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*United States v. Morrison*: Federalism against the Will of the States

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Note

*United States v. Morrison*:
Federalism Against the Will of the States

*Jil L. Martin*

[With the Court’s decision today, Antonio Morrison... has ‘won the states’ rights plea against the states themselves.]*

I. INTRODUCTION

Violence directed at women, particularly in the forms of rape and domestic abuse, is a nationwide problem that impacts the lives of seventy-five percent of America’s female population. Statistics regarding women’s safety paint a bleak picture. In 1994, Congress enacted the Violence Against Women Act (the “VAWA”) as a comprehensive response to this issue. One provision of the VAWA, section 13981, created a civil rights remedy in federal court for victims of violence motivated by gender bias. Congress relied on its commerce power and its enforcement authority under the Fourteenth Amendment to support section 13981. However, individuals charged with violating the VAWA have questioned these bases of authority. One victim of gender-motivated violence, Christy Brzonkala, chose to pursue the

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* J.D. expected January 2001. I would like to dedicate this article to my wonderful parents and brother, without whose love, patience, and support, it could not have been written; and to M.J.T., whose memory inspires me.

1. United States v. Morrison, 120 S. Ct. 1740, 1773 (2000) (Souter, J., dissenting) (quoting R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 160 (1941)). Justice Souter further remarked that, “[i]t is, then, not the least irony of these cases that the States will be forced to enjoy the new federalism whether they want it or not.” Id. (Souter, J., dissenting).

2. See id. at 1761 (Souter, J., dissenting) (citing H.R. REP. NO. 103-395, at 25 (1993)); see also infra Part II.A.1 (outlining congressional findings on the subject of violence against women).


4. See 42 U.S.C. § 13981(c); see also infra Part II.A.2 (highlighting the civil rights remedy made available under section 13981).

5. See S. REP. NO. 103-138, at 54 (1993); see also infra Part II.A.3 (discussing the constitutional and historical sources of power relied upon by Congress in enacting section 13981).
constitutionality of section 13981 all the way to the Supreme Court. Her efforts ended on May 15, 2000, when the Court rendered its decision in *United States v. Morrison.*\(^6\) Continuing to advance its current notions of federalism, the Supreme Court determined that Congress lacked sufficient constitutional authority to enact section 13981, and overturned the statute.\(^7\)

This Note will explore the history of Commerce Clause jurisprudence since the Constitution’s ratification, particularly emphasizing the Supreme Court’s 1995 decision in *United States v. Lopez,*\(^8\) on which the *Morrison* decision was firmly based.\(^9\) It will also review the original intent of the Fourteenth Amendment and the development of its interpretation through Supreme Court precedent.\(^10\) The procedural background of *United States v. Morrison* entails three lower court opinions, each of which will be reviewed, followed by an analysis of the *Morrison* decision itself.\(^11\) In so doing, this Note will demonstrate both the *Morrison* Court’s consistent interpretation with its opinion in *Lopez,* as well as its inconsistencies with prior case law.\(^12\) It will also examine the Court’s decision in light of Fourteenth Amendment precedent.\(^13\) Finally, this Note will discuss the social and legal impact of *United States v. Morrison,* concluding that future civil rights legislation, under the Supreme Court’s current conception of federalism, is unlikely to be sustained.\(^14\)

II. BACKGROUND

The VAWA represents the result of four years of congressional hearings and debate.\(^15\) During this time, Congress learned just how

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7. See id. at 1759; see also infra Part III.B (reviewing the Court’s analysis of the two constitutional bases on which Congress relied for authority to enact section 13981).
9. See Morrison, 120 S. Ct. at 1748-54; see also infra Part II.B (detailing the historical progression of Commerce Clause jurisprudence).
10. See infra Part II.C (discussing the evolution of the interpretation and application of the Enforcement Clause of the Fourteenth Amendment).
11. See infra Parts III.A.2-3 & III.B (reviewing the progression of Christy Brzonkala’s civil claim through the federal court system).
12. See infra Part IV (comparing and contrasting United States v. Morrison with United States v. Lopez and other prior Commerce Clause jurisprudence).
13. See infra Part IV (discussing the Court’s opinion in United States v. Morrison in the context of prior interpretation of the Fourteenth Amendment).
15. See infra Part II.A.1 (tracing the research compiled by Congress regarding violence
pervasive gender-motivated violence is throughout the nation and crafted a wide variety of approaches to address this serious problem. Relying on its commerce power, as well as its Fourteenth Amendment enforcement authority, Congress enacted a civil rights remedy as one of this spectrum of approaches. To effectively evaluate the constitutionality of this remedy, it is necessary to understand the history of each of these constitutional provisions and the jurisprudence that has shaped their interpretation. This information, combined with Congress' factual findings, constitutes the necessary basis for determining whether Congress created a valid remedy or overstepped its constitutionally defined limits.

A. The Development of the Violence Against Women Act

In enacting the VAWA, Congress first evaluated the seriousness of violence toward women. Based on these findings, Congress drafted a multi-strategy plan to address the problem. Congress called on its authority under both the Commerce Clause and the Fourteenth Amendment to support this multi-strategy plan, known as the Violence Against Women Act.

1. Congressional Findings

The VAWA represents Congress' response to a "national tragedy" that impacts millions of American women on a daily basis. Senator Joseph R. Biden, Jr. first introduced the Act in 1990. The VAWA was signed into law by President Clinton on September 13, 1994, following four years of congressional research, hearings, and debate. During those four years, Congress heard testimony from numerous experts, including judges, law professors, physicians, prosecutors, rape victims,
and survivors of domestic violence. These experts testified that violence in the form of rape and domestic abuse is the leading cause of injury to American women between the ages of fifteen and forty-four. In the United States, a woman is raped every six minutes, and another is beaten every fifteen seconds. Nearly 500,000 girls currently attending high school will be raped before they graduate, and 125,000 female college students can expect to be raped during any given year. In all, three out of every four women in America will be victims of violent crime at some point during their lives.

Congress reviewed the information gathered through its research and identified several detrimental links between violence against females and the nation’s economy. First, because of gender-based violence, women are less likely to seek employment during evening and overnight hours, as well as positions with employers located in “dangerous” areas. In addition, victims of sexual assault and domestic violence are more likely to be fired from, or forced to quit, their jobs because of the amount of time they must take off from work to recuperate from their injuries or to avoid the embarrassment of being seen bearing the physical marks of domestic abuse. Furthermore,
gender-motivated violence prohibits women from participating in basic commercial activities such as grocery shopping, going out to dinner, or using public transportation.\textsuperscript{30} Finally, Congress found that as many as fifty percent of all homeless women and children are without a place to live because they are fleeing domestic violence.\textsuperscript{31} Overall, Congress determined that violence against women costs the government at least three billion dollars each year.\textsuperscript{32}

In addition to findings regarding the occurrence of gender-based crimes and their effect on the economy, Congress gathered information regarding the status of state criminal and civil laws related to gender-motivated violence. As part of its VAWA research, Congress reviewed twenty-one gender-bias studies conducted by state task forces.\textsuperscript{33} Those studies revealed that the majority of states either did not have marital rape statutes\textsuperscript{34} or only prosecuted it when factors not required for other


\textsuperscript{30} See Biden Brief, supra note 19, at 5. For instance, fear of rape and other gender-motivated crimes has been shown to discourage as many as seventy-five percent of women from going to see a movie at night, alone. See \textit{Morrison}, 120 S. Ct. at 1762 (Souter, J., dissenting) (citing S. REP. NO. 102-197, at 38 (1991)).

\textsuperscript{31} \textit{See Morrison}, 120 S. Ct. at 1761 (Souter, J., dissenting) (citing S. REP. NO. 101-545, at 37 (1990)). Congress was informed that homeless women, because of their homeless status, are unable to purchase goods, including those that travel in interstate commerce, that they might ordinarily have purchased. \textit{See Brief of United States, supra note 28, at 25-26 (citing Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources, 101st Cong. 30 (1990)).}

Congressional testimony further revealed that some victims of domestic violence resort to committing property crimes to be able to provide the goods needed by themselves and their children. \textit{See id}.

\textsuperscript{32} \textit{See Morrison}, 120 S. Ct. at 1762 (Souter, J., dissenting) (citing S. REP. NO. 101-545, at 33 (1990)). The source of these costs has been traced to medical costs and expenditures on criminal justice, as well as other social costs. \textit{See S. REP. NO. 103-138, at 41 (1993)}.


\textsuperscript{34} According to the Model Penal Code, rape is defined as:

(1) Rape. A male who has sexual intercourse with a female not his wife is guilty of rape if:

(a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(b) he has substantially impaired her power to appraise or control her conduct by
rape claims were present.\textsuperscript{35} In addition, some states provided immunity from prosecution, through interspousal tort immunity statutes,\textsuperscript{36} to former husbands and boyfriends charged with sexual assault.\textsuperscript{37} Congressional experts also testified that this tendency to protect perpetrators of violent acts against women is not a modern concept. Centuries of laws that classified women as the chattel of their spouses have promoted a widespread belief in the culpability of the victim, whereby women are presumed to have done something to merit the violence they suffered.\textsuperscript{38} Through orders of protection, state law does

\begin{quote}
administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or
\begin{itemize}
\item[(c)] the female is unconscious; or
\item[(d)] the female is less than 10 years old.
\end{itemize}
\end{quote}

MODEL PENAL CODE § 213.1(1) (1985) (emphasis added). Marital rape statutes are those that hold a husband liable for the same non-consensual conduct as a traditional rape statute. The State of Illinois has a marital rape statute:

\begin{quote}
(a) The accused commits criminal sexual assault if he or she:
\begin{itemize}
\item[(1)] commits an act of sexual penetration by the use of force or threat of force; or
\item[(2)] commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent; or
\item[(3)] commits an act of sexual penetration with a victim who was under 18 years of age when the act was committed and the accused was a family member; or
\item[(4)] commits an act of sexual penetration with a victim who was at least 13 years of age but under 18 years of age when the act was committed and the accused was 17 years of age or over and held a position of trust, authority or supervision in relation to the victim.
\end{itemize}
\end{quote}

720 ILL. COMP. STAT. 5/12-13 (West 1998).

\textsuperscript{35} See Biden Brief, supra note 19, at 20 (citing S. REP. NO. 103-138, at 47 & nn.42-44, 55 (1993); S. REP. NO. 102-197, at 45 & nn.49-50 (1991)). As of September 10, 1992, all states except North Carolina and Oklahoma recognized some form of marital rape as a crime. See S. REP. NO. 103-138, at 47 n.42 (1993). The additional factors required in other states include accompanying acts of violence such as kidnapping or use of a weapon. See id. at 47. Further, many states have refused to prosecute marital rape where the woman was unconscious, asleep, or physically or mentally ill. See id.

\textsuperscript{36} Interspousal tort immunity grants each member of a married couple immunity against prosecution by his or her spouse for torts he or she may commit against that spouse. The State of New Jersey has one example of an interspousal tort immunity statute:

\begin{quote}
37:2-5. Right of husband and wife to contract with or sue each other.

Nothing in this chapter contained shall enable a husband or wife to contract with or to sue each other, except as heretofore, and except as authorized by this chapter.
\end{quote}


\textsuperscript{37} See Biden Brief, supra note 19, at 20 (citing S. REP. NO. 102-197, at 45 n.50 (1991)). Although during the five years since the VAWA's enactment, several states have declared their interspousal tort immunity statutes to be unconstitutional, such decisions do not provide relief for victims of gender-motivated violence who live in states where these doctrines have yet to be judicially reviewed. See id. at 21.

\textsuperscript{38} See id. at 19-20, 23 (citing S. REP. NO. 102-197, at 47 (1991)). One result of this belief is that numerous states refuse to prosecute cases of acquaintance rape. See id. at 23 (citing S. REP. NO. 102-197, at 47 (1991)). Acquaintance rape, similar to marital rape, occurs when the sexual
provide women with a means to control their own safety against known assailants. However, even when women have successfully obtained protective orders, in an attempt to stem the abuse they were enduring, frequent lack of enforcement by state officials has nullified the protection sought.\(^3\)

Congress also made numerous findings regarding the shortcomings of state law enforcement efforts in the area of gender-based crimes. Four years of congressional hearings and debate uncovered a national perception that crimes against women are second-class, and not worthy of the attention given to other violent crimes, such as murder.\(^4\) Congress cited estimates that there are as few as one arrest for every 100 domestic assaults each year.\(^5\) Furthermore, perpetrators of rape have only a twenty-five percent chance of being arrested, prosecuted, and convicted.\(^6\) Of those actually convicted of rape, nearly twenty-five percent never serve time in prison, and another twenty-five percent receive local jail sentences averaging eleven months.\(^7\) Congress learned that this attitude of minimizing the importance of gender-motivated violence extends beyond law enforcement officials to the general public. For example, a survey of jury verdicts revealed that less than one percent of all rape victims have collected civil monetary damages.\(^8\) Additionally, a survey of judges in Colorado indicated that

\(^3\) See Amici Brief of the States, supra note 33, at 19. The task force further reported that gender-based stereotypes about acquaintance rape play a significant role in this failure. See id.

\(^4\) See Biden Brief, supra note 19, at 24 & n.25 (citing specific examples of police refusal to enforce orders of protection). Among the examples cited by Senator Biden was the situation described in a letter to Representative Olver, in which a domestic violence victim recounted that, despite having obtained thirteen restraining orders against her husband, the state failed to charge him for even one of the 200 violations of those orders he committed. See id. at 24 n.25 (citing 139 CONG. REC. 31, 291-92 (1993) (statement of Representative Olver)). Even more dramatic was the story of Tracy Motuzick, who obtained an order of protection against her husband that the police refused to enforce. Tracy suffered thirteen stab wounds and a broken neck at the hands of her husband, leaving her paralyzed, during the time that the order of protection was in place. See id. (citing Women and Violence: Hearings Before the Senate Comm. on the Judiciary, 101st Cong. Pt. 2, at 99 (1990) (testimony of Tracy Motuzick)).

\(^5\) See S. REP. No. 103-138, at 41 (1993); see also Anisimov v. Lake, 982 F. Supp. 531, 538 n.4 (N.D. Ill. 1997) (quoting testimony of Burt Neuborne, before the House of Representatives, that “women have been subject to gender-based violence for so long and on such a scale in our society that we have difficulty perceiving the enormity of its impact”).


\(^7\) See id. (Souter, J., dissenting) (citing S. REP. No. 101-545, at 33 n.30 (1990)).

\(^8\) See id. (Souter, J., dissenting) (citing S. REP. No. 103-138, at 38 (1993)).

\(^8\) See id. (Souter, J., dissenting) (citing S. REP. No. 102-197, at 44 (1991)).
forty-one percent believe juries perceive sexual assault victims as less credible than other crime victims.\textsuperscript{45} In the aggregate, Congress determined that these findings revealed a general bias against equal enforcement of laws criminalizing gender-motivated violence.\textsuperscript{46}

These disturbing examples of enforcement problems were noticed by some state officials, who proactively supported a national solution. Most notably, the VAWA was supported by the attorneys general of forty-one states.\textsuperscript{47} These attorneys general recognized that prevailing attitudes in state law enforcement could not be overcome through state legislation.\textsuperscript{48} They believed that the uniformity of national regulation, coupled with the protections against bias inherent in the federal judicial system, was needed to properly address this costly and pervasive problem.\textsuperscript{49} The cause of action provided by section 13981 responds to the needs of the states as expressed to Congress, without preempting or interfering with state laws.\textsuperscript{50}

In total, the years of hearings and studies led Congress to conclude that gender-based violence impairs a woman's ability to obtain and maintain employment on an equal level with men.\textsuperscript{51} Congress heard testimony that gender-based violence "permeates every aspect of women's lives. It alters where women live, work, and study, as they try to be safe by staying within certain prescribed bounds."\textsuperscript{52} Experts confirmed that the effect of gender-based violence is to prevent its victims, primarily women, from full participation in the nation's economy.\textsuperscript{53} Further, Congress determined that state legal systems have

\textsuperscript{45} See id. (Souter, J., dissenting) (citing S. REP. NO. 102-197, at 47 (1991)).


\textsuperscript{48} See Amici Brief of the States, supra note 33, at 2, 15-16.

\textsuperscript{49} See Brzonkala Brief, supra note 46, at 31, 46. The federal courts have a number of safeguards against bias, including presidential appointment instead of popular election, Senate review in advance of confirmation, and lifetime appointment. See id. at 31.

\textsuperscript{50} See Biden Brief, supra note 19, at 14; infra Part II.A.2 (discussing Congress' efforts at avoiding interference with state laws).

\textsuperscript{51} See Biden Brief, supra note 19, at 4.

\textsuperscript{52} Id. at 12 (quoting Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary, 102d Cong. 253 (1991) (statement of Dr. Leslie R. Wolfe)).

institutionalized traditional prejudices against victims of gender-based violence,\textsuperscript{54} creating obstacles within the system that prevent such victims from obtaining the same justice available to victims of other serious crimes.\textsuperscript{55} These obstacles deny victims of gender-motivated violence equal protection of the laws.\textsuperscript{56}

2. Breadth of Coverage

In enacting the VAWA, Congress employed multiple strategies in a comprehensive approach to combat the problem of violence against women.\textsuperscript{57} These strategies include a civil rights remedy, appropriations for safety improvements in public areas, a mandate that full faith and credit be given to an order of protection in any state, and a criminal statute.

The first strategy chosen by Congress was the enactment of a new federal civil cause of action, section 13981. Section 13981 gives victims of gender-motivated violence the right to sue their attackers in federal court.\textsuperscript{58} Congress enacted this remedy to overcome the inequality found in many state judicial systems, which denied victims of rape and domestic abuse equal protection of the laws.\textsuperscript{59} Section 13981 puts the ability to secure restitution directly into the hands of the victims, in a forum that will not deny them the equal protection to which they are entitled.\textsuperscript{60} The civil rights remedy is also an anti-discrimination statute.\textsuperscript{61} As such, it was promulgated by Congress, in part, to break down the barriers that continue to prohibit women from fully participating in the national economy.\textsuperscript{62}
Congress took great pains to ensure that section 13981 would not interfere with state laws. The civil rights remedy was crafted, through numerous bipartisan revisions, to complement state remedies, not displace them. Unlike other federal statutes that have been invalidated by the Supreme Court, section 13981 does not duplicate the criminal or civil laws of any state, nor does it interfere with state programs designed to curb gender-motivated violence. After the Administrative Office of the U.S. Courts expressed concerns that section 13981 would overburden the federal court system, the Senate negotiated bipartisan amendments to narrow the remedy's scope.

Such amendments included providing state courts with concurrent jurisdiction to enforce section 13981 and prohibiting removal to federal court of any section 13981 claim initially filed in state court. Additionally, Congress prohibited the federal courts from having supplemental jurisdiction.

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63. See Biden Brief, supra note 19, at 15.
64. See id. at 5. The definitions of actionable offenses under the VAWA were derived from existing state laws, and therefore section 13981 creates a remedy that is consistent with state law. See Amici Brief of the States, supra note 33, at 21.
65. See Biden Brief, supra note 19, at 14 (comparing 42 U.S.C. § 13981 to the Gun-Free School Zones Act, which was declared unconstitutional in United States v. Lopez). In the words of one Senate leader, "despite some misconceptions, this measure does not make every sexual assault or rape a Federal offense. Rather, it recognizes that there is a proper role for the Federal Government in assisting the States in fighting violence against women." Id. at 16 (quoting 139 CONG. REC. 30, 107 (1993) (statement of Senator Hatch)).
66. See id. at 15. The Administrative Office of the U.S. Courts had predicted that section 13981 would "significantly affect the courts and their administration" by generating more than 53,000 new tort cases annually, of which 13,450 were predicted to be federal court filings. Id. (quoting Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary, 102d Cong. 15-16 (1991)).
67. Concurrent jurisdiction is, "[t]he jurisdiction of several different tribunals, each authorized to deal with the same subject-matter, person or thing at the choice of the suitor." BLACK'S LAW DICTIONARY 291 (6th ed. 1990). By providing for concurrent jurisdiction, Congress not only provided a choice of forum for victims of gender-based violence, but also preserved the states' participation in adjudicating such matters.
68. Removal is the procedure by which a civil claim, originally filed in state court, can be transferred to federal court in the district and division where the state action is pending. See 28 U.S.C. § 1441 (1994). Removal requires that the federal courts have original jurisdiction over the claim. See id.
70. Supplemental jurisdiction is the procedure by which a federal court having original jurisdiction over the claim before it can assume jurisdiction over all other claims in that particular matter, provided that the additional claims "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the
over cases containing a section 13981 claim that also involved issues of family law, such as divorce or child custody. Congress further limited the impact on state law by clarifying the types of crime that qualify for the civil rights remedy, namely, those felonies motivated not merely by gender, but by an animus against the victim's gender. Through these


71. See Biden Brief, supra note 19, at 16. Section 13981(e)(4) provides:

(4) Supplemental jurisdiction

Neither section 1367 of title 28 nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property or child custody decree.


72. See Biden Brief, supra note 19, at 15-16. Sections 13981(c), (d) and (e)(1) provide:

(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—

(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 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.

(e) Limitation and procedures

(1) Limitation

Nothing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender (within the meaning of subsection (d) of this section).

42 U.S.C. § 13981(c), (d), (e)(1) (1994). Congress chose the word “animus” to define the motivational standard under section 13981 as a middle ground between the two extremes of malice and disparate impact. See Nourse, supra note 21, at 29-30. Animus is a word that explains the perpetrator’s choice to commit acts of violence, while not pulling into section 13981’s reach any action of a category of actions that disproportionately affects women. See id. at 30-31. Animus can be established by statements made by the perpetrator at the time of the
careful limitations, Congress endeavored to maintain a sense of "cooperative federalism," not allowing section 13981 to supplant existing or future state laws.\textsuperscript{73}

In addition to section 13981, the VAWA includes other titles that further reflect the multi-strategy approach envisioned by Congress to address issues of violence directed at women. The second strategy provides for capital improvements to public transportation systems.\textsuperscript{74} Title I of the VAWA, the Safe Streets for Women Act, generates a ten million dollar appropriation to the Secretary of Transportation to fund installation of lighting, security cameras, and security phones in such areas as parking garages, subway stations, and bus stops.\textsuperscript{75} Title II, the Safe Homes for Women Act, embodies Congress' third strategy. This provision, among other things, closes a loophole associated with orders of protection by requiring every state to give full faith and credit to a protective order issued by another state.\textsuperscript{76} The fourth strategy is set forth in the Equal Justice for Women in the Courts Act.\textsuperscript{77} This title

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\textsuperscript{73} See Biden Brief, supra note 19, at 5.

\textsuperscript{74} See 42 U.S.C. § 13931(a) (1994) ("There is authorized to be appropriated not to exceed $10,000,000, for the Secretary of Transportation . . . to make capital grants for the prevention of crime and to increase security in existing and future public transportation systems.").

\textsuperscript{75} See id.; S. REP. NO. 103-138, at 42 (1993). Section 13931(b)(1)(A)-(D) provides:

\begin{quote}
(b) Grants for lighting, camera surveillance, and security phones
\begin{enumerate}
\item From the sums authorized for expenditure under this section for crime prevention, the Secretary is authorized to make grants and loans to States and local public bodies or agencies for the purpose of increasing the safety of public transportation by--
\begin{enumerate}
\item increasing lighting within or adjacent to public transportation systems, including bus stops, subway stations, parking lots, or garages;
\item increasing camera surveillance of areas within and adjacent to public transportation systems, including bus stops, subway stations, parking lots, or garages;
\item providing emergency phone lines to contact law enforcement or security personnel in areas within or adjacent to public transportation systems, including bus stops, subway stations, parking lots, or garages; or
\item any other project intended to increase the security and safety of existing or planned public transportation systems.
\end{enumerate}
\end{enumerate}
\end{quote}


\begin{quote}
(a) Full faith and credit.-- Any protection order issued that is consistent with subsection (b) of this section by the court of one State or Indian tribe . . . shall be accorded full faith and credit by the court of another State or Indian tribe . . . and enforced as if it were the order of the enforcing State or tribe.
\end{quote}

\textsuperscript{18} U.S.C. § 2265(a) (1994).

provides for the completion of studies on the nature and extent of
gender bias in the federal courts, as well as for training of state and
federal judges on the issues of sexual assault and domestic violence. Finally, the fifth strategy employed by Congress is a specific criminal
statute. Section 40221(a) of the VAWA provides a federal remedy for
Crimes of abuse committed during interstate travel or crimes that have
been committed by persons traveling across state lines in order to
commit acts of abuse. In all, these various approaches reflect
Congress' intent, under its constitutional authority, to provide a
comprehensive range of solutions to a national problem.

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Training provided pursuant to grants made under this part may include current information, existing studies, or current data on—
(1) the nature and incidence of rape and sexual assault by strangers and nonstrangers, marital rape, and incest;
(2) the underreporting of rape, sexual assault, and child sexual abuse;
(3) the physical, psychological, and economic impact of rape and sexual assault on the victim, the costs to society, and the implications for sentencing;
(4) the psychology of sex offenders, their high rate of recidivism, and the implications for sentencing;
(5) the historical evolution of laws and attitudes on rape and sexual assault;
(6) sex stereotyping of female and male victims of rape and sexual assault, racial stereotyping of rape victims and defendants, and the impact of such stereotypes on credibility of witnesses, sentencing, and other aspects of the administration of justice.


79. This strategy is codified at 18 U.S.C.A. § 2261(a)(1)-(2) (West 2000).
80. See 18 U.S.C.A. § 2261(a)(1)-(2). Section 2261 provides:
(a) Offenses.—
(1) Crossing a State line.— A person who travels across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b).
(2) Causing the crossing of a State line.— A person who causes a spouse or intimate partner to cross a State line or to enter or leave Indian country by force, coercion, duress, or fraud and, in the course of or as a result of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner, shall be punished as provided in subsection (b).

