Nos. 99-5, 99-29

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA
Petitioner

v.

ANTONIO J. MORRISON, ET AL.,
Respondents

CHRISTY BRZONKALA,
Petitioner

v.

ANTONIO J. MORRISON, ET AL.,
Respondents

BRIEF OF CLARENDON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Filed December 13, 1999

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37.3 of this Court, Clarendon Foundation respectfully submits this brief *amicus curiae* in support of Respondents.[1] Written consent to the filing of this brief has been granted by all parties. Copies of the letters of consent have been lodged with the Clerk. Clarendon Foundation is a nonprofit, nonpartisan legal foundation concerned with significant issues related to the Constitution and democratic government, particularly in the areas of federalism and separation of powers. Because this case raises questions relating to the proper bounds of federal power, we believe our perspective will complement the briefs of the parties and assist the Court in the resolution of the issues at hand.

INTRODUCTION AND SUMMARY OF ARGUMENT

In its recent report, the American Bar Association's Task Force on the Federalization of Criminal Law concluded that the increase in federal crimes "cover[ing] historically state-prosecuted areas (including essentially local conduct and sometimes street crime) is certainly significant [and] troubling." *The Federalization of Criminal Law* 10-11 (1998). The Report observes that there is an "absence of any underlying principle governing Congressional choice to criminalize conduct under federal law that is already criminalized by state law." *Id.* at 14. This "federalization" of criminal laws threatens to "undermine[] the state-federal fabric and disrupt[] the important constitutional balance of federal and state systems," a balance that would "alter . . . the careful decentralization of criminal law authority that has worked well for all of our constitutional history." *Id.* at 43, 50.

The provision of the Violence Against Women Act ("VAWA") at issue in this case, 42 U.S.C. § 13981(c), creates a private right

[1] Clarendon Foundation states that no counsel for a party authored this brief in whole or in part, and no person or entity other than Clarendon Foundation made a monetary contribution to the preparation or submission of the brief. SUP. CT. R. 37.6.

of action against any "person . . . who commits a crime of violence motivated by gender." Section 13981(c) is not a criminal statute, although VAWA contains criminal provisions. *E.g.*, 18 U.S.C. § 2261(a)(1) (punishing a person "who travels across a State line . . . with the intent to injure, harass, or intimidate that person's spouse or intimate partner"); § 2262 (punishing "interstate violation of [a] protective order"). There has always been a strong connection between crime and tort in the area of civil rights. Congress has historically provided for both actions. *See* Civil Rights Act of 1875, § 2, ch. 114, 18 Stat. 336 (providing both civil and criminal remedies for civil rights violations); Civil Rights Act of 1871, §§ 2, 6, ch. 22, 17 Stat. 13-14 (same); Civil Rights Act of 1870, §§ 2-4, ch. 114, 16 Stat. 140-41 (same). It makes sense for Congress to do so because "[b]oth crime and tort fit into the larger category of breaches of the king's peace." David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. Rev. 59, 59 (1996). "Crime and tort were different ways for a victim to pursue justice for the same wrongful act." *Id.* at 83. See *also* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795, 1803-13 (1992).

While we recognize that Section 13981 does not, strictly speaking, bring the criminal authority of the United States to bear on the defendants-respondents, this brief will focus on the general criminal authority of the United States because the source of that particular authority was of great concern both to the framers of the Constitution and to the framers of the Fourteenth Amendment.[2] Moreover, the constitutional authority for congressionally-defined crime and tort must rest on the same basis. Section 13981 must rest upon the same authority that Congress would have to define and punish the underlying "crime of violence motivated by gender." 42 U.S.C. § 13981(c). *See also United States v.*

[2] Much of the argument that follows has been adapted from Professor Bybee's study of Congress's criminal jurisdiction. Jay S. Bybee, *Insuring Domestic Tranquility:* Lopez, *Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 Geo. Wash. L. Rev. 1 (1997).

Cruikshank, 92 U.S. 542, 553-54 (1875) ("It is no more . . . within the power of the United States to punish for a conspiracy to . . . murder within a State, than it would be to punish for . . . murder itself.").

The United States has asserted two sources of constitutional authority for the VAWA: The Commerce Clause (art. I, § 8, cl. 3) and Section 5 of the Fourteenth Amendment. *See* 42 U.S.C. § 13981(a). In Section I, we discuss the deep concern of the framers of the Constitution that the federal government's authority under the Constitution be limited so as not to undermine the states as the primary organs for defining and punishing crime. Commenting on the delicate balance between state and federal governments, Alexander Hamilton thought "the ordinary administration of criminal and civil justice" to be the "one transcendent advantage" the states possessed over the federal government. *The Federalist No.* 17, at 107 (Jacob E. Cooke, ed. 1961). Thus, "[t]he administration of private justice between the citizens of the same state . . . can never be desirable cares of a general jurisdiction." *Id.* at 106. As Chief Justice Marshall later observed, Congress cannot "punish felonies generally." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 246, 428 (1821).

The framers' intentions are evident in the constitutional scheme, in the Preamble; in the grant of express authority to punish treason, counterfeiting, and piracy on the high seas; and in the Domestic Violence Clause (art. IV, § 4), which provides that the "United States . . . shall protect each of [the States] . . . against domestic Violence" following "Application of the Legislature, or of the Executive (when the Legislature cannot be convened)." In establishing the Constitution, the framers intended for the federal government to *insure* domestic tranquility in the states; it was not to *provide* for it, as the government would do for the common defense of the United States.

