Since the abolition of chattel slavery, the progress of human rights in America has been peculiarly attached to the traffic in commodities. Guarantees of rights considered universal in nature, as belonging to all humanity, bear a trademark of commerce. As a consequence, the rules of the market economy have come to penetrate ever more deeply into social existence, and the distinction between persons and things has eroded—a distinction at the heart of the difference between slavery and freedom.¹

At issue in this essay are not institutions of capital: corporations, contracts, money, or wage labor. Instead it explores the legal and moral perplexities posed by acts of Congress that connect vindications of the rights of persons to the free flow of commerce. It illuminates the counterpoint between two constitutional grants of power—the Commerce Clause, which gives Congress plenary power to regulate interstate and foreign commerce, and the Thirteenth Amendment, which gives Congress power to enforce the prohibition of slavery and involuntary servitude.² The essay traces how the American nation-state has made human wellbeing commensurate with the exchange of goods across state borders and with untrammeled wealth accumulation.
Put bluntly, I argue that the Commerce Clause has become a charter of human rights where the reach of the Thirteenth Amendment ends. Particularly, it is wrongs of sex that have connected human rights to commodity conceptions of personhood rather than calling forth antislavery prohibitions. For a century, Congress has invoked the commerce power in legislating against women’s subjection—from the ban on white slave trafficking to the ban on violence against women—making the flow of trade a source of protection against violations of free will and invasions of the body. As justified by the rules of commerce, human rights doctrine has carried the ethos of the market into the most private recesses of social exchange.

The development of this commerce-laden rights tradition involves deep contradictions: On the one hand, treating human beings as commodities—at its most extreme—counts as slavery. On the other hand, yoking fundamental rights to the commerce power adds new moral legitimacy to economic values, though on behalf of human dignity. Paradoxically, guarantees of human rights have come to underwrite the sway of the market.

This is a puzzle unstudied in jeremiads on the market’s dominion. Today philosophers argue that market values have overreached their moral limits, observing that the “logic of buying and selling no longer applies to material goods alone but increasingly governs the whole of life.” The warning echoes classic historical critiques of market society. Quoting Aristotle’s *Politics*, the political economist Karl Polanyi lamented a world that had been lost—where markets had been “mere accessories” to household economy—and condemned the destruction of “organic forms of existence.” Such claims take no account of human rights that owe their guarantee to market relations. Yet a century and a half ago, at the end of the Civil War, appeals for universal freedom as an outcome of slave emancipation anticipated the predicaments of sex. There were “no new arguments to be made on human
“rights,” explained Elizabeth Cady Stanton to the American Equal Rights Association, except to “teach man that woman is not an anomalous being.”

By outlawing wrongs of sex as burdens on commerce, Congress has at once guaranteed rights and extended the logic of buying and selling. In other words, the creation of this rights tradition enshrines a limitless market but also establishes the emancipatory sovereignty of the nation-state founded on the flow of commerce. Precisely because the situation of women remains anomalous, Congress has acted under the commerce power rather than the antislavery amendment. My account of the making of this human rights tradition begins with the contemporary problem of hate violence, which sets in relief the counterpoint between the Thirteenth Amendment and the Commerce Clause. Next it turns back to the era of slave emancipation, and then proceeds by following the paths of congressional lawmaking and constitutional jurisprudence, while also looking outward to international treaties that have shaped American guarantees of rights.

Although this is a distinctly American story, it may well prompt broader reflection on cosmopolitan political authority, global capitalism, and protection against both states and private actors in safeguarding human rights. At the least, it casts new light on the equation of social exchange and economic intercourse. And it reveals how sex confounds the opposition of freedom and bondage.

Consider the Hate Crimes Prevention Act of 2009, a law enacted by Congress to safeguard the right of all persons within the jurisdiction of the United States to freedom from violence based on bias. It bars violent acts motivated by animus on account of gender, sexual
orientation, or gender identity, as well as on account of race, color, religion, national identity, or disability. The traits fueling hate may be either actual or perceived. The prohibited violence involves willfully inflicting bodily injury on any person, or trying to do so, through the use of dangerous weapons, fire or firearms, or other explosive or incendiary devices. Punishment ranges from a fine to life in prison. The statute is also known as the Matthew Shepard and James Byrd, Jr. Act, in memory of the murders in 1998 of a gay man, Shepard, who was beaten with a pistol, tied to a fence like a scarecrow, and left to die by the side of a road in Laramie, Wyoming, and of a black man, Byrd, who was beaten, chained to a pickup truck, and dragged behind it, on a road in Jasper, Texas, until his body ripped apart.  

In Congress, arguments on behalf of the legislation drew on both international and American ideals of human rights. It would uphold the charter of the United Nations in protecting “the dignity of the human person.” It would guarantee the “inalienable rights framed in the Declaration of Independence.” It was universalist in principle, though realized within the domain of a nation, as a project of “garnering the civil and human rights of all Americans.” The reasoning linked together inherent rights with rights depending on membership in the nation. It also relied on empirical data revealing that across the country a hate crime occurred roughly every hour of every day. The legislation was a decade in the making, opposed as a violation of principles of free speech, impartial justice, and federalism, but supported by a broad coalition of civil rights, religious, and law enforcement groups. “We have for centuries strived to live up to our founding ideal, of a nation where all are free and equal and able to pursue their own version of happiness,” said President Obama in signing the measure into law. “A nation in which we’re all free to live and love as we see fit.” Under the legislation, the right to happiness would entail not only liberty and bodily security but free love, unqualified by race or sex difference.
The Hate Crimes Act reaches into a private sphere once fenced off from national authority. The Reconstruction Amendments were designed to empower Congress to enforce the abolition of slavery and its vestiges, and to guarantee rights of national citizenship, suffrage, due process, and equal protection of the law. Yet sex-based crimes—if not carried out across state lines or involving state action—remained within the traditional police power of the states. To the states was reserved authority for protecting the right to bodily security long defined as essential to liberty. A hate crimes law of 1968, enacted by Congress after the murder of Martin Luther King, Jr., addressed race, color, religion, and national origin alone, and covered only federally protected activities: suffrage, jury service, employment, interstate travel, pursuit of public education, enrollment in government programs, and use of public accommodations. The new measure, sponsored by John Conyers and Edward Kennedy, proceeds further. It grants all persons, in all places, a right to freedom from hate violence.12

The expansive hate crimes enactment rests on two constitutional pillars, each supporting the power of Congress to overcome states’ rights doctrine. The prohibition of violence animated by hate due to race, color, religion, or national origin rests on the Thirteenth Amendment. But the prohibition of violence animated by hate due to gender, sexuality, or disability rests on the Commerce Clause. Bias alone is a sufficient warrant for congressional action against hate crime under the antislavery amendment.13 But bias must affect buying and selling—the flow of commodities across state borders—for Congress to ban hate violence motivated by sex under the commerce power.14

The language of the statute is nothing if not explicit. Where the Thirteenth Amendment does not apply—to violence based on sex—the commerce power operates.

