25 Cases that cite this headnote

[23] **Constitutional Law**
⇦United States Constitution

With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution does not grant the Federal Government an unlimited license to regulate.

5 Cases that cite this headnote

[24] **Constitutional Law**
⇦Determination of powers of other branches in general

The Constitution's separation of federal power and the creation of the Judicial Branch indicate that disputes regarding the extent of congressional power are largely subject to judicial review.

Cases that cite this headnote

[25] **Constitutional Law**
⇦United States Constitution
States
⇦Police power

The Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States.

6 Cases that cite this headnote

[26] **Civil Rights**
⇦Power to enact and validity
Constitutional Law
⇦Criminal law and related remedies

Enforcement clause of Fourteenth Amendment did not provide Congress with authority to enact civil remedy provision of Violence Against Women Act (VAWA); although state-sponsored gender discrimination could violate equal protection under certain circumstances, Fourteenth Amendment did not prohibit private conduct, provision was not aimed at proscribing discrimination by officials which Fourteenth Amendment might not itself proscribe, and provision applied uniformly throughout the Nation even though Congress found that discrimination against victims of gender-motivated violence did not exist in all States. U.S.C.A. Const.Amend. 14, § 5; Violent Crime Control and Law Enforcement Act of 1994, § 40302, 42 U.S.C.A. § 13981.

72 Cases that cite this headnote

[27] **Constitutional Law**
⇦Equal protection clause, enforcement of
Constitutional Law
⇦Due process clause, enforcement of

The enforcement clause of the Fourteenth Amendment states that Congress may "enforce," by "appropriate legislation" the constitutional guarantee that no State shall deprive any person of "life, liberty or property, without due process of law," nor deny any person "equal protection of the laws." U.S.C.A. Const.Amend. 14, § 5.

4 Cases that cite this headnote

[28] **Constitutional Law**
⇦Enforcement of Fourteenth Amendment

The enforcement clause of the Fourteenth Amendment is a positive grant of legislative power that includes authority to prohibit conduct which is not itself unconstitutional and to intrude into legislative spheres of autonomy previously reserved to the States. U.S.C.A. Const.Amend. 14, § 5.

3 Cases that cite this headnote

[29] **Constitutional Law**
Enforcement of Fourteenth Amendment

As broad as the Fourteenth Amendment congressional enforcement power is, it is not unlimited. U.S.C.A. Const.Amend. 14, § 5.

Cases that cite this headnote

[30] **Constitutional Law**
Sex or gender

State-sponsored gender discrimination violates equal protection unless it serves important governmental objectives and the discriminatory means employed are substantially related to the achievement of those objectives. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[31] **Constitutional Law**
Discrimination or inequality in general

The language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct; these limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government. U.S.C.A. Const.Amend. 14.

4 Cases that cite this headnote

[32] **Constitutional Law**
Fourteenth Amendment in general

The Fourteenth Amendment, by its terms, prohibits only state action. U.S.C.A. Const.Amend. 14.

20 Cases that cite this headnote

[33] **Constitutional Law**
Applicability to Governmental or Private Action; State Action
Constitutional Law
State government

The action inhibited by the Fourteenth Amendment's first section, which, inter alia, prohibits States from denying due process or equal protection, is only such action as may fairly be said to be that of the States. U.S.C.A. Const.Amend. 14, § 1.

6 Cases that cite this headnote

[34] **Constitutional Law**
Private persons and entities

The Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful. U.S.C.A. Const.Amend. 14.

23 Cases that cite this headnote

[35] **Constitutional Law**
⇦Enforcement of Fourteenth Amendment
Constitutional Law
⇦Deterring, preventing, or remedying violations

Under the enforcement clause of the Fourteenth Amendment, where a subject has not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular 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. U.S.C.A. Const.Amend. 14, § 5.

5 Cases that cite this headnote

[36] **Constitutional Law**
⇦Congruence and proportionality

Prophylactic legislation under the enforcement clause of the Fourteenth Amendment must have a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. U.S.C.A. Const.Amend. 14, § 5.

3 Cases that cite this headnote

West Codenotes

Held Unconstitutional
42 U.S.C.A. § 13981

****1743** ***Syllabus****

Petitioner Brzonkala filed suit, alleging, *inter alia,* that she was raped by respondents while the three were students at Virginia Polytechnic Institute, and that this attack violated 42 U.S.C. § 13981, which provides a federal civil remedy for the victims of gender-motivated violence. Respondents moved to dismiss on the grounds that the complaint failed to state a claim and that § 13981's civil remedy is ****1744** unconstitutional. Petitioner United States intervened to defend the section's constitutionality. In dismissing the complaint, the District Court held that it stated a claim against respondents, but that Congress lacked authority to enact § 13981 under either the Commerce Clause or § 5 of the Fourteenth Amendment, which Congress had explicitly identified as the sources of federal authority for § 13981. The en banc Fourth Circuit affirmed.

Held: Section 13981 cannot be sustained under the Commerce Clause or § 5 of the Fourteenth Amendment. Pp. 1748–1759.

(a) The Commerce Clause does not provide Congress with authority to enact § 13981's federal civil remedy. A congressional enactment will be invalidated only upon a plain showing that Congress has exceeded its constitutional bounds. See *United States v. Lopez,* 514 **U.S.** 549, 568, 577–578, 115 S.Ct. 1624, 131 L.Ed.2d 626. Petitioners assert that § 13981 can be sustained under Congress' commerce power as a regulation of activity that substantially affects interstate commerce. The proper framework for analyzing such a claim is provided by the principles the Court set out in *Lopez.* First, in *Lopez,* the noneconomic, criminal nature of possessing a firearm in a school zone was central to the Court's conclusion that Congress lacks authority to regulate such possession. Similarly, gender-motivated crimes of violence are not, in any sense, economic activity. Second, like the statute at issue in *Lopez,* § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' regulation of interstate commerce. Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that § 13981 is sufficiently tied to interstate commerce ***599** to come within Congress' authority, Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime. Third, although § 13981, unlike the *Lopez* statute, *is* supported by numerous findings regarding the serious impact of gender-motivated violence on victims and their families, these findings are substantially weakened by the fact that they rely on reasoning that this Court has rejected, namely, a but-for

causal chain from the initial occurrence of violent crime to every attenuated effect upon interstate commerce. If accepted, this reasoning would allow Congress to regulate any crime whose nationwide, aggregated impact has substantial effects on employment, production, transit, or consumption. Moreover, such reasoning will not limit Congress to regulating violence, but may be applied equally as well to family law and other areas of state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. The Constitution requires a distinction between what is truly national and what is truly local, and there is no better example of the police power, which the Founders undeniably left reposed in the States and denied the central Government, than the suppression of violent crime and vindication of its victims. Congress therefore may not regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce. Pp. 1748–1754.

(b) Section 5 of the Fourteenth Amendment, which permits Congress to enforce by appropriate legislation the constitutional guarantee that no State shall deprive any person of life, liberty, or property without due process, or deny any person equal protection of the laws, *City of Boerne v. Flores,* 521 **U.S.** 507, 517, 117 S.Ct. 2157, 138 L.Ed.2d 624, also does not give Congress the authority to enact § 13981. Petitioners' assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence is supported by a voluminous congressional record. However, the Fourteenth Amendment places limitations on the manner in which Congress may attack discriminatory conduct. Foremost among ****1745** them is the principle that the Amendment prohibits only state action, not private conduct. This was the conclusion reached in *United States v. Harris,* 106 **U.S.** 629, 1 S.Ct. 601, 27 L.Ed. 290, and the *In re Civil Rights Cases,* 109 **U.S.** 3, 3 S.Ct. 18, 27 L.Ed. 835, which were both decided shortly after the Amendment's adoption. The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time, who all had intimate knowledge and familiarity with the events surrounding the Amendment's adoption. Neither *United States v. Guest,* 383 **U.S.** 745, 86 S.Ct. 1170, 16 L.Ed.2d 239, nor *District of Columbia v. Carter,* 409 **U.S.** 418, 93 S.Ct. 602, 34 L.Ed.2d 613, casts any doubt on the enduring vitality of the *Civil Rights Cases* and *Harris.* ***600** Assuming that there has been gender-based disparate treatment by state authorities in these cases, it would not be enough to save § 13981's civil remedy, which is directed not at a State or state actor but at individuals who have committed criminal acts motivated by gender bias. Section 13981 visits no consequence on any Virginia public official involved in investigating or prosecuting Brzonkala's assault, and it is thus unlike any of the § 5 remedies this Court has previously upheld. See, *e.g., South Carolina v. Katzenbach,* 383 **U.S.** 301, 86 S.Ct. 803, 15 L.Ed.2d 769. Section 13981 is also different from previously upheld remedies in that it applies uniformly throughout the Nation, even though Congress' findings indicate that the problem addressed does not exist in all, or even most, States. In contrast, the § 5 remedy in *Katzenbach* was directed only to those States in which Congress found that there had been discrimination. Pp. 1754–1759.

169 F.3d 820, affirmed.

REHNQUIST, C.J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. THOMAS, J., filed a concurring opinion, *post,* p. 1759. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post,* p. 1759. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined, and in which SOUTER and GINSBURG, JJ., joined as to Part I–A, *post,* p. 1774.

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Opinion

***601** Chief Justice REHNQUIST delivered the opinion of the Court.

In these cases we consider the constitutionality of 42 U.S.C. § 13981, which provides a federal civil remedy for the ***602** victims of gender-motivated violence. The United States Court of Appeals for the Fourth Circuit, sitting en banc, struck down § 13981 because it concluded that Congress lacked constitutional authority to enact the

section's civil remedy. Believing that these cases are controlled by our decisions in *United States v. Lopez,* 514 **U.S.** 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), *United States v. Harris,* 106 **U.S.** 629, 1 S.Ct. 601, 27 L.Ed. 290 (1883), and the *In re Civil Rights Cases,* 109 **U.S.** 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), we affirm.

I

Petitioner Christy Brzonkala enrolled at Virginia Polytechnic Institute (Virginia Tech) in the fall of 1994. In September of that year, Brzonkala met respondents Antonio **Morrison** and James Crawford, who ****1746** were both students at Virginia Tech and members of its varsity football team. Brzonkala alleges that, within 30 minutes of meeting **Morrison** and Crawford, they assaulted and repeatedly raped her. After the attack, **Morrison** allegedly told Brzonkala, "You better not have any ... diseases." Complaint ¶ 22. In the months following the rape, **Morrison** also allegedly announced in the dormitory's dining room that he "like[d] to get girls drunk and...." *Id.,* ¶ 31. The omitted portions, quoted verbatim in the briefs on file with this Court, consist of boasting, debased remarks about what **Morrison** would do to women, vulgar remarks that cannot fail to shock and offend.

Brzonkala alleges that this attack caused her to become severely emotionally disturbed and depressed. She sought assistance from a university psychiatrist, who prescribed ***603** antidepressant medication. Shortly after the rape Brzonkala stopped attending classes and withdrew from the university.

In early 1995, Brzonkala filed a complaint against respondents under Virginia Tech's Sexual Assault Policy. During the school-conducted hearing on her complaint, **Morrison** admitted having sexual contact with her despite the fact that she had twice told him "no." After the hearing, Virginia Tech's Judicial Committee found insufficient evidence to punish Crawford, but found **Morrison** guilty of sexual assault and sentenced him to immediate suspension for two semesters.

Virginia Tech's dean of students upheld the judicial committee's sentence. However, in July 1995, Virginia Tech informed Brzonkala that **Morrison** intended to initiate a court challenge to his conviction under the Sexual Assault Policy. University officials told her that a second hearing would be necessary to remedy the school's error in prosecuting her complaint under that policy, which had not been widely circulated to students. The university therefore conducted a second hearing under its Abusive Conduct Policy, which was in force prior to the dissemination of the Sexual Assault Policy. Following this second hearing the Judicial Committee again found **Morrison** guilty and sentenced him to an identical 2–semester suspension. This time, however, the description of **Morrison's** offense was, without explanation, changed from "sexual assault" to "using abusive language."

Morrison appealed his second conviction through the university's administrative system. On August 21, 1995, Virginia Tech's senior vice president and provost set aside **Morrison's** punishment. She concluded that it was " 'excessive when compared with other cases where there has been a finding of violation of the Abusive Conduct Policy,' " *Brzonkala v. Virginia Polytechnic and State Univ.,* 132 F.3d 949, 955 (C.A.4 1997). Virginia Tech did not inform Brzonkala of this decision. After learning from a ***604** newspaper that **Morrison** would be returning to Virginia Tech for the fall 1995 semester, she dropped out of the university.

In December 1995, Brzonkala sued **Morrison,** Crawford, and Virginia Tech in the United States District Court for the Western District of Virginia. Her complaint alleged that **Morrison's** and Crawford's attack violated § 13981 and that Virginia Tech's handling of her complaint violated Title IX of the Education Amendments of 1972, 86 Stat. 373–375, 20 U.S.C. §§ 1681–1688. **Morrison** and Crawford moved to dismiss this complaint on the grounds that it failed to state a claim and that § 13981's civil remedy is unconstitutional. The United States, petitioner in No. 99–5, intervened to defend § 13981's constitutionality.

The District Court dismissed Brzonkala's Title IX claims against Virginia Tech for failure to state a claim upon which relief can be granted. See *Brzonkala v. Virginia Polytechnic and State Univ.,* 935 F.Supp. 772 (W.D.Va.1996). It then held that Brzonkala's complaint stated a claim against **Morrison** and Crawford under § 13981, but dismissed the complaint because ****1747** it concluded that Congress lacked authority to enact the section under either the Commerce Clause or § 5 of the Fourteenth Amendment. *Brzonkala v. Virginia Polytechnic and State Univ.,* 935 F.Supp. 779

(W.D.Va.1996).

A divided panel of the Court of Appeals reversed the District Court, reinstating Brzonkala's § 13981 claim and her Title IX hostile environment claim.[1] *Brzonkala v. Virginia Polytechnic and State Univ.*, 132 F.3d 949 (C.A.4 1997). The full Court of Appeals vacated the panel's opinion and reheard the case en banc. The en banc court then issued an opinion affirming the District Court's conclusion that Brzonkala stated a claim under § 13981 because her complaint alleged a crime of violence and the allegations of **Morrison's** crude and derogatory statements regarding his ***605** treatment of women sufficiently indicated that his crime was motivated by gender animus.[2] Nevertheless, the court by a divided vote affirmed the District Court's conclusion that Congress lacked constitutional authority to enact § 13981's civil remedy. *Brzonkala v. Virginia Polytechnic and State Univ.*, 169 F.3d 820 (C.A.4 1999). Because the Court of Appeals invalidated a federal statute on constitutional grounds, we granted certiorari. 527 **U.S.** 1068, 120 S.Ct. 11, 144 L.Ed.2d 842 (1999).

Section 13981 was part of the Violence Against Women Act of 1994, § 40302, 108 Stat. 1941–1942. It states that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). To enforce that right, subsection (c) declares:

> "A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate."

Section 13981 defines a "crim[e] of violence motivated by gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an ***606** animus based on the victim's gender." § 13981(d)(1). It also provides that the term "crime of violence" includes any

> "(A) ... act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States;" and
>
> "(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken." § 13981(d)(2).

****1748** Further clarifying the broad scope of § 13981's civil remedy, subsection (e)(2) states that "[n]othing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section." And subsection (e)(3) provides a § 13981 litigant with a choice of forums: Federal and state courts "shall have concurrent jurisdiction" over complaints brought under the section.

Although the foregoing language of § 13981 covers a wide swath of criminal conduct, Congress placed some limitations on the section's federal civil remedy. Subsection (e)(1) states that "[n]othing in this section entitles a person to a cause of action under subsection (c) of this section 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." Subsection (e)(4) further states that § 13981 shall not be construed "to confer on the courts of the United States jurisdiction over any State law claim seeking ***607** the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree."

[1] [2] Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803) (Marshall, C. J.). Congress explicitly identified the sources of federal authority on which it relied in enacting § 13981. It said

that a "Federal civil rights cause of action" is established "[p]ursuant to the affirmative power of Congress ... under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution." 42 U.S.C. § 13981(a). We address Congress' authority to enact this remedy under each of these constitutional provisions in turn.

II

[3] Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds. See *United States v. Lopez,* 514 **U.S.**, at 568, 577–578, 115 S.Ct. 1624 (KENNEDY, J., concurring); *United States v. Harris,* 106 **U.S.**, at 635, 1 S.Ct. 601. With this presumption of constitutionality in mind, we turn to the question whether § 13981 falls within Congress' power under Article I, § 8, of the Constitution. Brzonkala and the United States rely upon the third clause of the section, which gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

As we discussed at length in *Lopez,* our interpretation of the Commerce Clause has changed as our Nation has developed. See 514 **U.S.**, at 552–557, 115 S.Ct. 1624; *id.,* at 568–574, 115 S.Ct. 1624 (KENNEDY, J., concurring); *id.,* at 584, 593–599, 115 S.Ct. 1624 (THOMAS, J., concurring). We need not repeat that detailed review of ***608** the Commerce Clause's history here; it suffices to say that, in the years since *NLRB v. Jones & Laughlin Steel Corp.,* 301 **U.S.** 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937), Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted. See *Lopez,* 514 **U.S.**, at 555–556, 115 S.Ct. 1624; *id.,* at 573–574, 115 S.Ct. 1624 (KENNEDY, J., concurring).

[4] [5] *Lopez* emphasized, however, that even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds. *Id.,* at 557, 115 S.Ct. 1624.

> "[E]ven [our] modern-era precedents which have expanded congressional power ****1749** under the Commerce Clause confirm that this power is subject to outer limits. 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 what is national and what is local and create a completely centralized government.' " *Id.,* at 556–557, 115 S.Ct. 1624 (quoting *Jones & Laughlin Steel, supra,* at 37, 57 S.Ct. 615).[3]

[6] As we observed in *Lopez,* modern Commerce Clause jurisprudence has "identified three broad categories of activity that Congress may regulate under its commerce power." ***609** 514 **U.S.**, at 558, 115 S.Ct. 1624 (citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 **U.S.** 264, 276–277, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Perez v. United States,* 402 **U.S.** 146, 150, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971)). "First, Congress may regulate the use of the channels of interstate commerce." 514 **U.S.**, at 558, 115 S.Ct. 1624 (citing *Heart of Atlanta Motel, Inc. v. United States,* 379 **U.S.** 241, 256, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); *United States v. Darby,* 312 **U.S.** 100, 114, 61 S.Ct. 451, 85 L.Ed. 609 (1941)). "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." 514 **U.S.**, at 558, 115 S.Ct. 1624 (citing *Shreveport Rate Cases,* 234 **U.S.** 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914); *Southern R. Co. v. United States,* 222 **U.S.** 20, 32 S.Ct. 2, 56 L.Ed. 72 (1911); *Perez, supra,* at 150, 91 S.Ct. 1357). "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, ... *i.e.,* those activities that substantially affect interstate commerce." 514 **U.S.**, at 558–559, 115 S.Ct. 1624 (citing *Jones & Laughlin Steel, supra,* at 37, 57 S.Ct. 615).

[7] Petitioners do not contend that these cases fall within either of the first two of these categories of Commerce Clause regulation. They seek to sustain § 13981 as a regulation of activity that substantially affects interstate commerce. Given § 13981's focus on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce), we agree that this is the proper inquiry.

Since *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation, it provides the proper framework for

conducting the required analysis of § 13981. In *Lopez,* we held that the Gun–Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), which made it a federal crime to knowingly possess a firearm in a school zone, exceeded Congress' authority under the Commerce Clause. See 514 **U.S.**, at 551, 115 S.Ct. 1624. Several significant considerations contributed to our decision.

[8] ***610** First, we observed that § 922(q) was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however ****1750** broadly one might define those terms." *Id.,* at 561, 115 S.Ct. 1624. Reviewing our case law, we noted that "we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce." *Id.,* at 559, 115 S.Ct. 1624. Although we cited only a few examples, including *Wickard v. Filburn,* 317 **U.S.** 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942); *Hodel, supra; Perez, supra; Katzenbach v. McClung,* 379 **U.S.** 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); and *Heart of Atlanta Motel, supra,* we stated that the pattern of analysis is clear. *Lopez,* 514 **U.S.**, at 559–560, 115 S.Ct. 1624. "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.,* at 560, 115 S.Ct. 1624.

Both petitioners and Justice SOUTER's dissent downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis. But a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case. See, *e.g., id.,* at 551, 115 S.Ct. 1624 ("The Act [does not] regulat[e] a commercial activity"), 560 ("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"), 561 ("Section 922(q) is not an essential part of a larger regulation of economic activity"), 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 judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty' "), 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition ***611** elsewhere, substantially affect any sort of interstate commerce"); see also *id.,* at 573–574, 115 S.Ct. 1624 (KENNEDY, J., concurring) (stating that *Lopez* did not alter our "practical conception of commercial regulation" and that Congress may "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy"), 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"), 580 ("[U]nlike the earlier cases to come before the Court here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far" (citation omitted)). *Lopez's* review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor. See *id.,* at 559–560, 115 S.Ct. 1624.[4]

The second consideration that we found important in analyzing § 922(q) was that ****1751** the statute contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have ***612** an explicit connection with or effect on interstate commerce." *Id.,* at 562, 115 S.Ct. 1624. Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce.

[9] Third, we noted that neither § 922(q) " 'nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.' " *Ibid.* (quoting Brief for United States, O.T.1994, No. 93–1260, pp. 5–6). While "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," 514 **U.S.**, at 562, 115 S.Ct. 1624 (citing *McClung, supra,* at 304, 85 S.Ct. 377; *Perez,* 402 **U.S.**, at 156, 91 S.Ct. 1357), the existence of such findings may "enable **us** to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye." 514 **U.S.**, at 563, 115 S.Ct. 1624.

Finally, our decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated. *Id.,* at 563–567, 115 S.Ct. 1624. The United States argued that the possession of guns may lead to 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, 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." *Id.,* at 563–564, 115 S.Ct. 1624 (citation omitted). The Government also argued that the presence of guns at schools poses a threat to the educational process, which in turn threatens to produce a less efficient and productive work force, which will negatively affect national productivity and thus interstate commerce. *Ibid.*

We rejected these "costs of crime" and "national productivity" arguments because they would permit Congress ***613** to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.,* at 564, 115 S.Ct. 1624. We noted that, under this but-for 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 example. Under the[se] theories ..., 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." *Ibid.*

With these principles underlying our Commerce Clause jurisprudence as reference points, the proper resolution of the present cases is clear. Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature. See, *e.g., id.,* at 559–560, 115 S.Ct. 1624, and the cases cited therein.

[10] Like the Gun–Free School Zones Act at issue in *Lopez,* § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce. Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that § 13981 ****1752** is sufficiently tied to interstate commerce, Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime.[5]

[11] [12] ***614** In contrast with the lack of congressional findings that we faced in *Lopez,* § 13981 *is* supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. See, *e.g.,* H.R. Conf. Rep. No. 103–711, p. 385 (1994), U.S.Code Cong. & Admin.News 1994, pp. 1803, 1853; S.Rep. No. 103–138, p. 40 (1993); S.Rep. No. 101–545, p. 33 (1990). But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez,* " '[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.' " 514 **U.S.**, at 557, n. 2, 115 S.Ct. 1624 (quoting *Hodel,* 452 **U.S.**, at 311, 101 S.Ct. 2389 (REHNQUIST, J., concurring in judgment)). Rather, " '[w]hether 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, and can be settled finally only by this Court.' " 514 **U.S.**, at 557, n. 2, 115 S.Ct. 1624 (quoting *Heart of Atlanta Motel,* 379 **U.S.**, at 273, 85 S.Ct. 348 (Black, J., concurring)).

***615** In these cases, Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. Congress found that gender-motivated violence affects interstate commerce

> "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; ... by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." H.R. Conf. Rep. No. 103–711, at 385, U.S.Code Cong. & Admin.News 1994, pp. 1803, 1853.

Accord, S.Rep. No. 103–138, at 54. Given these findings and petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. See *Lopez, supra,* at 564, 115 S.Ct. 1624. The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial **1753 effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

[13] [14] [15] [16] [17] [18] [19] Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez,* be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of *616 marriage, divorce, and childrearing on the national economy is undoubtedly significant. Congress may have recognized this specter when it expressly precluded § 13981 from being used in the family law context.[6] See 42 U.S.C. § 13981(e)(4). Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.[7] See *Lopez, supra,* at 575–579, 115 S.Ct. 1624 (KENNEDY, J., concurring); *Marbury,* 1 Cranch, at 176–178, 2 L.Ed. 60.

