FSU Conference participants—As you'll see, this draft as currently written indulges in a bit of speculative fiction, in that it is framed around one possible outcome in *Louisiana v. Callais*. That framing will change depending on what the justices do with *Callais*, but the bulk of the piece is not dependent on the outcome or reasoning of that case. I look forward to your feedback—LAR

RECONSIDERING CONGRUENCE AND PROPORTIONALITY AFTER LOUISIANA V. CALLAIS

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ABSTRACT

In Louisiana v. Callais*, the Supreme Court* [*invalidated race-conscious legislative districting under section 2 of the Voting Rights Act as beyond congressional power to enact under the enforcement provision of the Fifteenth Amendment.*] *In so doing, it reignited a debate about the proper test the Court should use to evaluate the scope of that power. The "congruence and proportionality" test [embraced by the Court in* Callais] *has been broadly criticized, including by Justice Antonin Scalia, one of the Court's most prominent originalists. The self-described originalist justices on the current Court nonetheless embraced the test and extended its reach by transplanting it from the Fourteenth Amendment context in which it originated into the Court's Fifteenth Amendment jurisprudence. This was a mistake. As we show, the test is inconsistent with modern originalist understandings of constitutional interpretation, construction, and liquidation. The meaning of enforcement provisions was fully liquidated by more than 100 years of settled practice. This practice began shortly after ratification of the Reconstruction Amendments and continued until* City of Boerne v. Flores, *the 1997 case that introduced the congruence and proportionality test. Moreover, even if the meaning of the enforcement provisions had not been fully liquidated (or was "reliquidated" by* Boerne*). the* Boerne test *itself is best understood as a constitutional construction adopted to constrain congressional power over the capacious rights protected by the Fourteenth Amendment, rather than an interpretation of the meaning of the enforcement provisions themselves. As such, the* Callais *Court doubly erred in expanding the reach of the test into the very different context presented by the Fifteenth Amendment.*

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INTRODUCTION

In *Louisiana v. Callais,* the self-described originalist justices on the U.S. Supreme Court [held that section 2 of the Voting Rights Act was beyond congressional power to enact under the enforcement provision of the Fifteenth Amendment.] Prior to *Callais*, section 2 had been interpreted as requiring states in certain situations to draw legislative districts enabling geographically concentrated and politically cohesive members of racial minority groups to elect representatives of their choice. In *Callais,* [the Court ruled Congress lacked enforcement power to require this. The substantive protection of the Fifteenth Amendment, the Court held, prohibited only intentional racial discrimination. Congress could not, therefore, use its enforcement power to mandate a remedy based solely on discriminatory effects. Because nothing in section 2 required a showing of intentional discrimination, the Court held it was beyond the reach of the enforcement power, at least as it had been previously construed.]

Callais reignited a simmering dispute about what test courts should use to determine the scope of congressional power under the Fifteenth Amendment. The enforcement provision of that amendment gives Congress

power to "enforce" the substantive provisions of the amendment through "appropriate" legislation. In a 1997 case, *City of Boerne v. Flores*,[1] the Supreme Court devised the "congruence and proportionality" test to restrain congressional authority under a nearly-identical provision in the Fourteenth Amendment. In the years following *Boerne*, many legal commentators assumed that the Court would apply the same test when next presented with the opportunity to define the enforcement provision of the Fifteenth Amendment.[2]

But that didn't happen. Instead, the Court repeatedly declined to extend the congruence and proportionality test beyond the confines of the Fourteenth Amendment.[3] The Court's apparent reticence to embrace the

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[1] City of Boerne v. Flores, 521 U.S. 507, 530, 533 (1997).

[2] *See, e.g.*, Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1258 n.329 (2016) (evaluating the equal sovereignty principle in *Shelby County* and "treat[ing] the Reconstruction Amendments collectively" even though "[t]here may be reasons why *Boerne*'s congruence-and-proportionality requirement would not apply to the Fifteenth Amendment"); Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2078 (2018) (stating that "*Boerne*'s congruence-and-proportionality test likely applies with equal force to Section 2 of the Fifteenth Amendment" because they have "materially identical language," "were enacted barely a half year apart from each other as part of Reconstruction[,]" "[t]he Court has previously interpreted both provisions in an identical manner," "[a]nd both provisions raise the same separation-of-powers concerns"); Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1593 (2019) (discussing constitutional concerns for section 2 of the VRA under congruence and proportionality while acknowledging that "*City of Boerne* dealt only with the Fourteenth Amendment, leaving the Fifteenth Amendment standard undetermined"). *See also* Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1568 n.99 (citing these sources for the same proposition).

[3] In 2023, in *Allen v. Milligan*, the justices declined to adopt it in the Fifteenth Amendment context even when asked to do so in a case, like *Callais,* involving the constitutionality of section 2 of the VRA. Allen v. Milligan, 599 U.S. 1 (2023). The Court also ignored the congruence and proportionality test in 2013 in *Shelby County v. Holder*, as well as in other cases involving the scope of congressional power under the Thirteenth Amendment, which also contains an enforcement provision. Shelby County v. Holder, 570 U.S. 529 (2013). In fact, between *Boerne* and *Callais,* the Court has used the test almost exclusively to invalidate congressional efforts to abrogate state sovereign immunity under the Eleventh

congruence and proportionality test outside of the Fourteenth Amendment context for as long as it did may be less puzzling than it initially seems. *Boerne*'s cramped understanding of congressional power was harshly criticized by legal scholars from across the ideological spectrum.[4] Among the most prominent of its critics was Justice Antonin Scalia, who for decades was the Court's most vocal originalist. Scalia abandoned the test in 2004 in *Tennessee v. Lane*, deriding it as both "flabby" and ungrounded in the text or original meaning of the Fourteenth Amendment.[5] This critique, from such an influential figure, may have given the originalists justices on the current Court some pause.

[Yet in *Callais*, after years of dodging the question, the Court finally not only embraced the congruence and proportionality test but extended it from the Fourteenth Amendment context in which it originated into its Fifteenth Amendment jurisprudence.] This was a mistake. As we demonstrate below Justice Scalia was correct, at least to the extent his dissent in *Lane* rejected the congruence and proportionality test as not dictated by the original public meaning of the enforcement provisions and inappropriate in the context of the Fifteenth Amendment.[6] As we show, the test is inconsistent with modern originalist understandings of constitutional interpretation, construction, and liquidation.

This is so in two ways. First, the meaning of enforcement provisions had been fully liquidated by more than 100 years of settled judicial practice giving courts final say over the rights protected by the substantive provisions of the relevant text but then deferring to congressional judgment about how to protect such rights once judicially recognized. This practice began shortly

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Amendment, while leaving the regulatory effect of the challenged law in place under the Commerce Clause. See Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1158 (2001). *See also,* WILLIAM D. ARAIZA ENFORCING THE EQUAL PROTECTION CLAUSE 114, 118 (2018).

[4] *See, e.g.*, Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1815 (2010); Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725 (1998); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 194 (1997).

[5] Tennessee v. Lane, 541 U.S. 509 (2004).

[6] This does not mean we agree with the cramped understanding of congressional power under the Fourteenth Amendment he embraced instead. Rather, as we discuss below, both his exceptions and his reasoning support our argument that whatever its value in the Fourteenth Amendment context, the test is inappropriate in the context of the Fifteenth Amendment.

after the Reconstruction Amendments were ratified, was used by justices writing both majority and minority opinions, and was grounded in reasoned constitutional arguments. In the language of modern originalism, this long-standing practice fully liquidated the meaning of the enforcement provisions. Second, even if the meaning of the provisions had not been fully liquidated (or if they were "re-liquidated" in *Boerne*[7]) the congruence and proportionality test is best understood, again in the language of modern originalism, as a constitutional construction adopted to constrain congressional power over the capacious rights now recognized as within the substantive provisions of the Fourteenth Amendment rather than a constitutional interpretation of the meaning of the enforcement provision itself. As such, its value is significantly diminished in the very different context of the Fifteenth Amendment and [the *Callais* Court erred in extending it into that space.]

We develop this argument in four parts.

In Part I, we recap the moves made by modern originalists in delineating constitutional interpretation, constitutional construction, and liquidation.

In Part II, we demonstrate how the Court's approach to congressional enforcement powers from the late 1800s through *Boerne* fully liquidated the meaning of that power. As we show, the Court's consistent and settled practice evidenced a well-accepted two-tiered approach to enforcement power questions. First, the justices retained for themselves the right to determine what substantive rights are protected by the Reconstruction Amendments, often by insisting that congressional enforcement powers are "corrective" or "remedial," thereby limiting congressional power to use the enforcement powers to enact what early courts would refer to as plenary or general police powers. Second, the Court regularly described congressional power to enforce the substantive provisions of those amendments, once judicially recognized, in deferential terms echoing those used by Chief Justice John Marshall in *McCulloch v. Maryland*, i.e., Congress is empowered to enforce the substantive provisions of the amendments in ways similar to its power under the Necessary and Proper Clause, meaning it can use any appropriate and not prohibited means to advance a constitutional

[7] David S. Schwartz, *Madison's Waiver: Can Constitutional Liquidation Be Liquidated?*, 72 Stan. L. Rev. Online 17, 25 (2019) (arguing that liquidations that can themselves be liquidated violate the originalist principle of Fixidity, and more generally that the malleability of liquidation is inconsistent with the constraint principle).

end.[8] We conclude this Part by explaining how *Boerne* broke from this well-established past practice.

In Part III, we show that even if the meaning of the enforcement powers had not been fully liquidated by this more than century-long practice, [the *Callais* Court nonetheless erred by transplanting the congruence and proportionality test from the Fourteenth Amendment into the Fifteenth Amendment context.] Again tapping the language of modern originalism, we demonstrate that the test is best understood, using that methodology, as a constitutional construction of the second part of the traditional test rather than a constitutional (re)interpretation of the enforcement power itself.[9] We support this argument by reconsidering two important moments in the development of the congruence and proportionality test: Justice Scalia's critique of the test in his *Tennessee v. Lane* dissent; and Justice Kennedy's majority opinion in *Boerne* itself. Both of these opinions, as we show, support the argument we make here.

Finally, in Part IV we show how, as a constitutional construction, the congruence and proportionality test should play no role in defining congressional powers under the enforcement provision of the Fifteenth Amendment. To originalists, constitutional constructions are not themselves dictated by the meaning of the relevant text. Rather, they are tools used to give legal effect to the meaning of ambiguous, vague, or otherwise under-determinate constitutional provisions.[10] *Boerne's* congruence and proportionality test may have been an acceptable way to do that in the context of the Fourteenth Amendment (especially as presented in *Boerne*) but there is no constitutional or logical need for an originalist judge to apply the same test when evaluating the scope of congressional powers in the very different context of the Fifteenth Amendment. In addition, its application in that context may well be incompatible with the meaning of the enforcement power, as understood by current scholars. If so, applying it would violate one of the core principles of originalist methodology: that a constitutional construction cannot be inconsistent with the meaning of the text to which it is giving effect.

We begin our discussion of these issues with a brief refresher of recent developments in originalist theory delineating constitutional construction, interpretation, and liquidation.

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[8] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

[9] As noted in Part I, our focus throughout this paper is on original public meaning originalism, although we do reference other originalists methodologies.

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I. INTERPRETATION, CONSTRUCTION, AND LIQUIDATION

A majority of justices currently sitting on the U.S. Supreme Court, [as well as [all] of the justices in the *Callais* majority,] identify themselves as originalists.[11] As is well-understood, "originalism" today is not a single constitutional theory, but rather as a family of related theories.[12] What unifies these theories is adherence to two core ideas: the Fixation Thesis and the Constraint Principle.[13] Combined, these ideas stand for the proposition that the communicative context of the constitutional text is fixed when framed and ratified, and that constitutional actors should be constrained by that fixed meaning when deciding constitutional cases or otherwise engaging in constitutional decision-making.[14]

Most originalists today also embrace two additional propositions: that the communicative content of constitutional text is determined by its original public meaning; and that there is a distinction between constitutional interpretation and constitutional construction.[15] Constitutional

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[12] Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 436 n.8 (2023) (citing Larry Alexander, *Simple-Minded Originalism, in* THE CHALLENGE OF ORIGINALISM 87 (Grant Huscroft & Bradley W. Miller eds., 2011)) for 'Original Intentions Originalism;' John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1400–11 (2018) and John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009) for 'Original Methods Originalism;' William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019) for 'Original Law Originalism')

[13] Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013). Solum describes the Fixation Thesis and the Constraint Principle as follows: The Fixation Thesis "is that the original meaning ('communicative content') of the constitutional text is fixed at the time each provision is framed and ratified." And the Constraint Principle "is that constitutional actors (e.g. judges, officials, and citizens) ought to be constrained by the original meaning when they engage in constitutional practice (paradigmatically, deciding constitutional cases . . .)."

[14] Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013).

[15] *Id.* Other academic originalists take somewhat different approaches to ascertaining constitutional meaning, *Id.*at 436 n.8 (citing Larry Alexander, *Simple-Minded Originalism, in* THE CHALLENGE OF ORIGINALISM 87 (Grant Huscroft & Bradley W. Miller eds., 2011)) for 'Original Intentions Originalism;' John O.

interpretation is the fact-bound enterprise of ascertaining what the relevant constitutional text means.[16] Constitutional *construction*, in contrast, is the act of giving legal effect to that meaning.[17] Sometimes, the meaning of the text will translate seamlessly into a legal effect.[18] But when the meaning of the text is ambiguous, vague, or otherwise under-determinate, legal actors in the "construction zone" must adopt additional tools to give legal effect to that meaning.[19]

Keith Whittington first developed this idea in two books meticulously distinguishing between efforts to ascertain the communicative content of constitutional text and those directed toward making constitutional judgments when that endeavor fails to yield a single determinate answer.[20] The first of these activities he called constitutional interpretation, the second constitutional construction.[21] Originalists disagree about how large the construction zone is and what tools should be used or prioritized when operating within it, but most agree that construction is necessary in at least some situations.[22]

McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1400–11 (2018) and John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009) for 'Original Methods Originalism;' William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019) for 'Original Law Originalism').

