Supplemental Materials for Brest, Levinson, Balkin, Amar and Siegel
Processes of Constitutional Decisionmaking
United States v. Morrison– Reconstruction Power

UNITED STATES v. MORRISON, 529 U.S. 598 (2000). [This was a challenge to the constitutionality of the civil rights remedy created by Violence Against Women Act, 42 U.S.C. §13981. The petitioner Christy Brzonkala, sued under the civil rights remedy; she alleged that she was brutally raped by two football players at Virginia Tech. The facts are given *infra* in the section of the opinion discussing Congress's commerce power. After holding that §13981 was not authorized under the commerce power, the Court went on to consider whether it could be upheld as an exercise of Congress's remedial powers under §5 of the Fourteenth Amendment. Only seven Justices reached the Fourteenth Amendment issue. Chief Justice Rehnquist wrote for a five person majority which included Justices O'Connor, Kennedy, Scalia, and Thomas]

REHNQUIST, C.J.
...

The principles governing an analysis of congressional legislation under §5 are well settled. Section 5 states that Congress may " 'enforce,' by 'appropriate legislation' the constitutional guarantee that no State shall deprive any person of 'life, liberty or property, without due process of law,' nor deny any person 'equal protection of the laws.' " City of Boerne v. Flores, 521 U.S. 507, 517 (1997). Section 5 is "a positive grant of legislative power,' that includes authority to 'prohibit conduct which is not itself unconstitutional and [to] intrud[e] into 'legislative spheres of autonomy previously reserved to the States.' " However, '[a]s broad as the congressional enforcement power is, it is not unlimited.' In fact, as we discuss in detail below, several limitations inherent in §5's text and constitutional context have been recognized since the Fourteenth Amendment was adopted.

Petitioners' §5 argument is founded on an assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence. This assertion is supported by a voluminous congressional record. Specifically, Congress received evidence that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions. Congress concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence. Petitioners contend that this bias denies victims of gender-motivated violence the equal protection of the laws and that Congress therefore acted appropriately in enacting a private civil remedy against the perpetrators of

gender-motivated violence to both remedy the States' bias and deter future instances of discrimination in the state courts.

As our cases have established, state-sponsored gender discrimination violates equal protection unless it " 'serves 'important governmental objectives and ... the discriminatory means employed' are 'substantially related to the achievement of those objectives.' " However, the language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government. Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action. '[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.' Shelley v. Kraemer, 334 U.S. 1, 13, and n. 12 (1948).

Shortly after the Fourteenth Amendment was adopted, we decided two cases interpreting the Amendment's provisions, United States v. Harris, 106 U.S. 629 (1883), and the Civil Rights Cases, 109 U.S. 3 (1883). In *Harris*, the Court considered a challenge to §2 of the Civil Rights Act of 1871. That section sought to punish 'private persons' for 'conspiring to deprive any one of the equal protection of the laws enacted by the State.' 106 U.S., at 639. We concluded that this law exceeded Congress' §5 power because the law was 'directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers.' In so doing, we reemphasized our statement from Virginia v. Rives, 100 U.S. 313, 318 (1880), that " 'these provisions of the fourteenth amendment have reference to State action exclusively, and not to any action of private individuals.' " *Harris*, supra, at 639 (misquotation in *Harris*).

We reached a similar conclusion in the Civil Rights Cases. In those consolidated cases, we held that the public accommodation provisions of the Civil Rights Act of 1875, which applied to purely private conduct, were beyond the scope of the §5 enforcement power. 109 U.S., at 11 ('Individual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment '). See also, e.g., Romer v. Evans, 517 U.S. 620, 628 (1996) ('[I]t was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations'); Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) ('Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power'); United States v. Cruikshank, 92 U.S. 542, 554 (1876) ('The

fourteenth amendment prohibits a state from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society').

The force of the doctrine of stare decisis behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur--and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.

