

AMERICAN CONSTITUTIONALISM  
VOLUME II: RIGHTS AND LIBERTIES  
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Supplementary Material

Chapter 11: The Contemporary Era – Equality/Gender

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

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*In the fall of 1994, Christy Brzonkala, a freshman at Virginia Tech, was allegedly raped by Antonio Morrison and James Crawford, both members of the Virginia Tech football team. Brzonkala later suffered depression and filed a complaint in 1995 with the university against Morrison and Crawford but did not pursue criminal charges. The university's disciplinary committee found insufficient evidence against Crawford but found Morrison guilty of sexual assault and suspended him for two semesters. When Morrison threatened a legal challenge to the sentence, a second hearing was conducted during the summer which found him guilty only of "using abusive language" but again imposed a two-semester suspension. Given the terms of the conviction, the university senior administration overturned the sentence as excessive in comparison to others convicted of similar offenses. When Brzonkala read in the newspapers that Morrison would be returning to campus in the fall, she withdrew from the university.*

*In December 1995, Brzonkala filed suit in federal district court against Crawford, Morrison, and Virginia Tech. The suits against Crawford and Morrison were based on the civil remedy provision of the Violence Against Women Act (VAWA). VAWA was passed by the Democratic Congress as part of the Crime Control Act of 1994. Following the model of many civil rights statutes, VAWA provided a federal civil remedy for victims of "violence motivated by gender." Under VAWA, such victims could sue in federal court those who commit a crime of violence motivated by gender for compensatory damages, punitive damages and other forms of relief. The act was controversial, both in analogizing violence against women to civil rights violations and for expanding federal authority over such areas of traditional state concern as rape and domestic violence, but with unified Democratic control of Congress VAWA easily passed. The district court ruled that that Congress lacked the authority under either the commerce clause or Section 5 of the Fourteenth Amendment to provide for such a suit. A divided circuit court panel reversed the district court, but the full circuit court meeting en banc affirmed the district court in a divided vote.*

*The Supreme Court by a 5-4 vote affirmed the circuit court's ruling. Chief Justice Rehnquist's majority opinion rejected both the commerce clause and Section 5 justifications for congressional authority to pass VAWA. How deferential should the courts be to congressional definition of rights under the Fourteenth Amendment? How badly would states have to fail in their duty to protect women from crimes in order to justify federal intervention under the Fourteenth Amendment, according to the majority? Why did the dissent dispute the Chief Justice's crucial conclusions? Who had the better of the argument?*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds. See *United States v. Lopez* (1995) (Kennedy, J., concurring). . . . With this presumption of constitutionality in mind, we turn to the question whether § 13981 falls within Congress' power under Article I, § 8, of the Constitution. . . .

As we discussed at length in *Lopez*, our interpretation of the Commerce Clause has changed as our Nation has developed. . . . We need not repeat that detailed review of the Commerce Clause's history here; it suffices to say that, in the years since *NLRB v. Jones & Laughlin Steel Corp.* (1937) . . . , Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause

than our previous case law permitted. . . .

*Lopez* emphasized, however, that even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds.

...

With these principles underlying our Commerce Clause jurisprudence as reference points, the proper resolution of the present cases is clear. Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature. . . .

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. . . [T]he concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. . . . The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

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Because we conclude that the Commerce Clause does not provide Congress with authority to enact § 13981, we address petitioners' alternative argument that the section's civil remedy should be upheld as an exercise of Congress' remedial power under Section Five of the Fourteenth Amendment.

The principles governing an analysis of congressional legislation under Section Five are well settled. Section Five states that Congress may "'enforce,' by 'appropriate legislation' the constitutional guarantee that no State shall deprive any person of 'life, liberty or property, without due process of law,' nor deny any person 'equal protection of the laws.'" *City of Boerne v. Flores* (1997). . . .

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

As our cases have established, state-sponsored gender discrimination violates equal protection unless it serves "important governmental objectives and . . . the discriminatory means employed" are "substantially related to the achievement of those objectives." . . . However, the language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government. See *Flores*. . . . Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action. The principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. . . .

Shortly after the Fourteenth Amendment was adopted, we decided . . . the *Civil Rights Cases* (1883). In those consolidated cases, we held that the public accommodation provisions of the Civil Rights

Act of 1875, which applied to purely private conduct, were beyond the scope of the Section Five enforcement power. . . .

