

Originalist Law Reform, Judicial Departmentalism, and Justice Scalia

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INTRODUCTION

Judicial departmentalism is the view that the Constitution means *in the judicial department* what the Supreme Court says it means in deciding a case. It is a legally superior alternative to judicial supremacy, which is the idea that the Constitution means *for everybody* what the Supreme Court says it means in deciding a case.¹

The perspective of judicial departmentalism provides a useful way to think about originalist law reform. By insisting on the real legal boundaries around the legal authoritativeness of Supreme Court determinations, judicial departmentalism clears the way to understanding how the constitutional law developed by the Supreme Court can differ from what the law of the Constitution really is at any particular time. Judicial departmentalism provides a way of thinking about how the original law of the Constitution *is still the law* unless lawfully changed even while divergent constitutional law applied in the judicial department *is also the law*.²

When the constitutional law applied in the judicial department diverges from the law of the Constitution, it displaces that law in the judicial department. But the displacement is only partial. The persistence of the law of the Constitution explains how there remain legal standards that are legally valid independent of the judicial department's say-so but also fully inside the law for their potential application. This

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¹ See generally Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 Wm & Mary L Rev 1713 (2017).

² See *id.* at 1733–34.

persistence justifies the originalist law reform that happens, for example, when the Supreme Court replaces nonoriginalist precedent with something more faithful to the law of the Constitution.³

Drawing on examples from Justice Antonin Scalia's jurisprudence, this Essay uses the perspective of judicial departmentalism to examine the nature and limits of two partially successful originalist law reforms in recent years. It then shifts to an examination of how a faulty conception of judicial supremacy drove a few nonoriginalist changes in the law that Scalia properly dissented from. Despite the mistaken judicial supremacy motivating these decisions, a closer look reveals them to be backhanded tributes to judicial departmentalism because of the way that the Court had to change jurisdictional and remedial doctrines to accomplish its substantive-law alterations. The Essay closes with a discussion of the somewhat surprising potential that § 5 of the Fourteenth Amendment offers for originalist law reform when situated within a framework of judicial departmentalism. Originalism provides both a foundation for understanding the breadth of Congress's enforcement power under § 5 and also a means of grounding enforcement legislation other than existing judicial doctrine. The combination of judicial departmentalism and originalism can be particularly potent for generating originalist law reform in areas in which existing judicial doctrine underenforces substantive Fourteenth Amendment protections when measured against the original law of the Fourteenth Amendment.

I. ORIGINALIST LAW REFORM: RECENT EXAMPLES AND LIMITS

Justice Scalia participated judicially in partially successful efforts for originalist law reform of Second and Sixth Amendment doctrines. In *District of Columbia v Heller*,⁴ Scalia wrote an originalist opinion for the Court that recognized and enforced, against conflicting DC law, an individual right to keep and bear a handgun for self-defense in one's home.⁵ And in *Crawford v Washington*,⁶ Scalia wrote an originalist opinion for the Court

³ See *id.* at 1730.

⁴ 554 US 570 (2008).

⁵ *Id.* at 636.

⁶ 541 US 36 (2004).

that ensured application of the Confrontation Clause⁷ to prevent the introduction of out-of-court testimonial statements not subject to prior cross-examination that had come in under the *Ohio v Roberts*⁸ approach overruled in *Crawford*.⁹

Both *Heller* and *Crawford* marked significant changes in our constitutional law. Yet the practical impact of each has been contained in ways that show the limits of originalist law reform when viewed within the framework of judicial departmentalism.

The Supreme Court extended the reach of *Heller* in *McDonald v City of Chicago*¹⁰ by incorporating the right it had recognized against the states. This extension of reach did not involve any extension of the recognized right itself, though. That recognized right remains defined by the Supreme Court as “the right to possess a handgun in the home for the purpose of self-defense.”¹¹ There has been extensive litigation over the further scope of the Second Amendment right to keep and bear arms, such as its protections outside the home and for other types of weapons. But the Supreme Court has not—as of this time, anyway, seven terms after *McDonald*—granted review of any of the resulting lower-court decisions. And the cases decided in the lower courts have largely decided against acknowledging any additional scope to the Second Amendment protections provided by *Heller*.¹²

While there are no doubt many variables that have contributed to the relatively limited scope of the Second Amendment right thus far recognized by the Supreme Court, judicial departmentalism suggests focus on both horizontal and vertical constraints arising out of the Supreme Court’s position within the judicial department. The Supreme Court is a multimember appellate court composed of justices appointed by different presidents at different times and with different backgrounds and outlooks. From the perspective of any “pure”

⁷ US Const Amend VI (enshrining the defendant’s right “to be confronted with the witnesses against him”).

⁸ 448 US 56 (1980).

⁹ *Crawford*, 541 US at 68–69.

¹⁰ 561 US 742, 750 (2010).

¹¹ *Id* at 791.

¹² See, for example, Reply Brief for Petitioners, *Peruta v California*, Docket No 16-894, *3–5 (US filed Mar 7, 2017) (contrasting a Seventh Circuit decision recognizing a right to bear arms outside one’s home with the decisions of three state courts of last resort and four federal circuit courts of appeals ruling the other way); *Kolbe v Hogan*, 849 F3d 114, 120–21 (4th Cir 2017) (en banc) (noting that, “[i]n the wake of *Heller*, four of our sister courts of appeals have also rejected Second Amendment challenges to bans on assault weapons and large-capacity magazines”).

theory of interpretation, the Supreme Court's output will always be "impure" in some way because of the horizontal constraints imposed by this particular setting for constitutional adjudication. The justices have different views about theories of interpretation, the desirability of legal change, and the weight of any number of other different legal variables. Yet "new law" emerges only from majority agreement on outcomes and reasoning.

From the vertical perspective, any "new law" handed down by the Supreme Court has effect in other courts only to the extent that those other courts actually take it up. Judges on these lower courts are bound by vertical stare decisis, but that obligation is just one of many variables contributing to lower-court decisions.

An illustrative lower-court case is the Fourth Circuit's recent en banc decision upholding—against a Second/Fourteenth Amendment challenge—a Maryland "assault weapons" ban that prohibits even the at-home possession of certain semiautomatic rifles commonly used for lawful purposes, such as hunting and self-defense.¹³ This ban would have been unlawful, at least as applied to at-home possession for self-defense, if the Fourth Circuit had treated these rifles as similar to handguns for Second Amendment purposes. But the en banc majority held that the banned weapons were not subject to Second Amendment protection at all because they closely resembled weapons used by the military.¹⁴ In the alternative, the en banc majority held that the ban was subject to intermediate scrutiny, which it found the law satisfied.¹⁵

Judge J. Harvie Wilkinson III, a vocal lower-court critic of *Heller* and *McDonald*,¹⁶ wrote a concurring opinion in *Kolbe v Hogan*¹⁷ describing *Heller* as "a cautiously written opinion, which reserved specific subjects upon which legislatures could

¹³ See *Kolbe*, 849 F3d at 137.

