In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.¹

Needing an effective national government but fearing a tyrannical central power, the Framers invented their own unique governmental model. The Framers designed a democratic system that balanced authority between the state and federal governments. The Framers created this federalist form of government to protect the liberties of the people, who, after all, are "the only proper objects of government."² The Framers chiefly worried about either the states or the federal government having too much power because such an imbalance would threaten the "double security" needed to protect "the rights of the people."³ Hence, the Framers specifically delegated only limited powers to the federal government while reserving those powers not delegated "to the States respectively, or to the people."⁴ Although the federal-state balance of power has changed significantly since the adoption of the Constitution, the question as to the appropriate scope of federal-state power is still one of the most important issues in constitutional law.

The nature of the federal-state relationship today differs greatly from what it was at the time of ratification. The adoption of the Fourteenth and Seventeenth Amendments has had a monumental impact on the division of power between the states and the federal government.⁵ Moreover, the adoption and subsequent

¹. The Federalist No. 51, at 357 (James Madison) (Benjamin Fletcher Wright ed., 1961).
³. The Federalist No. 51, supra note 1, at 357.
⁴. U.S. Const. amend. X.
⁵. For recent pieces exploring the impact of the Fourteenth Amendment's ratification of federalism as a limit on federal governmental power, see 2 Bruce Ackerman, We the People: Transformations 17-23, 160-85 (1996) [hereinafter Ackerman, Transformations]; Bruce Ackerman, Revolution on a Human Scale, 108 Yale L. J. 2279, 2301-11.
judicial ratification of the New Deal has changed forever this federal-state balance; the monstrous regulatory federal government that exists today is altogether a different species than the one contemplated by the Framers.\(^6\) Despite these significant changes, and a once-deferential judiciary, federalism still provides a meaningful check on an overpowering federal government. A majority of the Supreme Court has emphasized this fact time and again during its recent neo-federalism movement, which began with its decision New York v. United States,\(^7\) continued through United States v. Lopez,\(^8\) Printz v. United States,\(^9\) and City of Bourne v. Flores,\(^10\) and came to a head with its recent decisions in Alden v. Maine,\(^11\) Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank (College Savings Board I),\(^12\) Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank (College Savings Board II),\(^13\) and Kimel v. Florida Board of Regents.\(^14\) United States
v. Morrison, a case currently on the Supreme Court’s docket, promises to be the capstone of this movement.

In United States v. Morrison, the Supreme Court has the opportunity to announce finally that this neo-federalism movement is not aberrational, and that the Court is serious about scaling back the deference it previously has given to Congress’s use of its enumerated powers. This Note examines United States v. Morrison and the lower court’s opinions in Brzonkala v. Virginia Polytechnic Institute and State University and concludes that the Supreme Court should hold that Congress did not have the constitutional authority to enact the Civil Rights provision of the Violence Against Women Act (VAWA).

To reach such a conclusion, this Note takes both a descriptive and normative look at Congress’s powers under the Commerce Clause and Section 5 of the Fourteenth Amendment. This Note

18. Legal commentators and the media have watched the Brzonkala case closely from the very outset. Indeed, the case has attracted the attention of some of the nation’s largest newspapers. See, e.g., Court Voids Civil Rights Law on Rape Victims, N.Y. TIMES, Mar. 6, 1999, at A9; Court Voids U.S. Law on Rape Victim Suits, CHI. TRIB., Mar. 6, 1999, at 4; Brooke A. Masters, Appeals Court Rejects Part of Gender-Violence Act, WASH. POST, Mar. 6, 1999, at A1. The Brzonkala case has attracted a large amount of attention because the Supreme Court has granted certiorari, see supra note 15, and because of the enormous impact that the Court’s decision in Morrison will have on constitutional law. If the Supreme Court affirms the en banc opinion, that decision may put teeth into many of the Court’s recent decisions which have placed new limits on congressional power to regulate areas that have been traditionally relegated to the states. Moreover, VAWA and its apparent intrusion into areas traditionally relegated to the states has prompted even the generally reserved Chief Justice to express concern that the civil rights provision of VAWA has the “potential to create needless friction and duplication among the state and federal systems,” William H. Rehnquist, Welcoming Remarks: National Conference on State-Federal Judicial Relationships, 78 Va. L. Rev. 1657, 1660 (1992), and that the civil rights provision of VAWA creates a “new private right of action so sweeping, that the legislation could involve the federal courts in a whole host of domestic relations disputes.” CHI. DAILY L. BULL., Jan. 2, 1992, at 2, 4 (quoting from Chief Justice Rehnquist’s 1991 REPORT ON THE FEDERAL JUDICIARY). The Chief Justice’s comments, the media attention, and the fact that over twenty organizations filed Amici Curiae briefs in the Morrison case, see Morrison, 120 S. Ct. at 11, all suggest that the constitutionality of the civil rights provision of VAWA is a timely and important topic.
19. A descriptive analysis of the law focuses on what the current state of the law is and tries to apply this current state of the law to a new set of facts. See Timothy P. Terrell, Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles, 72 CAL. L. REV. 288, 295 (1984). A normative analysis of the law, in contrast, focuses on what the law ought to be. See id. at 305. Therefore, this Note’s descriptive analysis will apply what the current law is with respect to VAWA in order to determine whether VAWA is a constitutional exercise of congressional power. This Note’s normative analysis, on the other hand, will argue that, notwithstanding the current law,
argues on a descriptive level that, under recent Supreme Court precedent, Congress lacks the power to enact the civil rights provision of VAWA under either the Commerce Clause or Section 5 of the Fourteenth Amendment.\(^2\) Additionally, this Note argues on a normative level that Congress should not have the constitutional authority to legislate in areas such as intrastate crime and domestic relations. Placing such broad authority in the hands of a centralized body calls into question the very system of government that the Framers carefully designed and threatens the liberties and efficiencies that a federalist system secures.

The first part of this Note discusses the adoption and structure of VAWA. The second part examines United States v. Morrison by laying out the facts, the procedural history, and the reasoning used by the lower courts, including the district court,\(^2\) the Fourth Circuit Court of Appeals panel,\(^2\) and the en banc Fourth Circuit Court of

\(\text{VAWA ought to be an unconstitutional exercise of congressional power because legislation like VAWA eviscerates many of the benefits secured by a federalist structure of government.} \)

For insightful commentaries on the normative/descriptive or is/ought distinction, see, for example, Pierre Schlag, Normativity and the Politics of Form, 139 U. PA. L. REV. 801, 806-14 (1991); James Donato, Note, Dworkin and Subjectivity in Legal Interpretation, 40 STAN. L. REV. 1517, 1519 (1988); C. Emerson Talmage, Comment, Do Survival Values Form a Sufficient Basis for an Objective Morality: A Realist's Appraisal of the Rules of Human Conduct, 69 NOTRE DAME L. REV. 893, 909 (1994).

This Note makes the normative arguments that follow, in part, because they are more likely to be persuasive to courts. Indeed, the en banc Fourth Circuit seemed persuaded more by the normative principles underlying a holding that Congress overstepped its constitutional powers than it was persuaded by a descriptive argument that a given case was dispositive. See Brzonkala, 169 F.3d at 826. Moreover, Richard A. Posner, the Chief Judge on the Seventh Circuit, recognized that normative arguments are important precisely because they are more likely to be persuasive to an appeals court:

> The second biggest mistake that... advocates make... is to think that they can win by rubbing the judges' noses in the precedents. In an argued civil case, there probably is no dispositive precedent—otherwise the case would probably not have gotten to the point of an orally argued appeal. And if there is no dispositive precedent, then unless the appellate judges are very gullible, it is futile to argue the case as if there were... .

> The most effective method of arguing such a case is to identify the [normative] purpose behind the relevant legal principle and then show how that purpose would be furthered by a decision in favor of the advocate's position.


20. This Note examines both Congress's commerce power, see infra notes 102-94 and accompanying text, and Congress's enforcement power, see infra notes 198-267 and accompanying text, in the third part of this Note.


The third part analyzes congressional power under the Commerce Clause and Section 5 of the Fourteenth Amendment. In the fourth part, this Note argues on a normative level that Congress should not have the power to enact legislation, such as VAWA, that upsets the balanced sovereignty necessary to prevent tyranny. This Note concludes that VAWA is a very important piece of legislation, but Congress simply does not and should not have the authority to enact it in the enumerated scheme created by the Constitution despite its necessity.

**THE VIOLENCE AGAINST WOMEN ACT**

Without question, violence against women is a horrible problem in the United States. The statistics concerning violent acts committed against women are overwhelming. For example, "every week, during 1991, more than 2,000 women were raped, and more than 90 women were murdered 9 out of 10 times by men." Additionally, even when women are home, they are six times more likely than men to be the victim of a violent crime committed by an intimate and estimates indicate that more than one of every six sexual assaults a week is committed by a family member. If these statistics are not staggering enough, consider also that "three out of four U.S. women will be the victim of a violent crime sometime during their life," and "violence is the leading cause of injuries to women ages 15 to 44, more common than automobile accidents, muggings, and cancer deaths combined." To compound this egregious situation, "our laws, policies, and attitudes remain inadequate in the face of the

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24. See S. REP. No. 103-138, at 37 (1993). "In 1991, at least 21,000 domestic crimes were reported to the police every week; at least 1.1 million reported assaults—including aggravated assaults, rapes, and murders—were committed against women in their homes that year; unreported domestic crimes have been estimated to be more than three times this total." Id. (citing STAFF OF THE SENATE COMM. ON THE JUDICIARY, 102D CONG., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA 4 (1992)).
25. Id. at 38; see also Margo L. Ely, Civil Rights Law Withstands Early Constitutional Test, CHI. DAILY L. BULL., Feb. 9, 1998, at 6 (commenting on violence against women).
27. Id.
28. Id. (citing Surgeon General Antonio Novello, From the Surgeon General, U.S. Public Health Services: A Medical Response to Domestic Violence, 267 JAMA 3132 (1992)).
epidemic of violence against women.”²⁹ Obviously, action needed to
be taken to curb this alarming problem.

