

VOLUME 22 SYMPOSIUM: CONSTITUTIONAL LAW OUTSIDE THE COURTS

LEFT / RIGHT: MANAGING THE COMING CLASH BETWEEN
CONGRESSIONAL RIGHTS ENFORCEMENT AND JUDICIAL DOCTRINE

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TABLE OF CONTENTS

I. RIGHTS-ENFORCING LEGISLATION: MULTIPLE ROUTES TO THE SAME DESTINATION AND THE CHOICES THEY PRESENT	717
A. <i>Multiple Routes to the Same Destination</i>	717
B. <i>The Necessity of Congressional Choice</i>	719
II. CASE STUDIES.....	720
A. <i>The Civil Rights Act of 1964</i>	721
1. <i>The Constitutional Backdrop in 1963</i>	721
2. <i>Choosing the Commerce Clause</i>	722
B. <i>VAWA</i>	724
1. <i>The Doctrinal Backdrop and Application Strategy</i>	724
2. <i>The Court's Response</i>	726
C. <i>ENDA</i>	729
1. <i>The Evolving Doctrinal Context</i>	729
2. <i>Congress's Response</i>	732
3. <i>ENDA's Lessons</i>	734
D. <i>The Partial-Birth Abortion Act</i>	735
III. ADAPTATION STRATEGIES.....	739
A. <i>Challenges</i>	739
B. <i>Avoidance</i>	743
C. <i>Application</i>	745

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IV. IMPLICATIONS 750

The Democratic victories in the 2020 elections have raised the prospect of a unified Congress and executive branch committed to a robust civil rights agenda. In addition to policing, voting rights, and racial justice legislation more generally, one should add women’s rights to the likely legislative list: then-Senator Biden led the effort to enact the Violence Against Women Act, part of which was struck down in 2000,¹ and one can expect his Administration to prioritize strengthening women’s rights initiatives, especially in light of the #MeToo movement. Finally, the continued push for LGBT rights will likely place sexual orientation and transgender identity on that agenda as well.² As this article is being edited in the summer of 2021, this work is already underway.

As Congress and the President get down to this business, however, they will confront both a skeptical Supreme Court and hostile Supreme Court precedent. As to the first, the current Court has made clear its skepticism about aggressive civil rights legislation.³ While Justices Gorsuch, Kavanaugh, and Barrett joined the Court only recently, there is little reason to believe that they will depart from that general skepticism. More broadly, there is no reason to think that these new justices, and the Court they will shape, will shrink from protecting both their own law-declaring authority and what they believe to be states’ sovereign prerogatives against any perceived threat from federal civil rights legislation.

Beyond the Court’s composition lies its doctrine. Nearly a quarter-century has passed since *City of Boerne v. Flores*⁴ announced a stricter test for evaluating federal legislation enforcing the Fourteenth Amendment.⁵ Even though later applications of *Boerne*’s “congruence and proportionality” standard split heavily along ideological lines,⁶ *Boerne* itself enjoyed broad

1 United States v. Morrison, 529 U.S. 598 (2000).

2 See *infra* note 122 (citing source explaining the impetus behind current LGBT rights legislation).

3 See, e.g. *Shelby County v. Holder*, 570 U.S. 529 (2013) (striking down a critical component of the 1965 Voting Rights Act because of skepticism about Congress’s factual record and solicitude for states’ “equal sovereignty”); *but see Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (interpreting the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964 as encompassing discrimination based on sexual orientation and transgender status).

4 521 U.S. 507 (1997).

5 See U.S. CONST. amend. XIV, § 5 (authorizing Congress “to enforce” the rest of the amendment “by appropriate legislation”).

6 See *Coleman v. Ct. of App. of Md.*, 566 U.S. 30 (2012); *Tenn. v. Lane*, 541 U.S. 509 (2004); *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd of Regents*, 528 U.S. 62 (2000);

ideological support on the Court.⁷ Even more significantly, *Boerne* and its subsequent stringent applications appear to have become stable precedent; in 2020, Justice Kagan wrote an opinion for seven justices reaffirming the congruence and proportionality standard, and in particular, one of the closely-divided cases applying that standard, to strike down a copyright law's application to states.⁸ The remaining two justices, who had dissented in that earlier case that Justice Kagan applied, recognized that they had lost the battle and concurred in the result.⁹

The emerging picture thus combines political branches primed to enact significant civil rights legislation with a skeptical Court wielding now-longstanding precedent limiting the enforcement power.¹⁰ This prospect raises important questions about the relationship between the Court and the political branches in the project of safeguarding individual rights. This would not be the first time the political branches have collided with either a Supreme Court majority and/or a body of judicial precedent on individual rights issues. The most famous example of such a collision was the *Lochner*-era Court's battle against the New Deal, a tale told many times.¹¹ To be sure, that battle featured a Court that saw itself as *protecting* individual rights against assertions of state

Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (all 5-4 decisions, with all of them falling along the familiar liberal-conservative axis except for *Lane*, which fell along that axis except for Justice O'Connor's agreement with the Court's liberals); *but see* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721 (2003) (6-3 vote).

7 Six justices, spanning the ideological spectrum from Justices Thomas to Ginsburg, joined the majority opinion in *Boerne*. Justice O'Connor would have joined it except for her disagreement with the Court's application of its underlying Free Exercise Clause doctrine, *see Boerne*, 521 U.S. at 544-45 (O'Connor, J., dissenting). Justice Breyer appeared to agree with at least some of Justice O'Connor's endorsement of the majority's enforcement power analysis, *see id.* at 566 (Breyer, J., dissenting). Justice Souter did not join the opinion, again because of disagreement with the underlying free exercise doctrine the majority took as a starting point. However, he expressed no opinion about the majority's enforcement power analysis. *See id.* at 564 (Souter, J., dissenting).

8 *Allen v. Cooper*, 140 S. Ct. 994 (2020) (applying *Florida Prepaid*, *supra*. note 6, which struck down a federal law regulating state trademark infringements as exceeding the enforcement power, to an analogous federal copyright law).

9 *See id.* at 1008-09 (Breyer, J., concurring) (disagreeing with *Florida Prepaid*, but conceding that his view "has not carried the day." *Id.* Notably, of the then-four justice liberal bloc, the two who were not on the Court in *Florida Prepaid* (Kagan and Sotomayor) respectively wrote and joined the majority opinion. This suggests that, indeed, the view expressed by the *Florida Prepaid* dissenters "has not carried the day." *Id.*

10 Certainly, federal civil rights legislation can take the form of legislation the constitutionality of which is uncontroversial. For example, in the wake of police violence against communities of color, calls have arisen for strengthening constitutional tort remedies under 42 U.S.C. § 1983. *See, e.g.*, Lynda G. Dodd, *What's missing in the police reform debate (Part 2)*, BALKINIZATION (October 20, 2015), available at https://balkin.blogspot.com/2015/10/whats-missing-in-police-reform-debate_20.html.

11 *See, e.g.*, BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (Oxford Univ. Press 1998).

and federal regulatory prerogatives.¹² But other episodes have featured congressional contemplation of legislative action aimed at protecting individual rights in the face of anticipated conflict with either the Court or its precedent.

This Article examines four of those episodes to determine what they teach us today, as the nation stands at the threshold of a similar conflict. Part I begins by briefly laying out the doctrinal context—especially, but not only, the Court’s doctrine governing Congress’s power to enforce the Fourteenth Amendment.¹³ It then introduces three general approaches Congress might take when seeking to ground civil rights legislation on a firm constitutional foundation despite the existence of a skeptical Court or hostile precedent: challenging unfavorable precedent, avoiding it by relying on a different constitutional power, or arguing that its legislation merely applies that precedent.¹⁴

Part II considers four instances of congressional deliberation—over what became the 1964 Civil Rights Act’s public accommodations provisions,¹⁵ the private right of action provided by the 1994 Violence Against Women Act,¹⁶ and the 2003 Partial-Birth Abortion Ban Act,¹⁷ as well as thus-far unenacted legislation prohibiting employment discrimination based on sexual orientation (and, in later iterations, gender identity)¹⁸—to uncover what those debates offer by way of lessons for congressional action over the next several years. Each of these examples confronted a slightly different judicial and doctrinal backdrop to the desired legislative action, and each reflects a different ultimate constitutional strategy settled on by Congress.

Based on those case studies, Part III evaluates the challenge, avoidance, and application strategies. It concludes that each strategy holds both promise and peril for Congress. In particular, it concludes that, while the application strategy appears the safest and most straightforward, it is by no means

12 See, e.g., DAVID BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (Univ. of Chicago Press 2011) (explaining the *Lochner*-era Court in this way). Of course, those challenged state and federal regulatory programs were often cast in terms of individual rights more broadly construed, for example, workers’ right to organize. See, e.g., REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* (New York Univ. Press 2006) (framing the National Labor Relations Act as vindicating workers’ quasi-constitutional rights).

13 See *infra* Part I.A.

14 See *infra* Part I.B.

15 *Infra* note 36.

16 *Infra* note 37.

17 *Infra* note 38.

18 *Infra* note 39.

foolproof or risk free. Part IV briefly evaluates the implications of Part III's analysis. It concludes that the risks posed by each of these strategies requires Congress to think long and hard as it deliberates on the proper constitutional foundation for whatever civil rights legislation it is disposed to consider.

I. RIGHTS-ENFORCING LEGISLATION: MULTIPLE ROUTES TO THE SAME DESTINATION AND THE CHOICES THEY PRESENT

A. *Multiple Routes to the Same Destination*

Congress possesses broad legislative powers. Today, judicial scrutiny of congressional power to enact a particular piece of legislation focuses on the law's subject-matter rather than Congress's underlying goals. Thus, for example, Congress may use its taxing power to impose a tax for regulatory purposes, if the law raises at least some revenue.¹⁹ More relevantly for current purposes, Congress can use its power to regulate interstate commerce to promote civil rights, as long as Congress promotes that goal by regulating interstate commerce or conduct that substantially affects it.²⁰

While these developments provide Congress the flexibility to utilize a broad array of powers to promote individual rights, that flexibility has also triggered complaints about the resulting mismatch between regulatory goals and the tools employed to achieve them. Two generations ago, Justice Douglas criticized the Court's use of the dormant Commerce Clause to invalidate a state law criminalizing the importation of indigent persons, arguing "that the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines."²¹ That concern led him to base his concurrence on the Fourteenth Amendment right to interstate travel.²² Justice Jackson also concurred separately, for essentially the same reason.²³ But Jackson added an element to Justice Douglas's critique when he expressed

19 See, e.g., *United States v. Sanchez*, 340 U.S. 42, 44 (1950) ("It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. The principle applies even though the revenue obtained is obviously negligible, or the revenue purpose of the tax may be secondary.") (citations omitted).

20 See, e.g., *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964). This understanding rejects an older view that disabled Congress from enacting even facial regulations of interstate commerce if Congress sought to promote a goal other than remedying problems with such commerce itself. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (adopting this older understanding), *overruled by* *United States v. Darby*, 312 U.S. 100, 115 (1941) (stating the modern rule).

21 *Edwards v. California*, 314 U.S. 160, 177-78 (1941) (Douglas, J., concurring).

22 See *id.*

23 See *id.* at 181 (Jackson, J., concurring).

concern about the likely effect of the majority's use of the Commerce Clause on both the commerce power itself and the legal status of individual rights.²⁴

Congress's explicit power to enforce the Reconstruction Amendments²⁵—most notably, its power to enforce the Fourteenth Amendment²⁶—provides a more direct path for Congress to protect rights. However, the diverging doctrinal paths taken by the Court's Article I and enforcement power doctrines have caused Congress to refrain from reflexively relying on its enforcement power when considering rights-protecting legislation. Most notably, the Court has long insisted that the power to enforce the Fourteenth Amendment limits Congress to regulation of state action,²⁷ while Congress's Article I powers focus primarily (though not exclusively) on regulation of private entities.²⁸ Another difference relates to the remedies available to Congress when it legislates under these two different grants of authority.²⁹ Tracking the distinction between Commerce Clause-based federal regulation of the states and regulation of private parties, Congress's spending power also faces special limits when employed to grant money to states on the condition that recipient states take certain action.³⁰

Perhaps most importantly, each of these powers differs from the others in the doctrinal tests that measure the scope of each power. While the Court has

24 See *id.* at 182 (“[T]he migrations of a human being, of whom it is charged that he possesses nothing that can be sold and has no wherewithal to buy, do not fit easily into my notions as to what is commerce. To hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights.”).