Id. This provision has not met with the same Commerce Clause challenges as section 13981, because courts have recognized that it clearly falls within one of the three recognized areas of congressional regulation: channels of interstate commerce. See United States v. Morrison, 120 S. Ct. 1740, 1752 n.5 (2000).
3. Congressional Authority to Enact the VAWA

After four years of hearings and the enumeration of extensive congressional findings, Congress determined that gender-based violence substantially affects interstate commerce by preventing women from full participation in day-to-day commercial activities.\(^1\) Congress viewed this as sufficient grounds for enacting the VAWA civil rights remedy under its Commerce Clause authority.\(^2\) This constitutional provision enumerates to Congress, not the states, the authority to regulate those activities affecting commerce among the states.\(^3\)

Congress also found authority for enacting the VAWA under the Enforcement Clause of the Fourteenth Amendment.\(^4\) The Fourteenth Amendment was ratified shortly after the end of the Civil War to address continuing state discrimination against the newly freed slaves.\(^5\)

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\(^1\) See Biden Brief, supra note 19, at 4. It is interesting to note that the VAWA was enacted prior to the Supreme Court’s decision in United States v. Lopez, in which the requisite level of a regulated activity’s effect on interstate commerce was finally clarified as being “substantially affects” rather than merely “affects.” See 514 U.S. 549, 559 (1995). Yet, before it was clear that such a high threshold for interaction was necessary to pass judicial scrutiny, Congress determined that gender-motivated violence “substantially affects” interstate commerce. See Brzonkala II, 132 F.3d 949, 967 n.10 (4th Cir. 1997), vacated and reh’g en banc, 169 F.3d 820 (4th Cir. 1999), aff’d sub nom. United States v. Morrison, 120 S. Ct. 1740 (2000). The House of Representatives summarized the findings that it relied on to justify congressional authority for the VAWA under Article I, Section 8:

[C]rimes 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 in places involved in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products . . . .

Biden Brief, supra note 19, at 7 (quoting H.R. CONF. REP. NO. 103-711, at 385 (1994)). The Senate further found, “Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy. Gender-based violence bars its most likely targets—women—from full [participation] in the national economy.” Id. at 7-8 (quoting S. REP. NO. 103-138, at 54 (1993)).

\(^2\) See 42 U.S.C. § 13981 (1994); Brief of United States, supra note 28, at 22-27. The Commerce Clause appears in Article I, Section 8, Clause 3 of the Constitution, among the list of enumerated congressional powers. See U.S. CONST. art. I, § 8, cl. 3 (“[The Congress shall have Power] . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes:”). See infra Part II.B for an analysis of Congress’ Commerce Clause authority.

\(^3\) See infra Part II.B (discussing further the scope of authority over commerce enumerated to Congress).

\(^4\) See U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); 42 U.S.C. § 13981(a) (1994); Brief of United States, supra note 28, at 36-38. See infra Part II.C for an analysis of Congress’ authority under the Enforcement Clause of the Fourteenth Amendment.

\(^5\) See infra Part II.C.1 (exploring social reforms enacted in the post-Civil War era).
The Amendment provides that all persons are to be granted equal protection of the laws.86 Each of the Civil War Amendments87 contains an enforcement clause, which grants Congress the authority to enact legislation necessary to enforce the provisions of the Amendment.88

Since the ratification of the Civil War Amendments, Congress has passed federal laws prohibiting discrimination on the basis of race, national origin, and even sexual orientation.89 However, no legislation has been enacted to prohibit violence that is gender-motivated.90 In enacting the VAWA, Congress relied on the Supreme Court's holding in Meritor Savings Bank, FSB v. Vinson91 to conclude that violence motivated by gender is a form of discrimination.92 Finding no distinction between those types of discrimination already recognized by federal legislation and violence motivated by gender, Congress was compelled to provide victims of gender discrimination the same type of relief already available to other discrimination victims.93 Additionally, congressional findings that gender bias had caused state courts to treat gender-based crimes less seriously than other crimes constituted a

86. See U.S. CONST. amend. XIV, § 1 ("No State shall... deny to any person within its jurisdiction the equal protection of the laws."). Equal protection demands that the protections of a state government be applied equally among its citizens. A state "may not... selectivity deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197 n.3 (1989) (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

87. U.S. CONST. amends. XIII, XIV, XV (abolishing slavery, providing for due process and equal protection of the laws, and establishing voting rights, respectively); see infra Part II.C.1 (discussing the impact of the Civil War Amendments).

88. See infra Part II.C.1 (describing the authority granted to Congress by the Fourteenth Amendment's Enforcement Clause).

89. See S. REP. NO. 103-138, at 48 (1993) (noting that "society declared that it would not tolerate attacks against persons because of their race, religion, or national origin").

90. See id. There is little doubt that violence motivated by race or sexual orientation impacts its victims any differently than does gender-motivated violence. See id. In each case, the victim is chosen merely because of his or her class status, not by virtue of who they are as persons or what they might have said or done. See id. These victims not only are injured physically, but they are also traumatized emotionally, often to the point of being unable to continue leading normal lives. See id.


Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets. Meritor Savings Bank, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (1982)).

This disparate treatment could not be dismissed by Congress as merely negligent or accidental. Congress concluded that because state judicial systems were failing to provide victims of gender-motivated violence with equal protection of the laws, it had the authority to legislate enforcement of the Fourteenth Amendment.

B. The Commerce Clause

Congress relied on the Commerce Clause as one of the constitutional bases for its authority to enact the VAWA. A full understanding of the Commerce Clause, or any other constitutional provision, requires review of its origins, as well as its historical interpretation. Little is known of the Framers’ original intent regarding the Commerce Clause. However, Commerce Clause jurisprudence is both voluminous and dynamic. This jurisprudence was most recently reviewed in the Supreme Court’s decision in United States v. Lopez.

1. Original Intent and Delineation of Powers

The U.S. Constitution is divided into seven articles, the first three of which deal with the legislative, executive, and judicial branches of the federal government, respectively. In Article I, Section 8 of the Constitution, the Framers enumerated which regulatory powers would be the responsibility of the federal government through Congress. The Tenth Amendment, coupled with traditional rules of statutory interpretation, dictates that those powers not enumerated as the domain

94. See Biden Brief, supra note 19, at 5.
95. See id.
96. See id. at 26 (citing S. REP. NO. 103-138, at 55 (1993)).
97. See supra Part II.A.3 (highlighting Congress’ determination that gender-motivated violence had a substantial effect on interstate commerce).
98. See 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE § 4.3, at 412 (3d ed. 1999) (noting that the Constitutional Convention did not conduct a specific debate over Congress’ authority to regulate commerce, and therefore, no direct history exists as to the meaning of the word “commerce”); infra Part II.B.1 (discussing further the original intent of the Framers regarding congressional authority over commerce).
99. See infra Parts II.B.2-4 (tracing the complex development of Commerce Clause jurisprudence).
100. See infra Part II.B.4 (reviewing the Supreme Court’s opinion in United States v. Lopez).
101. See U.S. CONST. arts. I, II, & III.
102. See U.S. CONST. art. I, § 8, cl. 3.
of the federal government belong to the states.\textsuperscript{103} Among those powers granted to Congress is the regulation of commerce.\textsuperscript{104}

Clause 3 of Section 8 specifically provides for Congress to regulate three areas of commerce: that with foreign nations, that with Indian tribes, and that among the several states.\textsuperscript{105} According to Alexander Hamilton, one of the primary purposes for this provision was to restrain the "interfering and unneighborly regulations of some States," which had proven, under the Articles of Confederation, to be "serious sources of animosity and discord."\textsuperscript{106} The Framers hoped that the national commerce power would help bring an end to such contentious policies.\textsuperscript{107} While the provisions for congressional regulation of commerce with foreign nations and with Indian tribes have presented few issues of scope since their drafting in 1787, the same is not true for the provision regarding commerce among the several states.\textsuperscript{108}

From the earliest days of this nation, questions have been raised as to the breadth of the Constitution's grant of power over commerce among

\textsuperscript{103} See U.S. Const. amend. X.
\textsuperscript{104} See U.S. Const. art. I, § 8, cl. 3.
\textsuperscript{105} See id.
\textsuperscript{106} THE FEDERALIST NO. 22 (Alexander Hamilton). The Constitutional Convention was convened in Philadelphia in 1787. Its purpose was to shore up the cracks in the Articles of Confederation. See THE AMERICAN CONSTITUTION FOR AND AGAINST: THE FEDERALIST AND ANTI-FEDERALIST PAPERS 3 (J. R. Pole ed., 1987) [hereinafter THE AMERICAN CONSTITUTION FOR AND AGAINST]. The government under the Articles, as a result of the anti-monarchical feelings of the time, heavily favored state sovereignty, with a very minimal emphasis on central government. See THE FEDERALIST PAPERS 18 (Isaac Kramnick ed., 1987). As a prime example, the Articles of Confederation did not provide for an executive branch of government. See id. at 19. Any legislative action required the approval of at least nine of the thirteen state delegations, while changes to the Articles themselves could only be made by a unanimous vote of all thirteen state legislatures. See ARTICLES OF CONFEDERATION, arts. X & XIII. This structure, which successfully sustained the Confederation during the Revolutionary War, began to result in confusion following the War's end. See THE FEDERALIST PAPERS, supra, at 20. Among the various problems, states were squabbling over economic sanctions imposed on competing products from other states and over tariffs charged by neighboring states. See id.; I ROTUNDA & NOWAK, supra note 98, § 4.3, at 413. Additionally, some states were coining their own money, maintaining their own navies, and, most startlingly, deciding whether the terms of the Treaty of Paris, which formalized the end of the Revolutionary War, would be binding on them. See THE FEDERALIST PAPERS, supra, at 20. George Washington, the President of the Constitutional Convention, described the government under the Articles as, "a half-starved, limping government, that appears to be always moving upon crutches, and tottering at every step." Id. (quoting WRITINGS, XXVII, 305-06 (J. L. Fitzpatrick ed., 1939)). Alexander Hamilton wrote that the Articles had produced nothing but "little, jealous, clashing, tumultuous commonwealths, the wretched nurseries of unceasing discord . . . ." Id. (quoting THE FEDERALIST NO. 9 (Alexander Hamilton)).
\textsuperscript{107} See GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 141 (13th ed. 1997).
\textsuperscript{108} See I ROTUNDA & NOWAK, supra note 98, § 4.1, at 399.
the states. The key issue is determining the point at which the authority of the states ends and the authority of the federal government begins.\textsuperscript{109} This provision, however, was not debated during the Constitutional Convention, and therefore, little exists from which to glean the precise intent of the Framers regarding the commerce power.\textsuperscript{110}

Determining the precise nature of "commerce" has been a constant theme throughout the Supreme Court's Commerce Clause opinions.\textsuperscript{111} What constituted commerce in the late 1700s was much less complex and sophisticated than that which constitutes commerce in the twentieth century.\textsuperscript{112} Congressional authority under the Commerce Clause is not limited to the nature and instrumentalities of commerce as they existed in 1787.\textsuperscript{113} Rather, the power extends to all subjects and means of commerce as they presently exist, whether or not they were anticipated by the Framers in 1787.\textsuperscript{114}

\begin{footnotesize}
\begin{itemize}
\item[109] See 1 ROTUNDA & NOWAK, supra note 98, § 4.3, at 412-14.
\item[110] See id. at 412. The doctrine of separation of powers is one of the integral components of this nation's system of government. "Combining incompatible functions in one governmental agency, or allowing one division to usurp powers expressly delegated to another is generally deemed offensive to federal constitutional order..." 16B AM. JUR. 2D Constitutional Law § 639 (1998). The Framers believed that although England's constitution did call for a separation of powers, the executive, namely, the king, had gained too much power in the legislature. See THE AMERICAN CONSTITUTION FOR AND AGAINST, supra note 106, at 13. Thus, all present at the Constitutional Convention were aware of the need to safeguard against abuse of power. See id. at 14. They accomplished this task in two ways: through the separation of powers among the three branches of the federal government and by delegating certain powers to the federal government while providing for all non-enumerated powers to be left to the state governments. James Madison described this as a "compound republic," in which "different governments will control each other, at the same time that each will be controlled by itself." THE FEDERALIST NO. 51 (James Madison). This insight was echoed by Winston Churchill, almost 200 years later, when he noted: The men who founded the American Constitution embodied a separation of authority in the strongest and most durable form. Not only did they divide executive, legislative and judicial functions, but also by instituting a federal system, they preserved immense and sovereign rights to local communities and by all these means they have preserved a system of law and liberty under which they have thrived and reached the leadership of the world. Daniel M. Kolkey, The Constitutional Cycles of Federalism, 32 IDAHO L. REV. 495, 503 (1996). The Framers saw this division between branches and between two governments as a means of enhancing freedom. See United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). "In the tension between federal and state power lies the promise of liberty." Gregory v. Ashcroft, 501 U.S. 452, 459 (1991).
\item[111] See 1 ROTUNDA & NOWAK, supra note 98, § 4.3, at 412.
\item[112] But see discussion of Justice Thomas' concurrence in United States v. Lopez, infra note 243 (arguing for the Court to adopt a definition of commerce equivalent to that in 1787).
\item[113] See 15A AM. JUR. 2D Commerce § 9 (1976).
\item[114] See id.
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Some limitations do exist, however, on what may be regulated by Congress. Congress lacks power to regulate anything that is not "related to" commerce. This means that Congress is denied a general police power to promote the health, safety, or welfare of the nation. The fact, however, that promotion of these purposes might result from particular regulation does not make congressional action under the Commerce Clause invalid. In addition, Congress’ regulation of commerce cannot violate other provisions of the Constitution, such as security against unreasonable searches and seizures, or deprivation of life, liberty, or property without due process of law.

The Supreme Court’s efforts to interpret the Framers’ intent regarding commerce among the several states began shortly after the Constitution was ratified and continues to this day. The history of Commerce Clause jurisprudence is synonymous with the history of federalism. During this nation’s 224-year existence, the focus of the Supreme Court’s Commerce Clause decisions has shifted approximately every sixty-five years, varying its emphasis from that of states’ rights to that of a more centralized federal government.

2. Commerce Clause Jurisprudence: 1787 - 1937

The first century-and-a-half of Commerce Clause history is replete with interpretive changes. Although this period began with a very broad interpretation of Congress’ power under the Clause, it concluded with the Clause providing a much more limited power. During these decades, the Court expanded and contracted the meaning of

115. See id. at § 10.
116. See 1 ROTUNDA & NOWAK, supra note 98, § 4.1, at 398.
117. See 15A AM. JUR. 2D Commerce § 10 (1976).
118. See U.S. CONST. amend. IV (“The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”).
120. See 1 ROTUNDA & NOWAK, supra note 98, § 4.1, at 398. Federalism is a term used to describe the relationship between the federal government and the states. See BLACK’S LAW DICTIONARY 612 (6th ed. 1990).
121. See Kolkey, supra note 110, at 495. Justice Kennedy noted in his United States v. Lopez concurrence, “[t]he progression of our Commerce Clause cases from Gibbons to the present was not marked, however, by a coherent or consistent course of interpretation . . . .” 514 U.S. 549, 568 (1995) (Kennedy, J., concurring).
122. See infra Parts II.B.2.a-b (reviewing the cyclical history of Supreme Court interpretation of the Commerce Clause, applying alternating broad and narrow definitions of “commerce”).
123. See infra Part II.B.2.b (discussing the Supreme Court’s narrowing of Chief Justice Marshall’s initially broad definition of “commerce”).
“commerce” depending on the prevailing view as to the importance of states’ rights.124

a. Broad Interpretation of “Commerce”

The history of Commerce Clause interpretation began in 1824 with the landmark case of Gibbons v. Ogden.125 New York had granted monopoly rights to operate steamboats on its waterways to the partnership of Robert R. Livingston and Robert Fulton, which transferred the monopoly to Aaron Ogden.126 Shortly thereafter, Thomas Gibbons began operating steamboats in violation of Ogden’s monopoly.127 Gibbons’ boats, however, were licensed under a federal statute.128 The Supreme Court had to decide whether an injunction granted by a New York state court was valid.129 In finding the injunction invalid, Chief Justice Marshall relied on the Supremacy Clause,130 holding that the federal statute under which Gibbons was operating trumped the state-granted monopoly to Ogden.131

In the course of his decision, Chief Justice Marshall announced an extremely broad definition of commerce, declaring that commerce included all “commercial intercourse.”132 He further stated that congressional regulation of all commercial intercourse extended to activities that occur within a state, provided the activity has some commercial link to another state.133 Strictly adhering to the language of Article I, Section 8, Chief Justice Marshall did not go so far as to find congressional authority over all commerce conducted within a state.134

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124. See infra Part II.B.2.b (detailing the Supreme Court’s efforts to distinguish between areas subject to federal regulation and areas reserved for state control).
125. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); see also Lopez, 514 U.S. at 553 (acknowledging Gibbons as the first case to define “commerce”); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253-54 (1964) (citing Gibbons as containing the first definition of “commerce”). Chief Justice Marshall, who delivered the opinion of the Court, was a Federalist, and therefore, supportive of a strong federal government. See Kolkey, supra note 110, at 496.
127. See id. at 2.
128. See id.
129. See id. at 2-3.
130. See U.S. Const. art. VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .”).
132. See id. at 189-90.
133. See id. at 194-95.
134. See id. Chief Justice Marshall explained:

Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one . . . . The enumeration presupposes
However, in defining the limits of Congress' reach into the internal commerce of a state, the Chief Justice created a very narrow category of prohibited regulation. 135 Chief Justice Marshall also did not accept the argument that the Tenth Amendment, which reserves to the states those powers not otherwise delegated to the federal government, acts as a limit on the congressional commerce power. 136 Rather, Chief Justice Marshall's opinion provided that the commerce power is plenary and limited only by the language of the Constitution itself. 137 While the Chief Justice established virtually no bounds to the commerce power, this extremely broad interpretation was not destined to endure. 138

b. Gibbons' Broad Definition is Refined

In the years following Gibbons, the Court gradually shifted away from Chief Justice Marshall's broad interpretation of the commerce power. Relying more heavily on the language of the Tenth Amendment, the Supreme Court began to interpret aspects of economic activity as being either completely the domain of state law, or completely the domain of federal law. 139 In order to preserve some areas of business activity for state control, the Court began to require that the object or practice being regulated have a direct effect on commerce. 140 As a result, the Court distinguished between cases involving questions of "manufacturing" and those involving questions directly related to commerce. 141 The Court held that manufacturing, in something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.

Id. The designation of certain commerce as being internal to a state was seized upon by future justices as a means of restricting federal regulation. See 1 ROTUNDA & NOWAK, supra note 98, § 4.4, at 421.

135. See 1 ROTUNDA & NOWAK, supra note 98, § 4.4, at 416.

136. See Gibbons, 22 U.S. (9 Wheat.) at 198-201; see also U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

137. See Gibbons, 22 U.S. (9 Wheat.) at 196 ("This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.").


139. See 1 ROTUNDA & NOWAK, supra note 98, § 4.5, at 422.

140. See United States v. Lopez, 514 U.S. 549, 569-70 (1995) (Kennedy, J., concurring); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935) (stating that, in evaluating the breadth of the commerce power as it relates to intrastate activities, there is a "well-established distinction between direct and indirect effects").

141. See 1 ROTUNDA & NOWAK, supra note 98, § 4.6, at 424-25. The Court interpreted the Tenth Amendment to reserve manufacturing to the states, while commerce was enumerated in Article I, Section 8 as a congressional power. See id. at 426.
any form, had only an indirect effect on commerce, and should, therefore, be regulated by the states.\textsuperscript{142} This was the first in a series of formalistic notions developed by the Court to determine whether a particular activity constituted "commerce."\textsuperscript{143} Despite a brief lapse,\textsuperscript{144} the "direct/indirect" distinction remained the decisive test throughout the early 1900s of whether Congress could employ its commerce power.

At the same time that the Court was carefully distinguishing between activities of production and activities of commerce, Congress passed numerous laws to prevent the transportation of specific goods among the several states.\textsuperscript{145} This "policing" of the lines of commerce is referred to as the "police power,"\textsuperscript{146} and it allowed Congress to regulate intrastate activity indirectly.\textsuperscript{147} Because use of the police power directly regulated only interstate shipment of the undesirable objects, it was met

\textsuperscript{142} See, e.g., Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding that mining is a form of production, and therefore is not directly related to interstate commerce); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (denying Congressional authority to regulate a sugar-refining monopoly as it is related to manufacturing); Kidd v. Pearson, 128 U.S. 1 (1888) (finding state statute prohibiting manufacture of liquor to be related to manufacturing, not commerce, and therefore not within the regulatory reach of Congress). "Manufacturing" was interpreted as anything that involved some means of production, such as drilling for oil, farming, fishing, mining, etc., and was not limited to factory-based activities.

\textsuperscript{143} See Lopez, 514 U.S. at 605 (Souter, J., dissenting).

\textsuperscript{144} There was a short period during which the Court shifted its emphasis to the size of the effect on commerce created by a particular regulated activity. See The Shreveport Rate Case, 234 U.S. 342 (1914). The curious aspect of the Shreveport Rate Case, in light of the Court's Commerce Clause mindset at the time, was that the regulation at issue set transportation rates for shipping within the state of Texas, namely, completely intrastate commerce. Id. at 349-50. However, the Court found that the setting of such rates had a "substantial economic effect" upon interstate commerce, and thus deemed the rate setting as within Congress' commerce power. See id. at 353-54.

\textsuperscript{145} See, e.g., Hoke v. United States, 227 U.S. 308 (1913) (holding that the Mann Act, which prohibited the transportation of women across state lines for immoral purposes, was constitutional); Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) (holding that federal seizure of adulterated eggs under the Pure Food and Drug Act of 1906 was appropriate); The Lottery Case, 188 U.S. 321 (1903) (holding that lotteries, in general, are "evil," and regulation of the sale of lottery tickets across state lines is within the scope of Congress' authority).

\textsuperscript{146} The term "police power" is defined as:

An authority conferred by the American constitutional system in the Tenth Amendment... upon the individual states, and, in turn, delegated to local governments, through which they are enabled to establish a special department of police; adopt such laws and regulations as tend to prevent the commission of fraud and crime, and secure generally the comfort, safety, morals, health, and prosperity of its citizens by preserving the public order... .

BLACK'S LAW DICTIONARY 1156 (6th ed. 1990). Because the police power is used to regulate the safety and health of local citizens, this term was adopted to refer to Congress' efforts to regulate the safety and health of citizens nationally.

\textsuperscript{147} See 1 ROTUNDA & NOWAK, supra note 98, § 4.6, at 429.
with broader approval by the Supreme Court than direct congressional regulation of intrastate commerce.\textsuperscript{148}

However, while the Court was willing to extend the commerce power to protect society from harm when it regulated interstate commerce, the Court was not willing to allow these efforts at protection to encroach on activities that should be regulated by the states, such as manufacturing. Congressional attempts at legislation beyond indirect intrastate regulation were not met with great success.\textsuperscript{149} In \textit{Hammer v. Dagenhart},\textsuperscript{150} the Supreme Court overturned a federal statute prohibiting interstate transportation of items manufactured by companies using illegal child labor.\textsuperscript{151} Whereas the items prohibited from transportation in \textit{Hipolite Egg Co. v. United States},\textsuperscript{152} \textit{Hoke v. United States},\textsuperscript{153} and the \textit{Lottery Case}\textsuperscript{154} were themselves part of the undesirable conduct that Congress was attempting to inhibit, the goods produced by the labor of children too young to be legally employed were not, in and of themselves, undesirable.\textsuperscript{155} In \textit{Dagenhart}, the Court held that it was the use of child labor that was wrong, not the goods produced, and any evil that stemmed from child labor had already occurred by the time the goods entered interstate commerce.\textsuperscript{156} \textit{Dagenhart} further maintained that illegal employment of children, as a condition of manufacturing, was not directly related to interstate commerce and, therefore, was not covered by the commerce power.\textsuperscript{157} The Court feared that if it determined that illegal employment of children was sufficiently related to interstate commerce to fall under congressional authority, there would be no limit on Congress' control of manufacturing.\textsuperscript{158} However, the majority's argument in \textit{Dagenhart} was to be short-lived. In 1941, \textit{Dagenhart} was overruled under the Court's new attitude of judicial restraint.\textsuperscript{159}

\textsuperscript{148} See id.

\textsuperscript{149} See, e.g., \textit{Hammer v. Dagenhart}, 247 U.S. 251 (1918), \textit{overruled in part} by \textit{United States v. Darby}, 312 U.S. 100 (1941) (holding that the Tenth Amendment limits congressional authority to activities of commerce, and does not extend to activities of production).


\textsuperscript{151} \textit{See Dagenhart}, 247 U.S. at 268, 276-77.

\textsuperscript{152} \textit{Hipolite Egg Co. v. United States}, 220 U.S. 45 (1911).

\textsuperscript{153} \textit{Hoke v. United States}, 227 U.S. 308 (1913).

\textsuperscript{154} \textit{The Lottery Case}, 188 U.S. 321 (1903).

\textsuperscript{155} \textit{See Dagenhart}, 247 U.S. at 271-72.

\textsuperscript{156} \textit{Id.} at 272; 1 \textit{ROTUNDA & NOWAK, supra} note 98, § 4.6, at 430.

\textsuperscript{157} \textit{Dagenhart}, 247 U.S. at 272; 1 \textit{ROTUNDA & NOWAK, supra} note 98, § 4.6, at 430.

\textsuperscript{158} \textit{See Dagenhart}, 247 U.S. at 276.

\textsuperscript{159} \textit{See United States v. Darby}, 312 U.S. 100, 116-17 (1941), \textit{rev'd in part} \textit{Hammer v.

The New Deal was a time of trial for the Supreme Court,¹⁶⁰ which led to a significant change in the Court’s Commerce Clause interpretation.¹⁶¹ The decades following the Great Depression reflect a period in which the Court showed a great deal of deference to Congress in its actions under the Commerce Clause.¹⁶² This era of judicial restraint lasted almost six decades, during which the Court refrained from overturning a single act of Congress on Commerce Clause grounds.¹⁶³ That era ended in 1995.¹⁶⁴

a. The Age of Judicial Restraint

This new era of judicial restraint was marked by the Supreme Court’s 1937 decision in National Labor Relations Board v. Jones & Laughlin Steel Corp.,¹⁶⁵ which is considered a turning point in Commerce Clause interpretation.¹⁶⁶ At issue was the constitutionality of the National Labor Relations Act of 1935 (the “NLRA”), which guaranteed all employees the right to organize collectively and prohibited employer interference with that right.¹⁶⁷ The NLRA also prohibited employers

¹⁶⁰ In the early years of Franklin D. Roosevelt’s presidency, the federal court system was comprised predominantly of men who were stockowners and trustees. See William Manchester, The Glory and the Dream 136 (1973). During the years from 1932 to 1937, numerous aspects of the President’s New Deal legislation were overturned by the Supreme Court. See id. This infuriated FDR, who attempted to introduce legislation that would “pack the court,” adding six new positions to the Supreme Court and ultimately diluting the anti-New Deal majority. See id. at 151. The plan was defeated, but ultimately proved to be unnecessary. See id. at 153. The Court began deferring to Congress in matters of economics, and one justice, Justice Roberts, began to vote in favor of federal legislation. See 1 Rotunda & Nowak, supra note 98, § 4.7, at 438-39. Also, over the next four years, FDR was able to appoint seven new justices to the Court who favored deference to Congress. See id.

