CLARITY AND SECTION FIVE

CHRISTOPHER R. GREEN*

ABSTRACT

City of Boerne v. Flores *(1997) requires that congressional use of its Fourteenth Amendment Section Five power to "enforce, by appropriate legislation, the provisions of this article" must be "congruent and proportional" to judicial enforcement of Section One. The* Boerne *standard has six big problems:*

(1) The words "congruent" and "proportional" are slippery, unclear mathematical metaphors.

(2) Boerne *claims to be consistent with earlier enforcement-power precedent, but the Court admitted in* Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder *that* Boerne*'s standard and a standard taken from that earlier precedent "do not agree."*

(3) Boerne*'s discussion of particular Reconstruction evidence is selective and misleading. The Court relies heavily on Garfield and Farnsworth's 1871 understanding of the relationship between John Bingham's proposals from February and April 1866 without noting Bingham's energetic disagreement, a disagreement credited by leaders in Congress like future Vice President Henry Wilson, and noted by the Court itself in* Katzenbach v. Morgan.

(4) Boerne*'s standard more generally does not fit the history of Reconstruction, during which Congress, not the Court, was expected to take the lead in deciding the exact shape of the Section One principles of equal citizenship, state lawfulness, and states' duty to enforce the law.*

(5) Boerne *attacks a strawman, presenting RFRA as an attempt to* change *Section One, rather than* clarify *it.*

(6) Using judicial-restraint-motivated Section One precedent to limit Congress's Section Five power turns judicial modesty on its head.

Rather than congruence and proportionality, the concept of clarity *should instead govern the relationship between the judicially enforced Section One and the congressionally empowering Section Five. It was extremely well established at the time of the Fourteenth Amendment's adoption that judges may only declare the actions of the elected branches to be unconstitutional if the conflict*

* Jamie L. Whitten Chair in Law and Government, University of Mississippi School of Law.

between the Constitution and those actions is clear. Accordingly, courts may only enforce a subset of the actual Section One violations that occur. Similarly, courts may only declare Congress to have exceeded its Section Five enforcement power if the conduct that Congress has prohibited is clearly beyond *the scope of Section One. In between these two extremes—clear violations of Section One and clear non-violations of Section One—Congress's enforcement power includes the power of clarification. This interpretation makes sense of the many Republicans who claimed that Section One would entrench the Civil Rights Act of 1866, and so that courts would have a role independent of Congress, but that Congress would simultaneously be the chief driver of the Fourteenth Amendment's requirements. Accordingly, if Congress were to use its Section Five power to require states to supply the "protection of the laws" to the unborn, the support for a Section One requirement of such protection would only need to be strong enough to render such a requirement not clearly wrong.*

INTRODUCTION

City of Boerne v. Flores[1] requires that congressional use of its Fourteenth Amendment Section power to "enforce, by appropriate legislation, the provisions of this article"[2] must be "congruent and proportional" to judicial enforcement of Section One.[3] *Boerne*, however, (a) adopts an unclear standard, (b) contradicts earlier enforcement-power precedent, (c) cites Reconstruction history selectively and misleadingly, (d) conflicts with Reconstruction history more generally, (e) attacks a strawman, and (f) turns judicial-restraint precedent on its head.

Instead of congruence and proportionality, the Supreme Court should distinguish legislative from judicial power with the concept of *clarity*. The rule at the time of the Fourteenth Amendment's adoption, recognized unanimously

1. 521 U.S. 507 (1997) (striking down application of Religious Freedom Restoration Act to states).

2. U.S. CONST. amend. XIV, § 5.

3. *Boerne*, 521 U.S. at 519–20 ("While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."); *cf. id.* at 530 ("While preventative rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved."); *id.* at 533 ("The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved."); Tennessee v. Lane, 541 U.S. 509, 520 (2004) (noting that the language on "congruence and proportionality" was intended to "set forth a test"); Health & Hosp. Corp. of Marion Cnty v. Talevski, 599 U.S. 166, 203 n.5 (2023) (Thomas, J., dissenting) (referring to *Boerne*'s "congruence-and-proportionality test"); Dickerson v. United States, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution," relying on *Boerne*); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 638–39 (1999) (characterizing *Boerne* as "[c]anvassing the history of the Fourteenth Amendment and case law examining the propriety of Congress' various voting rights measures").

by state courts, federal courts, and commentators, and acknowledged as uncontroversial in Congress, was that judges may declare actions of the elected branches unconstitutional only if the conflict between the Constitution and those actions is *clear*. Accordingly, courts may only enforce a subset of the actual Section One violations that occur. Similarly, courts may only declare Congress to have exceeded its Section Five enforcement power if the conduct that Congress has prohibited is clearly *beyond* the scope of Section One. In between these two extremes—clear violations of Section One and clear non-violations of Section One—Congress's enforcement power includes the power of clarification. This interpretation makes sense of the many Republicans who claimed that Section One would entrench the Civil Rights Act of 1866, and so that courts would have a role independent of Congress, but that Congress would simultaneously be the chief driver of the Fourteenth Amendment's requirements. Because those requirements are fuzzy at the edges, they will always be judicially underenforced. Accordingly, if Congress were to use its Section Five power to require states to supply the "protection of the laws" to the unborn, the support for a Section One requirement of such protection would need only to be strong enough to render such a requirement not clearly wrong.

Section One of this essay explains *Boerne* and its flaws. Section Two looks to background principles of the nature of judicial and legislative power and Reconstruction history to put together a better view of the Section Five power. Section Three concludes.