25 U.S. CONST. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2.

26 Because this power resides in Section 5 of the Fourteenth Amendment, this article sometimes refers to that power as “the Section 5” power. Otherwise, references to the “enforcement power” or the “Enforcement Clause” should be understood as referring to the Fourteenth Amendment enforcement power, unless the context indicates otherwise.

27 The Civil Rights Cases, 109 U.S. 3 (1883).

28 Indeed, one of the basic goals of the Constitutional Convention was to create a national government that acted directly on individual Americans, rather than on the states. Today, Article I legislation regulating states encounters limits that are inapplicable to legislation regulating private parties. See *New York v. United States*, 505 U.S. 144 (1992) (prohibiting Commerce Clause-based regulation that commandeers state governments); *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996) (prohibiting Commerce Clause-based regulation that makes unconsenting states liable for retrospective relief in federal court); *Alden v. Maine*, 527 U.S. 706 (1999) (extending the *Seminole Tribe* rule to state court lawsuits); see also *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) (limiting the substance of federal regulation when that regulation acts on states), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

29 Compare *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996) (restricting remedies legislated pursuant to the Commerce Clause when they act upon unconsenting states) with *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (allowing such remedies when the law rests on Congress's enforcement power).

30 See *S.D. v. Dole*, 483 U.S. 203, 207-212 (1987) (identifying several conditions that must be satisfied in order for Congress to condition money it grants to states).

trimmed Congress's commerce and spending powers around the edges³¹ and introduced uncertainty into what had been settled areas of law,³² those powers remain largely intact from their mid-twentieth Century heights, while the enforcement power has experienced marked cut-backs in the last quarter-century.³³

B. The Necessity of Congressional Choice

The differences identified above have influenced Congress's deliberations about the constitutional foundation of individual rights legislation. Those deliberations illustrate three strategies Congress has employed when confronting Supreme Court personnel or doctrine that appear potentially hostile to its constitutional authority.

One obvious response to such judicial hostility is to join issue and mount a frontal challenge to judicial doctrine obstructing Congress's desired policy. Such a challenge entails Congress enacting the legislation it desires, and grounding it squarely in the constitutional power that judicial doctrine limits. As set forth in the case studies Part II examines, such challenges are high-risk but also high-return moves: if the challenge succeeds, Congress has removed the objectionable doctrine, but if it loses, that doctrine remains in place, indeed, reaffirmed. Moreover, if the challenge lacked a fallback argument based in another congressional power, a losing challenge means that the legislation in question is struck down, with whatever immediate and long-term wounds that loss inflicts.

Given these risks, an obvious alternative to challenges entails avoiding the problematic doctrine by relying on a different congressional power. Avoidance removes the risk inherent in challenging unfavorable doctrine. But it also removes whatever long-term reward might flow from a successful challenge. More immediately, avoidance raises whatever risks are inherent in

31 See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (holding that Congress lacked the Commerce Clause power to enact the individual mandate provision of the Affordable Care Act); *Morrison*, 529 U.S. at 598 (holding that the civil cause of action provision of the Violence Against Women Act exceeded the commerce power); *United States v. Lopez*, 514 U.S. 549 (1995) (same, with regard to the Gun Free School Zones Act); *but see Gonzalez v. Raich*, 545 U.S. 1 (2005) (upholding a provision of the Controlled Substances Act criminalizing possession of home-grown and consumed marijuana); *Nat'l Fed'n.*, 567 U.S. at 575-85 (Roberts, C.J., joined by two justices); *id.* at 671-691 (Scalia, J., dissenting, joined by three justices) (all voting to strike down the conditional spending aspect of the Affordable Care Act's Medicaid expansion, holding that the condition was unconstitutionally coercive).

32 See *Lopez*, 514 U.S. at 566 (conceding the existence of that uncertainty in Commerce Clause doctrine).

33 See *Flores*, 521 U.S. at 507.

invoking the alternative power. While that latter observation might seem nothing more than a truism, it bears wondering whether the Court—in particular, a Court that is suspicious of Congress³⁴—might exhibit skepticism of that alternative power argument exactly because it suspects a congressional attempt to circumvent the limits on the more obvious source of congressional power. That suspicion might provoke cutbacks on that alternative power, which in turn would apply more broadly.

Given that risk, a third strategy—“application”—presents itself. An application strategy means what the label says: Congress does not avoid the power in question, nor does it challenge the Court’s understanding of that power—rather, it justifies its legislation as an application of judicial doctrine governing that power. The application approach has much to recommend it. It is modest, but still forthright about the civil rights goals Congress seeks to achieve. It also fits neatly into the Court’s otherwise-restrictive post-*Boerne* enforcement power template, which recognizes Congress’s authority to enact prophylactic legislation extending beyond Court-stated Fourteenth Amendment jurisprudence as long as it refrains from redefining it.³⁵ But even this power raises difficult questions that limit its effectiveness.

Part II of this Article presents four case studies of legislation either fully or partially justified as rights-enforcing. These case studies illustrate the coping mechanisms described above. Part III then evaluates those mechanisms based on those case studies.

II. CASE STUDIES

This Part examines four case studies of congressional deliberations on civil rights legislation from the last half-century: the public accommodations provisions of the Civil Rights Act of 1964,³⁶ the private right of action granted by the Violence Against Women Act of 1994,³⁷ the ENDA and Equality Acts

34 See, e.g., Heather Elliott, *Congress’s Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 189 (2011) (“[T]he Court is increasingly suspicious of ‘fact-finding’ that allows Congress to change the balance of the constitutional structure.”). If anything, this suspicion has only grown since 2011. See, e.g., *Shelby County v. Holder*, 570 U.S. 529 (2013) (striking down a critical provision of the Voting Rights Act’s reauthorization because Congress used old data).

35 See text accompanying *infra* note 139.

36 Pub. L. No. 88-352, 78 Stat. 241. Unless the context indicates otherwise, this article sometimes refers to those provisions as “the Civil Rights Act” or the “CRA.” Of course, that statute addressed much more than public accommodations discrimination. See <https://www.ourdocuments.gov/doc.php?flash=false&doc=97> (summarizing the main features of the law).

37 42 U.S.C. § 13981. This provision, which this Article sometimes shorthands as “VAWA,” gave victims of gender-motivated crime a private right of action against their attackers. As did the Civil

considered over the last quarter-century,³⁸ and the Partial Birth Abortion Ban Act of 2003.³⁹ These bills required Congress to consider the appropriate constitutional foundation for rights-promoting legislation.⁴⁰ Each situation was slightly different, and thus implicated different considerations as Congress sought to adapt the legislation, and its constitutional grounding, to both the Court's personnel and its doctrine.

A. *The Civil Rights Act of 1964*⁴¹

1. *The Constitutional Backdrop in 1963*

By 1963, Congress and the Kennedy Administration were primed to consider the first significant civil rights legislation since Reconstruction.⁴² Advocates and pro-civil rights legislators planned to include in that legislation public accommodations non-discrimination provisions. Locating a constitutional foundation for such provisions presented them with an interesting problem. On the one hand, *the Civil Rights Cases*⁴³ appeared to reject the idea that the enforcement power authorized Congress to regulate private parties. The existence of that longstanding precedent—even in the early 1960s it was two generations old—seemed to place a difficult hurdle in front of any attempt to ground any public accommodations provisions on the Fourteenth Amendment enforcement power. On the other hand, the mid-century Court's tentative undermining of the state action rule raised hopes that the Warren Court's increasingly liberal tilt, when combined with the pressure of the then-current lunch-counter sit-in cases, would prompt the justices to grasp the opportunity to overrule that precedent if confronted with a federal public accommodations law grounded on the enforcement power.⁴⁴

Rights Act, *see supra* note 36, the Violence Against Women Act did more than provide this right of action. However, unless the context indicates otherwise, references to "VAWA" are to this particular provision.

38 These bills, never enacted, would have prohibited most employment discrimination on the basis of sexual orientation and, in later iterations, gender identity. *See, e.g.*, S.B. 815 § 4(a) (113th Cong.).

39 Pub. L. No. 108-105, 117 Stat. 1201.

40 Obviously, the 2003 abortion law is easily understandable as a rights-restricting law; indeed, it was challenged (unsuccessfully) on exactly that ground. *Gonzalez v. Carhart*, 550 U.S. 124 (2007). But its proponents saw it, at least in part, through the lens of promoting fetal rights. That perspective—indeed, the very fact that the legislation could be seen both as rights-restricting and rights-promoting—makes it an interesting subject for study.

41 This discussion relies heavily on Schmidt, *infra* note 163.

42 Modest civil rights statutes had been enacted in 1957 and 1960, the former of which was the first civil rights statute enacted by Congress since Reconstruction.

43 109 U.S. at 3.

44 *See* Schmidt, *infra* note 163 at 784 (noting the speculation raised by the mid-Century Court's tentative retreat from a rigid state action rule). Indeed, Professor Schmidt has concluded from a review of the

Competing with that option was the Commerce Clause. By the early 1960s the nation was two decades removed from the seminal opinions of the late 1930s and early 1940s that vastly expanded the reach of Congress's power to regulate interstate commerce. Still, the laws that prompted those opinions were direct regulations of the marketplace, motivated by economic considerations.⁴⁵ Nevertheless, in 1941 the Court rejected the idea that a non-commerce motivation for a federal law removed the Commerce Clause as a source of power for that law.⁴⁶ Moreover, cases from that era construed Congress's other Article I powers in ways also deemphasizing Congress's motivation.⁴⁷ The Kennedy Administration's Solicitor General, Archibald Cox, expressed confidence that a public accommodations bill would be upheld under the commerce power.⁴⁸

2. *Choosing the Commerce Clause*

While both constitutional foundations appeared at least plausible, during 1963 the Kennedy Administration gradually shifted its primary focus from the enforcement power to the commerce power. While the former enjoyed the political advantage of appealing to Republicans who still claimed the Fourteenth Amendment as their historical legacy,⁴⁹ and while it also appeared most logical given the bill's civil rights motives,⁵⁰ expert legal advice counseled against primary reliance on the enforcement power. Those experts worried about the integrity of the federal courts if legislation greatly expanding the class of entities subject to the Fourteenth Amendment forced the Court to harmonize such an expansion with its own judicial doctrine. For example, Harvard professor Paul Freund's congressional testimony warned that grounding the bill in the Enforcement Clause would raise difficult questions about that law's effect on the Court's self-executing Section 1 doctrine. Freund assumed that principles underlying Section 5 legislation would also apply in Section 1 adjudication.⁵¹ Thus, for example, abrogation of the state action

justices' papers that a majority, and potentially all, of them were in the early 1960s willing to uphold enforcement legislation jettisoning the doctrine. *See id.* at 803-804.

45 *See, e.g.,* Wickard v. Filburn, 317 U.S. 111 (1942) (upholding a law regulating agricultural production); United States v. Darby, 312 U.S. 100 (1941) (upholding a law regulating manufacturing of items with poorly-paid labor); Nat'l Lab. Rel. Bd. v. Jones & Laughlin Steel Co., 301 U.S. 1 (1937) (upholding a law regulating labor relations in a manufacturing facility).

46 *See supra* note 20.

47 *See supra* note 19.

48 *See* Schmidt, *infra* note 163 at 813.

49 *See* Schmidt, *infra* note at 811.

50 *See id.*

51 *See* Freund Statement, *infra* note 163 at 1187.

principle by Congress would mean that the private parties Congress thereby regulated would be susceptible to all Fourteenth Amendment requirements in Section 1 litigation.

