Brzonkala v. Va. Polytechnic Inst. & State Univ.

United States Court of Appeals for the Fourth Circuit

March 3, 1998, Argued ; March 5, 1999, Decided

No. 96-1814, No. 96-2316

Reporter
169 F.3d 820 *; 1999 U.S. App. LEXIS 3457 **

CHRISTY BRZONKALA, Plaintiff-Appellant, v. VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY; ANTONIO J. MORRISON; JAMES LANDALE CRAWFORD, Defendants-Appellees, and CORNELL D. BROWN; WILLIAM E. LANDSIDLE, in his capacity as Comptroller of the Commonwealth, Defendants. LAW PROFESSORS; VIRGINIANS ALIGNED AGAINST SEXUAL ASSAULT; THE ANTI-DEFAMATION LEAGUE; CENTER FOR WOMEN POLICY STUDIES; THE DC RAPE CRISIS CENTER; EQUAL RIGHTS ADVOCATES; THE GEORGETOWN UNIVERSITY LAW CENTER SEX DISCRIMINATION CLINIC; JEWISH WOMEN INTERNATIONAL; THE NATIONAL ALLIANCE OF SEXUAL ASSAULT COALITIONS; THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE; THE NATIONAL COALITION AGAINST SEXUAL ASSAULT; THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE; NATIONAL ORGANIZATION FOR WOMEN; NORTHWEST WOMEN'S LAW CENTER; THE PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, INCORPORATED; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; VIRGINIA NOW LEGAL DEFENSE AND EDUCATION FUND, INCORPORATED; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; INDEPENDENT WOMEN'S FORUM; WOMEN'S FREEDOM NETWORK, Amici Curiae. UNITED STATES OF AMERICA, Intervenor-Appellant, and CHRISTY BRZONKALA, Plaintiff, v. ANTONIO J. MORRISON; JAMES LANDALE CRAWFORD, Defendants-Appellees, and VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY; CORNELL D. BROWN; WILLIAM E. LANDSIDLE, in his capacity as Comptroller of the Commonwealth, Defendants. LAW PROFESSORS; VIRGINIANS ALIGNED AGAINST SEXUAL ASSAULT; THE ANTI-DEFAMATION LEAGUE; CENTER FOR WOMEN POLICY STUDIES; THE DC RAPE CRISIS CENTER; EQUAL RIGHTS ADVOCATES; THE GEORGETOWN UNIVERSITY LAW CENTER SEX DISCRIMINATION CLINIC; JEWISH WOMEN INTERNATIONAL; THE NATIONAL ALLIANCE OF SEXUAL ASSAULT COALITIONS; THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE; THE NATIONAL COALITION AGAINST SEXUAL ASSAULT; THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE; NATIONAL ORGANIZATION FOR WOMEN; NORTHWEST WOMEN'S LAW CENTER; THE PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, INCORPORATED; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; VIRGINIA NOW LEGAL DEFENSE AND EDUCATION FUND, INCORPORATED; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; INDEPENDENT WOMEN'S FORUM; WOMEN'S FREEDOM NETWORK, Amici Curiae.

Notice: [EDITOR'S NOTE: PART 4 OF 5. THIS DOCUMENT HAS BEEN SPLIT INTO MULTIPLE PARTS ON LEXIS TO ACCOMMODATE ITS LARGE SIZE. EACH PART CONTAINS THE SAME LEXIS CITE.]

Prior History: [1]** Appeals from the United States District Court for the Western District of Virginia, at Roanoke. Jackson L. Kiser, Senior District Judge. (CA-95-1358-R).

Disposition: AFFIRMED.

Opinion

[*889] WILKINSON, Chief Judge, concurring:

As this century draws to a close, it seems appropriate to examine the course of its jurisprudence **[**2] [*890]** 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. *See, e.g., United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995).

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. Respect for the institutions of self-government requires us, in all but the rarest of cases, to defer to the actions of legislative bodies. In particular, "the history of the judicial struggle to interpret the Commerce Clause . . . counsels great restraint before [we] determine[] that the Clause is **[**3]** insufficient to support an exercise of the national power." *Lopez*, 514 U.S. at 568 (Kennedy, J., concurring). 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.

I.

A.

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, 49 L. Ed. 937, 25 S. Ct. 539 (1905), and continuing through the early New Deal, has come to symbolize judicial activism taken to excess. The *Lochner* decision remains the foremost reproach to the activist impulse in federal judges. And the *Lochner* era is still widely disparaged for its mobilization of personal judicial preference in opposition to state and federal social welfare legislation. In a series of decisions, the Supreme Court pressed the doctrine of "liberty of contract" against state and federal laws **[**4]** protecting union members, *see Coppage v. Kansas*, 236 U.S. 1, 59 L. Ed. 441, 35 S. Ct. 240 (1915); *Adair v. United States*, 208 U.S. 161, 52 L. Ed. 436, 28 S. Ct. 277 (1908), and laws prescribing minimum wages for women and children, *see Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 80 L. Ed. 1347, 56 S. Ct. 918 (1936); *Adkins v. Children's Hospital*, 261 U.S. 525, 67 L. Ed. 785, 43 S. Ct. 394 (1923). Even though the Court during the same period upheld several maximum-hours provisions, *see Bunting v. Oregon*, 243 U.S. 426, 61 L. Ed. 830, 37 S. Ct. 435 (1917); *Muller v. Oregon*, 208 U.S. 412, 52 L. Ed. 551, 28 S. Ct. 324 (1908); *Holden v. Hardy*, 169 U.S. 366, 42 L. Ed. 780, 18 S. Ct. 383 (1898), as well as other labor legislation, *see, e.g., Chicago, B. & Q. R.R. Co. v. McGuire*, 219 U.S. 549, 55 L. Ed. 328, 31 S. Ct. 259 (1911), contemporary critics assailed the Court for indulging its "judicial sense of what was good for the business community" and ignoring the plight of the common citizen. Robert H. Jackson, *The Struggle for Judicial Supremacy* **[**5]** 164 (1941); *see also Morehead*, 298 U.S. at 619 (Hughes, C.J., dissenting). The irreconcilability of such cases as *Lochner* and *Adkins* on one side and *Holden* and *Bunting* on the other fostered the impression of a Court that was picking and choosing without principle, on occasion voiding legislative acts "simply because they [were] passed to carry out economic views which the Court believed to be unwise or unsound," *Adkins*, 261 U.S. at 562 (Taft, C.J., dissenting).

Then, as now, the scope of the commerce power was a major battleground. The New Deal Court used the Commerce Clause to rein in the expanding scope of federal economic legislation. These cases protected the authority of the states vis-a-vis the federal government, rather than restricting government action entirely. Nonetheless, doctrinal inconsistency again lent fuel to those who charged the Supreme Court with favoring the corporate class. *Compare Hammer v. Dagenhart*, 247 U.S. 251, 62 L. Ed. 1101, 38 S. Ct. 529 (1918) (Congress may not bar goods made with child labor from the channels **[*891]** of interstate commerce), *with, e.g., Hoke v. United States*, 227 U.S. 308, 57 L. Ed. 523, 33 S. Ct. 281 (1913) **[**6]** (Congress may keep channels of commerce free of transportation for prostitution). These results suggested to many that the Court's line-drawing was not truly constitutional, but that it simply reflected opposition to "the fundamental consideration . . . that industry should take care of its human wastage." *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330, 384, 79 L. Ed. 1468, 55 S. Ct. 758 (1935) (Hughes, C.J., dissenting).

Moreover, the shadows cast by such aggressive Commerce Clause decisions as *Carter v. Carter Coal Co.*, 298 U.S. 238, 80 L. Ed. 1160, 56 S. Ct. 855 (1936) (striking the Bituminous Coal Conservation Act of 1935), *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 79 L. Ed. 1570, 55 S. Ct. 837 (1935) (striking the National Industrial Recovery Act as applied), and *Alton Railroad Co.*, 295 U.S. 330, 79 L. Ed. 1468, 55 S. Ct. 758 (striking the Railroad Retirement Act), obscured earlier cases in which the Court upheld expansive federal regulation, *see, e.g., Texas & N.O. R.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 74 L. Ed. 1034, 50 S. Ct. 427 (1930) (Railway **[**7]** Labor Act); *Stafford v. Wallace*, 258 U.S. 495, 66 L. Ed. 735, 42 S. Ct. 397 (1922) (Packers and Stockyards Act); *Southern Ry. Co. v. United States*, 222 U.S. 20, 56 L. Ed. 72, 32 S. Ct. 2 (1911) (Safety Appliance Act). Narrow interpretations of the taxing and spending powers in *United States v. Butler*, 297 U.S. 1, 80 L. Ed. 477, 56 S. Ct. 312 (1936) (striking provisions of the Agricultural Adjustment Act), and the *Child Labor Tax Case*, 259 U.S. 20, 66 L. Ed. 817, 42 S. Ct. 449 (1922) (striking the Child Labor Tax Law), solidified the image of an obstructionist Supreme Court, determined to impede legislative efforts to reverse the era's economic dysfunction and to ease the human suffering that it had wrought.

The century's first era of judicial activism proved a painful experience for the courts, as well as for the nation. Battered by court-packing proposals and chastened by a wholesale change in personnel, the Court eventually abandoned the business of reviewing state and federal regulation of economic activity. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 129, 87 L. Ed. 122, 63 S. Ct. 82 (1942); **[**8]** *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578 (1937). Indeed, the reaction to the Court's early excesses was so strong that many supposed for a time that limits on the commerce power had become non-existent. *See, e.g.*, Gerald Gunther & Kathleen M. Sullivan, *Constitutional Law* 198 (13th ed. 1997) ("In the wake of Wickard . . . it was difficult indeed to articulate *any* limits on the reach of the commerce power."). And the *Lochner* specter of result-oriented activism still haunts the Court's debates today. *See Lopez*, 514 U.S. at 608 (Souter, J., dissenting) ("It seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago.").

B.

The century's second era of judicial activism was more social than economic in nature. The post-war civil rights movement pursued a strategy of litigation to correct the abuses blacks suffered in every aspect of their civic experience. Seeking to emulate the movement's success, more and more citizens turned to the courts to vindicate a wide variety of individual **[**9]** liberties. 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. *See, e.g., Malloy v. Hogan*, 378 U.S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964). In other instances it formulated new rights from the Bill of Rights, *see, e.g., Escobedo v. Illinois*, 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964), and the Fourteenth Amendment, *see, e.g., Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973).

The verdict on this second activist era has been more mixed than the verdict on the first. Four of the most widely accepted decisions of the era imposed broad restrictions on the states. *See Reynolds v. Sims*, 377 U.S. 533, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964) (requiring states to apportion their **[*892]** legislatures according to population); *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) **[**10]** (requiring states to recognize malice as an element of libel actions); *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963) (requiring states to furnish legal representation in criminal cases); *Brown v. Board of Educ.*, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954) (requiring states to end public school segregation). Unlike the most notable decisions of the first activist era, these four opinions have become judicial landmarks, and their position in the pantheon of our jurisprudence is secure.

In many contexts, however, the institutional stresses brought on by the era's most expansive and entangling decisions forced the Court to reverse course. Some decisions overextended the institutional capacity of the federal courts, installing judges as long-term supervisors of basic state functions. After approving district courts' broad equitable discretion to devise wide-ranging school desegregation plans, *see Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971), the Court constrained district judges from extending those plans beyond the school district in which the constitutional **[**11]** violation occurred, *see Milliken v. Bradley*, 418 U.S. 717,

41 L. Ed. 2d 1069, 94 S. Ct. 3112 (1974). And the rule that state prisoners could avail themselves of federal habeas corpus even if they failed to observe state procedures, *see Fay v. Noia*, 372 U.S. 391, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963), gave way to the requirement that defendants show "cause and prejudice" for procedural default, *see Wainwright v. Sykes*, 433 U.S. 72, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977). The Court likewise had to cabin its efforts to examine state administrative procedures case-by-case, *see Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970), reducing such inquiry to only those cases involving "liberty" and "property" interests, *see Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). In the midst of this era the Justices themselves engaged in the ad hoc review of state court obscenity rulings, *see, e.g., Redrup v. New York*, 386 U.S. 767, 18 L. Ed. 2d 515, 87 S. Ct. 1414 (1967) (per curiam), until they finally cast off "the role of **[**12]** an unreviewable board of censorship for the 50 States" by making obscenity more a jury question, *Miller v. California*, 413 U.S. 15, 22 n.3, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973). Other constitutional rulings were simply ridden too far, and the Court eventually had to rein them in. For example, the Court declined to apply the testimonial bar of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), to impeaching evidence, *see Harris v. New York*, 401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643 (1971).

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 **[**13]** the preservation of the Union," *Gregory v. Ashcroft*, 501 U.S. 452, 457, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991) (quoting *Texas v. White*, 74 U.S. (7 Wall.) 700, 725, 19 L. Ed. 227 (1868)), this second era of activism presaged -- and indeed guaranteed -- a cyclical correction.

C.

This century's third and final era of judicial activism probably began with *New York v. United States*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (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. *See Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) (striking the interim background check provision of the Brady Handgun Violence Prevention Act); *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 **[*893]** (1997) (striking the Religious Freedom Restoration Act of 1993); **[**14]** *Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (striking the Gun Free School Zones Act of 1990); *see also Seminole Tribe v. Florida*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996) (invalidating Congress' attempt under the Indian Commerce Clause to abrogate the states' Eleventh Amendment immunity).

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, 134 L. Ed. 2d 252, 116 S. Ct. 1114. It has enforced the "etiquette of federalism," *Lopez*, 514 U.S. at 583 **[**15]** (Kennedy, J., concurring), barring Congress from "commandeering the legislative processes of the States," *New York*, 505 U.S. at 161 (internal quotation marks omitted), and forbidding the national government from "impressing the state executive into its service" by "commanding 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.

II.

As abbreviated as the preceding discussion is, it will suffice to pose the critical question. 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 **[**16]** and means differ significantly from those of prior eras.

A.

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*. During this time, all of the Supreme Court's cases limiting the scope of the enumerated powers led to results that were favorable to the commercial class. *See, e.g., Carter*, 298 U.S. 238, 80 L. Ed. 1160, 56 S. Ct. 855 (voiding pro-labor provision); *Hammer*, 247 U.S. 251, 62 L. Ed. 1101, 38 S. Ct. 529 (voiding child labor provision). Moreover, the barricade of substantive due process thwarted social and economic advancements drafted not just by Congress, but by state governments as well. *See, e.g., Morehead*, 298 U.S. 587, 80 L. Ed. 1347, 56 S. Ct. 918 (rejecting state minimum wage law); *Adkins*, 261 U.S. 525, 67 L. Ed. 785, 43 S. Ct. 394 (rejecting federal minimum wage law); *Lochner*, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 **[**17]** (rejecting state maximum hours law). Given this drumbeat of "pro-business" outcomes, critics were able to assemble a solid case that the court was promoting -- in a political fashion -- the interests of business at the expense of the interests of working men and women.

By contrast, the cases of the present era cannot be seen as single-mindedly promoting the interests of a particular constituency. 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. *See New York*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (striking down radioactive waste disposal law); *Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (striking down criminal law penalizing gun possession); *Seminole Tribe*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (barring suits against unconsenting states authorized by Indian Gaming Regulatory Act); *Printz*, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 **[*894]** (striking down law requiring local law enforcement officials to administer federal regulatory scheme); *City of Boerne*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 **[**18]** (striking down act aiming to protect the free exercise of religion). As a matter of oxen, the gored are determined by infringements upon our federal system, not by judicial disdain for enacted policies.

Additionally, the cases of the current era arise out of disparate factual contexts, not simply out of repetitious clashes between business and labor interests. The first era's repeated parade of business-labor disputes solidified the perception that the Court was politically hostile to social welfare legislation. To be sure, the current cases present the customary array of amicus briefs advancing the positions of a variety of interest groups. But the identity and alignment of those groups varies, foreclosing the possibility that the judiciary will be seen as politically choosing sides in a single epic struggle. In the present period, the preservation of federalism values -- not the maintenance of *laissez faire* -- is the binding principle. Interestingly, even the states have occasionally aligned themselves on different sides of federalism issues, sometimes taking positions in derogation of their own sovereign power. *See New York*, 505 U.S. at 154 (noting that three **[**19]** states intervened as defendants in support of the take-title provision); Brief of 13 States, Amici Curiae, in Support of Respondent, *Printz*, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) (No. 95-1478) (supporting enlistment of local officials to conduct background checks).

