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Jennifer S. Hendricks
University of Colorado Law School

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WOMEN AND THE PROMISE OF EQUAL CITIZENSHIP

Jennifer S. Hendricks*

I. Introduction

Women have a great deal of potential political power and are already a major political force, consistently out-voting men since 1980. But majority voting power has not translated into the elimination of sex inequality, to the consternation of some legal scholars. An obvious reason for this paradox is centuries of entrenched culture, law, and judicial precedent that discriminate against women. Another, less obvious reason for the power paradox is that existing constitutional rights do not adequately protect women's autonomy and equality. "Women incompletely protected by those liberties cannot be considered fully constituted citizens within our democracy." This paper discusses one way to end this "partial citizenship" by

* Law Clerk to the Honorable Karen Nelson Moore, United States Court of Appeals for the Sixth Circuit. Many thanks to Professor Laurence Tribe for supervising this paper, which was written in connection with his spring 1998 seminar on alternatives to substantive due process.

1. See generally NAOMI WOLF, FIRE WITH FIRE: THE NEW FEMALE POWER AND HOW IT WILL CHANGE THE TWENTY-FIRST CENTURY 14 (1993) ("Though almost all discussions of 'women's equality' presume that the goal of the struggle is 50-50 representation, ... the true figure for parity is the terrifying 51 percent to 49 percent. If voting trends continue, women will have ten million to twelve million more votes than men will. According to the Census Bureau, they now have seven million more.").

2. See WOLF, supra note 1, at 10.

3. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 164 (1980). At current rates, it will take over 300 years for women to achieve parity in public offices. See WOLF, supra note 1, at 14 ("If we trust to 'progress,' we will languish in the low forties of representation forever.").

4. The role of judicial precedent in perpetuating sex discrimination has prompted one feminist scholar to advocate doing away with most judicial review of sex classifications and relying solely on women's political power to achieve sex equality. See Mary Becker, CONSERVATIVE FREE SPEECH AND THE UNEASY CASE FOR JUDICIAL REVIEW, 64 U. COLO. L. REV. 975, 979-81 (1993).

encouraging Congress to use its power under Section 5 of the Fourteenth Amendment to promote equal citizenship for women.

When Congress wants to promote equality, it usually relies on the Interstate Commerce Clause or, less frequently, its power to enforce the Equal Protection Clause. The Commerce Clause seems appropriate when Congress regulates, for example, discrimination in employment. Laws that regulate intra-state activity a step removed from commerce—where Congress’s power is based on the effects of the regulated activity on commerce—are on shakier ground doctrinally, in light of United States v. Lopez, and are less satisfying in principle. For example, one has the sense that the equality and dignity concerns behind the Violence Against Women Act (VAWA) should “occup[y] a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.” In instances where equality concerns predominate, Congress often invokes its power to enforce the Equal Protection Clause as a secondary justification. This power is also the usual basis for applying employment discrimination law to the states. However, the Supreme Court’s decision in City of Boerne v. Flores indicated that Congress’s power in this area may be less than it has assumed. In particular, Congress will have difficulty using the Equal Protection Clause when inequality is rooted in difference, so that achieving equality requires accommodations rather than mere formally neutral treatment as defined by the status quo.

Acting on the basis of Lopez and City of Boerne, the en banc Fourth Circuit has struck down part of VAWA on the grounds that it is beyond the scope of Congress’s power under either the Commerce Clause or the Equal Protection Clause. The Supreme Court may be poised to do the same.

This paper explores a third alternative: the possibility of promoting sex

10. See United States v. Chicago, 573 F.2d 416, 422-23 (7th Cir. 1978) (holding that Section 5 gave Congress the power to make Title VII fully applicable to state and local governments).
13. The Supreme Court heard oral argument in the Brzonkala case on January 11, 2000, the same day it decided Kimel v. Florida Board of Regents, discussed infra note 82.
equality by enforcing and giving substantive content to the Citizenship Clause of the Fourteenth Amendment.

The first step of this argument is that the Citizenship Clause—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside"—should have a substantive meaning that Congress can enforce. The second step is that this understanding of the Citizenship Clause is a better way to justify VAWA than are theories about the Commerce Clause or the Equal Protection Clause. In Part II of this paper, I describe the content of Congress's Section 5 power. In Parts III through V, I give a series of examples of how Congress might use this power to enforce the Equal Protection and Citizenship Clauses. Part III considers whether the Pregnancy Discrimination Act,\(^{14}\) as applied to the states, is a valid measure to enforce the Equal Protection Clause. Part IV considers a hypothetical federal law abolishing state immunities for interspousal torts and rapes. I use this example as a model for enforcing the Citizenship Clause. Part V examines two versions of the civil rights remedy of the Violence Against Women Act, one that Congress considered but rejected and one that was enacted. By comparing these two remedies, I show that the enacted version is better understood under the Citizenship Clause than under Equal Protection.

II. Congressional Power Under Section 5 of the Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.\(^{15}\)

Congress has used its powers to enforce the Civil War Amendments to protect a variety of political and economic rights. Section 5 of the Fourteenth Amendment is the most frequently invoked source of power and is linked to the broadest range of constitutional rights. There are limits, how-


\(^{15}\) U.S. CONST. amend. XIV, §§ 1, 5.
ever, to how and when Congress may go about protecting these rights. The Supreme Court has experimented with three rationales for deciding where these limits should be drawn. The first rationale allows Congress to take direct remedial or preventive action against violations of the Constitution.\textsuperscript{16} The second would let Congress expand the scope of constitutional rights beyond what the Fourteenth Amendment requires.\textsuperscript{17} However, this second approach was rejected in \textit{City of Boerne}, which held that the Religious Freedom Restoration Act\textsuperscript{18} (RFRA) was unconstitutional. Under the final rationale, Congress can act indirectly against the risk of violation by creating statutory rights that tend to preserve constitutional ones.\textsuperscript{19} Under any of these rationales, Congress's efforts to enforce the Fourteenth Amendment must be "congruent" and "proportional" to the constitutional injury that Congress is preventing or remedying.\textsuperscript{20}

A. \textit{Congressional Prevention and Response to Particular Constitutional Violations}

The first rationale is the most direct: Congress can pass laws against violations of the Constitution. In its simplest form, this power merely allows Congress to prohibit what the courts would also prohibit. For example, if a state violates the Equal Protection Clause by discriminating among candidates for state employment on the basis of religion, Congress can give the victims of that discrimination relief, such as the right to sue for damages.\textsuperscript{21}

Under this rationale, Congress may also take steps to prevent constitutional violations that are likely to occur, even though there has not yet been an actual violation. Congress has used this approach—direct prohibition of probable violations—to enforce the Fifteenth Amendment, and in \textit{City of Boerne}, the Court cited such usage as a model for exercising Congress's Fourteenth Amendment power.\textsuperscript{22} A leading case in the context of the Fifteenth Amendment, \textit{South Carolina v. Katzenbach},\textsuperscript{23} dealt with provisions of the Voting Rights Act of 1965.\textsuperscript{24} These provisions authorized the Attor-

\begin{itemize}
\item \textsuperscript{16} \textit{See infra} text accompanying notes 21-27.
\item \textsuperscript{17} \textit{See} Katzenbach v. Morgan, 384 U.S. 641, 653-56 (1966); \textit{see infra} text accompanying notes 28-52.
\item \textsuperscript{19} \textit{See} Morgan, 384 U.S. at 652-53; \textit{see infra} text accompanying notes 53-69.
\item \textsuperscript{20} \textit{See City of Boerne}, 521 U.S. at 511 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").
\item \textsuperscript{22} \textit{See} City of Boerne, 521 U.S. at 518.
\item \textsuperscript{23} 383 U.S. 301 (1966).
\end{itemize}
ney General to suspend a wide range of voter-eligibility tests, pending judicial review, in any state where census information suggested a pattern of racial discrimination in voter registration. The problem that had inspired Congress to pass such a preventive measure was that, previously, the only way to invalidate discriminatory tests was through expensive and time-consuming litigation. Several states were prepared to impose new requirements "as fast as existing laws were held unconstitutional, thus delaying Negro voting for the duration of each round of litigation." The suspension provisions were valid because "there [was] reason to believe that many of the laws affected . . . [had] a significant likelihood of being unconstitutional." Congress's measures were "congruent" to actual constitutional violations in need of remedy or prevention and "proportionate" to the scope of the danger.

B. Congressional Expansion of Fourteenth Amendment Rights: The Anti-Marbury Rationale of Katzenbach v. Morgan

South Carolina v. Katzenbach serves as the model for the direct approach to preventing constitutional violations and gives Congress as well as the courts a role in enforcing the Constitution. It is an example of one of the primary benefits of Section 5: it allows constitutional rights to be enforced through the mechanisms available to Congress as well as those available to the courts. The direct approach does not, however, allow Congress to participate in defining the scope of constitutional rights. The second rationale does just that.

The second rationale first appeared in Katzenbach v. Morgan, the leading modern case testing the limits of Congress's Section 5 power. Morgan upheld Section 4(e) of the Voting Rights Act, which exempted certain Puerto Rican immigrants from having to pass English-literacy tests in order to vote in any state. Registered New York voters sued to preserve the state's literacy test and prevent those immigrants who could not pass it from voting. The Supreme Court assumed, as it had previously held, that use of a literacy test did not in itself violate the Equal Protec-

27. City of Boerne, 521 U.S. at 532 (citing City of Rome v. United States, 446 U.S. 156, 177 (1980)).
29. See id. at 643-46.
30. See id. at 643-44.
tion Clause.\textsuperscript{32} In an apparent contradiction, it nonetheless held that the Section 4(e) exemption was a valid exercise of Congress's power to enforce the Equal Protection Clause.\textsuperscript{33}

Justice Brennan's opinion for the Court offered two rationales for allowing Congress to expand the scope of the Equal Protection Clause. The first and primary rationale was that Congress was using the Voting Rights Act to protect other rights indirectly; I discuss this "preservative" rationale below.\textsuperscript{34} A secondary rationale suggested that Congress is more qualified than the Court to identify certain kinds of constitutional violations.\textsuperscript{35} Violation of the Equal Protection Clause, wrote Justice Brennan, depends on the existence of discriminatory intent, a factual question, and the Court deferred to Congress's assessment of the facts.\textsuperscript{36} To uphold the Act, the Court needed only to "perceive a basis upon which Congress might predicate a judgment that application of New York's English literacy requirement \ldots constituted an invidious discrimination in violation of the Equal Protection Clause."\textsuperscript{37} After all, in \textit{Lassiter} the Court had left open the possibility that it would strike down a literacy test if it were "fair on its face [but] employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot."\textsuperscript{38} Rather than requiring an aspiring voter to prove in court that a particular state's literacy test was, in fact, so employed, Justice Brennan was willing to take Congress's word for it.

In his separate opinion in \textit{Oregon v. Mitchell},\textsuperscript{39} Justice Brennan, joined by Justices White and Marshall, expanded on this rationale, going further with his suggestion that Congress may interpret the Constitution and impose its interpretation on the states. He explained that the Court is often reluctant to find a violation of the Equal Protection Clause because of the Court's institutional limitations.\textsuperscript{40} When deciding how old people must be in order to vote, one of the issues in \textit{Mitchell}, any line will be arbitrary,

\begin{itemize}
  \item 32. See \textit{Morgan}, 384 U.S. at 649.
  \item 33. See id. at 652.
  \item 34. See infra Section II(c).
  \item 35. See \textit{Morgan}, 384 U.S. at 653-56.
  \item 36. See id. at 654-55 ("Congress might well have questioned [the purpose of the literacy requirement] in light of the many exemptions provided, and some evidence suggesting that prejudice played a prominent role in the enactment of the requirement.") (footnotes omitted).
  \item 37. Id. at 656.
  \item 39. 400 U.S. 112, 229 (1970) (holding that Congress could lower the voting age for national elections from 21 to 18).
  \item 40. See id. at 246-49 (Brennan, J., concurring and dissenting) ("The Court's limitation on judicial review of state legislation [stems] from the nature of judicial review.").
\end{itemize}
and selecting a cut-off age is a task more suited to a legislature. Based on this reasoning, the three justices were willing to uphold Congress's power under the Equal Protection Clause to give eighteen-year-olds the right to vote, without reaching the question of whether it was constitutional for states to set the cut-off at age twenty-one. It was enough that Congress had found a violation.

