

Male Victims of Domestic Violence

Mainstream studies indicate that just as many men as women are the victims of domestic abuse, yet male victims of domestic violence have been referred to as the "missing persons of the domestic violence problem."

Senator Joseph Biden has been one of the leaders in the effort to increase federal funding for programs that address domestic violence against women.

Senator Biden is also a professor at the Widener School of Law in Delaware and recently gave an A to one of his law students for this paper revealing state discrimination against male victims. The author and law student, David Burroughs, is a national leader in the movement to gain recognition for male victims of domestic violence.

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STATE DISCRIMINATION AGAINST MALE VICTIMS OF DOMESTIC VIOLENCE AND
CONGRESS' 14TH AMENDMENT POWER TO PROHIBIT SUCH DISCRIMINATION

I. INTRODUCTION

"Men have been shot, stabbed, beaten with objects, and been subjected to verbal assaults and humiliations. Nonetheless, I do not believe these are the "horrors" of violence toward men. The real horror is the continued status of battered men as the "missing persons" of the domestic violence problem"¹

Richard J. Gelles Ph. D., University of Pennsylvania

One and a half million women are raped or assaulted by an intimate partner each year. Nearly one million men are victims of rape or physical assault at the hands of their intimate partner annually.² While the first statistic comes as no surprise to most people the statistic regarding men usually does. It is the last dirty little secret of our society.

There are a multitude of reasons for this lack of public awareness about the extent to which men are victims of family violence. These include the counter-intuitive nature of the phenomena, the social stigma that disinclines men to come forward and the political and institutional focus on violence against women. While the first two of these factors are significant in understanding why men have been so easily overlooked, it is the political and institutional neglect that sustains conditions in which men, unlike women, have no place to turn and remain invisible victims to society at large and to the governmental institutions charged with providing equal protection to all citizens.

This paper will explore the question of whether there exist a pattern of discrimination by the states in their provision of funding and services for victims of domestic violence that unconstitutionally deprives male victims of equal protection and whether, under the 14th

Amendment of the United States Constitution, Congress is empowered to pass legislation to remedy such discriminatory state action. In so doing this paper will examine the history of the Fourteenth Amendment as to its use by Congress to prohibit discrimination and the development of the United States Supreme Court's interpretation of its general meaning and specifically, Congress' power under the §5 enforcement clause of the amendment. In order to fully understand the current state of constitutional law with regard to congressional power to remedy discrimination this paper will necessarily include a discussion of Congress' use of its commerce power for this purpose and the Rehnquist Court's evisceration of that power in recent decisions.

The conclusion reached is that the states unconstitutionally discriminate against male victims of domestic violence and that Congress possesses ample power, under the 14th Amendment, to pass legislation prohibiting the states from discriminating against male victims and to provide a remedy allowing private party suits against states that violate the statute.

II THE PROBLEM THAT COMMANDS CONGRESS' ATTENTION

Both because of the broad absence of awareness regarding male victims and the importance, under Supreme Court decisions³, of congressional findings it is necessary to outline the facts regarding male victims and the pattern of state discrimination against them that exist throughout the nation.

A. Historical Overview of Domestic Violence

Without question men and women have physically and verbally abused each other within the context of intimate relationships from time immemorial.⁴ And even though until the last few decades it was considered a private family matter, we have always recognized women as victims of domestic violence. What was and still is rarely recognized is the degree of violence by women against men.

For all his preeminence in Athens, Socrates suffered under the dominance and will of his wife. Abraham Lincoln regularly experienced violence from by Mary Todd and even had his nose broke when she hit him with a lump of wood. John Wayne endured harassment and stalking from his second wife following their divorce.⁵ and Nelson Riddle's father was a "football for his mother to kick around whenever she was angry"⁶ And countless ordinary unknown men have been "shot, stabbed, beaten with objects, and been subjected to verbal assaults and humiliations"⁷ While the principle that "There's never an excuse to hit a women" has become widely accepted, as recently as 1992, 22% of Americans approved of a wife slapping her husband.⁸

In the mid-1970's in the United States, two developments were occurring simultaneously. Research into family violence was beginning to be conducted ⁹and the women's movement began to turn its attention toward the issue of violence against women.¹⁰ This research was largely focused on women as victims of male violence.¹¹ However, in 1976 the scientist Richard Gelles Ph.D., along with Murray Straus and Susan Steinmetz, published the "First National Family Violence Survey,¹² which contrary to previous estimates that had placed the figure of child and wife abuse in the hundreds of thousands range, revealed the number to be between one and two million. In this same study, however, the researchers also discovered that the rate of female to male violence was the same as that of male to female violence.¹³ Meanwhile , the feminist activists, self-acknowledged political radicals, had firmly ensconced themselves within the nascent domestic violence movement in the United States and literally co-opted it in its birthplace in Chiswick, England¹⁴ Erin Pizzey author of the seminal book, *Scream Quietly: The Neighbors Will Hear*, and the acknowledged founder of the first domestic violence shelter in the world in Chiswick, England has flatly stated,

“In 1971, I opened the doors of the first shelter for victims of domestic violence in the world. Men, women, and children came to my door. The feminist movement hungry for funds and public

recognition, hijacked my movement and turned it into a war against men."¹⁵

Soon the mantra of the movement became, "All Men Are Rapist/All Men Are Batterers"¹⁶ Susan Brownmiller, in her feminist history of the women's movement, *In Our Time; Memoir of a Revolution*, relates that the "battered women's advocates developed a bunker mentality marked by rigid and fixed positions" and "oversimplified the complexities of male-female relations and publicly characterized batterers as all powerful brutes, and the women in their sway as pure victims, even when they had reason to know better."¹⁷ Brownmiller succinctly notes, "The way you get funding and church support is to talk about pure victims. If you talk about the impurity of the victim, the sympathy vanishes."¹⁸ By 1978 the feminist based domestic violence movement had become powerful enough that, Sharon Vaughn, one of its leaders in Duluth, Minnesota, the epicenter of the movement, helped write the Domestic Abuse Act for Minnesota." Brownmiller quotes Vaughn as saying, "We had a legislator who would sponsor anything we wanted." "She also helped found the National Coalition Against Domestic Violence, an ambitious attempt by movement activists to develop a national network of shelters that shared their radical political values."¹⁹

Amid this intolerant gender biased angst Drs. Gelles, Straus and Steinmetz released their 1975 Family Violence Survey sponsored by the National Mental Health Institute revealing that partner violence was equally split between male and female partners. The reaction was swift, brutal and "long-lasting."