B.

The nature of textual interpretation in the third era also differs from the prior two. The courts of the first era gave an exceedingly narrow definition to the term "commerce," unduly restricting congressional power. By distinguishing commerce from manufacturing, production, and mining, *see, e.g., Carter*, 298 U.S. 238, 80 L. Ed. 1160, 56 S. Ct. 855 (mining is not commerce); *United States v. E.C. Knight Co.*, 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249 (1895) (manufacturing is not commerce), and by separating economic activities that directly affect interstate commerce from those that have only indirect effects, *see, e.g., Schechter Poultry*, 295 U.S. at 544-50 (wage and hour regulations lack direct relation to interstate commerce), the Supreme Court removed even the plainly economic activities of mines, manufacturing plants, railroads, **[**20]** and merchants from the sphere of regulable "commerce."

The current era of judicial scrutiny does not face this same fundamental textual problem. Courts 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. The collapse of the first era's artificial distinctions dictates the third era's interpretive caution. The cases of the third era have not sought to characterize business and economic activity as something other than commerce. Modern courts instead have taken a minimalist approach, withholding only the narrowest of subjects from the ambit of the "commerce" power.

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 **[**21]** 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*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).

The search for meaning in textual provisions is common to all three judicial eras. And the real challenge to courts is to refrain from being textually selective. Yet, in reviewing the second and third eras, it 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 **[*895]** 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 **[**22]** 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.

The Supreme Court affirmed in *Lopez* the notion that "commerce" must mean something short of everything. *See* 514 U.S. at 567 (noting that to uphold statute at issue "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated"). This is not a radical principle. Rather than lashing out to greatly confine national power, the judiciary is proceeding, cautiously, to find a limiting principle at the margin. The *Lopez* limit on congressional power is not a strict one, but it is a limit.

C.

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, **[**23]** 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. *See U.S. Const.* art. I, § 8 (enumerating congressional powers); *id.* art. I, § 10 (limiting powers of the states); *id.* art. IV, § 4 (guaranteeing states a republican form of government); *id.* art. V (incorporating states and Congress into **[**24]** the amendment process); *id.* art. VI (making federal law supreme); *id.* amend. X (reserving to states powers not delegated); *id.* amend. XI (making states immune to suit in federal court). 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. *See Lopez*, 514 U.S. at 575-76 (Kennedy, J., concurring).

The role of the judiciary as a structural referee remains essential to the continued vitality of our federal system. *See id.* at 578 (Kennedy, J., concurring) ("The federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."). Courts have long adjusted the structural balance of power in our federal system "through judicial exposition of doctrines such as abstention, the rules for determining the primacy of state law, the doctrine of adequate and independent state grounds, the whole jurisprudence of pre-emption, and many of the rules governing **[**25]** our habeas jurisprudence." *Id.* (citations omitted). They have also commonly policed the structural lines inherent in the separation of powers. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998); *INS v. Chadha*, 462 U.S. 919, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983); *United States v. Nixon*, 418 U.S. 683, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974); *Marbury*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60. In so doing, courts have vindicated a simple, foundational principle: The federal government is one of limited powers not because it chooses to be, but because the Constitution makes that choice for it.

[*896] The judicial role in the structural questions of governance is a time-honored one. When Justice Black and Justice Harlan debated the incorporation of the Bill of Rights against the states through the Fourteenth Amendment, great structural principles were at stake. *See, e.g., Malloy*, 378 U.S. at 14-33 (Harlan, J., dissenting); *Adamson v. California*, 332 U.S. 46, 68-92, 91 L. Ed. 1903, 67 S. Ct. 1672 (1947) (Black, J., dissenting). Whether **[**26]** one agreed with Justice Black or Justice Harlan, no one doubted that the structural question of incorporation was a legitimate debate for the Court. Those who would call the modern era an illegitimate, activist one too easily forget this tradition. They would have it both ways -- approving wholly of incorporation and then chastising the courts for passing on the meaning of the enumerated powers. But it is important to remind ourselves of the principle underlying the incorporation debate: The judiciary rightly resolves structural disputes. Just as the relationship of the Bill of Rights to the Fourteenth Amendment was a legitimate structural question for the Court, so too is the debate over the relationship of Article I, Section 8 to the Tenth Amendment. It is just as important for the federal government to live within its enumerated powers as it is for state governments to respect the Bill of Rights. Insisting on both sets the state-federal balance right.

III.

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 **[**27]** 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. *See id.* at 564 (rejecting "costs of crime" and "national productivity" rationales because they would grant unlimited regulatory powers to Congress).

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. In both cases the displacement of state prerogatives in areas of traditional state concern would be profound. The displacement **[**28]** under the Fourteenth Amendment would come from the impermissible use of the enforcement and remedial powers of Section 5 to redefine Section 1 to include prohibitions on purely private actions. 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 **[*897]** point one views the case, the rent in the fabric of our federalism would be profound.

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[*] I believe that *City of Boerne* by itself effectively disposes of appellant's Section 5 arguments. The Court in that case was both clear and emphatic: "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." *City of Boerne*, 117 S. Ct. at 2164. Here, appellants are seeking the right to redefine the Fourteenth Amendment in contravention of not only the amendment's own

[29]** Our decision will assuredly be characterized as unjustifiable judicial activism. And just as assuredly, that characterization will miss the mark. It is true that our holding is "activist" in the sense that one provision in a federal statute is declared unconstitutional (the remainder of the Violence Against Women Act remains in effect). What is equally true, however, is that today's decision has the distinguishing features of the third period of judicial scrutiny and not the discrediting features of the previous two. The substance of the issue before us is wholly disparate from *Lopez* and *Printz* and cannot be said to be part of any substantive judicial agenda. The holding here vindicates the structural values of government by reaffirming the concept of enumerated powers. And it vindicates the role of the judiciary in maintaining this structural balance. Finally, it vindicates the textual values of the Constitution by refusing to assign a meaning to "commerce" that is nowhere comprehended by the term.

My fine colleagues in dissent would not have it this way. The dissent simply rewrites the Constitution to its taste. It promotes a congressional power without limitation. Under **[**30]** 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. *Post* at 209. But practically any exercise of congressional power can be artfully characterized as "supplementary" -- it will be the rare case where at least some states do not have some laws that attempt in some fashion to deal with the problem Congress seeks to redress. Second, if congressional enactments can conceivably be called civil rights statutes, then according to the dissent the judiciary must abdicate its role. *Post* at 209-211. Of course, most civil rights statutes should and will be sustained under the Commerce Clause. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964); *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 1997). But statutes are not free from constitutional scrutiny **[**31]** 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. *Post* at 210. 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. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1984). 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. I agree that Congress has great latitude in legislating, but under the dissent's rationale, the states must meekly and subserviently swallow whatever Congress serves up. If, as the dissent suggests, judicial **[**32]** acts to safeguard Our Federalism are *ipso facto* violations of separation of powers, the role of the courts would not be what *Marbury* envisioned and the role of the states would not be what the Framers designed.

Maintaining the integrity of the enumerated powers does not mean that statutes will topple like falling dominos. Rather, the values of federalism must be tempered by the maxims of prudence and restraint. There have been signs, of course, that *Lopez* would presage an era of aggressive intrusion into the activities of coordinate branches. *See, e.g., United States v. Olin Corp.*, 927 F. Supp. 1502, 1521-33 (S.D. Ala. 1996) (holding that as applied Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) exceeds Congress' commerce power), *rev'd*, 107 F.3d 1506 (11th Cir. 1997). Neither the Supreme Court nor the judiciary as a whole, however, has seen fit to take *Lopez* that far. This is as it should be. A **[*898]** wholesale invalidation of environmental, civil rights, and business regulation would signal a different and disturbing regime -- one other than that which we have now. If modern activism accelerates **[**33]** to a gallop, then this era will go the way of its discredited forebear.

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language, but also the Supreme Court's recent ruling. *See id.* at 2164-66 (detailing the federalism rationale underlying the restriction of the Fourteenth Amendment to state action).

In relying in its Section 5 analysis extensively upon the *Civil Rights Cases*, 109 U.S. 3, 27 L. Ed. 835, 3 S. Ct. 18 (1883), and *United States v. Harris*, 106 U.S. 629, 27 L. Ed. 290, 1 S. Ct. 601 (1883), I do not understand the majority opinion either to adopt or endorse the discredited holdings in those cases. Rather, the majority relies on them for the same reason that the Supreme Court does, for the proposition that "their treatment of Congress' § 5 power as corrective or preventive, not definitional, has not been questioned." *City of Boerne*, 117 S. Ct. at 2166.

In the end, neither swift retreat to cramped notions of commercial activity nor cessation of our judicial role will do. Only a role that is measured and cautious will ensure that a balanced allocation of powers in our federal system remains to protect our individual liberty. 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.

I would affirm the judgment.

NIEMEYER, Circuit Judge, 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, 42 U.S.C. § 13981 (this section hereafter referred to as "VAWA" or the "Act"). [1] 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 **[**34]** 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. *See* U.S. Const. amend. X.

It may be seductive, albeit undisciplined, to conclude that the Commerce Clause has a virtually unlimited scope simply because the volume of interstate commerce has expanded to the point where today it is difficult to delineate between interstate and local commerce. That indulgence, however, would lead to the conclusion that the federal structure created by the Constitution no longer has applicability. Such a position, striking at the heart of our Constitutional order, would be alarming. Yet, it seems to be the position advanced by the government in this case. Because the government has refused even to recognize a line of demarcation between federal power authorized under the Commerce Clause **[**35]** and the States' retained powers, I write separately to address this issue.

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. I will address each of these methods for defining limits to the commerce power, after first setting the basic factual backdrop.

I

While attending Virginia Polytechnic Institute ("Virginia Tech"), a state-owned university in Blacksburg, Virginia, Christy Brzonkala was sexually assaulted and raped by two football players who also were students at Virginia Tech. Some six months after the incident, Brzonkala filed a complaint against the football players under Virginia Tech's intramural disciplinary procedures. She did not pursue criminal charges because she had not preserved any physical evidence of the rapes. The record **[**36]** is not clear whether she has filed state law tort claims.

Brzonkala claims that persons employed by Virginia Tech, who were overly protective of the football program, frustrated university discipline of the players even though factual findings had been made in a university sponsored process to support Brzonkala's claim. If true, the alleged conduct by responsible university officials displays not only an unflattering lack of courage and judgment, but also a hardened insensitivity to Brzonkala's experience.

This case represents Brzonkala's effort to redress her injury in federal court under VAWA and under Title IX of the Education **[*899]** Amendments of 1972 to the Civil Rights Act of 1964, 20 U.S.C. § 1681 *et seq.* The defendants in this case have challenged the constitutionality of VAWA, while the United States has intervened to argue that VAWA is constitutional both under the Commerce Clause and under the Equal Protection Clause of the Fourteenth Amendment. I address only the Commerce Clause issue.

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 **[**37]** regulation under the Commerce Clause and a local interest which is

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[1] I also agree with the remand of the Title IX claims.

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. I believe that the government's approach, however, reveals a profound misunderstanding of Congress' authority and the limitations of the commerce power.

II

The Commerce Clause vests in Congress the power to "regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. This power has always been understood to be finite and therefore inadequate to regulate all commercial activity, including commercial activity which is purely local in character **[**38]** and effect. 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.

The Federalist, at 238 (George W. Carey & James McClellan eds., 1990); *see also The Federalist* No. 40, at 203 (George W. Carey & James McClellan eds., 1990) (James Madison) (Under the Constitution, the federal government's "powers are limited, and the States in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction"); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 179 (1996) (noting that rather than believing in unlimited federal legislative power, "most framers agreed that the scope **[**39]** of national lawmaking would remain modest").

In applying this understanding to the Commerce Clause, Chief Justice Marshall, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405, 4 L. Ed. 579 (1819), noted that the federal "government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only those powers granted to it, . . . is now universally admitted." *See also Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195, 6 L. Ed. 23 (1824) ("The enumeration presupposes something not enumerated . . . . The completely internal commerce of a State, then, may be considered as reserved for the State itself").

The Supreme Court's modern Commerce Clause jurisprudence preserves inviolate this principle that the federal commerce power, while a significant grant of legislative power, is nonetheless finite, possessing identifiable and judicially enforceable boundaries:

> The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. That distinction between **[**40]** what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30, 81 L. Ed. 893, 57 S. Ct. 615 (1937). **[*900]** And the vitality of this principle was maintained in the Court's recent decision in *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), striking down the Gun-Free School Zones Act of 1990 (criminalizing the knowing possession of firearms in a school zone) on the grounds that the activity regulated was not economic; it had too tenuous a connection with commerce; and the statutory provision had no jurisdictional element that would ensure that the prosecuted conduct would have the requisite nexus to interstate commerce. *Id.* at 561. Central to its holding in *Lopez*, the Court explicitly recognized that there are outer limits to the reach of the Commerce Clause and that there are local and non-commercial activities which may not be reached by Congress under the Clause. *See id.* at 556-57.

The Commerce Clause is thus both an enumerated and a limited power authorizing **[**41]** the United States to regulate interstate commerce. But despite 200 years of Commerce Clause jurisprudence, we continue to face the difficult challenge of how to define the limits of the power, distinguishing that which is national from that which is local. In *Jones & Laughlin Steel*, the Court upheld the National Labor Relations Act of 1935 as a proper exercise of the

commerce power, reasoning that although that act regulated some intrastate commercial activity, it did not exceed the Commerce Clause's grant of congressional power to regulate interstate commerce because that act only applied to labor practices "affecting [interstate] commerce." These, the Court said, were the "critical words" limiting the National Labor Relations Board's power to regulate labor practices. 301 U.S. at 31. Recognizing that Congress could not regulate local commerce or activity having little relation to interstate commerce, the Court observed that intrastate activities which "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" fall within the reach of Congressional power **[**42]** under the Commerce Clause. *Id.* at 37. "It is the effect upon commerce," the Court emphasized, "not the source of the injury, which is the criterion." *Id.* at 32 (citation omitted).

Similarly, in *Wickard v. Filburn*, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942), a case upholding the exercise of the Commerce Clause power perhaps at its fullest reach, *see Lopez*, 514 U.S. at 560, the Court held that the Commerce Clause allowed Congress to regulate a farmer's production of wheat, even for home consumption, when the effect of such consumption by farmers in the aggregate would directly affect the price of wheat in the interstate market. *See Wickard*, 317 U.S. at 127. The Court noted that the Commerce Clause, even though conferring a wide-ranging power, nonetheless possesses constitutionally-prescribed limits, and "the reach of that power extends [only] to those intrastate activities which *in a substantial way* interfere with or obstruct the exercise of the granted power." *Id.* at 124 (emphasis added) (internal quotation marks omitted). It is noteworthy that wheat production was recognized **[**43]** as an *economic* activity that had a substantial impact on the price of wheat traded in interstate commerce. Thus, even though wheat production itself "may not be regarded as commerce," it might still be regulated under the Commerce Clause "if it exerts a *substantial economic effect* on interstate commerce." *Id.* at 125 (emphasis added).

Attempting to delineate the "vital" distinction between national and local, the Court in *Jones & Laughlin Steel* stated that the Commerce Clause enables Congress to regulate only intrastate acts which possess a "*close and intimate* relation to interstate commerce." *Id.* at 37 (emphasis added). And similarly in *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) **[**44]** **[*901]** (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 have merely an "indirect" effect on interstate Commerce draws into question the quality of the nexus between the activity *sought* to be regulated and the interstate commerce *authorized* to be regulated. Drawing on the nature of the constitutional power to regulate interstate commerce, I therefore conclude that a local activity, in order to be covered by the Commerce Clause power, must have a *direct effect* on interstate commerce such that its regulation "targets" interstate commercial activity.

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 **[**45]** activity would stand next in its causation to the effect on interstate commerce and whether its impact is slight or incidental. *See generally Black's Law Dictionary* 1225-26 (6th ed. 1990). 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, [2] and (2) the effect that the activity has on interstate commerce must be proximate and not incidental.

[46]** 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*.

