulatory distinctions. And dignity helps explain the efforts of gun rights advocates to portray themselves as disempowered and despised members of a subordinate class. Araiza has cogently broken down the complicated mechanics of the Court’s equal protection, substantive rights, and Section 5 enforcement power jurisprudence, but it is the flywheel—dignity—that seems to drive this particular constitutional engine.

Part II of this essay recaps Professor Araiza’s useful analysis of the Second Amendment right to keep and bear arms and its relationship to Congress’s Fourteenth Amendment enforcement power. For the most part, I think his analysis is correct, although this is an area of many paradoxes; and, to his credit, Araiza doesn’t try to resolve them all. Part III identifies the way dignity—between courts and Congress, between Congress and the states, and between rights claimants and the states—explains the tensions within the Court’s Enforcement Clause jurisprudence. Part IV offers some concluding thoughts on how humility—the

cousin of dignity—may support the soft normative proposals Professor Araiza supplies near the end of his piece.

## *II. Second Amendment Rights and the Hydraulics of § 5 Enforcement*

A decade ago this year, in *District of Columbia v. Heller*,<sup>1</sup> the Supreme Court first held that the Second Amendment protects a right to keep and bear arms unrelated to participation in an organized militia. Since that time, lower courts have scrambled to make the “Delphic”<sup>2</sup> pronouncements in *Heller* work as practical law. They have converged on what is generally described as the “two part test:”<sup>3</sup> a decision-making device that performs the essential function of sorting issues between the constitutional and non-constitutional (the “coverage” question); and the constitutionally compliant from the unconstitutional (the “protection” question).

For example, using a gun to rob a bank is a non-constitutional issue under the Second Amendment in the same way that uttering the words “your money or your life” in the same circumstances is a non-constitutional issue under the First Amendment.<sup>4</sup> There is no standard of scrutiny to be applied; no constitutional issue to decide with these facts. The Constitution simply “does not show up” in these cases.<sup>5</sup> By contrast, a regulation that requires firearms to be

1. 554 U.S. 570 (2008).

2. See Nelson Lund, *No Conservative Consensus Yet: Douglas Ginsburg, Brett Kavanaugh, and Diane Sykes on the Second Amendment*, ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS, July 2012, at 24 (“The real problem is that *Heller* is so Delphic, or muddled, that the kind of methodological debate found in *Heller II* is unresolvable.”).

3. See *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) (“A two-step inquiry has emerged as the prevailing approach.”).

4. See Glenn Harland Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 478 (1995) (“Just as the demand ‘your money or your life’ is not protected by the First Amendment, so the right to arms is not without limits.”)

5. See Joseph Blocher & Darrell A.H. Miller, *What is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 296 (2016) (quoting Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004) (internal quotation marks omitted)).

kept out of the reach of children may well raise a Second Amendment coverage issue, and yet may still be constitutional because the government has supplied sufficient justification for the regulation. Almost uniformly, the lower courts have employed some version of means-end scrutiny to perform this protection inquiry.<sup>6</sup> Usually the scrutiny is intermediate, but occasionally it is strict.

Although some judges have spurned the second portion of this test as illegitimate<sup>7</sup>—and although some successful as-applied challenges have blurred the lines separating the first and the second steps<sup>8</sup>—the two part test still represents the predominant mode of reasoning in the lower courts.

Professor Araiza’s bold move is to suggest that this two part test is too crude a description of actual judicial practice.<sup>9</sup> The test actually is composed of five parts and applies almost algorithmically. The refined test progresses as follows: (1) determine if there is even a Second Amendment issue; (2) evaluate how much of a burden the regulation places on the Second Amendment; (3) determine how close to the “core” of the Second Amendment the regulation touches; (4) choose a level of scrutiny based on proximity to the core; (5) apply a level of scrutiny (typically intermediate), with reference to the importance of the government interest, the relationship between those interests, and the regulation.<sup>10</sup>

I have a few quibbles with Professor Araiza’s explanation of the doctrine, not so much with its descriptive accuracy as with its analytical utility. First, I am not certain how distinct some of these steps are from each other. For example, it is not at all clear how much an inquiry into the “burden” on the right differs from an

6. See, e.g., *Nat’l Rifle Ass’n of Am., Inc.*, 700 F.3d at 194.

7. *Houston v. City of New Orleans*, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting), opinion withdrawn and superseded on reh’g by 682 F.3d 361 (5th Cir. 2012); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1280–81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

8. *Binderup v. Att’y Gen.*, 836 F.3d 336, 356–57 (3d Cir. 2016) (en banc), cert. denied, 137 S. Ct. 2323 (2017).

