Supplemental Materials for Brest, Levinson, Balkin, Amar and Siegel
Processes of Constitutional Decisionmaking
United States v. Morrison– Commerce Clause

UNITED STATES v. MORRISON

529 U.S. 598 (2000).

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. THOMAS, J., filed a concurring opinion. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined, and in which SOUTER and GINSBURG, JJ., joined as to Part I-A.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In these cases we consider the constitutionality of 42 U.S.C. §13981, which provides a federal civil remedy for the victims of gender-motivated violence. ...

I

[Petitioner Christy Brzonkala enrolled at Virginia Polytechnic Institute (Virginia Tech) in the fall of 1994. In September 1994, Brzonkala met respondents Antonio Morrison and James Crawford, who were both students at Virginia Tech and members of its varsity football team. Brzonkala alleged that, within 30 minutes of meeting Morrison and Crawford, they pinned her down on a bed in her dormitory and repeatedly raped her. After the attack, Morrison allegedly told Brzonkala, "You better not have any f *** ing diseases." In the months following the rape, Morrison also allegedly announced in the dormitory's dining room that "I like to get girls drunk and f *** the s *** out of them."

Brzonkala stated that this attack caused her to become severely emotionally disturbed and depressed. She sought assistance from a university psychiatrist, who prescribed antidepressant medication. Shortly after the rape Brzonkala stopped attending classes and withdrew from the university.

Brzonkala complained to school officials. At a hearing Morrison admitted to having sex with her despite the fact that she twice told him "no." The school found insufficient evidence to punish Crawford. It found Morrison guilty of sexual assault and

sentenced him to a two semester suspension. After a rehearing, it reaffirmed the penalty but changed the charges to "using abusive language" without explanation. Eventually Morrison's punishment for the latter charge was set aside as "excessive." Virginia Tech did not inform Brzonkala of this decision. After learning from a newspaper that Morrison would be returning to Virginia Tech for the fall 1995 semester, she dropped out of the university.

In December 1995, Brzonkala sued Morrison and Crawford alleging that Morrison's and Crawford's attack violated §13981, the civil remedy created by the Violence Against Women Act. The Fourth Circuit upheld a lower court dismissal of the complaint on the grounds that Congress lacked authority to pass §13981 under either the Commerce Clause or §5 of the Fourteenth Amendment.]

Section 13981 was part of the Violence Against Women Act of 1994, §40302, 108 Stat. 1941-1942. It states that '[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender.' 42 U.S.C. §13981(b). To enforce that right, subsection (c) declares:

> '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.'

Section 13981 defines a 'crim[e] of violence motivated by gender' as '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.' §13981(d)(1). It also provides that the term 'crime of violence' includes any

> '(A) ... 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.' §13981(d)(2).

Further clarifying the broad scope of §13981's civil remedy, subsection (e)(2) states that '[n]othing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section.' And subsection (e)(3) provides a §13981 litigant with a choice of forums: Federal and state courts 'shall have concurrent jurisdiction' over complaints brought under the section.

Although the foregoing language of §13981 covers a wide swath of criminal conduct, Congress placed some limitations on the section's federal civil remedy. Subsection (e)(1) states that '[n]othing 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.' Subsection (e)(4) further states that §13981 shall not be construed '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.'

II

Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds. With this presumption of constitutionality in mind, we turn to the question whether §13981 falls within Congress' power under Article I, §8, of the Constitution. ...

As we discussed at length in [United States v.] Lopez, [514 U.S. 549 (1995)], our interpretation of the Commerce Clause has changed as our Nation has developed. We need not repeat that detailed review of the Commerce Clause's history here; it suffices to say that, in the years since NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted.

Lopez emphasized, however, that even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds.

> [E]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In Jones & Laughlin Steel, the Court warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually

> obliterate the distinction between what is national and what is local and create a completely centralized government.' Id., at 556-557 (quoting Jones & Laughlin Steel, supra, at 37).[a]

As we observed in *Lopez*, modern Commerce Clause jurisprudence has 'identified three broad categories of activity that Congress may regulate under its commerce power.' 'First, Congress may regulate the use of the channels of interstate commerce.' 'Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.' 'Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, ... i.e., those activities that substantially affect interstate commerce.'

Petitioners do not contend that these cases fall within either of the first two of these categories of Commerce Clause regulation. They seek to sustain §13981 as a regulation of activity that substantially affects interstate commerce. Given §13981's focus on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce), we agree that this is the proper inquiry. ...

In *Lopez*, we held that the Gun-Free School Zones Act of 1990, 18 U.S.C. §922(q)(1)(A), which made it a federal crime to knowingly possess a firearm in a school zone, exceeded Congress' authority under the Commerce Clause. Several significant considerations contributed to our decision.

First, we observed that §922(q) was 'a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms.' Reviewing our case law, we noted 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.' Although we cited only a few examples, we stated that the pattern of analysis is clear. 'Where economic activity substantially affects

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[a]JUSTICE SOUTER's dissent takes us to task for allegedly abandoning Jones & Laughlin Steel in favor of an inadequate 'federalism of some earlier time.' As the foregoing language from Jones & Laughlin Steel makes clear however, this Court has always recognized a limit on the commerce power inherent in 'our dual system of government.' 301 U.S., at 37. It is the dissent's remarkable theory that the commerce power is without judicially enforceable boundaries that disregards the Court's caution in Jones & Laughlin Steel against allowing that power to 'effectually obliterate the distinction between what is national and what is local.'

interstate commerce, legislation regulating that activity will be sustained.'

Both petitioners and JUSTICE SOUTER's dissent downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis. 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*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.[b]

The second consideration that we found important in analyzing §922(q) was that the statute contained 'no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.' Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce.

Third, we noted that neither §922(q) 'nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.' While 'Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce,' the existence of such findings may 'enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye.'

Finally, our decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated. The United States argued that the possession of guns may lead to violent crime, and that violent crime 'can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe.' The Government also argued that the presence of guns at schools poses a threat to the educational process, which in turn threatens to produce a less efficient and productive workforce, which will negatively affect national productivity and thus interstate commerce.

We rejected these 'costs of crime' and 'national productivity' arguments because

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[b]JUSTICE SOUTER's dissent does not reconcile its analysis with our holding in *Lopez* because it apparently would cast that decision aside. However, the dissent cannot persuasively contradict *Lopez*' s conclusion that, in every case where we have sustained federal regulation under Wickard's aggregation principle, the regulated activity was of an apparent commercial character.

they would permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.' We noted that, under this but-for reasoning:

> Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the[se] theories ... , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

With these principles underlying our Commerce Clause jurisprudence as reference points, the proper resolution of the present cases is clear. Gender- motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic 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.

Like the Gun-Free School Zones Act at issue in *Lopez*, §13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce. Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that §13981 is sufficiently tied to interstate commerce, Congress elected to cast §13981's remedy over a wider, and more purely intrastate, body of violent crime.[c]

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[c]Title 42 U.S.C. §13981 is not the sole provision of the Violence Against Women Act of 1994 to provide a federal remedy for gender-motivated crime. Section 40221(a) of the Act creates a federal criminal remedy to punish 'interstate crimes of abuse including crimes committed against spouses or intimate partners during interstate travel and crimes committed by spouses or intimate partners who cross State lines to continue the abuse.' S. Rep. No. 103-138, p. 43 (1993). That criminal provision has been codified at 18 U.S.C. §2261(a)(1), which states:

> 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).

The Courts of Appeals have uniformly upheld this criminal sanction as an appropriate

In contrast with the lack of congressional findings that we faced in *Lopez*, §13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, '[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'. Rather, '[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.' [*Lopez*]

In these cases, Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. Congress found that gender-motivated violence affects interstate commerce

> 'by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; ... by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.' H.R. Conf. Rep. No. 103-711, at 385.

