TEACHING CONGRESSIONAL ENFORCEMENT OF THE FOURTEENTH AMENDMENT

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Because I am a scholar of the Reconstruction Era, I always enjoy teaching the Fourteenth Amendment. I strongly believe that scholarship enhances classroom teaching and I welcome the opportunity to share my knowledge, gleaned from years of research, with my students. My work focuses on constitutional interpretation outside of the courts. I have written extensively about the role that Congress plays in enforcing equality rights, which is rooted in the Reconstruction Era.[1]

The Fourteenth Amendment is a rich source of material for my research, and for teaching constitutional law, because Section 5 of the Amendment authorizes Congress to enact "appropriate" measures to enforce the Amendment.[2] Congressional enforcement of the Fourteenth Amendment raises basic issues

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1. *See, e.g.*, REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS (2006) [hereinafter ZIETLOW, ENFORCING EQUALITY]; Rebecca E. Zietlow, *Democratic Constitutionalism and the Affordable Care Act*, 72 OHIO ST. L.J. 1367 (2011) [hereinafter Zietlow, *Democratic Constitutionalism*]; Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255 (2010) [hereinafter Zietlow, *Free at Last!*]; Rebecca E. Zietlow, *Congressional Enforcement of the Rights of Citizenship*, 56 DRAKE L. REV. 1015 (2008) [hereinafter Zietlow, *Rights of Citizenship*]; Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945 (2005) [hereinafter Zietlow, *Secure These Rights*].

2. U.S. CONST. amend. XIV, § 5. More recently, my scholarship has focused on the Thirteenth Amendment, which merits only a cursory mention in most constitutional law books. *See, e.g.*, REBECCA E. ZIETLOW, THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION [hereinafter ZIETLOW, FORGOTTEN EMANCIPATOR]; Rebecca E. Zietlow, *James Ashley, the Great Strategist of the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL'Y 265 (2017) [hereinafter Zietlow, *Great Strategist*]; Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 SEATTLE U. L. REV. 859 (2016) [hereinafter Zietlow, *A Positive Right*]; Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1697 (2012) [hereinafter Zietlow, *Ashley's Thirteenth Amendment*]; Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393 (2012) [hereinafter Zietlow, *Origins of the Thirteenth Amendment*]; Zietlow, *Free at Last!*, *supra* note 1, at 255. I believe that the omission of the Thirteenth Amendment is a mistake, and with a group of other Thirteenth Amendment scholars, have sought to revive interest in that amendment. Of course, that issue is beyond the scope of this Article.

such as individual rights, federalism, and separation of powers. Section 5 could, and arguably should, be a central component of the constitutional law curriculum. However, constitutional law textbooks vary in their coverage of Section 5 and finding time and space within the standard constitutional law curriculum to teach this important subject has proven to be quite a challenge. Nonetheless, teaching about congressional enforcement of the Fourteenth Amendment not only furthers the understanding of the Amendment, but also provides an excellent opportunity for teaching about the role of the political branches in constitutional development.

Teaching congressional enforcement of the Fourteenth Amendment raises a larger issue—to what extent can and should law professors teach about constitutional interpretation outside of the courts as part of a standard constitutional law curriculum? Like many (probably most) constitutional law professors, I teach a lot of history in my class. I believe it is necessary to understand the historical context of landmark Supreme Court cases to fully understand the Court's rulings. In addition, students traditionally enjoy studying the historical background of these cases, and I am convinced that interest in a subject is correlated with enhanced learning. A historical approach to constitutional law also enables me to use my research to add value to the class.

Because of the political nature of constitutional law, I teach a lot about politics. I often use examples from contemporary headlines to illustrate doctrines that we cover in class. When I ask students to consider the constitutionality of a political act, I want them to consider the Supreme Court rulings we have read, but also to go beyond what the Court would say. Often, the answer is not clear, and is subject to negotiation by the political branches. Constitutional interpretation in the real world frequently occurs outside of the courts, through the political actions of the political branches. It is essential for students to learn about constitutional interpretation outside of the courts to understand how constitutional law develops in our country.