Section 13981 is contrary to this careful scheme. If the government's theory of the Commerce Clause sustains this Act, then it is indeed "difficult," if not impossible, "to perceive any limitation on federal power" (*United States v. Lopez*, 514 U.S. 549,

564 (1995)). It suggests that "the first dut[y] of government . . . [to] afford . . . protection" (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)) belongs to Congress first and to the states only as a matter of congressional sufferance. It means that the framers really intended for Congress to provide for criminal law protection rather than insure it; that the framers had no reason to give Congress express provision to punish treason, counterfeiting, or piracy; and that the Domestic Violence Clause is not a guarantee to the states of federal support for state law enforcement efforts, but mere surplusage.

Congress has also asserted Section 5 of the Fourteenth Amendment as independent authority for Section 13981. *See* 42 U.S.C. § 13981(a). Even as the framers of the Fourteenth Amendment agreed that Congress should have some power to protect civil rights from unjust state actions, they expressed the same concerns held by the original framers--that Congress not undermine state enforcement of criminal laws.

Section 5 supplies no greater authority for Section 13981 than does the Commerce Clause. The framers of the Fourteenth Amendment rejected Representative John Bingham's proposal that would have given Congress general power to provide for equal protection of all persons. Instead, the framers drafted a Fourteenth Amendment that contains self-enforcing provisions in Section 1. Nevertheless, in Section 5, Congress acquired power to enforce these provisions. Congress may enact "remedial, preventive legislation" (*Boerne v. Flores*, 521 U.S. 507, 531 (1997)), so long as the legislation is proportional and congruent to some putatively unconstitutional state action. *See Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999). Congress has been granted the power to enforce violations of equal protection, not to grant protection in the first instance. As Representative James Garfield observed during the civil rights enforcement debates, Congress has power to act when "laws of the State are unequal" or there is "a systematic maladministration of the [the laws], or a neglect or refusal to enforce their provisions." But "when we provide by congressional enactment to punish a

mere violation of a State law, we pass the line of constitutional authority." Cong. Globe, 42d Cong., 1st Sess. app. at 153, 154 (1871).

In Section 13981, Congress has created a general tort remedy. The Act requires no showing that Virginia's laws are unequal, or that there is an inadequate remedy in Virginia for gender-based violence, or that Virginia has refused to enforce its laws in favor of women (or men). Congress's response to the problem of gender-based violence was simply to coopt the field nationally. In debates over an early draft of the Fourteenth Amendment, Senator Stewart pointed out that one means of securing equal protection is "to legislate fully upon all subjects affecting life, liberty, and property, and in this way secure uniformity and equal protection." But if Congress were permitted to do this, he warned, "there would not be much left for the State Legislatures." Cong. Globe, 39th Cong., 1st Sess. 1082 (1866). *See Boerne*, 521 U.S. at 521. As we discuss in Section II, the framers of the Fourteenth Amendment drafted that amendment to give Congress power to address inequities, but rejected the idea that Congress should have the power to legislate fully on all subjects.

ARGUMENT

I. THE FRAMERS OF THE CONSTITUTION GRANTED CONGRESS LIMITED POWER TO DEFINE AND PUNISH CRIME; SECTION 13981 IS CONTRARY TO THE CONSTITUTIONAL SCHEME

As the delegates opened the constitutional convention in May 1787, the question of the states' ability to suppress violence was very much on their minds. Only three months earlier Massachusetts had reestablished order over Shay's Rebellion. That uprising, in which cash-poor farmers facing debtors' courts and prison terms closed the state courts, had threatened the security not only of Massachusetts, but of Maryland, New Jersey, Pennsylvania, South Carolina and Virginia as well. *See* David P.

Szatmary, *Shay's Rebellion: The Making of an Agrarian Insurrection* 123-26 (1980). As Virginia Governor Edmund Randolph welcomed the delegates, he listed among the reasons for convening the convention the inability of the federal government to "check . . . rebellion" in the states and "to interpose according to the exigency." 4 *The Debates in the Several States on the Adoption of the Federal Constitution* 127 (Jonathan Elliot ed., 1836) ("*Elliot's Debates*").

Although the framers anxiously sought support for states that might face insurrection, the framers (and others) were concerned that the new federal government might acquire a general power to adopt its own criminal code, thereby authorizing the United States to assume primary responsibility for violence committed against either citizens or state and local governments. The framers' concerns over Shay's Rebellion and the scope of the new government's power to define and punish crime manifested themselves in three provisions in the Constitution: First, in the Preamble, which declared it the purpose of the United States to insure domestic tranquility; second, in Congress's express powers to punish counterfeiting (art. I, § 8, cl. 6), piracies and felonies on the high seas (art. I, § 8, cl. 10), and treason (art. III, § 3) and to legislate exclusively for the District of Columbia (art. I, § 8, cl. 17) and the territories (art. IV, § 3, cl. 2); and third, in the Domestic Violence Clause, by which the United States "shall protect [the states] . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence" (art. IV, § 4).

A. The Preamble Declared The Purpose Of The Constitution Is To "Insure," Not To "Provide" For, Domestic Tranquility

The Constitution dispelled any doubts that the United States would assume some responsibility for punishing crime. At the same time, it carefully limited the power the United States would exercise. The constitutional scheme can be discerned, quite subtly,

from the Preamble. In contrast to the Articles of Confederation, the new federal government assumed responsibility to wage war, raise armies and navies, direct the militia (art. I, § 8, cls. 11-16; art. II, § 2, cl. 1) and protect the United States against invasion (art. IV, § 4). The states relinquished their right to "engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay" (art. I, § 10, cl. 3), making the federal power over war exclusive. The national government thus assumed the duty to "*provide* for the common defence."