The legislative findings that introduce the act highlight the intersection of violence, slavery, and race that empowers Congress under the Thirteenth Amendment to trespass on
state authority in legislating against hate crime in order to purge the nation of the vestiges of chattel bondage:

For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry. . . . Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude. 

Notably absent from the findings is the designation of wrongs of sex as a badge of slavery and involuntary servitude that falls within the sphere of congressional authority under the Thirteenth Amendment. Notably absent, too, is any claim about a racial hate crime affecting the stream of interstate commerce.

By contrast, the statute highlights the intersection of the market, sex, and violence that empowers Congress to reach hate crimes under the Commerce Clause. Describing the nature of offenses bearing on sex, the language of the act grows specific and detailed, not simply about bodily injury and the use of dangerous weapons, firearms, and incendiary devices but also about the channels, facilities, and instrumentalities of commerce, and about crimes that interfere with “economic activity” and “purchasing goods and services” and “sustaining employment” and “commercial activity”—about violence that “affects interstate or foreign commerce.” Such violence must involve some kind of “Circumstances” demonstrating a market nexus and/or the circulation of people or things among states or nations:
(i) the travel of the defendant or the victim
   (I) across a State line or national border; or
   (II) using a channel, facility, or instrumentality of interstate or foreign commerce;

(ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce . . .

(iii) . . . the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

(iv) the conduct . . .
   (I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or
   (II) otherwise affects interstate or foreign commerce.16

Notably absent from the explanation of circumstantial evidence of economic activity is violence involving slavery’s badges. Notably absent, too, is any assumption that market exchange stands apart from the private sphere.

Under the Hate Crimes Act, therefore, where the relics of bondage prohibited by the Thirteenth Amendment are not at issue—in violence due to sex—the commerce nexus entitles Congress to safeguard freedom from bodily injury. By definition, the market’s ways must pervade social life traditionally belonging to the sphere of domestic relations governed by the states to create the authority of the nation to prohibit hate violence.

So the attorney general of the United States testified in congressional hearings, endorsing the measure’s constitutionality on the eve of its passage. Violent acts motivated by bias, Eric Holder told the Senate Judiciary Committee, “deny the humanity that we all share.”
On the dual sources of congressional power, he explained:

1. Thirteenth Amendment

Congress has authority under Section 2 of the Thirteenth Amendment to punish racially motivated violence as part of a reasonable legislative effort to extinguish the relics, badges, and incidents of slavery.

2. Commerce Clause Jurisdiction

The interstate commerce element would ensure that Federal prosecutions for hate crimes based on sexual orientation, gender, gender identity would be brought only in those particular cases in which a Federal interest is clear.

The extension of national authority would hinge on “proof of a nexus to interstate commerce.”

For a decade, Congress had heard testimony on the legislation. Witnesses told of violence with a connection to interstate commerce. A husband beat his wife while driving back and forth across state lines; a rapist held a gun that had traveled in interstate commerce. The central question was the source of congressional authority over acts of private violence, with no relation to state action. “The 13th amendment can be legitimately invoked insofar . . . as the bill involves racial hate crimes,” the law professor Cass Sunstein said in House judiciary hearings in 1998. Explaining the split in the statute, in reply to a query from a black congresswoman, Sheila Jackson Lee, he spoke of both antislavery doctrine and the commerce power:

Ms. Jackson Lee . . . You mentioned the commerce clause not being in 1 and being in 2. Give me some comfort, and maybe I can’t get any comfort, I would like it not to be in 2 . . .
and making 1 and 2 the same.

**MR. SUNSTEIN.** . . . The question would be whether clause 2, which does not involve race or color, could be supported by the 13th amendment . . . . The 13th amendment isn’t about those areas of discrimination . . . . The commerce clause . . . would be a legitimate basis for asserting authority given certain findings on the connection between these kinds of hate crimes and interstate commerce.

**MS. JACKSON LEE.** . . . You can cite the commerce clause . . . and we would be on safer grounds?

**MR. SUNSTEIN.** That is right.

The lesson was plain; wrongs of sex had no constitutional link to slavery—“the 13th amendment isn’t about those areas of discrimination.” Instead a connection to commerce—“private violence may well interfere with the interstate movement of both people and goods”—validated national authority by linking the right to bodily security with the traffic in goods.¹⁸

Consider the outcome of the odd cleft in the structure of the Hate Crimes Act. Surely it would count as a hate crime if a black person were murdered at home by a white killer using bare hands and uttering racial epithets. But suppose a wife were slain by a husband of the same race during a rape. That would count as a hate crime only if her death occurred from an object that had traveled in interstate commerce. Or if the private violence interfered with economic activity.

That asymmetry is the price of the counterpoint between the Thirteenth Amendment and the Commerce Clause as sources for securing human rights. Under the Hate Crimes Act, only a market nexus overcomes the limits of antislavery constitutionalism, making protections of freedom from sex-based violence an accessory of interstate
commodity exchange.

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The sweep of the Thirteenth Amendment has been circumscribed since its inception. That Congress would come to circumvent those limits by associating the freedom of persons with the traffic in merchandise appears all the more perverse because abolitionism had long taught that the essence of slavery was reducing human beings to commodities.

As the American Anti-Slavery Society declared at its founding in 1833, “No man has a right to enslave or imbrute his brother—to hold or acknowledge him, for one moment, as a piece of merchandise.” Under the slave system, human beings existed “as marketable commodities.”

This principle echoed in Congress as sectional crisis deepened before the Civil War. Above all, it was the figure of the ravaged bondswoman—and the creation of wealth through slave breeding—that symbolized the evil of treating people as merchandise. Slavery ruined “the image of God in the human soul,” as Congressman Horace Mann argued, describing the debasement of slave women who lacked the liberty to obey the Apostle’s rule: “Wives shall submit themselves to their husbands.” Such claims echoed accounts by former slaves, who disclosed how their masters compelled, as Frederick Douglass recalled, “unmitigated fornication” to produce human chattel as “a marketable commodity.”

