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Constitutional Law—Commerce Clause—Violence against Women Act's Civil Rights Remedy Exceeds Congress's Powers to Regulate Interstate Commerce. *United States v. Morrison*, 120 S. Ct. 1740 (2000).

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CONSTITUTIONAL LAW—COMMERCE CLAUSE—VIOLENCE
AGAINST WOMEN ACT'S CIVIL RIGHTS REMEDY EXCEEDS CONGRESS'S
POWERS TO REGULATE INTERSTATE COMMERCE. *United States v.*
Morrison, 120 S. Ct. 1740 (2000).

I. INTRODUCTION

[T]he principle which regulates the existing social relations between the two sexes—the legal subordination of one sex to the other—is wrong in itself, and now one of the chief hindrances to human improvement; and . . . it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.¹

What eerie foreshadowing that the above words, written by John Stuart Mill over 130 years ago in *The Subjection of Women*, are still telling of the social, legal, and political status of women in modern American culture. While women's rights have greatly expanded in recent history, as a society we have not yet reached a point where "perfect equality" exists in any sphere, be it the law, the church, the school, the workplace, or even the home. In recent years, crimes such as domestic abuse and rape have been embraced by various law reform initiatives as civil rights violations, which sparked a grassroots effort² to prove to lawmakers and courts that such crimes are driven by discriminatory personal motivations that merit civil rights protection for women.³ Bias-related crimes, supporters urged, whether they are committed against people because of their race, sex, religion, sexual orientation, or disability, are vicious expressions of discrimination that require federal civil rights protection.⁴ In 1994, Congress responded to the overwhelming national problem of gender-motivated violence by

1. JOHN STUART MILL, *THE SUBJECTION OF WOMEN* I (Susan M. Okin ed., Hackett Publishing 1988) (1869).

2. See Sally Goldfarb, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications & Litigation Strategy*, A Panel Discussion Sponsored by the Association of the Bar of the City of New York, 4 J.L. & POL'Y 391, 395 (1995). The NOW Legal Defense and Education Fund established the National Task Force on the Violence Against Women Act, which was composed of over 1000 organizations and individuals nationally. See *id.* Organizations that supported the bill in response to pressure from women within the groups ranged from the AFL-CIO, the National Education Association, and the NAACP to the Girl Scouts, the National Gay and Lesbian Task Force, and Feminists for Life. See *id.*

3. See Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L.J. 123 (1999). Ms. Goldscheid, a senior staff attorney for the NOW Legal Defense and Education Fund, represented petitioner Christy Brzonkala in *United States v. Morrison*, 120 S. Ct. 1740 (2000).

4. See Goldscheid, *supra* note 3, at 124.

enacting the Civil Rights Remedy of the Violence Against Women Act ("VAWA"), an historic provision that "declare[d] for the first time that violent crimes motivated by the victim's gender are discriminatory and violate the victim's federal civil rights."⁵

This note examines the United States Supreme Court's controversial decision in *United States v. Morrison*,⁶ in which the Court struck down VAWA's Civil Rights Remedy as an unconstitutional exercise of Congress's authority to regulate interstate commerce under the Commerce Clause. First, the note discusses the disturbing facts under which *Morrison* arose and its tumultuous prior history. The note next focuses on the historical development of congressional authority to regulate interstate commerce, and the various tests and standards of review employed by the Supreme Court in evaluating the limits of the commerce power. With the powerful precedent of *United States v. Lopez*⁷ in mind, the note shifts to a discussion of modern commerce clause jurisprudence and the difficulties in reconciling modern standards with past precedent. Next, the note analyzes the Court's reasoning in the *Morrison* opinion, highlighting the starkly opposed viewpoints of the majority and minority of the Court. In concluding, this note considers the significance of the holding and what it means for Arkansas, suggesting that federal bias-related legislation is no longer sustainable under the Commerce Clause and that state action is necessary and long overdue.

II. FACTS

In the fall of 1994, eighteen-year-old Christy Brzonkala enrolled as a freshman at Virginia Polytechnic Institute and State University ("Virginia Tech").⁸ On the night of September 21 of that year, Brzonkala and another female student met Antonio Morrison and James Crawford, two fellow Virginia Tech students and members of the college's varsity football team, in the dormitory where Brzonkala lived.⁹ The four young people went to a student's room on the third

5. Goldscheid, *supra* note 3, at 128.

6. 120 S. Ct. 1740 (2000).

7. 514 U.S. 549 (1995).

8. See Brief of Petitioner Christy Brzonkala at 2, *United States v. Morrison*, 120 S. Ct. 1740 (2000) (Nos. 99-5, 99-29).

9. See *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 772, 773-74 (W.D. Va. 1996) (granting defendants' motion to dismiss Brzonkala's Title IX claims). At the time, Brzonkala only knew the first names of the men and that they were football players. See *id.* at 774. It was not until five months later that Brzonkala learned the full

floor of the dormitory, and after only fifteen minutes of conversation, Brzonkala's friend and Crawford left the room, leaving Brzonkala and Morrison alone.¹⁰ Immediately thereafter, Morrison asked Brzonkala to have sexual intercourse with him, and after she refused him, twice, Morrison forcibly threw Brzonkala onto a bed, pinned her down, and raped her.¹¹ Crawford then returned to the room, and the men took turns forcing Brzonkala to submit to unwanted vaginal intercourse for a second and third time that night.¹² Neither of the men used condoms when they repeatedly raped Brzonkala.¹³

In the months following the sexual assault, Brzonkala became despondent and reclusive, quit going to class, and attempted suicide.¹⁴ A licensed psychiatrist for Virginia Tech prescribed anti-depressant medication as treatment, but Brzonkala's efforts at recovery failed, and she eventually withdrew from the university for the 1994-95 academic year.¹⁵

In April of 1995, after learning the identity of her attackers, Brzonkala filed a complaint against Morrison and Crawford¹⁶ under Virginia Tech's Sexual Assault Policy.¹⁷ Although the judicial

names of Morrison and Crawford. *See id.*

10. *See id.* at 774. *See also* Brief of Respondent James LaDale Crawford at 1, *United States v. Morrison*, 120 S. Ct. 1740 (2000) (Nos. 99-5, 99-29).

11. *See Brzonkala*, 935 F. Supp. at 774.

12. *See id.*

13. *See* Brief for Petitioner Christy Brzonkala at 3, *Morrison* (Nos. 99-5, 99-29). Despite the fact that the men failed to use protection, Morrison threatened Brzonkala after the third rape when he said, "You better not have any fucking diseases." *See id.* Then, when Morrison and Crawford finally let Brzonkala leave, Morrison, who was wearing only his underwear, silently stalked behind Brzonkala until she reached her dormitory room. *See* Brief of Respondent James LaDale Crawford at 1, *Morrison* (Nos. 99-5, 99-29). In the months following the gang rape, Morrison publicly boasted in the dining hall that he "like[d] to get girls drunk and fuck the shit out of them." *See* Brief of Petitioner Christy Brzonkala at 3, *Morrison* (Nos. 99-5, 99-29).