In contrast to its war powers, the United States acquired various powers that it would share concurrently with the states. Guardianship of these powers would assist in the promotion of the "general Welfare." These included the power to tax and spend to that end (art. I, § 8, cl. 1). *See United States v. Butler*, 297 U.S. 1 (1936). Those powers are well suited for Congress to "*promote* the general welfare," although stopping short of demanding that Congress "provide" for it. The framers contemplated that Congress would share the responsibility for promoting the general welfare with the states.

On the other hand, the Constitution did not grant Congress an exclusive power (as it had over war) or general enumerated powers (as it had for spending for the general welfare) to provide for domestic tranquility. The United States obligated itself to protect the states against domestic violence "on Application of the Legislature, or of the Executive (when the Legislature cannot be convened)" (art. IV, § 4). Congress did not assume primary responsibility–whether exclusive or concurrent–for quelling domestic violence. Rather, its responsibility was secondary: The United States was to "*insure* domestic tranquility" when the states, in their own judgment, proved incapable. This scheme by which the federal government would serve to back up the states did not create a perfect union, but only "a more perfect union."

B. The Constitution Granted Congress Limited Power To Punish Crimes Related To Its Enumerated Powers

1. The Enumerated Crimes

The Constitution expressly grants Congress the power to punish three crimes: counterfeiting the securities and current coin of the United States (art. I, § 8, cl. 6), piracies and felonies committed on the high seas (art. I,§ 8, cl. 10), and treason (art. III, § 3, cl. 3).[3] The Constitution also granted Congress exclusive power over the District of Columbia (art. I, § 8, cl. 17) and over federal territories and property (art. IV, § 3, cl. 2), locations in which no state would be competent to administer its criminal law. To these the Necessary and Proper Clause potentially added uncertain powers to Congress to define and punish crimes related to "all other Powers vested . . . in the Government of the United States" (art. I, § 8, cl. 18).

The question that naturally arose from the enumeration of these crimes was whether they constituted the complete federal domain over crime. In the Virginia convention, for example, Patrick Henry, who opposed ratification, argued that "congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence–petty larceny. They may define crimes and prescribe punishments." 3 *Elliot's Debates, supra*, at 447. To this George Nicholas responded that the enumerated powers doctrine barred Congress from defining any crimes not enumerated.

> [Mr. Henry] says that, by this Constitution, [Congress has] power to make laws to define crimes and prescribe punishments; . . . Treason against the United States is defined in the Constitution . . . . Congress have power to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations; but they cannot define or prescribe the punishment of any other crime whatever, without violating the Constitution. . . . [William Grayson] says that the power of legislation includes every thing. A general power of legislation does. But this is a special power of legislation. Therefore, it does not contain that plenitude of power which he imagines. They cannot legislate in any case but those particularly enumerated.

Id. at 451. In one of the earliest commentaries on the Constitution, St. George Tucker supported Nicholas' argument: "[Congress is] not entrusted with a general power over [the subject of crimes and misdemeanors], but a few offences are selected from the great mass of crimes . . . . All felonies and offences committed upon land, in all cases not expressly enumerated, being reserved to the states respectively." 1 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* app. 414-15 (1803).[4]

Alexander Hamilton expressed a different concern from Patrick Henry, but demonstrated his general agreement with Henry's detractors that Congress could not assume a general power superior to the states to punish crime. Hamilton thought the states privileged over the federal government because they retained control over criminal law enforcement. "It will always be far more easy for the State governments to encroach upon the national authorities, than for the national government to encroach upon the State authorities." The "proof of this proposition" rested on the "greater degree of influence" exercised by the states and evidenced by "one transcendent advantage"–"the ordinary administration of

[3] In addition, the Constitution refers to the crime of bribery and "other high Crimes and Misdemeanors" (art. II, § 4), although it does not expressly grant Congress the power to define or punish such crimes.

[4] The argument was made again by Thomas Jefferson in the Kentucky Resolutions, written in protest of the Alien and Sedition Acts. Referring to the enumerated crimes and quoting the Tenth Amendment, Jefferson wrote that the Sedition Act "(and all other acts which assumed to create, define, or punish crimes other than those enumerated in the Constitution,) are altogether void, and of no force; and that the power to create, define, and punish, such other crimes is reserved, and of right appertains, solely and exclusively, to the respective states, each within its own territory." Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, *reprinted in* 4 *Elliot's Debates*, *supra*, at 540.

criminal and civil justice." *The Federalist No.* 17, at 106, 107 (Jacob E. Cooke, ed. 1961). Because of the relative advantage of the states in this regard, "[t]he administration of private justice between the citizens of the same state . . . . can never be desirable cares of a general jurisdiction." *Id.* at 106. Hamilton thought that "regulating all those personal interests and familiar concerns to which the sensibility of individual is more immediately awake" was the "great cement of society" and made of the states "a complete counterpoise and not unfrequently dangerous rivals to the power of the Union." *Id.* at 107-08.

2. The Necessary and Proper Clause

A month after the constitutional convention, Colonel George Mason wrote George Washington to explain his objections to the proposed Constitution, including his concern that the Necessary and Proper Clause might permit Congress to "constitute new crimes." *Pamphlets on the Constitution of the United States* 331 (1968). "An Impartial Citizen" of Virginia answered Colonel Mason's argument directly: "It is also objected by Mr. Mason, that under [the Federalists'] own construction of the general clause, at the end of the enumerated powers, the Congress may grant monopolies in trade, constitute new crimes, inflict unusual punishments, and, in short, do whatever they please." For the "Impartial Citizen," "[n]othing can be more groundless and ridiculous than this. . . . [T]he laws which Congress can make, for carrying into execution the conceded powers, must not only be *necessary*, but *proper*–So that if those powers cannot be executed without the aid of a law . . . creating new crimes . . . as such a law would be manifestly *not proper*." *An Impartial Citizen V, On the Federal Constitution* (Feb. 28, 1788), *reprinted in* 8 The Documentary History of the Ratification of the Constitution 431 (Kaminski & Saladino eds., 1988). *See United States v. Printz*, 521 U.S. 898, 923-24 (1997).

