

Fall 10-9-2018

Originalism and Congressional Power to Enforce the Fourteenth Amendment

Christopher W. Schmidt

Chicago-Kent College of Law, cschmidt@kentlaw.iit.edu

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr-online>

 Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Fourteenth Amendment Commons](#), [Jurisprudence Commons](#), [Legal History Commons](#), [Legislation Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Christopher W. Schmidt, *Originalism and Congressional Power to Enforce the Fourteenth Amendment*, 75 WASH. & LEE L. REV. ONLINE 33 (2018), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol75/iss1/2>

This Response is brought to you for free and open access by the Law School Journals at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review Online by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.

Originalism and Congressional Power to Enforce the Fourteenth Amendment

Christopher W. Schmidt*

Abstract

In this Essay, I argue that originalism conflicts with the Supreme Court's current jurisprudence defining the scope of Congress' power to enforce the Fourteenth Amendment. Under the standard established in Boerne v. Flores, the Court limits congressional power under Section 5 of the Fourteenth Amendment to statutory remedies premised on judicially defined interpretations of Fourteenth Amendment rights. A commitment to originalism as a method of judicial constitutional interpretation challenges the premise of judicial interpretive supremacy in Section 5 jurisprudence in two ways. First, as a matter of history, an originalist reading of Section 5 provides support for broad judicial deference to congressional constitutional interpretive authority. Second, even if one accepts originalism as the best way for courts to interpret the Constitution, this assumption does not necessarily apply to nonjudicial actors when they are fulfilling their own constitutional responsibilities—such as members of Congress acting to enforce the provisions of the Fourteenth Amendment. Placing judicial originalism into the foreground of our discussion of Section 5 jurisprudence thus offers additional support for a broader reading of the congressional enforcement power than exists today under Boerne.

* Professor of Law, Associate Dean for Faculty Development, and Co-Director, Institute on the Supreme Court of the United States (ISCOTUS), Chicago-Kent College of Law; Faculty Fellow, American Bar Foundation; Editor, *Law & Social Inquiry*.

I would like to thank Bill Araiza, not only for writing the Article that gave rise to this Essay, but also for helping me develop my ideas through several conversations and then in the generous and insightful feedback he offered on a draft of this Essay.

Table of Contents

I. Introduction	34
II. The Original Meaning of Section 5	37
III. Originalism, Judicial Legitimacy, and the Section 5 Power	43
IV. Conclusion	51

I. Introduction

This Essay considers the relationship between originalism and the scope of Congress’ power to enforce the Fourteenth Amendment. I approach this topic by exploring the provocative hypothetical William Araiza presents in his important and enlightening new Article, *Arming the Second Amendment—and Enforcing the Fourteenth*¹: a federal statute, based on the enforcement clause of the Fourteenth Amendment, that protects the Second Amendment’s right to bear arms beyond those rights the Supreme Court explicitly recognized in *District of Columbia v. Heller*.² Araiza uses his hypothetical to illuminate flaws in the Court’s current enforcement power doctrine and to propose a different approach that would be more consistent and effective in defining the scope of the enforcement power.³

Araiza’s central argument is that the doctrine the Supreme Court has developed to determine the scope of congressional authority under Section 5 of the Fourteenth Amendment—the

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

2. 554 U.S. 570 (2008). The right that Congress would be enforcing would be the Fourteenth Amendment’s right to due process of law, which the Court has read to include the Second Amendment’s right to bear arms. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Araiza, *Arming*, *supra* note 1, at 1804–06.

3. Araiza’s *Arming the Second Amendment* builds on and expands his previous work on the enforcement power. WILLIAM D. ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW (2015); William D. Araiza, *The Enforcement Power in Crisis*, 18 U. PA. J. CONST. L. ONLINE 1 (2015); 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 (2014); William D. Araiza, *Deference to Congressional Fact-finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878 (2013); William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause*, 37 FLA. ST. U. L. REV. 451 (2010).

provision that empowers Congress to “enforce, by appropriate legislation,” the rights guaranteed in the amendment⁴—centers on the wrong object of analysis. Under the standard the Court established in *Boerne v. Flores*,⁵ Congress has the power under Section 5 to pass legislation to protect Fourteenth Amendment rights as long as these statutory remedies are premised on judicially defined interpretations of these rights.⁶ When Congress uses its Section 5 authority to protect against rights violations, these preventative measures must be “proportional and congruent” to the scope of any record of constitutional violations by the state.⁷ Araiza argues that this congruence and proportionality analysis should be based on “core constitutional meaning,” rather than the “decisional heuristics” the Court has developed in order to implement that constitutional meaning.⁸ Thus, in the context of his hypothetical legislation enforcing the Second Amendment’s right to bear arms, the proper baseline for measuring congruence and proportionality should be the meaning of the Second Amendment rather than the doctrinal gloss the courts have developed in their case law as they have adjudicated disputes involving this constitutional right. And this core constitutional meaning, according to Araiza, following the premise of the Court’s reasoning in *Heller*, derives from the original meaning of the Second Amendment.⁹