14. *See* Brief of Petitioner Christy Brzonkala at 4, *Morrison* (Nos. 99-5, 99-29). Initially, Brzonkala told no one what happened to her; however, she confined herself to her room, failed her classes, and overdosed on thyroid pills. *See* Brooke A. Masters, 'No Winners' in Rape Lawsuit; Two Students Forever Changed by Case that Went to Supreme Court, WASH. POST, May 20, 2000, at B1. Brzonkala also changed her physical appearance, cutting off her long hair. *See Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949, 953 (4th Cir. 1997), *rev'd en banc*, 169 F.3d 820 (4th Cir. 1999), *cert. granted sub nom. United States v. Morrison*, 120 S. Ct. 11 (1999), *aff'd*, 120 S. Ct. 1740 (2000).

15. *See Brzonkala*, 935 F. Supp. at 774.

16. *See id.* Brzonkala failed to preserve physical evidence of the rapes, so she believed that criminal prosecution of the men was impossible. *See id.* Virginia Tech never reported the assaults to either the Virginia Tech Police or to the Blacksburg Police Department. *See id.*

17. *See id.* Virginia Tech published the Sexual Assault Policy in its "University

committee found insufficient evidence to support Brzonkala's allegations against Crawford,¹⁸ the committee found Morrison guilty of sexual assault and sentenced him to a one-year suspension from school.¹⁹ After Morrison lost on appeal to Virginia Tech's Dean of Students, he threatened to sue the university for prosecuting him under the little-known Sexual Assault Policy, which was not published in the Student Handbook.²⁰ Thereafter, the Dean and another Virginia Tech official personally met with Brzonkala at her home, a four-hour drive from the university, and informed her that a second hearing was required under the Abusive Conduct Policy, which pre-dated the Sexual Assault Policy.²¹ Although Morrison was found guilty of "abusive conduct," a lesser charge than sexual assault, the sanction of a one-year suspension was re-imposed.²² Morrison appealed to the Senior Vice-President and Provost of Virginia Tech, Peggy Meszaros,

Policies for Student Life 1994-1995" and formally released the policy for student distribution in July of 1994. *See Brzonkala*, 132 F.3d at 953-54.

18. *See Brzonkala*, 132 F.3d at 954. Crawford produced a witness that corroborated his alibi defense to Brzonkala's allegations. *See Masters*, *supra* note 14, at B1. Crawford was later charged with rape and attempted sodomy for his involvement in a 1996 gang rape of another Virginia Tech woman. *See Brief of Petitioner Christy Brzonkala* at 5 n.2. *Morrison* (Nos. 99-5, 99-29). Crawford pleaded guilty to a lesser charge of attempted aggravated sexual assault and was sentenced to a year in prison. *See id.* However, the court later suspended Crawford's sentence and placed him on a period of unsupervised probation. *See id.*

19. *See Brzonkala*, 132 F.3d at 954.

20. *See id.* Brzonkala's complaint alleged that Virginia Tech and its counsel knew, or should have known, that Morrison's due process claim lacked merit under Virginia law. *See id.* at 954 n.2.

21. *See id.* at 954. Although university officials told Brzonkala that the second hearing was a "mere technicality" to prosecute Morrison under the college's Abusive Conduct Policy, the second hearing lasted twice as long as the first, and Brzonkala had to hire legal counsel at her own expense. *See id.* Unlike Morrison, Brzonkala was given insufficient notice to produce affidavits or live testimony from her witnesses, so that evidence was excluded from the second hearing. *See id.* at 955. In addition, the university forbade Brzonkala from giving any testimony related to Crawford, so she had to give an abbreviated, awkward version of the events. *See id.*

22. *See id.* at 955. In late November of 1995, a stunned Brzonkala learned from a newspaper article, and not from university officials, that Morrison was only found guilty of "using abusive language," despite the fact that he testified to having sexual intercourse with Brzonkala after she told him "no" twice. *See id.* The university, inexplicably altered the charges against Morrison, notwithstanding the Dean of Students' promise that the second hearing would address the sexual assault charges and the fact that Morrison had been accused and convicted of sexual assault at the first hearing. *See id.* at 954-56. Brzonkala claimed that the procedural shortcomings and the ultimate outcome of the second hearing were due to the involvement of Virginia Tech's head football coach as part of a "coordinated university plan" that would allow Morrison to play football in the 1995 season. *See id.* at 956.

who set aside the sanction without notice to Brzonkala.²³ Morrison returned to Virginia Tech in the fall on a full athletic scholarship.²⁴ In fear of her safety from previous threats, humiliated by the procedural biases in the judicial hearings, and outraged by the university's decision to set aside Morrison's sanction, Brzonkala canceled her plans to return to Virginia Tech that fall.²⁵

On March 1, 1996, Brzonkala filed an amended complaint against Morrison and Crawford in the United States District Court for the Western District of Virginia alleging, among other things, violations of Title III of the Violence Against Women Act ("VAWA"), 42 U.S.C. § 13981.²⁶ The VAWA cause of action imposes civil liability upon a person who commits a gender-motivated violent crime.²⁷ Brzonkala's complaint also charged the university with violations of Title IX of the Education Amendment Act²⁸ and with state-law breach of contract claims;²⁹ those claims were later settled out of court.³⁰ The United

23. See *Brzonkala*, 132 F.3d at 955. Although Provost Meszaros found sufficient evidence that Morrison violated the Abusive Conduct Policy, she summarily concluded that an immediate one-year suspension was excessive compared with sanctions imposed upon others for violations of that policy. See *id.* She imposed a deferred suspension until Morrison's graduation from the university and required that he attend a one-hour session on acceptable behavior under University Student Policy. See *id.*

24. See *id.*

25. See *id.* Brzonkala did not attend college in the fall of 1995. See *id.* She did eventually enroll at George Mason University, a 10-minute drive from her parents' home in Fairfax County, Virginia. See Masters, *supra* note 14, at B1. Still unable to deal with the challenges and pressures of being a college student, she dropped out yet again, stating, "I tried to hang out and party and be in a dorm and have fun. But I had no desire to be there at all with these kids." *Id.*

26. See *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 772, 773 (W.D. Va. 1996) (granting defendants' motion to dismiss Brzonkala's Title IX claims). The VAWA's purpose is stated as follows:

Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes motivated by gender.

42 U.S.C. § 13981(a) (1994).

27. See 42 U.S.C. § 13981(c) (1994).

28. See *Brzonkala*, 935 F. Supp. at 773. Title IX provides in part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. § 1681 (1994).

