

# Brzonkala v. Va. Polytechnic Inst. & State Univ.

United States Court of Appeals for the Fourth Circuit

March 3, 1998, Argued ; March 5, 1999, Decided

No. 96-1814, No. 96-2316

## Reporter

169 F.3d 820 \*; 1999 U.S. App. LEXIS 3457 \*\*

CHRISTY BRZONKALA, Plaintiff-Appellant, v. VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY; ANTONIO J. MORRISON; JAMES LANDALE CRAWFORD, Defendants-Appellees, and CORNELL D. BROWN; WILLIAM E. LANDSIDLE, in his capacity as Comptroller of the Commonwealth, Defendants. LAW PROFESSORS; VIRGINIANS ALIGNED AGAINST SEXUAL ASSAULT; THE ANTI-DEFAMATION LEAGUE; CENTER FOR WOMEN POLICY STUDIES; THE DC RAPE CRISIS CENTER; EQUAL RIGHTS ADVOCATES; THE GEORGETOWN UNIVERSITY LAW CENTER SEX DISCRIMINATION CLINIC; JEWISH WOMEN INTERNATIONAL; THE NATIONAL ALLIANCE OF SEXUAL ASSAULT COALITIONS; THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE; THE NATIONAL COALITION AGAINST SEXUAL ASSAULT; THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE; NATIONAL ORGANIZATION FOR WOMEN; NORTHWEST WOMEN'S LAW CENTER; THE PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, INCORPORATED; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; VIRGINIA NOW LEGAL DEFENSE AND EDUCATION FUND, INCORPORATED; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; INDEPENDENT WOMEN'S FORUM; WOMEN'S FREEDOM NETWORK, Amici Curiae. UNITED STATES OF AMERICA, Intervenor-Appellant, and CHRISTY BRZONKALA, Plaintiff, v. ANTONIO J. MORRISON; JAMES LANDALE CRAWFORD, Defendants-Appellees, and VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY; CORNELL D. BROWN; WILLIAM E. LANDSIDLE, in his capacity as Comptroller of the Commonwealth, Defendants. LAW PROFESSORS; VIRGINIANS ALIGNED AGAINST SEXUAL ASSAULT; THE ANTI-DEFAMATION LEAGUE; CENTER FOR WOMEN POLICY STUDIES; THE DC RAPE CRISIS CENTER; EQUAL RIGHTS ADVOCATES; THE GEORGETOWN UNIVERSITY LAW CENTER SEX DISCRIMINATION CLINIC; JEWISH WOMEN INTERNATIONAL; THE NATIONAL ALLIANCE OF SEXUAL ASSAULT COALITIONS; THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE; THE NATIONAL COALITION AGAINST SEXUAL ASSAULT; THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE; NATIONAL ORGANIZATION FOR WOMEN; NORTHWEST WOMEN'S LAW CENTER; THE PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, INCORPORATED; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; VIRGINIA NOW LEGAL DEFENSE AND EDUCATION FUND, INCORPORATED; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; INDEPENDENT WOMEN'S FORUM; WOMEN'S FREEDOM NETWORK, Amici Curiae.

**Notice:** [\*\*1] [EDITOR'S NOTE: PART 1 OF 5. THIS DOCUMENT HAS BEEN SPLIT INTO MULTIPLE PARTS ON LEXIS TO ACCOMMODATE ITS LARGE SIZE. EACH PART CONTAINS THE SAME LEXIS CITE.]

**Prior History:** Appeals from the United States District Court for the Western District of Virginia, at Roanoke. Jackson L. Kiser, Senior District Judge. (CA-95-1358-R).

**Disposition:** AFFIRMED.

**Counsel:** ARGUED: Mark Bernard Stern, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Julie Goldscheid, NOW LEGAL DEFENSE & EDUCATION FUND, New York, New York; Deborah L. Brake, NATIONAL WOMEN'S LAW CENTER, Washington, D.C., for Appellants. William Henry Hurd, Senior [\*\*2] Counsel to the Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia; Michael E. Rosman, CENTER FOR INDIVIDUAL RIGHTS, Washington, D.C., for Appellees. ON BRIEF: Frank W.

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Hunger, Assistant Attorney General, Robert P. Crouch, Jr., United States Attorney, Stephen W. Preston, Deputy Assistant Attorney General, Alisa B. Klein, Anne M. Lobell, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant United States; Martha F. Davis, NOW LEGAL DEFENSE & EDUCATION FUND, New York, New York; Neena K. Chaudry, Marcia D. Greenberger, NATIONAL WOMEN'S LAW CENTER, Washington, D.C.; Eileen Wagner, Richmond, Virginia, for Appellant Brzonkala. Mark L. Earley, Attorney General of Virginia, William E. Thro, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia; Jerry D. Cain, Special Assistant Attorney General, Kay Heidbreder, Special Assistant Attorney General, VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY, Blacksburg, Virginia, for Appellee VPI. Hans F. Bader, CENTER FOR INDIVIDUAL RIGHTS, Washington, D.C.; W. David Paxton, M. Christina Floyd, GENTRY, LOCKE, RAKES & MOORE, Roanoke, Virginia, for Appellee Morrison; **[\*\*3]** Joseph Graham Painter, Jr., PAINTER, KRATMAN, SWINDELL & CRENSHAW, Blacksburg, Virginia, for Appellee Crawford. Sara D. Schotland, Amy W. Schulman, CLEARY, GOTTlieb, STEEN & HAMILTON, Washington, D.C., for Amici Curiae Law Professors. Janice Redinger, VIRGINIANS ALIGNED AGAINST SEXUAL ASSAULT, Charlottesville, Virginia; Minna J. Kotkin, Sara Kay, Federal Litigation Program, BLS LEGAL SERVICES CORPORATION, Brooklyn, New York, for Amici Curiae Virginians Aligned, et al. E. Duncan Getchell, Jr., J. William Boland, Robert L. Hodges, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Richmond, Virginia, for Amicus Curiae Independent Women's Forum. Michael D. Weiss, LAWSON, WEISS & DANZIGER, Houston, Texas, for Amicus Curiae Women's Freedom Network.

**Judges:** Before WILKINSON, Chief Judge, and WIDENER, MURNAGHAN, ERVIN, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, Circuit Judges. Affirmed by published opinion. Judge Luttig wrote the opinion, in which Chief Judge Wilkinson and Judges Widener, Wilkins, Niemeyer, Hamilton, and Williams joined. Chief Judge Wilkinson wrote a concurring opinion. Judge Niemeyer wrote a concurring opinion. Judge Motz wrote a dissenting opinion, in which Judges **[\*\*4]** Murnaghan, Ervin, and Michael joined.

**Opinion by:** LUTTIG

## Opinion

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**[\*825]** LUTTIG, Circuit Judge:

We the People, distrustful of power, and believing that government limited and dispersed **[\*826]** protects freedom best, provided that our federal government would be one of enumerated powers, and that all power unenumerated would be reserved to the several States and to ourselves. Thus, though the authority conferred upon the federal government be broad, it is an authority constrained by no less a power than that of the People themselves. "That these limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 176, 2 L. Ed. 60 (1803). These simple truths of power bestowed and power withheld under the Constitution have never been more relevant than in this day, when accretion, if not actual accession, of power to the federal government seems not only unavoidable, but even expedient.

These foundational principles of our constitutional government dictate **[\*\*5]** resolution of the matter before us. For we address here a congressional statute, Subtitle C of the Violence Against Women Act, 42 U.S.C. § 13981, that federally punishes noncommercial intrastate violence, but is defended under Congress' power "to regulate *commerce* . . . among the several States," U.S. Const. art. I, § 8, cl. 3, and that punishes private conduct, but is defended under Congress' power "to enforce, by appropriate legislation" the Fourteenth Amendment guarantee that "no *State* shall . . . deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, §§ 1, 5. Such a statute, we are constrained to conclude, simply cannot be reconciled with the principles of limited federal government upon which this Nation is founded. As even the United States and appellant Brzonkala appear resignedly to recognize, the Supreme Court's recent decisions in *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), and *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), **[\*\*6]** which forcefully reaffirmed these most basic of constitutional principles, all but preordained as much. Enacted by the Congress assertedly in exercise of its powers both to regulate interstate commerce and to enforce the prohibitions of

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the Fourteenth Amendment, section 13981 was initially defended by appellants in the wake of *United States v. Lopez* primarily as a valid exercise, not of Congress' Commerce Clause power, but of Congress' power under Section 5 to enforce the Fourteenth Amendment's restrictions on the States -- notwithstanding the statute's regulation of conduct purely private. Confronted by the Supreme Court's intervening decision in *City of Boerne v. Flores* during this appeal, the appellants 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. And, finally, in the end, appellants are forced by these two plainly controlling decisions to defend the statute on little more than wistful assertions that *United States v. Lopez* is an aberration of no **[\*\*7]** significance and that the established precedents upon which *City of Boerne v. Flores* rested -- *United States v. Harris*, 106 U.S. 629, 27 L. Ed. 290, 1 S. Ct. 601 (1883), and the *Civil Rights Cases*, 109 U.S. 3, 27 L. Ed. 835, 3 S. Ct. 18 (1883) -- should be disregarded as insufficiently "modern" to define any longer the reach of Congress' power under the Fourteenth Amendment.

Appreciating the precariousness in which appellants find themselves by virtue of the intervening decisions in *Lopez* and *City of Boerne*, but accepting these recent and binding authorities as the considered judgments of a Supreme Court that has incrementally, but jealously, enforced the structural limits on congressional power that inhere in Our Federalism, see *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 2376-78, 138 L. Ed. 2d 914 (1997); *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 2162, 2168, 2172, 138 L. Ed. 2d 624 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44, 64-65, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996); *United States v. Lopez*, 514 U.S. 549, 552-53, 556-57, 567-68, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995); **[\*\*8]** *New York v. United States*, 505 U.S. 144, 155-57, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992), we hold today that section 13981 exceeds Congress' power under both the Commerce Clause of Article I, Section 8, and the Enforcement Clause of Section 5 of the Fourteenth Amendment.

To otherwise hold would require not only that we, as the dissent would do, disclaim all responsibility to "determine whether the Congress has exceeded limits allowable in **[\*827]** reason for the judgment which it has exercised," *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 650, 88 L. Ed. 1509, 64 S. Ct. 1196 (1944), and embrace the view of federalism articulated by Justice Blackmun over passionate denunciations by the Chief Justice and Justice O'Connor in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1984), but that we extend the reach of Section 5 of the Fourteenth Amendment beyond a point ever contemplated by the Supreme Court since that Amendment's ratification over a century and a quarter ago. These things we simply cannot do.

I.

In response to the problems of domestic violence, sexual **[\*\*9]** assault, and other forms of violent crime against women, Congress enacted the Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1796, 1902-55. This legislation represents a multifaceted federal response to the problem of violence against women and includes a host of provisions, only one of which we address today.

VAWA's provisions are too numerous to discuss exhaustively here. Among its many provisions not at issue, VAWA provides extensive federal funding -- initially \$ 1.6 billion, but subject to subsequent enhancement -- to the States to help them curtail violence against women through law enforcement efforts, 42 U.S.C. § 3796gg, education and prevention programs, *id.* § 300w-10, and the maintenance of battered women's shelters, *id.* § 10402(a); it criminalizes interstate acts of domestic violence, 18 U.S.C. § 2261, as well as the interstate violation of protective orders against violence and harassment, *id.* § 2262; it imposes various sentencing enhancements for existing federal crimes motivated by gender animus, 28 U.S.C. § 994, restitution to the victims **[\*\*10]** of violent crime against women, 18 U.S.C. §§ 2248, 2259, 2264, and other remedial provisions governing those who commit violent crimes against women, see, e.g., *id.* § 2247 (repeat offenders); *id.* § 2263 (pretrial release of defendants); it amends the Federal Rules of Evidence by adopting a rape shield provision to exclude from sexual assault trials evidence of a victim's prior sexual behavior, 28 U.S.C. § 2074; Fed. R. Evid. 412; and it mandates that all States give Full Faith and Credit to the protective orders of every other State, 18 U.S.C. § 2265.

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In addition to these provisions, however, VAWA establishes, in the single section at issue before us today, a federal substantive right in "all persons within the United States . . . to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). See *infra* Part II. And, to enforce this substantive right, section 13981(c) creates a private cause of action against any "person . . . who commits a crime of violence motivated [\*\*11] by gender," 42 U.S.C. § 13981(c), and allows any party injured by such a crime to obtain compensatory damages, punitive damages, and injunctive, declaratory, or other appropriate relief, *id.*

Plaintiff-appellant Christy Brzonkala brought the instant action under section 13981 in federal district court against defendants-appellees Antonio Morrison and James Crawford. As is relevant here, she alleged as follows.<sup>1</sup> Brzonkala was a student at Virginia Polytechnic Institute at the time of the incident at issue. Morrison and Crawford were students at Virginia Polytechnic Institute at the same time and were members of the school's football team. Brzonkala alleges that soon after she met Morrison and Crawford, the two defendants pinned her down on a bed in her dormitory and forcibly raped her. J.A. at 71-72. Afterwards, Morrison told Brzonkala, "You better not have any f\*\*\*ing diseases." *Id.* at 72. And, subsequently, Morrison announced publicly in the dormitory's dining hall, "I like to get girls drunk and f\*\*\* the s\*\*\* out of them." *Id.* at 73. In her complaint, Brzonkala alleges, *inter alia*, that these acts by Morrison and Crawford violated her right [\*\*12] under 42 U.S.C. § 13981(b) to be free from gender-motivated crimes of violence.<sup>2</sup>

[\*\*13] [\*\*828] Morrison and Crawford moved to dismiss Brzonkala's claim on the grounds that the complaint failed to state a claim under section 13981 and that, even if the complaint did state such a claim, Congress was without constitutional authority to enact section 13981. The United States intervened to defend the constitutionality of section 13981 under the Commerce Clause and Section 5 of the Fourteenth Amendment -- the two sources of power expressly invoked by Congress in enacting section 13981. See 42 U.S.C. § 13981(a) (declaring statute adopted "pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution"). The government, joined by Brzonkala, defended section 13981 as an appropriate exercise of Congress' power to regulate interstate commerce on the ground that violence against women is a widespread social problem with ultimate effects on the national economy. They defended section 13981 as an exercise of Section 5 of the Fourteenth Amendment on the grounds that bias and discrimination against women in the state criminal [\*\*14] justice systems often deny legal redress to the victims of gender-motivated crimes of violence and that such denials may violate the Equal Protection Clause.

In a thorough opinion, the district court concluded that Brzonkala stated a statutory claim against defendant Morrison, but held that Congress was without authority under the Constitution to enact section 13981. 935 F. Supp. 779 (W.D. Va. 1996). With respect to whether section 13981 could be justified under Congress' power "to regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, the district court meticulously canvassed the reasoning of *Lopez*, the Supreme Court's recent decision that invalidated the Gun-Free School Zones Act of 1990 as an unconstitutional exercise of Congress' Commerce Clause power. 935 F. Supp. at 785-88. The district court concluded that section 13981, like the Gun-Free School Zones Act, regulated neither the channels of interstate commerce nor the instrumentalities of interstate commerce, and thus could be upheld, if at all, only as a regulation of an activity that

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<sup>1</sup> This statement of facts is drawn almost verbatim from the statement of facts set forth by the United States and adopted, for purposes of this appeal, by appellees Morrison and Crawford. Br. of Intervenor United States at 16-17; Br. of Appellees at 1 (adopting statement of facts set forth by the United States).

<sup>2</sup> Appellant Brzonkala also contends that the district court improperly dismissed her claims against Virginia Polytechnic Institute under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, in which she assertedly alleged both disparate treatment and hostile environment causes of action. We do not question the district court's conclusion that Brzonkala failed to state a claim alleging disparate treatment, and we thus affirm that holding and the reasoning upon which it was based. With respect to the hostile environment claim, the Supreme Court of the United States has recently agreed to decide whether student on student sexual harassment is actionable at all under Title IX. See *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997), *cert. granted*, 524 U.S. 980, 141 L. Ed. 2d 789, 119 S. Ct. 29, 67 U.S.L.W. 3187 (U.S. 1998). Because the Court's decision in *Davis* will almost certainly prove informative of whether Brzonkala has sufficiently pled such a cause of action, if not determinative of that asserted cause of action as a matter of law, we vacate the district court's dismissal of the hostile environment cause of action and remand with instructions to the district court to hold this claim in abeyance pending the Supreme Court's disposition of *Davis*.

"substantially affects" interstate commerce. *Id.* at 786. Applying **[\*\*15]** *Lopez's* "substantially affects" test to section 13981, the district court concluded that, like the Gun-Free School Zones Act, section 13981 could not be sustained under the Commerce Clause both because it regulated noneconomic activity (private acts of gender-motivated violence) without any jurisdictional requirement limiting its application only to particular acts of violence that in fact affect interstate commerce and because the practical implications of concluding that gender-motivated violence was sufficiently related to interstate commerce to justify its regulation would be to grant Congress power to regulate virtually the whole of criminal and domestic relations law. *Id.* at 788-93. The district court reasoned that these failings rendered section 13981 materially indistinguishable from the Gun-Free School Zones Act invalidated in *Lopez*, and that the asserted differences between section 13981 and the Gun-Free School Zones Act -- that Congress made more extensive findings with respect to section 13981, that section 13981 imposes only civil and not criminal liability, and that there are arguably slightly "fewer steps of causation" in the chain from gender-motivated **[\*\*16]** violence to an effect on interstate commerce -- were, essentially, superficial distinctions in light of the Supreme Court's controlling reasoning in *Lopez*. *Id.*

**[\*829]** Turning to Section 5, the district court then concluded that section 13981 was not "appropriate legislation" "to enforce" the guarantee that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §§ 1, 5. In this regard, the district court concluded, first, that section 13981, which regulates private acts of gender-motivated violence, could not be reconciled with controlling Supreme Court precedent holding that Congress may not regulate purely private conduct under Section 5. 935 F. Supp. at 793-94 (citing, among others, *Civil Rights Cases*, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883)). Second, the district court reasoned that, even if Congress could regulate some private conduct under Section 5 as a means of remedying violations **[\*\*17]** of the Equal Protection Clause by the States, section 13981 was nonetheless invalid because it was not a closely tailored means to that end:

[Section 13981] is tailored to remedy conduct other than the conduct giving rise to the equal protection concern. [Section 13981] compensates victims for the violence directed against them because of their gender, not for the states' denial of equal protection. . . . The statute is overbroad: many women who do not suffer Fourteenth Amendment violations at the hands of the state system would still have a [section 13981] claim. A woman in a state with fair rape laws who is raped and whose rapist receives the maximum sentence may still have a [section 13981] claim. That woman may receive compensation via [section 13981] despite having suffered no denial of her equal protection rights. [Section 13981] is also too narrow: many women who suffer clear violations of their Fourteenth Amendment rights would not have a [section 13981] remedy, because the crime was not based on the woman's gender. These women would not receive any compensation despite the fact that the states clearly denied them equal protection of the laws.

**[\*\*18]** *Id.* at 800. Finally, the district court concluded that section 13981 was not even *aimed* at remedying violations of the Equal Protection Clause by the States, primarily because it regulates the perpetrators of gender-motivated violence rather than the States themselves or those acting under color of state law. Accordingly, the district court concluded that "no reasonable possibility exists that, in enacting [section 13981], Congress has enforced the Fourteenth Amendment mandate that 'no State shall . . . deny to any person within its jurisdiction the equal protection of the laws,'" *id.* at 801 (quoting U.S. Const. amend. XIV, § 1), and that "no reasonable possibility exists that [section 13981] will remedy any legitimate Fourteenth Amendment concern." *Id.*

The government and Brzonkala appealed this decision, and, on December 23, 1997, a divided panel of this court reversed the judgment of the district court, holding that section 13981 was a legitimate exercise of Congress' power under the Commerce Clause. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997). By order dated February 2, 1998, the full court vacated the **[\*\*19]** judgment and opinion of that panel, and, on March 3, 1998, we reheard the case *en banc*.

II.

As a threshold matter, we must determine whether Brzonkala has stated a claim under section 13981 sufficient to withstand appellees' motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. We hold that Brzonkala has properly stated a claim under section 13981 against appellee Morrison. We do not reach, because it

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is unnecessary to do so, the question of whether her complaint properly states a section 13981 claim against appellee Crawford.

Section 13981 provides a civil remedy to parties injured by "a crime of violence motivated by gender." 42 U.S.C. § 13981(c). The statute defines the term "crime of violence" by reference to existing state and federal law. *Id.* § 13981(d)(2) (defining the term to include "an act or series of acts that would constitute a felony" "and that would come within the meaning of State or Federal offenses"). Such a crime is defined to be "motivated by gender" for the purposes of the statute when that crime is "committed because of gender or on the basis of gender, and due, at least in part, to an animus based **[\*\*20]** on the victim's gender." *Id.* § 13981(d)(1); see also *id.* § 13981(e)(1) (no cause of action **[\*830]** "for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender").

Crawford and Morrison concede that Brzonkala's complaint alleges that they have committed "crime[s] of violence" within the meaning of the statute. *Cf.* J.A. at 96-97 (complaint alleging that Morrison and Crawford's conduct toward Brzonkala violated Virginia criminal law in several respects). They challenge, however, Brzonkala's allegation that they acted "because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1).

Brzonkala has explicitly alleged that the defendants-appellees' actions "were motivated wholly by discriminatory animus toward her gender and were not random acts of violence." J.A. at 24. As it relates to Morrison, this allegation of gender motivation is supported and corroborated by Brzonkala's allegation that Morrison stated publicly that he "liked to get girls drunk and f\*\*\* the s\*\*\* out of them. **[\*\*21]**" *Id.* at 20. Although these allegations do not necessarily compel the conclusion that Morrison acted from animus toward women as a class, and might not even be sufficient, without more, to defeat a motion either for summary judgment or for a directed verdict, we hold that they are sufficient to defeat Morrison's motion to dismiss.<sup>3</sup>

So concluding, we are faced directly, as appellants urge, with the question whether section 13981 represents a constitutional exercise of Congress' **[\*\*22]** power under either the Commerce Clause of Article I, Section 8, or Section 5 of the Fourteenth Amendment.

III.

After the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), but before the Court's decision two years ago in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), the appellants defended section 13981 primarily as a valid exercise of Congress' enforcement authority under Section 5 of the Fourteenth Amendment. Since the decision in *City of Boerne*, the appellants have resorted to defending the section primarily as a valid exercise of Congress' power under the Commerce Clause. Therefore, we address ourselves first to this defense of the statute.

In *United States v. Lopez*, the Supreme Court held that Congress had exceeded its power to regulate interstate commerce in enacting the Gun-Free School Zones Act of 1990 ("GFSZA"), 18 U.S.C. § 922(q). In so holding, the Court reaffirmed that, although the Commerce Clause represents a broad grant of federal authority, that authority is not plenary, but subject to outer limits. **[\*\*23]** See, e.g., *Lopez*, 514 U.S. at 556-57, 567-68. And although the Court reaffirmed that congressional power under the Commerce Clause is not limited solely to the regulation of interstate commerce *per se*, but extends to laws governing activities sufficiently related to interstate commerce to render their regulation necessary and proper to the regulation of interstate commerce, the Court also substantially clarified the scope and the limits of Congress' Article I, Section 8 power. Under the principles articulated by the Court in *Lopez*, it

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<sup>3</sup> It is much less clear whether Brzonkala has properly stated a section 13981 claim against appellee Crawford, as Crawford is not alleged to have made statements like Morrison's. By concluding that Brzonkala has stated a claim against Morrison, however, we are forced to confront the question of whether section 13981 exceeds the scope of Congress' constitutional powers. Our resolution of that question, which we discuss below at Parts III-IV, renders unnecessary any decision as to whether Brzonkala has also stated a claim against Crawford.

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is evident that 42 U.S.C. § 13981, like the Gun-Free School Zones Act, does not regulate an activity sufficiently related to interstate commerce to fall even within the broad power of Congress under the Commerce Clause.

A.

In demarcating the limits of congressional power to regulate activities that do not themselves constitute interstate commerce, the Court in *Lopez* made clear that such power does not extend to the **[\*\*24]** regulation of activities that merely have some relationship with or effect upon interstate commerce, but, rather, extends only, as is relevant here, to those activities "having a *substantial* relation **[\*831]** to interstate commerce, . . . i.e., those activities that *substantially* affect interstate commerce." *Lopez*, 514 U.S. at 558-59 (emphases added); *accord id.* at 559 ("Our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." (citations omitted)).<sup>4</sup>

**[\*\*25]** Furthermore, the Court made explicit that whether an activity "substantially affects" interstate commerce such that it may be regulated under the Commerce Clause "is ultimately a judicial rather than a legislative question." *Id.* at 557 n.2 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964) (Black, J., concurring)). Thus, the Court not only reaffirmed that the limits of the Commerce Clause are judicially enforceable, *see also* 514 U.S. at 557 ("The power to regulate commerce, though broad indeed, has limits that the Court has ample power to enforce." (internal quotation and citation omitted)); *id.* at 566 (referring to "judicially enforceable outer limits" of the Commerce Clause); *id.* at 580 (Kennedy, J., concurring) (discussing Court's "duty to recognize meaningful limits on the commerce power of Congress"), it also made clear, as its analysis confirms, that the "substantially affects" test does not contemplate a mere factual or empirical inquiry, **[\*\*26]** but must be understood, in the final analysis, as a *legal* test, and the phrase "substantially affects interstate commerce" as one of legal art.

In clarifying the content of this legal test, the Court specifically identified two types of laws that it had upheld as regulations of activities that substantially affect interstate commerce: (1) "regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce," *Lopez*, 514 U.S. at 561 (majority), and (2) regulations that include a jurisdictional element to ensure, "through case-by-case inquiry," that each specific application of the regulation involves activity that in fact affects interstate commerce, *id.*

The Court also emphasized that, any dictum in its previous cases notwithstanding, *see infra* Part III.E, it had never extended the substantially affects test to uphold the regulation of a noneconomic activity in the absence of a jurisdictional element, *see, e.g., id.* at 560 ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, **[\*\*27]** involved economic activity in a way that the possession of a gun in a school zone does not."); *id.* at 580 (Kennedy, J., concurring) ("Unlike the earlier cases to come before the Court here neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus."). And it confirmed that it was unwilling to follow "the broad language" in certain previous cases that had "suggested the possibility of additional expansion" of congressional

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<sup>4</sup> As the Court reaffirmed in *Lopez*, Congress may, under the Commerce Clause, "regulate the use of the channels of interstate commerce" and "regulate and protect the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities," in addition to regulating activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59. It is both clear and undisputed by the parties that § 13981, like the GFSZA,

is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can it be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce.

*Id.* at 559. Thus, § 13981 can be sustained under the Commerce Clause only if it constitutes "a regulation of an activity that substantially affects interstate commerce." *Id.*

authority under the Commerce Clause by extending that authority beyond the scope of its previous holdings, *Lopez*, 514 U.S. at 567 (majority) ("declining here to proceed any further"). Most importantly, the Court expressly held that because the Gun-Free School Zones Act "neither regulated a commercial [\*832] activity nor contained a requirement that the possession be connected in any way to interstate commerce," *id.*, "it exceeded the authority of Congress 'to regulate Commerce . . . among the several States . . .,'" *id.* at 551 (quoting U.S. Const. art. I, § 8, cl. 3) (ellipses in original). *Accord id.* at 567-68; [\*28] *cf. id.* at 561 ("[GFSZA] is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. . . . It cannot, *therefore*, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." (emphasis added)).

