

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: UNITED STATES, Petitioner v. ANTONIO J.  
MORRISON, ET AL.; and CHRISTY BRZONKALA,  
Petitioner v. ANTONIO J. MORRISON, ET AL.

CASE NO: 99-5 & 99-29 c-2

PLACE: Washington, D.C.

DATE: Tuesday, January 11, 2000

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1                           IN THE SUPREME COURT OF THE UNITED STATES

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3     UNITED STATES,               :

4                           Petitioner           :

5     v.                       :                  No. 99-5

6     ANTONIO J. MORRISON, ET AL.;       :

7     and                       :                  

8     CHRISTY BRZONKALA,               :

9                           Petitioner           :

10       v.                       :                  No. 99-29

11     ANTONIO J. MORRISON, ET AL.       :

12                           -X

13                           Washington, D.C.

14                           Tuesday, January 11, 2000

15                           The above-entitled matter came on for oral  
16                           argument before the Supreme Court of the United States at  
17                           10:14 a.m.

18                           APPEARANCES:

19     JULIE GOLDSCHEID, ESQ., New York, New York; on behalf of  
20                           Petitioner Brzonkala.

21     SETH P. WAXMAN, ESQ., Solicitor General, Department of  
22                           Justice, Washington, D.C.; on behalf of the United  
23                           States.

24     MICHAEL E. ROSMAN, ESQ., Washington, D.C.; on behalf of  
25                           the Respondents.

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## PROCEEDINGS

(10:14 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 99-5, United States against Antonio J. Morrison and Christy Brzonkala v. Antonio Morrison.

Ms. Goldscheid.

ORAL ARGUMENT OF JULIE GOLDSCHEID

ON BEHALF OF PETITIONER BRZONKALA

9                   MS. GOLDSCHEID: Mr. -- Mr. Chief Justice, and  
10        may it please the Court:

Congress enacted the civil rights remedy of the Violence Against Women Act to remove one of the most persistent barriers to women's full equality and free participation in the economy: discriminatory gender-based violence.

16                   A bipartisan Congress concluded that gender-  
17 based violence substantially affects the national economy  
18 based on a 4-year legislative record through which it  
19 found that gender-based violence and the fear of that  
20 discriminatory violence deters women's travel interstate,  
21 restricts women's choice of jobs and ability to perform  
22 those jobs, reduces national productivity, and increases  
23 medical and other costs.

24 Each of these findings was fully supported by  
25 evidence. For example, Congress heard from women whose

1 batterers kept their partners from working, who wouldn't  
2 let them leave home if they did work, or who inflicted  
3 visible injuries so that they were afraid to go to work or  
4 were physically unable to show up.

5                   QUESTION: Ms. Goldscheid, were all of these  
6 instances instances of gender-based violence?

7                   MS. GOLDSCHEID: Not --

8                   QUESTION: As I understand it, this law doesn't  
9 apply to any -- to any rape or any -- any violence against  
10 women. It is only when the woman is -- is selected  
11 because of her sex.

12                  MS. GOLDSCHEID: That is absolutely correct.

13                  The statute limits each individual case to claims in which  
14 a woman could --

15                  QUESTION: Now, all of these -- all of these  
16 instances that you're referring to that have such an  
17 effect on interstate commerce, are they all instances in  
18 which you have somebody who just hates women and is doing  
19 it for that reason?

20                  MS. GOLDSCHEID: Perhaps not each and every  
21 instance, but Congress --

22                  QUESTION: Most of them?

23                  MS. GOLDSCHEID: Congress looked at the record  
24 as a whole and explicitly made a finding. In the 1994  
25 conference report, Congress specifically found that crimes

1       of violence motivated by gender have a substantial adverse  
2       effect on interstate commerce.

3            QUESTION: Well, that's nice, but -- but the  
4       instances on which that finding was based that you're now  
5       alluding to don't -- aren't limited to -- to gender-based  
6       violence.

7            MS. GOLDSCHEID: The finding that Congress made  
8       was rational.

9            QUESTION: I know. I'm not talking about the  
10       finding. I'm talking about the evidence that supports the  
11       finding.

12          MS. GOLDSCHEID: The evidence that supports the  
13       finding was in the record. Congress also specifically  
14       found that some acts of discriminatory violence could, in  
15       fact, be discriminatory.

16          QUESTION: Well, let me -- let me ask a --

17          MS. GOLDSCHEID: They cited the case of Meritor.

18          QUESTION: -- a similar question. It -- it  
19       follows from my last one.

20          If indeed non-gender-based violence against  
21       women or, for that matter, against men also has a  
22       substantial effect on interstate commerce, I suppose  
23       Congress could enact a general criminal statute against -  
24       - against violence, a Federal -- a Federal rape law, a  
25       Federal robbery law. Right? A Federal murder law?

1 MS. GOLDSCHEID: This case is entirely distinct  
2 from the hypothetical that you propose because by --

3 QUESTION: Oh, I'm aware of that. I'm -- but  
4 that's why I posed the hypothetical.

5 MS. GOLDSCHEID: By requiring discriminatory --  
6 a showing of discriminatory motivation in each instance,  
7 the Congress specifically removed these cases from the  
8 kind of constitutional shoals that the Court in Griffin v.  
9 Breckenridge was worried about.

10 QUESTION: But the justification for the statute  
11 that you're now giving us is a justification that would  
12 allow general Federal criminal laws on all subjects  
13 because all crime affects interstate commerce.

14 MS. GOLDSCHEID: As we --

15 QUESTION: Is that not -- is that not so?

16 MS. GOLDSCHEID: It's entirely possible that all  
17 crime might affect interstate commerce, but that does not  
18 lead necessarily to the conclusion that --

19 QUESTION: Well --

20 MS. GOLDSCHEID: -- a general tort law of the  
21 type you suggest would be constitutional.

22 As we set forth in our briefs, there are other  
23 factors --

24 QUESTION: I don't see why. I don't see why.  
25 If all that is necessary is that there be some effect,

1 even though these are not economic matters we're talking  
2 about, but that there be some effect on interstate  
3 commerce, you have a Federal Government that can legislate  
4 in the entire realm of criminal law, which is certainly  
5 not what the Founders thought they were creating. It's  
6 very clear that they didn't think the Federal Government  
7 had general police powers.

8 MS. GOLDSCHEID: And we are not suggesting that  
9 Congress would have that authority.

10 QUESTION: Oh, I think you are suggesting that.  
11 That's the point of my question. Tell me why you are not  
12 suggesting it. Is it because you think that violence in  
13 general does not substantially affect interstate commerce,  
14 although this little narrow category of violence, namely  
15 not just violence against women but violence motivated by  
16 hatred of women, that little area, substantially affects  
17 commerce. My goodness, certainly murder, rape, robbery  
18 affect interstate commerce much more than that.

19 MS. GOLDSCHEID: Two responses to your question,  
20 Your Honor.

21 The first is that this Court long has held that  
22 especially when -- when Congress is looking at a general  
23 social problem of the type with which it was concerned  
24 here, Congress can regulate one step at a time, and that's  
25 what it did. So, by regulating a subset of the general

1 activity that it was looking at, it's consistent with this  
2 Court's holdings.

3 In addition --

4 QUESTION: That -- that would be a good response  
5 to an objection that Congress was being discriminatory in  
6 selecting only this area of -- of crime and not the entire  
7 area of crime. But that wasn't my question. My question  
8 is, if they can do this, surely a fortiori they could  
9 enact a general Federal robbery law.