I. *BOERNE* AND ITS PROBLEMS

A. Boerne *and Its Wake*

Boerne struck down the 1993 Religious Freedom Restoration Act (RFRA) as beyond the Fourteenth Amendment's Section Five power.[4] In RFRA, Congress attempted to reinstate the rule of *Sherbert v. Verner*[5] and *Wisconsin v. Yoder*,[6] which the Supreme Court had abandoned in 1990's *Employment Division, Department of Human Resources of Oregon v. Smith*.[7] The Court called RFRA an improper attempt to "Make a substantive change in the governing law" because it did not exhibit "congruence and proportionality" between unconstitutional actions and the congressionally specified remedy.[8] The Court relied on several Voting Rights Act precedents that involved the "parallel power to enforce the provisions of the Fifteenth Amendment."[9]

4. 521 U.S. 507.
5. 374 U.S> 398 (1963).
6. 406 U.S. 205 (1972).
7. 494 U.S. 872 (1990).
8. *Boerne*, 521 U.S. at 519–20.
9. *Id.* at 518.

Since 1997, the Court has upheld congressional legislation under the *Boerne* standard three times[10] and struck it down seven times.[11] Most of these cases focused on Section Five because they involved damages remedies against states, which the Court has allowed under Section Five[12] and a few other powers[13] but not under its powers to regulate commerce.[14] Despite Justice Scalia's regret at joining *Boerne*,[15] the Court has never reconsidered it or re-examined its precedential or historical foundations, but reaffirmed its vitality just last year.[16]

10. Nev. Dep't Hum. Res. V. Hibbs, 538 U.S> 721 (2003) (upholding family-leave portion of the Family and Medical leave act) (6-3); Tennessee v. Lane, 514 U.S. 509 (2004) (upholding Americans with Disabilities Act courthouse access) (5-4); United States v. Georgia, 546 U.S. 151 (2006) (upholding Americans with Disabilities Act in prison) (unanimous decision).

11. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (striking patent infringement law applied to states) (5-4); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (striking down trademark infringement law applied to states) (5-4); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (striking down Age Discrimination in Employment Act applied to states); United States v. Morrison, 529 U.S. 598 (2000) (striking down Violence Against Women Act applied to states) (5-4); Bd. of Trs. of Univ. Ala. v. Garrett, 531 U.S. 356 (2001) (striking down Americans with Disabilities Act regarding state employment discrimination) (5-4); Coleman v. Ct. of Appeals of Md., 566 U.S. 30 (2012) (striking down self-care provisions of the Family and Medical Leave Act) (5-4); Allen v. Cooper, 589 U.S. 248 (2020) (striking down copyright infringement applied to states) (unanimous decision).

12. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (allowing abrogation of sovereign immunity under Section Five).

13. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006) (allowing abrogation under bankruptcy power); Penn East v. New Jersey, 594 U.S. 482 (2021) (allowing abrogation under eminent domain power); Torres v. Tex. Dep't Pub. Safety, 597 U.S. 580 (2022) (holding no specific abrogation needed under military powers).

14. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding no abrogation under tribal commerce power); Coll. Sav. Bank v. Fla. Prepaid, 527 U.S. 666 (1999) (holding no abrogation under interstate commerce power); *see also* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (holding no abrogation under intellectual property power); Allen v. Cooper, 589 U.S. 248 (2020) (holding no abrogation under intellectual property power). For more on the distinction among the three commerce powers, see Christopher R. Green, *Tribes, Nations, States: Our Three Commerce Powers*, 127 PENN STATE L. REV. 643 (2023).

15. Tennessee v. Lane, 541 U.S. 509, 556–58 (2004) (Scalia, J., dissenting) ("I joined the Court's opinion in *Boerne* with some misgiving. I have generally rejected tests with such malleable standards as 'proportionality,' because they have a way of turning into vehicles for the implementation of individual judges' policy preferences. . . . I yield to the lessons of experience. The 'congruence and proportionality' standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking."); Coleman v. Ct. of Appeals of Md., 566 U.S. 30, 44 (2012) (Scalia, J., concurring) ("The plurality's opinion seems to me a faithful application of our 'congruence and proportionality' jurisprudence. So does the opinion of the dissent. That is becaue the varying outcomes we have arrived at under the 'congruence and proportionality test make no sense.").

16. Trump v. Anderson, 601 U.S> 100, 115 (2024) (noting that *Boerne* represents the current Section Five rule).

B. Six Problems with Boerne

1. "Congruent" and "Proportional": What Do They Mean?

Justice Scalia's chief objection to *Boerne* was his inability to make perfect sense of its mathematical metaphors. Of the Court's ten cases applying *Boerne*, seven have split 5-4, one 6-3, and only two have been unanimous, for an average of 3.1 dissenting votes per case. By contrast, the Spaeth Supreme Court database counts only about 1.5 dissenting votes per case in the approximately two thousand cases since 1997.[17]

Another reason to think that the Court itself may have given up the attempt to define "congruent" and "proportional" is its own failure to use the test, or even mention *Boerne* at all, in its 2013 Fifteenth Amendment case *Shelby County v. Holder*, which struck down a voting rights preclearance formula that relied on forty-year-old voting data.[18] *Boerne* itself had explicitly relied on Fifteenth Amendment precedent as support for its test, and had been used in an earlier Fifteenth Amendment case.[19] The district court and the D.C. Circuit in *Shelby County* applied *Boerne*.[20] Many of the briefs in *Shelby County* cited *Boerne* so much that their tables of authorities listed *Boerne* with a "passim."[21] Chief Justice Roberts and Justices Scalia and Sotomayor all asked about *Boerne* at the oral argument.[22] The four dissenters invoked *Boerne*.[23] The issue of *Boerne*'s applicability to the Fifteenth Amendment was, moreover, teed up four years before in *Shelby County*'s predecessor case, *Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder*.[24] *NAMUDNO* interpreted the 2006 Voting Rights Act extension narrowly in light of the possibility that a broader understanding of the Act might go beyond Congress's enforcement

17. *See The Supreme Court Database: Cases Organized by Supreme Court Citation*, WASH. U. L. (Jan. 30, 2025), http://scdb.wustl.edu/_brickFiles/2024_01/SCDB_2024_01_caseCentered_Citation.csv.zip (average of rows 7094 to 9278 in column BA).