I find Araiza’s argument persuasive to the extent that, working within the contours of existing constitutional doctrine, as defined by both *Boerne* and *Heller*, he offers an improved version of the Section 5 doctrine. Compared to the Court’s current doctrine, Araiza’s approach is more solidly grounded in the original meaning of the Fourteenth Amendment.¹⁰ By paying more attention to the relative institutional competencies of the Court and Congress, it offers a more functional enforcement power. And Araiza’s alternative produces a clearer and more predictable Section 5

4. U.S. CONST. amend XIV, § 5.

5. 521 U.S. 507 (1997).

6. *Id.* at 539.

7. *Id.* at 520.

8. Araiza, *Arming*, *supra* note 1, at 1847.

9. *Id.* at 1851–56, 1895–96.

10. *Infra* Part I.

doctrine. His distinction between constitutional meaning and constitutional doctrine improves upon the excessively juricentric nature of the Court's current interpretation of Section 5.¹¹ His approach does not require Congress, when exercising its own constitutional responsibilities, to adopt the posture of an inferior court, whose job is to discern and apply the often complex peculiarities of the Supreme Court's constitutional jurisprudence. Araiza's less juricentric doctrine also offers a doctrine that allows Section 5 to better serve its democracy-enhancing role.¹² Araiza, in short, offers a better Section 5 doctrine.

In this essay I press on Araiza's analysis on one dimension, questioning his assumption that the original meaning of a constitutional provision, as determined by the Court, constitutes the "core constitutional meaning" that should be the baseline for measuring the scope of Section 5 authority.¹³

Araiza's hypothetical federal gun regulation offers an opportunity to reconsider the assumptions that define the constitutional landscape of the post-*Boerne*, post-*Heller* world. Even if, for the sake of argument, we accept original meaning as the best way for the Court to derive constitutional meaning in adjudicating constitutional disputes, it does not necessarily follow that originalism is the appropriate baseline from which we assess the scope of congressional enforcement authority under Section 5.

I offer two ways in which we can destabilize the linkage between the judicially determined original meaning of constitutional rights and the scope of congressional enforcement authority. The first is the original meaning of the congressional enforcement power. The history of the framing and ratification of the enforcement clause of the Fourteenth Amendment indicates a

11. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003).

12. See Christopher W. Schmidt, *Section 5's Forgotten Years: Congressional Power to Enforce the Fourteenth Amendment Before Katzenbach v. Morgan*, 113 NW. U. L. REV. 47 (2018); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000).

13. My challenge to the operating assumption Araiza relies on in his Article is not a critique of his decision to make that assumption. Araiza's approach is to work within the basic parameters the Court established in *Boerne* to identify a better approach to Section 5 jurisprudence. My approach, by contrast, is to question the parameters that *Boerne* established.

robust conception of congressional interpretive authority that would not be defined and delimited by judicial interpretations of the Constitution. The second is a conception of the Section 5 power, prominent before *Boerne*, under which the Court recognized a gap between judicial interpretations of constitutional meaning and the meaning that Congress attached to these constitutional provisions when using its enforcement authority.¹⁴ In resurrecting this lost approach to Section 5, I suggest that judicially derived originalist analysis could be treated, using under Araiza's framework, as yet another decisional heuristic, and therefore not necessarily the baseline for "core" constitutional meaning—at least not when non-judicial actors are expected to play a role in giving meaning to the Constitution.

II. The Original Meaning of Section 5

Considerable evidence shows that the history of the framing and ratification of the Fourteenth Amendment reflects an understanding of the enforcement power that is less deferential to Court-developed rules of constitutional interpretation than the model of the Section 5 power that Justice Kennedy offered in *Boerne* and that still holds today.¹⁵ There is a strong case, therefore, that an originalist judge should be skeptical of not only the doctrine-centered approach in *Boerne* that Araiza critiques, but also, more broadly, any approach to defining that Section 5 power that places the Supreme Court as a primary constraint on federal authority to protect Fourteenth Amendment rights. In other words, the very same commitment to originalism as the source of "core constitutional meaning" that motivates Araiza's

14. I explore this theme at length in Schmidt, *supra* note 12.

15. See, e.g., Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1805 (2010) ("[M]odern doctrine has not been faithful to the text, history, and structure of the Thirteenth, Fourteenth, and Fifteenth Amendments. These amendments were designed to give Congress broad powers to protect civil rights and civil liberties Congress gave itself these powers because it believed it could not trust the Supreme Court to protect the rights of the freedmen"); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 194 (1997) ("In *Boerne*, the Court erred in assuming that congressional interpretation of the Fourteenth Amendment is illegitimate. The historical record shows that the framers of the Amendment expected Congress, not the Court, to be the primary agent of its enforcement").

reconceptualization of how the Court should apply the *Boerne* model could also be used to undermine the *Boerne* model itself.