When defining the "substantially affects" test, the Supreme Court stated, "Where *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at 560 (emphasis added). Applying an economic "subject-matter" requirement, the Court struck down the Gun-Free School Zones Act, noting that "by its terms [it] has nothing to do with 'commerce' or any sort of economic enterprise however broadly one might define those terms." *Id.* at 561; *see also id.* at 567 ("The possession of a gun in a local school is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce"). Moreover, the Court concluded that the economic impact of the conduct regulated did not satisfy this subject-matter requirement. The Court recognized that the economic costs of violent crime, which would obviously be more likely when guns are present, might be "substantial. **[**47]** " Thus, despite the fact that the Gun-Free School Zones Act was clearly rationally related to fighting violent crime and that violent crime might have a substantial negative effect on the national economy, the Supreme Court found that the act was not a permissible regulation of interstate commerce. The Court explicitly rejected the "costs of crime" argument as a basis for upholding a statute under the Commerce Clause. *Id.* at 564. The Court noted that to accept such reasoning would allow Congress to regulate all violent crime and all causes of violent crime. This, the Supreme Court found, the Constitution does not permit.

Despite the Supreme Court's rejection of the "cost of crime" reasoning in *Lopez*, the government advanced a similar argument in this case, positing that because the costs of domestic violence were set out in Congressional "findings," they were sufficient to sustain a federal regulation on domestic violence involving women. In advancing this argument, **[*902]** the government misses the point of *Lopez*. Congressional findings on whether violence involving women has an adverse effect on the economy are just as irrelevant to the proper Commerce **[**48]** 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.

In considering whether VAWA is constitutional under these principles for applying the Commerce Clause, we begin by noting that violence against women is not commerce, nor is its regulation under VAWA aimed at the protection or promotion of interstate commerce. While it is clear that the congressional focus was trained on violence directed against women, it is just as clear that it was not trained on economic or commercial activity. Judge Luttig's opinion for the court in this case amply describes this congressional focus. *See ante*, at 20-24, 49-53. While Congress went to great lengths to justify its enactment based on the impact that violence against women has **[**49]** on the national economy, this kind of rationalization was explicitly rejected in *Lopez. See* 514 U.S. at 563-64. The Court observed there that if it were to accept the cost of crime or the impact of crime on national productivity as justifications, "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody) for example." *Id.* at 564.

Such incidental rationalizations do not bring Congress within the specific constitutional grant of authority. The Commerce Clause authorizes only the regulation of interstate commerce. 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. *See Lopez*, 514 U.S. at 561. For example, in *Wickard*, the case identified as reflecting the

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[2] For example, Congress may enact legislation aimed at interstate commerce, even if its purpose is to promote social goals. The Freedom of Access to Clinic Entrances Act of 1994 might be such a law. *See Hoffman v. Hunt*, 126 F.3d 575, 582-88 (4th Cir. 1997) (upholding against a Commerce Clause challenge the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248).

broadest permissible reach of the Commerce Clause power, the Court upheld the Agricultural Adjustment Act of 1938, which regulated **[**50]** the amount of a farmer's harvest, even the portion that was intended for home consumption. The production of wheat was an important economic activity having a direct and substantial effect on the supply and therefore the price of wheat. In order to regulate the national wheat market, it was therefore necessary to regulate its important components. [3] The Court noted, "it can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions" which fall within the legitimate domain of Congress under the Commerce Clause. *Wickard*, 317 U.S. at 128. But when, as in the case of VAWA, Congress directs its regulatory efforts at violence, assaults, and torts, or indeed domestic relations, it does not aim at economic activity. 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."

[51]** The government argues that the prohibitions of VAWA promote jobs for women and therefore the economic activity of employment. This argument, however, is not supported by the language of the statute. *See* 42 U.S.C. § 13981. While data may support the finding that violence against women adversely affects the job market and causes an economic loss to the economy, the statute does not reflect an intent to address that economic concern; it does not refer to any job market or workplace, nor does it mention commerce except as a rationalization in its "purpose" section. *See* 42 U.S.C. § 13981(a). Moreover, VAWA does not restrict itself to violence that affects interstate commerce. **[*903]** *Cf. Lopez*, 514 U.S. at 561 (noting the importance of a "jurisdictional element which would insure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce"). [4] In providing additional remedies for violence against women, regardless of its connection with interstate commerce, Congress took aim at a *social ill* and not at *commerce*. Indeed, the data, which Congress claims prompted **[**52]** the enactment of VAWA, indicate Congress' concern with the increasing amount of violence against women, regardless of its economic impact. It is precisely such a broad social concern that falls outside the scope of Congress' Commerce Clause's power.

In short, I would hold that the activities regulated by VAWA are too remote from interstate commerce and that the regulation of commerce was not the target at which VAWA was aimed. For this reason, the enactment of VAWA cannot be upheld as a proper constitutional exercise of the Commerce Clause.

III

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. **[**53]** 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. To support this syllogism and apply it in this case, it is therefore necessary to examine (1) whether it is true that the general police power was never intended to be conferred on the federal government and (2) whether VAWA unduly intrudes on the general police power retained by the States.

Over 200 years ago, issues regarding the scope of the new national government's powers dominated the debates surrounding the ratification of the Constitution. What had emerged from Philadelphia in 1787 was a legal text creating a government constructed upon principles of federalism. The Constitution accomplishes this result by limiting the power of the national government, and giving it only enumerated powers. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803) ("The powers of the legislature are defined and limited; **[**54]** and that those limits may not be mistaken, or forgotten, the constitution is written"). In constituting the new national government, no one believed that the people conferred a general police power upon Congress. The Supreme Court most recently observed as much in *Lopez*, noting that the Constitution withholds "from Congress a plenary police power that would

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[3] This is permissible because Congress has the power to "make all laws which shall be necessary and proper" for executing any of its enumerated powers. U.S. Const. art. I, § 8, cl. 18.

[4] Because VAWA contains no jurisdictional hook, this case does not present the issue of how far Congress can extend its power, if at all, to enact legislation through the use of jurisdictional hooks. *Cf. Katzenbach v. McClung*, 379 U.S. 294, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964).

authorize enactment of every type of legislation." 514 U.S. at 566; *see also id.* at 584 (Thomas, J., concurring) (cautioning that the "substantial effects" test taken to its logical extreme would improperly give Congress "a 'police power' over all aspects of American life"); *United States v. Dewitt*, 76 U.S. (9 Wall.) 41, 43-44, 19 L. Ed. 593 (1870). This proposition is not remarkable because the general police power of the States rests at the core of their sovereignty. Thus, to read the Commerce Clause so broadly as to infringe significantly on the States' general police power would undermine state sovereignty in violation of the federal structure created by the Constitution and confirmed by the Tenth Amendment. Consequently, I believe that the Commerce Clause may not be so broadly **[**55]** interpreted as to authorize wholesale regulation of the sphere traditionally regulated by the States through their general police power.

If the police power was retained by the states and the people, then we must address whether VAWA purports, in contravention of this Constitutional structure, to exercise the general police power.

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, *see Berman v. Parker*, 348 U.S. 26, 32, 99 L. Ed. 27, 75 S. Ct. 98 (1954), it is not disputed that redress for **[*904]** assault and rape traditionally falls within the States' police power. *See, e.g., Brecht v. Abrahamson*, 507 U.S. 619, 635, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993) ("The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights") (internal quotation marks omitted); **[**56]** *United States v. Turkette*, 452 U.S. 576, 586 n.9, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981) (noting that RICO does not interfere with the States' rights "to exercise their police powers to the fullest constitutional extent"); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984) (noting "the States' traditional authority to provide tort remedies to their citizens").

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. *See, e.g.*, Va. Code Ann. § 18.2-61 (rape); Va. Code Ann. § 18.2-67.3 (aggravated sexual battery); Va. Code Ann. § 18.2-67.1 (forcible sodomy); Va. Code Ann. § 18.2-67.5 (attempted rape, forcible sodomy, object sexual penetration, aggravated sexual battery, and sexual battery). The punishment for rape in Virginia is five years to life imprisonment, and aggravated sexual battery carries a maximum jail sentence of twenty years. Va. Code Ann. § 18.2-61(C), 18.2-67.3(B). Moreover, **[**57]** Brzonkala would have civil claims against her attackers under established tort principles. *See, e.g., Parsons v. Parker*, 160 Va. 810, 170 S.E. 1 (1933) (holding that Virginia law recognizes the civil action for rape). And Virginia's interest in exercising its police powers to prohibit and to remedy sexual assaults has been longstanding. Indeed, the common law of Virginia, as it existed before the United States Constitution, criminalized this conduct. *See, e.g., For the Colony in Virginiea Britannia: Lawes Divine, Morall and Martiall, etc.* 12 (David H. Flaherty ed., 1969) (1612) (punishing rape with the death penalty under "Dale's Code," Virginia's earliest code of law); Thomas Jefferson, *Notes on the State of Virginia* 143-44 (William Peden ed., 1954) (1787) (proposing to proportion punishments for crimes existing in Virginia during the period of the Articles of Confederation, which included rape).

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. *See* **[**58]** Virginia Criminal Sentencing Commission, *Annual Report* 19-20, (1997). While data are not available for the number of prosecutions as a percentage of the total number of sexual assaults that have taken place, the 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. *See id.*

Thus, while the general police power of the States, and of Virginia in particular, covers conduct amounting to sexual assault and rape, VAWA purports to redress that same conduct, limiting its scope only to conduct motivated by gender, as both the language of the statute itself and Congress' explanation for it demonstrate. The statute creates a federal cause of action against a person committing a "crime of violence motivated by gender" and defines a crime of violence to be "an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious **[**59]** risk of physical injury to another." 42 U.S.C. §§

13981(c), (d)(2)(A). In creating this cause of action, Congress sought to redress all violence against women and did not limit its regulation to violence that has an economic impact, whether on interstate commerce or not. As Justice Kennedy observed in *Lopez* about the Gun-Free School Zones Act of 1990, "neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus." 514 U.S. at 580 **[*905]** (Kennedy, J., concurring). These same words describe VAWA. While domestic violence of the type regulated by VAWA undoubtedly impacts the economy, as does almost every human activity, the virtually unlimited scope of domestic violence covered by VAWA can be redressed only by exercise of the general police power by the states.

Violence against women is undoubtedly a *national* problem in that it is a problem that exists throughout every state in the nation. The government created by our Constitution, however, demands not that the problem be repeated in every state but that we determine whether that violence is a **[**60]** *federal* problem, that is, a problem that can be redressed with a *federal* power. The inquiry, therefore, turns to whether the Constitution enumerates a power with which our federal Congress can regulate violence against women generally. If not, then the Constitution, by its own terms, relegates regulation of the activity "to the States respectively, or to the people." U.S. Const. amend. X.

I recognize that the power to regulate commerce, if exercised by an enactment in fact aimed at regulating commerce, might incidentally overlap with the exercise of the general police power and that such an overlap would not *per se* render the enactment unconstitutional. But it is clear that Congress' undertaking to regulate violence against women through VAWA is not even aimed at the regulation of commerce. In its reports, Congress rationalized its statute only with the argument that the cost of violence against women generally adversely affects the economy. *See, e.g.*, S. Rep. No. 101-545, at 33 (1990) (violence against women is estimated to cost society "at least $ 3 billion -- not million, but billion -- dollars a year"); S. Rep. No. 101-545, at 37 (1990) (noting that domestic violence **[**61]** has economic cost to the family and leads to homelessness and increased absences from work); S. Rep. No. 103-138, at 41 (1993) ("estimates suggest that we spend $ 5 to $ 10 billion a year on health care, criminal justice, and other social costs of domestic violence"). But this cost-of-crime justification does not limit the statutory language to the regulation of commerce; rather it is a generalized rationalization that can be made equally with respect to all assaults, batteries, and indeed even murders. Each murder, for example, removes permanently from the economy a potentially productive citizen and fractures families causing further economic impact. Moreover, nowhere can we find any suggestion that women as a class have a more intimate connection with commerce than do men. The statute does not confine itself to the commerce-regulation power, and the regulation of commerce is not its target.

Because VAWA seeks to regulate activity so broadly that it exercises the States' general police power, I am further persuaded that the Act cannot be justified by the limited power of the Commerce Clause.

IV

In summary, the Commerce Clause authorizes Congress to regulate commerce among the **[**62]** States, i.e., the intercourse of economic activity among the States, and local activity insofar as it substantially affects interstate commerce. To satisfy this intrastate reach of the Commerce Clause, however, the effect of the intrastate activity on interstate commerce must be neither indirect nor remote; the federal regulation must be aimed at the regulation of interstate commerce, even though its purpose may be otherwise. Moreover, the scope of the Commerce Clause must be interpreted to preserve the federal structure of the Constitution and the States' general police power as an essential aspect of their sovereignty within that structure. Because VAWA regulates intrastate activity too broadly, detaching itself from any semblance of regulating interstate commerce, it is unconstitutional.

[*905] DIANA GRIBBON MOTZ, Circuit Judge, dissenting:

In response to a mountain **[**2]** 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 **[*906]** 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.

Nevertheless, a majority of this court today holds that Congress had no power to enact this legislation. The majority can reach this conclusion only by disregarding controlling Supreme Court precedent, by refusing to give Congress's eminently rational findings proper deference, by creating troubling new rules of constitutional analysis, and by mischaracterizing the statute before us.

I recognize that people of good will -- including **[**3]** federal judges -- could believe that the statute challenged here does not constitute good public policy. But judges' policy choices provide no basis for finding a statute unconstitutional. *See Vance v. Bradley*, 440 U.S. 93, 97, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think the political branch has acted."). Thus, regardless of our personal policy choices, we must uphold a statute unless it violates the Constitution.

Proper judicial review of the massive congressional record inexorably leads to the conclusion that Congress had a rational basis for finding that gender-motivated violence substantially affects interstate commerce. Further, even when subjected to the most searching examination, it is clear that this carefully drawn statute neither interferes with state regulation nor legislates in an area of traditional state concern. Accordingly, I believe a court must conclude that Congress properly exercised its constitutional authority **[**4]** in enacting this statute. Therefore, I respectfully dissent.

I.

When considering the appeal of "an order granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6), [a court] must accept as true the facts alleged in the complaint." *McNair v. Lend Lease Trucks, Inc.*, 95 F.3d 325, 327 (4th Cir. 1996). Christy Brzonkala, who entered Virginia Polytechnic Institute (Virginia Tech) as a freshman in the fall of 1994, alleges the following facts in her complaint.

On the evening of September 21, 1994, Brzonkala and another female student met two men who Brzonkala knew only by their first names and their status as members of the Virginia Tech football team. Within thirty minutes of first meeting Brzonkala, these two men, later identified as Antonio Morrison and James Crawford, raped her.

Brzonkala and her friend met Morrison and Crawford on the third floor of the dormitory where Brzonkala lived. All four students talked for approximately fifteen minutes in a student dormitory room. Brzonkala's friend and Crawford then left the room. Morrison immediately asked Brzonkala if she would have sexual intercourse with him. She twice told Morrison "no," but Morrison was not deterred. **[**5]** As Brzonkala got up to leave the room, Morrison grabbed her and threw her, face-up, on a bed. He pushed her down by the shoulders and disrobed her. Morrison turned off the light, used his arms to pin down her elbows, and pressed his knees against her legs. Brzonkala attempted to push Morrison off, but to no avail. Without using a condom, Morrison forcibly raped her.

Before Brzonkala could recover, Crawford came into the room and exchanged places with Morrison. Crawford also raped Brzonkala by holding down her arms and using his knees to pin her legs open. He, too, used no condom. When Crawford was finished, Morrison raped her for a third time, again holding her down and again without a condom.

When Morrison had finished with Brzonkala, he warned her "You better not have any fucking diseases." In the months following the rape, Morrison announced publicly in the dormitory's dining room that he "liked to get girls drunk and fuck the shit out of them."

Following the assault, Brzonkala became depressed and avoided contact with most residents of her dormitory outside of her own room. She radically changed her appearance **[*907]** by cutting off her long hair. She ceased attending classes **[**6]** and eventually attempted suicide. She sought assistance from a Virginia Tech psychiatrist, who prescribed anti-depressant medication. Neither the psychiatrist nor any other Virginia Tech employee made more than a cursory inquiry into the cause of Brzonkala's distress. She later sought and received a retroactive withdrawal from Virginia Tech for the 1994-95 academic year.