"All three of us received death threats. Bomb threats were phoned in to conference centers and buildings where we were scheduled to speak."²⁰

Efforts were made to have Susan Steinmetz's tenure denied. Murray Straus was soon the object of vicious attacks insinuating he beat his wife. All three found themselves persona non-

grata within the domestic violence community that had once lauded them. To this day feminists and advocates selectively cite their research without attributing it to them.²¹

Despite this unpleasant and intolerant environment Gelles and Straus and, to a lesser degree, Steinmetz continued their work and have been confirmed by over one hundred studies finding that women use violence in their relationships as often or more often than men.²² Moreover, numerous other studies in the last decade have found the figure of male victimization to fall in the range of 35% to 49%. Most notably the U.S. Department of Justice (DOJ) released a study in 1998 which found that 36% of the victims of intimate partner violence are men. Another large longitudinal study conducted for the DOJ by Terrie Moffitt of the University of Wisconsin-Madison and the Institute of Psychiatry, at the University of London found that of the 1,037 study participants, 34% of the men and 27% of the women reported being physically abused by their partner.²³

So it has come to pass that, despite the overwhelming evidence²⁴ of parity or near parity in domestic violence between the sexes, the feminist model of the female as victim and male as perpetrator continues to prevail.²⁵

B. Gender Bias Controls the States' Actions

Governments are made of people. And people are susceptible to misguided prejudice. Stereotypes about women kept them from enjoying full legal and social status for centuries. In Bradwell v. Illinois, Justice Bradley articulated the prevailing view of the late 19th century, "The paramount destiny and mission of woman are to fulfill the noble functions and benign offices of wife and mother."²⁶

African Americans have had the saddest experience at the hands of prejudice manifested through government action. In Plessy v. Ferguson, in upholding the constitutionality of a Louisiana statute separating blacks from whites and creating the principle of "separate but equal", the United

States Supreme Court brushed aside Homer Plessy 's claim of discrimination disingenuously expounding,

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."²⁷

Even the great Justice Harlan in his courageous dissent revealed the insidious nature of prejudice when he said,

" The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So I doubt not , it will continue to be for all time..."²⁸

It can be argued that in terms of legal and social privileges, of the two sexes, women have historically borne the brunt of gender stereotyping and discrimination. But that ignores the fact that much of that burden stemmed from a social order created by the necessities of times when nature dictated daily life. What author and former board member along with Betty Friedan and Gloria Steinem of the N.Y.C. NOW, Dr. Warren Farrell, has called, "the survival stage" of human social development.²⁹The burden of men that ran concurrent with their apparent privilege in the survival stage society was the devaluation of men's lives in general and particularly relative to that of women. "Man is, or should be, women's protector and defender."³⁰This societal mandate underlies a plethora of obligations on the part of men to sacrifice their lives, if not always to save a woman's life, then to sustain her comfort and safety. The essence of chivalry, which some bemoan has died, was to risk life and limb for women. And it is codified in our laws as well as our social structure.³¹

This historical devaluation of men's lives lent itself to the insistent and sometimes violent protestations of the feminist advocates to any meaningful acknowledgement or inclusion of male

victims in the societal effort to end domestic violence.³² The propensity for women to vote based on such issues further cemented the influence of the feminist advocates.³³

The consequence of this confluence of an organized and well funded campaign³⁴ to frame the issue of domestic violence as one of female victims and male perpetrators and of the societal inclination to value the lives and safety of women over that of men's has resulted in a destructive and invidious pattern of discrimination by state funding, law enforcement and service provider agencies.

There are over two thousand battered women's shelters in the United States.³⁵ The vast majority of these shelters receive significant funding from state governmental agencies.³⁶ There are no shelters, save one, for male victims of domestic violence in the United States receiving state funds.³⁷ This discriminatory pattern in funding is knowing and overt. Many state funding policies explicitly prohibit funding for programs serving men and where not explicit the policy of discrimination is blatant and pervasive.³⁸

State discrimination against male victims is not limited to the denial of direct services but extends to public education, law enforcement and judicial training. Male victims are not only ignored but a proactive effort to stigmatize and stereotype men as abusers exclusively and women as victims exclusively, permeates states' efforts in the domestic violence arena. Police are trained to look to the male as the "perpetrator". Advocates are taught that even when a woman is violent she is really a victim striking back. And the public is regularly targeted with education materials designed to re-enforce the stereotype of abusers as male and victims as female.³⁹

While the substantial evidence provided within the footnotes of this paper is sufficient to allow Congress to find that there exist a pattern of discrimination by the states against male victims of domestic violence, it also serves to indicate that through the resources available to

Congress an even more comprehensive and indisputable record could be established to bolster such a finding by Congress.

III CONGRESSIONAL POWER UNDER THE 14TH AMENDMENT

A. Historical Development

"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 any person within its jurisdiction the equal protection of the laws."

Fourteenth Amendment

The Fourteenth Amendment is a direct result of efforts by individual states in the defeated Confederate states to deny equal citizenship to the newly freed slaves. Through the passage of "Black Codes" southern states attempted to create a social system in which African Americans were relegated to inferior status. Criminal statutes treated blacks more harshly and civil statutes placed burdens on and afforded them less protection in their economic rights.⁴⁰ Congress first attempted to remedy these states' actions with passage of the Civil Rights Act of 1866 which secured "equal benefits of the laws" to "citizens of every race and color" and provided a civil remedy for those whose rights under the statute were violated.⁴¹

But to ensure that equal protection was made an inviolable part of our constitutional structure Congress passed in 1866, and the states soon ratified, the 14th Amendment that among other things explicitly prohibits the denial of equal protection by any state to any person within its jurisdiction. During Congressional debate of the amendment Radical Republican Pennsylvania Congressman Thaddeus Stevens averred that the purpose of the amendment was to ensure that the mandate of the Civil Rights Act should not be threatened by changes in political

power.⁴² The purpose was to enshrine in the constitution "the principles of the Civil Rights Act ...forever", said Congressman M. Russel Thayer.⁴³

Over the next several years the Supreme Court began to establish the boundaries of the protections the amendment afforded and the reach of congressional authority. Initially the cases decided by the Court began to set the limits of the Amendment as to both what state actions were covered and the individual rights protected. In the Slaughterhouse Cases, the Supreme Court, weighing the policing powers of the states versus individual economic rights, upheld a Louisiana statute conferring a monopoly on the City of New Orleans to operate a slaughterhouse.⁴⁴ In Strauder v. West Virginia and a companion case, Ex Parte Virginia, the Court declared unconstitutional the exclusion of blacks from juries as violating the equal protection clause of the 14th Amendment. In Strauder the Court focused on the "common purpose of the amendment when it was drafted which was the securing of equal rights for the newly freed slaves."⁴⁵ The Court explicitly allowed that the states could continue to discriminate in jury selection as to gender, age and property ownership.⁴⁶