Justice Brennan's suggestion that Congress can expand the scope of protected rights under the Fourteenth Amendment has been strongly criticized both as impractical and as contrary to Marbury v. Madison. Ultimately, in City of Boerne, the Court repudiated this rationale for Morgan and struck down the RFRA, which was Congress's attempt to expand on the Court's interpretation of the Free Exercise Clause. In Employment Division v. Smith, the Court had held that most facially neutral laws are valid even if they burden the exercise of a particular religion. Congress reacted with RFRA, in which it insisted that any state law substantially burdening religion be subjected to a "compelling interest" test. The Court held that Congress could not expand the states' duties under the

41. See id. at 240 (Brennan, J., concurring and dissenting) ("It is clear to us that proper regard for the special function of Congress in making determinations of legislative fact compels this Court to respect those determinations.").
42. See id. at 229-31.
43. See William Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 STAN. L. REV. 603, 606-07 (1975) (summarizing problems in identifying when Congress is expanding constitutional rights and when it is diluting them).
44. 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). See also Morgan, 384 U.S. at 667 (Harlan, J., dissenting) (arguing that "whether there has in fact been an infringement of [the Constitution is] for the judicial branch ultimately to determine"); Cohen, supra note 43, at 605 ("While the court [has] given large latitude to Congressional judgments about appropriate means to accomplish constitutionally defined ends, it [has] never before conceded to Congress the task of interpreting the meaning of the constitutional text."); but cf. Henry P. Monaghan, The Supreme Court—Forward: Constitutional Common Law, 89 HARV. L. REV. 1 (1975) (proposing a limited role for Congress in defining scope of liberties).
45. See City of Boerne, 521 U.S. at 512-15, 527-28 (discussing Congress's reasons for passing RFRA and rejecting this aspect of Morgan).
47. See id. at 878 (rejecting the contention that religious use of peyote must be exempted from otherwise constitutional laws not aimed at religious practices).
48. See 42 U.S.C. § 2000bb(b)(1) (1999). RFRA prohibited state governments from imposing a "substantial burden" on a person's exercise of religion unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. The main purpose of RFRA was "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b). Actually, the test demanded by RFRA was stricter than the Sherbert and Yoder test.
Fourteenth Amendment. It acknowledged Morgan’s implication to the contrary but stated that interpreting Morgan to allow Congress to define the scope of constitutional rights was not “a necessary interpretation or even the best one.” Concluding that Congress could not expand Fourteenth Amendment rights, the Court treated RFRA under only the direct, South Carolina v. Katzenbach approach. Because RFRA aimed not at weeding out intentional discrimination but at the incidental burdens imposed by neutral laws, RFRA did not “enforce” any constitutional prohibition. The sweep of the prohibition was out of proportion to any pattern of actual violations Congress might seek to remedy, and it was therefore beyond the scope of Section 5.

C. Congressional Protection of Fourteenth Amendment Values: The Preferred Rationale of Katzenbach v. Morgan

The primary rationale for the holding of Morgan is the preservative rationale, alluded to above. The preservative rationale has not been tested since Morgan. It appears to allow Congress to create statutory rights when doing so will have the indirect effect of “preserving” Fourteenth Amendment rights against potential infringement. Under this approach, Congress need not limit itself to directly remedying violations of the Constitution as in South Carolina v. Katzenbach. In Morgan, this meant that Congress could exempt Puerto Rican immigrants from the literacy test, thereby giving them the right to vote, because the vote is “preservative of all rights.” That is, the vote would help Puerto Ricans combat ethnic discrimination against their communities in the provision of government services. It did not matter that New York’s English-literacy test was itself constitutional because overriding that test was merely a means to the end of combating intentional discrimination elsewhere. The Court allowed Congress to say, in effect, that it understood New York’s reasons for wanting to test its voters for English literacy but was concerned that the test exacerbated conditions conducive to unconstitutional discrimination against minority communities. Congress could override the obstacle to voting because doing so would lessen the risk of discrimination in public services by enabling its victims to exert power over the perpetrators.

49. See City of Boerne, 521 U.S. at 527.
50. Id. at 528.
51. See id. at 529-35.
52. See id.
54. See id. at 652 ("This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community.").
There were important conditions in *Morgan* that allowed the Court to identify how the vote would preserve other rights. First, discrimination in the provision of government services is made possible and more likely by residential segregation. Puerto Rican immigrants in New York were a "discrete and insular minorit[y]," or so the Court assumed. Second, discrimination against a community in services like garbage collection or police protection is tangible and public. The harm is visible, as is the fact that it is a group and not just an individual that is harmed. It is also a type of harm well suited to correction through political processes because the same features that make a community susceptible to discrimination—discreteness and insularity—also provide a basis for political organization. Giving votes to the victims gives them the power to help themselves.

These conditions explain the power gained through the right to vote, but it would not make sense if the only statutory right Congress could create under the preservative rationale was an "extra" right to vote. After all, the *Morgan* Court assumed that *Lassiter* was correct and that neither the Fourteenth nor the Fifteenth Amendment forbade literacy tests in general. To allow such a limitation on the right to vote, as long as there is no evidence that it is a pretext for intentional discrimination, is to imply that the people excluded might reasonably be seen as so unqualified to vote as to justify denying them the power to protect their interests as citizens. Permitting Congress to say that this was not true with respect to the Puerto Rican community seems to conflict with *Lassiter*'s holding that literacy tests are facially constitutional. By observing that the vote is preservative of other rights, the preservative rationale for enforcing the Equal Protection Clause gives Congress a way to circumvent limits on its Fifteenth Amendment enforcement power. If *Morgan* and its "preservative" rationale are to be meaningful as a distinct method for enforcing the Fourteenth Amendment—and the *City of Boerne* Court clearly preferred the preservative ra-

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55. See Cox, *supra* note 26, at 102 (suggesting that "a law prohibiting discrimination against Negroes in the sale and rental of housing could well be viewed as a means of bringing about the break-up of the urban ghettos which are serious obstacles to the states' performance of their constitutional duty not to discriminate in the quality of . . . public services").

56. United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938) (suggesting that discrimination against minorities warrants heightened review because political processes may fail to protect them). Of course, the analysis described in this paragraph turns the theory of the *Carolene Products* footnote on its head. The same features that may make a group of people the target of discrimination may also, in the right circumstances, enable political mobilization that is more difficult when the group is "anonymous" or "diffuse." See Bruce Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713, 722-31 (1985).

57. See *Morgan*, 384 U.S. at 649.
tionale for Morgan to its alternative rationale\textsuperscript{58}—then the preservative rationale must mean something more than giving out votes. Section 5 power thus includes the power to outlaw direct constitutional violations—the South Carolina v. Katzenbach approach—and the power to preserve Fourteenth Amendment rights—by giving out votes in situations like Morgan, and by other means not yet explored.

Assuming, then, that the preservative rationale in Morgan implies a general power for Congress to prevent state opportunities to discriminate, what form might that power take? Professor Archibald Cox has suggested that because segregation is conducive to discrimination in government services, the real problem in Morgan-like cases is residential segregation.\textsuperscript{59}

To help reduce de facto segregation so as to reduce discrimination in public services, could Congress use the Morgan rationale to ban racial discrimination in the sale or rental of private housing? To answer, we must decide two questions: (1) may Congress act directly on private persons not bound by the Equal Protection Clause, and (2) how much deference will the courts give to Congress in determining what measures are “necessary and proper”\textsuperscript{60} to protect Fourteenth Amendment rights against lurking deprivations?

In the same year Morgan was decided, six justices, in two opinions in United States v. Guest,\textsuperscript{61} indicated that “there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Four-

\textsuperscript{58} See City of Boerne, 521 U.S. at 527-28.

\textsuperscript{59} See Cox, supra note 26, at 102 (“[U]rban ghettos . . . are serious obstacles to the states’ performance of their constitutional duty not to discriminate in the quality of education and other public services.”); see also J. Edmond Nathanson, Congressional Power to Contradict the Supreme Court’s Constitutional Decisions: Accommodation of Rights in Conflict, 27 WM. & MARY L. REV. 331, 340-41 (1986) (discussing attempts to justify Morgan on the basis of Congress’s superior fact-finding abilities). For additional suggestions of ways to use Section 5 power, see Cox, supra note 26, at 107-08 (proposing congressional action against de facto school segregation and enactment of a national code of criminal procedure).


\textsuperscript{60} See U.S. CONST., art. I, § 8. In Morgan, the Court indicated that Section 5 granted “the same broad powers expressed in the Necessary and Proper Clause.” Morgan, 384 U.S. at 651.

\textsuperscript{61} 383 U.S. 745 (1966).
teenth Amendment rights." This declaration was in the same spirit as Morgan's preservative rationale and is consistent with the vision of the Fourteenth Amendment's framers. Nonetheless, the Fourth Circuit's Brzonkala decision, which struck down the civil rights remedy of the Violence Against Women Act, rested heavily on the court's insistence that Section 5 does not empower Congress to act on private individuals who are not acting under color of state law. Surprisingly, the court repeatedly cited City of Boerne as authority for its position. RFRA dealt exclusively with state actions, and the Court therefore had little cause to discuss this issue.

The Fourth Circuit, however, conflated the state action doctrine with the proposition that Congress's power under Section 5 is not definitional, the central issue in City of Boerne. This conflation would make sense under the South Carolina v. Katzenbach approach to enforcing the Fourteenth Amendment, which allows for direct action against actual or potential vio-

62. Id. at 762 (Clark, J., concurring, joined by Black and Fortas, JJ.); see also id. at 774 (Brennan, J., concurring and dissenting, joined by Warren, C.J., and Douglas, J.). This dictum was reiterated in the opinion of the Court in District of Columbia v. Carter, 409 U.S. 418, 424 n.9 (1973).

The Fourth Circuit's Brzonkala opinion argued that in addition to being dicta, the justices' comments in Guest and Carter cannot be relied on because the Carter footnote cites Morgan. See Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 879 (4th Cir. 1999) (en banc), cert. granted, ___ S. Ct. ___ (1999). In the Fourth Circuit's view, this citation discredits the Court's statement because Morgan "expressed the view that Congress may redefine the substantive provisions of the Fourteenth Amendment...a view that...has been rejected by the full Supreme Court [in City of Boerne]." Id. This argument reflects the Brzonkala court's emphasis on the alternative, anti-Marbury rationale of Morgan and its failure to acknowledge the primary, preservative rationale. Indeed, the Fourth Circuit appears to be unaware of Morgan's primary rationale, despite the City of Boerne Court's clear delineation between that rationale and the alternative one it repudiated. See City of Boerne, 521 U.S. at 528-29.

63. See Laurent B. Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 Yale L.J. 1353, 1353-55, 1357 (1964) (stating that the framers wrote in light of "settled constitutional doctrine" that Congress has implied power to prevent private, but not necessarily state, interference with constitutional rights and expected Congress to enforce the Fourteenth Amendment more than the courts); see also James M. McGoldrick, The Civil Rights Cases: The Relevancy of Reversing a Hundred Plus Year Old Error, 42 St. Louis U.L.J. 451, 452 (1998) (arguing that the historical record indicates that Section 5 "was not intended to be limited by the 'state action' concept found in § 1 of the Fourteenth Amendment").


