

## COMMENTARY

### A LETTER TO THE SUPREME COURT REGARDING THE MISSING ARGUMENT IN *BRZONKALA V. MORRISON*

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In *Brzonkala v. Morrison*,<sup>1</sup> the Court will determine whether Congress had the authority to enact 42 U.S.C. § 13,981.<sup>2</sup> This provision of the Violence Against Women Act provides the victims of gender-motivated crimes of violence with a private cause of action against the perpetrators of such crimes. The plaintiff in *Brzonkala* was a student at the Virginia Polytechnic Institute; she alleges that two male students at the school pinned her down on a bed in her dormitory and forcibly and repeatedly raped her.

*Brzonkala* is likely to be an important case. The Commerce Clause and Section 5 of the Fourteenth Amendment—two pillars of congressional authority—have both been reexamined by the Court in recent cases.<sup>3</sup> Section 13,981 is so situated as to put the evolving understanding of each to the test. Congress's capacity to protect women from the injustice of violence and discrimination is a critical element in the architecture of civil rights in the United States, and the scope of that capacity may well be at stake in *Brzonkala*.

What prompts me to address the Court in this unorthodox and untimely fashion is my conviction that an important argument on behalf of Congress's Section 5 authority has been overlooked—overlooked in the opinions of the Fourth Circuit; overlooked in the briefs that have been proffered by the parties and the numerous amici; and overlooked in the oral argument. The general question of Section 5 of the Fourteenth Amendment as a source of authority to enact § 13,981 has been raised, of course. But an important argument about how

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<sup>1</sup> 169 F.3d 820 (4th Cir. 1999), cert. granted sub nom. *United States v. Morrison*, 120 S. Ct. 11 (Sept. 28, 1999) (Nos. 99-5, 99-29).

<sup>2</sup> 42 U.S.C. § 13,981 (1994) is set out in full in the Appendix to this letter.

<sup>3</sup> See *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000) (finding Age Discrimination in Employment Act to be outside scope of Congress's Section 5 authority); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating Religious Freedom Restoration Act as outside scope of Congress's Section 5 authority); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating Gun-Free School Zones Act as outside scope of Congress's Commerce Clause authority).

best to understand the application of Section 5 to § 13,981 appears to have been ignored. This letter is my attempt to place this missing argument before the Court.

I would like to approach the missing argument indirectly, by asking whether *Jones v. Alfred H. Mayer Co.*<sup>4</sup> survives the Court's recent Section 5 decisions. *Jones* held that Section 2 of the Thirteenth Amendment gives Congress sweeping authority to prohibit racially discriminatory acts by private actors in the real estate market.<sup>5</sup> Consider the structural problem of *Jones*: Section 1 of the Thirteenth Amendment abolishes slavery, but the Court clearly does not think that Section 1 empowers the judiciary to police private acts of racial intolerance.<sup>6</sup> As a matter of spontaneous judicial enforcement, at least, the substantive provisions of the Thirteenth Amendment address the institution of indentured servitude exclusively. How then does Congress's Section 2 authority to "enforce this article by appropriate legislation" expand to include the capacity to outlaw private discrimination in the sale or leasing of housing? The Court's answer in *Jones* had roots as old as the *Civil Rights Cases*: Congress can legislate against more than slavery proper; it can attack the "badges," "incidents," and, most importantly, the "relics" of slavery.<sup>7</sup>

But this seems a more pointed statement of the problem rather than a solution. The issue, after all, is the apparent mismatch between what the Court for its part takes to be the substantive content of the Thirteenth Amendment and the authority that the Court cedes to Congress in the name of that body's authority to enforce that Amendment. So, without more, the observation that Congress can address the badges, incidents, and relics of slavery as well as slavery itself seems a description of the margin of the unexplained discrepancy, not an explanation for that discrepancy.

The question has particular bite after *City of Boerne v. Flores*.<sup>8</sup> In *Boerne*, the Court held that Section 5 of the Fourteenth Amendment gives Congress authority that is purely "remedial," not "substantive"; per *Boerne*, Congress does not have the authority to "determine what constitutes a constitutional violation," only the authority to prevent or remedy violations that the judiciary would recognize as such.<sup>9</sup> The insistence in *Boerne* that "[t]here must be a congruence and pro-

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<sup>4</sup> 392 U.S. 409 (1968).