It was in the seminal opinion of the Civil Rights Cases that in 1883 the Supreme court set the limits of Congressional authority under the amendment. Congress passed the civil rights act of 1875 prohibiting discrimination in access to public accommodations - inns, theatres etc.- based on race, color or "previous condition of servitude". The court struck down the act declaring that the amendment gave Congress power only to prohibit "state action" that "impairs the privileges and immunities of citizens". Because this act was directed at private conduct it fell outside the reach of the Congress' powers under the amendment.⁴⁷ The Court went on to emphasize the remedial nature of Congress' power. "It does not authorize Congress to create a code of municipal law... but to provide modes of redress against the operation of state laws, and the action of state officers."⁴⁸ It is to "be directed to the correction of their operation and effect."⁴⁹

With the exception of the economic liberty first discovered by the Court in Allgeyer v. Louisiana⁵⁰ and made doctrine in Lochner v. New York⁵¹ in 1905, these cases laid the general framework within which the Court interpreted state powers, individual rights and Congressional power within the context of the 14th amendment for the next three quarters of a century. During the period following the Court's promulgation of limits on Congressional power under the 14th Amendment in the Civil Rights Cases and the emergence of the modern civil rights movement in the 1950's Congress did not attempt to exercise its authority under the 14th Amendment. The development of our understanding of the 14th Amendment during this period, at least as it related to non-economic rights, came largely through challenges by individuals seeking to overturn discriminatory practices.

The arrival of the Warren Court and the emergence of the modern civil rights movement in the 1950's ushered in two decades of legislative and Supreme Court activity that greatly expanded the reach and scope of the 14th Amendment. The first major development in this process was the rejection of the ignominious "separate but equal" doctrine of Plessy v. Ferguson in Brown v. Board of Education, Topeka, Kansas.⁵²

By the 1960's Congress had, using its power under the 14th Amendment, passed the Civil Rights Act of 1964 and Voting Rights Act of 1965. In the voting rights cases of State of Carolina v. Katzenbach⁵³ and Katzenbach v. Morgan⁵⁴, decided in 1966, the Court reaffirmed the power of Congress under the 14th Amendment to prohibit the discriminatory state action articulated in the cases decided shortly after the amendment's passage. In Katzenbach v. Morgan, New York was challenging Congress's prohibition against disqualifying individuals from voting who had completed sixth grade in a public or private school in the Commonwealth of Puerto Rico on the basis of a literacy test.⁵⁵ The Court held that , " in the application challenged in these cases, § 4(e) is a proper exercise of the powers granted to Congress by § 5 of Fourteenth Amendment..."⁵⁶ Quoting

Ex. Parte Commonwealth of Virginia with regard to the impact of the 14th Amendment, vis-à-vis the states, the Court said, " It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation"⁵⁷Moreover, the Court noted that a judicial finding of a violation of the 14th Amendment is not a prerequisite to congressional action. "It would confine the legislative powers..."⁵⁸In reviewing such congressional authority the Court asserted that "it is enough that we perceive a basis upon which Congress might " have judged the literacy test "an invidious discrimination in violation of the Equal Protection Clause."⁵⁹While in South Carolina v. Katzenbach the Court relied on Congress' enforcement power under §2 of the Fifteenth Amendment, language almost identical to that of the 14th Amendment, it nevertheless spoke clearly of Congress' authority. Again relying on the language of Ex Parte the Court expounded," What- ever legislation is appropriate,...to secure the rights of all persons to equal protection of the laws against the State denial..."⁶⁰

It should be noted that in its recent decision in U.S. v. Morrison the Court significantly lessened the weight it afforded Congressional findings for purposes of review. In Morrison the Court was reviewing Congress' power under the Commerce Clause to remedy gender discrimination. There, speaking to the record Congress had established as to the nexus between violence against women and interstate commerce the court said, " But the existence of congressional findings is not sufficient, by itself... Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."⁶¹Yet an important distinction is the fact that the court was reviewing Morrison largely under the commerce clause. The Rehnquist Court expressed its concern that "Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority...." (see also Lopez)⁶² However, while also rejecting the alternative claim of Congressional authority under the 14th amendment on the basis that the civil rights remedy in

question was directed at private conduct, as opposed to state action, the Court reaffirmed Congress' enforcement power under the 14th amendment provided it is directed at state action, is corrective in character, congruent with the violation and properly directed at the states or state actors whose laws or actions are violative.⁶³ Another recent case, more on point because the Congressional power was premised on the 14th Amendment, is City of Borne v. Flores⁶⁴. In City of Borne, reacting to an early decision of the Court permitting neutral legislation that limited religious exercise, Congress passed the Religious Freedom Restoration Act of 1993. The city of Borne had denied a church a building permit in compliance with its neutral zoning regulation. The Court was reviewing under an interlocutory appeal from the D.C. Circuit Court.⁶⁵ The Court found the RFRA an unconstitutional exercise of Congressional power under the 14th Amendment because Congress' remedy- i.e. exemption- was not proportionate to the wrong and because Congress had failed to establish in the record any bigotry in the United States more recent than 40 years ago.⁶⁶ Again this case is distinguished from the problem of discrimination against male victims of domestic violence by the fact that a clear and contemporaneous record exist of a pattern of state discrimination and because the remedy can be easily made proportionate to the wrong, i.e. a civil remedy that is targeted at the individual wrongdoer.

As in South Carolina v. Katzenbach and Katzenbach v. Morgan, the Court, in Fitzpatrick v. Bitzer, reviewing the 1972 amendments to the Civil Rights Act of 1964 that permitted federal courts to hear suits filed by individuals against state employment discrimination practices found ample authority for Congress to prohibit the discrimination.⁶⁷ Moreover the Court found 14th Amendment authority for Congress to abrogate state 11th Amendment immunity.⁶⁸

B. Gender is Protected Under the 14th Amendment

Since the Slaughterhouse Cases the Supreme Court has recognized that the 14th Amendment extended protection beyond those for whom it was originally created. " We do not say that no one

else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction.⁶⁹ Though Bradwell v. Illinois⁷⁰ and the necessity for the passage of the 19th Amendment indicates the limitations the Court attributed to the 14th Amendment for much of its history, the 1970's saw an ever expansive interpretation that led to the recognition of gender as falling under the protection of the amendment. The seminal case is Reed v. Reed⁷¹ in which the Supreme Court in 1971 declared an Idaho probate law unconstitutional because it gave a preference to males in the appointment of an executor. The Court distinguished from race classifications by stating that the equal protection clause does not prohibit states from differentiating by gender but declared it a violation to treat similarly situated men and women differently⁷²

Over the next two decades the Supreme Court consistently attacked gender based classifications with few exceptions.⁷³ In Frontiero v. Richardson the Court struck down a military regulation that presumptively granted "dependent" status to the wives of military personnel while requiring the husbands of military personnel to establish dependency. While perhaps wrongly viewing the regulation as discriminatory toward female military personnel (as opposed to the husband) the Court overturned the regulation repeating its principle from Reed that statutes that provide for dissimilar treatment for men and women who are similarly situated violate the constitution.⁷⁴ By 1979 in Orr v. Orr the Court was explicitly stating that discrimination on the basis of sex was unconstitutional whether the discrimination was against those historically viewed as the oppressed sex- women- or whether the classification worked to disadvantage men.⁷⁵ Orr involved an Alabama statute that provided alimony for women but not for men. The court said, "To withstand scrutiny under the equal protection clause 'classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.'"⁷⁶ Nevertheless the Court said,

Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the "proper place" of women and their need for special protection."⁷⁷

See also Kirchberg v. Feenstra, (statute gave husband unilateral right to dispose of marital property⁷⁸) and Weinberger v. Wiesenfeld, (widowers could not collect survivors' benefit but widows could⁷⁹)

In Craig v. Boren the Court again overturned a state statute that set different age limits for males and females for consumption of alcohol⁸⁰ with Justice Steven stating in his concurring opinion, "There is only one Equal Protection Clause. It requires every state to govern impartially"⁸¹ In 1982 the Court reviewed the Mississippi University for Women 's (MUW) admission policy which denied admission to men. Working through the well established standard of review, which is to determine whether the gender based discriminatory practice derives from a legitimate state objective and if so whether there is a "direct, substantial relationship between objective and means present", the Court found neither; finding the policy only perpetuated stereotypes.

Finally, in U.S. v. Virginia (VMI) in a lengthy and comprehensive review of constitutional jurisprudence on gender as well as a detailed examination of the facts in the instant case, Justice Ginsburg, former women's rights litigator for the ACLU⁸², delivered a near deathblow to gender classifications. While acknowledging that there are "inherent differences" between men and women, Justice Ginsburg announced that under the heightened scrutiny that has come to be the standard by which gender classifications are reviewed the nexus between state objective and means must be "exceedingly persuasive".⁸³ VMI is in fact a culmination of nearly thirty years of development of 14th Amendment jurisprudence that has firmly secured gender classification as suspect within the protection of the 14th Amendment and which can only

survive when the state action is based upon a valid state objective , the means are substantially related and the nexus is exceedingly persuasive"⁸⁴

C. The Commerce Clause: A Disfavored Approach

One of the broadest and exclusive powers Congress possess under the Constitution is that of the Art. I, § 8,CL 3 commerce power. In his seminal and often quoted opinion in Gibbons v Ogden⁸⁵, Chief Justice Marshall's pronounced the commerce power to be "the power like all others vested in Congress (is) complete in itself...(is) plenary"⁸⁶. However, for the next 110 years the Supreme Court's record was eradicate and hard to predict with regard to this power. Throughout the first decades of the 20th century and particularly during the first years of the New Deal the Supreme Court regularly struck down federal statutes regulating commerce. But following the Court's capitulation in the face of Franklin D. Roosevelt's confrontation with the Court through his "court-packing" plan in 1937, the Court made an abrupt turn in its view of the commerce clause.⁸⁷Two months after Roosevelt announced his plan the Court reversed course in its economic due process posture and in West Coast Hotel upheld a state minimum wage regulation for women. This was followed by decisions upholding New Deal Legislation⁸⁸ While Congress used the Commerce clause to advance labor and social welfare through the intervening years it was in 1964 that Congress turned to the Commerce Clause for the power to accomplish what it had been denied by the Court ninety years early in the Civil Rights Cases. Title II of the Civil Rights Act of 1964 prohibited discrimination in public accommodations and sought such power under the Commerce Clause. In Heart of Atlanta Motel v. U.S. the Court upheld Congress' power under the Commerce Clause to prohibit discrimination by inns and hotels serving "interstate" commerce.⁸⁹ And then came United States v. Lopez.⁹⁰

With Lopez the Supreme Court sent a clear and unequivocal message to Congress that it intended to reign in what it perceives as a Congress trampling upon the proper zones of state

power. With its focus on Federalism the Court raised the bar for purposes of the Commerce Clause. Reviewing a challenge to Congress' Gun Free School Zones Act of 1999 which made it a federal crime to possess a gun within 1,000 feet of a school, the Court declared its duty to step in when it views Congress as acting so as to shift the delicate balance between the national government and that of the states.⁹¹ Finding congress' claims of a interstate commerce connection based on "economic productivity", associated with the impact of education on the national economy, tenuous at best and declaring, "The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required"⁹², the Court struck down the statute.

Five years later the court struck hard again at Congress' exercise of the Commerce Clause power in United States v. Morrison.⁹³ Section 13981 of the Violence Against Women Act (VAWA) provided a female victim of gender based violent crime with the right to sue her attacker in federal court.⁹⁴ The act required that the violence have some element of gender based animus.⁹⁵ Congress had created a "voluminous" record of violence against women and of the inadequacy of state efforts to protect them.⁹⁶

Christy Brzonkala alleged that she had been attacked and repeatedly raped by two fellow students at Virginia Polytechnic Institute. She sued her attackers in federal court utilizing the civil remedy afforded her under VAWA.⁹⁷ The Fourth Circuit Court of Appeals dismissed her case after finding § 13981 an unconstitutional exercise of congressional power not granted under the Commerce Clause.⁹⁸

Reaching back to the pre-court-packing jurisprudence of A.L.A. Schechter Poultry Corp.,⁹⁹ the court challenged the "but-for casual chain" approach to establishing the connection between Congressional action and commerce¹⁰⁰ and repeated its concern in Lopez that "Congress might use

the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority"¹⁰¹

"We accordingly, reject the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"¹⁰²

In arriving at this decision the Court significantly shifted the standard of review by declaring,

"But the existence of congressional is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in Lopez, " Simply because Congress may conclude that particular activity substantially affects interstate commerce does not make it so."...Rather, whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them ultimately is a judicial rather than a legislative question, and can be settled only by this Court."¹⁰³

The Court also rejected the alternative argument for the validity of the act under Congress' 14th Amendment power. However, this was solely on the grounds that the state action requirement of 14th Amendment jurisprudence had not been met.¹⁰⁴ It specifically recognized the historical power of Congress to prohibit state discrimination under the 14th Amendment - "Congress may "enforce by appropriate legislation..." quoting City of Borne, Section 5 is " a positive grant of legislative power," quoting Katzenbach v. Morgan - and laid out the criteria Congress must meet to satisfy judicial review.¹⁰⁵ These are:

" Foremost ...is the time honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action...and "...legislation by Congress in the matter must necessarily be corrective in character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers"¹⁰⁶

Thus, while United States v. Morrison has left Congress' ability to legislate against discrimination through the Commerce Clause significantly reduced and Morrison certainly signals the Rehnquist Court's intention to scrutinize congressional action that regulates state action or appears to usurp state powers, it unquestionably left Congress' power under the 14th amendment intact even if subject to closer scrutiny.