**1754 [20] [21] [22] [23] [24] [25] *617 We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is *618 truly national and what is truly local. *Lopez,* 514 U.S., at 568, 115 S.Ct. 1624 (citing *Jones & Laughlin Steel,* 301 U.S., at 30, 57 S.Ct. 615). In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. See, *e.g., Cohens v. Virginia,* 6 Wheat. 264, 426, 428, 5 L.Ed. 257 (1821) (Marshall, C.J.) (stating that Congress "has no general right to punish murder committed within any of the States," and that it is "clear ... that congress cannot punish felonies generally"). Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.[8] See, *e.g., Lopez,* 514 U.S., at 566, 115 S.Ct. 1624 ("The Constitution ... withhold[s] from Congress a plenary police power"); *id.,* at 584–585, 115 S.Ct. 1624 (THOMAS, J., concurring) ("[W]e *always* have rejected readings *619 of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power"), 596–597, and n. 6, 115 S.Ct. 1624 (noting that the first Congresses did not enact nationwide punishments for criminal conduct under the Commerce Clause).

III

[26] Because we conclude that the Commerce Clause does not provide Congress **1755 with authority to enact § 13981, we address petitioners' alternative argument that the section's civil remedy should be upheld as an exercise of Congress' remedial power under § 5 of the Fourteenth Amendment. As noted above, Congress expressly invoked the Fourteenth Amendment as a source of authority to enact § 13981.

[27] [28] [29] The principles governing an analysis of congressional legislation under § 5 are well settled. Section 5 states that Congress may " 'enforce' by 'appropriate legislation' the constitutional guarantee that no State shall deprive any person of 'life, liberty, or property, without due process of law,' nor deny any person 'equal protection of the laws.' " *City of Boerne v. Flores,* 521 U.S. 507, 517, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). Section 5 is "a positive grant of legislative power," *Katzenbach v. Morgan,* 384 U.S. 641, 651, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), that includes authority to "prohibit conduct which is not itself unconstitutional and [to] intrud[e] into 'legislative spheres of autonomy previously reserved to the States.' " *Flores, supra,* at 518, 117 S.Ct. 2157 (quoting *Fitzpatrick v. Bitzer,* 427 U.S. 445, 455, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976)); see also *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 81, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). However, "[a]s broad as the congressional enforcement power is, it is not unlimited." *Oregon v. Mitchell,* 400 U.S. 112, 128, 91

S.Ct. 260, 27 L.Ed.2d 272 (1970); see also *Kimel, supra,* at 81, 120 S.Ct. 631. In fact, as we discuss in detail below, several limitations inherent in § 5's text and constitutional context have been recognized since the Fourteenth Amendment was adopted.

Petitioners' § 5 argument is founded on an assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence. This assertion ***620** is supported by a voluminous congressional record. Specifically, Congress received evidence that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions. Congress concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence. See H.R. Conf. Rep. No. 103–711, at 385–386; S.Rep. No. 103–138, at 38, 41–55; S.Rep. No. 102–197, at 33–35, 41, 43–47. Petitioners contend that this bias denies victims of gender-motivated violence the equal protection of the laws and that Congress therefore acted appropriately in enacting a private civil remedy against the perpetrators of gender-motivated violence to both remedy the States' bias and deter future instances of discrimination in the state courts.

[30] [31] [32] [33] [34] As our cases have established, state-sponsored gender discrimination violates equal protection unless it " 'serves "important governmental objectives and ... the discriminatory means employed" are "substantially related to the achievement of those objectives." ' " *United States v. Virginia,* 518 **U.S.** 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (quoting *Mississippi Univ. for Women v. Hogan,* 458 **U.S.** 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982), in turn quoting *Wengler v. Druggists Mut. Ins. Co.,* 446 **U.S.** 142, 150, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980)). See also *Craig v. Boren,* 429 **U.S.** 190, 198–199, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). However, the language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government. See *Flores, supra,* at 520–524, 117 S.Ct. 2157 (reviewing the history of the Fourteenth Amendment's enactment and discussing the contemporary belief ****1756** that the Amendment " 'does ***621** not concentrate power in the general government for any purpose of police government within the States' ") (quoting T. Cooley, Constitutional Limitations 294, n. 1 (2d ed. 1871)). Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action. "[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer,* 334 **U.S.** 1, 13, and n. 12, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

Shortly after the Fourteenth Amendment was adopted, we decided two cases interpreting the Amendment's provisions, *United States v. Harris,* 106 **U.S.** 629, 1 S.Ct. 601, 27 L.Ed. 290 (1883), and the *Civil Rights Cases,* 109 **U.S.** 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883). In *Harris,* the Court considered a challenge to § 2 of the Civil Rights Act of 1871. That section sought to punish "private persons" for "conspiring to deprive any one of the equal protection of the laws enacted by the State." 106 **U.S.**, at 639, 1 S.Ct. 601. We concluded that this law exceeded Congress' § 5 power because the law was "directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers." *Id.,* at 640, 1 S.Ct. 601. In so doing, we reemphasized our statement from *Virginia v. Rives,* 100 **U.S.** 313, 318, 25 L.Ed. 667 (1879), that " 'these provisions of the fourteenth amendment have reference to State action exclusively, and not to any action of private individuals.' " *Harris, supra,* at 639, 1 S.Ct. 601 (misquotation in *Harris*).

We reached a similar conclusion in the *Civil Rights Cases.* In those consolidated cases, we held that the public accommodation provisions of the Civil Rights Act of 1875, which applied to purely private conduct, were beyond the scope of the § 5 enforcement power. 109 **U.S.**, at 11, 3 S.Ct. 18 ("Individual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment"). See also, *e.g., Romer v.* ***622** *Evans,* 517 **U.S.** 620, 628, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) ("[I]t was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations"); *Lugar v. Edmondson Oil Co.,* 457 **U.S.** 922, 936, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) ("Careful adherence to the 'state

action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power"); *Blum v. Yaretsky,* 457 **U.S.** 991, 1002, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982); *Moose Lodge No. 107 v. Irvis,* 407 **U.S.** 163, 172, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972); *Adickes v. S.H. Kress & Co.,* 398 **U.S.** 144, 147, n. 2, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *United States v. Cruikshank,* 92 **U.S.** 542, 554, 23 L.Ed. 588 (1875) ("The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society").

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

Petitioners contend that two more recent decisions have in effect overruled this longstanding limitation on Congress' § 5 authority. They rely on *United States v.* ****1757** *Guest,* 383 **U.S.** 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966), for the proposition that the rule laid down in the *Civil Rights Cases* is no longer good law. In *Guest,* the Court reversed the construction of an indictment under 18 U.S.C. § 241, saying in the course of its opinion that "we deal here with issues of statutory construction, not with issues of constitutional power." 383 **U.S.**, at 749, 86 S.Ct. 1170. Three Members of the Court, in a separate opinion by Justice Brennan, expressed the view that the *Civil Rights Cases* ***623** were wrongly decided, and that Congress could under § 5 prohibit actions by private individuals. 383 **U.S.**, at 774, 86 S.Ct. 1170 (opinion concurring in part and dissenting in part). Three other Members of the Court, who joined the opinion of the Court, joined a separate opinion by Justice Clark which in two or three sentences stated the conclusion that Congress could "punis[h] all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." *Id.,* at 762, 86 S.Ct. 1170 (concurring opinion). Justice Harlan, in another separate opinion, commented with respect to the statement by these Justices:

> "The action of three of the Justices who joined the Court's opinion in nonetheless cursorily pronouncing themselves on the far-reaching constitutional questions deliberately not reached in Part II seems to me, to say the very least, extraordinary." *Id.,* at 762, n. 1, 86 S.Ct. 1170 (opinion concurring in part and dissenting in part).

Though these three Justices saw fit to opine on matters not before the Court in *Guest,* the Court had no occasion to revisit the *Civil Rights Cases* and *Harris,* having determined "the indictment [charging private individuals with conspiring to deprive blacks of equal access to state facilities] in fact contain[ed] an express allegation of state involvement." 383 **U.S.**, at 756, 86 S.Ct. 1170. The Court concluded that the implicit allegation of "active connivance by agents of the State" eliminated any need to decide "the threshold level that state action must attain in order to create rights under the Equal Protection Clause." *Ibid.* All of this Justice Clark explicitly acknowledged. See *id.,* at 762, 86 S.Ct. 1170 (concurring opinion) ("The Court's interpretation of the indictment clearly avoids the question whether Congress, by appropriate legislation, has the power to punish private conspiracies that interfere with Fourteenth Amendment rights, such as the right to utilize public facilities").

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

[35] Petitioners also rely on *District of Columbia v. Carter,* 409 **U.S.** 418, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973). *Carter* was a case addressing the question whether the District of Columbia was a "State" within the meaning of Rev. Stat. § 1979, 42 U.S.C. § 1983—a section which by its terms requires state action before it may be employed. A footnote in that opinion recites the same litany respecting *Guest* that petitioners rely on. This litany is of course entirely dicta, and in any event cannot rise above its source. We believe that the description of the § 5 power contained in the *Civil Rights Cases* is correct:

> "But where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular [s]tate legislation or [s]tate action in reference to that subject, the power given is limited **1758 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 [s]tate officers." 109 U.S., at 18, 3 S.Ct. 18.

Petitioners alternatively argue that, unlike the situation in the *Civil Rights Cases,* here there has been gender-based disparate treatment by state authorities, whereas in those cases there was no indication of such state action. There is *625 abundant evidence, however, to show that the Congresses that enacted the Civil Rights Acts of 1871 and 1875 had a purpose similar to that of Congress in enacting § 13981: There were state laws on the books bespeaking equality of treatment, but in the administration of these laws there was discrimination against newly freed slaves. The statement of Representative Garfield in the House and that of Senator Sumner in the Senate are representative:

> "[T]he chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." Cong. Globe, 42d Cong., 1st Sess., App. 153 (1871) (statement of Rep. Garfield).

> "The Legislature of South Carolina has passed a law giving precisely the rights contained in your 'supplementary civil rights bill.' But such a law remains a dead letter on her statute-books, because the State courts, comprised largely of those whom the Senator wishes to obtain amnesty for, refuse to enforce it." Cong. Globe, 42d Cong., 2d Sess., 430 (1872) (statement of Sen. Sumner).

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

[36] But even if that distinction were valid, we do not believe it would save § 13981's civil remedy. For the remedy is simply not "corrective in its character, adapted to counteract and redress the operation of such prohibited [s]tate laws or proceedings of [s]tate officers." *Civil Rights Cases, supra,* at 18, 3 S.Ct. 18. Or, as we have phrased it in more recent cases, prophylactic legislation under § 5 must have a "congruence *626 and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank,* 527 U.S. 627, 639, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999); *Flores,* 521 U.S., at 526, 117 S.Ct. 2157. Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.

In the present cases, for example, § 13981 visits no consequence whatever on any Virginia public official involved in investigating or prosecuting Brzonkala's assault. The section is, therefore, unlike any of the § 5 remedies that we have previously upheld. For example, in *Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), Congress prohibited New York from imposing literacy tests as a prerequisite for voting because it found that such a requirement disenfranchised thousands of Puerto Rican immigrants who had been educated in the Spanish language of their home territory. That law, which we upheld, was directed at New York officials who administered the State's election law and prohibited them from using a provision of that law. In *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), Congress imposed voting rights requirements on States that, Congress found, had a history of discriminating against blacks in voting. **1759 The remedy was also directed at state officials in those States. Similarly, in *Ex parte Virginia,* 100 U.S. 339, 25 L.Ed. 676 (1879), Congress criminally punished state officials who intentionally discriminated in jury selection; again, the remedy was directed to the culpable state official.

Section 13981 is also different from these previously upheld remedies in that it applies uniformly throughout the Nation. Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States. By contrast, the § 5 remedy upheld in *Katzenbach v. Morgan, supra,* *627 was directed only to the State where the evil found by Congress existed, and in *South Carolina v.*

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

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

IV

Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault. But Congress' effort in § 13981 to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under § 5 of the Fourteenth Amendment. If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent **Morrison**. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States. The judgment of the Court of Appeals is

Affirmed.

Justice THOMAS, concurring.

The majority opinion correctly applies our decision in *United States v. Lopez,* 514 **U.S.** 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), and I join it in full. I write separately only to express my view that the very notion of a "substantial effects" test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases. By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.

***628** Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The Court says both that it leaves Commerce Clause precedent undisturbed and that the Civil Rights Remedy of the Violence Against Women Act of 1994, 42 U.S.C. § 13981, exceeds Congress's power under that Clause. I find the claims irreconcilable and respectfully dissent.[1]

I

Our cases, which remain at least nominally undisturbed, stand for the following propositions. Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. See *Wickard v. Filburn,* 317 **U.S.** 111, 124–128, 63 S.Ct. 82, 87 L.Ed. 122 (1942); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 **U.S.** 264, 277, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981). The fact of such a substantial effect is not an issue for the courts in the first instance, *ibid.,* but for the Congress, whose institutional capacity for gathering evidence and taking testimony ****1760** far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. See *ibid.* Any explicit findings that Congress chooses to make, though not dispositive of the question of rationality, may advance judicial review by identifying factual authority on which Congress relied. Applying those propositions in these cases can lead to only one conclusion.

One obvious difference from *United States v. Lopez,* 514 **U.S.** 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), is the mountain of data assembled by Congress, ***629** here showing the effects of violence against women on interstate commerce.[2] Passage of the Act in 1994 was preceded by four years of hearings,[3] which included testimony from physicians and law professors;[4] from survivors ***630** of rape and domestic violence;[5] and from representatives of state law enforcement and private business.[6] The record includes reports on gender bias from task forces in 21 States,[7] and we have the benefit of specific factual ****1761** findings ***631** in the eight separate Reports issued by Congress and its committees over the

long course leading to enactment.[8] Cf. *Hodel,* 452 U.S., at 278–279, 101 S.Ct. 2352 (noting "extended hearings," "vast amounts of testimony and documentary evidence," and "years of the most thorough legislative consideration").

With respect to domestic violence, Congress received evidence for the following findings:

"Three out of four American women will be victims of violent crimes sometime during their life." H.R.Rep. No. 103–395, p. 25 (1993) (citing U.S. Dept. of Justice, Report to the Nation on Crime and Justice 29 (2d ed.1988)).

"Violence is the leading cause of injuries to women ages 15 to 44...." S.Rep. No. 103–138, p. 38 (1993) (citing Surgeon General Antonia Novello, From the Surgeon General, U.S. Public Health Services, 267 JAMA 3132 (1992)).

"[A]s many as 50 percent of homeless women and children are fleeing domestic violence." S.Rep. No. 101–545, p. 37 (1990) (citing E. Schneider, Legal Reform Efforts for Battered Women: Past, Present, and Future (July 1990)).

"Since 1974, the assault rate against women has outstripped the rate for men by at least twice for some age groups and far more for others." S.Rep. No. 101–545, at ***632** 30 (citing Bureau of Justice Statistics, Criminal Victimization in the United States (1974) (Table 5)).

"[B]attering 'is the single largest cause of injury to women in the United States.' " S.Rep. No. 101–545, at 37 (quoting Van Hightower & McManus, Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies, 49 Pub. Admin. Rev. 269 (May/June 1989)).

"An estimated 4 million American women are battered each year by their ****1762** husbands or partners." H.R.Rep. No. 103–395, at 26 (citing Council on Scientific Affairs, American Medical Assn., Violence Against Women: Relevance for Medical Practitioners, 267 JAMA 3184, 3185 (1992)).

"Over 1 million women in the United States seek medical assistance each year for injuries sustained [from] their husbands or other partners." S.Rep. No. 101–545, at 37 (citing Stark & Flitcraft, Medical Therapy as Repression: The Case of the Battered Woman, Health & Medicine (Summer/Fall 1982)).

"Between 2,000 and 4,000 women die every year from [domestic] abuse." S.Rep. No. 101–545, at 36 (citing Schneider, *supra*).

"[A]rrest rates may be as low as 1 for every 100 domestic assaults." S.Rep. No. 101–545, at 38 (citing Dutton, Profiling of Wife Assaulters: Preliminary Evidence for Trimodal Analysis, 3 Violence and Victims 5–30 (1988)).

"Partial estimates show that violent crime against women costs this country at least 3 billion—not million, but billion—dollars a year." S.Rep. No. 101–545, at 33 (citing Schneider, *supra,* at 4).

"[E]stimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence." S.Rep. No. 103–138, at ***633** 41 (citing Biden, Domestic Violence: A Crime, Not a Quarrel, Trial 56 (June 1993)).

The evidence as to rape was similarly extensive, supporting these conclusions:

"[The incidence of] rape rose four times as fast as the total national crime rate over the past 10 years." S.Rep. No. 101–545, at 30 (citing Federal Bureau of Investigation Uniform Crime Reports (1988)).

"According to one study, close to half a million girls now in high school will be raped before they graduate." S.Rep. No. 101–545, at 31 (citing R. Warshaw, I Never Called it Rape 117 (1988)).

"[One hundred twenty—five thousand] college women can expect to be raped during this—or any—year." S.Rep. No. 101–545, at 43 (citing testimony of Dr. Mary Koss before the Senate Judiciary Committee, Aug. 29, 1990).

"[T]hree-quarters of women never go to the movies alone after dark because of the fear of rape and nearly 50 percent do not use public transit alone after dark for the same reason." S.Rep. No. 102–197, p. 38 (1991) (citing M. Gordon & S. Riger, The Female Fear 15 (1989)).

"[Forty-one] percent of judges surveyed believed that juries give sexual assault victims less credibility than

other crime victims." S.Rep. No. 102–197, at 47 (citing Colorado Supreme Court Task Force on Gender Bias in the Courts, Gender & Justice in the Colorado Courts 91 (1990)).

"Less than 1 percent of all [rape] victims have collected damages." S.Rep. No. 102–197, at 44 (citing report by Jury Verdict Research, Inc.).

" '[A]n individual who commits rape has only about 4 chances in 100 of being arrested, prosecuted, and found guilty of any offense.' " S.Rep. No. 101–545, at 33, n. 30 ***634** quoting H. Feild & L. Bienen, Jurors and Rape: A Study in Psychology and Law 95 (1980)).

"Almost one-quarter of convicted rapists never go to prison and another quarter received sentences in local jails where the average sentence is 11 months." S.Rep. No. 103–138, at 38 (citing Majority Staff Report of Senate Committee on the Judiciary, The Response to Rape: Detours on the Road to Equal Justice, 103d Cong., 1st Sess., 2 (Comm. Print 1993)).

"[A]lmost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity." S.Rep. No. 102–197, at 53 (citing Ellis, Atkeson, & Calhoun, An Assessment of Long–Term Reaction to Rape, 90 J. Abnormal Psych., No. 3, p. 264 (1981)).

****1763** Based on the data thus partially summarized, Congress found 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 ... [,] 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, p. 385 (1994), U.S.Code Cong. & Admin.News 1994, pp. 1803, 1853.

Congress thereby explicitly stated the predicate for the exercise of its Commerce Clause power. Is its conclusion irrational in view of the data amassed? True, the methodology of particular studies may be challenged, and some of the figures arrived at may be disputed. But the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned. Cf. *Turner Broadcasting System, Inc. v. FCC,* 520 **U.S.** 180, 199, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) ***635** "The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process").

Indeed, the legislative record here is far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title II of the Civil Rights Act of 1964 against Commerce Clause challenges. In *Heart of Atlanta Motel, Inc. v. United States,* 379 **U.S.** 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964), and *Katzenbach v. McClung,* 379 **U.S.** 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964), the Court referred to evidence showing the consequences of racial discrimination by motels and restaurants on interstate commerce. Congress had relied on compelling anecdotal reports that individual instances of segregation cost thousands to millions of dollars. See Civil Rights—Public Accommodations, Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess., App. V, pp. 1383–1387 (1963). Congress also had evidence that the average black family spent substantially less than the average white family in the same income range on public accommodations, and that discrimination accounted for much of the difference. H.R.Rep. No. 88–914, pt. 2, pp. 9–10, and Table II (1963) (Additional Views on H.R. 7152 of Hon. William M. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, Hon. James E. Bromwell).

While Congress did not, to my knowledge, calculate aggregate dollar values for the nationwide effects of racial discrimination in 1964, in 1994 it did rely on evidence of the harms caused by domestic violence and sexual assault, citing annual costs of $3 billion in 1990, see S. Rep. 101–545, at 33, and $5 to $10 billion in 1993, see S.Rep. No. 103–138, at 41.[9] Equally important, though, gender-based violence in the 1990's was shown to operate in a manner similar to racial ***636** discrimination in the 1960's in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce. Like racial discrimination, "[g]ender-based violence bars its most likely targets—women—from full partic[ipation] in the national economy." *Id.,* at 54.

If the analogy to the Civil Rights Act of 1964 is not plain enough, one can always look back a bit further. In *Wickard,* we upheld the application of the Agricultural

Adjustment Act to the planting and consumption of homegrown wheat. The effect on interstate commerce in that case followed from the possibility that wheat **1764 grown at home for personal consumption could either be drawn into the market by rising prices, or relieve its grower of any need to purchase wheat in the market. See 317 U.S., at 127–129, 63 S.Ct. 82. The Commerce Clause predicate was simply the effect of the production of wheat for home consumption on supply and demand in interstate commerce. Supply and demand for goods in interstate commerce will also be affected by the deaths of 2,000 to 4,000 women annually at the hands of domestic abusers, see S.Rep. No. 101–545, at 36, and by the reduction in the work force by the 100,000 or more rape victims who lose their jobs each year or are forced to quit, see *id.*, at 56; H.R.Rep. No. 103–395, at 25–26. Violence against women may be found to affect interstate commerce and affect it substantially.[10]

*637 II

The Act would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause, complemented by the authority of the Necessary and Proper Clause, Art. I, § 8, cl. 18, extended to all activity that, when aggregated, has a substantial effect on interstate commerce. As already noted, this understanding was secure even against the turmoil at the passage of the Civil Rights Act of 1964, in the aftermath of which the Court not only reaffirmed the cumulative effects and rational basis features of the substantial effects test, see *Heart of Atlanta, supra,* at 258, 85 S.Ct. 348; *McClung, supra,* at 301–305, 85 S.Ct. 377, but declined to limit the commerce power through a formal distinction between legislation focused on "commerce" and statutes addressing "moral and social wrong[s]," *Heart of Atlanta,* 379 U.S., at 257, 85 S.Ct. 348.

The fact that the Act does not pass muster before the Court today is therefore proof, to a degree that *Lopez* was not, that the Court's nominal adherence to the substantial effects test is merely that. Although a new jurisprudence has not emerged with any distinctness, it is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them. These devaluations are accomplished not by any express repudiation of the substantial effects test or its application through the aggregation of individual conduct, but by supplanting rational basis scrutiny with a new criterion of review.

*638 Thus the elusive heart of the majority's analysis in these cases is its statement that Congress's findings of fact are "weakened" by the presence of a disfavored "method of reasoning." *Ante,* at 1752. This seems to suggest that the "substantial effects" analysis is not a factual enquiry, for Congress in the first instance with subsequent judicial review looking only to the rationality of the congressional conclusion, but one of a rather different sort, **1765 dependent upon a uniquely judicial competence.

This new characterization of substantial effects has no support in our cases (the self-fulfilling prophecies of *Lopez* aside), least of all those the majority cites. Perhaps this explains why the majority is not content to rest on its cited precedent but claims a textual justification for moving toward its new system of congressional deference subject to selective discounts. Thus it purports to rely on the sensible and traditional understanding that the listing in the Constitution of some powers implies the exclusion of others unmentioned. See *Gibbons v. Ogden,* 9 Wheat. 1, 195, 6 L.Ed. 23 (1824); *ante,* at 1749–1750; The Federalist No. 45, p. 313 (J. Cooke ed. 1961) (J. Madison).[11] The majority stresses that Art. I, § 8, enumerates *639 the powers of Congress, including the commerce power, an enumeration implying the exclusion of powers not enumerated. It follows, for the majority, not only that there must be some limits to "commerce," but that some particular subjects arguably within the commerce power can be identified in advance as excluded, on the basis of characteristics other than their commercial effects. Such exclusions come into sight when the activity regulated is not itself commercial or when the States have traditionally addressed it in the exercise of the general police power, conferred under the state constitutions but never extended to Congress under the Constitution of the Nation, see *Lopez,* 514 U.S., at 566, 115 S.Ct. 1624. *Ante,* at 1753.

