Everything You Always Wanted to Know About *Brzonkala* but Were Afraid to Read 100+ Pages About

(Excerpts from the 113 pages of majority, concurring, & dissenting opinions in *Brzonkala v. Virginia Polytechnic Institute*)

by Curt A. Levey

Judge Luttig, writing for the majority:

We the People, distrustful of power, and believing that government limited and dispersed protects freedom best, provided that our federal government would be one of enumerated powers, and that all power unenumerated would be reserved to the several States and to ourselves. Thus, though the authority conferred upon the federal government be broad, it is an authority constrained by no less a power than that of the People themselves. "[T]hat these limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 2 L.Ed. 60 (1803). These simple truths of power bestowed and power withheld under the Constitution have never been more relevant than in this day, when accretion, if not actual accession, of power to the federal government seems not only unavoidable, but even expedient.

These foundational principles of our constitutional government dictate resolution of the matter before us. For we address here a congressional statute, Subtitle C of the Violence Against Women Act, 42 U.S.C. § 13981, that federally punishes noncommercial intrastate violence, but is defended under Congress' power "[t]o regulate commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, and that punishes private conduct, but is defended under Congress' power "to enforce, by appropriate legislation" the Fourteenth Amendment guarantee that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Such a statute, we are constrained to conclude, simply cannot be reconciled with the principles of limited federal government upon which this Nation is founded. As even the United States and appellant Brzonkala appear resignedly to recognize, the Supreme Court's recent decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), which forcefully reaffirmed these most basic of constitutional principles, all but preordained as much. . . . [I]n the end, appellants are forced by these two plainly controlling decisions to defend the statute on little more than wistful assertions that *United States v. Lopez* is an aberration of no significance and that the established precedents upon which *City of Boerne v. Flores* rested – *United States v. Harris*, 106 U.S. 629 (1883), and the *Civil Rights Cases*, 109 U.S. 3 (1883) – should be disregarded as insufficiently "modern" to define any longer the reach of Congress' power under the Fourteenth Amendment.

. . .

[W]e hold today that section 13981 exceeds Congress' power under both the Commerce Clause of Article I, Section 8, and the Enforcement Clause of Section 5 of the Fourteenth Amendment.

To otherwise hold would require not only that we, as the dissent would do, disclaim all responsibility to "determine whether the Congress has exceeded limits allowable in reason for the judgment which it has exercised," *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643 (1944), . . . but that we extend the reach of Section 5 of the Fourteenth Amendment beyond a point ever contemplated by the Supreme Court since that Amendment's ratification over a century and a quarter ago. These things we simply cannot do.

. . .

The government, joined by Brzonkala, defended section 13981 as an appropriate exercise of Congress' power

to regulate interstate commerce on the ground that violence against women is a widespread social problem with ultimate effects on the national economy. They defended section 13981 as an exercise of Section 5 of the Fourteenth Amendment on the grounds that bias and discrimination against women in the state criminal justice systems often deny legal redress to the victims of gender-motivated crimes of violence and that such denials may violate the Equal Protection Clause.

. . .

In *United States v. Lopez*, the Supreme Court held that Congress had exceeded its power to regulate interstate commerce in enacting the Gun-Free School Zones Act of 1990 ("GFSZA"). In so holding, the Court reaffirmed that, although the Commerce Clause represents a broad grant of federal authority, that authority is not plenary, but subject to outer limits. . . . Under the principles articulated by the Court in *Lopez*, it is evident that 42 U.S.C. § 13981, like the Gun-Free School Zones Act, does not regulate an activity sufficiently related to interstate commerce to fall even within the broad power of Congress under the Commerce Clause.

In demarcating the limits of congressional power to regulate activities that do not themselves constitute interstate commerce, the Court in *Lopez* made clear that such power does not extend to the regulation of activities that merely have some relationship with or effect upon interstate commerce, but, rather, extends only, as is relevant here, to those activities "having a *substantial* relation to interstate commerce, . . . i.e., those activities that *substantially* affect interstate commerce." *Lopez*, 514 U.S. at 558-59 (emphases added).

Furthermore, the Court made explicit that whether an activity "substantially affects" interstate commerce such that it may be regulated under the Commerce Clause "is ultimately a judicial rather than a legislative question."

. . .

In clarifying the content of this legal test, the Court specifically identified two types of laws that it had upheld as regulations of activities that substantially affect interstate commerce: (1) "regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce," and (2) regulations that include a jurisdictional element to ensure, "through case-by-case inquiry," that each specific application of the regulation involves activity that in fact affects interstate commerce.

The Court also emphasized that, any dictum in its previous cases notwithstanding, it had never extended the substantially affects test to uphold the regulation of a noneconomic activity in the absence of a jurisdictional element. . . . Most importantly, the Court expressly held that because the Gun-Free School Zones Act "neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce, it exceed[ed] the authority of Congress '[t]o regulate Commerce . . . among the several States.' "

. . .

In contrast to the statutes that the Supreme Court has previously upheld as permissible regulations under the substantially affects test, section 13981 neither regulates an economic activity nor contains a jurisdictional element. Accordingly, it cannot be sustained on the authority of *Lopez*, nor any of the Court's previous Commerce Clause holdings, as a constitutional exercise of Congress' power to regulate interstate commerce.

. . .

While some violent crimes, such as robbery, may be economically motivated and thus at least arguably "economic" in a loose sense, section 13981 is not directed toward such crimes. . . . The statute thus explicitly excludes from its purview those violent crimes most likely to have an economic aspect – crimes arising solely from economic motives – and instead addresses violent crime arising from the irrational motive of gender animus, a type of crime relatively unlikely to have any economic character at all.

. . .

Similarly, and as appellants concede, section 13981 does not have an "express jurisdictional element which might limit its reach to a discrete set of [gender-motivated violent crimes] that additionally have an explicit

connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 56. Although the criminal statutes enacted by Congress as part of the Violence Against Women Act predicate liability on the crossing of state lines or the entering or leaving of Indian country, section 13981 includes no similar jurisdictional requirement.

. . .

Lopez affirms that we must evaluate carefully the implications of our holdings upon our federal system of government and that we may not find an activity sufficiently related to interstate commerce to satisfy the substantially affects test in reliance upon arguments which, if accepted, would eliminate all limits on federal power and leave us "hard pressed to posit any activity by an individual that Congress is without power to regulate." *Lopez*, 514 U.S. at 564. This is so especially when the regulated activity falls within an area of the law "where States historically have been sovereign." *Lopez*, 514 U.S. at 564.

. . .

Lopez, therefore, is emphatic that the scope of the interstate commerce power

> "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

Lopez, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

. . .

As in *Lopez*, appellants rely in essence on the costs of violent crime (including the deterrence of interstate travel and other similar interstate activities) and on decreased national productivity (including reduced employment, production, and demand), both of which ultimately affect the national economy, and presumably interstate commerce as well. But as the arguments are the same, so also does the Supreme Court's categorical rejection in *Lopez* of such attenuated links to interstate commerce gain control.