[16] Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 492 (2013).

[17] Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433,457 (2023)

[18] Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013).

[19] *Id.*at 458.

[20] KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999) AND KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999). *See also Id.*at 11 (stating that "the interpretation–construction distinction can be found in constitutional theory as early as the 1830s").

[21] Barnett & Bernick, *supra* note 186. *See also Id.*at 11 (stating that "the interpretation–construction distinction can be found in constitutional theory as early as the 1830s").

[22] Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456, 472 (2013). Solum argues that construction always occurs, because constitutional text always must be given legal effect, but that it is most

Finally, more recent constitutional theorists have invoked theories of "liquidation" to ascertain both the meaning of under-determinate constitutional text and to guide application of that meaning in the construction zone.[23] Liquidationists tie the approach to James Madison's comments that the meaning of the Constitution can be "liquidated" by settled practices.[24] In the first major treatment of this idea, Professor William Baude argued that liquidation required three things: textual indeterminacy, a course of deliberate practice reflecting constitutional reasoning, and a resultant constitutional settlement.[25] Textual indeterminacy is a necessary predicate to liquidation because to Baude (an originalist) the meaning of determinate text cannot be overridden by subsequent practice.[26] A deliberate practice reflecting constitutional reasoning is necessary to ensure that the meaning embraced was a constitutionally meaningful choice made with intentionality, rather than a "one-off" responding to, for example, political expediency.[27] Finally, settlement requires that advocates of competing interpretations accepted their defeat—the resolution of the issue has to stick.[28]

Not all liquidationists are originalists, but many originalists have embraced liquidation as a way to approach under-determinate constitutional text.[29] On the Supreme Court, liquidationist reasoning has been explicitly embraced by some originalist justices[30] and appears to undergird

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visible when the meaning of the provision being applied is more under-determined. *See also* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 495 (2013).

[23] William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1 (2019). See also, Rebecca Green, *Liquidating Elector Discretion*, 15 Harv. L. & Pol'y Rev. 53 (2020).

[24] William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1 (2019)(citing Madison's Federalist 37).

[25] *Id.*at

[26] *Id.*at

[27] *Id.*at

[28] *Id.*at ---. Baude tied this later idea to popular sovereignty and republicanism: the will of the people controls, but only when settled.

[29] Carle, *Liquidation and the Fourteenth Amendment*, at 119-121 (discussing the work of Baude, Solum, and fellow originalist scholar Caleb Nelson, Randy Barnett, John O. McGinnis, and Michal b. Rappaport). Carle concludes that liquidation is useful to the all of these originalist scholars, but most useful to the "original methods originalism" of McGinnis and Rappaport.

[30] Barrett in *Bruen;* Vidal v. Ester, 602 U.S. 286, 323 (2024) (Barrett, J., concurring); Moore v. Harper, 600 U.S. 1 (2023)(Roberts, C.J.)("We have long looked to 'settled and established practice' to interpret the Constitution"); *National Labor Relations Board v. Noel Canning,* 573 U.S. 513 (2014).

approaches, like the "history and tradition" test, used by others.[31] This is not surprising. Liquidation is a helpful theory for proponents of many originalist theories, both at the interpretation stage and in the construction zone.[32] At the interpretation stage, practices adopted near the time of ratification can be evidence of the original public meaning of under-determinate text.[33] So, for example, acts of the First Congress—many of whose members were active and influential participants in drafting and promoting ratification of the original Constitution—can shed light on what the public they were part of (and talking to) would have understood the text to be communicating.[34] At the construction stage, past practice can be considered as a settled method of giving effect to the meaning of the text.[35] In addition, to original methods originalists, who believe that constitutional text should be interpreted in accordance with the interpretive methods used

[31] William Baude, *Liquidation*, at 1 (examining the concept of constitutional liquidation in order to "provide a way to ground and understand the role of historical practice in constitutional law"). See also *Bruen*; Michael McConnell, *The Right To Die and the Jurisprudence of Tradition*, 1997 Utah L. Rev. 665, 883 (1997) (discussing the "traditionalism of cases like *Washington v. Glucksberg*).

[32] See Susan D. Carle, *Liquidation and the Fourteenth Amendment*, 76 Fla. L. Rev. 103, 119 (2004). *See also* Lawrence B. Solum, *Originalism and the Unwritten Constitution,* 2013 U. Ill. L. Rev. 1935, 1979 (2013)(noting that originalists can embrace the use of historical practice to liquidate constitutional meaning in the construction zone but not all will depending on their normative focus in that zone). But see David S. Schwartz, *Madison's Waiver: Can Constitutional Liquidation Be Liquidated?*, 72 Stan. L. Rev. Online 17, 25 (2019) (arguing that liquidations that can themselves be liquidated violate the originalist principle of fixidity, and more generally that the malleability of liquidation is inconsistent with the constraint principle).

[33] Carle, at ---

[34] *Id.*---

[35] *Id.*at 120. Carle notes that liquidation is less helpful at this stage to public meaning originalists like Solum, who already acknowledge the appropriateness of using a variety of legal tools in the construction zone, as long as the underlying text is under-determinate and the result reached is consistent with its meaning. See also Andrew Coan & David S. Schwartz, *The Original Meaning of Enumerated Powers*, 109 IOWA L. REV. 971, 1025 (2024) (discussing liquidation as a modality that could be used within the construction zone); *see also Id.*("What makes liquidation distinctive [from historical practice] is its insistence that historical practice must be repeatedly considered and affirmed over time. It must also deliberately expound the Constitution.").

by those who wrote and ratified it, liquidation has the particular benefit of bearing James Madison's stamp of approval.[36]

Each of these interpretive moves supports our argument that the Supreme Court erred, under the reasoning of modern originalism, in embracing and extending the congruence and proportionality test as a constraint on congressional power under the enforcement provision of the Fifteenth Amendment.

Two caveats are in order before we begin.

First, in developing this argument, we focus our discussion on original public meaning originalism. Original public meaning originalists hold that the meaning of constitutional text is determined by what the public that ratified it would have understood as its communicative content.[37] While we at times mention alternative originalists methods, original public meaning originalism is the most prominent of today's originalist methodologies.[38] It therefore is the version of originalism we consider here.

Second, we make two underlying assumptions: that the meaning of the enforcement provisions is under-determinate; and that judicial decisions "count" when liquidating the meaning of under-determinate constitutional text.

Neither of these assumptions is uncontroversial.[39]

In regard to the use of judicial decisions to liquidate constitutional meaning, skeptical scholars question whether liquidation through courts differs from routine adherence to stare decisis.[40] Supporters of judicial

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[36] Jeffrey A. Pojanowski and Kevin C. Walsh, *Enduring Originalism*, 105 Geo. L. J. 97, 142-143 (2016). Alexander Hamilton also talked about liquidation in Federalist 78. CITE with quote

[37] Lawrence B. Solum, *Originalism and the Unwritten Constitution,* 2013 U. Ill. L. Rev. 1935-1984, 1943 (2013).

[38] *Id*.

[39] For a comprehensive argument that the original public meaning of the enforcement provision is, at the very least, under-determinate, see Travis Crum, *The Superfluous Fifteenth Amendment*?, 114 Nw. U. L. Rev. 1549 (2020). For a review of the debate regarding the use of judicial decisions in liquidation, see Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents,* 87 Va. L. Rev. 1 (2001).

[40] Andrew Coan & David S. Schwartz, *The Original Meaning of Enumerated Powers*, 109 IOWA L. REV. 971, 1025 (2024). *See also* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 Va. L. Rev. 1 (2020)(considering liquidation in relation to arguments

liquidation, in contrast, differentiate the two by stressing that stare decisis allows judges to adhere to past decisions for pragmatic reasons even when those decisions are inconsistent with the meaning of the text, which liquidation does not.[41]

The under-determinacy of the enforcement provisions also is debated. As discussed below, Justice Scalia purported to find the meaning of "enforce" unambiguous merely by referencing dictionaries from the relevant time period.[42] Scholars of Reconstruction have more recently focused on "appropriate" and concluded that the term was intentionally chosen to parallel the scope of congressional power under the Necessary and Proper Clause as articulated in *McCulloch v. Maryland*.[43] More generally, proponents of different originalist theories disagree among themselves about which constitutional provisions are under-determinate, and how under-determinacy should be ascertained.[44]

By not engaging either of these debates here we do not mean to imply that this prior work has fully resolved them. Rather, we recognize that we have nothing new to contribute to these questions and instead move forward from them. We therefore assume for purposes of this project that judicial opinions are an acceptable way of liquidating constitutional meaning; and that the meaning of the enforcement provisions, especially in regard to what is "appropriate" legislation, is under-determinate.[45]

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regarding "historic gloss"); David S. Schwartz, *Madison's Waiver: Can Constitutional Liquidation be Liquidated?*, 73 Stan. L. Rev. Online 17 (2019).

[41] *See for example*, Caleb Nelson, *Originalism and Interpretive Conventions,* 70 U. Chi. L. Rev. 519 (2003) 527, 529 n.38.

[42] Tennessee v. Lane,

[43] Travis Crum, *The Superfluous Fifteenth Amendment*?, 114 Nw. U. L. Rev. 1549 (2020).

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[45] Travis Crum has highlighted an additional challenge presented when applying liquidation theory to the Reconstruction Amendments. UNPUBLISHED MANUSCRIPT. Crum's conclusion is that the practices of "redeemed" state legislatures, avowedly hostile to implementing the Reconstruction Amendments, should not be used to liquidate the meaning of those amendments. Because we focus on judicial decisions, this concern is not directly relevant here. Moreover, even if we assume the same type of hostility existed on the post-Reconstruction Supreme Court, that fact would strengthens our point: if a Court friendlier to the Reconstruction project might have gone even further in supporting congressional power, *Boerne's* constriction of that power was even more unjustified.

II. THE MEANING OF THE ENFORCEMENT PROVISIONS HAD BEEN FULLY LIQUIDATED PRIOR TO BOERNE

Liquidation theory holds that the meaning of ambiguous, vague, or otherwise under-determinate constitutional text can be "liquidated" by the post-ratification practices of constitutional actors, at least when those actions are infused with constitutional reasoning and result in a "settlement" of the question presented.[46] Applying this approach to the Fourteenth Amendment, Professor Susan Carle has argued that many of the famously opaque provisions of that Amendment have been liquidated.[47] Carle assumes, however, that the scope of that Amendment's enforcement provision is not among them.[48]

We disagree. A close examination Supreme Court decisions from the aftermath of the Civil War through *Boerne* demonstrate that the meaning of the enforcement provisions had indeed been fully liquidated, as evidenced by a century-long string of Supreme Court opinions prior to *Boerne*.[49] In this Part, we support this assertion by introducing the three Reconstruction Amendments, describing legislation enacted by the Reconstruction Congresses to enforce them, and reviewing the decisions of the Supreme Court evaluating that legislation. Finally, we conclude this Part by demonstrating how *Boerne* broke from the practice established by the Court in these early cases.

Throughout this Part, we show a consistent and settled practice prior to *Boerne* governing how the Court approached cases involving congressional enforcement powers. That approach, which we call the traditional approach, involved two steps. First, the Court retained for itself the right to determine what substantive rights are protected by the relevant amendment, often by insisting that congressional power be "corrective" or

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[46] William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1 (2019).

[47] Carle, *Liquidation and the Fourteenth Amendment*, 76 Fla. L. Rev. 103, 152 (2024).

[48] Carle, *Liquidation and the Fourteenth Amendment*, 76 Fla. L. Rev. 103, 152 (2024). Professor Carle's analysis on this point is quite thin, noting only that how the enforcement provisions altered the federalism balance has been subject to "perennial debate."

[49] To original public meaning originalists, past practices temporally close to ratification of the relevant test can liquidate the meaning of the text itself. To other originalists, past practice may liquidate constitutional constructions or original interpretive methodologies, even if they do not shed light on the original public meaning of the text itself. Because the past practice we examine here was both contemporaries and continuous for more than a century, it is applicable to each of these various approaches. CITE

"remedial" rather than "plenary." Second, the Court deferred to congressional judgment about how to protect those rights once recognized by the Court, usually by referencing the deferential Necessary and Proper Clause standard articulated by Chief Justice John Marshall in *McCulloch v. Maryland*.[50] This well-settled past practice, we argue, fully liquidated the meaning of the enforcement provisions: the Court decides the scope of the relevant constitutional right at issue but defers to congressional judgement regarding what legislation is appropriate to protect those rights. As we discuss, the line between defining and protecting rights can be unclear, but the Court's long-standing practice of approaching enforcement provisions using this two-step process is not.

A. The Early Enforcement Cases

Ratified between 1865 and 1870, the Thirteenth, Fourteenth, and Fifteenth Amendments sought to constitutionalize the victories of the Civil War. The Thirteenth Amendment (1865) abolished slavery and involuntary servitude.[51] The Fourteenth (1868) overturned *Dred Scott,* established birthright citizenship, and prohibited the states from abridging the privileges and immunities of citizenship or denying any person within their jurisdiction due process or equal protection of the laws.[52] The Fifteenth (1870) prohibits states from denying or abridging the right to vote on account of race, color, or previous condition of servitude.[53]

To accomplish these goals, each of the Reconstruction Amendments follows the same pattern. They set out the substantive constitutional rights or rules, then give Congress the power to "enforce" those substantive provisions through "appropriate" legislation.[54] After passage of each amendment, the Congress used these new powers to enact new laws, including five laws significantly changing how civil and voting rights were enforced.