9. For additional empirical work on this topic, see Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms after Heller*, 67 DUKE L.J. 1433, 1452–53, 1507 (2018).

10. William D. Araiza, *Arming the Second Amendment—and Enforcing the Fourteenth*, 74 WASH. & LEE L. REV. 1801, 1843–45 (2017).

inquiry into the “core” versus “periphery” of the right. Courts appear apt to merge these steps when they benchmark burdens or cores at an unhelpful level of abstraction as, for example, describing the right as “self-defense.”<sup>11</sup> Further, as Justice Breyer predicted in his *Heller* dissent, courts nearly always stipulate the government’s interest in protecting citizens from gun violence as compelling or important.<sup>12</sup> Hence, the level of scrutiny typically turns on matters of fit, rather than on evaluations of the seriousness, or even genuineness of the government interest. I do not think courts have agreed on what, if any, distinction there is to be made between a “historical” versus a “longstanding” regulation. Not only does this distinction raise further issues about the relevant level of abstraction;<sup>13</sup> the two formulations could be discontinuous. Consider prohibitions on loaded guns in checked luggage, which has been the law since the late 1960s. It is perfectly possible that a court could find the regulation has no historical parallel (no airplanes in 1791), but could still be longstanding (it has been the law for nearly half a century). These are a few examples of my doubts about the analytical utility of the five-factor test. Although, again, I agree with Professor Araiza’s descriptive point that all of these approaches appear in the lower courts to various degrees.

The gravamen of Professor Araiza’s article, though, is not about Second Amendment doctrine itself, but its relationship to congressional enforcement power. His argument is that the muddled nature of Second Amendment doctrine after *Heller*—with its talk of cores and peripheries, its agnosticism concerning tiers of scrutiny, and its imprecise measures of history and longevity—complicates how a Court is supposed to evaluate Section 5 enforcement legislation after *City of Boerne v. Flores*.<sup>14</sup>

That enforcement jurisprudence is complex. Depending on the rights or persons Congress aims to protect, the Court’s review of

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11. *Grace v. District of Columbia*, 187 F.Supp.3d 124, 143 (D.D.C. 2016).

12. *Heller*, 554 U.S. at 689 (Breyer, J., dissenting).

13. For example, some bans on possession of firearms by felons and certain misdemeanants are upheld because of a general historical prohibition on gun ownership by the “unvirtuous.” Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1360 (2009).

14. 521 U.S. 507 (1997).

legislation can be either deferential or exacting. Professor Araiza does an excellent job of pulling apart the different components of the Court's Enforcement Clause jurisprudence and he mounts a heroic effort to systematize it. In general, the doctrine works hydraulically: the less scrutiny the Court itself provides the subject right or classification, the more it will scrutinize Congress's power to enforce those rights or classifications.

For instance, in *Boerne* the Court concluded that Congress exceeded its Fourteenth Amendment enforcement powers in passing the Religious Freedom Restoration Act (RFRA).<sup>15</sup> RFRA required courts to apply a higher standard of scrutiny to free exercise claims than the Court itself was willing to employ, and Congress had not demonstrated to the Court's satisfaction such widespread "religious bigotry" as to necessitate such a deviation from the Court's doctrine.<sup>16</sup> Consequently, RFRA was not sufficiently "congruent and proportional" to be a legal exercise of Congress's Section 5 power.<sup>17</sup> By contrast, in *Nevada Department of Human Resources v. Hibbs*,<sup>18</sup> the Court was less skeptical of congressional evidence of sex discrimination in family medical leave policy, presumably because the Court itself accords sex discrimination a higher standard of scrutiny. Hence, the Family and Medical Leave Act's<sup>19</sup> abrogation of state sovereign immunity was a "congruent and proportional" exercise of Congress's Section 5 power. My description of the hydraulics of court enforcement versus congressional enforcement of constitutional rights is, of course, a simplification. Professor Araiza's article identifies the workings with much more nuance, and is not blind to some of the paradoxes: sex discrimination garners "intermediate" scrutiny from the Court, but in fact, that scrutiny looks something more like strict scrutiny, or, perhaps

