Nos. 99-5; 99-29

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTONIO J. MORRISON, *et al.*,

Respondents.

CHRISTY BRZONKALA,

Petitioner,

v.

ANTONIO J. MORRISON, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AND THE CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*

The Institute for Justice is a nonprofit public interest legal center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. Central to the mission of the Institute is guaranteeing that Congress be limited to its enumerated powers under Article I, Section Eight of the U.S. Constitution.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the idea that the U.S. Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the Institute and the Center undertake a wide range of publications and programs. The instant case raises squarely the question of the limits on Congress's power under the doctrine of enumerated powers and thus is of central interest to Cato and the Center.

This brief is co-authored with Professor Richard A. Epstein, one of the nation's leading authorities on constitutional law. Professor Epstein has authored numerous articles on constitutional jurisprudence and the Commerce Clause.[1]

STATEMENT OF FACTS

This case arises out of petitioner's allegations that two members of the Virginia Polytechnic Institute and State University football team repeatedly raped her in a dormitory

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[1] In conformity with Supreme Court Rule 37, the *amici* have obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. The *amici* also state that counsel for a party did not author this brief in whole or in part; and no person or entities other than *amici*, their members, and counsel made a monetary contribution to the preparation and submission of this brief.

room shortly after making her acquaintance in September 1994. Petitioner's allegations are sharply contested but have been treated as true for the purpose of the motion to dismiss. Respondent Antonio Morrison acknowledged that a single sexual encounter had occurred but claimed it was consensual. Respondent James Crawford denied that he had had any sexual relations with the petitioner. It is undisputed that the petitioner neither preserved evidence of the alleged rapes nor reported them to the police or to university authorities at, or shortly after, the time they were alleged to have occurred. Five months after the alleged rapes took place, petitioner claims that she identified the two respondents as her assailants. Two months later she filed a complaint with the university under the school's student code of conduct.

The university's internal system exonerated Crawford, but found that Morrison violated the university's code of conduct. Morrison was to be suspended for one year, but he appealed that decision on the ground that the university's internal procedures had not afforded him the process due under the Fourteenth Amendment to the United States Constitution. The university set aside the original findings and ordered a second hearing. The second hearing found Morrison guilty of using abusive language in violation of the student code and recommended a suspension from school. This sanction was overturned by the university Provost, Peggy Meszaros, in August 1995, on the ground that it was excessive relative to other similar cases, not specified. Morrison returned to school on athletic scholarship in the fall of 1995. His conduct was later investigated by the Virginia State Police for two months, who presented their findings to a grand jury, which refused to indict him.

In December 1995, plaintiff brought suit in federal district court. Her complaint alleged that VPI had permitted the creation of a sexually hostile environment in violation of Title IX of the Civil Rights Act of 1964, and that Morrison and Crawford had violated her rights under the Violence Against Women Act (VAWA), §13981(b), to be free of gender-based crimes of violence. Plaintiff's Title IX claim was dismissed in the District Court; that portion of the court's decision was

vacated by a panel of the Fourth Circuit and is not at issue here. 935 F. Supp. 779 (W.D. Va. 1996), *aff'd in part*, 132 F.3d 949 (4th Cir. 1997). Petitioner's VAWA claim against Morrison and Crawford was also dismissed by the District Court on the ground that Congress lacked the power under either the Commerce Clause or section 5 of the Fourteenth Amendment to create the private right of action provided for in VAWA. A Fourth Circuit panel initially reversed that decision, holding that Congress did have authority under the Commerce Clause to enact VAWA. 132 F.3d 949 (4th Cir. 1997). But this panel's decision was set aside and subsequently overturned by the Fourth Circuit en banc, 169 F.3d 820 (4th Cir. 1999), which held that Congress lacked the power to pass VAWA under either the Commerce Clause or the Fourteenth Amendment. The petition for certiorari to review the case under both heads of federal power was granted by this Court.

SUMMARY OF ARGUMENT

The sole question in this case is whether Congress has the power to create a private cause of action against a person "who commits a crime of violence motivated by gender," for which a court may award "compensatory and punitive damages, injunctive and declaratory relief." Petitioner Brzonkala claims that two separate provisions of the United States Constitution – the Commerce Clause and section 5 of the Fourteenth Amendment – confer that power on Congress. Both claims are manifestly mistaken.

The Constitution establishes a government of delegated, enumerated, and thus limited powers. Powers not delegated to the Federal Government are reserved to the states or to the people. Moreover, as James Madison wrote in Federalist 45, the powers of the Federal Government are "few and defined." In particular, there is no general federal police power; that power was reserved to the states. Thus, a fair interpretation of any particular clause in the Constitution must be consistent with that larger design. An interpretation that amounts to a

grant of plenary power to any branch of the Federal Government cannot be right.

Under the Commerce Clause, Congress has power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." In its application to domestic affairs, the clause was written primarily to ensure the free flow of goods and services among the states and to preclude states from interfering with that commerce. Given that understanding, it has never been disputed that Congress has the power to regulate both the shipment of goods and services in interstate commerce and the instrumentalities of interstate commerce – that is, transportation and communication among the several states. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). By the same token, *Gibbons* explicitly recognized that Congress could regulate neither local commerce (i.e., trade) nor manufacturing, agriculture, or mining, even of goods, foodstuffs, or raw materials intended for shipment in foreign or interstate commerce. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). That interpretation of the Commerce Clause was consistent with our system of dual sovereignty. It enabled both Congress and the states to regulate within their respective, authorized spheres while limiting both to those spheres.