Teaching congressional enforcement of the Fourteenth Amendment provides a valuable opportunity to teach about the complex and conflicting interaction between the courts and the political branches related to discerning constitutional meaning. However, deciding whether, and to what extent, to teach congressional enforcement of the Fourteenth Amendment entails balancing history, politics, and constitutional theory with the black letter law that students need to know for the bar exam.

Part I of this Essay considers in depth how and when to teach congressional enforcement of the Fourteenth Amendment in a constitutional law course. Part II considers a larger problem—how to teach constitutional interpretation by the political branches when the Supreme Court dominates the teaching and study of constitutional law. Part III provides suggestions on how to use Section 5 as a vehicle for teaching how members of Congress interpret the Constitution when enacting measures to define and protect equality rights.

I. WHY AND WHEN TO TEACH CONGRESSIONAL ENFORCEMENT OF THE FOURTEENTH AMENDMENT

Congressional enforcement of the Fourteenth Amendment is important for both historical and theoretical reasons. Historically, the primary purpose of the Fourteenth Amendment was to empower Congress to enforce the rights listed in the Amendment against state governments.[3] Twenty-first century lawyers (including a majority of the Supreme Court) tend to think of the Court as the primary enforcer of individual rights, including those in Section 1 of the Fourteenth Amendment.[4] Members of the Reconstruction Congress, however, viewed the Supreme Court as a threat to individual rights, not as their protector.[5] The framers of the Fourteenth Amendment expected that Congress would play the leading role in defining and enforcing individual rights.[6] *Dred Scott v. Sandford*, not *Brown v. Board of Education*, was the paradigm of the Court which the Reconstruction Congress viewed as an instrument of the "Slave Power."[7] Thus, teaching about congressional enforcement of the Fourteenth Amendment helps students to understand the original meaning of the Amendment.[8]

Congressional enforcement of the Fourteenth Amendment also raises issues of constitutional theory, because it implicates the fundamental structure of U.S. government and the role of individual rights within that structure. When Congress enacts legislation pursuant to Section 5 to enforce rights against state governments, it infringes on state autonomy. Thus, Section 5 raises important federalism issues. Which level of government, state or federal, should be primarily responsible for protecting individual rights?[9] Section 5 also raises fascinating issues of separation of powers—what is the proper division of authority over those rights between the Court and Congress? To what extent can members of Congress define constitutional meaning when legislating to protect

3. *See* Rebecca E. Zietlow, *Juriscentrism and the Original Meaning of Section Five*, 13 TEMP. POL. & C.R. L. REV. 485 (2004).

4. City of Boerne v. Flores, 521 U.S. 507, 524–25 (1997).

5. ZIETLOW, ENFORCING EQUALITY, *supra* note 1, at 33.

6. Zietlow, *Rights of Citizenship*, *supra* note 1, at 1028.

7. In *Dred Scott v. Sandford*, the Court held that slaveholders had a constitutional right to own slaves, and that people of African descent could not be U.S. citizens. 60 U.S. 393, 453–54 (1857). Republicans in the 39th Congress widely decried the *Dred Scott* decision as a political ruling serving the Slave Power. *See* ZIETLOW, ENFORCING EQUALITY, *supra* note 1, at 29–36. Almost a century later, in *Brown v. Board of Education*, the Court held that state-mandated segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment. 347 U.S. 483, 495 (1954). Scholars often invoke *Brown* to argue that the Court plays a leading role in protecting equality rights. ZIETLOW, ENFORCING EQUALITY, *supra* note 1, at 7.

8. Although I do not consider myself to be an originalist, the original meaning of a constitutional provision is at least relevant, if not decisive, to interpreting its meaning today.