29. See *Brzonkala*, 935 F. Supp. at 776.

30. See Michael Hemphill, *Brzonkala, Tech Reach Settlement in Lawsuit—U.S. Supreme Court Case Will Proceed*, ROANOKE TIMES & WORLD NEWS, Feb. 26, 2000, at A1. Under

States intervened to defend the constitutionality of the civil rights remedy in § 13981.³¹ The district court dismissed Brzonkala's claims against Morrison and Crawford, holding that although Brzonkala successfully stated a claim for a violation of § 13981,³² the VAWA was an unconstitutional exercise of Congress's power under both the Commerce Clause³³ and the Enforcement Clause of the Fourteenth Amendment.³⁴

A divided panel of the United States Court of Appeals for the Fourth Circuit reversed and remanded Brzonkala's § 13981 claim, holding that Congress had authority to enact the VAWA under the Commerce Clause.³⁵ The panel deferred to the four years of congressional hearings on the subject.³⁶ The findings gave Congress a rational basis for concluding that violence against women substantially affected interstate commerce, and thus the panel upheld the VAWA as a valid exercise of Congress's Commerce Clause authority.³⁷ However, the

the settlement agreement. Virginia Tech denied any wrongdoing in the university's judicial process and agreed to pay Brzonkala \$75,000 of her \$4.3 million claim in federal court. *See id.*

31. *See Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779, 786 n.1 (W.D. Va. 1996), *aff'd en banc* 169 F.3d 820 (4th Cir. 1999), *cert. granted sub nom. United States v. Morrison*, 120 S. Ct. 11 (1999), *aff'd*, 120 S. Ct. 1740 (2000).

32. *See Brzonkala*, 935 F. Supp. at 785. Brzonkala's complaint thus withstood the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *See Brzonkala*, 935 F. Supp. at 801.

33. *See U.S. CONST.* art. I, § 8. The Commerce Clause gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

34. *See Brzonkala*, 935 F. Supp. at 801; *U.S. CONST.* amend. XIV, § 1. The Fourteenth Amendment provides in part, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *U.S. CONST.* amend. XIV, § 1. The Enforcement Clause states, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* § 5. [Author's note: The scope of this note, however, is limited to discussion of the VAWA under the Commerce Clause. Therefore, the Court's analysis of the Act under the Fourteenth Amendment will not be addressed. *See infra* note 120 and accompanying text.]

35. *See Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949, 974 (4th Cir. 1997), *rev'd en banc*, 169 F.3d 820 (4th Cir. 1999), *cert. granted sub nom. United States v. Morrison*, 120 S. Ct. 11 (1999), *aff'd*, 120 S. Ct. 1740 (2000).

36. *See id.* at 973. The following are but few of the detailed and extensive congressional findings on the economic effects of gender-motivated violence: violence is the principal cause of injury to women ages 15-44; three out of every four American women will be victims of violent crimes at some point in their life; a woman is raped every five minutes; domestic violence costs employers \$3 billion annually due to absence from work; 95% of all victims of domestic violence are women; and the government spends between \$5 to \$10 billion annually on medical, criminal justice, and other social costs of domestic abuse. *See id.* at 966 (citations omitted).

37. *See id.* at 973-74. The Supreme Court previously held that the judicial branch

Fourth Circuit, sitting en banc, vacated the panel's decision and affirmed the district court's ruling by divided vote, invalidating § 13981 as unconstitutional.³⁸

Because the Court of Appeals struck down the VAWA civil remedy on constitutional grounds,³⁹ the United States Supreme Court granted certiorari.⁴⁰ In accordance with the Court's decision in *United States v. Lopez*,⁴¹ the Supreme Court held that violence against women does not "substantially affect" interstate commerce, and therefore its regulation is outside the scope of Congress's authority under the Commerce Clause.⁴²

III. BACKGROUND

A. Historical Overview of Congressional Power to Regulate Interstate Commerce and the Evolution of Judicial Standards of Review

The United States Constitution serves as an enumeration of the powers explicitly granted by the people to their federal government.⁴³ Chief Justice Marshall defined the power of Congress to regulate interstate commerce as the absolute power to define the rules by which commerce is to be governed—a power that knows no limitations other than those prescribed by the constitution itself.⁴⁴ However, the United States Supreme Court recognized that contests and conflicts must arise in view of our complex federal system, which consists of two compet-

should defer to laws that are carefully considered and passed by the legislative branch. *See id.* at 964 (citing *Westside Comm. Bd. of Educ. v. Mergens*, 496 U.S. 226, 251 (1990)). The Court's role in assessing the validity of congressional acts passed under the authority of the Commerce Clause is confined to determining whether Congress had a rational basis for inferring that the regulated activity substantially affects interstate commerce. *See id.* at 965 (citing *United States v. Lopez*, 514 U.S. 549, 557 (1995)).

38. *See Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 821 (4th Cir. 1999) (en banc), *cert. granted sub nom. United States v. Morrison*, 120 S. Ct. 11 (1999), *aff'd*, 120 S. Ct. 1740 (2000).

39. *See United States v. Morrison*, 120 S. Ct. 1740, 1747 (2000).

40. *See United States v. Morrison*, 120 S. Ct. 11 (1999). The Court consolidated the cases by petitioners *United States* and *Brzonkala*. *See id.*

41. 514 U.S. 549 (1995).

42. *See Morrison*, 120 S. Ct. at 1754.

43. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187 (1824).

44. *See id.* at 196. In the Chief Justice's own words, "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.*

ing sovereignties with specific, yet sometimes overlapping, powers to govern the American people.⁴⁵ Professor Tribe describes the Commerce Clause as both the principal source of Congress's regulatory powers and an implicit restriction on the states' legislative authority.⁴⁶ Therefore, it is not surprising that Congress's exercise of its commerce power and the Court's interpretation thereof has changed throughout the course of American history.⁴⁷

1. *Power Confined to the Direct Regulation of Commerce Itself*

The judiciary's early construction of the commerce power related to the interstate transportation of goods across state lines.⁴⁸ This direct regulation of commerce allowed Congress to regulate the national economy by preventing the states from discriminating against each other in ways that would fragment the young nation by state lines.⁴⁹ The blackletter rule was simple to apply: If something moved across state borders, Congress was empowered to regulate it under the Commerce Clause; but absent interstate transportation, the activity was outside the scope of the commerce power.⁵⁰

During this era of Commerce Clause jurisprudence, the Court utilized a "direct effects" test to set the standard for constitutional regulation under the Commerce Clause, which only allowed Congress to regulate an activity if it directly affected interstate commerce.⁵¹ The Supreme Court strictly adhered to its own judicially-created distinction between manufacture and commerce as the bright line demarcating the spheres of state and federal control.⁵² For example, in 1895 the Court struck down a congressional attempt to prevent monopolies in the sugar refining industry when it held that the manufacture of goods only had

45. *See id.* at 204-05.

46. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-4, at 807-08 (3d ed. 2000).

47. *See* ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES*, § 3.3.1, at 174 (1997).

48. *See* Anna J. Cramer, Note, *The Right Results for All the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause*, 53 *VAND. L. REV.* 271, 277 (2000).

49. *See id.* at 276.

50. *See id.* at 279.

51. *See* CHEMERINSKY, *supra* note 47, § 3.3.3, at 181; Charis Mincavage, *Title III of the Violence Against Women Act: Can It Survive a Commerce Clause Challenge in the Wake of United States v. Lopez?*, 102 *DICK. L. REV.* 441, 449 (1998).