Congress responded to this problem by passing VAWA,³⁰ which
was designed to control “the escalating problem of violent crime
against women.”³¹ Although there are many important provisions
of VAWA,³² the civil rights provision is the only part of VAWA that
raises any serious constitutional concern.³³ Accordingly, this Note
focuses only on VAWA’s civil rights provision.³⁴

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²⁹ Id.
³⁰ VAWA is actually part of the larger Violent Crime Control and Law Enforcement Act
108 Stat. 1796 (1994) (codified in scattered sections of 8, 12, 15, 16, 18, 20, 21, 26, 28, 31 and
42 U.S.C.); see also Cass Sunstein et al., The Constitutionality of the Violence Against Women
Act, in VIOLENCE AGAINST WOMEN: LAW & LITIGATION § 6.1 (David Frazee et al. eds., 1998)
(describing the Violence Against Women Act in general terms).
³¹ S. REP. NO. 103-138, at 37.
³² VAWA provided federal funding for educational and training programs to educate
state and federal judges and law enforcement officers about domestic violence and other
programs for state courts); see id. §§ 14001-14002 (providing funding for federal courts); see
also Sunstein et al., supra note 30, § 6.3 (describing the federal expenditures made in
VAWA). VAWA also issued grants to state and local governments to combat violent crimes
against women, see 42 U.S.C. §§ 3796gg to 3796gg-5, 3797 (1994), and to provide education
for and prevention of sexual assaults. See id. § 13931, 16 U.S.C. §§ 1a-7a, 4601-8 (1994).
Additionally, VAWA amended the Federal Rules of Evidence to protect victims of crimes of
violence motivated by gender. See FED. R. EVID. 412 (codifying VAWA § 40141, 28 U.S.C. §
2074 (1994)). Another part of VAWA made it a federal crime for an individual to cross state
lines and cause physical injury to her spouse or partner “with the intent to injure, harass,
or intimidate” her spouse or partner. See VAWA § 40221 (codified at 18 U.S.C. § 2261(a)
(1994)). VAWA also makes it a federal crime to violate a protective order in any state other
than the one where the protective order was issued. See id. (codified at 18 U.S.C. § 2262
(1994)). VAWA also extends full faith and credit to any protective order issued in any state.
See id. (codified at 18 U.S.C. § 2265 (1994)). Finally, VAWA amends the Immigration and
Nationality Act, see 8 U.S.C. §§ 1101-1525 (1994), by reducing the burden on battered
immigrant women in achieving legal permanent resident status and by creating a self-
petitioning process. See VAWA §§ 40701-40703 (codified at 8 U.S.C. §§ 1154(a)(1),
1186a(c)(4), 1254(a)(1994)).
³³ See, e.g., Brzonkala v. Virginia Polytechnic & State Univ., 169 F.3d 820 (4th Cir.
1999) (en banc) (holding that VAWA exceeds Congress’s authority under the Commerce
Clause and the Fourteenth Amendment); Liu v. Striuli, 36 F. Supp. 2d. 452 (D.R.I. 1999)
(rejecting a Commerce Clause challenge to VAWA’s civil rights provision); Anisimov v. Lake,
982 F. Supp. 531 (N.D. Ill. 1997) (holding that civil rights provision of VAWA did not exceed
congressional authority under the Commerce Clause); Seaton v. Seaton, 971 F. Supp. 1188
(E.D. Tenn. 1997) (doubting the policy arguments for VAWA but ultimately holding that
Congress had authority to pass the legislation); Doe v. Harts, 970 F. Supp. 1375 (N.D. Iowa
1997) (holding that Congress did not exceed its power by passing VAWA), rev’d on other
grounds, 134 F.3d 1339 (8th Cir. 1997); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996) (holding
that VAWA does not exceed Congress’s power under either the Commerce Clause or the
Fourteenth Amendment); Sunstein et al., supra note 30, § 6.1 (concluding that only the civil
rights provision of VAWA, also known as Title III, raises “serious legal question[s]”).
cause of action to sue an individual for a violation of her “right to be free from crimes
To establish a prima facie case under VAWA's civil rights provision, a litigant must prove three things. First, a litigant must prove the predicate offense of a violent crime or otherwise felonious conduct.\textsuperscript{35} VAWA expressly allows a civil rights action only for a victim of a "crime of violence."\textsuperscript{36} VAWA defines a crime of violence as "an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another."\textsuperscript{37} Courts have held that any act that would constitute a felony under either state or federal law is enough to satisfy the underlying crime of violence requirement.\textsuperscript{38} Additionally, state and federal statutes can be interpreted jointly when determining felonious conduct.\textsuperscript{39} Therefore, conduct that is punishable by imprisonment for more than a year under a federal statute is a felony even if the same conduct would be a misdemeanor under the relevant state statute.\textsuperscript{40} Further, a party can be civilly liable under VAWA even though the party was never subject to criminal charges, so long as the plaintiff in a VAWA cause of action can prove by a preponderance of the evidence that the party committed a "crime of violence."\textsuperscript{41}

Second, to establish a prima facie case under VAWA's civil rights provision, a plaintiff must prove that she was a victim of a crime of violence that was "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."\textsuperscript{42} The drafters of the statute specifically tailored VAWA to apply only to crimes of violence motivated by gender animus and not to "random acts of violence unrelated to gender."\textsuperscript{43} A plaintiff proceeding under VAWA must prove "subjectively ... on a case by case basis that the defendant was motivated by a bias

\textsuperscript{35} Id.
\textsuperscript{36} See 42 U.S.C. § 13981(b) (1994).
\textsuperscript{37} Id.
\textsuperscript{39} See Hartz, 970 F. Supp. at 1399.
\textsuperscript{40} See 18 U.S.C. § 3559(a) (1994) (classifying an offense with a maximum prison term of five years and a minimum term of one year as a Class E felony).
\textsuperscript{41} See 42 U.S.C. § 13981(e)(2) (1994) ("Nothing 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.")
\textsuperscript{42} Id. § 13981(d)(1).
\textsuperscript{43} Id. § 13981(e)(1).
against the victim's gender. The standard for proving gender motivation under VAWA is based upon the standard for proving conduct motivated by gender under Title VII of the 1964 Civil Rights Act: look at the totality of circumstances for a determination of whether the conduct was gender motivated.

The third element in a plaintiff's prima facie case under VAWA's civil rights provision is the remedy. A plaintiff suing under VAWA is entitled to compensatory and punitive damages if she can prove, by a preponderance of the evidence, that she was subject to a crime of violence motivated by gender animus. A plaintiff can also sue for injunctive or declaratory relief. In addition, because VAWA is a civil rights statute, a prevailing party under VAWA is entitled to recover reasonable costs of litigation and attorneys fees under the Civil Rights Attorneys' Fees Awards Act of 1976.

As the discussion above indicates, Congress designed VAWA to work like other civil rights statutes. Unlike other civil rights statutes, however, it is unclear whether VAWA is an appropriate constitutional extension of Congress's authority under either the

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44. Hartz, 970 F. Supp. at 1406 (citing S. Rep. No. 103-138, at 49-50 (1993)); see also S. Rep. No. 103-138, at 49-50 ("The committee is not asserting that all crimes against women are gender-motivated. As discussed below, title III requires subjective proof on a case-by-case basis that the criminal was motivated by bias against the victim's gender.")

45. See Hartz, 970 F. Supp. at 1405; see also David Frazee, Gender Motivation Requirement, in Violence Against Women: Law & Litigation, supra note 30, §§ 10:1-10:29 (analyzing the gender motivation requirement of VAWA). David Frazee explains how courts and litigants should use Title VII standards:

To determine whether the "requisite discrimination" is present in VAWA cases, courts will need to follow Title VII sexual harassment and employment discrimination case law. One Title VII model of proof, however, is inappropriate for the VAWA: the disparate impact framework. Because of the "any part" animus standard, mere statistical impact alone cannot suffice to establish gender motivation under the VAWA, though it may provide persuasive circumstantial evidence. The VAWA only covers what under Title VII would be termed "intentional discrimination." Since the circumstances of violent felonies vary widely, courts must anticipate that plaintiffs will attempt to prove gender motivation in a wide variety of ways. Proof of gender motivation is inherently difficult. Especially in early litigation, courts should permit great leeway to attorneys.

Id. § 10.1.

46. See Crisonino v. New York City Housing Auth., 985 F. Supp. 385, 391 (S.D.N.Y. 1997); S. Rep. No. 103-138, at 55; see also Frazee, supra note 45, § 10.1 (stating that "the bottom line [standard] is the same for VAWA cases as it is for Title VII . . . cases.")

47. See 42 U.S.C. § 13981(c).

48. See id.

49. See id. § 1988(b) (1994).

50. See, e.g., id. §§ 1960, 1981, 1983, 1985(c) (1999); Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2 (1999); see also supra notes 45-46 and accompanying text (demonstrating that VAWA's standards of proof are patterned after previous civil rights statutes).
Commerce Clause or the Enforcement Clause of the Fourteenth Amendment. The first court to seriously question Congress's authority to pass VAWA was the federal district court in the Western District of Virginia.

BRZONKALA

Facts

On the night of September 21, 1994, Christy Brzonkala and a friend met two Virginia Tech football players, Antonio Morrison and James Crawford. Brzonkala later alleged that about thirty minutes after they met, Morrison and Crawford violently gang raped her. Afraid and embarrassed, Brzonkala never reported this rape to the police. Brzonkala was so traumatized that she changed her appearance, cut off all her hair, attempted suicide, and eventually dropped out of her classes. Seven months later, Brzonkala finally reported the rape to Virginia Tech under its Sexual Assault Policy.

In May 1995, Virginia Tech held a hearing on the matter. After the hearing, the committee acquitted Crawford because of insufficient evidence. The committee nevertheless found Morrison guilty of sexual assault and suspended him for a year. Morrison appealed, and Virginia Tech held another hearing on the matter because it had mistakenly charged Morrison under the wrong policy during the first hearing. The second hearing, however, “turned

51. U.S. Const. amend. XIV, § 5.
53. See id. at 781-82.
54. See id.
55. See id. at 782.
57. See id.
58. See id. at 954.
59. See id. (“The Virginia Tech judicial committee found insufficient evidence to take action against Crawford . . . .”)
60. See id.
61. See id. at 954-55. Virginia Tech actually held the second hearing because it thought that the procedural infirmities of the first hearing—that Morrison and Crawford were charged under a sexual assault policy that did not come into existence until after the incident happened—would make Morrison's sentence void and subject the school to liability on due process and “ex post facto” grounds. See id. at 955. The Dean of Students at Virginia Tech and another school official actually drove up to Brzonkala's home in Northern Virginia to arrange a second hearing on the matter because of this perceived liability which had no basis in the current law. See id.
out to be much more than a mere formality." The second committee only found Morrison guilty only of "abusive conduct" because Morrison was charged only under the Abusive Conduct Policy at the second hearing but the committee still suspended him for a year.

Morrison appealed this sentence to the Provost of the University, arguing that the hearing violated his due process rights and that the sanction imposed was arbitrary and overly harsh. The Provost overturned Morrison's sentence, finding that the immediate suspension of Morrison for one year was "excessive when compared with other cases where there has been a violation of the Abusive Conduct Policy." Instead, the Provost deferred the suspension until Morrison graduated.

Procedural History

Brzonkala brought suit against Morrison, Crawford, and Virginia Tech alleging that the University violated Title IX of the Education Amendments of 1972 in its handling of her complaints. Additionally, Brzonkala sued Morrison and Crawford

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62. Id. at 954. Judge Motz, the author of the majority opinion for the Fourth Circuit panel, explained why the hearing was more than just a mere formality:

The second hearing lasted seven hours, more than twice as long as the first hearing. Brzonkala was required to engage her own legal counsel at her own expense. Moreover, the university belatedly informed her that student testimony given at the first hearing would not be admissible at the second hearing and that if she wanted the second judicial committee to consider this testimony, she would have to submit affidavits or produce the witnesses. Because she received insufficient notice, it was impossible for Brzonkala to obtain the necessary affidavits or live testimony from her student witnesses. In contrast, the school provided Morrison with advance notice so that he had ample time to procure the sworn affidavits or live testimony of his student witnesses. Virginia Tech exacerbated this problem by refusing Brzonkala or her attorney access to the tape recordings of the first hearing, while granting Morrison and his attorney complete and early access to those tapes. Finally, Virginia Tech officials prevented Brzonkala from mentioning Crawford in her testimony because charges against him had been dismissed; as a result she had to present a truncated and unnatural version of the facts.

Id. at 954-55.