9. *See* Denise C. Morgan & Rebecca E. Zietlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. 1347, 1347 (2005).

rights that they identify in the Fourteenth Amendment? What is the process Congress uses when legislating to enforce the Fourteenth Amendment? How does that differ from the judicial process? These important questions are open to discussion when teaching congressional enforcement of the Fourteenth Amendment.

Indeed, congressional enforcement of the Fourteenth Amendment raises a multitude of fundamental constitutional law issues and concepts, which justifies its addition to the constitutional law curriculum. But where is its proper place in the curriculum?

A. Finding a Home for Section Five

The most natural home for a discussion of Section 5 at my law school, the University of Toledo College of Law, appears to be Constitutional Law I ("Con Law I"). Con Law I is a required course that most students take in their second semester of law school. The curriculum of Con Law I includes the federal powers (judicial, executive, and legislative); the separation of those powers and checks and balances; federalism limits on federal power and the Tenth Amendment; limitations on the power of states, including an introduction to the Fourteenth Amendment; the Privileges or Immunities Clause of the Fourteenth Amendment; the debate over whether the Fourteenth Amendment incorporates the Bill of Rights; and the Fourteenth Amendment-based doctrine of substantive due process.[10] Section 5 seems to fit in the Con Law I curriculum because Con Law I includes the powers of Congress and introduces the Fourteenth Amendment. Indeed, I try to include a unit about Section 5 in my Con Law I curriculum. However, the complexity of the issues surrounding Section 5 make it difficult to accommodate into a first-year constitutional law course.

There are several reasons why it is difficult to fit a unit on congressional power to enforce the Fourteenth Amendment in the first semester of constitutional law. First and foremost, it is hard to find time to cover it. The list of subjects already covered in Con Law I illustrates that there is already limited time to teach the rest of the curriculum. Second, Section 5 jurisprudence is complicated and multi-layered and includes background information that we would not otherwise cover in Con Law I. *City of Boerne v. Flores* is the case in which the Court established the test for evaluating the propriety of congressional measures enforcing the Fourteenth Amendment.[11] In *Boerne*, the Court

10. At the University of Toledo College of Law, we standardize our constitutional law curriculum into two required semesters. This system enables students to take the second semester of constitutional law ("Con Law II") with a different professor than the professor who taught them Con Law I if they prefer or if their schedule so requires. The constitutional law professors meet regularly to discuss our curriculum and to ensure that we teach a consistent curriculum. However, we do not all use the same textbook.

11. 521 U.S. 507, 520 (1997). A comprehensive treatment of Section 5 would also include *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

considered the constitutionality of a provision of the Religious Freedom Restoration Act, an act enforcing the Free Exercise Clause of the First Amendment.[12] The first question which an astute law student might ask is, what does a First Amendment case have to do with the Fourteenth Amendment? The answer, of course, is that the First Amendment only applies to state governments because it was incorporated via the Fourteenth Amendment. I do teach incorporation in Con Law I, but usually not until after the unit on the powers of Congress. The issue of incorporation alone thus generates a timing problem, which is relatively minor. The larger issue is the fact that the decision in *Boerne* turns on the conflict between the Court and Congress interpreting the meaning of the Free Exercise Clause of the First Amendment. Students need some background in Free Exercise Clause jurisprudence to understand *Boerne*, but we do not cover the First Amendment until Con Law II.

In *Boerne*, the Court established a "congruence and proportionality" test to evaluate whether Section 5-based legislation falls within Congress's power to enforce the Fourteenth Amendment.[13] The congruence and proportionality test is *sui generis* and does not apply to any other area of the Court's jurisprudence.[14] Therefore, students cannot understand it unless they study cases in which the Court applies it. The next problem, then, is teaching the cases following *Boerne*. However, students first need at least a short lesson on the Eleventh Amendment and sovereign immunity from *Seminole Tribe v. Florida*.[15] In *Seminole Tribe*, the Court held that Congress could not use the Indian Commerce Clause to make individual rights enforceable against state governments.[16] After *Seminole Tribe*, Section 5 is the only permissible source of power to abrogate sovereign immunity. Section 5 cases post-*Boerne* almost always involve legislation in which Congress purports to make rights enforceable against state governments.[17] Therefore, teaching Section 5 entails adding the Eleventh

12. *Boerne*, 521 U.S. at 512.