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[50] *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819).
[51] U.S. CONST. AMEND. XIII.
[52] U.S. CONST. AMEND. XIV. The Fourteenth Amendment also attempted to prevent former confederates from regaining power in state legislatures and Congress, although these provisions were notably unsuccessful Crum, *Superfluous,* supra note 2, at 1601. *See also* Trump v. Anderson. 601 U.S. 100, 109-10 (2024).
[53] U.S. CONST. AMEND. XV.
[54] The Nineteenth Amendment (prohibiting discrimination in voting on the basis of sex) and the Twenty-Sixth Amendment (prohibiting discrimination in voting on the basis of age for those over the age of 18) follow this same pattern. The Eighteenth Amendment, establishing Prohibition, has a similar provision but gives concurrent authority to Congress and to the states.

The Civil Rights Act of 1866, enacted under the enforcement provision of the Thirteenth Amendment, came first.[55] It declared that all people born in the United States were citizens of the United States and had the right to make and enforce contracts, give evidence in court, hold and convey property, and enjoy "the full and equal benefit of all laws and proceedings for the security of person and property" as enjoyed by white citizens.[56] Whether the Thirteenth Amendment fully authorized this sweeping legislation was controversial, though, even among congressional Republicans.[57] So key provisions of the 1866 Act were subsequently reenacted in the next major piece of legislation, the 1870 Enforcement Act.[58] Enacted after ratification of both the Fourteenth and Fifteenth Amendments the 1870 Act also prohibited election officials from engaging in racial discrimination in voting and gave federal courts jurisdiction to hear voting discrimination cases.[59]

The next significant law, the 1871 Enforcement Act, deepened the protection of voting rights by making it a federal crime for state officials to discriminate on the basis of race or color in regard to voting or voting registration, or for anyone to interfere with a citizen's right to vote based on race.[60] It also authorized the federal government in some circumstances to supervise elections to ensure compliance with the law.[61] The third Force Act, also passed in 1871, prohibited any person acting under color of state law from depriving any person of rights, privileges, or immunities secured by the U.S. Constitution and imposed criminal penalties on private conspiracies to do so.[62] It specifically prohibited private conspiracies to deny any person or class of person of their equal rights, or to interfere with someone's right to vote.[63] Finally, the Civil Rights Act of 1875, the last major piece of civil rights legislation enacted in this era, prohibited (among other things) race discrimination in places of public accommodations.[64]

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[55] Civil, Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).
[56] Ch. 31, 14 Stat 27, 27 (1866).
[57] United State House of Representatives, *The Civil Rights Bill of 1866*, https://history.house.gov/Historical-Highlights/1851-1900/The-Civil-Rights-Bill-of-1866/.
[58] Enforcement Act of 1870, ch. 114, 16 Stat. 140 (1870).
[59] *Id.*
[60] Enforcement Act of 1871, ch. 99, 16 Stat. 433 (1871).
[61] *Id.*
[62] Third Force Act, ch. 22, 17 Stat. 13 (1871).
[63] *Id.*
[64] Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875). Some provisions of this law also enforced the Fifteenth Amendment.

These laws were major changes, and the Court was quickly asked to evaluate their constitutionality. The Court responded in most cases by construing the reach of the new amendments narrowly.[65] In doing so, however, the Court from the beginning was careful to distinguish between how it evaluated the scope of the substantive rights protected by the amendments and the degree of deference it would give to congressional efforts to use its enforcement powers to legislate in relation to those rights.

This is evident in the first Supreme Court case involving the new amendments, *Slaughter-House v. Louisiana.*[66] Decided in 1872, *Slaughter-House* did not involve the rights of black Americans at all; it challenged the grant of a commercial monopoly to a New Orleans butcher under the authority of a law enacted by the reconstructed state legislature then sitting in Louisiana.[67] Today, *Slaughter-House* is best known for its cramped understanding of the Fourteenth Amendment's Privileges and Immunities Clause, which (perhaps incorrectly[68]) divided the rich bundle of privileges and immunities inherent in citizenship into separate categories of state and federal citizenship, and then deemed the most important of them aspects of state citizenship and therefore beyond the reach of the Clause.[69] In that sense, then, *Slaughter-House* is correctly seen as the first of many cases that would narrowly construe the protections of the Reconstruction Amendments.

But that narrow construction did not extend to the Court's discussion of congressional power. Instead, the justices avoided directly opining on the scope of congressional enforcement powers, while also assuming or implying that power was broad and would be entitled to significant judicial deference. Indeed, the *Slaughter-House* Court described congressional enforcement powers in expansive terms. The Equal Protection Clause, the Court said, conferred power in Congress to "secure the rights and equality" of those previously enslaved.[70] But since no such congressional enactment was involved in the case presented, the Court did not address the scope of that power further.

Slaughter-House therefore was the first case to sever the question of defining the substantive rights protected by the Reconstruction Amendments

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[65] FONER, *supra* note 20, at 128-31.
[66] 83 U.S. (16 Wall.) 36 (1872).
[67] *Id.*
[68] Kermit Roosevelt III, *What if Slaughter-House Had Been Decided Differently?* 45 INDIANA L. REV. 61 (2011).
[69] *Slaughter-House*, 83 U.S. at 74-80.
[70] *Id.*at 81. CHECK QUOTE

from the deference due to Congress in determining how best to protect those rights, whatever the Court decided they were. But it wasn't the last. In *United States v. Cruikshank*[71]and *United States v. Reese*,[72] both decided three years after *Slaughter-House*, the Court repeated this pattern. In both of these cases, the justices once again adopted a narrow view of the substantive provisions of the Reconstruction Amendments while also implying Congress was owed significant deference in its determinations of how to best protect rights once judicially recognized.

Cruickshank involved the Colfax Massacre.[73] After the election of 1872, a group of Black men in Colfax, Louisiana, gathered at the county courthouse to protect the parish's newly-elected officials from being forcibly removed from office.[74] A mob of Klansmen and former confederate soldiers surrounded the courthouse, and killed more than 100 black men during the ensuing violence.[75] The federal government prosecuted the perpetrators under the 1870 Enforcement Act, which made it a crime to interfere with a federally protected right to vote.[76]

In *Cruikshank,* the Supreme Court invalidated those convictions.[77] But in doing so, it did not question Congress' authority to determine how to best protect judicially-recognized Fourteenth or Fifteenth Amendment rights. Rather, following the model used in *Slaughter-House*, the *Cruickshank* Court narrowly interpreted the underlying substantive rights themselves. The problem for the Court was the indictment used to secure the prosecutions. The indictment relied on in the *Cruickshank* prosecutions noted that the victims where black, and that the perpetrators had intended to interfere with their right to vote.[78] But it did not assert that they had do so *on account of race*.[79] Because nothing in federal law protected an affirmative right to vote (the Fifteenth Amendment protected against voting discrimination and the Fourteenth Amendment fundamental rights jurisprudence had not yet been developed) that meant, to *Cruikshank* Court, that the prosecution had failed to allege an "offense against the laws of the United States."[80] There was,

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[71] 92 U.S. 542 (1875).
[72] 92 U.S. 214 (1875).
[73] 92 U.S. 542 (1875).
[74] CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 22 (2008).
[75] *Id.*
[76] *See Cruikshank*, 92 U.S. at 555-56.
[77] *Id.*at 559.
[78] *Id.*
[79] *Id.*
[80] *Id.*at 556.

therefore, no federal right being protected. This may be an uncharitable reading of the underlying indictment, but it is not a rejection of congressional enforcement power under either the Fourteenth or the Fifteenth Amendment.[81]

United States v. *Reese*, also decided in 1875, followed this same pattern: it restricted the substantive scope of the relevant amendment but did not purport to restrict congressional power to use its enforcement power to protect rights once recognized by the Court. *Reese* involved the indictment of two city election "inspectors" in Lexington, Kentucky.[82] The inspectors had refused to accept a vote submitted by a black man, William Garner.[83] They justified their refusal by claiming Garner had failed to pay the required poll tax of $1.50.[84] Garner submitted an affidavit avowing that he had attempted to pay the tax but his payment was refused by the tax collector.[85] Federal prosecutors charged the election inspectors with violating the 1870 Enforcement Act.[86]

The Court in *Reese* again invalidated the indictments by reading them strictly.[87] Sections 1 and 2 of the 1870 Act, the Court wrote, penalized race-based interference with the right to vote, but those sections by their own terms did not apply to election inspectors. Sections 3 and 4 did apply to inspectors, but those sections lacked language limiting their application to race-based vote denials or otherwise indicating Congress intended to limit their application to "the terms of the Fifteenth Amendment"[88] To the Court, this was a fatal flaw. It could not "re-write" sections 3 and 4 of the Act to restrict their application to race discrimination, but nor could it read the indictment loosely to allege such discrimination.[89] That meant the only way, in the Court's view, to uphold the indictment would be to accept that sections 3 and 4 allowed Congress to penalize voting interference unrelated to race—i.e.,

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[81] Lane, *supra* note 52, at 246. The dissent likewise would have invalidated the indictment on other grounds and therefore also did not address the scope of congressional power under the Reconstruction Amendments. *Cruikshank*, 92 U.S. at 559-69 (Clifford, J., dissenting). See also, PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 95-97 (2011).
[82] United States v. Reese, 92 U.S. 214, 215 (1875)
[83] *Id.*
[84] *Id.*at 224 (Clifford, J., dissenting).
[85] *Id.*at 238-39 (Hunt, J., dissenting).
[86] *Id.*at 215.
[87] *Id.*at 219.
[88] *Id.*at 220-22.
[89] *Id.*at 221 ("[W]e must take the sections of the statute as they are.")

unrelated to an actual constitutional violation. The Court was unwilling to do so, and invalidated the indictment.[90]

Once again, though, the Court continued to recognize that Congress would have broad power under the enforcement provisions to enact legislation aiming at race-discrimination. In a short paragraph describing the power of Congress to enact legislation to protect rights that *are* covered by the substantive provisions of the amendment, the majority adopted a deferential posture. In such cases, the majority acknowledged, those rights can be protected by Congress, in the "form and manner" chosen by Congress and can be "varied" by Congress to "meet the necessities" of the right being protected.[91] But since Congress had not, in the Court's view, even attempted to connect those dots in the statutory provisions at issue in the case, the majority did not address the question further.[92]

Slaughter-House, *Cruikshank*, and *Reese,* in short, limited the reach of the Reconstruction Amendments by narrowing the substantive scope of the rights protected under them and reading criminal indictments strictly, rather than by aggressively reviewing congressional efforts to use the enforcement provisions to protect rights the Court has recognized as covered by the substantive provision of the amendments. *Slaughter-House* constrained the substantive reach of the Privileges or Immunities Clause; *Cruikshank,* working in a pre-incorporation world, viewed most fundamental rights as matters of state not federal law and narrowly construed the 1870 Enforcement Act accordingly; and *Reese* restricted the scope of congressional power to enforce the Fifteenth Amendment but only by viewing the relevant provisions of the Enforcement Act as not tied to race discrimination while also agreeing

[90] *Id.*at 219-21.

[91] *Id.*at 217. The Court affirmed this understanding of congressional enforcement power several years later, in *The Ku Klux Cases*, 110 U.S. 651, 665 (1884)(distinguishing *Reese* from the case presented, in which the indictment clearly alleged race-based discrimination in relation to voting).

[92] The dissenting justices agreed on this point. Justice Clifford dissented on the basis that the indictment itself demonstrated that Garner was not "otherwise qualified" to vote as required by the statute but noted that "every discrimination [on account of race] is forbidden" and within congressional power to regulate. Justice Hunt read the statutory provisions as implicitly limited to race discrimination and the indictment as adequately alleging the same. In doing so, he noted that it was "for congress to determine whether the necessity" calls for congressional action and to "adjudge" what the necessity requires. *Id.*at 231 (Clifford, J., dissenting); and 243, 253-54 (Hunt, J., dissenting) (citing McCulloch v. Maryland, 17 U.S. 316, 421 (1819)).

that congressional power to enact legislation that was tied to such discrimination was broad and entitled to significant judicial deference.

None of these cases rejected broad congressional power to determine how to best protect rights once judicially recognized as within the substantive scope of the relevant amendment. Quite to the contrary: even as the Court restricted the scope of the substantive rights involved, it repeatedly implied or acknowledged that congressional powers to enforce such rights once recognized was expansive and would be deferred to by the Court in an appropriate case.

That case finally appeared in *Ex parte Virginia*.[93] *Virginia* involved the Civil Rights Act of 1875, passed by Congress under the authority of the Thirteenth and Fourteenth Amendments.[94] Among other things, this law made it a misdemeanor to disqualify any citizen from jury service in state or federal court on account of race. A county court judge in Virginia was indicted under the law and challenged his prosecution on the grounds that the law was beyond the power of Congress to enact.[95] The law clearly prohibited the type of discrimination the judge was charged with engaging in, and the indictment alleged the charges correctly. So the question of Congress' enforcement powers was, finally, squarely before the Court.[96]

The Court upheld the law, in sweeping but familiar terms. The Court first emphasized that the purpose of the enforcement provisions was to increase the power of Congress, not of the courts.[97] Operationalizing that understanding, the Court applied the *McCulloch* standard. Under *McCulloch,* the Court wrote, congressional enforcement power is similar to its Necessary and Proper power: Congress is empowered to enact "whatever legislation is appropriate, that is, adapted to carry out" the purposes of the amendments and not otherwise prohibited.[98] The Court further described Congress' enforcement power as including "whatever tends to enforce submission to the prohibitions" of the Amendments, and to "secure to all persons the enjoyment of perfect equality" of civil rights and equal protection.[99]

This is very broad language. Applying it to the case presented, the Court had no difficulty upholding the law. One purpose of the Reconstruction Amendments, the *Virginia* Court wrote, was to bring formerly enslaved

[93] 100 U.S. 339 (1880).
[94] *Id.*at 344.
[95] *Id.*at 340.
[96] *Id.*at 344. [add direct quote]
[97] *Id.*at 354.
[98] *Id.*
[99] *Id.*at 356.

people "into perfect equality of civil rights with all other persons within the jurisdiction of the States."[100] As such, they were "intended to take away all possibility of oppression by law because of race or color" and to act as "limitations of the power of the States and enlargements of the power of Congress."[101] The Court had held in *Strauder v. West Virginia*, issued the same day as *Virginia*, that race discrimination in jury selection violated the substantive provisions of the Fourteenth Amendment.[102] Consequently, the *Virginia* Court held, a judge making racially discriminatory jury selections under the authority of the state was plainly within the reach of Congress' power.[103]

Virginia was the culmination of the approach foreshadowed in *Slaughter-House, Cruickshank,* and *Reese.* In evaluating the constitutionality of legislation enacted under the Reconstruction Amendments, the Court would engage in a two-part analysis. It would reserve for itself authority to determine what rights are protected by the substantive provisions of the amendments, but then defer to congressional judgement about what legislation is appropriate to enforce those rights.