10 MS. GOLDSCHEID: And that point goes to the  
11 second part of my response to your earlier question.

12 QUESTION: Good. It should have been your  
13 first.

14 MS. GOLDSCHEID: I'm sorry.

15 Which is that, as we set forth in our brief,  
16 there are other considerations to assessing whether or not  
17 a law that regulates intrastate non-commercial activity is  
18 constitutional. And the heart of that inquiry is whether  
19 or not the law intrudes on an area of traditional State  
20 concern.

21 And we simply don't have that here. This law -  
22 -

23 QUESTION: Where do you get that principle from?  
24 You see, I had thought that we had a Supremacy Clause in  
25 the Federal Constitution so that if Congress does have

1 power under the Commerce Clause to pass a law, it  
2 automatically has power to sweep away all State laws that  
3 -- that interfere with it.

4 MS. GOLDSCHEID: Congress certainly does have  
5 the authority to -- to preempt State law in areas in which  
6 it has power.

7 QUESTION: So then what difference does it make  
8 that this exercise of Commerce Clause power happens not to  
9 preempt State law? It seems to me it makes no difference  
10 at all. If -- if it is a valid exercise of Commerce  
11 Clause power, they can preempt State law.

12 MS. GOLDSCHEID: The inquiry derives from this  
13 Court's concern in the Lopez decision about obliterating  
14 the distinction between what is truly national and what is  
15 truly local. And the standards that we have set forth in  
16 our brief identifying issues such as what was presented to  
17 Congress here, the fact that the problem with which  
18 Congress was concerned is discrimination, which is  
19 uniquely and traditionally an area of Federal concern, the  
20 fact that in this case the States have come forward and  
21 have said that they need Federal help in resolving the  
22 problem -- Attorneys General from 38 States testified to  
23 Congress that the Violence Against Women in general, and  
24 the civil rights remedy in particular, was a law that  
25 would help them resolve this problem that they found to be

1 very serious and entrenched and perplexing. And, of  
2 course, you know that nearly three-quarters of the States'  
3 Attorneys General filed briefs with this Court in support  
4 of this law here.

5 And the law itself works no usurpation of any  
6 area of traditional State concern. It leaves the  
7 traditional areas of divorce, child custody, equitable  
8 distribution expressly and entirely undisturbed.

9 QUESTION: Well, presumably Congress could also,  
10 under your theory at least, legislate in those areas too.  
11 If -- if there's bias against women and they're not  
12 receiving adequate alimony or it's not enforceable in  
13 court in the States, then it would also have an effect on  
14 commerce. Would it not?

15 MS. GOLDSCHEID: It might have an effect on  
16 commerce, although that scenario -- if you're suggesting a  
17 scenario that -- where the Federal Government would  
18 propose to overtake, say, wholeheartedly a divorce law,  
19 that would be stepping into the shoes --

20 QUESTION: Make it just an alternate forum as  
21 here. You can bring your property distribution claim in  
22 State court or Federal court. On your theory Congress, I  
23 suppose, could do that.

24 MS. GOLDSCHEID: It might well be a harder  
25 question because you are talking about an area that is

1 more traditionally within State concern as compared to  
2 discrimination which is historically within the realm of  
3 the Federal Government.

4                   What the law here regulates -- it builds on this  
5 Court's -- this country's history of anti-discrimination  
6 laws through which Congress has provided means of redress  
7 for individuals --

8                   QUESTION: But the -- but the case of marital  
9 distribution would also be based on discrimination, that  
10 is, a documented legislative history that shows that women  
11 are getting the short end of the stick in marital property  
12 distribution.

13                  MS. GOLDSCHEID: And if there were such a  
14 legislative record, that would certainly be a closer case  
15 to what we have here than an over-arching, overall  
16 regulation of divorce law.

17                  QUESTION: All right. Well, what if -- what if  
18 Congress did pass a general murder statute? Is it your  
19 position that -- that it would be unconstitutional because  
20 it did trench upon a traditional sphere of -- of State  
21 criminal regulation?

22                  MS. GOLDSCHEID: It would be very different from  
23 our scenario here. And I -- I think the answer would  
24 be --

25                  QUESTION: Well, different enough to be

1 unconstitutional?

2 MS. GOLDSCHEID: I -- I think the answer would  
3 be yes. First of all --

4 QUESTION: And is the criterion tradition?

5 MS. GOLDSCHEID: It would be several things.

6 First of all, it would -- it would well run afoul of this  
7 Court's decision in Griffin v. Breckenridge which said  
8 that absent a showing of discriminatory animus or  
9 discriminatory motivation in each instance, a Federal tort  
10 law would roll -- could run into constitutional shoals.

11 Second of all, in a Federal murderer tort law -

12 -

13 QUESTION: Thank you, Ms. Goldscheid.

14 MS. GOLDSCHEID: Thank you.

15 QUESTION: General Waxman, we'll hear from you.

16 ORAL ARGUMENT OF SETH P. WAXMAN

17 ON BEHALF OF THE UNITED STATES

18 MR. WAXMAN: Mr. Chief Justice, and may it

19 please the Court:

20 The innovation of this Court's decision in  
21 United States v. Lopez was to reiterate that under the  
22 Commerce Clause there are judicially enforceable limits on  
23 Congress' authority and to explicate what those limits  
24 are. And we think that the statute at issue in this case  
25 satisfies those limits in the following respects.

1                   QUESTION: General Waxman, is the Government  
2 supporting this -- the constitutionality of this  
3 legislation both on Commerce Clause grounds and on section  
4 5 of the Fourteenth Amendment?

5                   MR. WAXMAN: Indeed, we are, Mr. Chief Justice,  
6 and I'm prepared to make the Government's argument with  
7 respect to both. I thought I would start on the commerce  
8 just to fill in some of the many questions that were  
9 answered.

10                  QUESTION: Let me just comment. Your colleague  
11 had a very brief time to answer our questions. And it --  
12 it seemed to me that when she was being pressed upon  
13 whether or not a murder statute could be enacted, she  
14 would immediately talk about discriminatory animus going  
15 to the -- to the Fourteenth Amendment question.

16                  Just confining yourself to the Commerce  
17 Clause --

18                  MR. WAXMAN: Okay.

19                  QUESTION: -- aspect of the case, can you  
20 address the questions the Court was asking about murder  
21 statutes and why this should be different?

22                  MR. WAXMAN: Yes.

23                  QUESTION: Just with reference to commerce.

24                  MR. WAXMAN: Yes, I will do it just with respect  
25 -- with reference to commerce.

1                   When Congress -- as this Court explained -- in  
2 explaining -- the explanation for why it's different  
3 requires a somewhat long answer, but I have -- I do have  
4 the question firmly in mind.

5                   (Laughter.)

6                   MR. WAXMAN: Believe it or not, I had the  
7 question firmly in mind weeks before I came up here.

8                   (Laughter.)

9                   MR. WAXMAN: My answer with respect to -- let me  
10 just get to the chase and then give you the explanation.  
11 A murder statute would be far more difficult to defend  
12 under Lopez, but without knowing what Congress found and  
13 what the factual premises were for such a statute and  
14 whether it was preemptive or -- or complementary I'm not  
15 able to say, as an a priori matter, constitutional or  
16 unconstitutional. But our defense of this statute doesn't  
17 rely on a conclusion that that would be constitutional for  
18 the following reasons.

19                  In Lopez, this Court explicated what we take to  
20 be a four-part test in judicial scrutiny of legislation  
21 that Congress passes under the substantial effects prong  
22 of the Commerce Clause, but which is not itself either  
23 economic or commercial or part of a legislative effort to  
24 regulate or protect the specific market. And Lopez was  
25 the first such case that this Court considered, and this

1 one is quite arguably the second.

2 And what the Court said in Lopez, as we  
3 understand it in both the majority opinion, joined by five  
4 Justices, and in the concurring opinion that you -- that  
5 you authored, was that Congress must -- the Court must  
6 independently find four things: first, that Congress did  
7 act to protect interstate commerce.