Accord, S. Rep. No. 103-138, at 54. Given these findings and petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Petitioners' reasoning, moreover, will not limit Congress to regulating violence but

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exercise of Congress' Commerce Clause authority, reasoning that '[t]he provision properly falls within the first of *Lopez*'s categories as it regulates the use of channels of interstate commerce--i.e., the use of the interstate transportation routes through which persons and goods move.' United States v. Lankford, 196 F. 3d 563, 571-572 (CA5 1999) (collecting cases) (internal quotation marks omitted).

may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national econ- omy is undoubtedly significant. Congress may have recognized this specter when it expressly precluded §13981 from being used in the family law context.[d] See 42 U.S.C. §13981(e)(4). Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.[e]

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[d]We are not the first to recognize that the but-for causal chain must have its limits in the Commerce Clause area. In *Lopez*, 514 U.S., at 567, we quoted Justice Cardozo's concurring opinion in A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935):

> There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.' Id., at 554 (quoting United States v. A. L. A. Schechter Poultry Corp., 76 F. 2d 617, 624 (CA2 1935) (L. Hand, J., concurring)).

[e]JUSTICE SOUTER's dissent['s] theory that Gibbons v. Ogden, 9 Wheat. 1 (1824), Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), and the Seventeenth Amendment provide the answer to these cases, is remarkable because it undermines this central principle of our constitutional system. As we have repeatedly noted, the Framers crafted the federal system of government so that the people's rights would be secured by the division of power. Departing from their parliamentary past, the Framers adopted a written Constitution that further divided authority at the federal level so that the Constitution's provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the legislature's self-restraint. ...

No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text. ... Contrary to JUSTICE SOUTER's suggestion, *Gibbons* did not exempt the commerce power from this cardinal rule of constitutional law. His assertion that, from *Gibbons* on, public opinion has been the only restraint on the congressional exercise of the commerce power is true only insofar as it contends that political accountability is and has been the only limit on Congress' exercise of the commerce power within that power's outer bounds. ... *Gibbons* did not remove from this

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. See, e.g., Cohens v. Virginia, 6 Wheat. 264, 426, 428 (1821) (Marshall, C. J.) (stating that Congress 'has no general right to punish murder committed within any of the States,' and that it is 'clear ... that congress cannot punish felonies generally'). Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.[f] See, e.g., *Lopez*, 514 U.S., at 566 ('The Constitution ... withhold[s] from Congress a plenary police power'); id., at 584-585 (THOMAS, J., concurring) ('[W]e always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power'), 596-597, and n.6 (noting that the first Congresses did not enact nationwide punishments for criminal conduct under the Commerce Clause).

III

[The Court also held that §13981 was not authorized under Congress's powers under §5 of the Fourteenth Amendment. This portion of the opinion appears infra in the discussion of

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Court the authority to define that boundary.

[f]JUSTICE SOUTER disputes our assertion that the Constitution reserves the general police power to the States, noting that the Founders failed to adopt several proposals for additional guarantees against federal encroachment on state authority. This argument is belied by the entire structure of the Constitution. With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate. And, as discussed above, the Constitution's separation of federal power and the creation of the Judicial Branch indicate that disputes regarding the extent of congressional power are largely subject to judicial review. Moreover, the principle that '[t]he Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States is deeply ingrained in our constitutional history.

the reconstruction power]

IV

Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault. ... If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States. The judgment of the Court of Appeals is

Affirmed.

JUSTICE THOMAS, concurring.

The majority opinion correctly applies our decision in United States v. Lopez, 514 U.S. 549 (1995), and I join it in full. I write separately only to express my view that the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases. By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The Court says both that it leaves Commerce Clause precedent undisturbed and that the Civil Rights Remedy of the Violence Against Women Act of 1994, 42 U.S.C. §13981, exceeds Congress's power under that Clause. I find the claims irreconcilable and respectfully dissent.[a]

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[a]Finding the law a valid exercise of Commerce Clause power, I have no occasion to reach the question whether it might also be sustained as an exercise of Congress's power

I

Our cases, which remain at least nominally undisturbed, stand for the following propositions. Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. See Wickard v. Filburn, 317 U.S. 111, 124-128 (1942); Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264, 277 (1981). The fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. See ibid. Any explicit findings that Congress chooses to make, though not dispositive of the question of rationality, may advance judicial review by identifying factual authority on which Congress relied. Applying those propositions in these cases can lead to only one conclusion.

One obvious difference from United States v. Lopez is the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce.[b] Passage of the Act in 1994 was preceded by four years of hearings, which included testimony from physicians and law professors; from survivors of rape and domestic violence; and from representatives of state law enforcement and private business. The record includes reports on gender bias from task forces in 21 States, and we have the benefit of specific factual findings in the eight separate Reports issued by Congress and its

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to enforce the Fourteenth Amendment.

[b]It is true that these data relate to the effects of violence against women generally, while the civil rights remedy limits its scope to 'crimes of violence motivated by gender'--presumably a somewhat narrower subset of acts. See 42 U.S.C. §13981(b). But the meaning of 'motivated by gender' has not been elucidated by lower courts, much less by this one, so the degree to which the findings rely on acts not redressable by the civil rights remedy is unclear. As will appear, however, much of the data seems to indicate behavior with just such motivation. In any event, adopting a cramped reading of the statutory text, and thereby increasing the constitutional difficulties, would directly contradict one of the most basic canons of statutory interpretation. Having identified the problem of violence against women, Congress may address what it sees as the most threatening manifestation; 'reform may take one step at a time.' Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955).

committees over the long course leading to enactment.

With respect to domestic violence, Congress received evidence for the following findings:

> 'Three out of four American women will be victims of violent crimes sometime during their life.'
> 'Violence is the leading cause of injuries to women ages 15 to 44 ... .'
> '[A]s many as 50 percent of homeless women and children are fleeing domestic violence.'
> 'Since 1974, the assault rate against women has outstripped the rate for men by at least twice for some age groups and far more for others.'
> '[B]attering 'is the single largest cause of injury to women in the United States.''
> 'An estimated 4 million American women are battered each year by their husbands or partners.'
> 'Over 1 million women in the United States seek medical assistance each year for injuries sustained [from] their husbands or other partners.'
> 'Between 2,000 and 4,000 women die every year from [domestic] abuse.'
> '[A]rrest rates may be as low as 1 for every 100 domestic assaults.'
> 'Partial estimates show that violent crime against women costs this country at least 3 billion--not million, but billion--dollars a year.'
> '[E]stimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence.'

The evidence as to rape was similarly extensive, supporting these conclusions:

> '[The incidence of] rape rose four times as fast as the total national crime rate over the past 10 years.'
> 'According to one study, close to half a million girls now in high school will be raped before they graduate.'
> '[One hundred twenty--five thousand] college women can expect to be raped during this--or any--year.'
> '[T]hree-quarters of women never go to the movies alone after dark because of the fear of rape and nearly 50 percent do not use public transit alone after dark for the same reason.'
> '[Forty-one] percent of judges surveyed believed that juries give sexual assault victims less credibility than other crime victims.'
> 'Less than 1 percent of all [rape] victims have collected damages.'
> " '[A]n individual who commits rape has only about 4 chances in 100 of being

> arrested, prosecuted, and found guilty of any offense.' "
> 'Almost one-quarter of convicted rapists never go to prison and another quarter received sentences in local jails where the average sentence is 11 months.'
> '[A]lmost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity.'

Based on the data thus partially summarized, Congress found that

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

Congress thereby explicitly stated the predicate for the exercise of its Commerce Clause power. Is its conclusion irrational in view of the data amassed? True, the methodology of particular studies may be challenged, and some of the figures arrived at may be disputed. But the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned.

Indeed, the legislative record here is far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title II of the Civil Rights Act of 1964 against Commerce Clause challenges. In Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964), the Court referred to evidence showing the consequences of racial discrimination by motels and restaurants on interstate commerce. Congress had relied on compelling anecdotal reports that individual instances of segregation cost thousands to millions of dollars. Congress also had evidence that the average black family spent substantially less than the average white family in the same income range on public accommodations, and that discrimination accounted for much of the difference.

While Congress did not, to my knowledge, calculate aggregate dollar values for the nationwide effects of racial discrimination in 1964, in 1994 it did rely on evidence of the harms caused by domestic violence and sexual assault, citing annual costs of $3 billion in 1990, and $5 to $10 billion in 1993.[c] Equally important, though, gender-based violence in

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[c]In other cases, we have accepted dramatically smaller figures. See, e.g., Hodel v. Indiana, 452 U.S. 314, 325, n.11 (1981) (stating that corn production with a value of

the 1990's was shown to operate in a manner similar to racial discrimination in the 1960's in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce. Like racial discrimination, '[g]ender-based violence bars its most likely targets-- women--from full partic[ipation] in the national economy.'