63. See id. at 955.

64. See id.

65. Id.

66. See id. (noting that Morrison was ordered to attend a one-hour session with the school's Equal Opportunity/Alcohol Awareness Compliance Officer to be tutored in "acceptable standards under University Student Policy").


68. See Brzonkala, 935 F. Supp. at 776.
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under VAWA\(^\text{69}\) alleging that she was brutally gang raped because of gender animus.\(^\text{70}\) The district court dismissed the VAWA claims against Morrison and Crawford, finding VAWA unconstitutional because Congress lacked the power under either the Commerce Clause\(^\text{71}\) or Section 5 of the Fourteenth Amendment to enact it.\(^\text{72}\)

Brzonkala appealed this decision to a panel of the Fourth Circuit Court of Appeals.\(^\text{73}\) The panel, by a 2-1 vote, reversed the district court and found that Congress did have the power to enact VAWA under the Commerce Clause.\(^\text{74}\) This panel reasoned that *United States v. Lopez*\(^\text{75}\) requires Congress to demonstrate through its findings that the regulated activity—violence against women—has a substantial effect upon interstate commerce.\(^\text{76}\) The panel argued that Congress's insertion of voluminous findings into the record\(^\text{77}\) indicated that Congress concluded that violence against

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\(^{69}\) See 42 U.S.C. § 13981 (1994). Brzonkala also brought state tort law claims against Morrison and Crawford, but these claims are similarly beyond the scope of this Note. *See Brzonkala*, 935 F. Supp. at 800 (dismissing state claims without prejudice).

\(^{70}\) *See Brzonkala*, 935 F. Supp. at 782.

\(^{71}\) *See id.* at 793.

\(^{72}\) *See id.* at 800-01 (noting that violent acts against women by individuals did not create a state interference with a citizen's right to equal protection).

\(^{73}\) *See Brzonkala v. Virginia Polytechnic & State Univ.*, 132 F.3d 949 (4th Cir. 1997).

\(^{74}\) *See id.* at 967-68 (holding that Congress simply demonstrated through its findings that it had "a rational basis" for concluding that the regulated activity—here violence against women—substantially 'affected interstate commerce'" (quoting *United States v. Lopez*, 514 U.S. 549, 558-59 (1995))).


\(^{76}\) *See Brzonkala*, 132 F.3d at 965-66.

\(^{77}\) In this case, Congress spent four years making copious and extensive findings as to the relationship between rape and interstate commerce. *See S. Rep. No. 103-138, at 38 (1993); H. Rep. No. 103-395, at 26 (1993); S. Rep. No. 101-545, at 33 (1990).* Congress found that:

1. crimes motivated by the victim's gender constitute bias crimes in violation of the victim's right to be free from discrimination on the basis of gender;
2. current law provides a civil rights remedy for gender crimes committed in the workplace, but not for gender crimes committed on the street or in the home;
3. State and Federal criminal laws do not adequately protect against the bias element of gender-motivated crimes, which separates these crimes from acts of random violence, nor do those laws adequately provide victims of gender-motivated crimes the opportunity to vindicate their interests;
4. existing bias and discrimination in the criminal justice system often deprives victims of gender-motivated crimes of equal protection of the laws and the redress to which they are entitled;
5. gender-motivated violence has a substantial adverse effect upon 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;
6. gender-motivated violence has a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other
women had a substantial effect upon interstate commerce;\textsuperscript{78} thereby satisfying the requirements under \textit{Lopez}.\textsuperscript{79} Because the panel found that Congress had the authority to enact VAWA under the Commerce Clause, it never reached the Fourteenth Amendment issue.\textsuperscript{80}

After rehearing the case \textit{en banc}, the Fourth Circuit reversed the panel.\textsuperscript{81} The \textit{en banc} opinion was seven to four, with Judge Luttig writing the majority opinion, Judges Wilkinson and Niemeyer writing concurring opinions, and Judge Motz writing the dissenting opinion.\textsuperscript{82} The majority found that the Supreme Court's \textit{Lopez} and \textit{Boerne} opinions were "plainly controlling" and reaffirmed "the principles of limited federal government upon which this Nation is founded."\textsuperscript{83} With these principles in mind, the Fourth Circuit was "constrained to conclude"\textsuperscript{84} that Congress exceeded its authority under either Section 5 of the Fourteenth Amendment or the Commerce Clause by passing VAWA.\textsuperscript{85}

In its analysis of the constitutionality of VAWA,\textsuperscript{86} the Fourth Circuit first examined whether Congress was within its authority under the Commerce Clause when enacting VAWA.\textsuperscript{87} The court interpreted \textit{Lopez} as placing outer limits upon congressional authority under the Commerce Clause.\textsuperscript{88} The court found that the \textit{Lopez} limitations were dispositive and determined that VAWA was not a constitutional extension of congressional power because it

\begin{itemize}
\item[(7)] a Federal civil rights action as specified in this section is necessary to guarantee equal protection of the laws and to reduce the substantial adverse effects of gender-motivated violence on interstate commerce; and
\item[(8)] victims of gender-motivated violence have a right to equal protection of the laws, including a system of justice that is unaffected by bias or discrimination and that, at every relevant stage, treats such crimes as seriously as other violence crimes.
\end{itemize}

\textsc{S. Rep.} No. 103-138, at 29.
78. See Brzonkala, 132 F.3d at 966-69.
79. See id. at 968.
80. See id.
81. See Brzonkala v. Virginia Polytechnic & State Univ., 169 F.3d 820 (4th Cir. 1999) (en banc).
82. See id.
83. Id. at 826.
84. Id.
85. See id.
86. The Fourth Circuit first evaluated whether Brzonkala properly stated a claim for relief under VAWA pursuant to a 12(b)(6) motion. See id. at 829-30. The Court held that Brzonkala properly stated a claim for relief under VAWA. See id. at 830. Further discussions of the claims requirements are beyond the scope of this Note.
87. See id. at 829-61.
88. See id.
wrote beyond these limits. The Fourth Circuit was also influenced by the Supreme Court's recent decisions that "jealously[] enforced the structural limits on congressional power that inhere in Our Federalism." Accordingly, the court held that the civil rights provision of VAWA was unconstitutional under the Commerce Clause because it intruded too heavily into areas reserved to the states.

The Fourth Circuit also held that Congress overstepped its authority granted under Section 5 of the Fourteenth Amendment by passing VAWA. Heavily influenced by the Supreme Court's decision in City of Boerne v. Flores, the Fourth Circuit held that Congress exceeded its powers under the Fourteenth Amendment by passing VAWA because VAWA is directed at purely private conduct. The en banc court rejected the argument that Section 5 allows Congress to pass prophylactic legislation aimed at purely private conduct even if Section 1 requires state action. The court found such an understanding of Congress's Section 5 power inconsistent with the structure of the Constitution and Supreme Court precedent. Finally, assuming arguendo that VAWA is directed at state equal protection violations, the court held that VAWA is vastly out of proportion to its aim in remedying equal protection violations and therefore is unconstitutional.

The en banc decision is not the end of the story. The Supreme Court has agreed to review the Brzonkala decision. With the

89. See id. (finding no connection between gender-related violence and interstate commerce).
91. See id. at 829-44.
92. 521 U.S. 507 (1997). The Supreme Court decided Boerne during the interim between the panel's decision and the en banc decision in Brzonkala. The Fourth Circuit majority described Boerne's importance as an intervening precedent:

[Slo crippling to appellants' Section 5 defense of section 13981 is the Court's intervening decision in City of Boerne, that both appellants now defend section 13981 primarily under the Commerce Clause, and only secondarily under Section 5, whereas before the panel of this court, immediately after the Court's decision in Lopez, they quite understandably defended the statute primarily as an exercise of Congress' Section 5 authority and only secondarily as an exercise of Congress' Commerce power . . . .

Brzonkala, 169 F.3d at 881.
93. See Brzonkala, 169 F.3d at 862-73.
94. See id. at 875-81.
95. See id.
constitutionality of VAWA \( ^{97} \) and a whole host of other federal statutes in flux, it is important to consider the constitutional arguments with renewed vigor. Such is the task of the next part of this Note.

THE UNCONSTITUTIONALITY OF VAWA

The Constitution contains twenty-one clauses specifically enumerating positive powers to Congress. \(^{98} \) Even though Congress only needs to have one legitimate power to adopt legislation, \(^{99} \) Congress explicitly invoked two of its enumerated powers to pass VAWA: the commerce power \(^{100} \) and the power to enforce the Fourteenth Amendment. \(^{101} \) This part argues that the Supreme Court should affirm the \textit{en banc} Fourth Circuit because neither the Commerce Clause nor Section 5 of the Fourteenth Amendment gives Congress the power to adopt legislation like VAWA.

\textit{Congress Overstepped Its Commerce Clause Authority}

Congress's commerce authority is arguably the broadest and most important of all Congress's powers. \(^{102} \) Indeed, between 1937...
and 1995, the Supreme Court did not strike down any piece of legislation enacted pursuant to the Commerce Clause.\textsuperscript{103} Notwithstanding the breadth of this power, the \textit{Lopez} Court demonstrated that the Commerce Clause is not a blank check that allows Congress to pass any legislation it deems appropriate.\textsuperscript{104} This section of the Note focuses on Congress's Commerce Clause authority as synthesized in the \textit{Lopez} decision.\textsuperscript{105} This section argues that \textit{Lopez} prevents Congress from enacting non-economic legislation like VAWA—legislation that only has a "substantial effect" upon commerce because Congress has "piled inference upon inference"\textsuperscript{106} in its findings. More importantly, this section argues that the recent federalist trend of the Court indicates that the Court will exact stricter scrutiny over Commerce Clause legislation that interferes with a power traditionally reserved to the states. Under this stricter scrutiny, VAWA clearly fails the constitutional test because VAWA regulates criminal and domestic relations, which are two areas left almost exclusively to the states.\textsuperscript{107}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Chemerinsky}, supra note 102, at 174.
\item Although the history of the Court's Commerce Clause jurisprudence is rich and important, the Court provided a comprehensive exploration of this history in \textit{Lopez}. See id. at 552-61. Moreover, the concurring and dissenting opinions supplement this already comprehensive examination of the Court's Commerce Clause precedents. See id. at 568-83 (Kennedy, J., concurring); id. at 584-603 (Thomas, J., concurring); id. at 603-08 (Souter, J., dissenting); id. at 615-18, 625-30 (Breyer, J., dissenting). Therefore, this Note does not revisit or explore the history of the Court's Commerce Clause jurisprudence as a treatise or textbook would, but rather uses the syntheses of Commerce Clause jurisprudence in \textit{Lopez} as a springboard for its discussion of Congress's commerce power. For some excellent works focusing on the Court's Commerce Clause jurisprudence, see generally \textit{Paul R. Benson, Jr., The Supreme Court and the Commerce Clause, 1937-1970} (1970); \textit{Chemerinsky, supra note 102, at 174-97}; \textit{Federick H. Cooke, The Commerce Clause of the Federal Constitution} (1967); \textit{Gerald Gunther & Kathleen M. Sullivan, Constitutional Law 141-227 (13th ed. 1997)}; \textit{1 Rotunda & Nowak, supra note 102, at 355-450}; \textit{Tribe, supra note 102, at 305-317}.
\item \textit{Lopez}, 514 U.S. at 567.
\end{enumerate}
\end{footnotesize}
Lopez

In 1995, the Supreme Court shocked many lawyers, judges, and academics because for the first time in sixty years it actually found that Congress exceeded its authority under the Commerce Clause.\(^{108}\) Studying the Supreme Court’s Commerce Clause jurisprudence prior to *Lopez* is like studying a display of unlimited power. The post-New Deal and pre-*Lopez* cases demonstrate that Congress can regulate virtually anything, from a lone wheat farmer in Ohio\(^{109}\) to a small barbecue restaurant in Alabama,\(^{110}\) in the name of commerce.\(^{111}\) This limitless history was, in part, what the Court was responding to with *Lopez*.