Approximately a month after Morrison and Crawford assaulted Brzonkala, she confided in her roommate that she had been raped, but could not bring herself to discuss the details. It was not until February 1995 that Brzonkala was able to identify Morrison and Crawford as the men who had raped her. Two months later, she filed a complaint against them under Virginia Tech's current sexual assault policy, which had been formally released for dissemination to

students on July 1, 1994, but was not yet incorporated into the Student Handbook. After Brzonkala filed her complaint, she learned that another male student athlete was overheard advising Crawford that he should have "killed the bitch."

Brzonkala did not pursue criminal charges against Morrison or Crawford, believing that criminal prosecution was impossible because **[**7]** she had not preserved any physical evidence of the rape. Virginia Tech did not report the rapes to the police, and did not urge Brzonkala to reconsider her decision not to do so. Sexual assault of a female student by a male student is the only violent felony that Virginia Tech authorities do not automatically report to the university or town police.

Virginia Tech held a hearing on Brzonkala's complaint against Morrison and Crawford. At the hearing, which was tape-recorded and lasted three hours, a number of persons, including Morrison and Crawford, testified. Morrison admitted that even though Brzonkala had twice told him "no," he had sexual intercourse with her in the dormitory on September 21. Crawford, who denied that he had sexual contact with Brzonkala (a denial corroborated by his suitemate, Cornell Brown), confirmed that Morrison had engaged in "sexual contact" with Brzonkala.

The Virginia Tech judicial committee found insufficient evidence to take action against Crawford, but found Morrison guilty of sexual assault. The committee imposed an immediate suspension on Morrison for two semesters (one school year). In May, 1995, Morrison appealed this decision, claiming that the **[**8]** college had denied him his due process rights and had imposed an unduly harsh and arbitrary sanction. Cathryn T. Goree, Virginia Tech's Dean of Students, notified Brzonkala in a letter dated May 22, 1995 that she had rejected Morrison's appeal and upheld his suspension for the Fall 1995 and Spring 1996 semesters. According to Virginia Tech's published rules, the decision of Dean Goree, as the appeals officer on this matter, was final.

In the first week of July 1995, however, Dean Goree and another Virginia Tech official, Donna Lisker, personally called on Brzonkala at her home in Fairfax, Virginia, a four-hour drive from Virginia Tech. These officials advised Brzonkala that Morrison's attorney had threatened to sue the school on due process grounds, and that Virginia Tech thought there might be merit to Morrison's "ex post facto" challenge that he was charged under a sexual assault policy that was not yet spelled out in the Student Handbook. Dean Goree and Ms. Lisker told Brzonkala that Virginia Tech was unwilling to defend in court the school's decision to suspend Morrison for a year, and that a rehearing under the university's disciplinary policy as it existed prior to the adoption **[**9]** of the sexual assault policy was required. To induce Brzonkala to participate in a second hearing, Dean Goree and Ms. Lisker assured Brzonkala that Virginia Tech officials believed her story, and that the second hearing was a mere technicality to cure the school's error in bringing the first complaint under a version of the sexual assault policy not contained in the Student Handbook.

Brzonkala submitted to a second hearing, which was scheduled for late July. This hearing was *de novo* and lasted seven hours, more than twice as long as the first hearing. Brzonkala was required to engage her own legal counsel at her own expense. Moreover, the university belatedly informed her that **[*908]** student testimony given at the first hearing would not be admissible at the second hearing and that, if she wanted the second judicial committee to consider this testimony, she would have to submit sworn affidavits. Because she received insufficient notice, it was impossible for Brzonkala to obtain the necessary affidavits from her student witnesses. In contrast, the school provided Morrison with sufficient notice to give him ample time to procure the sworn affidavits of his student witnesses. **[**10]** Virginia Tech exacerbated this inequity by refusing both Brzonkala and her attorney access to the tape recordings of the first hearing, while granting Morrison and his attorney complete and early access to those tapes. Finally, Virginia Tech officials prevented Brzonkala from mentioning Crawford in her testimony because charges against him had been dismissed; as a result she had to present a truncated version of events.

Nevertheless, the university judicial committee found Morrison guilty of abusive conduct, and re-imposed the sanction that it had set after the first hearing: an immediate two-semester suspension.

Morrison again appealed; this appeal was successful. On August 21, 1995, in a letter attached to the complaint, Senior Vice-President and Provost Peggy Meszaros notified Morrison of her decision to set aside his sanction. The Provost explained that in her view "there was sufficient evidence to support the decision that [he] violated the University's Abusive Conduct Policy and that no due process violation occurred in the handling of [his] case." She further informed Morrison, however, that his immediate suspension for one school year was "excessive when compared with **[**11]** other cases where there has been a finding of violation of the Abusive Conduct Policy." Provost Meszaros did not elaborate on the "other cases" to which she was referring. Instead of an immediate one-year

suspension, the Provost imposed "deferred suspension until [Morrison's] graduation from Virginia Tech." In addition, Morrison was "required to attend a one-hour educational session with Rene Rios, E.O./AA Compliance Officer regarding acceptable standards under University Student Policy."

Virginia Tech did not notify Brzonkala of these changes in the outcome of her case. Instead, on August 22, 1995, Brzonkala learned from an article in *The Washington Post* that the university had lifted Morrison's suspension and that he would return to campus for the Fall 1995 semester. Morrison did in fact return to Virginia Tech in the Fall of 1995, on a full athletic scholarship.

Upon learning that the university had set aside Morrison's suspension and was permitting him to return in the Fall, Brzonkala canceled her own plans to return to Virginia Tech. She did this because she feared for her personal safety and because she believed that Virginia Tech had repudiated her claim that Morrison **[**12]** had raped her.

Brzonkala believes and so alleges that Head Football Coach Frank Beamer, as part of a coordinated university plan to allow Morrison to play football in 1995, participated directly and indirectly in the process by which the sanction against Morrison was overturned.

On December 27, 1995, Brzonkala filed suit against Morrison, Crawford, and Virginia Tech. On March 1, 1996, she amended her complaint. Her amended complaint alleges *inter alia* that Virginia Tech, in its handling of her rape claims and failure to punish the rapists in any meaningful manner, violated Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1994). She also alleges that Morrison and Crawford brutally gang-raped her because of gender animus in violation of Subtitle C of the Violence Against Women Act of 1994 (VAWA), 42 U.S.C. § 13981 (1994). The United States intervened to defend the constitutionality of VAWA.

The district court dismissed the Title IX claims against Virginia Tech for failure to state a claim upon which relief could be granted, and it dismissed Brzonkala's VAWA claims against Morrison and Crawford because it found **[**13]** VAWA to be beyond Congress's constitutional authority. I address first the Title IX claim and then the VAWA claim.

II.

Title IX of the Education Amendments of 1972 provides in relevant part:

> **[*909]**
> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681(a)(1994). Virginia Tech concedes that it is an "education program . . . receiving Federal financial assistance." Hence, the only question is whether Brzonkala has sufficiently alleged that she was "subjected to discrimination" by Virginia Tech "on the basis of sex." 20 U.S.C. § 1681(a).

The district court recognized that Brzonkala pled a Title IX claim on the basis of two distinct legal theories: a hostile environment theory, that Virginia Tech responded inadequately to a sexually hostile environment; and a disparate treatment theory, that Virginia Tech discriminated against Brzonkala because of her sex in its disciplinary proceedings. For the reasons set forth **[**14]** in the panel opinion in this case, *Brzonkala v. Virginia Polytechnic Inst.*, 132 F.3d 949, 961-62 (4th Cir. 1997), I believe that Brzonkala has failed to allege a disparate treatment claim.

As for the hostile environment claim, determination of its validity must await the Supreme Court's decision in *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997), *cert. granted*, 119 S. Ct. 29 (1998), which should provide substantial guidance as to whether Title IX establishes a cause of action to remedy a hostile environment of the sort Brzonkala alleges. The majority apparently agrees, but it remands the case so that the district court can hold the resolution of this issue in abeyance pending the *Davis* decision. Remand of this legal question, which will almost inevitably be appealed, only wastes time and scarce judicial resources. Rather than creating unnecessary extra work for the district court, we should, as we ordinarily do, hold our own opinion in abeyance until the Supreme Court rules. *See, e.g., Lissau v. Southern Food Serv., Inc.*, 159 F.3d 177, 181 (4th Cir. 1998); *United States v. Hairston*, 96 F.3d 102, 105 (4th Cir. 1996). **[**15]**

III.

With regard to the civil rights provision of the Violence Against Women Act of 1994 (VAWA), 42 U.S.C. § 13981 (1994), the district court held that Brzonkala's complaint stated a claim against Morrison and Crawford. The court concluded, however, that this portion of VAWA was unconstitutional because Congress lacked the authority to enact it. Like the majority, I agree with the district court that Brzonkala stated a claim. After careful review of the statute, however, I can only conclude that Congress acted within its broad authority in passing this legislation. I would therefore reverse the district court's ruling to the contrary and allow Brzonkala to pursue her claim.

A.

In September 1994, after four years of hearings, Congress enacted VAWA in order to address "the escalating problem of violence against women." S. Rep. No. 103-138, at 37 (1993). Subtitle C, the portion of the statute at issue in this case, establishes the right upon which a civil rights claim can be brought:

> All persons within the United States shall have the right to be free from crimes of violence motivated by gender . . . .

42 U.S.C. § 13981 **[**16]** (b).

The statute goes on to set forth the elements necessary to plead and prove such a claim:

> (c) Cause of action
>
> A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.
>
> (d) Definitions
>
> For purposes of this section--
>
> (1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and
>
> (2) the term "crime of violence" means--
>
> **[*910]**
>
> (A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section **[**17]** 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and
>
> (B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

42 U.S.C. § 13981. Thus, to state a claim under § 13981(c) a plaintiff must allege that he or she has been the victim of a specific kind of felony -- "a crime of violence motivated by gender." 42 U.S.C. § 13981(c).

Morrison and Crawford do not argue that Brzonkala's allegation of gang rape fails to satisfy § 13981(d)(2)'s definition of a "crime of violence." However, they do briefly assert that Brzonkala has failed to allege a "crime of violence *motivated by gender*." 42 U.S.C. § 13981(c) (emphasis added).

A "crime of violence motivated by gender" is defined as "a crime of violence committed because of gender or on the basis of gender, **[**18]** and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1). Congress has indicated that "proof of 'gender motivation' under" Subtitle C of VAWA is to "proceed in the same ways proof of race or sex discrimination proceeds under other civil rights laws. Judges and juries will determine 'motivation' from the 'totality of the circumstances' surrounding the event." S. Rep. No. 103-138, at 52; *see also* S. Rep. No. 102-197, at 50 (1991).

The statute does not reach "random acts of violence unrelated to gender." 42 U.S.C. § 13981 (e)(1). However, bias "can be proven by circumstantial as well as indirect evidence." S. Rep. No. 103-138, at 52. "Generally accepted guidelines for identifying hate crimes may also be useful" in determining whether a crime is gender-motivated, such as "language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; previous

history of similar incidents; absence of any other apparent motive (battery without robbery, for example); common sense." *Id.* at 52 n.61.

Brzonkala alleges that two virtual strangers, Morrison and Crawford, **[**19]** brutally raped her three times within minutes of first meeting her. Although Brzonkala does not assert that they mutilated her, the brutal and unprotected gang rape itself constitutes an attack of significant "severity." *Id.* Moreover, Brzonkala alleges that the rapes were completely without "provocation." *Id.* One of her assailants conceded during the college disciplinary hearing that Brzonkala twice told him "no" before he initially raped her. Further, there is an absence of any "apparent motive" for the rapes other than gender bias. *Id.* For example, no robbery or other theft accompanied the rapes.

Finally, Brzonkala alleges that when Morrison had finished raping her for the second time he told her, "You better not have any fucking diseases." She also alleges that Morrison later announced in the college dining room, "I like to get girls drunk and fuck the shit out of them." Verbal expression of bias by an attacker is certainly not mandatory to prove gender bias, but it is "helpful." S. Rep. No. 103-138, at 51. As the district court noted, Morrison's "statement reflects that he has a history of taking pleasure from having intercourse with women without their sober consent" **[**20]** and that "this statement indicates disrespect for women in general and connects this gender disrespect to sexual intercourse." 935 F. Supp. at 785. In addition, since Brzonkala alleged that Morrison and Crawford engaged in a conspiracy to rape her, Morrison's comments are also relevant in assessing Crawford's liability. *See Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 103 (3rd Cir. 1993) (in a civil conspiracy "every conspirator is jointly and severally liable for all acts of co-conspirators taken in furtherance of the conspiracy"); *United States v. Carpenter*, 961 F.2d 824, 828 n.3 (9th Cir. 1992) (holding that "acts and statements in furtherance of the conspiracy may be attributed to" a coconspirator and citing *Pinkerton v. United States*, 328 U.S. 640, 646-47, 90 L. Ed. 1489, 66 S. Ct. 1180 **[*911]** (1946)); *United States v. Chorman*, 910 F.2d 102, 111 (4th Cir. 1990) (same).

In sum, Brzonkala has clearly alleged violations of the civil rights provision of VAWA. I find puzzling the majority's statement that these allegations "do not necessarily compel the conclusion that Morrison acted with **[**21]** animus toward women as a class, and might not even be sufficient, without more, to defeat a motion either for summary judgment or for a directed verdict." *Ante*, at 13. If the majority is simply indicating that Brzonkala may be unable to prove some or all of the allegations in her complaint, the statement is unremarkable. But if the majority is suggesting that, even if Brzonkala offers adequate evidence to support each and every one of these allegations, such evidence still might not be sufficient to prove a claim of gender-animated violence, the statement is incomprehensible. Brzonkala has alleged virtually all of the earmarks of a violent, felonious "hate crime": an unprovoked, severe attack, triggered by no motive other than gender-based animus, and accompanied by language clearly reflecting such animus. If she provides evidence proving these allegations, she is entitled to have a factfinder weigh that evidence.

B.

The remaining, and critical, issue is whether the district court correctly held that Congress exceeded its constitutional authority in enacting the civil rights provision of VAWA. Congress directly addressed this very question. On the basis of numerous specific findings **[**22]** and a host of evidence, Congress stated in the statute itself that it was invoking its authority "pursuant to . . . section 8 of Article I of the Constitution" in order to protect the civil rights of "victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for actions of violence motivated by gender." 42 U.S.C. § 13981(a). [1] Article I, Section 8, Clause 3 of the Constitution empowers Congress to "regulate Commerce with foreign Nations,

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[1] Congress also expressly stated that Section 5 of the Fourteenth Amendment authorized enactment of this statute. *See* 42 U.S.C. § 13981(a). In view of my conclusion that the statute is a valid exercise of Congress's Commerce Clause power, I need not reach the question of whether the Fourteenth Amendment also authorized it. Despite the majority's statements to the contrary, however, nothing in the record demonstrates that Brzonkala or the Government "primarily" defended Subtitle C as a valid exercise of Congress's Fourteenth Amendment power in reaction to *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), or that they subsequently "retreated to defend" it "primarily as an exercise" of Commerce Clause power in reaction to *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). *Ante*, at 6. In their initial briefs before a panel of this court, the Government and Brzonkala argued both issues -- allotting substantial attention to both, but perhaps slightly more to the Fourteenth Amendment; for example, that issue was addressed first. In the supplemental briefs submitted to the *en banc* court after the panel had, without reaching the Fourteenth Amendment question, upheld the statute as a valid exercise of Congress's

and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Our task is to determine whether Congress had a rational basis for reaching this conclusion.

[23]** 1.

In making this assessment, we 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, 102 L. Ed. 2d 714, 109 S. Ct. 647 (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, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990). **[*912]**

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. As Justice Kennedy explained in *United States v. Lopez*, "the substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights even though clear and bright lines are often absent in the latter class of disputes." 514 U.S. 549, 579, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995) **[**24]** (Kennedy, J., concurring); *see also id.* at 568 ("The history of the judicial struggle to interpret the Commerce Clause . . . counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power."). 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." 514 U.S. at 557.