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15. Religious Freedom Restoration Act of 1993, Pub L. No. 103-141, 1993 U.S.C.A.N. (107 Stat.) 1488, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

16. *Flores*, 521 U.S. at 530.

17. *Id.* at 533 ("The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate ends to be achieved.").

18. 538 U.S. 721 (2003).

19. 29 U.S.C. §§ 2601–54 (2012).

“intermediate scrutiny with bite.”<sup>20</sup> Gender-neutral legislation to prevent sex discrimination when taking leave from work is constitutional when one takes leave to care for others but not when one takes leave to care for oneself.<sup>21</sup>

Professor Araiza leaves other paradoxes unmentioned. Chief among them is the relationship between the “congruence and proportionality” test and Eleventh Amendment sovereign immunity. The employment provisions of the Americans with Disabilities Act<sup>22</sup> and the Age Discrimination in Employment Act<sup>23</sup> lack “congruence and proportionality” when Congress attempts to break through the barrier of Eleventh Amendment sovereign immunity. But when a person sues an individual officer for prospective injunctive relief under the very same statutes, “congruence and proportionality” never enters the picture.<sup>24</sup> Similarly, it’s beyond dispute that subdivisions of states—counties, municipalities, school districts, townships—do not enjoy sovereign immunity.<sup>25</sup> Which raises a huge unanswered question: *City of Boerne* involved the *city* of Boerne, so why was the Fourteenth Amendment enforcement power even relevant?<sup>26</sup>

Admittedly, these paradoxes are outside the scope of Professor Araiza’s project. His primary observation is simple but important: the less clearly the Court articulates a Second Amendment standard using traditional doctrinal methods, the less clear is the constitutionality of congressional efforts to enforce the Second Amendment using Section 5. This ambiguity, which Professor

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20. Brent L. Caslin, *Gender Classifications and United States v. Virginia: Muddying the Waters of Equal Protection*, 24 PEPP. L. REV. 1353, 1395 n.359 (1997.)

21. Araiza, *supra* note 10, at 1832–35.

22. 42 U.S.C. §§ 12101–213 (2012).

23. 29 U.S.C. §§ 621–34 (2012).

24. Bd. of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356, 374 n.9 (2001).

25. *See id.* at 369 (“[T]he Eleventh Amendment does not extend its immunity to units of local government. These entities are subject to private claims for damages under the ADA without Congress’ ever having to rely on § 5 of the Fourteenth Amendment to render them so.” (citing *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890))).

26. *Cf.* *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389 (1978) (providing that municipalities are not automatically immune from liability under the Sherman Antitrust Act).



Araiza attempts to resolve, has practical consequences. If Congress were to pursue legislation like concealed carry reciprocity—and especially if it wanted to create a private right of action to enforce such legislation—it would have to anticipate how the Court would apply *Boerne* and its progeny, and, correspondingly, what kind of record it would need to assemble in anticipation of such a challenge.<sup>27</sup>

### *III. Dignity and the Enforcement Power*

Professor Araiza’s contribution to this area is welcome and illuminating. He has done a great service in describing the nuance of the Second Amendment test, in disassembling the enforcement clause jurisprudence, and in thinking through its application through a developing right to keep and bear arms. But I wonder if his analysis wouldn’t have been helped by attention to an additional factor—dignity—which seems to drive so much of this area of law.