The Court held in *Lopez* that the Gun-Free Schools Zone Act (GFSZA) of 1990\(^{112}\) was an unconstitutional use of the commerce power. The Court “start[ed] with first principles”\(^{113}\) and examined the commerce power enumerated to Congress in Article I.\(^{114}\) The Court then examined its own precedent under the Commerce Clause.\(^{115}\) This examination led the Court to conclude that the Commerce Clause, as interpreted by the Supreme Court, gives Congress three broad areas of regulatory power.\(^{116}\) Congress has the power to regulate (1) “the use of the channels of interstate commerce,”\(^{117}\) (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce,”\(^{118}\) and (3) “activities having a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce.”\(^{119}\)

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111. Indeed, Professor Merritt reflected candidly that “[w]hen [she] graduated from law school in 1980, [her] classmates and [she] believed that Congress could regulate any act—no matter how local—under the Commerce Clause.” Merritt, supra note 108, at 674; see also Chemerinsky, supra note 102, at 194 (indicating that the commerce power has been very broad since 1937); 1 ROTUNDA & NOWAK, supra note 102, at 394 (maintaining that prior to *Lopez*, “the Supreme Court . . . interpret[ed] the commerce clause as a complete grant of power”).


114. See id. at 552.

115. See id. at 553-61.

116. See id. at 558.

117. Id. (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964) and United States v. Darby, 312 U.S. 100, 114 (1941)).

118. Id. (citing Shreveport Rate Cases, 234 U.S. 342 (1914) and Southern R. Co. v. United States, 222 U.S. 20 (1911)).

119. Id. at 558-59 (citing Maryland v. Wirtz, 392 U.S. 183, 196 (1968) and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).
The Court quickly concluded that GFSZA was neither a regulation of the channels of interstate commerce nor a regulation of an instrumentality of interstate commerce.\textsuperscript{120} Therefore, the Court focused solely on whether the GFSZA was a regulation of an activity that substantially affects interstate commerce.\textsuperscript{121} To determine if possession of guns in school was an activity that substantially affects interstate commerce, the Court examined three factors.

First, the Court looked to the regulated activity in question to determine if it was economic in nature.\textsuperscript{122} The Court indicated that if an activity is economic in nature, the Commerce Clause authorizes Congress to regulate that activity.\textsuperscript{123} The GFSZA, however, was not a regulation of an economic activity because, facially, the statute only criminalized possession of guns in school.\textsuperscript{124} Possession of guns, without more, is not an inherently economic activity.\textsuperscript{125} The first factor therefore was not satisfied.

The second factor the Court considered under the "substantial effects" test is the presence of a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."\textsuperscript{126} The Court intimated that if the GFSZA had such a jurisdictional requirement, the Court may have sustained the statute.\textsuperscript{127} This second factor carried no weight, though, because the GFSZA had no jurisdictional element.

The third factor the Court considered in \textit{Lopez} was by far the most important: the nexus the questioned regulation had to interstate commerce.\textsuperscript{128} This nexus is determined by a two-prong

\textsuperscript{120.} See id. at 559.
\textsuperscript{121.} See id. at 559-68. When evaluating whether Congress acts within its enumerated powers by enacting a given piece of legislation, the Court generally applies a deferential rational basis level of review. See infra notes 189-90 and accompanying text. The \textit{Lopez} decision, however, indicated that the Court was no longer willing to extend the traditional deference given to legislation passed under the Commerce Clause. Instead, the Court indicated that it was applying a stricter standard of review. See infra notes 189-94 and accompanying text.
\textsuperscript{122.} See \textit{Lopez}, 514 U.S. at 559-60 ("[W]e have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce.").
\textsuperscript{123.} See id.
\textsuperscript{124.} See id. at 561.
\textsuperscript{125.} See id.
\textsuperscript{126.} Id.
\textsuperscript{127.} See id. at 561-62.
\textsuperscript{128.} This factor is not explicitly laid out in the Court's decision. However, after the Court considered the jurisdictional factor, the Court moved on to examine the burdens that possession of guns in schools poses upon interstate commerce. The Court did so first by discussing the absence of congressional findings and then by considering the arguments
First, the Court must examine the burden that the regulated activity has upon interstate commerce. Second, the Court must weigh this burden against the intrusion that the regulation has into areas traditionally reserved to the states. The Court found that the GFSZA was an unconstitutional exercise of the commerce power because the burden that possession of guns in schools has upon interstate commerce is minimal and attenuated, whereas the intrusion into areas traditionally reserved to the states, education and criminal law, is great.

Lower courts are now left to wrestle with the meaning of *Lopez*. Scholars have suggested two general interpretations of *Lopez*. Some suggest that *Lopez* indicates an intention by the Supreme Court to significantly limit Congress's broad commerce authority. Others suggest that *Lopez* was simply an aberrational response to the cavalier manner in which Congress passed the GFSZA.
Under the latter interpretation, as long as Congress demonstrates the connection a regulation has to interstate commerce through findings or a jurisdictional requirement, the regulation will be sustained by future courts notwithstanding Lopez.\(^\text{138}\) By and large, the lower federal courts have adopted such an interpretation by calling into doubt\(^\text{137}\) or declining to extend Lopez to other federal statutes.\(^\text{138}\)

Although Lopez did not explicitly overrule any prior precedent,\(^\text{139}\) the decision nevertheless demonstrates that a majority on the Supreme Court is no longer willing to define the interstate commerce power as broadly as it had in the past. Instead, the Supreme Court indicated that it now will place both federalism and proximate cause-type limitations upon Congress’s commerce

\(^{138}\) See, e.g., Sunstein et al., supra note 30, § 6:16 ("Based solely on the voluminous support for the explicit Congressional findings connecting gender motivated violence with interstate commerce, federal courts should easily find that Title III is constitutional under Lopez.").

\(^{139}\) See United States v. Katz, No. 95-30348, 1997 U.S. App. LEXIS 24658, at *2 (W.D. Wash. Sept. 12, 1997) (declining to extend Lopez to wire fraud statute), aff’d, 214 F.3d 214 (9th Cir. 1997) (mem.).

authority. These limitations are important because they suggest that the Supreme Court should affirm the *en banc* Fourth Circuit and correctly hold VAWA unconstitutional. VAWA is simply too remote from interstate commerce and interferes too significantly with an area traditionally reserved to the states.

**Violence Against Women Does Not Have a Substantial Effect upon Interstate Commerce**

By using the three-factor analysis evident from *Lopez*, this section suggests that the *en banc* Fourth Circuit correctly decided that VAWA is an unauthorized extension of Congress's commerce power. To begin with, violence against women is not an activity that is economic in nature. As mentioned earlier, the *Lopez* Court indicated that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." The *Lopez* Court, however, found that the GFSZA was criminal in nature and has "nothing to do with 'commerce' or any sort of economic enterprise." Similar to the GFSZA, VAWA facially has nothing to do with economic or commercial activity. Instead, VAWA is more appropriately characterized as a civil rights statute. Therefore, VAWA fails the first factor the *Lopez* Court used in its "substantial effect" test.

Additionally, VAWA lacks any interstate jurisdictional requirement. The *Lopez* Court indicated that a statute containing a jurisdictional element that ensures a nexus between the regulated activity and interstate commerce likely would be sustained as a constitutional exercise of Congress's commerce power. Yet, similar to the GFSZA, VAWA lacks an interstate jurisdictional requirement that requires a case-by-case determination of the nexus between the activity in question and interstate commerce. Although the Court maintained that such a jurisdictional element

140. *Id.* at 560.
141. *Id.* at 561.
142. Commercial activity is used in the normal sense of the term. Commercial activity refers to "any type of business or activity which is carried on for a profit." BLACK'S LAW DICTIONARY 270 (6th ed. 1990). Violence against women does not directly relate to any exchange of goods, services, or property of any kind in the ordinary or plain sense of the terms. Indeed, Congress itself recognized in its findings that violence against women is not facially a commercial activity, but only relates to commerce indirectly by deterring women from fully participating in the economy. *See S. Rep. No. 103-138*, at 29 (1993).
143. Indeed, this is how Congress itself characterized VAWA by calling the provision in question "Civil Rights for Women." *42 U.S.C. § 13981* (1994).
144. *See supra* notes 122-23 and accompanying text.
is not required, the Court at least hinted that such a jurisdictional requirement may have helped to sustain the GFSZA. Just like the GFSZA, VAWA contains no jurisdictional requirement and accordingly fails the second factor used in *Lopez*.

The third *Lopez* factor is by far the most important: the burden the regulated activity has upon interstate commerce weighed against the regulation's intrusion into areas traditionally reserved to the states. To begin with, the burden that violence against women has upon interstate commerce is minimal and attenuated. An examination of the findings Congress made relative to the relationship between violence against women and interstate commerce reveals this attenuation. Congress found that "gender-motivated violence has a substantial adverse effect upon 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." Additionally, Congress found that "gender-motivated [crime] has a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products."

These findings essentially amount to a costs-of-crime argument. There are two assumptions underlying this argument. First, crimes motivated by violence are burdensome upon interstate commerce in that crimes of violence motivated by gender deter women from consuming goods and services at night and in risky situations when they otherwise would consume. Second, crimes of violence motivated by gender burden national productivity because such crimes deter women from working at night or at places where crimes of violence motivated by gender may be more prevalent. Simply put, this costs-of-crime argument suggests that crimes motivated by gender substantially affect interstate commerce because such crimes deter women from participating fully in the economy.

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146. See *Lopez*, 514 U.S. at 562.
147. See id.
148. See supra notes 128-33 and accompanying text.
150. Id.
151. Id.
152. See id.
153. See id.
154. See id.
155. See id.
This costs-of-crime reasoning was precisely the reasoning rejected in *Lopez*. The Court rejected this costs-of-crime reasoning for two reasons. First, similar to a proximate cause analysis in torts, the Court indicated that it was unwilling to accept the costs-of-crime argument because the causation link between the regulated activity and the burden on interstate commerce is just too remote and attenuated. Indeed, the *Lopez* Court struck down the GFSZA because it was concerned that if it accepted the costs-of-crime reasoning posited by the government, "it... [would be] difficult to perceive any limitation on federal power." The Court's proximate cause concern is further evidenced by the Court's recognition that "the question of congressional power under the Commerce Clause 'is necessarily one of degree.'" Interestingly, the Court quoted Justice Cardozo as an affirmation of this principle. The GFSZA failed the proximate cause concerns of the *Lopez* Court because the costs-of-crime reasoning used to support the GFSZA would render interstate commerce limitless. VAWA also fails these proximate cause concerns because the costs-of-crime

157. See *Merritt*, supra note 108, at 679. Referring to *Lopez*, Professor Merritt explains: "The majority's use of "substantial effect" is more akin to the notion of proximate cause in tort law. The *Lopez* majority meant that the relationship between the regulated activity and interstate commerce must be strong enough or close enough to justify federal intervention, just as the concept of proximate cause means that a defendant's negligence must be closely enough related to the plaintiff's injury to justify forcing the defendant to bear to the costs of the injury.