In *Lopez*, the Supreme Court concluded that the Gun-Free School Zones Act of 1990 (GFSZA), 18 U.S.C. § 922(q)(1994), fell outside Congress's commerce power. *Id.* at 567. Several characteristics of the GFSZA led the Court to this conclusion. As the facts of the case demonstrated, and as the Court noted, *id.* at 561 n.3, the GFSZA effectively supplanted state criminal regulation with federal regulation; the defendant had initially been charged by state police with violation of a state criminal law punishing **[**25]** the possession of a firearm at a school, but those charges were dropped after federal agents charged him with violation of the GFSZA, *id.* at 551. Moreover, although the Government defended the GFSZA as a proper exercise of the commerce power, the statute by its own terms had "nothing to do with 'commerce,'" contained no jurisdictional element ensuring a connection to interstate commerce in each case, and was supported by no congressional findings demonstrating that gun possession near schools had a substantial effect on interstate commerce. *Id.* at 561-62. The Supreme Court noted that, in these circumstances, it "would have to pile inference upon inference" to find a rational basis for concluding that the activity regulated by the GFSZA "substantially affect[s] any sort of interstate commerce." *Id.* at 567. This the Court declined to do, and it therefore declared that Congress had exceeded its Commerce Clause power in enacting the GFSZA. *Id.*

In contrast to the congressional silence about its basis for passing the GFSZA, Congress created a voluminous record demonstrating its reasons for enacting VAWA. Accordingly, a court in this **[**26]** case can begin where the *Lopez* Court could not, by "evaluating the legislative judgment that the activity in question substantially affected interstate commerce." *Id.* at 563; *see also City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 2169-70, 138 L. Ed. 2d 624 (1997) (noting the importance of Congressional findings in determining the "appropriateness of [Congress's] remedial measures"). In taking the legislative record supporting Subtitle C into account, I recognize that discerning a rational basis "is ultimately a judicial rather than a legislative question," *Lopez*, 514 U.S. at 557 n.2 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964) (Black, J., concurring)), and that "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981) **[**27]** (Rehnquist, J., concurring)). But when 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*, 452 U.S. at 276.

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commerce power, the Government and Brzonkala again addressed both issues. This time, however, they devoted slightly more attention to the Commerce Clause argument, placing it first. Although the supplemental briefs were filed after *Boerne* issued, it seems to me that the parties' slight change in emphasis could well be simply a reaction to the perceived interest of our court.

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 **[*913]** regulated activity had the necessary effect on commerce. *See* Lawrence H. Tribe, *American Constitutional Law*, 310-11 (2d. ed. 1988) (noting that the Supreme Court "has without fail given effect to" congressional findings). When the rationale for congressional action appears in the legislative record, the proper inquiry in assessing commerce power challenges involves examination of that record and determination of whether it demonstrates that Congress had a rational basis for finding that the regulated activity substantially affects interstate commerce. *See, e.g., Hodel*, 452 U.S. at 275-83; *Hodel v. Indiana*, 452 U.S. 314, 326, 69 L. Ed. 2d 40, 101 S. Ct. 2376 (1981); **[**28]** *Perez v. United States*, 402 U.S. 146, 155-56, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 299-301, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964); *Heart of Atlanta Motel*, 379 U.S. at 252-254. *See also United States v. Leshuk*, 65 F.3d 1105, 1111-12 (4th Cir. 1995) (rejecting a *Lopez* challenge to the Comprehensive Drug Abuse Prevention and Control Act by relying heavily upon Congress's "detailed findings" concerning the interstate commerce effects of the regulated activity). Accordingly, I turn to that inquiry.

2.

The congressional findings and testimony that support the enactment of VAWA under the Commerce Clause are detailed and extensive. [2] Space limitations prevent setting them all out here. But even abbreviated excerpts from the vast legislative record demonstrate that Congress carefully and repeatedly documented the substantial effect that gender-based violence has on interstate commerce and the national economy. For example, Congress found that:

> . "Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health **[**29]** expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy." S. Rep. No. 103-138, at 54.
>
> . "Gender-based violence bars its most likely targets -- women -- from full participation in the national economy." *Id.*
>
> . "Problem[s] of domestic violence . . . because of their interstate nature, transcend the abilities of State law enforcement agencies." *Id.* at 62.

[30]** Indeed, in the Conference Committee Report on VAWA, Congress made detailed and express findings, which were originally part of the text of the statute itself and were removed only to avoid cluttering the United States Code. *See Violence Against Women: Law and Litigation* § 5:40 and § 5:42 (David Frazee et al. eds., 1997). The conference 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 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853 (emphasis added).

Congress additionally explained that "the cost" of gender-motivated violence "is staggering." S. Rep. No. 101-545, at 33 (1990). One example of such gender-motivated violence is domestic violence, which alone is estimated to cost employers "$ 3 **[**31]** to $ 5 *billion* annually due to absenteeism in the workplace." *Women and Violence: Hearing Before the Committee on the Judiciary*, 101st Cong. 58 (1990) (statement of Helen K. Neuborne) (emphasis added). Furthermore, "estimates **[*914]** suggest that we spend $ 5 to $ 10 billion a year on health care, criminal justice, and

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[2] Most of Congress's findings do not appear in the statute itself, but in applying rational basis review courts also consider findings of congressional committees. *See Lopez*, 514 U.S. at 562; *see also Preseault v. ICC*, 494 U.S. 1, 17, 108 L. Ed. 2d 1, 110 S. Ct. 914 (1990) (citing House Report in discussion of congressional findings regarding effect on interstate commerce of federal "rails-to-trails" statute); *Hodel*, 452 U.S. at 277-80 (relying on committee reports to uphold Congress's power under the Commerce Clause to enact the Surface Mining and Reclamation Control Act); *Hoffman v. Hunt*, 126 F.3d 575, 587 (4th Cir. 1997) (relying on a House Report to uphold Freedom of Access to Clinic Entrances Act (FACE) as a legitimate exercise of Commerce Clause power).

other social costs of domestic violence." S. Rep. No. 103-138, at 41. Congress noted "it is not a simple matter of adding up the medical costs, or law enforcement costs, but of adding up all of those expenses plus the costs of lost careers, decreased productivity, foregone educational opportunities, and long-term health problems." S. Rep. No. 101-545, at 33.

These monetary figures were accompanied by other evidence establishing that gender-motivated violence has a substantial impact on interstate commerce:

> Over 1 million women in the United States seek medical assistance each year for injuries sustained by their husbands or other partners. As many as 20 percent of hospital emergency room cases are related to wife battering.
>
> But the costs do not end there: woman abuse "has a devastating social and economic effect on the family and the community. **[**32]** " . . . It takes its toll in homelessness: one study reports that as many as 50 percent of homeless women and children are fleeing domestic violence. It takes its toll in employee absenteeism and sick time for women who either cannot leave their homes or are afraid to show the physical effects of the violence.

Id. at 37 (footnote omitted).

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." S. Rep. No. 102-197, at 38 (1991) (emphasis added). 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. Those fears are justified: the No. 1 reason why women die on the job is homicide and the highest concentration of those women is in service/retail industries. . . . 42 percent of deaths on the job of women are homicides; only 12 percent of the deaths of men on the job are homicides.

S. Rep. No., 103-138, at 54 n.70 (citations omitted).

Congress also explicitly found that the states refused or were unable to deal effectively with the problems **[**33]** 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." H.R. Conf. Rep. No. 103-711, at 385. 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," and the Senate concluded that "these reports provide overwhelming evidence that gender bias permeates the [states'] court system." S. Rep. No. 102-197, at 43-44. Congress further indicated that a uniform national approach to these problems was needed by noting that, while federal statutes currently provide "a civil rights remedy" for gender-based violence in the workplace, no such remedy existed for gender-based violence "committed on the street or in the home." H.R. Conf. Rep. No. 103-711, at 385.

The majority does not assert that these findings lack documentation or power. [3] Instead, it nitpicks them. *See ante*, at 45-49. For example, the majority suggests that because hearings were held by "three different Congresses" **[**34]** and some of the congressional findings were general, they do not deserve deference. *Id.* at 45-46. But in *Hodel*, the Supreme Court relied on numerous general findings from *five* different Congresses to uphold the challenged statute. 452 U.S. at 278-80 & n.19. Indeed, the *Hodel* Court specifically commended Congress for holding "extended hearings during which vast amounts of testimony and documentary **[*915]** evidence" were received, demonstrating "six years of the most thorough legislative consideration." *Id.* at 278-79. Thus, the Supreme Court has praised precisely the kind of full and extended congressional consideration that the majority criticizes.

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[3] These specific findings are not mere "incidental rationalizations." *See ante*, at 154 (Niemeyer, J., concurring). Rather, Congress has demonstrated that gender-motivated violence is an "activity having a direct and substantial effect on the supply and therefore the price" of health care, consumer goods, and the like in the same way that a farmer's consumption of his home-grown wheat was held in *Wickard v. Filburn*, 317 U.S. 111, 128, 87 L. Ed. 122, 63 S. Ct. 82 (1942), to have the requisite effect on interstate commerce because of its impact on the supply and price of the national wheat market. *But see ante*, at 154-155 (Niemeyer, J., concurring).

[35]** The majority also suggests that because the Senate found in 1993, a year prior to the passage of VAWA and two years prior to issuance of the *Lopez* decision, that gender-based violence "affects" (rather than "substantially affects") interstate commerce and that VAWA therefore met the "*modest threshold* required by the Commerce Clause," *ante*, at 50, none of Congress's findings merits deference. Given that the Supreme Court has repeatedly deferred to a congressional record containing evidence that an activity affected interstate commerce without *any* specific findings as to the degree of this effect, *see, e.g., McClung*, 379 U.S. at 299; *Heart of Atlanta Motel*, 379 U.S. at 246, and that in *Lopez* the Court reiterated that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," *Lopez*, 514 U.S. at 562, this contention is a makeweight at best. [4] In fact, a panel of this court, which included two members of today's majority, recently relied on congressional committee reports to uphold a federal statute in the face of a *post-Lopez* Commerce **[**36]** Clause challenge even though those reports -- and the statute itself -- found merely that the regulated activity affected (not substantially affected) interstate commerce. *See Hoffman v. Hunt*, 126 F.3d 575, 587 (4th Cir. 1997)(citing H.R. Conf. Rep. No. 103-488 at 7-8 (1994), *reprinted in* 1994 U.S.C.C.A.N. 724, 724-25); Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, § 2, 108 Stat. 694 (1994); *see also Terry v. Reno*, 322 U.S. App. D.C. 124, 101 F.3d 1412, 1416 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264, 117 S. Ct. 2431, 138 L. Ed. 2d 193 (1997).

[37]** Moreover, the majority's critique of the findings here ignores one of those findings' most significant characteristics. A year *after* the Senate Report that the majority faults, Congress enacted VAWA upon receipt from the Conference Committee of findings (which were originally included in the statute itself) that gender-based violence has a "*substantial* adverse effect on interstate commerce." H.R. Conf. Rep. No. 103-711, at 385 (emphasis added). That Congress made these express findings *prior* to the issuance of *Lopez*, when the importance of congressional findings that regulated activity has a "substantial" effect on interstate commerce had not yet been explicated, plainly demonstrates just how strong Congress found the link between gender-based violence and interstate commerce to be.

The majority further claims that findings and evidence of the effects of gender-based violence on the *national economy* are irrelevant because they do not "describe the effects of gender-motivated violence on *interstate commerce*." *Ante*, at 50. The Commerce Clause, however, pertains to more than just interstate commerce; it gives Congress a plenary power "to regulate Commerce **[**38]** with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. This broad provision of authority encompasses the power to regulate problems affecting the national economy as a whole. The Commerce Clause does not render "the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with national needs." *North American Co. v. SEC*, 327 U.S. 686, 705, 90 L. Ed. 945, 66 S. Ct. 785 (1946). Thus, the mere fact that a statute **[*916]** addresses a problem affecting the national economy in general, rather than interstate commerce in particular, does not deprive Congress of the authority to enact it under the Commerce Clause.

The majority eventually concedes that VAWA's "legislative record" demonstrates "that violence against women is a sobering problem . . . that . . . ultimately does take a toll on the national economy" and "supports an inference that some portion of this violence, and the toll it exacts, it attributable to gender animus." *Ante*, at 52. Nonetheless, the majority holds that Congress exceeded **[**39]** its Commerce Clause authority in enacting VAWA. I cannot agree.

Proper application of the mandated rational basis standard of judicial review simply does not permit the result reached by the majority. That standard requires us to answer a single question: did Congress have a rational basis for finding, as it expressly did, that serious violence motivated by gender animus has "a substantial adverse affect on interstate commerce by deterring potential victims from traveling interstate, from engaging in employment in interstate commerce, and from transacting with business, and in places involved, in interstate commerce . . ., by diminishing

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[4] Similarly, the majority's contention as to the statute's purposes is meritless. The majority asserts that one of Subtitle C's "express statutory purpose[s]" -- "to promote *public safety, health, and activities affecting interstate commerce*" -- exhibits Congress's "misapprehension of the scope of the power to regulate interstate commerce." *Ante*, at 51. But in *Hodel*, the Supreme Court held that Congress could properly exercise its Commerce Clause power to require restoration of mined "prime farmland," which had only an "infinitesimal" effect on interstate commerce, 452 U.S. at 322-24, *because* Congress could reasonably act to protect "agriculture, the environment, *or public health and safety, injury to any of which interests would have deleterious effects on interstate commerce*," *id.* at 329 (emphasis added).

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. Congress so found only after four years of hearings and consideration of massive amounts of testimony, statistics, and other evidence. Analysis of this legislative record unquestionably demonstrates that each one of Congress's findings as to the substantial, deleterious impact of gender-based violence on interstate commerce is grounded in abundant evidence. In fact, it is hard to envision **[**40]** more careful legislative consideration, a more complete legislative record, or more amply supported legislative findings. 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. [5]

[41]** Supreme Court precedent well supports this conclusion. Certainly legislators could rationally find that the impact of gender-motivated violence on interstate commerce was at least as substantial as the impact of growing wheat for home consumption, *see Wickard v. Filburn*, 317 U.S. 111, 125, 87 L. Ed. 122, 63 S. Ct. 82 (1942) ("even if . . . activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce"), or racial discrimination, *see McClung*, 379 U.S. at 304 (Congress had a "rational basis" for believing that racial discrimination by local (non-chain) restaurants located in a single state affected **[*917]** interstate commerce), or local loansharking, *see Perez*, 402 U.S. at 156 (Congress rationally concluded that local loansharking affects interstate commerce because it supports "organized crime," which "exacts millions from the pockets of people"). As the Supreme Court explained in *Heart of Atlanta Motel*, "if it is interstate commerce that feels the pinch, it does not matter how local the operation which **[**42]** applies the squeeze." 379 U.S. at 258 (internal citation omitted).

Given Congress's clear finding that gender-based violence has a substantial effect on interstate commerce, the compelling evidence in the legislative record supporting that finding, and the fact that the challenged statute in no way interferes with state action on matters of traditional state concern, it seems to me that a court can only uphold Subtitle C. Significantly, every court to consider the question, except the majority and the court below, has reached the same conclusion. *See Liu v. Striuli*, 36 F. Supp. 2d 452, 1999 WL 24961 (D.R.I. 1999); *Ziegler v. Ziegler*, 28 F. Supp. 2d 601 (E.D. Wash. 1998); *Crisonino v. New York City Housing Auth.*, 985 F. Supp. 385 (S.D.N.Y. 1997); *Anisimov v. Lake*, 982 F. Supp. 531 (N.D. Ill. 1997); *Seaton v. Seaton*, 971 F. Supp. 1188 (E.D. Tenn. 1997); *Doe v. Hartz*, 970 F. Supp. 1375 (N.D. Iowa 1997), *rev'd on other grounds*, 134 F.3d 1339 (8th Cir. 1998); *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996); *Timm v. DeLong*, 59 F. Supp. 2d 944 (D. Neb. 1998); **[**43]** *Mattison v. Click Corp. of America, Inc.*, 1998 U.S. Dist. LEXIS 720, Civ. A. No. 97- CV-2736, 1998 WL 32597 (E.D. Pa. Jan. 27, 1998). [6]

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[5] The majority contends that in reaching this conclusion I have failed to engage in any "independent analysis of whether gender-motivated violence substantially affects interstate commerce." *Ante*, 66. First, I note that this criticism epitomizes the majority's flawed approach to the question before us -- judges are *not* to determine in the first instance whether a regulated activity substantially affects interstate commerce. Rather, they are, as the *Lopez* Court directed, "to evaluate the *legislative judgment* that the activity in question substantially affected interstate commerce." *Lopez*, 514 U.S. at 563 (emphasis added).