The premise that the enumeration of powers implies that other powers are withheld is sound; the conclusion that some particular categories of subject matter are therefore presumptively beyond the reach of the commerce power is, however, a non sequitur. From the fact that Art. I, § 8, cl. 3 grants an authority limited to regulating commerce, it

follows only that Congress may claim no authority under that section to address any subject that does not affect commerce. It does not at all follow that an activity affecting commerce nonetheless falls outside the commerce power, depending on the specific character of the activity, or the authority of a State to regulate it along with Congress.[12] My disagreement *640 with the majority is not, however, confined to logic, for history has **1766 shown that categorical exclusions have proven as unworkable in practice as they are unsupportable in theory.

A

Obviously, it would not be inconsistent with the text of the Commerce Clause itself to declare "noncommercial" primary activity beyond or presumptively beyond the scope of the commerce power. That variant of categorical approach is not, however, the sole textually permissible way of defining the scope of the Commerce Clause, and any such neat limitation would at least be suspect in the light of the final sentence of Art. I, § 8, authorizing Congress to make "all Laws ... necessary and proper" to give effect to its enumerated powers such as commerce. See *United States v. Darby,* 312 **U.S.** 100, 118, 61 S.Ct. 451, 85 L.Ed. 609 (1941) ("The power of Congress ... extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce"). Accordingly, for significant periods of our history, the Court has defined the commerce power as plenary, unsusceptible to categorical exclusions, and this was the view expressed throughout the latter part of the 20th century in the substantial effects test. These two conceptions of the commerce power, plenary and categorically limited, are in fact old rivals, and today's revival of their competition summons up familiar history, a brief reprise of which may be helpful in posing what I take to be the key question going to the legitimacy of the majority's decision to breathe new life into the approach of categorical limitation.

*641 Chief Justice Marshall's seminal opinion in *Gibbons v. Ogden,* 9 Wheat., at 193–194, 22 **U.S.** 1, 6 L.Ed. 23, construed the commerce power from the start with "a breadth never yet exceeded," *Wickard v. Filburn,* 317 **U.S.**, at 120, 63 S.Ct. 82. In particular, it is worth noting, the Court in *Wickard* did not regard its holding as exceeding the scope of Chief Justice Marshall's view of interstate commerce; *Wickard* applied an aggregate effects test to ostensibly domestic, noncommercial farming consistently with Chief Justice Marshall's indication that the commerce power may be understood by its exclusion of subjects, among others, "which do not affect other States," *Gibbons,* 9 Wheat., at 195, 6 L.Ed. 23. This plenary view of the power has either prevailed or been acknowledged by this Court at every stage of our jurisprudence. See, *e.g., id.,* at 197, 6 L.Ed. 23; *Nashville, C. & St. L.R. Co. v. Alabama,* 128 **U.S.** 96, 99–100, 9 S.Ct. 28, 32 L.Ed. 352 (1888); *Lottery Case,* 188 **U.S.** 321, 353, 23 S.Ct. 321, 47 L.Ed. 492 (1903); *Minnesota Rate Cases,* 230 **U.S.** 352, 398, 33 S.Ct. 729, 57 L.Ed. 1511 (1913); *United States v. California,* 297 **U.S.** 175, 185, 56 S.Ct. 421, 80 L.Ed. 567 (1936); *United States v. Darby, supra,* at 115, 61 S.Ct. 451; *Heart of Atlanta Motel, Inc. v. United States,* 379 **U.S.**, at 255, 85 S.Ct. 348; *Hodel v. Indiana,* 452 **U.S.**, at 324, 101 S.Ct. 2376. And it was this understanding, free of categorical qualifications, that prevailed in the period after 1937 through *Lopez,* as summed up by Justice Harlan: " 'Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators ... have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.' " *Maryland v. Wirtz,* 392 **U.S.** 183, 190, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968) (quoting *Katzenbach v. McClung,* 379 **U.S.**, at 303–304, 85 S.Ct. 377).

Justice Harlan spoke with the benefit of hindsight, for he had seen the result of rejecting the plenary view, and today's attempt to distinguish between primary activities affecting commerce in terms of the relatively commercial or noncommercial character of the primary conduct proscribed **1767 comes with the pedigree of near tragedy that I outlined in *642 *United States v. Lopez,* 514 **U.S.**, at 603, 115 S.Ct. 1624 (dissenting opinion). In the half century following the modern activation of the commerce power with passage of the Interstate Commerce Act in 1887, this Court from time to time created categorical enclaves beyond congressional reach by declaring such activities as "mining," "production," "manufacturing," and union membership to be outside the definition of "commerce" and by limiting application of the effects test to "direct" rather than "indirect" commercial consequences. See, *e.g., United States v. E.C.*

Knight Co., 156 **U.S.** 1, 15 S.Ct. 249, 39 L.Ed. 325 (1895) (narrowly construing the Sherman Antitrust Act in light of the distinction between "commerce" and "manufacture"); *In re Heff*, 197 **U.S.** 488, 505–506, 25 S.Ct. 506, 49 L.Ed. 848 (1905) (stating that Congress could not regulate the intrastate sale of liquor); *The Employers' Liability Cases*, 207 **U.S.** 463, 495–496, 28 S.Ct. 141, 52 L.Ed. 297 (1908) (invalidating law governing tort liability for common carriers operating in interstate commerce because the effects on commerce were indirect); *Adair v. United States*, 208 **U.S.** 161, 28 S.Ct. 277, 52 L.Ed. 436 (1908) (holding that labor union membership fell outside "commerce"); *Hammer v. Dagenhart*, 247 **U.S.** 251, 38 S.Ct. 529, 62 L.Ed. 1101 (1918) (invalidating law prohibiting interstate shipment of goods manufactured with child labor as a regulation of "manufacture"); *A.L.A. Schechter Poultry Corp. v. United States*, 295 **U.S.** 495, 545–548, 55 S.Ct. 837, 79 L.Ed. 1570 (1935) (invalidating regulation of activities that only "indirectly" affected commerce); *Railroad Retirement Bd. v. Alton R. Co.*, 295 **U.S.** 330, 368–369, 55 S.Ct. 758, 79 L.Ed. 1468 (1935) (invalidating pension law for railroad workers on the grounds that conditions of employment were only indirectly linked to commerce); *Carter v. Carter Coal Co.*, 298 **U.S.** 238, 303–304, 56 S.Ct. 855, 80 L.Ed. 1160 (1936) (holding that regulation of unfair labor practices in mining regulated "production," not "commerce").

Since adherence to these formalistically contrived confines of commerce power in large measure provoked the judicial crisis of 1937, one might reasonably have doubted that Members of this Court would ever again toy with a return to the days before ***643** *NLRB v. Jones & Laughlin Steel Corp.*, 301 **U.S.** 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937), which brought the earlier and nearly disastrous experiment to an end. And yet today's decision can only be seen as a step toward recapturing the prior mistakes. Its revival of a distinction between commercial and noncommercial conduct is at odds with *Wickard*, which repudiated that analysis, and the enquiry into commercial purpose, first intimated by the *Lopez* concurrence, see *Lopez, supra*, at 580, 115 S.Ct. 1624 (opinion of KENNEDY, J.), is cousin to the intent-based analysis employed in *Hammer, supra*, at 271–272, 38 S.Ct. 529, but rejected for Commerce Clause purposes in *Heart of Atlanta, supra*, at 257, 85 S.Ct. 348, and *Darby*, 312 **U.S.**, at 115, 61 S.Ct. 451.

Why is the majority tempted to reject the lesson so painfully learned in 1937? An answer emerges from contrasting *Wickard* with one of the predecessor cases it superseded. It was obvious in *Wickard* that growing wheat for consumption right on the farm was not "commerce" in the common vocabulary,[13] but that did not ****1768** matter constitutionally so long as the aggregated activity of domestic wheat growing affected commerce substantially. Just a few years before ***644** *Wickard*, however, it had certainly been no less obvious that "mining" practices could substantially affect commerce, even though *Carter Coal Co., supra*, had held mining regulation beyond the national commerce power. When we try to fathom the difference between the two cases, it is clear that they did not go in different directions because the *Carter Coal* Court could not understand a causal connection that the *Wickard* Court could grasp; the difference, rather, turned on the fact that the Court in *Carter Coal* had a reason for trying to maintain its categorical, formalistic distinction, while that reason had been abandoned by the time *Wickard* was decided. The reason was laissez-faire economics, the point of which was to keep government interference to a minimum. See *Lopez, supra*, at 605–606, 115 S.Ct. 1624 (SOUTER, J., dissenting). The Court in *Carter Coal* was still trying to create a laissez-faire world out of the 20th-century economy, and formalistic commercial distinctions were thought to be useful instruments in achieving that object. The Court in *Wickard* knew it could not do any such thing and in the aftermath of the New Deal had long since stopped attempting the impossible. Without the animating economic theory, there was no point in contriving formalisms in a war with Chief Justice Marshall's conception of the commerce power.

If we now ask why the formalistic economic/noneconomic distinction might matter today, after its rejection in *Wickard*, the answer is not that the majority fails to see causal connections in an integrated economic world. The answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual ***645** States see fit. The legitimacy of the Court's current emphasis on the noncommercial nature of regulated activity, then, does not turn on any logic serving the text of the Commerce Clause or on the realism of the majority's view of the national economy. The essential issue is rather the strength of the majority's claim to have

a constitutional warrant for its current conception of a federal relationship enforceable by this Court through limits on otherwise plenary commerce power. This conception is the subject of the majority's second categorical discount applied today to the facts bearing on the substantial effects test.

B

The Court finds it relevant that the statute addresses conduct traditionally subject to state prohibition under domestic criminal law, a fact said to have some heightened significance when the violent conduct in question is not itself aimed directly at interstate commerce or its instrumentalities. *Ante,* at 1749. Again, history seems to be recycling, for the theory of traditional state concern as grounding a limiting principle has been rejected previously, and more than once. It was disapproved in *Darby,* 312 **U.S.**, at 123–124, 61 S.Ct. 451, and held insufficient standing **1769 alone to limit the commerce power in *Hodel,* 452 **U.S.**, at 276–277, 101 S.Ct. 2352. In the particular context of the Fair Labor Standards Act it was rejected in *Maryland v. Wirtz,* 392 **U.S.** 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968), with the recognition that "[t]here is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other." *Id.,* at 195, 88 S.Ct. 2017 (internal quotation marks omitted). The Court held it to be "clear that the Federal Government, when acting within a delegated power, may override countervailing state interests, whether these be described as 'governmental' or 'proprietary' in character." *Ibid.* While *Wirtz* was later overruled by *646 *National League of Cities v. Usery,* 426 **U.S.** 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), that case was itself repudiated in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 **U.S.** 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), which held that the concept of "traditional governmental function" (as an element of the immunity doctrine under *Hodel*) was incoherent, there being no explanation that would make sense of the multifarious decisions placing some functions on one side of the line, some on the other. 469 **U.S.**, at 546–547, 105 S.Ct. 1005. The effort to carve out inviolable state spheres within the spectrum of activities substantially affecting commerce was, of course, just as irreconcilable with *Gibbons's* explanation of the national commerce power as being as "absolut[e] as it would be in a single government," 9 Wheat., at 197, 6 L.Ed. 23.[14]

*647 The objection to reviving traditional state spheres of action as a consideration in commerce analysis, however, not only rests on the portent of incoherence, but is compounded by a further defect just as fundamental. The defect, in essence, is the majority's rejection of the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy.[15] **1770 Whereas today's majority takes a leaf from the book of the old judicial economists in saying that the Court should somehow draw the line to keep the federal relationship in a proper balance, Madison, Wilson, and Marshall understood the Constitution very differently.

Although Madison had emphasized the conception of a National Government of discrete powers (a conception that a number of the ratifying conventions thought was too indeterminate to protect civil liberties),[16] Madison himself must have sensed the potential scope of some of the powers granted (such as the authority to regulate commerce), for he *648 took care in The Federalist No. 46 to hedge his argument for limited power by explaining the importance of national politics in protecting the States' interests. The National Government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." The Federalist No. 46, P. 319 (J. Cooke ed. 1961). James Wilson likewise noted that "it was a favorite object in the Convention" to secure the sovereignty of the States, and that it had been achieved through the structure of the Federal Government. 2 Elliot's Debates 438–439.[17] The Framers of the Bill of Rights, in turn, may well have sensed that Madison and Wilson were right about politics as the determinant of the federal balance within the broad limits of a power like commerce, for they formulated the Tenth Amendment without any provision comparable to the specific guarantees proposed for individual liberties.[18] In any case, this Court recognized the political component of federalism in the seminal *Gibbons* opinion. After declaring the plenary character of congressional power within the sphere of activity affecting commerce, the Chief Justice spoke for the Court in explaining that there was only one restraint on its valid exercise:

*649 "The wisdom and the discretion of Congress,

> their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments." *Gibbons,* 9 Wheat., at 197, 22 **U.S.** 1.

Politics as the moderator of the congressional employment of the commerce power was the theme many years later in *Wickard,* for after the Court acknowledged the breadth of the *Gibbons* formulation it invoked Chief Justice Marshall yet again in adding that "[h]e made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than judicial processes." ****1771** *Wickard,* 317 **U.S.**, at 120, 63 S.Ct. 82 (citation omitted). Hence, "conflicts of economic interest ... are wisely left under our system to resolution by Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do." *Id.,* at 129, 63 S.Ct. 82 (footnote omitted).

As with "conflicts of economic interest," so with supposed conflicts of sovereign political interests implicated by the Commerce Clause: the Constitution remits them to politics. The point can be put no more clearly than the Court put it the last time it repudiated the notion that some state activities categorically defied the commerce power as understood in accordance with generally accepted concepts. After confirming Madison's and Wilson's views with a recitation of the sources of state influence in the structure of the National Constitution, *Garcia,* 469 **U.S.**, at 550–552, 105 S.Ct. 1005, the Court disposed of the possibility of identifying "principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely ***650** by relying on *a priori* definitions of state sovereignty," *id.,* at 548, 105 S.Ct. 1005. It concluded that

> "the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.,* at 552, 105 S.Ct. 1005.

The *Garcia* Court's rejection of "judicially created limitations" in favor of the intended reliance on national politics was all the more powerful owing to the Court's explicit recognition that in the centuries since the framing the relative powers of the two sovereign systems have markedly changed. Nationwide economic integration is the norm, the national political power has been augmented by its vast revenues, and the power of the States has been drawn down by the Seventeenth Amendment, eliminating selection of senators by state legislature in favor of direct election.

The *Garcia* majority recognized that economic growth and the burgeoning of federal revenue have not amended the Constitution, which contains no circuit breaker to preclude the political consequences of these developments. Nor is there any justification for attempts to nullify the natural political impact of the particular amendment that was adopted. The significance for state political power of ending state legislative selection of senators was no secret in 1913, and the amendment was approved despite public comment on that very issue. Representative Franklin Bartlett, after quoting Madison's Federalist No. 62, as well as remarks by George Mason and John Dickinson during the Constitutional Convention, concluded, "It follows, therefore, that the ***651** framers of the Constitution, were they present in this House to-day, would inevitably regard this resolution as a most direct blow at the doctrine of State's rights and at the integrity of the State sovereignties; for if you once deprive a State as a collective organism of all share in the General Government, you annihilate its federative importance." 26 Cong. Rec. 7774 (1894). Massachusetts Senator George Hoar likewise defended indirect election of the Senate as "a great security for the rights of the States." S. Doc. No. 232, 59th Cong., 1st Sess., 21 (1906). And Elihu Root warned that if the selection of senators should be taken from state legislatures, "the tide that now sets toward the Federal Government will swell in volume and power." 46 Cong. Rec. 2243 (1911). "The time will come," he continued, "when the Government of the United States will be driven to the exercise of more arbitrary and unconsidered ****1772** power, will be driven to greater concentration, will be driven to extend its functions into the internal affairs of the States." *Ibid.* See generally Rossum, The Irony of Constitutional Democracy: Federalism, the Supreme Court, as the Seventeenth Amendment, 36 San Diego L.Rev. 671, 712–714 (1999) (noting federalism-base objections to the Seventeenth Amendment). These warnings did not kill the proposal; the Amendment was ratified, and today it is only the

ratification, not the predictions, which this Court can legitimately heed.[19]

*652 Amendments that alter the balance of power between the National and State Governments, like the Fourteenth, or that change the way the States are represented within the Federal Government, like the Seventeenth, are not rips in the fabric of the Framers' Constitution, inviting judicial repairs. The Seventeenth Amendment may indeed have lessened the enthusiasm of the Senate to represent the States as discrete sovereignties, but the Amendment did not convert the judiciary into an alternate shield against the commerce power.

C

The Court's choice to invoke considerations of traditional state regulation in these cases is especially odd in light of a distinction recognized in the now-repudiated opinion for the Court in *Usery.* In explaining that there was no inconsistency between declaring the States immune to the commerce power exercised in the Fair Labor Standards Act, but subject to it under the Economic Stabilization Act of 1970, as decided in *Fry v. United States,* 421 U.S. 542, 95 S.Ct. 1792, 44 L.Ed.2d 363 (1975), the Court spoke of the latter statute as dealing with a serious threat affecting all the political components of the federal *653 system, "which only collective action by the National Government might forestall." *Usery,* 426 U.S., at 853, 96 S.Ct. 2465. Today's majority, however, finds no significance whatever in the state support for the Act based upon the States' acknowledged failure to deal adequately with gender-based violence in state courts, and the belief of their own law enforcement agencies that national action is essential.[20]

The National Association of Attorneys General supported the Act unanimously, see Violence Against Women: Victims of the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess., 37–38 (1991), and Attorneys **1773 General from 38 States urged Congress to enact the Civil Rights Remedy, representing that "the current system for dealing with violence against women is inadequate," see Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 34–36 (1993). It was against this record of failure at the state level that the Act was passed to provide the choice of a federal forum in place of the state-court systems found inadequate to stop gender-biased violence. See Women and Violence, Hearing before the Senate Committee on the Judiciary, 101st Cong., 2d Sess., 2 (1990) (statement of Sen. Biden) (noting importance of federal forum).[21] The Act accordingly offers a federal civil rights remedy aimed exactly *654 at violence against women, as an alternative to the generic state tort causes of action found to be poor tools of action by the state task forces. See S.Rep. No. 101–545, at 45 (noting difficulty of fitting gender-motivated crimes into common-law categories). As the 1993 Senate Report put it, "The Violence Against Women Act is intended to respond both to the underlying attitude that this violence is somehow less serious than other crime and to the resulting failure of our criminal justice system to address such violence. Its goals are both symbolic and practical...." S.Rep. No. 103–138, at 38.

The collective opinion of state officials that the Act was needed continues virtually unchanged, and when the Civil Rights Remedy was challenged in court, the States came to its defense. Thirty-six of them and the Commonwealth of Puerto Rico have filed an *amicus* brief in support of petitioners in these cases, and only one State has taken respondents' side. It is, then, not the least irony of these cases that the States will be forced to enjoy the new federalism whether they want it or not. For with the Court's decision today, Antonio **Morrison**, like *Carter Coal's* James Carter before him, has "won the states' rights plea against the states themselves." R. Jackson, The Struggle for Judicial Supremacy 160 (1941).

III

All of this convinces me that today's ebb of the commerce power rests on error, and at the same time leads me to doubt that the majority's view will prove to be enduring law. There is yet one more reason for doubt. Although we sense the presence of *Carter Coal, Schechter,* and *Usery* once again, the majority embraces them only at arm's-length. Where such decisions once stood for rules, today's opinion points to considerations by which substantial effects are discounted. Cases standing for the sufficiency of substantial effects are not overruled; cases overruled since 1937 are not quite revived. The Court's

thinking betokens less clearly ***655** a return to the conceptual straitjackets of *Schechter* and *Carter Coal* and *Usery* than to something like the unsteady state of obscenity law between *Redrup v. New York,* 386 **U.S.** 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967) *(per curiam),* and *Miller v. California,* 413 **U.S.** 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), a period in which the failure to provide a workable definition left this Court to review each case ad hoc. See *id.,* at 22, n. 3, 93 S.Ct. 2607; *Interstate Circuit, Inc. v. Dallas,* 390 **U.S.** 676, 706–708, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968) (Harlan, J., dissenting). As our predecessors learned then, the practice of such ad hoc review cannot preserve the distinction between the judicial and the legislative, and this Court, in any event, lacks the institutional ****1774** capacity to maintain such a regime for very long. This one will end when the majority realizes that the conception of the commerce power for which it entertains hopes would inevitably fail the test expressed in Justice Holmes's statement that "[t]he first call of a theory of law is that it should fit the facts." O. Holmes, The Common Law 167 (Howe ed.1963). The facts that cannot be ignored today are the facts of integrated national commerce and a political relationship between States and Nation much affected by their respective treasuries and constitutional modifications adopted by the people. The federalism of some earlier time is no more adequate to account for those facts today than the theory of laissez-faire was able to govern the national economy 70 years ago.

Justice BREYER, with whom Justice STEVENS joins, and with whom Justice SOUTER and Justice GINSBURG join as to Part I–A, dissenting.

No one denies the importance of the Constitution's federalist principles. Its state/federal division of authority protects liberty—both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is closer to home. The question is how the judiciary can best implement that ***656** original federalist understanding where the Commerce Clause is at issue.

I

The majority holds that the federal commerce power does not extend to such "noneconomic" activities as "noneconomic, violent criminal conduct" that significantly affects interstate commerce only if we "aggregate" the interstate "effect[s]" of individual instances. *Ante,* at 1754. Justice SOUTER explains why history, precedent, and legal logic militate against the majority's approach. I agree and join his opinion. I add that the majority's holding illustrates the difficulty of finding a workable judicial Commerce Clause touchstone—a set of comprehensible interpretive rules that courts might use to impose some meaningful limit, but not too great a limit, upon the scope of the legislative authority that the Commerce Clause delegates to Congress.

A

Consider the problems. The "economic/noneconomic" distinction is not easy to apply. Does the local street corner mugger engage in "economic" activity or "noneconomic" activity when he mugs for money? See *Perez v. United States,* 402 **U.S.** 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971) (aggregating local "loan sharking" instances); *United States v. Lopez,* 514 **U.S.** 549, 559, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (loan sharking is economic because it consists of "intrastate extortionate credit transactions"); *ante,* at 1749–1750. Would evidence that desire for economic domination underlies many brutal crimes against women save the present statute? See United States General Accounting Office, Health, Education, and Human Services Division, Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients 7–8 (Nov.1998); Brief for Equal Rights Advocates et al. as *Amicus Curiae* 10–12.

The line becomes yet harder to draw given the need for exceptions. The Court itself would permit Congress to aggregate, hence regulate, "noneconomic" activity taking place ***657** at economic establishments. See *Heart of Atlanta Motel, Inc. v. United States,* 379 **U.S.** 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (upholding civil rights laws forbidding discrimination at local motels); *Katzenbach v. McClung,* 379 **U.S.** 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964) (same for restaurants); *Lopez, supra,* at 559, 115 S.Ct. 1624 (recognizing congressional power to aggregate, hence forbid, noneconomically motivated discrimination at public accommodations); *ante,* at 1749–1750 (same). And it would permit Congress to

regulate where that regulation **1775 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, supra,* at 561, 115 S.Ct. 1624; cf. Controlled Substances Act, 21 U.S.C. § 801 *et seq.* (regulating drugs produced for home consumption). Given the former exception, can Congress simply rewrite the present law and limit its application to restaurants, hotels, perhaps universities, and other places of public accommodation? Given the latter exception, can Congress save the present law by including it, or much of it, in a broader "Safe Transport" or "Workplace Safety" act?

More important, why should we give critical constitutional importance to the economic, or noneconomic, nature of an interstate-commerce-affecting *cause?* If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them? The Constitution itself refers only to Congress' power to "regulate Commerce ... among the several States," and to make laws "necessary and proper" to implement that power. Art. I, § 8, cls. 3, 18. The language says nothing about either the local nature, or the economic nature, of an interstate-commerce-affecting cause.