52. *See* TRIBE, *supra* note 46, § 5-4, at 810-111; Joseph R. Biden, Jr., *The Civil Rights Remedy of the Violence Against Women Act: A Defense*, 37 *HARV. J. ON LEGIS.* 1, 17 (2000).

an indirect and incidental effect on commerce.⁵³ Although the end result of manufacture was movement in interstate commerce, the Court viewed the manufacture/commerce distinction as vital in maintaining the integrity of state autonomy from federal control in matters of internal police power.⁵⁴

The Court reached a similar result in a 1935 case, *A.L.A. Schechter Poultry Corp. v. United States*,⁵⁵ when it held that intrastate transactions could only be federally regulated if they had a “close and substantial relation to interstate traffic” that resulted in a direct effect on the movement and flow of goods across state lines.⁵⁶ In summary, the Court confined congressional authority under the Commerce Clause to the direct regulation of the transportation of goods across state lines and the regulation of activities that directly impeded the free flow of goods in interstate commerce.⁵⁷

2. *Power Expanded to Encompass Activities That Indirectly Affect Interstate Commerce*

The New Deal era witnessed an expansion of congressional power to regulate activities that only indirectly affected interstate commerce,⁵⁸ and marked the beginning of the Court’s highly deferential approach to Congress’s commerce power.⁵⁹ The Court’s landmark decision in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*⁶⁰ held that local, intrastate activities could be reached by Congress if it considered the regulation of those activities necessary to remove burdens and obstructions from interstate commerce itself.⁶¹ The Court refused to examine “direct and indirect effects in an intellectual vacuum” and recognized that local industrial activities could be so closely related to interstate commerce as to make them urgent matters of national concern.⁶² This decision allowed Congress to regulate intrastate manufacturing activities previously out of its reach because prejudicial

53. See *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895). *But see* *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

54. See *id.* at 13.

55. 295 U.S. 495 (1935).

56. See *id.* at 543-46.

57. See *TRIBE*, *supra* note 46, § 5-4, at 810-11.

58. See *TRIBE*, *supra* note 46, § 5-4, at 812.

59. See *Cramer*, *supra* note 48, at 280.

60. 301 U.S. 1 (1937).

61. See *id.* at 37.

62. See *id.* at 41.

intrastate practices nevertheless had a detrimental effect on interstate commerce.⁶³

3. *The "Substantial Effects" Test and the "Rational Basis" Standard of Review*

The Court reaffirmed congressional authority to regulate intrastate activities that substantially affect interstate commerce in *United States v. Darby*.⁶⁴ The Court stated, "[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."⁶⁵ When Congress itself had made a determination that the regulated activity had a substantial impact on interstate commerce, the courts' only function was to evaluate whether the means employed by Congress were adopted in furtherance of the recognized federal power to regulate that commerce.⁶⁶ Thus, the *Darby* Court's decision built the foundation for the rational basis standard of review when it held that Congress was empowered to enact legislation when it reasonably believed that the regulation would favor the national economy.⁶⁷

The most sweeping application of the foregoing principles occurred when the Court allowed federal regulations pertaining to the interstate sale and transportation of wheat to restrict the amount of wheat a small farmer could grow and consume for his own personal use.⁶⁸ The Court held that while individual instances of the regulated activity may only have a trivial and indirect effect on interstate commerce, the aggregate effects of local activities could substantially obstruct commerce and could therefore be subject to federal regulation.⁶⁹ Thus, because the aggregate effect of homegrown wheat

63. See CHEMERINSKY, *supra* note 47, § 3.3.4, at 188; Cramer, *supra* note 48, at 280.

64. 312 U.S. 100, 119 (1941).

65. *Id.* at 115.

66. See *id.* at 120-21. However, Congress may not use a relatively frivolous impact on commerce as a justification for broad general regulation of intrastate or private activities; only when a general regulatory scheme has a substantial connection to commerce will the trifling character of individual cases arising under the statute be ignored. See *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968).

67. See *Mincavage*, *supra* note 51, at 449.

68. See *Wickard v. Filburn*, 317 U.S. 111 (1942). The Court recognized that the application of the federal regulation to the appellee farmer meant that Congress could regulate an activity that was not itself commercial or interstate in nature. See *id.* at 125.

69. See *id.* at 127-29.

consumption could substantially affect the price and market conditions of wheat nationally, the federal regulations applied to the local farmer.⁷⁰

After twenty years of applying the substantial effects test in Commerce Clause cases, the Court finally articulated the rational basis standard of review in *Katzenbach v. McClung*.⁷¹ This case involved the constitutionality of the public accommodations provisions of the Civil Rights Act of 1964, which prohibited discrimination or segregation on the basis of race, color, religion, or national origin in places of public accommodation if their operation affects commerce.⁷² The heated political and social climate surrounding the passage of the Civil Rights Act of 1964 created intense external pressure on the Supreme Court to uphold the law as constitutional.⁷³ The Court examined the congressional hearings on the Act and found that the information available to Congress gave it a rational basis for concluding that racial discrimination in restaurants created a national burden on interstate commerce.⁷⁴

The Court reasoned that the cumulative effects of racial discrimination in restaurants on interstate commerce, though trivial in any one case, rendered federal regulation an appropriate exercise of the commerce power.⁷⁵ The Court reiterated that "even if [a regulated] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce" ⁷⁶ Because Congress itself determined the negative effects of racial discrimination on commerce, and the record showed a rational basis for that conclu-

70. *See id.* at 128-29.

71. 379 U.S. 294 (1964). "[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *Id.* at 303-04.

72. *See id.* at 298. Specifically, the Act governs restaurants if they serve interstate travelers or if a substantial portion of the food served has moved in interstate commerce. *See id.*

73. *See Cramer, supra* note 48, at 282-83.

74. *See McClung*, 379 U.S. at 299-300. The congressional record included testimony regarding the reduced per capita spending of African Americans in discriminatory areas of the country, especially in the South. *See id.* at 299. The Attorney General testified that racial discrimination in restaurants artificially constrained the market and prohibited the free flow of goods. *See id.* at 299-300. Further, there was much evidence before Congress that this type of discrimination "had a direct and highly restrictive effect upon interstate travel by [African Americans]." *Id.* at 300.

75. *See id.* at 300-02.

76. *Id.* at 302 (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (internal quotations omitted)).

sion, the legislation was easily held to fall within federal control as a regulation of interstate commerce.⁷⁷

In addition, the Court explicitly deferred to congressional wisdom in the legislative sphere and declared that if Congress acted without expressly violating constitutional limitations, "it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere."⁷⁸ However, this sweeping language represented a broad expansion of federal power to regulate local activities even if they only had a distant or merely speculative link to interstate commerce.⁷⁹ Specifically, Congress used its expansive Commerce Clause power to nationalize criminal laws that were formerly within the exclusive police powers of the states.⁸⁰

The Court sustained federal regulation of intrastate criminal activity under the Commerce Clause in *Perez v. United States*,⁸¹ holding that a federal prohibition on loan sharking was within Congress's power to regulate activities that substantially affect interstate commerce.⁸² Opponents to Title II of the Consumer Protection Act expressed concern that the federal government was moving to regulate general criminal law via a national police power that was impermissible under our federal system.⁸³ However, Congress eventually determined that loan sharking was linked to a national ring of organized crime and that the problem was simply too large to be handled by the states alone, and the Court once again deferred to the judgment of Congress.⁸⁴ Formal findings, which the Court said were unnecessary precursors to legislation, nevertheless gave Congress a rational basis for its conclusion that the economic, financial, and social aspects of loan sharking in organized interstate crime required a federal solution.⁸⁵ Because the regulation passed the rational basis prong of the substantial effects test, the Court affirmed the petitioner's conviction under the federal statute.⁸⁶

77. See *McClung*, 379 U.S. at 303-04. The Court upheld the public accommodations provisions of the Civil Rights Act of 1964 as they applied to hotels the same day it handed down the *McClung* decision, utilizing the same rational basis approach. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

78. *McClung*, 379 U.S. at 305.