D. Congress' Authority to Abrogate 11th Amendment State Immunity Under the Fourteenth Amendment Power

Given the obvious "federalist" trend of the Rehnquist Court and recent decisions such as those in Board of Trustees of the University of Alabama v. Garrett¹⁰⁷, College Savings Bank v. Florida Prepaid¹⁰⁸ and Kimel v. Florida Board of Regents¹⁰⁹ a review of Congress' power to abrogate state immunity is necessary. The Eleventh Amendment bars suits by individuals against states without their consent unless Congress expressly permits it and "acts pursuant to a valid grant of constitutional authority."¹¹⁰ In 1976 in Fitzpatrick v. Bitzer the Supreme court clearly stated

"We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against states or state officials ...¹¹¹

In Fitzpatrick v. Bitzer, a state employee sued the state of Connecticut on behalf of all present and retired male employees on a claim of discrimination under the employment discrimination section 703(a) of the Civil Rights Act of 1964.¹¹² The lower court found for the plaintiffs but refused to award back pay damages finding that the 11th Amendment barred recovery of damages against a state.¹¹³ The Supreme Court reversed, finding that where Congress acts under constitutional authority and expressly provides for private party suits it may abrogate state immunity.¹¹⁴

Twenty five years later the Court in three cases involving private party suits based on discrimination struck down congressional legislation as it applied to the states. In College Savings Bank v. Florida Prepaid¹¹⁵ a company was suing the state of Florida in a trademark matter. The Court ruled that the relevant federal statute, the Lanham Act, passed under Congress' commerce clause power could not abrogate 11th Amendment state immunity because as the Court had held in Seminole Tribe¹¹⁶ "the power "" to regulate Commerce"" conferred...no authority to abrogate state sovereign immunity."¹¹⁷ Moreover, it rejected the § 5, Fourteenth Amendment claim of authority "finding that there is no deprivation of property at issue" that creates a cognizable property right under the 14th Amendment.¹¹⁸ Importantly, as it has in all the cases involving the § 5, 14th Amendment issue, the Court reaffirmed that,

"Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment- an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance."¹¹⁹

In Board of Trustees of the University of Alabama v. Garrett¹²⁰ and Kimel v. Florida Board of Regents¹²¹ parties had brought suit against their states for claims of discrimination in violation of the Americans With Disabilities Act and the Age Discrimination in Employment Act, respectively. Because the Court in Garrett refused to classify persons with disabilities as a "quasi-suspect" class and because "The legislative record of the ADA...fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled" the Court found Congress had failed to meet prerequisites for exercise of its Fourteenth Amendment enforcement power.¹²² Similarly, in Kimel the Court found age not to be a suspect class¹²³, that "Congress had never identified any pattern of age discrimination by the states"¹²⁴ and the remedy failed the test of "congruence and proportionality"¹²⁵ Once again, however, as in Garrett the Kimel Court clearly acknowledged the authority of Congress to pass

legislation to prohibit state discrimination¹²⁶ and abrogate 11th Amendment immunity provided the legislation clearly expresses the intent to abrogate¹²⁷.

IV. CONCLUSION

Congress is empowered to pass legislation to prohibit state discrimination against male victims of domestic violence in the provision of funding and services. Ample evidence exist that the there is throughout the states a pattern of discrimination and unequal treatment of male victims relative to their female counterparts. The Supreme Court has been clear. Gender, unlike age and disability, is protected under 14th Amendment and is subject to heightened scrutiny. Therefore, because the legislation would be directed at state action and the remedy proportionate and provided Congress clearly expressed intent to abrogate state immunity, such legislation would withstand judicial review.

David R. Burroughs

ENDNOTES

¹ Richard J. Gelles, Ph.D., "The Missing Persons in Domestic Violence: Battered Men", *The Journal of the Independent Women's Forum, The Women's Quarterly*, (August 1999), p. 22. Dr. Gelles is widely recognized as one of the earliest and preeminent researchers in the field of family violence. Along with Drs. Murray Strauss and Susan Steinmetz, he conducted the "First National Family Violence Survey" in 1976. He currently holds the Joanne T. and Raymond B. Welsh Chair of Child Welfare and Family Violence at the University of Pennsylvania's School of Social Work. He has authored or co-authored twenty-three books and over one-hundred professional journal publications on the subject of family violence.

² P Tjaden and A. Thoennes, *Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* (National Institute of Justice Centers for Disease Control and Prevention, November 1998), p. 7

³ *City of Boerne v. P.F. Flores*, 521.U.S. 117 (1997), at 530 "In contrast to the record which confronted congress and the judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances ... The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years." See also *Bd. of Trustees v. Garrett*, 531 U.S. (2001) at 366. "The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination..."

⁴ Christina Hoff Sommers, "Rule of Thumb," *Who Stole Feminism* (Touchstone, 1994), pp. 203-207.

⁵ Dr. Malcom George, Queen & Mary & Westfield College, London University. Presentation on male victims of domestic violence, AMEN Conference 1998, University College, Dublin, Ireland.

⁶ Peter Levinson, *National Public Radio* interview, Dec. 18, 2001. In his biography of Nelson Riddle *September in the Rain*, Levinson is slightly more discrete, describing Nelson Riddle's mother as negative and unhappy, and writing "As a boy, Nelson watched his father get swatted like a fly."

⁷ Philip W. Cook, *Abused Men: The Hidden Side of Domestic Violence* (Praeger, 1997), pp. 37-87. See also Gelles, "Missing Persons," p. 22; Patricia Pearson, *When She Was Bad*, (Viking Penguin, 1997), p. 114; Cathy Young, *Ceasefire* (The Free Press, 1999), p. xx; Sommers, *Who Stole Feminism*, p. xx.

⁸ Cook, *Abused Men*, pp. 128-129, citing M. Strauss and G. Kaufman-Kantor, "Cultural Norms Approving Marital Violence: Changes from 1968 to 1992 in Relation To Gender, Class, Cohort, and Other Social Characteristics," unpublished report, *Family Research Laboratory, University of New Hampshire* (1994), "[F]inding that approval of a husband slapping his wife decreased from 20% in 1968 to 12% in 1992 while approval of a wife slapping her husband had remained at 22%." *Wall Street Journal*, 1998 approx.. "I don't think it rises to impeachment but I certainly hope Hillary has smacked him around the Lincoln bedroom a few times"

⁹ L.G. Shultz, "The Wife Assaulter," *Journal of Social Therapy*, (1960); J. Sprey, "The Family as a System in Conflict," *Journal of Marriage and the Family* (1969) R. Stark and J. McEvoy, "Middle Class Violence," *Psychology Today* (November 1970), M. Straus "A General Systems Theory Approach to a Theory of Violence Between Family Members," *Social Science Information* (1973), R. Gelles, "An Exploratory Study of Intra-Family Violence," (1974),.