Dignity, or rather, competing notions of dignity, seems to explain many of the conflicting judgments in these cases. First, there are competing dignitary interests between the Court and Congress. Congress enacted RFRA under a Warren Court-era assumption that Congress was a co-equal (or at least a junior) partner in specifying and channeling constitutional norms. The Court’s sharp rebuke of Congress in *Boerne* manifested its sense that Congress had drifted out of its lane, and that expansion of congressional enforcement power represented a diminution in its own constitutional prestige to “say what the law is.”<sup>28</sup>

Then there are the competing dignitary interests between Congress as constitutional enforcer and the sovereignty of the states. The Court relied on notions of dignity in *Shelby County v. Holder*,<sup>29</sup> concluding that the Voting Rights Act’s formula for pre-clearance, which treated different states differently based on their prior history of voting rights violations, violated the “equal sovereignty” principle of the Constitution, which accords every

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27. See Araiza, *supra* note 10, at 1867–68.

28. See *Boerne*, 521 U.S. at 535.

29. 570 U.S. 529 (2013).

state “equal . . . power, dignity and authority.”<sup>30</sup> Similarly, much of the federalism jurisprudence of last thirty years—often surrounding the Eleventh Amendment—rests on the notion that it is an affront to the dignity of states as sovereigns for Congress to subject them to private lawsuit without their consent.<sup>31</sup> The dignitary protections of sovereign immunity further curb congressional aspirations already diminished by *Boerne*.<sup>32</sup> Indeed, it seems that dignity of the state is the only coherent justification for these cases: given that sovereign immunity extends far beyond the actual terms of the Eleventh Amendment,<sup>33</sup> given that no political subdivision of a state shares the state’s sovereign immunity,<sup>34</sup> and given that no individual officer of the state *even if indemnified by the state* shares in the same immunity.<sup>35</sup>

Finally, there are the competing dignitary interests between individual rights claimants and the states. *Tennessee v. Lane*’s<sup>36</sup> holding that Title II of the Americans with Disabilities Act validly abrogates sovereign immunity is difficult understand without the corollary that an alternative holding would have forced a disabled individual to literally crawl up the steps of the courthouse to seek justice. As Justice Ginsburg said in her concurrence, “[l]egislation calling upon all government actors to respect the dignity of

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30. *Id.* at 544 (quoting *Coyle v. Smith*, 221 U.S. 559 (1911)). For more, see Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175 (2013).

31. *See* *Fed. Mar. Com’n v. S.C. State Ports Authority*, 535 U.S. 743, 760 (2002) (“The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”); *Alden v. Maine*, 527 U.S. 706, 749 (1999) (“Private suits against nonconsenting States, however, present ‘the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,’ regardless of the forum.” (quoting *In re Ayres*, 123 U.S. 443, 505 (1887))).

32. For more work in this area, see generally Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS OF AM. ACADEMY OF POL. SCI. 81 (2001) and Julie Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003).

33. *Alden*, 527 U.S. at 706.

34. *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).

35. *See* *Lewis v. Clarke*, 137 S. Ct. 1285, 1293–94 (2017) (“[I]ndemnification provisions do not implicate one of the underlying rationales for state sovereign immunity—a government’s ability to make its own decisions about the allocation of scarce resources.” (internal quotation marks and citation omitted)). Caminker makes a similar point. Caminker, *supra* note 32, at 84.

36. 541 U.S. 509 (2004).

individuals with disabilities is entirely compatible with our Constitution's commitment to federalism, properly conceived."<sup>37</sup> Dignity appeared prominently in Justice Kennedy's majority opinion in *Obergefell v. Hodges*.<sup>38</sup> And, unsurprisingly, the concept of dignity featured in the arguments and ultimate opinion about the relative rights of cake bakers and homosexual couples the recent *Masterpiece Cakeshop* case.<sup>39</sup>