. . .

[T]o the extent that section 13981's remedy is limited to violent acts constituting felonies as defined by state law, the statute provides a remedy for such conduct, "whether or not those acts have actually resulted in criminal charges, prosecution, or conviction." 42 U.S.C. § 13981.

Thus, not only does section 13981 provide a federal remedy for violent crime in addition to those remedies already provided by the laws of the States – thereby increasing the total penalty for such crime – it also provides such a remedy for violence that the States would leave unpunished, whether for reasons of state criminal-law policy, prosecutorial discretion, or state tort-law policy.

. . .

Section 13981 also sharply curtails the States' responsibility for regulating the relationships between family members by abrogating interspousal and intrafamily tort immunity, the marital rape exemption, and other defenses that may exist under state law by virtue of the relationship that exists between the violent actor and victim. Although Congress may well be correct in its judgment that such defenses represent regrettable public policy, the fact remains that these policy choices have traditionally been made not by Congress, but by the States.

. . .

While we do not question the significance of the problems posed by violence arising from gender animus, *Lopez* confirms that such significance, standing alone, simply does not provide a meaningful limitation on federal power, and that a problem does not become a constitutionally permissible object of congressional regulation under the Commerce Clause merely because it is serious. . . . Such a sweeping interpretation of the

Congress' power would arrogate to the federal government control of every area of activity that matters, reserving to the States authority over only the trivial and the insignificant.

. . .

In short, to hold that an attenuated and indirect relationship with interstate commerce of the sort asserted here is sufficient to bring within Congress' power to regulate such commerce the punishment of gender-motivated violent crime, an activity that has nothing to do with commerce and that has traditionally been regulated by the States, we would have to do what the Supreme Court has never done, and what the *Lopez* Court admonished us not to do: "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States" and "conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68. Like the Supreme Court, "[t]his we are unwilling to do."

To the extent that appellants even acknowledge the precedential force of *Lopez*, they attempt to distinguish that decision primarily in two ways. First, they argue that here, unlike in *Lopez*, the relationship between the regulated activity and interstate commerce upon which they rely is not just identified by them alone, but is also documented by congressional findings to which we are obliged to defer. Second, they contend that section 13981 regulates conduct implicating civil rights, that civil rights is an area of manifest federal concern, and that therefore the regulation of the conduct here, despite its noneconomic character and its lack of a close connection to interstate commerce, does not offend the first principles of federalism.

. . .

[B]ecause the question of whether particular activities "affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question," *Lopez*, 514 U.S. at 557 n. 2, we cannot sustain a statute solely on the strength of a congressional finding as to the factual relationship between a particular activity and interstate commerce. Instead, we must undertake an "independent evaluation" to determine whether, as a legal matter, the substantially affects test is satisfied. *Lopez*, 514 U.S. at 562.

. . .

The Court did not reject as insufficient the relationship between guns in school zones and interstate commerce asserted by the government and the dissents because it deemed that relationship opaque or dubious, but rather that it did so for the reason that it explicitly stated: accepting such indirect and attenuated relationships as sufficient to justify congressional regulation would render unto Congress a power so sweeping as to leave the Court "hard pressed to posit any activity by any individual that Congress is without power to regulate." *Lopez*, 514 U.S. at 564.

. . .

Had the Court in *Lopez* intended so to elevate the existence or non-existence of findings or a formal legislative record, its holding that the Gun-Free School Zones Act exceeded Congress' power under the Commerce Clause would have constituted not a substantive limitation on congressional power, but rather a mere procedural hurdle – in essence, a remand to Congress to make formal findings or compile a formal record.

. . .

Appellants also argue that section 13981 is a "civil rights" statute, and as such cannot offend the first principles of federalism because civil rights represents an area of "quintessential federal responsibility."

It is unquestionably true that Congress has traditionally assumed an essential role in enacting legislation to protect civil rights and to root out discrimination and its vestiges. However, the Congress has never asserted a general authority, untethered to any specific constitutional power, to enact such legislation. And the Supreme Court has never upheld such legislation solely for the reason that it is civil rights in character.

. . .

Despite their half-hearted attempts to distinguish *Lopez*, it is apparent that, ultimately, Brzonkala and the government (not to mention the dissent) would have us ignore that decision altogether. Not only do appellants clearly, though mistakenly, regard *Lopez* as at most a decision of little importance, they also make no serious attempt to come to grips with the core reasoning of that opinion. . . . Unlike Brzonkala and the government, however, we are unwilling to consign the Supreme Court's most significant recent pronouncement on the Commerce Clause to the status of inconvenient but ultimately insignificant aberration.

. . .

Although *Lopez* undoubtedly preserves a healthy degree of judicial deference to reasonable legislative judgments of fact, it is plain that appellants do not by their incessant invocations of "rational basis review" contemplate merely such deference. Rather, it is evident that they use this fashionable label of judicial restraint to disguise their advocacy of a deference so absolute as to preclude any independent judicial evaluation of constitutionality whatsoever – a deference indistinguishable from judicial abdication. And the dissent does likewise; indeed, laying bare appellants' and the dissent's standard of review to an extent that will surely prove disquieting to appellants, the dissent, after announcing the "rational basis" standard of review, offers not a single sentence – not one – of independent analysis of whether gender-motivated violence substantially affects interstate commerce.

. . .

Whether one agrees or disagrees with our conclusion, it is the majority, not the dissent, that has undertaken the "rational basis" review contemplated by the Court in *Lopez*. . . . In this undertaking emphatically required by the Supreme Court in *Lopez*, appellants would have us only half-heartedly engage and the dissent would have us engage not at all.

. . .

The only other argument, which appellants advisedly forgo, is that of our colleagues in dissent, who would, in blissful denial of the Court's most recent precedents on Our Federalism, proceed to import into Commerce Clause analysis a doctrine whose legitimacy even in the context in which it was fashioned was in doubt from inception, *see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), and hold that Congress alone is constitutionally responsible for the protection of the sovereign States.

. . .

As *Lopez* forcefully reminds us, our federal system of government exists not as a mere matter of legislative grace, as the dissent (and ultimately appellants) would have, but rather as a matter of constitutional design.

Although in the wake of *City of Boerne* appellants have returned to defend section 13981 primarily as a constitutional exercise of Congress' power under the Commerce Clause, they still contend alternatively, though now less enthusiastically, that section 13981 is a constitutionally legitimate exercise of Congress' power under Section 5, one of the explicit bases upon which section 13981 was enacted.

The Fourteenth Amendment, of course, provides in pertinent part as follows:

> Section 1. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Appellants maintain that Congress properly invoked Section 5 in enacting section 13981 because Congress concluded that bias and discrimination against women in the state criminal justice systems "often deprive[ ] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled" and that section 13981 was "necessary to guarantee equal protection of the laws." H.R. Conf. Rep.

No. 103-711, at 385.