With the jurisprudential revolution of the New Deal, however, the power of Congress expanded significantly as the Commerce Clause was read to authorize regulation of even local activities, provided they had a "substantial effect" on interstate commerce. Thus, in *Wickard v. Filburn*, 317 U.S. 111 (1942), this Court upheld a federal statute regulating the production of wheat, even though the wheat never entered the market, because wheat produced in excess of the limits set by the statute was wheat that would not be purchased on the market, the Court said. Notwithstanding that expansion of Congress's power, however, this Court held in *United States v. Lopez*, 514 U.S. 549 (1995), that *Wickard* did not create an all-inclusive federal police power. Accordingly, it found that Congress did not have power under the Commerce Clause to enact the Gun-Free School Zones Act of 1990, 18 U.S.C. §922(q), which forbid any person from knowingly possessing

a firearm within 1000 feet of school premises. And it did so on the ground that the activity "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567.

Lopez governs here. The alleged sexual assault on petitioner "is, in no sense, an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* Nor is VAWA saved by the carefully scripted congressional findings that recount the admitted horrors of sexual assault while failing to explain how those actions fall under Congress's power to regulate "Commerce . . . among the several States." *Lopez* rejected similar conclusory findings as grounds for federal power. *Id.* at 564-68. If this section of VAWA is upheld, Congress's regulatory power is effectively plenary and the principle of enumerated powers, which is the foundation of federalism, is a dead letter.

Yet the effort to find authority for VAWA's right of action against private parties under section 5 of the Fourteenth Amendment fares no better. Section 5 grants Congress the power "to enforce, by appropriate legislation, the provisions of this Article." But those provisions – the substantive guarantees of the Fourteenth Amendment – apply only against the states, not against private citizens. Protecting people and property against private violence is the traditional function of state police power. The Fourteenth Amendment authorizes courts and Congress to take measures against civil rights violations by *states*. By no stretch of the imagination were Morrison or Crawford acting as either state officials or under color of state law when they committed their alleged assaults. In no way, therefore, does their conduct trigger Congress's power under section 5. Nor is federal jurisdiction saved by any "finding" of Congress, or strategic admission by state officials, that all state court personnel are subject to gender bias and discrimination in administering state law. Such unproven blanket assertions amount to conclusory presumptions, invoked to escape the limitations that section 5 places on Congress's power. And their truth is clearly belied by VAWA's grant of concurrent jurisdiction to state courts.

ARGUMENT

I. CONSTITUTIONAL STRUCTURE, TEXT, AND HISTORY ALL SHOW THAT CONGRESS'S POWER UNDER THE COMMERCE CLAUSE IS LIMITED.

The Constitution's Commerce Clause provides that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." In its most recent examination of the clause, *United States v. Lopez*, 514 U.S. 549 (1995), this Court did not endorse, as petitioner Brzonkala suggests, a "pragmatic" approach to interpreting the Commerce Clause. Brief of Petitioner Brzonkala ("Pet. Brief") at 22. Quite the opposite, Chief Justice Rehnquist's opinion for the Court, which is rarely quoted or cited in either Brzonkala's brief or the brief for the United States, contains a comprehensive and principled review of this Court's Commerce Clause jurisprudence.

Chief Justice Rehnquist's opinion for the Court begins by laying down the fundamental premise of the Constitution: "We start with first principles. The Constitution creates a Federal Government of enumerated powers." *Lopez*, 514 U.S. at 552. It then quotes Madison's famous words from Federalist 45: "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." And it concludes by observing that to uphold the government's expansive reading of its power, the Court "would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567-68.

Consistent with that framework, rooted in first principles, the Court identified three possible heads of federal power under the Commerce Clause. The first of these gives Congress the power "to regulate the use of the channels of interstate commerce." *Id.* at 558. The second gives Congress the power "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activity." *Id.*

Finally, and this is the only category relevant here, Congress has the power "to regulate those activities having a substantial relation to interstate commerce." *Id.* at 558-59. That third category, however, was not meant to afford Congress "an excuse" to regulate any activity that had *any* effect on commerce, however trivial, for in the next breath the Court said that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." In his concurrence, Justice Kennedy drew the ultimate conclusion: "As the Chief Justice explains, unlike the earlier cases to come before the Court here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus." *Id.* at 580.

Those conclusions are fully warranted by the text of the Commerce Clause, which on its face confers on Congress the power to regulate that portion of commerce – that is, trade – that takes place with foreign nations, among the several states, and with the Indian tribes. As a matter of both text and ordinary language, commerce was understood as trade – as distinct from manufacturing, agriculture, and mining. Thus, Justice Thomas noted in his concurrence in *Lopez* that "[a]t the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes. . . . As one would expect, the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture." *Id.* at 585-86. Indeed, the distinction between commerce and other activities is driven home if one tries to replace the term "commerce" with the terms "manufacturing" and "agriculture" in the Commerce Clause: "Congress shall have power to regulate manufacturing and agriculture with foreign Nations, and among the several States, and with the Indian tribes." That construction makes no more textual or thematic sense today than it did in 1787.

The Court's conclusions in *Lopez* are congruent with other parts of the Constitution as well. Thus, before the Civil War, it would have been inconceivable for Congress to invoke the Commerce Clause to regulate the *use* of slaves in the

Southern States, even though the Constitution explicitly empowered Congress to prohibit the "Migration or Importation" of slaves after 1808. U.S. Const. Art. I, §9. Likewise, "commerce" is used as a synonym for trade in Art. I, §9, which states that "No Preference shall be given by any Regulation to Any Commerce or Revenue to the Ports of one State over those of another." Consistent with that usage, Article I maintains a strong division between the manufacture that precedes trade and the commerce that flows from it.