65. See, e.g., id. at 863-64, 875.

66. In fact, in another provocative aside on this issue, the Court ended its discussion of the Civil Rights Cases and other early pillars of the state action doctrine by citing Guest for the proposition that "the specific holdings of these early cases might have been superseded or modified." City of Boerne, 521 U.S. at 525; but see Brzonkala, 169 F.3d at 879 (offering an alternative explanation for this comment).
lations, but it is inappropriate for the preservative rationale. The point of
the preservative rationale is that it allows Congress to de-couple its reme-
dial action from the targeted constitutional violation. Because Congress
can protect Fourteenth Amendment rights, whether or not targeted behavior
itself violates the Constitution, whether a law happens to affect private ac-
tion is not a talisman for unconstitutionality.

The second question was how much leeway Congress has to deter-
mine what measures are needed to protect constitutional rights from lurk-
ing violations. For example, in the housing scenario, would a ban on
private discrimination be too much of an intrusion into local affairs to be
justified by Section 5? The analysis of this question has been changed by
City of Boerne. The Court in Morgan noted that it would give substantial
deference to Congress’s preservative uses of Section 5, “presumably be-
cause Congress can be counted on to represent and consider seriously the
interests of the states.”67 Although at some point the connection between
government discrimination and the underlying conditions attacked by Con-
gress would become too attenuated to sustain Congress’s power, such “dif-
fences . . . of degree” were for Congress to evaluate.68 The Court in City
of Boerne drew back from this highly deferential position and made clear

67. Nathanson, supra note 59, at 422-23; see Morgan, 384 U.S. at 653; see also Cox,
supra note 26, at 104. Professor Cox stated,

The Court’s traditional task of umpiring the federal system and the weight of
respect for state government conceivably might have led it to strike for itself . . .
the balance between the costs of intrusion into local interests and the gains of the
statute’s supposed tendency to bring about equality in state services. The domi-
nant theme of the Morgan opinion, drawing upon the analogy of the commerce
clause, is that the Court should defer to the congressional judgment, even upon
such questions, in reviewing legislation enacted under section 5.

Id. at 104. The Court’s interest in its “traditional task” of enforcing the values of federalism
has fluctuated in recent decades. What Professor Cox saw as a deviation in Morgan ap-
ppeared normal to Mr. Nathanson twenty years later. The decision in City of Boerne fits in
with the revival in recent years of judicial enforcement of federalism. See, e.g., Alden v.
Maine, 119 S.Ct. 2240 (1999) (holding that Congress’s Article I powers do not include the
power to subject non-consenting states to private suits for damages in state courts); Printz v.
United States, 521 U.S. 898 (1997) (holding that Congress may not oblige state officers to
conduct background checks on prospective handgun purchasers); Seminole Tribe of Fla. v.
Florida, 517 U.S. 44 (1996) (holding that Congress cannot abrogate Eleventh Amendment
immunity pursuant to Indian Commerce Clause and overruling contrary case under Inter-
state Commdr Clause); United States v. Lopez, 514 U.S. 549 (1995) (striking down fed-
eral ban on guns in school zones); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (imposing
“plain statement” rule of construction on congressional regulation of states pursuant to
either commerce or Fourteenth Amendment power, so that “[i]f Congress intends to alter
the ‘usual constitutional balance between the States and the Federal Government’ it must
make its intention to do so unmistakably clear in the language of the statute” (quoting

68. Cox, supra note 26, at 117.
that it would decide whether Congress's remedy is "congruent and proportional" to Fourteenth Amendment harms.69

III. The Pregnancy Discrimination Act and the Equal Protection Clause

As interpreted through the "preservative" rationale of Morgan, the Voting Rights Act and Professor Cox's housing discrimination law share the goal of remedying a side-effect of segregation: the state's failure to treat similarly situated people the same. This was not, however, the original problem addressed by Section 4(e) of the Voting Rights Act. That provision was aimed at a disparate impact problem: Puerto Rican immigrants were disproportionately harmed by New York's English-literacy requirement. But because the Court had found, in Lassiter, that literacy tests were facially constitutional,70 the problem of disparate impact—that is, that the state was not accommodating people who were differently situated with respect to English literacy—had to be translated into a problem wherein the state was treating similarly situated people differently from each other. Hence, Spanish-speakers were cast as similarly situated to English-speakers with regard to government services like education and police protection, and Congress had an opportunity to ensure that they be treated the same. RFRA, in its attempt to protect differently situated religious groups, failed because it could not be translated into an attempt to protect similarly situated people from discriminatory state treatment.

The Court's position in Employment Division v. Smith and its objections to RFRA in City of Boerne echo some of the most difficult cases of sex discrimination: those instances where the Court perceives the discrimination as linked to inherent differences between women and men that cannot be helped, rather than to subordination of women to men that can be remedied. The clearest case of inherent difference is in the roles of women and men in reproduction. The Pregnancy Discrimination Act71 (PDA) at-

69. City of Boerne, 521 U.S. at 528-35; see Michael W. McConnell, Institutions and Interpretation: A Critique of City of Boerne v. Flores, 111 Harv. L. Rev. 153, 166 (1997) (describing the approach in City of Boerne as "typical of intermediate scrutiny" and noting that the Court "made independent judgments regarding the risk and frequency of free exercise violations under the Smith test, the fit between the constitutional evil and the statutory remedy, and the degree of impact on traditional state functions").


The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . . This subsection shall not require an em-
tempts to nullify the effects of this difference on women’s ability to participate in the public sphere. Recognizing that the terms of participation were often written with only men’s needs in mind, it mandates accommodation. It does so by broadening the definition of discrimination “on account of . . . sex” in Title VII of the Civil Rights Act of 1964\(^2\) to include discrimination “on the basis of pregnancy.”\(^3\) This extension of Title VII was at odds with the Supreme Court’s insistence in *Geduldig v. Aiello*\(^4\) and *General Electric Co. v. Gilbert*\(^5\) that classifications based on pregnancy do not implicate sex equality. Although the Court had embraced the principle that equality does not require identical treatment of people who are differently situated,\(^6\) it refused to recognize that equality may demand comparable treatment in the face of difference to prevent difference from being used as an excuse for discrimination.\(^7\) Thus, the Court held that it was not sex discrimination for a state’s disability insurance plan to deny coverage for disability due to normal pregnancy even while covering several similarly disabling conditions that fall on both sexes and some that fall exclusively or primarily on men.\(^8\)

To most people, the discriminatory nature of this policy seems obvious. To the Court, however, if nature imposes a burden on women, the state has no duty to alleviate it, even if it alleviates functionally similar burdens on men. By enacting the PDA, “Congress rejected [this] implicit measuring of women’s entitlement to equality by a male standard.”\(^9\) Unfortunately, the PDA looks a lot like RFRA. The purpose of the PDA was

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74. 417 U.S. 484 (1974) (holding that the failure of a state’s employee insurance program to cover pregnancy did not violate the Equal Protection Clause).
75. 429 U.S. 125 (1976) (extending *Geduldig’s* analysis of the Equal Protection Clause to the definition of sex discrimination in Title VII).
76. See infra note 100.
77. See *Gilbert*, 429 U.S. at 139 (“For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks.”); *Geduldig*, 417 U.S. at 496-97 (“There is no risk from which men are protected and women are not.”).
78. See *Geduldig*, 417 U.S. at 501 (Brennan, J., dissenting) (noting that state’s plan limited “the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex such as prostatectomies, circumcision, hemophilia, and gout”).
79. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 243 n.18 (1987) [hereinafter MACKINNON, FEMINISM].
to overrule *Gilbert*[^80] just as RFRA was an attempt to overrule *Smith*.\[^81\] In the name of women's equality, Congress prohibited state benefit plans from discriminating against pregnant workers, even though the Supreme Court had held that such discrimination did not offend the Equal Protection Clause. On its face the PDA would appear to be an unconstitutional attempt by Congress to expand rights beyond what the Fourteenth Amendment demands. Under *City of Boerne*, Section 5 cannot be the basis for applying the PDA to the states unless the PDA is "congruent and proportional" to a pattern or risk of constitutional violations—*intentional* discrimination in violation of the Equal Protection Clause or infringement on some other right.\[^82\]

Pregnancy discrimination is a special, extreme case of an employment practice with a disparate impact on a protected group. Underlying *Geduldig* was the rule of *Washington v. Davis*[^83] and *Personnel Administrator v. Feeney*[^84] that a state violates the Equal Protection Clause only when it has discriminatory intent. Under Title VII, Congress has gone further with respect to not only pregnancy discrimination but all employment practices with disparate impacts on protected groups. In 1971, the Supreme Court held that such practices were presumptively prohibited under Title VII.\[^85\] This prohibition was applied to the states along with the rest of Title

\[^80\] See Isleboro Sch. Comm. v. Califano, 593 F.2d 424, 430 (1st Cir. 1979) (citing legislative history indicating that the purpose of the PDA was to overturn *Gilbert*).

\[^81\] See *City of Boerne*, 521 U.S. at 512-16 (reviewing legislative history of RFRA).

\[^82\] See id. at 520. The PDA, and the other disparate impact provisions of Title VII discussed below, could technically be applied to the states through the Commerce Clause. *Compare* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (holding that Commerce Clause empowers Congress to apply Fair Labor Standards Act to states), with EEOC v. Wyoming, 460 U.S. 226 (1983) (holding that Commerce Clause empowers Congress to apply Age Discrimination in Employment Act to states). However, Title VII is now unenforceable against the states unless it is within the scope of Section 5. The Supreme Court has held that a state cannot be sued without its consent under a federal statute when the statute is based only on Congress's Article I powers. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (immunity in federal courts); Alden v. Maine, 119 S.Ct. 2240 (1999) (immunity in the state's own courts). In *Kimel v. Florida Board of Regents*, decided on January 11, 2000, the Court extended this rule to the Age Discrimination in Employment Act, holding that because age is not a suspect classification under the Fourteenth Amendment, the Act could not have been enacted under Section 5 and therefore could not abrogate Eleventh Amendment immunity.

\[^83\] 426 U.S. 229 (1976) (holding that evidence that more white job applicants than black applicants passed a written personnel test was not sufficient to establish a violation of the equality component of the Fifth Amendment).

\[^84\] 442 U.S. 256 (1979) (holding that a state's hiring preference for veterans did not violate the Equal Protection Clause merely because it disproportionately favored men).

\[^85\] See Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mecha-
VII in 1972 and was codified by the Civil Rights Act of 1991. Once a plaintiff demonstrates that an employment practice has a disparate impact on the basis of a protected characteristic such as race or sex, the burden shifts to the defendant “to demonstrate that the challenged practice is job related . . . and consistent with business necessity.”

While the Supreme Court has not addressed whether extension of the disparate impact provisions of Title VII to state employers is constitutional, the courts of appeals have held it to be a valid exercise of Section 5 power under Morgan without much discussion, despite the discriminatory intent requirement of the Equal Protection Clause. The Seventh Circuit was the first to consider the issue, and it found the disparate-impact rule analogous to the voting rights provisions upheld in Morgan because it was “undisputed that the 1972 Amendments to Title VII [were] an enactment to enforce the anti-discrimination prohibitions of the Equal Protection Clause and were ‘plainly adapted to that end.’” This analysis embraces a broad reading of Morgan not possible after City of Boerne, giving great deference to Congress in its expansion of the states’ duties and creation of a broad remedy. In Davis and Feeney, as in Smith, the Court left it to the political branches, both state and federal, to weed out the discriminatory effects of facially neutral laws. City of Boerne makes clear that Congress may not categorically hold the states to a higher standard.

