The *Boerne-Rucho* Conundrum: The Congressional Power over State-District Partisan Gerrymanders

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This Article explores the scope of Congress's authority to enact comprehensive partisan-gerrymandering reform governing state and local electoral districts. While there is a broad consensus that Congress can regulate partisan gerrymandering of federal (i.e., congressional) electoral districts under the Elections Clause, the background assumption in the field has been that Congress lacks the power to regulate a state's attempts to partisan gerrymander state and local electoral districts. To do so, Congress would have to rely on its Section 5 power under the Fourteenth Amendment, a task made near insurmountable in the partisan-gerrymandering context by the stringent "congruence and proportionality" test that Section 5 legislation must meet under City of Boerne v. Flores. *This Article challenges that background assumption. It argues that* Rucho v. Common Cause*—which held that partisan gerrymandering cases are nonjusticiable but at the same time left untouched the Court's previous determinations that "extreme" partisan gerrymanders violate the Equal Protection Clause—opened a new opportunity for Congress to comprehensively regulate state and local partisan gerrymandering using its Section 5 powers. The Court justified* Boerne*'s heightened standard of review for Section 5 legislation as a way of safeguarding the judiciary's prerogative to "say what the law is." But when the Court, by invoking nonjusticiability, disclaims its ability to "say what the law is" in the context of an acknowledged constitutional right, as it did in* Rucho, Boerne*'s "congruence and proportionality" test becomes incoherent. Instead, the Court must apply a lesser standard of review and evaluate Section 5 partisan gerrymandering legislation under a "rational means" test. This revelation makes possible a previously doubtful proposition—that Congress may pass legislation to regulate partisan gerrymandering of not just congressional districts but state and local legislative districts as well.*

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Introduction

In *Rucho v. Common Cause*,[1] the Supreme Court held that partisan gerrymandering claims are nonjusticiable, ending a thirty-three-year search for a manageable framework through which to evaluate partisan gerrymanders under the Equal Protection Clause.[2] The decision in *Rucho* foreclosed any possibility that a judicial fix to partisan gerrymandering would simultaneously, comprehensively, and uniformly regulate the ability of states to gerrymander federal and state electoral districts on a partisan basis. In the wake of *Rucho*, reform efforts have turned to two alternative forms of regulation, each of which provides a less complete solution than the federal judiciary might have offered.

The first is congressional action. Congress is widely believed to possess the authority, under the Elections Clause,[3] to mandate changes to redistricting processes.[4] The House relied in part on this power when it passed the For the People Act of 2021 (also known as "H.R. 1")—legislation that, if eventually passed by the Senate and signed by the President, would (in part) constrain states' ability to partisan gerrymander congressional districts.[5] However, the text of the Elections Clause clearly limits Congress's power to regulate *federal* electoral districts.[6] Congress cannot use its Elections Clause authority to regulate the process for redistricting state legislatures or local offices, and, as a result, the For the People Act does not purport to do so.[7]

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[1] 139 S. Ct. 2484 (2019).

[2] *See id.* at 2508.

[3] U.S. Const. art. I, § 4, cl. 1.

[4] *See, e.g.*, *Rucho*, 139 S. Ct. at 2508 ("The Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause."); Adam B. Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. Rev. 751, 794 (2004). In fact, Congress has previously exercised its Elections Clause power to regulate partisan gerrymandering. *See* Apportionment Act of 1842, ch. 47, 5 Stat. 491; *see also* Elmer Cummings Griffith, The Rise and Development of the Gerrymander 12 (1907).

[5] For the People Act of 2021, H.R. 1, 117th Cong. (2021). Among other reforms, H.R. 1 would require states to establish independent redistricting commissions for drawing U.S. congressional districts. *Id.* §§ 2400-2455; *see also* Franita Tolson, *The Elections Clause and Underenforcement of Federal Law*, 129 Yale L.J.F. 171, 171 (2019) (defending the constitutionality of a previous version of H.R. 1).

[6] *See* U.S. Const. art. I, § 4, cl. 1 (limiting Congress's authority to "[E]lections for Senators and Representatives"); *see also* Cox, *supra* note 4, at 794–95.

[7] *See* H.R. 1 § 2400 (limiting the scope of redistricting reform to "congressional redistricting" and locating Congress's authority for such reform in Article I, Section 4 and Section 2 of the Fourteenth Amendment). Some commentators have suggested that because states typically use the same process for drawing federal and state electoral districts, congressional efforts to reform congressional district drawing might in practice have the effect of preventing state partisan gerrymandering as well. *Cf.* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 41 (2013) (Alito, J., dissenting) ("As a practical matter it would be very burdensome for a State to maintain separate federal and state registration processes . . . . For that reason, any federal regulation in this area is likely to displace not only state control of federal elections but also state control of state and local elections."). However, this outcome seems highly implausible in the partisan-gerrymandering context. State legislatures bent on preserving the electoral maps that got them elected would likely create a separate process for state map drawing in response to an effort to regulate congressional district drawing. *See* David S. Louk, *Reconstructing the Congressional Guarantee of Republican Government*, 73 Vand. L. Rev. 673, 738 (2020) ("[I]t

A second source of reform avoids this problem: regulating congressional and state legislative redistricting processes through state law. As the *Rucho* decision itself notes, a handful of states have already taken this approach.[8] But problems abound with this source of regulation too. State reform is slow and fractured: it must proceed piecemeal on a state-by-state basis.[9] Moreover, reform efforts undertaken by state legislatures must garner the support of the very legislative majorities that benefit from the gerrymandered districting scheme. This conflict of interest presents a formidable barrier to reform. Where permitted, popular ballot initiatives can provide a partial solution to circumvent conflicted legislatures. But, historically speaking, gerrymandering reform by popular ballot initiative has failed more often than not.[10] And even when such initiatives succeed, their implementation risks being curtailed in states where legislative majorities oppose the reform.[11]

Neither the Elections Clause nor state-level reform, then, has been or will be able to provide a complete solution to partisan gerrymandering. While the Elections Clause can offer a nationwide solution for congressional districting, a simultaneous, nationwide, and uniform solution to gerrymandering in state legislative districts would remain elusive. Yet partisan gerrymandering reform for *state* elected offices matters tremendously, as gerrymandering can prevent actual electoral majorities from controlling the levers of government. For example, in 2018 a majority of the electorate in four states voted for a Democratic candidate for state assembly, but Democrats won fewer than 50% of the seats in the legislature. The disparities were not close: the gap between the Democratic share of the popular vote, on the one hand, and the share of seats won, on the other, exceeded 6% in all four states. In Michigan, Democrats won statewide races for governor, attorney

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seems probable that were legislation like H.R. 1 enacted into law, some states might seek to evade the full application of federal law by creating two-tiered systems of voter registration and electoral processes that distinguish between state and local elections and federal elections. Several states have already attempted to do this.").

[8] *See Rucho*, 139 S. Ct. at 2507–08.

[9] *See* Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 337 (2007).

[10] *See id.* at 333; *see also id.* at 338 (observing that "redistricting initiatives always fail when they are strongly opposed by the majority party in the state legislature"); Cox, *supra* note 4, at 793–94 (discussing the headwinds that states face in reforming their own redistricting processes, including conflicts of interests by state legislators).

[11] Lawmakers in multiple states that passed successful ballot initiatives in 2018 have sought to limit the effects of gerrymandering reform and make it more difficult for similar initiatives to make it to the ballot in the future. *See* Ari Berman, *After Voters Passed Progressive Ballot Initiatives, GOP Legislatures Are Trying to Kill Future Ones*, MOTHER JONES (Dec. 20, 2018), https://www.motherjones.com/politics/2018/12/after-voters-passed-progressive-ballot-initiatives-gop-legislatures-are-trying-to-kill-future-ones [https://perma.cc/VNU6-G7UH]; Timothy Smith, *In Ballot Initiatives, They Made Their Voices Heard. Then Came the Backlash.*, WASH. POST (Mar. 13, 2020, 9:52 AM), https://www.washingtonpost.com/outlook/in-ballot-initiatives-they-made-their-voices-heard-then-came-the-backlash/2020/03/13/5b40220e-526e-11ea-b119-4faabac6674f_story.html [https://perma.cc/GP3G-QQLH] (reviewing DAVID DALEY, UNRIGGED: HOW AMERICANS ARE BATTLING BACK TO SAVE DEMOCRACY (2020)); Jesse Wegman, Opinion, *A World Without Partisan Gerrymanders? Virginia Democrats Show the Way*, N.Y. TIMES (Mar. 28, 2020), https://www.nytimes.com/2020/03/28/opinion/virginia-gerrymandering-law.html [https://perma.cc/88PL-ZCCC].

general, and secretary of state,[12] as well as 53% of the statewide vote for state house candidates, yet ended up with only 47% of seats in the state house.[13] In North Carolina, Democrats won 51% of the popular vote but just 45% percent of the seats.[14] In Pennsylvania, they won the statewide governor's race and 55% of the popular vote but just 46% of the seats.[15] The most startling disparity occurred in Wisconsin, where Democrats won all five statewide offices and 54% of the state-assembly popular vote but walked away with only 36%(!) of the seats in the state legislature.[16]

Setting aside the paramount importance of a distortion-free representative body to the inhabitants of each state, the makeup of state legislatures is significant even from a purely federal perspective. State legislatures control the time, places, and manner of federal elections,[17] the makeup of a state's federal electoral base,[18] and the means of assigning a state's Electoral College votes.[19] Thus, the need persists for a regulatory scheme that can uniformly, comprehensively, and simultaneously affect both congressional *and* state legislative redistricting.