This Court has long held that only the interstate commercial effects, not the local nature of the cause, are constitutionally relevant. See *NLRB v. Jones & Laughlin Steel Corp.,* 301 **U.S.** 1, 38–39, 57 S.Ct. 615, 81 L.Ed. 893 (1937) (focusing upon interstate effects); *Wickard v. Filburn,* 317 **U.S.** 111, 125, 63 S.Ct. 82, 87 L.Ed. 122 (1942) (aggregating interstate effects of wheat grown for home consumption); *Heart of Atlanta Motel, supra,* at 258, 85 S.Ct. 348 (" '[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze' " (quoting *United States v. Women's Sportswear Mfrs. Assn.,* 336 **U.S.** 460, 464, 69 S.Ct. 714, 93 L.Ed. 805 (1949))). Nothing in the Constitution's language, or that of earlier cases prior to *Lopez,* explains why the Court should ignore one highly relevant characteristic of an interstate-commerce-affecting cause (how "local" it is), while placing critical constitutional weight upon a different, less obviously relevant, feature (how "economic" it is).

Most importantly, the Court's complex rules seem unlikely to help secure the very object that they seek, namely, the protection of "areas of traditional state regulation" from federal intrusion. *Ante,* at 1752–1753. The Court's rules, even if broadly interpreted, are underinclusive. The local pickpocket is no less a traditional subject of state regulation than is the local gender-motivated assault. Regardless, the Court reaffirms, as it should, Congress' well-established and frequently exercised power to enact laws that satisfy a commerce-related jurisdictional prerequisite—for example, that some item relevant to the federally regulated activity has at some time crossed a state line. *Ante,* at 1749–1750, 1751, 1752, and n. 5; *Lopez, supra,* at 558, 115 S.Ct. 1624; *Heart of Atlanta Motel, supra,* at 256, 85 S.Ct. 348 (" '[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question' " (quoting *Caminetti v. United States,* 242 **U.S.** 470, 491, 37 S.Ct. 192, 61 L.Ed. 442 (1917))); see also *United States v. Bass,* 404 **U.S.** 336, 347–350, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) (saving ambiguous felon-in-possession statute by requiring gun to have crossed state line); *Scarborough v. United States,* 431 **U.S.** 563, 575, 97 S.Ct. 1963, 52 L.Ed.2d 582 (1977) (interpreting same statute to require only that gun passed "in interstate commerce" "at some time," without questioning constitutionality); cf., *e.g.,* 18 U.S.C. § 2261(a)(1) (making it a federal crime for a person to cross state lines to commit *659 a crime of violence against a spouse or intimate partner); § 1951(a) (federal crime to commit **1776 robbery, extortion, physical violence or threat thereof, where "article or commodity in commerce" is affected, obstructed, or delayed); § 2315 (making unlawful the knowing receipt or possession of certain stolen items that have "crossed a State ... boundary"); § 922(g)(1) (prohibiting felons from shipping, transporting, receiving, or possessing firearms "in interstate ... commerce").

And in a world where most everyday products or their component parts cross interstate boundaries, Congress will frequently find it possible to redraft a statute using language that ties the regulation to the interstate movement of some relevant object, thereby regulating local criminal activity or, for that matter, family affairs. See, *e.g.,* Child Support Recovery Act of 1992, 18 U.S.C. § 228. Although this possibility does not give the Federal Government the power to regulate everything, it means that any substantive limitation will apply randomly in terms of the interests the majority seeks to protect. How much would be gained, for example, were Congress to reenact the present law in the form of "An Act Forbidding Violence Against Women Perpetrated at Public Accommodations or by Those Who Have Moved in, or

through the Use of Items that Have Moved in, Interstate Commerce"? Complex Commerce Clause rules creating fine distinctions that achieve only random results do little to further the important federalist interests that called them into being. That is why modern (pre-*Lopez*) case law rejected them. See *Wickard, supra,* at 120, 63 S.Ct. 82; *United States v. Darby,* 312 **U.S.** 100, 116–117, 61 S.Ct. 451, 85 L.Ed. 609 (1941); *Jones & Laughlin Steel Corp., supra,* at 37, 57 S.Ct. 615.

The majority, aware of these difficulties, is nonetheless concerned with what it sees as an important contrary consideration. To determine the lawfulness of statutes simply by asking whether Congress could reasonably have found that *aggregated* local instances significantly affect interstate commerce will allow Congress to regulate almost anything. ***660** Virtually all local activity, when instances are aggregated, can have "substantial effects on employment, production, transit, or consumption." Hence Congress could "regulate any crime," and perhaps "marriage, divorce, and childrearing" as well, obliterating the "Constitution's distinction between national and local authority." *Ante,* at 1752–1753; *Lopez,* 514 **U.S.**, at 558, 115 S.Ct. 1624; cf. *A.L.A. Schechter Poultry Corp. v. United States,* 295 **U.S.** 495, 548, 55 S.Ct. 837, 79 L.Ed. 1570 (1935) (need for distinction between "direct" and "indirect" effects lest there "be virtually no limit to the federal power"); *Hammer v. Dagenhart,* 247 **U.S.** 251, 276, 38 S.Ct. 529, 62 L.Ed. 1101 (1918) (similar observation).

This consideration, however, while serious, does not reflect a jurisprudential defect, so much as it reflects a practical reality. We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State—at least when considered in the aggregate. *Heart of Atlanta Motel,* 379 **U.S.**, at 251, 85 S.Ct. 348. And that fact makes it close to impossible for courts to develop meaningful subject-matter categories that would exclude some kinds of local activities from ordinary Commerce Clause "aggregation" rules without, at the same time, depriving Congress of the power to regulate activities that have a genuine and important effect upon interstate commerce.

Since judges cannot change the world, the "defect" means that, within the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance. *Garcia v. San Antonio Metropolitan Transit Authority,* 469 **U.S.** 528, 552, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985); *ante,* at 1768–1771 (SOUTER, J., dissenting); ****1777** *Kimel v. Florida Bd. of Regents,* 528 **U.S.** 62, 93–94, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (STEVENS, J., dissenting) (Framers designed important structural safeguards to ensure that, when Congress legislates, "the normal operation of the legislative process itself would adequately defend ***661** state interests from undue infringement"); see also Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L.Rev. 215 (2000) (focusing on role of political process and political parties in protecting state interests). Congress is institutionally motivated to do so. Its Members represent state and local district interests. They consider the views of state and local officials when they legislate, and they have even developed formal procedures to ensure that such consideration takes place. See, *e.g.,* Unfunded Mandates Reform Act of 1995, Pub.L. 104–4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.). Moreover, Congress often can better reflect state concerns for autonomy in the details of sophisticated statutory schemes than can the Judiciary, which cannot easily gather the relevant facts and which must apply more general legal rules and categories. See, *e.g.,* 42 U.S.C. § 7543(b) (Clean Air Act); 33 U.S.C. § 1251 *et seq.* (Clean Water Act); see also *New York v. United States,* 505 **U.S.** 144, 167–168, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (collecting other examples of "cooperative federalism"). Not surprisingly, the bulk of American law is still state law, and overwhelmingly so.

B

I would also note that Congress, when it enacted the statute, followed procedures that help to protect the federalism values at stake. It provided adequate notice to the States of its intent to legislate in an "are[a] of traditional state regulation." *Ante,* at 1753. And in response, attorneys general in the overwhelming majority of States (38) supported congressional legislation, telling Congress that "[o]ur experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds." Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 34–36

(1993); see also Violence Against Women: Victims of *662 the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess., 37–38 (1991) (unanimous resolution of the National Association of Attorneys General); but cf. Crimes of Violence Motivated by Gender, *supra,* at 77–84 (Conference of Chief Justices opposing legislation).

Moreover, as Justice SOUTER has pointed out, Congress compiled a "mountain of data" explicitly documenting the interstate commercial effects of gender-motivated crimes of violence. *Ante,* at 1760–1763, 1772–1773 (dissenting opinion). After considering alternatives, it focused the federal law upon documented deficiencies in state legal systems. And it tailored the law to prevent its use in certain areas of traditional state concern, such as divorce, alimony, or child custody. 42 U.S.C. § 13981(e)(4). Consequently, the law before us seems to represent an instance, not of state/federal conflict, but of state/federal efforts to cooperate in order to help solve a mutually acknowledged national problem. Cf. §§ 300w–10, 3796gg, 3796hh, 10409, 13931 (providing federal moneys to encourage state and local initiatives to combat gender-motivated violence).

I call attention to the legislative process leading up to enactment of this statute because, as the majority recognizes, *ante,* at 1752, it far surpasses that which led to the enactment of the statute we considered in *Lopez.* And even were I to accept *Lopez* as an accurate statement of the law, which I do not, that distinction provides a possible basis for upholding the law here. This Court on occasion has pointed to the importance of procedural limitations in **1778 keeping the power of Congress in check. See *Garcia, supra,* at 554, 105 S.Ct. 1005 ("Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy' " (quoting *EEOC v. Wyoming,* 460 **U.S.** 226, 236, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983))); see *663 also *Gregory v. Ashcroft,* 501 **U.S.** 452, 460–461, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (insisting upon a "plain statement" of congressional intent when Congress legislates "in areas traditionally regulated by the States"); cf. *Hampton v. Mow Sun Wong,* 426 **U.S.** 88, 103–105, 114–117, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976); *Fullilove v. Klutznick,* 448 **U.S.** 448, 548–554, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting).

Commentators also have suggested that the thoroughness of legislative procedures—*e.g.,* whether Congress took a "hard look"—might sometimes make a determinative difference in a Commerce Clause case, say, when Congress legislates in an area of traditional state regulation. See, *e.g.,* Jackson, Federalism and the Uses and Limits of Law: *Printz* and Principle?, 111 Harv. L.Rev. 2180, 2231–2245 (1998); Gardbaum, Rethinking Constitutional Federalism, 74 Texas L.Rev. 795, 812–828, 830–832 (1996); Lessig, Translating Federalism: *United States v. Lopez,* 1995 S.Ct. Rev. 125, 194–214 (1995); see also Treaty Establishing the European Community Art. 5; Bermann, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, 94 Colum. L.Rev. 331, 378–403 (1994) (arguing for similar limitation in respect to somewhat analogous principle of subsidiarity for European Community); Gardbaum, *supra,* at 833–837 (applying subsidiarity principles to American federalism). Of course, any judicial insistence that Congress follow particular procedures might itself intrude upon congressional prerogatives and embody difficult definitional problems. But the intrusion, problems, and consequences all would seem less serious than those embodied in the majority's approach. See *supra,* at 1774–1776.

I continue to agree with Justice SOUTER that the Court's traditional "rational basis" approach is sufficient. *Ante,* at 1759–1760 (dissenting opinion); see also *Lopez,* 514 **U.S.**, at 603–615, 115 S.Ct. 1624 (SOUTER, J., dissenting); *id.,* at 615–631, 115 S.Ct. 1624 (BREYER, J., dissenting). But I recognize that the law in this area is unstable and that time and experience may demonstrate both the unworkability of the majority's rules and the superiority *664 of Congress' own procedural approach—in which case the law may evolve toward a rule that, in certain difficult Commerce Clause cases, takes account of the thoroughness with which Congress has considered the federalism issue.

For these reasons, as well as those set forth by Justice SOUTER, this statute falls well within Congress' Commerce Clause authority, and I dissent from the Court's contrary conclusion.

II

Given my conclusion on the Commerce Clause question, I need not consider Congress' authority under § 5 of the Fourteenth Amendment. Nonetheless, I doubt the Court's reasoning rejecting that source of authority. The Court points out that in *United States v. Harris,* 106 **U.S.** 629, 1 S.Ct. 601, 27 L.Ed. 290 (1883), and the *Civil Rights Cases,* 109 **U.S.** 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), the Court held that § 5 does not authorize Congress to use the Fourteenth Amendment as a source of power to remedy the conduct of *private persons. Ante,* at 1756–1757. That is certainly so. The Federal Government's argument, however, is that Congress used § 5 to remedy the actions of *state actors,* namely, those States which, through discriminatory design or the discriminatory conduct of their officials, failed to provide ****1779** adequate (or any) state remedies for women injured by gender-motivated violence—a failure that the States, and Congress, documented in depth. See *ante,* at 1760–1761, n. 7, 1772–1773 (SOUTER, J., dissenting) (collecting sources).

Neither *Harris* nor the *Civil Rights Cases* considered this kind of claim. The Court in *Harris* specifically said that it treated the federal laws in question as "directed *exclusively* against the action of private persons, without reference to the laws of the State or their administration by her officers." 106 **U.S.**, at 640, 1 S.Ct. 601 (emphasis added); see also *Civil Rights Cases, supra,* at 14, 3 S.Ct. 18 (observing that the statute did "not profess to be corrective of any constitutional wrong committed by the States" and that it established "rules for the conduct ***665** of individuals in society towards each other, ... without referring in any manner to any supposed action of the State or its authorities").

The Court responds directly to the relevant "state actor" claim by finding that the present law lacks " 'congruence and proportionality' " to the state discrimination that it purports to remedy. *Ante,* at 1758; see *City of Boerne v. Flores,* 521 **U.S.** 507, 526, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). That is because the law, unlike federal laws prohibiting literacy tests for voting, imposing voting rights requirements, or punishing state officials who intentionally discriminated in jury selection, *Katzenbach v. Morgan,* 384 **U.S.** 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966); *South Carolina v. Katzenbach,* 383 **U.S.** 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966); *Ex parte Virginia,* 100 **U.S.** 339, 25 L.Ed. 676 (1879), is not "directed ... at any State or state actor." *Ante,* at 1758.

But why can Congress not provide a remedy against private actors? Those private actors, of course, did not themselves violate the Constitution. But this Court has held that Congress at least sometimes can enact remedial "[l]egislation ... [that] prohibits conduct which is not itself unconstitutional." *Flores, supra,* at 518, 117 S.Ct. 2157; see also *Katzenbach v. Morgan, supra,* at 651, 86 S.Ct. 1717; *South Carolina v. Katzenbach, supra,* at 308, 86 S.Ct. 803. The statutory remedy does not in any sense purport to "determine what constitutes a constitutional violation." *Flores, supra,* at 519, 117 S.Ct. 2157. It intrudes little upon either States or private parties. It may lead state actors to improve their own remedial systems, primarily through example. It restricts private actors only by imposing liability for private conduct that is, in the main, already forbidden by state law. Why is the remedy "disproportionate"? And given the relation between remedy and violation—the creation of a federal remedy to substitute for constitutionally inadequate state remedies—where is the lack of "congruence"?

The majority adds that Congress found that the problem of inadequacy of state remedies "does not exist in all States, ***666** or even most States." *Ante,* at 1759. But Congress had before it the task force reports of at least 21 States documenting constitutional violations. And it made its own findings about pervasive gender-based stereotypes hampering many state legal systems, sometimes unconstitutionally so. See, *e.g.,* S.Rep. No. 103–138, pp. 38, 41–42, 44–47 (1993); S.Rep. No. 102–197, pp. 39, 44–49 (1991); H.R. Conf. Rep. No. 103–711, p. 385 (1994). The record nowhere reveals a congressional finding that the problem "does not exist" elsewhere. Why can Congress not take the evidence before it as evidence of a national problem? This Court has not previously held that Congress must document the existence of a problem in every State prior to proposing a national solution. And the deference this Court gives to Congress' chosen remedy under § 5, *Flores, supra,* at 536, 117 S.Ct. 2157, suggests that any such requirement would be inappropriate.

Despite my doubts about the majority's § 5 reasoning, I need not, and do not, ****1780** answer the § 5 question, which I would leave for more thorough analysis if necessary on another occasion. Rather, in my view, the Commerce Clause provides an adequate basis for the statute before us. And I would uphold its constitutionality as the "necessary and proper" exercise of legislative power granted to Congress by that Clause.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 **U.S.** 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The panel affirmed the dismissal of Brzonkala's Title IX disparate treatment claim. See 132 F.3d, at 961–962.

2 The en banc Court of Appeals affirmed the District Court's conclusion that Brzonkala failed to state a claim alleging disparate treatment under Title IX, but vacated the District Court's dismissal of her hostile environment claim and remanded with instructions for the District Court to hold the claim in abeyance pending this Court's decision in *Davis v. Monroe County Bd. of Ed.,* 526 **U.S.** 629, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999). *Brzonkala v. Virginia Polytechnic and State Univ.,* 169 F.3d 820, 827, n. 2 (C.A.4 1999). Our grant of certiorari did not encompass Brzonkala's Title IX claims, and we thus do not consider them in this opinion.

3 Justice SOUTER's dissent takes **us** to task for allegedly abandoning *Jones & Laughlin Steel* in favor of an inadequate "federalism of some earlier time." *Post,* at 1766–1767, 1774. As the foregoing language from *Jones & Laughlin Steel* makes clear however, this Court has always recognized a limit on the commerce power inherent in "our dual system of government." 301 **U.S.**, at 37, 57 S.Ct. 615. It is the dissent's remarkable theory that the commerce power is without judicially enforceable boundaries that disregards the Court's caution in *Jones & Laughlin Steel* against allowing that power to "effectually obliterate the distinction between what is national and what is local." *Ibid.*

4 Justice SOUTER's dissent does not reconcile its analysis with our holding in *Lopez* because it apparently would cast that decision aside. See *post,* at 1764–1767. However, the dissent cannot persuasively contradict *Lopez's* conclusion that, in every case where we have sustained federal regulation under the aggregation principle in *Wickard v. Filburn,* 317 **U.S.** 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), the regulated activity was of an apparent commercial character. See, *e.g., Lopez,* 514 **U.S.**, at 559–560, 580, 115 S.Ct. 1624.

5 Title 42 U.S.C. § 13981 is not the sole provision of the Violence Against Women Act of 1994 to provide a federal remedy for gender-motivated crime. Section 40221(a) of the Act creates a federal criminal remedy to punish "interstate crimes of abuse including crimes committed against spouses or intimate partners during interstate travel and crimes committed by spouses or intimate partners who cross State lines to continue the abuse." S.Rep. No. 103–138, p. 43 (1993). That criminal provision has been codified at 18 U.S.C. § 2261(a)(1), which states:

> "A person who travels across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b)."

The Courts of Appeals have uniformly upheld this criminal sanction as an appropriate exercise of Congress' Commerce Clause authority, reasoning that "[t]he provision properly falls within the first of *Lopez's* categories as it regulates the use of channels of interstate commerce—i.e., the use of the interstate transportation routes through which persons and goods move." *United States v. Lankford,* 196 F.3d 563, 571–572 (C.A.5 1999) (collecting cases) (internal quotation marks omitted).

6 We are not the first to recognize that the but-for causal chain must have its limits in the Commerce Clause area. In *Lopez,* 514 **U.S.**, at 567, 115 S.Ct. 1624, we quoted Justice Cardozo's concurring opinion in *A.L.A. Schechter Poultry Corp. v. United States,* 295 **U.S.** 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935):

> "There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors throughout its

territory; the only question is of their size.' " *Id.*, at 554, 55 S.Ct. 837 (quoting *United States v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617, 624 (C.A.2 1935) (L.Hand, J., concurring)).

7 Justice SOUTER's theory that *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23 (1824), *Garcia v. San Antonio Metropolitan Transit Authority*, 469 **U.S.** 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), and the Seventeenth Amendment provide the answer to these cases, see *post*, at 1768–1772, is remarkable because it undermines this central principle of our constitutional system. As we have repeatedly noted, the Framers crafted the federal system of Government so that the people's rights would be secured by the division of power. See, *e.g.*, *Arizona v. Evans*, 514 **U.S.** 1, 30, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995) (GINSBURG, J., dissenting); *Gregory v. Ashcroft*, 501 **U.S.** 452, 458–459, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (cataloging the benefits of the federal design); *Atascadero State Hospital v. Scanlon*, 473 **U.S.** 234, 242, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985) ("The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties' ") (quoting *Garcia, supra*, at 572, 105 S.Ct. 1005 (Powell, J., dissenting)). Departing from their parliamentary past, the Framers adopted a written Constitution that further divided authority at the federal level so that the Constitution's provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the Legislature's self-restraint. See, *e.g.*, *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803) (Marshall, C.J.) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written"). It is thus a " 'permanent and indispensable feature of our constitutional system' " that " 'the federal judiciary is supreme in the exposition of the law of the Constitution.' " *Miller v. Johnson*, 515 **U.S.** 900, 922–923, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (quoting *Cooper v. Aaron*, 358 **U.S.** 1, 18, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958)).

No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text. As we emphasized in *United States v. Nixon*, 418 **U.S.** 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974): "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.... Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury* that '[i]t is emphatically the province and duty of the judicial department to say what the law is.' " *Id.*, at 703, 94 S.Ct. 3090 (citation omitted).

Contrary to Justice SOUTER's suggestion, see *post*, at 1769–1772, and n. 14, *Gibbons* did not exempt the commerce power from this cardinal rule of constitutional law. His assertion that, from *Gibbons* on, public opinion has been the only restraint on the congressional exercise of the commerce power is true only insofar as it contends that political accountability is and has been the only limit on Congress' exercise of the commerce power *within that power's outer bounds.* As the language surrounding that relied upon by Justice SOUTER makes clear, *Gibbons* did not remove from this Court the authority to define that boundary. See *Gibbons, supra*, at 194–195 ("It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States.... Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State").

8 Justice SOUTER disputes our assertion that the Constitution reserves the general police power to the States, noting that the Founders failed to adopt several proposals for additional guarantees against federal encroachment on state authority. See *post*, at 1768–1769, and n. 14. This argument is belied by the entire structure of the Constitution. With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate. See, *e.g.*, *New York v. United States*, 505 **U.S.** 144, 156–157, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). And, as discussed above, the Constitution's separation of federal power and the creation of the Judicial Branch indicate that disputes regarding the extent of congressional power are largely subject to judicial review. See n. 7, *supra*. Moreover, the principle that " '[t]he Constitution created a Federal Government of limited powers,' " while reserving a generalized police power to the States, is deeply ingrained in our constitutional history. *New York, supra*, at 155, 112 S.Ct. 2408 (quoting *Gregory v. Ashcroft, supra*, at 457, 111 S.Ct. 2395); see also *Lopez*, 514 **U.S.**, at 584–599, 115 S.Ct. 1624 (THOMAS, J., concurring) (discussing the history of the debates surrounding the adoption of

the Commerce Clause and our subsequent interpretation of the Clause); *Maryland v. Wirtz,* 392 **U.S.** 183, 196, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968).

1 Finding the law a valid exercise of Commerce Clause power, I have no occasion to reach the question whether it might also be sustained as an exercise of Congress's power to enforce the Fourteenth Amendment.

2 It is true that these data relate to the effects of violence against women generally, while the civil rights remedy limits its scope to "crimes of violence motivated by gender"—presumably a somewhat narrower subset of acts. See 42 U.S.C. § 13981(b). But the meaning of "motivated by gender" has not been elucidated by lower courts, much less by this one, so the degree to which the findings rely on acts not redressable by the civil rights remedy is unclear. As will appear, however, much of the data seems to indicate behavior with just such motivation. In any event, adopting a cramped reading of the statutory text, and thereby increasing the constitutional difficulties, would directly contradict one of the most basic canons of statutory interpretation. See *NLRB v. Jones & Laughlin Steel Corp.,* 301 **U.S.** 1, 30, 57 S.Ct. 615, 81 L.Ed. 893 (1937). Having identified the problem of violence against women, Congress may address what it sees as the most threatening manifestation; "reform may take one step at a time." *Williamson v. Lee Optical of Okla., Inc.,* 348 **U.S.** 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

3 See, *e.g.,* Domestic Violence: Terrorism in the Home, Hearing before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 101st Cong., 2d Sess. (1990); Women and Violence, Hearing before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. (1990); Violence Against Women: Victims of the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess. (1991) (S. Hearing 102–369); Violence Against Women, Hearing before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, 102d Cong., 2d Sess. (1992); Hearing on Domestic Violence, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103–596); Violent Crimes Against Women, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993); Violence Against Women: Fighting the Fear, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103–878); Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess. (1993); Domestic Violence: Not Just a Family Matter, Hearing before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, 103d Cong., 2d Sess. (1994).

4 See, *e.g.,* S. Hearing 103–596, at 1–4 (testimony of Northeastern Univ. Law School Professor Clare Dalton); S. Hearing 102–369, at 103–105 (testimony of Univ. of Chicago Professor Cass Sunstein); S. Hearing 103–878, at 7–11 (testimony of American Medical Assn. president-elect Robert McAfee).