Any notion that Congress had power only over the enumerated crimes was dispelled by the First Congress. In 1790, Congress

adopted an "Act for the Punishment of certain Crimes against the United States" (Act of April 30, 1790, ch. 9, 1 Stat. 112). Fulfilling the mandate of Article I, Section 8, Congress defined and punished treason, piracy and counterfeiting. It also defined crimes in places under the sole jurisdiction of the United States and further defined certain crimes related to federal activities, including the misprision of federal felonies, receiving goods stolen in contravention of U.S. law, perjury, bribery of judges, and obstruction of process.

While the Act of 1790 demonstrated that Congress intended to use the Necessary and Proper Clause to define crimes not expressly provided for in the Constitution, the early list of federal crimes was not a strong assertion of federal control of crime. These early crimes (like the Sedition Act, Act of July 14, 1798, ch. 74, 1 Stat. 596) punished acts against the government. Any crime may be understood as a challenge to the ability of the government to protect its citizens and to maintain the peace, but the early federal crimes punished those actions that challenged the government directly. It was not until after the Civil War that Congress enacted the first laws intended to protect individuals, rather than government. *See* Sara Sun Beale, *Federal Criminal Jurisdiction*, in 2 Encyclopedia of Crime and Justice 775-76 (Kadish, ed. 1983); Martin Conboy, *Federal Criminal Law*, in 1 Law: A Century of Progress, 1835-1935, at 311-24 (Reppy, ed. 1937).

During this early period, the Court had few opportunities to address the question of Congress's power to define and punish crime, but the Court's pronouncements did not depart from the sense that Congress could define crimes "necessary and proper" beyond the three enumerated crimes, and that Congress lacked a general power over crime. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Court inferred from Congress's power "[t]o establish Post Offices and post Roads," that Congress had the power "to punish those who steal letters from the post-office, or rob the mail." Chief Justice Marshall thought the "power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers." *Id.* at 417. In *United States v. Hudson &*

Goodwin, 11 U.S. (7 Cranch) 32 (1813), the Court held that federal courts did not have jurisdiction over common law crimes. "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." *Id.* at 34. *See also Liparota v. United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."); *United States v. Reese*, 92 U.S. 213, 216 (1876) ("If Congress has not declared an act done within a State to be a crime against the United States, the Courts have no power to treat it as such."). In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the Court confirmed that Congress must have an express source of authority to create a federal crime and that no provision granted to Congress a "general right to punish murder committed within any of the States." Congress "cannot punish felonies generally." *Id.* at 426, 428.

C. The Domestic Violence Clause Confirmed Congress's Lack Of Authority To Define and Punish Crimes Generally

The early framers also cited the Domestic Violence Clause (art. IV, § 4) as evidence that Congress had charge of the external police for the United States, but that ordinary police matters belonged to the states. The Constitution grants Congress the power to "call[] forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions," (art. I, § 8, cl. 15). In Article IV the Constitution also empowers the United States to protect the states against "Invasion." That section, however, did not give the United States the power to protect the states against "insurrections," as we might have expected. The framers substituted the broader phrase "domestic violence" for the term "insurrection" and they added a condition.

According to its authors, the term "domestic violence" included "dangerous commotions, insurrections and rebellions." 2 *The*

Records of the Federal Convention of 1787, at 47 (Max Farrand ed., rev. ed. 1937) (statement of James Wilson). The Attorney General has since advised that the constitutional phrase "domestic violence" includes "robbery, burglary, arson, rape, and murder" and has affirmed that "each State of the Union has the right to protect itself against domestic violence, and to invoke to that end the friendly cooperation, or at least the neutrality, of the United States." Yazoo City Post Office Case, 8 Op. Att'y Gen. 489, 494, 497 (1857). *See also* U.S. Dep't of Justice, The Use of Military Force Under Federal Law to Deal with Civil Disorders and Domestic Violence (1980).

The framers conditioned the exercise of federal power over domestic violence on the states requesting federal assistance. And the Constitution is quite specific that the request must come from the state legislature, unless it cannot convene, in which case a request from the governor will be sufficient. Although the Domestic Violence Clause at first appears to grant Congress power to suppress domestic violence, the clause is quite limited because Congress can intervene only when, *in the state's judgment*, the situation requires it. The Domestic Violence Clause thus shields the states from unwanted federal intervention. In the Virginia ratifying convention, Mr. Clay worried that the clause would permit the national government to intervene on the merest pretext of violence in a state. 3 *Elliot's Debates*, *supra*, at 407. Edmund Pendleton, President of the Virginia ratifying convention, stated that the Clause was more "a restraint on the general government not to interpose. The state is in full possession of the power of using its own militia to protect itself against domestic violence; and the power in the general government cannot be exercised, or interposed, without the application of the state itself." 3 *Elliot's Debates*, *supra*, at 441. *See also id.* at 408-25 (arguments of Patrick Henry, James Madison and others).