As it turned out, *Virginia* was the apex of both judicial and congressional enforcement of the Reconstruction Amendments for almost a century. Five years after *Virginia* was decided, the Court in *The Civil Rights Cases* struck down the public accommodation provisions of the Civil Rights Act of 1875.[104] In doing so, the Court introduced into its Fourteenth Amendment jurisprudence the "state action" limitation on congressional enforcement powers—a limitation that remains in place today.[105] Importantly, though, even the *Civil Rights Cases* Court did not reject the two-step analysis laid out in *Virginia.* Instead, it cited *Virginia* specifically for the proposition that Congress has power under the enforcement provisions to enact legislation correcting in operation or effect unconstitutional state action.[106] It also embraced the Necessary and Proper standard in relation to congressional power to enact appropriate legislation to correct or remedy constitutional violations by the state.[107]

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[100] *Id.*at 344.
[101] *Id.*
[102] Strauder v. West Virginia, 100 U.S. 303 (1880).
[103] *Virginia*, 100 U.S. at 348.
[104] 109 U.S. 3 (1883).
[105] *Id.*at 14.
[106] *Id.*at12.
[107] *Id.*at 13.

The Court in *The Civil Rights Cases* then went even further, noting that it was not necessary for the Court to opine on what appropriate legislation in such situations should be, but instead was sufficient for it to determine whether the federal law is "of that character." The public accommodations provisions of the Civil Rights Act of 1875 as applied to private actors, the Court said, did not pass this test. But not because the Court insisted on a tight means/end fit between Congress' goal and the means chosen to advance it, but rather because Congress in enacting the provision had, in the Court's assessment, made "no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the states."[108]

In a series of cases following *The Civil Rights Cases*, including *United States v. Harris,* and *Giles v. Harris*, the Court continued to aggressively constrain the reach of the Reconstruction Amendments by diligently applying its understanding of the state action doctrine or otherwise narrowly interpreting their substantive scope.[109] Our point is not that the Court in these cases was not hostile (or at least indifferent) to meaningful enforcement of the rights protected by the Reconstruction Amendments. It plainly was. Rather, our point is that even in these cases the Court worked within the settled two-step practice. It consistently read "enforce" as reserving for the Court the authority to decide what rights were in fact protected under the substantive provisions of the amendments, but then gave *McCulloch*

[108] *Id.*at 14. The Court rejected arguments made by Justice Harlan in dissent that state action was not necessary as long as Congress' target was racial discrimination in the provision of civil rights; and that even if state action was required proprietors of public accommodations were exercising sufficiently public powers to bring them within the proper scope of that doctrine. *Id.*at 37-42. These arguments rested on common law doctrines requiring owners of certain types of establishments to serve all members of the public and the understanding, which the majority does not directly dispute, that access to such establishments without regard to race were within the civil rights both the Thirteenth and Fourteenth Amendments were intended to protect. *Id.*Justice Harlan also noted that many of the public accommodations covered by the law were licensed by the state, *Id.*at 41, and that the Court had long accepted that Congress had power to legislate to protect all rights arising under the Constitution, which would include, in his view, the civil right to be free of race discrimination in the provision of public services such as those provided by places of public accommodations. *Id.*at 5

[109] *See* United States v. Harris, 106 U.S. 629 (1883) (holding the enforcement clause of the Thirteenth Amendment does not permit Congress to punish private conspiracies to deny equal protection of the law); *see also* Giles v. Harris, 189 U.S. 475 (1903)(recognizing the unconstitutionality of state-sanctioned racial discrimination in voting and the validity of congressional legislation prohibiting the same while holding, for what appear to be largely pragmatic reasons, that it was beyond the capacity of the federal courts to prevent it).

deference to Congress to determine what legislation was "appropriate" to protecting those rights. This two-step analysis, used without interruption across multiple judicial decisions, accepted even after the fall of Reconstruction, embraced by justices in majority and dissenting opinions, and (as judicial opinions) obviously infused with constitutional reasoning, fully liquidated the meaning of the enforcement provisions.[110]

B. The Modern Civil Rights Cases

It would be almost a century after *The Civil Rights Cases* before Congress again made a comprehensive effort to use federal power to enforce the protections of the Reconstruction Amendments. When it did, the laws it enacted, including the Voting Rights Act of 1965,[111] would bring the question of congressional enforcement powers back to the Supreme Court. The cases from this era most pertinent for our purposes are *South Carolina v. Katzenbach*,[112] *Katzenbach v. Morgan*,[113] and *City of Rome v. United States.*[114] Each of these cases challenged various provisions of the Voting Rights Act of 1965 on the grounds that they were beyond congressional power to enact under the enforcement powers of the Fourteenth or Fifteenth Amendments.

South Carolina was decided first. It involved a comprehensive challenge to multiple sections of the VRA,[115] but much of the Court's discussion focused on the most revolutionary provision of the law: the "preclearance" procedure set out under sections 4 and 5. Combined, these sections required certain jurisdictions, defined in section 4, to get advance permission (preclearance) from the federal government before changing any "standard, practice, or procedure with respect to voting."[116] Congress had enacted these provisions after gathering a substantial record showing how the covered jurisdictions had persistently blocked the right of black Americans to vote by enacting suppressive voting rules and forcing litigants to repeatedly incur the expense and time of challenging them one-by-one.[117]

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[110] *See also* Caminker, *supra* note --, at 1142-1143 (discussing *The Civil Rights Cases* and *United States v. Harris*, 106 U.S. 156 (1980).
[111] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§1971, 1973 to 1973bb-1).
[112] South Carolina v. Katzenbach, 383 U.S. 301 (1966).
[113] Katzenbach v. Morgan, 384 U.S. 641 (1966).
[114] City of Rome v. United States, 446 U.S. 156 (1980).[114]
[115] *South Carolina*, 383 U.S. at 316-317.
[116] Voting Rights Act of 1965 §§ 4-5.
[117] *South Carolina* at 310-15.

South Carolina challenged the preclearance process as beyond congressional power under the enforcement provision of the Fifteenth Amendment. The Supreme Court upheld the legislation. Chief Justice Earl Warren, writing for the majority, began by setting out what he called the "fundamental principle" governing the case: that Congress may use any rational means to effectuate the Fifteenth Amendment's prohibition on racial discrimination in voting.[118] Citing *Virginia*, Warren emphasized that the enforcement provisions were designed to enlarge the power of Congress, not the courts, and that they authorized Congress to make the substantive rights protected by the Reconstruction Amendments fully effective through the enactment of appropriate legislation.[119] He then went on to flesh out these principles using the *McCulloch* test:

> The basic test to be applied in a case involving s 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:
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> '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.'[120]

Under this deferential standard, the Court had no difficulty upholding the preclearance regime. Preclearance was plainly a "legitimate" response to the challenges presented by case-by-case litigation in the face of intransigent southern resistance to black voting rights,[121] and the provisions were an "appropriate" way of dealing with that problem.[122]

Katzenbach v. Morgan took a similarly deferential approach to congressional enforcement power, this time under the Fourteenth Amendment.[123] *Morgan* involved a provision of the VRA, section 4(e), prohibiting the use of literacy tests to disqualify voters who had completed

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[118] *Id.*at 324.
[119] *Id.*at 325-26.
[120] *Id.*at 326 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).
[121] *Id.*at 328.
[122] *Id.*
[123] Katzenbach v. Morgan, 384 U.S. 641(1966).

the sixth grade in any American school in Puerto Rico at which the predominant language was not English.[124] The provision was designed to ensure that Americans educated in Puerto Rico (a U.S. territory whose residents are American citizens) were not denied the right to vote when relocating to mainland jurisdictions.[125] Congress defended the provision as an appropriate way to enforce the Equal Protection Clause's prohibition on discrimination on the basis of national origin or ethnicity.[126] Once again citing *Virginia*'s deferential standard, the Court upheld the law.

Justice Brennan, writing for the majority, noted that restricting congressional enforcement powers would "depreciate both congressional resourcefulness and congressional responsibility for implementing the amendment."[127] The Court then proceeded to work through the traditional two-step analysis by asking whether section 4(e) was appropriate legislation to enforce rights the Court had said were protected by the Equal Protection Clause.[128] He had little difficulty in determining it was. Section 4(e), he wrote, protected U.S. citizens from Puerto Rico from being denied the right to vote. Because the fundamental right to vote is "preservative of all rights" (citing *Yick Wo v. Hopkins*[129]), section 4(e) could be "readily seen" as plainly adapted to ensuring Puerto Rican residents in New York were not subject to unconstitutional discrimination in either voting or in the equitable provision of government services that the vote helps ensure.[130]

It was well within the power of Congress to determine that prohibiting literacy tests was an appropriate way prevent these unconstitutional harms, even though literacy tests were not themselves unconstitutional.[131] It was not for the Court, Brennan concluded, to review the balance Congress struck between protecting those rights and the state's interest in administering its literacy test.[132] Instead, he wrote, it was enough that the Court be able to "perceive a basis upon which Congress might resolve the conflict as it did."[133]

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[124] *Id.*at 643.
[125] *Id.*at 652.
[126] *Id.*at 643 n.1.
[127] *Id.*at 648.
[128] *Id.*at 650.
[129] 118 U.S. 356, 370 (1886).
[130] *Morgan*, 384 U.S. at 652.
[131] *Morgan*, 384 U.S. at 648; citing Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45 (1959).
[132] *Id.*at 653.
[133] *Id.*

Morgan has at times been described as an example of the Warren Court's expansive understanding of both individual rights and congressional power,[134] but as our review of the Court's earlier cases demonstrates, judicial recognition of a deferential *McCulloch* standard to evaluate Congress' enforcement powers when legislating to protect a judicially recognized right was well-established in law long before the 1960s. *Slaughter-House* and *Reese* had recognized broad congressional powers even though those cases held the purported right being protected was not within the substantive provisions of the relevant amendments. *Virginia* adopted the test in the very first Supreme Court case to fully consider the question. Even *The Civil Rights Cases* restricted the enforcement power only by adopting a narrow approach to the state action doctrine and then determining that Congress had not even tried to identify or target any such action.

As many scholars have observed, it is possible to read *Morgan* more broadly, as endorsing congressional power to independently define the substance of the constitutional rights protected rather than just granting broad deference to Congress to protect those rights recognized by the Court—in other words, to inject Congress into the first part of the traditional analysis.[135] (As we discuss Part III, much of the *Boerne* decision is aimed at rejecting that expansive reading.) But that understanding of the enforcement power was not necessary to the *Morgan* decision, since the majority also saw the provision as a way of enforcing the judicially recognized rights to vote and receive governmental services free of discrimination on account of race.[136] Justice Brennan himself acknowledged this, noting "the result [in *Morgan*] is no different" if the Court limited itself to whether or not Congress was attempting to remedy an "invidious discrimination."[137] As long as the Court could perceive a basis on which Congress could determine the law was an appropriate way to address a constitutional problem, he wrote, it was up to Congress to weigh the competing considerations involved.[138]

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[134] 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)(citing Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 35 (2003).

[135] *Id.*at 49-50. Professor Schmidt argues that the more expansive reading of *Morgan* had its roots in lively debates in the 1940s through 1960s, during which courts and commentators had the difference between the two steps of the traditional test.

[136] *Morgan*, 384 U.S. at 652.

[137] *Morgan,* 384 U.S. at 653-654.

[138] *Id.*

Fourteen years after *Morgan* was decided, a very different court faced a similar question in *City of Rome v. United States.*[139] Liberal justices Warren, Black, Douglas, Clark and Fortas had left the Court, as had Justice Harlan. They had been replaced by Justices Marshall, Burger, Blackmun, Stevens, Powell and Rehnquist, all but one of whom (Marshall) had been appointed by more conservative presidents than their predecessors. Despite this shift in personnel, the Court in *Rome* continued to adhere to the traditional two-step test it had used in enforcement cases since Reconstruction.

Rome involved yet another challenge to the Voting Rights Act.[140] In a case decide before *Rome,* the Court had held that the Fourteenth Amendment, and possibly the Fifteenth Amendment, prohibited only those state actions having both a discriminatory effect *and* a discriminatory purpose.[141] In *Rome,* the challengers used that earlier holding to argue that a provision of the Voting Rights Act triggered solely by a law's discriminatory effect exceeded congressional enforcement power.[142] Congress, they argued, could not enforce a constitutional provision that itself only prohibited *intentional* discrimination through a law targeting discriminatory *effects*. Because the Voting Rights Act was explicitly directed toward discriminatory effects, the challengers argued it was beyond congressional power to enact.[143] [Callais?]