As dignity does so much work, it is no surprise that gun rights supporters appeal to notions of dignity frequently in their public statements and briefs. Gun rights organizations have continually portrayed gun owners as a despised and vulnerable minority, in need of protection by the judiciary. Sometimes they argue that gun violence prevention measures are not based on reasonable policy metrics but motivated by anti-gun "bigotry."<sup>40</sup> (The premise here seems to be if the regulation is over- or under-inclusive, then the only reason for the regulation must be some type of animus.) Their arguments appear in official briefing papers: lower courts are engaging in "massive resistance" to gun rights, the Second Amendment is being treated as "second-class."<sup>41</sup> The rhetoric—to the extent it persuades some judges, Justices, and political actors—perfectly advances the goals of gun rights advocates. They are able to frame gun rights supporters as victims of a political process failure, deserving of special protection by judicial actors,

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37. A similar reasoning applies to the unanimous court's decision in *United States v. Georgia*, that Congress may use its section five power under the ADA in an Eighth and Fourteenth Amendment cruel and unusual punishment case, given the indignity that a state had left a paraplegic prisoner in a cramped cell to sit in his own waste. 546 U.S. 151 (2006).

38. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (explaining that the Fourteenth Amendment's protection of "liberties extend to certain personal choices central to individual dignity and autonomy").

39. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, No. 16-111, 2018 WL 2465172, at \*3, 7 (U.S. June 4, 2018); Transcript of Oral Argument at 28, 29, 100, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 137 S. Ct. 2290 (2017) (No. 16-111).

40. David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417, 462 (2014).

41. See Darrell A.H. Miller, *The Second Amendment and Second-Class Rights*, HARVARD LAW REVIEW BLOG (Mar. 5, 2018), <https://blog.harvardlawreview.org/the-second-amendment-and-second-class-rights/> (last visited May 12, 2018) (on file with the Washington and Lee Law Review).

and, should the judicial branch fail, they help cultivate a friendly record for any prophylactic Section 5 measure Congress may enact.<sup>42</sup>

#### *IV. Humility and the Enforcement Power*

But dignity is not the only value at play in Second and Fourteenth Amendment enforcement going forward. There is also humility: the recognition that human beings are fallible, that their judgments sometimes have unintended consequences, and that certain institutions may be better positioned to make decisions than others. To this extent, my instincts are not that different from Professor Araiza's. Like Professor Araiza, I agree that legislatures are in a better institutional position to weigh the costs and benefits of most firearm policies. And, also like him, I agree that Congress also has a better position to channel the moral and constitutional sentiments of the nation.<sup>43</sup> On this score, the humility courts should employ is not the faux one so often rehearsed in judicial confirmation hearings, but something more of the kind suggested by Adrian Vermeule (at least where Congress has decided to act).<sup>44</sup> This kind of humility would not lead to predictable results. The same kind of deference to legislative judgments about the need to restrict certain kinds of firearms would operate with respect to legislative judgments about the need to protect Second Amendment rights by allowing firearms to travel across state lines. This is not to say that other constitutional considerations are irrelevant.<sup>45</sup> It is just to say that, as between believing and not

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42. Furthermore, to the extent that Second Amendment rights are treated as indistinguishable from self-defense rights, self-defense doctrine sometimes is explained by reference to notions of dignity. *See generally* Margaret Raymond, *Looking for Trouble: Framing and the Dignitary Interest in the Law of Self-Defense*, 71 OHIO ST. L.J. 287 (2010).

43. *See* Araiza, *supra* note 10, at 1880 (remarking on Congress's "capacity for empirical investigation" and its "authority to speak for the values of the American people").

44. Adriane Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1507 (2007).

45. For example, it is undeniable that the more protective Congress or the states become with respect to firearm ownership, the more the protective laws will conflict with other, equally important constitutional values. *See* *Wollschlaeger v. Gov. of Fla.*, 848 F.3d 1293 (11th Cir. 2017) (striking down

believing Congress when it says that some kind of prophylactic legislation is needed, courts should pay Congress the respect it is due as an independent constitutional actor empowered by the Reconstruction Amendments.<sup>46</sup>

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portions of the Florida's Firearm Owners' Privacy Act (FOPA)—the so-called “Docks v. Glocks” law—on First Amendment grounds).

46. For more on this, see Darrell A.H. Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 COLUM. L. REV. 1811, 1852–53 (2011) (discussing Congress's Thirteenth Amendment enforcement power).