Id. (citing W. PAGE KEETON ET AL., FROSSLER AND KEETON ON THE LAW TORTS § 42 (5th ed. 1984)). Prosser and Keeton explain that "[t]he term 'proximate cause' is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established." KEETON ET AL., supra, at 273.
158. See *Lopez*, 514 U.S. at 564-68. Prosser and Keeton explain that the chief concern of proximate cause is limiting tort liability to only "conduct [that] has been so significant and important a cause [to plaintiff's injury] that the defendant should be legally responsible." KEETON ET AL., supra note 157, at 273.
159. *Lopez*, 514 U.S. at 564.
160. Id. at 566 (quoting NRLB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).
161. This is interesting, of course, because Justice Cardozo wrote the majority opinion in perhaps the most famous proximate cause decision known to American legal culture. See *Palsgraf* v. Long Island R.R., 162 N.E. 99 (N.Y. 1928).
162. See *Lopez*, 514 U.S. at 567. Justice Cardozo wrote: "There is a view of causation that would obliterate the distinction of 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. (quoting United States v. A.L.A. Schecter Poultry Corp., 295 U.S. 495, 554 (1935) (Cardozo, J. concurring)).
163. See *Lopez*, 514 U.S. at 567-68.
reasoning supporting VAWA, evidenced by the congressional findings,\textsuperscript{164} renders the enumerated interstate commerce power limitless. After all, if Congress can regulate any violent crime or domestic violence in the name of commerce, what can it not regulate?

The second reason that the Court rejected this costs-of-crime reasoning is actually the second part of the third \textit{Lopez} factor: the intrusion that the congressional regulation has into areas traditionally reserved to the states. This is essentially a federalism concern.\textsuperscript{165} The \textit{Lopez} Court struck down the GFSZA because of its intrusion into "areas such as criminal law enforcement or education where States historically have been sovereign."\textsuperscript{166} Such an intrusion is unconstitutional because "[t]he powers delegated by the . . . Constitution to the federal government are few and defined"\textsuperscript{167} whereas the powers left to "the State governments are numerous and indefinite."\textsuperscript{168} Like the GFSZA, VAWA regulates areas traditionally of state concern—criminal conduct and domestic relations.\textsuperscript{169} Therefore, VAWA is similarly constitutionally suspect.

The costs-of-crime rationale Congress used to support VAWA,\textsuperscript{170} when extended, illustrates why VAWA is constitutionally suspect. Crimes of violence, whether motivated by gender animus or not, probably deter people from participating fully in the economy.\textsuperscript{171} Crimes of violence also are likely to have an adverse

\textsuperscript{164} See S. Rep. No. 301-138, at 37 (1993); see also \textit{supra} notes 149-55 and accompanying text.


\textsuperscript{166} \textit{Lopez}, 514 U.S. at 564.

\textsuperscript{167} \textit{Id.} at 552 (quoting \textit{The Federalist No. 45}, at 292-93 (James Madison) (C. Rossiter ed. 1961)).

\textsuperscript{168} \textit{Id.}


\textsuperscript{170} See \textit{supra} notes 152-55.

\textsuperscript{171} It seems perfectly reasonable to posit that people generally will be deterred from consuming goods and services at times or places where they would fear injury or death
affect on the productivity of the workforce.\textsuperscript{172} Accepting the costs-of-crime rationale used by Congress would convert the enumerated commerce power to a general police power. It is axiomatic that the general police power was retained by the states with the adoption of the Constitution.\textsuperscript{173} Thus, allowing Congress to use the costs-of-crime rationale in support of its authority to regulate under the Commerce Clause turns the Constitution's structural limitations into dead letter.\textsuperscript{174} Worse, allowing such a broadening of the resulting from crimes of violence. The higher the violent crime rate, therefore, the less likely it is that individuals will participate fully in the economy. \textit{See, e.g.}, Derek A. Kurtz, \textit{Does the Violence Against Women Act Do Violence to the Limits of Congressional Power?}, 34 SAN DIEGO L. REV. 1047, 1066 (1997) (analyzing both the civil rights remedy and the interstate domestic violence provisions of VAWA and concluding that the civil rights remedy is a questionable use of congressional power); Joanna Shapland, \textit{Preventing Retail Sector Crimes}, 19 CRIME & JUST. 263, 272-74 (1995) (recognizing that retailers are financially harmed by increases in risks associated with violent crime activity rates).

172. If individuals fear going to work at night or at given locations because of the violent crime rate, then these individuals' productivity will suffer. Moreover, if individuals are injured or killed, their concomitant absence from work will cause productivity to decline. If this productivity is aggregated on a national scale, see Wickard v. Filburn, 317 U.S. 111, 127-28 (1942), then crimes of violence may have a substantial effect upon interstate commerce. \textit{See, e.g.}, Kurtz, \textit{supra} note 171, at 1066-67.

173. \textit{See United States v. Lopez, 514 U.S. 549, 567 (1995).} As even the nationalist Chief Justice John Marshall recognized, it makes little sense to have a Constitution which expressly enumerates the powers allocated to the federal government if those powers are interpreted in such a way as to leave no powers to the states. \textit{See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824) ("The enumeration presupposes something not enumerated . . . ."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("The [federal] government is acknowledged by all to be one of enumerated powers.")}

174. It is true that federalism is never expressly mentioned or set out in the unamended Constitution. Scholars suggest that the founders left such references to federalism out of the Constitution because there was no perceived need for them. \textit{See RAOUl BERGER, FEDERALISM: THE FOUNDERS DESIGN 10-12 (1987).} It was obvious to the founders that the Constitution was a compact of the people who \textit{consented} to be governed by the limited powers enumerated to the federal government by the Constitution. \textit{See id.; see also THE FEDERALIST NO. 22, at 199 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) ("The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE.").} To allow the Court to interpret this power in a limitless way therefore abrogates the \textit{consent} of the governed and makes the Constitution no longer legitimate. \textit{See BERGER, supra, at 10-12.} Therefore, the limitations placed upon the federal government in the Constitution themselves suggest the federalism structure. \textit{See id.} Moreover, the text of the Tenth Amendment, see U.S. CONST. amend. X, when read with the understanding that the creation of the federal government postdated the creation of the various state governments, \textit{see BERGER, supra, at 21-47}, indicates that the Framers of the Constitution intended a federalist structure with the states retaining most of the governmental powers. \textit{See id. at 20.}

Suggesting that the Court must enforce federalism limits on Congress's use of power assumes, of course, that the Court can and should use judicial review to strike down statutes passed in contravention of these limits. This is certainly a contestable assumption. \textit{See generally JESSIE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175 (1980) (explaining the Federalism Proposal, which states that judicial review is not the mechanism for remedying federal intrusion into states' rights); Herbert Wechsler, The Political Safeguards of Federalism—The Role of the States in the Composition and Selection of the Federal Polity, 1961 U. CHICAGO L. REV. 295 (1961).}
federal government's power will destroy the "healthy balance of power between the States and Federal Government [and increase] the risk of tyranny and abuse from either front."175

This third factor—burden on interstate commerce weighed against the intrusion into states' sovereignty—is probably best interpreted as a sliding scale.176 The higher the burden a given activity has on interstate commerce, the more likely the regulation of that activity will be sustained as a constitutional use of Congress's commerce power.177 Similarly, the smaller the intrusion a congressional regulation has into an area retained by the states, the more likely it is that the regulation will be sustained. In the case of VAWA, the burden on interstate commerce from crimes of violence motivated by gender is so minimal and remote and the intrusion into areas reserved to the states so great that VAWA simply cannot stand.
Response to Civil Rights Legislation Argument

Those in support of VAWA's constitutionality rely on the fact that VAWA is a civil rights statute. Indeed, on several occasions the Court has sustained civil rights legislation passed under the Commerce Clause. This argument therefore concludes that VAWA should be sustained. The Lopez Court itself, however, implicitly rejected this argument. The Lopez Court reviewed the structure and history of the Commerce Clause and established a framework for analyzing cases arising under it. In this framework, the Court interpreted its Heart of Atlanta decision as affirming Congress's power to regulate the "channels of interstate commerce" because the statute at issue in that case prevented discrimination by hotels that operate on the interstate highways and byways. Additionally, the Court's decision in Katzenbach v. McClung rejected a Commerce Clause challenge to the 1964 Civil Rights Act because it regulated instrumentalities in interstate commerce. In McClung, the Court sustained the 1964 Civil Rights Act as a constitutional use of the commerce power as it applied to Ollie's Barbecue because the restaurant "serv[ed] food, a substantial portion of which has moved in interstate commerce."

VAWA differs significantly from the 1964 Civil Rights Act. VAWA regulates no instrumentality or thing in interstate commerce. Neither does VAWA regulate the channels of interstate commerce. Rather, VAWA only gives a private victim a cause of action against individuals who have committed a crime of violence motivated by gender animus. The framework the Lopez Court used in its Commerce Clause analysis therefore implicitly refutes this civil rights argument and suggests that the Court is unlikely to sustain VAWA on that ground.

179. See, e.g., Sunstein et al., supra note 30, § 6.1.
180. See supra notes 114-33 and accompanying text.
183. See Heart of Atlanta, 379 U.S. at 241.
185. See id. at 304.
186. Id.
Responses to the Rational Basis Argument

Some jurists and commentators point to the fact that the *Lopez* Court did not explicitly overrule any prior precedent and accordingly conclude that *Lopez* simply affirms the rational basis test used in prior decisions. Using this rational basis test, the Court reviews congressional action under the Commerce Clause to determine whether Congress had a rational basis for concluding that the regulated activity substantially affects interstate commerce. If Congress had a rational basis for concluding that the regulated activity substantially affected interstate commerce, then the Court defers to Congress’s judgment and sustains the regulation. Following this line of argument, as long as Congress had a rational basis for concluding that violence against women substantially affects interstate commerce, courts should defer to that judgment and sustain VAWA.

This argument is problematic. Although it is true that the *Lopez* Court did not overrule any prior precedents, the Court nevertheless indicated that it was unwilling to extend the deference previously given to Congress in such a way as to delimit the Constitution because allowing Congress to regulate crimes motivated by gender opens the door to the federalization of every violent crime.

188. See, e.g., Sunstein et al., supra note 30, § 6:15 (“The collective message from the post-*Lopez* jurisprudence is that rational review will continue to be deferential, but not meaningless.”); Christine Conover, Student Recent Development, *The Violence Against Women Act: Stabilizing Commerce Through a Civil Rights Remedy*, 1 J. GENDER RACE & JUST. 269, 272 (1997) (“A different interpretation of the legislative findings on gender-motivated violence and of *Lopez* will show how courts should uphold VAWA under the Commerce Clause.”); Peter J. Liuzzo, Comment, *Brzonkala v. Virginia Polytechnic and State University: The Constitutionality of the Violence Against Women Act—Recognizing that Violence Targeted at Women Affects Interstate Commerce*, 63 BROOK. L. REV. 367, 386-87 (1997) (arguing that VAWA is a constitutional use of Congress’s commerce power because *Lopez* requires a court to examine Congress’s findings to determine if Congress could rationally conclude that violence motivated by gender affects interstate commerce and the findings suggest that Congress could so rationally conclude).