8 In Lopez, it was not at all clear that that was  
9 true. The act didn't even regulate violence. It  
10 regulated possession and only within a school. It looked  
11 much more like an effort to regulate what schools should  
12 be doing.

13 Secondly, the Court --

14 QUESTION: Whereas this one is squarely directed  
15 at commerce.

16 MR. WAXMAN: This one is squarely directed at  
17 violent conduct as -- okay. I'm coming to the next part  
18 of the test.

19 (Laughter.)

20 MR. WAXMAN: The Court has to find also  
21 independently -- and -- and this was first I think  
22 explicated in Wirtz v. Maryland. The Court must find that  
23 Congress had a rational basis to conclude that the  
24 regulated activity substantially affected commerce.

25 Third, the Court itself must find independently

1 -- and this I think is an innovation of Lopez -- that the  
2 harm on Congress was direct and not attenuated when the  
3 activity being regulated is not itself economic.

4 And fourth -- and this is, I think, what gets  
5 most to the question about the -- the murder hypothetical.  
6 Fourth, the Court has to find that upholding the  
7 regulation at issue does not require the Court to embrace  
8 a rule that would create what the Court said in -- in  
9 Jones & Laughlin, a completely centralized Government by  
10 obliterating the distinction between national concerns and  
11 those that are truly local.

12 Now, the difficulty in -- in other words, when  
13 Congress is -- is acting with its Commerce Clause  
14 authority in this unique area where the underlying  
15 activity is not itself economic, the Court undertakes an  
16 evaluation that is not characteristic of the type of  
17 evaluation that it takes in the ordinary Commerce Clause  
18 situation where Congress is seeking to regulate a channel  
19 or an instrumentality or an activity that's inherently  
20 economic in itself, and it looks to the Federal versus the  
21 local side of the balance.

22 And here, unlike the --

23 QUESTION: Well, the Court has been helped many  
24 times by finding some kind of jurisdictional hook that the  
25 conduct that took place was carried out in -- in

1           interstate commerce. There is no such hook here.

2           MR. WAXMAN: There is no such hook here and  
3       quite deliberately on Congress' part. And let me answer  
4       that question and then explain the essential distinction  
5       with the murder statute.

6           Here Congress could have put a jurisdictional  
7       requirement that the act of gender-motivated violence  
8       affect commerce or substantially affect commerce. And  
9       under Lopez, there would be no question of Congress'  
10      constitutional authority to do that.

11         But we submit that it is both not  
12      constitutionally necessary under Wirtz and the -- Perez  
13      and the other cases that suggest that under the  
14      substantial effects test, it is appropriate for Congress  
15      to regulate where the class of activities substantially  
16      affects interstate commerce rather than the particular  
17      discrete action.

18         And that's really important here in terms of the  
19      effectiveness of this remedy for two reasons. One -- the  
20      two reasons that are quite specific to gender-based  
21      violence.

22         One, there are many instances of gender-based  
23      violence that don't take place in the work place or on the  
24      way to work that in fact, in and of themselves and in the  
25      fear that they instill in women, have a substantial effect

1       on the interstate economy. And some of them were  
2       mentioned by my colleague. If I can go -- and therefore,  
3       we think that a jurisdictional element in this case as,  
4       for example, didn't exist in Perez or in Wirtz or, for  
5       that matter, really even in Heart of Atlanta Motel,  
6       because Congress in that case simply decreed that any  
7       commercial establishment that accepted a transient guest  
8       sufficiently affected commerce -- so, we don't think it's  
9       necessary, and we don't think it would be as effective.

10            QUESTION: Well, of course, in Heart of Atlanta,  
11       you -- you did have commercial businesses, the running of  
12       motels and restaurants and so forth --

13            MR. WAXMAN: Very, very --

14            QUESTION: -- as I understand it.

15            MR. WAXMAN: -- very true, and we don't step  
16       back from that at all. It was important for this Court in  
17       Heart of Atlanta Motel and in Katzenbach v. McClung to  
18       ensure itself that there was a substantial effect on  
19       commerce.

20            My only point --

21            QUESTION: But your -- your approach seems to me  
22       would justify a -- a Federal remedy for alimony or child  
23       support or other things of that -- or contract disputes  
24       because we now have a record that there's bias in State  
25       courts against women. So, any woman entering into a

1 contract perhaps Congress could say should have remedies  
2 in Federal court, and under your theory that would be  
3 fine.

4 MR. WAXMAN: No. I -- I don't think under --

5 QUESTION: No?

6 MR. WAXMAN: -- my theory it would be fine. The  
7 fact that -- and I think it -- it would run into problems  
8 under at least three of the factors that I've identified  
9 with respect to Lopez. The fact that there -- Congress  
10 has, of course, made no such findings.

11 But with respect to --

12 QUESTION: It has made findings about bias  
13 against women in State courts.

14 MR. WAXMAN: Indeed. And it has found with  
15 respect to gender-based -- the criminal prosecution of  
16 gender-based violence that the bias, the archaic  
17 prejudices and improper stereotypes affect the outcomes of  
18 those prosecutions or potential prosecutions in a  
19 significant number of cases. If there were to be --

20 QUESTION: To remedy which in part it gave the  
21 States \$1.9 billion to -- to spend --

22 MR. WAXMAN: Indeed, as -- as part of the  
23 package that includes --

24 QUESTION: These States that are -- that are  
25 just bad actors.

1                   MR. WAXMAN: Yes, as part of this -- well,  
2 Justice Scalia, I -- if I can just respond to your last  
3 comment. I don't think that it is a fair reading of this  
4 statute or the findings that support it or the legislative  
5 record to suggest that Congress was on a tear to deal with  
6 the States as bad actors. The findings apply equally to  
7 the treatment that victims of gender bias -- gender-based  
8 violence get in Federal courts as well, and it's not our  
9 submission that States themselves are -- have a policy of  
10 discriminating against or depriving women.

11                  QUESTION: I thought that's what you had just  
12 said, that --

13                  MR. WAXMAN: No, no.

14                  QUESTION: -- State courts --

15                  MR. WAXMAN: There -- Congress found, largely by  
16 reference to the submissions by 21 State task forces and  
17 testimony of State Attorneys General and prosecutors and  
18 police, that archaic prejudices and improper stereotypes  
19 by people in the criminal justice system in a significant  
20 number of cases were affecting outcomes. And I don't  
21 think that that could fairly be said with respect to  
22 domestic relations matters, but even if it could, Justice  
23 O'Connor, there are other significant differences here.

24                  If this were a statute that were targeted at the  
25 core of a -- of an area in which the States by history and

1 tradition lay claim, it would raise, in this unique area  
2 of Commerce Clause regulation outside of an economic  
3 activity, a very substantial concern on the State side of  
4 the federalism balance.

5                   QUESTION: If we're -- if we're talking about  
6 archaic stereotypes and so forth, are the plaintiffs going  
7 to be any better with juries in Federal court? I mean,  
8 they come from the same pool that State court juries come  
9 from.

10                  MR. WAXMAN: Mr. Chief Justice, they -- they may  
11 or may not be, and Congress didn't base its establishment  
12 of the remedy on a conclusion that they would be. The --  
13 the establishment of the remedy -- the reason that the  
14 remedy were thought by -- was thought by Congress to be  
15 sufficiently efficacious -- no one thinks it's going to  
16 eliminate the problem of gender -- gender-motivated  
17 violence.

18                  The reason it was thought to be sufficiently  
19 efficacious to try as part of a multi-year, multi-statute  
20 scheme is, number one, it gives the plaintiffs -- it gives  
21 a category of people that Congress found may not have  
22 always had a fair chance at vindication -- an alternative  
23 forum. It gives them a civil forum. It gives them the  
24 option of pursuing that in a Federal court under different  
25 rules with different burdens and with certain advantages

1 and disadvantages.