Although the immediate effect of the Domestic Violence Clause was to authorize federal assistance to the states, upon their request, to avoid future situations such as Shay's Rebellion, the framers and earliest commentators imputed to the Clause a secondary meaning:

That Congress could not supplant the states as the primary organ for criminal law. That is, if Congress could not intervene against the wishes of the state to suppress domestic violence, neither could it accomplish the same thing indirectly by legislating a criminal code for the states and then enforcing the code as federal law.[5] "Brutus" stated the general principle:

> The *protection and defence* of the community is not intended to be entrusted *solely* into the hands of the general government .... But it ought to be left to the state governments to provide for the protection and defence of the citizen against the hand of private violence, and the wrongs done or attempted by individuals to each other–Protection and defence against the murderer, the robber, the thief, the cheat, and the unjust person, is to be derived from the respective state governments. ... The preservation of internal peace and good order, and the due administration of law and justice, ought to be the first care of every government.

Essays of Brutus (VII) (Jan. 3, 1788), *reprinted in, The Complete Anti-Federalist* 400-01 (Storing, ed. 1981).

The earliest commentators argued that the condition imposed by the Domestic Violence Clause was necessary "otherwise the self-government of the state might be encroached upon at the pleasure of the Union." William Rawle, *A View of the Constitution* 299 (2d ed. 1829). Joseph Story, following St. George Tucker, believed

[5] These concerns were nearly realized in the Whiskey Rebellion of 1794. After President Washington sent federal troops to Pennsylvania to quash armed resistence to federal revenue laws, Pennsylvania's governor protested that Pennsylvania's resources were adequate to suppress the riots. Secretary of State Randolph responded that the United States had authority to "support their own authority" and added that the U.S. had to "preserve the character of Republican Government, by evincing that it has adequate resources for maintaining the public order." 4 Annals of Congress app. at 2832 (1796). Although the United States had the power to enforce its revenue laws, from Pennsylvania's perspective the greatest threat to its republican form of government was direct federal intervention. *See* Leland D. Baldwin, *Whiskey Rebels: The Story of a Frontier Uprising* 184 (1939) ("[Pennsylvania] state officials were silent, probably each reminded of the prophecy that the federal government would swallow up the states and interpreting [Washington's] proposal as a step in that direction.").

that "every pretext for intermeddling with the domestic concerns of any state, under colour of protecting it against domestic violence, is taken away [by the Domestic Violence Clause]." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1819, at 684-85 (1833). *See also* Thomas M. Cooley, *General Principles; of Constitutional Law in the United States of America* 198 (1880); 1 Tucker, *supra*, app. at 367.

D. Upholding Section 13981 As An Exercise Of The Commerce Power Would Be Inconsistent With The Constitutional Design

What the text and the historical records evidence is the singular resolve of the framers to grant Congress the power to enforce those matters uniquely entrusted to the federal government, but at the same time, not to entrust to Congress the general authority to maintain domestic peace. They determined not to undermine the states and to avoid creating in the federal government a national criminal code, with the concomitant need for a national police force. *See Terminiello v. Chicago*, 337 U.S. 1, 34-35 (1949) (Jackson, J., dissenting). As the Office of Legal Counsel described the balance between federal and state criminal law,

> The present posture of criminal law in the United States is consistent with that intended by the Founding Fathers: the States retain jurisdiction over crimes committed within the State which are local in nature; the Federal Government has jurisdiction over certain crimes that involve interstate commerce, taxes, assaults on Federal and foreign officials, and the like.

Use of Potatoes to Block the Maine-Canada Border, 5 Op. Off. Legal Counsel 422, 423 (1981).

The framers recognized that protection is the first duty of every government. Indeed, the fundamental privileges belonging to the citizens of the United States begin with "protection by the Government." *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230). "One of the first duties of government," the

Court said in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), is to "afford . . . protection." *See United States v. Cruikshank*, 92 U.S. 542, 550-51 (1875); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 76 (1872). As Hamilton stated, the administration of criminal and civil justice was "the visible guardian of life and property" and "contributes more than any other circumstance to impressing upon the people affection, esteem and reverence towards the government." *The Federalist No.* 17, at 107 (Jacob E. Cooke, ed. 1961).

So carefully ingrained was the principle, that its corollary was nearly as obvious: a government that cannot or will not protect its citizens is not a government that can expect to remain sovereign. The relationship between them is one of mutual consideration. The government provides protection, and its citizens return their loyalty. *See Calvin's Case*, 7 Coke's Rep. 1, 4b-5a ; 77 Eng. Rep. 382 (1609) ("for as the subject oweth to the King his true and faithful ligeance and obedience, so the sovereign is to govern and protect his subjects"); 1 William Blackstone, *Commentaries on the Laws of England* *47-48 (George Sharswood ed. 1860) ("the community should guard the rights of each individual member, and . . . (in return for this protection) each individual should submit to the laws of the community"). Perhaps the two most influential state constitutions of the founding period made protection the essence of government and loyalty the duty of its citizens. The Virginia Declaration of Rights stated that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community" (Va. Decl. of Rights § 3 (1776), *reprinted in* 2 Benjamin Perley Poore, *The Federal and State Constitutions, Colonial Charters and Other Organic laws of the United States* 1908 (2d ed. 1878)), while the Pennsylvania Constitution declared that its citizens professed their allegiance "in consideration of protection only" (Pa. Const. of 1776, *reprinted in* Poore, *supra*, at 1540). To the degree the federal government assumes responsibility for our protection, it is entitled to our loyalty, and when it becomes our sole protector, it becomes the object of our undivided loyalty.

It is too late to contest that crime, including gender-based acts such as rape, does not have an impact on the economy. The toll for crime, measured in human suffering, social upheaval, lost opportunities, and financial losses, is heavy indeed. But the burdens of "domestic violence"–as understood in the Constitution and defined by the Attorney General as "robbery, burglary, arson, rape, and murder" (8 Op. Att'y Gen. at 494)–have always been present, and yet the framers adamantly maintained that the Constitution did not dethrone the states as the primary source of criminal laws and torts.