¹⁴ See id (quotation marks and citation omitted):

We conclude . . . that the banned assault weapons . . . are *not* protected by the Second Amendment [W]e are convinced that the banned assault weapons . . . are among those arms that are like M-16 rifles—weapons that are most useful in military service—which the *Heller* Court singled out as being beyond the Second Amendment's reach.

¹⁵ See id at 139.

¹⁶ See generally, for example, J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va L Rev 253 (2009).

¹⁷ 849 F3d 114 (4th Cir 2017) (en banc).

still act.”¹⁸ Wilkinson grounded this observation in what one might call a quasirealist account of Supreme Court decision-making, speculating that “[h]ad *Heller* in fact failed to reserve those subjects, or had it been written more ambitiously, it is not clear that it could have garnered the critical five votes.”¹⁹

In comparison with *Heller*, which has mostly been limited by a combination of lower-court reticence and Supreme Court inactivity, *Crawford* has been cabined by the Supreme Court itself. That is how Scalia saw it, at least, in the two post-*Crawford* cases of *Michigan v Bryant*²⁰ and *Ohio v Clark*.²¹

Bryant narrowed the scope of the Confrontation Clause by expanding an important category of statements not subject to its prohibition. Under *Crawford*, application of the Confrontation Clause to prohibit the introduction of an out-of-court statement not subject to prior cross-examination depends on whether that statement is “testimonial.”²² Subsequent to *Crawford*, the Court adopted a “primary purpose” test to determine whether statements are testimonial for purposes of the Confrontation Clause.²³ In *Bryant*, the Supreme Court applied this primary-purpose test to deem nontestimonial a gunshot victim’s statements about who shot him.²⁴ In the circumstances of that case (which are important to assessing whether the Court got it right, but not essential to set forth here), a majority of the justices determined that the primary purpose of the victim’s statements was not to give testimony but instead “to enable police assistance to meet an ongoing emergency.”²⁵

In dissent, Scalia charged the *Bryant* majority with adopting a “distorted view [of the ‘ongoing emergency’ category] that creates an expansive exception to the Confrontation Clause for violent crimes.”²⁶ He accused the Court majority of seeking to sneak back in the “reliability” approach of the case law overruled

¹⁸ Id at 150 (Wilkinson concurring).

¹⁹ Id at 150–51 (Wilkinson concurring).

²⁰ 562 US 344 (2011).

²¹ 135 S Ct 2173 (2015).

²² *Crawford*, 541 US at 51.

²³ See *Davis v Washington*, 547 US 813, 822–24 (2006).

²⁴ See *Bryant*, 562 US at 377–78.

²⁵ Id, quoting *Davis*, 547 US at 822. For a full discussion of the facts, see *Bryant*, 562 US at 370–78.

²⁶ *Bryant*, 562 US at 388 (Scalia dissenting).

in *Crawford*, an approach he described as “most incompatible with the text and history of the Confrontation Clause.”²⁷

A second case in which Scalia made a similar charge is *Clark*. This was a case involving statements by a three-year-old child to preschool teachers about how he received certain injuries.²⁸ Scalia agreed with the rest of the Court that the child’s statements were nontestimonial, a conclusion that he would have rested on the child’s age alone.²⁹ He did not join the opinion for the Court because it addressed other issues in ways that he disagreed with. He wrote separately “to protest the Court’s shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in *Crawford*.”³⁰ Scalia detected “hostility to *Crawford* and its progeny” in the opinion for the Court in *Clark*, as well as dangerous dicta suggesting that “the primary-purpose test is merely *one* of several heretofore unmentioned conditions . . . that must be satisfied before the [Confrontation] Clause’s protections apply.”³¹ Pointing to language about the burden of providing evidence about the reach of the Confrontation Clause, Scalia wrote that “[a] suspicious mind (or even mind that is merely not naïve) might regard this distortion as the first step in an attempt to smuggle longstanding hearsay exceptions back into the Confrontation Clause—in other words, an attempt to return to [the approach overruled in *Crawford*].”³²

Later Supreme Court rulings and lower-court “underrulings” and precedential narrowings are not the only ways that the application of the law set forth in a Supreme Court ruling like *Heller* or *Crawford* might be limited within the judicial department.³³ Whether a prior Supreme Court ruling may

²⁷ Id at 391 (Scalia dissenting).

²⁸ *Clark*, 135 S Ct at 2177–78.

²⁹ Id at 2183–84 (Scalia concurring in the judgment).

³⁰ Id at 2184 (Scalia concurring in the judgment).

³¹ Id (Scalia concurring in the judgment).

³² *Clark*, 135 S Ct at 2185 (Scalia concurring in the judgment).

³³ The terminology of “underrulings” and “precedential narrowings” are taken from Professors Michael Stokes Paulsen and Richard M. Re, respectively. See Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused*, 7 J L & Religion 33, 82–88 (1989) (explaining that a lower-court judge “underrules” a Supreme Court precedent when the judge repudiates its authority and disregards it when deciding cases because the lower-court judge views it as “lawless” or “clearly outside the range of allowable judicial interpretation of the Constitution”); Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 Georgetown L J 921, 923 (2016) (describing “narrowing” as “interpreting [a precedent] not to apply, even though

be applied as law in a later judicial proceeding also can depend on what kind of proceeding we are talking about. This may seem counterintuitive because a foundational premise of our legal system is that “the source of a ‘new rule’ [of constitutional law] is the Constitution itself, not any judicial power to create new rules of law.”³⁴ It follows that “the underlying right necessarily pre-exists [the Supreme Court’s] articulation of the new rule.”³⁵ How, then, can it be that a prior Supreme Court ruling might not count as applicable law in a particular judicial proceeding?

The answer to this question can be found in the Supreme Court’s retroactivity doctrine. As the Court itself has recognized, the label of “retroactivity” can be misleading because the issue “is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle [a person] to the relief sought” for violation of that right.³⁶ Looking at our law through this lens of “redressability,” it is immediately apparent that there are some judicial proceedings in which no remedy may be had for violation of some individuals’ newly announced rights. The most significant category of this sort consists of postconviction proceedings seeking relief for violation of a right that was newly announced only after the right holder’s conviction obtained in violation of that right had become final.