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

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

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

In the present cases, for example, § 13981 visits no consequence whatever on any Virginia public official involved in investigating or prosecuting Brzonkala's assault. The section is, therefore, unlike any of the Section Five remedies that we have previously upheld. . . .

Section 13981 is also different from these previously upheld remedies in that it applies uniformly throughout the Nation. Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States. By contrast, the Section Five remedy upheld in *Katzenbach v. Morgan* (1966) was directed only to the State where the evil found by Congress existed, and in *South Carolina v. Katzenbach* (1966) the remedy was directed only to those States in which Congress found that there had been discrimination.

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

Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault. But Congress' effort in § 13981 to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under Section Five of the Fourteenth Amendment. If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States.

JUSTICE THOMAS, concurring.

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JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The Court says both that it leaves Commerce Clause precedent undisturbed and that the Civil Rights Remedy of the Violence Against Women Act of 1994, 42 U.S.C. § 13981, exceeds Congress's power

under that Clause. I find the claims irreconcilable and respectfully dissent.

Our cases, which remain at least nominally undisturbed, stand for the following propositions. Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. See *Wickard v. Filburn* (1942). . . . The fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. . . . Applying those propositions in these cases can lead to only one conclusion.

One obvious difference from *United States v. Lopez*, is the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce. . . .

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The evidence as to rape was similarly extensive [as to domestic violence], supporting these conclusions:

"[The incidence of] rape rose four times as fast as the total national crime rate over the past 10 years." . . .

"According to one study, close to half a million girls now in high school will be raped before they graduate." . . .

...  
"Almost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity." . . .

Based on the data thus partially summarized, Congress found that

[C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce . . . [.] by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products. . . .

Congress thereby explicitly stated the predicate for the exercise of its Commerce Clause power. Is its conclusion irrational in view of the data amassed? True, the methodology of particular studies may be challenged, and some of the figures arrived at may be disputed. But the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned. . . .<sup>1</sup>

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JUSTICE BREYER, with whom JUSTICE STEVENS joins, and with whom JUSTICE SOUTER and JUSTICE GINSBURG join in part, dissenting.

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. . . [I]n a world where most everyday products or their component parts cross interstate boundaries, Congress will frequently find it possible to redraft a statute using language that ties the regulation to the interstate movement of some relevant object, thereby regulating local criminal activity or, for that matter, family affairs. Although this possibility does not give the Federal Government the power to regulate everything, it means that any substantive limitation will apply randomly in terms of

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<sup>1</sup> It should go without saying that my view of the limit of the congressional commerce power carries no implication about the wisdom of exercising it to the limit. I and other Members of this Court appearing before Congress have repeatedly argued against the federalization of traditional state crimes and the extension of federal remedies to problems for which the States have historically taken responsibility and may deal with today if they have the will to do so. . . . [footnote repositioned from original, eds.]

the interests the majority seeks to protect. How much would be gained, for example, were Congress to reenact the present law in the form of “An Act Forbidding Violence Against Women Perpetrated at Public Accommodations or by Those Who Have Moved in, or through the Use of Items that Have Moved in, Interstate Commerce”? Complex Commerce Clause rules creating fine distinctions that achieve only random results do little to further the important federalist interests that called them into being. That is why modern (pre-*Lopez*) case law rejected them. See *Wickard v. Filburn* (1942); *United States v. Darby* (1941); *Jones & Laughlin Steel Corp.* (1937).

...

I would also note that Congress, when it enacted the statute, followed procedures that help to protect the federalism values at stake. It provided adequate notice to the States of its intent to legislate in an “area of traditional state regulation.” And in response, attorneys general in the overwhelming majority of States (38) supported congressional legislation, telling Congress that “our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds.” . . .

Moreover, as Justice Souter has pointed out, Congress compiled a “mountain of data” explicitly documenting the interstate commercial effects of gender-motivated crimes of violence. After considering alternatives, it focused the federal law upon documented deficiencies in state legal systems. And it tailored the law to prevent its use in certain areas of traditional state concern, such as divorce, alimony, or child custody. . . .

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Given my conclusion on the Commerce Clause question, I need not consider Congress’ authority under Section Five of the Fourteenth Amendment. Nonetheless, I doubt the Court’s reasoning rejecting that source of authority. . . .

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

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