2                   And it was -- this does, I think, get in --  
3 somewhat into our Fourteenth Amendment argument, but it  
4 was thought to provide a remedy with respect to both the  
5 Commerce Clause problem that commerce sought -- Congress  
6 sought to address and the Fourteenth Amendment problem by  
7 providing this category of people a means to -- an  
8 alternative means to obtain vindication and redress --

9                   QUESTION: General Waxman --

10                  MR. WAXMAN: -- in a choice of forums.

11                  QUESTION: -- from what you say, I take it that  
12 there would not need to be a jurisdictional peg for the  
13 criminal provisions of this act. There is in fact, but am  
14 I correct in understanding you to say that that was not  
15 necessary? Proper perhaps but not necessary.

16                  MR. WAXMAN: I -- I'm not -- I'm not saying that  
17 and I'm not sure that the criminal provisions of the act  
18 would satisfy this Court's standard -- unlike the civil  
19 provisions would satisfy this Court's standard in Lopez  
20 without a jurisdictional provision, and here's why.

21                  The criminal provisions of the statute are not  
22 analogs of the civil remedy provision. The criminal  
23 provisions of the statute, which were included in a  
24 separate title and considered separate -- entirely  
25 separately, address themselves to the crossing of State

1       lines for the purpose of engaging in domestic violence or  
2       violating State protective orders. The crossing of State  
3       lines is not just the traditional jurisdictional element  
4       whereby Congress gets to grab authority. It's the element  
5       -- it's -- it's the *actus reus*, if you will.

6                  And if Congress were to essentially impose a  
7       remedy -- without the -- without the jurisdictional  
8       element in those statutes, Congress would be doing what I  
9       think was suggested it might be doing if it directed -- by  
10      Mr. Chief Justice -- if it directed itself at simply  
11      saying, well, they're biased in domestic -- in divorce  
12      cases, let's federalize it. That, unlike this, would be  
13      an act in which Congress, acting in this special Commerce  
14      Clause area, would be directed directly -- would be aimed  
15      directly at what the States traditionally do, and that  
16      would change the balance that I think this Court has --  
17      certainly the concurring opinion in Lopez suggests has to  
18      occur when Congress is operating at the limits of its  
19      Commerce Clause authority.

20                 QUESTION: General Waxman, can you give us a  
21       single opinion in which this Court has suggested that some  
22       activities under the Commerce Clause are valid on the part  
23       of the Federal Government where they do not displace State  
24       action, but would be invalid if they do displace State  
25       action? I'm alluding to your -- your dichotomy between, I

1 think you said, preemptive versus complementary Federal  
2 laws.

3 This is a new view of the Commerce Clause to me.  
4 I had thought if the Federal Government has Commerce  
5 Clause power, it has Commerce Clause power. Now, you're  
6 saying that it has it in some areas but only if it doesn't  
7 displace the State -- State action. Is that -- is that  
8 the theory?

9 MR. WAXMAN: Justice Scalia, I was with you  
10 entirely until the Court decided Lopez, and I think what  
11 the -- and I think the reason I was with you is that the  
12 Court had never considered the -- as it -- as it  
13 explained, the exercise of Commerce Clause authority in an  
14 area in which it wasn't channels or -- or  
15 instrumentalities of commerce, and under the substantial  
16 effects, it wasn't even activity that's economic itself or  
17 activity that protects or regulates a market. And what we  
18 understand this Court to have announced in Lopez is that  
19 when Congress does that, there has to be a -- an assurance  
20 that upholding the -- the regulation does not require the  
21 Court to embrace a completely centralized government.

22 QUESTION: Where does it say that in Lopez? I  
23 had thought what Lopez said is if the congressional action  
24 in this area is intruding into an area that is the States'  
25 exclusive concern under the Constitution, it can't do it.

1 I didn't see that the opinion said, well, Congress can  
2 sort of slice the bologna and say, we're going to intrude  
3 but not too much. Where does it say that?

4 MR. WAXMAN: Well, I -- perhaps I don't have the  
5 -- the opinion with me right here. Perhaps on rebuttal -  
6 -

7 QUESTION: Well, if it's the only opinion you're  
8 relying on, I -- I would really, you know, like to know  
9 what language suggests that. I --

10 MR. WAXMAN: There is language both in the --

11 QUESTION: -- must have signed on to it  
12 unconsciously.

13 MR. WAXMAN: There is language both in the  
14 majority opinion and particularly in -- in the concurring  
15 opinion. I read it from the majority opinion by the --  
16 the Court's analysis saying this -- Congress is regulating  
17 under the substantial effects test and this is not  
18 activity that's economic or part of a regulation of a  
19 market. It doesn't have a jurisdictional element, and --  
20 and then the Court goes on at great and persuasive length  
21 -- if we were to accept the Government's two arguments in  
22 this case, it would obliterate the distinction.

23 The concurrence adds that in the instance in  
24 which Congress seeks to regulate with respect to that type  
25 of activity, it is appropriate, it is required to inquire

1 the extent to which the Federal balance is changed.

2 And our submission here today is not only that  
3 this act falls on the appropriate side of the line, but  
4 that the creation of a bright line test, which is quite  
5 inconsistent with this Court's historical Commerce Clause  
6 experience that simply says if you're operating in the  
7 substantial effects area and it's not economic or  
8 identifiable to a particular market, it's invalid would be  
9 a very unwise rule for a number of reasons.

10 There are lots of non-economic activities that  
11 themselves have nothing to do with commerce or -- or the  
12 economy that help regulate a market. Drug and firearms  
13 possession laws, for example. There are economic  
14 activities that threaten markets. I'm thinking of the  
15 Federal Access to Clinic Entrances Act and, you know, acts  
16 that prohibit, you know, blocking the entrance to an  
17 exchange of some sort. And there are other acts that deal  
18 with -- directly with activities that themselves aren't  
19 economic but that themselves have substantial effects on  
20 commerce.

21 QUESTION: If you defend the scheme as being an  
22 analog and the same and therefore not a displacement, then  
23 that seems to me to cut against your Fifth Amendment --  
24 Fourteenth Amendment argument because you're not adding  
25 any additional remedy. It seems -- it seems to me you're

1       caught on the horns of a dilemma there.

2            MR. WAXMAN: Well, let me -- let me shift ground  
3 briefly to the Fourteenth Amendment. Our submission with  
4 respect to the -- I take it your question goes to why this  
5 is an efficacious remedy at all with respect to the  
6 Fourteenth Amendment violation that we've identified.

7       Is --

8            QUESTION: Yes, because you've defended it as  
9 saying it's just the same under the Commerce Clause.

10          MR. WAXMAN: Well, no, no, no. I --

11          QUESTION: And now you get to the Fifth  
12 Amendment, you're going to say, well, it's different.

13          MR. WAXMAN: If I -- if I said that it was just  
14 -- just the same -- just the same as what these plaintiffs  
15 already have available to them in State Courts, I -- I  
16 mistook. The -- the Federal remedy that Congress has  
17 enacted provides them something that they didn't have  
18 before. Now, it can be argued that they already -- they  
19 already had the right to have their crimes prosecuted and  
20 in all States they already had the right to pursue a tort  
21 remedy. But this is different.