¹⁰ Susan Brownmiller, *In Our Time: Memoir of a Revolution* (Dial Press, 1999), pp. 259-278. It should be noted that Susan Brownmiller was an early activist in the American feminist movement and remains a leading feminist writer and thinker. She is the author of a number of feminist books, including *Against Our Will: Men, Women and Rape* Her book *In Our Time: Memoir of a Revolution* (Dial Press, 1999) was written as a historical account of the women's movement and can hardly be described as critical of the movement.

¹¹ By their own testimony and a review of their early work, Gelles and Straus began their research with a concern for and focus on female victims of intimate partner violence: Straus, "A General Systems Theory" [relating to issues of institutionalized male power, cultural norms legitimating male violence against women]; Gelles, "Violence and Pregnancy: A Note on the Extent of the Problem and Needed Services," *The Family Coordinator*, 24 (January 1975), pp. 81-86.

¹² Susan Brownmiller, *In Our Time: Memoir of a Revolution*, (Dial Press, 1999). p. 262. See also Gelles, "The Missing Persons," p. 19.

¹³ Gelles, "The Missing Persons," p. xx

¹⁴ Brownmiller, *In Our Time*, pp. 259-278.

¹⁵ Erin Pizzey, *Title*, (Publisher, Year), p. xx. See also Brownmiller, *In Our Time*, p. 276

¹⁶ Brownmiller, *In Our Time*, p. 276.

¹⁷ *Ibid.*, pp. 275-276

¹⁸ *Ibid.*, p. 273

¹⁹ *Ibid.*, p. 265. The NCADV continues to be, and identifies itself as, a feminist organization. A May 2000 job posting on the NCADV's website listed among other qualifications for the position, "[T]eam player comfortable

working in a feminist environment...Knowledge of women's issues and diversity issues preferred." A review of the NCADV website, or any of the organization's literature, will reveal no mention of men as victims of domestic violence.

²⁰ Gelles, "The Missing Persons," p. 20.

²¹ *Ibid.* See also Pearson, *When She Was Bad*,

²² Martin S. Fiebert, Dept, Psychology, California State University, Long Beach. *An Annotated Bibliography* (<http://www.csulb.edu/~mfiebert/assault.htm>)

²³ "Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey," *National Institute of Justice*, November 1998, p. 7; "Findings About Partner Violence From the Dunedin Multidisciplinary Health and Development Study," *National Institute of Justice*, July 1999, p.2 It should be noted that this Dunedin study also reported that within the same subject group 37% of the women and 22 % of the men reported perpetrating violence against their partner, closely correlating with the number of men or women reporting they had been abused.

²⁴ In addition to the numerous studies showing significant or equal violence against men, police arrest records, largely as the result of feminist imposed mandatory arrest policies, reflect 25-35% female perpetrators; e.g., State of Delaware 32%, Commonwealth of Massachusetts 25%. Also see C. Young, "Feminist Play the Victim Game," *New York Times*, Nov. 26, 1999, p. xx.

²⁵ David R. Burroughs, "Gender Bias and Domestic Violence Addressed," *Delaware Capitol Review*, March 15, 1999, p. x

²⁶ *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130,141, denying Myra Bradwell's right to practice law

²⁷ *Plessy v. Ferguson*, 163 U.S. 537 (1896)

²⁸ *Ibid.*, .

²⁹ Warren Farrell, Ph.D., *The Myth of Male Power*, (Publisher, Year), p. 42.

³⁰ *Bradwell v. State of Illinois*, 16 Wall. 130, 141, 21 L.Ed2d 442 (1873) (Bradley, J)

³¹ Farrell, *The Myth of Male Power*, pp. 67-76. See also male only U.S. Draft Code , male only U.S. Selective Service Code Maritime law has always embraced the principle of "women and children first." "Remember, women and children first" (admonishment of ship's officer on a cruise on Carnival Cruiselines this writer took on February 5, 2002.) "A man convicted of murder is twenty time more likely than a woman who commits murder to receive the death penalty" While women commit 15% of the murders in the U.S. only one woman was executed between 1976 — when the death penalty was reinstated — and 1993, while 129 men were executed. Farrell, *The Myth of Male Power*, p. 240). Ninety-two percent of workplace deaths occur to men: 5,544 men versus 482 women (U.S. Department of Labor, *1998 National Census of Fatal Occupational Injuries*.) The United States invests approximately \$14,600 to find a cure for each life lost to prostate cancer; more than \$22,500 for each life lost to breast cancer.(National Prostate Cancer Coalition, Men's Health Network). We value the lives of victims of breast cancer at a 54% premium over that of prostate cancer victims There are four Offices of Women's Health within the various agencies of the U.S. Government yet Congress has defeated legislation to establish the first Office of Men's Health in the U.S. Government. In a 1996 airing of *ABC This Week*, Cokie Roberts argued the favorable case for Lorena Bobbit while repeatedly exhibiting delight at the discomfort of her two male colleagues', George Will and Sam Donaldson, as they discussed and obviously contemplated the nature of Ms. Bobbit's crime. The answer to the question, "Would George Will or Sam Donaldson still have a job with ABC if either of them displayed such obvious insensitivity to a story involving a man mutilating his wife's breast?" is self-evident.

³² It is noteworthy that while attending the NCADV's VAWA press conference and kick-off in Washington D.C. in the summer of 2000 to pass the pending VAWA reauthorization, this writer brought to Rep. John Conyers attention the statistics reported in the previously referenced DOJ study regarding male victims. The Congressman graciously noted those statistics to the gathered audience when he spoke. A couple of weeks later in a conversation at his office the Congressman relayed that he had gone back to his district recently and in a speech to a group of "advocates" had mentioned the male statistics. The Congressman described how one woman went into hysterics and literally writhed on the floor until she had to be helped out of the meeting room. The Congressman then politely ended our conversation. The message was clear. The hysteria and vehemence of those who would deny male victims was more than he was prepared to challenge. End of discussion.

³³ "David, women vote on these issues and men don't" Delaware State legislator to writer, March 1998.

³⁴ Brownmiller, *In Our Time*, p. 269.

³⁵ Number provided by Judy Fliss, of the National Coalition of Against Domestic Violence (NCADV), May 3, 2001. Also see Dugan, Nagin, and Rosenfield, "Exposure Reduction or Backlash? The Effects of Domestic Violence Resources on Intimate Partner Homicide, Final Report", *National Institute of Justice*, U.S. DOJ, 2001, stating "[B]y

the middle of the 1990's there were over 1,700 agencies, both public and private that were addressing the cause and effects of violence against women."