This Article argues that an avenue to enact just such a regulatory scheme exists, even after *Rucho*. Specifically, I contend that the Court's decision in *Rucho* may—and in fact, *must*—be read to grant Congress the authority under Section 5 of the Fourteenth Amendment to enact remedial and prophylactic legislation that regulates partisan gerrymandering of state and local election districts. By enabling the Section 5 power over state elec-

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[12] *See Michigan Election Results*, N.Y. TIMES (May 15, 2019, 2:10 PM), https://www.nytimes.com/interactive/2018/11/06/us/elections/results-michigan-elections.html [https://perma.cc/X83D-J37M].

[13] *See* Christopher Ingraham, *In at Least Three States, Republicans Lost the Popular Vote but Won the House*, WASH. POST (Nov. 13, 2018, 6:00 AM), https://www.washingtonpost.com/business/2018/11/13/least-three-states-republicans-lost-popular-vote-won-house [https://perma.cc/HM4B-M7EQ].

[14] *See id.*

[15] *See 2018 General Election Official Returns Statewide*, PA. ELECTIONS (2018) https://www.electionreturns.pa.gov/General/OfficeResults?OfficeID=13&ElectionID=63&ElectionType=G&IsActive=0 [https://perma.cc/MS4M-FCYD].

[16] *See* Dylan Brogan, *No Contest*, ISTHMUS (Nov. 15, 2018), https://isthmus.com/news/news/dems-sweep-statewide-offices-in-midterms-but-remain-underrepresented-in-assembly [https://perma.cc/8933-ZKMB].

[17] *See* U.S. CONST. art. I, § 4, cl. 1.

[18] *See id.* § 2, cl. 1. Several federal constitutional amendments constrain a state legislature's ability to determine the makeup of the state's electoral base, including the Fifteenth, Nineteenth, and Twenty-Sixth Amendments. *See id.* amend. XV, § 1 (prohibiting the denial or abridgement of the right to vote on the basis of race); *id.* amend XIX (prohibiting the denial or abridgement of the right to vote on the basis of sex); *id.* amend. XXVI, § 1 (prohibiting the denial or abridgement of the right to vote on the basis of age for those over the age of eighteen). However, the felon-disenfranchisement context provides a salient and dynamic example of the ways in which state legislatures may still expand or contract the electorate. *See id.* amend. XIV, § 2 (acknowledging that the right to vote may be "denied" or "abridged" for "participation in . . . crime"); *see also Felon Voting Rights*, NAT'L CONF. ST. LEGISLATURES (Oct. 1, 2020), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx [https://perma.cc/C3PX-NXPY] (summarizing the various state approaches to felon disenfranchisement).

[19] *See* U.S. CONST. art. II, § 1, cl. 2.

toral districts to be combined with Congress's Elections Clause power over federal electoral districts, this Article demonstrates that comprehensive, uniform, and simultaneous reform for *all* forms of partisan gerrymandering remains constitutionally feasible, even after *Rucho*. In other words, contrary to the background assumption that has motivated the work of scholars and legislators in the field, I argue that Congress has the authority to pass partisan-gerrymandering reform that reaches congressional, state, and local electoral districts.[20]

The idea that Congress might regulate partisan gerrymandering under Section 5 power is not a new one, but it is an avenue that has largely been dismissed by commentators in light of the Supreme Court's decisions in *City of Boerne v. Flores*[21] and progeny, which require that Section 5 legislation be "congruen[t] and proportional[ ]" to demonstrable constitutional violations.[22] This is in part why modern efforts by Congress to address the issue have focused only on federal electoral districts.[23] I add a new perspective to this debate that revises the conventional wisdom: I argue that the Court's holding in *Rucho* that partisan gerrymandering claims are nonjusticiable makes the *Boerne* "congruence and proportionality" test inapplicable to partisan-gerrymandering legislation and instead returns the status of Congress's power in this field to the pre-*Boerne* "rational means" framework set forth in *South Carolina v. Katzenbach*[24] and *McCulloch v. Maryland*.[25]

Crucial to this claim is the fact that the *Rucho* decision left untouched, and indeed reaffirmed, past statements by the Court declaring extreme partisan gerrymanders to be unconstitutional. This presents the Court with a dilemma should Congress pass comprehensive partisan gerrymandering reform under Section 5. *Boerne*'s congruence and proportionality analysis becomes incoherent where the Court admits that a constitutional right exists but refuses to delineate—in fact, disclaims authority to delineate—precisely where that right begins and ends. Because *Boerne* rests on the premise that it is the province of the Court, and not Congress, to say what the law is, *Boerne*'s heightened review necessarily does not apply to contexts—like non-

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[20] Certainly any effort to reform partisan gerrymandering will face political headwinds in Congress. Although the political feasibility of comprehensive partisan gerrymandering reform is outside the scope of this Article, it is worth noting that federal legislation that regulates state legislative districts might be more likely to pass than Elections Clause legislation that regulates congressional maps, due to the fact that self-dealing and conflicts-of-interest concerns afflict the latter process but not the former. That is, Congress might be more likely to pass legislation that would remedy gerrymanders afflicting other (i.e., state) legislative bodies but leave untouched the very gerrymanders that got Congress elected. That said, to some degree, a "sunrise provision" could decrease some of the friction associated with a congressional fix to congressional gerrymandering. On sunrise lawmaking, see generally AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 474 (2012); and Daniel E. Herz-Roiphe & David Singh Grewal, *Make Me Democratic, but Not Yet: Sunrise Lawmaking and Democratic Constitutionalism*, 90 N.Y.U. L. REV. 1975 (2015).

[21] 521 U.S. 507 (1997).

[22] *Id.* at 520.

[23] *See supra* notes 3–7 and accompanying text.

[24] 383 U.S. 301, 324 (1966).

[25] 17 U.S. (4 Wheat.) 316, 317 (1819).

justiciability—where the Court has held that it cannot exercise its law-declaring function as normal.

I. Section 5 and the Partisan Gerrymandering Landscape

A. City of Boerne v. Flores *and the Scope of Congress's Section 5 Power*

Section 5 of the Fourteenth Amendment grants Congress "the power to enforce, by appropriate legislation, the provisions" of the Amendment.[26] This language is nearly identical across the enforcement clauses of the Reconstruction Amendments.[27] Before 1997, Congress and the courts had long understood this language to confer on Congress the same scope of authority as many of its Article I powers. In *South Carolina v. Katzenbach*, the Court examined the meaning of the language "enforce . . . by appropriate legislation" in the context of Section 2 of the *Fifteenth* Amendment.[28] It held that the Amendment's assignment of enforcement power was broad, permitting Congress to enact measures that are a "rational means to effectuate the constitutional prohibition" in the Amendment.[29] The Court explained:

> The basic test to be applied in a case involving § 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 [in *McCulloch v. Maryland*]:
>
> > 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 consistent with the letter and spirit of the constitution, are constitutional.
>
> The Court has subsequently echoed his language in describing each of the Civil War Amendments.[30]

Although *South Carolina* concerned Section 2 of the Fifteenth Amendment, as the Court noted, the Reconstruction Amendments—including Section 5 of the Fourteenth Amendment—share materially identical

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[26] U.S. Const. amend. XIV, § 5.

[27] Section 2 of the Thirteenth Amendment provides that "Congress shall have power to enforce this article by appropriate legislation." *Id.* amend. XIII, § 2. Section 5 of the Fourteenth Amendment reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* amend. XIV, § 5. Section 2 of the Fifteenth Amendment provides: "The Congress shall have power to enforce this article by appropriate legislation." *Id.* amend. XV, § 2.

[28] 383 U.S. 301, 325–26 (1966).

[29] *Id.* at 324.

[30] *Id.* at 326 (citation omitted) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

enforcement language.[31] That is why, in *Katzenbach v. Morgan*, the Court recognized that the same test applies under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. There, the Court explained that "the McCulloch v. Maryland [*sic*] standard is the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment."[32] Before 1997, then, Congress's Section 5 authority was understood to be limited only by the rational connection between its end and its means.

In 1997, *City of Boerne v. Flores*[33] effected a major shift in the previously understood scope of Section 5.[34] In *Boerne*, the Court struck down the Religious Freedom Restoration Act (RFRA), which Congress had passed in an effort to overturn a constitutional doctrine that the Court had set forth in *Employment Division v. Smith*.[35] In striking down RFRA, the Court introduced a new, separation-of-powers-based limitation to Congress's exercise of its Fourteenth Amendment authority.[36] "Congress' power under § 5," the Court wrote, "extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment."[37] As a result, Congress lacks "the power to decree the substance of the Fourteenth Amendment's restrictions on the States."[38] The Court continued:

> Legislation which alters [the] meaning of the [substantive provisions of Section 1] cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what

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[31] The Court acknowledged the significance of the Reconstruction Amendments' near-identical enforcement language in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 365, 373 n.8 (2001).

[32] 384 U.S. 641, 651 (1966). The Court noted that this "same broad scope" of the Section 5 power had first been decided "12 years after the adoption of the Fourteenth Amendment" in *Ex parte Virginia*, 100 U.S. 339 (1879). *Id.* at 650.

[33] 521 U.S. 507 (1997).

[34] Over the years, the *Boerne* decision has been subject to considerable criticism by legal commentators, who have attacked the decision on textual, historical, structural, and functional grounds. For a sampling, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127 (2001); Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743 (1998); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE. L.J. 441 (2000); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003) [hereinafter Post & Siegel, *Legislative Constitutionalism*]; and Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003) [hereinafter Post & Siegel, *Protecting the Constitution*].

[35] 494 U.S. 872 (1990).

[36] The precise question in *Boerne* concerned the scope of Congress's authority to enforce the religious-freedom guarantees of the First Amendment against the states through the Religious Freedom Restoration Act (RFRA). Because the First Amendment applies to the states only through the Due Process Clause of the Fourteenth Amendment, RFRA amounted to an exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment.