But sex disappeared as Congress framed the Thirteenth Amendment, making explicit the reconciliation of emancipation with woman’s subjection. The debate over the amendment’s phrasing anticipated its limits, as antislavery statesmen refused language that would have provided, “All persons are equal before the law, so that no person can hold another as a slave”—an affirmation of freedom modeled on the French Declaration of Rights.
of 1789. For that expansive guarantee implied that any woman, even a wife, would be “as free as a man.”

After the war, Congress reinforced the Thirteenth Amendment’s limits, defining slave emancipation to forbid wrongs of labor, contract, property, and race—but not of sex. According to the inventory of unfreedom named in the Senate, denying rights to “the colored man . . . to buy or to sell, or to make contracts . . . to own property . . . were all badges of servitude made in the interest of slavery.” Drawing on the Thirteenth Amendment, the architects of Reconstruction enacted laws meant to complete the work of abolition: the Civil Rights Act of 1866, the Anti-Peonage Act of 1867, the Enforcement Act of 1870, the Ku Klux Klan Act of 1871, the Padrone Act of 1874, the Civil Rights Acts of 1875. But none struck at torments based on sex. Neither wifely submission nor unmitigated fornication figured as badges of slavery.

At the moment of abolishment, then, Congress began narrowing the meaning of slavery. And the limits of the Thirteenth Amendment soon became etched in constitutional doctrine, as the Supreme Court delineated freedom’s guarantees and slavery’s badges. In the Slaughterhouse Cases of 1873, the Court declared the antislavery amendments “additional guarantees of human rights,” while tethering their emancipatory force to the extinction of racial forms of bondage and the legacies of chattel slavery. The intent of the Thirteenth Amendment—“this grand yet simple declaration of the personal freedom of all the human race”—was to bar “all shades and conditions of African slavery,” the Court found, adding that its sanctions would also forbid bondage that might emerge from “Mexican peonage” and “Chinese coolie labor,” although “negro slavery alone was in the mind of the Congress which proposed the thirteenth article.” But slaughterhouse laws that affected white butchers fell outside the amendment’s prohibitions. Slaughterhouse did not speak of subjection on
account of sex. Instead it established that the “pervading spirit” of the Thirteenth Amendment aimed at “freedom of the slave race.” Yet that spirit too had boundaries. In the Civil Rights Cases of 1883, the Court rejected the Thirteenth Amendment as a source of congressional power to outlaw Jim Crow, ruling that to forbid race discrimination in “matters of intercourse or business” as a relic of bondage would be “running the slavery argument into the ground.”

But it was the companion case to the Slaughterhouse Cases that made evident the anomalies of being a woman and the exclusion of women from antislavery guarantees. In Bradwell v. the State—where the deprivation of the right to pursue employment and to contract freely involved a white wife rather than white butchers—the badges of slavery never arose at all. Rather, the Court infamously affirmed that slave emancipation left intact the different spheres and destinies of the sexes. It found that barring women from practicing law in state courts no more violated fundamental rights of United States citizenship than regulating the butchering of pigs in city slaughterhouses. The difference between men and women emanated from “nature itself,” Justice Bradley reasoned in concurrence, noting the annihilation of a wife’s independent legal existence under the principle of coverture and the persistence of “special rules of law flowing from and dependent upon this cardinal principle.”

Bradwell marks the conspicuous absence in Thirteenth Amendment doctrine of matters of sex difference.

Far less famous is a rape case that came before the Supreme Judicial Court of Massachusetts in 1870. Yet it stands as an exemplar of the special rules that shielded the household—and private violence animated by sex—from the guarantees of the Thirteenth Amendment. It spoke of a bond of master and subject unaltered by abolition.

The Massachusetts court bluntly set forth the definition of rape prevailing across the
country in the era of slave emancipation. “The simple question . . . is, Was the woman willing or unwilling?” The crime consisted in the violation of her body and denial of her will: “enforcement of a woman without her consent.”

And deciding if the sex was at will depended first on whether the violated woman was a wife. The rule, with the exception for marriage, declared, “A man who has carnal intercourse with a woman (not his wife) without her consent . . . is guilty of rape.” This common law rule was centuries old, appearing in Historia Placitorum Corone, a treatise on capital crimes written by the lord chief justice of the Court of the King’s Bench in the seventeenth century, and published posthumously in 1736: “But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.” The criminal law of the king’s court incorporated the Apostle’s gospel on wifely submission, and the tenet endured in American law. “In no State of the Union has the wife the right to her own person,” protested a Declaration of Rights for Women presented on the centennial of Independence Day.

In the eyes of the law, unfree sex could not exist within marriage as a bond founded on contract and consent. The intercourse between husband and wife represented the antithesis of slave breeding, for the illusion of perpetual consent turned violence into a legitimate taking. A woman could not be ravished by her own husband, just as a slave master could never be guilty of raping his chattel property: the essential difference was wives were assumed always to be willing, but slaves to have no will of their own.

In the era of slave emancipation, therefore, wrongs of sex fell beyond the limits of the Thirteenth Amendment, and Congress claimed no power to govern home life, but for enforcing the dissolution of the bonds of slavery. Meanwhile, in the Civil Rights Cases of
1883, the Supreme Court broached—yet left unanswered—the question of whether the commerce power might ground congressional rights decrees where the antislavery amendments could not: “Whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights . . . is not now before us.” Presciently, Justice Harlan noted in dissent, “It may become a pertinent inquiry.”

From that pertinent inquiry would develop the emancipatory use of the commerce power, a path of governance that led away from the antislavery amendments. In regulating commerce among the states, Congress came to enact laws that created a human rights tradition connecting the intercourse of persons with the circulation of pieces of merchandise.

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Irony lies in the title of the White Slave Traffic Act of 1910, for the legislation was not premised on the Thirteenth Amendment. Instead, Congress drew on the Commerce Clause to ban the transport of women across national and state borders for the purposes of prostitution. The act expanded the commerce power, beyond regulating objects such as steamboats, railroads, and livestock, to reach illegitimate human intercourse. Its full title clarified the intent: “An Act to Further Regulate Interstate and Foreign Commerce by Prohibiting the Transportation Therein for Immoral Purposes of Women and Girls, and for Other Purposes.” It made a felony of enticing, coercing, and conveying, as well as buying a ticket for the transport of white slaves.