22          QUESTION: Thank you, Mr. Waxman.

23          MR. WAXMAN: Thank you.

24          QUESTION: Mr. Rosman, we'll hear from you.

25            ORAL ARGUMENT OF MICHAEL E. ROSMAN

## ON BEHALF OF THE RESPONDENTS

MR. ROSMAN: Mr. Chief Justice, and may it  
please the Court:

4                   The question in this case is whether the  
5 enumeration of congressional powers in the Constitution  
6 provides principled, substantive limits to those powers.  
7 For each of the two powers that are at issue today,  
8 petitioners ask this Court to go beyond its previous  
9 holdings and to enlarge those already substantial powers  
10 even further.

With respect to the Commerce Clause, this Court  
has not yet held that Congress can regulate any violent  
crime non-economic in scope and without any jurisdictional  
element tying it to interstate commerce in the specific  
instance.

16                   With respect to section 5, this Court has not  
17       yet held that Congress can remedy violations of the  
18       section 1 prohibition against State denials of equal  
19       protection by regulating purely private behavior that  
20       could not possibly violate section 1.

Under these theories, Congress could justify laws -- virtually any laws -- in domestic relations law, crime, tort, areas that are traditionally governed by State law. And as Justice Scalia noted earlier, because the power to regulate is the power to preempt, Congress

1 could occupy the fields in these areas and relegate the  
2 States to a trivial and unimportant role in our Federal  
3 structure.

4 With respect to the Commerce Clause --

5           QUESTION: The Government argues, Mr. Rosman,  
6 that -- that we're in a new regime after Lopez and that  
7 what we should do for non-economic matters is not to say  
8 that absolutely the Commerce Clause power exists or  
9 doesn't exist, but rather it may exist so long as the  
10 Government doesn't go too far in displacing State  
11 activity. What -- what's wrong with that regime?

12           MR. ROSMAN: Because it's been -- as you noted  
13 earlier and -- and as I just mentioned, it's been the  
14 traditional jurisprudence of this Court that the power to  
15 regulate is the power to preempt. That is to say, if  
16 Congress has the power to regulate, it can displace State  
17 law to the extent it chooses.

18           QUESTION: But what if the Federal statute  
19 expressly says, this will not preempt State laws  
20 whatsoever?

21           MR. ROSMAN: This statute, Your Honor?

22           QUESTION: What if -- what if a Federal statute  
23 had that provision in it?

24           MR. ROSMAN: Well, the Gun-Free School Zones Act  
25 had that provision and it was still unconstitutional. So,

1 I would not think that would be of significance.

2 What the Court focused on --

3 QUESTION: Well, if that's not significance,  
4 then the question of whether there's preemption or not is  
5 not significant either.

6 MR. ROSMAN: That -- that's correct.

7 QUESTION: Oh, okay.

8 MR. ROSMAN: It's not significant. That would  
9 be our position.

10 QUESTION: Well, then this -- this Court has had  
11 a -- what I think is an unfortunate 150- or 200-year  
12 history of trying to draw some kind of line, as you are,  
13 between local and interstate effects. Most of those have  
14 failed. What's your line?

15 MR. ROSMAN: Well, we think that Lopez best drew  
16 the line between economic conduct -- that is to say,  
17 conduct which is connected to or arises out of a  
18 commercial transaction -- and other conduct.

19 QUESTION: So, then your view is that if it  
20 turns out that, to use one of the Government's examples,  
21 people are in their own houses cooking up biological  
22 warfare or it turns out that in their own fireplaces, they  
23 pollute the air in a way that will, through global  
24 warming, swamp the east coast -- or, you know, use any of  
25 their other imaginative examples -- Congress is powerless

1 to act?

2 MR. ROSMAN: Well, with respect to the first  
3 example, Justice Breyer, I think Congress' power to  
4 suppress insurrections would --

5 QUESTION: Well, you see my point. My point is  
6 that there are many, many, many instances of non-  
7 commercial activity, when you collect them all together,  
8 that could have overwhelming effects on interstate  
9 commerce. And so I want to know if you think in any of  
10 those myriads of examples -- I won't be too far-fetched -  
11 - the Congress is powerless to act simply because the  
12 cause of the major economic impact is itself not economic.

13 MR. ROSMAN: Yes, Justice Breyer. We think that  
14 is the best reading of Lopez.

15 QUESTION: Then the drug laws are also  
16 unconstitutional?

17 MR. ROSMAN: The vast majority of Federal drug  
18 laws regulate the sale, manufacture, and possession with  
19 intent to sell of drugs.

20 QUESTION: Yes, but what about --

21 QUESTION: Any of the Federal Government's is  
22 forbidden from regulating Federal drug laws for your own  
23 use in your own house.

24 MR. ROSMAN: Unless -- well, I do know, Your  
25 Honor, that 21 U.S.C. 801 has made various findings that

1 tried to connect the possession of drugs to the interstate  
2 sale of drugs. Whether that would distinguish Lopez or  
3 not, I don't know. I think it would not.

4                   QUESTION: So, if I reject your idea that  
5 Congress is powerless to act where the amazingly strong  
6 commercial activity -- I see. Sorry. Where the -- where  
7 the non-commercial activity has an overwhelming effect on  
8 interstate commerce, if I say I believe there Congress is  
9 power -- empowered to act, at least in some cases, would  
10 you lose?

11                  MR. ROSMAN: No, I don't think so. I think if  
12 you would -- if you read Lopez as permitting the  
13 regulation of some non-economic conduct, I think it would  
14 have to be non-economic --

15                  QUESTION: And you don't read it that way? I'm  
16 not sure what your reading is.

17                  MR. ROSMAN: No, I do. I do read it that way.  
18 I -- I read -- I read Lopez as precluding the regulation  
19 of non-economic conduct. I was responding to Justice  
20 Breyer's question which I thought the presumption of which  
21 was that Congress could regulate non-economic conduct.  
22 And I was responding by noting that you could read Lopez,  
23 I suppose, to permit the regulation of non-economic  
24 conduct, but it would have to be in a way that differs  
25 from -- the effect would differ from the effect that

1 virtually important problem has on --

2                   QUESTION: All right. Then suppose if you're  
3 going to -- if you're going to take a less extreme  
4 position, as I think you are, in this answer, what about a  
5 test that said, where a traditional activity of the State  
6 is at issue, what we will do is require that Congress  
7 address the federalism problem and explain why it believes  
8 in this traditional area a Federal solution is needed?

9                   MR. ROSMAN: That's an interesting solution,  
10 Justice Breyer, but I don't think it really relates to the  
11 text of the Constitution which permits Congress to  
12 regulate commerce among the States.

13                  QUESTION: Mr. Rosman, on that point, you're not  
14 challenging, are you, any of the findings that Congress  
15 made that this is, indeed, a problem that affects the  
16 national economy because it impedes women's mobility, it  
17 impedes the jobs that they can take, the times of day that  
18 they work? You're not challenging any of those findings,  
19 are you?

20                  MR. ROSMAN: I think we're challenging them,  
21 Justice Ginsburg, in the sense that Justice Scalia  
22 suggested earlier on today, in the sense that all of the  
23 studies that were done to support that finding are much  
24 broader and don't really relate to the specific conduct,  
25 gender-based, animus-motivated violence, which is the

1 subject of this particular statute.

2                   QUESTION: What -- what about the -- the finding  
3 that there was a \$3 billion effect on -- on the gross  
4 national product for goods and services, of what I  
5 understood to be gender-based violence? Is -- is that --  
6 is that too far from the -- from the causal connection  
7 that would satisfy you?

8                   MR. ROSMAN: Well, first, of course, this  
9 statute doesn't regulate simply gender-based conduct, but  
10 gender-based and animus-motivated conduct.