If the analogy to the Civil Rights Act of 1964 is not plain enough, one can always look back a bit further. In *Wickard*, we upheld the application of the Agricultural Adjustment Act to the planting and consumption of homegrown wheat. The effect on interstate commerce in that case followed from the possibility that wheat grown at home for personal consumption could either be drawn into the market by rising prices, or relieve its grower of any need to purchase wheat in the market. The Commerce Clause predicate was simply the effect of the production of wheat for home consumption on supply and demand in interstate commerce. Supply and demand for goods in interstate commerce will also be affected by the deaths of 2,000 to 4,000 women annually at the hands of domestic abusers, and by the reduction in the work force by the 100,000 or more rape victims who lose their jobs each year or are forced to quit. Violence against women may be found to affect interstate commerce and affect it substantially.[d]

II

The Act would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause, complemented by the authority of the Necessary and Proper Clause, Art. I. §8 cl. 18, extended to all activity that, when aggregated, has a substantial effect on interstate commerce. As already noted, this understanding was secure even against the turmoil at the passage of the Civil Rights Act of 1964, in the aftermath of which the

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$5.16 million 'surely is not an insignificant amount of commerce').

[d]It should go without saying that my view of the limit of the congressional commerce power carries no implication about the wisdom of exercising it to the limit. I and other Members of this Court appearing before Congress have repeatedly argued against the federalization of traditional state crimes and the extension of federal remedies to problems for which the States have historically taken responsibility and may deal with today if they have the will to do so. The Judicial Conference of the United States originally opposed the Act, though after the original bill was amended to include the gender-based animus requirement, the objection was withdrawn for reasons that are not apparent.

Court not only reaffirmed the cumulative effects and rational basis features of the substantial effects test, see *Heart of Atlanta*, supra; *McClung*, supra, but declined to limit the commerce power through a formal distinction between legislation focused on 'commerce' and statutes addressing 'moral and social wrong[s].'

The fact that the Act does not pass muster before the Court today is therefore proof, to a degree that *Lopez* was not, that the Court's nominal adherence to the substantial effects test is merely that. Although a new jurisprudence has not emerged with any distinctness, it 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. These devaluations are accomplished not by any express repudiation of the substantial effects test or its application through the aggregation of individual conduct, but by supplanting rational basis scrutiny with a new criterion of review.

Thus the elusive heart of the majority's analysis in these cases is its statement that Congress's findings of fact are 'weakened' by the presence of a disfavored 'method of reasoning.' This seems to suggest that the 'substantial effects' analysis is not a factual enquiry, for Congress in the first instance with subsequent judicial review looking only to the rationality of the congressional conclusion, but one of a rather different sort, dependent upon a uniquely judicial competence.

This new characterization of substantial effects has no support in our cases (the self-fulfilling prophecies of *Lopez* aside), least of all those the majority cites. Perhaps this explains why the majority is not content to rest on its cited precedent but claims a textual justification for moving toward its new system of congressional deference subject to selective discounts. Thus it purports to rely on the sensible and traditional understanding that the listing in the Constitution of some powers implies the exclusion of others unmentioned.[e] The majority stresses that Art. I, §8, enumerates the powers of Congress,

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[e]The claim that powers not granted were withheld was the chief Federalist argument against the necessity of a bill of rights. Bills of rights, Hamilton claimed, 'have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations.' The Federalist No. 84, at 578. James Wilson went further in the Pennsylvania ratifying convention, asserting that an enumeration of rights was positively dangerous because it suggested, conversely, that every right not reserved was surrendered. See 2 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 436-437 (2d ed. 1863) (hereinafter Elliot's Debates). The Federalists did not, of course, prevail on this point; most States voted for the Constitution

including the commerce power, an enumeration implying the exclusion of powers not enumerated. It follows, for the majority, not only that there must be some limits to 'commerce,' but that some particular subjects arguably within the commerce power can be identified in advance as excluded, on the basis of characteristics other than their commercial effects. Such exclusions come into sight when the activity regulated is not itself commercial or when the States have traditionally addressed it in the exercise of the general police power, conferred under the state constitutions but never extended to Congress under the Constitution of the Nation.

The premise that the enumeration of powers implies that other powers are withheld is sound; the conclusion that some particular categories of subject matter are therefore presumptively beyond the reach of the commerce power is, however, a non sequitur. From the fact that Art. I, §8, cl. 3 grants an authority limited to regulating commerce, it follows only that Congress may claim no authority under that section to address any subject that does not affect commerce. It does not at all follow that an activity affecting commerce nonetheless falls outside the commerce power, depending on the specific character of the activity, or the authority of a State to regulate it along with Congress.[f] My disagreement with the majority is not, however, confined to logic, for history has shown that categorical exclusions have proven as unworkable in practice as they are unsupportable in theory.

A

Obviously, it would not be inconsistent with the text of the Commerce Clause itself to declare 'noncommercial' primary activity beyond or presumptively beyond the scope of the commerce power. That variant of categorical approach is not, however, the sole textually permissible way of defining the scope of the Commerce Clause, and any such neat limitation would at least be suspect in the light of the final sentence of Article I, §8, authorizing Congress to make 'all Laws ... necessary and proper' to give effect to its enumerated

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only after proposing amendments and the First Congress speedily adopted a Bill of Rights. See Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 569 (1985) (Powell, J., dissenting). While that document protected a range of specific individual rights against federal infringement, it did not, with the possible exception of the Second Amendment, offer any similarly specific protections to areas of state sovereignty.

[f]To the contrary, we have always recognized that while the federal commerce power may overlap the reserved state police power, in such cases federal authority is supreme.

powers such as commerce. See United States v. Darby, 312 U.S. 100, 118 (1941) ('The power of Congress ... extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce '). Accordingly, for significant periods of our history, the Court has defined the commerce power as plenary, unsusceptible to categorical exclusions, and this was the view expressed throughout the latter part of the 20th century in the substantial effects test. These two conceptions of the commerce power, plenary and categorically limited, are in fact old rivals, and today's revival of their competition summons up familiar history, a brief reprise of which may be helpful in posing what I take to be the key question going to the legitimacy of the majority's decision to breathe new life into the approach of categorical limitation.

Chief Justice Marshall's seminal opinion in Gibbons v. Ogden, construed the commerce power from the start with 'a breadth never yet exceeded,' Wickard v. Filburn, 317 U.S., at 120. In particular, it is worth noting, the Court in *Wickard* did not regard its holding as exceeding the scope of Chief Justice Marshall's view of interstate commerce; *Wickard* applied an aggregate effects test to ostensibly domestic, noncommercial farming consistently with Chief Justice Marshall's indication that the commerce power may be understood by its exclusion of subjects, among others, 'which do not affect other States,' Gibbons, 9 Wheat., at 195. This plenary view of the power has either prevailed or been acknowledged by this Court at every stage of our jurisprudence. And it was this understanding, free of categorical qualifications, that prevailed in the period after 1937 through *Lopez*, as summed up by Justice Harlan: "Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators ... have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." Maryland v. Wirtz, 392 U.S. 183, 190 (1968) (quoting Katzenbach v. McClung, 379 U.S., at 303- 304).