[37] *Boerne*, 521 U.S. at 519 (alteration in original).

[38] *Id.*

> the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.[39]

Only this arrangement, the Court reasoned, would ensure that "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary."[40]

The *Boerne* decision makes no mention of *South Carolina*'s "rational means" test. Nevertheless, the Court ostensibly concluded that the "rational means" test was insufficient to preserve the judiciary's "province . . . to say the what the law is,"[41] because it announced a new test for Section 5 cases. Moving forward, Congress could still use its Section 5 enforcement powers to enact prophylactic or remedial legislation that prohibits a broader range of conduct than violations of the Fourteenth Amendment.[42] But now the scope of such legislation would need to be "congruen[t] and proportional[ ]" to the constitutional "injury to be prevented or remedied."[43]

Curiously, the *Boerne* opinion is replete with references to *South Carolina*, as if that decision supported its holding in *Boerne*, despite the analytical incompatibility of the two cases and the absence of any mention of *South Carolina*'s "rational means" test. Post-*Boerne* it has remained unclear whether (1) *South Carolina*'s reasoning has been abrogated and only its holding remains intact, (2) different standards now apply to the near-identical language of Section 2 of the Fifteenth Amendment and Section 5 of the Fourteenth Amendment, or (3) something else entirely occurred.[44] Subsequent decisions concerning the constitutionality of the Voting Rights Act,

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[39] *Id.*

[40] *Id.* at 524. Robert Post and Reva Siegel flag the import of the Court's conceptual move:

> At the heart of the enforcement model lies a particular view of separation of powers, which holds that the constitutional function of courts is to declare the substance and nature of Fourteenth Amendment rights, whereas the constitutional function of Section 5 legislation is to "enforce" those rights. The central premise of the enforcement model is that courts are the only legitimate source of authoritative constitutional meaning. Courts hold this privilege because the Constitution is a form of law[,] and "the province of the Judicial Branch . . . embraces the duty to say what the law is."

Post & Siegel, *Legislative Constitutionalism*, *supra* note 34, at 1953 (quoting *Boerne*, 521 U.S. at 536).

[41] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[42] "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Boerne*, 521 U.S. at 517 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

[43] *Id.* at 520.

[44] *See, e.g.*, Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 Ohio St. L.J. 177, 183–85 (2005); Calvin Massey, *The Effect of* Shelby County *on Enforcement of the Reconstruction Amendments*, 29 J.L. & Pol. 397, 398–400, 404–06 (2014); Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. Rev. 317, 337–38 (2019). One scholar has recently argued that the historical record of the passage of the Fourteenth and Fifteenth Amendments requires that *Boerne*'s congruence and proportionality test be limited to the Fourteenth Amendment only. *See* Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 Nw. U. L. Rev. 1549, 1555 (2020) (arguing that the decision to enact universal black suffrage through an amendment, rather than a statute, meant that the Fifteenth Amendment provided a source of enforcement

which *South Carolina* originally upheld, have declined to discuss or reconsider the standard.[45]

The Court expanded on the meaning of *Boerne*'s new requirements in *Kimel v. Florida Board of Regents*,[46] *Board of Trustees v. Garrett*,[47] and *Nevada Department of Human Resources v. Hibbs*.[48] *Kimel* and *Garrett* dealt with challenges to the federal government's abrogation of the states' Eleventh Amendment immunity in the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA), respectively.[49] In both laws, Congress sought to create a direct remedy for individuals to sue states for statutory rights violations in federal court, on the theory that Congress's power to enforce the Fourteenth Amendment permits it to override sovereign immunity.[50] Yet, in both *Kimel* and *Garrett*, the Court held that Congress's abrogation was ineffective because neither the ADEA nor the ADA constituted "appropriate legislation" within the meaning of Section 5.[51]

In *Kimel*, the Court examined the equal-protection backdrop of age-discrimination claims. The Court observed: "[A]ge is not a suspect classification under the Equal Protection Clause,"[52] and, as a result, states may "draw lines on the basis of age when they have a rational basis for doing so."[53] Yet despite the low bar for a constitutional violation, the provisions of the ADEA imposed "broad restriction[s] on the use of age as a discriminating factor, [and] prohibit[ed] substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[54] Judging the scope of the ADEA against *Boerne*'s congruence and proportionality standard, then, the Court concluded that "the ADEA is 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or de-

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that was distinct from and broader than Congress's Fourteenth Amendment enforcement authority).

[45] *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009) (declining to resolve whether *Boerne*'s "congruence and proportionality" test or *South Carolina*'s "rational means" test applies to the scope of Congress's enforcement authority under the Fifteenth Amendment); Shelby County v. Holder, 570 U.S. 529, 542 n.1 (2013) (explaining that "*Northwest Austin* guides our review under both [the Fourteenth and Fifteenth] Amendments in this case," but failing to adopt either the *Boerne* or *South Carolina* test); *see also* Richard Hasen, *The Curious Disappearance of* Boerne *and the Future of Voting Rights and Race*, SCOTUSBLOG (June 25, 2013, 7:10 PM), https://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race [https://perma.cc/EA8V-AKFZ]. *But see* Massey, *supra* note 44, at 404–06 (arguing that the Court applied *Boerne*'s congruence and proportionality test *sub silentio* in *Shelby County*).

[46] 528 U.S. 62 (2000).

[47] 531 U.S. 356 (2001).

[48] 538 U.S. 721 (2003).

[49] *See Garrett*, 531 U.S. at 356; *Kimel*, 528 U.S. at 62.

[50] The Court held in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), that Section 5 of the Fourteenth Amendment permitted Congress to abrogate the states' Eleventh Amendment sovereign immunity and make them liable in federal civil suits. *See id.* at 456.

[51] *See Garrett*, 531 U.S. at 365, 374; *Kimel*, 528 U.S. at 80, 91.

[52] *Kimel*, 528 U.S. at 83.

[53] *Id.* at 86.

[54] *Id.*

signed to prevent, unconstitutional behavior.'"[55] Toward the end of its opinion, the Court appeared to add a new requirement to its Section 5 analysis: it pointed out that part of the reason why the statute was inappropriate was that Congress had "fail[ed] to uncover any significant pattern of . . . widespread and unconstitutional age discrimination by the States."[56]

The Court later crystallized this observation into a formal requirement of Section 5 analysis in *Garrett*. *Garrett* prescribes a two-step inquiry for courts to follow when assessing congruence and proportionality. First, a court should "determine[ ] the metes and bounds of the constitutional right in question"[57]—an analysis that is consistent with the judiciary's role as the final expounder of constitutional meaning. Second, the court should "examine whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States" when crafting its remedy.[58] Applying this test to the ADA, the Court reached a similar conclusion to that of *Kimel*. The Court observed that "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational."[59] As a result, the ADA's broad requirements forbidding practices "without regard to whether such conduct has a rational basis" violated *Boerne*'s congruence and proportionality mandate.[60]

The Court's decisions in *Garrett* and *Kimel* rested on rights protected only under a rational-basis standard. In *Hibbs*, which concerned the Family and Medical Leave Act (FMLA),[61] the Court considered whether Congress could abrogate sovereign immunity when the state action at issue involved gender discrimination.[62] The *Hibbs* Court took the opportunity to draw a distinction between Section 5 cases that concern state action subject to rational-basis review and cases that implicate state action subject to heightened scrutiny. It held that while Congress must identify "a 'widespread pattern' of irrational reliance on [discriminatory] criteria" when rational-basis rights are concerned,[63] Congress's evidentiary burden is much easier to meet when Section 5 legislation seeks to remedy discrimination that triggers heightened scrutiny.[64] Applying this framework, the *Hibbs* Court proceeded to uphold the FMLA's abrogation of sovereign immunity. It reasoned that the FMLA was "appropriate legislation" under Section 5 because the relevant provisions of the Act (1) targeted state gender-based classifications, which are subject

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[55] *Id.* (quoting City of Boerne v. Flores, 521 U.S. 507, 532 (1997)).
[56] *Id.* at 91.
[57] Bd. of Trs. v. Garrett, 531 U.S. 356, 368 (2001).
[58] *Id.*
[59] *Id.* at 367.
[60] *Id.* at 372.
[61] 29 U.S.C. §§ 2601–54 (2000).
[62] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730 (2003).
[63] *Id.* at 735 (2003).
[64] *See id.* at 736. Armed with this new framework, the Court engaged in some creative reinterpretation of its holding in *South Carolina v. Katzenbach*—which it recast as a Fourteenth Amendment case. *South Carolina* was so broad, the Court explained, because "racial classifications are presumptively invalid" (i.e., subject to strict scrutiny). *Id.*

to intermediate scrutiny; (2) "narrowly targeted . . . the faultline between work and family"; and (3) did not apply to "every aspect of state employers' operations" like the statutes in *Boerne*, *Kimel*, and *Garrett*.[65]

The upshot of the *Boerne-Kimel-Garrett-Hibbs* line of cases is that Congress must surpass an evidentiary threshold—i.e., it must document a pattern of widespread state constitutional violations—any time it wishes to enact prophylactic or remedial legislation under Section 5.[66] And although this standard is somewhat relaxed in the context of legislation aimed at conduct subject to heightened scrutiny, *Garrett*'s strict evidentiary standard persists in all other contexts. As a result, the scope of Congress's Section 5 power is directly tied to, and constrained by, its ability to demonstrate that states have violated judicial interpretations of the Fourteenth Amendment.

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[65] *Id.* at 738.