That the Court's focus on the failure of the Gun-Free School Zones Act either to regulate economic activity or to include a jurisdictional element was intended to demarcate the outer limits -- or, at the very least, the presumptive outer limits, *see infra* Part III.C -- of congressional power under the substantially affects test is explicitly confirmed throughout the majority and concurring opinions. *See, e.g., id.* at 566 ("Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having [\*29] judicially enforceable *outer limits*, congressional legislation under the Commerce Clause always will engender 'legal uncertainty.'" (emphasis added); *id.* at 573-74 (Kennedy, J., concurring) (listing certain prior cases as "examples of the exercise of federal power where commercial transactions were the subject of regulation" and noting that "these and like authorities are within the fair ambit of the Court's practical conception of commercial regulation and are not called in question by our decision today"). And such an understanding of the case follows inescapably, as well, from the enormous emphasis placed by the Court -- essentially ignored by both the appellants and the dissent -- on the "commercial concerns that are central to the Commerce Clause," *id.* at 583, and on the corresponding distinction between regulation of commercial or economic activities and regulation of noncommercial, noneconomic activities, *see, e.g., id.* at 627-28 (Breyer, J., dissenting) (recognizing the majority's "critical distinction between 'commercial' and non-commercial 'transaction[s]'"); *id.* at 608 (Souter, J., dissenting) (similar); [\*30] *cf. Hoffman v. Hunt*, 126 F.3d 575, 586-87 (4th Cir. 1997) ("The [*Lopez*] Court repeatedly pointed to a distinction between the regulation of, on the one hand, those activities that are commercial or economic in nature -- or arise out of or are connected with a commercial transaction -- and, on the other hand, those activities that are not. In the two instances in which it stated the controlling analysis, the Court focused on the fact that possession of a gun in a school zone was neither itself an economic or commercial activity nor had any connection with such activity.").<sup>5</sup>

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<sup>5</sup> Although appellants -- in six briefs -- confine their tepid acknowledgment of this distinction to a single sentence, *see infra* note 19 and accompanying text, it is impossible to ignore either the distinction drawn by the Court between regulations of economic and noneconomic activities or the critical importance of this distinction to the Court's analysis. *See, e.g., Lopez*, 514 U.S. at 559 (majority) ("We have upheld a wide variety of congressional Acts regulating intrastate *economic* activity where we have concluded that the activity substantially affected interstate commerce.") (emphasis added); *id.* at 560 ("Where *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained.") (emphasis added); *id.* at 561 ("[GFSZA] is not an essential part of a larger regulation of *economic* activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.") (emphasis added); *id.* at 565-66 ("We do not doubt that Congress has authority under the Commerce Clause to regulate numerous *commercial* activities that substantially affect interstate commerce and also affect the educational process.") (emphasis added); *id.* at 567 ("The possession of a gun in a local school zone is in no sense an *economic* activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.") (emphasis added); *id.* at 574 (Kennedy, J., concurring) ("*Stare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a *commercial* nature. . . . Congress can regulate in the *commercial* sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.") (emphases added); *id.* at 577 ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of *commercial* activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.") (emphasis added); *id.* at 583 (GFSZA regulates "an activity beyond the realm of *commerce* in the ordinary and usual sense of that term.") (emphasis added); *id.* (GFSZA could not be sustained "absent a stronger connection or identification with *commercial concerns that are central to the Commerce Clause*") (emphasis added); *id.* at 595 (Thomas, J., concurring) (distinguishing regulation of "intrastate *commerce* that substantially affects interstate



**[\*\*31] [\*833]** Accordingly, the dissent's assertion that the rule that Congress' power under the Commerce Clause is at least *presumptively* limited to regulating economic activities and promulgating regulations that include a jurisdictional element is an "unprecedented new rule of law," *see infra* at 184, is perplexing. For this is precisely the rule repeatedly articulated by the Supreme Court in *Lopez*, beginning with its holding in the very first paragraph of the opinion:

The [GFSZA] neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "to regulate Commerce . . . among the several states . . ." U.S. Const., Art. I, § 8, cl. 3.

*Lopez*, 514 U.S. at 551 (ellipses in original); *compare infra* at 185 (omitting second sentence and asserting that majority merely "contends" that this is the rule, while at the same time acknowledging that for this rule we rely upon quotation from *Lopez*). Far from constituting a "new" rule of law, this rule of law is the law of the land.<sup>6</sup>

**[\*\*32] B.**

In contrast to the statutes that the Supreme Court has previously upheld as permissible regulations under the substantially affects test, *see Lopez*, 514 U.S. at 560; *id.* at 580 (Kennedy, J., concurring), but analogously to the Gun-Free School Zones Act, *see id.* at 551 (majority), section 13981 neither regulates an economic activity nor contains a jurisdictional element. Accordingly, it cannot be sustained on the authority of *Lopez*, nor any of the Court's previous Commerce Clause holdings, as a constitutional exercise of Congress' power to regulate interstate commerce. **[\*834]**

1.

Appellants do not contend that section 13981 regulates economic activity. Nor could they. The statute does not regulate the manufacture, transport, or sale of goods, the provision of services, or any other sort of commercial transaction. Rather, it regulates violent crime motivated by gender animus. Not only is such conduct clearly not commercial, it is not even economic in any meaningful sense. While some violent crimes, such as robbery, may be economically motivated and thus at least arguably "economic" in a loose sense, section 13981 is not **[\*\*33]** directed toward such crimes, but instead is expressly limited to "crime[s] of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1); *accord*

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and foreign commerce" from regulation of "all activities that affect interstate commerce"; *id.* at 601 n.9 ("Commercial character is not only a natural but an inevitable ground of Commerce Clause distinction.") (emphasis added; internal quotation marks and citation omitted).

*This said, the dissent actually does completely ignore this distinction. In fact, so consciously does the dissent turn a blind eye to the Court's repeated distinction between regulations of economic and noneconomic activities that in its discursive treatment of Lopez the dissent does not as much as once -- not once -- cite to or quote even one of the score of references to this distinction in the Lopez opinions, except a single time inadvertently, see infra at 203 ("The representative effectiveness of state and federal governments would also be impaired if 'the Federal Government [were] to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities.'") (quoting Lopez, 514 U.S. at 577 (Kennedy, J., concurring)) (emphasis added). Only once (and then only in a quote from another case) does the dissent quote even the word "economic" from Lopez -- a word that appears repeatedly throughout the several opinions in that case.*

Cases subsequent to *Lopez*, of course, reaffirm that congressional power under the substantially affects test is limited primarily to the regulation of economic or commercial activities. *See, e.g., United States v. Robertson*, 514 U.S. 669, 671, 131 L. Ed. 2d 714, 115 S. Ct. 1732 (1995) (per curiam) ("The 'affecting commerce' test was developed in our jurisprudence to define the extent of Congress's power over purely intrastate *commercial* activities that none-the-less have substantial interstate effects.") (second emphasis added).

<sup>6</sup> Notwithstanding this seemingly unequivocal holding by the Court in *Lopez*, we do, nevertheless, proceed to address the possibility that Congress' power might well extend to regulating some noneconomic activities as well. *See infra* Part III.C. To the extent that we do consider such a possibility, *that* new rule would contemplate a congressional power under the Commerce Clause *broader*, rather than *narrower*, than that acknowledged by the Court in *Lopez*. Thus, in the end, the dissent's rhetorical ploy of charging us with creating a "new rule" rebounds upon itself with a vengeance.

*id.* § 13981(e)(1) ("Nothing in this section entitles a person to a cause of action . . . for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender . . ."); see also S. Rep. No. 103-138, at 52 n.61 (1993) (listing "absence of any other apparent motive" among circumstantial indicia of gender motivation). The statute thus explicitly excludes from its purview those violent crimes most likely to have an economic aspect -- crimes arising solely from economic motives -- and instead addresses violent crime arising from the irrational motive of gender animus, a type of crime relatively unlikely to have any economic character at all.

That section 13981 may, on occasion, reach activity that arises in part from economic motives does not transform it into a statute regulating economic activity. For *Lopez* made clear that **[\*\*34]** the Gun-Free School Zones Act regulated activity having "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms," *Lopez*, 514 U.S. at 561, even though a ban on guns in school zones would appear on its face to regulate activity considerably more likely to arise from economic motivation than is the narrowly circumscribed conduct regulated by section 13981, and even though, as the Supreme Court was doubtless aware, the defendant in *Lopez* itself admitted that his criminal conduct was economically motivated, see *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995) (defendant charged with violating the GFSZA by delivering a gun to a student admitted that he had been promised \$ 40 for the delivery).

Not only is violent crime motivated by gender animus not itself even arguably commercial or economic, it also lacks a meaningful connection with any particular, identifiable economic enterprise or transaction. *Cf. Hoffman*, 126 F.3d at 587-88 (finding that the Freedom of Access to Clinic Entrances **[\*\*35]** Act of 1994 regulated conduct -- protests -- that "is closely and directly connected with an economic activity" -- the operation of abortion clinics). Furthermore, unlike guns in school zones, violence arising from gender animus lacks even a meaningful connection with any specific activity that might arguably be considered economic or commercial in the loosest sense. *Compare Lopez*, 514 U.S. at 628-30 (Breyer, J., dissenting) (arguing that GFSZA regulated conduct closely connected with the operation of schools, an arguably commercial activity), *with Lopez*, 514 U.S. at 565 (majority) (rejecting Justice Breyer's characterization of schools as commercial).

Finally, section 13981 cannot be sustained as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561. Although section 13981 addresses private discrimination, and other laws address discrimination in clearly economic contexts, the federal patchwork of antidiscrimination laws can hardly be characterized as a single, interdependent regulatory scheme aimed at commercial **[\*\*36]** or economic activity. While such an understanding of section 13981 might be suggested by certain language in the committee reports, see, e.g., H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S. Code Cong. & Admin. News 1839, 1853 ("Current law provides a civil rights remedy for gender crimes committed in the workplace, but not for crimes of violence motivated by gender committed on the street or in the home."), section 13981 and Title VII -- the statute to which the report apparently refers -- **[\*835]** cannot reasonably be said to constitute a unified statutory scheme. While the two statutes share a general concern with discrimination, they address different kinds of conduct that only occasionally overlap -- gender-motivated violence on the one hand, employer discrimination on the other. Rather than creating an integrated regulatory scheme, each statute is obviously written without regard for the concerns that animate the other. For example, section 13981 provides a remedy for gender-motivated violence in the workplace as well as on the street or at home, without regard for the victim's actual or potential employment status, and directly against the violent **[\*\*37]** actor. Title VII, by contrast, provides a remedy only for gender discrimination that can be attributed to the fault of the employer, without regard to whether such discrimination takes the form of violent conduct, and it provides that remedy against the employer, who may or may not be the actual discriminator.

More importantly, even if the federal patchwork of antidiscrimination laws could be characterized as a single, interdependent regulatory scheme, section 13981 itself does not regulate even arguably economic activity. And it is clear from the context in which the *Lopez* Court observed that the Gun-Free School Zones Act was not "an essential part of a larger regulation of economic activity," *Lopez*, 514 U.S. at 561, that the Court did not intend by this statement to authorize the regulation of activity lacking any meaningful economic nexus pursuant to a comprehensive statutory scheme that also regulates economic activity. Rather, it is plain that the Court's language references its discussion of *Wickard v. Filburn* in the preceding paragraph, and clarifies the constitutional basis of that decision. See *id.* at 560-

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61 (discussing *Wickard v. Filburn*, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942)). **[\*\*38]** As the Court explained, *Wickard*, which it characterized as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," 514 U.S. at 560, upheld the application to homegrown wheat of a statute "designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices." *Id.* Although the wheat at issue was not produced for sale, and therefore its production "might not be regarded as commerce" in the strictest sense, *Wickard*, 317 U.S. at 125 (*quoted in Lopez*, 514 U.S. at 556), it was produced for human consumption, directly satisfying needs that would otherwise be filled by purchase or other commercial transaction, and was thus clearly economic in a general sense, *see Lopez*, 514 U.S. at 560 ("Even *Wickard* . . . involved economic activity in a way that the possession of a gun in a school zone does not."). The Court's characterization of *Wickard* as a case involving economic activity thus makes explicit the Supreme Court's relatively broad understanding of such activity. *Id.* at 561 **[\*\*39]** (economic activity includes not just commercial transactions *per se*, but also "activities that arise out of or are connected with a commercial transaction"); *see also id.* at 573-74 (Kennedy, J., concurring) (discussing Court's "practical conception of commercial regulation"); *id.* at 574 (discussing "imprecision of content-based boundaries" and rejecting narrow "18th-century" understanding of commerce). And the Court's discussion reaffirms that when Congress enacts a general statutory framework regulating economic activity, its power is not limited to the regulation only of interstate economic activity, but extends to the regulation of purely intrastate *economic* activity as well. *Cf. United States v. Robertson*, 514 U.S. 669, 671, 131 L. Ed. 2d 714, 115 S. Ct. 1732 (1995) (per curiam) ("The 'affecting commerce' test was developed in our jurisprudence to define the extent of Congress's power over purely intrastate *commercial* activities that nonetheless have substantial interstate effects.") (second emphasis added); *Lopez*, 514 U.S. at 559 ("We have upheld a wide variety of *intrastate economic* activity **[\*\*40]** where we have concluded that activity substantially affected *interstate* commerce." (emphases added)). But the decision does not, in such circumstances, authorize the regulation of intrastate conduct falling outside even the Court's relatively generous conception of economic activity.<sup>7</sup>

**[\*\*41]** **[\*836]** It follows, then, that section 13981, even more clearly than the Gun-Free School Zones Act struck down in *Lopez*, does not fall "within the fair ambit of the Court's practical conception of commercial regulation," *Lopez*, 514 U.S. at 573-74 (Kennedy, J., concurring), but is, rather, a "statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms," *Lopez*, 514 U.S. at 561 (majority). To hold otherwise would divest the words 'commerce' and 'economic' of any real meaning. *Cf. id.* at 565 (rejecting definition of "commercial" activity broad enough to encompass the operation of schools as "lacking any real limits because, depending on the level of generality, any activity can be looked upon as commercial"). Accordingly, section 13981 cannot be sustained on the authority of cases such as *Wickard*, which have upheld "regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* at 561.

2.

Similarly, and as appellants **[\*\*42]** concede, section 13981 does not have an "express jurisdictional element which might limit its reach to a discrete set of [gender-motivated violent crimes] that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562. Although the criminal statutes enacted by Congress as part of the Violence Against Women Act predicate liability on the crossing of state lines or the entering or leaving of Indian country, *see* 18 U.S.C. § 2261 (interstate domestic violence); *id.* § 2262 (interstate violation of a protective order), section 13981 includes no similar jurisdictional requirement, *see* 42 U.S.C. § 13981(b)-(c) (extending cause of action

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<sup>7</sup> The Court's reaffirmation of *Wickard* in *Lopez* also distinguishes the present case from *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995), in which we upheld the federal prohibition on the manufacture of marijuana, even as applied to manufacture for personal use. Like the production of home-grown wheat, the manufacture of marijuana for personal use is an economic activity in a general sense. Further, such manufacture is prohibited pursuant to a comprehensive statutory scheme bearing on all aspects of the illegal-drug trade, which is assuredly both commercial and interstate. *Cf. id.* at 1112 ("In contrast to the firearm possession prohibited in the Gun Act, the intrastate drug activities regulated in the Drug Act are clearly tied to interstate commerce."). Thus, like the regulation of home-grown wheat, the prohibition of home-grown marijuana is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561.

to "all persons within the United States" who are victims of gender-motivated crime). Nor does the statute include any language which could possibly be construed to constitute such a jurisdictional element. *Cf. United States v. Bass*, 404 U.S. 336, 349, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971) (construing statute prohibiting felon from receiving, possessing, or transporting any firearm "in commerce or affecting commerce" to require **[\*\*43]** additional nexus to interstate commerce); *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 1956, 141 L. Ed. 2d 215 (1998) (reasoning that unambiguous statute cannot be construed to avoid constitutional concerns). Accordingly, section 13981 cannot be sustained as a statute that contains a jurisdictional element "which would ensure, through case-by-case inquiry, that the [gender-motivated violent act] in question affects interstate commerce." *Lopez*, 514 U.S. at 561; *cf. United States v. Cobb*, 144 F.3d 319, 321-22 (4th Cir. 1998); *United States v. Wells*, 98 F.3d 808, 810-11 (4th Cir. 1996).

3.

Because section 13981 neither regulates an economic activity nor includes a jurisdictional element, it cannot be upheld on the authority of *Lopez* or any other Supreme Court holding demarcating the outer limits of Congress' power under the substantially affects test. *See Lopez*, 514 U.S. at 551 ("The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds **[\*\*44]** the authority of Congress 'to regulate Commerce . . . among the several states . . . .'" (quoting U.S. Const. art. I, § 8, cl. 3) (ellipses in original). **[\*837]**

C.

Even if these two categories of permissible congressional regulations demarcate not the absolute, but only the presumptive outer limits of congressional power under the substantially affects test, such that Congress may regulate noneconomic activities absent jurisdictional elements in at least some circumstances -- a proposition not only unsupported by Supreme Court holding, *see Lopez*, 514 U.S. at 560; *id.* at 580 (Kennedy, J., concurring), but seemingly eschewed by the Court in *Lopez*, *see, e.g., Lopez*, 514 U.S. at 551, 560, 567 -- we hold that the Commerce power does not extend so far as to support the regulation at issue in this case. A contrary holding would violate the "first principles" of a Constitution that establishes a federal government of enumerated powers, *id.* at 552, principles that the *Lopez* Court believed so important to its constitutional analysis that it both began and ended its opinion with a full discussion of them, *id.* at 553-58, 564-68, **[\*\*45]** and that even the government is forced to concede lie at the heart of the Court's reasoning in *Lopez*, *see Reply Br. of Intervenor United States* at 14 ("The [*Lopez*] decision thus turned largely on the threat posed by the statute to principles of federalism."); *Supp. Br. of Intervenor United States* at 4 ("Federalism concerns were, of course, crucial in *Lopez*.").

Consistent with these principles, *Lopez* affirms that we must evaluate carefully the implications of our holdings upon our federal system of government and that we may not find an activity sufficiently related to interstate commerce to satisfy the substantially affects test in reliance upon arguments which, if accepted, would eliminate all limits on federal power and leave us "hard pressed to posit any activity by an individual that Congress is without power to regulate." *Lopez*, 514 U.S. at 564; *see also id.* at 567 (admonishing that courts are not to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"). This is so especially when the regulated **[\*\*46]** activity falls within an area of the law "where States historically have been sovereign," *id.* at 564, and countenance of the asserted federal power would blur "the boundaries between the spheres of federal and state authority" and obscure "political responsibility," *id.* at 577 (Kennedy, J. concurring).

*Lopez*, therefore, is emphatic that the scope of the interstate commerce power

"must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

*Lopez*, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 81 L. Ed. 893, 57 S. Ct. 615 (1937)); *see also* 514 U.S. at 567 (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554, 79 L. Ed. 1570, 55 S. Ct. 837 (1935) **[\*\*47]** (Cardozo, J., concurring)) (noting that everything affects interstate commerce

to some degree, but rejecting "view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce" (internal quotation marks omitted); *id.* at 567-68 (refusing to rely on arguments that obliterate "distinction between what is truly national and what is truly local"); *id.* at 580 (Kennedy, J., concurring) ("In a sense any conduct in this inter-dependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.").

We could perhaps reconcile with these "first principles" of federalism a holding that Congress may regulate, even in the absence of jurisdictional elements, noneconomic activities that are related to interstate commerce in a manner that is clear, relatively direct, and distinct from the type of relationship that can be hypothesized to exist between every significant activity and interstate commerce. *See, e.g., United States v. Bird*, 124 F.3d 667, 677 n.11 (5th Cir. 1997) ("In determining whether the regulated intrastate **[\*\*48]** **[\*838]** activity substantially affects interstate commerce, 'substantial' must be understood to have reference not only to a quantitative measure but also to qualitative ones; effects which are too indirect, remote, or attenuated -- or are seen only by piling 'inference upon inference' -- are not substantial."); *cf. Hoffman*, 126 F.3d at 587 (holding that obstruction of abortion clinic entrances "is closely connected with, and has a direct and profound effect on, the interstate commercial market in reproductive health care services").

In this case, however, we can discern no such distinct nexus between violence motivated by gender animus and interstate commerce. Indeed, to sustain section 13981 as a constitutional exercise of the Commerce power, not only would we have to hold that congressional power under the substantially affects test extends to the regulation of noneconomic activities in the absence of jurisdictional elements, but we would also have to conclude that violence motivated by gender animus substantially affects interstate commerce by relying on arguments that lack any principled limitations and would, if accepted, convert the power to regulate interstate **[\*\*49]** commerce into a general police power.

Echoing the government's arguments in *Lopez*, the appellants argue that violence motivated by gender animus imposes medical and legal costs upon its victims; discourages those who fear such violence from traveling, working, or transacting business at times or in places that they consider unsafe (thereby deterring some interstate travel, employment, and transactions); and, as a result, inhibits the productivity of its actual or potential victims and decreases the supply and demand for interstate products. *See* Br. of Appellant Brzonkala at 37; *cf.* Supp. Br. of Appellant Brzonkala at 3 (noting effects of gender-motivated violence "on employment, health care, housing, criminal justice, interstate travel and consumer spending"). These arguments closely resemble, and are functionally equivalent to, the arguments advanced by the government in *Lopez*:

The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, **[\*\*50]** those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being.

*Lopez*, 514 U.S. at 563-64 (citations omitted). As in *Lopez*, appellants rely in essence on the costs of violent crime (including the deterrence of interstate travel and other similar interstate activities) and on decreased national productivity (including reduced employment, production, and demand), both of which ultimately affect the national economy, and presumably interstate commerce as well. But as the arguments are the same, so also does the Supreme Court's categorical rejection in *Lopez* of such attenuated links to interstate commerce again control:

We pause to consider the implications of the Government's arguments. The Government admits, **[\*\*51]** under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for

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example. Under the theories that the Government presents in support of [the GFSZA], it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

*Id.* at 564 (citation omitted); see also *id.* at 600 **[\*839]** (Thomas, J., concurring) ("When asked at oral argument if there were any limits to the Commerce Clause, the government was at a loss for words.").<sup>8</sup>

**[\*\*52]** It is unsurprising that appellants must resort to such arguments. Just as it is impossible to link violence motivated by gender animus with any particular, identifiable economic transaction or enterprise, see *supra* Part III.B.1, it is similarly impossible to link such violence with a particular interstate market or with any specific obstruction of interstate commerce. *Cf. Hoffman*, 126 F.3d at 587 (noting close and direct relationship between obstruction of abortion clinic entrances and the interstate commercial market in reproductive health care services); *Leshuk*, 65 F.3d at 1112 (noting relationship between the manufacture of marijuana and the interstate market in illegal drugs). Rather, to the extent violence motivated by gender animus affects interstate commerce, it does so only in the same way that any other significant problem does. Like violence in schools, violent crime generally, and many other less visible though still significant problems, violent crime motivated by gender animus undoubtedly imposes costs on, and decreases the productivity of, its victims. As with other such problems, to the extent violent crime motivated by gender **[\*\*53]** animus is widespread, these costs and productivity losses in the aggregate will ultimately, though indirectly, affect the national economy. *Cf., e.g.,* Carol Krucoff, *Get Moving*, Wash. Post, Aug. 12, 1997, Health Section, at 12 (quoting director of Center for Disease Control as predicting annual savings of \$ 4 billion in medical costs if only one-fourth of sedentary people were to exercise); 140 Cong. Rec. S14211 (1994) (statement of Sen. Hatfield) (estimating annual cost of accidents, medical problems, and reduced productivity, due to insomnia at between \$ 92.5 and \$ 107.5 billion). And, presumably, any adverse effect on the national economy will eventually also affect interstate commerce.

However, though the Supreme Court has, in cases such as *Wickard*, relied on relatively sweeping and permissive reasoning of this kind -- including looking to the aggregate effects of entire classes of activities and indulging in attenuated chains of inferences -- to find that intrastate *economic* activity substantially affects interstate commerce, *Lopez* clearly forecloses either reliance upon such authority or application of such analysis to sustain congressional regulation of **[\*\*54]** *noneconomic* activities such as the conduct reached by section 13981. *Compare Lopez*, 514 U.S. at 558 ("Where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." (citation omitted; emphasis added)), *with id.* at 561 (explaining that, because GFSZA was "a criminal statute" having "nothing to do with 'commerce' or any sort of economic enterprise," it could not "be sustained under [the Court's] cases upholding regulation of *activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate*, substantially affects interstate commerce." (emphasis added)); see also *id.* at 567 ("The possession of a gun in a local school zone is **[\*840]** in no sense an *economic activity* that might, *through repetition elsewhere*, substantially affect any sort of interstate commerce." (emphases added)); *id.* at 563 (similar); *id.* at 567 (refusing to **[\*\*55]** "pile inference upon inference" to find a substantial effect on interstate commerce); *id.* at 565 (rejecting, as excessively permissive, Justice Breyer's

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<sup>8</sup> We reject Brzonkala's contention that the link here is more direct than in *Lopez* because section 13981 regulates actual violence rather than the possession of guns, which could, but would not necessarily, lead to violence. See Br. of Appellant Brzonkala at 38. As is apparent from their arguments, however, many of the economic effects of gender-motivated violence upon which the appellants rely arise, as in *Lopez*, not from actual violence, but rather from the fear of such violence. And, unlike in *Lopez*, in which the potential violence threatened education, a specific enterprise with clear links to the economy, see *Lopez*, 514 U.S. at 624 (Breyer, J., dissenting) ("The immediacy of the connection between education and the national economic well-being is documented by scholars and accepted by society at large in a way and to a degree that may not hold true for other social institutions. It must surely be the rare case, then, that a statute strikes at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce."), gender-motivated violence affects no such specific enterprise. Thus, the manner in which any given act of gender-motivated violence affects the economy will depend on the specific circumstances of its victim. It is clear that here, as in *Lopez*, the relationship between the regulated conduct and interstate commerce is attenuated, and that any slight difference in the number of "steps" in the relationship is both artificial and insignificant.

three-step analysis of the relationship between gun-related crime and interstate commerce). To extend such reasoning beyond the context of statutes regulating economic activities and uphold a statute regulating noneconomic activity merely because that activity, in the aggregate, has an attenuated, though real, effect on the economy, and therefore presumably on interstate commerce, would be effectively to remove all limits on federal authority, and to render unto Congress a police power impermissible under our Constitution. See, e.g., *id.* at 564.<sup>9</sup>

**[\*\*56]** This case, in fact, draws into sharp relief the sweeping implications for our federal system of government that would follow were we, in reliance on such reasoning, to extend congressional power under the substantially affects test to the regulation of noneconomic conduct remote from interstate commerce. For here, not only could the logic of the arguments upon which the appellants must rely justify congressional regulation of any significant activity, but the regulation in support of which these arguments are marshaled also intrudes upon areas of the law "to which States lay claim by right of history and expertise." *Id.* at 583 (Kennedy, J., concurring). Thus, in this case, concerns of federalism, far from hypothetical, are immediate and concrete. First, although 42 U.S.C. § 13981(c) provides a civil remedy, the underlying conduct to which the remedy attaches is violent crime, see *id.* § 13981(d)(2), conduct that has traditionally been regulated by the States through their criminal codes and laws of intentional torts. Compare *id.* (defining "crime of violence" through incorporation of state and federal criminal law), with *Lopez*, 514 U.S. at 561 n.3 **[\*\*57]** ("Under our federal system, the States possess primary authority for *defining and enforcing* the criminal law. . . . When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction." (citations and internal quotation marks omitted; emphasis added)). Appellants contend that section 13981 neither duplicates state criminal laws nor overrides these or any other state laws, but merely provides a civil remedy for conduct that is already proscribed by the States. Therefore, they argue, the provision does not implicate the sensitive balance between state and federal criminal authority.<sup>10</sup> **[\*\*59]** Even were appellants' **[\*841]** description of section 13981 wholly accurate, we would reject their conclusion. For when the federal government provides a remedy for violent crime in addition to that provided by the States, it both involves itself in the punishment of such crime and increases the total penalty for such crime beyond that provided by the laws of the States.<sup>11</sup> Moreover, this federal involvement will inescapably lead to changes in the allocation of state law enforcement and judicial **[\*\*58]** resources, and even in substantive state law, by altering the

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<sup>9</sup> Brzonkala selectively quotes from our opinion in *Hoffman* to support her argument that Congress may regulate violence motivated by gender animus, despite its noneconomic character, solely because of its ultimate economic effects, see Supp. Br. of Appellant Brzonkala at 4. That case, however, does not support her position. Compare *id.* (stating that this court has upheld regulation of an activity that "was 'closely connected with, and had a direct and profound effect on, the interstate commercial market.'") (quoting *Hoffman*, 126 F.3d at 586-87), with *Hoffman*, 126 F.3d at 587 (explaining that regulated activity "is closely connected with, and has a direct and profound effect on, the interstate commercial market *in reproductive health care services*" (emphasis added)). It is plain that we did not uphold the statute in *Hoffman* because the regulated conduct affected the national economy, but rather because it directly affected a specific interstate market and was also "closely and directly connected with an economic activity." *Id.*

<sup>10</sup> Appellants attempt to distinguish the GFSZA struck down in *Lopez* from section 13981 on the grounds that the former overrode state laws that would otherwise regulate guns in school zones. Appellants' characterization of the GFSZA, however, rests primarily on the misleading attribution to the Supreme Court of an opinion voiced only by President Bush, which the Court quotes in passing at the end of a lengthy footnote. Compare Br. of Intervenor United States at 31-32 ("*In the Court's view*, the Gun Free School Zones Act 'inappropriately overrode legitimate state firearms laws with a new and unnecessary Federal law.' 115 S. Ct. at 1631 n.3 (internal quotation marks and citation omitted).") (emphasis added), Supp. Br. of Intervenor United States at 5 (same), Reply Br. of Intervenor United States at 14 (similar), and *id.* at 15 (similar), with *Lopez*, 514 U.S. at 561 n.3 ("See also Statement of President George Bush on Signing the Crime Control Act of 1990, 26 Weekly Comp. of Pres. Doc. 1944, 1945 (Nov. 29, 1990) ('Most egregiously, section [922(q)] inappropriately overrides legitimate state firearms laws with a new and unnecessary Federal law. . . .')") (emphasis added)). Furthermore, appellants' characterization of the GFSZA overlooks the actual character of that statute which, like section 13981, carefully preserved state laws by, *inter alia*, exempting from its prohibition possession of a gun licensed by a State or locality, 18 U.S.C. § 922(q)(2)(B)(ii), and preserving the rights of States and localities to establish gun-free school zones, *id.* § 922(q)(4); see also *id.* § 927 (expressing desire not to preempt state laws).