Second, the majority's criticism that I have failed to make any "independent analysis" would only be valid if "independent analysis" required one to disagree with Congress. The majority offers no support for such a notion, and there is none. In fact, Supreme Court precedent demonstrates that if a court, after evaluating a statute and its legislative record, finds that it agrees with Congress's legislative judgment that a regulated activity substantially affects interstate commerce, the opinion of the court need only identify the relevant portions of the legislative record and state the court's conclusion that the legislative judgment made by Congress had a rational basis. *See, e.g., Hodel*, 452 U.S. at 277-80 (describing legislative record and then stating, "in light of the evidence available to Congress and the detailed consideration that the legislation received, we cannot say that Congress did not have a rational basis for concluding that surface coal mining has substantial effects on interstate commerce"); *Heart of Atlanta*, 379 U.S. at 252-53 (citing evidence in legislative record, in the absence of any findings, and then stating "the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel"). I have done precisely that here.

[6] Other courts have, without discussion of the constitutional question, held that a plaintiff has stated a valid cause of action under Subtitle C and so refused to grant defendants' motions to dismiss. *See, e.g., Kuhn v. Kuhn*, 1998 U.S. Dist. LEXIS 15315, No. 98 C 2395, 1998 WL 673629 (N.D. Ill. Sept. 16, 1998); *see also Wesley v. Don Stein Buick, Inc.*, 985 F. Supp. 1288, 1300-01 (D. Kan. 1997) (permitting plaintiff to amend her complaint to state a claim under Subtitle C without reaching the constitutional question).

C.

The length and the prolixity of the majority opinion fail to mask the deep flaws in its rationale for invalidating Subtitle C. The majority creates an unprecedented new rule of law and relies upon fundamentally unsound notions of both the judicial function and the demands of federalism.

[44]** 1.

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. Under the governing caselaw, including *Lopez*, Congress clearly had the authority to enact Subtitle C under the Commerce Clause.

The majority cites *Lopez* as the source for its rule that Commerce Clause legislation is unconstitutional unless it regulates economic activities or contains a jurisdictional element. *Lopez*, the majority contends, "expressly held that *because* the Gun-Free School Zones Act 'neither regulated a commercial activity nor contained a requirement that the possession be connected in any way to interstate commerce,'" *ante*, at 16 (quoting *Lopez*, 514 U.S. at 551) (emphasis added), "it exceeded the **[**45]** authority of Congress 'to regulate . . . Commerce among the several States,'" *id.* (quoting U.S. Const. art. I, § 8, cl. 3). *See also ante*, at 20-25.

Notwithstanding the frequency and vehemence with which the majority makes this assertion, it constitutes a fundamental mischaracterization of the Supreme Court's decision. To be sure, *Lopez* held that the GFSZA did not regulate a "commercial activity" or "contain [] a requirement [*i.e.*, a jurisdictional element] that the possession be connected in any way to interstate commerce." *Lopez*, 514 U.S. at 551. But the *Lopez* Court never held that the challenged statute exceeded Congress's authority *because* it did not fit into one of these categories. If the *Lopez* Court had struck down the GFSZA for these reasons alone, its opinion **[*918]** would have ended after discussion of these two issues at 514 U.S. at 562. Instead, the Court continued -- for an additional six pages -- to evaluate whether one could rationally conclude that possession of a gun in a school zone substantially affected interstate commerce. *Lopez*, 514 U.S. at 562-68. The Court only invalidated **[**46]** the GFSZA after pointing out the lack of congressional findings establishing a substantial effect on interstate commerce, after noting that the statute displaced state policy choices in an area of traditional state concern, and after considering and rejecting the Government's arguments.

A new rule restricting Congress's power under the Commerce Clause to regulating economic activity or enacting statutes containing jurisdictional elements undeniably conflicts with the pre-existing Commerce Clause jurisprudence that the *Lopez* Court approved. The *Lopez* Court quoted *Wickard v. Filburn*'s famous teaching that "even if appellee's activity be local and *though it may not be regarded as commerce, it may still, whatever its nature*, be reached by Congress *if it exerts a substantial economic effect on interstate commerce*." 317 U.S. at 125 (emphasis added), *quoted in Lopez*, 514 U.S. at 556. That statement simply cannot be reconciled with the majority's new rule.

Similarly, in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615 (1937), which was also approved in *Lopez*, the Supreme Court explained that **[**47]**

> the fundamental principle is that the power to regulate commerce is the power to *enact "all appropriate legislation" for "its protection and advancement*." . . . That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it."

Id. at 36-37 (emphasis added) (citations omitted); *see also Heart of Atlanta Motel*, 379 U.S. at 258 ("The power of Congress to *promote* interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce." (emphasis added)). It is this power -- the power to protect, advance, and promote commerce -- that Congress invoked in passing Subtitle C. *See also Goetz v. Glickman*, 149 F.3d 1131, 1137 (10th Cir. 1998) (rejecting argument that "Congress' commerce power is limited to restricting or prohibiting an activity," concluding "'it is now indisputable that the power to regulate interstate commerce includes the power to promote interstate commerce'") (quoting *United States v. Frame*, 885 F.2d 1119, 1126 (3d Cir. 1989)). **[**48]**

In arguing that Subtitle C is unconstitutional because it does not directly regulate economic activity, the majority slights these principles and 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. *See Jones & Laughlin*, 301 U.S. at 36-37.

The fact that in enacting Subtitle C Congress was also legislating against a moral wrong renders the enactment "no less valid" under the Commerce Clause. *See Heart of Atlanta Motel*, 379 U.S. at 257. That **[**49]** a statute was not explicitly meant "to increase the gross national product by removing a barrier to free trade, but rather to protect personal safety and property rights, is irrelevant [because] Congress can regulate interstate commerce for any lawful motive." *United States v. Soderna*, 82 F.3d 1370, 1374 (7th Cir. 1996) (Posner, C.J.); *see also United States v. Weslin*, 156 F.3d 292, 296 (2d Cir. 1998) ("it does not matter whether Congress's motive in enacting the statute was commercial, noncommercial, or mixed. For Congress may regulate interstate commerce **[*919]** for any purpose not affirmatively forbidden by the Constitution").

In sum, established precedent renders the majority's contention that gender-based violence itself is not an economic activity simply beside the point. In an effort to escape this precedent, the majority suggests that *Lopez* heralds a new era of Commerce Clause jurisprudence in which courts will flyspeck congressional judgments, striking them down if they do not regulate a sufficiently economic activity or do not contain a jurisdictional element. That is certainly not what the *Lopez* Court said. As an inferior **[**50]** court, we must follow what the Supreme Court says, not what we believe, or hope, its opinions foreordain.

The *Lopez* Court said that the GFSZA "plowed thoroughly new ground and represented a sharp break with the long-standing pattern of federal firearms legislation," 514 U.S. at 563 (internal quotation marks omitted), indicating that it was enunciating what two members of the five person majority expressly stated was a "limited holding," *id.* at 568 (Kennedy, J., concurring). Of course, the *Lopez* Court did refuse to make an "additional expansion" of Congress's commerce power to uphold the GFSZA, and it clarified that a regulated activity must "substantially" affect interstate commerce. But as the majority itself apparently acknowledges, *ante*, at 61, the *Lopez* Court did not overrule a single Commerce Clause precedent. Nor, as detailed within, *see infra*, at 193-194, did it abandon the "rational basis" test. *Id.* at 557-68; *see also United States v. Hartsell*, 127 F.3d 343, 348 n.1 (4th Cir. 1997) (*Lopez* is not "a radical sea change which invalidates the decades of Commerce Clause analysis"); *United States v. Wright*, 117 F.3d 1265, 1269 (11th Cir. 1997) **[**51]** ("*Lopez* did not alter our approach to determining whether a particular statute falls within the scope of Congress's Commerce Clause authority"), *vacated in part on other grounds*, 133 F.3d 1412 (11th Cir. 1998); *United States v. Wilson*, 73 F.3d 675, 685 (7th Cir. 1995)(the *Lopez* Court "reaffirmed, rather than overturned, the previous half century of Commerce Clause precedent").

Rather, in describing the history of the Court's Commerce Clause jurisprudence, *Lopez* forthrightly embraced the modern expansive view of Congress's power under the Commerce Clause, and eschewed the more restrictive view of "commerce" that relied on formalistic distinctions. 514 U.S. at 555. Justice Kennedy's concurrence specifically warned us *not* to seek "mathematical or rigid formulas" for deciding the constitutionality of statutes under the Commerce Clause. 514 U.S. at 573 (Kennedy, J., concurring) (*citing Wickard*, 317 U.S. at 123 n.24). The concurrence also cautioned against a strict requirement that the regulated activity itself be connected with commerce, noting that the history of the Supreme Court's Commerce Clause **[**52]** jurisprudence demonstrates the "imprecision of content-based boundaries used without more to define the limits of the Commerce Clause." *Id.* at 574 (Kennedy, J., concurring). Yet the majority's new rule mandates the use of precisely such rigid requirements and "content-based boundar[ies]."

The majority's attempt to distinguish the case at hand from *Hoffman*, 126 F.3d 575, in which this court recently held the Freedom of Access to Clinic Entrances Act (FACE) to be within Congress's Commerce Clause authority, tellingly demonstrates the problems with such formalistic rules. FACE contains no jurisdictional element and, as we pointed out, "the activity regulated" was "not itself economic or commercial." *Id.* at 587. Rather the regulated conduct, like the activity regulated by Subtitle C, was identified as the "use of force" or the "threat of force" that sufficiently affects

interstate commerce. *Id.* Thus, FACE patently does not satisfy the majority's new rule, which restricts Congress's Commerce Clause authority to enactment of statutes with jurisdictional elements or regulations of economic activity.

Implicitly recognizing this, the majority slips **[**53]** in an exception to its rule for regulation of non-economic activity that has a "meaningful connection" with "specific" economic activities. *Ante*, at 21. It claims that, unlike protests at abortion clinics, gender-based violence lacks such a connection. *Id.* But Congress expressly found that gender-based violence does affect specific economic activities, *e.g.*, the participation of its victims in the labor market and the provision of health care **[*920]** services, and that the connection of gender-based violence to these activities is "meaningful" both in particular instances and in the aggregate.

The majority's rule thus forces it to contend that these economic activities are insufficiently "specific" and that the effect of gender-based violence upon such activities is insufficiently "direct." *Id.* at 21, 27. Such specificity and directness requirements find no support in the governing "substantially affects" test, however. Indeed, the majority's requirement that the activity be "specific" conflicts with that test; it suggests that once an activity affecting commerce becomes widespread enough to be "general," its effects somehow become insufficiently "substantial" **[**54]** to justify an exercise of the Commerce Clause power. Moreover, as noted in *Lopez*, the Supreme Court "departed from the distinction between 'direct' and 'indirect' effects on interstate commerce" in 1937 in *Jones & Laughlin*, 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615, and has never returned to such distinctions because they "artificially [] constrain[] the authority of Congress to regulate interstate commerce." *Lopez*, 514 U.S. at 555-56. The majority opinion amply proves the wisdom of the *Lopez* Court's rejection of such rigid and technical tests for determining constitutionality under the Commerce Clause; as the majority's difficulty with its own formula shows, such tests lead only to a proliferation of dubious distinctions.

The majority's new rule also conflicts with the Supreme Court's specific holding, subsequent to *Lopez*, that an activity need not be commercial in character in order to come within the scope of the Commerce Clause. Just two terms ago, in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 117 S. Ct. 1590, 137 L. Ed. 2d 852 (1997), the Court held that a state law adversely affecting a nonprofit **[**55]** camp violated the dormant Commerce Clause. At the outset of its analysis the *Camps* Court noted that the "reasoning" of cases involving "Congress' affirmative Commerce Clause powers" also applied in the context of the dormant Commerce Clause. 117 S. Ct. at 1597. The Court then rejected arguments made by those defending the statute "that the dormant Commerce Clause is inapplicable [] because the campers are not 'articles of commerce' or more generally that interstate commerce is not at issue here." *Id.* The critical inquiry was not whether campers constituted "articles of commerce" or whether attending camp constituted an economic activity; rather, the challenged statute implicated the Commerce Clause because the services provided by the camp "clearly had a substantial effect on interstate commerce." *Id.*

Not only is the majority's new rule without precedent, the premises underlying that rule are seriously misconceived. The majority contends that gender-based violence is "a type of crime relatively unlikely to have any economic character at all." *Ante*, at 21. *See also id.* at 22. This argument only makes sense if one utterly ignores the effects of gender-based **[**56]** violence and instead focuses entirely on the motives of its perpetrators. There is, however, no reason to define the character of a crime by reference only to the actor's motive. Such reasoning leads to incongruous results. For example, arson is clearly a property crime, but on the majority's rationale it would not be considered as such in cases where the perpetrator had no interest in destroying anything, but only wanted to see the flames.

Moreover, the majority's implicit claim that gender-based harm to persons is insufficiently economic to be regulable under the commerce power involves a disturbing anomaly, as recent events demonstrate. A few months ago in Baltimore, an apparent victim of gender-based violence was found locked in the trunk of a car, which had been set on fire. The majority's approach would appear to give Congress the authority, under the Commerce Clause, to provide a remedy for the damage done to the car, but not for the victim's medical expenses, lost wages, or other damages. [7]

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[7] The distinction between harm to property and harm to persons is not merely a hypothetical one here; rather it is directly relevant to the scope of the majority's holding, because Subtitle C applies to property damage as well. It is difficult to see how the majority's rationale about economic activities could apply to this aspect of the statute. Could one honestly say that a statute, which provides a remedy for property damage caused by gender-based violence, regulates an activity that is *insufficiently economic* to come within the commerce power? One could only do so by falling back on unfounded categorical assertions that violence, or at least gender-based violence, is not an economic activity. One certainly could not say that a statute providing a remedy for gender-based

[57] [*921]** In sum, the majority has created a new and troubling rule out of whole cloth. *Lopez* cannot be fairly read to restrict congressional authority under the Commerce Clause to regulation of economic activities and enactment of statutes containing a jurisdictional element. Indeed, Supreme Court precedent, including *Lopez*, rejects the use of such rigid, formalistic rules. 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.

2.

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.

The Constitution creates a government of separated powers, in which legislative authority is allocated to Congress. Courts can, of course, refuse to give effect to **[**58]** an otherwise properly enacted law if they find it inconsistent with the Constitution. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-78, 2 L. Ed. 60 (1803). But to prevent this mighty judicial power from engulfing and ultimately eliminating the legislative powers reserved to Congress, the Supreme Court has established that acts of Congress are entitled to a strong presumption of constitutionality. *See Flemming v. Nestor*, 363 U.S. 603, 617, 4 L. Ed. 2d 1435, 80 S. Ct. 1367 (1960).

Chief Justice Rehnquist, the author of the principal opinion in *Lopez*, has elaborated upon this rule of judicial restraint, noting that because "judging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform," constitutional review of a statute begins with "deference" to the "duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 319, 87 L. Ed. 2d 220, 105 S. Ct. 3180 (1985) (internal quotation marks omitted). The Chief Justice has further explained **[**59]** that such deference is only appropriate because a court "must have due regard to the fact that [it] is *not exercising a primary judgment* but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." *Rostker v. Goldberg*, 453 U.S. 57, 64, 69 L. Ed. 2d 478, 101 S. Ct. 2646 (1981) (internal quotation marks omitted) (emphasis added). Justice Kennedy, concurring in *Lopez*, similarly noted that "the sworn obligation to preserve and protect the Constitution in maintaining the federal balance" belongs "*in the first and primary instance*" to the legislative and executive branches, not the judiciary. *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring) (emphasis added).

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 **[**60]** 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 **[*922]** for more than one such principle: "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S. at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991)). 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. *Compare ante*, at 5-6, **[**61]** *with Lopez*, 514 U.S. at 552.

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property damage regulates "a type of crime relatively unlikely to have any economic character at all." *Ante*, at 21. This aspect of Subtitle C would thus seem to be unaffected by the court's opinion today. Yet the majority purports to invalidate Subtitle C in its entirety.