[66] The Court's imposition of an evidentiary requirement has been subject to withering scrutiny by a number of commentators. For example, Robert Post and Reva Siegel argue that there is a "deep confusion" in this model:

> The model requires Congress to enact Section 5 legislation that will implement constitutional meaning as that meaning is determined from the institutional perspective of a court. Courts construe the Constitution in order to pursue the practice of adjudication . . . . [T]hat this framework should dominate and control the exercise of congressional power under Section 5 . . . leads to patent absurdity.

Post & Siegel, *Legislative Constitutionalism*, *supra* note 34, at 1967; *see also* McConnell, *supra* note 34, at 156 (arguing, contra *Boerne*, that "when Congress interprets the provisions of the Bill of Rights for purposes of carrying out its enforcement authority under Section Five, it is not bound by the institutional constraints that in many cases lead the courts to adopt a less intrusive interpretation from among the textually and historically plausible meanings of the clause in question"). Post and Siegel point to the decisions in *Kimel* and *Garrett*, in which the Court addressed whether Congress could exercise Section 5 power based on classifications that receive rational-basis review, as a perfect illustration of the flaws of the *Boerne* model:

> Rational basis review . . . explicitly defines a constitutional right in terms of the specific institutional purposes of the judiciary. The Court has explained that rational basis review is "a paradigm of *judicial* restraint" . . . . Rational basis review thus articulates the substance of the right to equal protection of the law by reference to the deference that the judiciary should adopt vis-à-vis the democratically accountable branches of government. It does not define the substance of the right in a way that can coherently be applied to Congress.
>
> It is easy to see that the thesis of the enforcement model makes little sense when it requires Congress to enforce rights that are defined in terms of institutional values pertinent to courts, but logically irrelevant to Congress. . . . Rights are not abstract statements of principle, but constitutional conclusions articulated in ways designed to make sense within particular institutional frameworks. We can, therefore, ask how rights defined in terms of specific institutional characteristics of courts *can* be translated into the distinct institutional framework of a legislature. And we may further ask why a legislature *should* be constrained by the distinct institutional purposes of courts.

Post & Siegel, *Legislative Constitutionalism*, *supra* note 34, at 1967–68 (footnote omitted) (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993)). The seminal treatment of institutionally driven judicial underenforcement of constitutional rights is set forth in Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV L. REV. 1212 (1978), which argues that Congress should be allowed to enforce constitutional norms to their full extent even when the judiciary "underenforces" the norm due to institutional limitations such as concerns about federalism or judicial competence.

The Court has justified this requirement as a separation-of-powers limitation on Congress: only by showing that the legislation is targeting a pattern of unconstitutional conduct can the Court be sure that Congress is seeking to remedy or deter violations of what the *Court* has declared the substance of the Constitution to be.

The separation-of-powers grounding of the *Boerne* line of cases is significant. Prior cases examining the outer limits of Congress's enforcement power under the Reconstruction Amendments had focused primarily on federalism concerns—namely, whether congressional overreach into traditional state domains would undermine the independence and autonomy of the states.[67] By contrast, the *Boerne* line of cases signaled for the first time that the Court would also police the boundary of the Reconstruction Amendments for threats to judicial supremacy and the courts' own ability to "say what the law is."[68]

B. Section 5 and Partisan Gerrymandering

The specter of *Boerne* (and its progeny) has heavily influenced the scholarly discussion over Congress's power to enact partisan-gerrymandering reform under Section 5. The background assumption in the field has been that the Court's stringent Section 5 requirements preclude a congressional fix to partisan gerrymandering at the state and local level.[69] Because the Court had failed to coalesce around a framework for distinguishing between unconstitutional and constitutional gerrymanders, it would be difficult—impossible even—for Congress to design legislation that would be congruent and proportional to a documented history of constitutional *violations*. To do so, Congress would need to know what constituted a violation in the first place. But how could it?[70] The only solution—to decide the metes and

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[67] *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 11 (1883); *Ex parte* Virginia, 100 U.S. 339, 357–59 (1879).

[68] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Post & Siegel, *Legislative Constitutionalism*, *supra* note 34, at 1945 (discussing *Boerne*'s addition of separation-of-powers concerns to the courts' historical preoccupation with federalism in the Section 5 context).

[69] *See, e.g.*, Cox, *supra* note 4, at 795–96 (raising doubts, post-*Boerne*, as to whether Section 5 legislation to remedy partisan gerrymandering would pass judicial muster); Mark D. Rosen, *Can Congress Play a Role in Remedying Dysfunctional Political Partisanship*, 50 IND. L. REV. 265, 272 (2016) (same); *see also* Luke P. McLoughlin, *Section 2 of the Voting Rights Act and* City of Boerne*: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 VT. L. REV. 39, 74–75 (2006) (cataloging the "problems . . . cause[d] under the *City of Boerne* analysis" but protesting that "it is hard to believe that Congress would be prohibited from legislating because the Court had not enunciated a standard"). *But cf.* Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 15–17 (2007) (observing, specifically in the context of the Voting Rights Act, that *Boerne* "[a]rguably" does not erect an insurmountable barrier to congressional regulation of state and local elections).

[70] *See* McLoughlin, *supra* note 69, at 74–75 ("[H]ow can the inquiry even begin into whether the statutory remedy sweeps beyond the constitutional protection, when the constitutional protection is undefined?").

bounds of the right on its own—would have been to determine the substance of a constitutional violation—precisely the type of separation-of-powers violation that was central to *Boerne*'s reasoning.

In the absence of an articulable equal-protection framework, Section 5 partisan-gerrymandering legislation almost certainly would have met the same fate as the rational-basis-based rights in the ADEA (*Kimel*) and the ADA (*Garrett*). The Court would have found the analogies irresistible. In *Kimel* especially, the Court placed heavy emphasis on the fact that the Court had not once before found a state's discrimination based on age or disability to violate the Equal Protection Clause.[71] The same has been true in the partisan-gerrymandering context. As the Court observed in *Rucho*, "We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years."[72] As a result, the consensus thinking has largely dismissed the possibility of a congressional fix to partisan gerrymandering that would reach beyond congressional districts and regulate state and local district maps.[73] Unsurprisingly then, the nonjuricentric partisan-gerrymandering literature has primarily focused on Congress's authority to regulate congressional districts under the Elections Clause[74] or on state-level reform.[75]

II. Nonjusticiability and the New Section 5 Deference

This Article's central claim is that *Rucho v. Common Cause* upended the conventional wisdom in the field and reinvigorated the feasibility of Section 5 legislation in the partisan gerrymandering space. In this Part, I argue that *Rucho*'s holding that partisan gerrymandering claims are nonjusticiable political questions, combined with its confirmation that extreme partisan gerry-

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[71] *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82 (2000) ("We have considered claims of constitutional age discrimination under the Equal Protection Clause three times. In all three cases, we held that the age classifications at issue did not violate the Equal Protection Clause.").

[72] Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019).

[73] For this reason, the For the People Act only sought to regulate congressional partisan gerrymandering and did not purport to govern state and local electoral map-drawing. *See supra* note 5 and accompanying text. A growing body of recent scholarship has broached whether Congress might be able to regulate partisan gerrymandering of state legislative districts under the Guarantee Clause. *See, e.g.*, Louk, *supra* note 7; Rosen, *supra* note 69, at 271–79; Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 Ariz. L. Rev. 183, 218 (2020). Because the Court has engaged in so little explication of the bounds of Congress's affirmative powers under the Guarantee Clause—and Congress has seldom relied on such authority—these proposals remain speculative compared to Congress's firmer authority to enact Section 5 legislation. In any case, extended discussion of the Guarantee Clause is outside the scope of this project, the primary goal of which is to explore the implications of *Rucho*'s nonjusticiability holding for the restrictions *Boerne* was understood to have placed on comprehensive partisan-gerrymandering legislation.

[74] *See* Richard H. Pildes, *The Constitution and Political Competition*, 30 Nova L. Rev. 253 (2006); Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 Yale L.J. 1021 (2005); *see also* Tolson, *supra* note 44.

[75] *See, e.g.*, Derek T. Muller, *Nonjudicial Solutions to Partisan Gerrymandering*, 62 Howard L.J. 791 (2019).

manders violate the Constitution, makes the *Boerne* line of cases inapplicable to partisan gerrymandering. Post-*Boerne*, the framework that now applies to Section 5 partisan gerrymandering legislation is the more deferential *South Carolina-McCulloch* "rational means" standard.

Specifically, I argue that *Rucho*'s nonjusticiability holding puts the Court in a dilemma: *Boerne*'s Section 5 requirement of congruence and proportionality implies a judicial act of "measurement"—that is, a measurement of the distance between the scope of Section 5 legislation and the outer limits of a constitutional right. Yet, that type of measurement is made impossible when, as in *Rucho*, the Court has said that it is incompetent to say where the outer boundary of a constitutional right falls.

This conundrum leaves the Court with four options if it were to be faced with Section 5 legislation regulating partisan gerrymandering: It could either (1) reverse course and concede that partisan gerrymandering claims are justiciable, thereby allowing the Court to measure the congruence and proportionality of Section 5 legislation; (2) double down on *Boerne* and declare that partisan gerrymandering must always be constitutional; (3) preserve both *Rucho* and *Boerne*, with the end result that Congress can never demonstrate congruence and proportionality to a constitutional violation and therefore never pass Section 5 legislation concerning partisan gerrymandering; or (4) decide that *Boerne* does not apply to Section 5 legislation in the context of a constitutional right whose contours are nonjusticiable.