Justice Harlan spoke with the benefit of hindsight, for he had seen the result of rejecting the plenary view, and today's attempt to distinguish between primary activities affecting commerce in terms of the relatively commercial or noncommercial character of the primary conduct proscribed comes with the pedigree of near-tragedy that I outlined in United States v. Lopez, supra, at 603 (dissenting opinion). In the half century following the modern activation of the commerce power with passage of the Interstate Commerce Act in 1887, this Court from time to time created categorical enclaves beyond congressional reach by declaring such activities as 'mining,' 'production,' 'manufacturing,' and union membership to be outside the definition of 'commerce' and by limiting application of the effects test to 'direct' rather than 'indirect' commercial consequences. See, e.g., United States v. E. C. Knight Co., 156 U.S. 1 (1895) (narrowly construing the Sherman Antitrust Act in light of

the distinction between 'commerce' and 'manufacture'); In re Heff, 197 U.S. 488, 505-506 (1905) (stating that Congress could not regulate the intrastate sale of liquor); The Employers' Liability Cases, 207 U.S. 463, 495-496 (1908) (invalidating law governing tort liability for common carriers operating in interstate commerce because the effects on commerce were indirect); Adair v. United States, 208 U.S. 161 (1908) (holding that labor union membership fell outside 'commerce'); Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating law prohibiting interstate shipment of goods manufactured with child labor as a regulation of 'manufacture'); A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 545-548 (1935) (invalidating regulation of activities that only 'indirectly' affected commerce); Railroad Retirement Bd. v. Alton R. Co., 295 U.S. 330, 368-369 (1935) (invalidating pension law for railroad workers on the grounds that conditions of employment were only indirectly linked to commerce); Carter v. Carter Coal Co., 298 U.S. 238, 303-304 (1936) (holding that regulation of unfair labor practices in mining regulated 'production,' not 'commerce').

Since adherence to these formalistically contrived confines of commerce power in large measure provoked the judicial crisis of 1937, one might reasonably have doubted that Members of this Court would ever again toy with a return to the days before NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), which brought the earlier and nearly disastrous experiment to an end. And yet today's decision can only be seen as a step toward recapturing the prior mistakes. Its revival of a distinction between commercial and noncommercial conduct is at odds with *Wickard*, which repudiated that analysis, and the enquiry into commercial purpose, first intimated by the *Lopez* concurrence, see *Lopez*, supra, at 580 (opinion of KENNEDY, J.), is cousin to the intent-based analysis employed in *Hammer*, but rejected for Commerce Clause purposes in *Heart of Atlanta* and *Darby*.

Why is the majority tempted to reject the lesson so painfully learned in 1937? An answer emerges from contrasting *Wickard* with one of the predecessor cases it superseded. It was obvious in *Wickard* that growing wheat for consumption right on the farm was not 'commerce' in the common vocabulary,[g] but that did not matter constitutionally so long as

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[g]Contrary to the Court's suggestion, *Wickard* applied the substantial effects test to domestic agricultural production for domestic consumption, an activity that cannot fairly be described as commercial, despite its commercial consequences in affecting or being affected by the demand for agricultural products in the commercial market. The *Wickard* Court admitted that Filburn's activity 'may not be regarded as commerce' but insisted that 'it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce ... .' 317 U.S., at 125. The characterization of home wheat production as 'commerce' or not is, however, ultimately beside the point.

the aggregated activity of domestic wheat growing affected commerce substantially. Just a few years before *Wickard*, however, it had certainly been no less obvious that 'mining' practices could substantially affect commerce, even though *Carter Coal Co.*, supra, had held mining regulation beyond the national commerce power. When we try to fathom the difference between the two cases, it is clear that they did not go in different directions because the *Carter Coal* Court could not understand a causal connection that the *Wickard* Court could grasp; the difference, rather, turned on the fact that the Court in *Carter Coal* had a reason for trying to maintain its categorical, formalistic distinction, while that reason had been abandoned by the time *Wickard* was decided. The reason was laissez-faire economics, the point of which was to keep government interference to a minimum. The Court in *Carter Coal* was still trying to create a laissez-faire world out of the 20th-century economy, and formalistic commercial distinctions were thought to be useful instruments in achieving that object. The Court in *Wickard* knew it could not do any such thing and in the aftermath of the New Deal had long since stopped attempting the impossible. Without the animating economic theory, there was no point in contriving formalisms in a war with Chief Justice Marshall's conception of the commerce power.

If we now ask why the formalistic economic/noneconomic distinction might matter today, after its rejection in *Wickard*, the answer is not that the majority fails to see causal connections in an integrated economic world. The answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit. The legitimacy of the Court's current emphasis on the noncommercial nature of regulated activity, then, does not turn on any logic serving the text of the Commerce Clause or on the realism of the majority's view of the national economy. The essential issue is rather the strength of the majority's claim to have a constitutional warrant for its current conception of a federal relationship enforceable by this Court through limits on otherwise

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For if substantial effects on commerce are proper subjects of concern under the Commerce Clause, what difference should it make whether the causes of those effects are themselves commercial? Cf., e.g., National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 258 (1994) ('An enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives'). The Court's answer is that it makes a difference to federalism, and the legitimacy of the Court's new judicially derived federalism is the crux of our disagreement.

plenary commerce power. This conception is the subject of the majority's second categorical discount applied today to the facts bearing on the substantial effects test.

B

The Court finds it relevant that the statute addresses conduct traditionally subject to state prohibition under domestic criminal law, a fact said to have some heightened significance when the violent conduct in question is not itself aimed directly at interstate commerce or its instrumentalities. Again, history seems to be recycling, for the theory of traditional state concern as grounding a limiting principle has been rejected previously, and more than once. It was disapproved in *Darby*, and held insufficient standing alone to limit the commerce power in *Hodel*. In the particular context of the Fair Labor Standards Act it was rejected in Maryland v. Wirtz, 392 U.S. 183 (1968), with the recognition that '[t]here is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.'. The Court held it to be 'clear that the Federal Government, when acting within delegated power, may override countervailing state interests, whether these be described as 'governmental' or 'proprietary' in character.' While *Wirtz* was later overruled by National League of Cities v. Usery, 426 U.S. 833 (1976), that case was itself repudiated in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), which held that the concept of 'traditional governmental function' (as an element of the immunity doctrine under *Hodel*) was incoherent, there being no explanation that would make sense of the multifarious decisions placing some functions on one side of the line, some on the other. The effort to carve out inviolable state spheres within the spectrum of activities substantially affecting commerce was, of course, just as irreconcilable with *Gibbons*'s explanation of the national commerce power as being as 'absolut[e] as it would be in a single government,' 9 Wheat., at 197.[h]

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[h]The Constitution of 1787 did, in fact, forbid some exercises of the commerce power. Article I, §9, cl. 6, barred Congress from giving preference to the ports of one State over those of another. More strikingly, the Framers protected the slave trade from federal interference, see Art. I, §9, cl. 1, and confirmed the power of a State to guarantee the chattel status of slaves who fled to another State, see Art. IV, §2, cl. 3. These reservations demonstrate the plenary nature of the federal power; the exceptions prove the rule. Apart from them, proposals to carve islands of state authority out of the stream of commerce power were entirely unsuccessful. Roger Sherman's proposed definition of federal legislative power as excluding 'matters of internal police' met Gouverneur Morris's

The objection to reviving traditional state spheres of action as a consideration in commerce analysis, however, not only rests on the portent of incoherence, but is compounded by a further defect just as fundamental. The defect, in essence, is the majority's rejection of the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy.[i] Whereas today's majority takes a leaf from the book of the old judicial economists in saying that the Court should somehow draw the line to keep the federal relationship in a proper balance, Madison, Wilson, and Marshall understood the Constitution very differently.

Although Madison had emphasized the conception of a National Government of discrete powers (a conception that a number of the ratifying conventions thought was too indeterminate to protect civil liberties), Madison himself must have sensed the potential

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response that '[t]he internal police ... ought to be infringed in many cases' and was voted down eight to two. 2 Records of the Federal Convention of 1787, pp. 25-26 (M. Farrand ed. 1911) (hereinafter Farrand). The Convention similarly rejected Sherman's attempt to include in Article V a proviso that 'no state shall ... be affected in its internal police.' 5 Elliot's Debates 551-552. Finally, Rufus King suggested an explicit bill of rights for the States, a device that might indeed have set aside the areas the Court now declares off-limits. 1 Farrand 493 ('As the fundamental rights of individuals are secured by express provisions in the State Constitutions; why may not a like security be provided for the Rights of States in the National Constitution'). That proposal, too, came to naught. In short, to suppose that enumerated powers must have limits is sensible; to maintain that there exist judicially identifiable areas of state regulation immune to the plenary congressional commerce power even though falling within the limits defined by the substantial effects test is to deny our constitutional history.