Petitioners contend that two more recent decisions have in effect overruled this longstanding limitation on Congress' §5 authority. They rely on United States v. Guest, 383 U.S. 745 (1966), for the proposition that the rule laid down in the Civil Rights Cases is no longer good law. In *Guest*, the Court reversed the construction of an indictment under 18 U.S.C. §241, saying in the course of its opinion that 'we deal here with issues of statutory construction, not with issues of constitutional power.' 383 U.S., at 749. Three Members of the Court, in a separate opinion by Justice Brennan, expressed the view that the Civil Rights Cases were wrongly decided, and that Congress could under §5 prohibit actions by private individuals. 383 U.S., at 774 (opinion concurring in part and dissenting in part). Three other Members of the Court, who joined the opinion of the Court, joined a separate opinion by Justice Clark which in two or three sentences stated the conclusion that Congress could 'punis[h] all conspiracies--with or without state action--that interfere with Fourteenth Amendment rights.' Id., at 762 (concurring opinion). Justice Harlan, in another separate opinion, commented with respect to the statement by these Justices:

> The action of three of the Justices who joined the Court's opinion in nonetheless cursorily pronouncing themselves on the far-reaching constitutional questions deliberately not reached in Part II seems to me, to say the very least, extraordinary. Id., at 762, n. 1 (opinion concurring in part and dissenting in part).

Though these three Justices saw fit to opine on matters not before the Court in *Guest*, the Court had no occasion to revisit the Civil Rights Cases and *Harris*, having determined 'the indictment [charging private individuals with conspiring to deprive blacks of equal access to state facilities] in fact contain[ed] an express allegation of state involvement.' 383 U.S., at 756. The Court concluded that the implicit allegation of 'active connivance by agents of the State' eliminated any need to decide 'the threshold level that state action must attain in order to create rights under the Equal Protection Clause.' ...

To accept petitioners' argument, moreover, one must add to the three Justices joining Justice Brennan's reasoned explanation for his belief that the Civil Rights Cases were wrongly decided, the three Justices joining Justice Clark's opinion who gave no explanation whatever for their similar view. This is simply not the way that reasoned constitutional adjudication proceeds. We accordingly have no hesitation in saying that it would take more than the naked dicta contained in Justice Clark's opinion, when added to Justice Brennan's opinion, to cast any doubt upon the enduring vitality of the Civil Rights Cases and *Harris*.

Petitioners also rely on District of Columbia v. Carter, 409 U.S. 418 (1973). *Carter* was a case addressing the question whether the District of Columbia was a 'State' within the meaning of Rev. Stat. §1979, 42 U.S.C. §1983--a section which by its terms requires state action before it may be employed. A footnote in that opinion recites the same litany respecting *Guest* that petitioners rely on. This litany is of course entirely dicta, and in any event cannot rise above its source. We believe that the description of the §5 power contained in the Civil Rights Cases is correct:

> 'But where a subject has not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular [s]tate legislation or [s]tate action in reference to that subject, the power given is limited by its object, any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of [s]tate officers.' 109 U.S., at 18.

Petitioners alternatively argue that, unlike the situation in the Civil Rights Cases, here there has been gender-based disparate treatment by state authorities, whereas in those cases there was no indication of such state action. There is abundant evidence, however, to show that the Congresses that enacted the Civil Rights Acts of 1871 and 1875 had a purpose similar to that of Congress in enacting §13981: There were state laws on the books bespeaking equality of treatment, but in the administration of these laws there was discrimination against newly freed slaves. The statement of Representative Garfield in the House and that of Senator Sumner in the Senate are representative:

> '[T]he chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them.' Cong. Globe, 42d Cong., 1st Sess., App. 153 (1871) (statement of Rep. Garfield).
>
> 'The Legislature of South Carolina has passed a law giving precisely the rights contained in your 'supplementary civil rights bill.' But such a law remains a

> dead letter on her statute-books, because the State courts, comprised largely of those whom the Senator wishes to obtain amnesty for, refuse to enforce it.'
>
> Cong. Globe, 42d Cong., 2d Sess., 430 (1872) (statement of Sen. Sumner).