190. See *Hodel*, 452 U.S. at 305; *Heart of Atlanta*, 379 U.S. at 301; *McClung*, 379 U.S. at 304-05.

191. These commentators argue that Congress’s findings, see S. REP. NO. 103-138, at 37 (1993), prove that Congress had a rational basis for concluding that violence against women substantially affects interstate commerce. See Sunstein et al., supra note 30, § 6:16; Conover, supra note 188, at 276-78; Liuzzo, supra note 188, at 391-92.

deference to Congress in such a way as to delimit the Constitution. "This," the Lopez Court reiterated, "we are unwilling to do." The Lopez Court found that the substantial effects rationale used to support the GFSZA, which portends no limits to Congress's commerce power, is not rational when viewed in the context of the limited powers enumerated in our constitutional scheme. The unlimited rationale used to support VAWA is similarly not rational when viewed through the same process.

VAWA fails constitutional muster under the Commerce Clause because VAWA fails all three factors used by the Lopez Court in its "substantial effects" reasoning. VAWA regulates a non-commercial activity, lacks a jurisdictional requirement, and intrudes too far into areas reserved to the states while addressing activity that burdens interstate commerce too remotely.

Congress Overstepped Its Fourteenth Amendment Authority

Congress passed VAWA to remedy two equal protection problems. First, Congress passed VAWA to provide private victims of crimes of violence motivated by gender a cause of action to remedy this harm. Second, Congress passed VAWA as an effort to correct states' differential treatment of crimes of violence motivated by gender. The Constitution does not authorize Congress to pass VAWA for the first purpose because VAWA proscribes purely private conduct. The Constitution also does not authorize Congress to pass VAWA for the second purpose, but for a different reason. In the second instance, the means used by Congress in passing VAWA are simply not proportionate to the end. VAWA is therefore an unconstitutional use of Congress's enforcement power.

Admittedly, some of our prior cases have given great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

Id. at 567-68 (citations omitted).
193. See supra note 77.
194. See id.
196. See supra note 77.
VAWA Regulates Private Conduct

Section 5 of the Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]." Section 1 of the Fourteenth Amendment provides, in relevant part, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Among other things, the Enforcement Clause gives Congress the authority to pass any legislation to enforce Section 1's proscription against a state's denial of the equal protection of the laws. Congress passed VAWA pursuant to this power.

It is well settled that any violation of the equal protection rights guaranteed by the Fourteenth Amendment requires state action. In 1883, the Court held that "the Fourteenth Amendment

200. Id. § 1.
201. Some scholars suggest that Congress's authority under Section 5 of the Fourteenth Amendment is broader than both Congress's spending power or commerce power. See Ronald D. Rotunda, The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores, 32 IND. L. REV. 163, 171 (1998). Congress's power may be broader under Section 5 of the Fourteenth Amendment than under the Commerce Clause because Congress can use its Section 5 power to override the Eleventh Amendment. See id. at 168-70. Moreover, although it cannot pass laws under its commerce power that are not generally applicable, Congress can do so under its Section 5 power. See id. at 169. In addition, Congress is not limited to regulating only areas within interstate commerce under Section 5 of the Fourteenth Amendment. See id. Congress can use its Section 5 power without having to spend any money, and thus by using its Section 5 power, Congress may be able to pass legislation that has a great deal of political benefits without having to suffer the political costs that attach to spending legislation. See id. at 163-69.
202. For the reasons Congress concluded that it had the power to pass VAWA under the Enforcement Clause, see supra note 77.
203. See City of Boerne v. Flores, 521 U.S. 507, 515-16 (1997) (affirming the state action requirement); NCAA v. Tarkanian, 468 U.S. 179, 191 (1988) ("As a general matter the protections of the Fourteenth Amendment do not extend to 'private conduct abridging individual rights.' . . . Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law."); see also Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982) and Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)); United States v. Guest, 383 U.S. 745, 755 (1966) ("The Equal Protection Clause does not . . . add anything to the rights which one citizen has under the Constitution against another."). This has been the view of the Court from the beginning. . . . It remains the Court's view today." (quoting United States v. Cruikshank, 92 U.S. 542, 554-55 (1876)); The Civil Rights Cases, 109 U.S. 3, 10-11 (1883) (holding that the Fourteenth Amendment only applies to state action); United States v. Harris, 106 U.S. 629, 639 (1883) ("The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it remains there."); Virginia v. Rives, 100 U.S. 313, 318 (1879) ("The provisions of the Fourteenth Amendment of the Constitution . . . have reference to State action exclusively, and not to any action of private individuals."); see also CHEMERINSKY, supra note 102, at 212 (maintaining that "the Court [in the Civil Rights Cases] broadly
... is prohibitory... upon the states... Individual invasion of individual rights is not the subject-matter of the Amendment."\(^{204}\)

This rule that Section 1 of the Fourteenth Amendment does not extend to private action without any state involvement is still good law.\(^{205}\) Any legislation passed in an effort to enforce the equal protection guarantees of Section 1, therefore, must be aimed at purposeful denials of equal protection caused by government action or by actors acting under the color of government action.\(^{206}\)

Because Section 1 of the Fourteenth Amendment only applies to activity involving state action, the Section 5 enforcement power can be used only to regulate purposeful discrimination involving state action.\(^{207}\) VAWA, however, is a regulation which by its terms applies to purely private conduct.\(^{208}\) VAWA imposes liability upon declared that the Fourteenth Amendment only applies to government action and that therefore it cannot be used by Congress to regulate private behavior").

205. \textit{See} CHEMERINSKY, \textit{supra} note 102, at 212-13 ("The \textit{Civil Rights Cases} remain good law in implicitly establishing that the provisions of § 1 of the Fourteenth Amendment apply only to government action, not to private conduct.").
206. Indeed the Court recognized this limitation:

\[\text{T}he \text{ last section of the [Fourteenth Amendment]} \text{ invests Congress with power to enforce it by appropriate legislation. To enforce what?... It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action... It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers."
\textit{The Civil Rights Cases}, 109 U.S. at 11 (emphasis added).

207. \textit{See} id. It is well settled that purposeful discrimination is required for any violation of the Equal Protection Clause. \textit{See} Personnel Adm'n v. Feeney, 442 U.S. 256, 286 (1979) (holding that the law needed to reflect a purpose to discriminate); Village of Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").\text{; Washington v. Davis, 426 U.S. 229, 239 (1976) (stating that "a purpose to discriminate must be present" (quoting Akins v. Texas, 325 U.S. 398, 403-04 (1945))). This Note assumes without argument that VAWA actually remedies purposeful discrimination. Whether VAWA actually does so is, however, contestable. VAWA attempts to remedy gender bias and the differential treatment of crimes of violence motivated by gender in state and federal courts. See S. REP. NO. 103-138, at 29 (1993). State and federal courts' gender biases and their differential and inadequate treatment of crimes of violence motivated by gender are certainly troubling, but they are probably not purposeful. Indeed, though Congress made an impressive array of findings relating to gender bias and inadequate treatment of gender-motivated violent crimes in state and federal courts, nowhere in these findings did Congress indicate that this discrimination was purposeful. \text{See id.}

208. VAWA provides a civil rights cause of action against individuals who commit gender-motivated violent crimes. \text{See} 42 U.S.C. § 13981(c) (1994). VAWA in no way limits this cause of action to plaintiffs who are state actors or who are acting under the color of state law. \text{See id.} Thus, a purely private plaintiff may bring a VAWA cause of action. Additionally, VAWA does not require a plaintiff to prove that the defendant who committed the gender-motivated crime of violence was a state actor or had any nexus to state action. \text{See id.} Therefore,
any "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." Congress's imposition of liability to any person "including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State" indicates that Congress intended to regulate both purely private conduct and state action. Otherwise, why would Congress parsimoniously distinguish between purely private individuals and individuals "who act[] under color of any statute, ordinance, regulations, custom, or usage of any State"? VAWA therefore is an unconstitutional use of Congress's enforcement power because VAWA regulates purely private conduct.

Activity with Nexus to State Action

It may be argued that the Court has long recognized, under the Fourteenth Amendment, that Congress is not limited to regulating activity solely involving state action. Indeed, the Court has held on many occasions that Congress can regulate the activities of private individuals so long as those individuals are acting under the color of state law, acting in concert with a state actor, or have some state authority to act. In Brzonkala, however, neither defendant Morrison nor Crawford acted in concert or colluded with any state official to violate Brzonkala's rights. Neither did Morrison nor Crawford have state authority to act as they did. Indeed, the fact that Virginia Tech punished Morrison for his behavior suggests that the State took no part in the deprivation of Brzonkala's civil rights.

VAWA allows a purely private plaintiff to sue a purely private defendant and others in federal court for a civil rights cause of action. Indeed, Christy Brzonkala herself was a purely private plaintiff suing, among others, a purely private defendant (Morrison) under VAWA. See Brzonkala v. Virginia Polytechnic & State Univ., 169 F.3d 820, 827 (4th Cir. 1999) (en banc).

209. 42 U.S.C. § 13981(c).
210. Id. (emphasis added).
211. Id.
214. See id.
215. See id. at 782.
The only arguable state action involved in VAWA is actually state inaction.\textsuperscript{216} Essentially, this argument suggests that because the states have been inadequate in preventing and prosecuting crimes of violence motivated by gender animus,\textsuperscript{217} the states are complicit in the violation of equal protection rights and are therefore causing harm by not acting. Yet, the Court expressly has rejected this complicity-is-action argument.\textsuperscript{218} Moreover, the Court in \textit{Lugar v. Edmondson Oil Co.}\textsuperscript{219} held that, in order to be considered state action, a private party's actions must be "fairly attributable to the State."\textsuperscript{220} In \textit{Lugar}, the Court held that the joint participation between a private actor and the state courts\textsuperscript{221} was enough to make the private party's actions fairly attributable to the State.\textsuperscript{222} In Brzonkala's case, though, there is no use of state procedures or joint action with a state actor. Morrison and Crawford

\textsuperscript{216} It may be argued that Congress passed VAWA to attack ineffective state remedies for victims of violence motivated by gender. Indeed, this is the argument that Congress itself articulated in support of its use of Section 5 power. \textit{See} S. Rep. No. 103-138, at 29 (1993) ("State and Federal criminal laws do not... adequately provide victims of gender-motivated crimes the opportunity to vindicate their interests."). This argument relies on cases like \textit{United States v. Guest} and \textit{Shelley v. Kraemer}, in which the court found that direct state action was not required. \textit{See} United States v. Guest, 383 U.S. 745, 756-57 (1966) (holding that allegations of private individuals' use of the state police and judiciary was enough to implicate the Fourteenth Amendment and prevent dismissal of the claim); Shelley v. Kraemer, 334 U.S. 1, 21-23 (1948) (holding that state court's enforcement of racial covenant violated the Equal Protection Clause of the Fourteenth Amendment). In both of those cases, however, some specific state action existed, it just was not direct. In \textit{Guest}, the state action was the action of the state police and judiciary that facilitated the racially discriminatory conduct of private individuals. \textit{See Guest}, 383 U.S. at 746-47. In \textit{Shelley}, the state action was the action of the court in enforcing a racially restrictive covenant. \textit{See Shelley}, 334 U.S. at 19. By contrast, VAWA allows a civil rights remedy because states are not acting at all, not because they are indirectly acting in a way to deprive individuals of their rights secured by the Equal Protection Clause.