5 See, *e.g., id.,* at 13–17 (testimony of Lisa); *id.,* at 40–42 (testimony of Jennifer Tescher).

6 See, *e.g.,* S. Hearing 102–369, at 24–36, 71–87 (testimony of attorneys general of Iowa and Illinois); *id.,* at 235–245 (testimony of National Federation of Business and Professional Women); S. Hearing No. 103–596, at 15–17 (statement of James Hardeman, Manager, Counseling Dept., Polaroid Corp.).

7 See Judicial Council of California Advisory Committee on Gender Bias in the Courts, Achieving Equal Justice for Women and Men in the California Courts (July 1996) (edited version of 1990 report); Colorado Supreme Court Task Force on Gender Bias in the Courts, Gender and Justice in the Colorado Courts (1990); Connecticut Task Force on Gender, Justice and the Courts, Report to the Chief Justice (Sept.1991); Report of the Florida Supreme Court Gender Bias Study Commission (Mar.1990); Supreme Court of Georgia, Commission on Gender Bias in the Judicial System, Gender and Justice in the Courts (1991), reprinted in 8 Ga. St. U.L.Rev. 539 (1992); Report of the Illinois Task Force on Gender Bias in the Courts (1990); Equality in the Courts Task Force, State of Iowa, Final Report (Feb.1993); Kentucky Task Force on Gender Fairness in the Courts, Equal Justice for Women and Men (Jan.1992); Louisiana Task Force on Women in the Courts, Final Report (1992); Maryland Special Joint Comm., Gender Bias in the Courts (May 1989); Massachusetts Supreme Judicial Court, Gender Bias Study of the Court System in Massachusetts (1989); Michigan Supreme Court Task Force on Gender Issues in the Courts, Final Report (Dec.1989); Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report (1989), reprinted in 15 Wm. Mitchell L.Rev. 825 (1989); Nevada Supreme Court Gender Bias Task Force, Justice for Women (1988); New Jersey Supreme Court Task Force on Women in the Courts, Report of the First Year (June 1984); Report of the New York Task Force on Women in the Courts (Mar.1986); Final Report of the Rhode Island Supreme Court Committee on Women in the Courts (June

1987); Utah Task Force on Gender and Justice, Report to the Utah Judicial Council (Mar.1990); Vermont Supreme Court and Vermont Bar Assn., Gender and Justice: Report of the Vermont Task Force on Gender Bias in the Legal System (Jan.1991); Washington State Task Force on Gender and Justice in the Courts, Final Report (1989); Wisconsin Equal Justice Task Force, Final Report (Jan.1991).

8 See S.Rep. No. 101–545 (1990); Majority Staff of Senate Committee on the Judiciary, Violence Against Women: The Increase of Rape in America, 102d Cong., 1st Sess. (Comm. Print 1991); S.Rep. No. 102–197 (1991); Majority Staff of Senate Committee on the Judiciary, Violence Against Women: A Week in the Life of America, 102d Cong., 2d Sess. (Comm. Print 1992); S.Rep. No. 103–138 (1993); Majority Staff of Senate Committee on the Judiciary, The Response to Rape: Detours on the Road to Equal Justice, 103d Cong., 1st Sess. (Comm. Print 1993); H.R.Rep. No. 103–395 (1993); H.R. Conf. Rep. No. 103–711 (1994).

9 In other cases, we have accepted dramatically smaller figures. See, *e.g., Hodel v. Indiana,* 452 **U.S.** 314, 325, n. 11, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981) (stating that corn production with a value of $5.16 million "surely is not an insignificant amount of commerce").

10 It should go without saying that my view of the limit of the congressional commerce power carries no implication about the wisdom of exercising it to the limit. I and other Members of this Court appearing before Congress have repeatedly argued against the federalization of traditional state crimes and the extension of federal remedies to problems for which the States have historically taken responsibility and may deal with today if they have the will to do so. See Hearings before a Subcommittee of the House Committee on Appropriations, 104th Cong., 1st Sess., pt. 7, pp. 13–14 (1995) (testimony of Justice KENNEDY); Hearings on H.R. 4603 before a Subcommittee of the Senate Committee on Appropriations, 103d Cong., 2d Sess., 100–107 (1994) (testimony of Justices KENNEDY and SOUTER). The Judicial Conference of the United States originally opposed the Act, though after the original bill was amended to include the gender-based animus requirement, the objection was withdrawn for reasons that are not apparent. See Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 70–71 (1993).

11 The claim that powers not granted were withheld was the chief Federalist argument against the necessity of a bill of rights. Bills of rights, Hamilton claimed, "have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations." The Federalist No. 84, at 578. James Wilson went further in the Pennsylvania ratifying convention, asserting that an enumeration of rights was positively dangerous because it suggested, conversely, that every right not reserved was surrendered. See 2 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 436–437 (2d ed. 1863) (hereinafter Elliot's Debates). The Federalists did not, of course, prevail on this point; most States voted for the Constitution only after proposing amendments and the First Congress speedily adopted a Bill of Rights. See *Garcia v. San Antonio Metropolitan Transit Authority,* 469 **U.S.** 528, 569, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (Powell, J., dissenting). While that document protected a range of specific individual rights against federal infringement, it did not, with the possible exception of the Second Amendment, offer any similarly specific protections to areas of state sovereignty.

12 To the contrary, we have always recognized that while the federal commerce power may overlap the reserved state police power, in such cases federal authority is supreme. See, *e.g., Lake Shore & Michigan Southern R. Co. v. Ohio,* 173 **U.S.** 285, 297–298, 19 S.Ct. 465, 43 L.Ed. 702 (1899) ("When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the General Government"); *United States v. California,* 297 **U.S.** 175, 185, 56 S.Ct. 421, 80 L.Ed. 567 (1936) ("[W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce").

13 Contrary to the Court's suggestion, *ante,* at 1750, n. 4, *Wickard v. Filburn,* 317 **U.S.** 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), applied the substantial effects test to domestic agricultural production for domestic consumption, an activity that cannot fairly be described as commercial, despite its commercial consequences in affecting or being affected by the demand for agricultural products in the commercial market. The *Wickard* Court admitted that Filburn's activity "may not be regarded as commerce" but insisted that "it may still, whatever its nature, be reached by Congress if it exerts a

substantial economic effect on interstate commerce...." *Id.,* at 125, 63 S.Ct. 82. The characterization of home wheat production as "commerce" or not is, however, ultimately beside the point. For if substantial effects on commerce are proper subjects of concern under the Commerce Clause, what difference should it make whether the causes of those effects are themselves commercial? Cf., *e.g., National Organization for Women, Inc. v. Scheidler,* 510 **U.S.** 249, 258, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994) ("An enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives"). The Court's answer is that it makes a difference to federalism, and the legitimacy of the Court's new judicially derived federalism is the crux of our disagreement. See *infra,* at 1768–1769.

14 The Constitution of 1787 did, in fact, forbid some exercises of the commerce power. Article I, § 9, cl. 6, barred Congress from giving preference to the ports of one State over those of another. More strikingly, the Framers protected the slave trade from federal interference, see Art. I, § 9, cl. 1, and confirmed the power of a State to guarantee the chattel status of slaves who fled to another State, see Art. IV, § 2, cl. 3. These reservations demonstrate the plenary nature of the federal power; the exceptions prove the rule. Apart from them, proposals to carve islands of state authority out of the stream of commerce power were entirely unsuccessful. Roger Sherman's proposed definition of federal legislative power as excluding "matters of internal police" met Gouverneur Morris's response that "[t]he internal police ... ought to be infringed in many cases" and was voted down eight to two. 2 Records of the Federal Convention of 1787, pp. 25–26 (M. Farrand ed.1911) (hereinafter Farrand). The Convention similarly rejected Sherman's attempt to include in Article V a proviso that "no state shall ... be affected in its internal police." 5 Elliot's Debates 551–552. Finally, Rufus King suggested an explicit bill of rights for the States, a device that might indeed have set aside the areas the Court now declares off-limits. 1 Farrand 493 ("As the fundamental rights of individuals are secured by express provisions in the State Constitutions; why may not a like security be provided for the Rights of States in the National Constitution"). That proposal, too, came to naught. In short, to suppose that enumerated powers must have limits is sensible; to maintain that there exist judicially identifiable areas of state regulation immune to the plenary congressional commerce power even though falling within the limits defined by the substantial effects test is to deny our constitutional history.

15 That the national economy and the national legislative power expand in tandem is not a recent discovery. This Court accepted the prospect well over 100 years ago, noting that the commerce powers "are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances." *Pensacola Telegraph Co. v. Western Union Telegraph Co.,* 96 **U.S.** 1, 9, 24 L.Ed. 708 (1877). See also, *e.g., Farmers' Loan & Trust Co. v. Minnesota,* 280 **U.S.** 204, 211–212, 50 S.Ct. 98, 74 L.Ed. 371 (1930) ("Primitive conditions have passed; business is now transacted on a national scale").

16 As mentioned in n. 11, *supra,* many state conventions voted in favor of the Constitution only after proposing amendments. See 1 Elliot's Debates 322–323 (Massachusetts), 325 (South Carolina), 325–327 (New Hampshire), 327 (Virginia), 327–331 (New York), 331–332 (North Carolina), 334–337 (Rhode Island).

17 Statements to similar effect pervade the ratification debates. See, *e.g.,* 2 *id.,* at 166–170 (Massachusetts, remarks of Samuel Stillman); 2 *id.,* at 251–253 (New York, remarks of Alexander Hamilton); 4 *id.,* at 95–98 (North Carolina, remarks of James Iredell).

18 The majority's special solicitude for "areas of traditional state regulation," *ante,* at 1753, is thus founded not on the text of the Constitution but on what has been termed the "*spirit* of the Tenth Amendment," *Garcia v. San Antonio Metropolitan Transit Authority,* 469 **U.S.**, at 585, 105 S.Ct. 1005 (O'CONNOR, J., dissenting) (emphasis in original). Susceptibility to what Justice Holmes more bluntly called "some invisible radiation from the general terms of the Tenth Amendment," *Missouri v. Holland,* 252 **U.S.** 416, 434, 40 S.Ct. 382, 64 L.Ed. 641 (1920), has increased in recent years, in disregard of his admonition that "[w]e must consider what this country has become in deciding what that Amendment has reserved," *ibid.*

19 The majority tries to deflect the objection that it blocks an intended political process by explaining that the Framers intended politics to set the federal balance only within the sphere of permissible commerce legislation, whereas we are looking to politics to define that sphere (in derogation even of *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803)), *ante,* at 1753–1754. But we all accept the view that politics is the arbiter of state interests only within the realm of legitimate congressional action under the commerce power. Neither Madison nor Wilson nor Marshall, nor the *Jones* &

Laughlin, Darby, Wickard, or *Garcia* Courts, suggested that politics defines the commerce power. Nor do we, even though we recognize that the conditions of the contemporary world result in a vastly greater sphere of influence for politics than the Framers would have envisioned. Politics has legitimate authority, for all of us on both sides of the disagreement, only within the legitimate compass of the commerce power. The majority claims merely to be engaging in the judicial task of patrolling the outer boundaries of that congressional authority. See *ante,* at 1753–1754, n. 7. That assertion cannot be reconciled with our statements of the substantial effects test, which have not drawn the categorical distinctions the majority favors. See, *e.g., Wickard,* 317 U.S., at 125, 63 S.Ct. 82; *United States v. Darby,* 312 U.S. 100, 118–119, 61 S.Ct. 451, 85 L.Ed. 609 (1941). The majority's attempt to circumscribe the commerce power by defining it in terms of categorical exceptions can only be seen as a revival of similar efforts that led to near tragedy for the Court and incoherence for the law. If history's lessons are accepted as guides for Commerce Clause interpretation today, as we do accept them, then the subject matter of the Act falls within the commerce power and the choice to legislate nationally on that subject, or to except it from national legislation because the States have traditionally dealt with it, should be a political choice and only a political choice.

20 See n. 7, *supra.* The point here is not that I take the position that the States are incapable of dealing adequately with domestic violence if their political leaders have the will to do so; it is simply that the Congress had evidence from which it could find a national statute necessary, so that its passage obviously survives Commerce Clause scrutiny.

21 The majority's concerns about accountability strike me as entirely misplaced. Individuals, such as the defendants in this action, haled into federal court and sued under the United States Code, are quite aware of which of our dual sovereignties is attempting to regulate their behavior. Had Congress chosen, in the exercise of its powers under § 5 of the Fourteenth Amendment, to proceed instead by regulating the States, rather than private individuals, this accountability would be far less plain.

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95 N.Y.2d 509
Court of Appeals of New York.

The PEOPLE of the State of New York, Appellant,
v.
Timothy WOOD, Respondent.

Dec. 21, 2000.

Defendant, who had previously been found to be in contempt of Family Court order of protection entered in favor of his ex-wife, was convicted following jury trial in the Supreme Court, Monroe County, John J. Ark, J., of five counts of first-degree criminal contempt, and five counts of second-degree aggravated harassment, based on same conduct which gave rise to Family Court contempt charge. Defendant appealed. The Supreme Court, Appellate Division, 260 A.D.2d 102, 698 N.Y.S.2d 122, reversed contempt convictions, and affirmed as modified. After granting permission to appeal, the Court of Appeals, Wesley, J., held that double jeopardy clause barred criminal contempt prosecution based on same acts which had earlier formed basis for finding of contempt under Family Court Act.

Affirmed.

West Headnotes (9)

[1] **Criminal Law**
Nature or Grade of Offense

Criminal courts and family court have concurrent jurisdiction over certain enumerated criminal offenses when committed by one family member against another, and while a family member may choose to address the family offense in family court, a parallel criminal proceeding is also available. McKinney's Family Court Act §§ 115(e), 812, subd. 1, 813, subd. 3; McKinney's CPL §§ 100.07, 530.11, subd. 1.

5 Cases that cite this headnote

[2] **Protection of Endangered Persons**
Authority and Power of Courts; Discretion

A domestic violence victim may commence a proceeding in either or both family court and criminal court, and each court has the authority to issue temporary or final orders of protection. McKinney's Family Court Act § 813, subds. 2, 3; McKinney's CPL §§ 100.07, 530.12.

5 Cases that cite this headnote

[3] **Double Jeopardy**
Prohibition of Multiple Proceedings or Punishments

Double jeopardy clause protects only against the imposition of multiple criminal punishments for the same offense. U.S.C.A. Const.Amend. 5.

4 Cases that cite this headnote

[4] **Double Jeopardy**
Proof of Fact Not Required for Other Offense

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, for purposes of double jeopardy clause, is whether each provision requires proof of an additional fact which the other does not; if each of the offenses contains an element which the other does not, they are not the "same offense," and any double jeopardy claim necessarily fails. U.S.C.A. Const.Amend. 5.

5 Cases that cite this headnote

[5] **Double Jeopardy**
Proof of Fact Not Required for Other Offense

"Same elements" test used to determine whether conviction under two separate statutory provisions is barred by double jeopardy clause focuses on the proof necessary to prove the statutory elements of each offense charged against the defendant, not on the actual evidence to be presented at trial. U.S.C.A. Const.Amend. 5.

2 Cases that cite this headnote

[6] **Double Jeopardy**
Contempt

A finding of contempt pursuant to Family Court Act is punitive in nature, and thus triggers double jeopardy clause protections. U.S.C.A. Const.Amend. 5; McKinney's Family Court Act § 846–a.

4 Cases that cite this headnote

[7] **Double Jeopardy**
Particular Offenses, Identity of

Prosecution for criminal contempt, based on violations of order of protection entered in favor of defendant's wife by criminal court, involved the same offense as earlier finding of contempt due to violations of separate family court order of protection, which was based on same acts, so that criminal contempt prosecution was barred by double jeopardy clause; criminal and family court contempt provisions did not each contain an additional element the other did not, and because same acts violated both orders, it would be impossible for defendant to be guilty of criminal contempt without also being guilty of contempt for violating family court order. U.S.C.A. Const.Amend. 5; McKinney's Family Court Act § 846–a; McKinney's Penal Law § 215.51(c).

17 Cases that cite this headnote

[8] **Double Jeopardy**
Ruling on Lesser as Bar to Prosecution for Greater Offense

Under same elements test, a lesser included offense is the "same" as a greater offense, so that successive prosecution and cumulative punishment for a greater offense after conviction for a lesser included offense is barred by double jeopardy clause. U.S.C.A. Const.Amend. 5.

4 Cases that cite this headnote

[9] **Contempt**
Criminal Contempt

Contempt provision of Family Court Act establishes a lesser included offense of criminal contempt in the first degree. McKinney's Family Court Act § 846–a; McKinney's Penal Law § 215.51(c).

Cases that cite this headnote

Attorneys and Law Firms

*****640 *510 **115** Howard R. Relin, District Attorney of Monroe County, Rochester (Patrick H. Fierro of counsel), for appellant.

R. Adrian Solomon, Rochester, for respondent.

***511** The Legal Aid Society, Rochester (Cynthia J. Carroll and Alan S. Harris of counsel), and Greater Upstate Law Project, Inc. (Jennifer L. DeCarli of counsel) for The Legal Aid Society of Rochester, New York, Inc., and another, amici curiae.

OPINION OF THE COURT

WESLEY, J.

Defendant Timothy Wood's ex-wife obtained two separate orders of protection—one issued pursuant to CPL 530.12 by Rochester City Court on February 9, 1996, and the other issued under Family Court Act article 8 by Monroe County Family Court on December 11, 1996. Both orders *****641 **116** directed defendant to have "no contact whatsoever" with his former wife.

During the early morning hours of December 25, 1996, defendant's ex-wife received 11 prank phone calls. Each time she answered the telephone, the caller simply hung up. Five of the calls were traced to defendant's residence. Defendant's ex-wife then commenced a contempt proceeding in Family Court for defendant's violation of the Family Court order. After trial, Family Court found defendant guilty of willfully violating the order of protection and sentenced him to six months incarceration.

Thereafter, defendant was indicted for five counts of criminal contempt in the first degree, five counts of aggravated harassment in the second degree and one count of harassment in the ***512** first degree. The criminal contempt and aggravated harassment charges were based on defendant's violation of the City Court order of protection as a result of the same five phone calls. Opposing defendant's motion to dismiss on double jeopardy grounds, the People argued that the Family Court contempt proceeding was based upon the violation of a different order of protection than that which served as a basis for the criminal contempt charge. Supreme Court denied the motion. After a jury trial, defendant was found guilty of each of the five counts of first degree criminal contempt and second degree aggravated harassment.[1]

The Appellate Division, in a thoughtful opinion, reversed defendant's conviction on the five counts of criminal contempt in the first degree and dismissed those counts of the indictment (260 A.D.2d 102, 698 N.Y.S.2d 122). The majority held that the Double Jeopardy Clause prohibited the criminal prosecution, while two members disagreed that the subsequent criminal prosecution was for the same offense. The majority noted "[t]he City Court order of protection and the Family Court order were both violated when defendant made the phone calls" (*id.*, at 108, 698 N.Y.S.2d 122). The dissenters maintained that the offenses were not the same inasmuch as proof of violations of two different orders of protection was necessary. A Judge of this Court granted the People leave to appeal, and we now affirm.

We note at the outset that the problematic double jeopardy situation presented by this case has its genesis in the parallel family offense jurisdiction of Family Court and our criminal courts. This overlap is the key to our resolution of the issue at hand.

[1] [2] Recognizing that domestic violence should be regarded as criminal behavior warranting strong intervention, the Legislature in 1994 amended the Family Court Act and the Criminal Procedure Law to provide criminal courts and Family Court with concurrent jurisdiction for certain enumerated criminal offenses when committed by one family member against another (*see*, Family Ct. Act § 115[e]; § 812[1]; Criminal Procedure Law §§ 100.07, 530.11 [1]). Although a family member may choose to address the family offense in Family Court, a parallel criminal proceeding is also available (*see*, Family Ct. Act § 813[3]). Indeed, the Legislature specifically authorized a domestic violence victim to commence a proceeding in either *or* ***513** both Family Court and criminal court (*see*, Family Ct. Act § 813 [3]; Criminal Procedure Law § 100.07). Each court has the authority to issue temporary or final orders of protection, as was the case here (*see*, Family Ct. Act § 813 [2]; § 821–a[2] [b]; §§ 828, 841[d]; § 842; Criminal Procedure Law § 530.12).[2]

*****642 **117** [3] [4] [5] [6] The Double Jeopardy Clause "protects only against the imposition of multiple criminal punishments for the same offense" (*Hudson v. United States*, 522 U.S. 93, 99, 118 S.Ct. 488, 139 L.Ed.2d 450).[3] The "applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the

other does not" (*Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306). If each of the offenses contains an element which the other does not, they are not the "same offense" under the rule enunciated by *Blockburger* and any claim of constitutional double jeopardy necessarily fails (*People v. Bryant*, 92 N.Y.2d 216, 229, n. 3, 677 N.Y.S.2d 286, 699 N.E.2d 910). The test focuses on "the proof necessary to prove the statutory elements of each offense charged against the defendant, not on the actual evidence to be presented at trial" (*People v. Prescott*, 66 N.Y.2d 216, 221, 495 N.Y.S.2d 955, 486 N.E.2d 813; *see also*, *United States v. Dixon*, 509 U.S. 688, 714–716, 113 S.Ct. 2849, 125 L.Ed.2d 556 [Rehnquist, Ch. J., concurring in part and dissenting in part]).

[7] The application of the *Blockburger* test in this case is unusual in that two successive contempt prosecutions are involved, rather than prosecutions for contempt and an underlying substantive offense (*see*, ***514** *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556, *supra*). A comparison of the two statutes in this case similarly reveals that *each* provision does not contain an additional element which the other does not. First degree criminal contempt contains the additional element of proof of a defendant's prior contempt conviction and can be based on violation of an order of protection from one of several enumerated courts, including a Family Court order issued under article 8.[4] The Family Court contempt provision contains no other element different from Penal Law § 215.51(c), but must be based on an order issued by Family Court.[5] As enumerated, the statutory elements of the Family *****643 **118** Court provisions are subsumed by those of Penal Law § 215.51(c).

Because the same acts violated both orders, it would be impossible for defendant to be guilty of first degree criminal contempt for violating the City Court order of protection without concomitantly being guilty of contempt for violating the Family Court order of protection (*see*, *McGovern v. United States*, 280 F. 73, 75–76 [7th Cir.], *cert. denied* 259 U.S. 580, 42 S.Ct. 464, 66 L.Ed. 1073 [where two separate injunctions were filed by different authorities to suppress the same liquor nuisance, the court held that there should have been only one order, and that where the defendant had been punished for contempt for violating the injunction under one order, he could not again be punished for contempt under the second order because the same act violated the injunction in the other]).

[8] [9] Moreover, under *Blockburger*, a lesser included offense is the "same" as a greater offense and, thus, the successive prosecution and cumulative punishment for a greater offense after conviction for a lesser included offense is barred by the Double Jeopardy Clause (*see*, *Brown v. Ohio*, 432 U.S. 161, 166–167, 97 S.Ct. 2221, 53 L.Ed.2d 187). ***515** Comparing the elements, we conclude that the contempt provision of the Family Court Act article 8 is clearly a lesser included offense of criminal contempt in the first degree. That the People sought to prove a violation of a City Court order and not a Family Court order does not, under these circumstances, alter the double jeopardy analysis under *Blockburger*.

We conclude that defendant's prosecution for criminal contempt in the first degree under Penal Law § 215.51(c) is barred because he was previously prosecuted for contempt under Family Court Act article 8 (*see*, *McGovern v. United States*, 280 F. 73, *supra; see also*, *People v. Colombo*, 31 N.Y.2d 947, 949, 341 N.Y.S.2d 97, 293 N.E.2d 247 [defendant's previous punishment for contempt under the Judiciary Law precluded a subsequent indictment for criminal contempt under the Penal Law]; *People v. Arnold*, 174 Misc.2d 585, 593–594, 664 N.Y.S.2d 1008, *supra* [defendants could not be tried for the charges of criminal contempt in the first or second degree based on violation of Family Court order of protection after having been previously adjudicated in contempt under the Family Court Act for violation of that same order]; *Matter of S.A. [T.A.]*, N.Y.L.J., Aug. 21, 1998, at 28, col. 5 [Family Court proceeding for violation of Family Court order of protection was precluded by a prior second degree criminal contempt conviction in criminal court based on violation of the same order by the same conduct]; *accord*, *State v. Buckley*, 83 Wash.App. 707, 924 P.2d 40).