13. *Id.* at 520.

14. The one exception is Congress's power to enforce the Fifteenth Amendment. At times, the Court has treated the Enforcement Clauses of the two amendments interchangeably. *See, e.g.*, *Katzenbach*, 384 U.S. at 651. The Court recently applied the congruence and proportionality test to a Fifteenth Amendment-based voting rights statute. Shelby County v. Holder, 133 S. Ct. 2612, 2627–28 (2013).

15. 517 U.S. 43, 47, 52–53 (1996).

16. *See id.* at 47.

17. *See, e.g.*, Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 724–25 (2003) (upholding a provision of the Family and Medical Leave Act which applies to states as employers as falling within Congress's Section 5 power); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360, 373–74 (2001) (striking down a provision of the Americans with Disabilities Act which prohibited disability discrimination by states as employers as beyond Congress's Section 5 power); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000) (striking down a provision of the Age Discrimination in Employment Act which prohibited age discrimination by states as employers as beyond Congress's Section 5 power).

Amendment and the doctrine of sovereign immunity, topics usually consigned to federal courts classes, into the Con Law I curriculum. Post-*Boerne* Section 5 cases often involve congressional enforcement of the Equal Protection Clause, the doctrine of which is not covered until Con Law II. Obviously, teaching all this additional doctrine takes time and adds difficulty to the standard Con Law I curriculum. If we do cover all this jurisprudence, there is almost no time remaining for the important subject of substantive due process at the end of the semester. Thus, teaching the Court's Section 5 jurisprudence is difficult.

Given the obstacles to teaching congressional power to enforce the Fourteenth Amendment in Con Law I, another option would be to teach it in Con Law II. Con Law II is a required course, but students can opt to take it at any time after their first year of law school, and they can also choose which professor to teach them. I love this system because it means that most, though not all, of my Con Law II students chose to take the class with me instead of the other constitutional law professors who teach it. While I cannot assume that all the students in my Con Law II class like me, I can mostly rest assured that they do not hate me, so I feel like I have a bit more latitude and flexibility to teach during that semester. In addition, Con Law II students are a bit more seasoned and sophisticated than the first-year students in my Con Law I class. Most importantly, Con Law II is the semester that students *like* because it covers juicy issues like equality and discrimination, as well as fascinating and politically relevant First Amendment doctrine. Happier students are more open to learning—perhaps this is the semester to teach Section 5.

There are several pedagogical reasons to teach Section 5 in Con Law II. Students have already learned about incorporation, so there is no need to explain that aspect of the *Boerne* case. This is the semester that we cover the Equal Protection Clause, and the Free Exercise Clause of the First Amendment. However, the question of timing looms even larger in Con Law II. I begin the semester with the Equal Protection Clause, and I usually do not teach the Free Exercise Clause until the end of the semester. Should I teach *Boerne* during my unit on equal protection, or wait until the very end of the semester after the religion clauses? More importantly, the Con Law II curriculum consists almost entirely of Supreme Court cases interpreting the Constitution. No matter how the timing goes, the switch from the powers of the Court to a discussion of the powers of Congress would likely be awkward. In addition, *Boerne* is only nominally about federalism. The *Boerne* Court is most concerned about separation of powers, the division of interpretive authority between the Court and Congress. While we talk a lot about federalism in Con Law II, issues of separation of powers are generally consigned to Con Law I. Thus, teaching Section 5 in Con Law II is likely to be an awkward fit.