The people who framed the Fourteenth Amendment and advocated for its passage believed that Congress, using its Section 5 power, would play a leading role in protecting constitutional rights. They frequently referred to Congress and the possibilities of future congressional action under the Fourteenth Amendment; they referred only infrequently to the courts. Indeed, the leading advocates of the amendment were generally skeptical toward the Supreme Court.¹⁶ A central goal of the amendment, after all, was to overturn the *Dred Scott* decision¹⁷ and its holding that African Americans could not be citizens of the United States.¹⁸

The Congress-centered mindset of the framers of the Fourteenth Amendment is reflected in the fact that the first version of the amendment was framed as entirely a grant of power to Congress: “The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities . . . and to all persons in the several States equal protection in the rights of life, liberty, and property.”¹⁹ Critics in Congress worried that phrased in this way, as an express grant of plenary power to Congress to define the rights of all Americans, the proposed amendment granted the federal government excessive control over the states.²⁰ The Joint Committee on Reconstruction, which drafted the Fourteenth Amendment, eventually offered a new version of the proposed

16. See, e.g., McConnell, *supra* note 15, at 182 (“Section Five of the Fourteenth Amendment was born of the fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power.”).

17. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

18. See generally JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 53–54 (1956); ROBERT J. HARRIS, *THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS, AND THE SUPREME COURT* 53–55 (1960); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1329–33 (1952); John P. Frank & Robert F. Munro, *The Original Understanding of “Equal Protection of the Laws,”* 50 COLUM. L. REV. 131, 165 (1950).

19. CONG. GLOBE, 39th Cong., 1st sess., 1033–34 (Feb. 26, 1866); see also BENJAMIN B. KENDRICK, *JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 46, 50–51, 61 (1914).

20. See, e.g., CONG. GLOBE, 39th Cong., 1st sess., 1087 (Feb. 28, 1866) (Representative Davis warning of a “centralization of power in Congress in derogation of constitutional limitations”).

amendment that separated the definition of the rights in the opening section from the congressional enforcement provision in the closing section.²¹ Although the historical record does little to illuminate the reason the Joint Committee abandoned the original version and introduced the new one²² (members of Congress gave little attention to Section 5 in their debates over the Fourteenth Amendment²³), some scholars have argued the first version offers a key to identifying the ambitious, Congress-centered commitment of the amendment's framers.²⁴

In *Boerne*, Justice Kennedy offered a different interpretation of this drafting history, presenting it as evidence of a commitment on the part of the drafters to a more limited conception of Congress's enforcement power. "Under the revised Amendment," he wrote, "Congress' power was no longer plenary but remedial. Congress was granted the power to make the substantive constitutional prohibitions against the States effective.... The revised Amendment proposal did not raise the concerns expressed earlier regarding broad congressional power to prescribe uniform national laws with respect to life, liberty, and property."²⁵ After summarizing a member of Congress arguing for a more limited view of the enforcement power, Kennedy notes, "[s]cholars of successive generations have agreed with this assessment."²⁶

Although Kennedy cited "generations" of scholars in support of his narrow reading of Section 5, scholars who have looked at the history Kennedy cited have questioned his interpretation of the material.²⁷ He read the history in favor of his position that

21. CONG. GLOBE, 39th Cong., 1st sess., 1095 (Feb. 28, 1866); KENDRICK, *supra* note 19, at 83–84.

22. See, e.g., Ruth Colker, *The Supreme Court's Historical Errors in City of Boerne v. Flores*, 43 B.C. L. REV. 783, 798–99 (2002). John Bingham, one of the framers of the Fourteenth Amendment, would argue during an 1871 congressional debate that the change was immaterial to the underlying meaning of congressional power. CONG. GLOBE, 42nd Cong., 1st sess., app. 83–86 (Mar. 31, 1871); see also Michael P. Zuckert, *Congressional Power under the Fourteenth Amendment—The Original Understanding of Section Five*, 3 CONST. COMMENT. 123 (1986) (discussing Bingham explanation).

23. Colker, *supra* note 22, at 799–812.

24. See generally HARRIS, *supra* note 18, at 34–53; JACOBUS TEN BROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 187-190* (1951).

25. *Boerne v. Flores*, 521 U.S. 507, 522–23 (1997).

26. *Id.* at 523.