See also, e.g., Cong. Globe, 42d Cong., 1st Sess., at 653 (statement of Sen. Osborn); id., at 457 (statement of Rep. Coburn); id., at App. 78 (statement of Rep. Perry); 2 Cong. Rec. 457 (1874) (statement of Rep. Butler); 3 Cong. Rec. 945 (1875) (statement of Rep. Lynch).

But even if that distinction were valid, we do not believe it would save §13981's civil remedy. For the remedy is simply not 'corrective in its character, adapted to counteract and redress the operation of such prohibited [s]tate laws or proceedings of [s]tate officers.' Civil Rights Cases, 109 U.S., at 18. Or, as we have phrased it in more recent cases, prophylactic legislation under §5 must have a 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.' Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 639 (1999); Flores, 521 U.S., at 526. Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.

In the present cases, for example, §13981 visits no consequence whatever on any Virginia public official involved in investigating or prosecuting Brzonkala's assault. The section is, therefore, unlike any of the §5 remedies that we have previously upheld. For example, in Katzenbach v. Morgan, 384 U.S. 641 (1966), Congress prohibited New York from imposing literacy tests as a prerequisite for voting because it found that such a requirement disenfranchised thousands of Puerto Rican immigrants who had been educated in the Spanish language of their home territory. That law, which we upheld, was directed at New York officials who administered the State's election law and prohibited them from using a provision of that law. In South Carolina v. Katzenbach, 383 U.S. 301 (1966), Congress imposed voting rights requirements on States that, Congress found, had a history of discriminating against blacks in voting. The remedy was also directed at state officials in those States. Similarly, in Ex parte Virginia, 100 U.S. 339 (1880), Congress criminally punished state officials who intentionally discriminated in jury selection; again, the remedy was directed to the culpable state official.

Section 13981 is also different from these previously upheld remedies in that it applies uniformly throughout the Nation. Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States. By contrast, the §5 remedy upheld in Katzenbach v. Morgan, supra, was directed only to the State where the evil found by Congress existed, and in South

Carolina v. Katzenbach, supra, the remedy was directed only to those States in which Congress found that there had been discrimination.

For these reasons, we conclude that Congress' power under §5 does not extend to the enactment of §13981.

BREYER, J., dissenting, joined by Stevens, J:

Given my conclusion [that Congress had authority to pass §13981 under] the Commerce Clause, ... I need not consider Congress' authority under §5 of the Fourteenth Amendment. Nonetheless, I doubt the Court's reasoning rejecting that source of authority. The Court points out that in United States v. Harris, 106 U.S. 629 (1883), and the Civil Rights Cases, 109 U.S. 3 (1883), the Court held that §5 does not authorize Congress to use the Fourteenth Amendment as a source of power to remedy the conduct of private persons. That is certainly so. The Federal Government's argument, however, is that Congress used §5 to remedy the actions of state actors, namely, those States which, through discriminatory design or the discriminatory conduct of their officials, failed to provide adequate (or any) state remedies for women injured by gender-motivated violence--a failure that the States, and Congress, documented in depth.

Neither *Harris* nor the Civil Rights Cases considered this kind of claim. The Court in *Harris* specifically said that it treated the federal laws in question as 'directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers.' 106 U.S., at 640 (emphasis added); see also Civil Rights Cases, 109 U.S., at 14 (observing that the statute did 'not profess to be corrective of any constitutional wrong committed by the States' and that it established 'rules for the conduct of individuals in society towards each other, ... without referring in any manner to any supposed action of the State or its authorities').

The Court responds directly to the relevant 'state actor' claim by finding that the present law lacks 'congruence and proportionality' to the state discrimination that it purports to remedy. That is because the law, unlike federal laws prohibiting literacy tests for voting, imposing voting rights requirements, or punishing state officials who intentionally discriminated in jury selection, is not 'directed ... at any State or state actor.'