If we accept the government's position–a position that plainly draws support from cases such as *Perez v. United States*, 402 U.S. 146 (1971); *Daniel v. Paul*, 395 U.S. 298 (1969); and *Wickard v. Filburn*, 317 U.S. 111 (1942)–the Commerce Clause will have become an inexhaustible font for federal criminal laws and torts. It will be "difficult to perceive any limitation on federal power . . . [in] criminal law enforcement" (*Lopez*, 514 U.S. at 564). The Commerce Clause will have swallowed the carefully written Domestic Violence Clause. And it will authorize Congress to do precisely what the framers denied would be possible–"punish felonies generally" (*Cohens*, 19 U.S. (6 Wheat.) at 428) and "administ[er] . . . private justice between the citizens of the same states" (*The Federalist No.* 17, at 107).

II. THE FRAMERS OF THE FOURTEENTH AMENDMENT DID NOT GRANT CONGRESS A GENERAL POWER TO PROVIDE EQUAL PROTECTION OF LAW, BUT A LIMITED POWER TO REMEDY STATE VIOLATIONS OF THAT CLAUSE

Even if Congress does not have power to enact Section 13981 under its Article I powers, Congress also has asserted Section 5 of the Fourteenth Amendment as an independent source of authority. In this section, we demonstrate that although the framers of the Fourteenth Amendment were concerned–justifiably–with the equal protection of the laws in the states, the Fourteenth Amendment did

not grant Congress the power to adopt criminal laws for the general protection of people; rather, in Section 5, it secured the power to enforce the requirement in Section 1 that state protection of the laws be offered equally. Congress's power under Section 5 is the power to correct unconstitutional state action, not the power to supplant the states.

A. The Framers Of The Fourteenth Amendment Carefully Considered And Then Expressly Rejected John Bingham's Proposed Amendment Granting Congress General Power Over Equal Protection Of Law

1. The Debates Over the Bingham Amendment

In early 1866, shortly after ratification of the Thirteenth Amendment, Congress began work on three important pieces of reconstruction legislation: the Freedmen's Bureau Bill, the Civil Rights Act of 1866, and the Fourteenth Amendment. Both the Freedmen's Bureau Bill and the Civil Rights Act incorporated controversial criminal provisions. Section 8 of the Freedmen's Bureau Bill made it a misdemeanor to deprive persons of their civil rights on the basis of race, color, or previous condition of servitude. S. 60, 39th Cong., § 8 (1866). Section 2 of the Civil Rights Act made it a misdemeanor for a person, under color of law, to deprive an inhabitant of any State or Territory of civil rights enumerated in the Act. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27. President Andrew Johnson vetoed both bills. *See* Cong. Globe, 39th Cong., 1st Sess. 915-17, 1679-81 (1866). In his veto message returning the Civil Rights Act, the President explained that the bill would preempt state law: In the "vast domain of criminal jurisprudence, provided by each State for the protection of its own citizens, and for the punishment of all persons who violate its criminal laws, Federal law, wherever it can be made to apply, displaces state law." *Id.* at 1680. Congress overrode the veto with respect to the Civil Rights Act, but not the return of the Freedmen's Bureau Act. Nevertheless, members of Congress had

lingering doubts over the constitutionality of the civil rights legislation and renewed their efforts to secure an amendment to the Constitution.

In February 1866, Representative John Bingham, a member of the Joint Committee on Reconstruction, proposed a new amendment:

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

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866). Despite Bingham's assurance that the proposed amendment did not "take away from any State any right that belongs to it" (*id.* at 1088), he admitted that under his proposal Congress would have the power to make laws equal. *Id.* at 1093-94. Republican Representative Robert Hale warned that under Bingham's Amendment, "all State legislation, in its codes of civil and criminal jurisprudence and procedures . . . may be overridden, may be repealed or abolished, and the law of Congress established instead" (*id.* at 1063). Senator Stewart argued that the only way to make the laws equal was to make them uniform.

> The only way this could be accomplished, would be for Congress to legislate fully upon all subjects affecting life, liberty, and property, and in this way secure uniformity and equal protection to all persons in the several States. When this was done, there would not be much left for the State Legislatures.

Id. at 1082. Bingham's amendment faced formidable opposition in the House and was tabled permanently in February 1866. *See Boerne*, 521 U.S. at 521-22.

In May 1866, a revised amendment was introduced which, with little recorded discussion, was adopted by Congress and ratified by the states. Although Bingham's first proposed amendment had not survived, the contrast between his failed amendment and the

Fourteenth Amendment continued to be a source of controversy during the civil rights enforcement debates.

2. The Civil Rights Enforcement Act Debates

Beginning in 1870, Congress enacted a number of laws creating civil remedies in tort and criminal offenses against persons who deprived others of their civil and political rights. Some of these provisions were directed at persons who acted under color of state law or attempted to interfere with official actions. Civil Rights Act of 1871, ch. 22, 17 Stat. 13, codified in part, as amended, at 42 U.S.C. § 1983 (providing a cause of action against persons acting "under color of state law"), § 1985 (providing a cause of action against persons conspiring to interfere with federal officials, court proceedings, or federal privileges or immunities); Act of May 31, 1870, ch. 114, 16 Stat. 140, codified in part, as amended, at 42 U.S.C. §§ 1987, 1990 (punishing federal officials who refused to serve process). Other provisions created crimes or tort actions against private persons. *See, e.g.* Act of March 1, 1875, ch. 114, 18 Stat. 335 (making it a misdemeanor to deny equal enjoyment of public accommodations and granting private parties the right to recover a civil fine).[6]

The debates over these acts, in particular, the Ku Klux Klan Act or Civil Rights Act of 1871, focused directly on the question of what power Congress had under the Constitution, including the new Fourteenth Amendment, to punish crime committed by private persons.[7] Representatives John Bingham and Samuel Shellabarger asserted that Congress's power to enact the Ku Klux Klan Act rested on Section 5 of the Fourteenth Amendment (Cong. Globe,

[6] The latter provision was held unconstitutional in *The Civil Rights Cases*, 109 U.S. 3 (1883)).