The People cannot circumvent the double jeopardy bar simply by seeking to prosecute the criminal action for violation of another court order based on the same conduct. Indeed, if the separate origin of each court order were alone determinative, thereby removing subsequent prosecutions from double jeopardy protection, the constitutional prohibition would be eviscerated. The Legislature's broad based attack on domestic violence which allowed parallel court proceedings in different venues was a recognition of the difficult task at hand—stemming the tide of domestic abuse between people locked in destructive relationships. The invocation of double jeopardy considerations in this case does not impinge on that goal, it merely recognizes that these

orders of protection had one and the same purpose.

Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge KAYE and Judges SMITH, LEVINE, CIPARICK and ROSENBLATT concur.

Order affirmed.

All Citations

95 N.Y.2d 509, 742 N.E.2d 114, 719 N.Y.S.2d 639, 2000 N.Y. Slip Op. 11312

Footnotes

1 The eleventh count of the indictment for harassment in the first degree was withdrawn.

2 The 1994 amendments also changed the definition of first degree criminal contempt to include the violation of various protective orders, including orders issued under Family Court Act article 8, if the violator was previously convicted of second degree criminal contempt (*see,* L. 1994, ch. 222, § 47, adding Penal Law § 215.51[c]).

3 The People conceded below (as acknowledged by the Appellate Division) that a finding of contempt pursuant to Family Court Act article 8 is punitive in nature, triggering double jeopardy protections. We concur with that concession. We have recognized that despite the "civil" legislative label (*see,* Family Ct. Act § 812[2][b]), section 846–a, which provides for a penalty of incarceration for violation of Family Court orders, is punitive in nature (*see, Matter of Walker v. Walker,* 86 N.Y.2d 624, 629, 635 N.Y.S.2d 152, 658 N.E.2d 1025 [holding that consecutive sentences of imprisonment are permitted for multiple violations of an order of protection]; *see also, People v. Arnold,* 174 Misc.2d 585, 590–591, 664 N.Y.S.2d 1008). An adjudication for contempt under article 8 is properly characterized as punitive because it does not seek to coerce compliance with any pending court mandate, but rather imposes a definite term of imprisonment and punishes the contemnor for disobeying a prior court order (*see, Hicks v. Feiock,* 485 U.S. 624, 632, 108 S.Ct. 1423, 99 L.Ed.2d 721; *Matter of Department of Envtl. Protection v. Department of Envtl. Conservation,* 70 N.Y.2d 233, 239, 519 N.Y.S.2d 539, 513 N.E.2d 706).

4 Under Penal Law § 215.51(c), a person is guilty of criminal contempt in the first degree when he or she: "commits the crime of criminal contempt in the second degree * * * by violating that part of a duly served order of protection, or such order of which the defendant has actual knowledge because he or she was present in court when such order was issued, under [domestic relations law §§ 240 and 252], articles four, five, six and eight of the family court act and section 530.12 of the criminal procedure law, or an order of protection issued by a [foreign] court of competent jurisdiction * * * and where the defendant has been previously convicted of the crime of criminal contempt in the second degree by violating an order of protection * * * within the preceding five years." In relevant part, a person is guilty of criminal contempt in the second degree by "[i]ntentional disobedience or resistance to the lawful process or other mandate of a court" (Penal Law § 215.50[3]).

5 Family Court Act § 846–a requires proof that a "lawful order [was] issued under [article 8]" and that defendant "willfully failed to obey [it]."

People v. Wood, 95 N.Y.2d 509 (2000)

742 N.E.2d 114, 719 N.Y.S.2d 639, 2000 N.Y. Slip Op. 11312

749 N.Y.S.2d 550, 2002 N.Y. Slip Op. 07948

301 A.D.2d 36
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of David WISSINK, respondent,
v.
Jane WISSINK, appellant.

Nov. 4, 2002.

Father petitioned for custody of minor child. The Family Court, Orange County, Andrew P. Bivona, J., granted petition, awarding custody to father. Mother appealed. The Supreme Court, Appellate Division, Miller, J., held that comprehensive psychological evaluations of father and minor child were required prior to award of custody in favor of father.

Reversed, and remitted.

West Headnotes (2)

1 **Child Custody**
Mental Examinations

Comprehensive psychological evaluations of father and minor child were required prior to Family Court's award of custody in favor of father, even though child was teenager who expressed that she preferred to live with her father, and social worker's interviews with child and each parent confirmed that child had positive relationship with her father, but not with her mother, where evidence established long history of domestic violence perpetrated by father against mother, and child denied knowledge of any such domestic violence. McKinney's DRL § 240, subd. 1.

21 Cases that cite this headnote

2 **Child Custody**
Factors Relating to Parties Seeking Custody
Child Custody
Behavior of Parties in General

Family Court could not disregard father's alleged failure to comply with child support obligations and his alleged violations of a prior order of protection, under which father was ordered to stay away from marital residence, in determining custody of minor child. McKinney's Domestic Relations Law § 240, subd. 1(a)(4).

11 Cases that cite this headnote

Attorneys and Law Firms

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Mark Diamond, New York, NY, Law Guardian for the child.

ANITA R. FLORIO, J.P., SONDRA MILLER, LEO F. McGINITY, and THOMAS A. ADAMS, JJ.

Opinion

S. MILLER, J.

This appeal presents a vexing custody dispute over a teenaged girl who has expressed a clear preference to live with her father. While both parents are seemingly fit custodians, the father has a history of domestic violence directed at the mother; yet he has never posed a direct threat to the child. Because of this circumstance, we hold that the Family Court erred in awarding custody to the father without first ordering comprehensive psychological evaluations to ensure that this award of custody was truly in the child's best interest.

The child in controversy, Andrea, born June 21, 1986, is the biological child of the mother and father; the mother also has a daughter, Karin, by a prior marriage. The parties have had a tumultuous relationship marked by numerous episodes of heated arguments, physical violence, police intervention and Family Court orders of protection. It is apparent that when it comes to his dealings with the mother, the father is a batterer whose temper gets the better of him. When it comes to Andrea, however, the father is the favored parent; he has never directly mistreated Andrea.

749 N.Y.S.2d 550, 2002 N.Y. Slip Op. 07948

The parties have lived apart at various times during their marriage, and separated most recently in 1999 following yet ****551** another physical altercation. The mother commenced a family offense proceeding and a proceeding for custody of Andrea. The father cross-petitioned for custody. The Family Court assigned a law guardian and ordered a mental health study which was clearly deficient. A hearing was held at which the parties, Karin, and other witnesses testified, and the court examined Andrea in camera; she downplayed the father's culpability and expressed her clear preference for living with him.

The order appealed from awarded custody to the father. In separate orders, the Family Court dismissed the mother's custody petition and sustained the mother's family offense petitions, directing, *inter alia*, that the father enter and complete a ***38** domestic violence program. We now reverse the order awarding custody to the father and remit for a new custody hearing following an in-depth forensic examination of the parties and child.

Andrea's preference for her father and her closely bonded relationship to him were confirmed by her law guardian and the "mental health professional" social worker who interviewed her. Indeed, putting aside the established fact of his abusive conduct toward her mother, Andrea's father appears a truly model parent. He is significantly involved in her school work and her extracurricular activities. They enjoy many pleasurable activities, including movies, shopping, building a barn, and horseback riding. He provides her with material benefits—a television set, clothing, a horse, a trip to Europe. He is loving and affectionate. She is his "princess," his "best girl." In contrast, Andrea's mother has not been significantly involved in her school work or her extracurricular activities, and Andrea does not enjoy her company or their relationship.

1 Were it not for the documented history of domestic violence confirmed by the court after a hearing, we would have unanimously affirmed the Family Court's award of custody to the father in accordance with Andrea's expressed preference and the evidence documenting their positive relationship. However, the fact of domestic violence should have been considered more than superficially, particularly in this case where Andrea expressed her unequivocal preference for the abuser, while denying the very existence of the domestic violence that the court found she witnessed.

The record is replete with incidents of domestic violence reported by the mother, and by evidence supporting her testimony. The earliest incident that the mother reported was perpetrated when Andrea was merely an infant in 1986. In a fit of anger the father hit and kicked the mother and pulled out chunks of her hair. In the course of the attack she heard him say, "Oh well, she's going to die." On Super Bowl Sunday in 1995, he attacked her, throwing her on the floor, kicking, hitting, and choking her. She sustained marks on her neck and a sore throat causing pain while speaking and inhibiting her ability to swallow.

In March 1995, she obtained an order of protection from the Village Court of Montgomery. In the fall of that year the father allegedly held a knife, approximately 8 to 10 inches long, to the mother's throat while Andrea, then nine, sat on her lap. In February 1996 the mother again obtained an order of protection from the Village Court of Montgomery.

***39** In 1997, the father attacked the mother, hit and kicked her, resulting in her obtaining a permanent order of protection from the Orange County Family Court. The severity of her injuries are documented by a photograph, entered in evidence, showing ****552** a large black and blue bruise on her left hip.

In June 1999, the mother left the marital home with Andrea and moved into a shelter where they remained for five days. Upon their return home the father blocked her car in the driveway, yelled at the mother and punched her.

On June 24, 1999, a few days after her return from the shelter, during a dispute over tax returns, the father tried to wrest papers the mother held in her teeth by squeezing her face in his hands, leaving marks and even enlisting the assistance of Andrea; he allegedly directed the child to "hold [the mother's] nose so she can't breathe."

On December 20, 1999, while Andrea was at home, the father attacked the mother, choking her. She had marks on her neck for days.

The latter two incidents were the subjects of the mother's most recent Family Offense petition, which the court sustained. In doing so, the Family Court also noted that a final order of protection had been entered in 1997, stating "based upon the proceeding [of 1997] as well as the succeeding [incidents] * * * Mr. Wissink is guilty of incidents of domestic violence occurring on June 24, [1999] and December 20, [1999]."

Domestic Relations Law § 240(1) provides that in any action concerning custody or visitation where domestic violence is alleged, "the court must consider" the effect of such domestic violence upon the best interest of the child,

together with other factors and circumstances as the court deems relevant in making an award of custody. In this case the Family Court did not entirely ignore that legislative mandate, and specifically noted that it had considered the effect of domestic violence in rendering its custody determination. However, the "consideration" afforded the effect of domestic violence in this case was, in our view, sorely inadequate.

The court-ordered mental health evaluation consisted of the social worker's interview of Andrea on two occasions (about 45 minutes each) and each parent once (about one hour each). These interviews resulted in the social worker's clearly foreseeable conclusion that Andrea was far more comfortable and involved with her father than her mother, that she did not relate well to her mother, and that she preferred living with her father.

***40** In a case such as this, where the record reveals years of domestic violence, which is denied by the child who witnessed it, and the child has expressed her preference to live with the abuser, the court should have ordered a comprehensive psychological evaluation. Such an evaluation would likely include a clinical evaluation, psychological testing, and review of records and information from collateral sources. The forensic evaluator would be concerned with such issues as the nature of the psychopathology of the abuser and of the victim; whether the child might be in danger of becoming a future victim, or a witness to the abuse of some other victim; the child's developmental needs given the fact that she has lived in the polluted environment of domestic violence all of her life and the remedial efforts that should be undertaken in regard to all parties concerned.

The devastating consequences of domestic violence have been recognized by our courts, by law enforcement, and by society as a whole. The effect of such violence on children exposed to it has also been established. There is overwhelming authority that a child living in a home where there has been abuse between the adults becomes a secondary victim and is likely to suffer psychological injury.

****553** Moreover, that child learns a dangerous and morally depraved lesson that abusive behavior is not only acceptable, but may even be rewarded (see *People v. Malone,* 180 Misc.2d 744, 747, 693 N.Y.S.2d 390, citing Frazee, Noel and Brenneke, Violence Against Women, Law and Litigation, § 1:40, at 1–43 1–44 [Clark Boardman Callaghan, 1997]).

In many states a rebuttable presumption that perpetrators of domestic violence should not be eligible for legal or physical custody has been accepted and the courts of those states are required to specify why custody should be granted to an offender and how such an order is in the best interest of the child (see Philip M. Stahl, Complex Issues in Child Custody Evaluations, at 36 [Sage, 1999]). We in New York have not gone that far, but the legislature, in enacting Domestic Relations Law § 240, has recognized that domestic violence is a factor which the court must consider among others in awarding custody or visitation.

2 Moreover, the court also erred in limiting the mother's inquiry regarding the father's failure to comply with child support obligations and in finding financial consideration "not relevant at all" to the custody proceeding. The Family Court was required to consider the parties' support obligations and their ***41** compliance with court orders (Domestic Relations Law § 240[1][a][4]) and to evaluate each party's ability to support the child (*see Eschbach v. Eschbach,* 56 N.Y.2d 167, 172, 451 N.Y.S.2d 658, 436 N.E.2d 1260). If, as the mother alleged, the father violated the child support order, and if he terminated the telephone and electrical services in the marital residence after he had been ordered to stay away pursuant to an order of protection, these facts would clearly be relevant to the court's custody determination.

Only after considering the complex nature of the issues and the relative merits and deficiencies of the alternatives can the court attempt to determine the difficult issue of the best interest of the child in a case such as this.

For the above reasons we thus reverse the custody order and direct a new custody hearing to be conducted after completion of a comprehensive psychological evaluation of the parties and the child. However, we stay Andrea's return to her mother, permitting her continued residence with her father, pending a final custody determination.

We note that the foregoing is without prejudice to the mother renewing her petition for custody, which was dismissed by an order from which no appeal was taken.

ORDERED that the order is reversed insofar as appealed from, on the law and as a matter of discretion in the interest of justice, without costs or disbursements, the petition is denied, and the matter is remitted to the Family Court, Orange County, for further proceedings in accordance herewith; and it is further,

ORDERED that pending the final custody determination, the father shall have temporary custody of the child, Andrea, with visitation to the mother pursuant to the terms of the order appealed from.

749 N.Y.S.2d 550, 2002 N.Y. Slip Op. 07948

FLORIO, J.P., McGINITY and ADAMS, JJ., concur.

301 A.D.2d 36, 749 N.Y.S.2d 550, 2002 N.Y. Slip Op. 07948

Parallel Citations

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820 N.E.2d 840
Court of Appeals of New York.

Sharwline **NICHOLSON**, on Behalf of Herself, Her Infant Children, Destinee B. and Another, and All Others Similarly Situated, et al., Respondents,
v.
Nicholas SCOPPETTA, Individually and as Commissioner of Administration for Children's Services, et al., Appellants, et al., Defendants.

Oct. 26, 2004.

Synopsis

Background: Mothers and their children brought § 1983 action, challenging constitutionality of city's policy of removing children from mothers' custody solely on ground that mothers had failed to prevent children from witnessing domestic violence against mothers. The United States District Court for the Eastern District of New York, Jack B. Weinstein, J., 205 F.R.D. 92, 181 F.Supp.2d 182, 203 F.Supp.2d 153, certified class action and granted preliminary injunction. City appealed. The Court of Appeals, Katzmann, Circuit Judge, 344 F.3d 154, certified questions regarding scope of state statutes under which city had acted.

Holdings: The Court of Appeals, Kaye, Chief Judge, held that:
1 evidence that caretaker allowed child to witness domestic abuse against caretaker is insufficient, without more, to satisfy statutory definition of "neglected child," and
2 emotional injury from witnessing domestic violence can rise to level that justifies removal of child, but witnessing does not, by itself, give rise to any presumption of injury.

Questions answered.

West Headnotes (12)

1 **Infants**🔑Deprivation, Neglect, or Abuse

Evidence that parent or other person legally responsible for child's care allowed child to witness domestic abuse against caretaker is insufficient, without more, to satisfy statutory definition of "neglected child." McKinney's Family Court Act § 1012(f).

4 Cases that cite this headnote

2 **Infants**🔑Deprivation, Neglect, or Abuse

Party seeking to establish child neglect must show, by preponderance of evidence, that: (1), child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) such actual or threatened harm to child is consequence of failure of parent or caretaker to exercise minimum degree of care in providing child with proper supervision or guardianship. McKinney's Family Court Act § 1012(f).

97 Cases that cite this headnote

3 **Infants**🔑Deprivation, Neglect, or Abuse

To be imminent, within meaning of statutory definition of child neglect, danger must be near or impending, not merely possible. McKinney's Family Court Act § 1012(f).

5 Cases that cite this headnote

4 **Infants**🔑Deprivation, Neglect, or Abuse

Court determining whether child had been "neglected" must evaluate parental behavior objectively: would reasonable and prudent parent have so acted, or failed to act, under circumstances then and there existing.

3 Cases that cite this headnote

5 **Infants**🔑Deprivation, Neglect, or Abuse

Whether particular mother who is victim of

domestic violence has actually failed to exercise minimum degree of care for her child, within meaning of child neglect statute, is dependent on facts such as severity and frequency of violence, and resources and options available to her. McKinney's Family Court Act § 1012(f).

10 Cases that cite this headnote

6 **Infants**Deprivation, Neglect, or Abuse
InfantsPresumptions and Burden of Proof

Emotional injury from witnessing domestic violence can rise to level that establishes imminent danger or risk to child's life or health, such as would justify removal of child on ground of neglect, but witnessing does not, by itself, give rise to any presumption of such danger or risk. McKinney's Family Court Act §§ 1022, 1024, 1027.

7 **Infants**Deprivation, Neglect, or Abuse

Court asked to authorize removal of child, following filing of abuse or neglect petition, must do more than identify existence of risk of serious harm; court must weigh, in factual setting before it, whether imminent risk to child can be mitigated by reasonable efforts to avoid removal, must balance that risk against harm removal might bring, and must determine factually which course is in child's best interests. McKinney's Family Court Act § 1027.

11 Cases that cite this headnote

8 **Infants**Deprivation, Neglect, or Abuse
InfantsPetition, Pleadings, and Issues
InfantsDisposition of Child in General

Emotional injury from witnessing domestic violence, where shown, can justify ex parte removal of child by court order prior to filing of abuse or neglect petition, if (1) parent is absent or had refused to consent to temporary removal despite warning that ex parte order will be sought, (2) extent of abuse or neglect necessitates immediate removal to avoid imminent danger to child's life or health, and (3) there is insufficient time to file petition and hold preliminary hearing. McKinney's Family Court Act § 1022.

1 Cases that cite this headnote

9 **Infants**Deprivation, Neglect, or Abuse
InfantsDisposition of Child in General

Court ruling on ex parte application to remove abused or neglected child must consider whether: (1) continuation in child's home would be contrary to best interests of child; (2) reasonable efforts were made prior to application to prevent or eliminate need for removal; and (3) imminent risk to child would be eliminated by issuance of temporary order of protection directing removal of person from child's residence. McKinney's Family Court Act § 1022.

6 Cases that cite this headnote

10 **Infants**Deprivation, Neglect, or Abuse
InfantsPetition, Pleadings, and Issues
InfantsDisposition of Child in General

Whether analyzing pre- or post-petition removal application, or application for allegedly abused or neglected child's return, court must engage in balancing test of imminent risk with best interests of child and, where appropriate, reasonable efforts made to avoid removal or continuing removal. McKinney's Family Court Act §§ 1022, 1027, 1028.

2 Cases that cite this headnote

11 **Infants**Deprivation, Neglect, or Abuse
InfantsDisposition of Child in General

Emotional injury from witnessing domestic violence, where shown, can justify emergency removal of child without court order only in rare case where there is: (1) reasonable cause to

believe that child is in such urgent circumstance or condition that continuing in home or care of parent presents imminent danger to child's life or health, and (2) not enough time to apply for ex parte removal order. McKinney's Family Court Act §§ 1022, 1024.

4 Cases that cite this headnote

12 **Infants**Deprivation, Neglect, or Abuse
InfantsAdmissibility

In neglect proceeding based on child's witnessing of domestic violence, there must be particularized evidence that removal is warranted; expert testimony may be offered on issue of imminent risk to child, but is not required. McKinney's Family Court Act § 1011 et seq.

Attorneys and Law Firms

***197 *359 **841 Michael A. Cardozo, Corporation Counsel, New York City (Alan G. Krams, Leonard Koerner, Jonathan Pines, ***198 **842 Martha A. Calhoun, Carolyn Wolpert and Kristin M. Helmers of counsel), for appellants.

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*361 Legal Aid Society, Juvenile Rights Division, New York City (Judith Waksberg and Monica Drinane of counsel), and Lawyers For Children, Inc. (Karen Freedman of counsel), for Subclass B respondents.

*362 Greenberg Traurig LLP, New York City (Alan Mansfield, Stephen L. Saxl, Hilary Ames and Jae J. Kim of counsel), for National Coalition Against Domestic Violence and others, amici curiae.

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Yisroel Schulman, New York City, and Kim Susser for New York Legal Assistance Group and others, amici curiae.

Wilbur McReynolds, amicus curiae.

Legal Aid Society, Cleveland, Ohio (Alexandra M. Ruden of counsel), and Michael R. Smalz, Columbus, Ohio, for Ohio Domestic Violence Network and another, amici curiae. I. An individualized assessment of harm to the child needs to be conducted.

Paul Chill, Hartford, Connecticut, for Joseph L. Woolston and others, amici curiae.

Opinion

***365 OPINION OF THE COURT**

KAYE, Chief Judge.

In this federal class action, the United States Court of Appeals for the Second Circuit has certified three questions centered on New York's statutory scheme for child protective proceedings. The action is brought on behalf of mothers and their children who were separated because the mother had suffered domestic violence, to which the children were exposed, and the children were for that reason deemed neglected by her.

In April 2000, Sharwline **Nicholson**, on behalf of herself and her two children, brought an action pursuant to 42 USC § 1983 against the New York City Administration for Children's Services (ACS).1 The action was later consolidated with similar complaints by Sharlene Tillet and Ekaete Udoh-the three named plaintiff mothers. Plaintiffs alleged that ACS, as a matter of policy, removed children from mothers who were victims of domestic violence because, as victims, they "engaged in domestic violence" and that defendants removed ***199 **843 and detained children without probable cause and without due process of law. That policy, and its implementation-according to plaintiff mothers-constituted, among other wrongs, an unlawful

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interference with their liberty interest in the care and custody of their children in violation of the United States Constitution.

In August 2001, the United States District Court for the Eastern District of New York certified two subclasses: battered custodial parents (Subclass A) and their children (Subclass B) (***Nicholson*** *v. Williams,* 205 F.R.D. 92, 95, 100 [E.D.N.Y.2001]). For each plaintiff, at least one ground for removal was that the custodial mother had been assaulted by an intimate partner and ****366*** failed to protect the child or children from exposure to that domestic violence.

In January 2002, the District Court granted a preliminary injunction, concluding that the City "may not penalize a mother, not otherwise unfit, who is battered by her partner, by separating her from her children; nor may children be separated from the mother, in effect visiting upon them the sins of their mother's batterer" (*In re* ***Nicholson***, 181 F.Supp.2d 182, 188 [E.D.N.Y.2002]; *see also* ***Nicholson*** *v. Williams,* 203 F Supp 2d 153 [E.D.N.Y.2002] [108-page elaboration of grounds for injunction]).

The court found that ACS unnecessarily, routinely charged mothers with neglect and removed their children where the mothers-who had engaged in no violence themselves-had been the victims of domestic violence; that ACS did so without ensuring that the mother had access to the services she needed, without a court order, and without returning these children promptly after being ordered to do so by the court;2 that ACS caseworkers and case managers lacked adequate training about domestic violence, and their practice was to separate mother and child when less harmful alternatives were available; that the agency's written policies offered contradictory guidance or no guidance at all on these issues; and that none of the reform plans submitted by ACS could reasonably have been expected to resolve the problems within the next year (203 F.Supp.2d at 228-229).

The District Court concluded that ACS's practices and policies violated both the substantive due process rights of mothers and children not to be separated by the government unless the parent is unfit to care for the child, and their procedural due process rights (181 F.Supp.2d at 185). The injunction, in relevant part, "prohibit[ed] ACS from carrying out *ex parte* removals 'solely because the mother is the victim of domestic violence,' or from filing an Article Ten petition seeking removal on that ****367*** basis" (***Nicholson*** *v. Scoppetta,* 344 F.3d 154, 164 [2d Cir.2003] [internal citations omitted]).3

On appeal, the Second Circuit held that the District Court had not abused its discretion in concluding that ACS's practice of effecting removals based on a parent's failure to prevent his or her child from witnessing domestic violence against the ******200 **844*** parent amounted to a policy or custom of ACS, that in some circumstances the removals may raise serious questions of federal constitutional law, and that the alleged constitutional violations, if any, were at least plausibly attributable to the City (344 F.3d at 165-167, 171-176).4 The court hesitated, however, before reaching the constitutional questions, believing that resolution of uncertain issues of New York statutory law would avoid, or significantly modify, the substantial federal constitutional issues presented (*id.* at 176).