Section 13981 creates a cause of action against private parties who commit acts of gender-motivated violence, and that action may be pursued without regard to whether the State connived in those acts or otherwise violated the particular plaintiff's constitutional rights. To sustain section 13981 under Section 5 of the Fourteenth Amendment, therefore, we would have to hold that Section 5 permits Congress to regulate purely private conduct, without any individualized showing of unconstitutional state action. Because, under the Amendment's text, its history, and a consistent line of Supreme Court precedent dating from just after the Amendment's ratification to the present, it is established that Congress may not regulate purely private conduct pursuant to its Fourteenth Amendment enforcement power, we cannot so hold.

. . .

[T]he complaint in the instant case, which clearly states a claim under the statute – at least as to appellee Morrison – does not even intone, much less allege, that appellees Morrison or Crawford are state actors, that they acted under color of state law, or that they otherwise conspired with state officials to deprive appellant Brzonkala of her rights guaranteed by the Equal Protection Clause.

. . .

[L]iability under section 13981 attaches without regard to whether the State adequately enforced its applicable criminal or civil laws. The statute even applies where, as here, no prior criminal or state civil complaint was even filed.

. . .

This is precisely the type of statute that the Supreme Court warned over a century ago would, if held valid under Section 5 of the Fourteenth Amendment, authorize a congressional "municipal code" through which the federal government could act directly upon all the rights of life, liberty, and property of all citizens and thereby eliminate altogether any role for the several States.

. . .

[A]lthough appellants concede, as they must, that wholly private acts of gender-motivated violence can never violate the Equal Protection Clause, they nonetheless contend that, under the *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), line of cases, Congress may regulate such private violence as a means of remedying the bias and discrimination against women in the States' criminal justice systems, which "often deprive[ ] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled," H.R. Conf. Rep. No. 103-711, at 385.

Appellants are doubtless correct that Congress may, pursuant to Section 5, prophylactically regulate or proscribe certain state conduct that does not violate Section 1 of the Fourteenth Amendment. In the prophylactic cases, however, the Court has only upheld federal statutes that prohibited state action; it has never upheld statutes, like section 13981, that prohibited private action. None of the prophylactic cases (nor any other Supreme Court case) holds or suggests that Congress may employ such a rationale to reach purely private conduct.

. . .

Rather than grapple with this basic textual, historical, and precedential distinction between laws regulating state action and laws regulating private conduct, the government instead resorts to speculation and hypothesizing as to why Congress' power to regulate state action that does not necessarily violate the Fourteenth Amendment entails a congressional power to regulate private conduct that can never violate the Fourteenth Amendment.

. . .

The government maintains . . . that in enacting section 13981, Congress might have chosen to regulate private action, rather than the States directly, so as not to offend the sovereignty of the States. This argument,

however, confuses the Fourteenth Amendment with the Commerce Clause and other similar grants of federal power. The Supreme Court has often held that it violates principles of state sovereignty for the federal government to impose certain obligations directly upon the States when acting pursuant to the federal power to regulate interstate commerce and various other federal powers. However, the Court has made clear that, by its very nature, the Fourteenth Amendment is a limitation on the governments of the States.

. . .

In sum, the prophylactic cases such as *City of Boerne*, *Morgan*, and *Katzenbach* all address the question of how broadly Congress may legislate when it imposes statutory requirements upon the States pursuant to Section 5. These cases do not address the very distinct question of whether Congress may, under Section 5, regulate purely private conduct at all. The answer to this latter question has been settled for over a hundred years. . . . To conflate these two lines of cases, and thereby allow a complete disjunction between the constitutional evil to be remedied and the object of Congress' legislation, would be nothing less than to recognize in the Congress itself, contrary to the Constitution, an authority to redefine the scope of the substantive provisions of the Fourteenth Amendment. And as the Supreme Court observed in *City of Boerne*, Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]." *City of Boerne*, 117 S.Ct. at 2164.

. . .

By invalidating the Religious Freedom Restoration Act, the Supreme Court in *City of Boerne* reaffirmed the principle that, in order to secure a federal government of limited and enumerated powers, congressional legislation enacted pursuant to Section 5 must be carefully scrutinized by the courts to ensure that Congress is truly enforcing the provisions of the Fourteenth Amendment, rather than redefining the substance of those provisions under the guise of enforcement. . . . To this end, the Court declared that a court entertaining a Section 5 challenge can uphold the statute only if there exists a "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end," or, in other words, only if the statute is actually aimed at, and is a closely tailored means of, enforcing a provision of Section 1. The Supreme Court then applied this "congruence and proportionality" test to the Religious Freedom Restoration Act and concluded that the statute exceeded Congress' powers under Section 5.

. . .

Ultimately, *City of Boerne* forcefully affirms that Congress' power under Section 5 is not without limits,and that those limits are not simply theoretical or speculative, but are real and concrete, and are to be enforced by the courts, even at the expense of invalidating laudable and otherwise socially beneficial legislation.

. . .

[I]t is clear under *City of Boerne* that we cannot simply defer wholesale to Congress' purely legal conclusion that "bias and discrimination in the criminal justice system[s of the States] often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." Indeed, as a legal conclusion, this particular finding may be worthy of little, if any, deference. The finding is an essentially verbatim recitation of the congressional testimony of a single law professor [Cass Sunstein], and it was added to the legislative history only after that law professor testified that such a "finding" would be instrumental in defending the constitutionality of section 13981 under Section 5. This finding thus appears to be less a considered congressional judgment as to the constitutionality of section 13981 than legal boiler plate belatedly appended to the House Conference Report in an effort to insulate section 13981 from judicial review. Moreover, even if this finding did represent a considered congressional judgment as to the constitutionality of section 13981, the soundness of that judgment is drawn into question by the fact that Congress also "found" – contrary to Supreme Court precedent applying the Equal Protection Clause only to state action – that purely private acts of violence against women also "threaten women's equal protection of the laws."

. . .

Although appellants are doubtless correct that the legislative history of the Violence Against Women Act – a statute that includes but is not limited to section 13981 – comprises an impressive array of reports and hearings detailing the scope of the problem of violence against women, . . . the record recites few, if any, specific findings that the States are engaging in unconstitutional discrimination against women in the enforcement or application of their criminal and civil laws.

. . .

If anything, the hearings and reports on section 13981 bear out that the States and state law enforcement officials are not purposefully discriminating against women in the enforcement of laws against gender-motivated crimes of violence, but rather that they have undertaken the "most fervent," S.Rep. No. 102-197, at 39, and "sincere efforts . . . to assist . . . victims of rape and domestic violence," S. Rep. No. 101-545, at 33 . . . *cf. Hearing Before the Comm. on the Judiciary, United States Senate* (1993) (noting that every State in the union has adopted legislation authorizing protective orders for victims of domestic violence, and use of such orders has increased dramatically); *Hearing Before the Subcomm. on Crime and Criminal Justice of the Comm. on the Judiciary, House of Representatives* (1994) (results of Attorneys General survey that "[t]hroughout the country, Attorneys General have developed innovative projects to prevent domestic violence" and "have produced a number of excellent resources to prevent sexual violence in their States"); *Hearings Before the Comm. on the Judiciary, United States Senate* (1993) (noting "a spirit and commitment" in the States to address problem of violent crime against women).