The structural limitations on Congress's power were imposed to guard the prerogatives of the states as part of a complex federal system. And federalism, in turn, "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (cited in *Lopez*). Those limitations were brought home with great force in Chief Justice Marshall's opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), where Marshall explicitly rejected any canon of "strict construction" that would "cripple the government and render it unequal to the object for which it is declared to be instituted. . . . " *Id.* at 188. It is noteworthy, given that thoroughly modern canon of construction, that Marshall held that the constitutional objectives of the Commerce Clause, within our grand constitutional scheme, were fully achieved even when the commerce power was "*restricted* to that commerce which concerns more States than one." *Id.* at 194 (emphasis added).[2] Thus, Marshall's reading explicitly excluded "the completely interior traffic of a State." *Id.* Yet it also proved broad and flexible enough to allow Congress to regulate instrumentalities of interstate commerce, such as the railroad and the telephone, which were neither known nor in use when the Constitution was adopted. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1, 19

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[2] Users of this passage often excise the word "restricted" and replace it with "extended." *See* Laurence Tribe, *American Constitutional Law* 232 (1987); Stern, *The Commerce Clause and the National Economy 1933-1946*, 59 Harv. L. Rev. 645, 648 (using "comprehended") (1946). The full passage, with "restricted," is quoted in the decision of Chief Justice Rehnquist. *Lopez*, 514 U.S. at 553.

(1876). At the same time, the Commerce Clause did not authorize Congress to enact any inspection laws, Marshall held, because such laws "act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose." *Gibbons*, 22 U.S. at 203.

Marshall's basic understanding governed all subsequent Supreme Court decisions until 1937. Thus, *Veazie v. Moor*, 55 U.S. 568 (1853), sustained a *state*-created steamboat monopoly against a Commerce Clause challenge because the monopoly operated only in commerce internal to the state. Likewise, *Kidd v. Pearson*, 128 U.S. 1, 20 (1888), held that the Commerce Clause did not prevent a state from regulating the local manufacture of intoxicating liquors intended for export to other states. And *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), reached back to *Gibbons* when Chief Justice Fuller wrote, "Commerce succeeds to manufacture, and is not a part of it," *id.* at 12, then insisted on "the independence of the commercial power and of the police power." *Id.* at 13.

That balanced view of the commerce power informed the passage of the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887), which incorporated a specific proviso that precluded its application "to the transportation of passengers or property . . . wholly within one State." *Id.* §3. In 1914, however, the constitutional line was overrun with respect "to intrastate carriers as instruments of interstate commerce." *Houston E. & W. Texas Ry. Co. v. United States* ("*The Shreveport Rate Case*"), 234 U.S. 342, 351 (1914). In that case this Court sustained the power of Congress to regulate *intra*state service that operated in direct competition with interstate service. Nonetheless, the *Shreveport Rate Case* did nothing to remove *E.C. Knight's* constitutional prohibition against the federal regulation of all forms of production.

Not until the New Deal and the watershed decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), did the Court construe the commerce power as reaching local manufacturing – there, to uphold the federal regulation of labor relations in local manufacturing under the Wagner Act, ch. 372, 49 Stat. 449 (1935). Then, in *Wickard v. Filburn*, 317

U.S. 111 (1942), "which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 514 U.S. at 560, this Court upheld the power of the Secretary of Agriculture to limit the production of wheat on the very farm on which it was consumed. According to Justice Jackson, "[e]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts *a substantial economic effect on interstate commerce*, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' " *Wickard*, 317 U.S. at 125 (emphasis added). In coming to that conclusion, Justice Jackson explicitly applied the *Shreveport Rate Case* while ignoring its key qualification: the commerce power reached "intrastate carriers as instruments of interstate commerce." *Wickard*, 317 U.S. at 123.

Given the New Deal Court's expansive reading of the Commerce Clause, it is important to reassert the soundness, as a matter of first principle, of the Court's interpretation of the clause prior to *Jones & Laughlin* and *Wickard*. In *Lopez*, Justice Kennedy noted that, "in contrast to the prevailing skepticism that surrounds our ability to give meaning to the explicit text of the Commerce Clause, there is widespread acceptance of our authority to enforce the dormant Commerce Clause, which we have but inferred from the constitutional structure as a limitation on the power of the states." *Lopez*, 514 U.S. at 579 (Kennedy, J., concurring). Yet that inference, from constitutional structure, is not only sound but instructive in interpreting the affirmative commerce power, which allows Congress to create a national free trade zone, insulated from the petty restrictions and recriminations of the various states. As Justice Jackson wrote seven years after *Wickard:* "This Court has not only recognized this disability of the state to isolate its own economy as a basis for striking down parochial legislative policies designed to do so, but it has recognized the incapacity of the state to protect its own inhabitants from competition as a reason for sustaining particular exercises of the Commerce Power of Congress to reach matters in which the states were so disabled." *H.P. Hood & Sons v. Du Mond*,

336 U.S. 525, 538 (1949). There the Court disallowed New York's refusal to issue a license to a Massachusetts milk distributor, seeing protectionism in New York's claims about "destructive competition in a market already adequately served." *Id.* at 528.

Thus, the great objects of the Constitution are best served when Congress is understood as having a limited power to regulate the *network* through which commerce courses among the several states, but is understood also as precluded from regulating the internal productive activities that send local goods and services into that network. The great danger, manifest well before *Gibbons*, was that each state, acting out of parochial interests, would hamper or sever the vital interconnections within a single national economic market by imposing crippling restrictions on the shipment of goods, information, and services across state lines. Pursuant to the commerce power, Congress could regulate commerce to overcome that danger.[3]

But most manufacturing, mining, and agriculture are *not* network industries. Thus, a principled refusal to extend the commerce power beyond its structural, textual, and historical limits helps preserve competition between firms in different states, firms that gain access to national markets over a national network guaranteed by the federal government. In that regard, it is often stated that the ever-greater complexity today of social and economic affairs requires a concomitant expansion of the federal commerce power so that its commands can be "translated" from yesterday's horse-and-buggy era to today's Internet economy. *See, e.g.*, Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV., 125, 130 (1995). But that argument gets the economic dynamics precisely backwards. Better and more rapid modes of transportation and communication bring the goods and services of