[7] There is, perhaps, less agreement among the framers of the Fourteenth Amendment over this point than there was among the framers of the original Constitution. With few exceptions, however, the framers of the Fourteenth Amendment agreed that the states remained the primary source of criminal law.

42d Cong., 1st Sess. app. at 69, 83 (1871)), and that Congress was enforcing the Privileges or Immunities Clause and the Equal Protection Clause. They pointed out that among the privileges and immunities of citizens was what Justice Washington had described in *Corfield v. Coryell*, as "[p]rotection by the Government" (6 F. Cas. at 551). Bingham argued that the Reconstruction Amendments "vest[ed] in Congress a power to protect the rights of citizens against States, and individuals in States, never before granted." Cong. Globe, 42d Cong., 1st Sess. app. at 83 (1871). Indeed, Bingham went so far as to assert that the Fourteenth Amendment, as adopted, was "more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition." *Id.* app. at 83.[8]

Although some of the framers of the Fourteenth Amendment continued the arguments of an earlier generation that Congress had no jurisdiction over crime except in federal territories and over enumerated matters,[9] others took a more pragmatic view. Among the more prudent participants was Ohio Republican James Garfield. Representative Garfield offered a careful comparison of the Bingham proposal and the Fourteenth Amendment adopted by Congress and ratified by the states. Bingham's "proposed amendment was a plain, unambiguous proposition to empower Congress to legislate directly upon the citizens of all the States in regard to their rights of life, liberty, and property." Instead, the Fourteenth Amendment:

> exerts its force directly upon the States, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations. The [Bingham proposal] would have brought the power of Congress to bear directly upon the citizens, and contained a clear grant of power to Congress to

[8] Bingham's claim was, of course, rejected by this Court in *Boerne*. 521 U.S. at 523.

[9] *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. app. at 50 (1871) (statement of Rep. Kerr); *id.* app. at 86-87 (statement of Rep. Storm); *id.* app. at 187 (statement of Rep. Willard); *id.* app. at 207 (statement of Rep. J. Blair); *id.* app. at 313 (statement of Rep. Burchard).

> legislature directly for the protection of life, liberty, and property within the States. The [Fourteenth Amendment] limited but did not oust the jurisdiction of the State over these subjects. The [Bingham proposal] gave Congress plenary power to cover the whole subject with its jurisdiction . . . to the exclusion of the State authorities.

Id. app. at 151.

During the civil rights debates, Garfield suggested that Section 1 of the Fourteenth Amendment could be enforced through Section 5, including criminal sanctions. *See id.* app. at 153. What troubled Garfield, however, was that the Fourteenth Amendment seemed to limit Congress's enforcement of Section 1 to circumstances when the "laws of the State are unequal" or there is "a systematic maladministration of [the laws], or a neglect or refusal to enforce their provisions"(*id.*). When this state of affairs was "clearly made out," the Fourteenth Amendment authorized congressional response. The problem was that one section of the Ku Klux Klan Act "propose[d] to punish citizens of the United States for violating State laws. This would virtually abolish the administration of justice under State law. . . . [W]hen we provide by congressional enactment to punish a mere violation of a State law, we pass the line of constitutional authority" (*id.* app. at 154).

As Representative Garfield pointed out, the mere fact of crime cannot prove that the states have failed to protect their citizens. If that were the case, then *every* crime could be characterized as a state's failure to provide protection, and Congress's authority would be nearly unlimited. *Id.* app. at 154. Illinois Representative John Farnsworth remarked that the Ku Klux Klan Act "assumes that an unlawful act of some of its citizens is the act of the State." *Id.* app. at 116. Garfield was quite clear that the Fourteenth Amendment did not authorize Congress to act on the pretext of providing equal protection:

> It is not required that the laws of a State shall be perfect. They may be unwise, injudicious, even unjust; but they must be equal in their provisions . . . . The laws must not only be equal on their face, but they must be so administered that equal protection under them shall not be denied to any class of citizens, either by the courts or the executive officers of the State.

Id. app. at 153. *See also* Cong. Rec., 43d Cong., 1st Sess. app. 244 (1874) (statement of Sen. Norwood) ("until a State shall attempt to abridge [a citizen's] rights, Congress has no power to act"). These statements merely confirmed what Senator Jacob Howard said as he introduced the redrafted Fourteenth Amendment: The new amendment would be a "restrain[t] [on] the power of the States . . . [and] not powers granted to Congress." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). As Senator Howard read Section 5 together with Section 1, "[i]t enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment" (*id.* at 2768). *See also* Cong. Globe, 42d Cong., 1st Sess. app. 160 (1871) (statement of Rep. Golladay).