79. See Cramer, *supra* note 48, at 283.

80. See *id.* at 283-84.

81. 402 U.S. 146 (1971).

82. See *id.* at 156-57.

83. See *id.* at 149-50.

84. See *id.* at 150, 154.

85. See *id.* at 156-157.

86. See *id.* at 157.

B. The Rehnquist Court and the Reining in of Congressional Commerce Clause Power: Ambiguity Persists Even After *United States v. Lopez*

In the 1995 case of *United States v. Lopez*,⁸⁷ the Supreme Court held that the Gun-Free School Zones Act of 1990, a federal criminal statute, exceeded congressional authority under the Commerce Clause because it neither regulated a commercial activity nor did it contain a jurisdictional requirement that a particular instance of gun possession be linked to interstate commerce.⁸⁸ The *Lopez* decision was a distinct departure from earlier Commerce Clause jurisprudence because the Court, for the first time in almost sixty years, invalidated as unconstitutional a federal law passed pursuant to Congress's commerce power.⁸⁹ Because the *Lopez* decision was the most recent case dealing with congressional authority to regulate intrastate activities that substantially affected interstate commerce, it formed the basis for the Court's analysis in *United States v. Morrison*⁹⁰ and will be discussed in detail in the following subsections. However, it is important to note that *Lopez* did not expressly overrule any of the Court's prior Commerce Clause decisions, leaving ambiguous standards for the courts to muddle through in the application of the decision to future cases.⁹¹

1. *The Regulation of Intrastate Activities That Substantially Affect Commerce—Has a Bright Line Been Drawn to Limit Congressional Authority to Purely Economic Activities?*

In *Lopez*, the Court determined that the Gun-Free School Zones Act was an attempt by Congress to regulate an intrastate activity—the possession of firearms in school zones—that had a substantial effect on interstate commerce.⁹² In examining past precedent, the Court maintained that it had only sustained congressional acts regulating intrastate activity when the Court had concluded that the regulated activity substantially affected interstate commerce.⁹³ This reasoning, however, stood in conflict with the Court's prior decisions that when

87. 514 U.S. 549 (1995).

88. *See id.* at 551.

89. *See* CHEMERINSKY, *supra* note 47, § 3.3.1, at 174; Biden, *supra* note 52, at 14.

90. 120 S. Ct. 1740 (2000).

91. *See* Cramer, *supra* note 48, at 285.

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

93. *See id.* at 559-60.

Congress itself made that determination, the Court need only look for a rational basis to support that conclusion.⁹⁴ Instead, the Court stated that “[w]here *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”⁹⁵ The Gun-Free School Zones Act regulated a criminal activity that was not part of a larger, economic regulatory scheme, and the Court concluded that the regulation could not be upheld on the basis of the activity’s aggregate effects on commerce because the transactions were not commercial in nature.⁹⁶

Critics argue that a judicially created “bright line” between commercial and noncommercial activity is inconsistent with the spirit of the commerce power.⁹⁷ Congressional authority to regulate interstate commerce includes the power to regulate obstructions to commerce that may not themselves be economic in nature if the effects on commerce therefrom are substantial.⁹⁸ Senator Joseph Biden, the sponsor of VAWA, stated that “[a] bright line between commercial and noncommercial activities not only would elevate form over substance, but would prove no more workable than the old distinctions between ‘direct’ and ‘indirect’ effects, or between ‘manufacturing,’ ‘production,’ or ‘mining,’ on the one hand, and ‘commerce,’ on the other.”⁹⁹ Nevertheless, the *Lopez* Court focused on the non-economic character of the intrastate regulation in invalidating the Gun-Free School Zones Act and rejected the Government’s argument that the possession of firearms in school zones could substantially affect interstate commerce in the aggregate.¹⁰⁰

2. *The Hazy Requirement of an Express Jurisdictional Element: Is It Necessary to Link the Individual Regulated Activity to Interstate Commerce?*

The *Lopez* Court further denounced the Gun-Free School Zones Act because it did not contain an express jurisdictional component that would link a particular case of firearm possession to interstate

94. See *supra* Section A(3).

95. *Lopez*, 514 U.S. at 560 (emphasis added).

96. See *id.* at 561.

97. See Biden, *supra* note 52, at 17.

98. See *id.*

99. *Id.* at 17-18 (citations omitted).

100. See *Lopez*, 514 U.S. at 567. However, the Court never expressly held that congressional regulatory authority was limited to economic or commercial activities. See TRIBE, *supra* note 46, § 5-4, at 823.

commerce.¹⁰¹ The Court contrasted the Act with a statute considered in a previous case that did directly link the possession of a gun to interstate commerce.¹⁰² Because the scope of the Gun-Free School Zones Act was not limited to instances where the firearm had a direct connection to interstate commerce, the Court struck it down as an impermissible exercise of the commerce power.¹⁰³

However, previous decisions have downplayed the significance of an express jurisdictional element so long as the regulated activity, in general, had a substantial impact on commerce. For example, the 1927 case of *Westfall v. United States*¹⁰⁴ dealt with a violation of the Federal Reserve Act, and the fact that the statute applied to all violations, regardless of whether the federal reserve banks experienced a financial loss, was irrelevant.¹⁰⁵ The Court stated: “[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so.”¹⁰⁶ Similarly, the Fair Labor Standards Act at issue in *Maryland v. Wirtz*,¹⁰⁷ which set minimum wage standards, was held to universally apply to all employees of commercial enterprises, even if the particular employees did not work in manufacture, production, or commerce themselves.¹⁰⁸ Therefore, the *Lopez* requirement of an express jurisdictional element departed from previous case law in that it requires an explicit link to commerce in each instance of the federally regulated activity, instead of a general link to commerce that is unnecessary in all cases.

3. *The Role of Congressional Findings—Has the Court Abandoned the Rational Basis Standard of Review in Favor of Heightened Judicial Scrutiny?*

In the cases prior to *Lopez*, the existence of congressional findings allowed the Court to evaluate whether Congress had a rational basis for concluding that the activity it sought to regulate had a substantial

101. See *id.* at 561.

102. See *id.* at 561-62. In *United States v. Bass*, the government was forced to prove as an essential element of the criminal offense that the firearm was directly involved in or affected interstate commerce. 404 U.S. 336, 347-49 (1971).