Given the strong preference for avoiding unnecessary constitutional adjudication, the importance of child protection to New York State and the integral part New York courts play in the removal process, the Second Circuit, by three certified questions, chose to put the open state statutory law issues to us for resolution. We accepted certification (1 N.Y.3d 538, 775 N.Y.S.2d 233, 807 N.E.2d 283 [2003]), and now proceed to answer those questions.5

Certified Question No. 1: Neglect

> "Does the definition of a 'neglected child' under N.Y. Family Ct. Act § 1012(f), (h) include instances in which the sole allegation of neglect is that the parent or other person legally responsible for the child's care allows the child to witness domestic abuse against the caretaker?" (344 F.3d at 176.)

****368*** **1** We understand this question to ask whether a court reviewing a Family Court Act article 10 petition may find a respondent parent responsible for neglect based on evidence of two facts only: that the parent has been the victim of domestic violence, and that the child has been exposed to that violence. That question must be answered in the negative. Plainly, more is required for a showing of neglect under New York law than the fact that a child was exposed to domestic abuse against the caretaker. Answering the question in the affirmative, moreover, would read an unacceptable presumption into the statute, contrary to its plain language.

Family Court Act § 1012(f) is explicit in identifying the elements that must be shown to support a finding of neglect. As relevant here, it defines a "neglected child" to mean:

> "a child less than eighteen years of age

> "(i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care ...
>
> "(B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court."

***201 **845 **2** Thus, a party seeking to establish neglect must show, by a preponderance of the evidence (*see* Family Ct. Act § 1046[b] [i]), first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship. The drafters of article 10 were "deeply concerned" that an imprecise definition of child neglect might result in "unwarranted state intervention into private family life" (Besharov, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 29A, Family Ct. Act § 1012, at 320 [1999 ed]).

3 *369 The first statutory element requires proof of actual (or imminent danger of) physical, emotional or mental impairment to the child (*see Matter of Nassau County Dept. of Social Servs. [Dante M.] v. Denise J.*, 87 N.Y.2d 73, 78-79, 637 N.Y.S.2d 666, 661 N.E.2d 138 [1995]). This prerequisite to a finding of neglect ensures that the Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior. "Imminent danger" reflects the Legislature's judgment that a finding of neglect may be appropriate even when a child has not actually been harmed; "imminent danger of impairment to a child is an independent and separate ground on which a neglect finding may be based" (*Dante M.*, 87 N.Y.2d at 79, 637 N.Y.S.2d 666, 661 N.E.2d 138). Imminent danger, however, must be near or impending, not merely possible.

In each case, additionally, there must be a link or causal connection between the basis for the neglect petition and the circumstances that allegedly produce the child's impairment or imminent danger of impairment. In *Dante M.*, for example, we held that the Family Court erred in concluding that a newborn's positive toxicology for a controlled substance alone was sufficient to support a finding of neglect because the report, in and of itself, did not prove that the child was impaired or in imminent danger of becoming impaired (87 N.Y.2d at 79, 637 N.Y.S.2d 666, 661 N.E.2d 138). We reasoned, "[r]elying solely on a positive toxicology result for a neglect determination fails to make the necessary causative connection to all the surrounding circumstances that may or may not produce impairment or imminent risk of impairment in the newborn child" (*id.*). The positive toxicology report, in conjunction with other evidence-such as the mother's history of inability to care for her children because of her drug use, testimony of relatives that she was high on cocaine during her pregnancy and the mother's failure to testify at the neglect hearing-supported a finding of neglect and established a link between the report and physical impairment.

The cases at bar concern, in particular, alleged threats to the child's emotional, or mental, health. The statute specifically defines "[i]mpairment of emotional health" and "impairment of mental or emotional condition" to include

> "a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to *370 think and reason, or acting out or misbehavior, including incorrigibility, ungovernability or habitual truancy" (Family Ct. Act § 1012 [h]).

Under New York law, "such impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward ***202 **846 the child" (*id.*). Here, the Legislature recognized that the source of emotional or mental impairment-unlike physical injury-may be murky, and that it is unjust to fault a parent too readily. The Legislature therefore specified that such impairment be "clearly attributable" to the parent's failure to exercise the requisite degree of care.

Assuming that actual or imminent danger to the child has been shown, "neglect" also requires proof of the parent's failure to exercise a minimum degree of care. As the Second Circuit observed, "a fundamental interpretive question is what conduct satisfies the broad, tort-like phrase, 'a minimum degree of care.' The Court of Appeals has not yet addressed that question, which would be critical to defining appropriate parental behavior" (344 F.3d at 169).

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"[M]inimum degree of care" is a "baseline of proper care for children that all parents, regardless of lifestyle or social or economic position, must meet" (Besharov at 326). Notably, the statutory test is "*minimum* degree of care"-not maximum, not best, not ideal-and the failure must be actual, not threatened (*see e.g. Matter of Hofbauer*, 47 N.Y.2d 648, 656, 419 N.Y.S.2d 936, 393 N.E.2d 1009 [1979] [recognizing, in the context of medical neglect, the court's role is not as surrogate parent and the inquiry is not posed in absolute terms of whether the parent has made the "right" or "wrong" decision]).

4 Courts must evaluate parental behavior objectively: would a reasonable and prudent parent have so acted, or failed to act, under the circumstances then and there existing (*see Matter of Jessica YY.*, 258 A.D.2d 743, 744, 685 N.Y.S.2d 489 [3d Dept.1999]). The standard takes into account the special vulnerabilities of the child, even where general physical health is not implicated (*see Matter of Sayeh R.*, 91 N.Y.2d 306, 315, 317, 670 N.Y.S.2d 377, 693 N.E.2d 724 [1997] [mother's decision to demand immediate return of her traumatized children without regard to their need for counseling and related services "could well be found to represent precisely the kind of failure 'to exercise a minimum degree of care' that our neglect statute contemplates"]). Thus, when the inquiry is whether a mother-and domestic violence victim-failed to exercise a minimum ***371** degree of care, the focus must be on whether she has met the standard of the reasonable and prudent person in similar circumstances.

5 As the Subclass A members point out, for a battered mother-and ultimately for a court-what course of action constitutes a parent's exercise of a "minimum degree of care" may include such considerations as: risks attendant to leaving, if the batterer has threatened to kill her if she does; risks attendant to staying and suffering continued abuse; risks attendant to seeking assistance through government channels, potentially increasing the danger to herself and her children; risks attendant to criminal prosecution against the abuser; and risks attendant to relocation.[6] Whether a particular mother in these circumstances has actually failed to exercise a minimum degree of care is necessarily dependent on facts such as the severity and frequency of the violence, and the resources and options available to her (*see* ***203** **847 *Matter of Melissa U.*, 148 A.D.2d 862, 538 N.Y.S.2d 958 [3d Dept.1989]; *Matter of James MM. v. June OO.*, 294 A.D.2d 630, 740 N.Y.S.2d 730 [3d Dept.2002]).

Only when a petitioner demonstrates, by a preponderance of evidence, that both elements of section 1012(f) are satisfied may a child be deemed neglected under the statute. When "the sole allegation" is that the mother has been abused and the child has witnessed the abuse, such a showing has not been made. This does not mean, however, that a child can never be "neglected" when living in a household plagued by domestic violence. Conceivably, neglect might be found where a record establishes that, for example, the mother acknowledged that the children knew of repeated domestic violence by her paramour and had reason to be afraid of him, yet nonetheless allowed him several times to return to her home, and lacked awareness of any impact of the violence on the children, as in *Matter of James MM.*, 294 A.D.2d at 632, 740 N.Y.S.2d 730; or where the children were exposed to regular and continuous extremely violent conduct between their parents, several times requiring official intervention, and where caseworkers testified to the fear and distress the children were ***372** experiencing as a result of their long exposure to the violence (*Matter of Theresa CC.*, 178 A.D.2d 687, 576 N.Y.S.2d 937 [3d Dept.1991]).

In such circumstances, the battered mother is charged with neglect not because she is a victim of domestic violence or because her children witnessed the abuse, but rather because a preponderance of the evidence establishes that the children were actually or imminently harmed by reason of her failure to exercise even minimal care in providing them with proper oversight.

Certified Question No. 2: Removals

Next, we are called upon to focus on removals by ACS, in answering the question:

> "Can the injury or possible injury, if any, that results to a child who has witnessed domestic abuse against a parent or other caretaker constitute 'danger' or 'risk' to the child's 'life or health,' as those terms are defined in the N.Y. Family Ct. Act §§ 1022, 1024, 1026-1028?" (344 F.3d at 176-177.)

The cited Family Court Act sections relate to the removal of a child from home. Thus, in essence, we are asked to decide whether emotional injury from witnessing domestic violence can rise to a level that establishes an "imminent danger" or "risk" to a child's life or health, so that removal is appropriate either in an emergency or by court order.

While we do not reach the constitutional questions, it is helpful in framing the statutory issues to note the Second Circuit's outline of the federal constitutional questions relating to removals. Their questions emerge in large

measure from the District Court's findings of an "agency-wide practice of removing children from their mother without evidence of a mother's neglect and without seeking prior judicial approval" (203 F.Supp.2d at 215), and Family Court review of removals that "often fails to provide mothers and children with an effective avenue for timely relief from ACS mistakes" (*id.* at 221).

Specifically, as to ex parte removals, the Circuit Court identified procedural due process and Fourth Amendment questions focused on whether danger to a child could encompass emotional trauma from witnessing domestic violence against a parent, warranting emergency removal. Discussing the procedural due process question, the court remarked that:

> ***204 **848 "there is a strong possibility that if New York law *373 does not authorize *ex parte* removals, our opinion in *Tenenbaum* at least arguably could weigh in favor of finding a procedural due process violation in certain circumstances. If New York law does authorize such removals, *Tenenbaum* likely does not prohibit us from deferring to that judgment. In either case, the underlying New York procedural rules will also be an important component of our balancing. Thus, the state-law question of statutory interpretation will either render unnecessary, or at least substantially modify, the federal constitutional question" (344 F.3d at 172).[7]

The court also questioned whether "in the context of the seizure of a child by a state protective agency the Fourth Amendment might impose any additional restrictions above and beyond those that apply to ordinary arrests" (*id.* at 173).

As to court-ordered removals, the Second Circuit recognized challenges based on substantive due process, procedural due process-the antecedent of Certified Question No. 3-and the Fourth Amendment. The substantive due process question concerned whether the City had offered a reasonable justification for the removals. The Second Circuit observed that "there is a substantial Fourth Amendment question presented if New York law does not authorize removals in the circumstances alleged" (*id.* at 176).

Finally, in certifying the questions to us, the court explained that:

> "[t]here is ... some ambiguity in the statutory language authorizing removals pending a final determination of status. Following an emergency removal, whether *ex parte* or by court order, the Family Court must return a removed child to the parent's custody absent 'an imminent risk' or 'imminentdanger' *374 to 'the child's life or health.' At the same time, the Family Court must consider the 'best interests of the child' in assessing whether continuing removal is necessary to prevent threats to the child's life or health. Additionally, in order to support removal, the Family Court must 'find[ ] that removal is necessary to avoid imminent risk.' How these provisions should be harmonized seems to us to be the province of the Court of Appeals" (344 F.3d at 169 [internal citations omitted]).

The Circuit Court summarized the policy challenged by plaintiffs and found by the District Court as "the alleged practice of removals based on a theory that allowing one's child to witness ongoing domestic violence is a form of neglect, either simply because such conduct is presumptively neglectful or because in individual circumstances it is shown to threaten the child's physical or emotional health" (*id.* at 166 n. 5).

It is this policy, viewed in light of the District Court's factual findings, that informs our analysis of Certified Question No. 2. In so doing, we acknowledge the Legislature's expressed goal of "placing increased emphasis on preventive services ***205 **849 designed to maintain family relationships rather than responding to children and families in trouble only by removing the child from the family" (*see Mark G. v. Sabol*, 93 N.Y.2d 710, 719, 695 N.Y.S.2d 730, 717 N.E.2d 1067 [1999] [emphasis omitted] [construing Child Welfare Reform Act of 1979 (L. 1979, chs. 610, 611)]). We further acknowledge the legislative findings, made pursuant to the Family Protection and Domestic Violence Intervention Act of 1994, that

> "[t]he corrosive effect of domestic violence is far reaching. The batterer's violence injures children both directly and indirectly. Abuse of a parent is detrimental to children whether or not they are physically abused themselves. Children who witness domestic violence are more likely to experience delayed development, feelings of fear, depression and helplessness and are more likely to become batterers themselves" (L. 1994, ch. 222, § 1; *see also People v. Wood*, 95 N.Y.2d 509, 512, 719 N.Y.S.2d 639, 742 N.E.2d 114 [2000] [though involving a batterer, not a victim]).

These legislative findings represent two fundamental-sometimes conflicting-principles. New York has long embraced a policy of keeping "biological families together" (*Matter of Marino S.*, 100 N.Y.2d 361, 372, 763 N.Y.S.2d 796, 795 N.E.2d 21 [2003]). Yet "when a child's best *375 interests are endangered, such objectives must yield to the State's paramount concern for the health and safety of the child" (*id.*).

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As we concluded in response to Certified Question No. 1, exposing a child to domestic violence is *not* presumptively neglectful. Not every child exposed to domestic violence is at risk of impairment. A fortiori, exposure of a child to violence is not presumptively ground for removal, and in many instances removal may do more harm to the child than good. Part 2 of article 10 of the Family Court Act sets forth four ways in which a child may be removed from the home in response to an allegation of neglect (or abuse) related to domestic violence: (1) temporary removal with consent; (2) preliminary orders after a petition is filed; (3) preliminary orders before a petition is filed; and (4) emergency removal without a court order. The issue before us is whether emotional harm suffered by a child exposed to domestic violence, where shown, can warrant the trauma of removal under any of these provisions.

The Practice Commentaries state, and we agree, that the sections of part 2 of article 10 create a "continuum of consent and urgency and mandate a hierarchy of required review" before a child is removed from home (*see* Besharov, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 29A, Family Ct. Act § 1021, at 5 [1999 ed.]).

Consent Removal

First, section 1021 provides that a child may be removed "from the place where he is residing with the written consent of his parent or other person legally responsible for his care, if the child is an abused or neglected child under this article" (Family Ct. Act § 1021; *see Tenenbaum v. Williams,* 193 F.3d 581, 590 n. 5 [2d Cir.1999]; *Matter of Jonathan P.,* 283 A.D.2d 675, 724 N.Y.S.2d 213 [3d Dept.2001]). This section is significant because "many parents are willing and able to understand the need to place the child outside the home and because resort to unnecessary legal coercion can be detrimental to later treatment efforts" (Besharov at 6).

Postpetition Removal

6 If parental consent cannot be obtained, section 1027, at issue here, provides for preliminary orders after the filing of a neglect (or abuse) petition. Thus, according ******206 **850*** to the statutory continuum, where the circumstances are not so exigent, the agency should bring a petition and seek a hearing *prior to* removal ****376*** of the child. In any case involving abuse-or in any case where the child has already been removed without a court order-the Family Court must hold a hearing as soon as practicable after the filing of a petition, to determine whether the child's interests require protection pending a final order of disposition (Family Ct. Act § 1027 [a]). As is relevant here, the section further provides that in any other circumstance (such as a neglect case), after the petition is filed any person originating the proceeding (or the Law Guardian) may apply for-or the court on its own may order-a hearing to determine whether the child's interests require protection, pending a final order of disposition (*id.*).8

For example, in *Matter of Adam DD.,* 112 A.D.2d 493, 490 N.Y.S.2d 907 [3d Dept.1985], after filing a child neglect petition, petitioner Washington County Department of Social Services sought an order under section 1027. At a hearing, evidence demonstrated that respondent mother had told her son on several occasions that she intended to kill herself, and Family Court directed that custody be placed with petitioner on a temporary basis for two months. At the subsequent dispositional hearing, a psychiatrist testified that respondent was suffering from a type of paranoid schizophrenia that endangered the well-being of the child, and recommended the continued placement with petitioner. A second psychiatrist concurred. The Appellate Division concluded that the record afforded a basis for Family Court to find neglect because of possible impairment of the child's emotional health, and continued placement of the child with petitioner.

While not a domestic violence case, *Matter of Adam DD.* is instructive because it concerns steps taken in the circumstance where a child is emotionally harmed by parental behavior. The parent's repeated threats of suicide caused emotional harm that could be akin to the experience of a child who witnesses repeated episodes of domestic violence perpetrated against a parent. In this circumstance, the agency did not immediately remove the child, but proceeded with the filing of a petition and a hearing.

Upon such a hearing, if the court finds that removal is necessary to avoid imminent risk to the child's life or health, it is ****377*** required to remove or continue the removal and remand the child to a place approved by the agency (Family Ct Act § 1027[b][i]). In undertaking this inquiry, the statute also requires the court to consider and determine whether continuation in the child's home would be contrary to the best interests of the child (*id.*).9

The Circuit Court has asked us to harmonize the "best interests" test with the calculus concerning "imminent risk" and "imminent danger" to "life or health" ******207 **851*** (344 F.3d at 169). In order to justify a finding of

imminent risk to life or health, the agency need not prove that the child has suffered actual injury (*see Matter of Kimberly H.*, 242 A.D.2d 35, 38, 673 N.Y.S.2d 96 [1st Dept.1998]). Rather, the court engages in a fact-intensive inquiry to determine whether the child's emotional health is at risk. Section 1012(h), moreover, sets forth specific factors, evidence of which may demonstrate "substantially diminished psychological or intellectual functioning" (*see also Matter of Sayeh R.*, 91 N.Y.2d 306, 314-316, 670 N.Y.S.2d 377, 693 N.E.2d 724 [1997]; *Matter of Nassau County Dept. of Social Servs. [Dante M.] v. Denise J.*, 87 N.Y.2d 73, 78-79, 637 N.Y.S.2d 666, 661 N.E.2d 138 [1995]). As noted in our discussion of Certified Question No. 1, section 1012(h) contains the caveat that impairment of emotional health must be "clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child" (*see Matter of Theresa CC.*, 178 A.D.2d 687, 576 N.Y.S.2d 937 [3d Dept.1991]).

Importantly, in 1988, the Legislature added the "best interests" requirement to the statute, as well as the requirement that reasonable efforts be made "to prevent or eliminate the need for removal of the child from the home" (L. 1988, ch. 478, § 5).[10] These changes were apparently necessary to comport with federal requirements under title IV-E of the Social Security Act (42 USC §§ 670-679b), which mandated that federal "foster care maintenance payments may be made on behalf of otherwise eligible children who were removed from the home of a specified relative pursuant to a voluntary placement agreement, or as the result of a 'judicial determination to the effect that continuation therein would be contrary to the welfare of ***378** the child and ... that reasonable efforts [to prevent the need for removal] have been made' " (Policy Interpretation Question of U.S. Dept. of Health & Human Servs., May 3, 1986, Bill Jacket, L. 1988, ch. 478, at 32-33). The measures "ensure[d] that children involved in the early stages of child protective proceedings and their families receive appropriate services to prevent the children's removal from their homes whenever possible" (Mem. from Cesar A. Perales to Evan A. Davis, Counsel to Governor, July 27, 1988, Bill Jacket, L. 1988, ch. 478, at 14).

By contrast, the City at the time took the position that

> "[t]he mixing of the standards 'best interest of the child' and 'imminent risk' is confusing. It makes no sense for a court to determine as part of an 'imminent risk' decision, what is in the 'best interest of the child.' If the child is in 'imminent risk', his/her 'best interest' is removal from the home. A 'best interest' determination is more appropriately made after an investigation and a report have been completed and all the facts are available" (Letter from Legis. Rep. James Brennan, City of New York Off. of Mayor, to Governor Mario M. Cuomo, July 27, 1988, Bill Jacket, L. 1988, ch. 478, at 23).

In this litigation, the City posits that the "best interests" determination is part of the Family Court's conclusion that there is imminent risk warranting removal, and concedes that whether a child will be harmed by the removal is a relevant consideration. The City thus recognizes that the questions facing a Family Court judge in the removal context are extraordinarily complex. As the Circuit Court observed, "it could be argued that the exigencies of the moment that threaten the welfare of a ***208 **852** child justify removal. On the other hand, a blanket presumption in favor of removal may not fairly capture the nuances of each family situation" (344 F.3d at 174).

7 The plain language of the section and the legislative history supporting it establish that a blanket presumption favoring removal was never intended. The court *must do more* than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests.

***379** Additionally, the court must specifically consider whether imminent risk to the child might be eliminated by other means, such as issuing a temporary order of protection or providing services to the victim (Family Ct. Act § 1027[b][iii], [iv]). The Committee Bill Memorandum supporting this legislation explains the intent that "[w]here one parent is abusive but the child may safely reside at home with the other parent, the abuser should be removed. This will spare children the trauma of removal and placement in foster care" (Mem. of Children and Families Standing Comm., Bill Jacket, L. 1989, ch. 727, at 7).

These legislative concerns were met, for example, in *Matter of Naomi R.*, 296 A.D.2d 503, 745 N.Y.S.2d 485 [2d Dept.2002], where, following a hearing pursuant to section 1027, Family Court issued a temporary order of protection against a father, excluding him from the home, on the ground that he allegedly sexually abused one of his four children. Evidence established that the father's return to the home, even under the mother's supervision, would

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present an imminent risk to the health and safety of all of the children. Thus, pending a full fact-finding hearing, Family Court took the step of maintaining the integrity of the family unit and instead removed the abuser.

Ex Parte Removal by Court Order

8 If the agency believes that there is insufficient time to file a petition, the next step on the continuum should not be emergency removal, but ex parte removal by court order (*see e.g. Matter of Nassau County Dept. of Social Servs. [Dante M.] v. Denise J.*, 87 N.Y.2d 73, 637 N.Y.S.2d 666, 661 N.E.2d 138 [1995]). Section 1022 of the Family Court Act provides that the court may enter an order directing the temporary removal of a child from home *before* the filing of a petition if three factors are met.

First, the parent must be absent or, if present, must have been asked and refused to consent to temporary removal of the child and must have been informed of an intent to apply for an order. Second, the child must appear to suffer from abuse or neglect of a parent or other person legally responsible for the child's care to the extent that immediate removal is necessary to avoid imminent danger to the child's life or health. Third, there must be insufficient time to file a petition and hold a preliminary hearing.

9 Just as in a section 1027 inquiry, the court must consider whether continuation in the child's home would be contrary to the best interests of the child; whether reasonable efforts were ***380** made prior to the application to prevent or eliminate the need for removal from the home; and whether imminent risk to the child would be eliminated by the issuance of a temporary order of protection directing the removal of the person from the child's residence. ***209 **853** 11. Here, the court must engage in a fact-finding inquiry into whether the child is at risk and appears to suffer from neglect.

The Practice Commentaries suggest that section 1022 may be unfamiliar, or seem unnecessary, to those in practice in New York City, "where it is common to take emergency protective action without prior court review" (Besharov, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 29A, Family Ct. Act § 1022, at 10 [1999 ed.]). If, as the District Court's findings suggest, this was done in cases where a court order could be obtained, the practice contravenes the statute. Section 1022 ensures that in most urgent situations, there will be judicial oversight in order to prevent well-meaning but misguided removals that may harm the child more than help. As the comment to the predecessor statute stated, "[t]his section ... [is] designed to avoid a premature removal of a child from his home by establishing a procedure for an early judicial determination of urgent need" (Committee Comments, McKinney's Cons. Laws of N.Y., Book 29A, Family Ct. Act § 322 [1963 ed.]).

10 Whether analyzing a removal application under section 1027 or section 1022, or an application for a child's return under section 1028, a court must engage in a balancing test of the imminent risk with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal. The term "safer course" (*see e.g. Matter of Kimberly H.*, 242 A.D.2d 35, 673 N.Y.S.2d 96 [1st Dept.1998]; *Matter of Tantalyn TT.*, 115 A.D.2d 799, 495 N.Y.S.2d 740 [3d Dept.1985]) should not be used to mask a dearth of evidence or as a watered-down, impermissible presumption.