<sup>5</sup> See *id.* at 413.

<sup>6</sup> See *Moose Lodge v. Irvis*, 407 U.S. 163 (1972).

<sup>7</sup> See *Jones*, 392 U.S. at 440-43 (discussing *The Civil Rights Cases*, 109 U.S. 3, 22 (1883)).

<sup>8</sup> 521 U.S. 507 (1997).

<sup>9</sup> See *id.* at 519.

portionality between the injury to be prevented or remedied and the means adopted to that end” is a doctrinal mechanism to enforce the line between the Court’s authority to define the substance of a constitutional wrong and Congress’s authority to redress the harms that flow from such a wrong.<sup>10</sup> Section 5 of the Fourteenth Amendment and Section 2 of the Thirteenth Amendment are structurally and formally parallel provisions, and the division of authority between the Court and Congress in one ought to hold in the other as well. The question thus becomes: Can we explain *Jones* as an exercise of Congress’s remedial authority as that authority is understood in *Boerne*?

I think the answer plainly is yes. Key is the nature of the harms that Congress can reasonably attribute to the grotesque institution of slavery. Slavery itself can be described narrowly and in the past tense, but the consequences of slavery are enduring, pervasive, and tentacular. To remedy slavery is to eradicate the complex and entrenched structure of bias and deprivation that it has left behind; fair housing laws fit easily within the call for remedy of this residual injustice. Congress’s authority under *Jones* is no broader than the harms to which it is responsive. Congress may address the unhappy relics of slavery where it finds them.

We are now accustomed to the trilogy of appropriate congressional targets named in *Jones*: the “badges,” “incidents,” and “relics” of slavery. But “relics” was an important addition by the *Jones* Court to the historic formulation. The *Civil Rights Cases* had referred to the “badges” and “incidents” of slavery.<sup>11</sup> As the outcome of those cases made clear,<sup>12</sup> that early Court saw “badges” and “incidents” as attributes of slavery itself, and never considered the possibility that slavery not only had contemporary attributes but deeply ingrained, enduring consequences. To the Court in *Jones*, addressing the question of Congress’s rectificatory authority ninety-five years after the *Civil Rights Cases*, it was painfully obvious that slavery had left an awful legacy—hence the authority of Congress to address the enduring “relics” of slavery, not merely its contemporaneous “badges and incidents.”

This brings us to the missing argument: For much of our history, women were treated in an exceptional and disabling way by the laws of every state and of our national government.<sup>13</sup> Women could not vote or hold many political offices, and they were excluded from di-

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<sup>10</sup> See *id.* at 520.

<sup>11</sup> See 109 U.S. at 23-24.

<sup>12</sup> The Court in the *Civil Rights Cases* held that discrimination in the provision of access to public accommodations was not a badge or an incident of slavery. See *id.* at 24-25.

<sup>13</sup> See generally Joan Hoff, *Law, Gender, and Injustice: A Legal History of U.S. Women* (1991); 1 *Women in American Law* (Marlene Stein Wortman ed., 1985).

verse professions and occupations.<sup>14</sup> When women married, their property rights were attributed to their husbands, and they themselves were impaired in their independent ability to engage in commercial transactions.<sup>15</sup> In many instances, they were excluded from elite state educational institutions.<sup>16</sup> And, of particular significance in this context, women were explicitly denied legal protection against the physical predations of their husbands.<sup>17</sup> This familiar litany encompasses several centuries of what are now recognized as patent violations of the norms of constitutional equality whose textual homes are the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment. Like slavery, this long history of state-sponsored disablement and injustice has left behind harms that are enduring, pervasive, and tentacular. In this respect, the reasoning of *Jones* is fully apt to *Brzonkala*. Congress's Section 5 authority to protect women from violence and discrimination is as broad as the cultural web of vulnerability to which governments at every level contributed by their plainly unconstitutional behavior. The Violence Against Women Act falls well within the scope of this remedial authority.<sup>18</sup>

That, in sum, is the missing argument. I would like to anticipate and respond to several possible objections. The first concerns the barrier of state action. Although Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment are textually and structurally parallel provisions, there is this important difference: The Thirteenth Amendment is understood as barring slavery in any form and in any hands, public or private; it has no requirement of state action to overcome in the first place. In contrast, it is precisely the

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<sup>14</sup> See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 n.10 (1982) (citing *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (upholding Illinois law that barred women from practice of law), and *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding Michigan law that precluded women from tending bar)).