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[3] Not all such regulation has been cost free, to be sure: witness the creation of the federal monopolies and cartels that eventually arose under the Interstate Commerce Act. *See Wisconsin Railroad Commission v. Chicago, Burlington & Quincy Railroad*, 257 U.S. 563 (1922).

one state into greater competition with those of all other states. That increased competition among the states implies an absence of barriers and hence a *reduced* need for federal policing of the network factors. One might deviate from that conclusion only from a misguided belief that federally-supported monopolies in manufacturing, labor, or agriculture somehow work to the national good, a conclusion that flies in the face of the antitrust laws and this Court's own dormant Commerce Clause and Due Process Clause jurisprudence. *See, e.g., American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987) (application to state taxation of interstate commerce). At this point in our history, it may be too difficult for this Court to extricate itself from its post-1937 Commerce Clause jurisprudence. *See Lopez*, 514 U.S. at 573-74 (Kennedy, J. concurring.) At the same time, the uncertain constitutional foundations of that jurisprudence strongly support this Court's decision in *Lopez* to not extend Congress's commerce power beyond the economic and commercial issues that were the target in *Wickard*.

Both petitioner Brzonkala and the government ignore those basic constitutional principles – as if they did not have to be addressed. Indeed, in analyzing the Commerce Clause, neither of their briefs seems able even to utter the phrase "enumerated powers." Neither tries to explain what activities lie outside the commerce power. Instead, they veer off into diversions. Thus, petitioner Brzonkala claims that the Necessary and Proper Clause, Art. I, §9, justifies an expansive reading of the commerce power. Pet. Brief at 20, 36. Yet petitioner never stops to explain why VAWA is either necessary *or* proper to regulate any activity that has a substantial economic effect on Congress, given the violence it does to our basic constitutional structure of enumerated powers. The Necessary and Proper Clause gives Congress the power only "to make all laws which shall be necessary and proper for carrying into Execution the foregoing powers." U.S. Const. Art. I, §8, cl. 18. It ensures that Congress shall have the power to adopt the *means* that are necessary and proper to achieve its ends. In no sense does it authorize an *expansion* of the set of ends or the repeal of the doctrine of enumerated powers. The

clause adds nothing to the scope of commerce, as indeed Chief Justice Marshall explicitly held in *Gibbons*, 22 U.S. at 187.

Petitioner Brzonkala next claims that the commerce power should receive an especially broad construction in civil rights cases. Pet. Brief at 32-36. Yet neither the text of the Commerce Clause nor this Court's decision in *Lopez* contain any such notion. In fact, *Lopez* cites the key civil rights cases (*e.g.*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), and *Maryland v. Wirtz*, 392 U.S. 183 (1968)) in the same paragraphs in which it cites the traditional agricultural regulation cases (*e.g.*, *United States v. Darby*, 312 U.S. 100 (1941), and *Wickard*). *See Lopez*, 514 U.S. at 557-78. Then, for analytical purposes, the Court groups those cases together as well: "[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. Examples include the regulation of intrastate coal mining, intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of home-grown wheat." *Id.* at 559-60 (citations omitted). The civil rights cases are included in the list, along with cases concerning agricultural regulation, because both kinds of cases involve "*economic* activity." *Id.* at 559 (emphasis added). As in *Lopez*, by no stretch of language or imagination can the activity at issue in VAWA be characterized as "economic."

Finally, petitioner Brzonkala also falsely brands the decision of the Fourth Circuit en banc as having created a "formalistic, bright line" rule, Pet. Brief at 38, even though Judge Luttig's exhaustive opinion frequently quotes and scrupulously applies this Court's precise language in *Lopez* and fully recognizes the inevitable ambiguity that lies in the interpretation of any of the great clauses of the Constitution. 169 F.3d 820 (4th Cir. 1999). Yet not once does the brief of either petitioner Brzonkala or the government seek to respond to the Fourth Circuit's specific reading of *Lopez*.

II. THE VIOLENCE AGAINST WOMEN ACT IS NOT AUTHORIZED UNDER THE COMMERCE CLAUSE AS INTERPRETED IN *UNITED STATES V. LOPEZ*.

A. Lopez Confines Congress's Power Under The Commerce Clause To Matters That Have A Substantial Effect On Economic Activity.

This Court's opinion in *Lopez* sets the framework for analyzing any claim that Congress has the power to create a private right of action for gender-based violence under VAWA. To place VAWA in context, it is useful to review just why this Court found that section 922(q) of the Gun-Free School Zones Act (GFSZA) did not fall within Congress's power under the Commerce Clause. Most critically, the Court distinguished *Wickard* from *Lopez* by noting that *Wickard* "involved economic activity in a way that the possession of a gun in a school zone does not." *Lopez*, 514 U.S. at 560. It then quoted those passages in *Wickard* that made it clear to the *Wickard* Court that the level of home production and consumption of wheat could influence the volume of wheat shipped in interstate commerce. *Wickard*, 317 U.S. at 128, *quoted in Lopez*, at 560-561. And the *Lopez* Court concluded its discussion by noting that "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561. Thus understood, the distinction between "affects commerce" and "substantially affects commerce" is not merely an elusive matter of degree. Rather, this Court intended to create a distinction in kind between those activities, done locally, that are subject to Commerce Clause regulation and those that are not.

The force of that analysis is made unmistakable by the Court's explicit rejection of Justice Breyer's effort to develop a network of causation that links the use of guns to the threats that guns pose to interstate commerce. Justice Breyer sought to demonstrate that guns cause violence, that violence disrupts education, and that uneducated students cannot participate in interstate commerce. *See Lopez*, 514 U.S. at 623-24 (Breyer, J., dissenting), criticized in *Lopez*, 514 U.S. at

564-65 (Rehnquist, C.J.). The key point is this: the Court did not reject that argument because of a dispute over some abstract theory of causation; rather, it rejected the argument because it made it impossible for Justice Breyer "to identify any activity that the States may regulate but Congress may not." *Id.* at 564. In principle and in fact, no area of education or child-rearing or anything else could lie beyond the power of the Federal Government. Even when this Court moved from *E.C. Knight* to *Wickard* it held fast to the first principle – that the Commerce Clause operated as part of a system of divided and enumerated powers. Chief Justice Rehnquist was thus driven to the inescapable conclusion: "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. . . . This we are unwilling to do." *Id.* at 567-568.