¹⁶¹ See infra Parts II.B.3.a-b (discussing examples of the Court’s more expansive view of the commerce power in the decades following the New Deal).

¹⁶² See United States v. Lopez, 514 U.S. 549, 606 (1995) (Souter, J., dissenting); Gunther & Sullivan, supra note 107, at 141; infra Parts II.B.3.a-b (highlighting the Court’s shift to the “affects interstate commerce” test and the emphasis it placed on congressional determinations that the regulated activity had such an effect).

¹⁶³ See infra Parts II.B.3.a-b (illustrating the result of Supreme Court deference to congressional determinations of effects on interstate commerce).

¹⁶⁴ See infra Part II.B.4 (analyzing the Court’s opinion in United States v. Lopez and the resulting shift to a more restrictive interpretation of the Commerce Clause).


¹⁶⁶ See United States v. Morrison, 120 S. Ct. 1740, 1767 (2000) (Souter, J., dissenting) (asserting that National Labor Relations Board v. Jones & Laughlin Steel Corp. marked a distinct change from the line of decisions that precipitated FDR’s court-packing plan).

¹⁶⁷ See Jones & Laughlin Steel Corp., 301 U.S. at 24.
from refusing to bargain with a union chosen by its employees. In Jones & Laughlin Steel Corp., the Court made a bold move by abandoning the distinction between production and commerce, returning to the broad definition of commerce espoused by Chief Justice Marshall in Gibbons v. Ogden. As a result, industries that involved manufacturing or production work, which had previously been deemed outside the reach of the commerce power, now fell clearly within it. The Court also modified the requisite link between regulated intrastate activity and interstate commerce, rejecting the strict "direct/indirect" relation test in favor of measuring whether the regulated activity had a "substantial economic effect" upon interstate commerce.

b. Expansion to Intrastate Activities

In decisions subsequent to Jones & Laughlin Steel Corp., the Court clarified its new test for determining the validity of congressional regulation of intrastate commerce. The Court emphasized that the size of the effect on interstate commerce created by a regulated intrastate activity was not a determining factor. Rather, the important requirement was that the regulated activity have some effect on interstate commerce, be it relatively large or relatively small.
Wickard v. Filburn\(^{173}\) represents possibly the most extreme example of this doctrine. In Wickard, a farmer produced wheat in excess of the quota allotted him and was assessed a penalty on the surplus.\(^{174}\) The farmer, Roscoe Filburn, protested that because the wheat he grew was for his own personal consumption, it was outside the scope of the Commerce Clause.\(^{175}\) However, the Supreme Court determined that this crop, even though not grown for interstate commerce, was within congressional reach because it impacted the price and demand for wheat in interstate markets.\(^{176}\) Even though Filburn's personal crop constituted a trivial amount of wheat in the scheme of the overall market, the Court held that the "cumulative effect" of his actions, when aggregated with those of other farmers doing the same thing, would create a result that was far from trivial.\(^{177}\)

Through cases like Wickard, the Court opened the door for regulation of purely local activities, provided they have an effect on commerce. This doctrine was further illustrated in the 1964 cases of Heart of Atlanta Motel, Inc. v. United States\(^{178}\) and Katzenbach v. McClung.\(^{179}\) Both cases challenged the constitutionality of the Civil Rights Act of 1964.\(^{180}\) In passing the Civil Rights Act, Congress made findings that people of all races had become increasingly mobile, traveling across state lines for business and personal reasons.\(^{181}\) The limited availability of accommodations for African Americans (in the case of Heart of Atlanta) and of restaurants that would serve them (in the case of McClung) was found to have both a qualitative and quantitative effect on the interstate travel of African Americans.\(^{182}\) Clearly, the qualitative effect was the impairment of an African American traveler's convenience and pleasure during the trip.\(^{183}\) The quantitative effect was the discouragement of travel altogether created by these inconveniences.\(^{184}\) These combined effects on interstate commerce

have an effect on interstate commerce, but many such acts, when considered cumulatively, would create the necessary effect. See 317 U.S. at 127-28.

174. Id. at 114-15.
175. See id. at 119.
176. See id. at 128.
177. See id. at 127-28.
180. See McClung, 379 U.S. at 298; Heart of Atlanta, 379 U.S. at 243-44.
181. See Heart of Atlanta, 379 U.S. at 252-53.
182. See McClung, 379 U.S. at 300; Heart of Atlanta, 379 U.S. at 253.
183. See Heart of Atlanta, 379 U.S. at 253.
184. See id.
were found to be sufficient to enable Congress to regulate the conduct of such purely local activities.\textsuperscript{185}

In addition to increasing Congress' reach into intrastate activities, *Heart of Atlanta* articulated an expansion to the "affects interstate commerce" test that is still valid today.\textsuperscript{186} Known as the "rational basis" test, it provides that courts will uphold federal legislation where they can determine that Congress had a rational basis for finding that the regulated activity affects interstate commerce.\textsuperscript{187} Once this determination is made, the courts will then evaluate if the means chosen by Congress are reasonably adapted to the end it sought to accomplish.\textsuperscript{188}

In addition to the civil challenges embodied in *Wickard* and the 1964 cases, the Court also heard challenges to Congress' authority to enact criminal laws under the commerce power. Relying on the "cumulative effect" theory of *Wickard*, as well as the belief that some issues are beyond the capacity of the states to regulate, the Court has upheld aspects of federal criminal laws that prohibit entirely local activities.\textsuperscript{189} In *Perez v. United States*,\textsuperscript{190} the Court reviewed the constitutionality of Title II of the Consumer Credit Protection Act, enacted by Congress to combat extortionate credit practices.\textsuperscript{191} Applying the "affects interstate commerce" test from *Jones & Laughlin Steel Corp.*, the Court determined that local loan sharking activities cannot be excised from congressional regulation merely because they constitute a trivial effect.\textsuperscript{192} The Court concluded that local loan sharking not only altered property ownership on a large scale, but was a tool of organized crime that enabled those involved to finance their national operations.\textsuperscript{193} Therefore, under the "cumulative effects" test, loan sharking was found

\textsuperscript{185} See *id.* at 261.
\textsuperscript{186} See *United States v. Lopez*, 514 U.S. 549, 557 (1995) (acknowledging that the Court has undertaken to determine whether there is a rational basis for finding that the regulated activity affected interstate commerce since its decision in *Jones & Laughlin Steel Corp.*).
\textsuperscript{187} See *Heart of Atlanta*, 379 U.S. at 258.
\textsuperscript{188} See *id.* at 258-59.
\textsuperscript{189} See *Perez v. United States*, 402 U.S. 146, 147, 154 (1971) (holding that local loan sharking activities could be reached by Congress through its commerce power).
\textsuperscript{190} *Perez v. United States*, 402 U.S. 146 (1971).
\textsuperscript{191} See *id.* at 146-49.
\textsuperscript{192} See *id.* at 154 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)) (asserting that if a class of activities is within the realm of the federal commerce power, then the courts have no authority to exclude from regulation what they perceive to be trivial examples of that class of activities).
\textsuperscript{193} See *id.* at 155-57; 1 ROTUNDA & NOWAK, supra note 98, § 4.10, at 464.
to have the necessary effect on interstate commerce.\textsuperscript{194} Furthermore, Congress believed that the seriousness of the national problem presented by organized crime was such that it could not be handled by the states acting alone; the resources of the federal government were needed to combat it.\textsuperscript{195}

c. Tenth Amendment Revisited

The Court also re-addressed the role of the Tenth Amendment in regulation of intrastate activities. The Supreme Court explicitly removed the Tenth Amendment as an independent limitation on the breadth of the commerce power in \textit{United States v. Darby},\textsuperscript{196} an interpretation that is still valid today.\textsuperscript{197} \textit{Darby} upheld the criminal provision of the Fair Labor Standards Act of 1938, which made it a crime to employ workers to produce goods for interstate commerce at wages below those specified in the Act, or for hours beyond the maximum provided by the Act.\textsuperscript{198} Whereas the Court in \textit{Dagenhart} had determined, under the Tenth Amendment, that terms of employment are not directly related to interstate commerce, the \textit{Darby} Court concluded that Congress was entitled to choose the means by which to enforce its regulation of interstate commerce, so long as those means do not violate some other constitutional provision.\textsuperscript{199} There would, however, be another brief lapse in the Court's Tenth Amendment interpretation before the holding of \textit{Darby} was firmly established.

In 1976, the Supreme Court held that the Tenth Amendment prohibited Congress from regulating minimum wages paid to state and local employees through the Fair Labor Standards Act.\textsuperscript{200} In \textit{National League of Cities v. Usery},\textsuperscript{201} the Court concluded that, although minimum wages clearly affect commerce, their regulation by Congress as applied to state and local employees impaired the states' autonomy to

\begin{itemize}
  \item \textsuperscript{194} See \textit{Perez}, 402 U.S. at 157.
  \item \textsuperscript{195} See \textit{id.} at 150 (citing congressional debate by Senator Proxmire).
  \item \textsuperscript{196} \textit{United States v. Darby}, 312 U.S. 100 (1941), \textit{rev'd in part} \textit{Hammer v. Dagenhart}, 247 U.S. 251 (1918).
  \item \textsuperscript{197} \textit{id.} at 123-24. Despite the Court's 1976 shift away from this holding in \textit{National League of Cities v. Usery}, Garcia v. San Antonio Metropolitan Transit Authority overruled \textit{National League of Cities}, thus restoring the Court's holding in \textit{Darby}.
  \item \textsuperscript{198} \textit{id.} at 125-26.
  \item \textsuperscript{199} See \textit{id.} at 114-15; \textit{supra} notes 150-59 and accompanying text (discussing the Court's opinion in \textit{Hammer v. Dagenhart}).
\end{itemize}
best determine how to allocate the funds they maintained for salaries.\textsuperscript{202} The Court determined that the Tenth Amendment required states be left alone to perform those functions not delegated to Congress.\textsuperscript{203} This left open the question of how to precisely define a \textit{“state function.”} Justice Blackmun’s vote in favor of the majority echoed this question, as he expressed concerns regarding \textit{“certain possible implications of the Court’s opinion.”}\textsuperscript{204} These concerns became important nine years later when Justice Blackmun joined with the dissenters from \textit{National League of Cities} to explicitly overrule it in \textit{Garcia v. San Antonio Metropolitan Transit Authority}.

The \textit{Garcia} decision marked a return to the elimination of the Tenth Amendment as a limitation on the commerce power. Under \textit{Garcia}, the Supreme Court concluded that congressional regulation of an activity that would be within its purview if applied to a private citizen retains its validity even where that activity is being performed by a state government.\textsuperscript{206} Therefore, where Congress passes a generally applicable statute, the Tenth Amendment does not exempt a state’s actions from that regulation merely because the actor is a state.\textsuperscript{207} The limits on this concept were clarified in \textit{New York v. United States},\textsuperscript{208} where the Court determined that congressional attempts to force a state to adopt certain regulations, or to develop regulations in an area that the state does not wish to regulate, are beyond the scope of the commerce power.\textsuperscript{209} Such attempts to force states to enact legislation that is not part of a generally applicable statute impinges on the state’s sovereignty.\textsuperscript{210}

\textsuperscript{202} See id. at 846.

\textsuperscript{203} See id. at 842.

\textsuperscript{204} Id. at 856. In his majority opinion for \textit{Garcia}, Justice Blackmun explicitly stated that this distinction had been very difficult to identify in the years following \textit{National League of Cities}. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 539 (1985), \textit{rev’g} National League of Cities v. Usery, 426 U.S. 833 (1976) (providing that is had been \textit{“difficult, if not impossible, to identify an organizing principle”} to distinguish between functions that were \textit{“traditionally governmental functions”} and those that were not).

\textsuperscript{205} Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), \textit{rev’g} National League of Cities v. Usery, 426 U.S. 833 (1976). It is interesting to note that the same statute that was at issue in \textit{National League of Cities} was also at issue in \textit{Garcia}, namely, the Fair Labor Standards Act. Id. at 530; \textit{National League of Cities}, 426 U.S. at 836-37.

\textsuperscript{206} See Garcia, 469 U.S. at 546-47.

\textsuperscript{207} See id. A \textit{“generally applicable statute”} may be defined as \textit{“a statute relating to the whole community, or concerning all persons generally.”} BLACK’S LAW DICTIONARY 1410 (6th ed. 1990).

\textsuperscript{208} New York v. United States, 505 U.S. 144 (1992).

\textsuperscript{209} See id. at 178.

\textsuperscript{210} See id. at 177-78, 187-88.
Today, the Court gives deference to Congress' determination that it has authority to enact particular legislation under the Commerce Clause. Still applying the "rational basis" test from *Heart of Atlanta*, the Court will only make two inquiries: whether there is a rational basis to support Congress' finding that the regulated activity affects interstate commerce, and whether "the means chosen by [Congress are] reasonably adapted to the end" sought to be achieved. Despite this test, the last addition to the Supreme Court's Commerce Clause jurisprudence, *United States v. Lopez*, demonstrated a shift back toward the more restrictive interpretation of the decades preceding *Jones & Laughlin Steel Corp.*

4. The Return to Federalism: *United States v. Lopez*

With *United States v. Lopez*, the pendulum of interpretation began to swing back in favor of states' rights. Chief Justice Rehnquist authored the majority opinion in this five-to-four decision. At issue was whether a 1990 federal statute, the Gun-Free School Zones Act ("GFSZA"), was a constitutionally sound exercise of congressional authority. Chief Justice Rehnquist emphasized that, despite the breadth of the definition given to "commerce" by Chief Justice Marshall in *Gibbons*, there is an inherent limitation on the commerce power. Despite this early emphasis on limitations, however, the *Lopez* Court upheld its prior position that legislation brought under the commerce power should be reviewed using a "rational basis" approach.

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212. Id. (citing *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964)).

213. See *United States v. Lopez*, 514 U.S. 549, 551 (1995). Chief Justice Rehnquist was joined in his opinion by Justices O'Connor, Scalia, Kennedy, and Thomas. See id. at 550. Both Chief Justice Rehnquist's majority opinion and the two concurring opinions, authored respectively by Justice Kennedy and Justice Thomas, contain excellent reviews of Commerce Clause jurisprudence from *Gibbons v. Ogden* to the present day. See id. at 551, 568 (Kennedy, J., concurring), 584 (Thomas, J., concurring).

214. See *id.* at 552. The GFSZA provided that anyone caught carrying a firearm within a distance of 1000 feet from any public, private, or parochial school was guilty of a federal offense. See *id.* at 551 & n.1.

215. See *id.* at 553; see also *supra* note 134 and accompanying text (discussing inherent limitation language in *Gibbons v. Ogden* relied on by both the majority and the concurrence in *Lopez*).

216. See *Lopez*, 514 U.S. at 557. Under this form of analysis, Congress' legislative judgment is given deference, provided that its legislative judgment was rational. See Biden Brief, *supra* note 19, at 12 (citing *Lopez*, 514 U.S. at 557, 563, 568); see also *supra* Part II.B.3.b (discussing the rational basis test from *Heart of Atlanta Motel, Inc. v. United States*).
Before beginning his analysis of the GFSZA under the "rational basis" test, the Chief Justice acknowledged that the case law following *Jones & Laughlin Steel Corp.* had been unclear as to whether the Commerce Clause required the activity being regulated to "substantially affect" or merely "affect" interstate commerce.217 In an explicit commentary on Commerce Clause interpretation, he concluded that the correct test was that of a "substantial effect."218

To determine if the activity being regulated by the GFSZA substantially affected interstate commerce, the Chief Justice divided his analysis into four areas: regulation of intrastate activities; jurisdictional elements; congressional findings; and practical implications of sustaining the Act. With regard to regulation of intrastate activities, the Chief Justice pointed out that in previous cases upholding congressional regulation of purely intrastate activity, the regulated activity was economic in nature.219 However, Chief Justice Rehnquist also quoted

217. See *Lopez*, 514 U.S. at 559.

218. See *id.* As a result, the broad test from *Jones & Laughlin Steel Corp.* may be referred to as the "substantially affects" test.

219. See *id.* at 559-60. The Chief Justice specifically made reference to *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, Inc, 452 U.S. 264 (1981), *Perez v. United States*, 402 U.S. 146 (1971), *Katzenbach v. McClung*, 379 U.S. 294 (1964), *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Wickard v. Filburn*, 317 U.S. 111 (1942). *See id.* Some have viewed this section of the Chief Justice's opinion as stating a new rule of Commerce Clause interpretation. *See Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 833 (4th Cir. 1999) (hereinafter *Brzonkala III*), aff'd sub nom. United States v. Morrison, 120 S. Ct. 1740 (2000) (stating that the reach of the commerce power strictly to intrastate activity that is economic in nature is the "law of the land"). *But see* dissenting opinions of Justices Souter and Breyer, *Lopez*, 514 U.S. at 603, 615. Justice Souter expressed his conviction that the majority's opinion was a "misstep" and "not quite in gear with the prevailing standard." *See id.* at 614-15 (Souter, J., dissenting). Acknowledging the lessons of history regarding Commerce Clause interpretation, Justice Souter accused the majority of taking a backward glance at interpretive standards in place during the years preceding *Jones & Laughlin Steel Corp.* *See id.* at 608 (Souter, J., dissenting). He opined that, in doing so, the majority had created a ripple in the rational basis test, implying an unequal application of that test depending on whether the regulated activity has an economic or non-economic nature. *See id.* (Souter, J., dissenting). Justice Souter did not express much hope for the future of Commerce Clause jurisprudence under a resurrected categorization scheme. *See id.* (Souter, J., dissenting). The Court has stated, in *North American Co. v. Securities & Exchange Commission*, that Congress must be permitted "to act in terms of economic ... realities," and that the determination of what constitutes commerce is a practical matter, not to be determined by technical legal conceptions. 327 U.S. 686, 705 (1946) (citing *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905)). Additionally, in his dissent, Justice Breyer addressed this point by referencing the language of the Commerce Clause itself, which provides for regulation of commerce among the several states. *See Lopez*, 514 U.S. at 615 (Breyer, J., dissenting) (quoting U.S. CONST. art. I, § 8, cl. 3). He maintained that this grant of power includes the power to regulate intrastate activities so long as those activities significantly affect interstate commerce. *See id.* (Breyer, J., dissenting). Echoing the arguments of Justice Souter, Justice Breyer criticized the majority's attempt to create a distinction between commercial and non-commercial intrastate activity. *See id.* at 627 (Breyer, J., dissenting). Such a distinction...
language from *Wickard v. Filburn*, which provides that even where a regulated intrastate activity is not economic in nature, it may still be reached by the commerce power if it bears a substantial effect upon interstate commerce.220 Because the GFSZA was a criminal statute, Chief Justice Rehnquist failed to see any effect it had on commerce, no matter how broad a definition one used.221

The Chief Justice next reviewed the GFSZA for a jurisdictional element, which would allow a case-by-case analysis of whether the particular firearm possession affects interstate commerce.222 Chief Justice Rehnquist indicated that such a limitation on the reach of the GFSZA might have been sufficient to save it under the “substantially affects” test.223 The Chief Justice then pointed to a lack of legislative findings regarding the effect of firearm possession on interstate commerce.224 Such data, although not required of Congress,225 can be conflicts with the language of *Wickard* cited by the Chief Justice, as well as other passages. See *id.* at 627-28 (Breyer, J., dissenting). Justice Breyer quoted *Wickard’s* warning to the Court not to review congressional action on the basis of “‘formula[s]’ that would give ‘controlling force to nomenclature such as ‘production’ and ‘indirect’ and foreclose consideration of the actual effects of the activity in question upon interstate commerce.’” See *id.* (quoting *Wickard v. Filburn*, 317 U.S. 111, 120 (1942)). Justice Breyer also criticized the Chief Justice’s classification of *McClung, Perez,* and *Wickard* as cases involving intrastate economic activity, because the Court did not focus on the economic nature of the regulated activity (or lack thereof) in any of these cases. See *id.* at 628 (Breyer, J., dissenting). Instead, each focused on the distinction between interstate and foreign commerce. See *id.* (Breyer, J., dissenting). Most importantly, Justice Breyer pointed out that the state of Commerce Clause jurisprudence had remained stable for almost sixty years. See *id.* at 630 (Breyer, J., dissenting). During that time, Congress had enacted countless statutes, many with jurisdictional provisions containing the language “affecting commerce.” See *id.* (Breyer, J., dissenting). The Chief Justice’s opinion in *Lopez* created confusion over whether the meaning of that language in the statutes is now altered to regulate only commercial activity, and not non-commercial activity. See *id.* (Breyer, J., dissenting). Additionally, Justice Breyer questioned whether the majority’s opinion meant that the cumulative effect doctrine applied in *Wickard* is no longer applicable where there is no jurisdictional element. See *id.* (Breyer, J., dissenting). Such confusion could have far-reaching implications.

220. See *Lopez*, 514 U.S. at 556 (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)). “[E]ven 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 . . . .” *Wickard*, 317 U.S. at 125.

221. See *Lopez*, 514 U.S. at 561.

222. See *id.*

223. See *id.* at 562 (stating that such a jurisdictional limitation might narrow the field of firearm possessions to those that have an explicit effect on interstate commerce).

224. See *id.* at 562-63. Congress had amassed data on firearm possession in school zones for other purposes, but Chief Justice Rehnquist held that those previous findings were insufficient to support the claims made by the United States in favor of the GFSZA. See *id.*

225. See *Perez v. United States*, 402 U.S. 146, 156 (1971) (clarifying that Congress need not make particularized findings to successfully legislate); *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (stating that the absence of congressional findings is not fatal to a statute’s validity).
useful to the Court in evaluating Congress’ judgment about the effect of the activity on interstate commerce. Finally, concerning the practical implications of sustaining the GFSZA, Chief Justice Rehnquist concluded that such validation by the Court would remove all limits on Congress’ ability to regulate any actions of an individual. Ultimately,

226. See Lopez, 514 U.S. at 563. Just as legislative history can be used to infer congressional intent, legislative findings can be used to infer Congress’ justification for passing the legislation in question. But see dissenting opinions of Justices Souter and Breyer, id. at 603, 615. Justice Souter stated that any congressional findings, unless they did more than merely enumerate the effect on interstate commerce that is implicit in the language of the GFSZA itself, would add nothing to the record. See id. at 612 & n.2 (Souter, J., dissenting). He concluded that the majority had expressed an interest in such findings because it needed assistance in performing a difficult task: determining whether gun possession in school zones substantially affects interstate commerce. See id. at 612 (Souter, J., dissenting). He conceded that the facts of the Lopez case were such that the effect on interstate commerce was not readily apparent. See id. (Souter, J., dissenting). The role of Congress, according to Justice Souter, is not to correctly determine whether the legislation it is enacting does, indeed, substantially affect interstate commerce but merely to exercise reasonable judgment in so finding. See id. at 613 (Souter, J., dissenting). This differs from the results yielded by congressional findings, which only show what Congress did find, not what it rationally could find. See id. (Souter, J., dissenting). In short, Justice Souter opined that congressional findings can be helpful in a certain context, but should not be used to replace, in any way, the rational basis test established in Heart of Atlanta:

Help is welcome, and it not incidentally shrinks the risk that judicial research will miss material scattered across the public domain or buried under pounds of legislative record. Congressional findings on a more particular plane than this record illustrates would accordingly have earned judicial thanks. But thanks do not carry the day as long as rational possibility is the touchstone . . . .

Id. at 614 (Souter, J., dissenting). Reviewing the results of numerous studies and reports available in the public sector, Justice Breyer, in his dissent, concluded that Congress could have rationally found that the presence of guns in schools is not only widespread, but also has a significantly negative impact on education. See id. at 619-20 (Breyer, J., dissenting). Education and the national economy are historically joined; where there has been a widespread increase in education, there has been a correlative increase in economic growth. See id. at 620 (Breyer, J., dissenting). Justice Breyer also cited statistics that show companies today are making decisions as to where to locate their offices based on the availability of workers with basic education. See id. at 622 (Breyer, J., dissenting). As a result of this inextricable link between education and commerce, coupled with Commerce Clause precedent, Justice Breyer found that gun possession in school yards bore the requisite effect on interstate commerce. See id. at 622-23 (Breyer, J., dissenting).

227. See id. at 564. The United States claimed that firearm possession within a school zone has the potential of resulting in violent crime; violent crime, in turn, affects interstate commerce in two ways. See id. at 563. First, violent crime creates substantial costs, which are spread through the national economy via insurance claims and payments. See id. at 563-64. Second, the threat of violent crime acts as a deterrent to travel. See id. at 564. The Government further argued that firearm possession within a school zone poses a threat to the national educational process, causing students to receive a lower level of education, ultimately weakening the national economy. See id. In response to what he termed the Government’s “costs of crime” reasoning, Chief Justice Rehnquist first argued that such an attenuated tie to interstate commerce would enable Congress to regulate all crime, not just that related to firearm possession within a school zone. See id. He similarly dismissed the Government’s “national productivity” argument, as he found it to have the potential for granting Congress authority to regulate any area of national
the Chief Justice was unable to find a nexus between the GFSZA and interstate commerce, short of “piling inference upon inference.”

Justice Kennedy’s concurrence demonstrated his lack of complete commitment to the Chief Justice’s position. Justice Kennedy began his concurrence with an expression of concern that the Court exercise “great restraint” before invalidating any act of Congress on the basis of the Commerce Clause. Noting the difficulty in translating the extent of the commerce power from the economic world known to the Framers to the modern, global economy of the twentieth century, Justice Kennedy acknowledged that Commerce Clause jurisprudence productivity, including child custody, divorce, and marriage. See id. Chief Justice Rehnquist also argued that allowing Congress to regulate activities having an adverse effect on the educational environment would lead to congressional authority to regulate education in general. See id. at 565. But see dissenting opinions of Justices Souter and Breyer, id. at 603, 615. Justice Souter interpreted the majority’s arguments against the GFSZA as being either that the relationship between commerce and those areas of traditional state concern impacted by the Act, namely education and criminal law, is remote, or that congressional commerce power is weakened when it impacts an area of traditional state concern. See id. at 609 (Souter, J., dissenting). He flatly renounced both arguments, observing that the latter had already been explicitly rejected in Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc., where the Court reaffirmed the plenary nature of the commerce power. See id. (Souter, J., dissenting) (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549-50 (1985); Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc., 452 U.S. 264, 276 (1981); United States v. Darby, 312 U.S. 100, 114 (1941); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196-97 (1824)). Justice Breyer addressed the Chief Justice’s suggestion that finding the GFSZA constitutional would open the door for congressional regulation of education, family law, or any activity that Congress determined had a substantial effect on interstate commerce. See id. at 624 (Breyer, J., dissenting). He believed that situations are few and far between in which the activity to be regulated, on its face, has very little to do with commerce, but, when aggregated, has a significant effect on commerce. See id. (Breyer, J., dissenting).