11                  QUESTION: Right. It regulates a subset of it.

12                  MR. ROSMAN: I don't -- I don't --

13                  QUESTION: What about the relevance of the \$3  
14 billion figure?

15                  MR. ROSMAN: Your Honor, findings could be made  
16 about virtually any activity and its effect on interstate  
17 commerce: marriage, divorce, virtually all crime. It  
18 has --

19                  QUESTION: But I think what that means is you're  
20 going back to the argument that you simply cannot regulate  
21 anything but economic activity as such because if you  
22 extend regulation beyond that, there is no stopping point.  
23 That's really your --

24                  MR. ROSMAN: That's certainly our primary  
25 argument today. That's correct.

1                   QUESTION: But if -- let's assume that your  
2 primary argument, that pure position, is not accepted, is  
3 -- is there something insufficient about the \$3 billion  
4 finding to support this kind of legislation?

5                   MR. ROSMAN: I think what we were speaking about  
6 just a moment ago, the fact that the statute doesn't  
7 regulate the particular conduct --

8                   QUESTION: Well, it regulates a -- a subset of  
9 it, the animus kind of violence. And -- and I would  
10 suppose that -- I don't know that the Government made this  
11 argument, but I would suppose that it could reasonably be  
12 argued that from a finding that gender-based violence  
13 resulted in a -- in a \$3 billion effect on -- on the  
14 economy, loss in gross product, that -- that one could  
15 also infer that probably the substantial or -- or a very  
16 substantial part of the -- the violence that goes to  
17 produce the \$3 billion effect was animus-based violence.  
18 At least most -- most gender-based violence I presume is  
19 animus-based violence.

20                  MR. ROSMAN: Well, I think that's the assumption  
21 that Congress made, and I'm not sure --

22                  QUESTION: Isn't that a -- isn't that a  
23 reasonable assumption?

24                  MR. ROSMAN: I'm not sure that it is.

25                  QUESTION: Why not?

1                   MR. ROSMAN: Well, I -- I'm not sure that  
2 Congress had any basis for believing it. I think that's  
3 the best way of putting it.

4                   QUESTION: What makes you think it's the  
5 assumption Congress made? I -- I'd assumed just the  
6 opposite, that it was very clear in the -- in the  
7 legislative history that Congress understood it was -- it  
8 was just addressing a -- a narrow -- a narrow spectrum of  
9 violence against women and wasn't enacting a general rape  
10 law.

11                  MR. ROSMAN: Correct, Justice Scalia. What I  
12 was --

13                  QUESTION: So, why do you think that Congress  
14 made the assumption that all -- all rape or all violence  
15 against women is -- is what you call gender-based?

16                  MR. ROSMAN: Well, I think that they concluded  
17 that it somehow constitutes a significant part of the  
18 economic effects of it. But as you point out, that's  
19 contrary to their equally -- well, it's contrary to the  
20 conclusion or the statements that are made in the  
21 legislative record --

22                  QUESTION: Well, but the --

23                  MR. ROSMAN: -- that this stuff does not  
24 constitute --

25                  QUESTION: No. Finish your answer.

1                   MR. ROSMAN: -- does not constitute a  
2 significant part of gender-based animus --

3                   QUESTION: What is your view of the proper  
4 standard this Court should employ to determine the  
5 accuracy of congressional findings? Do we review the  
6 whole legislative history and decide for ourselves whether  
7 the evidence supports the findings, or what do we do?

8                   MR. ROSMAN: I think this Court -- it's unclear  
9 after Lopez precisely the standard by which one reviews -  
10 -

11                  QUESTION: I'm asking what your view of the  
12 proper standard is.

13                  MR. ROSMAN: Actually, Justice Stevens, we don't  
14 think it much matters because the relationship that --  
15 between the conduct being regulated and -- and the amount  
16 of commerce being affected is what defeats this -- not --  
17

18                  QUESTION: Then do you agree that we should  
19 assume the findings are valid, or not? And if not, why  
20 not?

21                  MR. ROSMAN: I think, Justice Stevens, that  
22 there's reason to question the findings with respect to  
23 gender-based, animus-motivated violence, but it does not  
24 affect our argument one way or the other if you do assume  
25 it.

1                   QUESTION: So, in other -- you say we should  
2 take the case on the assumption that findings are  
3 supported by the evidence.

4                   MR. ROSMAN: I don't -- I don't believe the  
5 findings are supported by the evidence, but as I've said,  
6 we don't think that's --

7                   QUESTION: But then I asked you what standard  
8 should we use to determine whether or not there are  
9 findings supported by the evidence.

10                  MR. ROSMAN: I see what you're saying. In  
11 determining empirical effects, effects on the national  
12 economy, this Court can review under a rational basis  
13 test. The question whether or not, though, the activity  
14 being regulated substantially affects interstate commerce  
15 is somewhat different.

16                  This Court focused on two factors in making that  
17 determination in Lopez. First, the nature of the activity  
18 being --

19                  QUESTION: Well, Lopez doesn't address this  
20 question because there were no findings in Lopez. And  
21 what I'm particularly interested in is your view of, one,  
22 what is the standard by which we should review the  
23 findings, if they're going to be reviewed, and secondly,  
24 does it matter whether we accept the findings or not? And  
25 I'm not really clear on what your answer is to either of

1 those questions.

2 MR. ROSMAN: The answer to the second question  
3 is that it doesn't matter, and it doesn't matter --

4 QUESTION: Which means we can accept the  
5 findings and decide the case on the assumption they're  
6 valid in your view.

7 MR. ROSMAN: Yes. You can -- you can still --  
8 you can still accept the findings and nonetheless affirm  
9 the judgment of the Fourth Circuit.

10 QUESTION: Do you know of any case of ours that  
11 turned on the existence or non-existence of congressional  
12 findings?

13 MR. ROSMAN: I do not, no.

14 QUESTION: Do -- have we said --

15 QUESTION: Have you read the Lopez opinion which  
16 makes quite a point of the absence of findings?

17 (Laughter.)

18 MR. ROSMAN: I have, Justice Stevens, and I  
19 don't think it does make that much of a point of the  
20 absence of findings. I think that the Fifth Circuit  
21 opinion in Lopez made a great deal of the absence of  
22 findings, but I think that this Court wrote a much, much  
23 different opinion.

24 This Court focused on the nature of the activity  
25 being regulated and the absence of a jurisdictional

1 element. It was set forth in the very first paragraph of  
2 the opinion and repeated throughout. The possession of  
3 guns around schools was a non-economic activity, and that  
4 was so even though schools themselves buy things and  
5 employ people and, no doubt, have to divert resources when  
6 the violence is threatened.

7           QUESTION: Mr. Rosman, I'm concerned about, you  
8 know, the line you're -- you're urging us to adopt that it  
9 has to be an economic activity. I mean, you know, what  
10 about a gang that -- the Jesse James gang that -- that  
11 robs interstate trains? That's what they do. Violence  
12 directed against the actual organs of commerce. We -- the  
13 Federal Government would have no power to control that?

14           MR. ROSMAN: Well, presumably that would fall  
15 under Congress' power to regulate the instrumentalities of  
16 commerce.

17           QUESTION: Well, from Jesse James' point of  
18 view, it was economic.

19           (Laughter.)

20           MR. ROSMAN: Yes. That's -- it certainly was.  
21 There are going to be, Justice Scalia --

22           QUESTION: Oh, I see. So, all robbery is  
23 economic activity in your -- in your estimation. We can  
24 have a general Federal robbery statute because, after all,  
25 it's economic activity.

1                   MR. ROSMAN: I'm not sure that's the case  
2 because robbery is sort of -- if you think of commerce as  
3 voluntary exchange, robbery is not commerce.

4                   QUESTION: Well, but surely you have to broaden  
5 your -- your argument to say beyond mere economic  
6 activity. It has to be -- you have to allow some ability  
7 of the Federal Government to reach activity that is  
8 directed against commerce whether it's economic activity  
9 in and of itself or not.