As I demonstrate below, options (1)-(3) are unlikely and unsatisfactory responses to this dilemma. Option (1) is unlikely because the Court will be immensely reluctant to revisit *Rucho* (at least in the near term) after so much time spent struggling to find a judicial standard over the past three decades. Option (2) is unlikely because the Court has also repeatedly declined to hold that extreme partisanship in redistricting does not run afoul of the Equal Protection Clause. And option (3) is unsatisfactory because it would make an acknowledged constitutional right completely unenforceable. This leaves option (4) as the most logical and coherent outcome.

A. Rucho*'s Implications for* Boerne

The *Rucho* decision is significant not only for what the Court did, but also for what the Court did *not* do. Despite declaring partisan gerrymandering claims to be "beyond the competence of the federal courts,"[76] the *Rucho* decision does *not* say that partisan gerrymandering is therefore always constitutional. In fact, the Court explicitly rejects such a conclusion in several places. *Rucho*'s holding, the Court cautions, "does not condone excessive partisan gerrymandering."[77] Rather, "excessive partisanship in districting leads

[76] *Rucho*, 139 S. Ct. at 2500.
[77] *Id.* at 2507.

to results that reasonably seem unjust"[78] and is "incompatible with democratic principles."[79]

Other parts of the opinion demonstrate that partisan gerrymandering exists in both constitutional and unconstitutional forms. For example, the Court repeatedly characterizes its search for a judicial test as one that would "reliably differentiate *unconstitutional* from constitutional political gerrymandering."[80] At another point the Court asks: "At what point does permissible partisanship become *unconstitutional*?"[81] And further in the opinion it rejects the lower courts' methodology for failing to "separat[e] constitutional from *unconstitutional* partisan gerrymandering."[82] These quotes explicitly acknowledge that partisan gerrymandering can, indeed, be unconstitutional.

The Court therefore left undisturbed, and indeed confirmed, its prior constitutional statements about partisan gerrymandering. For instance, in *Davis v. Bandemer*, a plurality of the Court held that a partisan gerrymander results in "unconstitutional discrimination"[83] and an "equal protection violation"[84] when plaintiffs prove "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."[85] Justice Powell and Stevens disagreed with the plurality's method for measuring discriminatory effect.[86] But they became the fifth and sixth Justices to agree that a "partisan political gerrymander violates the Equal Protection Clause" where intentional discrimination and discriminatory effect are proven.[87] Eighteen years later in *Vieth v. Jubelirer*, [88] a four-Justice plurality opined that partisan gerrymandering claims were nonjusticiable.[89] But all nine Justices agreed that at least some partisan gerrymanders violated the Constitution.[90] Justice Scalia, writing for the plurality, explained:

> Much of [Justice Stevens's] dissent is addressed to the incompatibility of severe partisan gerrymanders with democratic principles. We do not disagree with that judgment . . . . The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy.[91]

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[78] *Id.* at 2506.
[79] *Id.* (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015)).
[80] *Id.* at 2499 (emphasis added) (citing Hunt v. Cromartie, 526 U.S. 541, 551 (1999)).
[81] *Id.* at 2501 (emphasis added).
[82] *Id.* at 2504 (emphasis added).
[83] 478 U.S. 109, 132 (1986).
[84] *Id.* at 133.
[85] *Id.* at 127.
[86] *See id.* at 162 (Powell, J., concurring in part and dissenting in part).
[87] *Id.* at 161.
[88] 541 U.S. 267 (2004)
[89] *See id.* at 306.
[90] *See* Karlan, *supra* note 69, at 14 ("In *Vieth v. Jubelirer* . . . . [a]ll nine Justices acknowledged that excessive partisan gerrymanders raise serious constitutional questions, and all nine located the constitutional infirmity at least in part in the Equal Protection Clause.").
[91] *Vieth*, 541 U.S. at 292.

In even more direct and forceful terms, he continued: "Justice Stevens says . . . that an excessive injection of politics is unlawful. *So it is*, and so does our opinion assume."[92] The four dissenters and Justice Kennedy, who concurred in the judgment, at a minimum agreed with this part of the plurality.[93]

Post-*Rucho*, then, the law remains that once partisan gerrymandering reaches the point at which it becomes *excessive*, it violates the Constitution—specifically the Equal Protection Clause. Although a majority of the Court could never agree on how to measure excessiveness, majorities in *Bandemer*, *Vieth*, and *Rucho* have all acknowledged that unconstitutional partisan gerrymandering exists (even if it is not *judicially* discoverable).

The fairest reading of *Rucho*, then, is not as a reimagination of the constitutional status of partisan gerrymandering, but principally as a statement about the judicial role. The decision repeatedly emphasizes the importance of institutional-competence considerations to its analysis. The Court writes: "Some criterion more solid and more demonstrably met than [fairness] seems to us necessary . . . to meaningfully *constrain the discretion of the courts*, and to *win public acceptance for the courts' intrusion* into a process that is the very foundation of democratic decisionmaking."[94] "Deciding among . . . different visions of fairness," the Court reasoned, "poses basic questions that are *political, not legal*. . . . Any *judicial* decision on what is 'fair' in this context would be an 'unmoored determination' of the sort characteristic of a political question *beyond the competence of the federal courts*."[95] To the Court, none of the various tests offered by the litigants in *Rucho* would provide "solid grounding for *judges* to take the extraordinary step of reallocating power and influence between political parties."[96] *Rucho*'s core message, then, is a narrow one: the federal judiciary, for legitimacy and competence reasons, cannot come up with a limit for when partisan map-making has gone too far. The

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[92] *Id.* at 293 (emphasis added) (emphasis omitted); *see also id.* at 316 (Kennedy, J., concurring in the judgment) ("I do not understand the plurality to conclude that partisan gerrymandering that disfavors one party is permissible. Indeed the plurality seems to acknowledge it is not.").

[93] *See id.* at 316 (Kennedy, J., concurring in the judgment); *id.* at 339 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting). Justice Kennedy, the swing vote in the case, set forth an example of a clear constitutional violation: "If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated." *Id.* at 312 (Kennedy, J., dissenting). It's fair to assume from the content of their opinions that, at a minimum, the four dissenters in *Vieth* would have agreed with Justice Kennedy on this point.

It is also noteworthy that lower courts in Wisconsin, Maryland, and North Carolina all cited to *Bandemer* and *Vieth* for the proposition that extreme partisan gerrymandering is unconstitutional. *See, e.g.*, Benisek v. Lamone, 348 F. Supp. 3d 493, 511–13 (D. Md. 2018); Common Cause v. Rucho, 318 F. Supp. 3d 777, 837–38 (M.D.N.C. 2018); Whitford v. Gill, 218 F. Supp. 3d 837, 885–86 (W.D. Wis. 2017). In none of these three cases did the Supreme Court qualify or reverse the lower court on the basis of those propositions. *See* Gill v. Whitford, 138 S. Ct. 1916 (2018); Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

[94] *Rucho*, 139 S. Ct. at 2499–500 (emphasis added) (quoting *Vieth*, 541 U.S. at 291).

[95] *Id.* at 2500 (emphasis added).

[96] *Id.* at 2502 (emphasis added).

Court does *not* say that such a limit does not exist—only that the *judiciary* is ill-equipped to draw it.

But a problem arises: *Rucho*, correctly understood, now generates a conundrum. As the decision declares,

> Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." Sometimes, however, "the law is that the judicial department has no business entertaining the claim . . . ."[97]

Recall, however, the Court's central justification for *Boerne*:

> When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.[98]

And so the central question emerges: how does the logic of *Boerne*, which held that only the Court, and not Congress, can create substantive law,[99] apply to a context in which the Court has said it will not decide what the law is, because the issue is nonjusticiable? The Court has confirmed on multiple occasions that extreme partisan gerrymandering violates the Equal Protection Clause,[100] but has declined to explain where the metes and bounds of the violation lie. Say Congress codified the "extreme outlier approach" favored by the four dissenters in *Rucho v. Common Cause*[101] in com-

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[97] *Id.* at 2494 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); and *Vieth*, 541 U.S. at 277).

[98] City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (citation omitted).

[99] By "create substantive law" I mean the ability of Congress to determine or inform the meaning of the substantive provisions of the Fourteenth Amendment.

[100] *See supra* notes 76–93 and accompanying text.

[101] *See Rucho*, 139 S. Ct. at 2518 (Kagan, J., dissenting) ("'[T]he extreme outlier approach' . . . begins by using advanced computing technology to randomly generate a large collection of districting plans that incorporate the State's physical and political geography and meet its declared districting criteria, *except for partisan gain*. For each of these maps, the method then uses actual precinct-level votes from past elections to determine a partisan outcome (*i.e.*, the number of Democratic and Republic seats the map produces). Suppose we now have 1,000 maps, each with a partisan outcome attached to it. We can line up those maps on a continuum—the most favorable to Republicans on one end, the most favorable to Democrats on the other . . . . And we can see where the State's actual plan falls on the spectrum—at or near the median or way out on one of the tails? The further out on the tail, the more extreme the partisan distortion and the more significant the vote dilution."). *See generally* Brief for Eric S. Lander as Amicus Curiae at 7–22, *Rucho*, 139 S. Ct. 2484 (Nos. 18-422, 18-726); Brief for Mathematicians et al. as Amici Curiae at 19–20, *Rucho*, 139 S. Ct. 2484 (Nos. 18-422, 18-726). As the dissent recognizes, the majority in *Rucho* did not reject this test as a means of vindicating constitutional rights in the gerrymandering context; rather, it disclaimed judicial authority to draw a line somewhere along the spectrum. *See Rucho*, 139 S. Ct. at 2520 ("[The majority] never tries to analyze the serious question presented here—whether the kind of stan-

prehensive legislation applying to all the states: in this case, would Congress be improperly creating substantive law by delineating a boundary for when a partisan gerrymander became unlawful? Or would it be permissibly remedying and deterring violations in a way that is overinclusive of the constitutional right but would at least capture *some* unconstitutional conduct? The Court has never made the line between substance and prophylaxis clear. Adding to the confusion: if the Court has said it will never draw a boundary for the constitutional right at issue, how could it ever assess whether such a proposal was congruent and proportional to the violation? And how could Congress document a pattern of unconstitutional conduct by the states?