That analysis puts into perspective two contentions that could easily lead to confusion in the analysis of this case. The first is that the rational basis test operates as an "open sesame" to Congress. Pet. Brief at 26-27. The second is that the GFSZA would have been upheld but for Congress's failure to supply a detailed set of findings to explain why its legislation had a substantial effect on commerce among the several states. Both contentions are wrong.

B. The Rational Basis Test Does Not Save VAWA Under The Commerce Clause.

The petitioner argues that the constitutionality of VAWA is preordained under the rational basis test. "As *Lopez* reaffirmed, intrastate activity is within the Commerce Power if a 'rational basis' exists for Congress to conclude 'that a regulated activity sufficiently affect[s] interstate commerce.' " *Lopez*, 514 U.S. at 557; Pet. Brief at 26. That contention has often proven true when the Court has refused, under the Due Process Clause, to strike down legislation that restricts the economic liberties of ordinary individuals to engage in certain occupations or trade. After the New Deal, especially, "the

Court declared that it would sustain regulation in the socio-economic sphere if any state of facts either known or reasonably inferable afforded support of the legislative judgment. Even this limited scrutiny soon gave way to virtually complete judicial abdication." Laurence Tribe, *American Constitutional Law* 582 (1987) (citing *Ferguson v. Skrupa*, 372 U.S. 726 (1963), as a case in which the legislation was upheld "for virtually no substantive reason at all."). The implicit, if mistaken, assumption behind such cases is that the political process can protect economic players from potential abuse by the democratic process.

Whatever the contours of the rational basis test as applied to economic liberties, that test takes on a different hue and coloration in *Lopez*. In that context, this Court has made it crystal clear that respecting constitutional restrictions on federal power is vital to preserving the original constitutional design. Justice Kennedy writes: "The statute before us [GFSZA] upsets the federal balance to a degree that renders it an unconstitutional assertion of the Commerce Power, and our intervention is required." *Lopez*, 514 U.S. at 580. Thus, although some deference is due Congress, if that were tantamount to treating Congress as the sole judge of the limits on its constitutional authority, no judicial review would be needed or even possible, and the principle of enumerated powers would amount to an empty promise. Fortunately, the doctrine of deference has not yet rendered judicial review superfluous.

When Congress can show that legislation is directed to local activities that have a substantial economic effect on interstate commerce, then this Court, after *Wickard*, will not examine that judgment to see whether the legislation promotes competition or monopoly. It will leave that determination to Congress. But it will not allow Congress, under its commerce power, to legislate over activities that have no substantial effect on the economic structure of product or service markets, or the price and quantity of goods that are sold in interstate commerce. Deference only to the wisdom of Congress's action; no deference, and certainly no complete deference, to the field of operation of any federal statute.

Lopez embraces a rational basis test, but it is a rational basis test with a kicker. The mere fact that this Court struck down the GFSZA is proof that the rational basis test, as applied to Congress's actions under the Commerce Clause, does not operate as a rubber stamp or an automatic validation of Congress's power. Both history and prudence teach that the risk of congressional aggrandizement is too great to allow for the application of a toothless rational basis test.

C. The Gun-Free School Zones Act, As Amended, Is Not Saved By Congress's Ostensible Legislative Findings.

When Congress first enacted the Gun-Free School Zones Act in 1990, it neglected even to cite its constitutional authority for doing so, much less make findings aimed at showing that the activity regulated – assuming it was regulating under the Commerce Clause – had a substantial effect on interstate commerce. Those omissions have led to misleading and incorrect assertions that the outcome in *Lopez* would have been different had Congress supplied a jurisdictional statement and findings as to why the GFSZA fell under the commerce power. *Lopez*, 514 U.S. at 561-52; Pet. Brief at 27. To be sure, this Court in *Lopez* took note of the place and purpose of legislative findings: "[A]s part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce." *Lopez*, 514 U.S. at 562. But once again, that "independent evaluation" must be properly made. This Court will "consider" those legislative findings, but will not act as a rubber stamp. The mere recitation of findings hardly suffices to pass constitutional muster. Such findings could have led to a different outcome in *Lopez* only if they had shown that the carrying of guns within 1000 feet of a school had a substantial effect on interstate commerce.

The mischievous use of legislative findings was revealed when Congress amended the Gun-Free School Zones Act, 18

U.S.C. §922(q), to add certain findings that supposedly demonstrate an interstate commerce connection. The amended GFSZA contained a list of nine findings that purport to show the effect that guns in school zones have on interstate commerce. *Id.* But those findings establish the truth, if they do, only of matters that have already been found irrelevant in *Lopez*. Indeed, they simply regurgitate, virtually point by point, the constitutionally insufficient factual connections mentioned in Justice Breyer's dissent about the ostensible causal connection between guns and interstate commerce.

Thus, finding (A) notes that "crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem." That point was conceded in *Lopez*, even without specific findings. Yet that truism fails to explain how Congress has power, under the Commerce Clause, to limit the use of guns within 1000 feet of a school. By the logic of finding (A), any prohibition on the use of guns anywhere comes within the commerce power, a proposition that *Lopez* plainly rejects. Finding (B) then states that "crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal[s]." True enough, but *Lopez* already refused to find that Congress could legislate under the commerce power solely because crime spreads the increased costs of insurance throughout the population and reduces the willingness to travel. Finding (C) states that "firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools." Finding (D), working in tandem with finding (C), notes that component parts, ammunition, and the raw materials from which guns are made also move in interstate commerce. But in both cases the question is not whether Congress has the power to stop the shipment of guns in interstate commerce but whether the GFSZA regulates activities that have a substantial effect on interstate commerce. Finding (E) observes that "ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their child to school for the same reason." Once again, that truism is no more true of crime in school zones than of crime anywhere else. Finding

(F) notes that "the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country." True, but again irrelevant. Finding (G) notes that "this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States," which once again restates the Breyer dissent. *Lopez*, 514 U.S. at 601 (Breyer, J., dissenting).