<sup>11</sup> In fact, section 13981 appears to have been specifically intended to enhance the penalty for the conduct that it regulates. See S. Rep. No. 103-138, at 50 (1993) ("Title III [section 13981] singles out for enhancement bias-inspired conduct . . .").

underlying enforcement realities against which all such allocative and legislative decisions are made. Thus, it is clear that the balance between federal and state responsibility for the control of violent crime is implicated not only by federal criminal statutes, but also by any federal sanction for such crime, even in the form of civil remedy. See Chief Justice William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships*, 78 Va. L. Rev. 1657, 1660 (1992) (noting section 13981's "potential to create needless friction and duplication among the state and federal systems"); cf. *Lopez*, 514 U.S. at 582 (Kennedy, J., concurring) (approving argument that "injection of federal officials into local problems causes friction and diminishes accountability of state and local governments" (citation omitted)).

As its proclamation of a new; substantive right "to be free from crimes of violence motivated by gender" suggests, however, section 13981 does not merely provide a federal remedy for certain violent conduct defined by the States as felonious. 42 U.S.C. § 13981(b). Although the statute does provide a remedy for such conduct, it also provides a remedy for certain *federally defined* violent felonies, "whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States." *Id.* § 13981(d)(2)(A). That is, under the plain language of the statute, a plaintiff may sue for gender-motivated violent conduct that would, if it occurred within an area of special federal jurisdiction, constitute a felony under the relatively comprehensive criminal code adopted by Congress **[\*\*60]** to govern such areas, see, e.g., 18 U.S.C. §§ 1111, 1118 (murder); *id.* § 1112 (manslaughter); *id.* § 1113 (attempted murder and manslaughter); *id.* § 113 (assault); *id.* § 114 (maiming); *id.* § 2241 (rape); *id.* § 1201 (kidnapping); *id.* § 81 (arson), even when the conduct occurs outside such a federal enclave, and even if the relevant federal law differs substantively from the law of the state in which the conduct occurs. Indeed, the apparent purpose of this provision is to create a minimum level of substantive protection -- tied to federal definitions of violent crimes and therefore subject to ready congressional calibration -- that is unaffected by individual variation among the criminal laws of the several States.

Further, to the extent that section 13981's remedy is limited to violent acts constituting felonies as defined by state law, the statute provides a remedy for such conduct, "whether or not those acts have actually resulted in criminal charges, prosecution, or conviction," 42 U.S.C. § 13981(d)(2)(A); *id.* § 13981(e)(2) (same); cf. *id.* § 13981(d)(2)(B) (abrogating certain defenses **[\*\*61]** that may exist under state law), and in many instances in which such violence would not be actionable under state tort law, see *id.* § 13981(c)-(d)(2)(B) (providing cause of action in cases in which a civil remedy may not exist under state law); 28 U.S.C. § 1658 (providing four-year statute of limitations which is considerably longer than the limitations periods for intentional torts in most States); cf. 42 U.S.C. § 1988(b) (successful section 13981 plaintiff may recover attorneys' fees).

Thus, not only does section 13981 provide a federal remedy for violent crime in addition to those remedies already provided by the laws of the States -- thereby increasing the total penalty for such crime -- it also provides such a remedy for violence that the States **[\*842]** would leave unpunished, whether for reasons of state criminal-law policy, prosecutorial discretion, or state tort-law policy. And the statute deliberately disregards the limits of state criminal and civil law, purportedly in response to the States' failure properly to enforce their criminal and tort laws against gender-motivated violent criminals. See *infra* Parts **[\*\*62]** III.D.2, IV. By responding to this alleged failure of the States not with a remedy against the States or their officers, as would a civil rights statute properly enacted pursuant to Section 5 of the Fourteenth Amendment, see *infra* Part IV.A, but instead with a remedy against the violent criminals themselves, Congress not only has encroached upon the States' ability to determine when and how violent crime will be punished, see *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) (noting States' abilities "as laboratories for experimentation to devise various solutions" for problems whose "best solution is far from clear"); *id.* at 583 (GFSZA impermissibly "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and experience"), but in so doing has blurred the boundary between federal and state responsibility for the deterrence and punishment of such crime. Accordingly, the citizens of the States will not know which sovereign to hold accountable for any failure to address adequately gender-motivated crimes of violence. See *Lopez*, 514 U.S. at 576-77 (Kennedy, **[\*\*63]** J., concurring) ("If . . . the Federal and State Governments are to control each other . . . and hold each other in check . . . citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. Federalism serves to assign political responsibility, not to obscure it." (citation omitted)); cf. *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 2377, 138 L. Ed. 2d 914 (1997) (noting that the Constitution contemplates that "a State's government will represent and



remain accountable to its own citizens"); *New York v. United States*, 505 U.S. 144, 168-69, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992) ("Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." (citation omitted)). Moreover, it is undisputed that a primary focus of section 13981 is domestic violence, a type of violence that, perhaps more than any other, has traditionally been regulated not by Congress, but by the several States. See, e.g., *infra* at 49-50 (discussing **[\*\*64]** congressional findings on the extent and effects of domestic violence). Though such violence is not itself an object of family law -- an area of law that clearly rests at the heart of the traditional authority of the States, see *Lopez*, 514 U.S. at 564 -- issues of domestic violence frequently arise from the same facts that give rise to issues such as divorce and child custody, which lie at the very core of family law. Although section 13981 explicitly precludes the federal courts from exercising the supplemental jurisdiction that might otherwise extend to such matters, see 42 U.S.C. § 13981(e)(4), the fact that Congress found it necessary to include such a jurisdictional disclaimer confirms both the close factual proximity of the conduct regulated by section 13981 to the traditional objects of family law, cf. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966) (holding that supplemental jurisdiction extends to state law claims arising from the same "common nucleus of operative fact" as federal claims); 28 U.S.C. § 1367 (codifying this aspect of *Gibbs* **[\*\*65]** ), and the extent of section 13981's arrogation to the federal judiciary of jurisdiction over controversies that have always been resolved by the courts of the several States. In the words of the Chief Justice of the United States, section 13981 creates a "new private right of action so sweeping, that the legislation could involve the federal courts in a whole host of domestic relations disputes." *Chi. Daily L. Bull.*, Jan. 2, 1992, at 2 (quoting from Chief Justice Rehnquist's 1991 report on the federal judiciary).<sup>12</sup>

**[\*\*66]** **[\*843]** Section 13981 also sharply curtails the States' responsibility for regulating the relationships between family members by abrogating interspousal and intrafamily tort immunity, the marital rape exemption, and other defenses that may exist under state law by virtue of the relationship that exists between the violent actor and victim. See § 13981(d)(2)(B); cf. *Br. of Intervenor United States* at 12 (noting that, "as of 1990, seven states still did not include marital rape as a prosecutable offense, and an additional 26 states allowed prosecutions only under restricted circumstances"). Although Congress may well be correct in its judgment that such defenses represent regrettable public policy, the fact remains that these policy choices have traditionally been made not by Congress, but by the States. By entering into this most traditional area of state concern, Congress has not only substantially reduced the States' ability to calibrate the extent of judicial supervision of intrafamily violence, see *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring), but has also substantially obscured the boundaries of political responsibility, freeing those States **[\*\*67]** that would deny a remedy in such circumstances from accountability for the policy choices they have made, see *id.* at 576-77.

The sweeping intrusion of section 13981 into these areas of traditional state concern well illustrates the essentially limitless nature of congressional power that would follow if we were to accept, as sufficient to justify federal regulation under the Commerce Clause, the type of connection with interstate commerce on which appellants rely in this case. Under such an understanding, the only conceivable limit on congressional power to regulate an activity would be the significance of that activity, because any significant activity or serious problem will have an ultimate, though indirect, effect upon the economy, and therefore, at least presumptively, upon interstate commerce as well. While we do not question the significance of the problems posed by violence arising from gender animus, *Lopez* confirms that such significance, standing alone, simply does not provide a meaningful limitation on federal power, and that a problem does not become a constitutionally permissible object of congressional regulation under the Commerce Clause merely **[\*\*68]** because it is serious. See *Lopez*, 514 U.S. at 565 (rejecting Justice Breyer's argument that because "gun-related violence is a serious problem" with an ultimate effect on "trade and commerce," it may be regulated

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<sup>12</sup> See also Chief Justice William H. Rehnquist, *Remarks at the Annual Meeting of the American Law Institute* (May 11, 1998) (listing the Violence Against Women Act as one of "the more notable examples" of "a series of laws passed by Congress that have expanded the jurisdiction of the federal courts" and that have raised the "prospect that our system will look more and more like the French government, where even the most minor details are ordained by the national government in Paris"); see generally Chief Justice William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary* (January 1999) ("The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the Judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system.").

under the Commerce Clause). To hold otherwise would require us to adopt a purely quantitative view of the substantially affects test that would, in light of the relative institutional competencies of the legislature and the judiciary, be difficult to square either with the *Lopez* Court's clarification of this test as "ultimately a judicial rather than a legislative question," *id.* at 557 n.2 (citation omitted), or with the "independent evaluation of constitutionality under the Commerce Clause" that *Lopez* requires of the courts, *id.* at 562; see also *Bird*, 124 F.3d at 677 n.11 (noting qualitative aspects of substantially affects test under *Lopez*). As this case illustrates, to adopt such an understanding of Congress' power to regulate interstate commerce would be to extend federal control to a vast range of problems falling within even the most traditional areas of state concern -- problems such as **[\*\*69]** violent crime generally, educational shortcomings, and even divorce, all of which are significant and as a result unquestionably affect the economy and ultimately interstate commerce. Cf. *Lopez*, 514 U.S. at 561 n.3 ("Under our federal system, the States possess primary authority for defining and enforcing the criminal law.") (citation omitted); *Northern Sec. Co. v. United States*, 193 U.S. 197, 402, 24 S. Ct. 436, 48 L. Ed. 679 (1904) (Holmes, J., dissenting) ("Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce."). Such a sweeping interpretation of the Congress' **[\*\*844]** power would arrogate to the federal government control of every area of activity that matters, reserving to the States authority over only the trivial and the insignificant.

After *Lopez*, it is simply insufficient to contend, as does the dissent, that principles of federalism are implicated *only* if a federal law "directly supersede[s] official state action in an area of *traditional state concern*." See *infra* at 207; see also *id.* at 204 (asserting that "*Lopez* stands for **[\*\*70]** the proposition that Commerce Clause legislation may be unconstitutional if it directly supersedes official state action in an area of traditional state concern"); *id.* at 207 ("When a federal statute directly supersedes official state action in an area of traditional state concern, then (and only then) may a court properly consider whether the rationale supporting the statute contains an inherent limiting principle."). Plainly put, neither the language nor the logic of *Lopez* permits, much less supports, such a parsimonious view of the rights of the States in our federal system. If anything, the Court in *Lopez*, as it has been over the past ten years or so, was at pains to express quite the opposite view, especially where, as here, the reasoning advanced in support of a given federal intrusion upon the prerogatives of the States would, if summoned, support a power in the Congress that is, for all intents and purposes, without limit. See, e.g., *Lopez*, 514 U.S. at 564 ("Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas where States historically have been sovereign."); **[\*\*71]** *id.* at 567 (rejecting reasoning "that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"); *id.* at 580 (Kennedy, J., concurring) ("We must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern."); *id.* at 583 (noting "tendency of this statute to displace state regulation in areas of traditional state concern" and explaining that "while the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant" and "contradicts the federal balance").

In short, to hold that an attenuated and indirect relationship with interstate commerce of the sort asserted here is sufficient to bring within Congress' power to regulate such commerce the punishment of gender-motivated violent crime, an activity that has nothing to do with commerce and that has traditionally been regulated by the States, we would have to do what the Supreme Court has never done, and what the *Lopez* Court admonished us not to do: "pile inference **[\*\*72]** upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States" and "conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local." *Id.* at 567-68 (citations omitted). Like the Supreme Court, "this we are unwilling to do." *Id.* at 568.

D.

To the extent that appellants even acknowledge the precedential force of *Lopez*, see *infra* Part III.E, they attempt to distinguish that decision primarily in two ways. First, they argue that here, unlike in *Lopez*, the relationship between the regulated activity and interstate commerce upon which they rely is not just identified by them alone, but is also documented by congressional findings to which we are obliged to defer. Second, they contend that section 13981 regulates conduct implicating civil rights, that civil rights is an area of manifest federal concern; and that therefore the regulation of the conduct here, despite its noneconomic character and its lack of a **[\*\*73]** close connection to

interstate commerce, does not offend the first principles of federalism. Appellants argue that these distinctions are sufficient grounds for upholding the constitutionality of section 13981 under the Commerce Clause. We disagree.

1.

It is true that section 13981, unlike the Gun-Free School Zones Act as originally enacted, is accompanied by congressional findings regarding the extent and effects of the [\*845] problem it addresses. However, though Congress' legislative expertise is entitled to deference, *Lopez* is unmistakable that our deference is not, and cannot be, absolute. And the principles articulated in that decision leave little doubt that the findings here are simply inadequate to sustain section 13981 as a constitutional exercise of Congress' power under Article I, Section 8.

(a)

The *Lopez* Court acknowledged that "legislative findings, and indeed even congressional committee findings," may assist the courts in determining constitutionality under the Commerce Clause. *Lopez*, 514 U.S. at 562; *see also id.* at 563 [\*\*74] (noting the lack of findings that "would enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye"). The Court emphasized, however, that "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* at 557 n.2 (citation omitted). Rather, because the question of whether particular activities "affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question," *id.*, we cannot sustain a statute solely on the strength of a congressional finding as to the factual relationship between a particular activity and interstate commerce. Instead, we must undertake an "independent evaluation" to determine whether, as a legal matter, the substantially affects test is satisfied. *Id.* at 562 (noting that congressional findings may be considered "as [\*\*75] part of our independent evaluation of constitutionality under the Commerce Clause" (emphases added)); *cf. id.* at 563 (stating that congressional findings "enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce" (emphasis added)); *id.* at 559 ("We have upheld a variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce." (emphasis added)).

Appellants concede, as they must, that, under *Lopez*, findings are not "conclusive," Reply Br. of Intervenor United States at 12, "that a court is not bound by congressional findings," Supp. Br. of Intervenor United States at 4, that "Congress cannot, by fiat, establish a substantial effect on interstate commerce where none exists," *id.*, and that "a court must conduct an independent investigation," *id.*; *cf.* Br. of Appellant Brzonkala at 35 n.29 (acknowledging "the *Lopez* decision's recognition that a law's constitutionality ultimately is a judicial decision").

Despite such lip service to the Court's explicit pronouncements in [\*\*76] *Lopez* that congressional findings are not conclusive of the constitutional inquiry, however, appellants contend that the Gun-Free School Zones Act's primary and dispositive flaw was that Congress did not *document* the connection between the conduct regulated by that Act and interstate commerce. In support of this contention, appellants cite the *Lopez* Court's cursory mention of the lack of congressional findings that might have "enabled [it] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye," *Lopez*, 514 U.S. at 563. They then construe that Court's refusal, four pages later, to sustain the government's contentions in that case by "piling inference on inference," *id.* at 567, as referring to the lack of congressional documentation of the regulated activity's affect on interstate commerce. <sup>13</sup> [\*\*77] According to appellants,

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<sup>13</sup> *See, e.g.*, Supp. Br. of Intervenor United States at 3 (contending that because Congress failed to identify nexus between regulated conduct and interstate commerce or provide "findings of any sort," "the effect of gun possession on interstate commerce could be posited only hypothetically," and "it would be necessary to 'pile inference upon inference' to sustain the statute") (quoting *Lopez*, 514 U.S. at 567); Reply Br. of Intervenor United States at 12 ("The *Lopez* Court found it could sustain the Gun Free School Zones Act only by 'piling inference on inference,' *Lopez*, 115 S. Ct. at 1634, and explicitly noted the absence of any legislative findings that would have made the inferential process unnecessary. *Id.* at 1631."); Br. of Intervenor United States at 19 (similar); *cf.* Br. of Appellant Brzonkala. at 38 (similar).

had **[\*846]** Congress provided such documentation, the Court could have sustained the statute without resorting to inference, and would in fact have done so.<sup>14</sup>

*Lopez*, however, cannot reasonably be understood to have turned on a mere lack of documentation of the effects of the regulated conduct on interstate commerce. Although the Supreme Court noted that findings could aid it in identifying an effect on interstate commerce that was not "visible to the naked eye," *Lopez*, 514 U.S. at 563, the Court never indicated that it did not understand the relationship alleged to exist between guns in school zones and interstate commerce. While the Court **[\*\*78]** did not consult legislative materials to illuminate the contours of this relationship, both the government and the principal dissent detailed how such guns affected interstate commerce. See, e.g., *id.* at 618-25 (Breyer, J., dissenting). The Court's lucid recitation of the arguments of both the government, see *Lopez*, 514 U.S. at 563-64 (majority) (reciting government's arguments), and the principal dissent, *id.* at 564-66 (reciting Justice Breyer's arguments), leaves no doubt that it understood the nature of the relationship asserted. Further, the Court nowhere questioned the factual validity of the arguments made by either the government or Justice Breyer. See *id.* at 563-66; see also *id.* ("Although Justice Breyer argues that acceptance of the Government's rationale would not authorize a general police power, he is unable to identify any activity that the States may regulate but Congress may not."); *id.* at 600 (Thomas, J., concurring) (same).

Had the Court's decision turned on either lack of understanding or skepticism of the factual link between guns in school zones and interstate commerce, the **[\*\*79]** Court's failure to consult the massive documentation available regarding those effects would have been inexplicable. Not only did the Court have available before it a wealth of legislative, governmental, and other materials documenting these links, see, e.g., *id.* at 631-34 (Breyer, J., dissenting) (appendix listing numerous hearings, transcripts, committee reports, and other legislative materials bearing directly on these links); *id.* at 634-36 (listing other governmental materials); *id.* at 636-44 (listing other readily available materials), it also had before it explicit congressional findings that (1) crime was a nationwide problem exacerbated by the interstate movement of drugs, guns, and criminal gangs; (2) firearms and their component parts move easily in interstate commerce, and guns have been found in increasing numbers around schools; (3) citizens fear to travel through certain parts of the country due to concern about violent crime and gun violence; (4) the occurrence of violent crime in school zones has resulted in a decline in the quality of education, which in turn has had an adverse impact on interstate commerce; and (5) **[\*\*80]** the States are unable to curb gun-related crime on their own. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320904, 108 Stat. 1796, 2125. To be sure, these findings had been added to the statute after its adoption, and the government did not rely on them "in the strict sense of the word." *Lopez*, 514 U.S. at 563 n.4 (citation omitted). But had the Court desired only legislative corroboration of the government's arguments, it could easily have consulted these findings, and presumably would have done so. As the government explained, "at a very minimum [the findings] indicate that reasons can be identified why Congress wanted to regulate this particular activity." *Id.* (citation omitted).

The Court's indifference both to these findings and to the massive documentation assembled by the principal dissent confirms that the Court did not reject as insufficient the relationship between guns in school zones and interstate commerce asserted by the government and the dissents because it **[\*847]** deemed that relationship opaque or dubious, but rather that it did so for the reason that it explicitly stated: accepting such indirect **[\*\*81]** and attenuated relationships as sufficient to justify congressional regulation would render unto Congress a power so sweeping as to leave the Court "hard pressed to posit any activity by any individual that Congress is without power to regulate." *Lopez*, 514 U.S. at 564.

It is clear, therefore, that appellants fundamentally misunderstand the *Lopez* Court's refusal "to pile inference upon inference" to sustain the Gun-Free School Zones Act. *Id.* at 567. When quoted in full rather than as an isolated fragment -- as appellants would have it -- the Court's statement is of unmistakable import:

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<sup>14</sup> See, e.g., Reply Br. of Intervenor United States at 12 n.8 ("The point for the *Lopez* majority . . . was that its inferential task was not lightened by the presence of legislative findings such as those that are present here. Defendant's insistence that the outcome in *Lopez* would have been identical regardless of the legislative record before the Court is flatly at odds with the Court's declaration and its reasoning."); cf. *id.* at 12 (noting "critical" nature of findings); *id.* at 11 ("Contrary to defendants' contention here, legislative findings are of key significance.").

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To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's **[\*\*82]** enumeration of powers does not presuppose anything not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

*Id.* at 567-68 (citations omitted). Rather than referring to the Court's passing mention of the original statute's lack of findings four pages earlier, this statement instead represents a powerful summary of an intervening three-and-a-half-page discussion emphatically reaffirming the existence of meaningful substantive limits on congressional authority under the Commerce Clause.

The indisputable abundance of the materials available to the Court in *Lopez* detailing the real, though indirect, effect of guns in school zones on interstate commerce strongly suggests that appellants' argument really is not that *Lopez* turned on a simple lack of documentation, but rather that it turned on a lack of legislative formalities. Thus, despite their concessions, *see supra* at 41, it is evident that appellants regard legislative formalities such as findings as dispositive -- at least as a practical matter -- of whether an activity may be regulated under the substantially **[\*\*83]** affects test. In fairness to them, however, they are far more abashed in their reliance upon congressional findings than are our dissenting colleagues, who are quite candid about their prostrate deference to congressional pronouncements. The dissenters begin and end their Commerce Clause analysis by posing the dispositive question as "whether . . . Congress exceeded its constitutional authority in enacting" section 13981. In the immediately following two sentences, they then provide what, from their following discussion, we know is for them the answer -- namely, that Congress did not exceed its authority, *because* "Congress directly addressed this very question" and on the basis of findings and evidence concluded that, in fact, it *did* act constitutionally in enacting section 13981. *See infra* at 173. <sup>15</sup> And only **[\*848]** as an afterthought (literally) -- and, for it, an empty one at that, *see id.* at 70-72 -- does the dissent even acknowledge that the courts must ensure compliance with the Constitution. *Id.* at 173-174, 191. So far from *Lopez*, appellants would not even dare to venture.

**[\*\*84]** Appellants' position (and *a fortiori* the dissent's), however, flatly contradicts the Supreme Court's opinion in *Lopez*. While an understanding of legislative formalities as dispositive in practice if not theory would follow from the reasoning initially employed by the *Fifth Circuit* in striking down the Gun-Free School Zones Act, *see Lopez*, 2 F.3d at 1363 ("Practically speaking, [congressional] findings almost always end the matter."); *id.* at 1365-66 (holding that Congress "had not taken the steps necessary to demonstrate that such an exercise of power is within the scope of the Commerce Clause"); *Lopez*, 514 U.S. at 552 (noting that Fifth Circuit held the Act invalid "in light of what it characterized as insufficient congressional findings and legislative history"), such an understanding cannot be reconciled with the much different analysis of the statute's constitutionality undertaken by the Supreme Court. *See, e.g., id.* at 551 ("The Act neither regulates a commercial activity nor contains a requirement that the possession be

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<sup>15</sup> *See also infra* at 195 ("Where Congress has supported a statute with an explicitly articulated rationale asserting its constitutionality, [] invalidation . . . [is] a direct repudiation of Congress's full authority."); *id.* at 214 ("No one doubts the validity of any of these principles [of federalism and enumerated powers]. The critical question, however, is who decides how they are to be upheld. The Constitution itself provides a clear and specific answer to that question. It allocates the fundamental power of government -- the power of legislation -- to Congress."); *id.* at 195 ("The statute itself articulates the *existence* of a congressional judgment of constitutionality, while findings articulate the *content* of that judgment. We defer to the former . . . and we grant an additional measure of deference to the latter. . . ."); *id.* at 183-184 ("Given Congress's clear finding that gender-based violence has a substantial effect on interstate commerce, the compelling evidence in the legislative record supporting that finding, and the fact that the challenged statute in no way interferes with state action on matters of traditional state concern, it seems to me that a court can only uphold Subtitle C."); *id.* at 187 (criticizing majority for "flyspecking congressional judgments"); *id.* at 189 (criticizing majority for claiming that gender-based violence lacks a meaningful connection to economic activities, given that "Congress expressly found that gender-based violence does affect specific economic activities. . . ."); *id.* at 195 ("Nothing in *Lopez* suggests that when Congress has considered a matter and made a rational finding of constitutionality -- let alone an explicit finding based on a massive congressional record, as in this case -- a court should not defer to that finding.").

connected in any way to interstate commerce. We hold that the Act exceeds the **[\*\*85]** authority of Congress to regulate Commerce . . . among the several States . . ." (internal quotation marks omitted)).

To read the Supreme Court's decision as if it were the Fifth Circuit's, one would have to dismiss as disingenuous the Supreme Court's explicit statements that "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so," *id.* at 557 n.2 (internal quotation marks and citation omitted); that "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question," *id.*; and even that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," *id.* at 562. Further, the Court's self-described "independent evaluation of constitutionality under the Commerce Clause," *id.*, together with its purported consideration of the government's arguments regarding the relationship between guns in school zones and interstate commerce, *id.* at 563-68, would **[\*\*86]** likewise have to be disregarded as mere contrivance. And, most importantly, the Supreme Court's definitive invocation of the first principles of federalism as limitations on congressional power would have to be consigned to platitude, for legislative formalities are at most a mere procedural limit on congressional power. *Cf. Seminole Tribe v. Florida*, 517 U.S. 44, 64, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996) ("If *Hans* means only that federal-question suits for money damages against the States cannot be brought in federal court unless Congress clearly says so, it means nothing at all.") (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 36, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989) (Scalia, J., concurring in part and dissenting in part)). In short, to read *Lopez* as elevating legislative formality to a position dispositive of the constitutional inquiry, even as a practical matter, one would have to ignore everything the Court said in that opinion, other than its single, passing allusion to the statute's lack of findings.

Had the Court in *Lopez* intended so to elevate the existence or non-existence of findings or a formal legislative **[\*\*87]** record, its holding that the Gun-Free School Zones Act exceeded Congress' power under the Commerce Clause would have constituted not a substantive limitation on congressional power, but rather a mere procedural hurdle -- in essence, a remand to Congress to make formal findings or compile a formal record. Not only would a judicial mandate that Congress construct a proper paper trail of the sort that might be demanded of an administrative agency ill befit the dignity of the Legislature, *see, e.g., Turner Broad. Sys. v. FCC*, 512 U.S. 622, 666, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994) (opinion of Kennedy, J.) ("Congress is not obligated, when enacting its statutes, to **[\*849]** make a record of the type that an administrative agency or court does to accommodate judicial review."); *City of Boerne*, 117 S. Ct. at 2170 ("Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but on due regard for the decision of the body constitutionally appointed to decide. As a general matter, it is for Congress to determine the method by which it will reach a decision." (internal quotation marks and citation omitted)); **[\*\*88]** *cf. Maryland v. Wirtz*, 392 U.S. 183, 190 n.13, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968) ("We are not concerned with the manner in which Congress reached its factual conclusions."), but had the Supreme Court intended to impose such a procedural requirement, *Lopez* would have been an unusual case in which to announce it. For after the Fifth Circuit's decision, but before the Supreme Court's, Congress had already amended the Gun-Free School Zones Act to include "congressional findings regarding the effects of firearm possession in and around schools upon interstate and foreign commerce." *Lopez*, 514 U.S. at 563 n.4. The Supreme Court's holding that the Gun-Free School Zones Act was unconstitutional, accordingly, would have constituted little more than historical irrelevancy. Surely we cannot conclude that the *Lopez* Court intended to authorize the enforcement of the Gun-Free School Zones Act against those who, unlike the defendant in *Lopez*, violated the statute after it was amended in 1994 to include explicit congressional findings. Not only did the Court never even hint that the addition of findings solved, even prospectively, the problems **[\*\*89]** it identified with the statute, but such an inference would also be difficult to reconcile with the Court's manifest lack of interest in the subsequently adopted findings. *See id.* at 563 n.4 (mentioning these findings only briefly in a footnote). Finally, if there were any doubt, despite the government's litigation position in this proceeding, neither Congress nor the government has so interpreted *Lopez*, as evidenced by the fact that, in response to that decision, Congress, at the Administration's urging, amended 18 U.S.C. § 922(q) by adding a jurisdictional element. *Compare* 18 U.S.C. § 922(q)(2)(A) (limiting statute's reach to prohibition of possession, in a school zone, of a firearm "that has moved in or that otherwise affects interstate or foreign commerce"), *with* 31 Weekly Comp. Pres. Doc. 809 (May 15, 1995) (presenting Attorney General Reno's

"analysis of *Lopez*" and recommended "legislative solution" of limiting statute's reach by adding jurisdictional element, "thereby bringing it within the Congress' Commerce Clause authority").