27. This statement, McConnell notes, "must have slipped past the cite

congressional authority under Section 5 must be constrained by the Court's interpretation of Section 1, based primarily on separation of powers principles. But the primary concern of the Thirty-Ninth Congress was not ensuring that the Court would constrain Congress (i.e., separation of powers). Rather, the primary concern in 1866 was federalism—a concern with how much power Congress could exercise under Section 5 vis-à-vis the states. As a matter of original meaning, questions of separation of powers and judicial supremacy were not explicitly considered by those who framed and ratified the Fourteenth Amendment.²⁸

So even if one accepts that the revision of the Fourteenth Amendment from a grant of authority to Congress to its final version indicated agreement that the Fourteenth Amendment did not constitute an abandonment of the principle of state sovereignty, the question remains open as to the balance of power within the federal government when acting under the amendment. The framers simply did not leave much of a record of their views of the relationship between the Supreme Court and Congress under the Fourteenth Amendment.²⁹ Although the issue has today become central to Section 5 doctrine, it was not an issue of major concern in 1866. Furthermore, even if one accepts that the changed wording had some significance in pulling back on congressional power there remains the question of determining how much of a limitation the revision signaled.

checkers. Even aside from the incongruity of making a claim about 'scholars of successive generations' when citing only two examples (Horace Flack in 1908 and Alexander Bickel in 1966), neither of the examples given supports the Court's reading The Court's position—that Congress lacks 'substantive' power but that it could go beyond judicially defined rights under its 'remedial' power—is contradicted by both Flack and Bickel, the only historians whom the Court cited on this point." McConnell, *supra* note 15, at 177 n. 151. See also Colker, *supra* note 22.

28. Robert A. Burt, *Miranda and Title II: A Morganic Marriage*, 1969 SUP. CT. REV. 81, 94.

29. Consider, for example, one of the few statements on the floor of Congress during debate on the Fourteenth Amendment explicitly referencing Section 5. Senator Howard defended Section 5 because it "casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it imposes upon Congress this power and this duty." CONG. GLOBE, 39th Cong., 1st sess., 2768 (May 23, 1866).

Further evidence of the broad original meaning of Section 5 can be found in the fact that many of the people who were involved in the drafting and ratification of the Fourteenth Amendment were also advocates for subsequent federal legislation designed to enforce that amendment.³⁰

Early precedents of the Supreme Court also reflect the prominence of this belief that Section 5 granted Congress broad discretion to protect Fourteenth Amendment rights—with the Court playing only a secondary, deferential role in the development of the Section 5 power. In its 1880 ruling in *Ex parte Virginia*,³¹ the Court upheld a provision of the Civil Rights Act of 1875 that made it a crime to discriminate on racial grounds in the selection of juries. In upholding the indictment of a state judge for violating this provision, the majority opinion explained that the Reconstruction Amendments, including the Fourteenth, “derive much of their force from [their enforcement] provision[s].” “It is not said,” the Court continued, “that the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation.” The Court then outlined a deferential standard for assessing the scope of the enforcement power echoing the language the John Marshall had used in his canonical case recognizing broad discretion in Congress when exercising its constitutionally enumerated authority, *McCulloch v. Maryland*: “Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the

30. ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 36 (1947) (citing as “[p]erhaps the best evidence” that the framers of the Civil War amendments “meant them to serve as a basis for a positive, comprehensive federal program” the fact “that during and just after the period when the Amendments were framed, Congress passed seven statutes establishing just such a federal program” (citation omitted)); McConnell, *supra* note 15, at 175–76; Colker, *supra* note 22, at 814–17.

31. 100 U.S. 339 (1880).

enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.”³² The reasoning in this passage reflects an assumption, prevalent at the time of the passage of the Fourteenth Amendment and in the years immediately following, that when it came to the scope of Section 5 authority, the Court should basically defer to Congress’s judgment in determining the meaning of the Fourteenth Amendment.

Thus we can see that the history of the framing of the Fourteenth Amendment, as well as early legislative and judicial efforts to interpret the scope of Section 5, point toward a robust Section 5 authority in which Congress, not the Supreme Court, is the institution understood to have primary responsibility to interpret the meaning of the Fourteenth Amendment’s rights protections. *Boerne*’s assumption that it is the particular role of the Court—and the Court alone—to define the meaning of the Fourteenth Amendment is not supported by the original meaning of the Fourteenth Amendment.

Originalists have tended toward judicial interpretive supremacy.³³ But in the context of Section 5, originalism conflicts with judicial interpretive supremacy. Considering the history of the Fourteenth Amendment, when it comes to the Section 5 power, the more faithfully originalist position is one that recognizes a

32. *Id.* at 345–46. See *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”) See also *Strauder v. West Virginia*, 100 U.S. 303, 306–07 (1880).