Two cases involving the application of *Crawford* after final convictions are illustrative here. Marvin Bockting and Stephen Danforth were each convicted and sentenced in pre-*Crawford* trials that included testimony admitted in violation of *Crawford* (at least arguably) but in line with the doctrine that governed before *Crawford* (or at least each was finally found to have lost under the pre-*Crawford* doctrine).³⁷ Each sought to take advantage of *Crawford* in a postconviction proceeding. The Supreme Court held different remedial rules potentially applicable to each.

Bockting sought to advance his *Crawford*-based argument in federal habeas proceedings.³⁸ The Supreme Court held, however,

[the judge thinks] that the precedent is best read to apply,” a technique that is conceptually distinct from both “overruling” and “distinguishing”).

³⁴ *Danforth v Minnesota*, 552 US 264, 271 (2008).

³⁵ *Id.*

³⁶ *Id.*

³⁷ See *Whorton v Bockting*, 549 US 406, 410–15 (2007); *Danforth*, 552 US at 267–68.

³⁸ See *Whorton*, 549 US at 413.

that *Crawford* was a “new rule” of constitutional criminal procedure that was not retroactively applicable on collateral review in federal habeas proceedings.³⁹

Danforth, by contrast, sought to advance his *Crawford*-based argument in state postconviction proceedings.⁴⁰ The Supreme Court held that the state courts were free, if they wished, to adopt a different approach to “retroactivity” and provide a remedy in state court that—because of *Whorton v Bockting*⁴¹—would have been unavailable in federal court.⁴² As it turns out, the state court on remand decided as a matter of state law to stick with the same approach to retroactivity that the Supreme Court used as a matter of federal law.⁴³ But as a matter of legal principle, the availability of a remedy was governed by a remedy-specific legal rule, not by an inquiry into the temporal scope of *Crawford*.

The *Danforth v Minnesota*⁴⁴ Court devoted a significant portion of its analysis to explaining that its own doctrinal framework for assessing the application of new rules in federal postconviction proceedings—a framework set forth in *Teague v Lane*⁴⁵—was based on an interpretation of the federal habeas statute.⁴⁶ In Justice John Paul Stevens’s words, writing for the Court, “A close reading of the *Teague* opinion makes clear that the rule it established was tailored to the unique context of federal habeas and therefore had no bearing on whether States could provide broader relief in their own postconviction proceedings than required by that opinion.”⁴⁷ Under *Teague*, the general rule is that new rules of constitutional law announced after a person’s conviction has become final are not retroactive in federal habeas proceedings.⁴⁸ That is, federal habeas proceedings generally cannot be used to remedy the violations of new rules of constitutional law for those whose convictions became final before the new rule was announced by the Supreme Court.

³⁹ Id at 421.

⁴⁰ *Danforth*, 552 US at 267–68.

⁴¹ 549 US 406 (2007).

⁴² Id at 290–91.

⁴³ *Danforth v State*, 761 NW2d 493, 498–99 (Minn 2009).

⁴⁴ 552 US 264 (2008).

⁴⁵ 489 US 288 (1989).

⁴⁶ *Danforth*, 552 US at 274–82.

⁴⁷ Id at 277.

⁴⁸ See id at 274–75.

There are two exceptions to *Teague*'s general rule, one for new substantive rules and the other for "watershed" procedural rules.⁴⁹ Neither of those exceptions was at issue in *Danforth*, and the Court observed that

not a word in Justice O'Connor's [controlling opinion in *Teague*] . . . asserts or even intimates that her definition of the class eligible for relief under a new rule should inhibit the authority of any state agency or state court to extend the benefit of a new rule to a broader class than she defined.⁵⁰

Teague does not bind state courts because it "is based on statutory authority that extends only to federal courts applying a federal statute."⁵¹ This not only is evident from a close reading of *Teague*, but also is confirmed by the practice of state courts following *Teague* that "almost universally understood the *Teague* rule as binding only federal habeas courts, not state courts."⁵²

Under *Danforth*, the law to be applied to petitioners whose convictions became final before *Crawford* has the potential to be different in state and federal proceedings. And under the Supreme Court's retroactivity jurisprudence more generally, the law to be applied in postconviction proceedings is often different from the law applied in proceedings prior to a final conviction. Consider, for instance, a federal tribunal ruling on a post-*Crawford* Confrontation Clause objection (1) during a criminal defendant's trial in the morning and (2) during federal habeas proceedings for an individual whose conviction became final before *Crawford* in the afternoon. The same tribunal the same day would apply *Crawford* in one (the trial), but not in the other (the habeas proceedings).

Judicial departmentalism provides a more sophisticated framework than judicial supremacy for understanding and analyzing the effects of legal changes like *Crawford*. To say that the law is for everybody what the Supreme Court says it is in resolving a case—as judicial supremacy provides—is only to restate the problem that results when (1) the Supreme Court

⁴⁹ Id. This capsule description is somewhat simplified with respect to both exceptions. Because this Essay provides just a sketch of the *Teague* framework, those interested in the scope of these exceptions should look elsewhere.

⁵⁰ *Danforth*, 552 US at 277–78.

⁵¹ Id at 278–79.

⁵² Id at 281.

changes what it says the law is (2) *after* one's case has finished working its way through the judicial system.

For someone imprisoned pursuant to a final criminal conviction, the issue presented by a new rule is not so much what the law has become, but whether there is any judicial forum for a new proceeding in which the new law may or must be applied with respect to that person's old conviction and punishment so that there may be a judicial remedy. These matters cannot be settled by appeal to the imprecise assertion that the law is whatever the Supreme Court has "said so." That is because at least some Supreme Court precedents (such as *Crawford* and other cases announcing certain kinds of new rules) are not required by the Constitution or any other federal law (at least at this time) to be treated as binding law *even within the judicial department* for most postconviction proceedings. Judicial departmentalism, by contrast, treats the binding law that results from judicial determinations (including those of the Supreme Court) as a function of the law of judgments, the law of precedent, and the law of remedies.⁵³ In so doing, judicial departmentalism points the way to the right kinds of more specific doctrines that exist precisely to answer questions like those raised by new rules of constitutional law.

II. JUDICIAL DEPARTMENTALISM IN DISSENT

I have contended previously that justices should be judicial departmentalists because "[j]ustices who know that their only tools for securing legal settlement through adjudication are judgments, remedies, and precedents are likely to judge in ways that lead to better judgments, better remedies, and better precedents."⁵⁴ The trio of decisions discussed in this Part—and Justice Scalia's dissents in these cases—all support this contention. These are examples of cases in which a Court majority's implicit adoption of judicial supremacy led to legally defective analysis about jurisdiction and remedies. Because judicial supremacy is not the law, but a majority of justices operated in these cases as if it were, the Court found itself needing to make changes in jurisdictional and remedial doctrines to grant itself the judicial authority it needed to maintain its conception of supremacy as a practical matter.