3. The Debates Over the Domestic Violence Clause.

Just as it had in the earliest arguments over the scope of Congress's power to punish crime, the Domestic Violence Clause also figured in the debates over the constitutionality of the civil rights enforcement acts.[10] Both sides in the debate claimed support from the Domestic Violence Clause. Some of the supporters of the Ku Klux Klan Act recognized that the Domestic Violence Clause authorized the United States to intervene to suppress domestic violence only upon the invitation of the states, but argued that the Fourteenth Amendment authorized the United States to intervene when there was evidence that a state had failed to protect its

[10] Congress ultimately provided in Section 3 of the Act that "when insurrection, domestic violence, unlawful combinations, or conspiracies" demonstrated that state officials were "unable to protect" or "refuse[d] protection" to the "rights, privileges, or immunities," of a "class of people," then the president was authorized to suppress the insurrection or domestic violence. Civil Rights Act of 1871, ch. 22, § 3, 17 Stat. 14, codified, as amended at 10 U.S.C. § 333. Congress has declared that when these conditions are met "the State shall be considered to have denied the equal protection of the laws" (10 U.S.C. § 333).

citizens. They claimed that the mere fact of crime was sufficient to justify federal intervention under the guise of the Fourteenth Amendment. *See id.* app. at 72-73 (statement of Rep. A. Blair); *id.* app. at 79 (statement of Rep. Perry).

By contrast, other supporters of the Act were careful to note that the Fourteenth Amendment required proof that "the State fails to give protection." *Id.* at 501-02 (statement of Sen. Frelinghuysen). *See id.* at 604 (statement of Sen. Pool); *id.* app. at 71 (statement of Rep. Shellabarger). Thus, Senator Frelinghuysen emphasized that the United States might intervene "only to guaranty rights and protection when the State fails." The United States "acts in its national character, and not municipally. It does not interfere with the State government . . . . The United States neither makes nor executes a criminal code. The framework of our Government, reserving municipal government to the States and national jurisdiction to the General Government, is not disturbed." *Id.* at 502.

Opponents of the Act did not deny that Congress had the power to prescribe laws when states denied equal protection, but they disputed that the Fourteenth Amendment justified intervention upon a simple showing that there was crime within a state. If such a proof sufficed to demonstrate a denial of equal protection, some members argued, then the Domestic Violence Clause had been repealed, *sub silentio*, by the Fourteenth Amendment. "[M]urder, manslaughter, larceny, [and] any substantive crime" were not within the jurisdiction of Congress. *Id.* app. at 207 (statement of Rep. J. Blair). The "further evidence" (*id.*) of this was the Domestic Violence Clause, which ensured against "the pretense" that the United States might "declare that State governments had failed to protect [their citizens]" and intervene in state affairs. *Id.* app. at 117 (statement of Sen. F. Blair). Protection against such federal pretense was "not repealed or modified by the fourteenth amendment." *Id.* app. at 49 (statement of Rep. Kerr). An implied repeal was contrary to the plain language of the Domestic Violence Clause, which some members regarded as a reservation of state authority over crime. *Id.* at 331 (statement of Rep. Morgan); *id.* at

574 (statement of Sen. Stockton); *id.* app. at 221 (statement of Sen. Thurman); *id.* app. at 207 (statement of Rep. J. Blair); *id.* app. at 160 (statement of Rep. Golladay); *id.* app. at 117 (statement of Sen. F. Blair); *id.* app. at 49 (statement of Rep. Kerr).

B. The Court's Early Decisions Under Section 5 Recognized The Limits Of Congress's Authority To Address Crime And Preserved The Role Of The Domestic Violence Clause; These Decisions Should Govern Section 13981 As Well

The Court's earliest tests of Section 5 limited Congress's authority to define and punish crime in the states and, as a consequence, preserved the role of the Domestic Violence Clause. *See The Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1882). In *Harris*, the Court struck down the criminal conspiracy section of the Ku Klux Klan Act, which punished conspiracies to deprive persons of their privileges or immunities or their rights to equal protection and due course of justice. The Act applied to private persons as well as public officials. The Court explained that Congress lacked power under the Fourteenth Amendment to reach private conduct.

> When the State has been guilty of no violation of [the Fourteenth Amendment]; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws . . . the amendment imposes no duty and confers no power upon Congress.

106 U.S. at 639. The language in *Harris* could apply with equal force to Section 13981(c). Section 13981 "is not limited to take effect in case the State [violates the Fourteenth Amendment]"; it "applies, no matter how well the State may have performed its duty" (106 U.S. at 639). As in *Harris*, Section 13981 "is directed exclusively against the action of private persons, without reference

to the laws of the State or their administration by her officers," a provision the *Harris* Court concluded "not warranted by any clause in the Fourteenth Amendment" (*id.* at 640).

Similarly, in *The Civil Rights Cases*, the Court struck down a provision of the Civil Rights Act of 1875 prohibiting discrimination in "places of public amusement," whether publicly or privately operated. The Court concluded that Congress had exceeded its authority under Section 5. "[U]ntil some State law has been passed, or some State action through its officers or agents has been taken," Congress has no power to act. 109 U.S. at 13. The Court's description of the Civil Rights Act of 1875 applies with equal force to Section 13981:

> It does not profess to be corrective of any constitutional wrong committed by the States . . . . It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens . . . . [I]t steps into the domain of Civil jurisprudence and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed actions of the State or its authorities.

Id. at 14. To concede to Congress the power to meet every "mischief and wrong" would "cover the whole domain of rights," establishing "a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them" (*id.* at 13).

* * * * *

These materials demonstrate that the framers of both the original Constitution and the Fourteenth Amendment were keenly aware of the importance to every government to protect persons within its jurisdiction. There is a role for federal criminal law, but federal interests must, necessarily, be distinct from those of the states. As the Congress, step by step, assumes the responsibility for defining, punishing, and redressing every wrongful act, Congress has tread

on ground that has not been granted to it and that is reserved to the states. It tempts the states into resignation, acquiescence and, ultimately, inaction. It threatens the states with atrophy of the function that makes them states.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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