But why can Congress not provide a remedy against private actors? Those private actors, of course, did not themselves violate the Constitution. But this Court has held that Congress at least sometimes can enact remedial '[l]egislation . . . [that] prohibits conduct which is not itself unconstitutional.' Flores, 521 U.S., at 518; see also Katzenbach v. Morgan, supra, at 651; South Carolina v. Katzenbach, supra, at 308. The statutory remedy does not in any sense purport to 'determine what constitutes a

constitutional violation.' It intrudes little upon either States or private parties. It may lead state actors to improve their own remedial systems, primarily through example. It restricts private actors only by imposing liability for private conduct that is, in the main, already forbidden by state law. Why is the remedy 'disproportionate'? And given the relation between remedy and violation--the creation of a federal remedy to substitute for constitutionally inadequate state remedies--where is the lack of 'congruence'?

The majority adds that Congress found that the problem of inadequacy of state remedies 'does not exist in all States, or even most States.' But Congress had before it the task force reports of at least 21 States documenting constitutional violations. And it made its own findings about pervasive gender-based stereotypes hampering many state legal systems, sometimes unconstitutionally so. The record nowhere reveals a congressional finding that the problem 'does not exist' elsewhere. Why can Congress not take the evidence before it as evidence of a national problem? This Court has not previously held that Congress must document the existence of a problem in every State prior to proposing a national solution. And the deference this Court gives to Congress' chosen remedy under §5, suggests that any such requirement would be inappropriate.

Despite my doubts about the majority's §5 reasoning, I need not, and do not, answer the §5 question, which I would leave for more thorough analysis if necessary on another occasion. Rather, in my view, the Commerce Clause provides an adequate basis for the statute before us. And I would uphold its constitutionality as the 'necessary and proper' exercise of legislative power granted to Congress by that Clause.

Discussion

1. *The legacy of the Civil Rights Cases-- restrictions on civil rights laws?* As noted in the casebook at pp. 471-472, the Court's holding in the Civil Rights Cases that Congress could not reach private conduct under §5 led the Kennedy and Johnson Administrations to use the Commerce Clause as the basis of civil rights legislation, and many subsequent civil rights bills have followed the same course. The decision in *Morrison* shows the pincer movement that results when the Court simultaneously cuts back on the Commerce Power and the Reconstruction Power. Civil rights laws that concern "economic" activities– like employment– or regulate the use of instrumentalities of interstate commerce– like roads, cars, planes, buses or telephones– are probably unaffected by *Morrison*. Nevertheless, *Morrison* does restrict the ability of Congress to pass some kinds of civil rights legislation in the future. Because Congress may not reach private discrimination under §5 it will have a harder time passing civil rights protections that involve "noneconomic" activities. The most obvious examples are hate crime laws, which punish criminal acts where the victim is selected based on race, gender, religion, or

other forms of identity.

2. *Harris and the Ku Klux Klan Act.* United States v. Harris, 106 U.S. 629, (1882), also relied on by the Court, involved prosecutions of a lynch mob in Tennessee under the Ku Klux Klan Act, which was §2 of the Civil Rights Act of 1871. As its name implies, the Ku Klux Klan Act was designed to combat the Klan and other mobs who attempted to frighten or harass blacks and keep them from exercising or enjoying equal civil rights. It created criminal and civil liability "where two or more persons conspire or go in disguise on a highway or on the premises of another for the purpose of depriving any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws." In *Harris,* the Court overturned criminal convictions against members of the lynching party on the ground that Congress had no power to reach private conspiracies under §5.