*Lopez*, then, cannot reasonably be understood to contemplate absolute **[\*\*90]** deference to legislative findings, either in theory or in practice. As the opinion instructs, such findings can clarify the *factual* relationship that exists between conduct that a statute seeks to regulate and interstate commerce. However, because constitutionality under the substantially affects test turns ultimately not on mere empirical fact but on law, unless the relationship so clarified is sufficient to satisfy the *legal* requirements of that test, the statute cannot be sustained.

(b)

When viewed not with absolute deference, but rather "as part of our independent evaluation of constitutionality under the Commerce Clause," *Lopez*, 514 U.S. at 562, it is apparent that the congressional findings on which appellants rely cannot establish that section 13981 is a permissible regulation under the substantially affects test.

In the first place, although the appellants cite hearings and committee reports from at least three different Congresses -- raising the reasonable question of which Congress found what, a question we would be forced to pursue if we believed findings constituted a formal procedural requirement -- many of the congressional findings on which **[\*\*91]** the appellants rely describe only indirectly the relationship between gender-motivated violent crime and interstate commerce. Although the committee reports recite numerous findings that violence against women generally, and domestic violence in particular, are significant problems, see, e.g., S. Rep. No. 103-138, at 38 (1993) (rape and murder statistics); *id.* at 41-42 (family violence); H.R. Rep. No. 103-395, at 26 (1993) (domestic violence statistics); S. Rep. No. 101-545, at 37 (1990) (same); H.R. Rep. No. 103-395, at 25 (violent **[\*850]** crime generally), and even that domestic violence and other violence against women affects the economy, see, e.g., S. Rep. No. 103-138, at 41 (estimating "health care, criminal justice and other social costs of domestic violence" at \$ 5 to \$ 10 billion annually); S. Rep. No. 101-545, at 33 ("Partial estimates show that violent crime against women costs this country at least 3 billion . . . dollars a year."), neither of these propositions clarifies the impact of *gender-motivated* violence against women -- as opposed to all violence against women -- on the economy. Cf., e.g., 42 U.S.C. § 13981(e)(1) **[\*\*92]** (excluding from statute's purview "random acts of violence unrelated to gender" and "acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender"); S. Rep. No. 102-197, at 69 (1991) (statement of Sen. Biden) ("Title III [section 13981] does not cover everyday domestic violence cases . . . . This is stated clearly in the committee report and it is the only fair reading of the statutory language."). The findings linking this more narrow class of violence to the economy are substantially more modest. See, e.g., S. Rep. No. 103-138, at 54 ("Gender-based violence bars its most likely targets -- women -- from full participation in the national economy."); *id.* ("Even the fear of gender-based violence affects the economy . . . ."). Not even these findings, however, describe the effects of gender-motivated violence on *interstate commerce*, let alone do they constitute a legislative judgment that gender-motivated violence substantially affects interstate commerce.

Ultimately, appellants cite only two congressional findings regarding the effects of gender-motivated violence on interstate commerce. First, they cite a House Conference Report finding, **[\*\*93]** in a single conclusory sentence, that "crimes 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; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S. Code Cong. & Admin. News 1839, 1853. Second, they cite a Senate report finding that "gender-based violent crimes meet the *modest threshold* required by the Commerce Clause. Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which *affect* interstate commerce and the national economy." S. Rep. No. 103-138, at 54 (emphases added).<sup>16</sup>

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<sup>16</sup> Although appellants cite this latter finding, they evince an understandable -- though barely excusable -- reluctance to quote it in its entirety. Compare *Br. of Intervenor United States* at 8 ("See also S. Rep. No. 103-138 at 54 ('gender-based crimes and the fear

**[\*\*94]** Although these two lone findings do recite effects of gender-motivated violence on interstate commerce as a factual matter, to the extent these findings are intended also as a legal conclusion that such violence is sufficiently related to interstate commerce to satisfy the substantially affects test, under *Lopez* we cannot accept this conclusion uncritically. This is especially so where, as here, Congress' findings themselves reveal a profound misunderstanding of the constitutionally permissible scope of its Commerce power under Article I, Section 8. The Senate initially found *not* that gender-motivated violence *substantially affects* interstate commerce, but only that gender-based violence *affects* interstate commerce *and the national economy* sufficiently to satisfy what it described as the "modest threshold required by the Commerce Clause." And even this finding must be considered in light of its simultaneously and explicitly stated belief that "the Commerce Clause is a broad grant of power allowing Congress to reach conduct **[\*\*851]** that has *even the slightest effect* on interstate commerce." S. Rep. No. 138, at 54 (emphasis added); *cf. Lopez*, 514 U.S. at 559 **[\*\*95]** ("We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity '*substantially affects*' interstate commerce." (emphasis added)). That this misapprehension of the scope of the power to regulate interstate commerce was not confined to the Senate is confirmed by section 13981's express statutory purpose "to protect the civil rights of victims of gender motivated violence and to promote *public safety, health, and activities affecting interstate commerce.*" 42 U.S.C. § 13981(a) (emphasis added). Not only does the explicit language of this provision misstate the scope of Congress' power under the Commerce Clause, but it also assumes a general power to regulate health and safety -- the very essence of the sort of police power the Constitution denies to the federal government and reserves to the States. *Compare* U.S. Const. art. I, § 8 (enumerated powers of Congress), *with id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."), *and City of Boerne*, 117 S. Ct. at 2171 **[\*\*96]** (noting "the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens").

Therefore, as a court, we cannot avoid our duty to evaluate independently the constitutionality of section 13981 under the Commerce Clause.

The legislative record in this case, considered as a whole, shows that violence against women is a sobering problem and also that such violence ultimately does take a toll on the national economy. The record also supports an inference that some portion of this violence, and the toll that it exacts, is attributable to gender animus. And Congress' specific findings regarding the relationship between gender-motivated violence and interstate commerce, though somewhat conclusory, *cf. Lopez*, 514 U.S. at 612 n.2 (Souter, J., dissenting) (noting that the findings added by Congress to the GFSZA were made "at such a conclusory level of generality as to add virtually nothing to the record"), depict the manner in which such violence affects interstate commerce -- primarily by imposing medical, legal, and other costs upon its victims; by discouraging those who fear such violence from traveling, working, or transacting **[\*\*97]** business at times or in places that they deem unsafe (thereby deterring some interstate travel, employment, and transactions); and, as a result, by inhibiting the productivity of its actual or potential victims and decreasing the supply and demand for interstate products.

This legislative record no doubt supports the wisdom and legitimacy of many of the measures Congress enacted in the Violence Against Women Act, such as the expenditure of federal funds, the criminalization of violence against women with an explicit interstate nexus, and the amendment of the Federal Rules of Evidence to better accommodate the victims of such violence. And, given the sweeping view of Congress' power to regulate interstate commerce suggested by the committee reports and the express statutory-purpose provision, it is not surprising that Congress believed the relationship between gender-motivated crimes of violence and interstate commerce sufficient to support, under the Commerce Clause, the regulation of this noneconomic activity, even in the absence of a jurisdictional element.

However, although appellants repeatedly assert that the relationship described by these findings is direct, *see, e.g. [\*\*98]* , Br. of Intervenor United States at 19, 28, 30-31; Reply Br. of Intervenor United States at 10, 12-13, it

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of gender-based crimes restrict[] movement, reduce[] employment opportunities, increase[] health expenditures, and reduce[] consumer spending").), *and id.* at 30 (same), *with* Supp. Br. of Intervenor United States at 1-2 ("Gender-based crimes and the fear of gender-based crimes restrict[] movement, reduce[.] employment opportunities, increase[] health expenditures, and reduce[] consumer spending, all of which affect interstate commerce and the national economy.' S. Rep. No. 103-138, at 54 (1993).").



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quite simply is not. Rather, it is almost precisely analogous to the attenuated, though undoubtedly real, relationship asserted to exist between guns in school zones and interstate commerce, see *Lopez*, 514 U.S. at 563-64 (rejecting arguments of costs of crime, decreased travel, and decreased national productivity as insufficient to bring the regulation of guns in school zones within the Commerce power), or, for that matter, to that which undoubtedly exists between any significant activity and interstate commerce. That the relationship here is asserted not by appellants alone, but also by Congress, cannot be dispositive. As noted, the Supreme Court did not reject the [\*852] government's arguments in *Lopez* because they lacked formality. Nor did it reject them because it did not understand them or because it questioned their factual validity. Rather, the Supreme Court held that the Commerce power could not be extended to the regulation of activities having only such an attenuated relationship with interstate commerce without granting Congress an unlimited [\*\*99] police power inconsistent with a Constitution of enumerated and limited federal powers. Here, as in *Lopez*, the power that Congress has asserted is essentially limitless; the existence of findings or documentation, standing alone, does not provide the type of meaningful limitation on congressional power required by a Constitution that withholds from Congress "a general police power of the sort retained by the States." *Id.* at 567.

Appellants also argue that section 13981 is a "civil rights" statute, see 42 U.S.C. § 13981(a) (noting [\*\*2] purpose of Act "to protect the civil rights of victims of gender motivated violence"), and as such cannot offend the first principles of federalism because civil rights represents an area of "quintessential federal responsibility." Supp. Br. of Intervenor United States at 6; see also Br. of Intervenor United States at 32 (same).

It is unquestionably true that Congress has traditionally assumed an essential role in enacting legislation to protect civil rights and to root out discrimination and its vestiges. However, the Congress has never asserted a general authority, untethered to any specific constitutional power, to enact such legislation. And the Supreme Court has never upheld such legislation solely for the reason that it is civil rights in character. Appellants do not contend otherwise, nor do they really even contend seriously that the Court should do so. Instead, as would be expected under our Constitution of enumerated powers, the Court has upheld such legislation, as all other legislation, only when it has been enacted in exercise of a specific power conferred upon Congress by the Constitution. Compare *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964) [\*\*3] (upholding Title II of the Civil Rights Act of 1964 under Commerce Clause of Article I), and *Katzenbach v. McClung*, 379 U.S. 294, 305, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964) (same), with *Lopez*, 514 U.S. at 559-60 (describing *Heart of Atlanta* and *McClung* as cases upholding regulation governing economic activity and therefore falling comfortably within the contours of the Commerce power); *id.* at 573-74 (Kennedy, J., concurring) (same). In fact, the Court has not hesitated to invalidate even the most paradigmatic of civil rights initiatives, like the Civil Rights Acts of 1871 and 1875, when there was lacking such support in the Constitution. See *United States v. Harris*, 106 U.S. 629, 27 L. Ed. 290, 1 S. Ct. 601 (1883); *Civil Rights Cases*, 109 U.S. 3, 27 L. Ed. 835, 3 S. Ct. 18 (1883).

Unlike those civil rights laws that have been readily enacted by Congress and readily sustained by the Supreme Court, however, section 13981 is untethered to, and otherwise unsupported by, any such enumerated power. Although appellants attempt to justify section 13981 as a legitimate exercise of Congress' [\*\*4] power over interstate commerce, the intrastate, noncommercial violence reached by the section, and its consequences, are far removed from interstate "commercial concerns that are central to the Commerce Clause." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

Moreover, the conduct targeted by section 13981 bears little resemblance to the discriminatory state denial of equal protection or other conduct that is the concern of the Reconstruction Amendments. See *infra* Part IV. Although assertedly enacted out of concern, in part, for inadequate state law enforcement, the particular shortcomings ascribed by Congress to the States are not so much intentional -- and thus unconstitutional -- discrimination by the States, but rather the failure, despite "fervent" and "sincere" efforts, S. Rep. No. 102-197, at 39; S. Rep. No. 101-545, at 33, to eradicate the "subtle prejudices" and "stereotypes" that prevent the victims of gender-motivated crimes from obtaining legal vindication in the state courts, S. Rep. No. 102-197, at 39. And the legislation does not even address these shortcomings directly by regulating the States or their [\*853] officials, but, instead, creates [\*\*5] a cause of action against private individuals. The reach of section 13981 is not even limited to private acts of violence committed with the active connivance of the States or their officials, or to private acts of violence purposely aimed at depriving the victims of equal access to legal redress or other constitutional rights. Accordingly, not even appellants seriously

contend that the purely private gender-motivated violence reached by section 13981 itself violates the Constitution. See, e.g., Reply Br. of Intervenor United States at 3 ("To be sure, § 1 of the Fourteenth Amendment speaks to state action and does not proscribe purely private conduct."); Br. of Intervenor United States at 21 (similar).

And, not only does section 13981 regulate wholly intrastate and private conduct, but the conduct regulated also falls within the most traditional of state concerns. That is, Congress' motive notwithstanding, the legislation indisputably shifts power from the States to the federal government, blurring the "distinct and discernable lines of political accountability" required by our Constitution. See *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring).<sup>17</sup>

**[\*\*6]** If we were to hold that a statute like section 13981, which regulates purely private, noneconomic activity at the very core of traditional state concern and has only the most attenuated relation to interstate commerce, could nonetheless be sustained under the Commerce Clause based upon no more than the kind of generalized findings of state shortcomings made here, then Congress could circumvent the constitutional limits on federal power imposed by both the Commerce Clause and the Fourteenth Amendment, see *infra* Part IV, and claim a general police power, because charges that States have failed fully to eradicate or remedy bias can be made about nearly every area of traditional state concern. See, e.g., Leslie Bender & Perette Lawrence, *Is Tort Law Male?: Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 Chi.-Kent L. Rev. 313 (1993) (tort law); Jane Goodman et al., *Money, Sex, and Death: Gender Bias in Wrongful Death Damage Awards*, 25 Law & Soc'y Rev. 263 (1991) (same); Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 Mich. L. Rev. 814 (1990) **[\*\*7]** (same); Mary Pat Treuthart & Laurie Woods, *Mediation -- A Guide for Advocates and Attorneys Representing Battered Women* 13-14, 75 (1990) (contract law); Sylvia A. Law & Patricia Hennessey, *Is the Law Male?: The Case of Family Law*, 69 Chi.-Kent L. Rev. 345 (1993) (family law). In **[\*854]** fact, the very findings on which appellants rely in this case would, themselves, justify not only section 13981, but the federalization of all crimes against women, see, e.g., S. Rep. No. 103-138, at 49 (citing studies concluding "that crimes disproportionately affecting women are often treated less seriously than comparable crimes affecting men"). For that matter, they would justify federal regulation, and even occupation, of the entire field of family law, including divorce, alimony, child custody, and the equitable division of property. See S. Rep. No. 102-197, at 43 n.40 (citing studies of state task forces on gender bias that find bias and state failings throughout the entire area of domestic relations and family law); S. Rep. No. 103-138, at 49 n.52 (similar).

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<sup>17</sup> Appellants assert that because section 13981 regulates not all violent crime -- or even all violent crime against women -- but only such crime arising from gender animus, it does not impermissibly intrude upon traditional areas of state authority. To the extent this argument rests on the assumption that gender-motivated crime constitutes a relatively small subset of all violent crime against women, it is in marked tension with appellants' reliance upon congressional findings of the total economic costs of all violence against women to support section 13981. See *supra* Part III.D.1.a. And if appellants believe that gender-motivated violence constitutes a relatively large subset of violence against women, it is difficult to understand how the statutory limitation upon which appellants rely substantially lessens the impact of section 13981 on the balance of state and federal authority.

In reliance upon inapposite precedent, however, appellants maintain that crime motivated by animus uniquely implicates federal interests and falls outside traditional areas of state concern. Even were this precedent relevant to the scope of congressional authority under the Commerce Clause, the rationale of the cases upon which appellants rely is clearly limited to crime that is itself tied to a specific constitutional violation or is purposefully aimed at depriving its victims of their constitutional rights. Compare *Griffin v. Breckenridge*, 403 U.S. 88, 102, 29 L. Ed. 2d 338, 91 S. Ct. 1790 (1971), with *United States v. Guest*, 383 U.S. 745, 784, 16 L. Ed. 2d 239, 86 S. Ct. 1170 (1966) (Brennan, J., dissenting), and *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 275, 122 L. Ed. 2d 34, 113 S. Ct. 753 (1993).

In any event, appellants' argument is inconsistent with *Lopez* itself. For, in that case, the Court found that the GFSZA interfered with state authority over violent crime and education, even though it did not regulate all violent crime or all matters relating to education, but only the possession of firearms in school zones. And it did so despite the argument that firearm regulation represented an area in which the federal government has "accumulated institutional expertise." *Lopez*, 514 U.S. at 563. Clearly, under *Lopez*, a statute regulating only a subset of a traditional area of state concern still implicates the balance of state and federal authority, and it does so even when that subset involves conduct similar to that regulated by the federal government in other contexts.

Accordingly, although we respect the concerns underlying appellants' argument that Congress has a general **[\*\*8]** power to pass "civil rights" statutes and acknowledge the argument's intuitive appeal, the Constitution does not extend to Congress the unlimited power that would necessarily follow were we to accept the argument. To the contrary, the extension of such power to the Congress solely on the grounds that appellants urge would be in contravention both of *Lopez* and of the first principles of federalism on which that opinion rests.

E.

Despite their half-hearted attempts to distinguish *Lopez*, it is apparent that, ultimately, Brzonkala and the government (not to mention the dissent) would have us ignore that decision altogether. Not only do appellants clearly, though mistakenly, regard *Lopez* as at most a decision of little importance, they also make no serious attempt to come to grips with the core reasoning of that opinion. Instead, appellants merely rely on arguments that repeat the opinions of the dissenting Justices in *Lopez* but are squarely foreclosed by the *Lopez* majority, even while criticizing the district court for its efforts to understand and apply the *Lopez* analysis. Unlike Brzonkala and the government, however, we are unwilling to consign the Supreme Court's **[\*\*9]** most significant recent pronouncement on the Commerce Clause to the status of inconvenient but ultimately insignificant aberration.

Throughout their briefs, both Brzonkala and the government repeatedly note that *Lopez* reaffirmed, rather than overturned, the Supreme Court's Commerce Clause decisions of the last sixty years. Apparently on this ground, they also repeatedly assert that *Lopez* did not work any change in the Supreme Court's Commerce Clause jurisprudence, or in the framework for analyzing a statute's constitutionality under the Commerce Clause. See, e.g., Br. of Appellant Brzonkala at 35 ("Rather than creating a new standard, the *Lopez* Court merely declined to expand the Commerce Clause's scope."); Br. of Intervenor United States at 27 (asserting that, in *Lopez*, "the Supreme Court reaffirmed its previous half century of Commerce Clause jurisprudence").

We find such a superficial understanding of *Lopez*, especially by the United States, surprising. Although it is true that the *Lopez* Court did not disturb the precise *holdings* of any previous Supreme Court precedents, it is equally true that the *Lopez* Court renounced or limited some of the **[\*\*10]** most sweeping *reasoning* and *dicta* of its Commerce Clause opinions:

Admittedly, some of our prior cases have taken long steps down that road [toward converting congressional authority under the Commerce Clause into a police power], giving great deference to congressional power. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further.

*Lopez*, 514 U.S. at 567 (citation omitted).<sup>18</sup>

**[\*\*11]** Not only did the Court specifically reject earlier statements suggesting that congressional **[\*855]** power extends to the regulation of activities that merely affect interstate commerce, *id.* at 559 (admitting that "our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce" to fall within the Commerce power, and approving, "consistent with the great weight of our case law," the latter analysis as "the proper test"); *cf. id.* at 616 (Breyer, J., dissenting) ("The word 'substantial' implies a somewhat narrower power than recent precedent suggests."), but it also drew a clear distinction between regulations of economic and noneconomic activities, see *supra* note 5 and accompanying text, limiting to the former category the reach of the authority and reasoning of its most permissive Commerce Clause cases. Compare *id.* at 560 (majority) ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not."), with *id.* at 561 **[\*\*12]** (holding that because GFSZA had "nothing to do with 'commerce' or any sort of economic enterprise," it could not "be sustained under [the Court's] cases upholding regulations of activities that arise out of or are connected with a commercial transaction,

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<sup>18</sup> Although appellants cite this passage as authority for the proposition that *Lopez* reaffirmed the Supreme Court's "previous half century of Commerce Clause jurisprudence," they tellingly do not quote the passage, but instead provide only the following parenthetical description: "recognizing the breadth of the Commerce Clause power under its precedents and simply 'declining here to proceed any further.'" Br. of Intervenor United States at 27 & n.13. This description, of course, as the textual quotation shows, misrepresents the import of the Supreme Court's pronouncement.

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which viewed in the aggregate, substantially affects interstate commerce"); *cf. id.* at 627-28 (Breyer, J., dissenting) (noting the Court's "apparent belief that it can reconcile its holding with earlier cases by making a critical distinction between 'commercial' and non-commercial 'transaction[s]'" ).

Furthermore, the Court elevated to a majority opinion statements from previous concurring opinions that "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so," *Lopez*, 514 U.S. at 557 n.2 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981) (Rehnquist, J., concurring in judgment)) (internal quotation marks omitted), and that "whether particular operations affect interstate commerce sufficiently to come under the constitutional **[\*\*13]** power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court," *id.* (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964) (Black, J., concurring)) (internal quotation marks omitted). Thus, the Court made clear that courts may not merely defer to a legislative judgment that an activity sufficiently affects interstate commerce to satisfy the substantially affects test, but must instead independently evaluate constitutionality under the Commerce Clause, *id.* at 562, a proposition that had not always been apparent from the earlier cases, *see, e.g., United States v. Lopez*, 2 F.3d 1342, 1362-63 (5th Cir. 1993) (suggesting that findings appeared to be dispositive under then existing Supreme Court authority), *aff'd*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995).

Finally, the *Lopez* Court was emphatic that it would not find an activity sufficiently related to interstate commerce to satisfy the substantially affects test in reliance upon arguments that lacked any principled substantive **[\*\*14]** limitations and that consequently would justify plenary federal regulation of anything. *See, e.g., Lopez*, 514 U.S. at 564 ("pausing to consider the implications of the Government's arguments" and noting that "under the theories that the Government presents in support of § 922(q) [the GFSZA], it is difficult to perceive any limitation on federal power"); *id.* at 567 (refusing "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States").

Thus, although *Lopez* may have left intact all of the Supreme Court's previous holdings, and even the analytical framework for determining the constitutionality of regulations of *economic* activity, *see, e.g., id.* at 573-74 (Kennedy, J., concurring) (noting that "*stare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a *commercial* nature" and that precedents upholding regulations of "*commercial* transactions" were "within the fair **[\*\*15]** ambit of the Court's practical conception of *commercial* regulation and are not called in question by our decision today" (emphases added)), **[\*856]** appellants' suggestion that *Lopez* changed nothing at all is in serious error.

In accordance with their misunderstanding of *Lopez* as an aberrational decision that worked little change in the Supreme Court's Commerce Clause jurisprudence, appellants hardly even cite the opinion at all, let alone those portions of the opinion that set forth the Court's holding and essential reasoning.

Although *Lopez* is emphatically clear that the Gun-Free School Zones Act's principal defects were its failure either to regulate an economic activity or to include a jurisdictional element -- so clear, it bears repeating, that the Court both began and ended its opinion, as well as framed its holding, by reference to these defects, *see, e.g., id.* at 551; *id.* at 557 -- appellants neither discuss nor even cite these aspects of the opinion. Instead, appellants completely ignore the crucial distinctions drawn by the Supreme Court between regulations of economic and noneconomic activities, and between regulations that include a jurisdictional **[\*\*16]** element and those that do not, and even chastise the district court for considering section 13981's failure to regulate an economic activity or to include a jurisdictional element. <sup>19</sup> **[\*\*18]** *See, e.g., Br. of Appellant Brzonkala* at 34 (criticizing the district court for "ignoring the last half-century of Commerce Clause cases prohibiting public and private discrimination that in the aggregate substantially

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<sup>19</sup> Almost by way of afterthought, the government, in the final paragraph of its principal brief, and without citation, concedes that the fact "that a statute does not address economic activity directly may, as in *Lopez*, suggest that the connection between federal legislation and interstate commerce is impermissibly attenuated." *Br. of Intervenor United States* at 33-34. Among the six briefs filed by Brzonkala and the United States before this court, this lone sentence constitutes the sum total of the appellants' attention to the critical distinction *Lopez* draws between regulations of economic and noneconomic activities.

affects interstate commerce," but citing only to cases upholding regulations of *economic* activities); *id.* at 38 n.32 (similar); *id.* at 39 n.34 (asserting that "*Lopez* does not . . . preclude federal criminal statutes when state law enforcement has proven inadequate," but citing only to a lower court decision upholding a statute that contained a jurisdictional element); *id.* at 36 ("Without any basis, the court below interpreted *Lopez* as limiting valid Commerce Clause legislation to laws that (1) have a jurisdictional element linking the activity to interstate commerce, or (2) regulate economic activity. Nothing in *Lopez* imposes those prerequisites." (citation and footnote omitted)); Reply Br. of Intervenor United States at 10 (similar); Supp. Br. of Appellant **[\*\*17]** Brzonkala at 4 (similar). Compare Supp. Br. of Intervenor United States at 4 ("The Supreme Court's concern with federalism did not lead it to overrule any precedent or to confine Congress's authority under the Commerce Clause to the regulation of economic activity."), and Br. of Intervenor United States at 18-19 (similar), with *id.* at 33-34 (criticizing the district court for placing "considerable emphasis" on section 13981's failure to regulate economic activity).<sup>20</sup>

**[\*\*19]** **[\*857]** It is evident that appellants' refusal to acknowledge the clear distinctions drawn by the *Lopez* Court between laws that regulate economic activities or include jurisdictional elements and those that do not cannot be squared with the majority or concurring opinions in *Lopez*. And, indeed, their attempts to paper over these distinctions and persuade us to sustain section 13981 on the authority of *Wickard* and similar cases are but echoes of the arguments that failed to persuade a majority of the Court in *Lopez*. See, e.g., *Lopez*, 514 U.S. at 608-09 (Souter, J., dissenting) (recognizing but criticizing the importance placed by the Court on both distinctions); *id.* at 616 (Breyer, J., dissenting) (arguing that *Wickard*-style reasoning applies to the evaluation of all congressional regulations); *id.* at 627-30 (recognizing, but criticizing, Court's distinction between regulation of economic and noneconomic activities).

Similarly, despite the *Lopez* Court's clarification of the judicial role in independently evaluating constitutionality under the Commerce Clause, see *Lopez*, 514 U.S. at 557 n.2; **[\*\*20]** *id.* at 562-63, appellants also ignore the clear import of these passages, seizing instead upon references by the Court to "rational basis" review, see *id.* at 557 (describing the Court's post-New Deal Commerce Clause analysis); *id.* at 564 (describing the government's argument), in a transparent attempt to relegate the decision to insignificance.<sup>21</sup> Although *Lopez* undoubtedly preserves a healthy

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<sup>20</sup> At times, in fact, appellants come dangerously close to affirmatively misrepresenting the holding and analysis of *Lopez*. Compare Br. of Intervenor United States at 34 ("The Court in *Lopez* did not, however, hold that Congress was limited to the direct regulation of economic activity under the Commerce Clause. Instead, the Court reiterated that "'even if [an] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . .'" *Lopez*, 115 S. Ct. at 1628 (quoting *Wickard v. Filburn*, 317 U.S. at 125).") (alterations and omissions in Br.); *id.* at 27-28 (similar); and Br. of Appellant Brzonkala at 36 n.2 ("In *Wickard v. Filburn*, which *Lopez* did not purport to reverse, the Court held that even if an activity is not commercial, it may be reached by Commerce Clause if it exerts a 'substantial economic effect.' 317 U.S. at 125 (1942) (emphasis added)."), with *Lopez*, 514 U.S. at 560-61 (characterizing *Wickard* as a case involving economic activity and holding that because the GFSZA "had nothing to do with 'commerce' or any sort of economic enterprise," it could not be sustained under the authority or reasoning of cases such as *Wickard* that had upheld regulations of economic activities); *id.* at 559-60 (listing *Wickard* among "examples" of cases upholding regulations of economic activities); and *supra* Part III.B.1. Compare also Br. of Intervenor United States at 27 & n.2 (stating that *Lopez* merely reaffirmed the "previous half century of Commerce Clause jurisprudence"; citing for this proposition *Lopez*, 115 S. Ct. at 1637 (Kennedy, J., concurring), and characterizing this passage with the following parenthetical description: "Commerce Clause precedents 'are not called into question by our decision today'"), with *Lopez*, 514 U.S. at 573-74, 115 S. Ct. at 1637 (Kennedy, J., concurring) ("Later examples of the exercise of federal power where *commercial* transactions were the subject of the regulation include *Heart of Atlanta Motel, Inc. v. United States*, *Katzenbach v. McClung*, and *Perez v. United States*. These and like authorities are within the fair ambit of the Court's practical conception of *commercial* regulation and are not called in question by our decision today." (citations omitted; emphases added)); cf. *supra* Part III.A & nn.5, 18, 19.