. . .

The structure of section 13981 and other provisions of the VAWA further confirm the lack of congruence between the statute and its asserted aim of addressing purposefully unequal law enforcement by the States. . . . For example, if a State consistently refuses to prosecute rapists because of its gender animus against their female victims, the victim's ability to obtain some small measure of justice through federal damages suits against the rapist would hardly eliminate or correct the State's constitutional violations.

. . .

Other features of the statute likewise belie the suggestion that section 13981 is designed to remedy purposeful discrimination against women by the States. For example, section 13981 vests the state courts with concurrent jurisdiction over section 13981 claims. . . . If Congress were truly concerned that state courts, judges, and juries were hostile to women and purposefully discriminating against them in the enforcement and application of law, the more natural response would have been to create exclusive federal jurisdiction over section 13981 claims.

. . .

The conclusion that Congress did not design section 13981 as a remedy for purposeful discrimination against women by hostile state courts is also borne out by features of the VAWA whose constitutionality is not at issue here. For example, in addition to creating a private cause of action, other provisions of the VAWA appropriated approximately $1.6 billion in federal funds, subject to enhancement, to help the States eliminate the causes and effects of rape and domestic violence. Such a generous subsidy to the state governments casts serious doubt upon any suggestion that the Congress that enacted section 13981 was truly concerned with purposeful and unconstitutional deprivations of Equal Protection rights at the hands of hostile state governments.

In sum, the combined effect of the legislative history, the structure of section 13981, and the other provisions of VAWA is to disprove any contention that section 13981 was actually aimed at purposeful acts of unconstitutional sex discrimination. . . . To the contrary, these materials establish that Congress' true concerns in enacting VAWA were to deter or remedy individual and private acts of violence and to raise public consciousness about the seriousness of violent crimes against women by sending a national signal of opposition to this class of violent crime. Although these are unquestionably worthy public policy goals, they are not sufficient in and of themselves to render section 13981 a legitimate exercise of Congress' power under Section 5 of the Fourteenth Amendment.

Even if section 13981 were intended as a means to remedy unconstitutional discrimination by the States, it, much like the provisions of the Religious Freedom Restoration Act invalidated in *City of Boerne*, is so out of

proportion to any possible unconstitutional state action at which it might conceivably be aimed as to exceed congressional power to "enforce" the Fourteenth Amendment. Liability under section 13981 . . . attaches to any criminal act, whether or not the plaintiff filed a criminal complaint in the state criminal justice system, and without regard to whether the State failed adequately to investigate or prosecute the case because of bias or discrimination. Section 13981 applies equally in all jurisdictions, whether those jurisdictions evidence a pattern of chronic under-enforcement of laws prohibiting rape and domestic violence or whether those jurisdictions are the States or metropolitan areas Congress applauded for strengthening the enforcement of their rape and sexual assault laws.

. . .

If the congressional findings cited here suffice to render section 13981 a legitimate enforcement of the Fourteenth Amendment, then in effect the federal government could constitutionally regulate every aspect of society, even including those areas traditionally thought to be reserved exclusively to the several States, such as general criminal and domestic relations law. For example, if section 13981 were an appropriate means to remedy gender-motivated bias in the States, then the federal government could similarly adopt a general federal criminal code to replicate or preempt the existing criminal laws of the fifty States in order to root out any such bias. Presumably, the very same or similar legislative record of section 13981 could support an analogous finding that all state criminal laws are infused with gender bias. And many of the same state gender-bias task forces that were cited in section 13981's legislative history also appear to find gender bias in state domestic-relations law. Thus, if section 13981 were constitutional under Section 5, then presumably the federal government could adopt and enforce a federal divorce and domestic relations code. And federal preemption, or even occupation, of other substantive fields of law, such as tort and contract law, would soon follow.

. . .

At the end of the day, it is apparent that, for objectives unquestionably laudable, Congress . . . has sought to reach conduct quintessentially within the exclusive purview of the States through legislation that neither conditions the federal intervention upon proof of misconduct imputable to a State or upon a nexus to interstate commerce, nor is tailored so as to address activity closely connected with constitutional failures of the States or with interstate commerce. This the Congress may not do, even in pursuit of the most noble of causes, lest be ceded to the Legislature a plenary power over every aspect of human affairs – no matter how private, no matter how local, no matter how remote from commerce.

. . .

We are not unaware that in invalidating section 13981 today, we invalidate a provision of a statute denominated the "Violence Against Women Act." No less for judges than for politicians is the temptation to affirm any statute so decorously titled. We live in a time when the lines between law and politics have been purposefully blurred to serve the ends of the latter. And, when we, as courts, have not participated in this most perniciously machiavellian of enterprises ourselves, we have acquiesced in it by others, allowing opinions of law to be dismissed as but pronouncements of personal agreement or disagreement. The judicial decisionmaking contemplated by the Constitution, however, unlike at least the politics of the moment, emphatically is not a function of labels. If it were, the Supreme Court assuredly would not have struck down the "Gun-Free School Zones Act," the "Religious Freedom Restoration Act," the "Civil Rights Act of 1871,"or the "Civil Rights Act of 1875." And if it ever becomes such, we will have ceased to be a society of law, and all the codification of freedom in the world will be to little avail.

Chief Judge Wilkinson, concurring:

As this century draws to a close, it seems appropriate to examine the course of its jurisprudence and the place of this case within it. The decision before us is an especially difficult one because it pits the obligation to preserve the values of our federal system against the imperative of judicial restraint.

I agree that section 13981 of the Violence Against Women Act exceeds the authority of Congress under both the Commerce Clause and Section 5 of the Fourteenth Amendment. Our ruling reaffirms the fundamental principle that our national government is one of enumerated – and therefore limited – powers.

Nonetheless, it is a grave judicial act to nullify a product of the democratic process. The hard question is whether our decision constitutes an indefensible example of contemporary judicial activism or a legitimate exercise in constitutional interpretation. . . . I would add to that cautionary tale not only the judiciary's parallel experience with economic due process but also the activist legacy of the Warren and early Burger Courts. By considering today's decision in light of history's often cold assessment of the product of those prior eras, we may ascertain whether we forsake to our peril the high ground of judicial restraint.

Judicial activism in this century falls into three general stages. The first, beginning roughly with the decision in *Lochner v. New York*, 198 U.S. 45 (1905), and continuing through the early New Deal, has come to symbolize judicial activism taken to excess.

. . .

The century's second era of judicial activism was more social than economic in nature. . . . Unlike the first era, which sought at least in part to protect the states against the encroachments of the federal legislature, the cases of this second era uniformly restricted the states' authority. The Court accomplished this in two ways. In some cases it incorporated the Bill of Rights against the states through the Fourteenth Amendment's Due Process Clause. In other instances it formulated new rights from the Bill of Rights.