\textsuperscript{217} \textit{See} S. Rep. No. 103-138, at 29 ("State and Federal criminal laws do not adequately protect against the bias element of gender-motivated crimes, which separates these crimes from acts of random violence, nor do those laws adequately provide victims of gender-motivated crimes the opportunity to vindicate their interests.")

\textsuperscript{218} \textit{See Flagg Bros., Inc. v. Brooks}, 436 U.S. 149, 164-65 (1978), in which the Court wrote that:

\textit{This Court... has never held that a State's mere acquiescence in a private action converts that action into that of the State... [Certain] cases clearly rejected the notion that our prior cases permitted the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as "authorization" or "encouragement."}

\textit{Id.} (citations omitted).

\textsuperscript{219} 457 U.S. 922 (1982).

\textsuperscript{220} \textit{Id.} at 937.

\textsuperscript{221} \textit{Id.} at 941-42 (holding that the use of prejudgment attachment procedures offered by the state courts was enough to make a private party liable under 42 U.S.C. § 1983's state action requirement).

\textsuperscript{222} \textit{See id.}
acted individually and contrary to the laws of the State and the University. If the State or some state official had been involved, then Brzonkala likely would have a valid claim under other civil rights statutes. Morrison and Crawford's actions therefore are not fairly attributable to the State, and the state action requirement is not satisfied.

Broad Interpretation of Section 5

Many commentators suggest that VAWA is a constitutional exercise of Congress's enforcement power because, whereas Section 1 of the Fourteenth Amendment is limited to state action, Section 5 is broader in that it allows Congress to remedy or prevent equal protection violations. VAWA's purpose is to remedy states' differential treatment of victims of crimes motivated by gender and to ensure equal treatment of these victims in the future. Therefore, these commentators contend, VAWA is a constitutional exercise of the enforcement power because Congress is remediying and preventing equal protection violations. These commentators point to the Court's opinions in United States v. Guest and Katzenbach v. Morgan in support of the contention that the enforcement power allows Congress to regulate private conduct, notwithstanding Section 1's state action limitation.

224. See id.
226. See, e.g., 1 ROTUNDA & NOWAK, supra note 102, at 525-26; Danielle M. Houck, Note, VAWA After Lopes: Reconsidering Congressional Power Under the Fourteenth Amendment in Light of Brzonkala v. Virginia Polytechnic and State University, 31 U.C. DAVIS L. REV. 625, 637-41 (1998); Chris A. Rauschl, Note, Brzonkala v. Virginia Polytechnic and State University: Violence Against Women, Commerce, and the Fourteenth Amendment—Defining Constitutional Limits, 81 MINN. L. REV. 1601, 1633-39 (1997). See generally R.J. HARRIS, THE QUEST FOR EQUALITY 33-56 (1960) (arguing that the legislative history of the adoption of the Fourteenth Amendment suggests that Congress intended Section 5 to be a broad grant of power); Laurent B. Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 YALE L.J. 1353, 1356-57 (1965) (arguing that the Framers of the Fourteenth Amendment thought that Section 5 would give them the power to reach private discrimination).
228. See Houck, supra note 226, at 637-41; Rauschl, supra note 226, at 1633-39.
231. See Houck, supra note 226, at 637-41; Rauschl, supra note 226, at 1633-39; see also 1 ROTUNDA & NOWAK, supra note 102, § 19.2, at 525-29 (indicating that the Guest and Morgan decisions interpreted Section 5 broadly enough to include regulation of private action).
Relying on *Guest* and *Morgan* is dubitable for two reasons. First, the language in *Guest* and *Morgan* used to support this broadening of power is dictum. Such dictum, of course, cannot be relied upon because it was not essential to the Court's decision. Second, and more importantly, subsequent decisions by the Court call into question the idea that Congress can regulate private activity under the enforcement power. In *Oregon v. Mitchell*, the Court scaled back the broad reasoning of *Morgan*. The *Mitchell* Court signaled that it was unwilling to let Congress use the Section 5 enforcement power as a way to expand the limited powers enumerated to Congress in Article I.

Whatever doubt was left about whether the enforcement power allows Congress to regulate private conduct was answered definitively by the Court in its 1997 opinion in *City of Boerne v. Flores*. The *Flores* Court wrote that, "[t]here is language in our opinion in *Katzenbach v. Morgan* which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in [Section] 1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one." Indeed, *Flores* seriously refutes the proposition that Section 5 can be used to regulate private conduct. *Flores* prompted one prominent scholar to recognize that "[one important implication of *Flores* is that it puts even more seriously in question Congress's power under Section 5 to regulate private conduct, including private acts of religious, racial or sex discrimination."

232. See *Morgan*, 384 U.S. at 650 (construing Section 5 to grant Congress "the same broad powers expressed in the necessary and proper clause" in a way that was not necessary to decide the case); *Guest*, 383 U.S. at 755 (refusing to reach the question as to what other kinds of broader legislation Congress could pass under Section 5); 1 *ROTUNDA & NOWAK*, supra note 102, § 19.2, at 526-28.


234. See id. at 112, 118, 124-31 (striking down a section of the Voting Rights Act Amendments of 1970 because Congress used Section 5 as a backdoor way to amend the Constitution without the cumbersome Article II amendment process); see also 1 *ROTUNDA & NOWAK*, supra note 102, at 531 ("Although the fragmented *Morgan* Court does not provide a precise guide to the proper limitations, a majority did reject the contention that section 5 authorizes Congress to define the substantive boundaries of the equal protection clause by invalidating state legislation.").


237. Id. at 527-28 (citations omitted).


239. Gardbaum, supra note 238, at 679 (emphasis added). Gardbaum further recognizes that the power to regulate private conduct
doubt that the enforcement power does not authorize Congress to regulate purely private conduct in the name of the Fourteenth Amendment. Even though Congress acted with good intentions in trying to provide victims of gender-motivated violence a cause of action, VAWA is an unconstitutional extension of Congress's enforcement power because it regulates only purely private conduct.

Yet Congress passed VAWA for another important equal protection goal: to remedy the differential treatment of crimes of violence motivated by gender by the various states' criminal justice systems. Although this remedial purpose clearly meets the state action requirement of the Fourteenth Amendment, VAWA is not proportionate to this remedial purpose. VAWA is therefore an unconstitutional use of Congress's enforcement power.

**Proportionality Test**

The Supreme Court has long recognized that Section 5 authorizes Congress to pass legislation remedying differential treatment. Accordingly, one may think that VAWA is a constitutional use of Congress's enforcement power if it remedies the differential treatment given to violence motivated by gender. The problem with VAWA as a remedy to the differential treatment afforded by states is not the object, but the means used. The means used by Congress, VAWA, is so out of proportion to the object of the legislation that it cannot be sustained under Section 5.

The Court recently established a proportionality test to evaluate constitutional action under Section 5. Under this test, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."
end. The Flores Court then used this test to strike down the Religious Freedom Reconstruction Act (RFRA) because "RFRA [was] so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." RFRA—the means—was so out of proportion to the supposed remedial or preventive object—burdening the free exercise of religion—that the Court was unwilling to sustain RFRA as a constitutional use of the enforcement power.

VAWA also fails this proportionality test. The object of VAWA—remedying and preventing the differential treatment of crimes of violence motivated by gender—is a constitutional object. The means used, however, are not congruent with the object because the civil rights provision of VAWA provides no remedy to the deficiencies in the state systems. VAWA only allows a victim of a crime of violence motivated by gender to have a civil rights cause of action. VAWA does not correct the current equal protection deficiencies; instead, VAWA allows a victim to use that deficient system in a different cause of action than those already provided by state law.

245. Flores, 521 U.S. at 520.
247. Flores, 521 U.S. at 532.
248. See id.
249. The Equal Protection Clause prevents states from treating similarly situated individuals differently. See 1 ROTUNDA & NOWAK, supra note 102, § 18.8, at 87-102.
250. See Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779, 800 (W.D. Va. 1996). The District Court reasoned effectively that VAWA does not remedy the current deficiencies because: The statute is overbroad: many women who do not suffer Fourteenth Amendment violations at the hands of the state system would still have a VAWA claim. A woman in a state with fair rape laws who is raped and whose rapist receives the maximum sentence may still have a VAWA claim. That woman may receive compensation via VAWA despite having suffered no denial of her equal protection rights. VAWA is also too narrow: many women who suffer clear violations of their Fourteenth Amendment rights would not have a VAWA remedy, because the crime was not based on the woman’s gender. These women would not receive any compensation despite the fact that the states clearly denied them equal protection of the laws.
Id.
252. See supra text accompanying notes 90-91.
VAWA is both too broad and too narrow.\(^{253}\) VAWA is too broad because it allows any victim of a gender-motivated crime of violence to sue for a Fourteenth Amendment violation, regardless of whether any state action was involved.\(^{254}\) VAWA is too narrow because a person may suffer a Fourteenth Amendment violation by being victimized by a crime of violence motivated by her membership in a suspect classification that has nothing to do with gender.\(^{255}\) Thus, because VAWA is too broad and too narrow, it does not remedy the problems cited by Congress.\(^{256}\) VAWA therefore cannot be sustained under the state differential treatment remedy theory. Simply put, VAWA is “so out of proportion to [the] supposed preventive or remedial object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”\(^{257}\)

It may be argued that, unlike RFRA, VAWA is proportionate to Congress’s legitimate ends and is therefore a constitutional use of the enforcement power.\(^{258}\) This argument suggests that remediying current biases against women who are victims of violence motivated by gender is a legitimate Fourteenth Amendment goal.\(^{259}\) This argument further suggests that VAWA is proportionate to that goal and that “VAWA displaces no state law.”\(^{260}\) Therefore, this argument goes, VAWA is consistent with the constitutional text and design.

Although this argument at first may look seductive, the argument’s conclusion relies on a premise which may not be true. That is, this argument unjustifiably discounts VAWA’s intrusiveness into areas of state control.\(^{261}\) VAWA regulates intrastate criminal conduct;\(^{262}\) even though only states have the general police power to regulate for the health, safety, and morals of its citizens.\(^{263}\) Thus, Congress has entered into areas of regulation that the Framers themselves intended to be left to the states.\(^{264}\) This

\(^{253}\) See supra note 250.
\(^{254}\) See id.
\(^{255}\) See id.
\(^{257}\) City of Boerne v. Flores, 521 U.S. 507, 532 (1997).
\(^{258}\) See Sunstein et al., supra note 30, §§ 6-36.2, 6-36.3 (“VAWA suffers neither of the defects identified by the Court in Flores: the legislative record leaves no doubt that the VAWA was enacted for a purpose within the purview of the Fourteenth Amendment, and the remedy chosen is entirely nonintrusive.”).
\(^{259}\) See id. § 6-36.3.
\(^{260}\) Id.
\(^{261}\) See id.
\(^{262}\) See supra notes 185-89 and accompanying text.
\(^{263}\) See supra note 173 and accompanying text.
\(^{264}\) See supra note 107 and accompanying text.
intrusion into spheres of state control sets a precedent for further intrusion via the Fourteenth Amendment into areas of state control. This precedent would turn the enforcement power of the Fourteenth Amendment into a general federal plenary power, and this kind of nationalistic expansion is precisely what the current Supreme Court has rejected in several recent cases. Moreover, such a precedent for national intrusion threatens the merging of "[t]his separation of the two spheres," and therefore threatens the "Constitution's structural protections of liberty."