The *Rome* Court, citing both *Virginia* and *McCulloch*, again deferred to Congress and upheld the law, using language closely tracking the traditional test.[144] "It is clear," Justice Marshall wrote for the majority, that the enforcement provision of the Fifteenth Amendment permits Congress to prohibit acts that aren't themselves unconstitutional as long as Congress' goal is prohibiting racial discrimination.[145] In the case presented, he went on, Congress could have rationally concluded, at least in regard to jurisdictions

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[139] 446 U.S. 156 (1980).
[140] *Id.*
[141] Mobile v. Bolden, 446 U.S. 55 (1980). *Mobile* involved claims under both the Fourteenth and Fifteenth Amendments. The holding regarding the Fourteenth Amendment is clear, but the reasoning in the split decision was murky regarding its application to the Fifteenth Amendment. Later cases have noted, without resolving the question, that the Supreme Court has not explicitly held that violations of the Fifteenth Amendment likewise require a discriminatory purpose and a discriminatory effect. *See, e.g.,* Rice v. Cayetano, 528 U.S. 495 (2000).
[142] Rome, 466 U.S. at ---.
[143] Rome, 466 U.S. at 177.
[144] *Id.*at 173, 177.
[145] *Id.*

with a history of intentional racial discrimination in voting, that prohibiting changes with a discriminatory impact was an appropriate way to combat unconstitutional racial discrimination in voting.[146] Applying this deferential standard, Justice Marshall had no difficulty upholding the challenged provisions.[147] Even then-Justice Rehnquist, dissenting in *Rome*, did so within the traditional two-step framework, acknowledging the deference owed to

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[146] *Id.*

[147] *Id.*at 182. Although not cited in *City of Rome*, the Court had reached a similar decision in 1924 in *James Everard's Breweries v. Day* when interpreting congressional power under the enforcement provision of the Eighteenth Amendment. 265 U.S. 545 (1924). The operative provision of the Eighteenth Amendment prohibits the sale of "intoxicating liquors" for "beverage purposes." Congress is then given power, as in the Reconstruction Amendments, to enforce those provisions by appropriate legislation. Using that power, Congress enacted the National Prohibition Act. *Day* was a challenge to an amended version of that Act, which prohibited physicians from issuing medicinal prescriptions for malt alcohol (beer) while retaining their ability to do so for certain liquors. The law was challenged by the U.S. distributors of Guinness's Stout. Their argument was that it exceeded congressional power by regulating alcohol for medicinal, rather than "beverage" purposes. Since the substantive provision of the Eighteenth Amendment only prohibited the sale of alcohol for "beverage purposes" (which is the actual text of the Amendment), Congress, they argued, and no authority to regulate medicinal uses at all. Citing *McCulloch* and the Necessary and Proper clause, the Supreme Court disagreed. *Id.*at 558-59. The enforcement powers allowed Congress to in its discretion "adopt any means, appearing to it most eligible and appropriate," "adapted to the end to be accomplished," and "consistent with the letter and spirit of the Constitution." *Id.*at 559. It was not for the justices, the Court went on, to inquire as to the necessity of Congress's means: as long as they were not prohibited and "calculated to effect the object intrusted [sic] to it" the Court would defer to Congress. To do otherwise would to "pass the line" between the judicial and legislative branches and "tread upon legislative ground." *Id.*Having set out this deferential standard, the Court had no difficulty in upholding the law. Even though the Eighteenth Amendment only prohibits the sale of alcohol for beverage purposes, the enforcement power granted Congress authority to regulate its use even for medicinal purposes as an appropriate means of enforcing the constitutional prohibition. Congress, in other words, can regulate and even prohibit conduct not itself unconstitutional, when it believes doing so is an appropriate way to effectively regulate the thing that is. Because the Court "could not say" that prohibiting the use of beer for medicinal purposes had "no real or substantial relation" to enforcing the Eighteenth Amendment, the law was a valid exercise of the enforcement power. *Id.*at 560. In reaching this conclusion, the Court cited earlier decisions that previously had allowed Congress to regulate even non-alcoholic beverages in its effort to effectively regulate alcoholic ones. *Id.*(citing Purity Extract Co. v. Lynch, 226 U.S. 192 (1912); Ruppert v. Caffey, 251 U.S. 264 (1920).

Congress in the second step but arguing Congress had erred at the first step by targeting a "harm not contemplated by its substantive provisions."[148]

As this review of past cases demonstrates, the use of a two-step analysis to determine the scope of congressional enforcement powers under the Reconstruction Amendments, including deferential *McCulloch*-style review in the second step of the analysis, was neither new nor novel in the 1960s. It had been foreshadowed by the first cases decided after the Reconstruction Amendments were ratified. It was solidified by the Court more than a century ago in *Virginia*. It was embraced by justices writing majority and dissenting options, and was never renounced by the Court, even in the years following the fall of Reconstruction. Then, when Congress got back into the business of protecting civil rights in the 1960s, it was again used by the Court in cases like *South Carolina*, *Morgan*, and *Rome*, and by justices as ideologically different as Justices Marshall and Rehnquist.

The meaning of the enforcement provisions, in short, had been fully liquidated by more than a century of settled practice: the Court would keep for itself the power to define the rights protected by the substantive provisions of the Reconstruction Amendments, but give *McCulloch*-style deference to Congress regarding legislation appropriate to protecting those rights.

C. The Boerne Break

That changed in *City of Boerne v. Flores*.[149] Decided in 1997, *Boerne* injected a new element, the "congruence and proportionality" test, into the traditional analysis. [150]

Boerne was a Fourteenth Amendment case. Its factual and legal underpinnings are complicated; understanding them requires a brief detour into a related case, *Employment Division v. Smith*, decided in 1990.[151] *Smith* involved practitioners of a Native American religion who were denied unemployment benefits by the State of Oregon after being fired from their jobs for using peyote, a mild hallucinogenic drug, during a religious ceremony.[152] The use of peyote was illegal in Oregon, which meant that under Oregon law the practitioners could be denied unemployment benefits

[148] Rome, 446 U.S. at 220.
[149] City of Boerne, 521 U.S. 507 (1997).
[150] *Id.*at 508.
[151] Employment Div. v. Smith, 494 U.S. 872 (1990).
[152] *Id.*

after they were fired for using it.[153] The practitioners sued, claiming this violated their First Amendment right to freely exercise their religion.[154]

Prior to *Smith*, the Court had held that laws burdening the free exercise of religion were unconstitutional unless justified by a compelling governmental interest and narrowly tailored to advance that interest (i.e., strict scrutiny).[155] *Smith* changed that. In *Smith,* the Court held that a generally applicable law not targeting a religious practice was not subject to such strict review, and therefore such laws were unlikely to violate the Free Exercise Clause.[156] Congress responded by enacting the Religious Freedom Restoration Act.[157] In essence, RFRA attempted to restore by statute the earlier, pre-*Smith* test. It invalidated any state, local, or federal law imposing a substantial burden on religion unless the law was the least restrictive means of advancing a compelling government interest.[158] Congress claimed that RFRA was a reasonable way of enforcing the Free Exercise Clause, as incorporated against the states through the Fourteenth Amendment.[159] The question presented in *Boerne* was whether RFRA was a constitutional exercise of Congress' Fourteenth Amendment enforcement power.

The Court held it was not. In effect, what the Court did in *Boerne* was create the congruence and proportionality test to impose a less deferential standard of review on the second part of the traditional two-step analysis, by requiring courts to determine whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[160] In other words, the *Boerne* Court claimed for itself the task of closely scrutinizing not just Congress' end goal—whether it was aiming at a judicially recognized right, but also Congress' means—whether the law at issue was an appropriate way to protect those rights.

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[153] *Id.; see also* OR. REV. STAT. §§ 475.005(6), 475.992(4) (2025).
[154] *Smith*, 494 U.S. 872*; see also* Black v. Emp. Div., 707 P.2d 1274 (Or. 1985).
[155] 494 U.S. at 894 (O'Connor, J., concurring)*; see also* Sherbert v. Verner, 374 U.S. 398 (1963).
[156] *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 (1982) (Stevens, J., dissenting)).
[157] Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb et seq., *invalidated in part by*, City of Boerne v. Flores, 521 U.S. 507 (1997).
[158] *Id.*at § 2000bb-1.
[159] *Id.*at §2000bb.
[160] *Id.*at 520; *see also* Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1572 (2020).

This was an error. As shown above, the meaning of the enforcement provisions had been fully liquidated prior to *Boerne* by more a century of a consistent, widely-accepted, and well-settled judicial practice of using the traditional two-step analysis when adjudicating enforcement provision cases. But even if the meaning of the enforcement provisions had not been fully liquidated or was re-liquidated after *Boerne*, [the self-identified originalists justices in the *Callais* majority] nonetheless committed an independent error in incorporating the congruence and proportionality test into the Court's Fifteenth Amendment jurisprudence. As we show in Part III, the congruence and proportionality test as used in *Boerne* is best described, again in the language of modern originalism, as a constitutional construction rather than a constitutional interpretation. Then, in Part IV, we explain how as a constitutional construction, it was unnecessary, inappropriate, and possibly violative of originalist methodology itself for [the *Callais* Court] to transplant the test from its original moorings in the Fourteenth Amendment into the very different context presented by the Fifteenth Amendment.

III. Congruence and Proportionality as a Constitutional Construction

A majority of the justices [embracing the congruence and proportionality test in *Callais*] identify themselves as originalists. Yet decades earlier the Court's most renowned originalist, Justice Antonin Scalia, had disavowed the congruence and proportionality test as inconsistent with the original meaning of the enforcement provision of the Fourteenth Amendment. In doing so, he adopted a narrow understanding of congressional power under that amendment, while also embracing the more generous *McCulloch* standard in some circumstances—including circumstances similar to those presented in *Callais.* This Part begins by examining Justice Scalia's critique. It then explores in greater detail the distinction, not utilized by Scalia in his *Lane* dissent but important to originalism theorists today, between constitutional interpretation and constitutional construction. We then reconsider *Boerne* using that distinction, concluding that the Court's adoption of the congruence and proportionality test is best understood as a constitutional construction rather than a constitutional interpretation.

A. Justice Scalia's Originalist Critique

A common claim of many originalists, especially when the theory first emerged in constitutional discourse in the 1970s and 80s, is that by fixing constitutional meaning at the time of ratification, originalist methodology can

meaningfully constrain judicial discretion.[161] Fidelity to the fixed original meaning of the constitutional text, its early advocates argued, would prevent justices from imposing their "personal preferences" in lieu of law.[162]

Justice Scalia's concerns about the congruence and proportionality test rested on just this ground. "Flabby" tests dependent on judicial assessments of things like "proportionality," he argued, are a "standing invitation to judicial arbitrariness and policy-driven decision-making."[163] Furthermore, he noted, the congruence and proportionality test had "no demonstrable basis in the text of the Constitution." Rejecting the test for these reasons, he turned to a pair of nineteenth-century dictionaries to ascertain for himself the original public meaning of the word "enforce." Enforce, he concluded, meant in the 1860s exactly what it means (in his view) today: to "put into execution" or to "cause to take effect."[164] What enforce does not mean, he continued, is to "go beyond" the provisions of the constitutional text to "proscribe, prevent, or remedy" conduct that is not itself a judicially recognized violation of the relevant substantive provision.[165] Prophylactic legislation like that enabled by the congruence and proportionality test, Scalia said, was "reinforcement" of the protected rights, not "enforcement" of them. Consequently, he concluded such legislation was not within the enforcement power of Congress in most circumstances.

From there, Scalia articulated the tests he would use instead to evaluate the scope of congressional enforcement powers under the Fourteenth Amendment. Again relying on the dictionary definitions of "enforce," Scalia first declared that in most situations he would limit congressional power to provide federal remedies for judicially recognized rights.[166] Secondly, and

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[161] *See* Logan E. Sawyer III, *Principle and Politics in the New History of Originalism*, 57 AM. J. LEGAL HIST. 198, 199 (2017); s*ee also* Reva B. Siegel, *Memory Games: Dobbs's Originalism As Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1131 (2023).

[162] *See, e.g.,* Antonin Scalia, *Originalism: The Lesser Evil,* 57 U. CINN. L. REV. 849, 864 (1989). See also Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 547 (2013).

[163] Tennessee v. Lane, 541 U.S. 509, 557-558 (2004)(Scalia, J., dissenting).

[164] *Id.*at 559.

[165] *Id.*

[166] *Id.*at 559. Preemptively responding to the criticism that this would make the enforcement powers superfluous, Scalia noted that federal courts in 1866 had no general jurisdiction to remedy violations of constitutionally protected rights. CITE

more importantly for our purposes, Scalia wrote that he would allow prophylactic legislation in situations involving race-based discrimination.

He grounded this exception in three things.

First, he noted that the Court's early cases embracing a broad congressional enforcement power involved legislation directed at race-based discrimination. *Stare decisis* warranted honoring that reading in race-related cases.[167]

Second, citing *Slaughter-House* and *Virginia,* he argued that a "principle purpose" of the Reconstruction Amendments generally and the Equal Protection Clause in particular was to counteract rampant race discrimination in the states.[168] A more expansive reading of congressional enforcement power in race-related cases was consistent with that purpose.[169] Consequently, he concluded, he would in the future apply the deferential *McCulloch* standard to legislation designed to remedy racial discrimination by particular states with an "identified history" of such discrimination."[170]

Third, he made a point of noting that cases like *Virginia* were decided at a time when the rights understood to be protected by the substantive provisions of the Fourteenth Amendment were much more narrowly defined.[171] The incorporation and substantive due process doctrines had not yet been developed, nor had equal protection been read to require heightened scrutiny of classifications beyond race and (later) sex.[172] While not explicitly spelled out, Scalia's implication in this discussion appears to be that the expanded scope of the substantive protections provided by section 1 of the Fourteenth Amendment warrants stricter judicial policing of congressional power to enforce those protections.