33. Justice Scalia, for instance, advocated an extremely narrow conception of the Section 5 power. See *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 743 (2003) (Scalia, J., dissenting) (arguing that Section 5 “prophylactic legislation” can be applied against a particular State only if it is first shown that “the State has itself engaged in discrimination sufficient to support the exercise of Congress’s prophylactic power.”). Scalia viewed the Section 5 power as basically a subsidiary enforcement mechanism for the Courts. For a critique of Scalia’s approach, see Robert Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Courts, Culture, and Law*, 117 HARV. L. REV. 4, 33–34 (2003) (explaining that Scalia “confuses the judicial power of allocating individual blame and responsibility with the legislative power granted to Congress by Section 5”).

shared role for Congress in giving meaning to the protections of Fourteenth Amendment.

III. Originalism, Judicial Legitimacy, and the Section 5 Power

Having shown that an originalist reading of Section 5 provides support for broad judicial deference to congressional constitutional interpretive authority, in this section I turn to another reason an originalist may be skeptical of *Boerne's* narrow, Court-centric reading of Section 5. My key point here is that much of the strength and appeal of originalism as a method of constitutional interpretation derives from claims about the particular competencies of judges and lawyers. The case for originalism has less force when applied to nonjudicial actors—such as members of Congress who are exercising their authority to enforce the provisions of the Fourteenth Amendment.

To cite one prominent example, Justice Scalia defended originalism because of what he saw as its particularly judicial and lawyerly qualities. He described the Constitution as “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.”³⁴ Scalia went on:

If the Constitution were not that sort of a ‘law,’ but a novel invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature? One simply cannot say, regarding that sort of novel enactment, that “[i]t is emphatically the province and duty of the judicial department” to determine its content. Quite to the contrary, the legislature would seem a much more appropriate expositor of social values, and its determination that a statute is compatible with the Constitution should, as in England, prevail.³⁵

Interpreting the Constitution, Scalia concluded, is “essentially lawyers’ work—requiring a close examination of text, history of

34. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).

35. *Id.*

the text, traditional understanding of the text, judicial precedent, and so forth.”³⁶

This kind of defense of originalism may lead in two different directions. One is judicial supremacy: because the Constitution is a legal document, it should be left to judges and lawyers to tell the American people what it means. This was Scalia’s belief and it is the premise of *Boerne*. But there is another direction available, one that Scalia and most other originalists have eschewed but that nonetheless is consistent with Scalia’s defense of originalism. The other direction is some version of interpretive pluralism: when judges and lawyers are charged with interpreting the Constitution, they should rely on traditional legal tools to do so; but when nonjudicial actors are fulfilling their constitutional responsibility to give meaning to the Constitution—such as members of Congress when exercising their Section 5 authority—then they need not necessarily be so constrained. The flaw in Scalia’s defense of originalism, according to this approach, is not in his assessment of his role as the judge in interpreting the Constitution. Its flaw is in the idea that judges should be telling everyone else what the Constitution *is*.

Even if one accepts that the Constitution should be treated as a legal document for purposes of judicial interpretation, it need not necessarily be this when those outside the courts are fulfilling their constitutional responsibilities. Franklin Roosevelt famously described the Constitution as a “layman’s document, not a lawyer’s contract.”³⁷ The powers of the national government are defined, Roosevelt said, using “generality, implication and statement of mere objectives,” language that “flexible statesmanship of the

36. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 46 (1997). See also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* xxviii (2012).

Scalia was not alone among the pioneers of modern originalism in defending the theory based on particularly judicial concerns. See, e.g., Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J. L. & PUB. POL’Y 5, 10 (1988) (asserting that judges act properly when they evaluate the constitutionality of act using the Constitution’s plain words as originally understood because doing so “treat[es] the Constitution as the supreme law and . . . enforce[es] the will of the . . . democratic majority that ratified the constitutional provision at issue”).

37. Franklin D. Roosevelt, *Address on Constitution Day, Washington, D.C.*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=15459> (last visited Aug. 4, 2018).

future, within the Constitution, could adapt to time and circumstance.”³⁸ More recently, scholars who have defended various forms of extrajudicial constitutionalism have echoed Roosevelt’s characterization of the Constitution.³⁹

One need not be a dedicated popular constitutionalist to recognize that Congress’ Section 5 authority could be premised on an understanding of the Constitution as something other than a legal document. Take, for example, Michael McConnell, one of the most skilled and dedicated defenders of originalism,⁴⁰ who has also written one of the most powerful critiques of *Boerne*.⁴¹ McConnell argues that Section 5 grants Congress more than simply the authority to provide remedies for judicially defined Fourteenth Amendment rights. His defense of a broad Section 5 power stems not only from his reading of the history of Section 5 (i.e., an originalist interpretation of Section 5), but also from his views on the distinct competency and legitimacy concerns of the judiciary and Congress. He writes:

[W]hen Congress interprets the provisions of the Bill of Rights for purposes of carrying out its enforcement authority under Section Five, it is not bound by the institutional constraints that in many cases lead the courts to adopt a less intrusive interpretation from among the textually and historically plausible meanings of the clause in question. Because these institutional constraints are predicated on the need to protect the discretionary judgments of representative institutions from uncabined judicial interference, there is no reason for Congress—the representatives of the people—to abide by them. Congress need not be concerned that its interpretations of the Bill of Rights will trench upon democratic prerogatives, because its actions are the expression of the democratic will of the people.⁴²

McConnell advocates a middle-ground approach to congressional authority under Section 5, which he labels an

38. *Id.*

39. See, e.g., LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 216–18 (2004); Post, *supra* note 11, at 26.

40. See, e.g., Michael McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

41. See McConnell, *supra* note 14.

42. *Id.* at 156.

“interpretive” approach. In exercising its enforcement power, Congress should not be required to defer to the Supreme Court’s definition of the Fourteenth Amendment, as *Boerne* requires. Nor should Congress have unfettered “substantive” authority, which would permit Congress to “pass legislation based solely on its legislative judgment about what rights people should have.”⁴³ Under McConnell’s interpretive approach, Congress’ authority is constrained, but it is constrained by the Constitution rather than the courts’ interpretation of the Constitution. Congress would be limited to “good faith interpretations of the meaning of the Fourteenth Amendment, just as the judiciary is.”⁴⁴ “The question in a Section Five case,” McConnell writes, “should be whether the congressional interpretation is within a reasonable range of plausible interpretations—not whether it is the same as the Supreme Court’s.”⁴⁵ Although he does not delve into exactly what constitutes a “good faith” or “plausible” interpretation of the Constitution, I would posit that a dedicated originalist, particularly one whose originalist commitments derive at least in part from views of the distinctive capacities of judges and courts, could accept that nonjudicial actors might in good faith rely on nonoriginalist interpretations of the Constitution.

This alternative approach defends originalism as the best way for courts to interpret the Constitution but it allows that nonjudicial actors may locate alternative readings of the Constitution—readings that may or may not align with the originalism of judges and lawyers. In many instances, when nonjudicial actors read the Constitution differently than judicial actors, the courts will need to exercise their authority to “say what the law is” and strike down the constitutional claim of the nonjudicial actor. This would be the case whenever a court concludes that a government action violates a provision of Section 1 of the Fourteenth Amendment, for example. But in other instances, nonjudicial actors might engage in constitutional decision making by relying on a reading of the Constitution that diverges from a “judicial” reading of the Constitution (for an originalist, this would be one based on original meaning). The

43. *Id.* at 171.

44. *Id.*

45. *Id.* at 184.

courts would not need to strike down this act of constitutional decision making simply because it relies on a nonoriginalist reading of the Constitution.

This then brings us back to Araiza's diagnosis of current Section 5 doctrine. If we assume that a judge who chooses originalism as her preferred method of constitutional interpretation does so because, at least in part, she believes it is well suited to the role of a judge, then we might question Araiza's equation of originalism with identification of "core" constitutional meaning. Originalism may be defensible as the best approach to constitutional interpretation for the judiciary, but an originalist judge could believe that a nonjudicial actor might, in good faith, adopt a method of constitutional decision making that is not originalist. A judicial originalist could accept that our constitutional system allows nonjudicial actors to rely on modes of constitutional engagement other than originalism—modes that are better suited to the institutional competencies of these nonjudicial actors.⁴⁶

Araiza equates originalist analysis with the derivation of "core constitutional law," which he contrasts with "mere decisional heuristics" (such as the levels of scrutiny analysis).⁴⁷ The former is driven by a search for constitutional truth. The latter by "concerns about institutional competence rather than a statement of core constitutional meaning."⁴⁸ But this point seems to be in potential tension with originalism as a theory of constitutional interpretation whose proponents justify it based on its suitability for *judges*. Why not treat originalism as a kind of "decisional heuristic," justified in terms of the institutional competence of judges rather than some unique insight into the true meaning of the Constitution?⁴⁹

46. For the classic accounting of "modalities" of constitutional interpretation, with originalism recognized as just one among at least six modalities, see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

47. Araiza, *Arming*, *supra* note 2, at 1850–51, 1847.

48. *Id.* at 1847.