18. 570 U.S. 529 (2013).

19. Lopez v. Monterey Cnty., 525 U.S. 266, 282–83 (1999).

20. Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 428 (D.D.C. 2011) ("Applying the standard of review articulated by the Supreme Court in [*Boerne*], this Court finds that Section 5 [of the Voting Rights Act] remains a 'congruent and proportional remedy' to the 21st century problem of voting discrimination in covered jurisdictions."); Shelby Cnty. v. Holder, 679 F.3d 848, 859 (D.C. Cir. 2012) (*NAMUDNO* sends "powerful signal that congruence and proportionality is the appropriate standard of review.").

21. *See* Brief for Petitioner 2012 WL 6755130 at vi; Reply Brief of Petitioner, 2013 WL 823229 at iii; Brief of Respondent-Intervenors Bobby Pierson et al., 2013 WL 325379 at iv; Brief for Respondent-Intervenor Bobby Lee Harris, 2013 WL 325378 at iv; Brief for Respondent-Intervenors Earl Cunningham et al., 2013 WL 315241 at vi; Brief Amicus Curiae of Abraham Lincoln Foundation, 2013 WL 75422 at iii; Amicus Curiae Brief of Mountain States Legal Foundation, 2012 WL 6771849 at iv; Brief of Judicial Education Project as Amicus Curiae, 2012 WL 6771850 at iii; Brief of Justice & Freedom Fund as Amicus Curiae, 2012 WL 6771851 at iv; Brief for John Nix et al. as Amicus Curiae, 2012 WL 6759406 at iii; Brief of Justice & Freedom Fund as Amicus Curiae, 2013 WL 12355741 at iv.

22. 2013 WL 6908203 at 6, 20, 27–28, 45, 49, 56–57.

23. *Id.* at 590 (Ginsburg, J., joined by Breyer, Sotomayor, & Kagan, JJ., dissenting).

24. 557 U.S. 193 (2009).

power. The Court noted the disagreement between the parties about which standard to apply:

> The parties to not agree on the standard to apply in deciding whether, in light of the foregoing concerns, Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements. The district argues that "'[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,'" Brief for Appellant 31, quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997); the Federal Government asserts that it is enough that the legislation be a "'rational means to effectuate the constitutional prohibition,'" Brief for Federal Appellee 6, quoting [*South Carolina v.*] *Katzenbach*[, 383 U.S. 301, 324 (1966)]. That question has been extensively briefed in this case, but we need not resolve it. The Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test.[25]

Despite all this background about what *Boerne* would mean in a Fifteenth Amendment context, and the particular setting of congressional use of old voting data, *Boerne* went entirely unmentioned by the *Shelby County* majority. A cryptic footnote in *Shelby County* noted that *NAMUDNO* guided the Court's analysis under both the Fourteenth and Fifteenth Amendments,[26] making it even odder that the Court did not discuss the *Boerne* standard in *Shelby County*. If "congruent" and "proportional" were conceptually coherent, the Court should have been able to say something about how they apply to congressional use of old voting-rights data. But the Court said nothing.

2. Inconsistent Precedents

NAMUDNO's discussion of *Boerne* highlights another problem: its inconsistency with earlier precedent. The Court's admission in *NAMUDNO* that the standard taken from *Boerne* contradicts one taken from *Katzenbach v. South Carolina*—that the two standards "do not agree"—is an admission that *Boerne* misrepresented the basis of its decision, because *Boerne* claimed to be *following* the Court's Fifteenth Amendment precedents like *Katzenbach*, not disagreeing with them in the context of the Fourteenth Amendment. In 2003, the Court similarly distinguished *Boerne*'s "congruence and proportionality" from the "necessary and proper" concept in Article I section 8 clause 18, despite the obvious linguistic similarity between "appropriate" in Section Five and "proper" in Article I.[27] If congruence and proportionality were such helpful tools, they would be used elsewhere as well.

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25. *Id.* at 204 (parallel citations omitted).

26. Shelby Cnty. v. Holder, 570 U.S. 539, 542 n.1 (2013).

27. Eldred v. Ashcroft, 537 U.S. 186, 218 (2003) ("[W]e have never applied that [*Boerne*] standard outside the § 5 context; it does not hold sway for judicial review of legislation enacted, as copyright laws are, pursuant to Article I authorization.").

3. *Boerne*'s Discussion of Reconstruction Evidence is Selective and Misleading.