In *Tennessee v. Lane,* then, the Court's most prominent originalist abandoned the congruence and proportionality standard as inconsistent with the text and original public meaning of the enforcement provision but retained the more expansive *McCulloch* standard in at least some situations involving race discrimination. He also tied the need for the more restrictive reading outside of the race context to the breadth of rights substantively protected by

[167] *Id.*at 560.
[168] *Id.*at 561.
[169] *Id.*at 561.
[170] *Id.*at 564.
[171] *Id.*at 561.
[172] *Id.*at 562.

the Fourteenth Amendment—a concern notably not applicable in the context of the Fifteenth Amendment.

Justice Scalia's opinion in *Lane* relies on a relatively simplistic application of originalist methodology. His use of nineteenth-century dictionaries to determine the meaning of "enforce" while ignoring the much more obviously vague word—"appropriate"—disregards the textual relevance of that word to the second part of the traditional test.[173] Nonetheless, even using this rudimentary analysis Scalia recognized three things: that the core purpose of the equal protection clause was to combat race discrimination; that *McCulloch* deference to Congress in cases addressing such discrimination was therefore warranted; and that *McCulloch* deference was itself broad, comparable to the Necessary and Proper Clause.[174]

Justice Scalia did not frame either his rejection of the congruence and proportionality standard or his acceptance of the *McCulloch* standard in race-cases as acts of constitutional construction rather than a constitutional interpretation. Unlike most originalists today, Justice Scalia denied the existence of the construction zone.[175] Nonetheless, both his reasoning in *Lane* and his embrace of the more generous *McCulloch* standard in certain circumstances support the argument we make here. Understanding how requires a closer examination of the "construction zone."

B. The Construction Zone

The distinction between constitutional interpretation and constitutional construction is critical to most originalists.[176] As Professor Solum has argued, acknowledging the construction zone can improve originalism in practice by reducing the rigidity to which some originalists may be prone.[177] According to Solum, "[o]riginalists may be tempted to argue that the original meaning of the constitutional text provides an answer to every constitutional question."[178] But the interpretation/construction

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[173] Words are ambiguous when they have more than one possible meaning. Ambiguity is often (not always) clarified by context. Vague words, in contrast, always present borderlines cases and thus require more work in the construction zone. Lawrence B. Solum, *Originalism and the Unwritten Constitution,* 2013 U. Ill. L. Rev. 1935, 1944-1946 (2013).

[174] Tennessee v. Lane,

[175] Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 484 (2013).

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distinction allows them to instead become "open to the possibility that the linguistic meaning of the constitutional text may sometimes underdetermine the outcome of constitutional cases" and can "serve as a check against the tendency to see bright lines where the meaning of the text is vague." [179] The distinction, in other words, enables originalists to acknowledge constitutional uncertainty and accept the need for workable rules and doctrines giving effect to under-determinate constitutional provisions, without abandoning their core principles of fixation and constraint.[180]

In this Part, we demonstrate that *Boerne*'s congruence and proportionality test is best understood as just such a construction. This is supported by four things: the Court's focus on the remedial/substantive distinction in *Boerne* itself; the inherent vagueness of the term "appropriate" in the constitutional text; the Court's emphasis in *Boerne* on structural reasoning when defending congruence and proportionality as the necessary standard of review; and the *Boerne* Court's otherwise inexplicable positive reference to cases, like *Virginia,* that use the more deferential standard in other contexts. The first of these factors illustrates how the *Boerne* Court was focused almost entirely on the original meaning of "enforce" as embodying the remedial/substantive distinction at the heart of the first step of the traditional analysis. The remaining reasons show how the congruence and proportionality test is best understood as a constitutional construction operationalizing that meaning, rather than a comprehensive rejection of *McCulloch* deference.

C. Re-Constructing Boerne

Justice Kennedy was not an originalist and *Boerne* did not purport to be an originalist decision. Nonetheless, since a majority of justices currently on the Court identify themselves as originalists, some scholars have begun adopting originalist language to classify certain Supreme Court cases and doctrines as constitutional constructions, even when they were not necessarily conceived of as such when written.[181] We take a similar approach

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[179] Barnett & Solum, *supra* note 170, at 437-438 457 (citing Richard H. Fallon Jr., *Appraising the Significance of the Subjects and Objects of the Constitution: A Case Study in Textual and Historical Revisionism*, 16 U. PA. J. CONST. L. 453, 462–70 (2013) and RICHARD H. FALLON JR., LAW AND LEGITIMACY IN THE SUPREME COURT 68, 100 (2001)).

[180] *Id.*See also Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 483 (2013).

[181] *See, e.g.*, Vincent Phillip Muñoz & Kate Hardiman Rhodes, *Constructing the Establishment Clause*, 54 LOY. U. CHI. L.J. 387, 404 (2022) (classifying leading Establishment Clause opinions as constitutional constructions and identifying "the

here, arguing that *Boerne* may be best understood, through an originalist lens, as a doctrinally muddled construction serving the limited purpose of protecting the long-recognized view of congressional enforcement power as corrective not plenary, rather than as a more sweeping constitutional interpretation rejecting the deferential *McCulloch* standard of review for congressional enforcement powers more generally. In other words, the *Boerne* Court adopted the congruence and proportionality test in step two of the traditional analysis only as a limiting constitutional construction the Court considered necessary to protect its prerogative under step one of that analysis, i.e., the authority to define for itself the rights protected by the substantive provisions of the Fourteenth Amendment.

A re-evaluation of *Boerne* demonstrates this.

As legal scholar Evan Caminker has observed, Kennedy sprinkled typically originalist methodologies throughout his *Boerne* decision.[182] None of that analysis, though, purported to justify the congruence and proportionality test itself as a matter of the original meaning of the enforcement provision of the Fourteenth Amendment.[183] Instead, the use of text, history, and early caselaw was dedicated almost entirely to supporting the Court's conclusion under the first step in the traditional enforcement

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mischief(s), meaning(s), rule(s), and purpose(s), explicitly or implicitly recognized" in each opinion); Lawrence B. Solum & Cass R. Sunstein, *Chevron as Construction*, 105 CORNELL L. REV. 1465, 1469–70 (2020) (classifying *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* Inc., 467 U.S. 837 (1984) as "involv[ing] a question of statutory construction" and the resulting *Chevron* doctrine as "judicial deference to agency action in . . . the construction-zone"); *Id.*at 1486 ("[I]n many of the most important cases [applying *Chevron*], courts defer to agency constructions and reject agency interpretations."); Floyd Abrams et. al., *The Press Clause: The Forgotten First Amendment A Report from the Floyd Abrams Institute for Freedom of Expression*, 5 J. FREE SPEECH L. 561, 592 (2024) (stating that "[o]n a theory like framework originalism, or any originalist approach that accepts the distinction between interpretation and construction, one can make a variety of arguments in support of an invigorated Press Clause . . . because the text of the Press Clause is vague"). it is rare for a Court, even today, to make the distinction explicitly, and "until recently it has been largely lost in contemporary public law." Solum & Sunstein, *supra* note 211, at 1478 ("As Professor Michael Herz has observed, '[a]lmost without exception, writing about statutory interpretation uses "interpretation" and "construction" as synonyms.'" (quoting Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1891–92 (2015)).

[182] Caminker, *supra* note 5, at 1158-59.

[183] *Id.*

power analysis: that the original meaning of the enforcement provision was that congressional power was remedial rather than substantive and preserved for the Court the power to define the substance of constitutional rights.[184] The congruence and proportionality test, in contrast, was defended in *Boerne* almost exclusively by construction-zone considerations involving federalism and separation of powers. In the language of modern originalism, the *Boerne* Court's constitutional *interpretation* was that congressional power was remedial not substantive, while its adoption of the congruence and proportionality test was a constitutional *construction* adopted as a way to implement that meaning in the context presented.

Like Justice Scalia in *Lane*, the Court in *Boerne* began its discussion of the remedial/substantive distinction by considering the meaning of "enforce."[185] Congress, the Court recognized, has power to enforce the provisions of the Free Exercise Clause as incorporated through Fourteenth Amendment.[186] But, the Court went on, to "enforce" does not include the power to "decree the substance" of the Amendment or impose that congressionally-created meaning on the states, because "legislation that alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."[187] To allow Congress to enforce a right by "changing what the right is" would mean that Congress would no longer be "enforcing" the substantive provisions of the Amendment in any "meaningful sense."[188]

The Court then moved on to history, engaging in an extensive discussion of an early draft of what would become the Fourteenth Amendment.[189] That draft, brought to the floor by Representative John Bingham, would have explicitly given Congress power to make all laws "necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."[190] This draft, Kennedy wrote for the *Boerne* majority, "encountered immediate

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[184] Professor Michael W. McConnell has called the argument that the enforcement power would "result in a consolidation of power and the destruction of the federal system as Americans had known it" "something of a straw man." Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 Harv. L. Rev. 153 (1997).
[185] *City of Boerne*, 521 U.S. at 518.
[186] *Id.*at 519.
[187] *Id.*
[188] *Id.*
[189] *Id.*at 520.
[190] *Id.*at 520.

objection" and was rejected.[191] In explaining his understanding of why this proposed wording was poorly received,[192] Kennedy turned to debates in Congress to show that members of Congress from across the political spectrum were, again in the Court's view, saw it as giving Congress "too much legislative power at the expense of the existing constitutional structure."[193] The subsequent version, which was eventually ratified as section 5 of the Fourteenth Amendment, was more acceptable, Kennedy concluded, because congressional power under it was "no longer plenary but remedial."[194]

The *Boerne* Court then bolstered this conclusion by reviewing the Court's earliest decisions applying the Reconstruction Amendments. Much as we did in Part II, Justice Kennedy read these cases, including *The Civil Rights Cases*, *Reese,* and *Harris,* as confirming that congressional power under the enforcement clauses is remedial not plenary. They did not give Congress power to pass 'general legislation upon the rights of the citizen," he wrote, but rather only "corrective legislation."[195] This included the power to remedy and prevent violations of judicially recognized rights, but did not "authorize Congress to 'legislate generally' regarding the life, liberty and property of citizens."[196] Kennedy then cited *South Carolina v. Katzenbach* as affirming this understanding, upholding "various provisions of the Voting Rights Act, [by] finding them to be 'remedies aimed at areas where voting discrimination has been most flagrant. . . .' "[197] The Court concluded this discussion by examining additional cases supporting the same proposition: that the meaning of "enforce" limited Congress to remedying or preventing constitutional violations, not substantively defining them.[198]

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[191] *Id.*

[192] *Id.*

[193] *Id.*("Democrats and conservative Republicans argued that the proposed Amendment would give Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution."). As we discuss in Part IV, his understanding of the meaning of this drafting history may well be incorrect.

[194] *City of Boerne*, 521 U.S. at 522. T As discussed in Part IV, the Court was not necessarily correct in how it read this history.

[195] *Id.*at 524–25 (quoting *Civil Rights Cases*, 109 U.S. 3, 13–14 (1883)).

[196] *Id.*at 524.

[197] *Id.*at 525 (quoting *South Carolina*, 383 U.S. at 315) (alterations in original).

[198] *Id.*at 526–29 (discussing Oregon v. Mitchell, 400 U.S. 112 (1970) and City of Rome v. United States, 446 U.S. 156 (1980)) and discussing *Morgan*, 384 U.S. 641 and stating that "interpreting *Morgan* to give Congress the power to interpret the Constitution 'would require an enormous extension of that decision's rationale.'" (quoting *Mitchell*, 400 U.S. at 296)).

In originalist terms, the Court's analysis of the meaning of the word "enforce," the drafting history of the Fourteenth Amendment, and early cases interpreting the enforcement provisions, fits comfortably on the interpretation side of the interpretation/construction divide.[199] Its focus on the remedial/substantive distinction (the first step of the traditional analysis) rather than the means/ends test (the second step) also is understandable, given the unusual circumstances that brought *Boerne* to the Court in the first place. The Religious Freedom Restoration Act was a fairly explicit effort by Congress to nullify the Court's holding in *Smith*. (One of RFRA's stated purposes, after all, was to "restore the compelling interest test" rejected in *Smith.*[200]) RFRA, consequently, could readily, and perhaps correctly, be framed as a congressional effort to overturn the Court's decision in *Smith* and redefine the substantive scope of the rights protected by the Free Exercise Clause as Congress, not the Court, understood them.[201]

Much of this part of the *Boerne* Court's analysis also seems directed at refuting the most expansive reading of Justice Brennan's opinion in *Morgan*.[202] But *Boerne* did not overturn *Morgan*. Instead, it focused its discussion of *Morgan* on the first step of the traditional analysis, rejecting only the reading of *Morgan* that would have validated congressional power to define for itself the substantive scope of the rights it was tasked with enforcing. In doing so, it decidedly did not categorially reject *McCulloch* deference in enforcement clause cases. Instead, the Court embraced what it saw as the other, more straightforward understanding of *Morgan* as upholding Congress' "reasonable attempts" to combat unconstitutional discrimination in voting and the provision of public services.[203]

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[199] *Id.*at 520–21.

[200] *City of Boerne*, 521 U.S. at 515.

[201] The dissenting justices, who focused almost exclusively on why *Smith* was wrongly decided, plainly saw the case this way. *Id.*at 544-45 (O'Connor, J., dissenting); *Id.*at 565-66 (Souter, J., dissenting).

[202] In its discussion of *Morgan,* the Court stated "[i]t is further contended that Congress' section 5 power is not limited to remedial or preventative legislation." 521 U.S. at 517. Interestingly, the Court does not provide a citation for this assertion, and a review of the briefing in the case shows it was only invoked by one advocate, the Clarendon Foundation, for the purpose of rebutting it. Brief of the Clarendon Foundation. The Clarendon Foundation, in turn, supported the assertion solely by citing a law review article discussing *Morgan*.