The enforcement power does not authorize Congress to regulate purely private conduct in the name of the Fourteenth Amendment. The enforcement power also does not authorize Congress to pass legislation when the constitutionally appropriate object of such legislation is incongruent with the means used. VAWA contravenes both of these limits. VAWA is therefore not a constitutional use of Congress's enforcement power.

NORMATIVE PRINCIPLES AND VAWA

Of all the aspects of political science and political theory used by the Framers when drafting the Constitution, federalism was the most important and unique. It makes sense that these Framers would, accordingly, draft various provisions of the Constitution to reflect this uniquely American idea. The Framers did so for good reason. They feared tyrannical government because of their bitter


266. Printz, 521 U.S. at 920.

267. Id.


269. See U.S. CONST. art. I (enumerating limited powers to the federal government in order to leave the rest to the states); U.S. CONST. art. I, § 4, cl. 1 (giving the powers to designate the time, manner, and place for holding elections to the states); U.S. CONST. art. I, § 9, cl. 6 (prohibiting any preference for the "[p]orts of one State over those of another"); U.S. CONST. art. IV (preventing states from intruding upon or discriminating against each other); U.S. CONST. art. VII (requiring the consent of at least nine states in order to ratify the Constitution); U.S. CONST. amend. X (reserving all rights and powers to the states which are not already limited in the Constitution or enumerated to the federal government).
experiences under British rule. Moreover, the Framers realized that a legitimate democracy requires consent of the governed, and this consent is best secured by making the government as close to the people as possible and by ensuring robust participation in the political system.

The normative principles on which the Framers built this constitutional system are equally important today. This part examines the normative principles of liberty, fidelity, and efficiency and suggests that these values are best served by the federalist government that the Framers created. Through the prism of these normative principles, this section demonstrates why Congress should not have the power to pass legislation like VAWA. This part concludes that allowing Congress to pass legislation like VAWA destroys the federal balance necessary to protect liberty, to maintain fidelity to the social contract secured by the Constitution, and to have efficient governance.

**Protects Individual Liberty**

Though today's modern world certainly differs from the world of the Framers, very good reasons still exist for maintaining a strong commitment to federalism. To begin with, federalism enhances freedom by providing a double layer of protection against tyranny. Maintaining two equally-balanced systems of government ensures greater protection for individual liberties because "[t]he different governments will control each other, at the same time that each will be controlled by itself." This double layer of

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273. See *Lopez*, 514 U.S. at 576; *The Federalist* No. 51, supra note 1, at 356-57.

274. *The Federalist* No. 51, supra note 1, at 357.
protection only works when both sides of the balance—state and federal—have enough power to prevent “abuse from either front.”

Congress should not have the power to pass legislation like VAWA because it upsets this federalist balance. When Congress regulates in areas traditionally belonging to the state—areas such as criminal justice—then the federalist balance begins to tip from the state side to the federal side of the scale. Although just allowing Congress to creep into the states’ territory with VAWA will not likely upset this balance, the current movement to find national solutions to all kinds of problems previously left to the states may severely upset the federalist balance. The Court should reject this nationalist creep, evidenced by the passage of VAWA, because this reallocation of power from the states to the federal government will result in the states not having enough power to prevent abuse.

276. See supra note 107 and accompanying text.
278. See William H. Rehnquist, The 1998 Year-End Report of the Federal Judiciary, THE THIRD BRANCH, Jan. 1999 (visited Apr. 8, 2000) <http://www.uscourts.gov/ttb/jan99/ttb/january1999.html> (“The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the Judiciary’s resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system.”).
279. See Printz v. United States, 521 U.S. 898, 920 (1997) (ensuring that state governments will represent and remain accountable to their citizens); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding that the Religious Freedom Restoration Act exceeded Congress’s Fourteenth Amendment powers); United States v. Lopez, 514 U.S. 549, 576-78 (1995) (Kennedy, J., concurring) (explaining that the balance between national and state power is entrusted to the political process); Ashcroft, 501 U.S. at 453-59 (discussing federalism’s checks on abuses of government power); THE FEDERALIST NO. 51, supra note 1, at 367.
Fidelity and the Social Contract

A second reason for maintaining a strong commitment to federalism is that the governed consented to a balanced federalist system. The Framers, influenced by the contractarian idea of government, understood the Constitution as a social contract or compact amongst the states. The drafters intended this social contract to be binding upon future generations unless breached. Moreover, this social contract could be changed (amended) as long as enough of the parties to the contract consented to the change. A material term of the contract was that the states and federal government would exist as co-equal sovereigns balanced in a federalist system. Alexander Hamilton himself recognized that this federalist balance was essential to the consent of the governed.

Because the federal balance is a material part of the contract, a destruction of the federalist balance constitutes material breach. Put another way, if the federal government usurps powers left to the states or if the states usurp powers left to the federal government without amending the original contract, then the federalist

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281. See THE FEDERALIST NO. 39, at 283 (James Madison) (Benjamin Fletcher Wright ed., 1961) (arguing that the mutual assent of the states was necessary to the formation of the union).


283. See U.S. CONST. art. V (providing for an amendment process).

284. Indeed this idea is reflected in the four corners of the Constitution. See supra note 272. Moreover, scholars suggest that explicit references to federalism or a federalist balance were left out of the four corners of the document because the Framers thought the balance so obvious that inclusion was unnecessary. See supra note 174.


286. Some may argue that the adoption of the Civil Rights Amendments already usurped the federalist balance created by the Framers. To an extent, this is true. However, the parties bound by the contract—the people—ratified the changes made to the federalist balance through the contractually-provided Article V amendment process. Therefore, the adoption of these amendments, although upsetting the original federalist balance, does not call the legitimacy of the social contract into question because the parties "agreed" to the changes.
balance provision of the social contract has been breached. Just like a regular contract, a material breach of the social contract means that the contract is no longer binding upon the parties.\(^7\) Thus, if the federal government upsets the federal balance by passing legislation which infringes upon areas of state control, the binding nature of the social contract is called into question. This means that no party to the social contract—the Constitution—is obligated to follow the Constitution and that the very core of our civil society is up for grabs.

The important question in this social contract framework is how much of a disruption of the federalist balance is needed to consider the breach of the social contract material. Passing VAWA alone is not enough. Yet the current trend of finding national solutions for problems that previously were left to the states\(^8\) is alarming for the very reason that, when viewed together, all of these national solutions may be enough to constitute a material breach of the social contract because the national-power side of the scale has more weight than the state-power side. When this material breach happens, the very legitimacy of our civil government is affected. Congress therefore should not have the authority to pass VAWA because it takes our society further down the road to materially breaching the social contract called the Constitution.

**Efficiency, Externalities, and Federalism**

A third reason for maintaining a strong federalist balance sounds in economic analysis—specifically externalities.\(^9\) Professor Dukeminier explains:

Externalities exist whenever some person, say X, makes a decision about how to use the resources without taking full account of the effects of the decision. X ignores some of the effects—some of the costs or benefits that would result from a particular activity, for example—because they fall on others. They are "external" to X, hence the label *externalities*.\(^0\)

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\(^7\) See supra note 282.

\(^8\) See supra note 279.


\(^0\) JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 49 (3d ed. 1993). The principle of externalities is an important concept in the economic analysis of the law school of thought. For more information on externalities and economic analysis of the law in general, see ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (1988); WERNER Z. HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS (2d ed. 1979); ROBIN PAUL MALLOY, LAW AND
This theory suggests that the self-sovereign states originally ceded power to the federal government in order to minimize the social costs of negative externalities and maximize the social benefits of positive externalities. According to this theory, the proper role of the sovereigns—the states and the federal—should be determined by evaluating which sovereign is in the best position to internalize and thereby minimize the costs of negative externalities. If a particular activity negatively affects more than one state, such as pollution of a river that flows from state-to-state, then the federal government is the better sovereign to solve the problem because the states lying upstream will have little or no incentive to act (the pollution does not stay in their state) whereas the states downstream will not be able to act effectively because of the large transaction costs. When the state is forced to take account of all the burdens of a given activity by internalizing these externalities (e.g. intrastate crime), however then the state is the better sovereign to solve the problem.

This economic theory suggests that VAWA is an inappropriate action for the federal government to take. The social costs of crimes of violence motivated by gender are suffered by the states. These social costs include victimized citizens, fear of crime and public safety, increased demand for stronger law enforcement, and more litigation. Congress, however, has taken it upon itself to pass VAWA in order to solve these burdens suffered by the states without having to take "full account of the effects of [its] decision." This is inefficient because "the costs and the benefits are not fully realized by the same group." In the federalism context, Congress should not have the power to enact legislation like VAWA because it allows the states to ignore the burdens that intrastate crimes of violence motivated by gender impose while receiving the benefits from the federal legislation. The states,


292. See SHAPIRO, supra note 289, at 83; Ulen, supra note 289, at 928-29.


294. See SHAPIRO, supra note 289, at 83-84; Ulen, supra note 289, at 929.

295. DUKEMINIER & KRIER, supra note 290, at 49.

296. SHAPIRO, supra note 289, at 83.
therefore, do not internalize the externalities created by crimes of violence motivated by gender. This makes the states less accountable and responsible for their own problems and encourages states to rely on the federal government for solutions rather than taking care of the problem themselves.

Whatever the state of the Supreme Court's jurisprudence relative to whether VAWA is an unauthorized congressional action, Congress should not have the power to pass regulations like VAWA which aim at purely intrastate activity. Such intrusive federal power threatens to upset the important federalist balance necessary for good governance. Upsetting this federal balance threatens individual liberty by giving the federal sovereign too much power and the states too little power. The states are thus unable to prevent abuse by the federal government.297 Upsetting this federal balance also breaches the social contract entered into with the ratification of the Constitution. Breaching this social contract is troubling because it calls the very legitimacy of our governing system in question. Finally, the economic analysis theory of federal-state power suggests that the federal government should not have the authority to regulate with legislation like VAWA because it prevents the states from internalizing the externalities involved with the regulated activity. Congress therefore should not have the power to enact VAWA.

CONCLUSION

Congress passed the Violence Against Women Act for good reason. Violence against women certainly occurs too often and has too many terrifying consequences for any responsible government not to take action in order to minimize the impacts of such activity. The civil rights provision of VAWA is simply the wrong solution.

VAWA is the wrong solution for two reasons. First, Congress does not have the authority to pass VAWA. The Commerce Clause, although broad, does not authorize Congress to regulate activity that has a minimal burden upon interstate commerce and that intrudes too far into areas reserved to the states. Moreover, Section

5 of the Fourteenth Amendment does not authorize Congress to enact legislation like VAWA because VAWA regulates purely private conduct and because the means used are not proportionate to the end. Second, VAWA is the wrong solution because it upsets the federalist balance necessary for good governance. A society that cherishes individual liberty and limited government should not allow Congress to pass legislation like VAWA because the "double security... to the rights of the people" will be threatened by unbalancing our federalist system.

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298. THE FEDERALIST NO. 51, supra note 1, at 357.