³⁶ While it is difficult to collect, for purposes of this paper, the funding statistics for all fifty states a review of various state and/or subdivision appropriations reveals substantial government funding in this area. State of Delaware, 1999: \$1,392,000 — *Delaware Domestic Violence Coordinating Council (D.V.C.C.)1999 Annual Report*. State of Illinois, 1999: \$13,047,059 — *Illinois Dept. of Public Aid*. FOIA request filed by David Nevers, State of Texas, 2002/2003 biennium: \$40.44 million — *Texas Council on Family Violence*. State of Indiana, 1996: \$5,521,512 — *Indiana Domestic Violence State Plan 2002-2007*, Indiana Family and Social Services Administration and Indiana Coalition Against Domestic Violence, Inc

³⁷ As the old legal adage goes: "It is hard to prove a negative." However, this writer, as an activist who has traveled and lectured on the subject of male victims from California to Maine to Florida over the last seven years is aware of two shelters in the U.S. for male victims of domestic violence. There are a handful of shelters in the U.S. known to willingly assist male victims by providing them short term motel vouchers. A survey of numerous of activists around the country via the internet confirmed only the two residential shelters for men and the rarity of women's shelters assisting through use of motel vouchers for men. In Delaware, for example, there are four state funded shelters for battered women, none for men. The Delaware U.S. Attorney's Office's Victims Advocate claims it maintains a "Supplemental Fund" from which motel vouchers can be funded. This "supplemental fund" is unknown to most within the advocacy community and not at all by the public. Example: February 2001 the Delaware Domestic Violence Coalition Domestic Violence 101 Training Class, during question and answer session, a young women who worked the hotline expressed her frustration that "I get calls from men all the time and I don't know what to do for them. I don't know anywhere to send them." The DV class trainer and DV activists/participants were unable to offer her any information. Cecil County, MD: one battered women's shelter, none for males.

Press Reports: Becky Beaupre, "No Place to Run for Male Victims of Domestic Abuse: Shelters, Support Groups Rare For Men," *Detroit News*, Sept. 4, 2000;

"Men Seek Equality in Law on Battery," *Washington Times*, July 9, 2000;—"Ms. Snitker of the Men's Health Network says she often gets calls from Shelters for domestic violence victims asking where they might send men who show up at their doors."

Ruth Ellen Cohen, "Battered Males: A Domestic Violence Secret," *Bangor Daily News*, Oct. 27, 2000; "The State has 14 intervention programs for men who batter and 10 shelters for women who are abused. But when it comes to the other side of the equation- programs for women who batter and shelters for men who are abused- the options are nonexistent."

"Official Washington State Policy: The Gender Neutrality Joke," *Battered Men in Washington*, Batteredmen.com: "The joke, as I stated at the start of this article, was that the state program manager of Washington's gender-polarized domestic violence programs informed me that state law requires gender neutrality and would bar funding a program focusing on men's needs. I wonder if the 25,000 men estimated to be battered in Washington each year think the joke is funny."

Quoting *Detroit News*: "The western Wayne County facility receives \$452,800 in state and federal aid through Sept. 30 to help meet that goal...No men are listed among the 1,742 victims sheltered from 1993-95. No men are among the advocates, intervention specialists, program coordinators and residential managers on its 36-member shelter staff. Literature used by the shelter describes abuse victims only as women and children."

Gelles, "The Missing Persons," p. 22. "Today there are places to go (for women) — more than 1800 shelters — and many agencies to which to turn. For men, there still is no place to go and no one to turn to."

Cook, *Abused Men*, p. 158. "My heart goes out to the men who call because there are no services available to them, other than with a psychologist or psychiatrist," quoting Jan Dimmitt, Executive Director, Emergency Support Center, Kelso, Washington.

³⁸ *Criminal Justice Division Grant Application*, State of Texas, "...VAWA funded project may not use VAWA funds or matching funds for: projects that focus on children or men."

West Virginia *Grant Application*, "Grants under this program must include one or more of the following purposes: 1) Training law enforcement...to...identify and respond to violent crimes against women, 2.) Specialized units...targeting violent crimes against women, 3)...police...responding to violent crimes against women, 4.)...data collection...track...violent crimes against women.

State of Delaware: VAWA Implementation Committee (VAWAIC) meeting, May 5, 2001, Criminal Justice Council VAWA Committee Coordinator Maureen Query, in response to question regarding funding Court DV reentry program, "VAWA clearly states that funding must be for women unless it is for offender program."

VAWAIC meeting, August 28, 2001, Maureen Query, providing staff recommendations to the Committee for F.C. 2003 grants, "[D]eny grant proposal from Forum for Equity and Fairness Family Issues (F.E.F.F.I.) to provide

temporary housing to male victims...This program primarily serves male victims which is prohibited under VAWA." Chairman of the Committee to David R. Burroughs representing F.E.F.F.I., "That's the law. I wish we could." VAWAIC meeting Sept. 10, 2001, Chairman again addressing denial of funding to F.E.F.F.I., "No VAWA funds may be given to a service provider primarily serving male victims."

An internet survey of activists around the country confirms that the policy of state government is to fund program serving female victims exclusively.

A 1999 meeting of Victims of Crime Act (VOCA) Committee, F.E.F.F.I — noting that Delaware has three state-funded battered-women's shelters and no shelter or services for men — requests that the Committee set aside some portion of its budget, not federally mandated for specific funding items, to begin to provide services or shelter for male victims. Shortly thereafter the VOCA Committee agrees to allocate all of its unmandated funds toward the establishment of a fourth state funded battered women's shelter.

³⁹ *Delaware Law Enforcement Domestic Violence Supervisory Training* manual- Riff with continual references to the perpetrator as male and the victim as female(52 times victim is referred as female and 32 times perpetrator is referred to as male.Not once is this reversed i.e. " Perpetrators will deny ... (i.e. "she bruises easily", " I had to restrain her") " Victim may not believe she can make it on her own", Victim may also be economically unable to leaved care for herself and her children.", "Allow the accused to give his account..." Align with the batterer without justifying his criminal activity. Acknowledge his feelings." "At the door one officer stands on the knob side the other a few feet away from the hinged side. This way to fire on you, upon opening the door, a suspect would have to expose himself past the door jamb to target you" This training is mandatory for all new police officers. New Castle County, Delaware Police Dept educational video, *There is a Way Out*,- repeatedly quotes statistics regarding female victims without mention of men while headlines from local newspaper such as " Husband Kills Wife, Self" zoom in and out of the video. Domestic Violence Coordinating Council (DVCC) public education and training video repeatedly frames domestic violence in context of male perpetrators and female victims., DVCC Law Enforcement Training Conference 2001 manual. (over 200 pages long) - Repeated reference to female victims. No reference to male victims.Feminist model " Cycle of Violence" stating " Effects of Battering... Women: Isolation from others, low self esteem... Men: Increased belief that power and control are achieved by violence, Increase in violent behavior..." Workshop- "Determining the Primary Aggressor-Reducing Dual Arrests" uses a video containing four different scenarios. The audience of judges, prosecutors a police officers is asked at different stages of the scenarios who is the aggressor. In the end, in each case we ultimately learn- it's the man., State of Georgia " *Legal Services Online Domestic Violence Protection Project*" self help petition for protection. The default language in the section for describing what happened is, " My husband hit me many times in the face.." " My husband punched me in the head..." State of Maryland 1997 Court users handbook- First page note states that the book will use gender neutral references throughout the book and the user should simply convert that language for their particular case. The handbook consistently does so throughout the book until the section on domestic violence at which point it violates its own protocol and begins to refer to the abuser as male and victim as female.