10                  MR. ROSMAN: Oh, the -- the standard in Lopez  
11 and what I had understood the definition of economic  
12 activity to be was activity that arises out of or is  
13 connected to commercial activity.

14                  QUESTION: So, would you say that if an act of  
15 violence were -- were committed simply for the -- for the  
16 purpose of -- of slowing the flow of goods in -- in  
17 interstate activity that in fact that would, therefore, be  
18 subject to -- to congressional regulation?

19                  MR. ROSMAN: I think that would constitute  
20 economic activity as the Court defined it in Lopez.

21                  QUESTION: Or even an act of violence on an  
22 interstate train or on an airline traveling interstate.

23                  MR. ROSMAN: Yes. That's -- that's correct. If  
24 the purpose of the act is to disturb commercial  
25 activity --

1                   QUESTION: No, I don't care about its purpose.  
2       That isn't its purpose. The purpose was to get money from  
3       the passengers, but -- but in fact it occurred in -- in  
4       the stream of commerce.

5                   MR. ROSMAN: Well, I think the purpose is of  
6       some consequence, but I would agree with you that the  
7       particular examples that you identified would probably  
8       constitute economic conduct, as the Court identified it in  
9       Lopez.

10                  QUESTION: But your test, in any case -- you've  
11       changed -- not only you've changed it, but you've --  
12       you've modified your statement of your test to this  
13       extent. Originally I thought the test was Congress could  
14       regulate only economic activity as such under the  
15       substantial effects prong. But I take it now you're  
16       saying it may regulate economic activity as such and it  
17       may regulate non-economic activity if that activity was  
18       intended to affect economic activity.

19                  MR. ROSMAN: Well, that's -- it certainly can do  
20       that, Justice Souter. And I had understood -- I had  
21       understood Lopez, when he characterized or described  
22       economic activity, to include activity connected to a  
23       commercial transaction, and I think that would fall --

24                  QUESTION: By -- by intent for --

25                  MR. ROSMAN: Yes.

1                   QUESTION: May I give you one example I'd be  
2 interested in your views on? Assume a person wants to  
3 grow marijuana in his back yard for his own use and for no  
4 other purpose. Could -- does Congress have the power to  
5 prohibit that activity?

6                   MR. ROSMAN: I don't think so, Justice Stevens.

7                   QUESTION: That's what I thought your view would  
8 be.

9                   MR. ROSMAN: And -- and I would --

10                  QUESTION: As opposed to wheat? I mean,  
11 marijuana is different from wheat? Is that --

12                  (Laughter.)

13                  MR. ROSMAN: Well, it -- it -- I was -- I was  
14 going to provide that caveat, Justice Scalia --

15                  (Laughter.)

16                  QUESTION: Yes, but let's -- let's assume --

17                  MR. ROSMAN: -- that -- that in --

18                  QUESTION: -- let's assume the marijuana grower  
19 says I want to grow it in my back yard solely for my own  
20 use because I am sick of being gouged by the interstate  
21 marijuana market.

22                  (Laughter.)

23                  QUESTION: Doesn't -- doesn't that pass muster  
24 with you?

25                  MR. ROSMAN: There's always going to be some

1 close cases. I think the specific --

2 (Laughter.)

3 MR. ROSMAN: I think the specific example --

4 QUESTION: I thought I gave you an easy one.

5 (Laughter.)

6 QUESTION: That's not a close case under our  
7 precedents. It's not a close case at all.

8 QUESTION: Well, I think it is a close case.

9 QUESTION: What if wheat -- he's growing wheat  
10 in his back yard to eat?

11 QUESTION: Let me just pursue this, please, for  
12 this one thing.

13 Regulating a lawful market in wheat is one  
14 thing. Regulating a -- commerce in something that's  
15 forbidden to be sold is quite a different thing, and  
16 that's why I think you're quite right in saying that under  
17 your theory you could not -- Congress would not have the  
18 power to prohibit mere possession of marijuana even though  
19 they would have the power to regulate possession and  
20 growth of wheat.

21 MR. ROSMAN: I think there is that difference,  
22 Justice Stevens. Thank you.

23 And what I was trying to say is that --

24 QUESTION: I see. You -- you read the Commerce  
25 Clause that Congress has the power to regulate lawful

1 commerce. Right? Unlawful commerce, the sky is the  
2 limit.

3 (Laughter.)

4 QUESTION: Congress has no power to regulate  
5 that. Is that it?

6 MR. ROSMAN: If -- no, it has the power to  
7 regulate unlawful commerce. The question is the -- is the  
8 possession -- the regulation of possession so necessary to  
9 the prohibition of marijuana in interstate commerce that  
10 Congress should be able to reach it, just as it was able  
11 to reach the growing of wheat in Wickard. That's the  
12 question that needs to be answered before I could come up  
13 with a definitive response to the hypotheticals that have  
14 been given to me.

15 QUESTION: Mr. Rosman, can we return to gender-  
16 based violence?

17 MR. ROSMAN: I'd like to, yes.

18 (Laughter.)

19 QUESTION: And I thought you said, at least for  
20 purposes of this argument, you're willing to accept the  
21 findings that Congress made that this does, indeed, deter  
22 women's full participation in the national economy. In  
23 taking a look at what Congress did here, they didn't do  
24 the things that this Court has said they can. They didn't  
25 commandeer any State legislators. They did not displace

1       the State legal system. They just provided an alternate  
2       remedy in an alternate forum.

3                 Now, why can't Congress do that if they say,  
4       here's the effect on commerce? We're not taking over the  
5       States' domain. We are just complementing what the States  
6       do. It's another auxiliary action just as giving them  
7       money for training is permitted. Why isn't that  
8       satisfactory?

9                 MR. ROSMAN: First, Justice Ginsburg, as we  
10      spoke about earlier, it's our view that the power to  
11      regulate is the power to preempt so that whether or not  
12      Congress has exercised that power in a specific instance  
13      ought not to determine whether something is within  
14      Congress' commerce power.

15                 Second, we do think that this statute does  
16      displace some State policies in the same way that the Gun-  
17      Free School Zones Act displaced some State prerogatives.  
18      After all, the Gun-Free School Zones Act didn't preempt  
19      anything at all, and yet this Court held that it was  
20      beyond Congress' commerce power.

21                 What's being regulated here, of course, is  
22      conduct --

23                 QUESTION: Could you just tell me what -- what  
24      is the clash here? Because I'm not sure I understand it.

25                 MR. ROSMAN: For example, there are various

1 assumptions under the common law between -- about parental  
2 immunities and torts between people in the same family.  
3 This statute says when you consider whether or not  
4 something is or is not a felony, you must disregard the  
5 relationship.

6           QUESTION: And if you're in a State that -- that  
7 has a similar statute, then there's no clash.

8           MR. ROSMAN: If a State had a similar -- I'm  
9 sorry -- a statute that disregarded the relationship?

10          QUESTION: That was just like the Federal  
11 remedy.

12          MR. ROSMAN: Yes, by -- by definition if they  
13 have exactly the same statute, there would be no clash.  
14 But virtually all States have a basic common law  
15 presumption about contact and torts within a family that  
16 this statute asks the Federal Government, the judiciary,  
17 to ignore.

18          QUESTION: Well, let's lay aside that for a  
19 moment and take this case that's before us. There's no  
20 question of family relationship here.

21          MR. ROSMAN: No, just as there was no particular  
22 conflict in Lopez. There was a statute in Texas which did  
23 the same thing as -- as the Federal statute.

24          QUESTION: May I ask you another question about  
25 a modest change in this statute? Say -- assume this

1       statute had a requirement of proving a jurisdictional fact  
2       in each case, such as in a gun case, you have to prove the  
3       gun traveled in interstate commerce. Supposing here a  
4       part of the cause of action was that the plaintiff had to  
5       prove that as a result of the act she sued on, she was  
6       unable to enter the labor market or unable to go to school  
7       or something like that. Would that save the statute in  
8       your view?