[203] *Id.*at 528 (emphasis added).

The *Boerne* Court reinforced this broad view of congressional power repeatedly. It recognized that the "sweep" of the enforcement powers allows Congress to intrude on state power by prohibiting conduct which is not itself unconstitutional,[204] and to do so despite burdens imposed on states.[205] It cited cases using the *McCulloch* standard, including citing *Virginia* on that exact point, without any effort to distinguish those cases from the case presented.[206] Justice Kennedy also cited later cases, including *Fitzpatrick v Bitzer*, *South Carolina v. Katzenbach*, *Oregon v. Mitchel*, *City of Rome*, and *James Everard's Breweries v. Day*, all of which embraced *McCulloch* deference in step two of the traditional test.[207] The majority opinion referenced these cases without qualification, citing *Fitzpatrick* and *South Carolina* for their recognition that Congress can prohibit conduct that is not unconstitutional; *South Carolina*, *Morgan*, *Oregon*, and *Rome* for their recognition that Congress can use its enforcement powers in ways that burden states and impose on their traditional prerogatives; and *Day* for its holding allowing Congress to ban even the legal use of liqueur as a way to enforce a prohibition on its illegal use.[208]

Throughout this discussion, the *Boerne* Court endorsed the deferential *McCulloch* standard. Congress, Justice Kennedy wrote, must "have wide latitude in determining where the distinction between appropriate remedial action to protect a right and efforts to re-define the right itself"[209] and that "[i]t is for Congress in the first instances to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference."[210] RFRA exceeds congressional authority, he concluded, not because that authority is not broad or because deference to Congress is not due, but rather because RFRA "cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Instead, it was an attempt to make a "substantive change in constitutional protections."[211]

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[204] *Id.*at 518.
[205] *Id.*
[206] *Id.*at 517 (citing Ex parte Virginia, 100 U.S. 339, 345-56 (1879).
[207] *Id.*at 518 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966); Oregon v. Mitchell, 400 U.S. 112, (1970); City of Rome v. United States, 446 U.S. 156, 161, (1980); James Everard's Breweries v. Day, 265 U.S. 545 (1924)).
[208] *Id.*
[209] *City of* Boerne, 521 U.S. at 519-20.
[210] *Id.*at 536, (citing Katzenbach v. Morgan, 384 U.S. 641 (1966).
[211] *Id.*at 534.

All of this discussion is perfectly consistent with the traditional test. Under the liquidated meaning of the enforcement provisions, the Court, not Congress, gets to decide what rights are protected by the substantive provisions of the Reconstruction amendment, but having done so Congress is entitled to broad deference when determining how to best protect those rights. The most expansive reading of *Morgan* and congressional overreach in RFRA are rejected, but cases granting *McCulloch*-style deference to Congress to determine what legislation is appropriate to protect judicially recognized rights are embraced. So why did the *Boerne* Court nonetheless adopt a limiting test—the congruence and proportionality test—on the second step of the traditional analysis?

The challenge for the Court was that RFRA lay in a gray zone, where the distinction between protecting and defining a right is unclear. [212] Sometimes, Justice Kennedy wrote, "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern."[213] In such situations, as he went on, Congress still has "wide latitude," but the distinction itself must nonetheless be observed. To the Court, RFRA was so expansive, and based on so little evidence of an actual underlying constitutional violation (as defined by the Court in *Smith*), that deferring to congressional judgment in *Boerne* would have intruded on the Court's prerogative to define the meaning of the Free Exercise Clause. The Court's solution to this gray zone problem was to impose a limiting construction in step two of the traditional test not for its own sake, but rather to protect its own power under step-one to define the rights protected by the substantive provisions of the text.[214] The congruence and proportionality test provided that limiting construction.

That this is best understood as a *construction* of the enforcement power rather than an *interpretation* of it is evidenced by the Court's own reasoning. As explained above, originalists employ constitutional constructions when constitutional text is under-determinate because it is ambiguous, vague, leaves gaps, or contradictory.[215] In *Boerne*, the Court

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[212] *Virginia*, 100 U.S. at 345-346.

[213] *Id.*

[214] While not grounding his argument in originalist methodology, Professor William Araiza had made a similar point regarding congressional enforcement of the Equal Protection clause, arguing that what the Court is doing in these cases is constructing a type of pragmatic constitutional doctrine, concerned with judicial capabilities and distinct from its understanding of what he calls "core" constitutional meanings. See ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE 122,143-144.

[215]

deployed the methodological tools of originalism (text, history, past practice) to ascertain the meaning of "enforce" as remedial rather than substantive. But that meaning itself did not dictate application of the congruence and proportionality test. There is no indication, in *Boerne* or elsewhere, that the original meaning of the enforcement power included a command to the judiciary to use this *particular* doctrinal test when evaluating congressional power.[216] Instead, Justice Kennedy turned to arguments grounded in federalism and separation of powers to justify the need for this type of constraint on the "appropriate" use of congressional power in the case presented.[217]

To public meaning originalists, structural arguments like this can be relevant at the construction stage as background principles informing how to best give legal effect to under-determinate constitutional provisions.[218] Justice Kennedy's used separation of powers and federalism arguments in exactly this way throughout his *Boerne* decision.[219] Throughout the opinion, he focused on structural concerns involving federalism and separation of powers, and the understanding of the purpose of the enforcement clause as expanding congressional power without eviscerating those basic elements of our constitutional design. He worried about how the sweeping scope of RFRA curtailed the "traditional general regulatory power" of the states far beyond what was warranted by unconstitutional state conduct.[220] He cited *McCulloch* for the foundational constitutional principle that the federal government is one of enumerated powers.[221] The opinion also cited *Marbury v. Madison*[222] multiple times: for the power of the Court to ensure Congress does not overstep it bounds;[223] for the proposition that it is the duty of the Court to say what the law is;[224] and to insist on the power of the Court to determine when Congress has exceeded its authority. "The power to interpret

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[216] Indeed, the only evidence that any particular test was required points the opposite direction, toward the Necessary and Proper test as adopted in *McCulloch*. See, *supra,* Parts II and IV. See also [Crum]; Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 Harv. L. Rev. 153 (1997).
[217] *Id.*at 530.
[218] Solu
[219]
[220] *Id.*at 534.
[221] *Id.*at 516.
[222] Marbury v. Madison, 5 U.S. 137 (1803).
[223] *City of Boerne*, 521 U.S. at 516, 529, 536 (twice).
[224] *Id.*at 536

the Constitution in a case and controversy," Kennedy stressed, "remains in the Judiciary."[225]

Deferring to Congress in regard to RFRA, Kennedy concluded, would intrude on that power and threaten the entire constitutional structure. "If Congress could define its own powers by altering the Fourteenth Amendment's meaning," he wrote, "the Constitution would no longer be superior paramount law, unchangeable by ordinary means.'"[226] So, as "[b]road as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment," he wrote, "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."[227] Building legal doctrines like the congruence and proportionality test in order to give operationalize structural concerns like these is a quintessential construction zone activity.[228]

We can now see how the pieces of the *Boerne* decision work together, as reconstructed through the lens of modern originalism. The Court's textual and historical analysis is focused on the meaning of "enforce" and the remedial/substantive distinction. Then, having established that the meaning of the enforcement provision requires respecting that distinction and preserving for itself the authority to define the rights protected by the substantive provisions of the amendments (step one of the traditional test), the Court must decide how to review Congress's determination about what legislation is "appropriate" to protecting those rights. The Court's repeated citation of cases using the *McCullouch* standard to do so illustrates the justices' acceptance of that deferential approach in most cases. But because this case is in the gray zone, where the difference between defining and protecting rights blurs, Justice Kennedy deploys federalism and separation of powers principles to justify imposing a limiting doctrine: the congruence and proportionality test. This stricter standard of review is necessary here not as a matter of interpretation (i.e., what the enforcement powers mean), but rather

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[225] *Id.*at 524.
[226] *Id.*at 529 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).
[227] *City of Boerne*, 521 U.S. at 508, 536.
[228] Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 490 (2013). Original law originalists might disagree with this statement. Their version of originalism adopts the legal tests that would have been used during the relevant time period. That could, in some circumstances, mean the original public meaning of a constitutional provisions did in fact include a particular doctrinal test to be used when applying it. William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019).

to give legal effect to the remedial/substantive distinction that is required by that meaning.

The best originalist reading of the *Boerne,* then, is not that the original public meaning of the enforcement provision itself requires use of the congruence and proportionality test, but rather that protecting the remedial/substantive distinction—which is required by the meaning of the word "enforce"—*in some situations* requires application of the test as a limiting construction of Congress' power to determine what legislation is appropriate to protect rights once judicially recognized.[229] Consequently, different tests, including *McCulloch* deference as cited favorably throughout the *Boerne* opinion, may well be appropriate in different situations, as a matter of construction rather than interpretation. This is especially relevant in the notably different context presented by the enforcement provision of the Fifteenth Amendment, which is where we turn next.

IV. CONGRUENCE AND PROPORTIONALITY AND THE FIFTEENTH AMENDMENT

The realization that *Boerne's* congruence and proportionality test is best understood as a constitutional construction rather than a constitutional interpretation [casts the *Callais* Court's adoption of the test in the Fifteenth Amendment context in a new light.] As we show in this Part, the construction zone reasoning used to justify use of the test as a limiting construction in the Fourteenth Amendment context are unpersuasive in the very different context presented by the Fifteenth Amendment. Consequently, even if the congruence and proportionality test was a reasonable way to construe the enforcement provision of the Fourteenth Amendment, it is an inappropriate construction of the enforcement provision of the Fifteenth Amendment. If inconsistent with the original meaning of the enforcement powers, it also would likely be an unconstitutional one under an originalist approach.

A. As Constructions, the Enforcement Powers Need Not be Coextensive

[229] The sentence after the Court declared congruence and proportionality as the standard further supports this reading. "Lacking such a connection, legislation *may* become substantive in operation and effect." This use of the word "may" indicates that congruence and proportionality is *one* way to ensure that an act of Congress is remedial and not substantive. But the Court at no point claimed it is the *only* way to ensure a statute is remedial, and explicitly recognized that appropriate remedial legislation could preventative. *Boerne* at 530.

Many justices and scholars have argued or assumed that the nearly-identical language of the enforcement provisions of the Fourteenth and Fifteenth Amendments mean those provisions should be treated as coextensive.[230] Justice Thomas treated them as such in *Northwest Austin*,[231] and then again in his *Milligan* dissent, which was joined by Justices Gorsuch and Barrett (in part).[232] Barrett also made this assumption in the *Callais* oral argument.[233] Justice Rehnquist, dissenting in *City of Rome*, agreed, writing "the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive."[234] This assumption has prevailed among some academics as well. While disapproving of Court's analysis in *Boerne*, Professor Pamela Karlan concluded in 1998 that "because the two amendments are rough contemporaries and their enforcement power provisions are articulated in similar terms, the analysis surely carries over" from the Fourteenth Amendment to the Fifteenth.[235] Professors Leah Litman, Michael Morley, and others have to varying extents argued or assumed so as well.[236]

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[230] For a discussion of this, see Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341 (2004).

[231] Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 225-26 (2009) (Thomas, J., concurring in part and dissenting in part).

[232] Allen v. Milligan, 599 U.S. 1, 81 (2023) (Thomas, J., dissenting) (quoting *City of Boerne*, 521 U.S. at 520) ("Thus construed and applied, § 2 is not congruent and proportional to any provisions of the Reconstruction Amendments."). Justice Alito also dissented in *Allen*, joined by Justice Gorsuch, but he did not address his view of the governing standard for the Fifteenth Amendment enforcement power. *Id.*at 109 (Alito, J. dissenting). ("The Court's treatment of *Gingles* is inconsistent with the text of § 2, our precedents on racial predominance, and the fundamental principle that States are almost always prohibited from basing decisions on race. Today's decision unnecessarily sets the VRA on a perilous and unfortunate path. I respectfully dissent.").

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[234] City of Rome v. United States, 446 U.S. 156, 207 n.1 (1980) (Rehnquist, J., dissenting).

[235] Karlan, *supra* note ---, at 725 n. 5.

[236] *See also,* Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1258 n.329 (2016) (evaluating the equal sovereignty principle in *Shelby County* and "treat[ing] the Reconstruction Amendments collectively" even though "[t]here may be reasons why *Boerne*'s congruence-and-proportionality requirement would not apply to the Fifteenth Amendment"); Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2078 (2018) (stating that "*Boerne*'s congruence-and-proportionality test likely applies with equal force to Section 2 of the Fifteenth Amendment" because they have "materially identical language," "were

Treating the enforcement provisions of the Fourteenth and Fifteenth Amendments as coextensive, however, ignores the notably different nature of the rights protected by their substantive provisions. More recent scholarship has developed this point. Professor Akhil Reed Amar, writing in the HARVARD LAW REVIEW in 2013, argued that the "obvious built-in limits" of the Fifteenth Amendment reduces the need for judicially imposed limitations on the power of Congress to enforce that amendment.[237] Jeremy Amar-Dolan, in an award-winning student note written in 2014, argued that "notwithstanding a superficial similarity in language, . . . the very different substantial guarantees of the [Fourteenth and Fifteenth] amendments may plausibly give rise to significant differences in Congress's power to enforce those guarantees."[238] More recently, Professor Travis Crum, who has written extensively on the history of the Fifteenth Amendment, concluded that the Fifteenth Amendment is and should be treated as an independent authority and that *Boerne's* test should not be extended into its realm.[239]

We agree. As a constitutional construction, there is no reason to import the congruence and proportionality test from *Boerne* into the very different context presented by the Fifteenth Amendment. Remember, constitutional constructions do not purport to interpret the Constitution or ascertain the original meaning of its text. Rather, they come into play when the text is under-determinate and, at least for many originalists, use familiar modes of legal reasoning to create implementing doctrines, with the caveat that those implementing doctrines cannot violate the meaning of the text itself

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enacted barely a half year apart from each other as part of Reconstruction[,]" "[t]he Court has previously interpreted both provisions in an identical manner," "[a]nd both provisions raise the same separation-of-powers concerns"); Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1593 (2019) (discussing constitutional concerns for section 2 of the VRA under congruence and proportionality while acknowledging that "*City of* Boerne dealt only with the Fourteenth Amendment, leaving the Fifteenth Amendment standard undetermined"). *See also* Crum, Superfluous, *supra* note 2, at 1568 n.99 (citing these sources for the same proposition); and Richard L. Hasen and Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, 108 GEO. L.J. 27 (2020)(distinguishing between Congress's Fourteenth and Nineteenth Amendment enforcement authority).