103. See *Lopez*, 514 U.S. at 567.

104. 274 U.S. 256 (1927).

105. See *id.* at 258-59.

106. *Id.* at 259.

107. 392 U.S. 183 (1968).

108. See *id.* at 185-86.

impact on interstate commerce.¹⁰⁹ What distinguishes the Gun-Free School Zones Act from the cases previously discussed is that Congress made no express findings that the possession of a firearm in a school zone substantially affected interstate commerce.¹¹⁰ This lack of findings rendered the Court ill-equipped to apply the rational basis test to the facts of the case.¹¹¹

Instead, the Government argued the following potential impacts of guns in school zones on commerce at trial: possession of firearms at schools may result in violent crime; this possibility of violent crime would increase social costs to combat the problem, such as insurance costs; violent crime decreases interstate travel in perceived unsafe areas; and guns in schools threaten the educational process and could thereby result in a less productive national citizenry.¹¹² The Court rejected these "cost of crime" arguments because they would allow federal regulation not only of all violent crime, but also of other activities that potentially lead to violent crime, which would impermissibly infringe on the police powers as reserved to the states.¹¹³

Significant for the future application of *Lopez*, however, was that the government's arguments had no support in the way of express findings or legislative history, which made it easy for the Act to fail the rational basis test.¹¹⁴ Instead, the Act required the Court "to pile inference upon inference" in such a way that would grant Congress the authority under its commerce power to police the nation, a power specifically retained by the states in our system of dual sovereignty.¹¹⁵ The Court candidly admitted that previous cases had granted Congress such policing authority by deferring to congressional enactments, but the Court declined to take it a step further because to do so would fail to recognize the long-heralded distinction between national and local concerns.¹¹⁶ The Court would not have been forced to make the aforementioned inferences had Congress made express findings regarding the link between firearm possession in school zones and interstate commerce, yet the decision failed to identify the role of congressional findings in future cases.¹¹⁷ However, in light of *Morrison*,

109. See *Lopez*, 514 U.S. at 563; see also *Biden*, *supra* note 52, at 15.

110. See *Lopez*, 514 U.S. at 562.

111. See *id.* at 563.

112. See *id.* at 563-64.

113. See *id.* at 564.

114. See *id.* at 552.

115. See *id.* at 567.

116. See *Lopez*, 514 U.S. at 567-68.

117. See *id.* at 567.

even express findings that support congressional action will no longer sustain the validity of an act if the Court's "independent evaluation"¹¹⁸ fails to reach the same conclusion.

IV. REASONING OF THE COURT

A. Majority Opinion

In *United States v. Morrison*,¹¹⁹ the United States Supreme Court affirmed the United States Court of Appeals for the Fourth Circuit and held that despite extensive legislative findings to the contrary, violence against women is not an activity that substantially affects interstate commerce.¹²⁰ The majority opinion began by detailing the provisions of the VAWA civil rights remedy in 42 U.S.C. § 13981.¹²¹

The civil rights remedy states that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender."¹²² The enforcement of that right is provided in subsection (c), which allows a civil cause of action for victims of gender-motivated violent crime.¹²³ In order to fall within § 13981's civil rights remedy, the injured party must show that the crime of violence was "committed because of gender or on the basis of gender, and due, at

118. *See id.* at 562.

119. 120 S. Ct. 1740 (2000).

120. *See id.* at 1752-54. Chief Justice Rehnquist wrote the 5-4 majority opinion, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. *See id.* at 1745. Justice Thomas wrote a concurring opinion. *See id.* at 1759 (Thomas, J., concurring). Justice Souter filed a dissenting opinion, in which Justices Stevens, Ginsburg, and Breyer joined. *See id.* (Souter, J., dissenting). Justice Breyer also wrote a dissenting opinion, in which Justice Stevens joined in full and Justices Souter and Ginsburg joined as to Part I-A. *See id.* at 1774 (Breyer, J., dissenting). [Author's note: The Supreme Court's grant of certiorari encompassed the constitutionality of the VAWA's civil rights remedy alone; therefore, this note will not discuss the petitioner's other claims. In addition, the focus of this note will be on the Court's analysis of the validity of the VAWA under the Commerce Clause. *See supra* note 34 and accompanying text.]

121. *See Morrison*, 120 S. Ct. at 1747.

122. 42 U.S.C. § 13981(b) (1994).

123. *See Morrison*, 120 S. Ct. at 1747. Specifically, § 13981(c) provides:

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.

42 U.S.C. § 13981(c) (1994).

least in part, to an animus based on the victim's gender."¹²⁴ The Court noted the broad scope of the remedy¹²⁵ in that it does not require a prior criminal charge or conviction to bring a civil suit.¹²⁶ Further, § 13981(e)(3) provides victims with a choice of forums: State and federal courts have concurrent jurisdiction over the litigation.¹²⁷

Despite the broad range of criminal activity encompassed in § 13981, Congress did place limitations on the civil rights remedy.¹²⁸ The remedy is specifically excluded for random violent acts independent of gender or for acts that cannot be established, by a preponderance of the evidence, to be inflamed by gender.¹²⁹ And, in an attempt not to encroach on areas of purely state concern, the federal courts cannot exercise supplemental jurisdiction over any claims dealing with divorce, alimony, the distribution of marital property, or child custody.¹³⁰

Next, the Court examined whether Congress had authority to enact § 13981 under the Commerce Clause,¹³¹ a source of authority it specifically identified when defining the purpose of the VAWA.¹³² At the outset the Court noted, "[d]ue 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."¹³³ However, the Court clearly expressed its federalism concerns when it stressed that Congress's regulatory authority over interstate commerce "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."¹³⁴

The Supreme Court recently addressed the scope of Congress's authority to enact legislation under the Commerce Clause in *United States v. Lopez*.¹³⁵ As the Court discussed in *Lopez*, there are three broad

124. See 42 U.S.C. § 13981(d)(1) (1994).

125. See *Morrison*, 120 S. Ct. at 1748.

126. See 42 U.S.C. § 13981(e)(2) (1994).

127. See *Morrison*, 120 S. Ct. at 1748; 42 U.S.C. § 13981(e)(3) (1994).

128. See *Morrison*, 120 S. Ct. at 1748.

129. See 42 U.S.C. § 13981(e)(1) (1994).

130. See 42 U.S.C. § 13981(e)(4) (1994).

131. See *supra* note 33 and accompanying text.

132. See *Morrison*, 120 S. Ct. at 1748; see also *supra* note 26 and accompanying text.

133. *Morrison*, 120 S. Ct. at 1748.