⁵³ See Walsh, 58 Wm & Mary L Rev at 1715 (cited in note 1).

⁵⁴ Id at 1740.

The first example is *Montgomery v Louisiana*.⁵⁵ This case addressed a question reserved in *Danforth*. While *Danforth* authorized state courts to give greater “retroactive” effect to a new rule than a federal postconviction court would, the question in *Montgomery* was whether a state postconviction court could give lesser “retroactive” effect to a certain kind of new rule.⁵⁶ The Court held that “when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.”⁵⁷ The category of “substantive rules” for this purpose consists of those that fit within the first of two exceptions to *Teague*’s general rule of “nonretroactivity,” embodied in the federal habeas statute, for federal habeas proceedings.⁵⁸

The “new rule” at issue in *Montgomery* had been articulated a few years earlier in *Miller v Alabama*.⁵⁹ In *Miller*, a five-justice majority of the Court decided that the Eighth Amendment forbids imposition of a life sentence without parole on those who commit crimes as juveniles, unless sentencing includes an individualized determination of “irreparable corruption” or “incurability” as of the time of sentencing.⁶⁰ When Henry Montgomery had been sentenced to life without parole over forty years before *Miller*, there had been no individualized determination about incurability. Given the state of the law then, it would not have occurred to anybody that such a procedure was constitutionally required. Yet the Supreme Court held in *Montgomery* that “[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.”⁶¹

The novelty and potentially broad implications of *Montgomery*’s “retroactivity” holding—which imposes a new remedial obligation on state courts that authorize collateral attacks based on federal law—can be seen in the use to which the principal premise underlying the *Montgomery* majority’s

⁵⁵ 136 S Ct 718 (2016).

⁵⁶ *Id.* at 728–29.

⁵⁷ *Id.* at 729.

⁵⁸ *Id.* at 728–29.

⁵⁹ 567 US 460 (2012).

⁶⁰ *Id.* at 472–73, 479–80.

⁶¹ *Montgomery*, 136 S Ct at 731–32.

holding has been put by scholars seeking to extend the Court's faulty reasoning. In a recent article published in the *Virginia Law Review*, Professors Carlos Vázquez and Stephen Vladeck argue that *Montgomery* establishes—in the words of their title—“*The Constitutional Right to Collateral Post-conviction Review*.”⁶² These scholars describe the *Montgomery* “retroactivity” analysis as “novel and momentous” for treating the “retroactive” application of a particular rule as constitutionally required in certain postconviction settings.⁶³ Their argument about the implications of the constitutional “right” to collateral postconviction review has many steps, leading to multiple conclusions at odds with previously articulated jurisdictional and remedial doctrines. In their own words, their conclusion—which goes beyond the “surface” holding of *Montgomery* to unfold the logic of its constitutionalization of the “retroactivity” issue—“call[s] into question decades of conventional scholarly and judicial wisdom.”⁶⁴ Spelling out and enforcing the logic of *Montgomery*, they assert, “should open the door to the revisiting of any number of other assumptions about the contemporary structure of post-conviction remedies.”⁶⁵ Vázquez and Vladeck do not purport to revisit all of those, but instead set themselves the goal

to explain how and why, in a seemingly innocuous holding . . . *Montgomery* upends a half-century's worth of doctrinal and theoretical analyses of collateral post-conviction review, a result that could have a significant impact on both commentators' and courts' understanding of the relationship between collateral post-conviction remedies and the Constitution.⁶⁶

All of this potential legal change—which is what it would really be, not just a change in “conventional wisdom” or in commentators' and courts' “understanding”—would follow only, of course, if later courts treat *Montgomery*'s reasoning as generative. And there is ample reason in the law not to, including all the disruption that it would cause to the prior law.

⁶² Carlos M. Vázquez and Stephen I. Vladeck, *The Constitutional Right to Collateral Post-conviction Review*, 103 Va L Rev 905 (2017).

⁶³ *Id.* at 910.

⁶⁴ *Id.* at 915.

⁶⁵ *Id.* at 915–16.

⁶⁶ Vázquez and Vladeck, 103 Va L Rev at 916 (cited in note 62).

Vázquez and Vladeck speculate, after all, that the Court in *Montgomery* “may not have fully appreciated . . . just how far-reaching the consequences” of its constitutionalization of its prior federal habeas retroactivity framework could be.⁶⁷ They may be right about this, but it is not as if the Court lacked notice about the substantiality of its inventive break with prior doctrine. Both Scalia’s and Justice Clarence Thomas’s dissents unpacked the *Montgomery* Court’s errors in detail.

As Scalia explained—consistent with *Danforth’s* understanding of *Teague* as grounded in interpretation of the federal habeas statute—“[n]either *Teague* nor its exceptions are constitutionally compelled.”⁶⁸ Under the Court’s approach coming into *Montgomery*, “[a] state court need only apply the law as it existed at the time a defendant’s conviction and sentence became final. . . . Any relief a prisoner might receive in a state court after finality is a matter of grace, not constitutional prescription.”⁶⁹ Scalia argued that the Supreme Court has repeatedly said that “*federal* habeas courts are to review state-court decisions against the law and factual record that existed at the time the decisions were made.”⁷⁰ This focus is a function of the “backward-looking language” of the federal habeas statute.⁷¹ “How can it possibly, be, then,” Scalia asked, “that the Constitution requires a *state* court’s review of its own convictions to be governed by ‘new rules’ rather than (what suffices when federal courts review state courts) ‘old rules’?”⁷² Until the Court’s decision in *Montgomery*, Scalia argued, “it was Congress’s prerogative to do away with *Teague’s* exceptions altogether.”⁷³ Scalia would have resolved *Montgomery* in line with the maxim that “[t]he Supremacy Clause does not impose upon state courts a constitutional obligation it fails to impose upon federal courts.”⁷⁴

⁶⁷ Id at 926. Vázquez and Vladeck use “necessarily” to describe the “far-reaching consequences” they see as flowing from *Montgomery*. I disagree that these consequences are necessary in any strict sense, and I believe courts should try to limit the damage done by *Montgomery* to previously settled doctrine.

⁶⁸ *Montgomery*, 136 S Ct at 739 (Scalia dissenting).

⁶⁹ Id (Scalia dissenting).

⁷⁰ Id (Scalia dissenting).

⁷¹ Id (Scalia dissenting) (discussing 28 USC § 2254(d), which “refers, in the past tense, to a state-court adjudication that ‘resulted in’ a decision that was contrary to, or ‘involved’ an unreasonable application of, established law”).