II. TEACHING CONSTITUTIONAL INTERPRETATION BY THE POLITICAL BRANCHES

Fortunately, teaching *Boerne* and its progeny is not the only approach available for teaching congressional enforcement of the Fourteenth Amendment. In those cases, the U.S. Supreme Court defines the scope of Congress's Section 5 power. However, *Boerne* and its progeny are only marginally about what Congress *actually does* when enforcing the Fourteenth Amendment. A comprehensive treatment of Section 5 would shift the focus away from the Court, and toward Congress, including congressional deliberations on legislation which enforces the Fourteenth Amendment. However, constitutional law textbooks for law students rarely include congressional deliberations on legislation.[18] This highlights a broader issue in the teaching of constitutional law in law schools—the extent to which the judicial power dominates how lawyers think and learn about the Constitution. Constitutional law textbooks for law students consist almost exclusively of U.S. Supreme Court cases, interspersed with some background material. I am not aware of any constitutional law textbook for law students which extensively covers constitutional interpretation outside of the courts.[19] Some textbooks take a historical approach and cover constitutional interpretation by the coordinate federal branches and state officials to contextualize Supreme Court decisions.[20] By and large, however, law students are taught that the Constitution means what the U.S. Supreme Court says it means.

Judicial supremacy dominates constitutional law—at least the way it is taught in law schools. There are some very good reasons to teach constitutional law this way. Perhaps most importantly, the bar exam tests mostly Supreme Court doctrine, and constitutional law is heavily tested on the bar exam. Also, students want answers! They want to know what the black letter law is and

18. The one statute that is included in many constitutional law textbooks is the 1973 War Powers Act, which is often included in material covering the war powers of Congress and the President, and the division of power between the two branches. However, those textbooks do not usually include congressional debates over the Act.

19. When I refer to textbooks throughout this Essay, I am referring to constitutional law textbooks which are designed for teaching students in law schools. As I will discuss, teaching constitutional law in an undergraduate course would allow for a more holistic approach to constitutional law which would encompass the subjects that most interest me. I have used a wide variety of textbooks during my years teaching constitutional law, including: ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (2d ed. 2006); 1 MICHAEL K. CURTIS ET AL., CONSTITUTIONAL LAW IN CONTEXT (2003); GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW (17th ed. 2010); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (6th ed. 2009); DAVID S. SCHWARTZ & LORI A. RINGHAND, CONSTITUTIONAL LAW: A CONTEXT AND PRACTICE CASEBOOK (2013). Some constitutional law textbooks designed for undergraduate courses do cover this subject, notably the GILMAN ET AL., AMERICAN CONSTITUTIONALISM series.

20. *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS (5th ed. 2006); CURTIS ET AL., *supra* note 19; STONE ET AL., *supra* note 19.

teaching the nuance of constitutional interpretation outside of the courts could frustrate these students. Nonetheless, we constitutional law professors are doing our students a great disservice if we teach them that constitutional law is limited to Supreme Court rulings. A large amount of constitutional law is created by the federal branches interacting with each other and negotiating with the states. Political scientists have long known this, and their work on constitutional development outside of the courts can greatly enrich our understanding of the Constitution.[21] Recently, a growing number of law professors have also begun to study popular constitutionalism, or constitutional interpretation outside of the courts.[22] This wealth of scholarship should inform what we teach our students. We are selling our students short when we only teach about the Constitution via the exercise of judicial review. A great deal of constitutional doctrine is developed outside of the courts, and students who are not taught about it lack a fundamental understanding of the workings of our constitutional government.

In my view, the most interesting aspects of constitutional law are its history and political implications. Teaching this to students raises a paradox—we want them to think about how constitutional law actually develops in our country, but we also want them to learn constitutional doctrine. In today's post-modern world, students are all too eager to jump to the conclusion that rulings are based on politics.[23] While they are undoubtedly correct that politics affect the Court's rulings, students must learn the doctrine despite its political origins. Unfortunately, their cynicism can sometimes impede their learning of the doctrine. By contrast, thinking about politics does not interfere with learning about constitutional interpretation by the political branches. That process is overtly political and more transparent than judicial deliberations. That is one of the reasons why it is so interesting. Unfortunately, many of my students have trouble understanding this nuanced approach to constitutional interpretation. I am sure that I am not the only constitutional law professor that receives student

21. *See, e.g.*, LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY (2013); Mark A. Graber, *Resolving Political Questions into Judicial Decisions: Tocqueville's Thesis Revisited*, 21 CONST. COMMENT. 485, 487 (2004).

22. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 5 (2004); James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 943 (1997); 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, 1947 (2003); Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 444 (2000); Robert C. Post, *The Supreme Court 2002 Term Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003).

23. There is ample evidence to support this view. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

evaluations that are divided between "too much history" and "not enough history" when evaluating the same class. An in-depth discussion of constitutional interpretation outside of the courts may warrant a similar response. However, this subject is too important not to make the effort.

Many constitutional law professors do teach about the political context of major constitutional crises and shifts in the Court's jurisprudence. For example, a unit on the development of the Court's Commerce Clause jurisprudence would be incomplete without a discussion of the Depression, the New Deal, and the resultant rise of the administrative state. It's hard to imagine teaching the Court's equal protection race discrimination jurisprudence without discussing the history of Jim Crow and the twentieth-century civil rights movement. Similarly, teaching the congressional power to enforce the Fourteenth Amendment from the perspective of Congress provides a valuable opportunity to teach about constitutional interpretation outside of the courts.

III. A VEHICLE FOR TEACHING CONGRESSIONAL INTERPRETATION OF THE CONSTITUTION

Some of the cases which we already teach in the standard constitutional law curriculum provide an opportunity to teach congressional enforcement of the Fourteenth Amendment from Congress's perspective. The canonical *Civil Rights Cases*, the case where the Supreme Court established the state action limitation on the Fourteenth Amendment, is a good place to start.[24] The *Civil Rights Cases* is usually taught in a unit about the state action requirement, but it provides a great introduction to the Section 5 power from Congress's perspective. In the *Civil Rights Cases*, the Court imposed an important limitation on the Section 5 power when it struck down the 1875 Civil Rights Act, which prohibited race discrimination by privately owned places of public accommodation, as beyond Congress's power to enforce the Fourteenth Amendment.[25] That ruling, which continues in effect to this day, means that when members of Congress want to enact civil rights legislation, they cannot use the Section 5 power to regulate private action. Thus, they must resort to an alternative source of power, such as the Commerce Clause. Teaching about the Court's Commerce Clause jurisprudence provides an opportunity to teach more about congressional enforcement of the Fourteenth Amendment and constitutional interpretation outside of the courts in general. To learn about the Court's Commerce Clause jurisprudence, students must learn about the political dynamics of the Depression, the New Deal, and President Franklin Roosevelt's court-packing plan and its impact on the Court. As a result of those politics, the

24. 109 U.S. 3, 21 (1883).

25. *Id.* at 9–10.

Court adopted a broad test for evaluating the commerce power, which enabled Congress to enact civil rights measures.[26]

Considering congressional deliberations over civil rights legislation in the late twentieth century provides an excellent opportunity to teach students about congressional enforcement of the Fourteenth Amendment as an exercise of constitutional interpretation outside of the courts. One of the landmark Commerce Clause cases is *Heart of Atlanta Motel v. United States*, the case in which the Court upheld the constitutionality of Title II of the Civil Rights Act of 1964, which prohibits race discrimination in privately owned places of public accommodation.[27] The 1964 Civil Rights Act was similar to the 1875 measure that the Court struck down in the *Civil Rights Cases*. Members of Congress debated whether to rely on Section 5 when enacting Title II but felt constrained by the state action limitation in the *Civil Rights Cases*.[28] They debated whether to rely on Section 5 or the commerce power, which the Court had broadened in its New Deal era opinions. Ultimately, supporters of the legislation decided to rely on both, but to emphasize the commerce power when defending the constitutionality of that measure before the Supreme Court.[29] In *Heart of Atlanta Motel*, the Court relied on the commerce power in its decision upholding the constitutionality of Title II.[30] The Court's majority opinion sidestepped the Section 5 issue even though the measure was about racial equality.[31] However, in their concurrences, Justices Douglas and Goldberg argued that the act fell within Congress's Section 5 Power.[32] As Justice Clark read his majority opinion from the bench, Justice Douglas passed a note to Justice Goldberg which said that he was happy that they had written separately.[33] Goldberg passed a note back, which said "Bill: I agree most emphatically. It sounds like hamburgers are more important than human rights. Arthur."[34] Thus, members of Congress and members of the Court were engaged in a dialogue about constitutional meaning, in which both were constrained by precedents from the past.