The *Boerne* Court, in a portion that Justice Scalia did not join even in 1997, rested its congruent-and-proportional formulation on a sharp distinction between the amount of congressional power that it saw in two 1866 proposals, both from John Bingham and the Joint Committee on Reconstruction. In February 1866, the House discussed but tabled a proposal that left things entirely in the hands of Congress to enforce civil rights: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."[28] In addition to confusion about how exactly Bingham's repetition of language from Article IV would help Congress protect freedmen who remained in their home states, the lack of any self-enforcing aspect to the rule drew opposition.[29]

The *Boerne* Court took the rejection of the February proposal and its replacement with the actual Fourteenth Amendment as a rejection of its breadth of federal power, citing the arguments in 1871 of Representatives James Garfield and John Farnsworth.[30] But the Court did not mention that in 1871, Bingham himself had responded to Garfield and Farnsworth at length, explaining why they were wrong about the relationship between the February proposal and the final Fourteenth Amendment.[31] In the Senate, future Vice

28. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

29. Representative Giles Hotchkins explained:

> I have no doubt that I desire to secure every privilege and every right to every citizen in the United States that the gentleman who reports this resolution desires to secure. As I understand it, his object in offering this resolution and proposing this amendment is to provide that no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another. If this amendment secured that, I should vote very cheerfully for it to-day; but as I do not regard it as permanently securing these rights, I shall vote to postpone its consideration until there can be a further conference between the friends of the measure, and we can devise some means whereby we shall secure those rights beyond a question. . . . I desire that the very privileges for which the gentleman is contending shall be secured to the citizens; but I want them secured by a constitutional amendment that legislation cannot override. Then if the gentleman wishes to go further, and provide by laws of Congress for the enforcement of these rights, I will go with him.

Id. at 1095. When the Fourteenth Amendment itself was unveiled, several Republicans similarly touted the fact that it would entrench, not merely authorize, the Civil Rights Act of 1866, in case a future Democratic Congress wanted to repeal it. *See infra* note 61.

30. City of Boerne v. Flores, 521 U.S. 507, 523 (citing CONG. GLOBE, 42d Cong., 1st Sess. App. 115–16, 151 (1871)).

31. CONG. GLOBE, 42d Cong., 1st Sess. app. 83 (1871). This Bingham speech is more famous for its material on the incorporation of the Bill of Rights. *See, e.g.*, McDonald v. Chicago, 561 U.S. 742, 762 n.9 (2010) (citing Bingham's statement that the privileges of citizens of the United States "are chiefly defined in the first eight amendments to the Constitution of the United States," CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871), and applying it to interpret the Due Process Clause).

President Henry Wilson noted, "I concur entirely in the construction put upon that provision of the fourteenth amendment by Mr. Bingham, of Ohio, by whom it was drawn."[32] Indeed, this 1871 response by Bingham had been cited by the Court in the main Section Five precedent prior to *Boerne*, *Katzenbach v. Morgan*. The Court in 1966 noted of the February 1866 proposal, citing Bingham's 1871 explanation, "[t]he substitution of the 'appropriate legislation' formula was never thought to have the effect of diminishing the scope of this congressional power."[33] The *Morgan* Court in 1966 could have given a fuller account of the dispute in 1871, rather than citing only one side of it. But it is far more objectionable for the *Boerne* Court to cite only the *other* side, ignoring both Bingham and the Court's own earlier citation of him.

4. Contrary to *Boerne*, the Nation in 1866 Expected Congress to Take the Lead.

Boerne's standard more generally does not fit the history of Reconstruction, during which Congress, not the Court, was expected to take the lead in deciding the exact shape of the Section One principles of equal citizenship, state lawfulness, and states' duty to enforce the law. Speaker of the House Schuyler Colfax responded to the Democratic argument that Section One would lead to voting rights for the freedmen by pointing to the Civil Rights Act of 1866. "We passed a bill on the ninth of April last, over the President's veto, known as the Civil Rights Bill, that specifically and directly declares what the rights of a citizen of the United States are—that they may make and enforce contracts, sue and be parties, give evidence, purchase, lease and sell property, and be subject to like punishments. That is the last law on the subject."[34] Republicans invited the country to look to Congress as the source of authoritative declarations about Section One. The congressional power to enforce was a power to "specifically and directly declare" what citizenship required.

5. Clarification v. Change

Next, the structure of *Boerne*'s argument, in which it characterizes RFRA as attempting to *change* the meaning of Section One, rather than clarity it, attacks a strawman. Just before announcing the "congruent and proportional" formulation, the Court explained:

> The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.

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32. CONG. GLOBE, 42d Cong., 1st Sess. app. 256 (1871).

33. Katzenbach v. Morgan, 384 U.S. 641, 650 n.9 (1966) (citing CONG. GLOBE, 42d Cong., 1st Sess. app. 83 (1871).

34. THE CINCINNATI COMMERCIAL: SPEECHES OF THE CAMPAIGN OF 1866 at 14 (1866). Thaddeus Stevens later pointed hearers to Colfax's speech for an explanation of the Fourteenth Amendment, even though he had introduced it to the House on behalf of the Joint Committee on Reconstruction. *Id.* at 27.

> Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.[35]

The Court then explained that its "congruent and proportional" was an attempt to help the Court distinguish "between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law."[36] Later, the Court complained that under the view taken by Congress in passing RFRA, "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."[37]

Congress indeed lacks power to change the Constitution. But it may still have power to change the "governing law" as expressed in the Supreme Court's view of the Constitution, because Congress can have power to *clarify* Section One. To "decree the substance" of Section One, by making clarificatory *declarations about* Section one, is different from supplying the truth-makers for Section one claims—in other words, *making it the case* that Section One means something. Likewise with the Court's condemnation of congressional power to "determine what constitutes a constitutional violation." If the word "determine" is taken epistemically, as a power in Congress to *discern* what constitutes a constitutional violation, as opposed to making it the case that something constitutes a constitutional violation, a congressional power of constitutional-violation-determination is entirely unremarkable and innocuous.