Finding (H) raises the specter of the failure of state and local coordination: "States, localities, and school systems find it almost impossible to handle gun-related crime by themselves; even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures." Initially, it seems odd to say that state and local efforts are "unavailing" when children are far safer at school than anywhere else. *See Schools the Safest Place for Kids* (NEA Focus, Aug. 12, 1998); Donohue, Schiraldi, and Ziedenberg, *School House Hype: School shootings and the real risks kids face in America* (Justice Policy Institute 1999) (documenting that the number of children killed by gun violence at schools is about half the number of Americans killed annually by lightning). And the law of Texas, the state involved in *Lopez*, already imposed heavy penalties for those convicted of carrying guns near schools. The states are not caught in some hopeless "prisoner's dilemma," such that no state will impose restrictions on guns near schools for fear that others might not follow. As long as the control of violence makes the citizens of its own state better off, then each state has an incentive to curb that violence, wholly apart from what any other state might do. To find here some deep failure of federalism is to convert the entire criminal code into a set of federal offenses.

That leaves only finding (I), that "Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection." That "finding" is patently circular, of course. It amounts to saying that GFSZA is constitutional because Congress says it is. *Lopez* stands for nothing if congressional

pretensions like those are allowed to stand. *Lopez* posed a serious substantive standard that requires Congress to identify, as in *Wickard*, the interstate commerce that will be substantially affected by regulation of the activity at issue. Nothing in those findings addresses that question. Congress cannot expand its power simply by asserting the truth of constitutionally irrelevant propositions. This Court should "consider" such canned findings and then reject them as worthless for deciding the issue at hand.

D. Congress's Findings Do Not Provide A Rational Basis To Think That The Private Right of Action Under VAWA Falls Within The Scope Of Its Commerce Power.

The reasons that doom the GFSZA under *Lopez* necessarily doom the private right of action of VAWA. As in *Lopez*, the private action provisions of VAWA do nothing to unclog the channels or instrumentalities of interstate commerce. Thus, VAWA is authorized under the commerce power only if gender-based violence against women substantially effects interstate commerce in ways that gun possession near schools does not. Once again, Congress has resorted to legislative legerdemain in an effort to establish that critical connection. Thus, section 302 contains these findings:

(5) gender-motivated violence has a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce;

(6) gender-motivated violence has a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and demand for interstate products.

Such "boilerplate" findings do nothing whatever to allay the *Lopez* fears of an unlimited expansion of Congress's power. Initially, they do nothing more than restate the obvious fact that gender-based violence has a substantial adverse effect on *all* human activities: after all, local activities are

affected at least as much as national ones. Nor are the economic implications of those effects at all clear. For all anyone knows, gender-based violence could *increase* interstate commerce by encouraging women to move elsewhere, to increase safety purchases, insurance protection, and the like.

No matter: on petitioner Brzonkala's and the government's view, Congress need only find that gender-based violence either deters people from or induces them toward interstate commerce. Such findings represent no serious effort to understand the relationship between violence and anything. In fact, under the implicit methodology, it is impossible to falsify the claim that any given human activity affects interstate commerce. Thus, in principle, all human activity is subject to federal regulation under the Commerce Clause. The Framers need not have enumerated Congress's other powers. Congress can regulate anything it wishes to regulate under this sole power.

Stated otherwise, Congress's purported findings do absolutely nothing to explain the impact of gender-based violence on the price or quantity of any specific product or service in the manner referred to in *Wickard* and now required in *Lopez*. VAWA's findings simply import the words "substantial adverse effect" in a transparent effort to cloak VAWA in *Lopez* garments. At no point do those findings address the key concern of *Lopez*, namely, to identify *some* activities that lie outside the scope of Congress's commerce power. Logically, it cannot be disputed that gender-motivated violence – violence against women, in particular – forms a proper subset of all forms of violence. Therefore, if gender-based violence directed against women alone, or against both women and men, has a substantial adverse (or positive) effect on interstate commerce, then it surely follows that all forms of violence, *wholly apart from gender-based motivation*, must have a *still greater* effect on interstate commerce, positive or negative. Thus, nothing prevents the complete federalization of every nook and cranny of tort and criminal law.

Those gaping difficulties in VAWA's legislative findings are hardly cured by extensive testimony presented at congressional oversight hearings. Such orchestrated, one-sided exercises are political love-fests that follow the same predictable, transparent pattern. Individual members of the House and Senate rise to denounce the impact of violence against women in their state, then call quickly for federal legislation. *See, e.g.*, Hearing on the Violence Against Women Act Before the Subcomm. of Crime and Criminal Justice of the House Comm. of the Judiciary at 7 (June 30, 1994) (statement of Mr. Sangmeister) ("No other civilized nation has ever tolerated this level of violence against women. In this Nation this Congress can no longer fail to take comprehensive action to deal with this serious problem."). Those statements are then followed by grim statistics about the prevalence of crime, by testimony from individual women who have worked with women who have been subject to violent crimes, *see, e.g., id.* at 9 (statement of Vicki Coffey, executive director, Chicago Abused Women Coalition), and by individual women who have been subjected to crimes of violence. *See, e.g., id.* at 14 (statement of Pegi Shriver). Evidence of this sort is then cited uncritically and at great length in the petitioner Brzonkala's, the government's, and numerous *amicus* briefs. Pet. Brief at 6-13; United States Brief at 3-8 (noting the frequency of rape, murder, and domestic violence). Yet even here their use of evidence is curiously selective; not once does either brief mention that for every two violent victimizations of females, there are three of males. Craven, *Sex Differences in Violent Victimization* (Bureau of Justice Statistics, Sept. 1997) (documenting that in 1994 men experienced almost 6.6 million violent victimizations while women experienced 5 million). Not once does either brief refer to the welcome improvement in overall crime statistics in recent years. *See Criminal Victimization 1996* (Bureau of Justice Statistics, Nov. 1997) (noting that between 1995 and 1996, the violent crime rate overall decreased about 10%). Not once does either brief seek to update those studies to address the progress on such matters in recent years.