Congress adopted the act to uphold a treaty, a 1904 agreement signed in Paris by the nations of Europe and providing for global repression of the commerce in white women,

Calls for suppression did not come from the trafficked women. But the treaty drew support from the International Council of Women, which advocated the abolition of white slavery throughout the world. At a meeting in Berlin in 1904, the council pledged to “keep the question of the White Slave Traffic on the International programme.” A resolution adopted by council delegates representing nations on every continent assailed the trade as “a disgrace to humanity and a slur on all women.”

A vast market existed in involuntary prostitutes, according to American documents of state proposing legislation that would honor the Paris treaty and supplement laws restricting immigration. Suppression of the White-Slave Traffic—a message from the president of the United States presented to Congress in 1910—denounced the “condition of virtual slavery,” estimating that more than a hundred thousand immoral women were imports from foreign nations. A Senate report summed up the findings of Congress by declaring that the treaty bound the United States to liberate “women who are owned and held as property and chattel” and to suppress the “business . . . of selling them outright.” Accounts in newspapers and reform tracts described how prostitutes were shipped interstate and held captive in brothels, how a white slave would be flayed “until the skin across her back and shoulders cracked.” The business was abhorred as “bestial degradation.”

Yet the Thirteenth Amendment never figured in the making of the white slave traffic legislation. The congressional debate on its constitutional validity examined the moral
contradictions of the chattel principle—the dualisms of free will and coercion, of persons and property, of humanitarianism and market exchange. And the debate blurred divisions of creed and region that dated from the era of the Civil War. But the project of abolishing sex trafficking produced no resolve to summon the antislavery amendment rather than the commerce power as a source of congressional authority.35

In re White-Slave Trade, a legislative memorandum prepared by the commerce committee of the House of Representatives in 1909, set forth the approach of Congress. In explaining the measure’s constitutionality under the Commerce Clause, the memorandum advanced three main claims. First, a prostitute transported “unwillingly” was the legal equivalent of an inanimate commodity, with both representing “the subject of commerce.” Second, the traffic in women “directly connected” to the flow of interstate commerce. Third, because the trade was at once “national in its character” and a peril to “civilized nations” the assertion of federal authority would not infringe on state police power. Therefore, the commerce power afforded Congress ample authority to prohibit sex trafficking.36

Particularly, In re White-Slave Trade dwelled on the parity between persons and property, and on the opposition between consent and coercion. It began with the principle that commerce encompasses the conveyance of passengers, further positing that the power of Congress over “the transportation of property of course applies to the transportation of persons.” It stressed that white slaves suffered “sale and exploitation” and “force and restraint,” that they were objects of sexual commerce “against their will,” that they were made to be “literally slaves . . . women owned and held as property.” They were utterly unlike willing wives. Accordingly, the commerce power extended to their circulation, like merchandise—articles with exchange value but without volition.37
Oratory in Congress decried illegitimate wealth creation, filthy lucre begotten by unfree sex. That it was an evil practice to “make merchandise of a human soul” had become an article of faith, as statesmen with antislavery and proslavery pedigrees joined in mounting a new abolitionism, speaking of “a horror which the devil would be ashamed of.” The crimes of the “black-slave trade,” claimed the author of the anti-trafficking act, Congressman James Mann of Illinois, chairman of the House Commerce Committee, “pale into insignificance as compared to the horrors of the so-called ’white-slave traffic,’” So, too, a Virginia congressman, Edward Saunders, who was born on a tobacco plantation worked by some fifty slaves, called on Congress to ban “this traffic in human flesh, a traffic which oppresses the conscience of humanity.” Citing the opinion of Justice Marshall a century earlier in *Gibbons v. Ogden*, the Virginian argued, “Intercourse is commerce.”

But on the use of the commerce power there was dissent—legal and moral and philosophical. It was unconstitutional, found a minority report of the Commerce Committee, for Congress to interfere with the domestic affairs of the states to legislate against vice under the “guise of regulating commerce”; nor was the intrusion on state authority justified by the Paris agreement and the treaty-making power.

In particular, the argument against the White Slave Traffic Act denied the analogy between persons and property, and discredited the equivalence between immoral intercourse and interstate commerce. The heart of the argument was that human beings—endowed with free will—differed from commodities. That difference meant Congress could not usurp states’ rights by invoking the commerce power to reach relations among persons or wrongs of sex as “commercial intercourse.” Allegedly, the legislation rested on a false premise, “that prostitution is commerce.” Congress must not “assume jurisdiction,” an Ohioan said. But it was Southerners, who had lived among chattel slaves, who most fully explained the
difference between trafficking in women and “chattels, something that has no volition in the transaction at all.” The interstate transit of an “immoral person,” a Georgian said, bore no resemblance to the unlawful trade in harmful articles such as “diseased cattle” that were “commercial in their nature.” An Alabaman elaborated on the dissimilarity between cotton and a prostitute:

When you ship . . . a bale of cotton . . . that is commerce between citizens of different States. What is the commerce here? . . . Simply the vague, indefinite statement that she is going to start from a place in one State and is going to another for immoral purposes.

By such reasoning, not even an impure woman amounted to a piece of merchandise, “a commodity subject to interstate commerce.”

Put simply, the point was that some intercourse did not constitute commerce.

Furthermore, it was asked why women should not be held culpable for their own transit, along with the traffickers who purchased their tickets, since even a white slave was not a thing—like cotton or cattle—with “no volition.” If Congress aimed to “purify commerce,” impartial justice required punishing an interstate prostitute as a person possessing a will of her own and containing no “inherent quality” rendering her equivalent to diseased, guiltless livestock.