In general, it is important to distinguish epistemic from temporal phenomena.[38] We don't always know the original meaning expressed by the constitutional text, for instance. But that is not an argument that meaning changes. An individual might not know, for instance, how many primes there are between a million and a billion, but they still know that whatever the number is, it is not going to change. Change and uncertainly are simply different phenomena. Likewise with change and clarification. Our epistemic states can ebb and flow even if the underlying reality stays fixed.

6. Section One v. Judicial Enforcement

Three cases in the *Boerne* line—*Boerne* itself on religious exemptions, the age-discrimination case *Kimel*, and the disability-discrimination case *Garrett*—condemn Congress for passing prohibitions on the states that are not congruent to the constitutional violations *as discerned and enforced by the Court*. But the underlying cases about Section One—*Employment Division v. Smith* on

35. *Boerne*, 521 U.S. at 519.

36. *Id.*

37. *Id.* at 529.

38. *See* Christopher R. Green, *Constitutional Truthmakers*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 497, 500 (2018); Stephen Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777 (2022).

religious exemptions,[39] *Massachusetts Board of Retirement v. Murgia* on age discrimination,[40] and *Cleburne v. Cleburne Living Center* on disability discrimination[41]—all appeal to the lack of judicial expertise as part of the basis for their holdings. Legislatures are competent to assess religious exemptions or the propriety of age or disability distinctions even in cases where courts are not. Condemning Congress for passing legislation that is not congruent and proportional to *Smith*, *Murgia*, or *Cleburne* turns this judicial restraint rationale on its head.

The Court said in *Murgia*, "[w]e turn to examine this state classification under the rational-basis standard. This inquiry employs a relatively relaxed standard reflecting the Court's awareness that *the drawing of lines that create distinctions is peculiarly a legislative task* and an unavoidable one."[42] The Court built on *Murgia* in *Cleburne*:

> The lesson of *Murgia* is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the Stte has the authority to implement, *the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices* as to whether, how, and to what extent those interest should be pursued.[43]

The Court said in *Smith*:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. . . . But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, *and that the appropriate occasions for its creation can be discerned by the courts*.[44]

Justice Breyer's dissent in *Garrett* makes this point powerfully:

> The problem with the Court's approach is that neither the "burden of proof" that favors States nor any other rule of restraint applicable to *judges* applies to *Congress* when it exercises its § 5 power. . . . Rational-basis review—with its presumptions. Favoring constitutionality—is "a paradigm of *judicial* restraint." And the

39. 494 U.S. 872 (1990).

40. 427 U.S. 307 (1976).

41. 473 U.S. 432 (1985).

42. *Murgia*, 427 U.S. at 314 (emphasis added).

43. *Cleburne*, 473 U.S. at 441–42 (emphasis added).

44. *Smith*, 494 U.S. at 890 (emphasis added).

> Congress of the United States is not a lower court. . . . There is simply no reason to require Congress, seeking to determine facts relevant to the exercise of its § 5 authority, to adopt rules or presumptions that reflect a court's institutional limitations.[45]

Using judicial-restraint-motivated Section one precedent to limit the scope of Congress's Section Five power thus turns judicial modesty on its head.

III. A BETTER VIEW

A more historically faithful account of congressional Fourteenth Amendment power begins where our criticism of *Boerne* ended: by looking at the notions of judicial restraint prevalent when the Fourteenth Amendment was adopted. Only in such a light can we see the boundary between legislative and judicial power properly.

A. Clarity and Judicial Review in 1868

Of the thirty-seven states in the Union in 1868, twenty-eight had by that time articulated a clarity requirement for judicial review, and none had rejected it.[46]

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45. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S> 356, 383–84 (2001) (citation omitted). *See also* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 185–88 (1997).