134. *Id.* at 1749 (citing *United States v. Lopez*, 514 U.S. 549, 556-57 (1995)) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

135. 514 U.S. 549 (1995). In *Lopez*, the Supreme Court invalidated the Gun-Free

categories of activity that Congress has authority to regulate under the Commerce Clause.¹³⁶ At issue in this case, as in *Lopez*, is the third category of permissible Commerce Clause regulation: activities that have a substantial relation to and “substantially affect” interstate commerce.¹³⁷ Thus, the Court viewed *Lopez* as the controlling authority on this issue, and *Lopez* provided the framework for the Court’s analysis of the VAWA.¹³⁸

The Court recounted their *Lopez* decision in detail¹³⁹ and ultimately rejected the petitioners’ argument that Congress is empowered to regulate non-economic violent crime based solely on the aggregate effects of that crime on interstate commerce.¹⁴⁰ First, the Court recognized that federal regulation of a purely intrastate activity has only been sustained when the activity was economic in nature.¹⁴¹ The federal criminal statutes in *Morrison* and *Lopez*, however, did not regulate commercial or economic activity.¹⁴² Specifically, the VAWA sought to regulate intrastate violent crime motivated by gender: a non-economic,¹⁴³ criminal activity that could not be upheld under *Lopez*.¹⁴⁴

Second, although Congress expressly found that violence against women substantially affected interstate commerce,¹⁴⁵ the Court rejected the “but-for” causation the petitioners used to reach that conclusion.¹⁴⁶ That line of reasoning could justify federal regulation of “any crime as

School Zones Act of 1990, a federal criminal statute which regulated the possession of firearms in a school zone, because it exceeded congressional authority to regulate interstate commerce. *See id.* at 551.

136. *See id.* at 558. Congress has authority to regulate the following activities under its commerce power: 1) the use of the channels of interstate commerce; (2) the instrumentalities, persons, or things involved in interstate commerce, even if the specific subject matter of the regulation is purely intrastate in character; and (3) activities that have a substantial relation to and substantially affect interstate commerce. *See id.* at 558-59.

137. *See id.* at 559.

138. *See Morrison*, 120 S. Ct. at 1749.

139. *See id.* at 1749-53.

140. *See id.* at 1754.

141. *See id.* at 1750.

142. *See id.* at 1750-51.

143. *See id.* at 1751. The majority summarized, “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.” *Id.*

144. *See Morrison*, 120 S. Ct. at 1751.

145. *See id.* at 1752. Violence motivated by gender animus 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.” *Id.* at 1752 (quoting H.R. CONF. REP. NO. 103-711, at 385 (1994)).

146. *See id.*

long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption,"¹⁴⁷ as well as other areas within the traditional powers of state regulation that have an equally substantial impact on the national economy.¹⁴⁸ The Court vehemently stressed that under our federal system, the power to police the citizenry, suppress crime, and vindicate victims has always been vested in the states.¹⁴⁹ In the Court's view, giving Congress such sweeping authority is in direct contradiction of the Constitution and the purposes of our federal system.¹⁵⁰

Third, § 13981, like the Gun-Free School Zones Act in *Lopez*, did not include an express jurisdictional element establishing that the federal civil rights remedy was in pursuance of Congress's regulation of interstate commerce.¹⁵¹ Such a jurisdictional requirement would have linked a specific gender-motivated act of violence directly to interstate commerce and might have sustained the VAWA's validity, but the requirement would have drastically limited the VAWA in scope.¹⁵² Instead, Congress attempted to regulate a broader category of crime that was more intrastate in nature, which could not be upheld in light of the Court's decision in *Lopez*.¹⁵³

Thus, the Court held that the VAWA civil rights remedy was an unconstitutional exercise of Congress's commerce power and affirmed the United States Court of Appeals for the Fourth Circuit.¹⁵⁴ The Court concluded, "[i]f the allegations here are true, no civilized system of justice could fail to provide [Brzonkala] 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."¹⁵⁵

147. *Id.* at 1752-53.

148. *See Morrison*, 120 S. Ct. at 1753. For example, the majority explained that this but-for reasoning could equally justify federal regulation of family law, because the "aggregate effect of marriage, divorce, and childrearing" are at least as substantial on the national economy as gender-motivated violence. *See id.*

149. *See id.* at 1754.

150. *See id.*

151. *See Morrison*, 120 S. Ct. at 1751.

152. *See id.* at 1751-52.

153. *See id.*

154. *See id.* at 1759.

155. *Id.*

B. Minority Opinions

In his concurring opinion, Justice Thomas expressed his view that the continuing use of the substantial effects test to gauge the constitutionality of a federal regulation under the Commerce Clause is incompatible with the enumerated powers of Congress in the Constitution.¹⁵⁶ He feared that the Court's continued application of the test will encourage Congress to pass regulations dealing with police powers "under the guise of regulating commerce."¹⁵⁷

In contrast, Justice Souter's dissent upheld the VAWA as a valid exercise of Congress's Commerce Clause authority.¹⁵⁸ First, the dissent cited a number of past decisions in which the Court upheld regulation of activities that only substantially affected interstate commerce in the aggregate.¹⁵⁹ Echoing the reasoning of the Court of Appeals for the Fourth Circuit panel, the dissent viewed the Court's role in assessing legislation as supervisory in nature, in that it must uphold a congressional act if the Congress had a rational basis for its findings.¹⁶⁰ Justice Souter, like the panel, would have deferred to the "mountain of data assembled by Congress" over the course of four years, which proved that Congress had a rational basis for its conclusion that gender-motivated violence substantially affects interstate commerce.¹⁶¹ In addition, Justice Souter likened gender-based violence in the 1990s to racial discrimination in the 1960s, in that it prohibits its victims from full participation in the national economy.¹⁶² In conclusion, this dissent criticized the majority's categorical distinctions between the regulation of economic and non-economic activity, characterizing it as a revival of an earlier federalism that is out of touch with our modern, integrated national economy and as ignoring the power of the political

156. See *United States v. Morrison*, 120 S. Ct. 1740, 1759 (2000) (Thomas, J., concurring).

157. See *id.* (Thomas, J., concurring).

158. See *Morrison*, 120 S. Ct. at 1759 n.1 (Souter, J., dissenting).

159. See *id.* at 1759 (Souter, J., dissenting) (citing *Wickard v. Filburn*, 317 U.S. 111, 124-28 (1942)); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277 (1981).

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

161. See *id.* at 1760-64 (Souter, J., dissenting). In fact, Congress cited the social costs of domestic violence alone at between \$5 and \$10 billion annually. See *id.* at 1762 (Souter, J., dissenting).

162. See *Morrison*, 120 S. Ct. at 1763 (Souter, J., dissenting); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

process to resolve conflicts between the federal government and the states.¹⁶³

Justice Breyer also filed a dissenting opinion,¹⁶⁴ concerned that the Court had failed to identify "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."¹⁶⁵ He found the distinction between economic and non-economic activities difficult to apply in certain situations, which is complicated further by the need for exceptions.¹⁶⁶ Also, as long as the aggregate effects on interstate commerce are substantial, Justice Breyer saw no need for the majority's focus on the locus in quo of the regulated activity.¹⁶⁷ In addition, he seemed to view the jurisdictional element that is lacking in the VAWA as a mere formality: "[I]n 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."¹⁶⁸

Finally, Justice Breyer agreed with Justice Souter that as long as the federal regulation passes the rational basis prong of the substantial effects test, the Congress should remain accountable for striking the appropriate balance between state and federal power, not the courts.¹⁶⁹ According to Justice Breyer, the passage of the VAWA involved the cooperation of state and federal governments to address a national problem, and thus did not encroach on state autonomy.¹⁷⁰ In fact, the overwhelming majority of state attorneys general supported the enactment of the VAWA civil rights remedy, stating that: "[T]he problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds."¹⁷¹ Thus, Justice Breyer also supported the continued application of the traditional

163. See *Morrison*, 120 S. Ct. at 1770-73 (Souter, J., dissenting).

164. See *Morrison*, 120 S. Ct. at 1774 (Breyer, J., dissenting).

165. *Id.* (Breyer, J., dissenting).