The disparate impact provisions of Title VII can apply to the states via Section 5 only if they are meaningfully distinguishable from RFRA. Two possible lines of formal distinction are apparent, but neither is fully satis-

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89. See Matt Pawa, When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment, 141 U. PENN. L. REV. 1029, 1088 (1993) (citing Guardians Ass’n v. Civil Serv. Comm’n, 630 F.2d 79, 88 (2d Cir. 1980); Scott v. City of Anniston, 597 F.2d 897, 899-900 (5th Cir. 1979); Blake v. City of Los Angeles, 595 F.2d 1367, 1372-74 (9th Cir. 1979); United States v. City of Chicago, 573 F.2d 416, 420-24 (7th Cir. 1978)).
90. United States v. City of Chicago, 573 F.2d 416, 423 (7th Cir. 1978).
91. See Feeney, 442 U.S. at 272 (“The calculus of effects, the manner in which a particular law reverberates in a society; is a legislative and not a judicial responsibility.”); Davis, 426 U.S. at 248 (stating that imposing strict scrutiny on laws with racially disparate impacts “would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of . . . statutes that may be more burdensome to the poor and to the average black than to the more affluent white,” so that “extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription”).
92. See supra text accompanying notes 45-52.
factory. First, Title VII deals with rights found in the Fourteenth Amendment itself, whereas RFRA protected a right derived from the First Amendment and later incorporated to apply to the states. Chief Justice Rehnquist has suggested that Congress’s enforcement power does not extend, or perhaps extends with less force, to rights that are merely incorporated.93 In City of Boerne, however, the Court treated the right freely to exercise religion as a “provisio[n] of the Fourteenth Amendment” without hesitation, indicating that the distinction played little or no role in the Court’s decision.94 Second, Title VII affects only the states’ activities as employers, whereas RFRA applied to all state and local enactments; RFRA reached more core state functions than does Title VII. In discussing what was wrong with RFRA, the Court emphasized its broad sweep, ensuring “intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.”95 The Court also criticized RFRA for “curtailing [the states’] traditional general regulatory power.”96 Title VII is much more constrained, and since “proportionality” is a touchstone of the City of Boerne Court’s Section 5 analysis, the disparate impact provisions may be acceptable prophylactics against intentional discrimination. While this difference of degree may help distinguish Title VII from RFRA, it is in tension with the Court’s reluctance to engage in line-drawing between those state functions that are core features of sovereignty and those that are less important and more open to congressional tampering.97

Although the “core state functions” distinction seems unsatisfactory on its own, it highlights how the Court’s analysis in City of Boerne emphasized matters of degree. In contrast to the “compelling interest” test demanded by RFRA for all state legislation, Title VII applies only to employment and imposes a much more lenient test. Under Title VII, the state must show only that the challenged practice is job-related and consistent with business necessity. As a way to identify possible instances of intentional discrimination, the disparate impact provisions could arguably fit the direct South Carolina v. Katzenbach model of Section 5 power.

93. See Hutto v. Finney, 437 U.S. 678, 717-18 (1978) (Rehnquist, J., dissenting) ("While the Court has held that the Fourteenth Amendment 'incorporates' the prohibition against cruel and unusual punishment, it is not at all clear to me that Congress has the same enforcement power under § 5 with respect to a constitutional provision which has merely been judicially 'incorporated' into the Fourteenth Amendment that it has with respect to a provision which was placed in that Amendment by the drafters.").

94. See City of Boerne, 521 U.S at 519-20.

95. Id. at 532.

96. Id. at 534.

When Congress extended Title VII to the states, it had found "'that widespread discrimination against minorities exists in State and local government employment.'"98 Subject to the Court's own evaluation of the scope of this problem—and thus the "proportionality" of the Title VII remedy—a burden-shifting scheme that requires a heightened showing of reasonableness when a state employment practice burdens minorities is at least a rational "congruent" method for identifying instances of intentional discrimination. In City of Boerne, the Court gave some indication that it would uphold Title VII on this basis when it noted that RFRA's "substantial burden" test was "not even a discriminatory effects or disparate impact test."99

The particularity of the PDA, as opposed to the more general disparate impact provisions, makes it more difficult to justify under the South Carolina v. Katzenbach approach. The PDA imposes on states an affirmative duty to level the playing field, which, if one assumes state employment is otherwise sexually neutral, looks like giving women special treatment to make up for their natural disadvantage. In its sex discrimination decisions, the Court has indicated its general willingness to give legislatures discretion in dealing with what it perceives as natural or inherent differences between the sexes,100 just as in Smith it left the way open for similar accommodation of religion. However, there is no indication that Congress was reacting to a widespread problem in which states, for example, excluded pregnancy-related conditions from disability plans in order to discourage women from working. As in the case of Smith, RFRA, and City of Boerne, the PDA was enacted because Congress disagreed with the Court about whether default discrimination due to failure to accommodate difference was a constitutional problem.

If the PDA fails as a direct, South Carolina v. Katzenbach-type shield against sex discrimination, it may still be valid if it indirectly protects some other right in a preservative, Morgan-like fashion. In Cleveland Board of Education v. LaFleur,101 the Supreme Court struck down a policy mandating unpaid leave for pregnant teachers not because it was a classification

99. City of Boerne, 521 U.S. at 535.
100. See, e.g., Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 471 (1981) (holding that because women "suffer disproportionately the profound . . . consequences of sexual activity," state may criminalize sex involving minor females but not sex involving minor males); Dothard v. Rawlinson, 433 U.S. 321, 335-36 (1977) (holding that a woman's rapeability, treated as inherent and referred to by the Court as "her womanhood," is adequate grounds for excluding her from job in a "contact position" at a prison).
Based on sex but because it burdened the fundamental right to procreate. Protecting women from pregnancy discrimination, thereby requiring that their particular burden in reproduction be shared through insurance on the same terms as other physical disabilities, helps ensure that the opportunity to reproduce is not the price of participation in the public sphere of employment. Just as "extra" voting power would enable non-English-speaking communities to receive the same public benefits as other communities, "extra" protection against temporary disability enables women to both reproduce and participate in the economy on terms similar to those available to the never-pregnant people for whom most state programs related to employment are typically designed.

Under either approach, the PDA may have a hard time passing the Court's test of congruence and proportionality to constitutional violations. With respect to proportionality, the advantage of a private cause of action is that it is self-limiting. If the remedy is congruent to a constitutional problem, then the burden imposed on the state will amount only to enforcement of the remedy in individual instances. In terms of congruence, the challenge is to move the PDA out of the "anti-Marbury" category. The

102. Id. at 639-40, 647-48. The Court objected to the use of a "conclusive presumption" that a four-months pregnant teacher was incapacitated from doing her job. See id. at 644. The Court acknowledged that gender stereotypes probably played a role in the formation of the policy, but it did not find it necessary to rely on a pure sex discrimination analysis. See id. at 641 n.9 (noting that several school board members thought the policy "justified in order to insulate schoolchildren from the sight of conspicuously pregnant women"). Justice Powell would have based the decision on the Equal Protection Clause because the policy was based on archaic stereotypes. See id. at 653 (Powell, J., concurring).

103. For example, social security and unemployment compensation programs were designed on the assumption that the typical beneficiary was a full-time male breadwinner with dependent wife and children. Welfare was initially founded on the complementary assumption that white women with small children could not or should not work outside the home. See Linda Gordon, Pitted But Not Entitled: Single Mothers and the History of Welfare (1994) (especially chapter on "Prevention Before Charity: Social Insurance and the Sexual Division of Labor"); see also Lisa A. Crooms, Don't Believe the Hype: Black Women, Patriarchy and the New Welfarism, 38 Howard L.J. 611, 620-24 (1995) (describing changes in racial makeup of welfare recipients and changes in program's goals); Barbara A. Mikulski & Ellyn L. Brown, Case Studies in the Treatment of Women Under Social Security Law: The Need for Reform, 6 Harv. Women's L.J. 29 (1983) (describing inequities in treatment of women depending on marital status); Mary F. Radford, Wimberly and Beyond: Analyzing the Refusal to Award Unemployment Compensation to Women Who Terminate Prior Employment Due to Pregnancy, 63 N.Y.U. L. Rev. 532 (1988) (critiquing Supreme Court's holding that the federal ban on pregnancy discrimination in unemployment compensation did not require state to compensate a job-seeking woman who left her job due to pregnancy); Elizabeth F. Thompson, Unemployment Compensation: Women and Children—The Denials, 46 U. Miami L. Rev. 751 (1992) (critiquing states' refusal to recognize lack of child care as "good cause" when mothers seek unemployment compensation).
success of disparate impact rules under the direct *South Carolina v. Katzenbach* rationale may depend on the Court’s viewing them, because of their modest scope and standards, as screening mechanisms that primarily structure the burden of proof in litigation, rather than as mechanisms that do away with the requirement of intentional discrimination. The PDA does not fit this model: it bans particular practices already held to be constitutional; it affects benefits plans as well as actual employment decisions; and it lacks a factual record demonstrating the use of pregnancy discrimination as a mask for what the Court considers sex discrimination. The indirect “preservation of fundamental rights” argument depends on the Court’s willingness to see at least a potential state infringement on the right to procreate in the structure of an employee benefit plan. The right to reproduce is protected against “undue” state interference, which may justify giving women a statutory right to “extra” benefits because of their greater biological burden. The fundamental problem illustrated by this approach to justifying the PDA is that, because “neutral” state actions will always satisfy the Equal Protection Clause, sexual inequality that turns on a sexual difference must also involve something independently protected by the Constitution in order for Congress to respond under Section 5.

IV. Enforcing the Citizenship Clause

The difference between women and men with regard to pregnancy is related to other sex differences, including different genitals and differences in size and build. Just as women’s ability to become pregnant is culturally transformed into their responsibility for most child care, their smaller size is exaggerated. Norms of behavior and attractiveness produce a society in which “husbands are overwhelmingly bigger [and] stronger than wives.”104 On top of women’s frequent physical disadvantage, violence against them is culturally legitimized. Domestic violence affects not just its direct victims but also those who live under its threat, and those who are grateful to husbands who refrain from using the level of violence considered normal.105 Under prevailing cultural norms, vulnerability to physical abuse,

104. Robin West, *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment* 62 (1994); see also Jane Smiley, *Ordinary Love and Good Will* 54-55 (1989) (“I would like that, . . . falling in love with someone in the seventh grade, and then having her grow up pretty, and shorter than me, and smart, and funny, too.”).

105. See Lillian Rubin, *Worlds of Pain: Life in the Working Class Family* 93 (1976) (finding that the typical response when subjects were asked what they valued in their husbands was, “‘He’s a steady worker; he doesn’t drink; he doesn’t hit me’”) (quoting a thirty-three year old housewife); see also Arlie Hochschild with Anne Machung, *The Second Shift: Working Parents and the Revolution at Home* 18 (1989) (describing how “economies of gratitude” between spouses depend on what each spouse considers typical).
along with other aspects of control that come with it, is the price many women pay for sexual intimacy and a family. This loss of freedom and autonomy, occurring through women’s intimate relationships, is an important feature of women’s inequality—their subordination to men one-at-a-time as well as collectively.

Some see women’s vulnerability to rape as similar to their vulnerability due to smaller size, a burden imposed by nature and the difference that provided the first step towards subordination to men. Others point out the danger of assuming that sexual domination is natural. For example, Professor Catharine MacKinnon notes of women’s experiences with pornography, “Because this treatment is done almost exclusively to women, it is implicitly treated as a difference, the sex difference, when in fact it is the socially situated subjection of women.” While it is sometimes difficult to identify the line between “biology [and] the social consequences of biology,” the result is that because of women’s vulnerability to rape, the sexes are differently situated in a way that the Supreme Court has recog-

106. See Susan Brownmiller, Rape, in Issues in Feminism: An Introduction to Women’s Studies 176, 177 (Sheila Ruth ed., 1990) (“From the humblest beginnings of the social order based on a primitive system of retaliatory force—the lex talionis: an eye for an eye—woman was unequal before the law. By anatomical fiat . . . the human male was a natural predator and the human female served as his natural prey. [T]here could be no retaliation in kind.”).