46 *See* Kamper v. Hawkinds, 3 Va. (1 Va. Cas.) 20, 39–40 (Va. 1793) ("plainly repugnant"); Respublica v. Duquet, 2 Yeates 493, 501 (Pa. 1799) ("evident indeed . . . unequivocally"); Kendall v. Inhabitants of Kingston, 5 Mass. (4 Tyng) 524, 534 (Mass. 1809) ("manifestly erroneous"); Syndics of Brooks v. Weyman, 3 Mart. (o.s.) 9, 12) (La. 1813) ("manifestly"); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 94 (Ky. 1822) ("clear and strong conviction"); Bowdoinham v. Richmond, 6 Me. 112, 114 (Me. 1829) ("clearly"); State v. Manuel, 20 N.D. (3 & 4 Dev. & Bat.) 144, 164 (N.C. 1838) ("clear repugnancy"); Trs. of the Bishop's Fund v. Rider, 13 Conn. 87, 93 (Conn. 1839) ("clearly repugnant"); State v. Cooper, 5 Blackf. 258, 259 (Ind. 1839) (per curiam) ("so obvious as to admit of no doubt"); Trs. of Caledonia Cnty. Grammar Sch. V. Burt, 11 Vt. 632, 637–38 (Vt. 1839) ("the most clear and unquestionable grounds"); Lane v. Dorman, 4 Ill. (3 Scam.) 238, 240 (Ill. 1841) ("plain and obvious"); Campbell v. Miss. Union Bank, 7 Miss. (6 Howard) 625, 672 (Miss. 1842) ("palpably"); State v. Balt. & Ohio R.R. Co., 12 G & J. 399, 438 (Nd. 1842 ("clear"), *aff'd*, 44 U.S. (3 How.) 534 (1835); Bailey v. Phila., Wilmington & Balt. R.R. Co., 4 Del. (4 Harr.) 389, 403 (Del. 1846) ("plain, palpable"); Nunn v. State, 1 Ga. 243, 246 (Ga. 1846) ("clear and strong conviction"); Sutherland v. DeLeon, 1 Tex. 250, 304 (Tex. 1846) ("clearly"); Reed v. Wright, 2 Greene 15, 21 (Iowa 1849) ("clear and apparent"); Eason v. State, 11 Ark. 481, 486 (Ark. 1851) ("clear and strong conviction"); Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm'rs of Clinton Cnty., 1 Ohio St. 77, 83 (Ohio 1852) ("clearly"); Dickson v. State, 1 Wis. 122, 126 (Wis. 1853) ("clearly");Cotton v. Cnty Comm'rs, 6 Fla. 610, 613 (Fla. 1856) ("very clear case") (quoting Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.) (internal quotation marks omitted)); Att'y Gen. *ex rel.* Indep. Or Congregational Church of Wappetaw v. Soc'y for Relief of Elderly & Disabled Ministers, 29 S.C. Eq. (8 Rich. Eq.) 190, 226 (Ct. App. Eq. S.C. 1856) ("clear and strong conviction") (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810) (internal quotation marks omitted)); Sears v. Cottrell, 5 Mich. 251, 259 (Mich. 1858) (Christiancy, J., concurring) ("*manifestly*"); People *ex rel.* Att'y Gen. v. Burbank, 12 Cal. 378, 384–85 (Cal. 1859) ("clear repugnancy . . . extreme caution"); Sadler v. Langham, 34 Ala. 311, 321 (Ala. 1859) ("clearly demonstrated"); Heyward v. Judd, 4 Minn. 483, 491 (Minn. 1860) ("must clearly appear"); State *ex rel.* Crawford v. Robinson, 1 Kan. 17, 27 (Kan. 1862) ("clear, beyond substantial doubt").

The other nine would do so within a few decades,[47] as would the thirteen states to enter the Union later.[48] Members of the Supreme Court had articulated clarity requirements even before *Marbury v. Madison*.[49] The Court as a whole noted in *Fletcher v. Peck* in 1810:

> [I]t is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.[50]

The Court reiterated the "clear incompatibility" rule in many later cases near the time of the Fourteenth Amendment.[51] Thomas Cooley quoted the rule from *Fletcher* in his celebrated 1868 treatise.[52] During an 1868 debate on proposals

47. Stephens v. St. Louis Nat'l Bank, 43 Mo. 385, 390 (Mo. 1869) ("plainly"); State v. Fuller, 34 N.J.L. 227, 232 (N.J. 1870) ("clearly"); State *ex rel.* Morrell v. Fickle, 71 Tenn. 79, 81–82 (Tenn. 1879) ("[no] hypercritical test. . . . manifestly [void] according to the plain letter and spirit of the Constitution"); Cline v. Greenwood, 10 Or. 230, 241 (Or. 1882) ("clear and palpable and free from all doubt"); Varner v. Martin, 21 W. Va. 534, 543 (W. Va. 1883) ("clearly"); State *ex rel.* Perry v. Arrington, 4 P. 735, 737 (Nev. 1884) ("clearly"); State v. Marshall, 15 A. 210, 211 (N.H. 1888) ("clear and substantial conflict"); State v. Dist. Of Narragansett, 16 A. 901, 906 (R.I. 1889) ("clearly") (quoting People *ex rel.* Burrows v. Supervisors of Orange Cnty., 17 N.Y. 235, 241 (N.Y. 1858)); State *ex rel.* Stull v. Bartley, 59 N.W. 907, 909 (Neb. 1894) ("clear and manifest").

48. People *ex rel.* Tucker v. Rucker, 5 Colo. 455, 458–59 (Colo. 1880) ("clear and unquestioned violation . . . clearly demonstrated"); Doan v. Bd. of Cnty. Comm'rs, 26 P. 167, 170 (Idaho 1891) ("so clearly repugnant to the constitution as to admit of no other reasonable construction"); State *ex rel.* McReavy v. Burke, 36 P. 281, 283 (Wash. 1894) ("greatest caution . . . clearly"); State *ex rel.* Adams v. Herried, 72 N.W. 93, 97 (S.D. 1897) ("plainly and palpably"); Farm Inv. Co. v. Carpenter, 61 P. 258, 263–64 (Wyo. 1900) ("clearly"); W. Ranches, Ltd. v. Custer Cnty., 72 P. 659, 661 (Mont. 1903) (per curiam) ("clearly"); Blackrock Copper Mining & Milling Co. v. Tingey, 98 P. 180, 185 (Utah 1908) ("clearly"); Anderson v. Ritterbusch, 98 P. 1002, 1017 (Okla. 1908) ("clear and strong conviction"); State *ex rel.* Lucero v. Marron, 128 P. 485, 488 (N.M. 1912) ("clear and strong conviction"); O'Laughlin v. Carlson, 152 N.W. 675, 677 (N.D. 1915) ("manifestly"); Smith v. Mahoney, 197 P. 704, 706 (Ariz. 1921) ("clearly"); Koike v. Bd. of Water Supply, 352 P.2d 835, 838 (Haw. 1960) ("clearly"); Armond v. Alaska State Dev. Corp., 376 P.2d 717, 724–25 (Alaska 1962) ("clearly").

49. Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.) ("very clear case"); Calder v. Bull, 3 U.S. (3 Dall.) 386, 395 (1798) (opinion of Chase, J.) ("very clear case"); Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 18 (1800) (opinion of Washington, J.) ("clearly demonstrated"); *id.* at 19 (opinion of Paterson, J.) ("clear and unequivocal . . . not a doubtful and argumentative implication").

50. 10 U.S. (6 Cranch) 87, 128 (1810).

51. *See, e.g.*, Knox v. Lee, 79 U.S. 457, 531 (1870) ("clear incompatibility"); Mayor v. Cooper, 73 U.S. 247, 251 (1868) ("This Court has the power to declare an act of Congress to be repugnant to the Constitution, and therefore invalid. But the duty is one of the great delicacy, and only to be performed where the repugnancy is clear, and the conflict irreconcilable."); *Ex Parte* Garland, 71 U.S. 333, 382 (1866) (Miller, J., joined by Chase, C.J., and Swayne & Davis, JJ., dissenting) ("[T]he incompatibility of the act with the Constitution should be so clear as to leave little reason for doubt, before we pronounce it to be invalid.").

52. THOMAS M. COOLER, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 183 (1868).

to subject the Supreme Court's exercise of judicial review to a supermajority requirement, Representative Thomas Williams noted of another representative, "He is perfectly well aware, as is every lawyer here, that it is a well-settled principle that no act of the law-making power should ever be declared invalid upon constitutional grounds unless it be a clear case."[53]

B. Legislative Clarification of Pre-Existing Law

The idea of legislation clarifying pre-existing law is of course well-known to the Anglo-American legal tradition. In 1606, the houses of Parliament were attempting to make sense of the legal relationship between Scotland and England three years after James VI of Scotland had also become James I of England. Francis Bacon said "[t]hat this Conference and the subject thereof was *non in deliberative*, but *in judiciali*; not *de bono*, but *de vero*, not to consult of a Law to be made, but to declare the Law already planted."[54] The Houses of Parliament in that context were not merely required to assess what would be a good idea (*de bono*) about how Scots and Englishmen should relate; they also had to figure out what the law truly (*de vero*) already said. This distinction marks an important limit on the Section Five role of Congress. Congress is required to declare the requirements of Section Once that already exist, not express their desires about requirements they would *like* to exist. But merely because Congress cannot *change* Section One does not mean that it cannot *disagree* with the Court about it, in cases of uncertainty.

Another famous episode in English legal history where the same distinction was important was in the dispute between Lady Jane Grey and Queen Mary. Edward VI claimed the right to name his successor because Parliament had told Henry VIII in 1543 that he could name *his* successor. The issue was whether Parliament was conveying to Henry a power he lacked before, or instead declaring and clarifying a power that kings of England had already, Edward included. If the former, Mary was entitled to reign, but if the latter, Lady Jane was.[55]

A distinction from the philosophy of language can also help clarify the difference between congressional *creation* of Section One rights and congressional *recognition* of them. Here is a famous example from Elizabeth Anscombe's book INTENTION:

> Let us consider a man going round a town with a shopping list in his hand. Now it is clear that the relation of this list to the things he actually buys is one and the same whether his wife gave him the list or it is his own list; and that there is a different relation where a list is made by a detective following him about. If he made the list itself, it was an expression of intention; if his wife gave it to him, it has the role of an order. What then is the identical relation to what happens, in the order and the intention, which is not shared by the record? It

53. CONG. GLOBE, 40th Cong. 2d Sess. 479 (1868).

54. Le Case del Union, del Realm, D'Escose, ove Angleterre, 72 Eng. Rep. 908, 908 (1606) (emphasis added).

55. *See* ERIC IVES, LADY JANE GREY: A TUDOR MYSTERY 142–44 (2011).

> is precisely this: if the list and the things that the man actually buys do not agree, and if this and this alone constitutes a mistake, then the mistake is not in the list but in the man's performance (if his wife were to say: "Look, it says butter and you have bought margarine" he would hardly reply: "What a mistake! We must put that right" and alter the word on the list to "margarine"); whereas if the dettective's record and what the man actually buys do not agree, then the mistake is in the record.[56]

John Searle explains Anscombe's example with a phrase that many later philosophers have found helpful: the "direction of fit."[57] *Beliefs* and their kin are attempts to get our minds to match or fit the world, but *desires* and the like are attempts to get the world to match or fit our mind. The Museum of Science and Industry rotunda inscription marks a similar distinction: "Science discerns the laws of nature; industry applies them to the needs of man." Science has a mind-to-world direction of fit, industry world-to-mind. This distinction could be used as an explanation of the limits of Congress's Section Five power. The enforcement power does not authorize Congress to express its desires in order to *make* Section One *be* a certain way. Congress's exercises of Fourteenth Amendment power must fit the actual, pre-existing meaning expressed in the words of Section One. If Section One is the shopping cart, Congress is the spy, not the shopper.