⁴⁰ Brest, Levinson, Balkin, Amar, *Process of Constitutional Decisionmaking* (Aspen Publishers, 2000), p. 241.

⁴¹ *Ibid.*, pp. 245-246.

⁴² *Ibid.*, p. 247.

⁴³ *Ibid.*

⁴⁴ *Slaughterhouse Cases*, 83 U.S. (16 Wall) 36 (1873)

⁴⁵ *Strauder v. West Virginia*, 100 U.S. 303 (1880)

⁴⁶ *Ibid.*

⁴⁷ *Civil Rights Cases*, 109 U.S. 3 (1883) at 11.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, at 11-12.

⁵⁰ *Allegeyer v. Louisiana*, 165 U.S. 578 (1897).

⁵¹ *Lochner v. New York*, 198, U.S. 45 (1905).

⁵² *Brown v. Board of Education*, 347 U.S. 483 (1954)

⁵³ *State of Carolina v. Katzenbach*, 383 U.S. 301 (1966).

⁵⁴ *Katzenbach v. Morgan*, 84 U.S. 641 (1966).

⁵⁵ *Ibid.*, at 643.

⁵⁶ *Ibid.*, at 646.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, at 648.

⁵⁹ *Ibid.*, at 656.

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- ⁶⁰ *State of Carolina v. Katzenbach*, 383 U.S. 301, (1966) at 327.
- ⁶¹ *U.S. v. Morrison*, 120 S. Ct. 1740 (2000) at 614.
- ⁶² *Ibid.*, at 643.
- ⁶³ *Ibid.*, at 646.
- ⁶⁴ *City of Borne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997)
- ⁶⁵ *Ibid.*, at 456.
- ⁶⁶ Id. P. 530, 532
- ⁶⁷ *Fitzpatrick v. Bitzer*, 96 S.Ct. 2666 (1976) at P. 455
- ⁶⁸ Id. at P. 456
- ⁶⁹ *Slaughterhouse Cases*, above.
- ⁷⁰ *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130, 141.
- ⁷¹ *Reed v. Reed*, 404 U.S. 71 (1971), at 76.
- ⁷² *Ibid.*, at 75-77.
- ⁷³ *Rostker v. Goldberg*, 453 U.S. (1981), upholding Selective Service Act requiring only males to register
- ⁷⁴ *Fronterio v. Richardson*, 411 U.S. 677 (1973) at 688, 690.
- ⁷⁵ *Orr v. Orr*, 440 U.S. 268, (1978) at 279.
- ⁷⁶ *Ibid.*, at 279, quoting from *Califano v. Webster*, 430 U.S. 313, 316-317 (1977).
- ⁷⁷ *Ibid.*, at 283.
- ⁷⁸ *Kirchberg v. Kirchberg*, 450 U.S. 455, (1980).
- ⁷⁹ *Weinberger v. Wiesenfield*, 429 U.S. 636 (1975)
- ⁸⁰ *Craig v. Boren*, 429 U.S. 190 (1976) at 198-199.
- ⁸¹ *Ibid.*, at 211.
- ⁸² Scott Smiler, "Justice Ruth Bader Ginsburg and the Virginia Military Institute: A Culmination of Strategic Success"
- ⁸³ *United States v. Virginia*, 518 U.S. 515 (1996) at 533. See also Rehnquist, J. Concurring at 559.
- ⁸⁴ *Ibid.*, at 529, 531, 546.
- ⁸⁵ *Gibbons v. Ogden*, 22 U.S. 1 (1824) at 196, 197
- ⁸⁶ *Ibid.*
- ⁸⁷ Brest, Levinson, Balkin, Amar, *Process of Constitutional Decisionmaking* (Aspen Publishers, 2000), p. 241..
- ⁸⁸ *Ibid.* at 427-428
- ⁸⁹ *Heart of Atlanta Motel v. United States* 85 S. Ct. 348 (1964)
- ⁹⁰ *United States v. Lopez* 115 S. Ct. 1624 (1995)
- ⁹¹ *Ibid.* at 551, 575
- ⁹² *Ibid.* at 580
- ⁹³ *U.S. v. Morrison*, 120 U.S. 1740 (2000)
- ⁹⁴ *Ibid.* at 605
- ⁹⁵ *Ibid.*
- ⁹⁶ *Ibid.* at 615
- ⁹⁷ *Ibid.* at 601
- ⁹⁸ *Ibid.* at 604
- ⁹⁹ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, (1935)
- ¹⁰⁰ *U.S. v. Morrison*, 120 S. Ct. 1740 (2000) at 615, FN6 P.616
- ¹⁰¹ *Ibid.* at 615
- ¹⁰² *Ibid.* at 617
- ¹⁰³ *Ibid.* at 614
- ¹⁰⁴ *Ibid.* at 621
- ¹⁰⁵ *Ibid.* at 619
- ¹⁰⁶ *Ibid.* at 624
- ¹⁰⁷ *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 92001) at 363
- ¹⁰⁸ *College Savings Bank v. Florida Prepaid*, 527 U.S. 666, (1999)
- ¹⁰⁹ *Kimel v. Florida Board of Regents*, 528 U.S. 62, (2000)
- ¹¹⁰ *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, (2001) at 363 .
- ¹¹¹ *Fitzpatrick v. Bitzer*, 96 S.Ct. 2666 (1976)
- ¹¹² *Ibid.* at 448
- ¹¹³ *Ibid.* at 450
- ¹¹⁴ *Ibid.* at 457,

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- ¹¹⁵ *College Savings Bank v. Florida Prepaid*, 528 U.S. 62, (2000) at 670
- ¹¹⁶ *Seminole Tribe v.* 517 U.S.
- ¹¹⁷ *College Savings Bank v. Florida Prepaid*, 528 U.S. 62, (2000) at 672
- ¹¹⁸ *Ibid.* at 675
- ¹¹⁹ *Ibid.* at 670
- ¹²⁰ *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356,(2001)
- ¹²¹ *Kimel v. Florida Board of Regents*, 528 U.S. 62, (2000)
- ¹²² *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, (2001) at 366, 368
- ¹²³ *Kimel v. Florida Board of Regents*, 528 U.S. 62, (2000) at 82
- ¹²⁴ *Ibid* at 83
- ¹²⁵ *Ibid.* at 88
- ¹²⁶ *Kimel* at 73,80, *Garrett* at 364
- ¹²⁷ *Kimel* at .80,81, *Garrett* at 365