While Freund's testimony later backtracked somewhat,⁵² the Kennedy Administration adopted this argument as it gradually shifted toward the Commerce Clause approach. In the fall of 1963, Attorney General Robert Kennedy reiterated Freund's concern that an enforcement power grounding for the bill would greatly limit the realm of private liberty if the bill's Fourteenth Amendment-based coverage of private entities thereby subjected those entities to the Fourteenth Amendment for all purposes. He raised the specter of a private business that, because its customer selection practices were covered by an enforcement power-based bill, would also have to satisfy due process if it wished to fire an employee, or a religious school that, again, if covered by the bill's enforcement power-based anti-discrimination provisions, would be prohibited from conducting Bible readings.⁵³ By contrast, the commerce power option allowed Congress near-complete control over the bill's scope without raising any broader implications.⁵⁴

To be sure, the Administration's primary concern was with the more practical issue of limiting the businesses the bill would cover, in order to ensure political support from congressional moderates. Pending in the fall of 1963 was a proposal covering a wide variety of private businesses that operated through state-granted licenses, with that licensure furnishing the justification for use of the enforcement power. Seeking to head off that Fourteenth Amendment-based expansion in the bill's coverage, the Administration expressed the concern, noted above, about the unintended consequences of using the enforcement power. That political maneuver succeeded, and legislators converged on a more limited coverage formula for public accommodations, based in the commerce power. The Court quickly and unanimously upheld the public accommodations provision under the Commerce Clause.⁵⁵ Still, despite the justices' strong support for allowing Congress to enact enforcement legislation dispensing with the state action

52 See Freund Statement, *infra* note 163 at 1189 (suggesting a decoupling of rules enacted in Section 5 legislation from rules applicable in analogous Section 1 litigation).

53 See Schmidt, *infra* note 163, at 816.

54 See Freund Statement, *infra* note 163 at 1187 ("The Commerce Clause 'is primarily a grant of legislative power to Congress, which can be exercised in large or small measure, flexibly, pragmatically, tentatively, progressively, while guaranteed rights, if they are declared to be conferred by the Constitution, are not to be granted or withheld in fragments.'"), quoted in Schmidt, *infra* note, 163 at 813.

55 *Heart of Atlanta Motel*, 379 U.S. at 241; *Katzenbach v. McClung*, 379 U.S. 294 (1964).

requirement,⁵⁶ the Warren Court never again got a clear opportunity to confront the state action question.

B. VAWA

1. *The Doctrinal Backdrop and Application Strategy*

Three decades later, the Congress considering VAWA confronted a very different doctrinal backdrop. In retrospect, it is clear that VAWA arose at the very end of the period featuring the most expansive understanding of congressional power in our history, and on the cusp of the federalism revolution of 1990s. In the early 1990s, the most recent precedents governing Congress's commerce and enforcement powers suggested VAWA would encounter little constitutional difficulty.⁵⁷ *United States v. Lopez*,⁵⁸ which began the Court's ultimately-tentative cutback on the commerce power, lay in the future,⁵⁹ as did the Court's limitation on Article I-grounded remedies on state violators of federal law.⁶⁰ *City of Boerne v. Flores*'s cutback on the enforcement power lay similarly in the future.⁶¹

Given that doctrinal backdrop, one can understand the different tone of legislators' and experts' deliberations about the constitutional foundation for VAWA's private right of action, as compared with its earlier deliberations about the CRA's public accommodations provisions.⁶² Academic experts

⁵⁶ See *supra* note 44.

⁵⁷ See, e.g., *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (upholding, as Fifteenth Amendment enforcement legislation, the Voting Rights Act's restrictions on state voting practices by historically-discriminatory jurisdictions that produced racially disparate impacts, even though the Fifteenth Amendment prohibited only intentional racial discrimination, because Congress could have "rationally" concluded that actions producing such effects risked being infected by invidious intent); *Hodel v. Va. Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981) (upholding a federal law regulating coal mining reclamation as valid regulation under the Commerce Clause, employing similarly deferential review).

⁵⁸ 514 U.S. 549 (1995).

⁵⁹ To be sure, the Fifth Circuit's ruling in *Lopez* striking down the Gun Free School Zones Act came down in 1993, during the period Congress was deliberating on VAWA. However, critical parts of that deliberation occurred in 1991, before the appellate decision in *Lopez* and, indeed, even before the conduct at issue in *Lopez* occurred. Compare *infra* note 74 (citing an October 1991 congressional report reprinting a version of the bill inserting findings relating to VAWA's commerce and enforcement power foundations) with *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995) (noting that the alleged conduct occurred in 1992).

⁶⁰ *Seminole Tribe*, 517 U.S. at 44 (prohibiting Congress from using its Commerce Clause power to make unconsenting states liable for retrospective relief); *College Savings Bank*, 527 U.S. at 666 (holding that a state did not impliedly consent to the imposition of retrospective relief for violating a federal statute when it engaged in conduct that statute regulated).

⁶¹ 521 U.S. 507 (1997).

⁶² An additional reason for this different tone was the view that VAWA was less vulnerable than the CRA to *the Civil Rights Cases*' state action rule, since VAWA was designed to respond to state

testifying about the VAWA provision's constitutionality expressed little worry about its validity under the Commerce Clause, with one of them exchanging humorous banter with a senator about the laxity of the requirement that Commerce Clause-based legislation exhibit a rational connection to interstate commerce.⁶³ To be sure, Professor Cass Sunstein, one of the testifying experts, did suggest adding findings documenting the connection between gender-motivated violence and interstate commerce.⁶⁴ While he did not explicitly explain the reason for his suggestion, the context in which he made it indicates that he was urging Congress to hew as closely as possible to the CRA's example, which featured findings connecting racial discrimination in public accommodations with interstate commerce.⁶⁵

Interestingly, Professor Sunstein expressed slightly less certainty about the breadth of the enforcement power. He noted the well-known pair of rationales Justice Brennan had proffered to uphold the enforcement legislation challenged in *Katzenbach v. Morgan*:⁶⁶ the "substantive" theory that purported to authorize Congress to act on its own independent interpretation of the Fourteenth Amendment, and the "remedial" theory that still gave Congress broad power, but only to remedy judicially-acknowledged constitutional violations.⁶⁷ Professor Sunstein characterized the first justification as one that no Court subsequent to *Morgan* had ever accepted, but he nevertheless concluded that the more restrained, remedial reading would likely support the law, as long as Congress "emphasize[d] legislative findings of equal protection violations"⁶⁸ that would justify VAWA's civil remedy.

governments' failure to prosecute gender-motivated crime. Ultimately, this rationale for VAWA's conformance with that rule failed. See *Morrison*, 529 U.S. at 598 (striking down VAWA's civil remedy provision as exceeding Congress's enforcement power, mainly because that provision regulated private parties). Nevertheless, enforcement power doctrine between the CRA and VAWA (and thus, before *Morrison*) had changed as well, in ways favorable to enforcement legislation. While the Court was never squarely confronted with the opportunity to overrule *the Civil Rights Cases*, see *supra* Part II.A, the Court nevertheless embraced a much expanded conception of the enforcement power in *Katzenbach v. Morgan*, 384 U.S. 641 (1966). *Morgan*, which formed part of the doctrinal backdrop to Congress's deliberations on VAWA, suggested that VAWA's civil remedy provision was likely constitutional, especially given the argument that that provision responded to sexually discriminatory state law enforcement. See *Violence Against Women: Victims of the System*, 102nd Cong. 118-22 [hereinafter "April 1991 Hearing"] (statement of Cass Sunstein).

63 April 1991 Hearing at 108.

64 See *id.* at 108-109.

65 See *id.* at 116-117.

66 384 U.S. 641 (1966).

67 April 1991 Hearing, *supra* note 62, at 120-122.

68 *Id.* at 121. The context of his comments indicate that he made this suggestion, at least in part, to dissuade Congress from relying on its power to enforce the Privileges and Immunities Clause, given

Beyond these details, Congress's deliberations about VAWA reflect a fundamental difference between the circumstances confronting that legislation and those surrounding the CRA. The CRA confronted Congress with a stark choice between a fairly secure Commerce Clause foundation and an enforcement power argument that, while rhetorically and politically attractive to some,⁶⁹ entailed some measure of risk and complication.⁷⁰ By contrast, VAWA's closer connection to state action seemed at the time to make its enforcement power path more secure than the CRA's,⁷¹ while the CRA cases themselves⁷² seemed to conclusively secure the Commerce Clause path. Thus, for the Congresses considering VAWA, the challenge was simply to craft the statute—and in particular, any findings supporting it—to conform with what seemed, in the early 1990s, the generous amounts of power the Enforcement and Commerce Clauses both gave Congress. In this sense, one can understand Congress, and the experts advising it, as embracing an application strategy.

Congress's deliberations reveal an additional point. Professor Sunstein's testimony observed that the equal protection enforcement theory he recommended obviated the need "to ask the complex, controversial, and unresolved question whether Section 5 of the Fourteenth Amendment allows Congress to reach purely private action."⁷³ His attempt to shift focus away from that issue can be understood as an avoidance strategy.

Nevertheless, these strategies failed.

2. *The Court's Response*

Several months later, the Senate produced a version of the bill that included findings relevant to the VAWA provision's Enforcement Clause and

what he believed to be the more difficult enforcement power question that reliance would raise. *See id.* at 122 and 122 n.*.

69 *See* text accompanying *supra* note 49.

70 *See* text accompanying *supra* notes 51–54.

71 Nevertheless, the Court rejected VAWA's enforcement power foundation. *See infra* Part II.B.3.

72 *Supra* note 55.

73 April 1991 Hearing, *supra* note 62 at 122. It is unclear why he thought an equal protection grounding, as opposed to the privileges and immunities grounding reflected in the then-current version of the bill, would obviate the private action question. Section 301 of the then-existing bill found that "[a]ll persons within the United States shall have the same rights, privileges and immunities in every State as is enjoyed by all other persons to be free from crimes of violence motivated by the victim's gender." *See id.* at 399. Perhaps he thought that emphasizing those rights necessarily focused attention on the private perpetrators of such violence, rather than on their state enablers, with the result that such a focus would raise the Section 5 state action issue.

Commerce Clause foundations.⁷⁴ Those findings eventually disappeared from the bill that was eventually enacted in 1994.⁷⁵ But the lack of formal findings ultimately played only a secondary role in the Supreme Court’s rejection of the provision’s enforcement power grounding.⁷⁶

Addressing the enforcement power argument, the Court acknowledged Congress’s “voluminous record” of evidence identifying gender bias in law enforcement. But it also cited a more fundamental problem: the provision regulated private parties (by giving victims of gender-based violence a cause of action against their attackers), and thus violated the rule, dating from *the Civil Rights Cases*, limiting enforcement legislation to laws regulating government actors.⁷⁷ The Court acknowledged that the VAWA provision responded to states’ failure to prosecute gender-motivated assaults, but it concluded that the remedy—the provision of a private right of action—failed *Boerne*’s “congruence and proportionality” test exactly because it regulated private parties.⁷⁸ The Court rejected the argument that the cases establishing that rule could be distinguished by the lack of state involvement in the underlying conduct, in contrast to the state law enforcement gender bias that motivated VAWA.⁷⁹

Mapping this analysis onto the congressional strategies Part I identified,⁸⁰ one can conclude that the Court’s rigid and arguably beefed-up⁸¹ application

74 See S. REP. NO. 102-97, at 27-28 (1991) (reprinting Section 301(a) of the amended version of VAWA, which included findings relating to state violations of equal protection and the interstate commerce effects of gender-motivated violence). Cf. April 1991 Hearing at 398-99 (prior version of Section 301(a), lacking such findings). See also Victoria Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act’s Civil Rights Remedy*, 15 WISC. WOMEN’S L.J. 257, 281 (2000) (noting this sequence).

75 Those findings were deleted in the House-Senate conference, according to a Senate staffer, for reasons unrelated to their substance. See Nourse, *Where Violence, Relationship, and Equality Meet*, at 292.

76 But see *infra* note 79.

77 See *Morrison*, 529 U.S. at 621-22.

78 *Id.* at 626 (stating, immediately after reciting the congruence and proportionality test, that “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.”).

79 See *id.* at 624-25. To be sure, the record compiled by Congress did matter to the enforcement power analysis in one small way: almost as an afterthought, the Court concluded its Section 5 analysis by observing that the provision applied nationwide, even though Congress’s evidence did not reveal a nationwide problem with gender-biased law enforcement. See *id.* at 626-27.