[237] Akhil Reed Amar, *The Lawfulness of Section 5—And Thus of Section* 5, 126 HARV. L. REV. F. 109, 119–20 (2013).

[238] Amar-Dolan, *supra* note 150, at 1478–79 (outlining the Court's avoidance of this question). *see also* Crum, *Superfluous*, *supra* note 2, at 1568 n.99 (citing these and more sources for the same propositions).

[239] *Id.*at 1621.

(i.e., the constraint principle).[240] In *Boerne*, the Court considered the original meaning of the enforcement clause only in regard to the remedial/substantive distinction, and then relied primarily on structural reasoning in the construction zone to create the congruence and proportionality test as an implementing doctrine to protect that distinction. The enforcement provision of the Fifteenth Amendment, in contrast, requires no such limiting construction.

B. The Enforcement Provision of the Fifteenth Amendment Does Not Require a Constraining Construction

Consider the reasons given by the *Boerne* Court for adopting the congruence and proportionality test. The Court discussed what it saw as the original meaning of the enforcement provisions as allowing Congress to remediate or prevent constitutional violations, but not to define the substance of the rights being protected. Failing to respect that distinction, the Court said, would violate federalism and separation of powers, both key structural aspects of our Constitution. It would violate federalism because without a judicially imposed restriction there would be no limitation on the reach of federal law. Congress would be able to decide for itself the extent of its legislative authority, essentially creating the type of plenary federal power long rejected by the Court. It would offend separation of powers by allowing Congress to tread on the Court's duty, as announced in *Marbury*, to have the final say on the meaning of the Constitution.[241]

None of these justifications are persuasive in the context of the Fifteenth Amendment. The Fifteenth Amendment prohibits the denial or abridgement of the right to vote on account of race, color, or prior condition of servitude. The Fourteenth Amendment, in contrast, protects—with just a bit of exaggeration—everything.[242] By its own terms, section 1 protects citizenship, privileges and immunities, due process, and equal protection. Through incorporation, it also protects freedom of speech and religion; prohibits unreasonable searches and seizures and cruel and unusual punishments; and protects property rights, criminal due process rights, and almost all other individual rights found in the Constitution. It is not unreasonable for a Court to fear that a Congress seeing itself as unconstrained by meaningful judicial review regarding the scope of its legislative power to

[240] For a discussion of the relationship between constitutional pluralism and constitutional construction, see SOLUM; GRIFFIN;

[241] City of Boerne v. Flores, 521 U.S. 507, 523-24 (1997).

[242] For a discussion of this problem, see ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE 109-10.

enforce these copious provisions may go too far and unbalance our constitutional design.

The Religious Freedom Restoration Act challenged in *Boerne* pushed the structural boundaries the Constitution in just this way. While facially purporting to "enforce" the Free Exercise Clause, the law was plainly enacted directly in response to *Smith* and explicitly declared its intention to re-impose the understanding of the Free Exercise Clause *Smith* had rejected.[243] And the Court treated it as such. It repeatedly referred to the RFRA as a congressional effort to "alter[]", "chang[e]", or "define" the Court's interpretation of the Fourteenth Amendment.[244] It is difficult to imagine a situation more likely to raise the hackles of the justices of the U.S. Supreme Court.

But these concerns are inapplicable in the Fifteenth Amendment context. The right to vote free from racial discrimination is far more determinate than the smorgasbord of rules and rights covered by the Fourteenth Amendment.[245] There is not universal agreement on what is contained within the prohibition on "denying or abridging the right to vote on account of race," but it inarguably covers a much narrower field than does the Fourteenth Amendment, supplemented by the incorporation doctrine.[246]

Given this, the likelihood that congressional legislation enforcing the Fifteenth Amendment would become a plenary power to legislate on virtually any topic is essentially nonexistent. An extremely deferential application of the *McCulloch* standard in that context would yield, at most, a broad power over matters related to race discrimination in voting. Even if Congress were, in a court's view, to occasionally legislate in the "gray zone" and use its Fifteenth Amendment enforcement power to enforce voting rights in a way that slips into defining those rights, the structural harm to federalism and

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[243] *Boerne* at 515. Justice Kennedy argued the congressional law actually went further, and imposed a test even more restraining on states than had the pre-*Smith* caselaw.

[244] *Id.*at 529. See also ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE 103.

[245] *See* Calvin Massey, *The Effect of Shelby County on Enforcement of the Reconstruction Amendments*, 29 J. L. & Pol. 397, 406 (2014) (making a similar point).

[246] Travis Crum, *The Unabridged Fifteenth Amendment,* 133 Yale L. Jour. 1039 (2024).

separation of powers would be contained to that context.[247] This is not the stuff that threats to our bedrock foundational principles are made of.

Justice Scalia's originalist critique of the Court's use of the congruence and proportionality test in its Fourteenth Amendment jurisprudence is consistent with this reasoning. Recall he exempted legislation addressing race discrimination from his narrow interpretation of congressional enforcement powers. He grounded this carve-out in both *stare decisis* and what he saw as a "principal purpose" of the Reconstruction Amendments to combat race-based discrimination. As discussed above, he also made a point of noting the relative narrowness of the substantive scope of the Fourteenth Amendment at the time cases like *Virginia* were decided.[248] All of these factors weigh against imposing the congruence and proportionality test in the context of the Fifteenth Amendment, especially when evaluating legislation, like the Voting Rights Act, protecting the right to vote. This is not to claim Scalia would endorse our approach, but rather that at least some of his concerns about the congruence and proportionality test were grounded in the copious nature of the Fourteenth Amendment and are therefore irrelevant to the Fifteenth Amendment analysis.

C. Construing the Fifteenth Amendment Using the Boerne Test May Violate the Constraint Principle

In addition to being unnecessary, expanding the congruence and proportionality test into the Fifteenth Amendment context may well violate the Constraint Principle essential to modern originalism. To originalists, constitutional constructions must not be contrary to the original public meaning of the text.[249] As noted above, we have assumed for purposes of this project that the meaning of the enforcement provisions, especially the meaning of "appropriate," is under-determinate. But whether the congruence and proportionality test is in fact consistent with the best understanding of the original meaning of the provisions is debatable.

In *Boerne*, the Court focused its interpretive work on the meaning of "enforce," which it saw as embodying the remedial/substantive distinction. It did not, however, engage in a similar interpretive investigation of "appropriate," opting instead to use a construction (the congruence and

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[247] This is especially true since *Boerne* itself recognized the power of Congress to enact legislation regulating even things which are not themselves unconstitutional as long as it is aiming at preventing or remedying a judicially recognized right. CITE

[248] *Id.*at 562.

[249]

proportionality test) to give legal effect to the meaning of enforce. Subsequent work, in contrast, has demonstrated that the term appropriate may have been chosen precisely to invoke *McCulloch*'s understanding of congressional power as including those means necessary and proper to its pursuit of a legitimate (constitutional) end, without being subject to any higher standard of judicial review. If correct, this could render any deviation from that deferential test inconsistent with the original public meaning of "appropriate" and therefore an invalid construction of the provision.

Travis Crum's work is illustrative here. Crum's close examination of the ratification debates surrounding the Fourteenth and Fifteenth Amendment lead him to conclude that the use of appropriate in the enforcement clauses was an intentional effort to link congressional power under those clauses to the Necessary and Proper Clause power as articulated by Chief Justice Marshall in *McCulloch.*[250] Digging deeply into congressional debates about the different versions of what became the Fifteenth Amendment, Crum shows that while members of Congress disagreed on several aspects of proposed text, advocates on both sides of the debate agreed that *McCulloch* provided the standard through which congressional enforcement power would be measured, under whatever version of the text ended up being adopted.[251] He therefore concludes that the Court erred in imposing the more restrictive congruence and proportionality test in the Fourteenth Amendment context, and should avoid replicating that error by extending it to the Fifteenth Amendment.[252] If correct, its adoption by originalists justices in *Callais* violates the Constraint Principle—one of the bedrock principles of originalist methodology.

Rejecting the congruence and proportionality test in the Fifteenth Amendment context would hardly leave congressional power under the that

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[250] *See* Crum, *Superfluous*, *supra* note 2, at 1569, 1590. Crum's work is the most recent to explore this issue and perhaps the most comprehensive, but his conclusions are shared by other scholars. *See* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801 (2010); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); Caminker, *supra* note 5); and Michael W. McConnell, *supra* note 7. It is not, however, universally accepted. *See* Edward Cantu, *Normative History and Congress's Enforcement Power under the Reconstruction Amendments*, 21 TEX. REV. OF L. & POL. 119 (2016).

[251] Crum, *Superfluous*, *supra* note 2, at 1568-1572, 1591, 1612, 1625.

[252] *Id.*Crum also has argued elsewhere that the original understanding of the Fifteenth Amendment supports an interpretation of that amendment imposing the "effects test" found in section 2 of the Voting Rights Act. See Crum, *Riddle, supra* note 266, at 1908.

amendment unconstrained. As the Court recognized in *Boerne,* as we discussed in Part II, and as Crum's work affirms, the Reconstruction Congress rejected arguments that congressional power even under the *McCulloch* standard would be plenary.[253] Saying a law must be reasonably adapted to advance a constitutional end simply does not mean the same thing as saying Congress can do whatever it wants. Indeed, the Court's usage of the *McCulloch* standard in the decades before *Boerne* illustrates that point. *The Civil Rights Cases* endorsed the deferential standard while imposing the state action restriction.[254] *Jones v. Mayer*, a Thirteenth Amendment case, upheld the prohibition on race discrimination by private property owners but only after surveying historical sources to conclude that the "badges and incidents" of slavery could reasonably be understood to include restrictions on property ownership.[255] *Virginia* itself described congressional power under the *McCulloch* standard as "but a limited authority, true, extending only to a single class of cases; but, within its limits, it is complete."[256] More recently, *Shelby County* rejected the pre-clearance formula of the Voting Rights Act as unreasonable, without adopting the more restrictive congruence and proportionality test.[257]

Given this, as well the understanding of the congruence and proportionality test as a constitutional construction and the very different contexts presented by the Fourteenth and Fifteenth Amendments, the methodology of modern originalism did not require expanding the reach of that test in *Callais.*

CONCLUSION

The Reconstruction Amendments authorize Congress to enact "appropriate" legislation to "enforce" constitutional rights. In *City of Boerne v. Flores*, the Court adopted the congruence and proportionality test to more strictly review legislation enacted under the enforcement provision of the Fourteenth Amendment. [In *Callais,* a majority of self-identified originalist justices incorporated that standard into the Court's Fifteenth Amendment jurisprudence.]

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[253] *Boerne*, 521 U.S. at 522; Crum, *Superfluous*, *supra* note 2, at 1621.
[254] Civil Rights Cases, 109 U.S. 3 (1883).
[255] Jones v. Alfred H. Mayer, Co., 392 U.S. 409, 441-43 (1968). *See also* Alexander Tsesis, *Enforcement of the Reconstruction Amendments*, 78 WASH & LEE L. REV. 849 (2021).
[256] *Ex parte Virginia*, 100 U.S. 339, 348 (1879).
[257] 570 U.S. 529 (2013).

As we have shown, they were wrong to do so. By approaching that question through the methodological tools developed by modern originalists, we have demonstrated that the settled practice of the Supreme Court applying the enforcement provisions from shortly after ratification of the Reconstruction Amendments and continuing through *City of Boerne,* fully liquidated the meaning of the enforcement provisions. That liquidated meaning established a two-step analysis defining the enforcement power. First, courts reserved for themselves the authority to determine what is and is not covered by the substantive provisions of the relevant amendment, often by insisting that the power granted to Congress to "enforce" the amendments is remedial, not substantive or plenary. Then, courts used the *McCulloch* standard to defer to congressional judgment about what legislation is "appropriate" to protect those rights once judicially recognized.

We then showed that even if the meaning of the enforcement provisions was not fully liquidated by this more than century-long judicial practice, the congruence and proportionality test as adopted in *Boerne* is best understood, again in the language of modern originalism, as a constitutional construction rather than a constitutional interpretation. Understood as such, it is clear that the Court in *Boerne* adopted the test not because it rejected *McCulloch* deference to congressional determinations of what legislation is appropriate to enforce judicially recognized substantive rights, but rather to protect the judicial prerogative to define such rights in the first place, especially given the capacious scope of the Fourteenth Amendment and the unusual nature of the statute (RFRA) at issue in *Boerne*.

Finally we concluded by arguing that, as a constitutional construction, transplanting the congruence and proportionality test from the Fourteenth Amendment context in which it originated into the very different context presented by the Fifteenth Amendment was unnecessary, inappropriate, and potentially invalid as contrary to the meaning of that amendment's enforcement provision.

The originalists justices in the *Callais* majority therefore erred in two ways by embracing the congruence and proportionality test in that case, first by ignoring the fully liquidated meaning of the enforcement provision as embodied in the traditional two-step test, and again by ignoring the lack of need for a limiting construction in step two of that test in the context of the Fifteenth Amendment.

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