[i]That the national economy and the national legislative power expand in tandem is not a recent discovery. This Court accepted the prospect well over 100 years ago, noting that the commerce powers 'are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances.' Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U.S. 1, 9 (1878). See also, e.g., Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 211-212 (1930) ('Primitive conditions have passed; business is now transacted on a national scale').

scope of some of the powers granted (such as the authority to regulate commerce), for he took care in The Federalist No. 46 to hedge his argument for limited power by explaining the importance of national politics in protecting the States' interests. The National Government 'will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments.' The Federalist No. 46, at 319. James Wilson likewise noted that 'it was a favorite object in the Convention' to secure the sovereignty of the States, and that it had been achieved through the structure of the Federal Government. 2 Elliot's Debates 438-439. The Framers of the Bill of Rights, in turn, may well have sensed that Madison and Wilson were right about politics as the determinant of the federal balance within the broad limits of a power like commerce, for they formulated the Tenth Amendment without any provision comparable to the specific guarantees proposed for individual liberties.[j] In any case, this Court recognized the political component of federalism in the seminal *Gibbons* opinion. After declaring the plenary character of congressional power within the sphere of activity affecting commerce, the Chief Justice spoke for the Court in explaining that there was only one restraint on its valid exercise:

> 'The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.' *Gibbons*, supra, at 197.

Politics as the moderator of the congressional employment of the commerce power was the theme many years later in *Wickard*, for after the Court acknowledged the breadth of the *Gibbons* formulation it invoked Chief Justice Marshall yet again in adding that '[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*. Hence, 'conflicts of economic interest ... are wisely left under our system to

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[j]The majority's special solicitude for 'areas of traditional state regulation,' is thus founded not on the text of the Constitution but on what has been termed the 'spirit of the Tenth Amendment,' Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S., at 585 (O'CONNOR, J., dissenting) (emphasis in original). Susceptibility to what Justice Holmes more bluntly called 'some invisible radiation from the general terms of the Tenth Amendment,' Missouri v. Holland, 252 U.S. 416, 434 (1920), has increased in recent years, in disregard of his admonition that '[w]e must consider what this country has become in deciding what that Amendment has reserved.' Ibid.

resolution by Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do.'.

As with 'conflicts of economic interest,' so with supposed conflicts of sovereign political interests implicated by the Commerce Clause: the Constitution remits them to politics. The point can be put no more clearly than the Court put it the last time it repudiated the notion that some state activities categorically defied the commerce power as understood in accordance with generally accepted concepts. [*Garcia*]. After confirming Madison's and Wilson's views with a recitation of the sources of state influence in the structure of the National Constitution, the Court disposed of the possibility of identifying 'principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on a priori definitions of state sovereignty,' It concluded that

> the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State 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.

The *Garcia* Court's rejection of 'judicially created limitations' in favor of the intended reliance on national politics was all the more powerful owing to the Court's explicit recognition that in the centuries since the framing the relative powers of the two sovereign systems have markedly changed. Nationwide economic integration is the norm, the national political power has been augmented by its vast revenues, and the power of the States has been drawn down by the Seventeenth Amendment, eliminating selection of senators by state legislature in favor of direct election.

The *Garcia* majority recognized that economic growth and the burgeoning of federal revenue have not amended the Constitution, which contains no circuit breaker to preclude the political consequences of these developments. Nor is there any justification for attempts to nullify the natural political impact of the particular amendment that was adopted. The significance for state political power of ending state legislative selection of senators was no secret in 1913, and the amendment was approved despite public comment on that very issue. Representative Franklin Bartlett, after quoting Madison's Federalist No. 62, as well as remarks by George Mason and John Dickinson during the Constitutional Convention, concluded, 'It follows, therefore, that the framers of the Constitution, were they present in this House to-day, would inevitably regard this resolution as a most direct blow at the doctrine of State's rights and at the integrity of the State sovereignties; for if you once deprive a State as a collective organism of all share in the General Government, you annihilate its federative importance.' 26 Cong. Rec. 7774 (1894). Massachusetts Senator

George Hoar likewise defended indirect election of the Senate as 'a great security for the rights of the States.' And Elihu Root warned that if the selection of senators should be taken from state legislatures, 'the tide that now sets toward the Federal Government will swell in volume and power.' 'The time will come,' he continued, 'when the Government of the United States will be driven to the exercise of more arbitrary and unconsidered power, will be driven to greater concentration, will be driven to extend its functions into the internal affairs of the States.' Ibid. These warnings did not kill the proposal; the Amendment was ratified, and today it is only the ratification, not the predictions, which this Court can legitimately heed.[k]

Amendments that alter the balance of power between the National and State Governments, like the Fourteenth, or that change the way the States are represented within the Federal Government, like the Seventeenth, are not rips in the fabric of the Framers' Constitution, inviting judicial repairs. The Seventeenth Amendment may indeed have

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[k]The majority tries to deflect the objection that it blocks an intended political process by explaining that the Framers intended politics to set the federal balance only within the sphere of permissible commerce legislation, whereas we are looking to politics to define that sphere (in derogation even of Marbury v. Madison, 1 Cranch 137 (1803)), ante, at 16- 17. But we all accept the view that politics is the arbiter of state interests only within the realm of legitimate congressional action under the commerce power. Neither Madison nor Wilson nor Marshall, nor the *Jones & Laughlin*, *Darby*, *Wickard*, or *Garcia* Courts, suggested that politics defines the commerce power. Nor do we, even though we recognize that the conditions of the contemporary world result in a vastly greater sphere of influence for politics than the Framers would have envisioned. Politics has legitimate authority, for all of us on both sides of the disagreement, only within the legitimate compass of the commerce power. The majority claims merely to be engaging in the judicial task of patrolling the outer boundaries of that congressional authority. That assertion cannot be reconciled with our statements of the substantial effects test, which have not drawn the categorical distinctions the majority favors. See, e.g., *Wickard*, 317 U.S., at 125; *Darby*, 312 U.S., at 118-119. The majority's attempt to circumscribe the commerce power by defining it in terms of categorical exceptions can only be seen as a revival of similar efforts that led to near tragedy for the Court and incoherence for the law. If history's lessons are accepted as guides for Commerce Clause interpretation today, as we do accept them, then the subject matter of the Act falls within the commerce power and the choice to legislate nationally on that subject, or to except it from national legislation because the States have traditionally dealt with it, should be a political choice and only a political choice.

lessened the enthusiasm of the Senate to represent the States as discrete sovereignties, but the Amendment did not convert the judiciary into an alternate shield against the commerce power.

C

The Court's choice to invoke considerations of traditional state regulation in these cases is especially odd in light of a distinction recognized in the now- repudiated opinion for the Court in *Usery*. In explaining that there was no inconsistency between declaring the States immune to the commerce power exercised in the Fair Labor Standards Act, but subject to it under the Economic Stabilization Act of 1970, as decided in Fry v. United States, 421 U.S. 542 (1975), the Court spoke of the latter statute as dealing with a serious threat affecting all the political components of the federal system, 'which only collective action by the National Government might forestall.' *Usery*, 426 U.S., at 853. Today's majority, however, finds no significance whatever in the state support for the Act based upon the States' acknowledged failure to deal adequately with gender-based violence in state courts, and the belief of their own law enforcement agencies that national action is essential.[l]

The National Association of Attorneys General supported the Act unanimously, and Attorneys General from 38 States urged Congress to enact the Civil Rights Remedy, representing that 'the current system for dealing with violence against women is inadequate'. It was against this record of failure at the state level that the Act was passed to provide the choice of a federal forum in place of the state-court systems found inadequate to stop gender-biased violence.[m] The Act accordingly offers a federal civil rights remedy aimed exactly at violence against women, as an alternative to the generic state tort causes of action found to be poor tools of action by the state task forces. See S. Rep. No. 101-545, at 45

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[l]The point here is not that I take the position that the States are incapable of dealing adequately with domestic violence if their political leaders have the will to do so; it is simply that the Congress had evidence from which it could find a national statute necessary, so that its passage obviously survives Commerce Clause scrutiny.

[m]The majority's concerns about accountability strike me as entirely misplaced. Individuals, such as the defendants in this action, haled into federal court and sued under the United States Code, are quite aware of which of our dual sovereignties is attempting to regulate their behavior. Had Congress chosen, in the exercise of its powers under §5 of the Fourteenth Amendment, to proceed instead by regulating the States, rather than private individuals, this accountability would be far less plain.