80 See *supra* Part II.B.2.

81 See *Morrison*, 529 U.S. at 664-65 (Breyer, J., dissenting) (arguing that earlier precedent striking down enforcement power legislation regulating private parties had described that legislation as responding to purely private conduct, not state government failures); *id.* at 665-66 (arguing that the Court had never required Congress to prove that a constitutional problem existed in every state as a condition of enacting enforcement legislation applicable in every state).

of the state action rule frustrated the application and avoidance strategies by moving the goalposts—that is, altering the underlying law Congress had attempted to apply (and partially avoid⁸²). The Court read the Nineteenth Century cases enforcing the state action rule as involving situations, just like VAWA, where state action lay behind the private conduct. But those cases did not have to be thus read: rather, as Justice Breyer argued in dissent,⁸³ they could have been read as situations where, unlike VAWA, “state action” was absent. Thus, as Professor Sunstein suggested in his testimony, VAWA could have been understood as a case that simply did not implicate the state action limitation.⁸⁴

This understanding of *Morrison* teaches a larger lesson: For a Court committed to an agenda—as the late Rehnquist Court was committed to a federalism agenda—even an application strategy may fail if it threatens that underlying agenda. VAWA’s use of the enforcement power threatened that agenda, by opening new vistas for enforcement power-based regulation of private conduct in response to state government misconduct. *Morrison*’s enforcement power analysis reflects the Court’s response to a threat it perceived from a strategy as modest as application.

So does *Morrison*’s Commerce Clause analysis. After Congress took Professor Sunstein’s advice and created a record documenting the interstate commerce effects of gender-motivated violence, the Court refused to give that record decisive effect. It reasoned that doing so would frustrate the Court’s agenda of demarcating a sphere of conduct exclusively regulable by states.⁸⁵ Thus, even though in *Lopez* the Court had suggested that it might uphold aggressive Commerce Clause regulation if Congress provided findings linking the regulated activity to interstate commerce,⁸⁶ in *Morrison* the Court retracted that commitment. Thus, just as with the enforcement power, the Court frustrated Congress’s strategy of “applying” existing Commerce Clause doctrine by altering that doctrine. Importantly for current purposes, that alteration may well have been provoked by that very act of application.

82 See *supra* note 73.

83 See *supra* note 81.

84 See April 1991 Hearings, *supra* note 62 at 122 (“On the argument outlined above, Congress is responding to an equal protection problem in the administration of state and local law by state and local governmental authorities. It is not responding to private acts at all . . .”).

85 See *Morrison*, 529 U.S. at 615 (“In these cases, Congress’ findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution’s enumeration of powers.”).

86 See *Lopez*, 514 U.S. at 563 (explaining that findings might demonstrate a connection between regulated conduct and interstate commerce that was not “visible to the naked eye”).

C. ENDA

1. *The Evolving Doctrinal Context*

Congress faced a different and evolving set of issues when it considered the constitutionality of legislation restricting sexual orientation (and, in later iterations, gender identity) discrimination in employment. Such legislation—usually entitled ENDA and, later, the Equality Act—was introduced first in 1974 and reintroduced with increasing frequency over time.⁸⁷

Even limiting our examination to the last thirty years reveals that Congress's deliberations on ENDA's constitutionality spanned very different doctrinal eras. Most importantly, the Supreme Court's 1996 decision in *Seminole Tribe v. Florida*⁸⁸ removed the Commerce Clause as a source of authority for ENDA provisions rendering state government employers liable for retrospective relief.⁸⁹ *Seminole Tribe* limited Congress's options. A challenge to that case was implausible. *Seminole Tribe* was a recent decision—unlike *the Civil Rights Cases*, it was not an old chestnut handed down by a long-ago Court facing a different world that Congress could reasonably suspect the current Court would be willing to reconsider. Indeed, while *Seminole Tribe* was decided by a slim 5-4 majority, that same majority proved durable, ruling for states in a long series of federalism cases decided from the mid-1990s to the early 2000s.⁹⁰ Unlike *the Civil Rights Cases* in the early 1960s, throughout the period in question here Congress had no reason to think that a challenge to *Seminole Tribe* might succeed.

Avoidance remained an option. Indeed, that strategy surfaced in at least some iterations of ENDA, which relied on Congress's spending power to render acceptance of federal funding “for any program or activity of a State” a

87 See Jeremy Brinster, Note, *Taking Congruence and Proportionality Seriously*, 95 N.Y.U. L. REV. 580, 595-599 (2020) (recounting the history of this legislation); see also H. REP. NO. 110-406, 2-10 (1996) (recounting this history up to the 110th Congress).

88 517 U.S. 44 (1996).

89 Throughout this period there appeared to be no serious concern about the constitutionality, under the Commerce Clause, of ENDA's applicability to private employers (including the applicability of any retrospective relief provisions). This is unsurprising, since even *Lopez* recognized broad congressional power to regulate economic activity, including, presumably, the employer-employee relationship.

90 See, e.g., *Lopez*, 514 U.S. at 549 (1995); *Printz v. United States*, 521 U.S. 898 (1997); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997); *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. at 627 (1999); *College Savings Bank*, 527 U.S. at 666 (1999); *Alden v. Maine*, 527 U.S. 706 (1999); *Garrett*, 531 U.S. at 356 (2001); *Kimel*, 528 U.S. at 62 (2000) (all 5-4 opinions ruling for states in federalism cases).

waiver of that state's sovereign immunity to claims arising under the statute.⁹¹ Nevertheless, despite the availability of what appeared, in the post-*South Dakota v. Dole*⁹² period, to be an easy constitutional path to enacting retrospective remedies against states,⁹³ most post-*Seminole Tribe* versions of ENDA focused on the enforcement power foundation for the law. This emphasis is interesting in itself, at it suggests the enforcement power's rhetorical attractiveness as the constitutional home for anti-discrimination legislation.⁹⁴ More generally, the difficulty of the Commerce Clause route and the apparent attractiveness of the Enforcement Clause path combined to create a situation in which the discussions about ENDA's constitutional foundations largely took the form, not of a comparison of the commerce and enforcement powers as distinct and equally plausible sources of congressional power to enact the law's remedies, but instead of a focused argument that ENDA was constitutional as an application of the enforcement power.⁹⁵

Such application was complicated by the evolution of both that enforcement power jurisprudence and the Court's underlying sexual orientation equality jurisprudence. Consider first the enforcement power issue. Before the 1997 decision in *City of Boerne v. Flores*,⁹⁶ the relevant enforcement power analysis was governed by the generous standards of cases such as *Katzenbach v. Morgan*⁹⁷ and *City of Rome v. United States*.⁹⁸ Between

91 *E.g.*, H.R. 3685, 110th Cong. § 11(b)(1). To complicate matters further, these waiver provisions effectively resurrected the Commerce Clause foundation for the full versions of ENDA—that is, the versions that included the full panoply of remedies Congress sought to impose on states. Whether one calls this situation “avoidance”—that is, avoidance of *Seminole Tribe*—or application—that is, application of the Court's congressional spending power jurisprudence—is more a matter of semantics than substance.

92 *Supra* note 30.

93 *See, e.g.*, Andrew Coan, *Judicial Capacity and the Conditional Spending Paradox*, 2013 WISC. L. REV. 339, 348 (2013) (“The consensus view of commentators, supported by twenty-five years of decisions following *Dole*, was that the decision represented a blank check to Congress.”).

94 *See* Schmidt, *supra* note 50 (noting a similar intuition among the congresspersons considering the CRA).

95 *See* Judith Olans Brown & Peter D. Enrich, *Nostalgic Federalism*, 28 HASTINGS CONST. L. Q. 1, 34 (2000) (“The changes wrought in both the Commerce Clause and the sovereign immunity doctrines have one clear corollary: to place at center stage the scope of congressional authority under Section Five of the Fourteenth Amendment. By a process of doctrinal elimination, Section Five [of the Fourteenth Amendment] seems to have become . . . the primary path by which Congress can supercede [sic] the states' sovereign immunity.”). Nevertheless, the qualifier “largely” is required due to the continued existence of the spending power as a source of power, not to enact ENDA, but to make its remedies effective despite *Seminole Tribe*. *See supra* note 91.

96 521 U.S. 507 (1997).

97 384 U.S. 641 (1966).

98 446 U.S. 156 (1980). *Rome* considered *Fifteenth* Amendment enforcement legislation, but during this period it was not thought that different standards governed the different Enforcement Clauses.

1997 and 2001, *Boerne's* more restrictive “congruence and proportionality” standard governed, but questions remained about how stringently the Court would apply that test. Finally, by 2001, the Court’s application of *Boerne* to equal protection-enforcing legislation made it clear that ENDA would face difficult questions in an enforcement power challenge.⁹⁹ In particular, those applications of *Boerne* established that the suspectness of the discrimination the enforcement legislation targeted would be a crucial consideration in the Court’s evaluation of that legislation’s constitutionality.

While the relevant enforcement power doctrine was evolving, so too was the Court’s attitude toward sexual orientation discrimination. Until 1996, LGB persons¹⁰⁰ had never won a constitutional victory at the Court;¹⁰¹ indeed, until 2003, it remained constitutional to criminalize same-sex intimacy.¹⁰² Thus, any consideration of ENDA as enforcement legislation required a more explicit congressional statement affirming their equal protection rights, to make up for the lack of any such statement in Supreme Court caselaw. *Romer v. Evans*¹⁰³ and *Lawrence v. Texas*,¹⁰⁴ not to mention the marriage cases some years later,¹⁰⁵ clearly altered the constitutional status of sexual orientation.¹⁰⁶ But they still left that status unclear. Those cases never even broached the question whether sexual orientation discrimination was a suspect or quasi-suspect class, let alone

The Civil Rights Cases posed no threat to ENDA’s constitutionality as enforcement legislation, since the only issue on which the enforcement power mattered was ENDA’s direct application to states.

99 See, e.g., *Garrett* 531 U.S. at 356 (applying skeptical scrutiny to the enforcement power argument for the employment provisions of the Americans With Disabilities Act); *Kimel v. Board of Regents*, 528 U.S. 62 (2000) (applying similarly skeptical scrutiny to the analogous argument for the Age Discrimination in Employment Act).

100 The constitutional status of transgender discrimination—the “T” in “LGBT”—presents a distinct, though related, question. This summary of Congress’s deliberations on ENDA omits consideration of that question, since throughout much of the period under discussion ENDA was limited to sexual orientation discrimination and did not purport to address gender identity discrimination.

101 See *Romer v. Evans*, 517 U.S. 620 (1996) (striking down a Colorado law that denied LGB persons protected status under state law).

102 See *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a Texas law criminalizing same-sex intimacy, and overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had upheld a Georgia sodomy law challenged as an unconstitutional infringement on LGB persons’ right to such intimacy).

103 *Supra* note 101.

104 *Supra* note 102.

105 See *Obergefell v. Hodges*, 576 U.S. 644 (2015) (striking down same-sex marriage bans); *United States v. Windsor*, 570 U.S. 744 (2013) (striking down a federal law defining marriage, for federal law purposes, as the union of one man and one woman).

106 *Lawrence* rested on a due process ground, but Justice Kennedy’s majority opinion nevertheless imported equality considerations into his analysis. See 539 U.S. at 575 (“Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”); see also *id.* at 579 (O’Connor, J., concurring) (concurring in the decision to strike down the Texas law on equal protection grounds).

decided that it was. Indeed, they provided little discussion of sexual orientation's constitutional status more generally, divorced from each case's particular subject-matter.¹⁰⁷

Given that the Court's post-*Boerne* equal protection enforcement power jurisprudence turned heavily on the answer to the suspect class question,¹⁰⁸ this string of gay rights victories nevertheless left unclear how steep a climb ENDA would face if its enforcement power foundation was challenged. However, the example set by *Board of Trustees v. Garrett*,¹⁰⁹ where the Court dismissed the significance, for enforcement power purposes, of the Court's rational basis/animus decision in *City of Cleburne v. Cleburne Living Center*,¹¹⁰ suggested that *Romer's* analogous rational basis/animus analysis, and, later, the equally opaque constitutional analyses in the marriage cases, might not suffice to place sexual orientation equality legislation on a firm enforcement power foundation.