107. MacKinnon, Feminism, supra note 79, at 41. The danger of what Professor MacKinnon warns against is illustrated by comments distinguishing “real” hate crimes from the forms of violence most often experienced by women. For example:

[Collective violence] is quite unlike private violence, for example, domestic violence or street violence, in which the victims are selected by the attacker because of some relationship the attacker has to the victim or because of something about the victim that makes him or her a desirable target, such as having money or being a woman (rape).


[We] are concerned that the premise of the bill is that all rapes are gender-bias crimes, a premise that we cannot accept and one we believe is unsupported by . . . the common belief among psychologists and others who have studied rapists that the principal motivation is a desire for control and power, rather than a hatred of women.


nized and treated as a natural sex difference rather than a problem of inequality.\textsuperscript{109}

Rape and family violence were among Congress's principal concerns when it passed the Violence Against Women Act. VAWA includes a variety of measures to combat violence against women, including grants for programs ranging from safety improvements in public transportation to the education of judges about domestic violence.\textsuperscript{110} The most legally controversial provision is the civil rights remedy, which creates a right "to be free from crimes of violence motivated by gender."\textsuperscript{111} By calling this statute a civil rights law, Congress indicated its view that such crimes reflect and maintain inequality rather than natural difference. Until recently, this provision was upheld by the federal courts as an exercise of Congress's commerce power.\textsuperscript{112} But when a panel of the Fourth Circuit so held, the en banc court reheard the case and struck down VAWA's civil rights remedy.\textsuperscript{113} In doing so, the court rejected not only the Commerce Clause rationale\textsuperscript{114} but also the alternative rationale offered by Congress and several

\begin{itemize}
  \item \textsuperscript{109} See Michael M. v. Superior Court, 450 U.S. 464 (1981) (discussed \textit{supra} note 100); Dothard v. Rawlinson, 433 U.S. 321 (1977) (discussed \textit{supra} note 100).
  \item \textsuperscript{110} See 42 U.S.C. §§ 13931, 13991 (1998).
  \item \textsuperscript{111} 42 U.S.C. § 13981 (1998).
  \item \textsuperscript{113} See Brzonkala v. Virginia Polytechnic & State Univ., 169 F.3d 820 (4th Cir. 1999) (en banc), \textit{cert. granted}, ___ S. Ct. ___ (1999).
  \item \textsuperscript{114} See \textit{id.} at 826-36. The court first held that under \textit{Lopez} the Commerce Clause does not authorize federal legislation of non-commercial activity unless the statute contains a jurisdictional element, regardless of the effect the regulated activity has on interstate or foreign commerce. \textit{See id.} at 826-27 (interpreting United States v. Lopez, 514 U.S. 549 (1995)). This is a plausible but not necessary reading of \textit{Lopez}.

In the alternative, the \textit{Brzonkala} court considered the possibility that Congress may regulate non-commercial activity but insisted that there must be some judicially enforceable stopping point. \textit{See Brzonkala,} 169 F.3d at 826. In addition to expressing its concern that
commentators, that VAWA enforces the Equal Protection Clause. In Part V, I argue that VAWA should instead be understood as enforcing the Citizenship Clause. To develop an approach to the Citizenship Clause, in this Part I explore a hypothetical law, similar to VAWA, that Congress might have enacted.

Another step Congress might have taken toward its goal that "crimes against women [not] be lessened, diminished, and dismissed because of the relationships that [spawn] them" would have been to abolish marital rape exemptions and interspousal tort immunity in those states where upholding VAWA would "emasculate the judicial role," the court held that VAWA went beyond any stopping point in part because it intruded on realms of traditional state authority: criminal law and domestic relations. See id. at 840-43, 858-59. This argument resonates with the political objections to other provisions of VAWA, but it is something of a stretch given that the provision at issue in Brzonkala was a civil rights remedy that neither defined nor hinged on family relationships. More importantly, the majority failed to respond effectively to the appellants' most intriguing argument, which was that any special interest the states have in crime and domestic relations is outweighed by the special federal interest in civil rights. See id. at 852-54. The court treated this argument as if the appellants were asserting the power to legislate on civil rights as an independent basis of federal authority. See id. at 854 ("[W]e respect the concerns underlying appellants' argument that Congress has a general power to pass 'civil rights' statutes."). Yet, it is the court that introduced the idea that certain fields of law belong to a particular level of government in a way that is relevant to a Commerce Clause analysis.

The dissenting opinion took the position that limitations on Congress's commerce power should be enforced primarily through the political process. See id. at 925-26 (Motz, J., dissenting); see also supra note 67 (discussing the relative roles of the courts and Congress in setting the boundary between state and federal power).

115. See id. at 861-89. For commentary discussing the equal protection rationale for VAWA, see Danielle M. Houck, VAWA After Lopez: Reconsidering Congressional Power Under the Fourteenth Amendment in Light of Brzonkala v. Virginia Polytechnic and State University, 31 U.C. DAVIS L. REV. 625 (1998); Chris A. Rauschl, Brzonkala v. Virginia Polytechnic and State University: Violence Against Women, Commerce, and the Fourteenth Amendment—Defining Constitutional Limits, 81 MINN. L. REV. 1601 (1997); Lori L. Schick, Breaking the "Rule of Thumb" and Opening the Curtains—Can the Violence Against Women Act Survive Constitutional Scrutiny?, 28 U. TOL. L. REV. 887 (1997); but see Carroll, supra note 112; Kurtz, supra note 112. All of these articles discuss VAWA as a measure to enforce the Equal Protection Clause. The first, by Danielle Houck, was written after the Supreme Court's decision in City of Boerne, but it relies on the Morgan description of the scope of congressional power, discussing City of Boerne only in a footnote.


117. See Model Penal Code § 213.1 (1997). A typical modern definition of rape incorporates a marital exemption. The Model Penal Code defines rape as a crime committed by a male against "a female not his wife." Id. In no state is marital rape completely immune from prosecution, but many states limit prosecutions by, for example, requiring aggravated force, treating marital rape as a misdemeanor, or allowing cohabitation as an affirmative defense to rape. See Lisa R. Eskow, The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution, 48 STAN. L. REV. 677, 681-83 (1996) (describing range of state laws covering marital rape); see also Lalena Weintraub Siegel,
they still exist. Though a smaller step, this would be a more direct intru-
sion into state affairs. Assuming that these immunities would not be
struck down under current equal protection doctrine, the remainder of this
Part discusses Congress's power to abolish them in order to enforce the
Citizenship Clause of the Fourteenth Amendment. I argue that despite the
formal sex neutrality that allows immunity doctrines to evade the Equal
Protection Clause, these doctrines are clear continuations of the legal
relegation of wives to second-class citizenship. Their role in preserving
inequality entitles Congress to abolish them despite their modern, neutral
form.

(arguing that equality between women and men cannot exist until martial rape exemptions
are abolished); Jaye Sitton, Old Wine in New Bottles: The "Marital" Rape Allowance, 72
N.C. L. REV. 261, 271-73 (1993) (arguing that marital rape exemptions create involuntary
servitude in violation of Thirteenth Amendment).

118. When wives were subsumed under their husbands' identities upon marriage, an in-
terspousal tort action was a legal impossibility—the husband would have been both plaintiff
and defendant. See Rhonda L. Kohler, The Battered Woman and Tort Law: A New Ap-
proach to Fighting Domestic Violence, 25 LOY. L.A. L. REV. 1025, 1038 (1996); Carl To-
the doctrine of coverture was abandoned, courts developed the doctrine of spousal immu-
nity for torts, asserting that it would promote marital harmony and prevent fraud. See
Kohler at 1039; Tobias at 389-91, 449. In this century, some states have rejected these
arguments and abolished spousal tort immunity, either by statute or by judicial decision.
See Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105
YALE L.J. 2117, 2163 n.163 (1996) [hereinafter R. Siegel]; Kohler at 1049; Tobias at 422-
41 (discussing developments in the period from 1921 to 1989). A few, however, have re-
affirmed it. See R. Siegel at 2163 n.163; Kohler at 1049; Tobias at 422-41; see also R.
Siegel at 2193 n.272 (summarizing cases involving constitutional challenges to interspousal
tort immunity).

119. Congress's power to enforce the Fourteenth Amendment's prohibitions necessarily
includes some power to intrude on state affairs. However, contrary to the Fourth Circuit's
argument in Brzonkala, there is nothing wrong with Congress seeking to minimize the intru-
sion, the degree of which may affect a court's analysis of whether Congress's remedy is
"proportional" under City of Boerne. Compare Brzonkala, 169 F.3d at 875-76 (dismissing
the government's argument that VAWA regulates private action so as to avoid intruding on
state sovereignty by claiming that this argument "confuses the Fourteenth Amendment with
the Commerce Clause and other similar grants of federal power") with id. at 872-73 (argu-
ing that VAWA's civil rights remedy is too broad because it does not recognize interspousal
tort immunity or the marital rape exemption).

120. Doctrines of interspousal tort immunity are, obviously, phrased in sex-neutral terms.
Some rape statutes, such as the Model Penal Code version, are sex-specific, so that any sex
crime committed by a woman or against a man is classified separately, as sodomy or sexual
assault. However, these statutes are always sex-symmetric in privileging assaults on a
spouse. They could be challenged as illegitimate classifications based on marital status.
However, as noted in the previous footnotes, several states have revised the doctrines to
cover all co-habitants and to exclude married couples living apart.
The Fourteenth and Fifteenth Amendments built on what was begun with the Thirteenth. In terms of direct political participation, one aspect of citizenship, the Thirteenth Amendment promised nothing explicitly, the Fourteenth tried to encourage the states to extend the franchise,\(^{121}\) and the Fifteenth directly forbade race discrimination in elections. Section 1 of the Fourteenth Amendment extended the Thirteenth Amendment's abolition of slavery to more general principles of equal status and treatment.

Under slavery, racial subjugation by law was accomplished primarily in the private sphere. Slaves were considered part of a plantation "family," to be governed primarily by the male head of the owning family.\(^{122}\) There was little or no additional privacy for slave families.\(^{123}\) Extreme abuse could lead to government or community intervention, but, for the most part, violence and the threat of violence were the right of the slave owners to use.\(^{124}\) In Professor Robin West's formulation, the slave was subject to two sovereigns: the general government and the owner, "the commands of both to be endured under the threat of unchecked violence."\(^{125}\)

The Thirteenth Amendment abolished the primary legal institution for making racial subjugation a private affair. Other mechanisms helped former slave owners maintain their private domination over former slaves. State legislatures tied former slaves to particular employers, maintaining personal, "family" relationships.\(^{126}\) Well into this century, a large proportion of black women worked as live-in maids, a job particularly known for its personally exploitative potential.\(^{127}\) State law enforcement denied protection, keeping intact the "threat of unchecked violence" that had made

\(^{121}\) See U.S. Const. amend. XIV, § 2. Section 2 of the Fourteenth Amendment tied each state's representation in the House of Representatives (and therefore the Electoral College) to the proportion of adult males in the state who were permitted to vote in national and state elections.


\(^{124}\) See Genovese, supra note 122, at 36-38, 41-43 (discussing legal and community responses to brutality).

\(^{125}\) West, supra note 104, at 23; see generally Genovese, supra note 122, at 25-49 (discussing legal regulation of relations between blacks and whites under slavery).


\(^{127}\) See Collins, supra note 123, at 53-56, 176 (noting that "urbanization meant migration out of agricultural work and into domestic work," which was "more profoundly exploitative than other comparable occupations [because of] the personal relationship between employer and employee" and subjected the employee to frequent sexual harassment).
whites sovereign under slavery. The Fourteenth Amendment attempted to improve this situation, recognizing that merely abolishing the particular institution of slavery had not abolished all aspects of racial subjugation. It abolished the legal basis for practices of subordination that underlay both slavery and its post-war continuations, which subjected one group to the sovereignty of another and denied the subordinate group equal and fair protection from the general government.