<sup>21</sup> See, e.g., Br. of Appellant Brzonkala at 35 n.29 (asserting, without analysis, that "the *Lopez* decision's recognition that a law's constitutionality ultimately is a judicial decision does not disturb the deferential rational basis review the Court endorsed"); *id.* at 35 ("*Lopez* leaves undisturbed the well-established principle that Commerce Clause legislation will be upheld as long as Congress had a *rational basis* for concluding that the regulated activity sufficiently affected interstate commerce."); *id.* ("*Lopez* does not disturb the standard Commerce Clause rational basis review."); Br. of Intervenor United States at 19 ("The rational basis standard [was] reaffirmed in *Lopez*."); Supp. Br. of Intervenor United States at 1 (same); cf. Br. of Intervenor United States at 28 (referring to "rational basis" review); Reply Br. of Appellant Brzonkala at 14 (same); Reply Br. of Intervenor United States at 13 (same); Supp. Br. of Appellant Brzonkala at 1-2 (same); Supp. Br. of Intervenor United States at 4, 6 (same); *id.* at 2 (similar).

degree of judicial deference to reasonable legislative judgments of fact, it is plain that appellants do not by their incessant invocations of "rational basis review" contemplate merely such deference. Rather, it is evident that they use this fashionable label of judicial restraint to disguise their advocacy of a deference so absolute as to preclude any independent judicial evaluation of constitutionality whatsoever -- a deference indistinguishable from judicial abdication. And the dissent does likewise; indeed, laying bare appellants' and the dissent's standard of review to an extent that will surely prove disquieting to appellants, the dissent, after announcing the "rational basis" standard of review, offers not a single sentence -- **[\*\*21]** *not one* -- of independent analysis of whether gender-motivated violence substantially affects interstate commerce.

**[\*\*22]** Such a view of the judicial role obviously cannot be reconciled with the opinions of the Court and of the concurring Justices in *Lopez*. And it is clear from the paucity of attention given by appellants and the dissent to these opinions that they do not derive their understanding of the judicial role in evaluating constitutionality under the Commerce Clause from these sources, but rather, again, from the *Lopez* dissents, the core rhetoric and reasoning of which their arguments closely parallel. *Compare* Br. of Appellant Brzonkala at 37 ("Rather than apply the traditional Commerce Clause analysis ratified by *Lopez*, the District Court instead substituted its own analysis and judgment."); *id.* (criticizing district court for "abandoning" the "rational basis test"); Br. of Intervenor United States at 31 (similar); Reply Br. of Intervenor United States at 12 ("The VAWA may be invalidated only if the Court chooses to set aside the findings of a **[\*858]** direct connection between gender-motivated violence and interstate commerce. . . . This task requires broad-scale second-guessing of legislative findings and judgment."); *and* Br. of Intervenor United States at 31 (similar), **[\*\*23]** *with Lopez*, 514 U.S. at 603 (Souter, J., dissenting) (invoking rational basis review); *id.* at 604 ("The practice of deferring to rationally based legislative judgments is a paradigm of judicial restraint." (internal quotation marks and citation omitted)); *id.* at 604-07 (discussing the genesis of rational basis review); *id.* at 608 (decrying the majority's "qualification of rational basis review"); *id.* at 609 (stating that the implications of the Court's opinion could not "square with rational basis scrutiny"); *id.* at 614-15 ("Because Justice Breyer's opinion demonstrates beyond any doubt that the Act in question passes the rationality review that the Court continues to espouse, today's decision may be seen as only a misstep . . ."); *id.* at 616-17 (Breyer, J., dissenting) (invoking rational basis review); *id.* at 618-25 (purportedly applying rational basis review); *and id.* at 631 ("Upholding this legislation would do no more than simply recognize that Congress had a 'rational basis' for finding a significant connection between guns **[\*\*24]** in or near schools and (through their effect on education) the interstate and foreign commerce they threaten.").

Whether one agrees or disagrees with our conclusion, it is the majority, not the dissent, that has undertaken the "rational basis" review contemplated by the Court in *Lopez*. That is, having been presented with Congress' findings on the matter, we have "independently evaluated" "whether a rational basis exist[s] for concluding that a regulated activity [here, gender-motivated violence] sufficiently affect[s] interstate commerce," to justify the exercise of Congress' broad powers under Article I, section 8. And we have done this mindful of the Supreme Court's pointed admonitions that "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so" and that "whether particular operations affect interstate commerce sufficiently . . . is ultimately a judicial rather than a legislative question." *Lopez*, 514 U.S. at 557 & n.2, 562 (internal quotation omitted). In this undertaking emphatically required by the Supreme Court in *Lopez*, appellants would have us only half-heartedly **[\*\*25]** engage and the dissent would have us engage not at all.

Finally, not content simply to emasculate the judicial role in the determination of whether Congress has exceeded its constitutional authority, appellants also would disregard the first principles of federalism that collectively constitute the infrastructure of the majority opinion in *Lopez*, only grudgingly acknowledging even their existence. See Reply Br. of Intervenor United States at 14; Supp. Br. of Intervenor United States at 4. Specifically, like the dissent, which at the same time that it roundly criticizes us for attempting a principled line between that which is "truly national" and that which is "truly local," *Lopez*, 514 U.S. at 567-68, tellingly omits quotation of all of the passages from *Lopez* reflecting the Court's commitment to such a limitation on the Commerce power, <sup>22</sup> appellants never address either

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<sup>22</sup> See, e.g., *Lopez*, 514 U.S. at 557 ("In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between between what is national and what is local and create a completely centralized government.'"); *id.* at 564

the *Lopez* Court's concern with the *implications* of the government's arguments **[\*859]** or its refusal to rely upon arguments that lack any principled limitations and would justify federal regulation of any activity. Instead, they simply note a series of particular characteristics **[\*\*26]** of section 13981 that they believe minimize the statute's disruption of the balance between state and federal authority, such as its partial reliance on state law in defining the conduct that it regulates; its exclusion of supplemental jurisdiction over divorce, custody proceedings, and similar matters; and its relatively narrow focus on gender animus.

**[\*\*27]** Not only do these statute-specific characteristics not eliminate the impact of section 13981 on the balance of federal and state authority, *see supra* at 32-37, 56-58 & nn.10, 16, the logic of the argument that appellants advance for sustaining the statute is independent of these characteristics; that is, the argument would require us to sustain section 13981 even without the particular characteristics upon which the government relies to distinguish the provision. For the essence of appellants' contention is that Congress can regulate any problem solely by finding that it affects the economy and has not been fully remedied by the States. *See, e.g.*, Br. of Intervenor United States at 32; *but cf.* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320904, 108 Stat. 1796, 2125 (adding to GFSZA, *inter alia*, statutory finding that the States are unable to curb gun-related violence). But if Congress has found that the States have failed adequately to address violence against women, and that such violence affects the economy, then surely it need not rely on state law definitions of violent crime, but can itself define such crime, preempting the States' **[\*\*28]** criminal and tort laws altogether. And if Congress has found that the States have failed to eradicate gender bias, a problem that is not limited to violent crime but permeates the law generally, and family law in particular, then Congress need not proscribe federal jurisdiction over the core areas of family law, but can extend supplemental jurisdiction over these areas, or even regulate them directly and perhaps exclusively, because issues of divorce, alimony, the equitable division of property, and child custody, like violent crime, indisputably have ultimate economic effects. Furthermore, if the congressional findings in this case as to the shortcomings of the States and the effects of violence against women would support the regulation of gender-motivated violence against women, then they would also support the regulation of all violence against women. Indeed, the States' failure to eliminate gender-motivated violent crime can surely be cited as a specific example of failure to resolve fully not only problems of animus, but also the scourge of violent crime generally. And it cannot be doubted that if gender-motivated violent crime affects the economy, *a fortiori* all violent **[\*\*29]** crime affects the economy. Accordingly, there is no reason that Congress must, under the logic of appellants' arguments, limit its reach to violent crime motivated by gender animus, rather than assume control over the entire field of violent crime, or, for that matter, all crime within all of the States.

The dissent stands in what we suspect will be, for appellants, uncomfortable testament to this infinite reach of appellants' argument. In the single paragraph of overarching significance in the dissent, our colleagues do nothing more than recite the following statement from the conference committee and assert, in *ipse dixit* protestingly characterized as "independent evaluation," that gendermotivated violence really does substantially affect interstate commerce:

Crimes 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 commerce, 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 **[\*\*30]** interstate products. . . . My independent evaluation of Congress's "legislative judgment" compels me to conclude that Congress had a rational basis for finding that gender-based violence substantially affects interstate commerce.

*Infra* at 177, 182 (quoting H.R. Conf. Rep. No. 103-711, at 385; citation and footnote omitted); *see also id.* at 182-183 n.5.

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("Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."); *id.* ("Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."); *id.* at 567 ("To uphold the Government's contentions here, we would have to pile inference upon inference *in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.*" (emphasis added)).

**[\*860]** But with only a moment's reflection it is apparent -- as the dissent certainly recognizes -- that what is said by the dissent (and Congress) to be true of gender-motivated violence is true of *all* crime many times over, as the simple deletion of the phrases "motivated by gender" and "gender-based" from this passage confirms:

Crimes of violence have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate commerce, 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. . . . My independent evaluation of Congress's "legislative **[\*\*31]** judgment" compels me to conclude that Congress had a rational basis for finding that violence substantially affects interstate commerce.

*Cf. Lopez*, 514 U.S. at 564 (rejecting argument from "costs of crime" and "national productivity" as leading to congressional power to "regulate not only all violent crime, but all activities that might lead to violent crime" and as eliminating "any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign").<sup>23</sup> The implications of such reasoning for the sovereign States need hardly be particularized.

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<sup>23</sup> Indeed, the substitution of "violent crime" or "crime" for "gender-based violence" in even the individualized statements regarding section 13981 relied upon by the dissent and the government, none of which was by Congress as an institution and few of which were even made by congressional members or staff, confirms the boundless power that would reside in the Congress were the section to be sustained upon such statements:

*Violent crime* and the fear of *violent crime* restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy.

*Infra* at 176-177.

Estimates suggest that we spend [billions] a year on health care, criminal justice, and other social costs of *violence* . . . [and lose billions] annually due to absenteeism in the workplace.

*Id.* at 177-178.

*Violent crime* bars its [targets] from full participation in the national economy.

*Id.* at 177.

Even the fear of *violent crime* affects the economy because it deters [men and] women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence.

Br. of Intervenor United States at 7.

[Men and] women often refuse higher paying night jobs in service/retail industries because of the fear of attack.

*Infra* at 178.

Fear of *crime* even deters [men and] women from using public transportation and thus acts as a barrier to mobility, particularly for those . . . who have no alternative to public transportation because of economic constraints.

Br. of Intervenor United States at 8 (internal quotation omitted).

The threat of violence has made many [men and] women understandably afraid to walk our streets or use public transportation.

*Id.*

But the costs do not end there: *violent crime* has a devastating social and economic effect on the family and the community.

*Infra* at 178 (internal quotation omitted).



**[\*\*32]** To these sweeping implications of their arguments, appellants offer little response other than that Congress here has enacted a more limited statute. Such a meager response is palpably insufficient, although we acknowledge that it may well be the one even remotely plausible argument available in the wake of *Lopez*.

The only other argument, which appellants advisedly forgo, is that of our colleagues in dissent, who would, in blissful denial of the Court's most recent precedents on Our Federalism, proceed to import into Commerce Clause analysis a doctrine whose legitimacy even in the context in which it was fashioned was in doubt from inception, see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985), and hold that Congress alone is constitutionally responsible for the protection of the sovereign States. Thus says the dissent in a passage that is so startling in its quaint innocence that it bears repetition in full:

My colleagues in the majority iterate and reiterate that the enumeration of powers in the Constitution reserves authority to the states, that ours is a system of dual sovereignty, and that the **[\*\*33]** states must operate as independent governmental bodies for that system to continue to exist. No one **[\*\*861]** doubts the validity of any of these principles. The critical question, however, is who decides how they are to be upheld.

The Constitution itself provides a clear and specific answer to that question. It allocates the fundamental power of government -- the power of legislation -- to Congress. Congress is not some central dictatorial assembly with interests independent of and antithetical to the states. Rather, Congress is composed entirely of members elected from each state to represent the interests of the people of that state, and is specifically designed to preserve state authority and protect state interests. Congressional legislation accordingly is not, as the majority suggests, a command from an autonomous central power to totally subjugated states. Congressional legislation is instead the product of the constitutionally coordinated authorities of the states, the localities, and the people. Courts thus have slender authority to invalidate the result of Congress's legislative process in order to protect the states or localities, unless there is some reason to suspect **[\*\*34]** that the legislative process has been or will be unreliable.

*Infra* at 213-14.

As the Chief Justice (then-Justice Rehnquist) and Justice O'Connor might have said in their impassioned dissents predicting that the "Court will in time" overrule *Garcia* and "again assume its constitutional responsibility," *Garcia*, 469 U.S. at 580, 589 (O'Connor, J., dissenting, joined by Powell and Rehnquist, JJ.); see also *id.* at 580 (Rehnquist, J., dissenting), such is nothing short of putting the fox in charge of the chicken coop. For, as Justice O'Connor wrote in critique of the *Garcia* majority, under Justice Blackmun's formulation, "all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint." And,

if federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, [the courts] cannot [so] abdicate [their] constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States.

*Id.* at 589 (O'Connor, J., dissenting). **[\*\*35]**

One need not rely upon the prescience of the Chief Justice and Justice O'Connor, however, for the conclusion that the dissent's view of federalism bears no resemblance to the Supreme Court's. He need only look to the Court's decision in *Lopez* itself where, in virtual anticipation of the very argument made by the dissent, Justice Kennedy wrote for himself, for Justice O'Connor, and just as assuredly for the three remaining Justices of the majority, that

the absence of structural mechanisms to require [Congress] to undertake this principled task [of ensuring the proper federal balance], and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role. Although it is the obligation of all officers of the Government to respect the constitutional design, the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.

*Lopez*, 514 U.S. at 578 (Kennedy, J., concurring, joined by O'Connor, J.).

Thus does **[\*\*36]** the dissent, even more than do appellants, fundamentally misapprehend the Court's recent pronouncements on our dual sovereignty and the affirmative constitutional obligation of the judiciary to safeguard the sovereignty of the States against congressional encroachment. As *Lopez* forcefully reminds us, our federal system of government exists not as a mere matter of legislative grace, as the dissent (and ultimately appellants) would have, but rather as a matter of constitutional design.

IV.

Although in the wake of *City of Boerne* appellants have returned to defend section 13981 primarily as a constitutional exercise of Congress' power under the Commerce Clause, they still contend alternatively, though now less enthusiastically, that section 13981 is a constitutionally legitimate exercise of Congress' power under Section 5, **[\*862]** one of the explicit bases upon which section 13981 was enacted. See 42 U.S.C. § 13981(a) (describing statute as adopted "pursuant to the affirmative power of Congress to enact this part . . . under section 5 of the Fourteenth Amendment . . .").

**[\*\*37]** The Fourteenth Amendment, of course, provides in pertinent part as follows:

Section 1. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV, §§ 1, 5. Appellants maintain that Congress properly invoked Section 5 in enacting section 13981 because Congress concluded that bias and discrimination against women in the state criminal justice systems "often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled" and that section 13981 was "necessary to guarantee equal protection of the laws." H.R. Conf. Rep. No. 103-711, at 385, *reprinted in* 1994 U.S. Code Cong. & Admin. News 1839, 1853. The remaining issue for us, therefore, is whether section 13981 is "appropriate legislation" to "enforce" the substantive constitutional guarantee that "no State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §§ 1, 5. In light of Supreme Court precedent, and particularly **[\*\*38]** given the Court's recent decision in *City of Boerne*, we hold that it is not.

A.

Section 13981 creates a cause of action against private parties who commit acts of gender-motivated violence, and that action may be pursued without regard to whether the State connived in those acts or otherwise violated the particular plaintiff's constitutional rights. To sustain section 13981 under Section 5 of the Fourteenth Amendment, therefore, we would have to hold that Section 5 permits Congress to regulate purely private conduct, without any individualized showing of unconstitutional state action. Because, under the Amendment's text, its history, and a consistent line of Supreme Court precedent dating from just after the Amendment's ratification to the present, it is established that Congress may not regulate purely private conduct pursuant to its Fourteenth Amendment enforcement power, we cannot so hold.

1.

Section 1 of the Fourteenth Amendment, which defines the rights "enforceable" by Congress through "appropriate legislation," provides that "no *State* shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1 (emphasis added). **[\*\*39]** The Supreme Court observed in *United States v. Guest*, 383 U.S. 745, 16 L. Ed. 2d 239, 86 S. Ct. 1170 (1966), that this prohibition is directed *exclusively* to the States:

The Equal Protection Clause does not add anything to the rights which one citizen has under the Constitution against another. . . . This has been the view of the Court from the beginning [and] it remains the Court's view today.

*Id.* at 755 (internal quotation marks and citations omitted). In the thirty years since *Guest*, not only the Court as a whole but nearly every Member of the Court individually has expressly embraced this longstanding view as to the state action limitation of the Amendment. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1981), the Court, characterizing its prior precedents as "insisting that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State," *id.* at 937, wrote simply, but unequivocally, that

"because the [Fourteenth] **[\*\*40]** Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action,'" *id.* at 924. A year later, in *Blum v. Yaretsky*, 457 U.S. 991, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982), the Court again forcefully stated the state action requirement: "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." *Id.* at 1002 (internal quotation marks and citation omitted). And in *Georgia v. McCollum*, 505 U.S. 42, 120 L. Ed. 2d 33, 112 S. Ct. 2348 **[\*863]** (1992), the Court observed that "racial discrimination, although repugnant in all contexts, violates the Constitution *only* when it is attributable to state action." *Id.* at 50 (emphasis added). As the Court explained at some length in *NCAA v. Tarkanian*, 488 U.S. 179, 102 L. Ed. 2d 469, 109 S. Ct. 454 (1988),

Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny **[\*\*41]** under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be. As a general matter the protections of the Fourteenth Amendment do not extend to private conduct abridging individual rights. Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law. . .

*Id.* at 191 (internal quotation marks and citations omitted).

Even when they have not joined the Court's opinions in particular cases or have written separately, the individual Members of the Court have not hesitated to express their agreement that the Fourteenth Amendment confers rights only against the States. See *Morse v. Republican Party*, 517 U.S. 186, 248, 134 L. Ed. 2d 347, 116 S. Ct. 1186 (1996) (Kennedy, J., dissenting) ("We have been cautious to preserve the line separating state action from private behavior that is beyond the Constitution's reach."); *J.E.B. v. Alabama*, 511 U.S. 127, 150, 128 L. Ed. 2d 89, 114 S. Ct. 1419 (1994) **[\*\*42]** (O'Connor, J., concurring) ("The Equal Protection Clause prohibits only discrimination by state actors."); *McCollum*, 505 U.S. at 59 (Rehnquist, C.J., concurring); *id.* (Thomas, J., concurring in the judgment); *id.* at 63 (O'Connor, J., dissenting) (noting that distinction between private and state action "appears on the face of the Fourteenth Amendment"), *id.* at 69 (Scalia, J., dissenting); *Lugar*, 457 U.S. at 945 (Powell, J., dissenting, joined by Rehnquist and O'Connor, JJ.) ("[The Fourteenth Amendment] does not create rights enforceable against private citizens . . . but only against the States.").

Indeed, even Justices Brennan and Marshall, who typically advocated the most expansive interpretations of the Fourteenth Amendment, agreed that the Amendment extends only to state action. Justice Brennan, for example, dissenting in *Blum*, described the Fourteenth Amendment as "a restraint on the abuse of state power." *Blum*, 457 U.S. at 1012 (Brennan, J., dissenting). And Justice Marshall fully concurred in that view of the reach of the Amendment. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 185, 32 L. Ed. 2d 627, 92 S. Ct. 1965 (1972) **[\*\*43]** (Brennan, J., dissenting, joined by Marshall, J.); *cf.* *Tarkanian*, 488 U.S. at 199 (White, J., dissenting, joined by Brennan, Marshall, and O'Connor, JJ.) (stating issue as "whether the NCAA . . . became a state actor").

Unsurprisingly, in accord with its uniform understanding of Section 1 as conferring rights only against the States, the Court has consistently held that Congress' Section 5 power to enforce Section 1 is correspondingly limited to remedial action against States and state actors. Thus, and significantly for the disposition of the question before us, as recently as 1997 in *City of Boerne*, the Court explained that Section 5 grants Congress only a "remedial" power to "make . . . effective" Section 1's "substantive prohibitions against the States." 117 S. Ct. at 2165. Such "remedial" legislation, the Court emphasized, "should be adapted to the mischief and wrong which the [Fourteenth] Amendment was intended to provide against" -- unconstitutional action by the States. *Id.* at 2170 (internal quotation marks and citation omitted); **[\*\*44]** see also *id.* at 2166 (that "Congress' § 5 power [is] corrective or preventive, not definitional, has not been questioned"); *cf.* *Morse*, 517 U.S. at 276 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.) ("It is well-established that Congress may not regulate purely private behavior pursuant to its enforcement power under the Fourteenth . . . Amendment[.]"); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 605-06, 111 L. Ed. 2d 445, 110 S. Ct. 2997 (1990) (O'Connor, J. dissenting, joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) ("Section 5 empowers Congress to act respecting the States" and "provides to Congress a particular, structural role in the oversight of certain of the States' actions.").

**[\*864]** These many and recent expressions by the Court of the reach of Sections 1 and 5 of the Fourteenth Amendment rest firmly not only on the Amendment's plain language, but also on the legislative history and early jurisprudence of the Amendment. In *City of Boerne*, the Court recounted the historical justification for its interpretation of the Amendment as limited to state action and Congress' power thereunder **[\*\*45]** as limited to the enactment of legislation aimed at the States. In particular, the Court contrasted the language and original understanding of the Amendment, as adopted, with the language and understanding of an earlier, rejected draft of the Amendment. See *generally City of Boerne*, 117 S. Ct. at 2164-66. This earlier draft, the so-called Bingham Amendment, was reported early in 1866 by Republican Representative John Bingham of Ohio to the House of Representatives on behalf of the Joint Committee on Reconstruction:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866), *quoted in City of Boerne*, 117 S. Ct. at 2164. By its terms, this draft Amendment would have authorized Congress to secure equality in the rights of life, liberty, and property of all citizens, by legislating *directly* upon these rights. Consequently, that proposed broad grant of congressional **[\*\*46]** power quickly generated enormous opposition from members of the Reconstruction Congress who feared that a congressional power to legislate in such a manner would reduce the role of the States to a virtual nullity. See, e.g., *City of Boerne*, 117 S. Ct. at 2164 (Bingham Amendment would permit "Congress to legislate fully upon all subjects affecting life, liberty, and property, such that there would not be much left for the State Legislatures.") (quoting Sen. Stewart); *id.* ("Members of Congress from across the political spectrum criticized the Amendment, and the criticisms had a common theme: The proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure."); *id.* ("Democrats and conservative Republicans argued that the proposed Amendment would give Congress a power to intrude into traditional areas of State responsibility, a power inconsistent with the federal design central to the Constitution.").

In the face of these objections, the Bingham Amendment was tabled, and the Joint Committee on Reconstruction thereafter drafted the proposal that eventually became the Fourteenth Amendment. This draft, like the **[\*\*47]** Fourteenth Amendment itself, "imposed several self-executing limits on the States," 117 S. Ct. at 2165, and also authorized Congress "to enforce, by appropriate legislation, the provisions of this article," Cong. Globe, 39th Cong., 1st Sess. 2286, *quoted in City of Boerne*, 117 S. Ct. at 2165. Subsequently adopted and ratified (with modifications not relevant here), this Amendment was understood by the Reconstruction Congress only to grant Congress "the power to make the substantive constitutional prohibitions *against the States* effective." *City of Boerne*, 117 S. Ct. at 2165 (emphasis added); see also *id.* (Section 5 "enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment") (quoting Sen. Howard); *id.* (new draft would "allow[] Congress to correct the unjust *legislation of the States*" (emphasis added)) (quoting Rep. Stevens); *id.* (new draft would vest Congress with authority "to protect by national law the privileges and immunities of all the citizens of the Republic . . . whenever the same shall be abridged **[\*\*48]** or denied by the unconstitutional acts of any *State*" (emphasis added)) (quoting Rep. Bingham).

Accordingly, this proposed Amendment did not raise the concerns that had ignited the debate over the Bingham Amendment, namely, that authorizing Congress to legislate directly upon individual rights would unduly expand Congress' powers at the expense of the States and authorize Congress "to prescribe uniform national laws with respect to life, liberty, and property." *Id.* As the Supreme Court emphasized in *City of Boerne*, this legislative history -- that Congress explicitly considered an earlier draft Amendment that would have given Congress power to **[\*865]** regulate purely private conduct, rejected that draft in the face of sharp opposition, and subsequently adopted an Amendment that gave Congress only the power to "enforce" a "provision" that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws" -- has a "*direct bearing* on the central issue of defining Congress' enforcement power." *Id.* at 2164 (emphasis added). In our view, and as the Supreme Court has consistently held, this history confirms the plain-language and commonsense **[\*\*49]** understanding that Section 1 provides rights only against the States and that, correspondingly, Section 5 only grants Congress power to enforce the rights provided in Section 1 through legislation directed plain against state action, not a power to regulate purely private conduct.

## Brzonkala v. Va. Polytechnic Inst. &amp; State Univ.

This understanding is reinforced by two Supreme Court decisions rendered nearly contemporaneously with the Amendment's ratification -- *United States v. Harris*, 106 U.S. 629, 27 L. Ed. 290, 1 S. Ct. 601 (1883), and the *Civil Rights Cases*, 109 U.S. 3, 27 L. Ed. 835, 3 S. Ct. 18 (1883). Although the particular prohibitions voided in these cases have since been properly sustained under different constitutional provisions, the broader holdings of these cases limiting the Fourteenth Amendment and its enforcement power to state action remain unassailable. See *infra* Part IV.B; see also *City of Boerne*, 117 S. Ct. at 2166, 2170 (quoting the *Civil-Rights Cases* and citing with approval both *Harris* and the *Civil Rights Cases*).

In *Harris*, the Court invalidated section two of the Civil Rights Act of 1871, which forbade any person to "conspire . . . for **[\*\*50]** the purpose of depriving . . . any person . . . of the equal protection of the laws." 106 U.S. at 632. The Court began its constitutional inquiry by emphasizing "that the government of the United States is one of delegated, limited, and enumerated powers," *id.* at 635, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively[,] or to the people," *id.* at 636 (quoting U.S. Const. amend. X), and, therefore, that section two of the Act could stand only if it were a valid exercise of one of Congress' enumerated powers.

The Court then went on to hold that section two of the Act, which punished private individuals for interfering with other private individuals' rights, exceeded Congress' power under Section 5. In reaching this conclusion, the Court first canvassed the language and meaning of the Fourteenth Amendment and concluded *both* that Section 1 of that Amendment imposes an obligation only upon the States *and* that Section 5 of the same authorizes **[\*\*51]** Congress to enforce the guarantees of Section 1 *only against the States themselves*:

[The Fourteenth Amendment] is a guaranty of protection against the acts of the State government itself. It is . . . not a guaranty against the commission of individual offenses; and *the power of Congress . . . to legislate for the enforcement of such a guaranty, does not extend to the passage of laws for the suppression of crime within the States. The enforcement of the guaranty does not require or authorize congress to perform "the duty that the guaranty itself supposes it to be the duty of the State to perform, and which it requires the State to perform."*

*Id.* at 638 (internal quotation marks omitted; emphasis added); see also *id.* at 638-39 ("The Fourteenth Amendment prohibits a State from depriving any person of life, liberty, or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen against another. . . . The duty of protecting all **[\*\*52]** its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, and no more. The power of the national government is limited to this guaranty." (citation omitted)); *Virginia v. Rives*, 100 U.S. 313, 318, 25 L. Ed. 667 (1879) ("The provisions of the Fourteenth Amendment of the Constitution have reference to State action exclusively, and not to any action of private individuals.").

Additionally, reasoned the Court, not only did section two apply to purely private conduct, but it also did so without regard to the conduct of the State in which the underlying **[\*866]** crime occurred and without so much as requiring an individualized showing that the State had unconstitutionally deprived the particular victim of a right protected by the Fourteenth Amendment:

The language of the amendment does not leave this subject in doubt. When the State has been guilty of no violation of its provisions; when it has not . . . denied to any person within its jurisdiction the equal protection of the **[\*\*53]** laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the right of all persons, the amendment imposes no duty and confers no power upon Congress.