2. Congress's Response

Given these ambiguities, it is instructive to note Congress's elaborate attempts to defend ENDA as an application of the Court's enforcement power and equal protection jurisprudence.¹¹¹ That application faced obstacles. By 2001, it was clear that the Court would look skeptically at any equal protection enforcement legislation that targeted discrimination against non-suspect classifications, such as sexual orientation.¹¹² Perhaps unsurprisingly, then, much of Congress's argumentation about ENDA's constitutionality focused on establishing that sexual orientation was indeed a suspect or quasi-suspect classification.¹¹³ This was not a far-fetched argument in the late 1990s and early 2000s; at that point, the Court's last serious application of suspect class analysis

107 See, e.g., *Windsor*, 570 U.S. at 763-774 (focusing on marriage); but see *Obergefell*, 576 U.S. at 660-662; (discussing the history of sexual orientation discrimination).

108 See *infra* note 123.

109 531 U.S. at 366-367, 366 n.4.

110 473 U.S. 432 (1985).

111 Even after the cutbacks on the commerce power in *Lopez* and *Morrison*, it remained clear that ENDA's focus on employment rendered it valid under the Commerce Clause, including its application to state government employers, even if, after *Seminole Tribe*, that grounding did not allow the imposition of retrospective remedies against states. See Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 977 (1997) (commenting on *Lopez's* limited effect on congressional power).

112 See *supra* note 109 and accompanying text.

113 See, e.g., *Employment Non-Discrimination Act: Ensuring Opportunity for all Americans*, 111th Cong. 124-127 (2009) (statement of ACLU); H. R. REP. NO. 110-406, at 29 (2007) (stating that LGB persons satisfy the traditional criteria for suspect class status).

lay only a decade-and-a-half in the past,¹¹⁴ and the then-recent decision in *Romer v. Evans*¹¹⁵ gave observers reason to think that formal suspect class status was simply a matter of time.¹¹⁶

Despite the plausibility of Congress's suspect class argument, it is striking to see Congress attempting to conform its legislation, not to underlying constitutional meaning, but to doctrinal rules, such as the suspect class/tiered scrutiny structure, that courts created to implement that meaning. As Justice Breyer pointed out in his *Garrett* dissent, those doctrinal rules are grounded in justices' (appropriate) concerns about their lack of both democratic legitimacy and institutional competence to second-guess legislative classifications. As such, he observed, those rules should play no limiting role when Congress acts via enforcement legislation.¹¹⁷ Scholars have agreed, criticizing what Robert Post and Reva Siegel have called the *Garrett* majority's "juricentric" understanding of the enforcement power.¹¹⁸

For our purposes, the most relevant observation is that Congress's embrace of such doctrine-based arguments—such as the argument that sexual orientation is a suspect classification—risks elevating such judicial decision rules to the status of core constitutional meaning. Put slightly differently, that embrace creates the risk that Congress, when staking out its enforcement power authority, implicitly accepts the terms of debate set by the Court.

However, Congress's constitutional defense of ENDA also sought to apply more fundamental constitutional law. Beyond the suspect class argument, another marked feature of ENDA's defense was Congress's insistence that sexual orientation employment discrimination is irrational and thus unconstitutional, a conclusion that thereby justified ENDA as enforcement legislation.¹¹⁹ At one level, this argument was just as doctrine-specific as the suspect class argument. After all, rational basis review constitutes part of the tiered scrutiny structure to which the suspect class idea is inextricably tied. Thus, arguing that sexual orientation-based employment discrimination was

114 See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

115 517 U.S. 620 (1996).

116 See, e.g., Tobias Barrington Wolff, *Principled Silence*, 106 YALE L.J. 247, 250 (1996) (arguing that the example of sex discrimination, which proceeded from a rational basis strike-down to an argument for conferral of suspect class status, could be applied to sexual orientation in light of *Romer*).

117 See 531 U.S. at 384 (Breyer, J., dissenting) ("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.").

118 See Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003).

119 See, e.g., H. R. REP. NO. 110-406, at 15 (2007).

irrational essentially slotted ENDA into that doctrinal structure, allowing Congress to create remedies for unconstitutional discrimination.

But Congress's insistence on the irrationality of sexual orientation employment discrimination also spoke to a deeper and broader constitutional law rule, one that transcends the suspect class/tiered scrutiny doctrinal structure. A fundamental rule of equal protection—indeed, of constitutional law more generally—requires that government regulate only in pursuit of a public purpose.¹²⁰ If we understand the rationality requirement¹²¹ in those terms—that is, as stating a core constitutional commitment rather than a judicially-crafted decision rule—then Congress's insistence that sexual orientation employment discrimination is irrational becomes understandable as an attempt to pierce the doctrinal veil of suspect class/tiered scrutiny analysis, and to justify ENDA as an application of that core commitment.

3. ENDA's Lessons

Because ENDA was never enacted, and now has been mooted by judicial decision,¹²² we will never know how the Court would have responded to Congress's constitutional arguments. Still, the ENDA example reveals that a successful application strategy requires that the Court be willing to defer to Congress's argumentation, about either the Court's doctrinal rules (the argument for suspect class status for sexual orientation) or the core constitutional law those rules implement (the argument that sexual orientation employment discrimination is irrational).

The Court's post-*Boerne* enforcement power jurisprudence makes clear that such deference is not forthcoming. Indeed, the only time since *Boerne*

120 See, e.g., H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 228–29 (2011) (“Rational-basis scrutiny, as traditionally understood, flows from a presupposition of American constitutionalism so basic and pervasive that it is easy to overlook: in its dealings with persons, the American government is under a constitutional obligation to act rationally. Rationality in turn requires both that public actions make sense and that they make *good* sense, that they have some legitimate purpose.”) (emphasis in original).

121 Note that the text speaks of a “rationality” requirement, not the “rational basis” standard. That latter standard, with all its presumptions in favor of the challenged legislative action, is a component of the tiered scrutiny structure this Article identifies as a judicial decision aid, rather than a core constitutional rule. Compare *Garrett*, 531 U.S. at 384 (Breyer, J., dissenting) (describing the rational basis standard as a judicial decision aid) with Powell, *supra*, note 120 (discussing the rationality requirement as a core constitutional commitment).

122 See *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (holding that Title VII of the CRA's prohibition on sex discrimination in employment prohibits discrimination based on sexual orientation or gender identity). Subsequent gay rights legislation, such as the currently-pending Equality Act, would extend anti-discrimination protections to realms not covered by the holding in *Bostock*. See, e.g., Human Rights Campaign, “The Equality Act,” <https://www.hrc.org/resources/the-equality-act>.

that the Court has shown such deference is when Congress legislates to protect a group the Court itself has denominated as suspect or quasi-suspect.¹²³ The irony, of course, is that such deference therefore rests on an initial suspect class determination that remains the Court's to make. More fundamentally, the Court's insistence on pegging the deference it accords enforcement legislation to the Court-announced scrutiny tier it assigns the discrimination that legislation targets reflects an unwillingness to allow Congress to transcend the tiered scrutiny structure. To repeat Justice Breyer's complaint in *Garrett*, that structure reflects healthy judicial self-restraint rather than core constitutional meaning.¹²⁴ As such, it should not play a determinative role in deciding enforcement power cases or even deciding how much deference Congress enjoys when it enacts enforcement legislation.

By contrast, the irrationality argument Congress made in its ENDA defense could be interpreted as a congressional attempt to apply core constitutional meaning. However, given the Court's unwillingness to allow Congress a meaningful role in implementing even the judicial decision rules reflected in its tiered scrutiny structure, there is little reason to be optimistic that it would share its power to state and apply core constitutional meaning. Without meaningful deference, this variant of the application approach remains limited indeed.

D. The Partial-Birth Abortion Act

A decade after its deliberations on VAWA, Congress considered a very different piece of legislation, the PBABA—a bill banning so-called partial-birth abortions.¹²⁵ While such legislation had been considered in the 1990s, federal action became increasingly important to anti-abortion forces after the Supreme Court struck down an analogous Nebraska restriction in 2000. The five-justice majority in that case, *Stenberg v. Carhart*,¹²⁶ faulted the state law for both its vagueness and its failure to include an exception for women's health. That latter failing was particularly relevant to abortion rights doctrine, given the governing law requiring health exceptions from any abortion restriction¹²⁷

123 See *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003) ("Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations" justifying sex equality enforcement legislation) (citation omitted).

124 See *supra* note 117; see also *supra* note 118 (similar critique from scholars).

125 *Supra* note 39.

126 530 U.S. 914 (2000).

127 See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992).

and the trial court's finding in *Stenberg* that the outlawed abortion method was sometimes the safest one for some women.¹²⁸

Congress, when it turned to abortion legislation in *Stenberg's* aftermath, had little difficulty with the vagueness issue, crafting legislation defining the prohibited procedure more precisely. But the latter obstacle posed a more serious problem. *Stenberg's* conclusion that the Constitution required a health exception seemed to mean that any absolute or rigid prohibition on "partial-birth" abortions, no matter how finely-crafted, would encounter resistance at the Court.¹²⁹ Unsurprisingly, then, Congress's constitutional argumentation turned heavily on what the PBABA characterized as Congress's broad power to find facts, in particular, facts about the need for a health exception.¹³⁰

More interesting from an enforcement power perspective are the admittedly sparse statements in Congress's deliberations suggesting that the PBABA enforced Fourteenth Amendment rights. Because the PBABA limited the availability of certain types of abortions, it is most naturally understood as limiting constitutionally-protected rights. However, during its consideration of the PBABA Congress and individual congresspersons sometimes suggested that the law sought to *protect* constitutionally-cognizable rights to life. Most notably, one of the statute's findings concluded:

A child that is completely born is a full, legal person entitled to constitutional protections afforded a "person" under the United States Constitution. Partial-birth abortions involve the killing of a child that is in the process, in fact mere inches away from, becoming a "person." Thus, the government has a heightened interest in protecting the life of the partially-born child.¹³¹

Such a finding hints at a congressional conclusion that the PBABA could be justified as prophylactic legislation designed to enforce the Fourteenth Amendment interest in life.¹³²

128 See *Stenberg*, 530 U.S. at 928-29, 936-37 (describing those findings and their implications for the Court's decision).

129 The PABA itself was not an absolute ban, as it exempted from the ban situations where the woman's life was at risk. See *infra*, note 135.

130 *Partial-Birth Abortion Act*, Pub. L. No. 108-105 §§ 2(6)-(12).

131 *Id.* at § 2(14)(H).

132 This language could easily be read as recognizing the *state's* interest in valuing the potentiality of post-natal life inherent in the fetus—an interest *Casey* recognized. See 505 U.S. at 871 (acknowledging "the interest of the State in the protection of potential life."). If that that interest belongs to the state, rather than the fetus itself, it would be non-cognizable as a Fourteenth Amendment interest, and thus also for enforcement power purposes. Nevertheless, individual congresspersons appeared interested in locating the interest in the fetus itself, thus triggering Congress's Section 5 authority. See, e.g., 114 CONG. REC. S10,491 (daily ed. Sept. 17, 1998) (statement of Sen. Ashcroft) ("[A] legislative ban on partial-birth abortions is constitutional. Indeed, allowing this life-taking procedure to continue would

To be sure, this language—aside from its sparseness—cannot be understood as a full-on challenge to Supreme Court doctrine. It would constitute such a challenge only if it reflected a blunt congressional assertion of fetal personhood. In *Roe v. Wade*, the Court explicitly rejected that proposition,¹³³ a move it acknowledged as critical to any recognition of an abortion right.¹³⁴ An assertion in the PBABA of fetal personhood would thus have directly challenged the abortion right, except perhaps when the pregnancy threatened the woman’s very life, in which case that assertion would have created a need to choose between the lives of two “persons”—the woman and the (congressionally-recognized) fetus.¹³⁵ A clearer challenge to the Court’s understanding of the Fourteenth Amendment would be hard to imagine, even without also adding the state action problem attending any enforcement statute prohibiting private parties from performing or procuring abortions.¹³⁶

Again, though, the careful drafting of the finding quoted above¹³⁷ indicates a less direct challenge to the Court’s abortion rights jurisprudence. At most,¹³⁸ it suggests instead an enforcement power argument resting on Congress’s power to enact prophylactic legislation¹³⁹ protecting *post*-natal life. Such an argument flows from both the PBABA’s finding that a fetus aborted pursuant to the prohibited method was “mere inches away from . . . becoming a person” and its finding that the prohibited method “blurs the line between abortion

be inconsistent with our obligation under section 5 of the 14th Amendment to protect life.”). See also David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial Birth Abortion Ban Act*, 30 CONN. L. REV. 59, 113 n.242 (1997) (recounting a congressperson’s statement grounding the PBABA in the enforcement power).