⁷² *Montgomery*, 136 S Ct at 739 (Scalia dissenting).

⁷³ Id at 741 (Scalia dissenting).

⁷⁴ Id (Scalia dissenting).

In any event, it is not very helpful to speculate in the abstract how any given court might distinguish *Montgomery* in a different setting so that it does not unsettle so much that was previously settled. It is sufficient here to note that in any circumstance in which application of *Montgomery* would threaten some previously settled rule, there will be at least two options to choose from—namely, the contemplated extension of *Montgomery* and the previously settled rule. And the coherence of that previously settled rule with other previously settled rules, in contrast with what applying some extension of *Montgomery* would call into question, will likely provide good reason not to apply *Montgomery* outside of its particular setting.

Regardless of how precisely it turns out that courts deal with *Montgomery* in the future, the decision provides a case study in how a mistaken notion of judicial supremacy can drive doctrinal innovation in the area of jurisdiction or remedies. Absent some means of bringing *Miller* matters back within the judicial department through postconviction proceedings in which *Miller* would govern, there was no way to ensure implementation of *Miller* for the large group of its intended beneficiaries whose convictions had become final. If the Supreme Court in *Montgomery* had simply treated the state court's application of its own "retroactivity" law as the state-law remedial issue that it was, the Court would have lacked jurisdiction to review it, much less to insist on *Miller's* application. Apparently that is not an outcome a majority of the Court was willing to countenance.

A similar dynamic was at work in another judicial-domain-expanding decision that Scalia also dissented from, *Boumediene v. Bush*.⁷⁵ The Supreme Court held unconstitutional a federal statute, the Detainee Treatment Act,⁷⁶ that provided access to Combatant Status Review Tribunals and appellate review in the DC Circuit for noncitizens held outside the territorial United States and designated by the military as enemy combatants.⁷⁷ In an opinion by Justice Anthony Kennedy, the Court held that these arrangements violated the Suspension Clause⁷⁸ because

⁷⁵ 553 US 723 (2008).

⁷⁶ Pub L No 109-148, 119 Stat 2742 (2005).

⁷⁷ Detainee Treatment Act § 1005, 119 Stat at 2740–44.

⁷⁸ US Const Art I, § 9, cl 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

Congress had eliminated access to the writ of habeas corpus for these individuals and had failed to provide an adequate substitute.⁷⁹

Scalia identified “an inflated notion of judicial supremacy” as the driver of the decision in *Boumediene*.⁸⁰ This notion of judicial supremacy displaced the Suspension Clause itself and the principles of the Court’s precedents interpreting it, he charged.⁸¹ And he spelled out his explanation of how the Court instead should have understood its judicial role in terms that sound in judicial departmentalism.

The *Boumediene* majority’s basic mistake, Scalia asserted, was to override the incidental nature of constitutional adjudication. The foundation of judicial power for federal courts to declare acts of Congress unconstitutional “is the power and duty of those courts to decide cases and controversies *properly before them*.”⁸² It follows that the exercise of this power “is circumscribed by the limits of our statutorily and constitutionally conferred jurisdiction.”⁸³ That was the real issue: Does the Court have jurisdiction? Yet the majority approached this backwards, reasoning that it had to have jurisdiction because otherwise the executive could evade review by the judiciary.⁸⁴ “It is both irrational and arrogant,” wrote Scalia, “to say that the answer must be yes, because otherwise we would not be supreme.”⁸⁵

Chief Justice John Roberts wrote his own dissent in *Boumediene*, in addition to joining Scalia’s. He identified an additional way in which the Court had hurtled ahead when it should not have: by ignoring traditional principles of exhaustion that would have required the detainees to use the process provided by Congress in the Detainee Treatment Act.⁸⁶ This charge differs from Scalia’s focus in that it is more about failing

⁷⁹ *Boumediene*, 553 US at 732–33. The majority’s analysis presupposed that noncitizens held as enemy combatants at Guantanamo Bay previously had been provided access to the writ of habeas corpus. That presupposition is mistaken for reasons outlined in Scalia’s dissent in *Rasul v Bush*, 542 US 466, 488–506 (2004) (Scalia dissenting).

⁸⁰ *Boumediene*, 553 US at 842 (Scalia dissenting).

⁸¹ *Id.* (Scalia dissenting).

⁸² *Id.* (Scalia dissenting).

⁸³ *Id.* (Scalia dissenting).

⁸⁴ See *Boumediene*, 553 US at 743 (asserting that “a regime in which Congress and the President, not this Court, say ‘what the law is,’” would be “a striking anomaly in our tripartite system of government”).

⁸⁵ *Id.* at 843 (Scalia dissenting).

⁸⁶ See *id.* at 803–04 (Roberts dissenting).

to use an existing rule than about making up a new one, but the result and underlying impulse are the same. The common thread is that the Supreme Court strayed from its proper judicial role in order to exercise control over an area outside its constitutional domain.

A third example of jurisdictional invention in service of a substantive agenda is *United States v Windsor*.⁸⁷ The case started out as an actual controversy between Edith Windsor and the United States government. She sought a tax refund reflecting a spousal exemption from the estate tax. That exemption had been denied her because her deceased spouse was of the same sex and § 3 of the federal Defense of Marriage Act⁸⁸ (DOMA) required the federal government to treat as valid for federal-law purposes only marriages between one man and one woman.⁸⁹

Windsor won in the trial court.⁹⁰ The federal government agreed that she should have won but appealed anyway.⁹¹ This agreement created a problem for appellate jurisdiction because there was no adverseness between the parties with respect to the judgment that had been entered. The United States asked the appellate court to affirm the trial-court judgment ordering the government to pay Windsor her tax refund with credit for the spousal exemption from estate tax that had been denied to her because of DOMA § 3.⁹² At the same, the federal government also refused to pay pending appellate review by the Second Circuit and the Supreme Court.⁹³ In effect, the government sought the same order as below, but just from a higher-level court. The Second Circuit accepted jurisdiction and affirmed the district-court judgment.⁹⁴ The federal government sought certiorari, again seeking affirmance.

The Supreme Court granted certiorari, determined it possessed jurisdiction, and gave the Government the affirmance it sought.⁹⁵ In his opinion for the Court, Kennedy held that the government's refusal to pay the refund despite agreeing with the judgment requiring it to do so was "a stake sufficient to support

⁸⁷ 133 S Ct 2675 (2013).

⁸⁸ Pub L No 104-199, 110 Stat 2419 (1996).

⁸⁹ *Windsor*, 133 S Ct at 2682–83.