. . .

The Warren and early Burger Courts focused on finding new substantive rights in the Constitution and downplayed that document's structural mandates. Although many of its individual decisions were overdue and salutary, when the era is considered as a whole, the states were relegated to a second-class constitutional status. As states themselves began to respect the civil rights of all their citizens, however, the justification for additional restrictions began to wear thin. And because "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quoting *Texas v. White*, 74 U.S. 700, 725 (1868)), this second era of activism presaged – and indeed guaranteed – a cyclical correction.

This century's third and final era of judicial activism probably began with *New York v. United States*, 505 U.S. 144 (1992), in which the Supreme Court held that the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 impermissibly coerced the states into passing legislation. Since that time, the Court has issued a spate of decisions striking federal enactments that exceeded Congress' authority at the expense of the states.

The common thread of contemporary activism is an interest in reviving the structural guarantees of dual sovereignty. For instance, Congress may not stretch the commerce power so far as to regulate noncommercial areas of traditional state concern – activity that "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561. Nor may Congress "define its own powers by altering the Fourteenth Amendment's meaning." *City of Boerne*, 117 S.Ct. at 2168. The Court has preserved the states' immunity in federal court, defending their right not to be sued without consent. *See Seminole Tribe*, 517 U.S. 44. It has enforced the "etiquette of federalism," *Lopez*, 514 U.S.at 583 (Kennedy, J., concurring), barring Congress from "commandee[ring] the legislative processes of the States," *New York*, 505 U.S. at 161, and forbidding the national government from "impress[ing] the state executive into its service" by "command[ing] the States' officers . . . to administer or enforce a federal regulatory program." *Printz*, 117 S.Ct. at 2371, 2384.

Taken as a whole, the decisions preserve Congress as an institution of broad but enumerated powers, and the states as entities having residual sovereign rights.

. . .

Will the current era of judicial scrutiny stand the tests of time and public acceptance any better than the prior eras have? The facial similarities between the present jurisprudence and the New Deal era underscore the dilemma. Yet upon closer scrutiny, the current wave of judicial decisions bears little relation to those which crested early in this century. If one remains attentive to the pitfalls of the past, the present jurisprudence holds

the promise to be an enduring and constructive one, for its aims and means differ significantly from those of prior eras.

As an initial matter, the outcomes of the current era have not consistently favored a particular constituency. In the first era of activism, courts were widely perceived as choosing sides with business interests in the political debate over the expansion of federal and state regulatory power and the abandonment of laissez-faire.

. . .

Unlike the cases of the first era, the decisions of the third era display no pattern of favoritism. In fact, the results are unfavorable to a variety of interests. As a matter of oxen, the gored are determined by infringements upon our federal system, not by judicial disdain for enacted policies.

. . .

The nature of textual interpretation in the third era also differs from the prior two.

. . .

Courts [in the third era] are not motivated by a desire that a particular substantive meaning be given to a constitutional term such as commerce, but instead by the duty to find that some meaning must exist. The question now is not what the proper allocation of economic regulatory power ought to be, but whether the states will have any subjects of social welfare to call their own.

. . .

Identifying the connection between commerce and the traditional, noneconomic state concerns addressed by section 13981, however, would require the courts to "pile inference upon inference," in the end sanctioning a commerce power without any limitations. *Lopez*, 514 U.S. at 567. Although the appellants have presented able arguments in support of section 13981, the Commerce Clause must contain some limitations if its language is not to be completely excised from the Constitution. The choice we face is between minimal invalidation of congressional intrusion and complete abdication of our interpretive duty. To choose the latter would be to depart from the judicial role of constitutional arbiter set forth nearly two centuries ago in *Marbury v. Madison*.

. . .

[I]t is hard to understand how one can argue for giving capacious meanings to some constitutional provisions while reading others out of the document entirely. Here, appellants suggest that we give a reading that would rob all meaning from the phrase "Commerce . . . among the several States," giving Congress a blanket power simply "To regulate." It seems patently inconsistent to argue for a Due Process Clause that means a great deal and a Commerce Clause that means nothing. How one clause can be robust and the other anemic is a mystery when both clauses, after all, are part of our Constitution.

. . .

Finally, our role in this modern era is not as substantive adjudicators, but as structural referees. The due process decisions of the Lochner and Warren Court eras, as well as the individual rights rulings of the latter, attempted to remove the subject matter of those cases from political debate altogether. Those decisions prevented the people from seeking resolutions of their differences through their popularly elected representatives – federal and state. By contrast, the present jurisprudence of federalism is purely allocative, standing for the simple proposition that the Constitution does not cast states as mere marionettes of the central government. This jurisprudence removes no substantive decision from the stage of political debate. Nor does this decision command those seeking to protect the rights of women to exit the arena. States remain free after *New York* to reach regional solutions to their hazardous waste problems, after *Lopez* to criminalize the act of bringing a firearm within a school zone, after *Printz* voluntarily to cooperate with federal law enforcement efforts, and after today's decision to provide civil remedies to women who are battered or raped. No court blocks the path of legislative initiative in any of these substantive areas.

Instead of aggressively pursuing substantive preferences, this court validates a structural principle found throughout the Constitution. Federalism is the shining gem cut by the Founders. It remains the chief contribution of America to democratic theory and the structural guarantor of liberty and diversity for the American people.

. . .

The present controversy is a highly charged one. Some will doubtless be amazed that a federal court could find section 13981 unconstitutional when every American of good will abhors violence against women. Of course, incursions on dual sovereignty will always carry a measure of democratic sanction, representing as they do the enactments of the elected branches of government. Still, the structural dictates of dual sovereignty must not ebb and flow with the tides of popular support.

VAWA's civil suit provision falters for the most basic of reasons. Section 13981 scales the last redoubt of state government – the regulation of domestic relations. By attaching civil penalties to criminal, but domestic, conduct, section 13981 "by its terms has nothing to do with 'commerce.' " *Lopez*, 514 U.S. at 561. Appellant's defense of the provision rests on the same analogy rejected in *Lopez* – that of attenuated causation to national productivity.

Section 13981 cannot be sustained under Section 5 of the Fourteenth Amendment for some of the same reasons that it cannot be sustained as an exercise of the commerce power. . . . If Section 5 alone were read to allow Congress to regulate private (and often purely domestic) conduct, it would, just like an unlimited reading of the Commerce Clause, intrude on what has traditionally been the core of the state police power. From whatever vantage point one views the case, the rent in the fabric of our federalism would be profound.

. . .

The dissent simply rewrites the Constitution to its taste. It promotes a congressional power without limitation. Under this view, two pillars of our government will crumble: The courts would have almost no role in structural disputes and the states would play no more than a bit part in our federal system.