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. *See ante*, at 67. [8] Indeed, the majority complains about the "incessant invocations" of this standard by Brzonkala and the Government. *Ante*, at 66. It seems natural, however, to refer frequently to the governing standard of judicial review in a case, like this one, in which application of that standard is critical. Moreover, the parties do no more than quote and follow the Supreme Court, which has consistently (not to say incessantly) invoked precisely this standard. *See, e.g., Preseault*, 494 U.S. at 17 (deference to congressional findings of sufficient effect on interstate commerce is required if there is "*any rational basis* for such a finding") (emphasis added); *Hodel*, 452 U.S. at 277 (when "Congress has determined that an activity affects interstate commerce, the courts need only inquire whether the finding is *rational*") (emphasis added); *McClung*, 379 U.S. at 303-04 (after **[**62]** a court determines that Congress had "a *rational basis* for finding a chosen regulatory scheme necessary to the protection of commerce" the court's "investigation is at an end") (emphasis added).

Although the *Lopez* Court did clarify that activity must "substantially" affect interstate commerce in order for Congress to regulate it under the Commerce Clause, the Court did not in any way retreat from the well-established rational basis standard of judicial review. To the contrary, the *Lopez* Court explained that since *Jones & Laughlin*, 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615 -- which both recognized a "greatly expanded" view of Congress's power under the Commerce Clause and warned that this power is "subject to outer limits" -- the Supreme Court "has heeded this warning and undertaken to decide whether a *rational basis* existed **[**63]** for concluding that a regulated activity sufficiently affected interstate commerce." *Lopez*, 514 U.S. at 556-57 (emphasis added) (citing *Hodel, Perez, McClung*, and *Heart of Atlanta Motel*).

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. *See United States v. Franklyn*, 157 F.3d 90, 93 (2d Cir.) *cert. denied*, 119 S. Ct. 563 (1998) (upholding 18 U.S.C. § 922(o), which criminalizes the possession or transfer of handguns); *United States v. Cardoza*, 129 F.3d 6, 11-13 (1st Cir. 1997) (upholding Youth Handgun Safety Act); *Hoffman v. Hunt*, 126 F.3d 575, 584-88 (4th Cir. 1997) (upholding Freedom of Access to Clinic Entrances Act (FACE)); *United States v. Knutson*, 113 F.3d 27 (5th Cir. 1997) (upholding 18 U.S.C. § 922(o) criminalizing the possession or transfer of machine guns); **[**64]** *United States v. Parker*, 108 F.3d 28, 29-31 (3d Cir.) (reversing district court and upholding Child Support Recovery Act), *cert. denied*, 522 U.S. 837, 118 S. Ct. 111, 139 L. Ed. 2d 64 (1997); *United States v. Olin Corp.*, 107 F.3d 1506, 1509-11 (11th Cir. 1997) (upholding CERCLA); *United States v. Bramble*, 103 F.3d 1475, 1482 (9th Cir. 1996) (upholding Eagle Protection Act); *Terry v. Reno*, 322 U.S. App. D.C. 124, 101 F.3d 1412, 1415-18 (D.C. Cir. 1996) (upholding FACE), *cert. denied*, 520 U.S. 1264, 117 S. Ct. 2431, 138 L. Ed. 2d 193 (1997); *Proyect v.* **[*923]** *United States*, 101 F.3d 11, 12-14 (2d Cir. 1996) (upholding Comprehensive Drug Abuse Prevention and Control Act); *United States v. McHenry*, 97 F.3d 125, 128-29 (6th Cir. 1996) (upholding the Anti Car Theft Act), *cert. denied*, 519 U.S. 1131, 117 S. Ct. 992, 136 L. Ed. 2d 873 (1997); *United States v. Hampshire*, 95 F.3d 999, 1001-04 (10th Cir. 1996) (upholding Child Support Recovery Act), *cert. denied*, 519 U.S. 1084, 117 S. Ct. 753, 136 L. Ed. 2d 690 (1997); **[**65]** *United States v. Kenney*, 91 F.3d 884, 889-91 (7th Cir. 1996) (upholding 18 U.S.C. § 922(o)); *United States v. Dinwiddie*, 76 F.3d 913, 920 (8th Cir.) (upholding FACE), *cert. denied*, 519 U.S. 1043, 117 S. Ct. 613, 136 L. Ed. 2d 538 (1996).

Because it refuses to apply the rational basis standard, the majority fails to give appropriate deference to the abundant and well-supported congressional findings demonstrating that gender- motivated violence has the requisite effect on interstate commerce. The majority itself acknowledges that "a healthy degree of judicial deference to reasonable legislative judgments of fact" is appropriate, but then asserts that the parties' invocation of rational basis review contemplates a "deference indistinguishable from judicial abdication," and refuses to defer *in any way* to the compelling findings here. *Ante*, at 66. Even if the parties have oversold the necessary deference, and that is not clear to me, a court must nonetheless defer to rational congressional findings. This is required because we are, as the Chief Justice explained, "not exercising a primary judgment," *Rostker*, 453 U.S. at 64, **[**66]** but rather reviewing the "carefully considered decision of a coequal and representative branch of our Government," *Walters*, 473 U.S. at 319. Deference to these legislative judgments, not disregard of them, constitutes the "paradigm of judicial restraint." *FCC*

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[8] The majority also maintains that I do not apply the rational basis standard and that it does. *See ante*, at 67-68. I am content to let the reader judge.

v. Beach Communications, Inc., 508 U.S. 307, 314, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993). *Compare ante*, at 122-137 (Wilkinson, C.J., concurring).

Congressional findings are significant, not for some formalistic or procedural reason, *cf. ante*, at 40-49, but because they clearly state Congress's contemporaneous judgment as to the need, scope, and basis for the law that it is enacting. The statute itself articulates the *existence* of a congressional judgment of constitutionality, while findings articulate the *content* of that judgment. We defer to the former out of respect for the primary legislative power and sworn responsibility of Congress under the constitution, *Rostker*, 453 U.S. at 64, and we grant an additional measure of deference to the latter in recognition of Congress's status as a coequal, deliberative body whose determinations are presumed to be rational, **[**67]** *Walters*, 473 U.S. at 319. 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.

In *Lopez*, of course, the Court had no congressional findings to which to defer. But nothing in *Lopez* suggests that when Congress has considered a matter and made a rational finding of constitutionality -- let alone an explicit finding based on a massive congressional record, as in this case -- a court should not defer to that finding. On the contrary, the *Lopez* Court noted that consideration of congressional findings is "of course" part of the proper judicial inquiry. *Lopez*, 514 U.S. at 562. In support of that statement, the *Lopez* Court cited *Preseault*, 494 U.S. at 17, in which the Court expressly explained that "we must defer to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding." (internal quotation **[**68]** marks omitted).

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. *See ante*, at 41-49. 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. In contrast to Subtitle C, in which Congress compiled an enormous factual record and left nothing to guesswork, in the GFSZA Congress **[*924]** left everything -- the necessity for the legislation, the rationale supporting it, the connection between gun possession near schools and interstate commerce, even the source of Congress's power -- to conjecture.

The GFSZA was enacted as part of the Crime Control Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844. The House Report on the Crime Control Act states its purpose in the most general terms, as provision of "a legislative response to various aspects of the problem of crime in the United States." H.R. Rep. No. 101-681(I), at 69 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6473. **[**69]** This report does not even mention the GFSZA, let alone explain how possession of a gun within 1000 feet of a school affects interstate commerce. Congress held a single subcommittee hearing on GFSZA; witnesses testified as to "tragic instances of gun violence in our schools," but no one mentioned "the effect of such violence upon interstate commerce" -- not even a floor statement attempted to explain the constitutional basis for the statute. *United States v. Lopez*, 2 F.3d 1342, 1359 (5th Cir. 1993), *aff'd*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995).

The lack of congressional findings served as the justification for the Fifth Circuit's refusal to uphold the GFSZA. *Id.* Although the Supreme Court did not affirm the Fifth Circuit on this basis, the Court did find the lack of legislative findings significant. First, the Court remarked on the Government's "concession that 'neither the statute nor its legislative history contain[s] express congressional findings.'" *Lopez*, 514 U.S. at 562 (quoting Brief for United States at 5-6). Then the Court noted that although such findings "normally [are] not required," they do assist **[**70]** a court. *Id.* Such findings, the Court explained, "enable [a court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no substantial effect was visible to the naked eye." *Id.* at 563.

Nevertheless, the majority maintains that the *Lopez* Court's "lucid recitation" of the "arguments" made by the Government and dissent in that case eliminated any need for congressional findings. *Ante*, at 42. Alternatively, the majority claims that if the *Lopez* Court's decision "turned on" the lack of congressional findings, it could and would have consulted findings that Congress made after the statute had been challenged. *Id.*

These contentions present multiple problems. If the Supreme Court truly regarded the lack of congressional findings in the GFSZA to be of no import, why did the Court comment on the assistance such legislative findings provide the

judiciary? *See Lopez*, 514 U.S. at 562. Why did the Court note the lack of findings in the GFSZA? *Id.* Why did the Court point out that the Government did "not rely upon [] subsequent [congressional] findings as a substitute **[**71]** *for the absence of findings in the first instance"? Id.* at 563 n.4 (emphasis added). And why did the Court also hold that it would not import "previous findings to justify" the GFSZA? *Id.* at 563.

As indicated above, *supra*, at 195, congressional findings submitted upon passage of legislation simply are not the same as the arguments of lawyers, even government lawyers, after a law has been challenged in the courts. For example, in *United States v. Bass*, 404 U.S. 336, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971), the government lawyers argued that in the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1202(a), 82 Stat. 197, 236 (1968), Congress validly exercised its Commerce Clause authority to criminalize possession of a firearm by a felon. Neither the statutory language nor any Congressional findings so stated. For this reason, the Supreme Court refused to "adopt this broad reading" of the statute and instead construed it to require a connection with interstate commerce. *Id.* at 339. However, the Court *expressly reserved the question* of whether the result would be different if Congress **[**72]** had made appropriate findings, noting that "in light of our disposition of the case, we do not reach the question whether, upon *appropriate findings*, Congress can constitutionally punish the 'mere possession' of firearms." *Id.* n.4 (emphasis added).

In sum, the Supreme Court has directed that, in deciding whether a statute was properly enacted under the Commerce Clause, a court must apply a rational basis standard of **[*925]** judicial review, deferring -- not abdicating but deferring -- to rationally based congressional findings that the regulated activity substantially affects interstate commerce. This means that when Congress makes findings, a court carefully examines them, but only to determine if they have a rational basis. The sole ground for rejecting legislative findings is, therefore, that they lack *any* rational basis. [9]

[73]** In order to strike down Subtitle C, the majority must ignore our restricted role in assessing a challenge to Congress's Commerce Clause power, refuse to follow the prescribed rational basis standard of judicial review, and deny the deference due to Congress's clear and amply supported findings.

3.

Finally, the majority errs by profoundly misunderstanding the nature and extent of the proper limits imposed by federalism concerns on Congress's commerce power. Whether considered as part of the substantially affects tests, *see Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624, or as a separate inquiry, *see New York v. United States*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992), federalism concerns do not justify invalidation of Subtitle C. The Founders provided Congress with a broad and far-ranging power to regulate interstate commerce, but they restrained that power by locating it within an explicit constitutional system that depends upon two spheres of government -- state and federal -- to represent the interests of, and be accountable to, the people. The majority disregards this careful scheme of structural limitations and seeks to **[**74]** place additional and unprecedented constraints on Congress. 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 Constitution allocates to Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. 1, § 8, cl. 3. The Founders intended this power to be extensive in order to remedy the "defect of power in the existing Confederacy to regulate the commerce between its several members." The Federalist No. 42, at 267 (James Madison) (Clinton Rossiter ed., 1961). From the outset, the Supreme

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[9] *Post-Lopez*, our sister circuits have often reiterated that "court[s] must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Terry*, 101 F.3d at 1416; *accord Proyect*, 101 F.3d at 12-13; *United States v. McKinney*, 98 F.3d 974, 979 (7th Cir. 1996); *Hampshire*, 95 F.3d at 1004; *United States v. Kim*, 94 F.3d 1247, 1250 (9th Cir. 1996); *United States v. Bishop*, 66 F.3d 569, 576-77 (3d Cir. 1995); *Cheffer v. Reno*, 55 F.3d 1517, 1520-21 (11th Cir. 1995); *see also Knutson*, 113 F.3d at 29-31 (upholding 18 U.S.C. § 922(o) solely on the basis of "congressional findings" and noting that *Lopez* "made clear that federal Commerce Clause legislation continues to merit a high degree of judicial deference"); *United States v. Monteleone*, 77 F.3d 1086, 1091-92 (8th Cir. 1996) (upholding 18 U.S.C. § 922(d) on the basis of "explicit Congressional findings"). Moreover, in *Leshuk*, 65 F.3d at 1112, this court upheld the Comprehensive Drug Abuse Prevention and Control Act principally on the basis of Congress's detailed findings.

Court recognized the extent of this power, holding it "complete in itself," and to "be exercised to its utmost extent." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196, 6 L. Ed. 23 (1824). This statement of Chief Justice Marshall in *Ogden* is "understood now as an early and authoritative recognition that the Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise." *Lopez*, 514 U.S. at 568 **[**75]** (Kennedy, J., concurring). At the same time, however, the Founders established judicially-enforceable limits on Congress's commerce authority.

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 -- a federal government composed of sovereign states. In *Ogden* itself, Chief Justice Marshall recognized that the central structural concern in Commerce Clause cases is the capacity of different government entities to represent the interests of the people:

> If, as has always been understood, the sovereignty of congress, though limited to specific objects, is plenary as to those objects, the power over commerce . . . is **[*926]** vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have **[**76]** relied, to secure them from abuse. They are the restraints on which the people must often rely solely, in all representative governments.

Gibbons, 22 U.S. at 197. Far from disavowing this principle, the Supreme Court in modern times has expressly embraced it:

> The 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, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985). [10] 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 **[**77]** to the will of the people, rather than from the unelected federal judiciary.

[78]** But neither in the nineteenth nor in the twentieth century has the Supreme Court counseled absolute judicial acquiescence to Congress's Commerce Clause legislation. Although, as Justice Marshall's language in *Ogden* implies, 22 U.S. at 197, Congress's capacity to represent "the people" is inherently superior to that of the courts, it is not inherently superior to that of state legislatures. The rationale for judicial deference to Commerce Clause legislation

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[10] The majority scolds me for citing and quoting *Garcia v. San Antonio Metro. Transit*, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985), because then-Justice Rehnquist and Justice O'Connor, in their dissents in that case, predicted that it would one day be overruled so that the Court could resume its "constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States." *Ante*, at 74 (quoting *Garcia*, 469 U.S. at 589 (O'Connor, J., dissenting)) (internal quotation marks omitted). *Garcia*, however, remains the law of the land, and treating it as such hardly constitutes "quaint innocence." *Ante* at 72. Furthermore, the emphasis placed on political accountability in cases like *New York* and *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997), conclusively demonstrates that the political process concerns articulated in *Garcia* have in fact proved to be more accommodating of an effective judicial role in protecting federalism than they initially appeared to be. Far from being "in blissful denial of the Court's most recent precedents on Our Federalism," *ante*, at 72, therefore, faithful adherence to those precedents requires courts to choose an approach deriving from considerations of representative authority and political process over a categorical approach of the sort that the majority adopts today. Finally, and most importantly, the majority's criticism of my use of *Garcia* rests on a fundamental misrepresentation of my position. Whatever the legal or totemic significance of *Garcia*, I nowhere maintain, and this dissent cannot fairly be read even to suggest, that "Congress alone is constitutionally responsible for the protection of the sovereign States." *Ante*, at 72. Rather, I repeatedly and expressly recognize that the courts, and not just Congress, have a definite obligation to ensure that our federal structure remains intact. *See supra*, at 199-200, and *infra*, at 201-204, 206-208, 212.

does not, therefore, apply as strongly to cases involving *conflicts* between federal and state authority as it does to cases in which a court has only its own view of what appropriately falls within the commerce power upon which to rely.

For this reason, courts 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. *See, e.g., Gregory*, 501 U.S. at 458 **[**79]** (noting that our federal structure makes **[*927]** government more "sensitive to the needs of a heterogeneous society" and "allows for [] innovation and experimentation in government"). Of course, dormant Commerce Clause doctrine teaches that a uniform national scheme must always be preferred with respect to regulations of certain kinds, and *Lopez* similarly suggests that when Congress regulates with respect to "commercial concerns that are central to the Commerce Clause," inevitably it is regulating activity that has a substantial effect on interstate commerce. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). [11]

[80]** 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. *See Garcia*, 469 U.S. at 554. The Supreme Court's decision in *New York*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408, 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 "raised the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests." *Id.* at 182. Moreover, by obscuring **[**81]** accountability for the selection of disposal sites, the 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. *Id.* at 168. The problem of political accountability will be most acute when, as with the statute at issue in *New York*, the federal government has effectively commandeered state authority:

> Where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

Id. at 169. The representative effectiveness of state and federal **[**82]** governments would also be impaired if "the Federal Government [were] to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities," because in this situation "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring).