Another way to fight the post-war continuations of slavery, using only the Thirteenth Amendment, is the “badges-and-incidents” doctrine. Congress has used its Thirteenth Amendment enforcement power to pass laws banning race discrimination in several private contexts, including bias crimes and contract formation. The Supreme Court has upheld these laws because, even though they do not directly outlaw slavery, they are aimed at what Congress believes to be the badges and incidents of slavery. When Congress passes a law to enforce the Thirteenth Amendment, the courts review it according to an idea of what slavery is and what is required to achieve its opposite, freedom. In other words, the badges-and-incidents doctrine is the Thirteenth Amendment version of the preservative rationale from *Katzenbach v. Morgan*. It allows Congress to create statutory rights in order to protect and preserve a constitutional value.

Just as the Fourteenth Amendment’s Citizenship Clause was an extension of the Thirteenth Amendment’s abolition of slavery, Congress’s Fourteenth Amendment enforcement power makes more sense if there is something substantive to enforce in the Citizenship Clause, something simul-
ilar to the badges-and-incidents doctrine of the Thirteenth Amendment. As the subtle distinctions in Morgan, South Carolina v. Katzenbach, and City of Boerne demonstrate, opportunities for Congress to contribute to enforcing the “No state shall” provisions—which can be enforced in court, and which Congress is forbidden to expand—are few. On the other hand, there is a necessary similarity between “the kind of values protected by the Fourteenth Amendment’s ideal of equal citizenship and the Thirteenth Amendment’s freedom component.” Both protect against class-based disabilities, “the degradation of stigmatization, [which] makes an individual unworthy to be treated as a person, and hence, as a citizen.”

If the Citizenship Clause imparts something more than “the privilege of writing ‘citizen’ after your name,” then that something must be similar to what is conferred by the Thirteenth Amendment, which abolished a particular institution of subordination and empowered Congress to weed out its remnants.

Suppose that rather than explicitly abolishing slavery in the Thirteenth Amendment, the nation had proceeded directly to the Fourteenth Amendment. Surely, the Citizenship and Equal Protection Clauses would have been sufficient to outlaw slavery. Furthermore, there is no reason why Congress’s power to outlaw the badges and incidents of slavery would not have been as broad. This is not to say that the Thirteenth Amendment has no role to play in the Constitution, only that it is a role that might have been played by the language of the Fourteenth, read with the understanding that abolishing slavery was its most immediate object.

Until the twentieth century, the law recognized and endorsed the subordination of women to men in marriage. The dismantling of that system has been much more gradual than was the abolition of slavery; it is first

133. See Frantz, supra note 63, at 1356 (noting that state action limitation on most of Section 1 “pulls inevitably toward producing an amendment which confers new power primarily on the federal judiciary”); Samuel Estreicher, Congressional Power and Congressional Rights: Reflections on Proposed “Human Life” Legislation, 68 VA. L. REV. 333, 421-22, n.294 (1982) (arguing that overly narrow interpretations of Section 5 produce “extravagant” uses of commerce power to address equality issues).


136. BLACK, STRUCTURE AND RELATIONSHIP, supra note 7, at 62. The Court has recognized that citizenship status involves certain obligations, the scope of which can be defined by the legislature. See e.g., Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (national citizen’s duty to render military service); Miller Bros. v. Maryland, 347 U.S. 964 (1954) (state citizen’s duty to pay taxes).

137. See Kaczorowski, supra note 129, at 913 (stating that the Citizenship Clause empowered Congress “to enforce the status and rights of citizenship”).
recognizable in the Married Women’s Property Acts that began to appear in the 1840s. As these early moves towards formal equality began, courts developed principles of marital privacy, used to justify interspousal immunity and marital rape exemptions, which shielded the perpetuation of private hierarchy. While after the abolition of slavery race relations slowly moved to the public spheres of politics and the economy, relations between the sexes as such remained centered in the private sphere of the home and family. The meaning of this privacy for whites was reflected in their reluctance to apply it to black families: some states developed an interest in wife-beating, selectively enforced against black men not out of solicitude for black women but “to prevent [their] recently emancipated husband[s] from asserting the ‘privileges’ of a master.” Few people want to abolish “the family” as an institution, but women’s equal citizenship depends upon abolishing the remnants of legal hierarchy between wives and husbands—a kind of second-class citizenship implicitly forbidden by the Citizenship Clause.

Accepting that the Citizenship Clause may be given substantive content would not mean that Congress would be free to create any statutory rights it pleased as long as it declared them to be crucial to citizenship. In its modern cases in the Thirteenth Amendment context, beginning with Jones v. Alfred H. Mayer Co., the Supreme Court has shown Congress great but not unbounded deference in defining the concept of slavery and in reaching out to abolish its badges and incidents. Jones may be the Morgan of the Thirteenth Amendment; it is safe to assume that a stricter standard along the lines of City of Boerne will be applied in the future to Thirteenth Amendment legislation, as well as to Citizenship Clause legislation if such a category emerges. However, it seems improbable that the Court would entirely eliminate Congress’s power to take the lead in defining and abolishing the badges and incidents of slavery. Doing so would mean forsak-

138. See R. Siegel, supra note 118, at 2206 (arguing that rhetorical shifts from explicit invocations of natural hierarchy to privacy and, recently, to federalism provide historically appropriate justifications for continuing patterns of racial and sexual subordination).

139. R. Siegel, supra note 118, at 2135. At the same time in history, white married women were slowly becoming less encumbered by legal disabilities, but judicial enthusiasm for the sanctity of marital privacy effectively sheltered their continued dominance by their husbands. See id. at 2120. In addition to failing to recognize black families’ privacy in the sense of allowing the husband to dominate, southern courts denied the sanctity of the parent-child bond in black families by sanctioning an apprenticeship system that separated thousands of black children from their families. See Burnham, supra note 126, at 436.

140. 392 U.S. 409 (1968) (holding that Congress has power under the Thirteenth Amendment to outlaw race discrimination in the purchase and sale of property); see also Runyon v. McCrery, 427 U.S. 160 (1976) (relying on the expansive standard in Jones); Griffin v. Breckenridge, 304 U.S. 88 (1971) (same).

141. See Tribe, supra note 108, at 332.
ing the badges-and-incidents concept beyond the context in which the courts would be willing to hold that people acting in their private capacities could commit constitutional violations. Even under increased judicial scrutiny, Congress would retain the power to develop the meaning of freedom under the Thirteenth Amendment and the meaning of citizenship under the Fourteenth.

As a starting point, then, one must have a theory of what citizenship is, what dangers threaten it, and what remedies are "congruent" to those dangers. One notion of citizenship is linked to the idea of a social contract, in which "liberty" is understood as the absence of governmental restraint. In this model, one becomes a citizen by voluntarily ceding a portion of pre-existing freedom to democratically legitimate constraints. Feminists have argued that this notion of citizenship is inadequate once the family, and women's place in it, is taken into account. As an alternative, Professor Tracy Higgins has outlined a feminist theory of citizenship in which freedom is created, rather than preserved, through democracy. Under this theory, "equality cannot be equated with state neutrality but must be evaluated against substantive conditions produced by both public and private power." When the conditions produced by private social allocations of power tend to subordinate women, Congress must be able to provide for women's full citizenship by creating ways to redress private imbalances.

The concept of freedom as something sought and created through government rather than pre-existing it is not entirely alien to our law. Our founding document indicates that even though the basic human rights of "Life, Liberty, and the Pursuit of Happiness" are "unalienable," governments must be instituted "to secure these Rights." Similar language appears in the preamble to the Constitution. The need for freedom to be


143. See Higgins, supra note 5.

144. Higgins, supra note 5, at 1698.

145. The Declaration of Independence para. 2 (U.S. 1776).

146. See U.S. Const. preamble. The preamble states: We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.
affirmatively secured was especially apparent during the post-Civil War period that gave rise to the Fourteenth Amendment. Dissenting in the *Civil Rights Cases,* Justice Harlan considered the question of what "positive rights and privileges were intended to be secured, and are in fact secured by the Fourteenth Amendment." While the majority ignored the first sentence of Section 1, declaring the entire section to be "prohibitory upon the states," Justice Harlan pointed out that Congress is empowered "to enforce 'the provisions of this article' . . . ; not simply those of a prohibitive character, but [all] of the provisions—affirmative and prohibitive."

But what was secured to colored citizens of the United States—as between them and their respective states—by the grant to them of state citizenship? With what rights, privileges, or immunities did this grant from the nation invest them? There is one, if there be no others—exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same state.

Although Justice Harlan refers to rights "as between them and their respective states," he is arguing here for the constitutionality of a federal law banning private race discrimination in public accommodations. The last phrase of the quotation refers to the Privileges and Immunities Clause of Article IV, Section 2, understood, as in *Corfield v. Coryell,* as guaranteeing not just equal treatment of out-of-state visitors but basic liberties "which belong, of right, to the citizens of all free governments." Justice Harlan thus treats the Fourteenth Amendment's grant of state citizenship as providing Congress "a constitutional basis for guaranteeing to all state citizens an equal right to common law protections," including the right to nondiscriminatory treatment. At least where the state's laws do not protect this right, Congress is empowered to provide a remedy. Linking Congress's ability to guarantee equal treatment to the adequacy of the states' laws, Professor Laurence Tribe explains that the *Civil Rights Cases* were "an ideal vehicle for demonstrating both proper and improper applications of the Civil Rights Act," because "in one of the cases before the Court but

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147. 109 U.S. 3 (1883).
148. Id. at 44 (Harlan, J., dissenting). For further critique of the majority decision, see McGoldrick, supra note 63.
150. Id. at 47 (Harlan, J., dissenting).
151. Id. at 48 (Harlan, J., dissenting).
152. Id. at 26-27 (Harlan, J., dissenting) (summarizing the statute).
154. 6 F. Cas. at 551.
155. TRIBE, supra note 108, at 1695 n.16.
not the others, a state (Tennessee) had specifically repealed its common law rule of equal access.\textsuperscript{156}

Applying an affirmative, freedom-seeking conception of citizenship to abrogation of legal immunity for husbands who beat and rape their wives, Congress could acknowledge that states have policy reasons for these doctrines but express its concern that they permit private domination, the intervention of another sovereign over one of the nation's citizens. Because this is not an isolated possibility but a traditional and widespread form of oppression, Congress may decide that the other policy considerations must yield. In doing so, Congress would be abrogating traditional rules rather than protecting a traditional common law right like the right to nondiscriminatory treatment cited by Justice Harlan.\textsuperscript{157} However, this difference does not matter because the relevant common law for deciding the rights of citizenship is that which governs between equals, not doctrines rooted in the notion of coverture, the legal disappearance of a woman upon marriage. One cannot rebut Justice Harlan's argument by digging up common law rules governing the relationship between master and slave. In the \textit{Civil Rights Cases}, states like Tennessee had to alter their common law to make up for the abolition of slavery by explicitly repealing the rule of equal access. While the continued existence of the family as a status relationship smoothed the transition from codified to permissive hierarchy, this fact should not make a constitutional difference.