133 See *Roe v. Wade*, 410 U.S. 113, 156–59 (1973).

134 See *id.* at 156–57 (“If this suggestion of [fetal] personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.”).

135 The PBABA does not raise this issue, because it exempts from its prohibition situations where the woman’s life depends on performance of the otherwise-prohibited procedure. 18 U.S.C. § 1531(a).

136 *The Civil Rights Cases*, 109 U.S. at 3. But see Keith Alexander, *Federalism, Abortion, and the Fourteenth Amendment Enforcement Power: Can Congress Ban Partial-Birth Abortions After Carhart?*, 13 TEX. REV. OF L. & POLITICS 105, 126–36 (2008) (acknowledging the PBABA’s state action problem but suggesting that it could be overcome if Congress made it applicable only to states that did not already ban partial-birth abortions). While that argument might answer *Morrison*’s objection that VAWA applied nationwide, not just in states experiencing gender-biased law enforcement, see *supra* note 79, it does not answer *Morrison*’s other objection that *the Civil Rights Cases* and analogous precedent enforced a state action requirement even when the regulated private conduct was encouraged or otherwise facilitated by government action. See 529 U.S. at 624–25.

137 *Supra* note 131.

138 See *supra* note 132 (explaining how the language could be understood as not implicating the enforcement power at all).

139 *Kimel*, 528 U.S. at 81 (allowing Congress to enact enforcement legislation “prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text”).

and infanticide in the killing of a partially-born child just inches from birth.”¹⁴⁰ On this reasoning, the enforcement power foundation for the law would rest on the claim that Congress was merely applying (by prophylactically protecting) the textually-recognized Fourteenth Amendment right to post-natal life.¹⁴¹

Still, even mere prophylactic protection of post-natal life collides with the judicially-recognized right to a late-term abortion if required for the woman’s health. Of course, Congress found that women’s health never required such abortions,¹⁴² and the Court deferred to those findings despite their suspiciousness.¹⁴³ On a reading of the PBABA as enforcement legislation, those findings thus play two closely-related, indeed, mirror-image roles: defeating a *Casey*-based abortion-rights attack and averting any collision between the woman’s Fourteenth Amendment right and the post-natal right-to-life this argument assumes Congress was prophylactically enforcing.

Ultimately, the parties challenging the PBABA focused entirely on the abortion rights issue, rather than the congressional power issue.¹⁴⁴ Thus, it is impossible to know how an enforcement power or commerce power challenge would have fared.¹⁴⁵ Indeed, a commerce power challenge to the PBABA presents a fascinating counter-factual: Justices Thomas and Justice Scalia, two of the bare majority of five justices voting to uphold the PBABA in *Gonzales v. Carhart*, expressly reserved the commerce power question, observing that it had been neither raised nor briefed by the parties.¹⁴⁶ That uncertainty suggests another variant on the application strategy—one focused not on the enforcement power, but rather, the commerce power itself. Congress seems to have embraced that variant when it almost literally applied the Commerce

140 Act, Pub. L. No. 108-105, § 2(14)(O) (2003).

141 To repeat, the prophylactic nature of this claim would not avoid the collision between that prophylactic protection of post-natal life and the woman’s right to an abortion for reasons other than protecting her life. See text accompanying *supra* notes 134–32. Nor would it solve the state action problem. See *supra* note 136.

142 Act Pub. L. 108-105 § 2(2), (5), (13), (14) (2003).

143 *Gonzales v. Carhart*, 550 U.S. 124, 166–67 (2007) (majority deference); *id.* at 174–80 (Ginsburg, J., dissenting) (critiquing Congress’s findings).

144 See generally Jordan Goldberg, *The Commerce Clause and Federal Abortion Law: Why Progressives Might be Tempted to Embrace Federalism*, 75 FORDHAM L. REV. 301 (2006) (discussing that choice).

145 The PBABA prohibited any doctor from knowingly performing the prohibited procedure “in or affecting interstate or foreign commerce.” 18 U.S.C. § 1531(a). Congress’s deliberations about the Commerce Clause foundation for the law were, however, if anything more cursory than those attending its consideration of the Fourteenth Amendment foundation. See, e.g., Alissa Schecter, *Choosing Balance: Congressional Powers and the Partial-Birth Abortion Ban Act of 2003*, 73 FORDHAM L. REV. 1987, 2010 (2005) (noting the paucity of congressional deliberation on the issue).

146 550 U.S. at 168 (Thomas, J., joined by Scalia, J., concurring).

Clause by limiting the PBABA's prohibition to those abortions performed "in or affecting interstate or foreign commerce."¹⁴⁷

III. ADAPTATION STRATEGIES

Part I introduced three strategies—challenge, avoidance, and application—that Congress can employ when confronting either a hostile Court or hostile precedent as it legislates to promote individual rights. Part II's case studies illustrate those strategies. This Part examines what those case studies reveal about their benefits and drawbacks.

A. Challenges

The deliberations over the Civil Rights Act's public accommodations provisions reveal political actors contemplating a direct challenge to judicial doctrine or the justices themselves. The CRA example illustrates how these two targets are distinct: the debate on those provisions occurred against a backdrop of hostile judicial precedent (*the Civil Rights Cases'* state action requirement) but also a Court that was suspected to be potentially amenable to revisiting that precedent if prodded by an enforcement statute forcing the question.¹⁴⁸

147 18 U.S.C. § 1531(a). For a critique of this application attempt, see Kopel and Reynolds, *supra* note 132 at 111 ("Unless a physician is operating a mobile abortion clinic on the Metroliner, it is not really possible to perform an abortion 'in or affecting interstate or foreign commerce.'"). Notwithstanding this critique, it is generally accepted that Congress's use of the "in or affecting" language reflects its intention to exercise its commerce regulatory power its fullest reach. *See, e.g., United States v. Yucel*, 97 F. Supp. 3d 413, 419 (S.D.N.Y. 2015) ("the phrase 'in or affecting interstate commerce' is a term of art used by Congress to signal that it is exercising its pull power under the Commerce Clause."). Given that understanding, one can view Congress's use of that term in the PBABA as reflecting a desire both to assert its regulatory power to its constitutional limit and, if possible, to forestall a powers attack on the law by definitionally limiting its applicability to conduct the Clause gives Congress the power to regulate. Essentially, the latter claim would amount to an argument that the "in or affecting" language constitutes the sort of jurisdictional element *Lopez* identified as tending to validate a claim of congressional power. *See* 514 U.S. at 561-562. At least one scholar has questioned the correctness of such an argument. *See* Allan Ides, *The Partial-Birth Abortion Ban Act of 2003 and the Commerce Clause*, 20 CONST'L COMM. 441, 456-461 (2003-04). This Article's limited consideration of this issue does not require passing on this argument, other than to observe that Congress's use of the "in or affecting" language could be understood as a congressional attempt (successful or not) to tie the PBABA's reach explicitly to the reach of its commerce power, and thus as an attempt at literal application of that power.

148 The Justices' accommodating beliefs about congressional power to ground the public accommodations provisions in the enforcement power were not well-known outside the Court, and, according to one scholar, were only "partially revealed" in a 1964 case, *Bell v. Maryland*, 378 U.S. 226 (1964), decided well after the powers issue had been settled in Congress. Schmidt, *infra*. note 163 at 809. Nevertheless, scholars had perceived the evolution in the Court's thinking on the state

A congressional challenge to judicial doctrine seeks, by definition, to create doctrinal change Congress favors. Indeed, as with the CRA, such a challenge may present a unique opportunity to obtain such change. But it is risky. Most obviously, challenges can fail. If, for example, Congress had staked the CRA's public accommodations provisions' constitutionality solely on the enforcement power, and if that gambit failed, those provisions would have been struck down—a politically disastrous result inflicting a possibly-fatal defeat for the civil rights movement and reaffirming and thus strengthening the state action requirement Congress sought to change. On the other hand, the very magnitude of those stakes might have forced the Court to find a way to uphold those provisions—flinching in a game of constitutional chicken.

Of course, on such a high-stakes issue one might expect Congress to hedge its bets—for example, by citing the Commerce Clause as a backstop to its enforcement power argument. But, as anyone familiar with the game of chicken understands, the more a player creates ways of avoiding the impending collision, the less credible it is as a competitor. Indeed, when the federal government took an accommodationist position regarding the CRA's enforcement power foundation, defending the public accommodations provisions primarily on Commerce Clause grounds with the Enforcement Clause functioning as merely a backstop, the majority shunted that latter theory aside,¹⁴⁹ even though one scholar has concluded that a majority—and perhaps all—of the Court would have endorsed it if forced to decide.¹⁵⁰ As if reflecting his regret with the government's choice, Justice Black—a particularly strong proponent of Congress's Section 5 authority to regulate private conduct¹⁵¹—hinted strongly that he would have voted to uphold the law on the enforcement power ground.¹⁵² But only Justice Douglas made a full-throated argument in its favor.¹⁵³

The enforcement power also raises troubling longer-term implications if Congress wields it in pursuit of its own constitutional vision. As explained earlier,¹⁵⁴ during deliberations on the CRA, concerns arose that grounding the public accommodations provisions in the Enforcement Clause might transform the reach of the Fourteenth Amendment to fully cover private

action question since at least the late 1940s. *See id.* at 781-86 (noting this evolution and scholars' and advocates' reactions to it).

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

150 *See* Schmidt, *infra* note 163 at 803-04.

151 *See id.* at 806.

152 *See* 379 U.S. at 278-79 (Black, J., concurring).

153 *See id.* at 279 (Douglas, J., concurring).

154 *See supra* Part II.A.

businesses and institutions those provisions sought to regulate. The fear, expressed by Attorney General Kennedy,¹⁵⁵ was that regulating those private entities via Section 5 enforcement legislation would convert them more generally into state actors for purposes of Section 1's self-executing provisions. Thus, for example, he suggested that inclusion of religious schools in such legislation would render them, as state actors, barred from conducting Bible readings.¹⁵⁶

This concern reflects the intricate relationship between enforcement legislation and the Court's understanding of Section 1's self-executing provisions. Unlike Commerce Clause legislation, enforcement legislation may influence judicial doctrine if it reflects an alternative understanding of Fourteenth Amendment law. To be sure, commerce legislation may also influence the shape of the Commerce Clause, for example, if the Court upholds the law by announcing a more expansive understanding of the commerce power. But Congress's textually-granted supervisory authority over the Fourteenth Amendment—its power to “enforce” that amendment—gives Congress much more direct control over its contours.

That control raises difficult questions. Understanding Congress's Section 5 enforcement power as authorizing Congress to enact into law its own understanding of the Fourteenth Amendment raises the question whether that understanding should influence, or even determine, the content of the Court's Section 1 doctrine.¹⁵⁷ A positive answer calls into question the Court's authoritative role in declaring constitutional law. But a negative answer renders constitutional doctrine inconsistent and fragmentary, with rules or principles enforcement legislation enacts in one context absent from contexts seemingly demanding similar treatment.¹⁵⁸ To take Attorney General Kennedy's example, a negative answer would mean that state-licensed religious schools would constitute state actors only for purposes of the conduct governed by enforcement legislation, unless the Court decided on its own—

155 *Supra* note 53.

156 *See* *Sch. Dist. of Abington Twp v. Schempp*, 374 U.S. 203 (1963) (holding that public school Bible readings violate the Establishment Clause).