228. Id. at 567. But see dissenting opinion of Justice Breyer, id. at 615. In his dissent, Justice Breyer pointed to several inconsistencies with prior case law created by the majority’s decision. See id. at 625 (Breyer, J., dissenting). He first contrasted the majority’s decision to invalidate the GFSZA with its decision to uphold regulation of loan sharking activities in Perez v. United States. See id. (Breyer, J., dissenting). Justice Breyer maintained that in Perez, the Court was concerned about the cumulative impact caused by violence inherent in the use of loan sharks to collect unpaid debts. See id. (Breyer, J., dissenting). This concern is analogous to the concern that he believed the Court should have over the cumulative effect on education, and thus, on the national economy, created by the threat of force inherent in guns in schools. See id. at 625-26 (Breyer, J., dissenting). Justice Breyer also compared the facts of Lopez to those of Katzenbach v. McClung, finding that in McClung, the Court concluded that discrimination caused both serious social and economic harm on a national scale. See id. at 626 (Breyer, J., dissenting). Justice Breyer called on the majority to give Congress the same degree of deference in Lopez as it had in Wickard. See id. at 627 (Breyer, J., dissenting). It was that deference that allowed the Court to see that homegrown wheat not only satisfied a demand which might otherwise be satisfied through purchases on the open market, but also might find its way into the open market, negatively impacting the price of wheat. See id. (Breyer, J., dissenting).

229. Justice Kennedy was joined in his concurrence by Justice O’Connor. See id. at 568.

230. See id. (Kennedy, J., concurring).
throughout that time had been anything but consistent. He referenced the duty that the principle of *stare decisis* places on the Court to continue in the direction plotted by all previous Commerce Clause decisions and, specifically, not to redefine what constitutes "commerce." Justice Kennedy advocated the application of case-by-case analysis under the Commerce Clause and condemned bright-line rules as being too inflexible.

Justice Kennedy also addressed the Court’s authority and responsibility to review acts of Congress that threaten to upset the balance between state and federal powers. He maintained that this responsibility is not as clearly established as the Court’s authority to preserve the separation of powers or the Court’s power of judicial review. Referencing discussion of federalism in the Federalist Papers, Justice Kennedy acknowledged that the separation between state and federal government can be maintained by the elective process, which would clearly not include the federal judiciary. However, finding that no specific procedures exist whereby the two elected branches of government can be mandated to take the action necessary to preserve this balance, Justice Kennedy concluded that judicial review is essential to preserve the requisite separation.

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231. *See id.* (Kennedy, J., concurring).

232. This is a legal doctrine that “when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same.” BLACK’S LAW DICTIONARY 1406 (6th ed. 1990).

233. *See Lopez,* 514 U.S. at 574 (Kennedy, J., concurring). In saying this, Justice Kennedy clearly disagreed with the position of Justice Thomas, whose concurrence argued for a return to a 1787 definition of "commerce." *See infra* note 243 (discussing Justice Thomas' concurrence in *Lopez*).

234. *See Lopez,* 514 U.S. at 573 (Kennedy, J., concurring) (acknowledging the Court’s “definitive commitment” to a “practical conception” of the Commerce Clause); *see also id.* at 574 (Kennedy, J., concurring) (decrying “content-based boundaries” without additional factual analysis as an imprecise means of defining Commerce Clause limitations).

235. *See id.* at 575 (Kennedy, J., concurring).

236. *See id.* (Kennedy, J., concurring).

237. *See id.* at 576-77 (Kennedy, J., concurring). “[T]he people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due.” THE FEDERALIST NO. 46 (James Madison).

238. *See Lopez,* 514 U.S. at 578 (Kennedy, J., concurring). Justice Kennedy stated: Although it is the obligation of all officers of the Government to respect the constitutional design . . . 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. *Id.* (Kennedy, J., concurring).
Calling on the Court’s authority to preserve the federal balance, Justice Kennedy declared that balance to be negatively impacted by the GFSZA. Justice Kennedy saw the authority to deter gun possession in school zones as clearly belonging to the states. He further concluded that the states are the best bodies to experiment with such legislation, where the process of trial and error can be used to mold the most effective means of deterrence. To Justice Kennedy, the GFSZA supplanted state regulations already in place and prohibited states without such legislation from enacting their own such laws. For these reasons, he concurred with the majority’s conclusion.

C. Preserving Equal Protection of the Laws

In addition to the Commerce Clause, Congress found support for its authority to enact the VAWA under the Fourteenth Amendment’s Enforcement Clause. The Fourteenth Amendment was drafted in the aftermath of the Civil War. The political influence in Congress was

239. See id. at 580 (Kennedy, J., concurring).
240. See id. at 581 (Kennedy, J., concurring).
241. See id. (Kennedy, J., concurring).
242. See id. at 583 (Kennedy, J., concurring).
243. See id. (Kennedy, J., concurring). The most extreme position expressed in Lopez was that of Justice Thomas’ concurring opinion. See id. at 584 (Thomas, J., concurring). Justice Thomas began his concurrence with a plea that the Court, at some future time, revisit its Commerce Clause jurisprudence, claiming that the Court had “drifted far from the original understanding of the Commerce Clause.” Id. (Thomas, J., concurring). Justice Thomas reviewed the historical definitions of “commerce” to support his position that the case law of the late 1800s and early 1900s, which separated commercial activities from those of manufacturing and production, was more in keeping with the original intent of the Clause. See id. at 586 (Thomas, J., concurring). Justice Thomas stated, “[a]s one would expect, the term ‘commerce’ was used in contradistinction to productive activities such as manufacturing and agriculture.” Id. (Thomas, J., concurring). Justice Thomas contended that this distinction pervaded the ratification process, being used by Alexander Hamilton in The Federalist Papers, and again during various state ratification conventions. See id. at 586-87 (Thomas, J., concurring). Justice Thomas explained that applying the term “commerce” in Article I, Section 8 to activities considered to be commerce under a modern-day definition, rather than limiting the application to those activities that constituted commerce in 1787, created textual and structural problems in applying the Clause. See id. at 587 (Thomas, J., concurring). He further contended that the “original” meaning of commerce does not support the “substantially affects” test developed in Jones & Laughlin Steel Corp. See id. (Thomas, J., concurring). He argued that, if the Framers had wanted Congress to have authority over any thing or activity that had a substantial effect on commerce, they could have written such language into the Commerce Clause prior to the Constitution’s ratification. See id. (Thomas, J., concurring). Justice Thomas stood alone in his concurring opinion. See id. at 584 (Thomas, J., concurring). Justice Kennedy’s concurrence may be read as an indication of the belief that likely prevented the other justices from signing on to Justice Thomas’s opinion. See supra notes 233-34 and accompanying text (discussing Justice Kennedy’s emphasis on the limitations that the doctrine of stare decisis places on the Court’s actions).
244. See infra Part II.C.1 (tracing the historical development of the Fourteenth Amendment).
heavily weighted in favor of former abolitionists, who saw the southern states' post-war treatment of newly freed slaves as a problem requiring national attention.\textsuperscript{245} Congress responded to this problem with three constitutional amendments.\textsuperscript{246} Following its ratification, questions began to arise regarding the breadth of the Fourteenth Amendment's reach.\textsuperscript{247} As with the Commerce Clause, the question of breadth has continued to generate Fourteenth Amendment litigation to this day.\textsuperscript{248}

1. Social Reform in the Wake of the Civil War

The Fourteenth Amendment was ratified in 1868, but not without some difficulty.\textsuperscript{249} It was one of three Civil War amendments enacted following the Emancipation Proclamation of 1863.\textsuperscript{250} The purposes of these Amendments reflect the political landscape after the Civil War.\textsuperscript{251} In the years following ratification of the Thirteenth Amendment, it became clear that its prohibitions needed reinforcement.\textsuperscript{252} During the congressional hearings on the Fourteenth Amendment, testimony revealed that newly freed slaves, as well as white persons, who advocated unpopular views in the South, were continuing to experience abuse by private individuals.\textsuperscript{253} In 1865, Congress was controlled by the Republican party, which had two primary objectives: securing civil rights for all persons, including the newly freed slaves, and retaining its congressional majority.\textsuperscript{254} There was widespread concern that those

\textsuperscript{245} See infra Part II.C.1 (examining the nation's political climate at the time of the Fourteenth Amendment's enactment).

\textsuperscript{246} See infra Part II.C.1 (describing the focus of each of the three Civil War Amendments).

\textsuperscript{247} See infra Part II.C.2 (discussing Fourteenth Amendment jurisprudence and the various positions taken by the Supreme Court since the Amendment's enactment).

\textsuperscript{248} See infra Part II.C.2 (describing the current debate as to the reach of the Fourteenth Amendment).

\textsuperscript{249} See 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE § 18.7, at 312 (3d ed. 1999). The difficulty involved in the ratification process is discussed, infra, notes 259-71 and accompanying text.

\textsuperscript{250} See GUNTHER & SULLIVAN, supra note 107, at 420. The three Civil War Amendments consist of the Thirteenth Amendment, abolishing slavery, the Fourteenth Amendment, requiring due process and equal protection for all citizens, and the Fifteenth Amendment, ensuring the right to vote for all (male) citizens. See U.S. CONST. amend. XIII, XIV, and XV.

\textsuperscript{251} See 3 ROTUNDA & NOWAK, supra note 249, § 18.7, at 302. Justice Miller reported, in his majority opinion from the Slaughter-House Cases, that the Civil War Amendments have "one pervading purpose...we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freedom and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." 83 U.S. 36, 71 (1872).

\textsuperscript{252} See RICHARD B. BERNSTEIN, AMENDING AMERICA 103 (1993).


\textsuperscript{254} See 3 ROTUNDA & NOWAK, supra note 249, § 18.7, at 307. The return of the southern
who had advocated the secession of the southern states would soon have power in Congress equal to those who had labored to keep the Union whole. The nation's interest in issues of state sovereignty was at a low point. The Republican majority believed that the only way to protect its reconstruction plans from presidential vetoes or congressional repeals was to immortalize them in a constitutional amendment. Some theorize that the intent of the Fourteenth Amendment drafters was not merely to establish a broad spectrum of civil rights for all persons, but to grant Congress equally broad authority to protect those rights and expand them, if necessary. The job of drafting an amendment that would accomplish these dual purposes was not an easy one.

Drafting constitutional amendments that would be accepted by both Democrats and Republicans, particularly in a post-civil war atmosphere, required a great deal of compromise. In addition to basic political differences between the parties, the drafters had to address the strong public opinion, particularly in the North, that post-war life should return to normal as quickly as possible. An initial draft, known as the Bingham Amendment, was presented by Representative John Bingham to the House of Representatives in February of 1866. This draft amendment granted Congress the authority to enact any law necessary to ensure equal protection and access to the full spectrum of privileges states to the Union, and thus, to Congress, opened a large number of Senate and House seats for which the Democrats were hungry to vie against the Republican majority. See Bernstein, supra note 252, at 104.

255. See Bernstein, supra note 252, at 105. Because representation in Congress was based on population, and those who, before the War, had been counted as three-fifths of a person per Article I, Section 3 of the Constitution, were now to be counted as a whole person, southern states would have increased representation over their pre-War status. See Joseph B. James, The Framing of the Fourteenth Amendment 156 (1956).

256. See 3 Rotunda & Nowak, supra note 249, § 18.7, at 311.

257. See Bernstein, supra note 252, at 105.

258. See 3 Rotunda & Nowak, supra note 249, § 18.7, at 307. Other sources break these intentions into four goals: 1) to guarantee each person a set of civil rights that could not be defeated by state action; 2) to advance the legal status of former slaves; 3) to secure broad enforcement powers for Congress over the provisions of the Amendment; and 4) to establish the federal government as the authority over civil rights issues. See id. at 309-11.

259. See id. at 307-08. It has been said that proponents of the Amendment faced a tripartite challenge: 1) preventing conservative and moderate supporters from withdrawing their support; 2) managing not to alienate progressive and radical supporters; and 3) disproving the most extreme criticisms of the Amendment's opponents. See Bernstein, supra note 252, at 107-08.

260. See 3 Rotunda & Nowak, supra note 249, § 18.7, at 308.

and immunities for all citizens. The draft was not warmly received, provoking three days of debate. The criticism was directed at the disproportionate power granted to Congress, which could potentially eliminate the need for state legislatures. A new draft was prepared, which was presented to the House of Representatives on April 30, 1866. This revision provided Congress with remedial, rather than plenary, powers, limiting the breadth of congressional authority to the protection of each citizen's access to privileges and immunities against denial by the states. Thus, through the revised draft, the necessary compromise was reached.

The revised draft was approved by Congress on June 13, 1866. The Fourteenth Amendment, however, still had not been ratified by the requisite three-fourths of the states in 1868. At this time, the states that had seceded from the Union were not represented in Congress. A House committee concluded that those states must provide "adequate security for future peace and safety" before being readmitted to the Union. Congress ultimately resorted to extreme measures, making ratification of the Fourteenth Amendment a condition for each former Confederate state's renewed representation in Congress.

As ratified, the Amendment consists of five sections. Section 1 contains the grant of three significant rights: to enjoyment of the privileges and immunities due each citizen of the United States, to due process, and to equal protection of the laws. Section 5, also known as the Enforcement Clause, grants Congress the authority to create

262. See City of Boerne, 521 U.S. at 520. The text of the Bingham Amendment is as follows:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Id. (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866)).

263. See id. at 520.

264. See id. at 520-21.

265. See id. at 522.

266. See id.

267. See BERNSTEIN, supra note 252, at 108.

268. See id. at 109.

269. See JAMES, supra note 255, at 156.

270. Id.

271. See BERNSTEIN, supra note 252, at 109.

272. See U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); 3 ROTUNDA & NOWAK, supra note 249, § 18.7, at 303.
legislation appropriate for protecting the rights contained in the Amendment.273 These two sections are the most widely litigated, with Section 1 being central to most civil rights litigation.274 Only one of the Civil War Amendments, the Thirteenth, provides for congressional regulation of private conduct.275 In contrast, state action is the key to the Fourteenth Amendment.276 This distinction has raised a number of questions concerning the precise scope of the Amendment.

2. The Development of Fourteenth Amendment Interpretation

Questions concerning interpretation of the Fourteenth Amendment's Enforcement Clause often focus on whether the Clause encompasses a broader range of activities than that explicitly referenced in Section 1. Whereas Section 1 explicitly limits the reach of Fourteenth Amendment legislation to state actions, the Enforcement Clause suggests that Congress may regulate beyond this limitation, provided the legislation is appropriate to ensure that the rights enumerated in the Amendment are not abridged.277 Fourteenth Amendment jurisprudence has substantiated this interpretation.

One of the earliest Supreme Court analyses of the Fourteenth Amendment occurred in the Civil Rights Cases,278 where the Court adopted a very narrow view of the Enforcement Clause.279 The Civil Rights Cases dealt with the constitutionality of the Civil Rights Act of 1875, which created a right of equal access to public buildings, places of accommodation, and theaters.280 Because the Civil Rights Act clearly encompassed private action, as well as state action, its

273. See U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").
274. See 3 ROTUNDA & NOWAK, supra note 249, § 18.7, at 303.
275. See U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction."). Cf. U.S. CONST. amends. XIV and XV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," and "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").
277. See 4 ROTUNDA & NOWAK, supra note 253, § 19.5, at 16 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966)).
278. The Civil Rights Cases, 109 U.S. 3 (1883).
279. See id. at 11.
280. See id. at 9.
The Court held that Section 5 "does not authorize Congress to create a code of municipal law for the regulation of private rights," and therefore, the Fourteenth Amendment is limited to the regulation of purely state actions. The narrow holding of the Civil Rights Cases has been widely criticized in the century since its publication.

Almost a century after the Civil Rights Cases were decided, six justices openly challenged their validity in United States v. Guest and opined that the Fourteenth Amendment could, indeed, be used to regulate private conduct. Their opinions, however, did not go so far as to grant Congress unlimited authority. The precedential value of these six opinions in Guest is questionable, as three justices joined in one concurrence and three joined in another, neither constituting a majority opinion. Guest concerned the validity of an indictment brought under an 1870 federal statute that prohibited two or more people from intentionally hindering another individual's free exercise of any existing right or privilege. The case was brought on charges that state actors and private individuals had conspired to prevent African Americans from exercising their right to utilize the instrumentalities of interstate commerce. The majority opinion in Guest, authored by Justice Stewart, cracked open the door to congressional regulation of private conduct by holding that the regulation of conspiracies to inhibit the exercise of constitutional rights is within Congress' authority. Justice Stewart further declared that the states need not be exclusively or directly involved in activity that is regulated by Congress.

281. See id. The text of the Civil Rights Act provided, in part, "[t]hat any person who shall violate the foregoing section by denying to any citizen . . . the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section . . . shall for every such offen[s]e forfeit and pay the sum of five hundred dollars to the person aggrieved thereby . . . ."

282. Id. at 11.


284. See id. at 762 (Clark, J., concurring), 782 (Brennan, J., concurring); infra notes 292-97 and accompanying text (discussing the content of Justices Clark and Brennan's opinions).

285. See Guest, 383 U.S. at 762 (Clark, J., concurring), 782 (Brennan, J., concurring).

286. Additionally, support for the expansion of Enforcement Clause authority to purely private conduct can be found in the majority opinion of District of Columbia v. Carter. 409 U.S. 418, 424 n.8 (1973) ("This is not to say, of course, that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment."). However, this support appears in a footnote to the opinion, which, again, makes its precedential value questionable.


288. See Guest, 383 U.S. at 747.

289. See id. at 760.

290. See id. at 755.
However, the Court stopped short of extending Fourteenth Amendment authority *carte blanche* over private conduct.291

Where the majority opinion left off, the concurring opinions began. Justice Clark’s concurrence recognized congressional authority to create legislation to combat all forms of conspiracy against individuals’ Fourteenth Amendment rights, regardless of whether a state or state actor was a member of that conspiracy.292 In his partial concurrence/partial dissent, Justice Brennan explicitly stated that Congress’ authority under the Fourteenth Amendment is not limited to conspiracies involving state action.293 Justice Brennan further maintained that the correct interpretation of the Enforcement Clause is grounded in a “rational basis” inquiry.294 The nature of this inquiry can be found in Chief Justice Marshall’s interpretation of the Necessary and Proper Clause295 in *M’Culloch v. Maryland.*296 The Chief Justice described the correct application of the Necessary and Proper Clause as follows: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”297 Thus, both Justices Clark and Brennan would have extended the reach of the Fourteenth Amendment to purely private conduct. Despite the limited impact of

291. See id. at 762 (Clark, J., concurring), 782 (Brennan, J., concurring).

292. See id. at 762 (Clark, J., concurring). Justice Clark was joined in his concurrence by Justices Black and Fortas.

293. See id. at 782 (Brennan, J., concurring). Justice Brennan was joined in his concurrence by Chief Justice Warren and Justice Douglas. Justice Brennan explained that to the drafters, Congress, not the courts, was the appropriate body to create the necessary legislation to guarantee the equality espoused by the Amendment. He argued that this view suggested the primary purpose of the Amendment was to enhance the powers of Congress, not the judiciary. See id. at 783 n.7 (citing JAMES, supra note 255, at 184).

294. See id. at 783-84 (Brennan, J., concurring). The position affirmed by Justice Brennan had been previously articulated by the Court in *Ex Parte Virginia*:

   Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

100 U.S. 339, 345-46 (1879).

295. See U.S. CONST. art. I, § 8, cl. 18 (“[The Congress shall have Power]... [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).


these two concurring opinions on future Fourteenth Amendment cases, Justice Brennan’s reliance on *M’Culloch* was echoed in other majority opinions.

Chief Justice Marshall’s interpretation of the Necessary and Proper Clause became part of the majority’s holding in the 1966 case of *Katzenbach v. Morgan*. Morgan involved the constitutionality of a particular section of the Voting Rights Act of 1965. In that case, the Court first concluded that the Enforcement Clause granted Congress the same broad regulatory authority as did the Necessary and Proper Clause. The Court then analyzed the questionable section of the Voting Rights Act under a “rational basis” theory. Ultimately finding that Congress had reasonably determined the New York statute to be discriminatory, the Court deferred to Congress’ judgment. Through *Morgan*, the Court affirmed Congress’ power under the Enforcement Clause to enact prophylactic legislation for the purpose of preventing Fourteenth Amendment violations. This power was also affirmed in *South Carolina v. Katzenbach*, which upheld other portions of the Voting Rights Act of 1965.

Thirty years later, the Supreme Court expanded its holding in *Morgan* regarding prophylactic legislation. In *City of Boerne v. Flores*, the Court acknowledged Congress’ authority under the Enforcement Clause as one of “wide latitude.” The Court reaffirmed that congressional legislation in furtherance of the Fourteenth Amendment need not prohibit only that conduct which itself is unconstitutional. However, the Court also spoke to the limits on congressional regulation of private conduct. Although prophylactic

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298. *Katzenbach v. Morgan*, 384 U.S. 641 (1966); see 4 *ROTUNDA & NOWAK*, supra note 253, § 19.2, at 7 (discussing the Court’s decision to construe the Enforcement Clause of the Fourteenth Amendment as granting Congress the same breadth of authority expressed by the Necessary and Proper Clause).

299. See *Morgan*, 384 U.S. at 643. The section at issue, section 4(e), prohibited the denial of voting rights to citizens who had attended Puerto Rican schools where instruction was not in English, and therefore could not read or write English. See 4 *ROTUNDA & NOWAK*, supra note 253, § 19.2, at 6.


306. See id. at 519-20.

307. See id. at 518.

308. See id. at 524-25.
legislation may be enacted to prevent violation of Fourteenth Amendment rights, the Court declared that the means used must be congruent and proportional with the ends to be achieved. Ultimately, *City of Boerne* represents the Court’s most recent opinion upholding the breadth limitations of Section 1 of the Fourteenth Amendment.

Despite the breadth limitations of Section 1, the decisions in *Guest* and *Morgan* have expanded the reach of the Fourteenth Amendment to private conduct that constitutes state action. Where the deprivation of a Fourteenth Amendment right was caused by a private individual, the Court has developed various parameters to determine if there is a sufficient nexus with state action to conclude that the deprivation falls within Congress’ authority. Deciding if the individual committing the conduct is a state actor depends on whether he is performing a traditional state function, as well as the degree to which he is reliant on state assistance. If, for example, the state has encouraged the discriminatory conduct of a particular individual, he will be considered a state actor. The Court, itself, has admitted that the determination of whether certain conduct is private, or constitutes state action, is not an easy one. No precise formula exists for making this determination, and a conclusion can only be reached by weighing the facts on a case-by-case basis.

309. See id. at 520.

310. The Court has been reticent to expand Enforcement Clause interpretation to encompass regulation of purely private conduct. See 4 ROTUNDA & NOWAK, supra note 253, § 19.5, at 21. There has yet to be a Supreme Court case explicitly sanctioning congressional regulation of private conduct under the Enforcement Clause. See id. The reason for this is the potential for creating a problem of conflicting constitutional rights. See id. Congressional prohibition of one individual’s discriminatory conduct may violate that individual’s constitutional right, for example, to freedom of speech. See id. at 22. Such an expansion of the Enforcement Clause’s reach would require the development of standards by which courts could determine which rights have priority over other rights. See id.


312. See 16B AM. JUR. 2D Constitutional Law § 800 (1998). For example, state enforcement of private discriminatory policies will convert private conduct under those policies into state action. See id. (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)).

313. See id.

314. See id. (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)). “While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to ‘state action,’ on the other hand, frequently admits of no easy answer.” *Moose Lodge*, 407 U.S. at 172.

III. DISCUSSION

The Supreme Court's decision in *United States v. Morrison* was the final link in a chain of four cases that began in 1995. The initial complaint was filed by Christy Brzonkala, who sought redress under section 13981 of the VAWA. Her case was heard by the United States District Court, as well as the Fourth Circuit Court of Appeals, twice, before Christy petitioned the Supreme Court for certiorari. That appeal resulted in *United States v. Morrison*, which was marked by Chief Justice Rehnquist's majority opinion, as well as two strong dissenting opinions filed by Justices Souter and Breyer.

A. Facts of the Case and Opinions of the Lower Courts

*United States v. Morrison* marked the end of five years of litigation for Christy Brzonkala. As a student at Virginia Polytechnic Institute and State University ("Virginia Tech"), Christy was allegedly gang raped by two football players. In the aftermath of her attack, the university failed to provide Christy with the recourse it repeatedly promised. Christy first filed suit under section 13981 in the Western District of Virginia. On a motion to dismiss, the district court determined that section 13981 lacked constitutional support under either the Commerce Clause or the Enforcement Clause of the Fourteenth Amendment. Christy appealed to the Fourth Circuit Court of Appeals, which upheld the statute. However, that opinion was
vacated, and a re-hearing was held before the en banc court. Sitting en banc, the Fourth Circuit affirmed the decision of the district court. Still seeking restitution, Christy petitioned the Supreme Court for certiorari, which was granted in the fall of 1999.

1. Gang Rape and Institutional Politics

In the fall of 1994, eighteen-year-old Christy Brzonkala enrolled as a freshman at Virginia Tech. She was a student athlete and a prospect for the women’s softball team. On the night of September 21, 1994, Christy and another female student, Hope Handley, were in a third floor room of the dormitory where Christy was living, along with two male students whom the girls had met approximately thirty minutes before. The two men were known to Christy and her friend only by first names and their status as members of the football team. After approximately fifteen minutes of conversation, Hope left with one of the male students, James Crawford. By Christy’s account, the remaining male student, Antonio Morrison, suggested to Christy that the two have sexual intercourse. Christy verbally refused, not once, but twice. As she got up to leave the room, Morrison pushed her onto a bed, stripped off her clothes and, pinning her elbows with his hands, forced her to engage in intercourse with him. Later that night, and into the early morning hours, while in that same room, Christy was sexually assaulted by James Crawford, the other male student she had only recently met. According to Christy, Crawford had returned to the room and exchanged places with Morrison, again pinning Christy’s arms and forcing her legs apart with his knees. The two assailants later swapped places yet again, subjecting Christy for a third time to

327. See infra Part III.A.3.b (reviewing the opinion of the Fourth Circuit en banc).
328. See infra Part III.A.3.b (setting forth the holding of the en banc court).
329. See infra Part III.A.3.b (recounting Christy’s decision to appeal the en banc court’s ruling).
330. See Brzonkala Brief, supra note 46, at 2.
332. See id. at 781-82.
333. See id.
334. See Brzonkala II, 132 F.3d 949, 953 (4th Cir. 1997); Brzonkala I, 935 F. Supp. at 782.
335. See Brzonkala II, 132 F.3d at 953; Brzonkala I, 935 F. Supp. at 782.
336. See Brzonkala II, 132 F.3d at 953; Brzonkala I, 935 F. Supp. at 782.
337. See Brzonkala II, 132 F.3d at 953; Brzonkala I, 935 F. Supp. at 782; Brzonkala Brief, supra note 46, at 3.
338. See Brzonkala II, 132 F.3d at 953; Brzonkala I, 935 F. Supp. at 781-82.
339. See Brzonkala II, 132 F.3d at 953; Brzonkala I, 935 F. Supp. at 782.
forced sexual intercourse. Neither of Christy’s attackers used a condom, and after the attack, Morrison told Christy, “You better not have any f******g diseases.” After finally releasing Christy, Morrison continued to assault her, stalking her until she entered her own room in the dormitory. Following these events, but prior to Christy’s identification of her assailants, Morrison was heard to say in the dormitory’s dining room, “I like to get girls drunk and f*** the s*** out of them.” The trauma of that night effected severe changes in Christy’s life.