The incompatibility between private subordination and a person's status as a full member of the political community was noted by a state court that decided, in light of the Nineteenth Amendment, that interspousal tort immunity should be abandoned.\textsuperscript{158} The court reasoned: "Wives are no longer chattels. There are half a million women voters in North Carolina. They do not need to beg for protection for their persons, their property, or their characters. They can command it."\textsuperscript{159} The court did not think it necessary that women actually "command it" by using their new political power to lobby for the abolition of tort immunity. Women's new status as voters, as full members of the community of citizens, was sufficient to make inappropriate a legal scheme in which they must "beg for protection" rather than claim it as a matter of right.

\begin{itemize}
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textit{See supra} notes 117-18 (discussing coverture, interspousal tort immunity, and the marital rape exemption).
\item \textsuperscript{158} \textit{See Crowell v. Crowell, 105 S.E. 206 (N.C. 1920)}.
\item \textsuperscript{159} \textit{Id. at 210, quoted in} Tobias, \textit{supra} note 117, at 471. Professor Higgins notes, "The idea that voting was central to citizenship, and even personhood, can be traced to Aristotle." Higgins, \textit{supra} note 5, at 1683 n.128 (citing \textsc{Aristotle}, \textsc{The Politics} 87 (Carnes Lord trans. 1984) and \textsc{Judith N. Shklar}, \textsc{American Citizenship} 3 (1991)).
\end{itemize}
V. The Violence Against Women Act as a Promise of Equal Citizenship

Congress has not chosen to abrogate state tort rules but instead, in the Violence Against Women Act, to create a right to be free of violence motivated by gender animus. The cause of action that enforces this right gives rise to two related problems: first, under what theory is it a constitutional exercise of Congress's Section 5 powers; second, what does "animus" based on gender mean? This Part considers two possible answers to these questions. The first is a categorical approach, under which all victims of sex crimes would be entitled to the civil rights remedy. I discuss this answer to the "animus" question as a Morgan-like enforcement of the Equal Protection Clause. The second answer is the one chosen by Congress, which rejected the categorical approach and instead made liability turn in all cases on whether the violence was gender-motivated. I argue that this remedy is better understood as a measure to enforce the Citizenship Clause.

A. State Action and Categorically Gender-Motivated Crimes

Congress considered writing into VAWA a rebuttable presumption that all rapes and sexual assaults are gender-motivated. This presumption would have reflected the facts that women are overwhelmingly the victims of such crimes, that sexual assault inherently is related to sex, and that Congress had cause to be concerned about shortcomings in state enforcement of sex-crimes laws. Such a categorical approach to violence against women would have made the parallel between VAWA and the preservation equal protection rationale of Morgan as strong as possible. Instead of emphasizing its concern for the gender-based criminal motives of private violators, Congress could have emphasized its concern for state discrimination against women that takes the form of failing to enforce sex-crimes laws or subjecting complainants to "double victimization" in the process of prosecution. A federal civil rights remedy helps insulate victims of these crimes from state discrimination in three ways: it creates an

160. See Nourse, supra note 116, at 26; Carroll, supra note 112, at 819 (citing Crimes of Violence Motivated by Gender: Hearing on H.R. 1133 Before the Subcomm. on Civil and Constitutional Rights of the House Comm'n on the Judiciary, 103d Cong. 101 (1993) (statement of Sally Goldfarb)).

161. This approach could be extended to include domestic violence cases. Under a categorical approach that seeks to redress state failures of law enforcement, extension to cover domestic violence would be as easy (or hard) to justify as categorical coverage of sex crimes. In terms of promoting women's equality, as opposed to providing equal protection to the victims of crimes historically neglected by law enforcement, the domestic violence category would probably be more over-inclusive than sex crimes.

additional deterrent against sex crime, making up for the states' failure to deter; it gives the victim more control over the proceedings; and it gives access to the federal courts, which have a special role in the protection of civil rights and may be less biased against women.\textsuperscript{163}

If Congress is concerned that sex crimes are not adequately handled by the states, a federal statutory right enforced through a private cause of action against perpetrators is a plausible remedy. It is certainly less of an intrusion on the states than direct interference in the form of mandates on how to handle the cases, which would be "a most cumbersome way of operating."\textsuperscript{164} Although a private suit against the offender does not create incentives for the state's criminal system to improve, it provides redress and protection for the victim, which is, after all, part of the reason for wanting to improve the state's behavior in the first place.

Applying \textit{City of Boerne}'s "congruence and proportionality" test, which the Fourth Circuit interpreted to require Congress's remedy to be "a closely tailored means"\textsuperscript{165} of correcting violations of the Equal Protection Clause, the \textit{Brzonkala} decision rejected these arguments. In arguing that VAWA lacks "congruence" to any constitutional violations, the court emphasized the state action doctrine\textsuperscript{166} and said the legislative history of VAWA did not demonstrate sufficient evidence of \textit{intentional} discrimination by the states.\textsuperscript{167} Despite its position that Congress should direct Sec-

\textsuperscript{163} \textit{See} Johanna R. Shargel, \textit{In Defense of the Civil Rights Remedy of the Violence Against Women Act}, 106 \textit{Yale L.J.} 1849, 1882 n.181 (1997) (citing results of Ninth Circuit study finding that "the federal courts are relatively free of the kind of blatant sexism [women] have encountered in some state courts"); \textit{see also} Linda G. Mills, \textit{Intuition and Insight: A New Job Description for the Battered Women's Prosecutor and Other More Modest Proposals}, 7 U.C.L.A. \textit{Women's L.J.} 183 (1997) (questioning mandatory arrest policies and arguing need for flexible response to domestic violence); Barbara J. Hart, \textit{Arrest: What's the Big Deal}, 3 \textit{Wm. \\& MARY J. WoMEN \\& L.} 207 (1997) (arguing that the response to domestic violence should have several goals, including increased agency of victims). In addition to allowing the victim to regain her sense of autonomy, victim control over domestic violence remedies is important where the victim has reason to believe the perpetrator, because of his race, will be treated unfairly by the criminal justice system and is therefore especially reluctant to seek legal redress.

\textsuperscript{164} Frantz, \textit{supra} note 63, at 1357; \textit{see also id.} at 1363 (quoting \textit{United States v. Hall}, 26 F. Cas. 79, 81-82 (C.C.S.D. Ala. 1871) ("[I]t would be unseemly for congress to interfere directly with state enactments, and as it cannot compel the activity of state officials, the only appropriate legislation it can make is that which will operate directly on offenders and offenses.").

\textsuperscript{165} \textit{See Brzonkala}, 169 F.3d at 883.

\textsuperscript{166} \textit{See supra} notes 61-66 and accompanying text (discussing the \textit{Brzonkala} court's rejection of the argument that Section 5 empowers Congress to regulate private action).

\textsuperscript{167} \textit{See Brzonkala}, 169 F.3d at 884-85. To buttress this point, the court suggested that congressional findings of state discrimination were undermined because the Act gave state courts concurrent jurisdiction over civil rights claims and because other portions of the Act appropriated funds that would be used to give grants to states to help reduce violence
tion 5 legislation exclusively toward the states, the court gave some consideration to the possibility that "enforcing" equal protection of the laws could mean filling in where the state had failed, not just directly correcting the state's violation. The court complained, however, that the remedy was not properly tailored to compensate for the equal protection violation: recovery hinges on the perpetrator's actions rather than on how well the state responds to the crime. The problem with this argument is that it treats each crime as an incident unto itself, not as part of a group-based civil rights problem. A particular victim suffers from the state's neglect not only because the state handles her complaint poorly but because the state's neglect of past cases legitimized future rapes and may have made them more likely to occur.

The Fourth Circuit's stronger argument is that VAWA fails the "proportionality" prong of City of Boerne. The court pointed out that the civil rights remedy is not limited in any way that is tied to whether the states' performance of their duties improves over the long term, or whether particular states are already performing well. The cause of action would continue to exist even in a state whose diligence in enforcing sex-crimes laws was everything one could ask. Whether these flaws require VAWA to be struck down, however, is not clear. Instead, the court could have looked at the Act "as applied" by considering whether the equality concerns that led Congress to enact the civil rights remedy are present in Virginia. This venture, however, would probably be beyond the capabilities of a court. Therefore, the lack of temporal or geographic restrictions on the civil rights remedy would have to be justified by arguing that the problems Congress sought to correct are so widespread that no limitations are appropriate at the moment.

against women. See id. at 885-86. This critique, which fails to recognize that states are not unitary entities, is typical of the opinion's tendency to nit-pick Congress's findings and policy choices. See id. at 914 ("The majority does not assert that these findings lack documentation or power. Instead, it nitpicks them.") (footnote omitted) (Motz, J., dissenting).

168. See id. at 885, 887 (noting that the civil rights remedy is available "without regard to whether the State failed adequately to investigate or prosecute the case because of bias or discrimination").


170. See Brzonkala, 169 F.3d at 887; cf. Frantz, supra note 63, at 1359 (summarizing theory that laws to enforce equal protection cannot "operat[e] uniformly regardless of the role played by the state").

171. This argument would not be as difficult to make as the Fourth Circuit suggests. The Brzonkala opinion scoffed at the suggestion that state laws maintain inequality by noting, for example, that at the time VAWA was enacted, forty-seven states criminalized marital
The Fourth Circuit's insistence on seeing VAWA's civil rights remedy as a law that intrudes on state regulation of "domestic relations" led it to miss a more important problem with the congruence between the Act and the Equal Protection Clause. The goal of enforcing equal protection does not fit well with other crimes clearly reached by VAWA's definition of "gender-motivated" crimes. Although murder, unlike sexual assault, would not be presumptively gender-motivated, a victim of a classic bias crime—such as the massacre of female engineering students in a Montreal university classroom by a man shouting that he hated feminists—would be able to show gender-motivation. Although this incident is not a typical case of gender-motivated crime, it fits the classic model of a hate crime, and Congress clearly wanted VAWA to reach such a case. But there is no indication that murder laws are under-enforced when the victim is female and the perpetrator is a stranger to her, so it is hard to see how an equal protection rationale for VAWA could enable Congress to reach this situation.

B. Would He Have Beaten His Wife if She Were a Man, or What is "Animus Based on Gender"?

The cases not reached by the categorical approach indicate that the real problem with gender-motivated violence is only in part that the state fails in its response. As defined in VAWA, a "crime of violence motivated by gender" is one that is "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."

When a gender-motivated crime occurs, the person who harms the victim's dignity and status in society is the perpetrator of the crime, not the state. The states have largely failed to act against the bias element of gender-motivated crimes—most state hate-crime statutes exclude sex from their lists of protected characteristics. However, there is no indication that the Equal Protection Clause requires states to provide enhanced penalties for bias-motivated crimes. It also seems unlikely that the Court would consider the exclusion of "sex" from statutes aimed at other kinds of bias, such as race, to be invidious discrimination. Nonetheless, gender-motivated violence was treated differently from other rapes by the statutes themselves or by prosecutors and juries. See supra notes 117-18 (describing typical modern statutes on marital rape and interspousal torts).


174. See S. REP. No. 103-138, at 48 (1993); Schick, supra note 115 at 898, n.67.

175. The Supreme Court has held that a state may punish invidious discrimination in selecting the victim of a violent crime. See Wisconsin v. Mitchell, 508 U.S. 476 (1993).
vated crime harms women's civil rights. Rather than as an attempt to enforce the Equal Protection Clause, Congress's invocation of the Fourteenth Amendment and its declaration that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender" is better understood as a measure to fulfill the promise that "[a]ll persons born or naturalized in the United States . . . are citizens."

Under Justice Harlan's approach to the Citizenship Clause, described in Part IV, the duty to remedy invidious private discrimination rests in the first instance with the states, because the right to be free of discrimination is an aspect of state citizenship. However, even the rights of state citizenship take on a federal quality because state citizenship is, in Justice Harlan's words, a "grant from the nation." The accompanying rights include the right to enjoy the same liberties as all citizens, and when one group threatens to subordinate, or continue subordinating, another, the federal government can take action against discriminatory denials of liberty. The bias element of an attack implicates federal concerns for citizenship:

In addition to constituting an assault on fundamental public order, [a hate crime] attacks the ongoing process of institutionalizing a pattern of pluralism . . . . [This explains] the vague assertions of Reconstruction legislators and judges about a distinction between ordinary crimes and crimes that deprive one of one's civil rights, a distinction which seems so hard to make when rights are looked upon solely as the accoutrements of individual dignity.

(holding that defendant's punishment could be enhanced because he intentionally selected his victim on the basis of race).

176. The Senate heard testimony that "[u]ntil women as a class have the same protection offered others who are objects of irrational hate-motivated abuse and assault, we as a society should be ashamed." S. Rep. No. 103-138, at 49 (1993) (quoting testimony of Illinois Attorney General Roland Burris).