157 One version of this problem is the risk that Congress could enact into enforcement legislation its own, more limited, understanding of constitutional rights. In *Katzenbach v. Morgan*, Justice Brennan attempted to solve that problem by arguing that such legislation could only expand rights, not limit them, thereby creating a “one-way ratchet.” *See* 384 U.S. at 651 n.10. *See also id.* at 668 (Harlan, J., dissenting) (responding to this argument).

158 *Cf.* Freund Statement, *infra* note 163 (warning against “fragmentary” grants of constitutional rights).

perhaps prodded by Congress's lead—that they merited general state actor status.¹⁵⁹

To be sure, this problem need not arise, at least not in its fullest form. Under today's *Boerne* regime, Congress's enforcement power is explicitly limited to deterring or remedying violations of judicially-declared rights. Under that regime, valid enforcement legislation by definition remains within the channel cut by the Court's own Fourteenth Amendment interpretations. But a milder variant of the problem still surfaces. Congress's authority to enact prophylactic legislation extending beyond the Court-stated constitutional rule¹⁶⁰ allows Congress to single out particular subject-areas (such as employment) or groups (such as the disabled) for regulation extending beyond what the Constitution requires. The possibility of such special treatment again raises the issue of different constitutional treatment for groups or contexts that legal reasoning would group as similar. While the character of that treatment as legislative rather than judicial eases the tension that differential creates, the strain created by the resulting Section 1-Section 5 gap persists.¹⁶¹

Grounding the CRA's public accommodations provisions on Congress's commerce power obviated this problem. As that option's proponents noted, that power allows Congress near-complete flexibility in wielding it: subject to minimal due process and equal protection constraints,¹⁶² Congress can regulate some businesses but not others, or impose some types of regulations but not

159 The state actor example may not be the best one, since state action presents context-specific questions yielding different results applicable to the same entity. *See, e.g.,* *Jackson v. Metro. Edison*, 419 U.S. 345, 351 (1974) (“[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.”) (emphasis added). But the problem extends beyond the state action question. *See, e.g.,* *Schmidt*, *supra* note 163 at 805 (“[T]he under-examined assumption of the *Brown* Court [that Congress had the Section 5 authority to prohibit racially-segregated schools] was that there could be an allowable gap between Section 5 and Section 1, which could have two possible consequences for the Court’s equal protection jurisprudence. Either the Court would be willing to recognize and accept this gap Or (more likely) the Court would follow Congress in redefining the meaning of the Equal Protection Clause—that is, the congressional interpretation of equal protection would then be adopted by the Court as a self-enforcing constitutional right.”).

160 *See supra* note 35

161 *See supra* note 159; *see also* Freund Statement, *infra* note 163 at 1189 (warning that Congress’s use of its enforcement power to regulate private parties would render “the responsibility on Congress . . . all the greater to think through the implications of its action for constitutional claims that are not precisely those recognized in the bill but in principle may be comparable”).

162 *See, e.g.,* *Wickard v. Fillburn*, 317 U.S. 111, 129–33 (1942) (noting and disposing of due process arguments); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980) (noting and disposing of equal protection arguments).

others, without creating inconsistencies in constitutional doctrine or impairing the Supreme Court's integrity as the ultimate expositor of constitutional law.¹⁶³

The larger point is that a political branch strategy of challenging unfavorable Fourteenth Amendment precedent must always consider the larger implications of a successful challenge. Those larger implications include considerations flowing from the nature of what Congress accomplishes when it uses its enforcement power to enact regulations that differ from the Court's constitutional understanding. Those considerations lurk even when, as required after *Boerne*, Congress purports merely to remedy or deter violations of that judicial doctrine.

B. Avoidance

Ultimately, legislators and Administration officials considering the CRA's public accommodations provisions decided to deemphasize the enforcement power and instead rely primarily on the Commerce Clause. That decision highlights another strategy—avoiding the problems that lurk in a challenge strategy by relying on another source of power.

Avoidance is a natural strategy when advocates of civil rights legislation confront a hostile Court and/or hostile precedent. It is feasible because, as noted earlier,¹⁶⁴ Congress enjoys broad latitude to enact Article I-based legislation for reasons beyond those directly implicated by the particular grant of power—for example, imposing a tax for non-revenue-raising reasons and regulating commerce for reasons remote from any motivation to improve commerce itself.¹⁶⁵ This non-scrutiny of motivation allows Congress to use these other powers to promote constitutional rights, thus avoiding any problems arising from use of the enforcement power.

To be sure, avoidance raises its own concerns. As a practical matter, every source of congressional power carries its own restrictions. Those restrictions might well make that alternative power less desirable, by either reducing the scope of Congress's regulatory reach as compared with the Enforcement Clause or otherwise limiting the legislation's effectiveness. Most notably, the

163 See, e.g., *A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce: Hearing on S. 1732 Before the S. Commerce Comm.*, 88th Cong., 1183, 1187 (1963) (brief of Professor Paul A. Freund) ("Freund Statement") (The Commerce Clause "is primarily a grant of legislative power to Congress, which can be exercised in large or small measure, flexibly, pragmatically, tentatively, progressively, while guaranteed rights, if they are declared to be conferred by the Constitution, are not to be granted or withheld in fragments."), quoted in Christopher Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 WM. & MARY BILL OF RIGHTS J. 767, 813 (2010).

164 See text accompanying *supra* notes 19–20.

165 See *supra* notes 19–20.

substantive and remedial reach of today's commerce power, while still broad, has been limited by cases decided over the last thirty years, especially in its ability to regulate states—the very feature that makes that power an attractive alternative to the enforcement power.¹⁶⁶ While the Enforcement Clause is subject to separate and distinct limitations,¹⁶⁷ it is either undeniably or arguably free from at least some of the ancillary restrictions the Court has imposed on Commerce Clause-based regulation of states.¹⁶⁸

Beyond these practicalities lies a more conceptual point about the expressive value of grounding civil rights legislation in the constitutional authority specifically concerned with civil rights—the enforcement power. As this Article noted at the outset,¹⁶⁹ concerns about grounding civil rights legislation in the appropriate constitutional provision have surfaced since at least *Edwards v. California* in 1941.¹⁷⁰ They resurfaced again in the debates over the CRA when legislators (and ultimately Justice Douglas) disposed to grounding its public accommodations provisions on the Enforcement Clause critiqued its Commerce Clause justification.¹⁷¹ It's at least possible that the same critique underlay Congress's focus, in its ENDA deliberations, on the enforcement power when the spending power appeared to provide an easier argument.¹⁷²

This conceptual concern potentially interacts with the more practical one noted earlier. A Court predisposed to trimming Congress's commerce power might well find attractive targets in civil rights legislation, exactly because the Enforcement Clause beckons as the more intuitively obvious home for such laws. To be sure, some civil rights legislation—such as the CRA or ENDA's non-remedial provisions—falls within the heartland of valid Commerce Clause regulation. However, other civil rights legislation could fall prey to the justices' desire to further limit Congress's Article I powers.

166 See *supra* note 28 (addressing limits on Article I-based regulation of states, including the provision of remedies against states); *supra* note 31 (addressing the general scope of the commerce power).

167 See *Flores*, 521 U.S. at 507 (requiring that enforcement legislation be congruent and proportional to the targeted constitutional violations); see also *Holder*, 570 U.S. at 529 (striking down a provision of the Voting Rights Act as Fifteenth Amendment enforcement legislation because it reflected outdated data and inappropriately imposed unequal burdens on the states).

168 See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding that, when legislating under its Enforcement Clause power, Congress may subject unconsenting states to lawsuits seeking retrospective relief). See also Edward Hartnett, *Distinguishing Permissible Preemption from Unconstitutional Commandeering*, 96 NOTRE DAME L. REV. 351, 375 (2020) (considering whether enforcement legislation is subject to the anti-commandeering principle).

169 See *supra*. Part I.A..

170 See text accompanying *supra* notes 21–23.

171 See Part II.A.; *Heart of Atlanta Hotel*, 379 U.S. at 279 (Douglas, J., concurring).

172 See *supra* note 93.

Most notably, *United States v. Morrison's* insistence on demarcating regulatory fields beyond the commerce power's reach might yield more unhappy results for civil rights legislation not targeting economic activity. Voting rights, educational equity, policing and criminal justice reform, and hate crimes legislation all regulate activities the Court might consider non-economic and thus presumptively beyond the Commerce Clause's reach. The Court might be especially likely to reject the Commerce Clause foundation for such laws if it viewed the commerce justification as an attempt to avoid having to defend them on enforcement power grounds. Indeed, the federal appellate court whose strike-down of VAWA was affirmed in *Morrison* criticized the litigants defending VAWA's constitutionality on quite similar grounds.¹⁷³

The argument that the availability of the enforcement power as a logical home for a law might persuade the Court to reject its commerce power grounding remains highly speculative. Nonetheless, the temptation Congress might feel to invoke the Commerce Clause or some other congressional power¹⁷⁴ in order to avoid confronting the Court's enforcement power jurisprudence could conceivably backfire if such attempts are perceived not just as congressional overreach, but overreach motivated by Congress's recognition of the enforcement power's limits.

C. Application

Given these risks, a third alternative naturally presents itself. Rather than directly confronting hostile justices or Enforcement Clause precedent, or avoiding that precedent entirely, Congress may justify civil rights legislation as applying that precedent. The idea is as modest as it is straightforward: Congress takes Court-stated Fourteenth Amendment doctrine as a given—as the “Amendment” Congress is authorized to enforce—and seeks merely to apply that law by identifying circumstances where that law is violated and/or remedies that, in its view, adequately punish and/or deter such violations. Indeed, it is not only modest and straightforward; the Court's post-*Boerne* caselaw has firmly embraced this idea, at least ostensibly.¹⁷⁵

173 See *Brzonkola v. Va. Poly. Inst.*, 169 F.3d 820, 826 (4th Cir. 1999) (“Confronted by the Supreme Court's intervening decision in *City of Boerne v. Flores* during this appeal, the appellants [defending the provision's constitutionality] retreated to defend the statute primarily as an exercise, not of Congress' power under Section 5 of the Fourteenth Amendment, but of its power under the Commerce Clause—notwithstanding the statute's regulation of conduct neither commercial nor interstate.”).

174 See, e.g., *supra* note 91 (citing one version of ENDA that sought to use Congress's conditional spending power to induce states to waive their sovereign immunity).

175 See *supra* note 35.

Given the varying levels of generality at which one could cast Fourteenth Amendment doctrine, much enforcement legislation could be plausibly defended as applying it. Even Section 4(e) of the Voting Rights Act, enfranchising citizens literate in Spanish and upheld in *Morgan* partially based on Congress's independent constitutional interpretive authority, could alternatively be understood as simply applying Court-stated equal protection law governing English literacy tests, even though it arguably contradicted a previous Court decision upholding such tests.¹⁷⁶

The application justification is buttressed by institutional competence arguments extolling Congress's superior capacity to find the various type of facts that assist the proper application of Court-stated constitutional law.¹⁷⁷ Given the inherent logic of an application approach, *Boerne's* approval of it, the amenability of much Fourteenth Amendment doctrine to significant legislation plausibly defensible on that basis, and Congress's fact-finding superiority, one can understand the argument favoring significant congressional authority to apply Fourteenth Amendment doctrine.