⁹⁰ *Windsor v United States*, 699 F3d 169, 176 (2d Cir 2012).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Windsor*, 699 F3d at 176.

⁹⁵ *Windsor*, 133 S Ct at 2696.

Article III jurisdiction on appeal and in proceedings before [the Supreme] Court.”⁹⁶ According to Kennedy, “Windsor’s ongoing claim for funds that the United States refuses to pay . . . establishes a controversy sufficient for Article III jurisdiction.”⁹⁷

Scalia dissented. With respect to the jurisdictional holding, he was joined in dissent by Roberts and Thomas.⁹⁸ In a tour de force that opens with words echoing his famous solo dissent in *Morrison v Olson*,⁹⁹ Scalia described *Windsor* as a case about “power”: “This case is about power It is about the power of our people to govern themselves, and the power of this Court to pronounce the law.”¹⁰⁰ Scalia argued that the judiciary was being used by the executive and that the Court’s enabling of jurisdiction facilitated “Executive contrivance.”¹⁰¹

The core of Scalia’s dissent was his insistence on the judiciary’s law-declaration function as incidental to its dispute-resolution function. Answering the majority’s invocation of the statement in *Marbury v Madison*¹⁰² that “[i]t is emphatically the province and duty of the judicial department to say what the law is,” Scalia pointed out that “[t]he very next sentence of Chief Justice Marshall’s opinion makes the crucial qualification that today’s majority ignores: ‘*Those who apply the rule to particular cases, must of necessity expound and interpret that rule.*’”¹⁰³ Instead of respecting the proper role of the judicial department, Scalia charged, the majority operated from an inflated notion of judicial supremacy: “There is, in the words of *Marbury*, no ‘necessity [to] expound and interpret’ the law in this case; just a desire to place this Court at the center of the Nation’s life.”¹⁰⁴ The Court’s determination that it possessed jurisdiction made

⁹⁶ Id at 2686.

⁹⁷ Id.

⁹⁸ Justice Samuel Alito dissented from the Court’s merits holding but believed that there was Article III jurisdiction pursuant to a different theory than the one adopted by the *Windsor* majority. See id at 2711–13 (Alito dissenting).

⁹⁹ 487 US 654, 699 (1988) (Scalia dissenting).

¹⁰⁰ *Windsor*, 133 S Ct at 2697 (Scalia dissenting). Compare id (Scalia dissenting), with *Morrison*, 487 US at 699 (Scalia dissenting) (“That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish—so that ‘a gradual concentration of the several powers in the same department’ can effectively be resisted.”) (quotation marks and citation omitted).

¹⁰¹ *Windsor*, 133 S Ct at 2702 (Scalia dissenting).

¹⁰² 5 US (1 Cranch) 137 (1803).

¹⁰³ *Windsor*, 133 S Ct at 2703 (Scalia dissenting), quoting *Marbury*, 5 US (1 Cranch) at 177.

¹⁰⁴ Id (Scalia dissenting), quoting *Marbury*, 5 US (1 Cranch) at 177.

Windsor the first of its kind. “In the more than two centuries that this Court has existed as an institution,” Scalia asserted, “we have never [before] suggested that we have the power to decide a question when every party agrees with both its nominal opponent *and the court below* on that question’s answer.”¹⁰⁵

Although the jurisdictional ruling in *Windsor* was incorrect, and was underpinned by an incorrect acceptance of a form of judicial supremacy, the Court’s need to bend the jurisdictional law was a backhanded tribute to judicial departmentalism. The whole point of taking jurisdiction was to establish a precedent that would be binding throughout the nation (unlike the Second Circuit’s decision, which would only have been binding within the Second Circuit). The only way to accomplish that would be to make use of the law of precedent, by arriving at a ruling of the Supreme Court of the United States that would, by virtue of that law, become binding on all judicial tribunals in the United States.

The *Windsor* decision also enabled the Supreme Court to cover its tracks a bit when it created a constitutional right to same-sex marriage exactly two years later in *Obergefell v Hodges*.¹⁰⁶ Sensing which way the wind was blowing in *Windsor*’s wake, the majority of lower courts that addressed themselves to the existence of a constitutional right to same-sex marriage after *Windsor* ruled in favor of such a right.¹⁰⁷ As a consequence, the Supreme Court in *Obergefell* could make it appear as if it were merely being reactive and recognizing a right that preexisted its exercise of judicial will.

Unlike in *Windsor*, there was no need in *Obergefell* to warp jurisdictional doctrine directly. The Supreme Court had already stuffed so much into substantive constitutional law that James Obergefell’s claim was able to “aris[e] under”¹⁰⁸ the Constitution. This time it was Roberts who explicitly accused the majority justices of entertaining an “extravagant conception of judicial supremacy.”¹⁰⁹ He asserted that “[t]hose who founded our

¹⁰⁵ Id at 2700 (Scalia dissenting). Scalia further noted that “[t]he United States reluctantly conceded that at oral argument.” Id (Scalia dissenting).

¹⁰⁶ 135 S Ct 2584 (2015).

¹⁰⁷ Id at 2597 (discussing the lopsided nature of the split in lower federal courts and state high courts over a constitutional right to same-sex marriage).

¹⁰⁸ US Const Art III, § 2.

¹⁰⁹ *Obergefell*, 135 S Ct at 2624 (Roberts dissenting).

country would not recognize the majority's conception of the judicial role."¹¹⁰

* * *

Montgomery, *Boumediene*, and *Windsor* are all cases in which the Court's changes to the substance of the law were so significant that the prior rules of remedies or jurisdiction needed to be changed in order to facilitate the kind of substantive shift that the majority justices had in mind. And each case involved a majority motivated by a particular form of judicial supremacy. Yet judicial departmentalism comes through even in these cases because the Court needed to change the boundaries of the judicial department in order to bring matters within its perceived monopoly over authoritative determinations of constitutional meaning.

III. SECTION 5, JUDICIAL DEPARTMENTALISM, AND ORIGINALIST LAW REFORM

What might happen if the Supreme Court were to more explicitly and consistently acknowledge that it lacks a complete monopoly on the authoritative meaning of the Constitution? By confining the legal authoritativeness of judicial determinations about the content of constitutional law to within the judicial department, judicial departmentalism invites attention to the possibility that judicial rulings may overenforce or underenforce the law of the Constitution in a variety of ways. This possibility, in turn, leads to consideration of the ways in which judicially underenforced rights might receive greater protection through legislative rather than judicial action by means of enforcement legislation premised on the content of the right itself rather than on the judicially articulated underenforcing doctrine.