Approximately five months after the sexual assault, Christy learned the full names of her assailants. Then, in April 1995, after speaking with a counselor at the university’s Women’s Center, Christy filed a complaint against Antonio Morrison and James Crawford under Virginia Tech’s Sexual Assault Policy. The school conducted a hearing in May 1995. During that hearing, the two football players produced a third teammate, who testified that he had been in the dorm room for the duration of the alleged incident. Morrison testified that he had, indeed, had sexual intercourse with Christy, despite her twice refusing to consent to the union. The panel conducting the hearing, having found insufficient evidence to punish James Crawford, let him go; however, the panel suspended Antonio Morrison for a year.

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340. See Brzonkala II, 132 F.3d at 953; Brzonkala I, 935 F. Supp. at 782; Brzonkala Brief, supra note 46, at 3.
342. See Brzonkala Brief, supra note 46, at 3.
343. Brzonkala I, 935 F. Supp. at 782; see also Brzonkala II, 132 F.3d at 953.
344. As a result of the gang rape, Christy ceased attending classes, wanting only to forget about the horrifying experience. See The Open Campus Police Logs Act of 1995: Hearing on H.R. 2416 Before the Subcomm. on Postsecondary Education, Training and Life-Long Learning of the House Comm. on Economic and Educational Opportunity, 104th Cong. (1996) [hereinafter Open Campus Police Logs Act Hearing] (prepared testimony of Christy Brzonkala). She cut her hair and began staying indoors all day, sleeping as a form of escape. See id. (prepared testimony of Christy Brzonkala). In early October, only a few weeks after the gang rape, Christy attempted suicide. See id. (prepared testimony of Christy Brzonkala); Brzonkala Brief, supra note 46, at 4.
345. See Brzonkala II, 132 F.3d at 953; Brzonkala I, 935 F. Supp. at 782.
346. See Brzonkala II, 132 F.3d at 953; Open Campus Police Logs Act Hearing, supra note 344 (prepared testimony of Christy Brzonkala).
347. See Brzonkala II, 132 F.3d at 954; Brzonkala Brief, supra note 46, at 4.
348. See Open Campus Police Logs Act Hearing, supra note 344 (prepared testimony of Christy Brzonkala).
349. See Brzonkala II, 132 F.3d at 954; Brzonkala I, 935 F. Supp. at 782; Brzonkala Brief, supra note 46, at 4.
350. See Open Campus Police Logs Act Hearing, supra note 344 (prepared testimony of
Morrison appealed immediately, but his suspension was upheld. According to the school’s published rules, the decision of the dean in such matters was final. Assuming that closure had been reached, Christy began to focus on taking care of herself.

Following the hearing, Christy returned home to seek professional help and prepare for her return to Virginia Tech in the fall, when she would repeat her freshman year. However, in July, two university officials came to Christy’s house to inform her that the May hearing had been conducted under the wrong policy, and Antonio Morrison was threatening to sue the school. Christy was presented with a choice: drop her charges under the Sexual Assault Policy, or agree to go through a new hearing under the correct policy. After being assured by the officials that they believed her story and that the new hearing would merely be a formality, Christy chose the latter. Despite the assurances of the university officials, it quickly became clear that the re-hearing was not a mere formality.

In order to prepare for the re-hearing, Morrison was given advance notice and unfettered access to the transcript and exhibits from the original hearing, including tape recordings of the testimony. Christy was given two weeks to prepare and was denied access to those materials from the first hearing. This was significant, given that Virginia Tech had determined that testimony provided during the initial hearing would be inadmissible at the re-hearing, and any testimony that either party wished to be considered required production of that witness

351. See Open Campus Police Logs Act Hearing, supra note 344 (prepared testimony of Christy Brzonkala).
352. See Brzonkala III, 169 F.3d 820, 907 (4th Cir. 1999) (Motz, J., dissenting); Brzonkala II, 132 F.3d at 954.
353. See Open Campus Police Logs Act Hearing, supra note 344 (prepared testimony of Christy Brzonkala).
354. See id. (prepared testimony of Christy Brzonkala); Brzonkala Brief, supra note 46, at 4.
355. See Open Campus Police Logs Act Hearing, supra note 344 (prepared testimony of Christy Brzonkala). Although in print at the time of the alleged rape, the university’s sexual abuse policy had not yet been widely distributed to students. See Brzonkala II, 132 F.3d at 953-54. Therefore, Antonio Morrison had threatened to file suit against the school for violation of due process, claiming the policy was ex post facto. See id. at 954. The “correct” policy was the university’s Abusive Conduct Policy, which had been well circulated at the time of the alleged rape. See United States v. Morrison, 120 S. Ct. 1740, 1746 (2000).
356. See Open Campus Police Logs Act Hearing, supra note 344 (prepared testimony of Christy Brzonkala).
357. See Brzonkala III, 169 F.3d at 908 (Motz, J., dissenting); Brzonkala Brief, supra note 46, at 5.
358. See Brzonkala III, 169 F.3d at 908 (Motz, J., dissenting); Brzonkala Brief, supra note 46, at 5.
again, or of a sworn affidavit. At the re-hearing in late July, the panel
also instructed Christy to omit any testimony related to the participation
of James Crawford in her assault, due to the fact that charges against
Crawford had been dismissed during the original hearing. As a
result, she was forced to give a distorted account of the events of
September 21, 1994. Despite the unequal treatment and the need to
provide incomplete testimony in order to comply with the panel’s
instructions, the result was the same as in the first hearing: Morrison
was found guilty and suspended for a year. Again, Christy believed
that closure had been reached, and she began to prepare for her return to
Virginia Tech in the fall.

Christy’s return was not to be. Unbeknownst to her, just a few days
before the start of the fall semester, the school informed the press that it
had decided to defer Morrison’s punishment until after he graduated,
allowing him to return to Virginia Tech in August 1995, on a full
athletic scholarship. Christy learned of the university’s about-face by
reading The Washington Post, only days before she had planned to
return to the university for the start of classes. Having overheard
threats against her safety, coupled with Morrison’s inevitable
presence on campus, Christy decided not to return to Virginia Tech that
fall and ultimately did not attend school anywhere that semester. It
was not until November of 1995 that Christy learned the second hearing
had found Morrison guilty of nothing more than “use of abusive
language.” All of these factors led Christy to believe that the excuse
for holding the second hearing was nothing more than a sham. Although she had waited too long to file criminal charges against the

359. See Brzonkala II, 132 F.3d at 954-55.
360. See id. at 955; Brzonkala Brief, supra note 46, at 5. Despite these instructions from the
Judicial Committee, James Crawford was present in an adjacent room during the re-hearing. See
Brzonkala Brief, supra note 46, at 5.
361. See Brzonkala III, 169 F.3d at 908 (Motz, J., dissenting); Brzonkala Brief, supra note 46,
at 5.
362. See Open Campus Police Logs Act Hearing, supra note 344 (prepared testimony of
Christy Brzonkala).
363. See id.
364. See Brzonkala II, 132 F.3d at 955; Brzonkala Brief, supra note 46, at 6.
365. A friend of Christy’s overheard a teammate of one of the accused say that the accused
player should have killed her. See Brzonkala II, 132 F.3d at 954; Brzonkala I, 935 F. Supp. at
782; Brzonkala Brief, supra note 46, at 3.
366. See Open Campus Police Logs Act Hearing, supra note 344 (prepared testimony of
Christy Brzonkala); Brzonkala Brief, supra note 46, at 6.
367. See Open Campus Police Logs Act Hearing, supra note 344 (prepared testimony of
Christy Brzonkala).
368. See id.
two athletes, Christy chose to seek restitution through a civil suit in federal district court.

2. The First Step

Christy Brzonkala’s suit was first filed in the District Court for the Western District of Virginia on December 27, 1995.369 Her complaint was amended in March 1996, to include a count for violation of the VAWA civil rights provision.370 During the district court proceedings, the United States intervened as of right in order to defend the constitutionality of the VAWA.371 The district court reached its decision in *Brzonkala v. Virginia Polytechnic & State University* ("*Brzonkala I*")372 on a motion to dismiss on July 26, 1996.373

Invoking a previous articulation by the Supreme Court of its expectations regarding judicial reliance on its decisions, the district court chose to adopt the four-test framework of *United States v. Lopez* for its Commerce Clause analysis.374 Although the district court acknowledged that violence against women significantly impacts the national economy, more so than the possession of a firearm in a school zone,375 its analysis found the differences between the GFSZA of *Lopez* and the VAWA civil rights remedy to be insignificant, while the similarities were significant.376 Based on this comparison, the court concluded that Congress had acted outside the scope of its Commerce Clause authority in enacting the VAWA.377

The district court chose to follow its initial conclusion with a more in-depth analysis of certain aspects of Commerce Clause interpretation. The court highlighted one particular point made by Chief Justice

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373. *Id.* at 779, 801.
375. *See id.* at 790-91 (analyzing the proximity to economic activity existent in the GFSZA and the VAWA civil rights remedy, ultimately concluding that the VAWA was one step closer to affecting commerce than was the GFSZA; see also *id.* at 792 ("A reasonable inference from the congressional findings is that violence against women has its major effect on the national economy.").
376. *See id.* at 791.
377. *See id.* at 793. The court further stated that to conclude otherwise "would strain reason." *Id.*
Rehnquist in *Lopez*, namely, that to date, all Supreme Court case law regarding Congress' reach into intrastate activities has only sustained regulation of clearly economic activities.\(^\text{378}\) The court concluded that *Lopez* created a distinction between the analysis to be used for intrastate activity of an economic nature and that for intrastate activity of a non-economic nature.\(^\text{379}\) Therefore, according to the district court, after *Lopez*, case law involving economic intrastate activity would no longer constitute precedent for cases involving non-economic intrastate activity.\(^\text{380}\) The district court concluded its Commerce Clause analysis with a blanket application of this distinction to every case on which the plaintiffs had relied.\(^\text{381}\) The court then turned its attention to the Fourteenth Amendment argument.

Regarding Congress' assertion of Enforcement Clause support for section 13981, the district court determined that providing a remedy for the gender-based acts of private individuals was not a reasonable response to the deficiencies in state law enforcement practices that Congress had uncovered.\(^\text{382}\) The court reasserted prior Fourteenth Amendment jurisprudence holding that the Amendment only permits

\(^{378}\) *See id.* at 787 (citing United States v. *Lopez*, 514 U.S. 549, 560 (1995)); *see also id.* at 790 ("With statutes regulating intrastate activities, the primary concern is whether the activity is economic.").

\(^{379}\) *See id.* at 787. Using the case of *Wickard* v. *Filburn* as an example, the court reiterated *Lopez*' comparison between the non-economic nature of a statute prohibiting firearm possession within a school zone and the economic nature of a statute penalizing a farmer for raising a crop of wheat in excess of his quota. *See id.* The court conceded, however, that the *Lopez* language might not have created a new rule, but might merely present a strong consideration for a court's analysis of regulated activity that is not economic in nature. *See id.*

\(^{380}\) *See id.* This reading of *Lopez* was unique to courts in the Fourth Circuit. At the time of the *Brzonkala I* decision, only one other challenge to the VAWA's constitutionality had been decided. *See id.* at 791 (referencing *Doe* v. *Doe*, 929 F. Supp. 608 (D. Conn. 1996)). That decision, *Doe* v. *Doe*, drew a comparison between section 13981 and *Wickard*. *See id.* The *Doe* court analogized the Supreme Court's finding, that a trivial amount of home-grown wheat substantially affected interstate commerce, to the withholding of women's participation in the national economy in response to the threat of gender-motivated violence. *See id.* The *Doe* court found the national response of women to gender-motivated violence to be on par with the cumulative conduct of farmers like Roscoe Filburn. *See id.* The *Brzonkala I* court refuted this analogy, focusing on Chief Justice Rehnquist's inference in *Lopez* that congressional regulation of intrastate activity was only constitutional if that activity was economic in nature. *See id.*


\(^{382}\) *See id.* at 800-01. The court stated that the responsibility of providing a remedy for a Fourteenth Amendment violation should be directed toward "the entity which causes the violation" rather than against individuals "who did not contribute in any real sense to the unequal treatment in the states' criminal justice systems." *Id.* at 800.
Although the court acknowledged that there are exceptions to this rule, it maintained that these exceptions are limited to situations in which there is some state involvement, even if it is only incidental or tangential. The court invoked language from *Lugar v. Edmondson Oil Co.*, in which the Supreme Court stated that, to be reached under the Fourteenth Amendment, conduct that allegedly denies federal rights must be "fairly attributable to the State." The court used this limitation to discredit the plaintiffs' reliance on language from prior Supreme Court decisions. The court also compared the activity targeted by section 13981 with that of other federal statutes that had survived Fourteenth Amendment scrutiny, as well as one that had not. After distinguishing section 13981 from other statutes sustained

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383. See id. at 793-94.
386. Id. at 937. *Lugar* provided two means by which the conduct in question could be considered "fairly attributable to the State": 1) where the denial of federal rights is caused through the exercise of some state-created right or privilege, or by a person for whom the state is responsible, or 2) where the denial of federal rights is caused by a state actor. Id.
387. The court found fault with the appellants' reliance on *Katzenbach v. Morgan* because *Morgan* involved infringement of Fourteenth Amendment rights through state action, specifically, election laws in New York that made the ability to read and write English a precondition to voting. See *Brzonkala I*, 935 F. Supp. at 794-95 (referencing *Katzenbach v. Morgan*, 384 U.S. 641 (1966)). The court distinguished *Morgan* from section 13981 because *Morgan* did not involve congressional regulation of solely private action that was denying equal protection. See *id.* at 795. The statute at issue in *Morgan* was upheld, through the Supremacy Clause, as invalidating New York's voting requirements statute. See *id.*; supra notes 299-303 and accompanying text (detailing the facts of *Katzenbach v. Morgan*).
388. See *Brzonkala I*, 935 F. Supp. at 798-99. The court first distinguished the VAWA from the facts of *United States v. Guest*, as *Guest* involved a conspiracy between the state and private individuals to discriminate against African Americans. See *id.* at 798; supra notes 284-97 and accompanying text (containing more detailed discussion of *United States v. Guest*). The court could find nothing in the record amassed by Congress in support of the VAWA to suggest any complicity between state judicial systems and private individuals committing acts of gender-motivated violence. See *Brzonkala I*, 935 F. Supp. at 798. The district court then distinguished *Shelley v. Kraemer* on two grounds. First, the court explained that, in *Shelley*, state courts had enforced discriminatory restrictive covenants, whereas the congressional findings in support of the VAWA only pointed to the state courts' failure to take appropriate action against, not actively participate in, gender-motivated violence. See *id.* at 799. Second, because the courts in *Shelley* were enforcing the restrictive covenants, those seeking their enforcement would be unable to pursue their scheme of denying federal rights to African Americans if the courts were not assisting them. See *id.* According to the *Brzonkala I* court, no such but-for causation existed with section 13981, as more appropriate action by state courts would not prohibit private individuals from committing acts of gender-motivated violence. *Id.* Finally, the district court distinguished *Flagg Bros., Inc. v. Brooks*, a case in which a woman's possessions were seized under a state law creating warehouseman's liens. See *id.* (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 154-55 (1978)). In *Flagg Bros.*, the Supreme Court concluded that the mere tangential involvement of the state in the actions of the warehouseman via the state-created law under which

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under the Fourteenth Amendment, and finding insufficient evidence that the remedy was directed at state action, the court concluded that section 13981 did not provide a remedy for curing Fourteenth Amendment violations committed by the states. Therefore, with no support under either the Commerce Clause or the Fourteenth Amendment, the district court ruled that section 13981 was unconstitutional.

3. Two Opinions in the Fourth Circuit

Christy and the United States appealed the decision of the district court. The case was first heard by a three-judge panel of the Fourth Circuit, which sustained section 13981. However, this decision was vacated following a vote by the full court, and a re-hearing was held en banc. The en banc court agreed with the district court’s conclusions and overturned section 13981.

a. Panel Majority Recognizes Constitutionality

Following the district court’s declaration of unconstitutionality, Christy appealed to the Fourth Circuit. In December 1997, a three-judge panel reversed the Western District of Virginia, finding, in a two-to-one decision, that the civil rights remedy of the VAWA was a legitimate exercise of Congress’ commerce power. Writing for the majority in Brzonkala v. Virginia Polytechnic Institute & State University (“Brzonkala I”), Judge Motz was able to distinguish the he was acting was insufficient to support Fourteenth Amendment regulation. Flagg Bros., 436 U.S. at 157. Although the Brzonkala I court found a distinction between section 13981 and Flagg Bros., in that section 13981 addressed the method of enforcement and the actual body of laws, the court placed a greater emphasis on the similarities between the two situations. See Brzonkala I, 935 F. Supp. at 799. Both Flagg Bros. and section 13981 involved no obvious action on the part of the state, and, as a result, the court argued that section 13981 should similarly be found not to arise under the Fourteenth Amendment. See id.

389. See Brzonkala I, 935 F. Supp. at 800.
390. See id. at 801.
391. See infra Part III.A.3.a (reviewing the decision of the three-judge panel in the Fourth Circuit).
392. See infra Part III.A.3.a (analyzing the first of two Fourth Circuit opinions on the constitutionality of section 13981).
393. See infra Part III.A.3.b (explaining the decision of the Fourth Circuit to hear the motion to dismiss en banc).
394. See infra Part III.A.3.b (discussing the opinion of the Fourth Circuit en banc court regarding the constitutionality of section 13981).
395. See Brzonkala II, 132 F.3d 949, 974 (4th Cir. 1997). “In following our ‘[s]trictly confined’ duty in this case, we must conclude that Congress has in no way ‘exceeded limits allowable in reason for the judgment which it has exercised.’” Id. (quoting Polish Nat’l Alliance v. National Labor Relations Bd., 322 U.S. 643, 650 (1944)).
panel’s analysis of section 13981 from that of the Supreme Court in *Lopez*. She explained that the distinction was possible because the VAWA’s legislative record enabled the panel to evaluate Congress’ legislative judgment regarding the effect of gender-motivated violence on interstate commerce. Judge Motz noted that the court’s task was to determine if Congress had a rational basis for its finding. The panel concluded that “Congress made an unequivocal and persuasive finding that violence against women substantially affects interstate commerce.” Their task complete, the majority voted to uphold the statute and reverse the district court’s dismissal.

In reaching this decision, the panel focused on Justice Kennedy’s concurrence in *Lopez*, in which he cautiously joined with the Court’s opinion, but acknowledged it as a “necessary though limited holding.” The appellate court interpreted *Lopez* to maintain the expanse of commerce power in effect since *Jones & Laughlin Steel Corp.*, concluding that the decision had neither overruled any previous Commerce Clause precedent nor repudiated the “rational basis” test. The panel directly addressed the true meaning of the *Lopez* intimation that congressional regulation of intrastate activities can only pass constitutional scrutiny when the regulated activity is economic in

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397. See *id.* at 965-66.
398. See *id.* at 965. The lack of such a legislative record was a specific complaint of the Chief Justice in his opinion in *United States v. Lopez*. See 514 U.S. 549, 563 (1995).
399. See *Brzonkala II*, 132 F.3d at 967.
400. *Id.* at 968. The same differences between the VAWA and the GFSZA that the district court had determined to be insignificant to its constitutional analysis, the *Brzonkala II* court found to have great significance. *See id.* at 970-71. Among these “insignificant” differences were: 1) the fact that the GFSZA was a criminal statute, while section 13981 was a civil statute; 2) legislative findings were absent from the record in *Lopez*, while such findings were voluminous in *Brzonkala II*; and 3) section 13981 required fewer steps of causation. *See Brzonkala I*, 935 F. Supp. 779, 789 (W.D. Va. 1996). The panel noted that, as a result of the legislative record built by Congress, the courts did not need to make any inferences to connect the VAWA with interstate commerce, let alone “pile inference upon inference.” *See Brzonkala II*, 132 F.3d at 970 (quoting United States v. *Lopez*, 514 U.S. 549, 567 (1995)). The panel also noted that the VAWA is not a criminal statute, and therefore neither supersedes any state criminal law, nor affects how the states prosecute the underlying violent crimes. *See id.* The Fourth Circuit stated that, “[i]n sum, VAWA acts to supplement, rather than supplant, state criminal, civil, and family law controlling gender violence.” *Id.* at 971. Instead, the VAWA provides a civil rights remedy, which has traditionally been within federal legislative authority. *See id.; see also supra* Part II.C (containing a discussion of the Fourteenth Amendment).
401. See *Brzonkala II*, 132 F.3d at 974.
403. See *Brzonkala II*, 132 F.3d at 969. The Fourth Circuit cited case law from the Seventh and Eleventh Circuits to support its interpretation. *See id.* (citing United States v. *Wright*, 117 F.3d 1265, 1269 (11th Cir. 1997); United States v. *Wilson*, 73 F.3d 675, 685 (7th Cir. 1995)).
nature.\textsuperscript{404} Pointing to language from \textit{Wickard v. Filburn} quoted by the \textit{Lopez} majority, the \textit{Brzonkala II} court argued that such a limitation on the breadth of the commerce power cannot be reconciled with prior case law.\textsuperscript{405} The panel reaffirmed that the key inquiry for any court is whether Congress had a rational basis for finding that the activity being regulated substantially affects interstate commerce.\textsuperscript{406} This was the key to the majority's decision in \textit{Lopez} and was repeatedly cited as the key to the panel's decision in \textit{Brzonkala II}.\textsuperscript{407} Because the court was satisfied that section 13981 represented a valid exercise of Congress' commerce power, no analysis was completed regarding the Enforcement Clause of the Fourteenth Amendment.\textsuperscript{408}

b. \textit{En Banc} Court Reverses Panel Decision

The \textit{Brzonkala II} opinion was vacated on February 5, 1998, after the \textit{en banc} court voted to rehear the case.\textsuperscript{409} In a seven-to-four decision in March 1999, the \textit{en banc} court reversed the decision of the three-judge panel and declared section 13981 unconstitutional.\textsuperscript{410} The majority

\textsuperscript{404} See id. at 972; \textit{Brzonkala I}, 935 F. Supp. at 790 ("With statutes regulating intrastate activities, the primary concern is whether the activity is economic.").

\textsuperscript{405} See \textit{Brzonkala II}, 132 F.3d at 972 (quoting \textit{Wickard} v. \textit{Filburn}, 317 U.S. 111, 125 (1942)); supra note 220 (detailing the passage from \textit{Wickard} quoted by the \textit{Lopez} majority).

\textsuperscript{406} See \textit{Brzonkala II}, 132 F.3d at 971.

\textsuperscript{407} See id. at 965, 972-73.

\textsuperscript{408} See id. at 965. The sole dissenting judge on the \textit{Brzonkala II} panel provided a brief, but stinging, dissent. Arguing that the district court had followed a more meticulous analysis of the VAWA's constitutionality under the \textit{Lopez} analytical framework than the majority in \textit{Brzonkala II}, Judge Luttig strongly criticized the majority for placing too great an emphasis on certain passages in the VAWA's legislative history. See id. at 974 (Luttig, J., dissenting). Judge Luttig believed the majority's reliance on the House of Representatives' finding that violence against women substantially affects interstate commerce was misplaced, stating that similar key findings were not to be found in any other legislative materials. See id. at 974-75 (Luttig, J., dissenting). The brief and all-too-unimportant placement of this finding in the House Report was, to Judge Luttig, of no more significance than if the sentence had not appeared at all. See id. at 976 (Luttig, J., dissenting) ("It should go without saying that this one sentence is functionally no different from a complete absence of express congressional findings."). It was certainly insufficient, in his eyes, to support the majority's conclusion that Congress had a rational basis for finding that regulation of gender-motivated violence substantially affected interstate commerce. See id. at 975-77 (Luttig, J., dissenting).

\textsuperscript{409} See \textit{Brzonkala III}, 169 F.3d 820, 829 (4th Cir. 1999).

\textsuperscript{410} See id. at 889. The Fourth Circuit is considered by many to be the most conservative of the thirteen federal appellate circuits. See Herman Schwartz, Opinion, \textit{Assault on Federalism Swipes at Women}, \textit{L.A. Times}, May 21, 2000, at M-1. This is due, in part, to the dominant number of Reagan and Bush appointees still serving in the Fourth Circuit. See \textit{NOW LDEF - Highlights}, \textit{U.S. Supreme Court, \textit{Brzonkala v. Morrison}, et al.}, (visited Apr. 7, 2000) <http://www.nowldef.org/html/courts/bron.htm> [hereinafter \textit{NOW LDEF - Highlights}]. Of the eighteen district courts to hear cases brought under the civil rights remedy of the VAWA, seventeen have upheld the statute as constitutional. See id.; see, e.g., \textit{Anisimov v. Lake}, 982 F.
opinion in *Brzonkala v. Virginia Polytechnic Institute & State University* ("*Brzonkala III*")411 was authored by the dissenting judge in the panel decision, Judge Luttig, whose majority opinion was no less passionate, though considerably more prolixic, than his dissent in *Brzonkala II*.412

Judge Luttig began his opinion by enumerating two primary reasons for invalidating section 13981. First, section 13981 was claimed to be supported by Congress' commerce power, yet punished non-commercial intrastate violence; second, it was claimed to be supported by Congress' enforcement power under the Fourteenth Amendment, yet punished private conduct.413 As the basis for his Commerce Clause analysis, Judge Luttig strongly defended the Supreme Court's opinion in *Lopez*.414 He accused the appellants of defending the VAWA's civil rights remedy "on little more than wistful assertions that United States v. *Lopez* is an aberration of no significance..."415 He further criticized the appellants for arguing that the Court's holdings in the *Civil Rights Cases* and *United States v. Harris*416 no longer reflected the scope of Congress' power under the Fourteenth Amendment.417 Judge Luttig explained that accepting the appellants' arguments regarding the status of these early Fourteenth Amendment cases would result in extending Congress' reach beyond the scope contemplated by the Supreme Court since the Amendment's ratification.418

Having summarized the foundation for his opinion, Judge Luttig proceeded to analyze each of the two constitutional bases on which Congress had relied.