Emergency Removal Without Court Order

11 Finally, section 1024 provides for emergency removals without a court order. The section permits removal without a court order and without consent of the parent if there is reasonable cause to believe that the child is in such urgent circumstance or condition that continuing in the home or care of the ***381** parent presents an imminent danger to the child's life or health, and there is not enough time to apply for an order under section 1022 (Family Ct. Act § 1024[a]; *see generally Matter of Joseph DD.*, 300 A.D.2d 760, 760 n. 1, 752 N.Y.S.2d 407 [3d Dept.2002] [noting that removal under such emergency circumstances requires the filing of an article 10 petition "forthwith" and prompt court review of the nonjudicial decision pursuant to Family Ct. Act § 1026(c) and § 1028]; *see also Matter of Karla V.*, 278 A.D.2d 159, 717 N.Y.S.2d 598 [1st Dept.2000]). Thus, emergency removal is appropriate where the danger is so immediate, so urgent that the child's life or safety will be at risk before an ex parte order can be obtained. The standard obviously is a stringent one.

Section 1024 establishes an objective test, whether the child is in such circumstance or condition that remaining in the home presents imminent danger to life or health.12 In construing "imminent danger" under section 1024, it has been held that ***210 **854** whether a child is in "imminent danger" is necessarily a fact-intensive determination. "It is not required that the child be injured in the presence of a caseworker nor is it necessary for the alleged abuser to be present at the time the child is taken

from the home. It is sufficient if the officials have persuasive evidence of serious ongoing abuse and, based upon the best investigation reasonably possible under the circumstances, have reason to fear imminent recurrence" (*Gottlieb v. County of Orange*, 871 F.Supp. 625, 628-629 [S.D.N.Y.1994], citing *Robison v. Via*, 821 F.2d 913, 922 [2d Cir.1987]). The *Gottlieb* court added that, "[s]ince this evidence is the basis for removal of a child, it should be as reliable and thoroughly examined as possible to avoid unnecessary harm to the family unit" (871 F.Supp. at 629).

Section 1024 concerns, moreover, only the very grave circumstance of danger to life or health. While we cannot say, for all future time, that the possibility can *never* exist, in the case of emotional injury-or, even more remotely, the risk of emotional injury-caused by witnessing domestic violence, it must be a rare circumstance in which the time would be so fleeting and ***382** the danger so great that emergency removal would be warranted.[13]

Certified Question No. 3: Process

12 Finally, the Second Circuit asks us:

> "Does the fact that the child witnessed such abuse suffice to demonstrate that 'removal is necessary,' N.Y. Family Ct. Act §§ 1022, 1024, 1027, or that 'removal was in the child's best interests,' N.Y. Family Ct. Act §§ 1028, 1052(b)(i)(A), or must the child protective agency offer additional, particularized evidence to justify removal?" (344 F.3d at 177.)

The Circuit Court has before it the procedural due process question whether, if New York law permits a presumption that removal is appropriate based on the witnessing of domestic violence, that presumption would comport with *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 [1972] [recognizing a father's procedural due process interest in an individualized determination of fitness]. All parties maintain, however, and we concur, that under the Family Court Act, there can be no "blanket presumption" favoring removal when a child witnesses domestic violence, and that each case is fact-specific. As demonstrated in our discussion of Certified Question No. 2, when a court orders removal, particularized evidence must exist to justify that determination, including, where appropriate, evidence of efforts made to prevent or eliminate the need for removal and the impact of removal on the child.

The Circuit Court points to two cases in which removals occurred based on domestic violence without corresponding expert testimony on the appropriateness of removal in the particular circumstance (*Matter of Carlos M.*, 293 A.D.2d 617, 741 N.Y.S.2d 82 [2d Dept.2002]; *Matter of Lonell J.*, 242 A.D.2d 58, 673 N.Y.S.2d 116 [1st Dept.1998]). Both cases were reviewed on the issue whether there was sufficient evidence to support a finding of neglect. In *Carlos M.*, the evidence showed a 12-year history of domestic violence between the parents which was not only witnessed by the children but also often actually spurred their intervention. ***211 **855** In *Lonell J.*, ***383** caseworkers testified at a fact-finding hearing about the domestic violence perpetrated by the children's father against their mother, as well as the unsanitary condition of the home and the children's poor health.

We do not read *Carlos M.* or *Lonell J.* as supportive of a presumption that if a child has witnessed domestic violence, the child has been harmed and removal is appropriate. That presumption would be impermissible. In each case, multiple factors formed the basis for intervention and determinations of neglect. As the First Department concluded in *Lonell J.*, moreover, "nothing in section 1012 itself requires expert testimony, as opposed to other convincing evidence of neglect" (242 A.D.2d at 61, 673 N.Y.S.2d 116). Indeed, under section 1046(a)(viii), which sets forth the evidentiary standards for abuse and neglect hearings, competent expert testimony on a child's emotional condition *may* be heard. The *Lonell J.* court expressed concern that while older children can communicate with a psychological expert about the effects of domestic violence on their emotional state, much younger children often cannot (242 A.D.2d at 62, 673 N.Y.S.2d 116). The court believed that "[t]o require expert testimony of this type in the latter situation would be tantamount to refusing to protect the most vulnerable and impressionable children. While violence between parents adversely affects all children, younger children in particular are most likely to suffer from psychosomatic illnesses and arrested development" (*id.*).

Granted, in some cases, it may be difficult for an agency to show, absent expert testimony, that there is imminent risk to a child's emotional state, and that any impairment of emotional health is "clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child" (Family Ct Act § 1012[h]). Yet nothing in the plain language of article 10 requires such testimony. The tragic reality is, as the facts of *Lonell J.* show, that emotional injury may be only one of the harms attributable to the chaos of domestic violence.

Accordingly, the certified questions should be answered

820 N.E.2d 840, 787 N.Y.S.2d 196, 2004 N.Y. Slip Op. 07617

in accordance with this opinion.

Judges G.B. SMITH, CIPARICK, ROSENBLATT, GRAFFEO, READ and R.S. SMITH concur.

Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the questions by this Court pursuant to section 500.17 of the Rules of **384* Practice of the Court of Appeals (22 NYCRR 500.17), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified questions answered in accordance with the opinion herein.

Parallel Citations

3 N.Y.3d 357, 820 N.E.2d 840, 2004 N.Y. Slip Op. 07617

Footnotes

1 "ACS" includes all named city defendants, including the City of New York. Apart from defendant John Johnson (Commissioner of the State Office of Children and Family Services, which oversees ACS), state officials are named in the complaint with respect to the assigned counsel portion of the case, which is not before us.

2 The District Court cited the testimony of a child protective manager that it was common practice in domestic violence cases for ACS to wait a few days before going to court after removing a child because "after a few days of the children being in foster care, the mother will usually agree to ACS's conditions for their return without the matter ever going to court" (203 F.Supp.2d at 170).

3 The injunction was stayed for six months to permit ACS to attempt reform on its own, free of the court's involvement, and to allow for an appeal. Thereafter, the City and ACS appealed, challenging the District Court's determination. The Second Circuit denied the City's request for an additional stay pending appeal.

4 Chief Judge Walker dissented, concluding that the injunction should be vacated because the evidence did not support the District Court's findings underpinning the injunction. In his view, the District Court's central factual finding that ACS had a policy of regularly separating battered mothers and children unnecessarily was "simply unsustainable" (*id.* at 177).

5 We are not asked to, nor do we, apply our answers to the trial record, though recognizing that in the inordinately complex human dilemma presented by domestic violence involving children, the law may be easier to state than apply.

6 The Legislature has recognized this "quandary" that a victim of domestic violence encounters (Senate Mem. in Support, 2002 McKinney's Session Laws of N.Y., at 1861). To avoid punitive responses from child protective services agencies, the Legislature attempted to increase awareness of child protective agencies of the dynamics of domestic violence and its impact on child protection by amending the Social Services Law to mandate comprehensive domestic violence training for child protective services workers (*id.*).

7 In *Tenenbaum v. Williams*, 193 F.3d 581 [2d Cir.1999], a child's parents brought an action pursuant to 42 USC § 1983 challenging the New York City Child Welfare Administration's removal of their five year old from her kindergarten class-under the emergency removal provision of Family Court Act § 1024-and taking her to the emergency room where a pediatrician and a gynecologist examined her for signs of possible sexual abuse. When they found none, the child was returned to her parents. The Second Circuit reversed the District Court's judgment in pertinent part and held that a jury could have concluded that the emergency removal for the medical examination violated the parents' and child's procedural due process rights, and the child's Fourth Amendment rights.

8 Under section 1028, a parent or person legally responsible for the care of a child may petition the court for return of the child after removal, if he or she was not present or given an adequate opportunity to be present at the section 1027 hearing. The factors to be considered when returning a child removed in an emergency mirror those considered in an initial determination under sections 1027 and 1022-best interests, imminent risk, and reasonable efforts to avoid removal.

9 The order must state the court's findings which support the necessity of removal, whether the parent was present at the hearing, what notice was given to the parent of the hearing and under what circumstances the removal took place (Family Ct. Act § 1027[b][i]).

10 The Legislature added these provisions to sections 1022 and 1028 as well.

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11 The order must state the court's findings concerning the necessity of removal, whether respondent was present at the hearing and what notice was given.

12 Section 1022 also requires that the child be brought immediately to a social services department, that the agency make every reasonable effort to inform the parent where the child is and that the agency give written notice to the parent of the right to apply to Family Court for return of the child.

13 Section 1026 permits the return of a child home, without court order, in a case involving neglect, when an agency determines in its discretion that there is no imminent risk to the child's health in so doing (Family Ct. Act § 1026[a], [b]). If the agency does not return the child for any reason, the agency must file a petition forthwith, or within three days if good cause is shown (Family Ct. Act § 1026[c]).

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269 A.D.2d 192, 703 N.Y.S.2d 32, 2000 N.Y. Slip Op. 01210

(Cite as: 269 A.D.2d 192, 703 N.Y.S.2d 32)

H

Supreme Court, Appellate Division, First Department, New York.

Hedda NUSSBAUM, Plaintiff-Respondent,

v.

Joel STEINBERG, Defendant-Appellant.

Brooklyn Law School, Amici Curiae.

Feb. 10, 2000.

Plaintiff brought an intentional tort suit against an incarcerated defendant. The Supreme Court, New York County, Steven Liebman, Special Referee, denied defendant's motion for summary judgment dismissing the action as time-barred, and the same court, Walter Tolub, J., denied defendant's motion for an order directing his production at a hearing to determine whether and to what extent plaintiff was under an insanity disability. On review, the Supreme Court, Appellate Division, held that: (1) defendant was not entitled to a jury trial of the question of whether plaintiff was under the disability of insanity so as to toll the statute of limitations; (2) denial of defendant's motion to be transported from prison to attend the hearing was proper and did not deny defendant due process; and (3) evidence demonstrated that plaintiff was unable to protect her legal rights because of an overall inability to function in society, which tolled the statute of limitations.

Affirmed.

West Headnotes

[1] Jury 230 k 19(6.5)

230 Jury

230II Right to Trial by Jury

230k19 Civil Proceedings Other Than Actions; Special Proceedings

230k19(6.5) k. Mental Health Determinations. Most Cited Cases

Defendant was not entitled to a jury trial of the question, referred to a Special Referee, of whether plaintiff was under the disability of insanity so as to toll the statute of limitations, and for what period of time. McKinney's CPLR 208.

[2] Constitutional Law 92 k 4827

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)11 Imprisonment and Incidents Thereof

92k4827 k. Access to Courts. Most Cited Cases

(Formerly 92k305(2))

Prisons 310 k 310

310 Prisons

310II Prisoners and Inmates

310II(H) Proceedings

310k307 Actions and Litigation

310k310 k. Presence or Appearance. Most Cited Cases

(Formerly 98k6)

Denial of defendant's motion to be transported from prison to attend a hearing on the issue of whether plaintiff was under the disability of insanity so as to toll the statute of limitations was proper and did not deny defendant due process; defendant was represented by counsel at the hearing and was not denied the right to cross-examine witnesses or to present evidence in his behalf. U.S.C.A. Const.Amend. 14; McKinney's CPLR 208.

[3] Limitation of Actions 241 k 197(1)

241 Limitation of Actions

241V Pleading, Evidence, Trial, and Review

241k194 Evidence

241k197 Weight and Sufficiency

241k197(1) k. In General. Most Cited Cases

Evidence demonstrated that, during the 10-year period preceding the commencement of an intentional tort action, the plaintiff was unable to protect her legal rights because of an overall inability to function in society, which tolled the one-year statute of limitations for intentional torts. McKinney's CPLR 208.

**33 Betty Levinson, for Plaintiff-Respondent.

Joel Steinberg, Pro Se.

Elizabeth M. Schneider, Nicole Scarmato, Catherine Paszkowska, Theresa Quinn, Lina Del Plato, for Amici Curiae.

WILLIAMS, J.P., ELLERIN, LERNER, RUBIN and SAXE, JJ.

MEMORANDUM DECISION.

*192 Order, Supreme Court, New York County (Steven Liebman, Special Referee), entered March 13, 1997, which denied defendant's motion for summary judgment seeking dismissal of the action as time-barred, and order, same court, (Walter Tolub, J.), entered October 13, 1994, which denied defendant's motion for an order directing his production at a hearing held to determine whether and to what extent plaintiff was under the insanity disability of CPLR 208, unanimously affirmed, with costs.

[1][2] Defendant was not entitled to a jury trial of the question, referred to a Special Referee, i.e., whether plaintiff was under the disability of insanity so as to toll the Statute of Limitations pursuant to CPLR 208, and for what period of time (see, Yannon v. RCA Corp., 131 A.D.2d 843, 517 N.Y.S.2d 205; compare, Libertelli v. Hoffman-La Roche, Inc., 565 F.Supp. 233, recognizing right to jury trial of the issue in Federal courts, but not necessarily in State courts). The denial of defendant's motion to be transported from prison to attend the hearing was proper and did not deny defendant due process since defendant was represented by counsel at the hearing and was not denied the right to cross-examine witnesses or to present evidence in his behalf (see, Matter of Raymond Dean L., 109 A.D.2d 87 88, 490 N.Y.S.2d 75; Pope v. Pope, 198 A.D.2d 406, 604 N.Y.S.2d 137; Cook v. Boyd, 881 F.Supp. 171, 175, affd. 3d Cir., 85 F.3d 611, cert. denied 519 U.S. 891, 117 S.Ct. 231, 136 L.Ed.2d 162).

[3] The evidence adduced at the hearing and credited by the *193 Special Referee amply demonstrated that, during the 10-year period preceding the commencement of this action, plaintiff was unable to protect her legal rights because of an overall inability to function in society, which tolled the one-year Statute of Limitations for intentional torts pursuant to CPLR 208 (see, McCarthy v. Volkswagen of Am., Inc., 55 N.Y.2d 543, 548, 450 N.Y.S.2d 457, 435 N.E.2d 1072).

N.Y.A.D. 1 Dept.,2000.

Nussbaum v. Steinberg

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McKinney's Consolidated Laws of **NewYork** Annotated
FamilyCourtAct(Refs & Annos)
Article 8. **FamilyOffenses** Proceedings (Refs & Annos)
Part 1. Jurisdiction

McKinney's **Family Court Act** § 812

§ 812. Procedures for **family offense** proceedings

Effective: December 18, 2013

Currentness

1. Jurisdiction. The **family court** and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of section 130.60 of the penal law, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, criminal obstruction of breathing or blood circulation, strangulation in the second degree, strangulation in the first degree, assault in the second degree, assault in the third degree, an attempted assault, identity theft in the first degree, identity theft in the second degree, identity theft in the third degree, grand larceny in the fourth degree, grand larceny in the third degree or coercion in the second degree as set forth in subdivisions one, two and three of section 135.60 of the penal law between spouses or former spouses, or between parent and child or between members of the same **family** or household except that if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the penal law, then the **family court** shall have exclusive jurisdiction over such proceeding. Notwithstanding a complainant's election to proceed in **family court**, the criminal court shall not be divested of jurisdiction to hear a **family offense** proceeding pursuant to this section. In any proceeding pursuant to this article, a court shall not deny an order of protection, or dismiss a petition, solely on the basis that the acts or events alleged are not relatively contemporaneous with the date of the petition, the conclusion of the fact-finding or the conclusion of the dispositional hearing. For purposes of this article, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this article, "members of the same **family** or household" shall mean the following:

(a) persons related by consanguinity or affinity;

(b) persons legally married to one another;

(c) persons formerly married to one another regardless of whether they still reside in the same household;

(d) persons who have a child in common regardless of whether such persons have been married or have lived together at any time; and

(e) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship".

2. Information to petitioner or complainant. The chief administrator of the courts shall designate the appropriate persons, including, but not limited to district attorneys, criminal and **family** **court** clerks, corporation counsels, county attorneys, victims assistance unit staff, probation officers, warrant officers, sheriffs, police officers or any other law enforcement officials, to inform any petitioner or complainant bringing a proceeding under this article, before such proceeding is commenced, of the procedures available for the institution of **family** **offense** proceedings, including but not limited to the following:

(a) That there is concurrent jurisdiction with respect to **family** **offenses** in both **family** **court** and the criminal courts;

(b) That a **family** **court** proceeding is a civil proceeding and is for the purpose of attempting to stop the violence, end the **family** disruption and obtain protection. Referrals for counseling, or counseling services, are available through probation for this purpose;

(c) That a proceeding in the criminal courts is for the purpose of prosecution of the offender and can result in a criminal conviction of the offender;

(d) That a proceeding or action subject to the provisions of this section is initiated at the time of the filing of an accusatory instrument or **family** **court** petition, not at the time of arrest, or request for arrest, if any;

(e) Repealed.

(f) That an arrest may precede the commencement of a **family** **court** or a criminal court proceeding, but an arrest is not a requirement for commencing either proceeding; provided, however, that the arrest of an alleged offender shall be made under the circumstances described in subdivision four of section 140.10 of the criminal procedure law;

(g) That notwithstanding a complainant's election to proceed in **family court**, the criminal court shall not be divested of jurisdiction to hear a **family offense** proceeding pursuant to this section.

3. Official responsibility. No official or other person designated pursuant to subdivision two of this section shall discourage or prevent any person who wishes to file a petition or sign a complaint from having access to any court for that purpose.

4. Official forms. The chief administrator of the courts shall prescribe an appropriate form to implement subdivision two of this section.

5. Notice. Every police officer, peace officer or district attorney investigating a **family offense** under this article shall advise the victim of the availability of a shelter or other services in the community, and shall immediately give the victim written notice of the legal rights and remedies available to a victim of a **family offense** under the relevant provisions of the criminal procedure law, the **family court act** and the domestic relations law. Such notice shall be available in English and Spanish and, if necessary, shall be delivered orally and shall include but not be limited to the following statement:

"If you are the victim of domestic violence, you may request that the officer assist in providing for your safety and that of your children, including providing information on how to obtain a temporary order of protection. You may also request that the officer assist you in obtaining your essential personal effects and locating and taking you, or assist in making arrangement to take you, and your children to a safe place within such officer's jurisdiction, including but not limited to a domestic violence program, a **family** member's or a friend's residence, or a similar place of safety. When the officer's jurisdiction is more than a single county, you may ask the officer to take you or make arrangements to take you and your children to a place of safety in the county where the incident occurred. If you or your children are in need of medical treatment, you have the right to request that the officer assist you in obtaining such medical treatment. You may request a copy of any incident reports at no cost from the law enforcement agency. You have the right to seek legal counsel of your own choosing and if you proceed in **family court** and if it is determined that you cannot afford an attorney, one must be appointed to represent you without cost to you.

You may ask the district attorney or a law enforcement officer to file a criminal complaint. You also have the right to file a petition in the **family court** when a **family offense** has been committed against you. You have the right to have your petition and request for an order of protection filed on the same day you appear in court, and such request must be heard that same day or the next day court is in session. Either court may issue an order of protection from conduct constituting a **family offense** which could include, among other provisions, an order for the respondent or defendant to stay away from you and your children. The **family court** may also order the payment of temporary child support and award temporary custody of your children. If the **family court** is not in session, you may seek immediate assistance from the criminal court in obtaining an order of protection.

The forms you need to obtain an order of protection are available from the **family court** and the local criminal court (the addresses and telephone numbers shall be **listed**). The resources available in this community for information relating to domestic violence, treatment of injuries, and places of safety and shelters can be accessed by calling the following 800 numbers (the statewide English and Spanish language 800 numbers shall be **listed** and space shall be provided for local domestic violence hotline telephone numbers).

Filing a criminal complaint or a **family court** petition containing allegations that are knowingly false is a crime."

The division of criminal justice services in consultation with the state office for the prevention of domestic violence shall prepare the form of such written notice consistent with the provisions of this section and distribute copies thereof to the appropriate law enforcement officials pursuant to subdivision nine of section eight hundred forty-one of the executive law. Additionally, copies of such notice shall be provided to the chief administrator of the courts to be distributed to victims of **family offenses** through the **family court** at such time as such persons first come before the court and to the state department of health for distribution to all hospitals defined under article twenty-eight of the public health law. No cause of action for damages shall arise in favor of any person by reason of any failure to comply with the provisions of this subdivision except upon a showing of gross negligence or willful misconduct.

Credits

(L.1962, c. 686. Amended L.1964, c. 156, § 1; L.1969, c. 736, § 2; L.1977, c. 449, § 1; L.1978, c. 628, § 3; L.1978, c. 629, § 2; L.1980, c. 530, §§ 5, 6; L.1981, c. 416, § 14; L.1983, c. 925, § 1; L.1984, c. 948, § 7; L.1986, c. 847, § 1; L.1990, c. 577, § 1; L.1990, c. 667, § 2; L.1992, c. 345, § 7; L.1994, c. 222, §§ 6 to 9; L.1994, c. 224, § 1; L.1995, c. 440, § 1; L.1999, c. 125, §§ 3, 4, eff. June 29, 1999; L.1999, c. 635, § 7, eff. Dec. 1, 1999; L.2007, c. 541, § 1, eff. Nov. 13, 2007; L.2008, c. 326, § 7, eff. July 21, 2008; L.2009, c. 476, § 4, eff. Dec. 15, 2009; L.2010, c. 341, § 5, eff. Aug. 13, 2010; L.2010, c. 405, § 9, eff. Nov. 11, 2010; L.2013, c. 526, § 1, eff. Dec. 18, 2013.)

Code of Federal Regulations
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter F. Tribal Government
Part 63. Indian Child Protection and Family Violence Prevention (Refs & Annos)
Subpart C. Indian Child Protection and Family Violence Prevention Program

25 C.F.R. § 63.36

§ 63.36 What are the special requirements for Indian child protection and family violence prevention programs?

Currentness

(a) Each tribe must develop appropriate standards of service, including caseload standards and staffing requirements. The following caseload standards and staffing requirements are comparable to those recommended by the Child Welfare League of America, and are included to assist tribes in developing standards for Indian child protection and family violence prevention programs:

(1) Caseworkers providing services to abused and neglected children and their families have a caseload of 20 active ongoing cases and five active investigations per caseworker.

(2) Caseworkers providing services to strengthen and preserve families with children have a caseload of 20 families. If intensive family-centered crisis services are provided, a caseload of 10 families per caseworker is recommended.

(3) It is recommended that there be one supervisor for every six caseworkers.

(b) The negotiation and award of contracts, grants, or funding agreements under these regulations must include the following requirements:

(1) Performance of background investigations to ensure that only those individuals who meet the standards of character contained in § 63.12 are employed in positions which involve regular contact with or control over Indian children.

(2) Submission of an annual report to the contracting officer's representative which details program activities, number of

children and families served, and the number of child abuse, child neglect, and family violence reports received.

(3) Assurance that the identity of any person making a report of child abuse or child neglect will not be disclosed without the consent of the individual and that all reports and records collected under these regulations are confidential and to be disclosed only as provided by Federal or tribal law.

(4) Assurance that persons who, in good faith, report child abuse or child neglect will not suffer retaliation from their employers.

SOURCE: 61 FR 32274, June 21, 1996, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 13, 200, 3201 et seq.; 42 U.S.C. 13041.

LAW REVIEWS

Tribal efforts to comply with **VAWA's** full faith and credit requirements: A response to Sandra Schmieder. 39 Tulsa L. Rev. 403 (2003).

Current through July 30, 2015; 80 FR 45448.

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