Harris only struck down the criminal provisions of the Klan Act. The provisions creating a civil cause of action for private conspiracies-- now codified as 42 U.S.C. 1985(3)-- were identical in all other respects. They were upheld by the Court in Griffin v. Breckenridge, 403 U.S. 88, 104-05 (1971). Justice Stewart's opinion distinguished *Harris* by arguing that Congress's authority for the Klan Act stemmed from its powers under Section 2 of the Thirteenth Amendment. Note also that in Ex Parte Yarbrough, 110 U.S. 651 (1884), the Supreme Court upheld Congress's right to reach purely private conspiracies to interfere with the right to vote in federal elections. Justice Miller distinguished *Harris* and other cases construing Congress's section 5 powers: "It is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself." Miller's argument was structural: if Congress could not protect citizens from private violence and corruption in exercising their right to vote, the integrity of the government would be threatened. Justice Miller did not identify the specific source of Congressional power: he argued that it "is a waste of time to seek for specific sources of the power to pass these laws." Id. at 665-666.

Dissenting in the Civil Rights Cases, the first Justice Harlan complained that "I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism." Given Justice Bradley's assertion that even the most basic civil rights protections made blacks "the special favorite of the laws," Harlan's objection has some force. Nevertheless, the Court has never directly considered overturning either *Harris* or the Civil Rights Cases, although it has often distinguished them. The Court came closest in United States v. Guest, 383 U.S. 745 (1966). Six members of the Court took the view that private conspiracies to violate civil rights were within Congress's §5 powers. Whatever

precedental value *Guest* had on this question before, it is now undermined by *Morrison*. Nevertheless, *Guest* still appears to be good authority for the proposition that Congress may regulate private parties who conspire or "connive" with state officials to abridge constitutional rights. See 383 U.S. at 756-57. And presumably Congress may still reach private conspiracies to interfere with the right to travel, which the Constitution protects from public as well as private interference. Id. at 760. See also Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 278 (1993).

3. *Section Five and original intention.* Chief Justice Rehnquist argues that *Harris* and the Civil Rights Cases correctly limit Congressional power under section 5 because "[e]very Member [of the Court that decided them] had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur--and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment." This argument for the authority of *Harris* is taken from an earlier opinion, Collins v. Hardyman, 341 U.S. 651, 657 (1951), written by Justice Jackson, and overruled in Griffin v. Breckenridge. (In *Collins* Justice Jackson went on to characterize the Klan Act of 1871– which reached private conspiracies-- as "partisan" and ill-considered.)

Why aren't the views of the Reconstruction Congress that passed both the Fourteenth Amendment and the Civil Rights Acts of 1871 and 1875 a much better indication of original intention? If anything, the decisions of the 1880s seem better to reflect the Compromise of 1877– in which Northern republicans downplayed black civil rights in order to achieve a rapprochement with white southerners– rather than the more radical spirit of 1868. See the discussion in the casebook on pp. 270-72.

4. *Working with states rather than suing them*. As Justice Breyer points out, the majority opinion in *Morrison* runs together two separate questions. The first is whether Congress's section five power is limited to remedying violations by state actors. The second question is whether the remedy must be a direct civil or criminal cause of action against state actors. The second rule does not follow from the first: Congress might decide to create a supplementary civil or criminal remedy against private actors who injure women instead of punishing state and local actors for failing to afford women equal protection of the laws. This strategy would make sense especially if states and local governments recognized their deficiencies and asked for federal help. Note that the Violence Against Women Act was specifically designed to help state and local governments deal with domestic violence and sexual assault. In addition to the civil rights remedy, VAWA distributed over $1.6 billion in funds to states and local governments for rape prevention and education programs, victim services programs, improved security in

public transit, the construction and maintenance of battered women's shelters, and funding for additional law enforcement to assist with prosecution of cases of violence against women. If Congress had authorized a direct civil remedy for damages against states and localities, it would be draining this money from state and local coffers. Worse yet, it would be allowing private individuals to impugn state and local officials at the very moment it was trying to work with them. On the other hand, a civil remedy against private tortfeasors would allow local officials to cooperate with victims of sexual assault and domestic violence without fear that they would be blamed for failing to protect them through the criminal justice system. Do you agree that *Harris* and the Civil Rights Cases prevent this kind of cooperative approach?