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[11] Thus, not only is federal regulation of this kind constitutional under the affirmative Commerce Clause, but also state regulation of this sort, if it benefits in-state interests and burdens out-of-state interests, is prohibited by the dormant Commerce Clause. A court reviewing such federal regulation need not weigh the representative capacity of a state legislature against that of Congress because, as the dormant Commerce Clause teaches, the value of state representative authority could not, in those circumstances, outweigh the value of national uniformity. A court, therefore, need only consider whether the states are better suited than Congress to regulate a certain subject if the states would be permitted to discriminate in favor of their own residents in regulating that subject. It is solely in this context -- that of identifying the class of cases in which a court can consider the possible representative superiority of the states -- that the question of whether the regulated activity is sufficiently commercial or "economic" becomes relevant. Contrary to the majority's assertions, there is no rule that Congress is prohibited from ever using the commerce power to regulate certain subjects -- for example, activities that the majority categorizes as "non-economic" -- just because they are not at the core of the Commerce Clause.

[*928] *Lopez*, like *New York*, seeks to preserve the efficacy of both the states and the federal government as representative bodies. 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. [12]

[83]** 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. 514 U.S. at 564-67. But the Court never held that this characteristic was, in itself, sufficient to justify invalidation.

Second, the majority's requirement that Congress's **[**84]** 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. The Supreme Court has expressly criticized its own prior use of an approach that permitted this kind of decisionmaking:

> Although the need to reconcile state and federal interests obviously demanded that state immunity have some limiting principle, the Court did not try to justify the particular result it reached; it simply concluded that "a line [must] be drawn" and proceeded to draw that line. . . . This inability to give principled content . . . no less significantly than its unworkability, led the Court to abandon the distinction . . . .

Garcia, 469 U.S. at 543 (citations omitted). The majority's approach **[**85]** would permit cases to be decided based on **[*929]** this same empty principle that "a line must be drawn"; courts would not, under this approach, even be required to articulate where the line lies, or why it is there.

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

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[12] As Justice Kennedy suggested in *Lopez*, 514 U.S. at 577, history may often be relevant in determining whether a statute will impermissibly blur the lines of political accountability; the likelihood that citizens will become confused regarding which sphere of government is responsible for regulation of an activity will depend in part on which sphere has traditionally controlled it. History can also be a guide to the identification of areas in which states may be superior to Congress as representative entities. However, courts should not, indeed cannot, rule an act of Congress unconstitutional just because it regulates a matter historically governed by the states. Congress undeniably has the power to legislate in areas traditionally controlled by the states. *See Gregory*, 501 U.S. at 460. Moreover, as the Supreme Court has observed in the context of state immunity, history cannot reasonably be made dispositive on questions of federalism:

> The most obvious defect of a historical approach to state immunity is that it prevents a court from accommodating changes in the historical functions of States . . . . At the same time, the only apparent virtue of a rigorous historical standard, namely, its promise of a reasonably objective measure for state immunity, is illusory. Reliance on history as an organizing principle results in line-drawing of the most arbitrary sort; the genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated.

Garcia, 469 U.S. at 543-44. The same principles apply here.

the same reasoning as that advanced to support the statute in question. A court reviewing the constitutionality of legislation should base its decision primarily on the operation of a statute at hand, not on its belief in the unconstitutionality of another, hypothetical statute or series of statutes. *Cf. Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 569, 91 L. Ed. 1666, 67 S. Ct. 1409 (1947) ("constitutional issues affecting legislation will not be determined . . . in advance of the necessity of deciding them" or "in broader terms than are required by the precise facts to which the ruling is to be applied"); *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461, 89 L. Ed. 1725, 65 S. Ct. 1384 (1945) **[**86]** (noting Supreme Court's long practice of refusing to decide "abstract, hypothetical, or contingent questions, or to decide any constitutional question in advance of the necessity for its decision, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, or to decide any constitutional question except with reference to the particular facts to which it is to be applied" (citations omitted)). Courts must of course consider the implications that the statute before them may have for the federal structure established by the Constitution. But as explained earlier, and as 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 **[**87]** any activity and thereby to obliterate the division of power between the national government and the states. Well established federalism-based limits on the commerce power exist to preserve the union of independent states.

Federalism concerns already empower courts to invalidate Congressional legislation that severely interferes with the national political process, such as legislation that seriously impairs accountability by commandeering state regulatory authority for federal purposes. *See Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997); *New York*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408. Federalism concerns also authorize courts to strike certain legislation even if it interferes with the political process less severely. *See Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). For example, statutes that *directly supersede* official state action in an area of *traditional state concern* are constitutionally suspect. *See Lopez*, 514 U.S. at 561 n.3, 564; *id.* at 580-83 (Kennedy, J., concurring). This is so because such statutes significantly interfere with **[**88]** political accountability, and because regulation in an area of traditional state concern raises the question of whether the states may be better representatives of the people than the federal government, with respect to the regulated activity. 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. *Cf. id.* at 564-66. 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. Even statutes that lack such a limiting principle, however, should not be struck down categorically in order to satisfy "abstract notions" of theory or propositional logic, as the majority is so eager to do; rather, such statutes should be evaluated through the exercise of the kind of "practical judgment" that the Supreme Court has expressly advised courts to use in Commerce Clause cases, *see, e.g., Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 650, 88 L. Ed. 1509, 64 S. Ct. 1196 (1944), **[**89]** and that the *Lopez* Court itself employed, *see,* **[*930]** *e.g.*, 514 U.S. at 567 (noting, with respect to the principles that guide Commerce Clause adjudication, that "these are not precise formulations, and in the nature of things they cannot be").

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. It obviously does not interfere with official state action in the way that the GFSZA did. The *Lopez* Court noted that "under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.' . . . When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *Lopez*, 514 U.S. at 561 n.3 (quoting *Brecht v. Abraham*, 507 U.S. 619, 635, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993), and *United States v. Enmons*, 410 U.S. 396, 411-12, 35 L. Ed. 2d 379, 93 S. Ct. 1007 (1973)). **[**90]** 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. [13]

Nor, contrary to the majority's contentions, does Subtitle C directly supersede or impermissibly infringe **[**91]** 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. Instead, Congress expressly limited the reach of Subtitle C in deference to traditional areas of state expertise on family law matters. *See* 42 U.S.C. § 13981(e)(4) (statute confers no "jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.").

Moreover, nothing in Subtitle C otherwise supersedes or interferes with official state regulation. Victims of gender-based violence remain free to press state criminal charges and pursue state tort remedies, and states remain free to treat such claims as they will. In fact, far from displacing state law, Congress carefully designed Subtitle C to harmonize with state law and to protect areas of state concern. Subtitle C not only expressly deprives federal courts of any jurisdiction over state law domestic relations claims, 42 U.S.C. § 13981(e)(4); it also specifically references state criminal laws in **[**92]** defining a "crime of violence," 42 U.S.C. § 13981(d)(2) ("crime of violence" defined as "an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of *State* or Federal offenses described in section 16 of Title 18." (emphasis added)).

Subtitle C thus acts to supplement, rather than supplant, state law. The states may still "experiment[] to devise various solutions" to the problems of gender-based violence. *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). Subtitle C simply provides victims of such violence with an independent, federal civil rights remedy as an alternative means of recovering the damages they incur.

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 **[**93]** of Subtitle C.

[*931] 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. Congress concluded that:

> Other State remedies have proven inadequate to protect women against violent crimes motivated by gender animus. Women often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination. Traditional State law sources of protection have proved to be difficult avenues of redress for some of the most serious crimes against women. Study after study has concluded that crimes disproportionately affecting women are often treated less seriously than crimes affecting men. Collectively, these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims.

S. Rep. No. 103-138, at 49 (footnotes omitted). [14]

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[13] Because Subtitle C is not a criminal statute, reliance on and analogy to the cost of crime rationale that was rejected in *Lopez* is misplaced. *See ante*, at 28-31; 153-154 (Niemeyer, J., concurring). Congress did not attempt to justify its enactment of Subtitle C with vague references to the high cost of crime. Rather, Congress's enactment of Subtitle C was firmly rooted in rational findings, based on abundant evidence, that violence caused by gender animus substantially affects interstate commerce.

[14] The studies referred to in the above quotation were largely state-sponsored, including the following: Administrative Office of the California Courts Judicial Counsel, *Achieving Equal Justice for Women and Men in the Courts* (1990); Colorado Supreme Court Task Force on Gender Bias in the Courts, *Gender & Justice in the Colorado Courts* (1990); *Connecticut Task Force on Gender Justice and the Courts* (1991); Florida Supreme Court Gender Bias Study Commission, *Report* (1990); Supreme Court of Georgia, *Gender and Justice in the Courts* (1991); Illinois Task Force, *Gender Bias in the Courts* (1990); Maryland Special Joint Committee, *Gender Bias in the Courts* (1989); Massachusetts Supreme Judicial Court, *Gender Bias Study of the Court System in Massachusetts* (1989); Michigan Supreme Court Task Force on Gender Issues in the Courts, *Final Report* (1989); Minnesota Supreme Court Task Force for Gender Fairness in the Courts, *Final Report* (1989); Nevada Supreme Court Gender Bias Task

[94]** Congress further noted that "each and every one of the existing civil rights laws covers an area in which some aspects are also covered by State laws. What State laws do not provide, and cannot provide by their very nature, is a national antidiscrimination standard." S. Rep. No. 102-197, at 49. In Subtitle C, Congress acted in a paradigmatic area of federal expertise and passed a civil rights law in response to "existing bias and discrimination in the criminal justice system." H.R. Conf. Rep. No. 103-711, at 385.

Not only did extensive objective evidence support Congress's conclusion that the states could not effectively deal with the pervasive problem of gender-based violence, but state officials themselves confirmed the inability of the states to handle the problem. Indeed, nothing more clearly illustrates the basic difference between Subtitle C and the GFSZA than the fact that Subtitle C responded to the states' self-described needs, while the GFSZA added a redundant layer of federal regulation in an area where most states had already acted.

Before Congress ever enacted the GFSZA, 40 states had already effectively addressed possession of guns near schools and, in fact, had enacted **[**95]** criminal statutes outlawing the very behavior made a federal crime in the GFSZA, *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring); indeed, Lopez himself was originally arrested by state authorities and charged with a state crime. In sharp contrast, prior to the enactment of VAWA, 41 Attorneys General from 38 states (including Virginia), the District of Columbia, and two territories, urged Congress to enact the legislation, explaining that the states had been unable to solve the problems arising from gender-animated violence. *See Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 34-36 (1993) (Letter from Attorneys General). The highest law enforcement officer in each of these jurisdictions told Congress: "Our experience as attorneys **[*932]** general strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds." *Id.*; *see also Women and Violence: Hearing before the Senate Comm. on Judiciary*, 101st Cong. 137-56 (1990) (noting pervasive nature of this problem in both **[**96]** rural and urban areas).

When there has been, as there was here, a "demonstrated state failure" to deal with a problem, Congress would even be justified, as the Chief Justice has recently noted, in federalizing state *crimes. See* Chief Justice William H. Rehnquist, *1998 Year-End Report on the Federal Judiciary* (January 1999). [15] Thus, Congress was certainly justified in concluding that gender-based violence qualified as a problem for which national civil rights legislation was preferable to a variety of failed state approaches.

[97]** 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. Rather, Subtitle C governs civil rights, a traditional subject of federal regulation, and provides a necessary national remedy for a severe problem that the states have, by their own admission, been unable to address effectively.

Force, *Justice For Women* (1989); New Jersey Supreme Court Task Force, *Women in the Courts* (1984); New York Task Force on Women in the Courts, *Report* (1986); *Rhode Island Supreme Court Committee on Women in the Courts* (1987); Utah Task Force on Gender and Justice, *Report to the Utah Judicial Council* (1990); Vermont Supreme Court and Vermont Bar Association, *Gender and Justice: Report of the Vermont Task Force on Gender Bias in the Legal System* (1991); Washington State Task Force, *Gender and Justice in the Courts* (1989); Wisconsin Equal Justice Task Force, *Final Report* (1991). *See* S. Rep. No. 103-138, at 49 n.52.

[15] The majority quotes the Chief Justice's criticism, in 1991, of the civil rights provision of VAWA as it had been proposed at that time. *Ante* at 36. That criticism pertained to an earlier, very different version of the statute, and it has not been reiterated since Subtitle C was enacted in its current form. The majority also notes that last year the Chief Justice included VAWA in a list of statutes whose enactment he regarded as bad policy. *Id.*, at 36-37 n.12. The Chief Justice's most recent Year-End Report, however, suggests that this discomfort with VAWA primarily pertains not to VAWA's civil rights provision, but rather to its criminal provisions, which constitute part of the trend "to federalize crimes." Chief Justice William H. Rehnquist, *1998 Year-End Report on the Federal Judiciary* (January 1999). Moreover, as noted in text above, the Chief Justice has expressly recognized that "demonstrated state failure" -- a consideration that Congress plainly relied upon in enacting Subtitle C -- makes even the federalization of state crimes acceptable. *Id.*

D.

The proper judicial role in commerce power cases certainly does not permit courts to surrender responsibility for safeguarding federalism to Congress. Nor does it require courts to simply stand and watch while Congress federalizes whole areas of law traditionally regulated by the states. It does, however, strictly confine a court's ability to strike down an act of Congress based on judgments of a kind that an unrepresentative body is ill-equipped **[**98]** to make.

History and precedent demonstrate that courts are not adept in formulating rules that limit the commerce power by guaranteeing a sphere of governmental authority to the states. In order to create and enforce such rules, judges inevitably rely, as my colleagues in the majority do, upon their own conception of "what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68.

This approach directly contradicts the principles that identify a court's proper role. More than fifty years ago, the Supreme Court explained that the determination of whether an activity sufficiently affects interstate commerce

> is a matter of practical judgment, not to be determined by abstract notions. The exercise of this practical judgment the Constitution entrusts primarily and very largely to the Congress, subject to the latter's control by the electorate. Great power was thus given to the Congress: the power of legislation and thereby the power of passing judgment upon the needs of a complex society. Strictly confined though farreaching power was given to this Court: that of determining whether the Congress has exceeded limits allowable in reason for the judgment **[**99]** which it has exercised.

Polish Nat'l Alliance, 322 U.S. at 650. The majority, of course, rejects a "strictly confined" judicial role. Instead, it would have courts substitute their own "abstract notions" about the proper allocation of **[*933]** power between the federal and state governments for the "practical judgment" that emerges from the political and legislative processes. This approach not only inflates judicial authority, it also demeans the constitutional structure, derogates congressional integrity and decisionmaking, and underestimates state power.

Even more disturbingly, the 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 **[**100]** 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.

My colleagues in the majority iterate and reiterate that the enumeration of powers in the Constitution reserves authority to the states, that ours is a system of dual sovereignty, and that the states must operate as independent governmental bodies for that system to continue to exist. No one doubts the validity of any of these principles. The critical question, however, is who decides how they are to be upheld.

The Constitution itself provides a clear and specific answer to that question. It gives the fundamental power of government -- the power of legislation -- to Congress. Congress is not some central dictatorial assembly with interests independent of and antithetical to those of the states. Rather, Congress is composed entirely of members elected from each state to represent the interests of the people of that state, and is specifically designed to preserve state authority and protect state interests. Congressional legislation accordingly **[**101]** is not, as the majority suggests, a command from an autonomous central power to totally subjugated states. Congressional legislation is instead the product of the constitutionally coordinated authorities of the states, the localities, and the people. Courts thus have slender authority to invalidate the result of Congress's legislative process in order to protect the states or localities, unless there is some reason to suspect that the legislative process has been or will be unreliable.

The majority believes that we, the judiciary, know best when it comes to deciding which level of government can enact certain legislation; in 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.

Judges Murnaghan, Ervin, and Michael have authorized me to indicate that they join in this dissent.
