# 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, 55 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,

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.

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 estammation te(our)3.8frm

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

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,

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