The restraints the dissent proposes to prevent this constitutional undoing are wholly ineffectual. First, the dissent argues that Congress can act under the Commerce Clause when it seeks to supplement, not supplant, state actions. But practically any exercise of congressional power can be artfully characterized as "supplementary." Second, if congressional enactments can conceivably be called civil rights statutes, then according to the dissent the judiciary must abdicate its role. Of course, most civil rights statutes should and will be sustained under the Commerce Clause. But statutes are not free from constitutional scrutiny solely because of their characterization as civil rights enactments. Third, the dissent asserts that in areas where states cannot "handle the problem," enumerated powers are converted into plenary ones. In practice, this will mean that when the state experimentation that our federal system envisages does not take the precise form that Congress prefers, Congress can impose a uniform rule.

Through these unexamined labels and glib formulas, none of which have any foundation in Supreme Court case law, the dissent would sweep the role of the judiciary and the place of the states away. The dissent's response is that the states can fend for themselves in the political system. This, however, ignores the vast temptation on the part of Congress to attempt the solution of any and all of our problems, no matter how remote from commerce they may be.

. . .

Today's holding is a measured one. To sustain this provision would signal that state governments are due no more than the sweet pieties of lip service and that no limits whatsoever exist on the exercise of congressional power.

Judge Niemeyer, concurring:

I join the thorough opinion for the court, concluding that neither the Commerce Clause nor Section 5 of the

Fourteenth Amendment provides Congress authority to enact the Violence Against Women Act of 1994 (this section hereafter referred to as "VAWA" or the "Act"). The broad, virtually limitless reach of VAWA into all violence motivated by gender, including domestic violence, whether implicating interstate commerce or not, far exceeds these constitutionally enumerated powers which were intended to be specific and limited grants of federal legislative authority. As the Tenth Amendment states, if a power is not delegated to the United States or prohibited to the States by the Constitution, it is reserved to the States or to the people.

. . .

Established Supreme Court precedent points to the existence of limits to the commerce power and defines these limits through two separate modes of analysis. Under one mode, the limits of the commerce power are defined by a federal regulation's nexus to interstate commerce. Under the other, the Court has observed that an overly broad exercise of the commerce power can be recognized when the exercise substantially infringes the general police power retained by the states under the Tenth Amendment.

. . .

At oral argument, the government was pressed at some length to articulate its position on how to define the line between a national interest subject to regulation under the Commerce Clause and a local interest which is beyond the scope of Congress' legislative power. It continually refused to accept the challenge, leaving me with the clear impression that if the political pressure were sufficiently great, the government would feel justified in maintaining the position that Congress could constitutionally regulate local matters, such as divorces and, indeed, even child custody proceedings. Under the impact-on-the-economy test relied on by the government, Congress could rationalize a regulation of these important but traditionally local activities simply by amassing the obviously available economic data showing their aggregate impact on the national economy.

. . .

In The Federalist No. 45, James Madison wrote:

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

. . .

[I]n *Lopez*, the Court reiterated that the Commerce Clause may not be extended

> so as to embrace effects upon interstate commerce so *indirect and remote* that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

Lopez, 514 U.S. at 557 (quoting *Jones & Laughlin Steel*, 301 U.S. at 37) (emphasis added). Thus, we may conclude that intrastate activities may be regulated under the Commerce Clause, but only if their relationship to interstate commerce is close and intimate and not "indirect and remote."

. . .

The requirement that a local activity which Congress seeks to regulate not be "remote" in effect on interstate commerce is distinct from the "direct effect" requirement and draws into question the proximateness of the activity's causal effect on interstate commerce. When examining remoteness, we can draw on well established tort principles of proximate cause, asking whether the local activity would stand next in its causation to the effect on interstate commerce and whether its impact is slight or incidental. In order not to be remote, an effect must be proximate and intimately related to interstate commercial activity.

Thus, to determine whether an intrastate activity substantially affects interstate commerce and therefore is neither indirect nor remote, I would apply a test which requires that (1) the target of any federal regulation of an intrastate activity must be interstate commerce, even though it may not be the purpose of the regulation, and (2) the effect that the activity has on interstate commerce must be proximate and not incidental.

In addition to being so limited, the commerce power is also limited to regulating commerce. If not inherently clear, this was explicitly pointed out in *Lopez*.

. . .

Congressional findings on whether violence involving women has an adverse effect on the economy are just as irrelevant to the proper Commerce Clause analysis as were Executive Branch findings that gun violence had an adverse economic impact. *Lopez* held that this type of relationship between non-economic activity and the economy does not make the regulated activity subject to regulation under the Commerce Clause.

In sum, a statute depending for its validity on the Commerce Clause power must ultimately both be a regulation that reaches intrastate activity only to the extent necessary to regulate interstate commerce and be an economic regulation.

. . .

If, in regulating interstate commerce, Congress necessarily must regulate local activity which has a substantial effect on the interstate commerce it seeks to regulate, then it may do so as long as the overall regulatory scheme is aimed at the protection or promotion of interstate commerce. . . . Instead, VAWA aims at a social ill which only incidently affects interstate commerce. In that sense, the regulated conduct's effect on commerce can only be characterized as "indirect."

. . .

It is self-evident that if the scope of the commerce power is defined too broadly, our national government would no longer be one of enumerated – and hence limited – powers. This observation brings me to the second method for discerning the limits of the Commerce Clause's scope. If a federal regulation ostensibly justified by the Commerce Clause unduly infringes on the general police power, a power that was never conferred on the national government, it follows that such regulation exceeds the limited federal power.

. . .

The Supreme Court most recently observed as much in *Lopez*, noting that the Constitution withholds "from Congress a plenary police power that would authorize enactment of every type of legislation."

. . .

Because the general police power is recognized to include the right of the States to promote the public health, safety, welfare, and morals of the State, it is not disputed that redress for assault and rape traditionally falls within the States' police power.

. . .

Moreover, the redress of sexual assaults and rape is a police power that the States, including Virginia, have traditionally exercised. Virginia law at the time that Brzonkala was attacked identified various crimes whose prosecution might cover the attacks on her. . . . Moreover, Brzonkala would have civil claims against her attackers under established tort principles.

Finally, as Virginia has asserted in its brief in this case, it enforces its sexual assault laws and in practice provides victims with "an array of remedies against the perpetrators to redress [these] wrong[s]." Statistical data confirm this assertion. . . . [T]he Virginia courts' compliance with sentencing guidelines for rape is over 90% and their compliance with sexual assault recommendations is over 70%. More revealing is the fact that the greater noncompliance in sexual assault cases can be attributed to the courts' treating sexual offenders more harshly

than the guidelines recommend.

. . .

In summary, the Commerce Clause authorizes Congress to regulate commerce among the States, i.e., the intercourse of economic activity among the States, and local activity insofar as it substantially affects interstate commerce. . . . Because VAWA regulates intrastate activity too broadly, detaching itself from any semblance of regulating interstate commerce, it is unconstitutional.