(noting difficulty of fitting gender-motivated crimes into common-law categories). As the 1993 Senate Report put it, 'The Violence Against Women Act is intended to respond both to the underlying attitude that this violence is somehow less serious than other crime and to the resulting failure of our criminal justice system to address such violence. Its goals are both symbolic and practical ... .'

The collective opinion of state officials that the Act was needed continues virtually unchanged, and when the Civil Rights Remedy was challenged in court, the States came to its defense. Thirty-six of them and the Commonwealth of Puerto Rico have filed an amicus brief in support of petitioners in these cases, and only one State has taken respondents' side. It 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. For with the Court's decision today, Antonio Morrison, like *Carter Coal*'s James Carter before him, has 'won the states' rights plea against the states themselves.' R. Jackson, The Struggle for Judicial Supremacy 160 (1941).

III

All of this convinces me that today's ebb of the commerce power rests on error, and at the same time leads me to doubt that the majority's view will prove to be enduring law. There is yet one more reason for doubt. Although we sense the presence of *Carter Coal*, *Schechter*, and *Usery* once again, the majority embraces them only at arm's-length. Where such decisions once stood for rules, today's opinion points to considerations by which substantial effects are discounted. Cases standing for the sufficiency of substantial effects are not overruled; cases overruled since 1937 are not quite revived. The Court's thinking betokens less clearly a return to the conceptual straitjackets of *Schechter* and *Carter Coal* and *Usery* than to something like the unsteady state of obscenity law between Redrup v. New York, 386 U.S. 767 (1967) (per curiam), and Miller v. California, 413 U.S. 15 (1973), a period in which the failure to provide a workable definition left this Court to review each case ad hoc. As our predecessors learned then, the practice of such ad hoc review cannot preserve the distinction between the judicial and the legislative, and this Court, in any event, lacks the institutional capacity to maintain such a regime for very long. This one will end when the majority realizes that the conception of the commerce power for which it entertains hopes would inevitably fail the test expressed in Justice Holmes's statement that '[t]he first call of a theory of law is that it should fit the facts.' O. Holmes, The Common Law 167 (Howe ed. 1963). The facts that cannot be ignored today are the facts of integrated national commerce and a political relationship between States and Nation much affected by their respective treasuries and constitutional modifications adopted by the people. The federalism of some earlier time is no more adequate to account for those facts today than the theory of laissez-faire was able to govern the national economy 70 years ago.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, and with whom JUSTICE SOUTER and JUSTICE GINSBURG join as to Part I-A, dissenting.

No one denies the importance of the Constitution's federalist principles. Its state/federal division of authority protects liberty--both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is closer to home. The question is how the judiciary can best implement that original federalist understanding where the Commerce Clause is at issue.

I

The majority holds that the federal commerce power does not extend to such 'noneconomic' activities as 'noneconomic, violent criminal conduct' that significantly affects interstate commerce only if we 'aggregate' the interstate 'effect[s]' of individual instances. JUSTICE SOUTER explains why history, precedent, and legal logic militate against the majority's approach. I agree and join his opinion. I add that the majority's holding illustrates the difficulty of finding a workable judicial Commerce Clause touchstone--a set of comprehensible interpretive rules that courts might use to impose some meaningful limit, but not too great a limit, upon the scope of the legislative authority that the Commerce Clause delegates to Congress.

A

Consider the problems. The 'economic/noneconomic' distinction is not easy to apply. Does the local street corner mugger engage in 'economic' activity or 'noneconomic' activity when he mugs for money? See Perez v. United States, 402 U.S. 146 (1971) (aggregating local 'loan sharking' instances); United States v. Lopez, 514 U.S. 549, 559 (1995) (loan sharking is economic because it consists of 'intrastate extortionate credit transactions'). Would evidence that desire for economic domination underlies many brutal crimes against women save the present statute?

The line becomes yet harder to draw given the need for exceptions. The Court itself would permit Congress to aggregate, hence regulate, 'noneconomic' activity taking place at economic establishments. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding civil rights laws forbidding discrimination at local motels); Katzenbach v. McClung, 379 U.S. 294 (1964) (same for restaurants); *Lopez*, supra, at 559 (recognizing congressional power to aggregate, hence forbid, noneconomically motivated discrimination

at public accommodations). And it would permit Congress to regulate where that regulation is 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.' *Lopez*, supra, at 561; cf. Controlled Substances Act, 21 U.S.C. §801 et seq. (regulating drugs produced for home consumption). Given the former exception, can Congress simply rewrite the present law and limit its application to restaurants, hotels, perhaps universities, and other places of public accommodation? Given the latter exception, can Congress save the present law by including it, or much of it, in a broader 'Safe Transport' or 'Workplace Safety' act?

More important, why should we give critical constitutional importance to the economic, or noneconomic, nature of an interstate-commerce-affecting cause? If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them? The Constitution itself refers only to Congress' power to 'regulate Commerce . . . among the several States,' and to make laws 'necessary and proper' to implement that power. Art. I, §8, cls. 3, 18. The language says nothing about either the local nature, or the economic nature, of an interstate-commerce-affecting cause.

This Court has long held that only the interstate commercial effects, not the local nature of the cause, are constitutionally relevant. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 38-39 (1937) (focusing upon interstate effects); Wickard v. Filburn, 317 U.S. 111, 125 (1942) (aggregating interstate effects of wheat grown for home consumption); Heart of Atlanta Motel, supra, at 258 ('[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze' (quoting United States v. Women's Sportswear Mfrs. Assn., 336 U.S. 460, 464 (1949))). Nothing in the Constitution's language, or that of earlier cases prior to *Lopez*, explains why the Court should ignore one highly relevant characteristic of an interstate-commerce-affecting cause (how 'local' it is), while placing critical constitutional weight upon a different, less obviously relevant, feature (how 'economic' it is).

Most important, the Court's complex rules seem unlikely to help secure the very object that they seek, namely, the protection of 'areas of traditional state regulation' from federal intrusion. The Court's rules, even if broadly interpreted, are underinclusive. The local pickpocket is no less a traditional subject of state regulation than is the local gender-motivated assault. Regardless, the Court reaffirms, as it should, Congress' well-established and frequently exercised power to enact laws that satisfy a commerce-related jurisdictional prerequisite--for example, that some item relevant to the federally regulated activity has at some time crossed a state line.

And in a world where most everyday products or their component parts cross interstate boundaries, Congress will frequently find it possible to redraft a statute using language that ties the regulation to the interstate movement of some relevant object, thereby

regulating local criminal activity or, for that matter, family affairs. See, e.g., Child Support Recovery Act of 1992, 18 U.S.C. §228. Although this possibility does not give the Federal Government the power to regulate everything, it means that any substantive limitation will apply randomly in terms of the interests the majority seeks to protect. How much would be gained, for example, were Congress to reenact the present law in the form of 'An Act Forbidding Violence Against Women Perpetrated at Public Accommodations or by Those Who Have Moved in, or through the Use of Items that Have Moved in, Interstate Commerce'? Complex Commerce Clause rules creating fine distinctions that achieve only random results do little to further the important federalist interests that called them into being. That is why modern (pre-*Lopez*) case law rejected them.

The majority, aware of these difficulties, is nonetheless concerned with what it sees as an important contrary consideration. To determine the lawfulness of statutes simply by asking whether Congress could reasonably have found that aggregated local instances significantly affect interstate commerce will allow Congress to regulate almost anything. Virtually all local activity, when instances are aggregated, can have 'substantial effects on employment, production, transit, or consumption.' Hence Congress could 'regulate any crime,' and perhaps 'marriage, divorce, and childrearing' as well, obliterating the 'Constitution's distinction between national and local authority.' *Lopez*, 514 U.S., at 558; cf. A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 548 (1935) (need for distinction between 'direct' and 'indirect' effects lest there 'be virtually no limit to the federal power '); Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (similar observation).

This consideration, however, while serious, does not reflect a jurisprudential defect, so much as it reflects a practical reality. We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State--at least when considered in the aggregate. And that fact makes it close to impossible for courts to develop meaningful subject-matter categories that would exclude some kinds of local activities from ordinary Commerce Clause 'aggregation' rules without, at the same time, depriving Congress of the power to regulate activities that have a genuine and important effect upon interstate commerce.