The counterargument hardly resolved the perplexities of the legislation—of delivering freedom by equating women with articles of commerce. Perversely, the justification for the act deplored the merchandising of souls but ratified the dominion of commerce, relying on the likeness of persons and things. It condemned the sinfulness of trafficking as sexual enslavement while defending the constitutionality of classifying women with impure commodities—contaminated cattle, spoiled food, lottery tickets—all objects of
interstate commerce banned by Congress as it exercised greater regulatory authority in the
Progressive Era. Fervent rhetoric paired the spiritual with the material. A white slave was an
“imprisoned soul that is being carried from one State to another” through the enterprise of
a “demon, in human form, who is . . . to sell her body and soul into hell.” Yet she would be
liberated within the broad expanse of the commerce power, due to the principle that “the
power to regulate the transportation of persons is the same as the power to regulate the
transportation of things.” Again southern statesmen, versed in the ways of the old slave system,
spoke of property and person but affirmed the analogy in defending the abolition of
“diabolical traffic.” In the words of Congressman Saunders of Virginia:

What is this interstate traffic? . . . Transportation of insensate objects for a
consideration, from one State to another, is clearly commerce; and yet when
it is proposed to carry from State to State, sentient beings for the purposes
of degradation, and dishonor, and in order that the image in which they have
been created, shall be defaced . . . gentlemen seek to make a distinction, and
assert that this transport across state lines of living beings for immoral
purposes, is not commerce, and cannot be reached under authority of the
interstate commerce clause of the Constitution.

Telling of a vast syndicate that carried women to market across the country, and that
profaned the stream of trade, the Virginian abjured “subtle distinctions” between inanimate
and sentient objects of commerce.⁴²

Still, nothing was said of the Thirteenth Amendment. For all the protest against the
chattel condition of involuntary prostitutes—and all the argument about property and
personhood—Congress did not contemplate prohibiting the traffic in women as a badge of
slavery or form of involuntary servitude. Rather, antislavery internationalism found a new
weapon against sexual bondage in the American commerce power.
The Supreme Court upheld the White Slave Traffic Act in 1913, construing interstate commerce to consist of traffic and intercourse and to include the transportation of both persons and property. Explicitly, the Court approved the analogy between “enslavement in prostitution” and “contagion of diseased cattle” as matters of congressional legislation, dismissing the difference between people and things: “Of course it will be said that women are not articles of merchandise, but this does not affect the analogy; the substance of the congressional power is the same.” That year, in a sensationalized trial in Chicago, a white slave was protected from an alleged black trafficker, Jack Johnson, the boxer. Two years later, the Court ruled that a woman could be punished for trafficking herself interstate—as a voluntary conspirator. The decision was written by Justice Oliver Wendell Holmes, in United States v. Holte, an obscure case involving a woman’s transit from Illinois to Wisconsin. Yet it illustrated the ambiguities of grouping persons with merchandise. The trial court held a woman could not be “both slave and slaver.” But the Supreme Court found to the contrary. As Justice Holmes wrote, “We abandon the illusion that the woman always is the victim.”43 In the law’s eyes, a white slave could be both the unfree object and willing agent of unlawful sexual commerce.

Emancipated not by the Thirteenth Amendment but by the Commerce Clause, the white slave became an anomalous being indeed. In fulfilling the Paris treaty, Congress made apparent the limits of the amendment and extended the province of the commerce power, striking at unfree interstate intercourse. The anti-trafficking act marked the burgeoning of an American humanitarianism that connected the protection of persons to the flow of commerce. It abolished a wrong of sex unrecognized as a vestige of slavery under the Thirteenth Amendment. By extending market values to human intercourse, it gave new moral stature to commodity conceptions of personhood.
Not until the end of the twentieth century did freedom from bodily subjection based on sex become a right guaranteed by the American nation-state. Appeals for that right were as old as calls for slave emancipation, and as new as international declarations of human rights. Emerging from the outcry of women against violence, the rights guarantee reached beyond wrongs of interstate transit to the sphere of home and marriage, and into the most private forms of intercourse. But again commerce held sway as Congress transposed an international affirmation of human dignity into American law: the Violence Against Women Act of 1994. The language of the United Nations hardly resonated in the congressional legislation, though both condemned the violation of fundamental rights to bodily security and autonomy.


The United Nations declaration against violence speaks of “human rights” and the “fundamental freedoms of women” and “historically unequal power relations between men and women” and the “dignity of all human beings.” It enjoins all nations to condemn and eliminate and punish gender-based violence, which it defines in terms of deprivation of liberty and physical, sexual, and psychological harm, “occurring in public or in private life.” It states that violence encompasses not only sexual trafficking, coercion, and brutality within
the “general community,” but also intimacies at home and within the precincts of marriage, in particular the wrong of marital rape. According to the United Nations, all violence against women violates human rights.46

In contrast, the American act speaks of “crossing a state line,” not of human rights. Like the United Nations declaration, it extends beyond the public sphere into private life. Originally, it was titled A Bill to Combat Violence and Crimes Against Women on the Streets and in Homes, and rhetorically it recognizes a fundamental right to freedom from crimes of violence motivated by gender, including domestic violence. But the rights guarantee reaches only to sex-based violence “affecting interstate commerce.”47

The prosaic language reflects how Congress asserted national authority in domestic life, trenching on state police power by drawing on the Commerce Clause in tandem with the Fourteenth Amendment’s equal protection and enforcement clauses. In addressing private wrongs of sex, the anti-violence act recalls the white slaving act. But the subjection outlawed stems from physical terror, rather than immoral transport, and the intent was to affirm rights, not simply punish wrongs, through an unprecedented reach of congressional power into the household. The legislation was conceived by lawyers at the Legal Defense Fund of the National Organization of Women, and introduced by then-Senator Joseph Biden. Support came from women’s rights and civil rights groups, and from a multitude of religious, labor, family advocacy, health, and community organizations. The commerce power, as an author of the act later said, was the “constitutional hook.”48

At congressional hearings, women spoke of their own experiences and aspirations. “Black eyes, bruises, a broken ear drum, and, yes, also being beaten while I was pregnant,” a witness told the Senate Judiciary Committee. She testified that “the problem hits too close to home and many men still feel that his home is his castle, where he is the ruler and all who
live under him should obey, or else.” Reading aloud from a document she titled *Rights of a Battered Woman*, she said, “I have the right not to be abused. . . . I have the right to freedom from fear of abuse. I have the right to request and expect assistance from police. . . . I have the right to privacy. . . . I have the right to develop my individual talents and abilities. I have the right to legally prosecute the abusing person. I have the right to be.” Such statements reiterated claims made for more than a century. “Can there be anything sacred at that family altar,” as Elizabeth Cady Stanton had objected, “where the chief-priest who ministers makes sacrifices of human beings.” Testimony on behalf of the legislation often began with statistics: a rape every six minutes; a woman beaten by a husband or partner every 15 seconds.49

Newly, the Violence Against Women Act made “interstate domestic violence” a federal crime, defined as causing bodily injury to a spouse or intimate partner and involving some kind of travel across state lines.50 Simultaneously, Congress created a new private right of action—a civil rights remedy—for victims of violence fueled by gender animus. That newfound private right entitled a woman to sue her assailant, rather than relying on the process of criminal justice, and to pursue her claims in the federal courts. The legislation annulled age-old exceptions for sexual violence within marriage, allowing no immunity to a husband who ravished his wife, overturning a proprietary claim.51

Under the Violence Against Women Act, therefore, the sweeping commerce power became an instrument of liberation, which reached into the home. It pierced into a private sphere of social exchange left untouched by the Thirteenth Amendment. “The Commerce Clause is a broad grant of power allowing Congress to reach conduct that has even the slightest effect on interstate commerce,” stated the Senate Judiciary Committee.52 But that expansive national power had never before been invoked to intrude on household bonds by
connecting wellbeing with interstate commerce.