Judge Motz, dissenting:

In response to a mountain of compelling evidence that violence animated by gender bias deprives many citizens of their civil rights, substantially affects the national economy and interstate commerce, and creates a profound problem that the states had been unable to remedy, Congress enacted the Violence Against Women Act of 1994. In passing this legislation, Congress took care to identify the constitutional source of its authority, expressly finding that the regulated activity – gender-motivated violence – has a "substantial adverse affect on interstate commerce." Furthermore, Congress specifically limited the reach of the statute challenged here, in order to ensure that it did not interfere with any state law or regulate in any area of traditional state concern.

. . .

[W]e must keep certain principles in mind. First, the Supreme Court has directed that when a court is "asked to invalidate a statutory provision that has been approved by both Houses of Congress and signed by the President, particularly an Act of Congress that confronts a vexing national problem, it should do so only for the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384 (1989). This is "particularly" true where, as here, the legislative "judgments are based in part on empirical determinations." *Board of Educ. v. Mergens*, 496 U.S. 226, 251 (1990).

Second, a court faced with a challenge to an exercise of the commerce power owes even greater deference to Congress than a court asked to determine whether a federal statute violates an express prohibition of the Constitution. . . . In accordance with these principles, the Supreme Court has long held, and recently reiterated in *Lopez*, that the proper inquiry for a court when considering a challenge to Congress's Commerce Clause power is "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce."

. . .

In contrast to the congressional silence about its basis for passing the GFSZA, Congress created a voluminous record demonstrating its reasons for enacting VAWA. . . . [W]hen Congress has made a specific finding that the regulated activity adequately affects interstate commerce, a "court must defer" to that finding if Congress had "any rational basis for such a finding." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S.264, 276 (1981).

The Supreme Court has consistently recognized the importance of deference to Congressional findings in Commerce Clause cases and has never struck down a statute that was supported by a finding that the regulated activity had the necessary effect on commerce.

. . .

The conference [committee] report included the ultimate finding that

> crimes of violence motivated by gender have *a substantial adverse effect on interstate commerce*, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce . . ., by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

H.R. Conf. Rep. No. 103-711, at 385 (emphasis added).

. . .

Congress further found that the fear of violence "takes a substantial toll on the lives of all women, in lost work, social, and even leisure opportunities." Thus, the legislature expressly recognized, as the Senate explained, that women often refuse higher paying night jobs in service/retail industries because of the fear of attack.

. . .

Congress also explicitly found that the states refused or were unable to deal effectively with the problems created by gender-based violence. The Conference Report concluded that "bias and discrimination in the [state] criminal justice system[s] often deprives victims of crimes of violence motivated by gender of equal protection of the law." Numerous reports from the state supreme courts demonstrated to the Senate "that crimes disproportionately affecting women are often treated less seriously than comparable crimes against men."

. . .

The majority does not assert that these findings lack documentation or power. Instead, it nitpicks them.

. . .

Proper application of the mandated rational basis standard of judicial review simply does not permit the result reached by the majority. . . . In light of the voluminous, persuasive record and the extensive deliberation supporting Subtitle C, my independent evaluation of Congress's "legislative judgment," *Lopez*, 514 U.S. at 563, compels me to conclude that Congress had a rational basis for finding that gender-based violence substantially affects interstate commerce.

. . .

Perhaps the most obvious of the majority's errors is its creation of a new rule that confines Congress's power under the Commerce Clause to either the direct regulation of economic activities or the enactment of statutes containing jurisdictional elements. This new rule depends upon a distorted view of *Lopez* and a cavalier disregard for the Supreme Court's other Commerce Clause precedents. Moreover, the majority's contention that this new rule justifies its holding demonstrates a serious misunderstanding of the statute before us.

. . .

In arguing that Subtitle C is unconstitutional because it does not directly regulate economic activity, the majority . . . ignores the expressly-stated purpose of the statute: "*to promote* . . . activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender." 42 U.S.C. § 13981(a) (emphasis added). The legislative record identifies these "activities" as including interstate travel, access to health care services, employment in general, the employment of victims of gender-based violence in particular, and – more particularly still – the employment of such individuals in certain sectors of the economy. In Subtitle C, Congress legislated against gender-based violence under the Commerce Clause as a means of "protection and advancement" of these and other economic activities.

. . .

The core teaching of *Lopez* remains true to the Court's prior and subsequent precedent: Congress must ensure that legislation enacted pursuant to its Commerce Clause authority reaches only activities that "substantially affect interstate commerce," and the courts must ensure that Congress has performed this constitutional obligation in a rational manner.

The majority's second fundamental mistake results from its absolute refusal to recognize our restricted role as judges. Due to this error, the majority fails to apply the correct standard of judicial review and to give proper deference to the legislative judgment challenged here.

. . .

As the opening words of its opinion demonstrate, the majority steadfastly refuses to recognize the constraints placed upon the judiciary by the separation of powers. In purporting to act on behalf of "We the People" in striking Subtitle C – an act of the people's duly elected legislature – the majority seeks to augment its limited judicial authority with a representative authority that it does not in fact possess. Indeed, the majority's resort to this kind of rhetoric constitutes an implicit acknowledgment that an unelected, unaccountable federal court could not, on its own power, properly invalidate Subtitle C.

Although the majority attempts to echo the *Lopez* Court by invoking "foundational" principles to justify its holding, the *Lopez* Court expressly recognized that maintenance of the proper balance of power requires respect for more than one such principle. . . . Thus, while the Supreme Court in *Lopez* recognized that both separation of powers and federalism are foundational or first principles, the majority utterly ignores the former in an effort to elevate the latter.

The majority manifests its lack of respect for the separation of powers by refusing to apply the rational basis standard of review, even though it assertedly recognizes that this standard controls here.

. . .

In refusing to apply the rational basis standard, the majority stands alone. Every one of our sister circuits to consider a post-*Lopez* Commerce Clause challenge, as well as this court itself in an earlier case, has respected and applied the rational basis standard to uphold a wide range of federal statutes.

. . .

Congressional findings are significant, not for some formalistic or procedural reason, but because they clearly state Congress's contemporaneous judgment as to the need, scope, and basis for the law that it is enacting. . . . Where Congress has supported a statute with an explicitly articulated rationale asserting its constitutionality, therefore, invalidation of the statute constitutes not just the correction of a possibly inadvertent congressional overestimate of its competence, but rather a direct repudiation of Congress's full authority.

. . .

Nonetheless, the majority suggests that the complete absence of congressional findings did not in any way impact the *Lopez* Court's decision to invalidate the GFSZA. The majority is almost forced to take this position because, if congressional findings are, as I believe, important, then the stunning lack of any findings supporting the GFSZA presents a formidable problem for the majority's position.

. . .

The lack of congressional findings served as the justification for the Fifth Circuit's refusal to uphold the GFSZA. Although the Supreme Court did not affirm the Fifth Circuit on this basis, the Court did find the lack of legislative findings significant. . . . [T]he Court noted that although such findings "normally [are] not required," they do assist a court. *Lopez*, 514 U.S. at 562

. . .

Finally, the majority errs by profoundly misunderstanding the nature and extent of the proper limits imposed by federalism concerns on Congress's commerce power. . . . Subtitle C, which legislates in an area of traditional congressional expertise, and does not interfere with or usurp any state authority, fits comfortably within the proper federalism-based limits on Congress's Commerce Clause power.