[Section two of the 1871 Act] is not limited to take effect only in case the State shall . . . deny to any person the equal protection of the laws. It applies, no matter how well the State may have performed its duty. Under it private persons are liable to punishment for conspiring to deprive any one of the equal protection of the laws enacted by the State.

In the indictment in this case, for instance, . . . there is no intimation that the State [in which the acts occurred] has passed any law or done any act forbidden by the Fourteenth Amendment.

*Harris*, 106 U.S. at 639-40. Thus, in spite of the "strenuous[] insistence" by the United States that the Act fell within Congress' Section 5 power, *id.* at 637, and even after affording the statute the full presumption of constitutionality warranted for any enactment of Congress, *id.* at 635, the Court invalidated [\*\*54] this section of the 1871 Civil Rights Act as having exceeded Congress' power under Section 5:

As, therefore, the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers, we are *clear* in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution.

*Id.* at 640 (emphasis added).

Later that same year, in the *Civil Rights Cases*, the Court similarly invalidated the public-accommodations provisions of the Civil Rights Act of 1875 -- provisions that are directly analogous to section 13981 in their application to purely private conduct and establishment of civil liability -- as beyond the scope of Congress' Section 5 enforcement power. The 1875 Act created a substantive right of equal access to "inns, public conveyances on land or water, theatres, and other places of public amusement . . . applicable alike to citizens of every race and color." 109 U.S. at 9 (quoting Civil Rights Act of 1875, § 1). In order to enforce the right, the Act authorized criminal penalties against [\*\*55] those who violated the right, and further authorized persons aggrieved by violations of the Act to bring private causes of action for damages against those who denied them their rights to the enjoyment of public accommodations. *Id.*

Using language similar to that in *Harris*, the Court summarized the nature and extent of congressional enforcement power under Section 5 thus:

[Section 5 of the Fourteenth Amendment] invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. *This is the legislative power conferred upon Congress, and this is the whole of it.* It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief *against State legislation, or State action*, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation [\*\*56] of private rights; but to provide modes of redress *against the operation of State laws, and the action of State officers executive or judicial*, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws . . . [and] by power given to Congress to legislate for the purpose of carrying such prohibition into effect; *and such legislation must necessarily be predicated upon such supposed State laws or State [\*\*867] proceedings, and be directed to the correction of their operation and effect.*

*Id.* at 11-12 (emphases added). And, again, the Court explained that Congress may not regulate private conduct when legislating pursuant to Section 5:

In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, [\*\*57] or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking.

*Id.* at 13-14. A contrary interpretation of the Enforcement Clause, the Court emphasized, would permit Congress to regulate directly those rights protected against state interference by the Fourteenth Amendment, opening the floodgates to the promulgation of a congressional "code of municipal law regulative of all private rights between man and man in society." *Id.* at 13. Eventually, the Court observed, such would result in "Congress taking the place of the State legislatures and . . . superseding them" in a manner "repugnant to the Tenth Amendment of the Constitution," *id.* at 15.

Turning to the statute at issue, the Court held that the first two sections of the 1875 Act, like section two of the Civil Rights Act of 1871 invalidated in *Harris*, exceeded Congress' Section 5 power. First, these provisions of the 1875 Act

were illegitimate under the principle that Congress may not reach purely private conduct. As the Supreme Court put the point:

An inspection of the law shows that **[\*\*58]** it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. *It proceeds ex directo to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States.*

*Id.* at 14 (emphasis added). Second, also like the provision at issue in *Harris*, the challenged provisions were not limited by their terms to take effect only in particular cases in which the plaintiff could make an individualized showing that the State had violated the victim's Fourteenth Amendment rights. *Id.* at 14 ("An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States."). Rather, the provisions "applied equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment." *Id.* The Court **[\*\*59]** concluded, therefore, that the Act was "not corrective legislation," but rather was "primary and direct," "taking immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement." *Id.* at 19.

Finally, and in stark contrast to the approach urged on us by appellants, the Court emphasized, as it had in *Harris*, that a court entertaining a Section 5 challenge is *not* simply to defer to the apparent conclusion of Congress that the statute is within its constitutional powers, but rather is duty-bound to form "an independent judgment" regarding the constitutionality of the statute and to "exercise [that judgment] according to the best lights" available to the court. *Id.* at 10. Exercising such judgment, the Court held that the provisions of the 1875 Act were not a permissible exercise of Section 5 power, and *inter alia* affirmed the judgments for the defendants, including the defendant in the private cause of action.

In later cases, such as *United States v. Guest*, 383 U.S. 745, 16 L. Ed. 2d 239, 86 S. Ct. 1170 (1966), **[\*\*60]** <sup>24</sup> **[\*\*61]** the Supreme Court clarified that the state action limitation on **[\*868]** Congress' power under Section 5 permits Congress to regulate not only the States themselves and those on the States' payroll, but also those individuals who, through active connivance or conspiracy with the State, in effect act under color of state law

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<sup>24</sup> At issue in *Guest* was whether certain indictments stated chargeable offenses under 18 U.S.C. § 241, a statute that prohibits conspiracies to deprive persons of constitutional rights. The disputed indictments in *Guest* alleged that certain white citizens conspired for the purpose of interfering with various constitutional rights of black citizens, including their rights to equal utilization of public facilities and to interstate travel. The Supreme Court reversed the lower court's dismissal of the indictments for failure to state a chargeable offense. With respect to the counts in the indictment alleging that the defendants interfered with the victims' right to "equal utilization, without discrimination upon the basis of race, of public facilities," *Guest*, 383 U.S. at 753, the Court concluded, as a matter of statutory construction, that such a right was protected by § 241 to the extent that it was protected by the Equal Protection Clause. *Id.* at 754. It then held that the indictment stated a chargeable offense because it alleged sufficient state involvement in the conspiracy -- "active connivance" between the private defendants and state officials -- for the conspiracy to fall within the prohibitions of the Equal Protection Clause under state action principles. *Id.* at 756-57 ("The allegation is broad enough to cover a charge of active connivance by agents of the State in the making of the 'false reports,' or other conduct amounting to official discrimination."). Therefore, the Court in *Guest* at most extended the Fourteenth Amendment's state action concept to include those who act in cooperation and active connivance with the State. *Cf. United States v. Price*, 383 U.S. 787, 16 L. Ed. 2d 267, 86 S. Ct. 1152 (1966) (holding that involvement of a sheriff, deputy sheriff, and a patrolman in lynching conspiracy was sufficient to render the conspiracy under color of state law).

Because the Court construed this count to allege state interference with a right protected by the Equal Protection Clause, it did not address the question whether Congress could, under Section 5, proscribe private conduct without any nexus to state action. The Court similarly did not consider whether Congress could regulate wholly private conduct in the course of reinstating the other counts in the indictment that alleged a private interference with the victims' constitutional right to travel. In reinstating these counts, the Court emphasized that "the constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private," and it "reiterated that the right to travel freely from State to State finds constitutional protection that is *quite independent of the Fourteenth Amendment.*" *Guest*, 383 U.S. at 760 n.17 (emphasis added).

or otherwise on behalf of the State. But the Court has never overruled either *Harris* or the *Civil Rights Cases*.<sup>25</sup> **[\*\*62]** And, since *Harris* and the *Civil Rights Cases*, when the Court has **[\*869]** upheld the application of civil rights statutes to purely private conduct, it has conspicuously done so under provisions of the Constitution other than Section 5 which are not subject to state-action requirements.<sup>26</sup>

**[\*\*63]** Thus, not only under the text and legislative history of the Fourteenth Amendment, but also under a consistent line of Supreme Court cases from *Harris* and the *Civil Rights Cases* to *City of Boerne*, it is now well established that, under the Fourteenth Amendment, Congress may adopt "appropriate legislation" to "enforce" its affirmative prohibitions against *state* action and action taken under color of state law. Congress may also regulate the conduct of nominally private persons who act in connivance with the State or whose conduct receives the "imprimatur of the

<sup>25</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 628, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996) (citing the *Civil Rights Cases* for the proposition that "it was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations"); *Lugar*, 457 U.S. at 936 (citing *Civil Rights Cases* and stating that "careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of *federal law and federal judicial power*" (emphasis added)); *Blum*, 457 U.S. at 1002 (citing *Civil Rights Cases* as origin of the "firmly embedded" doctrine that Section 1 only protects against state action (internal quotations omitted)); *Moose Lodge*, 407 U.S. at 172 (citing *Civil Rights Cases* as "setting forth the essential dichotomy" between state and private action); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970) (declining to reconsider the Section 5 holding of the *Civil Rights Cases*); *Collins v. Hardyman*, 341 U.S. 651, 657-58, 95 L. Ed. 1253, 71 S. Ct. 937 (1951) (noting that *Harris* was "in harmony with . . . other important decisions during that period [of *Cruikshank* and the *Civil Rights Cases*] by a Court, every member of which had been appointed by President Lincoln, Grant, Hayes, Garfield or Arthur -- all indoctrinated in the cause which produced the Fourteenth Amendment, but convinced that it was not to be used to centralize power so as to upset the federal system" (footnote omitted)); *United States v. Williams*, 341 U.S. 70, 95 L. Ed. 758, 71 S. Ct. 581 (1951) (opinion of Frankfurter, J.) ("We have consistently held that the category of rights which Congress may constitutionally protect from interference by private persons excludes those rights which the Constitution merely guarantees from interference by a State."), *overruled by United States v. Price*, 383 U.S. 787, 798, 16 L. Ed. 2d 267, 86 S. Ct. 1152 (1966) (overruling *Williams* construction of 18 U.S.C. § 241 and holding that statute extends to conspiracies to interfere with Fourteenth Amendment where conspirators acted under color of state law); *United States v. Powell*, 212 U.S. 564, 564-65, 53 L. Ed. 653, 29 S. Ct. 690 (1909) (per curiam) (holding that individual right to a fair trial in state court cannot be constitutionally vindicated by a federal prosecution of private persons); *Ex Parte Virginia*, 100 U.S. 339, 346, 25 L. Ed. 676 (1880) ("The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce *against State action*, however put forth, whether that action be executive, legislative, or judicial." (emphasis added)); *id.* at 347 (legislation pursuant to section 5 "must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are *the agents of the State* in the denial of the rights which were intended to be secured" (emphasis added)); *United States v. Cruikshank*, 92 U.S. 542, 555, 23 L. Ed. 588 (1875) ("The only obligation resting upon the United States [under the Fourteenth Amendment] is to see that the States do not deny the right [to equal protection of the laws]. This the amendment guarantees, but no more. The *power* of the national government is limited to the enforcement of this guaranty." (emphasis added)); *cf. James v. Bowman*, 190 U.S. 127, 139, 47 L. Ed. 979, 23 S. Ct. 678 (1903) ("These authorities show that a statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the Fifteenth Amendment upon Congress to prevent action by the State through some one or more of its official representatives . . .").

<sup>26</sup> See, e.g., *Guest*, 383 U.S. at 757 (upholding action under precursor to section 241 against private conspiracy to interfere with constitutional right to travel); *Ex Parte Yarbrough*, 110 U.S. 651, 665, 28 L. Ed. 274, 4 S. Ct. 152 (1884) (upholding private action under precursor to section 241 against private conspiracy to interfere with right to vote in federal elections); *Griffin v. Breckenridge*, 403 U.S. 88, 105, 29 L. Ed. 2d 338, 91 S. Ct. 1790 (1971) (upholding action brought under 42 U.S.C. § 1985(3) against private individuals as an exercise of congressional power to enforce the Thirteenth Amendment); *United Bhd. of Carpenters and Joiners v. Scott*, 463 U.S. 825, 833, 77 L. Ed. 2d 1049, 103 S. Ct. 3352 (1983) (refusing to extend 42 U.S.C. § 1985(3) to private conspiracies "aimed at a right [e.g., free speech] that is by definition a right only against state interference"); *id.* (reciting in dictum that even if § 1985(3) did cover private interference with rights not to associate with a labor union, such would be constitutional under the Commerce Clause); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439, 20 L. Ed. 2d 1189, 88 S. Ct. 2186 (1968) (upholding action under 42 U.S.C. § 1982 against private individuals as an exercise of congressional power to enforce the Thirteenth Amendment); *Runyon v. McCrary*, 427 U.S. 160, 179, 49 L. Ed. 2d 415, 96 S. Ct. 2586 (1976) (same for 42 U.S.C. § 1981); *Heart of Atlanta*, 379 U.S. at 249-50 (noting that "Congress based the [Civil Rights] Act [of 1964] on § 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce," but concluding that "since the commerce power is sufficient for our decision here we have considered it alone").



State." And, although the Supreme Court has never so held and has not addressed the issue in recent years, it has left open the possibility that Congress may regulate private conduct pursuant to a statute that applies only on an individualized showing of a State's violation of the Fourteenth Amendment. But Congress may not regulate purely private conduct under the Fourteenth Amendment. On this the Court has never wavered.

**[\*\*64]** 2.

*City of Boerne, Harris*, the *Civil Rights Cases*, and the principles underlying these cases confirm beyond question that section 13981 cannot be sustained under the Enforcement Clause of the Fourteenth Amendment. Section 13981 unmistakably regulates private action; it creates a cause of action against private individuals who commit acts of gender-motivated violence. Under section 13981, liability is not limited to the States, to their officials, to those who act under color of state law, or even to those who actively conspire with state officials. See 42 U.S.C. § 13981(c). Section 13981, like the statutes invalidated in *Harris* and the *Civil Rights Cases*, "proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States." *Civil Rights Cases*, 109 U.S. at 14; *cf.* 42 U.S.C. § 13981(b) ("All persons within the United States shall have the right to be free from crimes of violence motivated by gender."). Indeed, the complaint in the instant case, which clearly states a claim **[\*\*65]** under the statute -- at least as to appellee Morrison -- see *supra* Part II, does not even intone, much less allege, that appellees Morrison or Crawford are state actors, that they acted under color of state law, or that they otherwise conspired with state officials to deprive appellant Brzonkala of her rights guaranteed by the Equal Protection Clause.

**[\*870]** Further, like the statutes invalidated in *Harris* and the *Civil Rights Cases*, section 13981 is not limited to take effect only upon an individualized showing of unconstitutional state action. Indeed, liability under section 13981 attaches without regard to whether the State adequately enforced its applicable criminal or civil laws. The statute even applies where, as here, no prior criminal or state civil complaint was even filed. 42 U.S.C. § 13981(d)(2)(A) (cause of action may lie without regard to whether the predicate acts of violence "have actually resulted in criminal charges, prosecution, or conviction"); *id.* § 13981(e)(2) ("nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action"). Like the law invalidated **[\*\*66]** by the Supreme Court in *Harris*, section 13981 is "directed exclusively against the action of private persons, without reference to the laws of the States or their administration by her officers." *Harris*, 106 U.S. at 640. Section 13981 imposes liability for gender-motivated acts of violence, regardless of whether the predicate act of violence occurs in a State that at the time has "the justest laws" and authorities "ever ready to enforce such laws," *Civil Rights Cases*, 109 U.S. at 14, or whether it occurs in a State that has unconstitutionally turned a blind eye toward or deliberately contributed to or participated in the particular act of violence.

The absence of any such jurisdictional limitations confirms that section 13981, much like the provisions of the Civil Rights Acts of 1871 and 1875 invalidated by the Supreme Court in *Harris* and the *Civil Rights Cases* respectively, is not legislation designed to "correct[] the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous," *id.* at 11, but rather is "primary and direct" legislation that "takes immediate and **[\*\*67]** absolute possession of the subject of" individual acts of violence. *Id.* at 19. This is precisely the type of statute that the Supreme Court warned over a century ago would, if held valid under Section 5 of the Fourteenth Amendment, authorize a congressional "municipal code" through which the federal government could act directly upon all the rights of life, liberty, and property of all citizens and thereby eliminate altogether any role for the several States.

Accordingly, although we afford section 13981 the full presumption of constitutionality due an enactment of a coordinate branch of the federal government, we must hold, in spite of the "strenuous[] insistence" of the government to the contrary, see *Harris*, 106 U.S. at 637, that section 13981 simply cannot be sustained under Section 5 of the Fourteenth Amendment.

In obvious recognition of these fundamental principles, as well as the import, for the arguments they advance, of *Harris*, the *Civil Rights Cases*, and the modern precedents reaffirming the broader holdings of these cases as to the scope of Section 1 and Section 5, appellants attempt variously to argue that *Harris* and the *Civil Rights Cases* are

distinguishable, that they have been *sub silentio* overruled or qualified, and that they have been explicitly repudiated by the Supreme Court and other authorities. But none of these arguments is availing, as appellants themselves appear to understand.

1.

Albeit maunderingly, appellants first attempt to distinguish *Harris* and the *Civil Rights Cases*, contending that, in these cases, the Court only limited Congress' power **[\*\*3]** to regulate private conduct as an *end* in itself, and that those cases are inapplicable where, as here, Congress regulates such conduct not as an end in itself but only as a *means* to the legitimate end of remedying unconstitutional state action. To prove that *Harris* and the *Civil Rights Cases* were thus reasoned, appellants identify three features of the Civil Rights Acts invalidated in those cases, features that they argue establish that those statutes were enacted not out of concern for state deprivations of equal protection, but rather only out of concern for purely private conduct. Having so characterized the 1871 and 1875 Civil Rights Acts and Congress' motives in enacting those statutes, appellants argue that the Supreme Court's reasoning in invalidating those Acts establishes only that legislation passed for the exclusive purpose of addressing private conduct, unrelated to **[\*871]** any concern for actions by the States, is impermissible under Section 5. Appellants then claim that the Civil Rights Acts of 1871 and 1875 differ from section 13981 in that Congress' concern in the latter was with unconstitutional conduct by the States and, accordingly, section 13981 **[\*\*4]** is a permissible exercise of Congress' remedial power under Section 5.

The obvious flaw in this argument -- apart from the fact that it finds no support whatsoever in the opinions of the Court in *Harris* and the *Civil Rights Cases* and, in fact, directly contradicts the reasoning of those cases -- is its central premise that Congress enacted the Civil Rights Acts of 1871 and 1875 only out of a concern with private conduct and without any concern for unconstitutional conduct by the States. This premise is demonstrably incorrect, as even a cursory examination of the legislative history surrounding passage of these Acts discloses. Indeed, as an historical matter, it is indisputable that Congress enacted those civil rights laws for the precise purpose of remedying massive and systemic violations of equal protection by the States. That such was Congress' motive in passing the 1871 Act is evident from the following statement as to the law's purpose by Representative James Garfield, a statement that was frequently echoed by Representative Garfield's colleagues:

The chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal **[\*\*5]** on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them.

Cong. Globe, 42d Cong., 1st Sess. app. 153 (1871) (statement of Rep. Garfield); *see also id.* at 653 (statement of Sen. Osborn) ("The State courts . . . are utterly powerless. . . . Justice is mocked, innocence punished, perjury rewarded, and crime defiant in the halls of justice"); *id.* at 457 (statement of Rep. Coburn) ("We find that the commission of a certain class of high crimes is not noticed; that the offenders are not arrested, put on trial, or punished"); *id.* at 481 (statement of Rep. Wilson); *id.* at app. 78 (statement of Rep. Perry) ("Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices."). And it is no less clear that the 1875 Act was passed for the same purpose. As Senator Sumner, by reference to the South Carolina legislature, representatively described the Congress' concern with the States' nonenforcement of their laws:

The Legislature **[\*\*6]** of South Carolina has passed a law giving precisely the right contained in your "supplementary civil rights bill." But such a law remains a dead letter on her statute-books, because the State courts, comprised largely of those whom the Senator wishes to obtain amnesty for, refuse to enforce it.

Cong. Globe, 42d Cong., 2d Sess. 430 (1872) (quoting Letter of F.L. Cardozo, South Carolina Secretary of State) (internal quotation marks omitted); *see also id.* at 726; 2 Cong. Rec. 383 (1874) (statement of Rep. Ransier) ("Mr. Speaker, the States will not give us protection in these matters, and well do these 'State-rights' men know this."); *id.* at 457 (statement of Rep. Butler) ("The learned gentleman from Georgia [Mr. Stephens] agrees with me that every colored man now has all the rights which this bill gives him, but insists it is the States' duty to enforce them. But because of prejudice the States will not enforce them."); 3 Cong. Rec. 945 (1875) (statement of Rep. Lynch) ("You

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may ask why we do not institute civil suits in the State courts. What a farce! Talk about instituting a civil-rights suit in the State courts of Kentucky, for instance, where the decision of the [\*\*7] judge is virtually rendered before he enters the court-house, and the verdict of the jury substantially rendered before it is impaneled . . . ."); 2 Cong. Rec. 427 (statement of Rep. Stowell); 3 Cong. Rec. app. 15 (statement of Rep. White).

In light of this legislative history -- not to mention the contemporaneous history generally -- it borders on the frivolous to contend, as appellants do, that Congress was unconcerned with violations of equal protection by the States when it enacted the Civil Rights Acts of 1871 and 1875. <sup>27</sup>

[\*\*8] [\*\*72] Not only is the central premise of appellants' attempted distinction of *Harris* and the *Civil Rights Cases* demonstrably incorrect, but, ironically although not surprisingly, an examination of the purported differences between section 13981 and the Civil Rights Acts of 1871 and 1875, upon which appellants' attempted distinction rests, proves beyond question the applicability of the analysis of Congress' Section 5 enforcement power in *Harris* and the *Civil Rights Cases* and the unconstitutionality of section 13981 under these authorities.

First, appellants contend that the 1871 and 1875 Acts "failed to reference any Fourteenth Amendment violation by the States" and did not "respond[] to state officials' constitutional violations," Br. of Appellant Brzonkala at 30, and they contrast this legislative history with the legislative history of section 13981, which they contend clearly reveals that Congress enacted section 13981 in response to state-sponsored discrimination against women, see Br. of Intervenor United States at 22 n.11 (distinguishing section 13981 because it "respond[s] to systemic state equal protection violations"); Br. of Appellant Brzonkala [\*\*9] at 30 (section 13981 "has none of [the] defects" identified by the Supreme Court in the *Civil Rights Cases* because Congress in enacting section 13981 "found a 'classic' denial of equal protection by state law enforcement systems" and "specifically sought to remedy the equal protection violations resulting from the States' failings"); Reply Br. of Appellant Brzonkala at 11 (asserting that "Congress' express purpose [in enacting section 13981], documented throughout the legislative history, including the Conference Report, [was] to correct historic state-sponsored commission and tolerance of gender-based violence" (citation omitted)). As we explain, however, contrary to appellants' breathtaking ahistoricism, the legislative history of the 1871 and 1875 Acts not only evidences a concern with conduct by the States violative of the Equal Protection Clause, it evinces a considerably more profound concern with even more open and obvious violations of that Clause by the States than does the legislative history of section 13981. Compare *supra* at 95-96 (1871 and 1875 Acts were enacted in response to massive and open refusal of southern States to enforce the civil rights of blacks) [\*\*10] with S. Rep. No. 102-197, at 39; H.R. Conf. Rep. No. 103-711, at 385, reprinted in 1994 U.S. Code Cong. & Admin. News at 1853 (Congress' concern in enacting section 13981 was with "subtle" types of "bias" against women), and *infra* Part IV.C.3.b (Congress was primarily concerned with private conduct and public attitudes, not with state action, whether constitutional or unconstitutional.). Indeed, appellants' assertions that Congress found a "classic" denial of equal protection in enacting section 13981 cannot be understood except as an attempted comparison between the States' treatment of women today and the southern States' treatment of the freed slaves after the Civil War.

Next, the government contends that the Acts of 1871 and 1875, unlike section 13981, imposed the same "constitutional norms" upon private individuals that the Equal Protection Clause imposes upon the States. However, section 13981 is no less "premised on the explicit assumption that purely private conduct could violate the Fourteenth Amendment," Reply Br. of Intervenor United States at 3, and no less represents a "congressional attempt[] to apply the affirmative requirements of the Fourteenth Amendment [\*\*11] to purely private conduct," *id.*, than did the Civil Rights Acts of 1871 and 1875. Compare *United States v. Virginia*, 518 U.S. 515, 135 L. Ed. 2d 735, 116 S. Ct. 2264 (1996) (gender discrimination by State violates Equal Protection Clause), with 42 U.S.C. § 13981(b) (prohibiting gender-motivated discrimination performed by private individuals); S. Rep. No. 103-138, at 55 (section 13981 is

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<sup>27</sup> Appellants note that the Supreme Court did not cite this widely known legislative history in its opinions in *Harris* and the *Civil Rights Cases*. However, if not as a matter of common sense, then from the Supreme Court's statement that it had "carefully considered" "the views and arguments of distinguished senators, advanced while the [1875] law was under consideration, claiming authority to pass it by virtue of that amendment," *Civil Rights Cases*, 109 U.S. at 10, it is apparent that the Supreme Court was fully aware of this history.

"appropriate" legislation because, *inter alia*, "it attacks gender-motivated crimes that threaten women's equal protection of the laws").

**[\*873]** Finally, the government contends that the Civil Rights Acts of 1871 and 1875 criminalized private conduct that was not already prohibited under state law, *see, e.g., id.* at 4-5 (asserting that the 1871 and 1875 Acts "prohibited . . . conduct . . . not already prohibited . . . by law," laid "down rules for the conduct of individuals in society toward[s] each other," and thus "created a code of municipal law for the regulation of private rights") (quoting *Civil Rights Cases*, 109 U.S. at 11, 14), whereas section 13981 does not "prohibit . . . any conduct that is not already **[\*\*12]** prohibited . . . by [state] law," Reply Br. of Intervenor United States at 5, but instead merely creates a federal remedy that may be pursued when the States fail to enforce their own laws, *id.* ("This structure reflects the wholly remedial purpose of the statute: it corrects for deficiencies in the administration of state law by providing a federal remedy."). In fact, however, not only do the Civil Rights Acts of 1871 and 1875 actually appear only to have prohibited conduct that was already prohibited by the States (and simply not prosecuted), *see, e.g., supra* at 95-96 (citing legislative history of 1871 and 1875 Acts stating that the conduct regulated by those statutes was already prohibited under state law but underenforced); *Civil Rights Cases*, 109 U.S. at 25 ("Innkeepers and public carriers, by the laws of *all* the states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them." (emphasis added)), but, contrary to the government's suggestion, section 13981 actually does criminalize a substantial range of conduct not prohibited under state **[\*\*13]** law, *see supra* Part III.C (section 13981 abrogates interspousal and intrafamily tort immunities, the marital rape exception, and other defenses that might exist under state law by virtue of the relationship between the violent actor and the victim). Section 13981 even creates a substantive federal criminal standard below which no State may deviate, *see supra id.* (section 13981 creates a federal cause of action for conduct occurring anywhere within the United States that satisfies federal definitions of various violent felonies).

In sum, a careful consideration of the differences between section 13981 and the Civil Rights Acts asserted by the government confirms both that *Harris* and the *Civil Rights Cases* are, in the relevant respects, controlling authorities as to the instant case and that section 13981 is an impermissible exercise of Congress' power under Section 5. In fact, even if appellants' reading of *Harris* and the *Civil Rights Cases* were correct (which it is not), section 13981 would be even more clearly unconstitutional than were the Acts of 1871 and 1875.

Under the state action principles of *Harris* and the *Civil Rights Cases*, which, it bears **[\*\*14]** repeating, have been consistently and recently reaffirmed by the Supreme Court, section 13981 is invalid, regardless of whether its end is to remedy unconstitutional state action, for the simple reason that it regulates purely private conduct and is not limited to individual cases in which the state has violated the plaintiff's Fourteenth Amendment rights. These are the same constitutional defects that inhered in the Civil Rights Acts of 1871 and 1875.

2.

Evidently aware of the speciousness of these distinctions and, ultimately, of the fundamental premise on which they rest, appellants argue in the alternative that *Harris* and the *Civil Rights Cases* have been tacitly overruled by, or at least qualified by analogy to, the distinct line of cases holding that Congress may, as a "prophylactic" measure under Section 5, proscribe some conduct that does not violate Section 1 of the Fourteenth Amendment. *City of Boerne*, 117 S. Ct. at 2163 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . ."); *Katzenbach v. Morgan*, 384 U.S. 641, 648-49, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966) **[\*\*15]** (similar); *cf. City of Rome v. United States*, 446 U.S. 156, 173-78, 64 L. Ed. 2d 119, 100 S. Ct. 1548 (1980) (Enforcement Clause of Fifteenth Amendment); *South Carolina v. Katzenbach*, 383 U.S. 301, 324-27, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966) (same). That is, appellants **[\*874]** argue, just as Congress may prohibit the States from employing voting literacy tests as "appropriate legislation" to "enforce" the Reconstruction Amendments, even though the Supreme Court has upheld the facial constitutionality of such tests under those Amendments, *compare id.* at 337 (upholding congressional ban on voting literacy tests), *with Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53-54, 3 L. Ed. 2d 1072, 79 S. Ct. 985 (1959) (upholding facial constitutionality of voting literacy tests), so too may Congress regulate purely private violence against women as "appropriate legislation" to "enforce" the Equal Protection Clause, even though such private violence does not violate the Clause itself. Thus, although appellants concede, as they must, that wholly

private acts of gender-motivated violence can never **[\*\*16]** violate the Equal Protection Clause, *see, e.g., Collins v. Hardyman*, 341 U.S. 651, 658, 95 L. Ed. 1253, 71 S. Ct. 937 (1951) (stating that "the principle has become firmly embedded in our constitutional law" that "[the Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful" (internal quotation marks and footnote omitted)), they nonetheless contend that, under the *Katzenbach v. Morgan* and *South Carolina v. Katzenbach* line of cases, Congress may regulate such private violence as a means of remedying the bias and discrimination against women in the States' criminal justice systems, which "often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled," H.R. Conf. Rep. No. 103-711, at 385, *reprinted in* 1994 U.S. Code Cong. & Admin. News at 1853.