<sup>15</sup> Until the middle of the nineteenth century, “[w]ives generally could not hold, acquire, control, bequeath, or convey property, retain their own wages, enter into contracts, or initiate legal actions.” Deborah L. Rhode, *Justice and Gender* 10 (1989).

<sup>16</sup> See *United States v. Virginia*, 518 U.S. 515, 536-38 (1996).

<sup>17</sup> Under Anglo-American common law, husbands had the right of “chastisement.” The reform of this rule did not normalize state treatment of domestic violence, which was treated in a hands-off manner in order to protect marital privacy. See Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 *Yale L.J.* 2117, 2130 (1996). And it is only in very recent years that the marital rape exemption has been abandoned in most states. See Rhode, *supra* note 15, at 250-51.

<sup>18</sup> It bears emphasis that this argument merely invokes the example of the Thirteenth Amendment as a reminder that the remedial authority of Congress is proportionate to the scope and shape of the harm against which it is directed. I do not mean to advance or depend upon the claim that the ongoing vulnerability of women is itself a violation of the Thirteenth Amendment.

requirement of state action in the Fourteenth Amendment that makes Section 5 of the Fourteenth Amendment problematic as a source of authority for § 13,981.

But this objection asks us to take account of the state action requirement not once but twice, and asks us on the second occasion to give that requirement authority for which it has no warrant. Consider: We have from the outset recognized that violations of the Fourteenth Amendment require a delict properly assignable to a state actor; the starting point of the missing argument, after all, is the historical avalanche of *governmental* delicts with regard to gender bias. Once constitutional wrongs have been identified, the inquiry then turns to the proper scope of Congress's authority to remedy these wrongs. Congress has authority to reach the conduct of private perpetrators of violence against women because domestic and sexual violence are in no small part triggered by attitudes and reflexes that are relics of this history of the unconstitutional state treatment of women. There is no good reason to worry about the involvement of the state a second time, in the context of remedy, any more than it would have been appropriate in *Jones* to insist that racial discrimination in property transactions between private parties be deemed the equivalent of slavery. In *Jones*, it was not only slavery but its legacy that Congress was empowered to address; similarly, in *Brzonkala*, it is not only our history of official discrimination against women but its legacy that Congress is empowered to address.

This suggests a second possible objection to the argument advanced here: The argument assumes that there is an ongoing vulnerability of women to violence and, further, that this entrenched vulnerability is in some meaningful part and sense attributable to the history of unconstitutional state discrimination against women. Unhappily, there is no dearth of evidence to support the proposition that women are appallingly vulnerable to domestic and sexual violence.<sup>19</sup> In *Planned Parenthood v. Casey*,<sup>20</sup> the Court had the occasion to recite at some length the district court's findings, as well as persuasive data from other sources, which spoke to the shocking exposure of women to violence from their husbands or male partners.<sup>21</sup> In the extensive legislative hearings that preceded the enactment of the Violence Against Women Act, Congress had before it evidence from every quarter of the widespread scourge of domestic and sexual violence in the United States, as well as evidence of the lingering attitudi-

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<sup>19</sup> See generally Richard J. Gelles & Murray A. Straus, *Intimate Violence* (1988).

<sup>20</sup> 505 U.S. 833 (1992).

<sup>21</sup> See *id.* at 888-92.

nal resistance to enforcing laws against such violence when it is a woman's husband, partner, or date who is the perpetrator; this evidence, in turn, has been extensively rehearsed in the briefs submitted to the Court in *Brzonkala* and is not open to genuine doubt.<sup>22</sup>

That women's ongoing vulnerability to violence has its roots in legally endorsed historic attitudes and practices is a matter both of common sense and common knowledge. Our law, after all, once treated wives as subordinate subjects of their husbands' dominion. Some traces of the attitudes and reflexes encouraged by this long-standing regime of law surely have survived its gradual effacement; and those surviving traces surely contribute to the familial and sexual violence with which women continue to be threatened. Reflective studies of the ongoing vulnerability of women to violence point to a link of this sort. For example, two prominent researchers—Dr. Richard Gelles and Dr. Murray Straus—attribute the ongoing vulnerability of women to family violence to widespread social attitudes that tolerate such violence; in turn, they see those attitudes as flowing in significant part from “a centuries-old legacy in which women are men's property.”<sup>23</sup> In this regard, they highlight the “common law doctrine of coverture, under which a husband and wife took a single legal identity at marriage—the identity of the husband,” and common law rules permitting a husband's chastisement of his wife, as progenitors of contemporary attitudes.<sup>24</sup>