Congress designed the act expressly to safeguard freedom from sexual brutality as a fundamental right of personhood, and the guarantee drew no distinction between violence done by a stranger and a one-time lover. According to the rights clause, “All persons within the United States shall have the right to be free from crimes of violence motivated by gender.” For the first time, every woman would be entitled to enforce that right, rather than depending on police and prosecutors. An unwilling wife would acquire a right to sue her husband for rape, even in states that still adhered to the rule that rape was ravishing a woman without the consent assumed in marriage—a majority when the act was passed. Her status would be nothing like that of a white slave punishable for trafficking herself. Domestic wrongs, as Congresswoman Patricia Schroeder said, were “human rights abuses.”

The Violence Against Women Act collapsed the distinction between the market and the household while eroding classical dualisms of the law: the division between public and private, and between national and local. The act gave a wealth of new meaning to the old dictum of Justice Marshall in *Gibbons v. Ogden*—the case concerning steamboats plying the waters between New York and New Jersey—that the commerce power of Congress embraced more than “buying and selling . . . the interchange of commodities.” In the words of Justice Marshall, “Commerce, undoubtedly, is traffic, but it is something more: it is intercourse.”

Such was the constitutional logic of the anti-violence act—that traffic meant intercourse—in vindicating the rights of women. Congress based the act on the theory that all violence due to sex, even rape committed in marriage, inside a bedroom’s privacy, affects interstate commerce. The legislation extended the market’s reach, grounding the right to freedom from violence in the power of Congress to assure the free flow of commerce. The
declared intent was “to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce.”

At congressional hearings the market logic was summed up in a single phrase: “Sexual violence takes a toll on interstate commerce.” The act’s criminal sanctions hinged on the circumstance of interstate travel. But the rights clause did not carry that condition, resting instead on the premise that even violence committed at home burdens the interstate exchange of commodities; so long as the offense constituted a felony and was motivated by animus “because of gender,” it was immaterial where the injury occurred and whether it involved the passage of persons or objects across state borders. “Gender-based violent crimes meet the modest threshold required by the Commerce Clause,” the Senate Judiciary Committee found, “effect on interstate commerce.”

Only for a moment was there testimony proposing the Thirteenth Amendment as a constitutional basis for the prohibition. The theory was that the amendment embodied a “moral imperative” and that sexual violence was “analogous” to the incidents of chattel bondage as a “crude form of physical subordination.” But the antislavery approach had no purchase in Congress. It was too subversive in impinging on private relations of domination and dependence, too disruptive of settled doctrine in “generalizing slavery” to the situation of women, recalled its proponent, the constitutional law professor Burt Neuborne, who was then Special Counsel to the NOW Legal Defense and Education Fund. With provisions of the Fourteenth Amendment serving as “simply backstops,” the rights clause took shape as a protection of interstate commerce rather than as a ban on slavery’s badges.

Not the least of the reasons why the commerce power appeared so compelling as a basis for barring violence against women was that it had authorized prior protections of rights. It underlay the constitutional transformation of the New Deal era, when Congress
legislated against capitalist crisis by guarantying labor rights and regulating the market in labor as necessary to promoting interstate commerce. “Affecting commerce,” the Supreme Court affirmed in upholding the legislation, “means in commerce, or burdening or obstructing commerce or the free flow of commerce.” The commerce power also grounded the Civil Rights Act of 1964, enabling Congress to reach beyond state action and to resurrect protections that the Supreme Court had struck down in the Civil Rights Cases of 1883 as unconstitutional under the Thirteenth and Fourteenth Amendments. And the market logic of the 1964 act—that discrimination adversely affected interstate commerce—withstood scrutiny by the Court, which in turn cited the ban on white slave trafficking as a precedent for moral governance by Congress under the Commerce Clause.58

The Violence Against Women Act remade this body of doctrine, swelling the commerce power, creating rights involving neither the production and exchange of goods nor the circulation of persons across state borders, bringing the force of economic values into home life and across the threshold of marriage, to intercourse distant from the marketplace. The Senate Judiciary Committee offered a remarkably expansive justification for the rights clause: “The Commerce Clause gives Congress authority to act even if the proposed law, on its face, has nothing do with ‘commerce.’” Surely, on its face, the wrong of rape appeared remote from steamboats and railroads, or bales of cotton and diseased livestock—objects of the commerce power long recognized by the Supreme Court. But as the judiciary committee explained, “Even the fear of gender-based violence affects the economy.”59

In other words, the power of Congress to outlaw unfreedom due to sex presupposed a boundless market. The ban on violence against women at once amplified the cash nexus and augmented the authority of the national government to remedy private wrongs—private
in a double sense, of involving no state action and of occurring in private places. The rights clause presumed that the stream of interstate commerce connected violence against women “purely local in nature” with the national economy, and that market values mediated between private life and the public sphere. This was its “rational basis,” as formulated in congressional hearings. The notion was not that a rape, in itself, affects economic intercourse, but that unfree sex, in the aggregate, obstructs the free flow of commerce, inhibiting women from acting in the marketplace, interfering with buying and selling, diminishing the exchange of goods. The problem was the cumulative effect of women’s subjection on “our economic lives.”

No debate arose on the ethics of attaching the rights of persons to the traffic in commodities. Disagreement concerned the power of the national government and the presence of domestic disputes in the federal courts. Suppose that “every rape” were litigated as a rights claim? But there were no arguments against the moral legitimacy of associating sentient women with articles of merchandise.