The areas discussed in Judge Luttig's Commerce Clause analysis paralleled the four areas discussed by Chief Justice Rehnquist in

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412. See id. at 825.
413. See id. at 826.
414. See id.
415. Id.
417. See *Brzonkala III*, 169 F.3d at 826.
418. See id. at 827. The flaw in this statement is that Congress is the body that drafted and arranged for ratification of the Amendment; it is Congress that contemplated the breadth of the Amendment, not the Supreme Court.
According to Judge Luttig, the Lopez decision established that determining whether an activity substantially affects interstate commerce is a question of law to be answered by the courts. In clarifying this legal test, Judge Luttig read Lopez to permit two kinds of regulations: those that regulate activities arising from or having a nexus with commercial transactions, which, when aggregated, substantially affect interstate commerce, and those that contain a jurisdictional element to ensure that each occurrence of the regulated activity will substantially affect commerce. In reviewing section 13981 for its regulation of intrastate activity, Judge Luttig placed a great deal of emphasis on the Lopez observation that the regulation of intrastate activity previously upheld by the Court all involved intrastate activity of an economic nature. To Judge Luttig, this statement constituted a mandate that non-economic intrastate activity is beyond the reach of the commerce power. He harshly criticized the dissent for regarding this portion of the Lopez opinion as merely an “unprecedented new rule of law.” Instead, he argued that this mandate was the “law of the

419. See supra notes 219-28 and accompanying text (reviewing Chief Justice Rehnquist’s four-part analysis in Lopez).
420. See Brzonkala III, 169 F.3d at 831 (citing United States v. Lopez, 514 U.S. 549, 557 n.2 (1995)).
421. See id. But see id. at 905 (Motz, J., dissenting). Judge Motz believed that Judge Luttig had misinterpreted the Lopez decision to create a rule of law where none existed, thus disregarding other Supreme Court precedent. See id. at 917 (Motz, J., dissenting). She argued that the Lopez decision supported the rational basis test, continuing its analysis in Lopez beyond a discussion of economic nature and jurisdictional provisions. See id. at 917-18 (Motz, J., dissenting). The Lopez Court did not overturn the GFSZA because it failed to have either of these two elements; rather, it overturned the statute for lack of congressional findings establishing a substantial effect on interstate commerce, and for supplanting the states’ ability to regulate a traditional area of state law. See id. at 918 (Motz, J., dissenting). To further her arguments against the majority’s Lopez interpretation, Judge Motz pointed to other cases to illustrate its conflict with Supreme Court precedent. Specifically, in Camps Newfound/Owatonna, Inc. v. Town of Harrison, the Court held that an activity regulated under the Commerce Clause need not be commercial in nature. See id. at 920 (Motz, J., dissenting) (citing Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 574 (1997)). In Camps Newfound, the Court determined that the issue was not whether the use of the camp constituted an economic activity, but rather, whether the operation of the camp substantially affected interstate commerce. Camps Newfound, 520 U.S. at 574 (holding that a state law adversely affecting a non-profit camp violated the dormant Commerce Clause because the services provided by the camp to its principally out-of-state campers had a clearly substantial effect on commerce).
422. See Brzonkala III, 169 F.3d at 831, 855 (citing Lopez, 514 U.S. at 559-60). “[The Court] also drew a clear distinction between regulations of economic and noneconomic activities . . . limiting to the former category the reach of the authority and reasoning of its most permissive Commerce Clause cases.” Id. at 855.
423. See id. at 831 (citing Lopez, 514 U.S. at 567); see also id. at 855-57 (maintaining that Lopez created a new rule of law regarding regulation of intrastate activities).
424. Id. at 833; see also id. at 854, 856-57 (containing further criticism of the dissent’s
land. Judge Luttig quickly dismissed any possible claim that the activity regulated by section 13981 is economic in nature and also opined that gender-motivated violence lacks a meaningful connection with any particular commercial activity. He further concluded that section 13981 does not qualify as a requisite part of a larger regulatory scheme, which might falter should the statute not remain in place.

Turning to the second category of permitted regulation, Judge Luttig determined that section 13981 fails to fall within the reach of the commerce power because it is void of a jurisdictional element. Having concluded that section 13981 failed to meet either of the two requisite tests, Judge Luttig addressed the VAWA in terms of the remaining areas analyzed in Lopez: practical impact of sustaining the legislation and congressional findings.

The majority believed that section 13981 did not comply with principles of federalism and, therefore, presented practical implications similar to those of the GFSZA in Lopez.

A frequent theme
throughout the majority’s opinion was the potential for all distinctions between what is federal and what is state to be eradicated, and the federal system to collapse, because legislation like section 13981 was allowed to stand as a legitimate exercise of the Commerce Clause authority. Judge Luttig suggested that Congress’ creation of a federal remedy for gender-motivated violence, where one already existed under state law, would compel the states to modify allocation of state resources and even enforcement of such laws.

With regard to congressional findings, Judge Luttig found them to be inadequate to sustain the constitutionality of the VAWA civil rights remedy. He clarified the level of importance that the Supreme Court appropriate exercise.” United States v. Lopez, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring). The Garcia Court explained, “[a]ny substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a ‘sacred province of state autonomy.’” Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985), rev’g National League of Cities v. Usery, 426 U.S. 833 (1976) (quoting Equal Employment Opportunity Comm’n v. Wyoming, 460 U.S. 226, 236 (1983)).

431. See Brzonkala III, 169 F.3d at 840, 843-44, 853, 859-60, 888. But see id. at 905 (Motz, J., dissenting). In her dissent, Judge Motz responded to the majority’s concerns that upholding section 13981 would open Pandora’s Box, creating a general federal police power over any and all areas of traditional state authority. See id. at 928 (Motz, J., dissenting). She maintained that a court must analyze the statute at issue under the circumstances before it, not on a series of hypothetical extensions of that statute. See id. at 929 (Motz, J., dissenting). In Alabama State Federation of Labor v. McAdory, the Court acknowledged its long practice of not addressing abstract, hypothetical or contingent questions, or [of] decid[ing] any constitutional question in advance of the necessity for its decision, or [of] formulat[ing] a rule of constitutional law broader than is required by the precise facts to which it is to be applied, or [of] decid[ing] any constitutional question except with reference to the particular facts to which it is to be applied.


432. See Brzonkala III, 169 F.3d at 841. Judge Luttig’s opinion contained two remarkable arguments in light of Congress’ reasons for enacting the VAWA. First, he criticized section 13981 for punishing conduct that the states might have otherwise left unpunished. See id. at 841-42. Second, Judge Luttig argued that the VAWA impaired the states’ ability to regulate family issues, by creating a cause of action against an abusive spouse where a state has a spousal immunity law, or by allowing a woman to sue her husband for rape where a state has no marital rape statute. See id. at 843. He argued that such interference not only violates an area of traditional state authority, but also frees any state that might have such statutes from responsibility to those of its citizens who are dissatisfied with the statutes. See id.

433. See id. at 845. Judge Luttig condemned the dissent for its “prostrate deference” to Congress’ accumulated research. See id. at 847. But see dissenting opinion of Judge Motz, id. at 905. In her dissent, Judge Motz praised Congress for its thorough research into the area of gender-motivated violence, explaining that the data gathered by Congress enabled the judiciary to perform its analyses of the VAWA with the benefit of information that the various Lopez courts did not have. See id. at 912 (Motz, J., dissenting). She related that the Supreme Court had never overturned a federal statute that was accompanied by congressional findings showing the activity in question to have the requisite effect on interstate commerce. See id. at 912-13 (Motz, J.,
placed on legislative findings in *Lopez*, emphasizing that the Court only noted their absence because their presence might have helped to reveal an otherwise non-obvious effect on interstate commerce. Judge Luttig believed that such emphasis on legislative findings was never meant by the *Lopez* Court to displace judicial inquiry into the constitutionality of the legislation. Even when viewing Congress' findings merely as one part of the full constitutional analysis, the majority continued to hold that they were insufficient to satisfy the "substantially affects" test. With this, the majority concluded its
Commerce Clause analysis and began to analyze section 13981 under the Fourteenth Amendment.

In response to the appellants’ argument that section 13981 is supported by the Fourteenth Amendment, the en banc court concluded that the Amendment’s enforcement clause was an insufficient basis for congressional action. The court noted the language of the Amendment, which is directed at the states, as well as the Amendment’s legislative history, to demonstrate that the Amendment was not intended to regulate purely private conduct. Judge Luttig provided additional support by reaffirming the status of the Court’s earliest Fourteenth Amendment cases, the Civil Rights Cases and Harris. The majority determined that section 13981 was overly broad and not designed to address specific state laws or specific state actions. Judge Luttig substantially affects interstate commerce. See id. at 850. Specifically, Judge Luttig was referencing a statement in House Conference Report 103-711 stating:

[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; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

Id. The second finding Judge Luttig referenced was from Senate Report 103-138, providing: “[g]ender-based violent crimes meet the modest threshold required by the Commerce Clause. Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy.” Id. (emphasis added by court).

437. See id. at 862. Because she found sufficient support for section 13981 under the Commerce Clause, Judge Motz did not address Fourteenth Amendment support in her dissent. See id. at 911 n.1.

438. See id. at 862, 864; see also supra Part II.C.1 (reviewing the historical background of the Fourteenth Amendment).

439. See Brzonkala III, 169 F.3d at 865, 868-69, 873. Judge Luttig reemphasized that the Court’s opinion in Guest lacks the authority to negate the holdings of the Civil Rights Cases and Harris. See id. at 877-79; supra notes 284-97 and accompanying text (discussing the effect of United States v. Guest on the Civil Rights Cases and United States v. Harris). Judge Luttig was equally unswayed by the subsequent footnote in District of Columbia v. Carter. See Brzonkala III, 169 F.3d at 879; supra note 286 (explaining the significance of the footnote in District of Columbia v. Carter). He argued that language from City of Boerne v. Flores, cited by the appellants to support their claim that these two cases are no longer good law, merely reflects that the Court ultimately upheld legislation similar to that which was overturned in those two early cases. See Brzonkala III, 169 F.3d at 879 (quoting City of Boerne v. Flores, 521 U.S. 507, 525 (1997)). The failure of the City of Boerne Court to cite to the Guest concurrences was sufficient evidence for Judge Luttig that the Court did not intend to endorse the reach of the Fourteenth Amendment to private conduct espoused therein. See id. at 880. Thus, Judge Luttig dismissed the appellants' argument that precedent exists for extending the Fourteenth Amendment to purely private conduct. See id.

440. See Brzonkala III, 169 F.3d at 870.
further concluded that section 13981 does not represent a legitimate exercise of Congress' authority to enact prophylactic legislation to prohibit actions that do not themselves violate the Amendment. Judge Luttig concluded that extending the reach of that power to purely private conduct would equal a return to the language of the Bingham Amendment, which had not been well received due to its perceived overreach. Finally, relying on language from City of Boerne v. Flores, Judge Luttig determined that section 13981 exceeded Congress' power because it did not exhibit a congruence and proportionality between the problem it sought to remedy and the manner in which it was designed to do so. In support of this conclusion, he cited provisions of the VAWA that allow a section 13981 claim to be filed regardless of whether criminal charges have been brought, the fact that section 13981 applies to all jurisdictions, not merely specific jurisdictions known to have exhibited such discriminatory practices, as well as the lack of a termination date for the statute. In sum, Judge Luttig held that it would not be an overstatement to say that interpreting the Fourteenth Amendment to support section 13981 would be "'repugnant' to the Constitution."

Dissatisfied with the Fourth Circuit's en banc ruling, Christy and the United States petitioned the Supreme Court for certiorari. The writ was granted on September 28, 1999, and oral arguments were heard on January 11, 2000. Approximately five months later, the Supreme Court spoke to the constitutionality of section 13981.

**B. The Supreme Court's Majority Opinion**

On May 15, 2000, the United States Supreme Court decided United States v. Morrison in a five-to-four decision. Chief Justice Rehnquist, writing for the majority, used the framework of his opinion

441. See id. at 873, 875.
442. See id. at 875.
443. See id. at 881-82 (relying on City of Boerne, 521 U.S. at 520, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end").
444. See id. at 887. Judge Luttig also argued that the gender-neutral language of the statute, which would allow men to sue for section 13981 violations, supported his position. See id.
445. See id. at 889 (quoting City of Boerne, 521 U.S. at 525 (quoting The Civil Rights Cases, 109 U.S. 3, 15 (1883))).
in *United States v. Lopez* to analyze section 13981 under the Commerce Clause.\(^{449}\) Finding no Commerce Clause support for the Act, he further reviewed section 13981 under Fourteenth Amendment precedent.\(^{450}\) The VAWA failed this analysis as well, and the Chief Justice declared section 13981 unconstitutional.\(^{451}\)

1. Commerce Clause Analysis à la Lopez

Chief Justice Rehnquist authored the majority opinion in *United States v. Morrison*, which upheld both the Commerce Clause and Fourteenth Amendment determinations of the Fourth Circuit’s *en banc* decision.\(^{452}\) The Chief Justice began his opinion by acknowledging the volatility of the Court’s Commerce Clause interpretation throughout the nation’s history. Specifically, he noted that since its opinion in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, the Court had given Congress an increasing amount of latitude to regulate activities under the Commerce Clause.\(^{453}\) Reviewing the three broad areas that the Court had previously determined to fall under Congress’s commerce power, Chief Justice Rehnquist quickly dismissed the first two as inapplicable, concentrating his analysis on the third: “those activities having a substantial relation to interstate commerce.”\(^{454}\) Using the four-part analysis of *Lopez* as a framework, Chief Justice Rehnquist proceeded to analyze the VAWA’s constitutionality.\(^{455}\)

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449. *See infra* Part III.B.1 (detailing Chief Justice Rehnquist’s Commerce Clause review of section 13981 using the four-part analysis from *Lopez*).

450. *See infra* Part III.B.2 (reviewing Chief Justice Rehnquist’s Fourteenth Amendment analysis of section 13981).

451. *See infra* Part III.B.2 (summarizing the Chief Justice’s findings regarding the constitutionality of section 13981). Whereas Justices O’Connor and Kennedy had declared the holding in *Lopez* to be limited, there were no such reservations to their support for the majority’s opinion in *Morrison*. *See Jan Crawford Greenburg, High Court Ruling Further Clips the Role of Congress*, CHI. TRIB., May 16, 2000, § 1, at 16.

452. *See Morrison*, 120 S. Ct. at 1745.

453. *See id.* at 1748.

454. *See id.* at 1749 (quoting United States v. Lopez, 514 U.S. 549, 558-59 (1995)). The other two areas are: 1) the use of channels of interstate commerce; and 2) the instrumentalities of interstate commerce. *See United States v. Perez*, 402 U.S. 146, 150 (1971).

455. *See Morrison*, 120 S. Ct. at 1749-53. The first inquiry in *Lopez* was whether the regulated conduct substantially affects interstate commerce. *See id.* at 1749-50. Chief Justice Rehnquist identified this specific inquiry as a key aspect of the *Lopez* decision. *See id.* at 1750 (“But a fair reading of Lopez shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case.”). *Lopez* next looked for an express jurisdictional element in the statute that could be used to narrow the field of regulated activity to those specific instances of conduct that have an explicit effect on interstate commerce. *See id.* at 1750-51. The third consideration from *Lopez* was whether Congress had made any specific congressional findings in the legislative history that would assist the Court in weighing Congress’ legislative judgment regarding the nexus between the regulated activity and interstate commerce,
At the beginning of his inquiry into the effect of gender-motivated violence on interstate commerce, Chief Justice Rehnquist quickly concluded that such acts of violence cannot be viewed as any type of economic activity. The Chief Justice noted that gender-motivated violence is an intrastate activity, and the Court has yet to find that the commerce power extends to intrastate activity that is non-economic in nature. However, the Chief Justice stopped short of blanketly denying Congress the power to regulate non-economic intrastate activity. Turning to the question of a jurisdictional element, the Court could find no such provision in section 13981 to ensure a case-by-case connection with interstate commerce. Chief Justice Rehnquist concluded that, on the contrary, Congress had chosen to extend the remedy’s reach to the broad category of intrastate gender-motivated violence. With regard to congressional findings, the Chief Justice noted that, unlike the record in Lopez, the legislative history of the VAWA is replete with statistical and authoritative findings regarding the impact that gender-based violence has on victims and their families. However, the Court was not convinced by these findings. Instead, the Court reaffirmed its position as the final authority in determining whether specific activities fall within the commerce power. In analyzing the practical implications of sustaining section 13981, the Chief Justice suggested that to recognize a link between gender-motivated violence and interstate commerce would be to open particularly in recognizing such a nexus where one might not otherwise be readily identified. See id. at 1751. Finally, the Lopez Court looked at the practical implications of sustaining the legislation. See id.; see also supra notes 219-28 and accompanying text (reviewing the four-part Commerce Clause analysis used by Chief Justice Rehnquist in Lopez).

456. See Morrison, 120 S. Ct. at 1751.
457. See id. (citing Lopez, 514 U.S. at 560).
458. See id.
459. See id.
460. See id. at 1752.
461. See id.
462. See id. (citing Lopez, 514 U.S. at 557 n.2 (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273 (1964))). Chief Justice Rehnquist criticized Congress’ findings as being grounded in the same reasoning rejected by the Court in Lopez. See id. at 1752-53. In Lopez, the Court declared that following the reasoning relied on by the petitioners would open the door to congressional regulation of virtually any activity. See Lopez, 514 U.S. at 564. The Chief Justice further backed this position by citing Justice Cardozo in A.L.A. Schechter Poultry Corp. v. United States, "'[t]here is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce.'" Id. at 567 (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935)). In sum, the Court clearly stated that where the link between the regulated activity and interstate commerce required the piling of "inference upon inference" to reach a rational relation, the activity would not fall within the commerce power. See id.
Pandora's Box, clearing the way for Congress to regulate all crimes, and even all areas of family law, thus fulfilling the warning set forth in *Gibbons v. Ogden*.\(^\text{463}\) In concluding that the nexus between gender-motivated violence and interstate commerce was insufficient to pass constitutional scrutiny, Chief Justice Rehnquist declared the Court to be upholding the traditional means of regulating violence not directed at the instrumentalities of commerce: regulation by the states.\(^\text{464}\) Having found no support for sustaining section 13981 under the Commerce Clause, the majority turned to its analysis under the Fourteenth Amendment.

2. Enforcement Clause Focus on State Actions

The Chief Justice concluded that the Fourteenth Amendment failed to support section 13981 because the remedy was targeted at private acts of gender-motivated violence.\(^\text{465}\) Chief Justice Rehnquist first affirmed that the Enforcement Clause is ""a positive grant of legislative power"" that includes authority to 'prohibit conduct which is not itself unconstitutional and [to] intrud[e] into legislative spheres of autonomy previously reserved to the States.'\(^\text{466}\) Having said this, the Chief Justice next reviewed the limitations that prior case law has placed on Congress' reach under the Fourteenth Amendment.\(^\text{467}\) Fundamental among these limitations is the means by which Congress may legislate against discriminatory conduct, a limitation designed to preserve the balance of power between the federal and state governments.\(^\text{468}\) The Amendment accomplishes this balance, through its explicit language, by limiting its applicability to the actions of states.\(^\text{469}\) The Chief Justice relied on case law, as well as statutory language, to support his conclusion that section 13981 fell outside Congress' enforcement power.

Chief Justice Rehnquist summarized the Court's holdings in its first two Fourteenth Amendment cases to reinforce the precedent that federal

\(^{463}\) See *Morrison*, 120 S. Ct. at 1752-53; see also supra note 134 and accompanying text (explaining the *Gibbons* Court's warning against removing the line between what is national and what is local).

\(^{464}\) See *Morrison*, 120 S. Ct. at 1754. Chief Justice Rehnquist supported this aspect of the Court's decision with a reminder that the Framers had chosen to deny the federal government a national police power. See id.

\(^{465}\) See id. at 1758-59.

\(^{466}\) Id. at 1755 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (citations omitted)).

\(^{467}\) See id.

\(^{468}\) See id.

\(^{469}\) See id. at 1756.
anti-discrimination legislation can only be directed at discriminatory acts of states and state actors.\textsuperscript{470} Although the petitioners argued that the decision of the \textit{Civil Rights Cases} had been overruled by \textit{United States v. Guest}, thus allowing congressional regulation of purely private conduct, the Chief Justice stood behind the Court’s 1883 decision.\textsuperscript{471} The petitioners further argued that section 13981 is distinguishable from the facts of the \textit{Civil Rights Cases} because, in that case, there was no indication of state discriminatory action.\textsuperscript{472} In response, the Chief Justice contended that there was no significant distinction between the connection to state action in the VAWA civil rights remedy and the Civil Rights Act of 1875.\textsuperscript{473} Having defended the Court’s earliest Fourteenth Amendment holdings, the Chief Justice furthered his argument by analogizing section 13981 to more recent congressional action.

The Chief Justice’s primary concern was the target of the VAWA civil rights remedy: individual actors who have committed acts of gender-motivated violence.\textsuperscript{474} The Chief Justice compared various acts of Congress, each of which had been sustained by the Court in the face of a claim of unconstitutionality, to the VAWA civil rights remedy.\textsuperscript{475}

\begin{footnotesize}
470. See id. (discussing the Court’s holdings in \textit{United States v. Harris}, 106 U.S. 629 (1883) and the \textit{Civil Rights Cases}, 109 U.S. 3 (1883)). The Chief Justice placed a great deal of weight on the fact that every Supreme Court Justice serving at the time these two cases were decided had been appointed between 1862 and 1882, and therefore had first-hand knowledge of the events that prompted passage of the Amendment. See id. Every justice on the \textit{Civil Rights Cases} and \textit{Harris} panels had been appointed by Presidents Lincoln, Grant, Hayes, Garfield, or Arthur. See id.; \textsc{Gunter} & \textsc{Sullivan}, supra note 107, app. B at B-3, B-4 (listing all Supreme Court Justices, their respective terms, and the President who made the appointment).

471. See \textit{Morrison}, 120 S. Ct. at 1757 (quoting \textit{The Civil Rights Cases}, 109 U.S. at 18). Chief Justice Rehnquist dismissed Justice Clark’s comments in \textit{Guest} regarding the \textit{Civil Rights Cases} as mere dicta, which, even when combined with Justice Brennan’s explanation for finding that the \textit{Civil Rights Cases} were wrongly decided, was insufficient to constitute an overruling of the prior case law. See id. at 1756-57; see also supra Part II.C.2 (discussing the Court’s opinions in the \textit{Civil Rights Cases} and \textit{United States v. Guest}).

472. See \textit{Morrison}, 120 S. Ct. at 1758.

473. See id. (finding that the Civil Rights Act of 1875 was based on unequal enforcement of state laws requiring equal treatment of all persons).

474. See id. The Court also made a passing reference to the breadth of the civil rights remedy, which, unlike other substantiated acts of Congress, had no time or geographical limit. See id. at 1759. Specifically, Chief Justice Rehnquist pointed to the voting laws in \textit{Katzenbach v. Morgan} and \textit{South Carolina v. Katzenbach}, which were restricted in their applicability to those states in which Congress had determined discrimination was occurring. See id. \textit{Compare} \textit{United States v. Morrison}, 120 S. Ct. 1740, 1759 (2000) with \textit{City of Boerne v. Flores}, 521 U.S. 507, 532-33 (1997) (demonstrating that both the VAWA and the Religious Freedom Restoration Act extended beyond those states where constitutional violations were known to occur).

\end{footnotesize}
This comparison revealed that each such act had been directed at state officials, not at private individuals.\(^4\) As with his Commerce Clause analysis, Chief Justice Rehnquist concluded that, under the Fourteenth Amendment, there was insufficient support to sustain section 13981 as a valid exercise of congressional power.\(^5\) Having found no support for the VAWA civil rights remedy under either of the two constitutional bases cited by Congress, Chief Justice Rehnquist declared section 13981 unconstitutional.\(^6\)

### C. The Dissenting Opinions

Dissenting opinions were filed by Justices Souter and Breyer. Because both justices concluded that the Commerce Clause provided sufficient support to sustain section 13981, neither undertook a detailed review of the Act under the Fourteenth Amendment, although Justice Breyer did briefly comment on this issue.\(^7\)

1. Justice Souter’s Dissent

The first dissent in United States v. Morrison was written by Justice Souter.\(^8\) Justice Souter relied on Congress’ findings during its lengthy research into gender-motivated violence, as well as prior case law, to support his conclusion that section 13981 was a valid exercise of Congress’ commerce power.

Justice Souter initially observed that the majority had overturned section 13981, while at the same time claiming not to have changed previous Commerce Clause jurisprudence, two actions he considered irreconcilable.\(^9\) He premised the rest of his dissent on the “substantially affects” test articulated in Jones & Laughlin Steel Corp.\(^10\) Concluding that the Court would have sustained the civil
rights remedy as having sufficient constitutional support prior to *Lopez*, Justice Souter asserted that the majority was only nominally giving effect to this test. 483 Justice Souter believed that Congress, not the courts, is better equipped to perform the "substantially affects" test, due to its ability to gather evidence determinative of this requirement. 484 He stated that once Congress has performed such due diligence, its enactment of a statute signifies that the statute has passed the test. 485 It is then the courts' role to determine if Congress had a rational basis for that finding. 486 Justice Souter argued that the majority was attempting to change the "substantially affects" standard in favor of a greater emphasis on scrutiny by the courts, a change he believed was not substantiated by existing Commerce Clause precedent. 487 Justice Souter also asserted that it was the Framers' intent that the balance between state and national power be handled by the legislature, not the judiciary. 488 He directly contested the majority's emphasis on the Court's role in protecting federalism. 489 He then turned to the issue of congressional findings.

Justice Souter acknowledged the great mass of data related to violence against women that Congress had accumulated during its four years of research. 490 He noted the distinction between the legislative history of the GFSZA in *Lopez*, which contained virtually no congressional findings, and that of the VAWA. 491 He further contrasted

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483. *See id.* (Souter, J., dissenting). "[I]t is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them." *Id.* (Souter, J., dissenting).