. . .

The most important of these, and the one at issue here, is the limit arising from the structure of the government established by the Constitution. . . .

> [T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of the Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985).

Chief Justice Marshall and the Garcia Court thus explained that, because our government is a representative one, limits on a power as broad and important as that conferred by the Commerce Clause normally must come from the Congress, which is constitutionally designed to respond most sensitively to the will of the people, rather than from the unelected federal judiciary.

. . .

[C]ourts reviewing Commerce Clause legislation may appropriately take the relative representative abilities of the states and the federal government into account. Matters in which states may have the representational advantage include those in which community standards necessarily shape official regulation and those in which the development of a variety of approaches is preferable to a uniform national scheme. Of course, dormant Commerce Clause doctrine teaches that a uniform national scheme must always be preferred with respect to regulations of certain kinds.

. . .

Another, more fundamental aspect of the judicially-enforceable limitation on the commerce power is a court's duty to ensure the proper functioning of the constitutional mechanisms that preserve the representative authority of the states within the national political process. The Supreme Court's decision in *New York*, 505 U.S. 144, represents an application of this principle. In that case, the Court struck down legislation designed to coerce states into regulating the disposal of radioactive waste in a particular fashion. The Court found the legislation unconstitutional in order to compensate for a possible failing in the national political process. By offering both state and federal officials a way to address the problem of toxic waste disposal without taking full responsibility for the unpopular task of selecting particular disposal sites, the challenged statute . . . dampened the incentives that would otherwise operate to encourage these officials to protect state interests.

The *New York* Court recognized that the effectiveness of both state and federal governments as representative bodies suffers when citizens are confused about which sphere of government is responsible for the regulation of an activity.

. . .

Seen in the broader context of the Supreme Court's decisions addressing federalism and the commerce power, *Lopez* stands for the proposition that Commerce Clause legislation may be unconstitutional if it directly supersedes official state action in an area of traditional state concern. In these circumstances, political accountability is definitively disrupted, the value of local expertise is lost, and the benefits of the development of a variety of approaches to a problem are forfeited.

Despite its zeal to protect the rights of the states in the federal system, the majority utterly fails to recognize and respect these genuine federalism-based limitations. Instead it imposes its own unprecedented, formalistic limits on Congress's commerce power. In addition to its rule about economic activities and jurisdictional elements, the majority holds that Commerce Clause legislation is unconstitutional unless the rationale connecting the regulated activity to commerce contains a "principled" limitation. *Lopez* requires imposition of such a limitation, the majority argues, because without it Congress's commerce power would become an unbridled police power. This argument fails on several grounds.

First, contrary to the majority's suggestion, neither *Lopez* nor any other Supreme Court case mandates such a holding. Certainly the *Lopez* Court found the lack of such limitations in the rationale supporting the GFSZA to be one of the factors militating against its constitutionality. But the Court never held that this characteristic was, in itself, sufficient to justify invalidation.

Second, the majority's requirement that Congress's Commerce Clause legislation must be supported by a rationale with limits – one that renders some class of significant activity beyond Congress's reach – would permit courts to shirk their duty to make reasoned decisions. If a court were allowed to strike down a statute based solely on the principle that something must fall outside the scope of Congress's rationale for enacting the statute, then a court would be free of the responsibility to provide substantive reasons as to why or how that particular statute exceeds Congress's authority.

. . .

Moreover, we certainly may not, and *Lopez* does not hold that we can, strike down legislation that does not significantly interfere with state authority solely because Congress could someday enact more invasive legislation on the same reasoning as that advanced to support the statute in question. . . . [A]s cases such as *Lopez* and *New York* indicate, courts should only strike down legislation to protect federalism if there is some reason to believe that the representative authority of the states has been or will be unconstitutionally impaired.

Furthermore, the availability of the judicially-enforceable limitations on the commerce power, which I have described above, fatally undermines the basic premise of the majority's approach. It simply is not the case that, without its new "principled limitations" requirement, Congress would have carte blanche to regulate any activity and thereby to obliterate the division of power between the national government and the states.

. . .

When a federal statute directly supersedes official state action in an area of traditional state concern, then (and only then) may a court properly consider whether the rationale supporting the statute contains an inherent limiting principle. In such circumstances, the danger that the approval of the statute would give Congress the power (in theory) to eliminate the distinction between federal and state government has more substance.

. . .

When these principles are applied to Subtitle C, the question of its constitutionality is not a close one; Subtitle C fits easily within these federalism-based limitations on Congress's power.

First, Subtitle C does not directly – or indirectly – obscure the lines of political accountability or supersede any state action. . . . The GFSZA disrupted the federal-state balance by giving federal officials the power to override a state prosecutor's decision not to pursue a case, as well as the power to interfere with a state prosecution by initiating a virtually identical federal action. Subtitle C, in contrast, is not a criminal statute, displaces no state criminal law, and permits no such interference with official state action.

Nor, contrary to the majority's contentions, does Subtitle C directly supersede or impermissibly infringe on the states' authority to regulate family law matters. Domestic matters may be addressed in some cases brought under Subtitle C, but no state or official regulation is superseded as a result.

. . .

Furthermore, Subtitle C does not regulate in an area traditionally controlled by the states, like criminal justice, as the GFSZA did. Rather, Subtitle C governs an area – civil rights – that has been a critically important federal responsibility since shortly after the Civil War. Consequently, no problems of political accountability lurk in the implementation of Subtitle C.

Indeed, federal action is particularly appropriate when, as here, there is persuasive evidence that the states have not adequately protected the rights of a class of citizens. In passing Subtitle C, Congress made extensive and convincing findings that state law had failed to successfully address gender-motivated violence.

. . .

The majority disregards this evidence in favor of its own conception of the states' needs, and ignores the structural limitations inherent in our federal system in favor of its own categorical and unprecedented limits on Congress's power. It must do so in order to find that federalism concerns require the invalidation of Subtitle C.

In fact, no federalism concerns require this result: Subtitle C does not supersede or intrude on any state powers, nor does it regulate in any area of traditional state concern.

. . .

[T]he majority's ruling undermines the fundamental principle of the government under which the federal courts were created: that the people, through the mechanisms and within the limits described in the Constitution, have the ultimate authority to determine how they are to be governed. The majority today does not act to protect the rights of people underrepresented by the mechanisms of government. Rather, the majority seeks, in the name of "the People," to defend the states. Both the states and the people, however, are represented in the federal legislative process. Moreover, they are represented through mechanisms that, both practically and constitutionally, are far better designed than is the judiciary to protect their interests in preventing an improper distribution of power between the national government and the states.

. . .

[I]n essence, the majority's ruling today seeks to defend the states and the people against themselves in order to enforce its own understanding of what the federal government can properly do, and what must be left to the states. When federal courts undertake responsibility of this kind without specific constitutional support, the threat to our system of government is grave indeed.