What to do then? If one takes the *Rucho* decision as given—meaning that partisan gerrymandering claims are nonjusticiable but extreme partisan gerrymanders still violate the Constitution—then it appears that one of two views is available: either (1) *Boerne* applies, and Congress does not get to put remedial legislation in place—since assessing congruence or proportionality in this context would be impossible absent clear examples of what violates the law; or (2) *Boerne* does *not* apply, meaning that Congress can legislate free of the congruence and proportionality test and the need to document historical constitutional violations.

The problem with option one is that it eviscerates a constitutional right that the Court has repeatedly said exists. The "logical terminus" of the *Boerne* line of cases—particularly *Garrett*—is such that Congress can legislate "only to remedy [constitutional] violations that courts have already condemned."[102] *Rucho*, however, prevents such determinations from ever occurring. Option one, then, violates the longstanding Anglo-American legal principle *ubi jus ibi remedium*—"where there is a right, there is a remedy."[103] Moreover, as Robert Post and Reva Siegel have observed, "[r]ights are not abstract statements of principle, but constitutional conclusions articulated in ways designed to make sense within particular institutional frameworks."[104] It is therefore incoherent to refer to the existence of a right in the absence of an institution—be it judicial, legislative, or administrative—that gives the right effect.[105] Finally, option one would also violate the express terms of Section 5. There, Congress is given the authority to enforce

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dard developed below falls prey to [its] objections, or instead allows for neutral and manageable oversight."); *see also id.* at 2519 ("[T]he majority continues, they will have to decide '[h]ow much is too much?'—that is, how much deviation from the chosen 'touchstone' to allow? In answering that question, the majority surmises, they will likely go far too far. So the whole thing is impossible, the majority concludes." (citations omitted)).

[102] Post & Siegel, *Protecting the Constitution*, *supra* note 34, at 17.

[103] *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *51, *123; *see also* Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 40 (1916) (citing BLACKSTONE, *supra*, at *51, *123). Lord Chief Justice Holt articulated the classic formulation of the maxim in *Ashby v. White* [1703] 92 Eng. Rep. 126 (KB).

[104] Post & Siegel, *Legislative Constitutionalism*, *supra* note 34, at 1968.

[105] It does not make sense to think of state legislatures as right protectors, because they are the right *violators* in this context. State courts, moreover, likely fall under the same nonjusticiability mandate as federal courts when interpreting only federal constitutional provisions to adjudicate partisan gerrymandering claims.

the provisions of the Fourteenth Amendment, including the Equal Protection Clause. Because the Court has recognized that a right against extreme partisan gerrymandering exists under the Fourteenth Amendment, some degree of congressional enforcement power *must* exist, or else the Court itself has violated the terms of the Fourteenth Amendment.

Option two, then, is the more promising and coherent solution—in fact, it is arguably implied by the terms of *Boerne* itself. *Boerne* did not consider situations in which the Court refused to decide what the law is. It spoke only of scenarios where the Court has already declared what the law is. (Recall that in *Boerne* the Court rejected a congressional attempt to overrule a substantive constitutional precedent.) Thus, the separation-of-powers logic underlying *Boerne*'s heightened threshold for Section 5 legislation need not apply to the limited set of cases, like partisan gerrymandering, where the Court cannot decide the substance of the law.

Another way to think about *Boerne*'s inapplicability is to consider the counterfactual. If *Boerne* did apply, how would the Court review Congress's legislation? Or, to put it another way, how could it *overturn* Congress's remedy? The Court would either have to conclude that there is no constitutional violation at issue, which it has not done in any of the partisan-gerrymandering cases that have come before it (even though it could have done so), or it would have to apply *Boerne* and say that Congress's legislation is not congruent and proportional to a constitutional violation. But on what basis? How could the Court say that the legislation *isn't* congruent and proportional—or that Congress isn't responding to longstanding constitutional violations—when the Court has disclaimed its authority to determine when there is a constitutional violation or not in any given case? The best way out of this quagmire is to conclude that nonjusticiability fundamentally alters the balance of authority between Congress and the courts—and the amount of deference due to Congress—when it comes to Section 5 legislation.

In the absence of *Boerne*, what standard would apply to congressional action? The answer is not complicated—it is the same standard that governs other congressional powers under Article I, and that applied to Section 5 legislation before *Boerne*: *South Carolina v. Katzenbach*'s "rational means" test.[106] This approach makes sense. Once the separation-of-powers justification for heightened review under *Boerne* becomes inapplicable, what remains is Congress's "entitle[ment] to much deference"[107] in its conclusions regarding "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[108] The Court ought to defer, therefore, to the line Congress draws in its prophylactic and remedial legislation, unless the line is unreasonable.

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[106] *See* Katzenbach v. McClung, 379 U.S. 294, 303–04 (1964) ("[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.").

[107] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[108] *Id.* (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).

Support for this deferential approach is found in other contexts—analogous to nonjusticiability—in which the Court has determined that it is poorly positioned to make a statement about the law or has recognized that a different branch has been granted primary responsibility for law-making. One of the more ready examples is embodied in the *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*[109] and *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[110] line of cases.[111] There, the Court defers to reasonable interpretations of the law made by the executive branch because Congress has determined that the executive branch, and not the judiciary, is best equipped institutionally to determine what the effect of the law should be in a particular context.[112] This is true even when the Court would draw or has drawn differently the metes and bounds of the law that the agency has been assigned to enforce.[113] Notably, the executive branch, when "law-making" pursuant to a congressional mandate to issue rules and regulations, is still operating in its constitutional capacity to *enforce* the law Congress wrote,[114] much like Congress has been assigned responsibility by Section 5 to *enforce* the provisions of the Fourteenth Amendment. Deference to an institution's line drawing in the course of "enforcement" responsibilities, even if it means the creation of some substantive law, is thus neither an unprecedented nor an unworkable posture for the Court to take.[115]

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[109] 467 U.S. 837 (1984).

[110] 545 U.S. 967 (2005).

[111] *See* McConnell, *supra* note 34, at 184 ("The question in a Section Five case should be whether the congressional interpretation is within a reasonable range of plausible interpretations—not whether it is the same as the Supreme Court's. An analogy may be drawn to the *Chevron* doctrine . . . .").

[112] *See* Smiley v. Citibank (South Dakota), N. A., 517 U.S. 735, 740–41 (1996) ("We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by the agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (*rather than the courts*) to possess whatever degree of discretion the ambiguity allows." (emphasis added)).

[113] *See Brand X*, 545 U.S. at 983 ("Since *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.").

[114] *See, e.g.*, J.W. Hampton, Jr. v. United States, 276 U.S. 394, 409 (1928) ("Congress may use executive officers in the application and enforcement of a policy declared in law by Congress, and authorize such officers in the application of the Congressional declaration to *enforce it by regulation* equivalent to law." (emphasis added)); *see also* Julian Davis Mortenson & Nicholas Bagely, *Delegation at the Founding*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 43) (on file with author) ("When an administrative agency issues a generally applicable rule that regulates private conduct, has it acted in an executive capacity? Under the standard constitutional grammar of the founding, the answer is yes. That's because executive power had an extremely thin meaning: the authority to execute instructions and prohibitions as formulated by some prior exercise of legislative power.").

[115] The fact that the court shies away from the creation of substantive law in the Section 5 context but accepts it as a necessity under *Chevron* serves to underscore the incoherence of drawing a line between the two—and explains why the Court has never been able to articulate a clear division in the first place.

A few notes about the desirability and feasibility of the "rational means" approach in this context are in order. First, critics might counter that the approach above permits Congress free rein to determine the scope of its jurisdiction unbounded by the Court. That objection falls short, however. It is not true that Congress's authority would be boundless. As with Congress's exercise of any of its Article I powers, the Court still "retains the power . . . to determine if Congress has exceeded its authority under the Constitution."[116] Here, that power takes the form of the Court's final say over whether partisan gerrymandering can ever constitute a violation of Section 1 of the Fourteenth Amendment and over whether Congress's proposed solution is a rational means of addressing such gerrymanders. When the Court reviews congressional legislation under the Commerce Clause, or various other Article I powers, we do not say that Congress's authority is "boundless" despite the broad deference the Court affords Congress.

Moreover, the Court has already dismissed a similar objection in the analogous *Chevron* context. In *City of Arlington v. FCC*,[117] in the face of a delegation of lawmaking authority from Congress to the Federal Communications Commission (FCC), the Court explained that it would defer to the FCC's reasonable interpretation of the scope of its own jurisdiction under the authorizing statute.[118] The Court justified this rule by the futility of attempts to distinguish between whether an agency lacks jurisdiction or improperly exercised its authority within that jurisdiction. Writing for the majority, Justice Scalia described the line between jurisdictional and nonjurisdictional questions to be "incoheren[t],"[119] "arbitrary[,] and undefinable"[120] and explained that "judges should not waste their time in the mental acrobatics needed"[121] to distinguish between them. "Once those labels are sheared away," he wrote, "it becomes clear that the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not."[122] That Congress will have some control over the scope of its authority to enforce the Equal Protection Clause in the partisan gerrymandering context, within reasonable limits of the Constitution's ambiguity on the question, raises the same concerns and therefore merits the same resolution.