484. *See id.* at 1759-60 (Souter, J., dissenting).

485. *See id.* at 1760 (Souter, J., dissenting).

486. *See id.* (Souter, J., dissenting).

487. *See id.* at 1764 (Souter, J., dissenting).

488. *See id.* at 1770 (Souter, J., dissenting). In support of this argument, Justice Souter cited commentary by James Madison in The Federalist Papers that advocates the important role national politics plays in the protection of states' rights. *See id.* (Souter, J., dissenting) (citing THE FEDERALIST NO. 46 (James Madison)). This position was reaffirmed in *Garcia*, where the Court stated, "[s]tate sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia* v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985), rev'g *National League of Cities v. Usery*, 426 U.S. 833 (1976). Justice Souter also pointed to language in both *Gibbons* and *Wickard* to further support this theory. *See Morrison*, 120 S. Ct. at 1770 (Souter, J., dissenting). The Court in *Wickard* made reference to Chief Justice Marshall's opinion in *Gibbons v. Ogden*, stating, "[h]e made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than judicial processes." *Wickard* v. Filburn, 317 U.S. 111, 120 (1942).

489. *See Morrison*, 120 S. Ct. at 1769 (Souter, J., dissenting).

490. *See id.* at 1760 (Souter, J., dissenting).

491. *See id.* (Souter, J., dissenting).
the VAWA congressional findings with the modest record compiled by Congress for the Civil Rights Act of 1964, which was upheld in the companion cases of *Heart of Atlanta Motel, Inc. v. United States* and *Katzenbach v. McClung*. After highlighting a number of Congress’ findings on gender-motivated violence, Justice Souter rhetorically concluded that, in light of the data it had gathered, Congress had not been irrational in its finding that such violence substantially affected interstate commerce. For Justice Souter, these findings were only one of several indications that Congress had a rational basis for enacting section 13981. He further supported this argument with precedent.

Justice Souter compared the intrastate activity targeted by the VAWA, first to that regulated in *Heart of Atlanta* and *McClung*, and later to that in *Wickard v. Filburn*. Regarding the *Heart of Atlanta/McClung* comparison, he determined that both groups of regulated activities restricted their targets from fully participating in the national economy. He also pointed out that the Court, in both *Heart of Atlanta* and *McClung*, refused to create a distinction between legislation that addressed notions of commerce and those that addressed notions of social injustice. In comparing the activity regulated in *Wickard* to that addressed by section 13981, Justice Souter concluded that the effect on supply and demand, which the *Wickard* Court determined to be of pivotal importance, applied equally to the VAWA. These comparisons solidified Justice Souter’s conclusion that gender-motivated violence not only affects interstate commerce, but does so substantially.

Justice Souter criticized the majority for attempting to limit the reach of the commerce power into specific categories of activity, namely,
non-economic intrastate activities and those activities that have traditionally been the realm of the states. He suggested that the majority's focus on federalism was an ulterior motive for its attempt to create classifications of activity. Justice Souter pointed to the well-recognized tenet of interpretation that, in a document containing enumerated powers, those not listed are deemed withheld. He argued that, under this rationale, the grant of Commerce Clause authority can only logically be read to require the regulated activity to have some effect on commerce; it cannot support the majority's suggestion that activity affecting commerce may be excluded from the Clause's reach if it is non-economic in nature or falls within traditional areas of state regulation.

In order to demonstrate that such exclusion had previously resulted in "near tragedy," Justice Souter pointed to past judicial attempts to excise categories of activity from the reach of the commerce power. He explained that any attempt to distinguish between activities of a commercial and a non-commercial nature conflicts with the Court's statement in Wickard that such distinction has no bearing on the reach of the commerce power. He also criticized any separation of activities into those which are traditional subjects of state regulation and those which are not, as having been rejected by the Court in United States v. Darby and again in Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc. He concluded that the Court's advocacy of

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499. See id. at 1765 (Souter, J., dissenting).
501. See Morrison, 120 S. Ct. at 1765 (Souter, J., dissenting).
502. See id. (Souter, J., dissenting).
503. See id. at 1767 (Souter, J., dissenting). Justice Souter was referring to President Franklin Roosevelt's court-packing plan of 1937, in which he asked Congress for authorization to appoint one additional federal judge for every judge aged seventy or older who had also served on the federal bench for at least ten years. See 1 ROTUNDA & NOWAK, supra note 98, § 2.7, at 110; supra note 160 (explaining FDR's plan to pack the Court). Had Congress approved this plan, it would have added six justices to the Supreme Court. See 1 ROTUNDA & NOWAK, supra note 98, § 2.7, at 110; supra note 160 (discussing the court-packing plan in more detail). The categories about which Justice Souter was speaking include those distinctions made by the Court in the early 1800s between commerce and manufacturing. See supra Part II.B.2 (discussing the Court's various formalistic notions in Commerce Clause interpretation).
504. See Morrison, 120 S. Ct. at 1767 (Souter, J., dissenting).
505. See id. at 1768-69 (Souter, J., dissenting) (citing United States v. Darby, 312 U.S. 100 (1941), and Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981)). Justice Souter also explained that the Court had rejected this method of separation in Maryland v. Wirtz, which was overruled by National League of Cities v. Usery, but ultimately vindicated when Garcia v. San Antonio Metropolitan Transit Authority repudiated National League of Cities. See id. at 1769 (Souter, J., dissenting). The Garcia Court held that "[i]f there are to be
carving out certain activities from Commerce Clause regulation conflicts with Chief Justice Marshall’s definition of commerce in *Gibbons.* He further advised that the Necessary and Proper Clause of Article I, Section 8 negates the constitutionality of any attempt to excise particular categories of activity.

In concluding, Justice Souter reiterated his belief that the majority’s holding was erroneous and further predicted that the opinion would not stand the test of time. By neither overruling precedent that advocates application of the “substantially affects” test, nor reviving case law that advocates division of activity into categories that can be regulated and those that cannot, Justice Souter believed the Court was relegating the future of Commerce Clause interpretation to ad hoc review. Justice Souter’s dissent contained no analysis of the petitioners’ Fourteenth Amendment argument, as he stated that he would uphold section 13981 under the Commerce Clause.

2. Justice Breyer’s Dissent

Justice Breyer’s dissent focused on the Court’s intimation of a bright-line rule for categorizing activities eligible for Commerce Clause regulation, as well as its suggestion that sustaining section 13981 would have far-reaching negative implications. Justice Breyer initially expressed his agreement with Justice Souter’s analysis of the historical and precedential reasons why the majority’s opinion is flawed. He then began his own critique of the Court’s decision.

Justice Breyer accused the majority of failing to clarify any set of interpretive rules that courts could use in future Commerce Clause analyses. He noted that Supreme Court precedent had focused on the limits on the Federal Government’s power to interfere with state functions—as undoubtedly there are—we must look elsewhere to find them.” *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985), *rev’g National League of Cities v. Usery*, 426 U.S. 833 (1976).

See *Morrison*, 120 S. Ct. at 1769 (Souter, J., dissenting).

See *id.* at 1766 (Souter, J., dissenting). It is the language of the Necessary and Proper Clause that is embodied in the “rational basis” test. *See id.* (Souter, J., dissenting). *See supra* note 295 for the text of the Necessary and Proper Clause.

See *id.* at 1773 (Souter, J., dissenting).

See *id.* (Souter, J., dissenting).

See *id.* at 1759 n.1 (Souter, J., dissenting).

Justice Breyer’s dissent obtained the concurrence of only one other justice, Justice Stevens, who did not join in Justice Breyer’s brief Fourteenth Amendment commentary. *See id.* at 1774 (Breyer, J., dissenting).

See *id.* (Breyer, J., dissenting).

See *id.* (Breyer, J., dissenting).
effect of the intrastate activity being regulated, not its nature.\textsuperscript{514} He stressed the difficulty inherent in applying the economic/non-economic distinction intimated by the Chief Justice.\textsuperscript{515} Other Supreme Court precedent, such as the Court’s finding that non-economic activity of businesses, if aggregated, can be regulated under the Commerce Clause, further confuses this distinction.\textsuperscript{516} Justice Breyer also noted that the \textit{Lopez} Court’s suggestion, that those intrastate activities requiring regulation to avoid undercutting a broader regulation of economic activity fall within the commerce power, does not articulate a requirement that such activities be economic in nature.\textsuperscript{517} In short, Justice Breyer emphasized that the Constitution itself delineates no limit on the nature of the activity that can be regulated, and he rejected \textit{United States v. Lopez} as an inaccurate statement of the law.\textsuperscript{518}

Justice Breyer also rejected the majority’s argument that upholding section 13981 would open a Pandora’s Box, enabling Congress to regulate virtually any activity.\textsuperscript{519} He argued that in a modern economy, nearly every activity is, in some way, tied to commerce.\textsuperscript{520} This fact makes it nearly impossible for courts to define discrete categories of conduct that fall outside the commerce power, without somehow being overly inclusive and excising from Congress’ rightful control some types of activity that truly belong within it.\textsuperscript{521} Justice Breyer emphasized that because of this, Congress, not the courts, must be left to rationally determine the boundaries between which regulation falls under the Commerce Clause and which regulation interferes with state autonomy.\textsuperscript{522} Justice Breyer echoed a point made by Justice Souter:

\begin{itemize}
  \item \textsuperscript{514} See id. at 1775 (Breyer, J., dissenting).
  \item \textsuperscript{515} See id. at 1774 (Breyer, J., dissenting). Justice Breyer questioned whether, had Congress found that those committing gender-based violence were motivated not only by animus against women, but also by a desire to achieve economic power, the majority would have upheld the VAWA. See id. (Breyer, J., dissenting).
  \item \textsuperscript{516} See id. (Breyer, J., dissenting) (citing Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)). It is interesting to note that Justice Breyer refers to the activity being regulated in these companion cases as non-economic, while the Chief Justice, both in \textit{Morrison} and \textit{Lopez}, grouped this activity, along with that in \textit{Wickard v. Filburn}, \textit{Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.}, and \textit{United States v. Perez}, under the heading of “economic activity.” Id. at 1750; United States v. Lopez, 514 U.S. 549, 559-60 (1995).
  \item \textsuperscript{517} See \textit{Morrison}, 120 S. Ct. at 1774-75 (Breyer, J., dissenting) (citing United States v. Lopez, 514 U.S. 549, 561 (1995)).
  \item \textsuperscript{518} See id. at 1775, 1777 (Breyer, J., dissenting).
  \item \textsuperscript{519} See id. at 1776 (Breyer, J., dissenting).
  \item \textsuperscript{520} See id. (Breyer, J., dissenting).
  \item \textsuperscript{521} See id. (Breyer, J., dissenting).
  \item \textsuperscript{522} See id. (Breyer, J., dissenting) (citing Garcia v. San Antonio Metro. Transit Auth., 469
Congress is much better suited than the courts to gather information and hear testimony on a particular activity. From this accumulated data, Congress can make a more “educated” decision that will best reflect the sovereignty concerns of the states. His belief in Congress’ superior ability to determine whether a particular statute will interfere with states’ rights, coupled with the problems inherent in the majority’s opinion, confirmed for Justice Breyer that the “rational basis” approach is a sufficient test for judicial review of Commerce Clause regulation. For these reasons, he concluded that the VAWA was a necessary and proper exercise of Congress’ commerce power. Justice Breyer then turned briefly to the validity of the Enforcement Clause as constitutional justification for the VAWA.

Justice Breyer grounded his comments in Fourteenth Amendment precedent. He first pointed out that the Court, in both the Civil Rights Cases and United States v. Harris, did not consider legislation that addressed the states’ failure to provide adequate remedies for those citizens who were victims of crime. Because of this, he concluded that the majority’s use of these two cases, in support of its argument that the Fourteenth Amendment cannot be used to substantiate section 13981, was flawed. Justice Breyer also suggested that the Fourteenth Amendment can be used to regulate purely private conduct, even though that conduct does not violate the Constitution. Citing language from City of Boerne v. Flores suggesting that Congress is empowered to enact legislation directed at conduct “which is not itself unconstitutional,” he argued that section 13981 leads by example,

U.S. 528, 552 (1985)). As Justice Stevens stated in Kimel v. Florida Board of Regents, “the Framers designed important structural safeguards to ensure that when the National Government enacted substantive law . . . the normal operation of the legislative process itself would adequately defend state interest from undue infringement.” 120 S. Ct. 631, 651 (2000) (Stevens, J., dissenting). In Justice Breyer’s view, Congress is “motivated” to operate in the best interests of the states, both because of the discrete state constituency that each member represents and because of the formal procedures under which Congress operates. See Morrison, 120 S. Ct. at 1777 (Breyer, J., dissenting).

523. See Morrison, 120 S. Ct. at 1777 (Breyer, J., dissenting).
524. See id. (Breyer, J., dissenting). This Congress clearly did during the four years leading up to the passage of the VAWA. See id. (Breyer, J., dissenting). Justice Breyer noted that the VAWA does not represent a case of state/federal conflict, “but of state/federal efforts to cooperate in order to help solve a mutually acknowledged national problem.” Id. (Breyer, J., dissenting).
525. See id. at 1778 (Breyer, J., dissenting).
526. See id. at 1780 (Breyer, J., dissenting).
527. See id. at 1777 (Breyer, J., dissenting).
528. See id. at 1779 (Breyer, J., dissenting).
529. See id. (Breyer, J., dissenting).
530. See id. (Breyer, J., dissenting).
providing motivation for states to improve their criminal justice systems.\footnote{See id. (Breyer, J., dissenting).} Finally, Justice Breyer dismissed the majority's argument that the VAWA civil rights remedy is overly broad, imposing a remedy where one is not needed.\footnote{See id. (Breyer, J., dissenting).} Justice Breyer took exception to the Court's suggestion that, in order for Congress to enact a national solution, it must find that the target problem exists in each of the fifty states.\footnote{See id. at 1779 (Breyer, J., dissenting).} However, despite these conclusions, Justice Breyer maintained that the Commerce Clause provided sufficient grounds for upholding the VAWA and reserved his detailed Fourteenth Amendment analysis for a future opinion.\footnote{See infra Parts IV.A-B (demonstrating how Commerce Clause precedent fails to support the Chief Justice's intimation of a new rule of Commerce Clause interpretation).}

IV. ANALYSIS

The majority's opinion in United States v. Morrison conflicts in numerous ways with established Commerce Clause jurisprudence. The Chief Justice's continued intimation of a bright-line rule for categorizing intrastate activity reachable under the commerce power represents the first such conflict.\footnote{See infra Parts IV.A-B (detailing how the Morrison majority failed to apply established parameters of Commerce Clause analysis).} Such a bright line rule is not supported by precedent.\footnote{See infra Part IV.C (reviewing the impact of the Court's emphasis on federalism).} The majority also chose to view section 13981 through its current notions of federalism, which not only conflict with precedent, but in this case, also conflict with the wishes of the states themselves.\footnote{See infra Part IV.D (describing how arguments that the Fourteenth Amendment supports Congress' decision to enact the VAWA, based on precedent, are not as valid as those regarding Commerce Clause support).} The majority's determination that section 13981 was not supported by the Fourteenth Amendment is more solidly grounded in prior case law.\footnote{See infra Part IV.D (discussing the shortcomings of arguments in favor of Fourteenth Amendment grounds for sustaining section 13981).} The petitioners' arguments for viewing private acts of gender-motivated violence as having a sufficient nexus with the state to constitute state action under the Amendment are not as strong as their arguments in favor of Commerce Clause support.\footnote{See infra Part IV.D (discussing the shortcomings of arguments in favor of Fourteenth Amendment grounds for sustaining section 13981).}
A. Bright Line Rules Conflict With Prior Precedent

The Supreme Court’s use of United States v. Lopez as a model for its Commerce Clause review of section 13981 is not surprising. Lopez was the first case in almost sixty years to declare a federal statute unconstitutional. Although the Morrison majority opened by asserting that any Commerce Clause analysis should begin with a presumption of constitutionality, the decision that followed was flat and almost rote. The opinion did not contain the give-and-take that analysis under a presumption of constitutionality should have. In addition to its overall tone, there are several aspects in which the Court’s decision did not ring true with established parameters for Commerce Clause analysis.

The most obvious conflict with established parameters is the Chief Justice’s classification of the intrastate activity in prior Supreme Court Commerce Clause opinions as being exclusively economic in nature. The lingering question from Lopez is the precise meaning of the Chief Justice’s statements that “we have upheld a wide variety of congressional acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce,” and later in the same paragraph, “[t]hese examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.” The Chief Justice relied on this concept as one of four factors in his Commerce Clause analysis, first in Lopez, and again in Morrison. Some have interpreted this language to create a new rule: that in order for Congress to reach intrastate activity under the Commerce Clause, the activity must be economic in nature. Yet, the plain language of Lopez contradicts such an interpretation, suggesting an outer limit, or a safe zone, for constitutionality. The Chief Justice’s opinion in Morrison provided no further substantiation

540. See Anisimov v. Lake, 982 F. Supp. 531, 534 (N.D. Ill. 1997); GUNTER & SULLIVAN, supra note 107, at 141.
541. See supra Part III.B.1 (discussing the Morrison majority’s Commerce Clause analysis).
542. See supra Part III.B.1 (reviewing the Commerce Clause analysis of section 13981 written by Chief Justice Rehnquist).
545. See, e.g., Brzonkala III, 169 F.3d 820, 833 (4th Cir. 1999) (declaring the economic/non-economic distinction of Lopez to be the “law of the land”).
546. See United States v. Kenney, 91 F.3d 884, 887 (7th Cir. 1996) (noting that the Lopez majority intended to establish an “outer limit” to congressional authority).
for this interpretation. Chief Justice Rehnquist stopped short of denying Congress power to regulate non-economic intrastate activities across the board.\textsuperscript{547} Therefore, despite his reliance on the nature of the regulated intrastate activity as one of several tests, the Chief Justice’s majority opinion explicitly rejected a bright-line rule regarding intrastate activity.

The Chief Justice’s rejection of this conclusion is only right, as there would be no precedent for finding such a bright-line rule.\textsuperscript{548} In fact, in \textit{Lopez}, the Chief Justice quoted a passage from \textit{Wickard} providing that local activity need not be regarded as commerce to fall under congressional authority; rather, it need only have a substantial effect on interstate commerce.\textsuperscript{549} The Court’s past attempts to put regulated activities into categories, such as manufacturing or production, direct or indirect, traditional or untraditional, have failed, primarily due to the fine line between what is economic and what is not.\textsuperscript{550} Further, the evaluation of whether a particular activity is economic in nature does not differ from the determination of whether a particular activity “substantially affects interstate commerce.” The Court has struggled with the latter; clearly the former is equally as subjective and only makes the analysis more difficult.\textsuperscript{551} Such artificial distinctions restrict

\textsuperscript{547} \textit{Morrison}, 120 S. Ct. at 1751. “While we need not adopt a categorical rule against aggregating the effects of any non-economic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” \textit{Id.}

\textsuperscript{548} In addition to those cases discussed in Part IV.B, several other Supreme Court cases support this conclusion. In \textit{Camps of Newfound/Owatonna, Inc. v. Town of Harrison}, the Court held that whether the regulated activity is profit-driven is not determinative of the regulation being constitutional under the Commerce Clause. 520 U.S. 564, 583-84 (1997). In \textit{Fry v. United States}, the Court stated, “[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States.” 421 U.S. 542, 547 (1975). Two earlier cases helped to cement this conclusion by the Court, around the time that \textit{Wickard} was decided. In \textit{United States v. Womens’ Sportswear Manufacturing Ass’n}, the Court declared, “[i]t is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.” 336 U.S. 460, 464 (1949). Similarly, in \textit{United States v. Wrightwood Dairy Co.}, the Court articulated its position as, “[i]t is the effect upon interstate commerce . . . not the source of the injury which is the criterion of congressional power.” 315 U.S. 110, 121 (1942).

\textsuperscript{549} See \textit{United States v. Lopez}, 514 U.S. 549, 556 (1995); \textit{supra} note 220 (detailing the passage from \textit{Wickard} quoted in the \textit{Lopez} majority).

\textsuperscript{550} See \textit{Schwartz}, \textit{supra} note 410, at M-1; \textit{supra} Part II.B.2 (discussing Commerce Clause jurisprudence between 1787-1937).

\textsuperscript{551} For example, the legislation at issue in \textit{Heart of Atlanta} and \textit{McClung} is considered by Chief Justice Rehnquist to be economic regulation, \textit{see Lopez}, 514 U.S. at 559-60, whereas Judge Motz, in \textit{Brzonkala II}, referred to that same activity as civil rights laws, not economic regulation, 132 F.3d 949, 972 (4th Cir. 1997). As Justice Breyer illustrated in his dissenting opinion in \textit{Morrison}, does the conduct of a downtown mugger who mugs for money constitute economic, or non-economic, activity? \textit{See Morrison}, 120 S. Ct. at 1774 (Breyer, J., dissenting).
a court's ability to effectively evaluate whether Congress had a rational basis for enacting legislation. In addition, once established, such artificial distinctions cannot be quickly set aside by Congress or the populous. Bright line rules conflict with the practical conception of the commerce power embraced by the Supreme Court since the early twentieth century.

B. Supportive Precedent Avoided

In relying on this artificial distinction between those intrastate activities that can be regulated and those that cannot, the Chief Justice avoided addressing the four cases that most closely resemble the situation in Morrison, thereby failing to give them the attention they merit. Instead, he was able to dismiss all four as supportive of his view that the Court has tended to exclusively uphold regulation of economic intrastate activities because all four, in his opinion, involved intrastate activities of an economic nature. Each, however, is analogous to Morrison and demonstrates additional conflicts between the Morrison majority and Supreme Court precedent.

First, the majority’s analysis failed to give sufficient weight to Wickard v. Filburn. Roscoe Filburn’s small, homegrown, wheat crop is analogous to a single instance of gender-motivated violence, in that neither, alone, is likely to affect interstate commerce. The key is the cumulative effect of such conduct, which the Wickard Court determined was sufficient to affect interstate commerce. Certainly the cumulative effect of absenteeism and welfare expenses, not to mention the withdrawal from participation in the economy by one segment of the population, all resulting from gender-motivated violence, bears a greater impact on interstate commerce than does several hundred aggregated acres of home-grown wheat.

552. See Morrison, 120 S. Ct. at 1775 (Breyer, J., dissenting).
553. See Brzonkala Brief, supra note 46, at 40.
555. See supra Part III.B.1 (discussing the Commerce Clause analysis of the Morrison majority).
556. See Morrison, 120 S. Ct. at 1750.
Additionally, the Court bypassed any discussion of the companion cases of *Heart of Atlanta Motel, Inc. v. United States* and *Katzenbach v. McClung*. Both cases dealt with discriminatory practices against African Americans in the 1960s. The Court determined that the refusal to rent rooms to African American travelers, and to serve African American restaurant patrons, impacted the amount of traveling done by such persons. The Court further noted the negative impact on society, in general, because such discrimination discourages professional persons and industry from settling in areas where these types of discrimination are practiced. The VAWA is an anti-discrimination law, which, like the Civil Rights Act of 1964 at issue in *Heart of Atlanta* and *McClung*, was designed to address specific acts of discrimination against a defined group: women. Just as the Court concluded that African Americans were discouraged from traveling interstate because of the discrimination they suffered at establishments like the Heart of Atlanta Motel and Ollie’s Barbecue, Congress learned that the threat of gender-motivated violence impacts the degree to which women are generally willing to participate in the nation’s economy. Such connections to interstate commerce are neither attenuated, nor do they require the piling of “inference upon inference.”

Finally, and perhaps most significantly, the Court determined, in *Perez v. United States*, that local loan sharking activities substantially affected interstate commerce. *Perez* is a fitting analogy, as some have argued that section 13981, although a civil remedy, punishes gender-based crimes. When presented with validating an exercise of congressional authority under the Commerce Clause, the court must give deference to a congressional finding that the regulated activity substantially affects interstate commerce, so long as there is any rational basis for that finding. *Perez* sustained congressional regulation of

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559. See generally *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *supra* Part II.B.3 (discussing the Commerce Clause aspects of these two cases).

560. See *McClung*, 379 U.S. at 300 (taking note of congressional findings illustrating the negative effect of discriminatory practices on industry).

561. See *Brzonkala Brief, supra* note 46, at 19, 26.

562. See *id.* at 19.

563. This is a reference to language in Chief Justice Rehnquist’s *Lopez* opinion. See *supra* note 228 and accompanying text.


565. Contrary to this argument, section 13981 is a civil remedy, not a criminal statute. See *Biden Brief, supra* note 19, at 14.

566. See *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 276
local criminal conduct because the Court accepted congressional findings that local loan sharking activities were largely under the control of organized crime and thus, when aggregated, substantially affected interstate commerce.\footnote{567} The \textit{Perez} decision also reflected that issues too large for the states to adequately handle can be legislated by Congress.\footnote{568}

The delegates to the Constitutional Convention recognized the need to empower the federal government to address problems that the states were unable to handle.\footnote{569} In addition to \textit{Perez}, the Supreme Court’s support for this authority can most clearly be seen in its decisions sustaining civil rights laws, like the VAWA.\footnote{570} Primary examples include \textit{Heart of Atlanta} and \textit{McClung}, where Congress determined that discriminatory conduct had reached a point that a federal response was necessary.\footnote{571} The uniformity of enforcement that can be achieved through federal legislation is necessary to make civil rights laws effective.\footnote{572} In overturning section 13981, the Court ignored congressional findings derived, in part, from input provided by the states themselves, that dealing with gender-motivated violence was too large a problem for them to manage alone.\footnote{573} It also ignored the authority of Congress to address, on a national level, such sizable

\footnote{567. \textit{Perez}, 402 U.S. at 156-57.}
\footnote{568. In \textit{Perez}, the Court acknowledged congressional findings that the problem of organized crime, which received a large share of its revenues from loan sharking activities, was too large to be solved by the states alone and needed the resources of the federal government. \textit{See id.} at 150.}
\footnote{569. \textit{See Brzonkala Brief, supra note 46, at 29.} The Framers adopted a resolution, on July 17, 1787, clarifying the powers of Congress. \textit{See id.} at 29. This resolution read, in part: "[t]hat the Natl. Legislature ought to (possess) the Legislative Rights vested in Congs. by the Confederation . . . and moreover to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent . . . ." \textit{Id.} at 30 (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 95 (Max Farrand ed., 1911)) (emphasis added). Each of the various resolutions adopted during the Convention were delivered to the Committee of Detail, whose job it was to integrate all of the resolutions into the document that ultimately became the Constitution of 1787. \textit{See id.} at 30 n.11.}
\footnote{570. Civil rights and anti-discrimination legislation are traditional functions of the federal government dating back to the Civil War Amendments. \textit{See Brzonkala II,} 132 F.3d 949, 971 (4th Cir. 1997); \textit{Brzonkala Brief, supra note 46, at 35.} "The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere." Katzenbach v. McClung, 379 U.S. 294, 305 (1964).}
\footnote{571. \textit{See Biden Brief, supra note 19, at 12.}}
\footnote{572. \textit{See Brzonkala Brief, supra note 46, at 17.}}
\footnote{573. \textit{See Brzonkala II,} 132 F.3d at 971 n.14; \textit{supra} note 47 (setting forth a passage from the letter written by the state attorneys general).}
problems. Finally, it ignored its own precedent of sustaining civil rights legislation.