9                    MR. ROSMAN: It would certainly be a different  
10                  statute.

11                  QUESTION: I understand it would be different.  
12                  Do you think it would save the statute in your view?

13                  MR. ROSMAN: I think -- I think the  
14                  jurisdictional element was one of the two elements that  
15                  Lopez identified, and that, yes, it could very well.

16                  QUESTION: My question is, do you think it would  
17                  save the statute if it had that element in this case?

18                  MR. ROSMAN: Without a little more knowledge  
19                  about the exact jurisdictional element that you'd be  
20                  adding, I think it would be impossible to say for sure.  
21                  But yes, it would be a much closer case and Congress  
22                  could, I think, by adding jurisdictional elements in  
23                  general -- your general idea of saving this kind of  
24                  statute by adding jurisdictional elements we agree with.

25                  QUESTION: Can we talk for a few minutes about

1 the Fourteenth Amendment argument?

2 MR. ROSMAN: Sure, I'd love to.

3 QUESTION: Suppose that Congress finds -- and  
4 there's substantial evidence for the finding -- that if  
5 black people are assaulted, prosecutors do not treat the  
6 crime as seriously as they do if there's a white person  
7 assaulted. Could Congress pass a two-part statute,  
8 severable: one, making it a Federal crime to assault a  
9 black person on -- on account of his race; two, giving a  
10 civil remedy to a black person who was assaulted so that  
11 the black person could sue the white person?

12 MR. ROSMAN: Well, they certainly could do so,  
13 Justice Kennedy, but they'd be doing --

14 QUESTION: Under its Fourteenth Amendment  
15 powers.

16 MR. ROSMAN: Oh. Then I think the answer is no,  
17 that they could not. And the reason derives from the text  
18 of the constitutional provision. The constitutional  
19 provision states that Congress shall enforce the  
20 prohibitions in section 1. The prohibitions in section 1  
21 are against the States. It says no State shall do this,  
22 no State shall do that.

23 QUESTION: Would you agree that in my  
24 hypothetical I've established that there is a general  
25 denial of equal protection?

1                   MR. ROSMAN: Yes, in your hypothetical I believe  
2 there was.

3                   QUESTION: But you're saying --

4                   MR. ROSMAN: Assuming that States were acting -

5 -

6                   QUESTION: -- that Congress is so limited in the  
7 remedies that it can choose, that it cannot create a  
8 private cause of action, which is really in a sense -- we  
9 can argue about this, but in one sense less intrusive on  
10 that States?

11                  MR. ROSMAN: Well, the Fourteenth Amendment is  
12 intrusive on the States, Justice Kennedy, and this Court  
13 specifically considered statutes along the lines of what  
14 you're describing in United States v. Harris and the civil  
15 rights cases. Congress --

16                  QUESTION: I wouldn't think they made the  
17 argument that Justice Kennedy advanced; that is, as I  
18 understood his question, there is a clear finding that the  
19 State in its courts or in its legal system says where a  
20 black man and a white man are fighting it out in our legal  
21 system, the white man always wins, for example. And so,  
22 to remedy that situation, to remedy that -- nothing to do  
23 with the white man who's always winning -- to remedy the  
24 failure of the court system to apply the law equally, we  
25 create an optional Federal remedy. That's what I took as

1 his basic question.

2                 And my response to your answer would be could  
3 you explain it. Why isn't that a perfectly good remedy  
4 for a State's failure to follow the Equal Protection  
5 Clause?

6                 MR. ROSMAN: First, as we've set forth in our  
7 brief, we think that's exactly the situation that existed  
8 in the civil rights cases.

9                 QUESTION: That may be. If it is, they didn't  
10 address the argument, and therefore, I would like to know  
11 the reasoning as to why that isn't a remedy for the  
12 State's deprivation of equal protection of the law.

13                 MR. ROSMAN: Because the text of the statute  
14 says that Congress will enforce the prohibitions --

15                 QUESTION: They are enforcing the Equal  
16 Protection Clause. The Equal Protection Clause -- State,  
17 treat black people and white people alike. State, you  
18 have failed to do that. Therefore, we enforce that by  
19 giving the black person this Federal remedy.

20                 MR. ROSMAN: I don't believe that would be  
21 enforcement litigation because it would be doing --  
22 legislation -- it would be doing nothing to the States to  
23 get them to comply with the Fourteenth Amendment. It  
24 would be as if Congress decided that instead of having  
25 schools in the south to segregate in the 1950's, they

1 would offer separate Federal schools. That would not be  
2 enforcement legislation. The proper -- proper  
3 interpretation of section 5 is that Congress must do  
4 something so that the States are no longer engaging in the  
5 conduct which violates section 1.

6           QUESTION: You're saying section 5 does not  
7 provide, as a remedy for the State's failure to abide by  
8 the Constitution, the Federal Government's abolition of  
9 the Federal system.

10           MR. ROSMAN: That's correct, Justice Scalia.  
11           That's a very succinct way of putting it. Yes.

12           QUESTION: Mr. Rosman, can -- can I ask why, if  
13 we have in so many fields involving discrimination,  
14 parallel State and Federal regulation, public  
15 accommodations, employment, we don't say that that's a  
16 traditional area for the States just because they got  
17 there first, which they did? In both areas there was  
18 State legislation before Federal. So, if you can have  
19 harmonious legislation for public accommodations, for  
20 employment, then why not here?

21           MR. ROSMAN: I take it we've moved back to the  
22 Commerce Clause, Justice Ginsburg. And I think the answer  
23 to your question is because this isn't commerce. The  
24 reason that there was harmonious legislation on both the  
25 Federal and State level in the examples that you described

1       is that Congress is regulating commerce. This is not  
2       commerce. This is violence. This is interpersonal  
3       violence, the kind of thing the States have always had the  
4       exclusive province of regulating since the start of our  
5       country.

6             QUESTION: Going -- going back to section 5, I  
7       take it on -- on your view any civil remedy provided by  
8       Congress exceeds the section 5 power then.

9             MR. ROSMAN: Any civil remedy --

10          QUESTION: Yes.

11          MR. ROSMAN: -- against private individuals?

12          QUESTION: That -- that may be brought by a  
13       private individual against a perpetrator.

14          MR. ROSMAN: Against a private perpetrator.

15       Yes. The answer to your question is yes.

16          QUESTION: Okay.

17          QUESTION: Well, a private perpetrator who was  
18       engaged in a conspiracy that was acting under color of  
19       law?

20          MR. ROSMAN: I had understood Justice Souter's  
21       question to refer to someone who was not acting under  
22       color of State authority. You're quite correct.

23          QUESTION: But any private individual who -- who  
24       is participating in a State's violation of an individual's  
25       rights can be sued privately.

1                   MR. ROSMAN: As this Court has been -- has  
2 repeatedly said under section 1983.

3                   But what Justice Frankfurter said in his  
4 plurality opinion in United States v. Williams is that an  
5 individual's interest in receiving a fair trial in State  
6 courts cannot be constitutionally vindicated by Federal  
7 prosecution of private persons. That's essentially what  
8 this statute is trying to do, to create substantive  
9 Federal law to remedy State violations of the equal  
10 protection. It is not enforcement litigation.

11                  And, indeed, the various statutes that we spoke  
12 about just a moment ago, title VII, Equal Pay Act -- thank  
13 you, Your Honor.

14                  CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rosman.

15                  The case is submitted.

16                  (Whereupon, at 11:15 a.m., the case in the  
17 above-entitled matter was submitted.)

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