On the contrary, the anti-violence act affirmed the connection between human intercourse and interstate commerce. Again and again, it was said in Congress that the suffering of women burdened the economy. That rape and domestic violence imposed “enormous economic costs.” And that the freedom of economic man should not be forfeited by women “because of their sex.” The rights guarantee would protect both the exchange of goods and the autonomy of women, reducing the “high price for being female.”

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Today, the rights clause is no longer part of the Violence Against Women Act. The Supreme Court struck it down as unconstitutional in a rape case, United States v. Morrison, in 2000.
The Court reined in the commerce power and also denied that the Fourteenth Amendment applied to private wrongs, revoking the right of women to seek justice, at their own will. With *Morrison*, the anti-violence act became a negative landmark in the path of the law connecting human rights to market exchange.

The Court spoke categorically: violent crime against women was not “economic in nature”—“not, in any sense of the phrase, economic activity”—and fell outside the authority afforded by the commerce power. The causal connection between violence due to sex and the flow of commerce was too indirect.

What troubled the Court was the specter of a congressional leviathan fed by a commodity fiction. Writing for the majority, Justice Rehnquist envisioned the expansion of congressional power into spheres far beyond its constitutional bounds—from murder to marriage—by virtue of “every attenuated effect upon interstate commerce.” The commerce power would invade private life, obliterating the boundary between “what is truly national and what is truly local.” Conversely, the dissent measured the cost of domestic violence, money lost to the economy from the suffering of women, then about $5 billion a year, and viewed the national and local as joined. Writing for the dissent, Justice Souter disputed the restraint on the commerce power—the “economic/noneconomic distinction”—and the separation of market and household. “Deaths of 2,000 to 4,000 women annually at the hands of domestic abusers,” he observed, adversely affected “supply and demand for goods in interstate commerce.” His point was that sexual violence was always “economic.”

Turning the specter of a limitless market into an affirmation of the plenary power of Congress to safeguard the right of all persons to freedom from violence, the dissent linked the guarantee of women’s human dignity to expansive market values. Justice Souter wrote of “an integrated economic world” as the basis of a sweeping commerce power. A mistake of
“categorical formalism” accounted for the “limits to ‘commerce.’”^66

But in striking down the rights guarantee of the Violence Against Women Act, the majority adhered to a categorical distinction between the spheres of commerce and domestic life. It was the nightmare of a limitless commerce power encroaching on state control of marriage—and rooted in a boundless conception of the economic—that the Court evoked in *Morrison*. The rights clause lacked even a “jurisdictional element,” a requirement of circumstantial proof demonstrating a connection to “things or persons” involved in interstate commerce. Wholesale, the Court rejected the notion “that Congress may regulate noneconomic, violent criminal conduct,” discounting the aggregate effect of domestic violence on interstate commerce.^67 In sum, unfree intercourse had no bearing on the free flow of commodities.

Arguments on behalf of human rights were just as unconvincing to the Court. Uselessly, amicus briefs spoke of “binding commitments under international law” and “violations of international human rights.” Admonitions that it was improper to “read the Commerce Clause to invalidate an Act of Congress that advances our treaty and customary international commitments” came to nothing.^68 Dissociating the exchange of goods and the rights of persons by defining subjection due to sex as “noneconomic,” *Morrison* not only limited congressional authority to remedy private wrongs but refused the fulfillment of global human rights agreements. The dissent lamented the “ebb of the commerce power.”^69

The constitutional question, then, appeared settled. Enabling a woman to enforce her right to freedom from sex-based violence fell beyond the sphere of national sovereignty that is grounded in commodity exchange. As once Congress had insisted on the difference between a wife and a freed slave, so the Court now insisted on the boundary between domestic bonds and the flow of commerce.
Again consider the Hate Crimes Prevention Act, based on the two pillars of the Thirteenth Amendment and the Commerce Clause. As Congress debated the legislation, the ruling came down from the Court in *Morrison*, making it appear that a ban on hate violence extending to sex and home life would be a dead letter.70

With the delimiting of the commerce power, the theory was no longer that Congress was entitled to regulate private life simply because the wrongs at stake affected the flow of interstate commerce, however remote the intercourse from the market itself. New objections emerged after *Morrison*: that committing hate crimes “is in no sense economic or commercial but instead is noneconomic and criminal in nature” and that a congressional prohibition would be “struck down by the Supreme Court as violative of the Constitution.” There were more warnings about a flood of rape cases entering the federal courts, although the hate crimes measure contained no self-enforcing rights guarantee, only criminal sanctions.71

Therefore the act was rewritten, and the commerce nexus spelled out more distinctly in the section on hate crimes based on sex. Congress shored up its authority by requiring direct circumstantial proof that the forbidden activity was both economic in nature and crossed state lines, rather than relying on the concept of aggregate effect. It added a jurisdictional element absent from the defunct rights clause of the Violence Against Women Act.

The dualism of the hate crimes act thus grew more explicit—the juxtaposition of the commerce-saturated section on sex with the antislavery-infused section on race. “In light of *United States v. Morrison*,” a Justice Department memorandum stated, the prohibition of sex-based hate crime “would not be based ‘solely on that conduct’s aggregate effect on
interstate commerce,’ but would instead be based on a specific and discrete connection between each instance of prohibited conduct and interstate or foreign commerce.” Along with a motive of animus, not desire, the economic nature of the violence would have to be manifest. Explaining how the legislation had been altered to assure its constitutionality, its authors spoke of “sadistic murders” that possessed a “commerce nexus.”

As enacted in 2009, the Hate Crimes Act enumerates multiple ways that violence animated by sex might involve or affect commerce across the borders of states and nations. Shaped by the Court’s rebuke in _Morrison_, it deals in detail with both things and persons: channels, facilities, and instrumentalities of commerce; purchase of goods and services; interference with commercial or other economic activity; conduct affecting interstate or foreign commerce; use of a weapon or incendiary device that has traveled in interstate or foreign commerce; and travel of persons among states and nations.

It is an inventory of the market’s expanse that does not accompany the description of hate crimes based on race. For there, owing to the act’s cleft structure, the badges of slavery do the work of commodity relations, and the Thirteenth Amendment stands in place of the Commerce Clause. But hate crimes based on sex must connect directly to the flow of interstate commerce to constitute intercourse subject to the power of the nation-state. An article of merchandise—use of a weapon that had crossed state borders—would transform even a rape at home into violence sufficiently economic in nature for Congress to forbid it. In the market’s reach into private life lay the necessary justification for both the authority of the national government and the protection of persons.