Yet this straightforward argument quickly becomes clouded. First, as a matter of realpolitik, accurate congressional application of constitutional doctrine is not guaranteed to succeed when that application threatens the Court's broader commitments. Thus, the VAWA Congress's dutiful inclusion of findings detailing the connection between gender-motivated violence and interstate commerce did not save the statute in *Morrison* when reliance on those findings to uphold the law threatened to undermine the Court's agenda of crafting limits on the commerce power.¹⁷⁸ That same federalism agenda also appeared to motivate the *Morrison* Court when it arguably moved the enforcement power goalposts by imposing a version of

176 *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45 (1959). This argument goes beyond the alternative, more modest, *Morgan* theory avoiding *Lassiter*, in which Section 4(e) simply enforced the right of New York's Puerto Rican community to gain its fair share of government services by giving it a political voice. See *Morgan*, 384 U.S. at 652-53 (setting forth this rationale). Rather, it directly engages *Lassiter*; but understands Section 4(e)'s ostensible challenge to *Lassiter* as something more modest—as reflecting Congress's conclusion that, given the New York Puerto Rican community's access to Spanish language news outlets, *Lassiter's* recognition of government's interest in an informed electorate, 360 U.S. at 51-52, did not justify disenfranchising persons Section 4(e) enfranchised. See *Morgan*, 384 U.S. at 653-55. Compare *id.* at 654 (suggesting that Congress had reason to suspect that racism motivated New York's literacy requirement); with *Lassiter*, 360 U.S. at 53-54 (observing that *Lassiter* did not involve a race discrimination claim). For a fuller discussion of this understanding of *Morgan*, see WILLIAM D. ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW 96-97, 104 (2016).

177 See Araiza, *Deference*, *infra* note 201.

178 See *supra* notes 85-86.

the state action requirement not mandated by the relevant Reconstruction-era precedents.¹⁷⁹ In short: straightforward congressional application of Court-stated law may well fail if it threatens another value the Court cares about.

More conceptually, the application strategy is complicated by deep uncertainty about the proper understanding of the Fourteenth Amendment “law” Congress is authorized to enforce.¹⁸⁰ This complication arose in two post-*Boerne* decisions, *Kimel v. Board of Regents*¹⁸¹ and *Board of Trustees v. Garrett*,¹⁸² striking down enforcement legislation. Those opinions were heavily criticized, not just for their stringent application of *Boerne*’s congruence and proportionality requirement, but also for their equation of the “law” (to which the legislation had to be congruent and proportional) with the Court’s own institutionally-bounded, sub-constitutional doctrinal rules.¹⁸³ As Justice Breyer noted in his *Garrett* dissent, those doctrinal rules reflect appropriate judicial self-restraint, rather than core constitutional law, and thus, correctly understood, did not limit congressional action.¹⁸⁴

ENDA’s legislative history features a congressional attempt to apply these sub-constitutional doctrinal rules. As noted earlier,¹⁸⁵ that history featured detailed analysis arguing that sexual orientation satisfies the criteria for suspect class status, as part of the well-known tiered scrutiny structure which scholars and judges persuasively argue is not itself constitutional “law.”¹⁸⁶ By contrast, the argument in ENDA’s legislative history about the irrationality of sexual discrimination employment discrimination is at least susceptible to being understood as a congressional attempt to apply core constitutional meaning—that is, the core equal protection rule that, when it legislates, government must act reasonably in pursuit of a public purpose.¹⁸⁷

This distinction matters when evaluating the “application” strategy. A congressional argument that enforcement legislation applies core constitutional principles sends a very different message than an argument that such legislation applies sub-constitutional judicial decision rules such as the test for suspect class status. The former argument insists that sub-constitutional doctrine reflects merely judicially-manageable decision rules

179 See *supra* notes 81–82.

180 For a longer discussion of this issue, see Araiza, *supra* note 176, chs. 4–6.

181 528 U.S. 62 (2000).

182 531 U.S. 356 (2001).

183 See *supra* note 124.

184 See *Garrett*, 531 U.S. at 382–85 (Breyer, J., dissenting).

185 See *supra* Part II.C.

186 See *supra* note 124.

187 See text accompanying *supra* notes 112–120 (recounting these arguments in more detail).

that help courts decide constitutional cases, rather than constitutional law itself. It thus asserts Congress's authority to transcend such decision rules and apply core constitutional principles.

By contrast, the latter argument acknowledges judicial doctrine as the appropriate focal point for enforcement power analysis, even if that doctrine merely reflects such decision rules. If Congress argues that its legislation applies such decision rules, then it implicitly concedes the constitutional status of those rules—*i.e.*, it acknowledges that the Court sets the terms of Congress's application authority. Because those rules flow from the Court's sense of its own institutional limitations, Congress's acceptance of those rules as the proper focal point for enforcement legislation abnegates its unique institutional authority and capacity when working with the Court on the project of implementing constitutional meaning.¹⁸⁸

Nevertheless, sometimes mere "applications" of Court-stated law can be quite aggressive, and, indeed, can come close to challenging judicial doctrine. Consider the PBABA. Beyond purporting to find no serious infringement on the right the Court *has* recognized—the woman's right to a late-term abortion when her health demands it¹⁸⁹—the Congress that enacted the PBABA also sought to ground its abortion restriction on the right to life enjoyed by post-natal persons. Recall the House report finding both that "partially born" fetuses were "mere inches away from becoming a person,"¹⁹⁰ and that partial-birth abortions corroded respect for such post-natal life by "blur[ring] the line between abortion and infanticide."¹⁹¹

These findings could be read as implying congressional assertion of some level of constitutional right to life for fetuses—an assertion that would challenge *Roe's* rejection of that idea and with it the foundation of a right to terminate fetal life.¹⁹² To be sure, they could also be understood as supporting a less aggressive decision by Congress to prophylactically safeguard the Fourteenth Amendment right to post-natal life by extending that protection backward, several "inches" before it begins.¹⁹³ Indeed, the statute's citation of the Court's foundational abortion rights opinions¹⁹⁴ suggests the superiority of this latter

188 See Araiza, *supra* note 176, ch. 6.

189 See Partial Birth Abortion Act, Pub. L. No. 108-105, § 2(14)(B), (D), (F), (O) (finding that the prohibited procedure was never necessary for women's health). The statute did provide exceptions for women's lives. 18 U.S.C. § 1531(a).

190 *Supra* note 131.

191 *Supra* note 140.

192 See *supra* note 134 (quoting *Roe's* recognition of the implications for abortion rights of recognizing the constitutional status of fetal life).

193 See text accompanying *supra* notes 139-140 (presenting this argument in more detail).

194 See Partial Birth Abortion Act, Pub. L. No. 108-105, § 2(14)(H).

reading. But even construing the PBABA as this more modest, prophylactic application of the judicially-recognized right to post-natal life nevertheless steers the statute on a collision course with the (similarly judicially-recognized) right to a late-term abortion for health reasons.

Of course, the PBABA's authors addressed the women's health issue—probably not as part of the underdeveloped enforcement power argument just sketched out, but rather, more straightforwardly, in response to *Stenberg v. Carhart's* insistence that all abortion regulations provide exceptions for women's health.¹⁹⁵ The statute's response to that insistence—that the PBABA did not require a health exception because the prohibited procedure was never necessary for women's health—raises the final issue the application strategy implicates: the deference due Congress when it purports to apply Court-stated constitutional law.¹⁹⁶ While the deference question arose in the PBABA in the course of the Court's examination of a statute attacked as rights-limiting,¹⁹⁷ the same question arises in the context of rights-promoting legislation.¹⁹⁸ As with the rights-limiting context of the challenge to the PBABA, the level of deference courts accord legislative conclusions (including fact-findings) largely determines the fate of rights-promoting legislation grounded on such conclusions.

The Court's approach to the deference question in the enforcement power context turns on a variety of issues.¹⁹⁹ Most importantly for current purposes, its insistence that enforcement legislation hew closely to the Court's own sub-constitutional decision rules has rendered it skeptical of Congress's findings when that legislation targets either constitutional wrongs those rules identify as less serious or the core constitutional commitment of rational government action.²⁰⁰ More generally, the Court's approach to the deference question is deeply problematic. The analysis is intricate and far beyond the scope of this Article, but suffice it to say that the Court's approach to this question is marked

195 See *supra* notes 126-127.

196 In the PBABA example, that application could be understood as application of either the Court's abortion rights jurisprudence or the post-natal right-to-life enforcement argument the text sketches out.

197 See *Gonzales*, 550 U.S. at 165-67.

198 See generally Araiza, *Deference*, *infra* note 201.

199 For a more detailed discussion of this issue, see Araiza, *Deference*, *infra* note 201.

200 See, e.g., *Garrett*, 531 U.S. at 368-72 (applying skeptical review of Congress's findings relating to the underlying constitutionality of a form of discrimination that received only rational basis judicial review). Compare *Hibbs*, *supra* note 123 (stating that "it was easier" for Congress to amass the required factual showing when it legislated to combat sex discrimination rather than disability discrimination, because sex discrimination is a judicially-recognized quasi-suspect classification).

by inconsistency and poorly-theorized understandings of the proper roles of Court and Congress in reaching such conclusions.²⁰¹

Unless and until the Court creates and applies a more coherent approach to the deference question, the application option will remain a complex one with uncertain prospects in any given case. Its complexity and uncertainty are exacerbated by the Court's manipulation of its deference analysis to account for the degree to which enforcement legislation attempts to apply, not the Court's own institutionally-limited doctrine implementing the Fourteenth Amendment, but that Amendment's core law.

IV. IMPLICATIONS

One basic lesson these historical examples teach for future civil rights legislation is that no path is guaranteed to succeed. Challenging the Court or its doctrine risks losing. Avoiding that doctrine runs the risk of encountering completely different landmines threatening the legislation. Indeed, it risks creating such landmines if the Court perceives the avoidance tactic as an attempt to circumvent judicial doctrine blocking more obvious doctrinal foundations, and responds by trimming the alternative power. Finally, applying the Court's doctrine traps Congress into playing the Court's game, unless the Court defers to Congress when it seeks to apply not just court-created doctrine but core constitutional rules—something it has not been willing to do since *Boerne*.

One can say more about challenges. Generally, challenges to the Court and its doctrine are less likely to succeed today, given the Court's *Boerne*-fueled insistence on judicial supremacy, not just in stating constitutional meaning, but in implementing that meaning via doctrinal rules such as suspect class determinations. But such statements must be more granular to be accurate. A Court, like today's, that is already on a mission—say, to restrict abortion rights or increase free religious exercise rights—will likely be amenable to such “challenges” to its existing doctrine, just as the early 1960s Warren Court was not just amenable but eager to follow Congress's lead on the state action issue as soon as Congress grasped the reins. When the Court “defers” to Congress only when Congress is already moving in the Court's preferred direction, “challenges” succeed only when they challenge doctrine

201 See, e.g., Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 945 (1999) (“[T]he concept of deference remains malleable, indeterminate, and not well-defined.”). See generally William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878 (2013); Araiza, *supra* note 176, ch. 7.

the Court is already moving away from.²⁰² After *Boerne*, that is truer than ever before.

Avoidance also carries particular risks today. Today's Court is not one presumptively friendly to Congress's exercise of its Article I powers. If Congress seeks to use its commerce power to regulate in pursuit of civil rights, it should expect careful judicial scrutiny unless the law remains within the heartland of that power. After *National Federation of Independent Business v. Sebelius*,²⁰³ one might even expect that same skepticism when Congress uses its spending power.²⁰⁴ Any cutbacks the Court might impose on those powers would not, of course, remain confined to civil rights legislation.

That leaves application. Application seems a benign strategy. Yet it risks conceding to the Court the authority to set the terms of Congress's enforcement power, if that strategy requires Congress to frame its application by reference to the Court's own constitutional decision rules. That term-setting concession cripples Congress's authority to stake out stronger positions on civil rights issues than could the Court, confined by own institutional limitations.

Today, civil rights legislative initiatives stand at the forefront of the national conversation in a way not seen since the 1960s. But unlike then, today the Court is far more skeptical, not only of the obvious, Enforcement Clause-based, foundation for such laws, but of their alternative Article I foundations as well.²⁰⁵ That skepticism demands that Congress think long and hard as it decides where and how to ground civil rights legislation. Those decisions will determine the fate of such legislation. The stakes are high.

202 *Cf. supra.* note 44 (noting the mid-Century Court's tentative undermining of the state action rule).

203 567 U.S. 519 (2012).

204 See Nicole Huberfeld, Elizabeth Weeks Leonard, & Kevin Outterson, *Plunging Into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U. L. REV. 1, 4 n.14 (2013) (citing scholars recognizing the importance of the spending power issue in *National Federation*).

205 *Cf. Schmidt, supra.* note 163 at 813 (citing President Kennedy's Solicitor General's confidence that the CRA's public accommodations provisions would be upheld as valid Commerce Clause legislation).