No one can deny the seriousness of America's crime problem at any level, nor the harrowing condition of the victims of crime, whatever its motivation. But the issue before this Court is not whether the conduct is heinous or wrongful, but whether it forms the subject matter of a federal offense remediable under the Commerce Clause. Here the cumulative nature of VAWA's recitations does nothing to address the specific substantive requirements established in *Lopez*. Testimony that shows that victims of violence should have private federal rights of action also establishes that Congress could, if it chooses, punish all forms of violence under federal criminal law. If VAWA passes constitutional muster, then Congress need only hold preordained hearings and make uncontested findings about the disruption that all forms of violence have on the economy in order to pass the Violence Against People Act (VAPA), calling for *both* private rights of action *and* criminal sanctions against all forms of violence. In a twinkling, VAPA can federalize the entire criminal and tort law, given that accidental harms also substantially affect interstate commerce. If that happens, then the doctrine of enumerated federal powers, and the division of powers between the federal and state governments, becomes a distant memory. VAWA can be sustained only if *Lopez* is overruled or ignored.

That tragic result would mean the end of federalism and the multiplication of sanctions for single actions. All activities caught under VAWA are both criminal and tortious under the law of every state. Moreover, it takes little imagination to foresee that the doctrines of ancillary and pendent jurisdiction will be quickly invoked to bring large numbers of private actions in federal court even in the absence of diversity jurisdiction. Yet neither petitioner Brzonkala nor the government explain why or how this massive migration of litigation from state to federal court improves the administration of justice. VAWA consciously flouts each and every substantive requirement for and limit on congressional power under the Commerce Clause. As long as federalism and enumerated powers count, then VAWA cannot be sustained under Congress's commerce power.

III. THE VIOLENCE AGAINST WOMEN ACT IS NOT AUTHORIZED UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

A. The Guarantees Of The Fourteenth Amendment Protect Individuals Only Against State Action.

As an alternative to their Commerce Clause argument, petitioners assert that VAWA's private action provisions are a proper exercise of Congress's legislative authority under section 5 of the Fourteenth Amendment. But that conclusion is flatly inconsistent with the basic architecture of the amendment. Substantively, section 1 of the amendment offers three guarantees against state action: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In each case the guarantees run only against states, not against private parties. Individuals may bring actions to secure those guarantees against states. In addition, section 5 authorizes Congress "to enforce" the amendment's guarantees through legislation: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Congress's power is limited, therefore, by the substantive provisions to be enforced. None of those provisions provides guarantees against private wrongdoing. Thus, Congress has no authority under section 5 to create any cause of action against private parties.

The fatal flaw in the petitioners' argument arises, then, from the undeniable fact that the Fourteenth Amendment is designed to protect against wrongdoing by *states*, while the private action provisions of VAWA are designed to protect against wrongdoing by *ordinary individuals*. The point is made clear by the text of section 13981, which creates a cause of action against "a person (*including* a person who acts under color of any statute, ordinance, regulation, custom or usage of any State)." (emphasis added). By its terms, the unmistakable inference is that VAWA is meant to apply not only to state actors but to persons, such as Morrison and Crawford, who do

not act under color of state law, no matter how broadly defined. At that point the Act runs up against an unbroken line of cases that interpret the Fourteenth Amendment to mean what it says and say what it means.

The basic point was made unambiguously in the *Civil Rights Cases*, 109 U.S. 3 (1883), which struck down the Civil Rights Act of 1875, enacted under section 5, insofar as the Act provided that all persons "were entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, etc." The Court first noted that the Act did not purport to be "corrective of any constitutional wrong committed by the states." *Id.* at 14. It then observed that the Act "applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment." *Id.* In concluding, the Court said that "[t]he wrongful act of an individual, unsupported by any [State] authority is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by the laws of the State for redress." *Id.* at 17; *see also United States v. Harris*, 106 U.S. 629 (1883).

The same understanding of section 5 is found in more recent cases. Thus, in *United States v. Guest*, 383 U.S. 745 (1967), Justice Stewart, speaking for this Court, wrote: "It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or one acting under the color of its authority. *Id.* at 755; *see also District of Columbia v. Carter*, 409 U.S. 418, 423 (1973) ("the commands of the Fourteenth Amendment are addressed only to the State or to those acting under color of its authority."). Most recently, this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), struck down the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§2000bb *et seq.*,

insofar as it purported, under section 5, to restore the compelling state interest test of *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which had been rejected in *Employment Division v. Smith*, 494 U.S. 872 (1990). In so doing, this Court began its opinion with the premise it had articulated in *Lopez*, 521 U.S. at 516: "Under our Constitution, the Federal government is one of enumerated powers." On that ground, the Court then made the larger point that applies here also, namely, that Congress's power under section 5 is limited by the plain text. Thus, although RFRA, unlike VAWA, was directed against state action, "The design of the Amendment and the text of §5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation that alters the meaning of the Free Exercise Clause cannot be said to be enforcing the clause." *Id.* at 519. That point applies with equal force here: section 5 does not empower Congress to enlarge upon or otherwise alter the provisions it authorizes Congress to enforce through legislation. Those provisions afford protection against states, not against private parties. Insofar as VAWA expands Congress's power beyond constitutional bounds, it must fail.