C. The Glare of Federalism

It has been widely publicized that the current majority in the Supreme Court is focused on furthering its conception of federalism, determined to reinvigorate state sovereignty. The Court's current emphasis on states' rights has often been viewed by the states themselves as counterproductive. A majority of the states supported the passage of the VAWA and told the Court in an amicus brief that the problem of gender-motivated violence is too large for them to adequately address on their own. In sharp contrast to past Commerce Clause and federalism cases, United States v. Morrison saw a majority of the states actually arguing on the side of the federal government in favor of section 13981's constitutionality. This is not to say that the mere desire of the states that something be so justifies breaching the tenets of the Constitution. However, the tenacity with which the Court has been pursuing its goal of renewed state sovereignty is not in keeping with the traditional balance between federal and state power inherent in the concept of federalism.

The Chief Justice placed the greatest emphasis of his Commerce Clause analysis on the abuses likely to be wrought by the Court's validation of section 13981. However, this sort of wild speculation

575. See supra Part II.B.3 (discussing the Court's decisions in Heart of Atlanta and McClung).
576. See France, supra note 500, at 40.
578. See supra note 47 and accompanying text (detailing a passage from the letter provided by state attorneys general as part of the four years of testimony heard by Congress).
579. See Amici Brief of the States, supra note 33, at 2, 15-16; Shane, supra note 577, at B5.
580. See Joan Biskupic, States' Role at Issue in Rape Suit, WASH. POST, Jan. 10, 2000, at A17. The states have voluminous amounts of data that show rape victims alone accrue health costs far greater than those accrued by victims of other acts of violence. See id. Unfortunately, the states often bear the brunt of those costs through emergency, insurance, and welfare payments. See id.
581. Justice Hugo Black defined this balance in Younger v. Harris as:

The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government . . . will not unduly interfere with the legitimate activities of the States.

401 U.S. 37, 44 (1971).
runs contrary to previous Court rulings. 583 In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court condemned the "parade of horribles" argument suggested by the dissenting justices, claiming that "the process of constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency . . ." 584 The *Garcia* Court maintained that the structure of the federal government would provide safeguards against rampant invasion of the states' sovereignty. 585 Each state has representation in Congress, and the legislative process provides adequate protection
against federal interference with state autonomy.\textsuperscript{586} That structure remains unchanged from 1985 and will provide the same safeguards in the new century as it has during this nation's first 224 years.

Unlike the judicial branch of the federal government, over which the general population can exercise no control, or the executive branch, over which the population can exercise a limited amount of control, the legislative branch is controlled completely by the people. If Congress oversteps its bounds, the people express their displeasure through their votes. This is not to say that the courts are powerless to review the acts of Congress. \textit{Marbury v. Madison}\textsuperscript{587} clearly established that authority early in our nation's history.\textsuperscript{588} However, the Court has repeatedly held that congressional findings are due a high degree of deference.\textsuperscript{589} The whole purpose of the "rational basis" test is to require courts to defer to Congress on a case-by-case basis.\textsuperscript{590} This is because the legislature is better equipped to gather statistics, hold hearings, and formulate findings than is the judiciary.\textsuperscript{591} It is not the role of the courts to determine whether particular legislation is necessary or could have been drafted more effectively.\textsuperscript{592} One has to wonder what has become of judicial restraint and deference to Congress, particularly where Congress spent, not days, not months, but years gathering data, reviewing studies, hearing testimony, and refining language that would address a problem of national scope.\textsuperscript{593} The VAWA is not a statute that

\begin{footnotesize}
\textsuperscript{587}. \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137 (1803).
\textsuperscript{588}. See id. at 178.
\textsuperscript{589}. See \textit{Brzonkala Brief, supra} note 46, at 27-28. The Court declared, in \textit{Walters v. National Ass'n of Radiation Survivors}, "when Congress makes findings on essentially factual issues... those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." 473 U.S. 305, 330 n.12 (1985). Congressional findings submitted concurrently with a statute's enactment carry greater weight than arguments made by attorneys during a subsequent constitutional challenge to the legislation. See \textit{Brzonkala III}, 169 F.3d 820, 924 (4th Cir. 1999) (Motz, J., dissenting).
\textsuperscript{590}. See \textit{Anisimov} v. Lake, 982 F. Supp. 531, 539 (N.D. Ill. 1997) (citing United States v. Wilson, 73 F.3d 675, 682 n.7 (7th Cir. 1995)). In response to one litigant's argument before the Supreme Court that Congress lacked a rational basis for enacting a particular piece of legislation, it is reported that Chief Justice Rehnquist asked, "[a]re you saying, Counsel, that the Senators who voted for that bill belong in the looney bin?" \textit{Id.} at 534 n.1 (quoting \textit{Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary, 102d Cong. 103} (1991) (testimony of Professor Cass R. Sunstein)).
\textsuperscript{591}. See \textit{Morrison}, 120 S. Ct. at 1777 (Breyer, J., dissenting).
\textsuperscript{592}. See \textit{Anisimov}, 982 F. Supp. at 538.
\textsuperscript{593}. See \textit{supra} Part II.A.1 (detailing the breadth of congressional findings regarding the pervasiveness of violence against women).
\end{footnotesize}
was haphazardly thrown together during an all-night session; it was carefully crafted to meet the needs of victims, to avoid interference with the autonomy of the states, and to avoid imposing additional burdens on the states. The judgment of the legislature should not be discounted in a rush to protect states' rights.

The majority's emphasis on states' rights is not without its share of popular support. In response to the argument of states' rights advocates that giving an inch to Congress will only encourage it to take a mile, opening the door for federal regulation of even such traditional areas as criminal and family law, some perspective is important. The Constitution empowers the President to grant reprieves and pardons for offenses against the nation, without congressional or judicial review, and yet, no President has taken liberties with that power. Similarly, the federal courts have unchecked power to adjudicate matters brought before them by the executive branch, and yet they, too, have not abused that power. These two examples only add strength to the Court's past observations regarding the "parade of horribles"; clearly the Framers did not dwell on remote possibilities. If they had, either the Constitution would never have been completed, or it would be an excessively long document. Further, it is clear from the actions of Congress itself, by the amount of time and resources it expended during the four years of the VAWA's formation, that it made every effort to thoroughly understand the issue of gender-motivated violence. Congress carefully worded its legislation to avoid interference with state family and criminal law by limiting the application of the VAWA to

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594. See supra Part II.A.2 (discussing the steps taken by Congress to ensure that section 13981 would not interfere with state laws).

595. As Justice Stevens concluded in Kimel v. Florida Board of Regents, "[t]he kind of judicial activism manifested in [recent federalism cases] represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises." 120 S. Ct. 631, 653-54 (2000) (Stevens, J., dissenting). He later noted that it is not a function of the federal judiciary to protect the interests of the states. See id. at 651-52 (Stevens, J., dissenting) ("[T]he Framers designed important structural safeguards to ensure that when the National Government enacted substantive law (and provided for its enforcement), the normal operation of the legislative process itself would adequately defend state interests from undue infringement.").

596. See Shane, supra note 577, at B5.

597. See id. There are both political and practical reasons that will keep Congress from usurping power from the states. See Doe v. Mercer, 37 F. Supp. 2d 64, 69 (D. Mass. 1999) (reasoning that merely because Congress has certain regulatory powers does not mean Congress will inevitably take advantage of those powers).

598. See supra note 584 and accompanying text (discussing quote from New York v. United States in Garcia).

felonies, and only to those in which a gender animus could be proven.\textsuperscript{600} These are not the actions of a branch of government raring to commandeer all aspects of government, federal and state. It is clear from the record amassed by Congress that it recognized its limitations under the enumerated powers and made a conscientious attempt to stay within those boundaries.\textsuperscript{601} 

Supreme Court Commerce Clause precedent not only supports the constitutionality of section 13981, but also militates against the establishment of bright-line rules that sustain legislation based on the category of activity it regulates. The majority in \textit{Morrison} paid lip service to the "rational basis" test, by allowing its devotion to federalism to supersede the deference owed to congressional judgment. In trying to prevent an upset of the balance of power between federal and state governments, the Court managed to jostle the balance between two federal branches.

\textbf{D. Weak Link to State Action}

The majority's opinion regarding Fourteenth Amendment support for section 13981 is more firmly rooted in Supreme Court precedent than is its Commerce Clause holding. It is clear from prior Supreme Court cases that the Court has yet to extend congressional authority under the Enforcement Clause to purely private conduct.\textsuperscript{602} Congress' authority does extend, however, to the conduct of state actors.\textsuperscript{603} The petitioners argued that it was the conduct of state actors that Congress chose to

\textsuperscript{600} See Biden Brief, \textit{supra} note 19, at 15-16.

\textsuperscript{601} See \textit{Brzonkala II}, 132 F.3d 949, 973 (4th Cir. 1997). The rational basis test is built on a practical conception of the commerce power. This was articulated clearly in \textit{Polish National Alliance v. National Labor Relations Board}:

[Whether] the conduct of an enterprise affects commerce among the States 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 far-reaching power was given to this Court: that of determining whether the Congress has exceeded limits allowable in reason for the judgment which it has exercised.

\textsuperscript{602} See supra Part II.C.2 (tracing the development of Fourteenth Amendment interpretation).

\textsuperscript{603} See supra Part II.C.2 (discussing the types of conduct that can be regulated under the Fourteenth Amendment).
pursue under the VAWA.\textsuperscript{604} Both the \textit{Brzonkala I} and \textit{III} courts condemned the remedy of section 13981 for compensating victims of gender-motivated violence for the actions of private individuals, not for the state's denial of equal protection.\textsuperscript{605} Yet, it can be argued that if the states were not denying equal protection of the laws to a portion of their respective populations, there would be no need for such a supplemental remedy.\textsuperscript{606} In essence, the states' preclusion of women from obtaining redress for the injuries caused them by perpetrators of gender-based violence is equivalent to encouraging such behavior among assailants. This type of encouragement can be seen to make individual perpetrators state actors under the Amendment.\textsuperscript{607} However, the precedent against such reasoning is currently more substantial than that supporting it.

Congress maintained that the degree of remedy offered by enactment of section 13981 met the requirements set forth in \textit{City of Boerne v. Flores}, as it displayed "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."\textsuperscript{608} This proportionality and congruence was accomplished through congressional limitation of section 13981 to felony crimes of violence, giving the states concurrent jurisdiction and eliminating the potential for issues of family law to be joined to section 13981 claims.\textsuperscript{609} In choosing to act under its Enforcement Clause power, Congress consciously drafted the civil rights remedy to avoid supplanting state laws or otherwise burdening state governments.\textsuperscript{610} Congress' intent was to give private individuals a right to recover for violation of their rights, and by doing so, motivate states to improve their efforts to enforce those rights.\textsuperscript{611} Congress knew it would not be able to eradicate the problem of gender-motivated violence; rather, Congress' purpose was to send a message to the populous that gender-based violence is unacceptable and put such discrimination on par with

\textsuperscript{604} See \textit{Brzonkala Brief}, \textit{supra} note 46, at 47.
\textsuperscript{606} See Anisimov v. Lake, 982 F. Supp. 531, 539-40 (N.D. Ill. 1997).
\textsuperscript{607} See 16B AM. JUR. 2D Constitutional Law § 800 (1998).
\textsuperscript{608} See Biden Brief, \textit{supra} note 19, at 26 (citing \textit{City of Boerne v. Flores}, 521 U.S. 507, 520 (1997)).
\textsuperscript{609} See \textit{id}. at 27.
\textsuperscript{610} See \textit{id}. Section 13981 does not impose any obligations on the states or force them to administer federal programs. See \textit{Brzonkala Brief}, \textit{supra} note 46, at 33. Unlike the GFSZA in \textit{Lopez}, section 13981 does not prevent a state from enacting whatever additional laws or programs it wishes to enact to combat gender-motivated crime. See \textit{id}. at 34.
\textsuperscript{611} See Biden Brief, \textit{supra} note 19, at 28 (citing \textit{City of Riverside v. Rivera}, 477 U.S. 561, 574 (1986)).
racial and religious discrimination. Unfortunately, the lack of a more direct link between the states' denial of equal protection and the conduct of those private individuals committing acts of gender-motivated violence caused section 13981 to fail the tests for constitutionality under the Enforcement Clause.

V. IMPACT

It has been suggested that the cycle for Commerce Clause jurisprudence is approximately sixty-five years. Noting that the last significant change in this line of case law coincided with Jones & Laughlin Steel Corp. in 1937, such a theory would place the year 2000 just inside a new cycle, poised for a corresponding interpretive shift. The most recent trend began to show signs of its appearance in 1991, with the Court's decision in Gregory v. Ashcroft. This was followed in 1995 by United States v. Lopez, when the Supreme Court overruled an act of Congress for the first time in almost sixty years. Although Lopez explicitly clarified one aspect of then-existing Commerce Clause doctrine, questions still remain as to the true meaning of some of its other passages. Unfortunately, United States v. Morrison did not provide a clear answer to those questions. While in Lopez, Chief Justice Rehnquist intimated a new standard for assessing whether federal regulation of non-economic intrastate activity is constitutional, in Morrison, he failed to build on his previous comments, addressing this language from Lopez only in passing. In the wake of Lopez, several circuits interpreted the opinion to express the outer limits of congressional commerce power, not to restrict a half-century of

613. See Kolkey, supra note 110, at 495.
614. See id. at 499-501.
615. Gregory v. Ashcroft, 501 U.S. 452 (1991); see Kolkey, supra note 110, at 495. In Gregory v. Ashcroft, the Court held that a federal statute would not be applicable to the states unless Congress' intent that it be so applied was plainly stated on its face. See 501 U.S. at 463-64; 1 ROTUNDA & NOWAK, supra note 98, § 4.10, at 490. Interestingly, this shift loosely corresponded with Justice Rehnquist's elevation to Chief Justice. Justice Rehnquist was elevated to the position of Chief Justice in 1986. Some would argue that the shift began even earlier, citing then-Justice Rehnquist's 1976 opinion in National League of Cities v. Usery as a significant departure from almost six decades of Commerce Clause jurisprudence. See Susan Estrich, Losers In the Federalism Game, DENVER POST, May 21, 2000, at K-02.
616. See GUNTHER & SULLIVAN, supra note 107, at 141.
617. See supra note 219 and accompanying text (discussing the new principle of Commerce Clause interpretation established in Lopez).
618. See supra notes 219-21 and accompanying text (discussing the Lopez majority's distinction between economic and non-economic intrastate activity).
Commerce Clause precedent.\textsuperscript{619} However, one circuit interpreted the language to mandate a new rule of law.\textsuperscript{620} The ambiguity generated by 
\textit{Lopez}, and left unclarified in \textit{Morrison}, has resulted in the absence of a clear set of interpretive rules for lower courts to use in future Commerce Clause analyses.\textsuperscript{621}

If, following \textit{Morrison}, more circuits adopt the Fourth Circuit's view that intrastate activity of a non-economic nature cannot be reached under the Commerce Clause, Congress' power to deal with current national issues could be impeded.\textsuperscript{622} One example is Congress' ability to address civil rights through hate crime legislation.\textsuperscript{623} The object of such legislation, under the findings of \textit{Morrison}, "[is] not, in any sense of the phrase, economic activity,"\textsuperscript{624} and clearly falls within the authority of state law. Prior to the VAWA's enactment, fewer than twelve states had hate crime laws that included crimes motivated by gender bias.\textsuperscript{625} Under the Fourth Circuit's interpretation, any private discrimination that occurs through non-economic activity, if the states fail to enact a remedy for it, or, as with gender-motivated violence, fail to give it equal treatment in the judicial system, will be allowed to continue. Per the Court's holding in \textit{New York v. United States}, Congress cannot force states to enact hate crime legislation.\textsuperscript{626}

\textsuperscript{619} See, e.g., United States v. Wilson, 73 F.3d 675, 685 (7th Cir. 1995) (stating that the \textit{Lopez} court reaffirmed previous precedent).

\textsuperscript{620} This was the Fourth Circuit. \textit{See Brzonkala III}, 169 F.3d 820, 833 (4th Cir. 1999).

\textsuperscript{621} \textit{See United States v. Morrison}, 120 S. Ct. 1740, 1774 (2000) (Breyer, J., dissenting) (pointing out that the majority's analysis under the Commerce Clause illustrates the difficulty in determining a workable set of interpretive rules). It may be argued that the \textit{Morrison} decision is merely a signal to Congress to return to the drawing board and revise section 13981 to be in compliance with the parameters outlined by the Court. This is not as simple as it may sound. \textit{Morrison} does not provide a clear picture of what section 13981 needs to look like to pass the present Court's constitutional scrutiny. The addition of a jurisdictional element might fix the problem, but this would be impractical. \textit{See Doe v. Mercer}, 37 F. Supp. 2d 64, 70 n.10 (D. Mass. 1999). Additionally, there is no Supreme Court precedent requiring a jurisdictional element. \textit{See Wilson}, 73 F.3d at 685 (The Seventh Circuit rejected an interpretation of \textit{Lopez} that jurisdictional elements are required for statutes to be found constitutional. The Court declared that such elements are not necessary "to fulfill a prerequisite of constitutionality."). The mention of such a detail in both the \textit{Lopez} and \textit{Morrison} analyses merely suggests that its presence might enhance a statute's effect on interstate commerce; it does not indicate that all statutes with such an element would automatically pass constitutional scrutiny, nor does it indicate that the absence of such an element makes a statute \textit{per se} unconstitutional. \textit{See Kuhn v. Kuhn}, No. 98 C 2395, 1999 WL 519326, at *8 (N.D. Ill. July 15, 1999).

\textsuperscript{622} \textit{See Schwartz, supra} note 410, at M-1.

\textsuperscript{623} \textit{See George F. Will, A Revival of Federalism?}, NEWSWEEK, May 29, 2000, at 78.

\textsuperscript{624} \textit{Morrison}, 120 S. Ct. at 1751.

\textsuperscript{625} \textit{See S. REP. No. 103-138}, at 48 (1993).

\textsuperscript{626} \textit{See Brzonkala Brief, supra} note 46, at 32. \textit{New York v. United States} held that the Constitution does not authorize Congress to require the states to enact specific regulation. 505
Therefore, if Congress is prohibited from enacting hate crime laws under the Commerce Clause, and the states refuse to enact their own such legislation, there will be no protection against those forms of discrimination.\footnote{27}

A broad adoption of the Fourth Circuit’s rigid interpretation could also seriously inhibit Congress’ ability to respond to future national problems. Should the country be struck by some disaster that proves too large for the states to address on their own, be it weather-related, such as a drought, or health-related, such as an epidemic, the fact that such disasters are not “economic in nature” may prohibit Congress from taking the necessary action.\footnote{28} This limitation on Congress’ Commerce Clause reach threatens the ability of the federal legislature to fulfill the responsibilities assigned to it by the Framers.\footnote{29} This rigid interpretation will also tie Congress’ hands where the states refuse to address the problem themselves.

In analyzing the constitutionality of acts of Congress, the role of the courts is not to determine whether Congress enacted the best solution to the problem at hand, nor whether the statute is necessary.\footnote{30} The answers to these questions are to come from Congress.\footnote{31} Instead, the courts are to determine if Congress had a rational basis for its judgment and whether the means Congress chose are reasonably adapted to accomplishing its goal.\footnote{32} The concerns of the \textit{Morrison} majority, as well as the courts in \textit{Brzonkala I} and \textit{III}, regarding the potential for Congress to abuse this plenary power unless the judiciary steps in to

\footnotesize{U.S. 144, 178 (1992); see supra notes 209-11 and accompanying text (discussing \textit{New York v. United States}).

\footnote{27} See \textit{Brzonkala Brief}, supra note 46, at 39. \textit{Morrison} will also prevent enactment of hate crime laws under the Fourteenth Amendment. Even though Congress is empowered to enact prophylactic legislation to prevent violation of Fourteenth Amendment rights, such legislation can only be directed at states or state actors. See supra Part II.C.2 (discussing limitations on Congress’ reach under the Fourteenth Amendment). Until the Court issues a majority opinion that adopts the independent comments from \textit{Guest}, the Fourteenth Amendment will not provide an alternate means of sustaining such legislation. It is much more likely that the Commerce Clause will provide the means for this legislation than will the Fourteenth Amendment, for two reasons. First, the Court has already sustained civil rights legislation under the Commerce Clause, so precedent exists. See supra notes 178-85 and accompanying text (reviewing Supreme Court precedent in civil rights litigation). Second, the Fourteenth Amendment opens the door to issues of conflicting individual rights. See supra note 310 (discussing the Court’s reticence to extend the Fourteenth Amendment to regulate purely private conduct).

\footnote{28} See \textit{Brzonkala Reply Brief}, supra note 554, at 5-6.

\footnote{29} See \textit{Brzonkala Brief}, supra note 46, at 39.

\footnote{30} See \textit{Anisimov v. Lake}, 982 F. Supp. 531, 538 (N.D. Ill. 1997).

\footnote{31} See \textit{id}.

\footnote{32} See \textit{id}.
control it, apply equally in reverse. Just as the dividing line between constitutionally valid and invalid action by Congress is narrow so, too, is the line for judicial review. The Court experienced a troubling incident in the late 1930s as a result of its perceived overreaching; such a lesson will, hopefully, not ever be repeated.\textsuperscript{633} Decisions concerning the breadth of states' rights, particularly in the face of years of congressional research, are more appropriately left to Congress, as the representative of the populous.\textsuperscript{634} The Court's disregard for, and lack of deference to, congressional findings usurps the constitutional role assigned to Congress and threatens the balance between the federal branches of government.\textsuperscript{635} There is a chance, however, that this trend could be reversed fairly soon.

The potential exists for the next President to appoint three new Supreme Court justices to replace Chief Justice Rehnquist, Justice Stevens, and Justice O'Connor, who have served on the Court since 1972, 1975, and 1981, respectively.\textsuperscript{636} Those choices have the potential to advance the federalist thinking of the five-justice majority in \textit{Lopez} and \textit{Morrison}, or to reverse the trend by creating a new majority that would view the reach of Congress' commerce power more broadly.\textsuperscript{637} The implications for advancement of the current federalism campaign are far-reaching. This campaign has the potential to sustain challenges to numerous acts of Congress on the grounds that the regulated activity requires a chain of inference to support Congress' findings that the activity substantially affects interstate commerce.\textsuperscript{638} In the case of intrastate activity, such challenges could be sustained because the regulated activity requires a similar inferential chain to qualify as "economic in nature."\textsuperscript{639} Of course, Senate confirmation of a presidential appointment only occurs after a Senate confirmation hearing, at which questions concerning the nominee's views on federalism are likely to take center stage.\textsuperscript{640} This, combined with the

\textsuperscript{633} See \textit{supra} note 160 (discussing Franklin D. Roosevelt's court-packing plan).


\textsuperscript{635} See Anisimov, 982 F. Supp. at 539. Congress is the governmental branch best suited to performing the necessary research to generate those factual findings.

\textsuperscript{636} See Will, \textit{supra} note 623, at 78. The youngest of these three justices, Sandra Day O'Connor, will turn seventy this year. See \textit{GUNTHER & SULLIVAN}, \textit{supra} note 107, app. B at B-6, B-7.

\textsuperscript{637} See \textit{Will, supra} note 623, at 78.

\textsuperscript{638} See \textit{supra} Parts III.A.2 & 3.b (discussing the Commerce Clause analyses of the district court in \textit{Bzonkala I} and the Fourth Circuit in \textit{Bzonkala III}).

\textsuperscript{639} See \textit{supra} Parts III.A.2 & 3.b (reviewing the use of the \textit{Lopez} four-part analysis by both the district and appellate courts).

\textsuperscript{640} See \textit{France, supra} note 500, at 43.
political balance in the Senate and the political leanings of the newly elected President, will all contribute to the future direction of constitutional interpretation. The next successful appointment to the Supreme Court bench should indicate whether the shift toward states’ rights begun in 1991 will continue for a full sixty-five-year cycle, or be quickly reversed to the post-New Deal direction.641

VI. CONCLUSION

The full impact of the *Morrison* opinion, both socially and legally, will not become evident for the next several years. On the social level, it is important to remember that, despite the Court’s invalidation of section 13981, all the other provisions of the VAWA remain unaffected. Anyone who has not personally been the target of gender-motivated violence cannot fully appreciate the depth of emotional harm suffered by its victims. For past and future victims of gender-motivated violence, the Court’s decision is surely a disappointment and represents a backward step in preventing such conduct, possibly in advancing all forms of civil rights. However, those provisions that remain contain the mechanisms for numerous advancements, by funding capital improvements in public security, by providing education to members of the law enforcement community, and by mandating full faith and credit for orders of protection. It is possible that these improvements may accomplish one of the goals of section 13981: encouraging states to improve their enforcement against gender-motivated violence through leading by example. On the legal level, the Court’s current dedication to its own doctrines of federalism appears to have placed civil rights at the bottom of its priorities and extended the Court’s authority beyond its constitutional limitations. Prior to the *Morrison* decision, only one federal circuit had interpreted *Lopez* to divert Commerce Clause analysis in a new direction. With the *Morrison* decision’s mechanical tracing of the Court’s *Lopez* analysis, such an interpretation may gain favor throughout the judiciary. Blind devotion to *Lopez* interpretations similar to that of the Fourth Circuit threaten the ability of the federal legislature to carry out the work that it is constitutionally charged to do. Such an interpretation ties Congress’ hands in situations where the state governments are incapable, or refuse, to adequately address social problems that impact commerce. Perhaps the early years of the new century will bring a change in perspective to the members of the Court, but, more likely, it will bring a change in membership. Until that

641. *See Will, supra* note 623, at 78.
change occurs, it seems improbable that Congress could draft a replacement for section 13981 that would survive the scrutiny of a Court predisposed to disdain for any legislation perceived as a threat to its notions of federalism, even if those notions conflict with the will of the states.