49. The strongest counter argument to my analysis is the one offered by many modern day originalists: originalism, they argue, is not a methodology whose justification relies on judicial competencies. Rather, it is simply the correct way to interpret the Constitution. Regardless of whether the interpreter is a judge or an elected official, they must be guided by the Constitution's original meaning because originalism is the only way. See, e.g., William Baude, *Originalism as a*

Lawrence Sager, whose theory of underenforced constitutional norms Araiza draws on for his key distinction between core meaning and doctrinal heuristics, does not equate originalist analysis with defining the scope of “constitutional norms” and thereby deriving the “full conceptual boundaries” of a given constitutional provision.⁵⁰ Sager defined an underenforced constitutional norm as “those situations in which the Court, because of institutional concerns, has failed to enforce a provision of the Constitution to its full conceptual boundaries.”⁵¹ He writes: “[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.”⁵² If we follow Sager, to demand that Congress defer to originalist interpretation of the Fourteenth Amendment would be the equivalent of saying that nothing but an originalist interpretation is “analytically defensible.”

To sum up: a committed, conscientious originalist judge could believe that originalism is the best way for judges to interpret the Constitution while still recognizing that extrajudicial actors—such as members of Congress—might come to different conclusions when deciding on the best method of constitutional interpretation. The extrajudicial actor might, for example, believe that post-ratification history or prudential concerns should play a stronger role in giving meaning to open-textured constitutional provisions, such as the Due Process and Equal Protection Clauses. If an extrajudicial actor, acting on this reading of the Constitution, passes a law or engages in some other action that the Court deems, according to its best reading of the Constitution, to violate the Constitution, then the Court would strike down that law if it came before the Court in an appropriate case or controversy. But if that extrajudicial actor took an official action based on his best reading

Constraint on Judges, 84 U. CHI. L. REV. 2213, 2215 (2017) (“[M]odern originalists have tended to deemphasize the importance of constraining judges, relying instead on other arguments—that originalism is normatively desirable for other reasons, that it is an account of the true meaning of the constitutional text, or that it is required by our law.” (citations omitted)).

50. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

51. *Id.*

52. *Id.* at 1241.

of the Constitution (which happened to be non-originalist)—and the resulting action or legislation did not violate any judicially defined constitutional limitations—then the conscientious originalist judge could very well recognize the legitimacy of methodological pluralism outside the courts.

This recognition of the possibility of different methods of constitutional interpretation by nonjudicial actors might even serve to better protect the interests of the originalist judge. Originalism can be strong medicine; it can produce outcomes that are unpopular. In situations where other governmental actors who share constitutional responsibilities might not be constrained by originalism, an originalist judge might welcome sharing interpretive responsibility. It might be good for originalism and good for the courts if originalists did not insist on interpretive hegemony.

Consider the example of Justice Hugo Black, who, while serving on the Supreme Court between 1937 and 1971, developed a jurisprudence based on textualism and history that in some ways anticipated the originalism that has come into vogue in recent decades. Although evaluations of Black's judicial legacy rarely include his views on Section 5, he, perhaps more than any of his colleagues, embraced the idea that the enforcement provisions of the Reconstruction Amendments empowered Congress to address activity that would not necessarily be held unconstitutional if challenged in the courts. Justice Black's sweeping reading of congressional powers under Section 5 was of a piece with his uncompromising rejection of his liberal colleague's broad reading of the Fourteenth Amendment.⁵³

When, for example, the Court confronted the "sit-in cases"—appeals of criminal convictions of participants in lunch counter protests against racially segregated lunch counters—Black was adamant that neither the business operators' racially discriminatory policy nor the states' use of race-neutral trespass laws to enforce these policies violated the Equal Protection Clause.⁵⁴ Yet he insisted at the same time that Congress had

53. See *infra* notes 54–58.

54. *Bell v. Maryland*, 378 U.S. 226, 318 (1964) (Black, J., dissenting); CHRISTOPHER W. SCHMIDT, *THE SIT-INS: PROTEST AND LEGAL CHANGE IN THE CIVIL RIGHTS ERA* 130–31, 146, 148–50 (2018).

Section 5 authority to prohibit racial discrimination in privately operated public accommodations.⁵⁵

Black took a similar approach to a constitutional challenge to the poll tax. When the Court struck down the poll tax as violating the Equal Protection Clause, Black dissented.⁵⁶ But he insisted that Congress had Section 5 authority to ban the poll tax “if it believes that the poll tax is being used as a device to deny voters equal protection of the laws.” He went on: “[F]or us to undertake in the guise of constitutional interpretation to decide the constitutional policy question of this case amount, in my judgment, to a plain exercise of power which the Constitution has denied us, but has specifically granted to Congress.”⁵⁷ Black distinguished the act of constitutional interpretation (the work of judges) from the creation of “constitutional policy” outside the courts. The methods Black used, as a judge, to extract meaning from the text of the Constitution he did not demand that Congress apply when exercising its enforcement authority.