For a constitutional originalist, the original law of the Constitution—except to the extent that it has been lawfully changed—provides the standard against which to measure judicial doctrine to see if it underenforces, overenforces, or gets the law of the Constitution right. Assuming that at least some mismatch calls for originalist law reform, how should that be accomplished?

¹¹⁰ Id (Roberts dissenting).

Perhaps our constitutional law would be improved if the burden of originalist law reform did not fall entirely on the Supreme Court. This final Part of this Essay on originalist law reform, judicial departmentalism, and Justice Scalia draws on an area of law that he openly struggled with how best to implement judicially: § 5 of the Fourteenth Amendment. I offer a suggestion that would probably have come as something of a surprise to Scalia: the Court should invite Congress to use its enforcement authority under § 5 of the Fourteenth Amendment to act as a partner in the enterprise of originalist law reform.

It is perhaps an understatement to observe that Scalia would be cautious in considering this suggestion. The Supreme Court's modern doctrine on the scope of Congress's § 5 power was developed in a case that knocked down Congress's attempt to provide greater protection under the First Amendment's Free Exercise Clause than the Court had found it to provide in an opinion by Scalia. That § 5 case was *City of Boerne v Flores*,¹¹¹ in which the Supreme Court held that the Religious Freedom Restoration Act of 1993¹¹²—enacted in response to *Employment Division v Smith*¹¹³—exceeded Congress's authority under § 5.¹¹⁴ According to *Boerne*, § 5 enforcement legislation must exhibit “proportionality or congruence between the means adopted and the legitimate end to be achieved.”¹¹⁵

Scalia joined the Court's decision in *Boerne* but later rejected it in favor of a seemingly stricter approach. That move came in *Tennessee v Lane*,¹¹⁶ in which the Court held that Title II of the Americans with Disabilities Act of 1990¹¹⁷ was within Congress's § 5 authority “as it applies to the class of cases implicating the fundamental right of access to the courts.”¹¹⁸ In dissent, Scalia argued that “[t]he ‘congruence and proportionality’ standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking. Worse still, it casts this Court in the role of Congress's taskmaster.”¹¹⁹

¹¹¹ 521 US 507 (1997) (Scalia).

¹¹² Pub L No 103-141, 107 Stat 1488, codified as amended at 42 USC § 2000bb et seq.

¹¹³ 484 US 872 (1990).

¹¹⁴ *Boerne*, 521 US at 536.

¹¹⁵ *Id* at 533.

¹¹⁶ 541 US 509 (2004).

¹¹⁷ Pub L No 101-336, 104 Stat 327, codified at 42 USC § 12101 et seq.

¹¹⁸ *Id* at 533–34.

¹¹⁹ *Id* at 557–58 (Scalia dissenting).

Prior to *Lane*, Scalia had agreed with a series of post-*Boerne* decisions that found various provisions outside of Congress's authority under § 5. But he had joined in dissent from a decision that upheld a statutory entitlement to twelve work weeks of unpaid leave as a congruent and proportional responses to unconstitutional sex discrimination.¹²⁰ The dissent he joined in that case, Scalia said, established that "Congress had identified no unconstitutional state action to which the statute could conceivably be a proportional response."¹²¹ He reasoned similarly with respect to the disability-access legislation in *Lane*.¹²² Going forward, Scalia resolved in *Lane* that he would confine Congress's ability to "overenforce" the Fourteenth Amendment to legislation combating racial discrimination and would otherwise insist that Congress's § 5 authority be limited to protecting against actual violations of the Fourteenth Amendment.¹²³ Scalia's allowance of prophylactic legislation for racial discrimination was based on *stare decisis*, while the rest of his approach was based on his best understanding of what "enforce" means as used in § 5.¹²⁴

Although Scalia's approach in *Lane* is stricter than the Court's approach in *Boerne* with respect to allowing legislation that overenforces the Fourteenth Amendment, Scalia's approach to § 5 has the potential to authorize § 5 legislation that *Boerne* would not. That is because *Boerne* implicitly adopts judicial supremacy in determining what counts as a constitutional violation within Congress's power to remedy. In *Boerne*, for example, "the Court equated its prior decision in *Employment Division v. Smith* with the meaning of the Free Exercise Clause."¹²⁵

But what if judicial supremacy is wrong? If judicial doctrine underenforces the Fourteenth Amendment in some ways, for instance, then § 5 legislation that overenforces when measured against that doctrine may nonetheless be within Congress's § 5 authority when measured against the doctrinally underenforced

¹²⁰ See *Nevada Department of Human Resources v Hibbs*, 538 US 721, 744 (2003) (Kennedy dissenting).

¹²¹ *Lane*, 541 US at 557 (Scalia dissenting).

¹²² *Id* (Scalia dissenting).

¹²³ *Id* at 558–65 (Scalia dissenting).

¹²⁴ *Id* at 560 (Scalia dissenting) (noting that "[a] lot of water has gone under the bridge" regarding the enforcement power).

¹²⁵ Walsh, 58 Wm & Mary L Rev at 1747 (cited in note 1).

Fourteenth Amendment itself. Although Scalia did not formulate his approach to § 5 with this possibility in view, his final description of his approach to § 5 is compatible with this insight. In his concurrence in the judgment in *Coleman v Maryland Court of Appeals*,¹²⁶ Scalia summarily described his approach to § 5 as follows: “[O]utside of the context of racial discrimination (which is different for *stare decisis* reasons), I would limit Congress’s § 5 power to the regulation of conduct that *itself* violates the Fourteenth Amendment.”¹²⁷

A combined commitment to constitutional originalism and judicial departmentalism enables one to appreciate how pushing aside the implicit judicial supremacy of *Boerne* could result in the authorization of § 5 legislation that would not be authorized under *Boerne*. Constitutional originalism provides a standard outside of the Supreme Court’s doctrine but inside the law that enables one to see how legislation may appear to overenforce when measured against judicial doctrine, but actually does not, because the judicial doctrine underenforces the Fourteenth Amendment as assessed from an originalist perspective.

For this claim to have practical bite, it remains only to be seen whether there are any doctrines that underenforce the original law of the Fourteenth Amendment. From Scalia’s point of view, two obvious candidates to consider are the doctrines implementing the Second and Sixth Amendments, as incorporated against the states via the Fourteenth Amendment. There is good reason to believe that Scalia viewed the Court’s doctrine as underenforcing both. He said as much with respect to the Sixth Amendment in his *Bryant* dissent and *Clark* concurrence in the judgment.¹²⁸ And in 2015, Scalia twice joined dissents from denial of certiorari by Justice Thomas that criticized the Court for its “refusal to review a decision that flouts two of our Second Amendment precedents.”¹²⁹

Suppose Congress were to try to do something about this state of affairs through enactment of enforcement legislation

¹²⁶ 566 US 30 (2012).