The dialogue between the Court and Congress was renewed, this time with negative results, in the case of *United States v. Morrison*.[35] In *Morrison*, the Court struck down the civil rights remedy provision of the Violence Against

26. ZIETLOW, ENFORCING EQUALITY, *supra* note 1, at 113–14.

27. 379 U.S. 241, 242–43 (1964).

28. ZIETLOW, ENFORCING EQUALITY, *supra* note 1, at 114.

29. *See id.* at 114–15; Post, *supra* note 22, at 39.

30. *Heart of Atlanta Motel*, 379 U.S. at 250.

31. *Id.*

32. *Id.* at 279 (Douglas, J., concurring); *Id.* at 291 (Goldberg, J., concurring) ("The primary purpose of the Civil Rights Act of 1964, however, as the Court recognizes, and as I would underscore, is the vindication of human dignity, and not mere economics.").

33. RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE HEART OF ATLANTA MOTEL AND MCCLUNG CASES 180 (2001).

34. *Id.*

35. 529 U.S. 598, 602 (2000).

Women Act enacted in 2000.[36] Again, Congress had relied on the commerce power and Section 5 to enact civil rights legislation.[37] In Congress, supporters of the bill argued that they could use their Section 5 power to remedy the states' failure to protect women from gender-motivated violence.[38] In *Morrison*, the Court applied the *Boerne* congruence and proportionality test and disagreed, striking down the measure as beyond the scope of both the Section 5 power and the commerce power.[39] This time, the Court rejected Congress's characterization of the law as a civil rights measure and its interpretation of Section 5.[40] Both *Heart of Atlanta* and *Morrison* are generally covered as Commerce Clause cases, but they are also about Section 5. These Commerce Clause cases, already covered in most textbooks, provide contrasting examples of the conversation between the Courts and Congress about constitutional meaning. It would also be relatively easy to add segments of the congressional debates over the 1964 Civil Rights Act and the Violence Against Women Act to the coverage of those cases. Thus, they provide a good opportunity to teach about congressional enforcement of the Fourteenth Amendment from Congress's perspective, and to explore the interaction between the Court and Congress regarding Congress's exercise of this power.

CONCLUSION

It is difficult to teach constitutional law. Students like bright-line rules and want the answers to doctrinal questions. Instead, constitutional law is full of fuzzy lines and balancing tests. This makes constitutional law a great class for teaching legal reasoning and argument, but frustrating for students who want answers and professors who want to give them. When teaching constitutional law, there is always a need to balance interesting content with rules that students need to know. History is interesting, as is constitutional theory. I believe that students learn better when they are interested in what they are studying. But some students are not interested in history and theory. Other students are too interested, and don't learn the law because they only focus on history and theory. It is a tough balancing act for professors and students and adding constitutional interpretation by the political branches further complicates this balancing act. Teaching about congressional enforcement of the Fourteenth Amendment can complicate this balancing act, but also make it more rewarding. I will continue to struggle with this balance, which makes teaching constitutional law both so challenging and so continually engaging.

36. *Id.*
37. *Id.* at 613.
38. *Id.* at 619–20.
39. *Id.* at 613.
40. *Morrison*, 529 U.S. at 617–18.