The Hate Crimes Act has been upheld under both the Thirteenth Amendment and the Commerce Clause, as courts have approved the congressional interpretation of the badges of slavery and weighed the circumstantial evidence of an interstate commerce nexus.
It was a reasonable conclusion “that physically attacking a person of a particular race . . . is a badge or incident of slavery,” held the United States Court of Appeals for the Tenth Circuit, while stressing that the ban on “non-racial” hate violence emanated from the commerce power, for otherwise “nearly every hurtful thing . . . might be analogized to slavery.” And it was the channel of a highway and instrumentality of a car—as proof of a commerce nexus—that led a United States District Court in Kentucky to uphold the act in a case involving hate violence directed at a gay man. Although denying that the flow of commerce should be treated as “talismanic,” the ruling spoke of the “interstate transportation routes through which persons and goods move” and the “quintessential instrumentalities of modern interstate commerce” in finding private “non-economic activity” punishable by the national government. As the court observed, “the Interstate Commerce Clause continues to cast a very large shadow, indeed.”74

No hate crimes case has reached the Supreme Court, however; nor has a ruling on hate violence at home come from any court.75 As a constitutional question, the breadth of the commerce power has scarcely been settled.

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What remains as well is a historical question—why the law of commodities has served as a charter of human rights. Why Congress has forbidden violations of personhood in the name of market values. Why wrongs redolent of slavery—trafficking in and raping women—count as burdens on commerce.

Those are the puzzles that I have sought to elucidate in exploring the counterpoint between the Thirteenth Amendment and the Commerce Clause. My argument is that the
flow of commerce has become a source of human rights where the antislavery amendment has never reached—to the wrongs of sex and inside the home and across the threshold of marriage. The situation of women is still anomalous.

A legacy of slave emancipation, then, is a human rights order that rests on the spread of commerce into all spheres of social life. The economy has become sovereign, and principles of buying and selling prevail, where the liberating law of antislavery ends. Since the era of the Civil War, the freedom of persons has depended increasingly on the expansive commerce power of Congress.

The paradox revealed by my argument is that a boundless market is morally unimaginable, but the limits of antislavery constitutionalism have produced an American human rights tradition that values an unbounded market as a wellspring of individual rights. And the paradox is most acute where the wrongs of women are at stake. Sex has been potent in rendering human rights a commodity fiction.

Notes

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2 The Thirteenth Amendment states: “Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.”
Commerce Clause, Article I, Section 8, states: “The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”


10 Hate Crimes Act, § 4707 (a).


13 Hate Crimes Act, § 4702 (7) (8), § 4707 (a).

14 Ibid., § 4702 (6), § 4707 (a).

15 Ibid., § 4702 (7).

16 Ibid., § 4702 (6), § 4707 (a) (2).


23 Civil Rights Act of 1866, 14 Stat. 27 (1866); Peonage Abolition Act, 14 Stat. 546 (1867); Enforcement Act of 1870, 16 Stat. 140 (1870); Ku Klux Klan Act of 1871, 17 Stat. 13 (1871); Civil Rights Act of 1875, 18 Stat. 335 (1875).

24 Slaughterhouse Cases, 83 U.S. 36 (1873) at 67, 69, 72, 71; Civil Rights Cases, 109 U.S. 3 (1883) at 24–25.


27 Ibid., 376.


29 On the legal presumption of slaves’ lack of will, see State v. Mann, 13 N.C. 263 (1830) at 266.

30 Civil Rights Cases, 19, 61.


33 International Council of Women, Report of Transactions during the Third Quinquennial Term Terminating with the Third Quinquennial Meeting Held in Berlin, June, 1904, with an Introduction by May Wright Sewall, Retiring President (Boston, 1909), 1:173–75.


35 Congress did not act to ban child labor under the Thirteenth Amendment either; see Dina Mishra, “Child Labor as Involuntary Servitude: The Failure of Congress to Legislate Against Child Labor Pursuant to the Thirteenth Amendment in the Early Twentieth Century,” Rutgers Law Review 63, no. 1 (Fall 2010): 59–128.

37 Ibid., 9, 11.


45 VAWA, Subtitle A, § 40101; VAWA, Subtitle B, §40201; United Nations Human Rights
Committee, 53rd Sess., Summary Record of the 1401st Meeting, April 17, 1995, CCPR/C/SR. 1401 at ¶¶ 4, 29; International Covenant of Civil and Political Rights, 999 U.N.T.S. 171(1966) at preamble and articles, 6, 7, 8, 9. The United Nations Declaration against violence is not a binding treaty. Notably, the American delegation also testified that the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was then being considered by the Senate. CEDAW did not expressly address the problem of violence. A binding convention, CEDAW still remains unratiﬁed by the United States. Reverence for state domestic jurisdiction, along with contradictions between international law and national sovereignty, underlies American assertion of reservations on global human rights conventions; see Judith Resnik, “Categorical Federalism: Jurisdiction, Gender, and the Globe,” Yale Law Journal 111 (December, 2001): 619–80.


47 VAWA, § 2261 (a) (1) (2); VAWA, § 40302, codiﬁed at 42 U.S.C. § 13981.


privacy, see Suk, *At Home in the Law.*

50 VAWA, Subtitle B, chap. 2, § 2261 (a)(1)(2); Senate Report 103-138 at 43, 61.


52 Senate Report 102-197 at 52, 53; Senate Report 103-138 at 54, 55.


55 VAWA, Subtitle C, § 40302 (a), (d) (1) (2).

56 Senate Judiciary Hearing 102-369 at 104; VAWA, Subtitle C, § 40302 (a), (d) (1) (2); Senate Report 103-138 at 54.


59 Senate Report 102-197, 52; Senate Report 103-138, 54.

60 Senate Report 102-197, 53–54; Senate Report 103-138, 54; Senate Judiciary Hearing 102-369 at 103, 115, 119, 125, 86, 96–97.


62 Senate Hearing 101-939, pt. 1 at 68, 62.


65 Morrison, 529 U.S. at 615–16, 617–18, 632, 644, 636, 644. Also see the dissent of Justice Breyer, Morrison, 529 U.S. at 656.

66 Ibid. at 644, 639.

67 Ibid. at 613, 618, 609, 617.


69 Morrison, 529 U.S. at 613, 654.


73 Amendment SA 3473, Senate, 106th Cong., 2nd Sess. (June 19, 2000); Hate Crimes Act, § 4702 (6), § 4707 (a) (2).