166. See *id.* (Breyer, J., dissenting). For example, the Court would allow Congress to "regulate 'non-economic' activity taking place at commercial establishments." *Id.* (Breyer, J., dissenting).

167. See *id.* at 1775 (Breyer, J., dissenting).

168. *Id.* at 1776 (Breyer, J., dissenting).

169. See *Morrison*, 120 S. Ct. at 1776 (Breyer, J., dissenting).

170. See *id.* at 1777 (Breyer, J., dissenting).

171. *Id.* (Breyer, J., dissenting).

“rational basis” approach when evaluating federal regulations.¹⁷² In light of the extensive congressional findings that violence against women substantially affects interstate commerce, Justice Breyer argued that the VAWA is well within Congress’s authority under the Commerce Clause.¹⁷³

V. SIGNIFICANCE

By invalidating the Civil Rights Remedy of the VAWA as an unconstitutional exercise of congressional authority under the Commerce Clause, the Supreme Court shifted the delicate federal balance in favor of a heightened judicial review of Congress’s actions. Prior to the Court’s decision in *Morrison*, the strength of the rational basis standard of review withstood Commerce Clause challenges when Congress rationally concluded that a regulated activity substantially affected interstate commerce. This principle remained unscathed in the wake of *United States v. Lopez*,¹⁷⁴ and rendered the *Morrison* decision a surprising break from past precedent when the Court rejected four years of congressional hearings as a rational basis for passing the VAWA. Instead, the Court summarily rejected the well-considered legislation and essentially repudiated the rational basis test for the limitations on congressional Commerce Clause authority.

The significance of the *Morrison* decision is multi-faceted. One aspect of its significance is that the long-standing presumption that the federal government has special power, and indeed a responsibility, to regulate matters of discrimination and civil rights has been questioned by the *Morrison* decision with its emphasis on new federalism doctrine.¹⁷⁵ As Duke University Professor Walter Dellinger said, “it takes away Congress’s ability to deal with state inaction, state under-enforcement, state racial- or gender-based failure to protect the people from legal violations” by creating a federal remedy.¹⁷⁶ Senator Joseph Biden, the chief sponsor of the VAWA, expressed astonishment that the Court has so severely limited Congress’s regulatory powers by

172. See *id.* at 1778 (Breyer, J., dissenting).

173. See *id.* at 1777-78 (Breyer, J., dissenting).

174. 514 U.S. 549 (1995).

175. See generally David G. Savage, *High Court Rejects U.S. Law Allowing Civil Suits in Rapes Ruling: Justices Decide, 5 to 4, that Congress Overstepped Its Authority in Allowing Victims to Sue. Action Appears to Doom Other Federal Hate-crimes Statutes*, L.A. TIMES, May 16, 2000, at A1.

176. *All Things Considered* (National Public Radio broadcast, May 15, 2000), available in 2000 WL 21469056.

restricting Commerce Clause legislation to economic activity that affects interstate commerce.¹⁷⁷ Of course, future application of the economic/non-economic approach is destined to rely heavily on the Court's interpretation of exactly what "economic in nature" means,¹⁷⁸ a malleable standard that is sure to evade the legal community for years to come. It is ironic that the states, which bear the economic and other harm resulting from violence against women, overwhelmingly supported the Civil Rights Remedy, and yet the Court forced them to tackle the problem alone with an enlivened states' rights approach to federal power.¹⁷⁹

The ruling also could impact existing and proposed federal laws in areas such as the environment, hate-crimes prevention and enforcement, and education.¹⁸⁰ For example, the decision questions the eventual constitutional validity of the Hate Crimes Prevention Act, which would amend the federal hate crimes statute¹⁸¹ to include gender, sexual orientation, and disability with the existing protected classes of race, national origin, color, and religion.¹⁸² The decision is especially alarming in states such as Arkansas that have failed to enact bias-related or hate-crime laws protecting victims' civil rights, despite the occurrence of many bias and hate crimes in those states.¹⁸³ In our state, bias and hate-crime laws are long overdue.

Also significant is that the decision reinforces the feminist legal theorists' viewpoint that the federal court system is biased in itself by imposing perfunctory distinctions between federal and state jurisdiction that leave federal judges powerless to address traditional women's issues.¹⁸⁴ The failure to recognize bias-motivated crimes like domestic

177. *See id.*

178. *See* Herman Schwartz, *Supreme Court Assault on Federalism Swipes at Women*, L.A. TIMES, May 21, 2000, at M1.

179. *See* Peter M. Shane, *In Whose Best Interest? Not the States'*, WASH. POST, May 21, 2000, at B5.

180. *See* Jan Crawford Greenburg, *High Court Ruling Further Clips the Role of Congress*, CHI. TRIB., May 16, 2000, at 1.

181. 18 U.S.C. § 245 (1994).

182. *See* Goldscheid, *supra* note 3, at 124. The United States Senate approved the Act by a 57-42 vote on June 20, 2000. *See* Tom Raum, *Senate OKs Measure on Bias-Related Crimes; Critics: Bill Infringes on State, Local Power*, ARK. DEMOCRAT GAZETTE, June 21, 2000, at 2A.

183. *See* Shareese Kondo, *Lack of Hate-crime Law in State Fodder for Debate*, ARK. DEMOCRAT GAZETTE, June 15, 2000, at 1A. Arkansas, Georgia, Hawaii, Indiana, Kansas, Kentucky, South Carolina, New Mexico, and Wyoming are the nine states without hate-crime legislation. *See id.*

184. *See* Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2199 (1993).

violence, rape, and sexual assault as discriminatory civil rights violations is just one more example of the federal courts' disinterest in women's issues, shielded under the rubric of limited federal jurisdiction.¹⁸⁵

Finally, the most basic impact of *Morrison* is that it deprives the victims of gender-motivated violence of pursuing a civil remedy in federal court. As Christy Brzonkala argued in *Morrison*, this decision will substantially reduce the number of attackers who are brought to justice because the states admittedly lack funds and other resources to pursue these claims with fairness and vigor. Any future attempts by Congress to regulate bias or hate crimes, or any other purely non-economic, intrastate activity, will be struck down under *Morrison* unless the ideological composition of the Court changes and the Court is willing to reevaluate its holding here. With the recent election of former Texas Governor George W. Bush to the American presidency, any new appointees to the Court will finally solidify the *Morrison* majority, and future interpretations of this decision will most likely follow the Chief Justice's lead. Thus, it is imperative that the states take an active role in protecting the civil rights of all of their citizens. After *Morrison*, Congress is powerless to set the national standard under the Commerce Clause.

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185. *See id.*

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