No doubt it is impossible to gauge precisely how much our history of the legal subordination of women has contributed to the attitudes and reflexes that make women vulnerable now to family and sexual violence. Our unconstitutional regime of laws, after all, itself flowed from earlier, deeply held views that supported the subordination of women. But this we can know about the broad regime of unconstitutional discrimination to which women as a group were subject: That regime legitimated, amplified, and gave legal force to malign impulses, and left women more vulnerable to violence and discrimination than they otherwise would have been. While it is impossible to parse responsibility for the ongoing vulnerability of women with precision, this is no more a bar to Congress's authority than is the comparable observation that it is impossible to know with precision exactly how

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<sup>22</sup> See, e.g., Brief for the United States, *Brzonkala v. Morrison* (Nos. 99-5, 99-29), available in 1999 WL 1037259, at \*37-\*41.

<sup>23</sup> Gelles & Straus, *supra* note 19, at 31.

<sup>24</sup> *Id.* (citing R. Emerson Dobash & Russell Dobash, *Violence Against Wives: A Case Against the Patriarchy* (1979), and Lenore J. Weitzman, *The Marriage Contract: Spouses, Lovers, and the Law* 1-2 (1981)).

much slavery itself is causally responsible for contemporary racial injustice.

Certainly Congress had before it ample evidence of the enduring attitudinal consequences of our history of the unconstitutional treatment of women; much of the testimony before Congress underscored the proposition that we live with a legacy of stereotypes about women's subordination to men, stereotypes that sharply contradict our best understandings of the right of women to lead secure and equal lives. In one of its reports, the Senate specifically referred to the notorious common law "rule of thumb," which sanctioned the physical chastisement of wives, and concluded that we suffer a "legacy of societal acceptance of family violence," a legacy that "endures even today."<sup>25</sup>

This brings us to a third and final possible objection to the missing argument in *Brzonkala*. A critic might worry that it confers too much authority on Congress. "Too much" in this context would presumably mean that it permits Congress to enter domains better left to the states. But the argument we have been considering gives Congress focused authority, authority that is entirely congruent with the best understandings of federal-state relations. Consider: Racial inequality has been at the heart of national concern and it has been the focus of much of the work of the Supreme Court and of Congress in the last half century. We have come to understand that gender, like race, is a fault line of injustice in our society, a fault line with roots deep in our history. *Jones v. Mayer* recognized that slavery has left an enduring and pernicious residue. The missing argument in *Brzonkala* simply acknowledges that our history of unconstitutional gender discrimination has also left a pernicious residue—that, like slavery, it has left behind harms that are enduring, pervasive, and tentacular. Congress has the authority to help eradicate these unhappy relics; its effort in the Violence Against Women Act to reduce the vulnerability of women to family and sexual violence is well within the bounds of that authority. Quite possibly, Congress on this view is also authorized to address various nonviolent forms of discrimination against women. But this is entirely consistent with—indeed dictated by—the architecture of constitutional justice that has been in place in the United States since the Civil War and the subsequent ratification of the Reconstruction Amendments. The authority thus acknowledged is entirely consistent with durable features of our constitutional order, and with extant constitutional doctrine, including and especially the Court's recent decisions in *Boerne* and *Kimel*.

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<sup>25</sup> S. Rep. No. 103-138, at 41 (1993).

The Violence Against Women Act is Congress's reply to the lingering message of a regime of law that once encouraged and enforced the subordination of women. The Constitution clearly condemns this element of our legal past; so too, it should endorse Congress's attempt to redress the harms that have flowed from that past.



## APPENDIX: 42 U.S.C. § 13,981

## (a) Purpose

Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

## (b) Right to be free from crimes of violence

All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d) of this section).

## (c) Cause of action

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.

## (d) Definitions

For purposes of this section—

(1) the term “crime of violence motivated by gender” means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender; and

(2) the term “crime of violence” means—

(A) an 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.