B. The Congressional Findings Offered In Support Of VAWA Do Nothing To Fix The Jurisdictional Gaps In The Petitioners' Case.

To try to avoid a rudimentary application of the state action limitation, Congress again published predigested findings and carefully scripted testimony aimed at establishing the missing element of state action. Thus, VAWA stipulates:

> (7) a Federal civil rights action as specified in this section is necessary to guarantee equal protection of the laws. . . .
>
> (8) victims of gender-motivated violence have a right to equal protection of 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 violent crimes.

But those findings fall short of establishing any element of state action in VAWA cases. At most the findings make veiled hints that state court systems have been deficient in guarding against the dangers of gender-based discrimination, chiefly against women. Even if that point were true, it would justify at most some action taken against those state officials whose behavior flouted the applicable constitutional norm. But the private action section in VAWA does not question or remove the absolute immunity of judges or prosecutors. Nor does it establish a system of disciplinary review of judges or prosecutors to see that they have toed the line in cases of gender-based violence. Indeed, far from treating state judges as derelict in their handling of gender-based cases, VAWA pours further resources into the state civil and criminal law system. More astonishingly, section 13981(e) provides that "Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this Title," which hardly suggests a distrust of the fairness and ability of state court judges to apply and administer the substantive provisions of this act.

Worse still, the carefully rehearsed testimony on the point does not begin to show any of the discrimination in gender-based crimes that purport to drive the private right of action under VAWA. None of the testimony distinguishes between the performance of the courts in different states or even the differences in the performance of different divisions, or different judges, within any given state. *See,* the detailed dissection of the findings offered by Judge Luttig, App. 151, Section 3(a). Findings on that point are thus subject to the same criticism the Court directed toward the 1875 Civil Rights Act in the *Civil Rights Cases*: a uniform statutory provision is defective insofar as it fails to distinguish between states with the "justest" laws and states whose practices may, on some occasions, violate the requirements of equal protection. The law professors' *amicus* brief in support of the petitioners blithely dismisses that point by noting that to have granted any direct action against state officials for discriminatory underprosecution "would have required state and local

officials to defend their actions against charges of sex discrimination in federal court." Brief of Law Professors at 28. But the more plausible explanation for that omission is that Congress and the states have entered into a cozy alliance whereby the states agree to denounce everyone (and thus no one) in order to gain additional prosecutorial power in gender-based civil rights cases. It would create nothing short of a national scandal to single out by name any judicial decision or judge for failing to meet the appropriate constitutional standards, and to then document that charge chapter and verse. But the across-the-board condemnation of all state court institutions carries no such sting and provokes no such outrage precisely because everyone knows that its bland declarations have more to do with propping up the untenable constitutional foundations of the private action provisions of VAWA than examining with any rigor the professional conduct of any state official. Any dispassionate analysis of this topic would have to examine the constructive actions that state legislatures and public officials have taken over the years, and give at least some passing recognition to the major reductions in crime, including rape and other violent acts against women, under the current law. *See Criminal Victimization 1996* (Bureau of Justice Statistics, November 1997) (noting that between 1995 and 1996, the violent crime rate overall decreased about 10%); *Criminal Victimization 1994* (Bureau of Justice Statistics, April 1996) (documenting that the crime rate for rape/sexual assault fell 13% between 1993 and 1994 and 31% between 1992 and 1994).

In sum, these findings suffice only if this Court gives complete deference to legislative findings that utterly fail to support the creation of this private remedy. In the end, *City of Boerne* dooms this approach under section 5 for the same limited-government reason that *Lopez* dooms it under the Commerce Clause. "[A]s broad as the congressional enforcement power is, it is not unlimited." *City of Boerne*, 521 U.S. at 518 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970)). Even under a generous rational basis test, Congress cannot transmute a private party into an agent of the state; and it cannot, by mere say-so, declare all state agents derelict

in the discharge of their duties without *once* considering *any* contrary evidence.

Petitioner Brzonkala seeks to escape that conclusion by noting scattered dicta of Justices Clark and Brennan to the effect that Congress has the power to punish purely private action under section 5. *See Guest*, 383 U.S. at 762 (Clark, J., concurring), 782-784 (Brennan, J., concurring in part and dissenting in part). But the context there was wholly different. *Guest* arose out of a conspiracy of six private white individuals who sought to deny black citizens their rights by causing their arrest through false reports about criminal actions. The Court held that the interconnection between private and official conduct met the Fourteenth Amendment's state-action requirement. *Id.* at 756. But even if those defendants' actions were treated as purely private, the formulations of both Justices Clark and Brennan required that the private conduct charged "interfere with Fourteenth Amendment rights." *Id.* at 762, 782. By no stretch of the imagination did the defendants here act to violate the due process or equal protection rights of petitioner Brzonkala. Were the Court to let such a conclusion stand, private misconduct would be transmuted into public misconduct and the Fourteenth Amendment's state-action requirement would be obliterated. *Guest* applies only to situations where private parties seek to enlist the cooperation of public officials to deprive people of their Fourteenth Amendment rights, a far cry from the situation here.

CONCLUSION

The Constitution creates a government of limited, enumerated powers. It does not confer a general police power on the Federal Government. That power was reserved to the states. Petitioner Brzonkala and the government have sought to justify VAWA's private right of action under both the Commerce Clause and section 5 of the Fourteenth Amendment. But they fail to show how gender-based crimes have a substantial effect on interstate commerce as that test was set forth in *Lopez*; or how gender-based crimes constitute state action as required under the *Civil Rights Cases*.

Petitioners fail to show, in short, that Congress has the power to enact the statute. The great teaching of this Court for nearly two centuries now was set forth in *Marbury v. Madison*, 5 U.S 137, 176 (1803): "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" There being no constitutional grant of power to support this cause of action, the decision of the Fourth Circuit should be affirmed.

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