C. The Civil Rights Act of 1866 as an Exercise of Congressional Clarification

Republicans made one thing very clear about the Fourteenth Amendment in 1866: The Fourteenth Amendment was passed in order to safeguard and entrench the Civil Rights Act of 1866. That Act had defined American citizenship and required racial equality with respect to a list of rights, and both the Acts critics, like President Andrew Johnson in vetoing the bill, and its proponents, like Senator Lyman Trumbull responding to Johnson, understood the Civil Rights Act as a claim about the *pre-existing* rights of citizens of the United States. Johnson asked in his March 27 veto message about the freedmen, "Four million of them have just emerged from slavery into freedom. Can it be reasonably supposed that they possess the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States?"[58] Lyman Trumbull replied on April 4:

> [W]hat rights do citizens of the United States have? To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in

56. ELIZABETH ANSCOMBE, INTENTION 56 (2d ed. 1963).

57. John R. Searle, *A Taxonomy of Illocutionary Acts*, in LANGUAGE, MIND AND KNOWLEDGE 344–69 (Gunderson ed. 1975).

58. CONG. GLOBE, 39th Cong. 1st Sess. 1679 (1866).

> this bill, and they belong to them in all the States of the Union. The right of American citizenship means something.[59]

On April 21, Representative John Bingham proposed all of the clauses of the Fourteenth Amendment's Section One except the citizenship declaration to the Joint Committee on Reconstruction.[60]

Two aspects of the congressional debate are particularly important for the relationship between judicial and congressional power under the Fourteenth Amendment. First, several Republicans explained that the Amendment would *entrench* the Civil Rights Act, not just authorize it.[61] Even if Congress were to repeal the Civil Rights Act, then, Section One alone would authorize courts to require that freedmen re3ceive treatment as citizens of the United States. Second, Republicans conceded that the boundaries of "privileges or immunities of citizens of the Unites States" concept were fuzzy; not all instances of it were clear.[62] In light, then, of the unanimous understanding set out above that judicial power was limited to clear cases, judicial enforcement of Section one would necessarily be incomplete. If the privileges of citizens of the United States are, then, because of that concept's fuzzy edges, only partly entrenched by a self-executing Section One to be enforced in court, what is the role of Congress? Its

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59. *Id.* at 1757.

60. BENJAMEN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS 1865–1867, 82, 87 (1914).

61. CONG. GLOBE, 39th Cong. 1st Sess. 2459 (1866) (Representative Thaddeus Stevens, introducing amendment to House) ("Some answer, 'Your civil rights bill secures the same things.' That is partly true, but a law is repealable by a majority."); *Id.* at 2462 (Representative James Garfield) ("I am glad to see this first section here which proposes to hold over every American citizen, without regard to color, the protecting shield of law . . . The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment comes when [the Democratic] party comes to power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it."); *id.* at 2498 (Representative John M. Broomall) ("[W]hy should we put a provision in the Constitution which is already contained in an act of Congress? . . . If we are already safe with the civil rights bill, it will do no more harm to become the more effectually so, and to prevent a mere majority from repealing the law and thus thwarting the will of the loyal people."); *id.* at 2896 (Jacob Howard) (responding to Senator Doolittle's question that if the Civil Rights Act were constitutional, "[W]hat is the necessity of amending the Constitution at all on this subject?") ("We desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power of such gentlemen as the Senator from Wisconsin, who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters.").

62. *Id.* at 2765 (privileges of citizens of United States "are not and cannot be fully defined in their entire extent and precise nature"); CONG. GLOBE, 42d Cong. 1st Sess. 607 (1871) (Senator John Pool) ("The full scope of the rights incident to citizenship may not be easy to define.")' CONG. GLOBE, 42d Cong. 2d Sess. 844 (1872) (Senator John Sherman) ("There may be sometimes great dispute and doubt as to what is the right, immunity, or privilege conferred upon a citizen of the United States."); 3 CONG. REC. 1870 (Senator George Edmunds) ("[I]t may be that you cannot make a precise definition," though "what belongs to a man in his character as a citizen has been long in a great many respects well understood.").

most important aspect, contrary to *Boerne*, is a congressional power to *clarify* Section One.

Speaker of the House Schuyler Colfax's use of the Civil Rights Act as an exposition of Section One, quoted above, fits this reading of congressional power. Recall the key language: "[T]he Civil Rights Bill . . . specifically and directly declares what the rights of a citizen of the United States are."[63] To the extent that the Fourteenth Amendment's language is too general and its precise boundaries too difficult for courts to assess in a principled manner, Congress is the one to make its requirements more "specific." Democrats as well expected Congress to make authoritative declarations about the making of Section One. By far the most extensive recorded legislative ratification debate on the Fourteenth Amendment was in Pennsylvania. Democrat Burnett noted that the authorities went both ways with respect to whether voting was a right of citizenship:

> It is true that in 18th Howard, 531, 2nd Humphrey, 393, 6th Smith, New York, 408, 6th Peters, 762, the courts have taken both sides of the question, so far as the right of suffrage is concerned. I simply cite these adjudications of the court to show that this language is susceptible of more than one construction. If this becomes a part of the Constitution, Congress might declare that the words in the latter part of this section shall embrace the rights of suffrage.[64]

Both parties, then, expected declaratory legislation where Section One was less than perfectly clear or specific.

IV. CONCLUSION

Both Republicans and Democrats expected during Reconstruction that the Fourteenth Amendment's guarantees. Of equal citizenship, "process of law," and "protection of the laws" would be fleshed out by congressional clarification. Courts were to play a secondary role, preventing Congress from going below a floor in repealing statutes like the Civil Rights Act of 1866 that are clearly included within Section One, and also in preventing Congress from going above a ceiling by placing requirements on states or individuals that are clearly beyond Section One. But between those boundaries, Congress was expected to exercise a Section Five power of clarification. The Supreme Court should thus retreat from *Boerne* and adopt a view of congressional power that better fits the meaning expressed by the Fourteenth Amendment's text in its original context.

63. *See* CINCINNATI COMMERCIAL, *supra* note 34, and accompanying text.

64. APPENDIX TO THE LEGISLATIVE RECORD 25 (1867).