Second, implementing the *South Carolina-McCulloch* test would not require the Court to simply "rubber stamp" any partisan gerrymandering legis-

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[116] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).
[117] 569 U.S. 290 (2013)
[118] *See id.* at 301–02.
[119] *Id.* at 306.
[120] *Id.* at 307.
[121] *Id.* at 301.
[122] *Id.* It is hardly a coincidence that similar arguments may be employed to undermine the coherence of the distinction between "substantive lawmaking" and "enforcement" under Section 5 of the Fourteenth Amendment: both false dichotomies arose out of somewhat arbitrary line-drawing exercises intended to preserve greater judicial authority. *See* Post & Siegel, *Legislative Constitutionalism*, *supra* note 34, at 1949 (arguing that *Boerne* "does not offer a coherent framework for distinguishing between Section 5 laws that unconstitutionally 'interpret' the Fourteenth Amendment and Section 5 laws that merely 'enforce' it").

lation that Congress might pass under Section 5. The "rational means" test is not wholly without bite: In *Shelby County v. Holder*, the Court struck down Section 4(b) of the Voting Rights Act because it was an "irrational" exercise of Congress's enforcement authority under the Fifteenth Amendment.[123] In other words, the Court held that Section 4(b) failed the "rational means" test.[124] In so holding, the Court injected new content into *South Carolina*'s previous formulation of the test. In particular, it explained that departures from the constitutional default-rule that state legislatures will draw legislative districts must adhere to two requirements: they must (1) do justice to the principle of "equal sovereignty" among the states and (2) ensure that the "current burden" placed on the states is tailored to remedy the "current needs" and actual conditions in the states.[125] The Court ultimately determined that Section 4(b) was "irrational"[126] because the Section fulfilled neither condition. Thus, one way of reading *Shelby County* is that it modernized the *South Carolina* test into a "rational means plus" or "rational means with a bite" test. And since I argue that the "rational means" test governs partisan-gerrymandering legislation post-*Rucho*, both components of the *Shelby County*'s conception of "rational means" will need to be met by any future legislation Congress passes on the subject.

A further reason why the rational means test would function as a non-trivial constraint on Congress is that the standard as formulated in *McCulloch* is not merely a test for rationality—it is also a test for *pretext*. That is, under *McCulloch*, the Court is on the watch for instances in which Congress is purportedly exercising one of its constitutional powers but does so with the goal of circumventing some other constitutional limitation on its authority—perhaps an end it does not have the power to pursue.[127] Under this Article's proposal, the Court would be able to police for pretextual partisan-gerrymandering legislation and strike down any effort by Congress to achieve an

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[123] Shelby County v. Holder, 570 U.S. 529, 554, 556 (2013); *see also supra* notes 44–45 and accompanying text.

[124] As I describe above, *Shelby County* left unresolved whether *Boerne*'s "congruence and proportionality" test or *South Carolina*'s "rational means" test applies to the Voting Rights Act. *See supra* note 44 and accompanying text. The Court said only: "*Northwest Austin* guides our review . . . ." *Shelby County*, 570 U.S. at 542 n.1. But *Northwest Austin* famously *declined* to resolve whether the "congruence and proportionality" test or the "rational means" test applies to enforcement legislation under the Fifteenth Amendment. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009). In the end, the Court grounded its ultimate holding in *Shelby County* in the irrationality of Section 4(b). 570 U.S. at 554, 556. One way of reading *Shelby County*, then, is that the rational means test remains applicable to Congress's enforcement powers under the Fifteenth Amendment. But it is also possible that the Court saw an opportunity to kick the can further down the road, determining that it need not decide whether *Boerne* or *South Carolina* applies to the Fifteenth Amendment since Section 4(b) failed even the more permissive "rational means" test.

[125] *Id.* at 542.

[126] *Id.* at 556.

[127] As Chief Justice Marshall explained, "[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

impermissible (that is, otherwise unconstitutional) end using the cloak of gerrymandering reform.

Third, this Article's approach is not outside the Overton window with respect to the current Court such that it could not garner majority support. In fact, openness to the logic of this Article's argument has been indicated from an unlikely source. Consider Justice Alito's concurrence in the recent Fourth Amendment case, *Riley v. California*.[128] *Riley* dealt with the constitutionality of a warrantless police search of an arrestee's cell phone. Because Justice Alito decided he could "not see a workable alternative," he joined the Court's opinion holding that, without a warrant, such searches violate the Constitution.[129] But he added the following caveat:

> While I agree with the holding of the Court, *I would reconsider the question presented here if either Congress or state legislatures*, after assessing the legitimate needs of law enforcement and the privacy interests of cell phone owners, *enact legislation* that draws reasonable distinctions based on categories of information or perhaps other variables . . . .
>
> [B]ecause of the role that [modern cell phones] have come to play in contemporary life, searching their contents implicates very sensitive privacy interests *that this Court is poorly positioned to understand and evaluate* . . . .
>
> In light of [the increased role these devices have come to play in contemporary life] it would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts . . . . *Legislatures, elected by the people, are in a better position than we are* to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future.[130]

Justice Alito's message in *Riley* is essentially an argument that, where the Court has difficulty drawing coherent or functional distinctions in a constitutional space because of its institutional limitations, it might be appropriate for Congress to step in and for the Court to take its cue from Congress. What's striking about Justice Alito's opinion is his suggestion that Congress's regulation might actually *alter* the Court's substantive determinations about the substance of the Fourth Amendment.[131] This is significant because it unmistakably implicates the scope of Congress's Section 5 authority: because the Fourth Amendment has been incorporated against the states through the Due Process Clause of the Fourteenth Amendment, congressional regulation of the authority of state police to search cell phones, as in

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[128] 573 U.S. 373 (2014).

[129] *Id.* at 407 (Alito, J., concurring in part and concurring in the judgment).

[130] *Id.* at 407–08 (emphases added).

[131] *See id.* ("I would *reconsider* the question presented here if . . . Congress . . . enact[ed] legislation . . . ." (emphasis added)).

Riley, would derive its authority from Section 5. Justice Alito, then, has signaled a break with the Rehnquist Court's skepticism toward Congress's relative institutional advantages—a skepticism that underwrote and embodies much of the Court's Section 5 jurisprudence.[132]

It is unlikely that Justice Alito considered the extent to which this language might have implications for other contexts like voting rights. But his *Riley* concurrence does demonstrate that this Article presents a promising and "on-the-wall"[133] conceptual framework for assessing what happens to Congress's Section 5 authority when the Court has confessed—as it has in the partisan gerrymandering context—that institutional limitations prevent it from determining the precise metes and bounds of a constitutional right.

B. Counterarguments and Responses

The foregoing analysis still admits of two serious counterarguments that are important to address. Crucial to this Article's argument is the view that *Boerne* and *Rucho* interact to create a contextual incompatibility: *Boerne*'s heightened requirement of congruence and proportionality presupposes that the Court can *measure* whether a constitutional violation has occurred in a particular case, but *Rucho* stands for the proposition that any such measurement is impossible for the judiciary to undertake, even though the Court has acknowledged that constitutional violations do occur at some (judicially unknowable) point.

One possible critique of this view is that it overreads *Rucho*, because while the majority may disclaim its ability to pin down the exact contours of a vague category, that does not mean that the Court cannot spot clear instances of a deviation when they occur.[134] To illustrate: Suppose I have been asked by the dean of a law school to develop a mechanism for classifying the top twenty percent of a law school class according to each student's "intellectual excellence." It is perfectly imaginable that I might respond, "I don't feel confident in my ability to write down criteria. That's not to say that there's no such thing as intellectual excellence, or that ordinal differences in intellectual excellence do not exist—only that I don't believe I'm equipped to measure it." Now suppose the university's psychology department were to send me its views on the question—perhaps a checklist to use to "grade" the intellectual excellence of students. If, in response, I were to say, "It would be incoherent for me to pronounce on the validity of this model, since I wasn't able to specify criteria of my own," the dean would certainly look askance at

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[132] *See* Post & Siegel, *Legislative Constitutionalism*, *supra* note 34, at 1980; Post & Siegel, *Protecting the Constitution*, *supra* note 34, at 2.

[133] *See generally* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011); Jack M. Balkin, *From off the Wall to on the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040 [https://perma.cc/C88F-S5JL].

[134] I am grateful to Kiel Brennan-Marquez and Douglas Spencer for raising this critique and for engaging in thoughtful conversations about my response.

me. That's because, while it might be impossible for me to evaluate whether the psychology department *got it right*, it would not be *impossible* for me to evaluate whether they *got it wrong*, depending on how wrong they got it. If, for example, the checklist included "height and weight" as relevant traits, it would be ludicrous for me to say, "This certainly looks unrelated to intellectual excellence, but I have no choice but to accept it because I've stripped myself of the ability to exercise this sort of judgment." No. Instead, I would be well within my rights to say, "I may not know exactly what intellectual excellence consists of, but it certainly does *not* depend on height and weight."

The problem with this critique is that it misreads my argument. I do not mean to claim through my analysis of *Rucho* and *Boerne* that the Court can never review congressional legislation; rather, I argue that the implication of *Rucho* is that *Boerne*'s congruence and proportionality standard has become impossible to employ in the partisan-gerrymandering context, and instead a different level of deference applies. I claim that there is no way for the Court to evaluate congruence and proportionality because these terms implicate measurement: they require that the Court *measure* the distance between the reach of a legislative proposal and the reach of a constitutional right.[135] But such measurement becomes impossible where the Court has said it cannot determine the precise metes and bounds of a constitutional right. The problem is answering the question, "Congruent and proportional relative to *what*?" Nevertheless, I do believe that the Court can still pass upon whether legislation passes the *South Carolina-McCulloch* test—that is, whether there is a nonpretextual, rational relationship between Congress's proposed remedy and a constitutional violation. To revisit the intellectual excellence analogy above, then, the Court would still be able to say that height and weight are not rational means to measure intellectual excellence, despite the specific definition of intellectual excellence being "nonjusticiable." But the Court would not be able to pass judgment on the psychology department's checklist beyond a cursory review for rationality, since it has said it is ill-equipped to delineate the precise metes and bounds of intellectual excellence. Here, Congress is the institution that is better positioned, because of its proximity to the political process, to "measure" the extent to which the partisan gerrymandering runs afoul of the Equal Protection Clause—that is, when partisan gerrymandering has become "extreme." The Court's role would be to examine whether Congress's proposed remedy is rationally and nonpretextually connected to the equal protection values that extreme partisan gerrymandering offends.