Appellants are doubtless correct that Congress may, pursuant to Section 5, prophylactically regulate or proscribe certain state conduct that does not violate Section 1 of the Fourteenth Amendment. In the prophylactic cases, however, the Court has only upheld federal statutes **[\*\*17]** that prohibited *state* action; it has never upheld statutes, like section 13981, that prohibited *private* action. None of the prophylactic cases (nor any other Supreme Court case) holds or suggests that Congress may employ such a rationale to reach purely private conduct.

Recognizing as much, appellants ask us to extend these prophylactic cases to permit Congress to regulate purely private conduct, insisting that there is "no constitutional precept" for limiting these prophylactic cases to federal legislation that proscribes *state* conduct. Br. of Intervenor United States at 24. The "constitutional precept" that limits the prophylactic cases to their context, however, is the Fourteenth Amendment itself, which provides that "no State shall" deny any person equal protection of the laws, and accords Congress only the power to "enforce" "the provisions of *this* article." U.S. Const. amend. XIV, §§ 1, 5 (emphases added). Because the Fourteenth Amendment only prohibits action by the States, the prophylactic rationale of cases like *Katzenbach v. Morgan*, *South Carolina v. [\*\*18] Katzenbach*, and *City of Boerne* is simply inapplicable where, as here, Congress attempts to regulate purely private conduct, because such private conduct can *never* violate Section 1 of the Fourteenth Amendment.

In *South Carolina v. Katzenbach*, for example, the Supreme Court sustained a federal statute that categorically prohibited certain States from imposing voting literacy requirements, even though the Court had upheld the facial constitutionality of such literacy tests in cases such as *Lassiter*. But it did so because such tests could be *applied* in a racially unconstitutional manner in many circumstances. *See Lassiter*, 360 U.S. at 53; *South Carolina v. Katzenbach*, 383 U.S. at 309, 328, 329-30, 334; *Oregon v. Mitchell*, 400 U.S. 112, 131-34, 27 L. Ed. 2d 272, 91 S. Ct. 260 (1970) (opinion of Black, J.). The reasoning of the case, and of the like prophylactic cases, therefore, is simply that Congress may categorically prohibit the States from enacting or enforcing certain types of constitutional laws in order to "remedy" the significant likelihood that such laws will be applied unconstitutionally in **[\*\*19]** a manner that could be either difficult to detect in particular instances or otherwise difficult to remedy in case-by-case judicial proceedings. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. at 313-15, 327-29. **[\*875]**

Although it makes sense for Congress, as a prophylactic measure, to proscribe categorically a type of state law that is facially constitutional in order to prevent that law's certain and frequent unconstitutional application, *cf. City of Boerne*, 117 S. Ct. at 2170 ("Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a *significant likelihood* of being unconstitutional." (emphasis added)), it makes no sense at all to extend such reasoning to purely private conduct that can *never* violate the prohibition that "no State" deny any person the "equal protection of the laws." U.S. Const. amend. XIV, § 1. Indeed, we would have to stretch the "prophylactic" rationale well beyond recognition in order to permit Congress to regulate purely private conduct that can never be unconstitutional, on the strength of **[\*\*20]** a generalized concern over potentially unconstitutional conduct by the States. Such freewheeling prophylaxis would, in effect, transmogrify the actual Fourteenth Amendment into the Bingham Amendment, which was defeated for the very reason that it would have permitted Congress thus to secure directly the life, liberty, property, and equality rights of all citizens. *See supra* Part IV.A.1; *see also City of Boerne*, 117 S. Ct. at 2166 (quoting statement of Representative Garfield that "we cannot, by any reasonable interpretation, give to [§ 5] . . . the force and effect of the rejected [Bingham] clause").

It is not surprising, in light of the fundamental distinction drawn in the Fourteenth Amendment between action by the States and private action, that the Supreme Court itself has never treated the prophylactic line of cases upon which

appellants rely as having *sub silentio* overruled *Harris* and the *Civil Rights Cases*. In fact, during the very period of time in which the Supreme Court was deciding several of the prophylactic cases, see, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966); *Katzenbach v. Morgan*, 384 U.S. 641, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966); **[\*\*21]** *Oregon v. Mitchell*, 400 U.S. 112, 27 L. Ed. 2d 272, 91 S. Ct. 260 (1970), it was scrupulously adhering to, and conspicuously refusing to overrule, *Harris* and the *Civil Rights Cases* in cases such as *Guest*, *Griffin*, and *Jones*. See *supra* Part IV.A.1; see also *Guest*, 383 U.S. at 762 n.1 (Harlan, J., concurring in part and dissenting in part) (asserting that the Section 5 issue was "deliberately not reached" by the majority in that case). And, as we discuss above at pages 83-86 and note 25, the Supreme Court has consistently affirmed the state-action principles of *Harris* and the *Civil Rights Cases*, even as recently as two years ago. See *City of Boerne*, 117 S. Ct. at 2166.

Rather than grapple with this basic textual, historical, and precedential distinction between laws regulating *state* action and laws regulating *private* conduct, the government instead resorts to speculation and hypothesizing as to why Congress' power to regulate state action that does not necessarily violate the Fourteenth Amendment entails a congressional power to regulate private conduct that can never violate the Fourteenth Amendment.

**[\*\*22]** In this regard, the government argues, first, that congressional regulation of private conduct may in this case be a less "flawed or ineffective" remedy than direct regulation of the States. Br. of Intervenor United States at 25. For example, the government hypothesizes that "providing a cause of action against the state or state officials might create unseemly pressures on state officials to prosecute, even if the evidence of the defendant's guilt was weak, if the victim seemed poised to sue." *Id.* As the Supreme Court held in this precise context, however, "whether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment; and, in our judgment, it has not." *Civil Rights Cases*, 109 U.S. at 19. In any event, the government's argument assumes that the only alternative to section 13981 is to permit a private plaintiff to bring an action for damages against the State or its officers and ignores the possibility that Congress could have simply **[\*\*23]** nullified a category of state laws that discriminate against women. **[\*876]** Moreover, the government's expressed concerns of *overenforcement* lack credibility; it strikes us as particularly suspicious that the government would, on the one hand, dramatize the need for section 13981 by trumpeting the "massive" evidence of underenforcement of criminal laws due to bias and discrimination against women, and, on the other hand, defend the constitutionality of section 13981 on the grounds that a remedy against the very source of this "massive" state discrimination would lead to a rash of frivolous and fraudulent strike suits by women "poised to sue." In fact, it seems to us that this line of argument appears to all but concede that section 13981 was not designed to remedy the States' discriminatory exercise of prosecutorial discretion -- a concession that puts the lie to the government's argument that section 13981 is truly aimed at remedying state law-enforcement failures rather than at purely private acts of violence.

The government maintains, second, that in enacting section 13981, Congress might have chosen to regulate private action, rather than the States directly, so as not **[\*\*24]** to offend the sovereignty of the States. This argument, however, confuses the Fourteenth Amendment with the Commerce Clause and other similar grants of federal power. The Supreme Court has often held that it violates principles of state sovereignty for the federal government to impose certain obligations directly upon the States when acting pursuant to the federal power to regulate interstate commerce, see, e.g., *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997); *New York v. United States*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992), and various other federal powers, see, e.g., *Kentucky v. Dennison*, 65 U.S. (24 HOW) 66, 16 L. Ed. 717 (1860) (Extradition Clause); *Collector v. Day*, 78 U.S. 113, 11 Wall. 113, 20 L. Ed. 122 (1871) (Taxation power); *James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L. Ed. 155, 58 S. Ct. 208 (1937) (same); *Hans v. Louisiana*, 134 U.S. 1, 33 L. Ed. 842, 10 S. Ct. 504 (1890) (Article III). However, the **[\*\*25]** Court has made clear that, by its very nature, the Fourteenth Amendment is a limitation on the governments of the States, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976) (reasoning that the Fourteenth Amendment "quite clearly contemplates limitations on [the States'] authority" and "the substantive provisions are by express terms directed at the States"); *Ex Parte Virginia*, 100 U.S. 339, 346, 25 L. Ed. 676 (1880) ("The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put

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forth, whether that action be executive, legislative, or judicial."), and therefore that it "is no invasion of State sovereignty" for the federal government to impose obligations directly upon the States when enforcing the Fourteenth Amendment. *Id. Compare Fitzpatrick*, 427 U.S. at 456 (holding that state sovereign immunity may be abrogated by federal statute enacted pursuant to Section 5 of the Fourteenth Amendment), and *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983) **[\*\*26]** ("When properly exercising its power under § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers."), with *Seminole Tribe v. Florida*, 517 U.S. 44, 72, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996) (holding that state sovereign immunity may not be abrogated by federal statute enacted pursuant to Indian or Interstate Commerce Clauses). In fact, if anything, it may well be federal regulation of *private* conduct pursuant to the Fourteenth Amendment that poses the greater danger to the sovereignty of the several States. The Fourteenth Amendment recognizes the sovereignty of the States to protect their citizens' rights of life, liberty, property, and equality. See, e.g., *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L. Ed. 588 (1875) ("the very highest duty of the States" is to protect "the rights of life and personal liberty" and that "sovereignty, for this purpose, rests alone with the States"). A federal power under Section 5 to legislate against private interference for the **[\*\*27]** protection of these rights would permit Congress to regulate all of "the rights which one citizen has . . . against another," *id.* at 554-55, and thereby eliminate any role for the States whatsoever. See, e.g., *Civil Rights Cases*, 109 U.S. at 14 ("It is difficult to see where it is to stop. Why may not Congress, with equal show of authority, **[\*877]** enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? . . . The implication of a power to legislate in this manner . . . is repugnant to the Tenth Amendment of the Constitution.").

In sum, the prophylactic cases such as *City of Boerne, Morgan*, and *Katzenbach* all address the question of how broadly Congress may legislate when it imposes statutory requirements upon the States pursuant to Section 5. These cases do not address the very distinct question of whether Congress may, under Section 5, regulate purely private conduct at all. The answer to this latter question has been settled for over a hundred years:

Where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering **[\*\*28]** effective some prohibition against particular State legislation or State action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited State laws or proceedings of State officers.

*Civil Rights Cases*, 109 U.S. at 18. To conflate these two lines of cases, and thereby allow a complete disjunction between the constitutional evil to be remedied and the object of Congress' legislation, would be nothing less than to recognize in the Congress itself, contrary to the Constitution, an authority to redefine the scope of the substantive provisions of the Fourteenth Amendment. And as the Supreme Court observed in *City of Boerne*,

Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in **[\*\*29]** any meaningful sense, the "provisions of [the Fourteenth Amendment]."

*City of Boerne*, 117 S. Ct. at 2164.

3.

Appellants contend, finally, that, even if not formally overruled, *Harris* and the *Civil Rights Cases* have been repudiated by subsequent authorities and are no longer good law, a contention in support of which appellants rely upon dicta from concurring and dissenting opinions written during the 1960s, a speculative footnote from an opinion in the early 1970s, a passing observation from the Court's decision in *City of Boerne*, and a law review article from 1964. Reply Br. of Appellant Brzonkala at 11 n.13 (arguing that it "overstates the case law" to suggest that "those outdated cases remain good law"); see also Br. of Appellant Brzonkala at 29, 31; Br. of Intervenor United States at 22 n.11. As appellants themselves must no doubt recognize, none of these authorities is sufficient to draw into question the broad state action holdings of *Harris* and the *Civil Rights Cases*, much less to establish the expansive power in Congress to regulate purely private conduct for which appellants argue.

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First, although appellants, and Brzonkala **[\*\*30]** in particular, place considerable weight upon language in the concurring and dissenting opinions in *Guest* to the effect that Section 5 permits Congress to reach purely private conduct, their reliance upon that case -- even if as a last resort -- is misguided. As we discussed above, the Court in *Guest* could not have been clearer that it was *not* construing the outer limits of Section 5:

We deal here with issues of statutory construction, not with issues of constitutional power," 383 U.S. at 74 (citation omitted), [and] *nothing* said in this opinion goes to the question of what kinds of other . . . legislation Congress might constitutionally enact under § 5 of the Fourteenth Amendment to implement that Clause.

*Guest*, 383 U.S. at 755 (emphasis added). And, as previously discussed, the holding of the Court in *Guest* was only that the indictment pled enough state involvement in the defendants' conspiracy -- active connivance of state officials -- to allege a violation of the Equal Protection Clause and therefore sufficient state action to support the indictment under section 241.

Notwithstanding the unambiguous disclaimer **[\*\*31]** by the Court that nothing it said should be read to comment upon the extent **[\*878]** of Congress' Section 5 enforcement power, appellants cite two passages from the concurring and dissenting opinions in *Guest* in support of their assertion that Congress may freely regulate purely private behavior when legislating pursuant to the Enforcement Clause of the Fourteenth Amendment. The first such statement is that of Justice Clark, who, joined by Justices Black and Fortas, concurred in the opinion of the Court, but also wrote, inexplicably and without citation or analysis in a single conclusory sentence, that "there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies -- with or without state action -- that interfere with Fourteenth Amendment rights." *Id.* at 762 (Clark, J., concurring, joined by Black and Fortas, JJ.). By Justice Clark's own admission, this pronouncement was dictum, unnecessary to any legal conclusion reached by himself and the two Justices who joined his opinion. See *id.* (noting that "the Court carves out of its opinion the question of the power of Congress, under § 5 of the Fourteenth **[\*\*32]** Amendment, to enact legislation implementing . . . the Fourteenth Amendment"); *id.* at 762 (noting that the construction of the indictment adopted by the Court "clearly avoids the question whether Congress, by appropriate legislation, has the power to punish private conspiracies that interfere with Fourteenth Amendment rights"). In fact, so unnecessary was the statement that Justice Harlan was constrained to remark in a separate opinion that

the action of three of the Justices who join the Court's opinion in nonetheless cursorily pronouncing themselves on the far-reaching constitutional questions deliberately not reached in [the Court's opinion] seems to me, to say the very least, extraordinary.

*Id.* at 762 n.1 (Harlan, J., concurring in part and dissenting in part).

The second statement, that by Justice Brennan in dissent, although even more unequivocal than Justice Clark's, is no more authority for the assertion that Congress' power under Section 5 reaches purely private conduct. Writing for himself, Chief Justice Warren and Justice Douglas, Justice Brennan, unlike the majority and the three Justices in concurrence, construed the **[\*\*33]** law at issue to protect the right to equal utilization of public facilities from both state *and* private interference. Because of this construction of the statute, Justice Brennan reached the constitutional question expressly not addressed by the majority and unnecessary to the concurrence, and stated, similarly without citation of controlling authority, that he would have held that the statute was constitutional despite its extension to private conduct. *Id.* at 784 (Brennan, J., concurring in part and dissenting in part, joined by Warren, C.J., and Douglas, J.). As Justice Brennan stated:

I acknowledge that some of the decisions of this Court, most notably an aspect of the *Civil Rights Cases*, 109 U.S. 3, 11, 27 L. Ed. 835, 3 S. Ct. 18, have declared that Congress' power under § 5 is confined to the adoption of "appropriate legislation for correcting the effects of prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous." I do not accept -- and a majority of the Court today rejects -- this interpretation of § 5.

*Id.* at 782-83. Justice Brennan's (and Chief Justice Warren's and Justice **[\*\*34]** Douglas's) views in dissent, of course, are not binding authority, any more than are Justice Clark's (and Justice Black's and Justice Fortas's) in concurrence. Significantly, the Supreme Court, only two years ago, rejected Justice Brennan's equally sweeping companion theory



of congressional power under Section 5. *Compare City of Boerne*, 117 S. Ct. at 2168 (expressly repudiating reading of *Katzenbach v. Morgan* that would permit Congress to redefine the substantive guarantees of the Fourteenth Amendment), *with Katzenbach v. Morgan*, 384 U.S. at 654 (Brennan, J.) (asserting that Congress may be able to redefine the substantive guarantees of the Fourteenth Amendment). And, it goes without saying, the combination of these separately stated views by the concurring and dissenting Justices no more constitutes binding authority overruling *Harris* and the *Civil Rights Cases* than does either of the separate opinions standing alone. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 765 n.9, 100 L. Ed. 2d 771, 108 S. Ct. 2138 [\*879] (1987) (noting that it is the Court's "settled jurisprudence" that [\*\*35] "when no single rationale commands a majority, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." (internal quotation marks and citation omitted)).

The footnote statement that appears in Justice Brennan's opinion for the Court in *District of Columbia v. Carter*, 409 U.S. 418, 34 L. Ed. 2d 613, 93 S. Ct. 602 (1973), in which the Justice states merely that "this is not to say, of course, that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment," *id.* at 424 n.8, is likewise unavailing for appellants. As the government concedes, this statement, like Justice Clark's in *Guest*, is the purest of dicta, the holding of the Court having been merely that the District of Columbia was not a "State or territory" within the meaning of 42 U.S.C. § 1983 (a holding, incidentally, that has been overruled by statute).<sup>28</sup> And the statement, of course, does not even say that Congress *may* proscribe purely private conduct under Section 5. Moreover, as authority for this *dictum*, Justice Brennan cites *Katzenbach* [\*\*36] *v. Morgan*, *see id.*, in which the Court expressed the view that Congress may redefine the substantive provisions of the Fourteenth Amendment when legislating pursuant to Section 5 -- a view that, as we have explained, *see supra* at 101-102, has been rejected by the full Supreme Court.

Finally, in support of their contention that *Harris* and the *Civil Rights Cases* are no longer good law, appellants cite the Court's recent observation in *City of Boerne* that

although the specific holdings [\*\*37] of [*Harris* and the *Civil Rights Cases*] might have been superseded or modified, *see, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964), *United States v. Guest*, 383 U.S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966), their treatment of Congress' § 5 power as corrective or preventative, not definitional, has not been questioned.

*City of Boerne*, 117 S. Ct. at 2166. Appellants contend that this passing reference draws into doubt the Court's repeated holdings that Congress may not reach purely private conduct pursuant to Section 5.

We do not understand the Supreme Court in *City of Boerne* to have called into question in any way, in dictum or otherwise, its square holdings that Congress may not regulate purely private conduct pursuant to Section 5 of the Fourteenth Amendment. This understanding of the cited passage from *City of Boerne* in particular is confirmed by the overall context of, and subsequent language in, the *City of Boerne* opinion itself. [\*\*38] *See, e.g., id.* ("These early cases[] [including *Harris* and the *Civil Rights Cases*] . . . treatment of Congress' § 5 power as corrective or preventive, not definitional, has not been questioned."); *id.* ("The power to 'legislate generally upon' life, liberty, and property, as opposed to the 'power to provide modes of redress' against offensive state action, was 'repugnant' to the Constitution." (citation to the *Civil Rights Cases* omitted)).

It is obvious that the Court's reference to the superseding or modification of the *Civil Rights Cases* is only to the fact that, since the *Civil Rights Cases*, the Court has upheld, under different grants of federal power than Section 5, federal civil rights statutes similar to the Civil Rights Act of 1875 invalidated in that case. *See, e.g., Heart of Atlanta*, 379 U.S. at 261 (upholding constitutionality of public-accommodations provisions of 1964 Civil Rights Act as exercise of Congress' power under the Commerce Clause); *id.* at 250-52 (discussing *Civil Rights Cases* as "inapposite, and without precedential value in determining the constitutionality" of the public-accommodations [\*\*39] provisions of the

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<sup>28</sup> Acknowledging this statement from *Carter* to be dictum, the government nonetheless urges us "not [to] lightly dismiss[]" such dictum because it is the "declaration" of a "20th century" Supreme Court opinion. Reply Br. of Intervenor United States at 6. The implication of the government's argument, of course, is that square holdings from the "19th century" -- *i.e.*, those of *Harris* and the *Civil Rights Cases* -- may be "lightly dismissed" by a court of appeals. Of course, this is incorrect.

1964 Civil Rights Act whose applicability was "carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people"); see also *supra* Part III.A.1. In other [\*880] words, although Congress today doubtless has the constitutional power to enact legislation like the invalidated 1875 Civil Rights Act proscribing racial discrimination in public accommodations, it has such power not under Section 5, but rather under the Commerce Clause, Spending Clause, or similar constitutional authority.<sup>29</sup>

Equally obvious is that the Court's citation of *Guest* in *City of Boerne* refers to the fact that *Guest* and similar cases have extended the concept of state action under the Fourteenth Amendment to include nominally private individuals [\*\*40] who act in "active connivance" with the State and state officials. *Guest*, 383 U.S. at 756-57. That the Court did not intend by this citation to affirm the views of congressional power under Section 5 expressed by the concurring and dissenting opinions in *Guest* is plain from the fact that the Court cited only the majority opinion in *Guest*; it did not cite either the concurring or dissenting opinions, which, as we explained above, are the only opinions in *Guest* that express a view of Congress' power to reach purely private conduct under Section 5.<sup>30</sup>

#### [\*\*41] 4.

In summary, although appellants expressly contend that *Harris* and the *Civil Rights Cases* are distinguishable, have tacitly been overruled or modified, and have been repudiated by subsequent authorities, it is apparent from the character of each of these arguments and the "authorities" upon which they rely that appellants really have no argument other than that we should *ignore* these decisions because they are "too old" to be controlling. To the point of histrionics, in fact, appellants incant that *Harris* and the *Civil Rights Cases* are simply "outdated," Reply Br. of Appellant Brzonkala at 9, "century-old," Reply Br. of Appellant Brzonkala at 10, from the "1870's [sic] and 1880's," Br. of Intervenor United States at 22 n.11, "19th century" cases, Reply Br. of Intervenor United States at 3, and of little interest to "modern courts," Br. of Appellant Brzonkala at 31, or those with "modern" views about the proper scope of Congress' powers. *Id.* Indeed, the government in its principal brief cites *Harris* and the *Civil Rights Cases* but once, and that citation is a parenthetical embedded within footnote. Br. of Intervenor United States at 22. As we are [\*\*42] confident appellants appreciate, however, especially in light of the Supreme Court's recent explicit reliance upon both *Harris* and the *Civil Rights Cases* in *City of Boerne*, we are not at liberty simply to conclude that these cases do not represent the Court's current view of congressional power to regulate exclusively private conduct under Section 5. If *Harris* and the *Civil Rights Cases* are to be overruled, which the present Supreme Court apparently has no inclination to do, such must come from that Court itself. See, e.g., *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477, 484, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989).

#### C.

Given the scope of the Fourteenth Amendment's guarantees as articulated by the Supreme Court and explained above, it is apparent [\*881] in light of the Supreme Court's recent pronouncement in *City of Boerne* that section 13981 is not "appropriate legislation" to "enforce" those guarantees, because section 13981 is neither sufficiently *aimed* at safeguarding the Equal Protection rights guaranteed by that Amendment nor an appropriate *means* to

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<sup>29</sup> Of course, the government can find no solace in these later cases, as we have already considered and rejected its sole attempt to find an alternative constitutional basis for section 13981. See *supra* Part III.

<sup>30</sup> In the effort to convince us that neither *Harris* nor the *Civil Rights Cases* are any longer sound precedents, the United States and appellant Brzonkala also direct us to a law-review article by Laurent B. Frantz, *Congressional Power To Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353 (1964). Indeed, in its original brief, the United States cites this journal article twice as often as it cites the Supreme Court's decision in the *Civil Rights Cases*. See Br. of Intervenor United States at 22 n.11; *id.* at 23 n.12 (citing Frantz article, and, in particular, citing the page of that article in which Frantz sets forth his own "subtle" and "complex" reinterpretation of *Harris* and the *Civil Rights Cases*); see also Br. of Appellant Brzonkala at 33 n.24 (citing Frantz article). The author of that article does argue that Congress may in some cases regulate private conduct when acting under Section 5, but his conclusion is that "congressional legislation which impinges directly on the conduct of private individuals *and which operates uniformly regardless of the role played by the state* is unconstitutional." See Frantz, *supra*, at 1359 (emphasis in original). Under this interpretation of the Fourteenth Amendment, section 13981 would yet be unconstitutional because it operates uniformly in all States, without regard to the role played by those States in the alleged discriminatory violence. See *supra* Part IV.A.2.

protect those rights. In fact, as we noted, so **[\*\*43]** crippling to appellants' Section 5 defense of section 13981 is the Court's intervening decision in *City of Boerne*, that both appellants now defend section 13981 primarily under the Commerce Clause, and only secondarily under Section 5, whereas before the panel of this court, immediately after the Court's decision in *Lopez*, they quite understandably defended the statute primarily as an exercise of Congress' Section 5 authority and only secondarily as a valid exercise of Congress' Commerce power under Article I, Section 8.

1.

According to appellants, section 13981 is a legitimate exercise of Congress' Section 5 powers because it is designed and operates to enforce the Equal Protection Clause by remedying sex discrimination in the enforcement of state laws. This argument turns entirely on a congressional finding in a House Conference Report that "bias and discrimination in the criminal justice system[s of the States] often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled" and that section 13981 is "necessary to guarantee equal protection of the laws." H.R. Conf. Rep. No. 103-711, at 385, **[\*\*44]** *reprinted in* 1994 U.S. Code Cong. & Admin. News at 1853; *see also* S. Rep. No. 103-138, at 55 (asserting that section 13981 "provides a necessary remedy to fill the gaps and rectify the biases of existing State laws"). Appellants insist that this legislative history confirms that Congress enacted section 13981 for the purpose of enforcing the Equal Protection Clause, and that, as long as we can perceive any rational basis for Congress to have enacted section 13981 as a means to that end, we should defer to Congress' considered judgment and uphold the statute. *See, e.g.*, Br. of Appellant Brzonkala at 33 (criticizing district court for "substituting its own judgment about a suitable remedy" by engaging in means-end analysis of section 13981 and for "*defying* its obligation to defer to Congress' construction of the problem as long as it could perceive a basis upon which the Congress *might* resolve the conflict" (emphasis added and citation omitted)); Br. of Intervenor United States at 26-27 ("Congress itself found evidence of widespread equal protection violations . . . [and] though the district court might have preferred a different remedy, the choice was Congress's **[\*\*45]** to make."); *id.* at 27 ("It is not for [a court] to review the congressional resolution of these factors. It is enough that [it] be able to perceive a basis upon which the Congress might resolve the conflict as it did.") (quoting *Katzenbach v. Morgan*, 384 U.S. at 653). The underlying premise of this argument is that Congress possesses such "exceptionally broad discretion" to legislate pursuant to Section 5, Supp. Br. of Intervenor United States at 7, and that, at least in practice, it is for Congress to decide whether a statute is "appropriate legislation" to "enforce" the Fourteenth Amendment.

2.

The Supreme Court has made clear, however, that we cannot simply defer to these congressional findings or conclusions; rather, we must arrive at an independent judgment as to the constitutionality of section 13981. As recently as two years ago, in *City of Boerne*, the Court held that the Religious Freedom Restoration Act, a statute Congress had found necessary to enforce the Free Exercise Clause, *City of Boerne*, 117 S. Ct. at 2162 ("Congress relied on its Fourteenth Amendment enforcement power in enacting" the Religious Freedom Restoration **[\*\*46]** Act), was not "appropriate legislation" to "enforce" the rights of religious exercise protected by Section 1 of the Fourteenth Amendment. Congress had enacted the Religious Freedom Restoration Act in response to *Employment Division v. Smith*, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990), in which the Court held that generally applicable and religion-neutral laws virtually never violate the Free Exercise Clause. The Religious Freedom Restoration Act created a right of religious exercise that was more generous than that right protected by the **[\*882]** Constitution because it forbade States from imposing substantial burdens upon religious exercise, even pursuant to generally applicable and religion-neutral laws. *City of Boerne*, 117 S. Ct. at 2162.