178. U.S. Const. amend. XIV, §1, cl.1. The danger in basing VAWA on the Citizenship Clause is the possible inference that plaintiffs would have to be citizens. There are two responses to this problem. First, aliens in the United States are generally entitled to receive the same common law protections that citizens receive from the state. Second, Congress has the power, even under the Citizenship Clause, to extend VAWA's civil rights remedy to aliens because one of the major reasons the remedy exists is the group harm that is done to women as a class by patterns of gender-motivated violence. When rape, domestic violence, and more classic hate crimes occur in ways that target the victims as and because they are women, the material impact on the lives and status of women as a group does not hinge on whether the victim was a citizen.


180. Frederick P. Lewis, The Dilemma in the Congressional Power to Enforce the Fourteenth Amendment 72 (1980).
The special harm caused by a bias crime is recognized in *United States v. Cruikshank*, which ordered dismissal of charges for attacking two black men, in interference with their rights, on the grounds that the rights to assemble, to bear arms, and to receive due process of law were not rights of national citizenship. But the Court found it necessary to point out that there was no allegation that the defendants had acted *because of* the race of their victims. The negative implication is "that Congress might be able to add something to the rights of one individual against another, at least where a race motive is involved." The Supreme Court has since endorsed a federal civil rights remedy for victims of racially motivated violence, as one of the badges and incidents of slavery that Congress may proscribe under the Thirteenth Amendment. The VAWA civil rights remedy applies the same approach to gender-motivated crimes.

As a parallel to a law intended to eliminate a feature of race-based subjugation, VAWA is best grounded in a constitutional provision that guarantees women's status, the Citizenship Clause, rather than one that guarantees only neutral treatment by the state. The test, then, for VAWA's constitutionality is whether the civil rights remedy is a "congruent" and "proportional" response to threats to women's status as citizens. One possible problem with its "proportionality" is that, even under Justice Harlan's approach, Congress may be required to key its action to failures on the part of the states. Rather than focusing on whether the states adequately enforce neutral laws, however, the Citizenship Clause approach allows Congress to consider directly whether the states are responding adequately to gender-bias crime. Most states have failed to identify gender-motivated violence as a hate crime, but it may be necessary to exempt from VAWA's civil rights remedy those crimes that occur in the exceptional states. However, in order for a state to qualify for this exception, it must not only include "sex" as a protected characteristic in its hate-crime statute, but also enforce this provision in a manner tailored not only to classic hate.

183. *Id.*
186. *See* Schick, *supra* note 115, at 898 n.67 (noting that hate-crime statutes included gender as a protected criterion in only eleven states in 1994 and that, in some of those states, gender was included only in certain portions of statute).
crimes—conspiracies to commit violence against strangers chosen only for their race or other targeted characteristic—but to the kind of violence targeted by VAWA and most central to women’s subordination.\textsuperscript{187}

Whether the civil rights remedy is “congruent” to threats to women’s equal status depends on what Congress meant when it created the right to be free of “gender-motivated” crimes of violence. The question of what qualifies as a gender-motivated crime under VAWA is not yet settled, and it seems to cause more confusion than the idea of racially motivated crime.\textsuperscript{188} Some approaches to the problem of defining gender animus threaten to undermine VAWA’s goal that “crimes against women [not] be . . . dismissed because of the relationships that [spawn] them,”\textsuperscript{189} reinforcing rather than eliminating the remnants of women’s past legal subordination. In the view of at least one member of Congress, a showing of animus, in addition to gender-motivation, is necessary under VAWA because singling a person out on the basis of her gender to be the victim of a violent crime can indicate either animus or love, depending on the circumstances.\textsuperscript{190} Stereotypes suggesting that only “real rape”\textsuperscript{191} by a stranger is motivated by gender animus have shown up in one judicial opinion.\textsuperscript{192} Most courts, however, have indicated willingness to define gender animus broadly, at least on summary judgment. They have refused to equate animus with dislike\textsuperscript{193} and have rejected defendants’ arguments that their ac-

\textsuperscript{187} See Frazee, \textit{supra} note 107, at 190-95 (criticizing Anti-Defamation League for decision to exclude gender-based crime from model hate-crime statute and discussing inadequacy of classic hate-crime model for dealing with violence against women).

\textsuperscript{188} Both kinds of laws have, however, raised fears that congressional response to bias crimes will intrude on traditional state tort and criminal law. See Jones, An Argument for Federal Protection, \textit{supra} note 134, at 722.

\textsuperscript{189} Nourse, \textit{supra} note 116, at 2.

\textsuperscript{190} Senator Hatch, a co-sponsor of VAWA, believes, “If a man rapes a woman while telling her he loves her, that’s a far cry from saying he hates her. A lust factor does not spring from animus.” Jennifer Gaffney, Amending the Violence Against Women Act: Creating a Rebuttable Presumption of Gender Animus in Rape Cases, 6 J.L. & Pol’y 247, 259 (1997) (quoting from Ruth Shalit, \textit{Caught in the Act; Congress; Violence Against Women Act of 1993}, \textit{New Republic}, July 12, 1993, at 12). In contrast, Senator Biden stated, “Theoretically, I guess, a rape could take place that was not driven by gender animus, but I can’t think of what it would be.” \textit{Id.} at 260 (quoting from Shalit, at 12). As noted below, the federal courts appear so far to lean towards Senator Biden’s view.


\textsuperscript{192} See Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779, 784 (W.D. Va. 1997), \textit{aff’d en banc}, 169 F.3d 820 (4th Cir. 1999), \textit{cert. granted}, ___ S. Ct. ____ (1999). The court noted that it did not need to decide whether VAWA covered other rapes, such as acquaintance rape, which it viewed as less egregious than stranger rape.

\textsuperscript{193} See Doe v. Hartz, 970 F. Supp. 1375, 1406-09 (N.D. Iowa 1997) (stating that “forcing physical intimacy on a woman” is not a “signal of affection” but is “illustrative of a lack of respect for women”), \textit{rev’d on other grounds}, 134 F.3d 1339 (8th Cir. 1997); see also
tions, including rape, "demonstrate affinity, not animus, towards women" and towards their victims in particular.  

The problem of what kinds of attacks on women reflect gender animus is analogous to some problems in the law of sexual harassment. Indeed, Congress indicated that interpretation of VAWA should be guided by Title VII jurisprudence. This is not a helpful instruction. While sexual harassment of a woman by a man has generally been assumed to be sex discrimination under Title VII, recent confusion over male victim and same-sex cases has led to re-examination of why that assumption is warranted. Professor Katherine Franke has proposed an approach particularly appropriate for VAWA, focusing on whether the act in question enforces stereotypical gender roles. To apply this method and treat VAWA as a mandate to protect women's status as citizens, courts would look at the history of how citizenship has been denied, and refuse to adopt the same methods in applying VAWA. For example, domestic violence is one of the primary ways in which women have been subordinated to men, and it had the sanction of the law for quite some time. Yet, "[h]ow can a married woman prove that her husband [attacked her] her not as an individual person, but as a woman?" To answer this question, it is necessary to distinguish gender-motivation and animus from consciously articulated intent to discriminate. "Many men still believe that a woman has to obey her husband's wishes and as a consequence consider themselves justified to use violence." Such men do not perceive themselves as acting out of gender animus. However, the belief that women must obey men is itself a statement of disrespect for women, and effecting this belief through violence subordinates the victim on the basis of her sex. Domestic violence "is

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195. Katherine M. Franke, What's Wrong With Sexual Harassment?, 49 Stan. L. Rev. 691, 693 (1997). In Oncale v. Sundowner Offshore Services, Inc., 118 S.Ct. 998 (1998), the Supreme Court may have endorsed this approach by holding male-on-male sexual harassment to be actionable under Title VII regardless of the perpetrator's sexual orientation. However, the Court's short opinion offered very little guidance on how such claims should be adjudicated, and it could be read as requiring a pure nondiscrimination standard.


197. Id. at 14.

198. See id. at 14 (stating that "existing stereotypes about family and women are the underlying cause for abusive behavior in intimate relationships" and that "[t]he intent standard would fail to address civil rights deprivations coming from such stereotypes") (citing Susan Schechter, Women and Male Violence 209 (1982)).
often precipitated by women’s noncompliance with gender requirements.” Sometimes a family fight may be just a fight, and the weakness of human nature means that some fights will become physical. However, a “fight” in which one person disciplines another for failing to comply with a subordinate gender role is an illegitimate assertion of sovereignty over a fellow citizen on the basis of her sex, which is a civil rights problem.

The above discussion has assumed a male perpetrator and a female victim. This assumption is necessary initially because the basis for Congress’s action is the goal of eliminating the subordination of women, as a class, to men, as a class. This does not mean that a man can never be a VAWA plaintiff or a woman a defendant, or even that Congress could constitutionally limit the remedy in that way. Congress, constrained by the equality component of the Fifth Amendment, can take note of and remedy historical inequalities between groups, but rarely can it classify individuals according to suspect or “disfavored” criteria. In the “reverse” cases, the idea of gender animus is likely to be even more confusing to courts, as it has been in sexual harassment cases. Gender and sexual violence are closely linked to sex itself, and gender animus often gets mixed up with sexual love. Professor Franke’s model for identifying the discrimination in sexual harassment was developed explicitly to help understand when “reverse” cases should be covered by Title VII by focusing on whether the defendant imposed subordinating gender roles on the plaintiff. For example, the element of gender motivation would be satisfied in many cases of male-on-male rape in which the defendants “‘feminize’ their male victims in the process” of the crime. It is the “sex-based violent masculinity of the rapist” that constitutes the animus of the act, a conception of masculinity that is very much a part of the subordination of women, despite the fact that the victim of the rape is male. This approach, applied to VAWA, would not be a perfect criminal justice response to cases with male victims, female perpetrators, or both. To some extent this is because, as in sexual harassment cases, it is more difficult for courts to identify the dynamics. However, in some of these cases, as in some of the cases with male perpetrators and female victims, the failure to respond will be the right outcome.

199. MacKinnon, Theory of the State, supra note 142, at 178 (citing R. Emerson Dobash & Russell Dobash, Violence Against Wives: A Case Against the Patriarchy (1979)).

200. See Craig v. Boren, 429 U.S. 190, 217 (1976) (adopting intermediate scrutiny for sex-based classifications); but see United States v. Virginia, 518 U.S. 515, 533 (1996) (holding that government must have “exceedingly persuasive” justification for sex-based classification); id. at 570-76 (Scalia, J., dissenting) (criticizing the “exceedingly persuasive” standard and accusing the Court of raising the level of scrutiny for sex-based classifications).

201. Stellings, supra note 107, at 196.

202. Frazee, supra note 107, at 223.
Aggression and violence are part of the human condition, and there will be "residual" cases of domestic violence that do not qualify under VAWA. To the extent that VAWA is a response to domestic violence, it is not a response to domestic violence generally but to domestic violence as a tool for subjugating women to men. If it is interpreted that way, it will be congruent to a Fourteenth Amendment problem and a valid use of Congress's power to enforce the Citizenship Clause.

VI. Conclusion

Women's subordination to men has, in the course of history, been facilitated by the state and its legal system. However, state-sanctioned discrimination is not the most fundamental obstacle to women's equality, and a feminist conception of democracy requires a state that can assume responsibility for promoting the freedom and autonomy of its citizens. While much of our legal tradition has assumed that citizens encounter each other in the public square as equals, the Civil War Amendments responded to the falsity of this assumption when a particular class of people is targeted for subordination. For a federal guarantee of citizenship—both state and national—to have meaning, Congress must be able to respond to the modern continuations of class-based subordination that recently had the sanction of law. Exercise of this power is limited by the congruence of Congress's remedy both to the harm and to a reasonable conception of citizenship. Protecting women from gender-motivated violence is a fitting use of this power, since it responds to women's historic subordination through their sex and as an aspect of their status in families.