Since judges cannot change the world, the 'defect' means that, within the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance. Congress is institutionally motivated to do so. Its Members represent state and local district interests. They consider the views of state and local officials when they legislate, and they have even developed formal procedures to ensure that such consideration takes place. See, e.g., Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.). Moreover, Congress often can better reflect state concerns for autonomy in the details of sophisticated statutory

schemes than can the judiciary, which cannot easily gather the relevant facts and which must apply more general legal rules and categories. See, e.g., 42 U.S.C. §7543(b) (Clean Air Act); 33 U.S.C. §1251 et seq. (Clean Water Act); see also New York v. United States, 505 U.S. 144, 167-168 (1992) (collecting other examples of 'cooperative federalism'). Not surprisingly, the bulk of American law is still state law, and overwhelmingly so.

B

I would also note that Congress, when it enacted the statute, followed procedures that help to protect the federalism values at stake. It provided adequate notice to the States of its intent to legislate in an 'are[a] of traditional state regulation.' And in response, attorneys general in the overwhelming majority of States (38) supported congressional legislation, telling Congress that '[o]ur experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds.'

Moreover, as JUSTICE SOUTER has pointed out, Congress compiled a 'mountain of data' explicitly documenting the interstate commercial effects of gender- motivated crimes of violence. After considering alternatives, it focused the federal law upon documented deficiencies in state legal systems. And it tailored the law to prevent its use in certain areas of traditional state concern, such as divorce, alimony, or child custody. Consequently, the law before us seems to represent an instance, not of state/federal conflict, but of state/federal efforts to cooperate in order to help solve a mutually acknowledged national problem. Cf. §§300w-10, 3796gg, 3796hh, 10409, 13931 (providing federal moneys to encourage state and local initiatives to combat gender-motivated violence).

I call attention to the legislative process leading up to enactment of this statute because, as the majority recognizes, it far surpasses that which led to the enactment of the statute we considered in *Lopez*. And even were I to accept *Lopez* as an accurate statement of the law, which I do not, that distinction provides a possible basis for upholding the law here. This Court on occasion has pointed to the importance of procedural limitations in keeping the power of Congress in check. See *Garcia*, supra, at 554 ("Any 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' ".

Commentators also have suggested that the thoroughness of legislative procedures--e.g., whether Congress took a 'hard look'--might sometimes make a determinative difference in a Commerce Clause case, say when Congress legislates in an area of traditional state regulation. Of course, any judicial insistence that Congress follow

particular procedures might itself intrude upon congressional prerogatives and embody difficult definitional problems. But the intrusion, problems, and consequences all would seem less serious than those embodied in the majority's approach. I continue to agree with JUSTICE SOUTER that the Court's traditional 'rational basis' approach is sufficient. But I recognize that the law in this area is unstable and that time and experience may demonstrate both the unworkability of the majority's rules and the superiority of Congress' own procedural approach--in which case the law may evolve towards a rule that, in certain difficult Commerce Clause cases, takes account of the thoroughness with which Congress has considered the federalism issue.

For these reasons, as well as those set forth by JUSTICE SOUTER, this statute falls well within Congress's Commerce Clause authority, and I dissent from the Court's contrary conclusion.

II

[Justice Breyer's discussion of the Fourteenth Amendment question appears in the discussion of the Reconstruction Power]

Discussion

1. *Once more, with feeling.* In *Morrison*, a majority of the Court makes clear that its 1995 decision in *Lopez* did not simply mark out a liminal case of Congressional power, but rather stated a new principle of structural constitutional law. The Court suggests that cumulative effects on commerce by themselves do not necessarily justify Congressional regulatory power if the activity that produces those cumulative effects is "noneconomic." If an activity is noneconomic, it does not matter how great the cumulative effects produced or how much evidence Congress offered to prove them. On the other hand, even noneconomic activities can be regulated if they travel through the channels of commerce or make use of instrumentalities of interstate commerce (like roads, telephones, e-mail, and so on), even if the actual harm is produced from an intrastate activity.

If the point of the commerce power is to deal with spillover effects, is it clear that economic activities are more likely to lead to such spillovers than noneconomic activities? Or is the point of the court's distinction textual--that noneconomic activities are not "commerce"? Does this mean that manufacturing and employment are now acknowledged to be "commerce"?

2. *It's the economy, stupid.* The Court argues that even if violence against women has cumulative effects on the economy, such violence is not itself economic activity. What

precisely is a "noneconomic" activity? Consider marriage. In most marriages and domestic partnerships, household work and childrearing are generally uncompensated. But this does not mean the work is without economic value; if both spouses or partners work outside the home they will have to pay someone else to perform this labor. Indeed, the American economy depends heavily on the uncompensated labor of spouses (mostly women) working at home. Does this make marriage or childraising economic activities?

Justice Breyer points out that much crime is economically motivated. Muggers hold people up for money. Organized crime is usually organized to turn a profit. Levels of crime often vary with levels of unemployment or the comparative renumeration of legal activities. Economists regularly study crime in economic terms. Does this make crime economic activity? Should one distinguish between property crimes like theft or murders for hire, and crimes of passion? Is spousal assault connected to the relative economic power of men and women? Even if so, does this make spousal assault economic activity?

3. *Federalism as a liberty preserving doctrine*. How well does the Court's new rule serve the traditional goals of federalism-- decentralization of decisionmaking and promotion of individual liberty? Note that unlike Hammer v. Dagenhart and other *Lochner* era cases, the cumulative effects of economic activities are still within federal regulatory power. Thus *Morrison* cannot be seen as using federalism doctrines to protect laissez-faire economic policies or promote the liberty of contract.

If so, what sorts of individual liberties are promoted by the rule that noneconomic activities are free from certain types of federal regulation? In this case presumably it is Morrison's and Crawford's liberty to assault women on the basis of their gender. Note also that in some states marital rape is exempted from criminal sanction or is punished less severely than nonmarital rape. Hence the rule in *Morrison* helps protect the liberty of spouses (mostly husbands) to rape their wives.

To be sure, states may have laws against both sexual and non sexual assaults. The point of federalism restraints, however, is that if states do not have such laws, or do not enforce them, the federal government may not take up the slack. This prevents excess regulation of individual activity. In this way individual liberty (in this case to batter or rape) is preserved. Does this seem like a good application of the principle of federalism? Should the theory of federalism make any substantive distinctions about what kinds of liberty are preserved? Conversely, if the liberty that federalism preserves is one that involves violations of civil rights or equal citizenship, should federalism concerns be less strong? (Compare *Heart of Atlanta* and Katzenbach v. McClung).

4. *Federalism as preserving the regulatory flexibility and political accountability*

of the states. In the 4th circuit decision affirmed in *Morrison*, Judge Luttig argued that VAWA was an intrusion into traditional areas of state regulation which undermined the accountability of state governments to their citizens:

> Section 13981 also sharply curtails the States' responsibility for regulating the relationships between family members by abrogating interspousal and intrafamily tort immunity, the marital rape exemption, and other defenses that may exist under state law by virtue of the relationship that exists between the violent actor and victim. See § 13981(d)(2)(B); cf. Br. of Intervenor United States at 12 (noting that, "as of 1990, seven states still did not include marital rape as a prosecutable offense, and an additional 26 states allowed prosecutions only under restricted circumstances"). Although Congress may well be correct in its judgment that such defenses represent regrettable public policy, the fact remains that these policy choices have traditionally been made not by Congress, but by the States. By entering into this most traditional area of state concern, Congress has not only substantially reduced the States' ability to calibrate the extent of judicial supervision of intrafamily violence, but has also substantially obscured the boundaries of political responsibility, freeing those States that would deny a remedy in such circumstances from accountability for the policy choices they have made.

Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820 at 842 (4th Cir. 1999).

Do you agree that VAWA inappropriately undermines the states' accountability for state laws regarding domestic violence and sexual assault? If so, why do federal statutes regulating economic activity not undermine state accountability for regulation of business and economic concerns?