By invalidating the Religious Freedom Restoration Act, the Supreme Court in *City of Boerne* reaffirmed the principle that, in order to secure a federal government of limited and enumerated powers, *id.*, congressional legislation enacted pursuant to Section 5 must be carefully scrutinized by the courts to ensure that Congress is truly *enforcing* the provisions of the Fourteenth Amendment, **[\*\*47]** rather than *redefining* the substance of those provisions under the guise of enforcement. *Id.* at 2164. Although acknowledging that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law" is not always "easy to discern," *id.*, the Court emphasized that this distinction "*exists and must be observed,*" *id.* (emphases added). To this

end, the Court declared that a court entertaining a Section 5 challenge can uphold the statute only if there exists a "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end," *id.*, or, in other words, only if the statute is actually aimed at, and is a closely tailored means of, enforcing a provision of Section 1. The Supreme Court then applied this "congruence and proportionality" test to the Religious Freedom Restoration Act and concluded that the statute exceeded Congress' powers under Section 5, both because it appeared from the Act's legislative history that the statute **[\*\*48]** was aimed at remedying those *constitutionally* permissible burdens imposed upon religion by generally applicable and religion-neutral laws rather than any *unconstitutional* laws that targeted religion, *id.* at 2168-69, and also because the Act's "sweeping coverage" of all state laws regardless of subject matter, level of government, and without any geographic restriction or termination mechanism, was "so out of proportion to a supposed remedial or preventive object" as to betray the non-remedial character of that statute. *Id.* at 2170.

*City of Boerne* therefore eliminates the fundamental premise of appellants' arguments, namely, that a court cannot independently evaluate Congress' decision that section 13981 is "appropriate legislation" to "enforce" the Equal Protection Clause. Although in support of their contrary premise the parties rely heavily on some exceptionally broad pronouncements of congressional power appearing in *Katzenbach v. Morgan*, 384 U.S. 641, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966), see, e.g., Br. of Appellant Brzonkala at 27; Br. of Intervenor United States at 21, this broad language has now been **[\*\*49]** repudiated by the Supreme Court in *City of Boerne*, 117 S. Ct. at 2168 (explicitly renouncing language in *Katzenbach v. Morgan* that could be construed to give Congress the power to redefine, as opposed to simply enforce, the provisions of the Fourteenth Amendment); *id.* (emphasizing that under a broad reading of *Katzenbach v. Morgan*, "it is difficult to conceive of a principle that would limit congressional power"); *id.* at 2170 (characterizing *Katzenbach v. Morgan* as a case only about "a particular type of voting qualification, one with a long history as a notorious means to deny and abridge voting rights on racial grounds" (internal quotation marks and citation omitted)). *City of Boerne* similarly renders fanciful the government's suggestion that our inquiry into section 13981's validity under Section 5 should mirror our inquiry into the reasonableness of ordinary economic regulation in an economic substantive due process challenge. See Br. of Intervenor United States at 26 (quoting economic substantive due process cases including *Williamson v. Lee Optical*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955)). **[\*\*50]** <sup>31</sup> Ultimately, *City of Boerne* forcefully **[\*883]** affirms that Congress' power under Section 5 is not without limits, and that those limits are not simply theoretical or speculative, but are real and concrete, and are to be enforced by the courts, even at the expense of invalidating laudable and otherwise socially beneficial legislation. *City of Boerne*, 117 S. Ct. at 2163 ("as broad as the congressional enforcement power is, it is not unlimited" (internal quotation marks and citation omitted)); *id.* at 2172 (although "it is for Congress in the *first instance* to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," "Congress' discretion is not unlimited . . . and the *courts* retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution" (emphases added)); *id.* ("as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not [the Religious Freedom Restoration Act], which must control"); see also *Civil Rights Cases*, 109 U.S. at 10 **[\*\*51]** ("the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have").

**[\*\*52]** 3.

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<sup>31</sup> The government characterizes as "inexplicable" any suggestion that cases like *Williamson v. Lee Optical* are inapposite in the Section 5 context because *Williamson* and other similar cases "were quoted and applied by *Morgan* itself in addressing Congress's § 5 powers." Reply Br. of Intervenor United States at 9. In *Katzenbach v. Morgan*, however, the Supreme Court cited *Williamson* only to respond to the distinct argument that the challenged statute at issue in *Katzenbach v. Morgan* violated individual liberties by "invidiously discriminating" between American-flag and non-American-flag schools. *Katzenbach v. Morgan*, 384 U.S. at 656-57. It did not, contrary to the government's representation, cite *Williamson* "in addressing Congress's § 5 powers." Reply Br. of Intervenor United States at 9. In any event, and as our above discussion makes clear, even if the Supreme Court had so cited *Williamson* in *Katzenbach v. Morgan*, the Supreme Court more recently, in *City of Boerne*, repudiated any language in *Katzenbach v. Morgan* that could be interpreted to mean that Congress' Section 5 power is as broad as a State's power to enact ordinary economic regulations of the type upheld in *Williamson*.

Application of the principles set forth in *City of Boerne* to section 13981 reveals that section 13981 clearly represents an illegitimate exercise of Section 5 authority, because it is neither aimed at violations of the Equal Protection Clause nor a closely tailored means of correcting any such violations.

(a)

First, it is clear under *City of Boerne* that we cannot simply defer wholesale to Congress' purely legal conclusion that "bias and discrimination in the criminal justice system[s of the States] often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." H.R. Conf. Rep. No. 103-711, at 385, *reprinted in* 1994 U.S. Code Cong. & Admin. News at 1853; *see also* S. Rep. No. 103-138, at 55 ("the criminal justice system is not providing equal protection of the laws of women in the classic sense") (quoting Prof. Cass Sunstein). Indeed, as a legal conclusion, this particular finding may be worthy of little, if any, deference. The finding is an essentially verbatim recitation of the congressional testimony of a single law professor, and it was added to the legislative history only after **[\*\*53]** that law professor testified that such a "finding" would be instrumental in defending the constitutionality of section 13981 under Section 5.<sup>32</sup> This **[\*884]** finding thus appears to be less a considered congressional judgment as to the constitutionality of section 13981 than legal boilerplate belatedly appended to the House Conference Report in an effort to insulate section 13981 from judicial review. Moreover, even if this finding did represent a considered congressional judgment as to the constitutionality of section 13981, the soundness of that judgment is drawn into question by the fact that Congress also "found" -- contrary to Supreme Court precedent applying the Equal Protection Clause only to state action -- that purely private acts of violence against women also "threaten women's equal protection of the laws." S. Rep. No. 103-138, at 55. Therefore, instead of deferring wholesale to Congress' conclusion that section 13981 is aimed at, and a remedy for, violations of Equal Protection, we must examine the legislative history and structure of section 13981 to determine the basis of Congress' conclusion.

**[\*\*54]** The legislative history of section 13981, like that of the Religious Freedom Restoration Act invalidated in *City of Boerne*, reveals that section 13981 was not enacted as a remedy for action that violates, or may violate, the Constitution. Although this legislative history does establish that the States enforce and apply certain laws in a manner that may ultimately prevent the victims of gender-motivated violence from obtaining vindication through the criminal or civil systems, the portions of the legislative history cited by appellants do not demonstrate that Congress "[was] concerned," *City of Boerne*, 117 S. Ct. at 2169, with the type of *purposeful* discrimination against women in the enforcement of facially neutral laws that could give rise to an equal protection violation. *Personnel Adm'r. v. Feeney*, 442 U.S. 256, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979) (holding that Equal Protection Clause sex-discrimination challenge to facially neutral law must fail without a showing of purposeful discrimination); *cf. Washington v. Davis*, 426 U.S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976); *Village of Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977). **[\*\*55]**

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<sup>32</sup> Compare 137 Cong. Rec. S579, S608 (1991) (text of S. 15, 102d Cong. § 301(a) (1991)) (earlier version of section 13981 cause of action for damages, which recited no findings of state bias or discrimination in the enforcement or application of state laws), and *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 52 (1993) (statement of Prof. Sunstein) (testimony recommending that Congress amend S.15 as follows: "In particular, Title III [section 13981] might include provisions that . . . emphasize the existence of current bias or discrimination in the criminal justice system -- bias or discrimination that, Congress believes, in many cases deprives women subject to violent crime of the equal protection of the laws."), with H. R. Conf. Rep. No. 103-711, at 385, *reprinted in* 1994 U.S. Code Cong. & Admin. News at 1853 (finding that "bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled"). Interestingly, the earlier version of section 13981, included within S. 15, appears to ground the constitutionality of section 13981's damages cause of action not in the Equal Protection Clause at all, but rather in the Privileges and Immunities Clause of the Fourteenth Amendment. 137 Cong. Rec. at S608 (Title III, § 301(b)) ("All 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"). Presumably, the Privileges and Immunities rationale was abandoned by Congress because it was without merit. *See, e.g., Slaughter-House Cases*, 83 U.S. 36, 16 Wall. 36, 74-80, 21 L. Ed. 394 (1873).

Although appellants are doubtless correct that the legislative history of the Violence Against Women Act -- a statute that includes but is not limited to section 13981 -- comprises an impressive array of reports and hearings detailing the scope of the problem of violence against women, these extensive findings are, in the final analysis, of little value in the Section 5 inquiry. Many of them do not relate to burdens imposed by state action, see, e.g., S. Rep. No. 102-197, at 46 ("Even if we could eradicate these legal rules and practices tomorrow, it is unlikely that prosecution and reporting rates for rape would increase."); *Women and Violence: Hearing Before the Comm. of the Judiciary, United States Senate*, 101st Cong., 2d Sess. 39, 44 (1990) (noting low percentage of recoveries in civil rape cases due to impecunious defendants). And, most importantly, even if we were to concede that the legislative history detailed state discrimination of some sort, the record recites few, if any, specific findings that the States are engaging in *unconstitutional* discrimination against women in the enforcement or application of their criminal and civil laws. See H.R. Conf. Rep. No. **[\*\*56]** 103-711, at 385-86, *reprinted in* 1994 U.S. Code Cong. & Admin. News at 1853-54 (discussing findings without any mention of purposeful discrimination); S. Rep. No. 103-138, at 54-55 (discussing basis for enacting section 13981 under Section 5 without any mention of purposeful discrimination). Furthermore, although the legislative history also discusses some specific features of state laws that need reform, neither appellant has cited any portion of this massive legislative history indicating that the failure of the States to adopt such reforms is the result of purposeful and unconstitutional discrimination against women. See, e.g., S. Rep. No. 101-545, at 31-33; S. Rep. No. 102-197, at 45-46. This legislative record is therefore quite unlike that before the Court in *South Carolina v. Katzenbach*, in which there was voluminous evidence that the provisions of the challenged Voting Rights Act were designed to remedy purposeful discrimination or otherwise unconstitutional deprivations of voting rights. *South Carolina v. Katzenbach*, 383 U.S. at 308, 309-315, 329-30 (detailing a century of racially discriminatory deprivations of the right to vote in certain **[\*\*57]** southern States). In fact, section 13981's legislative record is almost perfectly analogous to the record found to be deficient **[\*885]** by the Supreme Court in *City of Boerne*, which recited little, if any, evidence that Congress enacted the Religious Freedom Restoration Act out of concern with purposeful or unconstitutional discrimination against religion by the States. *Cf. City of Boerne*, 117 S. Ct. at 2169 ("Congress' concern [in enacting the Religious Freedom Restoration Act] was with the incidental burdens imposed, not the object or purpose of the legislation.").

If anything, the hearings and reports on section 13981 bear out that the States and state law enforcement officials are *not* purposefully discriminating against women in the enforcement of laws against gender-motivated crimes of violence, but rather that they have undertaken the "most fervent," S. Rep. No. 102-197, at 39, and "sincere efforts . . . to assist . . . victims of rape and domestic violence," S. Rep. No. 101-545, at 33, and that *despite* such efforts, "subtle prejudices" and "stereotypes," S. Rep. No. 102-197, at 39, among society at large continue to prevent women from filing **[\*\*58]** criminal complaints, bringing suit, and otherwise obtaining vindication through the legal system. See, e.g., S. Rep. No. 101-545, at 33 (attributing low prosecution and conviction rates of gender-motivated violent crime against women, in part, to "the press and society"); S. Rep. No. 102-197, at 39-46; *cf. Violent Crimes Against Women: Hearing Before the Comm. on the Judiciary, United States Senate*, 103d Cong., 1st Sess. 25 (1993) (noting that every State in the union has adopted legislation authorizing protective orders for victims of domestic violence, and use of such orders has increased dramatically); *Domestic Violence -- Not Just A Family Matter: Hearing Before the Subcomm. on Crime and Criminal Justice of the Comm. on the Judiciary, House of Representatives*, 103d Cong., 2d Sess. 131 (1994) (results of Attorneys General survey that "throughout the country, Attorneys General have developed innovative projects to prevent domestic violence" and "have produced a number of excellent resources to prevent sexual violence in their States"); *Violence Against Women -- Fighting the Fear: Hearings Before the Comm. on the Judiciary, United States Senate*, 103d Cong., 1st Sess. **[\*\*59]** 42-43 (1993) (noting "a spirit and commitment" in the States to address problem of violent crime against women). The legislative history thus clearly demonstrates that the aim of section 13981 was not so much to redress violations of Equal Protection, but rather to send a national signal about the harms of violence against women. See, e.g., S. Rep. No. 103-138, at 50 (Section 13981 "has the entirely different function [from state tort law] of providing a special societal judgment that crimes motivated by gender bias are unacceptable because they violate the victims' civil rights.").

The structure of section 13981 and other provisions of the VAWA further confirm the lack of congruence between the statute and its asserted aim of addressing purposefully unequal law enforcement by the States. Most telling, of course, is the fact that section 13981 directly regulates only private individuals who commit acts of violence and subjects those individuals to liability for the harms resulting from that violence. That is, the statute does not regulate the actions

of the States or any other action taken under color of state law, much less *remedy* or *correct* the States' discriminatory **[\*\*60]** enforcement or application of their laws. For example, if a State consistently refuses to prosecute rapists because of its gender animus against their female victims, the victim's ability to obtain some small measure of justice through federal damages suits against the rapist would hardly eliminate or correct the State's constitutional violations. *See, e.g., City of Boerne*, 117 S. Ct. at 2170 ("Remedial legislation under § 5 'should be adapted to the mischief and wrong which the [Fourteenth] Amendment was intended to provide against.") (quoting *Civil Rights Cases*, 109 U.S. at 13). That section 13981 provides a remedy only against private individuals who commit violent crimes is significant, and perhaps dispositive, evidence that section 13981 does not truly aim at correcting unequal and unconstitutional enforcement of the laws by the States, but aims instead only to remedy or deter the underlying acts of violence to which that liability attaches.

Other features of the statute likewise belie the suggestion that section 13981 is designed to remedy purposeful discrimination against women by the States. For example, section 13981 vests the state courts **[\*\*61]** with concurrent **[\*\*886]** jurisdiction over section 13981 claims. 42 U.S.C. § 13981(e)(3). This mandatory concurrent jurisdiction provision is hard to square with the asserted rationale that section 13981 was designed to remedy unconstitutional state discrimination. If Congress were truly concerned that state courts, judges, and juries were hostile to women and purposefully discriminating against them in the enforcement and application of law, the more natural response would have been to create exclusive federal jurisdiction over section 13981 claims, or, at the very least, only to allow concurrent jurisdiction in state courts that Congress concluded were not purposefully discriminating against women. Section 13981 instead permits its authorized causes of action to be brought in the very fora that the appellants must contend are hostile to the interests of women.<sup>33</sup> Indeed, section 13981 does not merely permit claims to be brought in state court; it may actually *channel* section 13981 claims into state court. Most notably, for example, section 13981(e)(4) forbids federal courts entertaining claims brought under section 13981(c) from exercising supplemental **[\*\*62]** jurisdiction over "divorce, alimony, equitable distribution of marital property, or child custody decree" cases. Thus, plaintiffs who wish to bring *both* section 13981 claims *and* divorce or child-custody actions against their spouses -- a class of plaintiff very likely to have suffered the most egregious forms of gender-motivated domestic violence or marital rape -- will either be forced to prosecute two separate actions in different legal fora at greater cost, or else bring all of their claims in state court.

**[\*\*63]** The conclusion that Congress did not design section 13981 as a remedy for purposeful discrimination against women by hostile state courts is also borne out by features of the VAWA whose constitutionality is not at issue here. For example, in addition to creating a private cause of action, other provisions of the VAWA appropriated approximately \$ 1.6 billion in federal funds, subject to enhancement, to help the States eliminate the causes and effects of rape and domestic violence. 42 U.S.C. § 3796gg (law enforcement); *id.* § 300w-10 (education and prevention programs); *id.* § 10402(a) (battered women's shelters). Such a generous subsidy to the state governments casts serious doubt upon any suggestion that the Congress that enacted section 13981 was truly concerned with purposeful and unconstitutional deprivations of Equal Protection rights at the hands of hostile state governments.

In sum, the combined effect of the legislative history, the structure of section 13981, and the other provisions of VAWA is to disprove any contention that section 13981 was actually aimed at purposeful acts of unconstitutional sex discrimination. *Cf. City of Boerne*, 117 S. Ct. at 2170 **[\*\*64]** ("Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a *significant likelihood* of being unconstitutional." (emphasis added)). To the contrary, these materials establish that Congress' true concerns in enacting VAWA were to deter or remedy individual and private acts of violence and to raise public consciousness about the seriousness of violent crimes against women by sending a national signal of opposition to this class of violent crime. Although these are unquestionably worthy public policy goals, they are not

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<sup>33</sup> More evidence of the nonremedial character of section 13981 is the fact that there is virtually nothing in the record cited by the parties to prove that federal courts, federal judges, or federal juries are significantly less susceptible to the subtle prejudices and stereotypes that often prevent women from obtaining recovery in civil actions against the perpetrators of gender-motivated violence than are their counterparts in the state judicial systems. *See also* Br. of Appellees Morrison and Crawford at 34 n.13 (citing scholarly commentary and studies that the federal court systems are prone to the identical types of gender-bias that exist in state court systems).

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sufficient in and of themselves to render section 13981 a legitimate exercise of Congress' power under Section 5 of the Fourteenth Amendment.

(b)

Even if section 13981 were intended as a means to remedy unconstitutional discrimination by the States, it, much like the provisions of the Religious Freedom Restoration Act invalidated in *City of Boerne*, is so out of proportion to any possible unconstitutional state action at which it might conceivably be aimed as to exceed congressional power to **[\*887]** "enforce" the Fourteenth Amendment. Liability **[\*\*65]** under section 13981 attaches to *all* felonious acts of violent crime motivated by gender, 42 U.S.C. § 13981(c), and the provision creates a statutory right and a cause of action to enforce that right for all persons in the United States who suffer from such violent crime. *Id.* § 13981(b) (conferring upon "all persons within the United States" the statutory right to be free from gender-based crimes); *id.* § 13981(c) (creating cause of action for the same). This sweeping coverage is in no way tailored to the asserted ends of equal enforcement of the laws. For example, under section 13981, liability attaches to all gender-motivated crimes whether committed by private individuals acting alone, or by those acting under color of state law. *Id.* (liability extends to a person "including a person who acts under color of" state law (emphasis added)). Liability also attaches to any criminal act, whether or not the plaintiff filed a criminal complaint in the state criminal justice system, and without regard to whether the State failed adequately to investigate or prosecute the case because of bias or discrimination. *Id.* § 13981(d)(2)(A) (cause of **[\*\*66]** action may lie without regard to whether the predicate acts of violence "have actually resulted in criminal charges, prosecution, or conviction"); *id.* § 13981(e)(2) ("Nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action."). Section 13981 applies equally in all jurisdictions, whether those jurisdictions evidence a pattern of chronic under-enforcement of laws prohibiting rape and domestic violence, S. Rep. No. 102-197, at 45-46, or whether those jurisdictions are the States or metropolitan areas Congress applauded for strengthening the enforcement of their rape and sexual assault laws, S. Rep. No. 101-545, at 33. Also, although Brzonkala and the government attempt to defend section 13981 as a remedy for inequalities caused by certain States that either immunize spousal rape or that have failed to adopt rape shield evidentiary rules, section 13981 does not exempt from its coverage those forty-seven States that at the time of section 13981's adoption did criminalize spousal rape, S. Rep. No. 102-197, at 45 & n.50, or those States that have adopted rape shield laws in civil cases. In addition, like the **[\*\*67]** sweeping provisions of the Religious Freedom Restoration Act invalidated in *City of Boerne*, 117 S. Ct. at 2170, and unlike the provisions upheld in *City of Rome*, 446 U.S. at 177, and *South Carolina v. Katzenbach*, 383 U.S. at 331-32, section 13981 contains no termination date or termination mechanism. And, finally, section 13981 is written in gender-neutral terms and would presumably create a cause of action for a *male* plaintiff, even though there is no evidence, or even any suggestion, that the States have unconstitutionally enforced their laws that disproportionately affect men. See S. Rep. No. 102-197, at 43 (citing state gender bias task force conclusions that "crimes disproportionately affecting women are often treated less seriously than comparable crimes against men"); *cf.* Br. of Appellant Brzonkala at 26 n.12 ("While [section 13981] is gender-neutral, Congress recognized that women overwhelmingly are the victims of gender-motivated violence . . . . Consequently, this brief refers throughout to gender-motivated violence against women.").

In short, section 13981's "sweeping coverage," *City of Boerne*, 117 S. Ct. at 2170, **[\*\*68]** reaches all victims of gender-motivated violent felonies, all defendants who commit such crimes, all States and jurisdictions without regard to the adequacy of their enforcement efforts, substantive laws, or evidentiary rules and procedures, and does so without any time limit or termination mechanism. See *id.* (distinguishing sweeping coverage of the Religious Freedom Restoration Act from other relatively more narrow and measured federal statutes that the Supreme Court had previously upheld as valid exercises of congressional enforcement powers under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments); *cf.* *South Carolina v. Katzenbach*, 383 U.S. at 315, 331 (upholding provisions of federal statute that were confined to certain regions of the country where voting discrimination had been most flagrant, that affected a discrete class of state voting laws, and that contained a five year termination mechanism); *Katzenbach v. Morgan*, 384 U.S. at 641 (similar); *Mitchell*, 400 U.S. at 112 **[\*888]** (upholding provisions of federal statute that prohibited States from imposing a particular type of voting qualification **[\*\*69]** with a long history of racially discriminatory use); *City of Rome*, 446 U.S. at 177 (upholding federal statute that applied to state "jurisdictions with a demonstrable history of intentional racial discrimination" deemed to "create the risk of purposeful discrimination"). Therefore, even assuming that section 13981 were truly intended or designed as a means to remedy state



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discrimination, the remedy created by the section is so clearly out of proportion to any suggested unequal treatment as to be an illegitimate means of enforcement of the Equal Protection Clause. *Cf. City of Boerne*, 117 S. Ct. at 2171 ("The substantial costs [the Religious Freedom Restoration Act] exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct . . .").

(c)

The Supreme Court concluded its Section 5 analysis in *City of Boerne* by observing that, if it were to uphold the Religious Freedom Restoration Act as an appropriate exercise of Section 5, such would "contradict[] vital principles necessary to maintain **[\*\*70]** separation of powers and the federal balance," *id.* at 2172, namely, that the federal government not be accorded a general police power but rather be confined to its limited and enumerated powers, *id.* at 2162 ("Under our Constitution, the Federal Government is one of enumerated powers."); *id.* (citing *The Federalist* No. 45). Or, as Justice Kennedy explained in the analogous context of construing 42 U.S.C. § 1985(3), "essential considerations of federalism are at stake here. The federal balance is a *fragile* one, and a false step in interpreting § 1985(3) risks making a whole catalog of ordinary State crimes a concurrent violation of a single congressional statute . . ." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 287, 122 L. Ed. 2d 34, 113 S. Ct. 753 (1993) (Kennedy, J., concurring) (emphases added). We are convinced that we would disrupt the "vital" "federal balance," and essentially confer upon Congress a general police power, were we to hold that section 13981 is a legitimate exercise of congressional remedial power under Section 5.

If the congressional findings cited here suffice to render **[\*\*71]** section 13981 a legitimate enforcement of the Fourteenth Amendment, then in effect the federal government could constitutionally regulate every aspect of society, even including those areas traditionally thought to be reserved exclusively to the several States, such as general criminal and domestic relations law. *See supra* Part III.C. For example, if section 13981 were an appropriate means to remedy gender-motivated bias in the States, then the federal government could similarly adopt a general federal criminal code to replicate or preempt the existing criminal laws of the fifty States in order to root out any such bias. Presumably, the very same or similar legislative record of section 13981 could support an analogous finding that *all* state criminal laws are infused with gender bias. *See, e.g.*, S. Rep. No. 102-197, at 44 ("gender bias permeates the court system and . . . women are most often its victims" (internal quotation omitted)). And many of the same state gender-bias task forces that were cited in section 13981's legislative history also appear to find gender bias in state domestic-relations law. *Compare* Br. of Appellees Morrison and Crawford at 33 n.12 (citing **[\*\*72]** various state task force conclusions of gender bias in domestic relations law), *with* S. Rep. No. 102-197, at 43 n.40, *and* S. Rep. No. 103-138, at 49 n.52 (citing these and other task forces' conclusions on gender bias in state criminal systems). Thus, if section 13981 were constitutional under Section 5, then presumably the federal government could adopt and enforce a federal divorce and domestic relations code. And federal preemption, or even occupation, of other substantive fields of law, such as tort and contract law, would soon follow. *See, e.g.*, Br. of Appellees Morrison and Crawford at 33-34 (citing various law review articles and studies in support of argument that gender bias pervades tort law, contract law, and several other substantive areas of State law). Because the logic of appellants' argument would not be limitable to the Equal Protection Clause, the federal government presumably would even be permitted to create a **[\*889]** national burglary statute in order to protect from private interference the Fourteenth Amendment's guarantee that "no State" "deprive any person of life, liberty, or *property*, without due process of law." Indeed, we think it no **[\*\*73]** overstatement that such an interpretation of Section 5 would, in a way "repugnant" to the Constitution, *City of Boerne*, 117 S. Ct. at 2166 (quoting the *Civil Rights Cases*, 109 U.S. at 15), permit Congress, upon but a generalized finding of bias, to occupy the entire field of state law and to legislate directly upon all of the rights of life, liberty, and property of all the citizens of the United States.

We cannot conclude, therefore, that section 13981 is a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment.

V.

At the end of the day, it is apparent that, for objectives unquestionably laudable, Congress has sought, through its powers to enforce the Constitution's prohibitions against state deprivations of equal protection and to regulate

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commerce among the several States, to direct private individuals in their activities wholly local and noneconomic. It has sought to reach conduct quintessentially within the exclusive purview of the States through legislation that neither conditions the federal intervention upon proof of misconduct imputable to a State or upon a nexus to interstate commerce, nor is tailored so as to **[\*\*74]** address activity closely connected with constitutional failures of the States or with interstate commerce. This the Congress may not do, even in pursuit of the most noble of causes, lest be ceded to the Legislature a plenary power over every aspect of human affairs -- no matter how private, no matter how local, no matter how remote from commerce.

Appellants have labored to defend such an unprecedented power in the Congress first, in the immediate aftermath of *United States v. Lopez*, as a valid exercise of Congress' indisputably broad Fourteenth Amendment power under Section 5, then, after *City of Boerne v. Flores*, as a valid exercise of Congress' equally broad power under Article I, section 8, and, finally, countercurrently, as legislation that should usher in a new era not of congressional restraint, but of congressional expansion into the affairs of the States and of the People. Ultimately, however, certain of section 13981's constitutionality but uncertain of the reason, and recognizing that we are without authority to deviate from binding Supreme Court precedent, they have been left with little more than the sincerest of assertions that section 13981 is laudable **[\*\*75]** social policy. While this is undoubtedly true -- no one favoring violence against women -- the desirability of section 13981 is, as it must be under a Constitution that separates the powers one from the other, a matter that has been placed beyond our cognizance by the Constitution we interpret.

We are not unaware that in invalidating section 13981 today, we invalidate a provision of a statute denominated the "Violence Against Women Act." No less for judges than for politicians is the temptation to affirm any statute so decorously titled. We live in a time when the lines between law and politics have been purposefully blurred to serve the ends of the latter. And, when we, as courts, have not participated in this most perniciously machiavellian of enterprises ourselves, we have acquiesced in it by others, allowing opinions of law to be dismissed as but pronouncements of personal agreement or disagreement. The judicial decisionmaking contemplated by the Constitution, however, unlike at least the politics of the moment, emphatically is not a function of labels. If it were, the Supreme Court assuredly would not have struck down the "Gun-Free School Zones Act," the "Religious Freedom Restoration **[\*\*76]** Act," the "Civil Rights Act of 1871," or the "Civil Rights Act of 1875." And if it ever becomes such, we will have ceased to be a society of law, and all the codification of freedom in the world will be to little avail.

Accordingly, the Congress having exceeded its constitutional authority in enacting Subtitle C of the Violence Against Women Act, the judgment of the district court dismissing plaintiff-appellant Brzonkala's claims under 42 U.S.C. § 13981 is affirmed.

**AFFIRMED**