An apt comparison might be drawn to Justice Souter's concurrence in *Nixon v. United States*.[136] *Nixon* upheld a challenge to a Senate rule that permitted impeachment-trial witness examinations to be conducted by a

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[135] *See* Laycock, *supra* note 34, at 746 ("The proportionality part of this standard seems to require an empirical judgment . . . .").

[136] 506 U.S. 224 (1993).

special committee, which would then summarize the evidence for the full Senate to vote on.[137] The Court declined to address the merits of the constitutionality of the rule, instead holding that the meaning of the word "try" in the Impeachment Trial Clause of the Constitution was a nonjusticiable political question committed to the Senate alone to determine—thus, the rule could stand.[138] Concurring with the majority, Justice Souter agreed that the precise question before the Court was nonjusticiable, but argued that judicial review might be preserved under certain circumstances.[139] For example, if the Senate decided that it would "try" impeachments via coin flip, Justice Souter remarked that the Court would surely be able to determine that a coin flip is not a trial, despite the Constitution's commitment of the definition of "try" to the Senate.[140] Justice Souter's view demonstrates that the nonjusticiability of a question can still preserve a limited form of judicial review for legislative actions that are so clearly outside the scope of Congress's powers that they enter the realm of irrationality.

A second possible critique of this Article's analysis goes something like this: *Rucho* stands for the simple proposition that partisan-gerrymandering suits are nonjusticiable because any judicial intervention in such cases will necessarily be seen as an illegitimate intervention into political matters and taint the judiciary. However, if Congress were to move first and pass legislation addressing partisan gerrymandering under Section 5, this legitimacy concern would melt away, since the Court would now not be reallocating power between political parties but instead be conducting the familiar, and legitimate, exercise of passing judgment upon the scope of Congress's powers.

The force of this critique depends on whether *Rucho*'s nonjusticiability finding rests solely on considerations of judicial *legitimacy* or also rests, at least in part, on judicial *competence*.[141] Put another way, are partisan gerrymandering claims nonjusticiable because any line that the judiciary draws will be seen as an illegitimate political intervention by unelected officials, or because the judiciary lacks the proper legal tools to competently determine when partisan considerations in districting go too far? To the extent that *Rucho* is solely about legitimacy, this critique has some force—and, to be sure, several passages in *Rucho* indicate that legitimacy was an important concern for the majority.[142] But the opinion also makes clear that legitimacy

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[137] *Id.* at 226.
[138] *Id.* at 238.
[139] *Id.* at 253-54 (Souter, J., concurring in the judgment).
[140] *Id.*
[141] Scholars have observed in other contexts that when the Court determines that it is unable to delineate the precise boundaries of a vague constitutional right, it is because of concerns about either legitimacy or competence (or both). *See, e.g.*, Nancy Gertner, *On Competence, Legitimacy, and Proportionality*, 160 U. PA. L. REV. 1585, 1589 (2012) ("Since the Constitution is not clear regarding the metes and bounds of 'cruel and unusual punishment' as applied to imprisonment, the plurality [in *Ewing v. California*, 538 U.S. 11 (2003),] implies that the Court lacks either the competence or the legitimacy to make the decision in most cases.").
[142] For example, at various points the Court writes:

was not the Court's sole concern, and that its nonjusticiability holding independently (if not primarily) rests on a view that the nature of partisan gerrymandering prevents the judiciary from *competently* measuring the metes and bounds of the constitutional right against excessive partisan gerrymandering. Thus, the Court explicitly grounds its nonjusticiability finding in the lack of any "judicially *discernible* and *manageable*" standards for resolving partisan gerrymandering disputes, in addition to prudential concerns about tainting the judiciary with politics.[143] Further passages in the majority opinion underscore the basis of its holding in concerns about competence rather than legitimacy:

- "Courts have . . . been called upon to resolve a variety of questions concerning districting. Early on, doubts were raised about the *competence* of the federal courts to resolve those questions."[144]
- "The 'central problem' is . . . '*determining* when political gerrymandering has gone *too far*.'"[145]
- "Federal courts are not *equipped* to apportion political power as a matter of fairness . . . ."[146]
- "Any judicial decision on what is 'fair' in this context would be an 'unmoored determination' of the sort characteristic of a political question beyond the *competence* of the federal courts."[147]
- "Federal judges have no license to reallocate political power between the two major political parties, with . . . no legal standards to *limit* and *direct* their decisions."[148]

- "Any standard for resolving [partisan gerrymandering] claims must be . . . 'politically neutral.'" Rucho v. Common Cause, 139 S. Ct. 2484, 2498 (2019) (majority opinion) (quoting Vieth v. Jubelirer, 541 U.S. 267, 308 (2004) (Kennedy, J., concurring in the judgment)).
- "With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 307).
- "Some criterion more solid and more demonstrably met than ['fairness'] seems to us necessary . . . to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking." *Id.* at 2499–500 (quoting *Vieth*, 541 U.S. at 291 (plurality opinion)).
- "Appellees and the dissent propose a number of 'tests' . . . but . . . none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties." *Id.* at 2502.
- "Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role."

Id. at 2507.

[143] *Id.* at 2502 (emphasis added).

[144] *Id.* at 2496 (emphasis added).

[145] *Id.* at 2497 (emphasis added) (quoting *Vieth*, 541 U.S. at 296).

[146] *Id.* at 2499 (emphasis added).

[147] *Id.* at 2500 (emphasis added) (quoting Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012)).

[148] *Id.* at 2507 (emphasis added).

- "No one can accuse this Court of having a crabbed view of the reach of its *competence*. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to *guide* us in the exercise of such authority."[149]

The upshot of this language is such that even if we assume judicial-legitimacy concerns disappear once Congress passes partisan-gerrymandering legislation, an impediment to *Boerne*-style heightened review of the legislation still remains.[150] This is because *Rucho* rests in part—if not primarily—on the belief that the judiciary is *ill-equipped* to measure the extent of the underlying constitutional violation, even though the language of *Boerne* presupposes that such measurement is possible. Because the political fairness questions involved in partisan gerrymandering cases do not admit of precise legal standards that allow the Court to measure the outer bounds of the relevant constitutional violation (here, excessive partisan gerrymandering), it cannot then compare the distance between that boundary and the reach of the congressional statute, as *Boerne* requires.

Conclusion

This Article demonstrates that Congress may regulate state and local partisan gerrymanders under Section 5 of the Fourteenth Amendment, contrary to the conventional wisdom that has reigned since *City of Boerne v. Flores*. I have argued that *Rucho*'s abdication of judicial responsibility for declaring the substance of the Equal Protection Clause in the partisan gerrymandering context makes the *Boerne* framework inapplicable to partisan gerrymandering reform and thereby alters the limits that constrain Congress's powers under Section 5. In place of *Boerne*'s congruence and proportionality requirement, prophylactic and remedial legislation would now be judged under the *South Carolina v. Katzenbach* and *McCulloch v. Maryland* "rational means" test. The increased deference due to Congress in this context would permit Congress to enact tests and standards that the Court has previously considered but declined to adopt because they presented *judicially* unmanageable—but not necessarily irrational or unreasonable—standards. One promising standard would be the "comparator map" approach favored by four Justices in *Rucho*;[151] another might be H.R. 1's requirement that all states draw electoral maps using independent commissions.[152]

To be sure, political headwinds face any congressional effort to reform partisan gerrymandering, particularly for reforms that involve adopting a

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[149] *Id.* at 2508 (emphasis added).

[150] The contents of any congressional solution would thus need to address *both* legitimacy and competence.

[151] *See supra* note 101 and accompanying text. This standard was the first to achieve the support of at least four Justices.

[152] *See supra* note 5.

standard whose immediate effects, and winners and losers, can be calculated and known in advance.[153] While I acknowledge these hurdles, my goal in this Article has been to demonstrate that Congress now has greater latitude than it did pre-*Rucho* to make partisan gerrymandering reform of state legislative districts a reality. Congress has yet to recognize this greater authority: its most recent foray into the partisan-gerrymandering space—H.R. 1—seeks only to regulate congressional districting and does not attempt to reach state-level districts. However, this Article demonstrates that future efforts to revisit comprehensive partisan gerrymandering reform would be legally justified in extending beyond the ambit of the Elections Clause to eliminate extreme partisan gerrymanders of state and local legislative districts.

A final takeaway is that the logic of this Article is generalizable beyond the partisan-gerrymandering context. Since the Court has justified its heightened review of Section 5 legislation by pointing to separation-of-powers considerations rooted in judicial supremacy, by extension *any* nonjusticiable constitutional right protected by the Fourteenth Amendment cannot be subject to the requirements of the *Boerne* line of cases. Importantly, this observation applies not just to rights protected under the Equal Protection Clause, but also to the other substantive provisions of the Fourteenth Amendment and all rights protected by the Due Process Clause—including those provisions of the Bill of Rights that have been incorporated against the states. As a result, this Article raises broader questions about the general applicability and staying power of the *Boerne* line of cases.

[153] *See* discussion *supra* note 20.