Do you agree that it is a good thing for individual states to be able to "calibrate" the scope of defenses for marital rape or the level of enforcement for domestic assault? Should states have the right to give husbands the right to rape their wives or the right to devote less resources to rape and domestic assault if they are willing to take the political heat for it? Is this because states in different parts of the country may have different customs regarding the sexes that should be respected by the national government? Is this consistent with *Heart of Atlanta* and *Katzenbach*, which allowed Congress to impose uniform rules regarding race and sex discrimination?

Does Luttig's argument about "calibration" have anything to do with the noneconomic character of the activity? Doesn't federal regulation of economic activity also undermine state accountability and the state's ability to calibrate rights, defenses, and levels of enforcement for economic torts and violations of property rights?

How should the "accountability" argument interact with the fact that the states asked Congress for help in dealing with domestic violence and sexual assault?

5. *States as "laboratories" for innovation*. Justice Brandeis famously argued that it is "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (dissenting opinion). Brandeis wrote these words in the context of *Lochner*-era doctrines that protected freedom of contract from state regulation. His argument has since been used in many other contexts by defenders of state's rights.

Does the states-as-laboratories argument make sense in *Morrison*? Should states be permitted to experiment with affording women different levels of legal protection from violent sexual assaults? Should it matter that officials from over three quarters of the states reported to Congress that their criminal justice systems had failed to take assaults against women seriously and that they were asking for federal assistance?

6. *Federalism and freedom to move.* Another justification for limitations on national power is that while federal regulatory power extends everywhere, state power is (generally) confined to its borders. Thus, federalism promotes liberty in the sense of freedom of choice. If people do not like the legal regimes or welfare services available in one state, they can move to others. In addition, the right to exit increases competition among the states, and this may make state governments more accountable to their citizens. The major difficulty with the theory is that not everyone will uproot themselves over every difference in state law or state benefits. Thus, the possibility of exit does not justify restricting federal regulatory power equally in every case.

Does the exit justification explain the Court's distinction between economic and noneconomic activities? Is there reason to think that people will be more likely to move to a new state because they disagree with state laws regarding noneconomic activity but not economic activity? Consider the justification in the context of the Violence Against Women Act. Is VAWA a bad idea because men should be free to move to states with less stringent and less well-enforced criminal prohibitions on sexual assault and domestic violence? Conversely, would women be likely to press their families to move to states that did not have a marital rape exemption? Is it realistic to believe that women would research which states take domestic violence most seriously when deciding where to move?

7. *Preserving "traditional" areas of state regulation*. Perhaps what is really at stake in the Court's distinction between economic and noneconomic activity is whether Congress is intruding into a "traditional" area of state regulation– for example, criminal law, sexual

relations, or the family. This was an important theme in the Court's rhetoric in both *Morrison* and *Lopez* (and it was also emphasized by Luttig in the 4th Circuit opinion quoted above.). While the federal government is free to displace contrary state policies in matters of "economics," it must respect state regulatory judgments in areas that have been traditionally viewed as "local."

Is it clear to you that the line between economic and noneconomic activity is the same as the line between what has traditionally been considered national and local, or what has traditionally been a subject of both federal and state as opposed to exclusively state regulation? Haven't both federal and state governments been interested in regulating noneconomic activities like sexuality and reproductive rights? And didn't the *Lochner* Court point out that employment and manufacturing were traditionally "local" subjects of state regulation before the New Deal?

Is an area of regulation "traditionally" local because it has always been left exclusively to the states? If so, it is by no means clear the description fits regulation of families or regulation of sexuality. As Jill Hasday notes, the Federal government has been heavily involved in regulation of domestic relations since Reconstruction. Jill Elaine Hasday, Federalism and the Family Reconstructed, 45 UCLA L. Rev. 1297, 1298 (1998). Hasday argues that "exclusive localism in family law simply misdescribes American history" and "family law's actual historical record gives no weight to the claim that tradition should count as a reason for exclusive federal noninvolvement." Today both Congress and the Executive regularly intervene in welfare policy, abortion rights and contraception in an effort to shape culture and promote "family values." As for criminal law, the number of federal crimes on the books grows yearly.

Note as well that different statutes can be characterized in different ways. VAWA could be a statute about domestic relations or it could be a civil rights statute. Even if family law is a traditional local subject of regulation, civil rights has long been regarded as a national concern. Indeed, even when an area of law was long regarded as a domestic institution– as slavery once was– it has become subject to federal control when it was successfully recharacterized as an issue of civil rights. Did the Court in *Morrison* recognize violence against women as a civil rights issue?

8. *Federalism as an "anti-grandstanding" principle.* One possible concern that the Court may have had in both *Lopez* and *Morrison* is that Congress is too often tempted to use its Commerce Power to pass high visibility laws that help get its constituents reelected but are unnecessary, do little public good, interfere needlessly with state regulatory schemes, and bloat the docket of the federal courts. Does this concern about "grandstanding" explain the distinction between economic and noneconomic activities that the Court draws?

One important objection to VAWA was that it was unnecessary. Women could sue

their attackers under the common law tort of assault. On the other hand, VAWA seems to alter the common law rules of intrafamily tort immunity and defenses regarding marital rape. Is the argument that VAWA was unnecessary a policy objection or a constitutional objection?

Even if VAWA substantially overlapped with existing state tort remedies, is that a constitutional reason why it is beyond congressional power to enact? Presumably even after *Morrison* Congress could pass a national products liability statute because defective products substantially affect interstate commerce. Is it a constitutional objection that consumers can already sue in tort? Thus, the question of necessity or the possibility of grandstanding does not seem to track the Court's doctrinal distinction between economic and noneconomic activities.

9. *Regulatory end-runs.* The Court's decision in *Morrison* raises the stakes for another area of constitutional doctrine– the Spending Power. Note that under New York v. United States and South Dakota v. Dole, Congress may condition federal subsidies on states passing laws as long as there is some reasonable nexus between the reason for the subsidy and the laws to be passed. The civil rights provision struck down in VAWA was part of a larger bill that offered the states billions of dollars to improve their law enforcement efforts concerning sexual assault and domestic violence. Congress could conceivably pass a law stating that the states would get none of this money unless they passed a law identical to VAWA's civil rights provisions. The economic/noneconomic distinction, and the fact that the regulation intrudes into "traditional" areas of state regulatory concern is wholly irrelevant to the constitutionality of congressional action under the Spending power. Thus, once again the Court's federalism doctrines seem susceptible to an easy end-run.

Is the point of these doctrines purely symbolic or ideological, or does requiring Congress to "pay" for state regulation make sense in terms of the traditional justifications for federalism-- promoting individual liberty, decentralizing decisionmaking and offering citizens freedom of choice? Of course, if the Court revisits South Dakota v. Dole, it could very significantly change the federal state balance.

10. *The Rise and Fall of "The General Federal Police Power."* *Morrison* clearly stands for the proposition that there is no general federal police power. In this sense it rejects what had been assumed by many courts and commentators since *Darby* and *Wickard*. Nevertheless, because the Court was loath to state honestly what it was doing, this general federal police power (or its effective equivalent) had to be achieved through a complicated and sometimes comic form of rhetorical practice: One had to produce chains of causation from the activity that Congress sought to regulate that ultimately affected interstate commerce. *Morrison* rejects this form of reasoning; it

refuses to engage in the legal fictions or play by the doctrinal rules that had been created following the New Deal.

This explains an important difference between Justice Breyer's dissent in *Lopez* and his dissent in *Morrison*. In *Lopez*, he goes through the motions of showing how the presence of guns near schools substantially affect interstate commerce. This produces the objection from the majority that his style of reasoning has no discernable limits. In *Morrison*, by contrast, Breyer forthrightly acknowledges that "virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State--at least when considered in the aggregate." In short, he acknowledges that Congress does have a general federal police power, which is limited only by the political process. Once this point is admitted, however, how does one ensure that the interests of states are adequately protected? Breyer's point is that no doctrine which limits the *content* of legislation can do this work. Instead, other kinds of structural mechanisms must be employed. What might these mechanisms be?

Before the Seventeenth Amendment was ratified, state legislatures were represented by senators. Yet Justice Souter's dissent points out that even after Senators were directly elected, the states did not go out of business as regulators. Does his argument prove too much? Is it important to have representation for "states as states" if Congress has a general federal police power? And even if such mechanisms still exist, does it follow that they promote individual liberty?