¹²⁷ *Id.* at 45 (Scalia concurring in the judgment).

¹²⁸ See *Bryant*, 562 US at 380 (Scalia dissenting) (“[T]oday’s opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles.”); *Clark*, 135 S Ct at 2185 (Scalia concurring in the judgment) (criticizing the Court majority’s “aggressive hostility to precedent that it purports to be applying”).

¹²⁹ *Friedman v City of Highland Park*, 136 S Ct 447, 449 (2015) (Thomas dissenting from denial of certiorari). See also *Jackson v City and County of San Francisco*, 135 S Ct 2799, 2799 (2015) (Thomas dissenting from denial of certiorari).

under § 5. What if Congress were to enact legislation, for example, that prohibits introduction in state criminal prosecutions of statements that are nontestimonial under the Supreme Court's current doctrine but testimonial under Scalia's understanding of the original law of the Confrontation Clause? Or a federal law preempting state-law bans on "assault weapons" to allow for at-home possession for self-defense? Would these laws be within Congress's authority under § 5?

From an originalist perspective, the answer depends not only on whether the Sixth and Second Amendments themselves are best understood as providing the legislated protections, but also on whether the Fourteenth Amendment is best understood as having incorporated these protections for enforcement against the states. The relationship between original meaning and incorporation is crucial, for if the original law of the Fourteenth Amendment did not provide for incorporation, then § 5 legislation to enforce the original meaning of the Fourteenth Amendment would not include legislation enforcing the Bill of Rights.

In *McDonald*, Scalia joined the opinion for the Court holding the Second Amendment incorporated against the states, but that holding was based on the substantive due process analysis that Scalia has acquiesced in because of stare decisis, rather than accepting it because he believes it correct.¹³⁰ Thomas argued in his concurrence in the judgment in *McDonald*, though, that there is good reason to believe as a matter of original law that "the right to keep and bear arms is a privilege of American citizenship that applies to States through the Fourteenth Amendment's Privileges or Immunities Clause."¹³¹ And, more generally, there is good reason to believe that "[a]t the very minimum, the original meaning of the Privileges or Immunities Clause includes substantive rights, in particular the rights listed in the first eight amendments to the Constitution."¹³² If

¹³⁰ See *McDonald*, 561 US at 791 (Scalia concurring) (quotation marks and citation omitted):

Despite my misgivings about substantive due process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights because it is both long established and narrowly limited. This case does not require me to reconsider that view, since straightforward application of settled doctrine suffices to decide it.

¹³¹ *Id.* at 806 (Thomas concurring in part and concurring in the judgment).

¹³² Kurt T. Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* 283 (Cambridge 2014).

that is right, then both the Second Amendment's right to keep and bear arms and the Sixth Amendment's right to be confronted with the witnesses against one were both incorporated against the states as a matter of the original law of the Fourteenth Amendment.

We come to this: if judicial doctrine underenforces various guarantees in the Bill of Rights, and if those guarantees are incorporated under the Fourteenth Amendment—all from an originalist point of view—then constitutional originalism can combine with judicial departmentalism so that Congress can be a partner in the pursuit of originalist law reform. In particular, we have seen the potential for (1) originalist doctrines, like those articulated in *Crawford* and *Heller* (2) to combine with the judicial departmentalist recognition that constitutional law applicable in the judicial department is not necessarily equivalent to, and sometimes may underenforce, the law of the Constitution (3) to authorize originalism-based reform legislation enacted by Congress under § 5 of the Fourteenth Amendment. The practical impact that could result if Congress were to enact legislation of this sort would obviously depend significantly on the legislation enacted. But doctrinally, such legislation could allow judges to uphold a congressional act that rests on a correct interpretation of the Constitution despite incorrect precedent suggesting a different interpretation. And more generally, alerting legislators and the public to the availability of legislation of this sort reveals a lawful way to shake off constitutional lethargy and empower political actors to engage in a form of self-government that the political actors have largely abdicated to the judiciary.

The discussion of the potential of § 5 for originalist law reform up to this point has focused on the way in which originalism can be used to identify areas appropriate for enforcement legislation by supplying a standard to assess whether judicial doctrine underenforces the underlying right. There is also another important way that originalism can underwrite originalist law reform through § 5 legislation. That is by supplying a better understanding of the breadth of Congress's § 5 enforcement power than set forth in *Boerne*.

I have previously contended, following Professor Michael McConnell, that the *Boerne* Court's reasoning "rests on a false dichotomy" between a forbidden "substantive" authority of Congress to define the scope of the Fourteenth Amendment

and the permitted “remedial” authority to enact enforcement legislation to address Fourteenth Amendment violations understood as such according to judicial doctrine.¹³³ This dichotomy neglects what McConnell calls an “interpretive” approach, under which the question for the Court is not “whether Congress is enforcing the Fourteenth Amendment *as construed by the Court*, but whether it is enforcing a reasonable interpretation of the *Fourteenth Amendment*.”¹³⁴

McConnell has adduced evidence from the framing of the Fourteenth Amendment that undercuts *Boerne*’s exclusive reliance on judicially articulated doctrine and shows that “Congress did not consider itself limited to enforcing judicially determined rights under the Fourteenth Amendment.”¹³⁵ Suppose that McConnell is correct that “Section Five was born of the conviction that Congress—no less than the courts—has the duty and the authority to interpret the Constitution.”¹³⁶ This is but another way of saying that constitutional originalism supports a broader understanding of Congress’s § 5 enforcement authority than *Boerne* recognizes.

* * *

“Mission accomplished.”¹³⁷ These are (coincidentally?) the final words in Justice Scalia’s final published Supreme Court opinion. He could not have known when he wrote them at the conclusion of his dissent in *Montgomery* that these would be the last lines to flow from his judicial pen. But they are fitting. His legacy for those who seek to carry on the intergenerational project of constitutional maintenance goes far beyond carrying out the error-exposure mission of that final dissent. He accomplished a far more important and long-lasting mission in the area of constitutional law. He changed how we understand our constitutional past. Extending well into the future, Scalia’s intrepid originalism will offer enduring insight into both what our law is and also what it can be—even in the judicial department.

¹³³ See Walsh, 58 Wm & Mary L Rev at 1748–49 (cited in note 1). In this article, I discuss Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 Harv L Rev 153, 170–74 (1997).

¹³⁴ See McConnell, Comment, 111 Harv L Rev at 171 (cited in note 133).

¹³⁵ Id at 175.

¹³⁶ Id at 183.

¹³⁷ *Montgomery*, 136 S Ct at 744 (Scalia dissenting).