5. *Selective legislation*. Chief Justice Rehnquist argues that §13981 is not adapted to remedying constitutional violations because it applies "uniformly throughout the Nation" rather than only to those states and localities that have been shown to have unfairly discriminated against women. This argument recalls Justice Bradley's objection in the Civil Rights Cases that the Civil Rights Act of 1875 "applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment." Is this objection sound? What if Congress found that the problem was nationwide, as it did in the case of VAWA?

Does it impugn state sovereignty more or less to pick out individual states for special treatment, or to apply a national civil rights standard to all? Consider that during the 1960's and 1970's southern states complained that the Voting Rights Act's rules should be applied to all states if they were applied to any. To single Southern states out unduly stigmatized them. Moreover, northern Congressmen and Senators who supported civil rights laws should have their states held to the same standards they imposed on the South.

6. *The Citizenship Clause: A Better Way?* An obvious way out of the difficulties created by *Harris* and the Civil Rights Cases is the Citizenship Clause, which is the opening sentence of the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The Citizenship Clause was designed to overrule the *Dred Scott* decision, which held that blacks could not be citizens and "had no rights which the white man was bound to respect." It establishes a principle of equal citizenship. The United States cannot create first and second- class citizens. Perhaps most importantly, it contains no state action requirement.

Thus, one could argue that Congress has power under section 5 to enforce the

rights of equal citizenship of all Americans. And following the logic of *McCulloch*, if Congress determines that a particular piece of legislation would be necessary and proper to promote equal citizenship, it has the power to pass it. The question would be whether Congress reasonably concluded that the regulation promotes equal citizenship or prevents or forestalls the maintenance of second-class citizenship. (Recall Justice Harlan's dissent in the Civil Rights Cases, reprinted at p. 294 in the casebook, which takes a similar approach).

Note that the idea of equal citizenship and equal rights has changed since Reconstruction. It now includes freedom from private discrimination. After all, the Civil Rights Movement of the 1960's was not just about constitutional violations by states; it was about private discriminations at lunch counters. Just as Congress's commerce power grew in response to our developing economy, its civil rights power grows as our nation gradually comes to terms with old outmoded prejudices and inequalities.

This approach has three distinct advantages. First, it obviates the need to tie civil rights legislation to a story about cumulative effects on interstate commerce. Second, it locates civil rights law under the Fourteenth Amendment, which was intended to be and should be its natural home. Third, when Congress acts to protect the ideal of equal citizenship it is not necessarily enforcing judicially recognized constitutional rights, any more than when it clears the channels of interstate commerce through economic regulations under its commerce power. Thus, the Citizenship Clause theory does not require that Congress remedy prior violations of rights by states. Like Congress's authority under the Commerce Clause, its authority to enforce the Citizenship Clause is positive, not remedial. (This was Justice Harlan's point). But neither does this power involve the creation of new constitutional rights. That means that the apparatus of "congruence and proportionality" that the Court has lately devised to determine whether Congress is covertly creating new Fourteenth Amendment rights is irrelevant. The test of Congress's power is not "congruence and proportionality" under *Boerne*, but the familiar test of *McCulloch*.

Nevertheless, the equal citizenship theory has distinct disadvantages, depending on your views about federalism. Under this theory, is there any piece of legislation that Congress could not pass under the grounds that it promoted equal citizenship? For example, could it pass a uniform code of family law under the theory that democratic citizenship requires that men and women be treated with equal respect within the family? Could it pass a uniform real estate code on the grounds that property is a key component of citizenship? Obviously, if one believes that the federal government has a general federal police power, these concerns would not be very great. But if one wants to preserve some area of state autonomy, it would be necessary to develop administrable tests to decide what kinds of legislation were "really" civil rights legislation and which

kinds were not. (For example, one might argue that laws that gave special privileges to some groups were beyond the civil rights power. But what if Congress contended that special treatment was necessary to counteract other inequalities in society or to remedy past unfairness?) Do you think courts would be particularly well suited to devise such rules? Would such rules be likely to be any more successful than they have been in the area of commerce clause doctrine?