The premise of Black’s Section 5 jurisprudence was his recognition of a gap between judicial interpretations of Section 1 rights and congressional interpretations of Section 1 rights in the course of exercising Section 5 authority. Black believed that Congress could define for itself what the provisions of the Fourteenth Amendment meant, even if that definition did not align with the way the courts had defined its provisions. For Black, and for the many others during the years of the Warren Court who accepted this idea of a Section 1–Section 5 “gap,” this premise was not some kind of bold or radical innovation. To the contrary, it was often advanced as a more cautious route to constitutional change, one that allowed Congress rather than the courts to take a leading role in confronting the challenges of breaking down the structures of white supremacy in American law and society.⁵⁸

If we believe that originalism’s justification rests in some part of the particular competencies of judges, then we should allow that

55. *Bell*, 378 U.S., at 326, 331, 343, 345; *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 278-79 (1964) (Black, J., concurring); SCHMIDT, *supra* note 54, at 169–71.

56. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) (Black, J., dissenting).

57. *Id.* at 679.

58. See Schmidt, *supra* note 12.

Congress may rely upon different interpretive tools when undertaking its constitutional responsibilities. In the context of Section 5, we might ask why Congress need necessarily to be limited to originalism as a methodology when exercising its role in giving meaning to the Fourteenth Amendment. Justice Black's jurisprudence suggest that this could be a viable alternative approach for an originalist jurist.

IV. Conclusion

In this Essay I have revisited the questions Araiza introduces so provocatively in *Arming the Second Amendment*. If Congress were to pass a law designed to expand gun rights, using its Section 5 authority to enforce the Fourteenth Amendment, how should the Court evaluate the constitutionality of such a law? How might such a hypothetical illuminate the strengths and weaknesses of current Section 5 jurisprudence? I suggest that the very same analytical moves that Araiza uses to critique the Court's current application of the *Boerne* standard could be used to question the *Boerne* standard itself. For the Second Amendment hypothetical demands that we confront Justice Scalia's *Heller* decision, and this requires that we consider the place of originalism as a method of constitutional interpretation in Section 5 doctrine. The introduction of originalism into our analysis of Section 5, I argue, provides a basis to challenge the *Boerne*-assumption that the Courts alone are capable of producing constitutional meaning.

As I have sought to show in the preceding pages, originalism challenges the premise of judicial interpretive supremacy in Section 5 jurisprudence in two ways, one historical, the other functional. As a matter of history, there is considerable evidence that the original understanding of the Fourteenth Amendment did not revolve around a judicial supremacist vision of constitutional interpretation. To the contrary, those who framed the Fourteenth Amendment and advocated for its passage and ratification assumed that Congress, not the courts, would take the lead in giving meaning to the general language of the Amendment's first section.

As a matter of function—that is, as a matter of creating constitutional practices that operate to protect the core principles

of the Constitution—placing judicial originalism into the foreground of our discussion of Section 5 jurisprudence offers additional support for a broader reading of the congressional enforcement power than currently exists today under the doctrinal standard of *Boerne*.

Araiza argues that his approach offers a way in which the Court can reconcile “its insistence on stating constitutional meaning and its ostensible respect for congressional determinations that Congress is best-suited to make.”⁵⁹ These goals, I suggest, are in some tension with one another. These tensions are placed in sharp relief when we consider the judge-centered rationales that bolstered originalism’s rise to prominence as a method of judicial constitutional interpretation. Attention to the competencies of Congress indicates that the Court should be less insistent on its claims for interpretive supremacy; or, at least it should be less insistent in its claims for supremacy over the proper methodology by which the meaning of the Constitution can be discerned.

In situations where judges cannot justify robust Fourteenth Amendment rights protections on originalist grounds, they should welcome congressional initiatives that expand rights protections under its enforcement authority. Recognizing a potential gap between judicial interpretation of Section 1 and congressional enforcement of Section 5 offers a way to protect the integrity of originalism as a theory as well as the legitimacy of the courts. Originalism is most powerful as an interpretive theory designed to impose meaningful limits on judges. Its constraints need not, and perhaps should not, similarly constrain Congress when it acts under its Section 5 authority. This is the approach Justice Black embraced in the 1960s. Extending broad deference to Congress when enforcing Fourteenth Amendment rights he believed better justified his commitment to the constraints of textualism and originalism. If future Congresses were to do more to exercise their enforcement authority to protect the rights of Americans—whether they be the religious, economic, or gun rights favored by the conservatives, or the antidiscrimination agenda favored by liberals—originalist judges might want to reconsider *Boerne*’s premise of judicial interpretive supremacy.

59. Araiza, *supra* note 2, at 1893.